Top 10 Lessons in Family Law from 2012

POLK COUNTY BAR ASSOCIATION
FALL GENERAL PRACTICE CLE

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Des Moines, Iowa

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1. Pension benefits are complicated things.

O'Brien v. O'Brien, No. 11-1551 (Iowa 2012).

The trial court gave Dennis 100% of his pension and awarded Magdalen net assets worth $128,000 more than Dennis' total. However, the present value of the pension was $437,231.29. Given the 33- year length of the marriage, the fact that Dennis was the primary wage earner throughout the marriage, and the fact that Magdalen cared for the children and did not accrue retirement benefits, the Court of Appeals ruled that Magdalen was entitled to a portion of Dennis's pension. See Iowa Code § 598.21(5)(a), (c), (i) (2009); In re Marriage of Fall, 593 N.W.2d 164, 167 (Iowa Ct. App. 1999); In re Marriage of Curfman, 44,6 N.W.2d 88 (Iowa Ct. App. 1989). Therefore, the Court of Appeals awarded Magdalen 42% of Dennis's monthly retirement benefit, one-half of the portion of the pension earned during the marriage. However, the Supreme Court granted further review and noted that the Magdalen had received $128,000 more of the parties' assets outside the pension. Therefore, the Supreme Court reduced Magdalen's share of the monthly pension benefit and survivor benefit from 42% to 23.6% to produce an approximate equal division of the parties' net assets.

2. If you are going to draft qualified domestic relations orders, be careful – they will come back to haunt you many years down the road.

In re Marriage of Morris, (Iowa 2012).

The parties stipulated decree provided for the equal division of Dennis' Marine Corps pension. The decree did not mention the survivor benefits, and in 2010, Kathy sued to compel Dennis to share the survivor rights as well as the retirement benefits. The Supreme Court noted that a stipulation and settlement in a dissolution proceeding is a contract between the parties, but that it becomes the court's decision after the decree is approved and entered. In re Marriage of Jones, 65,3 N.W.2d 589 (Iowa 2002). Though the property division generally is not modifiable, the district court retains authority to

interpret and enforce its prior decree. See In re Marriage of Brown, 776 N.W.2d at 650. In similar situations, some courts have adopted a default rule by holding that a decree dividing retirement benefits includes survivorship benefits, and have permitted postdissolution orders compelling the retiree to designate his former spouse as the survivor. See Harris v. Harris, 621 N.W.2d 491, 498 (Neb. 2001). Other courts, however, have refused to allow postdissolution orders awarding a former spouse survivorship rights when the decree does not expressly contemplate the survivorship benefit. See, e.g., Potts v. Potts, 790 A.2d 703, 714-15 (Md. Ct. Spec. App. 2002). The court declined to speculate whether the parties might have negotiated a different division of property, for example, in exchange for Dennis's express agreement to designate Kathy as the survivor and, thereby, forfeit his right to designate his current spouse and instead, remanded the action to the district court for an evidentiary hearing to determine whether there is any extrinsic evidence to determine whether the district court intended half of the Marine Corps retirement to include survivor benefits or, instead, simply an equal division of the monthly payments.

3. If you are going to lie about who the father of your child is, you can be sued for damages.

Dier v. Peters, No. 11-1581 (Iowa, 2012).

Cassandra Peters based on her alleged fraudulent representation that he was the father of her child. Dier brought a common law action for fraud, seeking as damages for the money he paid after he learned that he was not the father. The trial court granted the mother's motion to dismiss, but the Supreme Court remanded for a trial on the merits. Iowa courts have never decided the viability of a tort action for paternity fraud; and a series of cases have held that a parents cannot obtain retroactive relief from court-ordered child support. See State ex rel. Baumgartner v. Wilcox, 532 N.W.2d 774, 776-77 (Iowa 1995). However, the Court held that Wilcox does not control this case because Dier's cause of action was based on the concepts of traditional fraud law: (1) [the] defendant made a representation to the plaintiff, (2) the representation was false, (3) the representation was material, (4) the defendant knew the representation was false, (5) the defendant intended to deceive the plaintiff, (6) the plaintiff acted in [justifiable] reliance on the truth of the representation, and (6) the representation was a proximate cause of [the] plaintiff's damages. See Spreitzer v. Hawkeye State Bank, 779 N.W.2d; Rosen v. Bd. of Med. Exam'rs, 539 N.W.2d 345, 350 (Iowa 1995).

