

# RECENT DEVELOPMENTS IN FAMILY AND MATRIMONIAL LAW

KATHLEEN E. RUDIS\*  
MICHAEL R. KOHLHAAS\*\*  
JAMES A. REED\*\*\*  
KEVIN P. MCGOFF\*\*\*\*

## INTRODUCTION

During the survey period, numerous Indiana appellate court decisions were published involving family and matrimonial law. These decisions will impact future cases involving topics such as dissolution of marriage, child custody, support, relocation, paternity, and adoption. The Indiana Supreme Court also issued its Order Amending Indiana Child Support Rules and Guidelines (“the Guidelines”) in 2009, with revisions to the Guidelines taking effect on January 1, 2010. Thus, this Article reviews developments in Indiana’s family and matrimonial case law during the survey period, as well as the recent amendments to the Guidelines.<sup>1</sup>

---

\* Associate, Bingham McHale LLP; professional profile *available at* <http://www.binghammchale.com/professionals/index.asp?id=rudis>. Since graduating from law school in 2009, Katie has practiced with the firm’s litigation and private client departments, where she represents clients on an array of matters from family and matrimonial law to long-term care and health care litigation.

\*\* Partner, Bingham McHale LLP; professional profile *available at* <http://www.binghammchale.com/professionals/index.asp?id=kohlhaas>. Mike concentrates his practice in a variety of personal representations, including matrimonial law and wealth transfer planning. His clients include executives, professional athletes, civic leaders, as well as other high-profile and high net worth individuals.

\*\*\* Partner, Bingham McHale LLP; professional profile *available at* <http://www.binghammchale.com/professionals/index.asp?id=reed>. Jim is the founder of the matrimonial and family law group at Bingham McHale and leads the firm’s private client department. He is a Fellow of the American Academy of Matrimonial Lawyers.

\*\*\*\* Partner, Bingham McHale LLP; professional profile *available at* <http://www.binghammchale.com/professionals/index.asp?id=mcgoff>. Kevin practices with the firm’s litigation and private client departments, where he represents clients in matters from family and matrimonial law to legal ethics.

1. To stay current on recent developments in Indiana family law, please consider subscribing to the Indiana Family Law Update, a free service provided by the Matrimonial Law Group of Bingham McHale LLP. The Indiana Family Law Update sends select Indiana cases pertaining to family law issues, along with brief synopses and analyses, to e-subscribers as cases are released by the Indiana Supreme Court and Indiana Court of Appeals. To subscribe, send an e-mail to [familylawcases@binghammchale.com](mailto:familylawcases@binghammchale.com) with “subscribe” in the subject field or body. Further updates on developments in Indiana family law are available through the Bingham McHale blog, *available at* <http://blog.binghammchale.com/c/departments/private-client/>.

## I. DISSOLUTION OF MARRIAGE

The following section reviews noteworthy cases involving marital property issues, property valuation issues, distribution issues, and other matters related to the dissolution of marriage.

### A. Property Distribution

Distributing marital property raises issues involving how to define the marital estate, how to value marital property, and how to distribute marital property.

1. *What Should Be Included in the Marital Estate?*—Several cases during the survey period address the issue of whether property is includable in the marital estate.

a. *Vested right to receive future employer-provided health constitutes a marital asset.*—In *Bingley v. Bingley*,<sup>2</sup> the Indiana Supreme Court considered whether the vested right to receive future employer-provided health insurance benefits constitutes a marital asset subject to division in divorce proceedings.

At the time of the dissolution proceeding in *Bingley*, the husband received a retiree benefit in the form of health insurance premiums, paid by his former employer, for the remainder of his life. The payments were a non-elective benefit for the husband as a retiree and were not subject to divestiture, division, or transfer. The husband could not have elected to receive a larger monthly pension payment in lieu of the health insurance premium payments. The trial court entered its dissolution decree, concluding that the benefit was not a marital asset subject to division.<sup>3</sup> The wife appealed, arguing that these benefits are property as defined by Indiana Code section 31-9-2-98(b)<sup>4</sup> and citing a line of Indiana cases holding that pension benefits are marital assets.<sup>5</sup> The Indiana Court of Appeals affirmed the trial court's decision that the benefit was not a marital asset, but the Indiana Supreme Court granted transfer.

On transfer, the Indiana Supreme Court reviewed Indiana's broad statutory definition of marital "property." The court also focused on the concept of "vesting" in determining whether a disputed item constitutes marital property, noting that "vesting is both a necessary and sufficient condition for a right to a benefit to constitute an asset."<sup>6</sup> In the instant case, there was no dispute that the husband's right to receive future health insurance benefits from his former employer was not subject to divestiture.

The court rejected the husband's argument that the health insurance benefits were not an asset because he could not transfer or alienate them, and because the value of the benefits was speculative.<sup>7</sup> Although the court agreed that these

---

2. 935 N.E.2d 152 (Ind. 2010).

3. *Id.* at 154.

4. IND. CODE § 31-9-2-98(b)(2) (2011) (defining "property" as "the right to receive pension or retirement benefits that are not forfeited upon termination of employment or that are vested").

5. *See Bingley*, 935 N.E.2d at 155.

6. *Id.* at 155.

7. *Id.* at 156-57.

characteristics of the asset could present challenges to a trial court in dividing the overall marital estate, it did not alter the benefits' status as a marital asset.<sup>8</sup> The court also provided some general guidance on how such benefits might be valued, underscoring that valuation rests with the discretion of the trial court. Finally, the court noted that the husband's argument that his health care benefits were illiquid and subject to risk "[might] be sufficient grounds" for the trial court to deviate in the husband's favor in the overall division of the marital estate.<sup>9</sup> The trial court's decree was reversed, and the matter was remanded for further proceedings that included the valuation of the husband's benefit and reconsideration of the overall division of the marital estate.

Justice Dickson dissented in *Bingley* to share his belief that Indiana's statutory definition of "property" is narrower than the majority construed it.<sup>10</sup> He also expressed public policy concerns about the number of people, especially in the military, who receive lifetime health care benefits that could be implicated by the court's decision: "The resulting inclusion of its present value as marital property would likely preclude a divorcing military retiree from retaining any other marital property . . . I seriously doubt that our legislature intended such potentially catastrophic results."<sup>11</sup> Justice Dickson was also concerned that the court's holding could be easily expanded to non-monetary future benefits that are difficult to value—for instance, a retired automobile manufacturer's right to future car discounts or a former airline employee's right to future free flights.<sup>12</sup>

*b. Real estate held as a life estate should not be included in the marital estate.*—In *Leever v. Leever*,<sup>13</sup> the Indiana Court of Appeals considered whether the trial court erred when it placed certain real estate into a constructive trust instead of assigning the real estate a value and including it in the marital estate.

In *Leever*, the husband and wife were married in 1977, and the wife filed a petition for dissolution in 2007.<sup>14</sup> In 1999, the husband's parents ("Parents") had quitclaimed their home to the husband and wife.<sup>15</sup> Parents continued to live in the home and paid the mortgage, utilities, homeowners' insurance, real estate taxes, and other expenses.<sup>16</sup> After the final hearing on the dissolution, the trial court requested that the parties submit a brief on the issue of whether the home should be included in the marital estate and, if so, how it should be divided.<sup>17</sup> The trial court issued its decree, awarding the home to the husband subject to a constructive trust in favor of his parents.<sup>18</sup>

---

8. *Id.* at 157.

9. *Id.* at 158.

10. *See id.* at 158-60 (Dickson, J., dissenting).

11. *Id.* at 159.

12. *Id.* at 159-60.

13. 919 N.E.2d 118 (Ind. Ct. App. 2009).

14. *Id.* at 121.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 121-22.

On appeal, the wife contested the placement of the home in a constructive trust and “maintain[ed] that the trial court abused its discretion by refusing to include the real estate in the marital estate and divide it between the parties.”<sup>19</sup> Thus, the court first considered whether the constructive trust was proper. The court found that a confidential relationship existed between Parents and the husband and wife and that Parents relied on the husband’s and wife’s oral promise that they could live in the home as long as they needed.<sup>20</sup> The court held that to allow the husband and wife to dispossess Parents of their home would “permit them to be unjustly enriched by the sale price or rents and profits accruing during the remainder of . . . [Parents’ lives].”<sup>21</sup> The constructive trust was therefore deemed proper.<sup>22</sup>

Next, the court considered if it was an error to omit the home from the marital estate. The court concluded that with the imposition of the constructive trust, the husband and wife were essentially owners of a remainder interest in the property, subject to Parents’ constructive trust life estate.<sup>23</sup> The court ruled that the parties’ remainder interest should have been included in the marital estate and assigned a value, with this value incorporated into the division of marital assets.<sup>24</sup>

The judgment of the trial court concerning the imposition of a constructive trust was affirmed, but the decision to omit the home from the marital estate was reversed. The case was remanded with instructions to assign a value to the home, include it in the marital estate and “re-divide the marital estate consistent with Indiana Code section 31-15-7-5.”<sup>25</sup>

2. *Property Valuation Issues: Valuation of Minority Ownership Interests.*— In *Alexander v. Alexander*,<sup>26</sup> the Indiana Court of Appeals considered the valuation of minority ownership interests.

The husband and wife married in 1976.<sup>27</sup> During the marriage, the wife’s parents gave the wife a five percent limited partner interest in an entity that was owned exclusively by various members of the wife’s family (“Bush Farms”).<sup>28</sup> Bush Farms’s assets included approximately 1339 acres of land. During the dissolution proceedings, one of the contested issues was the value of the wife’s interest in Bush Farms.<sup>29</sup>

After the final hearing, the trial court made specific findings on Bush Farms, including the following:

1. the entity’s partnership agreements provided that a limited partner could

---

19. *Id.* at 122.

20. *Id.* at 123.

21. *Id.* at 124.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 125.

26. 927 N.E.2d 926 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 824 (Ind. 2010).

27. *Id.* at 929.

28. *Id.* at 930.

