

Survey of Recent Developments in Family Law

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I. INTRODUCTION

During the survey period, family law decisions have encompassed the usual broad spectrum of property, custody, and support issues. Tax issues have been featured prominently as the appellate courts have struggled with dependency exemptions for children and have dealt with the tax consequences of property division. Also of special importance to the family law practitioner are property division cases now being decided under the statute providing for a rebuttable presumption in favor of an equal division of property.

II. CHILD CUSTODY

Child custody cases decided during the survey period dealt principally with jurisdiction under both the Indiana Dissolution of Marriage Act¹ and the Uniform Child Custody Jurisdiction Act² (hereafter UCCJA), and with modification of custody orders. In keeping with numerous appellate decisions affirming the trial courts' exercise of discretion to make initial custody determinations,³ challenges of original custody decisions are infrequently reported.

A. Jurisdiction

Twice within a six-month period, the Indiana Supreme Court addressed the difference between traditional subject matter jurisdiction and either jurisdiction under the UCCJA or the child custody provision of the Indiana Dissolution of Marriage Act.⁴ In each case, it concluded that a party may voluntarily submit to the jurisdiction of an Indiana court absent a statutory basis for the court's exercise of jurisdiction.

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1. IND. CODE ANN. §§ 31-1-11.5-1 to -28 (West 1979 & Supp. 1990).

2. *Id.* §§ 31-1-11.6-1 to -25 (West 1979 & Supp. 1990).

3. *See, e.g., Wright v. Wright*, 471 N.E.2d 1240 (Ind. Ct. App. 1984).

4. Subject matter jurisdiction is defined as the power to hear and decide a general type or class of cases. The absence of subject matter jurisdiction cannot be waived. *Board of Trustees of New Haven v. City of Fort Wayne*, 268 Ind. 415, 375 N.E.2d 1112 (1978); *Mann v. Mann*, 528 N.E.2d 821 (Ind. Ct. App. 1988).

In *State ex rel. Hight v. Marion Superior Court*,⁵ the parties stipulated at the time of divorce that the husband was not the biological father of the child the wife had been pregnant with at the time of marriage. Nevertheless, the parties agreed that the husband had acknowledged and supported the child, and the dissolution decree ordered him to support the child and granted him visitation rights.⁶ Several years later, when the husband sought a modification of visitation, the wife claimed that the trial court lacked subject matter jurisdiction because the child was not a child of the marriage.

The court concluded that the wife's challenge was not to the trial court's subject matter jurisdiction because the trial court had authority to hear actions for dissolution of marriage and child support.⁷ The wife invoked this jurisdiction when she filed her original dissolution action. The trial court's initial decree was not void and should have been challenged, if at all, in a timely manner.⁸ Justice Dickson wrote for a majority which included Chief Justice Shepard and Justice DeBruler. Justices Givan and Pivarnik dissented without a separate opinion.

The Indiana Supreme Court then addressed a similar issue, involving the UCCJA. In *Williams v. Williams*,⁹ the husband and daughter resided in Indiana, while the wife and son resided in Illinois. An Indiana dissolution of marriage action was filed, and the wife expressly consented to the trial court's jurisdiction. Custody of both children was awarded to the husband even though the son had never lived in Indiana.¹⁰ The court held (Justice DeBruler dissenting) that the wife's conduct in "affirmatively engaging the Indiana courts to determine custody, and expressly consenting to the trial court's authority to determine custody"¹¹ constituted a waiver of her otherwise valid jurisdictional objection.¹²

The issue was nearly identical in *Schneider v. Schneider*.¹³ Following a Wisconsin divorce, the husband remained in Wisconsin and the wife and children moved to Indiana. Both parties filed post-dissolution motions and attended hearings in Indiana until the husband claimed the trial

5. 547 N.E.2d 267 (Ind. 1989).

6. *Id.* at 268.

7. *Id.* at 270 (citing IND. CODE ANN. § 31-1-11.5-3(a) and (b) (West Supp. 1990)).

8. *Id.*

9. 555 N.E.2d 142 (Ind. 1990).

10. *Id.* at 142-43.

