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FAMILY CASELAW UPDATE

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Prepared by

Andrew B. Howie

SHINDLER, ANDERSON, GOPLERUD & WEESE, P.C.

5015 Grand Ridge Drive, Suite 100

West Des Moines, Iowa 50265

515-223-4567; Fax: 515-223-8887

howie@sagwlaw.com

> Lawyers spend a considerable part of their lives doing distasteful things for disagreeable people; and for their blood, sweat, and tears they receive in the end a few unkind words to the effect that it might have been done better, and a protest at the size of their fee.

-- William L. Prosser, *Lighthouse No Good*, 1 J. Legal Educ. 257 (1948) *reprinted in* 28 Stetson L. Rev. 1017, 1022 (1999) (paraphrased).

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Chapter 1 – Dissolution of Marriage

1. Procedural Aspects

A. Residence

Iowa has a statutory residency requirement for dissolutions of marriage. The residency requirement is:

> Except where the respondent is a resident of this state and is served by personal service, state that the petitioner has been for the last year a resident of the state, specifying the county in which the petitioner has resided and the length of such residence in the state after deducting all absences from the state, and that the maintenance of the residence has been in good faith and not for the purpose of obtaining a dissolution of marriage only.

Iowa Code § 598.5(1)(k); *see* Iowa Code § 598.9 (providing that residency must be proven or the action will be dismissed).

> Residence for the purpose of section [598.5(1)(k)] has the same meaning as domicile. To have a residence or domicile within the meaning of this section, "one must have a fixed habitation with no intention of" leaving it. [] Once a domicile is established, it continues until a new one is established. A new domicile is established if all of the following things happen: (1) the former domicile is abandoned; (2) there is an actual removal to, and physical presence in the new domicile; and (3) there is a bona fide intention to change and to remain in the new domicile permanently or indefinitely. This intention must be a present and fixed intention and not dependent on some future or contingent event.

In re Marriage of Kimura, 471 N.W.2d 869, 877 (Iowa 1991) (citations omitted). "The requisite element of intent to change one's domicile necessarily includes an intention to abandon the former domicile, and to do so permanently." *Swanson v. Iowa Dep't of Revenue*, 414 N.W.2d 670, 672 (Iowa Ct. App. 1987) (citing *Edmundson v. Miley Trailer Co.*, 211 N.W.2d 269, 271 (Iowa1973)). "[T]he question of acquiring a residence is to a large extent a question of intention on the part of the alleged resident. But such intention must be bona fide. Only the plaintiff himself can testify directly to such intention." *Messenger v. Messenger*, 188 Iowa 367, 372-73, 176 N.W. 260, 262 (1920).

If the residency requirement applies to your case, the petition for dissolution of marriage must: (1) state that the petitioner has been a resident of Iowa for the past year; (2) include the county of residence; and (3) provide the length of residence after deducting all absences from the state. Iowa Code § 598.5(1)(k). The petition also must state that maintenance of the residence

has been in good faith and not for the purpose of obtaining a dissolution of marriage. *Id.* If challenged, the averments of residence must be proven or the action will be dismissed. Iowa Code § 598.9; *In re Marriage of Vogel*, 293 N.W.2d 215, 216 (Iowa 1980) (citing *In re Marriage of Bouska*, 256 N.W.2d 196 (Iowa 1977) for the proposition that, although durational residency establishes subject matter jurisdiction, a case will not be dismissed simply because the petition was silent on durational residency, so long as the undisputed facts derived at a hearing demonstrate the requisite good faith durational residency.

B. Personal Jurisdiction

(1) Iowa Civil Procedure Rule 1.306.

Rule 1.306 "authorizes the widest jurisdictional parameters allowed by the Due Process Clause [of the fourteenth amendment to the Federal constitution]." *Capitol Productions, L.L.C. v. Don King Productions, Inc.*, 756 N.W.2d 828, 833 (Iowa 2008); *see also Hodges v. Hodges*, 572 N.W.2d 549, 551-52 (Iowa 1997) (citations omitted) (noting a previously-used, two-step analysis to determine personal jurisdiction: "(1) is there a statute or rule authorizing exercise of jurisdiction, and (2) does such jurisdiction offend due process principles?"). Because Rule 1.306 is equivalent to the outer limits of due process, the former two-step analysis of determining personal jurisdiction collapses into one step – in effect, does the exercise of jurisdiction over the nonresident defendants offend the principles of due process? *Twaddle v. Twaddle*, 582 N.W.2d 518, 520 (Iowa Ct. App. 1998) (citing *Hodges*, 572 N.W.2d at 552).

(2) Factors to determine personal jurisdiction

Iowa law requires that the nonresident party have certain "minimum contacts." Traditionally, Iowa law has used a five-factor test, with the first three (3) being most important: "(1) the quantity of the contacts; (2) the nature and quality of the contacts; (3) the source and connection to 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, 552 (Iowa 1997); *see Larsen v. Scholl*, 296 N.W.2d 785, 788 (Iowa 1980).

More recently, the Iowa Supreme Court has refined that test, narrowing the focus to two factors as follows: "Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, [due process] is satisfied if the defendant has "purposefully directed" his activities at residents of the forum and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Capitol Productions, L.L.C. v. Don King Productions, Inc.*, 756 N.W.2d 828, 834 (Iowa 2008); (citations omitted); *see also Kulko v. Superior Court of California*, 436 U.S. 84,

94 (1978) (holding that, when a father from New York sent his children to visit their mother in California, who then attempted to modify their New York custody agreement under California law, California did not have personal jurisdiction over the nonresident father); *see Shams v. Hassan*, 829 N.W.2d 848, 856-57 (Iowa 2013) ("Without expressly disavowing our five-factor test, we have followed the modern federal framework more closely in recent years, relying on its two main criteria. Nonetheless, our older five-factor test remains a useful tool, even if it may have less primacy." (citations omitted).)

Whichever test is used – the traditional five-step analysis or the more recent Capitol Promotions, L.L.C. two-step analysis – if satisfied, "the court must 'determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice.'" *Capitol Promotions, L.L.C.*, 756 N.W.2d at 834 (citations omitted).

(3) Motion to dismiss for lack of personal jurisdiction

A motion challenging personal jurisdiction must be filed before the responsive pleading; otherwise, the issue is deemed waived. Iowa R. Civ. P. 1.421(1) & (4); *In re Marriage of Zahnd*, 567 N.W.2d 684, 686 (Iowa Ct. App. 1997)). When challenging personal jurisdiction, "[t]he critical focus is on the relationship between the respondent, the forum and the litigation." *Meyers v. Kallestead*, 476 N.W.2d 65, 67 (Iowa 1991) (citations omitted). Whether the out-of-state respondent has minimum contacts with Iowa that demonstrate a meaningful relationship between the three "makes it 'essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Ross v. First Savings Bank of Arlington*, 675 N.W.2d 812, 815-16 (Iowa 2004).

(4) Ex parte divorce

There is one limited exception to the due process/minimum contacts personal jurisdiction requirement. The "ex parte divorce", established by the United States Supreme Court in *Williams v. State of North Carolina*, 317 U.S. 287, 63 (1942), and described in *Estin v. Estin*, 334 U.S. 541 (1948), allows a court located where the petitioner resides to grant a petition to dissolve the marriage, despite the fact that the court lacks personal jurisdiction over the respondent, whether it be because the respondent was not properly served, or the respondent had no minimum contacts with the state, or some other basis. The power to dissolve the marriage, however, is limited to restoring the parties to the rights and privileges of single persons. It cannot, most importantly, determine the related issues like, custody, visitation, child support, and property distribution. *See In re Marriage of Kimura*, 471 N.W.2d 869, 875

(Iowa 1991) (renaming the "ex parte divorce" as the "divisible divorce doctrine", the Iowa Supreme Court held that "[i]n these circumstances the court has jurisdiction to grant a divorce to one domiciled in the state but no jurisdiction to adjudicate the incidents of the marriage, for example, alimony and property division.").

C. Subject matter jurisdiction and venue

The district court has original jurisdiction over the subject matter of a dissolution of marriage. Iowa Code § 598.2. Venue is in the county where either party resides. *Id.*

****

***Meador v. Lu*, No. 23-1703, 2024 WL 3690730 (Iowa Ct. App. Aug. 7, 2024). Jonathan and Di were married in China in 2013 and are the parents of N.G.M., who was born the same year. The parties divorced in China in 2018. The China dissolution decree included a custody provision that Di would foster the parties' child, while Jonathan had visitation right.**

Despite the China divorce decree, Jonathan filed a filed a petition for custody and visitation in Iowa in 2020 when neither party resided in Iowa. A few months later, Jonathan filed a stipulated agreement giving the parties joint legal custody of N.G.M. and Jonathan physical care of the child, which the district court approved.

In May 2023, Di filed a motion to vacate the Iowa custody decree and the China decree was admitted into evidence by the parties' stipulation. The district court granted Di's motion to vacate. It noted that the 2020 order treated Jonathan's request as an initial custody determination, which is controlled by Iowa Code section 598B.201. Under that section, Iowa was not the child's "home state" so Iowa lacked subject matter jurisdiction when it entered the 2020 custody order. Jonathan appealed.

Jonathan asserted that the district court erred because Di could only vacate the Iowa custody order by filing a petition to vacate under Iowa Civil Procedure Rule 1.1012, and those motions must be filed within one year of the order's entry per Rule 1.1013(1). The court of appeals rejected Jonathan's argument invoking the well-established legal principles that when a decree lacks subject matter jurisdiction, it must be vacated. Rule 1.1012 is not applicable to a motion to vacate a decree which is void for lack of subject matter jurisdiction. A void judgment is one that, from its inception, is a complete nullity and

without legal effect. A motion to vacate based on lack of subject matter jurisdiction may be raised at any time. Subject matter jurisdiction cannot be conferred by agreement or waiver. *Meador* at *3. – NEW CASE

(1) Jurisdiction vs. Authority

Parties often confuse jurisdiction with authority. *Knutson v. Oellrich*, No. 22-1675, 2023 WL 2673137, at *3 (Iowa Ct. App. Mar. 29, 2023); *In re Est. of Burge*, No. 19-1881, 2021 WL 1017139, at *4 (Iowa Ct. App. Mar. 17, 2021).

> Subject matter jurisdiction refers to the authority of the court to hear and determine the general class of cases to which the proceeding belongs. It cannot be conferred by consent, waiver, or estoppel. This is because parties to a lawsuit cannot establish jurisdiction where it has not been first conferred by the constitution or legislation. On the other hand, the failure to properly invoke the authority of the court in a particular case can be obviated by consent, waiver, or estoppel. …
>
> A court may have subject matter jurisdiction but for one reason or another may not be able to entertain a particular case. In such a situation we say the court lacks authority to hear that particular case. Importantly, [a] court may lack authority to hear a particular case where a party fails to follow the statutory procedures for invoking the court's authority.

Alliant Energy-Interstate Power & Light Co. v. Duckett, 732 N.W.2d 869, 874–75 (Iowa 2007) (citations and quotation marks omitted).

(2) Venue

In 2018, the Allamakee District Court approved Doug and Kaytlyn's stipulation for shared legal custody and physical care of their child. In 2021, Kaytlyn moved to Cedar Rapids. She then moved and the Allamakee District Court granted permission to change the venue of the custody order to Linn County. Despite that order, Doug filed a petition to modify the custody order in Allamakee County. Kaytlyn responded by in Allamakee County filing a pre-answer motion to dismiss, but she also filed a "motion to determine schooling". Later, the Allamakee County District Court held an evidentiary hearing on the school issue. The Allamakee court denied Kaytlyn's motion to dismiss and ordered that the child attend school in Allamakee County for the current school year. Kaytlyn appealed.

First, the court of appeals found that the issue presented was one of the Allamakee District Court's *authority rather than subject*

***matter jurisdiction* to enter the school-choice order. Under Iowa's unified court system, the district court has general jurisdiction over all issues, so despite the venue change order any district court had subject matter jurisdiction. But did the district court have the authority to entertain and decide the school issue? No.**

The venue change order deprived the Allamakee County District Court of

> **authority to decide any substantive issue in the original case number after the change of venue to Linn County. The ruling on the school issue is therefore voidable … We hold that all substantive rulings entered in the Allamakee County District Court after the change of venue to Linn are void.**

***Knutson v. Oellrich*, No. 22-1675, 2023 WL 2673137, at *3 (Iowa Ct. App. Mar. 29, 2023). – NEW CASE**

D. Res judicata, issue, or claim preclusion

"The doctrine of res judicata embraces the concepts of claim preclusion and issue preclusion." *Spiker v. Spiker*, 708 N.W.2d 347, 353 (Iowa 2006).

(1) Issue preclusion or collateral estoppel

> The doctrine of issue preclusion, or collateral estoppel, serves a dual purpose. First, the doctrine protects litigants from the vexation of relitigating identical issues with identical parties or those persons with a sufficient connective interest to the prior litigation. Second, it promotes the interest of judicial economy by preventing unnecessary litigation.
>
> For issue preclusion to apply four prerequisites must exist: (1) the issue must be identical to the one previously decided; (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 made on the issue must have been necessary and essential to the resulting judgment.

State ex rel. Casas v. Fellmer, 521 N.W.2d 738, 740–41 (Iowa 1994) (citations omitted).

(2) Claim preclusion

> The general rule of claim preclusion provides a valid and final judgment on a claim precludes a second action on that claim or any part of it. The rule applies not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which could have been offered for that purpose. Claim preclusion, as opposed to issue preclusion, may foreclose litigation of matters that have never been litigated. It does not, however, apply unless the party against whom preclusion is asserted had a "full and fair opportunity" to litigate the claim or issue in the first action. A second claim is likely to be barred by claim preclusion where the "acts complained of, and the recovery demanded are the same or where the same evidence will support both actions." A plaintiff is not entitled to a second day in court by alleging a new ground of recovery for the same wrong. When we consider a defense of claim preclusion, we look for the presence of three factors: the parties in the first and second action were the same; the claim in the second suit could have been fully and fairly adjudicated in the prior case; and there was a final judgment on the merits in the first action. The absence of any one of these elements is fatal to a defense of claim preclusion.

Arnevik v. Univ. of Minnesota Bd. of Regents, 642 N.W.2d 315, 319 (Iowa 2002) (citations omitted).

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***In re Marriage of Samuels*, No. 23-0685, 2024 WL 4370049 (Iowa Ct. App. Oct. 2, 2024). In these two consolidated appeals, Rosanne challenged two decrees dissolving her marriages with two men. Regarding her first marriage and dissolution, Rosanne petitioned to dissolve her marriage to Daniel Samuels da Fonseca Silva in 2016. She claimed to serve Daniel by publication due to lack of his whereabouts but later admitted she knew some details (e.g., his passport number and a last known address in Brazil). The district court granted her motion for service by publication and issued a default dissolution decree.**

Regarding her second marriage and legal actions, in 2019, Rosanne married Mustapha El Khayat. When El Khayat filed for dissolution in 2022, Rosanne counterclaimed for annulment, alleging her first marriage to Silva was never validly dissolved due to improper service. She also petitioned to vacate the first dissolution decree, arguing it was void for lack of personal jurisdiction.

The court of appeals held that the district court properly denied Rosanne's petition to vacate. Rosanne was judicially estopped from

challenging the decree because she had previously represented to the court that service was valid and obtained a favorable judgment based on that position. Essentially, litigants cannot assert contradictory positions across proceedings to manipulate judicial outcomes. Courts may deny attempts to invalidate prior judgments where equitable doctrines such as estoppel apply. With her first dissolution decree affirmed, the district court properly denied Rosanne's petition for an annulment. – NEW CASE

(3) Enforcement of a dissolution decree's provision

In re Marriage of Ginsberg, 750 N.W.2d 520, 522 (Iowa 2008): The supreme court ruled that claim preclusion does not prevent the enforcement of the decree's provision which required husband to pay a debt owed to wife's father in an unspecified amount. Wife was not attempting to relitigate who should repay her father for the money he loaned the couple during their marriage. That issue had been decided. Wife was merely asking the district court to enforce the "hold harmless" provision of the decree. Such an action is always permissible. Moreover, even if the decree had stated the amount the parties owed, wife's father would not be estopped from proving the loan was for a different amount because he was not a party to the dissolution decree.

E. Servicemembers Civil Relief Act

If an absent respondent is a member of the armed forces, the Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901-4043 (formerly known as the Soldier's and Sailor's Civil Relief Act), permits a basis to stay the pending action under certain circumstances. *See* 50 U.S.C. §§ 3931, 3932; Iowa Code § 29A.93; *see also* Iowa Code § 232.116(3)(e) ("The court need not terminate the relationship between the parent and child if the court finds … The absence of a parent is … due to active service in the state or federal armed forces."). "At any stage before final judgment in a civil action or proceeding in which a servicemember … is a party, the court may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than 90 days, if the conditions [certain] are met." 50 U.S.C. § 3932(b)(1); *see also* 50 U.S.C. § 3932(a) (describing "servicemember"). Those conditions are:

> (A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.
>
> (B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current

> military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.

50 U.S.C. § 3932(b)(2); *cf. In re Marriage of Grantham*, 698 N.W.2d 140, 145 (Iowa 2005) (holding under the predecessor statute that a stay is only necessary if it affects the servicemember's "substantial rights").

F. Judicial Control of Trial

(1) Fair opportunity to resolve dispute

A trial judge's discretion "to manage trials is always constrained, in a large part, 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." *In re Marriage of Ihle*, 577 N.W.2d 64, 67 (Iowa Ct. App. 1998). "Judges, should impose time limits only when necessary, after making an enlightened analysis of all available information from the parties." *Id.* at 68.

(2) 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. *In re Marriage of Thielges*, 623 N.W.2d 232, 240 (Iowa Ct. App. 2000) (citing Iowa R. Evid. 5.403 & 5.611). "Of course, arbitrary and inflexible time limits are disfavored." *Id.*

G. Off-the Record Communications

> [T]he court and the lawyers are best advised to have all conversations reported when those conversations turn to the merits of the controversy. *See* Iowa R. Civ. P. 1.903 (requiring all trial proceedings to be reported). By doing so, the record will contain the remarks made by the court and any objections made to those remarks by the parties. 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 [6.806].

In re Marriage of Ricklefs, 726 N.W.2d 359, 363 (Iowa 2007).

H. Citation of Unpublished Appellate Decisions

Iowa Rule of Appellate Procedure 6.904(2)(a)(2) permits unpublished opinions or decisions of a court or agency to be cited. Unpublished opinions or decisions do not constitute controlling legal authority. When citing an unpublished opinion or decision a party must include an electronic citation indicating where the opinion may be readily accessed online. If not readily accessible in an online database, "the party must file and serve as an attachment a copy of that opinion or decision with the brief or other paper in which it is cited."

I. Discovery

(1) Subpoenas

"[I]f a subpoena requests documents that have no relevance to a litigated issue, the request automatically fails. Similarly, if the requesting party fails to show that they need to obtain documents or information from a nonparty, the subpoena may be quashed entirely." *Matter of Dethmers Mfg. Co.*, 985 N.W.2d 806, 815 (Iowa 2023). Further,

> attorneys and parties must *frontload* their efforts to "avoid imposing undue burden or expense on a person subject to the subpoena." Iowa R. Civ. P. 1.1701(4)(a); *see, e.g.*, *Mod. Plastics Corp.*, 890 F.3d at 251 ("[F]ailure narrowly to tailor a subpoena may be a ground for sanctions...." (quoting *Legal Voice v. Stormans Inc.*, 738 F.3d 1178, 1185 (9th Cir. 2013))). It is not enough to say that although a subpoena was obviously too broad when it was served, its onerous demands were just a starting point for a future negotiation that would likely lead the issuing attorneys to settle for less. We reject strategies of this kind. Subpoenas carry the power of the court. *See, e.g.*, Fed. R. Civ. P. 45 advisory committee's note to 1991 amendment ("[D]efiance of a subpoena is … an act in defiance of a court order and exposes the defiant witness to contempt sanctions."). We must avoid any abuse of that power. To the extent practicable, then, subpoenas must be reasonable — they must not be unduly burdensome — when they are served. And so, an issuing party must properly tailor its subpoenas before they are served. *See Va. Dep't of Corr. v. Jordan*, 921 F.3d 180, 189 (4th Cir. 2019)] ("A nonparty should not have to do the work of tailoring a subpoena to what the requesting party needs; *the requesting party should have done that before serving it*." (emphasis added)).

Matter of Dethmers Mfg. Co., 985 N.W.2d at 815–16.

(2) Noncompliance with discovery

(a) Default judgment as sanction.

In re Marriage of Williams, 595 N.W.2d 126, 129–30 (Iowa 1999): 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.

However, *Fenton v. Webb*, 705 N.W.2d 323, 326-27 (Iowa Ct. App. 2005): Wife 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 husband primary physical care. But, the court held that district court should not have established physical care without a hearing to confirm that placing the child in husband's physical care was in the child's best interests. "A child does not lose his or her rights because a parent fails to comply with court rules or orders." *Id.* at 327; *see also Flynn v. May*, 852 A.2d 963, 975 (Md. Ct. Spec. App. 2004).

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***In re Marriage of Mentz*, No. 23-1421, 2024 WL 4222622 (Iowa Ct. App. Sep. 18, 2024). Aron and Kelsey married in 2016 and share one child, V.M., born in 2018. Aron filed for dissolution of marriage in November 2021, requesting sole legal and physical custody. Kelsey requested joint legal custody and physical care, seeking equitable asset division.**

Aron consistently failed to comply with discovery orders, despite repeated motions to compel and warnings of sanctions. Discovery noncompliance led the court to bar Aron from contesting Kelsey's relief requests during the trial. Despite unresolved pretrial matters, the court granted primary physical care of V.M. to Kelsey, attributing the decision to Aron's noncompliance. Specifically, the district court awarded Kelsey joint legal custody and primary physical care of V.M., equitably divided the marital estate based on presented evidence, and imposed sanctions on Aron for procedural noncompliance.

Aron appealed to determine whether the court's sanctions improperly influenced the physical care determination. The court of appeals held that the court's reliance on procedural sanctions to decide the child's physical care was improper. Best interests of the child must govern custody determinations, not procedural

noncompliance. *Id.* at *6 (citing *Fenton*, 705 N.W.2d 323, 327 (Iowa Ct. App. 2005). The physical care award was reversed and remanded for a new evidentiary hearing. – NEW CASE

(b) Exclusion of evidence and witnesses

In re Marriage of Archer, No. 17-1221, 2018 WL 4354019, at *9 (Iowa Ct. App. Sep. 12, 2018): The court of appeals affirmed the trial court's exclusion of witnesses and exhibits when the offending litigant violated the pretrial scheduling order.

> Pretrial scheduling orders serve an important function in our civil justice system. A scheduling order encourages pretrial management and assists the trial court in controlling the direction of the litigation and stimulates litigants to focus on the most germane issues in the case. Deadlines promote efficiency and reduce the amount of resources required to be invested in the litigation. The failure of a party to meet pretrial deadlines not only undermines the goals of the schedule, but also prejudices the other party, who is subject to the deadlines as well.
>
> The purpose behind the disclosure requirements of the witness and exhibit lists is to assist the parties and the court in having an orderly trial free of surprises that can delay or even derailment. Exclusion should not be imposed lightly; other sanctions are available such as continuation of the trial or limitation of testimony. To ensure our district courts have the tools to effectively manage pretrial conduct and control the conduct of the trial, we have recognized the inherent power of the district court to enforce pretrial orders by imposing sanctions.

Archer at *9 (citations & quotation marks omitted).

2. Common Law Marriage

Though recognized in Iowa, there is no public policy favoring common law marriages. *In re Marriage of Winegard*, 278 N.W.2d 505, 510 (Iowa 1979) (hereinafter "*Winegard II*"), *cert. denied*, 444 U.S. 951. "There is no presumption that persons are married. Accordingly, the burden of proving a marriage rests on the party who asserts it, particularly where a common-law marriage is asserted[.]" *In Estate of Fisher*, 176 N.W.2d 801, 804 (Iowa 1970). Courts closely scrutinize claims of common law marriage because they are regarded with suspicion. *In re Marriage of Grother*, 242 N.W.2d 1 (1976); *In re Long's Estate*, 102 N.W.2d 76, 79 (Iowa 1960); *Conklin v. MacMillan Oil Co.*, 557 N.W.2d 102, 105 (Iowa Ct. App. 1996).

In order to prove the existence of a common law marriage, the party asserting its existence must prove all three elements by a preponderance of the evidence. *See Grother*, 242 N.W.2d at 1. "When one party is deceased, the party asserting the marriage must prove the elements of a common law marriage by a preponderance of clear, consistent, and convincing evidence." *Conklin*, 557 N.W.2d at 105; *see also Fisher*, 176 N.W.2d at 805 (Iowa 1970) (same). Those three elements are:

1. Present intent and agreement to be married,
2. Continuous cohabitation, and
3. Public declaration (holding out) that the parties are husband and wife.

In re Marriage of Martin, 681 N.W.2d 612, 617 (Iowa 2004); *Winegard II*, 278 N.W.2d at 510; *Conklin*, 557 N.W.2d at 105 ("'Holding out' or open declaration to the public is the acid test. 'In other words, there can be no secret common-law marriage.'"); *Fisher*, 176 N.W.2d at 804; *see also* Iowa Admin. Code r. 701-104.25 (425). Circumstantial evidence may be relied upon to meet this burden of proof, but circumstantial evidence alone is insufficient. *Martin* at 617; *see Coleman v. Graves*, 122 N.W.2d 853, 856 (Iowa 1963); *State v. Lawson*, 165 N.W.2d 838, 839 (Iowa 1969).

3. Same Sex Marriage

A. Recognized

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 section 595.2(1), which provides that "only a marriage between a male and female is valid", is unconstitutional as it applies to two members of the same sex wanting a legally recognized marriage. 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. 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. *See also Obergefell v. Hodges*, 576 U.S. 644 (2015) (recognizing same sex marriage nationally under the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

B. Same-sex marriage and birth certificates.

Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 354 (Iowa 2013): Iowa Code section 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 held 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, and the non-birthing spouse must be listed as the other parent.

4. Annulment

In re Marriage of Adam, No. 21-0693, 2022 WL 1486507 (Iowa Ct. App. May 11, 2022): Bekele Adam and Habiba Kedir chose to end their marriage. Bekele preferred an annulment, but the district court rejected that bid and granted a dissolution. Iowa Code section 598.29 sets out grounds for an annulment: (1) the marriage is prohibited by law; (2) either party was impotent; (3) either party was married at the marriage and no cohabitation after the previous marriage terminated; or (4) either party lacked the mental capacity to contract marriage. Bekele sought to prove illegality or impotence. He argued that Habiba violated federal law by entering the marriage solely to evade immigration laws. However, there are no cases in Iowa holding that a marriage entered for the purpose of evading immigration laws is invalid, void, or voidable; and the evidence showed that Habiba thought that she was married after living with Bekele for three years in Ethiopia and having a son with him. The court of appeals then determined that Iowa's annulment statute must be interpreted to mean that both men and women to be impotent; that impotence is more than being unable to maintain an erect penis; and that the impotent condition must be proved to be incurable. Here, Bekele did not claim that he was impotent; and Habiba testified that she was "able to engage in sexual intercourse," and, after all, they had a child in common and had sex sporadically since 2000.

5. Denial of a dissolution

In re Marriage of Schmidt, No. 19-0495, 2020 WL 2985459 (Iowa App. June 3, 2020): The court of appeals approved the district court's decision that, after appointing James a guardian ad litem, denied James's petition for dissolution of the marriage and granted Beverly's request for separate maintenance. After a 65-year marriage, James suffered from Alzheimer's and dementia. The court ruled that the denial of the dissolution was the court's prerogative. The district court "acted equitably in declining to dissolve the marriage and in determining

'both parties will be in a better financial position to provide for their needs in the final years of their lives under separate maintenance.'"

6. No QDRO without a decree

Wallace v. Wildensee, 990 N.W.2d 637 (Iowa 2023).

> QDROs are not freestanding or independent legal actions. They are ancillary to and depend on a domestic relations matter. Thus, without a divorce or separate maintenance proceeding under Iowa Code chapter 598 (2022), Iowa district courts cannot enter QDROs for the sole purpose of transferring a plan covered by ERISA.

Id. at 641.

Douglas and Mary Kathryn Wallace were married and never sought a dissolution or separate maintenance order. Douglas suffered from Parkinson's disease. They sought to transfer by QDRO Douglas's 401(k) to Mary Kathryn for their estate and tax planning purposes. The district court refused finding that it had no statutory authority to approve an interspousal agreement.

The 401(k) plan was controlled by ERISA, codified through amendments to both the Federal Labor Code (Title 29 U.S.C.) and the Internal Revenue Code (Title 26 U.S.C.). "One of the key components of the act was the spend-thrift provision," which is sometimes referred to as the antialienation provision. *Wallace* at 643 (quoting *Bruns v. Iowa Dist. Ct.* (*In re Marriage of Bruns*), 535 N.W.2d 157, 161 (Iowa Ct. App. 1995) (en banc).) Congress later created a key exception which permitted participants of an ERISA-controlled pension plan to alienate or assign benefits through a QDRO. "A QDRO is a domestic relations order that, among other things, recognizes an alternate person's right to receive plan benefits. 29 U.S.C. § 1056(d)(3)(B)(i), (C)–(D)." *Wallace* at 644.

Citing Iowa Code sections 597.3, 597.4, and 597.18 specifically, and chapter 597 generally, Mary Kathryn argued that the district court had authority to enter a QDRO transferring the 401(k) to her. The supreme court affirmed the district court's refusal to enter the QDRO because Iowa courts under Iowa law and the federal ERISA statute have no authority to enter such interspousal orders. In other words, Iowa courts only have such authority in a dissolution or separate maintenance decree entered pursuant to Iowa Code chapter 598.

7. Marital torts

A. Must reserve claim for marital tort in dissolution case.

"When a dissolution of marriage is decreed the parties shall forfeit all rights acquired by marriage which are not specifically preserved in the decree." Iowa Code § 598.20. It is the litigant's obligation to preserve a separate action during a dissolution trial. *See Ohlen v. Harriman*, 296 N.W.2d 794, 797 (Iowa 1980) (finding "the failure of the appellant to preserve a right of action for alienation of affections" during a dissolution suit barred the action).

B. Invasion of privacy

In re Marriage of Tigges, 758 N.W. 2d 824 (Iowa 2008). Jeffrey surreptitiously installed recording equipment and recorded Cathy's activities during the marriage in the marital home. The tort of invasion of privacy requires proof of an unreasonable intrusion upon an individual's seclusion, and the intrusion must be highly offensive to a reasonable person. Restatement (Second) of Torts §652B cmt. c, d; *Stessman v. American Black Hawk Broadcasting Co.*, 416 N.W.2d 685 (Iowa 1987). The Court approved the $22,500 award to Cathy as part of the dissolution action.

C. Eavesdropping devices

Papillon v. Jones, 892 N.W.2d 763, 772-74 (Iowa 2017): Bryon, without notice to Brenda, installed hidden sound-activated recording device in their home, a violation of Iowa Code section 808B.2, which prohibits "'willfully intercept[ing] … a[n] oral communication' without permission of one of the parties. Iowa Code § 808B.2(1)(a)." The Supreme Court affirmed the trial court's award of actual damages, attorney fees, and punitive damages.

Chapter 2 – Spousal Support

1. General legal principles

A. Burden of proof

In dissolution action (not a modification), the party seeking alimony has the burden to show he or she is entitled to support. *In re Marriage of Robert*, No. 11-0876, 2012 WL 2122310, at *5–6 (Iowa Ct. App. June 13, 2012); *accord In re Marriage of Doss*, No. 20-0624, 2022 WL 108961, at *9 (Iowa Ct. App. Jan. 12, 2022); *see also In re Marriage of Gust*, 858 N.W.2d 402, 418 (Iowa 2015) (Wiggins, J. concurring in part dissenting in part) (citing *Moore v. Moore*, 192 Iowa 394, 395–96, 184 N.W. 732, 732 (1921)).

B. Four types of alimony: Traditional, Reimbursement, Rehabilitative, and Transitional.

> An award of *traditional spousal support* is equitable in marriages of long duration to allow the recipient spouse to maintain the lifestyle to which he or she became accustomed. [*In re Marriage of Gust*, 858 N.W.2d 402, 412 (Iowa 2015).] Generally, only "marriages lasting twenty or more years commonly cross the durational threshold and merit serious consideration for traditional spousal support." *Id.* at 410–11. When traditional spousal support is ordered, the duration of support should correspond with need. *Id.* at 411. "Termination of spousal support may be appropriate when '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.'" [*In re Marriage of Mauer*, 874 N.W.2d 103, 111 (Iowa 2016)] (quoting *Gust*, 858 N.W.2d at 412).

In re Marriage of Sokol, 985 N.W.2d 177, 185 (Iowa 2023) (emphasis added).

> *Reimbursement* "support allows the spouse receiving the support to share in the other spouse's future earnings in exchange for the receiving spouse's contributions to the source of that income." [*In re Marriage of Becker*, 756 N.W.2d 822, 826 (Iowa 2008).] It "is predicated upon economic sacrifices made by one spouse during the marriage that directly enhance the future earning capacity of the other." *In re Marriage of Francis*, 442 N.W.2d 59, 64 (Iowa 1989) (en banc). Reimbursement support may be warranted

> where, for example, "a spouse contributed to the other's earning capacity" by supporting them through a degree program and where the supporting spouse "cannot otherwise be compensated for their contributions." [*In re Marriage of Pazhoor*, 971 N.W.2d 530, 544 (Iowa 2022)]. Generally, reimbursement support should "not be subject to modification or termination until full compensation is achieved. Similar to a property award, but based on future earning capacity rather than a division of tangible assets, it should be fixed at the time of the decree." *Francis*, 442 N.W.2d at 64.

In re Marriage of Sokol, 985 N.W.2d 177, 185 (Iowa 2023) (emphasis added).

> "*Rehabilitative* spousal support is 'a way of supporting an economically dependent spouse through a limited period of re-education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting.'" [*In re Marriage of Becker*, 756 N.W.2d 822, 826 (Iowa 2008)] (quoting [*In re Marriage of Francis*, 442 N.W.2d 59, 63 (Iowa 1989)]). Without a showing that the recipient spouse seeks reeducation, retraining, or some discrete period of time to increase earning capacity to become self-supporting, rehabilitative spousal support is inappropriate. *See Francis*, 442 N.W.2d at 64. "Because self-sufficiency is the goal of rehabilitative alimony, the duration of such an award may be limited or extended depending on the realistic needs of the economically dependent spouse, tempered by the goal of facilitating the economic independence of the ex-spouses." *Id.*

In re Marriage of Sokol, 985 N.W.2d 177, 185–86 (Iowa 2023) (emphasis added).

In 2022, the Iowa Supreme Court recognized a new type of alimony: transitional.

> *[T]ransitional spousal support* is warranted where the recipient spouse may already have the capacity for self-support at the time of dissolution but needs short-term assistance in transitioning to single life. See [*In re Marriage of Pazhoor*, 971 N.W.2d 530, 541–42 (Iowa 2022).] Dissolution of the marriage is expensive for the family unit: one residence becomes two, two beds become four, one set of pots and pans becomes two sets, etc. This requires a sufficient amount of liquidity for down payments, security deposits, a new vehicle, household items, and the like. *See, e.g.*,

> *In re Marriage of Hinshaw*, No. 12-1783, 2013 WL 3273584, at *5 (Iowa Ct. App. June 26, 2013) (affirming transitional spousal support award where spouse testified support would get her on her feet in "establishing a residence for herself and the children"); *In re Marriage of Byrne*, No. 03-0788, 2003 WL 23220082, at *3 (Iowa Ct. App. Nov. 26, 2003) ("Of the approximately eighty thousand dollars worth of property she received, less than one half of that amount was in cash or other liquid assets available to assist in her transition to self-sufficiency."). Where the requesting spouse has sufficient income or liquid assets to meet these immediate needs, transitional spousal support is inappropriate. *See Pazhoor*, 971 N.W.2d at 541–42. With respect to duration, the immediate needs of the recipient spouse generally "can be addressed through the issuance of orders on temporary matters while the dissolution proceeding is pending. But if additional relief is still necessary to assist in that transition, it should be of a short duration." [*In re Marriage of Mills*, 983 N.W.2d 61, 73 (Iowa 2022)].

In re Marriage of Sokol, 985 N.W.2d 177, 186 (Iowa 2023) (emphasis added).

Transitional is limited to one year.

> Because transitional spousal support is focused on solving a short-term liquidity issue, a transitional spousal support award generally *should not exceed one year in duration*.

In re Marriage of Sokol, 985 N.W.2d 177, 187 (Iowa 2023) (emphasis added).

B. Hybrid Awards

> The generally recognized categories of spousal support are not mutually exclusive. Courts may issue hybrid awards "to accomplish more than one of the foregoing goals." [*In re Marriage of Pazhoor*, 971 N.W.2d 530, 539 (Iowa 2022).] "[T]here is nothing in our case law that requires us, or any other court in this state, to award only one type of support." [*In re Marriage of Becker*, 756 N.W.2d 822, 827 (Iowa 2008)]. This does not mean, however, that courts are free to award spousal support not corresponding to any recognized category of support. Although the generally recognized categories of spousal support are not mutually exclusive, they are the exclusive categories of spousal support our precedents have recognized as equitable.

In re Marriage of Sokol, 985 N.W.2d 177, 186 (Iowa 2023).

***In re Marriage of Colby*, No. 22-0697, 2023 WL 5091835 (Iowa Ct. App. Aug. 9, 2023).**

<u>Summary – two courts, four judges, four different alimony awards.</u>

- **District Court ➔ "transitional" at $2500 per month for 36 months.**
- **Court of Appeals, majority (J. Badding & J. Buller) ➔ "rehabilitative" at $2500 per month for 36 months.**
- **Court of Appeals (J. Buller, concurring) ➔ "rehabilitative" at $2500 per month for 24 months.**
- **Court of Appeals (J. Ahlers, dissenting) ➔ "transitional" at $2500 per month for 12 months.**

Thomas and Kimberly married in 2014, after dating for four years. Thomas was sixty years old and Kimberly was fifty-two. The parties executed a premarital agreement that they stipulated at trial was legally enforceable.

