

1995 SURVEY OF INDIANA FAMILY LAW

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INTRODUCTION

During 1995,¹ the appellate courts addressed evolving areas of case law, including the rights and obligations of parents arising out of artificial insemination; the rights of persons cohabitating without agreements; and, the rights of homosexual parents. Additionally, new statutes were enacted which clarify the status of premarital agreements and a series of statutes were added to provide for greater sanctions against delinquent child support obligors. This Article will address these developments as well as other notable cases that commonly affect the family law practitioner.

I. ANTENUPTIAL AGREEMENTS

In 1995, Indiana adopted its version of the Uniform Premarital Agreement Act.² Indiana courts have typically recognized the validity of premarital (antenuptial or prenuptial) agreements. The statute now sets forth basic definitions, requirements, and exceptions for these types of agreements. Cases that have been issued prior to the enactment of the new statute can still be used to interpret agreements; however, one must be cautious to ensure that case law is not superseded by the statute.

The decision in *Rider v. Rider*,³ although handed down prior to the Act's effective date, parallels the legislation. In *Rider*, the parties entered into an antenuptial agreement which provided that in the event of divorce neither party would have a right to seek support or alimony. The wife introduced evidence at the final hearing that she suffered from inflammatory neuropathy which caused her to quit work. The trial court awarded her maintenance due to her illness. The court of appeals affirmed the trial court.⁴

In its decision, the court stated generally that "antenuptial agreements fixing the property rights of each party upon dissolution of the marriage must be honored and enforced by the courts as written, absent a showing of fraud, coercion, undue influence, or other matters making the agreement unconscionable."⁵ The court explained that, since *Boren* was decided, the court has considered whether events that exist at the time of "dissolution might make an antenuptial agreement

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1. This Article contains a few cases from 1994 that were highly controversial and publicly discussed. The authors thought the practitioner might benefit from their inclusion herein.

2. IND. CODE §§ 31-7-2.5-1 to -10 (Supp. 1995).

3. 648 N.E.2d 661 (Ind. Ct. App. 1995).

4. *Id.* at 666.

5. *Id.* at 664-5 (citing *In re Marriage of Boren*, 475 N.E.2d 690, 694 (Ind. 1985)).

unconscionable.”⁶ The court addressed this issue in *Justus v. Justus*⁷ where it held that “[i]f 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.”⁸ In the *Rider* case, the court used the *Justus* reasoning to find that “[a]n antenuptial provision limiting or eliminating spousal maintenance is unconscionable and will not be enforced when it would deprive a spouse of reasonable support that he or she is otherwise unable to secure.”⁹

The new Premarital Agreement Act states that “[t]he modification or elimination of spousal maintenance” is a matter that may be contracted in a premarital agreement.¹⁰ The Act also states that a court may choose not to enforce the agreement if “modification or elimination [of spousal maintenance] causes one (1) party to the agreement extreme hardship under circumstances not reasonably foreseeable at the time of the execution of the agreement”¹¹

Other prenuptial agreement issues have been addressed in the past year. In *Hunsberger v. Hunsberger*,¹² the wife challenged the validity of the parties’ prenuptial agreement. She alleged that the agreement was invalid due to her husband’s failure to disclose the nature and value of his assets before she signed the agreement. The trial court agreed with the wife. The court of appeals reversed. The wife “did not allege that there was fraud, duress or misrepresentation surrounding the execution of the antenuptial agreement,” nor did she allege unconscionability.¹³ The court relied upon *Johnston v. Johnston*¹⁴ and *In re Estate of Palamara*¹⁵ in holding that there is no duty to disclose the value of assets prior to entering into a prenuptial agreement.¹⁶

Although *Hunsberger* was litigated and decided prior to the enactment of the Premarital Agreement Act, its holding is consistent with the Act. Premarital agreements must be in writing and signed by both parties, and are enforceable without consideration.¹⁷ Further, the statute does not require mandatory disclosure of assets or the value thereof.

In *Lung v. Lung*,¹⁸ the court addressed the issue of whether separate property listed in an antenuptial agreement can become marital property. In *Lung*, the husband and wife entered into an antenuptial agreement that did not restrict the

6. *Id.* at 665.

