INDIANA FAMILY LAW 1993: MUCH ADO ABOUT SOME THINGS

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INTRODUCTION

Hailed as a year of great promise, 1993 brought major refinements rather than a wholesale overhaul of Indiana family law.[1] For example, the Indiana Supreme Court's long-awaited, much-anticipated amendments to the Indiana Child Support Rules and Guidelines made significant changes but did not replace the economic model upon which the Rules and Guidelines are premised. During its regular session, the Indiana General Assembly also promulgated significant but selected family law legislation, highlighted by the amendment to the grandparents' visitation statute. Indiana appellate courts continued their recent pattern of devoting increased attention to family law matters, issuing more than thirty reported decisions in the traditional areas of marital dissolution, child custody, and child support, as well as delving into ancillary areas such as paternity. On balance, the grandiose expectations for 1993 proved to be overstated and the year was far less eventful than anticipated.

I. THE INDIANA CHILD SUPPORT RULES AND GUIDELINES

On January 7, 1993, the Indiana Supreme Court issued amendments to the Indiana Child Support Rules and Guidelines ("Guidelines"), effective March 1, 1993.[2] Developed amidst much fanfare and controversy, the amendments to the

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1. The general scope of this Article is the Survey period January 1, 1993, to and including October 31, 1993, with the exception of selected references to Indiana appellate court opinions issued after October 31, 1993.

2. The Indiana Child Support Rules and Guidelines, which contain both rules and guidelines, initially became effective on October 1, 1989. This effective date followed a lengthy intertwining of federal and state efforts. In June, 1985, the Judicial Administration Committee of the Judicial Conference of Indiana (formerly the Judicial Reform Committee of the Judicial Conference of Indiana) responded to Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378 (1984), in which the United States Congress required child support guidelines to be developed on or before October 1, 1987, by beginning development of child support guidelines. These child support guidelines were not required to be mandatory, and were only required to be made available to judges and other public officials with authority to establish child support awards. 45 C.F.R. § 302.56 (1992). On September 17, 1987, the Board of Directors of the Judicial Conference of Indiana accepted the report of the Judicial Administration Committee and recommended use of the report to all judges and other public officials in Indiana with the authority to order child support. On October 13, 1988, the United States Congress passed the Family Support Act of 1988, Pub. L. No. 100-485 (1988), which made child support guidelines mandatory and applicable as a rebuttable

Guidelines followed an extensive public hearing and comment process in which citizens, special interest groups, and legislative and judicial officials voiced their often inconsistent concerns.[3] The resulting amendments brought significant changes to some portions of the Guidelines, while leaving intact the basic economic framework of the 1989 version of the Guidelines. When compared to the dramatic changes proposed and contemplated during the public hearing and comment process, the amendments to the Guidelines are important, yet relatively minor.

A. Support Guideline 1 and Related Commentary

At a fundamental level, the Indiana Supreme Court rejected repeated calls to convert the economic model for the Guidelines from a gross income approach to a net income approach. Thus, the Guidelines' schedules for weekly support payments continue to be derived from the combined weekly adjusted pretax incomes of the two parents.[4] In noting the decision to continue to calculate child support from an analysis of parents' gross incomes, however, the Commentary notes that "an average tax factor of 21.88 percent was used to adjust the support column."[5] In pointing out this assumption, the Commentary emphasizes that "a trial court may choose to deviate from the guideline amount" based upon tax rate differentials.[6] Given the large number of individuals whose tax rates exceed 21.88%, the Commentary creates a fertile area for deviation arguments beyond those typically explored under the 1989 version of the Guidelines.[7] Persons and interest groups arguing the inequity of the gross income approach under the Guidelines will find little solace in the meager expansion of deviation possibilities.

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presumption. The Judicial Administration Committee revised the Indiana Child Support Rules and Guidelines, which were required to be used in all proceedings involving issues of child support on or after October 1, 1989. The Federal legislation also requires all child support guidelines to be reviewed at least every four years. Family Support Act of 1988, Pub. L. No. 100-485, § 103(b) (1988). This legislative history sets the stage for the 1993 amendments to the Indiana Child Support Rules and Guidelines, which amendments resulted from recommendations from the Judicial Administration Committee and the Indiana Child Support Advisory Committee, a committee established pursuant to IND. CODE § 33-2.1-10-1 (Burns Supp. 1993).

3. It is beyond the scope of this Survey Article to recount the various positions asserted by each party or to document each change to the Guidelines. The following sections touch upon major amendments to the Guidelines. A thorough reading of the Guidelines and related Commentary is imperative to grasp fully the scope and impact of the amendments.

4. Indiana Child Support Guidelines, Commentary to Guideline 1.

5. *Id.*

6. *Id.* The Commentary provides an example of how this tax assumption corresponds to the former Marion County, Indiana, Guidelines which employed a net income model.

7. The Indiana Supreme Court also adds to the illustrative list of potential deviations by including travel expenses, payment of union dues, and support for an elderly parent.

B. Support Guideline 2 and Related Commentary

In contrast to the minimal change to Support Guideline 1, the Indiana Supreme Court amended Support Guideline 2 to provide that no more than fifty percent of a child support obligor's weekly *adjusted* income may be dedicated to child support and temporary maintenance purposes.[8] The impact of the reduction is set out in the amendment to the "maximum spouse and children" column of the Guidelines' schedules for weekly support payments.[9] This reduction from the previously fixed 60% level should alleviate some economic pressures for child support obligors, particularly since the Commentary requires that the obligor be allowed to retain "a means of self-support at a subsistence level."[10]

C. Support Guideline 3 and Related Commentary

The major amendments to the Guidelines were made to Support Guideline 3.

1. Weekly Gross Income.—The Indiana Supreme Court made significant clarifications in Support Guideline 3.A., as respects the determination of "weekly gross income" (Line 1 of the Child Support Worksheet).

The Guidelines now dictate that self-employment situations be more carefully scrutinized. Expenses from self-employment situations are to be "restricted to reasonable out-of-pocket expenditures necessary for the production of income [which expenditures] . . . may include a reasonable yearly deduction for necessary capital expenditures."[11] Significantly, "[t]he self-employed shall be permitted to deduct that portion of their F.I.C.A. tax payment that exceeds the F.I.C.A. tax that would be paid by an employee."[12] These changes should help resolve some of the most difficult child support calculations—those involving self-employed child support obligors.[13]

In an attempt to remove other issues fraught with confusion, overtime income and partnership distributions are specifically added to the Guidelines' definition of weekly gross income.[14] The Commentary notes that "overtime, commissions, bonuses, periodic partnership distributions, voluntary extra work and extra hours worked by a professional" illustrate irregular or nonguaranteed income includable in weekly gross income.[15] The Commentary, however,

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8. Indiana Child Support Guideline 2.
9. Indiana Child Support Guidelines, Schedules for Weekly Support Payments.
10. Indiana Child Support Guideline 2, Commentary.
11. Indiana Child Support Guideline 3(A)(2).
12. *Id. See also* Indiana Child Support Guideline 3(A), Commentary, noting that, at then-present F.I.C.A. tax rates, the self-employed pay 15.30% of their gross income to a maximum, while employees pay 7.65% to the same maximum. The self-employed are therefore permitted to deduct half of their F.I.C.A. payment when calculating weekly gross income for child support purposes.
13. *See, e.g.*, Merrill v. Merrill, 587 N.E.2d 188 (Ind. Ct. App. 1992).
14. Indiana Child Support Guideline 3(A)(1).
15. Indiana Child Support Guideline 3, Commentary.

cautions that child support should be set on the basis of "dependable income" and urges judges to "be innovative" in dealing with this issue.[16]

Additionally, the Guidelines recommend that weekly gross income should "be set at least at the *federal* minimum wage level."[17] However, the Commentary advises that this potential income analysis does not mean that all costs associated with a custodial parent's employment must be introduced into the child support analysis.[18] For example, the Commentary notes that the attribution of potential income to a spouse does not mandate attributing child care expenses which are not presently being incurred by the custodial parent.[19] Additionally, the Commentary now presents four detailed examples regarding the attribution of potential income to an unemployed or underemployed parent.[20] Further, the Commentary warns that courts must carefully balance the need for a custodial parent to contribute to child support with the benefit of a parent's full-time, in-home presence.[21] As respects imputing income, the Commentary notes that "regular and continuing payments made by a family member, subsequent spouse, roommate or live-in friend that reduce the parent's cost for rent, utilities, or groceries should be the basis for imputing income."[22] These changes, while helpful, leave much room for argument on these income issues.