11. *Id.* at 145 (DeBruler, J., dissenting).

12. Indiana was not the home state of the Illinois resident son, and the son was not present in Indiana. It did not appear that any state other than Indiana would have jurisdiction. The son had no significant connection with Indiana, as required by IND. CODE ANN. § 31-1-11.6-3 (West 1979).

13. 555 N.E.2d 196 (Ind. Ct. App. 1990).

court lacked personal jurisdiction over him in child support matters.¹⁴ Although the husband apparently did not challenge the trial court's exercise of jurisdiction under the UCCJA in reducing custody and visitation, the court found it was without jurisdiction. The court held that it did, however, have personal jurisdiction over the husband on the child support matter.¹⁵ The court of appeals concluded that the trial court had jurisdiction of all issues.¹⁶

B. Modification

Decisions of both the third and fourth district courts of appeals clarified that a successful action for modification of custody must be based upon proof of a decisive change in the custodial parent's circumstances.

In *Lucht v. Lucht*,¹⁷ the litigants sought to modify a joint custody order by a petition which was filed less than a year after the initial order. The court of appeals noted the express prohibition against indulging a presumption in favor of either parent when making an *initial* custody order.¹⁸ Conversely, the court noted that after an initial custody order is made, a presumption *is* created in favor of the custodial parent.¹⁹ The noncustodial parent has the burden of showing "changed circumstances so substantial and continuing as to make the existing custody order unreasonable."²⁰

The trial court granted a change of custody, finding a breakdown in communication, a change of locations by the custodial parent, remarriage of the noncustodial parent, and educational problems of the child.²¹ The court of appeals determined that the trial court had approached the case as if it were making an initial custody determination, and that the noncustodial father had failed to carry his burden of proving the existing custody order unreasonable.²² The court specifically noted that a change in the noncustodial parent's lifestyle, such as the father's remarriage, did not warrant modification of custody.²³

Despite different statutory language, the same result was reached by the court of appeals in *Walker v. Chatfield*.²⁴ Walker and Chatfield had

14. *Id.* at 197.

15. *Id.*

16. *Id.* at 200.

17. 555 N.E.2d 833 (Ind. Ct. App. 1990).

18. IND. CODE ANN. § 31-1-11.5-21 (West Supp. 1990).

19. *Lucht*, 555 N.E.2d at 836.

20. IND. CODE ANN. § 31-1-11.5-22(d) (West Supp. 1990).

21. *Lucht*, 555 N.E.2d at 837-39.

22. *Id.* at 836.

23. *Id.* at 838.

24. 555 N.E.2d 490 (Ind. Ct. App. 1990).

a child out of wedlock, and the initial custody award to the mother was made under the applicable paternity statute.²⁵ At the trial level, the father sought and was awarded custody. The court acknowledged the different language between the statutes dealing with custody modification in post-dissolution matters²⁶ and in paternity matters.²⁷

Notwithstanding the different statutory language, the court treated the paternity statute as though it also required a showing of changed circumstances. In so doing, the court expressed disapproval of *Griffith v. Webb*,²⁸ which approved a modification of custody in a paternity case based only upon the best interest of the child and not upon changed circumstances. The court expressed a strong policy favoring permanence and stability and opposing an interpretation of the paternity statute that could give dissenting parents the opportunity to return to court repeatedly to relitigate custody.²⁹

A custody change was also reversed in *Owen v. Owen*.³⁰ There, the custodial mother was hospitalized for psychiatric problems before her divorce. When she was again hospitalized for psychiatric treatment a year later, the father petitioned for a custody change. He obtained an emergency temporary custody order, and the hearing did not finally take place on his petition until nine months later. The father was awarded permanent custody, and the mother appealed.³¹ The court of appeals held that because there was no showing that the mother's condition had worsened after the divorce, the trial court erred in modifying custody.³²

In clearly the most unusual factual setting involving a custody modification, the trial court in *Thompson v. Thompson*³³ ordered that the custodial father would control the marital residence, although it would remain jointly owned by the parties.³⁴ The trial court transferred that control to the mother when she successfully petitioned for a change in

25. IND. CODE ANN. § 31-6-6.1-11 (West Supp. 1990).

26. Indiana Code § 31-1-11.5-21 refers to "the best interest of the child" regarding initial determinations and "changed circumstances" regarding modifications. IND. CODE ANN. § 31-1-11.5-21 (West Supp. 1990).

