that could not be resolved without a hearing giving the state the opportunity to defend.[172]

The Second District Court of Appeals upheld the trial court's denial of the defendant's petition for election of treatment in an opinion fraught with inconsistencies. In *Bezell v. State*,[173] the defendant had been enrolled in a drug maintenance program at the time of his arrest, had been drug-free for one month except for methadone, and stated that he had abused drugs. It was also charged that he had sixteen bindles of heroin on his person when arrested. Bezell argued that if a convicted individual states that he is a drug abuser and shows that he is not ineligible by reason of the nature of the present charge, his prior convictions, or his probation status, the court is required to offer him the opportunity to elect to submit to treatment in lieu of sentencing.[174] The court held that evidence of his drug-free status under the methadone program and the equivocal statement on his current status as a drug abuser rendered him ineligible.[175] The court's opinion casts doubt on the continued validity of *McNary v. State*[176] to the extent that it mandates the trial court to grant the defendant the opportunity to elect treatment and suggests a forthcoming reconsideration of the point.

VIII. Domestic Relations

Helen Garfield ***

A. Adoption—Termination of Parental Rights

1. Juvenile Court Proceedings.—The jurisdiction of juvenile courts to order permanent termination of parental rights was the

[172]*See* Hardin v. State, 254 Ind. 56, 257 N.E.2d 671 (1970).

[173]352 N.E.2d 809 (Ind. Ct. App. 1976).

[174]This contention is not without conflict. The Second District Court of Appeals held that the court may deny election where it determines that treatment would not rehabilitate the defendant. Glenn v. State, 322 N.E.2d 106 (Ind. Ct. App. 1975). The First District Court of Appeals held that a defendant had no right to treatment in lieu of imprisonment because he satisfied the statutory eligibility requirements. Reas v. State, 323 N.E.2d 274 (Ind. Ct. App. 1975). In Thurman v. State, 320 N.E.2d 795 (Ind. Ct. App. 1974), the Second District Court of Appeals limited the court's authority to suspend a sentence and order treatment to a period of six months after the defendant begins serving his sentence.

[175]352 N.E.2d at 811.

[176]156 Ind. App. 582, 297 N.E.2d 853 (1973).

*Associate Professor of Law, Indiana University School of Law—Indianapolis. J.D., University of Colorado, 1967.

The author wishes to thank Bert Paul for his assistance in the preparation of this survey.

**Several important abortion cases were decided during the survey period. These decisions are discussed in Grove, *Constitutional Law, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 78 (1977).

issue before the Third District Court of Appeals in *In re Perkins.*[1] Ambiguities in the juvenile and adoption statutes[2] were resolved in favor of such jurisdiction by the majority, over a strong dissent by Judge Garrard.[3]

The history of the Perkins children's involvement with the juvenile court and the welfare department dated back seven years; indeed, it antedated the birth of one of the two children made wards of the department in the present proceeding. During this seven-year period, all six children had at various times been found to be dependent and neglected and placed in a children's home, although some of them had subsequently been permitted to return to their parents' home. During the same period, contempt proceedings had been brought against the father for failure to comply with the court's order to pay support for the children placed in the children's home, and the mother had been hospitalized for psychiatric care. Ultimately, the welfare department initiated the present proceeding in which it asked the juvenile court to declare all six children wards of the department "for all purposes including adoption."[4] The parents appealed the court's decision granting the petition as to two of the children, contesting the juvenile court's jurisdiction to order termination of their parental rights.

The jurisdictional problem presented by this case arises from a lack of coordination between the provisions of the Indiana adoption statutes[5] and the juvenile statutes,[6] both dealing with children but involving two essentially different *kinds* of proceedings. Adoption proceedings are initiated in the circuit or probate court by a person seeking to adopt a child.[7] If the child has living parents, they must consent to the adoption, unless their consent is dispensed with on grounds specified in the statute.[8] If the parents do not consent,

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[1]352 N.E.2d 502 (Ind. Ct. App. 1976).

[2]Ch. 126, § 6, 1905 Ind. Acts 215 (amended 1975) (current version at IND. CODE § 31-3-1-6 (1976)); ch. 126, § 7, 1905 Ind. Acts 215 (amended 1975) (current version at IND. CODE § 31-3-1-7 (1976)); IND. CODE § 31-5-7-1 (1976); *id.* § 31-5-7-7; ch. 356, § 2, 1957 Ind. Acts 1040 (amended 1975) (current version at IND. CODE § 31-5-7-15 (1976)); IND. CODE § 31-5-7-17 (1976). *Perkins* deals with these statutes as they existed in 1973, when the proceedings were initiated.

[3]352 N.E.2d at 511 (Garrard, J., dissenting).

[4]*Id.* at 504. The *Perkins* majority held that this was, in effect, a final termination of parental rights. *Id.* at 507.

[5]IND. CODE §§ 31-3-1-1 to -11 (1976).

[6]*Id.* §§ 31-5-7-1 to -25.

[7]*Id.* § 31-3-1-1 states that adoption petitions are to be filed in the court "having jurisdiction of probate matters," which would be the circuit or probate court. *Id.* §§ 33-4-4-3, 33-8-1-9. Effective January 1, 1979, the Marion County Superior Court will have jurisdiction in adoptions *and* juvenile proceedings. *Id.* § 33-5-35.1-4.

[8]*Id.* § 31-3-1-6.

parental rights can be terminated by the court handling the adoption either in the same proceeding or in a separate proceeding, and such termination is sufficient to dispense with the necessity of the parents' consent to the adoption.[9] The adoption statutes thus specifically authorize the circuit or probate court to order permanent termination of parental rights, and no serious question can be raised as to these courts' jurisdiction to do so.

No such specific authorization is contained in the statutes relating to proceedings in the *juvenile* courts, however. The adoption statutes do contain an oblique reference to termination by other courts "having jurisdiction to terminate parental rights on any ground for termination specified in *that* law,"[10] which may have been intended to refer to juvenile court proceedings but which is hardly sufficient in itself to confer jurisdiction on the juvenile courts. The type of proceedings handled by the juvenile courts are not directed toward adoption but toward securing care, guidance, and control for the child "preferably in his own home."[11] Such proceedings are initiated by a court probation officer, by the Department of Public Welfare, or by transfer from a court where the child has been charged with a crime, requesting that the juvenile court declare the child to be delinquent, dependent, or neglected, as those terms are defined in the statutes.[12] Among the dispositional alternatives are commitment to a public institution, probation, supervision in the child's own home, and making the child a ward of the court, the welfare department, or a licensed child-placing agency.[13] In the context of juvenile proceedings, making a child the ward of the welfare department does not ordinarily contemplate a final termination of parental rights. It involves a temporary rather than a permanent wardship designed to remove the child from the parents' custody while efforts are made to rehabilitate the family.[14] In fact, this is what was done in *Perkins* during the seven years preceding the filing of the petition for permanent wardship.

The *Perkins* majority found a statutory basis for the juvenile courts' power to terminate parental rights in the dispositional provisions of the juvenile statutes (section 15),[15] particularly the catchall provision which authorizes the court to "make such further disposi-

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[9] *Id.* § 31-3-1-7(c), (d).

[10] *Id.* § 31-3-1-7(c) (emphasis added).

[11] *Id.* § 31-5-7-1

[12] *Id.* §§ 31-5-7-4.1 to -8.

[13] *Id.* § 31-5-7-15.

[14] The distinction is discussed in Judge Garrard's dissenting opinion. 352 N.E.2d at 511.

[15] IND. CODE § 31-5-7-15 (1976).

tion as may be deemed to be in the best interests of the child."[16] The majority relied on *In re Collar*,[17] a 1973 case involving a proceeding similar to that involved in *Perkins*, but in which the juvenile court's jurisdiction was not directly challenged by the parent whose rights had been terminated.[18] Judge Garrard, in his dissenting opinion, did not believe that so broad and drastic a power as the termination of parental rights should be implied from the general authorization to make "further disposition . . . in the best interests of the child,"[19] especially since no standards or grounds for termination are set out in either the juvenile statutes or the adoption statutes. The majority, however, supplied its own standards, holding that before an order permanently terminating parental rights can be entered the juvenile court must find: (1) a protracted history of dependency or neglect by the parent(s) as defined by statute, (2) a substantial probability of such deprivation of the child in the future, and (3) that it is not reasonably probable that it will serve the future welfare of the child to continue such child's legal relationship with the parent(s).[20] Applying these standards to the facts and findings of *Perkins*, the majority held the evidence sufficient to support the trial court's decision to terminate the Perkins' parental rights.

Judge Garrard's analysis of the statutes construed in *Perkins* and his perception of their deficiencies are eminently sound. The majority does stretch statutory interpretation to its outermost limits, but the result reached in *Perkins* is clearly preferable to a holding that the juvenile courts lack jurisdiction to order permanent termination of parental rights. Such a holding would have raised questions concerning the validity of all previous terminations ordered by juvenile courts, and all adoptions made on the strength of them would have been put in jeopardy. This would hardly have been in the best interests of the children involved, which both statutes purport to serve. However little support there may be for the majority's interpretation of the *words* in the statutes involved, the court's holding is entirely in harmony with the overall intent and purpose of both the adoption and the juvenile statutes.

Some indirect support for the majority's interpretation can be

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[16]*Id.* § 31-5-7-15(5).

[17]155 Ind. App 668, 294 N.E.2d 179 (1973).

[18]The sole challenge raised in *Collar* was to the sufficiency of the evidence to support the trial court's determination. *Id.* at 670, 294 N.E.2d at 181.

[19]IND. CODE § 31-5-7-15(5) (1976). The effect of termination is to "divest the parent and the child of all legal rights, privileges, duties and obligations, including rights of inheritance, with respect to each other." *Id.* § 31-3-1-7(g).

