

RECENT DEVELOPMENTS: INDIANA FAMILY LAW

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INTRODUCTION

During the survey period, at least fifty Indiana appellate decisions were published involving the broad topic known as Family Law.¹ This Article is primarily limited to a review of Indiana Appellate Court decisions during the survey period which advance, clarify, or raise further questions regarding the State's body of family law, particularly commonly recognized subjects including dissolution of marriage, paternity, child custody, support and adoption. A significant piece of legislation regarding parental relocation in child custody matters was enacted during the survey period and will also be discussed.

I. DISSOLUTION OF MARRIAGE

The following discussion considers some noteworthy cases involving the topics of property distribution, spousal maintenance, marital agreements and other matters in the context of dissolution of marriage.

A. *Property Distribution*

1. *Marital Property Issues.*—The first of the three primary questions involved in marital asset distribution concerns the definition of marital property.

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1. Ten articles of Title 31 of the Indiana Code are specifically titled family law. IND. CODE §§ 31-11 to -20 (2004). These articles cover marriage, domestic relations courts, the parent-child relationship, establishment of paternity, dissolution of marriage and legal separation, support of children and other dependents, custody and visitation rights, the Uniform Interstate Family Support Act, adoption and human reproduction. Title 31 also contains an article of general provisions as well as an article consisting of 149 sections of definitions pertaining to both family and juvenile law. An additional eleven articles of Title 31 are specifically referred to as "juvenile law." See IND. CODE § 31-9-2-72 (2004) ("Juvenile law" refers to [Indiana Code section] 31-30 to 31-40.").

Also, every legal proceeding in Indiana between parents involving child support or visitation with their children is governed by the Indiana Supreme Court's Child Support Rules and Guidelines and Parenting Time Guidelines. Throughout an additional fifteen other titles of the Indiana Code are provisions governing criminal offenses against children and the family, children's protection services, marriage and family therapists, and trust and fiduciaries. Federal legislation involving taxation, bankruptcy and retirement benefits can be a consideration in virtually any property settlement. Other federal legislation impacts Native American adoptions, parental kidnapping and state enforcement of child support obligations.

The other two questions involve the valuation of the property and how it is to be distributed. Indiana courts have referred to asset distribution as a two-step process, involving a determination of the marital estate and its division.² However, the legal process of marital asset distribution is more involved than this may indicate. Determining marital property sometimes involves a determination of whether something is in fact property and, if so, whether it is a marital asset. Many cases involving valuation of assets attest to the significance of that question.

The marital property and valuation questions necessarily affect the final question—distribution.³ “Indiana subscribes to the ‘one pot’ theory of marital possessions.”⁴ This “one pot” theory has been defined as meaning that the marital estate includes all the property of the parties; whether owned by either spouse prior to marriage, acquired by either spouse in his/her right after the marriage and prior to final separation of the parties, or acquired by their joint efforts.⁵ Thus, property owned by either spouse before the marriage is included in the marital estate and subject to division and distribution.⁶ The “one pot” theory has been held to specifically prohibit the exclusion of any asset from the marital estate⁷

In other words, the law requires that all property owned by the parties before separation is to be considered part of the marital estate, and, with certain limited exceptions, this “one pot” theory specifically prohibits the exclusion of any asset from the scope of the trial court’s power to divide and award in a dissolution of marriage action.⁸ Under the “one pot” theory only property acquired by a spouse after the final separation date is excluded from the marital estate.⁹

With the above in mind, several cases during the survey period addressed the issue of whether property was includable in the marital estate.

a. Social Security Disability Benefits.—In *Severs v. Severs*,¹⁰ the Indiana Supreme Court addressed whether Social Security Disability Income is a marital asset subject to equitable distribution. In *Severs*, the Indiana Court of Appeals

2. *Gard v. Gard*, 825 N.E.2d 907, 911 (Ind. Ct. App. 2005) (citing *Thompson v. Thompson*, 811 N.E.2d 888, 912-13 (Ind. Ct. App. 2004)); see generally Robert J. Levy, *Introduction to Divorce-Property Issues*, 23 FAM. L.Q. 147 (1989).

3. See generally Levy, *supra* note 2.

4. *Perkins v. Harding*, 836 N.E.2d 295, 299 (Ind. Ct. App. 2005) (internal citations omitted).

5. *Neffle v. Neffle*, 483 N.E.2d 767, 769 (Ind. Ct. App. 1985) (citing IND. CODE § 31-15-7-4(a) (2004)).

6. *Fobar v. Vonderahe*, 771 N.E.2d 57, 58 (Ind. 2002).

7. *Thompson v. Thompson*, 811 N.E.2d 888, 912 (Ind. Ct. App. 2004). For a discussion of *Thompson*, see Michael G. Ruppert & Joseph W. Ruppert, *Recent Developments: Indiana Family Law*, 38 IND. L. REV. 1085, 1089 (2005).

8. IND. CODE § 31-15-7-4(a) (2004); *Maxwell v. Maxwell*, 850 N.E.2d 969, 973 (Ind. Ct. App. 2006) (quoting IND. CODE § 31-15-7-4(a) (2004)).

9. *Maxwell*, 850 N.E.2d at 973.

10. 837 N.E.2d 498 (Ind. 2005).

had reversed¹¹ the trial court's determination that Husband's Social Security Disability payments were marital property.¹² The trial court had awarded Wife forty percent of Husband's future Social Security Disability payments.¹³ In granting transfer, the supreme court agreed with the decision of the court of appeals and reversed the trial court's order.¹⁴

Prior to *Severs*, the Indiana appellate courts had addressed other issues of inclusion in the marital pot such as Worker's Compensation,¹⁵ disability insurance under an employer sponsored policy that was purchased with marital assets¹⁶ and disability income benefits where no marital assets were used to contribute to the purchase of the benefits.¹⁷ However, no case in Indiana had specifically addressed inclusion of Social Security Disability benefits in the marital estate until the court of appeals decided *Severs*. In Indiana, the presumption is that all "assets acquired before final separation by either party are property subject to equal division."¹⁸ Property is defined as all the assets of either party or both parties, including:

- (1) a present right to withdraw pension or retirement benefits;
- (2) the right to receive pension or retirement benefits that are not forfeited upon termination of employment or that are vested (as defined in section 411 of the Internal Revenue Code) but that are payable after the dissolution of marriage; and
- (3) the right to receive the disposable retired or retainer pay "as defined in 10 U.S.C. 1408(a)" acquired during a marriage that is or may be payable after the dissolution of marriage.¹⁹

While "future earnings" are not considered part of the marital estate for purposes of property division a "future income stream":

maybe a marital asset to the extent that either marital assets were used to acquire the future income or the income is future compensation for past services, as opposed to replacement for lost earning capacity due to disability. But if both factors are absent a disability income stream is not

11. *Severs v. Severs*, 813 N.E.2d 812, 813 (Ind. Ct. App. 2004).

12. For a discussion of the court of appeals decision in *Severs*, see Ruppert & Ruppert, *supra* note 7, at 1087.

13. *Severs*, 837 N.E.2d at 499.

14. *Id.*

15. *Leisure v. Leisure*, 605 N.E.2d 755, 760 (Ind. 1993).

16. *Gnerlich v. Gnerlich*, 538 N.E.2d 285 (Ind. Ct. App. 1989).

17. *Antonacopulos v. Antonacopulos*, 753 N.E.2d 759, 761 (Ind. Ct. App. 2001); *Jendreas v. Jendreas*, 664 N.E.2d 367, 371 (Ind. Ct. App. 1996).

18. IND. CODE § 31-15-7-5 (2004); *Severs*, 837 N.E.2d at 499. As the court stated, "[t]he party who seeks to rebut the presumption . . . bears the burden of demonstrating that the statutory presumption should not apply." *Severs*, 837 N.E.2d at 499 (quoting *Beckley v. Beckley*, 822 N.E.2d 158, 162-63 (Ind. 2005)).

19. IND. CODE § 31-9-2-98(b) (2004).

a marital asset. . . .²⁰

Thus, the supreme court had determined that Worker's Compensation benefits intended to compensate for loss of future earnings were not marital property²¹ nor were employer or union provided disability benefits intended to compensate for loss of future earning which required no employee contribution and thus no depletion of the marital estate.²² However, Social Security Disability benefits are funded by a totally involuntary payroll tax some of which is paid by the employee.²³ Prior to *Severs* the court of appeals decided *Lawson v. Hayden*²⁴ in which the court had included a part of Husband's railroad retirement annuity in the marital estate because payroll taxes were used during the marriage to fund the annuity.²⁵ The court of appeals in *Severs* disagreed with the determination in *Lawson*—that payroll taxes constituted the use of marital assets²⁶—thus inviting the supreme court's grant of transfer and its decision in this case.²⁷

In its opinion, the supreme court noted that the court of appeals had correctly looked to federal authority to determine the nature of Social Security Disability benefits and their relation to payroll taxes.²⁸ Social Security disability benefits, because they are funded by an involuntary tax do not represent a depletion of the marital estate or property that is includable in the marital pot.²⁹

In dicta, the supreme court, in what amounted to an announcement of its position on the inclusion of Social Security benefits of any kind in the marital estate, stated that "any assignment or division of Social Security Benefits to satisfy a marital property settlement under Indiana law is barred by 42 U.S.C. 407."³⁰

b. Worker's compensation insurance benefits.—As noted earlier, the inclusion of worker's compensation benefits in the marital estate was addressed

20. *Severs*, 837 N.E.2d at 500.

21. *Leisure v. Leisure*, 605 N.E.2d 755, 759 (Ind. 1993).

22. *Antonacopulos*, 753 N.E.2d at 761-62 (employer provided disability benefits with no employee contribution); *Jendreas*, 664 N.E.2d at 371 (union pension disability benefits with no employee contribution).

23. *Severs*, 813 N.E.2d at 814 (Social Security deduction amounts to taxes imposed on all covered employees by the federal government and is wholly involuntary).

24. 786 N.E.2d 756 (Ind. Ct. App. 2003).

25. *Id.* at 762-63.

26. *Severs*, 813 N.E.2d at 814-15.

27. *Severs*, 837 N.E.2d at 501.

28. *Id.* at 500 (citing *Flemming v. Nestor*, 363 U.S. 603, 610 (1960)) (stating the interest of an employee covered by Social Security is a non-contractual interest and cannot be compared to that of an annuity whose rights are based on his contractual premium payment).

29. *Id.*

30. *Id.* at 501 (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) ("This provision of federal law prevents state courts from assigning of social security benefits in a property division judgment.")).

by the supreme court in *Leisure v. Leisure*.³¹ Generally speaking, worker's compensation benefits received after the date of separation are not includable in the marital estate.³² However, worker's compensation benefits received during the marriage are included in the marital estate if those benefits were to replace earnings prior to the date of separation.³³

During the survey period the court of appeals did have the occasion to address the issue of whether certain worker's compensation benefits received during the marriage were to be included in the marital estate.

In the case of *Shannon v. Shannon*,³⁴ Husband "received a lump sum worker's compensation payment in the amount of \$48,000."³⁵ Subsequently, "Wife filed a petition for dissolution of marriage."³⁶ To equalize the estate, the court awarded wife \$10,000 of Husband's worker's compensation award. Husband appealed.³⁷ In affirming the trial court, the court of appeals restated the holdings of *Leisure* that worker's compensation benefits received during the marriage which represent lost income for a period prior to the date of separation were subject to inclusion in the marital estate, but the benefits for loss of future earnings were not.³⁸ In *Shannon*, the court reasoned that because Husband was injured in October 2000 and the date of separation occurred in January 2003, the lump sum award would include part of his lost income during the marriage in addition to loss of future income.³⁹ "Husband did not present any evidence regarding how much of the \$48,000 award" was apportioned to lost income prior to the date of separation and how much represented loss of future earnings.⁴⁰ Because this evidence was not presented, Husband was unable to "overcome the strong presumption that the trial court's disposition of marital property [was] correct."⁴¹

In the future, it would seem that a party seeking to exclude part of a lump sum Worker's Compensation settlement from the marital estate would need to present evidence of the portion of the lump sum allotted to past earnings and the portion allotted to future loss of earning capacity.

c. Inclusion of assets acquired after the Date of Separation.—The case of *Deckard v. Deckard*⁴² involved a question of whether money that Husband had withdrawn from a joint line of credit subsequent to the date of separation should be included in the marital estate. After Wife had filed the petition for dissolution

31. 605 N.E.2d 755 (Ind. 1993).

32. *Id.* at 759.

33. *Id.*

34. 847 N.E.2d 203 (Ind. Ct. App. 2006).

35. *Id.* at 204.

36. *Id.*

37. *Id.* at 205.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 206.

