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

Please complete this application by placing your responses in normal type, immediately beneath each request for information. Requested documents should be attached at the end of the application or in separate PDF files, clearly identifying the numbered request to which each document is responsive. Completed applications are public records. If you cannot fully respond to a question without disclosing information that is confidential under state or federal law, please submit that portion of your answer separately, along with your legal basis for considering the information confidential. Do not submit opinions or other writing samples containing confidential information unless you are able to appropriately redact the document to avoid disclosing the identity of the parties or other confidential information.

PERSONAL INFORMATION

1. **State your full name.**
   Michael Owen Carpenter

2. **State your current occupation or title. (Lawyers: identify name of firm, organization, or government agency; judicial officers: identify title and judicial election district.)**
   Attorney; Gaumer, Emanuel, Carpenter & Goldsmith, P.C.

3. **State your date of birth (to determine statutory eligibility).**
   December 22, 1976

4. **State your current city and county of residence.**
   Ottumwa, 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 Iowa College of Law
   2001-2004
   Juris Doctorate, with distinction

University of Northern Iowa
1999-2001
Masters of Arts, Geography

University of Northern Iowa
1995-1999
Bachelor of Arts, Geography, *cum laude,* with Geographic Information Systems Certificate

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.**

a. Member Attorney
2009-present
Gaumer, Emanuel, Carpenter & Goldsmith, P.C.
111 W 2nd Street, Ottumwa, IA 52501
Richard J. Gaumer; Dennis W. Emanuel; Bryan J. Goldsmith

Associate Attorney
2004-2009
Webber, Gaumer, & Emanuel, P.C.
111 W 2nd Street, Ottumwa, IA 52501
Richard J. Gaumer; Dennis W. Emanuel; Bryan J. Goldsmith

Summer Legal Intern
2003
Davenport, Evans, Hurwitz, and Smith, LLP
206 W 14th Street
Sioux Falls, SD 57104
Keith A. Gauer

Summer Intern
2001
Linn County Health Department
1020 6th Street SE
Cedar Rapids, IA 52401
Unknown

b. None.

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 20, 2004. 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.**

2004 to 2009 – Associate attorney - Webber, Gaumer, Emanuel, P.C.

a. I was a general practitioner, practicing in a wide variety of cases. My typical clients were individual residents of the counties in District 8A. During this time period I had a contract with the State Public Defender's office, and a large portion of my cases were court-appointed criminal matters and Child In Need of Assistance cases. I would estimate that 50% of my work was for criminal defendants, 10% for parents in CINA cases. 30% of my time was spent in district court family law cases involving divorce or child custody. The remaining 10% of my time was spread in a variety of general practice roles and assisting my superiors with research and writing in their cases.
b. Almost all of my practice during this time period involved work in front of courts or other tribunals. I did very little transactional work, though I would occasionally handle a real estate closing, draft a will, or prepare a title opinion.
c. 99% of my practice involved litigation in court or other tribunals.

d. Administrative – 1% (most likely involving DOT drivers' license appeals and unemployment insurance appeals for claimants)
Civil – 40-50%, consisting mostly of family law and CINA cases, with some personal injury and workers' compensation experience.
Criminal – 50%, mostly in indigent defense. At that time there were no special requirements to qualify to take on high level felony cases, and I was involved with at least one Class A felony.

e. Answering for the past 10 years (2013 to the present) I have tried more than 80 cases to judges. I have tried 9 matters to a jury. I have also tried something in the neighborhood of 150 administrative actions, consisting primarily of social security disability hearings and workers' compensation hearings. In all of these matters I was sole counsel.

f. I've participated in approximately 10 appeals in the last 10 years, all as sole counsel.

2009 to 2023 – Member – Gaumer, Emanuel, Carpenter & Goldsmith, P.C.

a. After cancelling my public defender contract, my family law caseload steadily increased (20-40% of my time) while my criminal law caseload varied (10% to 30%). I expanded into workers compensation (10-20%) and social security disability (10-30%), personal injury (10-15%), probate (5-10%) and general civil litigation (10%). My clients still consist of individual residents of District 8A.

b. I obtained my mediation certificate in 2014. I estimate that I mediated one to two cases each week. At its peak mediation involved approximately 10% of my time. I also served in a handful of cases as a Child and Family Reporter. I found this work to be very intense, and while I did not do it often, it was quite time consuming when I did.

c. 90% of my cases involved litigation. The remainder was spent on mediation or CFR work.

d. Measured in hours worked, civil work constituted approximately 60% of my time. Criminal cases accounted for an additional 20%, and administrative cases were an additional 20%.

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.

I estimate I've done 3-5 cases through the Volunteer Lawyers Project over this time frame, with maybe 10 to 20 hours in each case. These were all family law matters.

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.

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.

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 never held judicial office or served in a quasi-judicial opinion.

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.

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.
ii. 180 days.
iii. 240 days.
iv. One year.

Not applicable.

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.

a. *Sundance Land Company, LLC v. Bobbi Remmark and Phillip Remmark*, Wapello County.
b. A property-line dispute between two neighboring parcels of rural property.
c. This case was significant as it involved a novel question that had not been litigated in Iowa, with potentially far-reaching implications for Iowa homeowners and rural property owners.

Iowa has an "Acquiescence" statute that establishes an "agreed upon" boundary as the permanent boundary between two pieces of land, so long as the acquiescence line has been recognized by both sides for at least ten years. In this case, the boundary had been recognized as being a fence line for at least 20 years.

I represented the Remmarks, who were asserting the acquiesced fence line as the proper boundary. Sundance Land Company, owner of the neighboring parcel, commissioned a survey which showed that the fence line was well to the north of the surveyed boundary line. This resulted in a loss of land by Sundance, but the survey line deprived the Remmarks of their driveway and ran through the middle of a grain bin and a pole barn that were always part of the Remmarks' property and had been in place for years.

The evidence supporting the fence line as an established acquiescence boundary was clear and uncontested. The legal twist was that a single couple briefly owned both parcels at the same time, before selling the parcels off one after the other to the Remmarks and Sundance. The question was whether this brief unity of title negated the acquiescence boundary. Sundance argued that it did.

This fact pattern had never been applied to the Iowa statute. After finding no case law in Iowa that was on point, I broadened my search to other states that have acquiescence statutes. I found a case almost directly on point out of Colorado. Unfortunately, the majority opinion of the Colorado case found that unity of title for even a couple of days erased a century-old acquiescence boundary. A dissenting minority, however, came to the opposite conclusion, and wrote an opinion that I felt displayed a better understanding of the nature and purpose acquiescence law.

Needing to find better legal authority, I continued to research. I stopped in the University of Iowa law library one evening to dig deeper into the more scholarly materials to gain a deeper understanding of the history and purpose of acquiescence law. I was able to find materials that helped me craft a successful legal argument.

The case was tried to a judge, who agreed with us that once a boundary is permanently established by acquiescence, common ownership does not serve to reset the boundary. Sundance filed an appeal, and we were again successful in front of the Iowa Court of Appeals. Sundance has requested further review from the Iowa Supreme Court. That request is still pending.

The significance of this case is that it will establish that "what you see is what you get" when it comes to purchasing rural property, and that Iowa land purchasers will not be subject to unfair surprise if someone commissions a survey that seeks to suddenly deprive them of significant portions of their real estate.

d. Bobbi Remmark and Phillip Remmark

e. I was the Remmarks' sole counsel throughout the case.
f. July 2019 and continuing.
g. The case was tried to Judge Wyatt Peterson, who ruled that the Remmarks established the fence line as the boundary. Sundance Land Company appealed his decision to the Iowa Court of Appeals, which affirmed Judge Peterson. Sundance has requested further review to the Iowa Supreme Court. A decision on that request is still pending.
h. N/A.
i. Bradley Grothe
j. Wyatt Peterson

a. *In re Marriage of Vickers*, Jefferson County, Iowa
b. A dissolution of marriage action primarily involving custody and visitation rights to the parties' two minor children.
c. This case was significant because of the unique constellation of issues presented in an intense custody divorce. The case began with a filing of a Chapter 236 domestic abuse allegation against the father, who was my client. The mother also accused the father of being sexually inappropriate with their daughter, a charge that she later recanted. The father was professionally very successful but had a history of severe alcohol abuse. The mother had a history of explosive behavior, often acting out in front of the children. It was a case that demanded maximum attention and effort from the lawyers of both parties. I represented Mr. Vickers from the initial domestic abuse filing, through the divorce, to the end of the appeal from the adverse trial decision. I devoted approximately 300 hours to this case.

   The case is also significant because of the excellent work by District Court Judge Mary Ann Brown. She handled the trial professionally and deftly. Her written opinion was an outstanding example of the judge's art. She took the case very seriously and was measured and reasonable in her assessment of the facts. The outcome was not what we wanted, but I had no doubt that she listened to and considered all sides of the matter.
d. Matthew Vickers
e. I was Mr. Vickers's sole counsel throughout the case.
f. From January of 2016 to May of 2018. I also represented Mr. Vickers in a child support modification from March of 2019 to March of 2020
g. Mr. Vickers lost, as primary care of the children was awarded to his wife.
h. N/A
i. Allison M. Heffern
j. Mary Ann Brown

a. *State v. Brandon Vandepol*, Mahaska County
b. My client, an 18-year-old, was accused of having sexually abused his stepsister several years prior. He was charged as an adult with two counts of Class B felony sexual abuse.
c. The significance for my client was profound. If convicted, he was faced with lengthy imprisonment and parole and registry requirements that would last his

entire life. The significance to me was the incredible responsibility that this high-stakes case placed on my shoulders. I felt a great responsibility to my client, as his future was in my hands. I also felt responsibility to the victim, who was still a young child. I felt it was my responsibility to defend my client in a manner that minimized adding or creating harm to the little girl.

d. Brandon Vandepol
e. I was Mr. Vandepol's sole counsel throughout the case.
f. May 2015 through September 2016.
g. The case was tried to a jury, with an unusual result. The jury found Mr. Vandepol guilty on one count, and not guilty on a second count. However, regarding the guilty count, the jury also found via special interrogatory that the crime had been committed by Brandon before he turned 14 years old. As a result, the District Court did not have jurisdiction over him, as the juvenile court has exclusive jurisdiction over minors below that age, and the case was dismissed.
h. N/A
i. James Blomgren and Bradley Kinkade
j. Daniel Wilson

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

I served as a family law mediator from 2014 through 2022. Practicing as a mediator gave me a sense of empathy and understanding for both sides of a conflict, which I believe is a necessary prerequisite to wise judicial practice. Mediation also exposed me to those instances where a party is clearly acting from impure and destructive motives, lying to their lawyers, and maybe even to themselves. I feel that mediation has honed my ability to detect when this is happening. Finally, mediation trained me to focus less on the petty gripes and grievances of the past that take up so much time and energy in family law cases, and instead to redirect the focus to the future, and the hopes and dreams that the parties still share, whether or not they recognize those shared goals.

My work as a Child and Family Reporter (CFR) has also been very valuable to my ability to serve as a judge. The job of a CFR is to act as an investigator for the judge, to gather, evaluate, and present primary source information that the judge cannot obtain independently, and that the attorneys might not present. Often the CFR is also asked to make a recommendation as to the outcome of the custody question, which means that the CFR must independently judge the case. Most of my CFR cases involved very difficult situations, where each side had significant liabilities. In these cases, I felt the terrible weight of responsibility for having a hand in deciding a family's future. I learned that you can never know whether your decision is right or wrong. All you can do is devote the maximum amount of effort and consideration, follow the letter of the law, and hope that is good enough. There is absolutely no excuse for a partial effort in matters of such importance.

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 served on the Ottumwa Community School District Board of Directors from 2018 to 2020. I was elected to complete the term of a Director who had resigned.

I have been on the Board of Directors for the Ottumwa Public Library for approximately 10 years.

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.**

    a. CGRE LLC
    b. Member
    c. Co-Management of LLC that holds title to the building that our law practice rents from it.
    d. 2020 to the present.

    a. Ottumwa Public Library Foundation
    b. President
    c. Attending quarterly board meetings; making decisions regarding the management, investment, and disbursement of the Foundations funds.
    d. Approximately 2010 to the present.

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 am a longtime member of the Iowa Association for Justice, and in November of 2022 I began a term on the Board of Directors.

I was the secretary and treasurer for the 8A Judicial District Bar Association from 2009 to 2014 and was on the organizational committee for the 2011 District 8A Bench-Bar Meeting.

I have been a member of the Iowa State Bar Association since 2004.

I have been a member of NOSSCR (National Organization of Social Security Claimant's Representatives) since 2021.

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.**

Ottumwa Hy-Noon Kiwanis, 2004 to present. President, 2013.

Ottumwa Symphony Orchestra, Board of Directors, 2006 to 2018 (approximately)

Ottumwa Regional Health Foundation, Board of Directors, 2009-2010.

TENCO, Board of Directors, 2016-2020.

With my wife, I volunteered to coach local middle school and high school mock trial teams for several years.

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.**

Not Applicable.

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.**

1. I am attaching my appeal brief from *Sundance Land Company, LLC v. Bobbi Remmark and Phillip Remmark*, a case that is discussed earlier in this application. This brief reflects the research I performed so that I could understand and argue the law of acquiescence, which was an area that I had no prior knowledge of or experience with. It also shows my willingness to use graphics and trial exhibits in my writings when doing so will aid the reader in understanding the subject matter.

2. I am attaching a C.F.R. report I performed in the case of *Caron K. Robinson v. Justin L. Bowen*, DREQ111182 (Wapello County). I chose this writing as it shows the dedication and thoroughness with which I approached having to make a recommendation in a difficult custody matter. Working on this case gave me a thorough appreciation for just how difficult a judge's task is. I did my best to

accurately relay to the court what the parties reported to me and what I learned, with a minimum of editorial content, as the ultimate custody decision resided with the judge. This writing is an example of how I would approach a difficult custody decision.

3. I am attaching the appeal brief from *In re Marriage of Vickers*, a case that was discussed earlier in this application. I believe this sample indicates the thoroughness and depth of my work.

OTHER INFORMATION

20. If any member of the State Judicial Nominating Commission (for Court of Appeals and Supreme Court applicants) or District Judicial Nominating Commission (for District Judge and District Associate Judge Applicants) 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.

None.

21. If any member of the State Judicial Nominating Commission (for Court of Appeals and Supreme Court applicants) or District Judicial Nominating Commission (for District Judge and District Associate Judge Applicants) is a current law partner or business partner, state the Commissioner's name and describe his or her professional relationship with you.

Bryan J. Goldsmith is my current law partner and business partner.

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.

My masters' theses, "Urban Traffic Externalities and Housing Value" was published by the University of Northern Iowa in 2004 and was nominated for an outstanding thesis award.

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.

I presented on the topic of Social Security Disability and Supplemental Security Income to the Ottumwa Hy Noon Kiwanis in late 2022.

I spoke to the Ottumwa Leadership Academy on the topic of Open Meetings Laws in 2021.

I was a member of a panel discussion at the District Bench-Bar conference discussing civility and professionalism. I do not recall the year.

I delivered the eulogy at my mother's funeral in April of 2023.

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.

I have a LinkedIn account that I do not actively use. My account name is Michael Carpenter.

I have a Facebook account. My account name is Michael.Carpenter.14.

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.

I received a four-year full-tuition scholarship from the College of Social and Behavioral Sciences at the University of Northern Iowa, where I graduated with a bachelor's degree *cum laude*.

I completed my Master's Degree at the University of Northern Iowa, and my master's thesis was nominated for an outstanding thesis award.

I was a member of the Iowa Law Review, 2002-2003.

I graduated law school "with distinction."

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. Bryan J. Goldsmith, 641-682-7579. We have worked together, first as associates and later as partners, since 2006.

2. Richard J. Gaumer, 641-680-3314. My now-retired partner. He hired me, trained me, and worked with me from 2004 to the present.

3. Judge Daniel Wilson, 641-859-2184. I have practiced in front of Judge Wilson throughout my career, and he is familiar with my work and approach.

4. Judge Kirk A. Daily, 641-683-0060. I have practiced in front of Judge Daily throughout my career, and he is familiar with my work and approach.

5. Cynthia Hucks, 641-682-4512. Cynthia is a long-time practitioner in Wapello County. I have been against Cynthia in dozens of family law cases, CINA cases, guardianships, and other civil matters. As a mediator I frequently mediated cases with Cynthia and her clients.

27. Explain why you are seeking this judicial position.

It would be an incredible honor to serve as a District Judge. The law has been my life and my passion, and I am devoted to the health and well-being of the institution of the judiciary. My 18 years of serving individuals in southern Iowa has taught me how important the work of the judiciary is to the ordered functioning of our society.

I believe strongly in fair and impartial justice, and in the right of every individual to their day in court. I believe in treating people respectfully, and I would strive to never lose sight of my duty to respect the problems of the individuals whose cases are before me. Every litigant must have the opportunity to be heard and must come out of the courtroom feeling that they have been heard. It is the judge's responsibility to make that happen.

As a lawyer, it is a great and strange privilege to stand next to my clients in the terrifying and fateful hours of trial. This is true when the cause of the client is righteous, and it is also true when the cause of the client is not. In the latter category, when the client's cause is not righteous, trial represents the moment where the client is finally and fully subjected to the consequences of his or her wrongful actions. I once had a client with untreated mental health and substance abuse issues. He would not stop contacting his ex-wife, despite multiple no-contact orders, multiple jail sentences for violations of those no-contact orders, and the constant pleading from his attorney (me) to cut it out. The destruction of his family was something he simply could not come to grips with. I stuck with this client because without me he had nothing. I share this story because the trial was not something I was looking forward to. Judge Myron Gookin heard the case. He got it. He did not let my client off the hook, and the ex-wife received the justice that she deserved. But he did not seek to humiliate my client or myself, and I felt that he truly sought to understand the complexities of the situation. That is the example that I hope to emulate.

My academic background and experience are well suited to the variety and rigors of the position. I was attracted to Geography in college because it was a generalist discipline – being the study of the spatial relationship between anything and everything. I have resisted specialization in my practice, as I enjoy a wide variety of cases. I love performing legal research, especially when I am called to go beyond a mere question of "what is the rule", and instead have to learn "why is that the rule?" The judicial position would allow me to experience the variety of different cases that I so enjoy.

I have a sense that this is a moment in my life where one season ends, and another begins. I have been in private practice for almost 19 years and have accomplished many of the

goals that I had set for myself. I have gone from being a restless young man to a more determined middle-aged man. I would like to apply my skills to a different set of challenges.

28. Explain how your appointment would enhance the court.

I will bring practical experience with the criminal and family law matters that are the bread and butter of the District Court docket. My short-term goal would be to earn the respect of my judicial colleagues by putting my head down and taking on a substantial workload without complaint. Judge Gamon was reputed to be a workhorse, and I would endeavor to fill her shoes in that regard. I bring the added benefit of being based in Ottumwa, which would otherwise be without a resident judge. I look forward to taking on the challenging workload that comes with Wapello County.

I have also devoted myself to maintaining courteous and professional relationships with my colleagues. I believe judges and attorneys should collaborate with the shared goal of achieving a fair trial or process. I always strive to be kind and courteous to everyone I encounter professionally, especially opposing counsel and opposing parties. Professional kindness and courtesy can be the lubricant that helps the legal machine run smoothly and without generating unnecessary heat. I would maintain that philosophy on the bench, which should lead to an efficient and reasonable experience for litigants and counsel.

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

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

Signed: Michael O. Carpenter Date: May 9, 2023

Printed name: Michael O. Carpenter

IN THE SUPREME COURT OF IOWA

No. 22-0848

IN THE IOWA DISTRICT COURT IN AND FOR WAPELLO COUNTY

SUNDANCE LAND COMPANY, LLC, Appellant, vs. BOBBI REMMARK and PHILLIP REMMARK, Appellees.	)	Case No.: EQEQ112440

APPELLEE'S FINAL BRIEF

/s/ Michael O. Carpenter
Michael O. Carpenter AT0001321
GAUMER, EMANUEL, CARPENTER & GOLDSMITH, P.C.
111 West Second Street, P.O. Box 601
Ottumwa, Iowa 52501
Telephone: (641) 682-7579
Facsimile: (641) 682-6982
E-mail: moc@ottumwalaw.com
ATTORNEY FOR APPELLEES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. **NO ONE DISPUTES THAT SUNDANCE LAND COMPANY, LLC IS THE OWNER OF THEIR REAL ESTATE IN FEE SIMPLE. THIS CASE INVOLVES A DISPUTED BOUNDARY, NOT DISPUTED TITLE.**

II. **BECAUSE ACQUIESCED BOUNDARIES ARE "PERMANENTLY ESTABLISHED", COMMON OWNERSHIP OF ADJOINING PROPERTIES DOES NOT ERASE THOSE BOUNDARIES BY OPERATION OF LAW.**

III. **THE REMMARKS PROVED THE BOUNDARY BY ACQUIESCENCE BY CLEAR AND CONVINCING EVIDENCE.**

IV. **THE ISSUE OF ACCESS TO THE SUNDANCE REAL ESTATE WAS NEITHER PLED NOR ARGUED BELOW AND SHOULD NOT BE REACHED IN THIS ACTION.**

ROUTING STATEMENT

While Appellee agrees with Appellant that this case turns on a substantial issue of first impression – whether a period of common ownership of adjoining lands erases an established acquiesced boundary, this question can be answered by the application of existing legal principles. The case should therefore be transferred to the Court of Appeals pursuant to Iowa R.App.P. 6.1101(3)(a).