[20]Judge Garrard also felt that the termination provisions of the adoption statute, *id.* § 31-3-1-7, were too "vague and ambiguous" to vest the juvenile courts with power to permanently terminate parental rights. 352 N.E.2d at 517 (Garrard, J, dissenting).

inferred from a 1975 amendment to the adoption statutes, which was enacted *after* the proceedings in *Perkins*. As amended, the statutes now dispense with the necessity of consent where a child has been declared an "abused, dependent or neglected child by the court of jurisdiction" (presumably the juvenile court), and where the parent(s) have been deprived of his custody for a period of two years prior to the adoption, "if there has been little or no change in the environment from which the child was removed."[21] Although this amendment fails again to *expressly* authorize the juvenile courts to order permanent termination of parental rights, it does implicitly recognize the validity of the kind of proceedings that were upheld in *Perkins*.[22]

2. Termination in Adoption Proceedings.—(a) Failure to Communicate.—Another termination case decided by the Third District Court of Appeals during the survey period concerned a proceeding for adoption, rather than a juvenile proceeding, and thus relied directly on grounds for dispensing with parental consent contained in the adoption statutes[23] rather than on the juvenile statutes. *In re Adoption of Thornton*[24] involved a petition filed by the prospective adoptive parents seeking adoption of the child and termination of the mother's parental rights in the same proceeding.[25] The trial court's order terminated the mother's parental rights based on section 6(g)(1) of the adoption statute, which dispenses with the necessity for a parent's consent where the parent has failed to "communicate significantly with the child" for a period of one year without justifiable cause.[26] The court of appeals held that the evidence was sufficient to support the trial court's order, rejecting the mother's arguments that the failure to communicate was justified and that her filing of a habeas corpus action constituted an

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[21]IND. CODE § 31-3-1-6(g) (7) (1976).

[22]The standards enunciated in *Perkins* were again applied by the Third District Court of Appeals in *In re* Wardship of Bender, 352 N.E.2d 797 (Ind. Ct. App. 1976), which affirmed an order of the juvenile court permanently terminating a mother's parental rights in her four children. (Judge Garrard also dissented in this case. *Id.* at 805.) Here, as in *Perkins*, the record showed a "protracted history" of involvement with the welfare department. The facts of this case would not have satisfied the standards of the 1975 amendment, had it been in effect at the time, since the children had not been removed from the mother's custody for two years prior to the filing of the petition for final termination of her parental rights.

[23]IND. CODE § 31-1-3-6(g) (1976).

[24]358 N.E.2d 157 (Ind. Ct. App. 1976). This opinion was written by Judge Hoffman, with a concurring opinion by Presiding Judge Staton. Judge Garrard concurred, without opinion.

[25]This is one of the alternative methods of proceeding authorized by IND. CODE § 31-3-1-7 (1976).

[26]*Id.* § 31-3-1-6(g)(l).

effort to "communicate" under the statute. The statute was seen as contemplating communication with the child directly and not merely involvement in litigation over custody, although participation in litigation *might* be relevant in a case where persons with custody actively prevented a parent from communicating with the child.[27]

(b) Abandonment.—In another proceeding under the adoption statute, the First District Court of Appeals held that imprisonment of the natural father did not *per se* establish his abandonment of his child so as to justify dispensing with the necessity of obtaining his consent to adoption of the child by the stepfather.[28] Abandonment requires a showing of intent, which was not established as a matter of law merely by evidence that the father was imprisoned for a period in excess of six months. The trial court's judgment denying the petition for adoption filed by the mother and her second husband was therefore affirmed.

3. Due Process Rights of Parents—Notice to Natural Mother.—In *Egan v. Finnegan*,[29] the Second District Court of Appeals sustained a natural mother's challenge to an order permanently terminating her parental rights, but sustained a provision of the same order awarding *custody* of the child to the mother's sister and the sister's husband. The child, born out of wedlock, had been in the sister's physical custody for the first five years of its life. The natural mother later married, and her husband initiated proceedings to adopt her child. The same day, he and the mother forcibly took the child from the sister. The sister and her husband intervened in the adoption proceedings, asking that they be permitted to adopt the child, and also filed a petition for custody, alleging that the child was dependent and neglected. The summons served upon the mother referred only to "a petition alleging that said [child] is dependent and a neglected child,"[30] and neither the petition nor the court's order fixing a hearing date contained any reference to final termination of parental rights or to the necessity of the mother's consent to adoption by the sister and her husband. Nevertheless, the court's order included a finding that the natural mother had abandoned the child and that her consent to the adoption was not required.[31]

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[27]358 N.E.2d at 158-59.

[28]Murphy v. Vanderver, 349 N.E.2d 202 (Ind. Ct. App. 1976). IND. CODE § 31-3-1-6 (g)(l) (1976) provides that a parent's consent is not required "if the child is adjudged to have been abandoned or deserted for six [6] months or more immediately preceding the date of the filing of the petition . . . ."

[29]351 N.E.2d 902 (Ind. Ct. App. 1976).

[30]*Id.* at 903.

[31]*Id.* at 902-03.

The court of appeals held that the natural mother's due process rights had been violated by the court's order dispensing with her consent, which in effect permanently terminated her parental rights without adequate notice. Similar due process questions had been raised and rejected in two other third district cases, *In re Perkins*[32] and *In re Wardship of Bender*.[33] However, in both of those proceedings, the parents were notified that the welfare department sought to have the children removed from parental custody and made wards of the department "for all purposes including adoption."[34] The court held in each case that this constituted adequate notice that termination of parental rights was at issue. In *Egan*, on the other hand, there was no reference either to termination of parental rights or to adoption in the documents served on the mother, and termination had not clearly been put in issue at the hearing.

4. Rights of Putative Fathers.—The Indiana legislature has amended the adoption statutes to add a new section permitting, but not requiring, a hearing to be held in cases where the putative father of an illegitimate child has "failed or refused to consent to the adoption of the child" or in proceedings to terminate the putative father's parental rights.[35] This is evidently an attempt by the legislature to deal with the questions concerning rights of unwed fathers, which were raised (but not answered) by the United States Supreme Court in *Stanley v. Illinois*.[36]

In *Stanley*, the Supreme Court relied on both the due process

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[32]352 N.E.2d 502 (Ind. Ct. App. 1976).

[33]352 N.E.2d 797 (Ind. Ct. App. 1976).

[34]*In re* Perkins, 352 N.E.2d at 506: *In re* Wardship of Bender, 352 N.E.2d at 800.

[35]IND. CODE § 31-3-1-6.1 (Supp. 1977), *as amended by* Pub. L. No. 307, 1977 Ind. Acts 1398. The amendment became effective May 1, 1977; it provides:

> In cases where the putative father of an illegitimate child has failed or refused to consent to the adoption of the child or terminate his parental rights as provided in section 7 of this chapter, the court may, at the request of any person having a legitimate interest in the matter, including the licensed child placing agency sponsoring the adoption of such child, conduct a hearing on any objections which the putative father has to the adoption of the child. Notice of the hearing shall be given to the putative father, and such notice and hearing shall satisfy fully the requirements of section 6(h) of this chapter with respect to putative fathers. At the hearing the court may determine the merits of any objections to the adoption or claims regarding the child to be adopted made by the putative father. If the putative father fails to make objections to the adoption of the child at the hearing, he shall be foreclosed from challenging or objecting to the adoption of the child at any later date. Failure of the putative father to appear after proper notice shall be tantamount to failure to object, and the court may make its determination accordingly.

[36]405 U.S. 645 (1972).

and equal protection clause of the fourteenth amendment[37] to hold that the natural father of illegitimate children was entitled to a hearing on his fitness as a parent before his children could be taken from his custody. The case concerned the validity of an Illinois statutory presumption that unwed fathers were unfit parents. The immediate issue was custody of the children rather than adoption; however, the Court's decision has far-reaching implications in adoption and termination proceedings. If due process requires that an unwed father be given a hearing before his *custody* rights can be adjudicated, then due process must also require notice and an opportunity to be heard before *all* of his parental rights can be finally terminated in an adoption or termination proceeding. Once the existence of the unwed father's parental rights is recognized, the law can no longer summarily dispose of them, as the Illinois courts had attempted to do in *Stanley* or as the Indiana adoption statutes do in dispensing with the necessity for his consent to adoption.[38] Consent to adoption, which amounts to a permanent relinquishment of all parental rights, is a far more serious and irreversible step than is a change in custody. The logic of *Stanley*, though not its holding, requires notice and a hearing before a putative father's rights can be finally terminated.

The practical problems this requirement raises in the context of adoption are enormous. It is still a fairly rare phenomenon for an unwed father to assert his parental rights, as Stanley did. The financial and other burdens of parenthood being what they are, most unwed fathers may still prefer to remain anonymous, even where the child is being put up for adoption. Any requirement that a putative father must give his consent before an illegitimate child can be adopted might well have the effect of preventing or delaying the adoption of many such children, a result hardly in keeping with the law's often stated concern for the child's best interests. The legislature has declined to take this alternative, leaving intact the existing provision of the adoption statutes that dispense with the putative father's consent. Instead, it has enacted the present amendment, which authorizes a court, at the request of any interested person, to conduct a hearing on any objections the non-consenting putative father may have to the adoption. If the putative father fails

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[37]U.S. CONST. amend. XIV, § 1.

[38]IND. CODE § 31-3-1-6(g)(2) (1976). For a general discussion of the question, see Schafrick, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 7 FAM. L. Q. 75 (1973). A Supreme Court decision handed down January 10, 1978, contains some clarification of the substantive rights of unwed fathers, but should not affect the *Stanley* notice and hearing requirements, since the father had been afforded a full hearing on his claims of parental rights. Quilloin v. Walcott, 98 S. Ct. 549 (1978).

to object to the adoption or fails to appear at the hearing after proper notice, he is foreclosed from raising objections later and from challenging the validity of the adoption.[39] The evident purpose of these provisions is to benefit both the child and its adopting parents by protecting the validity and finality of adoptions against any later attempt by a non-consenting father to assert his *Stanley* rights.