A major change to the Guidelines is a new provision for natural and legally adopted children living in a child support obligor's household that were born or adopted *subsequent* to the prior support order.[23] The Commentary provides specific adjustment factors which apply to each parent.[24] The upshot of this amendment is to place children of subsequent relationships on a more equitable footing with their older half-siblings.

2. *Income Verification.*—The Guidelines are clarified to mandate the completion and filing of child support worksheets with documentation and verification of current and past income.[25] This amendment effectively documents standard practices.

3. *Computation of Weekly Adjusted Income.*—A notable change to the Guidelines occurs in the subtraction of work-related child care expenses (Line 2.A. of the Child Support Worksheet) from total weekly adjusted income

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16. *Id.*
17. Indiana Child Support Guideline 3(A)(3).
18. Indiana Child Support Guideline 3, Commentary.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. Indiana Child Support Guideline 3(A)(4).
24. Indiana Child Support Guideline 3, Commentary. The factors are .935 for one child, .903 for two children, .878 for three children, .863 for four children, and .854 for five children. *See also* Lamon v. Lamon, 611 N.E.2d 154 (Ind. Ct. App. 1993), which treats a child born to a divorced couple after the marital dissolution the same as the children born of the marriage.
25. Indiana Child Support Guidelines 3(B)(1) and 3(B)(2).

(Line 1.E. of the Child Support Worksheet) to arrive at a new concept called "combined weekly adjusted income."[26] This amendment relieves the child support obligor from paying child support on an income partially dedicated to payment of work-related child care expenses. Additionally, the "first in time, first in right" rule contained in previous versions of the Guidelines is eliminated.[27]

4. Basic Child Support Obligation.—The amended Guidelines now include schedules for combined weekly adjusted income amounts up to and including $4,000 instead of the previous $2,000 limit.[28] This inclusion should reduce the number of complicated trigonometric calculations required.[29]

5. Adjustments to the Basic Child Support Obligation.—Several changes in this portion of the Guidelines are noteworthy. The Guidelines now expressly provide that work-related child care expenses (Child Support Worksheet Line 4.A.) are to be added to the basic child support obligation.[30] The tenor of this amendment appears to make this step mandatory, although the court of appeals has previously suggested that this addition may be discretionary.[31] The Commentary offers the child support obligor another potential reduction. The work-related child care expense to custodial parents claiming the work-related child care credit for federal tax purposes should be reduced by the amount of tax savings to the custodial parent.[32] Respecting extraordinary health care expenses (Child Support Worksheet Line 4.B.), the Guidelines now make clear that the custodial parent should pay up to six percent of the basic child support obligation annually.[33] The Commentary provides a specific example for this computation.[34] The Guidelines' extraordinary educational expense analysis (Child Support Worksheet Line 4.C.) revises its view of post-secondary education.[35] The Guidelines now explicitly direct trial courts to consider how such expenses would have been allocated had a marriage remained intact, places a more direct obligation upon the child to contribute to such expenses, and suggests that the child should be required to achieve a minimum level of academic performance as a condition for receiving parental payments toward such expenses.[36] The Commentary offers a detailed set of possibilities but concludes that the trial court

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26. Indiana Child Support Guideline 3(C).
27. Indiana Child Support Guideline 3, Commentary.
28. Indiana Child Support Guidelines, Schedules for Weekly Support Payments.
29. *See* Indiana Child Support Guideline 3, Commentary.
30. Indiana Child Support Guideline 3(E)(1).
31. *See* Cobb v. Cobb, 588 N.E.2d 571, 575 (Ind. Ct. App. 1992).
32. Indiana Child Support Guideline 3, Commentary.
33. Indiana Child Support Guideline 3(E)(2).
34. Indiana Child Support Guideline 3, Commentary.
35. Indiana Child Support Guideline 3(E)(3).
36. *Id.*

retains vast discretion on this issue.[37] It is indisputable that this section of the Guidelines is heavily-influenced by *Carr v. Carr*.[38]

D. Support Guideline 6 - Additional Commentary

The Indiana Supreme Court provided a lengthy Commentary to assist practitioners, courts, and litigants in applying the Guidelines. The Commentary contains part of the 1989 version of the Guidelines as well as new direction that modifies the prior Guidelines.

1. Split Custody.—The Commentary now expressly identifies situations where each parent has physical custody of one or more children of the marriage as "split custody," eliminating the former confusion in nomenclature.[39] The Commentary continues to offer suggestions for calculating support in split custody cases.[40]

2. Abatement of Child Support.—The Commentary now embodies the generally accepted practice of abating a child support obligor's payment up to fifty percent when extended visitation of seven days or longer occurs.[41]

3. Deviation for Regular Visitation.—The Commentary recommends that a child support obligor's payment be reduced by up to ten percent weekly in situations where the child support obligor (noncustodial parent) regularly exercises alternate weekend visitation.[42] The Commentary cautions that such abatement should occur only after careful consideration of the particular case in issue.[43]

4. Tax Dependency Exemptions.—The Commentary expands discussion of a trial court's authority to order a custodial parent to assign tax dependency exemptions to a noncustodial parent pursuant to I.R.C. § 152(e).[44] The Commentary embodies prevailing practice by suggesting that trial courts may wish to have the custodial parent execute I.R.S. Form 8332 on an annual basis upon verification that a child support obligor is current in his obligation at the end of the year.[45] The Commentary now also sets out a minimum set of factors to be considered by a trial court when determining whether or not to order a custodial parent to release tax dependency exemptions.[46]

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37. Indiana Child Support Guideline 3, Commentary.
38. 600 N.E.2d 943 (Ind. 1992).
39. Indiana Child Support Guideline 6, Commentary.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. Indiana Child Support Guidelines, Commentary to Guideline 6; *see, e.g.*, Ritchey v. Ritchey, 556 N.E.2d 1376 (Ind. Ct. App. 1990).
45. Indiana Child Support Guideline 6, Commentary.
46. *Id.*

5. Transportation Costs.—The Commentary expressly states that trial courts should not automatically order noncustodial parents to bear the entire cost of transportation related to visitation.[47] The geographic distance between the parties and their respective financial resources are among the factors relevant to the apportionment of these costs.[48]

6. Accountability of Custodial Parent for Child Support.—The Commentary supplements section 31-1-11.5-13(e) of the Indiana Code in recognizing the need for an accounting of child support by a custodial parent for future child support received.[49] A troublesome aspect of this Commentary, however, is its recognition that a remedy for the diversion of child support by a custodial parent for personal use "is not clear."[50]

7. Emancipation for Support Orders of Two or More Children.—The Commentary now expressly discusses child support orders for multiple children and the impact of emancipation of one child.[51] The Commentary emphasizes the frequent need to judicially amend child support orders upon emancipation.[52]

II. LEGISLATIVE DEVELOPMENTS

In its regular session, the Indiana General Assembly passed a modest amount of significant family law legislation.[53]

A. Grandparents' Visitation

Perhaps the most publicized piece of family law legislation approved in 1993 is the amendment to the grandparents' visitation statute.[54] Prior to July 1, 1993, the parents of a custodial parent were extremely limited in their ability to visit with their grandchildren over the objection of the custodial parent. The 1993 amendment effectively rewrote this section of the Indiana Code and permits the parent of *either* the custodial or noncustodial parent to seek visitation rights if "[t]he marriage of the child's parents has been dissolved in Indiana."[55] The 1993 amendment also permits grandparents to seek visitation rights under a

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47. *Id.*; *see also* Huffman v. Huffman, 623 N.E.2d 445 (Ind. Ct. App. 1993) (where an equal allocation of transportation costs between parents survived a constitutional equal protection challenge).