7. 581 N.E.2d 1265, 1274 (Ind. Ct. App. 1991), *trans. denied*.

8. *Id.*

9. *Rider*, 648 N.E.2d at 665.

10. IND. CODE § 31-7-2.5-5(a)(4) (Supp. 1995).

11. *Id.* § 31-7-2.5-8(b).

12. 653 N.E.2d 118 (Ind. Ct. App. 1995), *trans. denied*.

13. *Id.* at 126.

14. 184 N.E.2d 651 (Ind. App. 1962).

15. 513 N.E.2d 1223 (Ind. Ct. App. 1987).

16. *Hunsberger*, 653 N.E.2d at 125-26.

17. IND. CODE § 31-7-2.5-4 (Supp. 1995).

18. 655 N.E.2d 607 (Ind. Ct. App. 1995).

rights of either party to receive a voluntary transfer from the other party or to own real estate as tenancies by the entireties. The husband listed certain lake property on his list of separate property. Subsequent to the marriage, the husband executed a warranty deed conveying the lake property to himself and the wife, as husband and wife. The trial court found that the property constituted a marital asset and was subject to division in the dissolution action.¹⁹ The court of appeals affirmed, stating that there was no evidence of fraud, undue influence, or involuntariness.²⁰ The court found that because the parties did not intend to restrict transfers of property or the creation of joint assets, the husband's voluntary transfer of the property removed it from its prior status as separate property and caused it to become marital property subject to distribution.²¹

II. DETERMINATION OF MARITAL PROPERTY AND DISTRIBUTION

When dividing property in a dissolution action, four broad questions are addressed: Is it property? Is it marital property? What is the value of that property? And how should that property be divided?²² These questions comprise the issues in the following cases.

In a case of first impression in Indiana, *Hann v. Hann*²³ addressed the issue of whether the husband's unvested,²⁴ unmatured stock options, which were granted to him by his employer, were marital property subject to division upon dissolution. The court held that they were not marital property subject to distribution.²⁵ The court cited several appellate decisions regarding vested pension benefits,²⁶ as well as the Indiana Code,²⁷ in support of its decision. The court found that unvested stock options are analogous to unvested pension plans. The court stated that "Indiana is to classify only those stock options granted to an employee by his or her employer which are exercisable upon the date of dissolution or separation

19. *Id.* at 608-09.

20. *Id.* at 609.

21. *Id.* at 610.

22. Michael G. Ruppert, *Survey of Recent Developments in Family Law*, 23 IND. L. REV. 363 (1990).

23. 655 N.E.2d 566 (Ind. Ct. App. 1995), *trans. denied*.

24. The court labeled the stock options "unvested" because the stock options would be subject to forfeiture if the husband died, was fired or otherwise terminated his employment. *Id.* at 569 n.1.

25. *Id.* at 571.

26. *Mullins v. Matlock*, 638 N.E.2d 854, 856 (Ind. Ct. App. 1994), *trans. denied*; *Sadler v. Sadler*, 428 N.E.2d 1305 (Ind. Ct. App. 1981); *Hiscox v. Hiscox*, 385 N.E.2d 1166 (Ind. App. 1979); *Savage v. Savage*, 374 N.E.2d 536 (Ind. App. 1978); *Wilcox v. Wilcox*, 365 N.E.2d 792 (Ind. App. 1977).

27. "The term 'property' means all the assets of either party or both parties, including: . . . (2) the right to receive pension or retirement benefits that are not forfeited upon termination of employment, or that are vested" IND. CODE § 31-1-11.5-2(d) (1993).

