

## IX. Domestic Relations

*William Fox\**

### A. Marriage

#### 1. *The Right to Marry*

In *Indiana High School Athletic Association v. Raike*,<sup>1</sup> the Second District Court of Appeals held that rules prohibiting married students from participating in high school athletics were invalid, but refused to deem marriage a fundamental right sufficient to trigger strict judicial scrutiny under the equal protection clause of the fourteenth amendment.<sup>2</sup> The court examined virtually all of the modern United States Supreme Court cases which discussed marriage in the context of either the equal protection clause or the due process clause of the fourteenth amendment and concluded:

[T]here is no conclusive United States Supreme Court holding that the right to marry is a fundamental right. Nor is there any such holding by our Supreme Court . . . . Our reading of recent United States Supreme Court cases indicates a shrinking rather than an expansion of the concept of "suspect" classifications and fundamental rights.<sup>3</sup>

Since the court continued on to strike down the nonparticipation rules as violative of the equal protection clause on the basis of both "intermediate" and "low tier" scrutiny, the court's discussion of the fundamental nature of the right to marry is dicta. Nonetheless, it is interesting dicta because it appears to discuss the critical Supreme Court decision, *Loving v. Virginia*,<sup>4</sup> in light of an incomplete quotation from that decision which seriously weakens an extremely strong statement by the United States Supreme Court. Although *Loving* dealt with marriage in the context of the due process clause of the fourteenth amendment, the court of appeals used the decision in an effort to decide whether

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<sup>1</sup>329 N.E.2d 66 (Ind. Ct. App. 1975).

<sup>2</sup>See pp. 99-101 *supra* for additional discussion of the constitutional aspects of this case.

<sup>3</sup>329 N.E.2d at 75.

<sup>4</sup>388 U.S. 1 (1967).

marriage was a fundamental right sufficient to elicit strict judicial scrutiny, here in relation to the equal protection clause.

*Loving*, a 1967 decision, invalidated a series of Virginia statutes forbidding white persons to intermarry with nonwhites.<sup>5</sup> The United States Supreme Court held the statutes invalid on two grounds. The Court found them violative of equal protection, the racial classification requiring the statutes be viewed with strict scrutiny, and due process. It is the due process discussion in this alternative holding in *Loving* which is crucial to an understanding of *Raike*. In a unanimous opinion, Chief Justice Warren, writing for the Court, discussed marriage as follows:

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival . . . . To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes . . . is surely to deprive all the State's citizens of liberty without due process of law.<sup>6</sup>

The Indiana court of appeals characterized this language, as well as other language from analogous Supreme Court opinions,<sup>7</sup> as "beguiling language . . . [which] represents the opinion of individual justices and not a holding of the United States Supreme Court."<sup>8</sup> This is hardly a proper description of *Loving*, even if it fairly characterizes some of the comments in dicta from other Supreme Court opinions. *Loving* was a unanimous decision, and the Court plainly framed the decision in alternative holdings—the miscegenation statutes fell on both equal protection and due process grounds. Although the due process language in *Loving* concerning marriage is weak with respect to the equal protection discussion concerning racial discrimination, it nevertheless was not merely

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<sup>5</sup>*E.g.*, VA. CODE ANN. § 20-54 (1960) (the main statutory provision making interracial marriages illegal). This section, and others dealt with in *Loving*, 388 U.S. at 4-7, were later repealed by the Virginia legislature. Law of April 2, 1968, ch. 318, § 2, [1968] Va. Acts 430, *repealing* VA. CODE ANN. §§ 20-50 to -60 (1960).

<sup>6</sup>388 U.S. at 12 (citations omitted).

<sup>7</sup>*See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (the abortion decision, which turned on the due process rights of pregnant women and not on the right to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (a case decided before *Loving*, which involved the right of privacy within marriage and not the right to marry).

<sup>8</sup>329 N.E.2d at 75.

the "opinion of individual justices." Moreover, the court of appeals, in dealing with the *Loving* language, too quickly disposed of the powerful juxtaposition of the words "right" and "fundamental" in the statements: "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival," coupled with the phrase in the next sentence which denominates marriage a "fundamental freedom."

It is true, of course, that the Supreme Court has never placed the word "fundamental" immediately before the word "right" in any holding dealing with marriage. Furthermore, few will deny that the framing of the *Loving* decision as a two-part holding, with the due process discussion as the shorter, secondary statement, inevitably weakens the impact of the due process portion of the opinion—the portion which dealt with marriage. The fact that *Loving* involved a racial classification that had long since lost its attractiveness for most groups also tends to overwhelm the due process discussion. Indeed, a number of courts have read *Loving* as involving only a racial discrimination issue, thus effectively reading out of the opinion the strong language of the due process holding.<sup>9</sup>

It is not the purpose of this section to argue that the court of appeals was required to deem marriage a fundamental right. Undoubtedly the unequivocal holding of marriage as a fundamental right would trigger some singular problems. For example, it would be difficult to argue that statutory licensing and solemnization requirements,<sup>10</sup> which fulfill essentially a recordkeeping function, rise to the level of a "compelling state interest." In addition, the assertion that marriage is a fundamental right has been used to support an argument that strict scrutiny prohibits a state from refusing a marriage license to same-sex couples.<sup>11</sup> Nevertheless, Chief Justice Warren's due process discussion in *Loving* contains language much stronger than the court of appeals appears willing to admit. The *Raike* opinion would have been much stronger had *Loving* been squarely faced and adequately dealt with.

## 2. Statutory Age Requirements

In July, 1974, a 15-year-old girl and an 18-year-old man, both residents of Blackford County, petitioned a Blackford County

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<sup>9</sup>See, e.g., *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971); *In re Goalen*, 30 U.2d 27, 512 P.2d 1028 (1973), *cert. denied*, 414 U.S. 1148 (1974). *But see* *O'Neill v. Dent*, 364 F. Supp. 565 (E.D.N.Y. 1973) (strict scrutiny applied to a merchant marine academy cadet marriage prohibition).

<sup>10</sup>See, e.g., IND. CODE §§ 31-1-1-3, -4-1 (Burns 1973).

<sup>11</sup>*Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971).

judge for waiver of the statutory minimum age requirement for marriage. When the judge denied the application, the couple renewed the application in adjoining Grant County. A Grant County superior court judge approved the application and issued an order directing the Blackford County circuit court clerk to issue the marriage license. A show cause order was entered by the Grant County court after the Blackford County clerk refused to issue the license, and the clerk then petitioned the Indiana Supreme Court for an original writ of prohibition. In *State ex rel. Leffingwell v. Superior Court No. 2*,<sup>12</sup> Chief Justice Givan, writing for a unanimous court, made the writ permanent and ordered the Grant County Superior Court to dismiss the contempt charge against the clerk of Blackford County, holding that the Grant County court had no jurisdiction to approve the application.

The two applicable statutes, Indiana Code sections 31-1-1-1<sup>13</sup> (section 1) and 31-1-1-4<sup>14</sup> (section 4) are somewhat confusing. Section 1 permits men and women to marry at the age of 17 with parental consent; however, if the woman is at least 15 years old and pregnant, "a circuit, superior or juvenile court of the county of residence of either applicant"<sup>15</sup> may authorize the issuance of the license.<sup>16</sup> Section 4 applies only to persons between 17 and 18 years of age and requires parental consent to the marriage unless consent is waived by the judge of a circuit or superior court "of the county in which either or both of the parties reside, or of a county immediately adjoining such county."<sup>17</sup> The Grant County Superior Court had expressly referred to section 4 in ordering the Blackford County clerk to issue the marriage license.

The Indiana Supreme Court held that the section 4 disposition by the Grant County court was erroneous because those jurisdictional provisions apply only to persons between 17 and 18 years old who seek waiver of parental consent.<sup>18</sup> However, as

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<sup>12</sup>321 N.E.2d 568 (Ind. 1974).

<sup>13</sup>IND. CODE § 31-1-1-1 (Burns Supp. 1975).

<sup>14</sup>*Id.* § 31-1-1-4.

<sup>15</sup>*Id.* § 31-1-1-1(b).

<sup>16</sup>The issuance is authorized if "the putative father and the pregnant female indicate to the judge that they decide to marry; and . . . the persons required in section four of this chapter give consent to the marriage of underage applicants." *Id.* §§ 31-1-1-1(b)(1)-(2) (citations omitted).

<sup>17</sup>*Id.* § 31-1-1-4(b).

<sup>18</sup>321 N.E.2d at 570-71. The court's mistake is understandable. IND. CODE § 31-1-1-4(a) (Burns Supp. 1975) begins: "In the event an applicant for a license to marry is under eighteen [18] years of age . . ." Nowhere is there a clear limitation to the 17 to 18-year-old category. Subsection 4(b), which deals with application to the court for consent dispensation, begins: "Parties intending to marry who require parental or guardian's consent in order to

was the case here, "if the female is under seventeen, but is at least fifteen years of age, the application must be made in the county of the residence of either party and it must be established that the female is pregnant before the license will issue."<sup>19</sup> The parties were therefore actually applying to the court under section 1.<sup>20</sup>

The portion of the trial court order which stated that the girl was a resident of Grant County because she was living with her grandmother in Grant County was also set aside since the girl remained in the legal custody of her mother, a Blackford County resident, and an unemancipated child takes his residence from his parents.<sup>21</sup> However, the supreme court went on hold that the license could not have issued in any event under section 1 because the girl was not pregnant at the time of the application, even though she had already given birth to a child apparently fathered by the man she presently sought to marry.<sup>22</sup> In reading the statutory language of section 1 literally, the court reiterated the proposition that the legislature has "exclusive" power "to establish public policy as to who may marry . . . ."<sup>23</sup>

The *Leffingwell* rationale is difficult to dispute. The court wisely refused to substitute its judgment for that of the Indiana General Assembly in an area that has traditionally been a legislative province.<sup>24</sup> There is nothing wrong with forcing the legislature to live with statutory language of its own making; however, affected parties must deal with a lack of reasoned consistency between the statutes. There seems to be little logic in the two separate jurisdictional provisions which allow 17-year-olds to shop for a sympathetic judge in either their own county or in an

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obtain a license to marry . . . ." In order to ascertain who these parties requiring consent actually are, one presumably must return to section 31-1-1-1(a), which provides: "A male who has reached his seventeenth [17th] birthday may marry a female who has reached her seventeenth [17th] birthday, subject to the parental consent . . . ."

<sup>19</sup>321 N.E.2d at 571. The court's reasoning presumably is based on IND. Code § 31-1-1-1(b) (Burns Supp. 1975) which provides:

If proof is submitted to a judge of a circuit, superior or juvenile court of the county of residence of either applicant establishing the fact that the female is pregnant, the judge may authorize the clerk of the circuit court to issue a marriage license to the pregnant female and the putative father provided the female is at least fifteen [15] years of age . . . .

<sup>20</sup>321 N.E.2d at 571.

<sup>21</sup>*Id.*, citing 11 IND. L. ENCYC. *Domicile* § 3 (1958).

<sup>22</sup>The court cited BLACK'S LAW DICTIONARY 1342 (4th ed. 1951) for the definition of "pregnant" to exclude "a mother with a child already born." 321 N.E.2d at 571.

<sup>23</sup>321 N.E.2d at 571.

<sup>24</sup>*See, e.g.,* Maynard v. Hill, 125 U.S. 190 (1888).

adjoining jurisdiction while restricting the 15-year to 17-year age group to judges only in the county of residence.

If part of the legislative purpose underlying section 1, which permits pregnant females to marry at the age of 15, is to promote legitimacy and to help ensure that children are raised in a legally established nuclear family, there is little sense in giving such assistance to pregnant females but denying the alternative of marriage to women who, having already given birth, seek to marry the putative father.<sup>25</sup> Since pregnancy is a condition precedent to triggering the provisions of section 1, a girl in a *Leffingwell*-like situation appears to have only two choices: she may become pregnant a second time by the first child's father and then apply for permission to marry sometime during the pregnancy or she may wait nearly two years until she is 17 years old and apply for permission to marry under section 4. Neither is an attractive choice, but under the statute as presently worded and as construed in *Leffingwell*, there seems to be no alternative. The statutes should be corrected: First, to eliminate the inconsistent jurisdictional provisions and, secondly, to provide that both pregnant 15-year-olds and 15-year-olds who have already borne a child may obtain court permission to marry the putative father.

### 3. Married Woman's Name

Elizabeth Hauptly filed a petition under the first section of the Indiana name-change statute<sup>26</sup> asking court permission to resume the use of her maiden name, Elizabeth Howard. At the hearing she testified that her married surname detracted from her own identity. Other testimony revealed that her husband concurred in the petition. The trial court denied the petition, and the court of appeals affirmed. On a motion to transfer, the Indiana Supreme Court reversed, in *Petition of Hauptly*,<sup>27</sup> holding that a trial court has no discretion to deny a name-change petition, irrespective of reasons assigned, so long as the court is assured that the change is not sought for the purpose of fraud or concealment of criminal activity. A name-change petitioner need show

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<sup>25</sup>Under the Indiana Probate Code, the subsequent marriage of the natural mother and father legitimates the child for the purpose of intestate succession by, from, and through the father, if there is also an acknowledgment by the father. IND. CODE § 29-1-2-7(b)(2) (Burns 1972). The same applies to children in the testate situation. *Id.* § 29-1-6-1(e).

