vague to be enforceable. The condition authorized revocation if "anyone has sufficient grounds to think that he should be arrested or charged."[222] The court held that a condition of probation must be specific in order to justify revocation and that the language in the condition was too vague to be valid. However, another condition of probation, prohibiting use of controlled substances, was sufficiently specific. The court therefore approved revocation for possession of marijuana. It should be noted that although the defendant in *Dulin* had not been convicted of another crime at the time of revocation, he had violated a condition of his probation. *Dulin* thus may be reconciled with *Ewing*.

IX. Domestic Relations

*Judith S. Proffitt**

A. Adoption and Guardianship of Minors

During the survey period, Indiana courts decided two cases[1] concerning the custody of children following the death of a natural or adoptive parent.

In *Bristow v. Konopka*,[2] the First District Court of Appeals was confronted with a unique fact situation requiring construction of the notice provisions of the guardianship statute.[3] A minor child, Misty Dawn Konopka, had been adopted by her

---

[222]346 N.E.2d at 747-48.

*Member of the Indiana Bar. B.S., Butler University, 1967; J.D., Indiana University School of Law—Indianapolis, 1971.

The author wishes to thank Marian Meyer for her assistance in the preparation of this article.

[1]*In re* Adoption of Lockmondy, 343 N.E.2d 793 (Ind. Ct. App. 1976); Bristow v. Konopka, 336 N.E.2d 397 (Ind. Ct. App. 1975).

[2]336 N.E.2d 397 (Ind. Ct. App. 1975).

[3]IND. CODE § 29-1-18-14 (Burns Supp. 1976). The statute reads, in pertinent part:

> Notice of hearing on petition for guardianship.—When an application for the appointment of a guardian is filed with the court, notice of the hearing shall be served as follows:
>
> . . . .
>
> (b) When the application is for the appointment of a guardian for a minor, notice shall be served upon the parents or surviving parent of such minor, if the whereabouts of such minor's parents or surviving parent are known, but no other notice shall be necessary unless ordered by the court;

Id.

paternal grandmother, Marjorie Konopka. Following the adoption, Misty resided with Marjorie for five months until Marjorie's death on December 13, 1974. Misty was then cared for by members of Marjorie's family, including the appellants in this case. On December 17, 1974, Debra Konopka, Misty's natural mother, petitioned for appointment as Misty's guardian.[4] The trial court granted the petition without notice to appellants and ordered Misty to be released to Debra's custody. Appellant Bristow and her sister then filed separate motions to set aside Debra's guardianship and each requested appointment as Misty's guardian. When both motions were denied, Bristow and a new party, Hall, appealed.[5]

On appeal, the court first considered appellants' contention that the word "parent" in the guardianship notice statute[6] requires notice of proceedings to those who stand *in loco parentis* to minors and that appellants, by caring for Misty after Marjorie's death, had achieved such status. Relying upon the Indiana Supreme Court's 1974 definition of *in loco parentis* as the assumption of the legal obligation for a child without formal adoption,[7] the court of appeals found that the appellants did not stand *in loco parentis* to Misty since they had acted under a moral rather than a legal obligation.[8] The court therefore held that the statute did not require notice of the guardianship proceedings to the appellants.[9]

Because the guardianship notice statute clearly empowers the court "to require notice not specifically mandated by other language"[10] and in view of the "legal parental hiatus"[11] following

---

[4]Although Debra was Misty's natural mother, her legal rights as a parent had been relinquished when Misty was adopted by Marjorie, pursuant to IND. CODE § 31-3-1-9 (Burns 1973). In Bryant v. Kurtz, 134 Ind. App. 480, 189 N.E.2d 593 (1963), the court stated that a natural parent whose child is adopted by another "has lost the right to ever see said child again or to have any real knowledge of its whereabouts . . . ." *Id.* at 488, 189 N.E.2d at 597.

[5]Hall had not been a party in the initial action. 336 N.E.2d at 398. However, the court of appeals held that Hall had standing to proceed as a party on appeal pursuant to IND. CODE § 29-1-1-22 (Burns 1972) which reads in pertinent part: "*Any person* considering himself aggrieved by any decision of a court having . . . jurisdiction in proceedings under this . . . Code may prosecute an appeal . . . ." (emphasis added).

[6]See note 3 *supra.*

[7]Sturrup v. Mahan, 261 Ind. 463, 305 N.E.2d 877 (1974).

[8]336 N.E.2d at 399.

[9]*Id.*

[10]*Id.* "[B]ut no other notice shall be necessary *unless ordered by the court.*" IND. CODE § 29-1-18-14(b) (Burns Supp. 1976) (emphasis added).

[11]336 N.E.2d at 400.

Marjorie's death, the preferable procedure would be to use the court's statutory power to require notice to those directly caring for Misty.[12] Noting that the guardianship statute requires a court appointing a guardian to be satisfied that the person appointed is "the most suitable among the persons available to act as guardian,"[13] the court found that the situation required both a hearing and notice to the appellants, reversed the lower court, and remanded the case.

Judge Lowdermilk, author of the court's opinion, emphasized that concern for the child's welfare is superior to the rights of a child's natural parents in a guardianship proceeding and specifically stated that the court's conclusion was reached because of the unusual facts of the case.[14] However, the clear implication of the decision is that a court appointing a guardian for a minor child should utilize its statutory power to require notice to any individual actually caring for the child at the time of the appointment, regardless of the legal relationship of the individual to the child.[15]

The Third District Court of Appeals, in deciding *In re Adoption of Lockmondy*,[16] was confronted with issues of the admissibility of evidence and the scope of appellate review in adoptions granted without the consent of natural parents. The trial court granted the petition of Dean R. Jester, stepfather of Stephen Lockmondy and surviving spouse of Stephen's natural mother, to adopt Stephen without the consent of Joseph Lockmondy, Stephen's natural father.[17] The court's decision to grant the adoption was based on the statutory grounds that the natural father had failed to support the child for a period of twelve months, although he was legally obligated and financially able to do so.[18]

On appeal, Mr. Lockmondy first contended that the trial court's admission of the opinion testimony of the social worker employed by the county welfare department regarding the best interests of a child was tantamount to allowing into evidence the welfare department report, which is inadmissible in a contested

---

[12]*Id.*

[13]IND. CODE § 29-1-18-18 (Burns 1972).

[14]336 N.E.2d at 400.

[15]See also *In re* A.B., 332 N.E.2d 226 (Ind. Ct. App. 1975), discussed at text accompanying notes 26-37 *infra*.

[16]343 N.E.2d 793 (Ind. Ct. App. 1976).

[17]Jester, married to Stephen Lockmondy's natural mother for nine years, had petitioned for adoption on September 20, 1973, with the consent of his wife. Before the petition could be granted, Stephen's mother died of injuries sustained in an automobile accident. *Id.* at 794.

[18]IND. CODE § 31-3-1-6(g)(1) (Burns Supp. 1976).

adoption proceeding under Indiana law.[19] The court of appeals found, however, that the social worker had been properly qualified as an expert witness and that, since he had testified from memory rather than from his report, the trial court had not abused its discretion in allowing the testimony. The court did, however, provide a caveat: "Not every social worker may qualify as an expert to render an opinion on an adoption."[20] Mere familiarity with a case will not be sufficient to qualify a social worker as an expert; his training and experience must be of paramount importance in determining his qualification as an expert. The court further pointed out that even an expert's opinion may be subject to objection if it is based on hearsay not usually relied on in the expert's profession or not "normally found reliable."[21]

Mr. Lockmondy then challenged the sufficiency of evidence of his failure to support Stephen. The trial court had made special findings of the fact of nonsupport, but had not found the failure to support was willful.[22] The court of appeals, before passing on the sufficiency of the evidence, explained the standard of review in adoption without consent cases. Following the rule developed by the Indiana Supreme Court in *Harlock v. Oglesby*,[23] the court held that in adoption without consent the appellate court will consider "only the evidence most favorable to the appellee together with any reasonable inferences which may be drawn therefrom to determine whether the decision is sustained by sufficient evidence."[24] The court then found that the trial court's finding was supported by "clear and cogent evidence"[25] and affirmed the decree.

