IX. Domestic Relations

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A. Adoption

1. Consent.—The predominant consideration in any adoption proceeding is the best interests of the child. Where the child's interests conflict with the interests of the natural parents, or of the agency handling the adoption, the child's interests necessarily prevail. In two well-reasoned opinions,[1] the Indiana Court of Appeals reviewed the consent requirements of the Indiana adoption statute[2] and held that the power of a parent or an agency to prevent adoption of a child by withholding consent is limited by the interests of the child.

In re Adoption of Infant Hewitt[3] dealt with a natural mother's attempt to withdraw her consent to the adoption of her child. The mother signed the consent on the day that she was released from the hospital, two days after her child was born. A petition to adopt the child was filed the same day.[4] Ten days later, the mother filed a petition to withdraw her consent; the trial court denied her petition and granted the petition of the adoptive parents. The court of appeals affirmed, upholding the constitutionality of the consent provisions of the adoption statute and refusing to disturb the trial court's denial of the mother's petition to withdraw consent.[5]

The mother's constitutional argument was that the adoption statute was deficient because it failed to require either appointment of legal counsel or a judicial hearing before a natural parent could give irrevocable consent to an adoption. She argued that the state's failure to provide these safeguards to assure the voluntariness of her consent resulted in a violation of her fundamental right to raise her child. The court of appeals conceded that the fourteenth amendment protects the right of parents to raise their children free from

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[1]*In re* Adoption of Infant Hewitt, 396 N.E.2d 938 (Ind. Ct. App. 1979); Stout v. Tippecanoe County Dep't of Pub. Welfare, 395 N.E.2d 444 (Ind. Ct. App. 1979).

[2]IND. CODE § 31-3-1-6 (1976). The consent provisions were amended by Act of Mar. 10, 1978, Pub. L. No. 136, § 28, 1978 Ind. Acts 1196, 1272 (codified at IND. CODE § 31-3-1-6 (Supp. 1980)). Both *Hewitt* and *Stout* were decided under the statute as it existed prior to the 1978 amendments.

[3]396 N.E.2d 938 (Ind. Ct. App. 1979).

[4]The prospective adoptive parents received temporary custody of the infant on the day their petition was filed. *Id.* at 939.

[5]*Id.* at 941-43.

undue interference by the state[6] but found no state interference in the Indiana statute which permits, but does not require, a parent to consent to the adoption of his or her child.[7] The failure of the statute to provide additional safeguards in the form of counsel and hearing did not transform a permissive statute into an unconstitutional interference with parental rights. The court found that parental rights are adequately protected by Indiana cases holding that a consent to adoption, like any other contract, may be invalidated if found to be tainted by fraud, duress, or other forms of overreaching[8] and by the statutory provision permitting consent to be withdrawn at any time prior to the final decree of adoption if withdrawal is in the best interest of the child.[9] There was no evidence that the consent in *Hewitt* was executed under fraud or duress, and the trial court found that the mother was not acting in the best interests of the child in seeking to withdraw her consent.[10]

In *Stout v. Tippecanoe County Department of Public Welfare*,[11] the trial court denied a petition for adoption because the welfare department refused to consent to the adoption or to place the child in the petitioners' home. The court of appeals reversed, holding that neither the welfare department's consent nor its placement of the child in the prospective adoptive home was an absolute prerequisite to adoption.[12] The ultimate responsibility for the decision to grant an adoption must rest with the trial court, based upon the best interests of the child.[13] The court of appeals therefore reversed the summary judgment granted in favor of the welfare department and remanded the case to the trial court to determine whether the department had unreasonably withheld its consent.[14]

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[6]The early United States Supreme Court cases enunciating such parental rights as part of the liberty protected by the due process clause of the fourteenth amendment dealt with parents' rights to make decisions concerning their children's education. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). These cases were the foundation of the right of privacy first articulated in Griswold v. Connecticut, 381 U.S. 479 (1965). More recent decisions have recognized that "the interest of a parent in the companionship, care, custody, and management of his or her children" is entitled to constitutional protection. Stanley v. Illinois, 405 U.S. 645, 651 (1972). *See also* Caban v. Mohammed, 441 U.S. 380 (1979) (upholding the equal protection right of a natural father to prevent adoption of his children by withholding consent).

[7]396 N.E.2d at 940.

[8]Emmons v. Dinelli, 235 Ind. 249, 133 N.E.2d 56 (1955); Rhodes v. Shirley, 234 Ind. 587, 129 N.E.2d 60 (1955).

[9]IND. CODE § 31-3-1-6(f) (1976) (amended 1978).

[10]396 N.E.2d at 942.

[11]395 N.E.2d 444 (Ind. Ct. App. 1979).

[12]*Id.* at 451-52.

[13]*Id.* at 450-51.

[14]*Id.* at 452-53.