STATEMENT OF THE CASE

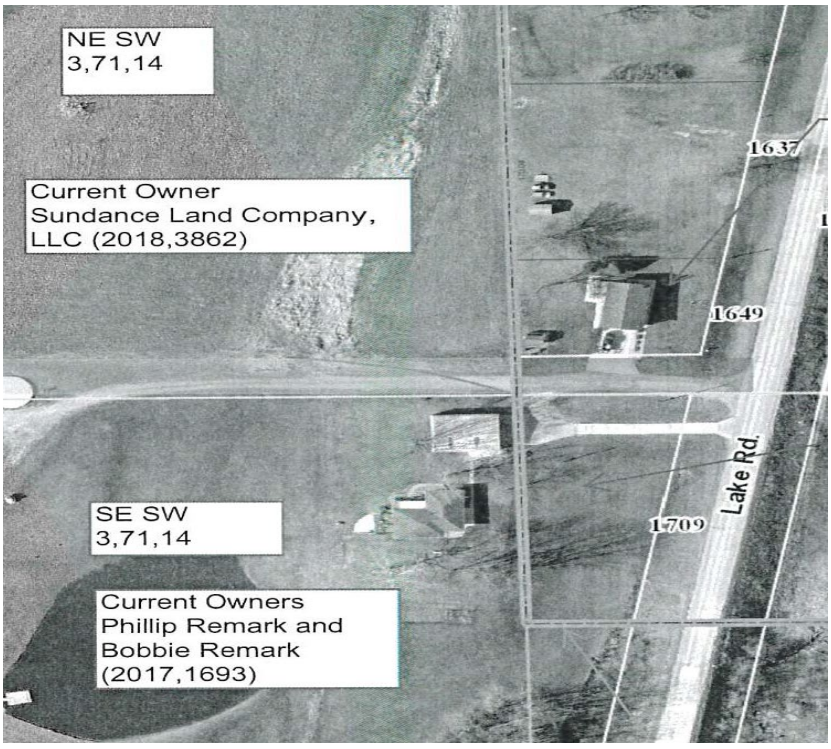
Though framed as a quiet title action by Appellant in its Petition, this case actually involved a disputed boundary under Iowa Code Chapter 650. This was

identified in Appellee's Answer and Counterclaim. The only issue litigated and tried below was the proper location of the boundary between the parties' land.

The trial court ruled in favor of Appellees, finding that they had established a boundary by acquiescence, and that this boundary was not erased by a period of common ownership of both parcels. The court identified the acquiesced boundary line for the eastern portion of the boundary, and ordered the appointment of a land surveyor to survey that line. The court further ordered the appointment of a commission to locate the boundary to the western part of the properties. Finally, the trial court refused to address the issue of Appellant's access to the property, as that issue was first raised in a post-trial motion and was not pled by either party or argued at trial.

STATEMENT OF THE FACTS

This case involves the disputed boundary between two parcels of real estate in rural Wapello County. Appellant Sundance Land Company, LLC ("Sundance") owns approximately 80 acres just to the west of Lake Road ("Sundance Real Estate"). Appellee Phillip and Bobbie Remmark ("Remmark") own approximately 60 acres adjacent to the south of the Sundance Real Estate ("Remmark Real Estate").



Detail of Exhibit 13 (APP. 124)

(APP. 77)

The historical chain of title of both properties was well illustrated by Sundance's Exhibit 17:

Remmark Real Estate			
Sequence	Grantee	Book/Page	Rec. Date
2	Deed to Hobart C. Sims and Mary K. Sims	297/242	10/27/1961
4	Quit Claim Deed to Sims Family Trust	496/1032	10/20/1995
5	Contract to Scott Brian Hubbell and Mary Sue Hubbell	2005/3485	6/30/2005
7	Deed to Scott Brian Hubbell and Mary Sue Hubbell	2014/1821	5/12/2014
8	Deed to Phillip Remmark and Bobbie Remmark	2017/1693	4/24/2017

Sundance Real Estate			
Sequence	Grantee	Book/Page	Rec. Date
1	Deed to John Grabenschroer and Sarah Grabenschroer	167/408	8/25/1941
3	Deed to Larry E. Handling and Linda S. Handling	475/498	6/21/1991
6	Deed to Scott Brian Hubbell and Mary Sue Hubbell	2014/1819	5/12/2014
9	Deed to Sundance Land Company LLC	2018/3862	9/19/2018

(APP. 145)

Since as far back as 1941, deeds for both properties described the boundary between them as the half-section line between the north and south halves of the southwest quarter of Section 3, Township 71, Range 14 in Wapello County. (APP. 105; APP. 119).

Beginning in 1869, Wapello County owned an easement for Michael Road, a 45-foot wide road running along the boundary between properties along that half-section line. (APP. 67-68, APP. 69-70). That part of Michael Road commencing

154 feet to the west of the eastern border of both properties was legally abandoned by Wapello County in 1980. (APP. 69). The remnants of the old Michael Road can be seen in old air photos, identified as a double line of trees on each side of the right-of-way. (APP. 86; Tr. 55).

At some point, either before or after the formal abandonment of the road, the owners of the Remmark Real Estate began to treat the land up to the north end of the right-of-way as theirs. This boundary was marked by an ancient fence, which presumably marked the northern extent of the Michael Road right-of-way. (Tr 53 - testimony of Trevor Brown; Tr. 121-122; APP. 80-81). An aerial photograph from 1994 reveals that Dorothy and Hobart Sims, then the owners of the Remmark property, were using the remains of Michael Road as a means of access to the structure in the rear of the property. (APP. 71). The white object in the photo was identified by witnesses as a semi trailer owned by Hobart Sims. (Tr. 109 – testimony of Scott Hubbell; Tr. 158-159 – testimony of Jerry Breon). This trailer is parked north of the half-section line but south of the north line of the old right-of-way. (Tr 109). The Sims barred access to the driveway with a gate. (Tr. 113 – testimony of Hubbell).

Detail from Exhibit O – 1994 Air Photo (APP. 71)

Subsequent air photos showed the continued occupation of the old road easement by the owners of the Remmark Real Estate. (APP. 72; APP. 73; APP. 74; APP. 75; APP. 76; APP. 77).

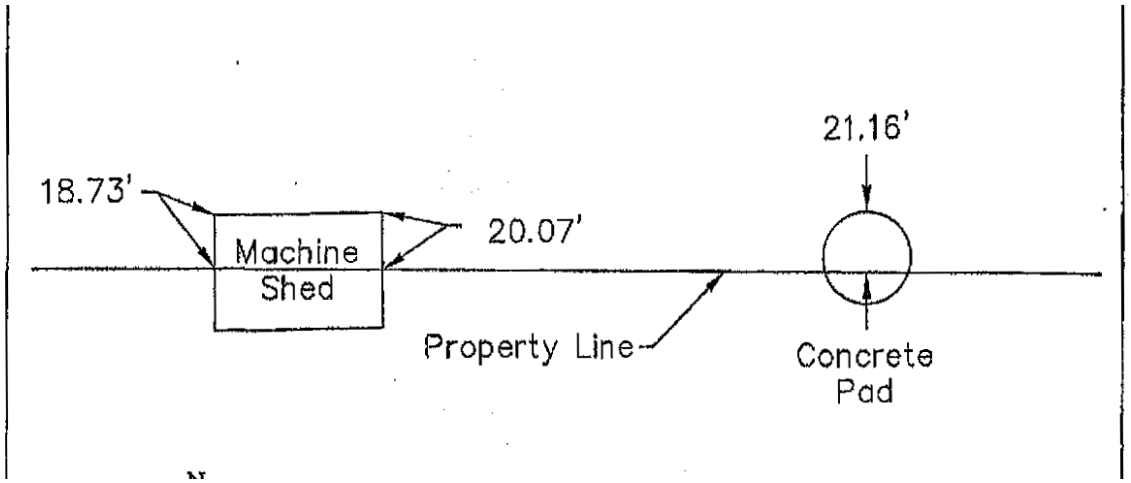
Detail from Exhibit Q – 2006 Air Photo (APP. 73)

Detail from Exhibit R – 2010 Air Photo (APP. 74)

Detail from Exhibit S – 2013 Air Photo (APP. 75)

Detail from Exhibit T – 2016 Air Photo (APP. 76)

The air photos show that sometime between 1994 and 2004 a blue-roofed machine shed was erected to the south of the fence line. (APP. 71; APP. 73). The photos also show that between 2013 and 2016 a circular grain bin was erected, also to the south of the fence line. (APP. 75; APP. 76). Both of these structures are south of the old fence line, but both are bisected by the half-section line. (APP. 144).



Detail from Ex. 16, p. 18 (Brown Survey) (APP. 144).

The machine shed was built in 2004. (Tr. 110 – Testimony of Hubbell). The Sims, through their trust, owned the land, and they built the shed at the request of Scott Hubbell, who was at that time farming the Remmark property. (Tr. 115). Hubbell paid for the structure. (Tr. 115). Neither the Sims, Hubbell, or Handling complained about the location of the shed. (Tr. 116). Hubbell built the grain bin during his period of common ownership of both the Remmark and Sundance Real Estate, and he did not believe that it encroached on the Sundance Real Estate. (Tr. 116-117).

Testimonial evidence confirmed that the owners of both parcels had long treated the north fence line of the old Michael Road right-of-way as the boundary. Linda Handling testified at trial. She was the owner of the Sundance Real Estate from 1991 to 2014. (APP. 102-103; Tr. 16). Handling testified that there was a fence between her property and the property then owned by the Sims. (Tr. 12, 13). She always considered that fence to be the boundary between their properties. (Tr. 13).

As for the Remmark Real Estate, the Sims are long gone, but neighbor Jerry Breon was able to testify about his conversations with Hobart Sims. Breon owns the house between Lake Road and the Sundance Real Estate depicted in the aerial photos, where he has resided since 1999. (Tr. 155; 156). Breon knew Hobart Sims

"[v]ery well." (Tr. 156) "Sat on the deck many times talking to him." (Tr. 156 – testimony of Breon). From that deck Breon could observe the boundary between the Remmark Real Estate and the Sundance Real Estate. (Id.) Breon always considered the fence to be the boundary. (Tr. 157). He confirmed that Hobart Sims "always claimed that was his land. The fence line was his land." (Tr. 157). "He claimed that was his, and everybody thought that." (Tr. 157).

Scott Hubbell also testified at trial. In about 1995 Hubbell began to rent the Sundance Real Estate from Linda Handling so he could farm it. (Tr. 83; 84). A year later, Hobart Sims offered to rent his fields to Hubbell. (Tr. 84). He purchased the Remmark Real Estate from Sims in 2005 (APP. 110-115, Tr. 85) and the Sundance Real Estate from Handling in 2014 (APP. 102-103, Tr. 85), owning both properties until he sold the Remmark Real Estate to the Remmarks in 2017. (APP. 66).

When called as a witness by Sundance, Hubbell testified that the fence "was just a fence. I didn't, you know – I guess I didn't know that as a boundary, but it was a fence." (Tr. 89-90). He denied that he ever treated the fence as the boundary between the properties and denied knowledge that the previous owners had treated it as such. (Tr. 92-93).

This was contradicted by his testimony on cross-examination, when he admitted that he thought that remaining original fence posts were the true

boundary. (Tr. 122); (APP. 80, 81). He also testified that he was involved in the erection of both the machine shed and the grain bin. (Tr. 110; 115). He believed that the true boundary was to the north of those objects. (Tr. 116). "I assumed it was close to that fenced area but didn't know exactly where . . . ." (Tr. 116). He further testified that after he sold the Remmark Real Estate to the Remmarks there was an understanding that the driveway "had to be used by both parties to get to the 80 [i.e., the Sundance Real Estate]." (Tr. 103-104; Tr. 118-119).

Hubbell testified that he had one conversation with the Remmarks prior to closing. (Tr. 101-102). He testified that this conversation occurred in his driveway. (Tr. 102). He testified that there was no discussion of boundaries, nor was there any question or concern that a survey ought to be done to find the boundary. (Tr. 102). He confirmed, however, that he never gave them any reason to believe that they were going to get anything less than the total use of the grain bin or machine shed. (Tr. 118). Hubbell testified that he never discussed changing the legally established boundary line with the Remmarks. (Tr. 118).

The Remmarks also testified about this conversation in the driveway. Phillip Remmark testified:

> I was raised on a farm and my dad always told me to walk the fence lines when you buy a property, and I told Scott, I said, I would like to -- before we close I would like to walk these fence lines with you to make sure where the property lines are. He said, I'm real busy. He said, I'm trying to close on our property at the end of Lake Road, and he said, I probably won't have time, but, he said, in any direction, he said, Lake Road is the boundary from the

> east and the south. He said, any -- the north and the west directions, when you come to a fence, that is the property line. I had no reason not to believe him.

(Tr. 136 – testimony of Phillip Remmark). Bobbie Remmark was present for this conversation and confirmed Phillip's testimony. (Tr. 150). The buildings, including the grain bin and the machine shed, were listed on the realtor's brochure. (Tr. 144). "At the time I thought I got everything I looked at. That's what he had for sale, and that's what I bought." (Tr. 145 – testimony of Phillip Remmark).

No one thought any different until Keith Davis, president and manager of Sundance Land Company, LLC, entered the scene. (Tr. 68). Davis purchased the Sundance Real Estate for Sundance Land Company, LLC in September of 2018. (APP. 88-101; Tr. 70). Before purchasing the property, Davis had questions about means of access to the property from Lake Road. (Tr. 70). He also looked up the property on the county GIS website, and noticed that the property line showed "encroachment of some of the southern property." (Tr. 71). He therefore decided to commission a survey performed by Trevor Brown. That survey was conducted on August 3, 2018. (APP. 128). This survey confirmed his suspicion that the half-section line was well to the south of the apparent boundary line. (APP. 143-144). Davis decided to proceed with the transaction anyway, as he liked the farm "and it fell into the criteria that Sundance Land Company discovers when they are looking for property." (Tr. 73; 74).

On July 23, 2019, an attorney for Sundance wrote to the Remmarks and demanded that they remove the allegedly encroaching buildings. (APP. 125-126). However, Davis conceded that Sundance was not taxed for any buildings and never paid taxes for any buildings supposedly located on the Sundance Real Estate. (Tr. 79-80; Ex. X, Ex. Y).

When asked about the effect that establishing the survey line as the boundary would have on his use of the property, Phillip Remmark testified:

> [I]t would be devastating. I wouldn't [] be able to get up to the pad. I haul grain for my little brother sometimes, and I was going to use the machine shed for my semi, and I would have to somehow build a new road around the property, and I don't know how I would do it without just basically ruining the property, and I thought this was the perfect property. I would have never bought it if I thought that the fence line wasn't the line. It would be devastating.

(Tr. 138 – testimony of Phillip Remmark).

Trevor Brown, the professional surveyor commissioned by Sundance, also testified. He testified that any survey performed in the last 40 years is required to be recorded with the county. (Tr. 47). He found no such prior surveys. In fact, he found no prior surveys other than the original survey from the 1830's. (Tr. 47). He confirmed that the survey line went through the machine shed, the grain bin, and interrupted the driveway. (Tr. 52). He acknowledged that the "'occupation line' differed from the line that we defined [in the survey]". (Tr. 52; 61). He further confirmed that the northerly fence line was "approximately the same

distance as the old right-of-way width of the road that used to go through that area." (Tr. 53).

ARGUMENT

I. NO ONE DISPUTES THAT SUNDANCE LAND COMPANY, LLC IS THE OWNER OF THEIR REAL ESTATE IN FEE SIMPLE. THIS CASE INVOLVES A DISPUTED BOUNDARY, NOT DISPUTED TITLE.

ERROR PRESERVATION

Appellee agrees with Appellant that this issue was preserved, as it was pled and argued below. (APP. 6-10; APP 31-40).

SCOPE AND STANDARD OF REVIEW

The case was tried in equity, and the standard of review is therefore *de novo*. *Albert v. Conger,* 866 N.W.2d 877, 879-80 (Iowa App. 2016).

ARGUMENT

Remmark has never claimed ownership over the Sundance property generally, nor has Sundance claimed ownership over the Remmark property generally. The argument is over the proper location of the boundary between these two distinct and separate parcels. This is a Chapter 650 disputed boundaries case.

Sundance's decision to frame the issue in terms of quiet title is an attempt to confuse the issue and draw the Court's gaze away from Chapter 650. Acquiescence statutes such as the one found in Chapter 650 are a practical response designed to bridge the gap between the invisible and abstract legal

descriptions found in deeds and the on-the-ground reality of real estate in the physical world. In his 1958 Michigan Law Review article, Professor Olin Browder recognized the judicial confusion over these issues. "Vagueness of theory has led in turn to vagueness and disagreement on the facts which will merit judicial recognition [of a boundary]. The result has been the growth of a gnarled and hoary knot upon this branch of the law of property." Olin L. Browder, Jr., *The Practical Location of Boundaries,* 56 MICH. L. REV. 487, 489 (1958).

Sundance's arguments suggest various theories that skirt around Chapter 650. One such theory is that the deed conveyed from Hubbell to Remmark, ending the period of common ownership, should have the effect of returning the boundary to the half-section line because that's what the deed says, and is therefore a written agreement evidencing a tacit intent to return to that line. (Appellant's Brief, p. 35). Another such theory is that the boundary should disappear the same way an easement disappears by merger when dominant and servient estates are unified in title. (Appellant's Brief, p. 28-30).

These theories and analogies are not useful for understanding acquiescence cases. The problem with these other legal doctrines is that they are designed to address different problems than what acquiescence is trying to address. Per Professor Browder, acquiescence addresses "the gulf in our conveyancing between descriptions in deeds and boundaries on the ground. It is the impossibility by

existing methods of so describing land that competent persons can, by using that description, be reasonably certain of locating its exact boundaries." Olin L. Browder, Jr., *The Practical Location of Boundaries,* 56 MICH. L. REV. 487, 531 (1958). It has nothing to do with contract interpretation or the relationships between dominant and servient estates.

CONCLUSION

Remmark asks that the Court keep its gaze firmly fixed on Chapter 650, where it belongs, and not be pulled into misleading and distracting theories.

Remmarks concede that Sundance Land Company, LLC, is the owner of its real estate in fee simple. Remmarks and Sundance disagree as to the location of the boundary between their properties. Remmarks ask the Court to affirm the district court, and quiet title in Sundance Land Company, LLC for the land to the north of the acquiesced boundary described by the trial court and whatever boundary the commission appointed by the district court finds.

II. BECAUSE ACQUIESCED BOUNDARIES ARE "PERMANENTLY ESTABLISHED", COMMON OWNERSHIP OF ADJOINING PROPERTIES DOES NOT ERASE THOSE BOUNDARIES BY OPERATION OF LAW.

ERROR PRESERVATION

Remmarks agree with Sundance that this issue was preserved. Remmarks pled acquiescence in their answer (APP. 11-12) and the issue was tried and argued to the Court below. (APP. 51-52).

SCOPE AND STANDARD OF REVIEW

The case was tried in equity, and the standard of review is therefore *de novo*. *Albert v. Conger,* 866 N.W.2d 877, 879-80 (Iowa App. 2016).

ARGUMENT

Iowa Code § 650.14 provides as follows: "If it is found that the boundaries and corners alleged to have been recognized and acquiesced in for ten years have been so recognized and acquiesced in, such recognized boundaries and corners shall be **permanently** established." IOWA CODE § 650.14 (emphasis added).

Sundance argues that a period of common ownership of both sides of an acquiesced boundary erases the acquiesced boundary as a matter of law. (Sundance Brief, p. 25). While it does not appear that any Iowa court has ever addressed this specific issue, the plain language of the statute answers the question – acquiesced boundaries are "permanently established." The statute does not leave open that any subsequent act would "terminate" the acquiesced boundary, save a boundary by agreement as authorized by Iowa Code § 650.17.

The permanence of acquiesced boundaries was confirmed by the Iowa Supreme Court in *Ollinger v. Bennett*, 562 N.W.2d 167 (Iowa 1997). In *Ollinger*

the Court addressed whether evidence of the parties' subsequent repudiation of the acquiesced boundary was relevant. In finding that it was not, the Court outlined the principles of the doctrine of acquiescence that are also relevant to our issue:

> [W]e believe scrutinizing parties' conduct, after acquiescence has been established, for signs of repudiation would undermine the purpose of establishing boundaries by acquiescence. The doctrine of acquiescence represents an attempt to settle titles and "avoid litigation resulting from the disturbance of boundaries long established." *Miller v. Mills County*, 111 Iowa 654, 662, 82 N.W. 1038, 1041 (1900); *see also King v. Fronk*, 14 Utah 2d 135, 378 P.2d 893, 896 (1963) (noting that the doctrine prevents "protracted and often belligerent litigation usually attended by dusty memory, departure of witnesses, unavailability of trustworthy testimony, irritation with neighbors and the like"); 12 Am.Jur.2d *Boundaries* § 85, at 620 (1964) (explaining that the doctrine of acquiescence "is a rule of repose for the purpose of quieting titles and discouraging confusing and vexatious litigation"). We believe that the goals underlying the doctrine of acquiescence are best served in this case by giving effect to the conduct of the owners of both parcels between 1972 and 1993 [the period of acquiescence].

