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**Supreme Court No. 16-1419  
Kossuth County No. CDCD002446**

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**IN RE THE MARRIAGE OF JODI LYNN ERPELDING  
AND TIMOTHY JOHN ERPELDING**

Upon the Petition of

JODI LYNN ERPELDING,

Petitioner-Appellant/Cross-Appellee,

And Concerning

TIMOTHY JOHN ERPELDING,

Respondent-Appellee/Cross-Appellant.

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**APPEAL FROM THE IOWA DISTRICT COURT  
FOR KOSSUTH COUNTY  
THE HONORABLE PATRICK M. CARR**

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**PETITIONER-APPELLANT/CROSS-APPELLEE'S  
PROOF REPLY AND CROSS-APPELLEE'S BRIEF AND  
REQUEST FOR ORAL ARGUMENT**

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**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

**I. THE DISTRICT COURT’S DECREE, WHICH FAILED TO AWARD JODI REIMBURSEMENT ALIMONY AND COMBINED WITH ITS UNEQUAL DIVISION OF ASSETS, IS INEQUITABLE AND SHOULD BE MODIFIED.**

**Cases**

*In re Marriage of Becker*, 756 N.W.2d 822, 826-827 (Iowa 2008)

*In re Marriage of Francis*, 442 N.W.2d 59, 61 (Iowa 1989)

*In re Marriage of Probasco*, 676 N.W.2d 179, 184-185 (Iowa 2004)

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*In re Marriage of Wegner*, 434 N.W.2d 397, 399 (Iowa 1988)

**Statutes**

Iowa Code § 598.21(A)(1)

**II. THE DISTRICT COURT’S FAILURE TO AWARD JODI ATTORNEY FEES WAS AN ABUSE OF DISCRETION**

**Cases**

*Huegli v. Huegli*, 2016 WL 1681435 (Iowa App 2016)

*In re Marriage of Van Horn*, 2002 WL 142841 at 4 (Iowa App. 2002)

*Walker v. Walker*, 765 N.W.2d 747, 755 (S.D. 2009)

## **Statutes**

Iowa Code § 596.5(2)

### **III. JODI SHOULD BE AWARDED APPELLATE ATTORNEY FEES.**

*In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa App. 1997)

### **IV. THE DISTRICT COURT CORRECTLY AWARDED PRIMARY PHYSICAL CARE OF D.E. TO JODI.**

*In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992)

*McCracken v. Edward D. Jones & Co.*, 445 N.W.2d 375, 378 (Iowa App. 1989)

## **Rules**

R. App. P. 6.14(6)(O).

## **ROUTING STATEMENT**

This case should be retained by the Supreme Court because it involves substantial questions of enunciating legal principles. Iowa R. App. P. 6.1101(2)(f). One legal principle is whether a prenuptial agreement may prohibit an award of attorney fees when alimony, child custody and child support are at issue. Both parties cited to out of state authorities, which highlight this as an issue that should be decided by the Supreme Court. A

second legal principle involves the concept of reimbursement alimony when a marriage devoted toward the acquisition of farmland rather than the acquisition of a professional degree enhanced one party's earning capacity.

### **STATEMENT OF THE CASE**

Jodi agrees that Tim's statement of the case is adequate for the physical care issues involved on Tim's cross appeal.

### **FACTUAL SUMMARY**

Jodi sought primary physical care because she had "essentially cared for our children since the day they were born." Tr. 44:5-9; App. 141. She felt she was the better parent and that "Tim could be a better parent if he was not burdened with the day-to-day responsibility of our children." Id. "I can provide a better emotional base for our children." Tr. 43:23-44:9; App. 140-141.

After the parties married in 1997, they began having marital problems "right from the start". Tim was jealous, controlling and moody during the marriage. Tr. 70:20-74:11; App. 166-170. Tim's jealousy would escalate to emotionally abusive behavior and would get worse during relapses of alcohol abuse. Tr. 85:19-89:20; 90:5-92:17; App. 178-185.