The Indiana adoption statute requires written consent to adoption by "any person, agency, or county department of public welfare having lawful custody of the child whose adoption is being sought."[15] The consent of such an agency, or of any nonparent, can be dispensed with, however, if the court finds that consent is being unreasonably withheld.[16] When the trial court declined to rule on the reasonableness of the department's refusal to consent, in effect, it granted the adoption agency greater rights than those of a natural parent.[17] "To grant the Department unbridled discretion in withholding its consent to adoption would elevate the Department to a status preferred over that of even a natural parent, a result we think the legislature did not intend."[18] The court of appeals cautioned, however, that in determining the child's best interests on remand, the trial court must consider the fact that the child had been living with the adoptive parents chosen by the Welfare Department during the preceding three years. Even if the trial court now determined that the welfare department had been unreasonable in withholding consent to the child's adoption by the Stouts, the child's adjustment to living with the adoptive parents chosen by the department must weigh heavily in determining the child's present best interests.[19]

The petitioners in *Stout* joined the child's foster parents in a federal suit attacking the constitutionality of the welfare department's removal of the child from the foster parents' home. In *Kyees*

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[15]IND. CODE § 31-3-1-6(a)(3) (Supp. 1980).

[16]*Id.* § 31-3-1-6(g)(6). The statute provides:

(g) Consent to adoption is not required of:

. . . .

(6) any legal guardian or lawful custodian of the person to be adopted other than a parent who has failed to respond in writing to a request for consent for a period of sixty (60) days or who, after examination of his written reasons for withholding consent, is found by the court to be unreasonably withholding his consent.

[17]Despite the protected status accorded parental rights, *see* note 6 *supra* and accompanying text, there are circumstances in which the adoption court can dispense with parental consent. These include abandonment, termination or voluntary relinquishment of parental rights and incompetency. IND. CODE § 31-3-1-6(g)(1)-(5),(7),(8) (1976) (amended 1978). The current version of the statute contains a somewhat different statement of the grounds for dispensing with parental consent. *See id.* § 31-3-1-6(g)(1)-(5) (Supp. 1980).

[18]395 N.E.2d at 449. The court of appeals cited several decisions from other jurisdictions interpreting similar statutes to require court review of agency decisions to withhold consent. *E.g.*, Stines v. Vaughn, 23 Ill. App. 3d 511, 319 N.E.2d 561 (1974); State *ex rel.* Portage County Welfare Dep't v. Summers, 38 Ohio St. 2d 144, 311 N.E.2d 6 (1974); State *ex rel.* Department of Insts. v. Griffis, 545 P.2d 763 (Okla. 1975).

[19]395 N.E.2d at 453 n.14 (quoting Unwed Father v. Unwed Mother, 379 N.E.2d 467, 472 (Ind. Ct. App. 1978) ("Unfortunately, the best interest of the child in this case may also have been thwarted")).

v. County Department of Public Welfare,[20] the Court of Appeals for the Seventh Circuit affirmed the district court's grant of summary judgment to the defendants, holding that the foster parents had no constitutional right to continuation of a relationship with the child which was clearly temporary in nature.[21]

2. Addendum on Unwed Fathers.—In the 1979 Survey of Indiana Domestic Relations Law,[22] the author of this Article erroneously discussed section 6(g)(6) of the Indiana adoption statute[23] in connection with the withholding of consent by the father of an illegitimate child. This section, discussed and interpreted by the court of appeals in *Stout*, allows the adoption court to dispense with the consent of a guardian or custodian "other than a parent" if it finds that consent is being unreasonably withheld.[24] It has no application to a parent, including the father of an illegitimate child "whose paternity has been established by a court proceeding."[25] Such a father would acquire veto power over his child's adoption under the statute, even though he may not be constitutionally entitled to it.[26] On the other hand, the Indiana statute does not require the consent of a natural father whose paternity has not been adjudicated,[27] but such a father may nevertheless have a constitutional right to veto his child's adoption if he has taken an active part in the child's upbringing. There are discrepancies between Indiana's statutory standard and the constitutional standard for the father's veto rights which may prove troublesome in future cases.

In *Caban v. Mohammed*,[28] the United States Supreme Court drew a distinction between a father who "never has come forward to participate in the rearing of his child,"[29] who may be denied "the privilege of vetoing the adoption of that child,"[30] and an unwed father who has "manifested a significant paternal interest in the child,"[31] who is entitled to the same veto right as an unwed mother.[32]

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[20]600 F.2d 693 (7th Cir. 1979).

[21]*Id.* at 698-99.

[22]Garfield, *Domestic Relations, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 215, 217-18 (1980).

[23]IND. CODE § 31-3-1-6(g)(6) (Supp. 1980).

[24]*Id.*

[25]*Id.* § 31-3-1-6(a)(2).

[26]*See, e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979), discussed *infra*, notes 28-32 and accompanying text.

[27]IND. CODE § 31-3-1-6(g)(2) (Supp. 1980).

[28]441 U.S. 380 (1979).

[29]*Id.* at 392.

[30]*Id.*

[31]*Id.* at 394.

