The Progression of Indiana's Family Law in 1992

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INTRODUCTION

During the Survey period, the Indiana appellate courts issued more than seventy-five reported decisions in the traditional "family law" areas of marriage dissolutions, property distribution, custody, visitation, paternity, adoption, and support. The bulk of the decisions applied established precedent to typical issues with expected results. As in the recent past, however, the appellate courts did not shy away from making progressive and sometimes controversial rulings on prominent issues of social concern in areas such as family torts and the rights and obligations of noncustodial parents.

I. PROPERTY DISTRIBUTION

A. Statutory Determination and Distribution of Property

Property distribution necessarily involves questions concerning the definition, division, and worth of specific marital property. In 1992, the trial courts and the appellate courts continued to struggle with the questions of what constitutes "property," whether property may be excluded from the marital estate, what justifies a deviation from a 50/50 distribution, and the necessity of presenting evidence as to valuation.

In *Prenatt v. Stevens*,[1] the Court of Appeals for the Fourth District addressed a wife's appeal of a lower court decision which held that a doctoral degree earned by the wife during the course of the parties' marriage was a "marital asset."[2] In *Prenatt*, the trial court concluded that because the wife's doctoral degree resulted in her enhanced earning capabilities, it was considered properly as a marital asset. Without placing a specific value on the degree, the court determined that it was appropriate to set off a pension of $200,000 to the husband inasmuch as the wife was receiving the "value" of her degree.[3]

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1. 598 N.E.2d 616 (Ind. Ct. App. 1992).
2. *Id.* at 619-21.
3. *Id.* at 619.

Expressing skepticism that an educational degree is capable of valuation, the court of appeals reasoned that any such valuation would result in an award of property beyond the actual physical assets of the marriage.[4] Citing *Wilcox v. Wilcox*[5] and *In Re Marriage of McManama*,[6] the court concluded that such an award would constitute an impermissible form of maintenance or support. The court stated that:

> [a] degree is an intangible which is personal to the holder. It is a piece of paper and has no real value except for what the holder chooses to pursue with it. Potential worth is dependent upon choice and availability of work, whether the holder is good at what she does, or a myriad of other potentialities.[7]

The court held that an advanced degree does not constitute a vested property interest and, therefore, does not constitute marital property.[8]

Judge Chezem, in her concurring opinion, disagreed that advanced degrees are not marital property.[9] Judge Chezem declined to elaborate on her reasoning. Nevertheless, her concurrence provides an intriguing invitation for a practitioner to pursue in this area.

Expressing a radical departure from the traditional "one pot" theory of property, the court of appeals in *Lulay v. Lulay*[10] concluded that a husband's military pension was not a marital asset inasmuch as it had been earned prior to the parties' marriage.[11] Five months later, apparently recognizing the error in its conclusion, the court of appeals entered a second opinion in *Lulay*,[12] reversing its prior rationale.[13] In *Lulay II*, the court noted that its prior exclusion of the husband's pension from the marital pot had been erroneous.[14] The appellate court concluded that although the effect of the erroneous exclusion of the pension had resulted in an unequal property division, the distribution was justified by the trial court's finding that the wife had made no contribution toward the acquisition of the pension.[15]

A concise explanation and reaffirmation of the "one pot" theory of marital property, which pulls into the marital estate virtually all

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4. *Id.* at 620.
5. 365 N.E.2d 792 (Ind. Ct. App. 1977).
6. 399 N.E.2d 371 (Ind. 1980).
7. Prenatt, 598 N.E.2d at 620.
8. *Id.*
9. *Id.* at 622.
10. 583 N.E.2d 171 (Ind. Ct. App. 1991) [hereinafter *Lulay I*].
11. *Id.* at 174.
12. 591 N.E.2d 154 (Ind. Ct. App. 1992) [hereinafter *Lulay II*].
13. *Id.* at 155-56.
14. *Id.* at 155.
15. *See also In re* Davidson, 540 N.E.2d 641, 646 (Ind. Ct. App. 1989).

recognizable property interests not excluded by a valid antenuptial agreement is found in *Huber v. Huber*.[16] *Huber*'s citation of *Lulay I* as authority to uphold a trial court's setting aside to one spouse the value of his or her pension funds on the basis that the funds had not been acquired through the joint efforts of both spouses is unfortunate.[17] Although decided prior to *Lulay II*, *Huber* does not point out the contradictory holding in *Lulay I*—the exclusion in *Lulay I* of an obvious marital asset from the martial estate prior to distribution, as opposed to *Huber*'s correct analysis which requires inclusion of the asset. *Huber* and *Lulay II* recognize that the same result as in *Lulay I* may be accomplished by an unequal property division based upon evidence that an equal division of the value of a particular asset may be unreasonable based on the factors found under Indiana Code section 31-1-11.5-11(c).[18]

Although the Fifth District Court of Appeals attempted to expand the concept of "property" to include a former air traffic controller's federal workers' compensation benefits in *Leisure v. Leisure*,[19] the Indiana Supreme Court concluded that such benefits were not marital property as defined in section 31-1-11.5-2(d) of the Indiana Code.[20] The court rejected the court of appeals reliance on *Gnerlich v. Gnerlich*[21] for the proposition that the federal workers' compensation benefits were analogous to the disability insurance benefits addressed in *Gnerlich*. The court distinguished the two types of benefits on the basis that unlike the pension in *Gnerlich*, the husband had not been required to pay a monthly premium or in any way deplete marital assets to acquire the federal workers' compensation benefits.[22]

The court also distinguished the workers' compensation benefits from common law tort claim awards because of the absence of damages for pain and suffering or monetary loss in workers' compensation benefits;[23] workers' compensation benefits are limited to wages lost as a result of an individual's inability to continue working.[24] Pension benefits are also distinguishable from workers' compensation benefits in that unlike the deferred compensation from a pension, workers' compensation benefits represent future wages.[25] The court further noted that workers' com-

16. 586 N.E.2d 887 (Ind. Ct. App. 1992).
17. *Id.* at 889.
18. *Id.*
19. 589 N.E.2d 1163 (Ind. Ct. App. 1992).
20. Leisure v. Leisure, 605 N.E.2d 755, 759 (Ind. 1993).
21. 538 N.E.2d 285 (Ind. Ct. App. 1989).
22. *Leisure*, 605 N.E.2d at 758.
23. *Id.*
24. *Id.*
25. *Id.*

pensation benefits were contingent upon the employee's continued disability.[26] On this basis, the court determined that workers' compensation benefits are not vested property under Indiana law.[27]

Livingston v. Livingston[28] highlighted the importance of presenting evidence as to the value of marital property. The Court of Appeals for the Third District affirmed the trial court's exclusion of a husband's 401K retirement plan from the marital pot because neither party had offered proof as to whether the plan was vested, or as to its value, despite the husband's testimony that he would receive a distribution from the account if his employment was terminated.[29] Citing *Grammar v. Grammar*,[30] the court held that it was not error to exclude the 401K plan from marital assets where the evidence did not establish unequivocally that the plan was vested or had a present value.[31] Additionally, although the court noted that the property division imposed by the trial court "appears somewhat unequal," the absence of evidence in the record as to the value of property contained in the marital estate led to the presumption that the trial court had considered all evidence and had properly applied the statute in dividing the property.[32]

