

RECENT DEVELOPMENTS IN INDIANA FAMILY LAW: OCTOBER 2017 TO SEPTEMBER 2018

RENA SEIDLER*
MARGARET RYZNAR**

This Article considers the notable developments in Indiana family law during the survey period of October 1, 2017 to September 30, 2018. The published appellate cases surveyed in this Article concern property division upon divorce; parenting time and visitation; child custody; child support; adoption and paternity; Children in Need of Services (“CHINS”) and the termination of parental rights; and jurisdiction and procedure.

I. PROPERTY DIVISION

One property division matter arising during the survey period concerned a retirement account funded prior to a twenty-six year marriage.¹ The husband funded the account with \$15,000 in 1987, but did not add to it during the marriage.² By the time of the divorce, the account had grown to over \$200,000.³ The appellate court remanded after determining that the trial court had abused its discretion in not considering the economic circumstances of both parties or the earning ability of the parties when awarding the husband the full account, as required by Indiana Code Section 31-15-7-5.⁴

In another case, the appellate court agreed with the trial court that the husband had willfully violated the parties’ marital settlement agreement by removing the wife from his employee benefit plan.⁵ However, the appellate court noted that federal law prevented the trial court from requiring the husband to reinstate the ex-wife as beneficiary.⁶ The appellate court remanded for a determination of an alternative remedy for the wife.⁷

In another property settlement matter, at the time of the parties’ divorce, the husband agreed to be solely responsible for the marital home mortgage until it was paid off, in lieu of any child support.⁸ Nine years after the divorce, the trial court agreed with the husband that he should no longer be responsible for the mortgage payments, as the parties’ children were no longer minors.⁹ The appellate court reversed, noting that while a child support obligation could be

* Research and Instructional Services Librarian, Indiana University Robert H. McKinney School of Law.

** Professor of Law, Indiana University Robert H. McKinney School of Law.

1. *Gish v. Gish*, 111 N.E.3d 1034 (Ind. Ct. App. 2018).

2. *Id.* at 1036.

3. *Id.* at 1035.

4. *Id.* at 1038-39.

5. *McCallister v. McCallister*, 105 N.E.3d 1114 (Ind. Ct. App. 2018).

6. *Id.* at 1119.

7. *Id.* at 1119, 1121.

8. *Copple v. Swindle*, 112 N.E.3d 205, 210 (Ind. Ct. App. 2018).

9. *Id.* at 209.

modified, a property settlement agreement could not.¹⁰

Also during the survey period, a wife unsuccessfully sought to repudiate a settlement agreement because it had not been signed by the parties before being incorporated into the divorce order.¹¹ The Indiana appellate court upheld the agreement because signatures were not statutorily required, and both parties had agreed to a verbal recitation of the property settlement agreement during the course of the final hearing.¹²

A final noteworthy property matter regarded the enforceability of a post-nuptial agreement signed five years into the parties' nearly forty-five year marriage, after the parties discussed divorce.¹³ The trial court found that this document was not clearly a reconciliation agreement, and therefore lacked consideration and was unenforceable.¹⁴ The appellate court reversed, agreeing with the husband that the agreement was signed with consideration as a reconciliation agreement, intended to impact a future dissolution of the marriage.¹⁵

II. PARENTING TIME & VISITATION

Regarding parenting time case law during the survey period, an Indiana appellate court affirmed a modification of parenting time when the mother had enrolled the children in numerous activities negatively impacting the father's visitation.¹⁶ Pursuant to the original visitation agreement, the father had several evening visitation periods, but less weekend visitation.¹⁷ Due to the increase in extracurricular activities and the father's relocation, the evening visitation became impractical and stressful to the child.¹⁸ Accordingly, a modification of parenting time was appropriate.¹⁹ The court rejected the mother's argument that the trial court could not vacate terms of a previous settlement agreement—this was a parenting time agreement, not an irreversible property agreement.²⁰

III. CHILD CUSTODY

One significant custody case that arose during the survey period transferred permanent physical custody between parents due to a pattern of domestic abuse against the child.²¹ Temporary physical custody was initially granted to the father

10. *Id.* at 211.

