SURVEY OF DEVELOPMENTS IN INDIANA FAMILY LAW

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INTRODUCTION

The reach of our state law involving the formation, regulation and dissolution of family rights and responsibilities, as well as the support, care and protection of children is vast.[1] Given the breadth of the subject, the scope of this article is primarily limited to developments in the case law, court rules and statutes pertaining to the traditional family law areas of dissolution of marriage, paternity, child custody and support, and adoption. Additionally, decisions during the survey period involving cohabitation and adoption by unmarried same-gender parents are discussed in light of the timeliness of these topics.

I. DISSOLUTION OF MARRIAGE

During the current survey period, as in past periods, our appellate courts decided an abundance of cases involving property distributions, spousal maintenance, settlement agreements and procedural matters. The cases discussed in this section represent developments of note regarding the law of property distribution.

A. Property Distribution

1. Marital Asset Issues.—The distribution of property in a dissolution action can be reduced primarily to three questions: Is it property and, if so, is it marital property? What is the value of the property? How should the property be divided?[2] Regarding the first question, it is well established in Indiana that,

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1. At least fifteen titles of the Indiana Code have statutes affecting Indiana families. Title 31 of the Code, alone, contains ten articles expressly identified as pertaining to "Family Law" which range from marriage to human reproduction. Eleven articles of Title 31 are specified as "Juvenile Law." *See* IND. CODE § 31-9-2-72 (1998) ("'Juvenile law' refers to [Indiana Code section] 31-30 through 31-40."). An additional article of general provisions and an article containing 144 sections of definitions apply to the whole of Title 31. *Id.* Sprinkled throughout the other titles are provisions governing criminal offenses against children and the family, children's and family protection services, marriage and family therapists, and trust and fiduciaries, to name just some. Finally, the Indiana Supreme Court has promulgated child support rules and guidelines and parenting time guidelines which are presumptively applicable to every legal case involving child support or visitation in Indiana.

2. Michael G. Ruppert, *Survey of Recent Developments in Family Law*, 23 IND. L. REV. 363 (1990). *See generally* Robert J. Levy, *An Introduction to Divorce-Property Issues*, 23 FAM. L.Q. 147 (1989).

unless excluded by statute, case authority or prenuptial agreement, all assets acquired before or during the marriage are marital assets, regardless of which spouse acquired the property.[3] Two cases decided during the survey period, *Lawson v. Hayden*[4] and *Beckley v. Beckley*,[5] added to the lists of property rights that are included or excluded from marital property.

In *Lawson*, Husband was employed for a railroad covered by the Railroad Retirement Act. He became permanently disabled and began receiving, during the marriage, a Railroad Retirement annuity. The annuity was comprised of several components. By federal law, the Tier I component is non-divisible. The Tier II component is divisible by a state court.[6] The trial court found that the Tier II payments received prior to retirement age were occupational disability benefits and were includable in the marital estate.[7] However, the trial court awarded none of the disability benefits to Wife until Husband had attained retirement age.[8] On appeal, Wife contended that the trial court erred by not awarding her any portion of the annuity payment received before Husband's attainment of retirement age; she also contended that the trial court erred by awarding her less than half of the retirement benefit after Husband reached the age of retirement.[9]

Lawson presented the court of appeals with an opportunity to clarify a line of cases with different results about the includability of occupational disability benefits.[10] The *Lawson* court noted that our supreme court limited *Gnerlich* in its *Leisure* decision and held that worker's compensation benefits were not marital property subject to division because, first, the recipient did not pay anything during the marriage to obtain the state benefits against lost earnings and did not in any other way deplete marital assets; and, second, the worker's compensation benefit is intended to replace future wages that the recipient would

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3. Property for purposes of dissolution of marriage means all of the assets of either party or both parties including pension and retirement benefits. IND. CODE § 31-9-2-98 (1998). Thus, the court in a dissolution of marriage action divides all the property of the parties whether owned by either spouse before the marriage, acquired by the spouses in their own right during the marriage and before separation, or acquired by their joint efforts. *See id.* § 31-15-7-4. Property may be excluded from the marital estate by a valid premarital agreement. *See* Huber v. Huber, 586 N.E.2d 887 (Ind. Ct. App. 1992).

4. 786 N.E.2d 756 (Ind. Ct. App. 2003).

5. 790 N.E.2d 1033 (Ind. Ct. App. 2003).

6. *Lawson*, 786 N.E.2d at 758.

7. *Id.* at 761.

8. *Id.* at 759.

9. *Id.*

10. Leisure v. Leisure, 605 N.E.2d 755 (Ind. 1993) (limiting *Gnerlich* and holding that worker's compensation benefits are not marital property subject to division); Jendreas v. Jendreas, 664 N.E.2d 367 (Ind. Ct. App. 1996) (holding that a disability pension is not marital property subject to division); Gnerlich v. Gnerlich, 538 N.E.2d 285 (Ind. Ct. App. 1989) (finding that benefits from private disability insurance were marital property subject to division); *see also* Antonacopulos v. Antonacopulos, 753 N.E.2d 759 (Ind. Ct. App. 2001).

earn if he could work.[11] Further, the Leisure court noted that worker's compensation benefits differ from a pension in that a pension amounts to deferred compensation for current employment, while worker's compensation amounts to compensation for decreased working capacity as the result of a work-related injury; once the former is vested it cannot be taken away, while the later is contingent upon continued disability.[12] It is well established in Indiana that future income is not divisible.[13] Yet, *Gnerlich*'s disability insurance benefits were held to be marital property, while the benefits in *Leisure*, *Jandreas*, and *Antonacopulos* were not. The distinction is that in *Gnerlich* the disabled spouse paid for the disability insurance benefits by contributions he had made during the marriage to a disability retirement plan.[14] The *Lawson* court reasoned that the Husband's annuity before retirement clearly represented payment for loss of future income, which favors exclusion as a marital asset; but, it noted that Husband's payroll taxes were credited to trust funds from which the annuities were paid, which favors inclusion as a marital asset.[15] Neither factor—replacement of future earnings or lack of marital contribution—appeared dispositive to the court. Instead, it concluded that in order to exclude occupational disability benefits from the marital estate, both must be present.

> We discern nothing in the analyses of *Antonacopulos*, *Jendreas*, and *Gnerlich* conveying the idea that either factor is dispositive, or indeed even more important than the other. Instead, it seems to us that both are cited as being integral to the determination that disability benefits are not marital property. For this reason, we view the two elements in the conjunctive. That is, *both* must be present in order for the particular disability benefit in question to be excluded as marital property and thus not subject to division.[16]

Stated conversely, it seems that includability of the disability benefit centers upon whether contributions were made to it during the marriage or marital assets were depleted to obtain it.[17]

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11. *Lawson*, 786 N.E.2d at 761.

12. *Id.* (citing *Leisure*, 605 N.E.2d at 759).

13. *Gnerlich*, 538 N.E.2d at 286 (citing Wilcox v. Wilcox, 365 N.E.2d 792, 795 (Ind. App. 1977)).

14. *Id.*

15. *Lawson*, 786 N.E.2d at 762.

16. *Id.*

17. It is speculated in a prior edition of this review that the outcome found in *Lawson v. Hayden* was inevitable:

> Resting the outcome in disability benefit cases on whether the trial court finds the benefit to be deferred compensation or replacement of future wages, as the *Jendreas* court does in part, must ultimately fail. These cases seem to show that the distinction between being in or out of the pot depends upon whether an actual contribution from a marital asset can be shown for acquiring the disability benefit.

Paula J. Schaefer & Michael G. Ruppert, *Survey of Indiana Family Law in 1996*, 30 IND. L. REV.

Beckley v. Beckley,[18] at first blush, seems to run counter to *Lawson* because it held that a portion of benefits under the Federal Employer's Liability Act (FELA) were included in the marital pot, despite the fact that the benefits were clearly intended to compensate for future lost wages and the recipient spouse contributed nothing to their acquisition nor depleted any marital assets to obtain them. Instead, the former husband, who was permanently disabled during the course of his employment with a railroad covered under the FELA, accepted a lump-sum settlement with the FELA wherein he received $175,000 after expenses and attorney's fees during the marriage. Part of the proceeds were used to reduce the parties' mortgage, to pay off the Wife's car, and to pay for personal items. A few months after Husband received the settlement, Wife filed her petition for dissolution of marriage. At that time, approximately $96,000 of the settlement was left.[19] At trial, Husband argued that the FELA settlement, like a worker's compensation award, was compensation in lieu of future income and not marital property subject to division. The trial court, however, decided that the FELA settlement was included in the marital estate and awarded Husband sixty-nine percent of the marital estate and Wife thirty-one percent of the marital estate.[20] Wife appealed her distribution. The Husband cross-appealed, contending that the trial court erroneously included the lump sum settlement received pursuant to FELA in the marital estate. On appeal, the court of appeals noted that the initial inquiry—whether settlement proceeds under FELA should be included in the marital estate—was one of first impression in Indiana.[21] Observing that other states have included, excluded, and devised hybrid approaches, the court once again returned to *Leisure v. Leisure*[22] for instruction. In *Leisure*, the supreme court reversed the lower courts' decisions, which included in the marital pot a worker's compensation lump-sum payment received by the husband during the marriage and periodic payments after the marriage, reasoning that it is generally accepted that worker's compensation is awarded in lieu of lost wages and not as damages for pain, suffering and monetary loss.[23] However, the *Beckley* court noted that the *Leisure* court qualified its own holding, stating that "[t]he worker's compensation benefits received during the marriage to replace earnings of *that period* are a marital asset subject to distribution, but to the extent the worker's compensation benefits replace earnings after dissolution, the benefits remain separate property."[24] *Beckley* remanded, holding:

Thus, we must reverse the trial court's order and remand this cause to the

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1073, 1076 (1997).

18. 790 N.E.2d 1033, 1037 (Ind. Ct. App.), *vacated by* 804 N.E.2d 757 (Ind. 2003).

