Survey of Recent Developments in Family Law

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I. Introduction

A survey of recent developments in "family law" necessarily requires limitation upon the scope of review. The areas of juvenile law, grandparent visitation, paternity, and the guardianship jurisdiction of probate law, while coming within the purview of "family law," have been omitted from this Article. Rather, the focus will be upon the recent cases and legislation concerning dissolution and post-decree issues.

This review is organized around the three incidents of marriage—property, children, and spousal maintenance. The cases and legislation will be discussed according to the development or clarification they bring to these issues.

II. Property

Property division involves four broad questions: whether something *is* property; whether property is included within the marital estate; the valuation of property; and the distribution of property.[1] The following discussion will address twelve cases reported during the survey period concerning these property issues.

A. Is It Property?

Likening a disability pension to a retirement pension, the Court of Appeals for the Fourth District in *Gnerlich v. Gnerlich*[2] held that the right to receive private disability insurance payments is property includible within the marital estate. In *Gnerlich*, the husband was completely disabled and was drawing monthly insurance benefits. Tracing the insurance to contributions the husband had made during the marriage to a disability retirement plan, the trial court awarded the

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1. *See generally* Levy, *An Introduction to Divorce-Property Issues*, 23 Fam. L.Q. 147 (1989).

2. 538 N.E.2d 285 (Ind. Ct. App. 1989).

wife two-thirds of the monthly benefit.[3] The husband contended that the definition of "property" contained in the dissolution statute[4] should be narrowly construed, arguing that inasmuch as the statute did not specifically include disability pensions, the right to receive the benefits was not marital property. He characterized the benefits as future income which may not be considered part of the marital estate subject to division.[5]

The court, while recognizing that the disability benefits were contingent upon the husband's survival and, therefore, contained a compensatory element similar to future earnings, nevertheless held that the value of the disability benefits was property includible in the marital estate. Focusing upon the fact that the value was "readily ascertainable and susceptible to division," the court stated:

> Its nature is no more contingent or speculative than an ordinary retirement (longevity) pension—except for one contingency. The benefits depend on William's continued disability. However, because Faye was awarded a percentage of each payment, her interest expires with William's. This contingency does not make William's disability pension speculative or conjectural such that it may not be characterized as a marital asset. . . .[6]

While *Gnerlich* is significant for its broad, rather than narrow, statutory interpretation of "property," it may arguably stand for the

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3. *Id.* at 286. In addition to the disability insurance benefits, the husband in *Gnerlich* also received Social Security disability benefits and the mortgage on the marital residence was being paid by yet a third disability benefit. The husband was awarded all the Social Security benefits, and the wife was awarded the marital residence and the disability benefit which paid the mortgage. The division of the disability annuity offered through the husband's employer was the only issue on appeal. *Id.*

4. IND. CODE § 31-1-11.5-2(d) (1988).

5. *Gnerlich*, 538 N.E.2d 285, 286 (citing Wilcox v. Wilcox, 173 Ind. App. 661, 365 N.E.2d 792 (1977)).

6. *Gnerlich*, 538 N.E.2d at 288. *But see* McNevin v. McNevin, 447 N.E.2d 611 (Ind. Ct. App. 1983); Murphy v. Murphy, 510 N.E.2d 235 (Ind. Ct. App. 1987). *McNevin* involved a personal injury lawsuit brought by the wife against her former husband after the dissolution decree, for injuries suffered in a beating during the marriage. The court held that an unliquidated personal injury claim, even if already filed, could not be considered property which was divided in the dissolution decree (which would extinguish her claim) because it had no present ascertainable value. Any attempt to value the claim would be too speculative; i.e., guessing as to both the husband's liability and the wife's damages. 447 N.E.2d at 618.

Likewise, in *Murphy* the court held that the husband's claim against his employer for benefits under the Longshore and Harbor Worker's Compensation Act was not marital property subject to division. The claim had no fixed value in which the husband had a vested interest. Therefore, the court refused to include the claim in the marital property to be divided because the claim was too speculative and conjectural. 510 N.E.2d at 237.

proposition that disability benefits may *only* be divided by a percentage of the benefit, rather than a present value set off. Only through rationing the actual benefit can the court avoid the inherent inequity of the contingent nature of the asset.

Also focusing on the elements of "property," the court of appeals, in the first district decision of *Porter v. Porter*,[7] held that a professional practice may be found to have goodwill value, and thus the trial court did not err by including this intangible asset in the valuation of a medical practice.[8] Although goodwill such as the expectation of continued or habitual patronage is frequently an element in the evaluation of commercial ventures, the propriety of its inclusion in Dr. Porter's medical practice appears to be an issue of first impression for the Indiana appellate courts.

Arguing that the method of evaluating his medical practice was mandated by the terms of a shareholder purchase agreement, Dr. Porter maintained that the "good will" in a professional practice is speculative, non-transferrable, and unmarketable.[9] Rejecting this as a minority view, the court sided with what it termed the majority view, holding that the goodwill of a professional practice is an asset of the marriage to be distributed upon dissolution.[10]

Dismissing the argument that goodwill is too speculative to be capable of valuation, the court held that the value of good will could be determined with the aid of expert testimony and consideration of "such factors as the practitioner's age, health, past earning power, reputation in the community for judgment, skill and knowledge, and his comparative professional success."[11]

With respect to the husband's argument that goodwill is not readily marketable, the court, citing authority from the State of Washington,[12] concluded that the marketability of goodwill is not dispositive of whether it is includible in the marital estate.[13] Concluding that an asset may have *value* to a spouse without *marketability*, the *Porter* court noted, with approval, that if a professional were to abandon his practice and relocate in another state, his volume of business would likely decrease though his skill and physical assets would remain the same.[14] "Again,

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7. 526 N.E.2d 219 (Ind. Ct. App. 1988).
8. *Id.* at 225.
9. *Id.* at 223.
10. *Id.* at 224-25.
11. *Id.* at 224 (quoting *In re* Marriage of Fleege, 91 Wash. 2d 324, ____, 588 P.2d 1136, 1138 (1979)).
12. *In re* Marriage of Lukens, 16 Wash. App. 481, 558 P.2d 279 (1976).
13. *Porter*, 526 N.E.2d at 225 (quoting *Lukens*, 16 Wash. App. at 485-86, 558 P.2d at 281).
14. *Id.*

the difference must be attributed to his not having developed in his new locale a reputation as to skill, efficiency and the other elements comprising goodwill."[15]

B. Is it Marital or Non-marital Property?

Liberally expanding the definition of "property," like *Gnerlich*,[16] the Indiana Supreme Court in *In re Marriage of Adams*,[17] held that a police pension came within the statutory definition of "property" even though the husband's right to receive the benefits did not accrue until after the filing of the petition for dissolution of marriage.