Tim's involvement with the children was limited by his work schedule. Tr. 78:8-78:20; App. 171. If something was going on, "He would always for the most part try to get out of doing it and say we could hire Ellen Gatton to do it or somebody else to do it." *Id.* Throughout trial, Tim describes Ellen Gatton as a daycare provider, babysitter, nanny, grandparent, surrogate grandparent, older friend and most recently "Alice of the Erpelding Bunch". Tr. 214:15-20; 638:2-21; 818:5-9; 1272:2-10; 1644:15-18; Appellee's Brief, 3-4; App. 262, 360, 373, 450, 508. Although Tim ostensibly seeks primary care, Jodi is concerned that he would cede parenting responsibilities to Ellen Gatton. Tr. 621:13-622:4; App. 355-356. Regarding Tim's dependence on Mrs. Gatton, Guardian Ad Litem Stoebe concurs: "of concern here, however, is that the Gattons have been at the forefront of physical care in virtually every instance." GAL Report, 9; App. 62-81.

Tim was an absentee father during much of the marriage due to farming or for other reasons. Tr. 80:23-81:14; 1357:10-1358:6; App. 173-174, 466-467. Jodi was concerned with Tim's lack of involvement with the children, telling Tim: "I said it would take me divorcing him to force him to have a relationship with the kids." Tr. 80:23-81:22; App. 173-174. Tim's

parenting depended on the mood he was in. “If he comes in the house in a bad mood, then that's how he parents.” Tr. 82:3-84:13; App. 175-177.

Jodi performed 90 percent of the childcare duties. Tr. 150:7-12; App. 228. Jodi handled most of the appointments and activities. Tr. 100:1-101:22; App. 192-193. Jodi made career sacrifices to take care of the children. Tr. 79:21-80:17; App. 172-173. Jodi has flexible hours, which allow her to care for the children herself. Tr. 148:6-15; App. 226. Jodi is a hands-on mother. Ex. 44; Tr. 84:14-16; 131:7-134:14; App. 602-606; 177, 210-213. She would prefer to raise the children herself. "That's why I had children, not to hire – not to hire it done." Tr. 84:17-24; App. 177. Tim would prefer to hire people and delegate it out. Tr. 84:18-85:18; App. 177-178. After the parties separated in early 2015 and divided physical care for the children, Tim paid \$9,160 to Ellen Gatton for childcare during the rest of the year. Tr. 375:12-20; App. 318.

After Jodi moved to Clear Lake in February of 2015, the parties shared custody and physical care of the children and they finished the school year at Algona Garrigan. Tr. 105:8-19; App. 197. Jodi felt it was in the boys’ best interest to allow them to complete the school year in their current setting. Tr. 138:9-22; App. 217. After the school year ended, Jodi sought temporary physical care of both children, which ultimately resulted in a

mediated settlement with D.E. residing primarily with Jodi and W.E. residing primarily with Tim. 6/29/15 Application; Ex. 301; App. 686-687. D.E. is in his second year attending school in Clear Lake and is excelling. Tr. 1310:7-1312:23; App. 453-455. He has become fully immersed in and is thriving in the Clear Lake school system and Jodi's home. Ex. 42; Ex. 301, 12; Decree, 18; App. 99, 599-611, 686-687. W.E attends school at Algona Garrigan and continues to do well in school. Tr. 206:19-23; App. 256.

Jodi's home in Clear Lake and Tim's farm home near Algona are about 40 miles apart. Tr. 107:18-20; App. 198. Tim's farm is currently the subject of litigation with his sister and will be put up for auction in the near future. Tr. 558:4-14; 725; App. 349, 372.

The parties arranged a liberal visitation schedule. The boys are together with one parent or the other every weekend and at least two week days every week. Tr. 470:18-472:3; App. 334-336. Jodi has relatives in the Algona area and a support group in Clear Lake. Tr. 181:6-22; 198:18-199:11; App. 247, 253-254.

After the Temporary Custody Agreement mediated by former Justice David Baker was implemented, the record is devoid of any real problems with routine child visitation, exchanges of children or communication

between the parents other than what might be expected in a litigated child custody case.

