STATE JUDICIAL NOMINATION COMMISSION AND OFFICE OF THE GOVERNOR JOINT JUDICIAL APPLICATION

PERSONAL INFORMATION

1. **State your full name.**

   Alan Thomas Heavens.

2. **State your current occupation or title. (Lawyers: identify name of firm, organization, or government agency; judicial officers: identify title and judicial election district.)**

   District Court Judge – First Judicial District (Election District 1A).

3. **State your date of birth (to determine statutory eligibility).**

   August 6, 1984.

4. **State your current city and county of residence.**

   Garnavillo, Clayton County, Iowa.

PROFESSIONAL AND EDUCATIONAL HISTORY

5. **List in reverse chronological order each college and law school you attended including the dates of attendance, the degree awarded, and your reason for leaving each school if no degree from that institution was awarded.**

   University of St. Thomas School of Law in Minneapolis, Minnesota from 09/07 to 05/10. J.D. awarded in 05/10.

   University of St. Thomas in St. Paul, Minnesota from 09/03 to 05/07. B.A. awarded cum laude in 05/07 with double major in Finance and Political Science.

6. **Describe in reverse chronological order all of your work experience since graduating from college, including:**
   a. **Your position, dates (beginning and end) of your employment, addresses of law firms or offices, companies, or governmental agencies with which you have been connected, and the name of your supervisor or a knowledgeable colleague if possible.**
   b. **Your periods of military service, if any, including active duty, reserves or other status. Give the date, branch of service, your rank or rating, and present status or discharge status.**

District Court Judge for Election District 1A. 111 High St. NE, Elkader, Iowa 52043. March 2019 to present. Chief Judge Kellyann Lekar. Phone: (319) 833-3331.

Clayton County Attorney. 120 N. Main St., Elkader, Iowa 52043. January 2011 to March 2019. County Attorney Zach Herrmann. Phone: (563) 245-3888.

McClean & Heavens Law Offices. 120 N. Main St., Elkader, Iowa 52043 and 401 First Ave. E., Dyersville, Iowa 52040. September 2010 to March 2019. Dan McClean (senior partner, now retired).

Law Clerk for Dubuque County Magistrate Dan McClean and Intern at McClean Law Offices. 401 First Ave. E., Dyersville, Iowa 52040. May 2009 to August 2009. Dan McClean (retired).

Research Assistant for Morrison Family Director of Lawyering Skills and University of St. Thomas School of Law Professor Julie Oseid. 1000 LaSalle Avenue, Minneapolis, MN 55403. May 2008 to August 2008. Professor Julie Oseid. Phone: (651) 962-4948.

I have not served in the military.

7. **List the dates you were admitted to the bar of any state and any lapses or terminations of membership. Please explain the reason for any lapse or termination of membership.**

Iowa, September 2010 to present with no lapses or terminations of membership.

8. **Describe the general character of your legal experience, dividing it into periods with dates if its character has changed over the years, including:**
   a. **A description of your typical clients and the areas of the law in which you have focused, including the approximate percentage of time spent in each area of practice.**
   b. **The approximate percentage of your practice that has been in areas other than appearance before courts or other tribunals and a description of the nature of that practice.**
   c. **The approximate percentage of your practice that involved litigation in court or other tribunals.**
   d. **The approximate percentage of your litigation that was: Administrative, Civil, and Criminal.**
   e. **The approximate number of cases or contested matters you tried (rather than settled) in the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel, and whether the matter was tried to a jury or directly to the court or other tribunal. If desired, you may also provide separate data for experience beyond the last 10 years.**
   f. **The approximate number of appeals in which you participated within the last 10 years, indicating whether you were sole counsel, chief counsel, or**

associate counsel. If desired, you may also provide separate data for experience beyond the last 10 years.

As Clayton County Attorney, I represented the State of Iowa as the prosecutor in criminal cases. I also provided legal advice to elected county officials, county employees, and township trustees on a wide variety of issues.

In my civil practice, I represented clients in the areas of civil litigation, family law, probate planning and administration, personal injury, business planning and development, contract drafting and disputes, and real estate transactions and disputes.

I spent approximately 50% of my time working on criminal matters and 50% of my time working on civil matters. I was regularly in court litigating cases as county attorney and in my private practice. Although I don't have exact numbers, I would usually try one to two criminal cases to a jury and two to three civil cases to the bench every year, along with a number of contested motion hearings on a regular basis. Appeals in criminal cases I prosecuted were handled by the Attorney General's Office but I was sole counsel in three appeals from civil cases, including one appeal that was taken by the Iowa Supreme Court.

9. Describe your pro bono work over at least the past 10 years, including:

a. Approximate number of pro bono cases you've handled.

b. Average number of hours of pro bono service per year.

c. Types of pro bono cases.

As a district court judge, I'm not allowed to provide legal services to anyone. When I was an attorney, I did pro bono work for debtors who could not afford an attorney, people needing a basic will, and dissolution cases with no minor children involved. I estimate handling approximately two or three pro bono cases per year for ten to twenty hours a year.

10. If you have ever held judicial office or served in a quasi-judicial position:

a. Describe the details, including the title of the position, the courts or other tribunals involved, the method of selection, the periods of service, and a description of the jurisdiction of each of court or tribunal.

District Court Judge. First Judicial District. Nominated by the Judicial Nominating Commission for Judicial Election District 1A in January 2019. Appointed by Governor Kim Reynolds in February 2019. Took office in March 2019.

As a district court judge, I have general jurisdiction over all civil and criminal filings in my district.[1]

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[1] Iowa Const. art. V, sec. 6 ("The district court shall be a court of law and equity . . . and have jurisdiction in civil and criminal matters arising in their respective districts.") and Iowa Code sec. 602.6202 (jurisdiction of district judges).

b. List any cases in which your decision was reversed by a court or other reviewing entity. For each case, include a citation for your reversed opinion and the reviewing entity's or court's opinion and attach a copy of each opinion.

I've issued 324 written decisions that resolved a contested case or contested issue. No one appealed 311 of those 324 decisions (96%). Of the 13 decisions which were appealed, 11 were affirmed. The two decisions which the Court of Appeals changed in some significant way are:

- Bickerton v. Bickerton, Case No. 20-1145 (June 30, 2021). Brian and Melissa have four children ages 15, 14, 12, and 10. I placed physical care of the children with Brian because he was doing a good job parenting after being honorably discharged from the military. Each child had a strong preference to stay with Brian. One child emphatically told me that she didn't feel safe with Melissa.

  The Court of Appeals placed the children with Melissa. They found I should have relied less on what the children told me, their close bond with Brian, their strained relationship with Melissa, and Brian's parenting performance and instead given more weight to Melissa's history of caregiving, Brian's inability to promote the childrens' relationship with Melissa, and a preference to keep these children with their seven half-siblings who all lived with Melissa. Brian's decision to represent himself at trial, and then to not participate in the appeal, may have played some role in the reversal of my decision in his favor.

- In re Estate of Gladys Troendle and Michele Troendle vs. Steven Troendle, Case No. 19-2034 (July 21, 2021). Siblings Michele and Steve sued each other over the probate of their mother's estate. A total of eight claims were combined into one jury trial which lasted nine days. The jury rejected Steve's claim that Michele unduly influenced her mother's will and awarded Michele approximately $75,000 in actual and punitive damages.

  The Court of Appeals affirmed the dozens of rulings I made over nine days of trial. They also affirmed all of the jury's verdicts except for one area: the sufficiency of the damages the jury awarded Michele. The Court of Appeals found that Michele was entitled to a new trial on damages only because in their view the jury awarded her an insufficient amount for four of her six claims.

c. List any case in which you wrote a significant opinion on federal or state constitutional issues. For each case, include a citation for your opinion and any reviewing entity's or court's opinion and attach a copy of each opinion.

I have written multiple opinions on motions to suppress which often involve claims made under the United States and Iowa Constitutions. None of these opinions have been reversed by an appellate court. Included in my writing samples is an opinion I wrote on the Confrontation Clause of the Constitution.

11. **If you have been subject to the reporting requirements of Court Rule 22.10:**

    a. **State the number of times you have failed to file timely rule 22.10 reports.**

    Iowa Court Rule 22.10 requires that judges file a report every month listing any decisions that have been under advisement for longer than 60 days, together with an explanation of the reasons for the delay and an expected date of decision.

    I have never failed to timely file a 22.10 report and have never had a case under advisement for 60 or even 30 days. Almost all of my opinions are filed in one week or less. I usually work on opinions throughout the weekend so I can file them faster.

    b. **State the number of matters, along with an explanation of the delay, that you have taken under advisement for longer than:**

        i. **120 days.**

        None.

        ii. **180 days.**

        None.

        iii. **240 days.**

        None.

        iv. **One year.**

        None.

12. **Describe at least three of the most significant legal matters in which you have participated as an attorney or presided over as a judge or other impartial decision maker. If they were litigated matters, give the citation if available. For each matter please state the following:**
    a. **Title of the case and venue,**
    b. **A brief summary of the substance of each matter,**
    c. **A succinct statement of what you believe to be the significance of it,**
    d. **The name of the party you represented, if applicable,**
    e. **The nature of your participation in the case,**
    f. **Dates of your involvement,**
    g. **The outcome of the case,**
    h. **Name(s) and address(es) [city, state] of co-counsel (if any),**
    i. **Name(s) of counsel for opposing parties in the case, and**
    j. **Name of the judge before whom you tried the case, if applicable.**

1. **State of Iowa v. Ryan Lee Rodenberg, Clayton County Case FECR01306.**

A fire broke out in the bed of a pickup truck being driven down the highway. The adults in the vehicle got out to assess the situation. Ryan Rodenberg then inexplicably ordered everyone to get back in the vehicle. Rodenberg drove the truck down the highway until the cab caught fire. Rodenberg's 20-year-old friend and two of Rodenberg's children, a 4-year-old girl and an 11-month-old boy, were trapped in the cab. All three died in the fire while Rodenberg survived.

This tragic and bizarre event happened in March 2011, less than three months after I became county attorney. Family members, citizens and law enforcement had conflicting opinions as to what consequences Rodenberg should face for his role in the death of these three people. Options ranged from charges which carried a 50-year prison sentence if convicted to no charges under a theory that this was an accident involving poor judgment, not a crime.

I took the case to the grand jury and presented them with all of their charging options, along with a case for and against each choice. The grand jury deliberated and chose a middle ground. They charged Rodenberg with three counts of involuntary manslaughter, which are aggravated misdemeanors. Rodenberg pled guilty to all counts as charged and was given suspended prison sentences and supervised probation. Attorney Matthew Boles represented Rodenberg. Judge George Stigler presided over the grand jury and Judge Margaret Lingreen imposed the sentence.

2. **State v. Brandon James Thoma, Clayton County Cases FECR014380, FECR014513.**

Brandon Thoma was the most dangerous person I prosecuted as Clayton County Attorney. In November 2015, days after he completed a prison sentence for assault causing serious bodily injury, 24-year-old Brandon Thoma stole his brother's car and drove to his adopted mother Theresa's house to kill her. He broke through a door and used an entire can of pepper spray to disable her. Then he threw Theresa down the stairs and kicked her in the head multiple times. He put a shovel to Theresa's neck, believing that would cut off all oxygen to her brain. He left thinking that he had killed her, but miraculously Theresa survived this violent and unprovoked attack.

Thoma was charged with attempted murder, burglary, and theft. While he was in jail after being arrested for those charges, Thoma spit at and attempted to gouge the eyes of a jailer. A charge for felony assault on a jailer was added. His behavior in jail confirmed what I already knew to be true: Brandon Thoma needed to be in prison for as long as possible.

I argued vigorously for consecutive sentences on all counts with the longest mandatory minimum available. Ultimately the sentences for attempted murder, burglary, theft, and assault on a jailer all ran consecutively for a total of 45 years in prison with a mandatory minimum sentence of 17-and-a-half years. Judge John Bauercamper imposed the sentence, which was the maximum allowed by law. Thoma was represented by State Public Defender Steve Hodge.

In April 2021, Thoma assaulted correctional staff in the Anamosa State Penitentiary. He was convicted of willful assault causing injury and interference with official acts causing serious injury. In April 2022, Thoma was sentenced to 15 additional years in prison for these crimes.

3. **<u>Vincent Mummau v. State of Iowa</u>, Clayton County Case PCCV010029.**

Vincent Mummau was found guilty by a jury of sexually abusing Beverly, a 71-year-old woman he lured into his house with an offer of free eggs. Mummau filed for postconviction relief after he lost a direct appeal. Mummau claimed that his trial attorney was ineffective in more than a dozen ways and there was newly-discovered evidence which entitled him to a new trial.

This case was significant because Beverly died a few years after the trial. The primary evidence against Mummau was Beverly's testimony so a new trial would have presented unique challenges. I briefed and tried the case as Clayton County Attorney in 2015-2016. Judge Michael Shubatt found that none of Mummau's claims had merit. The Court of Appeals unanimously affirmed in Case No. 16-1909 (August 16, 2017). Mummau was represented by an attorney who is known for her expertise in postconviction relief cases, Angela Campbell.

13. Describe how your non-litigation legal experience, if any, would enhance your ability to serve as a judge.

I am a better judge because I have served on committees and volunteered in my community.

Committees

Serving on committees has increased my understanding of how the law impacts our citizens. When I was county attorney, I served on a committee that focused on the sentences for crack and powder cocaine crimes. African American defendants were more likely to commit crimes involving crack cocaine and the penalties for crack were more severe than those for powder. That inconsistency was reducing confidence in the justice system for defendants and family members whose lives were negatively impacted by these prison sentences. My committee, and many other organizations, recommended changing the law. The legislature later voted unanimously to reduce the sentencing discrepancy.

The committees I've served on as a judge have covered many areas of the law such as family law trials with self-represented litigants, assessing Category B restitution for criminal defendants, and new probate litigation. I'm also the administrative judge for two counties. This job involves being the go-to person for the clerk's office when any issues arise and heading the magistrate appointing commission. Serving on all of these committees gave me a more in-depth understanding of how the judicial system works and how it could be improved. See Question 16 for a full list of the committees I've served on.

Community Outreach

The public presentations I've given have made me a better judge because they put me face to face with the people involved in and affected by the law in Iowa. Listening to community member concerns and opinions about the justice system gives me a wealth of knowledge I don't get at the courthouse. I'm always curious to know whether citizens believe our justice system is fair and, if not, then where the problems are and what could be done to fix them.

