

RECENT DEVELOPMENTS: INDIANA FAMILY LAW

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INTRODUCTION

This Article will consider the more important developments in the commonly recognized aspects of Indiana's vast body of family law, specifically recent cases and statutes concerning dissolution of marriage, paternity, child custody, child support, and adoption.¹

I. DISSOLUTION OF MARRIAGE

Some noteworthy dissolution of marriage cases decided by the Indiana courts during the current survey involved contested property distributions, post-nuptial agreements, expert witnesses, enforcement of property settlements, and spousal maintenance.

A. Property Distribution

1. *Marital Asset Issues.*—Determination of the marital estate is the first of

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1. The statutes covering these topics are located primarily in thirteen articles of title 31 of the Indiana Code. *See* IND. CODE §§ 31-9 to -21 (2004 & Supp. 2007). Specifically omitted from this Article are cases or statutory developments in child protection services, IND. CODE §§ 31-25 to -28 (Supp. 2007), and cases involving juvenile justice which arise under the eleven articles specifically referred to as "Juvenile Law" at IND. CODE §§ 31-30 to -40 (2004 & Supp. 2007). More than 200 specific definitions pertaining to title 31, sometimes applying to both family and juvenile law, sometimes one or the other, are located at IND. CODE § 31-9-2 (2004 & Supp. 2007). Further, at least fifteen other titles of the Indiana Code contain provisions concerning criminal offenses against children and family, marriage and family therapists, trust and fiduciaries, guardianships, and other family-related topics. Every legal proceeding in Indiana between parents involving child support or visitation with their children is governed by the Indiana Supreme Court's Child Support Rules and Guidelines and the Parenting Time Guidelines. Federal legislation involving taxes, bankruptcy, and distribution of retirement benefits can be a consideration in almost any case involving property settlement, child support, or spousal maintenance. Federal law can also impact adoptions of Native Americans, state laws regarding parental kidnapping, and states' obligations concerning enforcement of child support obligations, to mention just some aspects of state family law influenced by federal authority.

three broad questions encompassing the substantive law of property distribution in a dissolution of marriage action: Is it marital property? What is the value of the property? How should the property be divided?²

Of recent concern is whether *Granzow v. Granzow*³ seeks to exclude from the marital estate property interests acquired by the spouses' joint efforts where the interests vest after filing but before the actual finalization of the dissolution proceeding.⁴

2. "Property," for purposes of dissolution of marriage, "means all the assets of either or both parties, including" present rights to pensions and retirement benefits; vested rights to pensions or retirement benefits payable after the dissolution of marriage; and, disposable military retired pay. IND. CODE § 31-9-2-98(b) (2004). A dissolution court is required to divide all of the property of the parties whether it was owned by either prior to the marriage; acquired by either in his or her own right after the marriage but before final separation of the parties; or, acquired by the parties through their joint efforts. *Id.* § 31-15-7-4(a). In *Thompson v. Thompson*, 811 N.E.2d 888, 912-15 (Ind. Ct. App. 2004), the court succinctly set forth Indiana's "one-pot" theory of the marital estate. Included within the marital estate is all of the property acquired by the joint efforts of the parties. *Id.* at 914. With certain limited exceptions this "one-pot" theory "specifically prohibits the exclusion of any asset from the scope of the trial court's power to divide and award." *Id.* (quoting *Ross v. Ross*, 638 N.E.2d 1301, 1303 (Ind. Ct. App. 1994)). Only property acquired by an individual spouse after the final separation date is excluded from the marital estate. *Id.* In short, a spouse may not select which of the parties' assets are to be considered marital property, absent a valid premarital agreement. *See* *Huber v. Huber*, 586 N.E.2d 887, 887-89 (Ind. Ct. App. 1992). The Indiana Supreme Court has held that these statutes create a presumption that all property interests of either or both parties are subject to division and that "[t]he party who seeks to rebut the presumption, i.e., the party who seeks to have property not included (or at least not divided), bears the burden of demonstrating that the statutory presumption should not apply." *Beckley v. Beckley*, 822 N.E.2d 158, 163 (Ind. 2005); *see also* Joseph W. Ruppert & Joni L. Sedberry, *Recent Developments: Indiana Family Law*, 40 IND. L. REV. 891, 891-97 (2007); Joseph W. Ruppert & Michael G. Ruppert, *Recent Developments: Indiana Family Law*, 39 IND. L. REV. 995, 995-1001 (2006); Michael G. Ruppert & Joseph W. Ruppert, *Recent Developments: Indiana Family Law*, 38 IND. L. REV. 1085, 1085-1089 (2005).

3. 855 N.E.2d 680 (Ind. Ct. App. 2006).

4. Under Indiana Code section 31-9-2-46, the date of "final separation" in a divorce proceeding for purposes of property distribution means the date the petition for dissolution of marriage is filed. IND. CODE § 31-9-2-46 (2004). It could be an earlier date if a legal separation proceeding was filed first and converted to a dissolution of marriage proceeding. *Id.* However, to limit a trial court to distributing property acquired only prior to the date of filing would limit the statutory mandate of the trial court to divide all of the property of the marriage. Indiana Code section 31-15-7-4(a) (2004) sets the property that the trial court must divide:

In an action for dissolution of marriage under [Indiana Code section] 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

In *Granzow* the parties were married in 1983 at which time the husband had worked for his employer for more than nine years. In August 2003, he filed a petition for dissolution of marriage. The proceeding was bifurcated.⁵ The marriage was dissolved in February 2004, and the parties' partial settlement agreement, which reserved for a final hearing all issues involving husband's pension, was approved by the trial court. The husband was vested in his company's pension at the time of the filing of his petition and at the time of the decree dissolving the parties' marriage.⁶ However, a few days after the dissolution decree and partial settlement agreement, the husband reached his thirty-year employment anniversary with his employer, which entitled him to a lump sum enhancement of more than a quarter of a million dollars over the value of his pension on the date of filing.⁷ The husband soon thereafter retired.⁸ The final hearing on property distribution was more than a year after the retirement; and, the trial court excluded the enhanced pension benefit from the marital pot in its order dividing the property.⁹ The wife appealed, arguing that the enhancement portion of the pension was a marital asset, even though the entitlement to it did not occur until after the filing of the petition for dissolution of marriage and after the court's decree dissolving the marriage (but before the final hearing on property distribution), because the enhancement was attributable to the joint efforts of the parties.¹⁰

Stating that the wife had failed to cite any Indiana cases holding that a pension enhancement or other asset vesting after the date of filing could be included in the marital estate subject to division, the court stated a surprisingly rigid view of the marital pot which seems to conflict with an Indiana Supreme

(3) acquired by their joint efforts.

Id. § 31-15-7-4(a). The Indiana Supreme Court has made it clear that the foregoing represents three classes of property and that the third class may cause inclusion of pension rights in the marital pot where they vest after the date of filing but before the decree dissolving the marriage. *See In re the Marriage of Adams*, 535 N.E.2d 124, 126-27 (Ind. 1989) (discussing IND. CODE § 31-1-11.5-11 (b) (1988), the predecessor to IND. CODE § 31-15-7-4 (2004)).

5. Under Indiana Code section 31-15-2-14, a divorce proceeding may be bifurcated, thereby allowing the parties to be divorced and have non-contested issues approved by the court, while reserving for hearing at a later date contested issues. IND. CODE § 31-15-2-14 (2004). The order dissolving the marriage in the first stage of the bifurcated proceeding is not provisional; it is final. While the divorce action is not considered completed until the second part involving the contested issues is completed, the orders issued in the first part are not voidable. Thus, for example, where a party dies after the dissolution of the parties' marriage in a bifurcated proceeding, but before a final hearing on property, the court is not deprived of jurisdiction over the property issues. *See Beard v. Beard*, 758 N.E.2d 1019, 1025 (Ind. Ct. App. 2001).

6. *Granzow*, 855 N.E.2d at 682.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 683-84.

Court decision and other appellate authority.¹¹ Indeed, *Granzow* appears to completely subordinate joint effort property to that which is vested at initiation of the divorce: “Wife essentially asks us to ignore Indiana Code Sections 31-9-2-98(b) and 31-15-7-4(b), which together provide that the dissolution court shall only divide property owned as of the date the petition is filed. This we cannot do.”¹² Thus, the *Granzow* court flatly refused to acknowledge the last of the three categories of property in Indiana Code section 31-15-7-4(a): property owned by either before the marriage; property acquired by either in his or her own right after the marriage and before final separation; or, property acquired by joint efforts.¹³

Another way to look at *Granzow* is that the court of appeals mandated the “before final separation” language in the second category of property to all three categories. Arguably, *Granzow* is not at odds with *Adams* or *Kirkman* because the enhancement did not vest until after the dissolution of the parties’ marriage, albeit before the final hearing on property distribution. *Granzow* did not afford itself that kind of leeway. Instead, the decision seems to conflict with *Adams*, *Kirkman*, and appellate court decisions following their holdings.¹⁴

Hill v. Hill,¹⁵ involved a husband’s appeal of the trial court’s property distribution on the grounds, in part, that the court should not have included any part of certain assets that were awarded to him in the marital pot. His first argument for exclusion concerned his pension, which was in pay status. He contended that, since he could not receive his monthly payments in a lump sum on demand, but rather had to wait for them, the payments did not fit the definition of pensions under the property definition statutes.¹⁶ His next exclusion argument was that certain real estate he had acquired during the marriage should not be included in the marital pot because it was acquired with funds that he brought into the marriage.¹⁷ His final argument was that certain Florida real

11. See *Kirkman v. Kirkman*, 555 N.E.2d 1293, 1294 (Ind. 1990) (following the rule in *In re Marriage of Adams*, 535 N.E.2d 124, 126-27 (Ind. 1989), in holding that a pension or retirement benefit becoming vested prior to the final dissolution decree could be divided by the trial court).

12. *Granzow*, 855 N.E.2d at 684. Indiana Code section 31-15-7-4(a)(3) requires the court to divide property acquired by joint efforts. Neither Indiana Code section 31-9-2-98(b) or section 31-15-7-4(b) (2004), individually or jointly, place any limit on the court’s ability to distribute property interests arising through spouses’ joint efforts which vest after the date the petition is filed but before finalization of the divorce.

13. IND. CODE § 31-15-7-4(a) (2004).

14. For cases following the *Adams*, 535 N.E.2d at 125-27, and *Kirkman*, 555 N.E.2d at 1294, holdings regarding three classes of divisible property, which would permit division of assets vesting after filing the petition of dissolution but before the actual decree, see *Wyzard v. Wyzard*, 771 N.E.2d 754, 757-58 (Ind. Ct. App. 2002), and *Skinner v. Skinner*, 644 N.E.2d 141, 146 (Ind. Ct. App. 1994); see also *Hodowal v. Hodowal*, 627 N.E.2d 869, 873 (Ind. Ct. App. 1994).

15. 863 N.E.2d 456, 458 (Ind. Ct. App. 2007).

16. *Id.* at 460-61.

17. *Id.* at 461.

estate should not have been included in the marital pot because he did not own the property—even though he made the down payment and signed for the loan on the property which he deeded to his son after the date of the filing for dissolution of marriage.¹⁸ The *Hill* court dispatched the husband’s arguments and, in contrast to *Granzow*, favorably acknowledged the three categories of marital property which a trial court is to divide in a dissolution of marriage:

We reiterate that *all* marital property goes into the marital pot for division, even if it was owned by one spouse prior to the marriage or purchased with funds that one spouse brought into the marriage. These properties were properly included in the marital pot.

Husband also argues that the . . . real estate in Florida [is] not marital property and therefore should not have been included in the marital property because he has never owned the property. Husband did state at the final hearing that he only helped his son from a previous marriage to buy the property by giving him the down payment and signing for the loan. However, he contradicted himself when he testified that he himself bought one parcel for \$54,000.00 and the other parcel for \$47,000.00 or \$48,000.00. Furthermore, Wife testified that the Florida real estate was purchased during the marriage, and Ira Hill testified that Husband testified that he “owned two houses” in Florida. Finally, though husband apparently intended to transfer the Florida real estate to his son from a previous marriage, the deeds evidencing the transfer were not recorded until . . . eleven days *after* Wife filed for dissolution. This evidence is sufficient to support the trial court’s inclusion of the Florida real estate in the marital pot.¹⁹

*England v. England*²⁰ involved a former husband’s appeal of the trial court’s property distribution, claiming as error the inclusion of the value of his current right to occupy property for the rest of his life because the property was owned by a third party and his right to reside on it could be terminated before the end of his life.²¹ The *England* court held that it was proper for the value of the husband’s continued right to live on the property during his lifetime to be considered by the trial court in dividing the marital pot.²² In rejecting that a potential defeasance should prevent consideration of the property, the court stated:

To the extent Husband’s interest in the property is defeasible, he for the most part controls the defeasance. In [earlier cases], the defeasance would occur because of an act over which the remaindermen had no

18. *Id.*

19. *Id.* (citations omitted).

20. 865 N.E.2d 644 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 205 (Ind. 2007).

21. *Id.* at 648-49.

22. *Id.* at 649.

control—death or change of beneficiary. Here, Husband loses his interest in the property if he abandons the property, ceases to use it as his primary residence, or opposes [the lessor's] plans to expand its landfill, all of which are choices Husband would make of his own accord. Husband also loses his interest if both dwellings on the property are destroyed or become uninhabitable. Although it is true, as Husband points out, that the dwellings could be destroyed by fire or weather tomorrow, it is also true that they may never be destroyed and Husband will live on the property virtually rent-free for the remainder of his life. Finally, Husband also loses his interest when he dies, but in that case, it is possible that he may have enjoyed the use of the property for a nominal rent up to the time of his death.²³

In *Grathwohl v. Garrity*,²⁴ the trial court expressly excluded from the marital estate real estate that the husband inherited from his mother and real estate in which the wife had a joint interest with her son by a prior marriage which also was inherited from her mother.²⁵ At trial, the husband took the position that the inherited real estate of both parties “should be included in the marital pot, but set off separately to each party.”²⁶ However, the wife argued that her inherited property should not be part of the marital estate at all because it was merely a joint tenancy with her son.²⁷ On appeal, the wife argued the same, i.e., that the court erred by excluding the husband's real estate even though it also excluded hers.²⁸ In its analysis, the court found that the trial court's exclusion of both pieces of inherited property on the basis of *Stratton v. Stratton*²⁹ was misplaced because in *Stratton* the parties stipulated to the exclusion of the marital property from the marital estate.³⁰ Noting that “[i]t has been repeatedly held that [the Indiana Code] requires inclusion in the marital estate of all property owned by the parties before separation, including inherited property,” the court of appeals stated that it was clear error to exclude the husband's property from the marital estate.³¹ Regarding the wife's property, the court considered it a bit “more complicated,” but disposed of the wife's joint tenancy argument by noting that a joint tenancy constitutes a present possessory interest.³²

Regarding [the wife's] joint tenancy argument, as a general rule an asset of a party should be included in the marital estate so long as the party has a present interest of possessory value in the asset. “When a

23. *Id.* at 650 (footnote omitted).

24. 871 N.E.2d 297 (Ind. Ct. App. 2007).

25. *Id.* at 299-300.

26. *Id.* at 299.

27. *Id.*

28. *Id.* at 301.

29. 834 N.E.2d 1146 (Ind. Ct. App. 2005).

30. *Grathwohl*, 871 N.E.2d at 301 n.4.

31. *Id.* at 301-03.

32. *Id.* at 301.

joint tenancy is created, each tenant acquires ‘an equal right . . . to share in the enjoyment of the land in their lives.’” A joint tenancy relationship confers equivalent legal rights on the tenants that are fixed and vested at the time the joint tenancy is created. Additionally, each joint tenant may sell or mortgage his or her interest in the property to a third party. Thus, [the wife] has a present right to enjoy the use of the Michigan property and the right to sell or mortgage her interest in it. This is sufficient to render her joint tenancy interest a present possessory interest for purposes of including the Michigan property in the marital estate. The trial court erred as a matter of law in excluding [the wife’s] joint tenancy interest in the Michigan property from the marital estate.³³

In *Griffin v. Griffin*,³⁴ the court held that the portion of a spouse’s military retirement pay that had been waived to receive veteran’s disability payments was not subject to equitable distribution.³⁵ In *Griffin*, the parties agreed that they would split the husband’s retirement income from the military.³⁶ The court approved their agreement.³⁷ Thereafter, the husband was awarded Veteran’s Administration (“VA”) disability benefits, which he applied for prior to the settlement agreement.³⁸ Federal law expressly forbids distribution of VA benefits and requires a reduction of the military retirement income which, in effect, is replaced by the VA benefits.³⁹ In a post-decree enforcement proceeding, the wife sought and was granted an order requiring the husband to pay her half of his retirement income from the military, including his disability payments.⁴⁰ On appeal, the husband argued that the order violated the U.S. Supreme Court’s decision in *Mansell*.⁴¹ The wife did not file an opposing brief.⁴² The Indiana Court of Appeals agreed with the husband that the trial court’s decision was clear legal error.⁴³ It did, however, state in a footnote “that many other jurisdictions have addressed the resulting situation in this case. The majority view has been described as permitting the use of equitable remedies to prevent a spouse from unilaterally and voluntarily diminishing military retirement benefits awarded to the other spouse in a dissolution decree.”⁴⁴ Basically, those decisions hold that the agreement or order provides the non-

33. *Id.* at 301-02 (citations omitted) (quoting *Cunningham v. Hastings*, 556 N.E.2d 12, 13 (Ind. Ct. App. 1990)).

34. 872 N.E.2d 653 (Ind. Ct. App. 2007).

35. *Id.* at 658 (citing *Mansell v. Mansell*, 490 U.S. 581 (1989)).

36. *Id.* at 654.

37. *Id.*

38. *Id.* at 655.

39. *Id.* at 654-55.

40. *Id.* at 658.

41. *Id.* at 655, 657.

42. *Id.* at 656.

43. *Id.* at 659.

