SURVEY OF INDIANA FAMILY LAW IN 1996

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INTRODUCTION

This Article reviews family law cases decided by Indiana appellate courts in 1996. The cases discussed include topics such as property valuation and distribution in a divorce, child custody, child support and paternity. The authors have selected cases which will either clarify, modify or change issues that relate to family law. Legislative modifications to family law statutes will also be noted.

I. ANTENUPTIAL AGREEMENTS

In *Rider v. Rider*,[1] the Indiana Supreme Court dealt with an antenuptial agreement that was conscionable when made, but alleged to be unconscionable at the time of dissolution. In *Rider*, the wife argued that the provision which barred the payment of spousal maintenance had become unconscionable because her health had deteriorated during the marriage. The trial court found that "the Antenupital [sic] agreement is not binding. The Court finds the [wife] to be physically incapacitated to the extent that the ability of the [wife] to support herself is materially affected and the Court finds that maintenance is necessary during her period of incapacities . . . ."[2]

The court of appeals relied on *Justus v. Justus*[3] and *Gross v. Gross*[4] for its conclusion that it was not an unconstitutional impairment of contract to refuse to enforce a nonmaintenance provision of an antenuptial agreement because the state's interest in not having a spouse become a public charge outweighed the parties' freedom to contract.[5]

On transfer, the supreme court noted that Indiana's version of the Uniform Premarital Agreement Act (UPAA)[6] addresses the issue of unconscionability of

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1. 669 N.E.2d 160 (Ind. 1996).

2. *Id.* at 161.

3. 581 N.E.2d 1265 (Ind. Ct. App. 1991). The *Justus* court held, "If an antenuptial agreement dividing property between the parties would leave a post-dissolution reality in which one spouse would not have sufficient property to provide for his reasonable needs, then the court may refuse to enforce the antenuptial agreement." *Id.* at 1274.

4. 464 N.E.2d 500 (Ohio 1984).

5. *See* Rider v. Rider, 648 N.E.2d 661, 664-65 (Ind. Ct. App. 1995), *adopted in part, vacated in part*, 669 N.E.2d 160 (Ind. 1996).

6. IND. CODE §§ 31-7-2.5-1 to -10 (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE §§ 31-11-3-1 to -10).

nonmaintenance provisions at the time of dissolution;[7] however, because the UPAA did not take effect until July 1, 1995, it was not applicable to the antenuptial agreement in *Rider*.[8]

Although the supreme court adopted the appellate court's reasoning, it held that the trial court erred by not enforcing the agreement because it and the court of appeals failed to consider the relative financial positions of the spouses.[9] The evidence presented at trial indicated that wife had assets of $65,000 and was receiving $645 per month from a prior spouse for child support. However, husband had personal assets worth only several thousand dollars and had a pension which paid $1247 per month. The supreme court stated,

> [B]oth the trial court and the Court of Appeals failed to consider the relative financial positions of the spouses. Unconscionability involves a gross disparity. Thus, while an antenuptial agreement which would force one spouse onto public assistance may be unconscionable, we believe that a finding of unconscionability requires a comparison of the situations of the two parties.[10]

The supreme court characterized this case as one where "one party is left with a modest income stream, while the other party is left with a modest amount of real and personal property."[11] Accordingly, it was not unconscionable to enforce the parties' antenuptial agreement.

II. Determination of Marital Property and Distribution

During 1996, several interesting themes arose concerning property distributions in divorces.[12] One theme involved the trial court's discretion to determine the date to value an asset and the discretion to assign the risk of loss from changes in value.[13] Another theme was that the parties could not claim trial

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7. *See id.* § 31-7-2.5-8(b) (repealed 1997) (to be recodified at IND. CODE § 31-11-3-8(b)).

8. *Rider*, 669 N.E.2d at 164.

9. *See id.*

10. *Id* (citing Justus v. Justus, 581 N.E.2d 1265, 1272 (Ind. Ct. App. 1991)).

11. *Id.* at 165. *See also* Pardieck v. Pardieck, 676 N.E.2d 359, 364 (Ind. Ct. App. 1997) (following *Rider*).

12. Generally, those questions involved identification of property, determination of its value and the equitable basis for its distribution. "Is it property?" concerns whether there is a possessory interest or a vested right to tangible or intangible property which can reasonably be valued. "Is it marital property?" concerns whether property should be excluded from the marital estate because of an enforceable antenuptial agreement or because the property right accrues in the future. "What's it worth?" is the valuation issue. "How should the property be distributed?" looks to whether an equal or unequal distribution is justified by the circumstances of a particular case. *See* Michael G. Ruppert, *Survey of Recent Developments in Family Law*, 23 IND. L. REV. 363 (1990). An inappropriate resolution of any of the first three issues can have a devastating impact on the resolution of the fourth issue, resulting in an unfair property distribution.

13. *See* Quillen v. Quillen, 671 N.E.2d 98 (Ind. 1996), *vacating in part, adopting in part*

court error based on the parties' failure to present evidence of the existence or value of an asset.[14] Two cases were responsible for defining dissipation of assets, and distinguishing "dissipation" from "disposition" of assets.[15] One case addressed an issue of first impression: whether the likelihood that one spouse will inherit from a not-yet-deceased parent may be considered in determining an equitable distribution of property.[16]

A. Non-Marital-Property List Grows

In *Jendreas v. Jendreas*,[17] the Indiana Court of Appeals held that husband's union disability pension was not marital property subject to distribution by the divorce court.[18] The wife in *Jendreas* relied on *Gnerlich v. Gnerlich*[19] to support her contention that it was error to exclude the value of the disability pension from the marital pot.[20] The *Jendreas* court pointed out that in *Gnerlich,* the court of appeals determined that proceeds of an employer-sponsored disability insurance plan were property subject to distribution.[21] However, the *Jendreas* court noted that the Indiana Supreme Court specifically limited[22] *Gnerlich* in *Leisure v. Leisure.*[23] In *Leisure*, the supreme court observed that the husband's worker's compensation benefits did not require any contribution by him and were specifically designed to replace future income that would be lost due to injury. It therefore held that the worker's compensation benefits were non-marital property.[24] The spouse in *Gnerlich*, however, became entitled to the benefits due to monthly contributions to the employer-sponsored program, which required the use of a marital asset, income, thereby depriving the marital estate of the use of those funds.[25] Thus, the supreme court analogized the disability insurance proceeds to the deferred compensation of a pension which are accumulated as a marital asset.[26] Both the trial court and the appellate court specifically found that Mr. Jendreas' benefits represented compensation for future loss of income because

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659 N.E.2d 566 (Ind. Ct. App. 1995); Reese v. Reese, 671 N.E.2d 187 (Ind. Ct. App. 1996), *trans. denied.*

14. *See Quillen*, 671 N.E.2d 98; Conner v. Conner, 666 N.E.2d 921 (Ind. Ct. App. 1996).

15. *In re* Marriage of Coyle, 671 N.E.2d 938 (Ind. Ct. App. 1996); Roberts v. Roberts, 670 N.E.2d 72 (Ind. Ct. App. 1996), *trans. denied.*

16. Hacker v. Hacker, 659 N.E.2d 1104 (Ind. Ct. App. 1995). This case was decided just two days prior to the survey period, and therefore was not included in the previous survey.

17. 664 N.E.2d 367 (Ind. Ct. App. 1996), *trans. denied.*

18. *See id.* at 371.

19. 538 N.E.2d 285 (Ind. Ct. App. 1989).