When I was Clayton County Attorney, I wrote 98 monthly columns about the legal system called "Justice For All." The columns were published in all of the local newspapers and were designed to give readers a look at how various parts of our justice system operate in a concise and understandable way. Being able to explain legal concepts to citizens is a valuable skill when I'm presiding over cases involving self-represented litigants who are unfamiliar with how the court system works. My "Justice For All" columns are outlined in Question 22 and some columns are included in my writing samples.

14. If you have ever held public office or have you ever been a candidate for public office, describe the public office held or sought, the location of the public office, and the dates of service.

I was a successful candidate for Clayton County Attorney in the 2010, 2014, and 2018 general elections. My office was located in Elkader, Iowa. I served as Clayton County Attorney from January 1, 2011 to March 15, 2019.

15. If you are currently an officer, director, partner, sole proprietor, or otherwise engaged in the management of any business enterprise or nonprofit organization other than a law practice, provide the following information about your position(s) and title(s):

a. Name of business / organization.
b. Your title.
c. Your duties.
d. Dates of involvement.

N/A.

16. List all bar associations and legal- or judicial-related committees or groups of which you are or have been a member and give the titles and dates of any offices that you held in those groups.

I have been a part of the following committees, subcommittees, or groups since graduating from law school.

- Administrative Judges For First Judicial District - 2020 to present.
- Administrative Judge for Allamakee County and Clayton County - 2020 to present.
- Clayton County Bar Association. Member - 2010 to present. President - 2013 to 2019.
- First Judicial District Judges: Ability To Pay Category B Restitution - July 2020.
- First Judicial District Judges: Informal Family Law Trials - July 2020.
- First Judicial District Judges: Probate Legislation - January 2021 to present.
- Iowa Bar Association. Member - 2011-2012, 2021 to present.
- Iowa County Attorneys Association – Legislative Committee - 2015 to 2019: Subcommittee on Crack and Powder Cocaine Sentence Disparity - 2015 to 2017.
- Iowa County Attorneys Association – Best Practices Committee - 2015 to 2019: Subcommittee on Victim Outreach in Officer Involved Shootings - 2017 to 2018.
- Iowa Judges Association. Member - 2019 to present.

- Magistrate Appointing Commission Chair for Allamakee County - May 2021.
- Magistrate Appointing Commission Chair for Clayton County - May 2021.
- National District Attorneys Association. Member - 2012 to 2019.

17. List all other professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed above, to which you have participated, since graduation from law school. Provide dates of membership or participation and indicate any office you held. "Participation" means consistent or repeated involvement in a given organization, membership, or regular attendance at events or meetings.

St. Joseph's Catholic Church: Member - 2010 to present. Volunteer (cashier) for annual Lenten Fish Fry and Fall BBQ.

Knights of Columbus: Member - 2014 to present. Volunteer for Tootsie Roll Event for Persons with Intellectual Disabilities. Volunteer (kitchen worker) for Pancake and Sausage Breakfast and Hog Roast events in the spring and fall.

Clayton County Lion's Club: Member - 2011 to present.

18. If you have held judicial office, list at least three opinions that best reflect your approach to writing and deciding cases. For each case, include a brief explanation as to why you selected the opinion and a citation for your opinion and any reviewing entity's or court's opinion. If either opinion is not publicly available (i.e., available on Westlaw or a public website other than the court's electronic filing system), please attach a copy of the opinion.

1. <u>McCrea Dissolution</u>, Fayette County Case CDDM002866.

The substance of this case is significant because it called for an explanation of an important concept that is not always readily understood or accepted: parents who commit a crime are not automatically or indefinitely banned from seeing their children. Instead, judges must focus on what's in the best interest of the children under the unique circumstances of each case. My opinion analyzed not just the bad behavior that resulted in the father being charged with multiple offenses but also the father's sincere efforts to rehabilitate and earn the chance to spend time with his children again.

I also selected this opinion because Bryan Garner presented me with a "superb introduction" award at his Ten Steps to Better Judicial Writing Seminar held in November 2021. Approximately 65 Iowa judges attended the seminar, including every member of the Iowa Supreme Court and almost every judge on the Iowa Court of Appeals. We were all asked to provide an introduction to a case we presided over. The introduction was required to state the problem, the answer, and the justification for the answer in 75 words or less with no grammatical errors. Garner gave a superb introduction award and an autographed copy of his book, <u>Garner on Language and Writing</u>, to the judges who met all of his criteria, which was approximately one of every five judges who attended the conference.

2. **State v. Colton Michael Willie, Allamakee County Case OWCR015180.**

This case involved an unusual issue which was raised in an unusual way. Willie was charged with operating while intoxicated by State Trooper Ted Benda. Trooper Benda then died in the line of duty a few weeks later. The State wanted to continue prosecuting Willie by introducing Trooper Benda's body camera video. Willie's attorney cited the Confrontation Clause of the Constitution at the suppression hearing, but neither side developed any arguments on the issue, leaving the record bare. So I elected to frame the Confrontation Clause issue in a clear and impartial way so that both parties could make a full and complete record of their positions. After that, the State determined that Trooper Benda's video would not be admissible and dismissed the case.

3. **Karen Matt v. Donald Leyh Revocable Trust and Jeffrey Leyh as Trustee, Fayette County Case EQCV056044.**

This case involved the misconduct of a trustee which cost a trust over $600,000. I included it to show how I analyzed the trustee's conduct under what Iowa law requires of trustees. This opinion is also included to show how I ruled on a beneficiary's request to take over as trustee for the purpose of seeking vengeance against the prior trustee.

19. **If you have not held judicial office or served in a quasi-judicial position, provide at least three writing samples (brief, article, book, etc.) that reflect your work.**

N/A.

OTHER INFORMATION

20. **If any member of the State Judicial Nominating Commission is your spouse, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, father, mother, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister, state the Commissioner's name and his or her familial relationship with you.**

N/A.

21. **If any member of the State Judicial Nominating Commission is a current law partner or business partner, state the Commissioner's name and describe his or her professional relationship with you.**

N/A.

22. **List the titles, publishers, and dates of books, articles, blog posts, letters to the editor, editorial pieces, or other published material you have written or edited.**

In law school, I served as a research assistant for University of St. Thomas School of Law Legal Writing Professor Julie Oseid's 2009 article called "The Power of Brevity: Adopt Abraham Lincoln's Habits." This article became the first chapter of Professor Oseid's book called Communicators-in-Chief: Lessons in Persuasion from Five Eloquent Presidents.

I wrote a column every month that I was Clayton County Attorney called "Justice For All." These 98 columns were published in all Clayton County newspapers and were written for anyone who was interested in learning more about the legal system. As far as I know, I was the only county attorney in Iowa to have ever done something like this.

1.	Justice For All January 2011:	Introduction to the County Attorney's Office
2.	Justice For All February 2011:	Relationships with Law Enforcement
3.	Justice For All March 2011:	Suspended Sentences
4.	Justice For All April 2011:	True Cost of a Criminal Fine
5.	Justice For All May 2011:	Bail
6.	Justice For All June 2011:	Deadlines
7.	Justice For All July 2011:	Domestic Abuse / Domestic Violence
8.	Justice For All August 2011:	Checks and Balances
9.	Justice For All September 2011:	Presentence Investigations
10.	Justice For All October 2011:	Mental Health Committals
11.	Justice For All November 2011:	Standard Week as County Attorney
12.	Justice For All December 2011:	Fugitive Extraditions
13.	Justice For All January 2012:	Compassion for Victims
14.	Justice For All February 2012:	Preliminary Hearings
15.	Justice For All March 2012:	Fairness in Sentencing
16.	Justice For All April 2012:	Fine Collections
17.	Justice For All May 2012:	Dismissals
18.	Justice For All June 2012:	Clayton County Trial Docket 2011-2012
19.	Justice For All July 2012:	Guilty Pleas
20.	Justice For All August 2012:	Probation Agreements
21.	Justice For All September 2012:	Minutes of Testimony
22.	Justice For All October 2012:	Domestic Violence Prosecution/Prevention
23.	Justice For All November 2012:	Time Served on Probation
24.	Justice For All December 2012:	Deferred Judgments
25.	Justice For All January 2013:	Methamphetamine
26.	Justice For All February 2013:	Judges
27.	Justice For All March 2013:	Speedy Indictment
28.	Justice For All April 2013:	Speedy Trial
29.	Justice For All May 2013:	Natalia's Parting Thoughts
30.	Justice For All June 2013:	Clayton County Trial Docket 2012-2013
31.	Justice For All July 2013:	Trial Informations
32.	Justice For All August 2013:	Prior Bad Acts Rule of Evidence
33.	Justice For All September 2013:	New Prosecutors in Clayton County
34.	Justice For All October 2013:	Property Rights / Crimes Part I
35.	Justice For All November 2013:	Property Rights / Crimes Part II
36.	Justice For All December 2013:	Pretrial Conferences

37.	Justice For All January 2014:	Trial Publicity
38.	Justice For All February 2014:	No-contact Orders
39.	Justice For All March 2014:	Allocution
40.	Justice For All April 2014:	Community Service
41.	Justice For All May 2014:	Employment of Defendant
42.	Justice For All June 2014:	Clayton County Trial Docket 2013-2014
43.	Justice For All July 2014:	Case Resolution Without a Jury
44.	Justice For All August 2014:	Grand Juries
45.	Justice For All September 2014:	Depositions
46.	Justice For All October 2014:	Arrests
47.	Justice For All November 2014:	Court-appointed Attorneys
48.	Justice For All December 2014:	First Term Review
49.	Justice For All January 2015:	Checks and Balances Revisited
50.	Justice For All February 2015:	Possession
51.	Justice For All March 2015:	Anonymous Tips
52.	Justice For All April 2015:	Class A Felony Sentencing for Juveniles
53.	Justice For All May 2015:	Confessions / Corroboration Requirement
54.	Justice For All June 2015:	Clayton County Trial Docket 2014-2015
55.	Justice For All July 2015:	Marital Privilege
56.	Justice For All August 2015:	Habitual Offender Sentencing Enhancement
57.	Justice For All September 2015:	Evidence at a Trial
58.	Justice For All October 2015:	Role of Defense Attorney
59.	Justice For All November 2015:	Arraignments
60.	Justice For All December 2015:	Ry's Farewell
61.	Justice For All January 2016:	Expunging Dismissals
62.	Justice For All February 2016:	Prosecutor Duties – Part 1
63.	Justice For All March 2016:	Prosecutor Duties – Part 2
64.	Justice For All April 2016:	Prosecutor Duties – Part 3
65.	Justice For All May 2016:	Prosecutor Duties – Part 4
66.	Justice For All June 2016:	Clayton County Trial Docket 2015-2016
67.	Justice For All July 2016:	Initial Appearances
68.	Justice For All August 2016:	Methamphetamine
69.	Justice For All September 2016:	County Attorney Legislative Committee
70.	Justice For All October 2016:	Jury or Bench Trial
71.	Justice For All November 2016:	EDMS
72.	Justice For All December 2016:	Advice to Students
73.	Justice For All January 2017:	Fine Collections
74.	Justice For All February 2017:	Conduct in the Courtroom
75.	Justice For All March 2017:	Venue
76.	Justice For All April 2017:	Department of Corrections
77.	Justice For All May 2017:	Alford Pleas
78.	Justice For All June 2017:	Clayton County Trial Docket 2017-2018
79.	Justice For All July 2017:	Courthouse Security
80.	Justice For All August 2017:	Postconviction Relief
81.	Justice For All September 2017:	Accessory After the Fact
82.	Justice For All October 2017:	Legislative Committee Update

83.	Justice For All November 2017:	West Union Residential Facility
84.	Justice For All December 2017:	Court Revenue Distribution
85.	Justice For All January 2018:	Fine Collections Update
86.	Justice For All February 2018:	Domestic Abuse Part I (Relationships)
87.	Justice For All March 2018:	Domestic Abuse Part II (Penalties)
88.	Justice For All April 2018:	Domestic Abuse Part III (IDAP)
89.	Justice For All May 2018:	Domestic Abuse Part IV (Safe at Home)
90.	Justice For All June 2018:	Clayton County Trial Docket 2017-2018
91.	Justice For All July 2018:	Witnesses
92.	Justice For All August 2018:	Motions in Arrest of Judgment
93.	Justice For All September 2018:	Role of a Juror
94.	Justice For All October 2018:	Legislative Committee Update
95.	Justice For All November 2018:	OWI vs. Drug Laws
96.	Justice For All December 2018:	Second Term Review
97.	Justice For All January 2019:	Fine Collections
98.	Justice For All February 2019:	Farewell

23. List all speeches, talks, or other public presentations that you have delivered for at least the last ten years, including the title of the presentation or a brief summary of the subject matter of the presentation, the group to whom the presentation was delivered, and the date of the presentation.

The 35 speeches, talks, and public presentations I've given are as follows:

- Interview with State Judicial Nominating Commission. June 27, 2022. Available to view on YouTube at: https://www.youtube.com/watch?v=T5Uf90nBEgI

- Administering justice under the law equally to all persons. Edgewood-Colesburg Social Studies Class in Edgewood, Iowa. March 2022.

- Administering justice under the law equally to all persons. Edgewood-Colesburg Social Studies Class in Edgewood, Iowa. March 2021.

- Constitution Day speech: An enduring constitution and the tragedy of Korematsu v. United States. Upper Iowa University in Fayette, Iowa. September 2020.

- Administering justice under the law equally to all persons. Beckman High School History Class in Dyersville, Iowa. March 2020.

- Administering justice under the law equally to all persons. Edgewood-Colesburg Social Studies Class in Edgewood, Iowa. February 2020.

- Administering justice under the law equally to all persons. South Winneshiek Government Class and Student Body. January 2020.

- Panel member on emergency hospitalizations discussion and question and answer in Winneshiek County. Winneshiek County Annex in Decorah, Iowa. October 2019.

- Our liberties we prize and our rights we will maintain. Decorah Rotary Club Speech in Decorah, Iowa. September 2019.

- Our liberties we prize and our rights we will maintain. Manchester Rotary Club Speech in Manchester, Iowa. September 2019.

- The luckiest man on the face of the earth. Investiture as a district court judge speech. Clayton County Courthouse. Elkader, Iowa. March 2019.

- Child endangerment cases: The pass interference section of the Iowa Criminal Code. Elkader, Iowa. Clayton County Law Enforcement Association. January 2019.

- How the legal system works and why it's important for you to care. Guttenberg, Iowa. Clayton Ridge Government Class. January 2019.

- OWI search warrants and State v. Frescoln. St. Olaf, Iowa. Clayton County Law Enforcement Association. July 2018.

- Getting a confession? You must follow these rules if you want it to be admissible. St. Olaf, Iowa. Clayton County Law Enforcement Association. January 2018.