11. *Sanders v. Sanders*, 105 N.E.3d 1102, 1104 (Ind. Ct. App. 2018).

12. *Id.* at 1107.

13. *Buskirk v. Buskirk*, 86 N.E.3d 217, 220 (Ind. Ct. App. 2017).

14. *Id.* at 221.

15. *Id.* at 224.

16. *Moell v. Moell*, 84 N.E.3d 741, 743 (Ind. Ct. App. 2017).

17. *Id.* at 746.

18. *Id.* at 745.

19. *Id.* at 745-46.

20. *Id.* at 744.

21. *Collyear-Bell v. Bell*, 105 N.E.3d 176 (Ind. Ct. App. 2018).

after the child appeared at school covered in bruises caused by the mother with a belt.²² Permanent physical custody was subsequently granted to the father after the mother admitted to at least three other instances of punishing the child with a belt.²³ The appellate court affirmed the trial court's decision to grant the father physical custody of the child, finding that the trial court was within its discretion to consider the child's preferences and life adjustments, in addition to the repeated violence against the child, the latter of which statutorily sufficed to show substantial change pursuant to Indiana Code section 31-17-2-21.²⁴

In another case, the appellate court affirmed that a mother's stroke was a substantial and continuing change in circumstances supporting a modification of physical custody to the father.²⁵ The mother suffered permanent severe physical and verbal disabilities that required her extended family to assist in parenting the child.²⁶ The mother conceded that this was a substantial and continuing change in circumstance, but she argued that her ability to parent had not been adversely affected, despite her inability to assist the child with homework or to effectively communicate directly with the child.²⁷ Under these circumstances, the appellate court found that the trial court had not abused its discretion in modifying custody after concluding that the substantial change in circumstance had adversely affected the mother's ability to care for the child.²⁸

In a final custody case, prior to the divorce and custody hearing, the mother accepted a job in Maryland, paid a deposit for the child to attend a private school in Maryland without consulting the father, moved all of her belongings to Maryland, and intended to move to Maryland regardless of the court's decision.²⁹ The trial court granted primary physical custody to the father, finding that the parents were equally involved in the child's life and that the child had a close bond with grandparents and a half-sibling who lived nearby.³⁰ The appellate court affirmed the trial court's decision, noting that a move to Maryland would place a substantial hardship on the father, that the mother had not consulted the father in relation to the school for the child, and that the parents were equally involved in the child's life.³¹

IV. CHILD SUPPORT

The Indiana appellate courts also considered several noteworthy child support cases during the survey period. In one such case, the father had a child support

22. *Id.* at 180-81.

23. *Id.* at 183.

24. *Id.* at 185-86.

25. *Wills v. Gregory*, 92 N.E.3d 1133 (Ind. Ct. App. 2018).

26. *Id.* at 1135.

27. *Id.* at 1137-38.

28. *Id.* at 1142.

29. *Hamilton v. Hamilton*, 103 N.E.3d 690, 692-93 (Ind. Ct. App. 2018).

30. *Id.* at 693.

31. *Id.* at 695-96.

arrearage of nearly \$7000 prior to the children's emancipation.³² The mother filed a motion for enforcement of child support, which the trial court granted.³³ However, the trial court denied the requested interest on the arrearage because the children were emancipated and the mother had waited five years to attempt to collect the arrearage.³⁴ The appellate court reversed the trial court's decision, noting that Indiana Code section 24-4.6-1-101 specifies an 8% interest on judgments, absent an agreement otherwise by the parties.³⁵

In another child support case, the father sought a modification of his child support based on a temporary increase in visitation to make up for missed visitation.³⁶ The court determined that the father could make up the parenting time, having been previously and wrongfully denied parenting time with the child, but he had not met the burden of proof to show that custody be changed.³⁷ The court also affirmed that the father could not reduce his child support because he had already received credit for those overnights.³⁸

In a final case, the appellate court reversed a trial court decision after determining that the mother had willfully remained underemployed for child support purposes and that the father's income had not been properly calculated.³⁹ The appellate court determined that it was improper for the trial court to use the mother's gross income, rather than using the mother's potential income, in its child support calculations.⁴⁰ The appellate court also found that the trial court had failed to include the father's dependable overtime in its support calculations.⁴¹