Seemingly in conflict with *Livingston* was the case of *Schueneman v. Schueneman*.[33] In *Schueneman*, the Fourth Circuit Court of Appeals noted that although no substantive evidence had been presented as to the value of a wife's pension, "it is likely that the plan has some value and, by awarding it to [the wife], the trial court made an unequal distribution of the marital estate without making findings why a deviation from a 50/50 split was just and reasonable."[34] Remanding the issue for further consideration, the court of appeals noted that inasmuch as neither party had presented evidence as to the plan's value, division of the plan by the trial court based upon a present value would be speculative: "However, as an alternative, the Court may order a percentage of [the wife's] future payments be paid to [her husband]."[35]

Unlike *Livingston*, the court was not willing to affirm the trial court based on a presumption that it had considered all evidence and properly applied the statute.[36] Although a distinction arguably exists between

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26. *Id.* at 758-59.
27. *Id.* at 759.
28. 583 N.E.2d 1225 (Ind. Ct. App. 1992).
29. *Id.* at 1228.
30. 566 N.E.2d 1080, 1083 (Ind. Ct. App. 1991).
31. *Livingston*, 583 N.E.2d at 1228.
32. *Id. See also* Porter v. Porter, 526 N.E.2d 219, 222 (Ind. Ct. App. 1988).
33. 591 N.E.2d 603 (Ind. Ct. App. 1992).
34. *Id.* at 609.
35. *Id.*
36. *Id.*

Livingston and *Schueneman* in that the court in *Livingston* found no evidence that the 401K plan was vested, this glosses over the husband's testimony in *Livingston* that he would be able to cash-out the plan if he was terminated from work.

The Third District Court of Appeals in *Nil v. Nil*[37] concluded that the trial court erred when it found that the parties' personal property was functionally equivalent in value. The Third District held that the trial court had ignored clear evidence that the fair market value of the personal property distributed to each spouse differed greatly.[38] The actual distributions were unequal and conflicted with the language of the decree, which purportedly divided the marital estate 50/50. Accordingly, the trial court was directed to adjust the cash distribution in its property division consistent with the actual values of the personal property being divided.[39]

Of greater interest in *Nil*, however, was the court of appeals' affirmation of the trial court's inclusion (as a marital asset) of the parties' federal joint tax refund.[40] Although the husband was the sole wage earner and the dissolution petition had been filed in April 1989, the court refused to exclude part of the refund attributable to the percentage of income earned by the husband after the filing of the petition.[41] The court justified inclusion of the entire refund in the "marital pot" by reasoning that because the husband had deposited the refund into a joint account, each party was responsible for discharging financial obligations of the family; thus, the refund would not have been as substantial if the parties elected to file separately.[42] The practitioner should take note of *Nil* when advising his client as to whether to file a joint income tax return with his spouse.

Addressing the issue of fraud, the Indiana Supreme Court in *Selke v. Selke*[43] reversed the court of appeals, finding that where a husband and wife had entered into a property settlement agreement without having exchanged information as to the value of husband's pension plan, the settlement would not be set aside for fraud.[44] Refusing to expand the application of *Atkins v. Atkins*,[45] the supreme court found that there was no absolute duty to disclose an asset's value. Limiting *Atkins* to its facts, the court stated:

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37. 584 N.E.2d 602 (Ind. Ct. App. 1992).
38. *Id.* at 604.
39. *Id.*
40. *Id.* at 604-05.
41. *Id.* at 606.
42. *Id.*
43. 600 N.E.2d 100 (Ind. 1992).
44. *Id.* at 101-02.
45. 534 N.E.2d 760 (Ind. Ct. App. 1989).

> While a duty to disclose asset value information may arise from unique factual circumstances including the express terms of a property settlement agreement, or from a request for discovery under the Indiana Trial Rules, such a duty of spontaneous disclosure is not imposed as a matter of law by Indiana Code Sections 31-1-11.5-11(b) and -11(c) of the Indiana Dissolution of Marriage Act. Clearly there is no express statutory duty of mandatory disclosure. Nor can such a duty reasonably be inferred from the Act.[46]

Further expanding the concept of what is to be included in the "marital pot," the Third District Court of Appeals determined in *Hughes v. Hughes*[47] that a husband's early retirement supplement was "marital property," subject to division upon dissolution, even though it would only have value if the husband elected to retire prior to age sixty-two. Though acknowledging that a husband would receive no benefit under the early retirement supplement unless he terminated his employment prior to age sixty-two, the court construed broadly a statutory definition of "property," reasoning that inasmuch as the pension supplement was available at the time of dissolution and was not forfeited upon termination of employment, it constituted property as defined in section 31-1-11.5-2(d)(2) of the Indiana Code: "The statutory definition of property is broad and inclusive, 'providing that "all" assets "including" various pension interests are to be considered marital property subject to division.'"[48]

To the extent that the early retirement supplement was "available" to the parties at the time of the dissolution proceedings, the court of appeals was not persuaded that possible future forfeiture as a result of the husband's unilateral actions would justify its exclusion from the marital estate. The court seemed to suggest that inasmuch as the decision either to retire early or forfeit the supplement was within the husband's sole control, the husband retained control over whether he would be penalized by inclusion of the supplement in the marital estate.

B. Prenuptial Agreements: An Alternative to Statutory Property Distribution

The expansive definition of marital property contained in section 31-1-11.5-2(d) of the Indiana Code requires the trial court to distribute

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46. *Selke*, 600 N.E.2d at 101-02.

47. 601 N.E.2d 381 (Ind. Ct. App. 1992) *trans. denied.*

48. *Id.* at 383 (citation omitted). *See also* Huber v. Huber, 586 N.E.2d 887, 889 (Ind. Ct. App. 1992). *Hughes* may turn on the special weight of its facts, however, inasmuch as the trial court had been presented with stipulated evidence as to the *value* of the supplement. If the husband had argued that the supplement was incapable of valuation given its speculative nature, the result might have been different.

virtually all ascertainable property of both parties unless distribution is controlled by a valid antenuptial agreement. Although the Indiana courts have taken a broadening view as to the enforceability of antenuptial agreements, there continues to be a small, albeit ever-restricting, window through which these agreements can be rejected.

Narrowing that window, the court of appeals in *Matuga v. Matuga*[49] overturned the trial court's rejection of a prenuptial agreement. In *Matuga*, the parties executed a prenuptial agreement one day prior to their wedding. The husband, an attorney, had drafted the agreement and the wife, a legal secretary, had not been represented by counsel. Although the parties had discussed the agreement and their relative assets prior to execution, the wife was never provided with an inventory of the husband's assets until the time that she was presented with the finalized document for signature. She was allowed only a brief review of the document and was not provided with a copy of it following execution.