After the Temporary Custody Agreement was negotiated on 8/17/16, Tim sought appointment of an attorney for the children and specifically proposed Gregory Stoebe. Application; App. 17-18. Jodi resisted on grounds of unnecessary expense and because she did not believe it was necessary to complicate the case with additional lawyers. Resistance; App. 19-20. The court did appoint Mr. Stoebe who interviewed the children, participated in the trial and issued a 20 page “Report and Recommendations of Guardian Ad Litem. GAL Report; App. 62-81. The District Court, in its Decree stated: “The guardian ad litem has filed herein a detailed, thoughtful, and sincerely advanced report and recommendation to the court. The court could scarcely improve upon his recitation of the basic facts bearing upon the well-being of the two boys.” Decree, 9; App. 90. Some of the highlights of the Guardian Ad Litem Report are as follows:

*\* \* \* To the credit of the parties and the children, visitation has been proceeding relatively well. The parties get along very well in issues concerning the children. \* \* \* (Page 3.)*

*The temporary agreement has been working \* \* \* (Page 3.)*

*The petitioner and the youngest child have developed a particularly strong mother-son bond. Though he looks forward to seeing his brother and father during visitation, D.E. is*

*clearly most comfortable in his mother's environment. \* \* \**  
*(Page 6.)*

*His time commitments to directly supervise D.E., who at his age will still need substantial supervision, may be severely limited. \* \* \**  
*(Page 9.)*

*However, at the same time he is adamant that he wants to continue to live with his mother and attend the Clear Lake public school. He has developed some friendships there and is evidently very immersed in the school environment. \* \* \**  
*(Page 12.)*

*Even in the short period since separation and the time I saw the boys they had become entrenched in their respective environments and the analysis of a recommendation must first acknowledge that; by mutual agreement of the parties, these children were in safe, workable, but separated environments. \* \* \**  
*(Page 16.)*

*D.E. has become immersed in the Clear Creek Elementary environment. He has new friends and school activities which he very much wants. Further, the Clear Lake environment may be more conducive to his wants and needs at this age. \* \* \**  
*(Page 17.)*

*The Petitioner has structured her work schedule and has a support network to supervise D.E. \* \* \**  
*(Page 17.)*

*The separation of the boys does not appear to be affecting this and I detect no consternation from the separation because of this. \* \* \**  
*(Page 18.)*

*There are still plenty of activities to do together, but the age difference is taking their personalities in different directions. Separate placement does not appear to be jeopardizing their relationship significantly. \* \* \**  
*(Page 18.)*

Jodi testified that D.E. would have trouble being away from Jodi and that it would affect him in his school life. Tr. 209:23-210:25; App. 259-260. Both parties have testified that D.E. has stomach issues. Tr. 113:4-115:20; App. 203-205. D.E.'s physician links his recurrence of stomach problems, to some extent, especially to those times when he is with his father. Decree, 16; App. 97. Guardian Ad Litem Stoebe reports that D.E. "absolutely wants to live with his mother over his father. I sensed more than with W.E. a real potential of emotional upheaval, possibly long term, if the move back to Algona without his mother were effectuated." GAL Report, 12; App. 93.

The Guardian Ad Litem Report concludes:

*The parties have created this current situation. I see nothing beneficial by forcing one child or the other to relocate. Both are thriving. The parents are commendably getting along well on the issues of children. I see only positives for the children into the future with current living solemnized by the court. To uproot them now and reshuffle residents, visitation, friends, school, etc. may well generate more court activity of a very dark and damaging nature.*

GAL Report 1, 20; App. 81.

## **ARGUMENT**

### **I. THE DISTRICT COURT'S DECREE, WHICH FAILED TO AWARD JODI REIMBURSEMENT ALIMONY AND**

**COMBINED WITH ITS UNEQUAL DIVISION OF ASSETS, IS INEQUITABLE AND SHOULD BE MODIFIED.**

**A. Preservation of Error.**

Both parties agree error is preserved.

**B. Scope and Standard of Review.**

Both parties agree on the standard of review.

**C. The District Court's Decree, Which Failed to Award Jodi Reimbursement Alimony and Combined with its Unequal Division of Assets, Is Inequitable and Should be Modified.**

Tim does not dispute that Jodi contributed her time, talent and earnings to the family so that the Erpeldings could "grow equity in the farm". Tim also does not dispute that "Jodi's contribution toward the family living expenses combined with her unpaid farm labor freed up funds to purchase additional farmland that was placed in Tim's name." Appellant's Brief, 23. Tim does not respond to Jodi's assertion that "the parties did not intend that Tim would be the sole beneficiary of Jodi's sacrifices and contributions." Tim does not dispute that Jodi's child care responsibilities has resulted in her experiencing a substantial annual career salary sacrifice, both in the past and in the future. Tim does not dispute that Jodi's effort freed up funds allowing Tim to purchase farmland.