<sup>26</sup>IND. CODE § 34-4-6-1 (Burns 1973). This section provides: "The circuit courts in the several counties of this state may change the names of natural persons on application by petition."

<sup>27</sup>312 N.E.2d 857 (Ind. 1974).

no "particular reason other than his personal desire for change of name;"<sup>28</sup> therefore, the trial court's refusal to grant the petition after a determination that no fraudulent intent was involved constituted an abuse of discretion.<sup>29</sup>

The court continued on to point out in dictum that there is no requirement that a person proceed under the name-change statute. Instead, a person may simply adopt another name, subject to the fraud exception, because "[t]he statute merely provides for an orderly record of the change of name in order to avoid future confusion."<sup>30</sup> The court lent no credence to the assertion by the state that this name change would be detrimental to either Mrs. Hauptly's husband or her child. In dissent, however, Justice Prentice took a much stricter view of the statutory language, emphasizing the discretionary nature of the word "may" in the first section of chapter 6 on change of name<sup>31</sup> and pointing out that the fourth section permits the trial court to frame a decree which "to such court shall seem just and reasonable."<sup>32</sup> He further contended that wholly permissive name changes might seriously disrupt society's ability to keep track of people,<sup>33</sup> and that the burden of demonstrating reasonableness under the name-change statute should fall on the petitioner.<sup>34</sup>

There are only two provisions in the Indiana Code providing for change of name. One is the statute at issue in *Hauptly*. The other is a provision in the Dissolution of Marriage Act, which provision appears to be much less discretionary than the name-change statute: "If the woman requests restoration of her maiden or previous married name, the court *shall* grant such name-change upon entering the decree of dissolution."<sup>35</sup> As to any common law requirement that a married woman take her husband's name, there is a split among the various American jurisdictions.<sup>36</sup> The Indiana Supreme Court in *Hauptly* found such a common law tradi-

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<sup>28</sup>*Id.* at 859.

<sup>29</sup>*Id.* at 860.

<sup>30</sup>*Id.* at 859.

<sup>31</sup>IND. CODE § 34-4-6-1 (Burns 1973). See note 26 *supra* for the statutory language.

<sup>32</sup>IND. CODE § 34-4-6-4 (Burns 1973).

<sup>33</sup>312 N.E.2d at 863 (Prentice, J., dissenting).

<sup>34</sup>*Id.* at 862.

<sup>35</sup>IND. CODE § 31-1-11.5-18 (Burns Supp. 1975) (emphasis added). This statute also requires the following: "Any woman desiring such name change shall set out the name she desires to be restored to her in her petition for dissolution as part of the relief sought."

<sup>36</sup>See, e.g., the discussion in *Stuart v. Board of Supervisors of Elections*, 266 Md. 440, 295 A.2d 223 (1972). Hawaii is apparently the only state with a statutory requirement that a woman adopt her husband's surname. HAWAII REV. STAT. § 574-1 (1968).

tion but felt it in no sense deprived the married woman of her right to a name change.<sup>37</sup>

In respect to the common law discussion, *Hauptly* is somewhat confusing. On the one hand, Justice Givan, writing for the court, agreed that "a woman has a common law right to do business in a name other than her married name;"<sup>38</sup> however, he spoke of "the common law requirement that she use the name of her husband . . . ."<sup>39</sup> The decision itself, under the statute, nevertheless appears quite sound and fully in keeping with the increased awareness of the separate and individual interests of married women apart from those of their husbands.

## B. Dissolution

### 1. Financial Awards

Although the new Indiana Dissolution of Marriage Act<sup>40</sup> has been in effect since September, 1973, the appellate courts only recently have been faced with appeals under the statute. Two cases during this survey period, *Cox v. Cox*<sup>41</sup> and *Temple v. Temple*,<sup>42</sup> involved the financial aspects of dissolution, and both appear to be rather restrictive readings of the Dissolution Act.

In *Cox*, the trial court awarded \$22,000 to the wife as her share of the marital property, plus \$2,000 in attorney's fees. On appeal the husband attacked the \$22,000 award as excessive and not supported by the evidence. The First District Court of Appeals, looking at the record which showed "an abundance of evidence" that the wife had made a significant contribution to the couple's financial well-being in the course of the marriage,<sup>43</sup> concluded that the award of \$22,000 did not constitute an abuse of the trial court's discretion.<sup>44</sup>

The actual outcome of the case is sound; the \$22,000 appears fair under the circumstances. However, the court of appeals had

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<sup>37</sup>312 N.E.2d at 860.

<sup>38</sup>*Id.* at 859.

<sup>39</sup>*Id.* at 860 (emphasis added).

<sup>40</sup>IND. CODE §§ 31-1-11.5-1 to -24 (Burns Supp. 1975) [hereinafter referred to as the Dissolution Act]. For a general discussion of the Dissolution Act see *Domestic Relations, 1973 Survey of Indiana Law*, 7 IND. L. REV. 153, 158-63 (1973) [hereinafter cited as *1973 Survey of Indiana Law*].

<sup>41</sup>322 N.E.2d 395 (Ind. Ct. App. 1975).

<sup>42</sup>328 N.E.2d 227 (Ind. Ct. App. 1975).

<sup>43</sup>This contribution included physical labor, described by Judge Lowdermilk, in a statement that surely wins this year's male chauvinist award, in the following manner: "Sarah, while in Oregon, did the work of a man in repairing and remodeling buildings . . . helping to lay tile, digging ditches and building roads." 322 N.E.2d at 397.

<sup>44</sup>*Id.* at 398.



an opportunity to discuss this case in relation to the Dissolution Act, but did not do so. In fact, the court did not even cite the relevant sections of the Dissolution Act even though the Act was applicable<sup>45</sup> and contained a specific provision governing property settlement upon dissolution.<sup>46</sup> Instead, the court chose to cite a fifteen-year-old Indiana appellate court opinion, *Bahre v. Bahre*,<sup>47</sup> for the criteria to be used in framing award decrees—criteria different from those under the Dissolution Act.

As a threshold matter, the court persistently referred to the award made in this case as "alimony." That was incorrect. While the concept of alimony may once have existed in this state as a description of certain financial aspects of divorce decrees,<sup>48</sup> it is not used in the Dissolution Act. The proper term to describe the award at issue in the *Cox* case is "property settlement" or "property disposition."<sup>49</sup>

The criteria for the disposition of property are set out in section 11 of the Dissolution Act. These factors appear to be mandatory considerations for the trial court: "In determining what is just and reasonable the court *shall* consider the following factors . . . ."<sup>50</sup> The new statutory criteria,<sup>51</sup> which substantially

<sup>45</sup>The new Act clearly applied. The dissolution petition was filed on February 1, 1974, five months after the effective date of the Act, September 1, 1973.

<sup>46</sup>IND. CODE § 31-1-11.5-11 (Burns Supp. 1975).

<sup>47</sup>133 Ind. App. 567, 181 N.E.2d 639 (1962).

<sup>48</sup>The term itself was unclear under early case law and remained confusing. See generally Note, *Indiana's Alimony Confusion*, 45 IND. L.J. 595 (1970). See also 1973 *Survey of Indiana Law* 160 & n.41.

<sup>49</sup>IND. CODE § 31-1-11.5-11 (Burns Supp. 1975). Labels can be important. See Zuckman & Fox, *The Ferment in Divorce Legislation*, 12 J. FAMILY L. 515, 560 (1973).

<sup>50</sup>IND. CODE § 31-1-11.5-11 (Burns Supp. 1975) (emphasis added).

<sup>51</sup>Section 31-1-11.5-11 provides that the following criteria be considered in a property disposition:

- (a) The contribution of each spouse to the acquisition of the property, including the contribution of a spouse as homemaker;
- (b) the extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift;
- (c) the economic circumstances of the 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 therein for such periods as the court may deem just to the spouse having custody of any children;
- (d) the conduct of the parties during the marriage as related to the disposition or dissipation of their property;
- (e) the earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties.

Since this section uses the mandatory term "shall," it is arguable that the trial record must expressly reflect court consideration of these factors. Thus,

differ from those announced in *Bahre*,<sup>52</sup> therefore should have been applied. It is difficult to understand how the court determined that language in an intermediate appellate court opinion, decided under a repealed statute,<sup>53</sup> would control in the face of different language in a new statute which is clearly intended to be a full-blown revision of the earlier law.<sup>54</sup>

Furthermore, there is no indication in the *Cox* opinion that the trial court applied the correct technique for examining the extent of the couple's disposable property prior to framing the ultimate disposition. The Dissolution Act adopts the "hotchpot" approach<sup>55</sup> for accumulating the couple's property before applying the statutory criteria to dispose of it. The statutory "hotchpot" scheme requires the trial court to lump all property together, "whether owned by either spouse prior to the marriage, acquired by either spouse in his or her own right after the marriage and prior to final separation . . . or acquired by their joint efforts . . . ."<sup>56</sup> Concededly, the trial court in *Cox* may have accomplished the same result sub silentio. In approving the trial court's disposition of the property, the appellate court referred to the husband's total net worth and also discussed the wife's separate financial holdings; nevertheless, that language lacked the persuasiveness of a specific finding that the "hotchpot" approach was used.

The *Cox* court also addressed the award of attorney's fees in a dissolution action, holding that a fee award of \$2,000 was not an abuse of discretion even though there had been no evidence presented on the record regarding fees.<sup>57</sup> Again, however, the

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the enumerated criteria would be more than mere tests for appellate review of the propriety of the award, the purpose for which the *Cox* court apparently used the *Bahre* criteria.

<sup>52</sup>Under *Bahre* the following criteria were to be considered in a property disposition:

- (1) The existing property rights of the parties;
- (2) the amount of property owned and held by the husband and the source from which it came;
- (3) the financial condition and income of the parties and the ability of the husband to earn money;
- (4) whether or not the wife by her industry and economy has contributed to the accumulation of the husband's property;
- (5) the separate estate of the wife . . . .

133 Ind. App. at 571, 181 N.E.2d at 641 (citations omitted).

<sup>53</sup>Ch. 43, § 20, [1873] Ind. Acts 107 (repealed 1973).

<sup>54</sup>*See, e.g.*, IND. CODE § 31-1-11.5-1(a) (Burns Supp. 1975), which states: "This chapter shall be construed and applied to promote its underlying purposes and policies . . . [which include] (3) to provide for the disposition of property . . . ."

<sup>55</sup>*Id.* § 31-1-11.5-11. See the discussion of this approach in the UNIFORM MARRIAGE AND DIVORCE ACT § 307 (as amended 1973).

<sup>56</sup>IND. CODE § 31-1-11.5-11 (Burns Supp. 1975).

<sup>57</sup>322 N.E.2d at 398. The court relied on prior law which provided that a trial court could take judicial notice of what reasonable attorney's fees

court neglected to cite the Dissolution Act, which contains an express provision for fees in a "reasonable amount" and permits an attorney to enforce the fee portion of the order in his own name.<sup>58</sup>

In the only other opinion during the survey period which directly involved the Dissolution Act, *Temple v. Temple*,<sup>59</sup> the First District Court of Appeals affirmed a decree of dissolution in which the trial court refused to order spousal maintenance for a wife who suffered from grand mal epilepsy. The wife based her claim for maintenance largely on uncontroverted testimony from a physician that the physical effects of the medication, which she had to take to control her epilepsy, made her unemployable.<sup>60</sup> The husband testified that the wife did an adequate job running the household and that she "would be better off if she worked."<sup>61</sup>

The statute controlling awards of spousal maintenance forbids awards of maintenance "except that when the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of such incapacitated spouse to support himself or herself is materially affected, the court *may* make provision for the maintenance of said spouse . . . ."<sup>62</sup> This section is phrased in discretionary terms as to the award itself, but it first requires a specific finding of material impairment of earning capacity before the maintenance award may be considered. Even where there is a finding of material impairment, "a maintenance award is not mandatory,"<sup>63</sup> but rather, may be decreed in the proper discretion of the trial court.

In *Temple*, the appellate court found that the denial of maintenance involved no abuse of discretion, implying that the trial court had made no clear error in determining that the two-step statutory criteria had not been satisfied by the wife. Quite obviously, the result may be explained as the trial court's refusing to believe the medical expert and the appellate court's acknowledging the trial

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would be. See *DeLong v. DeLong*, 315 N.E.2d 412 (Ind. 1974), discussed at pp. 222-23 *infra*, in which the Indiana Supreme Court held that an award of \$100 in a case involving modification of a support decree was not an abuse of discretion.