- How the legal system works and why it's important for you to care. Guttenberg, Iowa. Clayton Ridge Senior Government Class. December 2017.

- What a complete case investigation looks like. St. Olaf, Iowa. Clayton County Law Enforcement Association. July 2017.

- Career Fair Day: Being an attorney. Guttenberg, Iowa. Clayton Ridge High School Student Body. May 2017.

- How the legal system works and why it's important for you to care. Guttenberg, Iowa. Clayton Ridge Senior Government Class. December 2016.

- Vehicular homicide by OWI: The consequences are real and tragic. Monona, Iowa. MFL MarMac High School Student Body. April 2016.

- A judicial system that you can be proud of in Clayton County. Guttenberg, Iowa. Guttenberg Rotary Club. February 2016.

- How the legal system works and why it's important for you to care. Guttenberg, Iowa. Clayton Ridge Senior Government Class. December 2015.

- Automobile searches after State v. Gaskins. St. Olaf, Iowa. Clayton County Law Enforcement Association. July 2015.

- The real and tragic consequences of an OWI vehicular homicide conviction. Guttenberg, Iowa. Clayton Ridge Mock Accident Presentation. May 2015.

- How the legal system works and why it's important for you to care. Guttenberg, Iowa. Clayton Ridge Senior Government Class. December 2014.

- What successful and unsuccessful drug prosecutions look like. Elkader, Iowa. Clayton County Law Enforcement Association. July 2014.

- How the legal system works and why it's important for you to care. Guttenberg, Iowa. Clayton Ridge Senior Government Class. December 2013.

- How the legal system works and why it's important for you to care. Elkader, Iowa. Clayton County 4-H. September 2013.

- No test OWI cases. St. Olaf, Iowa. Clayton County Law Enforcement Association. May 2013.

- Criminal cases from start to finish. Guttenberg, Iowa. Clayton County Law Enforcement Association. March 2013.

- How the legal system works and why it's important for you to care. Guttenberg, Iowa. Clayton Ridge Senior Government Class. December 2012.

- Domestic Abuse and OWI cases (with Assistant County Attorney Natalia Blaskovich) Elkader, Iowa. Clayton County Law Enforcement Association. November 2011.

- The Clayton County Attorney's Office and our judicial system at work for you. Strawberry Point, Iowa. Clayton County Lions Club. September 2011.

- Discovery: No conviction will stand if the defendant isn't given information favorable to him or her. St. Olaf, Iowa. Clayton County Law Enforcement Association. July 2011.

- What is about to change in the County Attorney's Office. St. Olaf, Iowa. Clayton County Law Enforcement Association. December 2010.

24. List all the social media applications (e.g., Facebook, Twitter, Snapchat, Instagram, LinkedIn) that you have used in the past five years and your account name or other identifying information (excluding passwords) for each account.

Facebook (since 2005): Al Heavens. I have never used Twitter, Snapchat, Instagram, or LinkedIn.

25. List any honors, prizes, awards or other forms of recognition which you have received (including any indication of academic distinction in college or law school) other than those mentioned in answers to the foregoing questions.

- Nominated by State Judicial Nominating Commission for vacancy on Iowa Supreme Court (one of three nominees, Justice David May was appointed to fill the vacancy by Governor Reynolds). June 2022.

- Award for superb introduction to a legal opinion. Awarded by Bryan Garner at his Ten Steps to Better Judicial Writing Seminar. November 2021.

- Award of Excellence for Service to the Citizens of Clayton County. Presented by the Clayton County Law Enforcement Association. January 2018.

- Ranked 1st in class of 152 in fall 2009 semester with 4.00 GPA. University of St. Thomas School of Law. February 2010.

- Dean's Award for highest grade in Small Firm Practice. University of St. Thomas School of Law. February 2010.

- Dean's Award for highest grade in Negotiations. University of St. Thomas School of Law. February 2010.

- Semi-finalist in ABA National Negotiations Competition. American Bar Association. January 2010.

- Champion: University of St. Thomas School of Law Negotiations Competition. University of St. Thomas School of Law. November 2009.

- Dean's Award for highest grade in Lawyering Skills III – Oral Argument and Appellate Brief Writing. University of St. Thomas School of Law. July 2009.

- Octo finalist in Evans Moot Court Competition. Evans Moot Court Organization. April 2009.

- 3rd place orator in University of St. Thomas Moot Court Competition. University of St. Thomas School of Law. April 2008.

- Graduated from University of St. Thomas cum laude with degrees in Financial Management and Political Science. May 2007. Dean's List six times.

26. Provide the names and telephone numbers of at least five people who would be able to comment on your qualifications to serve in judicial office. Briefly state the nature of your relationship with each person.

1. Chief Judge Kellyann Lekar. She is the chief judge of the First Judicial District and has been the chief judge since I began my judicial career. Phone: (319) 833-3331.

2. Senior Judge John Bauercamper. He has been a judge in the First Judicial District for over 35 years and has known me for my entire legal career. Phone: (563) 568-6351.

3. Melanie Anundsen. She was primarily assigned to be my court reporter for the first two years that I was a judge. She is familiar with my approach to judging and my writing style and ability. Phone: (563) 380-0001.

4. Julie Oseid. She is the Morrison Family Director of Lawyering Skills and Law Professor at the University of St. Thomas where I went to law school. I served as her research assistant the summer after my 1L year and we have stayed in touch in all of the years since. Phone: (651) 962-4948.

5. Ron McCartney. He is a farmer and was a Clayton County Supervisor for eight years when I was Clayton County Attorney. We communicated regularly about legal issues that came up during this time and worked closely together to ensure that every decision was consistent with what Iowa law required. Phone: (563) 423-5598.

27. Explain why you are seeking this judicial position.

I am seeking this position because I believe strongly in public service and the importance of concisely written appellate opinions that provide clear and understandable resolutions.

Public Service

Martin Luther King, Jr. once said that life's most persistent question is "what are you doing for others?" My father Jim Heavens served seven terms as Mayor of Dyersville, where the *Field of Dreams* movie and major league ballpark is located. He inspired me when I was a teenager to pursue a life-long career in public service. I've always enjoyed going to work throughout my legal career because I've always been in public service, and I love the law.

The district court judge has the final say on what the law is while the parties are in that judge's courtroom. But the district court judge's decision must hold up to the scrutiny – a check and balance – of three appellate judges. Those judges decide whether the district court judge made his or her decisions correctly. Judges on the Iowa Court of Appeals serve the public in a crucial way by ensuring that the law was accurately applied to a given case.

As a district court judge, I regularly handle a wide variety of criminal and civil cases in rural and urban counties. That experience is valuable because the cases that the Iowa Court of Appeals review come from all areas of the law and from all areas of the state. It's important for judges who are reviewing other judges' work to know what it's like to be in a district court judge's shoes. Whether it's an immediate ruling on an objection made during a trial or writing a decision in a complex case, serving as a district court judge is an excellent way to prepare to review the decisions of other judges.

Legal Writing

Every appellate opinion must be written clearly and concisely. And that's true no matter how complicated any case may be. If the lower court decision is affirmed, then the litigant who appealed must understand that – even though he or she disagreed with the outcome – the law was followed. If the panel reverses, then the judge needs to understand what should have happened without feeling that he or she was unfairly second-guessed by a Monday morning quarterback. Appellate opinions that are too long and full of technical and incomprehensible language won't accomplish any of those crucial purposes. Poorly written opinions are an injustice to all.

Writing is hard work, but I enjoy the process and approach it with enthusiasm. Hopefully the writing samples I've included will prove this point. I'm also open-minded and always welcoming of feedback and constructive criticism because I'll never stop trying to become a better writer. If appointed to the Iowa Court of Appeals, I will give my best effort to write every opinion concisely in a way that is easily understandable to litigants, attorneys, judges, and anyone else who is interested in what the law says and means in the State of Iowa.

28. Explain how your appointment would enhance the court.

The Iowa State Bar Association does a judicial performance evaluation where attorneys anonymously rate judges. 94% of respondents said I should be retained as a judge, tied for the highest total of any judge up for retention in Election District 1A in 2020. 81% of voters then voted to retain me in the 2020 general election, making me one of two judges in the district whose "yes" vote reached as high as 80% (50% + 1 is necessary for retention).

The 88 attorneys who participated in the performance evaluation gave me positive reviews in being courteous and patient with everyone in the courthouse, treating all people equally, ruling promptly, and deciding cases on the basis of the applicable law and fact, not affected by outside influence. In the interest of full disclosure, many other judges have received similar feedback from attorneys and voters. That's a tribute to the people who have served on a judicial nominating commission, a tribute to the Iowa Governors who have made judicial appointment decisions, and a tribute to the hard-working men and women who have served or are serving as judges for the Iowa Judicial Branch.

In addition to someone with the attributes listed above, the Iowa Court of Appeals must have judges who write well and who are both independent-minded and collegial.

Written opinions showcase a judge's writing skills and provide concrete examples of whether they are fair and independent. Those documents speak for themselves (and for the judge). As for collegiality, it was an honor to serve as President of the Clayton County Bar Association for six years before becoming a judge. I worked hard to create a positive atmosphere for our local attorneys. We developed a strong sense of community and camaraderie. We learned to enjoy one another's company outside the courtroom while being on opposite sides in the courtroom. That's the attitude that all appellate judges need to have – independent voices who can disagree without being disagreeable.

29. Provide any additional information that you believe the Commission or the Governor should know in considering your application.

Mark Twain once said the two most-important days in anyone's life are the day you are born and the day you find out why. My purposes in life are to be a good husband, father, son, brother, citizen, and judge. How I carry out these purposes on a daily basis is profoundly shaped by what happened on the final day of my wife Jillian's first pregnancy.

Jillian experienced a life-threatening complication towards the end of her third trimester. She was rushed to a specialist at a hospital an hour away. Our doctor volunteered to ride in the ambulance "in case this gets any worse." Ominous words that alarmed both of us. With no more room in the ambulance, I spent the most terrifying hour of my life driving to the emergency room alone, praying that my wife and child would survive this day.

Thankfully, Jillian delivered a healthy, and energetic, little girl. We had three more children after that without any problems. But my life would never be the same in many ways after the day that my first child was born. I realized a special appreciation for the importance of family and an understanding of what it might be like for a person to be taken away from their loved ones for any amount of time, even if it is *only* one more hour spent in jail or in prison because that's the sentence the judge imposed, or even if it's *only* one more hour a parent spends away from their child because of the care schedule that a judge handed down in a custody case. One hour can feel like a lifetime when it's spent apart from the ones you love. I know that's true because that's an experience I've lived.

I'm including this intensely personal information about me and my family because, as Judge John T. Noonan, Jr. once said, what counts most in judging is the "conviction at one's inner core, uniting principles and experience and empathy." Judges' decisions are not academic exercises; judges' decisions have real and profound consequences for people.

I hope you believe that I have the principles, the experience, the empathy, and the conviction at my inner core to help make the important decisions in the many cases that the Iowa Court of Appeals handles every year. Thank you for your consideration.

I hereby certify all the information in this joint judicial application is true and correct to the best of my knowledge.

Signed: Alan Heavens Date: September 9, 2022

Printed name: Alan Heavens

SUPPLEMENT TO QUESTION 10(b)

MICHELE TROENDLE VS. STEVEN TROENDLE

ORDER ON MOTION FOR NEW TRIAL

COURT OF APPEALS RULING

E-FILED 2019 NOV 07 8:46 AM ALLAMAKEE - CLERK OF DISTRICT COURT

IN THE IOWA DISTRICT COURT FOR ALLAMAKEE COUNTY

IN THE MATTER OF THE ESTATE OF GLADYS R. TROENDLE, Deceased.	)))))	Case No. ESPR014149 **ORDER ON POSTTRIAL MOTIONS**
MICHELE TROENDLE, vs. STEVEN TROENDLE,	)))))	Case No. LACV026494

Michele Troendle timely filed a motion for new trial or alternatively for additur. Michele notes that the jury failed to award any damages for Intentional Infliction of Emotional Distress, Abuse of Process, or Breach of Fiduciary Duty, despite finding that Michele had proven those claims. Michele argues that the jury's answers on the verdict form for these three claims are "internally inconsistent as a matter of law given their failure to award damages in some amount." As a result, Michele requests a new trial on the issue of damages alone for those claims. In the alternative, Michele requests the Court order additur as a remedy for the situation.

Steven Troendle timely filed a motion for judgment notwithstanding the verdict or alternatively for a new trial. Steven argues that he is entitled to a directed verdict on all claims because Michele failed to prove every element of every claim. He further argues that a number of motion in limine rulings which were adverse to him warrants a new trial. Finally, for the first time, Steven argues that a new trial is warranted because of "misconduct" by Michele during trial that consisted of "outbursts of anger and emotion."

In ruling upon motions for new trial, the trial court has a broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties. Yoch v. City of Cedar Rapids, 353 N.W.2d 95, 98 (Iowa Ct. App. 1984); Iowa R.Civ.P. 14(f)(3).

"The general rule is that a jury's verdicts are to be liberally construed to give effect to the intention of the jury and to harmonize the verdicts if it is possible to do so." Holdsworth v. Nissly, 520 N.W.2d 332, 337 (Iowa Ct. App. 1994).

I. MICHELLE TROENDLE'S MOTIONS

"The assessment of damages is traditionally a jury function. Its decision should be disturbed only for the most compelling reasons. We will reduce or set aside a jury award only if it (1) is flagrantly excessive or inadequate; or (2) is so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is a result of passion, prejudice or other ulterior motive; or (4) is lacking in evidentiary support." Yoch v. City of Cedar Rapids, 353 N.W.2d 95, 98 (Iowa Ct. App. 1984).

"The test is whether the verdicts can be reconciled in any reasonable manner consistent with the evidence and its fair inferences, and in light of the instructions of the court. Only where the verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside. Where verdicts are clearly inconsistent and there is no way to determine which verdict is inconsistent with the jury's intent, the proper remedy is a new trial." Id. (citations omitted).

"As a general rule, new trials will be granted as to the whole case and on all of the issues, and seldom on the issue of damages only, except where liability of a defendant is definitely established." Id. citing Householder v. Town of Clayton, 221 N.W.2d 488, 493 (Iowa 1974).

Duplicate or overlapping damages are to be avoided. Team Central, Inc. v. Teamco, Inc., 271 N.W.2d 914 (Iowa 1978) (citations omitted).

The jury awarded Michele $24,300.00 in actual damages for her claim of malicious prosecution and $639.13 in actual damages plus $50,000 in punitive damages for her claim of conversion. The jury found that Michele proved her claims of intentional infliction of emotional distress, breach of fiduciary duty, interference with inheritance, and abuse of process and awarded $0 in damages on each claim.