29. *See id.* at 936.

not bring an action forcing partition of the Bush Farms's land;

2. the two general partners (the wife's father and mother) maintained exclusive control over Bush Farms, leaving the wife no decisionmaking authority;

3. for entity matters requiring limited partner approval, a ninety percent supermajority of the limited partners was required;

4. any contemplated sale of ownership by a limited partner triggered a right of first refusal for the other partners;

5. if a limited partner's interest was assigned, the assignee would have no right to inspect entity books, vote, or gather information about the entity; and

6. the partnership agreement could not be modified without approval by the two general partners and a ninety percent supermajority of the limited partners.<sup>30</sup>

At trial, the wife's expert applied a twenty-five percent minority discount and a fifteen percent marketability discount to the wife's interest in Bush Farms.<sup>31</sup>

In reaching its conclusion on value, the trial court substantially adopted the methodology of the wife's expert, including the applicable discounts. The husband appealed, arguing that minority discounts and marketability discounts should not have been applied.<sup>32</sup> In his argument, he relied upon the *Wenzel*<sup>33</sup> and *Hansen*<sup>34</sup> cases, which stand for the proposition that such discounts are inappropriate when a majority shareholder—or the corporation—is the buyer.

In considering whether discounts were appropriate, the Indiana Court of Appeals acknowledged the likelihood that at some point, the wife would either inherit her aging parents' control interest in the entity or would sell her interest to the controlling shareholders of Bush Farms.<sup>35</sup> Either of these scenarios would seem to support the husband's argument that discounts on the wife's interest in Bush Farms were inappropriate. Nevertheless, the court rejected the husband's argument, noting that no immediate sale by the wife was presently contemplated and that the mere possibility—not certainty—that the wife's interest in the entity might unite with the controlling interest in the future was insufficient to deny the trial court its discretion to apply discounts to the present value of the wife's interest.<sup>36</sup>

3. *Distribution Issues.*—Cases regarding distribution issues can arise when a party to dissolution believes their spouse dissipated assets.

a. *Not filing a joint tax return constituting dissipation.*—In *Hardebeck v. Hardebeck*,<sup>37</sup> the Indiana Court of Appeals considered whether the wife's pre-separation decision not to file a joint tax return with her husband constituted “dissipation” in terms of the added resulting tax liability to the husband.

---

30. *Id.* at 930-31.

31. *Id.* at 931.

32. *Id.* at 936.

33. *Wenzel v. Hopper & Galliher, P.C.*, 779 N.E.2d 30 (Ind. Ct. App. 2002).

34. *Hansen v. 75 Ranch Co.*, 957 P.2d 32, 41 (Mont. 1998).

35. *Alexander*, 927 N.E.2d at 938.

36. *Id.* at 939.

37. 917 N.E.2d 694 (Ind. Ct. App. 2009).

The husband and wife married in 1965.<sup>38</sup> During the marriage, the parties had no children together, and the husband was the primary income earner.<sup>39</sup> It was the parties' practice during most of the marriage for the husband to turn over his paycheck to the wife, who then paid bills and otherwise managed the marital finances.<sup>40</sup> However, when the parties' relationship became strained, the husband began to alter this paycheck practice; he would cash his check, retain some money for himself, and then give the balance to his wife to pay bills.<sup>41</sup> The trial court found that because the wife "resented this change," she refused to file taxes jointly with the husband in 2006 and 2007.<sup>42</sup> The trial court found that filing separately cost the husband an additional \$8600 in taxes.<sup>43</sup> The husband filed for divorce in 2008.<sup>44</sup>

After a final hearing, the trial court issued its decree, which adopted substantially all of the husband's proposed findings but made some edits and additions to the husband's submitted findings.<sup>45</sup> The trial court concluded that the wife's refusal to file a joint tax return during the marriage constituted dissipation because it was done out of spite.<sup>46</sup>

On appeal, the wife assigned error to the nearly complete adoption of the husband's proposed findings as well as the dissipation finding.<sup>47</sup> On the dissipation issue, the court of appeals noted that dissipation related to an added tax liability for not filing a joint return was "a matter of first impression in Indiana."<sup>48</sup> However, reviewing Indiana's dissipation laws as well as some cases from foreign jurisdictions, the court concluded that the finding of dissipation was not an abuse of discretion.<sup>49</sup> The court held that failing to file jointly was not dissipation *per se*, but instead depended upon the facts of the case.<sup>50</sup> Here, the evidence supported the trial court's conclusion that the wife had no legitimate reason not to file jointly with the husband (e.g., specific concerns about the husband not declaring income), and that she was motivated instead by spite.

With regard to adopting the husband's proposed findings, the court noted that here, too, the practice is discouraged but not error *per se*.<sup>51</sup> The court expressed its feeling of reassurance in the fact that the trial court had made changes to the husband's proposed findings. In the court's view, these "changes to address what

---

38. *Id.* at 696.

39. *Id.*

40. *Id.* at 697.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 696.

45. *Id.* at 699.

46. *Id.* at 702.

47. *Id.* at 698-99.

48. *Id.* at 700.

49. *Id.* at 700-02.

50. *Id.* at 701.

51. *Id.* at 698-99.

. . . [the trial court] deemed to be deficiencies or inaccuracies”<sup>52</sup> suggested that the trial court had reviewed the husband’s proposed findings with care.

### *B. 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 several notable cases from the survey period.

1. *Court Order Encouraging Taking Children to Church During Parenting Time.*—In *Finnerty v. Clutter*,<sup>53</sup> the Indiana Court of Appeals considered whether a trial court abused its discretion by issuing a parenting time order that encouraged—but did not require—the father to take the children to church during his parenting time periods.<sup>54</sup>

The facts in *Finnerty* revolved around a mother and father who divorced with two young children in 2004.<sup>55</sup> Their divorce decree provided for joint legal custody of the children; the mother was deemed the “primary residential custodian.”<sup>56</sup> At issue during the proceedings were the religious implications of the decree. Specifically, the parents began attending a Catholic church with their children while they were still married. After the divorce, the mother continued to attend and otherwise participate in church activities and events.<sup>57</sup> At some point, a dispute arose over whether the father’s weekend parenting time should end at 7:00 p.m. on Sunday so that he could take the children to “attend Sunday dinners with extended family,” or at 3:00 p.m., so that the mother “could take the children to Sunday evening mass.”<sup>58</sup> The dispute was submitted to the trial court for resolution.

After a hearing, the trial court ordered that the father’s weekends would be “from Friday 4:00 p.m. to Sunday at 7:00 p.m.”<sup>59</sup> The trial court’s order also stated, “Church attendance on the [f]ather’s weekend shall be his prerogative. The [c]ourt will recommend, but will not require, the children [to] attend church during the [f]ather’s parenting time, if it has been their practice in the past to do so.”<sup>60</sup> The mother appealed, arguing that the decree made her the “custodian” of the children by virtue of its language that she would be “the primary residential custodian.” That custodian designation, the mother further reasoned, gave her the authority to determine the children’s religious upbringing under Indiana Code section 31-17-2-17(a).<sup>61</sup>

---

52. *Id.* at 699.

53. 917 N.E.2d 154 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 784 (Ind. 2010).

54. *Id.* at 155.

55. *Id.*

56. *Id.* at 156.

57. *Id.* at 155.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 155-56. This portion of the Indiana Code states that “[e]xcept . . . as otherwise

Ultimately, the court of appeals rejected the mother's argument, noting that the decree expressly awarded the parties "joint legal custody" of the children.<sup>62</sup> As such, Indiana Code section 31-17-2-17(a) was inapplicable.<sup>63</sup> Because the parties share responsibility for the children's religious upbringing under a joint legal custody order, the trial court's order was not inappropriate.<sup>64</sup> The court of appeals concluded that the trial court properly attempted to balance the father's "desire for uninterrupted parenting time" with the mother's "desire to provide the children with religious training."<sup>65</sup>

2. *Failure to Appear at Final Hearing Due to Fear of Spousal Abuse Leads to Post-Decree Pleadings Viewed as Petition to Modify.*—In *Oberlander v. Handy*,<sup>66</sup> the mother—who apparently failed to appear at her own final hearing because she had fled to South Carolina to avoid the alleged abuses of the father—was precluded from having a decree that awarded custody of the child to the father set aside.<sup>67</sup> The Indiana Court of Appeals reviewed whether the trial court should have construed the mother's post-decree pleadings as a petition to modify custody and revisited the custody issues accordingly.<sup>68</sup>

The mother and father in *Oberlander* began dating in 2005, and the mother gave birth to their child in 2006.<sup>69</sup> The parties subsequently married, but the mother filed for divorce in 2007.<sup>70</sup> A lengthy history of abuse, stalking of the mother, and other criminal misconduct by the father was apparently intertwined in the parties' relationship. While the divorce was pending in early 2008, the mother and child moved to South Carolina, where the mother had family, out of fear that the father would hunt her down "[a]s he had in the past."<sup>71</sup>

The trial court set the divorce for final hearing on July 22, 2008.<sup>72</sup> The father appeared, but the mother did not. The resulting decree, based solely upon the evidence of the father's testimony, awarded the father all of the marital property except for the mother's car. Furthermore, it awarded custody of the child to the father.<sup>73</sup> On August 21 of that year, the mother filed a request for relief from the decree, alleging that the father committed perjury at the final hearing.<sup>74</sup> The trial

---

agreed by the parties in writing at the time of the custody order . . . the custodian may determine the child's upbringing, including the child's education, health care, and religious training." IND. CODE § 31-17-2-17(a) (2011).

62. *Id.* at 156-57.

63. *Id.* at 156.

64. *Id.* at 156-57.

65. *Id.* at 157.

66. 913 N.E.2d 734 (Ind. Ct. App. 2009).

67. *Id.* at 739.

68. *Id.* at 738-39.

69. *Id.* at 735.

70. *Id.*

71. *Id.* at 736.

72. *Id.* at 737.