20. *Jendreas*, 664 N.E.2d at 370.

21. *Id.* at 370-71.

22. *Id.* at 371.

23. 605 N.E.2d 755 (Ind. 1993).

24. *See Jendreas*, 664 N.E.2d at 371 (citing *Leisure*, 605 N.E.2d at 758-59).

25. *See id.* (citing Gnerlich v. Gnerlich, 538 N.E.2d 285, 288 (Ind. Ct. App. 1989)).

26. *See id.*

the record contained no evidence regarding whether Mr. Jendreas had ever made any contributions to the acquisition of the disability pension during his employment; i.e., there was no evidence of a depletion of marital assets as in *Gnerlich*.[27] In all three cases, eligibility for the benefit depended upon disability and the benefits were designed to compensate for loss of future income. In *Leisure* and *Jendreas*, the wife contributed nothing to her husband's right to receive worker's compensation benefits and, consequently, they were not in the pot. In *Gnerlich*, the spouse paid insurance premiums from income, causing the benefits to be in the pot.

There can be no doubt that many spouses accumulate pension benefits, as opposed to disability benefits, without any actual monetary contributions to those pension benefits. Yet those pensions are still subject to valuation and distribution by the court. Resting the outcome in disability benefit cases on whether the trial court finds the benefit to be deferred compensation or replacement of future wages, as the *Jendreas* court does in part, must ultimately fail. These cases seem to show that the distinction between being in or out of the pot depends upon whether an actual contribution from a marital asset can be shown for acquiring the disability benefit.

In *Reese v. Reese*,[28] the court determined that all of the proceeds from the sale of a business which were attributable to a covenant not to compete were not replacement of future income as husband contended but were to "protect" the goodwill of the business which is a marital asset and includable in the pot.[29] From the decision, in which the court of appeals characterized the husband's argument as an invitation to reweigh the evidence,[30] it is unclear what sort of evidence the husband introduced at trial concerning his contention that the proceeds from the covenant were to replace future lost income, other than that he received $7.85 million for his stock and $3.6 million for the covenant. It would seem that the purpose of a covenant not to compete almost always, in part, is intended to protect the future goodwill of a business from diminishing by the competing efforts of the former owner after the sale. However, such covenants also prevent the former owner from making a living pursuing the same sort of business. If the only evidence necessary to create a conflict with plausible evidence of future lost income is the reality that such covenants protect goodwill, it would seem virtually impossible to ever overcome on appeal the finding of a trial court that proceeds from such a covenant are marital property as opposed to future income.[31]

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27. *See id.*

28. 671 N.E.2d 187 (Ind. Ct. App. 1996), *trans. denied.*

29. *See id.* at 192 (citing Berger v. Berger, 648 N.E.2d 378, 383 (Ind. Ct. App. 1995)).

30. *See id.*

31. *But cf. Berger*, 648 N.E.2d at 383 (stating 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 . . . ."). However, the *Berger* 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. Thus, the *Berger* court remanded and ordered the trial court to determine the

In *Roberts v. Roberts*,[32] the court addressed whether a law degree earned by one spouse during a marriage is marital property subject to division in a dissolution. In *Roberts*, husband quit his $30,000 per year job to attend law school while his wife continued to work full time and run the household. When husband was about to graduate, he filed for divorce. Although husband's law degree was not listed by the trial court as a marital asset, his student loans were listed as a marital debt. Wife appealed and argued that the law degree should be a marital asset and the student loans incurred by husband should not be included as marital debt.

The court of appeals, citing *Prenatt v. Stevens*,[33] held that a law degree was not marital property.[34] The court did note, however, that pursuant to sections 31-1-11.5-11(c)(3) and (5) of the Indiana Code,[35] "the enhanced earning ability of a

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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. *Id.* at 384. *See* Michael G. Ruppert & Paula J. Schaefer, *1995 Survey of Indiana Family Law*, 29 IND. L. REV. 913, 916 (1996). The *Reese* court, however, did not disturb the trial court's discretion.

32. 670 N.E.2d 72 (Ind. Ct. App. 1996), *trans. denied.*

33. 598 N.E.2d 616 (Ind. Ct. App. 1992).

34. The court wrote:

> A degree is an intangible which is personal to the holder. It is a piece of paper and has no real value except for what the holder chooses to pursue with it. Potential worth is dependant upon choice and availability of work, whether the holder is good at what she does, or a myriad of other potentialities.
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> Valuation of a degree is fraught with uncertainty because of the personal factors described above. Even if valuation could be made certain, such valuation, whether based on future earning capacity or upon cost of acquisition, would ultimately result in an award beyond the actual physical assets of the marriage.

Roberts, 670 N.E.2d at 75-76 (citing *Prenatt*, 598 N.E.2d at 620).

35.

> 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:
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> . . . .
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> (3) The economic circumstances of each spouse at the time the disposition of the 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.
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> . . . .
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> (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.

degree-earning spouse may certainly be considered in making a division of the marital assets."[36] The court further held that the student loans in husband's name were incurred during the marriage, thus, it was appropriate that they were listed as part of the marital estate.[37] The court opined that because the trial court assigned all of the student loan debt to the husband, the wife "suffered no harm whatever from their inclusion."[38]

B. Valuation of Marital Property

Quillen v. Quillen[39] and *Reese v. Reese*[40] stand for the proposition that the trial court's discretion to determine the most appropriate valuation date for a marital asset necessarily empowers the trial court with the same discretion to assign the risk of loss to one spouse or the other for changes in the value of that asset.

In *Quillen*, the Indiana Supreme Court reversed the portion of the court of appeals decision[41] that found the trial court abused its discretion by accepting a business valuation as of a date when husband was still running the business, as opposed to a date after the discontinuation of his business subsequent to his arrest on numerous counts of child molestation. In the court of appeals decision, Judge Kirsch, writing in the face of a strong dissent by Judge Hoffman, stated:

> We recognize that the trial court has wide discretion in selecting a valuation date. Proper exercise of that discretion, however, requires that the valuation date have some relation to the true value of the asset. . . . This court has never upheld an asset valuation that completely ignores factors which, as admitted by the [wife's] supporting valuation expert, would have a negative effect on the asset's value. [The] trial court's choice of valuation date must further a just and reasonable property distribution *under the circumstances*.[42]

Judge Kirsch then stated,

> We hold that where, as here, the value of a marital asset changes radically between the date of final separation and the final hearing, it is an abuse of the trial court's discretion to select a valuation date that does not account for the events contributing to that change. We remand this matter to the trial court with instructions to revalue Quillen Construction in

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IND. CODE § 31-1-11.5-11(c) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-15-7-5).

36. *Roberts*, 670 N.E.2d at 76.

37. *See id.* at 77.

38. *Id.*

39. 671 N.E.2d 98 (Ind. 1996).

40. 671 N.E.2d 187 (Ind. Ct. App. 1996) (citing Taylor v. Taylor, 436 N.E.2d 56, 58-59 (Ind. 1982)).

41. Quillen v. Quillen, 659 N.E.2d 566 (Ind. Ct. App. 1995), *adopted in part, vacated in part*, 671 N.E.2d 98 (Ind. 1996).

42. *Id.* at 572-73 (emphasis added).