44. *Id.* at 659 n.2.

military spouse with a vested interest in her portion of the military retirement benefits and that the vested interest cannot be unilaterally diminished by the military spouse.⁴⁵

In *Helm v. Helm*,⁴⁶ the court held that, to the extent the trial court intended to exclude the final two payments of a three million dollar lottery prize payable over twenty years, which the husband won prior to the marriage, it committed error because the husband's right to receive the final two payments after the date of filing was a vested property interest that he brought into the marriage.⁴⁷

2. *Asset Valuation Issues.*—*Galloway v. Galloway*⁴⁸ provides a good statement of the burden for going forward with the evidence of providing the value of an asset and the consequences of failing to do so. In *Galloway*, the husband and wife, both of whom were apparently represented by counsel, requested conflicting distributions of the marital property as it related to the wife's pension which was in pay status at the time of final hearing.⁴⁹ The husband, who was self-employed as a partner in an auction business, requested an even split of the pension.⁵⁰ The wife testified that she did not want the husband to receive any of the pension because she had worked for it for over thirty-one years and had helped him in his business, while he was not a good business man and went from job to job without developing any retirement savings or benefits.⁵¹ However, neither party presented any evidence of the value of the pension or the value of the husband's interest in the auction business.⁵² The trial court awarded the partnership interest to the husband and the pension in its entirety to the wife.⁵³ The remaining marital property was divided equally.⁵⁴ The husband appealed the trial court's decision, contending that it was an abuse of discretion because the trial court's distribution resulted in more than a fifty percent share to the wife, who he contended did not present evidence to rebut the statutory presumption of an equal division.⁵⁵

In what arguably amounts to reweighing the evidence, the Indiana Court of Appeals agreed with the husband's assertion that the wife failed to rebut the statutory presumption,⁵⁶ reasoning that it was the parties' obligation to present evidence of the value of the marital property—not the trial court's obligation.⁵⁷

45. *Id.* (citing *In re Marriage of Nielsen*, 729 N.E.2d 844, 849-50 (Ill. App. Ct. 2003); *Johnson v. Johnson*, 37 S.W.3d 892, 897-98 (Tenn. 2001)).

46. 873 N.E.2d 83 (Ind. Ct. App. 2007).

47. *Id.* at 88.

48. 855 N.E.2d 302 (Ind. Ct. App. 2006).

49. *Id.* at 304.

50. *Id.*

51. *Id.* at 305.

52. *Id.* at 304.

53. *Id.*

54. *Id.*

55. *Id.* at 304-05.

56. *Id.* at 306.

57. *Id.* at 305-06.

Thus, the court held that the husband waived the issue:⁵⁸

We remind the parties that the burden of producing evidence as to the value of the marital property rests squarely ““on the shoulders of the parties and their attorneys.”” In *Perkins*, this Court rejected the husband’s claim that the trial court’s order dividing the marital estate was vague and incomplete, relying on the principal that ““any party who fails to introduce evidence as to the specific value of the marital property at a dissolution hearing is estopped from appealing the distribution on the ground of trial court abuse of discretion based on that absence of evidence.””

We are guided by the reasoning of *Perkins*, which recognized the validity of protecting the trial court from ““the risk of reversal if it distributes the marital property without specific evidence of value.””⁵⁹

England v. England,⁶⁰ as discussed previously, also dealt with a challenge by the husband to the trial court’s valuation of his present possessory interest to live on the property in question for the remainder of his life, subject to defeasance for reasons primarily under his control. In *England*, the wife called a certified public accountant (“CPA”) to testify as to the value of the life-long lease of the property.⁶¹ The CPA, starting with the husband’s opinion of the monthly value of occupancy of his residence, added value for the remaining acreage and

58. *Id.* at 305. The trial court did justify its award of the entire pension to the wife and, thus, a greater share of the marital pot on the bases that the husband had failed to acquire any retirement benefits even though he was gainfully employed through all of the marriage; that the husband quit the same employer while he allowed the wife to accrue her substantial retirement benefits; and that the husband who was still employed was free to earn as much as he could, limited only by his ability and willingness to work. *Id.* Apparently, the appellate court felt that the wife’s failure to present evidence regarding her ability to work and earning capacity, and her failure to claim that the husband’s actions during the marriage constituted dissipation, amounted to a failure to present sufficient evidence for deviation from the presumption of an even distribution under Indiana Code section 31-15-7-5. The problem with the court reweighing the evidence and concluding that the evidence was not sufficient to justify deviation is that the facts in *Galloway* become nearly identical to the facts in *Schueneman v. Schueneman*, 591 N.E.2d 603, 608 (Ind. Ct. App. 1992), a case in which no evidence had been presented as to the value of the wife’s pension. In *Schueneman*, the court stated that “it is likely that the plan has some value and, by awarding it to [the wife], the trial court made an unequal distribution of the marital estate without making findings why a deviation from a 50/50 split was just and reasonable.” *Id.* at 609. In *Schueneman*, however, the appellate court remanded to the trial court for further consideration, noting that the trial court was free to order a percentage of future pension payments to the husband in light of the fact that division of the plan would be speculative without evidence of the value. *Id.*

59. *Galloway*, 855 N.E.2d at 306 (quoting *Perkins v. Harding*, 836 N.E.2d 295, 301-02 (Ind. Ct. App. 2005)).

60. 865 N.E.2d 644, 650-51 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 205 (2007).

61. *Id.*

buildings, multiplied the value by an average life expectancy to take into consideration the husband's parent's rights to use the property, and then reduced it to a present value.⁶² Noting that Indiana has long held that occupation of real estate at low or no cost is a relevant consideration in dividing marital assets,⁶³ the *England* court reiterated the long standing principal that "a trial court has broad discretion in determining the value of property in a dissolution action, and its valuation will not be disturbed absent an abuse of that discretion."⁶⁴ The husband essentially presented only his opinion at trial which ascribed merely \$150 per month in rental value to his occupancy of the property for life.⁶⁵ Finding that the trial court had sufficient evidence upon which to value the occupancy, the court held there was no abuse of its discretion in determining the value.⁶⁶

In *Grathwohl v. Garrity*⁶⁷ the appellate court noted that its remand to the trial court due to that court's exclusion of the two inherited pieces of property without any explanation for its reasoning could result in a situation where its nearly equal distribution of property could become grossly unequal, depending upon the relative values of the properties which were highly disputed at trial. Accordingly, the court remanded with these instructions:

Thus, we cannot determine the actual total value of the marital estate and the respective percentages of the estate that [the wife] and [the husband] received; in other words, we cannot determine whether set off of the inherited properties resulted in a significantly different division of the estate than the 49/51 split reflected in the trial court's order. We remand for the trial court to include the parties' inherited property interests in the marital estate, to value those interests, and to recalculate the division of those marital assets accordingly.⁶⁸

3. *Asset Distribution Issues.*—More than two decades ago, after the Indiana Supreme Court's decision in *Luedke v. Luedke*,⁶⁹ in which the court vacated a decision of the Indiana Court of Appeals which would have created a rebuttable presumption favoring the equal division of marital property, the Indiana legislature amended the dissolution statute to include a rebuttable presumption

62. *Id.* at 646.

63. *See Vadas v. Vadas*, 762 N.E.2d 1234, 1236 (Ind. 2002); *In re Dall*, 681 N.E.2d 718, 722-23 (Ind. Ct. App. 1997); *Hacker v. Hacker*, 659 N.E.2d 1104, 1111 (Ind. Ct. App. 1995).

64. *England*, 865 N.E.2d at 651 (citing *Hiser v. Hiser*, 692 N.E.2d 925, 927 (Ind. Ct. App. 1998)). Additionally, the court cited the recent decision in *Galloway* for the proposition that "[t]he burden of producing evidence as to the value of marital assets is upon the parties to the dissolution proceeding." *Id.* (citing *Galloway*, 855 N.E.2d at 306).

65. *Id.*

66. *Id.*

67. 871 N.E.2d 297, 302 (Ind. Ct. App. 2007).

68. *Id.* What makes this case substantially different from *Galloway* is that the parties apparently did present greatly differing valuations of the wife's property in Michigan.

69. 487 N.E.2d 133, 134 (Ind. 1985).

that an equal division of marital property between the parties was just and reasonable.⁷⁰ In *Hill v. Hill*,⁷¹ discussed above, the husband's appeal also included a challenge to a division of the marital pot, arguing that the trial court committed error by equally dividing the assets. However, in reaching its decision, the trial court actually excised from its valuations of the marital property portions of the total value attributable to amounts of the husband's pre-marital assets used to acquire the marital property.⁷² In effect, the trial court erroneously excised pre-marital assets by excluding a sum equivalent to their value from the marital assets which were purchased with the pre-marital assets.⁷³ Thus, the trial court's "equal division" actually resulted in a greater distribution to the husband.⁷⁴ However, the court noted that the trial court, while not supplying adequate reasoning for its exclusion of the value of pre-marital assets, did provide sufficient reasoning for why it divided the property as it did.⁷⁵ Thus, the Indiana Court of Appeals held that the trial court did not abuse its discretion in dividing the marital property by failing to give the husband even more than the superior distribution it had given him.⁷⁶

In *Grathwohl v. Garrity*,⁷⁷ the wife complained on appeal, in addition to her

70. The most recent articulation of the presumption for equal division of marital property and its rebuttal presumption is found at Indiana Code section 31-15-7-5, which provides as follows:

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

- (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
- (2) The extent to which the property was acquired by each spouse:
 - (A) before the marriage; or
 - (B) through inheritance or gift.
- (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.
- (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.
- (5) The earnings or earning ability of the parties as related to:
 - (A) a final division of property; and
 - (B) a final determination of the property rights of the parties.

IND. CODE § 31-15-7-5 (2004).

71. *Hill v. Hill*, 863 N.E.2d 456, 461-62 (Ind. Ct. App. 2007).

72. *Id.*

73. *Id.* at 462.

74. *Id.* at 462-63.

75. *Id.* at 463.

76. *Id.* at 464.

77. 871 N.E.2d 297, 302 (Ind. Ct. App. 2007).

argument that the court erred regarding the exclusion of husband's inherited real estate, that the trial court erred by not finding that the husband had committed dissipation of marital assets.⁷⁸ Apparently, however, the wife never asked the trial court to find that the husband had dissipated assets:

If a party does not present an issue or argument to the trial court, appellate review of the issue or argument is waived. "This rule protects the integrity of the trial court, which should not be found to have erred as to an issue or argument that it never had an opportunity to consider." Waiver may be avoided if the newly-raised issue was inherent in the resolution of the case, the other party had unequivocal notice of the issue below and had an opportunity to litigate it, or if the trial court actually addressed the issue in the absence of argument by the parties. We do not believe that any of these exceptions to the waiver rule applies in this case.⁷⁹

However, the court noted that, even if the issue had not been waived, it did not see the complained-of behavior as constituting dissipation of marital assets.⁸⁰ At trial, the wife complained that the husband had used his income and inheritance for his own benefit to the exclusion of contributing to marital expenses by purchasing a motorcycle, Conseco stock (which became worthless), and spending money "remodeling and repairing the property he inherited from his mother."⁸¹ The court quickly pointed out that displeasure with a spouse's spending decisions does not necessarily constitute dissipation of marital assets.⁸² It stated:

Dissipation of marital assets includes the frivolous and unjustified spending of marital assets. "The test for dissipation is whether the assets were actually wasted or misused." With respect to the motorcycle, its value was included in the marital estate and [the wife] was awarded one-half of its value. The money [the husband] spent to purchase it did not completely disappear; [the wife] will be compensated for [the husband's] purchase. Additionally, [the wife] testified that she sometimes rode the motorcycle with [the husband] before their separation. Thus, [the wife] enjoyed the use of the marital asset for some time. With respect to the Conseco stock, [the husband] is far from the only person who became "stuck" with worthless stock in that company. If it had not lost all of its value, it too would have been included in the marital estate. The fact that [the husband] ultimately made a poor decision in purchasing the stock does not render such purchase frivolous. Finally, we also cannot

78. See IND. CODE § 31-15-7-5(4) (2004).

79. *Grathwohl*, 871 N.E.2d at 302 (quoting *Nance v. Miami Sand & Gravel, LLC*, 825 N.E.2d 826, 834 (Ind. Ct. App. 2005)).

80. *Id.*

81. *Id.* at 303.

82. *Id.*

say that the use of money to remodel and repair the property [the husband] inherited from his mother constituted a frivolous expenditure. The use of funds to improve the condition of what we have upheld is clearly a marital asset (despite the fact of [the husband's] inheritance) is not wasteful.⁸³

In short, a way to look at the issue of dissipation is not whether the use of funds displeases a spouse, but whether it frivolously takes money out of the estate without justifiable cause.⁸⁴

B. Marital Settlement Agreements

1. *Post-Nuptial Settlement Agreements.*—There is very little appellate authority regarding post-nuptial agreements. *Augle v. Augle*,⁸⁵ a case involving a “post-nuptial” agreement, stands for the proposition that, unless the agreement provides otherwise, a trial court abuses its discretion where it modifies the agreement in a subsequent dissolution of marriage without making findings of “fraud, duress, other imperfections of consent, or manifest inequities.”⁸⁶

Several things are notable about this decision and others involving post-nuptial agreements. First, the agreement in *Augle*, like the agreement in *Pond*, was clearly executed in contemplation that the parties would eventually dissolve their marriage.⁸⁷ In *Augle*, the parties were married in 1970.⁸⁸ They separated in 2004, but agreed in their post-nuptial agreement not to file dissolution proceedings until 2006.⁸⁹ The agreement also adjusted all of their duties and obligations to each other in contemplation of a dissolution of marriage.⁹⁰ Upon filing the petition for divorce, the trial court enforced all of the provisions of the post-nuptial agreement, except a provision requiring the husband to maintain life insurance on the wife until one of their deaths.⁹¹ The trial court deleted that provision at the husband's request, and the wife appealed.⁹² She contended that the post-nuptial agreement was a settlement agreement under Indiana Code section 31-15-2-17.⁹³ *Pond* involved a similar sequence of events. In that case,

83. *Id.* (quoting *Balicki v. Balicki*, 837 N.E.2d 532, 540 (Ind. Ct. App. 2005)).

84. *Id.*

85. 868 N.E.2d 1146 (Ind. Ct. App. 2007).

86. *Id.* at 1148-49 (citing *Pond v. Pond*, 700 N.E.2d 1130, 1137 (Ind. 1998)).

87. *Id.* at 1147.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1148.

92. *Id.* at 1147-49.

93. *Id.* at 1148. See IND. CODE § 31-15-2-17 (2004), which provides as follows:

- (a) To promote the amicable settlements of disputes that have arisen or may arise between the parties to a marriage attendant upon the dissolution of their marriage, the parties may agree in writing to provisions for:
 - (1) the maintenance of either of the parties;

the parties began negotiating the terms for the settlement of their divorce long before filing.⁹⁴ Their agreement was completed and executed by both of them at the time they filed.⁹⁵ Included within their agreement was an *ad terrorem* clause which provided that if a party challenged the post-nuptial agreement and lost, he or she would pay the attorney's fees of the other.⁹⁶ The wife challenged the agreement, but the trial court upheld all of the agreement except for the provision requiring her to pay the husband's attorney's fees in the event that she unsuccessfully challenged the agreement.⁹⁷ Upon transfer, the Indiana Supreme Court found that the agreement was an agreement of settlement attendant to a divorce under Indiana Code section 31-15-2-17 and held that the trial court may reject or modify a marital settlement agreement only if it finds "fraud, duress, other imperfections of consent, or manifest inequities" pursuant to its prior decision in *Voigt v. Voigt*.⁹⁸

2. *Modification Versus Clarification of Property Settlement Orders.*—In

-
- (2) the disposition of any property owned by either or both of the parties; and
 - (3) the custody and support of the children of the parties.
- (b) In an action for dissolution of marriage:
- (1) the terms of the agreement, if approved by the court, shall be incorporated and merged into the decree and the parties shall be ordered to perform the terms; or
 - (2) the court may make provisions for:
 - (A) the disposition of property;
 - (B) child support;
 - (C) maintenance; and
 - (D) custody;as provided in this title.
 - (c) The disposition of property settled by an agreement described in subsection (a) and incorporated and merged into the decree is not subject to subsequent modification by the court, except as the agreement prescribes or the parties subsequently consent.

94. *Pond v. Pond*, 700 N.E.2d 1130, 1136-37 (Ind. 1998).

95. *Id.* at 1133.

96. *Id.* at 1135-36.

97. *Id.* at 1136-37.

98. *Id.* at 1137 (citing *Voigt v. Voigt*, 670 N.E.2d 1271, 1277-78 (Ind. 1996)). There appears to be no recent Indiana decision upholding a "post-nuptial" agreement executed by parties not in the contemplation of a divorce action which is filed shortly thereafter. In *Flansburg v. Flansburg*, 581 N.E.2d 430, 431-33 (Ind. Ct. App. 1991), a "reconciliation" agreement was upheld where the parties executed the agreement setting forth their right to property, spousal maintenance, and attorney's fees in the event of a future dissolution of marriage and in consideration of a dismissal of the pending dissolution action. In a later dissolution of marriage proceeding, after the prior one had been dismissed, the wife challenged the reconciliation agreement which the trial court upheld. *Id.* On appeal, the trial court was affirmed with the court stating: "We conclude that a reconciliation agreement may be enforced as long as it is entered into freely and without fraud or misrepresentation, or is not otherwise unconscionable." *Id.* at 437.

Robinson v. Robinson,⁹⁹ the Indiana Court of Appeals reversed a trial court order amending a qualified domestic relations order (“QDRO”) for the reason that it constituted an improper modification of the parties’ settlement agreement. Like property settlement agreements, which may not be modified except as provided therein or for consent vitiating circumstances, court orders concerning property distributions may not be revoked or modified except for fraud asserted within six years of the entry of the order; however, the trial court retains jurisdiction to clarify its orders.¹⁰⁰ In *Robinson*, the parties’ marriage was dissolved in 1994.¹⁰¹ The decree approved their settlement agreement and QDRO which provided that the wife would receive no more than \$1423 per month from the husband’s future pension payments, as the husband desired to limit the amount by which his future payments would be reduced.¹⁰² Unfortunately, the husband did not realize that a future pension administrator would reduce his pension by more than \$1600 per month in order to fund \$1423 per month to the wife.¹⁰³ When he retired, he discovered the error.¹⁰⁴ In other words, his settlement agreement with the wife, while capping her benefit, incorrectly assumed that the cost of funding her benefit out of his monthly benefit would be the same.¹⁰⁵ The trial court granted the husband’s request to modify the QDRO to provide that his monthly benefit would not be reduced by more than \$1423, i.e., that the wife would receive a lower monthly benefit.¹⁰⁶

On appeal, the court found the authority presented by the husband to be inapposite to the circumstance before it, as those cases related to modification of QDROs that failed to assign the risk or benefit of declines or increases in the pension benefits due to market forces.¹⁰⁷ The court found that the parties’ agreement was unambiguous and that they could have simply provided the maximum reduction from the husband’s benefit would be \$1423 per month.¹⁰⁸

99. 858 N.E.2d 203, 208 (Ind. Ct. App. 2006).