<sup>58</sup>IND. CODE § 31-1-11.5-16 (Burns Supp. 1975).

<sup>59</sup>328 N.E.2d 227 (Ind. Ct. App. 1975).

<sup>60</sup>*Id.* at 228.

<sup>61</sup>*Id.*

<sup>62</sup>IND. CODE § 31-1-11.5-9(c) (Burns Supp. 1975) (emphasis added). Following the common law tradition of first looking for court decisions construing a statute before grappling with the statute itself, the appellate court interpreted this statute only after concluding that: "Neither of the parties cited any authority under the [maintenance] statute and it now appears that none has been enunciated by this court." 328 N.E.2d at 229.

<sup>63</sup>328 N.E.2d at 230.

court's right to do so. The appellate court pointed out the traditional rule—not affected by the Dissolution Act—that an expert witness who gives uncontroverted testimony does not have to be believed.<sup>64</sup>

It is clear that the wife was taking maximum doses of anti-convulsives.<sup>65</sup> It is also implied by the court's recitation of the tasks she could do, and from her husband's testimony, that she had not worked outside the home recently.<sup>66</sup> The wife therefore may not have had marketable skills even if she were physically able to work. Additionally, the trial court apparently made no inquiry as to whether there had been a deterioration of prior skills which, coupled with her epilepsy, would be sufficient to warrant an award. In this vein, the Uniform Marriage and Divorce Act, in language not adopted in Indiana, speaks of "appropriate employment" rather than mere theoretical employability in any capacity.<sup>67</sup> Even if the wife in *Temple* were able to work as a housekeeper, it is far less certain on the record that she would be able to secure employment at a salary sufficient to keep the house, contribute to the support of the children, and feed herself. The trial court's decision thus seems less than sensitive to the problems of an epileptic housewife thrown onto the job market with two children to raise and rusty job skills.

There is, however, an additional basis on which the award of maintenance might properly have been refused. A basic premise of the Uniform Act's provisions regarding financial disposition states that the trial court should look first to the property disposition to help resolve the future financial needs of the spouses before it orders maintenance.<sup>68</sup> As the Act's commentary points out, the intention of the property disposition section and the maintenance section, not adopted verbatim in Indiana, "is to encourage the court to provide for the financial needs of the spouses by property disposition . . . . Only if the available property is insufficient for the purpose . . . may an award of maintenance be ordered."<sup>69</sup> In *Temple* the wife received custody of the children, \$50 per week child support, the residence (with encumbrances), a 1970 automobile (without encumbrances), and the household goods.<sup>70</sup> A court might conclude, again in the proper exercise of its discre-

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<sup>64</sup>*Id.* at 229, citing *Dudley Sports Co. v. Schmitt*, 151 Ind. App. 217, 279 N.E.2d 266 (1972).

<sup>65</sup>328 N.E.2d at 228.

<sup>66</sup>*Id.*

<sup>67</sup>UNIFORM MARRIAGE AND DIVORCE ACT § 308 [hereinafter referred to as the Uniform Act].

<sup>68</sup>*Id.*

<sup>69</sup>*Id.*, Commissioners' Note.

<sup>70</sup>328 N.E.2d at 228.

tion, that these arrangements were sufficient to give the wife financial stability without ordering maintenance. Maintenance is simply not a favored award, under either the Uniform Act or the Indiana Dissolution Act.

In contrast with *Temple*, the question of adequate financial support following divorce for a disabled spouse was addressed somewhat more sympathetically by the Second District Court of Appeals in *Zagajewski v. Zagajewski*.<sup>71</sup> In *Zagajewski*, a case which arose prior to the effective date of the Dissolution Act, the permanently disabled husband appealed from a trial court decision which gave virtually all the entireties property to his non-disabled wife and ordered him to pay \$850 for her attorney's fees and costs. The wife was ordered to pay the husband only \$1,626.55 when he conveyed their jointly owned real estate to her sole ownership.<sup>72</sup> The court of appeals reversed this decree on the basis of the trial court's abuse of discretion.<sup>73</sup> The appellate court was disturbed by the trial court's "failure to make a compensating provision for the permanently disabled husband which bears a reasonable relationship to the past contributions of the parties and to their prospective earning capacity."<sup>74</sup> The court continued on to point out that it was not sufficient to determine that the husband could live on his pensions since "the fact that he can survive on those benefits alone does not appear to justify taking his equity in the entireties property for the benefit of his able-bodied school teacher wife who can earn some three times that much for herself."<sup>75</sup>

## 2. Enforcement of Financial Awards by Contempt

Even in the face of court-ordered support payments, spouses charged with this duty often do not pay. The Uniform Reciprocal

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<sup>71</sup>314 N.E.2d 843 (Ind. Ct. App. 1974).

<sup>72</sup>*Id.*

<sup>73</sup>*Id.* at 846. As the court had pointed out earlier in its opinion:

The appellee-wife, at time of trial, is in good health (except for taking tranquilizers for her nerves), fifty-three years of age, is an employed school teacher who earned over ten thousand dollars in the year preceding trial. The appellant-husband, fifty-six years of age, is totally disabled (as to gainful employment), but is ambulatory, able to drive his automobile, and apparently able to care for himself. After the divorce he will draw two hundred sixty dollars per month in social security and veterans benefits, plus full medical and hospital expenses and \$98.00 monthly for the son's support.

*Id.* at 844.

<sup>74</sup>*Id.* at 846. The husband had contended that the wife's award had constituted 93 percent of their former property.

<sup>75</sup>*Id.*

Enforcement of Support Act<sup>76</sup> was designed to provide some assistance in this regard when spouses flee into other jurisdictions. Within single jurisdictions, however, the person to whom the payment is owed may usually invoke the regular machinery for the enforcement of judgments, often including the remedy of contempt.

In *State ex rel. Schutz v. Marion Superior Court*,<sup>77</sup> the Indiana Supreme Court held that the use of contempt to enforce payment of an "alimony judgment" ran afoul of the constitutional prohibition against imprisonment for debt. A separation agreement, which had been merged in the divorce decree, required the husband to make monthly payments, termed "alimony" in the agreement, of \$475 per month. Over a 6-month period, he paid nothing in three months and only \$75 in each of three other months. The wife petitioned for a contempt citation, and after a hearing, the superior court found the husband in contempt.<sup>78</sup> The husband then brought an original action for a writ of prohibition in the Indiana Supreme Court, which made the temporary writ permanent and reversed the trial court.

Article 1, section 22 of the Indiana Constitution provides, in part, that "there shall be no imprisonment for debt, except in the case of fraud." This provision is typical of those in many state constitutions, which, in other jurisdictions, have not always served as a barrier to the use of contempt for the enforcement of money judgments in domestic relations cases. For example, in 1973, the Idaho Supreme Court was faced with a situation strikingly similar to that in *Schutz* involving an ex-husband who had defaulted on payments under a merged settlement agreement.<sup>79</sup> The husband was held in contempt for failing to make his payments. He appealed, citing the Idaho Constitution's provision forbidding imprisonment for debt. The court permitted the use of the contempt power, however, and held that this clause applied "to matters basically contractual in nature. Problems of domestic relations involving alimony, support payments, property settlements, together with court orders in connection therewith, are state concerns and involve safeguarding the vital interests of the people."<sup>80</sup>

In *Schutz*, though, the court flatly stated that contempt has not been "a proper means of enforcing an alimony judgment,"<sup>81</sup> at least since a 1904 decision, *Marsh v. Marsh*.<sup>82</sup> The court used

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<sup>76</sup>For a discussion of the Act in Indiana see pp. 223-25 *infra*.

<sup>77</sup>307 N.E.2d 53 (Ind. 1974).

<sup>78</sup>*Id.* at 54.

<sup>79</sup>*Phillips v. District Court*, 95 Idaho 404, 509 P.2d 1325 (1973).

<sup>80</sup>*Id.* at 406, 509 P.2d at 1327; *accord*, *Harvey v. Harvey*, 153 Colo. 15, 384 P.2d 265 (1963); *Decker v. Decker*, 52 Wash. 2d 456, 326 P.2d 332 (1958).

<sup>81</sup>307 N.E.2d at 54.

<sup>82</sup>162 Ind. 210, 70 N.E. 154 (1904).

the remainder of the opinion to discuss a much later case, *State ex rel. Roberts v. Morgan Circuit Court*,<sup>83</sup> which contained language arguably eroding the *Marsh* holding. The court quickly pointed out that the discussion of enforcement of alimony judgments by contempt had been unnecessary to the *Roberts* decision, but nevertheless expressly overruled any portion of *Roberts* which might be construed to conflict with *Marsh*, since the use of contempt proceedings to enforce the payment of a money judgment would violate the Indiana Constitution.<sup>84</sup>

While *Schutz* squarely prohibits use of contempt to enforce alimony judgments, now property distributions under the Dissolution Act, the limits of *Schutz* are unclear.<sup>85</sup> For example, the case said nothing about support payments, either to children or spouses, not in the nature of property disposition. Neither did it speak to default on support duties by persons in undissolved families. It is possible, although unlikely, that *Schutz* may be narrowly limited only to financial payments arising out of merged settlement agreements and not extended to orders framed initially by a court. Regardless, the threat of contempt is sometimes the last possible leverage which may be used against a defaulting spouse; therefore, it may not be wholly wise to limit excessively its use through the *Schutz* holding.

### C. Custody of Children

#### 1. Change of Custody Between Natural Parents

##### a. Scope of Review of Modification Petitions

In *Marshall v. Reeves*,<sup>86</sup> a mother had been given custody of a child by a 1970 divorce decree, and the father had been awarded bi-weekly visitation rights. Two years later, with no notice to the husband or the court, the mother took the child and moved to

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<sup>83</sup>249 Ind. 649, 232 N.E.2d 871 (1968).

<sup>84</sup>307 N.E.2d at 55. The court in *Roberts* attempted to distinguish *Marsh* on the basis of a 1949 statutory amendment which allowed alimony to be considered a money judgment. Ch. 43, § 22, [1873] Ind. Acts 107 (repealed 1973). That provision was part of the old divorce law, which was still in effect when *Schutz* arose.

<sup>85</sup>The Dissolution of Marriage Act contains an express provision allowing the use of contempt procedures. IND. CODE § 31-1-11.5-17 (Burns Supp. 1975). This statute lumps together a discussion of child support and property disposition and provides that "terms of the decree may be enforced by all remedies available for enforcement of a judgment including but not limited to contempt . . ." *Id.* Presumably this provision now has no effect, at least with respect to property disposition, since *Schutz* was a decision resting on the Indiana Constitution rather than on the earlier statutory law.

<sup>86</sup>311 N.E.2d 807 (Ind. 1974).

Arizona, where she apparently remarried. The father then filed a petition for a change in custody, seeking to get custody himself. The wife defaulted, so the trial court granted the change in custody, ordered the child returned to the court's jurisdiction, and held the wife in contempt on three grounds: (1) Removal of the child without court permission, (2) refusal to allow the father his visitation rights, and (3) failure to appear.<sup>87</sup> The Second District Court of Appeals had reversed the trial court and remanded the action for a new trial on grounds that the record did not support a finding of a "decisive" change in circumstances.<sup>88</sup> On transfer, however, the Indiana Supreme Court reinstated the trial court decision, adopting in part the dissent in the court of appeals, written by Presiding Judge Buchanan.<sup>89</sup>

Custody cases are difficult and sometimes ugly disputes, often involving the use of children as pawns in the underlying disagreements between the two parents. The *best interest test* was initially formulated to circumvent the traditional idea that children were somehow chattels belonging to one or the other of the parents and to force the trial court to focus on the child, not on the parents.<sup>90</sup> The Indiana Supreme Court has long recognized this principle, pointing out in 1964 that the custody decision "cannot be used as a means of punishing the parents. It is the children's welfare—not the parents'—that must control the actions of the [trial] courts."<sup>91</sup> Although the best interest test controls during the initial custody dispute, modification of the custody decree requires something more—a showing of a *decisive change in conditions* which demands, in the child's best interest, a change in the original custody decree.<sup>92</sup> Thus, on a modification petition, the

<sup>87</sup>*Id.* at 809.

<sup>88</sup>Marshall v. Reeves, 304 N.E.2d 879 (Ind. Ct. App. 1973).

<sup>89</sup>311 N.E.2d at 809. The supreme court's opinion principally consisted of a quotation of part of Presiding Judge Buchanan's dissent in the court of appeals.

<sup>90</sup>The "best interest test" has been traced to a 1925 opinion written by Judge Cardozo:

[The trial court] does not proceed upon the theory that the petitioner, whether father or mother, has cause of action against the other or indeed against anyone. He acts as *parens patriae* to do what is best for the interest of the child . . . . He is not adjudicating a controversy between adversary parties, to compose private differences . . . . Equity does not concern itself with such disputes in their relation to the disputants. Its concern is for the child.

Finlay v. Finlay, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925).