42. 841 N.E.2d 194 (Ind. Ct. App. 2006).

of marriage and before any preliminary hearing could be held, Husband withdrew \$4750 “from the parties’ joint line of credit to purchase a car.”⁴³ The trial court then included that amount in Husband’s assets.⁴⁴ Husband appealed arguing that the trial court had abused its discretion in awarding him the amount that he had withdrawn from the parties’ line of credit.⁴⁵ Pursuant to Indiana Code sections 31-15-7-4 and 31-9-2-6, the marital estate closes when the petition for dissolution is filed.⁴⁶ Husband withdrew the money from the line of credit and purchased the car subsequent to the date that Wife filed the dissolution petition but prior to the entry of any preliminary order.⁴⁷ Therefore, the asset was acquired after the marital estate had closed. As such, it was an abuse of the trial court’s discretion to include it in the marital estate.⁴⁸

d. Antenuptial agreements.—Of course, one way that an individual can make certain that property brought into the marriage will be “separate property” is through a valid “prenuptial” or “antenuptial agreement.”⁴⁹ “Antenuptial agreements” have been defined in Indiana as “legal contracts by which parties entering into a marriage attempt to settle their respective interests in the property of the other during the course of the marriage and upon its termination.”⁵¹

The court’s in Indiana have held that antenuptial agreements are construed according to the principles applicable to the construction of contracts.⁵² The intent of the parties as expressed in the language of the antenuptial agreement is the court’s starting point in interpreting the antenuptial agreement.⁵³

In *McCord v. McCord*⁵⁴ the parties entered into an antenuptial agreement whereby Husband sought to keep as his separate property his retirement savings plan, whole life insurance policy, and the increase in value that said items might experience between the date of the antenuptial agreement and, in the event of divorce, the date of the parties’ separation. The parties did in fact separate, and

43. *Id.* at 201.

44. *Id.*

45. *Id.* It should be noted that the parties did not have the corresponding liability for this line of credit withdrawal because both parties had agreed to file for Chapter 7 Bankruptcy. As the court had stated earlier: “[T]he trial court may not divide assets which do not exist just as it may not divide liabilities which do not exist.” *Id.* (quoting *In re Marriage of Lay*, 512 N.E.2d 1120, 1123-24 (Ind. Ct. App. 1987)).

46. *Id.*

47. *Id.*

48. *Id.*

49. *McCord v. McCord*, 852 N.E.2d 35, 42 (Ind. Ct. App. 2006).

51. *Magee v. Garry-Magee*, 833 N.E.2d 1083, 1087 (Ind. Ct. App. 2005). For a discussion of *Magee* specifically and antenuptial agreements in general, see Joseph W. Ruppert & Michael G. Ruppert, *Recent Developments: Indiana Family Law*, 39 IND. L. REV. 995, 999 (2006).

52. See generally *McCord*, 852 N.E.2d at 35; *Magee*, 833 N.E.2d at 1083.

53. *Schmidt v. Schmidt*, 812 N.E.2d 1074, 1080 (Ind. Ct. App. 2004). For review of *Schmidt* specifically and the interpretation of the language of the contract in general, see Ruppert & Ruppert, *supra* note 7, at 1088-89.

54. *McCord*, 852 N.E.2d at 35.

the trial court dissolved the marriage and divided the marital property. In doing so the trial court failed to set over the appreciated values of Husband's retirement savings plan and whole life insurance policy to him in accordance with the antenuptial agreement.⁵⁵ Husband appealed, contending that the failure to set these appreciated values over to him was error.⁵⁶ The court of appeals agreed. Relying upon *Magee* and *Schmidt*, the court analyzed the parties' antenuptial agreement. The court found that the antenuptial agreement had clearly intended that Husband's retirement plan, life insurance, and any appreciation in value were to be and remain his separate property.⁵⁷ The court remanded to the trial court with instructions to enter a new property division.⁵⁸

2. *Property Valuation Issues*.—It is a well-established rule of law in Indiana that a trial court may select a valuation date for marital property at “any time between the date a petition for dissolution is filed and the date a decree of dissolution is entered.”⁵⁹ A continuing problem occurs when the parties' settlement agreement purports to divide the proceeds of a pension or retirement account pursuant to a qualified domestic relations order (“QDRO”).⁶⁰ There is often a delay between the date of the dissolution decree and the processing of the QDRO by the financial institution.⁶¹ During this gap the retirement plan can, for many reasons, increase or decrease in value. So the question becomes: how is the gain or loss that occurs after the valuation date but before the QDRO becomes effective to be treated? This was the issue in *Shorter v. Shorter*.⁶² In *Shorter*, Husband and Wife agreed that Wife would be awarded one-half of the value of Husband's 401(k) as of the date of approval of the settlement agreement. As of the date the settlement agreement was approved by the court the value of Wife's share was approximately \$80,000.⁶³ Due to delays beyond the control of either party, by the time the QDRO had been approved and submitted to the financial institution, Wife's share had increased in value in excess of \$10,000.⁶⁴

55. *Id.* at 42.

56. *Id.*

57. *Id.* at 43.

58. *Id.*

59. *Magee v. Garry-Magee*, 833 N.E.2d 1083, 1087 (Ind. Ct. App. 2005) (citing *Reese v. Reese*, 671 N.E.2d 187, 191 (Ind. Ct. App. 1996)). The date of the filing for dissolution of marriage is the statutory “final separation date.” See IND. CODE § 31-9-2-46 (2004).

60. When dissolving a marriage in Indiana, the parties are free to draft their own settlement agreement which is contractual in nature and becomes binding on the parties when the court merges and incorporates the agreement into the divorce decree. *Shorter v. Shorter*, 851 N.E.2d 378, 383 (Ind. Ct. App. 2006). These agreements are construed according to rules applicable to the construction of contracts, which means that “unless the terms of the contract are ambiguous, they will be given their plain and ordinary meaning.” *Id.*

61. See generally *Shorter*, 851 N.E.2d at 378; *Beike v. Beike*, 805 N.E.2d 1265 (Ind. Ct. App. 2004); *Niccum v. Niccum*, 734 N.E.2d 637 (Ind. Ct. App. 2000).

62. 851 N.E.2d 378 (Ind. Ct. App. 2006).

63. *Id.* at 380.

64. *Id.* at 382.

Husband sought clarification from the trial court regarding this increase in value. The trial court determined that the ex-wife was not entitled to the increase that had accrued after the valuation date but before the QDRO creating her account became effective.⁶⁵ Wife appealed. In reversing the trial court, the court of appeals discussed the prior decisions of *Niccum v. Niccum*⁶⁶ and *Beike v. Beike*⁶⁷ which both involved substantially similar fact situations. In all three cases none of the settlement agreements had contained any express language regarding the rewards of growth or risk of loss. In *Niccum* the court determined that:

Investment plans inherently include both the rewards of growth, and the risk of losses. Thus, absent express language stating otherwise, the settlement agreement of the parties implicitly contemplated both parties sharing all of the rewards and risks associated with an investment plan The valuation date merely provides a mutually agreed upon base amount to [w]hich any growth is added or loss is subtracted, and bars [Wife] from benefiting from any contributions made by [Husband] after the valuation date.⁶⁸

This rationale was followed by the court in *Beike*, and in *Shorter* the court defined the rule as this: “The principle that emerged from *Niccum* and has been applied since is that, *absent express language stating otherwise*, a settlement agreement dividing a pension plan implicitly contemplates that both parties will share all of the rewards and risks associated with an investment plan.”⁶⁹

In reversing the trial court, the court of appeals noted that just as in *Niccum* and *Beike*, the *Shorter* settlement agreement did not contain any express language stating how gains or losses were to be divided.⁷⁰ Of particular importance, however, to the practitioner is a sort of warning voiced by the court.

We note especially that *Niccum* was decided well before the [Shorters] entered into the instant settlement agreement and thereby put Indiana citizens on notice that provisions of that sort would be interpreted in this manner. In the second place, it would have been easy enough to draft a provision utilizing language that unambiguously expressed an intention to award [Wife] an amount of cash in sum certain, as opposed to a portion of a pension plan. But, the parties did not do this.⁷¹

It would seem that the court is also saying that practitioners now have been put on notice and should take care in drafting settlement agreements involving pension benefits effectuated by a QDRO.

65. *Id.*

66. *Niccum*, 734 N.E.2d at 637.

67. *Beike*, 805 N.E.2d at 1265. For an analysis of *Beike*, see Ruppert & Ruppert, *supra* note 7, at 1090.

68. *Niccum*, 734 N.E.2d at 640.

69. *Shorter*, 851 N.E.2d at 386 (citation omitted) (emphasis added).

70. *Id.*

71. *Id.*

The case of *Nowels v. Nowels*,⁷² which was decided during the survey period, provides a good example of the difficulty that a court faces when attempting to value property. In this case the issue was the valuation of Husband's one-half interest in a business. Each side presented expert testimony giving opinions as to the value of the business that varied widely from each other and were calculated on different dates during the dissolution process.⁷³ In its findings, the trial court thoroughly analyzed the strengths and weaknesses of each expert's testimony and the evidence presented and placed a value on Husband's interest that was between the figures offered by each expert.⁷⁴ Husband challenged the valuation as arbitrary and unsupported by the evidence.⁷⁵ He also contended that it was erroneous because no expert had valued his interest as of the date of the final hearing.⁷⁶ In rejecting Husband's claims, the court of appeals reaffirmed the longstanding rule that "the marital estate is to be closed at the time of the filing of the petition for dissolution" of marriage but that a "trial court has broad discretion in determining the date upon which to value marital assets, and may select any date between the date of filing the petition for dissolution and the date of the final hearing."⁷⁷ In further expounding upon the "broad discretion" of the trial court, the court of appeals stated:

Additionally, a trial court has broad discretion in ascertaining the value of property in a dissolution action and its valuation will not be disturbed absent an abuse of that discretion. The trial court has not abused its discretion if its decision is supported by sufficient evidence and reasonable inferences therefrom. Even where the circumstances would support a different award, we do not substitute our judgment for that of the trial court.⁷⁸

In *Nowells*, although the trial court had declined to adopt either experts appraisal in its entirety, the court of appeals determined that the trial court's valuation was not arbitrary because of its "well-reasoned resolution of conflicting evidence."⁷⁹ The court concluded by stating that the "trial court was not obligated to adopt the specific" value assigned by either expert or the specific valuation date chosen by either expert.⁸⁰ The value placed on the business by the trial court was within the bounds of the evidence presented and within the trial

72. 836 N.E.2d 481 (Ind. Ct. App. 2005).

73. *Id.* at 484.

74. *Id.* The court found the value to be as of the date of the final hearing. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 485 (citing *Sanjari v. Sanjari*, 755 N.E.2d 1186, 1192 (Ind. Ct. App. 2001) (marital estate is to be closed at the time of filing of the petition for dissolution); *Wilson v. Wilson*, 732 N.E.2d 841, 845 (Ind. Ct. App. 2000) (court may select any valuation date "between the date of filing the petition for dissolution and the date of final hearing"))).

78. *Id.* (citations omitted).

79. *Id.* at 486.

80. *Id.* at 487.

court's broad discretion.⁸¹

In *Nowells* the parties presented extensive evidence regarding the value of the assets and the court was faced with the task of having to resolve conflicts—sometimes significant—in the evidence. However, the court has an equally difficult—if not more so—task when the parties present little or no evidence of the value of the marital assets. This was the task facing the court in *Perkins v. Harding*.⁸² In this case, Wife challenged the order dividing property on the grounds that it was incomplete and vague.⁸³ At trial, the parties failed to testify or present exhibits regarding the values of some of the assets and debts. As a result, the trial court attempted to evenly divide the property as best it could.⁸⁴ In affirming the trial court, the court of appeals extensively analyzed the history of the law in Indiana regarding the burden of establishing values for property in a dissolution and the risk a party runs when failing to introduce evidence as to the specific value of the marital property.⁸⁵ The court of appeals pointed out that it had to rest, more than two decades ago, who bears the burden of introducing specific values of marital property at a dissolution hearing and what happens when the trial court distributes marital property without specific evidence of value.⁸⁶ Prior to *In re Marriage of Church*, the court of appeals had taken the position that it was “an abuse of discretion for a trial court to distribute property without apprising itself of the value of the property.”⁸⁷ In the *Church* case, the court adopted the position that “any party who fail[ed] to introduce evidence as to the specific value of marital property at the dissolution hearing [was] estopped from appealing the distribution on the ground of trial court abuse of its discretion based on that absence of evidence.”⁸⁸

The court of appeals found that the *Perkins*' trial court had not abused its discretion in dividing the assets and liabilities. Additionally, the trial court placed the burden of dividing most of the value of assets and debts equally between the parties and had done the best it could regarding the unvalued assets and debts. The court stated:

In light of the state of the record before us, we find no error attributable to the court. *See, e.g. In Re Marriage of Larkin*, 462 N.E.2d 1338, 1344

81. *Id.*

82. 836 N.E.2d 295 (Ind. Ct. App. 2005).