73. *Id.*

74. *Id.*



court set the matter for hearing and asked the Indiana Department of Child Services (DCS) to investigate.<sup>75</sup> DCS recommended that the mother have custody of the child, subject to the father's supervised parenting time.<sup>76</sup> After a hearing, however, the trial court (failing to find fraud) did not disturb its decree other than to change custody to joint custody, with the father continuing to have primary physical custody.<sup>77</sup> The mother appealed.

On appeal, the court was sympathetic to the mother's situation. Ultimately, the court concluded that it "cast no aspersions upon her stated reasons for her failure to appear [at the final hearing], but the simple fact is that she was not there and the trial court was entitled to proceed in her absence."<sup>78</sup> Therefore, the trial court's denial of relief was affirmed.<sup>79</sup> However, the court also volunteered that it believed "the trial court should have treated . . . [the mother's] motion as a motion to modify the custody arrangement set forth in its initial order."<sup>80</sup> Thus, the matter was remanded so that the trial court could "revisit this case and weigh *all* of the evidence to determine whether a modification" would be appropriate.<sup>81</sup>

3. *Change of Circumstance Required to Make a Change in Custody.*—In *In re Marriage of Julie C. v. Andrew C.*,<sup>82</sup> the Indiana Court of Appeals considered whether "when modifying custody, the change in circumstances required by Indiana Code section 31-17-2-21 need . . . be so decisive in nature as to make a change in custody necessary for the welfare of the child."<sup>83</sup>

The parties in *Julie C.* married in 1995 and had two children born in 2002 and 2004.<sup>84</sup> When the parties divorced in 2006, the agreed dissolution decree provided for "joint legal custody . . . with [the] [m]other having primary physical custody."<sup>85</sup> It also provided parenting time for the father in the amount of three days a week and every other weekend.<sup>86</sup> The father subsequently filed for a modification of physical custody, requesting more parenting time; the mother cross-petitioned for a modification of legal custody and child support.<sup>87</sup> At the court's request, a domestic relations evaluator wrote a report recommending that the "[m]other and [f]ather continue to share joint legal custody," "the children continue to reside in [the] [m]other's primary care," and "[the] [f]ather have greater parenting time."<sup>88</sup>

---

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 738.

79. *Id.* at 739.

80. *Id.*

81. *Id.* (emphasis in original).

82. 924 N.E.2d 1249 (Ind. Ct. App. 2010).

83. *Id.* at 1252.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 1253.

At the time of the petition, the father was living with his fiancée, who also had “joint physical custody of her two children.”<sup>89</sup> At the hearing, the fiancée testified that it was important that the father’s children and her children be together as much as possible to help form a bond. The trial court found that “[t]here ha[d] been a substantial change in circumstances and the facts set forth in . . . [Indiana Code section] 31-17-2-21” and that it was in the children’s best interests for the parents “to share joint legal custody and that [the] [f]ather have additional overnight parenting time.”<sup>90</sup> The increase amounted to fifty percent of overall parenting time.

The court of appeals found that this increase in the father’s parenting time amounted to “a *de facto* modification of custody to joint physical custody.”<sup>91</sup> The court found that the father’s upcoming marriage, along with other factors such as the children’s desire to spend more time with the father and the efforts to accomplish a blended family, constituted a substantial change in circumstances sufficient to change the original physical custody order.<sup>92</sup> The court noted that the legislature changed the requirements of changing a custody order so that it is no longer a requirement to show that an existing custody order is “unreasonable;” there simply needs to be a substantial change in the statutory factors and a finding that modification is in the children’s best interests.<sup>93</sup>

## II. CHILD SUPPORT RULES AND GUIDELINES

The following section starts by reviewing the recent changes to the Indiana Child Support Rules and Guidelines (the “Guidelines”). The section then continues by reviewing noteworthy cases on the topic of child support and the Guidelines.

### A. Amendments to the Guidelines<sup>94</sup>

In 1989, the use of the Indiana Child Support Guidelines became mandatory for all cases involving the establishment or modification of child support. The public policy behind the Guidelines had many facets, but one substantial objective was to provide more predictability and continuity in child support calculations, from court to court, and from case to case.<sup>95</sup>

---

89. *Id.* at 1252-53.

90. *Id.* at 1254-55.

91. *Id.* at 1256 (emphasis in original).

92. *See id.* at 1257-59.

93. *Id.* at 1258 (citing *Meade v. Levett*, 671 N.E.2d 1172, 1176 n.2 (Ind. Ct. App. 1996)).

94. This is not an exhaustive description of every revision to the Guidelines, and any reader seeking that level of detail should consult the court’s order amending the Guidelines directly.

95. Michael R. Kohlhaas & James A. Reed, *A Brief Survey of the New Amendments to the Indiana Child Support Rules & Guidelines*, RES GESTAE, Nov. 2009, at 30, 30, available at: <http://www.binghamchale.com/public/viewArticle.asp?id=86>.

On September 15, 2009, the Indiana Supreme Court issued an official order amending the Guidelines. These revisions to the Guidelines became effective on January 1, 2010.<sup>96</sup>

Among the most significant changes to the Guidelines are as follows:<sup>97</sup>

1. *Changes to Gross Weekly Income and Added Caution for Imputing Income.*—

The new Guidelines<sup>[98]</sup> include revisions for addressing Social Security income as well as handling imputation of income. Guideline 3(A)(1) is revised to provide that Social Security disability benefits paid for the benefit of a child are included in the disabled parent's [w]eekly [g]ross [i]ncome; however, that parent is also entitled to a credit for the amount of that benefit.

Guideline 3(A)(3) is revised to provide that potential income should be imputed to a parent only when the unemployment or underemployment is "without just cause." The [c]ommentary to this section is also revised to provide that where the underemployment or unemployment is the result of a disability, health issue, excessive child care costs or similar circumstances, it may be improper to impute *any* income to the parent. This revision seemingly modifies the widely used past of imputing an amount no less than minimum wage to an unemployed or underemployed parent. The [c]ommentary also is revised to dovetail with recent case law discouraging imputing potential income to incarcerated parents.<sup>[99]</sup>

The old Guidelines used a multiplier that reduced a parent's [w]eekly [g]ross [i]ncome depending upon the number of subsequent children. Though the net effect on the child support obligation remains the same, under the new Guidelines, the parent's [w]eekly [g]ross [i]ncome is not reduced; instead, a new line 1(A) is added to the [c]hild [s]upport [o]bligation [w]orksheet that produces a credit against [w]eekly [g]ross [i]ncome. Additionally, the new credit line allows for up to eight subsequent children, whereas the old Guidelines provided multipliers for only five or fewer subsequent children. The impact on the final support amount as a result of subsequent children remains unchanged.<sup>100</sup>

---

96. *Id.*

97. The following subsections, discussing the most significant changes to the Guidelines, are abstracts from an article by Michael Kohlhaas and James Reed, who are likewise authors hereto. For a more detailed discussion of the 2010 amendments to the Guidelines, please see *id.*

98. For ease of discussion, this article refers to the Guidelines prior to the recent amendment as "the old Guidelines" and the amended version as "the new Guidelines."

99. *See, e.g., Lambert v. Lambert*, 861 N.E.2d 1176 (Ind. 2007); *see also Becker v. Becker*, 902 N.E.2d 818 (Ind. 2009).

100. Kohlhaas & Reed, *supra* note 95, at 30.

2. *Elimination of the Child Support Plateau for High Income Earners.*—

One of the more significant changes to the Guidelines can be found in Guideline 3(D). The new Guidelines retain a substantially similar means of calculating the parties' combined weekly adjusted income. Likewise, the combined weekly adjusted income is still plugged into the Guidelines' "Schedules Table" to determine the parties' basic child support obligation, which is simply a function of: (1) the parents' combined weekly adjusted income; and (2) the number of children. However, under the old Guidelines, the schedules maxed out at \$4,000 per week (or \$208,000 per year) of combined weekly adjusted income. For income levels in excess of \$4,000 per week, the Guidelines applied a complicated formula that had the effect of causing support amounts to plateau as income increased further.

Under the new Guidelines, the schedules max out at \$10,000 per week (or \$520,000 per year) of combined weekly adjusted income. Further, for income levels in excess of \$10,000 per week, the plateau-causing formula has been jettisoned in favor of a simple linear calculation. For all income above \$10,000 per week, the basic child support obligation will increase at a fixed percentage of the income above \$10,000 per week, depending upon the number of children (*e.g.*, 7.1 percent for one child, 10 percent for two children, 11.5 percent for three children, 12.9 percent for four children, etc.).

....

The new Guidelines also provide that, beyond \$10,000 per week, the support obligation increases in a linear fashion at 7.1 percent of combined weekly income for one child. So, there never is any "plateau" in support obligation. Everything else held constant, child support for someone earning \$20,000 per week will be roughly twice what it would be earning \$10,000 per week. This is a substantial departure from the operation of the old Guidelines.<sup>101</sup>

3. *New Rebuttable Presumption That "Negative" Support Orders Require Support Payments from Custodial Parent to Non-Custodial Parent.*—

The new Guidelines contain added language in Guideline 3(F) providing that[] when a child support calculation produces a "negative" support amount for the non[]custodial parent, there is now a rebuttable presumption under the new Guidelines that the custodial parent shall pay to the noncustodial parent an amount equal to the "negative" support figure. This effectively overrules the interpretation of the old Guidelines set forth in *Grant v. Hager*. . . .<sup>102</sup>

4. *Other Notable Changes.*—In addition to the revisions of the Guidelines

101. *Id.* at 30-31 (emphasis in original).

