VI. Domestic Relations

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A. Child Support

The law of child support received a healthy dose of development during the survey period, yielding both case precedent and legislative enactments with significant import.

1. Nonconforming Child Support and the No-Credit Rule.—Prior to the survey period, Indiana's appellate tribunals had, with one exception, invoked the letter of the rule that child support must be rendered in the same manner and amount and at the same times as required by the support order.[1] In *Castro v. Castro*[2] and *Payson v. Payson*,[3] however, the third and fourth districts of the court of appeals took issue with that broadly stated proposition. In both cases, noncustodial parents had been ordered to make support payments via the clerks' offices. Each instead made payments directly to the custodial parent; *Payson* also involved rental payments tendered to the custodial parent's landlord in lieu of child support. The evidence in both cases included acknowledgements by the custodial parent that nonconforming payments had been tendered and accepted. In subsequent contempt proceedings, both noncustodial parents were granted credit for the nonconforming payments. Both decisions were affirmed on appeal.

Both districts of the appeals court recognized that an unyielding application of the no-credit rule would elevate form over substance. In *Payson*, the unanimous court stated:

> In a situation where, as here, the parties have *agreed to and carried out an alternate method of payment which substantially complies with the spirit of the original support decree*, we find it would be unfair to refuse to credit the non-custodial parent simply because the payments were not made through the clerk.[4]

The court in *Payson* noted that "an order making a support award payable

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[1] *See, e.g.*, Breedlove v. Breedlove, 421 N.E.2d 739 (Ind. Ct. App. 1981); Whitman v. Whitman, 405 N.E.2d 608 (Ind. Ct. App. 1980); Jahn v. Jahn, 179 Ind. App. 368, 385 N.E.2d 488 (1979); Stitle v. Stitle, 245 Ind. 168, 197 N.E.2d 174 (1964). *But see* Franklin v. Franklin, 169 Ind. App. 537, 349 N.E.2d 210 (1976) (noncustodial parent given credit for actual support provided while the minor child was in his physical custody, albeit technically in violation of the court's custody and visitation orders).

[2] 436 N.E.2d 366 (Ind. Ct. App. 1982).

[3] 442 N.E.2d 1123 (Ind. Ct. App. 1982).

[4] *Id.* at 1129.

to the clerk [is] 'merely directory' and further, that it would be unreasonable to disallow payments made by an obligated father at the request of the mother."[5]

Because the factual circumstances of both *Castro* and *Payson* inherently appealed for an equitable exception, the court shrank from a doctrinaire application of the rule, observing that it is "contrary to the basic grain of American jurisprudence and perhaps arrogates to the judicial system an importance in the daily lives of ordinary people which we neither do, nor should, enjoy."[6] However, the court did not reject outright the no-credit rule; it merely refused its application to the facts at hand.[7] Consequently, the holdings in *Castro* and *Payson* stand for the proposition that courts may abandon the no-credit rule when the parties have entered into an ex parte agreement abrogating the official support order.

In *Olson v. Olson*,[8] decided subsequent to *Castro* and *Payson*, the second district of the court of appeals refused to offset a noncustodial parent's overpayments toward his general support obligation against arrearages on his court-ordered responsibility to assist with a minor child's education.[9] The court acknowledged that the purpose of providing regular and uninterrupted income for the child's benefit would not be contravened, but denied credit and declared that the overpayments constituted a "voluntary contribution."[10]

Olson reflects a prudent predilection to permit only narrow exceptions to the no-credit rule. That reluctance is born not only from the desire to ensure that the best interests of the children are protected, but also from the concomitant concern that some workable legal guidelines remain for support enforcement.[11] Practitioners consequently should continue to emphasize to clients that support should be rendered in the amount, manner, and at the times required by the court order and that any contemplated deviation from the terms of a court order should be

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[5]*Id.* at 1128 (citing Manners v. State, 210 Ind. 648, 652, 5 N.E.2d 300, 302 (1936)).

[6]436 N.E.2d at 367, *quoted in Payson*, 442 N.E.2d at 1128.

[7]Both decisions expressly reaffirmed the rule that credit should not be permitted for incidental support provided directly to children in the form of toys, clothing, or entertainment. While the *Castro* court also endorsed the holding in Jahn v. Jahn, 179 Ind. App. 368, 385 N.E.2d 488 (1979) that no credit should be granted for "actual" support provided by a noncustodial parent during the minor child's short visits, its analysis likewise buttresses the holding in Franklin v. Franklin, 169 Ind. App. 537, 349 N.E.2d 210 (1976) that credit should be granted for support provided during extended periods in which a minor child resides with the noncustodial parent.

[8]445 N.E.2d 1386 (Ind. Ct. App. 1983).

[9]*Id.* at 1389-90.

[10]*Id.* at 1390. The obligated parent's overpayments toward his general support obligation occurred when he continued to pay support for an emancipated child under a *divided* support order for several children. *Id.* at 1389.

[11]*See* Whitman v. Whitman, 405 N.E.2d 608, 613 (Ind. Ct. App. 1980) (jurisdictions allowing discretion to give credit for nonconforming payments have found it impossible to develop guidelines for the exercise of such discretion).

preceded by a formal modification of the order. In addition, documentary proof of nonconforming support should be compiled and maintained. Given the fact-sensitive nature of the issue, the question whether credit should be granted and the extent thereof will in many circumstances become an evidentiary question.[12]

2. Emancipation.—Absent a special finding by the court that a child is incapacitated or warrants support for educational needs, the duty to support a minor child either "ceases when the child reaches his twenty-first birthday"[13] or is terminated by the emancipation of the child.[14] The legal obligation to support the child ceases by operation of statutory law;[15] modification or termination of the duty to support the child who reaches 21 or is in fact emancipated is not necessary.[16]

The consequences of a failure to recognize the automatic termination of a support obligation were at issue in *Olson v. Olson*.[17] There, the father had been ordered to pay periodic support for each of his three minor children. He was also ordered to pay the children's college expenses. While attending college, the oldest child reached age twenty-one; the father nonetheless continued to make the periodic payments toward the general support obligation of the oldest child, in addition to assuming the costs of his college education. In subsequent proceedings, the father sought credit against support arrearages for payments to his oldest son's general support rendered subsequent to the son's twenty-first birthday. The trial court denied credit.[18] On appeal, the court of appeals upheld the denial, ruling that "[u]nrequired payments made by a non-custodial parent for the benefit of children must be considered a gratuity or a voluntary contribution."[19] At the same time, the court of appeals observed that because the order for support of the three minor children had not been formulated in gross, the obligated parent could have "justifiably ceased" the general support payments for the oldest child on his twenty-first birthday, although the

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[12]In his dissenting opinion in *Castro*, Judge Staton argued that credit for nonconforming support should not be granted absent documentary evidence that the claimed support had been provided. 436 N.E.2d at 369 (Staton, J., dissenting). The majority in *Castro* expressly rejected this approach, *id.* at 368, as did the court in *Payson*. 442 N.E.2d at 1129.

[13]IND. CODE § 31-1-11.5-12(d) (1982).

[14]*Id.* § 31-1-11.5-12(d)(1).

[15]Ross v. Ross, 397 N.E.2d 1066 (Ind. Ct. App. 1979).

[16]Two exceptions have been recognized. First, a parent who is obligated to pay an amount in gross for the support of several children may not reduce his support obligation pro rata to reflect a minor child's emancipation or attainment of the age of majority. *Id.* at 1069-70. Second, the obligated parent who ceases support payments for a child on the basis of his emancipation risks the potential of a subsequent judicial determination that emancipation has not in fact occurred. Whether a child is emancipated often requires "the resolution of both legal and factual issues—a determination to be made by the trial court." *Id.* at 1069 n.4.

[17]445 N.E.2d 1386 (Ind. Ct. App. 1983).

