IN THE SUPREME COURT OF IOWA

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.	SUPREME COURT NO. 16-1419 Kossuth County No. CDCD002446

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

APPELLEE/CROSS-APPELLANT'S APPLICATION FOR FURTHER REVIEW

MATTHEW G. SEASE
CHRISTOPHER R. KEMP
KEMP & SEASE
The Rumely Building
104 SW 4th Street, Suite A
Des Moines, Iowa 50309
Phone: (515) 883-2222
Fax: (515) 883-2233
msease@kempsease.com
ckemp@kempsease.com
ATTORNEYS FOR RESPONDENT-APPELLEE/CROSS-APPELLANT

QUESTIONS PRESENTED FOR REVIEW

(1) As an Issue of First Impression, Does a Premarital Waiver of Attorney Fees Violate Public Policy When Child Custody and Support Issues are Litigated as a part of the Dissolution Action?

(2) Did the Court of Appeals Err by Increasing Jodi's Spousal Support by $500.00 per Month to $1666.00?

(3) Did the District Court and Court of Appeals Err in Awarding Split Care of the Minor Children?

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STATEMENT SUPPORTING FURTHER REVIEW

On June 21, 2017, the Iowa Court of Appeals concluded the Erpeldings' premarital agreement clause waiving attorney fees was "void and unenforceable as to child-related issues because it violates Iowa 'public policy by discouraging both parents from pursuing litigation in their child's best interests.'" *In re Marriage of Erpelding*, Sup. Ct. No. 16-1419 at *23 (Iowa Ct. App. June 21, 2017) (quoting *In re Marriage of Best*, 901 N.E.2d 967, 970 (Ill. App. 2009)) (hereinafter, "Slip Op. at *__"). Further, the Court of Appeals increased Tim's monthly spousal support obligation and affirmed the split care custody award.

This Court should grant further review because the Court of Appeals decision decided an important question of changing legal principles not yet settled by the Supreme Court and of broad public importance. Iowa R. App. P. 6.1103(1)(b)(2), (3), (4). The Court of Appeals examined persuasive authority from lower level courts from a few other states and invalidated a knowing and voluntarily contractual agreement by interpreting the broad "public policy" clause of the Iowa statute governing premarital agreements as a prohibition on attorney fees that deal with "child-related issues." The Court of Appeals—ruling on a matter of first impression—created a new categorical ban in premarital agreement clauses despite the fact that the legislature did not

choose to include restrictions on attorney fees as prohibited topics. The Court of Appeals did so despite the caution from this Court that the "power to invalidate a contract on public policy grounds must be used cautiously and exercised only in cases free from doubt." *Rogers v. Webb*, 558 N.W.2d 155, 157 (Iowa 1997) (quoting *Devetter v. Principal Mut. Life Ins. Co.*, 516 N.W.2d 792, 794 (Iowa 1994)).

This Court should also grant further review because the opinion is in conflict with this Court's standard on spousal support and split care. The Court of Appeals opinion, which increased Jodi's alimony from $1166.00 to $1666.00 per month allows Jodi to unduly lean upon Tim for support. *See In re Marriage of Wegner*, 434 N.W.2d 397, 399 (Iowa 1988)). Finally, the opinion affirmed the district court's split care arrangement despite the presumption that siblings should not be separated and the case did not meet the burden of good and compelling reasons for a departure. *See In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992); *In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981)

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STATEMENT OF THE CASE[1]

Nature of the Case

This is an appeal and cross appeal from a Decree of Dissolution of Marriage entered July 28, 2016, in the district Court for Kossuth County, Iowa, the Honorable Judge Patrick Carr presiding. The district court order dissolved the marriage of Jodi Erpelding ("Jodi") and Tim Erpelding ("Tim"). The district court entered a custody award of split physical care of the parties' two minor children. The district court further ordered Tim to pay child support and traditional alimony, and denied Jodi's request for attorney's fees.

Course of the Proceedings

Jodi filed a Petition for Dissolution of Marriage on February 9, 2015. (APP-001, Petition). Tim filed an Answer on February 18, 2015. On June 29, 2015, Jodi filed an application for temporary custody, temporary spousal support, temporary child support and temporary attorney's fees. (APP-007, Temp. App.). On August 21, 2015, the parties mediated the temporary issues and signed a stipulated agreement. (APP-016, Withdraw of Application; APP-686, Exhibit 301). The case then proceeded to an extensive trial lasting eight days, spread out over nearly two months. The trial originally started on December 2, 2015, and ended on February

[1] The Statement of the Case and Statement of Facts are limited to those events and facts relevant to this Court's consideration of the instant application.

19, 2016. (APP-082, Decree P. 1). The district court entered a decree on July 28, 2016, dissolving the parties' marriage. (APP-082, Decree). Jodi filed a timely notice of appeal on August 23, 2016. (APP-133, Notice of Appeal). Tim filed a timely notice of cross appeal on August 31, 2016. (APP-137, Notice of Cross-Appeal). On June 21, 2017, the Court of Appeals affirmed as modified the district court ruling and remanded to the district court. *See* Slip Op. at *1.

STATEMENT OF THE FACTS

Jodi Erpelding ("Jodi") and Tim Erpelding ("Tim") were married in 1997 after living together for approximately five (5) years. (APP-140, Tr. 43). Over the course of their marriage they had two boys, W.E. and D.E. At the time of the trial, W.E. was fourteen (14) and D.E. was nine (9). (APP-140, Tr. 43). Prior to the parties' separation and eventual divorce, the Erpelding family lived on the family farm in rural Algona, Iowa. (APP-142, Tr. 45). W.E. and D.E. spent their entire lives on the Erpelding family farm until the dissolution. (APP-171-172, Tr. 78-79).

As the boys grew into school age, they were both enrolled in the Bishop Garrigan parochial school system. (APP-256-259, Tr. 206-209). The boys both excelled in this environment and had many friends. (APP-256-259, Tr. 206-209). They were active in many athletic events and their local catholic church. (APP-462, Tr. 1333). They also have begun to show an interest in the farming operation. (APP-374, APP-403-404, Tr. 831, 906-907). W.E. has started to perform field work,

including driving tractors, walking beans and picking up rocks. (APP-374-380, Tr. 831-837). Similarly, D.E. has begun to express some interest and— while being somewhat limited in his age—has engaged in similar activities. (APP-381-382; APP-402, Tr. 838-839; 904). Both boys have previously engaged in bottle feeding calves and have expressed a desire for Tim to get cattle again in the future. (APP-403-404, Tr. 906-907).

Jodi continued to work in Clear Lake, and moved there during the pendency of the dissolution to eliminate her daily commute. (APP-196, Tr. 104). Additionally, Jodi is romantically involved with a co-worker and recent divorcee, Jason Enke. (APP-248-251, Tr. 192-195). Jodi originally testified that he was merely a "social friend", but eventually she admitted that he has spent numerous overnights at her house. (APP-219, Tr. 140; APP-252, Tr. 196). Importantly, Jodi's move to Clear Lake placed her outside of the Bishop Garrigan school system. (APP-207, Tr. 127).

At the time of the separation—February 2015—Jodi and Tim agreed to a joint care arrangement that included an informal agreement that both boys would remain in the Bishop Garrigan school system. (APP-592, Exhibit 21). However, this was unsuccessful as the 2015/2016 school year approached. (APP-391-392, Tr. 878-879). On the eve of a temporary matters hearing, Jodi and Tim mediated the matter and arrived to a split custody arrangement. (APP-686, Exhibit 301; APP-391-392,

Tr. 878-879). This is the arrangement that remained in place until the district court's order in July of 2016. (APP-082, Decree).

Prior to their marriage, Jodi and Tim entered into a premarital agreement. (APP-675, Exhibit 101). Both parties had attorneys who provided input to the agreement and it was signed a mere few days prior to their marriage in 1997. (APP-158-162, Tr. 61-65). Many additional relevant facts are discussed within the Argument section, *infra*.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN FINDING PUBLIC POLICY BARRED ATTORNEY FEE RESTRICTIONS PREMARITAL AGREEMENT WITH RESPECT TO "CHILD-RELATED ISSUES LITIGATED IN THE DISSOLUTION MATTER".

