

## RECENT DEVELOPMENTS: INDIANA FAMILY LAW

JOSEPH W. RUPPERT\*  
MICHAEL G. RUPPERT\*\*

### INTRODUCTION

During the survey period, at least sixty Indiana appellate decisions were published involving the broad topic known as Family Law.<sup>1</sup> This Article is primarily limited to a review of Indiana Appellate Court decisions during the survey period which advance, clarify, or raise further questions regarding the state's body of family law, particularly the commonly recognized subjects of dissolution of marriage, paternity, child custody, support, and adoption. A significant piece of legislation that permits arbitration in certain family law cases was enacted during the survey period and will be discussed.

### I. DISSOLUTION OF MARRIAGE

The following discussion considers some cases of note involving the topics of property distribution, spousal maintenance, marital agreements, and other matters in the context of dissolution of marriage.

#### *A. Property Distribution*

1. *Marital Property Issues.*—The first of the three primary questions involved in marital asset distribution concerns the definition of marital property. The other two questions involve the valuation of the property and how it is to be

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\* Associate, Ruppert & Schaefer, P.C. B.A., 1973, Purdue University; J.D., *with distinction*, 1979, St. Mary's University School of Law, San Antonio, Texas.

\*\* Partner, Ruppert & Schaefer, P.C. B.A., 1974, Indiana University; J.D., 1977, Cleveland Marshall College of Law, Cleveland, Ohio. The author has received the designation of Certified Indiana Family Law specialist from the Indiana Family Law Certification Board.

1. Ten articles of title 31 of the Indiana Code are specifically referred to as family law. IND. CODE § 31-11 to -31-20 (2004). Those articles cover marriage, domestic relations courts, the parent-child relationship, establishment of paternity, dissolution of marriage and legal separation, support of children and other dependents, custody and visitation rights, the Uniform Interstate Family Support Act, adoption, and human reproduction. Title 31 also contains an article of general provisions and an article consisting of 149 sections of definitions pertaining to both family and juvenile law. An additional eleven articles of title 31 are specifically referred to as "juvenile law." See IND. CODE § 31-9-2-72 (2004) ("Juvenile law" refers to [IND. CODE §] 31-30 [to] . . . 31-40."). Also, every legal proceeding in Indiana between parents involving child support or visitation with their children is governed by the Indiana Supreme Court's Child Support Rules and Guidelines and Parenting Time Guidelines. Throughout an additional fifteen other titles of the Indiana Code are provisions governing criminal offenses against children and the family, children's protection services, marriage and family therapists, and trust and fiduciaries. Federal legislation involving taxation, bankruptcy, and retirement benefits can be a consideration in virtually any property settlement. Other federal legislation impacts Native American adoptions, parental kidnapping, and state enforcement of child support obligations.

distributed. Indiana courts have referred to asset distribution as a two-step process, involving a determination of the marital estate and its division.<sup>2</sup> It is really more involved than that. Determining marital property sometimes involves a determination of whether something is in fact property and, if so, whether it is a marital asset. Many cases involving valuation of assets attest to the significance of that question. The marital property and valuation questions necessarily affect the final question—distribution.<sup>3</sup>

*In re Marriage of Nickels*<sup>4</sup> demonstrates the persistent desire of litigants to exclude property from the marital estate at the time of the divorce (rather than at the beginning of the marriage) and exemplifies Indiana's all-inclusive marital property law. In *Nickels*, the husband and wife both brought real estate into the marriage which they retitled to themselves as entireties property.<sup>5</sup> In addition, the wife inherited a substantial sum of money from her parents' estate prior to the marriage, which amount was distributed after the date of marriage and placed into a joint account.<sup>6</sup> The wife had accumulated nearly twenty-six years of credit toward her pension at the time of the parties' marriage. The wife appealed the trial court's division of assets.

Among other claims, the wife argued that the trial court erred by including the entire value of her pension and not just the portion that accumulated during the marriage.<sup>7</sup> On appeal the court reiterated Indiana's unified pot theory of marital property: "All property, whether acquired before or during the marriage, is generally included in the marital estate for property division. This 'one pot theory specifically prohibits the exclusion of any assets from the scope of the trial court's power to divide and award.'"<sup>8</sup>

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2. *Gard v. Gard*, 825 N.E.2d 907, 911 (Ind. Ct. App. 2005) (citing *Thompson v. Thompson*, 811 N.E.2d 888, 912-13 (Ind. Ct. App. 2004)).

3. *See generally* Robert J. Levy, *Introduction to Divorce-Property Issues*, 23 FAM. L.Q. 147 (1989).

4. 834 N.E.2d 1091 (Ind. Ct. App. 2005).

5. *Id.* at 1096.

6. *Id.* at 1094, 1098.

7. *Id.* at 1097-98.

8. *Id.* at 1098 (internal citations and quotation marks omitted) (quoting *Wyzard v. Wyzard*, 771 N.E.2d 754, 757 (Ind. Ct. App. 2002)). The Indiana Code defines "property" for purposes of dissolution of marriage as "all the assets of either party or both parties, including" current pension payments and the right to receive in the future vested retirement benefits. IND. CODE § 31-9-2-98(b) (2005). The Code provides:

In an action for dissolution of marriage under IC 31-15-2-2, the court shall divide the property of the parties whether:

- (1) owned by either spouse before the marriage;
- (2) acquired by either spouse in his or her own right:
  - (A) after the marriage; and
  - (B) before final separation of the parties; or,
- (3) acquired by their joint efforts.

IND. CODE § 31-15-7-4(a). Thus, a spouse may not select which of the parties' assets are to be

In short, the wife contended that only the portion of the pension that accrued during the marriage should have been subject to division. She argued effectively that the trial court should have used a “coverture fraction” to exclude the premarital portion of her pension.<sup>9</sup> The court quickly disposed of the wife’s argument on appeal because she

refers us to no authority standing for the proposition that a trial court must use a coverture fraction formula to distribute a pension or retirement plan. Moreover, while a trial court may set aside to one party the value of a marital asset where the other party made no contribution to its acquisition, it is not required to do so.<sup>10</sup>

*Magee v. Garry-Magee*<sup>11</sup> presents a question of first impression regarding whether a valuable tax right should be included in the marital estate.<sup>12</sup> In *Magee*, the parties executed a prenuptial agreement prior to the date of their marriage which included, among other matters, a provision that the parties would file joint income tax returns during the marriage if to do so would produce the smallest amount of aggregate tax.<sup>13</sup> One of the wife’s contentions on appeal was that the trial court erred by requiring her to reimburse the husband for his increased tax liability caused by her refusal to file joint tax returns in 2002.<sup>14</sup> Apparently, the wife accumulated a tax loss carryover through stock transactions in the wife’s brokerage account, which account was her separate property according to the premarital agreement. The wife’s refusal to file joint tax refunds deprived the husband of the tax reduction he could have received by claiming the losses. The wife argued that the trial court erred by subordinating the separate property provision of the agreement to the provision requiring joint tax returns where a tax savings would be realized.<sup>15</sup> The court noted that whether “a tax loss carryover is property that could be subject to allocation in dissolution proceedings . . .

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considered marital property, absent a valid premarital agreement. *See* *Huber v. Huber*, 586 N.E.2d 887, 889 (Ind. Ct. App. 1992).

9. The court explained that a coverture fraction is just one method that a court may use to distribute pension benefits to the earning and the non-earning spouses. The numerator of the coverture fraction “is the period of time during which the marriage existed [while pension rights were accruing] and the denominator is the total period of time which the pension rights accrued.” *In re Marriage of Nickels*, 834 N.E.2d at 1098 & n.2 (citing *In re Marriage of Preston*, 704 N.E.2d 1098, 1098 (Ind. Ct. App. 1999)). The total value of the pension is multiplied by the coverture fraction to determine the value accrued during the marriage. *Id.* Using the coverture fraction litigants typically argue that the premarital portion should be distributed to them and that the marital portion should be distributed in specific portions between the parties.

10. *In re Marriage of Nickels*, 834 N.E.2d at 1098 (citing *In re Marriage of Pully*, 652 N.E.2d 528, 530 (Ind. Ct. App. 1995)).

11. 833 N.E.2d 1083 (Ind. Ct. App. 2005).

12. *Id.* at 1086, 1092.

13. *Id.* at 1086.

14. *Id.* at 1092.

15. *Id.* at 1093.

presents a matter of first impression in Indiana.”<sup>16</sup> The court also “agree[d] . . . that a tax loss carryover is property subject to distribution in a dissolution proceeding under [Indiana Code section] 31-15-7-4.”<sup>17</sup>

The court also held that the trial court properly construed the premarital agreement. The agreement would have reserved the tax loss carryover entirely to the wife, but for the provision that the exclusion of separate property from marital property was specifically made subject to the provision that the parties file joint tax returns if that would achieve the greatest tax savings.<sup>18</sup>

The Indiana Supreme Court has clarified property settlement law as it relates to personal injury awards for damages occurring during the marriage versus awards for future lost wages. The question presented in *Beckley v. Beckley*<sup>19</sup> was whether an award of benefits under the Federal Employer’s Liability Act (“FELA”) was a part of the marital estate subject to distribution.<sup>20</sup>

In *Beckley*, the husband was injured in a work-related accident while employed by a railroad. He settled his claim under FELA, which covers employees of common carrier railroads for such accidents, for a lump sum in the amount of \$175,000. Four months later, the wife filed a petition for dissolution of marriage. The trial court, having included all of the settlement in the marital estate, gave seventy-five percent of it to the husband and a quarter to the wife. Overall, the husband received sixty-nine percent of the estate and the wife received thirty-one percent.<sup>21</sup> On appeal, the wife complained about the unequal distribution and the husband complained about inclusion of any of the settlement in the marital estate because he claimed the settlement was for future lost wages.<sup>22</sup>

The trial court had included all of the FELA award in the marital estate despite the fact that the award represented damages for both pain and suffering and future lost wages. The court of appeals remanded the case to the trial court with instructions to determine what portion of the FELA award represented compensation for damages occurring during the marriage and what portion represented future lost wages.<sup>23</sup> It held that only that portion representing compensation is divisible as a marital asset. The Indiana Supreme Court affirmed the trial court even though it agreed with the court of appeals because it reasoned that compensation for future lost wages is not a vested property interest subject to distribution in a dissolution of marriage.<sup>24</sup>

The supreme court began its analysis with two equally well-established propositions: (1) Indiana statutes define “property” as all the assets of either or

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16. *Id.* at 1092.

17. *Id.*

18. *Id.* at 1093.

19. 822 N.E.2d 158 (Ind. 2005).

20. *Id.* at 160.

21. *Id.*

22. *Id.*

23. *Id.*; see *Beckley v. Beckley*, 790 N.E.2d 1033, 1037 (Ind. Ct. App. 2003).

24. *Id.* at 162-63.

both parties and (2) earnings after the marriage are not marital property.<sup>25</sup>

The husband in *Beckley* contended that FELA was similar to Indiana's Workers' Compensation Act and, thus, his FELA settlement should not be included as part of the marital estate subject to distribution. The supreme court acknowledged that FELA, like Indiana's Workers' Compensation Statute, was designed to shift the cost of work injuries and death from the employee to the employer.<sup>26</sup> However, the court went on to note "important distinctions between the two systems."<sup>27</sup> Notably, federal courts have steadfastly maintained that FELA is not a worker's compensation law but a negligence statute.<sup>28</sup> Additionally, Indiana's Workers' Compensation Statute provided benefits regardless of fault, so long as the injury arose out of and in the course of employment.<sup>29</sup> FELA, on the other hand, imposes liability only where the injuries are the result of negligence.<sup>30</sup> Most importantly for the court, an award under FELA may include damages for pain and suffering.<sup>31</sup>

The court then went on to announce a holding that arguably applies to all personal injury settlements or awards resulting from a tort. "[W]e hold that any part of a FELA award representing future losses is not marital property subject to distribution. Rather, only that portion of the award intended as compensation for past losses, that is, losses incurred during the marriage, is included in the marital estate."<sup>32</sup> The court explicitly rejected the idea that "an entire lump sum settlement is included in the marital pot."<sup>33</sup>

The supreme court, however, did not remand the case to the trial court for further proceedings consistent with its decision. Rather, the majority held that a presumption is created by the dissolution statute that all the assets of either or both parties are subject to division and that

The party who seeks to rebut the presumption, i.e., the party who seeks to have property not included (or at least not divided), bears the burden of demonstrating that the statutory presumption should not apply. This is so because an exclusion from the marital estate directly implicates whether the marital property will be equally divided. And our dissolution statute provides that a party seeking to rebut the presumption of equal division of marital property bears the burden of proof in doing so.<sup>34</sup>

Thus, the court held that the husband, who sought to exclude the FELA award as

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25. *Id.* at 160.

26. *Id.* at 161.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 162.

33. *Id.*

34. *Id.* at 163

property, failed to carry his burden of proof to demonstrate the portion of the award that should not have been included in the marital estate; having failed to carry his burden, the majority could not say that the trial court erred by including the entire award in the marital estate subject to division.<sup>35</sup>

Justice Dickson concurred with the majority's holding that the portion of the FELA settlement representing future lost earnings should be excluded from the marital pot while the portion intended as compensation for losses incurred during the marriage should be included.<sup>36</sup> However, he disagreed "with the majority's decision to create a presumption that all assets of either or both parties in a dissolution case are marital property subject to division."<sup>37</sup> Apparently, he was concerned that the presumption was too broad and created the risk of uncertainty as to various types of property outside the marital estate.<sup>38</sup> Justice Dickson criticized the majority for deciding against the husband based on an evidentiary presumption "that did not exist at the time the parties presented their evidence and the trial court evaluated it. At the least, the parties and the trial court should be given an opportunity to apply this new presumption to the facts of this case. I believe that remand is appropriate."<sup>39</sup>

Another case decided during this survey period which determined that an intangible could constitute divisible marriage property is *DeSalle v. Gentry*.<sup>40</sup> In *DeSalle*, the main portion of the parties' personal property consisted of antique toys which the parties bought and sold at several toy show venues in the eastern continental United States.<sup>41</sup> The wife held fifty-one percent of the stock and the husband held forty-nine percent of the stock in the corporation they formed to buy and sell the toys.<sup>42</sup> On appeal, the husband complained, among other things, that the trial court erred by awarding the wife profitable toy show venues while he was awarded venues that were either unprofitable or no longer in existence.<sup>43</sup> He argued that the venues were personal goodwill, which were excludable from divisible marital property, because only he could represent the business since he is well known in the toy show industry, and he knows all the dealers.<sup>44</sup> The court disagreed with him. It concluded that the toy show venues were an aspect of the corporation's enterprise goodwill, a different intangible asset, which is divisible marital property.<sup>45</sup> The disagreement between the court and the husband was not fatal to his claim on appeal, however. The trial court, in attempting to divide the marital estate equally, abused its discretion when it impaired the husband's ability

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35. *Id.*

36. *Id.* (Dickson, J., concurring and dissenting).

37. *Id.*

38. *See id.* at 163-64.

39. *Id.* at 165.

40. 818 N.E.2d 40 (Ind. Ct. App. 2004).

41. *Id.* at 43.

42. *Id.*

43. *Id.* at 44.

44. *Id.* at 47.

45. *Id.* at 47-48.

to earn a future income by awarding him the poor performing venues.<sup>46</sup>

The absence of a permanent, physical location for the business means that the toy show venues are the sole place where the toys are bought and sold and, consequently, the sole source of [the husband's] income. . . . [T]he trial court's division of toy show venues effectively resulted in an injunction against [the husband's] future income. Therefore, we hold that the trial court abused its discretion when it divided the toy show venues between the former spouses.<sup>47</sup>

2. *Property Valuation Issues*.—It is a well-established rule of law in Indiana that a trial court may select a valuation date for marital property any time between the date the petition for dissolution is filed and the date a decree of dissolution is entered.<sup>48</sup> In *Magee*, the court noted that the parties' premarital agreement modified the rule for valuation,<sup>49</sup> and provided as the valuation date of the wife's interest in a parcel of the husband's real estate the earliest of the parties' estrangement, their legal separation, the dissolution of their marriage, or the husband's death.<sup>50</sup>

The trial court found that the term "estrangement" as used in the premarital agreement was ambiguous and that the parties' testimony regarding its meaning had little value. As a result, the trial court determined that estrangement was not applicable in this case.<sup>51</sup> Obviously, the husband was alive, and the trial court apparently took legal separation literally to mean the filing of a legal separation petition. Accordingly, the trial court selected the date of dissolution as the date to value the wife's interest in the real estate of the husband's that she was to receive under the premarital agreement.<sup>52</sup> On appeal, the husband contended that the dissolution court erred when it construed the term estrangement and thus used an improper valuation date.<sup>53</sup> The court stated that "[a]ntenuptial agreements are legal contracts by which parties entering a marriage attempt to settle their respective interests in the property of the other during the course of the marriage and upon its termination."<sup>54</sup> They should be "construed according to principals applicable to the construction of contracts generally, and . . . liberally construed to carry out the parties' intent."<sup>55</sup>

In this case, the agreement alters the customary understanding of what is

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46. *Id.* at 48.