Over a strong dissent by Justice Staton, the majority decided that the trial court erred in concluding that, "[t]he burden of proof that the antenuptial [a]greement was fairly entered into, with [the wife's] full knowledge of the extent of the property owned by [the husband], rests upon [the husband], a burden he has failed to discharge."[50] Noting that the burden of proof generally lies with the person petitioning to invalidate an antenuptial contract, the court stated the following exception:

> [When], however, the other party has a degree of dominance, that party may be required to demonstrate that the agreement is valid, but only if the dominance and its employment has vitiated the free will of the party challenging the agreement and even then, only if the party defending the agreement has obtained a substantial and unconscionable advantage.[51]

The court appeared to reweigh the evidence by rejecting the conclusions drawn by the trial court as to the husband's position of dominance, the time pressures placed upon the wife, the impact of the husband's failure to disclose the value of certain assets, and the wife's lack of representation by counsel.[52] Placing an emphasis on the fact that by virtue of the wife's employment as a legal secretary she should have known the legal effect of the document she was signing, the court

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49. 600 N.E.2d 138 (Ind. Ct. App. 1992).

50. *Id.* at 141.

51. *Id.* (citing *In re* Palamara, 513 N.E.2d 1223, 1230 (Ind. Ct. App. 1987); Johnston v. Johnston, 184 N.E.2d 651 (Ind. Ct. App. 1962)).

52. *Id.*

reversed the trial court's judgment.[53] Judge Staton issued a strong dissent, reasoning that the majority opinion had sanctioned fraud by completely ignoring the trial court's factual findings and instead reweighing the evidence before it.[54]

The court of appeals in *Justus v. Justus*[55] reversed the trial court's invalidation of the parties' prenuptial agreement. In *Justus*, the trial court found that an antenuptial agreement was unenforceable based upon circumstances at the time of the dissolution, rather than upon circumstances at the time of execution of the agreement. During the parties' marriage, the husband had a net worth in excess of $31 million and had agreed by the terms of the antenuptial agreement to pay his wife a fixed sum of money based upon the duration of the marriage.[56] At the time of trial, the husband had suffered a drastic financial reversal which had left his net worth at approximately $500,000. Inasmuch as enforcement of the agreement would have resulted in the wife being awarded almost the *entire* marital estate, the trial court found that it would be unconscionable to enforce the terms of the antenuptial agreement, and applied section 31-1-11.5-11 of the Indiana Code to award the wife sixty-six percent of the marital estate.

On appeal, the wife asserted that the trial court was precluded from examining changes in circumstances after execution of the prenuptual agreement in determining whether or not the agreement was enforceable. While agreeing that the doctrine of unconscionability traditionally applies only to the time of execution, the court found that, "in certain factual situations . . . a trial court may refuse to enforce an antenuptial agreement due to circumstances existing at the time of dissolution."[57]

The court of appeals reasoned that there was no basis to distinguish between provisions for property division and spousal maintenance in assessing the trial court's ability to examine the circumstances existing at the time of dissolution in deciding the validity of a prenuptial agreement: "If an antenuptial agreement dividing property between the parties would leave a post-dissolution reality in which one spouse would not have sufficient property to provide for his reasonable needs, then the court may refuse to enforce the antenuptial agreement."[58] Inasmuch as the trial court had not made specific findings regarding the husband's ability to support himself if the agreement were enforced, the judgment

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53. *Id.* at 141-42.

54. *Id.* at 142 (Staton, J., dissenting).

55. 581 N.E.2d 1265 (Ind. Ct. App. 1991).

56. The agreement provided that the wife would receive $500,000 after five years of marriage.

57. *Justus*, 581 N.E.2d 1265 at 1272.

58. *Id.* at 1274.

was determined to be clearly erroneous and the case was remanded: "We emphasize that the standard is stringent and the hardship contemplated must rise above a drastic alteration in [the] Husband's accustomed standard of living to threaten Husband's very ability to provide for himself."[59]

II. Children

A. Custody

1. Postdissolution and Postpaternity Custody Modifications Involing Different Statutory Standards.—The conflict between the Indiana Courts of Appeals—noted in a prior survey of developments in family law[60]—concerning the standards to be used in postdissolution and post-paternity custody modifications has been resolved. In *In re Grissom*,[61] the father's paternity of the parties' daughter was established in 1988, and by agreement, the mother was awarded custody with visitation privileges granted to the father. The father was later successful in obtaining modification of the custody agreement due to the mother's several out-of-state moves in violation of his visitation rights. The trial court's special findings centered on the home environments available to the mother and father for the care of their daughter and concluded "that in the best interest of [the parties' daughter], custody should be placed with [the] father and that [the] mother should have visitation."[62] The trial court's conclusion was consistent with the standard for modification of custody in paternity actions found in section 31-6-6.1-11(e) of the Indiana Code: "The court may modify an order determining custody rights whenever modification would serve the best interests of the child."[63]

The "best interests" standard is profoundly different from the "substantially changed circumstances" standard employed in post-dissolution custody modification proceedings found in section 31-1-11.5-22(d) of the Indiana Code, which requires, "changed circumstances so substantial and continuing as to make the existing custody order unreasonable."[64] In the court of appeals, Chief Judge Ratliff noted that the best interests

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59. *Id.* at 1275.

60. Michael G. Ruppert & Monty K. Woolsey, *The Continuing Evolution of Indiana's Family Law in 1991*, 25 Ind. L. Rev. 1243 (1992).

61. 587 N.E.2d 114 (Ind. 1992), *rev'g In re* Grissom, 573 N.E.2d 440 (Ind. Ct. App. 1991).

62. 587 N.E.2d at 115.

63. Ind. Code § 31-6-6.1-11(e) (1988).

64. *Id.* § 31-1-11.5-22(d) (1988).

standard for modification was first reviewed with some concern for its constitutionality in *Griffith v. Webb*[65]—which adhered to the best interest standard—and, then in *Walker v. Chatfield*,[66] a Fourth District decision that employed the substantial and continuing change of circumstances standard. Finding no policy reason to employ the best interests standard, and agreeing with *Griffith* that constitutional concerns were involved, the court of appeals reversed the trial court and returned custody to the mother.[67]

The Indiana Supreme Court granted transfer to resolve the conflict. The court first noted that the courts do not interpret statutes which are clear and unambiguous on their face; thus, the paternity statute must be given its apparent or obvious meaning.[68] Brushing aside the concerns over potential constitutional problems, the supreme court observed that a cogent argument had not been presented on the issue and that no constitutional problem existed with the statute as it applied to the case.[69] Thus, the court held "that on matters relating to change of custody in paternity actions, the standard to be applied is whether the modification would serve the best interests of the child."[70]

The practical effect of different standards in post-paternity and post-dissolution custody modifications is considerable. The deterrent to seeking modification brought about by the substantial and continuous change of circumstances standard is well-known to litigators. Although this standard is not available to custodial parents to maintain the stability of the parent/child relationship after paternity has been established, the availability of the less burdensome best interests standard to non-custodial parents will permit them to wrestle custody away more easily from an inadequate custodial parent whose situation has not changed since the entry of the initial custody order. In short, whether one views the supreme court's decision in *Grissom* as desirable depends upon whether one believes the best interests of a child are better preserved through stability of the child's environment—even if marginal—or by placement of the child in an optimal environment.

