This provision has now been made even more flexible by the inclusion of the following language: "In addition, the court may also authorize the guardian to apply or dispose of the excess principal or income for any other purpose the court decides is in the best interest of the ward, his estate, his spouse, or his family."[87]

IX. Domestic Relations

*Helen Garfield**

A. Adoption

1. Abandonment.—When a child with living parents is to be adopted, the consent of the child's natural parents is normally required.[1] Certain specific instances where consent is not required are enumerated in the adoption statutes;[2] the first of these is abandonment.[3] Three decisions interpreting the abandonment section were handed down by the Indiana Court of Appeals during the survey period.[4] None of these cases was concerned with the traditional common law concept of abandonment, which involves an *intentional* relinquishment of *all* parental rights and duties to the child.[5] They dealt, rather, with the less stringent statutory grounds for dispensing with the consent of a non-custodial parent.[6] These provisions permit a court to make what is, in effect, a finding of abandonment without the stringent proof of intent to abandon which would otherwise be required.[7]

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[87]IND. CODE § 29-1-18-33(c) (Supp. 1978), *as amended by* Act of Mar. 7, 1978, Pub. L. No. 132, § 11, 1978 Ind. Acts 1167.

*Associate Professor of Law, Indiana University School of Law—Indianapolis. J.D., University of Colorado, 1967.

[1]IND. CODE § 31-3-1-6(a)(1) (1976).

[2]*Id.* § 31-3-1-6(g). These include abandonment, voluntary relinquishment of the right to consent, and prior involuntary termination of parental rights. *Id.*

[3]*Id.* § 31-3-1-6(g)(1).

[4]Rosell v. Dausman, 373 N.E.2d 185 (Ind. Ct. App. 1978); *In re* Adoption of Dove, 368 N.E.2d 6 (Ind. Ct. App. 1977); Young v. Young, 366 N.E.2d 216 (Ind. Ct. App. 1977). *Rosell* and *Young* deal with the statute as it existed prior to the 1975 amendments, Act of Apr. 14, 1971, Pub. L. No. 421, § 1, 1971 Ind. Acts 1962, 1963 (amended 1975, 1978).

[5]*See* Murphy v. Vanderver, 349 N.E.2d 202, 203 (Ind. Ct. App. 1976).

[6]IND. CODE § 31-3-1-6(g)(1) (1976).

[7]The version of the statute in effect from 1975 until 1978 made it fairly clear that the legislature intended to establish a lesser category of abandonment. This intent is less clear under the 1978 amendments. The earlier version, IND. CODE § 31-3-1-6(g)(1) (1976) (amended 1978), provided:

Section 31-3-1-6(g)(1) permits a court to dispense with the consent of a non-custodial parent who has unjustifiably failed to "communicate significantly" with the child for one year, or has failed to support the child for one year, when able to do so.[8] Either of those circumstances might be evidence of abandonment,[9] but neither could suffice in itself to establish the all-encompassing intent to relinquish parental rights traditionally required for abandonment. It is undoubtedly necessary to broaden the courts' power to terminate inactive parent-child relationships so that the child will be able to make more lasting and productive ties with adoptive parents. This is especially true where, as the statute requires, the child has been in the actual custody of someone other than the parent for a period of one year or more. Abandonment is a concept derived from property law and should not be treated as controlling the disposition of children. Nevertheless, it would be well to keep in mind that the statute allows parents to be permanently severed from all connection with their children for conduct which, in some instances at

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(g) *Consent* to adoption *is not required of*:
(1) a parent or parents if the child is adjudged to have been abandoned or deserted for six (6) months or more immediately preceding the date of the filing of the petition; or *a parent of a child in the custody of another person, if for a period of at least one (1) year he fails without justifiable cause to communicate significantly with the child when able to do so or he wilfully fails to provide for the care and support of the child when able to do so* as required by law or judicial decree, *or if the parent or parents have made only token efforts to support or to communicate with the child, the court may declare the child abandoned by the parent or parents*. . . .

(Emphasis added). Although this section is unclear, it can be read as authorizing a finding of abandonment *if* a parent fails to communicate with the child, *or if* he fails to support the child, *or if* he makes only token efforts to support or communicate. It can also be read as authorizing a finding of abandonment if the parent has made "only token efforts to support or to communicate," but *not* if the parent has *totally* failed to support the child or to communicate with it. This obviously makes little sense, yet the 1978 version appears to adopt this reading. The relevant portion of IND. CODE § 31-3-1-6(g)(1) (Supp. 1978) now reads:

(g) Consent to adoption is not required of:
(1) . . . a parent of a child in the custody of another person, *if* for a period of at least one (1) year *he fails without justifiable cause to communicate significantly* with the child when able to do so or *knowingly fails to provide for the care and support* of the child when able to do so as required by law or judicial decree (*when the parent or parents have made only token efforts to support or to communicate with the child, the court may declare the child abandoned by the parent or parents)*. . . .

(Emphasis added).

[8]The statute might also be described as creating a conclusive presumption of abandonment, based on proof of *either* non-support *or* failure to communicate.

[9]*But see In re* Adoption of Anonymous, 158 Ind. App. 238, 302 N.E.2d 507 (1973).

least, may be unintentional, or at most negligent.[10] The courts should be wary of allowing the standards of proof to become too lax.

Two cases dealt with the portion of section 6(g)(1) dispensing with the necessity for consent of "a parent of a child in the custody of another person, if for a period of at least one (1) year he fails without justifiable cause to communicate significantly with the child when able to do so."[11] In *Rosell v. Dausman*,[12] the father's second wife petitioned the court for adoption of his two sons. The first wife, the children's natural mother, refused to consent, but the trial court granted the stepmother's petition based upon its finding that the natural mother had unjustifiably failed to communicate significantly with the children for at least one year. The court of appeals affirmed.[13]

The mother in *Rosell* contended that the statutory one-year period of non-communication had to be the year immediately preceding the filing of the petition. Here, she had visited the children three times, seven or eight months before the petition was filed,[14] but prior to these visits, there had been no communication at all for a period of more than eighteen months.[15] The court of appeals rejected the mother's proposed interpretation of the statute, holding instead that proof of failure to communicate for *any* one-year period would be sufficient under the statute.[16] Therefore, even assuming that the three visits within the year preceding the filing of the petition constituted the "significant" communication envisioned by the statute, the eighteen-month period of total non-communication preceding these visits satisfied the statutory requirements. Nothing in the statute required that the failure to communicate occur in the year immediately preceding the filing of the petition. To so interpret the statute would encourage non-custodial parents to visit their children just often enough to frustrate any attempted adoption.[17]

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[10]The non-support ground did require *wilful* failure to support when able to do so, but the word "wilfully" was changed to "knowingly" in the 1978 amendments, which seems to decrease the quantum of intent required to prove this ground. IND. CODE § 31-3-1-6(g)(1) (Supp. 1978). *See* note 7 *supra*.

[11]IND. CODE § 31-3-1-6(g)(1) (1976). Rosell v. Dausman, 373 N.E.2d 185 (Ind. Ct. App. 1978) dealt with the statute as it existed *prior to* the 1975 amendments. *In re* Adoption of Dove, 368 N.E.2d 6 (Ind. Ct. App. 1977) dealt with the statute *after* the 1975 amendments. The differences between the two versions of the statute were not significant to the issues involved in these cases.

[12]373 N.E.2d 185 (Ind. Ct. App. 1978).

[13]*Id.* The case was heard by the court of appeals en banc, and the opinion was written by Presiding Judge Staton.

[14]The visits occurred on August 28, 1974, September 8, 1974, and September 15, 1974. The stepmother's petition was filed April 21, 1975. *Id.* at 188.

[15]*Id.* at 187.

[16]*Id.* at 188.

[17]*Id.* The words of the statute support the court's interpretation. In order for the parent's consent to be dispensed with on the traditional ground of "abandonment or

The principal issue decided in *In re Adoption of Dove*[18] concerned the applicability of certain provisions of section 31-3-1-7 of the adoption statutes,[19] which was repealed in 1978. These aspects of the case have little current relevance. In *Dove*, the court of appeals affirmed the trial court's order granting the petition for adoption filed by the child's paternal grandparents. The trial court found that the mother had abandoned the child by unjustifiably failing to communicate with him for more than one year, and that her consent to the adoption was, therefore, unnecessary.[20]

The value of *Young v. Young*[21] as precedent is also questionable because of the 1978 amendments to the adoption statutes. *Young* held that the failure of a mother to make support payments ordered by the court in her divorce was not the *wilful* nonsupport required by section 6(g)(1)[22] before the mother's consent to adoption could be dispensed with. The trial court, therefore, erred in granting the stepmother's petition to adopt the children, when the mother had refused to consent to the adoption.[23] In the 1978 amendments to section 6(g)(1), the word "wilfully" was changed to "knowingly."[24] Whether this difference in wording will change the result in factual situations similar to *Young* remains to be decided in future cases. It would have been difficult to argue, under the facts of *Young*, that the mother had not "knowingly" failed to make the support payments ordered by the divorce court, simply because no one had

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desertion," the abandonment must be found to have taken place "for six (6) months or more *immediately preceding* the date of the filing of the petition." IND. CODE § 31-3-1-6(g)(1) (1976) (amended 1978) (emphasis added). For the statutory grounds (or lesser categories of abandonment), it is required only that the non-support or failure to communicate continue "for *a period* of at least one year." *Id.* (emphasis added). No particular one-year period is specified.

[18]368 N.E.2d 6 (Ind. Ct. App. 1977).

[19]IND. CODE § 31-3-1-7 (1976) (repealed effective October 1, 1979). Act of Mar. 10, 1978, Pub. L. No. 136, §§ 57, 59, 1978 Ind. Acts 1196, 1286-87.

[20]368 N.E.2d at 8. The grandparents had taken custody of the child in 1969, at the mother's request, when she had "personal, emotional and economic problems" following her divorce from the child's father. *Id.* at 7-8. Although the evidence on communication was in conflict, the grandparents testified there was no communication between the mother and her son from November 1974 to June 1976, when they filed their adoption petition. *Id.* at 8.

[21]366 N.E.2d 216 (Ind. Ct. App. 1977).

[22]IND. CODE § 31-3-1-6(g)(1) (1976). The provision is reproduced in note 7 *supra*.

[23]366 N.E.2d at 216, 217. The children had been living with the father and stepmother although the divorce decree had awarded custody to the paternal grandmother. Both parents had been ordered to make weekly support payments to the grandmother. Although it was undisputed that the mother had never made the payments ordered, there was no evidence that anyone had ever asked for them. The court of appeals, therefore, held that the mother's failure to support her children was not "wilful." *Id.*

[24]IND. CODE § 31-3-1-6(g)(1) (Supp. 1978). *See* note 7 *supra*.

ever requested that she make them, so the result might well have been different under the amended statute.

2. Termination of Parental Rights.—The legislature has made substantial changes in the procedures for terminating parental rights. Beginning October 1, 1979, when the newly enacted juvenile code becomes effective, juvenile courts will handle both voluntary and involuntary termination proceedings.[25] Although the juvenile courts have been ordering involuntary termination of parental rights under the present statutes, the statutory authority for such proceedings is less than clear.[26] The only provision expressly authorizing proceedings for permanent involuntary termination of parental rights is in section 7 of the adoption statutes,[27] which applies only to adoption proceedings and not to juvenile proceedings. Section 7 has now been repealed, effective October 1, 1979,[28] when the new juvenile code becomes effective. After that date, the only power courts handling adoptions will have over termination of parental rights will be that given by section 6(g) of the adoption statutes,[29] which specifies the grounds on which a court can dispense with a parent's consent to the adoption of his or her child.[30] Any separate proceedings for termination of parental rights, not brought in connection with an adoption, apparently, will have to be brought in juvenile court after October 1, 1979.