After trial the district court filed its decree dissolving the marriage which occurred after *Pazhoor* but before *Sokol.* The court awarded Kimberly what it characterized as transitional spousal support of $2500 per month for thirty-six months. Both parties appealed the alimony award.

The court of appeals affirmed the district court holding that, even though *Sokol* limited transitional alimony to one year, the award was "strikingly similar to the purpose of the rehabilitative spousal support awarded in *Sokol*". *Colby* at *3. "In all, the record shows that Kimberly needs 'assistance in the short-term to become self-sustaining in the long-term.' There was thus no failure to do equity with the court's limited spousal-support award designed to help Kimberly achieve that goal." *Id.* at *4 (citations omitted).

In a concurrence, Judge Buller wrote: "I would not come to this conclusion if I were writing alone or on a blank slate. ... I would likely affirm the award as modified, at $2500 per month for twenty-four months." *Id.* at *5. He continued:

> **I write separately in part to express my view that the current spousal-support-award case law is not working. The factors are so malleable, and the guardrails for appellate review so thin, that it renders appellate decision-making over spousal-support awards a black box—a gamble worth taking for unsatisfied litigants. In my view, our appellate courts should not sit as a super-court of equity, which at our level amounts to a triumvirate of judges conducting de novo equitable**

> **review and potentially substituting their judgment for that of a district court judge who observed the parties through trial.**

***Colby* at *5.**

In a dissent, Judge Ahlers "share[d] many of the frustrations expressed in the special concurrence." ***Id.*** **at *5**

> **There is no dispute that Iowa now recognizes four types of spousal support — traditional, reimbursement, rehabilitative, and transitional—each of which has a different goal. There is also no dispute that the categories of spousal support are not mutually exclusive, so courts may issue hybrid awards designed to satisfy the goals of more than one category. However, the fact the categories are not mutually exclusive does not give courts freedom "to award spousal support not corresponding to any recognized category of support." While the four categories of spousal support are not mutually exclusive, "they are the exclusive categories of spousal support our precedents have recognized as equitable." This is where the rub comes in that causes me to part company with the majority—the majority sees a case for rehabilitative spousal support and I don't.**

***Colby* at *5 (citing *In re Marriage of Sokol*, 985 N.W.2d 177, 185-86 (Iowa 2023)). Judge Ahlers would have reduced the alimony award to $2500 per month for twelve months. *Id.* at *6. – NEW CASE**

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***In re Marriage of Edwards*, No. 23-0230, 2024 WL 2309362 (Iowa Ct. App. May 22, 2024). Ron and Katrina married in 2008 and had three children. Ron, an attorney, primarily supported the family through his high-paying jobs at John Deere and later Nike, where he earned $258,000 annually. His work required extensive travel. Katrina, meanwhile, was the primary caregiver for the children and did not work outside the home, setting aside her education in school counseling after their first child was born. Ron filed for divorce in 2021, leading to a decree in which Katrina was awarded primary custody of the children. The court ordered Ron to pay Katrina hybrid transitional and rehabilitative spousal support but then, following a motion to enlarge or amend by Ron, reduced the amount to $3,000 per month for three years and then $2,000 per month for another five years.**

Ron appealed the amount and duration of spousal support awarded to Katrina, contending it was excessive. The court of appeals affirmed the spousal support but modified it based on recent case law. The appellate court ordered Ron to pay Katrina $3000 monthly transitional for one year, $3,000 monthly rehabilitative for three years, then $1500 a month reimbursement for another four years based on a hybrid of transitional, rehabilitative, and reimbursement support. *See In re Marriage of Becker*, 756 N.W.2d 822, 827 (Iowa 2008); *see also In re Marriage of Stenzel*, 908 N.W.2d 524, 531 (Iowa Ct. App. 2018) (discussing how "types of spousal support ... are not mutually exclusive" and that fixation on "the moniker" can sometimes lead to "nothing more than a 'red herring'" (citation omitted)). The court found that Ron's high earnings and Katrina's role as a stay-at-home parent justified the support. The valuation of the Wells Fargo account was upheld, and the court denied Katrina's request for appellate attorney fees. – NEW CASE

C. No guidelines employing mathematical formulas, only Iowa State § 598.21A.

(1) No guidelines

In re Marriage of Mauer, 874 N.W.2d 103, 107 (Iowa 2016): The Iowa Supreme Court rectified the confusion created by the earlier opinion which hinted a formula may be used by courts, *In re Marriage of Gust*, 858 N.W.2d 402, 410-12 (Iowa 2015) (citing Mary Kay Kisthardt, *Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. Am. Acad. Matrim. Law. 61, 80 app. A (2008) (alimony formula).)

> In *Gust*, we noted our resolution on the spousal support issue was consistent with the presumptive spousal support award that would have resulted from application of the AAML guidelines to the facts before us. *Gust*, 858 N.W.2d at 416 n.2. However, we clearly acknowledged the AAML guidelines are not Iowa law and therefore clearly are not binding on Iowa courts. *Id.* Nonetheless, we suggested the AAML guidelines might "provide a useful reality check with respect to an award of traditional spousal support." *Id.*
>
> However, even if spousal support guidelines may provide a useful reality check in some cases, because they are not Iowa law, they can serve neither as the starting point for a trial court nor as the decisive factor for a reviewing court on appeal. See *Id.* When application of the factors contained in section 598.21A(1) results in a spousal support calculation that is inconsistent with

> a spousal support calculation under any guidelines-based approach, the court's application of the statutory factors must prevail over the guidelines-based determination.

Mauer, 874 N.W.2d at 108. In a 2022 decision, the supreme court put the final nail in the coffin of the ability of Iowa courts using the AAML alimony formula stating that the formula "can no longer serve as a 'reality check' for spousal support awards in Iowa" because they do not reflect changes to the federal tax code. *In re Marriage of Pazhoor*, 971 N.W.2d 530, 538 n.3 (Iowa 2022).

(2) Iowa Code § 598.21A(1)

Iowa courts must consider the following criteria when determining whether spousal support is justified for "limited or indefinite length of time":

> a. The length of the marriage.
>
> b. The age and physical and emotional health of the parties.
>
> c. The distribution of property made pursuant to section 598.21.
>
> d. The educational level of each party at the time of marriage and at the time the action is commenced.
>
> e. The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, responsibilities for children under either an award of custody or physical care, and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
>
> f. The feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the length of time necessary to achieve this goal.
>
> g. The tax consequences to each party.
>
> h. Any mutual agreement made by the parties concerning financial or service contributions by one party with the expectation of future reciprocation or compensation by the other party.
>
> i. The provisions of an antenuptial agreement.
>
> j. Other factors the court may determine to be relevant in an individual case.

D. A party paying his/her child's expenses when that child is 18 years-old or older is not considered in ability to pay alimony

An alimony payor's voluntary support of payor's healthy majority-aged children is not considered when determining payor's ability to pay alimony. *In re Marriage of Cummings*, No. 22-1481, 2023 WL 7014330, at *5 (Iowa Ct. App. Oct. 25, 2023). Also, a payer's "voluntary contributions to his son's college education cannot be used to avoid paying spousal support." *In re Marriage of Clark*, No. 23-0644, 2024 WL 1296277, at *3 (Iowa Ct. App. Mar. 27, 2024).

E. Pre-divorce cohabitation with a third party when determining alimony

***In re Marriage of Cummings*, No. 22-1481, 2023 WL 7014330 (Iowa Ct. App. Oct. 25, 2023). John and Laura Cummings were married for 28 years and had two children. Laura stayed home to care for the children while John's career advanced. Laura later owned an unsuccessful small business. During the marriage, the parties started a "throuple" with T. After separating in 2018, T. began dating Laura exclusively, and they moved several times. At the time of the dissolution trial, John earned around $138,000 per year, while Laura earned $36,000 annually working at a coffee shop.**

The district court awarded Laura transitional spousal support on a step-down schedule for 6 years. Both parties appealed. The court of appeals found the 6-year transitional support award was not supported under current caselaw (*Sokol*), which limits transitional support to 1 year. The court instead awarded Laura traditional spousal support of $2,000 monthly continuing until her death, remarriage, or ability to be self-supporting at the marital standard of living. The court considered Laura's cohabitation with T. as part of her financial picture but found it did not preclude her need for spousal support from John stating:

> **We believe cohabitation can be a relevant factor in a spousal support determination, but it "is not a ground for automatic denial or limitation of spousal support." *In re Marriage of Gifford*, No. 19-1569, 2020 WL 7021760, at *4 (Iowa Ct. App. Nov. 30, 2020); *cf. In re Marriage of Ales*, 592 N.W.2d 698, 703 (Iowa Ct. App. 1999) (in a modification action, shifting the burden "to the recipient to show why spousal support should continue in spite of the cohabitation"). We consider Laura's pre-decree cohabitation as part of her complete financial picture. *In***

> ***re Marriage of Orgren*, 375 N.W.2d 710, 713 (Iowa Ct. App. 1985) (noting the support recipient's "financial status may be altered by the addition of another person with whom to share household expenses").**

***Id.* at *5 – NEW CASE**

2. Traditional Spousal Support

Traditional spousal support 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 (1) the 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, 883 (Iowa Ct. App. 1989).

A. Property division and alimony are interrelated.

> 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). An alimony or spousal support award is justified when the distribution of the assets of the marriage does not equalize the inequities and economic disadvantages suffered in marriage by the party seeking the support and there also is a need for support. *In re Marriage of Weiss*, 496 N.W.2d 785, 787-88 (Iowa Ct. App. 1992). That said, we do not believe it is wise or equitable to give the party requesting spousal support the majority of the assets accumulated during the marriage, and then reduce the spousal support the other party is to pay to allegedly compensate for the fact he or she received substantially less property.
>
> There are important differences between property division and alimony. It is anticipated that spousal support will be paid from future income whereas property distributions are designed to sort out property interests acquired in the past. 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).

In re Marriage of Hazen, 778 N.W.2d 55, 59–60 (Iowa Ct. App. 2009) (note omitted).

"[N]othing in the statute prohibits [the court's] consideration of ownership of property acquired by gift or inheritance, along with the earning capacity or anything else which might relate to an ability to pay, in determining whether alimony should be allowed." *In re Marriage of Thomas*, 319 N.W.2d 209, 212 (Iowa 1982).

The court declined to award spousal support 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 she received provided her with sufficient funds to support herself. *In re Marriage of Grady-Woods*, 577 N.W.2d 851 (Iowa Ct. App. 1998).

B. Long marriages

Traditional support "is equitable in marriages of long duration to allow the recipient spouse to maintain the lifestyle to which he or she became accustomed." *In re Marriage of Sokol*, 985 N.W.2d 177, 185 (Iowa 2023) (citing *In re Marriage of Gust*, 858 N.W.2d 402, 406 (Iowa 2015)). "Generally, only 'marriages lasting twenty or more years commonly cross the durational threshold and merit serious consideration for traditional spousal support.'" *Id.* (citing *Gust* at 410-11). When the marriage crosses that twenty-year durational threshold, there are other factors to consider including a "marked disparity of income" between spouses. *See In re Marriage of Mann*, 943 N.W.2d 15, 21 (Iowa 2020) (citing *Gust* at 411–12).

"In a marriage 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 capacity is great." *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998).

The "spouse with the 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, to the extent that that is 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 Ct. App. 1983).

C. Health of the parties

The husband, 51, totally disabled and without a high school education, was granted $125 per month spousal support to supplement his $849 social security and $117 pension benefits. *In re Marriage of Miller*, 524 N.W.2d 442 (Iowa Ct. App. 1994).

Though marriage lasted only fifteen years, Erinn's permanent disability and lack of earning capacity entitled her to traditional alimony because she could not become self-supporting at a standard of living reasonably comparable to the one enjoyed during the marriage. *In re Marriage of Mills*, 983 N.W.2d 61 (Iowa 2022)

3. Rehabilitative Spousal Support

"*Rehabilitative alimony* serves to support an economically dependent spouse through a limited period of education and retraining. Its objective is self-sufficiency." *In re Marriage of O'Rourke*, 547 N.W.2d864, 866-67 (Iowa Ct. App. 1996) (emphasis in original) (citing *In re Marriage of Francis*, 442 N.W.2d 59, 63-64 (Iowa 1989).).

A. Premarital standard of living irrelevant.

> The dependent spouse's "standard of living before the marriage 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 section [598.21A(1)(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 Ct. App. 1991) (emphasis in original).

B. Alimony needed for retraining or more education.

In re Marriage of Pazhoor, 971 N.W.2d 530 (Iowa 2022). – Suraj and Hancy had similar medical educations and earning capacities at the time of their marriage. However, Suraj continued his education and passed his medical boards, while Hancy became pregnant and had to care for her ill father. She then became a stay-at-home mom, while Suraj's career blossomed. Hancy has supported him and tended to the logistics of the moves from state to state, finances, childcare, and the children's development. She also had assisted in advancing Suraj's career. Hancy intended to pursue a master's degree in public health, and her annual income would be $23,115, while she continued her education. Suraj's after-tax annual income was approximately $232,500; and he clearly had the ability to pay. On the other hand because of Hancy's property award of $775,000, additional education, and substantial spousal support, the Supreme Court decided that she could eventually become self-sufficient. The Court concluded that: (1) Hancy was entitled to rehabilitative spousal support

because of her need to be supported while completing her education; (2) she did not qualify for reimbursement spousal support because she made no economic contribution to Suraj's career because she was not employed outside the home; and unlike the couple in *Francis*, Hancy and Suraj divorced well after he completed his residency and Hancy's homemaker services and financial support during the marriage was compensated by the division of the marital property that accumulated from Suraj's earnings; (3) that transitional spousal support was not needed because Hancy will have sufficient income and liquid assets to facilitate the change to single life; and (4) that Hancy did not qualify for traditional spousal support because she could attain self-support through income from the property settlement and her increased earning capacity upon attaining her master's degree. The district court awarded $7,500 monthly spousal support for five years. The court of appeals awarded Hancy hybrid spousal support of $9,000 monthly for seven years, $8,000 monthly for another three years, and $7,000 monthly for two more years for a total span of twelve years. The Supreme Court decided the court of appeals' award was excessive and set the amount at $8,500 per month. In addition, the Court ruled that the modified duration was too long. Instead, the Court ruled that seven years should be sufficient for Hancy to complete her master's degree and enhance her earning capacity while working part-time and sharing physical care of their children. Apparently, like the court of appeals ruling, the spousal support will terminate only on the death of either party. – NEW CASE

C. Don't confuse rehabilitative with transitional

***In re Marriage of Sokol*, 985 N.W.2d 177 (Iowa 2023): – Transitional spousal support addresses short term liquidity needs associated with splitting one household into two; rehabilitative spousal support addresses training, education, work readiness, and human capital development. Here, the trial court erred by awarding transitional rather than rehabilitative alimony to the husband. There was no evidence in this record that the husband needed transitional spousal support. He was awarded approximately $660,000 in the property settlement, including significant liquid assets held in several checking accounts. What the husband needed was sufficient time to improve his skills and retool his business plan to increase his income. That is what the district court's well-reasoned rehabilitative spousal support award was shaped to do. This is not a case of transitional support but instead one of rehabilitative support, and the court of appeals erred in concluding otherwise. – NEW CASE**

4. Transitional Spousal Support.

A. New Form of Alimony recognized.

***In re Marriage of Pazhoor*, 971 N.W.2d 530 (Iowa 2022).**

> **We conclude that formal recognition of transitional alimony will assist the bench and bar. There are inequities in dissolution beyond a spouse's "economic sacrifices" that "directly enhance[d] the future earning capacity of the other," a spouse's need for education or retraining to become self-sufficient, or a spouse's responsibility to support the other "so long as a dependent spouse is incapable of self-support." There may be a need for short-term support in some cases to help "transition from married life to single life." Transitional alimony can ameliorate inequity unaddressed by the other recognized categories of support. Divorcing spouses must adjust to single life. If one is better equipped for that adjustment and the other will face hardship, then transitional alimony can be awarded to address that inequity and bridge the gap. We now formally recognize transitional alimony as another tool to do equity.**

***Id.* at 541-42 (citations omitted). – NEW CASE**

5. Reimbursement Spousal Support

When divorce occurs soon after one spouse earns an advanced decree, traditional spousal support 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 established the concept of "reimbursement spousal support" 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 tax laws at the time of the Francis decision, the payments were ordered to terminate on the recipient's death. *In re Marriage of Francis*, 442 N.W.2d 59 (Iowa 1989).

A. Reimbursement not justified if one spouse's investment is provided in the property division.

The Supreme Court denied reimbursement spousal support 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 spousal support 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 Probasco*, 676 N.W.2d 179 (Iowa 2004).

B. Time passages – the more time passes since obtaining degree, then the likelihood of receiving reimbursement alimony is lowered

When 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, spousal support may be denied. *In re Marriage of Jennings*, 455 N.W.2d 284, 287 (Iowa Ct. App. 1990), *overruled on other grounds by In re Marriage of Craig*, 462 N.W.2d 692, 693 (Iowa Ct. App. 1990); *see also In re Marriage of Grauer*, 478 N.W.2d 83, 86 (Iowa Ct. App. 1991).

C. No offset with rehabilitative alimony

An award of reimbursement spousal support should be set off by the amount of rehabilitative spousal support. *In re Marriage of Farrell*, 481 N.W.2d 528, 530 (Iowa Ct. App. 1991). These two types of spousal support are designed to achieve different goals and may not be offset against each other. *Id.*

6. Termination of spousal support

A. Remarriage does not automatically terminate alimony

The general rule is that alimony does *not* automatically terminate upon remarriage. *In re Marriage of Francis*, 442 N.W.2d 59, 63 (Iowa 1989); *In re Marriage of Cooper*, 451 N.W.2d 507, 509 (Iowa Ct. App. 1989) (citing *In re Marriage of Shima*, 360 N.W.2d 827, 828 (Iowa 1985)); *see In re Marriage of Von Glan*, 525 N.W.2d 427, 429 (Iowa Ct. App. 1994); *see also In re Marriage of Aronow*, 480 N.W.2d 87, 89 (Iowa 1991) ("Parties can contract and

dissolution courts can provide alimony … does not terminate on remarriage, or is payable in a lesser sum on remarriage."). Subsequent remarriage creates a prima facie case for the elimination of alimony. *Shima*, 360 N.W.2d at 829 (reasoning that it is illogical and unreasonable for a person to receive support by way of alimony from a former spouse and an equivalent obligation from the present spouse at the same time, unless extraordinary circumstances exist); *see* Iowa Code § 597.14 (requiring a spouse to be liable for "reasonable and necessary expenses of the family"); *see also St. Luke's Med. Ctr. v. Rosengartner*, 231 N.W.2d 601, 602 (Iowa 1975) (holding a spouse liable for other spouse's medical and hospital expenses incurred during the marriage). Thus, the burden shifts to the alimony-recipient to show extraordinary circumstances exist that require the continuation of alimony payments. *In re Marriage of Johnson*, 781 N.W.2d 553, 558 (Iowa 2010); *In re Marriage of Whalen*, 569 N.W.2d 626, 630 (Iowa Ct. App. 1997); *Cooper*, 451 N.W.2d at 509.

B. Retirement does not automatically terminate alimony

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. 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. The changes which will occur at retirement are ordinarily too speculative issues to be considered in the initial spousal support award. Therefore, the court ruled that the question of whether the spousal support should be modified upon retirement must be made when retirement is imminent or has actually occurred. *In re Marriage of Gust*, 858 N.W.2d 402, 416-17 (Iowa 2015); *see In re Marriage of Michael*, 839 N.W.2d 630, 639 n.8 (Iowa 2013).

7. Income withholding order for alimony

Though Iowa Code section 598.22 specifically permits automatic assignment of income only for payment of child support, the district court has the inherent equitable power to order comparable assignments of income for payment of delinquent spousal support. Where, as here, the former husband's support record is poor and he works out of state, the court's power to order assignment is appropriate. *In re Marriage of Debler*, 459 N.W.2d 267, 270 (Iowa 1990); *see also* Iowa Code § 598.23(2)(a) (granting court authority to withhold income as an alternative to punishment for contempt).

8. Spousal support QDRO

The court has the power, through a Qualified Domestic Relations Order (QDRO), to order the division of a pension payment to an ex-spouse as an alimony award. *In re Marriage of Kurtt*, 561 N.W.2d 385, 388 (Iowa Ct. App. 1997). The QDRO must comply with the Internal Revenue Code, 26 U.S.C. § 401(a)(13), as well as ERISA, 29 U.S.C. § 1056(d)(3). *Id.* In *Kurtt*, the court of appeals modified the lower court's order to require a QDRO, rather than the IPERS-participant paying a percentage of his pension under *In re Marriage of Benson*, 545 N.W.2d 252, 255 (Iowa 1996). *Id.* "A QDRO's simplicity and fairness is far superior to the percentage approaches discussed in *Benson*." *Id.*; *see* Iowa Code § 97B.39.

Pension funds may be garnished or attached by means of a QDRO in order to satisfy a past-due support obligation. *In re Marriage of Rife*, 529 N.W.2d 280 (Iowa 1995). When the *Rife* marriage was dissolved in 1982, the wife was awarded alimony in the amount of $500 per month. The husband made only two payments over the next twelve years. During that time, he was held in contempt twice and all attempts to collect from him were unsuccessful. In 1993, the wife obtained a QDRO that ordered the arrearage of nearly $118,000 be satisfied by means of garnishment of the corpus of the husband's pension plan. Upholding the order, the Supreme Court noted that ERISA was not intended to be a vehicle for avoidance of family support obligations, *Id.* at 282, and stated "we see nothing in the federal statute that prohibits invasion of the corpus." *Id.* at 281; *see* 29 U.S.C. § 1056(d)(3)(B) (exempting QDROs from the creditor collection shield). Expanding upon *Rife*, the court of appeals ruled that the issuance of a post-decree QDRO directing the assignment of a former husband's pension benefits to pay a past-due alimony obligation was not an unlawful modification of a property settlement. *In re Marriage of Bruns*, 535 N.W.2d 157, 161 (Iowa Ct. App. 1995); *see* Iowa Code § 598.21(7) ("Property divisions made under this chapter are not subject to modification.").

9. Alimony for never-married couples in domestic abuse actions

Although the parties never married each other, one party can be ordered to pay support and maintenance for the other under Iowa Code chapter 236. *Fishel v. Redenbaugh*, 939 N.W.2d 660, 663 (Iowa Ct. App. 2019) (citing Iowa Code § 236.5(1)(b)(6) & § 236.7(1)).

Chapter 3 – Property Division

1. Choice of law

Choice-of-law issues may arise when the parties reside in different states or when the parties are in one state but some or all of the personal property acquired during the marriage is not. The general rule is that the applicable law is the law of the state where the spouses were domiciled when the personal property was acquired. *In re Marriage of Whelchel*, 476 N.W.2d 104, 109-10 (Iowa Ct. App. 1991) (citing Restatement (Second) of Conflict of Laws § 6 (1971) and applying Texas law to that portion of an investment account which contained pension funds of the husband); *Nichols v. Nichols*, 526 N.W.2d 346 (Iowa Ct. App. 1994) (applying Iowa law to a military pension acquired by a couple, both parties to which retained their Iowa residency throughout the husband's military career, which was acquired in Connecticut, which likewise was the state where the parties' marriage was dissolved).

2. Factors in equitable division

A. Gender neutral

Males and females are equal partners. *See Reed v. Reed*, 404 U.S. 71, 76-77 (1971). Therefore, Iowa courts "must approach this issue from a gender-neutral position avoiding sexual stereotypes. … To do otherwise would provide for different treatment on the basis of sex." *In re Marriage of Pratt*, 489 N.W.2d 56, 58 (Iowa Ct. App. 1992). "In general, the division of property is based upon each marriage partner's right to a just and equitable share of the property accumulated as a result of their joint efforts." *In re Marriage of Dean*, 642 N.W.2d 321, 323 (Iowa Ct. App. 2002) (citing *In re Marriage of Hitchcock*, 309 N.W.2d 432, 437 (Iowa 1981)); *see also In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa Ct. App. 1983).

B. Separate property

(1) Inherited and gifted property

Generally, property that one spouse receives by inheritance or gift is not subject to division with the other spouse in a divorce. Iowa Code § 598.21(5) ("The court shall divide all property, *except inherited property or gifts received or expected by one party*, equitably between the parties after considering all of the following … (emphasis added)); *see also* § 598.21(6). "In determining whether inherited property is divisible as marital property, the controlling

factors are the intent of the donor and the circumstances surrounding the inheritance or gift." *In re Marriage of Liebich*, 547 N.W.2d 844, 850 (Iowa Ct. App. 1996).

Though gifted and inherited property is typically set aside to that party, the court can divide it between the parties "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); *see In re Marriage of Mayfield*, 477 N.W.2d 859, 863 (Iowa Ct. App. 1991); *In re Marriage of Sparks*, 223 N.W.2d 264, 267 (Iowa Ct. App. 1982). In determining whether the "refusal to divide the property is inequitable" to one of the parties, the Iowa Supreme Court has adopted a non-exhaustive five factor list of considerations:

> "(1) contributions of the parties toward the property, its care, preservation or improvement[];
> (2) the existence of any independent close relationship between the donor or testator and the spouse of the one to whom the property was given or devised;
> (3) separate contributions by the parties to their economic welfare to whatever extent those contributions preserve the property for either of them;
> (4) any special needs of either party;
> (5) any other matter which would render it plainly unfair to a spouse or child to have the property set aside for the exclusive enjoyment of the donee or devisee."

In re Marriage of Goodwin, 606 N.W.2d 315, 319 (Iowa 2000) (quoting *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 659 (Iowa 1989); *In re Marriage of Thomas*, 319 N.W.2d 209, 211 (Iowa 1982)).

(2) Increase in value of separate property

In a split decision, the Iowa Court of Appeals affirmed the district court's refusal to consider the appreciation of an otherwise separate asset's worth to be marital property and subject to division. *In re Marriage of Kerkhoff*, No. 15-1139, 2016 WL 4543749, at *4-*5 (Iowa Ct. App. Aug. 31, 2016). In *Kerkhoff*, Neal received stock as a gift from his parents. The parties stipulated that the original value of the stock was Neal's separate (gifted) property. *Id.* at *4. During their twenty-three year marriage, the stock appreciated in value by $4,978,025, so Marcy, Neal's wife, argued that she should receive $2,489,012.50 — one-half of the appreciation of the gifted stock. *Id.* The district court refused holding that

> Marcy did not contribute towards the care, preservation or improvement of the gifted property. No close independent relationship existed between the donors and Marcy. Neither party has any special needs. The gifted property was not preserved by

> any separate contributions by Marcy to the parties' economic welfare.

Id. at *5. A two-judge majority affirmed the district court holding that the "gifted stock in the Kerkhoff family businesses never directly supplied Neal and Marcy with income or wealth. Instead, the value associated with the gifted stock resided in the income and distributions Neal received through the businesses, at the sole discretion of his father." *Id.* In dissent, Chief Judge Danilson noted: "This case exemplifies the difficulty courts have in dealing with appreciation of separate property." *Id.* at *10. Judge Danilson argued that the majority's opinion was "contrary to our case law, the principles in Iowa Code section 598.21," particularly noting that the Iowa Supreme Court had previously held that stock appreciation is subject to division and equitable to divide. *Id.* at *10-*11 (citing *In re Marriage of Friedman*, 466 N.W.2d 689 (Iowa 1991); *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995)).

(3) Premarital property

"Importantly, 'the property included in the divisible estate includes not only property acquired during the marriage by one or both of the parties, but property owned prior to the marriage by a party.'" *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006) (quoting *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005)). Iowa law does *not* automatically set aside or give credit to a party for the assets each spouse brought into the marriage. *Id.*; *In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa Ct. App. 1996). However, "[p]remarital property does not merge with and become marital property simply by virtue of the marriage." *In re Marriage of Wendell*, 581 N.W.2d 197, 199 (Iowa Ct. App. 1998).

"[P]roperty brought to the marriage by each party" is merely one factor among many courts consider under section 598.21(5). Iowa Code § 598.21(5)(b); *Schriner* at 496. Even so, courts often treat premarital 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 Johnson*, 499 N.W.2d 326, 328 (Iowa Ct. App. 1993) (citing *In re Marriage of Lattig*, 318 N.W.2d 811, 815-16 (Iowa Ct. App. 1982)); *see also In re Marriage of Earsa*, 480 N.W.2d 84, 85-86 (Iowa Ct. App. 1991).

The marriage's length significantly affects the division of premarital property. *Lattig*, 318 N.W.2d at 815; *see* § 598.21(5)(a); *In re Marriage of Wallace*, 315 N.W.2d 827, 831 (Iowa Ct. App. 1981) ("If there were wide disparities between the assets of the parties at the time of the marriage, … the length of the marriage is a major factor in determining what the respective rights of the parties with respect to such property are at the time of its dissolution."). In a short-term marriage, the court typically awards the premarital property to the party that brought it to the marriage. *In re Marriage*

of Hass, 538 N.W.2d 889, 892 (Iowa Ct. App. 1995) (finding division equitable in three-year marriage where there was a "vast difference" in assets brought to the marriage).

(4) Traceability

By the time of the divorce, often a party who argues he or she should receive inherited, gifted, or premarital property as separate property, that property has been transformed into some other property. For example, husband inherits $50,000 years before the divorce, then during the years up to the divorce, he converts the inheritance into stocks, CDs, real estate, or pays down debt or marital expenses. Then at trial, he demands he receives credit for that $50,000. After proving the source as inherited and the amount, it is key for that party to then trace the inheritance to where it exists at the time of trial. For example, the court set aside $40,000 as the wife's separate inheritance because "net proceeds from the sale of the … house were traceable to paying off the mortgage on the other rental property still in their possession." *In re Marriage of Bast*, No. 22-1725, 2024 WL 1295551 at *6 (Iowa Mar. 27, 2024); *In re Marriage of Sterner*, No. 18-0409, 2019 WL 1057304, at *4 (Iowa Ct. App. Mar. 6, 2019) (finding although the husband used inheritance funds to pay off the farm mortgage on jointly held property, "the use of the inherited funds [was] traceable and the property was still in the possession of parties at the time of dissolution"; and affirming the court's determination the inherited funds should be set aside prior to the property division).

C. Three simple questions regarding marital property

Despite the enormous amount of energy that can be and has been dedicated to property division in a divorce, the task of dividing the marital estate can be summarized in three questions answered in this order:

> (1) **Identification** – What are the parties' assets and liabilities subject to division?
> (2) **Valuation** – What is the value of each asset and liability?
> (3) **Division** – What is an equitable division of the assets and liabilities under Iowa law?

(1) Identification

"Before dividing the marital property, a court must identify all of the assets held in the name of either or both parties as well as the debts owed by either or both of them." *In re Marriage of Keener*, 728 N.W.2d 188, 193 (Iowa 2007) (citing *In re Marriage of Hagerla*, 698 N.W.2d 329, 333 (Iowa Ct. App. 2005));

In re Marriage of Driscoll, 563 N.W.2d 640, 642 (Iowa Ct. App. 1997); *see In re Marriage of Sundby*, No. 20-1552, 2022 WL 946508, at *7 (Iowa Ct. App. Mar. 30, 2022) ("As tedious as the chore may be, the district court has the obligation to equitably divide 'all' of the marital property between the parties in a decree. *See* Iowa Code § 598.21(1), (5).").

(2) Valuation

The court gives the assets and debts their value as of the date of trial. *Locke v. Locke*, 246 N.W.2d 246, 252-53 (Iowa 1976); *In re Marriage of Hagerla*, 698 N.W.2d 329, 333 (Iowa Ct. App. 2005). "The purpose of determining the value is to assist the court in making equitable property awards and allowances." *In re Marriage of Moffatt*, 279 N.W.2d 15, 19 (Iowa 1979). "It is the net worth of the parties at the time of the trial which is relevant in adjusting their property rights." *In re Marriage of Helmle*, 514 N.W.2d 461, 463 (Iowa Ct. App. 1994).

(a) Permissible evidence

The owner of the property has the burden to produce proof supporting the alleged value. *See In re Marriage of Ales*, 592 N.W.2d 698, 703 (Iowa Ct. App. 1999) (recognizing the evidentiary concept that "a person in possession of facts necessary to prove an issue, in this case economic need, should have the burden of proving those facts"). An owner may testify as to actual value without a showing of general knowledge of market value due to an owner's peculiar knowledge of the quality, cost and condition of the property. *In re Marriage of Driscoll*, 563 N.W.2d 640, 643 (Iowa Ct. App. 1997); *see Holcomb v. Hoffschneider*, 297 N.W.2d 210, 213 (Iowa 1980) (en banc) (holding that the property's owner is a competent witness to testify as to its market value); *see also In re Marriage of Hanson*, 475 N.W.2d 660, 662 (Iowa Ct. App. 1991) ("Generally, if a party testifies that a marital asset has no monetary or sentimental value, he or she is in no position to complain if that asset is awarded to the other party."). "[A]necdotal evidence is simply an insufficient basis upon which to determine fair market value." *In re Marriage of Keener*, 728 N.W.2d 188, 195 (Iowa 2007).

"The trial court is free to consider any and all evidence of the [property's] value … including the credibility of the expert witness' testimony, the credibility of the parties, and each party's opinion as to the value of the corporation." *In re Marriage of Dennis*, 467 N.W.2d 806, 809 (Iowa Ct. App. 1991). The appellate court will affirm the trial court's value when the valuations have supporting credibility findings or corroborating evidence and the value is within the permissible range of the evidence. *In re Marriage of*

Decker, 666 N.W.2d 175, 180 (Iowa Ct. App. 2003); *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999).

(b) Long separations

If the parties have been separated for a long time, the court may consider an alternate date in the past to value the asset – the separation date. *In re Marriage of Driscoll*, 563 N.W.2d 640, 643 (Iowa Ct. App. 1997); *see In re Marriage of Oakes*, 462 N.W.2d 730, 733 (Iowa Ct. App. 1990) (allowing for possibility of separation date valuation); *In re Marriage of Campbell*, 623 N.W.2d 585, 587–88 (Iowa Ct. App. 2001) (expressly overruling *Oakes* and now allowing for valuation based upon the date of separation when one party does not contribute to post-separation growth of an asset); *see, e.g.*, *In re Marriage of Meerdink*, 530 N.W.2d 458, 460 (Iowa Ct. App. 1995) (ruling that wife had right to obtain information as to husband's current net worth for purposes of equitable distribution even though parties had been separated for nine years and had disclosed their financial status seven years earlier); *In re Marriage of McLaughlin*, 526 N.W.2d 342, 344 (Iowa Ct. App. 1994) (holding that even though the parties had been separated for 18 months, "date of the dissolution is the only reasonable time when an assessment of the parties' net worth should be undertaken"); *In re Marriage of Tzortzoudakis*, 507 N.W.2d 183 (Iowa Ct. App. 1993) (filing of dissolution petition thirty years after separation of the parties); *In re Marriage of Richards*, 439 N.W.2d 876, 882 (Iowa Ct. App. 1989) ("Since respondent left home without making any contributions to the house payments, the trial court was correct in using the equity value as of the date of their separation."); *cf. In re Marriage of Kerkhoff*, No. 15-1139, 2016 WL 4543749, at *4-*5 (Iowa Ct. App. Aug. 31, 2016) (determining whether the increase the value in a separate asset (inherited/gifted) is subject to division).

(c) Closely-held corporations

"The value of stock in a closely held corporation is at best difficult to determine." *In re Marriage of Conley*, 284 N.W.2d 220, 222 (Iowa 1979); *see In re Marriage of Keener*, 728 N.W.2d 188, 194 (Iowa 2007).

> The general rule is that stock should be valued at market value if it can reasonably be ascertained. However, market value for the stock in a close corporation can rarely be ascertained. Thus its intrinsic value should be determined. A broad range of evidence is admissible to prove any fact calculated to affect its value.

In re Marriage of Moffatt, 279 N.W.2d 15, 19 (Iowa 1979). The "intrinsic value of such a business may be determined by using a broad range of evidence, including the corporation's assets and liabilities, dividends paid, the character and permanency of the business, the control of the stock, the management

structure, the market for articles produced, and other facts." *In re Marriage of Martin*, No. 14-0568, 2015 WL 576065, at *3 (Iowa Ct. App. Feb. 11, 2015) (citing *Moffatt*). The court "need not arrive at an exact value. The purpose of determining value is to assist the court in making equitable property awards and allowances. This can be done without putting a precise value on the stock of a closely held corporation." *Moffatt* at 19.

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, 21 (Iowa Ct. App. 1993); *In re Marriage of Coulter*, 502 N.W.2d 168, 171-72 (Iowa Ct. App. 1993). However, the court cannot delegate this responsibility to the parties through a private bidding process, i.e., auction, between parties. *In re Marriage of Dennis*, 467 N.W.2d 806, 808 (Iowa Ct. App. 1991) ("It is the province of the trial court to determine the value of marital property.").

The share of the corporation's 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, 247 (Iowa Ct. App. 1991). Depreciation deductions associated with a business taken by a party on income tax returns does not affect the fair market value of the business. *See In re Marriage of Gaer*, 476 N.W.2d 324, 328 (Iowa 1991) (relying on *Stoner v. Stoner*, 163 Conn. 345, 349-51, 307 A.2d 146, 151 (1972)).

Once the closely-held corporation has been valued, courts have approved awards of less than 50% of farms and small businesses to nonoperating spouses to permit the operating spouse to retain ownership and manage the farm or business as a single economic unit. *See In re Marriage of McDermott*, 827 N.W.2d 671, 683 (Iowa 2013); *In re Marriage of Callenius*, 309 N.W.2d 510, 515 (Iowa 1981). However, when 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 Ct. App. 1990), the wife received more of the net assets than the husband, but the husband got all of the income-producing farmland and equipment.

(d) Unique methods to divide unique property.

***In re Marriage of Bast*, No. 22-1725, 2024 WL 1295551 at *6 (Iowa Mar. 27, 2024). Kelly and Kathleen divorced after thirty-five years of marriage. The parties fought over numerous issues, but one unique class of property proved particularly difficult.**

The district court ordered Kathy's "doll collection" equally divided and provided a process to do so. *Id.* at *1 n.5. The court noted the parties' valuations of the doll collection varied greatly: Kathy

testified the collection was worth about $10,000 while Kelly claimed $140,000. Neither party submitted any evidence to document the extent of the collection or an appraisal value. Kelly testified he had considered getting the collection appraised but did not want to spend the $125 per hour appraisal charge, stating "it could take days and days to see all the many, many, many, many items there were and to appraise each one that it would be—it was financially not conceivable to do."