which cannot be forfeited upon termination of employment as marital property.”²⁸

*Berger v. Berger*²⁹ addressed two questions: Is it marital property? and What is the value of the property? In *Berger*, the court of appeals found that the trial court erred when it failed to include the goodwill value of the husband’s business in the property distribution scheme.³⁰ Prior to the parties’ separation, the husband decided to sell his dental practice. The buyer was willing to pay \$235,000—\$105,750 for the assets of the business and \$129,250 on a covenant not to compete. The agreement stated that part of the purchase price of the assets was for the goodwill of the practice. The \$105,750 was included as a marital asset. The wife argued that the trial court erred by not including the value of the restrictive covenant in the marital estate. The court of appeals stated that even though the asset purchase agreement contained a provision for goodwill, “Indiana law has long held a restrictive covenant ancillary to the sale of a business represents the sale of the goodwill of that business”³¹ The court recognized that part of the proceeds for the restrictive covenant were intended to be compensation for the husband’s agreement not to compete and that part of the proceeds may be for future income.³² The court remanded and ordered the trial court to make findings to determine the amount of the restrictive covenant that was intended to compensate the husband for the goodwill of the practice and to include that portion in the marital estate for distribution.³³

While also addressing the issues of spousal maintenance and property distribution, *Fuehrer v. Fuehrer*³⁴ primarily reaffirms the general principle that the marital pot closes on the date the petition for dissolution of marriage is filed and that post-filing debts are not marital debts. In *Fuehrer*, the wife was diagnosed with a rare and deadly form of cancer *during* the parties’ separation period. She underwent extensive surgery and chemotherapy treatments and incurred \$11,000 in medical bills and \$3,000 in credit card debt for clothing and other necessities. The trial court divided the marital estate fifty/fifty; however, it included the wife’s post-filing debts in the marital pot, consequently reducing the husband’s distribution. The court stated that “debts incurred by one party after the dissolution petition has been filed, including debts for medical expenses, are not to be included in the marital pot.”³⁵ The court of appeals reversed the trial court and remanded the case back to the trial court with instructions to exclude the debt from the marital estate and to modify the distribution plan if necessary.³⁶

*Simpson v. Simpson*³⁷ primarily involved the question concerning what is a fair

28. *Hann*, 655 N.E.2d at 571.

29. 648 N.E.2d 378 (Ind. Ct. App. 1995).

30. *Id.* at 384.

31. *Id.* at 383.

32. *Id.* at 384.

33. *Id.*

34. 651 N.E.2d 1171 (Ind. Ct. App. 1995), *trans. denied*.

35. *Id.* at 1173.

36. *Id.* at 1174.

37. 650 N.E.2d 333 (Ind. Ct. App. 1995).

property division in light of the rebuttable presumption that a fifty/fifty split is fair.³⁸ In *Simpson*, the husband appealed the trial court's distribution of the marital estate where it distributed sixty-five percent to the wife and thirty-five percent to the husband. The court of appeals affirmed the trial court stating that "[r]eversal of the trial court's decision is appropriate only where the decision is clearly against the logic and effect of the facts and circumstances."³⁹ The court of appeals observed that the trial court considered the wife's inheritance, the husband's dissipation, the parties unequal incomes, the wife's interrupted employment and education to be a wife and mother, and the wife's unequal earning capacity.⁴⁰ Because all are appropriate factors to be weighed under Indiana Code section 31-1-11.5-11(c),⁴¹ the court of appeals held that the trial court did not abuse its discretion.⁴²

The husband also raised the issue of whether his work bonus was properly included in the marital estate. The court found that even though the bonus was contingent upon him being employed in March 1992 (after the date of filing, but before the final dissolution order), the bonus was properly considered to be part of the marital estate.⁴³

38. *Id.* at 335. IND. CODE § 31-1-11.5-11(c) (1995) states:

The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

(1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.

(2) The extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift.

(3) The economic circumstances of each spouse at the time the disposition of property is to become effective, including the desirability of awarding the family residence or the right to dwell in that residence for such periods as the court may deem just to the spouse having custody of any children.

(4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.

(5) The earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties.

39. *Simpson*, 650 N.E.2d at 335.

40. *Id.* at 336.

41. *See supra* note 38 for text of this statute.

42. *Simpson*, 650 N.E.2d at 336.

43. *Id.* (citing *Libunao v. Libunao*, 388 N.E.2d 574, 577 (Ind. App. 1979) (property with vested interest at time of dissolution may be divided as marital asset)). *See also In re Marriage of Adams*, 535 N.E.2d 124, 126-27 (Ind. 1989) (police pension vesting after date of filing, but before final hearing, is marital property even though police officer continued employment and would not have contractual pension rights until actual retirement because the pension was acquired by the parties "joint efforts").