[32]The Court held that to deny such a father the veto privilege accorded to unwed mothers would result in a gender-based classification which would violate the equal

Under *Caban*, the Indiana statute could not constitutionally be applied to dispense with the consent of an unwed father who had participated in the rearing of his children. More troublesome, however, is the fact that the Indiana statute does extend the veto power to many fathers who would not qualify under the constitutional standard of *Caban*. In such cases, the adoption could not proceed without the father's consent, unless the court could find one of the statutory grounds for dispensing with a parent's consent, such as abandonment, relinquishment or incompetence.[33]

The line drawn by the Indiana statute, based on the existence or nonexistence of a judicial finding of paternity, has no necessary relationship to the bona fides of the father's interest in his illegitimate child. Indeed, it is the father who comes forward voluntarily to assume responsibility for his child, financially and otherwise, whose paternity is least likely to be adjudicated in a court of law. Such a father must look to the Constitution for protection of his rights, because the Indiana statutes afford him none.[34]

3. Child Selling.—Two new crimes have been added to the Indiana Criminal Code, "child selling"[35] and "profiting from an adoption,"[36] both Class D felonies.

Child selling occurs when a person "transfers or receives any property in consideration for the termination of the care, custody, or control of a person's dependent child."[37] There are exceptions for transfers of property in connection with a dissolution of marriage or a juvenile court proceeding for termination of parental rights.[38] Additional exceptions for attorneys fees, medical expenses of pregnancy and childbirth, fees of child placing agencies and other court-approved fees apply to both crimes.[39]

"Profiting from an adoption" applies to "a person who, with respect to an adoption, transfers or receives any property in connec-

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protection clause of the fourteenth amendment, U.S. CONST. amend. XIV, § 1. 441 U.S. at 394.

[33]IND. CODE § 31-3-1-6(g)(1)-(5) (Supp. 1980). When a parent's consent is involved, the court has no power to dispense with consent on the ground that it is being "unreasonably withheld." *See id.* § 31-3-1-6(g)(6).

[34]If such a father dies intestate, there is no constitutional protection for the illegitimate child. The child can inherit from the father only if paternity has been adjudicated, or if the father has married the child's mother and acknowledged the child. *Id.* § 29-1-2-7(b) (1976). The Indiana Court of Appeals upheld this statute against an equal protection attack in Tekulve v. Turner, 391 N.E.2d 673 (Ind. Ct. App. 1979) (citing Lalli v. Lalli, 439 U.S. 259 (1978)).

[35]IND. CODE § 35-46-1-4(b) (Supp. 1980).

[36]*Id.* § 35-46-1-9.

[37]*Id.* § 35-46-1-4(b)(2).

[38]*Id.* § 35-46-1-4(b)(1).

[39]*Id.* §§ 35-46-1-4(b)(2), -9(b).

tion with the waiver of parental rights, the termination of parental rights, the consent to adoption, or the petition for adoption."[40]

B. Child Custody

1. Jurisdiction.—Section 14(a) of the Uniform Child Custody Jurisdiction Act (UCCJA) states that an Indiana court "shall not modify" a custody decree of another state unless it appears "that the court which rendered the decree does not now have jurisdiction . . . or has declined to assume jurisdiction to modify the decree."[41] During the survey period, the Indiana Supreme Court and the Indiana Court of Appeals each decided a case holding that an Indiana court had improperly assumed jurisdiction to modify an out-of-state decree.[42] Both cases contain discussions of various provisions of the UCCJA which should prove useful to trial courts and practitioners attempting to interpret and apply the new statute. A third case,[43] dealing with a trial court's duty to determine its own jurisdiction, also contains valuable discussion of the relevant UCCJA provisions.

In *State ex rel. Marcrum v. Marion County Superior Court*,[44] the mother brought an original proceeding in the Indiana Supreme Court, asking it to prohibit the trial court from exercising jurisdiction to modify a Texas custody order. A 1977 Texas divorce decree awarded custody of the parties' two children to the mother. Subsequently, the father moved to Indiana, and in 1978 he filed a motion for modification of custody in the Texas divorce proceeding. In 1979, he filed a custody modification proceeding in Indiana, while the children were in Indiana for a four-week visitation under the Texas decree. After obtaining an order of temporary custody from the Indiana court, the father withdrew his Texas motion and the Texas modification action was thereupon dismissed. The Indiana court then granted permanent custody to the father. The Indiana Supreme Court granted the mother's petition for alternative writs of mandate and prohibition, ordering the trial court to expunge the support orders and to refrain from exercising further jurisdiction in the case.[45] The court held that under UCCJA section 14 "Indiana must

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[40]*Id.* § 35-46-1-9(a).

[41]*Id.* § 31-1-11.6-14(a).

[42]State *ex rel.* Marcrum v. Marion County Superior Court, 403 N.E.2d 806 (Ind. 1980); *In re* Lemond, 395 N.E.2d 1287 (Ind. Ct. App. 1979).

[43]Clark v. Clark, 404 N.E.2d 23 (Ind. Ct. App. 1980).

[44]403 N.E.2d 806 (Ind. 1980).