102. *Id.* at 31 (citation omitted).

listed above, there are many other notable changes. Such changes include: (1) guidance regarding Social Security benefits; (2) “new exceptions to [the] rule that child support modifications may relate back no earlier than date petition to modify is filed;”<sup>103</sup> (3) details on allocating “controlled expenses;” (4) a new health care guideline and worksheet; (5) the movement of “extraordinary expenses” and “accountability and tax exemptions” from commentary to guideline; and (6) a “[n]ew provision on rounding to [the] nearest dollar.”<sup>104</sup> The new Guidelines also include revisions related to the topics of elementary and secondary education, other extraordinary expenses, accounting, and tax exemptions.<sup>105</sup>

*B. Retroactive Child Support Preceding the Date of Filing a Petition for Dissolution Is Improper*

In *Boone v. Boone*,<sup>106</sup> the Indiana Court of Appeals considered whether it was error for a divorce court to issue a child support order that was “retroactive to a date preceding the filing of the petition for dissolution”<sup>107</sup> of marriage if the parties were living separately for that period of time. The mother and father in *Boone* married in 1998 and had one child together.<sup>108</sup> The mother and father physically separated in 2002, but neither filed for divorce at that time.<sup>109</sup> After the 2002 physical separation, the father began informally sending money to the mother every other week until June 2006.<sup>110</sup> At that time, the father filed a petition for dissolution in Illinois, which was ultimately dismissed due to the mother’s Indiana residency.<sup>111</sup> In November 2007, the father filed a petition for dissolution in Lake County, Indiana.<sup>112</sup>

At the final hearing in late 2008, the mother asked the trial court to award child support retroactive to June 2006—the date the father stopped making the informal support payments to the mother—even though this predated the filing of the petition for dissolution by about fifteen months.<sup>113</sup> After the final hearing, the trial court granted the mother’s request by issuing a retroactive support order to June 2006, thereby generating an immediate support arrearage of about \$14,000 to which the father appealed.<sup>114</sup>

In its analysis, the court of appeals noted that it was a matter of first

---

103. *Id.* at 32.

104. *See id.* at 31-37.

105. *See id.* at 37.

106. 924 N.E.2d 649 (Ind. Ct. App. 2010).

107. *Id.* at 650.

108. *Id.*

109. *See id.*

110. *See id.* at 650-51.

111. *Id.*

112. *Id.* at 651.

113. *Id.*

114. *Id.*

impression in Indiana as to whether a trial court in a divorce action has the authority to issue a retroactive support order for a period before the date the petition for dissolution was filed.<sup>115</sup> The court recognized the common law duty to support children; however, the court observed that neither statutes nor the Guidelines authorize a retroactive order of this nature.<sup>116</sup> In addition, the court noted well-settled case law that such a modification may not be made retroactive prior to the date a petition to modify is filed, absent limited and unusual exceptions.<sup>117</sup> Therefore, *Boone* held that the trial court abused its discretion in issuing its support order, and the decision was reversed and remanded to be reformed consistent with the opinion.<sup>118</sup>

### C. Proper Deductions from Weekly Gross Income

In *Ashworth v. Ehrgott*,<sup>119</sup> the Indiana Court of Appeals reviewed a comprehensive child support order, considering whether the trial court erred with respect to its deduction of alimony payments from the father's weekly gross income, its failure to deduct health insurance payments for children, and its improper inclusion of school expenses in the order.<sup>120</sup>

In *Ashworth*, the father and mother had two children and were divorced in Tennessee in 2006.<sup>121</sup> The trial court ordered the father to pay the mother \$306,000 of alimony in monthly installments of \$1500.<sup>122</sup> The father was also ordered to pay \$40,000 for the mother's attorney's fees in yearly installments of \$8000.<sup>123</sup> The mother had sole legal and physical custody of the children and was to receive \$2500 per month in child support from the father.<sup>124</sup> This figure was to be recalculated in accordance with Tennessee's child support guidelines in 2008.<sup>125</sup> The father was also to provide health insurance coverage for the children.<sup>126</sup>

The mother moved to Indiana in 2008.<sup>127</sup> In 2008, the father unilaterally reduced his monthly child support payments to \$1160, the amount provided in the father's revised Tennessee child support worksheet.<sup>128</sup> The father then moved

---

115. *Id.* at 652.

116. *Id.* at 653. By contrast, the court noted the paternity statute, which expressly authorizes the relation back of a support order to the child's date of birth. *Id.*

117. *Id.* at 654.

118. *Id.* at 655.

119. 934 N.E.2d 152 (Ind. Ct. App. 2010).

120. *Id.* at 155.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 156.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

to California, and the mother filed a petition to register the Tennessee child support order in Indiana.<sup>129</sup> The Indiana court entered a child support income withholding order directing the father's employer to withhold a weekly amount adding up to \$2500 per month.<sup>130</sup> In April 2009, the father petitioned the court for a stay of the income withholding order.<sup>131</sup> The court denied the petition but held a hearing in June 2009 on the child support order.<sup>132</sup>

Following the June 2009 hearing, the trial court entered a detailed order modifying the father's child support obligation. The court found that the father's child support should be \$500.75 per week, with an added child support obligation of \$231 per week for educational expenses for the minor children.<sup>133</sup> The father then filed a motion to vacate the order, arguing that some of the educational expenses were counted twice.<sup>134</sup> The court subsequently entered a revised order of \$612.10 per week.<sup>135</sup> In response, the father filed a motion to correct errors; because the court never ruled on this motion, it was deemed denied.

On appeal, the father raised numerous issues. He first contended that the trial court improperly included the amount he paid as alimony in his weekly gross income for purposes of calculating child support. Using Indiana law, the court determined that the monthly \$2500 payments were maintenance payments and not part of a property division.<sup>136</sup> The court then determined that the \$40,000 attorney's fee payments were part of a property division.<sup>137</sup> This issue was remanded for a recalculation of the father's weekly gross income.<sup>138</sup> The father then challenged the trial court's failure to award him credit for the children's health insurance premiums. The court reversed and remanded with instructions to provide the father with this credit.<sup>139</sup>

The father also contended that the trial court erred in failing to reduce his child support obligation based upon his higher tax bracket. The trial court's calculation found that the father's actual tax rate differed from Indiana's presumed rate by 10.72% and then deducted this from his weekly gross income.<sup>140</sup> The court of appeals found these calculations correct and affirmed the trial court's order in this regard.<sup>141</sup>

Next, the father argued that the trial court erred by failing to give him credit for travel expenses associated with exercising parenting time. Citing the

---

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 157.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 158-59.

137. *Id.* at 161-62.

138. *Id.* at 161.

139. *Id.* at 162.

140. *Id.* at 163.

141. *Id.*

commentary to the Guidelines, the court of appeals stated that the trial court had discretion to deviate from Guideline amounts to take these expenses into consideration.<sup>142</sup> The trial court had previously determined that the father's financial resources did not justify reducing the child support obligation, and the court of appeals held that the trial court did not abuse its discretion in failing to credit the father for his travel expenses.<sup>143</sup>

The father then challenged the trial court's award of his daughter's preschool expenses. Even though the mother was not working, she had included these expenses as a work-related child care expense. As there was no evidence that the mother had worked or searched for a job (thus requiring full-time care for her child), the appellate court found that including these expenses . . . an abuse of discretion.<sup>144</sup> Similarly, the father challenged the order requiring him to pay private school tuition for his son. Finding that the parties did not agree on private school for their children, and considering Guideline 8, the court held that the trial court's order requiring the father to pay private school tuition was also an abuse of discretion.<sup>145</sup>

In sum, the *Ashworth* court reviewed the trial court's comprehensive child support order and determined that the trial court erred with respect to its deduction of alimony payments from the father's weekly gross income, its failure to deduct health insurance payments for children, and its improper inclusion of school expenses.<sup>146</sup> The court affirmed the order in all other respects.

#### *D. Parenting Time Credit and Inclusion of Irregular Bonus Income*

In *In re Paternity of S.G.H.*,<sup>147</sup> the Indiana Court of Appeals considered whether the trial court erred in calculating child support by awarding both a parenting time credit and the abatement of support during father's parenting time. The court also considered whether the trial court erred by including father's irregular bonus income in the child support calculation.<sup>148</sup>

In *S.G.H.*, the mother and father had a child together. Paternity and child support were established in 1997.<sup>149</sup> In 2007, the mother filed a petition to modify child support.<sup>150</sup> The trial court set a base child support obligation for the father of \$131 per week, along with provisions concerning the father's bonus income that apparently resulted in some confusion in its interpretation.<sup>151</sup> Part of the root of the confusion was that the father typically received two different

---

142. *Id.* at 163-64.

143. *Id.* at 164.

144. *Id.*

145. *Id.* at 165-66.

146. *Id.* at 155.

147. 913 N.E.2d 1265 (Ind. Ct. App. 2009).

148. *Id.* at 1266.

149. *Id.*

150. *Id.*

151. *See id.*



types of bonuses: (1) semiannual bonuses of \$20,000, which the father received each January and July; and (2) “windfall bonuses,” which the father received every two years or so, and which were unpredictable in amount.<sup>152</sup>

The trial court held a hearing to clarify its order and address a petition filed by the father to modify summer parenting time. Following that hearing, the trial court issued an order stating that the father’s annual bonuses were already calculated into the court’s base child support calculation, and that the father was obligated to report his windfall bonuses upon receipt.<sup>153</sup> Further, if the father’s windfall bonus would result in a twenty percent change in the father’s child support obligation, he would be obligated to pay the resulting difference in the support amount.<sup>154</sup> In addition, the trial court granted the father’s request to modify the summer parenting time schedule and ordered that the father’s support obligation abate during his summer parenting time, citing Indiana’s parenting time guidelines.<sup>155</sup> The mother appealed both the handling of the windfall bonuses and the summer parenting time abatement.

The court of appeals agreed with the mother in both respects. As to the abatement, the court believed this was a relic of the old Guidelines prior to the establishment of the parenting time credit.<sup>156</sup> Moreover, it was improper for the trial court to award the father both a parenting time credit in his base support obligation and then to abate support during summer parenting time.<sup>157</sup>

As to the windfall bonuses, the court referenced the commentary in the Child Support Guidelines for handling the irregular bonus income.<sup>158</sup> With that guidance, it was inappropriate to include the father’s windfall bonuses in the child support calculation only if they caused the support amount to change by at least twenty percent.<sup>159</sup> In effect, the appellate court concluded that the trial court erroneously applied a modification standard to the windfall bonuses.