2. What Happens to Children upon the Death of the Custodial Parent?.—The Fourth District observed in *Atteberry v. Atteberry*[71] that long-standing Indiana law forces the trial court which originally decided dissolution and custody issues to lose jurisdiction over custody of the

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65. 464 N.E.2d 384 (Ind. Ct. App. 1984).
66. 553 N.E.2d 490 (Ind. Ct. App. 1990).
67. *In re* Grissom, 573 N.E.2d 440, 443 (Ind. Ct. App. 1991).
68. *In re* Grissom, 587 N.E.2d 114, 116 (Ind. 1992).
69. *Id.*
70. *Id.*
71. 597 N.E.2d 355 (Ind. Ct. App. 1992).

children upon the death of the custodial parent.[72] Thus, the court found that the deceased custodial mother's sister and brother-in-law could not intervene in the dissolution action for purposes of petitioning for modification of the dissolution decree in order to gain custody of the decedent's child. Instead, custody of the child automatically inured to the surviving parent, unless the surviving parent's visitation privileges were suspended or supervised at the time of the custodial parent's death.[73]

3. Can Visitation Be Restricted upon Suspicion of the Noncustodial Parent's Homosexuality?.—Eleven years after deciding that homosexuality does not as a matter of law render the homosexual parent unfit to have custody of a child in the absence of evidence of an adverse effect upon the child,[74] the court of appeals in *Pennington v. Pennington*[75] essentially upheld a trial court's finding that the alleged homosexuality of the noncustodial parent can be the basis for restricting overnight visitation to times when the father's adult male friend is not present in the household. In *Pennington*, the parties agreed that the mother should

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72. *Id.* at 356.

73. *Id.* Under Indiana Code § 31-1-11.5-27 (Supp. 1992), the trial court in a dissolution action "shall enter a conditional order naming a temporary custodian for the child" to receive temporary custody of the child upon the custodian's death where the court has previously required supervision during the noncustodial parent's visitation, or has suspended the noncustodial parent's visitation. The temporary custodian may then petition for his or her continued appointment as temporary guardian under Indiana Code § 29-3-3-6 (Supp. 1992) and/or as a permanent guardian under Indiana Code § 29-3-5-1 (1988 & Supp. 1992). Of course, Indiana Code §§ 31-1-11.5-27 and §§ 29-3-3-6 contemplate a situation in which the surviving non-custodial parent has had visitation privileges restricted. Other third parties seeking custody where visitation has not been suspended or restricted at the time of the custodian's death would seek custody under Indiana Code § 29-3-5-1 in a proceeding for the appointment of a guardian over the minor.

Although neither Indiana Code §§ 29-3-3-6 nor §§ 31-1-11.5-27 states the standard for a permanent award of custody, i.e. the best interests of the child, it probably may be presumed. However, in the latter situation where visitation has not been restricted, the third party would be required to overcome the presumption that placement of the child with the surviving parent is in the child's best interest as discussed in the line of cases starting with Hendrickson v. Binkley, 316 N.E.2d 376 (Ind. Ct. App. 1974), *cert. denied*, 423 U.S. 868 (1975), and more recently discussed in Turpen v. Turpen, 537 N.E.2d 537 (Ind. Ct. App. 1989). *See In re* Guardianship of Riley, 597 N.E.2d 995 (Ind. Ct. App. 1992) (grandparent's petition for guardianship of child upon death of custodial parent denied where father exercised unrestricted visitation rights and was not alleged to have been unfit or to have abandoned child). Obviously, the grandparent in *In re* Guardianship of Riley could seek grandparent visitation privileges under Indiana Code § 31-1-11.7-1 (1988). *See also In re* Groleau, 585 N.E.2d 726 (Ind. Ct. App. 1992) (adoption of child by stepparent did not terminate paternal grandmother's visitation rights, even though father had agreed to terminate his parental rights, where grandmother acted to perfect her visitation rights prior to termination of her son's parental rights).

74. D.H. v. J.H., 418 N.E.2d 286 (Ind. Ct. App. 1981).

75. 596 N.E.2d 305 (Ind. Ct. App. 1992).

have custody and that the father would enjoy reasonable visitation and pay child support. However, at the wife's request, the trial court permitted overnight visitation between the father and his son only when the father's male roommate was not present. The court's ruling was based upon the wife's suspicion that the father was homosexual because of a Valentine's Day card given to the father by his male roommate. The mother admitted that she had never witnessed any homosexual activity between the father and his male roommate, and could not say with certainty that the father was homosexual. The father denied that his relationship with his roommate was homosexual.[76]

Declining to reweigh evidence or to reassess the credibility of the witnesses, the court of appeals found that the trial court's decision was not an abuse of discretion: "It is not puritanical or unreasonable to attempt to shield a child of tender age . . . from the sexual practices of the visiting parent, whether those practices are homosexual . . . or heterosexual."[77] Citing a number of cases from other jurisdictions upholding prohibitions against visitation by non-custodial parents who lived with adults of the opposite sex, the court went on to say:

> Although the circumstances giving rise to these cases vary widely, the cases all stand for the proposition that the best interests of the child often demand the child be shielded from the visiting parents' heterosexual practices. There are an equal number of cases upholding trial courts' visitation restrictions when the partner is homosexual, as well.[78]

In a dissenting opinion, Judge Robertson wrote that he had no disagreement with the rationale expressed in the majority opinion, but stated his belief that the evidentiary basis for the decision to restrict visitation did not meet the showing of endangerment to the child's physical health or impairment of his emotional development required under section 31-1-11.5-24 (a) and (b) of the Indiana Code.[79]

4. What Standard Should Be Used When Modifying Joint Custody?.—In *Lamb v. Wenning*,[80] the Indiana Supreme Court agreed with the court of appeals[81] that in an action to modify joint custody where one parent has primary physical custody, the substantial changed circumstances standard should be used instead of the best interests standard. However, the supreme court disagreed with the appellate court's ruling

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76. *Id.* at 306.
77. *Id.*
78. *Id.* at 306-07.
79. *Id.* at 307 (Robertson, J., dissenting).
80. 600 N.E.2d 96 (Ind. 1992).
81. Lamb v. Wenning, 583 N.E.2d 745 (Ind. Ct. App. 1991).

that the mother's out-of-state relocation was insufficient as a matter of law to warrant modifying custody, and thus remanded the case to the trial court for evaluation of the evidence under the changed circumstance standard.[82]