[45]*Id.* at 811. Justice DeBruler dissented, arguing that the writ "should be denied because petitioner has failed to demonstrate in what manner her remedy by way of appeal from [the] final [custody] order is unavailable or inadequate." *Id.* (dissenting opinion).

refrain from modifying the custody decree of another state which had jurisdiction at the time of the decree and has continuing jurisdiction at the time the action to modify is filed in this state."[46]

Although it was ultimately decided under section 14, *Marcrum* contains much useful discussion of other provisions of the UCCJA. The court pointed out, for example, that there was some doubt whether Indiana met the jurisdictional requirements of section 3,[47] but declined to rule on this ground because the issue had not been argued on appeal.[48] The court refused to apply section 6, dealing with "[s]imultaneous proceedings in other states,"[49] because the Indiana proceeding sought modification of an existing custody order rather than an original determination of custody. The court noted that UCCJA section 8 requires an Indiana court to decline to exercise jurisdiction to modify an out-of-state custody order whenever a parent "has improperly removed the child from the physical custody of the person entitled to custody *or has improperly retained the child after a visit*," unless its assumption of jurisdiction is "required

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[46]*Id.* (citing Fry v. Ball, 190 Colo. 128, 544 P.2d 402 (1975)). The Indiana court quoted the following language from *Fry* in support of its interpretation of section 14:

> The underlying policy of the [UCCJA] is to prevent the desperate shifting from state to state of thousands of innocent children by interested parties seeking to gain custody rights in one state even though denied those rights by the decree of another state. The provisions of the Act seek "to eliminate jurisdictional fishing with children as bait." *Wheeler v. District Court*, 186 Colo. 218, 526 P.2d 658 (1974).

190 Colo. at 131, 544 P.2d at 405, *quoted in* 403 N.E.2d at 811.

[47]IND. CODE § 31-1-11.6-3 (Supp. 1980). The father claimed jurisdiction under subsections (a)(2) and (a)(3) of section 3. Under section 3(a)(2), jurisdiction is based on the fact that "the child and at least one (1) contestant, have a significant connection with this state," but the supreme court felt that the children's "significant connection" with Indiana was "suspect," because they were present in the state under the four-week visitation provision of the Texas decree. 403 N.E.2d at 807.

IND. CODE § 31-1-11.6-3(a)(3) (Supp. 1980) requires physical presence of the child plus *either* abandonment, *id.* § 31-1-11.6-3(a)(3)(A), or an "emergency" such as mistreatment, abuse or neglect, *id.* § 31-1-11.6-3(a)(3)(B), neither of which was present here. 403 N.E.2d at 808. Physical presence of the children alone is not a sufficient basis for jurisdiction under the UCCJA, IND. CODE § 31-1-11.6-3(b) (Supp. 1980), nor is physical presence a prerequisite to jurisdiction under the Act. *Id.* § 31-1-11.6-3(c). These provisions obviously are designed to discourage child snatching. *See id.* § 31-1-11.6-1(a)(5).

[48]403 N.E.2d at 808. The supreme court also felt the record on appeal was insufficient to permit it to determine whether jurisdiction existed in Indiana under section 3. *Id.*

[49]IND. CODE § 31-1-11.6-6 (Supp. 1980). Section 6 requires an Indiana court to decline jurisdiction if a prior custody proceeding is pending in another state, unless the other state's proceedings are stayed because Indiana is a more appropriate forum "or for other reasons." *Id.* § 31-1-11.6-6(a). The provision applies only if the other state is exercising jurisdiction "substantially in conformity with" the provisions of the UCCJA. *Id.*

in the interest of the child."[50] Because a determination of the child's interest is necessarily "largely discretionary,"[51] the court preferred to rely on the mandatory provisions of section 14.

The supreme court, noting that the UCCJA requires recognition of out-of-state decrees "made under factual circumstances meeting the jurisdictional standards" of the Act,[52] held that Texas had jurisdiction over the custody issue under UCCJA standards,[53] even though Texas had not adopted the Act. Strict reciprocity is not required.[54] The Indiana court held that the Texas court retained continuing jurisdiction over the custody issue and that its dismissal of the modification proceeding after the father withdrew his motion did not amount to a refusal by the Texas court to assume jurisdiction.[55] The Indiana court concluded that the father's attempt to terminate the Texas proceeding was the result of forum shopping and pointed out that "[d]iscouraging forum shopping is one of the primary purposes of the U.C.C.J.A."[56] Because the Texas court retained jurisdiction, section 14 required the Indiana courts to refrain from exercising jurisdiction to modify the Texas decree.

The Indiana Court of Appeals reached the same result under UCCJA section 14 in *In re Lemond*,[57] a case involving a custody order contained in a 1973 divorce decree issued in Hawaii. The decree awarded "the care, custody and control" of the daughter to both parents but specified that the father was to have physical custody so long as both parents resided in Hawaii; if either parent left Hawaii for a change of residence, physical custody was to be transferred to the mother, subject to reasonable visitation rights in

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[50]*Id.* § 31-1-11.6-8(b) (emphasis added). The propriety of the father's retention of the children beyond the four-week visitation period specified by the Texas decree would depend upon the validity of the trial court's temporary custody order, issued just before the end of the four-week period. The trial court's assumption of jurisdiction to modify would be valid only if there were evidence in the record to support the court's implicit determination that its exercise of jurisdiction was necessary to protect the "interest of the child." *Id.*

[51]403 N.E.2d at 810 (citing Nelson v. District Court, 186 Colo. 381, 527 P.2d 811 (1974)).

[52]IND. CODE § 31-1-11.6-13 (Supp. 1980), *quoted in* 403 N.E.2d at 809.