83. *Id.* at 301.

84. *Id.*

85. *Id.*

86. *Id.* at 302. The case referred to by the court was *In re Marriage of Church*, 424 N.E.2d 1078, 1081-82 (Ind. Ct. App. 1981).

87. *Perkins*, 836 N.E.2d at 301 (quoting *In re Marriage of Church*, 424 N.E.2d at 1081-82). The *Church* court also pointed out that the law was further complicated by a line of cases which had upheld trial court's in the distribution of unvalued property when the property was not unique and did not “require expertise for evaluation or when the unvalued property [was] clearly of little value in relation to the entire marital estate.” *In re Marriage of Church*, 424 N.E.2d at 1082.

88. *Perkins*, 836 N.E.2d at 301 (quoting *In re Marriage of Church*, 424 N.E.2d at 1081).

(Ind. Ct. App. 1984) (finding no abuse of discretion in trial court's division of assets when parties had failed to provide evidence of the value of some assets at trial); *Showley v. Showley*, 454 N.E.2d 1230, 1231 (Ind. Ct. App. 1983) (rejecting Wife's claims "the trial court was required to *sua sponte* fill the evidentiary void when the parties failed to introduce evidence of value").⁸⁹

3. *Distribution Issues*.—Indiana Code section 31-15-7-5 governs the distribution of marital property and provides as follows:

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:
 - (A) before the marriage; or
 - (B) through inheritance or gift.
- (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 the family residence for such periods as the court considers 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) a final division of property; and
 - (B) a final determination of the property rights of the parties.⁹⁰

Indiana Code section 31-15-7-5 has been determined by the Indiana appellate courts to "require[] the trial court to presume that an equal division of the marital property is just and reasonable" unless relevant evidence exists to the contrary and has been received by the court.⁹¹ The case of *Nowels v. Nowels*⁹² decided during the survey period provides just such an example of how the trial court can use Indiana Code section 31-15-7-5 to support an unequal division of marital property.⁹³ In *Nowels*, Wife suffered from muscular dystrophy with no expectation that she would be able to acquire employment in the future.⁹⁴ Wife

89. *Id.* at 302.

90. IND. CODE § 31-15-7-5 (2004).

91. *See* Capehart v. Capehart, 705 N.E.2d 533, 536 (Ind. Ct. App. 1999).

92. 836 N.E.2d 481 (Ind. Ct. App. 2005).

93. IND. CODE § 31-15-7-5 (2004).

94. *Nowels*, 836 N.E.2d at 487.

required constant assistance because she was unable to “lift herself or attend to her personal needs.”⁹⁵ The trial court awarded Wife sixty-three percent of the marital estate and explained the deviation by referring to the fact that Wife was disabled, could not work, had high medical and personal care expenses and Husband had “an extraordinarily high earning capability.”⁹⁶ Husband appealed arguing that the trial court committed error because Wife did not request an unequal division of property and Wife “did not present evidence to support a deviation from the statutorily presumptive equal division.”⁹⁷ The court of appeals rejected both of Husband’s arguments, determining that the evidentiary record supported the trial court’s explanation for the deviation and the record reflected sufficient evidence to support the deviation.⁹⁸ The court dismissed Husband’s suggestion that the “trial court may not deviate from the statutory presumption absent a specific request by a party” to do so.⁹⁹ There was no legal authority offered by the Husband to support the proposition that the “trial court may not deviate from the statutory presumption absent a specific request” to do so by a party and the court was not inclined to find as such.¹⁰⁰

An issue that has perplexed practitioners of family law for some time is whether a spouse’s Public Employee’s Retirement Fund (“PERF”) can be divided pursuant to a QDRO. This issue was dealt with in the case of *Everette v. Everette*.¹⁰¹ In this case, the trial court ordered that Husband’s PERF be divided pursuant to a QDRO as part of the equalization of the marital estate.¹⁰² Wife challenged this on appeal.¹⁰³ Indiana Code section 5-10.3-8-9(a) provides, in part, “All benefits, refunds of contributions, and money in the fund are exempt from levy, sale, garnishment, attachment, or other legal process. . . .”¹⁰⁴

Previously, the case of *Board of Trustees of Indiana Public Employees’ Retirement Fund v. Grannan*¹⁰⁵ dealt with the attachment or assignment of PERF benefits in the context of a dissolution of marriage.¹⁰⁶ In *Grannan*, the trial court had issued a QDRO and assigned one-half of the Husband’s PERF account balance to the Wife requiring that her “interest in the account be segregated for accounting purposes, and required PERF to pay directly to the Wife her share of

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 487-88.

101. 841 N.E.2d 210 (Ind. Ct. App. 2006).

102. *Id.* at 211.

103. Presumably Wife was seeking an adjustment of trial court’s division of the marital estate so that she would still receive an equal amount of the estate but without the PERF which would be credited against the Husband’s share.

104. IND. CODE § 5-10.3-8-9(a) (2005).

105. 578 N.E.2d 371 (Ind. Ct. App. 1991).

106. *Id.* at 375.

the benefits” which had been assigned by the QDRO.¹⁰⁷ In reversing the trial court, the court in *Grannan* stated that the “trial court had exceeded its authority by ordering assignment and attachment” pursuant to a QDRO.¹⁰⁸ The court stated:

[T]he husband’s PERF rights are an asset of the marriage subject to distribution. The marital dissolution statute offers the trial court two avenues if such an asset is to be distributed. The statutory language, “by setting aside to either of the parties a percentage of those payments *either by assignment or in kind at the time of receipt*,” offers the trial court a method of distribution which is not in violation of the PERF statutes against assignment and attachment. Because the statutes can be harmoniously construed, we find no supersedure or implied repeal of the PERF statutes. Thus, we order the trial court to enter a conforming order.¹⁰⁹

In *Everette*, the court of appeals “conclude[d] that the *Grannan* opinion [was] in error to the extent that it implie[d] that the PERF benefits themselves may be assigned in order to achieve distribution of that marital asset.”¹¹⁰ The *Everette* court felt that saying that PERF benefits themselves could be assigned would be contrary to the PERF statute’s prohibition against assignment of benefits. If “distribution of the PERF benefits [were] to be made in kind, such distribution would seem to be delayed until actual receipt of the benefits,”¹¹¹ which depending upon the age of the parties could be a significant number of years. The appellate court felt that the *Grannan* opinion seemed to be saying that Indiana Code section 31-15-7-4,¹¹² which authorized “assignment or distribution in kind was permitted under the PERF statute precluding such assignments.”¹¹³ However, because of the language of Indiana Code section 5-10.3-8-9(a) the *Everette* court concluded that the Husband’s PERF account was “exempt from levy, sale, garnishment, attachment, or other legal process” including a QDRO.¹¹⁴ The question then arises, if PERF is exempt from a form of levy, sale, garnishment, attachment or other legal process including a QDRO, does the spouse holding the PERF then, in effect, receive a greater share of the marital

107. *Everette*, 841 N.E.2d at 213 (citing *Grannon*, 578 N.E.2d at 373).

108. *Id.* (citing *Grannon*, 578 N.E.2d at 376).

109. *Grannan*, 578 N.E.2d at 376. The court was referring to what is now Indiana Code section 31-15-7-4.

110. *Everette*, 841 N.E.2d at 213.

111. *Id.*

112. The marital property distribution statute at the time *Grannan* was decided was codified as Indiana Code section 31-1-11.5-11. It is now re-codified at Indiana Code section 31-15-7-4. The relevant language has remained unchanged.

113. *Everette*, 841 N.E.2d at 213 (citation omitted). *Grannan* held that the QDRO in that case was invalid using the rationale cited earlier in this Article. The *Everette* court specifically rejected that rationale. *Id.*

114. *Id.* at 214 (quoting IND. CODE § 5-10.3-8-9(a) (2005)).

estate? The *Everette* court held that its ruling “does not leave the trial court without recourse to evenly divide the marital estate.”¹¹⁵ The court remanded to the trial court with an instruction that it was “to remove the language from the dissolution decree granting Wife any interest in Husband’s PERF account and otherwise adjust the decree to ensure that Wife still receives an equal share of the marital estate.”¹¹⁶

B. Spousal Maintenance Issues

A case decided on October 4, 2006¹¹⁷ was a first, of sorts, for the court of appeals. In the case of *Matzat v. Matzat*¹¹⁸ the court of appeals reversed an award of incapacity maintenance to a wife.¹¹⁹

In *Matzat*, the trial court awarded Wife incapacity maintenance.¹²⁰ Wife

115. *Id.* In this case, the parties had other assets that could be set over to the Wife to equalize the distribution of the estate. *Id.* Of course, if the one spouse’s PERF account is the only significant asset of the marital estate and could not be equalized by distribution of other marital assets another remedy would have to be found. Presumably, a court could order that the spouse holding the PERF pay to the ex-spouse a certain amount of each payment received.

116. *Id.*

117. Technically the period of this survey runs from October 1, 2005 to September 30, 2006. This case was included because it was of significance and decided so near to the survey period.

118. 854 N.E.2d 918 (Ind. Ct. App. 2006).

119. *Id.* at 919. This case was a first, of sorts, because the court noted:

While our research has not yielded a single, reported case in which this court has reversed the trial court’s grant or denial of an incapacity maintenance award on the basis of evidentiary sufficiency, it has also not produced a case where the evidence supporting an award was as meager as the one here.

Id. at 920; *cf.* *Frazier v. Frazier*, 737 N.E.2d 1220, 1224 (Ind. Ct. App. 2000) (trial court’s order characterizing “judgment as non-dischargeable maintenance or support” was reversed when no evidence supported a designation); *Coster v. Coster*, 452 N.E.2d 397, 403 (Ind. Ct. App. 1983) (because no evidence supported maintenance award, trial court’s order was held to be an installment payment of “the marital property division”).

120. *Matzat*, 854 N.E.2d at 919. In Indiana, post-decree spousal maintenance may be awarded by the trial court in a dissolution action where the recipient spouse is physically or mentally incapacitated so that it impairs his or her ability to support him or herself. The court may also award spousal maintenance if the recipient spouse is the custodial parent of an incapacitated child which requires the spouse to forego employment, and he or she lacks sufficient property to provided for his/her needs or for “rehabilitative maintenance” to improve job market ability. IND. CODE § 31-15-7-2 (2004). Concerning “rehabilitative maintenance,” Indiana Code section 31-15-7-2(3) provides:

(3) After considering:

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

“testified that she was seeking social security benefits” and “that she could no longer work as a certified nurse because she was unable to lift patients.”¹²¹ She also testified that she could no longer work “in data entry because it required her to sit for long periods of time.”¹²² The court awarded Wife incapacity maintenance and “COBRA insurance coverage until she beg[an] receiving social security disability benefits.”¹²³ Wife presented no medical evidence or testimony to support her claim of incapacity.¹²⁴ Husband filed a timely motion to correct errors, contending that the award of maintenance was in error and was an abuse of the trial court’s discretion.¹²⁵ Subsequent to the filing of the motion to correct errors, Husband discovered that Wife’s social security claim had been denied and, furthermore, that Wife had not claimed the same disability before the Social Security Administration as she had claimed at trial.¹²⁶ The trial court denied Husband’s proffer of evidence from the Social Security Administration, even though he had presented evidence that the denial letter from social security was not issued until after the final hearing.¹²⁷

In reversing the trial court, the court of appeals, citing *Augspurger v. Hudson*,¹²⁸ stated “a trial court’s decision to award maintenance is purely within its jurisdiction and we will only reverse if the award is against the logic and effect of the facts and circumstances of the case.”¹²⁹ A maintenance award is to help provide for a spouse’s support and “[t]he essential inquiry is whether the incapacitated spouse has the ability to support himself or herself.”¹³⁰ Here, Wife had presented no medical evidence to support her claim for incapacity. The court contrasted their holding in this case to that of *Paxton v. Paxton*¹³¹ where the court had held that “medical testimony was not required to support an award [of

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 an expense necessary to acquire sufficient education and training to enable the spouse seeking maintenance to find appropriate employment;

a court may find that rehabilitative maintenance for the spouse who is 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 § 31-15-7-2(3) (2004).

121. *Matzat*, 845 N.E.2d at 919.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 920.

128. 802 N.E.2d 503, 508 (Ind. Ct. App. 2004).

129. *Matzat*, 854 N.E.2d at 920.

130. *Id.* (quoting *McCormick v. McCormick*, 780 N.E.2d 1220, 1224 (Ind. Ct. App. 2003)).