Emphasizing that the pension benefits had been acquired by the joint efforts of the parties during the marriage, the *Adams* decision is intriguing for the succinctness of its analysis. Because a police officer who serves 20 years or more of active duty qualifies for benefits upon his retirement, the court reasoned that "any right to receive pension benefits became 'not forfeited upon termination' under section 2(d)(2). . . ."[18]

Recognizing that Indiana courts have consistently held that public employees, particularly police officers, have no contractual pension rights until actual retirement, the court noted that its objective was to determine and implement legislative intent. In so doing the court reasoned that the legislature did not intend to exclude police pension benefits for officers with over 20 years of active service who have not yet retired.[19] The more difficult problem faced by the court was overcoming the previously accepted notion that pension property rights found to exist under the definition of property are not subject to distribution under Indiana Code section 31-1-11.5-11(b) because they are property rights acquired after "final separation," *i.e.*, the date of filing the petition for dissolution of marriage. As if looking at section 11(b) for the first time, the court determined that the statute empowered a trial court to dispose of three types of property—property owned by either spouse prior to the marriage; property acquired by either spouse in his or her own right after the date of marriage and prior to final separation; and, property acquired by the joint effort of the parties. Although a property right may accrue after final separation, it nonetheless may have been acquired by joint effort. "The 'prior to

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15. *Id.*

16. Gnerlich v. Gnerlich, 538 N.E.2d 285 (Ind. Ct. App. 1989). *See supra* notes 2-6 and accompanying text.

17. 535 N.E.2d 124 (Ind. 1989).

18. *Id.* at 126 (citing IND. CODE § 36-8-7.5-12 (1988)).

19. *Id.*

final separation' demarcation applies only to property acquired by either spouse 'in his or her own right.' Thus a trial court could distribute property acquired after the filing of the petition for dissolution if acquired 'by their joint efforts.'"[20]

Finding the husband's pension to have been acquired through the joint efforts of the parties, the court concluded that it was subject to disposition as marital property, notwithstanding that the pension rights did not become marital "property" under section 2(d) until after the date of separation.[21]

The *Adams* decision has been followed in a decision from the Second District, *In re Marriage of Bickel*,[22] holding that military pension benefits accruing after final separation but prior to divorce is property acquired by the joint efforts of the parties as opposed to property acquired by a spouse in his own right after final separation.[23] Additionally, the case of *Tirmenstein v. Tirmenstein*[24] applies the same rationale and contains an enlightening discussion of a pension division and distribution. The court upheld the trial court's division of the pension under a formula for distribution which computed the wife's benefits by dividing the number of months during the marriage up to separation by the number of months of service, and dividing that percentage by two.[25]

A Fourth District Court of Appeals decision, *Sovern v. Sovern*,[26] provides practical guidance in the handling of an issue often confronted by practitioners, namely whether property titled to non-parties is actually marital property.[27] *Sovern* did not involve allegations of fraudulent transfer. Rather, the husband's parents held title to two parcels of real estate on which the marital residence and the husband's automobile bodyshop were located. The evidence at trial revealed that, although the property was titled in the husband's parents' names, the husband and wife had obtained the necessary improvement permits, contributed most of the money required to construct the home, depreciated the bodyshop on their federal income tax returns, and were the named beneficiaries on the homeowner's insurance policy and casualty insurance policy on the bodyshop.[28] Concluding that the husband's parents

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20. *Id.* at 126-27.
21. *Id.* at 127.
22. 538 N.E.2d 246 (Ind. Ct. App.), *vacating* 533 N.E.2d 593 (Ind. Ct. App. 1989).
23. *Id.*
24. 539 N.E.2d 990 (Ind. Ct. App. 1989).
25. *Id.* at 992-93.
26. 535 N.E.2d 563 (Ind. Ct. App. 1989).
27. *Id.*
28. *Id.* at 565.

held the property in constructive trust for the parties, its value was included in the marital estate. On appeal, the court held that, because the parents were not parties to the divorce, the trial court lacked the authority to impose a constructive trust over any properties titled to them. However, because the wife was awarded cash rather than the disputed property, the decree of the trial court did not bind the non-parties or affect their interest in any way.[29] Therefore, the error alleged by the husband was harmless.[30] The decision of the trial court was affirmed.[31] *Sovern* dictates that the practitioner should take care to join a non-party in a dissolution action if a dispute arises as to the existence of an equitable interest in property ostensibly titled to a non-party.

C. What is it Worth?

Euler v. Euler[32] is the first "50-50 case" since the 1987 legislation amending Indiana Code section 31-1-11.5-11(c)[33] to provide a rebuttable presumption that an equal division of marital property between parties to divorce is just and reasonable.

In *Euler*, the husband argued that the trial court abused its discretion in dividing the marital property because he was entitled to more than 50% of the net estate. While it appeared that the trial court intended to impose a 50-50 split of the marital property, in fact the husband received more than 50% of the marital property. The reason for such a deviation from the statutory presumption was not explained in the decision of the trial court.

> Although the trial court, in the exercise of its discretion, can divide the marital property unequally, the dissolution decree in this case indicates no reason for straying from the presumption of equality. We believe that IND. CODE § 31-1-11.5-11(c) requires the trial court to set forth the basis for a division of marital property which does not follow the fifty-fifty presumption. While the evidence in this case may support a 46/54 division of property, we will not speculate as to the trial court's reasoning. There-fore, we remand this case to the trial court to divide the marital property equally or to set forth its rationale for dividing the property unequally.[34]

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29. *Id.* at 567.
30. *Id.*
31. *Id.*
32. 537 N.E.2d 554 (Ind. Ct. App. 1989).
33. IND. CODE ANN. § 31-1-11.5-11(c) (West Supp. 1989) (as amended by P.L. 283-1987 Sec. 4).
34. *Euler*, 537 N.E.2d at 556-57.

It is clear from *Euler* that a trial court in a contested proceeding must now make a special finding of fact to support an uneven distribution in a dissolution decree.

Although previously discussed as a "property identification" case[35] *Porter v. Porter*[36] is also a valuation case. As the first reported Indiana case to recognized that intangible goodwill in a professional practice is a marital asset with potential value, *Porter* also provides a discussion of the factors an attorney must consider when dealing with experts on the goodwill value of a professional practice.[37] *Porter* is significant in its application to shareholder purchase agreements in the evaluation process. Rejecting Dr. Porter's argument that the shareholder purchase agreement controlled valuation of this practice, the court noted that such buy-sell agreements were but one method of valuation. The value calculated pursuant to a shareholder or partnership agreement is only a *presumptive* value which may be attacked as not reflective of the true value.[38]

Although stopping short of mandating that a value be assigned to all assets, the court in *Feitz v. Feitz*[39] held that the trial court abused its discretion when it assigned a value in the absence of any supporting evidence.[40] A business, airplane and stock were valued by a witness, not characterized as an expert, who admitted she had not examined any books or records of the business she was attempting to value. Finding the testimony speculative, the court reversed and remanded to the trial court for lack of evidence supporting the values assigned by the court below.[41]

D. How Should Property be Distributed?

The court of appeals upheld the enforceability of a pre-nuptial agreement in *Rose v. Rose*[42] by affirming the finding of the trial courts that a wife failed to establish a basis for rejecting the agreement. The wife alleged that the husband coerced her into the agreement by threatening not to marry her if she did not sign. The wife further contended that the antenuptial agreement was unenforceable because of the husband's failure to fully disclose his assets and his misrepresentations