27. Indiana Code § 31-6-6.1-11 allows modification whenever it "serves the best interests of the child" without regard to changed circumstances. IND. CODE ANN. § 31-6-6.1-11 (West Supp. 1990).

28. 464 N.E.2d 384 (Ind. Ct. App. 1984).

29. *Walker*, 555 N.E.2d at 495.

30. 549 N.E.2d 410 (Ind. Ct. App. 1990).

31. *Id.* at 412.

32. *Id.* at 414-15. Interestingly, the court noted that the trial court erred in refusing to allow discovery of the mother's medical records; the mother had waived the physician-patient privilege because her mental condition was at issue throughout the children's minority. *Id.* at 416 n.2.

33. 555 N.E.2d 1332 (Ind. Ct. App. 1990).

34. *Id.* at 1334.

custody. Citing Indiana Code section 31-1-11.5-12(c), which permits a court to set apart either parent's property for the support of a child, the court reasoned that control of the marital residence was a modifiable award of child support and not a final property division.³⁵ Judge Staton dissented, stating that "a property right has been snatched from the grasp of its lawful titleholder."³⁶

C. Joint Custody

An order of joint custody over the objection of one parent was approved in *Stutz v. Stutz*.³⁷ Significantly, however, the wife's objection was only a general claim of "rancor and hostility" between the parties, supported by the trial court's order that the parties comply with a pamphlet, "Parents are Forever," attached to the decree.³⁸

Relying on Indiana Code section 31-1-11.5-21(g), which provides that the parties' agreement is a matter of "*primary, but not determinative importance*,"³⁹ the court affirmed the award of joint custody. The court relied on evidence in the record that both parents were proper persons to be awarded custody: 1) on a lack of specific evidence in the record regarding hostility between the parties; 2) on the fact that the parties' preliminary agreement provided for joint custody;⁴⁰ and 3) on the parties' shared religious beliefs.⁴¹ The court also noted the lack of a request for specific findings of fact pursuant to Indiana Trial Rule 52(A).⁴²

When going to trial in a case in which joint custody is an issue, the practitioner should request written findings of fact and conclusions of law. The practitioner should also present specific evidence relative to each of the statutory factors⁴³ the court must consider when awarding joint custody. A general claim of inability to get along may not prevent an order of joint custody over one parent's objection.

35. *Id.* at 1336-37.

36. *Id.* 1337 (Staton, J., dissenting).

37. 556 N.E.2d 1346 (Ind. Ct. App. 1990).

38. *Id.* at 1350.

39. IND. CODE ANN. § 31-1-11.5-21(g) (West Supp. 1990) (emphasis added).

40. The court of appeals apparently did not consider Indiana Code § 31-1-11.5-7(f), which provides that the "issuance of a provisional order shall be without prejudice to the rights of the parties or the child as adjudicated at the final hearing in the proceeding." IND. CODE ANN. § 31-1-11.5-7(f) (West Supp. 1990).

41. *Stutz*, 556 N.E.2d at 1350-51.

42. *Id.* at 1351.

43. Indiana Code § 31-1-11.5-21(g) requires the trial court to consider each party's fitness, communications between the parties, the child's wishes, the closeness of the child's relationship with each party, whether the parties live in close proximity to each other, and the home environment of each party. IND. CODE ANN. § 31-1-11.5-21(g) (West Supp. 1990).

III. CHILD SUPPORT

The relatively modest value of the right to claim a child as a dependent for income tax purposes⁴⁴ continues to be a fertile battlefield for litigants and a source of judicial disagreement. Also, divorced parents continue to present new issues and theories in establishing, modifying, collecting, and avoiding child support payments.