131. 420 N.E.2d 1346, 1348 (Ind. Ct. App. 1981).

maintenance]” where Wife was already receiving social security disability benefits because of her condition.¹³²

The case of *In re Marriage of Irwin*¹³³ addresses the issue of modification—in this case, termination of spousal incapacity maintenance. When the parties were divorced in 2002, the court found that Wife was entitled to incapacity maintenance in the amount of \$700 per month and required Husband to pay Wife’s COBRA premiums for a period of thirty-six months.¹³⁴ Wife was also required to apply for social security disability benefits, and in the event she was awarded such, Husband’s maintenance obligations would be reduced or eliminated.¹³⁵ The court further found that Wife’s future earnings would be limited.¹³⁶ Subsequent to the decree, Wife attempted to work as a medical-surgical nurse and also attempted to teach nursing at Ivy Tech but had lost both positions because she was “stressed easily and performed poorly.”¹³⁷ Despite this, Wife’s income from employment in the two years subsequent to the divorce increased to \$18,000 and \$19,000 respectively.¹³⁸

Husband filed a petition to modify the trial court’s award of support. After a hearing the court modified the previously ordered spousal maintenance and terminated the spousal maintenance award.¹³⁹ Wife appealed.

On appeal, the court reversed.¹⁴⁰ In reaching its decision, the court reviewed the law in Indiana that allows the trial court to order spousal maintenance payments. Although the circumstances under which a trial court may order spousal maintenance are limited in Indiana,¹⁴¹ Indiana Code section 31-15-7-2(1) allows for the award of “incapacity maintenance.”¹⁴² The court stated:

Indiana Code section 31-15-7-2(1) . . . allows a trial court to award maintenance to a spouse if it finds the spouse to “to be physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself or herself is materially affected[.]” Upon a finding of incapacity, the court may then find that maintenance for the

132. *Matzat*, 854 N.E.2d at 920-21.

133. 840 N.E.2d 385 (Ind. Ct. App. 2006).

134. *Id.* at 387.

135. *Id.*

136. *Id.* Wife’s average income for the last three years of the marriage due to her disability was \$6136. *Id.*

137. *Id.* at 391.

138. *Id.* at 390. In the two years following the divorce Wife had been turned down twice for social security but was also receiving unemployment compensation which, under Indiana Code section 22-4-14-3(a), requires an individual to be physically and mentally able to work. *Id.*

139. *Id.* at 388-89.

140. *Id.* at 393.

141. *Id.* at 390 (citing *Zan v. Zan*, 820 N.E.2d 1284, 1287 (Ind. Ct. App. 2005)). For a discussion of *Zan*, see Ruppert & Ruppert, *supra* note 51, at 1009.

142. *In re Marriage of Erwin*, 840 N.E.2d at 390 (citing *McCormick v. McCormick*, 780 N.E.2d 1220, 1223 (Ind. Ct. App. 2003)).

spouse is necessary during the period of incapacity, subject to further order of the court.¹⁴³

In order to modify or terminate an award of spousal maintenance the spouse who is seeking the modification or termination must make a showing of “changed circumstances so substantial and continuing” that the terms of the maintenance order had become unreasonable.¹⁴⁴ The court said:

As we stated in *Lowes [v. Lowes]*, 650 N.E.2d at 1174, in determining whether a substantial change of circumstances has occurred to the point of making a maintenance award unreasonable, a trial court should consider the factors underlying the original award. Such factors include the financial resources of the party seeking to continue maintenance, the standard of living established in the marriage, the duration of the marriage and the ability of the spouse from whom the maintenance is sought to meet his or her needs while meeting those of the spouse seeking maintenance.¹⁴⁵

While it was true that Wife’s income had increased and that her symptoms had improved somewhat, other factors in the original award, including the Wife’s inability to maintain stable employment, had remained unchanged.¹⁴⁶ Therefore, in analyzing the requirement for the finding of substantial and continuing circumstances, the court found that under the circumstances in the record, the complete termination of Wife’s maintenance was an abuse of discretion by the trial court.¹⁴⁷

C. Miscellaneous Issues

1. *Garnishment to Enforce Payment of Spouse’s Share of Former Spouse’s Military Pension.*—It has long been a settled issue that state courts have the authority to award a portion of disposable military retired pay to former spouses.¹⁴⁸ If the former spouse to whom payments are to be made was married to the armed forces member for a period of ten years or more during which the service member performed at least ten years of service credible in determining the member’s eligibility, then the former spouse’s payments can be made directly from the Department of Defense (“DOD”).¹⁴⁹ This direct payment mechanism is due to a provision commonly referred to as the 10/10 rule. More specifically, the Uniformed Services Former Spouses Protection Act (USFSPA) defines the 10/10 requirement as follows:

143. *Id.* (citations omitted).

144. *Id.* (citing on IND. CODE § 31-16-8-1(1) (2004)).

145. *Id.* at 391.

146. *Id.* at 392.

147. *Id.*

148. See *Mansell v. Mansell*, 490 U.S. 581, 583 (1989); *Warren v. Warren*, 563 N.E.2d 633 (Ind. Ct. App. 1990).

149. 10 U.S.C. § 1048(d)(2) (2000).

If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse.¹⁵⁰

The question for the court to address in the case of *In re Marriage of Cope*¹⁵¹ was if the former spouse does not meet the requirements of the 10/10 rule for direct payment of an awarded share of military pension, can that spouse, nonetheless, enforce payment of their share through garnishment and proceedings supplemental against the current wages of their former spouse?¹⁵² In this case the parties entered into a property settlement which was approved by the trial court which provided for the division of Husband's military pension.¹⁵³ Wife could not secure direct payment from the DOD and Husband refused to pay, taking the position that if the DOD would not issue direct payment to Wife she would simply be "out of luck."¹⁵⁴ Pursuant to the provisions of Indiana Code section 31-15-7-10, Wife "initiated proceedings supplemental to enforce payment of her share of the pension through garnishment of [her ex-husband's] current wages."¹⁵⁵ After several hearings, the trial court issued its final order of garnishment and the ex-husband appealed.¹⁵⁶ The court of appeals affirmed.

The court of appeals determined that 10 U.S.C. § 1408(d)(2) only limited a former spouse's means of collecting his or her share of the military pension not their entitlement thereto.¹⁵⁷ In affirming the trial court, the court of appeals noted that the DOD provides for circumstances such as these and that the remedy "is for the retired member to make direct payments to his/her former spouse."¹⁵⁸

2. *Jurisdiction to Enforce Divorce Decree.*—The case of *Fackler v. Powell*,¹⁵⁹ which is a significant case regarding a trial court's continuing jurisdiction to enforce or interpret a decree concerning property, was decided

150. *Id.*

151. 846 N.E.2d 360 (Ind. Ct. App. 2006).

152. *Id.* at 363.

153. *Id.* at 361. The payment was to be "through either a qualified domestic relations order or other transfer mechanism approved by the DOD." *Id.*

154. *Id.* at 362.

155. *Id.*; IND. CODE § 31-15-7-10 (Supp. 2006) provides that awards concerning a dissolution of marriage decree may be enforced by assignment of wages or other income.

156. *In re Marriage of Cope*, 846 N.E.2d at 362.

157. *Id.*

158. *Id.* at 363. The court of appeals cited several government documents as well as provided relevant web site information. *See id.* The authors urge any practitioner who has a case involving military pay to review this case and make note of the resource information provided by the court.

159. 839 N.E.2d 165 (Ind. 2005).

during this survey period. However, the case was analyzed in the 2006 survey of Indiana Law.¹⁶⁰ The authors would refer the reader to that article.

II. CHILD CUSTODY AND PARENTING TIME

Custody and parenting time disputes are a very prominent area of Indiana family law. The following is a brief review of cases from the survey period.

A. *Right of First Refusal*

The court in *Shelton v. Shelton*¹⁶¹ discussed the opportunity for additional parenting time; more commonly referred to as the “right of first refusal”¹⁶² and held that the maternal grandmother was not a “family member” within the meaning of the Guidelines.¹⁶³ The court further held that a “family member” must be limited to a person within the same household as the parent with physical custody.¹⁶⁴ Therefore, the non-custodial parent should be offered the parenting time regardless of whether a non-household family member can care for the child.¹⁶⁵

B. *Rights of a Domestic Partner*

Whether a former domestic partner should be entitled to the legal rights of a parent such as parenting time rights, child support obligations, and other parental rights and responsibilities with respect to the Mother’s child was at issue in *King v. S.B.*¹⁶⁶ The facts set out in the complaint indicate that S.B. was “artificially inseminated with semen¹⁶⁷ donated by King’s brother” after the

160. See Ruppert & Ruppert, *supra* note 51, at 1009.

161. 835 N.E.2d 513 (Ind. Ct. App. 2005).

162. Indiana Parenting Time Guidelines (I)(C)(3) states in part, “When it becomes necessary that a child be cared for by a person other than a parent or a family member, the parent needing the child care shall first offer the other parent the opportunity for additional parenting time. . . .” IND. PARENTING TIME GUIDELINES (I)(C)(3).

163. *Shelton*, 835 N.E.2d at 518.

164. *Id.* at 517.

165. *Id.* at 518. Note the commentary to the Guidelines (I)(C)(3) that states:

The rule providing for opportunities for additional parenting time promotes the concept that a child receives greater benefit from being with a parent rather than a child care provider. It is also intended to be practical. When a parent’s work schedule or other regular recurring activities require hiring a child care provider, the other parent should be given the opportunity to provide the care. Distance, transportation or time may make the rule impractical. Parents should agree on the amount of child care time and the circumstances that require the offer to be made.

IND. PARENTING TIME GUIDELINES (I)(C)(3) cmt.

166. 837 N.E.2d 965, 966 (Ind. 2005).

167. The insemination took place in August 1998. *Id.* The child was born May 15, 1999. *Id.*

parties jointly decided to bear and raise a child together.¹⁶⁸ The parties' expenses were not covered by insurance but instead were paid by S.B. and King's joint bank account.¹⁶⁹ Until the relationship ended in January 2002, S.B. and King were equal parents in A.B.'s care and support. After the termination of their relationship, King continued to pay child support and have regular parenting time with A.B.¹⁷⁰

However, in July, 2003, S.B. decided to terminate parenting time and "began rejecting King's child support payments."¹⁷¹ The lawsuit began on October 31, 2003, when King sought to be recognized as A.B.'s legal parent and have the same "rights and obligations of a biological parent."¹⁷² King argued that even if the trial court did not find that she was entitled to the title of a legal parent, she "nonetheless acted in loco parentis and in a custodial and parental capacity," which should entitle her to at a minimum continued parenting time with A.B.¹⁷³ The biological mother of A.B. filed a motion to dismiss for failure to state a claim.¹⁷⁴ The trial court dismissed King's complaint. The court of appeals¹⁷⁵ reversed the trial court's decision holding that, by virtue of her agreement with A.B.'s mother, King is a legal parent.¹⁷⁶ The Indiana Supreme Court granted transfer, "thereby vacat[ing] the opinion of the court of appeals."¹⁷⁷ They also reversed the trial court's dismissal of King's complaint and remanded the case to the trial court for further proceedings.¹⁷⁸

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. Indiana Trial Rule 12(B)(6) is a defense to a motion for "[f]ailure to state a claim upon which relief can be granted. . . ." IND. TR. R. 12(B)(6).

175. *In re A.B.*, 818 N.E.2d 126 (Ind. Ct. App. 2004), *vacated*, 837 N.E.2d 865 (Ind. 2005).

176. *Id.* at 132.

177. *King*, 837 N.E.2d at 966. Indiana Appellate Rule 58(A) states:

The opinion or not-for-publication memorandum decision of the court of appeals shall be final except where a Petition to Transfer has been granted by the supreme court. If transfer is granted, the opinion or not-for-publication memorandum decision of the court of appeals shall be automatically vacated except for: (1) those opinions or portions thereof which are expressly adopted and incorporated by reference by the supreme court; or (2) those opinions or portions thereof that are summarily affirmed by the supreme court, which shall be considered as court of appeals' authority. Upon the grant of transfer, the supreme court shall have jurisdiction over the appeal and all issues as if originally filed in the supreme court.

IND. APP. R. 58(A).

178. *King*, 837 N.E.2d at 967.

C. Parenting Time Rights of a Biological Parent

In *Duncan v. Duncan*,¹⁷⁹ Father adopted Mother's two children from a previous relationship, H.D. and R.D.¹⁸⁰ Another child, S.D. was born during the marriage. H.D. alleged more than ten years of molestation by her adoptive father.¹⁸¹ Mother left with all of the children and Father did not have any further contact with them. Father was arrested and charged with child molestation.¹⁸² The charges against Father were dismissed after he suffered a severe stroke during incarceration.¹⁸³ In March 2004, the parties' marriage was dissolved¹⁸⁴ and Mother was awarded sole custody of the parties' children with no visitation rights for Father at that time.