---

[19]343 N.E.2d at 795, *citing* Attkisson v. Usrey, 224 Ind. 155, 65 N.E.2d 489 (1946); *In re* Adoption of Sigman, 308 N.E.2d 716 (Ind. Ct. App. 1974); Jeralds v. Matusz, 152 Ind. App. 538, 284 N.E.2d 99 (1972); *In re* Adoption of Chaney, 128 Ind. App. 603, 150 N.E.2d 754 (1958). Although IND. CODE § 31-3-1-4 (Burns Supp. 1976) mandates welfare agencies to investigate and make recommendations regarding the advisability of adoptions, this provision applies only to ex parte adoption proceedings. Attkisson v. Usrey, 224 Ind. 155, 160-61, 65 N.E.2d 489, 491 (1946). The rationale for the rule is that the report may contain not only hearsay and opinions of laymen, but also "gossip, bias, prejudice, trends of hostile neighborhood feelings, and the hopes and fears of social workers." *Id.*, *quoting from* People v. Lewis, 260 N.Y. 171, 172, 183 N.E. 353, 355 (1932).

[20]343 N.E.2d at 796.

[21]*Id.*

[22]*Id.* at 797 n.6.

[23]249 Ind. 251, 231 N.E.2d 810 (1967).

[24]343 N.E.2d at 798, *quoting from* 249 Ind. at 260, 231 N.E.2d at 815.

[25]343 N.E.2d at 798. "Clear and cogent" is the standard of proof required by Indiana courts in adoption without consent proceedings. *Id.*, *citing In re* Adoption of Bryant, 134 Ind. App. 480, 189 N.E.2d 593 (1963).

B. Paternity

In re A.B.[26] involved the issue of whether the father of an illegitimate child has the right, prior to a judicial determination of paternity, to be heard in a proceeding instituted by the welfare department to determine that a child is dependent and neglected.[27] The child bore the putative[28] father's name and at the age of one week was placed in the care of the father's mother and sister. One week later, the juvenile petition was filed and the welfare department was given temporary custody of the child. At the juvenile hearing, the father sought to enter his appearance but was advised that he had no standing. He then, through counsel, requested a continuance until his paternity could be judicially established. The request was denied and the father appealed.

On appeal, the father relied heavily on *Stanley v. Illinois*,[29] in which the United States Supreme Court held that due process and equal protection require that the parents of illegitimate children have a right to be heard and to have a determination on the merits in dependency proceedings. The Third District Court of Appeals found the Indiana statute adequate to withstand the appellant's constitutional attack. Citing both the purpose of the statute[30] and its provision for liberal construction,[31] the court held that statutory provisions for voluntary appearance[32] and summons to parents[33] as well as the court's power to require the appearance of any other necessary person[34] vested the court with sufficient discretion to admit "additional parties to the proceedings where

---

[26]332 N.E.2d 226 (Ind. Ct. App. 1975).

[27]IND. CODE § 31-5-7-8 (Burns 1973) allows any county welfare department to petition a court to determine that a child is dependent and neglected and to request that the child be made a ward of the court or of the county welfare department.

[28]There was no dispute regarding the child's paternity, but at the time of the juvenile petition, the father had not yet established his paternity through judicial decree. 332 N.E.2d at 227.

[29]405 U.S. 645 (1972).

[30]IND. CODE § 31-5-7-1 (Burns 1973).

[31]*Id.* § 31-5-7-2.

[32]

> [U]nless the parties hereinafter named shall voluntarily appear, the court shall issue a summons . . . requiring the person or persons who have the custody or control of the child to appear personally. . . . If the person so summoned shall be other than the parent or guardian of the child, then the parent or guardian or both shall also be notified . . . by personal service before the hearing . . . .

Id. § 31-5-7-9.

[33]*Id.*

[34]"Summons may be issued requiring the appearance of any other person whose presence, in the opinion of the judge, is necessary." *Id.*

necessary to secure substantial justice."[35] The court then found that the trial court's denial of the appellant's request to participate in the proceedings was an abuse of discretion, and reversed the decision.[36]

The court did not reach the issue of whether and under what circumstances the natural parent of an illegitimate child is entitled to notice under the statute. In view of the court's reliance on the due process and equal protection concepts of *Stanley*, and of the First District Court of Appeals decision in *Bristow v. Konopka*,[37] the practitioner should carefully consider notice to all individuals involved in a child's care in any case which will determine care and custody of a minor.

In *C.L.B. v. S.T.P.*,[38] petitioner, represented by the county prosecuting attorney,[39] filed a paternity suit against the respondent. Later, the petitioner also filed an affidavit alleging an assault and battery by the respondent against the petitioner. The respondent pleaded guilty to the charge of assault and battery, was fined, and received a suspended sentence. After the guilty plea, the deputy prosecuting attorney informed the appellant that he could not continue the paternity suit and suggested she contact another attorney. Eighteen months later, the paternity suit was dismissed without prejudice by the court sua sponte. The petitioner then sought other counsel and filed a second paternity suit, alleging respondent to be the father of her child and requesting support for the child. The respondent defended against the paternity suit on the ground that dismissal of the first action barred the second because of principles of res judicata and alleged that his guilty plea to the assault and battery charge was the result of a bargain in which the petitioner agreed to discontinue the paternity claim. After a hearing on the petitioner's motion to strike the respondent's defense, the trial court enforced

---

[35]332 N.E.2d at 228.

[36]The court of appeals also rejected the welfare department's argument that the appellant was not harmed by exclusion from the initial proceedings because he had the right, pursuant to IND. CODE § 31-5-7-17 (Burns 1973), to petition to have the child restored to him. The court pointed out that on a petition for restoration the burden of proof lay upon the petitioning parent, rather than upon the welfare department in the original proceedings; and that the petition for restoration was subject to the broad discretion of the court. 332 N.E.2d at 228. The same argument was rejected in Stanley v. Illinois, 405 U.S. 645, 647-48 (1972).

[37]336 N.E.2d 397 (Ind. Ct. App. 1975), discussed at text accompanying notes 2-15 *supra*.

[38]337 N.E.2d 582 (Ind. Ct. App. 1975).