Preservation of Error: Tim resisted Jodi's request for attorney fees at the district court level and to the Court of Appeals. Both courts ruled upon the issue presented here. As such, error was preserved on this issue. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." (citing *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998)).

Standard of Review: The standard of review regarding attorney fees is for an abuse of discretion. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). "An abuse of discretion occurs when the district court exercises its discretion "on

grounds or for reasons that are clearly untenable or to an extent clearly unreasonable." *In re Marriage of Schenkelberg*, 824 N.W.2d 481, 484 (Iowa 2012) (citing *State v. Nelson*, 791 N.W.2d 414, 419 (Iowa 2010); *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000)). "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *Id.* (citing *Graber v. City of Ankeny*, 616 N.W.2d 633 638 (Iowa 2000)).

Discussion: The Court of Appeals—ruling on a matter of first impression—voided a clause the Erpeldings' premarital agreement that prohibited an attorney fee award as against public policy because part of the fees were billed for litigation regarding custody and support of the children. The "power to invalidate a contract on public policy grounds must be used cautiously and exercised only in cases free from doubt." *Rogers v. Webb*, 558 N.W.2d 155, 157 (Iowa 1997) (quoting *Devetter v. Principal Mut. Life Ins. Co.*, 516 N.W.2d 792, 794 (Iowa 1994)). The party seeking to set aside the contractual clause on public policy grounds bears the burden of proof. *Walker v. Gribble*, 689 N.W.2d 104, 111 (Iowa 2004) (citing *Cogley Clinic v. Martini*, 112 N.W.2d 678, 682 (Iowa 1962)). "Before striking down a contract for public policy reasons, it must be shown that preservation of the general public welfare outweighs the weighty societal interest in the freedom of contract." *Id.* (citing *Rogers*, 558 N.W.2d at 158; *Bergantzel v. Mlynarik*, 619 N.W.2d 309, 317 (Iowa 2000) (quoting Restatement (Second) of Contracts § 178(2)–(3), at 6–7

(1981)).

A party to a dissolution does not have a right to an award of attorney fees; rather the district court uses its discretion to determine whether an award is appropriate. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa App. 1998). "Whether attorney fees should be awarded depends on the respective abilities of the parties to pay the fees and the fees must be fair and reasonable." *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa App. 1997). The district court held that under the terms of the premarital agreement, the parties waived their right to attorney fees.

However, the Court of Appeals—ruling on an issue of first impression—held that a premarital agreement clause which prohibits an award of attorney fees "is void and unenforceable as to child-related issues because it violates Iowa 'public policy by discouraging both parents from pursuing litigation in their child's best interest.'" Slip Op. at *23 (Iowa Ct. App. June 21, 2017) (quoting *In re Marriage of Best*, 901 N.E.2d 967, 970 (Ill. App. 2009)). This voiding of the attorney fees clause was in error as the concerns expressed by the Court of Appeals do not outweigh the "weighty societal interest in the freedom of contract." *Rogers*, 558 N.W.2d at 157.

As argued to the Court of Appeals, the IUPAA does not prohibited waiver of attorney fees and the district court correctly interpreted the law. Iowa Code section 596.5 provides:

1. Parties to a premarital agreement may contract with respect to the following:

    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.

    * * *

    c. The disposition of property upon separation, dissolution of the marriage, death or the occurrence or nonoccurrence of any other event.

    * * *

    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.

2. The right of a spouse or child to support shall not be adversely affected by a premarital agreement.

The legislature examined and specifically prohibited certain items from a prenuptial agreement, providing "[n]either alimony, custody, nor child support can be circumscribed by a pre-marital agreement." Iowa Code § 596.5. This Court has held "[t]he legislature may express its intent by the omission, as well as the inclusion of terms. In other words, when the legislature expressly mentions one thing, it implies the exclusion of other things not specifically mentioned." *Doe v. Iowa Dep't of Human Servs.*, 786 N.W.2d 853, 859 (Iowa 2010) (citing *Kucera v. Baldazo*, 745 N.W.2d 481, 487 (Iowa 2008)); *see also De Stefano v. Apts. Downtown, Inc.*, 879 N.W.2d 155, 183 (Iowa 2016); *Meinders v. Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632, 637 (Iowa 2002). Although the legislature had the opportunity to prohibit clauses in a premarital agreement that restrict payment of attorney fees when child

custody is at issue, the legislature did not do so.

As this is a matter of first impression, there are no Iowa cases directly on point when children are involved. However, Iowa law does allow premarital agreements to waive attorney fees when children are not involved. The Court of Appeals reversed a district court which awarded attorney fees in spite of a prenuptial waiver. In the case of *In re Marriage of Van Horn*, the Court of Appeals reversed a district court award of attorney fees where the parties waived their right to attorney fees in the event of a dissolution of marriage in their prenuptial agreement. 2002 WL 142841 at *4 (Iowa App. 2002) ("The agreement clearly precludes the award of attorney fees. As such, that award was in error, and we modify to eliminate it."). Although there are no Iowa cases on point, the South Carolina Supreme Court has held "[w]e concur with the majority of jurisdictions which hold prenuptial agreements waiving alimony, support and attorney's fees are not *per se* unconscionable, nor are they contrary to the public policy of this state." *Hardee v. Hardee*, 355 S.C. 382, 388, 585 S.E.2d 501, 504 (2003).

This Court has stated, "[i]n the absence of instructive Iowa legislative history, we look to the comments and statements of purposed contained in the Uniform Act to guide our interpretation of the comparable provisions of the IUPAA. *In re Marriage of Shanks*, 758 N.W.2d 506, 512 (Iowa 2008). Under the Uniform Premarital Agreement Act, after which Chapter 596 was modeled, the Model Section

regarding enforcement of a premarital agreement explains that if a party does not have independent legal representation at the time they signed the agreement, the unrepresented party must be given a notice of waiver of rights, "substantially similar to the following . . . 'If you sign this agreement, you may be: . . . Giving up your right to have your legal fees paid.'" UNIF. PREMARITAL AGREEMENT ACT §9(c). This shows that the intent of the Uniform Act was to allow parties to waive their right to attorney fee claims in the event of a dissolution. As Iowa's adoption of the model code does not specifically prohibit a premarital ban on attorney fee claims, the district court's ruling should stand.

Tim acknowledges that there are a few states where state courts of appeals have found a premarital agreement prohibiting attorney fees awards are not enforceable as to issues of child custody. *See, e.g. In re Marriage of Best*, 901 N.E.2d 967, 971 (Ill. App. 2009). The Court of Appeals found the *Best* rationale persuasive, but missed a key difference between Illinois and Iowa law with respect to attorney fees. Importantly, "[i]In Illinois, the party seeking an award of attorney fees must establish his or her inability to pay and the other spouse's ability to do so." *Id*. at 972. This notably differs from the Iowa standard, which requires the court to consider the respective abilities to pay, rather than placing a burden on the party requesting fees to establish an inability to pay.

If this Court decides that a premarital agreement prohibition on attorney fees

relating to child support violates public policy, the Court should then find that such restrictions are voidable as applied, rather than *per se* void. This case is a good example of why if the voluntarily-contracted restriction is against public policy, it should only be voidable. If the rationale behind the public policy argument is that it would be unfair to hinder the lesser-earning spouse's ability to effectively litigate the issues—that is not the case with Jodi and Tim. Here, Jodi received over $810,000 in assets and no liabilities, as well as substantial alimony and child support. She did not demonstrate an inability to pay her attorney fees, but merely wants to have Tim pay anything she can get the court to order.

Finally, public policy concerns that a party would not be able to effectively litigate the best interests of the children are not present in this case as the children's interests were fully represented by an appointed Guardian Ad Litem and Tim paid the entire fee ($9,140.00) for the children's representation. (APP-121, Decree P. 40). The Court of Appeals dismissed this agreement because argument there was no support for the proposition that "a GAL's role supplants a parent's role in dissolution proceedings involving custody and child support." Slip Op. at *23. However, this analysis replaces the "best interests of the children" consideration with "a parent's role in dissolution proceedings;" the focus should be on the children, not the parent. *Id*.