B. Child Support

Widespread anticipation that the amendment of the Indiana Child Support Rules and Guidelines[83] will spawn considerable litigation concerning their application and interpretation remains today as in recent periods. In 1992, decisions supplied guidance for the application of the Guidelines in less typical situations.[84]

The court of appeals in *Terpstra v. Terpstra*[85] noted that "[t]he Indiana Child Support Guidelines do not confront the problem of establishing a support order in shared or joint custody situations. This is left to the trial court's discretion for handling on a case by case basis."[86] In *Terpstra*, the parties agreed to modify the part of their divorce decree pertaining to custody and visitation by implementing a shared custody arrangement whereby the father would have the children fifty percent of the time. The parties were unable to agree to the appropriate amount of support under the circumstances and submitted the issue to the trial court. The trial court found that the father's child support obligation under the Guidelines was approximately $200 per week, and reduced support to approximately $100 per week, citing the equal time sharing arrangement as the reason for its deviation from the Guidelines.[87]

Among the mother's contentions on appeal was that the length of time of possession should have been an irrelevant consideration unless tied to substantial evidence of actual changes in expenditures caused by the shared custody. The court responded to this contention in what is becoming a familiar refrain: trial courts must avoid the pitfall of blind

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82. *Lamb*, 600 N.E.2d at 98-99.

83. The Indiana Supreme Court's amendment of the court's previously adopted mandatory Indiana Child Support Rules and Guidelines was based upon the recommendations of the Judicial Administration Committee of the Judicial Conference of Indiana and the Indiana Child Support Advisory Committee pursuant to § 33-2.1-10-1 of the Indiana Code.

84. The much-anticipated amendment to the Indiana Child Support Rules and Guidelines, effective Mar. 1, 1993, likely places in question the authority of some of the decisions issued during the survey period. The amendments, not issued until January 7, 1993, came after the survey period; the extensive changes are beyond the scope of a general survey such as this and merit individual attention.

85. 588 N.E.2d 592 (Ind. Ct. App. 1992).

86. *Id.* at 596.

87. *Id.* at 594.

adherence to the Guidelines;[88] and although a deviation from the guidelines requires the trial court to articulate a sufficient basis for the deviation in a written finding of the factual circumstances supporting the conclusion,[89] the finding need not be especially formal as long as the reviewing court can discern the basis for deviation.[90] The court noted that the first child support Guideline states as one of the situations to be considered appropriate for a deviation from the Guideline amount is a situation where "[t]he children spend substantially more time with the noncustodial parent than the average case."[91] Noting that the commentary to the Guidelines explains that the failure of the guidelines to address child support in shared custody situations is based upon the infinite permutations in shared custody for time spent with each parent, travel between parents, *et cetera*, the court observed that the father assumed, without court order, educational expenses that the mother had been ordered to pay, was responsible for all transportation of the children between households, and paid other day-to-day expenses.[92] Under these circumstances, the court refused to find an abuse of discretion.[93]

The primary issue in *Poynter v. Poynter*[94] involved the application of social security disability benefits received by a child on behalf of a disabled parent in the computation for child support, where the disabled parent was the support recipient. In prior appeals involving social security disability benefits, the trial courts had applied benefits for the children as support payments on behalf of the disabled parent who was the child support obligor.[95] Thus, the issue in *Poynter* had not been addressed previously by an Indiana court.

In *Poynter*, the trial court determined that the total support obligation was two hundred dollars per week. The court reduced the total support obligation by the $61.86 in benefits that the children received on behalf

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88. *Id.* at 594-95. Under the third stated objective of the Indiana Child Support Guidelines, the court emphasizes that the Guidelines are not "immutable, black letter law." The court advises further that, "[a] strict and totally inflexible application of the Guidelines to all cases can easily lead to harsh and unreasonable results."

89. Support Rule 3 states that "[i]f 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."

90. *Terpstra*, 588 N.E.2d at 596.

91. *Id.* (quoting Indiana Child Support Guideline 1).

92. *Id.* at 596-97 (quoting Additional Commentary, Indiana Child Support Guidelines).

93. *Id.* at 597.

94. 590 N.E.2d 150 (Ind. Ct. App. 1992).

95. *See* Dorgan v. Dorgan, 571 N.E.2d 325 (Ind. Ct. App. 1991); Ritter v. Bartholomew Co. Dep't. of Pub. Welfare, 564 N.E.2d 329 (Ind. Ct. App. 1990); and Patrick v. Patrick, 517 N.E.2d 1234 (Ind. Ct. App. 1988).

of their disabled mother, the support recipient. Finally, the court computed the father's proportionate support obligation on the total obligation reduced by the children's benefits.[96]

On appeal, the mother argued that the children received the benefits because of her disability, and that the benefits amounted to support furnished by her; thus, the court should have allocated the father's proportionate obligation to the total support obligation. The different methods of calculation amounted to more than a fifty dollar per week difference in the father's support obligation.[97] The court stated that, "[f]ollowing the majority rule of other jurisdictions, we hold that the disabled parent is entitled to have child support obligations credited with the social security disability benefits received by the child because of that parent's disability."[98] Thus, the court of appeals found that the trial court erred by reducing the total support obligation before determining the share of each party.

In *Carr v. Carr*,[99] the Indiana Supreme Court decided that "an order for college expenses which allocates the expenses between the parents in a way disproportionate to their resources is clearly erroneous."[100] In *Carr*, the mother initiated an action against her ex-husband to require that he assume the educational expenses of their daughter.[101] The trial court found that substantial and continuing changes in circumstances had occurred, and that the child had the aptitude and ability for a college education. Furthermore, the court found that the parties could reasonably finance such an education.[102] The court's order required the father to pay all tuition, room and board, fees, books, and supplies at a state-supported school.[103] The mother was to pay remaining miscellaneous college expenses, and the sum paid by the father was to be reduced by any nonrepayable grants, scholarships or other benefits awarded to the child.[104] The order also provided for abatement of support while the child attended college full-time, and reduction for support during vacation periods because of the likelihood that the child would have employment during the summer months.[105] The father appealed, but the court of appeals affirmed.[106]

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96. *Poynter*, 590 N.E.2d at 152.
97. *Id.*
98. *Id.*
99. 600 N.E.2d 943 (Ind. 1992).
100. *Id.* at 944.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. Carr v. Carr, 580 N.E.2d 966 (Ind. Ct. App. 1991).