[18]*Id.*

[19]*Id.* at 1389.

general support order had been decreed to continue "until further order of Court."[20]

As the *Olson* court noted, the prudent approach is to seek a court order which terminates the general support obligation.[21] This is particularly true when the termination is premised on the child's emancipation, because emancipation determinations involve both factual and legal issues.[22]

In that regard, the court of appeals in *Green v. Green*[23] held that the marriage of a minor child is, as a matter of law, an emancipating event.[24] The minor child in that case had married but was separated from her spouse and in the process of obtaining a divorce. Seeking to perpetuate the support duty, the custodial parent attempted to introduce evidence that by virtue of the child's marital separation, she in fact remained dependent upon her parents for support. The trial court refused to admit the testimony and found the child emancipated. The court of appeals affirmed, stating:

> [t]he salient failure of [emancipating] situations is [that] the child creates a new relationship between itself and its parent, relieving the parent from the responsibilities of support. Marriage of a minor child creates a similar relationship. Once married, a dependent spouse no longer looks to its parent for support but relies instead upon the other spouse for support.[25]

3. Modifications of Support Orders and the Effective Date Thereof.—Indiana has long held that modification or cancellation of an existing support order may only operate prospectively.[26] Retroactive modification of support has been rejected on the basis that once a support installment has accrued under a court's order, the court is without authority to annul or reduce the effect of its order.[27] The companion question of whether a modification order may be made effective as of the date a petition to modify is filed was addressed in *In re Marriage of Wiley*[28] and *Green v. Green*.[29] In opinions handed down the same day, the second and fourth districts of the court of appeals addressed this question of

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[20] *Id.*

[21] *Id.*

[22] Ross v. Ross, 397 N.E.2d 1066, 1069 n.4 (Ind. Ct. App. 1979); *see* Isler v. Isler, 422 N.E.2d 416, 419 (Ind. Ct. App. 1981).

[23] 447 N.E.2d 605 (Ind. Ct. App. 1983).

[24] *Id.* at 609-10.

[25] *Id.* at 609 (citation omitted).

[26] *See, e.g.*, Abner v. Bruner, 425 N.E.2d 716 (Ind. Ct. App. 1981); Haycraft v. Haycraft, 176 Ind. App. 211, 375 N.E.2d 252 (1978); Kniffen v. Courtney, 148 Ind. App. 358, 364, 266 N.E.2d 72, 76 (1971).

[27] Jahn v. Jahn, 179 Ind. App. 368, 370, 385 N.E.2d 488, 490 (1979).

[28] 444 N.E.2d 315 (Ind. Ct. App. 1983).

[29] 447 N.E.2d 605 (Ind. Ct. App. 1983).

first impression and adopted positions in irreconcilable conflict, thereby rendering the issue ripe for review by the Indiana Supreme Court.[30]

In *Wiley*, the trial court found a substantial and continuing change in the relative economic circumstances of the parties which warranted modification of the existing support order. The trial court ordered the modification effective as of the date of the hearing on the petition to modify. The second district reversed the trial court's determination that a modification was warranted and remanded the issue for redetermination,[31] but it affirmed the court's authority to order modification to relate back to the hearing date. Judge Shields explained:

> Here Husband filed a petition to modify, signaling an apparent significant and continuing change in circumstances warranting a modification of the dissolution decree. *This fact differentiates this case from one where a trial court grants modifications for payments due and payable prior to the filing of the petition to modify.*[32]

To buttress its conclusion, the court observed that both the Uniform Marriage and Divorce Act and the majority of those jurisdictions which have considered the question permit the trial court to make a modification effective as of the date the petition is filed.[33]

In *Green*, the fourth district did not address the distinction drawn in *Wiley* between support installments which have accrued prior to the filing of a petition and those which come due thereafter. Rather, the court of appeals focused solely on the appellant's contention that, pursuant to *Bill v. Bill*,[34] the trial court had erred in failing to order the increase in support effective as of the date the petition was filed. *Bill* stands for the proposition that a provisional order of support entered in conjunction with a dissolution action may be made effective as of the date of the parties' separation.[35] The fourth district rejected the appellant's reliance on *Bill*, stating that

> an interim award of support is often necessary to insure continued support for dependent minor children. . . .
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> A different factual setting is present when modification of

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[30]*See* IND. R. APP. P. 11(B)(2)(b), (c). Transfer was sought in *Green* but denied by the Indiana Supreme Court.

[31]444 N.E.2d at 320.

[32]*Id.* at 318 (emphasis added).

[33]*Id.* (citing UNIFORM MARRIAGE AND DIVORCE ACT § 316, 9A U.L.A. 183 (1979); Trezevant v. Trezevant, 403 A.2d 1134 (D.C. 1979); Movius v. Movius, 163 Mont. 463, 517 P.2d 884 (1974); Goodman v. Goodman, 173 Neb. 330, 113 N.W.2d 202 (1962); Annot., 52 A.L.R.3D 156, 165 (1973); Annot., 6 A.L.R.2D 1277, 1328 (1949)).

[34]155 Ind. App. 65, 290 N.E.2d 749 (1972).

[35]*Id.* at 74-75, 290 N.E.2d at 754.

> an existing support order is sought. When a parent is paying support pursuant to a valid order the status quo is maintained and there is no need to alter those payments until the court determines that a modification is necessary.[36]

The conflicting rulings in *Green* and *Wiley* need to be resolved judicially. *Green* should be overruled because it is not always true that simply because an existing support order is in effect, the status quo will be maintained. Discretion should be vested in the trial court to make a modification effective as of the time the petition was filed or any subsequent date.[37]

4. Evidence—Clerk's Support Records.—Whenever a court orders that child support payments be made via the clerk's office, the clerk is required to "maintain records listing the amount of such payments, the date when payments are required to be made, and the names and addresses of the parties affected by the order."[38] However, *Payson* held that these records are not subject to judicial notice and must be admitted before they are subject to court consideration.[39] The court of appeals based its ruling on the fact that the record of support payments is not among those matters which the law compels the clerk to include within the pleadings, papers, and documents constituting the court's record of a particular cause.[40]

The court's reasoning is buttressed by sound pragmatic considerations. The prohibition against judicial notice of support records ensures that the mathematical computations necessary to determine a support arrearage will be subject to the scrutiny of both parties.[41] The examination of the support records, although mechanical, provides a catalyst for the adjudication of any claims that credit should be granted for nonconforming support or that the noncompliance is not the product of contemptuous behavior. Lastly, the admission of the support records provides a basis for intelligent appellate review of the trial court's determination.

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[36]447 N.E.2d at 608.

[37]The better practice for a party seeking such an effective date would be to plead and prove the specific time when the circumstances changed, thereby providing a basis for the court's exercise of discretion. *See* Grundy v. Grundy, 589 S.W.2d 776 (Tex. Civ. App. 1979).

[38]IND. CODE § 31-1-11.5-13(b) (Supp. 1983).

[39]442 N.E.2d at 1129-30. A custodial parent seeking to establish a support arrearage or basis for contempt should obtain a certified copy of the support records and tender it as evidence at the hearing. A certified copy of the clerk's support records is admissible pursuant to IND. CODE § 34-1-17-7 (1982).

[40]Neither IND. CODE § 31-1-11.5-13 (Supp. 1983) nor IND. R. TR. P. 77 specifically require the clerk to include the record of support payments into the case record. 442 N.E.2d at 1129-30. It is the inclusion of a document in the record of a case which renders it appropriate for judicial notice as a court record. State v. Simpson, 166 Ind. 211, 215, 76 N.E. 544, 545 (1906).

[41]*See* 442 N.E.2d at 1130 n.6.