19. *Id.*

20. *Id.* at 1035.

21. *Id.*

22. 605 N.E.2d 755 (Ind. 1993).

23. *Beckley*, 790 N.E.2d at 1036 (citing *Leisure*, 605 N.E.2d at 759).

24. *Id.* at 1037 (quoting *Leisure*, 605 N.E.2d at 759).

> trial court so that it may re-divide the marital estate pursuant to the rule announced in *Leisure*. To be sure, a small portion of the FELA settlement will be a part of the marital estate inasmuch as [Wife] filed for dissolution four months after [Husband] received the award. As a result, part of the FELA proceeds attributable to these four months should be included in the marital pot.[25]

2. Valuation Issues.—Bass v. Bass[26] shows a trial court correctly and incorrectly adjusting an expert appraisal of real estate. When the trial court calculated the equity in the marital residence, it subtracted from the appraisal value the cost of estimated roof repairs and other repairs needed for the house to achieve the appraisal value.[27] A roofer testified to the amount he would charge to do the roof repairs ,and Wife testified generally to the amount necessary for the other "necessary repairs." She testified that she was guessing as to the estimate, and no other evidence was admitted showing the cost.[28] The trial court subtracted the expert roofer's estimate and Wife's unsupported estimate. On appeal, the court of appeals upheld the deduction for the roofer's estimate but found the evidence insufficient to support the trial court's finding that the appraised value should be further reduced for the amount that Wife guessed was necessary for other "necessary repairs."[29]

Case v. Case[30] involves a post-decree loss of value of an asset between the time that the court entered its decree and the actual distribution of the asset. Specifically, Husband's 401(k) plan was worth approximately $90,000 a few days before trial.[31] The court awarded Wife a $50,000 sum out of the 401(k) and awarded Husband the remaining sum of the 401(k).[32] Wife's counsel prepared the decree for the court's signature. The decree was actually issued approximately a month and a half after the final hearing date. Before effectuation of the distribution of the 401(k) could occur, Husband filed a motion to modify the decree because the 401(k) had lost approximately $23,000 in value since the final hearing purely as the result of market forces.[33] The trial court held a hearing on the motion and concluded that it would be unfair for Husband to

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25. *Id.*

26. 779 N.E.2d 582 (Ind. Ct. App. 2002).

27. *Id.* at 587.

28. *Id.* at 588-89.

29. *Id.* at 589.

30. 794 N.E.2d 514 (Ind. Ct. App. 2003).

31. *Id.* at 515.

32. *Id.* at 516.

33. *Id.* at 515. Trial courts are given broad discretion in selecting the valuation date for a marital asset. *See* Quillen v. Quillen, 671 N.E.2d 98, 103 (Ind. 1996). As noted in *Quillen*, the selection of the valuation date for any particular asset has the effect of allocating the risk of change in the value of that asset between the date of valuation and the date of the hearing. *See also* Reese v. Reese, 671 N.E.2d 187 (Ind. Ct. App. 1996). The *Bass* case deals with a post-decree change in value, before actual distribution of the asset.

exclusively bear the downside risk of the securities market. Accordingly, the trial court determined the parties' original percentages of its distribution and entered an order awarding the parties those percentages of the devalued asset.[34]

Wife first attacked the trial court's order on procedural grounds, contending that Husband should have filed a motion to correct error since modification of a property distribution was improper under the controlling statute.[35] Wife's second challenge to the trial court's ruling was that it abused its discretion even if analyzed under Trial Rule 60 because its original order specifically awarded her a set sum, $50,000, and did not specify any terms regarding growth or losses.[36] Wife seemed to ignore that the trial court also awarded Husband a set amount.[37] The appellate court noted that a similar situation had occurred in *Niccum v. Niccum*.[38] The court in *Case* noted that Wife conceded that there were no express terms regarding growth or losses in the decree. Accordingly, it held:

> Here, as in *Niccum*, we hold that absent express language stating otherwise, the decree implicitly contemplated that both parties would share in the risks and rewards associated with the investment plan. Thus, it was not the trial court's intent to award [Wife] $50,000 regardless of the value of the 401(k) plan. Rather, the parties were each awarded a percentage of the plan, of which [Wife's] share is slightly greater than [Husband's] share. Ultimately, the trial court did not modify the original decree as much as the trial court clarified the decree to reflect its original meaning. Therefore, we hold that the trial court did not abuse its discretion when it granted relief from the decree to ensure that both . . .

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34. *Case*, 794 N.E.2d at 516.

35. *Id.*

> First, we agree that a petition to modify the dissolution decree was not the correct title. Indiana Code section 31-15-7-9.1 provides, in relevant part, that "orders concerning property disposition entered under this chapter may not be revoked or modified, except in case of fraud." Because [Husband] does not allege fraud, a petition to modify was inapposite.

Id. The court went on to state that even though Husband's motion could not be characterized as a motion to correct error pursuant to Indiana Trial Rule 59(A)(1) because it was not filed within thirty days of the final judgment, his motion to modify could be treated as a motion for relief from judgment under Indiana Trial Rule 60(B). *Id.* at 517.

36. *Id.*

37. *Id.* at 518.

38. 734 N.E.2d 637 (Ind. Ct. App. 2000). In *Niccum* the parties entered into a settlement agreement which divided a retirement savings and investment program between the parties. The agreement apparently did not allocate the rewards of growth or the risk of loss involved in the investment plan. The trial court ultimately ordered that Wife would receive growth in the investment attributed to her share of the program, and Husband appealed. On appeal, the court held that "absent express language stating otherwise, the settlement agreement of the parties implicitly contemplated both parties sharing all of the rewards and risks associated with an investment plan." *Id.* at 640.

would bear the risk of the securities market.[39]

3. Distribution Issues.—Hendricks v. Hendricks[40] adds a new twist to the factors affecting distribution.[41] It has long been held that the trial court does not abuse its discretion if it considers evidence of a party's contribution during the parties' pre-marital cohabitation when dividing the marital pot.[42] In Hendricks, the parties lived together more than three years prior to their marriage, which lasted approximately ten years. Husband was employed by General Motors Corporation ("GM") approximately thirty-one years before retiring. Thus, Husband was employed at GM throughout the more than three years of co-habitation and approximately six-and-one-half years of the parties' ten years of marriage. Husband complained that the trial court erroneously included the parties' period of cohabitation in its division of his pension between the parties.[43] The trial court distributed the pension between the parties by applying the "coverture fraction" to the pension to arrive at "the marital portion of the pension," which it divided roughly in half.[44] Thus, Husband was complaining

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39. *Case*, 794 N.E.2d at 519.

40. 784 N.E.2d 1024 (Ind. Ct. App. 2003).

41. Indiana Code section 31-15-7-5 mandates that the trial court

> 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 whether the contribution was income producing.
>
> (2) The extent to which the property was acquired by each spouse;
>
> (A) before the marriage; or
>
> (B) though 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 earning or earning ability of the parties as related to:
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> (A) a final division of property; and,
>
> (B) a final determination of the property rights of the parties.

IND. CODE § 31-15-7-5 (1998).

42. Chestnut v. Chestnut, 499 N.E.2d 783, 786 (Ind. Ct. App. 1986).

43. *Hendricks*, 784 N.E.2d at 1026.

44. *Id.* at 1026. While *Hendricks* speaks in terms of the sum derived by applying the coverture fraction to the pension as the "marital portion of the pension", *id.*, it should be noted that, without a prenuptial agreement, *all of the pension is in the marital pot*. Huber v. Huber, 586 N.E.2d 887, 889 (Ind. Ct. App. 1992), *trans. denied*. The "coverture fraction" is just one

that, by including the period of cohabitation in the coverture fraction, Wife received more than her entitlement of his pension. In support of his contention, Husband noted that he and Wife only lived together "on and off" during their cohabitation. Wife, on the other hand, presented evidence indicating that during the period of cohabitation she worked, paid joint expenses and helped Husband start a business. Viewing Husband's contention as a request to re-weigh the evidence, the appellate court held that the trial court did not abuse its discretion when it considered Wife's contributions during the parties' period of cohabitation and, more specifically, when the court included the period of pre-marital cohabitation in calculating the coverture ratio.[45] However, the case was reversed in part and remanded with instructions to make appropriate adjustments in the trial court's overall scheme to award Husband fifty-six percent of the marital pot and Wife forty-four percent of the marital pot because of errors in the trial court's mathematical calculations.[46]

B. Spousal Maintenance

Bass v. Bass also involved Husband's contention upon appeal that the trial court caused him to improperly pay spousal maintenance in a bifurcated divorce proceeding by continuing its provisional order for spousal maintenance to Wife during the period of time between the dissolution of the parties' marriage and the final hearing pertaining to distribution of property.[47] Wife was granted in-kind temporary spousal maintenance in the form of mortgage and utility payments on the marital residence of which she had possession during the pendency of the parties' dissolution proceedings. Additionally, Husband was ordered to pay her auto loan payments and automobile insurance. The parties had a prenuptial agreement which did not exclude Wife's right to the provision of spousal support during the pendency of the dissolution action, but it did exclude her right to receive such maintenance after the granting of a dissolution petition.[48] At Husband's request, the court bifurcated the proceeding, divorced the parties, set a final hearing for property distribution, and ordered that all preliminary orders

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methodology that the court can use for division of a pension. *Hendricks*, 784 N.E.2d at 1026 (citing *In Re* Marriage of Preston, 704 N.E.2d 1093, 1098 n.6 (Ind. Ct. App. 1999)).

> The "coverture fraction" formula is one method a trial court may use to distribute pension or retirement plan benefits to the earning and non-earning spouses. Under this methodology, the value of the retirement plan is multiplied by a fraction, the numerator of which is the period of time during which the marriage existed (while pension rights were accruing) and the denominator is the total period of time during which pension rights accrued.

Id. (citing Tirmenstein v. Tirmenstein, 539 N.E.2d 990, 991 (Ind. Ct. App. 1989)).

45. *Hendricks*, 784 N.E.2d at 1026.

