RECENT DEVELOPMENTS IN INDIANA FAMILY LAW

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This Article considers notable developments in Indiana family law during the survey period of October 1, 2012 to September 30, 2013. The state statutes and published cases surveyed in this Article concern the parenting time guidelines, parental rights, adoption, relocation and child custody, child support, educational support orders, disposition of property and maintenance upon divorce, and mediation.

I. PARENTING TIME GUIDELINES

When the parents of a child separate, they might share legal and physical custody of the child. If only one of the parents receives physical custody of the child, the other parent is entitled to parenting time with the child to maintain the parent-child relationship.[1]

In such a case, Indiana lawmakers encourage parents to create a parenting plan for themselves, but the plan must protect the best interests of the child. If the parents cannot agree, Indiana provides a parenting plan in the form of the Parenting Time Guidelines, which are dependent on the child's age and which represent the minimum recommended time a parent should have in order to maintain frequent, meaningful, and continuing contact with a child.[2]

These Indiana Parenting Time Guidelines have undergone significant changes during the survey period. Specifically, the Indiana Supreme Court approved several amendments to the Guidelines that took effect for all new orders beginning on March 1, 2013.[3] The changes require a spirit of cooperation between the parents and are child-centered.

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1. Act of April 25, 2005, Pub. L. No. 68-2005, § 45, 2005 Ind. Acts 1582 (amending IND. CODE § 31-17-4-1, concerning the rights of a noncustodial parent, to replace "visitation" with "parenting time").

> [F]or many years it was common to speak of divorces, child custody proceedings, and visitation rights. Seeking even simple ways to mitigate the acrimony for which these disputes are famous, Indiana has been at the forefront of redefining these concepts as dissolutions of marriage and parenting time. Recognizing that children benefit from frequent, continuing, and meaningful contact with both parents, and that scheduling time is more difficult between separate households the heads of which may not be on good terms, the Indiana Supreme Court adopted Parenting Time Guidelines for resolving disputes over children and ensuring that both parents have time to be just that to their children. The shift in emphasis away from the rights of adults and toward the needs of children eventually led the Indiana General Assembly to abolish the idea of "visitation."

Randall T. Shepard, *Elements of Modern Court Reform*, 45 IND. L. REV. 897, 900 (2012).

2. Amended Order Amending Indiana Parenting Time Guidelines, Cause Number 94S00-1205-MS—275 (Ind. Jan. 4, 2013), *available at* http://www.in.gov/judiciary/files/order-rules-2013-0107-parenting.pdf, *archived at* http://perma.cc/6UYT-A6BN.

3. *Id.* at 32.

A noteworthy change regards how parents should share custody of their child over holiday periods.[4] Amendments to the Holiday Parenting Time address the Christmas Break schedule and add President's Day, Martin Luther King Day, and Fall Break as new holidays to be split between the parents.[5] Furthermore, a parent may now receive three consecutive weekends of custody in certain circumstances.[6]

Another amendment to the Parenting Time Guidelines introduces the new concept of parallel parenting, which is a temporary deviation from the Parenting Time Guidelines when the court determines that the parents are high conflict—meaning that they are litigious, chronically angry or distrustful, unable to communicate, or otherwise risk the child's well-being.[7] In parallel parenting, the parent with the child makes the day-to-day decisions. Communication between the parents is limited and often in writing, and counseling professionals are recommended to assist the parents with parallel parenting arrangements.[8]

During the survey period, Indiana courts encountered some resistance to the concept of parenting time. In *In re Paternity of J.T.*,[9] the Indiana Court of Appeals affirmed the lower court's custody change from mother to father after the mother routinely obstructed father's parenting time.[10] The court of appeals noted that the mother's denial of the father's parenting time established a substantial change in the interrelationship of the parents, which allowed a modification in custody.

II. PARENTAL RIGHTS

During the survey period, Indiana courts decided several cases implicating parents' rights, which are constitutionally protected through several United States Supreme Court cases.[11] A few of the recent Indiana cases involved grandparents.

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4. *Id.* at 20.
5. *Id*. at 20-21.
6. *Id.* at 20.
7. *Id.* at 23.
8. *Id.*
9. 988 N.E.2d 398, 401 (Ind. Ct. App. 2013).
10. *Id.*
11. *See, e.g.*, Pierce v. Soc'y of the Sisters, 268 U.S. 510, 535 (1925) (noting that the parents' right to choose private education over public education is a fundamental liberty interest protected by the Fourteenth Amendment); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (noting that the parents' right to hire a teacher to teach their child a foreign language is a fundamental liberty interest protected by the Fourteenth Amendment); *see also* Troxel v. Granville, 530 U.S. 57, 65 (2000) (noting that "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (noting that the freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment). Such protection has also been called the "parental liberty interest," which permits parents to direct the upbringing of their children. *See, e.g.*, Kandice K. Johnson, *Crime or*

An Indiana court first recognized a limited right to grandparent visitation in 1981.[12] Since then, grandparent visitation has been extensively litigated in many courts across the country, including in the United States Supreme Court.[13] In light of the U.S. Supreme Court's decision in *Troxel v. Granville*,[14] state courts have continued to seek the proper balance between grandparents' rights and parents' rights.