Ollinger v. Bennett, 562 N.W.2d at 171-2.

Ollinger provides substantial guidance to the Court in addressing the issue of common ownership. Recognizing the objective of avoiding "litigation resulting from the disturbance of boundaries long established" the Court should extend the holding of *Ollinger* and find that common ownership of properties divided by and acquiesced boundary does not disturb the boundary.

Sundance complains that "[u]nder this theory the subsequent purchaser would also be bound to take title to a purported line even if they never intended to." (Appellant's Brief, p. 25). Section 650.17 addresses this concern. Section

650.17 allows for a change to an established boundary when the parties agree to such a change, but to do so the parties must follow the specific requirements laid out in the Code. For example, such an agreement must be accompanied by a plat that is to be recorded. IOWA CODE § 650.17. No plat accompanied the deed to the Remmarks because there was no agreement to change the established boundary line.

The only case from the modern era that the undersigned was able to find specifically addressing common ownership and acquiescence was the Colorado case of *Salazar v. Pretto*, 911 P.2d 1086 (Colo. 1996). The narrow majority opinion in that case gets it wrong, and is an example of the "vagueness of theory" that Professor Browder warned of, as the majority confuses and conflates unrelated principles of the law of easements to the issue at hand. *Salazar*, 911 P.2d at 1091.

The three-justice minority in *Salazar* understood acquiescence, and it is their lead that this Court should follow:

> An acquiesced boundary often will not lie on the surveyor's true location. When this occurs, the legal effect of the doctrine of acquiescence is to rewrite the deed or document of title by operation of law to reflect the acquiesced change so that the agreed upon boundary becomes the true dividing line. *Duncan v. Peterson*, 3 Cal.App.3d 607, 83 Cal.Rptr. 744, 746 (1970); *Edgeller v. Johnston*, 74 Idaho 359, 262 P.2d 1006, 1010 (1953). An acquiesced line "becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location." *Young v. Blakeman*, 153 Cal. 477, 95 P. 888, 890 (1908). "Thus, if the distance call in the deed is '500 feet,' it may henceforth be treated as if it read '517 feet' or '483 feet,' and every future deed of the land which copies or incorporates the original description will also be so read." Roger A. Cunningham et al., The

> Law of Property § 11.8, at 765 (1984). See also Olin L. Browder, *The Practical Location of Boundaries*, 56 Mich.L.Rev. 487, 530 (1958).
>
> The policy underlying this construction of the language in the deed is the doctrine of repose, or "the notion that the law ought not to tinker with the well-settled and long-held understanding of the people involved, even if it does not comport with their documents." Cunningham et al., supra, at 766. See also 12 Am.Jur.2d *Boundaries* § 85 (1964). As the California Supreme Court has reasoned, measurements made at different times, by different persons, and with different instruments will usually vary, and that:
>
> > If the position of the line always remained to be ascertained by measurement alone, the result would be that it would not be a fixed boundary, but would be subject to change with every new measurement. Such uncertainty and instability in the title to land would be intolerable.
>
> *Young,* 95 P. at 889. Hence, boundary lines which have been recognized for the statutory period are regarded in law as being the true and permanent boundaries described by the language in the deed.
>
> Once the original language in the deed has been effectively changed in accordance with the acquiesced boundaries, a conveyance by that original description should be presumed to have been intended to refer to the boundaries as fixed by such acquiescence unless there is specific language to the contrary.

Salazar, 911 P.2d at 1093 (J. Kourlis, dissenting). This is the same understanding of acquiescence outlined by the Iowa Supreme Court in *Ollinger.*

The two other cases cited by Sundance – *Patton v. Smith*, 71 S.W. 187 (Mo. 1902) and *Conklin v. Newman,* 115 N.E. 849 (Ill. 1917) - are both pulled from cites in *Salazar v. Pretto*. Both are also from foreign jurisdictions, and both are more than 100 years old. The cite to Professor Browder's article for support is a circular reference, as the Professor was simply noting the holding in *Patton* in his review of

the case law, not endorsing that outcome. Olin L. Browder, Jr., *The Practical Location of Boundaries,* 56 MICH. L. REV. 487, 530 (1958).

None of these out-of-state opinions have any precedential value for an Iowa statute. The Court should follow the lead of the *Ollinger* court recognizing the anti-litigation purpose of the Iowa acquiescence statutes, the plain language of Iowa Code § 650.14 affirming the permanency of acquiesced boundaries, and the place of Iowa Code § 650.17 in the statutory scheme in describing how changes to established boundaries by agreement are made, and hold that common ownership has no particular effect on an acquiesced boundary.

CONCLUSION

For the foregoing reasons, the Remmarks ask the Court to affirm the holding of the district court, and rule that a period of common ownership does not as a matter of law erase a boundary established by acquiescence.

III. THE REMMARKS PROVED THE BOUNDARY BY ACQUIESCENCE BY CLEAR AND CONVINCING EVIDENCE.

ERROR PRESERVATION

Remmarks agree with Sundance that this issue was preserved. Remmarks pled acquiescence in their answer (APP. 11-12) and the issue was tried and argued to the Court below. (APP, 58-62).

SCOPE AND STANDARD OF REVIEW

The case was tried in equity, and the standard of review is therefore *de novo*. *Albert v. Conger,* 866 N.W.2d 877, 879-80 (Iowa App. 2016).

ARGUMENT

Remmarks can add little to the thorough and well-reasoned analysis of the trial court. The evidence of acquiescence recited above in the Statement of Facts, both direct and circumstantial, is unrebutted, consistent, and persuasive.

The strongest evidence of acquiescence is the construction of the machine shed astride the half-section line in 2004, and the grain bin between 2013 and 2016. The former evidences the Sims occupation of the disputed area, and the Handling's acquiescence to it. The latter evidences Hubbell's perception of the boundary during his period of common ownership.

Next most persuasive are the air photos, showing the long and consistent occupation lines and practical locations of the boundaries. These are supplemented by the on-the-ground photos in Exhibit Z (APP. 78-85), which show the obvious boundaries, and the complete lack of any visual indication of the presence of the half-section line. Finally, the testimony of the witnesses serves to confirm and support the rest of the evidence, which stands unrebutted.

The only thing to add is to identify the ten-year acquiescence period. This period could be met in a variety of ways. It could begin to run as early as 1991,

when the Handlings purchased the Sundance Real Estate. Linda Handling's testimony confirms her acquiescence to the fence, and Breon's testimony, coupled with the 1994 air photo, are evidence of Sim's earlier acquiescence. It could start in 1994 to conform to the date of the air photo that further proved Sims' acquiescence. It could start in 1999, when Breon first moved to his property and interacted with Hobart Sims. The earliest that it would end is 2014, when the Hubbells took title to both properties from Sims and Handling. Given Hubbell's construction of the grain bin during the period of common ownership, the acquiescence period could arguably run through the period of common ownership, terminating only upon Sundance's purchase of its property in 2018.

All of this evidence stands unrebutted. No witness testified that the half-section line was recognized as boundary prior to the Brown survey in 2018. No one testified to any other boundary line. The only boundary line that any of the owners or neighbors identified was the old fence line.

CONCLUSION

Remmarks have satisfied their burden and have proved acquiescence, and ask that this Court affirm the holding of the district court on that issue.

IV. THE ISSUE OF ACCESS TO THE SUNDANCE REAL ESTATE WAS NEITHER PLED NOR ARGUED BELOW AND SHOULD NOT BE REACHED IN THIS ACTION.

ERROR PRESERVATION

Remmarks do not agree that this issue was preserved. This issue was neither pled nor argued, and the trial court did not rule on it. The issue was first raised post-trial by Sundance in a Motion to Reconsider, Enlarge, and Amend. APP. 58-62). The Court specifically refused to rule on the issue, finding that "Sundance did not plead the issue of legal access or request the court to rule on that issue at trial. The evidence presented at trial centered on other matters as pled in the Petition and the Remmark's counterclaim, not a determination regarding legal access to the Sundance property. The court will not reconsider, enlarge, or amend its Ruling for separate matters not pled or addressed as issues for the court to determine at trial." (Ruling on Motion to Enlarge and Amend.

SCOPE AND STANDARD OF REVIEW

The case was tried in equity, and the standard of review is therefore *de novo*. *Albert v. Conger,* 866 N.W.2d 877, 879-80 (Iowa App. 2016).

ARGUMENT

The issue of access to the Sundance Real Estate is potentially complicated. The record below was not developed to address this issue, and only hints at possible solutions. For example, what exactly is the status of Michael Road? Where does it end? The abandonment proceedings indicate that 154 feet of the road from the eastern boundary of the properties was retained by the county.

(APP. 67-68). The location of this endpoint was not identified or discussed. The consequences of this detail were not researched, explored, or developed.

Access to the southeast corner of the Sundance Real Estate also potentially implicates the land owned by Jerry Breon. It is unclear from this record whether Breon's land extends to the half-section line, or whether the county owns the "stub" of Michael Road projecting off of Lake Road. (*See* APP. 120-122). The record regarding this area must be further developed.

Finally, there is also an alternative access point at the northeast corner of the Sundance Real Estate from Lake Road, which was only very briefly mentioned at trial. (Tr. 77 – testimony of Keith Davis; *see also* APP. 120-122). This means of access also needs to be considered, but again the record below did not address this.

CONCLUSION

Remmarks ask that this Court affirm the district court's decision to decline to rule on an issue that was neither pled nor argued at trial.

CONCLUSION

Remmarks asks that this Court affirm the district court in all respects, and remand this matter for the appointment of a commission as ordered by the district court.

REQUEST FOR ORAL ARGUMENT

Remmarks ask for oral argument in this matter.

CERTIFICATE OF SERVICE

Pursuant to Iowa R. App.P. 6.701 and 6.901, the undersigned hereby certifies that on the 13th day of October, 2022, the Final Brief was filed with the Supreme Court via EDMS and electronically served on all parties of record.

/s/ Michael O. Carpenter

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 4990 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Michael O. Carpenter

IN THE IOWA DISTRICT COURT IN AND FOR WAPELLO COUNTY

Upon the Petition of	)	
CARON K. ROBINSON,	)	
	)	
Petitioner,	)	
	)	**Case No.: DREQ111182**
And Concerning	)	
JUSTIN L. BOWEN,	)	
	)	
Respondent.	)	

Child and Family Reporter's Report to the Court

Michael O. Carpenter AT0001321
GAUMER, EMANUEL,
CARPENTER & GOLDSMITH, P.C.
111 West Second Street, P.O. Box 601
Ottumwa, Iowa 52501
Telephone: (641) 682-7579
Facsimile: (641) 682-6982
E-mail: moc@ottumwalaw.com
CHILD AND FAMILY REPORTER

Purpose of Investigation

The purpose of this investigation is to provide a report to the Court regarding the custody dispute between Caron Robinson and Justin Bowen, involving their daughter Kaylee Bowen.

Executive Summary

This matter was initiated by the filing of a Petition to Establish Paternity, Custody, Visitation, and Support by Caron K. Robinson ("Caron"), through attorney Cynthia Hucks, on October 19, 2017. After a great deal of litigation involving the temporary matters hearing, Justin filed an Answer asking for physical care of K.M.B.

Legal Standards

The best interests of child are the primary consideration to be followed by the court in determining the question of child custody. In determining the custody of the child involved in this case, the relevant factors were described by the Supreme Court in In re Marriage of Winter, 223 N.W.2d 165 (Iowa 1974). See also Section 598.41(3), Code of Iowa. The granting of custody is not made to reward one parent or to punish the other. In re Marriage of Carney, 206 N.W.2d 107 (Iowa 1973). Conduct of the parties, good and bad, is admissible in evidence as it bears on and reflects the character and fitness of the respective parties seeking the custody of the child. In re Marriage of Bare, 209 N.W.2d 551, 554 (Iowa 1973).

Investigative Mandate

This investigation is made pursuant to the court's order of appointment dated November 13, 2018. Per Iowa Code Section 598.12B(2):

> The court may require a child custody investigator or a child and family reporter to obtain information regarding both parties' home conditions, parenting capabilities, and other matters pertinent to the best interests of the child or children in a dispute concerning custody of the child or children. A report of the information obtained shall be submitted to the court and available to both parties. The report shall be a part of the record unless otherwise ordered by the court.

This reporter is authorized to include recommendations in this report.

Investigation

My investigation consisted of the following:

- A review of the court filings in this matter
- An ICIS search on each parent and some of the witnesses.
- A review of the documentation provided by the parties.
- An interview with Justin Bowen at my office on May 29, 2019.
- An interview with K.M.B. at my office on May 29, 2019.

- A home visit with Caron Robinson and K.M.B. on June 6, 2019.
- An interview with Caron Robinson at my office on June 7, 2019.
- A phone call to Health Initiatives
- A skype conference with Justin Bowen and Deanna Bowen on June 11, 2019.
- A phone conference with Chelsea Mathis, K.M.B.'s half sister on June 12, 2019.
- A phone conference with Toby Mitchell, Truancy Officer, on June 13, 2019.
- Preparation of this report.

Factual Background

Caron and Justin have been together since 2001. They have a child, Kaylee, born in 2004. Between 2004 and October 2016 Caron, Justin, and Kaylee lived together, except for occasional and short absences by Justin.

In October 2016, without warning to Caron or Kaylee, Justin left the family to reunite with his ex-wife Deanna in Texas. Caron was heartbroken, and wanted Justin back. Justin was largely unable to communicate with Kaylee. This was due to Caron's interference, as Caron wanted to pursue the resumption of her relationship with Justin, and used her position as go-between to try to force that discussion.

In September of 2017, Justin returned to Iowa to attend the funeral of his father. He arranged behind Caron's back to pick up Kaylee from school and take her to be with his family in Centerville. Caron was distraught when she went to pick up Kaylee from school and she was not there. Over the next couple of weeks Justin only communicated intermittently with Caron, refusing to give her his location. Justin asked Kaylee if she wanted to come live with him in Texas. Kaylee did, so when he returned to Texas he took Kaylee with him.

Caron initiated this case by filing the Petition and motion for immediate custody on October 19, 2017. On October 27, the court set a hearing on temporary matters for November 13, 2017. Justin was served on November 3rd. Both parties filed documents for the hearing, which was reset for November 20. The Court entered an order on November 20, 2017 granting Caron temporary physical care of K.M.B., and restricting Justin's visitation to Wapello County.

No further action was taken by either party or the court until August of 2018, when Justin filed a pro se motion to reconsider the temporary order. The Court set that matter for hearing for September 10, 2018. Both parties made various filings related to that Motion, which was denied in a court order dated September 11, 2018.

On September 26, 2018, Caron was charged with Harassment 3rd Degree and Interference with Official Acts after having left 46 messages on Justin's phone over a two day period.

Thereafter, attorney Joseph Goedken filed an Appearance and Answer on behalf of Justin. Attorney Goedken also filed an Application for Appointment of Child and Family Reporter on October 30, 2018, along with a Motion to Set Pretrial Conference. On November 13, 2018, the Court entered an order appointing me to conduct this investigation.

Attorney Hucks was allowed to withdraw her appearance for Caron on November 20, 2018. The Court subsequently confirmed this case for trial to commence on June 18, 2019.

Since the temporary hearing, Kaylee has resided with Caron in Ottumwa. Justin has had occasional visits in Wapello County.

Investigation

Interview with Justin Bowen, May 29, 2019

I interviewed Justin at my office on May 29, 2019. He was in Ottumwa for the trial of State v. Robinson, SMSM041721. He informed me that Caron had pled guilty harassment this morning rather than face trial, and he showed me a copy of a 5-year no contact order that had been entered.

Justin also provided me a copy of a Powerschool printout showing Kaylee's latest attendance and grades. She has missed an extraordinary number of classes this year, and her grades are mostly D's and F's.

Relationship with Caron Robinson

Justin and Caron had been together from before Kaylee's birth until his departure in October of 2016. Justin stated that he has always been a part of Kaylee's life. He was concerned that a court might not think so because he always paid child support. He always resided with Caron and Kaylee, claiming that the longest he was ever gone before 2016 was a couple of weeks, and that was for work. He is close with Chelsea, Caron's older daughter, and still has contact with her, and considers her daughter to be his granddaughter. (In fact, when I asked for Chelsea's phone number he rattled it off from memory). He stated that he drove back from Texas to Pella see be present for the birth of Chelsea's child, while Caron was unable or unwilling to make it from Ottumwa.

He admitted that his relationship with Caron was rocky, and they would argue. A frequent topic of dispute was Caron's refusal to find work. Caron stopped working in 2007 after her mother died.

Drug use

I asked Justin about his past drinking and drug use. He candidly admitted to recreationally using methamphetamine with Caron's brothers in the past. He stated he never used more than once every-other week, and has not used at all in several years. He also liked to drink beer recreationally while grilling. This would upset Caron, and she would pick a fight with him.

I asked him specifically about an allegation Caron had made about Justin destroying his clothes. He related that he was attempting to pack his clothes into his car in order to leave, and she kept bringing them back in. He eventually resorted to throwing his clothes onto the lawn. This occurred a long time ago.

October 2016

Justin had been married to Deanna Heronemus. (Court records indicate that they were divorced in 2003 – In re Marriage of Bowen, CDCD051489 (Scott County)). In October of 2016, Deanna's sister was hired at the plant Justin was working at. She informed him that Deanna's son Dustin had recently committed suicide. Justin reached out to Deanna, who was living in Texas, to offer his condolences. They began talking on the telephone. After about two weeks, she came to Iowa to visit. They rekindled their romance, and he decided to return to Texas with her. They have been together ever since, and were remarried in January of 2018.

He admitted that his departure was abrupt. He felt that leaving Kaylee with Caron was the best for Kaylee. I asked him what changed. He told me that Caron's mental state has deteriorated. Chelsea moved to get away from Caron, and their relationship is strained.

After he left he attempted to contact Kaylee by phone, but could not get past Caron, who would prevent the communication. He stated he did come back to Iowa to visit Kaylee 2-3 times between his departure in October 2017 and September 2017.

September 2017

In September of 2017, Justin's father was killed in a car accident in Centerville. He decided to come back to Iowa for the funeral. He contacted Chelsea to coordinate a plan to pick up Kaylee from school with the thought of bringing her back to Texas with him. He states that he contacted law enforcement in both Iowa and Texas ahead of time to make sure that he would not get in trouble. He was told that without a custody order he was free to take her. He got Kaylee from school and informed Caron right away. (Caron disputes this.) He stayed in Iowa for about a week, then returned to Texas with Kaylee. He was unable to attend his father's funeral because an autopsy was performed which caused a delay. He did attend a celebration of life with his family.

During the time period that Kaylee lived with him in Texas, Justin stated that everything was great. While she was not a morning person, she was well-behaved and attended school regularly.

I asked Justin about a letter purportedly written by Kaylee that was in the case file. Justin admitted that he asked Kaylee to write the letter. He did not have an attorney and was trying to fight this case on his own. He says he did not tell her what to put in the letter, nor did he read it. He simply took the sealed envelope and mailed it to the court. (Kaylee confirmed this in my interview of her).

I asked Justin about the DHS report where it was alleged, among other things, that he had taken Kaylee to Hooters, became intoxicated, drove drunk with her, and took her to a casino. Justin admitted that he took Kaylee to Hooters, but that was to meet NASCAR driver Chase Eliot, who was appearing there. Justin denied the other allegations, pointing out that no casino would allow a minor on the premises. (Kaylee confirmed Justin's account during my later interview of her).

I asked Justin about a harassment report that he filed in Texas, from during the time period shortly after he took Kaylee to Texas. He told me that Caron was texting him repeatedly. Rather than asking about Kaylee, she was professing her love for him and begging for him to come back to her. He showed me some of those texts on his phone, which confirmed his account.

Wapello County Harassment Case

I also asked Justin about the current harassment case in Wapello County, SMSM041721. (Justin was in Iowa for trial on that matter the morning of the day of this interview.) Justin was the victim and Caron the perpetrator. He told me that in September of 2018 he had 40 missed phone calls from Caron in quick succession. She filled up his voice mailbox with statements of her love for Justin and sexual advances. A no contact order was issued at that time, and is still in effect. Caron had appeared for trial that morning and pled guilty.

Justin's Criminal History

Prior to the interview I had conducted an ICIS search to determine Justin's criminal history. I also asked Justin about his criminal history in our interview. He confirmed that when he was 18 he participated in a robbery of the Hardees in Centerville. He told me that he had an uncle that he looked up to, who was like an older brother to him. It was his uncle's idea, and Justin went along with it. He pled guilty and received a 10 year suspended sentence. He performed very poorly on parole, which he repeatedly violated, ultimately spending 4-5 years in and out of prison. He also has a slew of older driving charges, including a couple of driving while barred (habitual offender) charges. However, he was able to get his license reinstated 4-5 years ago, and has not been in trouble since.