46. *Id.* at 1028.

47. 779 N.E.2d 582, 591-92 (Ind. Ct. App. 2002).

48. *Id.* at 587.

would remain in full force and effect.[49] On appeal, Husband argued that since the marriage was dissolved on December 11, 2000, albeit the final decree did not come out until May 7, 2001, the payments made during the interim constituted an improper award of maintenance.[50] On appeal, the court noted:

> "Bifurcation is a process created by statute that allows a trial judge to complete a dissolution in two separate phases." *Beard v. Beard*, 758 N.E.2d 1019, 1023 (Ind. Ct. App. 2001), *trans. denied*. A dissolution action is not complete until the second phase is finished and a final decree is entered. *Id.* With regard to orders entered while the dissolution is pending, Indiana Code 31-15-4-14 provides that "[a] provisional order terminates when: (1) the final decree is entered subject to right of appeal." [IND. CODE] § 31-15-4-14 (1998).[51]

Simply put, the court of appeals found that the prenuptial agreement did not preclude preliminary spousal maintenance, that a provisional order does not terminate until a final decree is entered, and that the dissolution of marriage action does not constitute a final order until the second phase of the bifurcated proceeding is complete and a final decree entered.[52]

Brown v. The Guardianship of Brown,[53] involves spousal support but not in the context of the dissolution of marriage. In this case, Mr. Brown's sons, his only offspring, appealed the trial court's order requiring Mr. Brown's guardianship to make a lump-sum support payment to Mrs. Brown's guardianship after Mr. Brown died. Mrs. Brown was Mr. Brown's childless, second spouse.[54] Mr. Brown died testate, leaving one-third of his personal estate and a life estate in one-third of his real property to Wife. All of the rest was left to his sons. Prior to his death, Mr. Brown's guardianship estate had been ordered to make support payments to Mrs. Brown's guardianship estate.[55] At the hearing before the trial court, the sons sought to eliminate the obligation of their father's guardianship to make support payments to Wife's guardianship. Wife's guardianship sought an order for a lump-sum support payment based upon multiplying her life expectancy by the amount of the monthly support payment and then reducing that sum to its present value.[56] The trial court agreed with Mrs. Brown's guardian and ordered a lump-sum support payment of more than $160,000 from the guardianship estate of Mr. Brown.[57] The trial court's order had the obvious effect of decreasing the sons' inheritance and increasing the amount that Wife received from her deceased husband's estate. On appeal, the

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49. *Id.* at 592.
50. *Id.* at 591-92.
51. *Id.*
52. *Id.*
53. 775 N.E.2d 1164 (Ind. Ct. App. 2002).
54. *Id.*
55. *Id.* at 1165.
56. *Id.* at 1165-66.
57. *Id.* at 1165.

sons presented a pure question of law: whether Husband's statutory and common law duty to support Wife ends at his death.[58] Reviewing the question of law under a *de novo* standard, the court of appeals held:

> It is clear that the original support order entered prior to [Mr. Brown's] death established a monthly periodic allowance, akin to spousal maintenance in dissolution actions or child support. A review of our common-law treatment of spousal maintenance and child support leads us to the conclusion that [Husband's] obligation to pay periodic support to [Wife] ceased upon his death.
>
> In *Hicks v. Fielman*, 421 N.E.2d 716 (Ind. Ct. App. 1981), we held, "[u]nless an agreement or decree calling for maintenance clearly says otherwise, maintenance payments can not accrue after the death of the person liable for them." *Id.* at 720. We concluded that the appellant's claim for maintenance after the death of her former husband could not as a matter of law succeed because the decree awarding such maintenance did not provide that the payments would continue after the death of the payor.[59]

The court further noted that the same rule was once true with respect to child support until the enactment of section 31-16-6-7 of the Indiana Code.[60] The guardian over Mrs. Brown's estate urged that the philosophy of the statutory rule extending child support after the payor's death should be extended to spousal support. Noting that the argument would be better presented to the legislature, the court explained its rationale:

> Moreover, we observe that there is a critical distinction between the need for continuation of spousal support payments and the need for continuation of child support payments when inheritance law is considered. Specifically, a divorced parent is free to disinherit a child of his divorced marriage. *See Estate of Brummett by Brummett v. Brummett*, 472 N.E.2d [616,] 619 [(Ind. Ct. App. 1984)] ("the statutory provisions that extend support obligations beyond the death of the supporting parent are commonly enacted to soften the harsh result of disinheritance after divorce"). On the other hand, certain statutes protect

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58. *Id.* at 1166.

59. *Id.* (footnote omitted).

60. Section 31-16-6-7 of the Indiana Code provides:

(a) Unless otherwise agreed in writing or expressly provided in the order, provisions for child support are terminated:

(1) by the emancipation of the child; but

(2) not by the death of the parent obligated to pay the child support.

(b) If the parent obligated to pay support dies, the amount of support may be modified or revoked to the extent just and appropriate under the circumstances on petition of representatives of the parent's estate.

IND. CODE § 31-16-6-7 (1998).

> a spouse from being disinherited by providing a spousal allowance and the ability to take against the will, thus ensuring a certain degree of future support.[61]

While living, spousal maintenance paid as the result of the incapacity of a spouse, however, can be turned on and off according to *McCormick v. McCormick*.[62] In *McCormick*, Wife was diagnosed with multiple sclerosis (MS) in 1979, during the parties' marriage. The marriage was dissolved in 1990, at which time Wife was not working due to the MS. She was awarded incapacity spousal maintenance in the amount of $600 per month until such time as she received governmental disability benefits.[63] At that time, it was to be determined what amount of spousal maintenance, if any, Husband would continue to pay. The trial court's order for spousal maintenance was slightly modified on several occasions after the divorce, including once due to Wife obtaining part-time employment.[64]

In 1998, apparently as the result of receiving further education and improvements in treatments for MS, Wife began working full-time. In that employment, she was subject to layoffs. Husband sought to terminate or modify his maintenance obligation, and Wife acknowledged that her medical condition had somewhat improved since the divorce so that she could now work full-time.[65] However, she argued that she still had many physical limitations due to the MS and that her job prospects in the economy at large were very much limited due to those physical limitations. Husband testified that changes had occurred for him also. He recently retired from a job in which he earned nearly $100,000 in 2000 and, at the time of the hearing, was earning approximately $2200 per month in retirement income.[66] The trial court ordered that Husband should continue to pay the full spousal maintenance amount in those months when Wife was unable to work full time and a reduced amount in any month in which she did work full-time.[67] On appeal, the court acknowledged the broad discretion afforded a trial court to modify a spousal maintenance award[68] and stated,

> [W]e find that the trial court abused its discretion in awarding maintenance during periods when Helen is working full time at the Census Bureau . . . .
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> We reject [Wife's] rationale that limited job opportunities necessarily amount to a material [effect] on an incapacitated spouse's self-supportive ability. Although these may go hand-in-hand, the essential

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61. *Brown*, 775 N.E.2d at 1167 (citations omitted).
62. 780 N.E.2d 1220 (Ind. Ct. App. 2003).
63. *Id.* at 1221.
64. *Id.*
65. *Id.* at 1221-22.
66. *Id.* at 1222.
67. *Id.* at 1223.
68. *Id.* at 1224.

> inquiry is whether the incapacitated spouse has the ability to support himself or herself. . . . Therefore, we reverse the trial court's award of maintenance in the amount of $300 per month when [Wife] is working full time at the Census Bureau.[69]

Turning to the portion of the judgment that ordered the continuation of maintenance when the former spouse was unable to work full time, the court stated,

> We affirm the portion of the judgment that ordered continuation of maintenance when Helen is unable to work full time at the Census Bureau. The portion ordering maintenance, at a reduced amount, during periods of employment at the Census Bureau is reversed.
>
> Contrary to [Husband's] assertions, it is irrelevant whether [Wife's] inability to work at the Census Bureau is based on her medical condition or being laid off. In either instance, the relevant inquiry is whether her ability to support herself through other employment is materially affected by her MS.[70]

II. COHABITATION

The development of our case authority regarding cohabitation during this survey period has not been limited to whether pre-marital cohabitation can be considered as a factor in distributing assets. In *Putz v. Allie*[71] a former heterosexual couple entered into a "Settlement Agreement" upon the termination of eleven years of cohabitation. In the agreement, the parties recited that they had commingled funds, contributed financially and emotionally to the betterment of each other and that Ms. Allie had contributed time, effort and funds to the business, real estate, and assets of Mr. Putz. Accordingly, the agreement provided that Mr. Putz would pay Ms. Allie $40,000 in installments over six years, pay her health insurance and car payments for one year, and pay off three charge accounts in her name. Mr. Putz made payments to Ms. Allie until someone told him that the agreement was unenforceable.[72] Consequently, Ms. Allie brought suit against Mr. Putz to enforce the agreement. Mr. Putz unsuccessfully moved for summary judgment, claiming that the agreement was against public policy. After a bench trial, the court entered judgment in favor of Ms. Allie for the balance of payments owed on the lump-sum, for pre-judgment interest, for the amount of several car payments, and the balances on the charge cards.[73] Putz appealed raising as issues for review whether the contract was an unenforceable palimony agreement and, alternatively, unenforceable as the result

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69. *Id.* at 1224-25 (footnote omitted).

70. *Id.* at 1225 & n.8.

71. 785 N.E.2d 577 (Ind. Ct. App. 2003).

72. *Id.* at 578.