In *In re Visitation of M.L.B.*,[15] a child's paternal grandfather sought visitation with his grandchild in Indiana, which the lower court granted.[16] The Indiana Supreme Court remanded so that the trial court would cure certain defects.[17] Specifically, the court instructed that 1) the trial court must include findings that address the four factors for balancing parents' rights and the child's best interests in the context of grandparent visitation,[18] and that 2) the trial court must limit the grandparents' visitation award to an amount that did not substantially infringe on the parents' constitutional rights to control the upbringing of their children.[19]

In *In re Paternity of A.S.*,[20] the Indiana Court of Appeals reversed the lower court, which had awarded physical custody of a child to the grandmother.[21] The court of appeals reiterated that the United States Constitution protects parental rights and that a presumption exists that it is in the best interests of the child to be placed in the custody of the natural parent in disputes between that parent and

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Punishment: The Parental Corporal Punishment Defense—Reasonable and Necessary, or Excused Abuse?, 1998 U. ILL. L. REV. 413, 425 (noting that the parent-child relationship creates a Fourteenth Amendment "liberty interest" that allows parents to direct the upbringing of their children).

12. Krieg v. Glassburn, 419 N.E.2d 1015, 1018-19 (Ind. Ct. App. 1981) (interpreting Indiana Trial Rule 24(A)(2) to permit grandparents to intervene of right in post-dissolution custody and stepparent adoption proceedings and to petition for visitation).

13. Troxel v. Granville, 530 U.S. 57 (2000). For litigation in Indiana courts, see McCune v. Frey, 783 N.E.2d 752 (Ind. Ct. App. 2003); Crafton v. Gibson, 752 N.E.2d 78 (Ind. Ct. App. 2001).

14. 530 U.S. 57 (2000).

15. 983 N.E.2d 583 (Ind. 2013).

16. *Id.* at 584-85.

17. *Id.* at 589.

18. The four factors that a grandparent-visitation order must address are: "(1) a presumption that a fit parent's decision about grandparent visitation is in the child's best interests (thus placing the *burden* of proof on the petitioning grandparents); (2) the "special weight" that must therefore be given to a fit parent's decision regarding nonparental visitation (thus establishing a heightened *standard* of proof by which a grandparent must rebut the presumption); (3) "some weight" given to whether a parent has agreed to some visitation or denied it entirely (since a denial means the very *existence* of a child-grandparent relationship is at stake, while the question otherwise is merely *how much* visitation is appropriate); and (4) whether the petitioning grandparent has established that visitation is in the child's best interests." *Id.* at 586 (citation omitted).

19. *Id.* at 584.

20. 984 N.E.2d 646 (Ind. Ct. App.), *trans. denied*, 987 N.E.2d 521 (Ind. 2013).

21. *Id*. at 653.

a third party.[22] The court of appeals determined that, in this case, the grandmother failed to overcome this presumption despite the mother's mental health issues.[23] However, the court suggested that on remand the trial court should determine whether any visitation rights are due to the grandmother under the Grandparent Visitation Act.[24]

In *In re Guardianship of L.R.T.*,[25] the great-grandparents of a child were the child's custodians until the lower court ordered the custody of the children to be transferred to their mother.[26] The great-grandparents appealed, but the Indiana Court of Appeals affirmed, citing the constitutional framework protecting parents' rights.[27]

Due to the constitutional protection of parents' rights, when Indiana terminates a parent-child relationship, it must comply with due process requirements.[28] This requires balancing three factors: 1) the private interests affected by the proceeding, 2) the risk of error created by Indiana's chosen procedure, and 3) the countervailing governmental interest supporting the challenged procedure.[29]

In *D.T. v. Indiana Department of Child Services*,[30] the Indiana Court of Appeals held that a minor father's due process rights were not violated when the trial court failed to appoint him a guardian ad litem before terminating his parental rights.[31] The court of appeals noted that both the private interests and the state's interests were substantial in termination cases, leaving the only factor to be the risk of error.[32] The court of appeals concluded that any risk of error created by the lack of a guardian ad litem was low because the minor father was represented by counsel and his mother was involved in the process.[33] Furthermore, he refused to participate in services that would allow him to maintain his relationship with his child.[34] Finally, the child's interests would be best served by adoption.[35]

In *In re R.S.*,[36] the Indiana Court of Appeals reviewed the evidence in child protection proceedings, reversing the lower court's order adjudicating a child as

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22. *Id*. at 651.

23. *Id.* at 653.

24. *Id.* (IND. CODE § 31-17-5-1 (2014) is commonly known as the Grandparent Visitation Act.).

25. 979 N.E.2d 688 (Ind. Ct. App. 2012), *trans. denied*, 983 N.E.2d 1157 (Ind. 2013).