Father filed a Motion to Establish Parenting Time with the two youngest children¹⁸⁵ on February 18, 2005. After a hearing, the trial court denied Father's motion.¹⁸⁶ On appeal, Father raised the issue of whether the trial court abused its discretion by denying his Motion to Establish Parenting Time. While it is true that "Indiana has long recognized that the rights of parents to visit their children is a precious privilege that should be enjoyed by non-custodial parents,"¹⁸⁷ a court may deny those rights whenever it would serve the best interests of the children.¹⁸⁸ The appellate court reviewed several past decisions,¹⁸⁹ but this case

179. 843 N.E.2d 966 (Ind. Ct. App. 2006).

180. *Id.* at 968.

181. The alleged molestation increased in nature and frequency over the years but began with touching and forced oral sex when H.D. was five years old and progressed into intercourse by the time H.D. was eleven. *Id.* It was alleged that at age thirteen, H.D. told a neighbor about the abuse but was threatened by Duncan that he had a loaded gun before she talked to officials. *Id.* She recanted her story for two more years until she finally told her maternal grandmother at the age of fifteen. *Id.*

182. *Id.* Father was charged with child molestation as both a Class A and Class B Felony in January 2004. *Id.*

183. *Id.*

184. *Id.* A Dissolution Decree was entered on March 24, 2004. *Id.*

185. Both R.D. and S.D. are male children.

186. *Duncan*, 843 N.E.2d at 968. The hearing was held on May 17, 2005, and the order denying Father's motion was issued on June 10, 2005. *Id.*

187. *Id.* at 969 (citing *Lasater v. Lasater*, 809 N.E.2d 380, 400 (Ind. Ct. App. 2004)).

188. IND. CODE § 31-17-4-2 (Supp. 2005) ("The court may modify an order granting or denying parenting time rights whenever modification would serve the best interests of the child. However, the court shall not restrict a parent's parenting time rights unless the court finds that the parenting time might endanger the child's physical health or significantly impair the child's emotional development.")

189. See generally *Farrell v. Littell*, 790 N.E.2d 612 (Ind. Ct. App. 2003); *K.B. v. S.B.*, 415 N.E.2d 749 (Ind. Ct. App. 1981). In *K.B.*, the evidence that the inappropriate actions occurred were conflicting and evidence was presented to show the court that the visitation would not be harmful and if anything did happen in the past, it would not recur. This case differs from *K.B.* because H.D. was a credible teenage witness and had the backing of the Monroe County Division of Family and

broke ground as the first time it was confronted with a situation where the molestation allegedly occurred with one child but Father was requesting parenting time with the other children. Based on the facts of this case,¹⁹⁰ the appellate court concluded that “visitation between Father and his sons would endanger their physical health or significantly impair their emotional development.”¹⁹¹ Therefore, the trial court did not err in denying the requested parenting time.¹⁹²

D. Biological Parent vs. Third-Party

The issue in *In re Paternity of Z.T.H.*¹⁹³ was whether or not the parental presumption applies to a parent’s request to modify a third party’s custody. Z.T.H. was in the care and custody of his maternal grandparents, the Ketners, for more than ten years before Father petitioned the court for a modification of custody.¹⁹⁴ During the time that the child resided with the Ketners, Father remained an active part of his life including regular telephone contact, parenting time and attending the child’s school events. The child’s mother was not a part of the action to modify custody. The trial court held that the grandparents failed to rebut the parental presumption required to maintain custody of Z.T.H. and awarded custody of the child to his Father.¹⁹⁵

The Ketners appealed and argued that they should not be required to rebut the position because they had been the child’s primary custodians for such an extended period of time.¹⁹⁶ They further contended that the burden of proof fell to Father to show a substantial change in circumstances that would make the modification of custody in the best interests of the child. Alternatively, the Ketners argued that “even if a parental presumption applies to cases in which the child has been in the long-term permanent custody of a third party, the parental presumption is waived where the parent voluntarily relinquishes custody pursuant [to] a written custody agreement.”¹⁹⁷

The appellate court compared the facts of Z.T.H. with several prior Indiana

Children. Moreover, besides an adamant denial, Father did not present any evidence to the contrary. *Farrell* was different because there was little to no evidence to support the allegations.

190. The important facts considered by the court were Father’s lack of remorse for his behavior and abuse of H.D. including the threat with a loaded gun and his refusal to attend counseling. The court also noted that although Mother told the court that he was a good father to the boys, neither of the boy’s desired visitation or a relationship with their father. *Duncan*, 843 N.E.2d at 971. Further, R.D. had a rocky relationship with his father and S.D. was just beginning to benefit from therapy. *Id.* at 972.

191. *Id.*

192. *Id.*

193. 839 N.E.2d 246 (Ind. Ct. App. 2005).

194. *Id.* at 248.

195. *Id.*

196. *Id.* at 249.

197. *Id.*

cases.¹⁹⁸ However, none of the cases addressed “the proper analysis where a parent seeks to modify a long-term permanent third party custody arrangement and there has not been a significant change in circumstances that led to the parent initially relinquishing custody.”¹⁹⁹ Z.T.H.’s Father relinquished custody based on his fears of being a single, young father.²⁰⁰ There was no evidence that he significantly improved his circumstances from when he voluntarily relinquished custody. The appellate court was faced with a scenario in which they needed to combine the parental presumption with the longstanding concept that “permanence and stability are considered best for the welfare and happiness of the child.”²⁰¹

The court developed a two-step approach for dealing with such cases where a parent seeks to modify custody when a third-party has been a long-time permanent custodian for the child(ren).²⁰² Their approach protects both the best interests of the child and the constitutional rights of the parents.²⁰³ First, the third party is required to rebut the parental presumption.²⁰⁴ If the third party is successful at the rebuttal, the “third party and the parent are on a level playing field, and the parent seeking to modify custody must establish the statutory requirements for modification by showing that modification is in the child’s best interests and there has been a substantial change in one or more of the enumerated factors.”²⁰⁵

The main error that the appellate court found in the trial court’s ruling was its conclusion that the Ketners failed to rebut the parental presumption after

198. See *In re Guardianship of B.H.*, 770 N.E.2d 283, 287 (Ind. 2002) (involving an initial custody determination between a father and a step-father after the death of the child’s mother and requiring a third party to rebut the parental presumption by showing that it is not in the child’s best interests to be placed with the parent and to show that it is the child’s best interests to be placed with the third party); *In re Paternity of V.M.*, 790 N.E.2d 1005, 1108-09 (Ind. Ct. App. 2003) (applying the analysis from *B.H.* where a father voluntarily relinquished custody to the children’s maternal grandmother and then sought a modification of custody after he significantly turned his life around, the court found for the grandparents under the presumption that it was in the best interests of the children to be in the custody of their natural parent and required the grandparents to rebut the parental presumption.); *In re Guardianship of L.L.*, 745 N.E.2d 222, 230-31 (Ind. Ct. App. 2001) (“[T]here is a presumption in all cases that the natural parent should have custody of his or her child. The third-party bears the burden of overcoming this presumption by clear and cogent evidence. . . . If the presumption is rebutted, then the court engages in a general ‘best interests’ analysis.”).

199. *In re Paternity of Z.T.H.*, 839 N.E.2d at 251-52.

200. *Id.* at 253.

201. *Id.* at 252 (citing *Lamb v. Wenning*, 600 N.E.2d 96, 98 (Ind. 1992)).

202. *Id.*

203. *Id.* at 253.

204. The presumption must be rebutted with “evidence establishing the natural parent’s unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third party[.]” *In re Guardianship of B.H.*, 770 N.E.2d at 287.

205. *In re Paternity of Z.T.H.*, 839 N.E.2d at 252-53.

finding that Z.T.H.'s Father acquiesced to the Ketners custody of his child.²⁰⁶ The appellate court reminded its readers that "Indiana courts have continuously recognized that the parental presumption may be rebutted with evidence of a parent's 'long acquiescence' in a third party having custody of a child."²⁰⁷ The Ketners "should have been in the same position as any custodial parent objecting to a petition to modify custody",²⁰⁸ therefore, the appellate court remanded Z.T.H. for a hearing where Father "has the burden of establishing that the modification of custody is in Z.T.H.'s best interests and that there has been a substantial change in circumstances."²⁰⁹

III. CHILD SUPPORT

A. Credit for Parenting Time

In *Fuchs v. Martin*,²¹⁰ the custodial parent, Mother, was given a credit in the amount of \$36.00 for "parenting time" on line seven of the child support obligation worksheet that the trial court attached to its order. Father, the non-custodial parent, asserted that the "parenting time" credit could only be given to the non-custodial parent.²¹¹ The appellate court agreed and found that Mother cannot be entitled to the credit according to the plain language of the Guidelines.²¹² Only a non-custodial parent can receive a monetary credit for "parenting time." The child support order was remanded back to the trial court to enter a corrected order.²¹³

B. Negative Support

*Grant v. Hager*²¹⁴ was a case of first impression that addressed whether a custodial parent could be ordered to pay child support to a non-custodial parent. In this case, Father earned significantly less income than Mother and exercised

206. *Id.* at 257.

207. *Id.* (quoting *Hendrickson v. Binkley*, 316 N.E.2d 376, 380 (Ind. App. 1974)).

208. *Id.*

209. *Id.*

210. 836 N.E.2d 1049 (Ind. Ct. App. 2005).

211. See IND. CHILD SUPPORT GUIDELINES 3(G)(4) (2004) (stating that "[t]he court may grant the noncustodial parent a credit towards his or her weekly child support obligation (Line 6 of the worksheet) based upon the calculation from a Parenting Time Credit Worksheet").

212. The court refers its readers to the commentary on Indiana Child Support Guideline 6, which explains how to compute the credit. It says in part:

The apportionment of credit for "transferred" and "duplicated" expenses will require a determination of the annual number of overnights of parenting time exercised by the parent who is to pay child support, the use of the standard Child Support Obligation Worksheet, a Parenting Time Table, and a Parenting Time Credit Worksheet.

IND. CHILD SUPPORT GUIDELINES 6 cmt.

213. *Fuchs*, 836 N.E.2d at 1060.

214. 853 N.E.2d 167 (Ind. Ct. App. 2006).

substantial parenting time with the parties' two children. Once the appropriate parenting time credits were subtracted from Father's child support, his obligation was a negative number. The trial court ordered Mother to pay Father an amount equal to the negative amount. Mother appealed. Father argued that non-custodial parents may be paying their obligations twice if they participate in shared parenting time.²¹⁵ He reasoned that they are required to provide the same basic living environment as the custodial parent and still pay the same child support obligation. The appellate court closely followed the language of the child support guidelines²¹⁶ and its commentary and reversed the trial court's decision.²¹⁷ The appellate court held "that the present Indiana Child Support Guidelines, while authorizing the use of a Parenting Time Credit to *reduce* the support obligation of a noncustodial parent, do not permit the application of the credit in a manner that requires a custodial parent to pay support to a noncustodial parent."²¹⁸

C. Birth Expenses

In *K.T.P. ex rel. A.S.P v. Atchison*,²¹⁹ the State of Indiana appealed the denial of full reimbursement for expenses they argued were "birth expenses" of K.T.P.²²⁰ The State argued that "[u]nder Indiana Code § 31-14-17-1,²²¹ a court in a paternity action must order a father to pay for at least fifty percent of the expenses of pregnancy and childbirth."²²² The trial court agreed and ordered A.S.P. to pay one-half of certain expenses that were directly related to the child's

215. For the court's purpose, "shared parenting time refers to a situation where a noncustodial parent exercises more than the traditional amount of parenting time, that is, more than approximately fifty-two overnights (or 14% of the overnights) per year." *Id.* at 170; *see* IND. CHILD SUPPORT GUIDELINE 6 cmt.

216. Indiana and our Child Support Guidelines currently follow the Income Shares Model of child support. *See* IND. CHILD SUPPORT GUIDELINE 1.

217. However, it is important to note that the appellate court sympathized with Father's arguments and reminded its readers that "the federal Family Support Act requires that each State review their child support guidelines at least once every four years." *Grant*, 853 N.E.2d at 174 (citing 42 U.S.C. § 667 (2000)). The court went on to say that "Father presents an issue that may be of considerable interest upon our State's next review." *Id.* In closing, and in reference to Father's concerns, the court said in part, "these and other concerns are best addressed by the judicial committees charged with that review rather than by this Court." *Id.* at 175.

218. *Id.* at 167-68.

219. 848 N.E.2d 280 (Ind. Ct. App. 2006).

220. *Id.* at 281.