73. *Id.* at 578-79.

of duress. Allie cross-claimed on appeal, ascertaining that the trial court erred by denying her attorney's fees.[74]

On appeal, Putz contended that the agreement was an unenforceable palimony agreement because there was no consideration for the agreement independent of the parties' relationship, which relationship is not recognized by law.[75] In response, the court returned to its early "palimony" case, *Glasgo v. Glasgo*.[76] In *Glasgo*, the former husband and subsequent cohabitant raised the same contention on appeal as in *Putz*, after a successful contractual action by his former spouse/cohabitant. He claimed that to permit an action based upon contract principles of unjust enrichment accomplishes indirect adjustment of common law marriage rights, which is prohibited in Indiana.[77] In particular, *Glasgo* had these prescient words:

> Just as married partners are free to delineate in ante- or post-nuptial agreements the nature of their ownership in property, so should unmarried persons be free to do the same . . . . Recovery would be based only upon legally viable contractual and/or equitable grounds which the parties could establish according to their own particular circumstances.
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> . . .
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> While we do not subscribe to the theory that cohabitation automatically gives rise to the presumed intention of shared property rights between the parties, we find in this case that it would be unjust for Laurel to assert in one breath that Jane can in no way be presumed to be his wife for purposes of either the dissolution of marriage statutes or the concept of putative spouse and to assert in another the presumption that she rendered her services voluntarily and gratuitously.[78]

The *Putz* court then went to the next case in this line of cohabitation of authority and noted:

> Subsequently, in *Bright v. Kuehl*, 650 N.E.2d 311 (Ind. Ct. App. 1995), this [c]ourt considered the property claim of a non-marital partner, and specifically determined "that a party who cohabitates with another without subsequent marriage is entitled to relief upon a showing of an express contract or a viable equitable theory such as an implied contract or unjust enrichment."[79]

The *Putz* court summed up its holdings:

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74. *Id.* at 579-82.

75. *See* IND. CODE § 31-11-8-5 (1998) ("A marriage is void if the marriage is a common law marriage that was entered into after January 1, 1958.").

76. 410 N.E.2d 1325 (Ind. Ct. App. 1980).

77. *Putz*, 785 N.E.2d at 579 (citing *Glasgo*, 410 N.E.2d at 1327-32).

78. *Glasgo*, 410 N.E.2d at 1332.

79. *Putz*, 785 N.E.2d at 580 (quoting Bright v. Kuehl, 650 N.E.2d 311, 315 (Ind. Ct. App. 1995)).

> We agree with the trial court that the Agreement may be construed as an agreement fixing liquidated damages in lieu of an unjust enrichment claim by Allie. Allie testified, and Putz did not dispute, that Allie rendered services in Putz's jewelry store for three to five days per week, over a four or five year period of time, without receiving a paycheck, although household expenses were paid from the jewelry store receipts. Over an eleven-year period of time, Allie and Putz co-mingled funds, exerted joint efforts to make the jewelry store a success, and incurred various liabilities (some of which were credit card cash advances on Allie's cards to increase cash flow into the business).[80]

The court of appeals dealt with Allie's cross-claim that the trial court erred by failing to order attorney's fees by noting that attorney's fees are not provided for by statute but that the agreement with Putz specifically called for attorney's fees in the event that he breached the agreement resulting in enforcement expenses to Allie. Thus, the cause was remanded for determination of reasonable attorney's fees.[81]

Turner v. Freed[82] involved a female cohabitant who actually filed a "Petition for Palimony" against her former male cohabitant, Turner.[83] Ms. Freed's claim for relief was based on the theory of unjust enrichment. The evidence revealed that the parties lived together for about ten years; that Freed took care of their child and sometimes Turner's child from a previous relationship; that she regularly maintained the home; and that she contributed financially by performing one of Turner's daily newspaper delivery routes.[84] In return, the trial court found that Turner had time to develop his business and, from the income generated through the business, purchased a home in his name.[85] On appeal Turner claimed that the trial court erred when it found that he had been unjustly enriched by Freed's domestic services. He argued that when parties live together as a family, without marriage, there is a presumption that services are provided to each other without expectation of payment.[86] Turner further complained that the trial court erred by requiring him to pay the cost of a business appraisal.[87]

The court quickly dispatched Turner's argument that living together as a family raises a presumption that services are provided without expectation of payment by noting that it disapproved of such thinking in *Glasgo v. Glasgo*.[88] Thus, it held that there was sufficient evidence to support the trial court's

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80. *Id.* at 581.
81. *Id.* at 582.
82. 792 N.E.2d 947 (Ind. Ct. App. 2003).
83. *Id.* at 949.
84. *Id.* at 950.
85. *Id.*
86. *Id.* at 949-50.
87. *Id.* at 951.
88. *Id.* at 950 (citing Glasgo v. Glasgo, 410 N.E.2d 1325, 1332 (Ind. Ct. App. 1980)).

findings that Turner had been unjustly enriched.[89] However, concerning the trial court's requirement that he pay the business appraisal, the court noted that there was no statutory authority for him to pay any of Freed's litigation expenses in an unjust enrichment action.[90]

Thomas v. Smith[91] involved yet another attack upon asset distribution incidental to cohabitation. In this case, Michelle Thomas appealed the trial court's ruling dividing the assets accumulated by the parties during cohabitation. Thomas and Smith actually had a marriage ceremony; however, no legal marriage occurred because Thomas was still married to her husband at the time of the ceremony with Smith. They discovered the marriage was not valid approximately five years after the ceremony.[92] Neither Thomas nor Smith thereafter attempted to enter into a valid marriage. Instead, they filed taxes as single persons, acquired real estate in Michelle's name, and adopted three minor children. In 2001, Michelle filed a petition for annulment of the marriage, but she did not request the division of the parties' real or personal property, even though she sought custody and child support. Leslie did not file a request for division of the real or personal property either. Instead, the issue of property distribution was tried by consent.[93] Leslie was awarded custody, child support, and certain property. Michelle was awarded specific property and required to pay child support. On appeal, Michelle contended that the trial court lacked subject matter jurisdiction to divide the property because her marriage to Leslie was bigamous and, therefore, void.[94] On appeal, the court noted that the question of subject matter jurisdiction is purely a question of law and that a judgment entered by a court lacking subject matter jurisdiction is void and may be attacked at any time.[95] Since a bigamous marriage is void according to Indiana statutes,[96] an Indiana court lacks subject matter jurisdiction to dissolve the marriage and order relief under the dissolution statute because the marriage is non-existent.[97] Nonetheless, the court noted that those in a bigamous relationship are not without remedies. For example, parties who have never been married may file a partition action as to real property.[98] Further, a trial court may equitably divide property

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89. *Id.* at 951.

90. *Id.* Freed argued that the court should order expenses under the section of the paternity statute providing for the payment of attorney's fees and costs, IND. CODE § 31-14-18-2(a) (1998), because she had consolidated her unjust enrichment claim with the paternity proceeding she had brought against Turner. Noting that the business appraisal was in no way used for Freed's child support claim against Turner, the court of appeals found that there was no basis upon which the trial court could have required Turner to pay the business appraisal costs. *Turner*, 792 N.E.2d at 951.

91. 794 N.E.2d 500 (Ind. Ct. App.), *trans. denied*, 804 N.E.2d 760 (Ind. 2003).

92. *Id.* at 502.

93. *Id.* at 502-03.

94. *Id.*

95. *Id.* at 503.

96. IND. CODE § 31-11-8-2 (1998).

97. Rance v. Rance, 587 N.E.2d 150, 152 (Ind. Ct. App. 1992).

98. *Thomas*, 794 N.E.2d at 503 (citing IND. CODE § 32-17-4-1 (1998)).

acquired during a bigamous relationship if one of the parties requests the action.[99]

In light of the court of appeals' decisions in *Thomas v. Smith*, *Turner v. Freed*, *Putz v. Allie*, and *Hendricks v. Hendricks*, the survey period presented substantial development in the rights of cohabitants upon the breakup of their relationship.

III. Child Custody and Parenting Time

The most significant developments in the areas of child custody and parenting time concern the avenues that third parties may take in actions against the natural parents for custody and visitation. These cases involve blood relatives, such as grandparents, and biological strangers, such as step-parents.

A. Third Party Versus Natural Parent Custody Disputes[100]

In re Paternity of V.M.,[101] the first appellate decision applying the supreme court ruling in *In re Guardianship of B.H.*, quoted extensively from that decision. In *V.M.* the natural father sought modification of a permanent guardianship placing two of his children in the custody of the children's maternal grandfather. The father, Benavides, originally consented to the guardianship "[b]ecause of his lack of fitness and willingness to parent the children, due in large part to his past drinking problems and criminal behavior."[102] To his credit, Benavides significantly changed his life for the better by getting sober, remarrying, maintaining responsible employment, and becoming involved in church. Without question, he had maintained a relationship with the children through visitation.[103] The court of appeals, beginning its discussion by noting the strong deference that the state pays to the presumption that it is in the best interests of the children that they be in the custody of their natural parent, stated that it was the grandfather's burden to rebut this presumption even in a modification action brought by the father who had previously relinquished custody to him.[104] Quoting, at length, from the Indiana Supreme Court's decision in *B.H.*, the court reiterated the rule and standard of proof in custody disputes between third parties and natural parents:

> Despite the differences among Indiana's appellate court decisions confronting child placement disputes between natural parents and other persons, most of the cases generally recognize the important and strong

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99. *Id.* at 503-04 (citing *Rance*, 587 N.E.2d at 152).

100. In a case decided on June 21, 2002, outside the survey period, the Indiana Supreme Court in *In re Guardianship of B.H.*, 770 N.E.2d 283 (Ind. 2002) resolved the conflicting and increasingly divergent Indiana Court of Appeals' decisions regarding the rights of natural parents when confronted by custody claims of third parties and the burden on third parties to prevail.

101. 790 N.E.2d 1005 (Ind. Ct. App. 2003).

102. *Id.* at 1006.

103. *Id.* at 1008.

104. *Id.* at 1007-08.

