

RECENT DEVELOPMENTS: INDIANA FAMILY LAW

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INTRODUCTION

Placing a limit on the scope of a survey article regarding developments in the law pertaining to the regulation and dissolution of family rights and responsibilities is challenging in light of the vast reach of our state law pertaining to families. Accordingly, this Article is primarily limited to developments in the law of Indiana pertaining to the traditional family law areas of dissolution of marriage, paternity, child custody and support, and adoption.¹

I. DISSOLUTION OF MARRIAGE

Indiana courts decided numerous cases involving property distribution, spousal maintenance, settlement agreements, and procedural matters during the current survey. The following discussion considers some cases of note involving the topic.

A. *Property Distribution*

1. *Marital Asset Issues*.—Three broad questions encompass the substantive law of property distribution in a dissolution of marriage action: Is it property, and, if so, marital property? What is the value of the property? How should the property be divided?²

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1. Indiana's "Family Law" contains ten articles expressly identified as such in Title 31 of the Indiana Code. The subjects range from regulation of marriage, prenuptial agreements and paternity through divorce, child support, custody, adoption, and human reproduction just to name major topics. Another eleven articles of Title 31 are specifically delineated as "Juvenile Law." See IND. CODE § 31-9-2-72 (2004) ("Juvenile Law" refers to [Ind. Code Section] 31-30 through 31-40."). One hundred forty-six sections of definitions are contained in an additional article of Title 31 applying to both family and juvenile law. Sprinkled throughout fifteen other titles of the Indiana Code are provisions governing criminal offenses against children and the family, children's protection services, marriage and family therapists, and trust and fiduciaries to mention just a few family-related topics. Finally, every legal proceeding in Indiana regarding child support or visitation is governed by the Indiana Supreme Court's Child Support Rules and Guidelines and Parenting Time Guidelines.

2. It is well established in Indiana that, unless excluded by statute, case law or prenuptial agreement, all assets acquired before or during the marriage are marital assets regardless of how titled and which spouse acquired the property. "'Property,' for purposes of IC 31-15, IC 31-16, and

A recent case dealing with includability in the marital estate is *Benjamin v. Benjamin*.³ Mr. Benjamin was a former lawyer who had tendered his resignation from the bar to the Indiana Supreme Court in settlement of a disciplinary complaint. As consideration for representing him with regard to the disciplinary action, he assigned to the law firm representing him attorneys' fees he was entitled to receive under existing legal services contracts. Wife claimed that this assignment involved a marital asset and thus requested that the trial court award her one-half of the fees that Husband had assigned. She prevailed. On appeal Husband contended it was error for the trial court to treat the legal fees he had assigned as a marital asset, arguing that the award of the assigned attorneys' fees was in violation of the rules of professional conduct because the award made Wife, who was a non-lawyer, a partner in his legal business by impermissibly permitting her to share in fees. The appellate court was not persuaded.

Citing *Landau v. Bailey*⁴ for the proposition that a professional practice may have value for purposes of marital asset distribution, the court noted the evidence showed that the only remaining economic value of Mr. Benjamin's law practice at the time of the final hearing was "embodied within the legal fees Husband was entitled to receive under the legal services contracts."⁵ The court went on to hold that the assignment of fees to the law firm that had represented him amounted to the encumbering of a marital asset and concluded that the trial court properly

IC 31-17, means all the assets of either party or both parties. . . ." IND. CODE § 31-9-2-98b(3). As if to reinforce the definition of property for purposes of divorce, Indiana Code section 31-15-7-4(a), provides:

In an action for dissolution of marriage under *IC 31-15-2-2*, the court shall divide the property of the parties, whether:

- (1) owned by either spouse before the marriage;
- (2) acquired by either spouse in his or her own right:
 - (A) after the marriage; and
 - (B) before final separation of the parties; or
- (3) acquired by their joint efforts.

IND. CODE § 31-15-7-4(a). *Thompson v. Thompson*, 811 N.E.2d 888 (Ind. Ct. App. 2004), refers to property division as a two-step process, obviously omitting valuation which is a crucial step nonetheless:

The division of marital property in Indiana is a two-step process. The trial court must first determine what property must be included in the estate. Included within the marital estate is all the property acquired by the joint efforts of the parties. With certain limited exceptions, this "one pot" theory specifically prohibits the exclusion of any asset from the scope of the trial court's power to divide an award. Only property acquired by an individual spouse after the final separation date is excluded from the marital estate. After determining what constitutes marital property, the trial court must then divide the marital property under the presumption that an equal split is just and reasonable.

Id. at 912 (citations omitted); see also *Huber v. Huber*, 586 N.E.2d 887 (Ind. Ct. App. 1992).

3. 798 N.E.2d 881 (Ind. Ct. App. 2003).

4. 629 N.E.2d 264, 266 (Ind. Ct. App. 1994).

5. *Benjamin*, 798 NE2d at 887.

awarded half of the fees to Wife.⁶

One of a number of issues raised by Husband in *Thompson v. Thompson*⁷ was the distribution by the trial court to Husband of debts, amounting to \$10,000, for counseling and medical expense, which were incurred after the date of separation by Wife.⁸ Husband argued on appeal that this “constituted an impermissible transfer of a debt arising after the filing of the decree of dissolution.”⁹ The court of appeals agreed with Husband, holding that it is well established in Indiana that debts incurred by a party to the dissolution after the filing of the dissolution petition are not part of the marital estate.¹⁰

The case of *Severs v. Severs*¹¹ resolved the issue of whether Social Security Disability Insurance (“SSDI”) benefits are marital property. The parties were married in 1977 and a Decree of Dissolution was entered in August 2003. In 2002, Husband had a heart attack and, as a result, he began receiving the disability benefits in addition to VA benefits. In the decree of dissolution, the trial court determined that the VA benefits were not marital assets because Husband’s eligibility for them did not require a financial payment or contribution from marital assets. However, the trial court found that Husband’s SSDI payments were marital property and granted Wife forty percent of all future SSDI payments made to Husband. The includability of the SSDI payments in the marital estate was the sole question presented on appeal.¹² The court of appeals noted that no prior Indiana cases existed concerning the inclusion of social security disability payments as marital property.¹³ Accordingly, the court went on to review the Indiana decisions that have been decided in the “general area of

6. *Id.*

7. *Thompson*, 811 N.E.2d at 888.

8. *Id.* at 913. Apparently, Husband was not ordered to pay such expenses of Wife under the provisional orders. *Id.* at 898. Wife was not entitled to post-decree spousal maintenance. *Id.* at 910.

9. *Id.* at 913.

10. *Id.* (citing *In re the Marriage of Moore*, 695 N.E.2d 1004, 1009 (Ind. Ct. App. 1998); *Fuehrer v. Fuehrer*, 651 N.E.2d 1171, 1174 (Ind. Ct. App. 1995)). Wife argued, interestingly, that the “after acquired debt” rule should not apply because of the “doctrine of necessities” which can make one spouse responsible for the necessities of the other spouse. *Id.* In holding that the “doctrine of necessities” did not apply in this case, the court of appeals noted that the doctrine “only renders the non-debtor spouse *secondarily* liable for debt.” *Id.* The doctrine can only be applied if the “debtor-spouse” is unable to meet his or her own personal needs or pay his or her own obligations. The court further stated that *Moore* and *Fuehrer* both stand for the proposition that the “doctrine of necessities” does not change the rule that “the marital estate closes on the date the dissolution petition was filed.” *Id.*

11. 813 N.E.2d 812 (Ind. Ct. App. 2004).

12. *Id.* at 813. The court of appeals noted that the parties did not address the potential application of 42 U.S.C. § 407(a) to the facts of the case. Section 407(a) prohibits the transfer or assignment “at law or in equity” of these benefits. 42 U.S.C. § 407(a) (2000). Child support or the support of a spouse are exceptions to the rule, however. *See id.* § 659.

13. *Severs*, 813 N.E.2d at 813.

disability payments which may constitute marital property.”¹⁴

In *Severs*, Wife acknowledged that future earnings are not a divisible asset and that Husband’s SSDI payments “are clearly to replace future earnings.”¹⁵ Her argument, however, was that the payments should be in the marital pot because they were paid for by Husband’s payroll taxes which deprived the family of the use of the funds during the marriage.¹⁶ The court of appeals rejected this argument concluding that the payroll tax was simply a tax imposed upon all employees by the federal government.¹⁷ As such, they did not constitute a voluntary contribution by Husband to secure a benefit that depleted the marital property.¹⁸ Thus, Social Security disability benefits received by Husband were not marital property.

The last significant case involving marital property concerns an antenuptial agreement. In the case of *Schmidt v. Schmidt*,¹⁹ the parties had entered into an antenuptial agreement five days prior to their marriage. Numerous sections in the parties’ agreement provided that the parties’ individually held property would remain separate property. However, a later section in the agreement appeared to provide that, upon dissolution of marriage, all other sections of the agreement were no longer applicable (i.e., that the sections pertaining to separately held property apply only on death of one of the parties). This was, arguably, a ridiculous result because such an interpretation would treat a divorcing spouse better than a spouse who remained married until death.

During the proceedings below, Husband filed a request for declaratory judgment, apparently seeking interpretation of the agreement while claiming that it was unambiguous.²⁰ Wife also contended that the agreement was unambiguous but that it called for the non-recognition of separate property upon the initiation

14. *Id.* at 813. In *Gnerlich v. Gnerlich*, 558 N.E.2d 285, 288 (Ind. Ct. App. 1989), it was decided that the disability payments received by Husband were marital property because Husband had made monthly payments to an insurance company for the disability plan. In contrast, the court in *Leisure v. Leisure*, 605 N.E.2d 755, 759 (Ind. 1993), held that workers’ compensation disability benefits were not marital property because they were to replace future earnings. The *Leisure* court distinguished *Gnerlich* because the husband used marital assets to pay for the disability benefits, whereas the husband in *Leisure* did not. *Leisure*, 605 N.E.2d at 758. The case of *Jendreas v. Jendreas*, 664 N.E.2d 867 (Ind. Ct. App. 1996) involved a situation where Husband was receiving both SSDI and disability under a union pension, both of which were found by the trial court not to be marital property. No challenge was made regarding SSDI but on appeal Wife contended that the union benefits should have been considered marital property. *Jendreas*, 664 N.E.2d at 370. The *Jendreas* court applied the *Leisure* holding that the union disability benefits were not marital property because they represented future income and no marital assets were used to purchase the benefits. *Id.* at 371.

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

16. *Id.*

17. *Id.*

18. *Id.*

19. 812 N.E.2d 1074 (Ind. Ct. App. 2004).

20. *Id.* at 1078.

of a divorce proceeding.²¹ The trial court found that the parties agreed that the agreement was unambiguous, that the intent of the parties could be found within the four corners of the document, and that the intent was to recognize separate property in the event of a dissolution action.²² The appellate court's decision demonstrates the clear strategic error of not acknowledging the patent ambiguity of the agreement.

On appeal, Wife argued that the trial court did not follow established rules for the construction of contracts and the court of appeals agreed.

Antenuptial agreements are to be construed according to principles applicable to the construction of contracts. To interpret a contract, a court first considers the parties' intent as expressed in the language of the contract. The court must read all of the contractual provisions as a whole to accept an interpretation that harmonizes the contract's words and phrases and gives effect to the parties' intentions as established at the time they entered the contract. If the language of the agreement is unambiguous, the intent of the parties must be determined from the four corners of the document. The terms of a contract are ambiguous only when reasonably intelligent persons would honestly differ as to the meaning of those terms.²³

In effect, Husband was the victim of his own argument because the appellate court agreed with the trial court that the agreement was unambiguous, but reversed the trial court's finding and held that the unambiguous agreement abolished separate property upon dissolution of marriage.²⁴ Thus, Husband was left with a prenuptial agreement that would only protect his separate property in the event that he died married to Wife, but not if they divorced. Judge Darden, concurring in the result with a separate opinion, would not have allowed such an obviously unintended result to have occurred without an evidentiary hearing for extrinsic evidence of the parties' intent; to do this required acknowledging the obvious—that the agreement was ambiguous:

I concur in result because I believe the trial court's grant of declaratory relief in favor of the husband was error. In my opinion, reversal is warranted based upon the ambiguity apparent upon the face of Section Thirteen. Because I find Section Thirteen to be ambiguous, I would remand to the trial court to hear evidence concerning the parties' intent as to the meaning of Section Thirteen when they entered into the prenuptial agreement.²⁵

2. *Valuation Issues.*—*Thompson v. Thompson*, which is more than forty

21. *Id.*

22. *Id.*

23. *Id.* at 1080 (citations omitted). In a footnote the court noted that extrinsic evidence of the parties' intent could not be submitted because the agreement was unambiguous. *Id.* at 1080 n.1.