B. Dissolution of Marriage

1. Antenuptual Agreements.—In *Tomlinson v. Tomlinson*,[40] the Second District Court of Appeals held that antenuptual agreements providing for the disposition of property in the event of divorce are not invalid per se as against public policy and that the particular agreement involved was neither a contract that promoted divorce, nor voidable for concealment, fraud, or duress. The agreement, however, was held not to be binding on the trial court but was merely one factor for the court to consider in making an equitable distribution of the parties' property.[41] Thus, the holding of this case goes no farther than the First District Court of Appeals' 1975 holding in *Flora v. Flora*,[42] but *Tomlinson* does contain an extensive discussion of the policies underlying previous decisions invalidating such agreements and indicates the court's support for a much broader rule of validation than would have been required by the facts of this case.

The agreement involved in *Tomlinson* provided only that if there were a divorce, the wife would have no claim to share in certain specified property—a residence and a real estate company—owned by the husband prior to the marriage. It did not involve any limitation on the husband's duties of support, which was the factor held to invalidate the antenuptual agreement in the 1906 case of *Watson v. Watson*.[43] The court could have merely distinguished the *Tomlinson* agreement from that involved in *Watson*, but it preferred to rest its decision on the broad policy grounds expressed in recent cases from other jurisdictions.[44] There is extensive quotation from a recent Illinois case, *Volid v. Volid*,[45] discussing the changing roles of men and

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[39]IND. CODE § 31-3-1-6.1 (Supp. 1977).

[40]352 N.E.2d 785 (Ind. Ct. App. 1976).

[41]*Id.* at 791. This treatment is justified on the ground that circumstances may have changed subsantially since the agreement was signed. Nothing in the Dissolution of Marriage Act *requires* a court to approve *any* agreement of the parties, whether made before or during the marriage. *See* IND. CODE § 31-1-11.5-10(b) (1975).

[42]337 N.E.2d 846 (Ind. Ct. App. 1976).

[43]37 Ind. App. 548, 77 N.E. 355 (1906).

[44]Posner v. Posner, 257 So. 2d 530 (Fla. 1972); Volid v. Volid, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972); Fricke v. Fricke, 257 Wis. 124, 42 N.W.2d 500 (1950) (dissenting opinion); *accord*, Hudson v. Hudson, 350 P.2d 596 (Okla. 1960).

[45]6 Ill. App. 3d 386, 286 N.E.2d 42 (1972).

women in modern society and the increasing incidence of divorce and remarriage by older persons with established families and independent means. The quoted conclusion from *Volid* was that no public policy is violated by permitting such persons to establish their rights by contract so long as the contract is made with full disclosure and without fraud or duress.[46] It is clear from this dicta in *Tomlinson* that the court would favor a broad rule upholding an otherwise valid antenuptual agreement, even if it limited or eliminated altogether the obligation of either spouse to support the other in the event of divorce (support obligations being no longer imposed solely on the husband, as they were when *Watson* was decided).[47]

2. Financial Awards.—During the survey period the appellate courts were still deciding cases involving alimony and property divisions made under former divorce statutes.[48] These decisions have little relevance to cases arising under the present Dissolution of Marriage Act[49] and will not be discussed. However, several cases were decided under the Dissolution of Marriage Act, and these may throw some light on the way the courts will be interpreting its various provisions with respect to maintenance and property divisions (the term "alimony" does not appear in the Act).

(a) Maintenance.—The *scope* of the limitations on maintenance awards found in section 9(c) of the Dissolution of Marriage Act was not precisely defined in any of the cases decided during the survey period.[50] Section 9(c) limits maintenance awards to cases where either spouse is "physically or mentally incapacitated."[51] In *Newman v. Newman*,[52] the husband was totally disabled by multiple sclerosis and confined to a wheelchair, thus section 9(c) was clearly applicable.

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[46]352 N.E.2d at 789-90 (quoting Volid v. Volid, 6 Ill. App. 3d 386, 391-93, 286 N.E.2d 42, 46-47 (1972)).

[47]IND. CODE §§ 31-1-11.5-9, -10, -12 (1976).

[48]Stanford v. Stanford, 352 N.E.2d 93 (Ind. Ct. App. 1976); Wilson v. Wilson, 349 N.E.2d 277 (Ind. Ct. App. 1976) (attorney's fees); Burkhart v. Burkhart, 349 N.E.2d 707 (Ind. Ct. App. 1976) (property division and attorney's fees).

[49]IND. CODE §§ 31-1-11.5-1 to -24 (1976). *Stanford* contains an express disclaimer to this effect. 352 N.E.2d at 93 n.1.

[50]The First District Court of Appeals did address this question in a case decided July 28, 1977, which is not within the period covered by this survey. Wilcox v. Wilcox, 365 N.E.2d 792 (Ind. Ct. App. 1977).

[51]IND. CODE § 31-1-11.5-9(c) (1976), which provides:

> (c) 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 himelf or herself is materially affected, the court may make provision for the maintenance of said spouse during any such incapacity, subject to further order of the court.

[52]355 N.E.2d 867 (Ind. Ct. App. 1976).

Although the trial court made no present award of maintenance to the husband, it did recognize his right to maintenance and expressly reserved jurisdiction over the question of possible future maintenance for the husband in its decree.[53]

The husband was not contesting the court's failure to award him maintenance, but objected to the property division, which awarded substantially all of the property to the wife, who had received custody of the parties' three children. The Second District Court of Appeals held that this property division was not an abuse of discretion in view of the limited earning capacity of the wife and the express reservation of the issue of possible future maintenance for the husband, which the court considered a "proper and wise exercise of the power" granted by section 9(c).[54] The court commented that this section, which authorized awards of support for disabled spouses that are modifiable in the future, allows the courts greater flexibility in providing for such spouses' future needs than did the former statute under which a present lump sum alimony award had to be made sufficient to take care of the unknown future needs of the disabled spouse. Such awards were often weighted in favor of the future needs of the disabled spouse to the disadvantage of the paying spouse.[55]

In re Marriage of Lewis[56] involved an order for temporary maintenance to a wife who was not incapacitated under section 9(c). The trial court entered its decree dissolving the marriage on December 13, 1974, but reserved decision on the question of property division. Its property division decree, handed down February 26, 1975, ordered the husband to pay $160 per week for the wife's maintenance for the interim period. In reversing this portion of the court's order, the Third District Court of Appeals made it clear that section 7 of the Act authorizes temporary maintenance (to either spouse) *only* up to the date of the final decree dissolving the marriage, which in this case was December 13, 1974.[57] The fact that the

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[53]The decree provided:

> Donald Newman is permanently disabled and unable to earn a living. The court retains continuing jurisdiction over the issue of possible maintenance to be paid by Gretchen Newman to Donald Newman, and such matter will be considered upon future hearing at the request of Donald Newman.

Id. at 869.

[54]*Id.* at 870.

[55]*Id.* at 869.

[56]360 N.E.2d 855 (Ind. Ct. App. 1977).

[57]IND. CODE § 31-1-11.5-7 (1976) provides in pertinent part:

> (a) In any action pursuant to section 3 either party may make a motion for temporary maintenance . . . .
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> . . . .

trial court had taken the property division question under advisement did not alter the finality of the December decree as to the parties' marital status.

(b) Property Division.—Under the Dissolution of Marriage Act, as under the former divorce statutes, separation agreements settling the property rights of the parties are recognized and encouraged;[58] but in order for such an agreement to be approved by the court and incorporated into a dissolution of marriage decree, it must be in writing.[59] Interpreting section 10 of the Act, the First District Court of Appeals held that an *oral* property settlement agreement could not be approved and incorporated into the decree but that it could be considered by the trial court in making its own equitable division of property. This is what the trial court did, in effect, in *Waitt v. Waitt*,[60] and the court of appeals affirmed the decree incorporating the terms orally agreed upon by the parties. Reversal would be justified only by showing that the trial court had failed to consider the factors listed in section 11 of the Act, which are to be considered in determining a "just and reasonable" division of property;[61] no such showing had been made in *Waitt*.

(d) The court may issue an order for temporary maintenance or support in such amounts and on such terms as may seem just and proper . . . .

(e) . . . *[A]nd it* [the order] *shall terminate when the final decree is entered* . . . .

(Emphasis added).

[58]*Compare id.* § 31-1-11.5-10 *with* ch. 120, § 2, 1949 Ind. Acts 312 (repealed 1973).

[59]IND. CODE § 31-1-11.5-10(a) (1976) provides:

To promote the amicable settlements 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 and the custody and support of their children.

(Emphasis added).

[60]360 N.E.2d 268 (Ind. Ct. App. 1977).

[61]IND. CODE § 31-1-11.5-11 (1976) provides in pertinent part:

In determining what is just and reasonable the court shall consider the following factors:

(a) the contribution of each spouse to the acquisition of the property, including the contribution of a spouse as a 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.

In *Covalt v. Covalt*,[62] there was a written property settlement, which was approved and incorporated into the dissolution of marriage decree. The problem arose when the wife filed a motion for relief from the decree under Trial Rule 60(B)(8), seventy-six days after the decree had been entered. The trial court, after a hearing, granted her motion, amended the decree, and awarded the wife an additional $5,000. The Second District Court of Appeals held the amendment "clearly erroneous" and reversed.[63] The wife's motion for relief from the decree was based on allegations that she had been without counsel at the time the agreement was made and that she had been misled by representations made by her husband and his attorney concerning the value of the house that was to become property of the husband under the parties' agreement. As a result, she had later agreed to relinquish her right to $5,000 in cash under the agreement, a sum which represented, at least in part, her share of the parties' equity in the house. It was this $5,000 that the trial court ordered restored to her in granting her motion for relief.