> accordance with this opinion. The trial court is also directed to adjust the property division to achieve an equal distribution which accounts for the revised value of the business.[43]

The supreme court, however, sided with Judge Hoffman's dissent and stated that the majority had merely reweighed the evidence and reinstated the trial court's valuation date.[44]

Judge Kirsch's analysis certainly appeals to common sense—wife's own expert admitted that the value would be different taking into consideration the husband's criminal charges and the inability of the husband to secure future financing due to those changes. However, because the husband decided not to continue to operate the company, even though he did similar work for his son's construction company after discontinuing his business, the bank loan officer testified that disapproval of any future loan request, although likely, was not certain. Thus, because of the conflicting evidence, the trial court is given broad discretion to determine the valuation date, and necessarily determines who will bear the risk of loss for changes in value.[45] The supreme court noted: "The selection of the valuation date for any particular marital asset has the effect of allocating the risk of change in the value of that asset between the date of valuation and the date of the hearing. We entrust this allocation to the discretion of the court."[46]

A few months after the supreme court's decision in *Quillen*, a different panel of the court of appeals, in *Reese v. Reese*,[47] was confronted with a similar substantial change in value of a corporation between the date of filing and the date of dissolution.

When one compares the obvious reduction in value in *Reese* with the conflicting evidence regarding the reduction in value in *Quillen*, the modified rule in *Quillen* begins to seem like a fairly sound limitation on a trial court's discretion in valuation cases. In *Reese*, the parties owned the majority of stock in several corporations. One of those corporations, Cadence Environmental Energy, Inc., was engaged in hazardous waste disposal. Both husband's and wife's valuation experts valued the business as of June 1992. Both valuations relied upon a business forecast prepared by the corporation's employees which took into account new environmental regulations that would take effect in August 1992, and the anticipated impact upon the corporation's business. Husband's experts, using one accounting approach, valued the corporation at $7.8 million. Wife's experts, using a different valuation method, valued the business at $14 million.[48]

The trial occurred approximately one year after the first valuations. At the time of trial, husband presented evidence that the impact of the new regulations

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43. *Id.* at 573.
44. *See Quillen*, 671 N.E.2d at 102.
45. *See id.* at 103.
46. *Id.*
47. 671 N.E.2d 187 (Ind. Ct. App. 1996).
48. *See id.* at 189-90.

was greater than anticipated. His experts prepared a new valuation showing that the regulations had caused the corporation's value to drop drastically, approximately $2 million in one year.[49]

Although the trial court in *Reese* acknowledged the new regulations and their impact on the corporation's value, it found that the husband should bear the risk of the change in value because he had complete control of the company before and after the petition for dissolution of marriage was filed.[50] However, apparently the control issue did not involve any misfeasance in the operation of the corporation and, in fact, would have allowed husband to sell the business pendente lite.[51] In other words, the factual uncertainty giving rise to the trial court's exercise of discretion was its finding that husband's control of the corporation allowed him to attempt to sell it. The court explained,

> Although the date selected for the valuation has the effect of allocating the risk of a change in value between the parties, this allocation of risk is entrusted to the discretion of the trial court. The choice of an early valuation date for an asset which decreases in value is not necessarily an abuse of discretion. We will reverse the trial court's decision as to a valuation date only if it is clearly against the logic and effect of the facts and circumstances before the trial court.[52]

After *Quillen* and *Reese*, it becomes difficult to imagine what could possibly be an abuse of discretion when the trial court selects a higher, earlier asset valuation even though there was no dispute that a substantial decrease occurred in the value of a significant marital asset.

If *Quillen* and *Reese* show the need for a more sensible valuation rule, they also demonstrate that appellate courts cannot disturb a divorce court's findings, unless there is an abuse of discretion. Admittedly, the trial court's discretion can protect an innocent spouse from devious manipulations of value by the spouse in control of the asset. But these cases do not show any deviousness on the parts of Mr. Quillen or Mr. Reese.[53] Perhaps the only solution to the dilemma faced in *Quillen* is legislation that will give a trial court more guidance concerning the valuation of an asset. For example, the trial court could still consider the

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49. *See id.*

50. *Id.* at 191-92.

51. *See id.* at 193. Footnote 6 indicates that there was no evidence of any offers to purchase the corporation: "[Husband] argues that this finding is erroneous because there is no evidence of any offers to purchase Cadence. [Husband] did not have to wait for a purchase offer. If a sale of Cadence was the best option, he could have put the business up for sale and solicited offers."

52. *Id.* at 191 (citing Quillen v. Quillen, 671 N.E.2d 98, 102-03 (Ind. 1996)).

53. Mr. Quillen did argue to the court of appeals that "the trial court impermissibly relied upon fault when dividing the marital property and allocating the expenses. He claims that the court sought to punish him for the criminal allegations against him." Quillen v. Quillen, 659 N.E.2d 566, 578 (Ind. Ct. App. 1995), *adopted in part, vacated in part*, 671 N.E.2d 98 (Ind. 1996). However, because the trial court divided the marital estate equally, the court of appeals found that the trial court had not injected fault into the property distribution. *Id.* at 579.

dissipation or unusual disposition of an asset in the distribution process because of section 31-1-11.5-11(c)(4) of the Indiana Code.[54] In short, a spouse's dissipation or ambiguous actions in disposing of property would be accounted for openly in deciding whether an even distribution was fair, rather than through the sleight of hand of giving that spouse a fifty percent share consisting of overvalued assets.

C. Dissipation and Disposition—Last Vestiges of Fault in Property Distribution

In re Marriage of Coyle[55] is significant because it establishes guidelines for determining and distinguishing dissipation and disposition of assets as they relate to distribution of marital property.[56] In *Coyle*, wife appealed the trial court's property distribution which awarded her thirty-seven percent of the total marital estate, arguing that the trial court abused its discretion when it found that she had dissipated marital assets in transactions involving her children by a prior marriage.[57] The trial court also found that husband brought approximately sixty-four percent of the assets into the marriage.[58] The dissipation recited by the trial court included: lost interest income due to an interest-free loan to her daughter, payment of her daughter's college expenses for which she sought no reimbursement from the child's father, and expenditure of funds to assist her daughter with the purchase of used automobiles.[59]

The court observed that neither dissipation nor disposition are defined by the Dissolution of Marriage Act.[60] In *Coyle*, wife astutely observed that

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

IND. CODE § 31-1-11.5-11(c)(4) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-15-7-5(4)).

55. 671 N.E.2d 938 (Ind. Ct. App. 1996).

56. Dissipation and disposition of assets is the fourth factor listed in the statute as a basis for deviating from a 50-50 distribution. *See* IND. CODE § 31-1-11.5-11(c) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-15-7-5). *See supra* note 54.

57. *Coyle*, 671 N.E.2d at 941-42.

58. *Id.* at 945.

59. *Id.* at 944.

60. IND. CODE § 31-1-11.5-1 to -28 (1993 & Supp. 1996) (repealed 1997) (to be recodified at scattered sections of title 31 of the Indiana Code); *Coyle*, 671 N.E.2d at 942, 944.