> presumption that the child's best interests are ordinarily served by placement in the custody of the natural parent. . . . To resolve the dispute in the caselaw regarding the nature and quantum of evidence required to overcome this presumption, we hold that, before placing a child in the custody of a person other than the natural parent, a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement. The trial court must be convinced that placement with a person other than the natural parent represents a substantial and significant advantage to the child. The presumption will not be overcome merely because "a third party could provide the better things in life 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 of course be important, but the trial court is not limited to these criteria. *The issue is not merely the "fault" of the natural parent. 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.* A generalized finding that a placement other than with the natural parent is in a child's best interests, however, will not be adequate to support such determination, and detailed and specific findings are required.[105]

Thus, though Mr. Benavides had overcome his past and had a solid relationship with his children, the court of appeals noted that the trial court had covered all of its bases by finding that the children would have to share with their father's new children if they lived with him whereas they would have the sole attention of their grandfather and, further, that severing the relationship with the grandfather by modifying custody would seriously mar and endanger their future happiness.[106]

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105. *Id.* (quoting *In re Guardianship of B.H.*, 770 N.E.2d at 287 (emphasis added by the court of appeals) (citations omitted)). The italicized portion of the quote is arguably the supreme court's synthesis of the two lines of appellate court decisions in this area. The line of fault-based cases, represented by *Hendrickson v. Binkley*, 316 N.E.2d 376 (Ind. App. 1974), *cert. denied*, 423 U.S. 868 (1975), has survived. However, in deference to the line of cases abrogated by *B.H.*, namely, *In re Marriage of Huber*, 723 N.E.2d 973 (Ind. Ct. App. 2000); *In re Paternity of L.K.T.*, 665 N.E.2d 910 (Ind. Ct. App. 1996); *Atteberry v. Atteberry*, 597 N.E.2d 355 (Ind. Ct. App. 1992); and *Turpin v. Turpin*, 537 N.E.2d 537 (Ind. Ct. App. 1989), the supreme court added as an alternative to *Hendrickson*'s parental fault-based criteria, the rather vague, "best interests . . . substantially and significantly served by placement with another person." *B.H.*, 770 N.E.2d at 287.

106. *In re Paternity of V.M.*, 790 N.E.2d at 109-09.

The court of appeals' decision in *Nunn v. Nunn*[107] stands for the proposition that the de facto custodian amendment to the child custody statutes permits a step-parent in a dissolution of marriage action to seek custody of a step-child that he has not adopted.[108] The court—noting that a de facto custodian is "a person who has been the primary giver for, and financial support of, a child who has resided with that person for at least: (1) six (6) months if the child is less than three (3) years of age; or (2) one (1) year if the child is at least three (3) years of age."[109]—found that the step-father had presented evidence tending to rebut the presumption in favor of the natural parent. Moreover, because the de facto custodian amendments permit third parties to seek custody in a dissolution action, the trial court erred by ruling that it did not have jurisdiction to make custody orders as to the child.[110] The facts of the case seem tailor-made for the holding. The child in question was born in September 1997, at which time the

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107. 791 N.E.2d 779 (Ind. Ct. App. 2003).

108. *Id.* at 784. Section 31-17-2-8 of the Indiana Code provides that the trial court "shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following . . . ." The statute then lists eight factors, the last of which is "[e]vidence 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." *Id.* Section 31-17-2-8.5(b) of the Indiana Code provides:

> (b) In addition to the factors listed in section 8 of this chapter, the court shall consider the following factors in determining custody:
> (1) The wishes of the child's de facto custodian.
> (2) The extent to which the child has been cared for, nurtured, and supported by the de facto custodian.
> (3) The intent of the child's parent in placing the child with the de facto custodian.
> (4) The circumstances under which the child was allowed to remain in the custody of the de facto custodian, including whether the child was placed with the de facto custodian to allow the parent now seeking custody to:
> (A) seek employment;
> (B) work; or,
> (C) attend school.
>
> (c) If a court determines that a child is in the custody of a de facto custodian, the court shall make the de facto custodian a party to the proceeding.
>
> (d) The court shall award custody of the child to the child's de facto custodian if the court determines that it is in the best interests of the child.
>
> (e) If the court awards custody of the child to the child's de facto custodian, the de facto custodian is considered to have legal custody of the child under Indiana law.

It should be noted that section 31-17-2-8.5(a) of the Indiana Code requires the court to find that a child has been cared for by a de facto custodian by clear and convincing evidence.

109. *Nunn*, 791 N.E.2d at 783 (quoting IND. CODE § 31-9-2-35.5 (1998)).

110. *Id.* at 785.

parties were not married but were dating. Mother informed her future husband that the child might not be his child. Nonetheless, the parties continued to date after the child was born and married in August 1997. Approximately one year later, the parties gave birth to a son. The Petition for Dissolution of Marriage was filed in August 2001, at which time the child in question was approximately four years of age. DNA testing revealed that she was not biologically related to the husband.[111]

In re Custody of G.J.,[112] was initiated by the brother of the deceased father. He filed an independent custody action pursuant to section 31-17-2-3(2) of the Indiana Code,[113] as opposed to a guardianship proceeding under the guardianship statute. At the final hearing, the trial court granted the mother's motion to dismiss, which contended that the uncle had no standing, concluding that section 31-17-2-3 of the Indiana Code related only to dissolution of marriage actions and that his action should have been filed under the guardianship statute.[114] It should be noted that the facts spurring the uncle to file his custody action involved the mother's new husband, whom she married within weeks of the death of her first husband, the child's father. Apparently, the new husband was a convicted child molester who collected child pornography. The mother and the child's father were involved in a dissolution of marriage proceeding at the time of the father's death. Prior to his death, the dissolution court prohibited the mother from allowing the child molester to have any contact with the child.[115] The court's decision thus allows third parties with the option to pursue custody of a child in a direct cause of action under section 31-17-2-3(s) of the Indiana Code.[116]

B. Grandparent Visitation Cases

McCune v. Frey[117] stands for the proposition that Indiana's Grandparent's Visitation statute[118] requires findings of facts and conclusions of law when

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111. *Id.* at 782.

112. 796 N.E.2d 756 (Ind. Ct. App. 2003).

113. IND. CODE § 31-17-2-3(2) (1998).

114. *G.J.*, 796 N.E.2d at 759.

> A child custody proceeding is commenced in the court by:
>
> (1) a parent filing a petition under [Indiana Code section] 31-15-2-4 [actions for dissolution of marriage], [Indiana Code section] 31-15-3-4 [actions for legal separation], or [Indiana Code section] 31-16-2-3 [actions for child support]; or
>
> (2) a person other than a parent by filing a petition seeking a determination of custody of the child.

IND. CODE § 31-17-2-3 (1998). Section 29-3-5 of the Indiana Code governs proceedings for appointment of guardians over the persons of minors.

115. *G.J.*, 796 N.E.2d at 758-59.

116. *Id.* at 764.

117. 783 N.E.2d 752 (Ind. Ct. App. 2003).

118. IND. CODE § 31-17-5-1 (1998).

issuing a decree granting or denying grandparent visitation.[119] In *McCune*, the paternal grandparents, the Freys, filed their petition requesting set visitation with their grandson. The child's mother, McCune, contended that she discontinued visitation between the child and the Freys for the safety of her child because he had alleged that Mr. Frey had abused him. After hearing, the trial court awarded the grandparents visitation with the child on the first Sunday of each month.[120] Mother appealed, contending that the trial court abused its discretion by failing to determine that visitation was in the child's best interests and by failing to enter findings of facts and conclusions of law.[121] *McCune* thus represents the first clear and complete explication of the elements necessary for a decree granting grandparent visitation, in addition to those contained in the statute. First, the *McCune* court noted the requirements under the act:

> Pursuant to the Act, a grandparent may seek visitation only if [] 1) the child's parent is deceased; 2) the child's parents are divorced; or 3) the child was born out of wedlock, but only if the child's father has established paternity. IND. CODE § 31-17-5-1 (1998). The trial court may grant a grandparent's petition for visitation if it determines visitation is in the best interests of the child. IND. CODE § 31-17-5-2 (1998).[122]

Next, the court noted that section 31-17-5-6 of the Indiana Code provides: "Upon hearing evidence in support of and opposition to a petition filed under this chapter, *the court shall enter a decree setting forth the court's findings and conclusions*."[123] Finally, in order to satisfy the presumption from *Troxel v. Granville* and to avoid unconstitutionality as applied, the court held:

> [W]e conclude that when a trial court enters a decree granting or denying grandparent visitation, it must set forth findings of fact and conclusions of law in said decree. In those findings and conclusions, the trial court should address: 1) the presumption that a fit parent acts in his or her child's best interests; 2) the special weight that must be given to a fit

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119. *McCune*, 783 N.E.2d at 759.

120. *Id.* at 754.

121. *Id.* at 756. Mother also contended that the grandparent visitation act is unconstitutional on its face because the Fourteenth Amendment's "strict scrutiny" standard should apply to it and that, applying the standard, "there is no compelling state interest that 'outweighs the infringement on the rights of parents to control the care and upbringing of a child's life.'" *Id.* at 758. Additionally, Mother contended that the grandparent visitation act was unconstitutional as applied. However, the former constitutional challenge was rejected in *Crafton v. Gibson*, 752 N.E.2d 78, 92 (Ind. Ct. App. 2001). The second constitutional challenge was dealt with by noting that any concern with an unconstitutional application of the statute would be remedied by applying the presumption in *Troxel v. Granville*, 530 U.S. 57 (2000), that a fit parent's decision with regard to grandparent visitation is made in the child's best interest.

122. *McCune*, 783 N.E.2d at 756.

123. *Id.* (emphasis added).