#### *E. Child Support Arrearage Accrued for Now-Adult Child*

In *Hicks v. Smith*,<sup>160</sup> the Indiana Court of Appeals considered whether the trial court abused its discretion in awarding a judgment for child support arrearage to the mother rather than to the now-adult child for whom the child support arrearage had accrued. The parties in *Hicks* were parents to a son born in 1985.<sup>161</sup> Their marriage was dissolved by decree in 1989.<sup>162</sup> On March 20,

---

152. *Id.*

153. *Id.*

154. *Id.* at 1267.

155. *Id.*

156. *Id.* at 1267-68.

157. *See id.*

158. *Id.* at 1268-69.

159. *Id.*

160. 919 N.E.2d 1169 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 791 (Ind. 2010).

161. *Id.* at 1170.

162. *Id.*

1992, the court entered an order granting sole custody of the son to the mother, giving the father “reasonable and liberal visitation,” and requiring the father to pay \$47 weekly in child support.<sup>163</sup> On March 22, 1992, the father absconded with the son.<sup>164</sup>

During the period when the father and son were out of the Indiana jurisdiction, the father did not pay child support as required by the order. On April 30, 1993, the court entered an order finding the father in contempt and entered a judgment of \$3029, representing arrearage and attorney fees.<sup>165</sup> On December 8, 1994, the court amended the order to reflect an extra \$4418 in arrears, which led to a final judgment of \$7447.<sup>166</sup> The father was also charged with a crime for absconding with the son; he was a fugitive until August 2008, when he appeared in court to answer the criminal charges. At this point, the mother brought a motion to collect the December 8, 1994 judgment plus interest and petitioned for support arrearage that had since accrued.<sup>167</sup>

In response to the mother’s petitions, the trial court ordered the father to pay interest on the judgment and to be responsible for an additional arrearage from the date of judgment through May 2, 2006—the son’s twenty-first birthday—of \$27,965 plus interest.<sup>168</sup> The court denied the father’s motion for relief from judgment as well as his “request to have any and all money paid toward satisfaction of any said judgments held in trust for the child.”<sup>169</sup> The father appealed.

In its discussion of the nature of arrearage and the purposes of child support, the court of appeals stated that “once funds have accrued to the child’s benefit, the trial court lacks the power to reduce, annul, or vacate the child support order retroactively.”<sup>170</sup> The court noted the two exceptions to this rule: (1) where parties have agreed to and executed other payment methods that substantially comply with the decree;<sup>171</sup> and (2) “where the obligated parent, by agreement with the custodial parent, ‘takes the child into his or her home, assumes custody, provides necessities, and exercises parental control for such a period of time’ that a permanent change of custody is effected.”<sup>172</sup> The court found that neither exception applied to the situation at hand.<sup>173</sup>

Next, the court turned to the unique facts of this case, as it was undisputed

---

163. *Id.*

164. *Id.* at 1170-71.

165. *Id.* at 1171.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1171-72 (citing IND. CODE § 31-16-16-6(a) (2011); *Whited v. Whited*, 859 N.E.2d 657, 661 (Ind. 2007)).

171. *Id.* at 1172 (citing *Whited*, 859 N.E.2d at 662; *Payson v. Payson*, 442 N.E.2d 1123, 1129 (Ind. Ct. App. 1982)).

172. *Id.* (citing *Whited*, 859 N.E.2d at 662)).

173. *See id.* at 1173-75.

that the father never paid any child support and the mother never had physical custody of the son due to the father absconding with him. The court stated that there were three people who could have claimed the arrearage.<sup>174</sup> The father would not succeed; despite having supported the son, he was “clearly not entitled to have the arrearage forgiven because of his wrongdoing in taking custody of . . . [the son] in willful violation of a court order.”<sup>175</sup> The mother was the next option. Although she did not provide financial support, the court noted that “being unaware of his whereabouts, [she] also did not have the option to support him.”<sup>176</sup> The third option—the son—was presumably fully supported by the father and therefore did not have to support himself. Weighing these three options, the court concluded that there was no authority for awarding the arrearage to the son and that the trial court did not abuse its discretion in awarding the amount to the mother.<sup>177</sup>

### III. ISSUES PERTAINING TO RELOCATION AND OUT-OF-STATE PARENTS

Issues pertaining to relocation and out-of-state parents—including relocation requests, attempts at gaining a jurisdictional advantage, maintaining a substantial connection so as to retain jurisdiction in Indiana, and enforcing a foreign child support order—arise from time to time in Indiana family law. The following section reviews several such noteworthy cases from the survey period.

#### A. Relocation Requests

In *In re Paternity of X.A.S.*,<sup>178</sup> the Indiana Court of Appeals considered whether the trial court abused its discretion when it denied the father’s requested relocation with the child to California.<sup>179</sup>

The child at issue in *X.A.S.* was born in 1997.<sup>180</sup> The father established paternity and was granted custody of the child. Pursuant to Indiana’s parenting time guidelines, his custody was subject to visitation with the mother. The father and mother were both extensively involved in the child’s life and remained cordial to each other during the period the child lived with the father. The father married another woman—a member of the U.S. Navy—in 2008.<sup>181</sup> He filed a notice of intent to relocate, requesting permission for the child to relocate to California (where the stepmother’s ship was based) with the father and stepmother.<sup>182</sup> The mother objected and petitioned to modify custody, but the state domestic relations counseling bureau’s report supported the father’s

---

174. *Id.* at 1174.

175. *Id.*

176. *Id.*

177. *Id.* at 1174-75.

178. 928 N.E.2d 222 (Ind. Ct. App.), *trans. denied*, 2010 Ind. LEXIS 603 (Ind. 2010).

179. *Id.* at 223.

180. *Id.*

181. *Id.*

182. *Id.*

request.<sup>183</sup> Thereafter, the trial court conducted a hearing and refused the father's request to conduct an in camera interview with the child.<sup>184</sup> The trial court entered a summary order that the child was to stay in Indiana.

On appeal, the court considered the state relocation statute<sup>185</sup> and the six factors relevant to the best interests of the child.<sup>186</sup> The relevant factors examined by the court included the "hardship and expense involved for [the] [m]other to exercise parenting time."<sup>187</sup> It was the trial court's opinion that such hardship and expense would be "extreme" for the mother.<sup>188</sup> The court of appeals, however, found that the evidence did not support this finding because the father offered to pay for the child to fly back to Indiana for summer, Christmas, and spring breaks so that the mother could exercise her parenting time.<sup>189</sup> The trial court had also found that the feasibility of preserving the mother-child relationship—including financial considerations—would be "nearly impossible."<sup>190</sup> The court of appeals, as discussed above, held that this finding was not supported by the evidence due to the father's offer to pay for the flights.<sup>191</sup> The appellate court noted that situations in which the parents are separated by distance are always difficult, and it is the court's responsibility to aid the parties.<sup>192</sup>

The court of appeals also took issue with the trial court's finding that the father's "insistence on moving with or without his son effectively rob[bed] [the

---

183. *Id.*

184. *Id.* at 224.

185. *Id.* at 224-25; *see* IND. CODE § 31-17-2.2-1 (2011).

186. *X.A.S.*, 928 N.E.2d at 225. The court cited the following 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 . . . .
- (3) The feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time . . . , 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 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.* (quoting IND. CODE § 31-17-2.2-1(b)) (citation omitted).

187. *Id.* at 226.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

child] of one of his parents.”<sup>193</sup> The court said that “this finding cast[] aspersion on [the] [f]ather, his motives, and his actions in a way that . . . [was] wholly unsupported by the record.”<sup>194</sup> The court also rebuked the trial court’s finding that by getting married, the father was choosing “romantic interests” over his child’s interests.<sup>195</sup> Again, the court noted that this was not supported by the record and opined that the “[f]ather was not required to choose between marriage and parenting—he can have both.”<sup>196</sup> The court noted several other inferences related to the “best interest” factors that the trial court relied upon—again, factors that were unsupported by the record.<sup>197</sup>

Though the court of appeals noted that the trial court was not required to conduct an in camera interview, it stated that it would have been better practice for the trial court to do so, given that the child was twelve years old and had expressed his desire to live with his father to the domestic relations counseling bureau.<sup>198</sup> The court also noted that the trial court’s explanation as to why an in camera interview was not conducted was that the trial court “knew precisely what . . . [the child] would say and that, in any event, the trial court was not ‘particularly interested.’”<sup>199</sup> Finally, the court noted that both parents were loving parents who only wanted the best for the child, and one of them was going to face “an undeniable heartbreak.”<sup>200</sup> That said, the court determined that the evidence did not support granting the mother’s petition to modify custody and that denial of the father’s petition to relocate was clearly erroneous.<sup>201</sup>

*B. One Parent Cannot Gain a Jurisdictional Advantage over the Other by Unilaterally Removing a Child to Another State*

*In re K.C.*<sup>202</sup> involved a father who had taken his child from Indiana to Mississippi and the mother’s action to force the return of the child to Indiana.<sup>203</sup> The Indiana Court of Appeals considered whether the trial court erred in determining that it did not have jurisdiction to entertain the mother’s action pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA).<sup>204</sup> The mother in this case had given birth to the child in 2003—out of wedlock—in Indiana.<sup>205</sup> Because there had been no paternity affidavit or proceedings, she had sole legal

---

193. *Id.* at 226-27.

194. *Id.*

195. *Id.* at 227.

196. *Id.*

197. *Id.* at 227-29.

198. *Id.* at 229.

199. *Id.*

200. *Id.*

201. *Id.*

202. 922 N.E.2d 738 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 796 (Ind. 2010).

203. *Id.* at 739.

204. *Id.*

205. *Id.*

custody of the child.<sup>206</sup> Without any further determination or modification of custody, the father “removed [the child] from Indiana to Alabama and later to Mississippi.”<sup>207</sup> There was conflicting information in the trial record as to whether the father had abducted the child or the mother had abandoned the child.<sup>208</sup>

When the mother found the father in Mississippi, she filed a writ of habeas corpus in Indiana, seeking an order that the father return the child to her.<sup>209</sup> The father “moved to dismiss, claiming that Mississippi had become [the child’s] home state and the proper state to adjudicate custody” under the UCCJA.<sup>210</sup> The Indiana trial court agreed and dismissed the matter. Because the UCCJA governs “custody matters,” and because this was an action by a mother who already had sole legal custody to force the return of her child (rather than an action to establish or modify custody), the UCCJA did not apply.<sup>211</sup> The mother appealed the dismissal.