On transfer to the Indiana Supreme Court, the sole issue was whether the trial court's apportionment of college expenses was erroneous.[107] Testimony revealed that the father earned approximately sixty percent of the parties' combined gross incomes.[108] Although both parties owned property and had modest savings, the father's assets were clearly greater. In a thoughtful analysis designed to bring some clarity to the gray area of college expenses, the supreme court noted that the Indiana Child Support Guidelines merely amplified upon the provisions of section 31-1-11.5-12(b)(1) of the Indiana Code, which provides that a divorce court may require payment of the expenses of higher education.[109] In *Carr*, the statute required a review of the aptitude and ability of the child, and the means of the parties in order to assure the standard of living the child would have enjoyed had the marriage not been dissolved. The court noted with approval lower court decisions holding that the Guidelines are to be utilized in the resolution of all support matters, including extraordinary educational expenses.[110] In particular, the court noted the commentary to Guideline (3)(E), which requires judges to consider all sources of financial assistance for a higher education, including loans.[111] Further, the commentary provides that the court should consider a failure by the student to apply for all available aid when making its order concerning higher education expenses.[112]

The court then reached the central part of its holding, which proportioned the expenses of the child's higher education. Though a trial court has discretion pursuant to Guideline 3(E)(3) to include extraordinary educational expenses in its calculation of support, or to order them separately and distinctly from child support, if the court chooses the latter method, it must adhere to that proportionality.[113] Thus, even though the father had more resources and earned sixty percent of the parties' combined incomes, the court concluded that the trial court could not have recognized the requirement of "rough proportionality" when it apportioned more than eighty percent of the educational costs to the father.[114]

Finally, in accordance with apportioning the costs, the supreme court noted that the trial court apparently did not attach proper weight to

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107. *Carr*, 600 N.E.2d at 944.

108. *Id.* at 944-45.

109. *Id.* at 945.

110. *Id.* at 945-46.

111. Indiana Child Support Guideline 3(E)(3) states that in the court's computation "[s]ources of income available to the children may include, but are not limited to, scholarships, grants, student loans and summer and school year employment."

112. *Carr* 600 N.E.2d at 946.

113. *Id.*

114. *Id.*

the child assuming some of the costs of her education. Thus, the court held by inference that the trial court should have fashioned an order that would place responsibility on the child to do so, and which would provide for remitment to the father in the event loans were obtained:

> The order did not place any responsibility on [the daughter] to actually seek grants, loans or employment. Moreover, while the order provides for the contingency of non-repayable aid, no remitment is prescribed should loans be received. The guidelines and the statutes contemplate that these cost-reducing measures will be factored into college expense orders where their potential is raised by the record.[115]

Merrill v. Merrill[116] appears to be the first post-Guideline decision upholding a trial court's refusal to exclude from gross income payments of principal on loans attributable to business ventures.[117] In *Merrill*, the father appealed from a judgment modifying his weekly child support payment from fifty dollars a week to one hundred seventy-seven dollars a week on the grounds that the trial court erred by failing to deduct principal payments on business loans from gross profit in his closely held corporation in determining his weekly income available for child support purposes.[118] He also claimed it was error to include a portion of his retained earnings in his corporation as disposable income.[119]

The court first noted that Child Support Guideline 3 "[s]pecifically excluded from ordinary and necessary expenses for purposes of these Guidelines . . . depreciation, investment tax credits, or any other business expense determined by the Court to be inappropriate for determining weekly gross income."[120] Thus, the court stated that the Guideline vests discretion with the trial court "to scrutinize the self-employed parent's financial situation closely, and to exclude as a business expense any expenditure which the court in its discretion finds will personally benefit the parent."[121] In this particular case, the father's principal payments over the years took his business from a fledgling pharmacy having a negative net worth to a business with a positive net worth solely owned by the father.[122]

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115. *Id.*
116. 587 N.E.2d 188 (Ind. Ct. App. 1992).
117. *Id.* at 190
118. *Id.* at 189.
119. *Id.* at 189-90.
120. *Id.* at 190 (quoting Indiana Child Support Guideline 3).
121. *Id.*
122. *Id.*

Concerning the father's complaint that the trial court erred by including one-half of his pharmacy's retained earnings for the prior year in the support calculation, the court on appeal noted that the trial court should consider the needs of the noncustodial parent pursuant to section 31-1-11.5-12(a)(4) of the Indiana Code:[123] "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 . . . [t]he financial resources and needs of the noncustodial parent."[124] Despite the father's testimony that the retained earnings were rolled-over to purchase inventory and to pay bills, and that the viability of small businesses in his area was declining, the court held it was not an abuse of discretion to include half of the retained earnings in the support calculation.[125] Thus, courts must determine on a case-by-case basis sound business practices and business deductions that actually benefit support obligors by reducing their expenses or increasing their net worth.

In *Zakrowski v. Zakrowski*,[126] Judge Staton, the author of the *Merrill* decision, found erroneous a trial court's exclusion of business expenses in the support calculation on the basis that they were capital investments rather than true business expenses.[127] In *Zakrowski*, the trial court excluded numerous expenditures as capital investments.[128] On appeal, the court agreed that the evidence established that some of the "business expenditures" were actually "investments" benefitting the father. On the other hand, the court disagreed with the trial court's finding that the total commercial mortgage payments represented a capital investment, because the trial court's finding was contrary to certain undisputed testimony.[129] From *Merrill* and *Zakrowski*, it is apparent that where determination of income for purposes of calculating support under the Guidelines is complicated by the self-employment of one of the parties, the court may properly consider that parent's "total financial circumstances, including net worth, access to credit and available financial flexibility."[130]

Cobb v. Cobb[131] perpetuates disparate treatment of support obligors whose children's custodial parent incurs child care expenses in order to

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123. *Id.* at 189.
124. IND.CODE § 31-1-11.5-12(a)(4) (1988 & Supp. 1992).
125. *Merrill*, 587 N.E.2d at 190-191.
126. 594 N.E.2d 821 (Ind. Ct. App. 1992).
127. *Id.* at 824.
128. *Id.* at 823-24.
129. *Id.*
130. *Id.* (citing Merrill v. Merrill, 587 N.E.2d 188, 190 (Ind. Ct. App. 1992); Cox v. Cox, 580 N.E.2d 344, 351 (Ind. Ct. App. 1991)).
131. 588 N.E.2d 571 (Ind. Ct. App. 1992).

work. This disturbing case is not the first to hold that (1) the trial court has the discretion to include work-related child care expenses, and (2) a failure to address those work-related child care expenses does not require a written finding of explanation under Child Support Guideline 3.[132]

In *Cobb*, several issues arose concerning the divorce court's setting of child support. The first issue concerned whether it was error for the trial court to base its child support calculation upon an unsigned child support worksheet.[133] The court concluded that basing child support on an unverified and unsigned child support worksheet was error where no findings were made regarding income.[134]

Next, the mother complained that it was error to exclude deductions for the cost of children's health care insurance from her gross weekly income for purposes of computing the support amount.[135] The father argued that because Child Support Guideline 3(C)(3) stated that a trial court "should" consider the cost of the children's health insurance in arriving at the basic support obligation, discretion to deduct such amount remained with the trial court.[136] The father's interpretation of "should" was the same as that found in *Carter v. Morrow*[137] and *Kyle v. Kyle*,[138] in which "should" was interpreted as not being a mandatory term when applied to the consideration of work-related child care expenses. The court, however, disagreed with such an interpretation by holding that "should" in this context was mandatory because of language found in the commentary. Thus, it was error for the trial court not to deduct health care expenses from the mother's income.[139]

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132. *See* text accompanying note 84 *supra*. The bold holding of *Cobb*, permitting flagrant disregard of work-related child care expenses, is readily distinguishable from Carter v. Morrow, 563 N.E.2d 183 (Ind. Ct. App. 1990), and Kyle v. Kyle, 582 N.E.2d 842 (Ind. Ct. App. 1991), upon which it relies. In *Carter* there was no work-related child care at the time of hearing; rather, the issue was whether the mother should have received past support, prior to establishing paternity, which included child care expenses. 563 N.E.2d at 186-187. In *Kyle*, the appellate court approved a support agreement which did not include work-related child care in its calculation; rather, the trial court made a separate order for child care proportional to each parent's income. 582 N.E.2d at 847-48.