[53]403 N.E.2d at 809.

[54]Prefatory Note to Uniform Child Custody Jurisdiction Act (U.L.A.) at 114, *quoted in* 403 N.E.2d at 809 ("The Act is not a reciprocal law. It can be put into full operation by each individual state regardless of enactment of other states."). At least 45 states have adopted the UCCJA. *See* [1980] 6 FAM. L. REP. (BNA) 1130.

[55]403 N.E.2d at 811. Once the father withdrew his action, the Texas court simply "had no call to assume jurisdiction." *Id.*

[56]*Id.* at 810. The enumerated purposes of the statute support this conclusion. *See* IND. CODE § 31-1-11.6-1(a) (Supp. 1980), *quoted in* 403 N.E.2d at 809-10.

[57]395 N.E.2d 1287 (Ind. Ct. App. 1979).

the father.[58] In June 1977, the father remarried and moved to Indiana. That fall, he attempted unsuccessfully to prevent the daughter's return to Hawaii after summer visitation in Indiana with her grandparents. The following May, the father went to Hawaii and brought the child back to Indiana while the mother was away. The mother then came to Indiana and filed a petition for enforcement of the Hawaiian decree; the petition was denied by the trial court.[59] The Indiana Court of Appeals reversed, holding that, under section 14, the Indiana court was obligated to defer to the prior jurisdiction of the Hawaiian court, even though the Indiana court could meet the jurisdictional requirements of the UCCJA.[60]

The court of appeals ruled that Hawaii, as the child's "home state,"[61] retained continuing jurisdiction over custody; the Indiana court therefore could not modify the decree by awarding the father physical custody. The court of appeals rejected the father's argument that the trial court did not "modify" the Hawaiian decree but merely enforced its "non-punitive" provisions.[62] Conceding that a custody decree which was truly punitive might not be entitled to "total deference" in Indiana,[63] the court was not convinced that the decree in question had been fashioned "to punish the Father rather than benefit the child."[64]

In *Clark v. Clark*,[65] a 1976 Indiana dissolution decree awarded custody of the parties' daughter to the mother. In the fall of 1978, the mother left the child with the father in Indiana when she went to live in Kentucky, but she returned in October and took the child back to Kentucky with her. Two months later, the father filed a

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[58]*Id.* at 1289.

[59]*Id.* at 1290. The trial court also "denied" a petition for modification filed by the father, although its decision, in effect, did modify the Hawaiian decree. *Id.*

[60]*Id.* at 1290-91 (citing Woodhouse v. District Court, 196 Colo. 558, 587 P.2d 1199 (1978) and Green v. Green, 87 Mich. App. 706, 276 N.W.2d 472 (1979)).

[61]IND. CODE § 31-1-11.6-2(5) (Supp. 1980). "Home state" is defined as "the state in which the child, immediately preceding the time involved, lived with . . . a parent . . . for at least six (6) consecutive months . . . ." Section three of the UCCJA grants jurisdiction to a state which "had been the child's home state within six (6) months before commencement of the proceedings [if] the child is absent from [the] state because of his removal or retention by a person claiming his custody . . . and a parent . . . continues to live in [the] state." *Id.* § 31-1-11.6-3(a)(1)(B).

[62]395 N.E.2d at 1291.

[63]*Id.* (citing Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978 (1977)).

[64]395 N.E.2d at 1291. With no evidence to support the father's argument, the court of appeals presumed the Hawaiian court was motivated by "a desire to further the best interests of the child." *Id.* at 1292. The court also rejected the father's argument that the Hawaiian decree infringed upon his constitutional right to travel. *Id.*

[65]404 N.E.2d 23 (Ind. Ct. App. 1980).

petition for change of custody.[66] After the first day of the hearing, in January 1979, the mother failed to bring the child for a weekend visit, as ordered by the court, and did not appear herself for the conclusion of the hearing. The court then awarded custody of the child to the father and issued a body attachment for the mother's arrest. After the mother filed a motion to correct errors, attacking the court's jurisdiction under the UCCJA, a further hearing was held in April 1979, but the trial court's final order left custody of the child with the father. The court of appeals affirmed, upholding the trial court's jurisdiction. Even though the trial court had erred in failing to make a finding of its own jurisdiction under the UCCJA, the error was harmless because the court clearly did have jurisdiction in this case.[67] The court of appeals also upheld the trial court's decision on the merits, affirming the order transferring custody to the husband.[68]

The court of appeals agreed with the mother that under the UCCJA the trial court had an affirmative duty to determine its own jurisdiction over the subject matter even though neither party raised the issue during the initial hearings.[69] The duty arose as soon as the court became aware that the custody dispute had "an interstate dimension."[70] Determination of subject matter jurisdiction under the UCCJA is a two-step process. First, the court must determine whether it has jurisdiction; then it must decide whether it should

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[66]The father first filed an emergency petition asking for temporary custody, while the child was visiting with him, when he learned the mother had been hospitalized for taking too many aspirins, but when the trial court determined that no emergency existed, he returned the child to her mother and requested a hearing for a permanent modification of custody. *Id.* at 26.