Summary

When asked what outcome Justin was seeking in this matter, he replied that he wants Kaylee to come home with him. For Caron's visits he proposed that she have the breaks from school and half of the summer.

Interview with Kaylee, May 29, 2019

I interviewed Kaylee later in the afternoon of May 29, 2019. Justin picked her up from school following my interview of him and brought her to my office. I interviewed her privately in my office, while Justin waited in the lobby.

Kaylee presented as a mature and self-aware young woman. She was articulate, and appeared able to accurately articulate her observations and reasoning.

I asked Kaylee where she went to school, and what activities she was involved in. She told me she was in no activities. She used to be in softball, but foot problems ended that.

I explained my role in this case, and that I could make a recommendation to the court as to who she should live with. I asked her who she wanted to live with, and why. She stated firmly that she wanted to go with her dad.

Caron's House

She described the problems she has at her mother's house. She stated that there are lots of drug addicts around her mom – nobody uses at the house but they are present while high. Her uncle Tracy Dyer specifically will use, come around, and start coming down while at the house. Her other uncle and his wife got back into drugs recently and have had all four of their kids removed from the home. (This was confirmed by Caron.) Those kids would come to Caron's house and steal from Kaylee. She says they stole from her change jar, and stole $600 from Caron's purse.

Kaylee describes her mother as very snappy. She has not been the same person since Justin left. She used to be caring and nice, but now she's constantly snappy and mean. She gets mad at the most random things. For example, she asks who called. Kaylee will respond that she does not know and will get yelled at for not knowing. Kaylee told me that it is hard for her not to retaliate, especially when her mom tells Kaylee that Justin and Deanna are drug addicts, which is something Caron does "constantly." Kaylee said that Caron physically came after her when she referred to Deanna as her "stepmom." Kaylee also complained that the house was always a mess.

Kaylee is close with her niece K.W., Chelsea's daughter. She had a good relationship with Chelsea, who she sees every-other weekend when Chelsea has to exchange K.W. with her father in Ottumwa.

Kaylee spends most of her time watching Youtube in her room.

Attendance

I asked Kaylee about her terrible school attendance. She admitted that a lot of that was her fault. She blamed her anxiety. She said she will come in late, miss classes, then be scared to go back to class because of the material she has missed. This is especially true for science and math. She wants to go back to class, but then she chickens out. The situation snowballs from there.

I asked her why that wouldn't be just as much of a problem at her father's house. She stated that he would not allow her to have that first "mess up".

Justin's House

Kaylee told me that she was always close with her father. She enjoyed living in Texas with him. At her father's house she was not yelled at all the time. There was not as much "drama" as there was at her mother's house. She stated that she did not realize how bad things had become at her mother's house until she was away from it.

October 2016

When Justin left the home in October 2016, Kaylee was "okay with it" at first. She thought he'd be back, as it wasn't the first time he'd left. Her mother was very down, and that

brought her down too. When she realized after a few weeks that he really wasn't coming back she was deeply hurt.

Between October 2016 and September 2017 Kaylee says she saw Justin only once, when she was able to "hang out" with him and his extended family for one day. She did not have his phone number, though she did have contact with him through facebook messenger for a couple of months.

September 2017

Per Kaylee, Justin told her on facebook that he was returning to Iowa because his father had died, and he was going to take her from school to spend time with him. She had fun with her father, hanging out with his family and going to Fun City with Justin and Deanna. He asked her if she wanted to come to Texas to see I she liked living down there. She stated that it was her choice to go, and he did not force her. Kaylee stated that she had some hesitation, but she ultimately decided to go with Justin.

I asked her about the accusations regarding Hooters, the casino, etc. She told me that she and her father were Nascar fans, and they were Chase Eliot fans in particular. Mr. Eliot was having a "meet and great" at Hooters, and Justin took her. She got to meet Chase Eliot, got her picture taken with him, and received some signed memorabilia. Justin had one beer and Deanna did not drink. They never went to a casino.

Letter

I asked Kaylee about the letter she wrote that was submitted to the Court. She stated that Justin asked her to writ the letter. He did not pressure her. She asked him what she should write, and he said he couldn't tell her. He wouldn't even help her spell check it. She stated that everything she wrote in the letter was true.

Substance abuse

I asked her if she had concerns about Justin's drinking. She said she did not. She noted that her aunt Alexis is an alcoholic, so she knows what that looks like. Justin will have an occasional beer, but that's it.

Kaylee stated that her mother neither drinks nor does drugs. She just smokes cigarettes.

Interview with Caron Robinson, June 6 and 7, 2019.

Preliminary Contact

Caron contacted my office twice between December of 2018 and May of 2019. She called again on May 9, 2019, and I was able to talk to her by phone on May 10, 2019. I explained to her my role in this case, and that I needed to perform a home visit very shortly. We made an appointment for that home visit for the next week. However, a couple of days later Caron left a message at my office cancelling the visit. I called Caron back that same day to

reschedule, as I hoped to get it done that week. For the times I was available, Caron claimed to have appointments scheduled. She eventually agreed to Tuesday, May 21 at 4:00. When May 21 arrived, Caron called and left a message, cancelling the visit due to sickness. I attempted to call her back that day, but she did not answer her phone.

She answered her phone when I called at 7:45 p.m. on Monday, June 3rd, 2019. I asked if she had any evenings available that week. She initially told me she was very busy trying to get bills paid. She told me she had a meeting with Joe Goedken (Justin's lawyer) at 9am on Thursday, June 6. She eventually allowed that I could come out at 5:00 p.m. on Thursday, June 6. When June 6th arrived she called my office and said she had fallen ill and asked to reschedule the visit. I called her back at 4:00 p.m. She was willing to have the visit, but either nerves or some medicine she was on made her feel sick. I asked if I could come over at 4:30 so she could rest, but she told me she had somewhere to go and asked that I come over at 5:00 p.m. as planned. I agreed.

Home Visit

I arrived at Caron's house shortly after 5:00 p.m. on June 6th. Caron stated that she has resided at this location for 11 years. Caron was present, as was Kaylee and Caron's brother, Tracy Dyer. Mr. Dyer was engaged in an energetic attempt to pick up the house. The house was dark, malodorous, and extremely cluttered. It is a one-story bungalow with a living room, kitchen, dining room, and 2-3 bedrooms. Caron's room was packed nearly to the ceiling with clothes. She said that she was doing laundry, but it was unclear where else all those clothes could go. All of the rooms were very cluttered. Kaylee's room was messy but safe. Approximately 6-10 kittens had the run of the house.

Given the lack of privacy at the house, as well as its condition, I asked Caron if she would be willing to come to my office the next morning so I could interview her. She agreed to come down at 9:00 a.m.

Personal History

Caron described a very difficult childhood. Caron dropped out during the last part of her 11th grade year, but obtained her GED prior to her expected graduation date. She worked at the Ottumwa Regional Health Center in food service for seven years. She obtained a diploma in administrative assistant/secretarial skills from Indian Hills in 1989. She moved to St. Louis to find work in that field but was unable to do so. She lived in Illinois around St. Louis for approximately 10 years. During that time she worked primarily in restaurants as a cook.

In 1999 she fled St. Louis when her paramour, Mark, got into drugs and became violent. Caron obtained a protective order, packed her things, and returned to Ottumwa with her daughter Chelsea, who was 7 at the time.

In Ottumwa, Caron supported herself and Chelsea by doing in-home healthcare for various family members, including a sister-in-law, uncle, aunt, and her mother. She was paid approximately $200 per month as contractor with Seneca.

Since 2007, when her mother died, Caron has not had regular employment. She states that she performs odd jobs, such as cutting grass and housekeeping. Currently she also receives child support, $355/month in food stamps, housing assistance, and Medicaid.

Caron has three children. Her eldest, Sean Robinson, was born in 1983. Per Caron, he is a doctor of physical therapy and lives in California. She only has occasional contact with him.

Her second child is Chelsea Mattis, born in 1992. Chelsea is a registered nurse who currently lives in Knoxville. Chelsea has two daughters, a 10-year-old named K.W. and an 8-month-old baby. Caron says that she "raised" K.W., who was born when Chelsea was 16.

Caron related that Chelsea was raped when she was 14. Caron was out helping a family member move when it occurred at Caron's house. As a result of that, Caron admitted that she has become a "helicopter mom," and that she does not like Kaylee to be outside without her. She wants to be able to maintain line-of-sight with Kaylee at all times. (This was confirmed by Chelsea, who also relates this behavior to her rape at Caron's house).

Caron met Justin on October 18, 2002. He was good with Caron's kids, and she ended up pregnant with Kaylee, who was born in 2004.

Caron confirmed that Justin lived with her during Kaylee's life. He would leave "off and on". Caron stated that Justin has a lot of issues from his family, who she described as alcoholics and drug addicts. While Caron does not mind "a drink here and there," she can't stand drunks. Justin would leave for 2-3 days if he was going to use meth. He did this once or twice a year. The longest absence was in 2014, when he left for about 4 weeks. However, he was "down the street" 8-9 blocks, and he had frequent contact with Kaylee during that time. I asked her why he left, and she could not recall, though she thought it might have to do with her being upset at him for being drunk.

October 4, 2016

Caron stated that Justin got up that morning, kissed her, and told her he was going to work. He called her after work and told her that he was going to have a couple of beers. This was unusual because he never told her when he was drinking. She called him 3 hours later and asked how long he was going to be. He got angry, hung up and refused to answer the phone.

He did not come home. She eventually discovered that he was seeing his ex-wife, Deanna. Two weeks after he left, he told Kaylee that he was going to transfer to Texas, but he told her that he'd be home every weekend. Instead, he saw her for a total of 8 hours in the next 11 months. By the end of October he was gone.

At various points in this case, Caron has asserted that Justin and Deanna are on drugs. I asked her what observations and information led her to believe that. She stated that when Justin is sober he's usually yelling, but when he's on meth he's very calm. She told me that she can read him and she knows him, because she loves him with all of her heart. She also told me of people she knows who claim to have purchased drugs from Deanna. Caron also told me that Deanna and Justin submitted to a drug test at the command of Texas DHS, but for some reason

those results were never released. Caron contacted Health Initiatives, the lab that performed the tests, and was told that an attorney could obtain the results. She asked me if I could get those, and I told her I would try.

I asked her if she blocked Justin's number, and she told me that she does not even know how to do that. She did admit that she blocked calls from numbers listed as private, and Justin always called her from a blocked number. (It should be noted that Chelsea complained to me that Caron was fixated on obtaining Justin's phone number, to the extent that she surreptitiously attempted to unlock her granddaughter K.W.'s phone to obtain it.)

Caron stated that between October 2016 and September 2017 Justin had 2 visits that totaled 8 hours. The first was Thanksgiving. Caron states that she believed Justin to be on drugs at that time because of his eyes and demeanor. Justin also visited in December.

September 2017

Caron stated that Justin arranged with Kaylee via facebook to pick her up from school. (Kaylee confirmed this). Caron was tearful as she described arriving at school and not being able to find Kaylee. She described her panic and despair as she was informed by the school staff that Justin had her. She had no contact information for him at that time and had no way to get any information from him.

It was 4 or 5 days before either Kaylee or Justin contacted her. Justin told her that he was taking Kaylee to Texas and refused to give Caron his location. He had Kaylee call her back and tell her that she wanted to go to Texas. Kaylee also refused to disclose her location. The calls were "private" so there was no call-back number.

Criminal History

Caron does not have a significant criminal history, other than her arrest for violation of the truancy laws for failing to get Kaylee to school, and the harassment against Justin.

I asked her about the harassment. Caron said she was trying to call Kaylee because she was very upset. Because Justin's mailbox was full, she would call 5 times in quick succession in the hopes that it would get his attention. She did that maybe 4 times. She never spoke to him and never left him a message.

Caron stated that Justin calls her, in violation of the no-contact order.

Kaylee's Attendance

Caron stated that before Justin took her in September of 2017, Kaylee was never belligerent or violent. Since that time, however, Kaylee has treated her terribly. She has said mean things ("I wish you were dead", etc.) and been physically violent – kicking, punching, pulling hair, etc. (This behavior was confirmed by Toby Mitchell, Truancy Officer for the Ottumwa Community School District, who witnessed Kaylee violently push Caron into a wall, knocking her down).

Caron took Kaylee to a psychiatrist who diagnosed her with anxiety and prescribed Zoloft. Since starting the Zoloft Kaylee is "almost back to normal – back to the baby I knew."

Caron blames the anxiety for Kaylee's absences. She goes to school, but she is always late. Caron says that she gets up at 6:30, trying to get her to go. She had Toby Mitchell taking her to school for a time, but that made things worse. She claims that Toby got a little violent with Kaylee, dragging her by the arm.

Tracy Dyer

I asked Caron about her brother Tracy. She denied that he resides at the house, but admitted that he stays there from time to time, sleeping on the dining room floor. She admitted that he smokes a lot of marijuana, but denies that he as ever done so around Kaylee.

Caron's Depression

I asked Caron about her depression following Justin's departure, which was mentioned in the affidavits from her own witnesses. She was very frank about being broken-hearted by his departure, as well as about her continued love for him. She stated that she was treated by Dr. Jimmy Mascaro for 2 years at Southern Iowa Mental Health, but he kept increasing her medication, which made her feel worse. She now sees Rebecca Bowman at River Hills. She is now on a couple of depression medicines. She does well, except when she thinks about Justin. She still loves him, and he is the love of her life. She admits that she is not over him.

Kaylee's Wishes

I told Caron that Kaylee had stated to me that she wants to live with her dad. I asked her why Kaylee would say that. Caron opined it was because she's a daddy's girl, and Justin promised to pay her $50 per week.

Other Miscellaneous

I asked Caron what else she wanted me to know. She wanted me to know that Justin is a felon, and he has four guns in his house in Texas. She claimed there is a loaded gun in Deanna's glove compartment, and she showed me a picture of Kaylee shooting a gun with Justin.

She also told me that Justin has 50 animals in a 2 bedroom trailer, including 20 chickens, 3 ducks, and 7 dogs. She also noted that he got a new full sleeve tattoo on his arm in May, and owns two trucks and two Harley Davidson motorcycles, yet is $2000 behind on child support.

Skype "Home Visit" with Justin Bowen, June 11, 2019

Because Justin Bowen lives in Texas, I was unable to perform an in-person home visit. Instead I arranged to do a video conference using Skype. On June 11, 2019, I connected with Justin on Skype and he gave me a tour of his mobile home. It appeared to be clean and tidy. There were numerous animals in the house, including birds and lizards, but they all appeared to be in clean cages and terraria. The home had a spacious fenced yard where the chickens and

ducks were in appropriate coops. Justin and Deanna's dogs had cages in their bedroom. Overall the house appeared to be clean, tidy, and well maintained. There was a large number of animals inside and out of the house, but they appeared to be well taken care of and not messy.

Justin showed me Kaylee's room and her separate bathroom, both of which appeared to be clean and appropriate.

Inteview with Deanna Bowen, June 11, 2019

I briefly interviewed Deanna Bowen via Skype as she was present when Justin was giving me the home visit.

I asked her if she was a drug user. She told me she was not.

I also asked her if she had her children taken away from her. She denied that as well. She stated that she had her children for two years after she divorced her husband, but after two years voluntarily ceded custody to him. She told me that she continued to have every other weekend visitation with them.

I decided to check court records to see if they reflected the history Deanna related to me. I obtained documents from the court file of In re Marriage of Yeoman, CDCV001741 (Jefferson County). These documents do reflect the initial divorce and subsequent modification as described by Deanna. However, a child support modification was filed by Deanna's ex-husband in 2001. Deanna did not appear or participate in that action, and at trial the court found that Deanna had "not had contact with the children for the last several months." It should be noted that she was married to Justin Bowen at this time.

Phone interview with Chelsea Matthis, June 12, 2019

I spoke with Chelsea Mathis by telephone the evening of June 12, 2019.

Chelsea is Caron's adult daughter from a prior relationship. Justin was in the home for the latter part of her childhood. She is a registered nurse presently residing in Knoxville, Iowa. She had two children, a 10 year old daughter and an 8-month old baby.

I asked her what resolution she thought would be in the best interests of Kaylee. She stated that this was hard for her. She feels that they both love Kaylee. But she does not feel that Kaylee is maturing under the care of her mother.

I asked her why she thought this. She shared that after she was raped at the age of 13, Caron became a "hover-mom." Caron blames herself for the rape. As a result of this, she has "babied" Kaylee. Chelsea illustrated this by comparing her own parenting style with Caron's. Chelsea lets her daughter ride her bike and play around their neighborhood. Caron, on the other hand, does not allow Kaylee to be outside without Caron there, and does not let Kaylee stay at friend's houses.

Chelsea is concerned that Kaylee used to be in TAG, but now barely gets to school. She believes Kaylee is smart. Chelsea told me that she relates to Kaylee more as an adult figure than as a sister. Chelsea believes that Kaylee will have a life at Justin's house. She will get out, go to school, and make friends. Chelsea stated that things cannot get much worse at Caron's house. For those reasons, Chelsea supports placing Kaylee with Justin.

Chelsea stated that she maintains a good relationship with Justin. She thinks of him as her dad. She has contact with him at least every week. She states that he has always been there for her.

I asked her if she thought Justin was on drugs, either now or in the past. She does not think so. She does not do drugs, but she has observed her drug addicted uncles. Based on those observations, she does not believe that Justin is on drugs.

October 2017

I asked Chelsea about her involvement in the events of October 2017. She told me that she was "110% reassured" by Justin that he was not going to take Kaylee. He just asked to see her. She was aware that Caron had been continually asking Justin to take her back, and would not let him see or speak to Kaylee without forcing a confrontation of that issue.

She was at work, as she worked nights at the time, when Caron called her in a panic. Chelsea contacted Kaylee an asked her to just call her mother and let her know she was okay. Kaylee called her back and stated she called her mother and tried to reassure her, but Caron just wanted to talk to Justin. Kaylee told Chelse, "mom doesn't care about me. I want to go with dad."

Phone conference with Toby Mitchell, June 13, 2019.

I spoke with truancy officer Toby Mitchell on the telephone on June 13, 2019.

Toby informed me that there is an undelivered warrant for Caron's arrest for another truancy violation. Apparently it has been undelivered for quite some time due to a backlog at the sheriff's department, along with the low priority assigned to truancy warrants. Acccording to Toby, this would be Caron's 3rd offense, thought the 2nd offense is still "stuck in court."

Per Toby, Kaylee rolls into school whenever she feels like it. She did very well last year because Toby brought her to school every day. Toby stated that she did the parenting and got Kaylee out of bed every day. On one occasion she observed Caron attempt to parent Kaylee and discipline her by taking her phone as punishment. Kaylee became violent and roughly pushed Caron to the ground. Toby believes that Kaylee "runs the show", and pits mother against father. Toby admitted that she does not know much about Justin. She had contact with him last year, but not this year. She did witness Caron denigrating Justin to Kaylee.

Attempt to obtain Drug Tests from Health Innovations

During my interview with Caron, she told me that Texas DHS had required Deanna and Justin to submit to drug tests, but those test results were never released. Caron gave me the number of "Sharon" at Health Innovations, a Texas clinic that performed the drug tests. I contacted Health Innovations to ask what they would need in order to release the drug tests. They stated that they would need a court order. My order of appointment was not specific enough to grant access to those records. Because of the impending deadline for this report, I did not pursue this matter further.

It should be noted that Caron has repeatedly accused Deanna and Justin of being on drugs, and this evidence could potentially confirm her accusations. If the Court wishes for me to obtain those results I can do so if it issues an order authorizing their release to me.

Analysis, Conclusion, and Recommendations

My recommendation is that K.B. be placed in her father's physical care. Kaylee should have visits with her mother over Christmas break, spring break, and the majority of the summer. Justin should be responsible for all transportation related to visits. Caron should have free and unfettered phone and video access to Kaylee.

Despite this recommendation, I reserve significant concerns about Justin. His precipitous departure from Caron's and Kaylee's life was selfish and troubling. He chose to pursue his romantic interests over his responsibility as a father. His deceptive unilateral decision to remove Kaylee to Texas in 2017 is inexcusable and indefensible. I am concerned about his ability to treat Caron respectfully as a co-parent going forward, though Caron bears some responsibility by her inability to move past their break-up. Finally, though it was nearly 20 years ago, his poor performance while on parole adds to the concern that he will not respect a court order. Going forward, the Court should not tolerate any failure by Justin to satisfy his obligations regarding Caron's parenting rights. His leash should be very short. I am also concerned by the discrepancies between Deanna's description of her history with her own children and the history reflected in her divorce file.

My recommendation is made based upon the weight of evidence that Kaylee will have a better chance of success going forward if she lives with her father.

- In her mother's custody, Kaylee's school attendance is chronically terrible. Kaylee bears, and accepts, a lot of responsibility for that, but at the end of the day her education is Caron's responsibility. In her depressed and low functioning condition, Caron has proven unable to shoulder that burden.