24. *Id.* at 1081.

25. *Id.* at 1083-84 (Darden, J., concurring).

pages long, has a little bit of something for everyone, including a virtual primer on valuation issues.²⁶ The most notable valuation issue involved post-filing changes in the value of retirement benefits due to post-filing contributions and appreciation prior to the final hearing.²⁷

Essentially, the trial court included in the valuation of Husband's retirement benefits the post-filing contributions by Husband in addition to the post-filing appreciation.²⁸ The court, on appeal, noted:

The difficulty encountered with the valuation at bar is that the increase in the retirement benefit's post-filing value derives from two sources: (1) wages withheld from the beneficiary's post-filing income, and (2) the increases attributable to the interest accumulated from the benefit's value at the time of separation. The former increase is the result of the beneficiary's contribution from non-marital property and may not be divided as a marital asset. The latter increase is the result of the benefit's mere existence and is divisible as marital property.²⁹

The court went on to hold that trial courts should choose a date between the final separation and the final hearing for purposes of valuing the retirement benefit and, based on the date and the evidence of record, assign a value after subtracting any contribution after the date of final separation.³⁰

Beike v. Beike,³¹ dealt with a former Husband's motion for relief from the dissolution decree due to a decline in the value of his pension benefits. The parties had agreed that former Wife would be entitled to thirty-six percent of the value of the vested pension through National Steel as of the date of final separation in December 1996. The trial court entered a final order approving the agreement and a qualified domestic relations order ("QDRO") was entered in October 1996. National Steel declared bankruptcy in March 2002 and the Pension Benefit Guarantee Corporation ("PBGC") then became responsible for the former Husband's pension, which decreased in value approximately sixty-two percent. In August 2003, former Husband filed a motion for relief from the order asking the trial court to modify the QDRO to reflect the change in circumstances brought about by the employer's bankruptcy. The trial court ruled in former Husband's favor and reduced former Wife's monthly payment accordingly. She appealed.³²

On appeal, the court noted that the QDRO did not contain express language "stating that the parties would not share in the risks and rewards associated with [former Husband's] pension benefits" and, thus, the court held that the trial court

26. *Thompson v. Thompson*, 811 N.E.2d 888, 917-19 (Ind. Ct. App. 2004).

27. *Id.*

28. *Id.* at 917.

29. *Id.* at 918 (citation omitted).

30. *Id.*

31. 805 N.E.2d 1265 (Ind. Ct. App. 2004).

32. *Id.* at 1266-67.

did not abuse its discretion in adjusting the pension benefits.³³ It is interesting to note that the court of appeals in a footnote stated that if the final order had set the amount the former Wife was to receive in dollars, as opposed to awarding a percentage of the pension plan, the “result of this case may have been different.”³⁴ But because she was to receive a percentage of the pension plan “it was within the trial court’s discretion to ensure that the percentages reflected the decrease in the value of [Husband’s] pension plan.”³⁵

3. *Distribution Issues.*—*Thompson v. Thompson*, in addition to asset inclusion and valuation issues, also involved a claim by Husband on appeal that the trial court injected fault into its asset distribution.³⁶ The proceedings below were highly contentious with multiple contempt findings against Husband. At the final hearing, Wife was awarded seventy percent of the marital estate and Husband was awarded thirty percent. Husband appealed contending that this division was clearly erroneous.³⁷

33. *Id.* at 1269.

34. *Id.* at 1269 n.2. *But see* *Case v. Case*, 794 N.E.2d 514 (Ind. Ct. App. 2003) (setting the amounts that each party was to receive from a retirement account which subsequently declined in value). In *Case*, Husband’s motion for relief also was granted using the same rationale as *Beike*, i.e., that there was no express allocation of risk or rewards between the parties due to changes in value of the asset. In *Case*, the trial court converted the dollar amounts in its original order to percentages and, then, applied the percentages to the decreased value of the retirement account. Affirming the decision below, the appellate court noted that decline in the plan’s value was not caused by the action of Husband. *Case*, 794 N.E.2d at 516. Increases in the value of retirement benefits have been held to not form the basis for relief from judgment on the same rationale as *Beike* and *Case*. In *Niccum v. Niccum*, 734 N.E.2d 637 (Ind. Ct. App. 2000), Wife was awarded a set amount of a retirement benefit which appreciated in value without any additional contributions from Husband. Husband moved for relief from the judgment. Ultimately, it was held that Wife was entitled to a portion of the growth occurring between the time of the court’s order and the effectuation of the QDRO, the theory being “absent express language stating otherwise, the settlement agreement of the parties implicitly contemplated both parties sharing all of the rewards and risks associated with an investment plan.” *Niccum*, 734 N.E.2d at 640.

35. *Bieke*, 794 N.E.2d at 1269 n.2.

36. *Thompson*, 811 N.E.2d at 921-22.

37. *Id.* at 920 (citing IND. CODE § 31-15-7-5, concerning the statutory presumption of an equal split and the factors for rebuttal of the presumption). The court quoted Indiana Code section 31-15-7-5, which states:

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

- (1) The contribution of each spouse to the acquisition of property, regardless of whether the contribution was income providing.
- (2) The extent to which the property was acquired by each spouse.
 - (A) before the marriage; or

On appeal it was noted by the court that, in Indiana, “[f]ault may not be used as a basis to support an unequal division of the marital estate.”³⁸ The basis of Husband’s argument was the following finding in the trial court’s property distribution order: “Because of Wife’s responsibility to the family and the household and Husband’s lack of responsibility and his behavior, the court finds that Husband’s behavior had caused Wife’s income to be depleted over the years.”³⁹ However, other language in the court’s order clearly showed that the trial court felt that Wife’s income was reduced because of her responsibilities with the children, that she had supported the family financially with the payment of debts and that Husband had a superior earning capacity.⁴⁰ The court of appeals went on to hold that it did not characterize the language of the trial court as a fault-based finding. Rather, the court of appeals felt that the trial court awarded a greater division to Wife based upon her economic condition and earning abilities.⁴¹

The case of *Poppe v. Jabaay*,⁴² involved a post-decree modification of a portion of the trial court’s dissolution decree dividing property at the request of one of the parties who did not claim fraud or any of the other grounds for relief from judgment under the Indiana Rules for Trial Procedure.⁴³ The trial court’s decree of dissolution clearly ordered the marital home to be sold, and gave Wife

(B) through inheritance or gift.

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

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

(5) The earnings or earning ability of the parties as related to:

(A) a final division of property; and,

(B) a final determination of the property rights of the parties.

Id. at 920-21 (quoting IND. CODE § 31-15-7-5 (1998)). The court continued, “[i]f the trial court finds reasons to rebut the presumption of equal division of the marital assets, it may divide the assets unevenly provided it sets forth its reasons for doing so.” *Id.* at 921.

38. *Id.* at 921 (citing *R.E.G v. L.M.G.*, 571 N.E.2d 298, 301 (Ind. Ct. App. 1991) (“we will not tolerate the injection of fault into modern dissolution proceedings”). Arguably, deviation from the presumption due to dissipation of assets would be a fault-based distribution. *See* IND. CODE § 31-15-7-5(4) (2004).

39. *Beike*, 805 N.E.2d at 922.

40. *Id.*

41. *Id.*

42. 804 N.E.2d 789 (Ind. Ct. App. 2004).

43. *Id.* at 794-95. Indiana Code section 31-15-7-9.1 prohibits revocation or modification of property distribution orders except in the case of fraud asserted no later than 6 years after the order is entered. IND. CODE § 31-15-7-9.1 (2004). However, as noted in *Poppe*, a trial court “may sometimes modify its property division decree under [Indiana Trial Rule (60)(B); however] a court may not do so without a motion by a party and without a hearing.” *Poppe*, 804 N.E.2d at 795.

the opportunity to conduct a “Sale By Owner.” Detailed procedures in the decree provided that if the parties could not agree or if the property did not sell by a certain time, then upon written motion the court would appoint a commissioner to effectuate the sale. The sale did not happen and Husband asked for the appointment of a commissioner. The court appointed a commissioner and both Husband and Wife submitted offers to purchase which were rejected by the commissioner as not being in compliance with the decree. Poppe, a third party, then submitted an offer to purchase the marital residence which the commissioner accepted. Wife then sought to block the sale and asked the court to modify the decree. Poppe intervened. After a hearing, the court ordered the commissioner to sell the property to Wife to effectuate the court’s original intent.⁴⁴ Poppe appealed contending that the trial court had abused its discretion by ordering the sale of the marital home to Wife because the trial court’s order modified the original property division provisions of the decree in the absence of fraud. Wife countered, asserting that the trial court’s modification was justified in order to reflect its original intention.⁴⁵

On appeal, the court noted the strong public policy favoring the finality of marital property divisions. Thus, modification is prohibited in the absence of fraud in order to “eliminate vexatious litigation which often accompanies the dissolution of a marriage.”⁴⁶ However, the court noted that, while the statute does not specifically grant authority for the court to modify, rescind, or grant relief from the division of property in the absence of fraud, the statute does not preclude a Trial Rule 60(b) motion for relief from judgment.⁴⁷ The court went on to agree with Poppe that the trial court did indeed modify its original dissolution decree without finding any evidence of fraud as required by statute, and without a motion for relief from judgment as required by the trial rule.⁴⁸

B. Spousal Maintenance Issues

A trial court’s mischaracterization of property distribution as “rehabilitative maintenance” does not make it so, according to *Benjamin v. Benjamin*.⁴⁹ Even though she had not requested it, the trial court awarded Wife \$400,000 as “rehabilitative maintenance.”⁵⁰ Husband argued on appeal that the award was error not only because she did not request the rehabilitative maintenance, but also because she did not meet the evidentiary burden required by the statute for an award of rehabilitative maintenance.⁵¹ Wife agreed that the \$400,000 could not

44. *Poppe*, 804 N.E.2d at 791-92.

45. *Id.* at 793.

46. *Id.* (citing *Lankenau v. Lankeuau*, 365 N.E.2d 1241, 1244 (Ind. Ct. App. 1977)).

47. *Id.*

48. *Id.* at 793-95.

49. *Benjamin v. Benjamin*, 798 N.E.2d 881, 885 (Ind. Ct. App. 2003).

50. *Id.* at 887.

51. *Id.* Post-decree spousal maintenance may be awarded by the trial court in a dissolution action where the recipient spouse is physically or mentally incapacitated so that it impairs his/her

be deemed rehabilitative maintenance, but instead argued that it should be sustained as a valid property distribution. Apparently, at the final hearing she requested that the trial court award her “an alimony judgment” in the sum of \$400,000 because of Husband’s conduct in dissipating marital assets which was amply supported by the evidence. The trial court denominated the award as a “maintenance award” because Indiana does not have provisions for the awarding of alimony.⁵²

The court of appeals sustained the \$400,000 award reasoning that “characterizing an award as maintenance does not make it so.”⁵³ The court of appeals stated that the record clearly indicated that the \$400,000 award was intended to be an award representing Wife’s distribution of the marital estate. The trial court had held that the evidence supporting Husband’s dissipation of assets had justified the distribution of the marital assets and debts.⁵⁴

In *Thompson v. Thompson*,⁵⁵ the trial court required Husband to pay Wife’s COBRA medical coverage. Husband appealed contending that this amounted to “an impermissible award of spousal maintenance.”⁵⁶ On appeal, the court agreed that requiring Husband to pay Wife’s COBRA benefits was “an improper award of spousal maintenance,”⁵⁷ observing that:

ability to support him or herself; if the recipient spouse is the custodian of an incapacitated child which requires the spouse to forego employment and he or she lacks sufficient property to provide for his or her needs and “rehabilitative maintenance” to improve job market ability. IND. CODE § 31-15-7-2 (2004). Concerning “rehabilitative maintenance,” Indiana Code section 31-15-7-2(3) provides:

(3) After considering:

- (A) the educational level of each spouse at the time of marriage and at the time the action is commenced;
- (B) whether an interruption in the education, training, or employment of a spouse who is seeking maintenance occurred during the marriage as a result of home making or child care responsibilities, or both;
- (C) the earning capacity of each spouse, including educational background, training, employment skills, work experience, and length of presence in or absence from the job market; and
- (D) the time and expense to acquire sufficient education or training to enable the spouse seeking maintenance to find appropriate employment;

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

Id. § 31-15-7-2(3).

52. *Benjamin*, 798 N.E.2d at 887.

53. *Id.* at 888 (citing *Millar v. Millar*, 581 N.E.2d 986, 987 n.1 (Ind. Ct. App. 1991), *rev’d as to remedy ordered*, 593 N.E.2d 1182, 1183 (Ind. 1992)).

54. *Id.*

55. 811 N.E.2d 888 (Ind. Ct. App. 2004).