[39]IND. CODE § 31-4-1-29 (Burns 1973) mandates prosecuting attorneys to act as counsel for plaintiffs in paternity suits, free of charge.

the agreement by dismissing the second paternity suit. The court also overruled the petitioner's subsequent motion to correct errors.[40] The First District Court of Appeals reversed, holding that the theory of res judicata could not apply to the second paternity action since the first suit was dismissed by the court on its own motion and therefore no judgment had been rendered on the merits in the first paternity suit.[41]

Conflicting testimony regarding the relationship between the parties resulted in the appeal reported as *G.B. v. S.J.H.*[42] The mother of twins born in January 1973 testified that her relationship with the appellant began in April of 1971 and continued through the late summer of 1972, and that the parties had intercourse several times a week beginning with their second or third date. She further testified that she had no relationships with other men during that period of time, and the appellant presented no evidence conflicting with that statement. However, the appellant contended that the relationship did not begin until April 1972 and that he did not have intercourse with the respondent until sometime after the 1972 "Indianapolis 500." He further testified that upon the first occasion of intercourse the respondent had told him that contraceptives were unnecessary because she was already pregnant.[43] In considering this appeal, the Third District Court of Appeals reiterated the standard that the "[a]ppellant may succeed only if he can show that the evidence supporting the decision establishes . . . a result based on mere conjecture, guess, surmise, possibility or speculation; or if he can show that the only evidence . . . could not induce conviction in any reasonable mind."[44] The court found the preponderance of evidence was sufficient to establish that appellant was the father, and affirmed the lower court's decision.

C. Dissolution of Marriage

1. Service of Summons

In *Chesser v. Chesser*,[45] a husband appealed from a denial of his motion for relief from a default decree dissolving his marriage and awarding all marital property to his spouse. The basis for

---

[40]337 N.E.2d at 583.

[41]*Id.* at 585.

[42]338 N.E.2d 315 (Ind. Ct. App. 1975).

[43]Again, the testimony was conflicting. The petitioner testified that she originally used contraceptives supplied by the father, but that when the supply ran out nothing further was used. *Id.* at 316.

[44]*Id., citing* Beaman v. Hedrick, 146 Ind. App. 404, 255 N.E.2d 828 (1970).

[45]343 N.E.2d 810 (Ind. Ct. App. 1976).

the appeal was that since the appellant had never received summons the court had no personal jurisdiction over him and the decree issued was therefore void.

Mr. and Mrs. Chesser had separated on July 8, 1974, when Mr. Chesser had moved from the marital residence in Otisco, Indiana, to Scottsburg. Mrs. Chesser petitioned for dissolution of marriage three days later. Service of summons on Mr. Chesser was attempted at the Otisco residence of Mrs. Chesser. The First District Court of Appeals found that the service was defective since it did not comply with the statutory requirements of leaving a copy of the summons at the appellant's "dwelling house or usual place of abode"[46] and sending a copy by first class mail to the "last known address of the person to be served."[47] The court also followed the doctrine of *Glennar Mercury-Lincoln, Inc. v. Riley*[48] that a party who is not served pursuant to statute, although he may have actual knowledge of a law suit, is not subject to the personal jurisdiction of a court.

Chesser dramatically illustrates that the Indiana practitioner must carefully investigate the location of the parties in any case of family disruption and must precisely comply with the statutory requirement for service of process.

2. *Irretrievable Breakdown*

Flora v. Flora[49] contains an excellent discussion of the evidentiary basis of "irretrievable breakdown" required by Indiana's Dissolution of Marriage Act.[50] The Act provides that the grounds for the dissolution of marriage in Indiana are:

> (1) Irretrievable breakdown of the marriage.
> (2) The conviction of either parties [*sic*], subsequent to the marriage, of an infamous crime.
> (3) Impotency, existing at the time of marriage.
> (4) Incurable insanity for a period of at least two [2] years.[51]

Before 1973, Indiana's divorce statute contained the more traditional "fault" grounds, including a catch-all ground of "cruel and inhuman treatment."[52] *Flora* is a case of first impression in

---

[46]IND. R. TR. P. 4.1(A)(3).

[47]*Id.* 4.1(B).

[48]338 N.E.2d 670 (Ind. Ct. App. 1975), discussed in Harvey, *Civil Procedure, supra* at 91.

[49]337 N.E.2d 846 (Ind. Ct. App. 1975).

[50]IND. CODE §§ 31-1-11.5-1 to -24 (Burns Supp. 1976).

[51]*Id.* § 31-1-11.5-3.

[52]Ch. 43, §§ 6-12, 14-24, 1873 Ind. Acts 107 (repealed 1973).

Indiana regarding whether the determination of irretrievable breakdown should be based upon objective evidence of irretrievable breakdown or upon the subjective state of mind of the parties. After the trial court had ordered dissolution of the marriage the wife appealed, contending that the court must require objective evidence of an irretrievable breakdown of the marriage rather than the expression of one party's unilateral desire to end the marriage.[53] The First District Court of Appeals first stated that a court does not perform a mere ministerial duty in approving petitions for dissolution of marriage, but makes a decision based upon the evidence at final hearing.[54] The key issue in arriving at the decision is whether or not a reasonable possibility of reconciliation exists.[55] In determining whether the possibility exists, the marital relationship as a whole must be considered by the court and the court must be satisfied that the parties can no longer live together because of substantial difficulties.[56] The court of appeals found that the trial court properly received and considered both subjective and objective evidence that an irretrievable breakdown of the marriage had occurred, and, after reviewing the evidence in the light most favorable to the appellee, affirmed the decision of the lower court.[57]

3. Defenses

The opinion of Judge Robertson on the petition for rehearing in *Flora*[58] disposes once and for all of the defenses which were traditional under the fault concept of divorce. The defenses of condonation, collusion, recrimination, and laches were not repealed by the legislature, although a repealer of the defenses was

---

[53] 337 N.E.2d at 849.

[54] *Id.* at 850.

[55]

> Upon the final hearing: the court shall hear evidence and, if it finds that the material allegations of the petition are true, either enter a dissolution decree . . . or if the court finds there is a reasonable possibility of reconciliation, the court may continue the matter and may order the parties to seek reconciliation through any available counseling.

IND. CODE § 31-1-11.5-8 (Burns Supp. 1976).

[56] 337 N.E.2d at 850.

[57] *Id.* at 850-51. Mr. Flora testified that his allegation of irretrievable breakdown was true and that the parties had excessive arguments. Mrs. Flora confirmed her husband's testimony concerning the arguments and further testified that husband's feelings appeared to have cooled toward her. *Id.* at 851.

[58] *Id.* at 852.

included in the original draft of the Dissolution of Marriage Act.[59] In *Flora,* Judge Robertson held that these defenses are no longer applicable since they are based upon a fault concept of divorce and are therefore not compatible with a termination of marriage under the "no fault" concept of the Dissolution of Marriage Act.[60]

4. Child Custody

Most of the cases decided during the survey period are the result of actions tried under old Indiana divorce law, before the effective date of the Dissolution of Marriage Act.[61] However, the present Act codifies much prior case law; results under the new Act should therefore not be significantly different from decisions under prior law. For example, the present statutory criterion for child custody, "the best interests of the child,"[62] was used by the Second District Court of Appeals in affirming the trial court's custody award based on prior law in *Hurst v. Hurst.*[63]

Custody was awarded to the father of the children in *Howland v. Howland,*[64] although the divorce was granted on the mother's cross-complaint. The evidence was undisputed that Mr. Howland had sired an illegitimate child immediately before the commencement of the divorce action. However, the evidence also established that during the eleven-month separation period Mrs. Howland had totally abdicated her responsibilities for the care of the couple's five minor children. Considering the welfare of the children and evidence that Mr. Howland had shown greater concern for that welfare, the trial court granted custody to him. The Second District Court of Appeals found no error in granting divorce to one party and custody to the other. Although decided under prior law, this case recognizes the concept enunciated in

---

[59]Ind. H.R. 1179, 97th Gen. Assembly, § 102(b)(2) (1971). The model for the draft was the 1970 version of the Uniform Marriage and Divorce Act. Note, *Alimony in Indiana Under No-Fault Divorce,* 50 IND. L.J. 541, 545-47 (1975).