47. *Id.*

48. *Magee v. Garry-Magee*, 833 N.E.2d 1083, 1087 (Ind. Ct. App. 2005) (citing *Reese v. Reese*, 671 N.E.2d 187, 191 (Ind. Ct. App. 1996)). The date of the filing for dissolution of marriage is the statutory "final separation date." See IND. CODE § 31-9-2-46 (2005).

49. *Magee*, 833 N.E.2d at 1087.

50. *Id.* at 1086.

51. *Id.* at 1088.

52. *Id.* at 1086.

53. *Id.* at 1087.

54. *Id.*

55. *Id.* (internal citation omitted).

included in marital property.<sup>56</sup> “The Agreement also modifies the rule of law that a trial court may select a valuation date any time between the date a petition for dissolution is filed and the date a decree of dissolution is entered.”<sup>57</sup>

The court went on to state that the trial court’s definition of “estrangement” altered the agreement by improperly adding a condition not in the agreement.<sup>58</sup> “Both the dissolution court and this court must apply the triggering events clause as it is written even if the draftsmanship is flawed.”<sup>59</sup> Therefore, “estrangement” must be construed as “a diversion or waning of affections that may or may not be accompanied by a physical separation, regardless of whether legal proceedings have been initiated.”<sup>60</sup> Here, estrangement had occurred because of the husband’s “verified declaration [of the] irretrievable breakdown of the marriage.”<sup>61</sup>

The issue presented in *Goossens v. Goossens*<sup>62</sup> was whether the trial court erred by using the lower of two amounts testified to by the wife as the value of the marital residence.<sup>63</sup> At the final hearing, the wife submitted a verified financial statement which contained her opinion that the value of the marital residence was \$97,500. She also submitted into evidence a tax assessment showing that the assessed value was \$97,500. However, during her direct examination, she testified that she thought the house was worth \$90,000, an amount which her own attorney noted was different from her original estimates. The trial court found that the value of the marital residence was \$90,000, which, obviously, had an affect upon the amount of the equity in the residence.<sup>64</sup> The husband appealed and claimed that the assignment of value by the trial court was error. The court of appeals did not agree.<sup>65</sup>

Where the trial court’s evaluation of property is within the range of values supported by the evidence, the court does not abuse its discretion. . . . Whether or not we would have come to the same conclusion as the trial court had we been the finder of fact, the fact remains that the trial court’s finding was within the range of values supported by the evidence. We therefore conclude that the trial court did not abuse its discretion in assigning value to the Jackson Boulevard property.<sup>66</sup>

Adjusting the value of a marital asset by debt incurred by one of the parties after the date of filing the petition for dissolution of marriage was rejected in *In*

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56. *Id.*

57. *Id.*

58. *Id.* at 1087-88.

59. *Id.* at 1088.

60. *Id.*

61. *Id.* at 1089.

62. 829 N.E.2d 36 (Ind. Ct. App. 2005).

63. *Id.* at 38.

64. *Id.*

65. *Id.*

66. *Id.* at 38-39 (internal citations omitted).

*re Marriage of Nickels*.<sup>67</sup> In *Nickels* the husband owned a garage business that apparently was a sole proprietorship. Among the assets comprising the business were a checking account and accounts receivable. However, the trial court's valuation of the accounts was approximately \$3000 lower than what the evidence indicated. On appeal the husband contended that the trial court merely "balanced" the value of the accounts against "'unspecified business debt' and his need to borrow \$3,000 when 'she took everything.'"<sup>68</sup> The court rejected this argument because "Husband testified that he borrowed the \$3000 *after* he filed the petition for dissolution. . . . Therefore, the trial court's valuation of Husband's 'Garage Account' at \$4487 is not supported by the evidence."<sup>69</sup>

3. *Asset Distribution Issues*.—For the most part, the foregoing cases claim error in the distribution of the marital estate as the result of improper exclusion or inclusion of assets in the estate or the improper valuation of an asset. In *Gard v. Gard*<sup>70</sup> the trial court attempted to use factors to deviate from the presumption of an equal division of the marital estate<sup>71</sup> because it wanted to adjust the content of the marital estate.<sup>72</sup> The trial court then applied the percentages for distribution

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67. *In re Marriage of Nickels*, 834 N.E.2d 1091, 1100 (Ind. Ct. App. 2005).

68. *Id.* at 1099.

69. *Id.* (emphasis added).

70. 825 N.E.2d 907 (Ind. Ct. App. 2005).

71. IND. CODE § 31-15-7-5 (2005) provides the presumption of an equal division of marital property and a non-exhaustive list of factors to rebut it:

The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

- (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
- (2) The extent to which the property was acquired by each spouse:
  - (A) before the marriage; or
  - (B) through inheritance or gift.
- (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.
- (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.
- (5) The earnings or earning ability of the parties as related to:
  - (A) a final division of property; and
  - (B) a final determination of the property rights of the parties.

72. In another finding of fact the trial court wrote:

Wife introduced evidence of Husband's net worth at the date of marriage of -\$135,013.14. The Court has already credited Husband with the sum of \$31,400 in pre-marital funds used to establish an investment account, increasing Husband's net worth to -\$103,613.14. Husband testified that an additional \$8,000.00 of alimony to previous

that it found appropriate to the altered marital estate.<sup>73</sup> Because of these altered percentages, the husband owed the wife over \$100,000.

The wife obviously recognized that she received sixty-five percent of a reduced marital estate. Both parties filed motions to correct calculation errors.<sup>74</sup> The husband appealed contending that the trial court should have disregarded his pre-marital debts and the marital assets used to satisfy those debts in determining the marital estate.<sup>75</sup> Among the husband's arguments was that it appeared that the trial court "without saying so . . . concluded [Husband's] pre-marriage debts had dissipated marital assets."<sup>76</sup>

Although the court in *Gard* did not find any evidence that the trial court had relied upon dissipation, it did find it necessary to recite a concise primer on marital assets and debts for its remand.<sup>77</sup> It noted that in this case the trial court improperly included the husband's premarital liabilities and assets.<sup>78</sup> To make clear to the trial court the distinction between the determination of marital property and its distribution, the court of appeals went on to note:

Husband states that he does not challenge the current 60%-40% division of the marital estate, but given that \$95,613.14 must be subtracted from its value, the trial court may determine that a different distribution is more just and reasonable. In this second step of marital property division [i.e. distribution of the assets], the trial court is not prohibited from considering Husband's premarital debts and their satisfaction with marital assets as factors relating to an appropriate division of the marital

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wife was not paid; the Court finds that Husband's net worth at the time of the marriage was -\$95,613.14.

*Gard*, 825 N.E.2d at 909. The court then concluded that the wife was primarily a homemaker and entitled to sixty-five percent of the marital estate and that the husband was entitled to thirty-five percent of the marital estate. *Id.*

73. *Id.*

74. *Id.* The trial court's entry on the wife's motion to correct errors reads in part:

[Wife] . . . asserts that the Court erred in deducting from, rather than adding to, the total value of the marital estate, a pre-existing financial obligation of [Husband] which was satisfied during the marital relationship by marital assets. The Court agrees, GRANTS [Wife's] Motion, and adopts the values of the marital estate contained in amended Paragraph 11 of the Court's Findings of Facts. . . . [T]he Court finds that, had those valuation and computational errors not been made, the Court would not have ordered the 65%-35% distribution of the marital estate. The Court further finds and now ORDERS that [Wife] shall receive 60% . . . of the marital estate. Accordingly, the Court now ORDERS [Husband] to pay [Wife] the sum of \$227,372.99 as a final distribution . . . .

*Id.* at 909-10 (alterations in original).

75. *Id.*

76. *Id.* at 911 n.2 (internal quotation marks omitted).

77. *Id.* at 910-11.

78. *Id.*

assets existing at the time of the final separation.<sup>79</sup>

In *Hatten v. Hatten*<sup>80</sup> the trial court made an unequal distribution of assets favoring the husband in the dissolution of approximately a forty year marriage by awarding him all of a jointly titled investment account because it was traceable to an inheritance the he had received in 1988. The wife appealed this distribution an abuse of discretion.<sup>81</sup>

On appeal, the court found that the trial court's findings were not supported by the evidence and did not support the judgment.

The trial court found that the Merrill Lynch account "remained a *separate and distinct* account throughout the marriage," but also found that the parties had "had the *mutual benefit* of approximately \$23,000 of expenditures from the Merrill Lynch account during the marriage." . . . Wife testified that originally, the account was held in Husband's name alone, but at some point, Husband added her name to the account of his own volition. Funds from the account were used to [repair the marital residence] . . . [and] for regular household expenses for both Husband and Wife . . . . Under these circumstances, we do not believe that the account can be considered "separate and distinct." Moreover, although it is true, as the trial court found, that Wife did not make any separate financial contribution to the account, the fact that she used a portion of her own inheritance for household expenses and the purchase of a car for Husband in part protected the funds in the Merrill Lynch account from having to be used for those purposes. Finally, the fact that Wife enjoyed the benefit of other commingled funds over the course of the marriage does not disqualify her from also enjoying the benefit of these commingled funds. We therefore hold that the trial court abused its discretion in awarding the entire value of the Merrill Lynch account to Husband.<sup>82</sup>

Judge Baker dissented and opined that the trial court's findings were sufficient for deviation from the presumption of an equal division.<sup>83</sup> The majority responded to Judge Baker's criticism to make clear that its decision was based upon rejection of the mere traceability as a basis for deviation: "We recognize the precedent of *Keller*, but disagree with the conclusion reached therein. People commingle assets for a variety of reasons; however, the mere fact of traceability of assets should not be the basis for deviation from the presumptive equal division. We therefore decline to follow *Keller* herein."<sup>84</sup>

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79. *Id.* at 911.

80. 825 N.E.2d 791 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 180 (Ind. 2005).

81. *Id.* at 792-93.

82. *Id.* at 796.

83. *Id.* at 797 (Baker, J., dissenting) (citing *Keller v. Keller*, 639 N.E.2d 372 (Ind. Ct. App. 1994)).

84. *Id.* at 796 (majority opinion).

*B. Spousal Maintenance Issues*

Two cases decided during the survey period, *Haville v. Haville*<sup>85</sup> and *Zan v. Zan*<sup>86</sup> provide answers at this time to the question of whether agreed-to spousal maintenance is subsequently modifiable where the court could have originally ordered the spousal maintenance. That question was specifically left open in the Indiana Supreme Court decision in *Voigt v. Voigt*.<sup>87</sup>

In *Haville*, the parties agreed at the time of their divorce that the husband would pay the wife maintenance in the amount of \$400 per month for the remainder of her life due to the disabling effects of multiple sclerosis.<sup>88</sup> The agreement to pay life time spousal maintenance was part of the parties' settlement agreement which was approved and incorporated by the court in its decree for dissolution of marriage. Also included in the settlement agreement were provisions providing: (1) that each party released all claims and rights which he or she had against the other by reason of their relationship as the husband and the wife; (2) that each party accepted the provisions of the agreement in full release and settlement of any and all claims that either had against the other; (3) that the settlement agreement was binding upon the heirs, executors and administrators of the parties; and (4) that the agreement settled all property and spousal maintenance rights between the parties.<sup>89</sup> Five years later the wife petitioned to modify the monthly maintenance seeking an increase. The husband moved to dismiss the petition. The trial court granted the motion to dismiss on the grounds that the agreement was not modifiable because the maintenance payments would continue after the husband's death which the trial court believed it could not have ordered.<sup>90</sup> The court of appeals affirmed,<sup>91</sup> and the supreme court granted transfer.<sup>92</sup> A united supreme court voted to affirm the trial court's decision but split 3-2 on the question of whether Indiana law authorizes orders for incapacity maintenance that continue after the obligor's death.<sup>93</sup>

The majority, led by Justice Dickson, agreed with the wife that a trial court does have the authority to make an incapacity award that continues after the death of the obligor.<sup>94</sup>

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85. 825 N.E.2d 375 (Ind. 2005).

86. 820 N.E.2d 1284 (Ind. Ct. App. 2005).

87. 670 N.E.2d 1271, 1280 n.13 (Ind. 1996). What *Voigt* did decide was that a trial court may not grant a contested post-decree modification of agreed-to spousal maintenance if the maintenance was of a form it could not have originally ordered. *Id.* at 1290.

88. *Haville*, 825 N.E.2d at 376.

89. *Id.* at 376-77.

90. *Id.* at 377.

91. *Haville v. Haville*, 787 N.E.2d 410 (Ind. Ct. App. 2003), *superseded by* 825 N.E.2d 375 (Ind. 2005).

92. *Haville*, 825 N.E.2d at 376.

93. *Id.* at 378-79.

94. *Id.* at 377-78.

Indiana case law thus does not prohibit a maintenance obligation from surviving the death of the obligor where the decree so provides. Furthermore, maintenance for a spouse's incapacity, lasting beyond the death of the obligor, is authorized by statute. Where a spouse is incapacitated such that the spouse's ability of self-support is materially affected, a court "may find that maintenance for the spouse is necessary *during the period of incapacity*, subject to further order of the court." The duration of this authorized maintenance obligation is expressly measured by the period of the recipient's incapacity and not by the lifetime of the obligor.<sup>95</sup>

Having found that the trial court could have ordered the spousal maintenance to last beyond the obligor's lifetime, the court, however, found that by the terms of the agreement the spousal maintenance was not modifiable.<sup>96</sup> Because a trial court cannot order non-modifiable spousal maintenance, "the trial court lacked authority to thereafter modify the maintenance obligation created by the previously approved settlement agreement."<sup>97</sup>

Chief Justice Shepherd, in a concurring opinion, stated his belief that the majority wrongly decided the question whether an Indiana court could order incapacity maintenance beyond the death of the obligor.<sup>98</sup> Arguing that our legislature abolished the idea of alimony as support for a former spouse, he noted that, prior to its abolition, a trial court could only order alimony for support which terminated upon the death of the spouse, unless the parties agreed otherwise.<sup>99</sup> Thus, in his opinion, the legislature did not intend to authorize judges to order maintenance beyond the death of the obligor. Rather, the legislature intended to recognize that certain impairments may last for quite a long time.<sup>100</sup>

Barring a subsequent supreme court decision to the contrary, the court in *Zan v. Zan* did squarely address the issue left open by *Voigt*.<sup>101</sup> In *Zan*, the husband agreed to pay \$800 a month to the wife in rehabilitative maintenance for a period of three years, so long as he remained employed in his current capacity. The parties specifically agreed that, should his employment change, then that event would be considered a substantial change in circumstances for purposes of modification of the amount of maintenance payable to the wife.<sup>102</sup> The wife used the spousal maintenance payments to live off of and made minimal efforts to obtain education which, according to the parties' agreement, was the object of the rehabilitative spousal maintenance so that she could improve her employment

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95. *Id.* (internal citation omitted).

96. *Id.* at 378.

97. *Id.* (citing *Voigt v. Voigt*, 670 N.E.2d 1271, 1280 (Ind. 1996)).

98. *Id.* at 379 (Shepard, C.J., concurring).

99. *Id.* at 379-80.

100. *Id.*

101. *Zan v. Zan*, 820 N.E.2d 1284, 1286 (Ind. Ct. App. 2005).

102. *Id.*

opportunities.<sup>103</sup> The husband apparently got tired of this and filed his petition to modify or revoke the spousal maintenance. The trial court modified the agreement by providing that the former husband would not have to pay any further maintenance to the wife unless she enrolled in an education program by a date certain and successfully completed it.<sup>104</sup> On appeal, the wife contended that the trial court erred in modifying the agreement because it lacked the authority to originally order the husband to make the spousal maintenance payments. The husband then argued on appeal that the court did have the authority to order him to make rehabilitative maintenance payments.<sup>105</sup> The court agreed with the husband and found that the trial court clearly had the authority, pursuant to Indiana Code section 31-15-7-2(3),<sup>106</sup> to order the husband to make rehabilitative maintenance payments without the agreement of the parties.<sup>107</sup> This was the question left unanswered in *Voigt*.

In *Voigt*, our supreme court established a general principal: “[w]here a court had no authority to impose the kind of maintenance award that the parties forged in a settlement agreement, the court cannot subsequently modify the maintenance obligation without the consent of the parties.” The court reserved the question whether a court may modify a maintenance obligation that originated in a settlement agreement but that rested on one of the grounds—including rehabilitative maintenance—on which the court could have ordered the same maintenance in the absence of agreement.

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Although our supreme court has not squarely decided the issue presented

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103. *Id.*

104. *Id.* at 1286-87.

105. *Id.* at 1287.