> without a clear legislative or judicial definition of the term [dissipation], parties to a dissolution are allowed to revisit and dispute "virtually any financial transaction or personal decision affecting finances" made during the marriage in a search for conduct that may be characterized as dissipation.[61]

Acknowledging the burden such a situation places on the trial court, Judge Najam wrote,

> Fault is not relevant in dissolution proceedings except as related to the disposition or dissipation of marital assets. One spouse's claim of improvident spending by the other spouse can be a powerful weapon in an attempt to secure a larger share of the marital estate. However, a trial court presiding over a dissolution proceeding in which dissipation is an issue should not be required to perform an audit of expenditures made during the marriage in order to determine which spouse was the more prudent investor and spender. The institution of marriage would be ill-served if spouses were encouraged to maintain a continuous record of expenditures and transactions during the marriage for use in the event they were ever divorced.[62]

Starting with the rule of statutory construction that undefined words and phrases in a statute are to be given their plain, ordinary and usual meaning, Judge Najam noted that "[w]aste and misuse are the hallmarks of dissipation. Our legislature intended that the term carry its common meaning denoting 'foolish' or 'aimless' spending."[63] Judge Najam then set out a variety of considerations that the trial court must weigh when confronted with allegations of dissipation.[64] Noting that spouses to second or subsequent marriage frequently provide some form of

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61. *Coyle*, 671 N.E.2d at 942.

62. *Id.* (citations omitted).

63. *Id.* at 943 (citing Roberts v. Roberts, 670 N.E.2d 72, 76 (Ind. Ct. App. 1996)).

64.

> The proper inquiry requires the trial court to weigh various considerations. While intent is not an essential element of dissipation, intent to hide, divert or otherwise deplete the marital estate is relevant. . . . The fact that one spouse or the marriage itself does not benefit directly from an expenditure does not, standing alone, require a finding that a dissipation of marital assets has occurred. . . . The non-dissipating party's participation in or consent to the expenditure is a relevant consideration. However, disagreements over the use of money can occur in any marriage. Even a sharp disagreement between spouses over the wisdom of an expenditure, without more, does not render that expenditure a dissipation of marital assets. . . . Before a spouse is chargeable with a dissipation of assets, the party claiming dissipation must show something more substantial than that the transaction was disputed at the time or that the transaction appears in retrospect to have been unwise. The test is whether the asset was actually wasted or misused.

Id. at 943-44 (citations omitted).

financial support to each other's children, including that for education, automobiles and houses, the court remanded to the trial court with instructions to reconsider whether wife's actions amounted to dissipation.[65] In doing so, the court also instructed the trial court to consider whether the wife's actions, if not dissipation, amounted to a "disposition" of marital property which also would permit a deviation from a 50/50 distribution.[66]

Roberts v. Roberts,[67] in addition to addressing whether a law degree was a marital asset, also addressed the intriguing question of whether the pursuit of a law degree was the dissipation of marital assets in light of the fact that husband quit a $30,000 a year job to pursue the degree. Finding that the circumstances of the case did not indicate that the pursuit of the law degree was foolish or aimless, the court rejected the wife's contention that the trial court should have increased the value of the marital estate in an amount equivalent to the income lost by husband while pursuing his law degree.[68] Nevertheless, the court noted that the trial court could take into consideration husband's enhanced earning ability in determining whether to deviate from the presumption of an even distribution of assets.[69]

D. Parties Cannot Blame the Trial Court for Not Doing Their Job

During the last year, several courts have dealt with the argument that the parties' failure to present evidence of an asset or its value cannot be the basis for a claim of error on appeal. *Conner v. Conner*[70] involved an effort by wife to reopen a divorce decree entered in 1985 that was signed by the court but not entered by the clerk alleging that marital assets were omitted from the distribution in the decree.[71] In dicta, the court noted that "[t]he parties have the burden to produce evidence as to the value of the assets. Therefore, impliedly, the parties also have the burden to produce evidence as to the existence of the assets."[72]

In *Quillen v. Quillen*,[73] the supreme court went even further. There, husband contended that the trial court abused its discretion by failing to include in the

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65. *See id.* at 944.

66. *Id.* "Disposition had not been defined by this, or any other, Indiana court. The common meaning of disposition is 'transferring to the care or possession of another.'" *Id.* (quoting BLACK'S LAW DICTIONARY 471 (6th ed. 1990)). Thus, the court observed that "'disposition' of marital property refers not to transfers or transactions that are wasteful, foolish or frivolous but to those that are unusual or out of the ordinary." *Id.* Thus, the presumption favoring an equal distribution of marital property could be rebutted by a showing that one party disposed of marital property in an unusual or extraordinary manner, albeit not a wasteful or foolish manner. *See id.*

67. 670 N.E.2d 72 (Ind. Ct. App. 1996).

68. *See id.* at 76.

69. *Id. See* IND. CODE § 31-1-11.5-11(c)(5) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-15-7-5(5)).

70. 666 N.E.2d 921 (Ind. Ct. App. 1996).

71. *Id.* at 922-24.

72. *Id.* at 926 (citation omitted).

73. 671 N.E.2d 98 (Ind. 1996).

marital estate or make a finding concerning certain accounts of wife, even though husband offered no testimony or documentation into evidence concerning the balance of the accounts.[74] The court stated, "Where the parties fail to present evidence as to the value of assets, it will be presumed that the trial court's decision is proper."[75]

E. Possibility of Inheritance Not a Factor for Distribution of Assets

Practitioners frequently face the situation in *Hacker v. Hacker.*[76] In a long marriage, the parties acquired modest assets and lived on a farm owned by husband's parents. The value of the farm alone was nearly equivalent in value to the gross assets of the parties. Although the trial court properly excluded the value of the farm from the marital estate, it found that husband was the only heir of his still-living parents, and thus likely to inherit the property. Accordingly, the trial court found that a deviation from the presumption of a 50/50 distribution was justified.[77] The appellate court noted that the trial court could properly consider the husband's continued residence, rent free, on the farm in dividing the marital assets as a factor for deviation under section 31-1-11.5-11(c)(3) of the Indiana Code.[78] However, the consideration of the potential for an inheritance as a factor in the division of marital property was a matter of first impression.[79] The court reasoned that, although the trial court is required to consider certain unvested interests in allocating marital property, such as future earnings, this case did not involve a fixed right of inheritance.[80] The spouse's parents could sell the farm to satisfy their own needs, or the farm could experience unforeseeable changes in its value due to changes in the farm marketplace or governmental policy.[81] Accordingly, the case was remanded for the trial court to reconsider its distribution of assets in light of the court's holding that a potential inheritance was not a factor justifying deviation.[82]

II. POST-DECREE MATTERS

Divorcing spouses are often quite shocked to learn that even though a divorce decree may award a joint debt to one spouse, the non-obligated spouse is still legally responsible to pay the debt in the event the obligated spouse defaults on payment or files bankruptcy. Although the divorce decree should contain

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74. *See id.* at 103.

75. *Id.*

76. 659 N.E.2d 1104 (Ind. Ct. App. 1995).

77. *See id.* at 1110-11.

78. *See id.* at 1111. This factor pertains to, among other matters not relevant hereto, the financial circumstances of the parties at the time the disposition of the property is to become effective.

79. *See id.*

80. *See id.* at 1111-12.

81. *See id.* at 1112.

82. *See id.* at 1113.

language providing that the obligated spouse shall hold the non-obligated spouse harmless in the event of a default or bankruptcy, the wise debtor will file to discharge the hold-harmless clause to his/her prior spouse. A discharge of that contingent liability leaves the non-obligated spouse with no remedy for reimbursement in the dissolution court.