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35. *See supra* notes 7-12 and accompanying text.
36. 526 N.E.2d 219 (Ind. Ct. App. 1988).
37. *Id.* at 223-25 (citing Peddycord v. Peddycord, 479 N.E.2d 615 (Ind. Ct. App. 1985)).
38. *Id.* at 223.
39. 533 N.E.2d 1287 (Ind. Ct. App. 1989).
40. *Id.* at 1289.
41. *Id.*
42. 526 N.E.2d 231 (Ind. Ct. App. 1988).

regarding assets, and because she signed without the benefit of counsel.[43] The evidence revealed, however, that the wife had lived with her husband for a period of one year prior to the marriage; that during that time the parties had discussed the necessity of an antenuptial agreement; that the wife never sought outside legal advice on the matter prior to the marriage; and that the wife told the husband she was marrying him for love not money.[44] The court observed that antenuptial agreements are valid and binding if entered into without fraud, duress or misrepresentation and are not unconscionable: "No absolute duty to disclose the value of all possessions exists when entering into an antenuptial agreement."[45] The court also found that antenuptial agreements are not *per se* unconscionable solely because enforcement of the agreement leaves one spouse with very little assets.[46] Accordingly, the court found that the wife failed to prove the existence of any of the factors which will invalidate an antenuptial agreement.[47] In so doing, however, the court has provided little insight as to what standards it applies to the enforceability of such agreements. Indeed, *Rose* may suggest to the unwary practitioner that there *are* no minimum standards.

In stark contrast to the logical extension of *Rose* is the duty of disclosure found to exist under the facts of *Atkins v. Atkins.*[48] In *Atkins*, the husband failed to disclose that certain stock awarded to him under a settlement agreement had substantially increased in value as the result of a corporate merger occurring just one day before execution of the settlement agreement and final hearing. The court found that the settlement agreement imposed a mutual duty upon the parties to make a "full and complete disclosure of all pertinent financial and other information about the parties as of the date of the agreement."[49] The court of appeals noted that a trial court has the discretion to approve a settlement agreement, reasoning that approval is appropriate unless the agreement is the product of "unfairness, unreasonableness or manifest inequity in its terms or that it was procured through fraud, misrepresentation, coercion, duress or lack of disclosure."[50] The court found that the "failure to disclose when such a

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43. *Id.* at 233.
44. *Id.* at 235-36.
45. *Id.* at 235.
46. *Id.*
47. *Id.* at 236.
48. 534 N.E.2d 760 (Ind. Ct. App. 1989).
49. *Id.* at 763.
50. *Id.* at 762 (citing Stockton v. Stockton, 435 N.E.2d 586, 589 (Ind. Ct. App. 1982)).

duty exists constitutes constructive fraud. . . ."[51] Therefore, the court reversed that portion of the judgment determining division of property and remanded for a new trial.[52]

While the concurring decision agreed that a duty to disclose existed under such settlement agreements, the duty pertained only to substantial changes.[53] This opinion, while attempting to narrow the majority holding to "substantial changes," makes it clear that the duty to disclose exists up to the moment the agreement is approved by the trial court, regardless of whether the change took place before or after agreement.[54] Thus, finality of the parties' obligations and rights to each other does not occur until judgment.

The dissent narrowly interpreted the disputed provisions of the settlement agreement, criticizing the majority for its interpretation which had the effect of broadening the language from a duty to disclose assets to a duty to disclose value; it opined that the language used in the agreement created no duty to disclose increases in value.[55] Finally, the dissent would have characterized the increase in value as property acquired after final separation for which no duty to disclose exists.[56] However, under the holding of *In re Marriage of Adams*,[57] that pensions vesting after separation may be property acquired by "joint efforts,"[58] a substantial increase in the value of an asset, by analogy, can be viewed as the result of "joint efforts."[59] In any event, the pertinent language from the settlement agreement in *Atkins* is reproduced in the opinion and certainly provides a hindsight-basis for redrafting the relatively standard language in the practitioner's settlement agreement forms in order to solidify the existence of such a duty or avoid it, as the case may be.[60]

Arguably a distribution case, the court in *In re Marriage of Gore*[61] held that a divorce court has inherent authority to impose a receivership as a provisional order to insure compliance with its other provisional orders and to prevent the diversion of assets out of the marital estate.[62]

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51. *Id.* at 763 (citing Brown v. Indiana Nat'l Bank, 476 N.E.2d 888, 891 (Ind. Ct. App. 1985)).
52. 534 N.E.2d at 763.
53. *Id.* (Staton, J., concurring).
54. 534 N.E.2d at 763-64 (Hoffman, J., dissenting).
55. *Id.*
56. *Id.*
57. 535 N.E.2d 124 (Ind. 1989).
58. *Id.* at 127.
59. *Atkins*, 534 N.E.2d at 764. *See* Tirmenstein v. Tirmenstein, 539 N.E.2d 990 (Ind. Ct. App. 1989).
60. *Atkins*, 534 N.E.2d at 762.
61. 527 N.E.2d 191 (Ind. Ct. App. 1988).
62. *Id.* at 197.

In *Gore*, the husband repeatedly violated court orders pertaining to business assets, among other matters. The trial court grew tired of wrestling the husband "like an alligator," and appointed a receiver over his business and personal assets.[63] On interlocutory appeal, the Fourth District followed a three-prong test for determining the propriety of a receivership over a corporation: (1) the proponent of the receivership must show that an emergency exists requiring that management of a corporation be taken over immediately from those in control; (2) the proponent must demonstrate that irreparable damage and injury is certain to result unless a receiver is appointed; and (3) there must be no adequate remedy otherwise available.[64] Observing that the evidence showed husband to be operating the business successfully, that there was no showing a receiver could operate the business, and that husband was not likely to dissipate marital assets to the extent that wife's claim on the marital estate could not be satisfied, the court found that a receivership over the business was not warranted.[65] In so doing, the court upheld the appointment of a receiver over the husband's personal assets, citing its belief that such a receivership would not threaten the value of the marital estate while the appointment of a receiver over the successful corporation might well be such a threat.[66]

As has happened to many practitioners, the parties in *Stolberg v. Stolberg*,[67] at direction of the court, reached a settlement agreement on the day of trial. Not having time to reduce the agreement to writing, its terms were read into the record orally by the parties. The wife later repudiated the agreement after it had been submitted to the court in written form by her counsel.[68] The agreement had been reduced to writing by the parties' attorneys and incorporated in the decree. The wife received an unsigned copy of the decree before it was signed by the judge as well as a copy of the decree after it was signed. Six months later, the wife moved to set aside the decree claiming that the husband had misrepresented material facts during discovery negotiations. Making no finding as to the allegation of fraud, the court granted the wife's request for rehearing, and found that there was no agreement in writing between the parties and declared the decree void as it related to property distribution.[69]

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63. *Id.*
64. *Id.* at 196.
65. *Id.*
66. *Id.* at 197.
67. 538 N.E.2d 1 (Ind. Ct. App. 1989).
68. *Id.* at 2-3.
69. *Id.* at 3.