A. Tax Dependency Exemption

The First District Court of Appeals of Indiana has issued two opinions addressing the trial court's power to determine which parent should have the benefit of the income tax dependency exemption for a child, and the way in which the trial court can effectuate its determination. Unless the custodial parent executes a waiver of the exemption, the Internal Revenue Code allows the custodial parent to claim the exemption.⁴⁵ In cases decided prior to the survey period, the First District ruled that the trial court lacked authority to allocate the dependency exemption to the noncustodial parent,⁴⁶ and the Second District approved a 1987 trial court determination that the noncustodial parent should have the exemption.⁴⁷

Two cases decided during the survey period have shed some light on the issue. *In re Marriage of Baker*⁴⁸ addressed a modification of a 1979 decree in which two dependency exemptions were divided between the parties. By the time of the modification, the older child was in college. The modification order provided that after the older child graduated, the exemption for the younger child would be alternated.⁴⁹

The court acknowledged conflicting precedent,⁵⁰ but noted that

44. At the 28% federal income tax bracket, the right to claim the \$2090.00 personal exemption for one child is worth less than \$12.00 per week.

45. I.R.C. § 152(e) (1989), *amended by* the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494.

46. *In re Davidson*, 540 N.E.2d 641 (Ind. Ct. App. 1989).

47. *Blickenstaff v. Blickenstaff*, 539 N.E.2d 41 (Ind. Ct. App. 1989). However, the court noted that according to I.R.C. § 152(e) such orders are honored by the Internal Revenue Service only if entered prior to 1985. *Bickerstaff*, 539 N.E.2d at 45 n.1; I.R.C. § 1523 (1986). Neatly sidestepping the issue, the court stated, "So long as Kenneth meets the requirements of the Internal Revenue Code, his claim of the dependency exemption is appropriate." *Bickerstaff*, 539 N.E.2d at 45. The court added, "Suffice it to say that the right of either party to claim a child or children is governed by the Internal Revenue Code." *Id.* at 45 n.1.

48. 550 N.E.2d 82 (Ind. Ct. App. 1990).

49. *Id.* at 83.

50. The court was referring to *In re Davidson*, 540 N.E.2d 641 (Ind. Ct. App. 1989), and *Blickenstaff v. Blickenstaff*, 539 N.E.2d 41 (Ind. Ct. App. 1989).

both decisions implicitly accept, apart from the matter of federal preemption, that the General Assembly has vested Indiana trial courts with both subject matter jurisdiction and statutory authorization to determine which parent should be entitled to claim the exemption, and that Indiana trial courts retain the inherent equitable power to enforce their decrees.⁵¹

The court disagreed with the assumption in *Davidson* that the amendment to Internal Revenue Code section 152(e) leads to the conclusion that state courts were divested of jurisdiction to decide which parent may claim the exemption.⁵²

The opinion contains a concise but thorough discussion of federal preemption and the supremacy clause.⁵³ The court concluded that Congress did not intend to supersede state domestic relations law, and held:

Compliance with § 152(e) and a state court order of allocation is not a physical impossibility. State court orders allocating the exemption can be drafted to conform with the dictates of the section, giving the IRS the objective proof it desires. A custodial spouse's failure to execute the IRS form can be enforced with an adjustment in the amount of support or by threat of civil contempt.⁵⁴

Chief Judge Ratliff dissented, based on the reasoning in *Davidson*.⁵⁵

More recently, the first district considered an appeal of a trial court's decision to reduce the presumptive child support by \$12.80 per week to compensate for the court's finding that according to *Davidson* and to section 152(e), it could not award the dependency exemption to a non-custodial father. In *Ritchey v. Ritchey*,⁵⁶ the court acknowledged the need to reconcile the holdings of *Baker* and *Davidson*.⁵⁷ In a welcome clarification of this issue, the court held that

a trial court has equitable jurisdiction to consider the respective tax burdens of custodial and non-custodial parents and, in a proper case, to order a custodial parent to sign a waiver of dependency exemption. A trial court may make the custodial parent's duty to execute a yearly waiver contingent upon the non-custodial parent's support payments being current. Fur-

51. *Baker*, 550 N.E.2d at 84.

52. *Id.*

53. *Id.* at 84-86.

54. *Id.*

55. *Id.* at 89 (Ratliff, C.J., dissenting).