III. CHILD CUSTODY

A. *Modification of Custody Orders*

*Doubiago v. McClarney*⁴⁴ is the first reported decision interpreting the standard for modification of child custody orders since the 1994 legislative amendments to the statute.⁴⁵ In *Doubiago*, the parties shared joint legal custody, with the mother being the primary custodian. The father was granted a modification of custody based upon plentiful evidence of the mother's inability to control her anger toward others and the child. The court noted that some of the mother's problems existed at the time of dissolution, but had since become worse. Thus, from the decision, the new amendments appear to have had no effect on the outcome.

B. *Jurisdiction*

Two cases involving Indiana's version of the Uniform Child Custody

44. 659 N.E.2d 1086 (Ind. Ct. App. 1995), *trans. denied*.

45. IND. CODE § 31-1-11.5-22(d) (Supp. 1995). Regarding the modification of a divorce court's custody order the statute states:

The court may not modify a child custody order unless:

(1) it is in the best interests of the child; and

(2) there is a substantial change in one (1) or more of the factors which the court may consider under section 21(a) of this chapter.

Section 21 lists a number of relevant factors to be considered by the court in an initial custody determination such as the age and sex of the child, the health of all individuals involved, the child's adjustment, the child's relationship with significant persons in the child's life, the parent's wishes, and the wishes of the child. The 1994 legislative amendments now provide, however, that "more consideration [be] given to the child's wishes if the child is at least fourteen (14) years of age" *Id.* § 31-1-11.5-21(a)(3). Prior to the 1994 amendments, the statute permitted modification "only upon a showing of changed circumstances so substantial and continuing as to make the existing custody order unreasonable." The factors under section 21 of the statute, prior to the 1994 amendments did not give any special weight to the preference of a child fourteen (14) or over. In practice, substantially changed circumstances had to amount to more than isolated acts of misconduct, *Pea v. Pea*, 498 N.E.2d 110, 113-14 (Ind. Ct. App. 1986), *trans. denied*, and could not be based solely on improvement in the non-custodial parent's circumstances, regardless of how potentially beneficial to the child, even if the child wanted to live with the noncustodial parent. *See Drake v. Washburn*, 567 N.E.2d 1188 (Ind. Ct. App. 1991). The amendments have also been made applicable to the statutes concerning an initial custody determination and modifications in paternity actions. IND. CODE § 31-6-6.1-11(a), (e) (Supp. 1995). It is not necessarily well known that the paternity statute formerly permitted the court to modify custody solely on a finding that it would be in the best interest of the child without any finding of a "substantial and continuing change [of] circumstances." *See In re Grissom*, 587 N.E.2d 114 (Ind. 1992) (discussing *Griffith v. Webb*, 464 N.E.2d 384 (Ind. Ct. App. 1984), and *Walker v. Chatfield*, 553 N.E.2d 490 (Ind. Ct. App. 1990)). The recent amendments now completely end the disparity in the burden of proof between custody modification litigants, post-divorce and post-paternity.

Jurisdiction Act (UCCJA)⁴⁶ involve some relatively novel situations. In *Cabanaw v. Cabanaw*,⁴⁷ the former wife brought an interlocutory appeal of the trial court's determination that it retained jurisdiction to modify its initial custody decree and that the trial court was not an inconvenient forum. In *Cabanaw*, the wife relocated to Florida at the time of the divorce. The father remained in Indiana and both parties used both Indiana and Florida courts to raise additional questions concerning the custody and the visitation orders.