48. Indiana Child Support Guideline 6, Commentary.

49. *Id.*

50. *Id.* The Commentary suggests that perhaps "the scrutiny that comes with an accounting would itself resolve the problem." *Id.*

51. *Id.*

52. *Id.*

53. The following sections of this Survey article briefly describe selected, notable Indiana family law legislation. A thorough review of all of the Indiana General Assembly's activities in its most recent term is recommended in order to conduct a complete analysis of all family law legislation.

54. IND. CODE § 31-1-11.7-2 (Burns Supp. 1993).

55. IND. CODE § 31-1-11.7-2(a)(2) (Burns Supp. 1993).

foreign divorce decree if the foreign decree does not bind the grandparents, or if an Indiana trial court could have jurisdiction over matters under Indiana's adaptation of the Uniform Child Custody Jurisdiction Act (known in Indiana as the Uniform Child Custody Jurisdiction Law).[56] Passed amidst a groundswell of publicity, this amendment may have a major impact on familial relationships.

B. Permanent Protective Order

The Indiana General Assembly added a new section to the Indiana Dissolution of Marriage Act[57] authorizing the issuance of a permanent protective order following a dissolution of marriage.[58] Effective July 1, 1993, trial courts may issue, upon motion supported by affidavit, a permanent protective order enjoining "a party from molesting or disturbing the peace of the other party" or to exclude "either party from the family dwelling or from the dwelling of the other party upon a showing that harm would otherwise result."[59] Despite its reference to Trial Rule 65,[60] this statute does not appear to mandate that the permanent protective order be reciprocal.[61] The statute also provides for the transformation of a temporary restraining order into a permanent protective order at a final marital dissolution hearing.[62] Issues of security and renewability of a permanent protective order are handled under existing Indiana law.[63] This new statute should provide a modicum of comfort to litigants who feel threatened at the conclusion of a family law proceeding, and may tend to reduce the caseload of routine protective order cases filed under sections 34-4-5.1-1 *et seq.* of the Indiana Code.

III. PROPERTY DISTRIBUTION

Property distribution under Indiana law involves three steps: identification,[64] valuation,[65] and division.[66] In 1993, Indiana trial and appellate courts continued to deal with these difficult issues, refining the definition of "property,"

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56. *See* IND. CODE § 31-1-11.7-2(b) (Burns Supp. 1993).

57. IND. CODE § 31.1.11.5-1 *et seq.* (Burns 1987 and Supp. 1993).

58. IND. CODE § 31-1-11.5-8.2 (Burns Supp. 1993).

59. IND. CODE § 31-1-11.5-8.2(a) (Burns Supp. 1993).

60. IND. TRIAL RULE 65(E) mandates that temporary restraining orders issued in family law cases must enjoin "both parties to the action."

61. IND. CODE § 31-1-11.5-8.2 (Burns Supp. 1993).

62. IND. CODE § 31-1-11.5-8.2(b) (Burns Supp. 1993).

63. IND. CODE § 31-1-11.5-8.2(c), (d), and (e) (Burns Supp. 1993).

64. *See, e.g.*, IND. CODE § 31-1-11.5-2(d) (Burns 1987) (defining "property").

65. *See, e.g.*, Eyler v. Eyler, 492 N.E.2d 1071 (Ind. 1986), addressing the timing of valuation of property in marital dissolution actions).

66. IND. CODE § 31-1-11.5-11(c) (Burns Supp. 1993) (presuming an equal division of marital property is just and reasonable, but providing a nonexclusive list of factors that a trial court may consider to rebut this presumption).

addressing the equal division presumption, and considering the effect of bankruptcy on property distribution.

A. Statutory Determination and Division of Property

In *Leisure v. Leisure*,[67] the Indiana Supreme Court held that a former air traffic controller's federal worker's compensation benefits acquired after the filing of a petition for dissolution of marriage was not property as defined in section 31-1-11.5-2(d) of the Indiana Code. The husband, who previously had worked as an air traffic controller and had been placed on administrative status, applied for immediate medical retirement on March 29, 1989.[68] He began receiving both disability and federal worker's compensation benefits and, when forced to choose, he opted for the worker's compensation benefits.[69] The trial court found the husband's federal worker's compensation benefits to be marital property.[70] The Indiana Court of Appeals affirmed the trial court's determination,[71] relying upon *Gnerlich v. Gnerlich*[72] in concluding that federal worker's compensation benefits were analogous to the disability insurance benefits addressed in *Gnerlich*. The supreme court granted transfer and reversed the court of appeals' decision, holding that the worker's compensation benefits were future income rather than property subject to distribution as a marital asset.[73] The supreme court reasoned that, unlike the disability benefit in *Gnerlich*, the husband had not been required to deplete marital assets or pay premiums to acquire the worker's compensation benefits.[74] The supreme court also distinguished worker's compensation benefits from common law tort claim awards since worker's compensation benefits lack elements of pain and suffering and monetary loss, instead giving prompt and certain relief to employees.[75] The supreme court also pointed out that worker's compensation benefits are contingent upon an employee's continued disability rather than an absolute entitlement.[76] Holding that "worker's compensation benefits are not a vested property interest subject to distribution as a present marital asset, but, rather, they represent future income,"[77] the supreme court ultimately opined that pension benefits are distinguishable from worker's compensation benefits as deferred compensation, since worker's compensation benefits simply replace wages lost

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67. 605 N.E.2d 755 (Ind. 1993).
68. *Id.* at 757.
69. *Id.*
70. *Id.*
71. Leisure v. Leisure, 589 N.E.2d 1163 (Ind. Ct. App. 1992).
72. 538 N.E.2d 285 (Ind. Ct. App. 1989) (holding that husband's disability benefits were a marital asset for distribution).
73. *Leisure*, 605 N.E.2d at 758.
74. *Id.*
75. *Id.*
76. *Id.* at 759.
77. *Id.*

due to an employee's injury. *Leisure* thus limits the statutory definition of property for marital dissolution purposes.

Castaneda v. Castaneda[78] dealt with the often thorny issue of the inclusion of inheritances in marital estates. During the course of the parties' marriage, the wife acquired an inheritance from her father, deposited the funds into certificates of deposit in her name, avoided commingling the inherited funds with other funds, and enjoyed substantial appreciation of the funds to the sum of $111,762.30 by the time of the final marital dissolution hearing.[79] The trial court held that the entire value of the inheritance was the wife's "individual property" which should be awarded to her, and that the inheritance "should not be considered marital assets for purposes of dividing the marital estate."[80] The Indiana Court of Appeals affirmed the trial court's judgment, in the process rejecting the husband's argument that the trial court erroneously excluded the inheritance from the marital estate.[81] In its analysis, however, the court of appeals confirmed that the inheritance was "property" within section 31-1-11.5-2(d) of the Indiana Code.[82] The court of appeals referenced the record of the proceedings which detailed two pre-trial conferences at which the husband and the wife agreed that the inheritance was part of their divisible marital estate, leaving as the sole issue the appropriate distribution of that property.[83] The court of appeals noted that the trial court listed the inheritance as marital property in its order but merely set aside the entire value to the wife.[84] Finding that portions of the trial court's order may have contained misstatements that could imply that the inheritance was not marital property, the court of appeals effectively concluded that the misstatements constituted nothing more than harmless error, given the record below.[85] The court of appeals also dismissed the husband's argument that the trial court abused its discretion in awarding the entire value of the inheritance to the wife, citing section 31-1-11.5-11(c) of the Indiana Code and its specific reference to inheritance as a factor that can justify deviation from the rebuttable equal division presumption and the wife's careful segregation and treatment of the inherited funds as nonmarital property.[86] *Castaneda* affirms that inheritances are part of a marital estate, but provides authority for a substantial deviation argument regarding the percentage division of assets in a contested marital dissolution action.