<sup>91</sup>311 N.E.2d at 810, quoting from Wible v. Wible, 245 Ind. 235, 237, 196 N.E.2d 571, 572 (1964).

<sup>92</sup>311 N.E.2d at 811, quoting from 304 N.E.2d at 888 (Buchanan, P.J., dissenting), which relied on a line of Indiana decisions including Wible v. Wible, 245 Ind. 235, 196 N.E.2d 571 (1964).



trial court must find a decisive change in conditions and then determine that, in the child's best interest, the change in circumstances warrants a modification of the existing decree.<sup>93</sup>

These rules, of course, govern the trial court in its decision and not the appellate court in reviewing the trial court's decision. In *Marshall*, the supreme court decided that the majority of the Second District Court of Appeals had applied the wrong standard of appellate review of the trial court's modification order. Quoting from Judge Buchanan's dissent, the court pointed out that the decision to modify is within the trial court's discretion, and, on appeal, the only determination reserved to the appellate court is whether the trial court has abused its discretion.<sup>94</sup> Here, the supreme court, again by agreeing with the dissent below, felt the court of appeals used the change in conditions test to weigh the evidence and substitute its own judgment on the facts.<sup>95</sup> Thus, *Marshall* appears to hold that an appellate court may reverse modification orders, as an abuse of discretion, only if the following conditions are present: (1) The petition contains no allegation of a decisive change in conditions, (2) evidence of such change is totally lacking in the record, and (3) the trial court has made no findings of fact which warrant the change in custody.<sup>96</sup>

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<sup>93</sup>The 1973 Indiana Dissolution Act contains no express provision for modification of custody, although it contains language which, by implication, appears to permit modification. IND. CODE § 31-1-11.5-17 (Burns Supp. 1975) (allowing modification of child support); *id.* § 31-1-11.5-22(d) (in investigations, speaking of evidence "prior to the last custody proceeding"); *id.* § 31-1-11.5-24 (expressly permitting modification of visitation rights). Moreover, several recent cases not controlled by the Dissolution Act permitted modification because the court retained jurisdiction after the initial decree. See, e.g., *Mueller v. Mueller*, 259 Ind. 366, 287 N.E.2d 886 (1972).

Indiana did not adopt the custody modification provisions of the Uniform Marriage and Divorce Act, on which much of the Indiana Dissolution Act is based. The Uniform Act is much more restrictive as to modification:

No motion to modify a custody decree may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral, or emotional health.

UNIFORM MARRIAGE AND DIVORCE ACT § 409(a). Indiana's lack of a similar provision seems clearly destined to promote a multiplicity of petitions to modify custody by litigious parents when the child desperately needs stability. See *Watson, The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55 (1969).

<sup>94</sup>311 N.E.2d at 811, quoting from 304 N.E.2d at 888 (Buchanan, P.J., dissenting).

<sup>95</sup>*Id.*

<sup>96</sup>*Id.* *Marshall* indirectly sets out these three factors. Judge Buchanan had stated in his dissent that the Indiana Supreme Court had reversed custody modifications when these deficiencies were present, and the supreme

b. *Necessary Change in Conditions for a Change in Custody*

Another factor which creates problems in custody situations is the removal of children by a parent from the jurisdiction in defiance of the custodial order—an act which troubles the courts. There are at least two legal conditions which lead to this problem: The American legal system contains precious little machinery to enforce judgments across jurisdictional lines, and the United States Supreme Court has refused to require that full faith and credit be given child custody decrees since such a holding would prohibit a court from analyzing the case solely in terms of the child's best interest.<sup>97</sup> It was under this state of the law that the mother in *Marshall* left Indiana in defiance of the father's visitation rights and failed to participate in the Indiana petition to modify. For these actions she was held in contempt by the trial court.

The Indiana Supreme Court condemned this sort of interstate flight in the strongest terms as "an unchecked license to flaunt and thwart the continuing jurisdiction of the court in child custody proceedings."<sup>98</sup> Additionally, to further clarify this problem area, the court held that the mere absence of a provision in a decree of custody as to any removal of the child from the jurisdiction does not, by silence, confer such a right on the custodial parent, at least when the noncustodial parent is given regular visitation rights.<sup>99</sup> The court stated that to hold otherwise would give the custodial party the ability to "make a unilateral determination" as to custody and visitation and usurp the power of the court to exercise continuing jurisdiction over the child's custody.<sup>100</sup> Nevertheless, the court refused to hold that such a violation, standing alone, would provide a sufficient basis for the trial court to find the requisite decisive change in conditions to modify custody.<sup>101</sup> This is only logical in that any rule appended to the best interest test would, in effect, modify that test and thus interfere

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court wrote an opinion which adopted and quoted that part of Judge Buchanan's dissent.

<sup>97</sup>*May v. Anderson*, 345 U.S. 528 (1953). In dissent, Justice Jackson predicted that *May* would result in a "rule of seize-and-run." *Id.* at 542 (Jackson, J., dissenting). Moreover, some commentators are now urging stability as a prime requirement for children of divorce. See generally J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

<sup>98</sup>311 N.E.2d at 813.

<sup>99</sup>*Id.* Removal can be made only with prior judicial sanction: by agreement of the parties approved by the court or after due hearing before the court. *Id.*

<sup>100</sup>*Id.*

<sup>101</sup>*Id.* This factor may be one, however, to be considered with others to indicate a change in circumstances concerning the best interest of the child. *Id.*

with the court's analysis of the controversy solely in terms of what is best for the child.

The First District Court of Appeals in *Leohr v. Leohr*<sup>102</sup> and the Third District Court of Appeals in *Ecker v. Ecker*<sup>103</sup> dealt with the question of what specific type of facts constitutes the requisite "definitive change in conditions" necessary to obtain a change in custody, but did not suggest any helpful general guidelines. In *Leohr*, the mother had been originally awarded custody; however, at the hearing on his petition for a change of custody to himself, the father was able to show rather bizarre conduct on the mother's part. He demonstrated that on a number of occasions the mother had displayed a violent temper in the presence of the child and at least once had driven an automobile recklessly with the child as a passenger. The trial court made specific findings that these acts presented a serious danger to the child and constituted the necessary change in conditions to order a change in custody.<sup>104</sup> The court of appeals quickly determined that its scope of review extended only to whether the trial court had abused its discretion and concluded that it had not.<sup>105</sup>

The *Ecker* facts were a bit different, but the appellate court merely affirmed the same principle involved in *Leohr*—the test on review is only "abuse of discretion" by the trial court. In *Ecker* also, the father had sought a change of custody away from the mother to himself. The record on hearing showed that the mother had engaged in illicit sexual activity which had a direct impact on the children since the children were often left unsupervised.<sup>106</sup> On one occasion, the mother "awakened her children at one o'clock A.M., on a sub-zero, snowy night and took them with her to search for her male friend."<sup>107</sup> The court of appeals examined this record and the trial court award of custody to the father, concluding there had been no abuse of discretion.<sup>108</sup>

## 2. *Disputes Between Parents and Third Persons*

Disputes over child custody often arise between a natural parent and some other person. Because courts are understandably reluctant to interfere between a natural parent and a child, the best interest test, usually applied in custody disputes between two natural parents, is modified in Indiana when the controversy in-

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<sup>102</sup>316 N.E.2d 400 (Ind. Ct. App. 1974).

<sup>103</sup>323 N.E.2d 683 (Ind. Ct. App. 1975).

<sup>104</sup>316 N.E.2d at 402.

<sup>105</sup>*Id.*

<sup>106</sup>323 N.E.2d at 684.

<sup>107</sup>*Id.*

<sup>108</sup>*Id.*

volves a natural parent and someone else. The court requires a showing of parental unfitness before custody may be given to a third party. In two recent decisions, two appellate districts took different approaches to this issue but apparently have not disturbed this parental unfitness prerequisite for awarding custody to a person who is not a natural parent.

In *Hendrickson v. Binkley*,<sup>109</sup> the First District Court of Appeals reversed a trial court decision giving custody of a child to the grandparents rather than to the natural father, who had also sought custody. Seven years prior to the present controversy, the natural mother and father had been divorced, with custody of the 3-year-old son being awarded to the mother. The wife had returned to her parents' home with the child, and the child had apparently resided with his maternal grandparents for about seven years until the father instituted the present habeas corpus proceeding to gain custody of the child. In the meantime, the natural mother had died and the natural father had married another woman with three children.<sup>110</sup>

The record showed that the father had a well-paying job and that his new wife was willing to have the son live with them; however, it also revealed that the child enjoyed a happy, stable existence with the grandparents. Following trial, the trial court entered judgment for the grandparents based expressly on the best interest of the child, although the grandparents' return to the writ of habeas corpus had alleged that the father was unfit.

In reversing this decree, Judge Lowdermilk, writing for the court, determined that there had not been the requisite showing of unfitness necessary to rebut the presumption that it is in the child's best interest to be in the custody of his natural parent.<sup>111</sup> From a synthesis of earlier cases, the court determined that this presumption may be rebutted only by a "clear and cogent" showing of one of three things: parental unfitness, "long acquiescence" by the natural parent in the existing custodial disposition, or "voluntary relinquishment."<sup>112</sup> The court also analogized to adoption

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<sup>109</sup>316 N.E.2d 376 (Ind. Ct. App. 1974).

<sup>110</sup>*Id.* at 377. The father had made two previous attempts to secure visitation rights but was refused although he had the duty to support the child stemming from the original divorce decree. After these denials, the father stopped making support payments. A number of earlier payments made to the court registry had never been picked up by the grandparents. *Id.* at 377-78.

<sup>111</sup>*Id.* at 381. The court had earlier pointed out the general rule that, on the death of the parent with custody under a divorce decree, the right to custody automatically passes to the surviving parent, unless the survivor is unsuitable. *Id.* at 378-79, citing *Gregory v. Superior Court*, 242 Ind. 42, 176 N.E.2d 126 (1961); *Combs v. Gilley*, 219 Ind. 139, 36 N.E.2d 776 (1941).

<sup>112</sup>316 N.E.2d at 380.

proceedings, which require a showing of parental abandonment or failure to support before a child may be adopted contrary to the wishes of his parents.<sup>113</sup> In justifying a test different from a mere "best interest test," the court recognized:

If the "best interest rule" was the only standard needed without anything else, to deprive the natural parent of custody of his own child, then what is to keep the government or third parties from passing judgment with little, if any, care for the rights of natural parents.<sup>114</sup>

In contrast, the Third District Court of Appeals in *Franks v. Franks*<sup>115</sup> refused to require the trial court to make an express finding of parental unfitness before granting an award of custody to a third party. The *Franks* custody dispute was also between the natural father and, ostensibly, the maternal grandparents. The dispute arose out of a divorce action between the natural mother and father, both of whom also sought custody. In an unusual decree, the trial court granted the divorce but refused custody to both natural parents, instead giving the child over to the maternal grandparents, with whom the natural mother lived. The trial court's reasoning was apparently based on the fact that the mother was mentally retarded and the father was sexually irresponsible; at one point during the marriage he had permitted another woman to live in their home and had been abusive to his wife.<sup>116</sup>

As in *Hendrickson*, the mother's cross-complaint for custody contained an allegation that the father was unfit, but the trial court did not make an express finding of parental unfitness before awarding custody to the grandparents. Unlike the *Hendrickson* court, however, the court in *Franks* refused to reverse solely for the lack of an explicit finding of unfitness,<sup>117</sup> emphasizing that custody matters are within the trial court's discretion and that the trial court will be reversed only for an abuse of discretion.<sup>118</sup>

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<sup>113</sup>*Id.* at 380-81, citing *In re Bryant's Adoption*, 134 Ind. App. 480, 189 N.E.2d 593 (1963).

<sup>114</sup>316 N.E.2d at 381.

<sup>115</sup>323 N.E.2d 678 (Ind. Ct. App. 1975).

<sup>116</sup>*Id.* at 679-80.

<sup>117</sup>In dealing with the absence of a specific finding of parental unfitness by the trial court, the appellate court contended that the trial court impliedly made a finding of the father's unfitness by finding on the mother's cross-complaint which alleged that the father was unfit. Also, the appellate court noted that the father had cited no cases requiring that the trial court make an explicit finding of unfitness. *Id.* at 679.

<sup>118</sup>*Id.* at 680-81. The natural father in *Franks* also cited the trial court's refusal to interview the child in chambers (both counsel had agreed to the interview) as reversible error. The appellate court held that an interview with

The appellate court found no such abuse of discretion in *Franks*.<sup>119</sup>

*Franks* and *Hendrickson* are initially difficult to harmonize. One distinction, though, is the factual difference. In *Hendrickson* the natural mother was dead; in *Franks* she was living, although retarded, and presumably would continue to care for her child<sup>120</sup> although legal custody was given to her parents. The *Franks* disposition might be regarded as an award made to the natural mother for practical purposes, with only legal custody going to the grandparents.<sup>121</sup> At any rate, the *Franks* decision does not have the aspects of a third party snatching a child away from a natural parent simply because the third party could provide more "advantages"—a concern which obviously troubled Judge Lowdermilk in *Hendrickson*.