56. *Id.* at 908.

57. *Id.* at 910. The court indicated that an order of post-dissolution periodic payments from

Indiana courts are very restricted in their ability to award spousal maintenance. . . . (Spousal maintenance may only be ordered when the court finds (1) a spouse to be physically or mentally incapacitated, (2) a spouse must forego employment in order to care for a child with a physical or mental incapacity, or (3) a spouse needs support while acquiring sufficient education or training to get an appropriate job.)⁵⁸

The court noted that Wife's health insurance benefits would terminate upon her death and that the COBRA payments would be made from future income. Those facts, coupled with the absence of evidence in the record that Wife had any disability or could not earn the substantial income she earned prior to separation resulted in the court reversing the order for COBRA coverage.⁵⁹

A related issue in *Thompson* concerned the trial court's order that Husband pay Wife the sum of \$70,000 so that Wife would realize seventy percent of the marital estate. The problem was that the trial court provided in its Order that this award was in the nature of alimony or maintenance and was not dischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(5) and 523(a)(15).⁶⁰

On appeal, the court observed that, because state courts have concurrent jurisdiction with federal courts to determine what constitutes non-dischargeable maintenance or support, state appellate review was premissible.⁶¹ The court of

one spouse to another does not always amount to spousal maintenance and can be considered property settlement if:

- (1) The payments are for a sum certain payable over a definite period of time;
- (2) There are no provisions for modification based upon future events;
- (3) The obligation to make the payments survives the death of the parties;
- (4) The provisions call for interest; and
- (5) The award does not exceed the value of the marital assets at the time of the dissolution.

Id. at 909. The court noted that the following factors tend to indicate that a periodic post-dissolution payment constitutes an award of spousal maintenance:

- (1) The designation of a payment as spousal maintenance;
- (2) The presence of provisions terminating the payments upon the death of either party;
- (3) The presence of orders requiring payments made from future income;
- (4) The presence of a provision for termination upon marriage;
- (5) The presence of provisions calling for modification based upon future events; and
- (6) The presence of orders requiring payments for an indefinite period of time.

Id.

58. *Id.* at 909 (citing *Brinkman v. Brinkman*, 722 N.E.2d 441, 445-46 (Ind. Ct. App. 2002); *Voigt v. Voigt*, 670 N.E.2d 1271, 1275-77 (Ind. 1996)).

59. *Id.* at 910.

60. *Id.* Section 523(a)(5) excepts from discharge alimony, maintenance, and support of a spouse or child. 11 U.S.C. § 523(a)(5) (2000). Section (a)(15) exempts from discharge debts that may more properly be described as arising from a court's order respecting property distribution. *Id.* § 523(a)(15).

61. *Thompson*, 811 N.E.2d at 911 (citing *Goodman v. Goodman*, 754 N.E.2d 595, 602 (Ind.

appeals went on to hold that the trial court could not make the award part of its order non-dischargeable in bankruptcy under 11 U.S.C. § 523(a)(5) because there was no evidence to support a finding that Wife was entitled to spousal maintenance and because Indiana does not recognize alimony.⁶²

In the case of *Augspurger v. Hudson*,⁶³ the court was called upon to determine whether the payment of a set amount for future medical expenses was a proper maintenance award. The evidence at trial showed Wife to be disabled and the trial court awarded Wife weekly spousal maintenance payments, as well as \$6000 for future medical expenses. Husband appealed. Among other challenges, Husband contended the \$6000 award to Wife for future medical treatment was a post-dissolution debt because it had not been specifically denominated maintenance or support.⁶⁴

The court determined, however, it was clear that the award for future medical treatment constituted an award of maintenance.⁶⁵ The trial court had made ample findings of Wife's incapacity. The court said that if the trial court makes a finding of mental or physical incapacity materially affecting the person's ability to be self-supporting, an award such as one in this case could be considered support or maintenance without specifically denominating it as support or maintenance.⁶⁶

II. CHILD CUSTODY AND PARENTING TIME

A. Grandparent Visitation

Several cases during the survey period involved the issue of grandparent visitation with some interesting twists. In *Wilson v. Cloum*,⁶⁷ the maternal grandparents were awarded guardianship of their daughter's child after their daughter was killed by her husband, the son of the paternal grandmother. The maternal grandparents then denied the paternal grandmother access to the child. Prior to this the paternal grandmother had frequent visitation and contact with the child. The paternal grandmother petitioned for visitation with the child and the

Ct. App. 2001)).

62. *Id.* The court also went on to say that, while the \$70,000 payment may not be dischargeable under 11 U.S.C. § 523(a)(15), that issue could only be determined during the course of a bankruptcy upon the filing by the creditor-spouse of a petition to determine non-dischargeability. *Id.* at 911-12.

63. 802 N.E.2d 503 (Ind. Ct. App. 2004).

64. *Id.* at 510-11.

65. *Id.* at 511.

66. *Id.* at 511 & n.6 (citing *Coster v. Coster*, 452 N.E.2d 397, 403 (Ind. Ct. App. 1983)). The court noted that *Coster* was incorrect to the extent that it held that an award merely designated as support or maintenance without specific findings was sufficient to establish the award as support or maintenance.

67. 797 N.E.2d 288 (Ind. Ct. App. 2003).

trial court granted the paternal grandmother's petition.⁶⁸ The maternal grandparents appealed.

The maternal grandparents argued that the trial court failed to presume that their decision regarding visitation with the child was in that child's best interest and it failed to give their decision special weight.⁶⁹ The court held that there is a presumption that the trial court followed the law in the exercise of its discretion and discussed *McCune v. Frey*,⁷⁰ in setting forth their requirements for a decree granting or denying grandparent visitation.⁷¹

Holding that the maternal grandparents' contention merely sought reweighing the evidence, the decision was affirmed. Interestingly, the trial court ordered that the paternal grandmother should be the babysitter for the child. The court of appeals vacated that part of the order stating that:

Clearly, choosing the babysitter is an everyday responsibility of child rearing in which the state has no special interest in substituting its

68. *Id.* at 290. Indiana Code section 31-17-5-1 provides that

(a) A child's grandparent may seek visitation rights if:

- (1) the child's parent is deceased;
- (2) the marriage of the child's parents has been dissolved in Indiana; or
- (3) subject to subsection (b) the child was born out of wedlock.

(b) A court may not grant visitation rights to a parental grandparent of a child who is born out of wedlock under subsection (a)(3) if the child's father has not established paternity in relation to the child.

IND. CODE § 31-17-5-1 (2004). Indiana Code section 31-17-5-2 provides

(a) The court may grant visitation rights if the court determines that visitation rights are in the best interests of the child;

(b) In determining the best interest of the child under this section, the court may consider whether a grandparent has had or has attempted to have meaningful contact with the child.

Id. § 31-17-5-2(a)-(b).

69. The maternal grandparents relied upon *Crafton v. Gibson*, 752 N.E.2d 78 (Ind. Ct. App. 2001). *Crafton* held that the trial court must presume that a parent's decision with respect to visitation is in the child's best interest and that the trial court must give "special weight" to the parent's decision regarding visitation. *Id.* at 98-99. The *Crafton* court relied upon the United States Supreme Court's decision in *Troxel v. Granville*, 50 U.S. 57 (2000).

70. 783 N.E.2d 752, 757 (Ind. Ct. App. 2003).

71. *Wilson*, 797 N.E.2d at 291. *Wilson* cited *Frey* for the proposition that when a trial court enters a decree granting or denying grandparent visitation, it must set forth findings of fact and conclusions of law in said decree. *Wilson* stated:

In those findings and conclusions, the trial court should address: (1) the presumption that a fit parent acts in his or her child's best interest; (2) the special weight that must be given to a fit parent's decision to deny or limit visitation; (3) whether the grandparent has established that visitation is in the child's best interest; and (4) whether the parent has denied visitation or has simply limited visitation.

Id. at 291 n.2.

judgment. It is one thing for the trial court to grant Grandmother visitation with [the child] under Indiana Code Section 31-17-5-2; it is quite another for the trial court to dictate [maternal grandparents] choice of a babysitter. We therefore vacate that portion of the trial court's order.⁷²

The case of *Maser v. Hicks*,⁷³ involved a case where the minor child's maternal step-grandfather filed a petition for grandparent visitation. The trial court granted the petition and Father appealed. The court of appeals reversed and remanded holding that the step-grandfather was not a "grandparent" for the purposes of the Grandparent Visitation Act.⁷⁴ Mother and Father divorced in 1995 and Mother was granted custody of the minor child. Mother died in September 2003 and after her death, the minor child went to live with the step-grandfather. Subsequently, Father sought and gained custody of the minor child and the step-grandfather petitioned for grandparent visitation. The trial court held a hearing on the step-grandfather's petition and granted the step-grandfather's petition. Father argued on appeal that the trial court's order was erroneous because the step-grandfather lacked standing to petition for visitation under the grandparent visitation act.⁷⁵ In other words, it was Father's contention that the step-grandfather was not a "grandparent" under the terms of the Act. In addressing this question, the court stated that: "In order to seek visitation rights with grandchildren, grandparents must have standing to seek those rights under the Grandparent Visitation Act. . . . If grandparents lack standing, their petition must be denied as a matter of law."⁷⁶ The court noted that Indiana Code section 31-9-2-77 defines "maternal/paternal grandparents" as including: "(1) the adoptive parent of the child's parent; (2) the parent of the child's adoptive parent; and (3) the parent of the child's parent."⁷⁷

The court then went on to hold that the step-grandfather "does not fit into any of the categories in the statutory definition of a grandparent entitled to petition for grandparent visitation rights."⁷⁸ By declining to expand the Grandparent Visitation Act to include step-grandparents as "grandparents," the court held that the Grandparent Visitation Act applies only to requests for visitation made by the grandparents.⁷⁹

B. Jurisdiction

*In re Custody of A.N.W.*⁸⁰ involved a couple who were divorced in Texas.

72. *Id.* at 292.

73. 809 N.E.2d 429, 430 (Ind. Ct. App. 2004).

74. *Id.* at 432.

75. *Id.* at 431.

76. *Id.* at 432 (citing *In re J.D.G.*, 756 N.E.2d 509, 511 (Ind. Ct. App. 2001)).

77. *Id.* (citing IND. CODE § 31-9-2-77 (1998)).

78. *Id.*

79. *Id.* at 433.

80. 798 N.E.2d 556, 558 (Ind. Ct. App. 2003).

Husband was granted custody of the child and, subsequently, the child came to live with Mother in Indiana. Mother enrolled the child in school. After approximately eighteen months, Father showed up unannounced at the child's school during school hours. Mother immediately requested an emergency hearing because Father was now in Indiana. The trial court, before holding a hearing on Mother's verified petition to transfer and assume jurisdiction and to modify the custody decree from Texas, contacted the presiding judge in Texas by telephone. The court learned that there were no pending proceedings in Texas and the Texas court, upon learning that the child had been living in Indiana and enrolled in school for approximately eighteen months, declined jurisdiction. The Indiana court then assumed jurisdiction over the child. The trial court granted temporary custody to Mother, granted visitation to Father, and ordered that the child not be removed from the state and county until further order of the court. The matter was then set for final hearing. Father filed a motion to correct errors asserting that the Texas court retained jurisdiction. The trial court denied the motion to correct errors and ordered Father to pay child support pending a final hearing. At the final hearing, Mother was awarded legal and physical custody of the child. Father was ordered to pay child support and was granted visitation.⁸¹

On appeal, Father maintained that the declining of jurisdiction by the Texas court over the telephone was improper because it did not make a written order. Thus, Indiana could not have jurisdiction over the child.⁸² In affirming the trial court, the court of appeals stated that the Uniform Child Custody Jurisdiction Act ("UCCJA") is the "exclusive method of determining the subject matter jurisdiction of a court in a custody dispute with an interstate dimension."⁸³ The court stated that under the UCCJA the court where the child custody matter was initially decided gains exclusive jurisdiction as long as "a significant connection" remains between the controversy and the state.⁸⁴ The first court retains exclusive jurisdiction only until the child and all of the parties have left the state.⁸⁵ That court will have exclusive jurisdiction so long as the significant connection remains or unless that court decides if it will defer jurisdiction to the court of another state which it determines is a more convenient forum to "litigate the issues."⁸⁶ In this case, the Texas court had continuing exclusive jurisdiction despite Mother's relocation to Indiana because Father's continued residence in Texas provided a "significant connection" with the Texas court.⁸⁷ Turning to the inquiry as to whether the telephone conversation between the Indiana court and the Texas court was sufficient for Texas to decline and for Indiana to exercise jurisdiction,⁸⁸ the court held that the telephone conversation, which was made a

81. *Id.* at 560.

82. *Id.*

83. *Id.*

84. *Id.* at 561-62.