221. IND. CODE § 31-14-17-1 (2004) states that "[t]he court shall order the father to pay at least fifty percent (50%) of the reasonable and necessary expenses of the mother's pregnancy and childbirth, including the cost of: (1) prenatal care; (2) delivery; (3) hospitalization; and (4) postnatal care."

222. *K.T.P.*, 848 N.E.2d at 282.

birth.²²³ However, the trial court did not order A.S.P. to pay any of the expenses incurred after the child's birth and before this action. The court relied on Indiana Code section 31-14-17-1 and held that "birthing expenses" did not include expenses that are not directly related to the birth of the child.²²⁴ The trial court's decision was affirmed.²²⁵

D. Retroactive Modification

The court in *Whited v. Whited*²²⁶ affirmed the trial court's decision to retroactively modify Father's child support and give him credit for extended parenting time. The amount of the child support for three of the parties' children was at issue.²²⁷ The children resided in Indiana with Father, and with Mother in Florida at sporadic times during their upbringing. In determining Father's child support arrearage, the trial court retroactively gave Father a credit for 183 overnights per year.²²⁸ Mother argued that Father should not have been given a credit for overnights²²⁹ for the time that the children were residing with him.²³⁰ While the court acknowledged the long standing case law and public policy in Indiana against modifying custody outside of written orders from the court,²³¹ it

223. *Id.* A.S.P. was ordered to and agreed to pay one-half of prenatal, birthing, and delivery expenses.

224. *Id.*

225. *Id.* at 281.

226. 844 N.E.2d 546, 532 (Ind. Ct. App. 2006), *aff'd in part, rev'd in part*, 859 N.E.2d 657 (Ind. 2007).

227. The parties had four children but only three of them survived into adulthood. This matter only concerns the three surviving children. *Id.* at 548.

228. *Id.* at 551. Although some of the children practically resided with Father, there was not a legal change of custody that eliminated Father's child support obligation. The maximum overnights that a party can be credited for pursuant to the Indiana Parenting Time Guidelines are 183. *Id.*

229. Mother argued that the 1991 guidelines that were in place when the original support order was issued should apply and that the earlier guidelines did not calculate for overnights unless they were mentioned in the order. The appellate court found that the trial court did not harm Mother by using the new Guidelines because the older guidelines provided for a fifty percent abatement in child support for extended parenting time. *Whited*, 844 N.E.2d at 553. The credit that Father is receiving under the trial courts order is slightly less than that with the maximum 183 overnights allowed. *Id.*

230. Mother admitted that Father was very good about paying his child support and that she did not contend that he owed her any additional money from the time that the children resided with him. *Id.* at 548. Father paid his child support and did an automatic calculation of what he owed to Mother by reducing his weekly amount by one-third for each child that was residing with him at any given time. Mother never paid Father any support for the times that the children resided with Father. *Id.*

231. *See Nill v. Martin*, 686 N.E.2d 116, 117 (Ind. 1997).

also recognized that there are exceptions to the rule.²³² The court held that the parties had an implied contract regarding custody that warranted a credit to Father.

E. Imputing Income

The court of appeals addressed an area of first impression regarding the imputation of income during incarceration in *Lambert v. Lambert*.²³³ The parties in *Lambert* entered into a preliminary agreement during the pendency of their divorce whereby Father would pay Mother \$277 per week in child support based on his earnings as a computer consultant.²³⁴ Before the final decree was entered, Father was incarcerated.²³⁵ For child support purposes, the trial court imputed Father's income consistent with his income prior to his incarceration.²³⁶ Father argued that he would not be able to obtain employment in that field again due to his conviction.²³⁷ The trial court did not sympathize with Father and held that his

232. See *Isler v. Isler*, 425 N.E.2d 667, 670 (Ind. Ct. App. 1981) (“We are of the opinion that a narrow exception to the rule may exist in a case where the obligated parent, by agreement with the custodial parent, has taken the child or children into his or her home, has assumed custody of them, has provided them with food, clothing, shelter, medical attention, and school supplies, and has exercised parental control over their activities and education for such an extended period of time that a permanent change of custody is demonstrated. In such a case the court may, in its sound discretion, allow credit against the accrued support for the reason that the obligated parent has merely furnished support in a different manner under circumstances easily susceptible of proof.”).

233. 839 N.E.2d 708 (Ind. Ct. App. 2005). After the closing of the survey period but before publication of this article, this court of appeals opinion was vacated by the Indiana Supreme Court on February 22, 2007. *Lambert v. Lambert*, 861 N.E.2d 1176 (Ind. 2007). The court stated that “[w]hile our Child Support Guidelines obligate every parent to provide some support even when they have no apparent present income, it was error to set support based on employment income that plainly would not be there during incarceration.” *Id.* Going further, the court acknowledged that “[t]he Court of Appeals was correct to note that most criminal activity reflects a voluntary choice, and carries with it the potential for incarceration and consequent unemployment.” *Id.* at 1180. However, the supreme court distinguished incarceration from voluntary underemployment. Child support computations should include and consider only the obligor's actual income or resources available from other sources (i.e. rental income, trust funds, inheritances). The supreme court decision in *Lambert* only “counsels against imputing pre-incarceration wages, salaries, commissions, or other employment income to the individual.” *Id.* at 1182. The court's decision reminds its readers that “a court could well order an increased support payment as soon as the incapacity caused by prison is removed from a non-custodial parent's ability to earn income.” *Id.* The burden to modify would then fall on the previously incarcerated parent.

234. Father made approximately \$1500 per week. *Id.* at 711.

235. Father had been charged with the molestation of two of his nieces before the preliminary agreement was executed but had not been convicted. *Id.*

236. *Id.* at 712.

237. *Id.*

incarceration was due to his voluntary actions.²³⁸ The trial court's holding was supported by previous Indiana Appellate decisions²³⁹ that found "that an obligor parent must take responsibility for crimes that he/she commits, and all of the consequences which flow from them."²⁴⁰

Father argued that the fact scenarios in the earlier cases do not apply because the parties were seeking a modification of child support due to incarceration. In *Lambert*, the court was making its initial determination of child support with imputed income information. After reviewing the prior Indiana decisions, the trial court was clear that incarceration due to "voluntary criminal conduct is not a valid rationale for abatement of an existing child support obligation."²⁴¹ However, the question posed to the court in *Lambert* was whether the same applied when the court is making an initial determination of an obligation. Case law from other states was not much guidance to the Indiana courts because they had decided both for and against the imputation based on incarceration.²⁴² The appellate court in *Lambert* decided that incarcerated parents should be treated the same as voluntarily underemployed parents. They reasoned that "[n]ot only is incarceration a foreseeable result of voluntary criminal conduct, but conviction of a crime necessarily imputes some fault to the perpetrator, fault for which he should not be rewarded with a lower child support obligation than he would have otherwise."²⁴³ Although the court affirmed the trial court's decision, it also noted that "a contempt finding would likely be inappropriate for any arrearage that accrues Father while incarcerated."²⁴⁴ The court also noted that any resources referred to in the Indiana Child Support Guideline 3(A)(1)²⁴⁵ that become available to Father during his incarceration should also be available to support his children.²⁴⁶

238. *Id.*

239. *See, e.g.,* Holsapple v. Herron, 649 N.E.2d 140, 142 (Ind. Ct. App. 1995); Davis v. Vance, 574 N.E.2d 330, 331 (Ind. Ct. App. 1991).

240. *Lambert*, 839 N.E.2d at 712.

241. *Id.* at 713.

242. *See, e.g.,* *In re Marriage of Rottschielt*, 664 N.W.2d 525, 535 (Wis. 2003) ("[I]ncarceration is an appropriate factor for courts to consider in reviewing a motion for modification, but the fact of incarceration alone is insufficient for a court to modify, or refuse to modify, a child support order."); Logan v. Bush, 621 N.W.2d 314, 318 (N.D. 2000) ("[I]mputation of income was authorized . . ."); Koch v. Williams, 456 N.W.2d 299, 300 (N.D. 1990) ("[A] child support obligor's incarceration . . . does not constitute a material change of circumstances justifying a modification of child support payments."); Parker v. Parker, 447 N.W.2d 64, 66 (Wis. Ct. App. 1989) ("[C]hild support need automatically not terminate during incarceration.").

243. *Lambert*, 839 N.E.2d at 714.

244. *Id.* at 715.

245. The Indiana Child Support Guidelines state in part "pensions, interest, trust income, annuities, capital gains, social security benefits, workmen's compensation benefits, unemployment insurance benefits, disability insurance benefits, gifts, inheritance, [and] prizes." IND. CHILD SUPPORT GUIDELINES 3(A)(1).

246. *Lambert*, 839 N.E.2d at 715.

Another case of first impression dealing with the imputation of income was *Meredith v. Meredith*.²⁴⁷ The Father in *Meredith* took a voluntary early retirement in order to increase the amount of his monthly pension.²⁴⁸ The trial court annualized his income using tax returns from the three prior years when determining whether his child support obligation should be modified.²⁴⁹ Father appealed the trial court's calculation because his federal tax returns showed overtime that was irregular income.²⁵⁰ The appellate court agreed that Father became voluntarily underemployed when he took the early retirement but held that in this case, "[t]he inclusion of overtime pay in the determination of Father's potential income would force him to work to his full potential or make career decisions based strictly upon the size of his paycheck."²⁵¹ In its decision to reverse and remand the matter for a calculation consistent with its decision, the appellate court suggested calculating Father's income using the hourly rate he was making before his retirement or the amount of his pension plus an imputation at minimum wage.²⁵²

F. Social Security Disability

In *Brown v. Brown*,²⁵³ the Indiana Supreme Court addressed the application of Social Security disability payments to child support. Father was disabled and his son received a lump sum for payment of retroactive disability benefits.²⁵⁴ At the time of the payment, Father had accrued a substantial arrearage on his child support obligation and sought to have the lump sum that his son received applied to his arrearage.²⁵⁵ He also sought to have the monthly payments that his son would receive in the future credited towards his weekly child support obligation. The trial court held that Father was not entitled to a credit on his obligation from the lump sum payment to his son.²⁵⁶ The appellate court affirmed that

247. 854 N.E.2d 942 (Ind. Ct. App. 2006).

248. *Id.* at 945.

249. Father filed his motion for modification of child support on February 24, 2004, and took early retirement on April 1, 2004. *Id.*

250. While the Indiana Child Support Guidelines state that all overtime and bonus can be included when calculating income, it is also a very sensitive area. IND. CHILD SUPPORT GUIDELINES 3(A).

251. *Meredith*, 854 N.E.2d at 949; *see also In re Paternity of Buehler*, 576 N.E.2d 1354, 1356 (Ind. Ct. App. 1991).

252. *Meredith*, 854 N.E.2d at 950. The court also noted that the trial court may wish to include a requirement that Father pay an additional percentage of any additional income he may earn from continued occasional work for his previous employer. *Id.*

253. 849 N.E.2d 610 (Ind. 2006).

254. *Id.* at 612.

255. *Id.*

256. *Id.*

decision.²⁵⁷ Father sought transfer and it was granted.²⁵⁸

The court reviewed the rationale from previous decisions²⁵⁹ and in a much anticipated decision, held that a disabled child support obligor was entitled to a credit against child support obligations for Social Security disability payments paid to child.²⁶⁰ The court did articulate some guidelines and principles for application of the credit for lump-sum retroactive benefits towards a child support obligation. First, the payment of retroactive “benefits cannot be credited against child support arrearages” that existed before the filing of a petition to modify child support based on the disability.²⁶¹ The court acknowledged that disabled persons have no influence on the amount of time the government takes to determine benefits and recommended that the disabled party should file his or her petition to modify, thus giving notice to all parties that the receipt of benefits is a possibility.²⁶² The trial court could then defer its ruling and wait for a decision from the government.²⁶³ Once a decision is made regarding the receipt of benefits, the trial court can order a retroactive modification of support back to the date of filing the petition to modify. However, note that “the filing of the petition does not relieve the parent of the parent’s child support obligation until

257. *Id.*

258. *Id.*

259. In *Poynter v. Poynter*, the Indiana Court of Appeals held that a “disabled parent is entitled to have child support obligations credited with the Social Security disability benefits received by the child because of that parent’s disability.” 590 N.E.2d 150, 152 (Ind. Ct. App. 1992). The court in *Brown* did not follow this rationale after reviewing *Stultz v. Stultz*, 659 N.E.2d 125 (Ind. 1995), a subsequent supreme court case. *Brown*, 849 N.E.2d at 614. *Stultz* involved a party seeking credit for social security retirement benefits received by his children. The trial court denied such credit in *Stultz*, but following *Poynter*, the court of appeals reversed. The supreme court in *Stultz* held that the benefits paid to children are only a factor in determining whether a credit should be applied and the trial court has discretion in determining when to apply such a credit. *Stultz*, 659 N.E.2d at 128. Although *Stultz* was not decided based on the difference between retirement and disability payments, the court did include that a disability recipient may have a stronger case for applying a credit than a retirement recipient. *Brown*, 849 N.E.2d at 614. The court in *Stultz* deferred making a definitive holding on that issue until there was a case on point and *Brown* is just that. *Id.*

260. *Brown*, 849 N.E.2d at 611. The court did not revisit its holding in *Stultz* regarding trial court discretion with respect to retirement benefits. *Id.* The court compared the differences between Social Security disability and Social Security retirement benefits and said “[d]isability impacts a parent’s earning capacity and, therefore, a child’s standard of living, in a fundamentally different way than does retirement. The trial court is in the best position to assess the impact of retirement in any particular case.” *Id.*

261. *Id.* at 615. The requirement of a petition to modify stems from Indiana Code section 31-16-16-6 which prohibits “retroactively modify[ing] an obligor’s duty to pay a delinquent support payment.” *Id.* (alteration in original).