- Kaylee's own statements about her desire to live with her father, and her reasons for that desire, are persuasive. She described a calmer, cleaner, and more stable environment at her father's house. She described her mother's depression, and how it has negatively affected their relationship. She described her mother's animosity towards Justin and Deanna, and how Caron "constantly" told Kaylee that they were drug addicts. I found

Kaylee to be clear-headed and mature. Her statements was corroborated by the statements of the other people I interviewed, including Caron.

- My interviews and my observation of Caron's house indicate that Caron has not been a highly functioning individual for quite some time. In her younger days she appears to have been an active and resilient woman, holding down jobs and raising children. Something changed along the way. She has not worked since 2007, when her mother died. According to all of the witnesses, including Caron herself, she has not been the same person since Justin's departure in 2016. Caron's home was smelly, dark, filthy, and filled with stuff. It was this way after my visit had been put off for a month, presumably so she could clean. Her inability to move on from the break-up has impeded her ability to parent Kaylee.

- Toby Mitchell's observations corroborated the concern that Caron is unable to effectively parent Kaylee. She described Kaylee as "running the show" and portrayed Caron as unable or unwilling to properly discipline her.

- Chelsea Mathis, Caron's daughter and Kaylee's half-sister, is well-positioned to observe the situation. Her opinion is that Kaylee would be betters served living with Justin. Caron successfully raised Chelsea to be a productive member of society, but Chelsea recognizes that Caron is not putting Kaylee on that same path. Instead, she "babies" Kaylee and is unable to hold her accountable.

- Justin's history of recreational drug use is a concern, but Caron's accusations against Justin and Deanna are unsubstantiated, and are contradicted by the observations of other witnesses.

- Caron's family, on the other hand, struggles with drug abuse issues, including her brother Tracy who frequently resides in her home, and has appeared in her home under the influence of drugs.

The bottom line is that the current living arrangement is not working. If Kaylee stays with Caron she is unlikely to complete high school, find employment, or ever do anything productive with her life. My hope is that placement with Justin will result in a different outcome. For all of these reasons, I recommend that Kaylee be placed in Justin's physical care.

APPENDIX- Documentary Evidence Obtained and Shared with Parties

	Full Name	Pages
	EVID-Pic Kaylee's Room 1-EVIDMOC20190509	1
	EVID-Aff of KB FS 8-29-18-EVIDMOC20190509	2
	EVID-Pic Kaylee's Medicine Cabinet-EVIDMOC20190509	1
	EVID-Ltr from Justin Bowen FS 1-10-18-EVIDMOC20190509	1
	EVID-Pic Kitchen 2-EVIDMOC20190509	1
	EVID-Aff of Sonya Tannreuther FS 11-13-17-EVIDMOC20190509	1
	EVID-Pic Kaylee's Room 3-EVIDMOC20190509	1
	EVID-Texts - Kaylee and Justin - Sept 2017-EVIDMOC20190614	2
	EVID-Pic Living Rm-EVIDMOC20190509	1
	EVID-Aff of Jackie Kalar FS 11-13-17-EVIDMOC20190509	1
	EVID-ICIS Report - Caron-EVIDMOC20190510	1
	EVID-Pic Kaylee's Room 2-EVIDMOC20190509	1
	EVID-Ltr from Justin Bowen FS 8-1-18-EVIDMOC20190509	3
	EVID-Pic Kaylee's Bathroom-EVIDMOC20190509	1
	EVID-Aff of KB FS 11-13-17-EVIDMOC20190509	1
	EVID-Aff of Justin Bowen FS 8-24-18-EVIDMOC20190509	2
	EVID-Stmt of Justin Bowen re Child Support & Excluding Filings FS 11-16-17-EVIDMOC20190509	1
	EVID-Pic Kitchen 1-EVIDMOC20190509	1
	EVID-Aff of Deanna Heronemus FS 11-9-17-EVIDMOC20190509	1
	EVID-Aff of Lori Williams FS 11-13-17-EVIDMOC20190509	1
	EVID-Aff of Justin Bowen FS 11-9-17-EVIDMOC20190509	1
	EVID-KBs School Records FS 11-9-17-EVIDMOC20190509	2
	EVID-ICIS - Bowen-EVIDMOC20190510	1
	EVID-Pic Front Entryway-EVIDMOC20190509	1
	EVID-Report Card & Attend Rec FS 11-13-17-EVIDMOC20190509	2
	EVID-KBs School Records FS 11-8-17-EVIDMOC20190509	17
	EVID-Withdrawal Transfer Form Evans FS 11-13-17-EVIDMOC20190509	1
	EX-Jeffrey Bowen Obituary - Centerville, Iowa _ Legacy.com-EXMOC20190514	1
	EVID-Attendance Rec FS 8-24-18-EVIDMOC20190509	2
	EVID-Aff of Tammy Ash FS 11-13-17-EVIDMOC20190509	1
	EVID-Warrant Wednesday July 4, 2018 – Ottumwa Post-EVIDMOC20190510	3

IN THE SUPREME COURT OF IOWA

No.: 17-1549

IN RE THE MARRIAGE OF MATTHEW JOHN VICKERS AND KATHRYN ANN VICKERS

Upon the Petition of MATTHEW JON VICKERS, Petitioner - Appellant, And Concerning KATHRYN ANN VICKERS, Respondent - Appellee.	)	CASE NO.: CDCV401501

APPEAL FROM THE DISTRICT COURT OF JEFFERSON COUNTY
HONORABLE MARY ANN BROWN
JUDGE OF THE EIGHTH JUDICIAL DISTRICT

PETITIONER-APPELLANT'S FINAL BRIEF AND ARGUMENT

Michael O. Carpenter
GAUMER, EMANUEL, CARPENTER & GOLDSMITH, P.C.
111 West Second Street
P.O. Box 601
Ottumwa, Iowa 52501-0601
Tele.: (641) 682-7579
Fax: (641) 682-6982
Email:moc@ottumwalaw.com
ATTORNEY FOR PETITIONER-APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules and Statutes **Page**

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The District Court erred by placing physical care of the children with Kathryn instead of Matthew.

A. Applicable legal standards for determining physical care.

In re Marriage of Wiedner, 338 N.W.2d 351 (Iowa 1983)

In re Marriage of Winter, 223 N.W.2d 165 (Iowa 1974)

In re Marriage of Williams, 589 N.W.2d 759 (Iowa Ct. App. 1998)

In re Marriage of Ullerich, 367 N.W.2d 297 (Iowa Ct. App. 1985)

In re Marriage of Kunkel, 555 N.W.2d 250 (Iowa Ct. App. 1996)

In re Marriage of Shanklin, 484 N.W.2d 618 (Iowa Ct. App. 1992)

In re Marriage of Rosenfeld, 524 N.W.2d 212 (Iowa Ct. App. 1994)

In re Marriage of Abkes, 460 N.W.2d 184 (Iowa Ct. App 1990)

In re Marriage of Nelson, 2003 WL 1970399 (Iowa Ct. App. 2003)

In re Marriage of Quirk-Edwards, 509 N.W.2d 476 (Iowa 1993)

In re Marriage of Gravatt, 371 N.W.2d 836 (Iowa Ct. App. 1985)

In re Marriage of Winneke, 497 N.W.2d 170 (Iowa Ct. App. 1992)

Nicolou v. Clements, 516 N.W.2d 905 (Iowa Ct. App. 1994)

In re Marriage of Udelhofen, 444 N.W.2d 473 (Iowa 1989)

In re Marriage of Leyda, 355 N.W.2d 862 (Iowa 1984)

In re Marriage of Wedemeyer, 475 N.W.2d 657 (Iowa Ct. App. 1991)

In re Marriage of Downing, 432 N.W.2d 692 (Iowa Ct. App. 1988)

In re Marrage of Barry, 588 N.W.2d 711 (Iowa Ct. App. 1998)

In re Marriage of Daniels, 568 N.W.2d 51 (Iowa Ct. App. 1997)

In re Marriage of Brainard, 523 N.W.2d 611 (Iowa Ct. App. 1994)

Iowa Code § 598.41

Iowa Code § 598.1(1)

B. Kathryn persistently sought to destroy the relationship between Matthew and the children.

C. Matthew never endangered the children by abusing alcohol.

D. Matthew never domestically assaulted Kathryn, and Kathryn only used these allegations in order to alienate Matthew from the children.

E. Matthew was never sexually inappropriate with the children. Kathryn's "concerns" were used by her for the sole purpose of destroying Matthew's parental rights.

F. Kathryn manipulated and exaggerated O.V.'s illnesses in an attempt to stop her from visiting Matthew.

G. Kathryn manipulated her job search in order to justify a move away from Iowa.

H. Kathryn has a demonstrated history of subjecting her children and loved ones to emotional abuse.

I. Matthew has demonstrated that he will foster Kathryn's relationship with the children despite their acrimonious past.

In re Marriage of Shanklin, 484 N.W.2d 618 (Iowa Ct. App. 1992)

Iowa Code § 598.41(1)(a)

J. Matthew is able to provide a safe and stable home for the children.

K. Matthew's shortcomings are not equivalent to Kathryn's.

In re Marriage of Rebouche, 587 N.W.2d 795 (Iowa Ct. App. 1998)

ROUTING STATEMENT

This case should be transferred to the Court of Appeals because there is no basis for the Supreme Court to retain this case for appellate review, and it involves questions that can be resolved by applying existing legal principles. *See* Iowa Appellate Procedure Rule 6.1101.

STATEMENT OF THE CASE

Nature of the Case

This is an appeal of a decree dissolving the marriage between Petitioner/Appellant Matthew Vickers ("Matthew") and Respondent/Appellee Kathryn Vickers ("Kathryn"). (App. vol. I at 79). This appeal is from a final order. *See* Iowa R. App. P. 6.103(1). Matthew appeals the district court's ruling placing physical care of the minor children with Kathryn.

Course of Proceedings

Matthew and Kathryn were married on September 5, 2000. (Tr. Vol. I, p. 57). The parties separated on January 11, 2016, when Kathryn obtained a no-contact order by filing a Chapter 236 domestic abuse claim. (Tr. Vol I, p.142:19-143:3). At the time of separation, the parties had two children: V.V., born in 2012, and O.V., born in 2014. (App. vol. I, at 0).

Matthew filed the Petition initiating this action on January 18, 2016. (App. vol. I at 10).

Kathryn accepted service of the Petition for Dissolution through her first attorney, Terri Quartucci, on January 27, 2016. (App. vol. I at 13). Ms. Quartucci's appearance was withdrawn on February 4, 2016. (App. vol. I at 14-16). Kathryn's second counsel, Paul Miller, filed an Answer on Kathryn's behalf on February 29, 2016. (App. vol. I at 18-19). On March 9, 2016, Kathryn's third lawyer, Sarah James, filed her appearance (App. vol. I at 20), and Paul Miller's appearance was withdrawn that same day. (App. vol. I at 21). Attorney James filed an Amended Answer on March 14, 2016. (App. vol. I at 23-26).

The parties attended mediation on April 5, 2016. (App. vol. I at 27). The next day Matthew filed a Motion for Hearing on Temporary Matters, requesting temporary physical care of the children. (App. vol. I at 28). The court entered a temporary order on May 16, 2016, placing physical care of the minor children with Kathryn and awarding Matthew visitation every other weekend and every Wednesday, as well as alternating holidays. (App. vol. I at 57-58).

On August 8, 2016, attorney James filed a Motion to Withdraw (App. vol. I at 64-65), and her appearance was withdrawn that same day. (Order Allowing Withdrawal). On August 15, 2016, Kathryn's fourth attorney, Michael Brown,

entered his appearance. (App. vol. I at 66). On December 2, 2016, Kathryn's fifth and final attorney, Allison Heffern, filed her appearance. (App. vol. I at 69).

Trial commenced on April 11, 2017 and lasted four days. (Tr. Vol 1, p.1; Tr. Vol IV, p.1). On July 25, 2017, Judge Mary Ann Brown entered a Decree of Dissolution that placed physical care of the minor children with Kathryn. (App. vol. I at 100). Kathryn filed a Rule 1.904(2) motion on August 9, 2017 (App. vol. I at 111), which was ruled on by the court on September 14, 2017. (App. vol. I at 115). This appeal followed by the timely filing of a Notice of Appeal on September 28, 2017 by Matthew (App. vol. I at 122).

STATEMENT OF THE FACTS

Matthew Vickers was born in 1970 and grew up in Greene, Iowa. (Tr. Vol I., 13:9-10, 14:20-21). His father was a lawyer and magistrate. (Tr. Vol I. 15:8-10). His mother was a nurse until she chose to stay at home and raise Matthew and his siblings. (Tr. Vol I. 15:10-12). Matthew had a happy childhood. (Id. 17:12-13). His parents owned an acreage that they operated as a hobby farm, and Matthew learned the benefits of hard work at an early age by doing chores on the farm. (Id. 16:9-17:2).

Matthew graduated from Greene High School in 1988 in a graduating class of 36 students. (Tr. Vol I, p.17:3-5). After graduation, he attended Iowa State University from 1988 through 1994. (Id., 17:18-20). Matthew was approximately ten credits short of earning his degree when he left school in order to work as a golf professional. (Tr. Vol I, p.18:7-21; Tr. Vol I, p.18:21-19:4). Unhappy with his low salary, Matthew switched careers in 1998 when he joined the Marriott Corporation as a salesman of vacation timeshares. (Tr. Vol I, p.19:7-20:5). In 2000, he took another position selling vacation timeshares in Scottsdale, Arizona, (Tr. Vol I, p.21:3-9), and later transitioned to a job selling golf vacations. (Tr. Vol I, p.22:23-23:6). After the attacks of September 11, 2001 resulted in the elimination of his position, Matthew decided on another career change, taking a job as a financial advisor for American Express Financial Advisors in 2002. (Tr. Vol I, p.25:5-6, p.24:24-5).

Matthew had found his calling, and he achieved great success at American Express. Within three months he was promoted to District Manager. (Tr. Vol I, p.26:24-27:1). Matthew was a high achiever and worked incredibly hard, stating that "[i]t was rare for me to work less than 70 hours a week." (Tr. Vol I, p.28:12-13). During his tenure there, he won several awards and was rated in the top ten, out of over five hundred, district managers. (Tr. Vol I, p.28:5-9). He eventually

hit a ceiling at American Express, and after being denied a promotion to Field Vice President, Matthew was recruited by Waddell & Reed for a similar position in March of 2008. (Tr. Vol I, p.29:9-31:20).

Matthew accepted the job at Waddell & Reed and was given a division in southern Arizona that was "rated number 108 out of 108 [divisions], which is the wrong side of the coin to be rated." (Tr. Vol I, p.32:4-6). Mathew began in June of 2008, and, through "a lot of hard work," managed to improve the division to "number seven out of 108 division." (Tr. Vol I, p.32:10-14).

Though Matthew worked long hours, he wanted more out of life. He harbored dreams of starting a family. "You know, I grew up in a . . . very good family. . . . I respect my parents very much. I mean, they did a great job of raising us, and, you know, I wanted the ability to be able to have that type of relationship, and I wanted the ability to become a father, so I thought about that a lot." (Tr. Vol I, p.35:24-36:5).

In February of 2009, Matthew met Kathryn Stewart. (Tr. Vol I, p.42:13-15). At the time, Matthew was 38 years old, and Kathryn was 8 years his junior. (Tr. Vol I, p.13) Kathryn had been married and divorced before. (Tr. Vol II, p.144:1-3). Matthew was still working 60 to 70 hours a week, and Kathryn was living with

her parents and finishing up coursework in hopes of entering a master's program for speech pathology. (Tr. Vol I, p.43:19-25).

Kathryn was born in New York City and grew up in Scarsdale, New York. (Tr. Vol III, p.45:16-8). Both of her parents worked full time, and she was cared for by au pairs and nannies. (Tr. Vol III, p.45:19-46:9). After high school, Kathryn attended Agnes Scott College, an all women's college in Georgia. (Tr. Vol II, p.3-10). Upon graduation, Kathryn worked for a short stint at Enterprise Rent-A-Car but ended that employment because she was "not a good driver." (Tr. Vol II, p.142:3). After that, Kathryn worked several years "in the lending business." (Tr. Vol II, p.142:18-24). She lived for a time in Oklahoma where she was involved in a short-term marriage that dissolved in less than one year. (Tr. Vol II, p.5-10). At some point, she returned to Arizona in order to live with her parents. (Tr. Vol I, p.43:19-25).

Matthew and Kathryn dated casually for 4-6 months in 2009, after which the relationship escalated, and Kathryn moved in with Matthew. (Tr. Vol I, p.45:25-46:8). In the spring of 2010, Matthew and Kathryn became engaged. (Tr. Vol I, p.46:15-16). During the engagement, Matthew developed concerns about Kathryn's temper. "I had concerns about her temper. I had concerns about . . . how she reacted to problems. . . . Her emotional response when she would get

upset would never match what she was getting upset about . . . ." (Tr. Vol I, p.47:14-23). "She was angry . . . she was yelling. She was screaming. She was very angry. . . . [L]ater, that turned into tears . . ." (Tr. Vol I, p.48:21-25) "Once a week to once every two weeks, she would get upset at that level about something." (Tr. Vol I, p.49:7-9).

Matthew reacted to Kathryn's outbursts by seeking to "understand what was wrong . . . I was always seeking to understand and approach it from a standpoint of, you know, look, I don't want your feelings to be hurt, I don't want you to be hurt, why are you so hurt about whatever it is that's going on. That's how I approached it all the way through us getting married." (Tr. Vol I, p.49:12-22). Kathryn's erratic emotional outbursts sparked a cycle of conflict that would define, and ultimately destroy, their marriage.

Matthew and Kathryn were married on September 5, 2010. (Tr. Vol I, p.57:5).

The parties had difficulty conceiving a child. (Tr. Vol I, p.58:22-59:6). Through the use of artificial insemination, Kathryn became pregnant in the fall of 2011. (Tr. Vol I, p.59:5-6). Their first child, V.V., was born in 2012. (Tr. Vol I, p.59:7-8). The birth of V.V. fulfilled a life-long dream of Matthew's, and it had a profound effect on him. "[It was] life changing. To be able to see her face and

eyes and hear her cry and to – to know that I was her dad. It was life changing for me. It was the – it was the most beautiful thing I had ever seen." (Tr. Vol I, p.64:3-7). Though Matthew continued to work, he was a very involved father. (Tr. Vol I, p.70:9-10).

Following V.V.'s birth, Kathryn's anger and aggressive behavior suddenly intensified. (Tr. Vol I, p.72:16-20) At trial, both parties described a cycle of reaction that characterized the conflict in the marriage. Kathryn's feelings would become hurt, and she would react by yelling and screaming at Matthew. (Tr. Vol I, p.71:14-15). Rather than match her volume and ferocity, Matthew would attempt to calmly understand why she was "hurt as badly as she claimed." (Tr. Vol I, p.71:15-17; 73:4-74:6; *See also* App. vol. I at 127, 130, and 132). Kathryn interpreted this as Matthew emotionally withdrawing from her. (Tr. Vol III, p.47:2-10) She would respond to his withdrawal by further escalating her verbal assault. (*See* Ex. 10 and 11).

Prior to the birth of V.V., these encounters occurred between once per week or once every other week. (Tr. Vol I, p.49:7-9). After V.V.'s birth, "it was on an every day to every other day basis, and in the following months, you know, from the fall of 2012 to the spring of 2013, it got to the point where it was every single

day, multiple times a day." (Tr. Vol I, p.73:14-18). Sometimes the fights would last for days. (Tr. Vol I, p.73:19-21).

Fortunately, the record reveals the full scope and fury of Kathryn's verbal attacks for review by this Court. (*See* Exhibits 10 and 11). Though these exhibits are recordings from October of 2015, they are similar to the conflict that occurred from 2012 through 2014. (Tr. Vol I, p.77:5-17) "The difference in '12 and '13 was that there was a lot more screaming [than in 2015]. There was just a lot more." (Tr. Vol I, p.75:14-15). "[N]o matter what I tried to do when she would get like that, to appease, it just – it was ineffective. She would keep on the attack. . . . It was a constant battle." (Tr. Vol I, p.78:17-25).

As part of her verbal assaults, Kathryn often leveled bizarre accusations against Matthew. For example, in late 2012 or early 2013, she accused Matthew of attempting to poison V.V. by failing to properly rinse her formula bottles. (Tr. Vol I, p.78:24-79:5). Kathryn continued to make this accusation against Matthew over the course of subsequent fights. (Tr. Vol I, p.80:2-7). "[S]he would pull that stuff back out of the bag, you know, as an arrow to shoot at me." (*Id*.). In fact, Kathryn can be heard referencing this incident in the recording from October 2015, more than two years later. (Ex. 11).

The pressure of these constant attacks took a toll on Matthew. "It was extremely, extremely stressful. It – it affected me in the sense that I got depressed. I questioned my . . . I questioned myself a lot. I questioned my sanity. I question – I was constantly looking for what – what can I do to get some relief from this; what can I do to – to make this better. . . . . [I]t affected me physically. . . . I was super tired. I started to get overweight." (Tr. Vol I, p.74:9-16). Worse, it began to affect Matthew's relationship with alcohol. "I then made the awful mistake to try to self-medicate, because at that point in time, not only was I dealing with the stress on a daily basis of having my wife screaming at me when I'm walking out of the house, screaming at me when I walk into the house, screaming at me at two o'clock in the morning about a myriad of things, but I was also dealing with increased pressure at work, . . . to continually perform, to repeat what I did . . . to maintain it. . . . That is where I made the choice, the very poor choice, to self-medicate . . . as a way to just kind of numb myself from all of that." (Tr. Vol I, p.74:18-75:6).