85. *Id.*

86. *Id.*

87. *Id.* at 562.

88. Indiana Code section 31-17-3-7(i) provides that "[a]ny communication received from

part of the record by the Indiana court, properly evidenced that the Texas court declined jurisdiction and that the Indiana court rightfully assumed jurisdiction.⁸⁹ The court relied upon Indiana Code section 31-17-3-6(c), which

permits the Indiana court to “communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged. . . .” We find nothing in the Indiana statutes that requires a written order from the court that is declining jurisdiction.⁹⁰

The court, noting that the Texas court did not follow-up the telephone conversation with a written order, suggested that this would have been the better practice but it was not fatal.⁹¹ It would seem that in circumstances like this in the future, it would behoove the Indiana court to request an order from the foreign court declining jurisdiction.

In re Paternity of A.B.,⁹² decided by the supreme court, clarifies the law in Indiana that minimum contacts are necessary to confer in personam jurisdiction in a paternity matter, thereby overruling *In re Paternity of Robinaugh*.⁹³ In *Paternity of A.B.*, Mother filed a petition to establish paternity, child support, and parenting time in Indiana. Father filed a motion to dismiss contending that he had never been physically present in Indiana and, thus, the court had no jurisdiction over him. Mother contended that the UCCJA conferred jurisdiction to establish paternity and to determine custody and parenting time. The trial

another state informing this state of a finding of inconvenient forum because a court of this state is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this state shall inform the original court of this fact.” IND. CODE § 31-17-3-7(i) (2004).

89. *In re Custody of A.N.W.*, 798 N.E.2d at 563.

90. *Id.* (quoting IND. CODE § 31-17-3-6(c)).

91. *Id.* at 564. The court also opined that “under the ‘home state’ analysis of the UCCJA, the Indiana court properly exercised jurisdiction over this matter.” *Id.* The court found that the child had lived in Indiana since December 2000; had attended school in Indiana since January 2001; and, that this action was not an issue until April 2002. Thus, Indiana was the home state of the child. *Id.* at 564-65.

92. 813 N.E.2d 1173 (Ind. 2004).

93. 616 N.E.2d 409 (Ind. Ct. App. 1993). *Robinaugh* was a paternity case in which the alleged biological Father filed a petition to establish his paternity and sought custody of the child. The child was born in Indiana and at the time the petition was filed, resided in Indiana. However, both Mother and Father resided in Arizona. Mother’s only contact with Indiana was her “single venture” into the State to give birth. She sought to dismiss, contending that this “single venture” did not satisfy the minimum contacts requirement of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *Paternity of A.B.*, 813 N.E.2d at 1175. The court of appeals in *Robinaugh* disagreed with Mother and held that the UCCJL was applicable because, “[c]ustody proceedings are adjudications of status, and as such are an exception to the minimum contacts requirements normally associated with discussions of personal jurisdiction.” *Robinaugh*, 616 N.E.2d at 411. The supreme court did not review *Robinaugh* because transfer had not been requested.

court determined that it lacked personal jurisdiction over the alleged Father and dismissed Mother's petition.⁹⁴ The court of appeals, in a memorandum decision, reversed in part and remanded. Transfer was granted.

On transfer, the supreme court affirmed the decision of the trial court. The supreme court relied on its opinion in the paternity case of *Stidham v. Whelchel*⁹⁵ in which the alleged Father contended he had no minimum contacts with Indiana. The supreme court held that a judgment is violative of the Due Process Clause of the Fourteenth Amendment if it is entered without minimum contacts.⁹⁶ It reiterated its finding in *Stidham*:

A court simply has no power over persons who have no contact with their [sic] territory, unless and until there is a response or an appearance and the lack of personal jurisdiction is not protested. Accordingly, if *Stidham* is correct that no minimum contacts existed, then the Indiana trial court did not have personal jurisdiction over him and its effort to exercise that power was a nullity.⁹⁷

The supreme court went on to point out that in *Paternity of A.B.* the UCCJA was incorrectly applied in *Robinaugh* because the UCCJA did not specifically refer to paternity proceedings.⁹⁸ In contrast to the UCCJA, the court noted that the Uniform Interstate Family Support Act ("UIFSA"), codified at Indiana Code section 31-18-2-1,⁹⁹ does specifically apply to paternity actions and permits an

94. *Paternity of A.B.*, 813 N.E.2d at 1174.

95. 698 N.E.2d 1152 (Ind. 1998).

96. *Paternity of A.B.*, 813 N.E.2d at 1175.

97. *Stidham*, 698 N.E.2d at 1155 (quoted in *Paternity of A.B.*, 813 N.E.2d at 1175).

98. *Paternity of A.B.*, 813 N.E.2d at 1175.

99. *Id.* The UIFSA, Indiana Code section 31-18-2-1 provides:

In a proceeding . . . an Indiana tribunal may exercise personal jurisdiction over a non-resident individual or the individual's guardian or conservator if:

- (1) the individual is personally served with notice in Indiana;
- (2) the individual submits to the jurisdiction of Indiana by:
 - (A) consent;
 - (B) entering an appearance, except for the purpose of contesting jurisdiction;or
 - (C) filing a responsive document having the effect of waiving contest to personal jurisdiction;
- (3) the individual resided in Indiana with the child;
- (4) the individual resided in Indiana and has provided prenatal expenses or support for the child;
- (5) the child resides in Indiana as a result of the acts or directives of the individual;
- (6) the individual engaged in sexual intercourse in Indiana and the child;
 - (A) has been conceived by the act of intercourse; or
 - (B) may have been conceived by the act of intercourse if the proceeding is to establish paternity;
- (7) the individual asserted paternity of the child in the putative father registry

Indiana trial court to exercise personal jurisdiction pursuant to the minimum contacts listed therein. Therefore, the court determined “the UCCJ[A] cannot be deemed to supersede the due process protections of the Fourteenth Amendment. Upon this issue, *Robinaugh* was incorrectly decided.”¹⁰⁰

The supreme court reversed and vacated the court of appeals decision in *Gamas-Castellanos v. Gamas*.¹⁰¹ The original decree granted in Texas awarded custody to Mother and granted visitation rights to Father. Subsequently, Mother moved to Indiana with the children. Thereafter, she allowed the youngest child to live with Father in the Netherlands. When Father returned to the United States, he and the youngest child moved to Louisiana.

Father then sought an order from a Louisiana court determining custody. Mother traveled to Louisiana, returned the child to Indiana and filed a motion to dismiss in the Louisiana court. The Louisiana court rejected Mother’s argument finding that Louisiana did have jurisdiction because Louisiana was the “home state” of the youngest child, and ordered the return of the child to Father.¹⁰² During the pendency of the Louisiana proceeding, Mother filed a motion to modify in Indiana. The Indiana trial court, contrary to the determination of the Louisiana court, determined that Indiana was the “home state” of both children and that it could exercise jurisdiction over the custody dispute regarding both children. The Indiana Court of Appeals affirmed and transfer was granted to the supreme court which vacated the opinion of the court of appeals.¹⁰³ The supreme court held that “Louisiana exercised jurisdiction in substantial conformity with the UCCJA and, therefore, under Indiana Code [section] 31-17-3-6, [the Indiana trial court] should not have also exercised jurisdiction over custody of the younger child.”¹⁰⁴ The supreme court went on to state that even if the Louisiana court had committed error in determining the “home state issue” the matter was fully and conclusively litigated in Louisiana with both parties participating, and therefore, the Louisiana decision was entitled to full faith and credit in Indiana.¹⁰⁵

The case of *Sudvary v. Mussard*,¹⁰⁶ involved a matter of first impression. The issue was whether a trial court, which had proper jurisdiction under the UCCJA, at the time the party filed a petition to modify custody, lost that

administered by the State Department of Health under IC 31-19-5; or

(8) there is any other basis consistent with the Constitution of the State of Indiana and the Constitution of the United States for the exercise of personal jurisdiction.

IND. CODE § 31-18-2-1 (cited in *Paternity of A.B.*, 813 N.E.2d at 1175 n.2).

100. *Paternity of A.B.*, 813 N.E.2d. at 1175-76.

101. 803 N.E.2d 665 (Ind. 2004).

102. *Id.* at 666. The Louisiana court found that under the UCCJA, it lacked jurisdiction to decide custody issues regarding the older child.

103. *Id.*

104. *Id.* This case was expedited by the supreme court because it involved the issue of child custody. Instead of a formal opinion, the supreme court issued a “Dispositive Published Order.” See IND. APP. R. 21(A).

105. *Gamas-Castellanos*, 803 N.E.2d at 666.

106. 804 N.E.2d 854 (Ind. Ct. App. 2004).

jurisdiction when the party moved to another state while the petition was pending.¹⁰⁷

The parties were originally married in Ohio, and after having lived in Indiana for six months, Father filed a petition for dissolution of marriage in Indiana. As part of the decree of dissolution, the trial court ordered that the parties share joint legal custody, with Mother having primary physical custody and Father having visitation. Approximately two years after the decree of dissolution was entered, Father filed a motion to modify the physical custody. While the petition was pending, Father moved from Indiana to Illinois because of a job transfer. Mother did not live in Indiana. Mother moved to dismiss arguing that the trial court lacked jurisdiction under the UCCJA because neither party lived in Indiana. The trial court denied Mother's motion and ordered that Father have physical custody of the child. Mother appealed.¹⁰⁸

Mother argued on appeal that the trial court lost jurisdiction under the UCCJA when Father moved from Indiana to Illinois. Father argued that the trial court properly had jurisdiction because it had jurisdiction when Father filed his petition for modification and once the petition was filed, the trial court cannot be divested of jurisdiction under the UCCJA while the petition was pending.¹⁰⁹ In affirming the trial court, the court of appeals held that "jurisdiction under the UCCJA is established on the date that a party files a petition to modify and that a court may not lose jurisdiction while such a matter is pending."¹¹⁰

C. Modification of Custody

The case of *Rea v. Shroyer*,¹¹¹ dealt with the issue of whether a court is allowed to consider events that occurred after the non-custodial parent filed a petition for custody modification in determining whether a substantial change of circumstances had occurred to allow for the modification of the initial custody award. The child was born out of wedlock and paternity was established in Father. Mother was awarded custody and Father was required to pay support. Approximately three years later, Father filed a petition to modify custody and support, alleging a substantial and continuing change of circumstances justified modifying custody. After a hearing, trial court granted the petition and custody was established in Father. Making its determination, the trial court considered evidence after the petition was filed in support of a finding that a substantial change of circumstances had occurred.¹¹²

On appeal, Mother contended that the trial court committed error when it considered factors that had occurred after Father had filed his petition relying

107. *Id.* at 855.

108. *Id.* at 855-56.

109. *Id.* at 856.

110. *Id.*

111. 797 N.E.2d 1178 (Ind. Ct. App. 2003).

112. *Id.* at 1180-81.

upon the case of *Joe v. Lebow*,¹¹³ for the proposition that evidence must be limited to changes occurring prior to the filing of the petition for modification. Regarding *Joe*, the court stated the following:

In *Joe*, we held that when making a determination regarding modification of custody, evidence of events occurring after the court granted an emergency petition to modify support may be considered *only* when determining what is in the best interests of the child. As for a substantial change in one of the factors in Ind. Code [section] 31-14-13-6, the evidence must demonstrate “changes occurring . . . while in Mother’s custody prior to the emergency petition which justified the transfer of custody.”¹¹⁴

The court also noted that in a cases decided after *Joe* it had held that the trial court may consider all changes that have occurred since the last custody determination and at the time of the hearing.¹¹⁵ Therefore, the court held that when determining whether a substantial change has occurred in one of the statutory factors, that it was proper to consider any events between the time the original custody was determined and the hearing.¹¹⁶

In Indiana it is well established that, when joint custody has not been awarded, the custodial parent has the right to determine the religious beliefs and training of the child as long as the custodial parent’s religious views do not harm the emotional or physical well-being of the child. *Conflenti v. Huff*¹¹⁷ addressed the issue of limitations on a non-custodial parent’s exercise of visitation and parenting time because of the custodial parent and child’s religious beliefs. The child, who was born out of wedlock, and the custodial parent were Jehovah’s Witnesses. As part of their religious beliefs, they do not celebrate birthdays, holidays, or Christmas. The trial court had imposed limitations upon the non-custodial parent’s visitation and parenting time so as not to conflict with the child’s beliefs. The non-custodial parent was prohibited from celebrating birthdays and holidays, and was not allowed to give gifts. Furthermore, the non-custodial parent was not allowed to have parenting time with the child on Christmas or Christmas Eve. On appeal, the Indiana Court of Appeals affirmed the trial court’s determination that these limitations would be in the best interest of the child.¹¹⁸ The court noted that Indiana Code section 31-14-14-1¹¹⁹ allows the court to impose restrictions on parenting time if, after a hearing, the exercise of that parenting time might endanger the child’s health or well-being or impair the child’s emotional development.¹²⁰ Other Indiana cases had allowed

113. 670 N.E.2d 9 (Ind. Ct. App. 1996).