V. PATERNITY & ADOPTION

Numerous paternity and adoption cases were decided during the survey period. In one such paternity matter, the father had voluntarily signed two paternity affidavits—one for a 3 year-old that he knew was not biologically his child and one for a newborn that he suspected was not his biological child.⁴² Seven years later, after the mother sought child support, the father moved to set aside a judgment of paternity for the older child and requested a DNA test for the younger child.⁴³ However, he had voluntarily signed the affidavits, both children only knew him as their father, and he had not requested DNA testing until the

32. *McKibben v. Kaiser*, 106 N.E.3d 529 (Ind. Ct. App. 2018).

33. *Id.* at 530.

34. *Id.*

35. *Id.* at 531.

36. *Perez v. Mounce*, 110 N.E.3d 404, 406 (Ind. Ct. App. 2018).

37. *Id.* at 406.

38. *Id.* at 408.

39. *Marshall v. Marshall*, 92 N.E.3d 1112, 1113 (Ind. Ct. App. 2018).

40. *Id.* at 1118.

41. *Id.* at 1121.

42. *In re Paternity of B.M.*, 93 N.E.3d 1132, 1134 (Ind. Ct. App. 2018).

43. *Id.*

child support case.⁴⁴ Based on these circumstances, both the trial court and the appellate court rejected his claim that the paternity affidavits should be set aside on the ground of fraud, duress, or material mistake.⁴⁵

In another paternity case, the appellate court reversed the trial court's finding that, as a matter of law, a child's legal father had the right of visitation with the child because he had signed a paternity affidavit.⁴⁶ The appellate court noted that while the time to rescind the paternity affidavit had long passed, as had the time for the biological father to seek out a paternity affidavit, the trial court should have allowed the mother to amend her paternity case, and it did not consider if the biological father provided earlier support to the child.⁴⁷ The appellate court remanded, with instructions that the trial court consider these additional issues.⁴⁸

In an adoption case, the Indiana appellate court affirmed the trial court's decision that the father had irrevocably implied consent to adoption by not registering as a putative father within the timeframe permitted by Indiana statute.⁴⁹ The appellate court relied on the plain language of the statute in reaching its decision.⁵⁰

The appellate court also reversed a trial court's holding that a parent must contest an adoption by a written motion.⁵¹ The father had hired an attorney for a CHINS case, who orally objected to the adoption at a hearing that consolidated the CHINS, guardianship, and adoption proceedings.⁵² The father was incarcerated and not present at the proceedings.⁵³ The trial court's holding was based on its interpretation of the word "file" in Indiana's adoption objection statute, which states that a parent's consent of an adoption is irrevocably implied if the parent "fails to file a motion to contest adoption."⁵⁴ The appellate court reversed and remanded on the grounds that the legislature did not require a "written" objection.⁵⁵

In another case, the appellate court affirmed a trial court's decision that a mother's consent for the adoption of her child was unnecessary when she was deemed unfit.⁵⁶ The trial court looked at several factors, including: 1) the mother's nine drug and alcohol parole violations in the year proceeding the hearing, 2) her lack of seeing the child for more than two years prior to the hearing, and 3) her failure to contribute financially to the child's expenses for

44. *Id.* at 1134-35.

45. *Id.* at 1136.

46. *Paternity of I.I.P. v. Rodgers*, 92 N.E.3d 1158, 1159-60 (Ind. Ct. App. 2018).

47. *Id.* at 1164.

48. *Id.*

49. *In re Adoption & Paternity of K.A.W.*, 99 N.E.3d 724, 725 (Ind. Ct. App. 2018).

50. *Id.* at 727.

51. *In re Adoption of J.R.O.*, 87 N.E.3d 37, 38 (Ind. Ct. App. 2017).

52. *Id.* at 39.

53. *Id.*

54. *Id.* at 41-42.

55. *Id.* at 43.