100. *Id.* at 205-06. See also Indiana Code section 31-15-7-9.1, which provides:

- (a) The orders concerning property disposition entered under this chapter (or [Indiana Code section] 31-1-11.5-9 before its repeal) may not be revoked or modified, except in case of fraud.
- (b) If fraud is alleged, the fraud must be asserted not later than six (6) years after the order is entered.

IND. CODE § 31-15-7-9.1 (2004).

101. *Robinson*, 858 N.E.2d at 204.

102. *Id.* at 205-06.

103. *Id.* at 205.

104. *Id.*

105. *Id.* at 205-06.

106. *Id.* at 205.

107. *Id.* at 205-06 (discussing *Self v. Self*, 907 So. 2d 546, 547-48 (Fla. Dist. Ct. App. 2005); *In re Marriage of Allen*, 798 N.E.2d 135, 137-38 (Ill. App. Ct. 2003); *Weller v. Weller*, 684 N.E.2d 1284, 1286-88 (Ohio Ct. App. 1996)).

108. *Id.* at 205 n.10, 208 (discussing *Niccum v. Niccum*, 734 N.E.2d 637, 637-39 (Ind. Ct. App. 2000)). While a trial court retains jurisdiction to interpret and enforce its own decree, *Thomas*

Thus, the trial court abused its discretion by ordering modification of the QDRO which, in effect, resulted in an improper modification of the parties' settlement agreement.¹⁰⁹

C. Enforcement of Dissolution Orders

1. *Interest on Orders.*—In *Zoller*¹¹⁰ the trial court enforced its decree for the payment of a sum of money to the wife and added substantial interest from the date of the entry of the decree.¹¹¹ On appeal, the husband complained that when the trial court entered its decree giving the husband the parties' marital residence in 2002 and ordering him to pay the wife more than \$62,000 to equalize the distribution, the decree said nothing about interest.¹¹² Therefore, he argued he should not be ordered to pay interest due to his failure to pay the court order in the decree.¹¹³ The order in the decree requiring the husband to pay the wife was not called a judgment.¹¹⁴

On appeal, the court noted that “[t]he issue of whether an amount ordered to be paid as part of the trial court’s property division in a dissolution action bears interest has been the subject of some dissension.”¹¹⁵ In a succinctly reasoned analysis, the court noted that Trial Rule 54 of the Indiana Rules of Trial Procedure defining “a ‘judgment’ includes a decree [of dissolution of marriage] and any order from which an appeal lies”; that a decree “becomes final and appealable when entered by the trial court”; that an order to pay a sum of money in a dissolution property order is a money judgment; and that “money judgments, including sums ordered to be paid in the dissolution decree, accrue interest” even if not expressly provided for in the dissolution decree.¹¹⁶

2. *Enforcement of Distribution Order by Contempt.*—In *Mitchell v. Mitchell*,¹¹⁷ the Indiana Court of Appeals essentially extended the proposition in prior authority that the court’s contempt power may be used to compel compliance with a decree’s hold harmless clause. *Mitchell* involved a divorce settlement in which the husband agreed to hold the wife harmless from obligations that he was assuming or had assumed.¹¹⁸ He failed to do so, and the

v. *Thomas*, 557 N.E.2d 216, 219 (Ind. 1991), the standard for the trial court and upon review is that, “[u]nless the terms of a contract are ambiguous, they will be given their plain and ordinary meaning.” *Robinson*, 858 N.E.2d at 205-06 n.2 (quoting *Niccum*, 734 N.E.2d at 639).

109. *Robinson*, 858 N.E.2d at 208.

110. 858 N.E.2d 124 (Ind. Ct. App. 2006).

111. *Id.* at 126.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* (citing IND. CODE § 31-15-2-16(b) (2004); *Williamson v. Rutana*, 736 N.E.2d 1247 (Ind. Ct. App. 2000); *Van Ripper v. Keim*, 437 N.E.2d 130 (Ind. Ct. App. 1982)).

117. 871 N.E.2d 390, 396 (Ind. Ct. App. 2007).

118. *Id.* at 391.

wife brought numerous contempt actions against him resulting in findings that he was in contempt and orders to purge the contempt or face incarceration.¹¹⁹ At one point during these numerous contempt proceedings the husband actually was incarcerated.¹²⁰

Eventually, the trial court began to entertain considerable doubts about its ability to continue tossing the husband in jail for failure to hold the wife harmless.¹²¹ The trial court appointed the husband an attorney due to the wife's continued request that he be incarcerated.¹²² Based upon the decision in *Merritt v. Merritt*,¹²³ the trial court held that contempt was not available to enforce a hold harmless clause.¹²⁴

The court simply skirts the prescription of Indiana Constitution article I, section 22 prohibiting imprisonment for debt¹²⁵ by saying that a hold harmless clause is not an order to pay a fixed sum in installments or a lump sum.¹²⁶ Additionally, where a hold harmless clause requires the offending party to make installments to a third party, how can imprisonment for contempt for failure to fulfill the hold harmless clause be any different than failure to pay any other debt—by lump sum or installment?¹²⁷ This is certainly a triumph of form over substance inasmuch as the amount owed to a creditor can be ascertained and reduced to a judgment in favor of one spouse and against the other. Additionally, where a hold harmless clause requires the offending party to make installment payments to a third party, how can imprisonment for contempt for failure to fulfill the hold harmless clause be any different than imprisonment for failure to pay any other debt?¹²⁸

119. *Id.*

120. *Id.* at 391-93.

121. *Id.* at 393.

122. *Id.*

123. 693 N.E.2d 1320, 1324 (Ind. Ct. App. 1998).

124. *Mitchell*, 871 N.E.2d at 394-96. Speaking of *Merritt*, the court decided its holding was dicta and decided not to follow it, stating that:

[In *Merritt*], [w]e affirmed and held that the hold harmless provision constituted an award of property, not a support obligation, and that therefore it was dischargeable in bankruptcy. As the debt was discharged in bankruptcy, the obligation could not be enforced. But, we went on to say in *dicta*, “[B]ecause [a] hold harmless provision constitute[s] a property settlement award, it may not be enforced through contempt proceedings. Property settlement agreements incorporated into a final decree of dissolution may not be enforced by contempt citation.” We find this *dicta* to be too broad.

Id. at 394-95 (citing and quoting *Merritt*, 693 N.E.2d at 1324) (footnote omitted).

125. IND. CONST. art. I, § 22.

126. *Mitchell*, 871 N.E.2d at 394-96.

127. *Id.*

128. See *Cowart v. White*, 711 N.E.2d 523, 531 (Ind. 1999) (finding that contempt is unavailable to enforce a hold harmless clause which requires installment payments to a third party). It should be noted, however, that *Cowart* upheld contempt findings by the trial court due to the

D. Spousal Maintenance

1. *Proof of Disability*.—In *Matzat v. Matzat*,¹²⁹ the Indiana Court of Appeals reversed that portion of the trial court's dissolution decree awarding post-decree incapacity maintenance to the wife, holding she failed to provide sufficient medical evidence of her disability. In *Matzat*, the husband appealed the trial court's award of incapacity maintenance to the wife and its exclusion of evidence that the Social Security Administration denied her disability claim at the hearing on his motion to correct errors.¹³⁰

In *Matzat*, the wife's only evidence of her incapacity was "that she could no longer work as a certified nurse because she was unable to lift patients," that she could not sit sufficiently long enough to do other work, and that she had applied for social security disability benefits.¹³¹ The trial court awarded her incapacity maintenance of \$200 per week and required the husband to continue her health insurance coverage until she began receiving the benefits.¹³² The husband filed a motion to correct errors contending that the award of maintenance was an abuse of discretion.¹³³ At the hearing on the motion to correct errors, the husband attempted to introduce evidence that the Social Security Administration had denied the wife's claim for disability.¹³⁴ Concerning the exclusion of the evidence at the hearing on the motion to correct errors, the court found that the evidence was improperly excluded because it fit the criteria for newly discovered evidence, it had not been issued until after the final hearing, and it was relevant to show the wife's claim for disability benefits was based, in part, on reasons other than those cited at trial.¹³⁵ Noting that it has long-been held that medical testimony is not required to support an award of incapacity maintenance where the spouse testified that she was receiving Social Security Disability benefits due to a medical condition,¹³⁶ the court stated:

While our research has not yielded a single, reported case in which this court has reversed the trial court's grant or denial of an incapacity maintenance award on the basis of evidentiary sufficiency, it has also not produced a case where the evidence supporting an award was as meager as the one here.¹³⁷

husband's failure to maintain certain real estate, sell it, and divide the proceeds with the former spouse. *Id.*

129. 854 N.E.2d 918, 922 (Ind. Ct. App. 2006).

130. *Id.* at 919.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 919-20.

136. *Id.* at 920-21 (citing *Paxton v. Paxton*, 420 N.E.2d 1346, 1348 (Ind. Ct. App. 1981)).

137. *Id.*

Under these circumstances, the court's decision is important for the examples it provides for what the allegedly incapacitated spouse must prove regarding her impairments and their impact on the ability to support:

[The wife] had the burden of proof on this issue; from her testimony

we know that she claimed back problems, including back pain, that she had sought medical treatment, that she takes medication for the pain, and that she claimed to have left her job as a certified nurse because she could not lift patients. She also claimed that she had trouble standing, sitting, or walking for extended periods of time.

[The wife] presented no medical evidence to support her claim of incapacity. We have no reports from treating or examining physicians. We have no expert opinion testimony. We have no x-rays or magnetic resonance imaging tests. We do not know the nature of her back problems or the cause. We do not know either the diagnosis or the prognosis. We also do not know the recommended treatment and whether she has followed that treatment. We do not know the limits, if any, that doctors may have placed on her. We do not know whether the problems are quiescent. We do not know whether they are temporary or permanent.¹³⁸

Accordingly, the trial court's award of incapacity maintenance was reversed because wife's evidence of her impairments was insufficient to show the extent to which they limited her ability to support herself.¹³⁹

II. CHILD CUSTODY

A. Jurisdiction

On August 15, 2007, Indiana's version of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA")¹⁴⁰ became effective.¹⁴¹ UCCJEA is a uniform state law approved by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") to replace the Uniform Child Custody Jurisdiction Act ("UCCJA").¹⁴²

The UCCJEA governs State courts' jurisdiction to make and modify "child custody determinations," a term that expressly includes custody and visitation orders.

138. *Id.* at 921.

139. *Id.*

140. IND. CODE § 31-21-1-1 (Supp. 2007).

141. *Novatny v. Novatny*, 872 N.E.2d 673, 678 n.5 (Ind. Ct. App. 2007).

142. Patricia M. Hoff, *The Uniform Child-Custody Jurisdiction and Enforcement Act*, JUV. JUST. BULL., Dec. 2001, at 1, available at <http://www.ncjrs.gov/pdffiles1/ojdp/189181.pdf> (footnotes omitted).

The Act requires State courts to enforce valid child custody and visitation determinations made by sister State courts. It also establishes innovative interstate enforcement procedures.

The UCCJEA is intended as an improvement over the UCCJA. It clarifies UCCJA provisions that have received conflicting interpretations in courts across the country, codifies practices that have effectively reduced interstate conflict, conforms jurisdictional standards to those of the Federal Parental Kidnapping Prevention Act (the PKPA) to ensure interstate enforceability of orders, and adds protections for victims of domestic violence who move out of State for safe haven.

The UCCJEA, however, is not a substantive custody statute. It does not dictate standards for making or modifying child-custody and visitation decisions; instead, it determines which States' courts have and should exercise jurisdiction to do so. A court must have jurisdiction (i.e., the power and authority to hear and decide a matter) before it can proceed to consider the merits of a case. The UCCJEA does not apply to child support cases.¹⁴³

143. *Id.* IND. CODE § 31-21-1-1 (Supp. 2007) provides: "This article does not apply to: (1) an adoption proceeding; or (2) a proceeding pertaining to the authorization of emergency medical care for a child." IND. CODE § 31-21-2-4 (Supp. 2007) provides:

- (a) "Child custody determination" means a judgment, decree, or other court order providing for:
 - (1) legal custody;
 - (2) physical custody; or
 - (3) visitation;with respect to a child.
- (b) The term does not include an order relating to child support or other monetary obligation of a person.

IND. CODE § 31-21-2-5 (Supp. 2007) provides:

- (a) "Child custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for:
 - (1) dissolution of marriage or legal separation;
 - (2) child abuse or neglect;
 - (3) guardianship;
 - (4) paternity;
 - (5) termination of parental rights; and
 - (6) protection from domestic violence;in which the issue of child custody or visitation may appear.
- (b) the term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement of child custody under [Indiana Code section] 31-21-6.

Indiana Code section 31-21-7-3 provides that any relevant action governed by the statute that was commenced before July 1, 2007, is governed by the law in effect at the time.¹⁴⁴

Several cases involving the UCCJA as it existed prior to July 1, 2007, were decided during the survey period. *Cox v. Cantrell*¹⁴⁵ involved the transferring of the jurisdiction of a custody proceeding from Indiana to Michigan where father's three children were receiving therapy while in residential placement. The mother, who had custody of the parties' three children, had moved from Indiana to Michigan.¹⁴⁶ On June 8, 2006, the Michigan Department of Human Services filed a petition alleging the children had been abused and neglected, and they were removed from the mother's care and put in residential placement.¹⁴⁷ On June 15, 2006, the father and mother filed a joint stipulation for change of custody and support with the Elkhart Superior Court.¹⁴⁸ They stipulated that it was in the best interests of the children for custody to be changed from the mother to the father.¹⁴⁹ On the same day, without a hearing, the Elkhart Superior Court approved the parties' stipulation, concluding that it had continuing and prior jurisdiction over the children.¹⁵⁰ The trial court further ordered the children to be returned to the State of Indiana to the father's custody as soon as possible.¹⁵¹ Thereafter, the judge of the Michigan court and the judge of the Indiana court held a telephone conference in which it was decided that the best interests of the children required that they remain in residential care (where they were receiving medical and psychological care) and that the jurisdiction was to be in the State of Michigan.¹⁵² The Indiana trial court ordered the jurisdiction changed to Michigan.¹⁵³

The father appealed contending, in sum, that the trial court lacked statutory authority to issue the order transferring jurisdiction of the proceedings to the Michigan court, that the father's due process rights had been violated by the two courts holding a telephone conference, and that the Indiana order violated Michigan law.¹⁵⁴ In affirming the trial court, the Indiana Court of Appeals

144. IND. CODE § 31-21-7-3 (Supp. 2007) provides: "A motion or other request for relief made: (1) in a child custody proceeding; or (2) to enforce a child custody determination; that was commenced before July 1, 2007, is governed by the law in effect at the time the motion or other request was made." *But see* *Novatny v. Novatny*, 872 N.E.2d 673, 678 n.5 (Ind. Ct. App. 2007) (stating effective date of August 15, 2007).

145. 866 N.E.2d 798, 802 (Ind. Ct. App. 2007).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 803.

153. *Id.*

154. *Id.* at 804-05, 808-10.

concluded that federal law required the trial court in Indiana to give full faith and credit to the Michigan court's custody determination because the Michigan court's exercise of jurisdiction to remove the children from the mother's custody was controlled by the emergency provision of the PKPA.¹⁵⁵ The court reasoned that the facts of the case indicated that the proceeding in Michigan was the equivalent of an Indiana Child in Need of Services Proceeding because the children had to be removed from their mother for their own physical and emotional welfare.¹⁵⁶ The court stated:

When such a tragic emergency occurs, the state where the children are located should and does have authority under federal law to immediately take action to protect the children located within its borders. Public policy supports such law when the state where the child is physically located has the best knowledge of the circumstances as well as the resources to take immediate action to ensure the child's protection. Therefore, Michigan was exercising its jurisdiction as provided under federal law, and Indiana was required to give full faith and credit to Michigan's temporary custody determination to put the children in residential placement for treatment.¹⁵⁷

The father also contended that the trial court violated his due process rights in holding a telephone conference with the Michigan court judge to determine the appropriate state jurisdiction.¹⁵⁸ The court disagreed quoting Indiana Code section 31-17-3-6(c) which provides that:

"If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and 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 in accordance with sections 19 through 22 of this chapter."¹⁵⁹

The Indiana Court of Appeals stated that not only is a trial court authorized to communicate with another state court to determine the appropriate jurisdiction, but it is required to do so upon learning that a proceeding concerning the custody of a child under its jurisdiction is pending in another state.¹⁶⁰ The father had argued that Indiana Code section 31-17-3-4 required that, before the court could make a decree, reasonable notice and opportunity had to be given to all the parties including the parents.¹⁶¹ The court held that the trial court's order

155. *Id.* at 807.

156. *Id.* at 808.

157. *Id.*

158. *Id.*

159. *Id.* (quoting IND. CODE § 31-17-3-6(c) (1998)).

160. *Id.* at 809.

161. *Id.*

transferring jurisdiction to the Michigan court was neither a decree nor a custody determination but was merely an order concluding that Michigan was the more appropriate forum to handle the custody proceeding.¹⁶²

In *Novatny v. Novatny*¹⁶³ the mother and father were divorced in Indiana. The mother was given custody of the children and subsequently petitioned the court to relocate the children to Virginia.¹⁶⁴ After a hearing, this petition was granted, and the mother moved the children to Virginia.¹⁶⁵ Prior to the hearing on relocation, the father had moved from the State of Indiana to the State of Illinois.¹⁶⁶ Approximately two-and-one-half years after the trial court had granted the mother's petition to relocate the children to Virginia, the father filed a petition to modify custody of the children.¹⁶⁷

The mother filed an objection under the UCCJA contending that Indiana no longer had jurisdiction over this case because neither of the parties resided in Indiana any longer and Virginia was the home state of the children.¹⁶⁸ The father countered by pointing out that no action had been initiated in Virginia and, therefore, no Virginia court had assumed jurisdiction, so it was appropriate for Indiana to retain jurisdiction.¹⁶⁹ The trial court agreed.¹⁷⁰ After a hearing the trial court granted the father's petition to modify.¹⁷¹ The mother appealed.¹⁷²

The court of appeals vacated the trial court's order and held that the trial court lacked jurisdiction under the UCCJA to hear the father's petition.¹⁷³ The court noted that the state that first enters a custody decree in a matter retains exclusive jurisdiction under the UCCJA, but that jurisdiction continues only until all the parties and the children have left the state.¹⁷⁴ Once all the parties and the children have left the state and the children acquire a "home state"¹⁷⁵ other than Indiana, then jurisdiction may not be assumed in Indiana unless the home

162. *Id.*

163. 872 N.E.2d 673, 675-76 (Ind. Ct. App. 2007).