***Reimbursement Alimony is not Restricted to Marriages of Short Duration***

Tim argues that *In re Marriage of Probasco*, 676 N.W.2d 179, 184-185 (Iowa 2004) holds reimbursement alimony is restricted to marriages of short duration which are devoted almost entirely to the educational advancement of one spouse and yield the accumulation of few tangible assets. Appellee's Brief, 9. The facts in *Probasco* are merely one illustration justifying an award of reimbursement alimony, not a restriction. Reimbursement alimony "is predicated upon economic sacrifices made by one spouse during the marriage to directly enhance the future earning capacity of the other." *In re Marriage of Francis*, 442 N.W.2d 59, 61 (Iowa 1989). Reimbursement spousal 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).

Tim does not dispute that Jodi enhanced his future earning potential. Tim urges that because Jodi's efforts devoted to growing the family farm occurred over a long period of time rather than for a short time, she is disqualified from being compensated for her efforts. Restricting reimbursement alimony to situations where a spouse financially assisted the



other spouse for a "short time" and denying it when a spouse assists the other spouse for a "long time" is illogical.

Here, the prenuptial agreement had the effect of depriving Jodi of a property settlement to compensate her for her efforts. The District Court incorrectly applied the law when it ruled: "the Petitioner previously contracted away an opportunity to be fairly compensated for her sacrifice and efforts by the execution of the prenuptial agreement." Decree, 32; App. 113. In calculating spousal support, it is proper to look at the effect of a premarital agreement and the assets each party received. *In re Marriage of Schenkelberg*, 824 N.W.2d 481, 487 (Iowa 2012). Here, Tim received the vast majority of the parties' assets and almost all of the farmland, totaling over \$8,000,000. These assets were accumulated to a significant extent because of Jodi's contributions.

***Reimbursement Alimony Should Not Be Restricted to Marriages Which are Devoted to Educational Advancement of One Spouse In Contrast to and to the Exclusion of Marriages that Are Devoted to Acquisition of Farmland By One Spouse***

Tim does not dispute that his farmland is capable of generating \$206,225 each year from government rental payments. Tim argues that because he is a farmer rather than a doctor he has immunity from the court's equitable powers to award reimbursement alimony. Reimbursement

alimony should be awarded when one spouse contributes toward the other spouse's earning potential. *Francis*, 442 N.W.2d at 61. Reimbursement alimony should not depend on whether the increased earning potential is acquired by deed or professional degree.

**D. The District Court's Award of Traditional Alimony to Jodi is Inadequate and Inequitable and Should be Increased Considering the Court's Failure to Award Reimbursement Alimony and the Inequitable Division of Assets.**

Tim cannot dispute that he was awarded over \$8,000,000 in assets and that his land is capable of generating \$206,225 in income each year from the government CRP Program. Tim can sell all of his equipment, pay any income tax, retire his debt and not only earn \$206,225 a year, but also have time to seek other full time employment. Tim's earning potential is clearly equal, if not above the \$8,145.40 monthly income used on the Court's Child Support Guideline Worksheets. Guidelines; App. 128-132. Tim has a duty to earn up to his capacity. *In re Marriage of Wegner*, 434 N.W.2d 397, 399 (Iowa 1988).

Tim's argument that Jodi did not examine the factors listed in Iowa Code § 598.21A(1) overlooks her extensive discussion of the parties, their contributions, their earning capacities and the property distribution.

Appellant's Brief, 6-26. Here the evidence indicates that the parties enjoyed a very high standard of living while they were married, had a lengthy marriage and because of the prenuptial, there was a very one-sided distribution of property.

**E. The District Court's Property Settlement Award to Jodi Was Inequitable, and Combined With the Court's Failure to Award Jodi Reimbursement Alimony Renders the Pre-Nuptial Unconscionable, and Should be Modified.**

The District Court's failure to award Jodi reimbursement alimony to compensate her for her financial contributions toward increasing Tim's earning potential to \$206,225 a year is what makes application of the Erpelding prenuptial both substantively and procedurally unconscionable. The court should and does have the inherent authority to set aside the prenuptial to such extent in order to allow the court do equity.