> 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. Also, in determining the best interests of the child, the trial court "may consider whether a grandparent has had or has attempted to have meaningful contact with the child."[124]

In re Visitation of C.H.[125] was decided subsequent to the court's decision in *McCune*. In *C.H.*, the trial court denied the grandparents' petition for visitation, specifically finding that the grandparent had not rebutted the presumption that a fit parent acts in the best interest of her child regarding her decision concerning visitations with third parties. Grandparents appealed, contending that the court used an incorrect standard in making its decision.[126] The facts of the case revealed that neither of the parents were unfit, and, with the exception of a brief period of no visitation after a family quarrel, the grandparents actually had visitation with the child—just not on their terms.[127] Accordingly, the court found that the trial court acted within its discretion in declining to order visitation between the child and the grandparents under the circumstances.[128]

Spaulding v. Williams[129] involved a trial court's grant of a grandparent's petition for visitation. In that case, the trial court issued a nine page order containing factual findings in paragraph form in which the court basically found that the father's motivation in restricting the grandparent's visitation was "selfish."[130] The facts revealed that the mother, the grandparent's daughter, had custody of the child and that the grandparents were practically a day-to-day part of the child's life until the mother died. After her death, the father permitted substantial visitation until he got into an argument with the grandfather over whether he could live in one of the deceased mother's houses. Thereafter, feelings between the father and the grandparents deteriorated, and the father restricted visitation.[131] Thus, on appeal the court found no error with the trial court's conclusion that the grandparents had met their burden of overcoming the presumption that the father's decision to restrict visitation was in the child's best interest.[132]

Spaulding, however, provides interesting guidance for how far the trial court can go to fashion its visitation order. While the court affirmed the trial court's

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124. *Id.* at 757 (citations omitted). In a footnote, the court noted that the consideration—whether a grandparent has had or has attempted to have meaningful contact with the child—is "not the touchstone for determining the child's best interests." *Id.* at 757 n.4 (citation omitted).

125. 792 N.E.2d 608 (Ind. Ct. App. 2003).

126. *Id.* at 609.

127. *Id.*

128. *Id.* at 610.

129. 793 N.E.2d 252 (Ind. Ct. App. 2003).

130. *Id.* at 256, 259.

131. *Id.* at 259-60.

132. *Id.* at 262.

grant of visitation, it remanded with instructions to revise parts of the trial court's order concerning the grandparents right to travel with the child and which incorporated portions of the Indiana Parenting Time Guidelines, permitting unfettered communications between a non-custodial parent and a child by e-mail, faxes, cards, letters, and packages, among other things. Apparently, Father's complaint was not that the travel and additional contact was not "visitation" contemplated by the Grandparent Visitation Act, rather, his complaint was that the travel and additional contact was unrestricted.[133]

> The Grandparent Visitation Act does not address contact between grandparents and grandchildren other than "visitation," a term that our legislature has not defined. Because Father does not raise a general challenge to the court's decision to allow contact other than actual visitation, we need not address whether any such contact falls within the scope of the Act. Still, we agree with Father that any contact or communication ordered, other than visitation, should be applied narrowly to preserve and protect a parent's rights . . . .
>
> Rather, we suggest that the court insert the same "unreasonable" language that it included in the telephone contact provision, so that Grandparents would be permitted to send written communications and packages to [the child] without *unreasonable* interference from Father. That qualification would preserve Father's parental role and allow him reasonable discretion in overseeing the communications between Grandparents and [the child].
>
> Similarly, the provision that allows Grandparents to travel "out of the area" with [the child] fails to provide Father with any say over when, where or under what circumstances Grandparents may travel with [the child]. If, for example, Grandparents travel to Virginia to exercise their monthly weekend visitation and wish to take [the child] on a weekend trip "out of the area," Grandparents should be required to receive Father's permission, in addition to providing Father with emergency contact information. In addition, if [the child] visits with Grandparents in Indiana and Grandparents want to travel with the child, they should first obtain Father's permission. And Father must use reasonable discretion in allowing Grandparents to travel with [the child]. In sum, we reverse the two parts of the court's order regarding written communications, packages and travel and remand for the trial court to revise those provisions consistent with this opinion.[134]

Clearly *McCune* and *Spaulding* are important cases inasmuch as they are two of approximately four[135] decided since *Troxel v. Granville* limited the

133. *Id.* at 262-63.

134. *Id.* at 263-64.

135. The other cases are *Woodruff v. Klein*, 762 N.E.2d 223 (Ind. Ct. App.), *trans. denied*, 774

circumstances under which grandparents could seek visitation.

IV. CHILD SUPPORT

Thurman v. Thurman[136] discusses several issues raised by Father on his appeal. The most interesting and relevant issue in this case is the first issue, wherein Father argues that he was unfairly surprised in court when Mother raised the issue of a child support arrearage owed by him. Father filed a petition to modify custody and child support. At the hearing, Mother sought to introduce evidence regarding Father's delinquent child support payments and arrearages. Father objected to this evidence, and the trial court overruled Father's objection, but indicated that it would give the parties additional time to address the arrearage issue. Father's counsel agreed at trial that ten days would be sufficient to submit arguments regarding the arrearage issues.[137]

Father first argues that he was not given notice of Mother's intention to seek arrearages. He argues that section 34-47-3-5 of the Indiana Code[138] sets forth the notice requirements necessary for charging someone with indirect contempt. The

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N.E.2d 516 (Ind. 2002), and *Crafton v. Gibson*, 752 N.E.2d 78 (Ind. Ct. App. 2001).

136. 777 N.E.2d 41 (Ind. Ct. App. 2002).

137. *Id.* at 41-42.

138.

> (a) In all cases of indirect contempts, the person charged with indirect contempt is entitled:
>
> (1) before answering the charge; or
>
> (2) being punished for the contempt;
>
> to be served with a rule of the court against which the contempt was alleged to have been committed.
>
> (b) The rule to show cause must:
>
> (1) clearly and distinctly set forth the facts that are alleged to constitute the contempt;
>
> (2) specify the time and place of the facts with reasonable certainty, as to inform the defendant of the nature and circumstances of the charge against the defendant; and
>
> (3) specify a time and place at which the defendant is required to show cause, in the court, why the defendant should not be attached and punished for such contempt.
>
> (c) The court shall, on proper showing, extend the time provided under subsection (b)(3) to give the defendant a reasonable and just opportunity to be purged of the contempt.
>
> (d) A rule provided for under subsection (b) may not issue until the facts alleged to constitute the contempt have been:
>
> (1) brought to the knowledge of the court by an information; and
>
> (2) duly verified by the oath of affirmation of some officers of the court or other responsible person.

IND. CODE § 34-47-3-5 (1998).

court noted that the statute is not applicable here because Mother had not filed a petition for contempt. The court next addressed Father's argument that the only appropriate way to raise a complaint about an arrearage is through a petition for contempt. Mother did not filed such a petition. The court of appeals disagrees that a petition for contempt must be filed, citing section 31-16-12-1 of the Indiana Code,[139] *Kuhn v. Kuhn*,[140] and *Haton v. Haton*.[141]

The court concluded that "if a party petitions the trial court to modify a child support order, the entire issue of child support, including arrearages, may be heard without unfair surprise *to the party seeking the modification*."[142] This case clearly distinguishes this fact situation from one where the parent *receiving* support petitions for modification of support. It seems clear that the person to whom the support is owed must still provide notice if she intends to seek arrearages.

Another case with a litigant arguing "that wasn't an issue raised in the pleadings" is *Drwecki v. Drwecki*.[143] Noncustodial parent, Father, petitioned the court for contempt, modification of support and for allocation of college expenses. The trial court found that Father had overpaid child support to Mother and ordered a judgment in Father's favor in excess of $10,000.[144] Mother argued that Father's petition did not allege "that there should be a reduction in child support for the time that the parties' son [B.] was in college. Father only sought an allocation of college education expenses."[145] The court discussed the Child Support Guidelines and found that both the Commentary to the Guidelines and the child support worksheet include as part of the calculation process a recalculation of the amount of child support paid to a custodial parent.[146] Thus, Father's petition for college expense allocation automatically requested a determination of the child support that Father owed Mother. It was not error for the trial court to address this issue.

139.

> Notwithstanding any other law, all orders and awards contained in a child support decree or an order directing a person to pay a child support arrearage may be enforced by:
>
> (1) contempt, including the provisions under section 6 of this chapter;
>
> (2) assignment of wages or other income; or
>
> (3) any other remedies available for the enforcement of a court order;
>
> except as otherwise provided by IC 31-16-2 through IC 31-16-11 or this chapter.

Id. § 31-16-12-1.

140. 402 N.E.2d 989 (Ind. 1980) (where a plaintiff filed a suit for accrued child support, but not a petition for contempt).

141. 672 N.E.2d 962 (Ind. Ct. App. 1996) (which discussed a petition to determine and reduce delinquent child support to judgment, without a petition for contempt).

142. *Thurman*, 777 N.E.2d at 43.

143. 782 N.E.2d 440 (Ind. Ct. App. 2003).

144. *Id.* at 442-45.

145. *Id.* at 445 (citing Appellant's Br. at 11).

146. *Id.* at 446.

Other issues raised by Mother in *Drwecki* addressed Father's overpayments of support in light of the recalculation of support and allocation of college expenses. Mother's argument was twofold: that his payments were either voluntary gifts; or, that allowing a credit for his overpayments resulted in an impermissible retroactive modification of child support.[147]

The court found that Father's payments were not voluntary because they were being paid by a wage withholding order during a time period between the child's emancipation and the court's order modifying Father's payment to a lower amount.[148] Father was doing nothing more than obeying the order of the court in effect at the time.

On Mother's next argument, the court recognized the general rule that child support orders cannot be modified retroactively.[149] In this case, however, the effective date of the modification was a date that occurred *after* Father filed his petition.[150] The court cited *Kruse v. Kruse*[151] for the premise that not allowing a court to retroactively modify an order to the date of the petition "'detracts from the purposes of the changed circumstances rule and serves to encourage and benefit dilatory tactics.'"[152] Thus, this is not an impermissible retroactive modification, but should overpayments be applied prospectively? The general rule is that "'child support payments cannot be applied prospectively to support not yet due at the time of the overpayment.'"[153] The purpose of the rule is to ensure a regular cash flow for the custodial parent and to prevent the payor from building up a large credit and then ceasing payments. The court of appeals found that this was not Father's intent in this case, since he did not voluntarily accumulate the large credit.[154] Had Father taken it upon himself to terminate or reduce the payments, he could have been found in contempt. The court stated:

> [I]f we do not allow Father to recoup his excess payments made pursuant to the court order, then we will be encouraging non-custodial parents who are current on their support obligation and who believe they deserve a decreased support requirement to unilaterally decrease their support payments before the court orders such a reduction. A better public policy is to encourage parents to stay current on their child support obligations and to follow the court's order until that order is modified; we should not encourage parents to violate court orders out of concern that they will be unable to receive credit for the excess money they

147. *Id.* at 446-48.