114. *Rea*, 797 N.E.2d at 1182 (citing *Joe*, 670 N.E.2d at 22-23).

115. *Id.* at 1183.

116. *Id.*

117. 815 N.E.2d 120 (Ind. Ct. App. 2004).

118. *Id.* at 126.

119. IND. CODE § 31-14-14-1 (2004).

120. *Conflenti*, 815 N.E.2d at 124.

restrictions on parenting time to accommodate a child's religion as long as interference with parenting time was not unreasonable and the custodial parent was not using religion to limit the non-custodial parent's visitation.¹²¹ Here, the non-custodial parent was not being denied parenting time but had been ordered to avoid activities that conflicted with the child's religious beliefs.¹²²

III. CHILD SUPPORT

A. *College Expenses*

Several cases during the survey period dealt with the issue of college expense. In *Naggatz v. Beckwith*,¹²³ Father agreed to pay all of the child's college expenses and uninsured healthcare expenses in lieu of child support. Mother had filed a petition to modify child support and determine education expenses. At the hearing, the parties submitted the stipulation referred to above. The trial court ordered Father to pay \$10,040 a year in college expenses plus \$3,684 in uninsured healthcare expenses. The bone of contention was that the court's order differed from the stipulation that had been submitted to the court.¹²⁴ The court's order respecting college expenses reflected a credit to Father for the amount of the child's Stafford loan. The agreement had called for the child to pay proceeds of the loan over to Father. Mother appealed, arguing that this deviation from the parties' stipulation essentially required the child to pay a portion of her college expenses, when the intent of the parties was to have the child not have to pay any expenses.¹²⁵ Referring to the Indiana Child Support Guideline 6, the Indiana Court of Appeals held that the policy of the Guidelines required post-secondary education be "a group effort."¹²⁶ The Guidelines state that "scholarships, grants, student loans, summer and school year employment . . . should be credited to the child's share of the educational expenses unless the court determines that it should credit a portion of any scholarships, grants, and loans to either or both parents' shares."¹²⁷ Thus, the court held that the trial court committed no error crediting the amount of the loan to the child as her share of the educational expenses, and even though the wishes of the parties are to be given great weight, it is the duty of the trial court to determine if any agreement is in the best interest of the child.¹²⁸

121. See *Periquet-Febres v. Febres*, 659 N.E.2d 602, 606 (Ind. Ct. App. 1995); *Johnson v. Nation*, 615 N.E.2d 141, 145-46 (Ind. Ct. App. 1993); *Overman v. Overman*, 497 N.E.2d 618, 619 (Ind. Ct. App. 1986).

122. *Conflenti*, 815 N.E.2d at 125.

123. 809 N.E.2d 899 (Ind. Ct. App.), *trans. denied* 822 N.E.2d 974 (Ind. Ct. App. 2004).

124. *Id.* at 901-02.

125. *Id.* at 902.

126. *Id.* (quoting IND. CHILD SUPP. G. 6).

127. *Id.* (emphasis omitted) (quoting IND. CHILD SUPP. G. 6).

128. *Id.*

Sebastian v. Sebastian,¹²⁹ was a case of first impression where the Indiana Court of Appeals held that Father was not required to pay a child's college expenses for any semester immediately following a semester where the child did not achieve at least a 2.0 GPA. The parties here were divorced in June 1994 and in September 1997 the trial court ordered the parents to equally share the son's tuition and book expenses provided that the son remain a full-time student, maintain a C-average and furnish Father with grades upon their receipt.¹³⁰ Thereafter, the son attended Ball State and for the 1998-1999 school year failed to earn a C-average. Because of this, he was unable to register for the Fall 1999 semester. The son had to petition the University to allow him to return and he returned to the University, for the Spring 2000 semester. He eventually graduated in 2002.¹³¹ Father did not pay tuition or expenses for the child. Mother sought contribution for these expenses from Father. Ultimately, the trial court entered an order requiring Father to reimburse Mother in excess of \$27,000 for the son's college and living expenses.¹³²

On appeal, Father argued that his son's first poor performance should have been sufficient grounds to emancipate the child fully and relieve Father of his obligation for educational expenses.¹³³ The court noted, however, that to adopt that position would have made it impossible for the son to graduate from college and was too harsh. Instead, it relieved Father of his educational expense obligation only following those semesters in which the son had failed to maintain the proper grade point average. The court remanded to the trial court to determine which semesters Father should be relieved of payment, keeping in mind that Father "should not be required to contribute to any semester following a semester where [son] achieved below a 'C' average."¹³⁴

*Borth v. Borth*¹³⁵ involved a case where the parties attempted to provide for post-secondary education in the dissolution decree, their intent, it seemed, to cap their obligation at the cost of an Indiana state-supported university. While the child was a senior in high school, the child began exploring college alternatives. One of those college alternatives included Baylor University, a private school in Texas. Mother knew that daughter was contemplating attending Baylor University, assisted in the process and even drove the child to Baylor for the start of her first year of college.

In the divorce settlement, the parties agreed as follows:

7. Post-secondary Education: Each of the parties agree that they will

129. 798 N.E.2d 224 (Ind. Ct. App. 2003).

130. *Id.* at 225.

131. *Id.* at 226.

132. *Id.*

133. *Id.* at 234. The court, earlier in the decision, held that the son had turned twenty-one prior to the hearings on Father's petition and was emancipated as a matter of law as of the date he turned twenty-one. *Id.* at 229.

134. *Id.* at 234, 236.

135. 806 N.E.2d 866 (Ind. Ct. App. 2004).

share in the future post-secondary educational expenses incurred by each of the minor children in such sum as would be appropriate for a student attending a state support [sic] Indiana University, unless otherwise agreed, in shares proportionate to their incomes which are 63% for the Petitioner and 37% for the Respondent.¹³⁶

Mother refused to pay thirty-seven percent of the cost of attending Baylor University and instead insisted that her responsibility was limited to thirty-seven percent of the cost of attending Indiana University. In response, Father filed a petition to modify the agreement on post-secondary education. At the hearing, the trial court ordered Mother to pay thirty-seven percent of the cost of the child's freshman year at Baylor and then forty percent of her tuition, room, board, books, fees and automobile, for the remainder of her college education. The trial court found that the parties had modified the property settlement agreement when Mother agreed that the child could attend Baylor. Mother appealed.¹³⁷

On appeal, the court noted that parties can provide for post-secondary education expenses in their settlement agreement, but these provisions are subject to modification by the trial court.¹³⁸ However, the court need not modify such an agreement if the change in circumstances was contemplated at the time the support order was entered.¹³⁹ The parties did not specify in their agreement how expenses in excess of those attributed to a state-supported school should be apportioned so the change in circumstances here was not contemplated in the agreement.¹⁴⁰ Therefore, it was proper for the trial court to address the issue. The fact that the parties had an eighty-nine percent increase in income, along with Mother's knowledge and acquiescence in the child's attending the private university represented a substantial change in circumstance justifying modification of the support order.¹⁴¹ Interestingly, the Indiana Court of Appeals advised trial courts to proceed with caution in modifying agreements where the property settlement provided for in-state college education costs versus out-of-state or private institution costs.¹⁴² It would seem, that when drafting a property settlement that encompasses college costs, if it is the intent of the parties to cap their obligation at the cost of state-supported schools, then care should be taken to exclude other possibilities that may arise.

B. Modification Due to Change in Income

A couple of cases during the survey period dealt with modification of support

136. *Id.* at 868.

137. *Id.* at 868-69.

138. *Id.* at 869.

139. *Id.* at 870.

140. *Id.*

141. *Id.*

142. *Id.* at 871.

due to change in the income of the parties. *Burke v. Burke*,¹⁴³ involved a father who was an assistant college football coach who lost several jobs resulting in a reduction of income each time. Father petitioned for a modification in child support after each job loss. The most recent modification downward of child support was filed less than a year after the previous modification.

Mother's argument on appeal was that (1) the trial court's modification was less than twenty percent of the previous order and it occurred before the one year limitation period imposed by Indiana Code section 31-16-8-1(2), and (2) Father did not present any evidence of changed circumstances to support the modification order. Father responded by contending that a decrease in income by \$10,000 qualified as substantial change in circumstances.¹⁴⁴

Indiana Code section 31-16-8-1 is the basis for modifying child support orders in Indiana and provides in part that child support orders may be modified only:

- (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or
- (2) upon a showing that:
 - (A) the party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and
 - (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.¹⁴⁵

Mother argued that there was not a twenty percent difference between the modified order and the previous order. Essentially, the Indiana Court of Appeals determined that Mother was attempting to convince them that in order to modify support, both subsections of the statute need to be satisfied. The court rejected this contention, affirming that either Indiana Code section 31-16-8-1(1) or section 31-16-8-1(2) may be used to seek modification of a child support order.¹⁴⁶ The court did not address the twenty percent issue, but instead focused on the change in circumstances.¹⁴⁷ Father did not change jobs in order to avoid paying child support and he lost his job, not because he performed poorly, but because the head coach was fired and, a fact of life in college football is that when the head coach gets fired, so do the assistant coaches. The record showed that Father was forced to accept a lower paying job in order to remain in his chosen field. As a result of the lowered income, Father's budget revealed that he had very little discretionary income left after paying bills and child support. The court found

143. 809 N.E.2d 896 (Ind. Ct. App. 2004).

144. *Id.* at 898.

145. IND. CODE § 31-16-8-1 (2004).

146. *Burke*, 809 N.E.2d at 898.

147. *Id.*

a substantial change in circumstances.¹⁴⁸

In the case of *MacLafferty v. MacLafferty*,¹⁴⁹ the court found that Father's child support obligation could be modified and reduced due to an increase in Mother's income. It also found that a summer day camp was no longer needed as a child care expense because Father's wife was capable of providing child care at no cost during the summer.¹⁵⁰ However, the Indiana Supreme Court granted transfer and pursuant to Indiana Appellate Rule 58 (A) the opinion of the court is vacated. The Indiana Supreme Court had not issued an opinion as of the date this survey was written.

C. Emancipation/Repudiation of Parent

In the case of *Butrum v. Roman*,¹⁵¹ the court dealt with the issue of when is a child "enrolled" in school for purposes of the emancipation statute. Indiana Code section 31-16-6-6 provides in part:

(a) The duty to support a child under this chapter ceases when the child becomes twenty-one (21) years of age unless any of the following conditions occurs:

(1) The child is emancipated before becoming twenty-one (21) years of age. In this case the child support, except for the educational needs outlined in section 2(a)(1) of this chapter, terminates at the time of emancipation, although an order for educational needs may continue in effect until further order of the court.

(2) The child is incapacitated. In this case the child support continues during the incapacity or until further order of the court.

(3) The child:

(A) is at least eighteen (18) years of age;

(B) has not attended a secondary or post-secondary school for the prior four (4) months, and is not enrolled in a secondary or post secondary school; and

(C) is or is capable of supporting himself or herself through employment.

(b) For purposes of determining if a child is emancipated under subsection (a)(1), if the court finds that the child:

(1) has joined the United States armed services;

(2) has married; or

(3) is not under the care or control of

(A) either parent; or

148. *Id.* at 899.

149. 811 N.E.2d 450 (Ind. Ct. App.), *trans. granted*, 822 N.E.2d 977 (Ind. 2004).

150. *Id.* at 455.

151. 803 N.E.2d 1139 (Ind. Ct. App. 2004).

(B) an individual or agency approved by the court; the court shall find the child emancipated and terminate the child support.¹⁵²

The parties' daughter moved in with her boyfriend after she had graduated from high school. They lived together from May 2002 until January 2003. During this time, the child worked full-time to save money for college. While she was living with her boyfriend, she still received financial support from her parents. Ultimately, she was accepted to Purdue University and moved to West Lafayette in January 2003 where she began living with three other girls and began her classes. She received a scholarship for tuition and books.