133. *Cobb*, 588 N.E.2d at 574-75.

134. *Id.*

135. *Id.* at 575.

136. *Id.*; Indiana Child Support Guideline 3(C)(3) states that, "[f]or each child support order, consideration should be given to the provision of adequate health insurance coverage for the child only. Such health insurance should normally be provided by the parent that can obtain the most comprehensive coverage through an employer at the least cost."

137. 563 N.E.2d 183 (Ind. Ct. App. 1990).

138. 582 N.E.2d 842 (Ind. Ct. App. 1991).

139. *Cobb*, 588 N.E.2d at 575.

Lastly, the mother argued that the court erred by not including her work-related child care costs in calculating support.[140] This assertion provided the basis for the court's troublesome reliance upon *Carter* and *Kyle* and arrival at the same conclusion in this case.[141] The undisputed testimony was that the father's income was more than twice the mother's income.[142] Further, the mother testified that she paid health insurance premiums of $31.50 per week and work-related child care costs of seventy-five dollars per week.[143] The court on appeal adhered to the interpretations of the First District in *Kyle* and *Carter* finding "should" was not mandatory. The difference in support to the mother was approximately seventy dollars per week.[144]

The failure to include work-related child care expenses in the support calculation or in a separate order can cause substantially disparate treatment between support obligors and support recipients. This is manifestly contrary to the intent of the Child Support Guidelines to "make awards . . . equitable."[145] Nonetheless, the Fifth Circuit Court of Appeals apparently felt obliged to follow the lead of the First Circuit, even though *Carter* and *Kyle* were readily distinguishable:[146]

> While we recognize the important public policy goal that custodial parents should be able to afford to work, we nevertheless hold that whether or not to increase a basic child support award to offset employment-related child care expenses is a matter for the trial court's discretion and the court's decision not to allow such an increase does not require a written finding of explanation under Child Support Rule 3. . . . The trial court here committed no error by failing to include [the mother's] work-related child care costs when it calculated the total child support obligations without articulating reasons for doing so.[147]

III. Miscellaneous

Three important cases were decided during this survey period which do not fit neatly into an analysis of family law developments centered upon custody, support and property distribution. These cases involved liability for family torts, liability to third parties for a spouse's debt,

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140. *Id.*
141. *Id.* at 574-76.
142. *Id.* at 573.
143. *Id.*
144. *Id.* at 573, 575-76.
145. Indiana Child Support Guideline 1, Preface.
146. *See supra* note 132.
147. *Cobb*, 588 N.E.2d at 576 (citation omitted).

and the right of a putative father to establish paternity of a child born during the mother's marriage to another person.

In *Barnes v. Barnes*,[148] the Indiana Supreme Court held that the doctrine of parental tort immunity does not preclude an action predicated upon a claim of intentional felonious conduct by the parent where there is no issue of parental privilege.[149] In *Barnes*, the daughter commenced a personal injury lawsuit against her divorced father two weeks before her eighteenth birthday, and approximately three months after the dissolution of her parents' marriage. The daughter alleged that her father committed multiple acts of rape and other sexual brutality upon her during a four day period when she was fifteen years of age, which resulted in various injuries to her including post-traumatic stress disorder.[150] The jury awarded the daughter a judgment of $250,000 in compensatory damages and three million dollars in punitive damages.[151] The father's appeal raised the issues of the tort immunity rule, the Indiana Rape Shield Statute[152] and other contentions concerning damages.[153] The court of appeals reversed the judgment and remanded with instructions to enter a judgment of dismissal in favor of the father.[154]

On transfer, the father contended that the trial court erred by denying his motion to dismiss, which asserted the doctrine of parental tort immunity.[155] This doctrine provides parents with immunity from personal injury damage actions brought by their minor children for injuries sustained during the marriage. The daughter argued that the doctrine should be abrogated because it no longer served society, and had been eroded by exceptions.[156] She urged rejection of the parental tort immunity doctrine, asserting reasons similar to those that were involved with the abrogation of interspousal tort immunity in *Brooks v. Robinson*.[157]

The Indiana Supreme Court noted that the law of parental tort immunity was in flux throughout the country: a substantial majority of jurisdictions have limited the doctrine; a few have eliminated it entirely; and despite the many variations throughout the states, it appears that no state allows immunity concerning intentional or malicious torts.[158] The court observed that, "[d]etermination of the present appeal, however,

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148. 603 N.E.2d 1337 (Ind. 1992).
149. *Id.* at 1342.
150. *Id.* at 1339.
151. *Id.*
152. IND. CODE § 35-37-4-4(a) (1988).
153. *Barnes*, 603 N.E.2d at 1339.
154. Barnes v. Barnes, 566 N.E.2d 1042 (Ind. Ct. App. 1991).
155. *Barnes*, 603 N.E.2d at 1339.
156. *Id.* at 1339-40.
157. 284 N.E.2d 794 (Ind. 1972).
158. *Barnes*, 603 N.E.2d at 1340-41.

does not require us to decide whether to generally abrogate the immunity in parental negligence cases."[159] After reviewing the primary cases from the Indiana courts of appeal in this area, the supreme court stated:

> [N]otwithstanding *Smith*,[160] the discussions in *Treschman*[161] and *Vaughan*[162] provide support for the view that parental immunity should not be absolute. No Indiana case has applied the immunity to shield a parent from an action alleging intentional felonious conduct. . . . We conclude that when, as here, a cause of action is predicated upon a claim of intentional felonious conduct and there is no issue of parental privilege, the doctrine of parental tort immunity will not apply to preclude the action.[163]

Although the court upheld the plaintiff's right to bring her cause of action, it provided that the Rape Shield Statute was not applicable to a civil action, and thus, did not exclude evidence of the daughter's prior sexual history. The court further concluded that the father could present proof of his payment of medical and psychiatric expenses, and that the constitutionality of the punitive damages need not be reached.[164]