106. IND. CODE § 31-15-7-2(3) (2005).

After considering:

- (A) the educational level of each spouse at the time of marriage and at the time the action is commenced;
  - (B) whether an interruption in the education, training, or employment of a spouse who is seeking maintenance occurred during the marriage as a result of homemaking or child care responsibilities, or both;
  - (C) the earning capacity of each spouse, including educational background, training, employment skills, work experience, and length of presence in or absence from the job market; and
  - (D) the time and expense necessary to acquire sufficient education or training to enable the spouse who is seeking maintenance to find appropriate employment;
- a court may find that rehabilitative maintenance for the spouse seeking maintenance is necessary in an amount and for a period of time that the court considers appropriate, but not to exceed three (3) years from the date of the final decree.

*Id.*

107. *Zan*, 820 N.E.2d at 1288.

today, it is our view that the trial court may modify the Agreement under these circumstances. To hold otherwise may circumvent the parties' ability or desire to bargain independently without court intervention. Put another way, a party may be loathe to enter into an agreement such as the one here, knowing that a court could not intervene in the event of changed circumstances.<sup>108</sup>

The countervailing view was expressed by Chief Judge Kirsch in a dissenting opinion. In short, he would prohibit the modification of any maintenance provision in a negotiated property settlement agreement—whether the trial court could have awarded the maintenance or not.<sup>109</sup>

Negotiated maintenance provisions are only one part of a negotiated property agreement. In exchange for such provisions, a party may give up other property claims or may agree to such a provision solely because of tax consequences of such a provision. Thus, modifying a negotiated maintenance provision implicates the entire division of the marital estate. Moreover, modifying the provision in effect adds a term to the parties' contract for which they did not bargain and for which they neither gave, nor received, consideration. Here, the parties could have made maintenance conditional on wife's satisfactory educational progress. They did not.<sup>110</sup>

### *C. Miscellaneous Issues*

1. *Jurisdiction to Enforce Divorce Decree.*—In *Fackler v. Powell*,<sup>111</sup> the former spouses disputed the amount of money that the former husband was to pay to the wife under a certain promissory note related to a construction project which the wife was awarded in the parties' settlement agreement.<sup>112</sup> The wife sought to have the dispute adjudicated in a court other than the one that issued the dissolution decree. The trial court held that it had subject matter jurisdiction over the dispute.<sup>113</sup> The husband appealed, the court of appeals affirmed, and the husband sought, and the supreme granted, transfer.<sup>114</sup>

The supreme court started its analysis,

with the firmly established rule that a court that issues a dissolution decree retains exclusive and continuing responsibility for any future modifications and related matters concerning the care, custody, control, and support of any minor children. Among the policy reasons supporting

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108. *Id.*

109. *Id.* at 1290 (Kirsch, J., dissenting).

110. *Id.*

111. 816 N.E.2d 476 (Ind. Ct. App. 2004), *superseded by* 839 N.E.2d 165 (Ind. 2005).

112. *Id.* at 478-79.

113. *Id.* at 481.

114. *Fackler v. Powell*, 839 N.E.2d 165 (Ind. 2005).

this rule is that deciding these matters frequently “involve factual determination[s] that substantial and continuing, changed circumstances render the existing terms unreasonable”; an inquiry that the dissolution court is in the best position to conduct.<sup>115</sup>

Recognizing that the case before it did not involve child-related issues, the court went on to hold: “But even under these circumstances, we believe the interests of judicial efficiency and comity are best served by requiring litigants to seek clarification and enforcement of property settlement agreements in the dissolution court. Both precedent and broader policy considerations support this result.”<sup>116</sup>

Justice Boehm dissented in a separate opinion in which Justice Dickson concurred.<sup>117</sup> Viewing the former wife’s claim as nothing more than a suit to collect on a promissory note that was assigned to her in a divorce proceeding, it was his opinion that she was free to seek enforcement in any court of competent jurisdiction.<sup>118</sup>

2. *Attorney’s Fees for Bad Faith Litigation.*—*French v. French*<sup>119</sup> and *Gaw v. Gaw*<sup>120</sup> presented, among other issues, requests for attorney’s fees under the statute permitting an award of attorney’s fees in civil actions for frivolous, unreasonable, or groundless claims or defenses.<sup>121</sup>

In *French*, the trial court awarded the former husband \$500 in attorney’s fees against the wife in a post-decree contempt action.<sup>122</sup> In the original dissolution decree, the trial court had ordered the husband to assume certain attorney’s fees for a civil case litigated by the parties during the marriage without a determination of the amount owed. A year later, the wife, who was represented by the attorney to whom the parties owed the fees for the civil action, brought a contempt action against the husband for failure to pay the fees. In response to the contempt action the trial court found that the husband was not in contempt because the amount to pay was not and could not be determined by it. Nevertheless, the wife once again filed another petition for contempt for failure

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115. *Id.* at 167 (internal citations omitted).

116. *Id.*

117. *Id.* at 170 (Boehm, J., dissenting).

118. *Id.*

119. 821 N.E.2d 891 (Ind. Ct. App.), *reh’g denied* (Ind. Ct. App. 2005).

120. 822 N.E.2d 188 (Ind. Ct. App. 2005).

121. IND. CODE § 34-52-1-1(b) (2005) provides:

In any civil action, the court may award attorney’s fees as part of the cost to the prevailing party, if the court finds that either party:

- (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
- (2) continued to litigate the action or defense after the party’s claim or defense clearly became frivolous, unreasonable, or groundless; or,
- (3) litigated the action in bad faith.

122. *French*, 821 N.E.2d at 898.

to pay the same fees.<sup>123</sup> Again the trial court rejected the petition for contempt and ordered the wife to pay the husband \$500 “for having to defend [the wife’s] baseless Petition for Contempt.”<sup>124</sup> The wife appealed. The court reviewed its prior decision defining the terms of the frivolous litigation statute. It noted that in a previous decision it had

defined a claim or defense as frivolous (a) if it is taken primarily for the purpose of harassing or maliciously injuring a person, or (b) if the lawyer is unable to make a good faith and rational argument on the merits of the action, or (c) if the lawyer is unable to support the action taken by a good faith and rational argument for an extension, modification, or reversal of existing law. A claim or defense is unreasonable under the statute, if, based on a totality of the circumstances, including the law and the facts known at the time of the filing, no reasonable attorney would consider that the claim or defense was worthy of justification. Finally, we determined a claim or defense to be groundless if no facts exist which support the legal claim relied on and presented by the losing party. Furthermore, we held that a claim or defense is neither groundless nor frivolous merely because a party loses on the merits.<sup>125</sup>

Finding that both of the trial court’s decisions on the former wife’s petitions for contempt were clear and well reasoned, the court concluded that her brief on appeal left them with a clear conviction that the trial court did not err.<sup>126</sup>

Even though her argument may be novel, the absolute lack of any supporting Indiana or out-of-state case law and the absence of a good faith argument after the trial court’s repeated and consistent analyses, makes us hesitant to categorize [the wife’s] actions as zealous advocacy. Rather, we conclude that with her continuous filings [the wife] crossed the boundary into unnecessary and unwarranted litigation.<sup>127</sup>

In *Gaw v. Gaw* the wife filed a motion to join a third party creditor as a defendant in her dissolution proceeding because of her frustration over the application of her and her husband’s payments on several loan accounts with the creditor.<sup>128</sup> The trial court issued an order joining the creditor as a party without holding a hearing on the matter.<sup>129</sup> The creditor responded by filing motions to dismiss, for summary judgment, to correct error and to reconsider, along with a motion requesting attorney’s fees under Indiana Code section 34-52-1-1.<sup>130</sup> The trial court conducted a hearing on the motions and dismissed the third party

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123. *Id.*

124. *Id.*

125. *Id.* at 897 (internal citations omitted).

126. *Id.* at 898.

127. *Id.* (internal citation omitted).

128. *Gaw v. Gaw*, 822 N.E.2d 188, 189-90 (Ind. Ct. App. 2005).

129. *Id.* at 190.

130. *Id.*

creditor but declined to find that the joinder had been wrongful and, thus, denied the creditor's petition for attorney's fees. On appeal, the creditor first argued that the trial court abused its discretion when it joined it as a party to the dissolution proceedings. The appellate court found the issue moot.<sup>131</sup> "However, we would be remiss if we failed to address the impropriety of joining a third-party creditor to a dissolution proceeding."<sup>132</sup> Noting that the wife neither filed a claim against the creditor nor established that joinder was mandatory or permissive, the court observed: "Neither the rules of trial procedure nor the dissolution of marriage statutes are so broad as to require third parties to be dragged into marriage dissolution proceedings by their heels and there compelled to litigate issues that are but tangential to that cause of action."<sup>133</sup>

The court rejected the wife's argument that *In re Marriage of Dall*<sup>134</sup> made creditors a proper party to join.<sup>135</sup>

However, the holding in *Dall* speaks only to the propriety of joining a nonparty to a divorce proceeding when a party claims that the marital estate includes an equitable interest in real property titled in that nonparty. The holding in *Dall* does not support the joinder of a third-party creditor like Sterling to a dissolution proceeding. Finally, we also note that the trial court granted [the wife's] motion to join Sterling two days after it was filed, without a hearing, and likely before Sterling had even received its notice by mail. Under these facts and circumstances, the trial court abused its discretion when it joined Sterling as a party to the Gaws' dissolution proceeding.<sup>136</sup>

Turning to the creditor's claim that it was an abuse of discretion to deny its petition for attorney's fees, the court concluded that the wife's argument to join Sterling was not completely unsupportable.<sup>137</sup>

In addition, Sterling argues that [the wife] filed the motion to join in bad faith for the purpose of harassment. Bad faith "implies the conscious doing of a wrong because of dishonest purpose or moral obliquity." Sterling points to no evidence indicating that [the wife's] motion to join was motivated by any dishonest purpose. [The wife] and her attorney were clearly frustrated by Sterling's heavy-handed attitude. Although, [the wife's] joinder of Sterling borders on being unreasonable and groundless, we cannot conclude that the trial court abused its discretion

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131. *Id.*

132. *Id.*

133. *Id.* at 191 (quoting *State ex rel. Stanton v. Super. Ct. Lake County*, 355 N.E.2d 406, 407-08 (Ind. 1976)).

134. 681 N.E.2d 718 (Ind. Ct. App. 1997).

135. *Gaw*, 822 N.E.2d at 191.

136. *Id.* at 192 (internal citation omitted).

137. *Id.*

when it denied Sterling attorney's fees.<sup>138</sup>

4. *Relief from Judgment for Fraud Not Supported by Opinion of Value.*—In *Wheatcraft v. Wheatcraft*<sup>139</sup> the wife filed a motion to set aside a mediated settlement agreement that had been approved by the court over wife's objection.<sup>140</sup> At the hearing on the motion to set aside, the wife claimed that the husband had committed fraud to induce her to sign the settlement agreement and that she had signed the agreement under duress. The wife testified that she feared the husband might hurt her if she did not sign the agreement based solely on his insistence that the parties successfully conclude mediation that day and her feeling that she was "beaten down" by the husband.<sup>141</sup> The wife's fraud claim was based on the husband's opinion of the value of his business at mediation. At the mediation, the husband opined that the business was worth approximately \$43,000 based on what he had been told by an appraiser. According to the wife, her first attorney had done nothing to value the business. The trial court found that the wife's claims were baseless.<sup>142</sup>

On appeal, the wife alleged that the husband committed actual fraud or, alternatively, constructive fraud when he represented the value of the company. The court of appeals did not agree.<sup>143</sup>

The elements of actual fraud which a plaintiff must prove are: (1) a material misrepresentation of a past or existing fact which (2) was untrue, (3) was made with knowledge of or in reckless ignorance of its falsity, (4) was made with the intent to deceive, (5) was rightfully relied upon by the complaining party, and (6) which proximately cause the injury or damage complained of. The elements of constructive fraud are: (1) a duty owing by the party to be charged to the complaining party due to their relationship, (2) violation of that duty by the making of deceptive material misrepresentations of past or existing facts or remaining silent when a duty to speak exists, (3) reliance thereon by the complaining party, (4) injury to the complaining party as a proximate result thereof, and (5) the gaining of an advantage by the party to be charged at the expense of the complaining party.<sup>144</sup>

Noting that it is well settled that fraud requires a misrepresentation of a material fact, the court held:

Expressions of opinions cannot be the basis for an action in fraud. "[T]he general rule is that statements of value are regarded as mere expressions of opinion." More specifically, this court has held that an appraisal is a

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138. *Id.* at 192-93 (citations omitted).

139. 825 N.E.2d 23 (Ind. Ct. App. 2005).

140. *Id.* at 27.

141. *Id.* at 28.

142. *Id.* at 29-30.

143. *Id.* at 31.

144. *Id.* at 30 (internal citation omitted).

matter of opinion, and is not, therefore, actionable under a theory of fraud. Accordingly, we hold that in this case, Wife cannot show actionable fraud based upon Husband's representation regarding the company's valuation.<sup>145</sup>

5. *Family Law Arbitration*.—Effective July 1, 2005, Indiana Code chapter 34-57-5 provides for family law arbitration.<sup>146</sup> Indiana Code section 34-56-5-2 permits parties to agree in writing to submit to arbitration by a family law arbitrator actions for dissolution of marriage, to establish child support, custody or parenting time or to modify a decree, judgment or order entered under Title 31.<sup>147</sup> Unless the parties agree in writing to repudiate the agreement to submit to

145. *Id.* at 30-31 (internal citations omitted).

146. IND. CODE §§ 34-57-5-1 to -5-13 (2005).

147. IND. CODE § 34-57-5-2 (2005) provides:

(a) In an action:

(1) for the dissolution of a marriage;

(2) to establish:

(A) child support;

(B) custody; or

(C) parenting time; or

(3) to modify:

(A) a decree;

(B) a judgment; or

(C) an order;

entered under IC 31;

both parties may agree in writing to submit to arbitration by a family law arbitrator.

(b) If the parties file an agreement with a court to submit to arbitration, the parties shall:

(1) identify an individual to serve as a family law arbitrator; or

(2) indicate to the court that they have not selected a family law arbitrator.

(c) Each court shall maintain a list of attorneys who are:

(1) qualified; and

(2) willing to be appointed by the court;

to serve as family law arbitrators.

(d) If the parties indicate that they have not selected a family law arbitrator under subsection (b)(2), the court shall designate three (3) attorneys from the court's list of attorneys under subsection (c). The party initiating the action shall strike one (1) attorney, the other party shall strike one (1) attorney, and the remaining attorney is the family law arbitrator for the parties.

(e) In a dissolution of marriage case, the written agreement to submit to arbitration must state that both parties confer jurisdiction on the family law arbitrator to dissolve the marriage and to determine:

(1) child support, if there is a child of both parties to the marriage;

(2) custody, if there is a child of both parties to the marriage;

(3) parenting time, if there is a child of both parties to the marriage; or

(4) any other matter over which a trial court would have jurisdiction concerning

arbitration by a family law arbitrator, it is irrevocable and enforceable.<sup>148</sup> If there is a child of both parties, the arbitrator is mandated to comply with the Indiana Child Support and Parenting Time Guidelines.<sup>149</sup> The arbitrator must take an oath prior to arbitration.<sup>150</sup> The arbitrator must divide marital property in accordance to the dissolution statute<sup>151</sup> and make written findings within thirty days after the hearing unless both parties consent to an extension of up to ninety days.<sup>152</sup> If requested, the arbitrator must make a record of the hearing.<sup>153</sup> Importantly, the chapter on arbitration does not apply if one party is represented by an attorney and the other party is pro se.<sup>154</sup> The definition of a family law arbitrator includes attorneys certified as family law specialists, qualified private judges, former commissioners and magistrates of Indiana courts of record, and attorneys registered as domestic mediators.<sup>155</sup>

## II. CHILD CUSTODY AND PARENTING TIME

### A. Determination of Custody

1. *Religious Considerations.*—The parents' religion was the issue in the case of *Jones v. Jones*.<sup>156</sup> Both the mother and father practiced Wicca, a form of paganism.<sup>157</sup> Both parents sought custody of their minor child. A custody evaluation was performed and filed with the court. At the final hearing, after reviewing the custody evaluation, the court extensively questioned both parents regarding their practice of Wicca and their pagan beliefs. In its decree of dissolution the court granted joint custody to the parents with the father being the child's physical custodial parent.<sup>158</sup>

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family law.

148. *Id.* § 34-57-5-3.

149. *Id.* § 34-57-5-5.

150. *Id.*

151. *Id.* § 34-57-5-8.

152. *Id.* § 34-57-5-7.

153. *Id.* § 34-57-5-6.

154. *Id.* § 34-57-5-1.

155. *Id.* § 34-6-2-44.7.

156. 832 N.E.2d 1057 (Ind. Ct. App. 2005).

157. *Id.* at 1058.