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78. 615 N.E.2d 467 (Ind. Ct. App. 1993).
79. *Id.* at 468-69.
80. *Id.* at 469.
81. *Id.* at 470.
82. *Id.* at 469.
83. *Id.*
84. *Id.* at 470.
85. *Id.*
86. *Id.* at 470-71.

Hoskins v. Hoskins[87] offers a forceful reminder that trial courts must set forth their rationale for deviating from the equal division presumption.[88] The parties agreed that the husband received more than fifty percent of the value of the parties' marital estate under the divorce decree, but the trial court failed to enter any findings explaining its reasons for deviating from an equal division.[89] The Indiana Court of Appeals reversed and remanded the trial court's approximate 56%/44% distribution and explained that the question of whether a deviation is substantial or not depends upon the size of the marital estate.[90] The court of appeals opined that "[t]he less property one has, the dearer the property is."[91] In the final analysis, the court of appeals determined that an approximate $1,600.00 deviation in a marital estate valued at $26,245.71 was substantial.[92]

McGinley-Ellis v. Ellis[93] reaffirms the principle that a trial court must explain a substantially unequal division of a marital estate. The husband owned 162 shares of stock in a family business, and the trial court included in the parties' marital estate only the appreciation on the 22 shares of stock the husband brought into the marriage.[94] The husband requested specific findings pursuant to Trial Rule 52(A),[95] and the trial court found that the 140 shares of stock gifted to the husband during the course of the parties' marriage were intended solely for the husband and that the value of the other 22 shares of stock was disputed, based upon the uncertainty as to the identity of the donees.[96] The trial court awarded the husband approximately 87% of the parties' $231,000 net marital estate purporting to give the wife 60% of the net value.[97] The court of appeals reversed the trial court's judgment, finding the trial court's calculation of the 162 shares of stock in the marital estate at $9,331 clearly erroneous in light of the husband's testimony that the 162 shares were worth $186,500.[98] The court of appeals found it "axiomatic that the source of the stock has no impact upon its value."[99] In including only $9,331 of the nearly $190,000 value

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87. 611 N.E.2d 178 (Ind. Ct. App. 1993).

88. IND. CODE § 31-1-11.5-11(c) (Burns Supp. 1993); *see also In re* Marriage of Coomer, 622 N.E.2d 1315 (Ind. Ct. App. 1993) (reversing a 60%/40% distribution on the basis of the trial court's erroneous valuation of marital assets).

89. *Hoskins*, 611 N.E.2d. at 179; *see also* In re Marriage of Davidson, 540 N.E.2d 641 (Ind. Ct. App. 1989); Kirkman v. Kirkman, 555 N.E.2d 1293 (Ind. 1990).

90. *Hoskins*, 611 N.E.2d at 180.

91. *Id.* (citing Mark 12:41-44).

92. *Id.* at 179-80.

93. 622 N.E.2d 213 (Ind. Ct. App. 1993).

94. *Id.* at 216. The 162 shares of stock the husband owned were worth approximately $190,000. *Id.* In contrast, the appreciation the trial court included in the marital estate was worth only $9,331. *Id.*

95. *Id.* at 218.

96. *Id.*

97. *Id.* at 216.

98. *Id.* at 219.

99. *Id.*

of the stock in the parties' marital estate, the court of appeals found the trial court had abused its discretion by "effectively and systematically" excluding marital assets from the marital estate.[100] The court of appeals also noted the trial court's conflicting findings as to the wife's substantial contributions as a homemaker and her lower future income earning capacity as making "it impossible to discern which party rebutted the statutory presumption."[101] Ultimately, the court of appeals held that the trial court's findings were insufficient under Trial Rule 52 and, remanding with instructions to include all 162 shares of stock in the marital estate, instructed the trial court to either follow the statutory presumption of equal division of property or set forth its rationale for not doing so.[102]

B. Antenuptial Agreements and the Abolishment of Presumption of Undue Influence in Interspousal Transactions

In *Womack v. Womack*,[103] the Indiana Supreme Court abolished the common law presumption of undue influence in interspousal transactions. The husband (age 85 at trial) and the wife (age 78 at trial) married on January 29, 1988, and executed a purported "Pre-Nuptial Agreement" on February 8, 1988, in which the husband agreed to support and maintain the wife in a suitable home, consistent with his financial ability.[104] The "Pre-Nuptial Agreement" also permitted either party to gift property to the other party.[105] On September 14, 1990, the husband closed a transaction for the purchase of a house in Mitchell, Indiana, and deeded the house to the wife contemporaneous with the closing.[106] In October, 1990, the husband petitioned to dissolve his marriage to the wife.[107] In the absence of evidence of deception or undue influence, the trial court determined that the husband had gifted the Mitchell, Indiana house to the wife.[108] The court of appeals affirmed the trial court's award of the Mitchell, Indiana house to the wife.[109] The Indiana Supreme Court vacated the court of appeals' decision, calling the presumption of undue influence in interspousal transactions "an antiquated rule of law." The court held that Indiana law no longer recognizes a presumption of undue influence in interspousal transactions on the basis of the confidential relationship or showing the dominant spouse benefitted from the transaction, and declared that the spouse seeking to set aside

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100. *Id.*
101. *Id.*
102. *Id.*
103. 622 N.E.2d 481 (Ind. 1993).
104. *Id.* at 482.
105. *Id.*
106. *Id.* at 483.
107. *Id.*
108. *Id.*
109. *Id.*; *see also* Womack v. Womack, 605 N.E.2d 221 (Ind. Ct. App. 1992), *reh'g denied.*

the transaction has the burden of proving that the other spouse exercised undue influence.[110]

C. Injunctive Relief

Kennedy v. Kennedy[111] involved a claim by the wife that her husband had either misrepresented or failed to disclose the true value of his pension and retirement benefits. Following the conclusion of her marital dissolution action, the wife sought to set aside the dissolution decree, alleging fraud and undue influence.[112] Shortly thereafter, the wife moved for a preliminary injunction to enjoin the husband from dissipating his pension pending resolution of her fraud allegations.[113] The trial court held a nonevidentiary hearing and, on January 4, 1993, enjoined the husband from removing, transferring, or disposing of his pension and retirement benefits.[114] The court of appeals affirmed the issuance of the preliminary injunction, noting the vast discretion the trial court has in considering whether to issue equitable relief.[115] The court of appeals rejected as harmless error the husband's argument that a two-month delay in entering special findings following the issuance of the preliminary injunction was prejudicial.[116] While the court of appeals agreed with the husband's position that injunctive relief is improper when an applicant cannot demonstrate the present existence of an actual threat of harm, it found that the parties' pleadings and discovery requests provided the trial court with the foundation necessary to support a grant of injunctive relief.[117] To support the trial court's issuance of the preliminary injunction, the court of appeals noted that the husband had asserted that the wife was not entitled to more than the $1,000 per month required by the terms of the divorce decree and that he had not been readily forthcoming in providing requested valuation information.[118] The court of appeals further rejected the husband's claims that his pension could not be the subject of injunctive relief, distinguishing *Selke v. Selke*[119] on the basis that the husband deliberately misrepresented the pension's value, rather than failing to volunteer information regarding the pension's value as in *Selke*. Finally, the court of appeals confirmed the trial court's issuance of the preliminary injunction without requiring the wife to post security as appropriate.[120] *Kennedy* illus-

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110. *Womack*, 622 N.E.2d at 483.
111. 616 N.E.2d 39 (Ind. Ct. App. 1993), *trans. denied.*
112. *Id.* at 41.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 42.
117. *Id.* at 42-43.
118. *Id.* at 43.
119. 600 N.E.2d 100 (Ind. 1992).
120. *Id.* at 43-44.

trates the broad discretion trial courts enjoy when fashioning methods to preserve marital property.