4. If your parental rights are about to be terminated, arguing that your child will lose your financial support is not going to help.

In re H.S., No. 11-0305 (Iowa, 2011).

Because the termination of parental rights in Iowa also terminates the parent's child support obligation, the question raised by this case is: Should juvenile courts consider the potential loss of child support when they apply the best interests of the child test under Iowa Code section 232.116(2)? The private termination of parental rights statute,

Chapter 665, has its own "best interests" test. According to section 600A.1: “The best interest of a child requires that each biological parent affirmatively assume the duties encompassed by the role of being a parent. In determining whether a parent has affirmatively assumed the duties of a parent, the court shall consider, but is not limited to consideration of, the fulfillment of financial obligations, demonstration of continued interest in the child.” By contrast, Chapter 232 has its own “best interests” test: Section 232.116 provides in part: “In considering whether to terminate the rights of a parent under this section, the court shall give primary consideration to the child's safety, to the best placement for furthering the long-term nurturing and growth of the child, and to the physical, mental, and emotional condition and needs of the child.” Iowa Code § 232.116(2). The Court stated that “notably absent from section 232.116(2), and the cases interpreting it is any explicit reference to financial support payments, and we believe it would be inappropriate for Iowa courts to introduce such a consideration.” In re P.L., 77,8 N.W.2d 33 (Iowa 2010). “We conclude the elimination of possible child support should not affect termination if it is otherwise in the child's best interests as defined by section 232.116(2). We are not holding that evidence about child support is inadmissible in a chapter 232 proceeding. Payment, or nonpayment, of such support may provide relevant information about the parent's ability to successfully parent. What we are holding. . .is that the anticipated loss of child support funds in and of themselves themselves as a result of termination should not be part of the section 232.116(2) best interests analysis

5. Drug tests do not violate a parent’s due process rights when he or she is in juvenile court.

Minor v. State, No. 12-0133 (Iowa, 2012).

The Supreme Court vacated the decision of the court of appeals and affirmed the judgment and order of the trial court, holding (1) a drug test did not violate Silverio's due process rights; (2) the evidence including the fingernail test was sufficient to warrant termination; and (3) termination was in the children's best interests. The juvenile court did not order Silverio to submit to a fingernail drug test; instead, he voluntarily agreed; and the test was received without objection. Therefore, no concerns were raised which required the Court to question the reliability of the test. In addition, Silverio shaved his head, apparently to avoid a hair-sample drug test; he had a urine test that was positive for methamphetamines several months earlier; and he had recently been arrested while running away from the police with a digital scale, cocaine, and methamphetamines in close proximity to him. Therefore, the Court concluded that there was sufficient evidence that Silverio had an unaddressed substance abuse problem at the time of the termination hearing. "Insight for the determination of the child's long-range best interests can be gleaned from 'evidence of the parent's past performance for that performance may be indicative of the quality of the future care that parent is capable of providing. " In re Interest of C.B., 61,1 N.W.2d 489 (Iowa 2000); In re Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981). In this case, Silverio's overall track record was not a good one, including termination of his parental rights to another child, six founded child abuse reports, drug-related

convictions, and incidents of domestic abuse.

6. If you want to sue the Department of Human Services once a Child in Need of Assistance Petition is dismissed, good luck.

In re A.B., No. 12-0133 (Iowa, 2012).

After a CINA proceeding was dismissed, the child's mother, Vania, sued the State and two DHS employees under 42 U.S.C. 1983 and the Iowa Tort Claims Act (ITCA), alleging the social workers wrongfully removed her child from her custody and negligently failed to protect the child from abuse. The district court granted summary judgment in favor of the defendants. The Supreme Court affirmed, holding (1) a social worker is entitled to absolute immunity when the social worker functions in the role of a prosecutor [e.g. signing a affidavit referring a case for CINA action] or ordinary witness; Rehberg v. Paulk, 566 U.S. _, _, 132 S. Ct. 1497, 1503, 182 L.Ed. 2d 593, 602 (2012); and (2) a social worker is entitled to qualified immunity when acting in the role of a complaining witness and for his or her investigatory and supervisory acts [here: alleged failure to timely conduct an investigation, to make a report, and to provide adequate medication, protection, and supervision of the child]. However, the doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Pearson v. Callahan, 555 U.S. 223, 231, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565, 573 (2009). All of the evidence in the affidavit referring the case for CINA action could be traced to verified facts or information from earlier investigations conducted in good faith; and the in supervising the child in foster care, the social worker did not ignore the mother's concerns about the quality of foster care. Therefore, there was no genuine issue of material fact to establish the social workers had violated clearly established constitutional rights.