262. *Id.* The court followed the guidance of the Michigan Court of Appeals in *Jenerou v. Jenerou*, 503 N.W.2d 744, 746 (1993).

263. *Brown*, 849 N.E.2d at 615.

such time as there is a modification, if any, of the existing child support order.”²⁶⁴ An obligor’s arrearage will continue to accrue pending the receipt of benefits. Secondly, any over payment that is made by the credit of the lump sum will be treated as a gratuity and not a payment advance on a future obligation.²⁶⁵ The same may be true “where prospective Social Security disability benefits paid to children exceed the amount of the parent’s corresponding child support payment.”²⁶⁶ In that situation, the disabled party would be well served to seek a modification of his or her weekly obligation to reflect the benefits.

The trial court decision in *Dedek v. Dedek*²⁶⁷ was reversed after the ruling in *Brown*.²⁶⁸ With facts very similar to those in *Brown*, Father sought to have a lump sum payment of Social Security disability benefits made to his children applied retroactively to his child support arrearage.²⁶⁹ The trial court denied his request, but pursuant to *Brown*, the appellate court reversed that decision and held that “Father is entitled to a credit against his arrearage, but only for the arrearage accumulated *after* he filed his petition to modify his child support based on his disability.”²⁷⁰ This case was remanded back to the trial court to determine the child support arrearage at the time the petition to modify was filed.²⁷¹ Another issue in *Dedek* was Father’s direct payments that he made to Mother. The trial court looked at the language in the parties’ divorce decree that stated that the child support payments “shall be paid to the Clerk of Monroe County”²⁷² and held that because the payments were made to Mother and not the Clerk, the payments should be credited as payment for the children’s educational expenses.²⁷³ The appellate court found that analysis to be clearly erroneous and held that the payments should have first been applied to his child support arrearage.²⁷⁴

264. *Id.* The court referenced *Tarbox v. Tarbox*, 853 A.2d 614, 621 (Conn. App. Ct. 2004).

265. *Brown*, 849 N.E.2d at 616.

266. *Id.*

267. 851 N.E.2d 1048, 1049 (Ind. Ct. App. 2006).

268. *Dedek* was decided on August 3, 2006; just over one month after the decision in *Brown* was handed down by the Indiana Supreme Court.

269. *Dedek*, 851 N.E.2d at 1049.

270. *Id.* (emphasis added).

271. Unfortunately for the father in this case, his petition to modify was not filed until December 14, 2005, just two days before the lump sum payment was made on December 16, 2004. Although the trial court was legally and technically reversed, the impact would be essentially the same in this case with or without retroactive application to the date of filing the petition.

272. *Dedek*, 851 N.E.2d at 1052.

273. *Id.* Mother never made a claim that Father was in arrears on his obligation to pay fifty percent of the children’s educational expenses. Furthermore, she admitted to receiving the payments from Father. The court relied on *Nill v. Martin*, 686 N.E.2d 116, 118 (Ind. 1997), in finding that “[c]redit has been allowed for payments that do not technically conform to the original support decree.” *Dedek*, 851 N.E.2d at 1052. Historically, courts give credit for payments where sufficient evidence is shown to prove the payments were made. *Id.*

274. *Dedek*, 851 N.E.2d at 1049.

G. Post-Secondary Educational Expenses

In *Borum v. Owens*,²⁷⁵ Father appealed the trial court's decision that denied his petition to modify the payment of college expenses for his daughter.²⁷⁶ Father filed his petition to modify on April 26, 2005, in anticipation of his daughter's upcoming wedding²⁷⁷ alleging that her marriage was "additional evidence of her emancipation."²⁷⁸ Father relied on Indiana Code section 31-16-8-1(1) which allows for modification only "upon a showing of changed circumstances so substantial and continuing as to make the current terms unreasonable."²⁷⁹ The appellate court considered the additional income to which Daughter would have access as a result of being married and sharing expenses with her husband.²⁸⁰ The appellate court reversed the trial court decision and held that Father had "established a change in circumstances so substantial and continuing as to make the terms of the May 17, 2004 order unreasonable."²⁸¹

H. Foreign Judgments

Another matter of first impression was whether a domesticated foreign judgment which included post-judgment interest at the forum state's rates was entitled to full faith and credit. In *Johnson v. Johnson*,²⁸² a Washington State child support judgment was domesticated in Indiana. The Washington judgment provided for post-judgment interest at the rate of twelve percent.²⁸³ Father argued that the post-judgment interest should be calculated pursuant to Indiana's rate of eight percent.²⁸⁴ Mother argued that the interest should be calculated based on the state that rendered the judgment.²⁸⁵ The appellate court agreed with Mother and concluded that

275. 852 N.E.2d 966 (Ind. Ct. App. 2006).

276. According to his divorce decree, Father was required to pay ninety-two percent of his daughter's remaining college expenses after scholarships and grants and Mother was to pay eight percent. *Id.*

277. *Id.* at 968. Daughter planned to, and in fact did, marry her fiancée on June 11, 2005. *Id.*

278. She had been formally emancipated by the court on May 17, 2004, but it was subject to her parent's continued duty to contribute to her college expenses. *Id.*

279. *Id.* at 969 (citing IND. CODE § 31-16-8-1(1) (2004)).

280. *Id.* at 970. In summary, Daughter's fiancée testified that he made approximately \$40,000 to \$44,000 per year and that he and Daughter would continue to reside in her current apartment after their marriage. Father made \$41,000 in 2004. *Id.*

281. *Id.*

282. 849 N.E.2d 1176, 1177 (Ind. Ct. App. 2006).

283. *Id.* at 1178.

284. *Id.*

285. *Id.*; see also *Mahl v. Aaron*, 809 N.E.2d 953, 959 (Ind. Ct. App. 1994), *aff'd sub nom. Aaron v. Scott*, 851 N.E.2d 309 (Ind. Ct. App. 2006), *trans. denied*, 2007 LEXIS 45 (Ind. 2007) (judgment from a sister state that is domesticated in an Indiana court will be given full faith and credit).

a domesticated foreign judgment that provides for post-judgment interest at the rendering state's statutory rate is entitled to full faith and credit in Indiana as to both principle and post-judgment interest at the rendering state's rate, unless the judgment debtor can show that the enforcement of the post-judgment interest part of the judgment would violate Indiana public policy.²⁸⁶

Pursuant to the Indiana Code, it is possible to have interest applied to delinquent child support payments at the rate of eighteen percent.²⁸⁷ Father was unable to show that Washington's interest rate was against Indiana public policy because Indiana's "legislature has determined that it is [the] state's public policy to allow a higher rate of interest on delinquent child support payments than the rate ordered here under Washington state law."²⁸⁸

IV. RELOCATION

Effective July 1, 2006, the law in Indiana regarding relocation changed substantially with the implementation of the new relocation statute.²⁸⁹ Relocation occurs when there is a change in an individual's residence for at least sixty days.²⁹⁰ The new statute applies to non-relocating individuals²⁹¹ and parents as well as relocating individuals.²⁹² A relocating individual must give appropriate notice,²⁹³ within the prescribed period²⁹⁴ prior to his or her relocation to all non

286. *Johnson*, 849 N.E.2d at 1180.

287. *Id.* at 1179 (citing IND. CODE § 31-16-12-2 (2004)). The statute provides:

The court may, upon a request by the person or agency entitled to receive child support payments, order interest charges of not more than one and one-half percent (1 1/2%) per month to be paid on any delinquent child support payment. The person or agency may apply for interest if support payments are not made in accordance with the support order. Accrued interest charges may be collected in the same manner as support payments under IC [section] 31-16-9.

IND. CODE § 31-16-12-2. However, even if the court found that the appropriate application of interest was Indiana's rate, the higher rate would not apply because it must be specifically requested by the parent seeking its application. *Johnson*, 849 N.E.2d at 1179 (citing *Caldwell v. Black*, 727 N.E.2d 1097, 1100 (Ind. Ct. App. 2000)).

288. *Johnson*, 849 N.E.2d at 1179.

289. IND. CODE § 31-17-2.2 (Supp. 2006) (repealing IND. CODE §§ 31-17-2-4, -23 (2004)).

290. *Id.* § 31-9-2-107.7.

291. Any person who has custody, parenting time or grandparent visitation with a child or someone who has filed a legal action seeking custody, parenting time or grandparent visitation with a child. *Id.* § 31-9-2-84.6.

292. A person who has custody or parenting time with a child or is seeking custody of parenting time, and intends to move his or her principal residence. *Id.* § 31-9-2-107.5. Grandparents with visitation rights do not fall under the term of relocating individuals. *Id.*

293. The notice must include the address and mailing address of the relocating individual's new residence, the home and other telephone numbers for the relocating individual; the date the

relocating individuals and file the notice with the clerk of the court that issued the custody or parenting order.²⁹⁵ If that provision is not applicable, he or she must file the notice with the clerk of the court having jurisdiction over custody or parenting time with the child.²⁹⁶ The nonrelocating parent can file a motion objecting to the child's relocation within sixty days of receiving the notice.²⁹⁷ A nonrelocating parent can seek a temporary or permanent injunction preventing the relocation of the child.²⁹⁸ Nonrelocating individuals as well as nonrelocating parents can also file motions to modify custody, parenting time, grandparent visitation or child support orders.²⁹⁹ If the nonrelocating parent fails to file a motion to temporarily or permanently enjoin the child's relocation within sixty days after his or her receipt of the notice, the relocating custodian may relocate.³⁰⁰

If the relocating parent meets the burden of proof to show relocation is made in good faith and for a legitimate reason, the burden shifts to the nonrelocating parent.³⁰¹ The person objecting to the relocation must show the court that the "proposed relocation is not in the best interest of the child";³⁰² that the notice "was not served in a timely manner" and that a parenting time agreement has not been presented; "that the child has been relocated without" appropriate notice or "an agreement between the parties" or an order of the court; or, "that there is a likelihood that, after final hearing, the court will not approve the relocation of the child."³⁰³ Pending a final hearing, the court may grant a temporary order permitting relocation if it finds that timely and appropriate notice was given; it

relocating individual intends to move; "[a] brief statement of the specific reasons for the proposed relocation of the child"; "[a] proposal for a revised schedule of parenting time or grandparent visitation with the child; a statement that a parent must file an objection to the relocation of the child with the court not later than sixty (60) days after receipt of the notice"; and, "[a] statement that a non-relocating individual may file a petition to modify custody order, parenting time order, grandparent visitation order or child support order." *See id.* § 31-17-2.2-3(a)(2).

294. The notice must be given "not later than ninety (90) days before the date that the relocating individual intends to move." *Id.* § 31-17-2.2-3(a)(1)(B). If the information cannot be provided at least ninety days before the intended move, the relocating individual must provide the information within ten days of obtaining it. *Id.* § 31-17-2.2-3(b). Regardless of the foregoing, "the relocating individual must provide all of the information required . . . not later than thirty (30) days the relocating individual intends to move the new residence." *Id.*

295. *Id.* §§ 31-17-2.2-1, -3.

296. *Id.* § 31-17-2.2-1.

297. *Id.* § 31-17-2.2-5.

298. *Id.* The objection must be made in good faith and for a legitimate reason. *Id.*

299. *Id.* § 31-17-2.2(1)(b).

300. *Id.* § 31-17-2.2-5(e). "On the request of either party, the court shall hold a full evidentiary hearing to grant or deny a relocation motion under subsection (a)." *Id.* § 31-17-2.2-5(b).

301. *Id.* § 31-17-2.2-5(d).