158. *Id.* at 1059. IND. CODE § 31-17-2-17 (2005) provides as follows:

(a) Except:

(1) as otherwise agreed by the parties in writing at the time of the custody order;  
and

(2) as provided in subsection (b);

the custodian may determine the child's upbringing, including the child's education, health care, and religious training.

(b) If the court finds after motion by a non-custodial parent that, in the absence of specific limitation of the custodian's authority, the child's:

However, the court placed a limitation in its order respecting custody prohibiting either parent from practicing their Wicca faith around the child or involving the child in Wicca or pagan practices.<sup>159</sup> The father filed a motion to correct error, in which the mother joined, asking that the restriction on religious upbringing be struck from the decree. The trial court denied the motion and father appealed.

On appeal, the court granted the father's request that the religious restriction be removed but affirmed the decree in all other respects.<sup>160</sup> The court found that Indiana Code section 31-17-2-17 "expressly reserves for the custodial parent the authority to determine the child's upbringing, unless otherwise agreed by the parties in writing at the time of the custody hearing."<sup>161</sup> The court also observed that the trial court, under the statute, could only place limits on the custodial parent's authority if the court found that the child's "physical health would be endangered" or that the child's "emotional health would be significantly impaired."<sup>162</sup> For the trial court to limit the custodial parent's authority in this regard, the court must make specific findings that the child would be endangered absent the restriction.<sup>163</sup> The court did not make any specific finding regarding endangerment to the child and the religious restriction was removed.<sup>164</sup>

The case of *Pawlik v. Pawlik*<sup>165</sup> addressed the rather unique question of whether it is proper, in a custody determination, to cross examine a non-party witness about her religious beliefs. On appeal the father questioned the trial Court's award of custody to the mother.<sup>166</sup> The father contended that it was error for the trial court to allow cross examination of the father's mother regarding her religious beliefs in violation of Indiana Evidence Rule 610.<sup>167</sup> The paternal grandmother was a devout Jehovah's Witness and counsel for the mother cross-examined her extensively regarding her beliefs. The evidence showed that the grandmother had been and would continue to be involved as a care giver of the child if the father were awarded custody.

In affirming the trial court, the court of appeals observed that the questions pertaining to the grandmother's religious beliefs were not intended to impeach

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- (1) physical health would be endangered; or
  - (2) emotional health would be significantly impaired;

the court may specifically limit the custodian's authority.

159. *Jones*, 832 N.E.2d at 1059.

160. *Id.* at 1061.

161. *Id.* at 1060.

162. *Id.* (quoting IND. CODE § 31-17-2-17).

163. *Id.* The court relied upon *Clark v. Madden*, 725 N.E.2d 100, 105 (Ind. Ct. App. 2000), in making this holding.

164. *Id.* at 1061.

165. 823 N.E.2d 328 (Ind. Ct. App. 2005).

166. *Id.* at 329.

167. *Id.* at 330. Indiana Evidence Rule 610 states that "[e]vidence of the beliefs or opinions of a witness on matters of religions is not admissible for the purposes of showing that, by the reason of their nature, the witness's credibility is impaired or enhanced." IND. R. EVID. 610.

her credibility.<sup>168</sup> Instead it was sought to determine the extent that the grandmother would influence the child's religious training in the event that the father was awarded physical custody.<sup>169</sup> Because Indiana Code section 31-17-2-17 allows the custodial parent to determine the child's religious training, an inquiry into those people who have an influence on that training is appropriate.<sup>170</sup>

The court of appeals was careful to say that the trial court cannot make a determination based upon an assessment of which party's religious beliefs are preferable but did note that there were legitimate reasons for the court to consider such evidence.<sup>171</sup> The appellate court was satisfied that the questioning of the grandmother about her religious beliefs did not violate Rule 610.<sup>172</sup>

2. *Custody Standard.*—The case of *Hughes v. Rogusta*<sup>173</sup> asked the court of appeals to address the issue of which custody standard should be used when unmarried cohabitating parents end their cohabitation and both seek custody of their child.<sup>174</sup> The mother and father lived together and during the time they lived together they had a child. The parties executed a paternity affidavit at the hospital following the child's birth. They continued to live together until the child was four years old at which time mother moved out of the residence and left the child with the father. The father filed a petition to establish paternity and sought custody. After a hearing the court granted the father's petition and placed custody of the child with the father. The mother appealed.<sup>175</sup>

The significant issue raised by mother on appeal is whether the trial court should have used the custody modification standard instead of the initial custody determination standard.<sup>176</sup> The initial custody determination is provided for in Indiana Code section 31-14-13-2<sup>177</sup> and a subsequent modification of child

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168. *Id.* at 333.

169. *Id.*

170. *Id.*; IND. CODE § 31-17-2-17 (2004).

171. *Pawlik*, 823 N.E.2d at 333.

For instance, the court is empowered to order the noncustodial parent to refrain from allowing the child to participate in activities that are inconsistent with the custodial parent's religious beliefs. The court might also need to know of the custodial parent's religious beliefs in fashioning its visitation schedule. The court might also need information about the parties' religious beliefs for purposes of determining the noncustodial parent's duties under the decree of dissolution.

*Id.* (internal citations omitted).

172. *Id.* at 334.

173. 830 N.E.2d 898 (Ind. Ct. App. 2005).

174. *Id.* at 900.

175. *Id.*

176. As the court of appeals noted, "[t]he difference is important. In an initial custody determination, both parents are presumed equally entitled to custody, but a petitioner seeking subsequent modification bears the burden of demonstrating that the existing custody should be altered." *Id.* (citing *Apter v. Ross* 781 N.E.2d 744, 758 (Ind. Ct. App. 2003)).

177. IND. CODE § 31-14-13-2 (2005) provides:

The court shall determine custody in accordance with the best interests of the child. In

custody in a paternity action is governed by Indiana Code section 31-14-13-6.<sup>178</sup> The mother's position was that the use of the initial custody standard by the trial court was error because the father had executed the paternity affidavit when the child was born. Paternity affidavits are governed by Indiana Code section 16-37-2-2.1(g) which in relevant part provides that "if a paternity affidavit is executed under this section, the child's mother has sole legal custody unless another custody determination is made by a court in a proceeding under IC 31-14."<sup>179</sup>

The mother argued in support of her claimed error that the case was governed by *In re Paternity of Winkler*.<sup>180</sup> The court, however, distinguished *Winkler* by pointing out that in *Winkler*—after the parties separated—the father had acquiesced in the mother's custody of the child for ten years.<sup>181</sup> Accordingly, it was appropriate to apply the custody modification standard.<sup>182</sup>

In *Hughes*, the court rejected the mother's argument by pointing out that there had been no prior court determination of custody, the parties had lived together with the child until the child was four years old, and most importantly, the father did not acquiesce in the custody of the child with the mother after the parties separated.<sup>183</sup>

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determining the child's best interests, there is not a presumption favoring either parent.

The court shall consider all relevant factors including the following:

- (1) The age and sex of the child,
- (2) The wishes of the child's parents.
- (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with:
  - (A) the child's parents;
  - (B) the child's siblings; and
  - (C) any other person who may significantly affect the child's best interest.
- (5) The child's adjustment to home, school, and community.
- (6) The mental and physical health of all individuals involved.
- (7) Evidence of a pattern of domestic or family violence by either parent.
- (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 2.5(b) of this chapter.

178. IND. CODE § 31-14-13-6 provides: "[T]he court may not modify a child custody order unless: (1) modification is in the best interests of the child; and (2) there is substantial change in one (1) or more of the factors that the court may consider under section 2 and, if applicable, section 2.5 of this chapter."

179. *Hughes*, 830 N.E.2d at 901.

180. 725 N.E.2d 124 (Ind. Ct. App. 2000).

181. *Hughes*, 830 N.E.2d at 901.

182. *Id.*

183. *Id.* at 901-02. Also, the signing of the paternity affidavit did not amount to a prior court determination. *Id.*

*B. Modification of Custody*

1. *Child's Wishes*.—Modification of a child custody order in Indiana is restricted by Indiana Code section 31-17-2-21(a) which provides, in relevant part, that “[t]he court may not modify a child custody order unless: (1) the modification is in the best interests of the child; and, (2) there is a substantial change in one (1) or more of the factors the court may consider under [Indiana Code section 31-17-2-8].”<sup>184</sup> Indiana Code section 31-17-2-8(3) provides that the court may consider “[t]he wishes of the child with more consideration given to the child’s wishes if the child is at least fourteen (14) years of age.”<sup>185</sup> In the case of *Williamson v. Williamson*,<sup>186</sup> the court was called upon to decide the weight given to the wishes of the child at age seventeen versus the child at thirteen.<sup>187</sup>

The child<sup>188</sup> was in the custody of the father and mother filed a petition to modify custody. A previous custody determination had been made when the child was thirteen years of age. In the years following the prior modification, the father’s relationship with the child worsened to the point that there was almost no emotional bond between the child and his father, they interacted on a very limited basis, and there was significant conflict between the two. After a hearing, the trial court determined that the child had “a strong desire to reside with his mother” and that it would be in the child’s best interest to modify custody to the mother.<sup>189</sup> The court granted the mother’s petition to modify custody and the father appealed.

On appeal the father argued, among other things, that the child wished to live with his mother at the time of the last modification when the child was thirteen and that he still wished to live with his mother, thus, there had been no substantial change in the child’s wishes and no substantial change in circumstances.<sup>190</sup> In the rejecting this argument, the court of appeals said:

[The child] would have been 13 years old at the time of the last modification. Consequently, the trial court would not have been required to consider [the child’s] wishes at the last modification but was required to consider [the child’s] wishes during this modification. As a result, the trial court properly placed more consideration on [the child’s] wishes at the time of this modification request than on his wishes at the prior modification.<sup>191</sup>

The father had also argued that the long standing rule in Indiana is that “a

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184. IND. CODE § 31-17-2-21(a) (2005).

185. *Id.* § 31-17-2-8(3).

186. 825 N.E.2d 33 (Ind. Ct. App. 2005).

187. *Id.* at 40.

188. At the time of the petition which is the subject of the present case, the child was seventeen. *Id.*

189. *Id.* at 37.

190. *Id.* at 40.

191. *Id.*

change in the child's wishes, standing alone, cannot support a change in custody."<sup>192</sup> The court agreed with the father that this is the longstanding rule in Indiana but the court concluded that the trial court properly relied on another factor listed in Indiana Code section 31-17-2-8.<sup>193</sup> The decision of the trial court was affirmed.<sup>194</sup>

2. *Tape Recording Child's Telephone Calls.*—The 2003 case of *Apter v. Ross*<sup>195</sup> held that a parent can record the telephone conversation of his minor child if the recording is motivated by a genuine concern for the child's welfare.<sup>196</sup> If the recording was done as a means to interfere with the other parent's relationship with the child and not for the child's well being, then the court could consider this as a factor in modifying custody.

In the current survey period, the court of appeals, reaffirmed its prior ruling in *Apter* in the case of *Leisure v. Wheeler*.<sup>197</sup> The father had primary physical custody of the children from the parties' marriage which had ended in divorce in May 1998.<sup>198</sup> In August 2004, the mother sought modification of custody alleging that the father was abusive towards their child, the child suffered physically from this abuse, and the child was afraid of the father.<sup>199</sup> After a hearing, the trial court denied the mother's petition to modify custody and the mother appealed.

On appeal, the mother alleged that there was a substantial change in at least three of the statutory factors delineated at Indiana Code section 31-17-2-8.<sup>200</sup> She contended, among other things, that the father had interfered with her interaction and interrelationship with the child by taping telephone conversations between the mother and the child. The Indiana Parenting Time Guidelines provide guidance for communications between a child and his or her parents, both generally and by telephone.<sup>201</sup> In *Apter*, the court held: "A parent's concern for a child's well-being must be the purpose in taping the phone conversation . . . [It] is a parent's motivation and not the child's actual well being that is important in

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192. *Id.* (citing *Joe v. LeBow*, 670 N.E.2d 9, 25 (Ind. Ct. App. 1996)).

193. *Id.*

194. *Id.*

195. 781 N.E.2d 744 (Ind. Ct. App. 2003).

196. *Id.* at 754.

197. 828 N.E.2d 409 (Ind. Ct. App. 2005).

198. *Id.* at 412.

199. *Id.* Interestingly, the parties' other child had died earlier in 2004 by means of accidental drowning while in the mother's care. *Id.*

200. *Id.* at 414.

201. Indiana Parenting Time Guidelines § I(A)(2)-(3) provides, in part: "[a] child and a parent shall be entitled to private communications without interference from the other parent . . . [b]oth parents shall have reasonable phone access to their child at all times . . . without interference from the other parent." The commentary to section I(A) states: "[e]xamples of unacceptable interference with the communication include . . . a parent recording phone conversations between the other parent and the child . . ."

determining this issue.”<sup>202</sup> *Apter* also held that, unless restricted in some legal proceedings, a parent has the power to consent on the behalf of his or her minor child to the recording of that child’s phone conversation.<sup>203</sup>

In *Leisure* the court determined that

a parent can consent on behalf of his minor child to the recording of a telephone conversation where the recording is motivated by a genuine concern for the welfare of a child. However, the trial court, if it finds that the recording was not done for the well-being of the child but instead as a way to interfere with the other parent’s relationship with the child, may consider this as a factor in modifying custody. As the Parenting Time Guidelines indicate, children should generally be able to engage in telephone conversations with a parent without the other parent recording those conversations.<sup>204</sup>

Because the father convinced the trial court that he was motivated by a genuine concern for his child, the trial court did not commit error by deciding that the father’s taping of the telephone conversation did not establish a substantial change necessitating the modification of custody.<sup>205</sup>

3. *Role of Guardian Ad Litem.*—The question of whether a guardian ad litem (“GAL”), appointed prior to the final decree of dissolution has less authority in post decree matters was addressed by the court in *Carrasco v. Grubb*.<sup>206</sup> The mother had petitioned for dissolution of marriage and requested appointment of a guardian ad litem, which was granted. The GAL’s services were to “include, but [were] not exclusive of researching, examining, advocating, facilitating and monitoring the children’s situation.”<sup>207</sup> The GAL conducted an investigation of the minor children’s circumstances and filed a report with the court. The parents then entered into an agreement settling the dissolution matters and the trial court entered a final decree granting the mother sole physical custody of both children. Subsequently, the mother began to experience severe difficulties with one of the children and believed that her ex-husband was encouraging this behavior. She contacted the GAL for assistance but eventually came to believe that the GAL’s involvement was “intrusive rather than helpful.”<sup>208</sup>

The GAL filed a report recommending that the father have sole legal and physical custody of the difficult child and that the other child remain with the mother. The GAL filed a motion with the court which was treated as the GAL’s petition to modify the custody order. At a pre-trial conference a temporary agreement was struck whereby the difficult child was placed with the father and

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202. *Apter v. Ross*, 781 N.E.2d 744, 754 (Ind. Ct. App. 2003) (citing *Schieb v. Grant*, 22 F.3d 149, 154-55 (7th Cir. 1994)).

203. *Id.* at 756.

204. *Leisure*, 828 N.E.2d at 415-16.

205. *Id.* at 416.

206. 824 N.E.2d 705 (Ind. Ct. App. 2005).

207. *Id.* at 708 (alteration in original).

208. *Id.*

the other child remained with the mother.<sup>209</sup> The court then entered an order placing the difficult child with the father and also set forth a parenting time schedule and sanctions should the parties not comply with the trial court's directive.

About a month later, the mother became dissatisfied with the arrangement and sought to withdraw her consent to the temporary custody arrangement. She filed a motion to strike the GAL's report as "unauthorized and inappropriate under the relevant Indiana statutes."<sup>210</sup> Her request was denied by the court and thereafter the trial court entered an order making permanent the change of custody of the difficult child to the father.<sup>211</sup> The trial court concluded that the GAL had acted within her statutory authority at all times. The mother appealed.

On appeal, the mother argued that the custody order must be set aside because the GAL's actions in the post dissolution proceedings were unauthorized by statute or case law and amounted to an "unlawful attempt to relitigate the original custody decree."<sup>212</sup> In rejecting this contention the court stated:

[W]e note that Indiana Code section 31-15-6-4 provides that a GAL is required to serve until he or she is excused by the trial court. Additionally, Indiana Code section 31-15-6-1 provides that in a dissolution action, a GAL may be appointed by the court "at any time." And the trial court may order a GAL to "exercise continuing supervision over the child to assure that the custodial or visitation terms of an order entered by the court . . . are carried out as required by the court." Once the GAL is appointed, his or her role as defined in Indiana Code section 31-15-6-3 is to represent and protect the best interest of a child and to provide the child with services requested by the court, including "researching, examining, advocating, facilitating and monitoring the child's situation."<sup>213</sup>

Accordingly, the court concluded that a GAL does not have less authority in post decree matters and the "GAL's responsibilities are not dependent upon the stage of the proceedings."<sup>214</sup> The mother's argument that the GAL's actions were an attempt to relitigate the custody award were also rejected.<sup>215</sup> The court observed that the trial court had continuing jurisdiction over custody matters pursuant to Indiana Code section 31-17-2-8 and parenting time matters pursuant to Indiana Code section 31-17-4-2.<sup>216</sup>

4. *Parenting Time and Attorney's Fees.*—The issue of a trial court's order restricting a father's parenting time and order of attorney's fees to the mother was

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209. *Id.*

210. *Id.* at 709.