The court of appeals reversed and remanded the trial court’s decision.<sup>212</sup> The court noted that “[t]he UCCJA defines ‘home state’ as ‘the state in which a child lived with (1) a parent; or (2) a person acting as a parent; for at least six (6) consecutive months immediately before the commencement of a child custody proceeding.’”<sup>213</sup> The court placed great weight on the fact that the mother had not filed a “custody proceeding,” but a motion to enforce her preexisting legal custody rights.<sup>214</sup> As such, the mother’s writ of habeas corpus “did not implicate the provisions of the UCCJA.”<sup>215</sup>

The court then noted in dicta that even had the UCCJA been implicated, there is substantial case law holding that “one parent cannot ‘gain home state jurisdictional advantage’” over the other “by taking a child to another state.”<sup>216</sup>

### C. Jurisdiction Pursuant to the UCCJA’s “Significant Connection” Test

In *Tamasy v. Kovacs*,<sup>217</sup> the Indiana Court of Appeals considered whether the trial court abused its discretion in a custody modification matter when it denied the mother’s motion to transfer the proceedings out of state and modified custody from the mother to father.<sup>218</sup> The mother and father had divorced in Indiana in

---

206. *Id.*

207. *Id.*

208. *See id.*

209. *Id.*

210. *Id.*

211. *See id.*

212. *Id.*

213. *Id.* (citing IND. CODE § 31-21-2-8 (2011)).

214. *Id.*

215. *Id.*

216. *Id.* (citation omitted).

217. 929 N.E.2d 820 (Ind. Ct. App. 2010).

218. *Id.* at 824.

2000.<sup>219</sup> The parties shared legal custody of their three children, with the mother providing primary physical custody. Shortly after the dissolution decree was issued, the mother relocated with the children to Massachusetts.

In 2008, the father filed a petition to modify custody in an Indiana court.<sup>220</sup> Days later, the mother filed for custody in a Massachusetts court and then filed a motion in the Indiana trial court asking that it decline jurisdiction due to the proceedings in Massachusetts—which, as her new state of residence, was “a more convenient forum.”<sup>221</sup> The Indiana trial court denied her motion.<sup>222</sup> Following extended hearings, which included a custody evaluation recommending that the children return to Indiana, the trial court modified custody in favor of the father.<sup>223</sup> The mother appealed.

The court of appeals first noted that due to the interstate nature of the case, the UCCJA controlled.<sup>224</sup> It was “undisputed that the trial court had jurisdiction” to issue its custody order set forth in the original decree “because Indiana was the home state of the children” in 2000.<sup>225</sup> Thereafter, although the mother and children moved away, the father remained in Indiana. Under the UCCJA, the trial court retains exclusive jurisdiction as long as the matter and the state maintain a “significant connection,” and it is up to the trial court’s discretion to determine whether that “significant connection” still exists.<sup>226</sup> The court concluded that the father’s continued presence in Indiana after the decree constituted adequate grounds for the “significant connection” to support the trial court’s retention of jurisdiction.<sup>227</sup> The court also concluded that the trial court did not abuse its discretion in its modification of custody for several reasons. Specifically, evidence was presented that the children expressed a preference to be with their father, the children were more emotionally open with the father, and the father had a better capacity for raising the children.<sup>228</sup> As such, it was in their best interest to relocate to Indiana.

#### *D. Enforcing a Foreign Child Support Order*

In *Hamilton v. Hamilton*,<sup>229</sup> the Indiana Supreme Court considered whether the means by which an Indiana court enforces a foreign child support obligation are subject to “full faith and credit.”<sup>230</sup> Additionally, it considered whether an

---

219. *Id.*

220. *Id.* at 825.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 826.

226. *Id.* at 826-27.

227. *Id.* at 827.

228. *Id.* at 832, 836-37.

229. 914 N.E.2d 747 (Ind. 2009).

230. *Id.* at 750.

Indiana court attempting to enforce a foreign child support obligation may fashion a different method of collection than the one originally set forth by the foreign court.<sup>231</sup>

After the mother and father divorced in Florida in 2005, the mother was awarded custody of the parties' two children, and the father was ordered to pay child support of \$1473 per month.<sup>232</sup> The mother subsequently filed a motion for contempt against the father in Florida when he did not meet his support obligations. The father was found in contempt, and the court concluded that he owed the mother \$11,879.<sup>233</sup> Further, the father was ordered to pay \$7500 of that arrearage within twenty days to avoid 170 days in jail.<sup>234</sup>

After the Florida proceedings, the father moved to Indiana to live with his parents. The mother then sought to enforce that state's orders by registering the judgment and contempt order in an Indiana trial court.<sup>235</sup> The trial court concluded that Florida's orders were "entitled to full faith and credit," but its contempt remedies were "discretionary and . . . [did] not bind responding tribunals."<sup>236</sup> The trial court also found the father in contempt but provided for a less strict purging opportunity than the Florida court had imposed.<sup>237</sup> Although the Indiana trial court also ordered 170 days of jail time for the father, it stayed the sentence contingent upon his "paying . . . [the mother] \$1000, obtaining full-time employment, and executing a wage assignment."<sup>238</sup> At a subsequent review hearing, the Indiana court found that the father was not in contempt because he had complied with the three conditions; further, he was paying the mother in excess of the sixty percent of net income limitation imposed by the Federal Consumer Credit Protection Act (FCCPA).<sup>239</sup> The mother appealed, arguing that the Indiana trial court's orders were "an impermissible modification" of the Florida orders and that the Indiana court had erred by interpreting the FCCPA as a cap on the father's support obligations.<sup>240</sup> The Indiana Court of Appeals affirmed the trial court's decision, and the Indiana Supreme Court granted transfer.<sup>241</sup>

Reviewing the history of the Uniform Interstate Family Support Act, the Full Faith and Credit for Child Support Orders Act, and related case law, the Indiana Supreme Court concluded that the Indiana trial court properly "gave full faith and credit to the Florida support order" that the father pay the mother child support

---

231. *Id.* at 750-54.

232. *Id.* at 749.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* (agreeing to stay the father's jail sentence if he paid \$3750 rather than \$7500).

238. *Id.*

239. *Id.* at 749-50.

240. *Id.* at 750.

241. *Id.*



of \$1473 per month and that arrearages continued to accrue on that amount.<sup>242</sup> Further, the Indiana court acted within its discretion to modify the means by which that child support obligation was enforced.<sup>243</sup> Justice Boehm noted that “[t]he trial court is entitled to fashion its order in a manner best designed to encourage compliance.”<sup>244</sup>

The mother also appealed the Indiana trial court’s finding that the father was not in contempt. In reviewing that issue, the Indiana Supreme Court was troubled by the trial court’s apparent reliance on the FCCPA.<sup>245</sup> The FCCPA imposes a maximum wage garnishment of sixty percent of the disposable income of an obligor who, like the father in *Hamilton*, has no other dependent spouse or child.<sup>246</sup> However, the supreme court underscored that the FCCPA imposes a limitation only on wage assignments, not on what support may be ordered or garnished by non-wage sources.<sup>247</sup> Therefore, the Indiana Supreme Court remanded this issue to the trial court for a reconsideration of the contempt finding made independently of FCCPA, noting that “[t]o the extent the trial court’s ruling was based on the FCCPA garnishment limitations, it was predicated on an erroneous view of the law.”<sup>248</sup>

#### IV. PATERNITY AND MATERNITY

Issues pertaining to paternity—and occasionally maternity—arise in Indiana family law. The following section reviews several such noteworthy cases from the survey period.

##### *A. Putative Father as Next Friend for Purposes of a Paternity Petition*

In *In re Adoption of E.L.*,<sup>249</sup> the Indiana Court of Appeals considered whether the trial court properly dismissed two paternity petitions: one brought by the putative father, and the other listing the putative father as co-petitioner, as next friend on behalf of the child.<sup>250</sup> The child at issue was born in 2004, and the mother and putative father were unmarried.<sup>251</sup> No father appeared on the child’s birth certificate, nor had paternity been subsequently established.<sup>252</sup> During the child’s first year, the parents worked out an arrangement where the putative father cared for the child two nights a week but neither lived with the mother nor

---

242. *Id.* at 753.

243. *Id.*

244. *Id.* at 754.

245. *See id.* at 755-56.

246. *Id.* at 755.

247. *Id.* at 755-56.

248. *Id.* at 756.

249. 913 N.E.2d 1276 (Ind. Ct. App. 2009), *aff’d mem.*, 938 N.E.2d 863 (2010).

250. *Id.* at 1278.

251. *Id.* at 1277.

252. *Id.*

provided financial support.<sup>253</sup> In 2006, the putative father moved to Florida and had no more regular contact with the child. The mother married another man, J.N., in 2006, and the child thereafter resided with them.<sup>254</sup>

In 2007, with the mother's consent, J.N. filed a petition to adopt her child.<sup>255</sup> The putative father refused consent and subsequently "filed a paternity petition on his own behalf and on behalf of . . . [the child], naming himself and [the child] as '[c]o-[p]etitioners.'"<sup>256</sup> The trial court consolidated the adoption and paternity actions.<sup>257</sup> The mother moved for dismissal, arguing that the putative father "was barred by Indiana statute from petitioning for paternity."<sup>258</sup> The trial court granted the motion and dismissed the paternity action with respect to both the putative father and the child (by the putative father as next friend).