Iowa Code section 598.12(1) provides "[t]he court may appoint a guardian ad

litem to represent the best interests of the minor child or children of the parties. The guardian ad litem shall be a practicing attorney and shall be solely responsible for representing the best interests of the minor child or children. The guardian ad litem shall be independent of the court and other parties to the proceeding, and shall be unprejudiced and uncompromised in the guardian ad litem's independent actions." The children's best interests is the paramount consideration in custody cases. *In re Marriage of Junkins*, 240 N.W.2d 667 (Iowa 1976). Here, the appointment of the GAL to advocate for the children's best interests squarely alleviates the public policy concern that a financially deprived parent would not have the ability to advance why their proposed custodial arrangement is in the children's best interest. The GAL's sole role is to represent the best interest of the children, and is not swayed by emotion, bias, prejudice, or parental wishes which are present when a parent has a "role" in the custody determination.

Because Iowa law and the majority of jurisdictions do not prohibit fee-shifting bans in premarital agreements, this Court should reverse the Court of Appeal's finding that public policy prohibits parties from contractually eliminating claims for attorney fees with respect to child custody through a premarital agreement. This Court should affirm the district court's denial of awarding Jodi attorney fees. Further, this Court should reverse the district court's award of $20,000 in temporary fees to Jodi. *See Van Horn*, 2002 WL. 142841 (Iowa App. 2002). Even if the Court

follows the minority of jurisdictions and finds fee-shifting bans are against public policy when custody is at issue, the facts and circumstances of this case do not warrant a *per se* voiding of the attorney fee provision.

II. THE COURT OF APPEALS ERRED IN INCREASING JODI'S ALIMONY AWARD BY $500.00 PER MONTH.

Preservation of Error: The issue alimony was raised and presented before the district court and Court of Appeals. As such, error was preserved on this issue. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." (citing *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998)).

Standard of Review: Iowa Rule of Appellate Procedure 6.907 provides "Review in equity cases shall be de novo." Iowa R. App. P. 6.907.

Discussion:

Spousal support "is not an absolute right, and an award thereof depends upon the circumstances of a particular case." *In re Marriage of Schenkelberg*, 824 N.W.2d 481, 486 (Iowa 2012)(quoting *In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005)). "In deciding whether to award alimony, the court must consider the earning capacity of the parties, the present standard of living, and the payor's ability to pay balanced against the needs of the recipient spouse." *In re Marriage of Wattonville*,

2012 WL 1439241 (Iowa App. 2012)(citing *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa App. 1996)). "If both parties are in reasonable health, they need to earn up to their capacities in order to pay their own bills and not unduly lean on the other party for support." *Id.* (citing *In re Marriage of Wegner*, 434 N.W.2d 397, 399 (Iowa 1988)).

If alimony is awarded, the appropriate amount of support is calculated based upon the factors listed in Iowa Code section 598.21A(1), including: "(1) the length of the marriage, (2) the age and physical and emotional health of the parties, (3) the property distribution, (4) the educational level of the parties at the time of the marriage and at the time the dissolution action is commenced, (5) the earning capacity of the party seeking alimony, and (6) the feasibility of the party seeking alimony becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage." *In re Marriage of Hansen*, 733 N.W.2d 683, 704 (Iowa 2007)(citing Iowa Code § 598.21A(1)(*a*)-(*f*)). Notably, Jodi did not advance any argument specifically examining the factors listed in Iowa Code section 598.21A(1); she simply asserts "an increase in traditional alimony is justified." The Court of Appeals increased Jodi's alimony to $1666.00 per month to allow her "to support herself, care for D.E., take vacations similar to the ones the parties enjoyed during the marriage, and fund an increase to her savings." Slip Op. at *18.

It is important to consider that the district court set Tim's alimony at $1166.00

per month (and Tim's monthly income) by averaging income that included historically-high crop prices. As acknowledged by Jodi's witness Alan Ryerson, even when making the depreciation adjustment, Tim's farm income was only $66,952 for the year 2013 and he lost $159,717 in the year 2014. (APP-630, Exhibit 53). There was also testimony that Tim will essentially be living on borrowed money as his farm income is not expected to increase in the next few years. (SUPP-APP 101-102, Tr. 1458-1459). Alternatively, Jodi was a wage earning employee at the ISEA throughout the marriage, and was awarded over $810,000 in assets, including an unencumbered home and vehicle.

Tim's adjusted net monthly income is $6,805.02 according to the district court's determination that he earns gross self-employment income of $125,000.00 per year. However, when the alimony payment is factored in, Tim's monthly income would be $5,139.02 and Jodi's would be $4,553.26 with the current alimony award. This calculation does not include child support, which need to be recalculated as ordered by the Court of Appeals. Running the Child Support Guidelines with Tim's proper income would result in a child support award of approximately $591.00 per month. That would leave Tim with net monthly income of $4,548.02 and Jodi with $5,144.26. The support offsets would provide Jodi with **ten percent more** monthly income in addition to Jodi having a home and vehicle free and clear as Tim assumed the debt on those items. Applying all of the relevant factors, the Court of Appeal's

increased award of traditional alimony was not appropriate under the circumstances of this case and should be reversed.

III. THE COURT OF APPEALS ERRED AFFIRMING THE SPLIT CARE AWARD AND IN NOT AWARDING TIM PRIMARY PHYSICAL CARE OF BOTH CHILDREN

Preservation of Error: The issue of whom should be awarded primary care was raised and presented before the district court. As such, error was preserved on this issue. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." (citing *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998)).

Standard of Review: Iowa Rule of Appellate Procedure 6.907 provides "Review in equity cases shall be de novo." Iowa R. App. P. 6.907.

Discussion: As in all cases involving the question of child custody, the Court's consideration in proceedings is always the best interest of the children. *In re Marriage of Junkins*, 240 N.W.2d 667 (Iowa 1976). The primary concern in determining primary physical care is the best interests of the children. Iowa Code § 598.1(7) (2013).

A. The District Court and Court of Appeals Erred in Ordering a Split Physical Care Arrangement.

In this case, the district court awarded and Court of Appeals affirmed joint legal custody to Jodi and Tim, with a split physical care arrangement. D.E. was

awarded to Jodi and W.E. was awarded to Tim. (APP-119, Decree P. 38). This Court and the Iowa Court of Appeals have equally recognized the general disfavor to this type of a custodial arrangement. This Court has stated as follows regarding split physical care arrangements:

> There is a presumption that siblings should not be separated. *In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981). We have long recognized that split physical care is generally opposed because it deprives children of the benefit of constant association with one another. "The rule is not ironclad, however, and circumstances may arise which demonstrate that separation may better promote the long-range interests of children." *In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981). Good and compelling reasons must exist for a departure.

In re Marriage of Will, 489 N.W.2d 394, 398 (Iowa 1992). To aid in determining whether good cause exists to award the extreme arrangement of split physical care, this Court has provided a number of factors to consider. These include the age differences between the siblings, if the children would have remained together but for a split physical care arrangement, the children's relationships with each other and "the likelihood that one of the parents or children would turn other children against the other parent." *Id.* In this case, each of these factors points against an award of split physical care.

Tim presented a clear plan for how he would reintegrate D.E. back into the Bishop Garrigan school system. He provided testimony from the Bishop Garrigan president/superintendent and D.E.'s former third grade teacher about how this

process would occur. (APP-473-475, Tr. 1402-1404; APP-477-478, Tr. 1425-1426). Both recognized however, that because D.E. spent a number of years already in the system, his transition would be relatively easy. (APP-473-475, Tr. 1402-1404; APP-477-478, Tr. 1425-1426). Additionally, Tim recognized that D.E. is still social and enjoys time with friends he made while attending Bishop Garrigan. (APP 406-408, Tr. 909-911). Thus, each of the factors delineated in *Will* establish that this is ***not*** the unique situation in which split care should be awarded. Instead, W.E. and D.E. should remain together.