Reversing the trial court, the Fourth District noted that property distribution occurs either by written agreement under Indiana Code section 31-1-11.5.10 or by order of the trial court. Citing the language of section 10, the court reasoned:

> The statute [Indiana Code section 31-1-11.5.10(a)] on its face requires (a) an agreement between the parties which is (b) reduced to writing. There is no statutory requirement the written agreement need be signed by the parties. Here, the facts indicate such an agreement was made. . . .
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> While it would have been advisable for the parties to sign the agreement, signatures are not specifically required by Indiana Code section 31-1-11.5-10.[70]

III. Children of the Marriage

Dissolution of a marriage involving children necessarily requires decisions concerning the questions of custody, support and visitation. The child-related questions involve many inter-twining issues. Should custody be sole or joint? How much support should be paid? Who gets to claim the children for tax purposes? What can the custodial parent require the non-custodial parent to do during visitation? The mobility of American families also gives rise to prickly jurisdictional issues. During the survey period, the Indiana courts addressed all of these issues and more. The following discussion concerns the developments the author views as the most significant.

A. Custody

A good case with which to be armed in a situation where all of the circumstances indicate joint custody is workable and appropriate but objected to by one of the parties is *Walker v. Walker*.[71] In that case, both parties sought sole custody of their two and one-half year old daughter. The decree of the court provided for joint legal custody of the child. The order further provided that the child would reside with the father in the marital residence and mother would pay support.[72] The mother argued on appeal that the court abused its discretion in ordering joint custody because it was not in the best interest of the child and contrary to law because not supported by the evidence.[73]

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70. *Id.* at 3-4.
71. 539 N.E.2d 509 (Ind. Ct. App. 1989).
72. *Id.*
73. *Id.* at 510.

While the record on appeal did indicate some ugly incidents between the mother and father, the court concluded that the trial court could have found them to be of minor importance.[74] Significantly, the record did not demonstrate any fundamental differences in child rearing philosophies, religious beliefs, or lifestyles. Additionally, the record indicated that both parties demonstrated a willingness and ability to communicate and cooperate regarding the child and lived within close proximity of each other.[75] The court, admitting its reluctance to affirm an order of the trial court providing for joint custody in the face of an objection by one of the parties, concluded that the evidence did not establish that the parties had made child rearing a battleground and that other factors to be considered in determining whether an award of joint custody would be in the interest of the child did not indicate an abuse of discretion.[76]

The Third District decided two cases involving Indiana's version of the Uniform Child Custody Jurisdiction Act ("UCCJA")[77] which reversed the trial court for assuming jurisdiction. In *In re Cox*,[78] the father of the parties' children went to their mother's home in Kentucky and took the children back to Indiana with him after being advised by the mother's second husband that the mother had left the home and her whereabouts were unknown. Although the initial custody order was entered in Kentucky, the father brought the children to Indiana where he resided and filed a petition seeking an emergency temporary

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74. *Id.* at 510-11.

75. *Id.* at 511.

76. *Id.* at 512-13. Guidance for the appropriateness of joint legal custody is found at IND. CODE § 31-1-11.5-21(g) (1988):

> (g) In determining whether an award of joint legal custody would be in the best interest of the child, the court shall consider it a matter of primary, but not derminative importance that the persons awarded joint custody have agreed to an award of joint legal custody. The court shall also consider.
> (1) the fitness and suitability of each of the persons awarded joint custody;
> (2) whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare;
> (3) the wishes of the child and whether the child has established a close and beneficial relationship with both of the persons awarded joint custody;
> (4) whether the persons awarded joint custody live in close proximity to each other and plan to continue to do so; and
> (5) the nature of the physical and emotional environment in the home of each of the persons awarded joint custody.

IND. CODE § 31-1-11.5-21(f) (1988), which defines joint legal custody, states that the term means the sharing of the "authority and responsibility for the major decisions concerning the child's upbringing, including the child's education, health care, and religious training. *Id.*

77. IND. CODE §§ 31-1-11.6-1 to -25 (1988).

78. 536 N.E.2d 520 (Ind. Ct. App. 1989).

modification of child custody. He made no attempt to modify custody in Kentucky.[79] The trial court issued an *ex parte* order granting the husband's petition and issued an order for the mother to appear before the court and show cause why the Kentucky child custody order should not be modified.

The mother filed a motion to dismiss for lack of subject matter jurisdiction.[80] A hearing was held on the motion to dismiss and the court denied the motion finding that it had jurisdiction under Indiana Code section 31-1-11.6-3(a)(2),[81] commonly known as the "significant connections" basis of jurisdiction.[82] On appeal, the court described the case as "a prime illustration of jurisdiction which exists but may not be exercised."[83] While the court did not dispute the finding of the trial court that the significant connections test had been met, it pointed out that Kentucky retained jurisdiction under the home state test.[84] When an initial custody decree has been rendered, jurisdiction is no longer determined under section 3 of the UCCJA.[85] Rather, it is determined under either section 8 of the Act, which the court found inapplicable to the facts before it, or under section 14 of the Act.[86] Section 14 requires that "Indiana refrain from modifying a child custody decree entered in another state which: Had jurisdiction at the time the decree was entered; has continuing jurisdiction at the time the action

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79. *Id.* at 521.

80. *Id.* at 521-22.

81. IND. CODE § 31-1-11.6-3(a) (1988) states:

A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

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(2) it is in he best interest of the child that a court of this state assume jurisdiction because (A) the child and his parents, or the child and at least one (1) contestant have a significant connection with this state, and (B) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

82. *Cox*, 536 N.E.2d at 522.

83. *Id.*

84. *Id.* at 523.

85. IND. CODE § 31-1-11.6-3(a)(1) (1988) provides:

A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) this state (A) is the home state of the child at the time of commencement of the proceeding, or (B) had been the child's home state within six(6) months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state.

86. IND. CODE § 31-1-11.6-14 (1988).

to modify was filed in this state; and, provides for the right to modification."[87] In short, the issue was whether Kentucky met the prerequisites for continuing jurisdiction. The court noted prior decisions in which it held that the home state test continued to be met for an additional six months after children left the home state if a parent continued to reside in that state. Thus, Kentucky still had jurisdiction under the home state test. Furthermore, the court found that Kentucky also met the significant connections test as an additional basis for continuing jurisdiction.[88] Because Kentucky had jurisdiction over the initial custody decree, possessed continuing jurisdiction and provided for modification of custody, the court held that the trial court's assumption of jurisdiction was error.[89]

Presiding Judge Gerard, in a partial concurrence,[90] cut through the elaborate analysis of the majority and very simply noted that the Parental Kidnapping Prevention Act ("PKPA")[91] "prohibits a foreign state from exercising jurisdiction on the basis of the significant connection test so long as another state continues to have jurisdiction under the home state test."[92]