B. Child Abuse

The new child abuse statute becomes effective January 1, 1979.[31] It broadens the definition of abused children to include victims of sex offenses as well as victims of physical injury.[32] The duty to report child abuse is expanded to include a duty to report child *neglect* as well. Now "any individual who has reason to believe that a child is the victim of child abuse or neglect" is required to make

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[25]IND. CODE §§ 31-6-5-1 to 6 (Supp. 1978).

[26]*See In re* Perkins, 352 N.E.2d 502 (Ind. Ct. App. 1976); Garfield, *Domestic Relations, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 149, 149-53 (1978). *Perkins* held that the juvenile courts did have jurisdiction to order permanent involuntary termination of parental rights, despite the ambiguity of the statutes. 352 N.E.2d at 505-06 (citing *In re Collar*, 155 Ind. App. 668, 294 N.E.2d 179 (1973)).

[27]IND. CODE § 31-3-1-7 (1976).

[28]Act of Mar. 10, 1978, Pub. L. No. 136, §§ 57, 59, 1978 Ind. Acts 1196, 1286-87.

[29]IND. CODE § 31-3-1-6(g) (Supp. 1978).

[30]There has been some modification of § 6(g), to conform it to the changes in termination procedure under the new juvenile code. Subsections (7) and (8) have been deleted and subsection (4) has been modified. IND. CODE § 31-3-1-6(g)(1) (Supp. 1978).

[31]IND. CODE §§ 31-5.5-1-1 to 3-20 (Supp. 1978). The present statute, Ind. Code §§ 12-3-4.1-1 to 6 (1976), has been repealed, effective January 1, 1979, by Act of Mar. 10, 1978, Pub. L. No. 135, § 4, 1978 Ind. Acts 1181, 1196.

[32]*Id.* § 31-5.5-1-1 (Supp. 1978).

an oral report to the "child protection service" established by the statute, or to a law enforcement agency.[33] Failure to report is a class B misdemeanor.[34] The person making such a report is granted immunity from civil or criminal liability, unless he acted maliciously or in bad faith.[35] In every child abuse case, an investigation must be initiated by the child protection service within twenty-four hours of the time a report is received.[36] All reports and information obtained in the course of an investigation are to remain confidential.[37] Appropriate "social services" are to be offered to the child and its family, or they may be ordered by the juvenile court;[38] where good cause is shown, the court can order temporary removal of the child from the family.[39] The statute sets up machinery for investigating child abuse and neglect, and for providing protective and rehabilitative services to the child and its family. Whether the machinery proves to be effective will depend upon how well it is funded and implemented.[40]

C. Child Custody and Support

1. Parental Rights Presumption.—In a custody dispute between a parent and a non-parent, it is presumed that the best interests of the child will be served by awarding custody of the child to the parent.[41] In two cases decided during the survey period, the court of appeals was called upon to determine whether the same presumption would apply in favor of an adoptive parent[42] or the father of an illegitimate child.[43] In both cases, the answer was in the affirmative.

In *Stevenson v. Stevenson*,[44] the adoptive mother, the child's maternal grandmother, sought custody of the child in her divorce

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[33]*Id.* §§ 31-5.5-3-3, 4. Establishment of child protective services within each county department of public welfare is required by *id.* § 31-5-.5-3-10.

[34]*Id.* § 31-5.5-3-3(a).

[35]*Id.* § 31-5.5-3-7. Immunity is also provided in the repealed statute. *Id.* § 12-3-4.1-4 (1976) (repealed 1978).

[36]*Id.* § 31-5.5-3-11(b) (Supp. 1978).

[37]*Id.* § 31-5.5-3-18.

[38]*Id.* § 31-5.5-3-11(f) to (i).

[39]*Id.* § 31-5.5-3-11(e).

[40]For a discussion of some of the problems encountered when the law attempts to deal with the social problem of child abuse, see Dickens, *Legal Responses to Child Abuse*, 12 FAM. L.Q. 1 (1978).

[41]Hendrickson v. Binkley, 161 Ind. App. 388, 393, 316 N.E.2d 376, 380 (1974), *cert. denied*, 423 U.S. 868 (1975).

[42]Stevenson v. Stevenson, 364 N.E.2d 161 (Ind. Ct. App. 1977).

[43]Hyatte v. Lopez, 366 N.E.2d 676 (Ind. Ct. App. 1977).

[44]364 N.E.2d 161 (Ind. Ct. App. 1977).

proceedings. The adoptive father, the child's grandfather, also sought custody. The adoptive parents' son and daughter-in-law, the child's uncle and aunt, intervened, asking that custody be awarded to them. The trial court awarded custody to the intervenors, and the court of appeals affirmed.[45] The court of appeals held that the parental preference presumptions *did* apply in favor of the adoptive mother, but that the presumption had been rebutted.[46] The evidence indicated that the adoption by the grandparents was effected after the child's mother learned she had a brain tumor, and that its purpose was to prevent the child's father from obtaining custody when the mother died. The child continued to live with the mother after the adoption, until the mother's death in 1975. The child apparently never lived with the adoptive parents or adopted their surname.[47] The court of appeals held the evidence sufficient to support a finding that the grandmother either acquiesced in allowing the child's custody to remain with another (the mother), or that she voluntarily relinquished custody to another. Either finding would be sufficient to rebut the presumption in favor of the adoptive mother, without a finding that she was "unfit" for custody.[48]

In *Hyatte v. Lopez*,[49] the court of appeals affirmed the trial court's award of custody to the father of an illegitimate child, over the objections of the maternal grandparents. The court held that the parental preference presumption operated in favor of the natural father, and that the trial court's implicit finding that the presumption had not been rebutted, based on conflicting evidence, was not an abuse of discretion.[50] Here, the child had been living with the grandparents since 1974, but the father had made repeated attempts

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[45]*Id.* at 163.

[46]*Id.* at 165.

[47]*Id.* at 163. The child's surname was not changed in the adoption proceedings. In 1974, it was changed to "Ghuman," her stepfather's name. The *Stevenson* opinion does not indicate where the child lived after her mother died in 1975 (nearly eight months elapsed between the mother's death and the trial court's award of custody to the child's uncle and aunt). *Id.*

[48]*Id.* at 165. The court held the presumption could be rebutted by a third party seeking custody, even though the third party was *not* the party to whom custody had been relinquished. *Id.* The court determined that the parental preference presumption can be rebutted by proof of (1) unfitness of the parent, (2) long acquiescence to custody in another, *or* (3) voluntary relinquishment of custody to a third party "such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child." *Id.* (citing Hendrickson v. Binkley, 161 Ind. App. at 393, 316 N.E.2d at 380). There would seem to be little substantive difference between "long acquiescence" and "voluntary relinquishment," acquiescence being merely a passive form of relinquishment. Relinquishment by inaction (acquiescence) would nonetheless be "voluntary."

[49]366 N.E.2d 676 (Ind. Ct. App. 1977).

[50]*Id.* at 681.

to regain custody. Hence, there was no acquiescence or voluntary relinquishment by the father, and there was no finding that he was unfit for custody.[51]

2. Visitation Rights.—Section 31-1-11.5-24(b) provides that a court "shall not *restrict* a parent's visitation rights unless it finds that the visitation might endanger the child's physical health or significantly impair his emotional development."[52] Because the courts are authorized to *modify* visitation rights whenever the "best interests of the child" require it,[53] the question arises: When does a *modification* of visitation rights constitute a *restriction*, which can be justified only be danger to the child's physical or emotional health? The answer given by the Indiana Court of Appeals in *Milligan v. Milligan*[54] seems to be "almost always."

In *Milligan*, the original dissolution decree gave the father the right to one overnight visitation per month, two hours per week of visitation in the mother's home, and all-day visitation outside her home on alternate holidays.[55] The trial court later found both parties in contempt for violations of the existing decree, then entered its order modifying visitation to allow the father only daytime visitation, one day per month.[56] The court of appeals held that this constituted a "restriction" of the father's visitation rights, which required a finding under section 24(b) that "the visitation might endanger the child's physical health or significantly impair his emotional development."[57] Since no such finding was made, the order was reversed.[58]

In his concurring opinion, Judge Garrard agreed that the majority's interpretation was required by the words of section 24(b). However, he felt the legislature's attention should be drawn to the possibly unintended effects of the language of the statute. Modifica-

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[51]The court of appeals held that the evidence would not support a ruling that the father was unfit as a matter of law. *Id.* at 679. The father had lived with the child's mother for 10 or 11 years, before and after the child's birth. The mother had left the child with the grandparents (*her* mother and stepfather) in 1974 when she entered the hospital for the birth of a second child. Thereafter, she disappeared. The grandparents retained custody of the child and the father filed a petition for a writ of habeas corpus to regain custody. *Id.* at 678.

[52]IND. CODE § 31-1-11.5-24(b) (1976) (emphasis added).

[53]*Id.*

[54]365 N.E.2d 1244 (Ind. Ct. App. 1977).

[55]The decree incorporated a settlement agreement between the parties. A prior modification, also by agreement of the parties, had made "minor changes" in the original order. *Id.* at 1246.

[56]The modification order allowed the father visitation "on the first Sunday of every month from 8:00 a.m. until 8:00 p.m." 365 N.E.2d at 1245.

[57]*Id.* at 1246. (quoting IND. CODE § 31-1-11.5-24(b) (1976)).

[58]365 N.E.2d at 1246.

tion orders are usually entered to redefine visitation rights after more general and flexible orders have proved unworkable in practice. Such orders would invariably constitute "restrictions" on visitation rights under the literal words of section 24(b). So, although the best interests of the child might clearly require modification, a court would be powerless to order it unless the court could find that the child's physical or emotional health was endangered. Judge Garrard did not believe that the legislature intended this result.[59]

In *McCurdy v. McCurdy*,[60] the trial court had made a finding that the children's physical or emotional health would be endangered if it granted the father's request to have the children visit him in prison.[61] The father had been sentenced to the Indiana State Prison on his plea of guilty to one count of kidnapping and four counts of rape. The court of appeals held that the trial court had abused its discretion, and directed it to "compel" the mother to allow the children to "occasionally visit" the father in prison.[62] Judge Hoffman dissented on the ground that there was ample evidence in

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[59]*Id.* at 1246-47 (Garrard, J., concurring). The opinion stated:

> The common, and perhaps the best, practice adopted by many courts . . . is simply to award to the non-custodial parent the right of visitation at all reasonable times and places. The flexibility allowed thereby promotes a continued spirit of cooperation between the parents and may aid the child in its right to a meaningful relationship with both mother and father. Of course, such orders do not always operate as intended. . . .
>
> In such instances, upon application of one of the parties, the common practice of our courts is to specify times for visitation. In other cases parties relocate their homes in other communities with the result that to remain "reasonable" a prior visitation order should be modified. *I do not believe it to have been the legislative intent to require that in all such instances . . . the court should be required to find that unless the order is made the child's physical health will be endangered or its emotional development will be significantly impaired.*

Id. (emphasis added).

[60]363 N.E.2d 1298 (Ind. Ct. App. 1977).

[61]*Id.* at 1302. Since no restriction on the father's previously granted rights to "reasonable visitation" was involved, the finding here was made under IND. CODE § 31-1-11.5-24(a) (1976) which provides: "A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation by the parent might endanger the child's physical health or significantly impair his emotional development." Although the father here *had* been granted visitation rights, he would be unable to exercise them unless the court ordered the wife to allow the children to visit him in prison.