Mother petitioned to modify child support and for contribution toward college expenses and Father filed a petition to emancipate the child. Ultimately, the trial court granted Mother's motion and Father appealed.¹⁵³

On appeal, the court noted, citing *Dunson v. Dunson*,¹⁵⁴ that "[e]mancipation cannot be presumed; rather, the party seeking emancipation must establish it by competent evidence."¹⁵⁵ Father argued that his child was emancipated under both (a)(3) and (b)(3) of Indiana Code section 31-16-6-6. Indiana Code section 31-16-6-6(a)(3) states that the duty to pay child support stops if three requirements are met. Those requirements are: (1) The child is at least 18 years old; (2) the child has not been to school for the prior four months and is not enrolled in school; and (3) the child is capable of self-support through employment.¹⁵⁶ All three requirements must be met before a court can find emancipation has occurred.¹⁵⁷

It was Father's contention that the child had not been enrolled in school for the four months proceeding his filing of the petition to emancipate. The trial court had found that the child was enrolled prior to the filing of the petition to emancipate, because she was going through the application process. This meant that the court of appeals had to decide the definition of "enroll." The court noted that enroll is not defined in Title 31 of the Indiana Code.¹⁵⁸ Therefore, it turned to Title 20 of the Indiana Code, which governs education, for some guidance. At Indiana Code section 20-12-71-6, the court found a definition of enrolled to be "the process enabling a student to become a bona fide member of the student body of a post-secondary institution and entitling the student officially to audit or receive academic credit for on-campus instruction in Indiana."¹⁵⁹ The court also turned to *Black's Law Dictionary*, which defines enroll as "to register . . . into an official record on execution."¹⁶⁰ Ultimately, the Indiana Court of Appeals

152. *Id.* at 1143 (quoting IND. CODE § 31-16-6-6).

153. *Id.* at 1142.

154. 769 N.E.2d 1120, 1123 (Ind. 2002).

155. *Butrum*, 803 N.E.2d at 1143.

156. *Id.* at 1144 (citing IND. CODE § 31-16-66(a)(3)).

157. *Id.*

158. *Id.* at 1145.

159. *Id.* (citing IND. CODE § 20-12-71-6).

160. *Id.* (quoting BLACK'S LAW DICTIONARY 551 (7th ed. 1999)).

determined that “[a]fter viewing these definitions of ‘enroll,’ we conclude that ‘is enrolled’ as used in Indiana Code [section] 31-16-6-6 means more than being involved in the application process; rather, it means that one has been accepted to the institution and is officially registered at the institution as a student.”¹⁶¹

The daughter was still in the application process when Father filed his petition; therefore, the Indiana Court of Appeals found that the trial court’s finding was clearly erroneous and that the child was not enrolled.¹⁶² But, the court did not end the inquiry because all three requirements of subsection (a)(3) must be fulfilled before a child can be emancipated.¹⁶³ The court found that she was not self-supporting because when she and her boyfriend were living together they lived rent free, and she still received financial assistance from her parents for groceries and clothing. As such, she was not emancipated under section (a)(3).¹⁶⁴

Father’s other contention was that the child was emancipated under section (b)(3) because she was “not under the care or control of either parent because she was eighteen years old, living with her boyfriend, and working full time.”¹⁶⁵ Relying again upon *Dunson*, the court of appeals found that to qualify for emancipation under this section, the child must (1) initiate the action putting herself out of the parent’s control; and (2) be self-supporting.¹⁶⁶ While it is true that the child put herself out of the parent’s control, it was also true that she was not self-supporting. The court concluded that Father failed to meet his burden under subsection (b)(3).¹⁶⁷

In a unique case, both factually and procedurally, *Borders v. Noel*,¹⁶⁸ involved the application of Indiana Code section 31-16-6-6(b)(1) which provides for emancipation by operation of law when a child joins the military. In this case, the son joined the Marine Corp Reserves upon graduation from high school. Five weeks into basic training, the child suffered a knee injury which resulted in his discharge from the service. Approximately two months after he joined the military, he then moved back into Father’s home, Father having been awarded physical custody of the child. Mother had been ordered to pay child support. Mother then filed her petition for emancipation. At the time of the hearing, he was not enrolled in school. The trial court determined that “as a matter law,” the son was emancipated when he enlisted in the military and that Mother’s support obligation terminated on the date the child enlisted. Father appealed. Father first asserted that it was error for the trial court to find that the son had been emancipated as a matter of law.¹⁶⁹

161. *Butrum*, 803 N.E.2d at 1145.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 1146.

166. *Id.*

167. *Id.* at 1147.

168. 800 N.E.2d 586 (Ind. Ct. App. 2003).

169. *Id.* at 588.

The son had joined the reserves in June, but was discharged in August due to his injury. Mother had filed her petition for emancipation after the son had been discharged. Relying on the strict interpretation of Indiana Code section 31-16-6-6(b)(1), the Indiana Court of Appeals held that the son was emancipated when he joined the military in June 2002.¹⁷⁰ However, because Mother did not file her petition until after he had been discharged, the court examined the issue of whether the child support obligation had been revived, noting that previous cases had indicated that a support obligation may be revived under certain circumstances.¹⁷¹ Therefore, the trial court erred when it failed to consider whether the support obligation had been revived.¹⁷²

Mother also argued that the child was emancipated under subsection (a)(3). The court of appeals found that the child was not enrolled in school and he was working a full-time job.¹⁷³ Unlike subsection (b)(1), where the child support terminates on the date of emancipation, subsection (a)(3) provides that child support is terminated on the date that the court finds the child is emancipated.¹⁷⁴ Therefore, under subsection (a)(3) the court remanded with instructions to clarify the date upon which Mother's child support obligation terminated under (a)(3).

*Bales v. Bales*¹⁷⁵ involves a case where the child repudiated Mother and maintained no contact with Mother. The trial court terminated Mother's obligation to pay child support. On appeal, the Indiana Court of Appeals reversed.¹⁷⁶ The court first noted that under Indiana law, the child's complete refusal to participate in a relationship with his or her parent, under certain circumstances, will terminate the parent's obligation to pay certain expenses, including college expenses.¹⁷⁷ The court observed that no case in Indiana had determined that a child's withdrawal from communication with the parent justified termination of a parent's financial responsibility to pay child support. The court refused to take that step here and did not extend it to the payment of child support.¹⁷⁸ The court reasoned that the payment of college expenses and the payment of child support are not legally equivalent in Indiana. There is no absolute duty on the part of the parents to provide a college education for their children. Parents do, however, have a legal obligation to provide their children with support.¹⁷⁹

170. *Id.* at 591.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 592.

175. 801 N.E.2d 196 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 807 (Ind. 2004).

176. *Id.*

177. *Id.* at 199 (citing *McKay v. McKay*, 644 N.E.2d 164, 168 (Ind. Ct. App. 1994)).

178. *Id.*

179. *Id.*

D. Income Issues

What is includable as income for the purposes of child support was addressed in a couple of cases during the survey period.

In *McGill v. McGill*,¹⁸⁰ the trial court ordered Father to pay \$15.57 per week in child support. Father was disabled and his income consisted of two components: Supplemental Security Income (“SSI”) of \$296 per month and Social Security Disability Benefits (“SSDI”) in the amount of \$276 per month.¹⁸¹ The trial court used the combination of these two benefits when it calculated the child support obligation. The application of the child support guidelines to Father resulted in an order that denied Father the means of self-support at a subsistence level. On appeal, the court discussed SSDI and SSI. SSI is a means-tested public assistance program.¹⁸² SSDI benefits are awarded for disability and are awarded regardless of the recipient’s income level.¹⁸³

The Indiana Court of Appeals found that because SSI is a means tested public assistance program, SSI payments are not included in a parent’s income for the purposes of computing child support under the Indiana Child Support Guideline 3(A)(1). However, SSDI benefits are included in the definition of weekly gross income.¹⁸⁴ The court of appeals went on to state that including public assistance benefits in the calculation of child support obligations defeats the purpose of the public assistance programs, because these programs are designed to keep the recipient at a minimum subsistence level.¹⁸⁵ The matter was remanded to the trial court to recalculate based solely upon the SSDI benefits. The trial court was further directed to analyze whether the recalculated amount would deprive Father of self-support at a subsistence level.¹⁸⁶

Tebbe v. Tebbe,¹⁸⁷ raised the question of whether pass-through income of an S Corporation that is received by a parent should be included in the calculation of a child support obligation. Here Father was a minority shareholder in a S Corporation. He had non-disbursed pass-through income. Father was employed by the S Corporation and received forty-nine percent of his employer’s stock. His annual salary ranged between \$46,000-52,000. His employer was the S Corporation and, as an owner, he was required to include on his personal taxes a percentage of the company’s income that was attributable to his ownership interest.¹⁸⁸ Father did not actually receive most of the income. He was paid only an amount sufficient to offset his increased tax obligations. The court noted that “[f]or taxation purposes, regardless of whether the income is actually disbursed,

180. 801 N.E.2d 1249 (Ind. Ct. App. 2004).

181. *Id.* at 1250.

182. *Id.* at 1252.

183. *Id.*

184. *Id.*

185. *Id.* at 1253.

186. *Id.*

187. 815 N.E.2d 180 (Ind. Ct. App. 2004).

188. *Id.* at 182.

S Corporation revenue is imputed directly to its shareholders in accordance with the shareholder's percentage of company ownership."¹⁸⁹

Mother petitioned for divorce and the final hearing was held before a magistrate. At the hearing the magistrate found that Father was capable of earning an additional \$24,582 in pass-through income, over and above Father's annual salary. The magistrate used this amount to establish Father's income for child support purposes. The magistrate submitted a proposed decree of dissolution which was approved by the trial court judge.

Father then filed a motion to correct errors alleging, among other things, that including the pass-through income in his child support obligation was error. The court denied the motion to correct errors.¹⁹⁰ On appeal, the court of appeals noted that this was an apparent case of first impression stating that: "No Indiana case has previously determined whether a minority shareholder pass-through income that was never disbursed to the shareholder should be included in child support calculations. Accordingly, case law from other jurisdictions and the Indiana Child Support Guidelines . . . inform our analysis."¹⁹¹ After review, the court concluded that undistributed pass-through income should not be included in the calculation for child support, unless the S Corporation was being used to shield income.¹⁹² Mother argued that at the very least, the amount paid to Father to compensate him for tax liability, incurred as a result of the pass-through income, should be included in the child support calculation.¹⁹³ However, other jurisdictions' decisions revealed that such limited pass-through incomes are not to be included in income for the purposes of child support calculations.¹⁹⁴

Citing to an earlier Indiana Court of Appeals decision from 2004,¹⁹⁵ the court indicated that it was the policy of the Guidelines that the children should receive the same portion of potential income as he/she would have received had the parents' marriage remained in tact.¹⁹⁶ Prior to the dissolution of the marriage, Father had never been paid the pass-through income (except that income attributed to tax liability) and, therefore, the children still would not be receiving the benefit of the pass-through income had the marriage not been dissolved, which was consistent with the Guidelines.¹⁹⁷ Finally, using the same reasoning, non-inclusion in the child support calculation of pass-through income that only compensates for tax liability was consistent with the Guidelines.¹⁹⁸

The case of *Harris v. Harris*,¹⁹⁹ considered the issue of proceeds from a

189. *Id.* at 182 n.2 (citing 26 U.S.C. § 1366).

190. *Id.* at 182-83.

191. *Id.* at 183.

192. *Id.* at 183-84.

193. *Id.* at 183.

194. *Id.*

195. *McGill v. McGill*, 801 N.E.2d 1249, 1250-51 (Ind. Ct. App. 2004).

196. *Tebbe*, 815 N.E.2d at 183-84.

197. *Id.* at 184.

198. *Id.*

199. 800 N.E.2d 930 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 798 (Ind. 2004).

wrongful termination settlement. Father filed a petition to modify child support based upon a substantial and continuous change in circumstances alleging a change in employment and the financial situation of both the parties. More specifically, Mother, post-dissolution, had obtained regular employment at a substantial salary, working out of her home. Father lost his employment, instituted a wrongful termination lawsuit, and then moved to Colorado and found, what the trial court determined to be “a lucrative job.”²⁰⁰ The issue of note, however, is the fact that the trial court only included in the calculation for child support the net amount of proceeds from the wrongful termination lawsuit that was actually received by Father. Mother argued that the gross amount should have been included for child support purposes. The monies actually available to Father, as a result of the wrongful termination lawsuit, were approximately \$189,500 after taxes, attorney’s fees, and what the court termed a “portion of the settlement award [that went] towards finding and acquiring new employment.”²⁰¹

In affirming the trial court’s decision, the Indiana Court of Appeals determined that the settlement award was a one-time payment of money and that the gross amount of the settlement award was “an irregular and non-guaranteed form of income, which the trial court, in its discretion, could exclude from its determination of gross income.”²⁰² Indiana Child Support Guideline 3(B), Comment 2, requires that these types of irregular income be approached with caution, in including them in the total income approach. “[W]hile irregular income is includable in the total income approach taken by the Guidelines, the determination is very fact sensitive.”²⁰³ As such, because the net portion actually available to Father would have been the only amount available to the family, the trial court was correct in including only that amount.²⁰⁴

E. Provisional Orders

The supreme court granted transfer in the case of *Bojrab v. Bojrab*.²⁰⁵ One of the issues decided by the Indiana Supreme Court on transfer was whether a party could raise claimed errors in a trial court’s interlocutory support orders on appeal from a final divorce judgment.²⁰⁶ During the hearing on the provisional orders, Husband testified that there was a possibility he would be leaving his current employment. In its supplemental provisional order, the trial court indicated that it would allow Husband to present additional testimony and evidence on the issue of alleged change of financial circumstances at the trial of the case. In this order, the trial court left open the possibility of modifying the

200. *Id.* at 933.