Neither party requested a jury instruction with information about duplicative damages and no such instruction was given. Despite the lack of any specific guidance from the Court on the issue, the jury's verdicts clearly indicate a recognition of the duplicative damages concept. Many key acts that Michele alleged Steven committed serve as the basis for multiple counts. The two most prominent areas or examples of acts which form a basis for multiple counts are:

1. Any actions taken during the probate of the 1964 Will could be used as evidence to support claims of: malicious prosecution, intentional infliction of emotional distress, breach of fiduciary duty, interference with inheritance, and abuse of process.

2. Any actions taken or not taken with respect to the return the contents of the lockbox could be used as evidence to support claims of: conversion, intentional infliction of emotional distress, breach of fiduciary duty, and interference with inheritance.

As is typical in many petitions, every Count in Michele's Petition "re-pleads and re-alleges" all paragraphs in the "Facts" section along with all paragraphs in every previous Count. While Michele did offer proof of damages at trial, she never distinguished what damages were associated with each claim and made no request for a specific amount of damages for any of her claims. Michele's motion for a new trial or additur also makes no attempt to highlight which facts could have been considered proven only for a claim that no damages were awarded for. The Court believes there are no such facts which have any significance.

It is clear to this Court that the jury decided Michele was entitled to a total of $74,939.13 in damages for six claims with largely overlapping facts supporting each individual claim against Steven.

THEREFORE, Michele's motions for new trial and additur are both **DENIED**.

II. STEVEN TROENDLE'S MOTIONS

A. Undue Influence

"If the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context." Iowa Court Rule 5.103(a)(2).

"The purpose of an offer of proof is to give the trial court a more adequate basis for its evidentiary ruling and to make a meaningful record for appellate review . . . ." State v. Ritchison, 223 N.W.2d 207, 212 (Iowa 1974).

Steven argues that he was denied a fair trial on his undue influence claim because the Court refused to let him bring in evidence of an unfounded elder abuse investigation, an allegation that Michele misused Gladys' medication, all of Gladys' medical records, and all of Karl Knudson's records. Steven even argues the Court disallowing evidence that Gladys didn't have a funeral somehow has relevance to Gladys being unduly influenced when she was alive.

Steven failed to make an offer of proof for any of the aforementioned areas and, as such, those objections are waived. Even if the merits were to be considered, the Court stated multiple times during the trial that Steven was not going to be allowed to dump voluminous amounts of documents and other information on the jury in the hopes that they find something within them that may help his case. In the case of Karl Knudson's file, had the jury been able to see that it would have been helpful to Michele in that it showed her communication with him long after Gladys signed her Will. If Michele's purpose was to unduly influence Gladys to create a Will that made her sole beneficiary then there would have been no reason to continue to communicate with Attorney Knudson after the Will was signed, as she would have already accomplished her alleged goal.

Ultimately, on the issue of undue influence, Karl Knudson testified that Gladys said she didn't want the Medicaid Trust that Michele was pushing for; rather, she wanted a simple Will that gave Michele everything if she survived her. If the jury found Mr. Knudson's testimony credible, this amounts to a fatal blow for Steven's undue influence claim that no amount of additional evidence offered by Steven could refute.

B. Conversion and Malicious Prosecution

"On a motion for directed verdict, the trial court is required to view the evidence in the light most favorable to the plaintiff, even if contradictory evidence exists." Fry v. Blauvelt, 818 N.W.2d 123, 134 (Iowa 2012) citing Bellville v. Farm Bureau Mut. Ins. Co., 702 N.W.2d 468, 473 (Iowa 2005).

"[W]here no substantial evidence exists to support each element of a plaintiff's claim, directed verdict or judgment n.o.v. is proper. Substantial evidence is that which a "reasonable mind would accept as adequate to reach a conclusion." Where reasonable minds could differ on an issue, directed verdict is improper and the case should go to the jury." East Broadway Corp. v. Taco Bell Corp., 542 N.W.2d 816, 820 (Iowa 1996).

Steven requests a directed verdict or a new trial on all counts that the jury found in Michele's favor for. The jury awarded no damages for Michele's claims of intentional infliction of emotional distress, breach of fiduciary duty, interference with inheritance, and abuse of process, and the Court did not order additur or a new trial on damages for any of those claims. All of Steven's motions for those claims are denied and will not be addressed any further.

1. Actual Damages for Conversion

Jury Instruction No. 18 required Michele to prove all of the following elements:

1. Michele Troendle had legal possession of or was entitled to possession the property located in a lockbox, personal property, and money refunded for taxes and insurance;

2. Steven Troendle assumed and exercised dominion and control over the property in an unlawful and unauthorized manner, or to the exclusion of and inconsistent with Michele Troendle's rights; and

3. Steven Troendle refused Michele Troendle's demands for the return of the property;

4. Michele Troendle has suffered damages.

There is no legitimate dispute that Michele was entitled to possession of all the items in element one and that her demands for the return of those items was not honored by Steven. The fighting issue was whether Steven's control of those items was unlawful and unauthorized or to the exclusion of and inconsistent with Michele's rights. If Michele could successfully show element two then damages for loss of use of the property would naturally follow.

Steven offered what seemed to be every possible reason for not returning Michele's property that included: he needed the items to complete the inventory, refunding the tax refund may have made him liable for mistakes Michele allegedly made on the tax return, Michele didn't ask in the right way, Michele as co-executor could have done it herself, he was just following the advice of his attorney, and he needed a court order before he could do anything.

What the jury was never told is that Steven offered to return Michele's property immediately before closing arguments but only if the conversion claim went away and the jury would not be told anything about the timing of when he finally returned the items.

Viewing the evidence that the jury did hear in the light most favorable to Michele, the jury could have found that Steven listed so many reasons for not returning Michele's property because there was not one valid reason for him to keep possession of these items for as long as he did. Some of Steven's reasons even contradict each other, i.e. Michele could have gotten the items herself as co-executor vs. nothing could be done without a court order; Steven was following the advice of his attorney vs. Attorney Garrett said the items could be returned. As such, there is substantial evidence to support each element of Michele's conversion claim.

2. Punitive Damages for Conversion

"Exemplary damages are not intended to be compensatory; they are intended to punish the party against whom they are awarded and to deter others from similar wrongdoing; to be effective for this purpose, the award must be relatively large; the amount is peculiarly within the discretion of the trier of fact." Grefe v. Ross, 231 N.W.2d 863, 868 (Iowa 1975).

The jury found clear, convincing and satisfactory evidence that Steven's conduct constituted a willful and wanton disregard for the rights and safety of Michele Troendle. In doing so, the jury could have relied on the same reasons they did in finding Michele proved element two of the jury instruction. The jury also could have taken into account that the personal and sensitive nature of the adoption papers that Steven was keeping from Michele warranted punishment for Steven and made it appropriate to award punitive damages to discourage this type of behavior by Steven or others.

As for the amount of the punitive damages in comparison to the actual damages, Attorney Garrett, as one of Steven's key witnesses, referred to a $50,000 settlement in another case as a small or insignificant amount that was well worth paying to dispose of a case with no merit. Awarding Michele $50,000 in punitive damages in connection with a claim that was found to have merit was well within the discretion of the jury and will not be disturbed by this Court.

3. Malicious prosecution

Jury Instruction No. 30 required Michele to prove all of the following elements:

1. Michele Troendle was required to defend a civil action based upon the improper submission of the 1964 will to probate.

2. Steven Troendle caused the civil action to be filed.

3. The action ended favorably for Michele Troendle.

4. Steven Troendle acted without probable cause.

5. Steven Troendle acted with malice.

6. As a cause of the filing of the civil action, Michele Troendle sustained financial losses by expending legal fees to reverse the improper submission of the 1964 will.

7. The amount of damage.

Having defined "civil action" as the probate of the 1964 Will, undisputed evidence showed that Steven caused this civil action, Michele defended it, and the end result was favorable to Michele in that the Court ruled that the 1964 Will was not a contractual Will. The fighting issues were whether Steven acted without probable cause and with malice and the amount of damages due to Michele.

"Probable cause" was defined in Jury Instruction No. 31 as having "reasonable trustworthy information about the facts and circumstances which was sufficient so that a reasonable person would believe that Gladys Troendle's Will executed in 1964 should have been submitted to probate instead of Gladys Troendle's Will executed in 2015." The jury was also instructed that probable cause "does not require absolute certainty of proof beyond a reasonable doubt. It is to be determined by the common sense a reasonable person would apply to the circumstances of everyday life."

Steven's defense to the malicious prosecution charge is simple and straightforward: he relied on the legal advice of attorney James Garrett. Attorney Garrett testified at trial about his research into the issue of contractual wills and his conclusion that the 1964 Will was a contractual will. Attorney Nicole Winke also testified about her conversations with James Garrett about contractual wills and her belief that the 1964 Will in this case was contractual.

Ordinarily, an attorney's advice that a claim has merit would be enough to give a litigant probable cause to pursue the matter in court; however, Michele introduced evidence at trial that showed that there was an almost immediate push by Steven and Attorney Garrett to challenge the 2015 Will on the grounds of undue influence. An alternative way to obtain the same relief sought in an undue influence case would be to get another Will that had Steven as a one-half beneficiary into probate. The jury could have found that the undue influence case created an incentive for Steven and Attorney Garrett to argue that the contractual will argument had merit even if they didn't truly believe that. Michele testified that, after the Court found the 1964 Will was not a contractual will, Steven flippantly commented to Michele that he "always knew the will was not a contract." Steven denies saying this, but the jury was free to, and apparently did, determine that Steven made this confession to Michele. This establishes a lack of probable cause and malice.

Steven next argues that attorney fees are not allowed as damages for a malicious prosecution case and that Michele's testimony about the amount of fees incurred is alone insufficient to establish proof of damages. This is wrong on both counts.

Iowa law has long allowed attorney fees as damages for a malicious prosecution case and has never required more than a minimal amount of evidence such as the testimony of the party who incurred the fees to establish the amount. *See:* Davis v. Rudolph, 52 N.W.2d 15, 20 (Iowa 1952) (Finding verdict for malicious prosecution "must have included" attorney fees and that it was not necessary to instruction jury that they could use their own judgment as to the appropriate amount); Turner v. Zip Motors, 65 N.W.2d 427, 431 (Iowa 1954) (Noting that attorney fees "are a part of the damages allowable in certain suits for malicious prosecution."); Yoch v. City of Cedar Rapids, 353 N.W.2d 95 (Iowa Ct. App. 1984) (Finding that an award of *only* attorney fees for a malicious prosecution case was insufficient when evidence showed the plaintiff was entitled to compensation for mental anguish and suffering) *Cf.* Everly v. Hy Vee, Inc., Not Reported in N.W.2d, 2002 WL 31757433 (Iowa Ct. App. 2002) (Finding attorney fees alone were sufficient for malicious prosecution case); Bronner v. Randall, 867 N.W.2d 195 (Iowa Ct. App. 2015) (Reversing attorney fee award only when there was "absolutely no evidentiary support for the attorney fee claim").

This Court will not disturb the jury's damage award for malicious prosecution.

C. Passion or Prejudice

The word "passion" as applied to the *jury's* action means "anger, resentment, heat, absence of reflection, disregard of the rights of others, and kindred motives." WSH Properties, L.L.C. v. Daniels, 761 N.W.2d 45, 49 (Iowa 2008) citing Murphy v. S. Pac. Co., 31 Nev. 120, 101 P. 322, 327 (1909).

Steven equates the jury's passion with Michele's passion as expressed through her anger at points during the trial. Steven's arguments here fail for multiple reasons. First, Steven's attorney never made a motion for a mistrial or even an objection when any of these incidents occurred at trial. The Court always gave the parties an opportunity to make a record on any matter outside the presence of the jury every time the jury left the room. The failure to make such a record or motion denied Michele an opportunity to respond with her own characterization of what happened and denied the Court an opportunity to give its characterization of what happened, which would have been significantly different than how Steven described the "emotional outbursts" in his motion.

Even if Steven had preserved error on this issue, he incorrectly equates the jury's passion with Michele's passion. The mere fact that a witness lost his or her composure on the stand does not mean a jury verdict in favor of that witness must have been the result of the jury losing its composure and rendering a verdict based on something other than the facts and the law.

Steven makes a similar passion or prejudice claim associated with Attorney Tronvold's questioning of James Garrett. Steven again failed to preserve error by raising this issue outside the presence of the jury. The Court allowed testimony about a prior case between attorneys Tronvold and Garrett for the purpose of exploring Garrett's potential bias against Tronvold. Any potential bias that Garrett might have against Tronvold is relevant to his credibility as a witness and his actions during the probate of the Gladys Troendle estate. Also, as noted above, during the interchange between attorneys Garrett and Tronvold, Garrett described a $50,000 settlement as a small amount that was well worth paying to resolve a meritless case. Now, Steven argues that $50,000 is such a large amount that it must have been the result of passion or prejudice.

The jury deliberated for approximately six hours before rendering their verdict. Jury Instruction No. 40 required them to "[d]ecide what damages, if any, have been proved, based upon the evidence" and this instruction also prohibited them from basing the amount of their damages upon "sympathy or prejudice."

The Court finds a lack of any credible evidence that the verdict for any claims in this case was a result of the jury's passion or prejudice.

THEREFORE, Steven's motions for directed verdict and a new trial and his request for oral argument on those motions are all **DENIED.**

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
LACV026494	MICHELE TROENDLE V. STEVEN TROENDLE, KATHLEEN TROENDLE

So Ordered

Alan Heavens, District Court Judge
First Judicial District of Iowa

965 N.W.2d 635 (Table)
Decision without published opinion. This disposition is referenced in the North Western Reporter.
Court of Appeals of Iowa.

In the MATTER OF the ESTATE OF
Gladys R. TROENDLE, Deceased.
Steven Troendle, Plaintiff-Appellant/Cross-Appellee,
v.
Michele Troendle, Individually and in her capacity as Co-Executor, Defendant-Appellee/Cross-Appellant.
Michele Troendle, Plaintiff,
v.
Steven Troendle, Defendant.

No. 19-2034
|
Filed July 21, 2021

Appeal from the Iowa District Court for Allamakee County, **Alan Heavens**, Judge.

Steven Troendle appeals a civil jury verdict. Michele Troendle cross-appeals the damages awarded. **AFFIRMED ON APPEAL; REVERSED AND REMANDED ON CROSS-APPEAL.**

Attorneys and Law Firms

Dennis G. Larson, Decorah, for appellant.