[62]363 N.E.2d at 1300-01. The majority felt it would be better for the children to "learn the truth about their father now" and that their visits might have a "rehabilitiative effect" on the father. *Id.* at 1301. It may indeed have been better for the children to know the truth, but this does little to prove that they should be ordered to visit their father in prison. Any rehabilitative effect on the father is highly speculative.

the record to support the trial court's finding and order.[63] It does indeed seem that the court of appeals has exalted the parent's right to visitation above the welfare of his children in holding that an incarcerated father is entitled as a matter of law to visitation from his young children[64] despite the trial court's finding that such visitation might endanger the children's physcial health or significantly impair their emotional development.

3. Child Support.—The Dissolution of Marriage Act no longer places the primary burden for supporting a child on the father. Either or both parents can be ordered to pay reasonable child support, taking into account the financial resources of both parents and the needs of the child.[65] The court also can order either parent to provide for the child's college education, or for medical expenses.[66]

In re Marriage of Osborne[67] involved a dissolution of marriage decree in which the father was ordered to pay all of his daughter's

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[63]*Id.* at 1302 (Hoffman, J., dissenting). Judge Hoffman described the evidence as follows:

> Testimony of two witnesses at the hearing described the reaction of Tamela to her father's arrest and incarceration in the county jail. "And she withdrawed. (sic) She cried an awful lot; she just didn't seem happy with anything. She didn't want to be with the other children, she didn't want to be with people; she more or less wanted to be off to herself. And when it would get dark, she wanted to make sure she was by her mother." It took about six months for Tamela to return to her cheerful self as a happy and content child, who likes to be with other children and have a good time.

Id.

[64]The children were four and seven years old at the time the original dissolution decree was entered in June 1975. *Id.* at 1299. The youngest child was six years old when the decision on appeal was issued June 28, 1977.

[65]IND. CODE § 31-1-11.5-12(a) (1976) provides:

> Sec. 12. Child Support. (a) In an action pursuant to section 3(a) or (b), the court may order either parent or both parents to pay any amount reasonable for support of a child, without regard to marital misconduct after considering all relevant factors including:
>
> (1) the financial resources of the custodial parent;
>
> (2) standard of living the child would have enjoyed had the marriage not been dissolved;
>
> (3) physical or mental condition of the child and his education needs; and
>
> (4) financial resources and needs of the noncustodial parent.

[66]IND. CODE § 31-1-11.5-12(b) (1976) provides:

> (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, taking into account the child's attitude and ability and the ability of the parent or parents to meet these expenses; and
>
> (2) special medical, hospital or dental expenses necessary to serve the best interests of the child.

[67]369 N.E.2d 653 (Ind. Ct. App. 1977). The principal issue in the case concerned the property division provisions of the decree. It is discussed at notes 173-76 *infra* and accompanying text.

college expenses, including tuition, books, room and board and an allowance of $15 per week. When the daughter was not in college, the father was to pay $50 per week and all medical expenses in excess of $100 per year. At the time of the dissolution, the wife's earnings were slightly higher than the husband's. The court of appeals reversed, holding that the trial court had failed to give sufficient consideration to the wife's earnings and to her duty of support: "It appears instead that the order was premised upon the assumption that it was the father's preliminary obligation to support his child regardless of the economic circumstances of the parties."[68] The trial court had apparently disregarded the standards set forth in the statute and made a determination improperly based upon the sex of the parent.[69] The court of appeals was perhaps too ready to assume that, by paying all of his daughter's college expenses, the father would be meeting all of the daughter's support needs. It is apparent to any parent of a child in college that there are additional expenses not covered by the court order, for instance, clothing and transportation. It will also continue to be necessary for the mother to maintain a home for the daughter, although it may be used only during vacation periods. Even if these expenses are taken into account, however, the trial court's order still seems to impose too large a share of the burden of support on the father.

The criminal non-support statute has long been sex-neutral, at least as far as non-support of *children* was concerned.[70] The former statute applied to "*every person* having any child under the age of eighteen (18) years depending upon him or her for education or support, who *wilfully neglects* to furnish necessary food, clothing, shelter and medical attention . . . ."[71] Under the present statute, it is a Class D felony for "*a person* [to] knowingly or intentionally [fail] to provide support to his dependent child."[72] It is debatable whether the changes in the wording of the statute will alter the result in cases such as *Hudson v. State*,[73] decided under the former statute.

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[68]*Id.* at 658. The court rejected any contrary implication in the dictum in Geberin v. Geberin, 360 N.E.2d 41, 46 (Ind. Ct. App. 1977), that "it is not an abuse of discretion for the trial court to ignore the mother's financial means." In *Geberin*, the husband's earnings were more than triple those of the wife.

[69]369 N.E.2d at 658.

[70]IND. CODE § 35-14-4-1 (1976) (repealed effective 1977). With regard to support of *spouses*, only the husband was liable for criminal nonsupport. *Id.*

[71]*Id.* (emphasis added). Criminal nonsupport was a misdemeanor, punishable by a fine of not more than $500 and imprisonment in the county jail for a period not exceeding six months. *Id.*

[72]*Id.* § 35-46-1-5 (Supp. 1978) (emphasis added). Inability of a parent to provide support is a defense to the charge. *Id.*

[73]370 N.E.2d 983 (Ind. Ct. App. 1977).

In *Hudson*, the court of appeals upheld the conviction of an able-bodied unemployed father, who had make no support payments under a dissolution decree. The court held that the evidence was sufficient to support a jury finding that he was "deliberately pursuing an irresponsible lifestyle, that he intentionally failed to conscientiously seek employment, and that he wilfully neglected to provide support for his children."[74] It is at least arguable that the same evidence would also support a finding under the current statute that the father "knowingly or intentionally" failed to support his children.

In *Strawser v. Strawser*,[75] the husband had obtained an ex parte divorce which made no provision for the custody or support of the parties' three sons. The children continued to live with their mother in Florida, and in 1973 all three children were emancipated. In January, 1976, the mother sued the father for reimbursement of sums allegedly spent on support of the children prior to their emancipation. The trial court's judgment in her favor for $13,649 was reversed by the court of appeals, which held her action was barred by the two-year statute of limitations for "injuries to personal property."[76] The court's "reasoning" was: The nature of the mother's action is "in effect an allegation of a debt,"[77] hence, it is an action "at law" and the statute of limitations—rather than the equitable doctrine of laches—applies; the right to a debt is a chose in action, which is also a property right; choses in action are properly characterized as personalty; therefore, the statute of limitations for "injuries to personal property" applies.[78]

If the court of appeals was correct in its initial determination that the *Strawser* action was "in effect an allegation of a debt," then the court should have applied the statute of limitations for debt,[79] instead of following this circuitous line of reasoning to the astonishing conclusion that what had started as an action for "debt" should be treated as an action for "injuries to personal property" for statute

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[74]*Id.* at 985.

[75]364 N.E.2d 791 (Ind. Ct. App. 1977).

[76]*Id.* at 792. The statute applied was IND. CODE § 34-1-2-2 (1976).

[77]364 N.E.2d at 792.

[78]*Id.* at 792.

[79]It is not clear which statute of limitations would apply, since the Indiana statutes speak of debt only in terms of contractual obligations, whereas the father's obligation in *Strawser* was based upon his legal duty to support his children. The analogy to a contractual obligation, however, is certainly much closer than the analogy to an action for "injuries to personal property." If the obligation were analogized to a debt, the appropriate statute would be either IND. CODE § 34-1-2-1(1) (1976) (6 years for a contract not in writing), or *id.* § 34-1-2-2(5) (1976) (10 years on a written contract). Either would seem more appropriate than the two-year statute for injuries to personal property. *Id.* § 34-1-2-2(1) (1976).

of limitations purposes. The characterization of this action as debt is also open to serious question. The court of appeals relied upon *Owens v. Owens*[80] and *Corbridge v. Corbridge*,[81] both of which refer to past-due installments of court-ordered support as "debt"; but these cases are not apposite here, because no decree was ever entered fixing the amount of support due from the father.[82] The initial determination by a court, fixing a reasonable amount due from the father for support of his children, is equitable in nature.[83] No such determination had ever been made in *Strawser*, and this was essentially what the mother was entitled to in her reimbursement action. Although she sued to recover a specific sum of money spent on support of the children, she was not ipso facto entitled to reimbursement. When the trial court awarded her judgment for these sums, it implicitly found that the sums expended by the wife were reasonable and necessary to the support of the children, and that the husband should equitably be required to reimburse her.[84] Although the form of the action may have resembled an action "at law," on a "debt," in substance it was an action in equity to enforce the legal duty of a parent to support his children. It is, thus, doubly ironic that such an action should be held to be barred by a two-year statute of limitations for injuries to personal property.

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[80]354 N.E.2d 350 (Ind. Ct. App. 1976).

[81]230 Ind. 201, 102 N.E.2d 764 (1952).

[82]If there *had* been an order of support entered in *Strawser*, the ten-year statute of limitations relating to judgments, IND. CODE § 34-1-2-2(6) (1976), should apply, despite any inference to the contrary which might be drawn from the language of *Owens*. For a more complete discussion of *Owens*, see Garfield, *supra* note 26, at 173-75; Townsend, *Secured Transactions and Creditors' Rights, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 252, 281-82 (1978).

Merritt v. Economy Dept. Store, 125 Ind. App. 560, 128 N.E.2d 279 (1955), *cited in* Strawser v. Strawser, 364 N.E.2d at 792, 793, also has no relevance to the issue presented. Although characterized in the *Strawser* opinion as involving the husband's "right to reimbursement" for his wife's medical expenses, 364 N.E.2d at 793, *Merritt* was a suit by the husband for damages resulting from personal injuries inflicted on his wife through defendant's negligence. One of the items of damage alleged was the medical expenses, but it was the husband's claim for loss of *services* which led the court to classify the action, for statute of limitations purposes, as one for injuries to personal property. 128 N.E.2d at 280-81. No such claim was involved in *Strawser*.

[83]Although actions for child support are authorized by statute, IND. CODE § 31-1-11.5-3(b) (1976), it has long been recognized in Indiana that courts of general equity jurisdiction have the power to order parents to support their children independent of statutes. Leibold v. Leibold, 158 Ind. 60, 62 N.E. 627 (1902). *See generally*, H. CLARK, LAW OF DOMESTIC RELATIONS § 15.1 (1968).

[84]*See* H. CLARK, *supra* note 83, § 15.1: "The only issue [in a dispute over reimbursement of past support expenses] is, as between husband and wife, who should *equitably* bear the expense." (Emphasis added.) If the action is characterized as equitable, then the equitable doctrine of laches, rather than the statutes of limitations, should apply.

D. Dissolution of Marriage

1. Jurisdiction.—Dissolution of marriage has always been regarded as the province of state, rather than federal, government.[85] Problems arise, however, when two or more states become concerned with the dissolution of a single marriage. Each state is required by the United States Constitution to give "full faith and credit" to the judicial proceedings of every other state.[86] Whether in a given instance one state must defer to the decree of another state in an action affecting marital status ultimately depends on the jurisdiction each state has over the various aspects of the marriage relation. Since it is increasingly likely, in a highly mobile society, that more than one state will have a legitimate claim to jurisdiction over a single marriage, complex problems of jurisdiction and full faith and credit arise. These problems were explored in two opinions issued by the Indiana Court of Appeals during the survey period, *In re Marriage of Rinderknecht*[87] and *Abney v. Abney.*[88]

In *Rinderknecht*, both Nebraska and Indiana had issued decrees affecting the marriage of a serviceman stationed in Omaha, but domiciled in Indiana. The wife had filed an action for separate maintenance in Nebraska four days before the husband petitioned for dissolution of the marriage in Indiana.[89] Subsequently, each court issued a decree. The Indiana decree dissolved the marriage; the Nebraska separate maintenance decree did not purport to affect the parties' marital status. Both decrees awarded the wife custody of the parties' only child, which, apparently, was not in dispute, but each decree awarded the wife a different amount as child support.[90] The decrees also awarded the respective parties different automobiles.[91]

Since the two decrees were inconsistent with each other, it became necessary for the Indiana Court of Appeals to resolve the conflict. The court held that the Indiana trial court had jurisdiction

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[85]*See* Sosna v. Iowa, 419 U.S. 393, 404 (1975) (citing Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1859)).