Analyzing the trial court's dismissal of the action, the court of appeals noted that the trial court relied on Indiana Code section 31-19-9-12(1), "under which a putative father's consent to adoption is implied if the putative father fails to file within thirty days' notice of the adoption petition '(A) a motion to contest the adoption . . . and (B) a paternity action.'"<sup>259</sup> Here, the putative father did file the paternity action within thirty days but failed to contest the adoption, so the trial court determined that he "was barred from petitioning for paternity by Indiana Code section 31-19-9-14."<sup>260</sup> The court noted that after the trial court's order, the Indiana Supreme Court determined in a different matter that consent is implied "only when a putative father 'fails in *both* respects'" to meet the requirements of Indiana Code section 31-19-9-12(1).<sup>261</sup> Given this development, the court of appeals analyzed other Indiana statutes to determine whether the putative father's petition should have been barred.<sup>262</sup>

The court of appeals determined that the putative father failed to register as a putative father and that such failure "constitutes an irrevocably implied consent to the child's adoption."<sup>263</sup> The court also dismissed the putative father's argument that his timely filing for paternity as to the adoption petition mooted the failure to file in the state putative father registry.<sup>264</sup> In discussing the requirements, the court noted that filing a paternity action "does not relieve the putative father from the: (1) obligation of registering; or (2) consequences of failing to register . . . unless paternity has been established before the filing of the

---

253. *Id.* at 1278.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* (emphasis added).

260. *Id.* at 1279 (citation omitted).

261. *Id.* (quoting *In re Adoption of Unborn Child of B.W.*, 908 N.E.2d 586, 592 (Ind. 2009)) (emphasis in original).

262. *Id.*

263. *Id.* at 1280 (quoting IND. CODE § 31-19-5-18 (2011)).

264. *Id.*

petition for adoption of the child.”<sup>265</sup> Additionally, the putative father’s paternity petition would fail under Indiana Code section 31-14-5-3(b), which sets a two year limitation to file for paternity, subject to six exceptions, none of which were applicable in this instance.<sup>266</sup>

Next, the court discussed the paternity petition by the child (by the putative father as next friend). Following Indiana precedent, the court determined that “a putative father is a proper next friend for purposes of a paternity petition.”<sup>267</sup> The court also stated that “the time limitation of Indiana Code section 31-14-5-3(b) does not apply when the child is the petitioner. Rather, under Indiana Code section 31-14-5-2(b), ‘a child may file a paternity petition at any time before the child reaches twenty (20) years of age.’”<sup>268</sup> The court concluded that “the trial court erred in dismissing the paternity petition with respect to . . . [the child] because no Indiana statute sets forth applicable grounds for dismissing a paternity petition filed on behalf of a minor child by a next friend.”<sup>269</sup>

### *B. Establishment of Maternity in a Non-Birth Mother*

In *In re Paternity and Maternity of Infant R.*,<sup>270</sup> the court of appeals considered, in the context of surrogacy, whether Indiana law permits an establishment of maternity other than to a birth mother.<sup>271</sup> This case involved a father and biological mother who arranged to have their embryo implanted in a surrogate. During the pregnancy, the father executed a paternity affidavit, and all three of the parties filed a petition together to establish paternity and maternity.<sup>272</sup> The parties submitted an agreed entry to establish maternity in the biological mother. However, the trial court refused to approve that portion of the agreed entry, finding that Indiana law did not permit the establishment of maternity in a non-birth mother.<sup>273</sup> All three parties appealed.

The court of appeals observed that reproductive technologies have changed substantially since the initial adoption of Indiana’s parentage statute.<sup>274</sup> The court also noted the public policy rationale for favoring the establishment of legal family bonds.<sup>275</sup> Thus, the court determined that equity required that an establishment of maternity be permitted.<sup>276</sup> The court expressly noted that these

---

265. *Id.* (quoting IND. CODE § 31-19-5-6(b) (2011)).

266. *Id.* at 1280-81.

267. *Id.* at 1281.

268. *Id.* at 1282.

269. *Id.*

270. 922 N.E.2d 59 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 794 (Ind. 2010).

271. *Id.* at 60.

272. *Id.*

273. *Id.*

274. *Id.* at 61.

275. *Id.* at 60.

276. *Id.* at 61.

grounds made evaluation of the parties' equal protection claim unnecessary.<sup>277</sup>

Notably, though, the court gave added instructions on remand. Specifically, the court noted that a birth mother should be presumed to be the biological mother of a child.<sup>278</sup> The court also held that establishing maternity in a woman other than the birth mother must require clear and convincing evidence beyond a stipulation or agreed entry among the parties.<sup>279</sup>

### C. Genetic Testing in Paternity Matters Is Not Categorical

In *Schmitter v. Fawley*,<sup>280</sup> the Indiana Court of Appeals considered whether a trial court properly dismissed a pending paternity action and request for genetic testing. The mother had filed a paternity action against the putative father in 1973 to determine the paternity of the child.<sup>281</sup> The putative father succeeded in having the matter continued based on his ongoing military service in the Vietnam War.<sup>282</sup> Then in 1975, the mother married a different man, and her new husband successfully petitioned to adopt the child.<sup>283</sup> Decades later, in 2009, the thirty-five-year-old child and mother filed a petition for the original paternity action to proceed.<sup>284</sup> The putative father responded with a motion to dismiss and for summary judgment. The mother and child then filed a motion for genetic testing to determine paternity. After a hearing, the trial court granted the putative father's motion for dismissal and summary judgment and denied the motion for genetic testing.<sup>285</sup> The mother and child appealed.

The court reviewed applicable adoption statutes and case law and recited that the finalization of adoption terminates pre-existing parental rights and obligations.<sup>286</sup> In the court's view, "assuming that . . . [the husband's] adoption of . . . [the child] was valid, it terminated all duties and obligations that . . . [the putative father] might ever potentially have had . . . as his putative biological father."<sup>287</sup> However, the mother and child also challenged the validity of the husband's adoption. They claimed it was invalid because the judge pro tempore who signed the adoption decree was the putative father's attorney in the paternity matter.<sup>288</sup> While the court acknowledged that perhaps there should have been a recusal, this irregularity made the adoption voidable at most—not void.<sup>289</sup> The

---

277. *Id.* at 62 n.4.

278. *Id.* at 62.

279. *Id.*

280. 929 N.E.2d 859 (Ind. Ct. App. 2010).

281. *Id.* at 860.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *See id.* at 861.

287. *Id.*

288. *Id.*

289. *Id.* at 861-62.

court was further swayed by the issue of estoppel, as the irregularity had not been raised by the mother and child for thirty-five years.<sup>290</sup>

The mother and child further argued that they were statutorily entitled to genetic testing regardless of the dismissal of the paternity action.<sup>291</sup> In support of their argument, they relied upon statutory language in Indiana Code section 31-14-6-1, which states that “[u]pon the motion of any party, the court shall order . . . genetic testing.”<sup>292</sup> The mother and child argued that because they filed their motion prior to dismissal of the matter, the trial court was obligated to grant it.<sup>293</sup> The court concluded that this would be an unmanageable construction of the statute not intended by the Indiana General Assembly; it could subject individuals to genetic testing in vexatious paternity lawsuits, even where the action was promptly dismissed after commencement.<sup>294</sup> Thus, the trial court’s grant of summary judgment in the putative father’s favor was affirmed, as was its denial of the motion for genetic testing.<sup>295</sup>

## V. ADOPTIONS

Issues related to adoption occasionally arise in Indiana family law. The following section reviews several such noteworthy cases from the survey period.

### A. Decree of Adoption Without Consent of Natural Father

In *In re Adoption of J.C.*,<sup>296</sup> an unpublished decision accidentally published and later withdrawn from publication, the Indiana Court of Appeals considered the propriety of a decree of adoption issued by the trial court without consent of the natural father. In this case, the natural father and mother were parents to the child, born in November 2004.<sup>297</sup> The parents separated in 2005, and the mother then married the adoptive father.<sup>298</sup> During their marriage, the natural father provided care to the child. Upon separation, the mother did not allow the natural father to see the child until visitation was established through the trial court. The natural father’s last visitation occurred in February 2008.<sup>299</sup> After that time, the natural father made no attempt to communicate directly with the child, and the mother had only sporadic contact with the natural father.

---

290. *Id.* at 862-63.

291. *Id.* at 862.

292. IND. CODE § 31-14-6-1 (2011); *Schmitter*, 929 N.E.2d at 862.

293. *Schmitter*, 929 N.E.2d at 862.

294. *Id.* at 862-63.

295. *Id.* at 863.

296. 919 N.E.2d 1230 (Ind. Ct. App. 2010), *depublished* by 2010 Ind. App. LEXIS 512 (Ind. Ct. App. Mar. 23, 2010), *reh’g denied sub nom.* J.C. v. T.C., 2010 Ind. App. LEXIS 523 (Ind. Ct. App. Mar. 24, 2010). For purposes of this Article, the cited material was taken from *In re Adoption of J.C.*, No. 27C01-0808-AD-15, at \*1 (Ind. Ct. App. Jan. 22, 2010).

297. *Id.* at \*2.

298. *Id.*

299. *Id.*

The natural father was ordered to pay eighty dollars per week in child support.<sup>300</sup> He made these payments for three months in 2006 and for approximately three months in 2007.<sup>301</sup> After October 2007, he failed to fulfill any of his child support obligations and was incarcerated twice for failing to meet these obligations.<sup>302</sup> Evidence was also presented that the natural father did not take advantage of the full visitation time he was granted, and all visitation ceased after February 14, 2008.<sup>303</sup> The natural father was subsequently incarcerated for burglary in July 2008 and has a scheduled release date of January 2012.<sup>304</sup> During his incarceration, the natural father attempted to contact the child by sending cards and having a Christmas present delivered, which the mother refused to retrieve.<sup>305</sup>

In August 2008, the adoptive father filed his petition for adoption with the consent of the mother.<sup>306</sup> In May 2009, the trial court entered its decree of adoption, finding that prior to his incarceration, the natural father “had the ability to provide for [the child] and failed to do so.”<sup>307</sup> The trial court found that the natural father had made no substantial contact with the child in some time and no contact whatsoever since February 2008.<sup>308</sup> Moreover, the natural father’s acts of sending cards and a present were “characterized as token efforts.”<sup>309</sup> Therefore, the trial court concluded that the natural father had abandoned the child and his consent to the adoption was not required.<sup>310</sup> The natural father appealed; he asserted that the trial court erred when it concluded that his consent was not required under Indiana Code section 31-19-9-8(b).<sup>311</sup>

On appeal, the court stated, “Indiana Code section 31-19-11-1 provides that the trial court ‘shall grant the petition for adoption and enter an adoption decree’ if the court hears evidence and finds, in part, that ‘proper consent, if consent is necessary, to the adoption has been given.’”<sup>312</sup> The court found that the evidence supported a finding that the natural father failed to provide financial support to the child and that there was a lack of substantial contact.<sup>313</sup> The court stated, “In order to preserve the consent requirement for adoption, the level of communication with the child must not only be significant, but it must also be more than ‘token efforts’ on the part of the parent to communicate with the

---

300. *Id.* at \*3.