Judge Lowdermilk's worry is a compelling one, raising as it does the bothersome question of when and to what extent a court may disrupt a natural parent's rights in his child. In virtually all the other situations in which a trial court may sever the rights of a natural parent and give over the child to someone else, including the state, some showing of unfitness—whether exemplified by abandonment, abuse, or neglect—is required.<sup>122</sup> It is difficult to believe that the legislature contemplated any different standard in custody disputes, although it is arguable that the new Dissolution Act does away with the parental unfitness test.<sup>123</sup>

The problem appears largely attributable to the Indiana Supreme Court's failure to clarify the standard. In this respect, it is instructive to note that both *Hendrickson* and *Franks* cited

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the child prior to a custody disposition is similarly within the trial court's discretion. *Id.* at 681.

<sup>119</sup>*Id.* at 681.

<sup>120</sup>*Id.* at 680.

<sup>121</sup>In her cross-complaint, the mother had requested custody be awarded to either her or her parents. The record reflected also a willingness on the part of the maternal grandparents to care for the mother and child together. *Id.*

<sup>122</sup>See, e.g., IND. CODE § 31-3-1-6(g) (1) (Burns Supp. 1975) (dispensation of consent of natural parents to adoption if the child is adjudged to have been abandoned); *id.* § 31-3-1-7 (termination of parental rights).

<sup>123</sup>The child custody provisions of the Dissolution Act specify that custody is to be decided "in accordance with the best interests of the child" with "no presumption favoring either parent." *Id.* § 31-1-11.5-21(a). The "wishes of the child's parent or parents" is only one of six factors to be considered by the trial court. *Id.* § 31-1-11.5-21(a) (2). Moreover, it cannot be said that this statute involves only disputes between two parents, because the immediately preceding section specifically provides that a custody petition may be brought by either parent "or by a person other than a parent." *Id.* § 31-1-11.5-20.

the same supreme court decision, *Duckworth v. Duckworth*.<sup>124</sup> *Duckworth*, however, did not clearly address itself to the point at issue here—whether parental unfitness must be expressly found before an award of custody can be made to a third party. Instead, the case seemed to be more concerned with the test for review on appeal. A later case, *Gilchrist v. Gilchrist*,<sup>125</sup> also cited by the *Franks* court, involved a dispute between the natural mother on the one hand and the new wife of the natural father on the other. The supreme court's discussion in *Gilchrist*, though, again centered around the scope of review.

The arguments on both sides of this particular controversy are compelling. Few would disagree that natural parents have identifiable rights in their children and should not lose them to third parties merely because the third party can make a stronger showing of ability to provide and care for the child. This consideration clearly underlies the requirement for showing abandonment or unfitness in the statutes providing for adoption and termination of parental rights.<sup>126</sup> On the other hand, if the trial court is to seek exclusively the disposition that would be in the child's best interest, then it ought to be able to find the best possible placement for the child irrespective of the fact that a potential custodian is not a natural parent. The supreme court could resolve the issue either by rejecting the *Hendrickson* rationale and permitting the court to decide between contesting parties on the same basis, irrespective of parental ties, or by clearly establishing unfitness as the test in controversies between natural parents and third parties and retaining the best interest test only between natural parents.

### 3. *The Use of Habeas Corpus in Custody Disputes*

The noncustodial parent quite often uses the petition of habeas corpus to begin a challenge to the custodial parent's right to custody of minor children. In *Ortega v. Ortega*<sup>127</sup> the use of the habeas corpus approach by the father produced an undesired result for him, however. He and the children's mother had been divorced in Venezuela, with the original Venezuelan custody decree giving the father custody during the school year and the mother custody during the summer. When the mother refused to return the children at the end of a summer period, the father

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<sup>124</sup>203 Ind. 276, 179 N.E.2d 773 (1932) (award to brother of child's natural father), cited in *Franks v. Franks*, 323 N.E.2d 678, 680 (Ind. Ct. App. 1975); *Hendrickson v. Binkley*, 316 N.E.2d 376, 380 (Ind. Ct. App. 1974).

<sup>125</sup>225 Ind. 367, 75 N.E.2d 417 (1947).

<sup>126</sup>IND. CODE §§ 31-3-1-6(g) (1), -7 (Burns Supp. 1975).

<sup>127</sup>315 N.E.2d 370 (Ind. Ct. App. 1974).

brought an Indiana habeas corpus action. At the habeas corpus hearing, the mother was permitted to give evidence of a change in conditions sufficient to modify the custody order, while the father insisted that the only issue properly cognizable at the habeas hearing was whether she had properly retained the children under the original decree. The trial court overruled his objection, however, and changed the award to give the mother schooltime custody with the children going with the father only for the summer.<sup>128</sup> The First District Court of Appeals affirmed and refused to restrict the scope of presentation by the parties in this sort of habeas corpus action. In declaring that Indiana law was other than the father had contended, the court pointed out: "[A] return as commanded by the writ of *habeas corpus* is effective to place the child in the custody of the court subject to its disposition with unlimited power as to custody, guided only by the child's welfare and best interest."<sup>129</sup>

In a similar case, *Ray v. Stanton*,<sup>130</sup> the Second District Court of Appeals decided that a superior court lacked jurisdiction to act on a habeas corpus petition brought by a mother to regain custody of her children from the county welfare department. The court held that the provision of the juvenile court statutes which give the juvenile court exclusive jurisdiction in neglect proceedings<sup>131</sup> deprived the superior court of jurisdiction to act on the parallel habeas corpus petition.<sup>132</sup>

#### 4. *Termination of Parental Rights in a Custody Dispute*

The limits of a trial court's powers in framing a custody decree are often ill-defined, primarily because appellate review of the trial court's decision is limited to the abuse of discretion test. In *Sanders v. Sanders*,<sup>133</sup> however, the Third District Court of Appeals did refuse to permit a trial court to terminate completely the parental rights of both parents in a custody dispute arising in a divorce action. Without discussing the specific facts which led to the decree, the appellate court focused on the trial court's order itself—that the children were to become wards of the state and either be placed in a foster home or be put up for adoption, the parents being denied visitation rights whatever the situation.<sup>134</sup>

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<sup>128</sup>*Id.*

<sup>129</sup>*Id.* at 371, quoting from *Scott v. Scott*, 227 Ind. 396, 405-06, 86 N.E.2d 533, 537 (1949).

<sup>130</sup>324 N.E.2d 161 (Ind. Ct. App. 1975).

<sup>131</sup>IND. CODE § 33-12-2-3 (Burns 1975).

<sup>132</sup>324 N.E.2d at 162.

<sup>133</sup>310 N.E.2d 905 (Ind. Ct. App. 1974).

<sup>134</sup>*Id.* at 906.



The court looked exclusively at the question of whether the trial court had jurisdiction to order permanent termination of parental rights and concluded that the former divorce statute<sup>135</sup> did not confer such power.

In so holding, the *Sanders* court looked at the other statutory provisions for termination of parental rights, including adoption,<sup>136</sup> termination of parental rights,<sup>137</sup> placement of a child of divorced parents in an orphan's home by the trial court under a series of now repealed statutes,<sup>138</sup> and disposition of a dependent or neglected child under statutes also presently repealed.<sup>139</sup> The court of appeals concluded that the requisite statutory formalities for each of these procedures had not been complied with; therefore, the trial court could not have based its decree on any of these provisions. Only by exceeding its jurisdiction could the trial court have based its permanent termination of parental rights on the divorce statutes then in force: While the primary focus of a custody dispute is on the child's interest, parental rights are "not cut off by a determination of custody adverse to the parent, and it [the custody award] may serve as a basis for a later award of custody to that parent when the circumstances surrounding the original award have changed."<sup>140</sup>

This decision appears correct. The legislature had provided for termination of parental rights only under the most extreme circumstances of abandonment, neglect, or abuse.<sup>141</sup> A custody dispute in a divorce action normally contemplates a choice between two parents, not a total severing of the parents' rights. Moreover,

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<sup>135</sup>The divorce was granted under the former statutes, ch. 43, §§ 6-12, 14-24, [1873] Ind. Acts 107 (repealed 1973). However, there appears to be nothing in the child custody provisions of the new Dissolution Act, IND. CODE § 31-1-11.5-21 (Burns Supp. 1975), which would change the *Sanders* result, although the new Act does give the court power to order continuing supervision of a specific case by various state agencies to insure that its custody orders are carried out. The court may do so if both parents agree to such supervision or if the court finds the possibility of physical or emotional danger to the child if such an arrangement is not made. *Id.* § 31-1-11.5-21(c).

<sup>136</sup>IND. CODE §§ 31-3-1-1 to -11 (Burns Supp. 1975). These sections require a specific adoption petition, which was not in evidence in the trial court record in *Sanders*.

<sup>137</sup>*Id.* § 31-3-1-7. This section also requires a specific petition, which was likewise not in the *Sanders* trial court record, before parental rights may be terminated.

<sup>138</sup>Ch. 24, §§ 1-3, [1903] Ind. Acts 39 (repealed 1973). These sections required such dispositions to be "specified and recited in the decree of the court." The trial court in *Sanders* made no such recitations.

<sup>139</sup>Ch. 41, §§ 1-4, [1907] Ind. Acts 39 (repealed 1974).

<sup>140</sup>310 N.E.2d at 907.

<sup>141</sup>See the grounds in IND. CODE §§ 31-3-1-1 to -11 (Burns Supp. 1975) and ch. 24, §§ 1-3, [1903] Ind. Acts 39 (repealed 1973).

as the *Sanders* court pointed out, a custody disposition leaves open the possibility of a different disposition later in time. None of the termination statutes allows for the opportunity for a change of the decree subsequent to the original determination. Thus, a complete termination of parental rights in a child is something quite different from the normal determination of the custody of a child when a marriage is dissolved.

#### D. Child Support

##### 1. College Expenses

In *DeLong v. DeLong*<sup>142</sup> the Second District Court of Appeals resolved a dispute between divorced parents over the extent of the father's duty to pay his daughters' college expenses. On the father's petition to modify the divorce decree, the trial court had ordered the father to pay a sum toward college expenses for his two daughters, subject to a reduction in the amount of support to the extent that scholarships received by the girls covered expenses. The trial court had further ordered that the father's support obligation would cease automatically when each child reached twenty-one. The mother appealed the order, arguing that the trial court's award was an abuse of discretion and contrary to the law and the evidence. She further argued that the decree was vague and uncertain because it was not explicit as to the effect of a daughter reaching age twenty-one in the middle of a semester, as to the possibility of partial scholarship funds, and as to the effect of a trimester program on the order.

The court of appeals affirmed the trial court's judgment, reiterating the principle that broad discretion is vested in the trial court and pointing out with respect to modification of support decrees that the support statute "permits the court, upon proper application, to make whatever adjustments are necessary for the welfare of the children . . . including the cost of post-high school education."<sup>143</sup> In this vein, the court went on to hold that a trial court may, in the exercise of its discretion, order a parent to provide college expenses for minor children, establish a reasonable amount for expenses, and exert continuing jurisdiction over the minor children and the parents so as to keep such expense amounts in conformity with changing circumstances.<sup>144</sup>

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<sup>142</sup>315 N.E.2d 412 (Ind. Ct. App. 1974). The petition to modify the divorce decree was filed in July, 1972; therefore, the case was decided on the basis of the now-repealed support statute in the former divorce law. Ch. 43, § 21, [1873] Ind. Acts 107 (repealed 1973).

<sup>143</sup>315 N.E.2d at 417 (citations omitted).

<sup>144</sup>*Id.* at 418.

The court also found no fatal lack of clarity with respect to the issues of a daughter reaching twenty-one in mid-semester, since the support for that term would already have been paid; the issue of a partial scholarship, since any partial scholarship funds would reduce but not cut off the father's duty to support; and the trimester problem, since the decree contemplated no summer support obligation.<sup>145</sup>

*DeLong* is an unexceptional case which is not only sound with respect to earlier precedent<sup>146</sup> but also fully compatible with the current Indiana child support provision under the new Dissolution Act. Since 1974, this section has allowed for educational expenses to a child's twenty-first birthday.<sup>147</sup> Therefore, no new development appears forthcoming from the revision of the support statutes under the Dissolution Act.

## 2. *Uniform Reciprocal Enforcement of Support Act*

The Uniform Reciprocal Enforcement of Support Act<sup>148</sup> provides a useful mechanism for the interstate enforcement of support decrees. The Act permits the use of another state's judicial system to enforce support obligations without forcing the stay-at-home spouse to travel to the other state. For example, the spouse or child to whom the duty of support is owed files a complaint in a court of his or her home state, the initiating state.<sup>149</sup> The complaint is examined only to ascertain whether a claim has been stated, and if a claim has been stated, the complaint is subsequently forwarded to the state in which the spouse who owes the support duty is located, the responding state.<sup>150</sup> The responding state court then may conduct a hearing on the complaint to determine whether a duty of support exists and fix the amount

<sup>145</sup>*Id.* at 420.