[86]U.S. CONST. Art. IV, § 1, provides: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

[87]367 N.E.2d 1128 (Ind. Ct. App. 1977).

[88]374 N.E.2d 264 (Ind. Ct. App. 1978).

[89]The husband was personally served with summons in Nebraska. The wife was served by certified mail in the husband's Indiana action.

[90]The Nebraska decree ordered the husband to pay $65 every two weeks as child support. The Indiana decree ordered him to pay $25 per week, and to provide for the medical and insurance needs of the child.

[91]The Nebraska decree awarded the wife possession of a 1975 Matador automobile, title to which was in the husband's name alone. The Indiana decree awarded this automoblie to the husband, giving the wife a 1968 automobile (also held in the husband's name).

over the marital status, based upon its determination that the husband was a domiciliary of Indiana.[92] Domicile is the key to a court's jurisdiction over marital status. A state where *either* of the parties is domiciled has jurisdiction to dissolve the marriage, even without personal jurisdiction over the other party.[93] Jurisdiction in divorce is divisible, however. Jurisdiction over custody, support and property rights *does* require personal jurisdiction over both parties,[94] and the Indiana court did not have personal jurisdiction over the wife. The court of appeals rejected the husband's contention that his wife and child were also domiciled in Indiana, recognizing the "modern trend" which allows a wife the right to choose her own domicile, separate from the husband's.[95] The domicile of the wife was held to be Nebraska and the domicile of the child was the same as that of the mother with whom she lived.[96] In view of this, the Indiana court could not claim personal jurisdiction over the wife based upon service outside the state by certified mail.[97] The Indiana decree was, therefore, held to be effective to dissolve the marriage, but not to affect custody or property rights of the nonresident wife.[98] The conflicts in the support and property provisions were thus resolved in favor of the Nebraska decree.

The *Rinderknecht* opinion discusses the effect of *Shaffer v. Heitner*[99] on jurisdiction problems in dissolution of marriage actions. The United States Supreme Court held in *Shaffer* that *all* assertions of state court jurisdiction must meet the "minimum contacts" due process standard of *International Shoe Co. v. Washington*,[100]

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[92]The court of appeals upheld the trial court's finding of domicile although the husband had not lived in the state since his enlistment from Indiana in 1968. 367 N.E.2d at 1132. Once domicile is established, it is not lost by absence from the state, as long as the party intends to return. H. CLARK, *supra* note 83, § 4.2.

The husband's status as a domiciliary satisfied the requirement of the Indiana statute that "at least one of the parties shall have been a resident of the state" for six months immediately preceding the filing of a petition for dissolution of marriage, IND. CODE § 31-1-11.5-6 (1976), "resident" under the statute being construed to mean "domiciliary." 367 N.E.2d at 1131 (citing Board of Medical Registration v. Turner, 241 Ind. 73, 168 N.E.2d 193 (1960)).

[93]Williams v. North Carolina, 317 U.S. 287 (1942).

[94]Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); May v. Anderson, 345 U.S. 528 (1953); Estin v. Estin, 334 U.S. 541 (1948).

[95]367 N.E.2d at 1132 (citing H. CLARK, *supra* note 83, § 4.3).

[96]367 N.E.2d at 1132. "[T]he residence or domicile of the child would follow the residence of the parent with whom the child is living." *Id.*

[97]Under Milliken v. Meyer, 311 U.S. 457 (1940), such service would apparently be sufficient to confer personal jurisdiction over a *domiciliary* of the state, provided there was actual notice, as there evidently was in *Rinderknecht.*

[98]367 N.E.2d at 1136, 1137.

[99]433 U.S. 186 (1977).

[100]326 U.S. 310 (1945), *cited with approval in Shaffer*, 433 U.S. at 212.

whether the jurisdiction asserted is in rem or in personam. Dissolution of marriage involves both types of jurisdiction. Insofar as it affects the parties' marital status, dissolution has generally been treated as a proceeding in rem; adjudication of the parties' rights to custody, support and property has been treated as in personam.[101] As to the in rem (status) aspects of divorce, the court of appeals held only that the minimum contacts test was satisfied "by requiring only the residency of one of the parties."[102] Assuming that the court used "residency" to mean "domicile," this is an accurate statement of the rule of *Williams v. North Carolina*,[103] which appears to be in no imminent danger of being overruled.[104] It is conceivable, however, that application of the *Shaffer* "minimum contacts" test could lead the Supreme Court to modify the *Williams* rule to the extent that it might be used to confer divorce jurisdiction on a state which is merely the technical domicile of one of the parties, but has no real contact with either party, or with the marriage. But *Rinderknecht* is not such a case. Although Indiana had no real contact with the wife or with the marriage, its contact with the husband appeared to be substantial enough to justify the Indiana courts in assuming jurisdiction over his marital status. Since the wife was protected by the requirement that a court must have personal jurisdiction over her before it can adjudicate her custody or property rights, it seems doubtful that her due process rights were violated by allowing Indiana to dissolve the marriage.

As far as the in personam aspects of jurisdiction are concerned, there was no real need for the court of appeals to discuss the implications of *Shaffer*. Because the court held that there was no valid basis for the trial court to assert jurisdiction, either under Trial Rule 4.4[105] or on a theory of waiver by the wife,[106] there was no need

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[101]367 N.E.2d at 1133. The Supreme Court has been equivocal about attaching these jurisdictional labels, *see* Williams v. North Carolina, 317 U.S. 287, 297 (1942), but its treatment of jurisdictional issues in divorce, especially the different requirements for jurisdiction over the status and over the other incidents of marriage, is entirely consistent with the in rem-in personam analysis.

[102]367 N.E.2d at 1134.

[103]317 U.S. 287 (1942).

[104]*See* Sosna v. Iowa, 419 U.S. 393, 407 (1975).

[105]IND. R. TR. P. 4.4(A)(7) provides for jurisdiction over a nonresident "living in the marital relationship within the state notwithstanding subsequent departure from the state . . . ." There was no evidence that the Rinderknechts had ever lived in Indiana as husband and wife. They had married in Idaho after the husband, an Indiana citizen, had enlisted in the Air Force. At the time the two actions were filed, both parties apparently were living in Nebraska.

[106]The court of appeals held that the wife had not waived her objection to the trial court's jurisdiction by making what was, in effect, a special appearance, noting that special appearances are no longer necessary. If a defendant makes a timely challenge

to further test the claim of in personam jurisdiction under the constitutional "minimum contacts" standard. Only where the trial court *did* have a valid claim to in personam jurisdiction, under the long arm provisions of Trial Rule 4.4 or otherwise, would *Shaffer* require that such claimed jurisdiction also meet the minimum contacts test. If it failed to meet the test, there would be no valid personal jurisdiction, despite the long arm provision, because such jurisdiction would violate the wife's due process rights under the fourteenth amendment.[107]

In *Abney v. Abney*,[108] the wife had obtained a separate maintenance decree in Tennessee in 1964. The husband thereafter attempted unsuccessfully to obtain a divorce in Tennessee. In 1970, the Tennessee Court of Appeals held his petition for divorce barred by his unpurged contempt for failure to pay arrearages in support under the separate maintenance decree.[109] The husband then filed a petition for dissolution of marriage in Marion County, Indiana. When the Indiana court refused the wife's request that it defer to the Tennessee court because of the prior litigation in that state, the wife obtained a Tennessee decree restraining the husband from pursuing his Indiana dissolution action.[110] The Indiana court, nevertheless, entered a decree dissolving the marriage, and the court of appeals affirmed.[111]

The wife argued that the trial court was bound to give effect to the Tennessee injunction, either under the full faith and credit clause of the United States Constitution[112] or as a matter of comity.

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to the court's in personam jurisdiction, either by motion to dismiss or by answer, the issue may properly be raised on appeal even if the case proceeded to trial on the merits. *Id.* at 1136, n.11.

[107]U.S. CONST. amend. XIV, § 1. *See* Kulko v. Superior Court, 98 S. Ct. 1690 (1978) (holding that the California courts could not assert long-arm personal jurisdiction over a nonresident father in an action for support of a child domiciled in California).

[108]374 N.E.2d 264 (Ind. Ct. App. 1978).

[109]Abney v. Abney, 61 Tenn. App. 531, 456 S.W.2d 364 (1970), *cited in* Abney v. Abney, 374 N.E.2d at 266.

[110]The Tennessee decree asserted that "this court [has] continuing jurisdiction over this Defendant through a separate maintenance decree . . . [and] refused this Defendant such relief previously requested . . . because of his being in contempt, and this contempt having never been purged." 374 N.E.2d at 266. The Tennessee decree restrained the husband from obtaining a dissolution of the marriage in *any* other jurisdiction.

[111]*Id.* at 271. The court of appeals had initially sought to avoid a decision on the merits, affirming the trial court's decree because the wife's brief did not contain a verbatim statement of the dissolution decree as required by IND. R. APP. P. 8.3(A)(4). Abney v. Abney, 360 N.E.2d 1044 (Ind. Ct. App. 1977). The Indiana Supreme Court remanded the case for review on the merits, holding that the omission was cured by the verbatim statement contained in the husband's brief. Abney v. Abney, 374 N.E.2d 264, 265 (Ind. Ct. App. 1978).

[112]U.S. CONST. art. IV, § 1.

In a well-reasoned opinion, the court of appeals first noted the general agreement among the authorities that no court is obligated to give full faith and credit to an injunction issued in a sister state against the prosecution of judicial proceedings in the forum state.[113] The jurisdiction of the Indiana court over the parties' marital status derived from the bona fide residence (domicile) of the husband in the state.[114] Once that jurisdiction attached, it could not be ousted by the action of the Tennessee court in issuing an injunction against further prosecution of the suit by the husband. If any effect was to be accorded to the Tennessee injunction, it would have to be under the discretionary doctrine of comity, rather than under the constitutional compulsion of the full faith and credit clause.[115]

The wife's comity argument was based upon the premise that the Tennessee court retained "continuing jurisdiction over the marital relationship" under its 1964 separate maintenance decree.[116] Such jurisdiction, however, extended only to modification of the support obligations imposed by that decree, and not to the parties' marital status.[117] The Tennessee court had expressly declined to assert jurisdiction over the parties' marital status by dismissing the husband's petition for divorce.[118] Indiana was, therefore, the first state to obtain jurisdiction over the marital status and was not required to defer to the later Tennessee injunction. Although priority of jurisdiction might not be the controlling factor in every case, it was considered dispositive here.[119] The court of appeals held that the trial court had given Tennessee all the deference required when it

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[113]374 N.E.2d at 267-68.

[114]*See* Williams v. North Carolina, 317 U.S. 287 (1942). *See* discussion of the similar jurisdictional issues raised by *Rinderknecht*, *supra* at notes 89-107 and accompanying text. No question was raised in *Abney* as to the bona fides of the husband's Indiana domicile. 374 N.E.2d at 269.