56. 556 N.E.2d 1376 (Ind. Ct. App. 1990).

57. *Id.* at 1378.

thermore, a trial court can enforce its order against a custodial parent by an order of contempt or by an adjustment of child support payments in an amount representing the additional tax burden upon the non-custodial parent because of the absence of the waiver.⁵⁸

The court also held that a trial court cannot "allocate a dependency exemption and [noted] that even if section 152(e) did not prohibit the allocation, a court order would be ineffective to provide tax relief to the non-custodial parent"⁵⁹ The portion of *Davidson* containing the same holding was affirmed, and to the extent *Baker* held otherwise, *Davidson* was overruled.

Unfortunately, a problem still exists. Child support orders can be modified only prospectively, and not retroactively.⁶⁰ If a child support order is made in connection with an order that the custodial parent execute a waiver at the end of the year when it can be determined that the noncustodial parent is current in support payments, a trial court may not reduce the support obligation for the tax year at issue if the custodial parent refuses at year-end to execute the waiver. The modification can only be ordered prospectively.

B. Modification and Collection of Support

Modification of a support award is governed by Indiana Code section 31-1-11.5-17(a), and enforcement is governed by section 31-1-11.5-17(c). Although these are separate issues, they often are present in the same cases, and are therefore discussed together.

In *Holy v. Lanning*,⁶¹ the support obligor made overpayments both when he was current and when he was delinquent in support. The trial court refused to credit any of the overpayments against the arrearage it found. The court of appeals held that overpayments made when an arrearage existed should have been credited against the arrearage and that to do otherwise would give a delinquent support obligor no incentive to remedy the delinquency.⁶²

Several cases have dealt with support orders in gross for two or more children. *In re Marriage of Baker*⁶³ involved the noncustodial

58. *Id.* at 1379. The court recognized that Child Support Rule 3 permits deviation from the presumptive support award pursuant to the Indiana Child Support Guidelines after consideration of the tax benefit of the dependency exemption. *Id.* at 1379 n.1.

59. *Id.* at 1379 n.1.

60. *See, e.g.,* Pickett v. Pickett, 470 N.E.2d 751 (Ind. Ct. App. 1984).

61. 552 N.E.2d 44 (Ind. Ct. App. 1990).

62. *Id.* at 46.

63. 550 N.E.2d 82 (Ind. Ct. App. 1990).

father's unilateral one-half reduction in support while, by court order, he paid one-half of the college education expenses for the older child.⁶⁴ Although the trial court credited the educational expense payments against the regularly ordered support and found no arrearage, the court of appeals held otherwise. Because the parties had not expressly agreed to an alternate form of payment, the father was only entitled to credit for the payments he made directly to the mother.⁶⁵

Similarly, a unilateral pro rata reduction in an "in gross" support order was not permitted in *Kaplon v. Harris*.⁶⁶ The trial court permitted credit against an arrearage for the pro rata portion of support for a child who died eighteen months before a modification petition was filed. The trial court also gave the father credit against the arrearage for one-half of the funeral expenses he paid for the deceased child.⁶⁷ The court of appeals held those credits were an improper retroactive modification of support,⁶⁸ although in a dissenting opinion Judge Baker asserted that the trial court appropriately allowed credit for the funeral expenses.⁶⁹ He reasoned that the trial court had not retroactively modified the support order but, unlike voluntary payment for expected and ordinary expenses such as clothing and education, had simply apportioned the unexpected funeral expenses between the parties and had effected that apportionment by giving the father a credit against his arrearage.⁷⁰

Unexpectedly large psychiatric expenses for a teenage child warranted a support modification in *Barnes v. Barnes*.⁷¹ The child had undergone hospitalization twice during the pendency of the divorce, as a result of suicide attempts. The decree ordered the father to pay all of the child's psychiatric expenses. Soon after the divorce became final, the child again attempted suicide and was committed for long-term psychiatric treatment expected to last two years and to cost approximately \$300,000.00.⁷² The father sought to have each parent pay one-half of those expenses, and the trial court agreed. The court of appeals, noting that both parents were millionaires, affirmed the modification, reasoning that the enormity of the expenses, as compared to the previous, less-expensive hospitalizations, constituted a change in circumstances warranting a modification.⁷³

64. *Id.* at 86.