<sup>146</sup>*See, e.g.,* *Lipner v. Lipner*, 256 Ind. 151, 267 N.E.2d 393 (1971); *Dorman v. Dorman*, 251 Ind. 272, 241 N.E.2d 50 (1968).

<sup>147</sup>The new child support section provides in part: "(b) Such child support order may also include, where appropriate: (1) sums for the child's education in schools and at institutions of higher learning . . ." IND. CODE § 31-1-11.5-12(b) (1) (Burns Supp. 1975). The section continues:

(d) The duty to support a child under this chapter ceases when the child reaches his twenty-first birthday unless:

(1) the child is emancipated prior to his twenty-first [21st] birthday in which case the child support, except for educational needs, terminates at the time of emancipation; however, an order for educational needs may continue in effect until further order of the court . . . .

*Id.* § 31-1-11.5-12(d) (1).

<sup>148</sup>IND. CODE §§ 31-2-1-1 to -39 (Burns 1973) [hereinafter referred to as URESA].

<sup>149</sup>*Id.* § 31-2-1-10.

<sup>150</sup>*Id.* § 31-2-1-14.

of support and order payment once a support duty is determined.<sup>151</sup> Payment is usually made through the responding state's court registry.<sup>152</sup> Conflicts may arise, however, when a stay-at-home spouse seeks to use the URESA machinery while an earlier support order exists in the initiating state, since the responding state court is empowered by URESA to decide in the URESA hearing the question of the existence and amount of support owed.<sup>153</sup>

This latter problem was at the center of *Banton v. Mathers*.<sup>154</sup> The husband had been ordered to pay his former wife \$100 per week child support by the Indiana trial court which had also dissolved their marriage. After his move to Oklahoma, the wife, who remained in Indiana, filed a URESA complaint to enforce the husband's support duty. The Oklahoma court, as the responding court, apparently reduced the support order to \$200 per month. A number of years later, the wife sought a contempt citation in Indiana against the husband based on the original \$100 per week Indiana support order, and the husband counter-petitioned for modification of the original decree. While this latest Indiana action was pending, however, the husband asked for and received a modification of the Oklahoma order from \$200 to \$150 per month. When the Indiana proceeding finally was heard, the trial court adopted the second Oklahoma reduction, to \$150 per month, because the Indiana court decided that full faith and credit required adoption of the Oklahoma decree. The Third District Court of Appeals reversed, holding that "[f]ull faith and credit is not applicable to support orders under the Uniform Reciprocal Enforcement of Support Act," and that the Indiana decree "remained in full force until modified by the Indiana court."<sup>155</sup>

*Banton* serves to illustrate one of the singular problems in the area of child support: jurisdiction-shopping. The problem arises from the United States Supreme Court decision, *Sistare v. Sistare*,<sup>156</sup> in which the Court held that support decrees need not be given full faith and credit because such decrees are not the sort of "final order" to which full faith and credit applies.<sup>157</sup> The problem is complicated by the fact that a party like the wife in

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<sup>151</sup>*Id.* § 31-2-1-23.

<sup>152</sup>*Id.* § 31-2-1-26.

<sup>153</sup>*Id.* § 31-2-1-23.

<sup>154</sup>309 N.E.2d 167 (Ind. Ct. App. 1974). *Banton* involved child support, but URESA may properly be invoked for any type of support duty. The issue of whether a duty is owing is decided "under the laws of any state where the obligor was present during the period for which support is sought." IND. CODE § 31-2-1-7 (Burns 1973).

<sup>155</sup>309 N.E.2d at 168.

<sup>156</sup>218 U.S. 1 (1909).

<sup>157</sup>*Id.* at 17.

*Banton* cannot be deemed to have elected the remedy of URESA to the exclusion of any other remedy since URESA plainly states that its remedies "are in addition to and not in substitution for any other remedies."<sup>158</sup> In a less-mobile society, jurisdiction-shopping would not be a problem. In the United States today, however, the *Sistare* principle applied to child support, with the concomitant refusal of the United States Supreme Court to require that full faith and credit be applied in custody actions,<sup>159</sup> has led to the creation of a group of persons who spirit children across state lines and hop from state to state seeking more favorable disposition of custody and support orders.<sup>160</sup>

*Banton* presents an additional observation on the issue of what a spouse to whom support is owed may do. As the court of appeals pointed out in a textual footnote,<sup>161</sup> URESA was not necessarily the best choice for the wife to ensure that a foreign court would not tamper with the amount of the original Indiana decree. She might have gone into Oklahoma by way of enforcing the Indiana judgment; while this may not have controlled as to future payments, she should have been able to recover the arrearages. Alternatively, she could have used the URESA machinery simply to register the Indiana decree, without giving the Oklahoma courts virtually de novo powers over the support dispute.<sup>162</sup> Using the conventional URESA procedures as she did, however, it is difficult to accept any argument that the wife should not now be bound by the Oklahoma decree. The Oklahoma court, though, could have applied some consideration of comity to the initial Indiana support order, even in the URESA hearing.

### E. Child Neglect and Abuse

In *Howard v. State*<sup>163</sup> the Third District Court of Appeals reversed a conviction of cruelty and neglect of a child for lack of sufficient evidence. The accused, the stepfather of the deceased

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<sup>158</sup>See, e.g., IND. CODE § 31-2-1-3 (Burns 1973). The *Banton* court cited a Mississippi decision, *Howard v. Howard*, 191 So. 2d 528 (Miss. 1966), and an Idaho decision, *Despain v. Despain*, 78 Idaho 185, 300 P.2d 500 (1956), as support for the proposition that URESA is a supplementary statute. 309 N.E.2d at 172-73.

<sup>159</sup>*May v. Anderson*, 345 U.S. 528 (1953).

<sup>160</sup>See the excellent discussion of the custody problem in *Ferreira v. Ferreira*, 9 Cal. 3d 824, 512 P.2d 304, 109 Cal. Rptr. 80 (1973).

<sup>161</sup>309 N.E.2d at 170-71 n.2.

<sup>162</sup>See, e.g., the registration provisions in Indiana's URESA, IND. CODE §§ 31-2-1-32 to -37 (Burns 1973).

<sup>163</sup>319 N.E.2d 849 (Ind. Ct. App. 1974). See Note, *Neglected Children and Their Parents in Indiana*, 7 IND. L. REV. 1048 (1974), for a general discussion of the subject of neglect in Indiana.

child, had had the 2-year-old child in his custody for slightly more than three hours. Around 3 a.m., the stepfather brought the child to a hospital emergency room where an examining physician observed "multiple bruises covering his entire face, his upper arms, his lower arms, his anterior chest, his back, his hips, and his legs, and his lower legs, even including the tops of his feet."<sup>164</sup> The child died the same day he entered the hospital, the cause of death being given as either a "skull fracture or abdominal hemorrhage."<sup>165</sup>

Testimony as to the child's condition was in conflict. The child's mother testified that the child had various bruises, but it is difficult to believe that her rather innocuous description of the child's physical state, "[H]e had just other bruises on him,"<sup>166</sup> is consistent with the physician's testimony. Moreover, the physician who conducted the autopsy testified that the injuries were due to force applied with a blunt object.<sup>167</sup> The stepfather gave several conflicting versions of the manner in which the child received his injuries.

While the *Howard* opinion does not raise the point, some jurisdictions permit an inference of child abuse to be drawn from the injuries themselves coupled with a lack of a satisfactory explanation.<sup>168</sup> There seems to have been an inference of abuse drawn in *Howard*, but the evidence did not appear to point conclusively to the stepfather as the perpetrator. For example, there was no evidence whatsoever that the stepfather had ever struck the child, and there was one other child in the house, the 5-year-old brother of the deceased child. Additionally, the injuries occurred from 12 to 24 hours before the child was taken to the hospital, during which time the child "was under the control of several persons other than [the stepfather]."<sup>169</sup> As the court went on to point out, "[a]t most, the evidence shows that [the stepfather], among others, had an opportunity to inflict the in-

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<sup>164</sup>319 N.E.2d at 850. Severe head injuries were also diagnosed.

<sup>165</sup>*Id.*

<sup>166</sup>*Id.*

<sup>167</sup>*Id.* at 851.

<sup>168</sup>*See, e.g., In re Vulon Children*, 56 Misc. 2d 19, 288 N.Y.S.2d 203 (Family Ct., Bronx County 1968).

When there is insufficient evidence as to whether or not parents are responsible for a child's injury, an inference of parental abuse or lack of attention may, under special circumstances, be drawn from the injury itself coupled with the lack of explanation (for example, when a young baby has recurrent fractures, explicable only by either blows or serious falls).

*Id.* at 23, 288 N.Y.S.2d at 207-08. Here again, though, the evidence was not sufficient to indicate abuse on the part of the parent.

<sup>169</sup>319 N.E.2d at 851.

juries . . . ."<sup>170</sup> Thus, even viewing the evidence most favorably to the state, the court had to reverse the conviction.

#### F. Parental Control of Medical Treatment

Traditionally parents have been given almost exclusive control over the medical treatment of their children.<sup>171</sup> The exceptions to this rule are few and generally operative only when the parent refuses to consent to a necessary life-saving treatment such as a blood transfusion.<sup>172</sup> Some state statutes dispense with the requirement of parental consent, however, when the social consequences of the child's revelation of the ailment to his parents often inhibit disclosure. In this vein, Indiana dispenses with parental consent for venereal disease treatment.<sup>173</sup> A number of states have also abolished the need for parental consent for contraceptive devices and information.<sup>174</sup> Likewise, several states have developed a "mature minor" role, either by statute or judicial decision, by which minors close to the age of majority may consent to or refuse medical treatment apart from the wishes of the parents.<sup>175</sup>

Very few courts have faced squarely the issue of a parent's authority to order treatment which may not benefit the child. The Third District Court of Appeals, in *A.L. v. G.R.H.*,<sup>176</sup> though, did make an effort to deal with just such an issue when it decided that the common law rule of parental control does not extend to the power to order sterilization of a retarded child, at least when such sterilization is not required as a life-saving measure.<sup>177</sup> The

<sup>170</sup>*Id.* at 851-52.

<sup>171</sup>*See, e.g.,* *Weston v. Hospital of St. Vincent*, 131 Va. 587, 107 S.E. 785 (1921).

<sup>172</sup>*See, e.g.,* *People ex rel. Wallace v. Zabrenz*, 411 Ill. 618, 104 N.E.2d 769 (1952). At least one jurisdiction, Iowa, has permitted a court to substitute its judgment for that of the parents in a non-life-threatening situation, however. The case involved parental refusal to consent to a tonsillectomy for their child. *In re Karwath*, 199 N.W.2d 147 (Iowa 1972).

<sup>173</sup>IND. CODE § 16-8-5-1 (Burns 1973).

<sup>174</sup>*See* the table and discussion in Paul, Pilpel & Wechsler, *Pregnancy, Teen-agers and the Law*, 1974, 6 FAMILY PLANNING PERSPECTIVES 142, 143 (1974). *See also* Note, *Minors and Contraceptives in Indiana*, 8 IND. L. REV. 716, 723-24 (1975).

<sup>175</sup>*See* Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOOD HALL L.J. 115, 120-22 (1973).

<sup>176</sup>325 N.E.2d 501 (1975).

<sup>177</sup>*Id.* at 502. Courts have been rather hesitant to approve sterilization as a method of social control. *Compare* *Skinner v. Oklahoma*, 316 U.S. 535 (1942), *with* *Buck v. Bell*, 274 U.S. 200 (1926). After the Nebraska Supreme Court authorized sterilization of a woman inmate as a condition of parole from a state home for the mentally retarded, *In re Cavitt*, 182 Neb. 712, 157 N.W.2d 171 (1968), the Nebraska legislature reversed the decision by statute.

question arose when the mother filed for a declaratory judgment, seeking court approval of the proposed sterilization; however, the facts presented a surprisingly unpersuasive case for sterilization. The child, a boy 15 years old, was retarded as a result of an automobile accident and had, at the time of the trial, a measured intelligence quotient of 83, normal usually regarded as somewhere around 90.