The guardian ad litem's report and courts' ruling did not take into consideration the long-term considerations of D.E. in denying Tim primary care. Iowa Courts have long recognized that the "first and governing consideration" is a determination as to what will be in the best long-term interests of the children. *In re Sivesind*, 2004 WL 360605 at *2 (Iowa App. 2004) (citing Iowa Code § 598.41(3) (2003) (citing *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984)). In this case, the guardian ad litem recognized that there would very likely be a need to modify the split physical care arrangement in the future because D.E. may wish to enroll into Bishop Garrigan's middle school or high school in the future. (APP-080, GAL P. 19) ("At some point either middle school or more probably high school, he may decide the Garrigan environment is better for him. Strictly on the educational issue a switch in primary placement may be appropriate at that point."). This

acknowledgement of the potential lack of long-term stability, is exactly what the guardian ad litem should be advocating against and was not given enough weight by the district court or Court of Appeals. Long-term stability for D.E. clearly lies with Tim and not Jodi.

At the time of trial, Tim testified that the split care arrangement was not working. He noticed that due to the traveling back and forth the boys seemed very tired. (APP-397-398, Tr. 896-897). For example, in the time it would take to drive from Clear Lake to Algona, D.E. would fall sleep in the car. (APP-397-398, Tr. 896-897). Additionally, the boys are simply not spending enough time together. Following the temporary matters stipulation, the boys were spending two nights together during the week. (APP-686, Exhibit 301). However, the reality of the situation is that based upon the school schedules, the extracurricular activities schedules, and the amount of time spent driving between the two homes, the boys are only basically sleeping in the same location on many occasions. (APP-399-400, Tr. 900-901). Simply put the brothers are not spending any quality time together. Finally, as recognized by the Guardian Ad Litem, the brothers miss spending time with each other. (APP-072-073, GAL P. 11-12). This is not a situation where one brother has angst against the other or against a particular parent. Instead, the guardian ad litem recognized that the brothers have a bond with each other and that

after only a couple of months of being apart, they both expressed missing the other. (APP-072-073, GAL P. 11-12).

These principles absolutely exhibit the problems with a split care arrangement and establish why there is a presumption against split physical care. *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992) ("There is a presumption that siblings should not be separated."). This case simply does not warrant the split physical care of W.E. and D.E. Instead, this case is a somewhat standard case in which the boys should not be split between the parents and liberal visitation should be awarded to the noncustodial parent. *See e.g., In re Marriage of Fynaardt*, 545 N.W.2d 890, 894 (Iowa App. 1996) ("We do not find Gene and Jil's situation to be so rare to require a deviation of the strong policy of courts to avoid splitting custody of the children."). Accordingly, this Court should reverse the district court's split physical care arrangement.

B. Tim Provides the Necessary Stability to Both W.E. and D.E.

The importance of stability in a child's life cannot be overemphasized. *In re Marriage of Colter*, 502 N.W.2d 168 (Iowa App. 1993). Stability of the parent is one factor in determining the long-term best interests of the children. *See In re Marriage of Worthington*, 504 N.W.2d 147, 150 (Iowa App. 1993)(discussing employment and home stability in awarding physical care); *Neubauer v. Newcomb*, 423 N.W.2d 26, 27 (Iowa App. 1988)(finding father's employment more secure than

mother's, particularly as to geographical location). Tim is able to provide a more stable environment for the children and as such the district court and Court of Appeals erred in denying primary physical care of both W.E. and D.E.

D.E., in order to provide stability, should remain on the family farm with Tim. As with W.E., D.E. was actively involved in the Bishop Garrigan school system and had numerous friends. (APP-406-408, Tr. 909-911; APP-392-393, Tr. 879-880). During one of D.E.'s visits with Tim, he saw his friends and reintegrated with them without any issues. (APP-406-408, Tr. 909-911). Further, while D.E. is clearly younger than W.E. and unable to participate in the same level, D.E. has begun to show an interest in the family's farming operation. (APP-381-382; APP-402, Tr. 838-839; 904). In fact, when discussing the issue with the guardian ad litem, he specifically requested long summer vacations with Tim so that he could spend time on the farm. (APP-073, GAL P. 12). He also shows a potential desire to follow his family footsteps and attend Bishop Garrigan High School. (APP-406-408, Tr. P. 909-911, APP-080, GAL P. 19).

Accordingly, this Court should reverse the district court's split physical care arrangement and award primary physical care of both boys to Tim and remand to the district court for child support calculations.

CONCLUSION

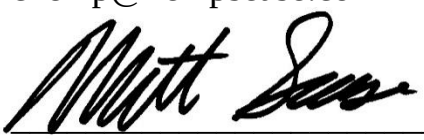
Respondent-Appellee/Cross-Appellant Tim Erpelding respectfully requests this Court (1) reverse the Court of Appeals ruling that attorney fee bans in premarital agreements are void for public policy with respect to child-related issues, (2) reverse the Court of Appeals increase in traditional alimony and reinstate the district court's award, and (3) reverse the district court's (and Court of Appeals affirmance of) the split physical care award between the parties. This Court should find that both W.E. and D.E. should be placed in Tim's care and award him primary physical of both boys. This Court should further remand this matter to the district court for a determination of child support to be awarded to Tim.

REQUEST FOR ORAL ARGUMENT

Tim respectfully requests oral argument in this matter.

Respectfully Submitted,

KEMP & SEASE
The Rumely Building
104 SW 4th Street, Suite A
Des Moines, Iowa 50309
Ph: (515) 883-2222
Fx: (515) 883-2233
msease@kempsease.com
ckemp@kempsease.com

By: 

MATTHEW G. SEASE

CHRISTOPHER R. KEMP
Attorneys for Respondent-Appellee/Cross Appellant

ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Proof Brief and Argument was $0.00, as it was electronically filed.

KEMP & SEASE
The Rumely Building
104 SW 4th Street, Suite A
Des Moines, Iowa 50309
Ph: (515) 883-2222
Fx: (515) 883-2233
msease@kempsease.com

By: 

_____

MATTHEW G. SEASE
Attorney for Respondent-Appellee/Cross-Appellant

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Dated: July 11, 2017

KEMP & SEASE
The Rumely Building
104 SW 4th Street, Suite A
Des Moines, Iowa 50309
Ph: (515) 883-2222
Fx: (515) 883-2233
msease@kempsease.com

By: 

_____

MATTHEW G. SEASE
Attorney for Respondent-Appellee/Cross-Appellant

CERTIFICATE OF SERVICE AND CERTIFICATE OF FILING

I certify on July 11, 2017, I will serve this brief on the Appellant's Attorney, Thomas W. Lipps, by electronically filing it.

I further certify that on July 11, 2017, I will electronically file this document with the Clerk of the Iowa Supreme Court.

KEMP & SEASE
The Rumely Building
104 SW 4th Street, Suite A
Des Moines, Iowa 50309
Ph: (515) 883-2222
Fx: (515) 883-2233
msease@kempsease.com

By: 

_____

MATTHEW G. SEASE
Attorney for Respondent-Appellee/Cross-Appellant

IN THE COURT OF APPEALS OF IOWA

No. 16-1419
Filed June 21, 2017

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.

Appeal from the Iowa District Court for Kossuth County, Patrick M. Carr, Judge.

Jodi Erpelding appeals the economic provisions of the decree dissolving her marriage to Tim Erpelding, and Tim cross-appeals the children's split physical care. **AFFIRMED AS MODIFIED AND REMANDED.**

Thomas W. Lipps of Peterson & Lipps Law Firm, Algona, for appellant.

Matthew G. Sease and Christopher R. Kemp of Kemp & Sease, Des Moines, for appellee.

Heard by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, Judge.

Jodi Erpelding appeals the economic provisions of the decree dissolving her marriage to Tim Erpelding, and Tim cross-appeals the physical-care arrangement and his child-support obligation. After our de novo review, we find the district court's provision for split care of the two brothers promotes the best interests of each child. Due to a scrivener's error, we remand for the district court to recalculate Tim's child support. We reject Jodi's claim she is entitled to reimbursement alimony but modify the decree to increase Jodi's traditional alimony from $1166 to $1666 per month. Resolving an issue of first impression, we conclude the prenuptial agreement's prohibition on the district court's award of attorney fees as to issues of parental responsibility and child support violates Iowa public policy. We remand for the district court to determine and assess the appropriate amount of Jodi's attorney fees for the trial and on appeal.

I. Facts and Prior Proceedings

Tim and Jodi lived together for five years on the Erpelding family farm before executing a prenuptial agreement in November 1997. Jodi discussed the agreement with her own attorney before signing it. At that time, Tim—a lifelong farmer—listed his net worth at more than $500,000, while Jodi had a net worth of $41,000. The parties married in December 1997.