[67]*Id.* at 34. Several other allegations of error were raised by the mother on appeal, including the court's denial of her motion for change of venue and her motion for rule to show cause, which sought to punish the husband for failing to return the child to her before the emergency hearing of December, 1978.

[68]*Id.* at 35.

[69]*Id.* at 28. The duty was enunciated in Campbell v. Campbell, 388 N.E.2d 607 (Ind. Ct. App. 1979). The jurisdiction issue was raised for the first time in the wife's initial motion to correct errors filed March 16, 1979. Even though a further hearing was held thereafter, on April 9, 1979, the trial court never made a formal ruling on jurisdiction, although it "noted its subject matter jurisdiction under the theory of continuing jurisdiction at the outset of each proceeding." 404 N.E.2d at 30 n.2. Continuing jurisdiction would not of itself satisfy the requirements of the UCCJA, although the court of appeals noted that courts operating under the UCCJA "have exercised a preference in favor of continuing jurisdiction where there is a significant connection remaining with the home state at the time a modification is sought." *Id.* at 28 n.1.

[70]*Id.* at 29. In *Clark*, the interstate nature of the dispute was clear from the outset, because the father alleged in his initial petition that the mother had moved to Kentucky. *Id.* at 30.

exercise that jurisdiction.[71] The court of appeals was convinced that, had the trial court made the proper determination of jurisdiction at the outset of the *Clark* proceedings, it would have found that it did have jurisdiction and "that there was no other court which . . . could have exercised jurisdiction" at that time under the UCCJA.[72] Indiana was the "home state" of the child, as defined in the statute.[73] No proceedings were pending in other states, and there was no other more appropriate forum.[74] In view of this, the court of appeals held that the trial court's failure to determine its own jurisdiction was harmless error and refused to remand on the issue of jurisdiction. The court felt that the child's best interests "require[d] a prompt and lasting decision with regard to her custody."[75]

In *McCarthy v. McCarthy*,[76] the custody issue arose in a juvenile court proceeding. The parents were divorced in Maine in June 1978, and custody of the son was awarded to the mother. The following October, the Indiana juvenile court held that the child was a "neglected child" as defined in the former juvenile statutes[77] and

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[71]*Id.* at 29. The court of appeals quoted the following from an Oregon case, inserting the appropriate Indiana citations:

> Under the Act the court must go through a multistep process in determining whether to exercise jurisdiction . . . under [IND. CODE § 31-1-11.6-3]. If it finds that there is jurisdiction, then the court must determine whether there is a custody proceeding pending or a decree in another state which presently has jurisdiction. If so, the [Indiana] court must decline to exercise its jurisdiction. [IND. CODE § 31-1-11.6-6] Finally, assuming the court has jurisdiction and there is not a proceeding pending or a decree, the court then must determine under [IND. CODE § 31-1-11.6-7] whether to exercise its jurisdiction because of convenient forum.

404 N.E.2d at 30 (quoting Carson v. Carson, 29 Or. App. 861, 865, 565 P.2d 763, 764-65 (1977)).

[72]404 N.E.2d at 30.

[73]IND. CODE §§ 31-1-11.6-2(5), -3(a)(1) (Supp. 1980). The child had lived all of her seven years in Indiana until her mother removed her to Kentucky in October, 1978. 404 N.E.2d at 31. Even if Indiana lost its status as "home state" it could retain jurisdiction as long as the child and one parent maintained a "significant connection" with Indiana, and there was in the state "substantial evidence concerning the child's present or future care, protection, training, and personal relationships." IND. CODE § 31-1-11.6-3(a)(2) (Supp. 1980).

[74]The court of appeals believed that the trial court could have determined on the facts of *Clark* that "a Kentucky court would not have had subject matter jurisdiction under section 3 of the Uniform Act." 404 N.E.2d at 32. In any case, a Kentucky court might have refused to take jurisdiction under the "clean hands" provision of the UCCJA, IND. CODE § 31-1-11.6-8 (Supp. 1980). 404 N.E.2d at 32.

[75]404 N.E.2d at 33. The court also affirmed the trial court's decision on the merits, rejecting the wife's argument that the court had "improperly based its modification on punitive motives rather than on the best interests of the child." *Id.* at 34.

[76]401 N.E.2d 759 (Ind. Ct. App. 1980).

[77]*Id.* at 761. IND. CODE § 31-5-7-6 (1976) (repealed effective October 1, 1979) defined a neglected child as one who "(1) Has not proper parental care or guardianship [or] . . .

transferred custody to the father, with limited visitation rights to the mother.[78] The Indiana Court of Appeals affirmed without discussing the custody jurisdiction issue implicit in the facts. The court simply relied upon the juvenile statutes which authorized the trial court to "place" a child found to be neglected "in the custody of a relative or other fit person."[79]

The mother argued that the juvenile court had "improperly redetermined the issue of custody"[80] but apparently did not specifically attack the court's jurisdiction to modify an out-of-state custody decree under the UCCJA.[81] As *Lemond* indicates, the Indiana courts may well have lacked the power to modify the Maine custody order had the issue been raised in a custody modification proceeding.[82] The UCCJA, however, provides for emergency jurisdiction when a child present in the state is "subjected to or threatened with mistreatment or abuse or is *otherwise neglected or dependent*."[83] This provision should support the Indiana trial court's jurisdiction to make its finding of neglect and its order transferring custody to the father. It is not clear, however, that such emergency jurisdiction in Indiana would oust the original custody court, Maine, from its continuing jurisdiction over the controversy. If custody modification proceedings were instituted in Maine in these circumstances, this would seem to be an appropriate occasion for utilizing the UCCJA provi-

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(5) Is in an environment dangerous to life, limb, or injurious to the health or morals of himself or others." Under the present juvenile code, such a child would be characterized as a "child in need of services." *See id.* § 31-6-4-3 (Supp. 1980).