164. *Id.* at 676.

165. *Id.* at 676-77.

166. *Id.* at 676.

167. *Id.* At the time of the filing of the father's petition he continued to live in Illinois, the mother had moved the children to Virginia in February 2004, and that was where they were living at the time the petition was filed. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 682.

174. *Id.* at 679 (citing *In re Custody of A.N.W.*, 798 N.E.2d 556, 561 (Ind. Ct. App. 2003)).

175. Indiana Code section 31-17-3-2(5) (2004) (repealed 2007) defines "home state" as the state in which the child, immediately preceding the time involved, lived with his parents, a parent, or a person acting as parent, for at least six (6) consecutive months . . . Periods of temporary absence of any of the named persons are counted as part of the six (6) months or other period.

state has declined its jurisdiction.¹⁷⁶ The court further stated that, even though Virginia had not assumed jurisdiction of the case, no evidence in the record indicated that Virginia had declined jurisdiction either.¹⁷⁷ The court noted that under the UCCJA, Virginia qualified as the children's home state.¹⁷⁸

After the father had been granted custody of the children by the trial court and before the appeal was decided, he moved back to Indiana with the children.¹⁷⁹ He argued that through the passage of time, by operation of law, Indiana would now be the children's home state.¹⁸⁰ The court dismissed that argument by pointing out that the trial court did not have jurisdiction over the father's petition when he had filed it.¹⁸¹ "When a court lacks subject matter jurisdiction, its actions are *void ab initio* and may be challenged at any time."¹⁸²

B. Factors Affecting Modification of Custody

1. *Consistent Denial of Visitation and Failure to Foster Parent/Child Relationship.*—*In re Marriage of Kenda*¹⁸³ involved a case where the mother and father were both citizens of a foreign country.¹⁸⁴ The parties were divorced in the District of Columbia Superior Court.¹⁸⁵ The mother eventually relocated to Indiana where she filed a petition to modify non-custodial parenting time.¹⁸⁶ The father countered by filing a petition for modification of custody, parenting time, child support, and request for custody evaluation.¹⁸⁷ The custody evaluation was performed with the conclusion that the mother retain physical custody of the parties' minor child.¹⁸⁸ Prior to the hearing on the matter, the father filed a motion for contempt citation alleging that the mother had refused to allow any parenting time, unless it was supervised, since prior to the filing of her petition to modify, which was not a requirement under the divorce decree.¹⁸⁹ Indeed, the record was replete with evidence of the mother's interference with the father's

176. *Novatny*, 872 N.E.2d at 680 (citing *Hughes v. Hughes*, 665 N.E.2d 929, 932 (Ind. Ct. App. 1996)).

177. *Id.* "Apparently, Virginia had never been requested to assume jurisdiction prior to the filing of [f]ather's petition." *Id.*

178. *Id.*

179. *Id.* at 681.

180. *Id.*

181. *Id.*

182. *Id.* (quoting *Allen v. Proksch*, 832 N.E.2d 1080, 1095 (Ind. Ct. App. 2005)).

183. 873 N.E.2d 729, 731 (Ind. Ct. App.), *trans. denied*, *Kenda v. Pleskovic*, 878 N.E.2d 222 (Ind. 2007).

184. *Id.*

185. *Id.*

186. *Id.* at 731-32.

187. *Id.* at 732.

188. *Id.*

189. *Id.*

parenting time.¹⁹⁰ After trial, the court denied the mother's request for supervised parenting time and granted the father's petition for modification of custody.¹⁹¹ The mother appealed.¹⁹²

On appeal, the mother argued that the trial court's modification decision was based on her perceived violations of the trial court's prior orders regarding visitation rather than the statutory factors.¹⁹³ In Indiana, a trial court cannot modify custody unless it first determines that a substantial change in circumstances has occurred and that a modification is in the best interest of the child.¹⁹⁴ The burden of demonstrating that the existing custody order is unreasonable is upon the party seeking the modification, and the court needs to keep in mind that stability and permanence are considered best for the child.¹⁹⁵

In this case the court of appeals found that the relationship between the father and the child had been substantially changed due to the mother's efforts to prevent such a relationship by interfering with the father's visitation rights as provided by court order.¹⁹⁶ The court further noted that it was in the child's best interest to "have a well-founded relationship with each parent" and that prior decisions have held that when a custodial parent denies visitation rights to the other parent without evidence that the non-custodial parent is a threat to the

190. *Id.* at 738.

191. *Id.* at 735.

192. *Id.*

193. *Id.* at 737. Pursuant to Indiana Code section 31-17-2-21, the court may not modify a child custody order unless modification is in the child's best interest and there is a substantial change in one of the factors found at Indiana Code section 31-17-2-8 which are as follows:

- (1) The age and sex of the child.
- (2) The wishes of the child's parent or parents.
- (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with:
 - (A) the child's parent or parents;
 - (B) the child's sibling; and
 - (C) any other person who may significantly affect the child's best interests.
- (5) The child's adjustment to the child's:
 - (A) home;
 - (B) school; and
 - (C) community.
- (6) The mental and physical health of all individuals involved.
- (7) Evidence of a pattern of domestic or family violence by either parent.
- (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

IND. CODE § 31-17-2-8 (2004).

194. *In re Marriage of Kenda*, 873 N.E.2d at 737.

195. *Id.*

196. *Id.* at 739.

child, such may be a proper grounds to modify custody.¹⁹⁷ Based on the significant evidence of the mother's denial and interference with the father's rights, the trial court did not abuse its discretion in modifying custody.¹⁹⁸

2. *Gender and Wishes of the Child.*—In custody determination matters in Indiana, the appellate courts “accord latitude and great deference to a trial court’s custody determination.”¹⁹⁹ This is because the trial court often considers sensitive and subtle factors, has the ability to speak with and observe the parties and the principals, and thus is in a far better place to perform the necessary personal and interpersonal evaluations to weigh the competing considerations.²⁰⁰ This latitude and deference was accorded to the trial court in the case of *Sabo v. Sabo*.²⁰¹

In *Sabo*, when the mother and father divorced they had reached an agreement of settlement which provided that the child would live with one parent during the school year and with the other parent during the summer vacation.²⁰² The mother was in the military and had relocated several times while the father remained in Indiana.²⁰³ Up to and including her eleventh birthday the child had lived with the father during the school year and with the mother during the summer vacations.²⁰⁴ During the school year the child developed a close relationship not only with the father, but also with the father’s family and some newly acquired friends.²⁰⁵ During the summer vacation the child was exposed to different and sometimes exotic locales while with the mother in which she benefited culturally, educationally, and emotionally.²⁰⁶ As she approached puberty and her twelfth birthday, the child made a request that she be allowed to live with the mother during the school year and with the father during the summer vacations.²⁰⁷ Primarily, the child felt more comfortable discussing the issues of puberty and adolescence with her mother.²⁰⁸ The mother requested a change in the custody arrangement to accommodate the daughter’s wishes.²⁰⁹ A custody evaluation was performed which determined that both parents were responsible, conscientious, and loving parents.²¹⁰ The custody evaluator stated that the child had expressed a desire to be with the mother during the school year for the previously stated

197. *Id.* (citing *Johnson v. Natton*, 615 N.E.2d 141, 146 (Ind. Ct. App. 1986); *Bays v. Bays*, 489 N.E.2d 555, 561 (Ind. Ct. App. 1986)).

198. *Id.* at 740.

199. *Sabo v. Sabo*, 858 N.E.2d 1064, 1071 (Ind. Ct. App. 2006).

200. *Id.*

201. *Id.*

202. *Id.* at 1066.

203. *Id.*

204. *Id.*

205. *Id.* at 1067.

206. *Id.* at 1069.

207. *Id.* at 1067 n.1.

208. *Id.* at 1069.

209. *Id.* at 1067.

210. *Id.*

reasons.²¹¹ The court conducted an in camera interview in which the child stated the same reasons.²¹² Testimony of both the parents was taken.²¹³ At the conclusion of the hearing, the trial court awarded school-year custody to the mother and summer vacation custody to the father.²¹⁴ The father appealed.²¹⁵

On appeal, the father argued essentially that the trial court committed error by considering the wishes of the child because she was only eleven years of age and not fourteen as specified in Indiana Code section 31-14-13-2(3).²¹⁶ In affirming the trial court, the court of appeals noted that the court's decision was driven solely by a consideration of the best interests of the child and that it was neither a custody modification nor an initial custody determination.²¹⁷ Regardless, however, the court noted that when custody rights of the parents are determined, the best interests of the child are the primary consideration.²¹⁸

Here, the fact that the child wanted to spend a specified period of time with the same gender parent because of puberty issues was a factor that the trial court could consider.²¹⁹ With respect to the issue of whether the child had to be at least fourteen years of age before the court could consider her wishes, the court of appeals noted that Indiana Code section 31-14-13-2(3) did not prevent the court from considering the wishes of a child under fourteen years of age—merely that a child's wishes are to be given more weight in the court's balancing of factors if the child was at least fourteen years of age.²²⁰ Thus, considering the child's desire to live with the mother was appropriate as long as the trial court's decision had not considered only the child's wishes on the subject.²²¹ Here, the trial court considered all the factors and circumstances bearing upon the child's best interest and did not commit an abuse of discretion.²²²

3. *Failure of Children to Progress Academically.*—In the case of *Webb v. Webb*,²²³ the mother and father had been awarded joint legal custody with primary physical custody of the children being given to the mother. The father

211. *Id.* at 1066-67.

212. *Id.* at 1068 n.1.

213. *Id.* at 1067.

214. *Id.* at 1067-68.

215. *Id.* at 1068.

216. *Id.* at 1070 (citing IND. CODE § 31-14-13-2(3) (2004)).

217. *Id.* at 1068-69. “The difference is generally important. In an initial custody determination, both parents are presumed equally entitled to custody, but a petitioner seeking subsequent modification bears the burden of demonstrating that the existing custody should be altered.” *Id.* at 1068 (citing *Hughes v. Roqusta*, 830 N.E.2d 898, 900 (Ind. Ct. App. 2005)).

218. *Id.* Indiana Code section 31-14-13-2(3) is the initial custody statute. IND. CODE § 31-14-13-2(3) (2004). The court noted that the terms of the agreement of settlement were not being changed. *Sabo*, 858 N.E.2d at 1068.

219. *Id.* at 1068-69.

220. *Sabo*, 858 N.E.2d at 1068.

221. *Id.* at 1070.

222. *Id.* at 1070-71.

223. 868 N.E.2d 589, 591 (Ind. Ct. App. 2007).

filed a petition to modify that custody provision, and the trial court awarded sole legal and physical custody to the father.²²⁴ The mother appealed, contending that the evidence was insufficient to prove that the custody modification would be in the children's best interests and that the evidence did not establish that a substantial change in circumstances had occurred.²²⁵ At trial, evidence was introduced that demonstrated significant failure of the children to progress academically while in the mother's care.²²⁶ The evidence further demonstrated that one of the problems preventing the children's educational progress was the failure of the mother to ensure that their homework was completed or turned in while the children were in her care.²²⁷ Evidence also showed that the father was very proactive in attempting to address the children's problems through the school.²²⁸ Evidence further showed resistance from the mother regarding the father's efforts.²²⁹

In affirming the trial court, the court of appeals again reiterated the factors and burden established by Indiana Code section 31-17-2-8.²³⁰ In analyzing the evidence in the record in light of the statute, the court agreed with the trial court that the failure of the children to progress academically constituted a substantial change in circumstances that warranted modification of the custody provision and that it would be in the best interests of the children to grant sole legal and physical custody to the father.²³¹

C. Modification of Joint Legal Custody to Sole Legal Custody

In Indiana, an appellate court will affirm an award of joint legal custody where the parents demonstrate a willingness and ability to communicate and cooperate in advancing the welfare of the children.²³² In the case of *Tompa v. Tompa*²³³ the court of appeals affirmed a trial court's decision to modify the joint legal custody of the parties' two minor children to sole legal custody in the father. The record demonstrated that the parties had quite a contentious post-dissolution relationship.²³⁴ The mother and father's relationship was particularly marked by the mother's frequent accusations that the father was a sexual abuser of children despite the conclusion of a panel of psychologists that they were unable to determine to a reasonable degree of certainty whether the children had

224. *Id.*

225. *Id.* at 592.

226. *Id.* at 593.

227. *Id.*

228. *Id.* at 593-94.

229. *Id.* at 593.

230. *Id.* at 592-93.

231. *Id.* at 594.

232. *Walker v. Walker*, 539 N.E.2d 509, 513 (Ind. Ct. App. 1989).

233. 867 N.E.2d 158, 164 (Ind. Ct. App. 2007).

234. *Id.* at 161-62.

been abused by anyone.²³⁵ The trial court had also found that the mother's allegations of sexual misconduct by the father were unsubstantiated.²³⁶

The mother appealed the trial court's order contending it had abused its discretion and that the evidence reflected in the trial court's findings and conclusions did not support a change in the custody arrangement.²³⁷ The mother pointed out that no fundamental difference "in child rearing philosophies, religious beliefs, or lifestyles" existed between the parents.²³⁸ The court of appeals, however, noted that the record revealed that child rearing between the parties had become a battleground.²³⁹ The court stated: "The record is saturated with evidence documenting the tensions, lack of communication, and lack of cooperation associated with the [parties'] joint legal custody arrangement."²⁴⁰ As an example, the record was "replete with references of the parties' inability to communicate concerning the children's extracurricular activities, schooling, vacations, and missed visitation opportunities."²⁴¹ Therefore, the trial court properly used its discretion in modifying the joint legal custody arrangement to sole legal custody in favor of the father.²⁴²

As a cautionary note regarding joint legal custody, the court of appeals further stated that "[i]n this light, we whole heartedly agree with the following words stated in the dissenting opinion in *Lamb v. Wenning*: 'The pitfall of awarding and maintaining a joint custody arrangement primarily to placate the [parents] should be avoided as not in the best interests of the child.'²⁴³

D. Custody and Third Parties

Before a trial court can place a child in the custody of a person other than the natural parents, it must be satisfied by clear and convincing evidence that the best interests of the child require a placement with the third person.²⁴⁴ In the case of *Truelove v. Truelove*²⁴⁵ the trial court awarded custody of the mother's children to their paternal grandparents. The mother appealed contending, among other things, that "the trial court was specifically required to find that the Grandparents were de facto custodians of the Children, Mother was unfit, or Mother had long acquiesced to the Grandparents' custody of the Children."²⁴⁶ Because the

235. *Id.* at 164.

236. *Id.*

237. *Id.* at 163.

238. *Id.*

239. *Id.*

240. *Id.* at 163-64.

241. *Id.* at 164.

242. *Id.*

243. *Id.* (alteration in original) (quoting *Lamb v. Wenning*, 583 N.E.2d 745, 753 (Ind. Ct. App. 1991), *rev'd on different grounds*, 600 N.E.2d 96 (Ind. 1992)).

244. *In re Guardianship of B.H.*, 770 N.E.2d 283, 287 (Ind. 2002).

245. 855 N.E.2d 311, 313 (Ind. Ct. App. 2006).

246. *Id.* at 314.

evidence did not support any of these findings, she contended that the trial court's order lacked sufficient evidence to support a finding that placement with the grandparents was in the children's best interests.²⁴⁷

In addressing these arguments of the mother, the court of appeals noted the following:

The presumption in favor of the natural parent will not be overcome merely because a third party could provide better things for the child. In a proceeding to determine whether to place a child with a person other than the natural parent, evidence establishing the natural parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third person, would be important, but the trial court is not limited to these criteria. The issue is not merely the "fault" of the natural parent, but rather it is whether the important and strong presumption that a child's interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving that the child's best interests are substantially and significantly served by placement with another person. This determination falls within the sound discretion of our trial courts, and their judgments must be afforded deferential review.²⁴⁸

Taking the above into consideration, the court of appeals noted that the trial court was not required to make specific findings of the mother's unfitness or her acquiescence to the children's living arrangements.²⁴⁹ Instead, the trial court carefully reviewed the substantial evidence that existed showing that the parents' circumstances were such that "[they] can barely take care of themselves, let alone two children in addition to themselves."²⁵⁰ Based upon the evidence from the record, the court of appeals agreed that clear and convincing evidence established that the children's best interests were substantially served by placement with the grandparents.²⁵¹

The issue of whether the trial court must specifically find unfitness, abandonment, or acquiescence on the part of the child's parents was raised in the subsequent case of *Blaisius v. Wilhoff*.²⁵² In this case, the Wilhoffs filed a petition to adopt a child.²⁵³ Blaisius, the putative father, however, contested the adoption after having been established as the child's biological father.²⁵⁴ Subsequently, the putative father was adjudicated to be the child's biological father, and the

247. *Id.*

248. *Id.* (citing *B.H.*, 770 N.E.2d at 287).

249. *Id.*

250. *Id.* at 315. The appellate court noted that the trial court appropriately refrained from labeling the mother an "unfit" parent. *Id.*

251. *Id.*

252. 863 N.E.2d 1223, 1229 (Ind. Ct. App. 2007).

253. *Id.* at 1226.