A court may set aside or modify a pre-nuptial agreement on the grounds it is unconscionable. *In re Marriage of Shanks*, 758 N.W.2d 506, 513-520 (Iowa 2008). Under these circumstances, this court has authority to, and should, modify the Decree to award Jodi an additional \$600,000 in property settlement.

## **II. THE DISTRICT COURT'S FAILURE TO AWARD JODI ATTORNEY FEES WAS AN ABUSE OF DISCRETION.**

### **A. Preservation of Error.**

Both parties agree error is preserved.

### **B. Scope and Standard of Review.**

Both parties agree on the standard of review.

### **C. The District Court's Failure to Award Attorney Fees Was an Abuse of Discretion.**

Tim does not dispute that Jodi incurred substantial legal expenses to litigate a complicated divorce case with child custody, a prenuptial agreement, property settlement and alimony, all in dispute. Also, Tim does not dispute that the Decree left Jodi owing significant legal expenses that will significantly impair her limited property settlement. In contrast, Tim's legal fees will not significantly impair his property settlement award of over \$8,000,000 in assets.

Tim's citation to *In re Marriage of Van Horn*, 2002 WL 142841 at 4 (Iowa App. 2002), an unreported decision, is distinguishable, if not incorrectly decided. First, the *Van Horn* case does not involve alimony, child support or child custody. Second, it appears that the prenuptial in *Van*

*Horn* was executed in 1987 when it was actually legal for a pre-nuptial agreement to preclude an award of alimony. This changed on January 1, 1992 when Iowa Code § 596.5(2) was enacted. The case of *Huegli v. Huegli*, 2016 WL 1681435 (Iowa App 2016) provides a chronology and explanation of this legislative history.

Because the Uniform Prenuptial Act prohibits prenuptials from precluding alimony, it is a “logical extension” that awarding attorneys fees to secure alimony awards cannot be prohibited. *Walker v. Walker*, 765 N.W.2d 747, 755 (S.D. 2009). Because the Act prohibits prenuptials from regulating child custody and child support, it follows that awarding attorney fees to seek child custody and child support cannot be prohibited. A party should not be forced to exhaust their meager property settlement in order to litigate an extensive child custody, child support and alimony case.

Tim urges the court to reverse the trial court’s award of \$20,000 to Jodi for temporary attorney fees. The \$20,000 awarded Jodi was used for the appraisals of the farmland and machinery that were accepted by Tim and used by the court. The funds used to pay for expert Ryerson furnished an analysis, which was helpful for the court to understand the parties’ finances.

Jodi, in her resistance to Tim’s Motion to Appoint a Guardian Ad Litem, expressed concern that Tim was escalating the legal expense

associated with their divorce. Resistance; App. 19-20. The trial transcript is 1675 pages. On the first day of trial, Jodi called one initial witness and she followed with herself. Jodi's direct exam was finished by page 178. On day two, Jodi began with direct exam of expert Ryerson. Her proof was essentially completed by 10:30 A.M by page 275. The trial continued for another 1440 pages over six and one-half days during which time Tim simultaneously employed three attorneys. If Jodi submitted the same number of witnesses or quantity of proof as Tim, the trial would have lasted 13 days. The legal expense incurred by Jodi as a result of Tim's prolonged proof significantly impairs her financial award. Jodi should be awarded her attorney fees.

### **III. JODI SHOULD BE AWARDED APPELLATE ATTORNEY FEES.**

#### **A. Preservation of Error.**

Both parties agreed Jodi has preserved error.

#### **B. Scope and Standard of Review.**

The parties agree on the standard of review.

#### **C. Tim Should be Required to Pay Jodi's Appellate Attorney Fees and All Costs on Appeal.**

Jodi's Appellant's Brief only sought review of the financial issues associated with the Decree. Now, Jodi is required to defend the court's primary care decree by responding to Tim's cross appeal on primary physical care issues. Tim complains that the Trial Court followed the recommendations contained in the Guardian Ad Litem Report that Tim himself sought. Jodi should be awarded all her appellate attorney fees. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa App. 1997).