Since the wife's motion was based on alleged misrepresentations made to her, it was in substance grounded on an allegation of fraud, or constructive fraud, although brought under Trial Rule 60(B)(8), which authorizes relief for "any other reason justifying relief from the operation of the judgment," rather than under the fraud provision of Trial Rule 60(B)(3). The court of appeals' holding that there was insufficient evidence of fraud, actual or constructive, to support the trial court's judgment may have been all that was needed to dispose of this case. The court's further holding that the provisions of sections 10(c) and 17(a) of the Dissolution of Marriage Act limit the remedies available under Trial Rule 60(B) might well have been reserved for future decision in a more appropriate case.

Section 10(c) provides that property division provisions of a decree incorporating an agreement of the parties may not be subsequently modified by the court unless the agreement itself provides for modification or the parties subsequently consent to modification.[64] Section 17(a) provides that court orders "as to property division . . . may not be revoked or modified, *except in cases of fraud*," distinguishing such provisions from child support provisions, which are always subject to future modification or revocation on a showing of substantial change in circumstances.[65] It was the court's opinion in

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[62]354 N.E.2d 766 (Ind. Ct. App. 1976).

[63]*Id.* at 771. (Judge White dissented, without opinion.)

[64]IND. CODE § 31-1-11.5-10(c) (1976).

[65]*Id.* § 31-1-11.5-17(a). The pertinent portions of this section provide:

(a) Provisions of an order with respect to child support may be modified or revoked. Such modification shall be made only upon a showing of changed circumstances so substantial and continuing as to make the terms

Covalt that these two sections limit a trial court's power to grant relief from the property division provisions of a dissolution decree under Trial Rule 60(B), because to grant such relief would be to modify the provisions in violation of sections 10(c) and 17(a). Under *Covalt*, the *only* ground available for relief from a property division decree would be fraud.[66]

It seems imprudent to so limit the equitable powers of courts to relieve parties from the effects of an oppressive judgment, based on statutory provisions relating to *modifications* of such judgments. The kind of modification referred to in sections 10(c) and 17(a) is made on the basis of *future* changes in circumstances. Relief from a judgment, on the other hand, is granted for conditions existing *at the time the judgment was entered*, such as fraud, mistake, surprise, or newly discovered evidence.[67] These are two fundamentally different concepts, and there is no reason to conclude that the legislature, when it limited future modification of property division decrees by sections 10(c) and 17(a), intended to also foreclose equitable relief from such decrees where it would otherwise be justified on the limited grounds specified in Trial Rule 60(B). Suppose, for example, that a decree were based upon a property settlement agreement made by the parties under a mutual mistake of fact sufficiently material to justify rescinding the agreement under the usual rules relating to equitable rescission of contracts. Nothing in the Dissolution of Marriage Act justifies the conclusion that the legislature intended to deprive the courts of power to relieve the parties from such a decree under Trial Rule 60(B)(8), yet that would seem to be the result under *Covalt*.

3. Child Custody.—(a) Original Custody Decrees.—Two cases were decided by the First District Court of Appeals in which the trial courts' determinations of custody on dissolution of marriage were directly challenged.[68] In each case, custody had been awarded to the father; and in each, the trial court's determination of custody was affirmed on appeal.

In *Schwartz v. Schwartz*,[69] the wife challenged the award on the ground that the court should give preference to the wife and award her custody if it finds that she is a fit and proper person to have

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unreasonable. *The orders as to property disposition entered pursuant to section 9 may not be revoked or modified except in cases of fraud which ground shall be asserted within two (2) years of said order.*

(Emphasis added).

[66]Fraud is *one* of the grounds for relief under IND. R. TR. P. 60(B).

[67]*Id.*

[68]Farley v. Farley, 359 N.E.2d 583 (Ind. Ct. App. 1977); Schwartz v. Schwartz, 351 N.E.2d 900 (Ind. Ct. App. 1976).

[69]351 N.E.2d 900 (Ind. Ct. App. 1976).

custody. In this case, the wife had adopted the husband's child from a prior marriage, and the court of appeals held she had the same rights to custody as a natural parent would have.[70] However, those rights do not include any preference with respect to custody under section 21(a) of the Dissolution of Marriage Act, which provides: "(a) The court shall determine custody and enter a custody order in accordance with the best interests of the child. *In determining the best interests of the child, there shall be no presumption favoring either parent . . . .*'[71] The italicized portion was added to the Uniform Act's custody provision[72] by the Indiana legislature. Its effect is to emphasize, rather than to alter, the intent of the Uniform Act to make the interests of the child, rather than those of the parents, the predominant consideration in custody decisions. Rejection of any preference based on sex is also probably required by the reasoning of recent Supreme Court equal protection decisions in the area of sex discrimination.[73] Based on the evidence presented in *Schwartz*, the court of appeals held the award of custody to the father was not an abuse of the trial court's discretion.

Farley v. Farley[74] involved a somewhat more complex fact situation in which the wife had left the state after filing her dissolution action, taking the parties' infant son with her. The wife was not present at the dissolution hearing, although she had notice of it; her attorney did appear and attempted unsuccessfully to have the proceedings dismissed or continued. The wife had filed another action for dissolution and custody in Texas, where she was then living with her parents. The Indiana trial court proceeded with the hearing, dissolved the marriage, and awarded custody to the husband. The wife, through her counsel, attempted to amend the judgment and to stay its enforcement, again without success. On appeal, the First District Court of Appeals affirmed the actions of the trial court.

In refusing to overturn the trial court's custody decision, the court of appeals emphasized the broad discretion courts necessarily have in such matters and the fact that appellate review is limited to the question of abuse of that discretion.[75] The wife's failure to ap-

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[70]IND. CODE § 31-3-1-9 (1976) provides in pertinent part: "After such adoption such adopting father or mother or both shall occupy the same position toward such child that he, she or they would occupy if the natural father or mother or both, and shall be jointly and severally liable for the maintenance and education of such person."

[71]*Id.* § 31-1-11.5-21(a) (emphasis added).

[72]UNIFORM MARRIAGE AND DIVORCE ACT § 402.

[73]*See, e.g.*, Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).

[74]359 N.E.2d 583 (Ind. Ct. App. 1977).

[75]*See, e.g.*, Gilchrist v. Gilchrist, 225 Ind. 367, 75 N.E.2d 417 (1947) (habeas corpus action); Shaw v. Shaw, 304 N.E.2d 536 (Ind. Ct. App. 1973).

pear and testify at the hearings and her direct violation of a prior court order prohibiting removal of the child from the jurisdiction were factors the court was entitled to consider in making its custody determination, along with evidence of the husband's willingness and ability to care for the child.[76] The wife's presentation, through her attorney, of a letter from her physician advising against travel because of her pregnancy and of affidavits from her grandmother and great aunt attesting to her fitness as a mother did not require the trial court to grant her relief from the judgment under Trial Rule 60(B)(8).[77]

(b) Custody Modification.—The First District Court of Appeals also decided two custody modification cases[78] in which custody had been awarded to the father and a third case in which the father's petition for change of custody was held to have been erroneously dismissed.[79]

The first of these decisions, *Franklin v. Franklin*,[80] discussed the standards to be used in custody modification cases under the Dissolution of Marriage Act and concluded that these standards do not differ significantly from those used under prior statutes. In adopting the present statute, which is based on the Uniform Marriage and Divorce Act, the legislature omitted the section dealing with modification of custody decrees from the Indiana version.[81] This omission left the Indiana statute with no explicit statement of the standards to be used in determining custody modification, but the general provisions relating to standards for determining custody in accordance with the best interests of the child were held relevant to modification as well as to the original determination of custody.[82] The statute also specifically authorizes the court to interview the

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[76]359 N.E.2d at 589.

[77]*Id.* at 586. The issue raised in *Farley* as to the effect of the automatic dismissal provisions of section 9(a) of the Dissolution of Marriage Act is discussed *infra* at 168, under *4. Procedure.*

[78]*In re* Marriage of Lopp, 362 N.E.2d 492 (Ind. Ct. App. 1977); Franklin v. Franklin, 349 N.E.2d 210 (Ind. Ct. App. 1976).

[79]Pund v. Pund, 357 N.E.2d 257 (Ind. Ct. App. 1976).

[80]349 N.E.2d 210 (Ind. Ct. App. 1976).

[81]UNIFORM MARRIAGE AND DIVORCE ACT § 409.

[82]IND. CODE § 31-1-11.5-21(a) (1976). The statute lists the following factors to be considered in determining the child's best interests:

(1) the age and sex of the child;

(2) the wishes of the child's parent or parents;

(3) the wishes of the child;

(4) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

(5) the child's adjustment to his home, school and community; and

(6) the mental and physical health of all individuals involved.

child in chambers to ascertain the child's wishes.[83] The court of appeals held in *Franklin* that these statutory provisions did not change the requirement of prior case law that a change in conditions must be shown before a court can modify a custody decree.[84] In both *Franklin* and *In re Marriage of Lopp*,[85] the court held there was sufficient evidence of changed conditions to justify the trial court's exercise of its discretion to modify its prior custody decree and award custody to the father.

In *Pund v. Pund*,[86] the father filed his petition for change of custody in the Dubois Circuit Court, although the original 1974 dissolution decree awarding custody of the parties' two daughters to the mother had been entered in the Spencer Circuit Court. At the time the father's petition for change of custody was filed, all of the parties were residents of Dubois County. The mother's motion to dismiss for lack of subject matter jurisdiction was granted by the trial court, but the First District Court of Appeals reversed, holding that the Dubois Circuit Court did have subject matter jurisdiction over the custody issue. At most, the issue of whether the case should be tried in Spencer or Dubois County was a question of venue, and the proper remedy would have been an order transferring the case under Trial Rule 75(B), rather than an order dismissing the case.