In *White v. White*,[83] husband filed for bankruptcy following his dissolution and discharged certain debts he was ordered to pay in the dissolution action. Because the wife was a joint debtor on the credit cards husband discharged, she paid the debts to the creditors because he also discharged his contingent liability to wife. Following his bankruptcy, husband petitioned the court for an order requiring wife to sign a quitclaim deed to the parties' property pursuant to the decree. After a hearing, the trial court found that husband was in contempt of court for failing to hold wife harmless on certain debts that he discharged and ordered him to pay her $10,038.70 as reimbursement on those debts. The trial court further refused to order wife to sign the quitclaim deed to the real estate.[84]

The court of appeals reversed the trial court, in part, and found that because husband discharged his personal liability to wife, he was not in contempt of court for failure to either pay the debts or reimburse wife.[85] However, because the divorce decree provided that the parties would remain as co-tenants on the real estate until husband satisfied the marital debts, the trial court's refusal to order wife to quitclaim her interest in the real estate to husband was affirmed. The court reasoned that because husband had not performed the condition precedent, the wife's obligation to execute a quitclaim deed did not occur.[86]

> [T]he bankruptcy discharge had no effect upon the necessary performance of the condition. . . . While the discharge operated to relieve husband of his personal liability to the wife and creditors, it does not prevent her from enforcing the lien attached to the real estate before the commencement of the bankruptcy proceedings.[87]

In *Voigt v. Voigt*,[88] the ex-husband petitioned the trial court to modify a spousal maintenance provision of a settlement agreement entered into by the parties which purported to resolve all claims in their dissolution of marriage action. In the agreement, the husband agreed to pay wife the sum of $400 per week until she died, remarried or turned sixty-five. Further, the agreement stated that "[a] modification . . . of any of the provisions of this Agreement shall be effective only if made in writing and executed with the same formality as this

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83. 666 N.E.2d 459 (Ind. Ct. App. 1996).

84. *See id.* at 460.

85. *See id.*

86. *See id.* at 461.

87. *Id.* (citing Zachary v. Zachary, 99 B.R. 916 (Bankr. S.D. Ind. 1989); Ruth v. First Fed. Sav. & Loan Ass'n, 492 N.E.2d 1105 (Ind. Ct. App. 1986); Tokash v. Tokash, 458 N.E.2d 270 (Ind. Ct. App. 1984)).

88. 670 N.E.2d 1271 (Ind. 1996).

Agreement."[89]

The trial court granted wife's motion to dismiss the petition. The supreme court affirmed the dismissal.[90] Chief Justice Shepard, writing for the court, acknowledged the lower court's struggle to reconcile two earlier opinions from the court of appeals, *Pfenninger v. Pfenninger*[91] and *Bowman v. Bowman.*[92] *Pfenninger* held that "an obligation to provide spousal maintenance, even one originating in a settlement agreement, was subject to judicial modification."[93] Whereas *Bowman* held that "a maintenance obligation that originated in a settlement agreement could be immunized from judicial modification by an express provision in the settlement agreement prohibiting modification."[94] The chief justice then went on to review the modern history of court-ordered spousal maintenance, as contrasted with an agreement for spousal maintenance, and flatly stated that the narrow issue before the court was whether a court may modify an approved maintenance agreement without the consent of both parties.[95]

After the enactment of the Dissolution of Marriage Act,[96] the provision for "alimony" payments from one spouse to the other was narrowed. Exactly three specific statutory grounds for court-ordered spousal maintenance have evolved in Indiana: spousal incapacity; caregiving for a disabled child; and vocational rehabilitation.[97] However, in recognizing the parties' freedom of contract, spouses

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89. *Id.* at 1272 (quoting paragraph 20 of the Agreement).

90. *See id.*

91. 463 N.E.2d 1115 (Ind. Ct. App. 1984).

92. 567 N.E.2d 828 (Ind. Ct. App. 1991).

93. *Voigt*, 670 N.E.2d at 1273 (citing *Pfenninger*, 463 N.E.2d at 1121).

94. *Id.* (citing *Bowman*, 567 N.E.2d at 830).

95. *See id.* at 1274.

96. Act of Apr. 12, 1973, No. 297, 1973 Ind. Acts 1585 (codified as amended at IND. CODE §§ 31-1-11.5-1 to -28 (1993 & Supp. 1996) (repealed 1997) (to be recodified at scattered sections of title 31 of the Indiana Code)).

97.

(e) A court may make the following findings concerning maintenance:

(1) If the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself is materially affected, the court may find that maintenance for that spouse is necessary during the period of incapacity, subject to further order of the court.

(2) If the court finds a spouse lacks sufficient property, including marital property apportioned to that spouse, to provide for that spouse's needs and that spouse is the custodian of a child whose physical or mental incapacity requires the custodian to forego employment, the court may find that maintenance is necessary for that spouse in an amount and for a period of time as the court deems appropriate.

(3) After considering:

(A) the educational level of each spouse at the time of marriage and at the time

have the flexibility to negotiate settlement agreements providing spousal maintenance to take advantage of tax laws or for other reasons, even though a court does not have the authority to enter these awards.[98]

The court's conclusion was that if a statute does not give a court the authority to order a certain type of maintenance, then a court does not have authority to modify that maintenance award without the parties' consent. The court stated that "a court has no statutory authority to grant a contested petition to modify a maintenance obligation that arises under a previously approved settlement agreement if the court *alone* could not initially have imposed an identical obligation had the parties never voluntarily agreed to it.[99]

IV. CUSTODY

In 1994 and 1996, the Indiana General Assembly revised the modification statutes governing child custody.[100] Due to these revisions, Indiana courts have recently reviewed a number of child custody cases.[101] *Joe v. Lebow*[102]

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the action is commenced;

(B) whether an interruption in the education, training, or employment of a spouse who is seeking maintenance occurred during the marriage as a result of homemaking or child care responsibilities, or both;

(C) the earning capacity of each spouse, including educational background, training, employment skills, work experience, and length of presence in or absence from the job market; and

(D) the time and expense necessary to acquire sufficient education or training to enable the spouse who is seeking maintenance to find appropriate employment;

a court may find that rehabilitative maintenance for the spouse seeking maintenance is necessary in an amount and for a period of time that the court considers appropriate, but not to exceed three (3) years from the date of the final decree.

IND. CODE § 31-1-11.5-11(e) (Supp. 1996) (repealed 1997) (to recodified at IND. CODE § 31-15-7-2).

98. *Voigt*, 670 N.E.2d at 1277.

99. *See id.* at 1280 n.13. In its ruling, the court specifically reserved the question of whether a court may modify a maintenance obligation in a settlement agreement which rests upon a ground—incapacity, caregiving, rehabilitation—on which a court could have ordered the same maintenance. *Id.*

100. Indiana Code sections 31-1-11.5-22(d) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-17-2-21) and 31-6-6.1-11(e) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-14-13-9) govern the modification of child custody in divorces and paternity actions respectively.