211. *Id.* The other child remained with the mother.

212. *Id.*

213. *Id.* (internal citations omitted).

214. *Id.* at 710.

215. *Id.*

216. *Id.*

addressed in the case of *Barger v. Pate*.<sup>217</sup> The parties were divorced and they had agreed that they would share joint legal custody and that the mother would have physical custody of their two children.<sup>218</sup> Later, after the first child had been admitted to a juvenile facility for physically accosting his mother, the father filed a petition for custody of this child, in which the mother joined. The mother also petitioned for the father's termination of joint legal custody of the second child, and, in return, the father petitioned for physical custody of the second child. After a hearing on the petitions, the court dismissed the father's custody modification petition and entered an order that restricted the father's parenting time, ordered attorney's fees to the mother, and made a temporary custodian appointment pursuant to Indiana Code section 31-17-2-11.<sup>219</sup>

The trial court's parenting time restriction essentially allowed the mother to determine whether the second child's—who was in the mother's custody—contact with the first child—who was in the father's custody—should be limited or restricted in any way, including no contact.<sup>220</sup> If the mother and father were unable to resolve parenting time conflicts, or were unable to agree on an ultimate method for the father to exercise his parenting time then the court ordered that the father would not be entitled to parenting time with the second child while the child in his custody was present.<sup>221</sup>

On appeal, the father argued that this restriction on his parenting time was clearly erroneous and the court agreed.<sup>222</sup> Indiana Code section 31-17-4-2 governs modification and restriction of parenting time.<sup>223</sup> The court opined that

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217. 831 N.E.2d 758 (Ind. Ct. App. 2005).

218. *Id.* at 761.

219. *Id.* IND. CODE § 31-17-2-11 (2005) provides as follows:

(a) If, in a proceeding for custody or modification of custody under IC 31-15, this chapter,

IC 31-17-4, IC 31-17-6, or IC 31-17-7, the court:

(1) requires supervision during the noncustodial parent's parenting time privileges; or

(2) suspends the non-custodial parent's parenting time privileges;

the court shall enter a conditional order naming a temporary custodian for the child.

(b) A temporary custodian named by the court under this section receives temporary custody of the child upon the death of the child's custodial parent.

(c) Upon the death of a custodial parent, a temporary custodian named by a court under this section may petition the court having probate jurisdiction over the estate of the child's custodial parent for an order under IC 29-3-3-6 naming the temporary custodian as the temporary guardian of the child.

220. *See Barger*, 831 N.E.2d at 764.

221. *Id.*

222. *Id.*

223. IND. CODE § 31-17-4-2 (2005) provides as follows:

The court may modify an order granting or denying parenting time rights whenever a modification would serve the best interests of the child. However, the court shall not restrict a parent's parenting time rights unless the court finds that the parenting time

the statutory language of Indiana Code section 31-17-4-2 was clear and unambiguous.<sup>224</sup> “Parenting time may not be restricted absent a finding by the *court* that the interaction might endanger the child’s health or significantly impair his or her emotional development.”<sup>225</sup> Here, the trial court had failed to comply with the statute because there was “a total absence of evidence that [the child in the father’s custody] posed a danger,” physically or emotionally, to the child in the mother’s custody.<sup>226</sup> In fact, the evidence suggested the children had bonded and were emotionally close.<sup>227</sup> “Conferring upon Mother prerogative to enforce the restriction at her discretion is contrary to statute. Accordingly, the parenting time restriction is reversed.”<sup>228</sup> Because the restrictions on parenting time were contrary to law, the appointment of a temporary custodian was contrary to law and clearly erroneous.<sup>229</sup>

The trial court also ordered the father to pay the mother’s attorney \$7800 within thirty days. The appeals court acknowledged that Indiana Code section 31-17-7-1 allows a court to order a party to pay a reasonable amount for the other parties’ attorney’s fees when one party is in a superior position to pay fees over the other party.<sup>230</sup> However, evidence must be presented indicating that the parties’ economic circumstances differ significantly.<sup>231</sup> In this case, the mother did not present evidence that her economic circumstances differed significantly from those of the father and, in fact, the child support worksheets filed by the parties indicated that their incomes were substantially similar.<sup>232</sup> The amount of the award was based upon the mother’s petition for attorney’s fees which listed litigation events with no corresponding time expenditure. Also, there was no evidence of record supporting the reasonableness of the fee. The award of attorney’s fees was reversed.<sup>233</sup>

### C. Guardianship

In a proceeding to determine whether to place a child with a person other than a natural parent, the Indiana Supreme Court has mandated that the trial court must make specific findings of fact in support of its decision.<sup>234</sup> The purpose of these detailed and specific findings is to make certain that the court has determined by

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might endanger the child’s physical health or significantly impair the child’s emotional development.

224. *Barger*, 831 N.E.2d at 763.

225. *Id.*

226. *Id.*

227. *Id.* at 764.

228. *Id.* at 764-65.

229. *Id.*

230. *Id.* at 765.

231. *Id.* (citing *In re Marriage of Bartley*, 712 N.E.2d 537, 546 (Ind. Ct. App. 1999)).

232. *Id.*

233. *Id.*

234. *In re Guardianship of B.H.*, 770 N.E.2d 283, 287 (Ind. 2002).

clear and convincing evidence that the natural parents' unfitness or acquiescence in the third party custody has been established and that a strong emotional bond has been established between the child and the third person.<sup>235</sup> Because there is a strong presumption that the child's best interests are served by placement with the natural parent, it is important that this presumption is clearly and convincingly overcome by evidence that the child's best interests are substantially and significantly served by placement with another person. Additionally, the detailed and specific findings serve to further alert the parents to the reasons why their children are in third party custody so that they know the steps they have to take to have the children returned to them.<sup>236</sup>

The issue in the case of *In re Guardianship of A.R.S.*<sup>237</sup> is whether these requirements of specific findings of fact need to be made by the trial court in a proceeding to terminate guardianship in the absence of a request pursuant to Trial Rule 52(A). The mother had petitioned to terminate the maternal grandparents' guardianship of her two children in which she had previously acquiesced. The mother alleged that "[t]he guardianship is no longer necessary because the children's mother is able to provide them suitable care and custody."<sup>238</sup> The trial court conducted a hearing and, without making specific findings, denied the mother's petition to terminate the guardianship, relying on Indiana Code section 29-3-12-1.<sup>239</sup> The mother appealed alleging that the trial court had applied an incorrect burden of proof, failed to make specific findings in support of its order, and that the order was not supported by the evidence.<sup>240</sup>

On appeal, the appellate court, over the dissent of Judge Crone, reversed and remanded to the trial court to make specific findings of fact using the clear and convincing evidence standard.<sup>241</sup> In arriving at its decision, the court of appeals extended the requirement of specific findings of fact enunciated in *In re Guardianship of B.H.* to petitions to terminate a guardianship.<sup>242</sup> The grandparents had correctly pointed out that neither party had requested findings and that the statute governing termination of guardianship does not require specific findings. In deciding otherwise, the court stated:

We see no reason not to extend this requirement of detailed findings to petitions to terminate guardianship. We do so for two reasons. First, the issues are the same regardless of whether the placement is the initial

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235. *Id.*

236. *Id.*

237. 816 N.E.2d 1160 (Ind. Ct. App. 2004).

238. *Id.* at 1161.

239. IND. CODE § 29-3-12-1 (2005) provides in part that "the court may terminate any guardianship if: . . . (4) the guardianship is no longer necessary for any other reason."

240. *In re Guardianship of A.R.S.*, 816 N.E.2d at 1162.

241. *Id.* at 1163. In addition to the lack of specific findings of fact, the court noted that it was unable to determine from the trial court's order whether the trial court had used "preponderance of the evidence" or "clear and convincing evidence." *Id.*

242. *Id.* at 1162.

placement or a question of whether the placement should be continued. Second, the reason behind requiring detailed and specific findings applies in equal force to termination of guardianship petitions, i.e. notifying the parties and the reviewing court of the facts and theory upon which the decision is based.<sup>243</sup>

In his dissent, Judge Crone disagreed that the court should expand the special finding requirement to subsequent guardianship proceedings.<sup>244</sup> Judge Crone believed the requirement of special findings on the denial of every petition for modification or termination is overly burdensome to the trial court.<sup>245</sup> Crone stated that because guardianships “spawn many relatively meritless petitions, . . . [they] should be dealt with as efficiently and expeditiously as possible.”<sup>246</sup> Crone noted that if either of the parties wanted specific findings, they could avail themselves of Trial Rule 52(A).<sup>247</sup>

### III. CHILD SUPPORT

#### A. College Expenses

1. *Repudiation.*—Indiana law recognizes that a child’s repudiation of a parent—that is, a complete refusal to participate in a relationship with his or her parent—under certain circumstances—will obviate a parent’s obligation to pay certain expenses, including college expenses.<sup>248</sup> Indiana case law clearly establishes that only an adult child over eighteen years of age can repudiate his relationship with a parent.<sup>249</sup> In *Norris v. Pethe*,<sup>250</sup> the trial court found that the child had rejected all of the father’s efforts to establish a relationship including the child’s participation in court ordered counseling, refusing cards and gifts, and discouraging the father’s attendance at any of her extracurricular activities.<sup>251</sup> Consequently, the trial court found that the father had no duty to pay the child’s college expenses.<sup>252</sup>

On appeal, the court noted that the father had testified regarding numerous attempts to have a relationship with his daughter and that she rejected them all.<sup>253</sup>

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243. *Id.* The court also noted that the absence of findings had hampered its review of the case. *Id.* at 1163.

244. *Id.* (Crone, J., dissenting).

245. *Id.*

246. *Id.*

247. *Id.*

248. *Norris v. Pethe*, 833 N.E.2d 1024, 1033 (Ind. Ct. App. 2005) (citing *Bales v. Bales*, 881 N.E.2d 196, 199 (Ind. Ct. App.), *reh’g denied, trans. denied*, 812 N.E.2d 807 (Ind. 2004)).

249. *Id.* at 1034; *McKay v. McKay*, 644 N.E.2d 164, 168 (Ind. Ct. App. 1994) (citing *Milne v. Milne*, 556 A.2d 854, 856 (Pa. Super. Ct. 1989)).

250. 833 N.E.2d 1024.

251. *Id.* at 1033.

252. *Id.* at 1032.

253. *Id.* at 1033-34.

The court observed that although the child's behavior towards her father started as a minor, it continued when she became an adult and well after her eighteenth birthday.<sup>254</sup> In holding that the trial court did not commit error in finding that the child had repudiated her father which relieved him of his obligation to contribute to her college expenses, the court, referencing language in *McKay v. McKay*,<sup>255</sup> stated: "[T]his child will not, in any event, be allowed to enlist the aid of the court in compelling [a] parent to support his or her educational efforts unless and until the child demonstrates a minimum amount of respect and consideration for that parent."<sup>256</sup> It is important to note that orders finding a repudiation are limited to an adult child who completely rejects a relationship with his or her parent.<sup>257</sup>

2. *Modification After Child Turns Twenty-one.*—Indiana has long held that a trial court is authorized to consider petitions to modify support to include college expenses only where those petitions are first filed before the child reaches twenty-one years of age or is otherwise emancipated.<sup>258</sup> The court is not authorized to order for the first time that college expenses be paid after the child's emancipation or attaining twenty-one.<sup>259</sup> The supreme court held in *Donegan v. Donegan*<sup>260</sup> that: "Where educational needs are expressly included in a support order enacted prior to a child's emancipation or attaining age 21, the trial court is authorized to continue to address such educational needs."<sup>261</sup> The case of *Martin v. Martin*, decided by the Indiana Supreme Court in 1986, set forth the rule:

The statute [Indiana Code section 31-16-6-6(a)(1)] does not authorize adult children to use post dissolution proceedings to finance the expenses of college commenced or resumed later in life. . . . The statutory language is clear. Where educational needs are expressly included in a support order enacted prior to a child's emancipation or attaining age 21, the trial court is authorized to continue to address such educational needs.<sup>262</sup>

In *Brodv. Lewis*,<sup>263</sup> the court was asked to address a specific settlement agreement. The issue presented was whether the parties' settlement agreement, which provided that the father would pay one-half of their child's school supplies,

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254. *Id.* at 1034.

255. 644 N.E.2d 164 (Ind. Ct. App. 1994).

256. *Norris*, 833 N.E.2d at 1034.

257. *See id.* at 1033-34. Compare this to the holding in *Staresnick v. Staresnick*, 830 N.E.2d 127, 132-34 (Ind. Ct. App. 2005), *reh'g denied* (Ind. Ct. App. 2006), in which the child's reluctance to participate in a relationship with the father, although significant, did not amount to a complete refusal to participate in a relationship with the parent.

258. *Donegan v. Donegan*, 586 N.E.2d 844, 845 (Ind. 1992).

259. *Id.*

260. 586 N.E.2d 844.

261. *Id.* (quoting *Martin v. Martin*, 495 N.E.2d 523, 525 (Ind. 1986)).

262. *Martin*, 495 N.E.2d at 525.

263. 824 N.E.2d 1288 (Ind. Ct. App. 2005).

book rental, and certain education needs, allowed the court to continue to consider college expenses when a petition seeking an order for college expenses was filed after the child's twenty-first birthday.<sup>264</sup>

In *Brodt*, the parties entered into a settlement agreement when the child was six months old. They had agreed that in addition to child support, the father would pay for "half of the costs for school supplies, book rental, and child care expenses."<sup>265</sup> The agreement was subsequently modified twice with the child's clothing allowance being terminated in the last modification. Neither order addressed post-secondary educational expenses. Twenty-one years later, after the child had reached her twenty-first birthday, her mother filed a petition requesting that a child support obligation be modified to include college expenses. The trial court denied the request for modification to add college expenses on the grounds that modification to add college expenses could not be filed for the first time after the child had attained the age of twenty-one years.<sup>266</sup> The mother appealed, contending that the parties' settlement agreement had provided that the father was obligated to pay half of the child's school supplies and book rental and because these educational needs had never been terminated in the subsequent modifications, the trial court could, in fact, require the father to pay college expenses even after the child had turned twenty-one years of age.<sup>267</sup>

On appeal, the court rejected the mother's argument.<sup>268</sup> The court noted that although the original agreement did provide for payment of "school supplies" and "book rental," that agreement and the subsequent modifications were silent as to post-secondary educational expenses.<sup>269</sup> The court stated that educational expenses associated with college typically "receives an expansive interpretation in the case law and . . . includes . . . tuition, books, lab fees, supplies and student activity fees."<sup>270</sup> But, in this case, a clear reading of the parties' original agreement revealed that it contemplated only elementary and secondary educational charges.<sup>271</sup> In distinguishing post-secondary educational needs from earlier expenses the court stated:

However, whereas the definition of educational needs clearly seems to be geared towards college life, our reading of the parties' 1983 settlement agreement appears to focus solely upon the costs related to elementary and secondary education where the charges for school supplies and book rental are more common than in post-secondary education. As included in the Commentary to Ind. Child Supplemental Guideline 6, Extraordinary Expenses, regular elementary and secondary school

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264. *Id.* at 1290.

265. *Id.* at 1292.

266. *Id.* at 1290.

267. *Id.* at 1291.

268. *Id.* at 1292-93.

269. *Id.* at 1292.

270. *Id.*

271. *Id.*

expenses are covered by the basic child support obligation. Moreover, an educational support order is premature when a child is too young to assess her aptitude and ability, such as [the child] was at the time the agreement was made. See I.C. § 31-16-6-2; *Moss v. Frazier*, 614 N.E.2d 969 (Ind. Ct. App. 1993).<sup>272</sup>

3. *Limitation to Indiana State Supported College.*—In *Snow v. Rincker*,<sup>273</sup> the court decided whether a parent's contribution to a child's college education should be limited to the cost of an Indiana state-supported institution.<sup>274</sup> The parties, who had one child, were divorced in 1985.<sup>275</sup> The original order did not require the father to pay for the child's college expenses. The child, an exceptional student, attended an expensive out-of-state private college.<sup>276</sup> The child's father earned approximately \$41,700 per year and this represented fifty-nine percent of the parties' combined income. The mother took out a \$50,000 loan to pay for the first three years of her daughter's college, and the daughter borrowed an additional \$11,000 and also received scholarships. The father did not contribute, and the mother petitioned for a modification asking that the father contribute to college expenses.<sup>277</sup> The trial court ordered the father to pay fifty-nine percent of the child's senior year expenses at college. The trial court found that the child should be responsible for one-third of her educational expenses for the next two years and that the father should pay fifty-nine percent of the balance of the expenses.<sup>278</sup> The father appealed, contending that the trial court should have capped his contribution based upon costs at a level consistent with the tuition and costs at a state supported university or college in Indiana.<sup>279</sup> The

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272. *Id.*

273. 823 N.E.2d 1234 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 749 (Ind. 2005).