The other case decided by the Third District is *Sixberry v. Sixberry*.[93] In that case, the mother and father were married in Texas in 1982. Their only child was born in Texas in 1983 where they lived for the next five years. The father moved to Indiana and then the mother and child moved to Indiana on January 17, 1987. On June 17, 1987, the mother returned with the child to Texas.[94] In July, the husband filed a petition for dissolution of marriage and for custody of the child in the Allen County Circuit Court. The wife filed a motion to dismiss contending that Indiana did not meet either the home state or significant connection tests for jurisdiction under the UCCJA.[95] The husband contended, first, that the home state requirement, *i.e.* the state in which the child has most recently resided for at least six consecutive months,[96] was met if any part of a calendar month was counted as constituting a month within the meaning of the definition. The court disagreed,

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87. 536 N.E.2d at 523.
88. *Id.*
89. *Id.*
90. *Id.* at 525.
91. 28 U.S.C. § 1738A (1982).
92. 536 N.E.2d at 525 (Garrard, P.J., concurring in part and dissenting in part). *See also* Thompson v. Thompson, 484 U.S. 174 (1988) and 28 U.S.C. § 1738A(c)(2)(B)(i) (1982).
93. 540 N.E.2d 95 (Ind. Ct. App. 1989).
94. *Id.* at 96.
95. *Id.*
96. IND. CODE § 31-1-11.6-2(5) (1988).

holding that "'six consecutive months' as used in this statute means a period of six full months, *e.g.* from January 17, 1987 through July 16, 1987."[97] With respect to the husband's second contention, the court concluded that the child's five month residency in Indiana was insignificant compared to connections she had with Texas where she lived for five years and was attending school at the time of filing of the petition for dissolution of marriage.[98] Noting that the prime purpose of the UCCJA is to allow child custody decisions to be made by the court with the greatest access to relevant information, the court found that the purposes of the UCCJA would best be served if a Texas court accepted jurisdiction over the dispute. Accordingly, the decision of the trial court denying the mother's motion to dismiss was reversed.[99]

Turpen v. Turpen,[100] decided by the First District, is a custody case with disturbing implications. The court acknowledged the presumption that, barring a finding of unfitness,[101] it is in the child's best interest to be in the custody of a surviving natural parent upon the death of the custodial parent. *Turpen*, however, goes on to depart from the rigorous three-part test established in *Hendrickson v. Binkley*[102] for third party-natural parent custody disputes.[103] More importantly, however, the court also ignored the burden of proof standard established in *Hendrickson*, namely, that the presumption in favor of the natural parent must be overcome by clear and cogent proof.[104] Never addressing

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97. 540 N.E.2d at 96.

98. *Id.* at 96-97.

99. *Id.*

100. 537 N.E.2d 537 (Ind. Ct. App. 1989).

101. *Id.* at 538.

102. 161 Ind. App. 388, 316 N.E.2d 376, *trans. denied*, *cert. denied* (1974), 423 U.S. 868 (1975).

103. This three-step process was succinctly stated as follows:

> First, it is presumed it will be in he best interest of the child to be placed in the custody of the natural parent. Secondly, to rebut this presumption it must be shown by the attacking party that there is (a) unfitness, (b) long acquiescence, or (c) voluntary relinquishment such that the affections of the child and the third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child. The third step is that upon a showing of one of these above three factors, then it will be in the best interest of the child to be placed with the third party.

Hendrickson, 161 Ind. App. at 392, 316 N.E.2d at 380. This rule has been involved in numerous cases. *See, e.g.*, Brown v. Brown, 463 N.E.2d 310 (Ind. Ct. App. 1984); Williams v. Throwbridge, 422 N.E.2d 331 (Ind. Ct. App. 1981); *In Re* Phillips, 178 Ind. App. 220, 383 N.E.2d 1056 (1978); Stevenson v. Stevenson, 173 Ind. App. 495, 364 N.E.2d 161 (1977).

104. In the typical custody case between natural parents, whether the case involves an initial determination or a modification, the burden of proof required is a prepon-

the burden of proof question, the court, acknowledging that "this case is a close one,"[105] implicitly applied a lesser standard of proof. Perhaps realizing the difficulties this case may present, the court stated:

> We depart from these decisions only to the extent that they suggest to litigants that the trial court must employ a mechanical approach in evaluating the evidence before it. As we have indicated, the cases which have generated the rule applied in our appellate decisions have not required trial courts to apply these principles so rigidly.[106]

Turpen is troublesome because as it comes dangerously close to the proposition that the "best interest" of the child is no longer *presumed* to be with a merely adequate, natural parent. Rather, the fact that a potential third party custodian may be able to provide a better home was a seemingly sufficient basis upon which to award custody.

B. Child Support

In *O'Neil v. O'Neil*,[107] an Indiana Supreme Court decision, the custodial parent appealed an order, which increased child support retroactively to the date she had filed her petition for modification while at the same time allowing a partial support reduction upon the emancipation of each of the parties' children. Also appealed was the order of the trial court permitting the offset of voluntary direct contributions to the children's college educational expenses against a child support arrearage.[108]

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derance of the evidence. However, in a custody dispute between a third party and the natural parent, the burden of proof is greater:

> [I]n custody cases, especially as here where a certain maine permanency of custody is involved, the court cannot determine that it is in the best interests of the child to be placed within the custody of a third party, as against the presumption favoring the natural parent, unless the trial court has first determined from clear and cogent evidence that there is either unfitness of the appellant, long acquiescence, or voluntary relinquishment. If the "best interest rule" was the only standard needed without anything else, to deprive the natural parent of custody of his own child, then what is to keep the government or third parties from passing judgment with little, if any, care for the rights of natural parents. In other words, a child might be taken away from the natural parent and given to a third party simply by showing that a third party could provide the better things in life for the child and therefore the "best interest" of the child would be satisfied by being placed with a third party.

Hendrickson, 161 Ind. App. at 393, 316 N.E.2d at 381.

105. *Turpen*, 537 N.E.2d at 540.

106. *Id.*

107. 535 N.E.2d 523 (Ind. 1989).

108. *Id.* at 523-24.

The court of appeals affirmed the order of the trial court in its entirety.[109] On transfer, the Indiana Supreme Court agreed that the reduction of support upon emancipation did not violate the rule against retroactive modification.[110] It rejected, however, the decision of the trial court to give the father credit for voluntarily assumed educational costs. Noting the general rule that a parent obligated to pay support will not be allowed credit for payments not conforming to the support order, the court held that the gratuitous payments did not come within the narrow exceptions to this rule, *i.e.*, payment of support directly to the custodial parent rather than through the court clerk, alternate methods of payment which substantially comply with a support order, and in-kind support where the obligated parent, by agreement with the custodial parent, takes the child into his home and assumes the child's custody for an extended period of time.[111]

Blickenstaff v. Blickenstaff[112] provides a concise primer of the law pertaining to support modification. The mother in *Blickenstaff* appealed the denial by the trial court of her petition to increase the amount of child support. On appeal, the court concluded that the trial court had failed to consider the totality of the circumstances in ruling upon the mother's petition. Specifically, the court enumerated the following factors for consideration: "Everyday knowledge" of changes in the cost of living;[113] the truism of judicial knowledge that older children require more support than younger children;[114] and, the lack of evidence mitigating against an increase in support.[115] Accordingly, the case was remanded to the trial court with instructions to reconsider the petition in light of the totality of the circumstances.[116]