[60]337 N.E.2d at 852. The defenses were judicial, rather than legislative, in origin. *See* Alexander v. Alexander, 140 Ind. 555, 38 N.E. 855 (1894) (recrimination); Armstrong v. Armstrong, 27 Ind. 186 (1886) (condonation); Everhart v. Puckett, 73 Ind. 409 (1881) (collusion). Therefore, judicial action was sufficient to "repeal" the defenses. In 1969, the Indiana Supreme Court had substantially lessened the effect of the defenses through a decision that recrimination was no longer an absolute bar to divorce. *See* O'Connor v. O'Connor, 253 Ind. 295, 253 N.E.2d 250 (1969).

[61]September 1973.

[62]IND. CODE § 31-1-11.5-21 (Burns Supp. 1976).

[63]335 N.E.2d 245 (Ind. Ct. App. 1975).

[64]337 N.E.2d 555 (Ind. Ct. App. 1975).

the Dissolution of Marriage Act that "there shall be no presumption favoring either parent" in determining the best interests of the child.[65]

Patterson v. Patterson[66] involved a post-divorce petition by the father of minor children for a change of custody. The children were in the custody of their mother, who had remarried; her present husband was ill and had only a part-time job as a bartender. The family of six, in poor financial condition, had lost its home by foreclosure and was living in a two-bedroom trailer. The school age child had changed schools frequently and had done poorly in school. The father was remarried, employed, and lived with his present wife in a large trailer in a park equipped with playground, tennis courts, and a swimming pool.

In denying the father's petition, the trial court stated that a change in custody could be based only on "compelling, urgent and cogent"[67] circumstances. On appeal, the father contended that the trial court's standard was contrary to law. The Second District Court of Appeals agreed that no Indiana cases establish a standard of "compelling, urgent and cogent," and that the criterion set out by case law for modification of a custody order is a change in circumstances rendering the change necessary for the welfare of the child.[68] The decision of the trial court was affirmed, however, because the court on appeal found that the appellant had not met his burden of proving that the trial judge had departed from the established legal standard that the change in circumstances must be substantial and material.[69] The court of appeals specifically disapproved of "urgent" as a standard for custody modification, but felt that the trial court judge's opinion, taken as a whole, did not carry an implication that the "urgent" standard had been applied.[70]

5. *Temporary Maintenance*

A petition for dissolution of marriage may include a petition for temporary maintenance, temporary support, child custody, temporary restraining orders, and possession of property.[71] The opinion of the Second District Court of Appeals in *Castor v.*

---

[65] IND. CODE § 31-1-11.5-21 (Burns Supp. 1976).

[66] 333 N.E.2d 115 (Ind. Ct. App. 1975).

[67] *Id.* at 117.

[68] Partridge v. Partridge, 257 Ind. 81, 272 N.E.2d 448 (1971); Perdue v. Perdue, 254 Ind. 77, 257 N.E.2d 827 (1970); Brickley v. Brickley, 247 Ind. 201, 210 N.E.2d 850 (1965).

[69] Wible v. Wible, 245 Ind. 235, 196 N.E.2d 571 (1964).

[70] 333 N.E.2d at 118.

[71] IND. CODE § 31-1-11.5-7 (Burns Supp. 1976).

Castor[72] indicates that orders for temporary maintenance and attorney's fees are appealable under the present statute, just as they were under former law.[73] The new statute, like the old, allows orders for the payment of money which are appealable interlocutory orders pursuant to Appellate Rule 4(B)(1). Mrs. Castor appealed the trial court's order that Mr. Castor pay various household bills and the sum of $75 per week for a period of eight weeks for her support instead of the $177 per week she had requested.[74] The court also restrained Mrs. Castor from disposing of any of her own assets, valued at $11,000, before the final dissolution. On appeal, Mrs. Castor contended that the temporary maintenance award was contrary to law because it deprived her of the "necessities of life" guaranteed by statute.[75] The court of appeals correctly found the statutory language concerning temporary maintenance to be permissive[76] and therefore concluded that the trial court has discretion to decide whether temporary maintenance should be awarded to either spouse. Similarly, the decision of whether or not to issue orders restraining the disposition of property during the separation period is discretionary. Reiterating the standard that an exercise of the court's power for the protection of the parties is reviewable only for an abuse of discretion,[77] the court of appeals affirmed the decision of the trial court.

6. *Financial Awards*

a. Antenuptial agreements.—In *Flora v. Flora*,[78] the First District Court of Appeals considered the propriety of allowing the terms of an antenuptial agreement to be admitted as relevant

---

[72]333 N.E.2d 124 (Ind. Ct. App. 1975).

[73]Ch. 43, § 17, 1873 Ind. Acts 107 (repealed 1973); ch. 160, § 1, 1939 Ind. Acts 738 (repealed 1973).

[74]The court evidently decided upon the lesser sum because facts showed that Mrs. Castor had previously managed to save $5 weekly on an allowance of $60 a week. 333 N.E.2d at 130.

[75]IND. CODE § 31-1-11.5-7(b)(1) (Burns Supp. 1976) allows the court to restrain "any person" from disposing of assets "except in the usual course of business or for the necessities of life."

[76]"The court *may* issue an order for temporary maintenance . . . and *may* issue a temporary restraining order . . . to the extent it deems proper." *Id.* § 31-1-11.5-7(d) (emphasis added).

[77]333 N.E.2d at 129, 130, *citing* Cox v. Cox, 332 N.E.2d 395 (Ind. Ct. App. 1975); Terry v. Terry, 313 N.E.2d 83 (Ind. Ct. App. 1974); Farley v. Farley, 300 N.E.2d 375 (Ind. Ct. App. 1973); Becker v. Becker, 141 Ind. App. 562, 216 N.E.2d 849 (1966); Bahre v. Bahre, 133 Ind. App. 567, 181 N.E.2d 639 (1962).

[78]337 N.E.2d 846 (Ind. Ct. App. 1975).

evidence on the issue of property division in dissolution of marriage proceedings. Prior to their marriage in 1974, Mr. and Mrs. Flora entered into an agreement providing that property held individually by each of them prior to the marriage and property acquired individually during the marriage would not be subject to the claims of the other spouse at the death of either or in the event of dissolution of the marriage. After dissolution was granted, Mrs. Flora contended unsuccessfully on appeal that it was error for the trial court to admit into evidence the antenuptial agreement. Rejecting her position that antenuptial agreements are contrary to public policy, the court of appeals interpreted the Indiana Dissolution of Marriage Act to mean that settlement agreements, both antenuptial and postnuptial, are expressly encouraged by law.[79] Mrs. Flora further contended that her husband had waived the provisions of the agreement by requesting the court, in his Petition for Dissolution of Marriage, to make an order for the disposition of the property of the parties. The court of appeals determined that since the statute[80] gives the court discretion to make provisions for the disposition of property notwithstanding agreements by the parties, the court had power to make such disposition without regard to a request from either party. Consequently, the court held that the request did not constitute a waiver of the agreement.[81] The court also stated that there is a presumption that a settlement agreement is valid, and therefore: "The burden of persuasion as to factors militating against the presumption of validity should be borne by the objecting party."[82] Although the court upheld the agreement in *Flora,* language in this opinion indicates to the practitioner that antenuptial agreements may be of little value in Indiana since the trial court, by statute, has the discretion to

---

[79] *Id.* at 851. IND. CODE § 31-1-11.5-10 (Burns Supp. 1976) provides, in pertinent part:

> Agreements.—(a) To promote the amicable settlement of disputes that have arisen *or may arise* between the parties to a marriage attendant upon the dissolution of their marriage, the parties may agree in writing to provisions for the maintenance of either of them, the disposition of any property owned by either or both of them . . . .
>
> (b) In an action for dissolution of the marriage the terms of *the agreement* if approved by the court shall be incorporated and merged into the decree and the parties ordered to perform them, or the court may make provisions for disposition of property . . . .