As in *Franklin*, the absence of a specific provision relating to custody modification proceedings in the Indiana Dissolution of Marriage Act was the source of the problem faced by the trial court in *Pund*. Section 3 of the Act refers to only two causes of action, dissolution of marriage and child support.[87] Section 20 states that a child custody proceeding can be commenced by a parent "by filing a petition pursuant to section 4(a) or (b),"[88] but section 4 describes only the same two types of proceedings, dissolution and child support.[89] The section of the Uniform Act dealing with child custody pro-

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[83] *Id.* § 31-1-11.5-21(d).

[84] *E.g.*, Rose v. Rose, 256 Ind. 440, 269 N.E.2d 365 (1971); Huston v. Huston, 256 Ind. 110, 267 N.E.2d 170 (1971); Perdue v. Perdue, 254 Ind. 77, 257 N.E.2d 827 (1970). *Rose* states the requirement to be "a substantial and material change in conditions affecting the welfare of the children." 256 Ind. at 443, 269 N.E.2d at 366.

A 1976 amendment to IND. CODE § 31-1-11.5-22(d) added a requirement that custody orders be modified "only upon a showing of changed circumstances so substantial and continuing as to make the existing custody order unreasonable." Pub. L. No. 128, §4(d), 1976 Ind. Act 616, 619.

[85] 362 N.E.2d 492 (Ind. Ct. App. 1977).

[86] 357 N.E.2d 257 (Ind. Ct. App. 1976).

[87] IND. CODE § 31-1-11.5-3 (1976).

[88] *Id.* § 31-1-11.5-20.

[89] *Id.* § 31-1-11.5-4.

ceedings,[90] as well as that dealing with custody modification, were omitted from the Indiana Act, leaving it without any express provisions for a child custody action *not* connected with a dissolution or child support action.[91] In *Pund*, the court of appeals had to look to the general statutes that established the circuit courts and gave them jurisdiction over "actions for divorce"[92] to support its determination that the trial court had subject matter jurisdiction in this case.

These omissions in the Indiana Dissolution of Marriage Act have now been corrected by adoption of the Uniform Child Custody Jurisdiction Law,[93] which contains provisions both for original custody proceedings and modification proceedings.[94]

(c) Uniform Child Custody Jurisdiction Law.—This statute, which was adopted in substantially unchanged form, does a great deal more than fill in some gaps in the Indiana Dissolution of Marriage Act. It is designed to minimize such problems as continual relitigation of custody, forum shopping by parents seeking a change in custody, child snatching, and jurisdictional competition with courts from other states. It also attempts to promote cooperation and exchange of information between courts of different states concerned with the same custody dispute.[95] To achieve these purposes, the statute provides standards to determine when a court should assume jurisdiction of a custody dispute.[96] It sets up procedures to assist in resolving conflicts of jurisdiction where a court in another state is also entitled to assume jurisdiction, essentially by the simple expedient of "communication" and exchange of information between the two courts, with a view to determining which is the more appropriate forum.[97] The law provides for enforcement of out-of-state decrees rendered by courts meeting the jurisdictional requirements of the statute,[98] for cooperation between courts in forwarding transcripts and other evidence, and for cooperation in ordering persons within a court's jurisdiction to appear in custody

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[90]UNIFORM MARRIAGE AND DIVORCE ACT § 401.

[91]Ironically, § 20 does provide that a child custody proceeding can be commenced by a "person other than a parent," but that provision would not apply to the father's petition in *Pund*. IND. CODE § 31-1-11.5-20 (1976).

[92]*Id.* § 33-4-4-3. The Indiana Dissolution of Marriage Act also gives the circuit courts jurisdiction to "enter dissolution decrees," but the language of the above statute is broader. *Id.* § 31-1-11.5-2(a).

[93]*Id.* §§ 31-1-11.6-1 to -24 (Supp. 1977) (originally enacted as Pub. L. No. 305, § 4, 1977 Ind. Acts 1383). The Act became effective August 1, 1977.

[94]IND. CODE § 31-1-11.6-3 (Supp. 1977).

[95]*Id.* § 31-1-11.6-1.

[96]*Id.* § 31-1-11.6-3.

[97]*Id.* § 31-1-11.6-7.

[98]*Id.* § 31-1-11.6-13.

proceedings in another state.[99] At least twenty states, in addition to Indiana, have adopted the Uniform Child Custody Jurisdiction Law.[100]

4. Procedure.—Two court of appeals decisions have been handed down interpreting section 8(a) of the Dissolution of Marriage Act, which provides for automatic dismissal of the action if no motion for dissolution of the marriage is filed by either party within ninety days after a continuance has been granted for reconciliation purposes.[101]

In *Bennett v. Bennett*,[102] the dissolution action had been initiated by the husband. After the final hearing, held November 12, 1974, the trial court ordered the matter continued and directed the parties to seek reconciliation through Lutheran Family Services. A month later, the agency reported that neither party felt reconciliation was possible. On April 29, 1975, more than five months after the final hearing, the husband requested a further hearing. Both parties appeared at this hearing and a decree of dissolution was entered on June 23, 1975. After the decree was entered, the wife raised the issue of automatic dismissal under section 8(a) for the first time in her motion for relief from judgment and motion to correct errors. The Third District Court of Appeals held the wife had waived the issue of automatic dismissal by failing to raise it until after the dissolution decree was entered, rejecting her argument that section 8(a) was "jurisdictional."

The wife's contention was, in effect, that upon the expiration of ninety days from the date of continuance, the court's jurisdiction

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[99]*Id.* § 31-1-11.6-20.

[100]It was reported in [1977] 3 FAM. L. REP. 1181 (BNA) that the following states had adopted the Uniform Act: Alaska, Arizona, California, Colorado, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Maryland, Michigan, Minnesota, Montana, New York, North Dakota, Ohio, Oregon, Pennsylvania, Wisconsin, and Wyoming.

[101]IND. CODE § 31-1-11.5-8(a) (1976) provides:

> (a) In an action pursuant to section 3(a) [dissolution of marriage], a final hearing shall be conducted no earlier than sixty (60) days after the filing of the petition. 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 as provided in section 9(a) or if the court finds that 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. At any time forty-five (45) days after the date of the continuance either party may move for the dissolution of the marriage and the court may enter a dissolution decree as provided in section 9(a). *If no motion for the dissolution is filed, the matter shall be, automatically and without further action by the court, dismissed after the expiration of ninety (90) days from the date of continuance.*

(Emphasis added).

[102]361 N.E.2d 193 (Ind. Ct. App. 1977).

over the subject matter "automatically" terminated under section 8(a) so that any proceedings held thereafter, including issuance of the dissolution decree, were void. However, the court of appeals declined to construe section 8(a) as having so drastic an effect, holding instead that the legislature adopted the automatic dismissal provision merely as a "procedural vehicle . . . to aid the efficient housekeeping of the court," similar in effect to a statute of limitations.[103] Being procedural rather than jurisdictional, it could be waived by a party's participation without objection in the dissolution proceedings, as the wife did in this case.

The automatic dismissal provision was also raised by the wife in *Farley v. Farley*,[104] but the facts of this case were not such as to make the provision applicable. The section provides for automatic dismissal only where the court exercises its power to continue the matter *after final hearing* so that the parties can seek reconciliation. The automatic dismissal occurs if, ninety days after such a continuance, neither party has moved for dissolution. In *Farley*, the reconciliation attempts had occurred *before* any final hearing had been held. Even though more than a year had passed since the filing of the petition for dissolution,[105] no final hearing had occurred to start the ninety-day period running. Under these facts, the First District Court of Appeals held that the automatic dismissal provisions of section 8(a) were inapplicable.

In *State ex rel. Stanton v. Superior Court*,[106] the Indiana Supreme Court made a temporary writ of mandate and prohibition issued against the Superior Court of Lake County permanent. The writ directed the court to vacate an order joining the administrators of the state and county departments of public welfare as additional parties to a dissolution of marriage proceeding, and to vacate an order restraining the administrators from denying to the wife any benefits to which she would be entitled if she were unmarried. The joinder order was entered by the superior court sua sponte on learning that the husband's purpose in filing the dissolution action was to make his disabled wife eligible for medicaid benefits.[107] The supreme court held that the joinder was improper under Trial Rule 19(A)(2)[108] since the welfare administrators claimed no interest in the pro-

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[103]*Id.* at 196.

[104]359 N.E.2d 583 (Ind. Ct. App. 1977). Other aspects of this case are discussed *supra* at 163, under *3. Child Custody.*

[105]The parties filed separate actions for dissolution on June 6, 1974. The final hearing was held September 19, 1975. *Id.* at 584-85.

[106]355 N.E.2d 406 (Ind. 1976).

[107]*Id.* at 407.

[108]IND. R. TR. P. 19(A)(2) provides:

> A person . . . shall be joined as a party in the action if
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> . . . .

ceeding, and nothing in the Dissolution Act contemplated the joinder of such additional parties in an action to dissolve a marriage.

C. Enforcement of Alimony and Support Judgments

The appellate courts of Indiana decided several cases relating to enforcement of money judgments awarded in connection with divorce. The cumulative effect of these decisions may be to limit the remedies available for enforcement of decrees ordering payment of periodic sums regardless of their denomination as alimony, maintenance, property division, or child support.