26. *Id.* at 689.

27. *Id.* at 691.

28. *In re* E.E., 853 N.E.2d 1037, 1043 (Ind. Ct. App. 2006).

29. *Id.*

30. 981 N.E.2d 1221 (Ind. Ct. App. 2013).

31. *Id.* at 1226.

32. *Id.* at 1225.

33. *Id*.

34. *Id.* at 1226.

35. *Id*.

36. 987 N.E.2d 155 (Ind. Ct. App. 2013).

being a child in need of services (CHINS).[37] The court of appeals noted that the parents had a clean residence and that they nurtured their child, despite the lower court's finding that the parents lacked financial resources and adequate housing to properly care for their special needs children.[38]

In *A.D.S. v. Ind. Dept. of Child Services*,[39] the court of appeals affirmed the lower court's order terminating a mother's parental rights.[40] The court determined that the findings of mother's lack of capacity to remain sober and failure to address her domestic violence issues sufficed to support the termination of her parental rights, and that the best interests of her children were served by terminating those parental rights.[41]

In *In re A.M.-K.*,[42] the Indiana Court of Appeals held that a mother involuntarily committed for emergency mental health treatment was adequately notified of the Department of Child Service's recommended plan of participation in various services.[43] However, the court also held that the Department of Child Services had produced insufficient evidence to overcome mother's objection to a parental participation order requiring her to take prescribed medications.[44]

In *D.L. v. Huck*,[45] the Indiana Court of Appeals held that the Department of Child Services and its workers were not entitled to quasi-judicial immunity for their removal of a child from the home of relatives who were caring for her and who were in the process of adopting her.[46] However, the court held that the workers and the Department of Child Services were entitled to statutory immunity under Indiana Code section 31-25-2-2.5.[47] The court subsequently affirmed its opinion as to Department of Child Services (DCS) in all other respects and "allowed tort claims against DCS to proceed under a theory of vicarious liability, within the [Indiana Tort Claims Act] ITCA; and to allow federal civil rights claims to proceed."[48]

III. ADOPTION

Related to parents' rights are consent procedures for adoption. As parents' rights are permanently severed in an adoption, parents must typically give their consent to the adoption of their child. Several cases arose during the survey

37. *Id.* at 157.
38. *Id.* at 159.
39. 987 N.E.2d 1150 (Ind. Ct. App.), *trans. denied*, 992 N.E.2d 206 (Ind. 2013).
40. *Id.* at 1153.
41. *Id.* at 1159.
42. 983 N.E.2d 210 (Ind. Ct. App. 2013).
43. *Id.* at 212.
44. *Id.* at 217.
45. 978 N.E.2d 429 (Ind. Ct. App. 2012), *aff'd on reh'g*, 984 N.E.2d 223 (Ind. Ct. App. 2013).
46. *Id.* at 435.
47. *Id.* at 436.
48. D.L. v. Huck, 984 N.E.2d 223, 225 (Ind. Ct. App. 2013).

period implicating Indiana's statutory framework on the required parental consent for a child's adoption.[49]

In *In re Adoption of J.T.A.*,[50] an Indiana woman appealed the lower court's denial of her petition to adopt her fiancé's child.[51] The court of appeals affirmed the lower court, requiring the biological mother's consent to the adoption despite her nonpayment of child support for six years because there was a question regarding her ability to pay the support.[52] The court also concluded that the mother's consent to the adoption was not implied because she did not receive proper or complete notice of the adoption.[53]

However, the Indiana Court of Appeals determined that if the adoption was successful, it would not sever father's parental rights because this was an intra-family adoption despite the couple's non-marital status.[54] The court reasoned that both members of the couple acted as parents to the child and neither wanted the adoption to terminate the father's parental rights.[55] The court therefore concluded that the trial court was mistaken that the couple's non-marital status would result in the severance of both biological parents' rights.[56]

Finally, the court of appeals in *In re Adoption of J.T.A.* [57] called upon state legislators to re-write the Indiana adoption statute in gender-neutral terms.[58] Currently, the statute assumes that it is always the mother putting her child up for adoption, and consequently notice of the adoption would be given to the father.[59] In this particular case, however, the biological mother needed to be given notice.[60]

In *In re Adoption of K.S.*,[61] the Indiana Court of Appeals reversed the lower court's denial of a petition for adoption brought by a child's stepmother.[62] The Indiana Court of Appeals simply applied Indiana Code section 31-19-9-8, which dispensed with the biological mother's consent to the adoption based on her failure to pay child support for more than one year.[63]

IV. RELOCATION AND CHILD CUSTODY

A parent planning to relocate with a child who is the subject of an existing

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49. IND. CODE § 31-19-9-8 (2014).
50. 988 N.E.2d 1250 (Ind. Ct. App.), *trans. denied*, 996 N.E.2d 1278 (Ind. 2013).
51. *Id.* at 1252.
52. *Id.* at 1255.
53. *Id.* at 1256.
54. *Id.* at 1253.
55. *Id.*
56. *Id.*.
57. 988 N.E.2d 1250 (Ind. Ct. App.), *trans. denied*, 996 N.E.2d 1278 (Ind. 2013).
58. *Id.* at 1256 n.4.
59. *Id.* at 1256.
60. *Id*.
61. 980 N.E.2d 385 (Ind. Ct. App. 2012).
62. *Id.* at 386.
63. *Id.* at 389.