(emphasis added). The court's decision is in harmony with the statutory policy favoring post and antenuptial agreements in the probate context. *See* IND. CODE § 29-1-3-6 (Burns Supp. 1972).

[80] *Id.* § 31-1-11.5-10(b) (Burns Supp. 1976).

[81] 337 N.E.2d at 851.

[82] *Id.* at 852.

make provisions regarding the disposition of property, notwithstanding the terms of an agreement by the parties.[83]

b. Nature of alimony.—Although the 1973 Dissolution of Marriage Act omitted the term "alimony," the concept remains important to the Indiana practitioner because of the many controversies arising between parties subsequent to decrees entered under prior law.

The nature of an alimony award made under prior law[84] was considered by the First District Court of Appeals in *White v. White.*[85] The Whites were divorced in 1971 and, among other things, the court ordered Mr. White to pay

> as alimony in lieu of property settlement the sum of One Hundred Thousand Dollars ($100,000) as follows: Thirty-Four Thousand Dollars ($34,000) cash, and the sum of Sixty-Six Thousand Dollars ($66,000), payable at the rate of Six Thousand Dollars ($6,000) beginning January 15, 1972 and the sum of Six Thousand Dollars ($6,000) each January thereafter, to end including January 15, 1982.[86]

Mr. White made the payments as ordered until his death in 1974. Mrs. White then filed a claim against his estate for $48,000 representing the balance due. The claim was disallowed by the personal representative of the estate. After a judgment for Mrs. White, the administrator appealed, contending that the payments were a series of "periodic" payments and that the trial court at the time of the divorce could not properly make such an award under the statutes then in effect.[87] Before resolving the issue,

---

[83]

> [T]he trial court may exercise its discretion [pursuant to IND. CODE § 31-1-11.5-10(b) (Burns Supp. 1976)] to accept a settlement agreement as valid, valid in part, or reject it as invalid. However, even if a settlement agreement is accepted as valid, the trial court is not required to approve it or use any part of it in the decree.

337 N.E.2d at 852.

[84]Ch. 43, § 20 1873 Ind. Acts 107 (repealed 1973); ch. 120, § 3, 1949 Ind. Acts 310 (repealed 1973).

[85]338 N.E.2d 749 (Ind. Ct. App. 1975). This case is also discussed in Poland, *Trusts and Decedents' Estates, infra.*

[86]338 N.E.2d at 751.

[87]*Id.* at 752. The statute in effect at the time of the award was ch. 120, § 3, 1949 Ind. Acts 310, *amending* ch. 43, § 22, 1873 Ind. Acts 107 [*codified at* IND. CODE § 31-1-12-17 (Burns 1973)] (repealed 1973), and expressly stated that "the court may require that [alimony] be paid in gross or in periodic payments." The personal representative's contention that the "periodic" payments were illegal under that statute was apparently based upon the following considerations: (1) The 1949 statute had amended a

the court examined treatment of alimony under the statutes prior to the 1973 Dissolution of Marriage Act:

> At the root of all of the confusion is judicial indecision as to the reasons for the award of alimony. Cases may be cited in support of at least two major ideas: first, that alimony is a property settlement; and, second, that alimony is an award for the future support of the wife. In *Wellington v. Wellington*, [Ind. App., 304 N.E.2d 347], the court eventually concluded ". . . in the final analysis that alimony serves a dual purpose—a method to aid in the equitable distribution of property and a method to provide continued maintenance or support if deemed appropriate. It is not necessary as many Indiana cases have done, to theorize the concept into an either/or situation. The concepts are not mutually exclusive."[88]

The court determined that what the *White* court had incorrectly characterized as "alimony" was "in essence a cash distribution in lieu of a disposition of property."[89] The court found that the 1949 Act did not remove the trial court's option of requiring payment of a sum certain in installments and that payment in installments did not diminish the amount ultimately due Mrs. White. Accordingly, the judgment of the trial court was affirmed.

The court of appeals also held that alimony is a property settlement in *Eppley v. Eppley*.[90] On appeal, Mrs. Eppley contended that the trial court had abused its discretion in awarding her alimony in the "meager" sum of $30,000. The record indicated that the couple's assets on the date of separation amounted to $84,172, and that Mr. Eppley earned approximately $90,000 in 1973. Holding that under Indiana law alimony is a property settlement[91] rather than future support for a spouse or compensation for injured sensitivities,[92] the court of appeals found the

---

prior statute which allowed for alimony awards to be made only in gross, although payment could be made in installments, 338 N.E.2d at 754; (2) the 1949 act's provision for "periodic payments" was actually a rephrasing of the previous statute's provision for installment payments; and (3) the award of alimony to Bette was not the award of a gross amount to be paid in installments, legal under the statute, but was an award of an indefinite sum to be paid periodically, illegal under the statute. *See id.* at 754-55.

[88]338 N.E.2d at 753.

[89]*Id.* at 754.

[90]341 N.E.2d 212 (Ind. Ct. App. 1976).

[91]Doner v. Doner, 302 N.E.2d 511 (Ind. Ct. App. 1973).

[92]Shula v. Shula, 148 Ind. App. 496, 267 N.E.2d 555 (1971).

trial court's judgment within the bounds of discretion and affirmed.

Mrs. Eppley also alleged error in that in evaluating assets for the property division, which included $16,172 in tangible assets as well as the $30,000 alimony award, the trial court used property appraisals at the time of the separation rather than at the time of the final hearing. The court of appeals acknowledged that the time of valuation could materially affect the court's determination of a property settlement; but it held that the determination to use valuations of one date or another should be left to the trial court's discretion, since an inflexible rule could encourage conduct seeking to distort the true value of marital property.[93]

c. Maintenance.—The case of *Liszkai v. Liszkai*[94] is particularly important for the Indiana practitioner as a judicial interpretation of the maintenance provision of the Dissolution of Marriage Act.[95] Mrs. Liszkai was granted a property settlement[96] of $5,000 to be paid over a period of twenty months, considerably more than one-half of the parties' net worth of approximately $7,900. She appealed, contending that her poor education and lack of marketable skills "incapacitated" her to such an extent that she was entitled to maintenance[97] in addition to the property settlement.[98] The Second District Court of Appeals

---

[93]341 N.E.2d at 218.

[94]343 N.E.2d 799 (Ind. Ct. App. 1976).

[95]IND. CODE § 31-1-11.5-9(c) (Burns Supp. 1976).

[96]The trial court had incorrectly denominated the award "alimony," a term eliminated in the Dissolution of Marriage Act. 343 N.E.2d at 804. The proper term for an award of property pursuant to the statutory provision is "property settlement" or "property disposition." Fox, *Domestic Relations, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 197, 205 (1975) [hereinafter cited as Fox].

[97]

> The court may make no provision for maintenance except that when the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of such incapacitated spouse to support himself or herself is materially affected, the court may make provision for the maintenance of said spouse during such incapacity, subject to further order of the court.

IND. CODE § 31-1-11.5-9(c) (Burns Supp. 1976).