5. Enforcement and URESA.—During the survey period, the General Assembly enacted two statutory amendments concerning the enforcement of support obligations. First, the legislature provided that upon application by the obligee of delinquent support payments, the court may award interest charges not exceeding one and one-half percent per month on the delinquent amount.[42] Enforcement of the interest award may be had in the same manner as is available for any other support obligation.[43]

The existence of a delinquency is a prerequisite to the award of interest; the statutory amendment does not authorize the trial court to award interest prospectively in contemplation of default.[44] Nor does the amendment mandate that interest be awarded once a delinquency is established. Rather, the issue is reserved to the discretion of the trial court.[45] While the statutory enactment is silent as to guidelines for the court's exercise of discretion, the experiences of other jurisdictions suggest that relevant factors should include whether the delinquency is the product of contemptuous behavior,[46] as well as other equitable considerations.[47] An award of interest bears obvious potential as a coercive measure in contempt proceedings.

The General Assembly's second enactment concerning child support removed discretion from the trial court in the context of enforcement proceedings initiated by the Title IV-D agency.[48] The act requires that when a particular amount of arrearage accumulates within a certain time frame, the court must order an assignment of wages if the IV-D agency requests it.[49] The assignment is then withheld "prior to all other assignments, orders of garnishment, and attachments."[50]

Whether seeking the implementation of the new mandatory proviso or the discretionary authority of the court, those pursuing the remedy

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[42]Act of Mar. 23, 1983, Pub. L. No. 280-1983, § 1, 1983 Ind. Acts 1762, 1763 (codified at IND. CODE § 31-1-11.5-12(e) (Supp. 1983)).

[43]IND. CODE § 31-1-11.5-12 (Supp. 1983).

[44]*Id.*

[45]*Id.*

[46]*See, e.g.*, Myhre v. Myhre, 296 N.W.2d 905 (S.D. 1980).

[47]*See, e.g.*, McClure v. Dowell, 15 Utah 2d 324, 392 P.2d 624 (1964).

[48]Act of Apr. 18, 1983, Pub. L. No. 281-1983, §§ 1-2, 1983 Ind. Acts 1763, 1764-65 (codified at IND. CODE §§ 31-1-11.5-13, 31-6-6.1-16 (Supp. 1983) (former section concerns support due via the Dissolution of Marriage Act; latter governs support due via the Paternity Act)).

[49]The statute imposes this requirement when an obligor is

(A) at least thirty (30) consecutive days in arrears;

(B) in arrears in the amount of one (1) month's obligation within the last preceding two (2) months; or

(C) in arrears in the amount of two (2) months' obligation within the last preceding six (6) months;

IND. CODE § 31-1-11.5-13(e)(2) (Supp. 1983). Only subsections (A) and (B) trigger the automatic wage assignment when the delinquency relates to a duty to support via the Paternity Act. IND. CODE § 31-6-6.1-16(e)(2) (Supp. 1983).

[50]*Id.* §§ 31-1-11.5-13(e)(2), 31-6-6.1-16(e)(2).

of a wage assignment should be cognizant of *Bowmar Instrument Corp. v. Maag*.[51] In that case, the noncustodial parent had been ordered to execute a wage assignment to satisfy arrearages on his support obligation. Ostensibly unaware that the employer was implementing the assignment, the custodial parent instituted contempt proceedings to enforce the court-ordered wage assignment. Following a hearing, the court ordered the corporation to comply with the assignment, found it was not in contempt, and denied its application for attorney fees. On appeal, the court of appeals reversed "because no personal jurisdiction of Bowmar was acquired in any of the proceedings leading up to the contempt citation."[52]

The reasoning behind the reversal appears confused. On the one hand, the court of appeals deemed inapplicable Trial Rule 71's requirement that "when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party."[53] Thereafter, the court continued:

> Here, although IC 31-1-11.5-13 grants the court authority to require an employer to accept a wage assignment, the separate and distinct interests of such an employer require that it be properly subjected to personal jurisdiction before the court may exercise its authority vis-a-vis the employer.
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> Since Bowmar was never served with process and the court had acquired no personal jurisdiction of it at the time of the contempt proceeding, it follows that Bowmar was not in contempt and the trial court lacked jurisdiction for the other orders it entered against Bowmar.[54]

Given the vagueness of its factual recitation and analysis,[55] two possible interpretations of this holding emerge. The decision could require that personal jurisdiction be obtained over an employer in conjunction with the proceedings in which the wage assignment is executed; likewise, it could require that jurisdiction be obtained at the time proceedings are instituted to enforce the wage assignment.[56] In short, *Bowmar* needs clarification.

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[51]442 N.E.2d 729 (Ind. Ct. App. 1982).

[52]*Id.* at 730.

[53]IND. R. TR. P. 71.

[54]442 N.E.2d at 731.

[55]It is unclear whether the reversal was warranted because of a lack of personal jurisdiction over Bowmar in the proceedings prior to the contempt action or in conjunction with the action itself.

[56]Ostensibly, the court's rejection of the application of Trial Rule 71 would suggest that the service of process and acquisition of personal jurisdiction should be accomplished at the time the wage assignment is executed—or at least prior to its implementation. Practically speaking, it is via the implementation of the assignment that a court exercises authority "vis-a-vis the employer." 442 N.E.2d at 731.

Applying the Uniform Reciprocal Enforcement of Support Act (URESA),[57] complementary decisions were rendered in *County of Ventura v. Neice*[58] and *D.L.M. v. V.E.M.*,[59] regarding the principles of full faith and credit and res judicata. In both instances, courts of other jurisdictions had entered judgments of paternity and concomitant orders of support, URESA actions subsequently were initiated in Indiana, and the respondents filed motions to dismiss the enforcement actions which were granted by the trial courts. On appeal, the trial court's dismissal in *Neice* was reversed; however, the court's dismissal in *D.L.M.* was affirmed.

In *Neice*, respondent's motion to dismiss was accompanied by an affidavit and memorandum which attacked the factual validity of the California court's determination of paternity.[60] He also argued that 1) the California court had lacked personal jurisdiction over him; 2) the statute of limitations had run; 3) enforcement of the judgment would be inequitable; and 4) the support order was modifiable and therefore not entitled to full faith and credit.[61] In response, the court of appeals emphasized that full faith and credit precludes a collateral attack on a foreign judgment except on jurisdiction over respondent.[62] The court rejected the second and third arguments as lacking in jurisdictional bases,[63] but agreed that the modifiable nature of the California support order took its enforcement outside the purview of the full faith and credit clause.[64] The principles of comity embodied in URESA, however, prompted the court to conclude that the support order entered in California was entitled to recognition and enforcement.[65]

D.L.M. provides an interesting comparison to *Neice*. There, petitioner originally sought reciprocal enforcement of the foreign judgment and support order in 1976. At that time, the Indiana trial court refused enforcement of the foreign judgment and order, finding that respondent had not fathered the subject child. Three years later petitioner filed a second URESA action, again seeking enforcement of the foreign paternity judgment and accompanying support order. Respondent invoked the defense of res judicata, arguing that the second enforcement action was barred by the trial court's 1976 determination that he was not the child's father. Upholding the trial court's dismissal of the second URESA action, the court of appeals held that the petitioner had waived any error in the trial court's 1976 failure to grant full faith and credit to the foreign paternity

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[57] IND. CODE §§ 31-2-1-1 to -39 (1982).

[58] 434 N.E.2d 907 (Ind. Ct. App. 1982).

[59] 438 N.E.2d 1023 (Ind. Ct. App. 1982).

[60] 434 N.E.2d at 909. Neice maintained that it was factually impossible that he was the father of the child.

[61] *Id.* at 911.

[62] *Id.* at 910.

[63] *Id.* at 912-13.

[64] *Id.* at 913.

[65] *Id.*

judgment by failing to appeal that decision.[66] Noting that the trial court had jurisdiction in 1976, the court of appeals concluded that res judicata precluded petitioner from prosecuting her 1979 URESA action.[67]

In the wake of *Neice* and *D.L.M.*, practitioners should recognize that while a foreign determination of a duty to support is entitled to full faith and credit absent any jurisdictional defect, the failure to accord a judgment the constitutionally mandated effect is an error of law which does not render the URESA proceeding void, but merely voidable.[68] Just as a party seeking to invoke the full faith and credit doctrine has the burden of proving the existence of the prior foreign judgment,[69] so also does he have the burden of appealing an improper failure to apply the doctrine.