custody order must file a motion with the court that issued the custody or parenting time order.[64] Upon motion, the court must have a hearing before modifying parenting time or custody.[65] The other parent, if opposing relocation, must file a motion to prevent the relocation of the child within sixty days of receiving notice of the planned relocation.[66] The parent planning to relocate must bear the burden of proof to show that the relocation is made in good faith and for a legitimate reason.[67] If the relocating party meets this burden, the burden of proof shifts to the nonrelocating parent to show that the relocation is not in the best interests of the child.[68]

In *D.C. v. J.A.C.*,[69] the Indiana Supreme Court reiterated that the trial courts are afforded a great deal of deference in family law matters, including relocation and custody disputes.[70] This serves the interest of finality in custody.[71] Accordingly, the Indiana Supreme Court reversed the Indiana Court of Appeals for reversing the trial court in such a dispute.[72]

In the case, the mother and father had shared legal custody of their son, who lived with the mother subject to the father's parenting time, which consisted of three overnight visits per week and two weekends per month.[73] About two years into this arrangement, the mother filed a notice of intent to relocate.[74] While the motion pended, she moved with her son to Tennessee, but returned the child to Indiana after the trial court denied her relocation motion.[75]

Around the same time, the father filed a motion to modify custody and prevent his son's relocation.[76] At an evidentiary hearing on the issues of relocation and modification of custody, the guardian ad litem testified that he did not believe that the relocation was in the best interests of the child. Various relatives also testified.[77]

The trial court granted the father's motion.[78] Although the mother and father would retain joint legal custody, the father would become the primary physical custodian, while the mother would be granted parenting time during school breaks and on any other occasions she visited central Indiana.[79]

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64. IND. CODE § 31-17-2.2-1(a)(1) (2014).
65. *Id.* § 31-17-2.2-1(b).
66. *Id.* § 31-17-2.2-5(a).
67. *Id.* § 31-17-2.2-5(c).
68. *Id.* § 31-17-2.2-5(d).
69. 977 N.E.2d 951 (Ind. 2012).
70. *Id*. at 956.
71. *Id.* at 957.
72. *Id.* at 957-58.
73. *Id.* at 953.
74. *Id.*
75. *Id.*
76. *Id*
77. *Id.*
78. *Id.*
79. *Id.*

The trial court had determined that the child's relocation to Tennessee would not be in the child's best interests.[80] The court reasoned that the distance involved was significant, that the father was very involved in the child's daily life, that both sets of grandparents and other extended family lived in Indiana, and that the child's relationship would deteriorate with his Indiana family if he moved to Tennessee.[81]

The court of appeals reversed the trial court,[82] finding that the trial court's best-interest determination was clearly erroneous.[83] Specifically, the court of appeals found that the trial court had undervalued the benefit that the mother's new management-level employment would provide by finding that her primary motivation was to join her boyfriend in Tennessee.[84] The court of appeals also noted the trial court's finding that the father had already purchased a more fuel-efficient vehicle for visitation purposes, and that time spent traveling was neutral because it occurred regardless of which parent had the child.[85] Finally, although the court of appeals acknowledged that relocation would cause the deterioration of the child's relationship with the father and extended family, the court noted that the Indiana statute would never allow relocation if denial of daily life with one parent were always against the child's best interests.[86]

The Indiana Supreme Court reversed, underscoring the deferential nature of the "clearly erroneous" standard.[87] This deference was justified, especially in family law matters, because of the trial court's unique position to interact with the parties over time. Meanwhile, appellate courts were limited to a "cold transcript of the record."[88]

Under the clearly erroneous standard, the Indiana Supreme Court could not conclude that no facts supported the trial court's judgment that relocation was against the child's best interests.[89] On the contrary, the trial court had "ample support for its decision."[90] Therefore, the Indiana Supreme Court affirmed the trial court.[91]

Subsequent to *D.C. v. J.A.C.*, the Indiana Courts of Appeals affirmed the lower courts in other cases on child custody and relocation matters. For example, in *Dixon v. Dixon*,[92] the Indiana Court of Appeals affirmed the trial court's order

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80. *Id.* at 955.

81. *Id.*

82. D.C. v. J.A.C., 966 N.E.2d 158 (Ind. Ct. App.), *opinion vacated*, 977 N.E.2d 951 (Ind. 2012).

83. *Id.* at 160.

84. *Id.* at 163.

85. *Id.* at 161.

86. *Id.* at 164.

87. D.C. v. J.A.C., 977 N.E.2d 951, 957-58 (Ind. 2012).

88. *Id.* at 956.