Tim farmed with his father in Kossuth County, east of Algona. Tim's father died a few years before the parties' dissolution, and Tim received both gifts and an inheritance from his father. Tim continued to operate the family farm with his brothers, who had other full-time employment and farmed only part time. Jodi,

also from Kossuth County, works for the Iowa State Education Association (ISEA).

The parties have two sons, W.E., who was born in 2001, and D.E., who was born in 2005. During the marriage, Jodi's work location changed from nearby Algona to Emmetsburg, and finally, to Clear Lake, which is about forty miles from the family farm. Jodi reduced her hours after W.E.'s birth and again after D.E.'s birth, generally working four days a week. Jodi's employer also provides her with another day off each week in June and July.

Jodi suffered a heart attack in September 2014, which she attributed to the stress of an unhappy marriage. When she and Tim separated in January 2015, Tim moved in with a sibling who lived nearby. Tim and his attorney aided Jodi's negotiations for a house in Clear Lake, closer to her office, as the transaction occurred before Jodi had obtained counsel. Using a bank loan, Tim financed the Clear Lake home for Jodi. In February 2015, Jodi filed a petition to dissolve the marriage.

In the decree dissolving their marriage of eighteen years, the district court awarded Jodi and Tim joint legal custody and split the physical care of the parties' two sons. On the financial side, the district court found the parties' prenuptial agreement was "clear and unambiguous" in requiring all property each party owned before the marriage, as well as all property each party acquired during the marriage in his or her individual name, to be awarded "to the party in whose name it is registered or who otherwise owns the same" in the event of a dissolution. Based on the parties' agreement, the court awarded Jodi assets worth approximately $810,000 and no debt. Similarly, Tim received his assets,

including inherited and gifted assets and a debt obligation of $944,454, for $6,300,000 in net assets.[1] The court rejected Jodi's request for reimbursement alimony but awarded her traditional alimony in the amount of $1166 per month.

Jodi appeals, and Tim cross-appeals.

II. Scope and Standard of Review

In this equitable proceeding, we review de novo. *See In re Marriage of Probasco*, 676 N.W.2d 179, 183 (Iowa 2004). "[W]hen considering the credibility of witnesses, we give weight to the district court's findings of fact, but we are not bound by them." *Id.* "No hard and fast rules govern the economic provisions in a dissolution action; each decision turns on its own uniquely relevant facts." *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). Generally, we will disturb the trial court's ruling only when there has been a failure to do equity. *Id*.

III. Split Physical Care

During the parties' initial separation in the spring and summer of 2015, they shared physical care while W.E. and D.E. finished the second semester of third grade and eighth grade, respectively, at Bishop Garrigan, Algona's parochial schools. But neither party requested shared care at trial. In the summer of 2015, Jodi sought temporary physical care of both boys, and the parties agreed to mediate the issue with former justice David Baker. In August 2015, the parties agreed to a pre-decree plan for the upcoming 2015-16 school year—D.E. lived in Clear Lake with Jodi and attended the local public school for

[1] The court assigned Tim his farm-related debt of $635,454 and the $309,000 debt Tim had assumed when he took out a loan for Jodi's new home.

fourth grade, and W.E. lived with Tim on the farm and attended ninth grade at Garrigan high school in Algona.

Before trial, Tim asked the court to appoint a guardian ad litem (GAL), suggesting attorney Gregory H. Stoebe. Jodi resisted. On October 23, 2015, the court appointed Stoebe as the GAL for the children. The GAL conducted interviews, questioned the parties at trial, and compiled a posttrial report dated March 2, 2016. The GAL recognized "the long-established rule is to keep children together whenever possible" but concluded:

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

The district court's July 28, 2016 dissolution decree discussed the GAL's report as one of eleven factors it analyzed, stating the GAL provided "an excellent summary" of the relevant evidence and "has recommended" the court implement "a split physical care arrangement. Although the court will not abdicate to the [GAL] its duty to decide the custody issues in this case, the court is grateful for the work [of the GAL] and has accorded respectful consideration" to his report and recommendations. The court also provided a thoughtful analysis of the other ten factors—the characteristics of each child, the emotional, social, moral, material, and educational needs of each child, the characteristics of each parent, the capacity and interest of each parent to provide for the needs of the child, the interpersonal relationship between the child and each parent, the interpersonal relationship between the siblings, the effect on each child of

continuing or disrupting an existing custodial status, the stability and wholesomeness of each home environment, the child's preference, and the court's available alternatives. After considering all the factors and recognizing the preference against split care made its decision "a close one," the court ruled, "in this case, split physical care is in the best interests of each child."

Under the decree, the boys are together every Wednesday and every weekend, alternating between Clear Lake and the farm. Each parent has ten days of summer visitation each year with both boys. The district court recognized implementation of the schedule is "a little complicated," and it expected the parties to be "flexible and accommodating with each other and with their sons. The boys are at an age where their views are entitled to respectful consideration by their mother and father."

In his cross-appeal, Tim argues the family's circumstances are not "the unique situation in which split care should be awarded," quoting the applicable legal standard:

> There is a presumption that siblings should not be separated. We have long recognized that split physical care is generally opposed because it deprives children of the benefit of constant association with one another. "The rule is not ironclad, however, and circumstances may arise which demonstrate that separation may better promote the long-range interests of children." Good and compelling reasons must exist for a departure.

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

In the decree, the court found both Tim and Jodi "are good parents" who will cooperate "to see that the two boys are together as much as possible." The court believed Jodi, as compared to Tim, "might be a bit more attuned to the many non-verbal, intuitive queues of a child's unstated emotional needs." The

court also found "some truth" to the fact Tim worked hard and became more involved in the boys' lives following the separation. But the court observed Tim "seems able to overlook minor bumps in the road, trying to guide as much by example and inaction as forcible intervention." In sum, the court found "each parent presents positive aspects, and each possesses some positive aspects the other does not."

Noting a resolution of physical care "involves a great deal more than simply asking children with whom they wish to live," the court gave some weight to W.E.'s preference to live with his father on the farm and to D.E.'s preference to live with his mother in Clear Lake, but based on each child's age, it gave greater weight to W.E.'s preference. The court also noted fourth-grader D.E. was in generally good health but had stomach issues acknowledged by both parents and treated medically. The court found both Jodi and D.E.'s "physician link, to some extent, the custody difficulties, especially when [D.E. is with Tim], with some recurrence of [D.E.'s] stomach problems."

Discussing long-range issues, the court noted W.E. will finish high school in three years (now two years), while D.E. had another year of grade school followed by middle school in 2017-18. When considering the effect of continuing or disrupting the children's existing care, the district court believed trouble would ensue if the court placed W.E. with his mother in Clear Lake and would also ensue, "including probable emotional damage to D.E., should he be placed with [his father] and required to live on the farm." The court found, "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."[2]

After framing its alternatives—placing both boys on the farm with Tim, placing both boys with Jodi in Clear Lake, or keeping split care—the court concluded: "[S]plit physical care is the least damaging alternative available in this case." Our court has defined "split physical care" as "the separation of children between parents." *In re Marriage of Fynaardt*, 545 N.W.2d 890, 893 (Iowa Ct. App. 1996). While courts endeavor to keep children together, the rule is not "ironclad." *In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981).

After observing Tim and Jodi over eight days of testimony, the district concluded it was in the children's best interests to be placed in split physical care. *See In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984) (recognizing the district court's ability to observe the demeanor of the witnesses helps it formulate a "wise decision"). Relevant factors in addition to each parent's caretaking capability include the age difference between the separated children, the relationship between the children, and the likelihood that one of the parents or children would turn a child against the other parent. *Will*, 489 N.W.2d at 398. The decree shows the district court was fully aware of these principles. The decree implicitly concludes "both of the parties are capable caretakers as to the

[2] Earlier, the court had found each boy had a stronger interpersonal relationship with the parent with whom he had been living but "this phenomenon is more than just a result of their recent placement." Due to W.E.'s age and desire to emulate his father, W.E. has "a strong interest" in his friends at school and in Algona generally, sports, and living and working on the family farm. Finding D.E. to be "a harder study," the court observed: "[T]here was something about D.E. that has made him wish for some new surroundings. He wanted, and now appears to thrive in, the school system in Clear Lake, Iowa and living with his mother."

specific [child] placed in their care." *See id.* (recognizing needs of "children within the same family may differ").