274. *Id.* at 1237.

275. *Id.* at 1236.

276. There was some question as to whether or not the child could obtain a similar education at an Indiana state-supported university.

277. *Snow*, 828 N.E.2d at 1236.

278. *Id.* at 1238.

279. *Id.* at 1237. IND. CODE § 31-16-6-2 (2005) governs educational support and provides in relevant part:

- (a) The child support order or an educational support order may also include, where appropriate:
  - (1) amounts for the child's education in elementary and secondary schools and at institutions of higher learning, taking into account:
    - (A) the child's aptitude and ability;
    - (B) the child's reasonable ability to contribute to educational expenses through:
      - (i) work;
      - (ii) obtaining loans; and,
      - (iii) obtaining other sources of financial aid reasonably available to the child and each parent; and,
    - (C) the ability of each parent to meet these expenses;

court's order would have reduced the funds available to the father with which to support himself to well below the poverty level for a one-person household.<sup>280</sup> Relying upon Indiana Code section 31-16-6-2 and the commentary to Indiana Child Support Guideline 6, the appellate court held that it was an abuse of discretion for the trial court to plunge the father into poverty for a degree that could have been earned at a less expensive, state-supported university.<sup>281</sup> The court of appeals noted that the trial court appeared to try to "even the playing field" by considering that the mother had incurred \$50,000 in prior loans.<sup>282</sup> The court of appeals characterized this as a "makeup payment" that the court cannot condone.<sup>283</sup> The court of appeals reversed and remanded with instructions to cap

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...

(b) If the court orders support for a child's educational expenses at an institution of higher learning under subsection (a), the court shall reduce other child support for that child that:

- (1) is duplicated by the educational support order; and
- (2) would otherwise be paid to the custodial parent.

IND. CHILD SUPP. G. 6 provides as follows:

Extraordinary education expenses may be for elementary, secondary or post-secondary education, and should be limited to reasonable and necessary expenses for attending private or special schools, institutions of higher learning, and trade, business or technical schools to meet the particular educational needs of the child.

...

(b) Post-Secondary Education. The authority of the Court to award post-secondary educational expenses is derived from IC 31-16-6-2. It is discretionary with the court to award post-secondary education expenses and in what amount. In making such a decision, the court should consider post-secondary education to be a group effort, and weigh the ability of each parent to contribute to payment of the expense, as well as the ability of the student to pay a portion of the expense.

If the court determines that an award of post-secondary educational expenses is appropriate, it should apportion the expenses between the parents and the child, taking into consideration . . . scholarships, grants, student loans, summer and school year employment, and other cost-reducing programs available to the student. These . . . sources of assistance should be credited to the child's share of the educational expense

.....

...

The court may limit consideration of college expenses to the cost of state supported colleges and universities or otherwise may require that the income level of the family and the achievement level of the child be sufficient to justify the expense of private school.

IND. CHILD SUPP. G. 6 (2004), available at [http://www.in.gov/judiciary/rules/child\\_support/child\\_support.pdf](http://www.in.gov/judiciary/rules/child_support/child_support.pdf).

280. *Snow*, 823 N.E.2d at 1239. The father was not remarried. *Id.* at 1235.

281. *Id.* at 1234.

282. *Id.* at 1239.

283. *Id.*

the father's expenses based upon costs consistent with tuition and costs at a state supported university.<sup>284</sup> Judge Sharpnack dissented in part, noting in particular that he felt that the father had not offered enough evidence regarding his financial status to establish that the order of the trial court represented an unacceptable burden.<sup>285</sup> Furthermore, he stated that although limitation to the cost of a state school may be reasonable in some circumstances, "it is not a benchmark."<sup>286</sup>

4. *Cost of Child Care.*—In *Thomas v. Orlando*,<sup>287</sup> the court decided whether it was proper to include the cost of child care that a mother incurred while attending college in determining a father's child support obligation. After paternity was established, the trial court entered an order that allowed child care expenses to be a component of child support during the period of time when the mother was attending college rather than working.<sup>288</sup> The father appealed, and on appeal the court determined that such an allocation of child care expenses as a component of child support was proper.<sup>289</sup>

The father's argument relied upon Indiana Child Support Guideline 3(E) and the commentary which specifies in part, that

[c]hild care costs incurred due to employment or job search of both parent(s) should be added to the basic obligation. It includes the separate cost of a sitter, day care, or like care of a child or children while the parent works or actively seeks employment. Such child care costs must be reasonable and should not exceed the level required to provide quality care for the children. Continuity of child care should be considered. Child care costs required for active job searches are allowable on the same basis as costs required in connection with employment.

...

Work-related child care expense is an income-producing expense of the parent. Presumably, if the family remained intact, the parents would treat child care as a necessary cost of the family attributable to the children when both parents work. Therefore, the expense is one that is incurred for the benefit of the child(ren) which the parents should share.<sup>290</sup>

Specifically, the father contended that being a full-time student does not qualify as a "work-related activity" for which child care may be reimbursed.<sup>291</sup> The appellate court disagreed, noting that:

Indeed, we believe that it is a parent's responsibility to continually try to

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284. *Id.* at 1240-41.

285. *Id.* at 1241 (Sharpnack, J., concurring and dissenting).

286. *Id.*

287. 834 N.E.2d 1055 (Ind. Ct. App. 2005).

288. *Id.* at 1057.

289. *Id.* at 1059.

290. *Id.* at 1058; IND. CHILD SUPP. G. 3(E) & cmt. 1 (2004), available at [http://www.in.gov/judiciary/rules/child\\_support/child\\_support.pdf](http://www.in.gov/judiciary/rules/child_support/child_support.pdf).

291. *Thomas*, 834 N.E.2d at 1058.

better herself and to create more and better opportunities for the child and the family unit. We are hard pressed to come up with a better example of a way to do just that than by pursuing an education, be it high school, college, or graduate school. A parent who finds within herself the diligence and ambition to obtain a degree will be rewarded not only with better job prospects and increased earning potential, but also with a child who has learned by example that education is essential and valuable.<sup>292</sup>

The court concluded by pointing out that education is designed to benefit both the parents and the child and that “childcare expenses that are incurred because the parent with primary custody is a full-time student are income-producing expenses as contemplated by the Guidelines.”<sup>293</sup>

5. *Jurisdiction*.—The jurisdiction of the trial court to enter an order for college expenses under the Uniform Interstate Family Support Act (“UIFSA”)<sup>294</sup> was at issue in *Johnston v. Johnston*.<sup>295</sup> The mother filed a petition to modify the dissolution decree and sought educational support for her college age children. The father, who had no contact with Indiana, did not appear in the dissolution action but did sign a waiver of final hearing in a subsequent action to modify the dissolution decree.<sup>296</sup> The dissolution was granted by the trial court, but no child

292. *Id.* at 1059.

293. *Id.*

294. IND. CODE § 31-18-1-1 to -9-4 (2005). IND. CODE 31-18-2-1 provides:

In a proceeding to establish, enforce, or modify a support order or to determine paternity, an Indiana tribunal may exercise personal jurisdiction over a nonresident individual or the individual’s guardian or conservator if:

- (1) the individual is personally served with notice in Indiana;
- (2) the individual submits to the jurisdiction of Indiana by:
  - (A) consent;
  - (B) entering an appearance, except for the purpose of contesting jurisdiction; or
  - (C) filing a responsive document having the effect of waiving contest to personal jurisdiction;
- (3) the individual resided in Indiana with the child;
- (4) the individual resided in Indiana and has provided prenatal expenses or support for the child;
- (5) the child resides in Indiana as the result of acts or directives of the individual;
- (6) the individual engaged in sexual intercourse in Indiana and the child:
  - (A) has been conceived by the act of intercourse; or
  - (B) may have been conceived by the act of intercourse if the proceeding is to establish paternity;
- (7) the individual asserted paternity of the child in the putative father registry administered by the state department of health under IC 31-19-5; or
- (8) there is any other basis consistent with the Constitution of the State of Indiana and the Constitution of the United States for the exercise of personal jurisdiction.

295. 825 N.E.2d 958 (Ind. Ct. App. 2005).

296. *Id.* at 960-61.

support petition had ever been filed, and no order regarding child support payment was entered into the record.<sup>297</sup> Thereafter, the parties had apparently entered into an informal agreement based upon Ohio law whereby the father paid child support until the last child had turned eighteen years of age.<sup>298</sup> After the children had finished high school and began to attend college, their mother filed a petition to modify the dissolution decree wherein she sought an educational support order. The father entered an appearance solely for the purpose of contesting personal jurisdiction and filed a motion to dismiss. After hearing the evidence, the court granted the mother's petition and entered an educational support order requiring the father to pay some of the children's college expenses.<sup>299</sup> The trial court had noted that the waiver of final hearing signed by the father subjected the father to the court's jurisdiction. The father appealed.

On appeal, the father argued that the trial court erroneously found that personal jurisdiction under UIFSA existed because of the signed waiver of final hearing in the dissolution action.<sup>300</sup> He argued that because UIFSA applies only in the establishment, enforcement, or modification of support orders or with respect to determination of paternity issues, his waiver of the final hearing in the petition to modify the dissolution—where support had not been addressed—did not amount to his submission to the jurisdiction of the court on the child support matter.<sup>301</sup> The court of appeals agreed that a dissolution action does not require in personam jurisdiction of both parties.<sup>302</sup> However, a proceeding with regard to a child support order incident to the marriage does require in personam jurisdiction of both parties.<sup>303</sup> Furthermore, citing Indiana Code section 31-18-2-1, the court noted that UIFSA provisions are not applicable to dissolution matters.<sup>304</sup> A judgment entered without "minimum contacts" violates the due process clause of the Fourteenth Amendment.<sup>305</sup> The UIFSA, itself, enumerates eight conditions that are intended to satisfy the due process requirements of minimum contacts.<sup>306</sup> The court noted that even if the UIFSA "would have" applied, the father did not meet any of those enumerated minimum contacts, did not submit to jurisdiction, and had never done anything inconsistent to his position of contesting jurisdiction.<sup>307</sup>

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297. *Id.* at 960.

298. *Id.* Two children were born to the parties. *Id.*

299. *Id.* at 961-62.

300. *Id.* at 963.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.* (citing *In re Paternity of A.B.*, 813 N.E.2d 1173, 1175 (Ind. 2004)). For a discussion of *In re Paternity of A.G.*, see Michael G. Ruppert & Joseph W. Ruppert, *Recent Developments: Indiana Family Law*, 38 IND. L. REV. 1085, 1100 (2005).

306. *Johnston*, 825 N.E.2d at 963.

307. *Id.* at 965.

*B. Modification Due to Change in Income*

During the current survey period, the Indiana Supreme Court decided *McLafferty v. McLafferty*.<sup>308</sup> In the proceedings below, the father had moved to modify the child support based upon the mother's increase in income.<sup>309</sup> The trial court granted the motion and the court of appeals affirmed.<sup>310</sup> The supreme court granted transfer, vacated the court of appeals opinion, and reversed the trial court.<sup>311</sup>

The trial court had reduced the father's child support obligation by approximately fourteen percent after the custodial mother obtained full time employment which increased her income by \$385 per week. During the same period of time, the father's income also increased.

Even though the trial court had found a substantial change in circumstances, the supreme court considered both subsections of Indiana Code section 31-16-8-1, which provide alternative methods for modifying child support.<sup>312</sup> A party can show either a change in circumstance that is substantial and continuing or the party can show that the order of child support differs by more than twenty percent from the amount that would be ordered by applying the child support guidelines provided it has been more than twelve months since that order was set.<sup>313</sup> The Indiana Supreme Court noted that Indiana Code section 31-16-8-1(2)(A) was not available to the father because the amount that he would be ordered to pay pursuant to the Indiana Child Support Guidelines differed by less than twenty percent.<sup>314</sup> Therefore, the father had the burden of establishing changed circumstances which were so substantial and continuous as to make the original order unreasonable. The court observed that "a determination of whether or not the change in circumstances asserted is 'so substantial and continuing' as to render the prior child support order's terms 'unreasonable' is, at minimum, a

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308. 829 N.E.2d 938 (Ind. 2005).

309. *Id.* at 939.

310. *Id.*; see *McLafferty v. McLafferty*, 811 N.E.2d 450, 456-57 (Ind. Ct. App. 2004), *vacated by* 829 N.E.2d 938 (Ind. 2005).

311. *McLafferty*, 829 N.E.2d at 943. Justice Dickson dissented without opinion.

312. *Id.* at 939-40. IND. CODE 31-16-8-1 (2005) provides in pertinent part as follows:

Provisions of an order with respect to child support . . . may be modified or revoked .

. . . [M]odification may be made only:

- (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or
- (2) upon a showing that:
  - (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and
  - (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.

313. IND. CODE 31-16-8-1.

314. *McLafferty*, 829 N.E.2d at 940.

mixed question of law and fact.”<sup>315</sup> Subsection (2) of the statute had been added by the legislature in 1997.<sup>316</sup> In analyzing this amendment the supreme court stated that:

Our interpretation of the Legislature’s action in 1997 is that it wanted to provide a bright-line for parents and for courts as to when a parent would be entitled to modification in his or her child support obligation solely on grounds of change in income. . . . The legislature left in place the opportunity for a parent to request modification at any time and for any reason so long as—but only if—the parent could show changed circumstances “so substantial and continuing as to make the terms [of the prior order] unreasonable.”<sup>317</sup>

The court reasoned that the legislature had established a bifurcated standard for modification with subsection (2) governing situations where modification is sought solely on grounds of change of income and subsection (1) governing all other situations, including those alleging a change in income and other changes.<sup>318</sup> Thus, although a parent could theoretically use subsection (1) to seek a modification solely on grounds of change of income, the court did not believe that the legislature had intended to create a situation where the only alleged change of circumstance under subsection (1) would result in a change of one parent’s payment by less than twenty percent.<sup>319</sup> The court found that in order for subsection (1) to be used when the change of circumstance alleged is a change in one parent’s income that only changes one parent’s payment by less than twenty percent, there must be other factors present that make the modification permissible under the terms of the statute.<sup>320</sup> The Indiana Supreme Court found that, in this case, such other factors did not exist.<sup>321</sup> In reversing the trial court, the supreme court reinstated the father’s original child support order and directed the trial court to set a hearing to determine a schedule for the father to pay the amount that had accrued as a result of the decision.<sup>322</sup>

### *C. Modification Based Upon Parenting Time Credit*

The commentary to Indiana Child Support Guideline 6 explains the parenting time credit, in part, as follows:

[A] parenting credit based upon the number of overnights with the noncustodial parent ranging from 52 overnights annually to equal

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315. *Id.* at 941.

316. *Id.* at 941 n.4; *see* 1997 Ind. Legis. Serv. P.L. 1-1997 (S.E.A. 8) (West).

317. *McLafferty*, 829 N.E.2d at 941-42 (alteration in original) (quoting IND. CODE § 31-16-8-1(1) (2004)).

318. *Id.* at 942.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.* at 943.

parenting time. As parenting time increases, a proportionately larger increase in the credit will occur.

A change in a child support order through the application of a parenting time credit does not constitute good cause for modification of the order unless the modification meets the requirements of Guideline 4.<sup>323</sup>

The question arises, then, whether application of the parenting time credit may be included in the trial courts' calculation in determining whether a petitioner has fulfilled his statutory burden to modify support. In a case of first impression, *Naville v. Naville*<sup>324</sup> asked the court of appeals to address this very issue. The issue in *Naville*, as stated by the court of appeals, was

whether a petitioner seeking a modification of a child support order must meet the requirements of Indiana Code section 31-16-8-1 without factoring in a parenting time credit to receive such credit, or whether instead the parenting time credit may be included in the trial court's calculation as it determines whether petitioner has fulfilled its statutory burden.<sup>325</sup>

The mother and father were divorced in 1994.<sup>326</sup> The father was required to pay \$215 per week in child support for the parties' two minor children and was granted visitation rights pursuant to the court visitation guidelines.<sup>327</sup> In 1999 the father was granted a modification of visitation such that he began enjoying 148 overnights annually with the children. In 2004, the father filed a motion to modify support. Both parties incomes had changed substantially since 1994 and the trial court granted a modification from \$215 per week to \$79.70 per week based upon the parties' incomes and after the application of the parenting time credit.<sup>328</sup> The mother appealed.