254. *Id.*

adoption petition was denied.²⁵⁵ However, the trial court awarded custody of the child to the prospective adoptive parents as third party custodians.²⁵⁶ The father appealed.²⁵⁷

The father's argument on appeal was substantially the same as in *Truelove*.²⁵⁸ He argued that the trial court abused its discretion in awarding the third party custody of the child because it did not conclude and could not find "that he is unfit, that he abandoned [the child] [] or acquiesced in the [third party's] custody."²⁵⁹ Relying upon the court's determination in *Truelove*, the court "reiterat[ed] that evidence establishing the biological parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third person, would be important, but the trial court is not limited to these criteria."²⁶⁰ Thus, the trial court did not abuse its discretion "despite not finding unfitness, abandonment, or acquiescence."²⁶¹

The father further argued, relying on *In re Guardianship of L.L.*,²⁶² that the trial court failed "to make a specific finding that separation from the [third party custodians] will cause [the child] long-term trauma."²⁶³ However, the court noted that the father's reliance on this case was misplaced:

[E]vidence sufficient to rebut the presumption may, but need not necessarily, consist of the parent's present unfitness, or past abandonment of the child such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child.²⁶⁴

Furthermore, the court noted that "[s]uch an upheaval, where it can only be said to have potential short-term effects, is insufficient to deny natural parent custody of his or her child."²⁶⁵

The court of appeals noted that the child's therapist testified that the separation would be very traumatizing to the child and "did not qualify his opinion by stating the effects would be merely short-term."²⁶⁶ An independent evaluation believed that the traumatic effect on the child would be much less severe than the child's therapist believed.²⁶⁷ However, because "the trial court clearly assigned greater weight to [the therapist's] prognostication," the court

255. *Id.*

256. *Id.* at 1226-27.

257. *Id.* at 1229.

258. *Id.* (citing *Truelove v. Truelove*, 855 N.E.2d 311 (Ind. Ct. App. 2006)).

259. *Id.* at 1230.

260. *Id.* (citing *Truelove*, 855 N.E.2d 311).

261. *Id.*

262. 745 N.E.2d 222 (Ind. Ct. App. 2001).

263. *Blasius*, 863 N.E.2d at 1230.

264. *Id.* at 1231 (citing *L.L.*, 745 N.E.2d at 230-31).

265. *Id.* (citing *L.L.*, 745 N.E.2d at 233).

266. *Id.*

267. *Id.*

would not reweigh the respective testimonies of the experts.²⁶⁸

In sum, the court of appeals found that the trial court was clearly convinced that placement with the third parties “represent[ed] a substantial and significant advantage to the child,” and therefore the court’s findings were not “clearly erroneous or . . . against the logic and effect of the evidence.”²⁶⁹

E. Parenting Time/Visitation Issues

1. *Admissibility of Hearsay Statements.*—In custody or visitation modifications involving small children, admissibility of statements purportedly made by those children is often at issue. Such was the dilemma confronted by the court in the case of *In re Paternity of H.R.M.*²⁷⁰ In this case, the father was allowed reasonable visitation, which was to be agreed upon by the parties.²⁷¹ Conflict and disagreement between the parties regarding the father’s visitation with the minor child, ensued with the mother petitioning the court to modify visitation.²⁷² The basis for this motion was the mother’s assertion that the father had sexually abused the parties’ child.²⁷³ Over the father’s objection the trial court allowed into evidence statements purportedly made by the child to one social worker and documents made by a second social worker.²⁷⁴ After the hearing, the trial court issued an order granting the mother’s motion and ordered the father’s visitation to be supervised.²⁷⁵ The father appealed arguing that the admission of the child’s purported statements constituted inadmissible hearsay that affected his substantial rights.²⁷⁶

In determining the issue of whether the statements made to the social worker constituted inadmissible hearsay, the court of appeals examined Indiana Evidence Rule 803(4).²⁷⁷ Rule 803(4) provides that hearsay evidence may be admitted if it consists of statements made for the purposes of medical treatment.²⁷⁸ As the court noted, the rationale for this rule is the assumption that people seeking medical treatment have a strong incentive to tell the truth and that, therefore,

268. *Id.*

269. *Id.*

270. 864 N.E.2d 442, 444 (Ind. Ct. App. 2007).

271. *Id.* at 445.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 446.

277. In pertinent part Rule 803(4) provides that “statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or the general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment” are not excluded by the hearsay rule. IND. R. EVID. 803(4).

278. *Id.*

such statements are reliable.²⁷⁹ Statements made to non-physicians may be included under the rule so long as the person making the statement does so to advance a medical diagnosis or treatment.²⁸⁰ In this context, the court pointed out that it has been held that statements made to family therapists may be admitted pursuant to Rule 803(4) as long as a proper showing of reliability has been made.²⁸¹ Because the social worker specialized in working with abused children, the court concluded that statements made to her would fall within the scope of Rule 803(4).²⁸² Having determined that question, the court then looked to see whether the record revealed evidence that satisfied the two prong test for a proper showing of reliability.²⁸³ The court found that the statements to the social worker failed the first prong.²⁸⁴ The court observed:

Under this first prong, “the declarant must subjectively believe that he was making the statement for the purpose of receiving medical diagnosis or treatment.” Although sometimes this subjective belief may be readily inferred from the circumstances, “[w]here that inference is not obvious as in this case involving a young child brought to treatment by someone else, there must be evidence that the declarant understood the professional’s role in order to trigger the motivation to provide truthful information.”²⁸⁵

The court concluded that “the record contains no indication that [the child] had the requisite motivation to tell the truth, as no evidence indicates that she knew [the social worker’s] role or that she was being interviewed for the purpose of medical diagnosis.”²⁸⁶

Also admitted into evidence over the father’s objection were notes made by another social worker which contained hearsay statements attributed to the child.²⁸⁷ The court determined that these notes did not comply with the records of regularly conducted business activity exception to the hearsay rule found under Indiana Evidence Rule 803(6) because the records were not properly supported by testimony or an affidavit.²⁸⁸ In this case the records were

279. *H.R.M.*, 864 N.E.2d at 446.

280. *Id.*

281. *Id.*

282. *Id.* (citing *McClain v. State*, 675 N.E.2d 329, 331 (Ind. 1996)). The Indiana Supreme court noted that in determining whether a statement is admissible pursuant to Rule 803(4) the “courts engage in a two prong test: ‘1) is the declarant motivated to provide truthful information in order to promote diagnosis and treatment; and 2) is the content of the statement such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment.’” *Id.* (quoting *McClain*, 675 N.E.2d at 331).

283. *Id.*

284. *Id.* at 447.

285. *Id.* at 446 (alteration in original) (quoting *McClain*, 675 N.E.2d at 331).

286. *Id.* at 447.

287. *Id.* at 448-50.

288. *Id.* Under Indiana Evidence Rule 803(6), otherwise inadmissible hearsay may be

accompanied by an affidavit.²⁸⁹ The father argued that the affidavit accompanying the business records was insufficient because it did not indicate that the statements were certified under oath.²⁹⁰ The court agreed.²⁹¹ The purported affidavit did not indicate before whom the affiant swore, to what she swore, that she took an oath, or that these statements were made under the penalty for perjury.²⁹² The court further noted that “[t]he chief test of the sufficiency of an affidavit is its ability to serve as a predicate for a perjury prosecution.”²⁹³ The court went on to note that the admission of this evidence affected the father’s substantial rights and, therefore, did not amount to mere harmless error.²⁹⁴

2. *Grandparent Visitation.*—Two cases of interest during the survey period dealt with grandparent visitation issues.²⁹⁵ Indiana has enacted the Grandparent Visitation Act which is codified at Indiana Code section 31-17-5-1.²⁹⁶ Under the Indiana Grandparent Visitation Act, if the court determines that visitation with the grandparents is in the best interests of the child it may order such visitation.²⁹⁷ Indiana Code section 31-17-5-6 provides that when a trial court issues an order on a petition for grandparent visitation, it must issue findings and conclusions.²⁹⁸ In the case of *McCune v. Frey*,²⁹⁹ the court set forth four factors that must be specifically addressed in those findings of fact and conclusions of law.³⁰⁰ In *Ramsey*, the father had denied maternal grandparents visitation with the minor child of the parties for several reasons.³⁰¹ Among those reasons was that great

admitted if it consists of records of regularly conducted business activity. IND. R. EVID. 803(6). Such evidence must be supported by testimony or an affidavit, made under oath, indicating that such records were kept in the normal course of business and that it was the regular practice of the business to make such records. *Id.*

289. *Gaddie*, 864 N.E.2d at 448.

290. *Id.*

291. *Id.*

292. *Id.* at 449.

293. *Id.* at 448 (quoting *Jordan v. Deery*, 609 N.E.2d 1104, 1110 (Ind. 1993)).

294. *Id.* at 451.

295. See *Ramsey v. Ramsey*, 863 N.E.2d 1232 (Ind. Ct. App. 2007); *Shady v. Shady*, 858 N.E.2d 128 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 451 (Ind. 2007).

296. See Michael G. Ruppert & Joseph W. Ruppert, *Recent Developments: Indiana Family Law*, 38 IND. L. REV. 1085, 1096-98 (2005) (discussing the Indiana Grandparent Visitation Act).

297. IND. CODE § 31-17-5-2 to -10 (2004 & Supp. 2007).

298. *Id.* § 31-17-5-6.

299. 783 N.E.2d 752, 755 (Ind. Ct. App. 2003).

300. The four factors are:

- 1) the presumption that a fit parent acts in his or her child’s best interests; 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 interests; and 4) whether the parent has denied visitation or has simply limited visitation.

Id. at 575.

301. *Ramsey v. Ramsey*, 863 N.E.2d 1232, 1240 (Ind. Ct. App. 2007). This animosity

animosity existed on the part of the maternal grandparents against the father.³⁰² The maternal grandparents had been active participants in allowing the mother to remove the minor child from the State of Indiana and keeping the child's location a secret for a period of time.³⁰³ After a hearing, the trial court granted the maternal grandparents' petition for visitation and issued findings and conclusions along with its order.³⁰⁴

The father appealed, contending that the court failed to issue sufficient findings of fact and conclusions of law along with its order.³⁰⁵ In siding with the father, the court of appeals found that the trial court's findings and conclusions failed to comply with the requirements of *McCune* by not specifically addressing the four factors required by *McCune*.³⁰⁶ The court strongly noted the importance in a grandparent visitation case for the trial court to not only issue findings of fact and conclusions with its order as required by Indiana Code section 31-17-5-6, but also to specifically address the four factors established by *McCune*.³⁰⁷

3. *Factors to Be Considered in Visitation Awards.*—One of issues in the case of *Shady v. Shady*³⁰⁸ was whether a trial court was required to consider statutory factors listed in the child custody statute when determining a husband's parenting time with his child. In this case, the decree of dissolution awarded the mother legal and physical custody of the child, and father was granted supervised parenting time with the child.³⁰⁹ The husband, an Egyptian citizen, had his parenting time supervised based primarily upon the testimony of an expert in the field of international parental child abduction³¹⁰ and the wife's introduction into evidence as an exhibit the American Bar Association's publication, *Jurisdiction In Child Custody and Abduction Cases: A Judge's Guide to the UCCJA, PKPA and Hague Child Abduction Convention*.³¹¹ Basically, this evidence concluded that the father was a flight risk with the child.³¹² On appeal, the father argued that the trial court abused its discretion by failing to consider the statutory factors found in Indiana Code section 31-17-2-8.³¹³ The father tried to convince the court that the factors in section 31-17-2-8 are factors the trial court must consider

manifested itself in the maternal grandparents accusing the father of illegal and immoral acts. *Id.*

302. *Id.*

303. *Id.* at 1234.

304. *Id.* at 1233.

305. *Id.*

306. *Id.* at 1238-39.

307. *Id.*

308. 858 N.E.2d 128, 130 (Ind. Ct. App. 2006), *trans. denied*, 864 N.E.2d 451 (Ind. 2007).

309. *Id.*

310. *Id.* at 132.

311. *Id.* at 136 (citing Patricia M. Hoff et al., *Jurisdiction in Child Custody Cases: A Judge's Guide to the UCCJA, PKPA, and the Hague Child Abduction Convention*, 48 JUV. & FAM. CT. J. 1 (1997)).

312. *Id.* at 136-37.

313. *Id.* at 139 (citing IND. CODE § 31-17-2-8 (2004)); *see also supra* note 193.

before entering an order determining custody and visitation.³¹⁴ The court of appeals observed that Indiana Code section 31-17-2-8 is clearly entitled “Custody Order” and that it sets forth the only factors that a trial court must consider in making a custody determination.³¹⁵ Additionally, the court noted that Indiana Code section 31-17-4-1, which

governs a trial court’s decision to award or deny parenting time, does not require the trial court to consider prescribed factors. Rather, it states, in relevant part, that “[a] parent not granted custody of the child is entitled to reasonable parenting time unless the [trial] court finds, after a hearing, that parenting time by the noncustodial parent might endanger the child’s physical health or significantly impair the child’s development.” Whatever the value of a trial court considering the factors listed in [Indiana Code section] 31-17-2-8, if any, in making the parenting time determination, it is clear that such is not required, and, therefore, the trial court did not abuse its discretion by failing to consider those factors.³¹⁶

Based on this and other issues, the court of appeals affirmed the trial court’s decision.³¹⁷

F. Paternity

On July 1, 2006, several additions and changes to the Indiana paternity affidavit statute became effective.³¹⁸ Since the adoption of the new statute, a man who signs a paternity affidavit after the birth of a child is now considered to be the child’s legal father without requiring further court proceedings.³¹⁹ He is also afforded reasonable parenting time with the child unless a court determines otherwise.³²⁰ Once sixty days have elapsed after the execution of a paternity affidavit, it may only be rescinded in two instances:³²¹ (1) when there is a showing that there was “fraud, duress, or material mistake of fact bearing upon the execution of the paternity affidavit” or (2) when the rescission is requested by the man who signed the affidavit, and only then if that man was excluded as

314. *Shady*, 858 N.E.2d at 139.

315. *Id.*

316. *Id.* at 140.

317. *Id.* at 143. This case contains a very interesting discussion of the qualification of a witness as an expert witness in the field of international child abduction and also points out the dangers of failing to object to evidence at the trial level. *See id.* at 138-39. The father did not object to the introduction of the ABA publication. *Id.* at 138. On appeal the father could have claimed that the admission of the exhibit was fundamental error which would have excused the failure to object at trial; however, the father did not do that either. *Id.* at 138 n.5.

318. IND. CODE § 16-37-2-2.1 (Supp. 2007); *see Ruppert & Sedberry, supra* note 2, at 925 (discussing these changes).

319. IND. CODE § 16-37-2-2.1(m) (Supp. 2007).

320. *Id.* § 16-37-2-2.1(g)(2)(B).

321. *Id.* § 16-37-2-2.1(i).

the child's father after biological testing.³²² A paternity affidavit may only be set aside if genetic testing excludes the man who signed the affidavit as the child's father.³²³ A question raised in the case of *In re Paternity of Davis*,³²⁴ was: Does the existence of a paternity affidavit foreclose any attack upon the presumption of paternity created thereby except through the procedure set out in Indiana Code section 16-37-2-2.1?³²⁵

In *Davis*, the county prosecutor's office filed a petition to establish paternity in *Davis*.³²⁶ The court ordered genetic testing and the results indicated a 99.9943% chance that *Davis* was the biological father.³²⁷ However, at the time of the child's birth, the mother had another man execute a paternity affidavit.³²⁸ This paternity affidavit was neither set aside nor was it contested by the man who had signed the affidavit.³²⁹ After the paternity hearing the court found *Davis* to be the father, and he appealed.³³⁰ On appeal he argued that the existence of the paternity affidavit foreclosed any attack upon the presumption of paternity created thereby because the procedure set out in Indiana Code section 16-37-2-2.1 had not been followed.³³¹ The court of appeals affirmed the trial court, concluding that the action brought by the county prosecutor was not governed by the paternity affidavit statute, but instead by Indiana Code sections 31-14-4 and 31-14-6-1.³³² The court noted that according to Indiana Code section 31-14-2-1 a man's paternity may only be established in one of two ways: "(1) in an action under [Indiana Code section 31-14] or (2) by executing a paternity affidavit in accordance with [Indiana Code section] 16-37-2-2.1."³³³ The court went on to explain that "[t]he methods available to negate the affidavit vary depending upon the identity of the party that wishes to rebut paternity."³³⁴ If the man who executed the affidavit seeks to rebut the affidavit, he must do so under Indiana Code section 16-37-2-2.1.³³⁵ However, an entity, such as a prosecutor's office, may file a paternity action under Indiana Code section 31-14-4-1.³³⁶ This is what happened in this case, and while paternity was initially established via a paternity affidavit under Indiana Code section 16-37-2-2.1, the order of the trial court

322. *Id.* The fathers have sixty days after execution of the paternity affidavit to request the court to order genetic testing. *Id.* § 16-37-2-2.1(h).

323. *Id.* § 16-37-2-2.1(k).

324. 862 N.E.2d 308, 312-13 (Ind. Ct. App. 2007).

325. *Id.*

326. *Id.* at 310.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.* at 311.

331. *Id.* at 312.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* at 313.

336. *Id.*

changed the initial status and established paternity in *Davis* under Indiana Code section 31-14-4.³³⁷ The court of appeals rejected Davis's call for them to declare that Indiana Code section 16-34-2-2.1 "trumps" Indiana Code section 31-14-4, finding that the two statutes could be reconciled and the proper legislative intent be determined.³³⁸

Along the same lines as *Davis*, the court also decided the case of *In re Paternity of E.M.L.G.*³³⁹ In this case the putative fathers had each executed paternity affidavits and allowed the sixty-day time period to expire without filing a request for genetic testing under Indiana Code section 16-37-2-2.1.³⁴⁰ The county prosecutor's office brought an action to establish a child support order based on each father's execution of a paternity affidavit, and a hearing was conducted by the trial court.³⁴¹ At the child support hearings each of the putative fathers "requested the court to order genetic testing," which the trial court granted.³⁴² The state filed motions to correct error for each case; upon denial by the trial court, the state appealed.³⁴³

On appeal, the court framed the issue as "whether the trial court properly granted four putative fathers' requests for genetic testing to disestablish paternity under Indiana Code section 31-14-6-1."³⁴⁴ As the court stated, Indiana Code section 31-14-6-1 provides that "[u]pon the motion of any party, the court shall order all the parties to a paternity action to undergo blood or genetic testing."³⁴⁵ The prosecutor's office had labeled these proceedings as support matters, but the trial court treated them as an establishment of paternity.³⁴⁶ In rejecting the trial court's logic the court of appeals noted that

Indiana Code section 31-14-2-1 (1998) provides for two ways to establish paternity: "(1) in an action under [article 14 governing proceedings for establishing paternity] or (2) by executing a paternity affidavit in accordance with [Indiana Code section] 16-37-2-2.1." (Emphasis added). Furthermore, Indiana Code [s]ection 31-14-7-3

337. *Id.*

338. *Id.*

339. 863 N.E.2d 867 (Ind. Ct. App. 2007). This appeal combined four similar cases. *Id.* at 868.