B. Child Custody

Preeminent among survey-period developments in the law of child custody was the General Assembly's enactment of provisions permitting the award of joint custody to the divorced parents of minor children. Other notable developments involve the modification of a child custody order and the application of the Uniform Child Custody Jurisdiction Act.

1. Joint Custody.—In recent years, the concept of joint custody[70] has gained increasing acceptance as a potential alternative to the traditional notion that custody must be vested solely in one parent. A majority of jurisdictions now recognize in particular circumstances that the "best interests of the child" may be served through joint custody.[71]

In *Lord v. Lord*,[72] the court of appeals reversed a trial court's award of joint custody because the custody statute did not authorize an award of joint custody to competing parties.[73] Shortly thereafter, the legislature amended the Dissolution of Marriage Act to recognize joint custody and define those circumstances in which it may be appropriate.[74]

The statutory polestar for joint custody is the "best interests of the child."[75] Indiana's statute creates no presumption either for or against

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[66]438 N.E.2d at 1028.

[67]*Id.* at 1029.

[68]*Id.* at 1028.

[69]*Id.* at 1027.

[70]Joint custody should not be confused with split custody, whereby siblings are separated through custody by different persons, or divided custody, whereby each parent has physical custody of a child for extended periods of time. *In re* Marriage of Ginsberg, 425 N.E.2d 656, 657-58 n.1 (Ind. Ct. App. 1981) (citing Miller, *Joint Custody*, 13 FAM. L.Q. 345 (1979)).

[71]At least twenty-five states now recognize joint custody by legislative decree. *See* Schulman, *"Who's Looking After the Children?"* 5 FAMILY ADVOCATE (pt. 2), 31-35 (ABA 1982). Some states have recognized the remedy by judicial fiat. *See, e.g.*, Lumbra v. Lumbra, 136 Vt. 529, 394 A.2d 1139 (1978).

[72]443 N.E.2d 847 (Ind. Ct. App. 1982).

[73]*Id.* at 849.

[74]Act of Apr. 18, 1983, Pub. L. No. 283-1983, § 1, 1983 Ind. Acts 1767, 1768 (codified at IND. CODE § 31-1-11.5-21 (Supp. 1983)).

[75]IND. CODE § 31-1-11.5-21 (Supp. 1983).

the award of joint custody. Rather, the legislature has dictated that the question is one which must be resolved on a case-by-case basis within the factual guidelines laid down in the statute.[76]

The definition which the legislature has accorded joint custody is also primary to the implementation of the statute. Joint custody does not denote equal physical custody of a child, but instead describes the right of the parents to share the authority and responsibility for "major decisions concerning the child's upbringing, including the child's education, health care, and religious training."[77] The distinction must be clear in the minds of the parties, however, for their ability to obtain and utilize the statutory remedy is directly dependent upon their mutual understanding of the post-dissolution relationship.[78]

The legislature has declared the fitness and suitability of the prospective custodial persons relevant to joint custody.[79] For obvious reasons, however, the willingness and ability of the parents "to communicate and cooperate in advancing the child's welfare"[80] has played a more crucial role in determining when joint custody is appropriate in other jurisdictions.[81] A general inability to communicate or cooperate often causes marriage dissolutions. The general relationship of the parties, however, is not at issue. Rather, the parties' communication with respect to their child is what bears on their suitability for joint custody.[82] Where parents indicate an ability to unite in actions and decisions that advance their child's welfare, joint custody may be appropriate. Where rancor or fundamentally distinct philosophies of child-rearing predominate, it is inappropriate.[83]

"[T]he wishes of the child and whether the child has established a close and beneficial relationship with both [parents]" are other statutory considerations.[84] The significance of a child's preference will depend upon various factors, particularly his age. Ultimately, joint custody requirements are designed to ensure that the child recognizes both parents as "sources of security and love."[85]

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[76]*Id.* § 31-1-11.5-21(g).

[77]*Id.* § 31-1-11.5-21(f).

[78]The ability to communicate and cooperate is one of the statutory factors which bears on the propriety of a joint custody award. *Id.* § 31-1-11.5-21(g)(2).

[79]*Id.* § 31-1-11.5-21(g)(1).

[80]*Id.* § 31-1-11.5-21(g)(2).

[81]*See, e.g.*, Wanser v. Wanser, 120 N.H. 436, 415 A.2d 881 (1980); Braiman v. Braiman, 44 N.Y.2d 584, 407 N.Y.S.2d 449, 378 N.E.2d 1019 (1978); *In re* Marriage of Clement, 52 Or. App. 101, 627 P.2d 1263 (1981).

[82]The statute indicates the parties' ability to communicate and cooperate is significant only insofar as it concerns the advancement of the child's welfare. IND. CODE § 31-1-11.5-21(g)(2) (Supp. 1983).

[83]*See, e.g.*, Beck v. Beck, 86 N.J. 480, 498-99, 432 A.2d 63, 72 (1981).

[84]IND. CODE § 31-1-11.5-21(g)(3) (Supp. 1983).

[85]*See* Beck v. Beck, 86 N.J. 480, 498, 432 A.2d 63, 71 (1981).

The geographic proximity of the parents represents the least subjective factor bearing on joint custody.[86] The ability to share physical custody and to cooperate and communicate effectively is affected by distance.[87] Equally as significant, close proximity provides the child with continuity of instruction in school and stability in his association with peers. This factor must have been especially important to the legislature, because any plans of a parent to change residence also figure into the court's assessment.[88]

The "nature of the physical and emotional environment in the home of each of the persons awarded joint custody" are also factors.[89] Stability and continuity should mark the life of the minor child, notwithstanding the dual homesteading which will probably accompany joint custody. To that end, markedly disparate lifestyles in the respective parents' homes may militate against an award of joint custody.

Finally, the General Assembly established that the parties' agreement to joint custody should be primary, but not determinative.[90] Even though the legislature has indicated that a joint custody award without an agreement would be dubious, joint custody should not be a vehicle of convenience or appeasement.[91] Indeed, circumstances justifying joint custody may only infrequently coalesce.

2. Modification of Custody and the "Whole Environment" Approach.—By statute, a child custody order may be modified "only upon a showing of changed circumstances so substantial and continuing as to make the existing custody order unreasonable."[92] In *Poret v. Martin*,[93] the Indiana Supreme Court ruled that the required change need not compel modification when viewed in isolation if the change warrants modification when examined in the context of the child's whole environment.[94]

In that case, the court determined that a review of circumstances existing at the prior custody determination was necessary to demonstrate the total effect of subsequent changes.[95] The court explained this approach as follows:

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[86]IND. CODE § 31-1-11.5-21(g)(4) (Supp. 1983).

[87]However, a significant distance between the prospective joint custodial parents should not necessarily defeat the award. *See* Bazant v. Bazant, 80 A.D.2d 310, 439 N.Y.S.2d 521 (1981).

[88]IND. CODE § 31-1-11.5-21(g)(4) (Supp. 1983). Ostensibly, the requirement of Marshall v. Reeves, 262 Ind. 107, 117, 311 N.E.2d 807, 813 (1974), that custodial parents who wish to move outside the state must obtain judicial sanction prior to the move would apply to both parents when joint custody is awarded.

[89]IND. CODE § 31-1-11.5-21(g)(5) (Supp. 1983).

[90]*Id.* § 31-1-11.5-21(g).

[91]The remedy should not be employed to dodge the difficult task of awarding sole custody to one of two competing parents nor to placate a parent's desire to extract his or her "share" of the marriage.

[92]IND. CODE § 31-1-11.5-22(d) (1982).

[93]434 N.E.2d 885 (Ind. 1982).

[94]*Id.* at 888.

[95]*Id.* at 888-89.