On appeal, the mother argued that the trial court committed error in granting the modification of child support based upon a parenting time credit.<sup>329</sup> The mother contended that a child support order may not be modified solely based upon a parenting time credit but instead the modification must first meet the

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323. IND. CHILD SUPP. G. 6 (2004), available at [http://www.in.gov/judiciary/rules/child\\_support/child\\_support.pdf](http://www.in.gov/judiciary/rules/child_support/child_support.pdf). Referencing Indiana Code section 31-16-8-1, Indiana Child Support Guideline 4 provides that a child support order "may be modified only if there is substantial and continuing change of circumstances." IND. CHILD SUPP. G. 4.

324. 818 N.E.2d 552 (Ind. Ct. App. 2004).

325. *Id.* at 556. The court noted that the "commentary to Guideline 6 cautions that applying a parenting time credit is not good cause for modifying a child support order 'unless the modification meets the requirements of Guideline 4.'" *Id.*

326. *Id.* at 554.

327. The father was also allowed a fifty percent abatement in support for any full week that the children lived with him pursuant to the old county guidelines.

328. *Naville*, 818 N.E.2d at 559.

329. *Id.* at 555.

requirements of Indiana Code section 31-16-8-1 independent of the parenting time credit. The court agreed that the modification of a child support order must meet the requirements of Indiana Code section 31-16-8-1, but both the statute and Guideline 4 were not clear in whether the court could apply the parenting time credit in determining whether the petitioner has met the statutory requirements.<sup>330</sup> The court noted, neither the statutory language nor the commentary specified that the parenting time credit “should be ignored when applying either the ‘substantial and continuing’ change in circumstances test or the twenty percent change test.”<sup>331</sup> The court agreed with the mother that the application of the parenting time credit alone does not justify modification.<sup>332</sup>

In clarifying this situation, the court stated that a petitioner seeking modification of a support order must still meet either the substantial and continuing change of circumstances test or the twenty percent change test to be successful.<sup>333</sup> However, in attempting to fulfill either test, the petitioner for modification of child support may apply the parenting time credit.<sup>334</sup> In *Naville*, the application of the parenting time credit satisfied the twenty percent change test.<sup>335</sup> As such, the trial court was correct in granting the father’s petition for modification. Not every case, the court observed, would result in a successful petition for modification of child support solely by applying the parenting time credit.<sup>336</sup>

#### *D. Non-Conforming Child Support Payments*

In Indiana, the general rule is that, except in narrow circumstances, a parent will not be given credit for the payment of child support that is not confirming to the child support order.<sup>337</sup> In *Decker v. Decker*,<sup>338</sup> the father had not paid child support in over ten years and was approximately \$43,000 in arrears.<sup>339</sup> The father

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330. *Id.* at 556.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* In *Naville*, the application of the parenting time credit more than met the twenty percent change test. Therefore, the court did not consider whether the parties change in incomes together with the other factors that were present constituted “a substantial and continuing change of circumstances.” *Id.* at 556-57.

337. *Kaplon v. Harris*, 567 N.E.2d 1130, 1133 (Ind. 1991). The exceptions to this rule are for “payments made directly to the mother, payment made via an alternative method agreed to by the parties and substantially complying with the existing decree, and payments covered when the non-custodial parent takes custody of the children with the other parent’s consent.” *Id.* The court also found a “narrow exception” to the no-credit rule for payments toward the child’s funeral expenses. *Id.*

338. 829 N.E.2d 77 (Ind. Ct. App. 2005).

339. *Id.* at 78-79.

testified that he and the mother had verbally agreed that he would provide child care for their child while the mother was at work and in return would not be required to pay child support. There was some dispute about whether the father and the mother had executed written agreements memorializing this arrangement, but regardless, none of the reported written agreements had ever been submitted to the court for approval. The trial court found the father to be in arrears in the amount of \$43,105 and the father appealed.<sup>340</sup>

On appeal, the father argued that he should not be ordered to pay any child support arrearage because he had provided child support in the form of child care while the mother was at work. He argued that this was an alternative method of payment agreed to between the mother and himself. The father relied on the case of *Payson v. Payson*,<sup>341</sup> in which the mother and father had agreed that the father could make direct payments to the mother and to third parties for rent instead of through the clerk of the court, as ordered.<sup>342</sup> However, the court of appeals in *Decker* found that the father's reliance upon *Payson* was misplaced.<sup>343</sup> In *Payson*, the father had provided proof in the form of canceled checks that he had in fact made the payments. In *Decker*, the court of appeals found that the father had failed "to provide any evidence as to the frequency with which he provided child care, or how much money Father saved Mother by providing child care."<sup>344</sup> As such, the father could not prove that he substantially complied with the decree requiring him to pay weekly installments of money to the clerk.<sup>345</sup>

Judge Sullivan concurred with a separate opinion and cautioned that the majority opinion implied that:

"substantial compliance" may be effected only by payments of money to someone providing goods or services. It also does not acknowledge that in *Payson v. Payson*, cited by the majority, the court stated that credit, might, in equity, be given for substantial compliance "with the *spirit* of the original support decree." The spirit of an order to pay support through the Clerk of Court may be met by "money or its equivalent" and might include the provision of services or tangible goods such as groceries.<sup>346</sup>

Judge Sullivan concluded that had the father produced evidence of the frequency and value of the child care provided, a different result might well have been reached.<sup>347</sup>

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340. *Id.* at 79.

341. 442 N.E.2d 1123 (Ind. Ct. App. 1982).

342. *Decker*, 829 N.E.2d at 80.

343. *Id.*

344. *Id.*

345. *Id.* The matter was remanded to the trial court because of an error in calculation of the child support order. *Id.*

346. *Id.* at 81 (Sullivan, J., concurring) (internal citations omitted).

347. *Id.*

*E. Provisional Arrearage*

In *Trent v. Trent*,<sup>348</sup> the father had accumulated a child support arrearage of \$6519 pursuant to a provisional order.<sup>349</sup> The decree of dissolution granted custody of the children to the mother and ordered the father to pay child support. However, the dissolution decree did not address the father's child support resulting from the provisional order. Three years later, the parties agreed to modify custody and the father was awarded the custody of the children. The mother agreed to pay child support.

After the children were emancipated and more than twelve years after the parties were divorced, the deputy prosecutor filed an affidavit for citation alleging that the mother had failed to pay child support.<sup>350</sup> The mother countered by stating that she had previously stopped paying child support based upon a verbal agreement with the father. Furthermore, she alleged that the father was in arrears in child support, a portion of which was child support ordered pursuant to the provisional order. She likewise filed a citation against the father. At hearing, the trial court found that (1) the amount of the arrearage that the father owed, including the provisional arrearage, was approximately equal to the arrearage owed by the mother; (2) that both parties had unreasonably delayed in taking action; and (3) that in the interest of equity the outstanding arrearages canceled each other and the citations were dismissed.<sup>351</sup>

The father appealed, contending that the inclusion of the provisional arrearage was error because it had not been addressed by the dissolution decree. The father argued that the arrearage that had been accrued under the provisional order was extinguished by the dissolution decree.<sup>352</sup>

On appeal, the court agreed with the father and discussed the rule of merger of the provisional order with the dissolution decree.<sup>353</sup> The court stated that:

The general rule of merger is that when a valid and final personal judgment is rendered in favor of the plaintiff, the original debt or cause of action, or underlying obligation upon which an adjudication is predicated is said to be merged into the final judgment, and the plaintiff cannot maintain a subsequent action on any part of the original claim, because the doctrine of merger operates to extinguish a cause of action on which a judgment is based and bars a subsequent action for the same

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348. 829 N.E.2d 81 (Ind. Ct. App. 2005).

349. *Id.* at 82.

350. *Id.* at 83.

351. *Id.* at 84. The trial court noted that the father took more than four years after the mother's support obligation had stopped to bring his citation and that the mother had failed to prosecute her citation and modification until brought into court on the father's citation. *Id.*

352. *Id.* at 85. IND. CODE § 31-15-4-14 (2005) governs the termination of provisional orders and provides: "A provisional order terminates when: (1) the final decree is entered subject to right of appeal; or (2) the petition for dissolution or legal separation is dismissed."

353. *Trent*, 829 N.E.2d at 85.

cause.<sup>354</sup>

In *In re Dean*,<sup>355</sup> the doctrine of merger did not prohibit the state from pursuing the father for a provisional arrearage because the state was not a party to the original dissolution proceedings.<sup>356</sup>

Because the father in *Trent* had accumulated a portion of the arrearage pursuant to a provisional order that was not included in the dissolution decree, pursuant to the doctrine of merger, the provisional order and the arrearage accruing under it were extinguished.<sup>357</sup> The trial court erred when it included the provisional arrearage in the amount that the father owed the mother.<sup>358</sup>

Another issue raised by the father was that the trial court had applied the doctrine of laches in finding that both parties had delayed in pursuing the arrearages and thus were not entitled to relief. The court of appeals agreed.<sup>359</sup> Although the trial court's ruling did not specifically use the term "laches" when finding an unreasonable delay, the trial court—in a sense—did apply that very concept.<sup>360</sup> The court noted that it had previously held that "the doctrine of laches simply does not apply to child support cases."<sup>361</sup> As a result, the trial court's finding was clearly erroneous and the proceeding was reversed and remanded back to the trial court.<sup>362</sup>

#### F. Contempt and Incarceration

The father in *Branum v. State*<sup>363</sup> was held in contempt for failure to pay child support and jailed for 120 days.<sup>364</sup> On appeal, the father contended that he was not advised of his right to counsel, that the order was punitive in nature, and that his release was not conditioned upon his willingness to comply with the court's order.<sup>365</sup> The court agreed:

This court has observed that "[i]t is crystal clear that a person may not be incarcerated by the state without first being advised of his constitutional right to counsel, and, if indigent, without having counsel appointed to represent him, whether the contempt proceedings are initiated by a

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354. *Id.* (quoting *In re Dean*, 787 N.E.2d 445, 447 (Ind. Ct. App. 2003)).

355. 787 N.E.2d 445.

356. *Id.* at 448.

357. *Trent*, 829 N.E.2d at 86.

358. *Id.*

359. *Id.* at 87.

360. *Id.* "Laches is neglect for an unreasonable length of time, under circumstances permitting diligence, to do what in law should have been done." *Id.* (internal quotation marks omitted) (quoting *Knaus v. York*, 586 N.E.2d 909, 914 (Ind. Ct. App. 1992)).

361. *Id.* (internal quotation marks omitted) (quoting *Knaus*, 586 N.E.2d at 914).

362. *Id.*

363. 822 N.E.2d 1102 (Ind. Ct. App.), *clarified on reh'g*, 829 N.E.2d 622 (Ind. Ct. App. 2005).

364. *Id.* at 1103.

365. *Id.* at 1104-05.

private person or the state.”<sup>366</sup>

The court went on to state that on remand, if the court determined that the father was indigent, he had the right to court appointed counsel.<sup>367</sup>

Indiana has long recognized a persons right to have counsel appointed under such circumstances. As Chief Justice Shepard has observed, “[m]ore than a century before *Gideon v. Wainwright* was decided,” in *Webb v. Baird*, our supreme court recognized an indigent defendant’s right to an attorney at public expense.<sup>368</sup>

The court also observed that the trial court erred when it did not condition the father’s release from jail on compliance with the support order.<sup>369</sup>

Our supreme court has held that: “The primary objective of a civil contempt proceeding is not to punish the defendant, but rather to coerce action for the benefit of the aggrieved party. Punishment in the form of imprisonment or a fine levied against the defendant, which goes to the State and not to the injured party, is characteristic of a criminal proceeding. In a civil contempt action the fine is to be paid to the aggrieved party, and the imprisonment is for the purpose of coercing compliance with the order.”<sup>370</sup>

As such, a finding of contempt and incarceration will be viewed as remedial and not punitive “if the court conditions release upon the contemnor’s willingness to [comply with the order].”<sup>371</sup>

### G. Credit for Social Security Payments

The court of appeals also decided the case of *Brown v. Brown*,<sup>372</sup> which held that a retroactive lump sum payment of Social Security Disability benefits received by the dependent child of a child support obligor could not be credited against that person’s child support arrearage.<sup>373</sup> However, the supreme court granted transfer and the opinion of the court of appeals, pursuant to Indiana

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366. *Id.* at 1104 (internal quotation marks omitted) (quoting *In re Marriage of Stariha*, 509 N.E.2d 1117, 1122 (Ind. Ct. App. 1987)).

367. *Id.*

368. *Id.* (internal citations omitted) (quoting Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 578 (1989)).

369. *Id.*

370. *Id.* at 1105 (quoting *Duemling v. Fort Wayne Cmty. Concerts, Inc.*, 188 N.E.2d 274, 276 (Ind. 1963)).

371. *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Moore v. Ferguson*, 680 N.E.2d 862, 865 (Ind. Ct. App. 1997)). On rehearing, the court added that on remand the trial court should determine if the father had the financial ability to comply with the support order. *Branum v. State*, 829 N.E.2d 622, 623 (Ind. Ct. App. 2005).

372. 823 N.E.2d 1224 (Ind. Ct. App.), *trans. granted*, 841 N.E.2d 183 (Ind. 2005).

373. *Id.* at 1226.

Appellate Rule 58, was vacated.<sup>374</sup> At the time this survey was written, the supreme court had not issued a decision.

#### IV. PATERNITY

##### *A. Disestablishment of Paternity*

In *Sutton v. Boes*,<sup>375</sup> the father and mother were killed and the child's maternal grandmother was granted temporary custody of the child.<sup>376</sup> As the next friend of the child she filed a verified petition to disestablish paternity. She alleged that the father of the child was not the child's true biological father because the mother had been at least four months pregnant when the father and mother had begun dating and that the mother did not know the identity of the true biological father. The grandmother filed her request for DNA testing and the estate of the father filed a motion to dismiss the petition to disestablish paternity. The trial court granted the motion and grandmother appealed.

On appeal, the grandmother argued that Indiana Code section 31-14-5-2 allowed a child to file a paternity petition and thus it was error for the court to grant the motion to dismiss.<sup>377</sup> In affirming the trial court, the court appeals noted that there was no provision in the Indiana Code which permitted an action to disestablish paternity.<sup>378</sup> Because the child was born during the marriage of its parents, the husband was presumed to be the child's father.<sup>379</sup>

*In re Paternity of B.W.M.*<sup>380</sup> also involved disestablishment of paternity, this time pursuant to a petition for modification of child support.<sup>381</sup> The trial court vacated the father's child support order because subsequent DNA testing showed that he was not the child's father. When the child sought to establish that another man, Bradley, was the child's father, the trial court also dismissed that action.<sup>382</sup> The trial court dismissed the action because at the time the paternity petition was brought, the child was nearly fourteen years of age and Bradley had been "foreclosed from the opportunity to ever have any meaningful contact with this child."<sup>383</sup> This essentially left the child fatherless. The child appealed and the court of appeals reversed.<sup>384</sup>

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374. *Brown*, 841 N.E.2d at 183.

375. 829 N.E.2d 157 (Ind. Ct. App. 2005).

376. *Id.* at 158.

377. *Id.* at 159.

378. *Id.*

379. *Id.* (citing IND. CODE § 31-14-7-1 (2005)).

380. 826 N.E.2d 706 (Ind. Ct. App.), *trans. denied sub nom.* Miller v. Bradley, 841 N.E.2d 179 (Ind. 2005).

381. *Id.* at 706-07.

382. *Id.* at 707.

383. *Id.*

384. *Id.* at 708.

The court noted that in *In re S.R.I.*<sup>385</sup> the supreme court had observed that “there is a substantial public policy in correctly identifying parents”—both for the medical and psychological best interests of the child—and for the “just determination of child support” because “public policy disfavors a support order against a man who is not the child’s father.”<sup>386</sup> However, the trial court in *B.W.M.* had, in effect, taken away the child’s legal father and left him powerless to establish the identity of his biological father. “This runs completely contrary to our established public policy of correctly identifying parents and their offspring.”<sup>387</sup> The record revealed that the child wanted to know the identity of his father and though Bradley was a virtual stranger, the child wanted the opportunity to know his real father.<sup>388</sup> In disapproving of the action in the court below, the court of appeals observed “[w]e are mindful of the fact that both our supreme court and this court have previously looked with displeasure on parents attacking their paternity through motions to modify child support orders under Indiana Trial Rule 60.”<sup>389</sup> The matter was remanded to the trial court to give the “fatherless child . . . the chance to prove who his biological father [was].”<sup>390</sup>

#### *B. Statute of Limitations/Necessary Parties*

The case of *In re Paternity of K.L.O.*<sup>391</sup> determined the statute of limitations applicable to a paternity action and the parties necessary to a paternity action. The mother and Jeffery were dating at the time the child, K.L.O., was born in August 1992.<sup>392</sup> They executed a paternity affidavit naming Jeffery as the father. Approximately ten years later, another man, Toby Lakins, at the mother’s request, submitted to a DNA test which “revealed the probability of 99.99995% that Lakins was K.L.O.’s biological father.”<sup>393</sup> The mother then filed a petition to establish paternity in Toby who answered by filing a motion to dismiss maintaining that the executed paternity affidavit had already established paternity in Jeffery and that Jeffery should have been joined in the paternity action as a necessary party. The trial court granted the motion.