During one of the actions in Florida, the parties entered into an agreement that purportedly tried to control jurisdiction by requiring the husband to initially invoke only the jurisdiction of a Florida court in subsequent custody disputes. However, the Florida court, in approving the agreement, explicitly stated that it was not making a determination of jurisdiction. Because father continued to reside in Indiana and the children continued to have substantial contacts with him in Indiana, mother was faced with the well established principle that the court making the initial custody determination retains that jurisdiction so long as one parent remains within the state providing it with a "significant connection" to the children.⁴⁸ In *Cabanaw*, the mother asserted that the question was not whether Florida or Indiana had jurisdiction to modify the Indiana decree, but which state should decide the issue of jurisdiction. Her argument was rejected "because jurisdiction cannot be imposed by consent of the parties."⁴⁹ However, crucial to the court's determination is the fact that the Florida court on two occasions specifically stated that it was not reaching the issue of whether or not it had jurisdiction in approving various agreements of the parties.⁵⁰

In *Stephens v. Stephens*,⁵¹ the court recognized that it is possible for more than one state to qualify for initial subject-matter jurisdiction.⁵² In *Stephens*, the parties were married in Kentucky with the wife maintaining her residence there and the husband maintaining a residence in Indianapolis. A few weeks after their child was born, the wife moved to Indianapolis with the husband temporarily and then to a new home in Mooresville. Within two months, the wife had returned to Kentucky with the parties' daughter and sought the protection of an emergency protective order against the husband. The husband filed a custody proceeding in Indiana within a few days of the filing of the Kentucky action. The husband argued that Indiana had initial subject-matter jurisdiction and that the protective order proceeding in Kentucky, which gave the wife temporary custody of the parties' child, was not a custody statute contemplated by the UCCJA. The Indiana trial court disagreed, however, and dismissed the husband's action in deference to the Kentucky proceeding.

On appeal, the court held that while Indiana could be considered the child's

46. IND. CODE §§ 31-1-11.6-1 to -25 (1993 & Supp. 1995).

47. 648 N.E.2d 694 (Ind. Ct. App. 1995).

48. See *Francis v. Francis*, 654 N.E.2d 4, 6 (Ind. Ct. App. 1995), *trans. denied*.

49. *Cabanaw*, 648 N.E.2d at 697.

50. *Id.* at 698.

51. 646 N.E.2d 682 (Ind. Ct. App. 1995).

52. *Id.* at 685.

home state the court could not "say, as a matter of law, that Kentucky [was] not also a 'home state.'"⁵³ Rather, the crucial question to the court was whether the Indiana court should have exercised its jurisdiction, assuming it had jurisdiction. Citing the statute, the court held that if there is a custody proceeding pending in another state that does have jurisdiction, the trial court may not exercise its jurisdiction unless the other state declines its jurisdiction.⁵⁴ Because the Kentucky emergency protective order form incorporated Kentucky's version of the UCCJA, the court held that, under section 6 of the UCCJA, a court of this state could not exercise its jurisdiction if, at the time of the filing the petition, a proceeding was pending in another state exercising jurisdiction substantially in conformity with Indiana law.⁵⁵

*C. Third Party Natural Parent Custody Disputes*⁵⁶

The case of *Teegarden v. Teegarden*⁵⁷ was a very controversial and much publicized case regarding the custodial rights of a homosexual parent. In *Teegarden*, the mother and father divorced in 1990 and the father received custody of the parties' two minor boys. The mother was a homosexual. The father remarried two years later and then died in 1993. When the mother's petition for immediate custody was denied for jurisdictional reasons, she filed an action asking for an order for custody. The stepmother also filed a petition for custody alleging "that 'circumstances and questions of parental fitness dictate that it is in the best interests of [the children] that Stepmother be granted custody . . .'"⁵⁸ The trial court found that pursuant to Indiana law, the mother "'had the right to custody of her children without court proceedings.'"⁵⁹ The court entered an order granting the mother custody, however, it conditioned custody upon the mother: "'(1) not co-habiting with women with whom she is maintaining a homosexual relationship; and (2) not engaging in homosexual activity in the presence of the children.'"⁶⁰ The court of appeals found the imposition of these restrictions to be an abuse of discretion.⁶¹ The trial court specifically found that the stepmother failed to prove that the mother's homosexuality made her an unfit parent for purposes of custody.⁶² The court of appeals adopted a view similar to that of other jurisdictions and held that "homosexuality standing alone without evidence of any

53. *Id.* at 686.

54. *Id.*

55. *Id.* at 686-87.

56. For a more complete discussion of the development of this area of custody litigation, see Michael G. Ruppert & Monty K. Woolsey, *The Continuing Evolution of Indiana's Family Law in 1991*, 25 IND. L. REV. 1243, 1259-63 (1992).