[98]Mrs. Liszkai also contended on appeal that the trial court had abused its discretion in the property settlement by failing to consider the parties' earning abilities as mandated by *id.* § 31-1-11.5-11(e). The court of appeals found no abuse of discretion, since the trial court had considered the other guidelines statutorily required for a "just and reasonable" division of property and there was ample evidence that Mr. Liszkai's earnings would be consumed by his responsibilities for the homes and the children in his custody. 343 N.E.2d at 804.

correctly stated that the General Assembly adopted "a concept of property division separate from the concept of maintenance by enacting" two separate provisions for property division and maintenance, and that the guidelines for each provision are different.[99] Maintenance may only be granted when the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of the spouse to support himself or herself is materially affected.[100] Evidence revealed that Mrs. Liszkai had been employed intermittently outside the home during the marriage although she was primarily a homemaker, and there was no evidence that she was in poor health. The court of appeals therefore found that the trial court did not abuse its discretion in finding Mrs. Liszkai was not incapacitated within the meaning of the statute.

The court acknowledged that the phrase "unable to support" could be construed to include unemployable spouses,[101] but found that the legislature did not intend to give such an effect to the statute. Judge Buchanan, writing for the majority, first noted that the original draft of the Act would have allowed a court to order maintenance for a spouse "*unable to support himself through employment.*"[102] He then pointed out that the General Assembly had rejected this more liberal provision for maintenance in favor of maintenance only for a spouse physically or mentally incapacitated. From these facts the court inferred that "to construe section 9(c) as including general unemployability due to the lack of many marketable skills [would be] ravishing section 9(c)."[103]

Liszkai and the Second District Court of Appeals decision in

---

[99]*Id.* at 804-05.

[100]IND. CODE § 31-1-11.5-9(c) (Burns Supp. 1976).

[101]Judge Sullivan argued that unemployable individuals may be "incapacitated" within the meaning of the statute, but concurred in the result in the case. 343 N.E.2d at 806 (Sullivan, J., concurring).

Support for Judge Sullivan's position may be found in Senator Merton Stanley's version of the legislative history of the Dissolution of Marriage Act. *See* Note, *Alimony in Indiana Under No-Fault Divorce*, 50 IND. L.J. 541, 549-50. The second version of the bill, introduced in the 1972 General Assembly, provided for maintenance only for a spouse who was "physically or mentally incapacitated." Ind. H.R. 1021, 97th Gen. Assembly, 2d Sess. § 10(b) (1972). In 1973, the House Judiciary Committee added the phrase "to the extent that the ability of such incapacitated spouse to support himself or herself is materially affected." 1973 IND. H.R. JOUR. 790. Senator Stanley indicated that the legislative purpose of the change was to broaden the concept of incapacity to include unemployable spouses. Note, *Alimony in Indiana Under No-Fault Divorce*, *supra* at 550.

[102]343 N.E.2d at 805, *quoting from* Ind. H.R. 1179, 97th Gen. Assembly, § 210 (1971) (emphasis by the court).

[103]343 N.E.2d at 806.

Temple v. Temple[104] clearly illustrate a trend to construe the maintenance provision of the statute narrowly and to award maintenance only when a spouse's incapacity results from a physical or mental disease and the disease is serious enough to render the spouse incapable of gainful employment.

d. Property division.—In *Hurst v. Hurst,*[105] Mr. Hurst not only received custody of the couple's minor child,[106] but was also granted the family residence, valued at $35,000, subject to a mortgage of approximately $7,500, some furniture, and farm equipment and tools. Mrs. Hurst was granted household furniture and furniture she had inherited from her family and the sum of $13,750. On appeal Mrs. Hurst claimed that the family residence was "ancestral property" to which she had an emotional attachment which should have been considered in the property division. The record indicated, however, that Mrs. Hurst had lived on the property for only seven years during her childhood and that the Hursts had purchased the property from Mrs. Hurst's mother in 1954. The trial court had also considered the fact that Mrs. Hurst had taken unusually poor care of the premises during her ownership. In awarding the family residence to the parent with custody of the child in an action brought under the old divorce statute, the trial court reached the result suggested by the present Dissolution of Marriage Act.[107]

The property settlement in *Howland v. Howland*[108] was reversed and remanded for new trial because there was no evidence in the record of the market value of the assets used in the husband's sole proprietorship or business income, and thus no information on which the court could make a reasonable evaluation of the property of the marriage. In reversing as to the property division, the court stated that there is an abuse of discretion if the trial court distributes property without knowing the value of the

---

[104]328 N.E.2d 227 (Ind. Ct. App. 1975) *discussed in* Fox, *supra* note 96, at 207-09. In *Temple*, a wife suffering from grand mal epilepsy, controlled by maximum doses of medication, was held not to be entitled to maintenance.

[105]335 N.E.2d 245 (Ind. Ct. App. 1975).

[106]*See* text accompanying notes 62-63 *supra.*

[107]IND. CODE § 31-1-11.5-11 (Burns Supp. 1976) provides, in pertinent part:

> Disposition of property.—. . . .
>
> In determining what is just and reasonable the court shall consider the following factors:
>
> (c) . . . the desirability of awarding the family residence or the right to dwell therein . . . to the spouse having custody of any children . . . .

[108]337 N.E.2d 555 (Ind. Ct. App. 1975).

property distributed.[109] This rule should not change in cases arising under present law, since the Dissolution of Marriage Act mandates the court to arrive at a property settlement by division of "the property of the parties, whether owned by either spouse prior to the marriage, acquired by either spouse in his or her own right after the marriage . . . or acquired by their joint efforts."[110]

Reed v. Reed[111] also concerned the division of property incident to a divorce action under prior law. Mrs. Reed was awarded approximately half the property owned jointly by the parties and retained all of her individual property, composed of certain farm land inherited from her mother. The Second District Court of Appeals found that the property settlement created no "semblance of abuse of discretion" and that the appeal deserved "only minimal consideration."[112] The court found that the trial court followed the standards of *Bahre v. Bahre*[113] by considering as factors in determining the property division the existing property rights of the parties, and whether or not the wife's efforts had contributed to the accumulation of the family property.[114] The question of the disposition of inheritances in a dissolution of marriage is now met by statutory guidelines: "In determining what is just and reasonable the court shall consider the following factors: . . . (b) the extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift . . . ."[115]

A problem often arising in property division was considered in *Wireman v. Wireman.*[116] Lewis Wireman transferred assets to an irrevocable trust for the benefit of their children just before his wife, Dianne, filed for divorce. On appeal, Dianne alleged that the trial court's exclusion of transferred assets resulted in an incorrect valuation of marital property and therefore an error in the alimony award. In Indiana, property transferred by one spouse to defeat the other spouse's claim to alimony or the collection of alimony may be set aside as a fraudulent transfer.[117] Following the rule that an equitable property settlement cannot be made

---

[109]337 N.E.2d at 559, *citing* Hardiman v. Hardiman, 152 Ind. App. 675, 284 N.E.2d 820 (1972); Snyder v. Snyder, 137 Ind. App. 72, 198 N.E.2d 8 (1964).

[110]IND. CODE § 31-1-11.5-11 (Burns Supp. 1976).

[111]338 N.E.2d 728 (Ind. Ct. App. 1975).

[112]*Id.* at 732.

[113]133 Ind. App. 567, 181 N.E.2d 639 (1962).

[114]338 N.E.2d at 733.

[115]IND. CODE § 31-1-11.5-11 (Burns Supp. 1976).

[116]343 N.E.2d 292 (Ind. Ct. App. 1976).