> Although a change in a custody order must be necessitated by a substantial change in conditions since the order was made, it does not follow that there must be such a change that it compels the change in and of itself. The change, if its effect upon the child is to be properly assessed, must be judged in the context of the whole environment. It is, after all, the effect upon the child that renders the change substantial or inconsequential; and a change that might be regarded as slight or inconsequential in one case might be catastrophic in another.[96]

The significance of this whole environment approach lies in its consideration of "all circumstances, *including those previously weighed*, in order to determine, in context, the substance of the change giving rise to the review."[97] On its face, this pronouncement may appear to contravene the statutory dictate that, in evaluating a modification petition, "the court shall not hear evidence on matters occurring prior to the last custody proceeding between the parties unless such matters relate to a change of circumstances."[98] However, because the previously weighed matters are considered in the context of showing a change in the child's environment, this approach does not subvert the res judicata principle behind the statute. This "whole environment" approach should not signal a departure from the statutory rule of evidence or the requirements for modification of a custody order; it only clarifies that courts must consider changes allegedly justifying modification in light of the child's entire factual context. Two districts of the Indiana Court of Appeals have quoted the *Poret* "whole environment" approach in affirming modification orders.[99]

3. Uniform Child Custody Jurisdiction Act.—The law of interstate custody disputes continued to evolve during the survey period. Of particular consequence was the Indiana Court of Appeals' decision in *In re Marriage of Hudson*,[100] where the fourth district confronted both jurisdictional and due process challenges to the trial court's disposition of custody. The court of appeals examined the complex factual circumstances[101] and

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[96]*Id.* at 888.

[97]*Id.* (emphasis added).

[98]IND. CODE § 31-1-11.5-22(d) (1982).

[99]Barnett v. Barnett, 447 N.E.2d 1172, 1175 (Ind. Ct. App. 1983); *In re* Marriage of Davis, 441 N.E.2d 719, 722 (Ind. Ct. App. 1982).

[100]434 N.E.2d 107 (Ind. Ct. App. 1982).

[101]The parties had been married in Bloomington, Indiana, in 1975, and resided there for approximately one and one-half years. The husband was enlisted in the United States Navy and was transferred to Iceland, where the parties lived for two and one-half years. They then moved to the state of Washington for nine months. Thereafter, the wife and children moved to Bloomington for one and one-half months; then to Washington for four months; and finally returned to Bloomington where they resided at the time the wife filed her petition to dissolve the marriage. Meanwhile, the husband had been transferred to Spain;

concluded that neither Indiana nor any other jurisdiction enjoyed home state status over the parties' custody battle, the first test of jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA).[102] Under the significant connection test, a corollary basis for jurisdiction under the UCCJA,[103] the trial court's jurisdiction was upheld because the parties had maintained marital residency in Indiana for one and one-half years, the current residence of the mother and children was in Indiana, and evidence of the past, present, and future residence of the children with their father in Spain was lacking. While the court of appeals recognized that Washington arguably also enjoyed subject matter jurisdiction by virtue of the parties' temporary stay in that state, the court noted that proceedings had not been instituted there and that, consequently, the question of competing jurisdictions was not at issue.[104]

The nonresident father also challenged the trial court's exercise of personal jurisdiction over him, alleging that it violated his due process rights. The court of appeals, in an extensive analysis of principles underlying the UCCJA and long-arm jurisdiction, held that a custody dispute "is in effect an adjudication of a child's status, which falls under the status exception of *Shaffer v. Heitner*."[105]

Unlike in *Hudson*, the question of competing jurisdictions was at issue in *In re Marriage of Cline*.[106] In that case, the parties had resided in Indiana during their marriage until final separation. When their marital relationship deteriorated, the wife returned to her parents' home in California, taking the parties' young child with her. Eight days later, the husband filed a petition for dissolution in the Dubois Circuit Court of Indiana and obtained an order awarding him custody of the child and enjoining the wife from interfering with his custody. The following day, he proceeded to California where authorities refused to enforce the order, prompting an incident which ultimately led to criminal charges against the husband. The husband returned to Indiana the following day. Two days later, the wife filed a petition for separation in a California court. Not until the following day did she receive a copy of the Dubois Circuit Court's restraining order. The wife then filed a motion to dismiss the Indiana proceedings. The Dubois Circuit Court held a hearing on the

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on the same day the dissolution petition was filed, the husband forcibly removed two of the parties' three children to Spain. *Id.* at 110.

[102]IND. CODE § 31-1-11.6-3(a)(1) (1982).

[103]*Id.* § 31-1-11.6-3(a)(2).

[104]434 N.E.2d at 117.

[105]*Id.* (citing Shaffer v. Heitner, 433 U.S. 186 (1977)). Disposition of this issue is comprehensively analyzed in Garfield, *Due Process Rights of Absent Parents in Interstate Custody Conflicts: A Commentary on* In re Marriage of Hudson, 16 IND. L. REV. 445 (1983). Professor Garfield characterizes the court's result as defensible under the UCCJA, *id.* at 448, but argues that a balance is needed between the child-oriented provisions of the UCCJA and the due process rights of the absent parent.

[106]433 N.E.2d 51 (Ind. Ct. App. 1982).

motion, communicated with the California court,[107] and declined to further exercise its jurisdiction. On appeal, the court of appeals found that the trial court had not abused its discretion in declining jurisdiction.[108]

The *Cline* ruling is an interesting one. Dubois Circuit Court had home state jurisdiction under the UCCJA because Indiana had been the child's residence "within six (6) months . . . of the proceeding and the child [was] absent from this state because of his removal or retention by a person claiming his custody."[109] Noting that the UCCJA was designed to limit—not expand—jurisdiction, the court of appeals upheld the abstention of the Dubois Circuit Court on the basis that California was the situs of the husband's alleged criminal behavior, that the wife was a battered spouse who had returned to her parents in California, that the husband had retained counsel in California,[110] and that medical records concerning the wife's alleged mental problems were available in California. Compared with the statutory forum non conveniens provisions of the UCCJA which emphasize the need for evidence concerning the child's best interests,[111] the factors present in *Cline* perhaps represent the outer limits of circumstances in which a trial court would be justified in refusing to exercise its jurisdiction. Tacit recognition of that conclusion lies in the court of appeals' acknowledgement that "if the California court determines that it is not an appropriate forum, we believe Indiana would have jurisdiction."[112]

Finally, the General Assembly amended section 23 of the UCCJA to provide substance to the international application of the Act.[113] Defined in the new statutory provisions are the international circumstances in which

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[107]The communication between California and Indiana represented a positive implementation of the interstate cooperation available under the UCCJA. *See* IND. CODE § 31-1-11.6-6(c) (1982).

[108]433 N.E.2d at 53.

[109]IND. CODE § 31-1-11.6-3(a)(1) (1982). Complementary considerations are contained in IND. CODE § 31-1-11.6-8 (1982), which governs the circumstances in which a court should decline to exercise jurisdiction. The statute provides that "[i]f the petitioner for an initial decree has wrongfully taken the child from another state," jurisdiction may be declined. In *Cline*, the husband argued that section 8 was relevant to the question of whether the DuBois Circuit Court had erred in declining jurisdiction. The court of appeals held that section inapplicable because the respondent, rather than the petitioner, of whom the statute speaks, removed the child. 433 N.E.2d at 53. A second and equally interesting aspect of the court of appeals' statutory analysis lies in its distinction between "unilateral" and "wrongful" removal as contemplated by the statute. *Id.* Absent an existing custody order, a parent's contemporaneous removal of a child and separation from a spouse would not be wrongful; however, section 8 specifically governs petitions for an initial decree, the very circumstance which the court ruled was outside the purview of the statute.

[110]This factor seems a querulous one, because the wife filed a motion to dismiss the Indiana proceedings and apparently had retained counsel here.

[111]*See* IND. CODE § 31-1-11.6-7(c) (1982).

[112]433 N.E.2d at 54.