57. 642 N.E.2d 1007 (Ind. Ct. App. 1994).

58. *Id.* at 1008 (citing the record).

59. *Id.*

60. *Id.* (citing the Record).

61. *Id.* at 1010.

62. *Id.* at 1009.

adverse effect upon the welfare of the child does not render the homosexual parent unfit as a matter of law to have custody of the child.”⁶³

IV. CHILD SUPPORT

In 1995, the legislature enacted federally mandated legislation that is sure to attract the attention of numerous child support obligors in the state. Indiana Code sections 31-1-11.5-13(j) and (k); sections 9-25-6-19 and 20; and sections 12-17-2-34 and 35 became effective October 1, 1995. These statutes state, generally, that when a court finds a person delinquent in the payment of child support⁶⁴ or committing “an intentional violation of an order for support, the court shall issue an order to the bureau of motor vehicles” ordering that any driver’s license or permit held by the delinquent obligor be suspended or a permit or license not be issued until further order of the court.⁶⁵ The statutes also provide for revocation or non-issuance of professional licenses, including those of attorneys, teachers or other professional persons.⁶⁶ Although there are no cases interpreting this statute yet, on its face it would appear that to revoke a professional license, the court must find an intentional violation of a support order, not just a delinquency.

Because cases dealing with support of a child can encompass many components, there are always numerous decisions in this area. A few involving new or problematic issues have been selected for this Article.

The following case will be of interest to those who become parents at an advanced age. In *Stultz v. Stultz*,⁶⁷ the Indiana Supreme Court vacated the opinion of the court of appeals and affirmed the trial court’s finding that a father was not entitled to credit against his child support obligation where his children were receiving Social Security retirement benefits. The court relied upon three prior cases decided by the court of appeals in reaching its decision. *Head v. State*⁶⁸ held that Title II Social Security Disability benefits received by a child were not child support and therefore could not be subject to assignment to the state to offset AFDC payments. In *Brummett v. Brummett*,⁶⁹ the court found that a child’s receipt of Social Security survivor’s benefits did not justify modification of the “child support obligation initially owed by the child’s father and, after his death,

63. *Id.* at 1010. See *Caban v. Healey*, 634 N.E.2d 540, 543 (1994) (concerning the criteria for court-ordered visitation between children and an unrelated third party).

64. As defined by IND. CODE § 12-17-2-34 (Supp. 1995), which states that

(a) . . . ‘delinquent’ means at least:

(1) two thousand dollars (\$2,000); or

(2) three (3) months; past due on payment of court ordered child support payments.

65. IND. CODE § 31-1-11.5-13(j)(1)-(2) (Supp. 1995).

66. *Id.* § 31-1-11.5-13(k)(1)-(2).

67. 659 N.E.2d 125 (Ind. 1995).

68. 632 N.E.2d 749, 751-52 (Ind. Ct. App. 1994).

69. 472 N.E.2d 616 (Ind. Ct. App. 1984).

owed by his estate."⁷⁰ Finally, in *Kyle v. Kyle*,⁷¹ the court of appeals held that where a disabled child receives Title XVI Supplemental Security Income, the noncustodial parent is not entitled to have his child support obligation reduced.

These cases stand for the general principle that where children are entitled to receive Social Security benefits, the benefit payments are not intended to be a substitute for child support. The supreme court stated that, as a general rule, when eligible children receive social security benefits because of a parent's retirement, the child support obligor should not be entitled to offset his obligation.⁷²

The court of appeals stated quite succinctly in *Holsapple v. Herron*⁷³ that "when a criminal act or the resulting consequences therefrom is the primary cause of an obligor-parent's failure to pay child support, abatement of said obligation is not warranted."⁷⁴ The court stated that "[i]t would be contrary to the Indiana Child Support Guidelines and to the . . . public policy favoring a child's security to . . . allow [child support] payments to abate . . . [for] a willful, unlawful act of the obligor."⁷⁵