[115]374 N.E.2d at 267.

[116]*Id.* at 268.

[117]*Id.* The divisible nature of divorce jurisdiction was also involved in *Rinderknecht*.

[118]The Tennessee court's order is quoted at note 110 *supra*.

[119]374 N.E.2d at 268, 269. The court of appeals acknowledged that the "equities involved and the other competing interests of the two jurisdictions should also be considered." *Id.* at 268. However, priority of jurisdiction was given primary consideration, "based on the policy that after suits are commenced in one state, it is inconsistent with inter-state harmony to let the courts of another state control their prosecution." *Id.* (citing James v. Grand Trunk W.R. Co., 14 Ill.2d 356, 152 N.E.2d 858, *cert. denied* 358 U.S. 915 (1958)). Ehrenzweig suggests that anti-suit injunctions, such as that entered by the Tennessee court here, might be refused enforcement on the ground they "do not adjudicate the merits of the case," which would certainly be applicable to the facts of *Abney*. A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 183 (1962). *See also*, H. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS §§ 216, 218 (4th ed. E. Scoles 1964).

ordered the husband to pay $10,390 in past-due support and maintenance "as ordered by the Tennessee courts."[120]

2. Grounds.—The wife in *Abney v. Abney*[121] argued that the trial court should have exercised its equitable discretion to deny the husband's petition for dissolution, even though it found the marriage was irretrievably broken. The finding of irretrievable breakdown was not challenged by the wife, nor could it have been, in view of the fact that the parties had lived apart since at least 1964.[122] The wife's opposition to dissolution of the marriage apparently stemmed from concern over termination of her husband's military medical benefits. She suffered from severe rheumatoid arthritis requiring costly medical treatment, and the trial court expressly found that the husband was incapable of providing her with sufficient maintenance to offset the loss of the medical benefits. The court of appeals held that the trial court had no discretion to deny dissolution once it found the marriage was irretrievably broken, and affirmed its decree of dissolution.[123]

Under the no-fault ground, the key issue is whether there is a reasonable possibility of reconciliation. If on final hearing the court finds that there is such a possibility, the court may continue the matter and order the parties to seek reconciliation through counseling.[124] However, if the court finds that the marriage is irretrievably broken—that there is *no* reasonable possibility of reconciliation—then "the court *shall* enter a dissolution decree."[125] The dissolution decree is mandatory once the finding of irretrievable breakdown is made.

The courts' disposition of the *Abney* case undoubtedly works a hardship on the wife. Although maintenance was awarded to her, it was admittedly insufficient to provide for her medical needs. Yet denial of the divorce would have done violence to the statute, and would have worked a hardship on the husband. To have condemned

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[120]374 N.E.2d at 269. A foreign judgment for arrears in support is entitled to full faith and credit in other states, to the extent that it is final under the law of the state in which it was entered. Sistare v. Sistare, 218 U.S. 1 (1909).

[121]374 N.E.2d 264 (Ind. Ct. App. 1978).

[122]The Tennessee separate maintenance decree was dated May 25, 1964, and the parties had lived apart continuously since their initial separation.

[123]374 N.E.2d at 269-71.

[124]IND. CODE § 31-1-11.5-8(a) (1976). The statute provides:

> Upon the final hearing: the court shall hear evidence and, if it finds that the material allegations of the petition are true, either enter a dissolution decree . . . or if the court finds that there is a reasonable possibility of reconciliation, the court may continue the matter and may order the parties to seek reconciliation through any available counseling . . . .

[125]IND. CODE § 31-1-11.5-9(a) (1976) (emphasis added).

him to a lifetime of marriage to a woman with whom he had not lived for fourteen years, solely to assure her continued access to his medical benefits, would have been a questionable exercise of equitable discretion even if such discretion had been found to exist. The court of appeals' disposition of the case appears to be the only possible resolution of an impossible dilemma.

3. Maintenance.[126]—Although the Indiana courts' power to award spousal maintenance is sharply limited,[127] they still possess broad power to award *temporary* maintenance during the pendency of dissolution proceedings.[128] In *Wendorf v. Wendorf*,[129] the husband claimed that the trial court abused its discretion in awarding temporary maintenance and child support of $200 per week. Although the weekly payment ordered was almost equal to the husband's weekly salary, he had substantial additional income.[130] The court of appeals affirmed the order, holding that the trial court was entitled to consider the temporary nature of the order along with the needs of the spouse and children and the husband's ability to pay.[131] Even a temporary order which exceeded the husband's present earnings would not be per se an abuse of discretion.[132]

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[126]Two cases decided during the survey period involved "alimony judgments," which no longer exist in Indiana; all financial awards to spouses are now labeled either as maintenance or property division. *See* IND. CODE §§ 31-1-11.5-9(c) to 11 (1976). In Johnson v. Johnson, 367 N.E.2d 1147 (Ind. Ct. App. 1977), the court of appeals reversed a decree awarding the wife an "alimony" judgment for $5,500, and remanded the case to the trial court for clarification of the statutory basis for the award.

Lyon v. Lyon, 369 N.E.2d 649 (Ind. Ct. App. 1977), concerned a decree entered in 1961, under the former statute, based upon a written property settlement agreement of the parties. The decree ordered the husband to pay the wife alimony of $525 per month for the rest of her life, unless she remarried or the husband died. The court of appeals held that the husband was estopped from now challenging the award by reason of his participation in the original divorce proceedings, from which no appeal was taken.

[127]*See* IND. CODE § 31-1-11.5-9(c) (1976) discussed *infra* at notes 140-80 and accompanying text.

[128]IND. CODE § 31-1-11.5-7(d) (1976) provides: "The court may issue an order for temporary maintenance or support in such amounts and on such terms as may seem just and proper . . . ." IND. CODE § 31-1-11.5-7(e) (1976) provides:

> The issuance of a provisional order shall be without prejudice to the rights of the parties or the child as adjudicated at the final hearing in the proceeding. Its terms may be revoked or modified prior to final decree on a showing of the facts appropriate to revocation or modification and it shall terminate when the final decree is entered subject to right of appeal or when the petition for dissolution is dismissed.

[129]366 N.E.2d 703 (Ind. Ct. App. 1977).

[130]Additional income from bonuses and commodity sales amounted to $6,800 in 1975, and his 1975 tax refund was $3,200. The wife was not employed.

[131]366 N.E.2d at 705.

[132]*Id.* The court of appeals also upheld the trial court's order requiring the husband to pay $500 to the wife's attorneys, rejecting the husband's assertion that the wife should have sold her fur coat to pay her attorney's fees. *Id.* at 706.

The only major legislative amendment to the Dissolution of Marriage Act during the 1978 session was to section 31-1-11.5-13, relating to enforcement of support orders.[133] The section authorizes the courts to order support payments to be made through the clerk of the circuit court, to require an accounting from the recipient, and to enforce support orders by requiring the obligor to make an assignment of wages to the person entitled to receive the payments. All of these provisions now apply to orders for spousal support, as well as to child support orders.[134]

The legislature also added a new provision, section 13(e)(1), authorizing the court to "enter a judgment against the person obligated to pay support requiring that person to pay all unpaid obligations to the person entitled to receive payments."[135] With this addition, section 13(e) now provides that, upon application for enforcement of a support order, the court *may* either (1) enter a judgment for arrears, or (2) order the obligor to make an assignment of wages. If the intent was to list all alternatives open to a court when asked to enforce a support order, it is difficult to understand why contempt was not also listed, especially in view of the specific provision of section 31-1-11.5-17(a), authorizing enforcement of support orders by contempt.[136] The omission may well be cited as implicitly supporting the statements in *Kuhn v. Kuhn*[137] to the effect that a judgment fixing the amount of the arrearage is necessary before a support decree can be enforced by contempt.[138] It should be noted, however, that the new provision is permissive rather than mandatory. It could as well have been intended to make it clear that courts do have the power to enter judgments for arrears despite repeal of the former statute expressly authorizing such judgments.[139]

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[133]IND. CODE § 31-1-11.5-13 (Supp. 1978). Amendments to §§ 1 and 3 changed one of the alternative grounds for dissolution from conviction of an "infamous crime" to conviction of "a felony." *Id.* §§ 31-1-11.5-1, -3(a)(2).

[134]Throughout the section, the word "child" and references to § 12, relating to child support orders, have been deleted, so that § 13 now applies to orders "for support." *Id.* § 31-1-11.5-13.

[135]*Id.* § 31-1-11.5-13(e)(1).

[136]*Id.* § 31-1-11.5-17(a) provides, in part: "Terms of the decree may be enforced by all remedies available for enforcement of a judgment *including but not limited to contempt* or an assignment of wages or salary, except as otherwise provided in this chapter." (Emphasis added.) Note that § 17(a) is not limited to support decrees, but applies to *all* "terms of the decree." Despite this broad language, the Indiana Supreme Court has held that contempt is not available to enforce payments ordered as part of a division of property. State *ex rel.* Shaunki v. Endsley, 362 N.E.2d 153 (Ind. 1977).

[137]361 N.E.2d 919 (Ind. Ct. App. 1977). For a critical discussion of *Kuhn*, *see* Garfield, *supra* note 26, at 175; Townsend, *supra* note 82, at 281-82.

[138]361 N.E.2d at 920.

[139]Act of Mar. 11, 1967, ch. 282, § 1, 1967 Ind. Acts 901 (repealed 1973). The former statute was also permissive rather than mandatory.

Unfortunately, it may have succeeded only in raising new ambiguities.

4. Property Division.—The courts of appeal decided several cases dealing with division of property on dissolution of marriage. Because maintenance, formerly "alimony," can now be awarded only to an "incapacitated" spouse,[140] in the vast majority of cases, property division is the sole vehicle for settling the financial affairs of couples upon divorce. Its importance to the parties involved cannot be over-emphasized.

In *Wilcox v. Wilcox*[141] the parties were married in 1949, during their final year in college. After graduation, the wife worked while the husband continued his education; he received a Ph.D. degree in 1952. The wife then quit work to raise three children. At the time of the dissolution, the husband was a tenured full professor at Purdue University, earning $20,800 per year. The couple had accumulated tangible assets totalling $42,000. The trial court awarded substantially all of these assets, or their cash equivalent, to the wife, and the Indiana Court of Appeals affirmed.[142]

Both parties were dissatisfied with the trial court's disposition of their property. The husband argued that it was an abuse of discretion to award substantially all of their property to the wife. Normally, a more equal division of property would be appropriate, but the Dissolution of Marriage Act allows the courts to consider many factors in arriving at a "just and reasonable" division of property.[143] Under the statutory guidelines, the court of appeals held

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[140]IND. CODE § 31-1-11.5-9(c) (1976) provides:

> The court may make no provision for 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 during any such incapacity, subject to further order of the court.

"Incapacitated" has been given a restrictive interpretation by the courts. *See* Liszkai v. Liszkai, 343 N.E.2d 799 (Ind. Ct. App. 1976) (dictum).

[141]365 N.E.2d 792 (Ind. Ct. App. 1977).

[142]*Id.* at 796.

[143]The relevant portion of IND. CODE § 31-1-11.5-11 (1976) provides:

> In determining what is just and reasonable the court shall consider the following factors:
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> (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;

that the trial court had not abused its discretion in making an unequal division, because: (1) The wife had contributed to the acquisition of the property; (2) she had relinquished her own education and career; (3) her economic circumstances were "somewhat unsettled," and (4) the husband had "greater probability of high earnings" than the wife, who had only recently obtained her license as a real estate salesperson.[144] The court in effect concluded that the disparity in the parties' earning ability and the wife's contribution to the husband's career over a lengthy marriage were sufficient to tip the scales of equity in her favor. Under the circumstances of this case, an unequal division of assets was equitable.