Later, the mother filed a second petition to establish paternity alleging that Jeffery was K.L.O.’s father.<sup>394</sup> But in doing so she failed to make Toby a party to the proceedings. Subsequent DNA testing revealed that Jeffery was not the

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385. 602 N.E.2d 1014 (Ind. 1992).

386. *In re Paternity of B.W.M.*, 826 N.E.2d at 707 (citing *In re S.R.I.*, 602 N.E.2d at 1016).

387. *Id.* at 708.

388. *Id.*

389. *Id.* (citing *Ohning v. Driskill*, 739 N.E.2d 161, 164 (Ind. Ct. App. 2000); *Russell v. Russell*, 682 N.E.2d 513, 518 (Ind. 1997); *Gibson v. Gibson*, 644 N.E.2d 876, 877 (Ind. 1994); *Farrow v. Farrow*, 559 N.E.2d 597, 600 (Ind. 1990)).

390. *Id.*

391. 816 N.E.2d 906 (Ind. Ct. App. 2004).

392. *Id.* at 907.

393. *Id.*

394. *Id.*

biological father of K.L.O. The petition to establish paternity was dismissed.

Undeterred, the mother filed a third petition to establish paternity, again alleging that Toby was the father. Once again, Toby moved to dismiss contending that paternity had already been established in Jeffery pursuant to the paternity affidavit, that Jeffery was a necessary party, and that the paternity petition should be dismissed because Jeffrey had not been joined in the action. The trial court denied Toby's motion and he was granted certification of the trial court's denial for interlocutory appeal.

On appeal, Toby alleged that his motion to dismiss should have been granted because the statute of limitations barred the mother from pursuing a paternity action and because Jeffrey was not joined in the paternity action as a necessary party.<sup>395</sup> In deciding the statute of limitations question, the court of appeals observed that Indiana Code section 31-14-5-3 prohibited a mother from filing a paternity petition later than two years after the child is born.<sup>396</sup> Nevertheless, the court noted that Indiana Code section 31-14-5-2(b) allows a child to bring a paternity action at any time before the child reaches twenty years of age.<sup>397</sup> Also, the court determined that Indiana Code section 31-14-5-2(a) allows an underage child to bring a paternity action by guardian ad litem or next friend.<sup>398</sup> Because the paternity action was filed on behalf of K.L.O. by her mother as her next friend, the mother was not barred by the statute of limitations from filing a paternity petition on the child's behalf as her next friend.<sup>399</sup>

In addressing whether Toby's motion to dismiss should have been granted because Jeffrey was not joined as a necessary party, the court of appeals agreed with Toby.<sup>400</sup> The court relied on the following: "Indiana Code § 31-14-5-6 provides, 'the *child*, the *child's mother*, and *each person alleged to be the father* are necessary parties to each [paternity] action.'" <sup>401</sup> Indiana Code section 31-14-7-3 provides that a man is a child's legal father if he has executed a paternity affidavit and that affidavit has not been set aside.<sup>402</sup> Because Jeffrey was K.L.O.'s father by operation of the paternity affidavit and that affidavit had not been set aside or rescinded pursuant to Indiana Code section 16-37-2-2.1(i), he was a necessary party to the paternity action against Toby and had to be joined in that action.<sup>403</sup> The court reversed and remanded to the trial court.<sup>404</sup>

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395. *Id.* at 908.

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.* at 908-09.

401. *Id.* at 908 (emphasis added) (alteration in original).

402. *Id.*

403. *Id.*

404. *Id.* at 908-09.

*C. Child's Name*

*In re Paternity of J.C.*<sup>405</sup> involved the issue of whether a trial court is required to determine if it is in the best interest of a non-marital child to change the child's surname.<sup>406</sup> The mother filed a petition to determine paternity, and both parties were present at the hearing. At the hearing, the parties presented an agreement "with respect to child support, custody, visitation, insurance, and the child's name."<sup>407</sup> Pursuant to that agreement, the child was to retain the mother's maiden name. The trial court entered an order which incorporated the parties' agreement. Following the paternity entry adopting the agreement of the parties, they returned to court several times for modification of various issues but never regarding the child's surname. Subsequently, the mother married and the father filed a motion for change of minor's name. The basis of the father's argument was that the mother's name was now different than the child's surname and that he had a "protectable interest in the child bearing his last name pursuant to common law and as a matter of statute."<sup>408</sup> The trial court granted the father's motion and the mother appealed.

On appeal, the mother argued that not only should the father be required to show that changing the child's surname would be in the best interest of the child but he also had to show that there was a substantial change in circumstances since the initial determination.<sup>409</sup> In reversing the trial court, the court noted that

[i]t is well settled in Indiana that a biological father seeking to obtain the name change of his nonmarital child bears the burden of persuading the court that the change is in the best interest of the child. Absent that evidence of the child's best interests, the father is not entitled to obtain a name change.<sup>410</sup>

The court remanded the matter to the trial court advising the trial court to consider:

whether the child holds property under a given name, whether the child is identified by public and private entities and community members by a particular name, the degree of confusion likely to be occasioned by a name change and (if the child is of sufficient maturity) the child's desires.<sup>411</sup>

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405. 819 N.E.2d 525 (Ind. Ct. App. 2004).

406. *Id.* at 527.

407. *Id.*

408. *Id.*

409. *Id.* at 528.

410. *Id.* at 527 (internal citations omitted). The court rejected the mother's "novel" argument that change of circumstances is also required citing a lack of authority. *Id.* at 528.

411. *Id.*

V. ADOPTION: ADOPTIONS BY SAME SEX PARTNERS<sup>412</sup>

The case of *Mariga v. Flint*,<sup>413</sup> where the same sex partner had adopted the partner's biological children under Indiana's stepparent adoption statute,<sup>414</sup> called upon the court of appeals to "examine the nature of parenthood."<sup>415</sup> In the previous survey period, the court of appeals decided the case *In re Adoption of K.S.P.*,<sup>416</sup> which held that an adoption by a same sex partner under the Indiana stepparent adoption statute did not divest the parental rights of the biological parent.<sup>417</sup> In *K.S.P.*, the court of appeals reversed the trial court's conclusion that adoption by a same sex partner was not allowed by the Indiana Stepparent Adoption statute.<sup>418</sup> The court of appeals stated:

We conclude that where, as here, the prospective adoptive parent and the biological parent are both in fact acting as parents, Indiana law does not require a destructive choice between the two parents. Allowing continuation of the rights of both the biological and adoptive parent, where compelled by the best interests of the child, is the only rational result<sup>419</sup>

In *Mariga*, the same sex couple had been involved in an intimate relationship since at least 1992.<sup>420</sup> One of the partners had two children from a prior marriage that had ended in divorce. In 1996, the mother's partner, with the consent of the biological father, adopted the mother's children under Indiana's stepparent adoption statute. Two years later, the couple separated and both the children remained with the mother. The couple had an informal agreement regarding child support and the partner continued to exercise parenting time. Eventually, the child support payments from the partner stopped and the partner's parenting time with the children became increasingly sporadic.

The mother filed a petition to establish custody, visitation, and support.<sup>421</sup> In response, the partner filed a petition to vacate her original adoption of the children. The petition to vacate the adoption was denied and the partner was ordered to pay weekly child support and uninsured medical expenses pursuant to the "6% Rule."

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412. The case of *In re A.B.*, 818 N.E.2d 126 (Ind. Ct. App. 2004) was also decided, but the Indiana Supreme Court granted transfer and vacated sub nom. *King v. S.B.*, 837 N.E.2d 965 (Ind. 2005).

413. 822 N.E.2d 620 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 191 (Ind. 2005).

414. IND. CODE § 31-19-15-2 (2005).

415. *Mariga*, 822 N.E.2d at 622.

416. 804 N.E.2d 1253 (Ind. Ct. App. 2004).

417. *Id.* at 1260. For a discussion of *Adoption of K.S.P.* and IND. CODE § 31-19-15-2, see Ruppert & Ruppert, *supra* note 305, at 1120.

418. *In re Adoption of K.S.P.*, 804 N.E.2d at 1260.

419. *Id.* (internal citation omitted).

420. *Mariga*, 822 N.E.2d at 624.

421. *Id.* at 624-25.

The partner appealed and the court of appeals affirmed the trial court, rejecting the argument that the adoption should have been vacated.<sup>422</sup> The court held that the partner had legally and properly become the parent of the children, and that her parental responsibilities could not be set aside simply because the underlying domestic partnership had dissolved.<sup>423</sup>

#### VI. COHABITATION/MARRIAGE: PROPERTY CLAIMS OF A NON-MARITAL PARTNER

The law in Indiana regarding the property claim of a non-marital partner is that “a party who cohabitates with another without subsequent marriage is entitled to relief upon a showing of an express contract or a viable equitable theory such as an implied contract or unjust enrichment.”<sup>424</sup> During the survey period the court of appeals was asked to consider just such a claim in the case of *Fowler v. Perry*.<sup>425</sup> In this case, the parties lived together in Missouri, and while in Missouri they had a child together.<sup>426</sup> After sixteen months, the girlfriend moved to Indiana with the couple’s son while the boyfriend stayed in Missouri, to finish his education. During the period that the boyfriend stayed in Missouri, he gave his girlfriend control of approximately \$18,000 of his income with which, he believed, she was going to pay his individual bills and save the left over money so that the two could buy a house. She, on the other hand, believed that he wanted her to use the money to pay for the couple’s household expenses and to provide for the couple’s child. The boyfriend did not pay support separately and the girlfriend had always been responsible for paying the couple’s household expenses.<sup>427</sup> The couple had also become engaged and the boyfriend had purchased an engagement ring he gave to the girlfriend. Ultimately, the girlfriend broke off the engagement and attempted to pawn the engagement ring. Before the ring could be pawned, it was stolen and she received insurance proceeds in the amount of \$5000.

The boyfriend brought an action against her for the amount of the money that he believed should have been placed in savings and for the value of the engagement ring. The trial court ruled against the boyfriend, finding that there was no evidence of an express or implied contract as to how the funds should have been distributed and found an absence of specific facts establishing that the engagement had been given in expressed contemplation of marriage.<sup>428</sup> The boyfriend appealed.

On appeal, the boyfriend argued that the trial court committed error because his claim was one more appropriately classified as for unjust enrichment rather

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422. *Id.* at 628.

423. *Id.*

424. *Bright v. Kuehl*, 650 N.E.2d 311, 315 (Ind. Ct. App. 1995).

425. 830 N.E.2d 97 (Ind. Ct. App. 2005).

426. *Id.* at 100.

427. *Id.*

428. *Id.* at 101.

than one for express or implied contract. The court of appeals rejected his contention, holding that the rule laid down in *Bright v. Kuehl*<sup>429</sup> required the plaintiff to show an express contract or a viable equitable theory such as implied contract or unjust enrichment.<sup>430</sup> With respect to unjust enrichment, the court stated:

To prevail on a claim for unjust enrichment, a plaintiff must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust. Principals of equity prohibit unjust enrichment of a party who accepts the unrequested benefits another provides despite having the opportunity to decline those benefits.<sup>431</sup>

Because of the conflicting testimony, it was apparent that the parties did not have an express agreement,<sup>432</sup> and the trial court could have reasonably concluded, given the testimony and the parties' past history together, that all of the money had been used by the girlfriend to support the household, provide for the couple's son, and pay for the boyfriend's bills.<sup>433</sup> Thus, it could not be said that she had been unjustly enriched.<sup>434</sup>

The boyfriend also argued that it was error for the court not to award him the purchase price of the engagement ring. The trial court had found that it had not been presented with any evidence of a proposal for marriage or other evidence that the ring had been given in contemplation of marriage—even though the parties, throughout their testimony, had identified the ring as “the engagement ring.”<sup>435</sup> In analyzing the propriety of the trial court's ruling, the court of appeals first examined whether the ring constituted a gift in contemplation of marriage.<sup>436</sup> Both parties had referred to the ring as an “engagement ring” and the court determined that “[A]n ‘engagement ring’ is defined as ‘a ring given in token of betrothal.’”<sup>437</sup> The court stated, “[t]he term ‘betrothal’ refers to ‘a mutual promise or contract for a future marriage.’”<sup>438</sup> Therefore, because the parties had referred to their ring as an engagement ring, the trial court had committed error when it found the evidence insufficient to prove that the ring was given in contemplation of marriage.<sup>439</sup>

The court next had to determine whether the boyfriend was entitled to the

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429. 650 N.E.2d at 311.

430. *Fowler*, 830 N.E.2d at 103.

431. *Id.* (internal citation omitted).

432. *Id.* at 103-04. No written document was introduced into evidence regarding the parties' agreement.

433. *Id.* at 101.

434. *Id.* at 104.

435. *Id.*

436. *Id.*

437. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 751 (2002)).

438. *Id.*

439. *Id.*

return of the ring or its purchase price. The court noted that the question of whether of the engagement ring should be returned was one of first impression in Indiana.<sup>440</sup> The court examined whether the ring was intended as an absolute or a conditional gift.<sup>441</sup> The court determined that in our society an engagement ring is the symbol token of a couple's agreement to marry.<sup>442</sup> Thus, in order for title to the ring to transfer and the gift to become absolute, the marriage must first occur.<sup>443</sup> That is, "marriage is a condition precedent before ownership of an engagement ring vests in the donee."<sup>444</sup> Therefore, in most circumstances, an engagement ring is a conditional gift.<sup>445</sup>

The court next had to determine the rightful ownership of an engagement ring when the condition of marriage is never satisfied.<sup>446</sup> In analyzing the case law of other jurisdictions, the court determined that there is a majority and minority rule.<sup>447</sup> The majority of jurisdiction have "adopted a 'fault based' approach, wherein the donor is entitled to the return of the engagement ring only if the engagement was broken by mutual agreement or unjustifiably by the donee."<sup>448</sup> The minority of jurisdictions have adopted what the court of appeals termed "the modern trend" which holds that "once an engagement is broken, the engagement ring should be returned to the donor, regardless of fault."<sup>449</sup> Thus, fault is irrelevant because the condition of marriage was never fulfilled, and ownership of the ring was never transferred.<sup>450</sup>

The court found this minority approach to be the better approach for two

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440. *Id.* at 105 (citing *Linton v. Hasy*, 519 N.E.2d 161, 162 (Ind. Ct. App. 1988) for this proposition).

441. *Id.*

In addition to the competency of the donor, a valid inter vivos gift—i.e., an absolute gift—occurs when: (1) the donor intends to make a gift; (2) the gift is completed with nothing left undone; (3) the property is delivered by the donor and accepted by the donee; and, (4) the gift is immediate and absolute. *Shourek v. Stirling*, 652 N.E.2d 865, 867 (Ind. Ct. App. 1995). Thus, once the delivery and acceptance of the gift inter vivos occurs, the gift is irrevocable and a present title vests in the donee. *Hopping v. Wood*, 526 N.E.2d 1205, 1207 (Ind. Ct. App. 1988), *reh'g denied, trans. denied*. By contrast, a gift is conditional if it is conditioned upon the performance of some act by the donee or the occurrence of an event in the future.

*Id.*

442. *Id.*

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.* (citing *Heiman v. Parrish*, 942 P.2d 631, 635 (Kan. 1997)); *see also* Elaine Marie Tomko, Annotation, *Rights in Respect of Engagement and Courtship Presents when Marriage Does Not Ensur*, 44 A.L.R. 5TH 1 (2005).

449. *Fowler*, 830 N.E.2d at 106.

450. *Id.*

reasons.<sup>451</sup> First, the “no fault” approach was consistent with Indiana’s “no-fault” system of divorce.<sup>452</sup> Second, the court did not want the Indiana judiciary “to tackle the seemingly insurmountable task of determining which party was at fault for the termination of an engagement for marriage.”<sup>453</sup> Having determined that the gift of the engagement ring was conditioned upon the parties’ marriage, and because that promise was not kept, regardless of fault, the ring had to be returned or the purchase price refunded.<sup>454</sup>

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451. *Id.*

452. *Id.*; see IND. CODE § 31-15-1-2 (2005).

453. *Fowler*, 830 N.E.2d at 106.

454. *Id.*

In adopting the “no-fault” approach, however, we note that, in this modern era, it is not uncommon for both parties to contribute financially to the purchase of an engagement ring. Though not customary, it is also not atypical for the woman, i.e., the donee or the recipient, to purchase her own engagement ring. Armed with these realities, we hold that when an engagement ring is purchased in contemplation of marriage and such engagement does not result in marriage, the person who purchased the engagement ring is entitled to its return or, if return of the ring is impossible, to the monetary amount contributed toward the purchase of the ring.