#### **IV. THE DISTRICT COURT CORRECTLY AWARDED PRIMARY PHYSICAL CARE OF D.E. TO JODI.**

##### **Preservation of Error.**

Jodi does not agree that Tim has preserved error on his complaints related to the Guardian Ad Litem Report. It was Tim who personally selected Guardian Ad Litem Stoebe and sought his appointment over Jodi's objections. If Tim had objections to the Report, he should not have sought a Guardian Ad Litem in the first place, should have objected to the Report either before or after it was filed, or filed a post trial motion directed to how the court's consideration of the report was wrong. "It is elementary a litigant cannot complain of error which he has invited or to which he has assented." *McCracken v. Edward D. Jones & Co.*, 445 N.W.2d 375, 378 (Iowa App. 1989).

### **Standard of Review.**

The parties agree the standard of review is de novo.

#### **A. The District Court Correctly Awarded Primary Physical Care of D.E. to Jodi.**

The District Court correctly awarded split custody of the boys to Jodi and Tim. The Court's Decree continued the temporary custody arrangement that Tim agreed to that was mediated by former Justice David Baker. Continuation of the split custody arrangement was recommended in the Report submitted by Guardian Ad Litem Gregory Stoebe. It was Tim himself who sought appointment of attorney Gregory Stoebe as guardian ad litem over Jodi's objection to interview the boys, represent them at trial and submit the report that he now disagrees with. Tim did not object to submission of the report. A party may not complain of error that he invited or assented to. *McCracken* 445 N.W.2d at 378. Regardless, the trial court correctly considered the best interests of the children and incorporated those conclusions in its decree. R. App. P. 6.14(6)(O).

Tim did not challenge the physical care arrangement of the Decree until after Jodi appealed the financial components of the Decree. Tim's controlling personality extends to finances. Jodi had difficulty obtaining



child support from Tim. Tr. 108:5-109:5; 129:2-129:15; 619:18-23; App. 199-200, 209, 353. Tim's cross appeal may be more about control and child support than seeking the best interests for the children.

The court carefully considered the split custody analysis contained *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992). By spring of 2017, the current split custody arrangement will have continued for two full school years and with no problems to date. The boys are fine. They see each other at least twice during the week and every weekend they are together with one parent or the other. If physical care of both boys were awarded to one parent, the boys would only be in the same household for two more years while W.E. is a junior and senior. The boys are five grades apart. Their interests, social life and activities will obviously be different during this period. The Court agrees that "the difference in their ages, about four and a half years, and in their school placement, five class years, means that they are not going to be in constant association with each other. Their interests are necessarily going to diverge." Decree, 19; App. 100.

**B. The Guardian Ad Litem Report is Correctly Premised on Proper Conclusions.**

Although Tim criticizes the opinions, observations and report of Guardian Ad Litem Stoebe, he did not preserve error on his complaints related to it. *McCracken* 445 N.W.2d at 378.

Mr. Stoebe's report, solicited by Tim, is part of the record created by the parties. The court properly considered Mr. Stoebe's report and gave it appropriate weight. Tim acknowledged "the children's interests were fully represented by an appointed Guardian Ad Litem". Appellee's Brief, 28.

### **C. The Split Care Arrangement is Working.**

Tim's argument that the split custody arrangement is not working is contradicted by the report of the Guardian Ad Litem which Tim solicited, did not object to and to which he directed no post trial motions. Tim may not complain of error that he invited or assented to. *McCracken* 445 N.W.2d at 378. The record shows both children are doing fine in school, are well socialized and get to spend weekends and two nights per week in the same household together. Tr. 477:8-25; App. 337. Guardian Ad Litem Stoebe notes that the current formula is working and reasonable. GAL Report, 19-20; App. 80-81.