89. *Id.* at 957.

90. *Id.*

91. *Id.* at 957-58.

92. 982 N.E.2d 24 (Ind. Ct. App. 2013).

granting the mother's notice of intent to relocate.[93]

In *Dixon*, mother had physical custody of the parties' two children and the father had parenting time when the mother filed a notice of intent to relocate.[94] She planned to remarry and move with her new husband to Illinois.[95] Father then filed a petition to modify custody and support.[96]

The mother, a schoolteacher, testified in subsequent hearings that although she would marry her fiancé regardless of whether the trial court approved the relocation, she would not move to Illinois if it would jeopardize her custody of the children.[97] She also testified that if the court granted her request to relocate, she would continue alternating weekends with the father and ensure that the children were in Indiana for holidays so that they could spend time with him, his second wife, and their children.[98]

The trial court granted the mother's request to relocate, which effectively denied the father's motion to modify custody.[99] The trial court found that the mother's desire to relocate was made in good faith, for a legitimate reason, and was not done in haste.[100] The trial court further noted that it was in the best interests of the children to remain with their mother because she had been their primary caretaker since the separation.[101]

Reviewing the record, the Indiana Court of Appeals determined that the lower court's judgment was not clearly erroneous.[102] The court concluded that the lower court had properly considered the relevant statutory factors in making its determination on the relocation issue.[103]

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93. *Id.* at 28.

94. *Id.* at 25.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id*.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 28.

103. In determining whether to modify a custody order, the trial court must consider the factors in IND. CODE § 31-17-2.2-1(b) (2014):

> (1) The distance involved in the proposed change of residence.
>
> (2) The hardship and expense involved for the nonrelocating individual to exercise parenting time or grandparent visitation.
>
> (3) The feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time and grandparent visitation arrangements, including consideration of the financial circumstances of the parties.
>
> (4) Whether there is an established pattern of conduct by the relocating individual, including actions by the relocating individual to either p thwart a non-relocating individual's contact with the child.
>
> (5) The reasons provided by the:
>
> (A) relocating individual for seeking relocation; and

In *Kietzman v. Kietzman*,[104] the Indiana Court of Appeals affirmed the lower court's decision permitting the mother to move to China with her nine-year-old daughter, whose legal and physical custody she shared with her ex-husband.[105] The mother wanted to relocate when her second husband, an engineer employed by a large chemical manufacturer, received an offer to train personnel in a factory in China for three years.[106] The family would live in a special compound for employees of large international businesses and the daughter would attend an international school in China.[107] The family would be able to return to the United States twice annually for a visit of three or four weeks.[108]

At the hearing in the lower court, various family members testified on the mother's planned relocation.[109] The girl's guardian ad litem concluded that it was in her best interests to move to China if her father received ample parenting time.[110]

The Jefferson Circuit Court granted the mother's petition to relocate to China with the girl and gave her sole custody of the child so that decisions could be made quickly abroad, finding that it was in the child's best interests.[111] The girl's father was to receive three periods of parenting time: two when the child returned to the United States with the rest of the family and one that required the father to visit the girl in China.[112] The court further ordered that both parents be afforded liberal access to the girl via telephone, Skype, and other forms of communication.[113]

In a child custody case without a relocation aspect, the Indiana Court of Appeals reversed the trial court, noting that the trial court's finding that the father was incarcerated on child molestation charges was insufficient by itself to deny his petition for modification of visitation.[114] The court of appeals reiterated the presumption that the Indiana Parenting Time Guidelines applied to all cases covered by the guidelines, and that deviation from these Guidelines must be accompanied by a written explanation indicating why the deviation was necessary or appropriate in the case.[115] The case was accordingly remanded for such determination.[116]

(B) non-relocating parent for opposing the relocation of the child.

(6) Other factors affecting the best interest of the child.

104. 992 N.E.2d 946 (Ind. Ct. App. 2013).

105. *Id.* at 950.

106. *Id.* at 947.

107. *Id.*

108. *Id.*

109. *Id.* at 948.

110. *Id.* at 947-48.

111. *Id.* at 948.

112. *Id.*

113. *Id.*

114. Rickman v. Rickman, 993 N.E.2d 1166, 1169 (Ind. Ct. App. 2013).

115. *Id.* at 1169-70.

116. *Id.*

V. CHILD SUPPORT

Indiana courts utilize the Child Support Guidelines to establish a presumptively correct child support amount.[117] The Guidelines have several objectives, including to promote settlement,[118] but the courts nonetheless encountered child support litigation during the survey period.