340. *Id.* at 869. All the paternity affidavits were signed before the July 1, 2006 effective date of the amendments to Indiana Code section 16-37-2-2.1 by P.L. 145-2006. *Id.* at 869 n.2. Therefore, the court had to rely on the version of the statute in existence before such amendments became effective. *Id.*; see *Martin v. State*, 774 N.E.2d 43, 44 (Ind. 2002).

341. *E.M.L.G.*, 863 N.E.2d at 868. "Each hearing was conducted more than sixty days after the father had executed a paternity affidavit." *Id.*

342. *Id.* "Even though these were child support hearings, the trial court stated that it treated such support hearings as hearings to establish paternity." *Id.*

343. *Id.*

344. *Id.*

345. *Id.* at 869 (quoting IND. CODE § 31-14-6-1 (1998)).

346. *Id.*

(2001) provides that “[a] man is a child’s legal father if the man executed a paternity affidavit in accordance with Indiana Code [s]ection 16-37-2-2.1 and the paternity affidavit has not been rescinded or set aside under Indiana Code section 16-37-2-2.1.” To rescind or set aside a paternity affidavit, a putative father may “within sixty (60) days of the date a paternity affidavit is executed . . . file an action in a court with jurisdiction over paternity to request an order for a genetic test.”³⁴⁷

Because the fathers had signed paternity affidavits pursuant to the statute and did not rescind or set aside the affidavits within the sixty-day time frame provided for under Indiana Code section 16-37-2-2.1, the court reasoned that, “under the plain, unambiguous language of the statute,” paternity [had] already [been] established” prior to the hearings even being conducted.³⁴⁸ None of the putative fathers had sought to set aside the paternity affidavits on the grounds of fraud, duress, or material mistake of fact, but “the trial court rescinded the paternity affidavits on the grounds that the men were allegedly not aware of the legal ramifications of the document when they signed the paternity affidavits.”³⁴⁹ The court rejected this position of the trial court, holding that such was “not a valid statutory reason for setting aside the paternity affidavits.”³⁵⁰ The court went on to note that the trial below amounted to nothing more than an action to disestablish paternity.³⁵¹ The court pointed out that “[t]he Indiana code has no provision for the filing of an action to disestablish paternity.”³⁵² The court of appeals stated that under the paternity statutes a trial court does not have the authority to treat child support proceedings as proceedings to disestablish paternity.³⁵³ The matter was reversed and remanded to the trial court.³⁵⁴

In re Paternity of C.M.R.,³⁵⁵ the court decided that an order for genetic

347. *Id.* (alteration in original) (quoting IND. CODE § 16-37-2-2.1 (2001)).

348. *Id.*

Indiana Code section 16-37-2-2.1(i) further provides that: “[a] paternity affidavit that is properly executed under this section may not be rescinded more than sixty (60) days after the paternity affidavit is executed unless a court has determined that fraud, duress, or material mistake of fact existed in the execution of the paternity affidavit.”

Id.

349. *Id.*

350. *Id.* It appears that ignorance of the law is not a defense. *Id.*

351. *Id.*

352. *Id.* (alteration in original) (quoting *In re Paternity of H.J.B.*, 829 N.E.2d 157, 159 (Ind. Ct. App. 2005)).

353. *Id.* at 870. “Indiana’s paternity statutes were created to avoid such an outcome, which could carry with it countless ‘detrimental emotional and financial effect[s].’” *Id.* (alteration in original) (quoting *Johnson Controls, Inc. v. Forrester*, 704 N.E.2d 1082, 1085 (Ind. Ct. App. 1999)). The court noted that “[i]f genetic testing were to disestablish paternity, then each child would be considered a ‘filius nullius,’ which in Latin means a son of nobody.” *Id.*

354. *Id.* at 871.

355. 871 N.E.2d 346, 351 (Ind. Ct. App. 2007).

testing is void where there is a failure to join necessary parties. In this case the county prosecutor brought an action to determine the paternity of C.M.R.³⁵⁶ The putative father was deceased when the trial court ordered the genetic testing of the father's former girlfriend and her two children to determine if their deceased father was the father of C.M.R.³⁵⁷ The former girlfriend appealed the trial court's order for genetic testing of her and her two children.³⁵⁸

On appeal, the court found that several necessary parties had not been joined in the paternity action.³⁵⁹ The court noted that "Indiana Code [s]ection 31-14-5-6 provides that 'the child, the child's mother, and each person alleged to be the father are necessary parties to each [paternity] action.' 'A necessary party is one who must be joined in the action for a just adjudication.'"³⁶⁰ The court observed that the State had not petitioned to open the putative father's estate so that its interest and the interest of its heirs could be presented.³⁶¹ Therefore, the order for genetic testing was void.³⁶²

As for the former girlfriend, the court pointed out that "Indiana Code Section 31-14-6-1 contemplates that only parties to a paternity action may be ordered to undergo genetic testing."³⁶³ As for her children, the court stated that "[t]he record suggest[ed] that they would be necessary parties to the action" because they are collecting or receiving their father's survivor benefits, but since C.M.R. may very well claim some of those benefits they should be given an opportunity to appear, answer, and defend their interests.³⁶⁴

In conclusion, the court found that the order for genetic testing was void due to a failure to join necessary parties and on remand instructed the trial court to determine which of the participants should be joined as parties, and to have those parties served, and to give them an opportunity to appear, answer, and defend.³⁶⁵

G. Miscellaneous Issues

1. *Child's Name.*—During the survey period two cases involving the surname of a child in a paternity context were decided.

The first case, *In re Change of Name of Fetkavich*,³⁶⁶ involved a matter of first impression as to who is a necessary party in a proceeding to change a child's surname. In this case the mother petitioned the court to change the surname of

356. *Id.* at 347-48.

357. *Id.* at 347. The mother of C.M.R. is not the same person as the father's former girlfriend.
Id.

358. *Id.* at 348-49.

359. *Id.* at 349.

360. *Id.* (quoting *In re Paternity of H.J.F.*, 634 N.E.2d 551, 552 (Ind. Ct. App. 1994)).

361. *Id.* at 350.

362. *Id.*

363. *Id.*

364. *Id.* at 350-51.

365. *Id.* at 351.

366. 855 N.E.2d 751, 754-55 (Ind. Ct. App. 2006).

her minor son to that of his stepfather.³⁶⁷ The mother and father were never married, and the child never bore the father's last name.³⁶⁸ At the time of the filing of the petition, the mother was using the stepfather's surname, and the child's surname appeared to be the mother's maiden name, although that was not clear from the court's opinion.³⁶⁹ The father had visited the child "ten to twenty times in his lifetime," and had created an irrevocable trust with \$280,000 to provide child support for the child.³⁷⁰

The court held a hearing on the petition at which the father was represented by counsel.³⁷¹ The trial court granted a request for a separation of witnesses which had the unlikely result of the trial court ordering the father out of the court room until after he had testified.³⁷² At the conclusion of the hearing the trial court issued an order granting the request to change the child's last name to that of his stepfather.³⁷³

The dispositive issue on appeal was whether the trial court committed reversible error by preventing the father from being present in court during the hearing.³⁷⁴ The father contended that he was "not a mere witness at the hearing but that he was a party" to the action and "had a right to be in court during the hearing."³⁷⁵ In reversing, the court of appeals noted that "[t]he definition of 'party' in the context of a name change proceeding is a matter of first impression for this court."³⁷⁶ If the father was a necessary party to the name change then his exclusion from the courtroom by the trial court constituted reversible error.³⁷⁷

In determining that both parents are parties to an action to change a child's surname the court observed that Indiana case law recognizes that "[a] father and mother enjoy equal rights with regard to naming their child."³⁷⁸ The father enjoys a legal right with regard to naming his child and, pursuant to Indiana Trail Rule 19, is a necessary party to a proceeding regarding the change of his minor

367. *Id.* at 753.

368. *Id.* at 752.

369. *See id.*

370. *Id.* at 752-53. The last visit was two years before the name change and petition was filed by the mother. *Id.*

371. *Id.* at 753.

372. *Id.*

373. *Id.*

374. *Id.* at 754.

375. *Id.*

376. *Id.*

377. *Id.* at 755. The court of appeals relied on *Jordan v. Deery*, 778 N.E.2d 1264, 1272 (Ind. 2002), in which the Indiana Supreme Court noted the right of a party to an action to be personally present during trial is so universally understood to exist that "[c]itation of authority is not required to sustain the proposition." *Fetkavich*, 855 N.E.2d at 756 (alteration in original) (quoting *Jordan*, 778 N.E.2d at 1272)).

378. *Id.* at 755 (citing *Tibbitts v. Warren*, 668 N.E.2d 1266, 1267 (Ind. Ct. App. 1996); *In re the Change of Name of J.N.H.*, 659 N.E.2d 644, 646 (Ind. Ct. App. 1995)).

child's name.³⁷⁹

The second case regarding name change is *Petersen v. Burton*,³⁸⁰ which involved two interesting questions in the context of the surname of a minor child in a paternity proceeding. One issue was who bears the burden of proof and what that proof is.³⁸¹ The other issue was which parent the statutory presumption found in Indiana Code section 34-28-2-4(d) favors.³⁸² The father requested that the court change the child's surname to that of the father.³⁸³ The trial court granted the father's petition and changed the child's surname.³⁸⁴ The mother appealed.³⁸⁵

The court of appeals affirmed the trial court, determining that Indiana Code section 34-28-2-4(d) provides that "[a] biological father seeking to obtain a name change of his nonmarital child bears the burden of persuading the court that the change is in the child's best interests."³⁸⁶ The court also determined that "whether it is in the best interest for [such a child] to be given the father's surname when paternity has been established is an issue to be resolved on a case-by-case basis."³⁸⁷ Here the father satisfied that burden by convincing the court that his actions did "demonstrate a genuine desire to form a parent-child relationship."³⁸⁸ He consistently paid child support and exercised visitation on a "fairly regular" basis.³⁸⁹ The father testified that having the child bear his surname would foster the parent-child relationship and allow him to forge closer

379. *Id.* Indiana Trial Rule 19 provides that

a person who is subject to service of process shall be joined as a party if in the action if "he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . as a practical matter impair or impede his ability to protect that interest[.]"

Id. (quoting IND. TRIAL R. 19(A)(2)(a)).

380. 871 N.E.2d 1025, 1028 (Ind. Ct. App. 2007).

381. *Id.*

382. *Id.* Indiana Code section 34-28-2-4(d) states that

the trial court shall recognize a presumption in favor of the parent who (1) has been making support payments and fulfilling other duties in accordance with the decree issued under [the dissolution, child support, or custody and parenting time statutes]; and (2) objects to the proposed name change of the child.

Id. (quoting IND. CODE § 34-28-2-4(d) (2004)).

383. *Id.* at 1027. At the time of the father's petition the surname of the child was not the mother's surname by birth nor was it even her current last name. *Id.* at 1026-27. Rather it was the surname of the mother's stepfather. *Id.*

384. *Id.* at 1027.

385. *Id.*

386. *Id.* at 1029 (quoting *In re Paternity of Tibbitts*, 668 N.E.2d 1266, 1267-68 (Ind. Ct. App. 1996)).

387. *Id.* at 1029 (quoting *Tibbitts*, 668 N.E.2d at 1269).

388. *Id.*

389. *Id.* at 1029-30.

ties with his son.³⁹⁰

With respect to the presumption found in Indiana Code section 34-28-2-4(d), the mother argued that she was entitled to the presumption and that the father was required to overcome that presumption as well as her objection to the proposed name change of the child.³⁹¹ The father argued that “the presumption applies only to noncustodial parents who satisfy the statutory requirements.”³⁹² The court of appeals agreed, finding that: “Our research did not reveal any cases where the presumption has been applied to a custodial parent. For these reasons, we conclude that the presumption created in Indiana Code Section 34-28-2-4(d) does not apply to Mother, the custodial parent, in this case.”³⁹³

The court further observed that “[l]imiting the application of this statutory presumption to noncustodial parents, primarily fathers, . . . may appear outdated in light of modern attitudes and practices regarding surnames of children born out-of-wedlock,” but stated that “it is for the legislature . . . to make any revisions.”³⁹⁴

2. *Contempt.*—The Indiana Court of Appeals affirmed the trial court’s decision not to hold a mother in contempt for her failure to follow the court’s order not to smoke in the child’s presence in *Heagy v. Kean*.³⁹⁵ In determining whether the mother should be held in contempt of court, the trial court relied on Indiana Code section 34-47-3-1³⁹⁶ which makes a person guilty of contempt by an act that is a “willful disobedience” of an order.³⁹⁷ In this case, the mother stated that she did not realize she was violating the order at the time she was

390. *Id.* at 1030. The court further noted that the mother-child relationship is generally less affected by the child’s surname. *Id.* at 1029. The court observed that “[i]t is not necessary for a mother to come to court to establish her blood relationship to her own child” and that the origin of the mother-child relationship is inherently known. *Id.* (quoting *Tibbitts*, 668 N.E.2d at 1269). On the other hand, there is no such presumption for the father of a child born out-of-wedlock. *Id.* In order for that child “to inherit from the father or to receive the benefits of support and visitation, the father must be legally determined.” *Id.* (quoting *Tibbitts*, 668 N.E.2d at 1269). The legal determination of paternity provides practical benefits as well as symbolic ones. *Id.*

391. *Id.* at 1028.

392. *Id.*

393. *Id.*

394. *Id.* at 1028-29.

395. 864 N.E.2d 383, 385 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 205 (Ind. 2007).

396. Indiana Code section 34-47-3-1 provides:

A person who is guilty of any willful disobedience of any process, or any order lawfully issued:

- (1) by any court of record, or by the proper officer of the court;
- (2) under the authority of law, or the direction of the court; and
- (3) after the process or order has been served upon the person; is guilty of an indirect contempt of the court that issued the process or order.

Id. at 385-86 (quoting IND. CODE § 34-7-3-1 (2004)).

397. *Id.*

smoking around the child.³⁹⁸ Although the trial court ordered her to pay a portion of the father's attorney's fees for bringing the action, the mother was not held in contempt.³⁹⁹

The holding in *Heagy* and subsequent affirmation from the court of appeals could potentially provide an incentive for parents to argue that they did not willfully violate the courts order because they did not realize that they were doing so until after the fact.

III. CHILD SUPPORT

A. Modification

The court of appeals in *In re Marriage of Kraft*⁴⁰⁰ reversed the trial court's denial of a father's petition for modification of child support. The parties in *Kraft* modified their original agreement of settlement in 2004 with a mediated agreement regarding the father's weekly child support.⁴⁰¹ The agreement stated in part, "[t]his agreement is a compromise between the parties of several competing positions expressed during mediation and may not be consistent with the Indiana Child Support Guidelines."⁴⁰² Soon thereafter,⁴⁰³ the father filed a petition to modify his obligation on the basis of "a substantial and continuing change of circumstances regarding his employment."⁴⁰⁴ The trial court modified the father's child support obligation.⁴⁰⁵ On appeal, the court held that the father was not entitled to a modification after he failed to prove "changed circumstances so substantial and continuing" in nature as to make the previous order "unreasonable."⁴⁰⁶ Furthermore, the court held that he was not entitled to a modification because it had been less than twelve months since his previous child support order.⁴⁰⁷

398. *Id.* at 387-88.

399. *Id.* at 388.

400. 868 N.E.2d 1181, 1182 (Ind. Ct. App. 2007).

401. *Id.* at 1183.

402. *Id.*

403. October 27, 2004. *Id.*

404. *Id.* The father alleged that his salary had been significantly reduced to business restructuring and lost contracts. *Id.*

405. *Id.*

406. *Id.* at 1184 (quoting *Kraft v. Kraft*, 842 N.E.2d 895 (Ind. Ct. App. 2006) (unpublished table decision)). The court of appeals found that the father's company did not lose a contract that they previously held; they only failed to obtain the contract as they had hoped they would. *Id.* Furthermore, although the father "made a personal cut" to his annual salary, the "\$14,400.00 salary reduction does not independently establish that [f]ather sustained a 'continuing' reduction in income such that the existing order is 'unreasonable.'" *Id.* The court also looked at other factors such as the father's investments and significant home equity. *Id.*

407. *Id.* at 1185. See IND. CODE § 31-16-8-1 (Supp. 2007), which provides:

(a) Provisions of an order with respect to child support or an order for maintenance

Over a year later,⁴⁰⁸ the father filed another petition to modify his child support.⁴⁰⁹ The father's main contention in his petition was that he changed employment positions and was no longer able to make the additional income from bonuses as he had anticipated at the time of the mediated agreement.⁴¹⁰ The father appealed the trial court's denial of his petition.⁴¹¹ There was no dispute that the father met the requirements for the lapse of time and percentage of change required by statute.⁴¹² Because the father's child support order was based on a mediated agreement, the mother argued that prior Indiana case law⁴¹³ held that in order to receive a modification of child support the father was required to show "changed circumstances so substantial and continuing as to make the terms unreasonable."⁴¹⁴ In a very long opinion that analyzed prior decisions,⁴¹⁵ the court of appeals reversed the trial court's denial of the father's petition and remanded the matter to the trial court for proceedings consistent with its findings.⁴¹⁶ The court ultimately held that it did not matter whether the father's child support was based on a court hearing or a mediated agreement; the statute

(ordered under [Indiana Code section] 31-16-7-1 or [Indiana Code section] 31-1-11.5-9(c) before their repeal) may be modified or revoked.

(b) Except as provided in section 2 of this chapter, modification may be made 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) a 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.

(c) Modification under this section is subject to [Indiana Code section] 31-25-4-17(a)(6).

408. February 2, 2006. *In re Marriage of Kraft*, 868 N.E.2d at 1184.

409. *Id.*

410. *Id.* According to the mother, the father's "\$274,000.00 income in their mediation agreement was reached by taking a three-year average of his past incomes with bonuses." *Id.*

411. *Id.* at 1184-85. The trial court's decision will only be reversed upon a showing of abuse of discretion. *Id.* (citing *In re E.M.P.* 722 N.E.2d 349, 351 (Ind. Ct. App. 2000)).

412. *Id.*; see IND. CODE § 31-16-8-1 (Supp. 2007).

413. *Hay v. Hay*, 730 N.E.2d 787, 794 (Ind. Ct. App. 2000).