101. It should be noted that sections 31-1-11.5-21 and 31-6-6.1-11 of the Indiana Code were modified to include a new factor a court should consider when determining custody awards: "The court shall consider all relevant factors including: . . . evidence of a pattern of domestic violence by either parent." IND. CODE § 31-1-11.5-21(a) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-17-2-8(7)); *id.* § 31-6-6.1-11(a) (Supp. 1996) (repealed 1997) (to be recodified at

reviewed the differences between the pre-1994 dissolution and paternity modification statutes and the new modification statutes. As the court pointed out, the former statutes had different standards for modification of custody in both paternity and dissolution actions. The legislature has now incorporated the same requirements in each statute so that they are identical.[103]

In *Lebow*, the child lived with mother in Maryland and visited father regularly in Indiana. After having a series of physical and developmental problems as a youngster, the child's health stabilized.. When the child was eleven years old, father began to have concerns about the child's obesity and depressed mood. During the period of visitation, father took the child to a physician and a social worker. Based upon their findings and his concerns, father filed a "Verified Emergency Petition for Temporary Custody" and was awarded temporary custody. Prior to the final hearing, father, mother and the child submitted to a psychological evaluation. With the help of expert testimony, the trial court found that "substantial changes" had occurred in four of the factors enumerated by statute and, accordingly, the father was granted custody.[104] On appeal, the mother argued that the decision was based on changes in the child's condition while in the temporary custody of her father and that there had been no substantial changes in the child's circumstances while living with her. The appellate court upheld the trial court's determination that custody should be modified, stating that both the "best interests" and "substantial change in at least one of the original factors" tests had been satisfied.[105] However, the appellate court emphasized that a change in custody may not be premised on a change in the child's condition occurring while in the temporary care of the moving party.[106] Furthermore, the court stated,

> The amendments [to the modification statutes] do not do away wholesale with the longstanding policy of stability that has animated caselaw in this area, however, and this policy is not to be disregarded, but rather, reconsidered in each case with respect to whether a substantial change in the factors relevant to the best interests of the child has occurred.[107]

Van Schoyck v. Van Schoyck[108] addresses whether the trial court can retroactively apply the modification statute. The parties in this action filed their

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IND. CODE § 31-14-13-2(7)).

102. 670 N.E.2d 9 (Ind. Ct. App. 1996).

103. 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 [the provision enumerating factors relevant to determining the best interests of the child].

IND. CODE §§ 31-1-11.5-22(d), 31-6-6.1-11(e).

104. *See Joe*, 670 N.E.2d at 24.

105. *Id.* at 25.

106. *Id.* at 23.

107. *Id.* at 27.

108. 661 N.E.2d 1 (Ind. Ct. App. 1996).

petitions in May 1994, and in June 1994 and the matter was set for hearing on August 18, 1994. The trial court applied the new statute, effective July 1, 1994, in its findings of fact and order which modified the court's previous order and awarded residential custody to father.[109]

Although the court of appeals affirmed the trial court's usage of the revised statute, the court reversed the trial court's holding that modified custody. The revised statute provides that a change in custody must be in the best interests of the child *and* there must be "a *substantial* change in one or more of the factors which were initially used to determine child custody."[110] Because the trial court clearly stated in its findings that the child was healthy, happy, well-adjusted and comfortable, the trial court's decision was contradictory to the statute.[111] The court of appeals stated that "there was insufficient evidence of a substantial change in one or more of the factors which were initially used to determine child custody."[112]

In *Sills v. Irelan*,[113] the Indiana Court of Appeals dealt with an issue of first impression. In this post-paternity matter, father, who was in the military and stationed in Korea, filed a petition for modification of custody. The child had been taken to the emergency room on two different occasions with serious head injuries, and the authorities were focusing their investigation on the mother's boyfriend. Although the trial court allowed the mother to retain custody, it further ordered that she have no contact with her boyfriend. The mother appealed this decision, arguing that the trial court's order violated her First Amendment freedom of association.

First, the court noted that "[i]n crafting a custody order, whether in dissolution or paternity proceedings, the paramount concern is the best interest of the child."[114] The court continued, in response to mother's contentions, that the "freedom of association is not absolute, however, and must yield to sufficiently important governmental interests if the means are closely drawn to avoid unnecessary abridgment of associational freedoms."[115] Because the government has a great interest in child custody cases, "the trial court's consideration of a parent's associations in a custody determination does not violate her freedom of association."[116] The mother's right to freedom of association must yield to the best interests of the child.

The court also noted that the extent of a court's authority to restrict a parent's custody in a paternity case was an issue of first impression in Indiana. Because no statute is applicable to paternity cases, the court construed paternity and dissolution custody/visitation statutes together in its holding that restrictions can

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109. *See id.* at 5.

110. *Id.*

111. *See id.*

112. *Id.* Judge Sullivan dissented with the view that the evidence did justify the trial court's decision. *Id.* at 6 (Sullivan, J., dissenting).

113. 663 N.E.2d 1210 (Ind. Ct. App. 1996).

114. *Id.* at 1213 (citing *In re* Paternity of Joe, 486 N.E.2d 1052, 1055 (Ind. Ct. App. 1985)).

115. *Id.* at 1213 (citing Buckley v. Valeo, 424 U.S. 1 (1976)).

116. *Id.* at 1213-14 (citing *In re* Marriage of Diehl, 582 N.E.2d 281, 293 (1991)).

be placed on a parent in a paternity case. The court relied on *Teegarden v. Teegarden*[117] and on the statute.[118] The court of appeals stated that a court "has an important interest in placing restrictions upon custody orders entered in paternity cases which serve to protect children from situations which would endanger their physical health or significantly impair their emotional development."[119]

V. CHILD SUPPORT

In *Gilpin v. Gilpin*,[120] father filed an appeal of the trial court's post-decree modification of child support based on two issues. Father alleged that the court failed to impute income to mother based on her new husband's contribution to monthly expenses. The court of appeals agreed with father, citing Indiana Child Support Guideline 3(A)(2), Commentary 2(e)[121] and found that the court did err by failing to impute income to mother based on her subsequent spouse's $1200 contribution to monthly expenses.[122]

Further, father asserted that mother was voluntarily underemployed because her income had decreased, even though she was still employed at the same location. Father contended that mother should have income imputed to her. The decree for dissolution recognized that mother's income fluctuated often and that the parties should recalculate child support annually. The court of appeals agreed with the trial court on this issue stating that because the mother's income as a loan originating officer fluctuated with market rates, it would not be proper to impute income.[123]

Nill v. Martin[124] discusses two of the more frequently asked questions posed to family law practitioners: "Are oral agreements to modify child support enforceable?" and "Does the support obligor have to pay child support *and* pay for college expenses?" In *Nill*, father was ordered in the decree of dissolution to pay child support in the amount of $2100 per month for all three of his children.[125]

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117. 642 N.E.2d 1007 (Ind. Ct. App. 1994). For a discussion of this case, see Michael G. Ruppert & Paula J. Schaefer, *1995 Survey of Indiana Family Law*, 29 IND. L. REV. 913 (1996).

118. "[T]he court shall not restrict a parent's visitation rights unless it finds that the visitation might endanger the child's physical health or significantly impair his emotional development." IND. CODE § 31-1-11.5-24(b) (1993) (repealed 1997) (to be recodified at IND. CODE § 31-17-4-2).

119. *Sills*, 663 N.E.2d at 1215.

120. 664 N.E.2d 766 (Ind. Ct. App. 1996).

121. "[R]egular and continuing payments made by a family member, subsequent spouse, roommate or live-in friend that reduce the parent's costs for rent, utilities, or groceries, should be the basis for imputing income." IND. CHILD SUPP. G. 3(A)(2) cmt. 2(e).

122. *See Gilpin*, 664 N.E.2d at 767. The $1200 contribution by the new husband equaled one-half of mother's total monthly expenses. *See id.*

123. *Id.* at 768.

124. 666 N.E.2d 936 (Ind. Ct. App. 1996).

125. "Under an in gross order, the parent must pay the total support amount until the support payments are modified by court order or all of the children are emancipated or reach the age of twenty-one years." *Id.* at 938.