65. *Id.* at 87.

66. 552 N.E.2d 528 (Ind. Ct. App. 1990).

67. *Id.* at 529.

68. *Id.* at 530-31.

69. *Id.* at 531-32 (Baker, J., dissenting).

70. *Id.* at 532 (Baker, J., dissenting).

71. 549 N.E.2d 61 (Ind. Ct. App. 1990).

72. *Id.* at 63.

73. *Id.* at 65.

Medical education, as opposed to treatment, was at issue in *Shriver v. Kobold*.⁷⁴ The noncustodial father was ordered to pay one-half of his daughter's college education expenses. He complied, and she graduated from college at age twenty-one. Two months later, her mother sought an order that the father pay for one-half of the cost of medical school.⁷⁵ Both the trial court and the court of appeals reasoned that the original educational order had expired upon her graduation and the father's statutory duty of support had expired on her twenty-first birthday. With no order in effect that could be modified, a new educational order could not be entered.⁷⁶

IV. DIVISION OF PROPERTY

Unlike child custody and visitation issues, in which new case law generally sheds light on statutes that remain largely unchanged, property division cases have dealt most significantly with interpretation of recent statutes.

A. Tax Consequences of Property Division

In 1985, a new statute was enacted directing trial courts when dividing property to consider tax consequences of the property disposition.⁷⁷ The court interpreted the statute in *Harlan v. Harlan*.⁷⁸ The most valuable asset in the Harlans' marital estate was a family corporation awarded to the husband. The trial court attempted to divide equally between the parties the increase in the value of the marital estate. However, in determining the value of the business, the court subtracted the tax that would be incurred if all of the husband's stock were sold even though sale was not ordered and even though the husband was permitted to pay a judgment to the wife over 180 months at three percent annual interest.⁷⁹

The court of appeals reasoned that the statute provides for consideration of tax consequences "necessarily arising from the plan of distribution" but not "speculative possibilities."⁸⁰ Because the trial court's

74. 553 N.E.2d 867 (Ind. Ct. App. 1990).

75. *Id.* at 867.

76. *Id.* at 867-68.

77. Indiana Code § 31-1-11.5-11.1 states: "The court, in determining what is just and reasonable in dividing property, under section 11 of this chapter, shall consider the tax consequences of the property disposition with respect to the present and future economic circumstances of each party." IND. CODE ANN. § 31-1-11.5-11.1 (West Supp. 1990).

78. 544 N.E.2d 553 (Ind. Ct. App. 1989), *aff'd*, 560 N.E.2d 1246 (Ind. 1990).

79. *Harlan*, 544 N.E.2d at 554.

80. *Id.* at 555.

plan of distribution did not require a sale of stock and was structured to avoid the need for a sale, the trial court abused its discretion in subtracting the tax that would be paid upon sale.⁸¹

B. *Equal v. Unequal Division*

Indiana Code section 3-1-11.5-11(c) directs the courts to “presume that an equal division of the marital property between the parties is just and reasonable,” and has been a fruitful source of disputes. Under what circumstances may a trial court deviate from an equal division? How unequal can a just and reasonable division be?

*Kirkman v. Kirkman*⁸² is instructive on the first question. The Indiana Supreme Court recognized that the statute speaks to an exactly, rather than approximately, equal division. Nevertheless, the court held that “express trial court findings will not be compelled for insubstantial deviations from precise mathematical equality.”⁸³ However, absent a description in the opinion of the marital estate and how it was divided, it is impossible to tell what constitutes an insubstantial deviation and what requires an express finding of fact supporting an unequal division.

A remand for specific findings was also not warranted in *Benda v. Benda*.⁸⁴ The wife did not appear for the final hearing and therefore presented no evidence of valuation. Neither did the wife request special findings of fact and conclusions of law. The court recognized that although the husband was awarded more property, he was also held responsible for nearly all of the marital debts.⁸⁵ The court of appeals held that the trial court had acted within its discretion.⁸⁶ However, this holding was almost certainly influenced by the wife’s refusal to participate in the case and her refusal to aid the court in valuing and dividing the marital estate.