In the decree, the court ordered:

> **Kathy shall preserve the entire doll and keepsake collection in one room of her home. She shall not remove any items in the collection from the room. The parties and their respective attorneys shall agree upon a day and time no later than 30 days after entry of this Decree upon which the parties and their respective attorneys shall gather in that room and the parties, supervised by their attorneys, shall alternate selection of the dolls and keepsakes one at a time until all the dolls and keepsakes have been divided, or until Kelly thinks that he has enough to satisfy him, whichever happens first (Kathy may have the first selection). Each party shall be responsible for their own attorney's fee for this exercise. In the alternative, the parties, prior to the date selected above, can agree upon a reasonable value for the items, and Kathy can pay one-half of that amount to Kelly in cash or from the proceeds of the sale of the two Guthrie County properties.**

After trial, the parties' efforts to split the collection was aborted and they urged the district court to order the appointment of a special master to referee the process. In ruling on that request, the court noted a special master would charge $350 per hour. The court found the problem was due to the parties "petulant behavior and not any deficiency in the [court's] order itself." It noted the parties "were free to agree to hire a referee and bestow whatever powers they wish upon that person" but the court would not enter an order. *Id.* at n.5. – NEW CASE

(3) Division

"An equitable distribution of the parties' property must be made according to the criteria set forth in Iowa Code section [598.21(5)]." *In re Marriage of Goodwin*, 606 N.W.2d 315, 319 (Iowa 2000). That section provides:

The court shall divide all property, except inherited property or gifts received or expected by one party, equitably between the parties after considering all of the following:

a. The length of the marriage.

b. The property brought to the marriage by each party.

c. The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.

d. The age and physical and emotional health of the parties.

e. The contribution by one party to the education, training, or increased earning power of the other.

f. The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

g. 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 the children, or if the parties have joint legal custody, to the party having physical care of the children.

h. The amount and duration of an order granting support payments to either party pursuant to section 598.21A and whether the property division should be in lieu of such payments.

i. Other economic circumstances of each party, including pension benefits, vested or unvested. Future interests may be considered, but expectancies or interests arising from inherited or gifted property created under a will or other instrument under which the trustee, trustor, trust protector, or owner has the power to remove the party in question as a beneficiary, shall not be considered.

j. The tax consequences to each party.

k. Any written agreement made by the parties concerning property distribution.

l. The provisions of an antenuptial agreement.

m. Other factors the court may determine to be relevant in an individual case.

Iowa Code § 598.21(5); *In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005).

The Iowa Supreme Court summarized how Iowa courts should divide property of divorcing spouses in *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005):

> Like most other states, Iowa is known as an "equitable distribution" jurisdiction for purposes of dividing property in a dissolution of marriage. *In re Marriage of McNerney*, 417 N.W.2d 205, 207 (Iowa 1987) (citing Iowa Code § 598.21(1) (1985)); *see generally* Joseph A. McKnight, *Defining Property Subject to Division at Divorce*, 23 Fam. L.Q. 193 (1989). "Equitable distribution" essentially means that courts divide the property of the parties at the time of divorce, except any property excluded from the divisible estate as separate property, in an equitable manner in light of the particular circumstances of the parties. *McNerney*, 417 N.W.2d at 207.
>
> In Iowa, two types of property, inherited property and gifts received by one party, are specifically excluded by statute from the divisible estate. Iowa Code [§ 598.21(5)]. This property is normally awarded to the individual spouse who owns the property, independent from the equitable distribution process. Yet, this exclusion is not absolute. Iowa has a unique hybrid system that permits the court to divide inherited and gifted property if equity demands in light of the circumstances of a spouse or the children. *Id.*; [§ 598.21(6)]. Property not excluded is included in the divisible estate.
>
> Under our statutory distribution scheme, the first task in dividing property is to determine the property subject to division. The second task is to divide this property in an equitable manner according to the factors enumerated in the statute, *see Id.* [and § 598.21(5)], as well as other relevant factors determined by the court in a particular case.
>
> Our statute is written to define divisible property as "all property" of the parties, other than the two classes of excluded property. *Id.* The statute provides:
>
> > Upon every judgment of annulment, dissolution or separate maintenance, the court shall divide the property of the parties and transfer the title of the

> > property accordingly. … The court shall divide all property … equitably between the parties. …
>
> *Id.* This broad declaration means the property included in the divisible estate includes not only property acquired during the marriage by one or both of the parties, but property owned prior to the marriage by a party. *In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa Ct. App. 1994). Property brought into the marriage by a party is merely a factor to consider by the court, together with all other factors, in exercising its role as an architect of an equitable distribution of property at the end of the marriage. Iowa Code [§ 598.21(5)(b)]. More importantly, the statute makes no effort to include or exclude property from the divisible estate by such factors as the nature of the property of the parties, the method of acquisition, or the owner. "All property," except inherited or gifted property, is included, and the circumstances and underlying nature of the included property are generally considered as factors that impact the second task of determining an equitable division, along with all other relevant factors. *See Id.* [§ 598.21(5)(a)-(m)].

Schriner, 695 N.W.2d at 496 (Iowa 2005) (citing 2005 predecessor to Iowa Code § 598.21(5)) (other statutory citations updated); *but see In re Marriage of Hansen*, 886 N.W.2d 868, 871-72 (Iowa Ct. App. 2016) (holding trial court properly declined to consider motor vehicle that was repossessed during trial in dividing assets in divorce proceeding).

(a) Equal division?

Equitable is not synonymous with equal. *See In re Marriage of Anliker*, 694 N.W.2d 535, 542 (Iowa 2005). "What is equitable in a divorce is an endless source of debate." *In re Marriage of Fennelly*, 737 N.W.2d 97, 99 (Iowa 2007). While Iowa Courts do not require an equal division or percentage distribution of marital assets, see, e.g., *In re Marriage of Hoak*, 365 N.W.2d 185, 194 (Iowa 1985), Iowa courts seek to provide what is "fair and equitable." *Madsen v. Madsen*, 261 Iowa 476, 479, 154 N.W.2d 727, 729 (1967). "What is fair and equitable in any case is peculiarly dependent upon the particular facts. Precedent is of little value and general principles, though easy to announce, are difficult to apply." *Id.*; *accord In re Marriage of Keener*, 728 N.W.2d 188, 193 (Iowa 2007) (citing *Schriner*, 695 N.W.2d at 496); *see also In re Marriage of Conley*, 284 N.W.2d 220, 223 (Iowa 1979) (stating "in evaluating the method chosen by the court to accomplish its objective, we recognize that equality need not be achieved with 'mathematical exactness.'" (citations omitted)); *In re Marriage of Miller*, 552 N.W.2d 460, 464 (Iowa Ct. App. 1996). Nevertheless, "[e]quality is … often most equitable; therefore, [the Iowa Supreme Court has]

repeatedly insisted upon the equal or nearly equal division of marital assets." *In re Marriage of McDermott*, 827 N.W.2d 671, 682 (Iowa 2013).

(b) Tax Consequences/Selling Costs

The court should consider tax consequences of the sale of assets where the property settlement requires liquidation of the assets. Iowa Code § 598.21(5)(j); *In re Marriage of Hogeland*, 448 N.W.2d 678 (Iowa Ct. App. 1989). 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. *In re Marriage of Friedman*, 466 N.W.2d 689, 691 (Iowa 1991). When a sale is speculative, consideration of tax consequences is inappropriate. *Id.*; *see also Daniels v. Holtz*, 794 N.W.2d 813, 818 (Iowa 2010).

In *In re Marriage of McDermott*, 827 N.W.2d 671, 684 (Iowa 2013), the supreme court refused to reduce the property division equalization payment by $750,000 to allow for the tax and sale costs. Stephen argued that he would have to sell land and incur taxes and selling expenses to make a $1 million equalization payment. The Court rejected this argument because Stephen was offered a mortgage loan to make the payment by his bank; and his cash flow was sufficient to permit him to make the payment without selling any land.

(c) Property in lieu of alimony

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 alimony. *In re Marriage of Goodwin*, 606 N.W.2d 315, 323 (Iowa 2000).

(d) No bonus property for domestic abuse

"Domestic abuse is not included as a factor to be considered in the division of property in a dissolution action." *In re Marriage of Goodwin*, 606 N.W.2d 315, 323–24 (Iowa 2000) (citing Iowa Code § 598.21(5)). Though the trial record "is extremely void of any evidence" that the wife suffered physical abuse from her husband, she argued that she is entitled to greater share of their marital property under the "catchall provision, allowing the court to consider '[o]ther factors the court may determine to be relevant in an individual case.'" *Id.* at 323 (citing Iowa Code § 598.21(5)(m)). The supreme court rejected this argument "because it would introduce the concept of fault into a dissolution-of-marriage action, a model rejected by our legislature in 1970." *Id.* at 324.

(e) Long separations

If the parties have been separated for a long time, the court may consider an alternate date in the past to value the asset – the separation date. *In re Marriage of Driscoll*, 563 N.W.2d 640, 643 (Iowa Ct. App. 1997); *see In re Marriage of Oakes*, 462 N.W.2d 730, 733 (Iowa Ct. App. 1990) (allowing for possibility of separation date valuation); *In re Marriage of Campbell*, 623 N.W.2d 585, 587–88 (Iowa Ct. App. 2001) (expressly overruling *Oakes* and now allowing for valuation based upon the date of separation when one party does not contribute to post-separation growth of an asset); *see, e.g.*, *In re Marriage of Meerdink*, 530 N.W.2d 458, 460 (Iowa Ct. App. 1995) (ruling that wife had a right to obtain information as to husband's current net worth for purposes of equitable distribution even though parties had been separated for nine years and had disclosed their financial status seven years earlier); *In re Marriage of McLaughlin*, 526 N.W.2d 342, 344 (Iowa Ct. App. 1994) (holding that even though the parties had been separated for 18 months, "date of the dissolution is the only reasonable time when an assessment of the parties' net worth should be undertaken"); *In re Marriage of Tzortzoudakis*, 507 N.W.2d 183 (Iowa Ct. App. 1993) (filing of dissolution petition thirty years after separation of the parties); *In re Marriage of Richards*, 439 N.W.2d 876, 882 (Iowa Ct. App. 1989) ("Since respondent left home without making any contributions to the house payments, the trial court was correct in using the equity value as of the date of their separation."); *cf. In re Marriage of Kerkhoff*, No. 15-1139, 2016 WL 4543749, at *4-*5 (Iowa Ct. App. Aug. 31, 2016) (determining whether the increase the value in a separate asset (inherited/gifted) is subject to division).

(f) Failure to disclose

Iowa Code section 598.13 requires both parties to disclose their financial status. *In re Marriage of Meerdink*, 530 N.W.2d 458, 459 (Iowa Ct. App. 1995). This affidavit requires each party to not only identify each asset and debt, but also place a value on it. Iowa R. Civ. P. 1.1901 - Form 7; *see* Iowa Code § 598.13(1)(a). A party's failure to comply with the requirements of this section constitutes a failure to make discovery as provided in Rule of Civil Procedure 1.517. § 598.13(1)(b); *Meerdink* at 459. However, failure to file an affidavit of financial status under section 598.13 is not jurisdictional that would deprive the court authority to grant the dissolution and file the final decree. *In re Marriage of Butterfield*, 500 N.W.2d 95, 98 (Iowa Ct. App. 1993).

In a similar fashion, courts mete harsh consequences upon a party who hides or otherwise transfers assets to avoid an equitable distribution. *See, e.g.*, *In re Marriage of Keener*, 728 N.W.2d 188, 193 n.2 (Iowa 2007) (approving that, when assessing ownership of marital property subject to division, the trial

court disregarded wife's attempt to devalue her share in family business by giving a portion of the business to her son shortly after the husband filed for divorce); *In re Marriage of Aronow*, 480 N.W.2d 89, 90 (Iowa Ct. App. 1991) ("Where a husband or wife is obligated to pay child support or alimony, and he or she is the principal in a business that employs his or her spouse … [and] the salary is in excess of salaries for comparable employment, then we will assume the portion of the salary that is in excess of comparable salaries is being paid in an attempt to show a reduced level of income for the obligor. Absent evidence showing a valid basis for the excess salary, we will attribute that portion of the salary that is excessive to the obligor spouse."); *In re Marriage of Williams*, 421 N.W.2d 160, 164 (Iowa Ct. App. 1988) (holding that husband's use of the parties' tax refund, removal of money from joint bank accounts, forging of documents for the purpose of borrowing money, then not accounting for the subsequent use of those funds properly resulted in a property division favoring the wife).

(g) Dissipation (waste) of marital assets / hiding property

Conduct of a spouse that results in the loss or disposal of property that would otherwise be subject to equitable division in a dissolution of marriage may be considered by the courts in fashioning a property distribution. *In re Marriage of Fennelly*, 737 N.W.2d 97, 104-05 (Iowa 2007) (determining an unexplained cash advance of $22,000 made by the husband after the wife filed the petition for dissolution, at a time when he "taunted [the wife] was going to have to pay for it all" was dissipation of marital assets, particularly since "the parties' assets will eventually be needed to pay [the husband's] debt."); *In re Marriage of Bell*, 576 N.W.2d 618, 624 (Iowa Ct. App. 1998) (approving an unequal division of assets based upon the husband's dissipation of marital funds for gambling), *abrogated on other grounds by In re Marriage of Wendell*, 581 N.W.2d 197, 200 (Iowa Ct. App. 1998); *In re Marriage of Goodwin*, 606 N.W.2d 315, 321 (Iowa 2000) (concluding a property distribution that favored the husband was appropriate based on the wife's dissipating marital assets by transferring title to a vehicle, then retaining possession of it, and cashing in and disposing of life insurance proceeds, as well as liquidating a mutual fund). "Typically, a dissipated asset is included in the marital estate and awarded to the spouse who wasted the asset. However, where the dissipation is debt, it is appropriate to set aside the debt for the spouse who incurred the debt and not include it in the marital estate." *Fennelly* at 106 n.6 (citing *Goodwin*, 606 N.W.2d at 322).

However, the focus should not be whether one spouse or the other is responsible for a debt, but whether the payment of an obligation was a reasonable and expected aspect of the particular marriage. *In re Marriage of*

Burgess, 568 N.W.2d 827, 829 (Iowa Ct. App. 1997) (noting that current wife knew prior to marriage that husband had other alimony and child support obligations); *see In re Marriage of Kimbro*, 826 N.W.2d 696 (Iowa 2013) (rejecting husband's claim that wife's expenditures while divorce was pending was dissipation). Another significant fact concerns *when* the dissipation occurred so that expenditures immediately near or during the period of separation support a finding of dissipation while expenditures during the marriage (prior to the dissolution action) are not considered dissipation. "Generally, one spouse's historical spending patterns prior to the time of separation are immaterial to the dissipation inquiry." *In re Marriage of Drenter*, No. 17-1548, 2019 WL 478195, at *2 (Iowa Ct. App. Feb. 6, 2019).

<u>EXAMPLE:</u>

In re Marriage of Nissen, No. 19-0541, 2020 WL 4197751 (Iowa Ct. App. July 22, 2020) – Prior to the divorce, Tim, without Linda's knowledge or consent, withdrew substantial funds ($573,332.50) from his 401(k) account to purchase a home in Polk City for his exclusive use. Tim also incurred tax liabilities by prematurely withdrawing funds from his 401(k), requiring additional withdrawals of $98,500 to pay those taxes.

At trial, Tim argued that his withdrawal to purchase his secret house was not dissipation because Linda refused to sign the loan documents on his secret house forced him to withdraw from his 401(k) so he could pay cash for the house. Tim also argued that Linda should pay the taxes and penalties he incurred by making the advanced withdrawal from his 401(k). Linda argued that Timothy's unilateral withdrawals from his 401(k) amounted to dissipation of marital assets.

The court of appeals affirmed this district court that Timothy's withdrawal of $573,332.50 from the 401(k) to purchase the Polk City home amounted to dissipation of marital assets. As a remedy, $148,952.86 representing dissipated assets should be added to Timothy's side when dividing the marital property. Timothy was ordered to pay Linda $134,754.14 to equalize the division.

(h) Cash equalization payments / installment terms / interest

> An equalization payment is preferable when the court cannot divide an asset easily and there are not enough liquid assets in the marital estate to achieve an equitable distribution. The easiest way for a court to divide property is to order the parties to sell the [asset] and split the proceeds. In that instance, each party is then responsible for any tax consequences arising from the sale.

> However, a forced sale is not a preferable method to divide marital assets, because such a sale tends to bring lower prices, and, as in this case, a party usually wants to keep the property rather than sell it.

In re Marriage of McDermott, 827 N.W.2d 671, 683 (Iowa 2013) (finding that, if the party receiving the asset has to also make an equalization payment, it is equitable if the payer must take a mortgage on the asset to pay the payment). "The ability of a party to meet the financial obligations imposed by 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 Ct. App. 1996).

Unpaid cash equalization payments ordered in a dissolution decree should accrue interest at the rate specified in Iowa Code sections 535.3 and 668.13(3). *In re Marriage of Keener*, 728 N.W.2d 188, 196 (Iowa 2007). However, interest is not required in every case. *In re Marriage of Hoak*, 364 N.W.2d 185, 194 (Iowa 1985) (noting that Iowa courts have upheld denial of interest on property-division payments in the past, each case is different as the "determinative factor is what is fair and equitable in each particular circumstance"); *see, e.g.*, *Keener* at 196 (finding interest was "certainly" "necessary" because wife received $4,280,650 cash award payable over ten years); *In re Marriage of Pittman*, 346 N.W.2d 33, 37 (Iowa 1984) (rejecting inequity of interest on $3000 payment as the overall property division was equitable even with no interest); *In re Marriage of Conley*, 284 N.W.2d 220, 223 (Iowa 1979) (holding district court's failure to award interest on $90,000 award which was to be paid over nine years was unfair because "the property division fell substantially short of the trial court's goal of an approximately equal division of assets"); *In re Marriage of Briggs*, 225 N.W.2d 911, 913 (Iowa 1975) (affirming no interest on cash award of $50,000 over an eleven-year period because lack of interest was a factor the district court considered in determining the amount); *In re Marriage of Richards*, 439 N.W.2d 876, 883 (Iowa Ct. App. 1989) (approving a long duration non-interest bearing property division payment).

"In Iowa, fixed awards of money for child support, alimony, and property settlement draw interest at the statutory rate even though the judgment makes no reference to the matter of interest." *In re Marriage of Dunn*, 455 N.W.2d 923, 924 (Iowa 1990) (citing *Arnold v. Arnold*, 258 Iowa 850, 854-55, 140 N.W.2d 874, 877 (1966)). This is because a property award in a dissolution decree has the essential qualities of a judgment. *Hunt v. Kinney*, 478 N.W.2d 624, 626 (Iowa 1991); *Arnold*, 258 Iowa at 854, 140 N.W.2d at 877. Interest is payable from the date a judgment becomes due. *Hunt*, 478 N.W.2d at 626. If a party seeks an interest rate different from the statutory rate, that party must show circumstances of the property settlement that warrant a departure. *In re Marriage of Blume*, 473 N.W.2d 629, 634 (Iowa Ct. App. 1991); *see In re*

Marriage of Friedman, 466 N.W.2d 689, 693 (Iowa 1991) (approving 6% interest, even though rate was less than statutory rate, "because of our award of alimony and our decision on property division.").

> [Iowa courts] have long adhered to what is known as the United States Rule regarding computation of interest when payment is made toward retiring a judgment. When partial payments are made they are allocated first toward the interest due. Any payment which exceeds the interest due is applied toward the judgment principal. Subsequent interest is to be computed on the remaining principal.

Gail v. Western Convenience Stores, 434 N.W.2d 862, 864 (Iowa 1989) (citations omitted).

D. Unique assets and debts

(1) Pensions

Pensions that have accumulated in value during the marriage are held to be marital assets subject to division in dissolution cases, just as any other property. Iowa Code § 598.21(5)(i); *In re Marriage of Branstetter*, 508 N.W.2d 638, 640 (Iowa 1993) (holding that § 411.13, which exempts pensions "from execution, garnishment, attachment, or any other process whatsoever", does not prevent division of pensions in dissolution actions). However, when the marriage is brief, and one or both of the parties has a retirement account, equity does not require an equal division of pension assets accumulated during the marriage. *In re Marriage of Knust*, 477 N.W.2d 687, 688 (Iowa Ct. App. 1991). "Unvested and future interests are to be considered in addition to vested interests." *In re Marriage of Johnston*, 492 N.W.2d 206, 208 (Iowa Ct. App. 1992).

Payments required to equitably divide pension benefits are property settlement payments, not alimony, and, therefore, do not terminate upon remarriage or cohabitation and are not modifiable. *In re Marriage of Huffman*, 453 N.W.2d 246, 249 (Iowa Ct. App. 1990); *In re Marriage of Wilson*, 449 N.W.2d 890, 892 (Iowa Ct. App. 1989). Furthermore, the spouse's share is payable as soon as the benefits are received. *See In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa Ct. App. 1995).

(a) Survivor benefits

Survivor benefits in a pension plan may also be property subject to division. *See In re Marriage of Morris*, 810 N.W.2d 880 (Iowa 2012); *In re Marriage of Davis*, 608 N.W.2d 766, 770-71 (Iowa 2000). In *Morris*, the Supreme Court's opinion began, "This case should serve as a vivid reminder to attorneys

practicing matrimonial law to specifically address survivor rights when dividing retirement benefits." *Id.* at 881. The parties had been litigating for years after the district court had adopted their stipulation dividing the marital property. The problem arose when the ex-husband, a retired marine, had remarried and sought to name his new spouse as the survivor beneficiary of his military pension. The dissolution decree awarded the former spouse one-half of his military pension. However, when he died, the pension would cease and only survivor benefits remained. The decree was silent as to survivor benefits. The former wife applied to the district court to force her ex-husband to name her as survivor beneficiary. He resisted. The district court denied the application holding that the ex-wife was attempting to modify the decree's property division which is prohibited by Iowa Code section 598.21(7). The court of appeals affirmed. The Supreme Court vacated the court of appeals and reversed the district court, holding that the ex-wife's application was asking the court to "interpret" the property division, not modify it. *Id.* at 886-87. Further, since the decree was ambiguous as to pension survivor benefits, the Supreme Court remanded so the district court could receive evidence in order to discern whether the district court intended to include survivor benefits in the division of the pension. *Id.* at 887 (citing cases from other jurisdictions that found survivorship benefits are included in pensions and other jurisdictions that concluded the opposite).

(b) Methods to divide pensions

The preferred method of handling a pension benefit is to divide the plan through a Qualified Domestic Relations Order (QDRO) which assigns some or all of the pension benefit to the non-participant spouse. *In re Marriage of Benson*, 545 N.W.2d 252, 255 (Iowa 1996). "This allows the court to allocate other assets equitably and assures similar retirement security for both spouses." *In re Marriage of McLaughlin*, 526 N.W.2d 342, 344 (Iowa Ct. App. 1994). Though alimony based on a percentage of a pension benefit may be equitable, a QDRO, when available, is preferable. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997) ("A QDRO's simplicity and fairness is far superior to the percentage [approach] …")

"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." *In re Marriage of Sullins*, 715 N.W.2d 242, 248 (Iowa 2006) (citations omitted). "When the plan at issue is a defined-contribution plan, like a 401(k), the determination of the present value of the benefits and the distribution is less complicated"; therefore, the present-value method is preferred when dividing the asset. *Id.* at 248 n.2 (citing *Benson*, 545 N.W.2d at 256 n.1). In

contrast, "it is normally desirable to divide a defined-benefit plan by using the percentage method." *Sullins* at 248.

[1] Present-value method

> The present-value method requires the present value of the benefits to be determined before allocating a portion of the benefits to the pensioner's spouse. Present value derived under this method represents the restatement in current dollars of a payment or series of payments to a current lump sum equivalent. Yet, the determination of present value of a defined-benefit plan is a complicated process that requires the use of actuarial science.

In re Marriage of Sullins, 715 N.W.2d 242, 248 (Iowa 2006) (citations and internal quotation marks omitted). This method is used when sufficient information (e.g., testimony from an accountant and/or an actuary) is available, and the parties have sufficient assets, in addition to the pension, to satisfy the payee spouse's immediate needs. *See In re Marriage of Fidone*, 462 N.W.2d 710, 711-12 (Iowa Ct. App. 1990) (citations omitted) ("In assessing the equity of the award … David has been the substantial wage-earner during the marriage. Consequently, we find he leaves the marriage with greater retirement entitlements. We consider this factor in assessing the award.").

[2] Percentage method – *Benson* formula

Because the present value method is so complicated and expensive to calculate, many times the percentage method is a much more attractive way to determine the proper distribution of a pension plan or similar retirement vehicle. *In re Marriage of Sullins*, 715 N.W.2d 242, 248 (Iowa 2006). "Under the percentage method, the non-pensioner spouse is awarded a percentage (frequently fifty percent) of a fraction of the pensioner's benefits (based on the duration of the marriage), by a qualified domestic relations order (QDRO), which is paid if and when the benefits mature." *Id.* at 250 (citing *In re Marriage of Benson*, 545 N.W.2d 252, 255 (Iowa 1996)). Commonly referred to as the *Benson* formula, the "fraction represents the portion of the pension attributable to the parties' joint marital efforts." *Id.* "The numerator in the fraction is the number of years the pensioner accrued benefits under the plan during the marriage, and the denominator is the total number of years of benefit accrual." *Id.; but see In re Marriage of Heath-Clark*, No. 15-0525, 2016 WL 2753779, at *7-*8 (Iowa Ct. App. May 11, 2016) (reviewing an IPERS QDRO).

For a thorough discussion and how to apply *Benson*, as well as calculating surviving spouse benefits, *see In re Marriage of Smock*, No. 07-1081, 2007 WL

4553658, at *2-*4 (Iowa Ct. App. Dec. 28, 2007); *see also In re Marriage of Smith*, No. 16-0597, 2017 WL 362000 at *5-*6 (Iowa Ct. App. Jan. 25, 2017).

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***In re Marriage of Ocean*, No. 22-1664, 2024 WL 697757 (Iowa Ct. App. Feb. 21, 2024) – The parties had been married fifteen years by the time of their 2022 divorce trial. Ocean worked full-time as a teacher earning around $53,000 per year. Osborne works two full-time jobs and as a referee/umpire, earning around $381,000 per year at the time of dissolution. Ocean had an IPERS retirement account.**

The district court awarded the full IPERS account to Jaime valued at the death benefit amount. The district court adopted Ocean's proposed property distribution, assigning certain debts solely to Osborne including tax liabilities from his income. The court awarded Ocean $2,000 per month in spousal support for 10.5 years and required Osborne to maintain $200,000 life insurance for the children as beneficiaries.

The majority of the court of appeals affirmed valuing Ocean's IPERS at the death benefit amount rather than using the *Benson* formula division, finding this equitable based on the circumstances. The court wrote:

> **Both parties have cashed out previous retirement accounts for marital expenses over the years. Osborne has chosen to not maintain a retirement account in recent years, even with employer matches. We also note Osborne is nearly ten years older than Ocean and would not receive any IPERS payments until his mid-seventies—assuming Ocean continues to contribute to her retirement until age sixty-five. The parties submitted projections assuming life expectancy of eighty years of age. Should Ocean draw IPERS from age sixty-five to eighty, her total income will be approximately $746,000. Osborne projected he can save $471,567 through 401K contributions before his retirement at age sixty-five. This amount does not take into account any gains Osborne may accrue on his investments, while investment gains are calculated into Ocean's IPERS income. We also note the difference in value reflected above represents six to twelve months of Osborne's earnings without any umpiring duties or bonuses Osborne might receive. Considering all the assets divided by the court, the timing of distributions, anticipated earnings,**

> **and their respective abilities to save, we find Ocean keeping her IPERS account is equitable.**

***Id.* at *2.**

The dissent disagreed on the IPERS's division. Judge Ahlers found it erroneous and would have modified the decree to have the IPERS divided by the *Benson* formula.

> **Here, no evidence utilizing actuarial science was utilized. Instead, the district court just accepted the "lump-sum death benefit" amount listed on a recent statement from IPERS as the value of the benefits, with no persuasive evidence that such figure represented the present value of the benefits. The only fair way to value the IPERS benefits, in the absence of any actuarial-based evidence of their value, is to divide them using the *Benson* formula.**

***Id.* at *5. – NEW CASE**

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***In re Marriage of Trulson*, No. 23-0732, 2024 WL 3289856 (Iowa Ct. App. July 3, 2024). Holly and Timothy had been married for twenty-eight years. A key sticking point on appeal was how the trial court divided Holly's IPERS account. "In its decree dividing the marital property, the district court valued Holly's IPERS account at $219,684 based on the refund value stated on a recent annual statement."**

The court of appeals modified the trial court's division by ordering that Holly's IPERS must be divided using the *Benson* formula. First, using the "refund value" is an incorrect method of valuing an IPERS plan. *Id.* at *2 (citing *In re Marriage of Brown*, 776 N.W.2d 644, 651 (Iowa 2009) (finding it impermissible to value IPERS benefits based on contribution information on a statement because "[t]his figure does not accurately value the present worth of the benefits"). "As there was no actuarial evidence to find the present value of Holly's IPERS account, we find it appropriate to use the other accepted valuation and division method—the percentage method, also known as the *Benson* formula." *Id.* at *3. – NEW CASE

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***In re Marriage of Hill*, 986 N.W.2d 884 (Iowa Ct. App. 2022) – This case involves a dispute and modification of a QDRO over the division of**

Marshall Hill's military retirement pay following his divorce from Lori Hill.

Marshall and Lori were married for 12 years, during which Marshall worked for the U.S. Postal Service and the Iowa Air National Guard. In their 2013 divorce decree, Lori was awarded 50% of Marshall's military retirement benefits accrued during their marriage, calculated using his *years of service*. The Defense Finance and Accounting Service (DFAS) required a modified order calculating Lori's share based on Marshall's *reserve points, not* years of service.

The main legal question was whether modifying the Military Retirement Pay Division Order (MRPDO) to use reserve points instead of years of service constituted an impermissible modification of the property division in the divorce decree. The Iowa Court of Appeals held that the district court's decision that the modification was permissible and consistent with the original decree's intent.

Agreeing with other state court decision that, when a military member's retirement pay is *not* strictly a function of length of service, the appropriate formula uses retirement points earned during the marriage divided by total retirement points earned. Specifically, it found that using reserve points accurately reflects the military retirement benefits accrued during the marriage, whereas years of service do not. Concluding that the modification aligns with the decretal court's intent to equally divide the military benefits accrued during the marriage and does not impermissibly modify the property division. – NEW CASE

(2) Family residence

Iowa Code section 598.21(5)(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 the children, or if the parties have joint legal custody, to the party having physical care of the children." Thus, Iowa courts commonly award the marital home to the party who receives physical care of the minor children while the other party receives a continuing ownership interest or a lien against the property. *See, e.g.*, *In re Marriage of Pittman*, 346 N.W.2d 33, 37 (Iowa 1984). Put simply, courts seek to provide stability for the children, thus the party getting physical care gets the house. *In re Marriage of Ales*, 592 N.W.2d 698, 704 (Iowa Ct. App. 1999); *but see In re Marriage of Hoffman*, 493 N.W.2d 84 (Iowa Ct. App. 1992) (house and contents sold and the proceeds divided because the mother and children had resided in the homestead for only six months prior to the separation.

Aside from stability for the children, Iowa courts, pursuant to section 598.21(5)(m), also consider whether the physical-care parent can afford the house payments when determining how to distribute that asset.

> [T]he financial obligations following a dissolution of marriage can be burdensome, especially when the financial obligations during the marriage were not easily satisfied. The ability of a party to meet the financial obligations imposed by 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 Ct. App. 1996).

(3) Family Farm

Iowa caselaw recognizes a public policy of preserving family farm operations. *In re Marriage of McDermott*, 827 N.W.2d 671, 683 (Iowa 2013). However, that policy "is not an absolute mandate." *In re Marriage of Sterner*, No. 18-0409, 2019 WL 1057304, at *5 (Iowa Ct. App. Mar. 6, 2019) (citing *McDermott*). Additionally, the Iowa Supreme Court has recognized the reasonableness of awarding the farm to the operating spouse "and in fixing the awards and schedule of payments to the other spouse without reaching *equality* so the farmer-spouse might retain ownership of the farm." *Id.* (quoting *In re Marriage of Callenius*, 309 N.W.2d 510, 515 (Iowa 1981) (emphasis in original)).

(4) Disability income and worker's compensation benefits

Social security or veteran's disability payments are not marital property. *In re Marriage of Howell*, 434 N.W.2d 629, 632 (Iowa 1989); *In re Marriage of Miller*, 524 N.W.2d 442, 444 (Iowa Ct. App. 1994); *see also Mansell v. Mansell*, 490 U.S. 581, 594–95 (1989) (finding states lack the power to "treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits"). However, "'workers' compensation benefits received up to the time of the dissolution are property subject to an equitable division *to the extent they have been retained and not spent*. Benefits received after the divorce constitute separate property of the injured spouse." *In re Marriage of Schriner*, 695 N.W.2d 493, 499 (Iowa 2005) (emphasis in original).

Disability income a spouse receives post-divorce through the Municipal Fire & Police Retirement System of Iowa is not property subject to division. *In re Marriage of Miller*, 966 N.W.2d 630, 637-40 (Iowa 2021) (this benefit creates "a retirement system [for fire fighters or police officers] which will provide for the payment of pensions to retired members and members incurring disabilities." Iowa Code § 411.1A(1) (2017)).

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***In re Marriage of Nye*, No. 23-0350, 2024 WL 2317706 (Iowa Ct. App. May 22, 2024). Twelve years after a property settlement was reached between Lonnie and Heather, Lonnie filed a petition for modification of the parties' decree, which awarded Heather half of his retirement pension. At the time of their divorce, Lonnie was working as a firefighter and entitled to a pension through the Municipal Fire & Police Retirement System of Iowa. The parties stipulated to the terms of their dissolution decree, which awarded Heather half of the pension that accumulated during their marriage.**

Post-divorce, Lonnie was diagnosed with PTSD and converted his retirement pension to a disability pension. Relying on in *In re Marriage of Miller*, 966 N.W.2d 630, 639 (Iowa 2021), which held "future payments from a chapter 411 ordinary disability benefit are income and not property and thus not subject to equitable division because they replace income that an individual would have earned if not for an injury causing the disability", Lonnie sought to modify the property division.

The court of appeals affirmed the district court's denial of Lonnie's request. Citing Iowa Code section 598.21(7) that expressly states that property division is not modifiable, Lonnie is not permitted to change his 2010 divorce decree. Further, in *Miller*, the pensioner's divorce had not been finalized so it was an original property division rather than a modification. A "court can only consider the property at the time of the decree, and the court does not have a magic mirror to look into the future to see how the property might change." *Id.* at *3. – NEW CASE

(5) Retained earnings & deferred compensation

Income received and retained during the marriage becomes property subject to divisions between the spouses. *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005). However, future earnings from employment are not property at the time of divorce. *Id.* But, an asset a spouse will receive in the future can be considered part of the divisible estate if that asset derived from actions that occurred during the course of the marriage. *See, e.g.*, *In re Marriage of White*, 537 N.W.2d 744, 746–47 (Iowa 1995) (dividing future royalties on textbooks published during the marriage); *In re Marriage of Howell*, 434 N.W.2d 629, 632 (Iowa 1989) (concluding a military pension is compensation for past services and therefore properly characterized as marital property).

Using the foregoing as a basis, the court of appeals addressed whether retained earnings are property at the time of the divorce (divisible) or future income (non-divisible). *In re Marriage of Casten*, No. 11-0796, 2012 WL 1860358, at *3 (Iowa Ct. App. May 23, 2012) In *Casten*, the husband paid taxes each year on earnings, but his employer "retained" the earnings that it *may* pay out in the future. *Id.* The husband argued that the retained earnings were not property because, as a minority shareholder, he had no control whether his employer would ever pay him. *Id.* In contrast, the wife argued the retained earnings were property because such were based on past work and they had already paid taxes on the earnings. *Id.* Siding with a "majority of jurisdictions" outside of Iowa, "where a spouse is a minority shareholder and does not have the ability to distribute dividends, retained earnings of a corporation in which a spouse held an interest were nonmarital property." *Casten*, 2012 WL 1860358, at *4-*5.

(6) Student loans

(a) A student loan for a party's education

Debts incurred to pay for a party's college expenses are often issues to be decided in a divorce. If the student loan is incurred prior to the marriage, that debt is considered to be separate property attributable to the spouse who incurred the expense for his or her education. *In re Marriage of Campbell*, No. 13-1383, 2014 WL 1999231, at *5 (Iowa Ct. App. May 14, 2014); *In re Marriage of Fiedler*, No. 10-0271, 2011 WL 227647, at *5 (Iowa Ct. App. Jan. 20, 2011) (holding student loans obtained prior to marriage are outside the marital estate) *see also In re Marriage of Hatch*, No. 13-2066, 2014 WL 5862153, at *3 (Iowa Ct. App. Nov. 13, 2014) (student loans incurred after the parties separated is the debt of the party incurring the debt).

The *Campbell* Court faced an issue of first impression concerning how student loans are divided between the spouses. Jennifer and Joel Campbell were born in 1985, married in 2006, had one child together in 2012, and divorced in 2013. *Campbell*, 2014 WL 1999231 at *1. Both parties had extensive college educations with each earning bachelor's and master's degrees. *Id.* There was no prenuptial agreement. *Id.* Both were healthy and gainfully employed at the time of the divorce. *Id.* At trial, their student loans were an issue. *Id.* at *5.

> Jennifer maintains she should have been given credit for half of the principal reduction of Joel's student loans that occurred during the marriage. The district court denied this claim, stating that "[r]egular payments upon these loans were no different than debt repayment on other types of debt, such as medical or credit card debt."