56. *J.H. v. S.S.*, 93 N.E.3d 1137 (Ind. Ct. App. 2018).

more than two years.⁵⁷ The appellate court affirmed, noting that criminal history, substance abuse, and mental health were several of the contributing factors determining whether a parent is deemed unfit.⁵⁸

In a failed adoption case, the appellate court reversed a trial court's decision that a father's consent to an adoption by the stepfather was unnecessary.⁵⁹ The trial court based its decision on the father's failure to pay child support during several periods in the preceding couple of years and his failure to communicate significantly with the child.⁶⁰ The appellate court disagreed, noting that it was the stepfather's burden to show that the father had knowingly failed to pay child support when able to do so and that the stepfather had provided no such evidence.⁶¹ The appellate court also noted that the mother had limited, and then prevented entirely, the father's communication with the child.⁶²

VI. CHINS AND THE TERMINATION OF PARENTAL RIGHTS

The number of CHINS cases in Indiana remained unabated for yet another year. In one CHINS case, the appellate court found that neither a mother's marijuana issue, nor an incident of domestic violence, sufficed to find the children were CHINS.⁶³ The domestic violence in this case took place between the mother and father when they thought the children were asleep.⁶⁴ The mother subsequently filed a protective order against the father and moved the children out of the home in which he was living.⁶⁵ The appellate court found that the high standard to adjudicate the children as CHINS was not met because the mother did file for a protective order, even though not immediately, and there was no evidence that the violence was ongoing or repeated.⁶⁶ The appellate court also noted that the mother's marijuana use alone did not sufficiently meet the requirement that a child must be "seriously endangered" to be a CHINS.⁶⁷

In another case, an infant was removed from a mother's care at birth and was later found to be a CHINS after testing positive for the drug Tetrahydrocannabinol ("THC") at birth and upon evidence that the mother was living with a known drug dealer.⁶⁸ The mother appealed, noting that in the intervening months between the removal and the finding that the child was a CHINS, the mother moved into safe housing, found a job, had positive weekly

57. *Id.* at 1139.

58. *Id.* at 1140.

59. *In re Adoption of E.M.L.*, 103 N.E.3d 1110 (Ind. Ct. App. 2018).

60. *Id.* at 1115.

61. *Id.* at 1116.

62. *Id.* at 1118.

63. *Ad.M. v. Ind. Dep't of Child Servs.*, 103 N.E.3d 709 (Ind. Ct. App. 2018).

64. *Id.* at 711.

65. *Id.* at 712.

66. *Id.* at 714.

67. *Id.* at 713.

68. *In re B.V.*, 110 N.E.3d 437 (Ind. Ct. App. 2018).

visits with child, and had regular negative drug screens.⁶⁹ In reviewing the evidence supporting the trial court's decision, the appellate court must "apply the two-tiered standard of whether the evidence supports the findings and whether the findings support the judgment."⁷⁰ Finding that there was no evidence that the mother had difficulty in meeting the child's needs or that the child had unmet needs, the appellate court reversed.⁷¹

The Indiana Court of Appeals also underscored that a child cannot be adjudicated a CHINS when there is no indication that any needs are unmet or that the child is any particular danger.⁷² In one case, the Indiana Department of Child Services ("DCS") merely stated that the mother was not affectionate with the child and appeared to have a mental health issue.⁷³ Noting that every endangered child is not a CHINS case, and that no evidence had been submitted showing that the child was in any danger from the mother's mental illness or lack of affection, the court dismissed the case.⁷⁴

In another case, a CHINS petition initially arose after the mother shot the putative father while the child was in the home.⁷⁵ During the course of the proceedings, it was discovered that the putative father was not the biological father.⁷⁶ The biological father then established paternity and took over care of the child.⁷⁷ The court nevertheless found the child to be a CHINS, before later granting the father physical and legal custody of the child.⁷⁸ Although this change of custody may have mooted the appeal of the CHINS adjudication, the appellate court reached a decision on the merits because of the role of a CHINS adjudication in jeopardizing future family stability.⁷⁹

One successful parental rights termination case pitted court-appointed special advocates ("CASA"), supporting termination, against DCS, which opposed it.⁸⁰ At issue was whether a CASA had statutory authority to petition for the termination of parental rights of a CHINS child when DCS opposed the termination.⁸¹ The appellate court affirmed that a CASA could do so given his or her role to protect the best interests of a child alleged to be a CHINS.⁸²

Finally, an Indiana appellate court overturned a trial court's decision to terminate an incarcerated father's parental rights after denying him a

69. *Id.* at 438.