A very problematic area for practitioners and courts is the calculation of a parent's overtime into a child support figure. In *Mullin v. Mullin*,⁷⁶ the mother appealed a trial court's order granting the father's petition for modification of child support. The original child support figure included all of the father's overtime pay. The father testified that since the time of the divorce, his earnings had been reduced from \$23 per hour to \$14.77 per hour. He was working approximately thirteen hours of overtime per week to make ends meet. He testified that his increased overtime had impinged on his ability to exercise his visitation rights with his children. The trial court found that a modification was warranted under Indiana Code section 31-1-11.5-17(a).⁷⁷ The court looked to Indiana Child Support Guideline 3 (Commentary 2.b.) which states,

the includability of overtime wages in the noncustodial parent's income

70. *Stultz*, 659 N.E.2d at 129.

71. 582 N.E.2d 842 (Ind. Ct. App. 1991), *trans. denied*.

72. *Stultz*, 659 N.E.2d at 130.

73. 649 N.E.2d 140 (Ind. Ct. App. 1995).

74. *Id.* at 141.

75. *Id.* at 142 (citing *Davis v. Vance*, 574 N.E.2d 330, 331 (Ind. Ct. App. 1991)).

76. 634 N.E.2d 1340 (Ind. Ct. App. 1994).

77. *Id.* at 1341. The pertinent part of the Indiana Code states:

Provisions of an order with respect to child support . . . may be modified or revoked. Such modification shall be made only:

- (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or
- (2) upon a showing that:
 - (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines

IND. CODE § 31-1-11.5-17(a) (1993).

is a fact sensitive matter and it is not the intent of the guidelines to require a party who has worked a great deal of overtime to continue doing so indefinitely just to meet a support obligation based on that higher level of earnings.⁷⁸

The court of appeals found that the trial court did not commit error by including only twenty percent of the father's overtime so that he might cut back on the overtime to enjoy visitation with his sons.⁷⁹

The noncustodial mother in *Hazuga v. Hazuga*⁸⁰ raised an interesting argument regarding deductions on the child support worksheet for health insurance and child care costs when they are paid from the father's pre-tax income. The mother argued that the deductions listed on the child support worksheet should be reduced by the father's tax savings. In this case, the father paid \$55 per week for health insurance. Because the payments were made with pre-tax dollars, the mother argued that the father's tax savings of \$16.50 should be excluded from the worksheet, thus making the actual deduction \$38.50. She used the same analogy for child care expenses. The court rejected the mother's arguments stating that child support is calculated using weekly gross income. The court said that any tax savings that comes from deducting those expenses is irrelevant to a calculation of child support.⁸¹

The mother further argued in her appeal that the trial court erred by ordering her to pay forty-eight percent of the child's uninsured medical expenses. The court of appeals agreed with the mother on this issue citing the Commentary to Child Support Guideline 3(E). The revised Guidelines, effective March 1993, state that the "guidelines require that where the presumptive amount has been ordered, the custodial parent shall be responsible for yearly uninsured medical expenses up to 6% of the yearly amount of support before requiring the non-custodial parent to contribute because 6% of the presumptive guideline amount is for health care expense."⁸² The court reversed on this ground.⁸³

V. DEFINING A PARENT'S OBLIGATION TO A CHILD

Another highly publicized case was the matter of *Straub v. B.M.T. ex rel. Todd*.⁸⁴ Todd and Straub were involved in a romantic relationship. In 1986, Todd and Straub entered into a contract whereby Straub agreed to impregnate Todd in return for her promise to hold Straub harmless from any financial or legal obligation toward the child. Todd did indeed become pregnant and gave birth to the parties' child. Just over three years later, Todd filed a petition asking the court to declare Straub the father of the child and order him to pay child support and

78. *Mullin*, 634 N.E.2d at 1342.

79. *Id.*

80. 648 N.E.2d 391 (Ind. Ct. App. 1995).

81. *Id.* at 394.

82. *Id.* at 394-95 (citing, CHILD SUPPORT GUIDELINE 3(E) Commentary (1993)).

83. *Id.* at 395.