> Here, Joel incurred the debt before the marriage. It was a nonmarital obligation. Joel was the only party responsible for the debt before marriage, and he remains solely responsible for it after. The district court found that joint funds were used to make periodic payments that resulted in a principal reduction of approximately $10,200. As at least one other court has done, we consider the amount of principal reduction obtained with marital funds an asset to be divided. *See Gangwish v. Gangwish*, 678 N.W .2d 503, 509 (Neb. 2004) ("We agree that [one party's] award should have been reduced by the total student loan debt that she brought into the marriage because the debt was paid off with marital assets."). In order to reach an equitable distribution in a short-term marriage, we give Jennifer credit for half of the amount of principal reduction. Accordingly, we reduce the property equalization payment owed to Joel by $5100.

Id. (emphasis added).

Concerning student loans incurred during the marriage, courts regularly consider that debt to be marital and divided between the parties. *In re Marriage of Deol*, No. 09-0909, 2010 WL 2925147, at *2–3 (Iowa Ct. App. July 28, 2010) (holding student loan debt is a shared marital liability when accrued during the marriage relationship, used for family expenses, and incurred with the approval of the non-borrowing spouse). In one particular case, "the wife argue[d] that since the loan proceeds were used to pay tuition rather than for 'household expenses or debts' and the husband did not get a degree, the student loan debt should not be included as marital property to reduce the husband's net worth for purposes of calculating an equalization payment." *In re Marriage of Hensley*, No. 19-0982, 2020 WL 2062093, at *2 (Iowa Ct. App., Apr. 29, 2020). The court of appeals rejected her argument stating:

> The fact the husband did not complete a degree does not necessarily mean his efforts were wasted or he alone should bear the brunt of uncompleted plans. *See In re Marriage of Burgess*, 568 N.W.2d 827, 829 (Iowa Ct. App. 1997) ("We do not believe the focus should be whether or not a spouse is personally responsible for a debt incurred by the other spouse, but whether the payment of the obligation was a reasonable and expected aspect of the particular marriage."). In assessing this argument, it should be kept in mind that every expenditure made during a marriage that is not an investment or payment of a debt negatively affects the marital net worth by depleting an asset (e.g., cash or a bank account) or increasing a liability (e.g., credit card debt). *To take the wife's argument to its logical, albeit absurd, conclusion, every dissolution case and trial could be an endless battle over every*

> *purchase made during the marriage to determine whether it was for the good of the marriage — an alarming thought to most parties, lawyers, and judges.* While we realize the wife is not taking the argument to this extreme, the underlying premise of her argument has the same weakness. In this case, there is nothing about the husband incurring student loan debt early in the marriage suggesting it was done irresponsibly or for an improper purpose. Under these circumstances, we find no error in including the husband's student loan debt as a marital liability to be accounted for in the property division.

Hensley, 2020 WL 2062093, at *2 (emphasis added).

(b) A loan to pay for the parties' child's education

One or both of the parties may have agreed to be a joint debtor (co-signer) on a loan for the parties' child. In one case, the district court considered $93,372 in student loans taken for their children's college educations to be marital debt and ordered the wife to be responsible for it. *In re Marriage of Towne*, 966 N.W.2d 668, 676 (Iowa Ct. App. 2021). By assigning that debt to the wife in the overall property division, it had the effect of reducing her cash equalization payment to the husband by half that amount. *Id.* In its review, the Iowa Court of Appeals found that to be in error. *Id.* Because the record revealed that the parties expected their children to repay those loans and it was a joint debt, the wife alone would not be responsible for that debt should a child default. *Id.* Therefore, the wife's cash equalization payment was recalculated without including the student loans. *Id.*

(7) Other assets

(a) Tangible personal property

> As to tangible personal property, the number of variables is very great, but some general guidelines may be applied. In general, gifts and inheritances should be permitted to remain with the intended recipient. Such intimate personal items such as jewelry, clothing, and the like should also be permitted, as far as is reasonably possible, to remain with the person whose possessions they were during the marriage. Any item that is reasonably likely to possess far greater sentimental value to one party than to the other, such as jewelry, heirlooms, the fruits of hobbies (such as stamp or coin collections), and the products of artistic efforts by one of the parties (such as paintings, sculptures, ceramic work, weaving, and the like) should remain, as far as is reasonably

> possible, in the possession of the party to whom the sentimental value is the greatest. However, jewelry, collections, works of art, and other items purchased primarily as investments should be divided equally between the parties, such division being based as far as possible on current market value.

In re Marriage of Wallace, 315 N.W.2d 827, 832 (Iowa Ct. App. 1981).

(b) Lottery winnings / Royalties / growing crops

Lottery winnings are marital assets (rather than being earnings or future income) and subject to a property division. *In re Marriage of Swartz*, 512 N.W.2d 825, 826-27 (Iowa Ct. App. 1993). Future royalties on publications written during the marriage are likewise subject to division. *In re Marriage of White*, 537 N.W.2d 744 (Iowa 1995) (textbook royalties for writing done during the marriage were divided 70% to author/30% to spouse; royalties for the next edition of the text would be divided 80%/20%); *In re Marriage of Curfman*, 446 N.W.2d 88, 90 (Iowa Ct. App. 1989) (holding that a court may deal with assets for which no present value can be determined by a decree that divides the funds when received). The value of a farmer's growing crops is a marital asset subject to division. *In re Marriage of Martin*, 436 N.W.2d 374, 376 (Iowa Ct. App. 1988).

(c) Pets

A pet is personal property subject to division; however, "while courts should not put a family pet in a position of being abused or uncared for, we do not have to determine the best interests of a pet." *In re Marriage of Stewart*, 356 N.W.2d 611, 613 (Iowa Ct. App. 1984); *but see Houseman v. Dare*, 966 A.2d 24, 28 (N.J. 2009) (recognizing pets have special "subjective value" to their owners); Eric Kotloff, Note, *All Dogs Go to Heaven ... Or Divorce Court: New Jersey Un "leashes" a Subjective Value Consideration to Resolve Pet Custody Litigation in Houseman v. Dare*, 55 Vill. L.Rev. 447, 447–49 (2010) (recognizing while current legal framework does not coincide with modern public sentiment about pets, the law is changing). Applying those legal principles to an argument over which party should receive the parties' pet dog, the court of appeals ruled:

> We find the district court did equity in awarding Max [the dog] to Cira. The evidence shows that Max is licensed to Cira by the City of Dubuque. The "GEO tracker" device associated with Max is in Cira's name alone. Cira took Max to training classes and got Max medical attention when he had his most recent ear infection, even though he was in Joe's care at the time. Cira also has physical care of the parties' youngest child, who has known Max all of her life.

In re Marriage of Berger, No. 12-1389, 2013 WL 1749799, at *6 (Iowa Ct. App. Apr. 24, 2013).

(d) Personal injury awards

Proceeds from a personal injury case are divided according to the circumstances of each case. *In re Marriage of McNerney*, 417 N.W.2d 205, 208 (Iowa 1987) (allowing proceeds from a personal injury automobile accident to be equitably divided, in spite of the fact the settlement agreement did not specify the values to be attributed to various potential claims like "hospital expenses, lost wages, pain and suffering, damage to the automobile [and] loss of consortium" chiefly because both parties signed the settlement agreement, which the trial court properly discerned meant that some portion went to a loss of a consortium claim, entitling the wife to some portion of the proceeds); *In re Marriage of Plasencia*, 541 N.W.2d 923, 926 (Iowa Ct. App. 1995) (husband was granted the claim for his personal injuries and wife was limited to her claim for consortium, where husband was permanently disabled and wife had greater earning capacity); *see also In re Marriage of Rigdon*, No. 16-0768, 2017 WL 362601, at *3-*4 (Iowa Ct. App. Jan. 25, 2017) (regarding how to divide a job-severance package based upon employment discharge claim); *In re Marriage of Schmitt*, No. 15-1207, 2016 WL 3556462, at *4-*5 (Iowa Ct. App. June 29, 2016) (deciding how to divide a structured personal injury payment received before, during, and after marriage). Regarding medical debts, such debts are marital debts and should be divided by the divorce court. *See* Iowa Code § 597.14 ("The reasonable and necessary expenses of the family … are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately."); *St. Luke's Med. Ctr. v. Rosengartner*, 231 N.W.2d 601, 602 (Iowa 1975) (finding medical and hospital expenses constitute "expenses of the family"); *In re Marriage of Walker*, No. 13-1310, 2014 WL 4937727, at *7 (Iowa Ct. App. Oct. 1, 2014) (ordering husband to pay ex-wife's medical debt).

(e) Advanced degree

An advanced educational degree is not considered a marital asset subject to division. *See In re Marriage of Wagner*, 435 N.W.2d 372, 373 (Iowa Ct. App. 1988). "However, because it has the potential to increase the future earnings of the person receiving the degree, it is a factor to be considered when determining the equitable division of property." *In re Marriage of Plasencia*, 541 N.W.2d 923, 926 (Iowa Ct. App. 1995).

(f) Attorney fees in property division

"Attorneys' fees incurred in dissolution proceedings are not marital debt." *In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007). So, any debt incurred by a party to pay his or her attorney fees is a separate debt attributable only to that party and is not considered part of the marital property division. *In re Marriage of Thomas*, No. 10-1175, 2011 WL 2556077, at *4 (Iowa Ct. App. June 29, 2011); *see In re Marriage of Hinshaw*, No. 12-1783, 2013 WL 3273584, at *3 (Iowa Ct. App. June 26, 2013) (refusing to give one party credit for alleged marital assets used by other party on attorney fees toward court's attorney fee award).

Chapter 4 – Child Custody and Visitation

1. Jurisdiction

A. Uniform Child-custody Jurisdiction and Enforcement Act (UCCJEA)

Iowa's UCCJEA "is the exclusive jurisdictional basis for making a child custody determination by this state." *In re Guardianship of Deal-Burch*, 759 N.W.2d 341, 343-44 (Iowa Ct. App. 2008) (citing Iowa Code § 598.201(2) (*footnote omitted*)). If the requirements of the Iowa UCCJEA are not met, the Iowa trial court lacks ***subject matter jurisdiction*** to resolve the dispute. "'The question whether a court has subject matter jurisdiction may be raised at any time and is not waived even by consent.'" *Stauffer v. Temperle*, 794 N.W.2d 317, 320 (Iowa Ct. App. 2010) (quoting *In re Jorgensen*, 627 N.W.2d at 554); *see In re Marriage of Del Real*, 948 N.W.2d 542, 546 (Iowa Ct. App. 2020) (treating Mexico as a state, Mexico was the home state of the child and there was no evidence Mexico declined to exercise jurisdiction; therefore, Iowa courts had no subject matter jurisdiction to address custody even though the parties stipulated to custody and no one raised a jurisdictional objection).

B. Parental Kidnapping Prevention Act (PKPA)

Courts must consider the provisions of the federal Parental Kidnapping Prevention Act (PKPA) when determining whether to exercise jurisdiction of a child-custody case. 28 U.S.C. § 1738A; *see also In re Marriage of Leyda*, 398 N.W.2d 815 (Iowa 1987). The PKPA mandates that states not modify decrees that follow the federal statute unless the original state no longer has jurisdiction or has declined to exercise its jurisdiction. 28 U.S.C. 1738A(a) & (f). Jurisdiction under the PKPA substantially parallels the UCCJEA and gives a strong preference for jurisdiction in the home state. Parties must enforce the PKPA in state court proceedings, however, the statute does not grant a private right of action. *Thompson v. Thompson*, 484 U.S. 174, 187 (1988).

2. Custody of embryos – surrogacy

A. Custody of embryos

In re Marriage of Witten, 672 N.W.2d 768 (Iowa 2003). As the result of in vitro fertilization procedures, Tamera and Trip were responsible for seventeen fertilized eggs remaining in storage under an "Embryo Storage Agreement." Tamera sought "custody" so she could 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" which provides that 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 pre-embryos. 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. Gestational surrogacy

P.M. v. T.B., 907 N.W.2d 522, 535 (Iowa 2018). The supreme court found that gestational surrogacy agreements do not violate Iowa law. T.B. and her husband signed a contract in which T.B. agreed to gestate two embryos fertilized in vitro with P.M.'s sperm and the eggs of an anonymous donor. The court decided that the surrogacy agreement did not violate the criminal statute that prohibits selling babies; and that the agreement did not violate Iowa statutes relating to adoption or termination of parental rights. The court also found that the surrogacy agreement was not against public policy because gestational surrogacy agreements promote families by enabling infertile couples to raise their own children. Finally, the court ruled that the agreement did not violate substantive due process or equal protection rights because the constitutional rights of the biological father of the child were superior to any parental interests claimed by T.B. or her husband who had no biological connection with the child.

3. Joint and Sole Legal Custody.

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 including "but are not limited to decision making affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction." *See* Iowa Code § 598.1(3), (5). "Physical care", on the other hand, means a parent's "right and responsibility to maintain a home for the minor child and provide for the routine care of the child." Iowa Code § 598.1(7).

B. Legal Custody Rights

(1) Access to law enforcement records

"We conclude a noncustodial parent has a right to access to information concerning his or her minor child's law enforcement records. We therefore find the duty to keep the juvenile law enforcement records confidential does not exclude either parent's access." *In re Marriage of Maher*, 510 N.W.2d 888, 890 (Iowa Ct. App. 1993).

(2) Access to child's medical records

"[A]lthough section 598.41(1)(e) guarantees both parents 'legal access' to a child's medical records, section 598.41(1)(e) does not give either parent an absolute right to those records. Under chapter 598, the best interests of the child always prevail." *Harder v. Anderson, Arnold, Dickey, Jensen, Gullickson & Sanger, L.L.P.*, 764 N.W.2d 534, 538 (Iowa 2009), *overruling Leaf v. Iowa Methodist Med. Ctr.*, 460 N.W.2d 892, 894 (Iowa Ct. App. 1990).

(3) Parents' Medical Decisions and Expenses

In re Marriage of Dauterive, No. 18-0381, 2019 WL 1056816 (Iowa Ct. App. Mar. 6, 2019). –

> Joint legal custody ensures both parents have "equal participation" in decisions affecting a child's medical care. See Iowa Code § 598.1(3). But equal participation does not mean one parent has veto power in determining whether a course of treatment is medically necessary and therefore a shared expense if not covered by health insurance. Likewise, one parent does not automatically forfeit the right to recover funds from the other parent by seeking treatment for a child against the other parent's wishes, if the treatment proves to be medically necessary.

Id. at *5. Tricia proved the orthodontia expenses were "reasonably necessary", so "Christopher's idiosyncratic view that the treatment could have been delayed does not absolve him from financial responsibility." *Id.*

(4) Right to name child

Naming a child is an incident of the child's legal status. *See In re Matter of Quirk*, 504 N.W.2d 879, 882 83 (Iowa 1993); *In re Marriage of Gulsvig*, 498 N.W.2d 725, 726 (Iowa 1993); *In re Petition of Staros*, 280 N.W.2d 409, 410-11 (Iowa 1979); *Montgomery v. Wells*, 708 N.W.2d 704, 708 (Iowa Ct. App. 2005); *Gail v. Winemiller*, 464 N.W.2d 697, 698 (Iowa Ct. App. 1990). The district

court has the authority to change a child's name in divorce proceedings under chapter 598, *Gulsvig* at 727 29, and paternity proceedings under chapter 600B, *Montgomery* at 708.

Two distinct classes of name-change litigation exist. *Braunschweig v. Fahrenkrog*, 773 N.W.2d 888, 890-91 (Iowa 2009); *see Montgomery*, 708 N.W.2d at 708. One class is when the court is asked to change an established name. *Id.* The other is to determine whether the child was appropriately named in the first place. *Id.*

If the action is to change a name, then Iowa Code section 674.6 governs. *Braunschweig*, 773 N.W.2d at 890. A minor child's name may be changed upon consent of both parents. § 674.6. If one parent does not consent, then the court may change the name upon notice to the nonconsenting parent and to the satisfaction of one of the statutory conditions. *Id.*; *see Quirk*, 504 N.W.2d at 882-83 (Iowa 1993); *Gulsvig*, 498 N.W.2d at 726; *Staros*, 280 N.W.2d at 410-11; *Gail*, 464 N.W.2d at 698. Those conditions are: "a. That the parent has abandoned the child; b. That the parent has been ordered to contribute to the support of the child or to financially aid in the child's birth and has failed to do so without good cause; or c. That the parent does not object to the name change after having been given due and proper notice." § 674.6(3).

In contrast,

> when the court first entertains an action between the parents to determine their legal rights and relationships with each other and the child, the court may also consider the legitimacy of the child's original naming as part of its determination of the child's legal status and custody. *See Gulsvig*, 498 N.W.2d at 733 (Snell, J. dissenting); *Quirk*, 504 N.W.2d at 882-83 (Carter, J. concurring specially); *Id.* at 884 (Snell, J. dissenting) ("This case, like *Gulsvig*, is not a change of name case; it is a name case *ab initio*.
>
> The child was not legally named on the birth certificate.")

Montgomery, 708 N.W.2d at 708; *see Braunschweig*, 773 N.W.2d at 891. "When a parent unilaterally chooses a child's name, the other parent may request the court to examine the name issue – as 'the mother does not have the absolute right to name the child because of custody due to birth. Consequently, [she] should gain no advantage from her unilateral act in naming [the child].'" *Montgomery* at 708; (quoting *Gulsvig*, 498 N.W.2d at 729). If it is an initial determination, then courts are guided by the best interest standard regarding the child's name. *Quirk*, 504 N.W.2d at 881 n.1 (citing *Gulsvig*, 498 N.W.2d at 729).

In an Iowa Code chapter 600B paternity action, a challenge to the child's name must be brought in the initial proceedings, rather than a subsequent action. *Braunschweig*, 773 N.W.2d at 893-94.

B. Legal presumption in favor of joint legal custody

Iowa Code 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. "The legislature and judiciary of this State have adopted a strong policy in favor of joint custody from which courts should deviate only under the most compelling circumstances." *In re Marriage of Winnike*, 497 N.W.2d 170, 173 (Iowa Ct. App. 1992); *see* § 598.41(2)(a). "To deny joint custody requires a finding by clear and convincing evidence that joint custody is not reasonable and not in the best interest of the child to the extent the legal custodial relationship between the child and a parent should be severed." *In re Marriage of Holcomb*, 471 N.W.2d 76, 79–80 (Iowa Ct. App. 1991).

C. Sole Custody

(1) History of domestic abuse

The key statutory exception to granting joint legal custody is if there is a "history of domestic abuse" between the parties. § 598.41(1)(b) & (2)(c). "Domestic abuse" is defined by Iowa Code section 236.2.

> Whether a history of domestic abuse, as defined in section 236.2, exists. In determining whether a history of domestic abuse exists, the court's consideration shall include but is not limited to commencement of an action pursuant to section 236.3, the issuance of a protective order against the parent or the issuance of a court order or consent agreement pursuant to section 236.5, the issuance of an emergency order pursuant to section 236.6, the holding of a parent in contempt pursuant to section 664A.7, the response of a peace officer to the scene of alleged domestic abuse or the arrest of a parent following response to a report of alleged domestic abuse, or a conviction for domestic abuse assault pursuant to section 708.2A.

§ 598.41(3)(j). If the court finds that such a history exists, that one factor "shall outweigh consideration of any other factor" in the determination of the awarding of legal custody. § 598.41(2)(c).

(2) High conflict parents

Joint legal custody can be denied because the parents do not get along and were barely civil to one another. *In re Marriage of Winnike*, 497 N.W.2d 170 (Iowa Ct. App. 1992); *see In re Marriage of Eilers*, 526 N.W.2d 566, 569 (Iowa

Ct. App. 1994). "When one parent's obduracy makes joint custody unworkable, the trial court in a modification proceeding may find the child's best interests require sole custody in the other parent." *In re Marriage of Bolin*, 336 N.W.2d 441, 446 (Iowa 1983). Parties could not "agree on many of the fundamental decisions that must be made in their children's lives, such as education and medical treatment." *In re Marriage of Rolek*, 555 N.W.2d 675, 677 (Iowa 1996). Therefore, awarding sole legal custody to one parent was justified. *Id.*

(3) Unbundled legal custodial rights not *allowed*

***In re Marriage of Makela*, 987 N.W.2d 467 (Iowa Ct. App. 2022). Wayne and Stephanie Makela divorced in 2016. The court granted Stephanie sole legal custody of their two children due to Wayne's conviction and incarceration for second-degree sexual assault of a child. After his release from prison and completion of sex offender treatment, Wayne petitioned to modify the decree seeking joint legal custody and visitation.**

The trial court modified the decree to grant joint legal custody, with some exceptions giving Stephanie sole authority over education and medical decisions. It also granted Wayne supervised visitation, gradually increasing to include monthly overnight visits.

The court of appeals faced the issue of whether Iowa courts can unbundle legal custodial rights. Starting with the statute, the court stated:

> **"'[J]oint legal custody' means an award of legal custody of a minor child to both parents jointly under which both parents have legal custodial rights and responsibilities toward the child and *under which neither parent has legal custodial rights superior to those of the other parent.*" Iowa Code § 598.1(3) (emphasis added). "Rights and responsibilities of joint legal custody include but are not limited to *equal participation in decisions* affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction." *Id.* (emphasis added).**

***Makela*, 987 N.W.2d at 470. "[T]he statutory definition of 'joint legal custody' *leaves no room for a parceling of rights*. Indeed, we have indicated that a less-than-complete award of joint custodial rights is actually an award of sole rather than joint legal custody." *Id.* at 471 (emphasis added).**

Answering the question, the court held: "When a court grants one parent a greater share of the legal rights subsumed within the definition of joint legal custody, we conclude the award is one of sole

legal custody rather than joint legal custody." *Id.* at 471. So, unbundling legal custody rights is not permitted by section 598.1(3). – NEW CASE

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***In re Marriage of Frazier*, 1 N.W.3d 775 (Iowa 2024) – Divorced parents, Mary and Shannon, who had joint legal custody of their two children, disagreed on whether to vaccinate the children against COVID-19. After unsuccessful mediation, Mary filed an application asking the court to authorize vaccinating the children. Mary did *not* file a petition to modify the legal custody status of the parties. The district court dismissed the case, finding it lacked authority to resolve the dispute without a petition to modify legal custody being filed. The court of appeals reversed, but the Supreme Court ultimately agreed with the district court.**

The supreme court addressed two issues.

1) Did Mary properly invoke the district court's authority by filing an application rather than a petition?

2) How does the trial court resolve this dispute?

The *Frazier* majority opinion began: "The issue in this case is not whether the district court ever has the authority to resolve a dispute between separated parents over an important decision affecting their children, but rather *when* and *how* the district court may resolve that dispute." *Frazier*, 1 N.W.3d at 777 (emphasis in original).

Regarding the first issue, the supreme court held that Mary's application for vaccination determination did not properly invoke the district court's authority. To do so, she needed to file a petition to modify the parties' joint legal custody status. *See* Iowa R. Civ. P. 1.301(1).

Concerning the second issue, the supreme court held that Iowa's definition of joint legal custody, Iowa Code section 598.1(3), does not allow courts to parcel (or "unbundle") legal custodial rights so that one parent would be the sole decision-maker on certain issues like COVID-19 vaccination, while both parties retained joint legal custody on other issues. *Frazier*, 1 N.W.3d at 779 (citing *In re Marriage of Makela*, 987 N.W.2d 467, 471 (Iowa Ct. App. 2022)). "This statutory definition treats joint custody as an all-or-nothing proposition that 'leaves no room for a parceling of rights.'" *Id.* (quoting *Makela*).

When joint legal custodians cannot agree on a custodial issue covered by section 598.1(3), then one or both parties must file a petition to modify the joint legal custody status asking the court to grant one parent sole legal custody, so that parent has sole decision-

making authority. Parents, not judges, are the decision makers. When deciding whether to grant one parent sole legal custody "courts should apply a best-interest standard to resolve disputes between joint legal custodians over important issues affecting the child." ***Frazier*, 1 N.W.3d at 787-88. – NEW CASE**

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***In re Marriage of Kisting*, 6 N.W.3d 326 (Iowa 2024) – In 2016, Sara and Matthew divorced and were granted joint legal custody and joint physical care of their two children. Subsequent events, including a domestic abuse incident and significant disagreements over the children's education and upbringing, led Sara to petition for modification of the decree. She requested an end to joint physical care and have the children placed in her physical care. She also requested the right to be the sole decision-maker regarding certain custodial decisions.**

The court of appeals wrote:

> **The parties' parenting styles also differ wildly. They are unable to agree on whether their children should be allowed even restricted access to cell phones or other devices. They cannot decide at what point their children should be allowed to start dating or what those relationships should look like. They further disagree on the basic roles of men and women.**

6 N.W.3d at 333.

The district court granted Sara physical care of the children and gave her sole authority to make religious and educational decisions. The court of appeals affirmed the modification, finding a substantial change in circumstances due to the parents' inability to cooperate and communicate, and that Sara was better able to meet the children's needs.

However, the court of appeals vacated the portion of the order giving Sara sole decision-making authority for religious and educational matters. 6 N.W.3d at 336 (citing *In re Marriage of Sokol*, No. 21-1918, 2022 WL 3440256, at *3 (Iowa Ct. App. Aug. 17, 2022) (concluding Iowa Code sections 598.1 (defining legal custody) and 598.41(2)(b) (regarding legal presumption in favor of joint legal custody) do not permit inequal participation in decision-making by parents with joint legal custody), *aff'd in part and rev'd in part*, 985 N.W.2d 177, 187 (Iowa 2023) (affirming "the court of appeals modification of the custodial provisions of the decree"); *accord In re Marriage of Frazier*, 1 N.W.3d 775, 779 (Iowa 2024) (treating the

statutory definition of "joint custody as an all-or-nothing proposition" with equal shares of legal rights); *In re Marriage of Makela*, 987 N.W.2d 467, 471 (Iowa Ct. App. 2022). Thus, the court of appeals restored Matthew as joint legal custodian.

(4) If one parent receives sole legal custody, then joint physical care is impossible.

> **"Joint physical care 'is only authorized when coupled with joint legal custody.' *In re Marriage of Beasley*, No. 21-1986, 2022 WL 16985437, at *8 (Iowa Ct. App. Nov. 17, 2022); *accord* Iowa Code § 598.41(5)(a) (2020) (premising the court's discretion to award joint physical care upon an award of joint legal custody). Because [mom] was awarded sole legal custody, a joint-physical-care arrangement is not an option."**

***In re Marriage of Cowger*, No. 22-1254, 2023 WL 6620127, at *3 (Iowa Ct. App. Oct. 11, 2023). – NEW CASE**

4. Physical care

A. General principles

In child custody cases, the best interests of the child are the first and governing consideration. Iowa R. App. P. 6.904(3)(o); *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984). "Physical care issues are not to be resolved based upon perceived fairness to the *spouses*, but primarily upon what is best for the *child*." *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007) (emphasis in original). Iowa Code section 598.41(3) enumerates the factors the court must consider in awarding custody. *See In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983); *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). Those statutory factors are:

> In considering what custody arrangement … is in the best interest of the minor child, the court shall consider the following factors:
>
> a. Whether each parent would be a suitable custodian for the child.
>
> b. Whether the psychological and emotional needs and development of the child will suffer due to lack of active contact with and attention from both parents.
>
> c. Whether the parents can communicate with each other regarding the child's needs.

> d. Whether both parents have actively cared for the child before and since the separation.
> e. Whether each parent can support the other parent's relationship with the child.
> f. Whether the custody arrangement is in accord with the child's wishes or whether the child has strong opposition, taking into consideration the child's age and maturity.
> g. Whether one or both of the parents agree or are opposed to joint custody.
> h. The geographic proximity of the parents.
> i. Whether the safety of the child, other children, or the other parent will be jeopardized by the awarding of joint custody or by unsupervised or unrestricted visitation.
> j. Whether a history of domestic abuse, as defined in section 236.2, exists. In determining whether a history of domestic abuse exists, the court's consideration shall include but is not limited to commencement of an action pursuant to section 236.3, the issuance of a protective order against the parent or the issuance of a court order or consent agreement pursuant to section 236.5, the issuance of an emergency order pursuant to section 236.6, the holding of a parent in contempt pursuant to section 664A.7, the response of a peace officer to the scene of alleged domestic abuse or the arrest of a parent following response to a report of alleged domestic abuse, or a conviction for domestic abuse assault pursuant to section 708.2A.
> k. Whether a parent has allowed a person custody or control of, or unsupervised access to a child after knowing the person is required to register or is on the sex offender registry as a sex offender under chapter 692A.

§ 598.41(3). Notably, the factors of section 598.41(3) explicitly apply only to determinations of custody, not physical care. *In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007); *see also In re Marriage of Hynick*, 727 N.W.2d 575, 578-79 (Iowa 2007) (noting the distinction between "custody" and "physical care"). However, the factors listed in section 598.41(3) "as well as other facts and circumstances are relevant in determining" which physical care arrangement is in the best interest of the child. *Hansen*, 733 N.W.2d at 696 (citing *Winter*, 223 N.W.2d at 166-67) Iowa courts have long applied the non-exclusive list of criteria articulated in *Winter*, 223 N.W.2d at 166-67 (Iowa 1974), in determining which parent should receive physical care:

> 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 is of sufficient age and maturity.
> 10. The report and recommendation of the attorney for the child or other independent investigator.
> 11. Available alternatives.
> 12. Any other relevant matter the evidence in a particular case may disclose.

Winter, 223 N.W.2d at 166-67.

The criteria governing physical care decisions are the same regardless of whether the parties are dissolving their marriage or are unwed. *Jacobson v. Gradlin*, 490 N.W.2d 79, 80 (Iowa Ct. App. 1992). The weight assigned to each factor depends upon the particular facts of the case. *In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa Ct. App. 1998).

B. Joint (or shared) physical care

(1) Defined

Iowa Code § 598.1(4): "Joint physical care" means 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.

> Joint physical care anticipates that parents will have equal, or roughly equal, residential time with the child. Given the fact that 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.

In re Marriage of Hynick, 727 N.W.2d 575, 579 (Iowa 2007) (citation omitted).

(2) No legal presumption in favor of joint physical

Legislation granting courts to consider joint physical custody "did not create a presumption in favor of joint physical care." *In re Marriage of Hansen*, 733 N.W.2d 683, 692 (Iowa 2007) (citing *In re Marriage of Ellis*, 705 N.W.2d 96, 101-02 (Iowa Ct. App. 2005)). Further, the legislation did not create any substantive change in the law concerning shared physical care. *Id. overruling in part Ellis* at 101. "Thus, simply because a parent is not unfit or is a capable parent does not equate to entitlement to joint physical care." *In re Marriage of Heitman*, No. 15-0631, 2016 WL 742816, at*3 (Iowa Ct. App. Feb. 24, 2016).

(3) **In re Marriage of Hansen*, 733 N.W.2d 683 (Iowa 2007)***

The *Hansen* Court provides a non-exclusive list of factors to consider when determining whether a joint physical care arrangement is in the best interests of the child. *Hansen*, 733 N.W.2d at 697. The factors are

(1) "approximation" – what has been the historical care giving arrangement for the child between the two parties;
(2) the ability of the spouses to communicate and show mutual respect;
(3) the degree of conflict between the parents; and
(4) "the degree to which the parents are in general agreement about their approach to daily matters."

Id. at 697-99; *see re Marriage of Hynick*, 727 N.W.2d 575, 579–80 (Iowa 2007) ("The critical question in deciding whether joint physical care is … appropriate is whether the parties can communicate effectively on the myriad of issues that arise daily in the routine care of a child."); *In re Marriage of Berning*, 745 N.W.2d 90, 93-94 (Iowa Ct. App. 2007) (holding that certain facts may mitigate against the *Hansen* factors in order to support a shared physical care arrangement, particularly the "approximation" rule when the child has spent considerable time with daycare providers because both parents worked).

C. Split/divided physical care

Split physical care occurs when each parent has sole physical care of at least one of their children. *See* Iowa Code § 598.41(7). This is not the same as joint physical care when both parents have physical care and the children switch back-and-forth between living with both parents on a relatively equal basis. *See In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). "Only in rare cases is split … physical care appropriate." *Id.*

There is a presumption that siblings should not be separated. *Will* at 398; *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa Ct. App. 1996). This presumption applies equally to half siblings. *In re Marriage Orte*, 389 N.W.2d 373, 374 (Iowa 1986). Iowa courts generally oppose split physical care "because it deprives children of the benefit of constant association with one another." *Will* at 398. Therefore, good and compelling reasons must exist to depart from this rule. *Id.*

D. Primary physical care

> When joint physical care is not warranted, the court must choose one parent to be the primary caretaker, awarding the other parent visitation rights. *See generally* Iowa Code § 598.41(1)(a), (5). Under this arrangement, the parent with primary physical care has the responsibility to maintain a residence for the child and has the sole right to make decisions concerning the child's routine care. *See generally Id.* § 598.1(7). The noncaretaker parent is relegated to the role of hosting the child for visits on a schedule determined by the court to be in the best interest of the child.

In re Marriage of Hynick, 727 N.W.2d 575, 579 (Iowa 2007); *see* Iowa Code § 598.1(7).

(1) Historical primary caregiver

In making physical care determinations, courts consider which parent has historically been the primary caretaker. *See In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa Ct. App. 1996). Though Iowa courts give significant consideration to placing the child with the primary caregiver, it is *not the singular factor* in determining which placement would best serve the child's interests. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995); *In re Marriage of Wilhelm*, 491 N.W.2d 171, 172 (Iowa Ct. App. 1992); *see In re Marriage of Aronow*, No. 06-0195, 2007 WL 2004709 (Iowa Ct. App., July 12, 2007) (awarding the children's physical care to the mother who had been their undisputed primary caregiver despite two custody evaluators and a guardian ad litem recommending the children should be placed with the father).

Though a parent's successful care of the children in the past does not ensure an award of physical care, it is a strong predictor that her care for the children in the future will likewise be dedicated and consistent. *See In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa Ct. App. 1998); *In re Marriage of Kunkel*, 546 N.W.2d 634, 635 (Iowa Ct. App. 1996); *see also In re Marriage of Toedter*, 473 N.W.2d 233, 234 (Iowa Ct. App. 1991) (affirming physical care with father despite mother's role as primary caretaker); *Neubauer v. Newcomb*,

423 N.W.2d 26, 27-28 (Iowa Ct. App. 1988) (awarding custody of a child who had been in mother's primary care for most of life to father).

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***Worth v. Geinitz*, No. 23-1080, 2024 WL 2316657 (Iowa Ct. App. May 22, 2024). Macy Alexandra Worth and Matthew Noel Geinitz are the parents of two children. They were in a sixteen-year relationship but never married. After their relationship ended, Macy filed an action to establish legal custody, physical care, visitation, and child support. The district court granted joint legal custody, awarded Matthew physical care of the children, and ordered Macy to pay child support. Macy appealed, arguing she should have primary physical care or, alternatively, joint physical care.**

The court of appeals affirmed the lower court's decision that joint physical care is not in the children's best interests because her history as primary caregiver was negated by her returning to work, and a temporary matters order that placed the children in Matthew's physical care for roughly a year and a half before the custody trial, resulting in Matthew serving as the children's primary caregiver in recent years.

Though the court found that both parents were suitable caregivers, the children felt safe and secure with Matthew. The court rejected joint physical care due to the high conflict and lack of respect between the parents. Additionally, Macy's domestic abuse claims were insufficient to shift physical care away from Matthew in part because Macy admitted to perpetrating her own acts of domestic abuse on Matthew by slapping him and throwing a lit cigarette at him. In addition to each party being physically abusive to the other, each has also engaged in name-calling and making derogatory comments directed toward the other. – NEW CASE.

(2) Sexual orientation of parent

Iowa courts do not limit or restrict parents' custody or visitation rights or obligations based upon the parent's sexual orientation. *See, e.g.*, *In re Marriage of Walsh*, 451 N.W.2d 492, 493 (Iowa 1990) (restriction on visitation with gay father "to times when 'no unrelated adult' is present" is inappropriate in light of statutory goal of keeping children in close contact with both parents); *In re Marriage of Cupples*, 531 N.W.2d 656, 657 (Iowa Ct. App. 1995) ("Discreet homosexual parents will not be denied visitation or custody merely because of their sexual orientation."); *In re Marriage of Wiarda*, 505 N.W.2d 506, 508 (Iowa Ct. App. 1993) (rejecting that the homosexual nature of mother's

extramarital relationship influenced the custody decision, rather said extramarital relationship regardless of whether it was a "man or a woman … was disruptive to the continued good relationship between the two children and both parents"); *Hodson v. Moore*, 464 N.W.2d 699, 700–01 (Iowa Ct. App. 1990) (noting that the mother was "discreet with respect to [her] sexual relationship" with another woman when in her son's presence).

(3) Moral Misconduct/Child Endangerment

Moral misconduct is a factor to be accorded weight in a child custody determination. *In re Marriage of Dawson*, 214 N.W.2d 131, 132 (Iowa 1974) ("Assuredly this misconduct [adultery] is a factor to be considered; but it is not the Only factor."); *In re Marriage of Wilson*, 532 N.W.2d 493 (Iowa Ct. App. 1995) ("moral misconduct" is a consideration, but only one factor). Such behavior weighs most heavily in those cases when the parent's misconduct occurred in the presence of the children. *In re Marriage of Roberts*, 545 N.W.2d 340, 343 n.1 (Iowa Ct. App. 1996); *In re Marriage of Cordes*, No. 02-1777, 2003 WL 21921263, at *2 (Iowa Ct. App. Aug. 13, 2003) (granting father physical care because mother sacrificed time with children to spend time in adulterous affair as well as exposing the children to the affair).

(4) Parental alienation; failure to promote noncustodial parent's relationship with child

Refusal by one parent to provide the opportunity for children to have maximum continuous physical and emotional contact with the other parent without just cause is considered harmful to the best interest of the child, Iowa Code § 598.1(1), and is considered a significant factor in determining the proper custody arrangement. Iowa Code § 598.41(1)(c); *see In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993) ("If visitation rights of the noncustodial parent are jeopardized by the conduct of the custodial parent, such acts could provide an adequate ground for a change of custody."). Because children of a divorce need to maintain meaningful relationships with both parents, *In re Marriage of Gravatt*, 371 N.W.2d 836, 840 (Iowa Ct. App. 1985), Iowa courts have given great weight to evidence of one parent's attempt to alienate a child from the other parent. *In re Marriage of Winnike*, 497 N.W.2d 170, 174 (Iowa Ct. App. 1992).