70. *Id.* at 440.

71. *Id.* at 441.

72. *See In re E.Y.*, 93 N.E.3d 1141 (Ind. Ct. App. 2018).

73. *Id.* at 1146.

74. *Id.* at 1148.

75. *In re S.C.*, 96 N.E.3d 579, 580 (Ind. Ct. App. 2017).

76. *Id.* at 581.

77. *Id.*

78. *Id.*

79. *Id.* at 584.

80. *Z.B. v. Ind. Dep't of Child Servs.*, 108 N.E.3d 895 (Ind. Ct. App. 2018).

81. *Id.* at 898.

82. *Id.* at 899.

continuance.⁸³ In this case, the father was likely to receive a sentence modification for finishing an intensive outpatient drug program.⁸⁴ Although the child was with a foster family that would adopt her if the father's parental rights were terminated, the father had never missed one of his court-permitted visits and had a bond with the child.⁸⁵ The appellate court found good cause for the father's motion for a continuance and remanded.⁸⁶

VII. JURISDICTION & PROCEDURE

In one of the many jurisdiction and procedure cases that arose during the survey period, an Indiana appellate court held that a CHINS petition must be dismissed because a complete fact-finding hearing did not take place within 60 days of the filing of the petition.⁸⁷ The appellate court found it insufficient that the hearing began within 60 days because it was continued and not completed until several months later.⁸⁸

In another procedural matter, a mother alleged that she was denied due process when DCS was allowed to file a successful second CHINS petition based on "substantially similar allegations" that were found insufficient in the first petition.⁸⁹ The mother raised this potential *res judicata* matter after the second hearing was completed,⁹⁰ and the appellate court found that she waived the claim.⁹¹

During the survey period, the Indiana Court of Appeals noted the "disturbing trend" of motions to remand by DCS instead of briefs defending repeated, significant violations of due process in termination of parental rights cases.⁹² In *In re J.K.* and eight similar cases in 2018, DCS filed a motion to remand proceedings rather than filing a responsive appellate brief after the parents alleged due process violations.⁹³ In *In re J.K.*, the trial court entered a default judgment

83. *In re A.S.*, 100 N.E.3d 723 (Ind. Ct. App. 2018).

84. *Id.* at 728.

85. *Id.*

86. *Id.* at 729.

87. *In re J.R.*, 98 N.E.3d 652, 654 (Ind. Ct. App. 2018).

88. *Id.* at 653-54.

89. *In re Eq.W.*, 106 N.E.3d 536, 539 (Ind. Ct. App. 2018).

90. *Id.* at 540.

91. *Id.*

92. *In re J.K.*, 110 N.E.3d 1164, 1165 (Ind. Ct. App. 2018).

93. *Id.* at 1165. See also *In re S.T. v. Ind. Dep't of Child Servs.*, No. 48A02-1709-JT-2094 (Ind. Ct. App. 2018); *In re T.Z. v. Ind. Dep't of Child Servs.*, No. 79A02-1710-JT-2406 (Ind. Ct. App. 2018); *In re K.P. v. Ind. Dep't of Child Servs.*, No. 53A05-1712-JT-2830 (Ind. Ct. App. 2018); *In re N.L. v. Ind. Dep't of Child Servs.*, No. 18A-JT-94 (Ind. Ct. App. 2018); *In re A.B. v. Ind. Dep't of Child Servs.*, No. 18A-JT-170 (Ind. Ct. App. 2018); *In re C.S. v. Ind. Dep't of Child Servs.*, No. 18A-JT-280 (Ind. Ct. App. 2018); *In re J.F. v. Ind. Dep't of Child Servs.*, No. 18A-JT-341 (Ind. Ct. App. 2018); *In re L.R. v. Ind. Dep't of Child Servs.*, No. 18A-JT-529 (Ind. Ct. App. 2018).