[113]Act of Apr. 18, 1983, Pub. L. No. 284-1983, § 1, 1983 Ind. Acts 1774, 1775 (codified at IND. CODE § 31-1-11.6-23 (Supp. 1983)).

Indiana courts have jurisdiction to act, as well as the procedural steps which must be taken to invoke the jurisdiction of the court.[114]

C. *Visitation*

The subject of grandparents' visitation rights dominated developments in the law of visitation. Also of consequence was the court of appeals' decision that the doctrine of parent-child immunity does not preclude a negligence action against a noncustodial parent for injuries sustained by a minor child during visitation.

1. Grandparents' Visitation Rights.—In *In re Visitation of J.O.*,[115] the court of appeals refused to expand the availability of court-ordered grandparent visitation beyond the specific circumstances outlined in the statute permitting such orders. The statute allows grandparents to seek visitation when the child's mother or father is deceased or the marriage of the child's parents has been dissolved.[116] In *J.O.*, summary judgment was entered against a grandmother who sought visitation with a grandchild born out of wedlock to the petitioner's daughter. The decision was upheld based on a strict interpretation of the statute's requirements: inasmuch as the natural parents had never been married, the marriage of the child's parents was obviously not dissolved.[117] The court stated that "[c]ourts are not the proper forum for all inter-family disputes and we shall not open the doors of the court to resolve such personal problems as do not come within the statute relied upon."[118] In virtually identical circumstances, the *J.O.* decision was invoked in *In re Meek*,[119] where the trial court's refusal to grant summary judgment against the petitioning grandmother was reversed.

Consistent with the court's strict interpretation of the grandparents' visitation statute, the legislature has clarified and further limited the circumstances in which judicial intervention is available.[120] The amendment restricts a grandparent from seeking visitation against his own son or daughter; rather, each may only invoke court intervention vis-a-vis a son-in-law, daughter-in-law, or third party.[121] For example, maternal grandparents may seek visitation rights if their daughter is dead or if her mar-

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[114]IND. CODE § 31-1-11.6-23 (Supp. 1983).

[115]441 N.E.2d 991 (Ind. Ct. App. 1982).

[116]IND. CODE § 31-1-11.7-2 (1982).

[117]441 N.E.2d at 995.

[118]*Id.*

[119]443 N.E.2d 890 (Ind. Ct. App. 1983).

[120]Act of Apr. 19, 1983, Pub. L. No. 285-1983, § 1, 1983 Ind. Acts 1776, 1776 (codified at IND. CODE § 31-1-11.7-2 (Supp. 1983)).

[121]IND. CODE § 31-1-11.7-2 (Supp. 1983). The third party vulnerability to suit is arguable. Where the child of the petitioning grandparent is dead, the statute remains silent as to who is subject to court order. Where the marriage is dissolved, the statute offers suit against the former in-law with legal custody of the child.

riage was dissolved and her former husband has legal custody[122] of the child.

2. The Parent-Child Immunity Doctrine and the Noncustodial Parent.—Among the more problematic decisions rendered during the survey period was the court of appeals' decision in *Buffalo v. Buffalo*.[123] The parties' marriage had been dissolved for approximately three years when, while visiting his father during a visitation period, the minor child was bitten by the father's dog, and as a result suffered severe and permanent injuries. As custodial parent, the mother filed suit against the father to recover medical expenses and loss of service.[124] The minor child also sued his father for personal injuries. The trial court dismissed their complaints.

On appeal, the child argued that the parent-child immunity doctrine was "obsolete and should be abrogated in its entirety."[125] The court refused to go so far, deciding the case on the first-impression question of whether the doctrine barred an action in negligence against a noncustodial parent. Distinguishing cases where the marital relationship remained intact, the fourth district unanimously rejected application of the doctrine:

> The reasons underlying the parental immunity rule apply to [the mother] but cannot reasonably be said to apply to [the] father . . . .
>
> Father points out he had a right of visitation with his child in this case. He argues it would be confusing at best and "discrimination" to permit suit against the non-custodial parent but keep the custodial parent immune therefrom.
>
> We perceive no confusion arising from our decision. . . . There is no discrimination in the position we take today because visitation is not the equivalent of custody.[126]

The complete abrogation of parent-child immunity between the noncustodial parent and minor child runs against the legislature's trend to recognize that both parents can play an active role in a child's upbringing after dissolution.[127] When a minor child can sue his noncustodial parent, the law becomes a catalyst for hostilities which may ultimately prove adverse to the best interests of the child. While permitting the cause of action may serve the child's economic interests, allowing his testimony

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[122]The legislature's use of the term "legal custody," rather than the generic "custody," has significance. During the same legislative session, the General Assembly statutorily distinguished legal custody from physical custody in its joint custody provisions. *See supra* notes 70-91 and accompanying text.

[123]441 N.E.2d 711 (Ind. Ct. App. 1982).

[124]The support decree required the noncustodial father to pay the child's reasonable medical expenses. *Id.* at 712. The court did not explain whether the mother sought extraordinary medical expenses via her negligence action.

[125]*Id.*

[126]*Id.* at 713-14.

[127]*See supra* notes 70-91 and accompanying text.

against the noncustodial parent may cause severe and perhaps irreparable harm to that relationship.

In addition, the *Buffalo* ruling ignores the fact that noncustodial parents often enjoy extended periods of visitation where, as was recognized in *Lord v. Lord*,[128] "the non-custodial party must have some residual authority over discipline and health care when he or she has immediate physical control over the child."[129] Stripped of protection in the "bumps and bruises" world of children, the noncustodial parent will be vulnerable to vindictive, frivolous litigation, thus discouraging him from exercising visitation.

In short, the issue is not as simple as the *Buffalo* court would have it. The noncustodial parent's role in post-dissolution parenthood should be nurtured, not discouraged. The minor child's right to economic reimbursement by legal remedy should be balanced against the emotional best interests of the child. Litigation will likely be divisive and have lasting impact on the tripartite relationship.

D. Dissolution

1. Statutory Procedural Developments—Provisional Counseling and Enforcement of Orders.—The remedy of reconciliation through counseling was expanded by the General Assembly during the survey period. Effective September 1, 1983, a court may enter a provisional order requiring the parties to seek counseling "in an effort to improve conditions of their marriage."[130] Unlike the counseling the court may order at the final hearing, provisional counseling is available only upon a party's motion. In contemplating the provisional remedy, parties should not balk at the prospect of a lengthy delay because no time requirements are imposed on parties who implement the "one last try" legislation.[131]

The legislature also expanded the statutory provisions regarding the enforcement of orders entered pursuant to the Dissolution of Marriage Act, by providing that:

> all orders and awards contained in the dissolution decree may be enforced by:
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> (1) contempt;
> (2) assignment of wages; or
> (3) any other remedies available for the enforcement of a court order;
>
> except as otherwise provided by this chapter.[132]

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[128]443 N.E.2d 847 (Ind. Ct. App. 1982).

[129]*Id.* at 849 n.1.

[130]Act of Mar. 23, 1983, Pub. L. No. 278-1983, § 1, 1983 Ind. Acts 1759, 1760 (codified at IND. CODE § 31-1-11.5-7(e) (Supp. 1983)).

[131]The provisional remedy of counseling is complementary to the sixty-day waiting period which the law imposes as a prophylactic against hasty and ill-considered dissolutions.

[132]Act of Mar. 23, 1983, Pub. L. No. 282-1983, § 1, 1983 Ind. Acts 1766, 1766 (codified

This amendment is in response to the Indiana Supreme Court's 1977 interpretation of a similar statutory provision in *State ex rel. Pritam Singh Shaunki v. Endsley*.[133] The court in *Endsley* held that the earlier statutory language[134] did not render money judgments enforceable via contempt.[135]

2. Settlement Agreements.—Several developments during the survey period concerned the extent to which a trial court should be bound by the terms of a settlement agreement.