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***In re Marriage of Shada*, No. 23-1912, 2024 WL 4222888 (Iowa Ct. App. Sept. 18, 2024). David and Nicole married in 2011. They had three children born in 2009, 2010, and 2016. Nicole filed for divorce in 2023.**

Nicole described herself as a stay-at-home mom. She was in her last semester of college when the oldest child was born. Nicole left school to stay home with the child, but she soon picked up a part-time bartending job. For most of the marriage, she worked every weekend from Thursday through Sunday, usually from 6:00 p.m. until the bar closed. While Nicole was working, David cared for the children. In 2023, Nicole started working as a paraeducator in the children's school district. She kept her bartending job but dropped the Thursday shift.

David is employed as a clinical trauma therapist. While David previously had a heavy case load, he has reduced the number of clients that he sees over the last few years. He typically works from 9:00 a.m. until 5:00 p.m., although he will at times provide some evening appointments.

Nicole claimed that David has a gambling problem and spent more time at the casino than with the children. Nicole testified that she registers the children for school, helps them with their homework, and attends their parent-teacher conferences, while David doesn't participate in any of those things. Nicole maintained that David played no part in raising the children, at least until the last several months before the dissolution trial, during which she said he became "super dad."

Nicole shared her negative opinions about David with the children in group texts with them. She told one child that she wouldn't have to babysit her brother "if u[r] dad just came home like any other father i[n]stead of hanging out and drinking with his low life druggy 'friends.'" When David replied, "Totally not appropriate to be texting," and asked her to stop, Nicole shot back with, "Nothing but facts u super father."

Nicole unapologetically agreed at trial that she has undermined David's discipline of the children and said things in front of them about David wanting to sell the house, not being an involved parent, drinking with his friends, and using drugs. David testified that when he asks her to not say those things in front of them, Nicole will reply, "This is the truth. They need to hear this."

Nicole's harsh communication was not limited to David. Multiple witnesses testified about times they saw Nicole "cussing and yelling" at David or the kids. Nicole admitted at trial, "I'm a yeller," which is apparent even in her text messages. After David's counsel uploaded these text messages as exhibits for the trial, Nicole texted the children saying "why you guys talking shit on me'" which upset the child.

When confronted with her behavior at trial, Nicole dismissed these concerns saying that she's been the children's primary caregiver and deserved physical care. David asked for joint physical care and in the alternative primary physical care. The district court placed the children in Nicole's physical care. David appealed.

The court of appeals concluded that Nicole has been hostile to the extreme—not just in private with David, but in text messages with the children and in public with friends and family. Even though the court found that David likewise gets "jabs" in at Nicole, there was no evidence in the record to support that finding. Nicole has shown no ability to support David's relationship with the children, undermining and demeaning him at every opportunity. In contrast, David worked to gloss over Nicole's shortcomings when the children complained to him and continually assured them of her love. After balancing all the relevant statutory factors, and considering the totality of the evidence, we find that it is in the children's best interests to be placed in David's physical care. – NEW CASE

(5) Gender of Parent Irrelevant

In 1974, the Iowa Supreme Court abandoned the previous legal inference that "advance[ing] the best interests of young children will be better served if their custody is awarded to their mothers instead of their fathers." *In re Bowen's Marriage*, 219 N.W.2d 683, 688 (Iowa 1974). "[N]either parent should have a greater burden than the other in attempting to obtain custody in a dissolution proceeding." *Id.*

(6) Religion

As joint legal custodian, Iowa Code section 598.41(5)(b) 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. *In re Marriage of Moore*, 526 N.W.2d 335, 337 (Iowa Ct. App. 1994); *see In re Marriage of Craig*, 462 N.W.2d 692, 694–95 (Iowa Ct. App. 1990); *see also In re Marriage of Rodgers*, 470 N.W.2d 43, 45 (Iowa Ct. App. 1991). The court will not favor one religion over another, but the moral values of religion, conscientiously adhered to, will be considered in deciding which parent will provide the more desirable environment for the children. *In re Marriage of Anderson*, 509 N.W.2d 138, 141 (Iowa Ct. App. 1993).

(7) 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." *In re Marriage of Williams*, 589 N.W.2d 759, 762 (Iowa Ct. App. 1998); *accord In re Marriage of Hoffman*, 867 N.W.2d 26, 34 (Iowa 2015); *see In re Marriage of Whalen*, 569 N.W.2d 626, 630 (Iowa Ct. App. 1997) ("While stability is important in a child's life, stability can be nurtured as much by leaving children with the same custodial parent as leaving them in the same neighborhood.").

(8) Child's Preference

Iowa Code section 598.41(3) provides:

> In considering what custody arrangement … is in the best interest of the minor child, the court shall consider … Whether the custody arrangement is in accord with the child's wishes or whether the child has strong opposition, taking into consideration the child's age and maturity.

§ 598.41(3)(f).

"Deciding custody is far more complicated than asking children with which parent they want to live." *In re Marriage of Behn*, 416 N.W.2d 100, 101 (Iowa Ct. App. 1987) (finding a father failed to meet the burden necessary to modify a decree where the claimed substantial change in circumstances was based in part on a ten-and-one-half-year-old girl's "adamant desire" to live with her father) (citing *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258 (Iowa Ct. App. 1985)).

Child preference is only one factor among many that the court considers to determine which parent is better able to meet the best interests of the child. *See In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981) (stating that "[c]hildren's expressed preferences are entitled to consideration but are not controlling," and that "deciding custody issues is more complicated than merely asking the children which parent they wish to live with"); *see also In re Marriage of Jahnel*, 506 N.W.2d 473, 475 (Iowa Ct. App. 1993) (concluding the child's stated preference is entitled to less weight in a modification proceeding than it would be accorded in an original dissolution proceeding).

The child's preference, while not controlling, is relevant and cannot be ignored. *Ellerbroek*, 377 N.W.2d at 258. In assessing the weight to afford these preferences, the court considers many factors, including:

1) the child's age and educational level;
2) the strength of the preference;
3) the intellectual and emotional makeup of the child;
4) relationships with family members;
5) the reasons for the decision;
6) the advisability of recognizing the preference; and

7) the realization that the court cannot be aware of all the factors that influence the child's decision.

Id. at 258–59; *see also* Iowa Code § 598.41(3)(f); *Jones v. Jones*, 175 N.W.2d 389, 391 (Iowa 1970) ("[W]hen 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.").

(9) Domestic Abuse

(a) Effect on visitation

Iowa Code § 598.41(1)(c): "The court shall consider the denial by one parent of the child's opportunity for maximum continuing contact with the other parent, without just cause, a significant factor in determining the proper custody arrangement. Just cause may include a determination by the court pursuant to subsection 3, paragraph "j", that a history of domestic abuse exists between the parents."

(b) Effect of one parent's relocation due to domestic abuse

Iowa Code § 598.41(1)(d): "If a history of domestic abuse exists as determined by a court pursuant to subsection 3, paragraph "j", and if a parent who is a victim of such domestic abuse relocates or is absent from the home based upon the fear of or actual acts or threats of domestic abuse perpetrated by the other parent, the court shall not consider the relocation or absence of that parent as a factor against that parent in the awarding of custody or visitation.

(c) Iowa Code chapter 236 – Relief from domestic abuse.

Iowa Code Chapter 236 provides a mechanism for individuals to obtain protection from domestic abuse, including but not limited to courts deciding issues of child custody, physical care, visitation, and support. Iowa Code § 236.5(1)(b). In setting visitation rights, the court may condition or restrict visitation as to time, place, duration, or supervision, or deny visitation entirely, if needed, to safeguard the safety of the victim and the children. § 236.5(1)(b)(5)(b). A support order for the plaintiff and any minor children and professional counseling may also be ordered. § 236.5(1)(a).

(d) Rebuttable Presumption.

The Iowa Legislature established a presumption against an award of joint legal custody if there is a "history of domestic abuse" between the parties. Iowa Code §§ 598.41(1)(b) & (2)(c); *In re Marriage of Ford*, 563 N.W.2d 629, 632 (Iowa 1997) (holding that the presumption is rebuttable). A history of domestic abuse also is one factor in determining what custody arrangement is in a child's best interests. § 598.41(3)(j) (referencing domestic abuse under chapter 236).

> In interpreting what is sufficient to constitute a "history of domestic abuse," we find that a "history" is not necessarily established by a single documented incident, … Nor does more than one minor incident automatically establish a "history of domestic abuse." … It is for the court to weigh the evidence of domestic abuse, its nature, severity, repetition, and to whom directed, not just to be a counter of numbers.

In re Marriage of Forbes, 570 N.W.2d 757, 760 (Iowa 1997) (internal citations omitted).

(e) Mutual Aggression

"We do not minimize the seriousness of domestic violence 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, 713 (Iowa Ct. App. 1998); *see also In re Marriage of Forbes*, 570 N.W.2d 757 (Iowa 1997).

(f) Aiding and Abetting Abuse

In *Wilker v. Wilker*, 630 N.W.2d 590 (Iowa 2001), Paula stood by while others pushed and held Timothy while she removed the child from the house. Because Paula lent countenance to Timothy's assault by others, she was also guilty of assault.

(g) Permanent Injunction

In re Marriage of Cickavage, No. 21-1492, 2022 WL 1486182 (Iowa Ct. App. May 11, 2022). During a custody modification action, communication between Jesse and Sara broke down to the extent that the district court granted a temporary injunction, which prevented Jesse from "[t]hreatening, assaulting, stalking, attacking, harassing, or otherwise contacting [Sara] in any manner

either directly or through third-persons anywhere within the State of Iowa" or "[c]ommunicating with or contacting [Sara] in person, in writing, or through third-persons." The injunction did not affect Jesse's visitation and allowed for limited communication pertaining to the children. Thereafter, Jesse repeatedly threatened to file contempt actions against her, sent people to watch her home when he thought she had taken the children out of state, and showed up at her door to "serve" her papers while videotaping her. At a doctor's appointment Jesse made a scene resulting in police involvement. The court found a pattern and practice to belittle and annoy Sara for no good reason motivated by malice and the primary purpose of attacking her worth as a person and as a parent. The court then extended the injunction for two years.

The Court of Appeals found that a "permanent injunction is appropriate when "[a] plaintiff [can] establish '(1) an invasion or threatened invasion of a right; (2) that substantial injury or damages will result unless the request for an injunction is granted; and (3) that there is no adequate legal remedy available.'" *Id.* at *4. "The injunction should be "drawn narrowly enough to address the harm sought to be redressed." *Id.* (citation omitted). The terms of this injunction do not prohibit Jesse from communicating with Sara about their children. Instead, it merely limits the methods he can use to communicate. *Id.*

E. Preference for Parent

(1) Legal presumption

"Parents' fundamental right to the care, custody, and control of their children is seemingly meaningless without a preference for parents who have never been adjudicated unfit over all others in guardianship proceedings." *In re Guardianship of L.Y.*, 968 N.W.2d 882, 898 (Iowa 2022) (discussing the former Iowa Code § 633.559 (2019) (statutory presumption in favor of a child's parents to be appointed guardian), *repealed by* 2019 Iowa Acts ch. 56, § 43. The preference for natural parents extends to non-custodial parents where the custodial parent has died or has been judicially adjudged incompetent. Iowa Code § 598.41(7). "In applying these principles, we have acted in some cases to remove children from conscientious, well-intentioned custodians with a history of providing good care to the children and placed them with a natural parent." *Zvorak v. Beireis*, 519 N.W.2d 87, 89 (Iowa 1994).

(2) Presumption rebuttable

"The presumption of preference in favor of a natural parent, however, is rebuttable." *Matter of Guardianship of Stodden*, 569 N.W.2d 621, 623 (Iowa Ct. App. 1997). However, a non-parent may gain custody if the parent seeking custody is proven to be unfit or substantially inferior. *Id.* "[I]f return of custody

to the child's natural parent "is likely to have a seriously disrupting and disturbing effect upon the child's development, this fact must prevail." *In re Guardianship of Knell*, 537 N.W.2d 778, 782 (Iowa 1995).

In re Guardianship of L.Y., 968 N.W.2d 882 (Iowa 2022). – This is the first case where the Iowa Supreme Court interpreted the new "Iowa Minor Guardianship Proceedings Act", effective January 1, 2020. *See* 2019 Iowa Acts ch. 56 (H.F. 591). Specifically, this case concerned a minor child's guardianship established by the consent of minor's mother when she was an unmarried 16-year-old. This case is based on the mother's motion to terminate the guardianship under the new Iowa Code section 232D.503 (2021). The district court and the court of appeals rejected mother's motion.

The key legal questions of first impression. First, which party had the burden of proof in a motion to terminate a guardianship, and what evidence is necessary to terminate a voluntary guardianship. Second, whether the repeal of Iowa Code section 633.559 (2019), which was the former statutory preference favoring the minor child's parents "over all others" as guardian for the child, cancelled a presumption favoring parental custody in guardianship determinations. *See* 2019 Iowa Acts ch. 56 § 43 (H.F. 591).

The supreme court first noted that Iowa Code section 232D.503(2) requires that the court find that termination of the guardianship would be harmful to the minor and that the minor's interest in continuation of the guardianship outweighs the interest of a parent of the minor in the termination. Therefore, because the default is termination of the guardianship, the party favoring continuation of the guardianship has the burden of proof once consent is withdrawn.

On the parental preference issue, the supreme court held that a statutory preference was unnecessary because constitutional protections afforded parents in the care, custody, and control of their children establish a common law parental preference. The constitutionally-based parental preference predated section 633.559 and survived its repeal. *Id.* at 894. The supreme court held:

> Parents' fundamental right to the care, custody, and control of their children is seemingly meaningless without a preference for parents who have never been adjudicated unfit over all others in guardianship proceedings. We presume that fit parents are acting in their children's best interests in seeking not only to establish but also to terminate a guardianship, and this presumption casts the burden of proving the contrary on the non-parent. Accordingly, when interpreting Iowa Code section 232D.503, courts must start with the rebuttable presumption that the child's best interests are served in the parent's custody as opposed to all others.

L.Y., 968 N.W.2d at 898.

The guardian bears the burden of rebutting this presumption by clear and convincing evidence that the guardianship should continue because "termination of the guardianship would be harmful to the minor and the minor's interest in continuation of the guardianship outweighs the interest of a parent of the minor in the termination of the guardianship." Iowa Code § 232D.503(2). "To meet this standard, it is insufficient for the guardians to show that they would provide superior care to the child. We have said that "'[e]conomic and cultural advantages in the [guardians'] home do not tip the balance in their favor.'" *L.Y.*, 968 N.W.2d at 900. Instead, the supreme court applied the "rigorous harm standard." *Id.* This requires the third party to show "either physical harm or significant, long-term emotional harm," not "merely social or economic disadvantages" "to ensure that the temporary guardianship will be continued only when a real threat of harm would result from termination." *Id.*

(3) Equitable Parent Doctrine.

(a) Legal elements

"[E]quitable parenthood may be established in a proper case by a father who establishes all the following: (1) he was married to the mother when the child is 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 child's best interest." *In re Marriage of Gallagher*, 539 N.W.2d 479, 481 (Iowa 1995)

(b) Action to Overcome Paternity

Iowa Code section 600B.41A provides the basis to overcome paternity.

(c) Distinction between establishing paternity and overcoming paternity

A putative father has the right to overcome paternity regarding another father whose paternity was established by other means. *Callender v. Skiles*, 591 N.W.2d 182, 192 (Iowa 1999); *see* Iowa Code § 600B.41A.

F. Tortious Interference with Custody

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.

Wolf v. Wolf, 690 N.W.2d 887, 892 (Iowa 2005).

5. Parenting Coordinator

Varner v. Conway, No. 20-0143, 2021 WL 3661143 (Iowa Ct. App. Aug. 18, 2021). – Lauren and Tanner attempted joint physical care for two years, but their parenting styles were incompatible: Tanner is "very structured"; Lauren is "free-spirited." Communication and cooperation broke down, and the court granted Tanner physical care. Lauren requested the appointment of a parenting coordinator; and the child's therapist and guardian ad litem agreed it could be beneficial. Tanner opposed it. The court of appeals declined to appoint a parenting coordinator. "Without cooperation by both parents, the appointment of a parenting coordinator will not fix the problems between the parents." *Id.* at *6 (citing *In re Marriage of Saluri*, No. 12-1279, 2013 WL 2397822, at *4 (Iowa Ct. App. May 30, 2013)). Still, the court of appeals strongly recommended that the parties consider a similar intermediary to improve their communication and cooperation for the child's sake. "A shared calendar may also aid the parents in providing school and activity schedules and locations, family events they would like the child to attend, as well as trip itineraries." *Id.* at *6.

6. Visitation

A. General legal principles

Iowa Code sections 598.1(1) and 598.41(1)(a) provide that, except in unusual circumstances, the best interests of the child require the "maximum continuing physical and emotional contact with both parents". *See Willey v. Willey*, 253 Iowa 1294, 1302, 115 N.W.2d 833, 838 (1962) ("the right of access to one's child should not be denied unless the *court* is convinced such visitations are detrimental to the best interests of the child. In the absence of extraordinary circumstances, a parent should not be denied the right of visitation." (emphasis in original)). Thus, Iowa courts have considered liberal visitation rights to be in a child's best interest, and courts avoid placing restrictions or conditions on a parent's opportunity for continuing contact with a child following the dissolution of his or her parents. *In re Marriage of Rykhoek*, 525 N.W.2d 1, 4 (Iowa Ct. App. 1994); *but see* Iowa Code § 598.41A (restricting visitation when

parent has committed crimes against a minor), § 598.41B (restricting visitation when parent has been convicted of murdering the other parent); *In re Marriage of Makela*, No. 16-1034, 2017 WL 2181544, at *3-*4 (Iowa Ct. App. 2017) (interpreting § 598.41A(2) to eliminate the district court's ability to order in-person visitation; however, the section does not eliminate all communication between parent and child).

B. Visitation rights are not controlled by physical care parent

An order granting visitation rights

> should not make the right of visitation contingent upon an invitation from the party having the custody of the child, or require the consent of one parent for the other to visit the child, … thereby leaving the privilege of visitation entirely to the discretion of the party having the child in custody.

Smith v. Smith, 258 Iowa 1315, 1322, 142 N.W.2d 421, 425 (1966) (citations omitted). Thus, any order that delegates the parameters of visitation rights to the other party is particularly troublesome. *In re Marriage of Retterath*, No. 14-1701, 2015 WL 6509105, at *4 (Iowa Ct. App., Oct. 28, 2015) (citing *Smith* at 425).

***Felton v. Iowa Dist. Ct.*, No. 21-1398, 2023 WL 1809820 (Iowa Ct. App. Feb. 8, 2023). The district court found Staesha Felton in contempt of court for depriving Ray Wilson of parenting time with their two children and acting contrary to her duties as a joint legal custodian. The court ruled: "Allowing a 12-year-old and a 7-year-old to dictate whether they want to go to their father's home is unacceptable." The court found Staesha guilty on five of the alleged contempt counts and ordered her to serve terms of incarceration of thirty days on each count, mittimus being withheld pending compliance with the decree. Staesha appealed.**

The parties were divorced in 2020. Their three children — born in 2003, 2007, and 2013 — were placed into their joint legal custody. Staesha had physical care of the eldest child subject to Ray's liberal visitation, while the two younger children were placed in the parties' joint physical care on an alternating week schedule, with a Wednesday evening visit for the non-exercising parent. The decree required the parties to support each other's disciplinary decisions and to take no action that "may estrange the minor child[ren] from the other party or impair their high regard for the other party." Ray filed a multi-count contempt application alleging that Staesha had denied visitation and violated her legal custodial obligations.

The breakdown in Ray's relationship with his children began in early 2021, when he started taking away their electronic devices to discipline them. Staesha claimed the breakdown occurred when Ray devoted more attention to his new wife than the kids. The first issue with parenting time began when Ray wanted the children returned to him during his parenting time. Staesha texted: "Nope I won't ... And we have been doing it for a year so take me to court." Recriminations continued and the children remained with Staesha.

Staesha started texting Ray how much the children dislike being with him. In one message, Staesha told him that "the kids hate you.... They hate your house. They beg not to go." Staesha then started conversing with the elder child, criticized Ray's new wife, talked with the child about "running away" from Ray's home, described the situation at Ray's as "worse and worse," and encouraged the child to lie to Ray and "[e]rase these texts" about it.

The conflict escalated to involving the younger two children. The elder child refused to go to Ray's, and the younger children followed suit soon after. Staesha started a confrontation in front of the children during a custody exchange. Insults were thrown and the children became distraught. As Ray returned to his home with the children, the elder child got out of the car at a stop sign and ran back to Staesha's house. Staesha then showed up at Ray's with the elder child in tow, demanded her belongings, and refused to leave until law enforcement arrived. She texted Ray later that the elder child "will not be coming back to your home for her own safety for the time being."

Soon after, the younger two children stopped visiting Ray for several months. Though waiting in Staesha's driveway to retrieve the children at the start of his parenting time, the children would not come out of Staesha's house. Staesha testified that she packed the children's bags and told them they needed to go with Ray, but she would not force them or give them any consequences when they refused. Staesha claimed Ray had to come to the house to convince the children to leave with him. Ray contended he chose not to go up to Staesha's house to avoid more conflict between him and Staesha.

Ray continued to ask Staesha to encourage the children to visit him. Staesha claimed that she tells the children they need to go, but she is "at a loss as to what [she] is supposed to do" when they refuse. Staesha also claimed that spending time with Ray hindered the children's wellbeing. Staesha agreed with the children that they did not have to visit Ray.

In response to this evidence, the district court found Staesha guilty of contempt because:

> **Allowing a 12-year-old and a 7-year-old to dictate whether they go to their father's home is unacceptable. Further, ... Staesha has undermined the relationship between Ray and the children, enhancing an environment where Ray is disrespected and the children are allowed to choose to stay at Staesha's home rather than go to Ray's home. She condones the children's refusal to go Ray's.**

***Id.* at *3. The court also found Staesha "failed, neglected, or refused to act to foster feelings of affection and respect between the minor children and Ray," "engaged in actions with the intent to estrange the minor children from Ray," and "engaged in actions with the intent to impair the children's high regard for Ray."**

Staesha argued the district court erred based on the Iowa Court of Appeals ruling in *Terry v. Iowa Dist. Ct.*, No. 17-0959, 2018 WL 3471836, at *4 (Iowa Ct. App. July 18, 2018). In *Terry*, the court of appeals rejected a claim that a mother "was required to force [the child] to attend visitation with [the father] or penalize her for not attending." This court factually distinguished *Terry* because Staesha "enhanc[ed] an environment where Ray is disrespected and the children are allowed to choose to stay at Staesha's home rather than go to Ray's home." *See Rausch v. Rausch*, 314 N.W.2d 172, 174 (Iowa Ct. App. 1981) (upholding contempt finding where mother did not encourage child to attend visitation when child said that she did not want to go).

> **While Staesha often expressed her concern with the children's emotional well-being at Ray's house, there was no evidence that his house was unsafe or that the children were subject to abuse there. *See Mann v. Iowa Dist. Ct.*, No. 09-0807, 2010 WL 624248, at *3 (Iowa Ct. App. Feb. 24, 2010) (stating a parent cannot rely on the duty to protect a child as a defense to contempt when the alleged threat of abuse is not founded); *see* also [*Ary v. Iowa Dist. Ct.*, 735 N.W.2d 621, 624 (Iowa 2007)], (shifting burden to contemnor after violation of court order proven to show violation was not willful). Instead, the older child's dissatisfaction with Ray's house seems to have started when he implemented rules about electronic devices. *Cf. Terry*, 2018 WL 3471836, at *2 (discussing contempt for denial of visitation for child with "suicidal thoughts and self-harms when staying with" her father).**
>
> **Bottom-line, "[i]n no case may a child be allowed to control whether visitation occurs." *In re S.P.*, No. 16-1919, 2017 WL 108798, at *5 (Iowa Ct. App. Jan. 11, 2017) (quoting**

> ***In re Hunter S.*, 48 Cal. Rptr. 3d 823, 828 (Cal. Ct. App. 2006)). Staesha allowed this to happen — despite the lip service she paid to encouraging visitation — when she fed into the children's dissatisfaction with the rules at Ray's house and stood passively by when they refused to attend parenting time with him.**

The court of appeals affirmed the guilty finding on five counts of contempt —NEW CASE**

****On March 27, 2024, the Iowa Court of Appeals issued its second opinion involving the parties, this time on the pending modification petition. *In re Marriage of Wilson*, No. 23-1239, 2024 WL 1296700 (Iowa Ct. App. Mar. 27, 2024). Despite the previous contempt findings against Staesha and its affirmation by the court of appeals, *Felton*, 2023 WL 1809820, the district court granted Staesha's petition to modify, ended the parties' joint physical care, placed the children in Staesha's physical care, and her sole legal custody. The court of appeals affirmed. *Wilson*, 2024 WL 1296700 at *4.**

C. Balancing the child's needs

Setting visitation is an exercise of providing significant contact between the child and noncustodial parent balanced against avoiding excessive disruption of the child's life. *See In re Marriage of Weidner*, 338 N.W.2d 351, 359 (Iowa 1983). "Visitation should include not only weekend time, but time during the week when not disruptive to allow the noncustodial 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 Ct. App. 1985); *In re Marriage of Toedter*, 473 N.W.2d 233, 235 (Iowa Ct. App. 1991) (holding that the noncustodial parent is entitled to midweek overnight visitation with a child in addition to alternate weekends).

A visitation schedule that attempts to provide a substantial amount of visitation also has limits. The Iowa Court of Appeals ruled:

> We cannot say as a matter of law that [sections 598.1(1) and 598.41(1)] require the court to apportion at least one-half of available time to the noncustodial parent. The Iowa Code requires us to consider only those factors listed in section 598.41(1), i.e., the best interests of the child; not an equitable arrangement among the parents.

In re Marriage of Bunch, 460 N.W.2d 890, 892 (Iowa Ct. App. 1990); *see also Weidner*, 338 N.W.2d at 359 (alternating two-week intervals in summer instead of 4 consecutive weeks would be confusing and upsetting to the children). The parent with physical care of the children "is entitled to be more

than a servant to the children, entitled to enjoy weekend time with them." *Weidner* at 359; *see also In re Marriage of Lacaeyse*, 461 N.W.2d 475, 477 (Iowa Ct. App. 1990) ("Since [the father] has primary physical custody of the boys, he is entitled to enjoy weekend time with them."). Both parents should be able to participate in weekend fun with their children. *In re Marriage of Ertmann*, 376 N.W.2d 918, 922 (Iowa Ct. App. 1985); *In re Marriage of Guyer*, 238 N.W.2d 794, 797 (Iowa 1976) (visitation every weekend instead of alternating weekends would be "unduly disruptive"). School and friendship-related activities, as well as the travel time between the parties' homes, may make reduced visitation reasonable and in the child's best interests. *In re Marriage of Hunt*, 476 N.W.2d 99, 103 (Iowa Ct. App. 1991).

D. Restrictions on visitation disfavored

Generally, courts will not impose conditions on a parent's visitation such as prohibiting the use of alcohol and profanity or prohibiting contact with unrelated adults. *In re Marriage of Rykhoek*, 525 N.W.2d 1, 5 (Iowa Ct. App. 1994); *see also In re Marriage of Fite*, 485 N.W.2d 662, 663-64 (Iowa 1992) (reversing condition that permitted the child to abort the visitation); *In re Marriage of Bakk*, No. 12-1936, 2013 WL 5962991, at *2 (Iowa Ct. App. Nov. 6, 2013 (affirming district court's refusal to require ex-wife to submit to random alcohol testing at ex-husband's discretion). The Iowa Court of Appeals struck down as unduly restrictive a limitation on a mother's visitation rights which barred her from having an unrelated adult male present in her living quarters. *In re Marriage of Ullerich*, 367 N.W.2d 297, 300 (Iowa Ct. App. 1985). Nor is homosexuality a reason to restrict visitation when the homosexual parent testified he would not expose the children to his private sex life. *In re Marriage of Walsh*, 451 N.W.2d 492, 493 (Iowa 1990). However, if a parent behaves irresponsibly during visitation, or if a parent's conduct prior to the dissolution raises concerns that visitation with that parent may cause "direct physical harm or significant emotional harm to the child," courts may reduce or eliminate visitation. *Rykhoek* at 4; *Fite* at 664; *see also In re Marriage of Smith*, 471 N.W.2d 70, 73 (Iowa Ct. App. 1991) (approving a condition prohibiting a father from removing the children from the state of their residence during visitation where he had once failed to return the children after visitation).

The court of appeals also vacated visitation provisions that restricted visitation to within the United States and that required the non-physical care parent either to reach a written agreement with the physical-care parent or to apply for and obtain a court order concerning the application to take the child outside of the United States. *In re Marriage of Stern*, No. 13-2087, 2015 WL 568584, at *4 (Iowa Ct. App. Feb. 11, 2015). "Generally, 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." *Id.* (quoting *Abouzahr v. Matera–Abouzahr*, 824 A.2d 268, 281 (N.J. Super. Ct. App. Div. 2003)). In *Stern*, the non-physical-care parent sought to bring the child to Israel, and Israel is a signatory country to the Hague Convention.

EXAMPLE:

***In re Marriage of Lyga*, No. 21-0156, 2022 WL 108951 (Iowa Ct. App. Jan. 12, 2022). – Courts have imposed self-executing step-up schemes in visitation arrangements. For example, the non-physical care parent has a history of alcohol abuse, and the court permits that visiting parent to have unsupervised or more visitation if that parent seeks treatment, remains sober, etc. In such a case, the court of appeals affirmed a step-up schedule because "a self-executing graduated visitation arrangement that fosters rebuilding parent-child relationships may be in the best interests of a child." (distinguishing *In re Marriage of Thielges*, 623 N.W.2d 232, 237 (Iowa Ct. App. 2000) because *Thielges* concerned self-executing physical placement provisions, not visitation). – NEW CASE**

E. Conflicting visitation provisions

Often a visitation schedule will include "regular" visitation, i.e., alternating weekends, as well as a holiday schedule, e.g., Memorial Day weekend. Those schedules will invariably conflict, e.g., Mom's Memorial Day weekend falls on Dad's regular alternating weekend. Visitation orders should expressly state which parent's visitation supersedes the other's visitation. If not, easily avoidable litigation will ensue. *See, e.g.*, *In re Marriage of Mennen*, No. 09–1821, 2010 WL 2384865, at *2 (Iowa Ct. App. June 16, 2010) (acknowledging a mother disobeyed a visitation order by taking the child at the start of the father's regularly-scheduled weekend when her holiday visitation was not to occur until Sunday); *In re Marriage of Brigman*, No. 22-0738, 2022 WL 17828831 (Iowa Ct. App. Dec. 21, 2022) (involving parents arguing over which schedule takes precedence).

F. Right of first refusal

Often parents will request the court to obligate a party, when that party is unavailable to care for the child, to require that party to inform and grant the other party the "right of first refusal" to care for the child rather than leaving the child in the care of a third party. *See Fries v. Barney*, No. 21-1124, 2022 WL 2348145, at *1 n.1 (Iowa Ct. App. June 29, 2022). Some courts loathe such provisions because they are often vague (how long must the parent be gone

before the right of first refusal is effective, i.e., 3 hours, 12 hours, 24 hours, etc.), or they exacerbate problems between high-conflict parents leading to continual contempt actions. *See In re Marriage of Johnsen*, No. 20-0779, 2021 WL 2690019, at *4 (Iowa Ct. App. June 30, 2021) (refusing to modify on appeal the district court's right-of-first-refusal from a 24-hour absence to a 4-hour absence because a 4-hour period would be hard to enforce and would "only result in additional conflict"); *Dirks v. Eccles*, No. 19-0994, 2020 WL 2071116, at *4 (Iowa Ct. App. Apr. 29, 2020); *In re Marriage of Taylor*, No. 14-1652, 2015 WL 4935795, at *4 (Iowa Ct. App. Aug. 19, 2015) (affirming trial court's refusal to include a right-of-first-refusal provision in the visitation schedule because parents "struggl[ed] to cooperate and communicate").

Regardless, Iowa's appellate courts have upheld such provisions. *Varner v. Conway*, No. 20-0143, 2021 WL 3661143, at *7 (Iowa Ct. App. Aug. 18, 2021) (modifying the district court's order to provide "when either biological parent knows they will be leaving town during their care time and unable to personally care for the child for more than twenty-four hours, they must offer the time to the other parent at least two weeks before the expected departure")); *In re Marriage of Brown*, No. 19-0705, 2020 WL 569344, at *5 (Iowa Ct. App. Feb. 5, 2020) (providing for a right of first refusal when a parent was unable to care for the children for twelve hours or more); *In re Marriage of Klemmensen*, No. 14-1292, 2015 WL 2089699, at *4 (Iowa Ct. App. May 6, 2015) ("We conclude Misty should be given 'the right of first refusal' when Michael is required to work for twelve or more consecutive hours or during his National Guard weekends if Misty does not already have visitation scheduled with K.L.K. for that weekend."); *In re Marriage of Bevers*, No. 14-0875, 2015 WL 1332578, at *4 (Iowa Ct. App. Mar. 25, 2015) (allowing the party without the children the first opportunity of care when a parent is unavailable for four hours or longer); *In re Marriage of Lauritsen*, No. 13-1889, 2014 WL 3511899, at *3 (Iowa Ct. App. July 16, 2014) ("Daren shall have the right of first refusal to provide child care for E.L. if the need for child care exceeds twelve hours.").

Chapter 5 – Child Support

1. Interstate Jurisdiction for Child Support Orders

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 Ct. App. 1997); *see also In re Marriage of Carrier*, 576 N.W.2d 97 (Iowa 1998). 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 like the FFCCSOA.

2. Supreme Court Guidelines

"The purpose of the child support guidelines is to provide for the best interests of the children after consideration of each parent's proportional income." *In re Marriage of McDermott*, 827 N.W.2d 671, 684 (Iowa 2013). Chapter nine of the Iowa Court Rules reflects the current Iowa Child Support Guidelines (hereinafter "the Guidelines").

> The purpose of the guidelines is to provide for the best interests of the children by recognizing the duty of both parents to provide adequate support for their children in proportion to their respective incomes. While the guidelines cannot take into account the specific facts of individual cases, they will normally provide reasonable support.

State ex rel. Nicholson v. Toftee, 494 N.W.2d 694, 695 (Iowa 1993). "The child support guidelines are mandatory, unless the court makes written findings an adjustment is 'necessary to provide for the needs of the children and to do justice between the parties under the special circumstances of the case.'" *In re Marriage of Ludwig*, 478 N.W.2d 416, 419 (Iowa Ct. App. 1991) (quoting Supreme Court Order re: Child Support Guidelines, filed Dec. 31, 1990)). Special circumstances can call for an adjustment up or down when necessary to do justice between the parties. *In re Marriage of Nelson*, 570 N.W.2d 103, 108 (Iowa 1997); *see* Iowa Ct. R. 9.4. The court then has judicial discretion to consider factors that make application of the guidelines unjustified. *In re Marriage of Thede*, 568 N.W.2d 59, 61 (Iowa Ct. App. 1997). However, any request for variation should be viewed with great caution. *Nelson*, 570 N.W.2d

at 108. Further, deviation from the child support guidelines is discouraged. *In re Marriage of Jones*, 653 N.W.2d 589, 593 (Iowa 2002). A court may vary from the Guidelines only upon specific written findings that, when applying the Guidelines:

> Substantial injustice would result to the payor, payee, or child. 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. Circumstances contemplated in Iowa Code section 234.39.

Iowa Ct. R. 9.11(1)-(3); *see* Iowa Code § 598.21B(2)(d).

3. Child support is income based

"To compute the guideline amount of child support, first compute the adjusted net monthly income, …" Iowa Ct. R. 9.14

A. Determining Income

> Before applying the guidelines there needs to be a determination of the net monthly income of the custodial and noncustodial parent at the time of the hearing. *See In re Marriage of Powell*, 474 N.W.2d 531, 534 (Iowa 1991) (holding the court must determine the parents' current income from the most reliable evidence presented); *In re Marriage of Lalone*, 469 N.W.2d 695, 696 (Iowa 1991) (holding that application of child support guidelines chart first involves determination of the net monthly income of each parent); *In re Marriage of Miller*, 475 N.W.2d 675, 678 (Iowa Ct. App. 1991) (holding that the first step in using the child support guidelines is to arrive at "net monthly income"). Yet the translation of income to "net monthly income" as defined by the guidelines *is not an exact science*. *See In re Marriage of Gaer*, 476 N.W.2d 324, 329 (Iowa 1991); *State ex rel. Dep't Human Servs. v. Burt*, 469 N.W.2d 669, 671 (Iowa 1991); *In re Marriage of Cossel*, 487 N.W.2d 679, 682 (Iowa Ct. App. 1992).

In re Marriage of Kupferschmidt, 705 N.W.2d 327, 332 (Iowa Ct. App. 2005) (emphasis added). "Generally, child support is figured on income, not net worth." *In re Marriage of Will*, 602 N.W.2d 202, 206 (Iowa Ct. App. 1999). "The court must determine the parent's current 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." *Powell*, 474 N.W.2d at 534.

"Net monthly income" under the guidelines is determined by first establishing gross income. *See* Iowa Ct. R. 9.5 (stating net monthly income is gross monthly income minus applicable deductions). "In the guidelines, the term 'gross monthly income' means reasonably expected income from all sources." Iowa Ct. R. 9.5(1). The court cannot impute income (or use a parent's earning capacity) to determine child support, except as permitted by Rule 9.11. Iowa Ct. R. 9.5(1)(d). Regarding parents who are self-employed, their gross income is "self-employment gross income less reasonable business expenses." Iowa Ct. R. 9.5(1)(c).