201. *Id.* at 940.

202. *Id.* (citing *Gardner v. Artemia*, 743 N.E.2d 353, 359 (Ind. Ct. App. 2001)).

203. *Id.* (citing IND. CHILD SUPP. G. 3(A), cmt. 2(b)).

204. *Id.*

205. 810 N.E.2d 1008 (Ind. 2004). The Indiana Court of Appeals decision is reported at *Bojrab v. Bojrab*, 786 N.E.2d 713 (Ind. Ct. App. 2003).

206. *Bojrab*, 810 N.E.2d at 1014.

maintenance and support order. Husband contended that the court's language made this a modifiable order subject to retroactive revision. On appeal, Husband argued the trial court committed error when it did not retroactively modify its order for provisional maintenance and child support.²⁰⁷ The Indiana Court of Appeals found that an order of temporary support and maintenance is an order for the payment of monies and that Indiana Appellate Rule 14(A) provides that interlocutory orders for the payment of money may be appealed, as a matter of right, by filing a notice of appeal.²⁰⁸

The Indiana Supreme Court noted, however, that

Shortly after the Court of Appeals issued its decision, we decided *Georgos v. Jackson*, 790 N.E.2d 448 (Ind. 2003), which held that, even though an interlocutory order may be appealable as of right under Appellate Rule 14(A)(2), there is no requirement that an interlocutory appeal be taken. A claimed error in an interlocutory order is not waived for failure to take an interlocutory appeal, but may be raised on appeal from the final judgment.²⁰⁹

As to the merits of Husband's argument, the trial court found Husband could have remained at his prior position, and that he voluntarily changed jobs.²¹⁰ Despite this, the court held that he was in a financial position to finance the support and maintenance during the transition "thus maintain[ing] the standard of living for his wife and children."²¹¹ Therefore, the supreme court found that it was not an abuse of discretion to deny retroactive modification.²¹²

F. Support of a Non-Biological Child

In *Tirey v. Tirey*,²¹³ the Indiana Court of Appeals addressed the issue of whether a man who volunteered to pay child support for a non-biological child in exchange for visitation pursuant to a dissolution of marriage can later seek to relieve himself of that obligation.

During the marriage, Wife's niece came to live with Husband and Wife when the niece was only a few days old. No guardianship or formal legal custody was ever established though Husband and Wife did have an agreement from the biological mother giving them full permanent custody. Husband and Wife, who also had a biological child, were later divorced and in the decree of dissolution Husband agreed to pay child support for the niece in exchange for visitation rights and maintaining what he considered to be a parent-child relationship. After paying support for several years, Husband's circumstances changed and he

207. *Id.*

208. *Id.*

209. *Id.* (citing *Georgos v. Jackson*, 790 N.E.2d 448, 452 (Ind. 2003)).

210. *Id.* at 1015.

211. *Id.*

212. *Id.*

213. 806 N.E.2d 360 (Ind. Ct. App. 2004).

saw fit to modify support which included eliminating all of his obligation of support for the niece. Relying upon *Farrow v. Farrow*,²¹⁴ Husband argued that it was against public policy for him, as the non-biological father, to be ordered to pay child support for the child of another man.²¹⁵ The trial court refused to set aside the order to pay support and Husband appealed. Affirming the trial court, the Indiana Court of Appeals noted that while *Farrow* stands for the proposition that public policy does not favor a support order against a man not the biological father of a child, it does not apply to a case where the man knowingly agreed to pay child support for a non-biological child in exchange for adequate and valuable consideration.²¹⁶ While the parties to a dissolution of marriage are free to enter into agreements for the payments of child support which are limited only by the best interest of the child, the court found that, in cases involving an agreement for the gratuitous payment of child support (which could not have been otherwise ordered by the court), the law of contracts also must be considered.²¹⁷ Here the court found that the agreement to pay child support was voluntarily entered into and was supported by adequate consideration. Thus, the court held in a dissolution proceeding a court has full authority to enter a child support order against the non-parent party so long as that order is the product of voluntary agreement supported by valid consideration and entered into without fraud, duress, or mistake.²¹⁸

IV. PATERNITY

In the case of *Reynolds v. Dewees*,²¹⁹ the court decided a matter of first impression involving the interplay between the placement of a child in a pending CHINS case and a simultaneous petition for change of custody in the paternity action. Father had established paternity and, by agreement of the parties, Mother was awarded custody of the child. Subsequently, a CHINS action was filed and the child was removed from Mother's home by the CHINS court and temporarily placed with Father. While the CHINS case was still pending Father filed a petition for change of custody in the paternity court. The paternity court awarded Father permanent custody and Mother appealed alleging that the paternity court lacked jurisdiction to change custody while the CHINS proceeding was pending. The Indiana Court of Appeals observed that Mother's argument was once a correct statement of the law.²²⁰ The court noted, however, that on July 1, 1999, Indiana Code section 31-30-1-13 took effect.²²¹ The court of appeals held that

214. 559 N.E.2d 597, 600 (Ind. 1990).

215. *Tirey*, 806 N.E.2d at 363.

216. *Id.* at 364.

217. *Id.*

218. *Id.* at 365.

219. 797 N.E.2d 798 (Ind. Ct. App. 2003).

220. *Id.* at 800.

221. Indiana Code section 31-30-1-13 states:

(a) Subject to (b) a court having jurisdiction under IC 31-14 of a child custody

Indiana Code section 31-30-1-13 gives a paternity court concurrent original jurisdiction with a juvenile court to modify child custody even when there is a pending CHINS proceeding.²²² The court noted, however, that the authority of a paternity court to modify custody of a child during a pending CHINS action does have limitations.²²³ Specifically, when the paternity court modifies custody under Indiana Code section 31-30-1-13(a) the modification will become effective only when a CHINS court enters an order approving the child custody modification.²²⁴ That piece of information was not apparent to the Indiana Court of Appeals in *Reynolds*, and the court thus limited its holding to state that Indiana Code section 31-30-1-13 vested the paternity court with the requisite jurisdiction to enter the order that it did.²²⁵

The case of *Richard v. Richard*,²²⁶ was a paternity matter that involved identical twins. Husband, one of the identical twins, and Wife were divorced in September 2000. In June 2001, Wife gave birth to the child. Wife filed a petition to establish paternity in her former Husband. The former Husband filed a third party complaint seeking to establish paternity in his identical twin brother. DNA testing was conducted and the former-Husband's probability of paternity was determined to be 99.999% and his twin's was determined to be 99.995%.

During the hearing the twin, who had cognitive difficulties, testified—rather crudely—that he had sexual intercourse a number of times with Wife during the period of conception. During his testimony, the twin offered to pay \$25 per week in support, implying that he was the father of the child. The former Husband testified that he did not have sex with Wife during the conception period. The trial court found that there was a presumption of paternity in Husband and that Husband could not rebut that presumption.²²⁷ Husband appealed, challenging the

proceeding in a paternity proceeding has concurrent original jurisdiction with another juvenile court for the purpose of modifying custody of a child who is under the jurisdiction of the other juvenile court because:

- (1) the child is the subject of a child in need of services proceeding; or
- (2) the child is the subject of a juvenile delinquency proceeding that does not involve an act described under IC 31-37-1-2.

(b) Whenever the court having child custody jurisdiction under IC 31-14 in a paternity proceeding modifies child custody as provided by this section, the modification is effective only when the juvenile court with jurisdiction over the child in need of services proceeding or juvenile delinquency proceeding:

- (1) enters an order approving the child custody modification; or
- (2) terminates the child in need of services proceeding or the juvenile delinquency proceeding.

IND. CODE § 31-30-1-13 (2004).

222. *Reynolds*, 797 N.E.2d at 801.

223. *Id.* at 802.

224. *Id.*

225. *Id.*

226. 812 N.E.2d 222 (Ind. Ct. App. 2004).

227. *Id.* at 224.

conclusion that he did not successfully rebut the statutory presumption of paternity. The Indiana Court of Appeals affirmed.²²⁸ The court of appeals pointed out that Indiana Code section 31-14-7-1 created a presumption of paternity in Husband that was necessary for Husband to rebut.²²⁹ To rebut this presumption, it is necessary to show by:

direct, clear and convincing evidence that the husband: (1) is impotent; (2) was absent so as to have no access to the mother; (3) was absent during the entire time the child must have been conceived; (4) was present with the mother only in circumstances which clearly prove there was no sexual intercourse; (5) was sterile during the time the child must have been conceived; or (6) can show that the DNA test of another man indicates a 99% probability that the man is the child's father combined with uncontradicted evidence that the man had sexual intercourse with the mother at the time the child must have been conceived.²³⁰

While Husband denied having sexual intercourse with Wife, except for the DNA test of the twin, he presented no evidence of the type necessary to rebut the presumption.²³¹ Because this case involved an identical twin and because both men had a ninety-nine percent probability of paternity, Husband contended that the testing and the offer by his twin to pay \$25 per week child support was enough to rebut that presumption.²³² The court of appeals disagreed, reasoning that the Indiana Supreme Court had determined in *LFR v. RAR*,²³³ that mere denial of sexual intercourse with Wife is not sufficient to rebut the presumption of paternity.²³⁴ Following that reasoning, the court of appeals said that the mere testimony by the identical twin that he had sex with Wife was not sufficient to rebut the presumption of paternity.²³⁵

228. *Id.*

229. *Id.* Indiana Code section 31-14-7-1 provides in part that:

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

(1) the

(A) man and child's biological mother are or have been married to each other;
and

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

(2) . . . ; or

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

230. *Richard*, 812 N.E.2d at 226 (citing *Minton v. Weaver*, 697 N.E.2d 1259, 1260 (Ind. Ct. App. 1998)).

231. *Id.*

232. *Id.*

233. 378 N.E.2d 855, 857 (Ind. 1978).

234. *Richard*, 812 N.E.2d at 226.

235. *Id.* at 228.

V. ADOPTION

One significant case during this survey period deals with a same sex partner being permitted to adopt the biological children of her domestic partner. The case of *In re Adoption of Infant K.S.P. and Infant J.P.*²³⁶ was the first case to recognize the right of a domestic partner, not related biologically or through marriage, to adopt her partner's biological children. Mother and Father had two biological children, one born in 1990 and the other in 1993. Mother and Father were divorced in 1994 and Mother retained the legal custody of the children. Father did not pay child support because of his inability to hold a job due to frequent incarcerations in jail and chronic alcoholism.²³⁷

Mother's same-sex partner sought to adopt the children and filed a petition to adopt, which included written consents from both Mother and Father. The County Office of Family and Children Services ("OFC") filed an Adoptive Family Preparation Summary with the trial court endorsing the partner's adoption of the children. The OFC report determined that Mother and her partner, along with the children, formed a family unit that had been together for seven years. The partner provided support and day-to-day care of the children and fostered a nurturing environment. An adoption would benefit the children because they could be insured through the partner's health insurance and, if anything happened to Mother, the children would not be without a parent. The trial court denied the partner's petition because she was not married to the biological mother or the biological father. The trial court reasoned that allowing the partner to adopt would divest the biological mother of her parental rights, in accordance with Indiana Code sections 31-19-15-1 and 31-19-15-2.²³⁸ The trial court found that Indiana Code section 31-19-15-1 divests biological parents, if they are alive, of all rights in the child after an adoption. Indiana Code section 31-19-15-2 is the Step-parent Adoption statute. This statute protects the right of the biological parent, only if they are married to the adopting petitioner.

On appeal, the Indiana Court of Appeals noted that they recently decided *In re Adoption of M.M.G.C.*,²³⁹ which dealt with the narrow issue of whether a same-sex domestic partner could adopt the adopted children of her domestic partner, without divesting the adoptive mother of her parental rights. In a holding that was "expressly" limited to the facts of that case, the court held that Indiana law does not require that the rights of the adoptive parents be divested in the adopted child, in the event of a second parent adoption.²⁴⁰ The issue before the *K.S.P.* court was the effect of adoption upon biological parents.

As the court noted, Indiana Code section 31-19-15-1 provides that:

Except as provided in section 2 of this chapter or IC 31-19-16, if the

236. 804 N.E.2d 1253 (Ind. Ct. App. 2004).

237. *Id.* at 1253-55.

238. *Id.*

239. 785 N.E.2d 267 (Ind. Ct. App. 2003).