The wife argued that the trial court had erred in giving too *little* weight to the disparity in earning ability. She contended that the husband's future earnings, discounted to present value (alleged to be $195,501) should be considered an asset of the marriage, subject to division by the court on dissolution.[145] If this asset were added to the tangible assets of $42,000, the wife's award of $42,000 would be but a small fraction of the total ($237,501) and, therefore, inadequate. Under the wife's theory, an award to her in excess of $100,000 might have constituted a "just and reasonable" division. The court of appeals was probably correct in rejecting any such result as inequitable, but the reasoning employed by the court is likely to lead to even greater inequities in future cases.

The court "noted" that "any award over and above the [value of the] actual physical assets of the marital relationship must represent some form of support or maintenance,"[146] and that under section 31-1-11.5-9(c), the courts may make no provision for maintenance *except* "when the court finds a spouse to be physically or mentally incapacitated . . . ."[147] To treat discounted future income as an asset subject to division would, therefore, run "contra to the statutory provisions forbidding maintenance without a showing of incapacitation."[148] Regardless of the label attached to such an award, "its true

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(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.

[144]365 N.E.2d at 796. The facts enumerated by the court coincide with some of the factors enumerated in the statute. *See* IND. CODE § 31-1-11.5-11(a), (c), (e) (1976).

[145]The wife also included the capitalized value of her *own* future earnings in the total marital assets, but valued them at only $14,625. Brief for Appellant at 8, 13. The wife further argued that the trial court should have treated the husband's interest in a retirement plan as an asset subject to division, but neither court considered this argument, on the ground that no evidence was adduced concerning the plan. 365 N.E.2d at 794.

[146]*Id.*

[147]IND. CODE § 31-1-11.5-9(c) (1976). *See* note 134 *supra.*

[148]365 N.E.2d at 795.

nature would shine through as maintenance."[149] In support of this proposition, the court cited *Liszkai v. Liszkai*,[150] in which there is dictum to the effect that a non-working wife who is unemployable due to lack of marketable skills is not "incapacitated" within the meaning of section 9(c).[151]

This reasoning overlooks the fact that the true nature of the award actually made by the *Wilcox* court would still "shine through as maintenance,"[152] regardless of whether it exceeded the value of physical assets of the marriage. In justifying the unequal division of property, the court considered, among the factors authorized by section 31-1-11.5-11, the economic circumstances (*i.e.*, the need) of the wife, and the earning ability (*i.e.*, the ability to pay) of the husband. These are the very factors that have always been considered in determining awards of maintenance or alimony.[153] Without those factors, any "just and reasonable" division would necessarily have been more nearly equal. Of the marital assets of $42,000, the wife could have expected to receive approximately half, or about $21,000.[154] The additional $21,000 which she did in fact receive was clearly intended primarily to meet her support needs; that is, it was "maintenance." If the prohibition of section 9(c) really meant what the court of appeals said it meant, it would necessarily forbid this kind of maintenance award as well. Such an interpretation would bring section 9(c) into irreconcilable conflict with section 11, which clearly authorizes the courts to take support-related factors into account in divisions of property, as the court expressly held in *Wilcox*.

The two holdings of *Wilcox* conflict. On the one hand, it correctly holds that section 11 requires the courts to effect a "just and reasonable" division of property, even if this means that *all* of the property must be awarded to one of the spouses, in cases where

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[149] *Id.*

[150] 343 N.E.2d 799 (Ind. Ct. App. 1976), *cited in* Wilcox v. Wilcox, 365 N.E.2d at 795.

[151] 343 N.E.2d at 805-06. Neither of the two concurring judges joined in the opinion of Presiding Judge Buchanan in *Liszkai*. Judge White concurred only in the result, and Judge Sullivan wrote a concurring opinion which expressed disagreement with the restrictive interpretation given § 9(c). *Id.* at 806 (White & Sullivan, JJ., concurring).

[152] 365 N.E.2d at 795.

[153] *See, e.g.*, UNIFORM MARRIAGE AND DIVORCE ACT § 308. Bahre v. Bahre, 133 Ind. App. 567, 181 N.E.2d 639 (1962), decided under the former statute, listed as factors in determining alimony "the financial condition and income of the parties and the ability of the husband to earn money." *Id.* at 571, 181 N.E.2d at 641.

[154] This is, in fact, the holding of *In re* Marriage of Osborne, 369 N.E.2d 653 (Ind. Ct. App. 1977), discussed at notes 173-76 *infra* and accompanying text, in which the court of appeals reversed a decree awarding the wife a greater share of the marital assets than the husband received where the earning capacity of the two spouses was approximately equal.

there is a gross disparity in earning ability between the two. On the other hand, it holds that, regardless of how great this disparity in earning ability may be, section 9(c) prohibits the courts from awarding a spouse anything over and above the value of the actual physical assets of the marriage, unless the spouse is incapacitated as that term is narrowly defined in the *Liszkai* dictum. These two holdings can coexist in *Wilcox* only because the value of the physical assets of this marriage was substantial. It is at least arguable that the additional $21,000 the wife received was sufficient to compensate her for the diminished earning capacity resulting from her long years as a non-working wife and mother. But how is a future court, following *Wilcox*, to reach the mandated "just and reasonable" result in a case where the parties had managed to accumulate little or nothing in tangible assets? Would a total award of $5,000 be sufficient to equalize the disparity in earning ability between a husband earning $20,000 a year, and his non-working wife of twenty or thirty years, capable of earning only a fraction of that amount? What of a case where there are no assets to divide, but only debts? Would it violate the prohibition of section 9(c) to order the husband to pay those debts? Because such an "award" would exceed the value of the actual physical assets of the marriage, would it not necessarily also be forbidden "maintenance" under the reasoning of *Wilcox*? In this kind of case, it simply will not be possible to achieve a "just and reasonable" result without considering the working spouse's earning ability as an asset subject to division under section 11.[155] The only real question is *how* should earning ability be considered?

The court's discussion of the wife's argument in *Wilcox* suggests that she wanted simply to discount the husband's future income to present value, then divide the result. Such an approach would oversimplify a complex problem. It might be appropriate for measuring the income value—"good will"—of a business, but the earning capacity of an individual is far more uncertain. The individual's future income is subject to contingencies such as disability, death, and unemployment, to a much greater degree than is the future income of a business entity. It is also relevant that this income is to be earned in the future without any further contribution from the wife. The only contribution the wife can claim is to the husband's *present* capacity to earn more income in the future.[156] In attempting to measure the value of her contribution, it might be more useful to

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[155]IND. CODE § 31-1-11.5-11(e) (1976).

[156]*In re* Marriage of Horstmann, 4 FAM. L. REP. (BNA) 3069, 3073 (Iowa 1978) held that "the increase in future earning capacity" made possible by the law degree which his wife had helped him to earn constituted an asset subject to division under the Iowa divorce statute.

look at what she has *lost* through her years as a homemaker rather than at what the husband has gained. What would *her* earning capacity be if she had devoted her time to developing her own career, instead of assisting her husband in developing his?[157] The difference between that figure and her actual present earning capacity should approximate the value of her contribution. Whether it would be "just and reasonable" to require the husband to pay her all or any part of this amount would, of course, depend in turn upon *his* earning capacity.[158]

The court of appeals is correct in saying that this kind of award would be equivalent to an award of maintenance, but it is also clearly authorized, if not commanded, by section 11(e).[159] So long as the courts cling to the restrictive definition of an incapacitated spouse given in *Liszkai*, this will be the only way of achieving an equitable result in many cases. An alternative solution would be to give a more expansive reading to the term "incapacitated" in section 9(c). A spouse who is unable to adequately support herself or himself because of "age, lack of education, inexperience and want of vocational skill or training" could reasonably be held to be "incapacitated" within the meaning of section 9(c)[160] and, hence, eligible for an award of maintenance. This award would have the added advantage of flexibility, being subject to modification in the future if the circumstances of either party change.[161] Until the legislature acts to remove the tension between sections 9(c) and 11, the courts need to interpret both of these sections so as to do justice to each of the parties to the many traditional marriages which surely still exist in Indiana.

The status of the husband's interest in a retirement plan was also raised by the wife in *Wilcox*, but was not resolved by the court

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[157]The fact that the wife, a college graduate, had relinquished her own education and career was one of the circumstances relied upon by the court of appeals to support the unequal division of property actually made in *Wilcox*. 365 N.E.2d at 796, discussed in note 144 *supra* and accompanying text.

[158]IND. CODE § 31-1-11.5-11(e) (1976) authorizes the court to consider the "earnings or earning ability" of *both* parties in arriving at a "just and reasonable" property division. The wife's argument did in fact attempt to take both parties' earning ability into account, by adding the value of both to the total marital assets. Brief for Appellant at 8, 13; *see* note 138 *supra*. By dividing the total, the court would achieve a rough equalization of future income between the parties, but this is not necessarily the result to be achieved by a property division on divorce.

[159]*Id.*

[160]Liszkai v. Kiszkai, 343 N.E.2d 799, 806 (Ind. Ct. App. 1976) (Sullivan, J., concurring).

[161]*See* IND. CODE § 31-1-11.5-9(c) (1976), quoted at note 140 *supra*, which makes maintenance orders "subject to further order of the court"; Newman v. Newman, 355 N.E.2d 867 (Ind. Ct. App. 1976).

because of lack of evidence.[162] However, a similar issue was decided by the court of appeals in a later case. In *Savage v. Savage*,[163] the husband was already receiving monthly payments under a pension plan which provided for periodic payments during the life of the beneficiary. The trial court ordered the husband to pay one-third of the pension payments, as received, to the wife.[164] The court of appeals reversed, holding that the order constituted an improper award of maintenance under *Wilcox*.[165] The husband did not have a "sufficient vested present interest" in the pension benefits for them to qualify as marital property.[166]

In order to reach this result, it was necessary for the court of appeals to distinguish its own recent decision in *Stigall v. Stigall*.[167] The court in *Stigall* had affirmed an order awarding the wife *her own* interest in a pension and profit sharing plan as part of the division of property on divorce.[168] The effect of this was to permit the court to make an offsetting award to the husband of the wife's interest in the residence owned by the parties as tenants by the entireties.[169] The husband in *Stigall* was totally disabled, but the statute in force at the time permitted awards of alimony only to wives. The court's treatment of the pension plan as marital property was a wise exercise of equitable discretion, necessary in order to mitigate the harsh result otherwise mandated by the statute. The same wisdom is necessary today to mitigate the harshness of the limitation on awards of maintenance under the present statute and the limitation on property divisions imposed by *Wilcox*. Instead, the court in *Savage* speaks of "vested present interests" as though it

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[162]365 N.E.2d at 794.

[163]374 N.E.2d 536 (Ind. Ct. App. 1978). For another discussion of this case, see Townsend, *Secured Transactions and Creditors' Rights, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 289, 312-13 (1978).

[164]The permanent monthly payment under the plan was $350, but at the time of trial the husband was receiving an additional $600 per month as an early retirement bonus, which was to expire during 1978. The trial court ordered the husband to pay the wife $350 per month until the bonus payments terminated, and one-third of the pension payments thereafter. *Id.* at 537.

[165]*Id.* at 538-39 (citing Wilcox v. Wilcox, 365 N.E.2d 792 (Ind. Ct. App. 1977), discussed at notes 141-62 *supra* and accompanying text).