Two years later, the youngest son was killed in an automobile accident. The parties then orally agreed that father's child support should be reduced to $1677 per month. Some years later, mother filed a petition for modification asking for more child support and that father's child support arrears be determined. Father responded by filing a motion to reduce his child support obligation and asked the court to allocate college expenses between the parties. The trial court found that the oral agreement between the parties was valid to modify father's child support obligation. However, the trial court ordered father to pay eighty-nine percent of college expenses, even though the father's college contributions did not reduce his monthly support obligations.

Father appealed the trial court's decision which ordered him to pay full child support and college expenses for his child. The court of appeals affirmed the trial court's recognition of the oral agreement because it found that the parties had a mutual, oral agreement which modified child support, and that it satisfied one of the three exceptions to the general rule that a court order is required to modify child support.[126] Citing Commentary 3(b) to the Indiana Child Support Guideline 3(E),[127] *Vore v. McFarland*[128] and *In re Marriage of Tearman*[129], the court stated that "when a parent is obligated to pay a portion of a child's college expenses in addition to child support, the trial court must consider full or partial abatement of a parent's basic child support obligation."[130] Accordingly, the court remanded this issue to the trial court for recalculation of either a full or partial abatement for those months the child is attending college.[131]

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126. The three exceptions whereby courts will allow a credit for a child support obligation are:

> 1) support payments have been made by the obligated party even though the payments are technically nonconforming;
>
> 2) the parties have agreed to and carried out an alternative method of payment which substantially complies with the spirit of the support decree; and
>
> 3) the obligated parent takes the children into his or her home, assumes custody over them, provides them with necessities, and exercises parental control over their activities for such a period of time that a permanent change of custody has in effect occurred.

Id. at 939.

127. "[S]upport paid to the custodial parent should be reduced or eliminated, at least while the student is away from the household and at school." IND. CHILD SUPP. G. 3(E) cmt. 3(b). This guideline was codified at IND. CODE § 31-1-11.5-12 (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE §§ 31-16-6-1 to -8).

128. 616 N.E.2d 790, 792 (Ind. Ct. App. 1993).

129. 617 N.E.2d 974, 977 (Ind. Ct. App. 1993).

130. *Nill*, 666 N.E.2d at 940.

131. It should be noted that the child in this case was living on the college campus and not in his mother's home.

A. Social Security Disability and its Relation to Child Support

In *Scott v. Scott*,[132] the court addressed the issue of imputing potential income to a father from a business he owns, even though he was considered "disabled" by the Social Security Administration. Father argued that the doctrine of collateral estoppel was applicable and the trial court was estopped from calculating his potential income from self-employment. Because of the father's disability, both he and his son received monthly benefit checks. However, the father testified that his disability payments were his only income, even though he was still the owner of a used car lot. Because of his ownership of the car lot, the trial court concluded that the father was "capable of earning additional money based on his ownership of the business."[133]

Father argued that potential income could not be calculated for child support purposes because he was disabled and not "'voluntarily' unemployed or underemployed as a matter of law."[134] The court of appeals found that even though the Social Security Administration determined that father was disabled, the trial court was permitted to calculate father's potential income for child support purposes.[135] The court used two factors in reaching this decision: (1) whether the issues sought to be barred are the same and (2) whether the parties are the same in both proceedings.[136] The court determined that because neither the issues nor the parties were the same, the court did not have to apply the doctrine of administrative collateral estoppel.[137] The court of appeals found that father's "employment potential and probable earnings level" were properly determined by reviewing tax returns and operating statements of the business.[138]

Furthermore, the father also argued that he was entitled to a credit for the disability benefits that his son received from Social Security, due to father's disability. The court cited *Stultz v. Stultz*[139] in its holding that the trial court was under no obligation to give father a credit for benefits that his son received.[140]

In re Marriage of Lang[141] is another child support matter where a court imputed income and refused to give credit for disability payments to a child on behalf of a parent. During the marriage, father worked as an engineer earning $50,000 and mother earned approximately $50,000 per year. In 1992, mother was in an automobile accident and was rendered a quadriplegic. After wife received a structured settlement of $4.5 million and Social Security benefits, father quit his job and began spending a great deal of money and traveling extensively. Father

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132. 668 N.E.2d 691 (Ind. Ct. App. 1996).
133. *Id.* at 696.
134. *Id.* at 697.
135. *See id.* at 699.
136. *See id.*
137. *See id.*
138. *Id.* at 701.
139. 659 N.E.2d 125 (Ind. 1995).
140. *Scott*, 668 N.E.2d at 703-04.
141. 668 N.E.2d 285 (Ind. Ct. App. 1996).

alleged that the trial court erroneously imputed income to him and failed to give him credit for the Social Security benefits that the minor child received. Again, the court of appeals found that a trial court's refusal to give father a credit against child support for disability benefits received by a child on behalf of the mother was not erroneous.[142] With respect to imputing income to father, the court found that the child's standard of living would decline without child support from father because mother needed all of her insurance settlement proceeds to meet her needs.[143] Based on the theory that "a child should receive the same proportion of parental income that he or she would have received if the parents lived together," the court upheld the trial court's imputation of income to father and rejected father's contention that the income from mother's insurance proceeds should be included in the calculation of her gross income.[144]

B. Accounting for Child Support Payments

Beyond the problem of calculating income in support cases, courts must also deal with issues of accounting for paid child support. In *Kovenock v. Mallus*,[145] the court of appeals discussed the grounds necessary for a court to order an accounting of support payments. In this case, the father filed a verified petition for an accounting with the trial court alleging that the custodial parent was not using child support payments for the benefit of the children. Father made allegations and testified that he believed mother was using child support payments to subsidize a business, take trips and purchase vehicles. The mother and her new husband had traveled to Europe and purchased two new cars, even though their alleged income was only $18,000. However, the trial court denied father's motion, finding that the basic needs of the children were being met.[146] This decision was upheld by the court of appeals because "where, as here, the children's basic needs are met, some disagreement between the parties concerning whether adequate resources are being devoted to the children's particular 'wants' as distinct from their actual needs is insufficient, by itself, to support a showing of necessity for an accounting."[147]

VI. PATERNITY

A common misconception among family law practitioners is that the two year statute of limitations for a mother or father to file a paternity action precludes the establishment of paternity at a later date.[148] *In re P.L.M.*[149] serves as a reminder

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142. *Id.* at 289-90.

143. *See id.* at 289.

144. *See id.* (citing Castaneda v. Castaneda, 615 N.E.2d 467, 471 (Ind. Ct. App. 1993)).

145. 660 N.E.2d 638 (Ind. Ct. App. 1996).

146. *See id.* at 641.

147. *Id.*

148.

(a) Except for an action filed by the division of family and children or its agents under subsection (c), the mother, a man alleging to be the child's father, or the division of

that a mother or father, as next friend of the child, can file a petition to establish paternity even after the two year statute of limitations expires.[150] In this case, the two year statute of limitations had expired for father to file a paternity action. Father then filed an action for paternity as the "next friend" of the child. Mother argued that father was merely trying to "circumvent[] the statute of limitations established by section 31-6-6.1-6(a) of the Indiana Code."[151] The court of appeals affirmed the trial court's establishment of paternity stating: "There is no limitation provided in the statute as to who may act as the child's next friend. . . . [therefore] the applicable statutes of limitation . . . [are] of no consequence since this petition was filed by [the child]."[152] Thus, now it is clearly established that both mothers and fathers can file petitions to establish paternity as the "next friend" of a child after the expiration of the two year statute of limitations.