Iowa courts have included such items as overtime income, incentive pay, and bonuses as gross income. *See State ex rel. Hammons v. Burge*, 503 N.W.2d 413, 415 (Iowa 1993) (incentive pay); *In re Marriage of Brown*, 487 N.W.2d 331, 333 (Iowa 1992) (overtime); *In re Marriage of Lalone*, 469 N.W.2d 695, 698 (Iowa 1991) (bonus). National Guard pay is income. *State ex rel. Weber v. Denniston*, 498 N.W.2d 689, 691 (Iowa 1993). Military housing allowance is income. *In re Marriage of Staton*, 511 N.W.2d 418, 420 (Iowa Ct. App. 1993). Annual tribal benefits paid to tribe members are income. *Seymour v. Hunter*, 603 N.W.2d 625, 626 (Iowa 1999). Dependent social security disability benefits are income. *In re Marriage of Hilmo*, 623 N.W.2d 809, 813 (Iowa 2001).

Only "public assistance payments, the earned income tax credit, or child support payments a party receives" are not included as gross monthly income. Iowa Ct. R. 9.5(1)(b); *see also In re Marriage of Swagel*, No. 04-1127, 2005 WL 839642, at *3 (Iowa Ct. App. Apr. 13, 2005) (stating the "adoption subsidy" parents receive are specifically exempted from income to determine child support per Iowa Admin. Code r. 441-99.1(1) & 441-41.27(6)(x)); *In re Marriage of Benson*, 495 N.W.2d 777, 781–82 (Iowa Ct. App. 1992) (declining to include the children's SSI payments as income for the mother "because we consider [SSI] as public assistance … and also because we recognize the amount of [SSI] received, if any, will be affected by the child support that [the father] is ordered to pay").

(1) Fluctuating income / averaging income

For parents who have fluctuating income, the court may average income over a period of time to calculate child support. *In re Marriage of Hagerla*, 698 N.W.2d 329, 332 (Iowa Ct. App. 2005); *In re Marriage of Cossel*, 487 N.W.2d 679, 681 (Iowa Ct. App. 1992). However, "in most cases the income of a wage-earner with steady employment need not be averaged." *In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 333 (Iowa Ct. App. 2005) (citing *Hagerla* at 332).

(2) Overtime

Overtime income should be considered income when establishing net income unless it is "an anomaly or is uncertain or speculative". *In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 333 (Iowa Ct. App. 2005); *see In re Marriage of Brown*, 487 N.W.2d 331, 333 (Iowa 1992); *In re Marriage of Elbert*, 492 N.W.2d 733, 735 (Iowa Ct. App. 1992); *see also In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993); *In re Marriage of Close*, 478 N.W.2d 852, 854 (Iowa Ct. App. 1991). "Yet a parent's child support obligation should not be so burdensome that the parent is required to work overtime to satisfy it. However, the district court must make a specific finding to that effect." *Kupferschmidt* at 333 (citing *Brown* at 333).

(3) Second job

Income from a second job, including National Guard pay, is similar to overtime and is considered income for child support purposes if it is steady, not speculative. *State ex rel. Weber v. Denniston*, 498 N.W.2d 689, 691 (Iowa 1993); *but see In re Marriage of Griffin*, 525 N.W.2d 852, 853 (Iowa 1994) (refusing to include payor's income from a summer job because the income was speculative).

(4) Bonus

Unlike overtime or second-job pay for the purpose of determining whether it should be included to determine net income, bonus pay is not measured by whether it is speculative, anomalous, or uncertain. Rather, bonus pay is included if it is "consistent" – paid on a regular basis – as opposed to something that is awarded one time only. *In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 333 (Iowa Ct. App. 2005) (citing *In re Marriage of McCurnin*, 681 N.W.2d 322, 329 (Iowa 2004); *In re Marriage of Nelson*, 570 N.W.2d 103, 105 (Iowa 1997)); *see In re Marriage of Lalone*, 469 N.W.2d 695, 698 Iowa 1991); *In re Marriage of Pettit*, 493 N.W.2d 865 (Iowa Ct. App. 1992); *In re Marriage of Russell*, 479 N.W.2d 592, 594 (Iowa Ct. App. 1991); *see also Dallenbach v. MAPCO Gas Prod., Inc.*, 459 N.W.2d 483, 488 (Iowa 1990) (holding that an employee's annual bonus was income and not a gift when the bonus was clearly designed as was part of the compensation for his labor or services).

Incentive pay is also properly included as income. *State, Dep't of Human Servs. ex rel. Hammons v. Burge*, 503 N.W.2d 413, 415 (Iowa 1993). "In calculating the effect of bonuses [and/or overtime], … 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." *Seymour v. Hunter*, 603 N.W.2d 625, 626 (Iowa 1999). "To ignore [bonus or overtime income] would be to invite manipulation of the guidelines by arrangements with friendly employers, earmarking part of the expected earnings by labeling them as

bonuses. It is not controlling that the amount … be fixed, or even that the various bonus payments be of similar size." *Id.*

(5) Value of employee benefits

Valuable benefits provided to an employee, e.g., home mortgage payments, real estate taxes, insurance, utility, vehicle, gasoline and other vehicle expenses, are considered income to determine child support, 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, 179 (Iowa Ct. App. 1992) (including such benefits as income when parent was owner of small business that paid virtually all of the parent's personal expenses). "However, the definition of net monthly income does not encompass adding employment benefits to other income prior to applying the guideline percentages. The value of the [benefit] should not be considered income but is a factor that justifies the trial court making a discretionary call to order more support than provided in the guidelines." *In re Marriage of Huisman*, 532 N.W.2d 157, 159 (Iowa Ct. App. 1995); *see In re Marriage of Wade*, 780 N.W.2d 563, 567–68 (Iowa Ct. App. 2010) ("Recognizing Mike, as a corporate owner, has covered many normal personal living expenses through the corporation, we conclude equity requires the recognition of the value of corporation-paid personal expenses as a factor that could justify a deviation from the amount of support provided in the guidelines.").

(6) Contributions from others

"Income" as defined by the child support guidelines does not include income earned by a subsequent spouse. *In re Marriage of Will*, 602 N.W.2d 202, 206 (Iowa Ct. App. 1999). A party's new spouse has no support obligation to that party's child. *Id.* Likewise, voluntary contributions by a party's paramour living with a custodial parent is not considered "income" to that parent. *In re Marriage of Keopke*, 483 N.W.2d 612, 614 (Iowa Ct. App. 1992); *see also In re Marriage of Drury*, 475 N.W.2d 668, 672 (Iowa Ct. App. 1991) (holding that "possible support" available to payor from "another person is not a consideration the district court must weigh in setting the child support award"); *In re Marriage of Norwood*, No. 07-1148, 2009 WL 249638, at *4 (Iowa Ct. App. Feb. 4, 2009) (citing *Drury*, holding "possible gifts" to a parent were properly excluded for calculating child support). However, the court's first consideration is not what is in the best interest of the support obligor or obligee, but what is in the best interest of the children. *In re Marriage of McKenzie*, 709 N.W.2d 528, 533 (Iowa 2006). Therefore, the court may consider the obligor's spouse and/or live-in paramour's combined income to determine whether the Guideline amount should be deviated from by the court. *Id.* (citing *State ex rel.*

Reaves v. Kappmeyer, 514 N.W.2d 101, 104-05 (Iowa 1994) (determining parents' incomes for purposes of the child support guidelines without regard to the incomes of others, and then only considering such additional funds in evaluating "whether awarding the guideline amount would result in a substantial injustice" warranting departure from the guidelines)); *In re Marriage of Gehl*, 486 N.W.2d 284, 287 (Iowa 1992); *see also In re Marriage of Shivers*, 557 N.W.2d 532, 534 (Iowa Ct. App. 1996).

Even though a payor's new spouse has no obligation to support the children of the payor, that new spouse's income is relevant in determining the financial condition of the payor in light of a change of circumstances. *See In re Marriage of Dawson*, 467 N.W.2d 271, 276 (Iowa 1991) (citing *Page v. Page*, 219 N.W.2d 556, 558 (Iowa 1974)); *see also* Iowa Code § 598.21C(1)(g) & (h). In *Page*, the trial court considered, and the Iowa Supreme Court found proper, the fact that the payor's wife was gainfully employed and contributing significantly to the familial expenses. *Id.* The Court emphasized that no one factor, such as a payor spouse's income can be taken into consideration in a vacuum. *Id.* It must be considered in light of all the other factors and the individual needs of the parties. *Id.*

(7) Voluntary reduction in income

A parent may not place selfish desires over the welfare of a child. *In re Marriage of McKenzie*, 709 N.W.2d 528, 534 (Iowa 2006). "[P]arents 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, 712 (Iowa Ct. App. 1990). A parent's voluntary reduction in income or earning capacity may be cause to refuse to reduce the parent's child support obligation. *In re Marriage of Rietz*, 585 N.W.2d 226, 229–30 (Iowa 1998); *In re Marriage of Walters*, 575 N.W.2d 739, 741 (Iowa 1998). "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 support through improper intent or reckless conduct." *In re Marriage of Foley*, 501 N.W.2d 497, 500 (Iowa 1993). Income need not be imputed, however, when the custodial parent voluntarily withdraws from the work force. *In re Marriage of Bonnette*, 492 N.W.2d 717, 721 (Iowa Ct. App. 1992); *see also State ex rel. Dep't of Human Servs. v. Cottrell*, 513 N.W.2d 765, 768 (Iowa 1994) (imputing net monthly income mother received on prior job); *In re Marriage of Fogle*, 497 N.W.2d 487, 489 (Iowa Ct. App. 1993) (affirming support based on full-time minimum wage job even though obligor had been unemployed for over three years).

The court may disregard earning capacity and use low or non-existent actual earnings when the reduced income was temporary or for a good reason. *In re Marriage of Hart*, 547 N.W.2d 612, 615 (Iowa Ct. App. 1996) (using payor's substantially reduced current income rather than earning capacity because payor quit working to return to school to earn future higher income); *In re Marriage of Weiss*, 496 N.W.2d 785, 788–89 (Iowa Ct. App. 1992) (same); *In re Marriage of Blum*, 526 N.W.2d 164, 165–66 (Iowa Ct. App. 1994) (payor lost job through no fault of his own and took lower-paying job to stay near his children). The obligor's incarceration is not considered voluntary and self-inflicted, thus courts use the obligor's actual earnings rather than earning capacity. *Walters*, 575 N.W.2d at 743 *overruling In re Marriage of Phillips*, 493 N.W.2d 872, 878 (Iowa Ct. App. 1992).

Iowa courts will take into account a payer's earning capacity when the facts suggest that the payer is passing up opportunities to make more money and the result is unfair to the child. *See, e.g.*, *In re Marriage of Wahlert*, 400 N.W.2d 557, 560 (Iowa 1987) (farmer with labor skills, whose farm income was reduced, somewhat, by the depreciation he claimed for tax purposes, was not entitled to a significant reduction in his child support when he moved to modify child support, in part because his labor skills gave him the potential to earn additional side income); *In re Marriage of Pfeffer*, 443 N.W.2d 92, 95 (Iowa Ct. App. 1989) (farmer who inherited property from his family and lived off of the proceeds of that property without working – and who at age 29 wasn't actively farming (but instead had a lengthy history of drug and alcohol abuse, but was currently attending community college) – was determined to have an income capacity far exceeding his actual income; as such, his estimated earning capacity was deemed the appropriate measure for purposes of establishing a child support figure for his four children).

(8) How spousal support affects income

Gross monthly income includes spousal support payments to be received by a party in the pending matter and prior obligation spousal support payments actually received by a party pursuant to court order. For spousal support payments taxable to the payee and deductible by the payor, the payments shall be added to or subtracted from gross monthly income prior to the computation of federal and state income taxes. For spousal support payments not taxable to the payee or deductible by the payor, the payments will be added or subtracted after the computation of federal and state income taxes in arriving at net monthly income.

(1) If spousal support is to be paid in the pending matter, whether temporary or permanent, it will be

determined first and added to the payee's income and deducted from the payor's income before child support is calculated.

(2) A payor of prior obligation spousal support will receive a reduction from income for spousal support actually paid pursuant to court order.

(3) Reimbursement spousal support, whether being paid in a prior matter or to be paid in the pending matter, may not be added to a payee's income or deducted from a payor's income.

Iowa Ct. R. 9.5(1)(a).

(9) Wealthy people ($25,000+ net monthly income)

Under Iowa Court Rule 9.26(3), to determine child support for net monthly income that exceeds $25,000, "the amount of the basic support obligation is deemed to be within the sound discretion of the court … but may not be less than the basic support obligation for combined net monthly incomes equal to $25,000." "With the adoption of guidelines, the court is no longer required to consider the statutory factors. However, the factors may be considered when the guidelines require judicial discretion[.]" *In re Marriage of Powell*, 474 N.W.2d 531, 534 (Iowa 1991). If the parties' net monthly income exceeds $25,000, though

> Iowa Code section [598.21B(2)(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. [] A reasonable award would include consideration of the factors set out in *In re Marriage of Zoellner*, 219 N.W.2d 517, [525] (Iowa 1974).

Powell at 534-35. The *Zoellner* factors are:

> parties' age, health, present earning capacity, future prospects, amount of resources owned by each or both parties, contributions of each to the joint accumulations, the children involved, duration of the marriage, indebtedness of each or both, and any other relevant factors which might assist the trial court in reaching a just and equitable decision.

Zoellner at 525. As further guidance, in a modification case, the Iowa Supreme Court deemed the following factors relevant in determining whether an alteration in the support was justified: "(1) the financial resources of the child, (2) the financial resources of both parents, (3) the standard of living the children would have enjoyed had there not been a dissolution, and (4) the children's educational needs." *In re Marriage of Maher*, 596 N.W.2d 561, 565-

66 (Iowa 1999); *see also Mason v. Hall*, 482 N.W.2d 919, 921 (Iowa 1992) (income over $800,000 per year).

B. Deductions

The Guidelines have set forth specific deductions for income, FICA, and Medicare taxes, mandatory occupational license fees, union dues, mandatory pension, dependent health insurance, unreimbursed individual health costs, prior child and spousal support obligation, qualified additional dependent deductions, and childcare expenses. Iowa Ct. R. 9.5(2), 9.11A. There are some additional items which may qualify as a deduction from income when computing the guidelines.

(1) Prior child and spousal support obligations

This deduction is limited to support "actually paid pursuant to court or administrative order". Iowa Ct. R. 9.5(2)(h). A child may qualify for either the qualified additional dependent deduction, R. 9.5(2)(i), or the prior support obligation deduction, R. 9.5(2)(h), *but not both*. R. 9.8(2) ("A qualified additional dependent deduction cannot be claimed for a child for whom there is a prior court or administrative support order."); *see* Iowa Admin. Code r. 441-99.2(7); *State ex rel. Spencer v. White*, 584 N.W.2d 572, 575 (Iowa Ct. App. 1998) ("[W]e look to the date of the original order to determine whether a deduction based on a prior order is appropriate.").

Because the Guidelines allow this deduction for other children and/or other child support orders, courts are weary to further deviate from the guidelines based upon a noncustodial parent's pre-existing multiple obligations, such as when a parent is obligated to pay support for several children by several different mothers. *State ex rel. Epps v. Epps*, 473 N.W.2d 56, 58 (Iowa 1991). However, it remains possible. For an obligor in a multiple family situation to reduce child support below the guideline amount, the obligor must show the lack of financial ability to pay the amount of support dictated by the Guidelines. *See, e.g.*, *State ex rel. Nielsen v. Nielsen*, 521 N.W.2d 735, 738 (Iowa 1994); *State ex rel. Reaves v. Kappmeyer*, 514 N.W.2d 101, 104 (Iowa 1994); *State ex rel. Nicholson v. Toftee*, 494 N.W.2d 694, 698 (Iowa 1993); *Epps* at 58.

(2) Health insurance premiums

"Health insurance premium costs for other children not in the pending matter when coverage is provided pursuant to court or administrative order or for children who are qualified additional dependents under rule 9.7." Iowa Ct. R. 9.5(2)(f). "Cash medical support ordered in this pending matter as determined

by the medical support table in rule 9.12." R. 9.5(2)(g). Amounts paid for the children's health insurance may be deducted from obligor's gross monthly income, but not also from obligor's guideline amount of monthly child support. *In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997). Iowa Court Rule 9.14(5) provides that "[i]n calculating child support, the allowable child(ren's) portion of the health insurance premium is prorated between the parents and used to adjust the basic support obligation as provided in this rule."

(3) Qualified additional dependent deduction

The criteria for and amount of the deduction is found in the Guidelines. Iowa Ct. R. 9.7 & 9.8. A child may qualify for either the qualified additional dependent deduction, R. 9.5(2)(i), or the prior support obligation deduction, R. 9.5(2)(h), *but not both*. R. 9.8(2) ("A qualified additional dependent deduction cannot be claimed for a child for whom there is a prior court or administrative support order."); *see* Iowa Admin. Code r. 441-99.2(7); *State ex rel. Spencer v. White*, 584 N.W.2d 572, 575 (Iowa Ct. App. 1998) ("[W]e look to the date of the original order to determine whether a deduction based on a prior order is appropriate."). In *Spencer*, the responsible parent had three children by three different mothers. Child support was ordered in 1993 for Karissa and in 1995 for Tristan; Mariah lived with the responsible parent. In modifying the child support for Karissa, the responsible parent would receive the qualified additional dependent deduction for both Mariah and Tristan. He did not qualify for the prior child support obligation deduction for Tristan.

(4) Business expenses / depreciation

When evaluating whether business expenses should be treated as deductions in order to calculate child support "*some* consideration must be given to business expenses *reasonably necessary* to maintain the business or occupation." *In re Marriage of Gaer*, 476 N.W.2d 324, 329 (Iowa 1991) (some emphasis added, some emphasis in original); *see In re Marriage of Golay*, 495 N.W.2d 123, 126–27 (Iowa Ct. App. 1992) (approving the deduction of out-of-pocket business expenses of a self-employed person, including depreciation, postage, office expenses and promotion, but denying the artificial deduction of 27.5 cents per mile for mileage when the self-employed person's vehicles were fully depreciated and his employer furnished gas and oil).

Often, a parent will attempt to reduce his/her income by creating a false expense or deducting personal expenses as business expenses. *See In re Marriage of Wiedemann*, 402 N.W.2d 744, 748 (Iowa 1987) ("It is not uncommon for an owner to cover many normal personal living expenses through the corporation or to over-depreciate or undervalue inventory, all of which would decrease profits while increasing the owner's standard of

living …"); *In re Marriage of Wade*, 780 N.W.2d 563, 567–68 (Iowa Ct. App. 2010); *In re Marriage of Aronow*, 480 N.W.2d 87, 90 (Iowa Ct. App. 1991). Iowa courts do not permit those deductions. *See Id.* Further, courts are not required to give consideration to business expenses in maintaining a certain operation which is neither a business nor an occupation but is instead a hobby or tax shelter. *In re Marriage of Starcevic*, 522 N.W.2d 855, 857 (Iowa Ct. App. 1994) (citing *Gaer* at 329)

In defining "net monthly income," the guidelines do not provide for a deduction for depreciation. *See generally* Iowa Ct. R. 9.5. However, in *In re Marriage of Gaer*, 476 N.W.2d 324, 326 (Iowa 1991), the Iowa Supreme Court recognized that courts have flexibility to allow all or part of straight-line depreciation as a deduction from gross income, given a finding the Guidelines would otherwise be unjust or inappropriate. Depreciation allows a business owner to accumulate funds for the eventual replacement of equipment, thereby providing the owner an "'opportunity to maintain and preserve that which makes his business possible …'" *Id.* at 328 (quoting *Stoner v. Stoner*, 307 A.2d 146, 152 (Conn. 1972)). However, the *Gaer* Court also recognized the economic reality of depreciation as "'a mere book figure which does not either reduce the actual dollar income … or involve an actual cash expenditure when taken. … it represents additional cash available to the [obligor] by permitting substantial tax deductions and, ultimately, tax savings'" *Id.* Accordingly, the decision of whether depreciation should be allowed must be left to a court's discretion "'determined from all the circumstances including the amount of depreciation claimed and the property depreciated.'" *Id.*

(5) Payments on accrued or delinquent support or other debts

Amounts set for monthly payments on accrued support are not deductible from gross income in determining net income. *State ex rel. Davis by Eddins v. Bemer*, 497 N.W.2d 881, 882 (Iowa 1993); *State ex rel. Dep't of Human Servs. v. Burt*, 469 N.W.2d 669, 671 (Iowa 1991). "Our guidelines specifically do not allow a deduction for voluntary savings or payment of indebtedness." *State ex rel. Nielsen v. Nielsen*, 521 N.W.2d 735, 737 (Iowa 1994). For example, payments on delinquent taxes are not deductible. *Id.*

(6) Extraordinary visitation credit

The Guidelines expressly provide for reduction of the obligor's child support if the obligor meets the requirement for "extraordinary visitation". Iowa Ct. R. 9.9. Depending on the amount of visitation, the obligor's child support could be reduced 15%, 20%, or 25%. *Id.* Whether the credit is given is determined by the

number of court-ordered overnight visits – currently 128-147 overnights; 148-166 overnights; and 167 or more, but less than shared physical care. *Id.*

(7) Taxes

The Guidelines, not the deductions listed on a parent's wage pay stub, determine that parent's federal and state tax liability. *In re Marriage of Huisman*, 532 N.W.2d 157, 159 (Iowa Ct. App. 1995). "We do not consider pay stubs as a reliable indicator of income tax liability. The amount of federal and state income tax withheld is at the election of the employee and frequently does not reflect his or her ultimate tax liability for the current calendar year." *Id.*; *see also State ex rel. Shoars v. Kelleher*, 539 N.W.2d 189, 190–91 (Iowa 1995) (reversing trial court's "approximation" of estimated quarterly tax payments, rather court should have "properly calculated" the tax liability based upon the best evidence). Rule 9.6 details the Guidelines' method for computing taxes. *See also* Iowa Ct. R. 9.5(2)(a)-(c). Rule 9.6 dictates what "status" is assigned to each parent to calculate the support. R. 9.6(1)-(3). The parties are given the "standard deduction" rather than any itemized deductions. R. 9.6(4).

(8) Children's extra expenses

The Guidelines are intended to include "normal and reasonable costs of supporting a child", e.g., clothes, school supplies, and recreation activities. *In re Marriage of Okland*, 699 N.W.2d 260, 268 (Iowa 2005). 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, 292 (Iowa Ct. 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); *but see In re Marriage of McDermott*, 827 N.W.2d 671, 686 (Iowa 2013) (holding that when parents have joint physical care of their children, a provision in addition to the offset child support requiring the parents to share child-related expenses is equitable).

4. Other child support issues

A. No suspension during visitation

Child support is not normally suspended during visitation. *In re Marriage of Fleener*, 247 N.W.2d 219, 221 (Iowa 1976); *In re Marriage of Mrkvicka*, 496 N.W.2d 259, 261 (Iowa Ct. App. 1992). 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. *In re Marriage of McElroy*, 475 N.W.2d 221, 224–25 (Iowa Ct. App. 1991); *In re Marriage of Toedter*, 473 N.W.2d 233, 235 (Iowa Ct. App. 1991).

B. Stepparents

Stepparents can be ordered to pay child support in a temporary order during a pending dissolution of marriage action. *Whitlock v. Iowa Dist. Ct.*, 497 N.W.2d 891, 894-95 (Iowa 1993) (citing Iowa Code §§ 598.11, 598.21B(2)(a)). Any rights a stepparent may have, if any, derive from the marriage, so once the divorce is granted, all obligations and rights toward that child are terminated. *Petition of Ash*, 507 N.W.2d 400, 404 (Iowa 1993) ("Iowa case law recognizes that a stepparent cannot be considered a natural parent against the stepparent's will and cannot be required to pay child support."). Therefore, an Iowa court cannot 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).

C. Split/Divided Physical Care

> In the cases of court-ordered split or divided physical care, child support shall be calculated in the following manner: determine the amount of child support required by these guidelines for each party based on the number of children in the physical care of the other party; offset the two amounts as a method of payment; and the net difference shall be paid by the party with the higher child support obligation unless variance is warranted under rule 9.11.

Iowa Ct. R. 9.14(4); *see In re Marriage of Will*, 489 N.W.2d 394, 400 (Iowa 1992). However, if one of the parties receives public assistance, then the offset method is not available. *See State ex rel. Heidick v. Balch*, 533 N.W.2d 209, 212 (Iowa 1995) (regardless of any child support offset that might be appropriate, if a party receives government benefits, the government's entitlement to reimbursement trumps the parties' right to an offset); *see also State ex rel. Mack v. Mack*, 479 N.W.2d 327, 329 (Iowa 1992) (same).

D. Joint or shared physical care / child expenses

"The distinction between 'liberal visitation' and 'joint physical care' is crucial on the issue of the proper manner in determining child support." *In re Seay*, 746 N.W.2d 833, 835 (Iowa 2008). If the district court *expressly* awards the parties joint or shared physical care, then Iowa Court Rule 9.14(3) applies and support is calculated using the offset method. *Id.* The *Seay* Court distinguished *In re Marriage of Fox*, 559 N.W.2d 26, 28 (Iowa 1997), that involved a

noncustodial parent who had "liberal visitation", but the district court had not expressly ordered shared physical care even though the parties treated it as such. *Id.*

The *Seay* Court also noted that the "amount of child support calculated pursuant to the rules is not cast in stone." 746 N.W.2d at 836. Under Rule 9.11, the court has the authority to deviate from the Guideline amount if it finds that the offset method would result in a substantial injustice to the children and/or the parties. *Id.* (e.g., even with "shared" custody, if one parent has the children two-thirds of the year, the offset method could result in an injustice between the parties). If shared care is ordered, the district court has authority to require the parents to share children's extracurricular and other related expenses in addition to child support. *In re Marriage of McDermott*, 827 N.W.2d 671, 685-86 (Iowa 2013).

Because of the offset method, the court has the authority to also order the parties to split child-related expenses, i.e., extracurricular activities, in addition to child support. *In re Marriage of McDermott*, 827 N.W.2d 671, 686 (Iowa 2013) (distinguishing *In re Marriage of Okland*, 699 N.W.2d 260, 268 (Iowa 2005) that holds the Guidelines are designed to calculate an amount of funds that will "cover the normal and reasonable costs of supporting a child.")). The Iowa Court of Appeals affirmed the district court's order for the shared-care parents maintain a joint checking account to pay their children's expenses. *In re Marriage of Munger*, No. 06-1638, 2007 WL 1063048, (Iowa Ct. App. Apr. 11, 2007).

E. Child's own income

The 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 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, 499 (Iowa 1993).

F. Agreement of the parties to waive child support

Iowa courts refuse to endorse any agreement that cancels a parent's obligation to pay support. *See* Iowa Code §§ 252A.3, 598.21B, & 600B.1. Agreements to waive child support are against public policy. *In re Marriage of Sundholm*, 448 N.W.2d 688, 690 (Iowa Ct. App. 1989) (stating that parents may not agree to "relieve a [parent] entirely and permanently of the duty to support [a] minor child"); *see Huyser v. Iowa Dist. Ct.*, 499 N.W.2d 1, 3 (Iowa 1993); *State ex rel. Blakeman v. Blakeman*, 337 N.W.2d 199, 203 (Iowa 1983) ("Parental agreements that have the effect of making their children a public charge

cannot be countenanced."); *Webb v. Iowa Dist. Ct.*, 416 N.W.2d 95, 98 (Iowa Ct. App. 1987); *see also In re Marriage of Harvey*, 523 N.W.2d 755, 756 (Iowa 1994) (noting that § 598.21C(3) *overruled Anthony v. Anthony*, 204 N.W.2d 829, 831 (Iowa 1973) ("[d]ivorced parents may contract between themselves as to the support of their minor child if the best interest of the child is not injured thereby")). Stipulations that deviate from the Guidelines should be approved and enforced only if the district court determines that the stipulated amount will not adversely affect the best interests of the parties' child. *Id.*; *see* Iowa Ct. R. 9.11.

If the parties attempt to modify a court-ordered child support obligation, such action "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, and entered as an order of the court." Iowa Code § 598.21C(3) (formerly codified at § 598.21(8)(l)). Further, "[p]arents cannot lightly contract away or otherwise modify child support obligations." *In re Marriage of Zeliadt*, 390 N.W.2d 117, 119 (Iowa 1986).

G. Denial of visitation or repudiation by children

Iowa's courts and legislature have gone to great lengths to disassociate the payment of support from the right to exercise visitation. Withholding visitation does not stop the obligation to pay child support. See *State ex rel. Wagner v. Wagner*, 480 N.W.2d 883, 885 (Iowa 1992). Repudiation by the minor child does not relieve the obligation to pay child support. *In re Marriage of Hoksbergen*, 587 N.W.2d 490, 492 (Iowa Ct. App. 1998). As the Iowa Court of Appeals ruled, refusing to pay child support because payer-parent does not receive visitation is not permitted:

> This type of self-help measure is not a basis for avoiding a contempt citation. See [*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) (accepting State's premise as a general rule that "one parent's duty of support does not turn on the other parent's fulfillment of custodial obligations such as visitation."); *Gerk v. Gerk*, 259 Iowa 293, 298, 144 N.W.2d 104, 108 (1966) ("The parent's duty to support continues unless removed or shifted in some way recognized by law.")[.]

Farrell v. Iowa Dist. Ct., 747 N.W. 2d 789, 791 (Iowa Ct. App. 2008) (holding parent in contempt for refusing to pay support because "he needed to get his wife's attention on joint parenting issues"). However, in one extreme case, *Wagner*, 480 N.W.2d at 885-86, the Supreme Court quashed a mandatory income withholding order on equitable grounds when father had not seen his

children for more than six years because the mother was hiding, and the father otherwise was denied a forum to address the issues related to the denial of contact with his children.

H. Variance because of actual cost of living

Courts should refrain from deviating from the Guidelines based on the standards of living in different areas. *In re Marriage of Del Real*, 948 N.W.2d 542, 547–48 (Iowa Ct. App. 2020).

I. Pay support to Clerk or Collection Services Center

"Payments 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 …" Iowa Code § 598.22; *see In re Marriage of Caswell*, 480 N.W.2d 38, 40 (Iowa 1992). "Payments made to individuals or entities other than the clerk of the court or the collection services center will not be deemed a credit on the official support payment record." *Caswell* at 40. "The rule is simple. A child support obligor will only receive credit for child support payments made to the appropriate clerk of court or collection services center." *Hurd v. Iowa Dep't of Human Servs.*, 580 N.W.2d 383, 386 (Iowa) (citations omitted), *cert. denied* 119 S. Ct. 455, 525 U.S. 987, 142 L. Ed. 2d 408 (1998). "The only exception to this rule is if payment is confirmed by the court upon submission of an affidavit by the person entitled to receive the support payment." 580 N.W.2d at 386; *see* Iowa Code § 598.22A(1) ("For payment made pursuant to an order, the clerk of the district court or collection services center shall record a satisfaction as a credit on the official support payment record if its validity is confirmed by the court upon submission of an affidavit by the person entitled to receive the payment, after notice is given to all parties.").

In very rare cases, a party may be estopped from collecting a child support obligation after promising to enter a satisfaction of judgment for out-of-court child support payments. *In re Marriage of Harvey*, 523 N.W.2d 755, 756-57 (Iowa 1994); *In re Marriage of Yanda*, 528 N.W.2d 642, 644 (Iowa Ct. App. 1994).

J. Credit for overpayment

A parent who overpays support or otherwise contributes to the custodial parent an amount above the court-ordered support obligation is not automatically entitled to a credit toward future support obligations. *In re Marriage of Pals*, 714 N.W.2d 644, 650-51 (Iowa 2006) (citations omitted). In *Pals*, the parties had two children. *Id.* at 645. In the original support order, the court required the obligor-father to pay $679 monthly for the two children until a child

reached the age of twenty-two. *Id.* When only one child was eligible for support, the decree provided his support reduce to $495. *Id.* One of the children married at age twenty and, therefore, was no longer a subject of support. *Id.* at 650. However, the obligor continued to pay $679, instead of $495, monthly for almost four years until the obligor finally filed a modification action. *Id.* at 645.

The obligor asked that he receive credit for his many months of overpaying support. The Supreme Court, reviewing numerous cases from other jurisdictions, refused to grant the credit. "James testified he overpaid because he 'wanted [his] son to continue to have the same standard of living he had had before.' It was undisputed that James knew Nicole married, knew his support obligation was $495 per month after Nicole married, and he knew he was overpaying his support." *Id.* at 651. "This is not the kind of case in which courts normally grant an exception to the general no-credit-for-voluntary-overpayment rule to do equity, and we see no reason to make an exception in this case." *Id.* at 651.

In other cases, Iowa courts have given a child support payer credit for overpayment if the court finds that the overpayment was involuntary due to an error in calculating the support. *Pals*, 714 N.W.2d at 651 (holding no credit for voluntary payments except "when the equities of the circumstances demand it and when allowing a credit will not work a hardship on the minor children" (quoting *Griess v. Griess*, 608 N.W.2d 217, 224 (Neb. 2000))); *see McRill v. Needham-Delorenzo*, No. 16-0015, 2016 WL 5931383, at *3 (Iowa Ct. App. Oct. 12, 2016) (finding payer should receive credit for overpayment).

K. Interest on accrued monthly support obligations

In 1997, the Iowa Legislature amended section 535.5 governing interest on judgments and decrees. 1997 Iowa Legis. Serv. ch. 175, § 232; ch. 197, §§ 2 - 4 (West). These amendments applied to actions filed after July 1, 1997. *Id.* ch. 197, § 16. Thus, the applicable statute dictates:

> Interest on periodic payments for child, spousal, or medical support shall not accrue until thirty days after the payment becomes due and owing and shall accrue at a rate of ten percent per annum thereafter. Additionally, interest on these payments shall not accrue on amounts being paid through income withholding pursuant to chapter 252D for the time these payments are unpaid solely because the date on which the payor of income withholds income based upon the payor's regular pay cycle varies from the provisions of the support order.

Iowa Code § 535.3(2). When a person makes partial payments toward his or her child support arrearage, the "United States Rule" does *not* apply, so payments were to be applied first to back support and then to interest. *State ex rel. Benson v. Jager*, 865 N.W.2d 608, 616 (Iowa Ct. App. 2015).

L. The parent awarded physical care of the child cannot be ordered to pay child support to the non-physical care parent.

***In re Marriage of Cook*, No. 23-0727, 2024 WL 707009 (Iowa Ct. App. Feb. 21, 2024) – Julie and Matt divorced in 2014 with a decree providing for joint legal custody and joint physical care of their two children. In 2018, Julie was granted physical care of the younger child, B.C., while the parties maintained joint physical care of the older child G.C. In 2022, Julie petitioned to modify Matt's child support obligation after G.C. aged out and the parties' incomes changed.**

Though she had primary physical care of B.C., the trial court ordered Julie to pay $573.41 per month in child support to Matt, treating the situation as joint physical care, even though the decree awarded Julie physical care. *Cook*, 2024 WL 707009, at *1. Julie appealed.

The court of appeals held that the trial court erred in ordering the parent with physical care (Julie) to pay child support to the noncustodial parent (Matt), which is incompatible with the child support guidelines. *Cook* at *2. The court of appeals modified the incorrect order by requiring Matt to pay Julie child support amount of $326.50 per month retroactive to April 2023, the date of the trial court's error. – NEW CASE

5. Termination of child support

A. Age 18 or 19?

Child support terminates when the child attains eighteen years of age, unless one of the statutory provisions described below apply. *In re Marriage of Ludwig*, 478 N.W.2d 416, 420 (Iowa Ct. App. 1991); *see also In re Marriage of Harless*, 251 N.W.2d 212, 213 (Iowa 1977) (holding that age of majority law in effect at time of dissolution decree governed divorced father's child support obligation; when age of majority at time decree was entered was 21 years, divorced father's child support obligation continued until his daughter reached age 21, despite change in law lowering age of majority to 18). Iowa Code section 598.1(9) provides that support shall continue for a child "between the ages of eighteen and nineteen 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 nineteen years of age[.]"

B. Dependent adult child

"A parent's legal obligation to support his or her children does not necessarily end when the child reaches the age of majority." *In re Marriage of Nelson*, 654 N.W.2d 551, 553 (Iowa 2002). Iowa law provides that a parent's obligation to support a child "may include support for a child of any age who is dependent on the parties to the dissolution proceedings because of physical or mental disability." Iowa Code § 598.1(9). "To determine whether a child is 'dependent,' we consider the child's ability to be gainfully employed and whether the child receives income or benefits from other sources." *Nelson*, 654 N.W.2d at 553. The Guidelines do not apply in determining support for adult dependent children. *In re Marriage of Hansen*, 514 N.W.2d 109, 111 (Iowa Ct. App. 1994); *In re Marriage of Davis*, 462 N.W.2d 703, 705 (Iowa Ct. App. 1990). Yet, while the guidelines do not govern the court's determinations of the appropriate support payments for an adult dependent child, they are instructive. *See Nelson*, 654 N.W.2d at 555. The support obligation for a child beyond his eighteenth birthday is based on his need for assistance and his parents' ability to contribute to this need. *Hansen*, 514 N.W.2d at 112.

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***In re Marriage of Bashore*, No. 23-1028, 2024 WL 3287561 (Iowa Ct. App. July 3, 2024). James and Loriel married in 2002. They have one child, F.A.B. James is 56 years old, in good health, and earns $164,000 annually in the Army National Guard. Loriel is 60 years old, has various health issues, and has not worked full-time outside the home since 2008 or 2009.**

F.A.B. is 18 years old and has various diagnosed conditions but is described as highly intelligent. Loriel opined that F.A.B. is a dependent adult; James disagreed. The district court concluded F.A.B. was a dependent adult child and ordered James to pay F.A.B. directly child support of $1591 per month. James appealed.

The court of appeals reversed the determination that F.A.B. is a dependent adult child and the corresponding child support order.

> **Nothing in the record goes directly to establish that F.A.B. is a dependent adult child, other than Loriel's long list of diagnoses that F.A.B. has received. But there is little to no evidence that specifically explained how the diagnoses translated to F.A.B. being unable to be gainfully employed and, thus, dependent on the support of her parents for life., finding insufficient evidence to establish F.A.B.'s inability to be gainfully employed.**

***Id.* at *6. Further, there was no testimony or an exhibit reflecting F.A.B.'s estimated monthly expenses. "Case law requires a determination of [F.A.B.'s] financial needs." *Id.* at *6 (citing *State ex rel. Moore v. McCampbell*, No. 09-1029, 2010 WL 2079701, at *3 (Iowa Ct. App. May 26, 2010)).**

Loriel was the party who requested support for F.A.B., so she bore the burden of proof. *Id.* at *6 (citing Iowa R. Civ. P. 6.904(3)(e) ("Ordinarily, the burden of proof on an issue is upon the party who would suffer loss if the issue were not established.")). The court of appeals concluded that Loriel did not meet her burden to establish that F.A.B. is a dependent adult child.