In *Stockton v. Stockton*,[136] the first district of the court of appeals extensively analyzed the role the trial court may adopt when confronted with a property settlement agreement. Noting that the *Stockton* agreement lacked specificity and contained a judgment provision of questionable fairness, the appellate court concluded that the trial court had not abused its discretion by rejecting the parties' agreement. Judge Ratliff described the standard for rejection as follows:

> The trial court should not reject a property settlement agreement arbitrarily or based upon whim or because the court believes it could write a better agreement. Unless the record demonstrates some unfairness, unreasonableness, manifest inequity in the terms of the agreement, or that the execution of the agreement was procured through fraud, misrepresentation, coercion, duress, or lack of full disclosure, the court should not second-guess the parties, particularly where both are represented by counsel.[137]

The limitation on the court's role envisaged in *Stockton* is reflected in *Hull v. Hull*.[138] There, the trial court had accepted a property settlement agreement which included a provision requiring the husband to maintain a country club membership for the wife and children. At the time of dissolution, the parties contemplated the continuance of their family membership; the country club subsequently informed them a family membership was not permitted after dissolution. The wife sought and was granted a court order requiring the husband to obtain an individual membership on her behalf. The husband appealed, arguing the original provision contained in the settlement agreement constituted an award of maintenance which, absent a finding of incapacity, was improper. The court of appeals agreed that the country club membership was a maintenance award; however, the court held that incapacity was not a prerequisite to an award of maintenance when the award is pursuant to a settlement agreement. The court explained that the statutory provisions

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at IND. CODE § 31-1-11.5-17(a) (Supp. 1983)).

[133]266 Ind. 267, 362 N.E.2d 153 (1977).

[134]IND. CODE § 31-1-11.5-17(a) (1982) (repealed 1983).

[135]266 Ind. at 269, 362 N.E.2d at 154.

[136]435 N.E.2d 586 (Ind. Ct. App. 1982).

[137]*Id.* at 589.

[138]436 N.E.2d 841 (Ind. Ct. App. 1982).

permitting agreements for maintenance "were not in any way limited to circumstances of financial or physical incapacity."[139]

The question of when an agreement in fact exists was considered in *Eddings v. Eddings*.[140] At the outset of the proceedings, the wife, while unrepresented by counsel, signed a document entitled "Agreement of Settlement" purporting to divide the marital estate. After retaining counsel, the wife repudiated the agreement both prior to and at the final hearing. The document was admitted at the final hearing and its provisions were merged and incorporated into the dissolution decree. The court of appeals summarily rejected the trial court's incorporation and merger of the "Agreement of Settlement." Relying on section 10 of the Dissolution of Marriage Act,[141] the court indicated that the agreement contemplated by the legislature must exist at the time the final hearing is held; until that moment, a party is free to reaffirm or renounce the agreement, even if consent has been previously indicated via written instrument.[142]

E. Property Division

The disposition of marital property was the subject of numerous incremental developments during the survey period. Indiana courts confronted the weight to be accorded a homemaker's contribution in the distribution of property, the definition of property and the valuation thereof for division purposes, the prerequisites of a "just and proper" award, and fraud.

1. The Homemaker's Contribution.—In *Temple v. Temple*,[143] the court of appeals held that, pursuant to section 11 of the Dissolution of Marriage Act, a trial court should consider the homemaking efforts of both spouses in assessing the contribution of each to the acquisition of the marital property. The court found "no justification for limiting this factor exclusively to a non-wage earner, primary home-making spouse."[144] In reaching its conclusion that a spouse's homemaking and wage-earning efforts are both relevant, the second district expressly rejected the postulate of *In re Marriage of Patus*[145] that the legislature intended the homemaker contribution to be considered only where an unemployed spouse has acted solely as the primary homemaker of the marital household.[146]

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[139] *Id.* at 843.

[140] 437 N.E.2d 493 (Ind. Ct. App. 1982).

[141] IND. CODE § 31-1-11.5-10 (1982).

[142] 437 N.E.2d at 494 (citing Anderson v. Anderson, 399 N.E.2d 391 (Ind. Ct. App. 1979) (an agreement is not binding on the parties until approved by the trial court)).

[143] 435 N.E.2d 259 (Ind. Ct. App. 1982).

[144] *Id.* at 262.

[145] 175 Ind. App. 459, 372 N.E.2d 493 (1978).

[146] *Id.* at 461, 372 N.E.2d at 495.

The factors which the legislature has decreed relevant to the disposition of marital property are designed to determine the extent to which each party has contributed to the accumulation of property.[147] The legislature recognized that homemaking functions figure significantly in the economic circumstances of a marriage. *Patus* was grounded on a concern that where the spouses made relatively equal contributions to homemaking and wage earning, final hearings would involve volumes of self-serving testimony regarding "who washed dishes, who took out the trash, who painted the house, [etc.]."[148] This is a valid concern. However, as the court in *Temple* implicitly recognized, the existence or extent of homemaking contributions to the economic circumstances of a marriage does not vary according to its source. In short, *Patus* and *Temple* may not conflict. The myriad of factual circumstances in which the homemaker factor might arise will require case-by-case analysis and a common sense application of the statute.

2. Property, Debts, and the Valuation Thereof.—The survey period provided incremental developments in the definition of marital property,[149] and valuation of assets and debts continued to gain attention.[150]

3. Property Awards.—Indiana has long adhered to the rule that the division of marital assets is a matter vested in the sound discretion of the trial court.[151] The survey period saw the rule cited as an adjunct to the "Herculean task" of property division[152] and condemned as so imprecise as to be meaningless in most instances.[153] Indeed, the survey period continued to reflect an unwillingness to overturn property distributions which were challenged on the basis that the percentage of property

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[147]*See* IND. CODE § 31-1-11.5-11(b) (1982).

[148]175 Ind. App. at 462, 372 N.E.2d at 496.

[149]Metropolitan Life Ins. Co. v. Tallent, 445 N.E.2d 990 (Ind. 1983) (group term life insurance policy void of cash surrender value and subject to continued employment is not subject to disposition); McNevin v. McNevin, 447 N.E.2d 611 (Ind. Ct. App. 1983) (opinion on rehearing) (vacating McNevin v. McNevin, 444 N.E.2d 320 (Ind. Ct. App. 1983)) (personal injury claim unliquidated at time of final separation is not marital property); Sedwick v. Sedwick, 446 N.E.2d 8 (Ind. Ct. App. 1983) (vested annuity structured for installment payments to the husband or his beneficiaries is marital property); Goodyear v. Goodyear, 441 N.E.2d 498 (Ind. Ct. App. 1982) (tax refund due to loss carryback deduction involving years when parties filed joint returns is not marital property because loss occurred after dissolution).

[150]Salas v. Salas, 447 N.E.2d 1176 (Ind. Ct. App. 1983) (property disposition struck down because trial court failed to consider indebtedness on parties' assets); Dean v. Dean, 439 N.E.2d 1378 (Ind. Ct. App. 1982) (trial court not required to attach a specific value to each marital asset prior to distribution); Whaley v. Whaley, 436 N.E.2d 816 (Ind. Ct. App. 1982) (trial court erred in failing to honor request to discount a judgment to present value).

[151]*See, e.g.*, Morphew v. Morphew, 419 N.E.2d 770, 779 (Ind. Ct. App. 1981); *In re* Marriage of Hirsch, 179 Ind. App. 166, 170, 385 N.E.2d 193, 196 (Ind. Ct. App. 1979).

[152]Temple v. Temple, 435 N.E.2d 259, 262 (Ind. Ct. App. 1982).