In *Beeson v. Beeson*,[117] "a unique question in Indiana case law, *i.e.*, whether a trial court can abuse its discretion by awarding inadequate child support," was considered.[118] As a matter of course, the court pointed out that child support decisions are within the sound discretion of the trial court and will not be reversed unless against the clear logic and effect of the facts and circumstances before the trial court.[119] The argument on appeal was whether the child support awarded

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109. *Id.* at 523.
110. *Id.*
111. *Id.* at 523-24.
112. 539 N.E.2d 41 (Ind. Ct. App. 1989).
113. *Id.* at 44.
114. *Id.*
115. *Id.*
116. *Id.* at 45.
117. 538 N.E.2d 293 (Ind. Ct. App. 1989).
118. *Id.* at 296.
119. *Id.*

was inadequate in light of the great disparity between the parties' income. The court noted, however, that the *needs* of the child are the primary focus in awarding child support.[120] The evidence presented by the mother failed to demonstrate that the child's needs, and the maintenance of the daughter's standard of living, mandated higher support. While the disparity in the financial conditions of both parents was substantial, the court held that the support, under the circumstances, was not illogical or unreasonable.[121]

Addressing the allocation of an income tax dependency exemption to the non-custodial father, the court in *In re Marriage of Davidson*[122] agreed with wife's contention that the trial court had no authority to make such an allocation. Specifically, the wife argued that the Federal Internal Revenue Code[123] automatically allocates the child dependency exemption to the custodial parent unless expressly waived by that parent and that therefore state courts are no longer free to allocate the exemption to the non-custodial parent.[124] This aspect of *Davidson* appears to be in direct conflict with *Blickenstaff* which was decided by the Second District Court of Appeals during the survey period.[125] In *Blickenstaff*, the father was awarded the deduction by a modification decree entered in 1987. Notwithstanding its observance that the Internal Revenue Service apparently honors only such decrees if entered prior to 1985, the court stated, "[W]e find no basis upon which to hold the modification order to be an abuse of discretion as to the tax deduction division."[126]

The facts in *Davidson* presented the court with an excellent opportunity to consider whether a trial court has the authority to order the custodial parent to execute a written waiver of the dependency presumption:

> We are not surprised that the trial court awarded the tax exemption to Robert. Carol testified that she had been unemployed for the past nine years and was physically unable to earn an income due to her poor state of health. The tax exemption will entitle Carol to nothing since she has no earnings to which the exemption can be applied.[127]

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120. *Id.*

121. *Id.*

122. 540 N.E.2d 641 (Ind. Ct. App. 1989).

123. I.R.C. § 152(e) (1989) (amended by the Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 423(a)).

124. 540 N.E.2d at 647.

125. *Blickenstaff*, 539 N.E.2d at 45. *See supra* notes 102-06 and accompanying text.

126. 539 N.E.2d at 45.

127. *Davidson*, 540 N.E.2d at 647.

Nonetheless, the court failed to address the waiver issue broadly, holding that the trial court had erred by awarding the exemption to the father.[128]

In *Wright v. Brown*,[129] James Wright appealed the entry by the trial court of a money judgment against him for support arrearages based upon an Illinois support order. Because the arrearages had not been reduced to judgment in Illinois, Wright claimed that his former wife had failed to state a claim upon which relief could be granted. The Court of Appeals for the Second District disagreed, noting that unpaid installments of court-ordered child support constituted a debt and, where entered by a court of a sister-state, are entitled to full faith and credit by the courts of this state even though prior to judgment.[130]

Probably the most significant development in the area of child support during the survey period is the issuance by the Supreme Court of Indiana of its Order Adopting Child Support Rules and Guidelines, effective October 1, 1989.[131] Pursuant to the Child Support Enforcement Amendment of 1984, all states were required to adopt formulas for child support awards by October 1, 1987.[132]

The court promulgated three support rules. The first rule adopts the third edition of the Indiana Child Support Guidelines which contains five guidelines, commentary, a work sheet and schedules for support.[133] The second rule establishes a rebuttable presumption that the amount

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128. *Id.* But see the Second District's latest pronouncement, decided after the survey period, holding that the trial court *can* order the custodial parent to execute the IRS waiver and enforce the order by contempt or reduction of ch.7d support. *In re* Marriage of Baker, 550 N.E.2d 82, 86 (Ind. Ct. App. 1990).

129. 528 N.E.2d 824 (Ind. Ct. App. 1988).

130. *Id.* at 825.

131. IND. CHILD SUPPORT GUIDELINES (3d ed. 1989), *reprinted in* 541-43 N.E.2d XXXI (West's Ind. Cases) [hereinafter CHILD SUPPORT GUIDELINES]. Drafted by the Judicial Administration Committee and adopted by the Board of the Judicial Conference of Indiana. The third edition of the Guidelines is effective October 1, 1989 pursuant to Chief Justice Randall T. Shepard's order of August 31, 1989.

132. Pub. L. No. 98-378 (codified at 42 U.S.C. § 667). For a discussion of the history, use and application of child support guidelines, see Phelps and Miller, *The New Indiana Child Support Guidelines*, 22 IND. L. REV. 203 (1989). Care should be taken to utilize the proper edition of the guidelines. The Supreme Court's order specifically adopts the Indiana Child Support Guidelines (Third Edition, 1989), as drafted by the Judicial Administration Committee and adopted by the Board of the Judicial Conference of Indiana.

133. Support Rule 1 provides:

> The Indiana Supreme Court hereby adopts the Indiana Child Support Guidelines (Third Edition, 1989), as drafted by the Judicial Administration Committee and adopted by the Board of the Judicial Conference of Indiana, as the child support rules and guidelines of this Court.

Child Support Guidelines, 541-43 N.E.2d at XXXII.

of support determined under the worksheet of the guideline and schedules is the correct amount of support to be awarded.[134] The third rule expressly requires the court to enter a written finding setting forth the factual circumstances supporting a conclusion that the amount of support required by application of the guidelines would be unjust.[135] While it reasonably may be anticipated that application of this rule will form the basis of future appellate decisions in Indiana, the guideline level of support in any given case will, however, form the bench mark for the establishment of all support orders.

Arguably, determination of guideline level support subsumes within its calculation three of the four statutory factors to be considered by a court when determining support.[136] Although the first three factors to be considered under the statute leave considerable room for disagreement in determining the guideline level of support, the fourth factor is not considered on an individualized basis in the guidelines. Instead, if the needs of a non-custodial parent are the basis for a deviation from the guideline level of support, that parent would bear the burden of supplying the court with a sufficient basis upon which to base such a deviation. Additionally, agreed child support orders "submitted to the court must also comply with the 'rebuttable presumption' requirement; that is, the order must recite why the order deviates from the Guideline amount."[137] While the reasons for deviations from the guide-

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134. Support Rule 2 provides:
In any proceeding for the award of child support, there shall be a rebuttable presumption that the amount of the award which would result from the application of the Indiana Child Support Guidelines is the correct amount of child support to be awarded.