C. Emancipation of minor child

Support may terminate earlier than age eighteen if the child dies or otherwise becomes emancipated. "'Emancipation' as the term is used in the law of parent and child means the freeing of the child from the custody of the parent and from the obligation to render services to him." *Vaupel v. Bellach*, 261 Iowa 376, 154 N.W.2d 149, 150 (1967) (citations omitted); *see also Lipovac v. Iowa Ry. & Light Co.*, 202 Iowa 517, 210 N.W. 573, 575 (1926) ("'Generally the father, as head of the family, is entitled to the services of his minor children, or to their earnings, if by his permission they are employed by others. He is also under obligation to support his children during their minority. The right and obligation are correlative, and where the father neglects or refuses to support his child, denies him a home, or abandons him, so that he is obliged to support himself, the law implies an emancipation, and recalls the father's right to the child's services and earnings.'" (quoting *Swift & Co. v. Johnson*, 138 F. 867, 872-73 (8th Cir. 1905) (citations omitted))). All minors attain their majority by marriage. Iowa Code § 599.1 ("period of minority extends to the age of eighteen years"); *see also In re H.G.*, 601 N.W.2d 84, 88 (Iowa 1999) (holding that "marriage by a child during the pendency of a child in need of assistance proceeding does not divest the juvenile court of its jurisdiction"). With the exception of marriage, emancipation prior to age eighteen must be determined by a court. *Vaupel* at 151.

In 2009, the Iowa Legislature for the first time codified the means for a minor to emancipate himself or herself. 2009 Iowa Acts ch. 153 (S.F. 366). That Act is found in chapter 232C of the Iowa Code. A minor who is at least sixteen years-old, resides in Iowa, and is not a ward of the State may petition. Iowa Code § 232C.1(1). Section 232C.1(2) details the content of the petition. The court has the authority to stay the proceedings and order mediation between the parties, and/or require the department of human services to investigate allegations of abuse. § 232C.2. The court may emancipate if the minor proves

"by clear and convincing evidence that" it is in "the best interests of the minor" including a list of statutory factors. § 232C.3(1)-(2).

The legal effect of an emancipation, including the rights of the newly-emancipated minor, are found in section 232C.4. Despite emancipation, the emancipated minor remains subject the age restrictions regarding voting, gambling, alcohol, cigarettes/tobacco, and compulsory attendance in school. § 232C.4(3). Further, emancipation does not automatically make that emancipated minor subject to criminal prosecution as an adult. § 232C.4; *see* § 232.8 (guidelines to prosecute a juvenile as an adult). Emancipation terminates a person's obligation to pay child support for that emancipated child. § 232C.4(2).

Even with the new emancipation statute Iowa's developed common law rules seemingly remain in effect. Emancipation is established by the evidence and is determined on a case-by-case basis. *Vaupel*, 154 N.W.2d at 151. Factors that may be considered to determine emancipation include where the child is living, the extent to which the child is employed and expending his own funds. *Id.* However, the "fact alone that a child is outside the home expending his own money does not demonstrate emancipation." *Id.*; *see also Pearson v. Pearson*, 247 Iowa 437, 74 N.W.2d 224, 226–27 (1956). Also, emancipation is not necessarily a continuing status. *Id.* Even if established, it may be terminated at any time during the child's minority. *Id.*

D. Remarriage between the parents

When child support is established pursuant to a dissolution decree and the parents later remarry each other, the remarriage nullifies the prior divorce decree and any future support obligation. *In re Marriage of Helm*, 271 N.W.2d 725, 727 (Iowa 1978). However, accrued support owed as of the date of the remarriage is not nullified and remains an enforceable judgment against the obligor. *Greene v. Iowa Dist. Ct.*, 312 N.W.2d 915, 917-18 (Iowa 1981).

E. Other factors

***In re Marriage of Schuler*, 6 N.W.3d 338 (Iowa Ct. App. 2024). In the original dissolution decree, Scott agreed to pay Sarah child support for their two children, B. and A., terminable when a child turned 18 and graduated high school, married, died, or became self-supporting. At the time of the modification trial in April 2023, B. was 17 years old, had a child of her own, and was living with the 16-year-old father (G.) of B.'s child. However, B. and G. were still financially dependent on their respective parents, splitting their time residing in either Sarah's or G.'s parents' home.**

A. was 15 years old and had been accepted into a foreign exchange program for the upcoming school year, which would cost Sarah between $5,000-$10,000. Sarah did not expect or request from Scott outside of child support any financial contribution toward these expenses.

Regarding B., Scott argued that his child support obligation should end because B. had a child of her own. The court of appeals affirmed that Scott's support obligation for B. should continue, as she was not self-supporting based on her part-time job and relied on Sarah and G.'s parents for financial assistance. Further, B. having a child of her own and residing with the sixteen-year-old father "does not alter [Scott]'s support obligation to his minor child." ***Schuler*****, 6 N.W.3d at 340 (citing** ***Bedford v. Bedford*****, No. 07-1536, 2008 WL 681138, at *2 (Iowa Ct. App. Mar. 14, 2008) (finding child-support obligation did not terminate when child had a child of her own "out of wedlock" but still attended high school and depended on parents for financial support)).**

Regarding A., Scott argued that the court should deviate from the child support guidelines amount because B. was residing with G. and A. was studying abroad. The court held that Scott did not present evidence showing Sarah's support of the children would be significantly different, so there was no basis to deviate from the guidelines. ***Schuler*** **at 341. – NEW CASE**

Chapter 6 – Postsecondary Education Subsidy

1. In general

Iowa Code section 598.21F provides the trial court with the ability to order divorced parents to pay for a child's postsecondary education (college). *See In re Marriage of Briggs*, 225 N.W.2d 911, 913-14 (Iowa 1975) (citing the Iowa Legislature's first codification of support during a child's college years through 1972 amendments to then-section 598.1(2) that defined child support as terminating at age 18, but continuing if the child is attending college). The "Postsecondary education subsidy" means:

> 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 career and 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.

Iowa Code § 598.1(8); *see In re Marriage of Huss*, 438 N.W.2d 860, 862 (Iowa Ct. App. 1989) (interpreting the meaning of "full-time" to include an internship pursued during the course of study).

2. Constitutional – no violation of equal protection

Because the postsecondary education subsidy is purely a statutory, not common law, right, and it *only* applies to formerly married spouses, there have been several constitutional challenges to it. Nevertheless, the Iowa Supreme Court repeatedly has ruled that the subsidy is not unconstitutional on equal protection grounds. *Johnson v. Louis*, 654 N.W.2d 886, 891 (Iowa 2002) (concluding statute did not impermissibly discriminate against children whose parents were never married); *In re Marriage of Vrban*, 293 N.W.2d 198, 202 (Iowa 1980) (concluding statute did not impermissibly discriminate against children of divorced couples).

3. Determining the subsidy

A. Standing; timing

Each parent and the child, who would benefit from the subsidy, have standing to bring an application for the court to award a postsecondary education subsidy. *In re Marriage of Jacobs*, No. 16-2005, 2017 WL 5185435, at *2-*3 (Iowa Ct. App. Nov. 8, 2017); *In re Marriage of Kruse*, No. 17-0108, 2017 WL 4049234, at *1 (Iowa Ct. App. Sep. 13, 2017); *see* Iowa Code § 598.21F. Divorced parents can be ordered to provide defined financial support for their adult children so long as a child is older than seventeen years-old but less than twenty-three. *In re Marriage of Neff*, 675 N.W.2d 573, 579 (Iowa 2004).

B. Good cause

Under Iowa Code section 598.21F, the court must determine if good cause exists to award a postsecondary education subsidy. *In re Marriage of Murphy*, 592 N.W.2d 681, 684 (Iowa 1999). This threshold issue must be resolved before the court goes to the next step of calculating and ordering the parties' contributions. *Id.* To determine if good cause exists for a postsecondary education subsidy, the court next needs to consider the child's postsecondary educational ability, financial resources, and whether he or she is self-sustaining. § 598.21F(1); *In re Marriage of Longman*, 619 N.W.2d 369, 370 (Iowa 2000).

C. Calculating the amount

If good cause is shown for a subsidy, the court then determines the amount. *In re Marriage of Sullins*, 715 N.W.2d 242, 253–54 (Iowa 2006). Initially, Iowa courts have repeatedly held "a postsecondary 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, 371 (Iowa 2000) ("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 subsistence support for minor children."). Calculating the amount involves three steps:

> First, the court must ascertain "the cost of postsecondary education based upon the cost of attending an in-state public institution for a course of instruction leading to an undergraduate degree and shall include the reasonable costs for only necessary postsecondary education expenses." Iowa Code § 598.21F(2)(a).
>
> Second, the court must ascertain the amount of the child's reasonably expected contribution in light of "the child's financial

> resources, including but not limited to the availability of financial aid whether in the form of scholarships, grants, or student loans, and the ability of the child to earn income while attending school." *Id.* § 598.21F(2)(b).
>
> Third, the court must subtract the child's expected contribution from the total cost of postsecondary education. *Id.* § 598.21F(2)(c). The court must then allocate the remaining costs between the parents in an amount not to exceed thirty-three and one-third percent of the total cost of postsecondary education. *Id.* This appeal calls us to review the three-step analysis applied by the district court.

In re Marriage of Larsen, 912 N.W.2d 444, 449 (Iowa 2018).

Regarding the first step, "[w]hen a child is attending an in-state private or out-of-state institution, step one is the same as it is in cases in which a child is attending an in-state public institution, which is to calculate the reasonable and necessary cost of attending an in-state public institution." *In re Marriage of Ossowski*, 987 N.W.2d 435, 438 (Iowa Ct. App. 2022). Clarifying "cost", the Supreme Court in *Larsen* explained the parents fought "over the specific costs for [college-bound child] to attend an in-state public institution" namely $1920 in sorority dues. *Id.* at 450. Effectively overruling years of case law, the Iowa Supreme Court held "arguing over the specific costs is unnecessary." *Id.* at 449 (citing Iowa Code § 598.21F(2)(a)). In its place, the Supreme Court ruled:

> the cost of attendance as published by each institution pursuant to 20 U.S.C. § 1087ll 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 section 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 for a course of instruction for that particular student, the court may vary from the presumptive cost.

Id. at 450; *cf. In re Marriage of Neff*, 675 N.W.2d 573, 579 (Iowa 2004) (accepting Iowa's state universities' award letters as an accurate estimate of costs, including estimates of personal expenses and transportation); *Vannausdle*, 668 N.W.2d at 886. 20 U.S.C. § 1087ll requires public universities to determine and publish the specific costs to attend per that statute.

20 U.S.C. § 1087ll defines the term "cost of attendance" as:

> (1) tuition and fees normally assessed a student carrying the same academic workload as determined by the institution, and including costs for rental or purchase of any equipment, materials, or supplies required of all students in the same course of study;

> (2) an allowance for books, supplies, transportation, and miscellaneous personal expenses, including a reasonable allowance for the documented rental or purchase of a personal computer, for a student attending the institution on at least a half-time basis, as determined by the institution;
> (3) an allowance (as determined by the institution) for room and board costs incurred by the student which–
> (A) shall be an allowance determined by the institution for a student without dependents residing at home with parents;
> (B) for students without dependents residing in institutionally owned or operated housing, shall be a standard allowance determined by the institution based on the amount normally assessed most of its residents for room and board;
> (C) for students who live in housing located on a military base or for which a basic allowance is provided under section 403(b) of Title 37, shall be an allowance based on the expenses reasonably incurred by such students for board but not for room; and
> (D) for all other students shall be an allowance based on the expenses reasonably incurred by such students for room and board;

20 U.S.C. § 1087ll. "In summary, we hold the presumptive cost of attending an in-state institution under section 598.21F(2)(a) is the cost of attendance as published by the in-state public institution." *Larsen* at 451. Utilizing that definition, the *Larsen* Court then determined that there was no factual basis to increase – include sorority dues – from the presumed cost of attendance. *Id.*

For the second step,

> the process is only slightly more complex when a child is attending an in-state private or out-of-state institution in comparison to the calculation when the child is attending an in-state public institution. Even though we use the cost of attending an in-state public institution in step one, calculating the child's expected contribution in step two when attending an in-state private or out-of-state institution requires a determination of whether certain contributions are specific to that institution.

In re Marriage of Ossowski, 987 N.W.2d 435, 439 (Iowa Ct. App. 2022).

The *Larsen* Court faced the issue of whether the child's access to unsubsidized loans should be considered in determining the amount the child can reasonably expect to contribute. *See* § 598.21F(2)(b). The Court rejected that argument because the parents had saved "$63,000 in a § 529 account" for the child's college and it made "little sense to require" the child "to accumulate a substantial debt burden in her college years when her parents had prudently set aside substantial funds for her postsecondary education in an amount

sufficient to avoid such a result." *Id.* at 451; *see* 26 U.S.C. § 529 (exempting qualified tuition programs from income taxes).

The *Larsen* Court also expressly found that the child's ability to earn income, including summer work, should have been included to determine the subsidy. *Id.* at 452-53. However, the Court rejected the father's argument that child support he paid to the mother "over the summer months prior to the 2016–2017 school year should be included as a contribution by [the child] to her education." *Id.* at 453. Finally, the Court held that a portion of the child's savings ($500 of $2119.11) should be included as part of the child's contribution. *Id.*

The step is the same regardless of whether the child is attending an in-state public, in-state private, or out-of-state institution. *In re Marriage of Ossowski*, 987 N.W.2d 435, 440 (Iowa Ct. App. 2022). The amount that remains is apportioned to the parents, with a ceiling for each parent equal to one-third of the cost of attending an in-state public institution. § 598.21F(2)(c); *In re Marriage of Murphy*, 592 N.W.2d 681, 684 (Iowa 1999); *In re Marriage of Wood*, 567 N.W.2d 680, 682 (Iowa Ct. App. 1997). It is the court's discretion governed by the intent to be equitable between the parties based on each parent's unique financial circumstances. For example, in determining a mother's contribution to her child's college expenses, the trial court properly credited the mother for providing a "home base" for the children living at home during the school year, thus saving the expense of room and board normally paid to the college. *Wood*, 567 N.W.2d at 683-84. In another case, a student attending an out-of-state college received loans and federal work-study money in excess of the total costs of attending a public, in-state college. *In re Marriage of Sullins*, 715 N.W.2d 242, 254 (Iowa 2006). With these facts, the Court found the statute did not require the parents to contribute to the college education costs when there was no evidence the student would not have been able to contribute similar amounts to a college education at an in-state college. *Id.* at 255. The *Sullins* Court also noted that the statutory scheme to calculate a postsecondary education subsidy can fall short of providing a complete solution in all circumstances. *Id.* at 254. This is particularly true for students of divorced parents who desire to attend an out-of-state institution or a private, in-state college. *Id.*

Applying the foregoing three-steps to the facts, the *Larsen* Court set the subsidy as follows:

$19,750.00 reasonable costs of school, *see* 20 U.S.C. § 1087ll
-$7,025.00 child's expected contribution, *see* § 598.21F(2)(b).
$12,725.00 to be apportioned between parents, *see* § 598.21F(2)(c).
To determine statutory cap of each parent's liability:
$19,750.00 reasonable costs of school, *see* 20 U.S.C. § 1087ll
x 33 1/3 % to determine cap, *see* § 598.21F(2)(c).
$6,583.33 cap on each parent's liability, *see* § 598.21F(2)(c).

Based on the financial situation of each party, the court then determined each parent should pay one-half of the amount to be apportioned between the parents – $6,362.50 ($12,725÷2). *Id.* at 453-54. The statutory limit of "thirty-three and one-third percent of the total cost of postsecondary education" each parent could be ordered to pay is $6,583.33. *See* § 598.21F(2)(c). Because $6,362.50 is less than the cap of $6,583.33, the Supreme Court ordered each parent to pay $6,362.50. *Id.* at 454.

The parties may have to revisit the subsidy's calculations in the future due to changes in expenses as well as each party's and the child's ability to contribute.

> In recent years, college education expenses have increased between three and six percent each year. With the ever-increasing costs of sending a child to college, it would be difficult to set a specific dollar amount of an obligation four years before the child attends college. Additionally, because Iowa Code section [598.21F] applies, the court is required to consider the amount, if any, a child can contribute to his education.

In re Marriage of Rosenfeld, 668 N.W.2d 840, 848 (Iowa 2003) (code sections updated to reflect current citations and notes omitted).

> [I]n numerable other changes – such as alterations in financial aid or the financial status of the student – may occur, creating conditions that were not present in the first year of college. For this reason, we recognize that the postsecondary education subsidy contemplated by the parties and ordered by the court may need to anticipate such changes. In the absence of an agreed-upon method for anticipating these changes, the subsidy may need to be revisited and revised on an annual basis.

Vannausdle, 668 N.W.2d at 889 n.1.

D. Repudiation as a defense to subsidy

Iowa Code section 598.21F(4) states: "A postsecondary 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." *See In re Marriage of Pendergast*, 565 N.W.2d 354, 356–57 (Iowa Ct. App. 1997); *see also In re Marriage of Baker*, 485 N.W.2d 860, 862 (Iowa Ct. App. 1992) (finding father not required to pay college expenses of children who consciously and intentionally disowned him); *In re Marriage of Kruse*, No. 17-0108, 2017 WL 4049234, at *2 (Iowa Ct. App. Sep. 13, 2017) (rejecting the repudiation defense finding that father, through his failure to exercise his visitation rights, caused breakdown in relationship with daughter, so subsidy was justified); *In re Marriage of Shipley*, No. 15-1418, 2016 WL 757416, at *4

(Iowa Ct. App. Feb. 24, 2016) ("Divorcing parents may agree, equitably and in the best interest of their children, that they would 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."). In *Pendergast*, the court held a daughter repudiated her father when she completely cut off her relationship with him, asked for the return of any personal property still in her father's possession, wrote him a letter telling him she "no longer considered him to be her father," failed to acknowledge him at funerals for his parents, and did not list him as a parent in the program for her high school graduation. *Id.*

4. Retroactive recovery & reimbursement

The court can calculate and order the amount owed retroactively to the start of the child's postsecondary education. *See In re Marriage of Mullen-Funderburk*, 696 N.W.2d 607, 611 (Iowa 2005); *In re Marriage of Neff*, 675 N.W.2d 573, 580 (Iowa 2004); *In re Marriage of McFadon*, No. 17-0299, 2018 WL 2085060, at *2 (Iowa Ct. App. May 2, 2018).

> The determination of each parent's obligation shall be made as to both prior years and future years. Credit shall be given for college expenses already advanced by either parent. To avoid inequity, the court may reconcile the respective past obligations by requiring one parent to indemnify the other for payments beyond that required under the postsecondary education subsidy that the court retroactively establishes for prior college years, but only to the extent that the indemnifying parent has underpaid that parent's own share of the subsidy.

Mullen-Funderburk, 696 N.W.2d at 611.

However, a parent cannot seek reimbursement from the other parent claiming that she advanced the other parent's obligation prior to the court's establishment of subsidy. *Neff*, 675 N.W.2d at 577-78 (affirming *In re Marriage of Longman*, 619 N.W.2d 369 (Iowa 2000)). In *Neff*, the parties agreed that their respective obligations to pay for their children's college expenses was capped at 33 1/3% and the ex-wife advanced both her and her ex-husband's alleged share of the subsidy. Two years later, she asked the court to require her ex-husband to reimburse to her. *Id.* at 575-76. The district court ordered the ex-husband to reimburse her $3,874. *Id.* at 576. The Supreme Court vacated that award because no court order had ever obligated her ex-husband to pay anything. *Id.* at 577-78. "There is a manifest difference in stipulating that a cap and a code section apply, as opposed to *fixing* the amount of a postsecondary education subsidy." *Id.* at 577 (emphasis in original). The lesson of *Neff*: advise clients with college-bound children to have the court determine the amount each parent must pay before or as soon as those actual costs are

incurred, and a parent should never advance the “defaulting” parent’s portion in hopes of receiving reimbursement later. *See Id.* at 577-78.

Chapter 7 – Post Decree Proceedings

1. Motion to Set Aside or Vacate Judgment.

Iowa Rule of Civil Procedure 1.1012(2) provides that a final judgment may be vacated if irregularity or fraud occurred in obtaining the judgment or order. An irregularity occurs when

> a party suffers an adverse ruling due to action or inaction by the court or court personnel. Second, the action or inaction must be contrary to (1) some prescribed rule, (2) mode of procedure, or (3) court practice involved in the conduct of a lawsuit. Finally, the party alleging the irregularity must not have caused, been a party to, or had prior knowledge of the breach of the rule, mode of procedure, or practice of the court.

In re Marriage of Cutler, 588 N.W.2d 425, 429 (Iowa 1999) (citation omitted).

> Fraud "covers the conduct of a party who obtains judgment." *Id.* at 429. 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.

Id. at 430; *see also In re Marriage of Wagner*, 604 N.W.2d 605, 610 (Iowa 2000) ("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."). Which rule applies depends on whether the fraud is extrinsic or intrinsic. *In re Marriage of Hutchinson*, 974 N.W.2d 466, 483 (Iowa 2022) (holding that husband's perjury in his affidavit of financial status was intrinsic fraud).

2. Motion to reconsider, enlarge, or amend a decree

Iowa Civil Procedure Rule 1.904(2) provides that "the findings and conclusions may be reconsidered, enlarged, or amended and the judgment or decree modified accordingly or a different judgment or decree substituted. Resistances to such motions and replies may be filed and supporting briefs may be served …" A rule 1.904(2) motion is "timely if filed within 15 days after the filing of the order, judgment, or decree to which it is directed." R. 1.904(3). "Successive rule 1.904(2) motions by a party are prohibited unless the court has modified its order, ruling, judgment, or decree and the subsequent rule 1.904(2) motion is directed only at the modification." R. 1.904(4).

3. Motion to set aside default

Iowa Rule of Civil Procedure 1.977 states: "On motion and for good cause shown, and upon such terms as the court prescribes, but not ex parte, the court may set aside a default or the judgment thereon, for mistake, inadvertence, surprise, excusable neglect or unavoidable casualty." The motion must be filed within 60 days of the judgment's entry. R. 1.977. Such a motion "shall not affect the finality of the judgment or impair its operation." *Id.* "The burden to support setting a judgment aside under rule 1.977 is lighter than the burden to vacate a judgment under rule 1.1012." *In re Marriage of Siddall*, No. 11-1860, 2012 WL 3026414, at *4-*5 (Iowa Ct. App. July 25, 2012).

4. Appeal

A. Final order

A party may appeal as a matter of right only when the order or judgment is final. *See* Iowa R. App. P. 6.103(1); *In re Marriage of Welp*, 596 N.W.2d 569, 572 (Iowa 1999). "A 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." *Welp*, 596 N.W.2d at 572 (*citations & footnote omitted*); *see also Catlin v. United States*, 324 U.S. 229, 233 (1945) (defining a "final decision" as one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment"); *see Lyon v. Willie*, 288 N.W.2d 884, 887 (Iowa 1980) ("Two final orders are possible in a single case, one putting it beyond the power of the court to put the parties in their original positions in relation to a specific issue, and the other adjudicating remaining issues in the case.").

> A final order or judgment on an application for attorney fees entered after the final order or judgment in the underlying action is separately appealable. The district court retains jurisdiction to consider an application for attorney fees notwithstanding the appeal of a final order or judgment in the action. If the final order or judgment in the underlying case is also appealed, the party appealing the attorney fee order or judgment must file a motion to consolidate the two appeals.

Iowa R. Civ. P. 6.103(3).

Orders on temporary matters concerning child or spousal support or attorney fees *are final* orders. *In re Marriage of Denly*, 590 N.W.2d 48, 49-50 (Iowa 1999); *In re Marriage of Winegard*, 257 N.W.2d 609, 614 (Iowa 1977); Iowa R. App. P. 6.103. If an appeal is not taken within thirty days of the temporary order's filing, the right to appeal is lost. Iowa R. App. P. 6.101(1)(b). In contrast,

temporary matter orders concerning child custody *are not* final orders that can be appealed as a matter or right. *Denly*, 590 N.W.2d at 50-51; see Iowa R. App. P. 6.103(1). Therefore, an appeal from a temporary custody order is treated as an application for interlocutory review. *Id.*; *see* Iowa R. App. P. 6.103(4), .104.

B. Jurisdiction during appeal

"When an appeal is perfected, the trial court loses jurisdiction over the merits of the controversy." *In re Marriage of Courtney*, 483 N.W.2d 346, 348 (Iowa Ct. App. 1992). Perfection of the appeal divests the district court of authority to consider either (1) "any post-trial motions filed after the notice of appeal," or (2) any post-trial motion previously filed by the appellant, which are "deemed … waived and abandoned. …" *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 628 (Iowa 2000). If the trial court modifies a decree that has been appealed while the appeal is pending, that modification order is a nullity because the trial court had lost jurisdiction. *In re Marriage of Russell*, 479 N.W.2d 592, 596 (Iowa Ct. App. 1991). If an immediate modification is necessary while an appeal is pending, any "party may apply to the Iowa Supreme Court [or court of appeals if the case has been transferred] for a limited remand on the particular issue(s) sought to be modified or addressed." *Courtney*, 483 N.W.2d at 348 (citing *In re Marriage of Novak*, 220 N.W.2d 592, 596 (Iowa 1974)).

C. Failure to cross-appeal

"Failure to bring a cross-appeal in the manner provided by the Rules of Civil Procedure precludes examination of this question upon appeal. Review is de novo … but it is such only on matters properly presented to this court." *In re Novak's Marriage*, 220 N.W.2d 592, 598 (Iowa 1974) (citing *In re Marriage of Williams*, 199 N.W.2d 339, 346 (Iowa 1972) (holding that wife's failure to bring cross appeal from trial court's decree in marriage dissolution proceeding precluded her raising on appeal issue of award of custody of minor son to husband)); *see In re Marriage of Sjulin*, 431 N.W.2d 773, 777 (Iowa 1988) (refusing to consider whether alimony should be increased when appellee failed to cross appeal) (citing *Sandler v. Sandler*, 258 Iowa 84, 86-87, 137 N.W.2d 591, 592 (1965)); *Anthony v. State*, 374 N.W.2d 662, 664 (Iowa 1985) (noting that a party that does not file a cross-appeal is precluded from obtaining a more favorable result on appeal); *In re Marriage of Winegard*, 257 N.W.2d 609, 618 (Iowa 1977); *see also Becker v. Central States Health & Life Co. of Omaha*, 431 N.W.2d 354, 356 (Iowa 1988), *overruled in part by Johnston Equip. Corp. of Iowa v. Industrial Indem.*, 489 N.W.2d 13, 16 (Iowa 1992) ("a *successful* party need not cross-appeal to preserve error on a ground urged but ignored or rejected in trial court") (emphasis added).

D. Effect on the appealed judgment after an appeal closes

"After appellate review of a trial court's decision is concluded, the district court has inherent power to enforce the judgment but not to render a new judgment." *In re Marriage of Hoffman*, 515 N.W.2d 549, 551 (Iowa Ct. App. 1994) (*citations omitted*). The court on remand should interpret the mandate in accordance with the context of the proceedings and should take into account the appellate court's opinion and the circumstances it embraces. *In re Marriage of Davis*, 608 N.W.2d 766, 769 (Iowa 2000) (citations & quotation marks omitted); *see City of Okoboji v. Iowa Dist. Ct.*, 744 N.W.2d 327, 331-32 (Iowa 2008); *see also In re Marriage of Drenter*, No. 19-1037, 2020 WL 2062106, at *1 (Iowa Ct. App. Apr. 29, 2020) (holding that the district court lacked authority to make "its own determination of whether appellate attorney fees should be awarded" because the court of appeals "had already determined appellate attorney fees should be awarded").

E. Spousal/child support during appeal

Iowa's appellate courts as well as trial courts have jurisdiction to grant temporary alimony or legal fees of the other party while an appeal is pending, even if an appeal bond has stayed enforcement proceedings to collect support under the appealed district court ruling. *In re Marriage of McCurnin*, 681 N.W.2d 322, 331-32 (Iowa 2004); *In re Marriage of Spiegel*, 553 N.W.2d 309, 321 (Iowa 1996); *see also In re Marriage of Shanks*, 805 N.W.2d 175, 179 (Iowa Ct. App. 2011); *but see In re Marriage of Kats*, No. 21-0217, 2022 WL 1484043, at *10 (Iowa Ct. App. May 11, 2022) (holding that district court lacked authority to award temporary alimony when the appellant has posted a supersedeas bond because, under *Spiegel*, only the supreme court had such authority). Unless a party seeking temporary alimony pending appeal "shows a need for such alimony", the opposing party may use the supersedeas bond as a defense to the enforcement of a decree for alimony. *McCurnin* at 332.

F. Appellate Waiver Doctrine

"[W]here 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. of Am.*, 644 N.W.2d 299, 300 (Iowa 2002). "However, this rule is subject to an exception. 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). "Payment of a judgment under compulsion does not amount to waiver of the right to appeal." *Hegtvedt v. Prybil*, 223 N.W.2d 186, 188 (Iowa 1974).

5. Contempt proceedings

A. 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 Iowa Code chapter 665.

(1) Chapter 665

This chapter provides a comprehensive procedure for contempt proceedings. Section 665.4 permits punitive sanctions for past disobedience to court orders. Section 665.5 permits coercive sanctions to encourage performance of affirmative acts required by an order. *Amro v. Iowa Dist. Ct.*, 429 N.W.2d 135, 139 (Iowa 1988).

(2) Violation of protective order

Iowa Code 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. Section 664A.7(3) provides that if a person is found guilty of violating a no-contact order, the person must serve a mandatory minimum jail sentence of seven consecutive days, and deferred judgments and sentences are forbidden on the mandatory minimum sentence. Section 664A.7(4) provides that if a person is found in contempt for violation of a 664A.2 civil protective order, the person shall serve a jail sentence, served on consecutive days, and may be ordered to pay plaintiff's attorney's fees and court costs. Alternatively, the court may convict the person of a simple misdemeanor subjecting the defendant to the penalties of a simple misdemeanor. *See* Iowa Code § 664A.7(5). However, a "person shall not be held in contempt or convicted of violations under multiple no-contact orders, protective orders, or consent agreements, for the same set of facts and circumstances that constitute a single violation." § 664A.7(6).

(3) Violation of dissolution decree

Section 598.23(1) limits the maximum punishment for punitive sanctions under section 665.4 to 30-day jail terms. The court may impose as an "alternative to punishment for contempt" such remedies as withholding income, modifying visitation rights, transferring custody, contact the child through a third party, or require the parties to mediate future issues. Iowa Code § 598.23(2).

Section 598.23A 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. The court may also "[E]njoin the contemnor from engaging in the exercise of any activity governed by a license."

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. Ct.*, 584 N.W.2d 562, 563-64 (Iowa 1998) (former wife punished for selling assets awarded to husband in decree).

B. Appealing a contempt case

"No appeal lies from an order to punish for a contempt, but the proceedings may, in proper cases, be taken to a higher court for revision by certiorari." Iowa Code § 665.11. "It is clear section 665.11 proscribes appeal only when a defendant is found in contempt." *State v. Iowa Dist. Ct.*, 231 N.W.2d 1, 4 (Iowa 1975). When "the application to punish for contempt is dismissed, a direct appeal is permitted." *Id.*

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 will give district courts the ability to fashion remedies prior to sentencing without losing jurisdiction. *Rater v. Iowa Dist. Ct.*, 548 N.W.2d 588, 590 (Iowa Ct. App. 1996).

6. Criminal Liability

Iowa Code § 710.6. Violating custodial order

1. A relative of a child who, acting in violation of an order of any court which fixes, permanently or temporarily, the custody or physical care of the child in another, takes and conceals the child, within or outside the state, from the person having lawful custody or physical care, commits a class "D" felony.

2. A parent of a child living apart from the other parent who conceals that child or causes that child's whereabouts to be unknown to a parent with visitation rights or parental time in violation of a court order granting visitation rights or parental time and without the other parent's consent, commits a serious misdemeanor.

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***State v. Kerlin*, No. 23-1027, 2024 WL 4220585 (Iowa Ct. App. Sep. 18, 2024). Brienna Kerlin (Defendant-Appellant) and Charles Barrett (father of their child, B.B.) shared custody of B.B. per a 2016 decree granting Barrett physical care. The decree allowed deviations from the custody schedule upon mutual agreement.**

In January 2022, Kerlin agreed to keep B.B. for 3-4 days while Barrett moved homes. Barrett claimed Kerlin refused to return B.B. after this period. Kerlin blocked Barrett's attempts to retrieve B.B., applied for a protective order against him (later dismissed), and changed B.B.'s school and residence without informing Barrett. Barrett contacted law enforcement, but they advised him to seek legal action, which he could not afford. Barrett eventually involved the county attorney, leading to criminal charges against Kerlin for violating a custodial order, per Iowa Code section 710.6.

The State presented evidence that Kerlin concealed B.B. from Barrett by refusing access, moving without providing an address, and making unilateral decisions about B.B.'s schooling. Kerlin argued that Barrett knew B.B.'s whereabouts, had contact through messages, and failed to retrieve B.B. due to his own lack of stable housing.

The court of appeals affirmed the conviction ruling that substantial evidence supported the finding that Kerlin concealed B.B. by: 1) Refusing to return B.B. after their agreement expired; 2) Preventing Barrett's access through her boyfriend; 3) Relocating and changing schools without informing Barrett, despite claiming otherwise. – NEW CASE

Chapter 8 – Modification

1. Jurisdiction

A. Subject matter jurisdiction

(1) General

While a decree of dissolution of marriage is a final order, the district court retains subject matter jurisdiction to modify orders regarding child custody, visitation, child support, and alimony. *In re Marriage of Meyer*, 285 N.W.2d 10, 10–11 (Iowa 1979).

(2) Child support

Regarding child support, if another state has a child support order in place concerning the parties and the child, then Iowa may not have jurisdiction on that issue. The federal Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 U.S.C. § 1738B, determines which state has authority to modify support once it has been established in any state. In very basic terms, once a child support order has been entered, the state issuing the order retains "continuing exclusive jurisdiction" so long as one of the parties continues to reside in that state. *See In re Marriage of Zahnd*, 567 N.W.2d 684, 687–88 (Iowa Ct. App. 1997) (holding that Iowa court in pending dissolution of marriage action lacked authority to set child support when support had previously been set by administrative order in Virginia).

(3) Child custody/physical care/visitation

If a party attempts to modify an out-of-state custody order in an Iowa court, the party must satisfy the requirements of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Iowa Code chapter 598B, and the Federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A. Both statutes concern an Iowa court's subject matter jurisdiction that can be challenged at any time and cannot be waived "even by consent." *In re Jorgensen*, 627 N.W.2d 550, 554 (Iowa 2001); *see In re B.C.*, 845 N.W.2d 77, 79 (Iowa Ct. App. 2014). "Jurisdictional requirements are mandatory, not discretionary." *B.C.* at 79. If the court does not have jurisdiction it is required to dismiss the action. *Id.*

Interpreting the UCCJEA's predecessor (the UCCJA which was repealed in 1999) and the PKPA, the *Jorgensen* Court discussed the analysis needed for Iowa to modify the out-of-state order. *Id.* at 554-57. The primary

purpose of the limitation on an Iowa court's ability to modify out-of-state order is to prevent forum shopping or conflicts between several states in determining custody. *See* Iowa Code § 598B.202 (providing that if Iowa has proper jurisdiction to make an initial custody determination, Iowa shall retain "exclusive, continuing jurisdiction").

The first step is to determine whether the Iowa court must give "full faith and credit" to the out-of-state order pursuant to 28 U.S.C. § 1738A(c)(2). *Jorgensen* at 557 (citing *Thompson v. Thompson*, 484 U.S. 174, 177, 108 S. Ct. 513, 515, 98 L. Ed. 2d 512, 518–19 (1988)); *see* U.S. Const. art. IV, § 1. If the PKPA does not require the Iowa court to give credit to the out-of-state order, then the court must ascertain if Iowa has jurisdiction under the UCCJEA. *See* Iowa Code § 598B.203.

B. Venue

"Venue shall be in the county where either party resides. Iowa Code §598.2; *In re Marriage of Engler*, 532 N.W.2d 747, 749–50 (Iowa 1995). The Supreme Court discussed the play between sections 598.2 and 598.25 in *Niles v. Iowa Dist. Ct.*, 683 N.W.2d 539 (Iowa 2004); *see also In re Marriage of Fleming*, No. 17-1200, 2018 WL 1433090, at *2-*3 (Iowa Ct. App. Mar. 21, 2018) (discussing doctrine of forum non conveniens to change venue).

C. Notice

The parties to a modification action are entitled to notice and a reasonable opportunity to appear and be heard before changes to the original decree are made. *See In re Marriage of Garretson*, 487 N.W.2d 366, 367 (Iowa Ct. App. 1992). The State too is entitled to notice. *See* Iowa Code § 598.21C(3). If child support payments have been assigned to the State or the Child Support Recovery Unit is providing services to the child, the State is a *necessary party* to the modification. *Id.* If notice is not given to the State, the modification order is *void*. *Id.*

2. Modification of property division

A court's final property division is not subject to modification. Iowa Code § 598.21(7); *In re Marriage of Full*, 255 N.W.2d 153, 156 (Iowa 1977) (citing *Knipfer v. Knipfer*, 259 Iowa 347, 355, 144 N.W.2d 140, 144 (1966)). A dissolution decree settles all property rights as between the parties. "If title is left undisturbed by the divorce decree], it is, in effect, adjudged in the party who holds it. In other words, property rights are settled and are adjudged in a divorce decree whenever the parties own property." *In re Marriage of Ruter*,

564 N.W.2d 849, 851 (Iowa Ct. App. 1997) (quoting *Prochelo v. Prochelo*, 346 N.W.2d 527, 529 (Iowa 1984)).

"If the dissolution decree is not appealed, its property division is not subject to modification unless it falls under one of two exceptions[.]" *In re Marriage of Hutchinson*, 974 N.W.2d 466, 469 (Iowa 2022) (detailing how fraud is proven to vacate a property division). First, a petition for relief at law is commenced within one year after entry of decree (Iowa Rules of Civil Procedure 1.1012–.1013); or (2) a petition is commenced for relief with an independent action in equity based on extrinsic fraud. *Id.*; *In re Marriage of Knott*, 331 N.W.2d 135, 136–37 (Iowa 1983); *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998) ("[O]nce set, absent fraud, duress, coercion, mistake, or other similar grounds which would support modification of an ordinary judgment, property settlements in dissolution decrees are not subject to modification."); *see also In re Marriage of Prendergast*, 380 N.W.2d 431, 433 (Iowa Ct. App. 1985) (listing cases involving mistakes that justified a modification of property division); 7); *Simon v. Simon*, No. 15-0814, 2016 WL 1703521, at *1 (Iowa Ct. App. Apr. 27, 2016) (noting collateral attacks on the property division are generally impermissible).