1. Contempt.—In a divided decision, *State ex rel. Shaunki v. Endsley*,[109] the Indiana Supreme Court held that a judgment for installment payments awarded as a division of property is not enforceable by contempt proceedings. Although the issue on appeal was precisely, and correctly, defined as "whether payment of a judgment awarded in lieu of property division and payable in weekly installments, is enforceable by contempt proceedings,"[110] throughout the majority opinion there are references to enforcement of an "alimony judgment." Since the decree here sought to be enforced was rendered under the present Indiana Dissolution of Marriage Act,[111] in which the word "alimony" does not appear, such references are at best confusing. Many alimony judgments rendered under previous statues are still in effect, and they should not be so casually equated with property divisions entered under the Dissolution of Marriage Act without consideration being given to the substantial differences between the present and former statues. In fact, the rule applied in *Shaunki* came into existence more than seventy years ago under statutes significantly different from statutes that have been in effect in more recent years.

The *Shaunki* majority cited and followed a 1904 case, *Marsh v. Marsh*,[112] which held that an award of alimony in gross (for a fixed sum), though payable in installments, could not be enforced by con-

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(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:

(a) as a practical matter impair or impede his ability to protect that interest or

(b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

[109]362 N.E.2d 153 (Ind. 1977) (Justices Arterburn and DeBruler dissented).

[110]*Id.* at 153.

[111]IND. CODE § 31-1-11.5-1 to -24 (1976). The decree was entered December 3, 1976, dissolving the Shaunkis' marriage on the present statutory ground of irretrievable breakdown of the marriage. *In re* Marriage of Shaunki, No. C 75-1531 (Marion Cir. Ct. Dec. 3, 1976).

[112]162 Ind. 210, 70 N.E. 154 (1904).

tempt. The reason given was that such an award—the only form of alimony permitted under the statute then in force[113]—was "to all intents and purposes a judgment, which may be collected on execution"; use of the "more drastic remedy" of contempt was therefore considered unnecessary.[114] *Marsh* followed a long line of prior Indiana cases that had held a judgment for alimony to be "an absolute personal judgment, which is collected by execution as other judgments."[115] The statute in force at that time not only required a decree for alimony to be "for a sum in gross, and not for annual payments," but gave the court discretion to allow payment by installments *only* if "sufficient surety" was given.[116] Thus, under that statutory scheme, the *Marsh* court was justified in concluding that the wife was adequately protected both by the surety provision of the statue and by the ready availability of the execution remedy; therefore, use of the contempt power as a means of forcing compliance with the court's alimony decree was not necessary.

The statutory scheme had changed dramatically by 1974, when the *Marsh* rule was applied in *State ex rel. Schutz v. Marion Superior Court.*[117] No longer was an alimony judgment an "absolute personal judgment" readily collectible by execution.[118] The 1949 statute,[119] in effect at the time of the decree sought to be enforced in *Schutz*, required neither a final judgment for a fixed and immutable sum, nor sufficient surety for a judgment payable in installments. Rather, it permitted installments to be discontinued or reduced on the death or remarriage of the wife and made the giving of any kind of security entirely discretionary with the court.[120] As Mr. Justice

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[113]Ch. 43, § 22, 1873 Ind. Acts 107 (effectively repealed 1949).

[114]162 Ind. at 212, 70 N.E. at 155.

[115]Musselman v. Musselman, 44 Ind. 106, 122 (1873).

[116]This statute, in force at the time *Marsh* was decided, was identical to that quoted in *Musselman.* Ch. 43, § 22, 1873 Ind. Acts 112 (effectively repealed 1949); it states: "The decree for alimony to the wife shall be for a sum in gross, and not for annual payments; but the court, in its discretion, may give a reasonable time for the payment thereof, by installments, on sufficient surety being given."

[117]261 Ind. 535, 307 N.E.2d 53 (1974).

[118]Recent court of appeals cases limiting the availability and effectiveness of execution as a remedy for enforcement of alimony judgments are discussed *infra* at 173.

[119]Ch. 120, § 3, 1949 Ind. Acts 312 (repealed 1973).

[120]The pertinent portion of *id.* § 3, provided:

> In determining the method of payment of alimony *the court may require that it be paid in gross or in periodic payments,* either equal or unequal, and if to be paid in periodic payments *the court may further provide for their discontinuance or reduction upon the death or remarriage of the wife,* and, *in his discretion, the court may further provide for such security,* bond, or other guarantee as shall be satisfactory to the court *for the purpose of securing the obligation* to make such periodic payments . . . .

(Emphasis added).

Arterburn's dissent in *Schutz* pointed out, the situation hardly called for automatic application of the seventy-year-old rule of *Marsh*, when the underlying reasoning of that rule had been completely eroded by subsequent changes in the divorce statutes.[121] The *Schutz* majority attempted to shore up the deficiency of *Marsh* as precedent by reliance on the Indiana Constitution's prohibition of imprisonment for debt,[122] but the changes in the nature of alimony under recent statutes and the limitations on the execution remedy discussed in the following section also tend to cast doubt on the court's characterization of alimony as "debt."[123]

The statute in force when the *Schutz* decree was entered had been repealed and the present Dissolution of Marriage Act had been adopted by the time the *Shaunki* decree was entered.[124] The Dissolution of Marriage Act introduced new concepts as well as new terminology. In lieu of alimony, "maintenance" can now be awarded if a spouse is "physically or mentally incapacitated,"[125] or where the parties agree in writing.[126] Maintenance is of indefinite duration and subject to future modification by the court.[127] It clearly does not come within the holding of *Schutz* that "a specific sum of money provided in an alimony judgment is a judgment debt" within the defini-

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In fact, the only security actually provided in the *Schutz* decree was beneficiary status on two life insurance policies, which would be effective as security only in the event of the husband's death. 261 Ind. at 536, 307 N.E.2d at 54.

[121]261 Ind. at 538-40, 307 N.E.2d at 55-56 (Arterburn, J., dissenting).

[122]IND. CONST. art. 1, § 22. *Marsh* did not mention the constitutional provision.

[123]Other states having similar constitutional provisions have found it to be inapplicable to alimony judgments. The rationale of these cases is summarized by Professor Clark, as follows:

> It is well settled that the enforcement of alimony decrees by contempt does not violate the prohibition against imprisonment for debt found in many state constitutions. This is so even though the decree is based upon an agreement of the parties. Alimony is said not be a "debt" in the sense used in such provisions, but an obligation arising out of marriage. In addition the enforcement of alimony is so important to the state as to justify the use of imprisonment as a matter of policy where necessary to insure that the husband will perform his obligation. The purpose of the constitutional prohibition, which is to protect the honest debtor who is unable to pay his debts, can still be accomplished by adherence to the settled principle that inability to pay alimony is a defense to contempt proceedings.

H. CLARK, LAW OF DOMESTIC RELATIONS § 14.10 (1968).

[124]*In re* Marriage of Shaunki, No. C 75-1531 (Marion Cir. Ct. Dec. 3, 1976).

[125]IND. CODE § 31-1-11.5-9(c) (1976), *quoted in* note 51 *supra*.

[126]*Id.* § 31-1-11.5-10(a), *quoted in* note 59 *supra*.

[127]The maintenance award to an incapacitated spouse is to be made only "during any such incapacity" and is "subject to further order of the court." *Id.* § 31-1-11.5-9. *Id.* § 31-1-11.5-10 authorizes the parties to agree in writing to provisions for maintenance, property division, and custody and support of children, and expressly limits modification of provisions for "disposition of property," but contains no such limitation on future modification of provisions for maintenance, custody, or child support.

tion of the Indiana constitutional provision that "there shall be no imprisonment for debt."[128] The provisions relating to property division give the trial court broad powers to divide property owned by either or both spouses, including property acquired prior to the marriage. In so doing, the court may take into account, among other factors, the "earnings and earning ability of the parties,"[129] a factor clearly more relevant to rights and duties of support than to a mere disentangling of the property interests of the parties.[130] The Dissolution of Marriage Act thus tends to blur the dividing line between awards labeled "maintenance" and those labeled "property division." The Act also contains an express provision authorizing enforcement of decrees entered in dissolution actions by contempt.[131]

On its facts, *Shaunki* holds only that a "judgment awarded *in lieu of property division* and payable in weekly installments"[132] is not enforceable by contempt. The court might well have considered the changes in the Indiana divorce statutes and the general policies relating to enforcement of dissolution decrees by contempt before applying the *Marsh-Schutz* rule in *Shaunki.* These factors certainly should be considered before extending the rule to other types of financial awards under the Dissolution of Marriage Act, whether labeled as "maintenance" or "property division."

In *Kuhn v. Kuhn,*[133] the First District Court of Appeals stated that a second judgment fixing the amount of arrearage is necessary before a judgment for child support can be enforced by contempt. This case is discussed in the section which follows because of its

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[128]261 Ind. at 538, 307 N.E.2d at 55.

[129]IND. CODE § 31-1-11.5-11 (1976).

[130]A spouse's equitable interests in marital property generally extend only to property acquired by the parties during the marriage. *See* H. CLARK, LAW OF DOMESTIC RELATIONS § 14.8 (1968).

[131]IND. CODE § 31-1-11.5-17(a) (1976), the pertinent portion of which provides: "Terms of the [dissolution] decree may be enforced by all remedies available for enforcement of a judgment *including but not limited to contempt* except as otherwise provided in this chapter." (Emphasis added).

Under prior statutes, the Indiana courts had to rely on their inherent equity powers as authority for enforcement of decrees by contempt. *See* Corbridge v. Corbridge, 230 Ind. 201, 207, 102 N.E.2d 764, 767 (1952) (child support order).

[132]362 N.E.2d at 153 (emphasis added). The decree sought to be enforced in *Shaunki* contained no findings relating to support factors. Rather it contained findings that the wife was entitled to a share of a business owned and operated by the husband, that the business could not be readily divided or sold, and that the wife "could best benefit by a cash settlement in lieu of a division of the business." Based on these findings, the court awarded the wife $35,000, payable in installments, "in lieu of property division." *In re* Marriage of Shaunki, No. C 75-1531, slip op. at 2-5 (Marion Cir. Ct. Dec. 3, 1976).