In *Ashworth v. Ehrgott*,[119] a father challenged the trial court's modification of his child support obligation.[120] First, he argued that the trial court failed to account for alimony payments and issued an income withholding order inconsistent with a previous order.[121] Second, he argued that the trial court abused its discretion in calculating his additional child support obligation based on his 2010, 2011, 2012 bonuses and subsequent employment bonuses, which he argued amounted to impermissible retroactive modification of his child support obligation.[122] Finally, he argued that the trial court abused its discretion by not addressing his alleged overpayment of child support.[123]

The Indiana Court of Appeals reiterated that the trial court's calculation of child support is presumptively valid and that the trial court's decision regarding child support should be upheld unless there was an abuse of discretion.[124] The court concluded that the trial court did not abuse its discretion in calculating the father's 2012 and subsequent weekly child support obligation.[125] The trial court also did not abuse its discretion in its use of an income allocation ratio to determine the amount of additional child support and in calculating the father's child support obligation based on his irregular income for 2011 and 2010.[126] However, the court concluded that the trial court did abuse its discretion by using an irregular income factor based upon the parties' prior financial declarations to determine father's additional child support obligation.[127]

At issue in *Schwartz v. Heeter* was an agreement between the parents that solved the problem of father's variable income by requiring each parent's weekly support obligation to be adjusted and recalculated at the end of each year based

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117. IND. CHILD SUPPORT GUIDELINES, *available at* www.in.gov/judiciary/rules/child_support/ (last visited Aug. 10, 2014).

118. *Id.* The other explicit objectives of the Guidelines are "[t]o establish as state policy an appropriate standard of support for children, subject to the ability of parents to financially contribute to that support; [and] [t]o make awards more equitable by ensuring more consistent treatment of people in similar circumstances." *Id.* at GUIDELINE 1. PREFACE.

119. 982 N.E.2d 366 (Ind. Ct. App. 2013).

120. *Id.* at 368.

121. *Id.*

122. *Id.*

123. *Id.* at 371.

124. *Id.* at 372.

125. *Id.* at 378.

126. *Id.*

127. *Id.*

on reported gross taxable income divided by fifty-two weeks.[128] One year into this arrangement, the Indiana Supreme Court amended the Guidelines to increase the child support obligation for high-income parents, which would impact the father's obligation given his six-figure income.[129] Under the revised Guidelines, the father would owe his children $44,720, versus $6,344 under the previous Guidelines.[130] The parents' agreement did not state which version of the Support Guidelines would apply.[131]

The Indiana Supreme Court held that the version of the Guidelines that governed was the one that was in effect when the father earned each year's income.[132] First, the court determined that the parents intended to treat the Guidelines as a "variable" that changed. [133] Second, the court noted that the agreement is presumed to contemplate the federal-law obligation to review the Guidelines every four years and, naturally, to incorporate the resulting changes.[134] Finally, the court presumed that the parties intended their obligations to be updated with periodic amendments to the Guidelines, regardless of the impact of the amendments on their personal financial obligations.[135]

In *Nikolayev v. Nikolayev*,[136] the Indiana Court of Appeals affirmed the lower court's determination that the money that a husband voluntarily contributed to his 401(k) retirement plan was includable in his income for purposes of determining his child support obligation.[137] The husband had been diverting nearly half of his $100,000 income from Eli Lilly to his 401(k) and savings accounts.[138]

In *Engelking v. Engelking*,[139] the Indiana Court of Appeals held that children born during marriage as a result of artificial insemination with a third party's sperm were "children of marriage" within the meaning of the Dissolution of Marriage Act.[140] The court affirmed the lower court's determination that the father should pay child support upon divorce, reasoning that the mother testified that he knew of the artificial inseminations that led to the conception of both children and helped her in the process, even holding the children out as his own during the marriage.[141]

In *Tisdale v. Bolick*,[142] the Indiana Court of Appeals held that the state court

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128. 994 N.E.2d 1102, 1105 (Ind. 2013).
129. *Id.* at 1104.
130. *Id.*
131. *Id.*
132. *Id.* at 1105.
133. *Id.*
134. *Id.*
135. *Id.* at 1107.
136. 985 N.E.2d 29 (Ind. Ct. App.), *trans. denied*, 988 N.E.2d 797 (Ind. 2013).
137. *Id.* at 31.
138. *Id.* at 30.
139. 982 N.E.2d 326 (Ind. Ct. App. 2013).
140. *Id.* at 328-29.
141. *Id.* at 328.
142. 978 N.E.2d 30 (Ind. Ct. App.2013).

had continuing, exclusive jurisdiction over a child support order entered in that court if either parent or one of their children resided in that state or until mutual written consent was given to another state's exercise of jurisdiction.[143] The court also held that the father was entitled to a hearing in the lower court on whether the state's courts retained jurisdiction over child support matters following the transfer to another state of child custody and parenting time issues.[144]

In *In re B.J.R.*,[145] the Indiana Court of Appeals affirmed the lower court's grant of a petition to modify a foreign child support order.[146] The court of appeals reasoned that the trial court had subject matter jurisdiction and did not abuse its discretion by finding that the foreign child support order was properly authenticated.[147] The court of appeals further held that the evidence was sufficient to establish changed circumstances to make the terms of foreign child support unreasonable and that the foreign child support order differed by more than twenty percent than would be ordered by applying the child support guidelines.[148]

Effective July 1, 2012, the legislature amended Indiana Code section 31-16-6-6, changing the presumptive age for termination of child support from twenty-one to nineteen.[149] In *Turner v. Turner*,[150] a father argued that the amendment controlled the issue of whether his child support should end for his nineteen-year-old son.[151]

The trial court held that its final dissolution decree controlled in the case

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143. *Id.* at 35.