301. *Id.*

302. *Id.*

303. *Id.* at \*2-3.

304. *Id.* at \*3.

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* at \*3-4.

311. *Id.* at \*4.

312. *Id.* at \*4-5 (quoting IND. CODE § 31-19-11-1(a) (2011)).

313. *Id.* at \*5.

child.”<sup>314</sup> The court determined that imprisonment on its own is not statutory abandonment per se, but it also does not “constitute justifiable reason for failing to maintain significant communication with one’s child.”<sup>315</sup> Thus, the court concluded that the trial court properly determined that the natural father’s consent was not required for adoption of his minor child.<sup>316</sup>

### *B. Adoption by Grandparent Without Divesting Parental Rights*

In *In re Adoption of A.M.*,<sup>317</sup> the Indiana Court of Appeals considered whether the trial court erred in denying a grandfather’s uncontested petition to adopt his grandchild without divesting the mother of her parental rights. The child was born in 2005; in 2009, the mother’s father—the grandfather—filed a petition to adopt the child, reciting therein that the mother joined the petition and that she was not relinquishing her parental rights.<sup>318</sup> The child’s father filed consent to the proposed adoption separately. Subsequently, the trial court issued an order granting the grandfather’s adoption and expressly noting that the mother’s parental rights were not terminated by the adoption.<sup>319</sup>

However, several weeks later, the trial court vacated the adoption order sua sponte, reciting that the order was granted in error, and set the matter for a hearing.<sup>320</sup> The grandfather filed a motion to correct the error, which the trial court heard. Afterwards, the trial court issued an order denying the grandfather’s motion, therein referencing Indiana Code section 31-19-15-1 for the proposition that permitting the mother to retain parental rights in the course of granting the grandfather’s adoption was not permitted by the statute.<sup>321</sup> The grandfather appealed.

The court of appeals reviewed the applicable statute, which generally provides that biological parents are relieved of their rights and obligations upon the granting of an adoption, subject to two statutory exceptions:

- (a) If the adoptive parent . . . is married to a biological parent . . . ;
- (b) After the adoption, the adoptive father or mother, or both . . . occupy the same position toward the child that the adoptive father or adoptive mother, or both, would occupy if the adoptive father or adoptive mother, or both, were the biological father or mother; and . . . are jointly and severally liable for the maintenance and education of the person.<sup>322</sup>

The court also reviewed the substantial body of case law dealing with adoption

---

314. *Id.* at \*6 (quoting *Rust v. Lawson*, 714 N.E.2d 769, 772 (Ind. Ct. App. 1999)).

315. *Id.* at \*7 (quoting *Lewis v. Roberts*, 495 N.E.2d 810, 813 (Ind. Ct. App. 1986)).

316. *Id.* at \*8-9.

317. 930 N.E.2d 613 (Ind. Ct. App. 2010).

318. *Id.* at 614.

319. *Id.*

320. *Id.* at 614-15.

321. *Id.* at 615.

322. *Id.* at 618 (quoting IND. CODE § 31-19-15-2 (2011)).

and the best interests of the adopted child. The record was uncontroverted that although the mother and grandfather did not live together, they lived about fifteen minutes apart, and the child spent almost every other weekend with the grandfather (as well as three to four other visits per week).<sup>323</sup> In other words, the mother and grandfather were essentially co-parenting the child.

The court concluded that the child's best interests would be served by permitting adoption by the grandfather without divesting the parental rights of the mother.<sup>324</sup> Further, to the extent that a literal application of the statute would not permit this outcome, this would be an "absurd result" that ignored the overarching objective of serving the best interests of the child.<sup>325</sup> Thus, the denial of the adoption was reversed and the matter remanded for further consistent proceedings.<sup>326</sup>

Judge Najam filed a dissenting opinion to argue that the adoption statute permits adoption by only a limited class of persons: single adults, married couples, and stepparents.<sup>327</sup> He therefore would have affirmed the trial court.<sup>328</sup> In his view, the statute was based on policy decisions enacted by the legislature and should be followed even if the best interests of the child might suggest a different result to the trier of fact.<sup>329</sup>

### *C. Role of Department of Child Services in Foster Parents' Adoptions*

In *In re Adoption of H.L.W., Jr.*,<sup>330</sup> the court considered whether the trial court erred in granting an adoption in favor of the foster parents based in part upon a finding that consent to the adoption by DCS was unnecessary. In this case, the child was born out of wedlock in 2006, at which time the child tested positive for various drugs.<sup>331</sup> The mother admitted to drug use; after giving birth, she checked herself out of the hospital against medical advice but did not take the child with her.<sup>332</sup> Several days later, the mother returned to the hospital with the father and completed paperwork designating the father as the putative father.<sup>333</sup>

DCS promptly took the child from the hospital, placed him in foster care, and filed a child in need of services (CHINS) petition.<sup>334</sup> The trial court ordered that the child remain a ward of DCS and in foster care.<sup>335</sup> The mother remained

---

323. *Id.* at 621.

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* at 621-22 (Najam, J., dissenting).

328. *Id.* at 622.

329. *Id.*

330. 931 N.E.2d 400 (Ind. Ct. App. 2010).

331. *Id.* at 402.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*



uncooperative, and upon DCS's motion, the trial court terminated her parental rights. Nevertheless, the goal of the CHINS action plan was reunification of the child and father.<sup>336</sup> The trial court issued an order requiring the father to visit the child, submit to drug testing, complete various follow-ups and evaluations, remain employed and drug-free, and establish paternity.<sup>337</sup>

In July 2006, the father established paternity and was ordered to pay child support of \$41 per week to DCS.<sup>338</sup> The father's construction business subsequently suffered, and he made no support payments between mid-November 2006 and late November 2007.<sup>339</sup> Although the father was inconsistent in paying support, he eventually brought himself into compliance with the other expectations of the trial court, and his visitation with the child increased from supervised to unsupervised in 2009.<sup>340</sup> DCS eventually recommended reunification of the father and the child.

Nevertheless, the foster parents filed a petition to adopt the child in the same trial court where the CHINS case was pending. The father and DCS filed objections to the adoption. Hearings were held, after which the trial court issued an order granting the foster parents' adoption.<sup>341</sup> The trial court concluded, in pertinent part, that DCS's consent to the adoption was not necessary because DCS was not withholding consent in the best interests of the child and, further, that the father's failure to pay child support for a year meant that the father's consent to the adoption was not required.<sup>342</sup> The father and DCS appealed.

The court initially undertook a lengthy analysis of whether it was jurisdictionally appropriate for the same trial court to approve the CHINS reunification plan and then adjudicate the adoption issue.<sup>343</sup> In the end, the court concluded that it was "persuaded that the consent statutes . . . enable[d] the trial court to consider the adoption proceeding despite the pending CHINS action."<sup>344</sup>

Next, the court considered the argument set forth by DCS that the trial court erroneously concluded that DCS consent to the adoption was unnecessary. The Indiana Code generally provides that written consent to the adoption of a minor is required by an agency having lawful custody of the child.<sup>345</sup> However, excepted from that general requirement are legal custodians who "failed to consent to the adoption for reasons found by the court not to be in the best interests of the child."<sup>346</sup>

The trial court had concluded that DCS was not acting in the best interests

---

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* at 403.

342. *Id.*

343. *Id.* at 403-08.

344. *Id.* at 407-08.

345. *Id.* at 408.

346. *Id.* (quoting IND. CODE § 31-19-9-8(a) (2011)).

of the child by withholding consent to the adoption.<sup>347</sup> In support of this conclusion, the detailed findings of the trial court indicated that DCS failed to present any evidence that the foster parents were unfit.<sup>348</sup> However, the appellate court concluded that the trial court had applied the wrong standard. In fact, DCS had no burden to prove the foster parents' lack of fitness.<sup>349</sup> Instead, the correct standard was "whether DCS proved by clear and convincing evidence that its withholding of consent to the adoption was in [the] [c]hild's best interests."<sup>350</sup> Reviewing the totality of the evidence presented, the court of appeals concluded that DCS met this burden; as such, it was improper to have granted the adoption without DCS's consent.<sup>351</sup>

In sum, the trial court had the jurisdictional ability to hear the CHINS processing and the adoption matter simultaneously.<sup>352</sup> However, it erred in concluding that DCS's consent to the adoption was unnecessary.<sup>353</sup> Because DCS's consent was required, but withheld, the adoption in favor of the foster parents was reversed.<sup>354</sup> Because the case was resolved on these grounds, the court did not reach the father's sole claim on appeal, which was that the trial court erred in concluding that his consent was not required because of his failure to pay child support.<sup>355</sup>

#### CONCLUSION

This Article reviews developments in Indiana's family and matrimonial law, including many notable cases and several fundamental modifications to the Indiana Child Support Guidelines. These decisions and modifications will impact future cases involving topics such as dissolution of marriage, child custody, support, relocation, paternity, and adoption.

---

347. *Id.*

348. *Id.* at 408-09.

349. *Id.* at 409.

350. *Id.*

351. *Id.* at 410.

352. *Id.*

353. *Id.* at 410-11.

354. *Id.* at 411.

355. *Id.*