There was no indication whatsoever that any of the child's retardation was genetic; thus, he would not pass on the retardation to his children. Moreover, there was an inference drawn that the boy's intelligence was improving since his intelligence quotient two years before trial had been 65, nearly 20 points lower than at the time of trial. Apparently the nub of the mother's desire to have her son sterilized lay in the fact that he "had become interested in girls," and that since his social contact was mainly with handicapped children in his class, any sexual activity on his part ran the risk of impregnation of one of the handicapped girls in his class.<sup>178</sup>

The trial court had denied the mother's request. The court of appeals, in a somewhat confused holding, affirmed by pointing out that

the facts do not bring the case within the framework of those decisions holding either that the parents may consent on behalf of the child to medical services necessary for the child, or where the state may intervene over the parents' wishes to rescue the child from parental neglect or to save its life.<sup>179</sup>

Having ostensibly disposed of the case on this factual basis, the court nevertheless went on to state categorically that "the common law does not invest parents with such power over their children even though they sincerely believe the child's adulthood would benefit therefrom."<sup>180</sup> In so holding, the court cited two cases, one from Missouri<sup>181</sup> and the other from California,<sup>182</sup> both of which held that the juvenile statutes did not validly give courts

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NEB. REV. STAT. § 83-218 (1969). The Indiana sterilization laws have also been repealed. Ch. 241, §§ 1-6, [1927] Ind. Acts 713 (repealed 1974); ch. 244, §§ 1-2, [1937] Ind. Acts 1164 (repealed 1974); ch. 227, §§ 1-2, [1951] Ind. Acts 649 (repealed 1974).

<sup>178</sup>325 N.E.2d at 502. The sterilization procedure involved was a vasectomy which, as the court pointed out, is "simple, virtually painless and irreversible." *Id.*

<sup>179</sup>*Id.* (citations omitted).

<sup>180</sup>*Id.*

<sup>181</sup>*In re M.K.R.*, 515 S.W.2d 467 (Mo. 1974).

<sup>182</sup>*In re Kemp's Estate*, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974).



the power to authorize sterilization of retarded minor females in the absence of more specific legislation.

Once the appellate court chose to enter into this additional discussion, it might have elaborated a bit more on this aspect of the decision since the language used applies to a situation somewhat broader than the facts. If sterilization is impermissible on the relatively nonthreatening facts of this case, the question remains whether it is necessarily outside the scope of parental authority when the retardation is genetic in origin, thereby being capable of being passed on to offspring, or when the record shows an established course of sexual misconduct on the child's part. The decision might better have been restricted to the rather special facts involved here—clearly this boy's situation did not warrant the drastic step of a vasectomy. The language as to the scope of common law parental authority may now be extended to other important areas of medicine, such as nontherapeutic medical experimentation, where the distinctions are not quite so clear. It is presently questionable, after *A.L. v. G.R.H.*, whether parents of a minor may agree to any medical experimentation on a child if the research is not directly beneficial to the child, but simply beneficial to society as a whole. In the final analysis, this entire area of medical treatment of children is in dire need of legislative clarification.

### G. Parental Tort Immunity

Although the Indiana Supreme Court abolished the doctrine on interspousal tort immunity three years ago,<sup>183</sup> the First District Court of Appeals, in *Vaughan v. Vaughan*,<sup>184</sup> refused to extend that decision to the issue of the immunity of parents from suits by their children. *Vaughan* involved a grandfather who brought a personal injury action on behalf of his 4-year-old grandson against the boy's parents. The suit alleged that the parents had been negligent in supervising the child while on a visit to a cemetery where the boy had suffered head injuries caused by a falling tombstone. The trial court dismissed on two grounds, parental immunity and failure to state a claim upon which relief could be granted. The grandfather then filed a motion to correct errors which sought "an abrogation of the doctrine of parental immunity in Indiana."<sup>185</sup>

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<sup>183</sup>*Brooks v. Robinson*, 259 Ind. 16, 284 N.E.2d 794 (1972). See 6 IND. L. REV. 558 (1973) for a general discussion of *Brooks* and the abrogation of the common law doctrine of interspousal tort immunity.

<sup>184</sup>316 N.E.2d 455 (Ind. Ct. App. 1974).

<sup>185</sup>*Id.* at 456.

The court of appeals affirmed the trial court's judgment. The court, in a deliberately concise opinion,<sup>186</sup> avoided virtually all of the policy arguments for or against the doctrine of parental immunity and disposed of the case by distinguishing the abrogation of spousal immunity in *Brooks v. Robinson*<sup>187</sup> from the doctrine of parental immunity attacked here. In doing so, the court focused on two portions of the *Brooks* opinion. The first—the supreme court's rejection of the notion that husband-wife suits would promote “fraud, collusion and trivial litigation”<sup>188</sup>—was similarly rejected by the court of appeals as an argument for maintaining parental immunity.

The court refused, however, to accept as a controlling analogy the second portion of the *Brooks* opinion, which rejected the argument that such suits would have a disruptive effect on family harmony. Instead, the court reaffirmed “the seemingly ageless observation”<sup>189</sup> contained in *Smith v. Smith*,<sup>190</sup> a 50-year-old landmark decision establishing parental immunity in Indiana. Unfortunately, *Smith* was essentially a policy decision by the court of appeals which seems to have rested on rather antiquated reasoning based on judicial notice of the then existing social conditions. The *Smith* court had reasoned: “From our knowledge of the social life of today, and the tendencies of the unrestrained youth of this generation, there appears to be much reason for the continuance of parental control during the child's minority . . . .”<sup>191</sup> Although the *Smith* court had recognized a possible exception to the immunity doctrine, that of extreme circumstances, the *Vaughan* court refused to hold that mere failure to supervise brought the case within that exception.

The court also rejected the arguments that the doctrine of parental immunity was an unconstitutional denial of both equal protection and access to the courts. The equal protection claim was disposed of by holding that the classification which gave parents immunity was reasonable for several reasons: “Unity of interest of parent and child, no truly adversary situation, [and

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<sup>186</sup>The court noted:

It [the court] does recognize, however, that the question has been widely litigated as well as receiving the attention of numerous scholars. Any substantial discussion on our part of the sub-issues (changing social values, parent-child relationship, etc.) could not significantly add to what already exists, and only serve the course of redundancy.

*Id.* at 456 n.1.

<sup>187</sup>259 Ind. 16, 284 N.E.2d 794 (1972).

<sup>188</sup>*Id.* at 21, 284 N.E.2d at 796.

<sup>189</sup>316 N.E.2d at 457.

<sup>190</sup>81 Ind. App. 566, 142 N.E. 128 (1924).

<sup>191</sup>*Id.* at 570, 142 N.E. at 129.

the] difficulty of dissolving the relationship and prevention of family discord . . . .”<sup>192</sup> The access-to-the-courts argument was premised on the provision of the Indiana Constitution giving “every man” a legal remedy for personal injury.<sup>193</sup> Although the *Brooks* decision used this constitutional provision as additional support for its holding, the *Vaughan* court linked the supreme court’s invocation of this provision to its statement that “the reasoning advanced for retention of the doctrine [interspousal immunity] is judicially unsound . . . .”<sup>194</sup> The constitutional provision was inapposite in *Vaughan*, according to the court of appeals, because they believed “the doctrine of parental immunity to be judicially sound.”<sup>195</sup>

As noted above, the court deliberately shortened its discussion of the issues on the ground that further elaboration would be redundant. While not categorically improper, it is highly dubious to use this technique in a case involving a frontal attack on a shaky principle of law, one that is fast eroding throughout the country. The technique is particularly troublesome when an analogous doctrine has been abrogated by a higher court and the only support for affirming the continuance of the present rule is found in an old decision, grounded on neither statute nor common law—a decision which disposes of an important argument by judicial notice of “the tendencies of the unrestrained youth of this generation.”<sup>196</sup>

In *Vaughan* the question was thoroughly briefed by both sides and deserved a much more thorough analysis by the court. Indeed, much of the opinion, albeit sub silentio, appears to reflect the third district’s basic policy disagreement with the supreme court’s abrogation of interspousal immunity.<sup>197</sup> There may be some validity to the basic proposition advanced—that parent-child suits disrupt family harmony; however, this proposition is based on two factors which deserve more discussion. First, there should be some empirical evidence that disruption of the family in fact does occur when the parental immunity doctrine is abrogated. This, clearly, is not the place for unrestrained judicial notice. Secondly, there

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<sup>192</sup>316 N.E.2d at 457.

<sup>193</sup>IND. CONST. art. 1, § 12. This section provides: “All courts shall be open; and every man, for injury done to him in his person, property or reputation, shall have remedy by due course of law . . . .”

<sup>194</sup>259 Ind. at 24, 284 N.E.2d at 798.

<sup>195</sup>316 N.E.2d at 457. See generally Note, *Parental Tort Immunity Doctrine in Indiana*, 8 IND. L. REV. 394 (1974).

<sup>196</sup>*Smith v. Smith*, 81 Ind. App. 566, 570, 142 N.E. 128, 129 (1924).

<sup>197</sup>Note, for example, the rather grudging statement leading into the quotation from *Smith*: “Assuming for the moment that nuptial peace and harmony no longer requires judicial enforcement . . . .” 316 N.E.2d at 457.

should be a recognition of the fact that disposition of this case requires judicial policymaking, and thus, that the policy arguments must be squarely faced. Rather than strengthening the parental immunity doctrine, the *Vaughan* decision actually appears to have weakened it because the court refused to grapple with the difficult questions posed.

#### *H. Waiver of Juveniles to Criminal Court*

In one of the few major statutory developments in domestic relations this survey period, the Indiana General Assembly enacted a new statute revising the provisions under which a juvenile accused of a criminal act is waived into the adult criminal process.<sup>198</sup> One revision is in Indiana Code section 31-5-7-3,<sup>199</sup> which changes the definition of "child" by specifically excluding from the definition in subsection (b) (1) "a person who is charged with first degree murder," in subsection (b) (2) a youth sixteen or over who is charged with a traffic offense, and in subsection (b) (3) a person who has been waived by the new waiver provisions. Thus, under the new statute, a person charged with first degree murder, irrespective of age, will be tried as an adult.

As revised, the waiver statute, Indiana Code section 31-5-7-14,<sup>200</sup> establishes two broad categories of youthful offenders. Section (a) establishes the first category which includes persons 14 years of age or older. For minors coming under this category, the statute permits waiver at the discretion of the judge upon a motion by the prosecutor after investigation and hearing, *if* the court makes certain specific findings. The court first must determine that "the offense has specific prosecutive merit . . ."<sup>201</sup> The court then must make one of three alternative findings:

- (1) That the crime "is heinous or of an aggravated character" giving greater weight to crimes against person;<sup>202</sup>
- (2) that the crime is "part of a repetitive pattern of juvenile offenses;"<sup>203</sup> or
- (3) that "it is in the best interest of the public welfare and for the protection of the public security gen-

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<sup>198</sup>Ind. Pub. L. No. 296 (Apr. 25, 1975) (codified in (Burns Supp. 1975)), amending IND. CODE §§ 31-5-4-2, -3; -7-3, -4, -13, -14, -15, -23 (Burns 1973).

<sup>199</sup>IND. CODE § 31-5-7-3 (Burns Supp. 1975).

<sup>200</sup>*Id.* § 31-5-7-14.

<sup>201</sup>*Id.* § 31-5-7-14(a).

<sup>202</sup>*Id.* § 31-5-7-14(a) (1).

<sup>203</sup>*Id.* § 31-5-7-14(a) (2).

erally that the juvenile be required to stand trial as an adult offender."<sup>204</sup>

The second category under section (b) consists of youths 16 or older who are charged with specified felonies.<sup>205</sup> A waiver in this situation is mandatory, not permissive, after the prosecutor's motion and investigation. The word "hearing" is not included in this section; therefore, unless this omission is inadvertent, there need be no hearing at all under this category. It is arguable, though, that the omission of "hearing" was not intended because the court has the power to prevent waiver by making the requisite negative "findings." Findings, of course, usually indicate some type of hearing. Specifically, the court must make a negative finding of all the following:

- (1) That the crime "is not heinous or of an aggravated character;"<sup>206</sup>
- (2) that the crime "is not a part of a repetitive pattern of juvenile offenses;"<sup>207</sup> and
- (3) that "it would be in the best interest of the child and of public welfare and public security for the juvenile to remain with the regular statutory juvenile system."<sup>208</sup>

A substantial part of the language of the new waiver provisions is an attempt to codify much of the language in *State ex rel. Atkins v. Juvenile Court*<sup>209</sup> and *Summers v. State*.<sup>210</sup> However, waiver in those cases remained discretionary, while waiver for 16-year-olds accused of serious felonies is virtually assured by the new statute. If a juvenile judge is willing to make only one of the specified findings, sizeable numbers of 14-year-olds also may find their way into the adult criminal system.

To a certain extent, moving juveniles into the adult system merely gives them additional procedural protections not available in the juvenile system.<sup>211</sup> However, one of the aspects of the juvenile system, wide discretion in the disposition of the child after

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<sup>204</sup>*Id.* § 31-5-7-14(a) (3).

<sup>205</sup>These felonies include: "second degree murder, voluntary manslaughter, kidnapping, rape, malicious mayhem, armed robbery, robbery, first degree burglary, aggravated assault and battery, or assault and battery with intent to commit any of the felonies in this subsection." *Id.* § 31-5-7-14(b).

<sup>206</sup>*Id.* § 31-5-7-14(b) (1). This provision also retains the offenses against person/offenses against property distinction.