Conversely, two other cases resulted in remands to the trial court for specific findings of fact. In *Raval v. Raval*,⁸⁷ there was no discussion of the value of the marital estate or the extent to which the trial court’s division was unequal. The court of appeals simply noted that values of assets were disputed and that both parties proposed an unequal division.⁸⁸ The court remanded for either an equal division or a statement of reasons supporting the unequal division.⁸⁹

81. *Id.* at 556.

82. 555 N.E.2d 1293 (Ind. 1990).

83. *Id.* at 1294.

84. 553 N.E.2d 159 (Ind. Ct. App. 1990).

85. *Id.* at 164.

86. *Id.*

87. 556 N.E.2d 960 (Ind. Ct. App. 1990).

88. *Id.* at 962.

89. *Id.*

In *Crowe v. Crowe*,⁹⁰ the trial court was unable to comply with section 11(c) because the parties were unable to place a value on their business.⁹¹ The court of appeals was unable to determine whether the court equally divided the assets, and therefore remanded the case to the trial court.⁹² This ruling has important implications in cases in which the parties are themselves unable to testify about the value of an asset and are also unable to find or afford an expert witness who can testify about its value.

How unequal can a division be and still be just and reasonable? When one spouse's conduct has been fraudulent,⁹³ a very unequal division is justified. In *Shumaker v. Shumaker*,⁹⁴ the gross marital estate was valued at over \$270,000.00, minus debts of nearly \$17,000.00. The wife forged the husband's name on two notes, which created liens on the couple's assets. Much of the marital estate was brought into the marriage by the husband.⁹⁵ The trial court awarded fifteen percent of the assets to the wife and the remainder to the husband. The court of appeals found that the trial court's articulation of its reasoning justified the unequal division.⁹⁶

An award to the husband of seventy-four percent of the assets, based upon the husband's values, was upheld in *Stutz v. Stutz*.⁹⁷ In making its division, the trial court awarded to the wife a car, furniture, jewelry, her individual retirement accounts, and a judgment for half of the value of a business.⁹⁸ The court, however, did not award her any part of the parties' savings accounts, including \$1.4 million in one account, reasoning that the wife had dissipated the marital assets by incurring large credit card bills and by bouncing checks.⁹⁹ The trial court's unequal division was affirmed.

The inescapable conclusion to be drawn from this year's property division cases is that a trial court is unlikely to commit reversible error if it enters special findings of fact explaining its decision, and that the careful practitioner should request such findings in most cases.

90. 555 N.E.2d 180 (Ind. Ct. App. 1990).

91. *Id.* at 182.

92. *Id.* at 183.

93. According to Indiana Code § 31-1-11.5-11(c)(4), the court may consider, *inter alia*, "the conduct of the parties during the marriage as related to the disposition or dissipation of their property." IND. CODE ANN. § 31-1-11.5-11(c)(4) (West Supp. 1990).

94. 559 N.E.2d 315 (Ind. Ct. App. 1990).

95. Another factor in Indiana Code § 31-1-11.5-11(c)(2) is "the extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift." IND. CODE ANN. § 31-1-11.5-11(c)(2) (West Supp. 1990).

96. *Shumaker*, 559 N.E.2d at 318.

97. 556 N.E.2d 1346 (Ind. Ct. App. 1990).

98. *Id.* at 1347.

99. *Id.* at 1348-49.

V. LEGISLATIVE DEVELOPMENTS

For family law practitioners, the most significant legislative developments concern the Indiana Child Support Guidelines and Child Support Rules, adopted by the Indiana Supreme Court on August 31, 1989.¹⁰⁰ Support Rule 2 creates a rebuttable presumption that the application of the guidelines will result in a correct support award. Support Guideline 4 echoes the statutory requirement¹⁰¹ that a child support order may be modified only upon a substantial and continuing change of circumstances.