On appeal, Tim contends the difference of four and one-half years in age and five grades between the brothers is not significant and the boys are bonded to each other. As an example of their bond, Tim asserts D.E. likes to help W.E. pick up rocks on the farm and they enjoy trap shooting together. Tim claims: "[B]oth children's relationships with their individual brother and with their parents [are] normal and neither party had great disdain for the other." But Tim emphasizes W.E. was "absolutely adamant" about not leaving his current school system or the farm. Tim argues split care was not working because the boys were not spending enough quality time together. Tim alleges the boys were tired from travelling back and forth and D.E. would fall asleep in the car. Tim concludes split care should not be ordered because neither brother has angst against the other or against a particular parent and because the GAL recognized the brothers have a bond and both missed each other after only a couple of months being apart.[3]

The issue before us is whether, despite the presumption in favor of keeping siblings together, under the conditions that have arisen in this family, "separation may better promote the long-range interests of the children." *See*

[3] Despite his own reliance on the GAL report for this conclusion, on appeal Tim contends the GAL's report used discredited gender stereotypes and the district court gave the report too much deference. Jodi responds Tim did not preserve error on his challenge to the GAL's report. We find no merit in Jodi's error-preservation challenge; the district court acknowledged Tim disagreed with the GAL and sought physical care of both boys in his posttrial briefing. On the other hand, we are not persuaded by Tim's attack on the GAL report. The district court weighed the GAL report as only one of the eleven factors it thoughtfully considered in its physical-care analysis. Further, when the report is read as a whole, the GAL's conclusion is not premised on improper grounds.

Jones, 309 N.W.2d at 461 (citing *In re Marriage of Wahl*, 246 N.W.2d 268, 270 (Iowa 1976)). Upon our de novo review, we find "good and compelling reasons" for split physical care in the circumstances of this case. While each boy loves both parents and his brother, the boys are five grades apart, their social lives and activities are obviously unalike, and as recognized by the district court, their age difference "means that they are not going to be in constant association with each other. Their interests are necessarily going to diverge."

Jodi and Tim love and support their children and each is a capable caretaker. To their credit, neither Jodi nor Tim has taken steps to damage the other's relationship with the children.[4] But we find it significant that Jodi was the historical caretaker for the boys, and her more flexible work schedule, especially in June and July when D.E. is not in school, allows her to "better minister" to D.E.'s needs as a younger child. *See Will*, 489 N.W.2d at 396-99 (affirming district court's split physical care).

Split care is also supported by the stability the arrangement provides. W.E. recently finished his sophomore year; he strongly desired to live on the farm with Tim, is helpful on the farm, and is happy at Garrigan high school where he can participate in activities with his long-time friends. In contrast, while D.E. enjoys his time on the farm with his brother and father, he wants to live with his mother and is thriving in his new school in Clear Lake, recently completing fifth

[4] After Jodi and Tim separated, there were relatively few unpleasant incidents between them affecting the children. The record shows those incidents were typical of incidents occurring in the heightened emotions of dissolution proceedings. Such matters do not affect either party's ability to capably parent the children or either party's ability to support the children's relationship with the other spouse.

grade. The record supports the district court's conclusion that moving D.E. into Tim's care would likely have negative consequences for D.E.

Recognizing the district court's advantage of being able to watch and listen to the parties and the other witnesses during this extended trial, we agree with its observation "each boy has, to some extent, perhaps instinctively, gravitated to the parent with whom he feels most comfortable, from whom he will accept guidance best, and the parent [that] will ultimately guide him to a full measure of well-adjusted adulthood." Because split physical care promotes each child's long-term best interests, we affirm.

IV. Calculation of Tim's Child Support Obligation

In the event split care is affirmed, Tim asks for a remand for the district court to recalculate his child support. The parties agree Jodi's wages are $3458.10 per month, or $41,497.20 per year. The court found a six-year average of Tim's 2009 to 2014 annual income to be $149,800. For 2015, the court found Tim's "actual cash loss" would be "much less than his tax loss," disallowing Tim's deductions for attorney fees and depreciation on farm equipment Tim "secured from his father's estate." Taking these factors into consideration, the court concluded a gross annual income of $125,000 "is a reasonable sum to attribute to [Tim] for the purpose of calculating child and spousal support." Tim does not challenge this determination on appeal.[5] The court ordered Tim to pay Jodi $742 in monthly child support while both boys are minors, with support increasing to $1149 per month when D.E. is the only dependent.

[5] The district court also found, if Tim decided to cash rent his farm ground at "$275 per acre," he could receive "$148,500 in gross annual income before real estate taxes."

On appeal, Tim asserts the district court mistakenly used $150,000 for Tim's income in its guideline calculations. We agree that amount was inconsistent with the court's earlier declaration that $125,000 per year was a reasonable sum to assign as Tim's income for determining child support. Because the court made a scrivener's error,[6] we remand for the recalculation of Tim's child support using $125,000 as his gross annual income.

V. Alimony

At trial, Jodi requested reimbursement alimony to offset Tim's purchase of farm land titled in his name during their marriage. Citing Iowa case law dealing with marriages of shorter duration where one spouse makes career sacrifices while the other obtains a professional license, the district court ruled the facts here did not support reimbursement alimony. The court reasoned: "In this case it appears that efforts during the marriage by [Jodi] benefited [Tim]. In a case without a prenuptial agreement, this economic benefit conferred by [Jodi] would be reflected in a property settlement." Instead, the district court ordered Tim to pay traditional alimony of $1166 per month, terminating upon death or Jodi's remarriage.

Alimony is not an absolute right; an award depends upon the specific circumstances of each case. *In re Marriage of Gust*, 858 N.W.2d 402, 408 (Iowa 2015). On appeal, Jodi challenges the alimony award in two alternative ways.

Jodi first seeks $600,000 in reimbursement alimony, asserting the court "misinterpreted the law" after it recognized Tim benefited from Jodi's efforts

[6] A "scrivener's error" results from inadvertence and not from judicial reasoning. *See Scrivener's Error*, Black's Law Dictionary (9th ed. 2009)

during the marriage as her efforts freed up marital cash for Tim to accumulate farmland. Jodi admits the "typical factual circumstance" for reimbursement alimony is a spouse's contributing toward the other spouse's "advanced professional degree" but creatively argues reimbursement alimony "should not be limited to only those situations involving professional degrees," otherwise, a farmer's divorce rights are elevated "over those of persons with professional degrees."

Tim points to the long duration of the marriage—eighteen years—and the fact the circumstances are not similar to "degree cases" where there is "little or no property to be divided." Jodi was awarded $810,000 in assets with no debt. Tim contends Iowa law does not extend reimbursement alimony "beyond situations where the marriage is devoted almost entirely to the educational advancement of one spouse." He asserts the rationale for reimbursement alimony "is not the efforts of the supporting spouse, but the fact there has not been enough time for the parties to receive the benefit from the [educational] advancement through tangible assets accumulated during the marriage."

After reviewing Iowa case law, we find Tim's argument persuasive and conclude Jodi is not entitled to reimbursement alimony under these circumstances. *See Probasco*, 676 N.W.2d at 184 ("Reimbursement alimony was first denominated as such in *Francis*."); *In re Marriage of Francis*, 442 N.W.2d 59, 61 (Iowa 1989) (resolving "'advanced degree/divorce decree' dissolution of marriage action" (citation omitted)). Jodi cites no case from *any* jurisdiction applying a "degree analysis" to the acquisition of farmland during a long-term marriage. As the district court explained, but for the prenuptial

agreement, the economic benefit Jodi conferred on Tim would have been reflected in a property division in this marriage of long duration. *See Francis*, 442 N.W.2d at 66.