148. *Id.* at 447.

149. Thacker v. Thacker, 710 N.E.2d 942, 945 (Ind. Ct. App. 1999).

150. Retroactive application of a modified order is permissible back to the date of the filing of the petition. *Drwecki*, 782 N.E.2d at 449.

151. 464 N.E.2d 934, 939 (Ind. Ct. App. 1984).

152. *Drwecki*, 782 N.E.2d at 449 (quoting Kruse v. Kruse, 464 N.E.2d 934, 939 (Ind. Ct. App. 1984)).

153. *Id.* at 448 (quoting Matson v. Matson, 569 N.E.2d 732, 733 (Ind. Ct. App. 1991)).

154. *Id.* at 449.

paid.[155]

The court limited its holding to the narrow facts of this case, finding that a payor parent could have an overpayment prospectively applied,

> where 1) the petitioning parent has stayed current on his support obligation such that little arrearage exists; 2) the petitioning parent continued to follow the trial court's previous order despite a change in circumstances justifying a decrease in the support obligation; and 3) the trial court modified support to a time after the petition was filed.[156]

Smith v. Smith[157] is an example of the application of equitable law to protect a litigant. In this case, the parties divorced in January 1996, and Mother was granted custody of both minor daughters. Almost immediately following the dissolution, the oldest daughter moved to Florida and lived with Father for several years. Shortly after the oldest daughter returned to live with Mother, the younger daughter moved in with Father. The living arrangements remained as such until the youngest daughter was emancipated as a matter of law in June 2001. Following the dissolution, neither party sought to modify the court's order regarding custody or child support.[158] In April 2002, the State filed a petition seeking child support arrears from Father. Mother did not step forward in an attempt to resolve this matter; rather, she joined the State in their efforts to collect child support. The trial court found that there existed "an in gross order of support with a de facto split custodial arrangement not sanctioned by court order, [thus] the Court has no authority under the existing case law to award credit for nonconforming payments."[159] Father's arrearage was found to be $20,302.[160]

The court of appeals pointed out that there are situations where a non-custodial parent can be awarded a credit for nonconforming child support payments. In *DeMichieli v. DeMichieli*[161] the court of appeals found that a credit will be granted to a noncustodial parent where

> the obligated parent by agreement has taken the children in his or her home, assumed custody of them, provided them with necessities, and has exercised parental control over their activities for such an extended period of time that a permanent change of custody has in effect occurred.[162]

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155. *Id.*

156. *Id.* at 449-50.

157. 793 N.E.2d 282 (Ind. Ct. App. 2003).

158. *Id.* at 283-84.

159. *Id.* at 284.

160. *Id.* at 283.

161. 585 N.E.2d 297 (Ind. Ct. App. 1992).

162. *Id.* at 302.

Additionally, consistent with *Isler v. Isler*,[163] a trial court

> may afford relief from an unmodified support order if the noncustodial parent has, by agreement with the custodial parent, assumed custody and has provided food, clothing, shelter, medical attention, and school expenses and has exercised parental control for an extended period.[164]

The court of appeals determined that Father would be paying child support twice if the arrearage was affirmed. The court stated that affirming the trial court's decision would "unjustly penalize" Father and "unjustly enrich" Mother.[165] Further, it stated that "such prejudicial and unscrupulous 'gotcha' litigation tactics should not be tolerated."[166] The case was remanded for further proceedings to determine whether to grant some relief to Father from the arrearage previously ordered and, if so, the amount.[167] It is strongly implied by the court's opinion that some significant degree of relief should have been granted to Father.

V. PATERNITY

El v. Beard[168] is an interpretation of the UIFSA[169] statutes. In this case, Father (a well known athlete in Indiana) filed his paternity action in Indiana, but Mother and child resided in Illinois. The trial court held that it had jurisdiction over paternity and child support, but not over custody and visitation.[170] The trial court established paternity in Father and then set the matter for hearing on the support issues. The court entered several orders regarding support, and Father appealed those orders.[171] Mother filed a cross appeal in this action alleging that Indiana lacked personal jurisdiction over her and, thus, could not issue any child support orders in this case. The court of appeals found the jurisdictional issue to be dispositive; therefore, it did not address Father's issues on appeal.[172]

Indiana Code 31-18-2-1 sets forth the basis for obtaining jurisdiction over a person in an action filed under UIFSA. Father alleged that he had jurisdiction for the following reasons:

> In a proceeding to establish, enforce, or modify a support order or to determine paternity, an Indiana tribunal may exercise personal

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163. 425 N.E.2d 667, 670 (Ind. Ct. App. 1981).

164. *Smith*, 793 N.E.2d at 285.

165. *Id.* at 286.

166. *Id.*; *see* Wilson Fertilizer & Grain, Inc. v. ADM Mill. Co., 654 N.E.2d 848, 856 (Ind. Ct. App. 1995).

167. *Smith*, 793 N.E.2d at 286.

168. 795 N.E.2d 462 (Ind. Ct. App. 2003).

169. Uniform Interstate Family Support Act, IND. CODE § 31-18-1-1 to -9-4 (1998).

170. *El*, 795 N.E.2d at 464.

171. *Id.*

172. *Id.*

> jurisdiction over a nonresident individual . . . if:
> * * *
> (2) the individual submits to the jurisdiction of Indiana by:
> (A) consent;
> (B) entering an appearance, except for the purpose of contesting jurisdiction; or
> (C) filing a responsive document having the effect of waiving contest to personal jurisdiction.
> * * *
> (6) the individual engaged in sexual intercourse in Indiana and the child:
> (A) has been conceived by the act of intercourse; or
> (B) may have been conceived by the act of intercourse if the proceeding is to establish paternity.[173]

The court of appeals discounted Father's argument under subsection (2) readily. Prior to the first hearing establishing paternity, Mother filed a motion to dismiss for lack of jurisdiction. When the trial court denied her petition, Mother proceeded to file other pleadings seeking relief and presented her case vigorously in court. The court of appeals stated that a party is not required to sit by idly and not present evidence in the hopes of winning a jurisdictional issue on appeal.[174]

The issue to which the court devotes more time is interpreting subsection 6(B). The court found that by the clear language of the statute, the trial court could not have properly exercised jurisdiction over Mother on the child support issues.[175] This subsection clearly states that the only time a court can exercise jurisdiction over a non-resident party when the child "may have been conceived" in Indiana is for a paternity proceeding. The language of the statute precludes the use of UIFSA for child support under these circumstances.[176]

The court then looked at whether there is evidence to support the argument that the child was born in Indiana. The only evidence that Father presented that the child was born in Indiana was in his initial verified petition for paternity. Mother filed a verified affidavit with her motion to dismiss, asserting that the child was conceived in Illinois. Unfortunately for Father, no other evidence was presented on his behalf to rebut this presumption.[177] The Indiana Supreme Court has stated that "once the party . . . challenges the lack of personal jurisdiction, the plaintiff must present evidence to show that there is personal jurisdiction over the defendant."[178] The court went on to state that "a plaintiff cannot 'maintain his position by pleading under oath and then resting on that pleading.' . . . [N]either . . . the trial court [n]or the appellate court [may] rely on [a] petition as evidence

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173. IND. CODE § 31-18-2-1 (1998).

174. *El*, 795 N.E.2d at 466.

175. *Id.*

176. *Id.*

177. *Id.* at 467.

178. *Id.* (citing Anthem Ins. Cos. v. Tenet Healthcare Corp., 730 N.E.2d 1227, 1231 (Ind. 2000)).

of the facts alleged therein."[179] Because Mother presented the best evidence that the child was conceived in Illinois, the court held that the trial court did not have jurisdiction over Father for the support issues and reversed the trial court's order on support.[180]

In the case of *In re Paternity of M.R.*,[181] the UIFSA and UCCJL[182] were applied and interpreted to determine whether the Indiana court had jurisdiction to enter orders on this case. Another popular athlete fathered a child out of wedlock and filed a Petition to Establish Paternity with the trial court. M.R. was born on July 14, 2000. Father executed a paternity affidavit. Mother and M.R. moved to Georgia in late September or early October 2001. Father was traded to the Chicago Bulls, but maintained residency in Indiana. Father filed his petition to establish paternity on April 15, 2002. A hearing was scheduled for April 20, 2002, and, on April 24, 2002, Mother filed her petition to establish paternity in Georgia. Before the hearing, Mother filed a Motion to Dismiss for Lack of Personal Jurisdiction and Insufficient Notice to Persons Outside This State. Mother argued that under the UCCJL, a hearing must be conducted at least twenty days after notice is given to a person living outside Indiana.[183] Father conceded this issue, but argued that the notice requirement did not apply to the support issues. The trial court took evidence and, after briefing by both parties, denied Mother's motion to dismiss and ordered Father to pay support.[184]

Father argued that the UCCJL is not applicable because custody is not an issue, he only sought to determine paternity and child support. However, this argument was contradicted by Father's own petition and request for relief, as Father did seek an order regarding "a plan of care for the minor child . . . ."[185] Further, in open court Father's own counsel asked that the custody and parenting time issues be rescheduled for another hearing date. Following a lengthy discussion about custody and how it is a valid component of a paternity case, the court found that an action for paternity does necessarily include a determination of custody. Therefore, since Mother had been in Georgia for at least six months, Georgia was the child's "home state" and the Indiana trial court lacked jurisdiction to make a custody determination.

The court next found that the UCCJL only applied to custody determinations, not support.[186] Thus, the UIFSA statutes would need to be examined to determine whether the trial court's order on support was proper. Mother argued that the trial court lacked jurisdiction under UIFSA. Section 31-18-2-4(b) of the Indiana Code is dispositive of this issue.[187] Not only did Mother file her petition

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179. *Id.* (citing State v. Sanders, 596 N.E.2d 225, 227 (Ind. 1992)).