As an adult, Matthew consumed, and occasionally abused, alcohol. "When I was in my 20's, my relationship with alcohol was it was a social thing." (Tr. Vol I, p.39:7-9). "My relationship with alcohol changed when I was in my 30's . . . it evolved into a stress reliever." (Tr. Vol I, p.39:20-40:12.) In 1992, when Matthew

was attending Iowa State, he was charged with an OWI. (Tr. Vol I, p.36:9-16). In 2002, Matthew was involved in a second OWI in Arizona in which he wrecked his vehicle on a highway. (Tr. Vol I, p.37:10-38:6).

In 2013, Matthew's self-medication took the form of drinking beer before or during his work day to calm his nerves. "I'm completely stressed out . . . I need something to calm me down, and I stopped at, you know, a gas station on the way to work, and I went in and I bought a couple … of beers…and when I got to work …I sat in the parking lot and I just drank them and went into work." (Tr. Vol I, p.75:18:-76:1). He would often drink a couple of beers alone in his car over the lunch hour and return to work. (Tr. Vol I, p.80:16-21). In June of 2013, Matthew's use of alcohol was noticed at the office, and he received a reprimand. (Tr. Vol I, p.80:13; App. vol. I at 228). In response, Matthew changed his behaviors, but he did not stop drinking. "I changed the way that I was self-medicating. I negotiated with myself, because there was a …somewhat of a blurry line with my role and alcohol." (Tr. Vol I, p.81:1-3). Part of the culture at Waddell & Reed allowed for social alcohol use at work events, or while doing business outside of work hours, and Matthew sought to take advantage of these opportunities in order to continue to abuse alcohol. (Tr. Vol I, p.81:4-82:3).

Kathryn's verbally aggressive and assaultive behavior continued to escalate during 2013. The December 14 and 15 of 2013 weekend involved some particularly intense arguing. (Tr. Vol I, p.83:10-12). On Sunday, December 15,, an argument broke out when Kathryn came home to discover Matthew drinking a beer and watching golf. (Tr. Vol I, p.83:13-84:15). For three hours, Kathryn hurled invective at Matthew while holding V.V. (*Id*.) "I tried to own it on my side [and] then … towards the end … it had gotten so personal and there was so many attacks coming my way that I, you know, stood up for myself at that point …. I just wasn't apologizing, and I was arguing back, and at that point she threatened to call 9-1-1 on me." (Tr. Vol I, p.84:9-15).

Kathryn followed through on her threat, and Matthew was arrested. (Tr. Vol I, p.85:2-86:4). Kathryn told the police that she did not want them to arrest Matthew, "she only wanted him to be talked to." (App. vol. I at 290) There was no protective order issued, and Kathryn picked Matthew up from jail the next morning. (Tr. Vol I, p.86:5-10). The charges were eventually dropped after Kathryn wrote a letter to the prosecutor asserting that there was no domestic violence. (App. vol. I at 125-126).

On March of 2014, Matthew's continued abuse of alcohol finally caught up to him at Waddell & Reed. "[O]n the day in question, I went to work. We

[Kathryn and I] were having another big fight. I had a beer over lunch, went back into work." (Tr. Vol I, p.88:4-6). One of Matthew's co-workers informed his boss, who asked him to take a urine test. Matthew refused, and was terminated. (Tr. Vol I, p.88:4-11).

Matthew continued to abuse alcohol for a few weeks after the termination. (Tr. Vol I, p. 92:9-23). However, he soon began the process of looking for a new job, and it was not long before he received an offer to join Cambridge in Fairfield, Iowa. (Tr. Vol I, p.89:13-19). This new opportunity offered some significant advantages over his prior employment: "[it] would allow us to be able to live closer to my side of the family, give my daughters access to that. It would provide my daughters and us the ability to have a small-town-type environment that they could grow up in, just like I did. … With this offer, it was 8:00 to 5:00 … with limited travel." (Tr. Vol I, p.90:18-91:2). After receiving Kathryn's approval for the move, Matthew accepted the job. (Tr. Vol I, p.90:9-15).

In June of 2014, Matthew moved to Fairfield and began working at Cambridge. (Tr. Vol I, p.91:8-14). Kathryn and V.V. followed four weeks later. (Tr. Vol I, p.91:13-15). Matthew stopped abusing alcohol at this time, and he never returned to his self-medicating ways. "When I relocated to Fairfield and took the job with Cambridge, that was kind of a new start, and I made the

commitment that … I wasn't going to have alcohol consumption affect my work, and so from that point going forward, I had no instances of … drinking while I should be working, drinking and going into work …. I no longer felt the need to do that." (Tr. Vol I, p.92:12-25)

The parties' second child, O.V., was born in Fairfield in 2014. (Petition). Given their prior fertility difficulties, O.V. was not planned. (Tr. Vol II, p.125:11-14). In Arizona, Kathryn had been working part-time. (Tr. Vol II, p.19-22). Even when she had only V.V. to care for, Kathryn required a great deal of assistance in parenting her child; her mother came to the home three to four times per week, (Tr. Vol IV, p.57:1-8) and she also employed a babysitter named Marlene. (Tr. Vol II, p.178:17-19). Four months after O.V.'s birth, Kathryn resumed part-time work as a speech pathologist. (Tr. Vol II, p.182:20-183:11) Kathryn employed a local girl, Lexi Fortin, as a babysitter, and often had her over even when Kathryn was at home. (Tr. Vol IV, p.199:13-25).

In February of 2015, the Vickers returned to Arizona for the wedding of one of Matthew's former employees. (Tr. Vol I, p.123:8-10). The original plan was for Matthew to stay the weekend and return to Iowa on Monday. (Tr. Vol I, p.123:11-15). Kathryn and the children had plane tickets booked for the following week. (Tr. Vol I, p.123:18-20). However, Kathryn "had another emotional

outburst prior to that trip. … [W]e signed documents on a Friday to purchase [a] house, and then on Sunday, 48 hours later, my wife has a complete emotional meltdown stating that she can't – that she doesn't want to live in Fairfield; I need to resign my job and start looking for other opportunities; she wants to move back to Tucson." (Tr. Vol I, p.123:25-124:8).

Kathryn refused to return to Iowa with the children, and refused to tell Matthew when or if she was coming back. (Tr. Vol I, p.125:7-15). "[T]hings got more contentious between my wife and I. She continually did not give me a time frame as to when she would be back with the kids. She repeatedly made mention, you know, if you really want to see the kids, why don't you instead come down to Tucson; why don't you instead relocate down here. She made mention that she was starting to look for schools down there to put V.[V.] in. … [S]he was giving more and more indication that … she's not coming back, and if I wanted to see my kids and if I wanted to get her back, that I would need to move down there." (Tr. Vol I, p.125:8-23). The parties engaged in counseling with a Tucson counselor, and Kathryn agreed to return to Iowa after two months in April of 2015. (Tr. Vol I, p.125:24-126:8).

When Kathryn and the children returned to Fairfield, Matthew and Kathryn had a visit with V.V.'s pediatrician, Dr. Jay Heitsman, to discuss some disturbing

behaviors that V.V. had exhibited for some time. (Tr. Vol I, p.105:13-106:2). "V.[V.] has a security blanket toy which is a blanket with a cow's head on it that she call Moo-Moo … and she started exhibiting what we came to phrase humping Moo-Moo sometime in the latter part of 2013, so she was just over a year old." (Tr. Vol I, p.105:23-106:2). Dr. Heitsman related the behaviors to stress and told them that it was normal. (Tr. Vol I, p.106:9-13). Matthew did not relay to Dr. Heitsman that, during this time period, V.V. had been exposed to the daily verbal assaults on Matthew from Kathryn, though he believed that V.V.'s behaviors were a result of this exposure. (Tr. Vol I, p.107:4-7; Tr. Vol I, p. 159:3-7 ("I observed multiple times that when we would – when my wife and I would be in that cycle that V[.V.] would retreat to her room, go to her bed, lay down on her stomach, and do that with her Moo-Moo.")).

After Kathryn's return, the couple began to see Dr. Scott Terry for counseling. Dr. Terry became a significant figure for Matthew; Dr. Terry's counseling helped Matthew understand his relationship with alcohol, to overcome this history, and stay "clean." (Tr. Vol IV, p.135:11-137:20; Tr. Vol I, p.93:15-20).

Despite the fact that Matthew was no longer abusing alcohol and was working fewer hours, the marriage continued to rapidly deteriorate. In desperation,

Matthew began to secretly record Kathryn's outbursts. "My reasoning for doing that was I could play those incidents in individual sessions with Dr. Scott Terry to be able to have him be able to hear what was going on and then help me with regards to how can I do better when this stuff happens . . ." (Tr. Vol I, p.108:3-8).

On the morning of October 1, 2015, Matthew recorded one of Kathryn's verbal assaults. (Ex. 10, Tr. Vol I, p.107:19-21). This time he informed her that he was recording her. (Tr. Vol I, p.108:12-16). "My hope was that if she would listen to this and see how dysfunctional this was, that she could recognize and be able to change [her] behavior." (Tr. Vol I, p.108:22-25). Matthew later emailed the recording to both Dr. Terry and Kathryn. (App. vol. I at 135). This tape must be listened to, as words do not do it justice. The basis of the fight was Kathryn's displeasure that Matthew had taken a couple of steps away from the parties' king-sized bed while O.V., age one, was resting in the middle of it. (Tr. Vol I, p.110:14-112:17). The tape begins with Kathryn's repeated, angry demands that Matthew admit that he put O.V. in danger and that he agree never to do so again. Matthew responds calmly, informing her that he is recording her and repeatedly asking Kathryn not to have this argument in front of the children. Kathryn demands that Matthew move out of the house. She tells him to leave and never come back. She begins taking his clothes out of his dresser and depositing them on the porch.

What is particularly disturbing is that throughout the recording V.V., age four at this time, and O.V. are both present to witness Kathryn's assault. You can hear V. V. interact with both of the parties. You can hear V.V. weep. It is only with great difficulty that Matthew is eventually able to extract himself from the house, half dressed, in order to take V.V. to school. (Ex. 10).

Exhibit 11, recorded under similar circumstances ten days later, on October 11, reveals that the events of October 1 were hardly isolated. Again, Kathryn continued her vicious verbal assaults on Matthew, all in full view of the children. (Ex. 11).

It should be noted that in neither of these tapes does Kathryn ever reference Matthew's use of alcohol as a source of concern or discord, nor does she mention any sexual impropriety between Matthew and V.V.

For Matthew, the final straw came on Christmas Eve, 2015. The Vickers were visiting Matthew's family – his siblings, their children, and his parents -- in Omaha. (Tr. Vol I, p.127:1-3). The families had dinner on Christmas Eve at the home of Matthew's sister. (Tr. Vol I, p.127:13-16). The weather was icy. (Tr. Vol I, p.129:11-13). Kathryn's anxiety level was high, and she screamed at Matthew during the car ride to his sister's. "On the way there, she was screaming at me primarily about staying behind my brother, keeping up with him, but at the

same point in time, she was also screaming at me about driving her car, in fact that I should be in a lower gear than I was in. This is an automatic minivan. So at one point, I said, well, then if you want me to be in a lower gear, let me just shift to a lower gear, and then she screamed at me that I was wrecking her transmission." (Tr. Vol I, p.131:12-21). When they arrived at his sister's, Matthew had a half of a glass of wine with dinner. (Tr. Vol I, p.128:11-17). Before they left, Kathryn asked Matthew if he was going to be okay to drive, and Matthew responded, "this is still my first glass of wine; this is all I'm having." (Tr. Vol I, p.129:1-4).

The trip back to Matthew's brothers' home, where they were staying, was similar to the earlier ride, with Kathryn screaming and yelling at Matthew while the children sat in the back of the car. (Tr. Vol I, p.131:22-132:17). Kathryn admitted that she "reached over in the car and was honking the horn and I was probably yelling . . ." (Tr. Vol III, p.22:3-4). His brother's house was on a steep hill, and the road was bisected by a median. (Tr. Vol III, p.140:1-18). In normal weather, a vehicle would have to execute a U-turn at the bottom of the hill then proceed back uphill in order to reach the driveway. (*Id*.) Given the icy conditions, Matthew's brother, Stephen, decided to go downhill the wrong way on the other side of the median for a short ways and turn left into the driveway. (Tr. Vol III,

p.140:21-25). Matthew did the same thing. (Tr. Vol I, p.132:7-17). Matthew was able to park the van without incident or damage. (Tr. Vol I, p.132:18-19).

Once inside the house, Kathryn continued to attack Matthew. "I was as close as I had ever been at that point to saying I'm done with this relationship, because if you can't keep yourself in check and have a way to deal with your issues in a non-dysfunctional way in front of your kids on Christmas Eve, I don't – I don't know how I can stay in this relationship. I don't know how this gets fixed." (Tr. Vol I, p.133:6-12).

The events of Christmas Eve, 2015 were a turning point for Matthew. (Tr. Vol I, p. 136:16-22). That night, Matthew had a long conversation with his brother and he confided to him "I've had it; I can't take this anymore, I'm going to file for a divorce." (Tr. Vol III, p.144:1-10; *see also* Tr. Vol I, p.136:13-22).

Kathryn and Matthew barely spoke to each other the next two days. (Tr. Vol I, p.137:11-13). Finally, on the evening of December 27, 2015, the parties spoke. "[W]e sat down in the living room of our house, and she started by listing out her – started on a list of grievances, and at that point, I stopped her, and I said, I am happy to listen to this, but I need to inform you, I'm done. And she asked me to clarify what that meant. I said, I'm done; I want a divorce; I'm done with this marriage." (Tr. Vol I, p.137:23-138:4). Kathryn responded by telling Matthew he

needed to leave the house. (Tr. Vol I, p.138:10-11). Matthew refused. (Tr. Vol I, p.138:13-18). Kathryn "got a disturbed look on her face and said, there's consequences for that." (Tr. Vol I, p.138:20-21). Matthew believed that to be an idle threat, but he would soon learn otherwise. (Tr. Vol I, p.138:23).

Matthew did not have any concrete plans or ideas as to how to go about the divorce. (Tr. Vol I, p.139:3-20). He spoke with Dr. Terry, who recommended that he put together a "go bag," and he obtained a credit card in his own name. (*Id*.) He still hoped that they could separate amicably. (Tr. Vol I, p.140:5-9).

Kathryn, on the other hand, did not idly wait, and she had no plans to make this separation amicable. Within the next few days, she began to contact people in order to build a case against Matthew. (Tr. Vol III, p.54:19-23). Kathryn spoke with her therapist on December 31, 2015, concocting a tale of an "escalating pattern" of drinking and violence on the part of Matthew. (Tr. Vol III, p.25:14-5); *see also* App. vol. I at 41). Also on or about December 31, she contacted her sister Amy and asked her to provide a written statement to support her application for a no-contact order. (Tr. Vol. IV, p125:2-6). Kathryn told her sister that Matthew had five drinks on Christmas Eve and that he was intoxicated when he drove her and the children home. (Tr. Vol IV, p.125:7-127:13). She also told her sister that Matthew had driven while intoxicated on many occasions. (Tr. Vol IV, p.123:8-

21). Amy dutifully repeated these allegations in her supporting letter that she wrote on January 2, 2016. (*Id*.)

While Kathryn was feeding information to these individuals describing Matthew as a violent, alcoholic, unsafe person, she continued to allow him unsupervised contact with the children. (Tr. Vol. I, p. 140:10-24; Tr. Vol III, p.52:12-53:8; Ex. 17, p.8-25).

On January 11, 2016, Kathryn finally sprung the trap, filing her application for a no-contact order under Chapter 236. (Tr. Vol I, p.142:19-143:3). That evening, when he returned home from work, Matthew was greeted by a Jefferson County Sheriff's deputy, who served the no-contact order on him. (Tr. Vol I, p.142:19-143:3). Matthew cooperated with the deputy, grabbed some things, and got a room at the AmericInn hotel. (Tr. Vol I, p.143:4-144:12).

The 236 Application was filled with falsehoods and omissions, all designed to portray Matthew in the worst possible light, while failing to mention or acknowledge any of Kathryn's own abusive behaviors. First, she effectively weaponized Matthew's history of alcohol abuse, asking the court to prevent Matthew from having unmonitored visitation with the children until he received assistance for his alleged alcohol problem. (Tr. Vol III, p.58:11-4). She did not mention that she allowed Matthew unmonitored visitation for the entirety of their

relationship, up to and including the day before she filed. (Tr. Vol III, p.58:15-25; *see e.g.*, (Tr. Vol III, p.59:1-4) (Matthew took V.V. to a wedding in Iowa City in November without Kathryn.)) She told the court that she had seen Matthew drink four to five glasses of wine on Christmas Eve of 2015. (Tr. Vol III, p.55:10-13). She bolstered this allegation with her sister's affidavit, which simply recycled the misinformation Kathryn herself had provided. (Tr. Vol IV, p.123:8-21). At trial, Matthew and his family testified that he was in no way intoxicated that night. (Tr. Vol I, p.128:11-13; Tr. Vol.III, p.139:3-7; Tr. Vol. III, p.160:12-14).

Kathryn also made various allegations of domestic violence. She cited Matthew's arrest in December of 2013, (Tr. Vol III, p.57:20-22) though she did not tell the court that the charges were dismissed without conviction, nor did she mention the letter that she had written to the prosecutor. (Tr. Vol III, p.57:23-58-10).

That same day, Kathryn drained one of the couples' savings accounts and applied the $14,000 she took to pay off one of her student loans. (Ex. 54; Tr. Vol I, p.144:19-145:16).

In crafting the 236 application, Kathryn demonstrated a willingness to take shreds of truth and stretch them well past their limit in order to attack Matthew and

disrupt his relationship with the children. It was a pattern that was to repeat itself multiple times, in terrible ways, as the divorce progressed.

Perhaps realizing that her position was still tenuous, based as it was on falsehoods and misinformation, Kathryn soon decided to go to an infinitely darker place in her assault on Matthew. Kathryn met with her first attorney, Terry Quartucci, on either January 12 or 13. (Tr. Vol III, p.30:3; Ex. 22). Kathryn claims that she told Ms. Quartucci that V.V. "had these night terrors; she's inserting things in her vagina, humping until she's raw, humping people, had [disrobed] in inappropriate places." (Tr. Vol III, p.60:1-8). According to Kathryn, Ms. Quartucci refused to take the case unless Kathryn had V.V. evaluated. Kathryn claimed that Ms. Quartucci "called DHS and made a report." (Tr. Vol III, p.60:7-8). In fact, it was Kathryn that obtained a referral to the University of Iowa by calling Dr. Heitsman on January 13, 2016. (App. vol. II at 10).

On January 20, 2016, Kathryn took V.V. to the University of Iowa Stead Family Children's Hospital to be evaluated by Dr. Resmiye Oral, M.D., "for concerns of possible sexual abuse perpetrated by her father . . ." (App. vol. II at 12). At that meeting, Kathryn's bizarre malevolence was on full display. Strangely, Kathryn told Dr. Oral that after delivering V.V., "she retained a piece of the placenta and developed jaundice." (App. vol. II at 13) Kathryn admitted at

trial that this diagnosis was not provided to her by a medical professional and "was [her] own theory." (Tr. Vol III, p.62:15-20)

She also "reported that [Matthew] has anger management problems which led to multiple episodes of domestic violence. He apparently is being treated for depression very erratically (he takes his medicine whenever he feels like it.)" (App. vol. II at 13). Though Kathryn denied it at trial (Tr. Vol III, p.63:20-22), Dr. Oral stated that "Kathryn endorses a primary concern of possible sexual abuse perpetrated toward her daughter by her husband." (App. vol. II at 13). Kathryn described V.V.'s humping behaviors, and also alleged that she had been trying to "insert objects into her vagina." (*Id*.) Kathryn blamed V.V.'s behaviors on Matthew, "alleg[ing] that her husband and [V.V.] have always had a relationship that she considered 'inappropriate' at times. . ." (*Id*.) Kathryn detailed a series of allegations: Matthew playing "horsey" with V.V.; Matthew asking V.V. to rest on his groin and make a bouncing motion; Matthew sleeping with V.V. on his belly and lower down. (*Id*.) She disclosed Matthew's past drinking history and alleged that she only returned from Arizona in February 2015 on Matthew's promise to undergo treatment for his drinking. (Id., 2-3) (Significantly, she did not allege that Matthew had also agreed to stay out of V.V.'s bed, which Kathryn stated at trial was a condition of her return to Fairfield. (Tr. Vol II, p.232:19-24). Kathryn

expressed to the social worker that "she feels a lot of guilt and like she has abandoned her children at times to avoid making Matt angry." (App. vol. II at 17)

Dr. Oral interviewed V.V. and concluded that "she did not disclose any sexually abusive interaction with anybody and did not seem to be a sexualized child, either. As a result, This interviewed [sic] did not provide any evidence of sexual abuse of this child by her father or anybody else." (App. vol. II at 15) Her impression was "masturbation (most likely due to stress in the family) . . . sexual related behavior is not outside the realm of normalcy, and may serve as diversion of her attention toward her own body during times of parental/family distress …." (App. vol. II at 15).