<sup>207</sup>*Id.* § 31-5-7-14(b) (2).

<sup>208</sup>*Id.* § 31-5-7-14(b) (3).

<sup>209</sup>252 Ind. 237, 247 N.E.2d 53 (1969).

<sup>210</sup>248 Ind. 551, 230 N.E.2d 320 (1967).

<sup>211</sup>See the classic cases of *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (no jury trial requirement for juveniles), and *In re Gault*, 387 U.S. 1 (1967) (discussion of juvenile system defects).

conviction, will be lost. Also, the "public welfare" and "public security" grounds for waiver appear overly broad and virtually undefinable. The total abolition of juvenile court jurisdiction over all persons accused of first degree murder by way of changing the definition of "child" to exclude such cases may, ultimately, prove both absurd and tragic in those cases of very young children who stand accused of murder. It is at least technically possible under the new statute for a 10-year-old child to be tried for murder in adult court and, upon conviction, to be imprisoned with adults.<sup>212</sup>

### I. Paternity

In two paternity actions, separate Indiana courts of appeals recently reaffirmed the principle that the mother bears the burden of proving paternity. In *E.G. v. M.B.*<sup>213</sup> the Second District Court of Appeals, affirming a negative judgment for the putative father, held that the test on appellate review for reversing a negative judgment of paternity is not a question of whether there is an absence of "sufficient evidence" to support the decision but rather "whether it [the evidence] is without conflict and leads to but one conclusion, which is contrary to the conclusion reached by the trial court."<sup>214</sup> Here, there was a substantial amount of conflicting, inconsistent testimony. The actual gestation time was unclear, and the putative father had testified that he was only one of several persons to have sexual relations with the petitioner during the critical time period. Since the evidence had to be viewed in the light most favorable to the appellee-putative father,<sup>215</sup> the negative judgment of paternity by the trial court had to stand. Even the mother's evidence that the putative father had visited the mother after birth and bought the infant some clothing was insufficient proof to overcome the other conflicting evidence and support a finding of paternity.<sup>216</sup>

By way of contrast, the First District Court of Appeals affirmed a declaration of paternity in *O.Q. v. L.R.*<sup>217</sup> In *O.Q.* the court had to determine the applicability of the rules of civil procedure to a paternity action when the rules were in conflict with a procedural requirement found in the statutes regulating a pater-

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<sup>212</sup>IND. CODE § 31-5-7-23 (Burns Supp. 1975) provides that: "No child shall be detained in any prison, jail or lockup . . ." However, a child tried for murder is now excluded from the definition of child. *Id.* § 31-5-7-3(b) (1).

<sup>213</sup>326 N.E.2d 858 (Ind. Ct. App. 1975).

<sup>214</sup>*Id.* at 859.

<sup>215</sup>*Id.*

<sup>216</sup>*Id.* at 860. The appellate court indicated, however, that such evidence alone might be enough to affirm a judgment of paternity if there had been one on those facts.

<sup>217</sup>328 N.E.2d 233 (Ind. Ct. App. 1975).

nity action. The paternity statute<sup>218</sup> purportedly required the losing party to file a motion for a new hearing within 30 days of the verdict.<sup>219</sup> Here, the defendant, as the losing party, had merely filed a motion to correct errors within the 60-day period prescribed by Trial Rule 59(C). The court of appeals resolved the conflict in favor of Trial Rule 59, holding that the paternity statute "has been superseded to the extent that it can be construed to require the filing of a petition for a new hearing as a condition precedent to appeal."<sup>220</sup> The preservation of the right to appeal is thus governed by a timely-filed motion to correct errors.<sup>221</sup>

Although the defendant-putative father won the procedural dispute, the appellate court affirmed the finding of paternity on the evidence. The plaintiff had testified to sexual relations with the defendant around the approximate time of conception and further had asserted that she had not had relations with anyone other than defendant during that period. In affirming the judgment of paternity below, the court quoted from some older cases to establish a distinction between an act of intercourse plus the *probability* of conception at the time of that act, which will support a finding of paternity, and an act of intercourse plus only the *possibility* of conception at the time of the act, which will not support a paternity finding.<sup>222</sup> Since a physician had testified that the probable date of conception had been five days earlier than the first asserted sexual relations, the defendant had argued that the five day discrepancy established, at best, the mere *possibility* of conception. The court quickly disposed of that contention, however, by pointing out that "[t]he period of gestation in the case at bar falls well

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<sup>218</sup>IND. CODE § 31-4-1-18 (Burns 1973).

<sup>219</sup>*Id.* Section 31-4-1-18 provides:

If the finding of the court, or the verdict of the jury, be for or against the defendant, the party aggrieved thereby may file a motion for a new hearing within thirty [30] days after such finding or verdict . . . . Otherwise the procedure on appeal shall be the same as is provided for by law and rules for appeal for civil cases.

<sup>220</sup>328 N.E.2d at 235. The court of appeals relied on an Indiana Supreme Court case, *City of Mishawaka v. Stewart*, 310 N.E.2d 65 (Ind. 1974), which dealt with a problem in a similar context: a 10-day period in which to file a petition for rehearing of a disciplinary case was not permitted to be a condition precedent for appeal under Trial Rule 59(C).

<sup>221</sup>The court acknowledged Trial Rule 4, which provides that the Indiana rules of civil procedure "shall supercede all procedural statutes in conflict therewith." The First District Court of Appeals had already held that paternity actions are civil in nature. *Cohen v. Burns*, 149 Ind. App. 604, 274 N.E.2d 283 (1971). The Second District Court of Appeals had previously held that paternity suits are governed by the Indiana Rules of Procedure. *Houchin v. Wood*, 317 N.E.2d 911 (Ind. Ct. App. 1974).

<sup>222</sup>328 N.E.2d at 236, *citing* *Roe v. Doe*, 289 N.E.2d 528 (Ind. Ct. App. 1972); *Beamon v. Hedrick*, 146 Ind. App. 404, 255 N.E.2d 828 (1970).

within the normal range of probability."<sup>223</sup> Thus, the inference of conception fell within the probable, rather than the merely possible, category, and the adjudication of paternity had to be affirmed.<sup>224</sup>

### J. Guardianship

In *Guardianship of Carrico v. Bennett*,<sup>225</sup> the Third District Court of Appeals affirmed in an appeal on the evidence a denial of a petition to terminate a guardianship. The court also examined the question whether the petitioner might properly recover attorney's fees even though her petition to terminate guardianship was denied. Mrs. Carrico, the petitioner, was an elderly lady under the guardianship of her son. There was considerable conflicting testimony at the termination hearing, but an expert, Mrs. Carrico's psychiatrist, testified that she was competent. There apparently was no expert testimony in opposition to the petition, even though the son did testify that his mother, while often rational, had periods when she was disoriented and incompetent. As a rebuttal witness, the ward, Mrs. Carrico, gave rather mixed testimony in which she accused her son of instituting the guardianship "so he could get her property."<sup>226</sup>

In reviewing the evidence, the appellate court pointed out that the petitioner had the burden of proving that she was no longer incapable of managing her property and caring for herself. The court also reiterated the rule that lay testimony is admissible in questions of insanity and incompetence and may be weighed along with expert testimony. In looking at all the testimony, both lay and expert, the court concluded: "While such evidence may be susceptible to more than one ultimate inference, we cannot say it led solely to the conclusion that Mrs. Carrico was capable of managing her affairs and caring for herself."<sup>227</sup> In so holding, the court refused to pass on the argument made by Mrs. Carrico that mere old age or physical infirmity is not sufficient to support a decree of guardianship.

The court disposed of the second major issue, attorney's fees, much less quickly. The question revolved around the statute which provides for a petition for a adjudication of competency.<sup>228</sup> That

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<sup>223</sup>328 N.E.2d at 236. See *E.F. v. G.H.*, 290 N.E.2d 795 (Ind. Ct. App. 1972) (finding that a 290-day period of gestation was not improbable, and implying that the bounds of gestation periods are not yet scientifically established).

<sup>224</sup>Again, the appellate court must view the evidence in a light most favorable to the appellee—here the mother—since there was a judgment of paternity below. 328 N.E.2d at 235.

<sup>225</sup>319 N.E.2d 625 (Ind. Ct. App. 1974).

<sup>226</sup>*Id.* at 627.

<sup>227</sup>*Id.*

<sup>228</sup>IND. CODE § 29-1-18-48 (Burns Supp. 1975).



statute expressly provides that the ward who is adjudged still incompetent shall pay "the expenses of such proceeding" if "the proceeding was brought in good faith."<sup>229</sup> The trial court had denied Mrs. Carrico's motion to recover her attorney's fees and expenses, apparently without stating reasons for the denial. In passing on this portion of her motion to correct errors, the appellate court wisely examined the policies underlying guardianship proceedings, quoting a 1965 Indiana Supreme Court decision which "recognized the public necessity for insuring the ability of a person to contest his, or her, asserted incompetence."<sup>230</sup> The *Carrico* court went on to hold that the word "expenses" in this statute included "reasonable attorney's fees incurred in maintaining the proceeding."<sup>231</sup> An inability to secure attorney's fees in this type of action, the court stated, "would greatly restrict the ability of one adjudged incompetent to seek a restoration of competency . . ."<sup>232</sup> The appellate court therefore remanded for an express finding of good faith since the trial court had made no finding of good or bad faith under the "expenses" portion of the statute, and there was no such evidence on the record.<sup>233</sup>

To the extent that the statute permits recovery of expenses for a petition to set aside a earlier declaration of incompetence, it should fulfill the purpose assigned it by the court. The requirement of good faith, however, appears to be somewhat ill-considered, when the ward is the petitioner. A finding of incompetence and a decree of guardianship necessarily require a finding that the ward does not have the present mental ability to cope with day-to-day affairs. For example, in Mrs. Carrico's case, there was evidence that she was sometimes disoriented, had lapses of memory, and made occasional, unwarranted accusations. In other words, incompetents often act irrationally. It is questionable how a court may hope to make a valid finding as to the ward's state of mind under the "expenses" portion of the statute—whether the ward

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<sup>229</sup>*Id.* This implies that the estate of the ward would pay the expenses since the statute continues to provide that, if the proceeding was brought in bad faith "[t]he court shall give judgment therefore [for the expense of the proceedings] against the person filing such petition." *Id.* The ward pays for the expense through his or her estate. In this case, it happened that the person bringing the proceeding was the ward herself, and the person in charge of the estate, who must pay on behalf of the estate, was her guardian, her son. The son hoped to shift the expenses from the ward, as represented by her estate, to the ward personally, as a person who brought the proceeding without good faith.

<sup>230</sup>319 N.E.2d at 629, *citing* State *ex rel.* Koch v. Vanderburgh Probate Court, 246 Ind. 139, 203 N.E.2d 525 (1965).

<sup>231</sup>319 N.E.2d at 629.

<sup>232</sup>*Id.*

<sup>233</sup>*Id.* at 630.

(petitioner) acted in good faith or bad faith—when by previous decree the ward's mental processes are inferior to those of competent persons. It is one thing to weigh state of mind for the initial competency proceeding, but it is wholly inane to suppose that an incompetent ward makes good faith decisions in the same manner as a competent person. Moreover, it does little good to leave the good faith/bad faith decision to the ward's attorney who, by misjudging the ward's state of mind, loses his fees.<sup>234</sup>

There is obviously no perfect solution to the problem. Clearly, multiple, unwarranted petitions by wards may result in the "profligate consumption of their estate."<sup>235</sup> However, the alternative jeopardizes the prerogative of a ward to challenge the original declaration when he believes himself competent. The Indiana statute, by forbidding new petitions earlier than six months after a determination of incompetency,<sup>236</sup> is one means of balancing the merits of each consideration. Beyond this, there are practical controls apart from the spurious "good faith" test. A clearly incompetent ward will not be able to show evidentiary support for his assertion beyond his own statements. Few attorneys would be willing to expend time and energy on such a case. However, even if these controls were inadequate, the fact remains that the law simply does not favor guardianships. The Indiana Supreme Court has indicated: "[T]he law should be liberally construed . . . to allow the presentation . . . on behalf of the alleged incompetent."<sup>237</sup> If this policy results in a few instances of "profligate consumption," the error is simply one society ought to be willing to suffer in order to ensure the expeditious termination of guardianships of wards who become competent.

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<sup>234</sup>If it is adjudged that the petitioner, who happens to be the ward, brought the proceeding in bad faith, the ward, vis-à-vis his estate, will not be liable for the attorney's fees. Since the ward, as petitioner, may have no assets in his personal capacity, the attorney is going to be without his fee.

<sup>235</sup>319 N.E.2d at 629.

<sup>236</sup>IND. CODE § 29-1-18-48 (Burns Supp. 1975).

<sup>237</sup>State *ex rel.* Koch v. Vanderburgh Probate Court, 246 Ind. 139, 141, 203 N.E.2d 525, 526 (1965).