Id.

135. Support Rule 3 provides:
If the court concludes from the evidence in a particular case that the amount of the award reached through application of the guidelines would be unjust, the court shall enter a written finding articulating the factual circumstances supporting that conclusion.

Id.

136. IND. CODE § 31-1-11.5-12(a) (1988) provides:
In an action pursuant to section 3(a), 3(b), or 3(c) of this chapter, the court may order either parent or both parents to pay any amount reasonable for support of a child, without regard to marital misconduct, after considering all relevant factors including:
(1) the financial resources of the custodial parent;
(2) the standard of living the child would have enjoyed had the marriage not been dissolved or had the separation not been ordered;
(3) the physical or mental condition of the child and the child's educational needs; and
(4) the financial resources and needs of the non-custodial parent.

137. *Child Support Guidelines*, 542 N.E.2d at XXXVIII.

line amount are limitless, some probable reasons for deviation can be found in the commentary to Support Guideline 1. These include the non-custodial parent providing child care or purchase of school clothes; the non custodial parent spending a considerable amount of time with the child; the non-custodial parent having extraordinary medical expenses; and the custodial parent moving a substantial distance from the non-custodial parent who must incur significant travel expenses for visitation.[138]

The practitioner should also note that the addition of the guidelines adopted by the Indiana Supreme Court requires the submission of a worksheet, signed under penalties for perjury by the parties, as a verification of income. The worksheet is required in all cases regardless of whether the parties agree upon support or whether it is contested. The worksheet must be accompanied by documentation of current and past income.[139]

C. Visitation

In *Beeson v. Beeson*,[140] the court also addressed in its opinion the issue of whether a stipulation regarding visitation is binding on the court. The court reiterated the well-established proposition that visitation is an element of a custody order and that the court, when determining custody and visitation rights, must be mindful that the best interest of the child is paramount. Thus, a stipulation cannot place restrictions upon the duty of the court to protect the child's best interest.[141] Because the wife failed to demonstrate that the visitation rights ordered by the court were not in the child's best interest or that the order was otherwise illogical or unreasonable, the visitation order was affirmed.[142]

Also addressing the issue of visitation, the court in *In re Marriage of Davidson*[143] confronted a mother's contention that the trial court erred in finding that "no one can be required to attend religious services as a condition to visitation," in response to her request that the husband be required to transport their child to catechism classes and mass during his visitation.[144] In holding that the trial court did not abuse its discretion in failing to require the husband to transport

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138. *Id.* at XXXVIII-IX.
139. *Id.*
140. 538 N.E.2d 293 (Ind. Ct. App. 1989).
141. *Id.* at 298-99.
142. *Id.* at 299.
143. 540 N.E.2d 641 (Ind. Ct. App. 1989).
144. *Id.* at 650.

the child during visitation,[145] the court clarified its prior holding in *Overman v. Overman*[146] in which the opposite result was reached under essentially the same facts. The court explained that in the *Overman* decision "[w]e observed that absent an unreasonable interference with the non-custodial parent's visitation rights, the custodial parent's right to choose religious training was paramount."[147] The refinement on this point of the law is the teaching of the court regarding the burden of going forward with the evidence:

> However, when the circumstances place the interests of the custodial and non-custodial parents in direct conflict with one another, we believe it proper to place the burden of going forward with the evidence to establish the basis and facts which will enable the trial court to make an appropriate ruling upon the party seeking the intrusion or asking the accommodation. Thereafter, once the custodial parent has met the burden of going forward, the burden falls upon the non-custodial parent to prove that the request would create an unreasonable interference with his visitation rights.[148]

Because the mother failed to meet her burden, the denial by the court of her request to intrude upon the husband's visitation was upheld. This holding should logically extend to other potential intrusions upon a non-custodial parent's visitation, the most obvious of which is the involvement of the child in extracurricular sports activities that are scheduled to occur at the same time as visitation. Some parents may view participation in sports or special educational opportunities as equally essential to a child's development as religious training. Where regular participation is expected, a child might naturally feel singled-out if he or she is required to miss participation on a periodic basis in order to accommodate visitation. Thus, *Davidson*, when combined with the holding in *Overman*, provides an analytical framework for resolving the competing interest of the non-custodial parent's right to visitation and the custodial parent's right to make the major child-rearing decisions.

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145. *Id.* at 651.

146. 497 N.E.2d 618 (Ind. Ct. App. 1986).

147. 540 N.E.2d at 650. The court did observe in a footnote "that other jurisdictions view the non-custodial parent's right to visitation and the custodial parent's right to choose religious training as competing but co-equal interests." 540 N.E.2d at 650 n.1. *See* Wagner v. Wagner, 165 N.J. Super. 553, 398 A.2d 18 (1979); Morris v. Morris, 271 Pa. Super. 19, 412 A.2d 139 (1979).

148. 540 N.E.2d at 650.

IV. Maintenance

Although *Rump v. Rump*[149] adds little, if anything, to existing case law concerning an award of post-decree maintenance, it does reinforce prior authority regarding the factors to be considered in making an award of maintenance.[150] *Rump* also reiterates the established principle that a maintenance award is not mandatory even if the court finds that a spouse's incapacity materially affects his or her self-supportive ability.[151]

In *Rump*, the trial court found that the wife suffered from osteoarthritis, peripheral neuropathy, lumbar disc protrusion, hypertension, peptic ulcer, and obesity. A physician considered her to have a 15% to 20% permanent partial impairment, and she had been injured in an automobile accident which exacerbated her medical condition. She earned a little over $70 per week, and had expenses of approximately $440. Thus, she sought a weekly maintenance award amounting to the difference. On appeal, the wife contended it was error for the trial court to deny her maintenance given the evidence of her physical incapacity and its effect upon her ability to support herself.[152] Relying upon the well-established principle that an award of maintenance is discretionary, the court stated the factors to be considered in making a determination regarding maintenance:

> If the spouse's self-supportive ability is materially impaired, the propriety of the maintenance award and the amount thereof should be determined after considering such factors as the financial resources of the party seeking maintenance (including matrimonial property apportioned to that spouse), the standard of living established in the marriage, the duration of the marriage, and the ability of the spouse from whom maintenance is sought to meet his or her needs while meeting those of the spouse seeking maintenance.[153]

The court noted the majority of the marital estate had been awarded to the wife, and she was also a plaintiff in a pending civil action for damages relating to the automobile accident.[154]

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149. 526 N.E.2d 1045 (Ind. Ct. App. 1988).

150. *See In re* Marriage of Dillman, 478 N.E.2d 86, 87 (Ind. Ct. App. 1985).

151. *Rump*, 526 N.E.2d at 1046 (citing Coster v. Coster, 452 N.E.2d 397, 403 (Ind. Ct. App. 1983)).

152. 526 N.E.2d at 1046.