[78]Visitation was limited to two weeks in the summers of 1979 and 1980, at the father's place of residence, but would increase to one month in the summer of 1982. The order made no reference to any visitation in the summer of 1981. 401 N.E.2d at 761.

[79]*Id.* at 763 (relying on IND. CODE 31-5-7-15 (1976) (repealed effective October 1, 1979)). The court of appeals also upheld the trial court's restrictive visitation order as within the court's "broad discretion" in custody matters. 401 N.E.2d at 763.

[80]401 N.E.2d at 762.

[81]The Uniform Child Custody Jurisdiction Act applies to child neglect and dependency proceedings in which custody is an issue, as well as to custody proceedings in connection with divorce actions. *See* IND. CODE § 31-1-11.6-2(3) (Supp. 1980).

[82]It is not clear from the *McCarthy* opinion when the mother and son came to Indiana, but there is some indication they were here in December 1977, seven months before the juvenile court proceedings were commenced. 401 N.E.2d at 762. Indiana thus may have qualified as the child's "home state" under IND. CODE § 31-1-11.6-3(a)(1) (Supp. 1980). The Maine court's jurisdiction may nevertheless have continued if the child and at least one contestant had a "significant connection" with the state, and substantial evidence concerning the child was available in the state. ME. REV. STAT. ANN. tit. 19 § 804(1)(B) (Supp. 1980-81). *See* Fry v. Ball, 190 Colo. 128, 544 P.2d 402 (1975).

[83]IND. CODE § 31-1-11.6-3(a)(3)(B) (Supp. 1980) (emphasis added).

sions calling for communication between courts in different states to determine which court is the "more appropriate forum."[84]

2. Visitation.—Section 24(b) of the Indiana Dissolution of Marriage Act[85] forbids a court to "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."[86] Modification of a visitation order, however, requires only a finding that "modification would serve the best interests of the child."[87] In *Chance v. Chance*,[88] the trial court, on petition of the father, amended a dissolution of marriage decree to provide more specific visitation periods.[89] The court of appeals affirmed, declining to treat the trial court's order as a "restriction" on visitation requiring a finding of danger to the children's physical or mental health.[90] "The visitation as now specified is neither a restriction nor an expansion of the visitation as specified in the original dissolution agreement. Rather, it is a determination of what is reasonable visitation."[91]

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[84]*Id.* § 31-1-11.6-6(c). The UCCJA also calls for exchange of information and other forms of cooperation between courts in different states. *See id.* §§ 31-1-11.6-19 to -22.

In two other custody cases decided during the survey period, the court of appeals reaffirmed that the standard of review in custody cases is abuse of discretion. *In re* Marriage of Julien, 397 N.E.2d 651 (Ind. Ct. App. 1979), involved a custody award in a dissolution of marriage decree. Based on conflicting evidence, the trial court awarded custody of two of the couple's three children to the father. The court of appeals affirmed, holding that the mother had not established a "manifest abuse of discretion" by the trial court. *Id.* at 653. In Campbell v. Campbell, 396 N.E.2d 142 (Ind. Ct. App. 1979), the trial court also awarded the father custody of the younger two of the parties' three children, this time in a custody modification proceeding. Again the court of appeals affirmed, finding no abuse of discretion by the trial court. *Id.* at 143.

[85]IND. CODE § 31-1-11.5-24(b) (1976).

[86]*Id.*

[87]*Id.*

[88]400 N.E.2d 1207 (Ind. Ct. App. 1980).

[89]The decree incorporated an agreement of the parties providing "reasonable visitation" to the father on two days' notice to the mother, and "split time" on specified holidays. *Id.* at 1209 n.1. The revised order granted the father visitation on alternate weekends, from 6 p.m. Friday to 6 p.m. Sunday, for four weeks in the summer, and on alternate holidays. *Id.* at 1211.

[90]*Id.* The court of appeals also refused to treat the father's "Petition for Instructions" as a petition for modification of custody, requiring a showing of changed circumstances and a verified petition under Marion County Rules of Practice & Procedure, Circuit & Superior Cts., Rule 20. *Id.* at 1209-11. Local Rule 20 requires a verified petition showing "an extreme emergency" before a petition for modification of custody will be entertained within less than a full year from the date of the latest custody decision.

IND. CODE § 31-1-11.5-22(d) (1976) requires "a showing of changed circumstances so substantial and continuing as to make the existing custody order unreasonable" before modification of a custody order; a modification of visitation rights, however, requires only a showing that "modification would serve the best interests of the child." *Id.* § 31-1-11.5-24(b).