D. Bankruptcy and Property Distribution

Reich v. Reich[121] addressed the issue of whether a state court has concurrent jurisdiction with the bankruptcy court to grant relief from the automatic stay provision of the United States Bankruptcy Code.[122] In *Reich*, the wife received a $27,000 judgment, payable in 72 monthly installments of $302.19, as well as relief from two bank loans as part of the court order equalizing property division.[123] The trial court characterized the judgment in the nature of additional child support and nondischargeable.[124] Shortly after the wife filed a motion to enforce payment of the bank loans, the husband filed a voluntary petition for Chapter 7 bankruptcy and ceased making the payments on the bank loans because of the automatic stay provision of the bankruptcy code.[125] The trial court ultimately found the husband in contempt for failing to make the bank loan payments and awarded attorneys' fees to the wife.[126]

The husband claimed on appeal that the trial court did not have subject matter jurisdiction to find him in contempt because the bank loan payments were stayed by the automatic stay provisions of the bankruptcy code.[127] The court of appeals agreed and reversed the trial court's ruling on this issue, finding that the trial court did not have jurisdiction to grant relief from the bankruptcy stay.[128] The court of appeals distinguished the trial court's concurrent jurisdiction with the bankruptcy court on issues of dischargeability of debts from the bankruptcy court's exclusive jurisdiction over the automatic stay issue.[129] The court of appeals affirmed the award of attorneys' fees to the wife but remanded to the trial court for recalculation of the award in an amount consistent with issues over which the trial court had jurisdiction.[130] *Reich* reveals the complexities inherent in dealing with bankruptcy issues and shows the dramatic impact that federal law can occasionally have on marital dissolution actions.

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121. 605 N.E.2d 1178 (Ind. Ct. App. 1993).
122. 11 U.S.C. § 362 (1988 & Supp. 1992).
123. *Reich*, 605 N.E.2d at 1179.
124. *Id.*
125. *Id.* at 1179-80.
126. *Id.* at 1181.
127. *Id.* at 1181-82.
128. *Id.* at 1183.
129. *Id.*
130. *Id.*

IV. CHILDREN'S ISSUES

A. Child Custody

1. What Legal Standard Should Apply When Modifying Joint Legal Custody?—In *In re Marriage of Richardson*,[131] the Indiana Supreme Court extended its analysis of the legal standard applicable to the modification of joint legal custody arrangements from its landmark *Lamb v. Wenning*[132] decision. In *Richardson*, the 1988 settlement agreement provided for joint legal custody of the parties' twin eight-year-old sons with the mother designated as having primary physical custody.[133] In 1991, the trial court conducted an extensive evidentiary hearing and changed primary physical custody of the children to the father while maintaining the joint legal custody arrangement.[134] The court of appeals reversed the trial court's modification, finding the custodial modification an abuse of the trial court's discretion.[135]

The Indiana Supreme Court reversed the court of appeals' decision and reinstated the trial court's modification, emphasizing the "clearly erroneous" standard for reversing trial court determinations and giving priority to a trial court's ability to weigh the credibility of witnesses.[136] In adhering to this standard of review, the supreme court noted that expert testimony, combined with the persuasive in-chambers testimony of the 12-year-old twin boys, established "changed circumstances so substantial and continuing as to make the original residential arrangement unreasonable."[137] The supreme court rejected the mother's argument that she was denied due process because of her inability to cross-examine letters sent to the trial court by a testifying psychologist after the conclusion of evidence, noting that the trial court's modification order did not reference the letters and that the mother did not move to strike the letters or reopen the evidence.[138] Justice De Bruler authored a concurring opinion taking issue with the majority opinion's implication that a change in circumstances of a nonresidential parent, standing alone, might support a custody modification.[139] *Richardson* opens several avenues for seeking modifications of joint

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131. 622 N.E.2d 178 (Ind. 1993).

132. 600 N.E.2d 96 (Ind. 1992).

133. *Richardson*, 622 N.E.2d at 178-79.

134. *Id.* at 179.

135. Richardson v. Morgan, 612 N.E.2d 157 (Ind. Ct. App. 1993).

136. *Richardson*, 622 N.E.2d at 179; *see also* IND. TRIAL RULE 52(A) (a trial court's judgment should not be set aside "unless clearly erroneous, and due regard should be given to the opportunity of the trial court to judge the credibility of the witnesses.").

137. *Richardson*, 622 N.E.2d at 179 (quoting *Lamb*, 600 N.E.2d at 98).

138. *Id.* at 180.

139. *Id.* at 180-81 (De Bruler, J., concurring). For further discussion of Justice De Bruler's point, *see* Pierce v. Pierce, 620 N.E.2d 726, 729 (Ind. Ct. App. 1993) (concluding that a trial court may consider the noncustodial parent's circumstances in determining whether to modify a custody

legal custody arrangements, including heightening the relevance and appropriateness of the in-chambers interview procedure for young children, emphasizing the import of testimony by mature pre-teenagers, and reaffirming the vast discretion granted trial courts in custodial matters.

2. The Developing Interpretation of Indiana's Version of the Uniform Child Custody Jurisdiction Act.—The year 1993 saw several significant cases related to Indiana's version of the Uniform Child Custody Jurisdiction Act, known as the Uniform Child Custody Jurisdiction Law ("UCCJL").[140] *Williams v. Williams*[141] involved a husband and wife who were married in North Carolina and who lived in North Carolina throughout their marriage.[142] Upon separation, the wife and one of the parties' two daughters, Amber, moved to Muncie, Indiana.[143] The wife subsequently filed a petition for dissolution of marriage in Indiana, and the trial court granted the mother immediate temporary custody of both Amber and Amanda, the daughter who had never left North Carolina.[144] The husband objected to the trial court's attempted assertion of *in personam* jurisdiction over him and its subject matter jurisdiction to determine custody of Amanda.[145] Following a hearing, the trial court acknowledged that it did not have *in personam* jurisdiction over the husband and refused to grant the wife's petition for dissolution of marriage, but confirmed its prior order granting the wife temporary custody of Amanda.[146]

The court of appeals reversed, holding that Indiana did not have jurisdiction over Amanda's custody dispute.[147] The court of appeals determined that the "significant connection" test found in the UCCJL[148] was inapplicable since it is appropriate only when the "home state" test under the UCCJL[149] is inapplicable.[150] The court of appeals ultimately found that North Carolina was the "home state" of Amanda and, thus, that Indiana did not have jurisdiction over her custody dispute.[151]

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arrangement, but finding no Indiana case which modified custody on the primary basis of improvements in the noncustodial parent's fitness as a parent). *See also* Herrmann v. Herrmann, 613 N.E.2d 471, 473-74 (Ind. Ct. App. 1993).

140. IND. CODE § 31-1-11.6-1 *et seq.* (Burns 1987 & Supp. 1993).

141. 609 N.E.2d 1111 (Ind. Ct. App. 1993).

142. *Id.* at 1112.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 1113-14.

148. IND. CODE § 31-1-11.6-3(a)(2) (Burns 1987).

149. IND. CODE § 31-1-11.6-2(5) (Burns 1987).

150. *Williams*, 609 N.E.2d at 1113.

151. *Id.* at 1113-14. *Cf.* Ward v. Ward, 611 N.E.2d 167, 169 (Ind. Ct. App. 1993), *trans. denied*, (an Indiana trial court can modify a foreign custody order when the foreign jurisdiction declines to exercise jurisdiction because of a child's physical presence in Indiana).