[153]Lord v. Lord, 443 N.E.2d 847, 850-51 n.4 (Ind. Ct. App. 1982).

awarded to the respective parties was not supported by the evidence.[154] By the same token, property dispositions reflecting an improper assessment of assets or liabilities[155] or an unauthorized form of award[156] continued to receive dispositive treatment at the appellate level. In this latter respect, it was held in *Whaley v. Whaly*[157] that an award of $137,200 cash payable in installments but conditioned upon the survivorship of the recipient spouse was an impermissible award of maintenance. The court of appeals held that absent an agreement between the parties, the award could not be conditioned on a subsequent change in circumstances.[158]

4. Fraud.—In *State ex rel. Smith v. Delaware Superior Court*,[159] the Indiana Supreme Court held that an action to set aside a property disposition due to fraud survives the death of a divorced party. The court rejected the contention that the action lay only in the probate proceedings of the deceased party, holding that section 17 of the Dissolution of Marriage Act constituted an exception to the general rule that divorce proceedings terminate with the death of either party.[160]

F. Paternity

Significant developments in the law of paternity occurred during the survey period.[161] The 1983 General Assembly amended section 8 of the Paternity Act to provide that if the state or a political subdivision initially pays for blood tests, those expenses are recoverable from an individual determined to be the biological father of the child.[162] The legislation is designed to recognize and accommodate the Department of Public Welfare's role in Title IV-D paternity actions. Pre-existing statutory authority had authorized trial courts to tax the expenses of blood tests as costs.[163] The legislature's action followed on the heels of the court of

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[154]*See, e.g.*, Lord v. Lord, 443 N.E.2d 847 (Ind. Ct. App. 1982) (division of 77%—23% upheld); Temple v. Temple, 435 N.E.2d 259 (Ind. Ct. App. 1982) (69%—31% split upheld); *see also* Dean v. Dean, 439 N.E.2d 1378 (Ind. Ct. App. 1982).

[155]*See supra* note 150.

[156]Whaley v. Whaley, 436 N.E.2d 816 (Ind. Ct. App. 1982).

[157]436 N.E.2d 816 (Ind. Ct. App. 1982).

[158]*Id.* at 819-20.

[159]442 N.E.2d 978 (Ind. 1982).

[160]*Id.* at 980.

[161]In *In re* M.D.H., 437 N.E.2d 119 (Ind. Ct. App. 1982), the Indiana Court of Appeals invoked the United States Supreme Court's analysis in Mills v. Habluetzel, 456 U.S. 91 (1982), and held that the two-year statute of limitations formerly applicable to paternity actions violated the equal protection clause of the United States Constitution. *See* IND. CODE § 31-4-1-26 (1976) (repealed 1979). Kennedy v. Wood, 439 N.E.2d 1367 (Ind. Ct. App. 1982), discussed the right to counsel in paternity cases. For a discussion of the *Kennedy* case, *see* Been & Donnella, *Constitutional Law, 1983 Survey of Recent Development in Indiana Law*, 17 IND. L. REV. 79, 107 (1984).

[162]ACT OF APR. 15, 1983, PUB. L. No. 291-1983, § 3, 1983 Ind. Acts 1796, 1797 (codified at IND. CODE § 31-6-6.1-8 (Supp. 1983)).

[163]IND. CODE § 31-6-6.1-8 (1982) (amended 1983).

appeals' conclusion in *Kennedy v. Wood*[164] that the then-existing statutory provisions for blood testing were constitutionally infirm.[165] This amendment allows the state to advance the expense of the tests which, in turn, could be taxed as costs to the parties once a determination is made, an approach which the United States Supreme Court has implicitly held constitutional.[166]

The statute was also amended to provide that "[t]he results of the tests, together with the finding of the expert, constitute conclusive evidence" if the defendant is excluded as the biological father.[167] Whatever the results and findings, however, they are admissible unless there is "good cause" to exclude them.[168] The statutory amendments reflect continuing confidence in the validity of blood testing.

G. Termination of Parental Rights

Reverberations from the 1982 United States Supreme Court decision in *Santosky v. Kramer*[169] continued to sound during the survey period. In *Van Hoosier v. Grant County Department of Public Welfare*,[170] the court of appeals remanded a determination to terminate parental rights for further consideration under the *Santosky* clear and convincing standard of proof. The trial court's determination rendered prior to *Santosky* contained no indication that the invalid preponderance of the evidence standard embodied in Indiana's statuory scheme had not been utilized.[171] Meanwhile, in *In re V.M.S.*,[172] the court of appeals held that the statutory prerequisite to the termination of parental rights requiring proof of "a reasonable probability that the conditions that resulted in the child's removal will not be remedied"[173] does not violate *Santosky*. Distinguishing between procedural due process and substantive due process,[174] the court of appeals ruled that the reasonable probability the conditions would not be remedied must be established by clear and convincing evidence. After analyzing the evidence, the court concluded that the standard of proof had been satisfied.[175]

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[164]439 N.E.2d 1367 (Ind. Ct. App. 1982).

[165]*Id.* at 1373-74.

[166]*See* Little v. Streater, 452 U.S. 1, 16-17 (1981).

[167]IND. CODE § 31-6-6.1-8(a) (Supp. 1983).

[168]*Id.* The statute creates a rebuttable presumption that results are to be admitted; the burden rests on the objecting party to establish that the results should be excluded.

[169]455 U.S. 745 (1982).

[170]443 N.E.2d 350 (Ind. Ct. App. 1982).

[171]*Id.* at 351. The invalid preponderance of the evidence standard is contained in IND. CODE § 31-6-7-13(a) (1982). Notwithstanding *Santosky*, the statute was not amended by the 1983 General Assembly.

[172]446 N.E.2d 632 (Ind. Ct. App. 1983).

[173]IND. CODE § 31-6-5-4(1) (1982).

[174]446 N.E.2d at 636.

[175]*Id.* at 641.

The requirement of a reasonable probability that conditions will not be remedied was also the subject of *In re Wardship of B.C.*,[176] where a divided Indiana Supreme Court reversed the court of appeals' ruling that the prerequisite had not been established. B.C. was removed from her mother's custody because her mother was afflicted with schizophrenia. Following the termination of her parental rights, the mother argued on appeal that the treatment she was receiving and the lack of evidence concerning the potential alleviation of her mental illness warranted reversal of the termination. The court of appeals agreed.[177] Its decision, which was rendered eight days prior to *Santosky*,[178] invoked the constitutionally doomed preponderance of the evidence standard. Seven months after *Santosky*, the Indiana Supreme Court granted transfer.[179] Ironically, the court did not cite *Santosky* or define the standard of proof it was applying. Instead, the majority simply held that the court of appeals' evidentiary analysis was incorrect,[180] not acknowledging that the lower appellate court's opinion was predicated on a standard of proof lesser than was constitutionally required.

The applications of *Santosky* in *Van Hoosier v. Grant County Department of Public Welfare*, *In re V.M.S.*, and *In re Wardship of B.C.* are irreconcilable. As per *Van Hoosier*, the *Santosky* principle should have been applied retroactively in *B.C.*, for the case was still pending review[181] and had been decided by the trial court utilizing a constitutionally invalid standard of proof, a matter which lies at the very heart of the fact-finding process.

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[176]441 N.E.2d 208 (Ind. 1982).

[177]433 N.E.2d 19, 22 (Ind. Ct. App.), *rev'd*, 441 N.E.2d 208 (Ind. 1982).

[178]The court of appeals' decision in *B.C.* was handed down March 16, 1982, *id.* at 19; *Santosky* was decided March 24, 1982. 455 U.S. at 745.

[179]Transfer was granted and the case was decided on the same date; November 4, 1982. 441 N.E.2d at 208.

[180]*Id.* at 211-12. As part and parcel of its evidentiary analysis, the court relied on case precedent decided prior to *Santosky* which had employed the preponderance of the evidence standard.

[181]As explained in Roberts v. Russell, 392 U.S. 293 (1968), and Linkletter v. Walker, 381 U.S. 618 (1965), a judicial decision of constitutional import which bears on the validity of the fact-finding process should be applied retroactively to cases pending direct review. *Accord* Enlow v. State, 261 Ind. 348, 303 N.E.2d 658 (1973).