144. *Id.* at 36.

145. 984 N.E.2d 687 (Ind. Ct. App. 2013).

146. *Id.* at 690.

147. *Id.* at 694.

148. *Id.* at 697.

149. The amended version of IND. CODE § 31–16–6–6 (2014) provides:

> (a) The duty to support a child under this chapter, which does not include support for educational needs, ceases when the child becomes nineteen (19) years of age unless any of the following conditions occurs:
>
> (1) The child is emancipated before becoming nineteen (19) years of age. In this case the child support, except for the educational needs outlined in section 2(a)(1) of this chapter, terminates at the time of emancipation, although an order for educational needs may continue in effect until further order of the court.
>
> (2) The child is incapacitated. In this case the child support continues during the incapacity or until further order of the court.
>
> (3) The child:
>
> (A) is at least eighteen (18) years of age;
>
> (B) has not attended a secondary school or postsecondary educational institution for the prior four (4) months and is not enrolled in a secondary school or postsecondary educational institution; and
>
> (C) is or is capable of supporting himself or herself through employment.

150. 983 N.E.2d 643 (Ind. Ct. App. 2013).

151. *Id.* at 645.

instead, which the court had issued twelve years earlier, when the father and mother were divorcing.[152] The final dissolution decree required the father to pay $144.00 per week until the child reached 21 years of age, married, left home, or was emancipated.[153]

The Indiana Court of Appeals reversed, agreeing with the father that his obligation to pay child support for his son terminated as a matter of law on July 1, 2012 because of the amendment to Indiana Code section 31-16-6-6.[154] The Indiana Court of Appeals confirmed that the trial court's failure to follow the law as set forth by the Indiana legislature constituted an abuse of discretion.[155] According to the court of appeals, the trial court had no discretion to extend the father's duty to pay child support beyond what the law required.[156] The court noted, however, that its opinion applied only to the father's obligation to provide child support, not to his obligation to provide educational support.[157]

VI. EDUCATIONAL SUPPORT ORDERS

Indiana law provides that a court may enter an educational support order for a child's college education, which is separate from a child support order.[158] However, the child's repudiation of a parent is a complete defense to such an educational support order.[159] In *Lovold v. Ellis*, the Indiana Court of Appeals affirmed the lower court's denial of an educational support order for college expenses because the child repudiated a relationship with his father.[160]

In a matter of first impression, the Indiana Court of Appeals also held in *Lovold* that a father was not required to pay child support for the time his son lived away from home on a college campus.[161] The court noted that to hold otherwise would make repudiation no longer a complete defense to the payment of college expenses.[162]

In *Svenstrup v. Svenstrup*,[163] a mother appealed the trial court's order denying her petition for allocation of college expenses.[164] The Indiana Court of Appeals affirmed, but noted that where a parent petitioned for an educational support order before a child's emancipation at age nineteen, the order is subject to

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152. *Id.* at 646.

153. *Id.* at 645.

154. *Id.*

155. *Id.* at 648.

156. *Id.*

157. *Id.* at 648 n.4.

158. IND. CODE § 31-16-6-2 (2014).

159. *See* Lovold v. Ellis, 988 N.E.2d 1144, 1150 (Ind. Ct. App. 2013) (stating that "[r]epudiation of a parent by the child, however, is recognized as a complete defense").

160. *Id.* at 1152.

161. *Id.*

162. *Id.* at 1153.

163. 981 N.E.2d 138 (Ind. Ct. App. 2012).

164. *Id.* at 139.

modification when denied by the trial court's order.[165]

In denying the education expenses at the time of the case, the court in *Svenstrup* noted that neither parent could bear the financial burdens of college expenses.[166] Indiana Code section 31-16-6-2, which lists factors that courts must consider in awarding such expenses, provides that the courts must consider the ability of each parent to meet the expenses.[167] The other statutory factors include the child's aptitude and ability, as well as the child's reasonable ability to contribute to educational expenses through work, loans, and other financial aid.[168]

VII. DISPOSITION OF PROPERTY AND MAINTENANCE UPON DIVORCE

During the survey period, several cases prompted Indiana courts to explore the contours of property division upon the dissolution of marriage. A few cases also brought maintenance claims to the forefront, particularly maintenance for an incapacitated spouse.