In *Matter of E.H.*,[152] the Indiana Court of Appeals held that a trial court considering a "children in need of services" ("CHINS") proceeding must exercise its jurisdiction within the framework and policy considerations of Indiana's version of the UCCJL. The court of appeals rejected a claim that the UCCJL conflicted with the CHINS statute,[153] noting that the CHINS statute does not control interstate jurisdiction disputes.[154] *Matter of E.H.* affirms the priority of the UCCJL in connection with all multiple jurisdiction custodial questions.

Ruppen v. Ruppen[155] deals with the complex issue of international custodial disputes. The mother, a United States citizen, and the father, an Italian citizen, married in Floyd County, Indiana, in 1987 and moved to Italy shortly thereafter.[156] Two daughters were born of the marriage, enjoying dual Italian and United States citizenships, but always living in Italy.[157] The daughters' contact with the United States was limited to summer vacations with their maternal grandparents in Indiana.[158] In 1992, the mother and daughters visited Indiana, and the mother filed a verified petition for custody and child support after having been in Indiana for 97 days.[159] The next day, the father petitioned for a writ of habeas corpus seeking physical custody of his daughters so that custody could be determined in Italy.[160] The father also filed a motion to dismiss the mother's petition for custody.[161] The trial court dismissed the mother's petition on the basis of a lack of jurisdiction and ordered the mother to transfer physical custody of the children to the father so he could return them to Italy for a custody determination.[162]

The court of appeals affirmed the trial court's determination, holding that a foreign country is a "state" for purposes of the UCCJL and that Italy was the "home state" of the daughters.[163] The court of appeals reaffirmed the inapplicability of the "significant connection" test when a "home state" for children can be determined under the UCCJL.[164] Ultimately, the court of appeals concluded that the mother had failed to show either that Italy did not have jurisdiction to determine child custody under its own laws, or that she would be denied due process if forced to litigate custody in an Italian forum.[165]

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152. 612 N.E.2d 174, 182 (Ind. Ct. App. 1993), *opinion adopted by* Matter of E.H., 624 N.E.2d 471 (Ind. 1993).

153. IND. CODE § 31-6-2-1 *et seq.* (Burns 1987 & Supp. 1993).

154. *Matter of E.H.*, 612 N.E.2d at 182-83.

155. 614 N.E.2d 577 (Ind. Ct. App. 1993).

156. *Id.* at 580.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 582.

164. *Id.* at 581.

165. *Id.* at 582; *see also* Horlander v Horlander, 579 N.E.2d 91 (Ind. Ct. App. 1991).

The mobility of society today makes the UCCJL and its provisions all the more important. Sometimes peculiar fact patterns invoke UCCJL jurisdiction. *Matter of Paternity of Robinaugh*[166] involved a motion by the mother, a resident of Arizona, to dismiss the father's petition to establish paternity. The mother and father were living together in Arizona when the mother became pregnant.[167] Without notice, the mother relocated to Fort Wayne, Indiana, where she gave birth to a son.[168] The mother planned to permit the child to be adopted, but the father intervened with the filing of a paternity action in Arizona.[169] The father later filed a paternity action in Whitley County, Indiana.[170] The mother moved to dismiss the father's petition, and the trial court denied the motion, resulting in an interlocutory appeal.[171]

The Indiana Court of Appeals affirmed the trial court's denial of the mother's motion to dismiss, holding that the UCCJL governed the question of jurisdiction of this paternity proceeding.[172] In noting that the UCCJL governs "custody proceedings" with an interstate dimension, the court of appeals concluded that the UCCJL governs all interstate proceedings in which child custody is one of the issues.[173] The court of appeals further determined that Indiana was the "home state" of the child and that Indiana had jurisdiction under the UCCJL, thereby rejecting the mother's claim that Indiana was an inconvenient forum.[174]

3. The Interplay Between Religion and Custody.—Johnson v. Nation[175] is an extremely significant opinion from the Indiana Court of Appeals. In *Johnson*, the parents divorced in 1985 and the trial court awarded the father sole custody of the parties' two children, granting the mother reasonable visitation rights.[176] In 1987, the parties modified the custodial provisions to provide the mother more liberal visitation.[177] The father petitioned in 1990 to modify the mother's new visitation schedule, alleging that the modified visitation arrangements served neither the best interests of the children nor the best interests of the parties.[178] The mother responded with a petition requesting sole custody of the chil-

166. 616 N.E.2d 409 (Ind. Ct. App. 1993).
167. *Id.* at 410.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 410-11.
173. *Id.* at 411.
174. *Id.* at 411-12.
175. 615 N.E.2d 141 (Ind. Ct. App. 1993).
176. *Id.* at 143.
177. *Id.*
178. *Id.*

dren.[179] The trial court heard the cross-petitions for modification and granted the mother sole custody of the children.[180]

The court of appeals reversed the trial court's determination, reaffirming that a custody modification must be granted only upon "a showing of changed circumstances so substantial and continuing as to make the existing custody order unreasonable."[181] The court of appeals differentiated this standard from the "best interest" test for an initial custody determination set forth in section 31-1-11.5-21(a) of the Indiana Code.[182] Rejecting the claim that the father's control over religious matters warranted a change of custody, the court of appeals noted that a noncustodial parent may not impose his religious views on a child and held that the father's enhanced religious involvement, standing alone, did not support a custodial modification.[183] The court of appeals also found that the father's attempts to "block the transfer" of the mother's beliefs, attitudes, and values did not support a custody modification.[184] Interestingly, the court of appeals found that the father had interfered with the mother's visitation.[185] However, the court of appeals reasoned that the interference did not rise to a level to support a custody modification and returned custody of the parties' children to the father.[186] The *Johnson* court further held that the trial court did not err in refusing to order the mother to take the children to religious functions sanctioned by the father during her visitation.[187] The interferences to the mother's visitation by the interruption for those activities, the court of appeals concluded, would be unreasonable.[188]

4. Equal Protection Arguments and Transportation Issues.—Huffman v. Huffman[189] considered an equal protection challenge to a trial court's order apportioning transportation expenses related to visitation. The father and mother shared joint legal custody of their children, and the 1985 court order provided that the mother would receive sole legal custody if either she or the father moved more than 5 miles away from their Greencastle, Indiana home.[190] Upon the mother's proposed relocation 175 miles away from Greencastle, Indiana, the father petitioned for a custody modification.[191] The trial court denied the mother's motion to dismiss, ordered that the mother have sole custody of the

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179. *Id.*
180. *Id.*
181. *Id.*; IND. CODE § 31-1-11.5-22(d) (Burns 1993).
182. *Johnson*, 615 N.E.2d at 143.
183. *Id* at 145-46.
184. *Id.* at 146.
185. *Id.* at 147.
186. *Id.*
187. *Id.*
188. *Id.* at 149.
189. 623 N.E.2d 445 (Ind. Ct. App. 1993).
190. *Id.* at 447.
191. *Id.*

children, and divided equally the financial responsibility for providing transportation related to the father's visitation.[192] The court of appeals affirmed the trial court's judgment denying the mother's motion to dismiss.[193] In its analysis, the court of appeals rejected the mother's contention that the trial court's transportation order violated the equal protection clause, noting that the mother admitted that the new visitation order imposed the same transportation obligations upon her as it did upon the father.[194]