[117]State *ex rel.* American Fletcher Nat'l Bank v. Spencer Circuit Court, 242 Ind. 74, 175 N.E.2d 23 (1961); Kuhn v. Kuhn, 125 Ind. App. 337, 123 N.E.2d 916 (1955); Schmeling v. Esch, 84 Ind. App. 247, 147 N.E. 734 (1925).

unless all of the property held by the spouses is considered by the court,[118] the Second District Court of Appeals remanded the case to determine whether the transfer was fraudulent and, if so, whether an adjustment should be made in the property settlement.

A division of property under the 1973 Dissolution of Marriage Act was reviewed by the Third District Court of Appeals in *Johnson v. Johnson.*[119] The statute provides that property be divided in a "just and reasonable manner" and mandates the consideration of specific factors in determining the division.[120] At the time of the dissolution, the wife was fifty years old and was earning $3,120 per year, while the husband was age fifty-six, earned $20,000 per year and would be eligible for railroad retirement benefits in nine years. The marital assets consisted of a 1973 Plymouth, household furniture worth approximately $700, and the family residence valued at $28,500 and subject to a mortgage of $12,700. The trial court awarded virtually all of the assets to Mrs. Johnson. The court of appeals affirmed the award, stating, "In the case at bar, considering the age and economic circumstances of the parties and their respective earnings and earning abilities, we cannot say, in view of the limited nature of the assets, that the court's decision was clearly against the logic and effect of the evidence."[121]

e. Child support.—In reviewing child support, property division, and alimony, the First District Court of Appeals in *Eppley v.*

---

[118]Hardiman v. Hardiman, 152 Ind. App. 675, 284 N.E.2d 820 (1972).

[119]344 N.E.2d 875 (Ind. Ct. App. 1976).

[120]IND. CODE § 31-1-11.5-11 (Burns Supp. 1976). The factors to be considered by the court in making the decision are:

> (a) the contribution of each spouse to the acquisition of the property, including the contribution of a spouse as homemaker;
>
> (b) the extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift;
>
> (c) the economic circumstances of the 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 therein for such periods as the court may deem just to the spouse having custody of any children;
>
> (d) the conduct of the parties during the marriage as related to the disposition or dissipation of their property;
>
> (e) the earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties.

[121]344 N.E.2d at 877. The court of appeals also indicated the lower court's property division could have appropriately granted the husband an interest in the equity in the family residence, but that failure to do so was not an abuse of discretion. *Id.*

Eppley[122] reiterated that the trial court's decision in such matters will be reviewed only for an abuse of discretion. Mr. Eppley had been ordered to pay $150 per month for support of his nine-year-old daughter. Mrs. Eppley had testified that the necessary monthly living expenses of the child totalled $839.70,[123] and on appeal she contended that the support award was an abuse of discretion. Pointing out that support awards are for the support of the child and not for the custodial parent, and that the custodial parent may reasonably be expected to contribute to the child's support, the court of appeals affirmed the support award. The court's decision was in conformity with the present statutory provision that "the court may order either parent or both parents to pay any reasonable amount for support of a child."[124]

During the recent period of inflation and economic recession, petitions to modify existing child support orders have been filed with increasing frequency. The statutory criterion for modification of support orders is "a showing of changed circumstances so substantial and continuing as to make the terms unreasonable."[125] Prior case law had established that the determination of a "substantial change in circumstances" necessary for a modification is within the sound discretion of the trial court and is reviewable only upon an abuse of such discretion.[126]

Carlile v. Carlile[127] concerned a petition by Mr. Carlile to have child support payments for three children reduced from the $50 per week ordered in the decree of divorce fourteen months earlier. In addition, he asked to be relieved of the obligation to pay a second mortgage on residence real estate awarded to his wife at the time of the divorce. Evidence at the hearing on Mr. Carlile's petition revealed that at the time of the divorce he had been earning between $680 and $702 per month and that at the time of the modification hearing his monthly net had decreased to approximately $672. Obligations for debts and support under the divorce decree totalled $560.60, leaving him $111.40 each month for living expenses. Both parties had remarried and both Mrs. Carlile (Hayes) and her present husband were employed. The record did not reveal whether Mr. Carlile's present wife was employed. The trial court reduced Mr. Carlile's child support obli-

---

[122]341 N.E.2d 212 (Ind. Ct. App. 1976).

[123]*Id.* at 215. The figure included sums for auto expenses, newspapers and hairdressers, all of which the court of appeals deemed "beyond the realm of necessity for a nine year old girl." *Id.*

[124]IND. CODE § 31-1-11.5-12 (Burns Supp. 1976).

[125]*Id.* § 31-1-11.5-17.

[126]*See, e.g.*, Dragoo v. Dragoo, 133 Ind. App. 394, 182 N.E.2d 434 (1962).

[127]330 N.E.2d 349 (Ind. Ct. App. 1975).

gation to $30 weekly during the time he was paying the second mortgage. On review, the trial court's decision was found not to be an abuse of discretion and was affirmed.

In *Vance v. Hampton,*[128] the First District Court of Appeals reiterated its statement in *Carlile* that support orders must be "based upon reasonable and proper grounds" and will be modified only for "substantial reasons," and that denial of a request for modification is reviewable only for abuse of discretion.[129] At the time of the divorce, the court had ordered Mr. Hampton to pay $100 for child support every two weeks until his former wife's remarriage, and $25 per week thereafter. Mrs. Hampton remarried two days after the divorce, but subsequently her marriage to Mr. Vance was dissolved. She then petitioned to modify the support decree to increase the support obligation of Mr. Hampton to $100 every two weeks. The evidence revealed that Mrs. Vance's financial situation was better than Mr. Hampton's, since she was employed and received child support from both former husbands. The court of appeals therefore held that the trial court's denial of modification was not an abuse of discretion and affirmed the decision.

Modification and enforcement of decrees were considered in *Linton v. Linton.*[130] The Lintons were divorced in August 1970. In the decree, Mr. Linton was ordered to pay alimony of $2,400 at the rate of $100 per month, child support of $70 per week, hospitalization insurance, and medical expenses of the couple's children. He paid only one $70 support payment and in September 1971, the parties entered into a modification agreement approved by the court. The agreement provided for certain stock transfers to be made to Mrs. Linton to discharge support and alimony arrearages, reduced child support payments, and provided that alimony payments were not to be made for one year following the modification. The agreement also provided:

> 8. It is further agreed by the parties and ordered by the Court that this Agreed Modification of Divorce Decree shall be contingent upon Defendant's performance of the agreed obligation herein and compliance with the Court's orders herein for a period of 12 months from the date of this order; in the event Defendant shall breach the agreement between the parties herein and shall be adjudged in contempt of Court thereon, then this Agreed

---

[128]337 N.E.2d 154 (Ind. Ct. App. 1975).

[129]*Id.* at 157, *quoting from* Carlile v. Carlile, 330 N.E.2d 349 (Ind. Ct. App. 1975).

[130]336 N.E.2d 687 (Ind. Ct. App. 1975).

> Modification of Decree of Divorce shall be null and void, and the amounts so paid shall be applied against the amount due under the Decree of Divorce dated the 12th day of August, 1970.[131]

When Mr. Linton again failed to pay alimony, his former wife filed a petition for contempt, asking that he be found in contempt under both the modification agreement and the original decree, and that the modification be declared void. The court found that he had breached the modification agreement, that the agreement was therefore void, and that he was in contempt of court. Mr. Linton's motions to strike the petition for contempt, for change of venue, and for summary judgment were all overruled and were the basis of his appeal.