[133]361 N.E.2d 919 (Ind. Ct. App. 1977).

reliance on the rule announced in *Owens v. Owens*,[134] discussed therein.

2. Execution.—In *Owens v. Owens*,[135] the First District Court of Appeals held that execution was not available to enforce a judgment for child support until the amount of arrearages in support had been reduced to judgment in a "second suit."[136] The court of appeals affirmed the judgment of the trial court granting the defendant-husband's motion to quash a writ of execution against his property. The wife had previously filed a petition to reduce the support arrearages to judgment, which the trial court had denied. Although the court of appeals' holding seems to indicate that the trial court should have granted the wife's petition, the court held the wife had waived the issue by failing to file a motion to correct errors at the time her petition was originally denied. Moreover, the court said, the statute on which the petition was based had been repealed prior to the filing of her petition.[137] The repealed statute[138] permitted, but did not require, entry of a judgment for arrears in a contempt proceeding. Since the court of appeals held in *Owens* that entry of such a judgment is mandatory, despite the repeal of this statute, it is difficult to see the relevance of its repeal to the outcome of this case.

The wife relied on section 17(a) of the Dissolution of Marriage Act, which now provides that terms of a support decree "*may be enforced by all remedies available for enforcement of a judgment*, including but not limited to contempt . . . ."[139] It is at least arguable that repeal of the former statute specifically providing for a judgment for arrears and adoption of a statute providing in broad terms for enforcement of the original decree indicates a legislative intent to authorize direct enforcement of that decree without the necessity

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[134]354 N.E.2d 350 (Ind. Ct. App. 1976).

[135]*Id.*

[136]*Id.* at 352.

[137]*Id.* The trial court dismissed the wife's Petition to Reduce Arrearages to Judgment on July 16, 1975. It granted the husband's motion to quash the writ of execution on September 17, 1975; at which time the wife orally moved to reinstate her petition; her motion was denied. *Id.* at 351-52.

[138]Ch. 282, § 1, 1967 Ind. Acts 901 (repealed 1973). The repealed statute provided:

> Whenever any person is determined by a court to be guilty of contempt for failure to comply with an order of that court to pay support for dependents and that court shall make a determination of the amount of an arrearage under such order, the *amount of such arrearage* so determined *may be entered as a judgment of record* against such person and be enforced in the same manner as provided for the enforcement and collection of money judgments.

(Emphasis added).

[139]IND. CODE § 31-1-11.5-17(a) (1976).

of obtaining a second judgment for the amount in arrears.[140] Without discussing either policy or statutory construction, the court of appeals held in *Owens* that adoption of section 17(a) did not change "existing Indiana practice." The only reason given is that "otherwise, the person filing the praecipe [for execution] may state any given figure and place the burden upon the other party to prove that the amounts are incorrect."[141]

Indiana is not the only state requiring the docketing of a second judgment for arrears of alimony or child support before execution may issue. But in many other states that follow this practice, a judgment for alimony or child support can be modified up to the time the second judgment is entered, even as to amounts already in arrears (retroactive modification).[142] In those states, the amount actually owed under such an order can never be finally determined until the judgment for arrears is docketed, and the requirement of a second judgment is "the logical corollary of the rule . . . that even arrears of alimony may be modified up to the time that the [second] judgment is docketed."[143] In Indiana, on the other hand, support judgments are not retroactively modifiable.[144] The amount of support due is fixed by the original decree, and, as to past-due installments, the only defense open to the obligor is the defense of payment.

Moreover, both the present and former statutes authorize the court to order that payments be made through the clerk of the circuit court, who is required to maintain a record of such payments.[145] Where this procedure is followed, there appears to be no reason at all to require the parent with custody to spend time and money in securing a second judgment, because the amount actually due is readily ascertainable. In other cases, the need to provide adequate support for children should outweigh any inconvenience to a parent who might have to prove that he (or she) had actually made the payments alleged to be due, especially when that parent could have

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[140]As a matter of policy, such a legislative intent would be entirely consistent with the intent expressed by the legislature in adopting the Uniform Reciprocal Enforcement of Support Act, which recognizes the importance of improving and extending the enforcement of duties of support. *Id.* § 31-2-1-1.

[141]354 N.E.2d at 352. Three cases are cited in support of the *Owens* holding, but in none of them was the necessity for a second judgment an issue. Corbridge v. Corbridge, 230 Ind. 201, 102 N.E.2d 764 (1952); Grace v. Quigg, 150 Ind. App. 371, 276 N.E.2d 594 (1971); Smith v. Smith, 124 Ind. App. 343, 115 N.E.2d 217 (1953). *Quigg* did involve a judgment for arrears in support, but it was the *amount* of the arrears, not the necessity for a second judgment, which was at issue.

[142]*See* H. CLARK, LAW OF DOMESTIC RELATIONS §§ 14.9, 14.10, 15.3 (1968).

[143]*Id.* § 14.10.

[144]Zirkle v. Zirkle, 202 Ind. 129, 172 N.E. 192 (1930); *see* Corbridge v. Corbridge, 230 Ind. 201, 102 N.E.2d 764 (1952).

[145]IND. CODE § 31-1-11.5-13 (1976); *id.* §§ 31-2-2-1, -2.

protected himself by requesting that the payments be made through the court.

Owens is cited by the First District Court of Appeals in *Kuhn v. Kuhn*,[148] in support of a statement that a second judgment fixing the amount of arrearage is necessary before judgment for child support can be enforced by *contempt*, but resolution of this issue was not necessary in *Kuhn*. The three children involved were all emancipated before the contempt proceedings were brought, and under prior Indiana case law, contempt is not available as a remedy to enforce support orders after emancipation.[147] The trial court granted the defendant's motion for summary judgment on this ground, and its action was affirmed on appeal.[148] Since contempt was not available as a remedy in any event on the facts of this case, there was no reason for the court to decide whether one proceeding or two would be necessary to enforce a support order by contempt; if that question *had* been at issue here, there is even less reason for requiring two proceedings for contempt enforcement than there is for execution. Whereas in execution proceedings the obligor parent may be subjected to the inconvenience of having his property seized before he can contest the amount of the arrearage alleged to be due, in a contempt proceeding, he would normally be afforded a hearing on the court's order to show cause *before* any coercive action is taken against him.[149] No reason was given in *Kuhn* for rejecting the plaintiff-wife's contention that the trial court should have authority to reduce child support arrearages to judgment and enforce the judgment through contempt in the same proceeding. To require two proceedings for every delinquency, where one would serve as well, seems wasteful of both the courts' and the parties' time and serves no purpose other than delay in enforcing the children's right to support.

3. Alimony as a Lien.—Owens is also cited by the Third District Court of Appeals in support of its holding in *Uhrich v. Uhrich*[150] that an alimony judgment, payable in the future, does not constitute a lien on the obligor-husband's real estate. The judgment in question was for the gross sum of $40,500, payable in 122 monthly installments. None of the installments was in default at the time the wife began her action to have the unpaid balance declared a lien on

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[146]361 N.E.2d 919 (Ind. Ct. App. 1977).

[147]Corbridge v. Corbridge, 230 Ind. 201, 102 N.E.2d 764 (1952). This is in accord with the general rule. *See* Annot., 32 A.L.R.3d 888 (1970).

[148]361 N.E.2d at 921.

[149]This was the procedure followed in State *ex rel.* Schutz v. Marion Superior Court, 261 Ind. 535, 307 N.E.2d 53 (1974), discussed in the preceding section.

[150]362 N.E.2d 1163 (Ind. Ct. App. 1977).

her former husband's real estate. The statute in force at the time the alimony judgment was rendered provided:

> Said judgment [for alimony] shall be a lien upon the real estate and chattels real of the spouse liable therefor to the extent that it is payable immediately *but shall not be such a lien to the extent that it is payable in the future unless and to the extent such decree so provides expressly.*[151]

The *Uhrich* decree did not expressly provide that the alimony judgment would constitute a lien.

The wife's argument was that the above statute constituted a limitation on the effect of an alimony judgment as a lien. She argued that repeal of the statute in 1973 removed the limitation, leaving alimony judgments subject to the provisions of the general lien statute that "all final judgments for the recovery of money or costs . . . shall be a lien upon real estate and chattels real liable to execution in the county where such judgment has been duly entered . . . ."[152] The court of appeals, in a divided opinion, rejected this argument, holding that the general lien statute does not apply to an alimony judgment payable in futuro.[153] By citing *Owen* in support of this view, the majority implicitly held that the requirement of a second judgment for arrears applies to alimony judgments as well as to judgments for child support; therefore, the original alimony judgment, though for a gross sum, is not immediately due, payable, and enforceable by execution as ordinary money judgments are.[154]

Presiding Judge Staton's dissent rejected this rationale and reasoned instead that repeal of the former provision by the legislature was a "clear expression of policy that alimony judgments should be treated as any other judgment."[155] He pointed out that the effect of the court's decision was to subordinate alimony judgments to later-acquired judgment liens. It would therefore require the alimony judgment-holder to obtain repeated executions as payments become due in order to protect the judgment, which would place an "insufferable hardship" on the judgment holder "as well as the judicial system which would have to process the repetitive executions."[156] It should be noted that under *Owens*, each of these

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[151]Ch. 120, § 3, 1949 Ind. Acts 312 (repealed 1973) (emphasis added).

[152]IND. CODE § 34-1-45-2 (1976).

[153]362 N.E.2d at 1164 (opinion of Garrard, J.).