B. Child Support

1. Court-Ordered Child Support Payments Cannot Exceed the Amounts Prescribed by the Indiana Child Support Rules and Guidelines.—Kinsey v. Kinsey[195] set forth this proposition in a situation where, upon a modification petition, the trial court found the father's child support obligation under the Guidelines to be $80.00 weekly.[196] The trial court deviated from the Guidelines amount and ordered the father to pay $140.00 weekly in child support, basing its determination, in part, upon the desire to mitigate the perceived detrimental impact of implementing an immediate reduction in child support from $200.00 to $80.00 weekly.[197] The court of appeals reversed and held that the Indiana Child Support Rules and Guidelines do not contemplate deviations from Guidelines child support in excess of the Guidelines amount.[198] The court of appeals, however, noted that a child support obligor can bind himself by agreement to pay child support in excess of what the trial court could order if it crafted the award or can make voluntary payments that exceed the amount prescribed by the Guidelines.[199]

Closely related is the case of *In re Marriage of Loeb*,[200] in which the court of appeals enforced a father's obligation under a settlement agreement to pay child support past age 21 and through the completion of a child's college education.[201] In enforcing the child support order, the court of appeals noted the lack of ambiguity in the father's agreement to pay child support until his daughter graduated from an accredited four-year college program unless she earlier married, died, or became emancipated.[202] Taken together, *Kinsey* and *Loeb* clarify the limits of the Indiana Child Support Rules and Guidelines while

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192. *Id.*
193. *Id.* at 450.
194. *Huffman*, 623 N.E.2d at 449; *see also* U.S. CONST. amend. XIV, § 1, commanding that no State shall "deny to any person within its jurisdiction the equal protection of the laws."
195. 619 N.E.2d 929 (Ind. Ct. App. 1993).
196. *Id.* at 931.
197. *Id.*
198. *Id.* at 933.
199. *Id.* at 934.
200. 614 N.E.2d 954 (Ind. Ct. App. 1993).
201. *Id.* at 955-56.
202. *Id.* at 957.

acknowledging parents' freedom of contract and voluntary right to make excess child support contributions.

2. Child Support Abatement When Children Live at College.—In re Marriage of Tearman[203] dealt principally with the issue of abatement of child support during a child's on-campus college attendance. In remanding to the trial court for a determination of the appropriate amount of the abatement of child support while the parties' daughter attended college and resided on campus, the court of appeals noted that the trial court must address the issue of full or partial abatement of child support when a noncustodial parent is obligated to pay a share of the child's on-campus "board."[204] *Tearman* reaffirms the great latitude trial courts possess in determining what, if any, abatement should occur when a child is away from home and living at college and provides guidance that *some* abatement is likely in order.[205]

3. Weekly Gross Income.—In *McGinley-Ellis v. Ellis*,[206] the Indiana Court of Appeals continued its examination of the concept of weekly gross income for the self-employed. The trial court determined that the father, the president and majority stockholder of a family corporation, controlled his compensation, but only considered the father's salary and "in kind" compensation in its child support calculation.[207] The court of appeals determined the trial court's methodological treatment of the father as an "employee" of the corporation to be error and remanded for a recalculation of child support.[208] The court of appeals pointed out, however, that the father's majority in stockholder status, the corporation's rent payments to purchase real estate, and the father's line of credit from the corporation all were relevant factors to be considered in the child support calculation.[209] *McGinley-Ellis* offers much needed guidance on the issue of weekly gross income for the self-employed and realistically considers the "in-kind" benefits enjoyed by many business careers.[210]

4. The 20% Rule.—Sections 31-1-11.5-17(a)(2)(A) and (B) of the Indiana Code provide that a child support obligor's child support obligation shall be modified if the current child support amount differs by more than 20% from that

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203. 617 N.E.2d 974 (Ind. Ct. App. 1993).

204. *Id.* at 977.

205. The Commentary to Indiana Child Support Guideline 6 recommends a 50% abatement in certain situations.

206. 622 N.E.2d 213 (Ind. Ct. App. 1993).

207. *Id.* at 220.

208. *Id.*

209. *Id.* at 220-22. The court of appeals, on an unrelated point, refused to inject itself into the role of arbiter in a dispute over preschool tuition and parochial school education expense, noting that the parties' joint legal custody arrangement meant that the parents should make decisions related to their children jointly or seek a custody modification. *Id.* at 223-24; *see also* IND. CODE § 31-1-11.5-21(f) (Burns 1987 & Supp. 1993) (defining the role of joint legal custodians).

210. *See also* Forbes v. Forbes, 610 N.E.2d 885 (Ind. Ct. App. 1993) (confirming that a child support obligor's social security disability benefits are includable in his gross income for child support calculation purposes).

presumed by the Indiana Child Support Rules and Guidelines and if the trial court order establishing the current child support obligation was entered more than 12 months from the date of the modification petition.[211] *In re Marriage of Brown*[212] confirms the mandatory nature of this statutory provision. In *Brown*, the court of appeals reversed the trial court's refusal to either honor the "20% rule" or set forth its rationale for not doing so.[213]

5. Uniform Reciprocal Enforcement of Support Act.—Burke v. Burke[214] added to the development of Indiana case law interpreting Indiana's version of the Uniform Reciprocal Enforcement of Support Act ("URESA").[215] The parties were divorced by an Indiana trial court in 1976 with a subsequent 1981 child support modification occurring in the trial court.[216] The mother later registered the Indiana decree in Illinois following the father's relocation to that state, and an Illinois trial court modified the father's child support obligation.[217] The father then moved back to Indiana and, in 1991, filed a verified petition to terminate and abate child support following the parties' youngest child reaching 18 years of age.[218] The Indiana trial court concluded that it retained subject matter jurisdiction over the case and that the previous Indiana orders were registered in Illinois for enforcement purposes only.[219] The trial court also found that the father had accrued a $48,500.49 child support arrearage.[220]

The court of appeals reversed and remanded, in the process setting forth a relevant analysis of URESA.[221] The court of appeals noted that Indiana had adopted URESA, while Illinois had adopted a version of the Revised Uniform Reciprocal Enforcement of Support Act ("RURESA").[222] Under principles of comity and full faith and credit, the court of appeals determined that Illinois' RURESA governed this case.[223] Illinois' RURESA, the court of appeals analyzed, contained an antisupersession clause which provided for a prospective modification of child support.[224] After reviewing Illinois precedent, the court of appeals held that the prior order of the Illinois trial court provided for a modification of the Indiana decree.[225] Having concluded that the Illinois trial court shared both subject matter jurisdiction and *in personam* jurisdiction, the

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211. IND. CODE § 31-1-11.5-17(a)(2)(A) and (B) (Burns Supp. 1993).
212. 609 N.E.2d 1173 (Ind. Ct. App. 1993).
213. *Id.* at 1174.
214. 617 N.E.2d 959 (Ind. Ct. App. 1993).
215. IND. CODE § 31-2-1-1 *et seq.* (Burns 1987 & Supp. 1993).
216. *Burke*, 617 N.E.2d at 961.
217. *Id.*
218. *Id.*
219. *Id.* at 961-62.
220. *Id.* at 962.
221. *Id.* at 966.
222. *Id.*
223. *Id.*
224. *Id.* at 963.
225. *Id.* at 964.

court of appeals found that the Indiana trial court, under principles of full faith and credit, was required to enforce the intervening Illinois order to the exclusion of the prior Indiana decree.[226] Thus, the court of appeals held that the Indiana trial court erred in calculating the father's arrearage solely on the basis of the Indiana decree without consideration of the Illinois modification.[227] As to the prospective modification, however, the court of appeals held that the Indiana trial court had the authority to modify the father's duty of child support, noting the continuing jurisdiction of an Indiana court to modify child support during the minority of a child, and determining that principles of comity did not preclude this action.[228] Judge Barteau concurred in the result, reasoning that the language of Illinois' RURESA did not grant the Illinois trial court the authority to modify the Indiana decree,[229] but that the act of registering the Indiana decree in Illinois vested the Illinois court with that authority.[230]