The Second District Court of Appeals found no error in the trial court's denial of Mr. Linton's motion for change of venue. Trial Rule 76, under which he claimed to be entitled to the change, applies only to civil actions. The rule does not apply to a contempt of court action, which "is neither civil, criminal nor equitable for the reason that the right to exercise this power is inherent in all our courts."[132]

However, the trial court's contempt judgment against Mr. Linton was reversed as contrary to law, since enforcement of alimony decrees payable in money through contempt would violate article 1, section 22 of the Indiana Constitution in that it would amount to imprisonment for debt.[133]

The ambiguity of paragraph 8 of the modification agreement was discussed to determine whether the parties intended that a one-year test period be established during which the original decree was temporarily suspended or whether the intent was to substitute the modification agreement, thus superseding the decree. The latter interpretation was deemed correct by the trial court and affirmed on appeal.[134]

f. Attorney's fees.—In *Castor v. Castor*,[135] Mrs. Castor contended on appeal that the trial court had erred in awarding her attorney $250 as preliminary attorney's fees. The trial court had

---

[131]*Id.* at 691.

[132]*Id.* at 692, *quoting* from State *ex rel.* Grile v. Allen Circuit Court, 249 Ind. 173, 176, 231 N.E.2d 138, 139-40 (1967).

[133]Marsh v. Marsh, 162 Ind. 210, 70 N.E. 154 (1904). However, if alimony consists of other types of payments, the order may be enforced by contempt. *See* State *ex rel.* Schutz v. Marion Superior Court, 307 N.E.2d 53 (Ind. 1974); Wellington v. Wellington, 304 N.E.2d 347 (Ind. Ct. App. 1973) *discussed in* Fox, *supra* note 96, at 210-11.

[134]336 N.E.2d at 694.

[135]333 N.E.2d 124 (Ind. Ct. App. 1975).

excluded Mrs. Castor's attorney's testimony concerning time spent prior to filing the original petition for dissolution. The language of the statutory provision for attorney's fees in dissolution cases in permissive,[136] and awards of such fees are reviewable only upon an abuse of discretion.[137] The *Castor* opinion recognizes that it is not uncommon for a trial court to award preliminary partial attorney's fees which may or may not accurately represent the hours rendered by counsel. The use of such standardized fees does not deny the attorney compensation for those services, but merely excludes evidence of such services at the preliminary hearing stage.[138] One should note that the permissive statutory language does not impose an absolute duty upon the husband to pay his wife's legal fees nor does it obligate him to pay the full cost of services of the wife's attorney.[139]

In *Johnson v. Johnson*,[140] Mr. Johnson claimed as error the award to Mrs. Johnson of attorney's fees incurred in defending the motion to correct errors and the appeal.[141] However, the statute provides for a discretionary award of attorney's fees, including fees for appeal.[142] The court of appeals, affirming, found that the fees were reasonable and that Mr. Johnson's income was sufficient to allow him to pay the award.[143]

In *Linton v. Linton*,[144] Mr. Linton contended on appeal that the trial court's award of attorney's fees to his former wife was improper. He argued that the trial court was without jurisdiction

---

[136]IND. CODE § 31-1-11.5-16 (Burns Supp. 1976) provides: "The court from time to time *may* order a party to pay a reasonable amount for the cost to the other party . . . for attorney's fees . . . ." (emphasis added).

[137]333 N.E.2d at 127, 128-29, *citing* Cox v. Cox, 322 N.E.2d 395 (Ind. Ct. App. 1975) (fee award of $2,000 was not an abuse of discretion even though there was no evidence regarding fees on the record); DeLong v. DeLong, 315 N.E.2d 415 (Ind. Ct. App. 1974) (award of $100 attorney fee for modification of a decree was not an abuse of discretion); Farley v. Farley, 300 N.E.2d 375 (Ind. Ct. App. 1973) (award of $6,500 "suit money" was not an abuse of discretion, even though the party had received a property settlement of $87,500). Northup v. Northup, 154 Ind. App. 469, 290 N.E.2d 501 (1972) (award of $500 attorney's fees was not an abuse of discretion even though there was no evidence in the record to support the award, since the trial court may take judicial notice of attorney's services); McDaniel v. McDaniel, 245 Ind. 551, 201 N.E.2d 215 (1964) (award of attorney's fees in an amount less than that requested and supported by evidence was not an abuse of discretion).

[138]333 N.E.2d at 127.

[139]*Id.* at 128.

[140]344 N.E.2d 875 (Ind. Ct. App. 1976).

[141]*See* text accompanying notes 119-21 *supra*.

[142]IND. CODE § 31-1-11.5-16 (Burns Supp. 1976).

[143]344 N.E.2d at 877.

[144]336 N.E.2d 687 (Ind. Ct. App. 1975).

to grant her petition for fees because it was filed after the appeal was perfected and the trial court was, therefore, without jurisdiction. The general rule is that perfection of an appeal results in removal of jurisdiction to the appellate court and a concomitant loss of jurisdiction of the trial court.[145] However, the rule is inapplicable in divorce proceedings because the trial court is deemed to have continuing jurisdiction of matters before the higher court.[146] The court of appeals therefore affirmed the trial court's decision.

X. Evidence

*William Marple**

A. Impeachment

A defendant's post-arrest silence may not be used even to impeach his trial testimony. The Indiana Court of Appeals in *Lukas v. State*[1] held that a charge or accusation made while the accused is in police custody does not call for a reply and failure to deny or explain the accusation does not constitute an admission. This is an exception to the general rule that when one is accused of or charged with an offense and fails to contradict or explain the charge, both the accusation and failure to respond may be admitted into evidence as a tacit or adoptive admission.[2]

Lukas is incorrect in its reliance on earlier cases of silence while in police custody.[3] In *Lukas,* the charge or accusation was made by the defendant's stepson at a time when he and the

[145]Lake County Dep't of Public Welfare v. Roth, 241 Ind. 603, 174 N.E.2d 335 (1961).

[146]Inkoff v. Inkoff, 306 N.E.2d 132, 135 (Ind. Ct. App. 1974), *relying on* State *ex rel.* Reger v. Superior Court, 242 Ind. 241, 177 N.E.2d 908 (1961).

*Member of the Indiana Bar, Staff Attorney, Legal Services Organization of Indianapolis, Inc. A.B., Indiana University, 1970, J.D., Indiana University School of Law—Indianapolis, 1973.

[1]330 N.E.2d 767 (Ind. Ct. App. 1975).

[2]Jethroe v. State, 319 N.E.2d 133 (Ind. 1974), *noted in* Marple, *Evidence, 1975 Survey of Recent Developments in Indiana Law,* 9 IND. L. REV. 239, 242 (1975) [hereinafter cited as *1975 Survey of Indiana Law*]; Robinson v. State, 309 N.E.2d 833 (Ind. Ct. App. 1974), *aff'd,* 317 N.E.2d 850 (Ind. 1974), *noted in* Marple, *Evidence—Criminal, 1974 Survey of Recent Developments in Indiana Law,* 8 IND. L. REV. 186, 208 (1974) [hereinafter cited as *1974 Survey of Indiana Law*].

[3]The court cited Garrisson v. State, 249 Ind. 206, 231 N.E.2d 243 (1967), as its most recent application of the rule. The seminal case is Diblee v. State, 202 Ind. 571, 177 N.E. 261 (1931), which relied on Commonwealth v. Kenney, 53 Mass. (12 Met.) 235, 46 Am. Dec. 672 (1847), and other authorities.