Both parties testified at trial that the children have been doing well during the split custody arrangement. Guardian Ad Litem Stoebe reported, "I

have not seen more well-behaved, respectful, intelligent young men of their respective ages in a long time.” Tr. 644:21-25; App. 361

**D. The Court Should Leave the Split Care Arrangement in Place and Should the Court Deem Otherwise, The Court Should Award Jodi Primary Care of Both Children.**

Tim, after arguing that the Guardian Ad Litem report is incorrect, asks that he be awarded primary care of both children. Tim did not preserve error on his complaints related to the Stoebe report. *McCracken* 445 N.W.2d at 378. Tim also incorrectly urges “Jodi does not and now cannot appeal the physical care determination in this matter.” Cross-Appellant’s Brief, 40. Jodi disagrees. It was Tim who first raised custody issues in his Cross-Appellant’s Brief and now Jodi responds. Jodi attempted to preserve error by filing her own Notice of Cross Appeal to Tim’s Cross-Appeal but the Supreme Court issued an order indicating that a “notice of cross-appeal” for Jodi “was unnecessary” and that the “Petitioner-Appellant/Cross-Appellee shall raise all her issues in her proof brief.” (9/15/16 Sup. Ct. Order.) Jodi is within her rights to respond to primary care issues Tim raises in his Cross-Appellant Brief.

**E. Jodi is the Better Parent if the Court Finds a Compelling Interest to Keep the Boys with the Same Primary Physical Care Parent.**

When Jodi applied for primary physical care on 6/29/15, she was convinced she was the parent better able to administer to the day-to-day needs and upbringing of the children. She still believes this today. If for some reason the court finds there is a compelling interest to keep the boys together, it is Jodi's position it would be in the best interest of the boys that she be awarded primary physical care of both children. R. App. P. 6.14(6)(O).

Tim's history as an "absentee" father described by Jodi - was more or less corroborated by his own witness, his sister-in-law Betty Erpelding. Tr. 1357:10-1358:6; App. 466-467. Jodi provided most of the children's care while Tim was farming. The time commitment of Tim's vocation is unlikely to change and many of his parenting duties, either by choice or necessity, are delegated out to others. Jodi believes that Tim is seeking primary control rather than primary care. Based on Tim's history as an absentee father and his reliance on the Gattons, Jodi believes that Tim will delegate his primary care duties to the Gattons.

Tim's controlling personality is an indicator of his emotional maturity and ability to parent. Tr. 92:18-93:7; 135:23-140:17; App. 185-186, 214-219. Tim arranged for the boys to go on a shooting trip to South Dakota with the Gattons that conflicted timewise with Jodi's 25<sup>th</sup> high school class reunion that she was responsible for planning. Tr. 93:17-95:16; 1319:5-15; App. 186-188, 456. Then when Tim decided that he had other things to do, he criticizes Jodi because she would not cancel her plans for the class reunion. Tim also planned an outing to a Green Bay Packers game, giving no consideration as to his abusive behavior in Green Bay two months earlier. Tim criticizes Jodi for declining to risk a repeat of Tim's alcohol fueled meltdown. However, this event, rather than furnishing a negative depiction of Jodi, demonstrates Tim's lack of sensitivity, controlling personality and his characteristic of failing to accept responsibility for his own actions. Tr. 89:21-90:4; 95:12-98:7; 490:5-12; 497:16-499:9; 649:16-650:8; App. 182-183, 188-191, 341, 345-347, 362-363.

Tim's solicitation of his employees, family members and miscellaneous others seeking their involvement in the Erpelding divorce did serve to create a voluminous record. However, it does not change the fact that Jodi has a history of being a hands-on mother and Tim has a history being an absentee father. Ellen Gatton's testimony reflects her emotional

dependence on the children and her financial dependence on Tim. Tr. 375:12-20; 1647:21-1648:1; App. 318, 511-512. Tim has exploited this relationship by encouraging the Gattons to meddle in the Erpelding divorce. Tim's Brief tries to rehash Jodi's friendship with a male friend. However, the court found that it had no effect on the children, that Jodi was acting discreetly and Tim himself testified he had no knowledge of it. Tr. 847:1-3; App. 388. Nevertheless, Tim sought out witness Sarah Enke whose testimony only serves to paint an unflattering portrait of herself as a troubled woman who is motivated to meddle in a divorce that is of no concern to her. Tr. 1204:10-1214:3; 1218:10 – 1221:2 App. 429-439, 442-445. Guardian Ad Litem Stoebe acknowledged this testimony as not material to the overall wellbeing of the children. GAL Report, 8; App. 69. In contrast, Jodi has attempted to confine the dissolution issues to Tim and Jodi.