84. 645 N.E.2d 597 (Ind. 1994).

certain medical expenses. The trial court granted Todd's petition and the Indiana Supreme Court affirmed. The court stated that it is against public policy for one parent to have the right to contract away the child's right to support.⁸⁵ The court also stated that "[u]sing sexual intercourse as consideration is itself against public policy."⁸⁶

In the world of advanced reproductive technology, courts are finding themselves presented with interesting and difficult situations regarding the rights of parents. In a case of first impression, the Indiana Supreme Court addressed the issue of the obligation of a father to support a child conceived during the marriage by artificial insemination through a third party donor. In *Levin v. Levin*,⁸⁷ the court likened this situation to an adoption during the marriage. The court held that where a husband and wife were fully informed and consented to the artificial insemination, both parents have an obligation to support the child.⁸⁸ In this particular case, the court also found that the husband had held the child out as his own for over fifteen years; therefore, he was equitably estopped from denying his obligations towards the child.⁸⁹

VI. MISCELLANEOUS

The case of *Bright v. Kuehl*,⁹⁰ while technically a contractual dispute, is a case that family law practitioners should review. This case of first impression addresses the issue of what happens when two people live together without marrying or signing a cohabitation agreement, commingle funds, and then decide to separate. In *Bright*, the man, Kuehl, brought an action against Bright seeking damages arising from Bright's unauthorized use of his checking account and credit cards. Additionally, he sought damages for Bright's destruction of personal property, medical bills incurred due to attacks by Bright, and excessive use of the telephone. Kuehl also sought punitive damages. Bright counterclaimed for unjust enrichment because Kuehl retained the parties' personal property. The trial court found in favor of Kuehl and awarded \$28,270.39. It also found in favor of Bright on her counterclaim and awarded her \$5,759 in damages.⁹¹

The court of appeals reversed the trial court's decision. The court determined that "a party who cohabitates with another without subsequent marriage is entitled to relief upon a showing of an express contract or a viable equitable theory such as an implied contract or unjust enrichment."⁹² Upon reviewing the record, the court did not find any evidence that the parties had an implied contract to

85. *Id.* at 600.

86. *Id.* at 601.

87. 645 N.E.2d 601 (Ind. 1994).

88. *Id.* at 605.

89. *Id.* at 604-05.

90. 650 N.E.2d 311 (Ind. Ct. App. 1995), *trans. denied*.

91. *Id.* at 313.

92. *Id.* at 315.

reimburse the other party if the relationship soured.⁹³ The court found that the circumstances of the case did not support an implied contract, therefore Kuehl was not entitled to damages. The court additionally stated that because there was not an award of damages, there could be no award of punitive damages.⁹⁴

The case of *Daugherty v. Ritter*⁹⁵ addressed the 1993 revision to the Grandparent Visitation Statute.⁹⁶ The former statute precluded visitation with a grandparent if the parent did not consent to the visitation. The revision created the possibility that, in certain circumstances, courts could grant visitation to grandparents even though there may be dissension between the custodial parent and the grandparents.

In *Daugherty*, the trial court denied the grandparents' petition for visitation. The grandparents argued on appeal that the trial court was required to consider the prior relationship they had with their grandchild. The court stated in its affirmance that the revision to the statute does not create a presumption in favor of visitation being granted where the grandparents have had, or have attempted to have, contact with the child; rather, it is left to the discretion of the trial court to determine whether, in the totality of the circumstances, visitation between the child and the grandparents is in the child's best interests.⁹⁷ Although the grandparents may have had substantial contacts with the child prior to the disagreement with the parents, this does not automatically give the grandparents the right to visitation.

CONCLUSION

In the past year, the court has focused on defining parties' rights and obligations to each other and to children. Case law and legislation make it clear that the duties owed to children will be enforced and that it will not be easy to avoid the obligation. In this world of absentee parents, the judicial system and lawmakers are trying to guarantee to the child the right of financial support.

93. *Id.*

94. *Id.* at 317.

95. 646 N.E.2d 66 (Ind. Ct. App. 1995), *aff'd*, 652 N.E.2d 502 (Ind. 1995).

96. "In determining the best interests of the child under this section, the court may consider whether a grandparent has had, or has attempted to have, meaningful contact with the child." IND. CODE § 31-1-11.7-3(b) (Supp. 1995).

97. *Daugherty*, 646 N.E.2d at 68.