240. *Id.* at 270 n.1.

biological parents of an adopted person are alive, the biological parents are:

- (1) relieved of all legal duties and obligations to the adopted child; and
- (2) divested of all rights with respect to the child; after the adoption.²⁴¹

Thus, the “strict literal reading of these two statutes would seem to support the trial court’s determination.”²⁴² Such a result in this case would not only be harsh and illogical, it would be destructive of the caring family unit that Mother and partner had built—certainly not a consequence contemplated by the parties. After analyzing the intent and spirit of the Indiana adoption laws, the court concluded such “a destructive and absurd result” could not have been contemplated by the legislature.²⁴³ In reversing the trial court, the court of appeals stated:

We conclude that where, as here, the prospective adoptive parent and the biological parent are both in fact acting as parents, Indiana law does not require a destructive choice between the two parents. Allowing continuation of the rights of both the biological and adoptive parent, where compelled by the best interest of the child, is the only rational result.²⁴⁴

Another significant adoption case, *In re Adoption of Infant Child Baxter*,²⁴⁵ concerned whether an improperly executed adoption consent may still be valid. In *Baxter*, the adoptive parents met with the natural parents and obtained a consent to adopt. The signatures were by the adoptive parents prior to the child’s birth and there was no one present authorized to notarize the consents as required by Indiana Code section 31-19-9-2.²⁴⁶ The adoptive father then took the consents to have them notarized. It was uncontested that the biological parents were not present when the consents were notarized. Later, after the birth, the biological

241. IND. CODE § 31-19-15-1 (2004).

242. *In re Adoption of Infant K.S.P. and J.P.*, 804 N.E.2d at 1257.

243. *Id.*

244. *Id.* at 1260 (citations omitted).

245. 799 N.E.2d 1057 (Ind. 2003).

246. *Id.* at 1060. Indiana Code section 31-19-9-2 provides that:

The consent to adoption may be executed at any time after the birth of the child either in the presence of:

- (1) the court;
- (2) a notary public or other person authorized to take acknowledgments; or
- (3) an authorized agent of:
 - (A) the division of family and children;
 - (B) the county office of family and children; or
 - (C) a licensed child placing agency.

parents had a change of heart and sought to revoke the consents. The trial court held the consents were invalid and void because they had not been signed in the presence of any of the entities listed in the statute.²⁴⁷ The court of appeals upheld the trial court and transfer was granted by the Indiana Supreme Court.²⁴⁸ In reversing and remanding to the trial court, the supreme court noted that the court of appeals, a decade earlier, ruled in a case where a pre-birth consent was executed that the validity of the consent may nonetheless be satisfied by the evidence that the signatures are authentic and genuine in all respects and that a manifest present intention to give the child up for adoption is present.²⁴⁹ Relying upon that case, the supreme court reasoned that the same result would be true if the consents were not executed in front of one of the specified entities.²⁵⁰ Given the fact that the record contained sufficient evidence of a post-birth act, which sufficiently manifested the present intention to give the child up for adoption, the court remanded to the trial court for consideration of this evidence to determine whether the consents are authentic and valid.²⁵¹

In re T.J.F.,²⁵² dealt with the issue of post-adoption sibling visitation. In *T.J.F.*, a post-adoption visitation agreement was filed in the cause prior to the entry of the decree of adoption. This agreement allowed the child to visit with her biological sister. Subsequently, the trial court entered a decree of adoption but did not include an order approving the post-adoption visitation agreement. Thereafter, the guardian of the biological sister sought to begin visitation. The adoptive parents declined. The office of family and children and the Guardian Ad Litem then filed a motion to permit the visitation. The adoptive parents filed a motion to dismiss which was denied. At trial, the court held that the visitation agreement was valid and the adoptive parents appealed.

Indiana Code section 31-19-16.5-1 states that at the time the adoption decree is entered, the court may order post-adoption contact with a sibling for a child who is at least two years of age.²⁵³ On appeal, the court stated that authorization for post-adoption visitation must be contained in the decree of adoption.²⁵⁴ Absent a specific statement authorizing such visitation, "the judicial authorization for sibling contact ended with the entry of the adoption decree."²⁵⁵ The court remanded to the trial court with instructions to grant the motion to dismiss.²⁵⁶

247. *In re Adoption of Infant Child Baxter*, 799 N.E.2d at 1059-60.

248. *Id.* at 1060.

249. 799 N.E.2d at 1062 (citing *In re Adoption of H.M.G.*, 606 N.E.2d 874 (Ind. Ct. App. 1993)).

250. *Id.*

251. *Id.* at 1062-63.

252. 798 N.E.2d 867 (Ind. Ct. App. 2003).

253. *Id.* at 872 (citing IND. CODE § 31-19-16.5-1).

254. *Id.*

255. *Id.* at 873.

256. *Id.* at 874.

Two cases, *McElvain v. Hite*,²⁵⁷ and *In re Adoption of M.A.S.*,²⁵⁸ seemed to reach different results in determining the burden of proof to be applied in a step-parent adoption. In *McElvain*, Father appealed the trial court's granting of Step-father's petition to adopt the children and terminate the parental rights of Father. In reversing the trial court, the Indiana Court of Appeals stated that Step-father had failed to carry his burden of proof for the granting of his adoption petition without the parental consent of the biological Father.²⁵⁹ Citing to the case of *In re Adoption of Augustyniak*,²⁶⁰ and *In re Adoption of Childers*,²⁶¹ the court held that the burden of proving the statutory criteria for dispensing with such consent is by "clear, cogent, and indubitable evidence."²⁶² In *In re Adoption of M.A.S.*, decided approximately ten months later, a different panel of the Indiana Court of Appeals addressed the issue of the step-father's burden of proof to show that a biological father's consent was not required for the adoption. This time, the trial court's termination of parental rights and granting of the petition of adoption was affirmed.²⁶³ On appeal, Father argued that the standard of evidence dispensing with consent as found in Indiana Code section 31-19-9-8(a)(2) was by "clear, cogent, and indubitable evidence."²⁶⁴ The court noted that the standard of "clear, cogent, and indubitable evidence," dates to the court of appeals decision in *In re Bryant*.²⁶⁵ The court observed that this standard of proof had been followed in subsequent cases. "Indubitable" was defined in *Augustyniak*, as "not open to question or doubt: too evident to be doubted: UNQUESTIONABLE."²⁶⁶ Step-father argued that the "clear, cogent and indubitable" evidence standard was an even more stringent burden of proof than the "beyond a reasonable doubt" used in criminal cases. The court of appeals agreed.²⁶⁷ The court noted that the legislature in 2003 added subsection 11 to Indiana Code section 31-19-9-8(a). Indiana Code section 31-19-9-8(a)(11) provides that the consent of the biological parent may be dispensed with if: "a petitioner for adoption proves by clear and convincing evidence that the parent is unfit to be a parent."²⁶⁸ Thus, a petitioner for adoption had to prove by "clear, cogent and indubitable evidence" that a parent had knowingly failed to provide for support or to communicate with the child but only had to prove by clear and convincing evidence that the parent was unfit. The court reasoned that the legislature could not have intended such a

257. 800 N.E.2d 947 (Ind. Ct. App. 2003).

258. 815 N.E.2d 216 (Ind. Ct. App. 2004).

259. *McElvain*, 800 N.E.2d at 949.

260. 505 N.E.2d 868, 870 (Ind. Ct. App. 1987).

261. 441 N.E.2d, 976, 978 (Ind. Ct. App. 1982).

262. *McElvain*, 800 N.E.2d at 949.

263. *In re Adoption of M.A.S.*, 815 N.E.2d at 218.

264. *Id.* at 219.

265. 189 N.E.2d 593, 600 (Ind. App. 1963).

266. *In re Adoption of M.A.S.*, 815 N.E.2d at 219 (quoting *In re Augustyniak*, 505 N.E.2d at 870).

267. *Id.*

268. *Id.* at 220 (emphasis omitted) (quoting IND. CODE § 31-19-9-8(a)(11)).

conflicting result.²⁶⁹ The court also noted that “clear and convincing evidence” is the standard of proof in Indiana Code section 31-37-14-2 which governs proceedings to terminate parental rights.²⁷⁰ Furthermore, the Indiana Supreme Court in the case of *In re Guardianship of P.H.*,²⁷¹ found that before placing a child in the custody of a person other than a natural parent, placement must be in the best interest of the child as determined by clear and convincing evidence.

In another step-parent adoption case, *Mathews v. Hansen*,²⁷² the Indiana Court of Appeals addressed a putative father’s failure to register in the putative father registry. Indiana Code section 31-14-20-2 provides that a putative father who fails to register with the putative father registry will waive his right to the notice of the adoption of the child if the adoption is filed before the putative father establishes his paternity and the child’s mother does not disclose to the attorney or agency arranging the adoption the name or address of the putative father.²⁷³ In this case, Mother had initiated a paternity action several years prior to the petition for adoption, however paternity was never established. At the adoption proceeding the putative Father was served by publication and the trial court granted the adoption. Almost one year later, the putative Father attempted to register with the Indiana putative father’s registry. Thereafter, he filed an Indiana Trial Rule 60(B)(6) motion to vacate the judgment granting the adoption. Step-father moved to dismiss on the grounds that the putative Father’s motion was time barred under Indiana Code sections 31-19-14-2 and 4. Those sections require that actions to challenge an adoption decree must be filed the later of six months after the entry of the adoption decree or one year after the adoptive parents have taken custody of the child. If not brought within that time period, the adoption decree may not be challenged even if notice was not given to the putative father or the adoption proceedings were otherwise defective.²⁷⁴ The court of appeals agreed with Step-father.²⁷⁵ The record in the present case clearly demonstrated that the Indiana Trial Rule 60(B)(6) motion was not brought within six months of the date of the adoption decree or within one year from the time the adoptive parent received custody of the child. As such, the putative Father had been time barred and his due process rights were not violated.²⁷⁶ Furthermore, the court found that he was not deprived of his opportunity to be heard because he had failed to register with the putative father registry and he had waived his right to notice of the adoption.²⁷⁷

The issue of Indiana’s jurisdiction in an adoption with an interstate

269. *Id.*

270. *Id.* (citing IND. CODE § 31-37-14-2 (1998)).

271. 770 N.E.2d 283, 287 (Ind. 2002).

272. 797 N.E.2d 1168 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 795 (Ind. 2004).

273. *Id.* at 1169.

274. *Id.* at 1171 (citing IND. CODE §§ 31-19-14-2, -4 (2003)).

275. *Id.* at 1173.

276. *Id.* at 1172.

277. *Id.* at 1173.

dimension was considered in the case of *In re M.L.L.*²⁷⁸ Mother, who lived in Tennessee, gave the child to her cousin and his wife who brought the child to live with them in Indiana. Mother signed a consent to guardianship and a consent to adoption. At the time of the transfer of the child, there was a paternity petition pending in Tennessee. After the Indiana couple filed their petition for adoption, Mother moved to withdraw her previously executed consents. Mother also obtained an order in the Tennessee court for the return of the child. The child was not returned and the Indiana couple proceeded with adoption, which was granted. On appeal, Mother challenged the Indiana court's jurisdiction to grant the adoption under the UCCJA.²⁷⁹

In affirming the trial court's granting of the adoption, the court of appeals determined that Mother had abandoned the child to the Indiana couple.²⁸⁰ Indiana Code section 31-17-3-3(3) provides that Indiana can exercise jurisdiction under the UCCJA if "the child is physically present in this state and has been abandoned."²⁸¹ While Indiana has no statutory definition of abandonment, case law has defined it as: "when there is such conduct on the part of the parent which evidences a settled purpose to forego all . . . claims to the child."²⁸² The court found that sufficient evidence of this "settled purpose" existed. Mother had given the child to the Indiana couple because her situation as a confidential drug informant for the police endangered the health and safety of the child. In addition to signing the consents referred to above, Mother also gave the Indiana couple the child's belongings, birth certificate, and social security card.²⁸³

Mother also argued that Indiana Code section 31-17-3-6(a), which prohibits the exercise of jurisdiction when another case involving custody is pending in another state, prohibited an Indiana court from exercising jurisdiction. The Indiana Court of Appeals disagreed, noting that the order in the Tennessee paternity case specifically stated that it did not address visitation or custody.²⁸⁴ Thus, the trial court's exercise of jurisdiction was not prohibited.

278. 810 N.E.2d 1088 (Ind. Ct. App. 2004).

279. *Id.* at 1091.

280. *Id.* at 1097.

281. *Id.* (citing IND. CODE § 31-17-3-3(3) (2004)).

282. *Id.* at 1092 (quoting *In re Adoption of Force*, 131 N.E.2d 157, 159 (Ind. App. 1956)).

283. *Id.* at 1092-93.

284. *Id.* at 1093.