Jeffrey R. Tronvold of Eells & Tronvold Law Offices, P.L.C., Cedar Rapids, for appellee.

Considered by Mullins, P.J., and May and Schumacher, JJ.

Opinion

MAY, Judge.

*1 Steven Troendle appeals a jury award in favor of his sister, Michele Troendle. Michele cross-appeals. We affirm as to Steven's appeal. We reverse and remand as to damages only on Michele's cross-appeal.

I. Facts and Prior Proceedings

Steven and Michele are the adopted children of Gladys and Richard Troendle. In 1964, Gladys and Richard executed a joint will. It devised and bequeathed all of their property "to the survivor" spouse or, if both "should die in a common disaster," to Steven and Michele, "share and share alike."

Then in 1986, Richard died. That same year Gladys drafted a new will. It directed her estate to be divided between Steven and Michele, "share and share alike."

Eventually, Michele moved back on the family farm. Meanwhile, Steven lived in town with his family.

Gladys's health began to deteriorate. She had a stroke in 2002. After that, she required assistance from Michele to get around the home.

Gladys began discussing possible changes to her will. She told Steven's sons, who rented farmland from her, that she intended for Michele to inherit the family farm.

Gladys's health continued to deteriorate. Michele continued to provide her with day-to-day care. In 2015, Gladys met with an attorney and executed a new will. Unlike her prior will, Gladys's 2015 will left her entire estate to Michele. And it stated:

> I am deliberately omitting my son, Steven Troendle as a beneficiary.... I hold no ill will against my son Steven, but wish to leave my entire estate to my daughter Michele because she has a greater financial need for the inheritance and because she has cared for me for many years without any compensation through sickness and infirmity.

Then on March 16, 2016, Gladys died. On April 29, Michele provided Steven with a copy of Gladys's 2015 will. On May 2, Steven initiated probate proceedings using the 1964 will and was appointed executor. Michele became co-executor on July 11.

Michele continued to live on the farm. However, because Steven and Michele served as co-executors, any maintenance or improvements to the property had to be agreed upon by both Michele and Steven. Several times the two could not come to agreement about how to address issues with the property.

Steven contested the 2015 will, claiming Michele exerted undue influence on Gladys to persuade her to change her will. Michele filed a separate civil lawsuit against Steven stemming from his conduct as an individual and as executor of Gladys's will. Michele asserted ten claims against Steven: abuse of process, tortious interference with inheritance, breach of fiduciary duty, conversion, defamation, fraud, civil conspiracy, concert of action, intentional infliction of emotional distress, and malicious prosecution. [1] Steven moved to consolidate the two cases, which the court granted over Michele's objection. The matter proceeded to a jury trial. Following presentation of the evidence, Steven moved for a directed verdict, which the district court denied. [2] Seven of Michele's claims were submitted to the jury, namely: abuse of process; tortious interference with inheritance; breach of fiduciary duty; conversion; fraud; intentional infliction of emotional distress; and malicious prosecution. The court also submitted Steven's undue influence claim.

*2 The jury found Steven did not prove the 2015 will was the result of undue influence by Michele. And the jury found Michele did not establish the elements of her fraud claim. But the jury found Michele did prove her claims of intentional infliction of emotional distress, breach of fiduciary duty, conversion, interference with inheritance, abuse of process, and malicious prosecution. As for damages, the jury awarded $639.13 in actual damages and $50,000 in punitive damages on Michele's conversion claim. In addition, the jury awarded $24,300 in actual damages on Michele's malicious prosecution claim. But the jury awarded no damages on Michele's claims of intentional infliction of emotional distress, breach of fiduciary duty, interference with inheritance, and abuse of process.

Following trial, Steven moved for judgment notwithstanding the verdict (JNOV) or for new trial. Michele moved for new trial or additur. The court denied the motions; entered judgment against Steven for $74,939.13; and removed Steven as co-executor of Gladys's estate.

Steven appeals, and Michele cross-appeals. Additional facts will be discussed as necessary.

II. Discussion

A. Steven's claims

1. JNOV

For his first claim, Steven contends the district court should have granted his motion for JNOV. "We ... review a district court ruling on a motion for judgment notwithstanding the verdict for correction of errors of law." *Thornton v. Am. Interstate Ins. Co.*, 897 N.W.2d 445, 460 (Iowa 2017) (citation omitted).

"The purpose of [JNOV] is to allow the district court an opportunity to correct any error in failing to direct a verdict." *Easton v. Howard*, 751 N.W.2d 1, 4 (Iowa 2008). "Our role is to decide whether there was sufficient evidence to justify submitting the case to the jury when viewing the evidence in the light most favorable to the nonmoving party." *Smith v. Iowa State Univ. of Sci. & Tech.*, 851 N.W.2d 1, 18 (Iowa 2014) (citation omitted). "Every legitimate inference which can be reasonably made from the evidence is considered, and if reasonable minds can differ on the issue, it is for the jury to decide." *Thacker v. Eldred*, 388 N.W.2d 665, 670 (Iowa Ct. App. 1986) (citation omitted). JNOV is appropriate "only in rare circumstances." *Huss v. State*, No. 16-2145, 2019 WL 478794, at *2 (Iowa Ct. App. Feb. 6, 2019).

So we must decide if this case is one of those rare circumstances. But to do so, Steven must first present fully developed arguments for us to consider. This is where we reach a significant roadblock. Steven's appellate briefing presents scattershot arguments that are under developed or not supported by relevant legal authority. *See* Iowa R. App. P. 6.903(2)(g)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."); *Midwest Auto. III, LLC v. Iowa Dep't of Transp.*, 646 N.W.2d 417, 431 n.2 (Iowa 2002) (finding a "random assertion of error insufficient to preserve the issue for appellate review"); *cf Mahnesmith v. State*, No. 19-0877, 2020 WL 7868233, at *5 (Iowa Ct. App. Dec. 16, 2020) (noting a party "cannot plant seeds [of an argument] and walk away expecting the court to nurture them to maturity to discover their true identity"); *Shcharansky v. Shapiro*, No. 19-0739, 2020 WL 2487620, at *10 (Iowa Ct. App. May 13, 2020) (determining a motion for JNOV "was not presented with enough specificity for us to review the issue on appeal"). Moreover, as Michele points out, many of Steven's claims are not preserved because he did not first bring them in his motion for directed verdict. *See Konicek v. Loomis Bros., Inc.*, 457 N.W.2d 614, 617 (Iowa 1990) ("A [JNOV] must stand or fall on the grounds stated in the motion for directed verdict. On appeal, our review is limited to those grounds."). As to the preserved and sufficiently developed arguments, we conclude the evidence presented was sufficient

to support the jury's verdicts. The district court did not err in denying the JNOV motion.

2. Directed Verdict

*3 Steven also argues the district court erred in denying his motion for directed verdict on each count. We review the court's denial of a motion for directed verdict for errors at law. *Heinz v. Heinz*, 653 N.W.2d 334, 338 (Iowa 2002). "We consider the evidence in the light most favorable to the non-moving party." *Id.* "If reasonable minds could reach different conclusions based upon the evidence presented, the issue must be submitted to the jury for determination." *Id.* "If there is substantial evidence in the record to support each element of the claim," the district court must overrule the motion. *Id.* (citation omitted).

On appeal, Steven's argument focuses on the abuse-of-process claim.[3] To recover on the abuse-of-process claim, the jury instructions required Michele to establish:

> 1. On or about the 2nd day of May, 2016, Seven Troendle intentionally used the probate court to initiate probate proceedings with a will from 1964 after[4] he knew another will should have been submitted.
>
> 2. Steven Troendle used the legal process primarily for harassment, delay and to place himself in the position of [e]xecutor to which he was not entitled, and not for its intended use which is explained in [i]nstruction [n]o. 27.[5]
>
> 3. Steven Troendle's use of the legal process for the improper purpose was a cause of Michele Troendle's damage.
>
> 4. The amount of damage.

Steven argues he could not be liable for abuse of process because, when he initiated probate proceedings using the 1964 will, it was yet to be determined that the 2015 will was valid. He also claims he was entitled to serve as executor and his acts were reasonable.

We note Steven has not provided any supporting legal authority for his argument. *See* Iowa R. App. P. 6.903(2)(g)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."). Rather, Steven merely presents his version of events. Michele presented a differing version of events—and a differing explanation of Steven's motivations and conduct. And she presented sufficient evidence to support the elements of her abuse-of-process claim as instructed. So the district court correctly denied Steven's motion for directed verdict.

3. Reversal of Directed Verdict on Conversion Claim

*4 Next, Steven argues the district court erred in reversing its ruling on the motion for directed verdict with respect to Michele's conversion claim.[6] Because Steven does not develop his argument, we consider it waived. *Midwest Auto.*, 646 N.W.2d at 431 n.2.

4. Punitive Damages Award

Finally, Steven argues the district court should have reduced the punitive damages awarded on the conversion claim because they were excessive. "Appellate review for excessiveness is de novo." *Wolf v. Wolf*, 690 N.W.2d 887, 894 (Iowa 2005). But we again run into an error-preservation issue. On appeal, Steven argues the ratio between actual and punitive damages was constitutionally excessive under *Thornton v. American Interstate Insurance Co.*, 940 N.W.2d 1, 42 (Iowa 2020), and "various cases cited in *Thornton*, such as *Ezzone v. Riccardi*, 525 N.W.2d 388 (Iowa 1994)." But he did not raise this argument in the district court. So error is not preserved. *See Meier*, 641 N.W.2d at 537.[7]

B. Michele's Claims

For her part, Michele cross-appeals the district court's denial of her motion for new trial or additur. She argues the damages awarded were inconsistent with the jury's liability findings. She asks for "retrial on the issue of damages for the claims of abuse of process, malicious prosecution, interference with inheritance, intentional infliction of emotional distress[,] and breach of fiduciary duty." Alternatively, Michele asks us to "order an additur, and grant a conditional new trial on damages ... if Michele rejects [our] additur."

"We review the denial of a motion for new trial based on the grounds asserted in the motion." *Fry v. Blairvelt*, 818 N.W.2d 123, 128 (Iowa 2012) (quoting *Estate of Long ex rel. Smith v. Broadlawns Med. Ctr.*, 656 N.W.2d 71, 88 (Iowa 2002)). "If a motion turns on a legal question, such as whether a verdict is inconsistent, we review for correction of errors at law." *Behle v. Youngwirth*, No. 19-0967, 2020 WL 6157786, at *3 (Iowa

Ct. App. Oct. 21. 2020) (citing *Pavone v. Kirke*, 801 N.W.2d 477. 496 (Iowa 2011)).

> In evaluating whether a verdict is inconsistent, we consider whether it "can be reconciled in any reasonable manner consistent with the evidence and its fair inferences, and in light of the instructions of the court." *Hoffman v. Nat'l Med. Enters., Inc.*, 442 N.W.2d 123. 126-27 (Iowa 1989). If it cannot be reconciled because it is so logically and legally inconsistent, the verdict will be set aside.

*5 *Id.*

Here, the jury found Michele established her claims for abuse of process, malicious prosecution, interference with inheritance, intentional infliction of emotional distress, conversion, and breach of fiduciary duty. Under the court's instructions, damage to Michele was an essential element of each of these claims. Moreover, for each of these claims, the marshalling instruction stated, "If Michele Troendle has proved all of these [elements to the relevant claim], Michele Troendle is entitled to damages in some amount." So it was inconsistent for the jury to find Michele satisfied these claims but not award her any damages for some of the claims. *See id.*

Because we cannot reconcile the jury's liability findings with its damages awards for abuse of process, interference with inheritance, intentional infliction of emotional distress, and breach of fiduciary duty, we reverse the verdicts as to damages on these four counts only. We remand for new trial as to the damages on these four counts. [8] *See* *Thompson v. Allen*. 503 N.W.2d 400, 401–02 (Iowa 1993) (ruling that a new trial was required on the issue of damages but not on liability when there was no evidence "that the jury's determination of fault was compromised or affected by the evidence of damages"); *Behle*, 2020 WL 6157786, at *4; *Henson v. City of Davenport*. No. 12-0698, 2012 WL 5951365, at *5 (Iowa Ct. App. Nov. 29, 2012); *Dell v Hy-Vee, Inc*, No. 09-0121. 2009 WL 2528095. at *3 (Iowa Ct. App. Aug. 19. 2009).

III. Conclusion

We find the bulk of Steven's claims to be waived or not preserved. As to his properly presented claims, we find no grounds for reversal. We reverse the damages verdicts for Michele's claims of abuse of process, interference with inheritance, intentional infliction of emotional distress, and breach of fiduciary duty. We remand for new trial as to damages only on those claims only.

AFFIRMED ON APPEAL; REVERSED AND REMANDED ON CROSS-APPEAL.

All Citations

965 N.W.2d 635 (Table), 2021 WL 3076361

Footnotes

1 The petition also named Steven's attorney and several of his family members as defendants. Those individuals are not a part of this appeal.

2 The court initially granted the motion for directed verdict with respect to the conversion claim and then later changed its ruling.

3 Steven attempts to incorporate all of the arguments from his motions for directed verdict and JNOV into his appellate brief by stating, "Arguments made in both [m]otions are incorporated by reference and are further addressed below." This is not sufficient. The appellant must present and develop their arguments in their appellate brief. It is not for this court to chase down the parties' arguments; it is for the parties to present their arguments before this court for our consideration.

Steven's brief also raises an argument relating to the tortious-interference claim. However, he did not raise the argument in either his written or oral motion for directed verdict. So we will not consider it on appeal. *See* *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Steven also briefly mentions the conversion claim; but he does not develop his argument beyond a passing reference. So we deem it waived. *See* *Midwest Auto., LLC*, 646 N.W.2d at 431 n.2.

4 The word "which" was crossed out and replaced with "after" in handwriting. This alteration does not change our analysis.

5 Instruction twenty-seven stated:

> The wrong act involved in "abuse of process" is using the process for a reason different from the purpose for which the process was designed. For example, it could be using a legal process to force another to take some action or not take some action unrelated to the legal process. The result of the earlier legal proceeding does not matter.
>
> The purpose of probate proceedings is to probate the will of a decedent.

6 The court initially granted the directed verdict in anticipation that Steven would promptly return property removed from a security box, including Michele's adoption paperwork, and provide payment for various expenses to Michele.