Dr. Oral "strongly recommend[ed] that [V.V.'s] mother become engaged in individual psychotherapy …" and recommended a follow-up visit with Matthew "as is our protocol in a custody dispute." (App. vol. II at 16)

The no-contact order was set for hearing on January 19, 2016. The parties entered into a consent order. Kathryn agreed to remove the children as protected parties from the order and allowed Matthew to have contact with them. In exchange, Matthew agreed that she could retain temporary physical care pending hearing in the dissolution matter, as he was still living in a hotel. (Tr. Vol I, p.147:12-25, p. 148:1-10). Patsy Stewart, Kathryn's mother, who had moved in

when Matthew moved out, agreed to facilitate Matthew's visits. (Tr. Vol I, p.148:4-7).

Shortly thereafter, Matthew emailed Patsy a proposed schedule that would allow him frequent, short visits over the next several days. (App. vol. I at 161; (Tr. Vol I, p.148:19-25). Patsy refused to allow the visits. (Tr. Vol I, p.149:12). In fact, Patsy claimed that the court order required her to supervise the visits. (App. vol. I at 162, 163; Tr. Vol I, p.149:13-150:4). The court order had no such requirement. (Tr. Vol I, p.149:17-24). At trial, Patsy unconvincingly alleged that she thought she had the "obligation to supervise visits" because "the attorney that was representing Katey at the time said, you can do whatever you want. You have primary care, and you can have these visits supervised." (Tr. Vol IV, p.61:22-62:10).

At this point, Matthew was aware of the fabulous allegations in the 236 application, and he was understandably wary of letting Patsy supervise his visits. (Tr. Vol I, p.150:5-12). Matthew attempted to solve the problem by suggesting that he find an unbiased third party to supervise the visits. Patsy did not accept that suggestion. (Tr. Vol I, p.150:13-24). Matthew was thus unable to have contact with his children until January 30, 2016, when he was afforded a brief, one-hour

visit with V.V. at the local recreation center, supervised by Patsy. (Tr. Vol I, p.151:9-19).

On February 3, 2016, attorney Quartucci moved to withdraw as Kathryn's attorney. (App. vol. I at 14)

On that same day, Matthew missed a phone call from the University of Iowa Hospitals and Clinics. (Tr. Vol I, p.152:22-153:11). He googled Dr. Oral's specialty and learned that she specialized in forensic investigation of sexual abuse. (Tr. Vol I, p.153:25-154:3).

Matthew arranged to meet with Dr. Oral the next day. (App. vol. II at 20). Dr. Oral asked Matthew whether Kathryn had a "tendency to lie and exaggerate things." (Tr. Vol I, p.156:9-13; App. vol. II at 20). Matthew answered that she did. (Tr. Vol I, p.156:15-16). Matthew denied any sexual misconduct. (Tr. Vol I, p.158:1-6). He discussed Kathryn's abusive behaviors and the recordings he had made. (Tr. Vol I, p.158:13-17; App. vol. II at 20-21).

In her report summary, Dr. Oral concluded that "[d]uring the interview with Mrs. Vickers, she did raise concerns for exaggeration and/or fabrication of certain conditions such as her problems during delivery, her concerns for sexual abuse of [V.V.] by her father and arriving at piece when we reported to her we had not found any evidence of such, among others. Mr. Vickers on the other hand,

presented himself as an adjusted and insightful individual, who is struggling with the difficulties of the divorce process and not being able to see his children." (App. vol. II at 22).

From January 30, 2016 until the temporary order was entered on May 20, 2016, Kathryn and Patsy restricted Matthew to sporadic and tightly controlled visits with the children. "I would continually have to agree to their venue of choice, to their prescribed activities. It was primarily either at the Rec Center or the public library. It was for short periods of time, and I had to agree that I would not go anywhere other than where they prescribed I be with my children." (Tr. Vol I, p.160:14-22). The longest visit they allowed him to have was four hours long, and he never had more than two visits in a week. (Tr. Vol I, p.169:8-15).

The parties attended mediation on April 6, 2016. (App. vol. I at 27). That same day, Matthew filed an application for hearing on temporary matters. (App. vol. I at 28). That hearing was held, on affidavit, on May 16, 2016 (Order Setting Hearing for Temporary Matters), and the court issued an order on May 20, 2016. (App. vol. I at 57-58). Though physical care of the children temporarily remained with Kathryn, Matthew was finally afforded overnight visits; the court granted him every-other weekend from Friday to Sunday. (*Id.*) Acting in his daughter's best interests, Matthew offered to gradually transition the girls to the full weekend

visits. (Tr. Vol I, p.167:20-168:4). His first full weekend was Father's Day weekend, the weekend of June 17, 2016, though he had to "trade[] 15 to 20 e-mails back and forth with my wife negotiating that until it finally was resolved." (Tr. Vol I, p.168:19-25).

Despite the presence of a court order, scheduling visits was a contentious affair. Kathryn wanted to take the children out of state for one of Matthew's weekends, but she was unwilling to agree to a simple exchange of weekends. (Tr. Vol I, p.172:13-173:11). Matthew asked for extra time with the children on a weekly basis, but those requests were consistently denied. (Tr. Vol I, p.173:12-175:14). It was not until late January of 2017 that Kathryn finally allowed Matthew additional time, letting him drop V.V. off at school two days per week. (Tr. Vol I, p.174:17-175:15).

Matthew was able to exercise his visits in June, July, and August of 2016. Kathryn was not content to sit idly by and allow this to continue. On August 29, 2016, the Department of Human Services received an anonymous report from Kathryn, alleging physical abuse of Kathryn by Matthew and sexual abuse of V.V. by Matthew. (Tr. Vol III, p.69:21-70:3, p.114:7-21; Ex. 34). Specifically, she alleged that Matthew attempted to strangle her in the presence of O.V. and V.V., and that Matthew "makes [V.V] lay on top of him with their crotches together and

[V.V.] demonstrated that she would put her hand by his private and was making a humping motion." (App. vol. II at 42).

The case was assigned to CPW Amanda Seymour. (Tr. Vol III, p. 113:19-23; App. vol. II at 44). Ms. Seymour met with Kathryn on the morning of August 30, 2016. (Tr. Vol III, p. 115:5-8). Again, Kathryn's bizarre malevolence was on full display. Kathryn claimed a history of domestic abuse at Matthew's hands. (Tr. Vol III, p.115:24-116:18; App. vol. II at 44-46). She also related Matthew's past problems with alcohol. (App. vol. II at 45). Kathryn then produced "a binder full of documentation regarding his criminal charges, graphs and charts regarding the children's behaviors when the kids do not have any contact with Matthew and then when they do." (App. vol. II at 45) "There was a lot of information, binders, graphs, charts, pie charts, graphs. I mean, just – it was very overwhelming, because there was a lot of information to take in …." (Tr. Vol III, p.117 (testimony of Amanda Seymour)).

Seymour asked Kathryn about the sexual abuse allegations. (Tr. Vol III, p.117:14-16). Kathryn told Seymour that she "[didn't] believe that he's sexually abusing the kids, but he's – she was concerned that there was inappropriate sexualization going on." (Tr. Vol III, p.117:18-21). She described "a pattern of sexualized behaviors and [V.V.] putting items in her vagina since 2014. She

reported [V.V. experienced] night terrors, [] wetting herself and isolating herself from friends. Kathryn indicated that [O.V.] has started mimicking [V.V.'s] behaviors." (App. vol. II at 45).

Kathryn then stated that V.V. had shared in the car "that she sleeps on top of her dad and then patted her stomach." (App. vol. II at 45).

> When they arrived home, Kathryn asked [V.V.] to show her how they lay together. Kathryn advised that she and her mom observed this interaction so they could take pictures. [V.V.] had Kathryn lay down on the couch then laid on top of her, groin to groin. [V.V.] then took her hand and rubbed Kathryn's thigh area. [V.V.] then wiggled her hips. … She reported her dad really likes her to sleep on him.
>
> …
>
> Kathryn advised that she had forgotten to have her mom take pictures so she made [V.V.] get on top of her again to reenact how she lays on her dad. This worker expressed concern that she would have [V.V.] get on top of her again just to take pictures.

(App. vol. II at 45). Kathryn admitted to Seymour that her attorney advised her not to contact DHS because "that could lose her custody," but she did so anyway. (App. vol. II at 45).

Seymour then met alone with V.V., who reported "she feels safe with her dad and mom." (Id.)

The next day, Seymour spoke with Matthew by telephone. Matthew denied the reports of domestic violence and "advised that during the course of the court

[case], Kathryn has accused him from anything to domestic violence to sexually abusing the children. He advised that these allegations are not new to him because that is what she as claimed in court." (App. vol. II at 45).

V.V. was interviewed at the St. Luke's Child Protection Center on September 21, 2016. (Tr. Vol III, p.122:18-123:7). Law enforcement was present. (*Id*.) V.V. did not disclose any sexual abuse. (*Id*.) The child abuse assessment was ultimately returned "not confirmed" on both the domestic abuse and sexual abuse allegations. (Tr. Vol III, p.124:3-5; App. vol. II at 48).

Seymour's conclusions were issued on September 26, 2016. (App. vol. II at 29). As Kathryn's repeated allegations of domestic abuse, alcohol abuse, and sexual abuse had all failed to stop Matthew's visits with the children, she tried a new tactic. On September 30, 2016, she sent an email to Matthew, the guardian ad litem Sam Erhardt, and her attorney at the time, Michael Brown. (App. vol. I at 166-170). In this email, Kathryn claimed that O.V. was having "chronic bouts of a bronchitis/asthma, with a fever and congestion periodically since the beginning of July." (*Id*.) Kathryn claimed that O.V.'s "big toenails . . . have become very thin, concaved and are breaking . . ." (*Id*.) She claimed that the pediatrician told her that this was "secondary to her being chronically ill; which is most likely creating a protein deficiency as well as respiratory issues." (*Id*.)

Kathryn claimed that these recurring illnesses coincided with her visits with Matthew. (*Id*.) "Five out of six of the visits, with Matthew, [O.V.] has come home with a fever, mucus, cough, up every few hours, and inflamed lymph nodes." (*Id*.) She suggested that all of this was due to some sort of environmental exposure from Matthew's residence. (*Id*.)

Kathryn stopped short in the email of demanding that Matthew forfeit his visits. However, she wasted no time making that request of Matthew in text messages. (App. vol. I at 179). In those messages, Kathryn reiterated her supposed concern that O.V. was suffering from an exposure from something in the environment at Matthew's residence. (App. vol. I at 179) Matthew refused her requests and had his visit as scheduled. (App. vol. I at, 179-182) Kathryn texted a request that Matthew return O.V. early if she showed any signs of illness. (App. vol. I at 182)

In fact, contrary to the tale of severe chronic illness told by Kathryn, the truth was that O.V. did not see her pediatrician, or any other medical provider, between April 15, 2016 and August 30, 2016. (Tr. Vol III, p.77:18-78:2; App. vol. II at 70, p.14:20-15:15)

In her September 30, 2016 email, Kathryn disclosed that O.V. had an appointment with Dr. Princy Ghera at the Children's Hospital in Iowa City for the

morning of October 27, 2016. (App. vol. II at 51). Matthew believed that Kathryn was trying to use these supposed illnesses in order to justify a denial of his visits with O.V., so he decided to appear for this appointment unannounced. (Tr. Vol I, p.176:25:177:3, 178:6-10). A medical student performed the intake, and Kathryn provided a history consistent with the concerns outlined in her September 30 email. (Tr. Vol I, p.178:14-179:2). Kathryn further made the claim that "one of the reasons for the referral up to the University of Iowa was that [O.V.] had been prescribed so much antibiotics and so much steroids and the doctors in Fairfield couldn't figure out what was wrong …" (Tr. Vol I, p.179:6-11). Meanwhile, Matthew silently waited and listened. At the end of the intake, Matthew finally spoke up and told the student that he disagreed with everything he'd just been told. (Tr. Vol I, p.179:17-180:4).

The student left, and Dr. Ghera entered. She proceeded to ask clarification questions of Kathryn, who proceeded to reiterate the history of illness she provided earlier. (Tr. Vol I, p.180:18-181:5). Dr. Ghera then stated that she would like to prescribe an ongoing breathing treatment for O.V., to be administered on a daily basis for the next six months. (Tr. Vol I, p.181:14-182:2). At that point, Matthew spoke up. "I asked Dr. Ghera if the information you've been provided is not accurate, in particular, you've been told that she's been prescribed all of these

medications … if she hasn't actually been prescribed this much medication as you've been told, would that change your diagnosis." (Tr. Vol I, p.182:5-11). She responded that "yes, it could." (Tr. Vol I, p.182:12-13). Matthew then asked her to "call Jefferson County Health Center, and … Hy-Vee Pharmacy, and I would like you to confirm with them how many times my daughter [O.V.] has been prescribed antibiotics and steroids in the last 12 months." (Tr. Vol I, p.182:15-20). Kathryn stated that she had brought the records with her, but Matthew insisted that Dr. Ghera confirm the information directly. (App. vol. II at 57).

Dr. Ghera did as Matthew requested. (App. vol. II at 57). "[S]he talked to Dr. Gray. She talked to Hy-Vee Pharmacy. She didn't go back 12 months. She went back through the life records of [O.V.] and that [O.V.] had been prescribed antibiotics once, if I recall, not multiple times, and steroids once, not multiple times, and as a result of the new information, she changed her recommendation." (Tr. Vol I, p.183:6-12). Dr. Ghera diagnosed O.V. with "[m]ild intermittent asthma without complication" and recommended use of albuterol on an as-needed basis. (App. vol. II at 58-59).

Dr. Ghera also diagnosed "[c]oncerns of Munchausen's syndrome by proxy." (App. vol. II at 58; *see also* App. vol. II at 66 (defining Munchausen's by proxy as when a "child [is] receiving unnecessary and harmful or potentially

harmful medical care due to the caregiver's overt actions including exaggeration of symptoms, lying about the history or simulating physical findings (fabrication), or intentionally inducing illness in their child.")) "Munchausen's by proxy should be considered if these concerns continue without actual evidence of disease in child." (App. vol. II at 59) Dr. Ghera discussed this concern with Dr. Heitsman in a phone conference on December 19, 2016. "[She] [i]nformed him about [the] discrepancy in [Kathryn's] report of need of steroids/antibiotics vs actual history (confirmed with pharmacy and PCP). We had suggested to consider Munchausen's by proxy if these symptoms/compliants [sic] continue. He agreed." (App. vol. II at 61).

Kathryn's last line of defense to curtail Matthew's visit with his children was to simply move as far away as possible. (Tr. Vol II, p.190:18-191:22, 191:25-192:4). Her justification was her allegation that she could not find full time work in Iowa, and she portrayed her nationwide job search as an economic necessity. *See* (Tr. Vol III, p. 100:8-101:9; 104:5-13). When Judge Brown asked her whether she wanted to receive permanent spousal support, the following exchange occurred:

> THE WITNESS: I would prefer to be able to support us and move.
>
> THE COURT: Say that to me again.
>
> THE WITNESS: I would much prefer to be able to support us and move. I don't feel like in Fairfield I can support us.

> THE COURT: Do you understand that if you move away and you have physical care of the girls that effectively terminates a meaningful relationship between the girls and their father on a weekly and monthly basis?
>
> THE WITNESS: I would hope Matt would move with us. He lived in Phoenix for 12 years.
>
> THE COURT: Let me back up. Do you understand that if you move away, that effectively terminates a meaningful day-to-day, weekly kind of relationship between the girls and their father, or do you think that's just not true?
>
> THE WITNESS: No, I can see it really making it very difficult.
>
> THE COURT: And with that in mind, is it still your desire then to be able to move away?
>
> THE WITNESS: I think financially, it would be best for our family, and I strongly believe that Matthew worked in Phoenix for 12 years and that he could find a job in Phoenix.

(Tr. Vol III, p.100:11-101:9). Accordingly, Kathryn obtained job offers from Santa Rosa, California and Tucson, Arizona. (App. vol. I at 311-313; Tr. Vol II, p.190:25-191:19).

Knowing full well what Kathryn was up to, Matthew commissioned a vocational report from Laughlin Management which showed numerous job opportunities in Iowa for speech pathology. (App. vol. I at 192-222). In fact, the Laughlin Management report explained that salaries in speech pathology in Iowa were on average higher than California, Arizona, and North Carolina. (App. vol. I

at 192-195; Tr. Vol III, p.91:6-92:13). The report also showed that there were plenty of speech pathology positions in southeast Iowa. (App. vol. I at 195-222).

Two weekends before the trial, Matthew asked Kathryn if he could watch the children on a Saturday morning while she was at work. Kathryn denied Matthew's request, stating that the children had to go to craft time. (Tr. Vol I, p.189:18-22). Matthew was running errands that morning and decided to drive by the recreation center where craft time was held. (Tr. Vol I, p.190:1-11). Finding no one there, Matthew drove by the marital home and observed the children in the backyard in the care of a babysitter. (Tr. Vol I, p.191:3-10).

A four-day trial was held from April 11 through April 14, 2017. (Tr. Vol I, p.1; Tr. Vol. IV, p.1). All other relevant facts will be discussed in the argument below.

ARGUMENT

Error preservation and scope and standard of review.

The issue of physical care of the children is properly preserved for review on appeal because it was raised by Matthew in his appeal was tried to the district court.

The Iowa Supreme Court summarized the general principles applicable to appeals of child custody in In re Marriage of Bowen, 219 N.W.2d 683, 687 (Iowa 1974):

> Our review is de novo. Although we are not bound by trial court findings we give them weight. The status of children should be quickly fixed and, thereafter, little disturbed. Siblings should usually not be separated. No hard and fast rule governs which parent should have custody. It is not a matter of reward or punishment. The issue is ultimately decided by determining under the whole record which parent can minister more effectively to the long-range best interests of the children.

Id.

I. The District Court erred by placing physical care of the children with Kathryn instead of Matthew.

A. Applicable legal standards for determining physical care.

In child custody cases, the "best interests of the children" is the first and governing consideration. Iowa R. App. P. 6.904(3)(o). Iowa Code section 598.41(3) (2017) enumerates the factors the court must consider in awarding custody. *See* In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983); In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). 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). While the child's physical and financial stability are important considerations, great emphasis is placed on achieving emotional stability for the child. In re Marriage of Williams, 589

N.W.2d at 762. 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 dissolution proceeding. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa Ct. App. 1985). Selection of the custodial parent hinges on "who can minister more effectively to the long range best interest of the child." In re Marriage of Kunkel, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). "The court should also consider the characteristics and needs of the child, the characteristics of the parents, the capacity and desire of each parent to provide for the needs of the child, the relationship of the child with each parent, the nature of each proposed environment and the effect of continuing or changing an existing custodial status." *Id*. (citing Winter at 167).

When both parents are capable of attending to the children's day-to-day needs, the court must consider which parent will encourage the most contact between the noncustodial parent and the child. In re Marriage of Shanklin, 484 N.W.2d 618, 619 (Iowa Ct. App. 1992); Iowa Code § 598.41(1)(a). The denial by one parent of continuing contact with the other, without just cause, is a significant factor in determining custody. § 598.41(1)(c); *see. e.g.*, In re Marriage of Rosenfeld, 524 N.W.2d 212, 215-16 (Iowa Ct. App. 1994); In re Marriage of

Shanklin, 484 N.W.2d 618, 619 (Iowa Ct. App. 1992); In re Marriage of Abkes, 460 N.W.2d 184, 185 (Iowa Ct. App. 1990); In re Marriage of Nelson, 2003 WL 1970399 at *2 (Iowa Ct. App. 2003).

Refusal by one parent to provide the opportunity for children to have maximum continuous physical and emotional contact with the other parent, without just cause, is considered harmful to the best interest of the child, (Iowa Code § 598.1(1)), and is considered a significant factor in determining the proper custody arrangement. Iowa Code § 598.41(1)(c); In re Marriage of Quirk-Edwards, 509 N.W.2d 476, 480 (Iowa 1993) ("If visitation rights of the noncustodial parent are jeopardized by the conduct of the custodial parent, such acts could provide an adequate ground for a change of custody."). Because children of a divorce need to maintain meaningful relationships with both parents, Iowa courts have given great weight to evidence of one parent's attempt to alienate a child from the other parent. In re Marriage of Gravatt, 371 N.W.2d 836, 840 (Iowa Ct. App. 1985); In re Marriage of Winnike, 497 N.W.2d 170, 174 (Iowa Ct. App. 1992). ("The court recognizes that a custodial parent has the power to instill anxieties in a child toward the noncustodial parent.") Nicolou v. Clements, 516 N.W.2d 905, 909 (Iowa Ct. App. 1994).