In *In re Paternity of S.R.I.*,[165] the Indiana Supreme Court held that section 31-6-6.1-2(a)(2) of the Indiana Code[166] allows a man claiming to be a child's biological father to file a paternity action without regard to the marital status of the mother: "Thus a putative father may establish paternity without regard to the mother's marital status, so long as the petition is timely filed. . . . Of course, the putative father must put forth evidence that is 'direct, clear, and convincing' to rebut the presumption that a child born during marriage is legitimate."[167] In *S.R.I.*, the child was born during his mother's marriage, which was dissolved several years later.[168] The divorce decree referred to the child as an issue of the marriage.[169] After the mother and her husband divorced, she commenced living with the alleged father who assumed support of the child.[170]

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159. *Id.* at 1341.
160. Smith v. Smith, 142 N.E. 128 (Ind. App. 1924).
161. Treschman v. Treschman, 61 N.E. 961 (Ind. App. 1901).
162. Vaughan v. Vaughan, 316 N.E.2d 455 (Ind. Ct. App. 1974).
163. *Barnes*, 603 N.E.2d at 1342.
164. *Id.* at 1343, 1344-46.
165. 602 N.E.2d 1014 (Ind. 1992).
166. "A paternity action may be filed by . . . [a] man alleging that he is the child's biological father." IND. CODE § 31-6-6.1-2(a)(2) (1988 & Supp. 1992).
167. *S.R.I.*, 602 N.E.2d at 1016 (quoting Fairrow v. Fairrow, 559 N.E.2d 597, 600 (Ind. 1990)).
168. *Id.* at 1015.
169. *Id.*
170. *Id.*

When the alleged biological father filed his petition to establish paternity, he attached to it his affidavit acknowledging paternity and blood tests purporting to show that he was the biological father of the child.[171] The trial court denied the paternity petition, ruling that the question of paternity was res judicata.[172] Although a divided court of appeals concluded that the finding of res judicata was error, it affirmed the trial court on public policy grounds favoring stability in the relationships between children and parents.[173]

On transfer to the Supreme Court, the court noted a competing substantial public policy favoring the support of children by their actual father.[174] This public policy supported the putative father's attempt to establish paternity, as well as casting favorably upon the more personal aspects of his relationship with the child, such as custody and the right to supervision. In seeking to avoid a decision that might permit disruption of established relationships, however, the court stated as follows:

> Under these unusual circumstances, [the putative father] ought to have his day in court and an opportunity to present his evidence. Whether a cause of action like this one would be permitted while the mother's marriage is intact is not presented in this case, and we do not decide that question.[175]

A final case concerned the liability of an estranged spouse for the medical debts of her husband. In *Bartrom v. Adjustment Bureau, Inc.*,[176] the trial court granted summary judgment against the wife for the substantial medical debts of her husband who was injured after the parties' separation and filing for divorce.[177] While in the hospital and on life support systems, the wife did not visit the husband, and made no decisions concerning his care and removal from life support.[178] It was clear that had provisional orders been entered, the husband would have been required to support the wife and their children pendente lite.[179]

The issue of whether the wife was liable for the medical expenses incurred by her husband after she had filed for divorce, and where no support order had been entered, was one of first impression.[180] Judge

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171. *Id.*
172. *Id.*
173. *In re* Paternity of S.R.I., 588 N.E.2d 1278 (Ind. Ct. App. 1992).
174. *S.R.I.*, 602 N.E.2d at 1016.
175. *Id.*
176. 600 N.E.2d 1369 (Ind. Ct. App. 1992).
177. *Id.* at 1370.
178. *Id.*
179. *Id.*
180. *Id.*

Chezem, speaking for the Fourth District, proceeded through a thoughtful analysis of the evolution of the common law rule that, "in the absence of a support or maintenance decree pending a divorce action, a spouse is primarily liable for medical expenses incurred by the other spouse."[181] At common law, a husband was responsible for the necessities of his spouse, but she was not similarly liable because she was legally incapable of incurring an independent obligation. With the enactment of the Married Woman's Act,[182] all legal disabilities of married women were abolished. Thus, the current modified common law rule in Indiana places primary liability on the purchasing spouse and secondary liability on the non-debtor spouse, regardless of whether the latter knows of the purchases, promises to pay for them or has sufficient financial resources to satisfy them.[183]

In *Bartrom*, the widow received approximately eight thousand dollars in marital equity, and approximately thirty-three thousand dollars in marital debt. Based on those hard facts, the court entered a ruling that Mrs. Bartom was not liable:

> We hold that unless a dissolution court otherwise orders, one spouse is not liable for the debts of another spouse when a Petition of Dissolution of Marriage has been filed and, but for the untimely death or incapacity of the spouse who incurred the debt, that spouse would have been responsible for the support and maintenance of the other spouse and children. Because the debt was incurred by decedent after the date of final separation, it will not be apportioned to Bartrom.[184]

If, however, a similar case arises with identical facts except that the marital estate clearly has financial resources to cover such expenses, the result may depend upon the weight accorded to the court's reasoning: arguably, the last sentence of the above quote might prove too expansive.[185]

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181. *Id.* at 1371.

182. The Married Woman's Act was first enacted in Indiana in 1879. 1879 Ind. Acts 160-61. The Act was substantially re-enacted in 1923. 1923 Ind. Acts, Chapter 63. In 1986, the remaining codification of the original Act was repealed by P.L. 180-1986, § 6.

183. *Bartrom*, 600 N.E.2d at 1371-72.

184. *Id.* at 1374.

185. For another situation involving medical expenses that were incurred by a husband after the divorce hearing but before entry of a decree because his wife removed him from medical insurance coverage, see Schueneman v. Schueneman, 591 N.E.2d 603 (Ind. Ct. App. 1992), discussed in text accompanying note 33 *supra*. The husband asked the Court of Appeals to expand the application of *In re* Marriage of Adams, 535 N.E.2d 124 (Ind.

IV. Conclusion

Although the Indiana courts issued decisions mostly reflecting the application of established precedent to typical permutations of property division, custody and support, they left such issues as the following for future decisions: while parental immunity does not bar actions for felonious torts, to what extent will abrogation of the rule be permitted for less egregious conduct? While a putative father may bring a paternity action regarding the "child of a marriage" after dissolution the marriage, under what circumstances can the putative father bring such action during the mother's marriage? Will decisions permitting a trial court to forego provision for work-related child care expenses cause such disparate treatment that the issue will be addressed by the Indiana Supreme Court? These issues are sure to arise in the future.

1989), and Kirkman v. Kirkman, 555 N.E.2d 1293 (Ind. 1990), to include as marital debts, medical expenses incurred after the date of filing but before the date the dissolution was granted. The husband attempted to draw an analogy to *Adams* and *Kirkman* in that they included, as marital property, pensions vesting *after* the date of filing but before the dissolution petition had been granted, as being within the marital estate.

Rejecting the husband's argument, the court of appeals noted that pensions are acquired by the joint efforts of both spouses during the marriage and are therefore dissimilar from debts incurred subsequent to the filing of the dissolution petition. Declining to extend the long-standing rule that the marital pot is closed (at least as to debts) when the petition is filed, the court rejected the husband's argument. *Schueneman*, 591 N.E.2d at 609-10.