A new standard for modification of child support in both dissolution and paternity actions has been added.¹⁰² Now, absent any showing of changed circumstances, a support order entered at least twelve months prior to the filing of a petition for modification may be modified if the application of the child support guidelines would result in a support order that differs by at least twenty percent from the previous order.¹⁰³ There are now two alternate bases upon which support can be modified. If the petitioner can show that use of the guidelines would result in a twenty percent difference in child support, there need be no evidence of the circumstances existing at the time of the prior order. If prior orders are several years old, evidence of the circumstances that existed at the time of the prior order can be difficult to obtain. In those cases, this amendment can be very helpful.

New statutes have been added to the Indiana Code which provide for a noncustodial parent's access (in the absence of a court order prohibiting access) to both health records¹⁰⁴ and education records¹⁰⁵ of the children.

The statute providing for temporary protective orders¹⁰⁶ has been amended. Now, a threat of abuse is sufficient to warrant filing a petition for such an order, and the abuse or threat need not have been directed only at the petitioner, but also may have been directed at a member of his or her household.¹⁰⁷ A petition *must* include a request that a date be set for hearing on a permanent protective order.¹⁰⁸ A protective order

100. INDIANA CHILD SUPPORT RULES & GUIDELINES (effective Oct. 1, 1989), IND. CODE ANN. tit. 34, app., supp. at 100 (West Supp. 1990), *reprinted in* IND. CASES 542 N.E.2d XXXI (1989).

101. IND. CODE ANN. § 31-1-11.5-17 (West Supp. 1990).

102. Pub. L. No. 155-1990, 19____ Ind. Acts ____.

103. IND. CODE ANN. § 31-1-11.5-17(a)(2)(A) (West Supp. 1990); *id.* § 31-6-6.1-13(f).

104. *Id.* § 16-4-8-14.

105. *Id.* § 20-10.1-22.4-1.

106. *Id.* § 34-4-5.1-2, *as amended by* Pub. L. No. 26-1990.

107. *Id.* § 34-4-5.1-2(a).

108. *Id.* § 34-4-5.1-2(b)(1).

may include an order for counseling, domestic violence education, or other social services.¹⁰⁹ Similar amendments relate to permanent protective orders.¹¹⁰

An important development is a provision for court appointment of a special advocate or a guardian ad litem for a child in a proceeding to determine or modify custody.¹¹¹

Child support now may become easier to collect. An amendment to Indiana Code section 31-2-10-7¹¹² provides in title IV-D cases for immediate income withholding even when the obligor is not delinquent. Also, delinquent support payments in paternity cases now may bear interest at the same monthly rate, one and one-half percent,¹¹³ as the interest that may accrue on delinquent support payments in dissolution cases.¹¹⁴

VI. CONCLUSION

During the survey period, tax issues were at the forefront of domestic relations cases. The nature of changed circumstances sufficient to warrant a custody modification has been clarified, with the potential for reducing litigation of this emotionally charged issue. The adoption of presumptive child support guidelines appears to have begun to reduce appeals of support orders. On the other hand, the presumption in favor of an equal division of marital assets seems in some cases to have made the trial court's task more difficult and its decisions more susceptible to appeal. Greater emphasis now is placed on the entry of findings of fact and conclusions of law.

109. *Id.* § 34-4-5.1-2(d).

110. *Id.* §§ 34-4-5.1-3, -5.

111. Section 6 of Pub. L. No. 155-1990 added a new section — Indiana Code § 31-1-11.5-28. The statute defines “special advocate” and “guardian ad litem,” authorizes the appointment of either or both, directs them to “represent and protect the best interests of the child,” authorizes legal representation of the guardian or advocate, designates them as officers of the court, provides civil immunity for their good faith performance of their duties, and allows an order that either or both parents of a child pay a user fee. IND. CODE ANN. § 31-1-11.5-28 (West Supp. 1990).

112. Section 7 of Pub. L. No. 155-1990 added a new subsection (b) to Indiana Code § 31-2-10-7. *See* IND. CODE ANN. § 31-2-10-7 (West Supp. 1990).

113. Section 27 of Pub. L. No. 155-1990 amended Indiana Code § 31-6-6.1-15.5. *See* IND. CODE ANN. § 31-6-6.1-15.5 (West Supp. 1990).

114. *Id.* § 31-1-11.5-12(f).