[166]374 N.E.2d at 538.

[167]151 Ind. App. 26, 277 N.E.2d 802 (1972). The *Savage* opinion does point out that the pension plans involved in the two cases are distinguishable, in that the *Stigall* plan was a "fully vested fund of money . . . payable in a lump sum either on retirement or on resignation of employment." 374 N.E.2d at 539 (discussing *Stigall*). However, the *Savage* court ultimately relied on the conflict between the reasoning of *Stigall* and *Wilcox*. 374 N.E.2d at 539.

[168]151 Ind. App. at 43-44, 277 N.E.2d at 811.

[169]*Id.* at 29-30, 277 N.E.2d at 804.

were resolving a title dispute under property law rather than attempting to achieve a "just and reasonable" result in equity.[170]

The court pointed out in *Stigall* that the interest accumulated by the wife in her pension fund and profit sharing plan was "made possible by and through the help and work of her husband . . . without [whose] help and work it would have been impossible for her to have accumulated the amount she did."[171] The same equities apply to many pension interests held by husbands and wives today. They should not be overlooked in deference to a supposed legislative intent to ban all payments based on support-related factors, and to confine property divisions to "vested present interests" in tangible personal property. *Savage* adds yet another limitation to the equitable discretion of the courts already unduly restricted by *Liszkai* and *Wilcox*. In many marriages, where the working spouse's interest in a pension or retirement plan is the only substantial asset, it will be impossible for the courts to achieve a truly equitable division of property.

Broad discretionary powers are needed in order for the courts to deal adequately with the many and diverse fact situations presented in dissolution of marriage actions. Further illustration of this diversity is provided by two cases decided during the survey period by the court of appeals.[172] *In re Marriage of Osborne*[173] reversed a trial court order awarding substantially all of the jointly acquired assets of the marriage to the wife in a case where the earning ability of the wife slightly exceeded that of the husband. The trial court had reached this result by treating the husband's recent inheritance from his mother as an asset subject to distribution, and awarding it to the husband. The bulk of the parties' other property was then awarded to the wife, resulting in a nearly equal division: $36,700 to the wife and $42,770 to the husband. An equal division is not necessarily equitable, however.

Section 11 expressly authorizes a court to divide property "acquired by either spouse in his or her own right after the marriage and prior to final separation."[174] Presumably this would include in-

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[170]In many other states, it is recognized that the property concept of "vesting" has little relevance in proceedings to effect an equitable division of property on divorce. *See, e.g., In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); Hutchins v. Hutchins, 71 Mich. App. 361, 248 N.W.2d 272 (1976); Pellegrino v. Pellegrino, 134 N.J. Super. 512, 342 A.2d 226 (1975). California is a community property state; Michigan and New Jersey are common law property states.

[171]151 Ind. App. at 43, 277 N.E.2d at 811.

[172]*In re* Marriage of Patus, 372 N.E.2d 493 (Ind. Ct. App. 1978); *In re* Marriage of Osborne, 369 N.E.2d 653 (Ind. Ct. App. 1977).

[173]369 N.E.2d 653 (Ind. Ct. App. 1977).

[174]IND. CODE § 31-1-11.5-11 (1976).

herited property. However, the statute then instructs the court, in determining what is a "just and reasonable" division, to consider, among other factors, "the extent to which the property was acquired . . . through inheritance or gift."[175] The combined import of these two provisions is that, all other factors being equal (as they were in *Osborne*), the inherited property should be awarded to the inheriting spouse in addition to, rather than in lieu of, his equitable share of the parties' jointly acquired property.[176] It would seem to follow from this interpretation of the statute that in cases where such factors as "economic circumstances" and "earning ability" are *not* equal, inherited or gift property *could* be divided as a means of avoiding the "tangible assets" limitation of *Wilcox* or the "vested present interest" limitation of *Savage*.

In the other case, *In re Marriage of Patus*,[177] a working wife argued that a fifty-fifty division of the marital property was inequitable because it indicated that the trial court had ignored her contribution as a homemaker.[178] The court of appeals rejected her contention that a working wife is entitled to a more-than-equal share of marital property because she also functioned as homemaker.[179] The primary purpose of section 11(a) was to make allowance for the contribution of a *non*-working spouse, whose sole and primary contribution to the marriage was as a homemaker. Where both parties worked, and both parties contributed to the homemaking aspects of the marriage, the courts should not become involved in detailed weighing of their respective contributions.[180]

5. Evidence.—In an opinion later vacated by the Indiana Supreme Court,[181] the court of appeals held that evidence procured by a wiretap in the marital home was not admissible in a divorce ac-

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[175]*Id.* § 31-1-11.5-11(b).

[176]This interpretation of the statute is supported by the concurring opinion of Presiding Judge Staton and is implicit, though not expressly stated, in the opinion of the court. *In re* Marriage of Osborne, 369 N.E.2d 653, 659-60 (Ind. Ct. App. 1977) (Staton, J., concurring). Judge Staton disagreed with the court opinion in its characterization of the inheritance as "acquired" prior to separation of the parties, and questioned the sufficiency of the evidence as to its value. *Id.* at 660.

[177]372 N.E.2d 493 (Ind. Ct. App. 1978).

[178]IND. CODE § 31-1-11.5-11(a) (1976) lists, among the factors to be considered in dividing property, "the contribution of each spouse to the acquisition of the property, including the contribution of a spouse as homemaker."

[179]372 N.E.2d at 495-96.

[180]When each marital partner brings earnings into the marriage, and these earnings are substantially equal, we do not believe that an exhaustive examination of who washed the dishes, who took out the trash, who painted the house, who changed the oil in the car, who changed the diapers, who paid the bills, and who mowed the lawn is constructive.

Id. at 496.

[181]*In re* Marriage of Lopp, 378 N.E.2d 414 (Ind. 1978).

tion. In *In re Marriage of Lopp*,[182] the husband had attached a self-activating tape recorder to the home telephone, recording all telephone conversations. A tape of one of the wife's conversations was admitted into evidence in the parties' dissolution of marriage proceedings. The trial court granted the husband's petition for dissolution and granted him custody of the parties' only child. The court of appeals reversed, on the ground that admission of the tape was in violation of the federal wiretap statute.[183] The decision was carefully limited to the remedy of exclusion of evidence. The court expressed no opinion as to whether the husband would be subject to civil or criminal liability under the statute.[184] The husband argued that the wiretap statute did not apply to domestic relations, there being no "expectation of privacy" between husband and wife.[185] The court could see no reason why the "right to privacy should be totally abrogated upon entry into a marriage," and held that evidence secured through illegal wiretap should be excluded "in any legal proceeding."[186]

In vacating this judgment, the Indiana Supreme Court did not express disagreement with the court of appeals' reasoning, but held that the tapes had been properly admitted here in connection with the wife's claim that they had been used by the husband to coerce her into signing a custody agreement.[187] Since the trial judge had already listened to the tapes for this limited and proper purpose, his later ruling admitting the tapes into evidence at the final hearing on the merits did not constitute reversible error. The tapes were then admitted only for the purpose of incorporating all evidence into the final hearing, and the judge neither listened to the tapes again, nor permitted them to be transcribed into the record.[188] Insofar as the final disposition of the merits of the case was concerned, the supreme court accepted the trial court's findings that the evidence of the tapes was "merely cumulative" and its admission therefore

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[182]370 N.E.2d 977 (Ind. Ct. App. 1977).

[183]*Id.* at 982. 18 U.S.C. § 2515 (1976) provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

[184]*Id.* §§ 2511, 2520.

[185]370 N.E.2d at 980.

[186]370 N.E.2d at 981.

[187]378 N.E.2d at 416. The wife's attorney had expressly consented to the court's listening to the tapes for this purpose.

[188]*Id.* at 423.

constituted harmless error.[189] In the supreme court's view of the case, it was unnecessary to decide the broader question decided by the court of appeals, whether wiretap evidence would be admissible on the merits in a dispute over child custody.

6. Discovery.—Sanctions for resisting and obstructing discovery were imposed upon the husband in *Finley v. Finley*.[190] The trial court ordered the husband to pay the cost of an audit of a family corporation whose stock constituted the principal marital asset, so that the value of the stock could be ascertained. The court of appeals held that the sanction imposed was not an abuse of discretion under Trial Rule 37(B)(2)(c).[191] The husband contended that only expenses for enforcement of the discovery order could be charged against him under the rule. The court of appeals held that "[t]he intent and purpose of the Rule together with the inherent power of the trial court to do those things which are necessary to move the proceedings along to judgment" supported a broader interpretation.[192]

7. Relief under Trial Rule 60(B).—In *Lankenau v. Lankenau*,[193] the trial court entered a dissolution of marriage decree. As part of the division of property, the court ordered the husband to pay to the wife the sum of $36,400 in 520 weekly installments of $70 each. Four months later, the husband filed a motion under Trial Rule 60(B), asking the court to correct the order to provide for 521 installments, so that the payments would qualify for deduction as periodic payments for federal income tax purposes. The trial court found that its original decree was in error in failing to make the payments deductible to the husband and, hence, taxable to the wife, and that the decree should be modified "to accurately reflect the in-

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[189] *Id.*

[190] 367 N.E.2d 1126 (Ind. Ct. App. 1977). For another discussion of this case, see Harvey, *Civil Procedure and Jurisdiction, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 42, 52-53 (1978).

[191] *Id.* at 1127. IND. R. TR. P. 37(B)(2) provides:

> The court may allow expenses, including reasonable attorney's fees, incurred by a party, witness or person, against a party, witness or person responsible for unexcused conduct that is:
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> . . . .
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> (c) in bad faith and abusively resisting or obstructing a desposition, interrogatories, production of evidence, inspection, examination, request, question, enforcement order, subpoena, protective order or any other remedy under the discovery provisions of these rules.

[192] 367 N.E.2d at 1127. The court also noted that Trial Rule 37(B)(4) authorizes a trial court to enter default judgment or dismissal against a party guilty of resisting or obstructing discovery, *id.*, n.3, implying that the lesser sanction imposed by the trial court here was within its discretionary power.

[193] 365 N.E.2d 1241 (Ind. Ct. App. 1977).

tention of the Court."[194] The court of appeals affirmed the order as a proper exercise of the court's discretionary power to correct erroneous judgments under Trial Rule 60(B)(1),[195] rejecting the wife's argument that section 31-1-11.5-17(a) precluded such "modification" of the judgment.[196]

Section 17(a) provides that "orders as to property disposition . . . may not be revoked or modified, except in case of fraud . . . ."[197] The court of appeals held that this provision has no effect on the courts' power to grant relief from a judgment under Trial Rule 60(B).[198] Section 17(a) forbids future modification of property division orders based on changes in circumstances occurring *after* the decree is entered.[199] Trial Rule 60(B) authorizes relief from an order based on circumstances existing at *the time the judgment was entered* (mistake in this case).[200] Section 17(a) has no relevance in this context. The decision in *Lankenau* appears to be inconsistent with the court of appeals' statements in *Covalt v. Covalt*,[201] that relief under Trial Rule 60(B) is limited by the provisions of sections 10(c) and 17(a).[202] Any conflict between the two opinions should be resolved in favor of the *Lankenau* holding that Rule 60(B) is not affected by the restrictions on "modification" of decrees contained in the Dissolution of Marriage Act.

E. Marriage

Where an individual contracts two successive marriages, there is a strong presumption that the later of these marriages is valid. The presumption shifts the burden of proof to the party attacking the second marriage, who must prove the negative proposition that the first marriage was *not* ended by death or divorce.[203] Normally, the

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[194]*Id.* at 1244. The revised decree provided for a total sum of $36,470, payable in 521 weekly installments of $70 each. The principal sum would, thus, be paid over more than ten years.