The current split custody arrangement is working fine. If the court finds a compelling interest to order primary physical care of the boys with the same parent, Jodi requests that she be awarded primary physical care of both boys.

**F. The Court Should Leave the Split Care Arrangement in Place and Should the Court Deem Otherwise, The Court Should Award Jodi Primary Care of Both Children.**

Tim's assertion that he can provide more stability for the children than Jodi is not supported by the Guardian Ad Litem Report. Tim has not preserved error. *McCracken* 445 N.W.2d at 378.

At the risk of stating the obvious, it is Tim, rather than Jodi, who has a history of incarceration after being charged with vehicular homicide, has experienced drinking relapses, as well as anger issues. Tim's controlling personality and inability to control his anger detrimentally affected Jodi. Tim acknowledges that he has anger issues in front of the boys. GAL Report, 7; App. 68. Tim's personality is not likely to change around the boys simply because he is now divorced. Jodi's good character is supported by the evidence, the Guardian Ad Litem Report and was acknowledged by the Decree. "The Court thinks that as between the two, the Petitioner might be a bit more attuned to the many non-verbal, intuitive queues of a child's unstated emotional needs." The Court also found Jodi to have a warm and caring nature. Decree, 17; App. 78.

Tim's fixation with the Bishop Garrigan school system places his own personal desires ahead of the emotional trauma to D.E. that a forced move and separation from his mother would cause. GAL Report, 12; App. 73. The Court concluded that split physical care is the least damaging alternative available in this case. "Simply put, the Court thinks that any disposition

other than split physical care will cause significant emotional harm to at least one of the two children, which may take years, to resolve, if ever.” Decree, 22; App. 103.

Tim urges that the concept of his “family farm” supports his argument for obtaining physical care of both boys. However, Tim admits that the courts do not award custody by determining whether a rural or urban Iowa upbringing is more advantageous to a child. Appellee’s Brief, 34-35. Further, Tim’s strained relationship with his sister has embroiled the same family farm in litigation and it will be put up for auction in the near future. Tr. 558:4-14, 725; App. 349, 372. Tim’s Brief criticizes Jodi’s move to Clear Lake, but it was Tim and his lawyer who arranged all of the important details of her move. Tim was “happy” about it. Tr. 102:16 – 105:3; 138:9-138:14; App. 194-197, 217. Tim cannot complain of error that he invited or participated in. *McCracken* 445 N.W.2d at 378.

Although Tim states that Jodi being in a relationship is not an issue for him, he nevertheless accuses her of being “evasive” about the facts. Actually, it was Jodi, herself, who testified as to having a male friend. Tr. 140:18-141:2; App. 219-220. She added, and Tim confirmed, that he also has a female friend, Marie Berke. Tr. 141:3-7; 1122:3-7; 1174:14-15; App. 220, 419, 421. Tim’s Brief does not discuss that he accepted a roommate



into his farm home, without Jodi's prior knowledge, who entertained an overnight female guest in the presence of the boys. Tr. 109:6-111:4; App. 200-202.

### **CONCLUSION**

For all of the above reasons, Petitioner/Appellant respectfully requests the Court modify the Decree of Dissolution of Marriage to award reimbursement alimony, increased traditional alimony and/or an increased property settlement award. Jodi also requests the Court order Tim to pay all of Jodi's attorney fees and appellate attorney fees and all costs of appeal, including additional Guardian Ad Litem fees. On Tim's Cross Appeal, Jodi asks that the award of \$20,000 in temporary attorney fees be affirmed. She also asks that the split primary care arrangement be affirmed, but that if the appellate court determines both boys should reside together that Jodi be awarded primary care of both boys.

### **REQUEST FOR ORAL ARGUMENT**

Petitioner/Appellant Jodi Lynn Erpelding respectfully requests that oral argument be granted.

### **ATTORNEY'S COST CERTIFICATE**

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Dated: December 9, 2016.

RESPECTFULLY SUBMITTED,



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## **PROOF OF SERVICE AND CERTIFICATE OF FILING**

I certify that on December 9, 2016, I electronically filed the foregoing document with the Clerk of the Supreme Court of Iowa using the Iowa Judicial System Electronic Document Management System, which will send notification of such filing to the counsel below:

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