In *In re Marriage of Edwards and Bonilla-Vega*,[169] the Indiana Court of Appeals confirmed that a *chose in action* in the form of the husband's action in tort against his employer is divisible marital property because the property right existed before the wife filed for divorce.[170] Accordingly, the trial court did not abuse its discretion when it included the *chose in action* in the marital pot for division upon divorce.[171]

In *Troyer v. Troyer*,[172] the Indiana Court of Appeals determined that the lower court had acted within its discretion in a divorce case.[173] The lower court had held that there was no dissipation of marital assets when a wife sold her shares in her former law firm for particular value, that the wife's "enterprise goodwill" was not included in her assets, that the jewelry that the husband gave to the wife was valued at $1,000, that there was no misconduct when the wife cashed out of a retirement account, that the husband's remaining inheritance money was marital property when it was previously held in a joint account and used for shared bills, and that the husband and wife should share custody of their children.[174]

In *Birkhimer v. Birkhimer*,[175] the Indiana Court of Appeals held that it was

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165. *Id.* at 146.

166. *Id*. at 142.

167. IND. CODE § 31-16-6-2(a)(1)(c) (2014).

168. *Id.* § 31-16-6-2 (2013).

169. 983 N.E.2d 619 (Ind. App. 2013).

170. *Id.* at 621-22. As the court's opinion notes, Black's Law Dictionary defines *chose in action* as "1. A proprietary right *in personam,* such as a debt owed by another person, a share in a joint-stock company, or a claim for damages in tort. 2. The right to bring an action to recover a debt, money, or thing." BLACK'S LAW DICTIONARY 234 (7th ed. 1999).

171. *Id.* at 622.

172. 987 N.E.2d 1130 (Ind. Ct. App.), *trans. denied*, 996 N.E.2d 1278 (Ind. 2013).

173. *Id.* at 1138.

174. *Id.* at 1140-48.

175. 981 N.E.2d 111 (Ind. Ct. App. 2012).

error for the lower court not to consider the impact of the wife's debt to her father in dividing the marital property.[176] The court reiterated that marital property includes both assets and liabilities.[177] The court also held that the lower court acted within its discretion in ordering the wife to pay some of her husband's attorney's fees.[178] However, the court required the lower court to make written findings supporting its deviation from Indiana guidelines in calculating the wife's income for purposes of the child support calculation.[179]

In *Banks v. Banks*,[180] the Indiana Court of Appeals encountered a maintenance issue, ultimately affirming the lower court's reduction in spousal maintenance due to the incapacitation of the obligor spouse.[181] The court of appeals determined that the reduction was justified by the former husband's deteriorating health and resulting unemployment and bankruptcy.[182]

Finally, in *Alexander v. Alexander*,[183] the wife appealed the denial of her request for incapacity maintenance.[184] The Indiana Court of Appeals held that the lower court's denial was not clearly erroneous despite the wife's past injuries and present medical conditions.[185] The court noted that the wife received disability payments and was college-educated as an accountant.[186]

VIII. MEDIATION

Mediation continues to be often used in family law cases.[187] Accordingly, Indiana courts encountered litigation regarding the mediation process during the survey period.

In *Horner v. Carter*,[188] the Indiana Supreme Court confirmed that statements made during mediation were inadmissible in a hearing on a petition to modify a mediated settlement agreement.[189] The husband had tried to introduce statements he allegedly made during mediation to terminate his monthly housing payments to his former wife.[190] The court stressed that Indiana policy strongly favored the

176. *Id.* at 121.
177. *Id.* at 120.
178. *Id.* at 127.
179. *Id.* at 129.
180. 980 N.E.2d 423 (Ind. Ct. App. 2012), *trans. denied*, 985 N.E.2d 738 (Ind. 2013).
181. *Id.* at 424.
182. *Id.* at 428.
183. 980 N.E.2d 878 (Ind. Ct. App. 2012).
184. *Id.* at 879.
185. *Id.* at 881-82.
186. *Id.* at 881.
187. For the background on and benefits of mediation, see Carolynn Clark Camp, *Mediating the Indissoluble Family: Mediators Style in Domestic Relations Cases*, 26 BYU J. PUB. L. 187 (2012).
188. 981 N.E.2d 1210 (Ind. 2013).
189. *Id.* at 1213.
190. *Id.* at 1212.

confidentiality of mediation discussions.[191]

In *Stone v. Stone*,[192] the Indiana Court of Appeals held that the trial court's determination regarding the best interests of the child trumped the parents' mediation agreement,[193] which provided for joint physical and legal custody of the child.[194] However, the trial court had indicated that it would only approve the agreement if there were some explanation as to how the agreement was in the child's best interests.[195] Hearing the mother's evidence of the father's recent irrational behavior, the trial court awarded mother primary physical custody and sole legal custody.[196]

The court of appeals further decided in *Stone* that the father was entitled to a continuance to await the results of his mental health evaluation.[197] The court also required that, on remand, the trial court give full force and effect to the settlement agreement's provision on attorney fees.[198]

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191. *Id.*

192. 991 N.E.2d 992 (Ind. Ct. App.), *aff'd on reh'g*, 4 N.E.3d 666 (Ind. Ct. App. 2013).

193. *Id.* at 1001-02.

194. *Id.* at 995.

195. *Id.* at 996.

196. *Id*. at 997.

197. *Id.* at 1003.

198. *Id*. at 1004.