7. Mediation is now required in all family law matters in the Fifth Judicial District.

Konzen v. Goedert, No. 2-099/11-1028 (Iowa App., 2012).

During a dissolution trial, the parties asked the judge to mediate a settlement. The judge spent several hours trying to assist the parties in reaching an agreement. Only some issues were resolved; a week later the judge issued an order to memorialize the parties' agreement [which the wife disputed]; and then presided at the hearing to resolve the remaining child-related issues. The Iowa Code of Judicial Conduct 51:2.6(A) requires a judge to disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably he questioned, including but not limited to circumstances in which the judge has personal knowledge of facts that are in dispute in the proceeding. The Court of Appeals did not question the judge's desire to act in the best interests of the children at issue in these proceedings, the judge should have recused herself, after she participated in settlement negotiations with the parties and issued the order resulting from the settlement. In dicta, the Court

also criticized the judge's delay in memorializing the parties' alleged agreements: the preferred practice is to memorialize settlement agreements on the record immediately following a settlement conference so any continuing disagreements may be resolved at that time.

8. The determination of what each parent is to contribute to their child's post-high school educations is a five step process.

I **In re Marriage of Vaughan** (Iowa 2012)

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

Philip and Arleen's divorce decree required that Philip pay child support until the couple's child, Allison, turned twenty-two if Allison pursued higher education. A modification hearing resulted in an order requiring Philip to pay $634.00 per month to the daughter towards her education expenses when is child support obligation ended. Arleen lived in a mortgage free home, had income of $28,000 per year and had assets with her current husband of $500,000.00. Philip's gross income was $56,600, but after taxes and child support payments for another child, he had only about $3,000 per month for his monthly expenses. His net worth was $8,500. The Supreme Court noted that in determining a parent's share, a parent is not required to make the same amount of parental sacrifice toward assisting in the college education of a child as in providing subsistence support for minor children. In re Marriage of Longman, 61,9 N.W.2d 369 (Iowa 2000); and a postsecondary education subsidy must not cause undue financial hardship on a parent. In re Marriage of Neff, 67,5 N.W.2d 573 (Iowa 2004). Applying this legal framework to the facts and circumstances of this case, the Court concluded that Philip should pay a $150 per month postsecondary education subsidy to Allison to help defray the cost of her education.

9. If you do not take advantage of marriage, you cannot take advantage of divorce.

Blanchard v. Houdek, No. 1-813/11-0057 (Iowa App. 2011).

Crystal Blanchard and Jeffrey Houdek began to cohabit in the fall of 1998; birthed two children, and continued to reside together, off and on, until May 2009. Houdek had purchased a house, and the parties disputed who paid for various improvements to the house. The parties also purchased several vehicles, a boat, a camper, and other personal property during the course of their relationship. On October 6, 2009, Blanchard filed a petition in equity for "Joint Legal Custody, Physical Care, Child Support, and Division of Property." Citing In re Marriage of Martin, 681 N.W.2d 612 (Iowa 2004), the court found that Blanchard failed to advance a separate legal theory on which the district court could divide the property accumulated by the parties.

10. If your spouse dies before the divorce can be final, you have a right of appeal.

Dietz v. Dietz, (Iowa App., 2012)No. 2-088/11-0440.

Carol and Mark Dietz were divorced on June 22, 2009, but the property distribution issues were preserved and set for trial in July. Two written property agreements were filed made after the dissolution, but Carol died before the property hearing. Mark contended that the parties had an oral agreement on various other issues. The Court held that death of a party does not prevent an appeal of property issues in a dissolution action. Oliver v. Oliver, 216 Iowa 57, 58, 248 N.W. 233, 234 (1933); and that the existence of an oral contract are questions for the trier of fact. Gallagher, Langlas, Gallagher v. Burco, 587 N.W.2d 615, 617 (Iowa Ct. App. 1998). However, the court found that only the two written agreements and some payments and sales made by Mark prior to Carol's death were supported by the evidence.