180. *Id.* at 468.

181. 778 N.E.2d 861 (Ind. Ct. App. 2002).

182. Uniform Child Custody Jurisdiction Law, IND. CODE § 31-17-3-1 to -25 (1998).

183. *Id.* § 31-17-3-5(b).

184. *M.R.*, 778 N.E.2d at 866.

185. *Id.* at 865.

186. *Id.*

187. Section 31-18-2-4(b) of the Indiana Code states:

for paternity in Georgia before the time allowed to file a responsive pleading in Indiana expired, she also timely filed her motion to dismiss challenging jurisdiction in the Indiana court. Finally, as the court already determined, Georgia is the home state of the child, not Indiana. The court held that the trial court's order for support must be vacated, but that the order establishing paternity was affirmed.[188]

In *Seger v. Seger*,[189] the court narrows the limits to which Indiana's paternity statutes will stretch to make someone legally responsible for a child. The facts of that case are quite interesting. Wife gave birth to a child prior to the marriage. Both Wife and Husband knew that Husband was not the biological father of child. Following the marriage, the parties went to the local health department and executed a paternity affidavit purporting that Husband was the biological father of child. In his petition for dissolution, Husband stated that no children were born of the marriage. The trial court agreed and rescinded the paternity affidavit. Wife filed an appeal.

The Indiana Court of Appeals recognized in its decision that the signing of a paternity affidavit only creates a legal presumption that the man is the child's biological father.[190] A paternity affidavit is valid only when a mother and a man who "reasonably appears to be the child's biological father" execute the document.[191] The court found that since both parties knew the child was not the biological child of Father, the paternity affidavit was a falsehood from the outset and Mother was precluded from using the paternity statutes in her efforts to make Husband legally responsible for the child.

Mother further argued that the execution of this document was, in effect, an adoption of the child. The court stated that there is no equitable adoption in the

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> An Indiana tribunal may not exercise jurisdiction to establish a support order if the petition is filed before a petition or comparable pleading is filed in another state if:
>
> (1) the petition or comparable pleading in the other state is filed before the expiration of the time allowed in Indiana for filing a responsive pleading challenging the exercise of jurisdiction by Indiana;
>
> (2) the contesting party timely challenges the exercise of jurisdiction in Indiana; and
>
> (3) the other state is the home state of the child, if relevant.

IND. CODE § 31-18-2-4(b) (1997).

188. In a footnote, the Indiana Court of Appeals noted that Father argued in his brief that Indiana should not relinquish jurisdiction because the Georgia court in which Mother hopes to pursue her paternity action does not have personal jurisdiction over Father. The court declined to issue an opinion about the jurisdictional issue in Georgia, stating, in essence, that would be Mother's problem, but the court noted that if Father was concerned about jurisdiction in Florida, he could merely consent to jurisdiction. This statement by the court was further clarified on rehearing. *See In re* the Paternity of M.R., 784 N.E.2d 530 (Ind. Ct. App. 2003) (where Father petitioned to transfer the case, but transfer was dismissed on September 26, 2003).

189. 780 N.E.2d 855 (Ind. Ct. App. 2002).

190. *Id.*

191. IND. CODE § 16-37-2-2.1(b)(1) (1999).

state of Indiana.[192] There are specific procedures that are prescribed by statute that must be followed to complete an adoption. Those procedures were not followed; thus, Mother's adoption argument must fail. The court of appeals agreed with the trial court that the paternity affidavit should be rescinded.

In re Paternity of K.R.H.,[193] Mother appealed the trial court's decision to uphold a settlement agreement granting custody of the parties' minor daughter to the Father. The parties to this case spent two days immediately before the trial of the case in depositions. At the conclusion of the depositions, at 7:30 p.m. on the day before trial, the parties entered into settlement negotiations and at 11:00 p.m., the parties reached an agreement that was reduced to writing and signed by both parties. The next day at trial, Mother repudiated the agreement. The trial court upheld the agreement.

Mother argued that the Alternative Dispute Resolution ("ADR") Rules were not followed and that the agreement should have been declared void.[194] The court points out that this was not a formal mediation requiring the application of the ADR Rules. Those rules are only applicable when a court orders mediation. The record was clear that neither party requested mediation and the trial court did not order mediation. Thus, the trial court did not commit error by failing to apply these rules and accepting the agreement.[195]

Mother next argued that the agreement should not have been enforced because she was under duress and the agreement was unconscionable. The court found that there was no duress, as there was no evidence of any threatened violence or physical restraint to Mother if she refused to sign the agreement.[196] Mother's unconscionability argument was not successful either. To prove unconscionability, one must prove that "there was a gross disparity in bargaining power which led the party with the lesser bargaining power to sign a contract unwillingly or unaware of its terms and the contract is one that no sensible person, not under delusion, duress or distress would accept."[197] Again, the court found that Mother failed to show evidence that these factors existed.

Mother's final arguments are that there was not a finalized agreement and that the agreement was not in the best interest of the child. The court found that the parties signed a document called a "Binding Terms Sheet" and that a "meeting of the minds" took place.[198] Thus, the document, while not contemplated to be in final form, was acceptable to form a binding agreement.

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192. *Seger*, 780 N.E.2d at 858 (citing Lindsey v. Wilcox, 479 N.E.2d 1330, 1333 (Ind. Ct. App. 1985)).

193. 784 N.E.2d 985 (Ind. Ct. App. 2003).

194. *Id.* at 990.

195. *Id.*

196. *Id.* (citing Rutter v. Excel Indus., Inc., 438 N.E.2d 1030, 1031 (Ind. Ct. App. 1982)) (stating that "there must be an actual or threatened violence or restraint of a man's person, contrary to law, to compel him to enter into a contract or discharge one" if a contract is to be void due to duress).

197. *Id.* at 991 (quoting Justus v. Justus, 581 N.E.2d 1265, 1272 (Ind. Ct. App. 1992)).

198. *Id.* at 992.

Finally, the court found that Mother was unable to prove that the agreement was not in the child's best interest.[199]

The Indiana Court of Appeals found that the agreement was typed and signed; that both parties were represented by counsel; that an integration clause was included in the document; and that no undue influence or duress was placed upon Mother when she signed the document. In affirming the trial court's decision to uphold the agreement, the court cited *Reno v. Haler*,[200] which held that "a written and signed agreement pertaining to custody, once the trial court determines the terms are in the child's best interests, is enforceable, even if a party wishes to repudiate it."[201]

VI. ADOPTION

One of the most socially controversial cases in this survey period is *In re Adoption of M.M.G.C.*[202] This case carves out a narrow exception in the adoption laws which will now allow homosexual couples to adopt children together. In this case, Shannon Crawford-Taylor, the domestic partner of the litigant, Amber Crawford-Taylor, adopted two Ethiopian children and one Chinese child in 1999 through the international adoption process. She transacted the adoptions as a single parent. In April, 2000, Shannon and Amber jointly filed three adoption petitions with the trial court. The trial court denied the petitions finding that foreign adoptions must be domesticated without modification.[203] On March 29, 2001, Shannon filed Petitions Requesting Comity and Full Faith and Credit in the adoption of all three children. On March 30, 2001, Amber filed petitions to adopt all three children as a second parent. Pursuant to section 31-19-9-1(a)(3) of the Indiana Code, Shannon filed consents to Amber's adoption as a second parent. The trial court ultimately granted Shannon's petitions but denied Amber's petition, finding that Amber must be a relative of Shannon's to adopt the children and the only way to become a legal relative of Shannon is to marry her. Because Indiana does not allow same sex marriage,[204] Amber cannot become a relative and, therefore, cannot adopt with Shannon. The trial court further stated that the only means by which Amber could adopt would be to divest Shannon of her parental rights, and that this was clearly not the intent of the parties.

The Indiana Court of Appeals recognized this as a case of first impression in Indiana. It pointed out first that the trial court erred in finding that Amber must be related to Shannon in order to adopt the children.[205] The adoption statute only requires that a person filing a petition for adoption be a legal resident of

199. *Id.* at 993.

200. 734 N.E.2d 1095 (Ind. Ct. App. 2000).

201. *K.R.H.*, 784 N.E.2d at 988 (citing *Reno*, 734 N.E.2d at 1099).

202. 785 N.E.2d 267 (Ind. Ct. App. 2003).

203. *Id.* at 268.

204. IND. CODE § 31-11-1-1 (1997).

205. *M.M.G.C.*, 785 N.E.2d at 270.

Indiana.[206] The court went on to note that Indiana law "does not require that the rights of an adoptive parent with respect to the child be divested in the event of a second-parent adoption."[207] The court found that the trial court's "legal conclusions [were] not supported by statutory law."[208] Because no statutory law exists on this issue, the court turned to common law.

The court noted that "[T]he primary concern in every adoption proceeding is the best interest of the child. The state has a strong interest in providing stable homes for children. To this end, early, permanent placement of children with adoptive families furthers the interests of both the child and the state."[209] The court further stated that it would be in the best interest of the children involved in this case to be "entitled to the legal protections and advantages that a two-parent adoption provides."[210] In conclusion, the court held that "Indiana's common law permits a second parent to adopt a child without divesting the rights of the first adoptive parent."[211] Thus, Amber was also able to adopt the three children previously adopted by her partner, Shannon, in a second-parent adoption.

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206. IND. CODE § 31-19-2-2(a).

207. *M.M.G.C.*, 785 N.E.2d at 270; *cf.* IND. CODE § 31-19-15-1 (providing that an adoption divests all rights of a *biological* parent with respect to a child except in the case of a stepparent adoption).

208. *M.M.G.C.*, 785 N.E.2d at 270.

209. *Id.* (citing B.G. v. H.S., 509 N.E.2d 214, 217 (Ind. Ct. App. 1987)).

210. *Id.*

211. *Id.*