302. *Id.*

303. *Id.* § 31-17-2.2-6(a).

orders a revised schedule for temporary parenting time; and it finds “there is a likelihood that, after the final hearing, the court will approve the relocation of the child.”³⁰⁴ At the final hearing, the court will determine whether to allow the permanent relocation of the child after considering the relocation factors and whether the relocation is in the child’s best interests.³⁰⁵ Obviously, the greater the distance involved in the planned relocation, the more significant the threat to the continuity, quality, and pattern of interaction between the children and the parent left behind. Indiana’s relocation statute has finally officially recognized what trial courts and practitioners have always known in these highly emotional cases: the legitimacy of the reason for relocating and the motives for relocating and opposing the relocating are crucial.

V. PATERNITY

During the survey period, the Indiana legislature adopted several additions and changes to the paternity affidavit statute. These changes became effective as of July 1, 2006. Since the adoption of the new statute, fathers who sign a paternity affidavit after the birth of a child are now considered to be a child’s legal father without requiring further court proceedings.³⁰⁶ These fathers are also afforded reasonable parenting time with the child unless a court determines otherwise.³⁰⁷ Once sixty days have elapsed after the execution of a paternity affidavit, the affidavit may only be rescinded for two reasons.³⁰⁸ It can be rescinded if there is a showing that there was “fraud, duress, or material mistake of fact [during] the execution of the paternity affidavit” or if rescinder is requested by the man who signed the affidavit and only then if that man was

304. *Id.* § 31-17-2.2-6(b).

305. *Id.* § 31-17-2.2-6(c). The court will consider the following relocation factors:

- (1) The distance involved in the proposed change of residence.
- (2) The hardship and expense involved for the nonrelocating individual to exercise parenting time or grandparent visitation.
- (3) The feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time and grandparent visitation arrangements, including consideration of the financial circumstances of the parties.
- (4) Whether there is an established pattern of conduct by the relocating individual, including actions by the relocating individual, including actions by the relocating individual to either promote or thwart a nonrelocating individual’s contact with the child.
- (5) The reasons provided by the
 - (A) relocating individual for seeking relocation; and
 - (B) nonrelocating parent for opposing the relocation of the child.
- (6) Other factors affecting the best interest of the child.

Id. § 31-17-2.2-1(b).

306. IND. CODE § 16-37-2-2.1(m) (Supp. 2006).

307. *Id.* § 16-37-2-2.1 (g)(2)(B).

308. *Id.* § 16-37-2-2.1(i).

excluded as the child's father after biological testing.³⁰⁹ A paternity affidavit may only be set aside if genetic testing excludes the man who signed the affidavit as the child's father.³¹⁰

The case of *In re Paternity of N.R.R.L.*³¹¹ focused primarily on civil procedure. It involved a paternity matter where the birth mother and her boyfriend, Rogge, executed a paternity affidavit soon after the child's birth.³¹² Almost two years later,³¹³ Milner filed a petition to establish paternity of the child naming the child's mother as the sole respondent.³¹⁴ The parties stipulated to genetic testing which proved Milner to be the child's biological father. Six months later, in April 2005,³¹⁵ Mother filed a motion to dismiss the paternity action filed by Milner. Rogge, the child's "legal father," filed a motion to intervene and later filed a notice of joinder in mother's motion to dismiss.³¹⁶ Milner, now the child's presumed father,³¹⁷ filed a motion to join Rogge. The motion to dismiss was denied, but Rogge's motion to join Rogge as a party was granted.³¹⁸ Rogge filed an interlocutory appeal contending the court erred when

309. *Id.* Fathers have sixty (60) days after execution of the affidavit to request the court to order genetic testing. *Id.* § 16-37-2.2.1(h).

310. *Id.* § 16-37-2-2.1(k).

311. 846 N.E.2d 1094 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 586 (Ind. 2006).

312. *Id.* at 1095. The paternity affidavit was executed pursuant to Indiana Code section 31-14-2-1.

313. The statute of limitations for filing a paternity action is two years. IND. CODE § 31-14-5-3 (2004). Note that Milner filed his petition just under one week before the statute would have run.

314. *In re Paternity of N.R.R.L.*, 846 N.E.2d at 1095.

315. The court states that Mother filed her motion in April, 2004, but upon preparing a timeline of facts, the author noticed a discrepancy in the dates. Counsel of record for the case was contacted and he confirmed the actual date of filing the motion was April 2005, the spring following Milner's petition.

316. *In re N.R.R.L.*, 846 N.E.2d at 1095.

317. IND. CODE § 31-14-7-1 (2004) provides:

A man is presumed to be a child's biological father if:

(1) the:

(A) man and the child's biological mother are or have been married to each other; and
(B) child is born during the marriage or not later than three hundred (300) days after the marriage is terminated by death, annulment, or dissolution;

(2) the:

(A) man and the child's biological mother attempted to marry each other by a marriage solemnized in apparent compliance with the law, even though the marriage:

(i) is void under IC 31-11-8-2, IC 31-11-8-3, IC 31-11-8-4, or IC 31-11-8-6; or

(ii) is voidable under IC 31-11-9; and

(B) child is born during the attempted marriage or not later than three hundred (300) days after the attempted marriage is terminated by death, annulment, or dissolution; or

(3) the man undergoes a genetic test that indicates with at least a ninety-nine percent (99%) probability that the man is the child's biological father.

318. *In re Paternity of N.R.R.L.*, 846 N.E.2d at 1095.

it denied the motion to dismiss.³¹⁹ Rogge argued the paternity action should have been dismissed because he “was a necessary party but was not named a party in that action.”³²⁰ The court of appeals found that he was indeed a necessary party as an adjudicated father; however, any error that resulted from Milner’s failure to add him was harmless as it was remedied when he was allowed to intervene in the action.³²¹ The court did not reach the issue of whether the genetic testing that established Milner as the biological father excluded Rogge as the child’s biological father,³²² it simply found that Milner did, in fact, have a claim upon which relief could be granted, and that the trial court did not err in denying Rogge’s motion to dismiss.³²³

VI. ADOPTION

A. *Standing to Participate in Proceedings*

*In re Adoption of J.B.S.*³²⁴ held that a party’s visitation privileges with a child through a guardianship do not guarantee standing to participate in adoption proceedings.³²⁵ Alfred Weidenhammer was married to J.B.S.’s grandmother.³²⁶ After the child’s mother, Strucker, was incarcerated, the couple were appointed guardians of the minor child and she began living with them. In December 2003, the child’s grandmother passed away.³²⁷ The child’s maternal aunt, Sorensen, petitioned the court to become the successor guardian for the child. The court denied her motion but gave her visitation privileges with the child.³²⁸ Weidenhammer filed a verified petition to adopt J.B.S. in August 2004, and the appropriate home studies were conducted.³²⁹ The court held a hearing on his

319. *Id.* The appellate court determined that although Rogge did not state it exactly, his motion to dismiss was essentially a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Indiana Trial Rule 12(B)(6) and the court treated it as such. *Id.*

320. *Id.* at 1096.

321. *Id.* The court compared the facts of this case to those in *In re Paternity of K.L.O.*, 816 N.E.2d 906 (Ind. Ct. App. 2004). In *K.L.O.*, the mother and her boyfriend executed a paternity affidavit as soon as the child was born. *Id.* at 907. The case is also similar because a different man, Larkins, later took a paternity test that confirmed his parentage of the child with a probability over of 99.99%. *Id.* Unlike this case, the legal father in *K.L.O.* was never a party to any of the paternity proceedings. *Id.* In *N.R.R.L.*, Rogge was allowed to intervene in the paternity action by Milner, therefore, any harm that arose out of Rogge not being named in the action was remedied. *In re Paternity of N.R.R.L.*, 846 N.E.2d at 1096.

322. *In re Paternity of N.R.R.L.*, 846 N.E.2d at 1097 n.3.

323. *Id.* at 1098.

324. 843 N.E.2d 975 (Ind. Ct. App. 2006).

325. *Id.* at 978.

326. *Id.* at 976.

327. *Id.*

328. *Id.* She was granted visitation two Thursdays and one Sunday a month. *Id.*

329. *Id.* The adoption report to the court recommended the granting of Weidenhammer’s

petition on November 22, 2004.³³⁰ The court entered a decree of adoption on December 17, 2004.³³¹ Sorensen filed a verified motion to set aside the adoption order on February 18, 2005.³³² The trial court agreed with Sorensen and set aside the decree of adoption stating that it had been procured by fraud.³³³ Weidenhammer appealed and the appellate court held that “[w]hile she had been granted the privilege to visit J.B.S. under the previous guardianship, Sorensen had no standing to participate in the adoption proceedings, and certainly no standing to object to those proceedings once final.”³³⁴ The case was remanded back to the trial court to revoke and set aside its order.³³⁵

B. Consent

A mother appealed the trial court’s decision to grant adoption of her child to the paternal grandparents arguing that she did not consent to the adoption in *In re Adoption of C.E.N.*³³⁶ C.E.N.’s paternal grandparents, Alfred and Lucy Stamper, were granted custody of him in October 2001.³³⁷ The child’s natural father consented to the adoption of C.E.N.³³⁸ However, his biological mother, Saulmon, would not consent to the adoption although she had admitted that she was “not in a position to have custody” of C.E.N.³³⁹ Saulmon did not make any effort to provide cash to support C.E.N.³⁴⁰ Furthermore, she failed “to exercise

petition. *Id.*

330. *Id.* Weidenhammer stated at the hearing that Sorensen had not exercised her visitation rights with the child since the summer of 2004. *Id.* The court later found that statement to be false. *Id.*

331. *Id.* at 977. The Decree granted Weidenhammer’s adoption of the child and terminated Stucker’s parental rights. *Id.* The Decree was later amended to reflect the correct spelling of J.B.S.’s name. *Id.* The amended decree is dated January 19, 2005. *Id.*

332. *Id.* Sorensen’s argument was based on the false testimony of Weidenhammer concerning her failure to exercise her visitation privileges with the child. *Id.*

333. *Id.* Although it has been indicated in caselaw that fraud may be one of the reasons a court can set aside an adoption, those cases involve situations where a particular person whose consent was required for the adoption was defrauded. *Id.* at 978 (citing *Adoptive Parents of M.L.V. v. Wilkens*, 598 N.E.2d 1054, 1057 (Ind. 1992)). Here, the trial court did not need Sorensen’s consent before issuing the decree of adoption. *Id.*

334. *In re Adoption of J.B.S.*, 843 N.E.2d at 978. Standing is defined as “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.” BLACK’S LAW DICTIONARY 1442 (8th ed. 2004).

335. *Id.* at 979.

336. 847 N.E.2d 267, 271 (Ind. Ct. App. 2006).

337. *Id.* at 269. C.E.N. was born on August 2, 2000, and had been in the care and custody of his grandparents since the age of eight months old. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* The findings of fact from the trial court indicated that Saulmon contributed approximately \$125 to C.E.N. from October 2001 through November 2004. *Id.*

any substantial parenting time or communicate with C.E.N.” while he was with the Stampers.³⁴¹ Saulmon argued that her consent was required for the Stampers to adopt C.E.N.³⁴² The trial court followed Indiana Code section 31-19-9-8³⁴³ and held that because Saulmon failed “to communicate significantly with C.E.N.” without justifiable cause during the one year prior to the filing of the petition for adoption, her consent was not necessary.³⁴⁴ The appellate court agreed and held that the trial court “properly granted the Stampers’ petition for adoption of C.E.N.”³⁴⁵

341. *Id.* at 269-70. At one time, C.E.N. and Saulmon lived in the same apartment complex; yet Saulmon did not make any effort to visit with her child. *Id.* at 270. Saulmon visited C.E.N. for approximately ten minutes on Christmas day in 2003 and declined offers made by Lucy to arrange parenting time. *Id.*

342. *Id.* at 271. IND. CODE § 31-19-9-1 (2004) provides:

(a) Except as otherwise provided in this chapter, a petition to adopt a child who is less than eighteen (18) years of age may be granted only if written consent to adoption has been executed by the following:

- (1) Each living parent of a child born in wedlock.
- (2) The mother of a child born out of wedlock and the father of a child whose paternity has been established by:
 - (A) a court proceeding other than the adoption proceeding, except as provided in IC 31-14-20-2; or
 - (B) a paternity affidavit executed under IC 16-37-2-2.1;unless the putative father gives implied consent to the adoption under section 15 of this chapter.

343. In pertinent part, IND. CODE § 31-19-9-8 states:

- (a) Consent to adoption, which may be required under section 1 of this chapter, is not required from any of the following:
 - (1) A parent or parents if the child is adjudged to have been abandoned or deserted for at least six (6) months immediately preceding the date of the filing of the petition for adoption.
 - (2) A parent of a child in the custody of another person if for a period of at least one (1) year the parent:
 - (A) fails without justifiable cause to communicate significantly with the child when able to do so; or
 - (B) knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree.

344. *In re Adoption of C.E.N.*, 847 N.E.2d at 271.

345. *Id.* at 272.