Our analysis starts with *Francis*, which ventured "no predictable method of valuing" a wife's contribution to her husband's "increased earning capacity due to his education received during the marriage" had been settled upon in Iowa. 442 N.W.2d at 61-61 (stating prior cases "interchangeably used property awards and alimony" to compensate the non-student spouse). Seeking to provide predictability, *Francis* approved the Utah Court of Appeals analysis recognizing traditional alimony "would often work hardship" when a divorce "occurs shortly after the degree is obtained" due to both spouses having modest incomes but "one is on the threshold of a significant increase in earnings. Moreover, the spouse who sacrificed . . . is precluded from enjoying the anticipated dividends the degree will ordinarily provide." *Id.* at 63 (quoting *Petersen v. Petersen*, 737 P.2d 237, 242 n.4 (Utah Ct. App. 1987)). Following these principles, *Francis* affirmed an award of reimbursement alimony to the non-student spouse, providing the following rationale:

> A calculation of future earning capacity . . . essentially represents a value placed on *the income to be derived from the advanced degree achieved during the marriage* . . . . Thus, the court's duty to look at the future earning capacity of the spouses tracks more closely with a concern for loss of anticipated support, reimbursable through alimony, *than through division of as-yet-unrealized tangible assets*.

442 N.W.2d at 63 (emphasis added).

In 2004, the Iowa Supreme Court followed *Francis* and rejected a wife's request for reimbursement alimony. *See Probasco*, 676 N.W.2d at 186. Similar

to the matter before us, the parties in *Probasco* had a long-term marriage and the wife had not contributed to the husband's college degree. *Id.* After the wife supported the husband in starting and running several successful restaurant franchises, the parties accumulated tangible assets. *Id.* *Probasco* explained *Francis* had described "*the circumstances under which reimbursement alimony should be awarded*" as follows—"for marriages of short duration . . . devoted almost entirely to the educational advancement of one spouse and yield[ing] the accumulation of few tangible assets." *Id.* at 185 (emphasis added) (quoting *Francis*, 442 N.W.2d at 62); *see also In re Marriage of Hayes*, No. 11-1847, 2012 WL 2407540, at *2 (Iowa Ct. App. June 27, 2012) (affirming reimbursement alimony where dissolution occurred five years after increase in doctor's medical income).

Probasco found the following circumstances "militate against an award of reimbursement alimony" to the wife: (1) the "marriage was *not one of short duration* devoted almost entirely to the educational advancement of one spouse"; (2) although the wife "may not have pursued her career during the marriage as much as she may have liked," she was actively involved in the job market during the marriage with career skills that are not outdated; and (3) the parties' "significant assets" will balance the equities without the need for an award of reimbursement alimony as the wife "leaves the marriage with a net worth in excess of $800,000." 676 N.W.2d at 186 (emphasis added).

Unlike *Francis*, Iowa's seminal case on reimbursement alimony, Jodi and Tim have accumulated millions of dollars in tangible assets, and Jodi did not contribute to an advanced degree for Tim with her contribution followed shortly

thereafter by a divorce. Under *Frances* and *Probasco*, we decline Jodi's request for reimbursement alimony.

Jodi alternatively requests "a significant increase in lifetime traditional alimony," claiming equity requires an increase from $1166 per month to $2200 each month "until death." Tim disagrees.

As an initial matter, the district court ended Tim's alimony obligation upon either party's death *or Jodi's remarriage*; we find this provision equitable as written. *See Gust*, 858 N.W.2d at 415 (stating "traditional spousal support is ordinarily unlimited in duration except upon the remarriage of the payee spouse, or death of either party"). Second, traditional alimony is intended to provide Jodi "with support comparable" to what she would have received if her marriage to Tim had continued. *See In re Marriage of Schenkelberg*, 824 N.W.2d 481, 486 (Iowa 2012). Alimony may not be restricted by a premarital agreement. *In re Marriage of Shanks*, 758 N.W.2d 506, 513 (Iowa 2008); *see also* Iowa Code § 596.5(2) (2015). The amount of Jodi's alimony is to be "calculated equitably" based on *all* statutory factors, *Schenkelberg*, 824 N.W.2d at 486; such factors are not "considered in isolation from each other," *Gust*, 858 N.W.2d at 408.

The relevant factors are set out in Iowa Code section 598.21A, and we "consider property division and alimony together in evaluating their individual sufficiency." *In re Marriage of Christensen*, 543 N.W.2d 915, 919 (Iowa Ct. App. 1995). We also consider the terms of any premarital agreement. *Id.* (considering, unlike here, spouse seeking support received an "enhanced property distribution" from her premarital agreement, diminishing "her need" for alimony). Our supreme court has discussed the interrelationship of a property

award under a premarital agreement and a request for alimony, explaining (1) the husband "received a substantial property award" due to the premarital agreement, (2) a proper spousal-support calculation for the wife looks "at the assets each party received" in order to "determine the income potential of the property distributed to each party," and (3) the husband's assets will continue "to generate substantial income" and the assets the wife was awarded will not. *Schenkelberg*, 824 N.W.2d at 487.

The following facts are key to our analysis. At the time of the dissolution trial, Jodi was forty-six and Tim was fifty-one years old. Both parties are generally in good health.[7] Their marriage was of relatively long duration. Jodi received $810,000 in net marital property. Under the premarital agreement, Tim received more than three times as much net marital property, around $3,582,000.[8] As in *Schenkelberg*, the marital assets Tim received will continue to generate substantially more income than the marital assets Jodi received.[9] 824 N.W.2d at 487. Additionally, the earning patterns of the parties are set, and their earning capacity is another factor we consider in setting the amount of spousal support. *See id.* Jodi continues in her long-term ISEA employment, earning around $41,500 annually. Jodi's child-care responsibilities during the marriage reduced both her earned-income track at her employer and her savings. Another factor reduced Jodi's savings—as noted by the district court—

[7] Jodi has recovered from her heart attack.

[8] Specifically, Tim asserts: "Removing the gifted and inherited property ($3,538,321) from Tim's side of the equity and accounting for his $944,454 in liabilities, Tim actually received $3,581,499 in marital assets."

[9] Jodi received $262,500 for her share of the Thill farm. The current rate of return for a one-year CD (FDIC insured) is 1.5%. Applying that percent shows Jodi can earn $3938 each year in a conservative investment.

the parties agreed to use Jodi's income for nondeductible living expenses allowing Tim to "free up cash flow generated by [his] farming operation to be invested or re-invested in assets titled solely in his name."

As to Tim's earning capacity, he continues farming, earning an average annual income of $125,000—three times the amount Jodi will earn each year. Further, Jodi will not have the ability to rival Tim's earning capacity as she continues to provide physical care for D.E. We also agree with the district court's belief that many of Tim's personal expenses "would be paid untaxed by his farming operation." As in *Scheckelberg*, Tim has "the ability to pay a substantial amount of support indefinitely into the future." *Id.* Considering all relevant factors, we conclude it is unlikely Jodi will be able to support herself, care for D.E., take vacations similar to the ones the parties enjoyed during their marriage, and fund an increase to her savings without spousal support from Tim of $1666 per month. We modify the decree accordingly.[10]

VI. Trial and Appellate Attorney Fees

The prenuptial agreement states the parties "shall have no rights" to attorney fees and expenses upon the filing of a petition for dissolution and the court granting a dissolution. The district court asked the parties to brief whether a prenuptial agreement's prohibition of an award of attorney fees violated public policy. *See* Iowa Code § 596.5(1)(g) (permitting parties to a premarital agreement to contract with respect to "any other matter, including the personal

[10] Jodi's final alternative argument asserts, if she is not awarded "significant reimbursement alimony or increased traditional alimony," we should increase her property award. Because we have increased Jodi's traditional alimony, we do not address this claim.

rights and obligations of the parties, not in violation of public policy"). When the parties failed to produce "any case on point in Iowa or elsewhere," the court rejected Jodi's request for trial attorney fees, reasoning it did "not have authority to ignore the plain language of the parties' prenuptial agreement." The court ordered Tim to pay court costs, including the $9140 GAL fee.[11]

On appeal, Jodi claims the parties' premarital agreement waiving attorney fees in the event of dissolution is "void as against public policy." She contends it would "violate public policy to leave a spouse without means to litigate the best interests of her children."[12]

Generally, Iowa courts have considerable discretion in awarding attorney fees in dissolution cases. *In re Marriage of Steele*, 502 N.W.2d 18, 22 (Iowa Ct. App. 1993). Jodi bases her argument for attorney fees on the public-policy limitation in Iowa Code section 596.5(1)(g), as well as section 596.5(2), which commands that the right of a child to support "shall not be adversely affected by a premarital agreement." Jodi contends, because Iowa prohibits premarital agreements "from regulating child custody and child support, it follows that

[11] In the temporary proceedings, Jodi requested fees so she could employ experts to appraise Tim's real estate and farm machinery. The court ordered Tim to pay Jodi $20,000, reserving its final resolution of Tim's advance for the decree. Jodi then paid the retainers and hired the valuation experts. In the decree, the court did not grant Tim's request Jodi repay this advance. Tim challenges that ruling on cross-appeal. In declining to order repayment, the district court reasoned Jodi's experts' appraisals "ultimately became the figures agreed to by the parties' in their pretrial stipulation." The award of litigation expenses is traditionally within the district court's discretion. *EFCO Corp. v. Norman Highway Constructors, Inc.*, 606 N.W.2d 297, 301 (Iowa 2000). Jodi's use of experts was related to the extensive nature and complexity of Tim's assets and led to a successful stipulation of values by the parties. Finding the district court's decision equitable and logical, we are unable to find the court abused its discretion.