7 Couched within Steven's punitive-damages argument, he also argues the jury's passions were inflamed because of tensions between Michele's attorney and a witness, so he should be granted a new trial as a result of counsel's "improper conduct." But as the district court noted Steven did not object to the testimony or seek any curative measure, so he has failed to preserve error as to that claim. *See State v. Thongvanh*, 398 N.W.2d 182, 187 (Iowa Ct. App. 1986) (holding "[f]or an objection to be timely it must ordinarily be made at the earliest opportunity, once the basis of the objection becomes apparent" and because an objection was not made when it became apparent, error was not preserved).

8 Michele's appellate brief also requests "retrial on the issue of damages for the claim[ ] of ... malicious prosecution." But the jury awarded her $24,300 in damages on this claim, which is not irreconcilable with the jury's liability finding. So we do not reverse damages as to malicious prosecution.

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SUPPLEMENT TO QUESTION 10(b)

BICKERTON DISSOLUTION

FIRST CONTEMPT RULING

DISSOLUTION DECREE

COURT OF APPEALS RULING

SECOND CONTEMPT RULING

E-FILED 2020 JUL 22 2:35 PM CLAYTON - CLERK OF DISTRICT COURT

IN THE IOWA DISTRICT COURT IN AND FOR CLAYTON COUNTY

MELISSA BICKERTON, **Petitioner,** **vs.** **BRIAN BICKERTON,** **Respondent.**	**Case No. CDDM010151** **ORDER**

INTRODUCTION

There is no dispute that the requirements of a temporary custody order are not being followed in this case. The disputed issue is whether this problem is the Respondent's fault.

PROCEDURAL BACKGROUND

On May 1, 2018, an "Order for Temporary Matters" was entered. In relevant part, this Order placed primary physical care of four children, L.B. (DOB 2004), R.B. (DOB 2005), S.B. (DOB 2008), and E.B. (DOB 2010) with Petitioner ("Melissa") while outlining a visitation schedule for Respondent ("Brian").

On June 17, 2020, Melissa filed an Application for Rule to Show Cause which claimed that Brian violated the May 1, 2018, Order by willfully refusing to carry out the visitation provisions contained therein. More specifically, Melissa alleges that the four children have not been returned to her at the conclusion of Brian's visitation time on June 14, 2020.

On July 21, 2020, a reported hearing was held via Go To Meeting video conference. Melissa appeared alongside her attorney Steve Belay. Brian appeared pro se. A contempt hearing was held after a contested motion to continue filed by Brian was overruled.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Anyone who "willfully disobeys" a temporary or final order in a dissolution case may be cited and punished by the court for contempt. Iowa Code Chapter 598.23 (1).

To support a finding of willful disobedience, the Court must find "conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not." Amro v. Iowa Dist. Ct., 429 N.W.2d 135, 140 (Iowa 1988).

In Iowa, all actions for contempt are quasi-criminal, even when arising from civil cases, and as such they must be proved beyond a reasonable doubt. Zimmermann v. Iowa Dist. Ct., 480 N.W.2d 70, 74 (Iowa 1992); Ary v. Iowa Dist. Ct., 735 N.W.2d 621, 624 (Iowa 2007).

The contemnee has the burden of demonstrating contemner had a duty to obey court order and failed to perform the duty, with burden then shifting to contemner to produce evidence suggesting he or she did not willfully violate the order or decree at issue. Rater v. Iowa District Court for Polk County, 548 N.W.2d 588 (Iowa Ct. App. 1996).

"Two defenses to contempt are recognized: (1) indefiniteness of the order and (2) absence of willful disobedience . . ." McKinley v. Iowa Dist. Court for Polk County, 542 N.W.2d 822, 824 (Iowa 1996) (citations omitted).

Turning to the present case, pursuant to Paragraph 2(a) of the Temporary Custody Order, the four children were scheduled to have visitation with Brian from Friday, June 12, 2020, at 3:30 p.m. to Sunday, June 14, 2020, at 6:00 p.m. When Melissa's daughter came to pick up the children at 6:00 p.m., the children refused to leave Brian's residence. Except for a few brief periods, all four children have remained with Brian at his residence since June 14, 2020.

Iowa appellate courts have consistently ruled that a parent's refusal to follow a court-ordered visitation schedule constitutes contempt. *See*: Copic v. Iowa Dist. Court for Polk County, 356 N.W.2d 223, 225 (Iowa 1984) (Parent found in contempt for failing to arrange flight from Hawaii to Iowa because "she thought the trial court was wrong in awarding custody" and "[i]n her view it was in Zeke's best interest not to return to Iowa and this view, she thinks, should control over the trial court's award of custody"); Kirk v. Iowa Dist. Court for Jefferson County, 508 N.W.2d 105, 106-107 (Iowa Ct. App. 1993) (Parent who "refused to cooperate" and "interfered with" other parent's visitation rights was found in contempt).

The present case is distinguishable from the Copic and Kirk cases outlined above because those cases involved a parent making a conscious and bad faith decision not to follow the visitation schedule. The situation that Melissa and Brian find themselves in, on the other hand, is similar to that of the parents in In re Marriage of Ruden, 509 N.W.2d 494 (Iowa Ct. App. 1993).

In Ruden, two children who were almost 16 years old and almost 18 years old at the time of the contempt hearing were found to be "steadfastly refusing to visit their father." Id. at 496. The Court found that "the poisoned relationship between the boys and their father is not the result of only one factor or one person's actions. Diana has had a role in formulating the existing situation. Ronald has also had a role in that regard." Id.

In affirming the district court's dismissal of the contempt application, the Court of Appeals in Ruden found "[w]hile the evidence shows Diana could have done more to assure Ronald got the visitation ordered by this court, there is insufficient evidence Diana deliberately prevented Troy and Trent from participating in visitation." Id.

In the present case, there was no credible evidence that Brian is deliberately preventing any of the children involved in this case from seeing Melissa; rather, the children are, for the most part, steadfastly refusing to return to Melissa's care. While it's possible that Brian could be doing more to encourage compliance with the Order for Temporary Matters, his actions or inactions do not constitute contempt.

The real problem in this case is how to effectively enforce the terms of the Order for Temporary Matters, which will soon be replaced by a final order after the trial has concluded.

There are no rules or procedures in the Order for Temporary Custody for how visitation or other disputes will be resolved. Law enforcement and DHS have both been looked to for help but, as to be expected, this has not solved the problem because neither one of those organizations is in the business of enforcing custody and visitation orders.

The upcoming trial will give Melissa and Brian a chance to present a proposal(s) for how to best resolve future disputes. For example, a parenting supervisor to mediate visitation difficulties and resolve problems regarding the children could be appointed. This would avoid looking to law enforcement, DHS, or the court system for an answer every time an issue arises.

Overall, while the final decree may contain language about enforcement of its terms, Melissa and Brian need to understand, as the Court of Appeals stated in Ruden, 509 N.W.2d at 496, there are "limitations of the court system in solving a family's problems."

CONCLUSION

For the above-mentioned reasons, Melissa's contempt application is **DISMISSED**. Court costs associated with the contempt application are assessed to Melissa.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CDDM010151	MELISSA BICKERTON VS BRIAN BICKERTON

So Ordered

Alan Heavens, District Court Judge
First Judicial District of Iowa

E-FILED 2020 AUG 18 3:20 PM CLAYTON - CLERK OF DISTRICT COURT

IN THE IOWA DISTRICT COURT IN AND FOR CLAYTON COUNTY
IN RE THE MARRIAGE OF MELISSA BICKERTON AND BRIAN BICKERTON

MELISSA BICKERTON, **Petitioner,** **vs.** **BRIAN BICKERTON,** **Respondent.**	**Case No. CDDM010151** **DECREE**

INTRODUCTION

A temporary custody order was issued in this case over two years ago. The Bickerton family's situation did not get better with time, and approximately two months before trial the four children involved began rebelling against the temporary order's custodial arrangement.

The Court must now decide which parent is best positioned to have primary physical care of the children and how to ensure that the noncustodial parent has maximum continuing physical and emotional contact with all of the children.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A pretrial stipulation was filed the morning of trial which resolved all issues except for physical care, visitation, child support, attorney fees, and court costs. The Court adopts and approves all agreements contained within the pretrial stipulation.

The four children covered by this Decree are: L.B. (15 years old), R.B. (14 years old), S.B. (12 years old), E.B. (10 years old). All other children referenced during the trial are not the children of both Petitioner ("Melissa") and Respondent ("Brian") and are, therefore, not currently subject to the jurisdiction of this Court.

I. PHYSICAL CARE

Physical care is "the right and responsibility to maintain a home for the minor child and provide for the routine care of the child." Iowa Code Chapter 598.1(7).

The Iowa Supreme Court set out a non-exclusive list of factors to be considered in determining whether joint physical care is in the best interest of a child. In re Marriage of Hansen, 733 N.W.2d 683, 697 (Iowa 2007). The factors are (1) stability, continuity, and approximation – what has been the historical caregiving arrangement for the child between the two parties; (2) the ability of the spouses to communicate and show mutual respect; (3) the degree of conflict between the parents; and (4) "the degree to which the parents are in general agreement about their approach to daily matters." Id. at 697-99. "Joint custodians should be mature adults who can put aside their differences and operate in their children's best interests." In re Marriage of Fortelka, 425 N.W.2d 671, 673 (Iowa Ct. App. 1988).

Turning to the present case, Brian requested the Court consider joint physical care. The historical caregiving arrangement is similar to a primary care setup with Melissa and Brian both having at various times played the role of custodial and noncustodial parent. Melissa and Brian have not shown an ability to consistently communicate and show mutual respect for each other and often have a high degree of conflict. The approach and agreement about daily matters for the children was not explored in much detail at trial.

A DHS report entered as Exhibit 1A describes Melissa and Brian's co-parenting ability as "awful" and this Court agrees with that assessment. Overall, none of the four factors from In re Marriage of Hansen indicate that joint physical care is appropriate. If joint physical care is not appropriate, "the court must choose one parent to be the primary caretaker, awarding the other parent visitation rights." In re Marriage of Hynick, 727 N.W.2d 575, 579 (Iowa 2007).

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

The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in a custody proceeding. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa Ct. App. 1985).

Iowa courts apply a non-exclusive list of criteria articulated in In re Marriage of Winter, 223 N.W.2d at 166-67 (Iowa 1974), in determining which parent should receive physical care. Those factors include, but are not limited to: the characteristics of each child and 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 and between the child and his or her siblings, the effect on the child of continuing or disrupting an existing custodial status, the nature of each proposed environment, including its stability and wholesomeness, and the preference of the child, if the child is of sufficient age and maturity. Id.

The weight assigned to each factor depends upon the particular facts of the case. In re Marriage of Williams, 589 N.W.2d 759, 761 (Iowa Ct. App. 1998).

In determining the weight to be given to a child's wishes, the following factors are considered: (1) the child's age and educational level; (2) the strength of the child's preference; (3) the child's relationship with family members; and (4) the reasons the child gives for his or her decision. In re Marriage of Behn, 416 N.W.2d 100, 102 (Iowa Ct. App. 1987).

A child's preference to live with one parent over another is given more weight in an initial custody determination than in a custody modification case. In re Marriage of Hunt, 476 N.W.2d 99 (Iowa Ct. App. 1991); Slidell v. Valentine, 298 N.W.2d 599, 605 (Iowa 1980).

"We believe the best approach to determining difficult child custody matters involves a framework with some spine, but the sufficient flexibility to allow consideration of each case's unique facts." In re Marriage of Hansen, 733 N.W.2d 683, 696 (Iowa 2007).

In this case, Brian has been serving as primary physical caretaker for the two months leading up to trial regardless of what the temporary custody order says. Melissa attributes each child's refusal to follow the temporary order entirely to Brian but, as the Court found in its July 22, 2020, contempt ruling, this situation is not the result of one factor or one person. Brian is not deliberately preventing or discouraging the children from returning to Melissa's residence.

Melissa made a number of allegations about Brian physically and sexually assaulting the children and using illegal drugs around or with the children. Brian adamantly denies all of these allegations. As Respondent's Exhibit 1A states, Brian and Melissa "have a very long history of not-confirmed Child protective and Family Assessments." In considering the sum of all credible evidence received at the trial on these issues, the Court determines that, while Brian is not a perfect person or parent, he does currently provide a stable and wholesome environment for his children and has not abused them in the ways that Melissa and other witnesses allege he has.

Having questioned L.B., R.B., S.B., and E.B. outside the presence of anyone else during the trial, it was clear that the four children in this case have a close and healthy relationship with each other. All four children have a closer relationship with Brian than they do Melissa.

Each child requested that the Court place primary care with Brian. On a scale of one to ten, with ten being the strongest possible opinion, the children's strength of preference to be placed with Brian ranged from a low of seven to a high of ten. As a whole, the reasons the children cited for their custody preference were legitimate and genuine. Disrupting the custodial arrangement that is now informally in place would negatively impact all of the children.

For all of the reasons outlined above, the Court places primary physical care of L.B., R.B., S.B., and E.B. with Brian with visitation for Melissa as outlined in this Decree.

The custody decision contained in this Decree should not be inaccurately oversimplified as deferring to the preference of the children. Children have a voice but not the final say in custody decisions. "Deciding custody is far more complicated than asking children with which parent they want to live." In re Marriage of Behn, 416 N.W.2d 100, 101 (Iowa Ct. App. 1987) *citing* In re Marriage of Ellerbroek, 377 N.W.2d 257, 258 (Iowa App.1985). The children's opinion on custody in this case was one factor among many that the Court considered.

II. VISITATION

Iowa Code Sections 598.1(1) and 598.41(1) provide that, except in unusual circumstances, the best interests of the child require the "maximum continuing physical and emotional contact with both parents." Typically, visitation rights set by a court are a minimum and parents are routinely admonished to grant additional visitation. In re Marriage of Toedter, 473 N.W.2d 233, 235 (Iowa Ct. App. 1991).

Starting the weekend of September 4-6, 2020, Melissa shall have all children in her physical care every other weekend from Friday at 3:30 p.m. to Sunday at 6:00 p.m. Melissa shall also have the children on Memorial Day, Mother's Day, Labor Day and Christmas Eve Day every year and for four full weeks during the summer. Melissa shall also have half of the spring

and winter school breaks. Brian shall have the children in his physical care for all other times including Father Day, the 4th of July, Thanksgiving and Christmas Day. All other holidays shall be split evenly with Melissa to select the first holiday she wants and then alternating back and forth between Brian and Melissa until all holidays are agreed upon. Transportation responsibilities and costs for all visitations shall be shared equally between the parties.

Brian is admonished to grant Melissa additional visitation when feasible because it is important for each child to continue to develop their relationships with each parent. Brian shall not tell the children, or in any way indicate, that it is their choice whether to follow the Court's order or not. Melissa and Brian are encouraged to seek mediation through a parenting coordinator if the children continue to refuse to go to Melissa's residence.