3. General legal principles – Custody, Physical Care, Visitation, Alimony, Child Support

A. Substantial change in circumstances

The following principles are applicable to all child custody, physical care, and support modification actions:

> (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be permanent or continuous rather than temporary; (5) [for support cases] the change in financial conditions must be substantial; and (6) the change in circumstances must not have been within the contemplation of the trial court when the original decree was entered.

In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983). A party who seeks a modification of child custody, physical care, or support must establish those foregoing factors by a preponderance of the evidence. *In re Marriage of Walters*, 575 N.W.2d 739, 741 (Iowa 1998) (modifying child support). An applicant is required to establish "a substantial change in the circumstances of the parties since the entry of the decree or of any subsequent intervening proceeding that considered the situation of the parties upon application for the

same relief." *In re Marriage of Maher*, 596 N.W.2d 561, 564–65 (Iowa 1999); *In re Marriage of Lee*, 486 N.W.2d 302, 304 (Iowa 1992) (noting a change of circumstances is measured from the last order entered); *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983); *Shepard v. Gerholdt*, 244 Iowa 1343, 60 N.W.2d 547, 549 (1953). In other words, a modification is *not a retrial* of the last time the court decided the issue. *See Id.*

Courts disapprove of provisions in dissolution decrees that address "temporary matters" or future contingencies that permit a modification without a showing of a change in circumstances. *In re Marriage of Schlenker*, 300 N.W.2d 164, 165 (Iowa 1981); *In re Marriage of Vandergaast*, 573 N.W.2d 601 (Iowa Ct. App. 1997). The court of appeals ruled:

> 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, 237 (Iowa Ct. App. 2000) (emphasis in original); *see Hoffman v. Muff*, No. 10-0503, 2010 WL 4104523 (Iowa Ct. App. Oct. 20, 2010) (striking automatic change of physical care provision based on a parent's relocation); *see also In re Cline*, 12-1575, 2013 WL 3272890, at *3 n.1 (Iowa Ct. App. June 26, 2013) (criticizing district court's order granting automatic switch of child's physical care from shared to father's-sole care when the child starts school, but nevertheless affirming the lower court because neither party challenged the legality of the district court's decision per *Thielges*). "Although stopping short of forbidding the practice," the Iowa Supreme Court has also "discouraged the retention of jurisdiction to modify divorce decrees without a showing of change of circumstances." *In re Marriage of Schlenker*, 300 N.W.2d 164, 165 (Iowa 1981) (citations omitted).

B. Custody or physical care

(1) Burden of proof

The principle governing any change of the existing court order is that the modification must be in the child's best interests. *In re Marriage of Bergman*, 466 N.W.2d 274, 275 (Iowa Ct. App. 1990); *see* Iowa R. App. P. 6.904(3)(o). Once child custody and physical care is set in a decree, Iowa Code chapter 598 expressly provides authority to modify that custody determination in only three sections: 598.21D ("Relocation of parent as grounds to modify order of child custody"), .41C ("Modification of child custody or physical care—active duty"), and .41D ("Assignment of visitation or physical care parenting time—parent serving active duty—family member"). Despite the limited statutory authority, Iowa courts have long permitted courts to modify existing child-

custody provisions, but only upon the moving party meeting a heavy burden of proof due to the rule that, once custody is fixed, it should be disturbed only for the most cogent reasons. *Bergman* at 275 (citing *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983)).

(2) Two steps

Changing the physical care of a child is one of the most significant modifications that can be undertaken in family law matters. *See In re Marriage of Thielges*, 623 N.W.2d 232, 236 (Iowa Ct. App. 2000). There are *two* legal steps to modify provisions in an existing decree governing a child's physical care. The party seeking the modification has the burden to prove *both* steps by a preponderance of evidence. *Id.* at 235; *see also In re Marriage of McDermott*, No. 14-2049, 2015 WL 4936055, at *2 (Iowa Ct. App. Aug. 19, 2015) ("We find no requirement in our statutes or case law that requires finding a parent is unfit in order to modify the physical care provisions of a dissolution decree.").

(a) First - substantial change in circumstances

First, the moving party must show that conditions have so materially and substantially changed since the last court order governing that issue that the child's best interests make it expedient to make the requested change. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The change must be permanent and directly relate to the child's welfare but must not have been contemplated by the court when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998).

(b) Second step differs based upon the type of litigation

The second element in the burden of proof depends upon what the existing custody order provides concerning the physical care arrangement between the parents, and the relief sought by the moving party.

Switching sole physical care from one parent to the other. If the existing order provides that one parent has physical care, the other parent has visitation rights, and the non-physical care parent seeks to switch physical care, then the non-physical care parent, as the moving party, must also prove that s/he is a superior parent to existing physical-care parent. *Thielges*, 623 N.W.2d at 238; *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa Ct. App. 1997); *see also In re Marriage of Ivins*, 308 N.W.2d 75, 78 (Iowa 1981); *Crary v. Curtis*, 199 N.W.2d 319, 320 (Iowa 1972); *In re Marriage of Gravatt*, 371 N.W.2d 836, 840 (Iowa Ct. App. 1985). Unlike an initial custody determination, in a modification action, the question is not which home is better, but whether

non-physical care parent can show an ability to minister to the child's needs that is *superior* to the existing physical-care parent. *Id.*

Modifying sole physical care with one parent to grant both parents' joint physical care. If the existing order provides that one parent has physical care, the other parent has visitation rights, and the non-physical care parent seeks to have joint physical care, then the moving party must also prove that joint physical care better serves the child's interests than keeping the child in the sole physical care of one parent. *In re Marriage of Schiltz*, No. 20-1740, 2021 WL 5105921, at *2 (Iowa Ct. App. Nov. 3, 2021); *In re Marriage of Kelly*, No. 19-1295, 2020 WL 3571863, at *3 (Iowa Ct. App. July 1, 2020).

Ending an existing joint physical care arrangement and awarding one parent sole physical care. If the existing order provides that the parents have joint physical care, and one or both of the parents seek to end joint physical care and have the child placed in one of the parent's physical care, then the moving parent's

> burden is not as heavy as a parent who seeks to wrest sole physical care from the other parent. … In other words, neither parent is at a disadvantage when asking to modify joint physical care to sole physical care.

In re Marriage of Lehman, No. 21-0468, 2021 WL 5919046, at *3 (Iowa Ct. App. Dec. 15, 2021) (clarifying *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002)).

(3) Examples

***In re Marriage of Rayburn*, No. 23-1458, 2024 WL 3688338 (Iowa Ct. App. Aug. 7, 2024). Cliff and Jennifer had three children, born in 2005, 2007, and 2009. The couple divorced in 2010 where the parties stipulated having joint legal custody and the children in being placed in Jennifer's physical care. In 2021, following several years during which Cliff did not receive the full visitation time afforded to him by the decree, Cliff filed a petition to modify the decree. He sought physical care and sole legal custody of the children. The district court denied his petition. Cliff appealed.**

This modification action stems from a series of ill-conceived choices by both parents that have snowballed into a complete deterioration of Cliff's relationship with the children. As the parties' divorce was pending, Cliff moved away from the children to Fremont, Nebraska. As the children grew older, their extracurricular activities began to interfere with Cliff's visitation schedule. By 2017, Cliff was receiving only about half of his visitation time. The reduced time partly resulted from Cliff allowing the children to skip visitation on

many occasions out of a desire to prevent conflict and support the children's activities. The mother contributed to this reduction in visitation time by following a pattern of asking the children whether they wanted to spend the required weekend with their father. The mother would then report that the children had declined the visit.

The evidence is clear that the mother has engaged in systematic efforts that have contributed to the children's alienation from the father. But the father is not blameless. His efforts to maintain his relationship with the children have been too limited.

The court of appeals found that the mother has undermined the father's relationship with the children for years by giving them the choice not to see him, failing to impose consequences when they refuse, and failing to communicate with the father about the children. When she takes the children to the exchange point for visits, she does not make sure they bring overnight bags, all but assuring they will return home with her instead of going with their father.

> While we condemn the mother's behavior, the father's limited efforts to keep in touch with the children persuade us that he has not met his burden to show he can provide superior care for the children. He has made minimal efforts to see the children outside of the required visits, and when these visits do not occur, he does not seek to make the time up. He has attended too few of the children's events and does not keep up communication with them through phone calls or other means. The father has not always provided a pleasant living environment for the children when they visit. The children are of the belief that their father does not love and care for them as a father should. While we have little doubt the mother has played a large role in the formation of this belief, the father bears responsibility as well. Ultimately, both parents have done a poor job facilitating the father's relationship with the children. The children are succeeding academically and in extracurriculars in the mother's care and, notwithstanding the difficult relationship with their father, they appear healthy, happy, and to be maturing well. We do not find that the father has proved by a preponderance of the evidence that he is better able to minister to the children's needs. … The children's interests are also best served by remaining with their mother.

Id. at *4 (citation omitted).

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***In re Marriage of Cowern*, No. 23-1240, 2024 WL 2045686 (Iowa Ct. App. May 8, 2024) – Brandis and Read divorced in 2019. Under their decree, the parties had joint physical care of their two children. In August 2021, Brandis petitioned to modify, seeking physical care of the children. Read's answer denied Brandis's allegations and did not include a cross-claim for modification. But he still requested that the children be placed in his physical care.**

The trial record showed that the parties' ability to communicate regarding their children did not improve post-divorce. For example, Read was barred from the children's school for an entire school year after two incidents involving Brandis – one when he created a scene upon seeing Brandis also present at the school, and another when discussing Brandis and another family inappropriately. Their decree's silence on child-exchange times showed repeated occurrences of the parties agreeing to a particular time or childcare schedule, only to have Read alter it at the last minute. Read often knowingly disregarded Brandis's work hours – scheduling or trying to schedule appointments, activities, or pick-ups during her work or commute hours. Throughout their discussions, Read is often condescending and insulting, which makes collaborating difficult. Compounding Read's position even further, he had a history of disobeying their divorce decree including failing to pay child support and spousal support, and failing to transfer Brandis's share of a retirement account.

Both parties agreed that the joint physical care arrangement needed to end, so they requested the court place the children in their respective sole care. The district court placed the children in Brandis's physical care, Read appealed asking the appellate court to switch physical care to him.

The court of appeals affirmed considering "'[w]hether each parent can support the other parent's relationship with the child[ren].' Iowa Code § 598.41(3)(e); *see also In re Marriage of Barnhart*, No. 12-2251, 2013 WL 2372309, at *4 (Iowa Ct. App. 2013)." The appellate court also held it against Read that he allowed the children to be tardy numerous times in one school year, improving only *after* Brandis filed this modification action. Further, Read's failure to divide a retirement account and provide Brandis with her share, as well as being behind on his child support and alimony obligations, showed "[a] consistent theme" that Read's parenting improved only when litigation or court hearings were imminent. Thus, Read was not the superior parent. – NEW CASE.

C. Visitation

(1) Burden of proof – lesser

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 or physical care. *In re Marriage of Rykhoek*, 525 N.W.2d 1, 3 (Iowa Ct. App. 1994).

However, a parent cannot modify based on negative changes that parent created. *Nicolou v. Clements*, 516 N.W.2d 905, 909 (Iowa Ct. App. 1994). "To allow the custodial parent to instill such anxieties and then to use that as justification to block visitation would open a Pandora's Box of abuse which no Court should tolerate." *Id.*

(2) Examples

***In re Marriage of Cowger*, No. 22-1254, 2023 WL 6620127 (Iowa Ct. App. Oct. 11, 2023). This was an appeal of a ruling modifying the divorce decree between Leslie and Bradley. The parties had four children together and originally had joint legal custody and joint physical care of the children. After the divorce, Leslie and Bradley each filed contempt applications and modification petitions accusing the other of being unable to co-parent effectively. Leslie filed a modification petition in 2020 requesting sole legal custody and physical care of the children, citing inability to co-parent with Bradley.**

<u>At trial, Brad unequivocally testified that, if his time with the children was reduced by any amount, then he would no longer have any involvement with the children.</u> After hearing the evidence at trial, the GAL changed her proposal to encompass Brad only receiving parenting time with the children four out of every fourteen nights during the school year. The district court awarded Leslie sole legal custody and physical care but did not modify the parenting time schedule, leaving equal parenting time for both parents. Leslie appealed.

The court of appeals held:

> **Joint physical care "is only authorized when coupled with joint legal custody." *In re Marriage of Beasley*, No. 21-1986, 2022 WL 16985437, at *8 (Iowa Ct. App. Nov. 17, 2022); *accord* Iowa Code § 598.41(5)(a) (2020) (premising the court's discretion to award joint physical care upon an award of joint legal custody). Because Leslie was awarded**

> sole legal custody, a joint-physical-care arrangement is not an option.

Id. at *3. Therefore, the appellate court determined that equal parenting time was not in the children's best interests given the high conflict between the parties and modified the schedule to give Leslie primary physical care with Brad having visitation every other weekend and certain vacation time.

The court also modified the child support calculation, finding errors in the district court's guidelines worksheet. "This modification is retroactive to the time of the entry of the district court's modification ruling." Finally, the court awarded Leslie $12,000 in attorney fees and full court costs including GAL fees. – NEW CASE

D. Alimony

In re Marriage of Ficken, 989 N.W.2d 669 (Iowa Ct. App. 2023):

> Iowa Code section 598.21C(1) ... allows a district court to modify spousal-support orders following a substantial change in circumstances. "The party seeking modification ... bears the burden of establishing by a preponderance of the evidence the substantial change in circumstances." Additionally, "the substantial change must not have been within the contemplation of the district court when the decree was entered, and we presume the decree is entered with a 'view to reasonable and ordinary changes that may be likely to occur.'

Ficken at 672 (citing *In re Marriage of Michael*, 839 N.W.2d 630, 636 (Iowa 2013)).

In 2017, David and Theresa divorced after twenty-four years of marriage. The court found Theresa had an earning capacity of $25,000 a year as through full-time work. David earned approximately $79,000 per year. On that basis, David was ordered to pay Theresa $1750 each month in spousal support.

In 2019, David wanted to retire and filed a petition to modify his alimony obligation. Though medical records supported David's contention that his work was physically taxing, he was not under any doctor-ordered work restriction. By the time of the 2021 trial, David had retired. The district court denied David's petition by finding that David's retirement was not a substantial change in circumstances.

In the appeal, the court of appeals focused on David's reasons for his retirement. *Ficken* at 673. "[F]orced retirement can constitute a substantial change in circumstances. Generally, a voluntary retirement, however, is not a substantial change in circumstances." *Id.* (citations omitted). The court of appeals affirmed stating: "we do

not find it helpful to his modification request that David chose to retire *before* health reasons mandated it … And we find that David has a more favorable financial position now that he has remarried." *Id.* at 674 (emphasis added). – NEW CASE

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***In re Marriage of Reinsbach*, No. 22-1701, 2023 WL 4103896 (Iowa Ct. App. June 21, 2023) – Parties divorced in 2015 after 36 years of marriage. Decree awarded wife $1500 monthly lifetime spousal support. Husband formerly earned $200K+ annually but lost high-paying sales jobs after divorce. He became disabled and now receives $33K annually in disability benefits. Wife earns approx $28K annually as independent contractor cosmetologist. She claims monthly expenses exceeding her income.**

After hearing this evidence, the district court denied husband's petition for a modification, finding no substantial change in circumstances, and ordered that spousal-support payments continue unmodified. The court also denied Husband's request for attorney fees. Husband appealed.

The court of appeals reversed holding husband proved substantial change in circumstances based on unanticipated decline in health and dramatic drop in income. However, the court of appeals rejected eliminating spousal support outright given husband's failure to show he cannot supplement disability pay and his retention of luxury assets. The appellate court reduced husband's obligation by 25% to $1125 based on husband's reduced earnings capacity and income relative to the time of last modification.

Substantial improvements or declines in health and income may justify modifications if changes were not in the original decree's contemplation. Courts will scrutinize credibility of claimed inability to pay support obligations, including luxury expenditures and retention of discretionary assets. Equitable result tailored to magnitude of financial changes; modifications need not be all-or-nothing propositions. So, in summary, unforeseen adverse changes in health or earnings can warrant reductions in spousal support, but courts will carefully weigh facts to craft equitable modifications short of outright termination. – NEW CASE

AUTHOR'S NOTE: The court of appeals' modification of the trial court's ruling in *Reinsbach* was made retroactive to the date husband petitioned to modify his alimony obligation, *not* the date of the district court's judgment denying his petition. *Reinsbach*, 2023 WL 4103896, at

*5 (citing *In re Marriage of Schradle*, 462 N.W.2d 705, 708 (Iowa Ct. App. 1990). The court of appeals is incorrect.

"We hold that … the decrease in alimony payments as modified by the Iowa Supreme Court on direct appeal of the [court's order] speaks *from the date of the original [order].*" *In re Marriage of Wegner*, 461 N.W.2d 351, 353 (Iowa Ct. App. 1990) (emphasis added) (interpreting *Thomas v. Minner*, 340 N.W.2d 285 (Iowa 1983)); *see also In re Marriage of Mata*, No. 08-1682 at *7 n.4 (Iowa Ct. App., filed July 22, 2009) (citing *In re Marriage of Schradle*, 462 N.W.2d 705, 708 (Iowa Ct. App. 1990)).

A supreme court case dealt with this exact issue:

> Our courts have no authority to retroactively decrease a spousal support award to the date of the filing of the application for modification unless and until the legislature gives the courts the authority to do so. *In re Marriage of Shepherd*, 429 N.W.2d 145, 146 (Iowa 1988); *In re Marriage of Harvey*, 393 N.W.2d 312, 314 (Iowa 1986); *Delbridge v. Sears*, 179 Iowa 526, 536–37, 160 N.W. 218, 222 (1916). This rule is based on the premise that each installment payment of a spousal support award in the original decree becomes a binding final judgment when it comes due and cannot be decreased until a subsequent judgment is entered decreasing the original award. *See Shepherd*, 429 N.W.2d at 146; *Walters v. Walters*, 231 Iowa 1267, 1270, 3 N.W.2d 595, 596 (1942). This rule is true even though a change of circumstances may have occurred prior to the entry of the modification decree. *Shepherd*, 429 N.W.2d at 146; *Walters*, 231 Iowa at 1270, 3 N.W.2d at 596. Consequently, we have refused to retroactively terminate spousal support awards upon a party's remarriage; instead, we have consistently terminated spousal support payments prospectively, from the date the trial court issued its modification ruling. *See, e.g.*, *In re Marriage of Harvey*, 466 N.W.2d 916, 918–19 (Iowa 1991) (holding alimony should terminate as of the date of the modification decree); *Harvey*, 393 N.W.2d at 314 (recognizing a trial court cannot terminate alimony payments which accrue prior to the date the modification order was entered); *In re Marriage of Bonnette*, 431 N.W.2d 1, 5 (Iowa Ct. App. 1988) (holding the trial court acted properly when it terminated alimony payments prospectively from the date of the filing of its opinion). Therefore, we can only terminate the medical support award from the date the district court entered its decree.

> **A district court's modification decree is effective when the court files it with the clerk of court. Iowa R. Civ. P. 1.453. The district court filed its final ruling with the clerk of court on August 1, 2008. Our decision reversing the district court "is also effective as of the date of the trial court's entry of the modification decree."** ***In re Marriage of Schradle*****, 462 N.W.2d 705, 708 (Iowa Ct. App. 1990). Therefore, our decision reversing the district court is effective as of August 1, 2008.**

In re Marriage of Johnson**, 781 N.W.2d 553, 559 (Iowa 2010).**

Chapter 9 – Premarital Agreements

1. Premarital Agreements

A. Uniform Premarital Agreement Act

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

B. General legal principles

1. Common Law versus Iowa Code chapter 596

In Iowa, all premarital agreements entered prior to January 1, 1992, are governed by common law. *In re Marriage of Spiegel*, 553 N.W.2d 309, 316 (Iowa 1996); *In re Marriage of Van Regenmorter*, 587 N.W.2d 493, 495 (Iowa Ct. App. 1998); *see* Iowa Code § 596.12. All premarital agreements entered on or after January 1, 1992, are enforced according to Iowa Code chapter 596. *Id.*

Premarital agreements should be construed liberally to carry out the intention of the parties. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 96 (Iowa Ct. App. 1997). Premarital agreements may include provisions relating to the following issues:

> a. The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located.
>
> b. The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property.

> c. The disposition of property upon separation, dissolution of the marriage, death, or the occurrence or nonoccurrence of any other event.
> d. The making of a will, trust, or other arrangement to carry out the provisions of the agreement.
> e. The ownership rights in and disposition of the death benefit from a life insurance policy.
> f. The choice of law governing the construction of the agreement.
> g. Any other matter, including the personal rights and obligations of the parties, not in violation of public policy or a statute imposing a criminal penalty.

Iowa Code § 596.5(1).

2. Defenses to enforcing a premarital agreement

Iowa Code section 596.4 requires that a premarital agreement must be in writing and signed by both "prospective spouses."

Iowa Code 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 premarital agreement was not voluntarily executed or was unconscionable.

Agreements entered into before January 1, 1992, will be enforced under prior Iowa precedents which provide those 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, 715-16 (Iowa Ct. App. 1989).

Premarital agreements entered after January 1, 1992, are still subject to common law contract defenses. *In re Marriage of Shanks*, 758 N.W.2d 506, 512 (Iowa 2008). With respect to "voluntariness", the Iowa Supreme Court has determined that "voluntariness" does not require post-January 1, 1992, premarital agreements to be both knowing and voluntary. *Id.*, *superceding In re Marriage of Spiegel*, 553 N.W.2d 309, 313 (Iowa 1996), *also superseded in pertinent part by* Iowa Code § 596.8(1). An admission that a party voluntarily signed a premarital agreement is enough to enforce it.

In 2008, the Iowa Supreme Court analyzed the contract law defense of "voluntariness" when determining the enforceability of a premarital agreement by considering various common law indices demonstrating an alleged lack of voluntariness. *Shanks*, 758 N.W.2d at 512. The underlying facts revealed the husband ("Randy") was a successful attorney and his then-fiancé ("Teresa") was his employee when he presented her with a premarital agreement, urging her to consult independent counsel. *Id.* at 508-09. The

parties were to be married in Jamaica ten days from the time Randy first presented Teresa with the premarital agreement. *Id.* at 509. Teresa immediately consulted a Nebraska attorney, whose assistant wrote several concerns and impassioned remarks on the draft, before the attorney, upon realizing Teresa would need to apply Iowa law, returned the marked-up draft to Teresa and advised her to consult an Iowa-licensed attorney. *Id.* Teresa did not heed the advice. *Id.* Instead, Teresa returned the marked-up draft to Randy. *Id.* He then made some of the suggested changes, failed to make others, and made changes independent of the Nebraska legal assistant's suggestions. *Id.* Randy provided the revised draft to Teresa with financial disclosures attached, and again urged her to consult independent counsel. *Id.* at 510. However, instead of consulting independent counsel, she simply signed the draft and the parties left for Jamaica the next day and soon married. *Id.*

The *Shanks* Court considered whether Teresa signed the premarital agreement "voluntarily" by analyzing the affirmative defense of duress. The Court confirmed that to succeed in nullifying an agreement using the duress defense, the claimant must prove: "(1) one party issues a wrongful or unlawful threat and (2) the other party had no reasonable alternative to entering the contract." *Shanks*, 758 N.W.2d at 512 (citing *Spiegel*, 553 N.W.2d at 318). In so doing, the Iowa Supreme Court reaffirmed the principle that threatening to not marry if the requested party does not sign the premarital agreement "fall[s] far short of a showing of duress sufficient to support" a finding that the requested party involuntarily signed a premarital agreement. *Id.*

The *Shanks* Court then considered whether Teresa had been subjected to "undue influence," which it defined as "influence that deprives one person of his or her freedom of choice and substitutes the will of another in its place. '[M]ere importunity that does not go to the extent of controlling the will of the grantor does not establish undue influence.' Freedom from undue influence is presumed." *Shanks*, 758 N.W.2d at 513 (quoting *Spiegel*, 553 N.W.2d at 318). Teresa argued that, given the power disparity between herself and Randy, particularly considering his position not only as her fiancé but as a lawyer and her boss, his "will was substituted for Teresa's own judgment in deciding to sign the agreement." *Id.* (citing *Spiegel* at 319). The Supreme Court rejected Teresa's argument and found no undue influence. *Id.*

Having found that Teresa had voluntarily signed the premarital agreement, the Supreme Court then considered whether the premarital agreement was "unconscionable". *Shanks*, 758 N.W.2d at 513-14. It analyzed the premarital agreement as it would a commercial contract, citing the official comments to the Uniform Premarital Agreement Act, on which Iowa Code Chapter 596 is based. *Id.* at 514 (citing UPAA § 6 cmt.). The Court divided "unconscionability" into two subsets:

(1) "procedural unconscionability", which it defined as the "employment of 'sharp practices[,] the use of fine print and

> convoluted language," as well as "a lack of understanding and an inequality of bargaining power."' *Id.* at 515; and
> (2) "substantive unconscionability", which "focuses on the 'harsh, oppressive, and one-sided terms' of a contract." *Id.*

However, "the concept [of unconscionability] is not a means by which a party may escape the requirements of an unfavorable contract after experiencing buyer's remorse." *Id.* at 515-16. The Court then concluded that, though the premarital agreement provided a property distribution that "clearly contemplated the allocation of a greater portion of the marital assets to" Randy, it was not substantively unconscionable. *Id.* at 717. Likewise, it found the premarital agreement not procedurally unconscionable because "[e]quitable principles will not permit a party to eschew an opportunity to consult counsel as to the legal effect of a proposed contract, execute the contract, and then challenge the enforceability of the agreement on the ground she did not have adequate legal advice." *Id.*

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***In re Marriage of Sanders*, No. 22-1963, 2024 WL 2842310 (Iowa Ct. App. June 5, 2024). "After three years in court, and hundreds of thousands of dollars in attorney fees, Ellen and William Sanders were divorced." *Id.* at *1. The district court bifurcated the proceedings, first dealing with the validity of the parties' prenuptial agreement.**

Ellen claimed the prenuptial agreement was both substantively and procedurally unconscionable. Ellen and William had wildly divergent memories and explanations of how the prenuptial agreement came into existence. Ultimately, the trial court found Ellen's explanation more credible. *Id.* at *2 ("William forging documents was not a new thing. He essentially admitted at trial that he forged a title to his son's truck after his son passed away in 2015."). William challenged the credibility findings on appeal, "but his arguments are largely based on his slanted version of events without reference to the court's credibility findings against him." *Id.* at *3.

> **While the court concluded that Ellen did not sign the agreement under duress and that it was not substantively unconscionable, the court found the agreement was procedurally unconscionable because Ellen's "ability to contact independent counsel was extremely limited since she learned William intended to pursue the premarital agreement only just before her wedding." The court also found "there was not a fair and reasonable disclosure of financial information" because no values were listed for the financial accounts in exhibits A and B. So the court found the agreement unenforceable due to procedural**

> **unconscionability and lack of fair and reasonable disclosure.**

***Sanders*, 2024 WL 2842310 at *3 (citations omitted).**

C. 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 spousal support 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).

D. Spousal or child support waiver

Iowa Code Section 596.5(2) prohibits provisions in premarital agreements which adversely affect the right of a spouse or child to support. § 596.5(2); *In re Marriage of Van Brocklin*, 468 N.W.2d 40, 46 (Iowa Ct. App. 1991) ("Any provision of an antenuptial agreement which may be interpreted as prohibiting alimony is contrary to public policy and thus void.") (citing *In re Marriage of Gudenkoff*, 204 N.W.2d 586, 587 (Iowa 1973)).

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. But, any such spousal support waiver provision is not binding on a court, though it must be considered with the other factors of section 598.21A(1) in making the spousal support award.

***In re Marriage of Sherwood*, 995 N.W.2d 522 (Iowa Ct. App. 2023). This appeal concerns a dispute over *temporary* spousal support during divorce proceedings. Laura and Robert married in 2017 and signed a prenuptial agreement. Robert owned 80% of their jointly-owned restaurant, Sarpino's Pizza, and had several other income sources. Laura filed for divorce in 2022, withdrew $53,145 from their accounts, and obtained a protective order. Robert fired Laura from Sarpino's, removed her from his insurance, and stopped making her car**

payments. Laura requested temporary spousal support and other financial assistance during the proceedings. The district court ordered Robert to pay Laura $1,000 per month in temporary spousal support.

Robert appealed arguing that the district court gave prenuptial agreement insufficient weight because it did not mention the provisions stating that he and Laura were to maintain separate incomes and be responsible for their own debts and insurance. He claims these provisions "evince the parties' intent to maintain separate finances and property both during and after their marriage." 955 N.W.2d at 527.

Robert agrees that temporary spousal support orders are governed by Iowa Code section 598.11(1). But he responds that Iowa courts have "routinely referenced" Iowa Code section 598.21A factors in assessing temporary orders. In his view, those final-decree factors fall under "other matters as are pertinent" in the temporary support analysis. *See* Iowa Code § 598.11(1).

The court of appeals admitted, "our court has not been clear on whether we should borrow final-decree factors for our analysis of temporary spousal support." 955 N.W.2d at 528 (several citations omitted). It concluded that "for a matter [e.g., a prenuptial agreement] to be pertinent under section 598.11(1), it must relate to or be connected with the parties' physical or financial fitness during the divorce proceedings." *Sherwood* at 529. The court of appeals found that prenuptial agreement was not "pertinent" because the trial record showed

> **that the couple had a joint bank account and that Robert included Laura on his insurance coverage and made her car payments through the business. On top of that, Sarpino's paid some of her personal expenses, including her phone plan and gas for her car. All in all, Robert and Laura did not abide by the prenup terms during the marriage. Accordingly, it is not relevant to their financial conditions during the divorce proceedings.**

***Id.* – NEW CASE**

E. 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).

F. Legal effect.

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, 674–75 (Iowa Ct. App. 1997).

The motivation for a prenuptial agreement may vary from case to case, but often such agreements protect the interests of children by former marriages, and by doing so, settle property questions that might otherwise cause dissension in the marriage.

> 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 by protecting the financial expectations of the parties. The right to enter into an agreement regulating financial affairs in a marriage is important to a large number of citizens.

In re Marriage of Spiegel, 553 N.W.2d 309, 313 (Iowa 1996) (citations omitted).

2. Postmarital agreements – valid?

Iowa Code Section 598.21(k) requires that the Court consider any written agreement of the parties, so the court may consider postnuptial agreements as only one of many factors in dividing property in dissolution proceedings and in fixing spousal support. *See In re Marriage of Cooper*, 769 N.W.2d 582, 585 (Iowa 2009); *see also* Iowa Code §§ 598.21(k), 598.21A(1)(i). "Accordingly, in applying the factors set forth in Iowa Code section 598.21(5), the district court may consider the terms of a postnuptial agreement, ignore its terms as inequitable, or adopt its terms in full or in part." *In re Marriage of Hansen*, No. 17-0889, 2018 WL 4922992, at *4 (Iowa Ct. App. Oct. 10, 2018).

A reconciliation agreement, which imposed severe penalties in the event of infidelity, could be considered by the Court under Iowa Code section 598.21(1)(k). Though post-marital agreements are only considered, among other factors, in making property divisions, Iowa will not enforce contracts which attempt to regulate spouse's personal conduct. "[Iowa's] no-fault divorce law is designed to limit acrimonious proceedings. Further, a contrary approach

would empower spouses to seek an end-run around our no-fault divorce laws through private contracts." *Cooper*, 769 N.W.2d at 587 (citation omitted).

***Roberts v. Roberts as trustee of W. David Roberts Revocable Tr.*, 6 N.W.3d 730 (Iowa 2024). In 1993, David and Elizabeth Roberts executed a valid premarital agreement before getting married. The agreement waived each spouse's elective share but gave the surviving spouse 1/3 of the other's net real property interests at death. In 2017, they executed a "Partial Revocation" agreement, prepared by David's attorney, that eliminated Elizabeth's 1/3 interest in David's real property. In exchange, Elizabeth received around $65,000 and a $800/month allowance while married. David died in 2022, leaving an estate worth around $15 million held mostly in a revocable trust that named his son Eric as the sole beneficiary.**

In summary, the Court held that Iowa law prohibits amendments diminishing a spouse's interest in the other's property after marriage, even if agreed to, and invalidated the 2017 "Partial Revocation" agreement as an unenforceable amendment. Specifically, the Court answered two questions.

First, does Iowa law allow married couples to amend their premarital agreements regarding inchoate dower/elective share interests in each other's property? No, Iowa law does not permit amendments to premarital agreements affecting inchoate dower/elective share interests after marriage under Iowa Code sections 596.7 and 597.2. While revocation of the entire agreement is allowed under section 596.7, an amendment is not. The Court reversed the lower court's enforcement of the "Partial Revocation" agreement as it was an impermissible amendment, not a revocation.

Second, if the "Partial Revocation" is invalid, should Elizabeth have to return the benefits she received from David under that agreement? The Court remanded the case for further proceedings on Eric's counterclaims seeking return of benefits Elizabeth received if the agreement is invalid to prevent unjust enrichment. – NEW CASE

Chapter 10 – Juvenile Law

1. Child in need of assistance (CINA)

In re D.M., 965 N.W.2d 475 (Iowa 2021). – The State initiated a CINA proceeding after the parents' inability to coparent led to numerous reports to DHS. Mom was the primary custodial parent under a shared parenting schedule between the parents, but she struggled with mental health issues, housing instability, and ensuring the child made it to school. At the permanency hearing, the professionals in the case recommended a brief transition plan to reunify the child with Mom over the course of a four- to-six-week transition, but the juvenile court transferred sole legal custody of the child to Dad. The supreme court noted that the juvenile court has the authority to transfer custody to the noncustodial parent, but "[a]ny such placement is subject to the constraints in section 232.102, including the goal of returning the child to the original custodian as quickly as possible." *In re Blackledge*, 304 N.W.2d 209, 214 (Iowa 1981). Here, all the professionals agreed that D.M. was safe with her mother. They only suggested a gradual transition because D.M. needed time to adjust to her "new normal." The juvenile court should have taken the steps needed to return the family to its original custody agreement and left the parents' custody issues to the district court. Chief Justice Christensen then issued a reminder for juvenile courts.

> The primary goal of the juvenile court in CINA proceedings is reunification when parties have specifically complied with court-ordered services, not establishing or modifying custody. "The parent's right to have a child returned ... is not measured by comparing the parent's home to the [other parent's] or an ideal home. Rather the parent's right is established by negating the risk of recurrence of harm." … When Mom met the juvenile court's directives, it should have taken the steps necessary to return the family to its original custody agreement with Mom as the primary custodial parent and left the parents' custody issues for district court. To do otherwise was an unauthorized modification of the custody agreement by the juvenile court.

D.M., 965 N.W.2d at 483. – NEW CASE

2. Termination of parental rights

A. Delayed Appeal.

In re W.T., 967 N.W.2d 315 (Iowa 2021). – Dad's attorney filed his notice of appeal one day late and filed a motion for delayed appeal. Here, Dad clearly

intended to appeal, the failure to timely perfect the appeal was his attorney's fault, not his, and the appeal process was not delayed by the one-day-late filing of the notice of appeal where the petition on appeal was still filed within thirty days of the termination order.

> Undoubtedly, "[i]t is in the best interests of children for the court process to proceed without delay, but it is also in the best interests of children that their parents have a full and fair opportunity to resist the termination of parental rights." Thus, despite what we said in the [*In re A.B.*, 957 N.W.2d 280, 293 n.4 (Iowa 2021)], we do not require extenuating circumstances in addition to the three factors we identified when the missed deadline is caused by attorney inadvertence. We confirm that a delayed appeal is allowed "only where the parent clearly intended to appeal," the "failure to timely perfect the appeal was outside of the parent's control," and the delay was "no more than negligible." *In re A.B.*, 957 N.W.2d at 292. We clarify that when the failure is counsel's fault, the reason is irrelevant. Dad has met those requirements, and we proceed to consider his appeal.

W.T., 967 N.W.2d at 321-22.

B. Termination after CINA.

In re L.B., 970 N.W.2d 311 (Iowa 2022). – In the first CINA proceeding, L.B. was adjudicated because the child's mother was using methamphetamine and had attacked L.B.'s maternal grandmother who was then appointed L.B.'s guardian. About 6 months later, a second CINA was filed because L.B.'s mother refused to return the child to the grandmother. Three days later, the county attorney filed a petition to terminate both parents' parental rights. The court heard the second CINA and the TPR together and terminated both parents' parental rights. The supreme court ruled that a prior CINA adjudication in a closed case cannot be utilized to meet the statutory requirements of Iowa Code section 232.116(1)(f) and (g) for termination after a second CINA proceeding. "A goal of CINA proceedings under chapter 232 is to keep families together when possible, not provide an avenue for summary termination of parental rights." The circumstances and needs which led to the closed CINA case may have been sufficiently accomplished. "It would make no sense to interpret the 'has been adjudicated' language to permit an adjudication in a prior closed proceeding to set the stage for termination of parental rights when services have been successfully provided and the child returned to the home. Further, the later proceeding could well involve entirely different problems and could well involve the actions of different individuals." – NEW CASE