[12] Jodi also claims it would violate public policy to disallow attorney fees incurred to litigate the validity of the premarital agreement and the provisions of spousal support. Because she provides no compelling arguments to reach these litigation categories, we limit our analysis to attorney fees concerning child-related issues.

awarding attorney fees to seek child custody and child support cannot be prohibited."

In asking for briefing on the interplay of these two sections, the district court opined "it did not seem fair that a party with vastly superior financial resources could," based on a prenuptial agreement, "possess a great deal of money with which to fund litigation over such an important issue as child custody." The court explained that it "always viewed an award of counsel fees as a way to allow each party to a marriage to make a fair fight of it at trial." Although the parties did not provide cases to the district court, both now cite relevant cases on appeal. Both also acknowledge the Iowa Supreme Court has not addressed the propriety of waiving attorney fees in a premarital agreement, making it an issue of first impression in this state.

In support of her claim the premarital waiver of attorney fees violates public policy, Jodi cites *Walker v. Walker*, 765 N.W.2d 747, 755 (S.D. 2009), in which the husband argued the wife "unreasonably elevated the cost of litigation." Jodi similarly claims her evidence took two days and Tim increased her litigation expenses by calling witnesses for six days. *Walker* held because public policy precluded waiver of alimony in a prenuptial agreement, by "logical extension" attorney fees associated with an alimony award also could not be prohibited by the prenuptial agreement. 765 N.W.2d at 755. Jodi argues a similar "logical extension" applies to attorney fees for litigating child custody and child support.

Citing Iowa Code section 596.5, Tim counters that "[a]lthough the legislature had the opportunity to prohibit clauses in a premarital agreement that restrict payment of attorney fees when child custody is at issue, the legislature

did not do so."[13] But Tim acknowledges other state courts have found premarital agreements prohibiting attorney fees as to child-related issues are not enforceable. For example, in *In re Marriage of Best*, an Illinois appellate court analyzed a premarital agreement that "would bar fee-shifting for costs incurred in connection with child support." 901 N.E.2d 967, 970 (Ill. App. Ct. 2009). Similar to Iowa Code section 596.5(2), the pertinent Illinois provision stated: "The right of a child to support may not be adversely affected by a premarital agreement." *Id.* at 971 (citation omitted). The "pivotal question" before the Illinois court was "whether a fee-shifting ban governing child-related issues violates" public policy. *Id.* *Best* answered the question in the affirmative, holding "the fee-shifting ban" in the parties' premarital agreement was "not enforceable as to child-related issues because it violates public policy by discouraging both parents from pursuing litigation in their child's best interests." *Id.* at 970.

Best cited approvingly to *In re Marriage of Ikeler*, 161 P.3d 663, 667 (Colo. 2007), where the state supreme court pointed out the Colorado Marital Agreement Act (CMMA) did not specifically mention attorney fees; therefore, the "only statutory basis for parties to contractually waive an award of attorney's fees" is the catch-all provision allowing contracts "not in violation of public policy." *Ikeler* reasoned, "[u]nder this subsection, if a waiver of attorney's fees violates public policy it cannot be enforced by the court because it is not a valid contract term." 161 P.3d at 667. *Ikeler* concluded:

[13] Tim also cites the South Carolina Supreme Court's holding: "[P]renuptial agreements waiving alimony, support, and attorney's fees are not per se unconscionable, nor are they contrary to the public policy of this state." *Hardee v. Hardee*, 585 S.E.2d 501, 504 (S.C. 2003). Because *Hardee* does not address attorney fees for child-related issues, it is not persuasive to our analysis.

> [A] waiver of attorney's fees violates public policy where one spouse lacks the financial resources to litigate the dissolution, and the case involves issues of parental responsibilities and child support. The CMAA specifically states that "[a] marital agreement may not adversely affect the right of a child to child support," which reflects the well-established policy of this state that the needs of the children in a dissolution proceeding are paramount. If one spouse is unable to hire an attorney, and the parties waived a possible award of attorney's fees in a marital agreement, the lesser-earning spouse's ability to effectively litigate the issues related to the children will be substantially impaired. This, in turn, may negatively impact the court's ability to assess the best interests of the children.

Id. at 670-71 (citations omitted); *see also In re Marriage of Joseph*, 266 Cal. Rptr. 548, 552-53 (Cal. Ct. App. 1990) (reasoning a parent litigating a custody dispute is also representing the child's interests and the parties' fee-shifting bar "abridge[s] the courts' ability to act on behalf of the children").

Finally, the Washington Court of Appeals rejected a husband's argument that while parents cannot enter into binding contracts regarding parenting plan issues, the parties can waive a right to an award of attorney fees and costs, "which is not a parenting plan issue." *In re Marriage of Burke*, 980 P.2d 265, 268 (Wash. Ct. App. 1999). Noting the "state's interest in the welfare of children requires" a court "have the discretion to make an award of attorney fees and costs so that a parent is not deprived of his or her day in court by reason of financial disadvantage," the court ruled the parties' attorney-fee bar in their prenuptial agreement violated public policy as to litigation of parenting-plan issues. *Id.*

In Iowa, the purpose of child support 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." Iowa Ct. R. 9.3.

Similarly, the controlling consideration in determining physical care is the children's best interests. *McKee v. Dicus*, 785 N.W.2d 733, 736 (Iowa Ct. App. 2010). As set out above, Iowa statues prohibit parties to a premarital agreement from contracting in violation of public policy and from contracting "adversely" to the right of children to support. Given these expressions of Iowa's public policy, we find persuasive the analyses in *Best*, *Ikeler*, *Joseph*, and *Burke*. Iowa's commitment to the best interests of the children of divorce requires our courts "have the discretion to make an award of attorney fees and costs" as to child-related issues in dissolution proceedings so that "a parent is not deprived of his or her day in court by reason of financial disadvantage." *Burke*, 980 P.2d at 268. Accordingly, the provision in the Erpeldings' premarital agreement waiving such fees and costs is void and unenforceable as to child-related issues because it violates Iowa "public policy by discouraging both parents from pursuing litigation in their child's best interests."[14] *Best*, 901 N.E.2d at 970.

We reverse and remand to the district court with instructions to exercise its discretion to make an award of attorney fees and costs to Jodi as to child-related issues litigated in the dissolution matter. Next, we grant Jodi's request for attorney fees on appeal as to the child-related issues. *See McKee*, 785 N.W.2d at 740 (setting out standard). The amount of Jodi's award, both at trial and on appeal, shall be determined by the district court upon remand.

[14] Tim alternatively asserts, if we conclude "a premarital agreement prohibition on attorney fees" as to child-related issues violates public policy, we should find the agreement's restrictions here voidable as applied and not void *per se*. Tim then asserts public policy concerns that Jodi would not be able to effectively litigate the children's best interests are not present because the children's interests were "fully represented" by the GAL and Tim paid the GAL's fee. We are not persuaded. Tim cites no cases supporting his proposition a GAL's role supplants a parent's role in dissolution proceedings involving custody and child support.

Costs on appeal are assessed to Tim.

AFFIRMED AS MODIFIED AND REMANDED.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
16-1419	In re Marriage of Erpelding

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