[195]IND. R. TR. P. 60(B)(1) provides: "On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order, default or proceeding for the following reasons: (1) mistake, surprise, or excusable neglect . . . ."

[196]365 N.E.2d at 1244.

[197]IND. CODE § 31-1-11.5-17(a) (1976).

[198]365 N.E.2d at 1244.

[199]Such future modification is expressly authorized in the case of child support, IND. CODE § 31-1-11.5-17(a) (1976) and maintenance, *id.* § 31-1-11.5-9(c). *See* Newman v. Newman, 355 N.E.2d 867 (Ind. Ct. App. 1976).

[200]*See* Garfield, *supra* note 26, at 161-62.

[201]354 N.E.2d 766 (Ind. Ct. App. 1976), *discussed in* Garfield, *supra* note 26, at 161-62.

[202]354 N.E.2d at 770-71 (discussing IND. CODE §§ 31-1-11.5-10(c), -17(a) (1976)).

[203]*E.g.*, Boulden v. McIntire, 119 Ind. 574, 21 N.E. 445 (1889); Dunn v. Starke County Trust & Sav. Bank, 98 Ind. App. 86, 184 N.E. 424 (1933); Compton v. Benham, 44 Ind. App. 51, 85 N.E. 365 (1908); *see* Annot., 14 A.L.R.2d 7 (1950).

presumption operates to vindicate the expectations of the parties, or to protect the legitimacy of children of the marriage,[204] but no such equities would apply to the marriage in *Rainier v. Snider.*[205] One month after the marriage ceremony, the wife had signed what she described as a "common law divorce," in which she acknowledged that the marriage was "null and void," because of a prior marriage which had never been legaly terminated to her knowledge.[206] Shortly thereafter, the parties separated, and they never lived together again. It seems clear that neither party expected anything from this brief marriage, and there were no children. Nevertheless, after the husband's death, the wife claimed a share of his estate, and the court of appeals upheld her claim, reversing the trial court's ruling in favor of the administrator of the estate.[207]

The court of appeals held that the presumption of validity applied, regardless of the equities, and that the estate had not sustained its burden of proving both that the former husband was alive[208] and that he had not procured a divorce prior to the wife's marriage to the decedent.[209] Although the result may be anomalous on the facts of this case, the presumption generally produces an equitable result, and the court of appeals believed that applying it uniformly in all cases would promote stability and predictability in the law.[210]

A confidential relationship exists between a man and woman about to be married, which imposes on them a duty of fair dealing

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[204]See H. CLARK, *supra* note 83, § 2.7 (1968).

[205]369 N.E.2d 666 (Ind. Ct. App. 1977).

[206]*Id.* at 668. The document, prepared by the second husband, read:

> I make this statement. I married Russell L. Rainier Sept. 3, 1971 using the name of Mary Lou Miller. I was not divorced from Kermit McClure *to my knowledge.* My real name being Mary Lou McClure. This makes the marriage to Russell Lynford Rainier null and void. We are not married. I can make no claims to that affect. [sic] We will just forget the whole thing. Russell L. Rainier will not prosicute [sic] me as a bigomist. [sic] I will divorce Kermit McClure before marring [sic] again.

Id. (emphasis by the court).

[207]*Id.* at 669.

[208]The wife testified that she had not seen or heard from her first husband since their separation in 1967, after a marriage lasting three months. She said she had believed this marriage to be void, because her first husband had not been divorced from *his* former wife. She also claimed to have explained the situation to her second husband prior to her marriage to him.

[209]The evidence showed only that the wife had not procured a divorce, and that she did not *know* of any divorce initiated by the husband. To satisfy its burden, the estate would have to prove both that the first husband was alive at the time of the second marriage, and that no divorce action was filed in any of the places where he had lived since the separation. *See* Compton v. Benham, 44 Ind. App. 51, 85 N.E. 365 (1908).

[210]369 N.E.2d at 670.

toward each other.[211] The court of appeals held in *Blaising v. Mills*[212] that the same relationship exists between a recently divorced man and wife contemplating reconciliation.[213] The plaintiff relied upon her ex-husband's promises of reconciliation when she conveyed real estate and personal property to him, and paid $300 on his debt to J.C. Penney Company. When the promised reconciliation failed to materialize, plaintiff sued to recover her property and her money. The court of appeals affirmed a judgment in plaintiff's favor, ordering the ex-husband to restore the real estate to her.[214] The court of appeals accepted the ex-husband's contention that his promise of reconciliation could not be the basis for an action in fraud, since it was a promise to perform in the future, rather than a misrepresentation of an existing fact.[215] The court, however, held that the confidential relationship which existed between the parties was sufficient to make the ex-husband's promises actionable on a theory of constructive fraud or undue influence,[216] in what was in essence an action for rescission and restitution.

The court's holding that a confidential relationship existed under the circumstances of this case was based in part on the trial court's findings that plaintiff was suffering from emotional distress and personality disorders which made her substantially dependent on her ex-husband, and that he was aware of her condition.[217] These findings raise a strong inference that the representations were made to induce plaintiff to act in reliance on them, an important element of constructive fraud.[218] They also serve to create a presumption of undue influence.[219] Since both courts implicitly found that the representations of reconciliation made to plaintiff were false, it would appear that the real basis for the confidential relationship

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[211]Lamb v. Lamb, 130 Ind. 273, 30 N.E. 36 (1892).

[212]374 N.E.2d 1166 (Ind. Ct. App. 1978).

[213]On the other hand, a married couple negotiating a divorce settlement has been held *not* to be in a confidential relationship. Wellington v. Wellington, 158 Ind. App. 649, 304 N.E.2d 347 (1973).

[214]*Id.* at 1173. The court of appeals allowed defendant a set-off of $3,683.48 against the $5,500 damage award. This was the amount he had paid on the mortgage while he held the real estate. *Id.* The damages awarded constituted restitution to plaintiff of benefits conferred on the defendant. They included the rental value of the real estate, the value of an automobile he induced her to trade in, and the $300 debt she paid for him. *Id.* at 1171.

[215]*Id.* at 1169 (citing Sachs v. Blewett, 206 Ind. 151, 185 N.E. 856 (1933); Wellington v. Wellington, 158 Ind. App. 649, 304 N.E.2d 347 (1973)).

[216]374 N.E.2d at 1169.

[217]*Id.* at 1170-71.

[218]*See* Coffey v. Wininger, 156 Ind. App. 233, 240-41, 296 N.E.2d 154, 159-60 (1973); Smart & Perry Ford Sales, Inc. v. Weaver, 149 Ind. App. 693, 698, 274 N.E.2d 718, 722 (1971).

[219]*See* Folsom v. Buttolph, 82 Ind. App. 283, 296-97, 143 N.E. 258, 262 (1924).

here was not the parties' non-existent "engagement" to be remarried, but the plaintiff's mental condition and her dependence upon her ex-husband, which caused her to repose special confidence and trust in him. Knowing of her condition, he abused her trust to his own advantage. This abuse of trust was sufficient in itself to constitute constructive fraud.

F. Paternity

In *Barkey v. Stowell*,[220] the Indiana Court of Appeals made the following statement regarding the procedure followed in 1947 in awarding child support in paternity cases:

> It has been the practice in this state, immemorially, for the judge in bastardy proceedings to hear evidence or not, as he deemed necessary, upon the subject of the amount to be awarded to be paid by the defendant for the support of the child, and in the absence of abuse of discretion, the Appellate Court will not interfere with the finding or judgment as to the amount to be paid.[221]

This practice was challenged by the father in a 1977 paternity case, *B.G.L. v. C.L.S.*[222] B.G.L. did not question the finding of paternity, but argued that the trial court erred in ordering him to pay $15 per week for the child's support without hearing any evidence as to the child's need or the father's ability to pay. The court of appeals affirmed the order on the ground that there was *some* evidence in the record which was relevant to the support issue.[223] The court went on to "suggest" that it would be better practice for the trial court "to continue the case for a reasonable time after the determination of paternity and allow the parties to prepare and present evidence specifically on the issue of support."[224] The court of

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[220]117 Ind. App. 162, 70 N.E.2d 430 (1947). *Barkey* held that the support provisions of a paternity decree were "surplusage and may be disregarded entirely and that reversible error cannot be predicated upon such findings, even if they are not supported by the evidence." *Id.* at 168-69, 70 N.E.2d at 433-34.

[221]*Id.* at 170, 70 N.E.2d at 434.

[222]369 N.E.2d 1105 (Ind. Ct. App. 1977).

[223]*Id.* at 1107-08. The evidence consisted of testimony as to financial difficulties encountered by the mother and child, the employment of the father, and the previous employment of the mother as a housekeeper. In addition, the record indicated that the judge had interrogated the father concerning his finances before entering the support order. The court of appeals apparently felt this was sufficient to support the modest award made here. "[C]ertainly an award of $15 per week for the support of the child cannot be deemed per se unreasonable, considering the facts and circumstances before the trial court and the reasonable, probable and actual deductions to be drawn therefrom." *Id.* at 1108.

[224]*Id.* at 1108. The Court of Appeals also held in *B.G.L.* that the trial court did not err in awarding support for a period preceding the filing of the petition. *Id.* at 1108.

appeals, thus, in effect, rejected the highly questionable practice described in *Barkey*.

The paternity statutes[225] have been repealed and re-enacted as part of the new juvenile code.[226] A number of changes have been made in the statutes, most of them simply involving the rewording and reorganization of its provisions. Several provisions dealing with the quasi-criminal aspects of paternity actions, such as arrest of the defendant in lieu of summons,[227] and the provision that the alleged father "shall not be compelled to give evidence,"[228] have been deleted. Also omitted are all references to imprisonment for contempt,[229] and the provision for modification of support orders.[230] Provisions relating to the putative father's right to remain silent and enforcement of support orders by contempt are included in other chapters of the code.[231] Since the statute continues to impose on parents of children born out of wedlock the same obligations as are imposed on parents of legitimate children,[232] presumably the modification provisions of the Dissolution of Marriage Act will be applicable to orders for support of illegitimate children.[233]

X. Evidence

*Henry C. Karlson**

A. Hearsay; Patterson Reconsidered

The departure from the traditional hearsay rule, announced by the Indiana Supreme Court in *Patterson v. State*,[1] was carried to its logical, although perhaps not reasonable, extreme in *Flewallen v. State*.[2] In *Patterson* the court held that extrajudicial statements

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IND. CODE § 31-4-1-26 (1976) authorizes recovery for "accrued support" for not more than two years prior to the bringing of the action.

[225]IND. CODE §§ 31-4-1-1 to 33, 31-4-2-1, -2 (1976).

[226]*Id.* §§ 31-6-6-1 to 22 (Supp. 1978) (effective Oct. 1, 1979).

[227]*Id.* § 31-4-1-13 (1976) (repealed effective Oct. 1, 1979).

[228]*Id.* § 31-4-1-16.

[229]*Id.* §§ 31-4-1-20, -22, -24.

[230]*Id.* § 31-4-1-19.

[231]*Id.* §§ 31-6-3-3(5), -7-15 (Supp. 1978) (effective Oct. 1, 1979).

[232]*Id.* § 31-6-6-2.

[233]*Id.* § 31-1-11.5-17 (1976).

*Assistant Professor of Law, Indiana University School of Law—Indianapolis. J.D. (Honors), University of Illinois, 1968.

[1]263 Ind. 55, 324 N.E.2d 482 (1975).

[2]368 N.E.2d 239 (Ind. 1977).