against a mother for simply missing a status of counsel hearing, thereby terminating her parental rights.⁹⁴ The mother filed a timely motion to correct error, but at the hearing, she was denied the opportunity to explain her failure to appear.⁹⁵ In reversing the trial court, the appellate court admonished DCS “for its failure to afford litigants throughout this state the due process rights they are owed.”⁹⁶ The court continued by reminding trial courts “of their duty to ensure that litigants’ due process rights are not violated. Given the fundamental due process rights at issue in termination of parental rights cases, affording litigants these fundamental due process rights is essential, including not only the litigants but also their children.”⁹⁷

In another case, the Indiana Supreme Court determined that a judge need not recuse himself in an adoption case despite having previously ruled against the father and having listed opposing parties’ attorney as a professional reference for an appointment to the Indiana Supreme Court.⁹⁸ The Indiana Supreme Court relied on the Indiana Trial Rules and noted that trial court judges were presumed to “remain objective notwithstanding their having been exposed to information which might tend to prejudice lay persons.”⁹⁹ The unanimous court distinguished this case from prior cases where a judge was running in a partisan election, and the attorney was part of the campaign.¹⁰⁰

An Indiana appellate court also reversed a trial court’s termination of parental rights, holding that procedural difficulties in a CHINS case denied the parents due process.¹⁰¹ During the CHINS case, five Family Case Managers (“FCMs”) from DCS were involved in the matter, two of which were fired during the investigation because of their inappropriate behavior in the case.¹⁰² DCS conceded that the parents were denied due process, based partially on the number of FCMs and also on the poor advice and actions of several of the FCMs.¹⁰³ The appellate court agreed that the CHINS proceeding had “unusual and alarming circumstances” that required a remand to the trial court with reinstatement of parental rights and re-opening of the CHINS case.¹⁰⁴

Regarding jurisdictional matters, an Indiana appellate court upheld a trial court’s decision to decline its continued jurisdiction over a child custody case initially filed in New Jersey.¹⁰⁵ The parties had moved to Indiana from New Jersey for two years with the children, during which the Indiana courts gained

94. *In re J.K.*, 110 N.E.3d at 1165.

95. *Id.*

96. *Id.* at 1167.

97. *Id.*

98. *L.G. v. S.L.*, 88 N.E.3d 1069 (Ind. 2018).

99. *Id.* at 1073.

100. *Id.* at 1072.

101. *In re C.M.S.T.*, 111 N.E.3d 207 (Ind. Ct. App. 2018).

102. *Id.* at 212.

103. *Id.* at 212-13.

104. *Id.* at 213.

105. *Wilkinson v. Assante*, 107 N.E.3d 1074, 1076 (Ind. Ct. App. 2018).

exclusive and continuing jurisdiction over any custody dispute.¹⁰⁶ However, after the mother returned to New Jersey with the minor children,¹⁰⁷ the father filed in Indiana a motion for custody.¹⁰⁸ The Indiana trial court dismissed it because New Jersey was “the most appropriate and most convenient forum to determine the best interest of the children as it is now the state with the closest connections to the children and their family.”¹⁰⁹ The appellate court affirmed, noting that a state retains jurisdiction over a family law matter so long as a significant connection remains between the state and the controversy.¹¹⁰

In another matter, during the original custody proceedings in Indiana, the mother and child relocated to California.¹¹¹ A custody dispute subsequently arose and the mother successfully filed for a restraining order in a California court, while the father subsequently filed a custody matter in Indiana.¹¹² The trial court denied the mother’s motion to transfer jurisdiction of the custody matter from Indiana because a “significant connection” between the controversy and Indiana remained if the father still resided there.¹¹³ The appellate court reversed, noting that the trial court had abused its discretion in exercising jurisdiction because it failed to consider whether domestic violence had occurred and the distance between Indiana and the court that would get jurisdiction.¹¹⁴

In sum, Indiana appellate courts resolved a wide range of family law cases during the survey period of October 1, 2017 to September 30, 2018, ranging from property division to adoption. The courts continue to address the many issues facing families today, providing guidance in the field.

106. *Id.* at 1078-79.

107. *Id.* at 1078.

108. *Id.*

109. *Id.* at 1077.

110. *Id.* at 1079-80.

111. *In re Paternity of J.G.L.*, 107 N.E.3d 1086, 1088 (Ind. Ct. App. 2018).

112. *Id.* at 1087-88.

113. *Id.* at 1090.

114. *Id.* at 1092.