Spousal maintenance also falls within the reach of URESA, according to the Indiana Court of Appeals. In *Legge v. Legge*,[231] a South Carolina divorce decree provided a monthly "alimony" award to the wife.[232] Upon the husband's relocation to Indiana and failure to make the required alimony payments, the wife filed an enforcement action in Indiana under URESA.[233] Following a hearing, the trial court found the husband in contempt, fixed an arrearage, and established a revised payment schedule.[234] The court of appeals affirmed the trial court's judgment, holding that orders for spousal maintenance may be enforced by contempt.[235] In its analysis, the court of appeals specifically determined that URESA extends to the enforcement of spousal maintenance orders.[236] Acknowledging the past ambiguity in Indiana law regarding the use of the term "alimony," the court of appeals defined alimony as "the sustenance or support of the wife by her divorced husband,"[237] and noted that the South Carolina definition of alimony definitively brought that concept within the scope and jurisdictional reach of URESA.[238]

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226. *Burke*, 617 N.E.2d at 964.
227. *Id.*
228. *Id.* at 965.
229. *Id.* at 966 (Barteau, J. concurring).
230. *Id.*
231. 618 N.E.2d 50 (Ind. Ct. App. 1993).
232. *Id.*
233. *Id.*
234. *Id.* at 50-51.
235. *Id.* at 51. For a more detailed discussion of the contempt process as well as the standard applicable to a child support modification, *see* Kirchoff v. Kirchoff, 619 N.E.2d 592 (Ind. Ct. App. 1993).
236. *Legge*, 618 N.E.2d at 51.
237. *Id.* (quoting Black's Law Dictionary 67 (5th ed. 1979)).
238. *Legge*, 618 N.E.2d at 51.

6. The Discretionary, Nonrestrictive Nature of Private School Educational Expenses.——*Moss v. Frazer*[239] dealt with a 1979 divorce decree that ordered the father to pay "educational expenses" for a child. The court of appeals affirmed the trial court's order that the father pay a portion of the child's future private educational expenses but reversed the portion of the trial court's order which sought to compel the father to reimburse the mother for expenses incurred prior to the filing of the modification petition.[240] The court of appeals based its ruling on the trial court's broad discretion to award future educational expenses and the fact that the ambiguous original order did not cover private educational expenses.[241] *Moss* clarifies and reaffirms firmly-embedded Indiana legal principles regarding private educational expenses.

V. MISCELLANEOUS

Aspects of at least four 1993 Indiana appellate court family law opinions do not fit squarely into any particular category, but contain noteworthy elements.

Bartrom v. Adjustment Bureau, Inc.[242] considered the vitality of the doctrine of necessaries in Indiana. A 1989 automobile accident rendered the husband comatose.[243] His separated wife, the appellant in this action, failed to visit her husband in the hospital and did not participate in economic or life support discussions related to her spouse.[244] The husband subsequently died, and the appellee collection agency pursued payment from the wife.[245] In the ensuing lawsuit, the trial court entered judgment against the wife in the amount of $79,812.55.[246] The court of appeals reversed and remanded with instructions to grant the wife's motion for summary judgment.[247]

The Indiana Supreme Court vacated the court of appeals' opinion and remanded for reconsideration.[248] The supreme court traced the history of the doctrine of necessaries, noting that common law permitted wives to purchase necessaries on their husbands' credit since wives could not contract or be sued in their own right.[249] Over time, a gender-neutral rule developed making the duty of spousal support mutually enforceable by imposing secondary liability on each spouse for the payment of necessary debts of the other.[250] The supreme

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239. 614 N.E.2d 969, 970 (Ind. Ct. App. 1993).
240. *Id.* at 972.
241. *Id.*
242. 618 N.E.2d 1 (Ind. 1993).
243. *Id.* at 2.
244. *Id.* at 2-3.
245. *Id.* at 3.
246. *Id.*
247. *Bartrom*, 618 N.E.2d at 3. *See* Bartrom v. Adjustment Bureau, Inc., 600 N.E.2d 1369 (Ind. Ct. App. 1992).
248. *Bartrom*, 618 N.E.2d at 10.
249. *Id.* at 3-4.
250. *Id.* at 4.

court agreed with this reformulation of the doctrine of necessaries and the primary and secondary liability distinction for contracts entered by one spouse in an individual capacity.[251] However, the supreme court disagreed with the approach adopted by the court of appeals and held that each spouse is primarily liable for his or her independent debts, but the creditor may look to the noncontracting spouse for satisfaction of a debt under limited secondary liability (*i.e.*, the ability of the noncontracting spouse to pay at the time the debt was incurred).[252] The supreme court noted that the duty of spousal support continues at least until the marriage is dissolved.[253] The supreme court also held that rules regarding marital misconduct, applied in a gender-neutral manner, continue to limit a spouse's common law duty of support.[254] *Bartrom* will understandably have a significant impact on interspousal relationships and relationships between spouses and third-party creditors in the future.

McGinley-Ellis v. Ellis[255] also addresses Indiana's treatment of dependency tax exemptions for minor children. The court of appeals, in considering the trial court's order that the mother execute a waiver of the children's dependency tax exemptions "for all future years," concluded that the trial court could later modify its order by directing that the father refrain from attaching I.R.S. Form 8332 to his tax returns for subsequent years, thus returning the dependency tax exemptions to the mother.[256] Although the court of appeals' opinion appears to have been carefully researched, the practical problems in clarifying this issue to the I.R.S. upon modification seem endless given the Service's bureaucratic structure.

Fager v. Hundt[257] held that parental tort immunity is not applicable to an action predicated upon a claim of intentional felonious conduct.[258] In confirming this limit on that doctrine, the Indiana Supreme Court held that "discovery" of a cause of action by a child's parent, even absent actual cognition or memory by a child, cannot limit a claim premised upon an intentional felonious act by a parent.[259] The supreme court added that an exception based upon fraudulent conduct is available to estop a parent from asserting a statute of limitations defense, opining that a plaintiff must exercise due diligence in commencing an action after a child becomes an adult and knows or should have discovered that

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251. *Id.* at 5. *See also* IND. CODE § 31-1-11.5-7(d) (Burns 1987 & Supp. 1993) (temporary maintenance); IND. CODE § 31-1-11.5-11(e) (Burns 1987 & Supp. 1993) (post-dissolution maintenance); IND. CODE § 31-7-11-1 (Burns 1987) (actions for spousal support not attendant to dissolution).

252. *Bartrom*, 618 N.E.2d at 8.

253. *Id.* at 8-9.

254. *Id.* at 9-10.

255. 622 N.E.2d 213 (Ind. Ct. App. 1993).

256. *Id.* at 224-25.

257. 610 N.E.2d 246 (Ind. 1993).

258. *Id.* at 248.

259. *Id.* at 251.

a childhood injury occurred as a result of a parent's tortious conduct.[260] *Fager* opens up the possibility for many more actions by children against their parents.

Finally, in *Penix v. Hicks*,[261] the court of appeals held that the wife's money judgment set out in the divorce decree was a judgment lien under section 34-1-45-2 of the Indiana Code,[262] finding that the divorce decree did not limit the application of the judgment lien statute as it could pursuant to section 31-1-11.5-15 of the Indiana Code. *Penix* affirms the true "judgment" nature of divorce decrees but also illustrates the authority possessed by trial courts to excise that judgment from the public record.

VI. CONCLUSION

The year 1993 saw many notable refinements to Indiana family law. When judged against the expectations preceding the advent of this year, the progression may seem less than startling. When viewed in the context of the historical priority traditionally shown family law matters in Indiana, however, the developments reflect the increased thought given to family law issues by the Indiana General Assembly and Indiana appellate courts. This continued attention bodes well for the future of Indiana family law and Indiana citizens.

260. *Id. See also* Barnes v. Barnes, 603 N.E.2d 1337 (Ind. 1992).
261. 618 N.E.2d 1346 (Ind. Ct. App. 1993).
262. IND. CODE § 34-1-45-2 (Burns 1986).