III. CHILD SUPPORT

Iowa Court Rules require the Court to determine child support based on the Child Support Guidelines which create a "rebuttable presumption" that they result in the correct amount of child support to be paid. *See* Iowa Ct. R. 9.4.

"The Court must determine the net monthly income from the most reliable evidence presented. This often requires the Court to carefully consider all of the circumstances relating to the parent's income. Where the parent's income is subject to substantial fluctuations, it may be necessary to average the income over reasonable period when determining current monthly income." In re Marriage of Powell, 474 N.W.2d 531, 534 (Iowa 1991).

Turning to the present case, the Court makes the following findings:

1. Melissa earns $10.25 per hour from her employment at the Elkader Care Center where she works 10 hours per week. Melissa also receives income from social security in the amount of $700 per month. Melissa's total monthly income is $1,144.

2. Brian earns income from social security and the Veteran's Administration in a total amount of $3,210.45 per month.

3. Using actual earnings would not result in a substantial injustice. Income adjustments are not necessary to provide for the needs of the children or to do justice.

4. Child support is set pursuant to the guidelines being filed alongside this Decree. Melissa shall pay Brian child support in the amount of $242 per month starting September 1, 2020. The amount of child support due shall decrease to $222 per month when three children are eligible, $197 per month when two children are eligible, and $145 per month when one child is eligible. See Guidelines filed herein.

5. Child support payments shall be made to the Collection Services Center of the Iowa Department of Human Services, P.O. Box 9125, Des Moines, Iowa 50306-9125, if the person obligated to pay support has been notified by that Department or if support is paid through an employer. In other instances, support is paid through the office of the Clerk of Court, Clayton County Courthouse, Elkader, Iowa.

6. Iowa Code Chapter 252D makes the paying party immediately subject to an Income Withholding Order without regard to whether support is in arrears.

7. Health insurance shall continue to be provided through Brian's military TRICARE insurance. Uncovered medical expenses shall be paid in proportion.to respective net incomes. Brian shall be responsible for the first $250 in uncovered medical expenses per calendar year. All uncovered medical expenses after that should be paid as follows: Melissa shall be responsible for 28% and Brian shall be responsible for 72%.

8. "Uncovered medical expenses" means all medical expenses for a child not paid by insurance. "Medical expenses" shall include, but not be limited to, costs for reasonably necessary medical; orthodontia; dental treatment; physical therapy; eye care, including eye glasses or contact lenses; mental health treatment; substance abuse treatment; prescription drugs; and any other uncovered medical expense.

IV. ATTORNEY FEES

Attorney fees are not recoverable as a matter of right but rest within the considerable discretion of the Court in dissolution cases. In re Marriage of Francis, 442 N.W.2d 59 (Iowa 1989); In re Marriage of Schissel, 292 N.W.2d 421, 428 (Iowa 1980).

An award of attorney fees must be reasonable and based on the parties' respective ability to pay. In re Marriage of Geil, 509 N.W.2d 738 (Iowa 1993). In order to make a determination of the respective abilities of each party to pay, the court reviews the entire financial picture of both parties, including their respective earnings, living expenses, and liabilities. In re Marriage of Kimbro, 826 N.W.2d 696 (Iowa 2013).

In examining the entire financial picture of each party, the Court notes that neither Melissa nor Brian has a significant amount of assets to their name but Brian earns almost three times as much income than Melissa. The net income differential between the parties will widen even further now that Brian will be receiving, as opposed to paying, child support.

Brian testified that he has no desire to receive child support from Melissa and it would be unfair for him to pay her attorney fees. As the custodial parent, Brian is entitled to child support. What he chooses to do with the money he receives is his decision. As outlined above, attorney fee awards are based on each party's ability to pay, not who hired the attorney or which party the attorney represented at trial. Brian has a much greater ability to pay attorney fees than Melissa does. Therefore, Brian shall pay $3,000 of Melissa's attorney fees through installment payments of no less than $250 per month. The first installment payment is due October 1, 2020.

CONCLUSION

The marriage between Melissa and Brian is dissolved and both parties are returned to the status of single persons. Court costs are assessed one-half to each party. Brian shall complete the Children in the Middle course no later than 60 days from the date of this Decree.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CDDM010151	MELISSA BICKERTON VS BRIAN BICKERTON

So Ordered

Alan Heavens, District Court Judge
First Judicial District of Iowa

Electronically signed on 2020-08-18 15:20:37 page 6 of 6

965 N.W.2d 495 (Table)
Decision without published opinion. This disposition is referenced in the North Western Reporter.
Court of Appeals of Iowa.

IN RE the MARRIAGE OF Melissa BICKERTON and Brian Bickerton
Upon the Petition of Melissa Bickerton, Petitioner-Appellant,
And Concerning Brian Bickerton, Respondent-Appellee.

No. 20-1145
|
Filed June 30, 2021

Appeal from the Iowa District Court for Clayton County, **Alan Heavens**, Judge.

Melissa Bickerton appeals the district court order awarding physical care of the children to Brian Bickerton. She also disputes the calculation of her child support obligation if custody is not changed. **AFFIRMED AS MODIFIED AND REMANDED FOR FURTHER PROCEEDINGS.**

Attorneys and Law Firms

James Burns of Miller Law Office, P.L.C., Decorah, for appellant.

Brian Bickerton, Monona, self-represented appellee.

Considered by May, P.J., and Greer and Schumacher, JJ.

Opinion

GREER, Judge.

*1 At the dissolution-of-marriage trial, the four children voiced a preference to live with their father, Brian Bickerton. Their mother, Melissa Bickerton, contends the district court weighed the children's stated preference too heavily. Melissa urges that deciding custody is far more complicated than asking children where they want to live. Arguing the district court failed to understand the children's motivation for their views and should have given her history of caretaking more weight, Melissa claims the district court got it wrong. She also disputes the calculation of her child-support obligation if physical care is not changed. Under our de novo review, we examine the record with the best interests of the children at the forefront.

I. Factual and Procedural Background.

These parents, who married in 2004, have four children [1] who were between the ages of ten to fifteen years at trial. Melissa was forty-two years old at trial and working as a dietary aid at a care center ten hours per week. [2] As a couple, she and Brian lived together in several states, including Texas, Georgia, and Illinois. Melissa returned to Iowa with only the children in 2016. After being injured during service in the Army, [3] Brian ultimately retired from the military with a medical honorable discharge as he had back troubles, post-traumatic stress disorder (PTSD), and traumatic brain injury. Because of his injuries, Brian receives social security disability payments. Brian testified that he had severe depression and issues with his PTSD until he was charged with a felony assault against one of Melissa's children and the judge recommended a PTSD program. He finished treatment, which he contends resolved his PTSD issues. Believing there was a "five-year hold from [Melissa and the children]" because of the assault charges, Brian moved to North Dakota and remained there until March 2018 when he came to Iowa. [4] Prior to his move to Iowa, Brian went two years without seeing the children, although he had telephone contact. Brian was forty years old at the time of the trial. He reinstituted personal contact with the children when he moved to Iowa.

Separated for nearly two years, Melissa petitioned for a dissolution of her marriage to Brian in January 2018. At the time, Brian resided in North Dakota. In May 2018, at the temporary hearing stage, the district court granted Melissa temporary physical care subject to reasonable visitation by Brian. The arrangement worked with Brian having visitation on alternating weekends and holidays until June 15, 2020. Brian was to pick up the children at school and Melissa would retrieve them at an agreed upon law enforcement agency. No summer visitation was ordered. Yet, in the summer of 2020, Brian stated:

> *2 Things were going okay for the first couple years up until this summer. That's when we started having issues. We've been doing the summer visitations every—every other week because originally it was put in by the judge, that four weeks. I was supposed to have four weeks with the kids.
>
> This summer, Melissa said it wasn't in the paperwork, that they didn't have to follow it.

Operating under the temporary order became difficult when four of the children refused to return home to Melissa. This "rebellion" occurred two months before the trial of the parents' dissolution of marriage. Ultimately, Melissa went to Brian's home to retrieve the children but they refused to leave his home. Melissa filed for contempt of court against Brian to seek the return of the children. Finding no credible evidence supported the allegation Brian deliberately prevented the children from returning to their mother, the district court dismissed the contempt application. As a final comment in the order, the district court noted there are "limitations of the court system in solving a family's problems."

From June 15 on, the children remained in Brian's home, but just before the August trial, the two older children did visit the mother and their half-siblings. The two younger children, ages ten and twelve, had not seen their mother or half-siblings for more than two months. Brian took the position of "I'm not going to say yes or no. I'm going to leave it up to the kids to make that decision if they want to go." Trial occurred over two days in August on the unresolved issues of custody, visitation, and child support. The district court awarded Brian physical care and provided a visitation schedule for Melissa. The decree required her to pay child support of $242 per month and cash medical support of $11.44 per month. Melissa appeals the decree as to the physical care decision or, in the alternative, asks for a change in the child support calculation.

II. Standard of Review.

"Marriage dissolution proceedings are equitable proceedings." *In re Marriage of Mauer*, 874 N.W.2d 103, 106 (Iowa 2016); *see also* Iowa Code § 598.3 (2018). "Thus, the standard of review is de novo." *Mauer*, 874 N.W.2d at 106; *see also* Iowa R. App. P. 6.907. "Although we give weight to the factual findings of the district court, we are not bound by them." *Mauer*, 874 N.W.2d at 106; *see also* Iowa R. App. P. 6.904(3)(g). "But we will disturb a district court determination only when there has been a failure to do equity." *Mauer*, 874 N.W.2d at 106.

III. Analysis.

A. Custody.

In a pre-trial stipulation, Brian and Melissa agreed to joint custody but could not agree as to physical care. "Physical care issues are not to be resolved based upon perceived fairness to the *spouses*, but primarily upon what is best for the *child[ren]*." *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). "The objective of a physical care determination is to place the children in the environment most likely to bring them to health, both physically and mentally, and to social maturity." *Id.* Unlike *Hansen*, we have a limited record to evaluate the differences in how these parents approach the routine care of the children. In the four paragraphs of the decree analyzing the specifics of the custodial question, two paragraphs addressed the children's preferences. The other paragraphs addressed trial testimony, and the district court concluded:

> *3 In considering the sum of all credible evidence received at the trial on these issues, the Court determines that, while Brian is not a perfect person or parent, he does currently provide a stable and wholesome environment for his children and has not abused them in the ways that Melissa and other witnesses allege he has.

But in our de novo review, we start with the factors listed in Iowa Code section 598.41(3) and the non-exclusive factors enumerated in *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974) and apply those to the facts presented at trial. *McKee v. Dicus*, 785 N.W.2d 733, 737 (Iowa Ct. App. 2010). As in *McKee*, here the district court did not detail the precise reasons it would be in the children's "best interests" to be with Brian or exactly why it would "negatively impact" the children to be with Melissa. *Id.* at 738. In *McKee*, a panel of our court explained the lack of reasoning as "to a degree understandable" because:

> [o]ften trial judges who see the witnesses in a custody dispute come away with a gut feeling that one parent is a better fit than the other, though it may be difficult to explain the underlying reasons. Certainly it is preferable if the decree sets forth those reasons, even if that may not be literally required by the statute.

Id. Yet after a review of the factors that arm us with a path to determine what is best for the children, we cannot arrive at the same decision as the district court. Melissa's witnesses included herself, her father, a previous family counselor for two of the children, and two of her children who are not related to Brian. Without objection, a letter authored by Melissa's mother was made part of the evidence, which detailed personal observations of Brian's physical aggression against the children.[5] Melissa also presented exhibits referencing domestic battery by Brian against her and a child. The behavior health intervention specialist, Maryanne Harris, testified she has a master's degree in psychology. In March 2019, Harris became involved with the two older children, L.B. and R.B., under a psychiatrist's recommendation to address L.B.'s behavior issues and R.B.'s identity issues.[6] She opined that Melissa is a good mother and is improving her parenting over time. Brian complained about Harris's counseling behavior with L.B. so she removed herself from future counseling, but before that incident she attempted to set up a time to visit the children at Brian's home. He refused to accept the voluntary service. Harris has maintained contact with Melissa and her children as a friend. She opined it was not in the best interests of the children to keep them from contact with their mother and that it was inappropriate to have these children control their own visitation based upon their developmental stages.

Melissa's twenty-one-year-old child, N.G., testified about his mother's good parenting skills and Brian's anger and propensity to use physical punishment.[7] Describing the relationship Brian's children have with him, N.G. summarized: "I believe that their relationship is built on fear, the same way that he did to me and my—my other siblings that aren't biologically his. The only thing that we—we have learned from Brian is that you have to fear him or else he will retaliate against you." K.F., Melissa's seventeen-year-old child, described her close relationship with R.B. She relayed that R.B. told her the weekend before the trial Brian was doing "meth" and giving R.B. marijuana. R.B. also described being hit by Brian's live-in girlfriend, Sumitra Bryant, when R.B. objected to Sumitra saying bad things about Melissa. K.F. characterized Melissa as a good mother.

*4 Melissa called Julissa Elsbernd, the family babysitter, as a witness. Julissa was in the home three to four times per week, starting in late October 2019. She reported to the Department of Child Services (CPS) that R.B. told her several times about Brian providing R.B. marijuana and Brian's use of methamphetamine. Julissa also indicated there were vague allegations about sexual abuse[8] and because she had not seen the younger two children recently, she called CPS to do a wellness check. Finally, Melissa's father, Robert Zwirlein, testified. He described an incident where R.B. ran from Brian's home to his:

> A couple weeks ago, maybe it's been a month now, [R.B.] came down one night really, really upset; and she was afraid that she might get hit or was afraid of Brian because what happened was—I don't know what was going on, but it must have been at the dinner table, [R.B.] said, and he got mad and slammed the silverware down on the table.
>
> They must have been talking about [Melissa's older daughter], [R.B.'s] sister, and Brian had called her a big-ass bitch; and that very, very much upset [R.B.]because [R.B.] came down, she was just totally beside herself, and says Brian is talking about my sister being a terrible person. [R.B.] says, "I love my sister."
>
> ....
>
> Because [R.B.] was afraid, if she didn't go back to her dad, she might be in really bad trouble and something drastic could happen to the other kids that were there. She was concerned about the other littler ones. So we got her calmed down and ended up she did go back to Brian's house.

Robert also expressed concern that even though he had regular weekly contact with the younger two children, he had not seen them for two and one-half months since they moved in with their father. He also described being pushed by Brian during Brian's earlier altercation with N.G. in Texas.