414. *Kraft*, 868 N.E.2d at 1186.

415. *Id.* at 1186-89. The language in *Hay* requiring modification upon showing substantial changed circumstances independent of the twenty percent deviation for modification was *dicta*. It is contrary to the clear language of Indiana Code section 31-16-8-1 (Supp. 2007). *Id.* at 1186-87. In light of the Indiana Supreme Court's language in *Meehan v. Meehan*, 425 N.E.2d 157, 160 (Ind. 1981), where the trial court was reversed for straying from the language of the support modification statute, the *dicta* in *Hay*, should be disregarded. *Kraft*, 868 N.E.2d at 1187-88.

416. *Kraft*, 868 N.E.2d at 1190.

should be interpreted the same in both situations.⁴¹⁷ The court of appeals further found that the father would have been entitled to a modification even if he was required to meet the requirements of a substantial and continuing change of circumstances.⁴¹⁸

B. Retroactive Modification

In *Whited v. Whited*,⁴¹⁹ the Indiana Supreme Court granted transfer of a portion of the court of appeals decision⁴²⁰ that retroactively modified a father's child support obligation to take into account the time the parties' children stayed with him.⁴²¹ Even though more than eleven years had passed since the emancipation of the youngest child subject to an in gross child support order, the change of custody exception to the rule against retroactive modification was not available due to the fact that at least one child remained living with the mother at all times.⁴²² The father was not entitled to a retroactive modification even though it could be shown that the father acted in good faith by reducing his in gross child support obligation proportionately based on the number of children residing with the mother at any one time.⁴²³ The court stated that "when a court enters an order in gross, that obligation similarly continues until the order is modified and/or set aside, or *all* of the children are emancipated, or *all* of the children reach the age of twenty-one."⁴²⁴ The court strongly suggested that it would be much simpler for parties to submit agreed modifications of child support in instances where the parties agree that in gross orders are no longer

417. *Id.* at 1189. The court of appeals agreed with the father's analysis that "parents [would be] less likely to reach such agreements regarding child support if they will have a 'tougher time changing the agreement later' and that 'having such an added burden would do nothing but discourage parents from ever agreeing to pay more than absolutely necessary.'" *Id.* (quoting Appellant's Brief, *Kraft*, 868 N.E.2d 1181 (No. 22A04-0612-CV-752)).

418. *Id.* at 1189-90. Even if the *dicta* in *Hay* were law, the excess support in the mediation agreement was based upon a compromised income almost three times greater than the income at the time of the hearing on the petition to modify. *Id.* Such a reduction in income amounts to a changed circumstance so substantial and continuing as to make the terms of the current order unreasonable. *Id.*

419. 859 N.E.2d 657 (Ind. 2007).

420. See Ruppert & Sedberry, *supra* note 2, at 916-17 (discussing *Whited* at both trial and appellate levels).

421. *Whited*, 859 N.E.2d at 660-61.

422. *Id.* at 663-64.

423. *Id.*

424. *Id.* at 661 (citing *Ogle v. Ogle*, 769 N.E.2d 644 (Ind. Ct. App. 2002); *Schrock v. Gonser*, 658 N.E.2d 615 (Ind. Ct. App. 1996)). Indiana has historically been very harsh in this area, even disallowing automatic reductions to in gross orders after the death of one of the children referenced in the order. *Id.* (citing *Nill v. Martin*, 686 N.E.2d 116, 118 (Ind. 1997); *Kaplon v. Harris*, 567 N.E.2d 1130, 1132-33 (Ind. 1991)).

representative of their situation.⁴²⁵

C. Credit for Social Security Retirement Benefits

Social Security benefits and their treatment have been a revolving and reoccurring issue with the Indiana courts.⁴²⁶ In *Thompson v. Thompson*,⁴²⁷ the court tried to reconcile prior Indiana Supreme Court and Indiana Court of Appeals decisions together with recognition of the fact that the Indiana Child Support Guidelines do not deal with third party sources of income paid directly to children. The *Thompson* court held that “a trial court abuses that discretion in setting support at a level that varies to such an extent from the standard of living that the child would have enjoyed had the family remained intact.”⁴²⁸ There is also an abuse of discretion where the amount of support ordered “devotes substantially higher percentages of total family income to such support for families receiving Social Security benefits than those that do not.”⁴²⁹

D. Post-secondary Educational Expenses

In *Quinn v. Threlkel*,⁴³⁰ the mother filed a petition for modification of the father’s child support and for a determination of responsibility for college expenses. In this case, the parties’ daughter attended a private college.⁴³¹ The daughter obtained student loans in addition to her scholarships and grants.⁴³² The father also contributed a substantial sum to tuition.⁴³³ Due to the mother having a spouse that could support her financially, the mother’s income was

425. *Id.*

426. The Indiana Supreme Court provided in *Brown v. Brown*, 849 N.E.2d 610, 612 (Ind. 2006), that “a disabled parent is entitled to a credit against the parent’s support obligations for Social Security disability benefits paid to a child” and in *Stultz v. Stultz*, 659 N.E.2d 125, 128 (Ind. 1995), “that such a credit is not automatic” for Social Security retirement benefits received by the minor child of divorcing parents. Rather, the receipt of such benefits is a factor to be considered by the trial court in setting support. *Id.* Note the main difference between *Brown* and *Stultz* is the type of benefit; *Brown* considers disability benefits, while *Stultz* focuses on retirement benefits. *See Brown*, 849 N.E.2d at 612; *Stultz*, 659 N.E.2d at 126.

427. 868 N.E.2d 862, 865-69 (Ind. Ct. App. 2007).

428. *Id.* at 869.

429. *Id.* This ruling only evaluates when the trial court has abused its discretion and does not provide practitioners with a clear cut way to calculate child support where Social Security benefits are involved. The practical analysis may be for practitioners to add any retirement benefits received by the parents and children into the combined family income to determine the benefit the child would be receiving if the family remained intact and then reduce the retiree’s child support obligation by the amount the child is receiving in retirement benefits.

430. 858 N.E.2d 665, 668 (Ind. Ct. App. 2006).

431. *Id.*

432. *Id.*

433. *Id.* The father had contributed “approximately \$6000 towards [the child’s] college expenses before the hearing.” *Id.*

substantially lower than the father's at the time of the hearing.⁴³⁴ At the father's request and without objection from the mother, the trial court awarded the child dependency tax exemption for the parties' daughter to the father beginning with the 2005 tax year.⁴³⁵ The trial court expressed strong disagreement with the parties' willingness to allow their daughter to obtain student loans when their combined incomes were over \$100,000 annually.⁴³⁶ The court went so far as to forbid the parents from allowing the child to take out any further student loans and required them to repay her current loans.⁴³⁷ The trial court also disagreed with the use of any post-secondary education worksheet to determine the father's support obligation while the child was home from college and staying with the mother.⁴³⁸ The father was ordered to pay support only in the weeks that the parties' daughter was at home for at least seven days,⁴³⁹ and the parties' contribution to college expenses was set at an arbitrary percentage.⁴⁴⁰

The court of appeals held that the trial court's failure to adopt one of the parties' verified, properly executed, post-secondary education worksheets or to base the college expense order on its findings using the methodology of the Child Support Guidelines was error and remanded it to the trial court.⁴⁴¹ The court of appeals also instructed the trial court to consider and apportion part of the expense to the child.⁴⁴² The trial court's scolding of parents for allowing the child to take out modest loans to invest in her own education was inappropriate,⁴⁴³ especially in light of the fact that subsidized loans cannot be obtained without a showing of need.⁴⁴⁴ Finally, after consideration of the relevant factors to be considered by trial courts in deciding who shall be entitled

434. *Id.* The father earned approximately \$86,000 in 2003, \$61,500 in 2004, and \$100,000 in 2005. *Id.* The mother was previously employed with a salary of \$34,000, but had an income of only \$10,000 in 2005. *Id.*

435. *Id.*

436. *Id.* at 669.

437. *Id.*

438. *Id.* The mother's residence was located very close to the daughter's college, and the mother reported that daughter visited home frequently. *Id.* at 668.

439. *Id.* The court of appeals was concerned about the potential for a tug-of-war involving the parties' daughter with the mother wanting her to visit so she would get child support and the father encouraging the opposite so he did not have to pay child support. *Id.* at 673.

440. *Id.* at 668, 671. The trial court ordered the father to pay seventy-one percent and the mother to pay twenty-nine percent, even though the trial court did not consider a post-secondary education worksheet. *Id.*

441. *Id.* at 671.

442. *Id.*

443. *Id.* at 672. The trial court was also directed to "reconsider its absolute prohibition against [the daughter] taking out any loans to help pay for her education at a private school, and especially its requirement that the parties repay the loans she already took out during the 2005-06 school year." *Id.*

444. *Id.* at 671-72.

to the tax exemption,⁴⁴⁵ the court of appeals held that the trial court did not abuse its discretion when it awarded the tax exemption for the parties' daughter to the father.⁴⁴⁶

*In re the Marriage of Hensley*⁴⁴⁷ was another post-secondary educational case during this survey period. The trial court in *Hensley* ordered the father to be responsible for eighty-six percent of the educational expenses of the parties' children⁴⁴⁸ and also ordered the father to reimburse the mother for over \$60,000 in past tuition for the children.⁴⁴⁹ After all of the support orders, including child support, were taken into consideration, the father would have been expected to support himself⁴⁵⁰ on less than \$4300 per year.⁴⁵¹ The court of appeals found this

445. The Indiana Child Support Rules and Guidelines section on tax exemptions provides:

Development of these Guidelines did not take into consideration the awarding of the income tax exemption. Instead, it is recommended that each case be reviewed on an individual basis and that a decision be made in the context of each case. Judges and practitioners should be aware that under current law the court cannot award an exemption to a parent, but the court may order a parent to release or sign over the exemption for one or more of the children to the other parent pursuant to I.R.C. s 152(e). To effect this release, the parent releasing the exemption must sign and deliver to the other parent I.R.S. Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents. The parent claiming the exemption must then file this form with his or her tax return. The release may be made, pursuant to the Internal Revenue Code, annually, for a specified number of years or permanently. Judges may wish to consider ordering the release to be executed on an annual basis, contingent upon support being current at the end of the calendar year for which the exemption is ordered as an additional incentive to keep support payments current. It may also be helpful to specify a date by which the release is to be delivered to the other parent each year. Shifting the exemption for minor children does not alter the filing status of either parent.

In determining when to order a release of exemptions, it is recommended that at minimum the following factors be considered:

- (1) the value of the exemption at the marginal tax rate of each parent;
- (2) the income of each parent;
- (3) the age of the child(ren) and how long the exemption will be available;
- (4) the percentage of the cost of supporting the child(ren) borne by each parent; and
- (5) the financial burden assumed by each parent under the property settlement in the case.

IND. CHILD SUPPORT GUIDELINES 6 cmt. (2004).

446. *Quinn*, 858 N.E.2d at 675-76.

447. 868 N.E.2d 910 (Ind. Ct. App. 2007).

448. *Id.* at 912. The mother's income was found to be \$210 per week (an imputation of minimum wage) and the father's income was \$1,286.87 per week, which is approximately eighty-six percent of the parties' total income. *Id.* at 914-15.

449. *Id.* at 916.

450. The court noted that the father was a hard worker, already working over sixty hours per week to support himself and his four children, while the mother was unemployed and would have

to be “inequitable and unjust”⁴⁵² in that the trial court failed to consider the parents’ ability to meet the needs as required by the Indiana Code.⁴⁵³

*E. Voluntary Underemployment and Irregular Income*⁴⁵⁴

*Meredith v. Meredith*⁴⁵⁵ reviewed the trial court’s finding that the father was voluntarily underemployed after he voluntarily took an early retirement in order to increase his monthly pension amount.⁴⁵⁶ The court affirmed the trial court’s decision and held that where a support payor voluntarily takes early retirement and does not seek new employment solely for the purpose of increasing his monthly retirement benefit and despite being able to work, the court of appeals will not reverse the trial court’s finding of voluntary unemployment.⁴⁵⁷

The *Meredith* court also analyzed the trial court’s calculation of the father’s potential income and held that the determination of potential income is *fact sensitive*.⁴⁵⁸ The Indiana Child Support Guidelines, however, suggest that the weekly gross income must be set at least at the minimum wage level.⁴⁵⁹ The trial court’s use of the father’s previous four years of tax returns, which included substantial irregular overtime pay, to average his income for purposes of determining potential income was an error under the circumstances.⁴⁶⁰ The father’s pension income plus minimum wage would be similar to his pre-

money to spare under the trial court’s order. *Id.* at 916-17. An affirmation of the trial courts order would have penalized hard work and rewarded the mother for remaining unemployed. *Id.* at 917.

451. *Id.* at 916.

452. *Id.*

453. *Id.* (citing IND. CODE § 31-16-6-2 (Supp. 2007)).

454. *Meredith v. Meredith*, 854 N.E.2d 942 (Ind. Ct. App. 2006), was decided on October 6, 2006, just after the close of the survey period for 2006. Due to it being a case of first impression, it was also discussed in last year’s edition of this Article. See Ruppert & Sedberry, *supra* note 2, at 919.

455. 854 N.E.2d 942, 945-46 (Ind. Ct. App. 2006).

456. *Meredith* is distinguishable from *In re Paternity of E.M.P.*, 722 N.E.2d 349 (Ind. Ct. App. 2000), due to the father’s ability to work in *Meredith* coupled with the fact that he did not seek new employment making a comparable income after his retirement. *Meredith*, 854 N.E.2d at 947-48.

457. *Id.*

458. *Id.* at 948-49.

459. *Id.* at 949. The Indiana Child Support Guidelines provide:

If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income. A determination of potential income shall be made by determining employment potential and probable earnings level based on the obligor’s work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community. If there is no work history and no higher education or vocational training, it is suggested that weekly gross income be set at least at the federal minimum wage level.

IND. CHILD SUPPORT GUIDELINES 3(A)(3) cmt. (2004).

460. *Meredith*, 854 N.E.2d at 949.

retirement hourly wage without overtime.⁴⁶¹ Either of those amounts would have served as a proper basis for the father's potential income because both would reflect the fact that the father is voluntarily unemployed, but would not dictate that the father base his employment decisions strictly upon maintaining the prior amount of his income which included overtime pay.⁴⁶²

F. Imputation of Income During Incarceration

In *Lambert v. Lambert*,⁴⁶³ the Indiana Supreme Court reviewed an issue that was a matter of first impression at the appellate level.⁴⁶⁴ After reviewing the various approaches in other states on the issue of calculating child support during incarceration,⁴⁶⁵ the court of appeals' decision was vacated in part and affirmed in part, and the case remanded to the trial court. The court stated that "[w]hile our Child Support Guidelines obligate every parent to provide some support even when they have no apparent present income, it was error to set support based on employment income that plainly would not be there during incarceration."⁴⁶⁶ The supreme court agreed with the appellate court that "most criminal activity reflects a voluntary choice, and carries with it the potential for incarceration and consequent unemployment."⁴⁶⁷ However, the court went on to make a distinction between unemployment due to incarceration and unemployment that is voluntary by saying that "[t]he choice to commit a crime is so far removed from the decision to avoid child support obligations that it is inappropriate to consider them as identical."⁴⁶⁸

461. *Id.*

462. *Id.* at 949-50.

463. 861 N.E.2d 1176 (Ind. 2007).

464. *See* Ruppert & Sedberry, *supra* note 2, at 917-18 (discussing *Lambert* at both the trial and appellate levels).

465. *Lambert*, 861 N.E.2d at 1177-79. The court discussed *Leasure v. Leasure*, 549 A.2d 225, 227 (Pa. Super. Ct. 1988) and examined the Absolute Justification Rule approach. *Lambert*, 861 N.E.2d at 1178. *Leasure* was later disapproved by the Pennsylvania Supreme Court. *See* Yerkes v. Yerkes, 824 A.2d 1169, 1172 n.12 (Pa. 2003). Other states, such as Montana and Iowa, "have concluded that it is appropriate to impute pre-incarceration income to the non-custodial parent" and used the Imputation of Pre-Incarceration Income Allowed Rule. *Lambert*, 861 N.E.2d at 1178. These states focus mainly on "whether incarceration constitutes a voluntary reduction of income." *Id.* *Mooney v. Brennan* reasoned that "'a criminal should not be offered a reprieve from [his] child support obligations when we do not do the same for one who becomes voluntarily unemployed.'" *Id.* (alteration in original) (quoting *Mooney v. Brennan*, 848 P.2d 1020, 1022-23 (Mont. 1993)). The disallowing imputation of pre-incarceration income rule followed by Nebraska in *State v. Porter* states "that imposing pre-incarceration income on a felon would conflict with the state's child support guidelines precisely because an imprisoned individual had no 'earning capacity.'" *Id.* (quoting *State v. Porter*, 610 N.W.2d 23, 28-29 (Neb. 2000)).

466. *Lambert*, 861 N.E.2d at 1176.

467. *Id.*

468. *Id.* at 1180.

The court rejected the idea of suspending child support obligations while a parent is incarcerated as contrary to Indiana law.⁴⁶⁹ Rather, the court supported the idea of not imputing income but rather imposing the minimum support requirements provided by the Child Support Guidelines.⁴⁷⁰ The Indiana Supreme Court decision in *Lambert* only “counsels against imputing pre-incarceration wages, salaries, commissions, or other employment income to the individual. A court may, obviously, still consider other sources of income when calculating support payments.”⁴⁷¹ The court’s decision reminds its readers that “a court could prospectively order that child support return to the pre-incarceration level upon a prisoner’s release because following release, the parent is theoretically able to return to that wage level.”⁴⁷² The burden to modify would then fall on the previously incarcerated parent.⁴⁷³

G. Post-Divorce Support of a Guardianship Ward of the Parties

As a matter of first impression, the Indiana Supreme Court in *In re Marriage of Snow*⁴⁷⁴ held that the doctrine of *in loco parentis*⁴⁷⁵ should not be allowed to

469. *Id.* at 1179. Indiana Code section 31-16-6-6 provides the following:

(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.

IND. CODE § 31-16-6-6 (Supp. 2007).