Iowa courts find that any behavior by one parent to alienate the other from their children abhorrent. *See, e.g.*, In re Marriage of Udelhofen, 444 N.W.2d 473, 474-75 (Iowa 1989) (awarding physical care to father when mother used child as a pawn for personal gain against father); In re Marriage of Leyda, 355 N.W.2d 862, 866 (Iowa 1984) (granting father physical care when mother expressed hatred toward father and girlfriend in front of child); In re Marriage of Winnike, 497 N.W.2d 170, 174 (Iowa Ct. App.1992) (awarding physical care to father when mother used visitation to collect evidence against father and tried to run away with the child); In re Marriage of Wedemeyer, 475 N.W.2d 657, 659 (Iowa Ct. App.1991) (granting father physical care when mother pressured children to spy on father); In re Marriage of Downing, 432 N.W.2d 692, 694-95 (Iowa Ct. App.1988) (awarding father physical care when mother intercepted mail sent to children from father, interfered with visitation with father); In re Marriage of Nelson, 666 N.W.2d 620 2003 WL 1970399 at *2 (Iowa Ct. App. 2003) (modifying custody to grant father physical care when mother stubbornly refused all changes to court-ordered visitation, measured visitation in minutes; refused to promote child's relationship with father); *see also* In re Marriage of Quirk-Edwards, 509 N.W.2d at 480 (affirming a modification of physical care from mother to father based solely on mother's willful interference with father's visitation rights).

Domestic abuse between the parents is a factor in determining the custodial parent. Iowa Code § 598.41 (2007); *see* In re Marriage of Barry, 588 N.W.2d 711, 713 (Iowa Ct. App. 1998); In re Marriage of Daniels, 568 N.W.2d 51, 54 (Iowa App. 1997); *see also* In re Marriage of Brainard, 523 N.W.2d 611, 614-15 (Iowa Ct. App. 1994). However, "a claim of domestic violence must not be used by either party to gain an advantage at trial, but should be reserved for the intended purpose-to protect victims from their aggressors." In re Marriage of Barry, 588 N.W.2d 711, 713 (Iowa Ct. App. 1998).

B. Kathryn persistently sought to destroy the relationship between Matthew and the children.

Before January 11, 2016, Matthew Vickers enjoyed a great relationship with his daughters. He was intimately involved in their care, with the permission and at the behest of Kathryn. He performed the bath time routine. (Tr. Vol I, p.93:24-94:4). He cooked breakfast. (Tr. Vol I, p.67:20-22). He would take V.V. to school. (Tr. Vol I, p.115:15-24). He played with the girls.

All of that changed on January 11, 2016. From that date through end of trial, Kathryn engaged in a constant, vicious, and transparent campaign to destroy Matthew's ability to maintain a relationship with his children. She made a variety of unfounded allegations that he either had or would endanger and abuse the children.

C. Matthew never endangered the children by abusing alcohol.

Without a doubt, Matthew had abused alcohol in the past. He was charged with OWI in 1992 and 2002, and in 2013 and 2014, he self-medicated with alcohol, which resulted in the loss of his job. (Tr. Vol I, p.88:4-11). Kathryn sought to exploit this history of substance abuse in the 236 application, (Tr. Vol IV, p.123:8-21), in the appointment with Dr. Oral, (App. vol. II at 14), at the hearing on temporary orders, (App. vol. I at 29-31, 35-36, 39), in the DHS investigation, (Tr. Vol III., p.116:21-25), and finally at trial. (*See, e.g.*, Tr. Vol. II, p. 150-1).

First, the court must recognize that the allegation that Matthew drove drunk on Christmas Eve 2015 was fabricated by Kathryn. The only person who claims to have seen Matthew drink more than one half of a glass is Kathryn, and by the time of trial, her observations were heavily qualified. (Tr. Vol III, p.19:22-20:1). Matthew and several of his family members, who were in attendance that night, rebutted Kathryn's statements. (Tr. Vol I, p.128-9; Tr. Vol.III, p.139:3-7; Tr. Vol. III, p.160:12-14).

Kathryn repeatedly claimed to be afraid that Matthew would drive the children while intoxicated on his visits. She specifically stated this concern in order to justify the denial of visits. (App. vol. I at 39; App. vol. I at 164-5). In

order to address this (false) concern, Matthew proposed that he be required to blow into a handheld breathalyzer at visitation exchanges. (App. vol. I at 29; Tr. Vol II, p.104:6-7; 127:5-18). By the time of trial, Kathryn had long ago stopped asking Matthew to blow in the breathalyzer. (Tr. Vol III, p.80:17-18).

Matthew was able to stop his alcohol abuse after the family moved to Fairfield. (Tr. Vol I, p.92:12-25). Matthew testified frankly and honestly about his relationship with alcohol and how it evolved over time. (Tr. Vol I, p.39-41). He waived privilege in order to allow his therapist, Dr. Scott Terry, to testify about his diagnosis and treatment concerning alcohol. (Tr. Vol IV, p.135-159). Dr. Terry testified that he had been consistently seeing and treating Matthew for two years. (Tr. Vol IV, p.135:20-136:6). Dr. Terry testified that Matthew was not an alcoholic but was rather a situational alcohol abuser. (Tr. Vol IV, p.138:16-21; p.145:4-10). Dr. Terry felt that Matthew had made great progress and would no longer qualify as having a diagnosable alcohol-related disorder. (Tr. Vol IV, p.137:15-20, 140:10-15).

Matthew's past abuse of alcohol never posed a danger to his children. Kathryn's claims to the contrary were made solely for the purpose of preventing him from having contact with the children.

D. Matthew never domestically assaulted Kathryn, and Kathryn only used these allegations to alienate Matthew from the children.

It is impossible to listen to Exhibits 10 and 11 and conclude that Kathryn lived in fear of Matthew's temper. Judge Brown clearly recognized this: "Katey reports that there have been five memorable incidents of physical fights between herself and Matt. She reports him to have been the aggressor on all of these. … The[] recordings reveal that Katy is verbally and emotionally aggressive and relentless in her attacks on Matt." (App. vol. I at 84). Judge Brown also correctly recognized that the 236 protective order was nothing more than "a vehicle to have Matt removed from the home." (App. vol. I at 85).

Nonetheless, allegations of domestic abuse were repeatedly trotted out by Kathryn in her plots to alienate Matthew, including the no-contact order on January 11, 2016, (Tr. Vol. III, p.57:20-22), her report to Dr. Oral later that month, (App. vol. II at 13-14), her report to DHS and subsequent discussion with Amanda Seymour, (App. vol. II at 44), and in her trial testimony. (*See, e.g.*, Tr. Vol.II, p. 149-150).

Kathryn was never afraid of Matthew, and he never abused her. Her repeated allegations were made for the sole purpose of separating Matthew from the children and gaining an advantage in this litigation.

E. Matthew was never sexually inappropriate with his children. Kathryn's "concerns" were used by her for the sole purpose of destroying Matthew's parental rights.

The most disturbing facet of Kathryn's campaign against Matthew were her vague allegations of sexual abuse. All the while, she attempted to maintain some plausible deniability by couching her accusations just short of concrete claims. For example, she described Matthew's relationship with V.V. to Dr. Oral as "'inappropriate' at times," and claimed that only her observations "and friend's concerns" prompted her to seek the sexual abuse evaluation. (App. vol. II at 13-14). Amanda Seymour reported that "[Kathryn] does not believe that [Matthew] is sexually abusing the children but feels there is inappropriate sexualized behaviors . . ." (App. vol. II at 45). Judge Brown asked Kathryn directly to describe what she thought "is the difference between sexually inappropriate behaviors and sexual abuse." (Tr. Vol III, p.102:13-15). She vaguely responded "I think there have been a few inappropriate behaviors … poor judgment calls …" (Tr. Vol III, p.102:16-17).

Kathryn was not being honest with Dr. Oral, or anyone else, about her motivations for putting forward these allegations. At trial, Kathryn claimed that her attorney, Terri Quartucci, advised her to obtain the evaluation from Dr. Oral. ((Tr. Vol III, p.29:23-30:8). "My attorney, Terri Quartucci, actually was so concerned when I talked with her. I said I wanted Matt to be involved, a loving

dad is really important. . . . And she said these were signs of being sexually abused, that it was very important to rule it out. In fact, she would not take my case unless I did this evaluation . . ." ((Tr. Vol III, p.59:23-60:8). This statement is not consistent with the fact that Ms. Quartucci withdrew from representing Kathryn in early February, presumably immediately upon receiving the results of Dr. Oral's report.

Perhaps Ms. Quartucci advised Kathryn to obtain the evaluation because Ms. Quartucci could sense that Kathryn was bent on pursuing unfounded allegations of the most heinous kind and did not want to get involved without some corroboration from a professional source. That would be consistent with the timing and circumstances of her withdrawal. It may provide some explanation as to why Kathryn went through five different lawyers in the course of this matter despite being able to raise significant funds for the retention of counsel. (App. vol. I at 315). In any event, the evidence shows that it was Kathryn that arranged for the evaluation by requesting a referral from Dr. Heitsman. (App. vol. II at 10).

The dishonest nature of these allegations is further revealed by the allegations that were omitted by Kathryn at various instances. Kathryn had shown that she could be meticulously organized when preparing her assaults against Matthew. (*See* App. vol. II at 45 (describing the binder full of documentation and

charts presented by Kathryn to Amanda Seymour)). However, when it came to reporting allegations of sexual abuse, she was tellingly sloppy, failing to mention several disturbing allegations that she described at trial.

For example, at trial Kathryn described the following incidents or allegations of sexually inappropriate behavior that she did not mention to Dr. Oral:

1. The "naked pillow fort" incident, when Kathryn accused Matthew of playing with a naked V.V. in a fort made of pillows. (Tr. Vol I, p.93:21-100:6);
2. The "diaper cream incident" when Kathryn accused Matthew of being too deliberate in applying diaper cream to V.V.'s genital area. (Tr. Vol III, p.66:19-25);
3. An incident when Kathryn alleged that Matthew slept with V.V., while he was naked from the waist down. (Tr. Vol III, p.67:1-11);
4. That, because of this incident, Matthew agreed to never sleep with V.V. again as a condition of Kathryn's agreement to return to Fairfield from Arizona in April of 2015. (Tr. Vol III, p.67:11-21);
5. That V.V. disrobed in front of other children. (Tr. Vol III, p.67:12-15).

When she met with Amanda Seymour, Kathryn also failed to disclose the naked pillow fort incident, Matthew sleeping naked with V.V., his agreement to

stop doing so, and V.V. disrobing in front of other children. (Tr. Vol III, p.73:22-76:3).

The "naked pillow fort" incident was based on something that actually happened, but the actual explanation is so transparently innocent that it makes some sense that Kathryn would not mention it to Dr. Oral or Seymour. (Tr. Vol. I, p. 93:21-100:6). But the other allegations are sufficiently disturbing and significant that there is no good explanation as to why she would fail to disclose them to either Dr. Oral or Amanda Seymour if they had actually occurred. The logical conclusion is that Kathryn was attempting to bolster her case at trial by adding new allegations.

In any event, Kathryn already had the answers to her concerns about V.V.'s behaviors for years before the divorce began. The pediatrician in Arizona, before they even moved to Fairfield, told her that "some kids hump … it's no big deal." (Tr. Vol.II, p.217:10-13). Dr. Heitsman told the couple in 2015 that these were stress behaviors; Kathryn knew full well the source of stress in V.V.'s life – Kathryn herself and her relentlessly aggressive behavior. (*See* Ex. 10 and Ex. 11).

Kathryn's repeated use of allegations of sexual impropriety were made solely to destroy Matthew's relationship with the girls. It shocks the conscious that Kathryn would engage in this malicious behavior. But she did, and her willingness

to repeatedly do so makes her a completely inappropriate choice for physical care of the girls.

F. Kathryn manipulated and exaggerated O.V.'s illnesses in an attempt to stop her from visiting Matthew.

Not only did Kathryn slander Matthew's character in an attempt to destroy his relationship with their daughters, she also endangered her own child's health. Almost immediately after receiving notice that the DHS assessment was not going to stop Matthew's visits, Kathryn sent the email in evidence as Ex. 37. (App. vol. I at 166). Though she claimed that O.V. had been chronically ill for months, O.V. had not seen the pediatrician for any reason between April and August of that year. (App. vol. II at 70, p.14:20-15:15). Kathryn's motives were laid bare in her text messages to Matthew asking him to cancel his visitation out of concern for O.V.'s health. (App. vol. I at 171-176). The most disturbing aspect of all of this is that she misrepresented O.V.'s medical history to Dr. Ghera, which if allowed to stand would have resulted in unnecessary medication and medical treatment. (App. vol. II at 56-57). Fortunately, Matthew was present to correct Kathryn's exaggerations, and the result was the inclusion of the extraordinary diagnosis of Munchausen's syndrome by proxy in O.V.'s medical chart. (*Id*.) Kathryn was willing to abuse her child's health in order to slow down Matthew's visits. Her willingness to go to

such extraordinary measures is another factor that militates against placing physical care with her.

G. Kathryn manipulated her job search to justify a move away from Iowa.

At trial, Kathryn claimed that she was unable to find satisfactory full-time work in southeast Iowa. (Tr. Vol III, p. 100:8-101:9; 104:5-13). Instead, she hired a headhunter to find her jobs in areas as widely separated as Asheville, North Carolina and Northern California. (App. vol. I at 311-313). The Laughlin Management report commissioned by Matthew disproved Kathryn's claims. (App. vol. I at 192-222). If all else failed (which it had) Kathryn intended to simply move as far away as possible in order to deny Matthew access to the children.

H. Kathryn has a demonstrated history of subjecting her children and loved ones to emotional abuse.

The record clearly establishes that Kathryn was "verbally and emotionally aggressive and relentless in her attacks on Matt." (App. vol. I at 84) Exhibits 10 and 11 demonstrate this. These exhibits also demonstrate that Kathryn had no capacity to protect her children from her own anger and frustration.

Kathryn never denied this. (Tr. Vol II, p.167:8-13 ("It's inexcusable. My children were there. It was – there's a context to them, but it's inexcusable. . . . I see how it made me an unsafe person to my children, because I need to be a stable good parent for them.")). In fact, the trained medical professionals that Kathryn

sought out in order to bolster her campaign against Matthew actually noted Kathryn's apparent psychological issues. After speaking with Kathryn, Matthew, and V.V. separately, Dr. Oral suggested that Kathryn, not V.V. or Matthew, seek out individual psychotherapy. (App. vol. II at 16). She described Matthew, by contrast, as an adjusted and insightful individual. (*Id.*). Additionally, Dr. Ghera diagnosed concerns that O.V. was a victim of Munchausen Syndrome by proxy. (App. vol. II at 58). Were it not for Matthew's intervention, O.V. would have been subject to unnecessary medical interventions. Both direct evidence (Ex. 10 and Ex. 11) and circumstantial evidence support Matthew's description of the level of verbal abuse. His alcohol abuse in 2013 and 2014 is circumstantial evidence of the hell that Kathryn was putting him through. While he had the two OWI's in the distant past, alcohol use had never affected his job performance. In fact, Matthew did nothing but excel at any of his jobs, other than during the period of his abuse. (*See, e.g.*, Tr. Vol. I, p.32:4-14)

V.V.'s sexualized behaviors are also circumstantial evidence of the conflict she experienced. Every pediatrician or therapist who weighed in on the issue gave the same opinion – that the behaviors were a way for V.V. to deal with stress. (Tr. Vol I., p. 106:9-13; App. vol. II at 15). As Matthew testified, V.V.'s behaviors were often closely linked to Kathryn's abusive attacks. (Tr. Vol I, p. 107:4-7;

159:3-7). While there was no evidence that V.V. or O.V. were ever the targets of her assaults, what assurances does the court have that Kathryn will be able to behave reasonably when the girls are teenagers or when Kathryn begins another romantic relationship?

Contrast Kathryn's behaviors, as shown in Exhibits 10 and 11, with Matthew's behaviors as shown in those same exhibits, and also in the emails to his wife through the years that were made part of the record. See Exhibit 4, an email sent the day after the "naked pillow fort" accusation. (App. vol. I at 127). Note how Matthew calmly seeks to understand and reaches out to support and love his wife. See Exhibit 5, when Matthew again tries to make sense out of Kathryn's displeasure in a calm and understanding way, again reminding her of his love for her. (App. vol. I at 129). See Exhibits 6, 7, and 8 for more of the same. (App. vol. I at 130-134). See Exhibit 9, where he shares the tape from Exhibit 10 with their counselor, in hopes of learning to resolve their conflict. (App. vol. I at 135). These emails pre-date the parties' separation and were not made in anticipation of litigation. The difference between the attitudes of the parties could not be starker.

Kathryn's vindictive personality is not suited to the role of physical care parent. Matthew, on the other hand, has always exhibited a reasonable, mild, and forgiving personality – all traits that are important for a physical care parent.

I. Matthew will foster Kathryn's relationship with the children despite their acrimonious past.

When both parents are capable of attending to the children's day-to-day needs, the court must consider which parent will encourage the most contact between the noncustodial parent and the child. In re Marriage of Shanklin, 484 N.W.2d 618, 619 (Iowa Ct. App. 1992; Iowa Code § 598.41(1)(a)). In this case, that parent is Matthew. At trial, Matthew testified:

> A. My children need their mother and their father in their lives in a healthy way. My children didn't get asked to be born into the issues between my wife and I, and my children love me very much, and I know that they love their mother very much.
>
> What I would ask the Court to do is to recognize the importance of having both parents in their lives in a healthy way and make a good determination as to who is the best parent to be able to facilitate that for my children.
>
> Q. And who do you think that is?
>
> A. That's me.
>
> Q. And tell the Court why that's you.
>
> A. Because I recognize the importance of both parental relationships with those kids, and I would never utilize my kids as a pawn or a weapon to simply hurt my wife.

(Tr. Vol I, p.193:7-21). Matthew's testimony is lent credibility by his conciliatory and tolerant behaviors towards his wife during the marriage and by the lack of any retaliatory conduct by him during the divorce.

Matthew remains committed to encouraging Kathryn's involvement in their children's lives, despite their terrible history. This is another significant factor in Matthew's favor as physical care parent.

J. Matthew is able to provide a safe and stable home for the children.

Matthew is able to provide the children with emotional stability, financial stability, and love. (Tr. Vol I, p.194:3-12). He was awarded the marital home in the divorce and would be able to provide the children with a familiar environment. (App. vol. I at 106).

K. Matthew's shortcomings are not equivalent to Kathryn's.

Judge Brown's fact-finding was largely accurate, but her analysis was critically flawed. In particular, she found that Matthew's substance abuse history was equally relevant as all of Kathryn's abusive and alienating behaviors. "The court is as concerned about whether Katey can control her emotional stability as the court is concerned about Matt being able to control his alcohol abuse." (App. vol. I at 91). "Choosing between these parents is akin to choosing between the lesser of evils." (App. vol. I at 90). The tipping point in her analysis appears to be the fact that Matthew concealed some financial difficulties from Kathryn early in the marriage and that he misrepresented his educational history on his resume. (App. vol. I at 91).

While neither party is perfect, Judge Brown erred in awarding physical care to Kathryn. She erroneously emphasized Matthew's prior problems with alcohol and his concealment of embarrassing financial facts early in the marriage, but these past difficulties do not reflect upon his ability to provide a stable, loving home today. He has acknowledged these problems, sought the proper assistance to tack them, and has ultimately overcome them for the betterment of himself and his family. (*See, e.g.*, Tr. Vol. IV, p.137 (testimony of Dr. Terry)).

Kathryn, on the other hand, has ongoing, pervasive behavioral problems that have negatively impacted the emotional well-being of her children in the past, and will likely continue to do so. *See* In re Marriage of Rebouche, 587 N.W.2d 795 (Iowa Ct. App. 1998) ("moral misconduct is also a factor to be accorded weight in a child custody determination; however, it has been weighed most heavily only in those cases where the misconduct occurred in the presence of the children.") Kathryn has demonstrated her willingness to take extreme measures in order to separate her children from their father, even if it means endangering the health of her own daughter.

It is in the best interests of V.V. and O.V. that they be placed in the physical care of their father. Matthew has demonstrated time and time again his ability to approach conflict and hurt feelings with patience and understanding. (*See* App.

vol. I at 127-134). He is able to provide the children with a safe, loving, stable, and abuse-free home.

CONCLUSION

The district court erred when it placed the children in the physical care of Kathryn. The court should modify the dissolution decree to place the children in Matthew's physical care and remand so the lower court can determine Kathryn's visitation rights and child support obligation.

REQUEST FOR NON-ORAL SUBMISSION

Matthew requests that the case be submitted without oral argument.

CERTIFICATE OF SERVICE

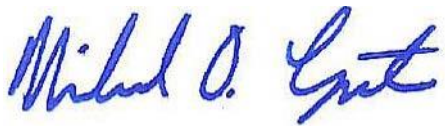
Pursuant to Iowa Appellate Procedure 6.701 and 6.901, the undersigned hereby certifies that on the 29th day of January, 2018, the Final Brief was filed with the Supreme Court via EDMS and electronically served on all parties of record.

Michael O. Carpenter

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 13,787 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.



Michael O. Carpenter

1/29/2018

Date