The Indiana Supreme Court, in *Humbert v. Smith*,[153] addressed the conflict which existed between the Indiana Rules of Evidence and the paternity statute regarding admissibility of blood tests. This case was a paternity suit wherein father appealed the trial court's admission of blood tests because there was an insufficient foundation under Rule 803(6) of the Indiana Rules of Evidence.[154]

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family and children or its agents must file an action within two (2) years after the child is born . . . .

IND. CODE § 31-6-6.1-6(a) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE §§ 31-14-5-1 to -8).

149. 661 N.E.2d 898 (Ind. Ct. App. 1996).

150.

(a) A paternity action may be filed by the following persons:

. . . .

(4) A child.

A person under the age of eighteen (18) may file a petition if he is competent except for his age. A person who is otherwise incompetent may file a petition through his guardian, guardian ad litem, or next friend.

IND. CODE § 31-6-6.1-2(a)(4) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-14-4-1(5)).

A child "may file a petition at any time before he reaches twenty (20) years of age . . . ." *Id.* § 31-6-6.1-6(b) (repealed 1997) (to be recodified at IND. CODE § 31-14-5-2(b)).

151. *In re P.L.M.*, 661 N.E.2d at 899.

152. *Id.* (citing Hood v. G.D.H., 599 N.E.2d 237 (Ind. Ct. App. 1992)).

153. 664 N.E.2d 356 (Ind. 1996).

154.

Records of Regularly Conducted Business Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other

The mother offered the results of the paternity blood test at trial without a foundational witness, relying upon the paternity statute found at section 31-6-6.1-8(b) of the Indiana Code.[155] Although the trial court affirmed the admission of the evidence, the court of appeals reversed. The supreme court recognized that generally "[i]n instances where [a conflict between a rule and a statute] exists, the conflicting statute is nullified."[156] Because the statute facilitated the expeditious resolution of child related issues, an exception to Evidence Rule 803(6) was created.[157] Thus, in paternity cases, evidence will be admissible under section 31-6-6.1-8(b) of the Indiana Code.

Recent decisions have dealt with who may file a paternity action[158] and when that action may be filed. The supreme court, in *K.S. v. R.S.*,[159] faced the issue of whether "a man who claims to be the biological father of a child, born during the marriage of the child's mother and another man to file a paternity action while the mother's marriage is still intact?"[160] The court stated that, for purposes of paternity statutes, "the term wedlock refers to the status of the biological parents of the child in relation to each other. A child born to a married woman, but

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qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

IND. R. EVID. 803(6).

155.

A party may object to the admissibility of genetic test results obtained under subsection (a) if the party files a written objection at least thirty (30) days before a scheduled hearing at which the test results may be offered as evidence. If a party does not file an objection under this subsection, the test results are admissible as evidence of paternity without the necessity of:

(1) foundation testimony; or

(2) other proof;

regarding the accuracy of the test results.

IND. CODE § 31-6-6.1-8(b) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-14-6-2).

156. *Humbert*, 664 N.E.2d at 357 (citing Harrison v. State, 644 N.E.2d 1243, 1251 n.14 (Ind. 1995)).

157. *See id.*

158.

(a) A paternity action may be filed by the following persons:

(1) The mother or expectant mother.

(2) A man alleging that he is the child's biological father or that he is the expectant father of an unborn child.

(3) The mother and a man alleging that he is her child's biological father, or by the expectant mother and a man alleging that he is the biological father of her unborn child, filing jointly.

(4) A child.

IND. CODE § 31-6-6.1-2 (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-14-4-1).

159. 669 N.E.2d 399 (Ind. 1996).

160. *Id.* at 400-01.

fathered by a man other than her husband, is a 'child born out of wedlock' for purposes of the statute."[161] Thus, the supreme court found that "[n]othing in the paternity act precludes a man otherwise authorized from filing a paternity action on the basis of the mother's marital status."[162] Additionally, the court upheld the trial court's decision that this failure to name a party does not render the judgment void, but rather voidable.[163] Therefore, the prior judgment does not preclude the child from later relitigating any issues with respect to its interests.[164] *K.S. v. R.S.* has had a profound effect on who can file an action for paternity.

In *C.J.C. v. C.B.J.*,[165] a woman had a child as a result of an extramarital affair. Although her husband had knowledge that he was not the biological father, he chose to have a relationship and support the child. When the child got older, a guardian ad litem, on behalf of the child, petitioned the court to establish the alleged father's paternity. The trial court dismissed the petition for paternity on public policy grounds.[166] On appeal, the issue was whether a child may maintain an action to establish paternity when his mother and her husband, who is not the child's biological father, remain married.[167] Citing *K.S. v. R.S.*, the appellate court held that a child is permitted to maintain "a paternity action against the alleged father even though the child was born during the marriage of his mother and her husband and their marriage remains intact."[168]

K.S. v. R.S.[169] has caused appellate courts to grant a petition for rehearing in a few previous paternity decisions. In *K.T.H. v. M.K.B.*[170] the court found that res judicata does not apply to a case brought under the Uniform Reciprocal Enforcement of Support Act (URESA).[171] The court also found that a matter brought under URESA cannot involve matters of custody or visitation. Instead, URESA actions are limited to the "establishment and enforcement of support obligations."[172]

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161. *Id.* at 402.

162. *Id.*

163. *See id.* at 405. "[O]nly judgments in which the trial court lacks subject matter jurisdiction are void; judgments in which the trial court lacks personal jurisdiction are merely voidable." Chapin v. Hulse, 599 N.E.2d 217 (Ind. Ct. App. 1992).

164. *See K.S.*, 669 N.E.2d at 405.

165. 669 N.E.2d 197 (Ind. Ct. App. 1996).

166. The public policy argument was asserted by the alleged father who argued that where a "marriage and the family remains intact, public policy does not favor the maintenance of a paternity action against a third party." *Id.* at 198.

167. *See id.*

168. *Id.* at 199.

169. 669 N.E.2d 399 (Ind. 1996).

170. 670 N.E.2d 199 (Ind. Ct. App. 1996).

171. In a URESA action, the court may establish paternity where necessary to enter a child support order. IND. CODE § 31-2-1-19.5 (1993).

172. *K.T.H.*, 670 N.E.2d at 119 (citing IND. CODE § 31-2-1-1 (1993); Egan v. Bass, 644 N.E.2d 1272, 1274 (Ind. Ct. App. 1994)).

VII. MISCELLANEOUS

The legislature modified section 31-1-11.5-7 of the Indiana Code to provide counseling in dissolution, separation, or child support matters. Parties are now statutorily permitted to petition the court to order counseling. Furthermore, the legislature provided that the court, on its own motion, can order the parties to obtain counseling, either for themselves or for a child of the marriage who is less than eighteen years of age. The legislature stipulated, however, that joint counseling cannot be required without the consent of both parties, or if there is a"demonstrated pattern of domestic violence" against one of the parties or a child of the party.[173]

173.

> (f) The court may require the parties to seek counseling for themselves or for a child of the parties under such terms and conditions as the court deems appropriate if:
>
> (1) either party makes a motion for counseling in an effort to improve conditions of their marriage;
>
> (2) a party, the child of the parties, the child's guardian ad litem or court appointed special advocate, or the court makes a motion for counseling for the child; or
>
> (3) the court makes a motion for counseling for parties who are the parents of a child less than eighteen (18) years of age.
>
> However, the court may not require joint counseling of the parties under this subsection without the consent of both parties, or if there is evidence that the other party has demonstrated a pattern of domestic violence against the party or a child of a party.

IND. CODE § 31-1-11.5-7(f) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-15-4-9).