153. *Id.*

154. *Id.*

In *Beeson v. Beeson*,[155] the court confronted a claim for rehabilitative maintenance with a spouse who fell far short of presenting a compelling case for such an award.[156]

The husband was a successful plastic surgeon, well educated and possessing superior earning capacity. His wife had a lesser education, earned $28,000 per year when last employed, and had interrupted her employment during the marriage to care for the parties' children. At the time of the final hearing, however, the wife had been unemployed for only three years, was only thirty-four years old, was in good health, and received over 75% of the marital property. The wife contended on appeal that her husband's high income and her lack of gainful employment made her deserving of spousal maintenance. Disagreeing, the court observed that her request to reverse the trial court on this issue amounted to nothing more than a request to reweigh the evidence.[157]

V. Recent Legislation

A considerable amount of legislation has been passed which will be of interest to any family law practitioner. Legislation which may significantly affect dissolution and post-decree litigation is summarized below.

Indiana Code section 31-1-11.5-13 "Payment of Support Orders," has been amended effective July 1, 1989. The statute now allows a court to order a person to perform community service without compensation if that person is found to be delinquent in the payment of child support as a result of an intentional violation of a support order.[158]

Indiana Code section 31-1-11.5-8(d) was added effective July 1, 1989. This section provides that the court may enter a summary dissolution decree without holding a final hearing if verified pleadings are signed by both parties and filed with the court. The pleadings must contain a written waiver of the final hearing, and either a statement

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155. 538 N.E.2d 293 (Ind. Ct. App. 1989).

156. *See* Ind. Code § 31-1-11.5-1(e) (1988).

157. 538 N.E.2d at 298.

158. Section two of P.L. 65-1989 added Subsection (h) to Ind. Code § 31-1-11.5-13 as follows:

> (h) If the court finds that a party is delinquent in the payment of child support as a result of an intentional violation of an order for support, the court may find the party in contempt of court. The court may order a party who is found in contempt of court under this subsection to perform community service without compensation in a manner specified by the court.

that there are no contested issues or that a written settlement is filed.[159]

In addition to the foregoing amendment, Indiana Code section 31-1-11.5-8 was also amended to provide that, effective July 1, 1989, a court may bifurcate the issues in an action for dissolution of marriage by entering a summary disposition of the uncontested issues and setting the contested issues for trial.[160]

Indiana Code section 31-1-11.5-7, pertaining to provisional orders has been amended effective May 3, 1989. It now requires the clerk of a court which issues a temporary restraining order to supply a copy of that order to each party, the county sheriff, and the municipal law enforcement agency in which the protected person resides.[161] The sheriff

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159. Section one of P.L. 269-1989 added subsection (d) to IND. CODE § 31-1-11.5-8 as follows:

(d) At least sixty (60) days after a petition is filed in an action under section 3(a) of this chapter the court may enter a summary dissolution decree without holding a final hearing under this section if there have been filed with the court verified pleadings, signed by both parties, containing:
(1) a written waiver of final hearing; and
(2) either:
(A) a statement that there are no contested issues in the action; or
(B) a written agreement made in accordance with section 10 of this chapter that settles any contested issues between the parties.

160. Section one of P.L. 269, 1989 added subsection (e) to IND. CODE § 31-1-11.5-8 as follows:

(e) The court may bifurcate the issues in an action filed under section 3(a) of this chapter to provide for a summary disposition of uncontested issues and a final hearing of contested issues. The court may enter a summary disposition order under this subsection upon the filing with the court of verified pleadings, signed by both parties, containing:
(1) a written waiver of a final hearing in the matter of:
(A) uncontested issues specified in the waiver; or
(B) contested issues specified in the waiver upon which the parties have reached an agreement;
(2) a written agreement made in accordance with section 10 of this chapter pertaining to contested issues settled by the parties; and
(3) a statement:
(A) Specifying contested issues remaining between the parties; and
(B) requesting the court to order a final hearing as to contested issues to be held under this section.

The court may include in a summary disposition order entered under this subsection a date for a final hearing of contested issues.

161. Section two of P.L. 53-1989 added subsections (g) and (h) to IND. CODE § 31-1-11.5-7 as follows:

(g) The clerk of the court that issued an order under subsection (b) (2) or (b) (3) shall provide a copy of the order to:
(1) each party;
(2) the sheriff; and
(3) the law enforcement agency of the municipality (if any) in which the

and law enforcement agencies which receive such an order are required to maintain a depository in which to keep the order for a period of one year unless otherwise specified in the order.[162]

Indiana Code section 31-1-11.5-8.1 was added, effective July 1, 1989. It requires the party who initiates an action for dissolution of marriage and files a motion to dismiss to notify the opposing party. The opposing party, in turn, may file a counter-petition for dissolution of marriage within 5 days after the filing of the motion to dismiss. A final hearing may be held after 60 days after the filing of the initial petition.[163]

The conciliation procedures available under Indiana Code section 31-1-11.5-19 have been amended to provide that referrals may be made to mediators in addition to family service agencies, community mental health centers, clinical psychologists, physicians, attorneys, and clergy.[164]

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protected person resides.

(h) Each sheriff and law enforcement agency that receives an order under subsection (g) shall maintain a copy of the order in the depositor established under IC 5-2-9. The order may be removed from the depositor after the later of the following:

(1) The elapse of one (1) year after the order is issued.

(2) The date specified in the order (if any).

162. IND. CODE § 31-1-11.5-7(n). *See supra* note 152.

163. Section two of P.L. 269-1989 added IND. CODE § 31-1-11.5-8.1 as follows:

Sec. 8.1 (a) This section applies when a party who filed an action under section 3(a) of this chapter files a motion to dismiss the action.

(b) A party that files an action shall serve each other party to the action with a copy of the motion.

(c) A party to the action may file a counter petition under section 3(a) of this chapter no later than five (5) days after the filing of the motion to dismiss. If a party files a counter petition under this subsection, the court shall set the petition for final hearing no earlier than sixty (60) days after the initial petition was filed.

164. Section four of P.L. 269-1989 amended IND. CODE § 31-1-11.5-19 which now reads as follows:

Sec. 19. Any court that is exercising jurisdiction over domestic relation cases may establish a family relations division of the court. The family relations division may be administered by the community mental health center or by any other person approved by the court. The division shall offer counseling and related services to person before the court. Conciliation procedures may include, but shall not be limited to, referrals to the family relations division of the court, if established, public or private marriage counselors, family service agencies, community mental health centers, clinical psychologists, physicians, attorneys, clergy or mediators. The costs of conciliation procedures shall be paid by the parties as the court shall order, unless the court determines that such parties will be unable to pay the costs without prejudicing their financial ability to provide themselves and any minor children with economic necessities, in which such costs shall be paid from the budget of the court.

IND. CODE § 31-1-11.5-19 (1989).

VI. Conclusion

During the survey period, significant legislative changes and case law development occurred in the area of dissolution of marriage. The trend toward equal distribution of marital assets continues, as does the trend toward recognizing as marital property valuable property rights heretofore excluded from the marital pot. The advent of presumptively applicable child support guidelines and schedules, together with income verification requirements, should make child support more uniform throughout the state. Legislative changes are directed toward expediting resolution of non-contested issues in divorce, and may have the effect of both relieving crowded dockets and reducing the cost of representation.