In addition to testifying on his own behalf, Brian's evidence included a friend, Michael Riden, who had been homeless after trying to manage a "fleabag motel." Brian met Riden playing online video games. Riden stayed at Brian's home in Iowa for around forty-five days, and was still residing and working in Iowa at trial. Riden described Brian as a calming influence on the children. Brian taught him to be a better parent to his own son. Next, Riden's mother, who previously lived with Riden at the motel but resided with Brian and his live-in girlfriend Sumitra over the past year, testified about Brian's good parenting skills. Brian also called Sumitra as a witness. Sumitra previously lost custody of her own two daughters, although they have since reunited, but offered her observations of Brian's parenting skills with the children. She described Brian as an "incredibly loving father."

Brian also asked the district court to allow the four children to testify.[9] We deal with their testimony next. Given the emphasis of the children's preference in the district court's four-paragraph analysis of the facts supporting the custody determination, we agree with Melissa that the children's statements were an important factor in the district court's physical-care decision. From the children's testimony, the district court opined that "it was clear that the four children in this case have a close and healthy relationship with each other. All four children have a closer relationship with Brian than they do Melissa." Yet, "[w]hen we speak of what is best for the child, we do not mean that which the child wants." *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258 (Iowa Ct. App. 1985) (citation omitted). The preferences of a child, while not controlling, are relevant. *Id.* But when determining the weight to be given to a child's wishes, we consider the following factors: (1) the child's age and educational level; (2) the strength of the child's preference; (3) the child's relationship with family members; and (4) the reasons the child gives for his or her decision. *In re Marriage of Behn*, 416 N.W.2d 100, 102 (Iowa Ct. App. 1987). These children were ages fifteen, fourteen, twelve and ten years at the time of trial. Little information was developed about their maturity levels, but there were educational concerns with the older two children.

*5 We are not convinced that the district court's questioning ferreted out the reasons for the children's preferences. And other than asking why they did not return to their mother's home after the June visit with Brian, the questions focused on who the child wanted to live with as opposed to gathering information about the role each parent played in the day-to-day living. The ultimate question is always which parent can minister more effectively to the long-range best interests of the children, and we learned little about how each child viewed their parents and who they relied on for all aspects of their care. There was some evidence that Brian offered less rules than Melissa, and certainly the children might receive less attention at Melissa's house with all of the other half-siblings in the home. *See Ellerbroek*, 377 N.W.2d at 258 (noting that children might manipulate the parents if allowed control over the choice, respond to a parent's needs and not his or her own, or may have other reasons for a choice unknown to the court).

In the end, when we examine the legislature's nonexclusive list of factors, several factors tip the scale towards Melissa. *See* Iowa Code § 598.41(3). Melissa's previous history of primary caregiving tops the list. Brian missed several years of involvement with these children. The court commended him for his care over the two-month testing ground where he provided full-time care. But under the factor involving each parent's support of the other, Brian has been unable to promote or require these children to have contact with their mother. We find that significant as the reasons the children gave for not returning to the mother's home offered no insight into their reluctance to return. One of the younger children explained the events when all decided to not return to Melissa's home:

> Q. And could you tell me what happened that day? A. My mother sent [half-sister] first; and my dad—my dad said, if we didn't want to go, we don't have to go because he said that ... that Officer Jo said to stop making us kids go if we didn't want to. So we didn't go, and my dad sat out on the porch so that—so that it would be like—so it wouldn't be like people thinking he would be making us not go because he wasn't.

Melissa's past caregiving, her involvement in the children's mental-health counseling and schooling, and the half-sibling relationships weigh in her favor. *See Hansen*, 733 N.W.2d at 696–97. We have little history or information to assess Brian's stability, his current parenting style, and his ability to accept full parental responsibilities. The record is quiet on whether Brian engaged in school conferences or ever was involved with medical or mental-health care. In the few short months he had taken over care, we can only see that the children have missed important appointments, distanced themselves from the mother and the grandparents, and now believe they can decide where they live.[10] Although the district court did not mention the half-siblings or address those relationships in the questioning of the children, we consider that returning the children to Melissa will keep the siblings together. *See Ellerbroek*, 377 N.W.2d at 260 (noting "the court ordinarily attempts to keep children of broken homes together").

After a consideration of the factors important to our review, we reverse the custody order and award physical care to Melissa. Brian shall exercise the visitation rights established under the May 1, 2018 temporary custody order with these changes: (1) Brian shall provide all transportation for visitations and (2) Brian is awarded four weeks of summer

visitation, exercised in weekly increments. He shall provide notice of the weeks he intends to exercise on or before April 1 of each year.

B. Child Support.

Looking at the pre-trial stipulation, the parties agreed Melissa's net income equaled $1218.50 per month and Brian's net monthly income was $2967.30. The district court used those numbers to calculate support. "In Iowa, child support is calculated using the child support guidelines." *In re Marriage of Erpelding*, 917 N.W.2d 235, 245 (Iowa 2018); *see* Iowa Code § 598.21B; Iowa Ct. R. 9.2. "The purpose of the guidelines is to provide for the best interests of the children by recognizing the duty of both parents to provide adequate support for their children in proportion to their respective incomes." Iowa Ct. R. 9.3(1). Given our change in custody status, we remand for a determination of the appropriate amount of child support from Brian based on the current income figures available at the time of the hearing. The parties may address current income by affidavit or testimony at a hearing on the support issue.

IV. Conclusion.

*6 We reverse the physical-care determination and award Melissa physical care with reasonable and liberal visitation in Brian. We remand for a determination of child support given this change in custodial status.

AFFIRMED AS MODIFIED AND REMANDED FOR FURTHER PROCEEDINGS.

All Citations

965 N.W.2d 495 (Table), 2021 WL 2708987

Footnotes

1 In order of birth, the children are L.B., R.B., S.B., and E.B. Melissa has seven other children, whose custody status is not involved in this dispute because they have other fathers. Although Brian initially refused to be tested, paternity testing established that two of the youngest children born during this marriage were not Brian's children.

2 The care center paid Melissa $10.25 per hour.

3 Brian's military service began in 2000 when he joined the Marine Corps and included two tours in Iraq. He was discharged honorably but then enlisted in the Army. His combined service in both the Marine Corp and Army lasted for almost ten years.

4 There was another felony assault charge in North Dakota filed against Brian because of an alleged assault against a girlfriend, but Brian testified a jury acquitted him.

5 Examples of Brian's aggression were shoving the child against a wall and grabbing a child's ear and twisting until the child cried.

6 Harris treated L.B. from September 2019 until March 2020 and R.B. from August 2019 until February 2020. She also related that Melissa had to bribe L.B. to visit his father.

7 N.G. described being hit with a paddle and the practice of "exercise punishment" involving holding a heavy object out in front of your body while in a sitting position up against a wall.

8 Julissa admitted the sexual abuse information has changed multiple times so she was not sure about it, but that one version related to Brian sexually abusing R.B.

9 Now arguing the children's testimony was influenced by Brian, Melissa complains that the children testified from the father's home, but the testimony was offered without objection.

10 There was limited information that R.B. returned to Melissa's home for a short time during the two-month pre-trial window of care at Brian's home but then returned to Brian's home.

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IN THE IOWA DISTRICT COURT IN AND FOR CLAYTON COUNTY

MELISSA BICKERTON, **Petitioner,** **vs.** **BRIAN BICKERTON,** **Respondent.**	**Case No. CDDM010151** **ORDER**

Melissa and Brian's 11-year-old daughter E.B. is refusing to return to Melissa's care in defiance of the court-ordered care schedule. Melissa filed a contempt action against Brian alleging that he's allowing E.B. to set her own care schedule. Because what's truly going on behind closed doors is more complicated than what Melissa's claiming, the contempt action must be dismissed.

Findings of Fact and Conclusions of Law

Anyone who "willfully disobeys" a temporary or final order in a dissolution case may be cited and punished by the court for contempt.[1]

"Willful disobedience" is "conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not."[2]

In Iowa, all actions for contempt are quasi-criminal and must be proved beyond a reasonable doubt.[3] The contemnee must show the contemner failed to obey a court order.[4] The contemner must then show the order was indefinite or there was no willful disobedience.[5]

Melissa and Brian's history in court is as long as it is contentious. Melissa had "temporary" primary care of their four children for two years under a pretrial order that was not intended to be in place for that long. Shortly before the trial, the children all began refusing to return to Melissa's care. Melissa filed a contempt action against Brian alleging that he was responsible for the childrens' refusal to return to her. That action was dismissed after a finding that Brian wasn't "deliberately preventing any of the children involved in this case from seeing Melissa."

At the trial, all four children testified in chambers. All asked to continue living with Brian. All reported he was doing a good job parenting them. All had concerns about returning to Melissa's care. The Court found their opinions and concerns to be legitimate and sincerely held. Physical care was placed with Brian. The decision to do so was based in large part on the childrens' strongly-held preferences. But other factors also weighed in favor of giving Brian physical care including his characteristics, his capacity to and interest in providing for the needs of the children, the effect on the children of continuing or disrupting the existing arrangement, and the stability and wholesomeness of the environment Brian was providing for his children.

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[1] Iowa Code Chapter 598.23 (1).
[2] Amro v. Iowa Dist. Ct., 429 N.W.2d 135, 140 (Iowa 1988).
[3] Zimmermann v. Iowa Dist. Ct., 480 N.W.2d 70, 74 (Iowa 1992).
[4] Rater v. Iowa District Court for Polk County, 548 N.W.2d 588 (Iowa Ct. App. 1996).
[5] McKinley v. Iowa Dist. Court for Polk County, 542 N.W.2d 822, 824 (Iowa 1996) (citations omitted).

Ten months after the trial, following an appeal by Melissa that Brian didn't participate in, the court of appeals found that too much weight was given to the childrens' preferences. They found Melissa's history of providing care, the preference to keep the children together with their half-siblings who live with Melissa, and Brian's failure to convince the children to go with Melissa meant Melissa should have physical care. On the final point, the court of appeals found that it was "significant" that Brian was "unable to promote or require these children to have contact with their mother."[6] The court of appeals used the word "unable" as opposed to the word "unwilling" when it came to Brian convincing the children to have contact with Melissa.

Physical care of the children was transferred to Melissa in July 2021 when the ruling from the court of appeals became final. By September 2021, E.B. began refusing to return to Melissa. By November, E.B. was living with Brian full-time. Melissa alleges Brian is behind E.B.'s refusal to go with her. She alleges that Brian has "aided, abetted, and encouraged his children to behave in violation of the Court's orders" by refusing to return them and telling them they have a choice.

Brian testified that he's tried to get E.B. to go with Melissa but E.B. is refusing because she believes it's bad for her mental health. E.B. has also told him she doesn't like babysitting other children at Melissa's. Brian claims he can't stop E.B. from refusing to gó and he isn't doing or saying anything to give her the impression that she has the power to set her own care schedule.

Brian also testified extensively about recent DHS involvement. Brian claims that a DHS worker told him to "hold on to E.B. as long as possible" because E.B. had a plan to hurt herself. Because no one from DHS testified, no weight is given to the mountain of hearsay that Brian introduced in this area. Even if someone from DHS or law enforcement told Brian to deviate from the care schedule, the proper and only procedure for Brian to change the care schedule is to ask for a hearing in front of a judge who will decide whether a change is appropriate or not.

Both Brian and Melissa's views of what's happening with E.B. are clouded by their animosity for each other. They both used the contempt hearing to air grievances and criticize each other for not doing a good job parenting. Relying on either parent's testimony to determine what's truly causing E.B.'s behavior is problematic because their perceptions are so slanted.

The most credible witness was Sumitra "Remy" Bryant. Remy doesn't have the same hostility that Brian has for Melissa or that Melissa has for Brian. As a result, her testimony and observations are more level-headed than those of either parent. Remy also spends time at home with the children while Brian is at work so she has a first-hand insight on the situation.

Remy testified that Brian tells his children that they have to go with Melissa when it's time. Remy reported that Brian has regularly argued with E.B. *and L.B.* about going with Melissa since physical care was transferred back to Melissa. If Bryan was truly influencing his children to ignore the care schedule then presumably L.B. would be refusing to return to Melissa as well. He isn't.

Remy described an incident where Brian told E.B. that she must go with Melissa. E.B. responded by telling Brian to go (blank) himself. E.B. went to her room and slammed the door. Remy testified that Melissa doesn't come to Brian's house for pickups which means Melissa doesn't see this type of drama unfold when E.B. is told it's time to go. Remy and Brian both testified that Melissa is welcome to come over, try to pick up E.B., and see what happens.

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[6] Court of appeals opinion filed June 30, 2021, Page 11.

Melissa's contempt action suggests that E.B.'s refusal to return could be cured solely by Brian being ordered to convince or somehow force E.B. to go with Melissa. But Brian isn't unwilling to try to convince E.B. to go with Melissa, he's unable.

E.B. is a strong-willed 11-year-old girl who isn't shy about making her opinions known. Melissa and Brian must continue to tell E.B. in no uncertain terms that they expect her to follow the court-ordered care schedule whether she wants to or not. The Court also told her that at the trial when it explained exactly what Melissa assumes E.B. doesn't already know or understand.

> THE COURT: The important thing for everyone is that they agree to follow what I decide in terms of custody and when you're going to be at your mom or dad's house. It's important that you develop a relationship with -- or continue to develop a relationship with your mom and your dad. . . . I think you may and your sisters and brother may have gotten the impression that it's up to the four of you to just decide where you're going to be on any given day, but that's not quite accurate. The Court system and my order kind of makes that decision and, again, sometimes not everyone likes that; but I do something that I think is in the four of your guys' best interests and that's fair to both your mom and your dad.
>
> So when I issue my opinion, will you agree to follow the schedule that I give for everyone, even if you might not like all of it?
>
> E.B.: Yes, sir.[7]

Summary

E.B. is an intelligent young girl. She knows what the rules of her care schedule are. She knows she should be following the rules like she promised she would, even if she doesn't agree with what was decided. Brian is not the person behind E.B.'s refusal to go with Melissa. E.B. is.

Melissa failed to prove beyond a reasonable doubt that Brian aided, abetted, or encouraged E.B. to violate the court-ordered care schedule. E.B. is doing that of her own free will. The contempt application is **DIMISSED**. Melissa shall pay all court costs.

[7] Trial Transcript Volume 2, Page 49, Lines 1 to 17.

State of Iowa Courts

Case Number	**Case Title**
CDDM010151	MELISSA BICKERTON VS BRIAN BICKERTON
Type:	DISMISSED PER COURT

So Ordered

Alan Heavens, District Court Judge
First Judicial District of Iowa

Electronically signed on 2021-12-03 12:00:23