470. *Lambert*, 861 N.E.2d at 1179-80. The Indiana Child Support Guideline provides: The Guideline’s schedules for weekly support payments do not provide an amount of support for couples with combined weekly adjusted income of less than \$100.00. Consequently the Guidelines do not establish a minimum support obligation. Instead the facts of each individual case must be examined and support set in such a manner that the obligor is not denied a means of self-support at a subsistence level. It is, however, recommended that a specific amount of support be set. Even in situations where the noncustodial parent has no income, courts have routinely established a child support obligation at some minimum level. An obligor cannot be held in contempt for failure to pay support when there is no means to pay, but the obligation accrues and serves as a reimbursement if the obligor later acquires the ability to meet the obligation.

IND. CHILD SUPPORT GUIDELINES 2 cmt. (2004).

471. *Lambert*, 861 N.E.2d at 1182.

472. *Id.*

473. *Id.*

474. 862 N.E.2d 664, 667 (Ind. 2007).

475. “[A]dv. & adj. [Latin “in the place of a parent”] Acting as a temporary guardian of a child.” BLACK’S LAW DICTIONARY 791 (7th ed. 1999). *Niewiadomski v. United States* discusses *in loco parentis* by stating the doctrine ““refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through

impose an obligation to support a child on the adult standing *in loco parentis* after the relationship has ended. In other words, “when a relationship of *in loco parentis* exists, that status alone is an insufficient basis for imposing a child support obligation on the stand-in parent.”⁴⁷⁶ Because the voluntary agreement to contribute to the expenses of the child, post-divorce, should not be characterized as spousal maintenance capable of being ordered by a court or child support, the court determined the payments constituted an agreement concerning property distribution which is not modifiable absent fraud or a contractual provision between the parties permitting modification.⁴⁷⁷

H. Negative Child Support

In *Grant v. Hager*,⁴⁷⁸ the judgment of the trial court was reversed by the Indiana Supreme Court and the case was remanded to the trial court for further consideration. The court of appeals reversed the trial courts finding that the mother, the custodial parent, should pay child support to the father, the non-custodial parent, in an amount equal to the amount his credits for insurance and parenting time exceeded his child support obligation.⁴⁷⁹ The court’s holding was based on the deviation authority granted to courts by Child Support Rule 3.⁴⁸⁰ More specifically, the court stated that

[g]iven this deviation authority, a court could order a custodial parent to pay child support to a non-custodial parent based on their respective incomes and parenting time arrangements if the court had concluded that it would be unjust not to do so and the court had made the written

the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties.” *Snow*, 862 N.E.2d at 666 (quoting *Niewiadomski v. United States*, 159 F.2d 683, 686 (6th Cir. 1947)).

476. *Snow*, 862 N.E.2d at 667.

477. *Id.* at 667-68. The court came to its holding for several reasons, the first being that “Indiana policy disfavors entering a support order against adults who are not natural parents.” *Id.* at 667. “Second, it makes little sense to require child support from a person *in loco parentis* when that status is temporary in nature and essentially voluntary.” *Id.* The court went on to say “[i]t also seems unwise to create a layer of financial risk for adults who voluntarily provide financial and emotional support to children not their own.” *Id.* Furthermore, “it is difficult to imagine imposing parallel obligations on the institutions (like juvenile courts or universities) to which *in loco parentis* is commonly deployed.” *Id.*

478. 868 N.E.2d 801, 804 (Ind. 2007).

479. *Id.* at 802-03; see *Ruppert & Sedberry*, *supra* note 2, at 914-15 (discussing *Grant v. Hager* at both the trial court and appellate levels).

480. *Grant*, 868 N.E.2d at 803. Indiana Child Support Rule 3 states “[i]f the court concludes from the evidence in a particular case that the amount of the award reached through application of the guidelines would be unjust, the court shall enter a written finding articulating the factual circumstances supporting that conclusion.” *Id.* (quoting IND. CHILD SUPPORT GUIDELINES 3 (2004)).

finding mandated by Child. [sic] Supp. R. 3.⁴⁸¹

Following the Indiana Supreme Court's decision, which remanded the matter to the trial court for "reconsideration in accordance with the principles enunciated," the trial court issued an order in which it made specific findings, found that it would be unjust not to order support to be paid by the custodial mother, and reinstated retroactively its order awarding child support payable by the mother to the father in the amount of \$92.00 per week.⁴⁸² The mother then appealed this order contending that the trial court committed error by not holding a hearing prior to entering its findings of fact and judgment on remand.⁴⁸³ The mother further alleged that the court failed to rely on appropriate facts when concluding that the father had rebutted the presumptive child support obligation as calculated by using the Indiana Child Support Guidelines.⁴⁸⁴ The court of appeals affirmed the decision of the trial court and opined that it was not necessary for the trial court to hold a hearing because the supreme court had not instructed the trial court to conduct a new hearing.⁴⁸⁵ Regarding the mother's complaint that the trial court did not rely on appropriate facts, the court found that the trial court had relied upon the respective incomes of the parents, parenting time arrangements, and relevant payments being made by the parents to support its determination.⁴⁸⁶ Thus, the trial court followed the principles announced by the supreme court in its decision and committed no reversible error.⁴⁸⁷

IV. GUARDIANSHIP: INCAPACITATED ADULT

*In re Guardianship of Atkins*⁴⁸⁸ is an emotional case focusing on the best interests of an incapacitated, adult homosexual male.⁴⁸⁹ Patrick Atkins was in a twenty-five-year committed relationship⁴⁹⁰ when he became incapacitated as a result of a medical condition while on a business trip.⁴⁹¹ Patrick's life partner,

481. *Id.* at 804.

482. *Grant v. Hager*, 879 N.E.2d 628, 630-31 (Ind. Ct. App. 2008).

483. *Id.* at 631.

484. *Id.*

485. *Id.*

486. *Id.*

487. *Id.*

488. 868 N.E.2d 878 (Ind. Ct. App. 2007), *trans. denied*.

489. *Id.* at 880. While the sexual orientation of a person is not typically of noteworthy importance, it is of utmost importance in this case as it is the main reason for the disagreements over what is in Patrick's best interest.

490. *Id.* at 881. Patrick's family made it very clear through the years that they did not approve of Patrick's lifestyle. *Id.* at 880-81. Patrick's brother testified that his mother told him "that if Patrick was going to return to his life with Brett after recovering from the stroke, she would prefer that he not recover at all." *Id.* at 881.

491. *Id.* Patrick had an acute subarachnoid hemorrhage and a ruptured aneurysm. *Id.* He also suffered a stroke at some point during his hospital stay. *Id.*

Brett, traveled to Atlanta to be with Patrick at the hospital but was eventually excluded from visiting hours by Patrick's family.⁴⁹² After approximately six weeks in intensive care in Atlanta, Patrick was moved to a nursing facility.⁴⁹³ Brett developed a good relationship with the staff of the facility and continued to visit with Patrick after normal visiting hours so as not to be seen by Patrick's family.⁴⁹⁴ In June 2005, Brett filed a motion requesting to be Patrick's guardian, but Patrick's parents opposed the motion, making their own motion to be Patrick's guardians.⁴⁹⁵ Brett withdrew his request to be guardian over Patrick's property, but continued to seek appointment as the guardian over his person.⁴⁹⁶ Brett later petitioned the court⁴⁹⁷ for an "order requiring the Atkinses to allow him to visit and have contact with Patrick."⁴⁹⁸

The trial court named Patrick's parents, the Atkinses, as his co-guardians and denied Brett's request for the visitation order.⁴⁹⁹ The court of appeals⁵⁰⁰ affirmed the trial court's decision to name the Atkinses as Patrick's co-guardians,⁵⁰¹ but

492. *Id.* Although the family did not allow Brett to visit Patrick during visiting hours and went so far as to add a sign to the door of his room that read "immediate family and clergy only," the "hospital staff defied the family's instructions and allowed Brett to continue to visit with Patrick early in the morning and in the evenings, outside of regular visiting hours." *Id.*

493. *Id.*

494. *Id.* at 881-82.

495. *Id.* at 882.

496. *Id.*

497. *Id.* In November 2005, Brett filed a motion seeking the payment of a portion of his attorney's fees and costs from the guardianship estate. *Id.* The trial court denied his request, but the court of appeals remanded it to the trial court with instructions "to calculate the amount of Brett's attorney fees and costs to be paid by the guardianship estate" after finding that the fees were reasonably incurred in good faith and the expenditure of the fees was beneficial to Patrick. *Id.* at 888.

498. *Id.* at 882.

499. *Id.* at 882-83.

500. This case also involved the distribution of a Charles Schwab account that Patrick and Brett accumulated together over the past twenty-five years that was in Patrick's sole name. *Id.* The court of appeals upheld the trial court's decision to set the account aside to the guardianship estate. *Id.* at 887-88.

501. *Id.* at 883-84. The standard of review was whether the trial court abused its discretion in naming the Atkinses as co-guardians over Patrick. *Id.* at 883. Therefore, the court could not conduct a *de novo* analysis of what they felt was in the best interests of Patrick. *Id.* at 883-84. While they could not conclude there was an abuse of discretion on the part of the trial court, the court of appeals expressed some concern in saying

[g]iven the Atkinses' lack of support for their son's personal life through the years and given his mother's astonishing statement that she would rather that he *never recover* than see him return to his relationship with Brett, we are extraordinarily skeptical that the Atkinses are able to take care of Patrick's emotional needs.

Id.

reversed their decision to deny Brett visitation rights.⁵⁰² The court of appeals found that overwhelming evidence⁵⁰³ lead to the conclusion that visits between Patrick and Brett would be in Patrick's best interest and directed the trial court "to amend its order to grant Brett visitation and contact with Patrick as Brett requested."⁵⁰⁴

V. ADOPTION

A. Consent

The court of appeals in *In re Adoption of J.E.H.*⁵⁰⁵ affirmed the trial court's dismissal of a stepmother's petition to adopt her two stepchildren based on the lack of written consent by the oldest child, who was over the age of fourteen⁵⁰⁶ at the time of the hearing.⁵⁰⁷ The stepmother contended that the applicable statute⁵⁰⁸ was ambiguous as to whether consent is necessary when the child is not yet fourteen at the time of the petition but turns fourteen years of age before the adoption hearing.⁵⁰⁹ Both the trial court and the court of appeals disagreed with her rationale and held that the statute was clear and that her petition required written consent by the oldest child.⁵¹⁰

*In re Adoption of T.W.*⁵¹¹ involved the adoption of two children by their maternal great-uncle and great-aunt, Gary and Rachel Silbernagel, after the children were temporarily placed in their care.⁵¹² The Silbernagels obtained temporary guardianship over the children while Matthew White, their father was incarcerated. The Silbernagels sought counseling⁵¹³ for the children and denied

502. *Id.* at 884-86.

503. *Id.* at 885. The evidence included testimony from Patrick's guardian ad litem and an impartial neurophysiologist. *Id.* at 884-85.

504. *Id.* at 886. The court of appeals held that because "the Atkinses have made it crystal clear that, absent a court order requiring [them] to do so, they will not permit Brett to see their son, it was incumbent upon the trial court to order visitation as requested by Brett." *Id.*

505. 859 N.E.2d 388 (Ind. Ct. App. 2006).

506. The consent of the youngest child was not at issue as he was not yet fourteen years old. *Id.* at 389. However, because "it would not be in the best interests of W.D.H. to have a different mother than his older brother, the court also denied the adoption petition as to W.D.H." *Id.*

507. *Id.*

508. IND. CODE § 31-19-9-1(a)(5) (2004).

509. *J.E.H.*, 859 N.E.2d at 389-90.

510. *Id.* at 390.

511. 859 N.E.2d 1215 (Ind. Ct. App. 2006).

512. *Id.* at 1216-17. The Silbernagels were contacted by the father of the children and asked to care for them after he was unable to contact their mother while he was facing criminal prosecution. *Id.*

513. Psychological counseling was sought after the children began exhibiting sexualized behaviors and had emotional outbursts. *Id.* at 1216.

the father parenting time⁵¹⁴ with the children upon his release.⁵¹⁵ The Silbernagels petitioned the court for permanent guardianship over the children, which was set for hearing.⁵¹⁶ The father appeared at the hearing and requested parenting time with the children at his place of incarceration.⁵¹⁷ His request was denied, and the guardianship petition filed by the Silbernagels was granted.⁵¹⁸ After the hearing, the father ended all communication with the children.⁵¹⁹ Just under one year later, the Silbernagels petitioned to adopt the children.⁵²⁰ On December 29, 2005, their petition was granted.⁵²¹ The father appealed.

Indiana law waives the requirement of consent to the adoption of a child under certain circumstances, one of which is based on a voluntary lack of communication between a parent and child for a period of at least one year.⁵²² In this situation, while the court did not grant the father visitation with his children while he was incarcerated, nothing hindered his ability to communicate with the children by telephone or mail.⁵²³ The Silbernagels had the burden to prove by clear and convincing evidence that the father was unfit to be a parent to the children and that waiving his consent was in their best interests.⁵²⁴ The court of appeals affirmed the trial court's decision to grant the adoption and held that "there is clear and convincing evidence to support the trial court's determination of [the father's] parental unfitness, and that dispensing with his consent to the adoptions would serve the [c]hildren's best interests."⁵²⁵

B. Grandparent Visitation Rights After Parent's Adoption

As a matter of first impression before the court of appeals, *In re Guardianship of J.E.M.*⁵²⁶ addressed whether a mother's adoption by her second

514. The denial of parenting time was made pending an investigation into the behaviors by the children after reports of the allegations were made by the therapist. *Id.*

515. *Id.*

516. *Id.* at 1217. The hearing was on August 29, 2003. *Id.*

517. *Id.*

518. *Id.*

519. *Id.*

520. *Id.* The petition was filed on August 16, 2004. *Id.* The trial court held hearings on their petition on August 17, 2005, October 12, 2005, and November 2, 2005. *Id.*

521. *Id.*

522. *Id.* (citing IND. CODE § 31-19-9-8 (a) (2004)).

523. *Id.* at 1218. The father asserted that he did not attempt to communicate via telephone or mail because the Silbernagels "would have thwarted his efforts." *Id.* While it is true that the court would have considered any such thwarting by the Silbernagels had it occurred, the court held the father's contentions that they would have done so when he had not put forth the effort was purely speculative. *Id.*

524. *Id.* at 1217-18 (citing IND. CODE § 31-19-9-8(a)(11) (2004); *In re Adoption of M.A.S.*, 815 N.E.2d 216, 219 (Ind. Ct. App. 2004)).

525. *Id.* at 1218-19.

526. 870 N.E.2d 517, 518 (Ind. Ct. App. 2007).

cousins could serve to sever the ties between her biological mother and her son. In *J.E.M.*, the child's biological grandmother, Handshoe, was appointed the child's guardian with his mother's consent in June 2002.⁵²⁷ The child resided with Handshoe until her guardianship was terminated in February 2005.⁵²⁸ At the time the guardianship was terminated, Handshoe was granted visitation rights of J.E.M.⁵²⁹ J.E.M.'s mother, Ridgway, was adopted by her second cousins, Jack and Joyce Mueller, in April 2005.⁵³⁰ Under the basis that Handshoe was no longer J.E.M.'s grandmother because his mother had been adopted, Ridgway filed a "Verified Motion for Termination of Grandparent Visitation" in September 2006.⁵³¹ The petition failed to make any claims regarding the termination of visitation being in the child's best interest.⁵³² The trial court granted Ridgway's motion and terminated Handshoe's visitations with J.E.M.⁵³³ Handshoe appealed the trial court's denial of her motion to correct error.⁵³⁴

Although Handshoe's original visitation order was not in compliance with the *Grandparent Visitation Act*,⁵³⁵ the court of appeals treated the order as if it had complied due to the lack of objection to the order at the time it was issued.⁵³⁶ Aside from statute,⁵³⁷ trial courts are directed by Indiana case law as well as the United States Supreme Court⁵³⁸ when it comes to the issue of grandparent visitation.⁵³⁹ Indiana court opinions also provide ample guidance and history in the area of a child's adoption and how that affects the rights of the grandparents.⁵⁴⁰ However, the "question of the effect of an adult *parent's* adoption on the ability of a biological grandparent to seek visitation with his or her grandchild" was a matter of first impression in Indiana.⁵⁴¹ The court of

527. *Id.*

528. *Id.*

529. *Id.* Handshoe was granted visitation privileges with the child one weekend per month.

Id.

530. *Id.*

531. *Id.*

532. *Id.*

533. *Id.* at 518-19.

534. *Id.* at 519.

535. *See* IND. CODE § 31-17-5 (2004 & Supp. 2007).

536. *J.E.M.*, 870 N.E.2d at 519. The only issues were questions of law, not fact. *Id.* at 520. Therefore, the issues in this appeal would be handled de novo, with no deference to the trial court. *Id.* (citing *Harris v. Harris*, 800 N.E.2d 930, 935 (Ind. Ct. App. 2003)).

537. IND. CODE § 31-17-5-1(a)(3) (2004) (allowing grandparents to seek visitation with a grandchild born out of wedlock); *id.* § 31-17-5-2(a) (providing a court may grant grandparent visitation if it determines that visitation is in the best interests of the child); *id.* § 31-17-5-7 (providing grandparent visitation may be modified or terminated upon a finding of the child's best interests).

538. *See Troxel v. Granville*, 530 U.S. 57 (2000).

539. *J.E.M.*, 870 N.E.2d at 520.

540. *Id.* at 520-21.

541. *Id.* at 521.

appeals looked to Florida for guidance in this matter.⁵⁴² Ridgway requested that the court view her adoption as an adoption of her son as well, in effect severing the natural ties with Handshoe.⁵⁴³ The court of appeals disagreed with Ridgway's analysis and concluded that there was not an automatic severance of the relationship between Handshoe and J.E.M.⁵⁴⁴ The matter was remanded to the trial court for consideration under the best interests of the child standard presented by the Grandparents Visitation Act.⁵⁴⁵ The court of appeals noted that while there is not an automatic severance of ties between Handshoe and the child, the trial court may take the circumstances into consideration when looking at the best interests of the child.⁵⁴⁶ Furthermore, the court of appeals observed "that Handshoe would not be able to seek visitation with any children of Ridgeway [sic] born after her adoption by the Muellers."⁵⁴⁷

542. *Id.* A Florida court held that "the adoption of an adult who has children in being at the entry of judgment of adoption does not operate to sever the relationship of those children with their natural relatives." *Id.* (quoting *Worley v. Worley*, 534 So. 2d. 862, 863 (Fla. Dist. Ct. App. 1988)).

543. *Id.* at 522.

544. *Id.*

545. *Id.*

546. *Id.*

547. *Id.*