[154]*Id.* Child support judgments have been held not to create liens under the general lien statute because they are subject to future modifications by the court and therefore are not final judgments for a specific sum of money. Myler v. Myler, 137 Ind. App. 605, 210 N.E.2d 446 (1965); Rosenberg v. American Trust & Sav. Bank, 86 Ind. App. 552, 156 N.E. 411 (1927).

[155]362 N.E.2d at 1165 (Staton, J., dissenting).

[156]*Id.*

repeated executions would involve entry of a separate judgment specifying the amount then in arrears.

The question presented in *Uhrich* is far from easy. It represents a direct conflict between the policy favoring free alienability of land and the policy favoring enforcement of judgments for support.[157] Although some support can be found for the *Uhrich* holding in the law of other states,[158] it should be noted that in most states, though not in Indiana, alimony decrees *are* enforceable by contempt.[159] In Indiana, we have the anomalous situation of a rule denying contempt enforcement to alimony judgments on the ground that they are "judgment debts,"[160] based on a line of cases reasoning that contempt enforcement was unnecessary because an alimony judgment was "an absolute personal judgment, which is collected by execution as other judgments."[161] This rule now exists alongside rules requiring that a second judgment be obtained before an alimony judgment can be enforced by execution and denying that alimony judgments have the same effect as other judgments as far as the general judgment lien statute is concerned. Collectively, these rules present a curious implementation of the legislative policy expressed in the provision of the Dissolution of Marriage Act that the terms of a decree for maintenance, support, and property division "may be enforced by *all remedies available for enforcement of a judgment including but not limited to contempt.*"[162] This provision clearly expresses a legislative judgment that judgments for support of a spouse or children should be *more* readily enforceable than other money judgments, rather than less.

The limitations now placed on enforcement of support judgments by contempt and by execution serve to underscore the importance of the question expressly reserved in *Uhrich*: whether a lien may be *expressly created* in a decree under the Dissolution of Marriage Act.[163] Section 15 of the Act expressly authorizes the trial court to "provide for such security, bond or other guarantee that shall be satisfactory to the court to secure the obligation to make child support payments or to secure the division of property."[164] The language of this provision is certainly broad enough to cover the

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[157]*See* H. CLARK, LAW OF DOMESTIC RELATIONS § 14.10 (1968).

[158]*See* cases collected in Annot., 59 A.L.R.2d 656, 678 (1958).

[159]H. CLARK, LAW OF DOMESTIC RELATIONS § 14.10 (1968).

[160]State *ex rel.* Schutz v. Marion Superior Court, 261 Ind. 535, 538, 307 N.E.2d 53, 55 (1974).

[161]Musselman v. Musselman, 44 Ind. 106, 122 (1873).

[162]IND. CODE § 31-1-11.5-17(a) (1976) (emphasis added).

[163]362 N.E.2d at 1164 n.2.

[164]IND. CODE § 31-1-11.5-15 (1976). Note this section makes no provision for securing *maintenance* payments.

creation of a lien.[165] It also suggests that in all cases where the collectibility of a financial award is in doubt, the parties should insist that the decree contain adequate security provisions. Since under *Uhrich* no automatic lien results from a money judgment in a dissolution action, the parties must attempt to protect themselves through the fullest possible use of the courts' power to provide security under section 15.

D. Paternity

In *J.E.G. v. C.J.E.*,[166] the natural mother filed a verified petition alleging that J.E.G. was her eight-month-old child's father. At the request of the mother's attorney, the court issued a warrant for J.E.G.'s arrest. Two months later, J.E.G. was arrested and detained for eight days before being brought before the court. Although he conferred with an attorney, none entered an appearance to represent him in the paternity proceeding. At the hearing, J.E.G. stated under oath that he was "pretty sure that it [the child] is mine," and later, when asked if he acknowledged the child to be his, he answered, "Yes."[167] Judgment of paternity was entered based solely on this admission.[168] On appeal, the Second District Court of Appeals reversed the judgment, holding that both the arrest and the detention were unreasonable, that the admission of paternity was tainted by the illegal arrest and detention, and therefore the admission could not properly constitute the sole basis for the judgment. Judge Buchanan dissented on the ground that the exclusionary rule should apply only to criminal proceedings.[169]

Since the mother did not participate in the appeal, Judge Sullivan's majority opinion proceeded on the premise that J.E.G. needed only to make out a prima facie case of reversible error in order to be entitled to reversal. On this basis, the court noted that there was nothing in the record to show that the trial court had probable cause to believe that J.E.G. was the putative father *and* that he would not respond to a summons. Even though the paternity statutes specifically authorize issuance of an arrest warrant in lieu of a summons,[170] the constitutional prohibitions against unreasonable searches and seizures[171] require probable cause in civil as well as

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[165]In other jurisdictions, courts have generally upheld the power of courts to create liens under similar statutes. *See* cases collected in Annot., 59 A.L.R.2d 656, 680-81 (1958).

[166]360 N.E.2d 1030 (Ind. Ct. App. 1977).

[167]*Id.* at 1033.

[168]*Id.* at 1032.

[169]*Id.* at 1037-38.

[170]IND. CODE § 31-4-1-13 (1976).

[171]U.S. CONST. amends. IV, XIV; IND. CONST. art. 1, § 11.

criminal cases. Without a showing that the more drastic arrest warrant was necessary in order to effect the public interest in assuring support of illegitimate children, the arrest was unreasonable. The detention was also unreasonable, since it was not necessary to the acquisition or retention of jurisdiction over the defendant or to assure satisfaction of any judgment that might be obtained.[172]

Relying on United States Supreme Court cases decided in the context of criminal proceedings,[173] the majority held that the illegal arrest and detention required suppression of the defendant's admission, leaving no evidence to support the trial court's judgment of paternity. It was on this point that Judge Buchanan dissented; the exclusionary rule should be confined to criminal proceedings and should not be extended to proceedings essentially civil in nature. He pointed out that the purpose of a paternity proceeding is not "to impose a fine, a forfeiture or imprisonment," but to assure that the child involved is supported from the time of its birth.[174] Conceding that J.E.G.'s arrest *may* have been illegal, Judge Buchanan would hold society's interest in the child sufficient to require admission into evidence of J.E.G.'s acknowledgement of paternity.

The exclusionary rule applied to this case was not the more familiar *Miranda* rule, which is based on the fifth amendment provision that no person "be compelled in any *criminal case* to be a witness against himself."[175] That rule clearly would have no application in a civil proceeding. The exclusionary rule applied in *J.E.G.*, however, is based upon the defendant's fourth amendment right to be secure against "unreasonable searches and seizures,"[176] and there

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[172]The statute authorizes a court to require a putative father to post a pre-trial bond and provides that the bond can be declared forfeited if he fails to appear. The proceeds of the bond may then be "put in suit" by the person in whose favor a judgment for money is rendered. IND. CODE § 31-4-1-14 (1976). Statutes also authorize enforcement of a judgment by contempt or by requiring a post-judgment bond. *Id.* §§ 31-4-1-20, -22. In light of these provisions, and in the absence of anything in the record indicating any necessity for detention, the majority held the detention to be unreasonable.

[173]Brown v. Illinois, 422 U.S. 590 (1975) (murder); Wong Sun v. United States, 371 U.S. 471 (1963) (sale of narcotics).

[174]State *ex rel.* Beaven v. Marion Juvenile Court, 243 Ind. 209, 184 N.E.2d 20 (1962), *cited in* J.E.G. v. C.J.E., 360 N.E.2d 1030, 1038 (Ind. Ct. App. 1977) (Buchanan, J., dissenting).

[175]U.S. CONST. amend. V (emphasis added). This provision, as well as the right to counsel, *id.* amend. VI, was the basis for the exclusionary rule announced in Miranda v. Arizona, 384 U.S. 436 (1966). The Indiana paternity statutes contain on analogous provision that the putative father "shall not be compelled to give evidence." IND. CODE § 13-4-1-16 (1976).

[176]U.S. CONST. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and

is nothing in the nature of the right or the language of the fourth amendment which would foreclose its application to non-criminal proceedings.[177] It is therefore a question of policy whether abuse of the statutory authorization for issuing arrest warrants in paternity cases is sufficiently serious to justify excluding admissions resulting from illegal arrest and detention. Although no criminal penalties follow from a determination of paternity, it does impose a substantial and continuing obligation of support, enforceable by imprisonment for contempt. Where an admission of paternity is given, as in this case, under circumstances which at least cast doubt upon its voluntariness,[178] it does seem a slender thread upon which to hang so heavy a liability. Excluding such an admission serves to discourage the careless or unnecessary use of arrest and detention in paternity cases.

IX. Evidence

*William Marple**

A. Opinions

In *Williams v. State*,[1] the Indiana Supreme Court held that "[a]n opinion by an expert witness upon an ultimate fact in issue is not excludable for that reason."[2] The court also held that lay witness opinion testimony concerning an ultimate fact issue is also permissible within the discretion of the trial court.[3] The *Williams* holding appears to conflict with *Strickland v. State*,[4] a later decision by the

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no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[177]The Supreme Court has held that the fourth amendment right (though not the exclusionary rule) is applicable to administrative searches not related to criminal prosecution. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967) (refusal of entry to city housing inspectors checking for violation of building occupancy permit).

[178]The involuntary nature of the confession resulting from illegal arrest is, at least in part, the basis for its exclusion. *See* Brown v. Illinois, 422 U.S. 590, 599 (1975).

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

[1]352 N.E.2d 733 (Ind. 1976).

[2]*Id.* at 714.

[3]*Id.* at 742 (citing Rieth-Riley Constr. Co. v. McCarrell, 325 N.E.2d 844 (Ind. Ct. App. 1975), *noted in* Marple, *Evidence, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 239, 245 (1975)).

[4]359 N.E.2d 244 (Ind. 1977).