[91]400 N.E.2d at 1211.

An order calling for visitation with the children's stepfather was affirmed by the court of appeals in *Collins v. Gilbreath*.[92] The three children had lived with their mother and stepfather for more than two years when the mother committed suicide. Ten days later, the father brought a habeas corpus action to regain custody of the children from their stepfather. The trial court awarded custody to the father but ordered him to permit the stepfather to visit the children. In affirming, the court of appeals conceded that the Indiana Dissolution of Marriage Act grants no visitation rights to nonparents,[93] but the court properly considered the well-being of the children to be paramount. The stepfather had cared for the children as a father, and to end this close relationship abruptly might well prove traumatic. "The children would in essence lose their second parent in ten days—one by suicide and one by court decree."[94] The court of appeals concluded that the order was not an abuse of discretion but was rather "a wise decision by a thoughtful and insightful judge."[95]

The dissenting opinion argued that the stepfather, as an "unrelated third party," had no standing to ask for visitation unless the natural father were found to be unfit for custody.[96] The majority, however, viewed the father's right to custody as less than absolute. It "is not akin to a property right, but is more in the nature of a trust which may be subject to the well-being of the child."[97] In essence, it was not the stepfather's right to visitation which was upheld in *Collins* but the children's right to continue their association with him.

C. Child Support

1. Cost of Living Adjustments.—Orders for child support are subject to modification when a substantial and continuing change of circumstances occurs.[98] Some changes are so predictable that the

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[92]403 N.E.2d 921 (Ind. Ct. App. 1980). The court of appeals reversed the trial court's order directing the father to pay $750 in support arrearages to the stepfather, holding that any arrearages should be paid to the deceased mother's estate. *Id.* at 924. Judge Young dissented on the visitation issue. *Id.* (dissenting opinion).

[93]*See* IND. CODE § 31-1-11.5-24 (1976).

[94]403 N.E.2d at 923.

[95]*Id.*

[96]*Id.* at 924 (Young, J., dissenting). It should be noted that the stepfather in *Collins* did not request visitation rights, but the visitation order was made by the trial court *sua sponte*. *Id.*

[97]*Id.* at 923 (citing Looper v. McManus, 581 P.2d 487 (Okla. Ct. App. 1978)).

[98]IND. CODE § 31-1-11.5-17(a) (Supp. 1980). "Such modification shall be made only upon a showing of changed circumstances so substantial and continuing as to make the terms [of the original decree] unreasonable." *Id.*

parties sometimes provide for them in advance by agreement. Especially predictable in recent years is the inexorable rise in the cost of living, and parties may provide for automatic cost of living adjustments in various kinds of contracts, including divorce settlements. In *Branstad v. Branstad*,[99] however, the parties were unable to agree on the issues of custody and child support;[100] it was the trial court which ordered annual adjustments in the child support order, based on the percentage change in the Consumer Price Index published by the United States Department of Labor. The court of appeals affirmed, holding that the cost of living adjustments did not violate the modification provisions of the Indiana Dissolution of Marriage Act.[101]

In affirming the trial court's order, the court of appeals distinguished cases invalidating automatic adjustments based upon factors not related to actual needs of the children.[102] In *Branstad*, the trial court had first ascertained that the amount of $1,200 per month was needed to meet the children's actual needs. The cost of living adjustment "simply assure[d] that the buying-power equivalent of $1,200 as of January 1, 1979, [would] be available each month during succeeding years."[103] The support order would still be subject to modification in the event of changed circumstances. In sum, the court of appeals approved the order because the adjustment provision

> (1) gives due regard to the actual needs of the child[ren], (2) uses readily obtainable objective information, (3) requires only a simple calculation, (4) results in judicial economy, (5) reduces expenses for attorney fees, and (6) in no way infringes upon the rights of either . . . parent to petition the court for modification of the decree due to a substantial and continuing change of circumstances.[104]

2. Modification and Termination.—In the absence of special circumstances, the duty of a parent to support his (or her) child terminates upon emancipation of the child.[105] For child support pur-

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[99]400 N.E.2d 167 (Ind. Ct. App. 1980).

[100]The parties did settle the division of property by agreement. *Id.* at 168.

[101]IND. CODE § 31-1-11.5-17(a) (Supp. 1980).

[102]400 N.E.2d at 170 (discussing *In re* J.M. & G.M., 585 S.W.2d 854 (Tex. Civ. App. 1979) (arbitrary formula) and *In re* Marriage of Mahalingam, 21 Wash. App. 228, 584 P.2d 971 (1978) (percentages of father's salary increases and outside income)).

[103]400 N.E.2d at 170.

[104]*Id.* at 171.

[105]IND. CODE §§ 31-1-11.5-12(d), -17(b) (Supp. 1980). The special circumstances justifying continuation of the support duty beyond emancipation include educational needs, *id.* § 31-1-11.5-12(d)(1), and incapacity of the child, *id.* § 31-1-11.5-12(d)(2).

poses, emancipation occurs at the age of twenty-one, but it may occur earlier, for all purposes except the child's educational needs.[106] Whenever the child is emancipated, any outstanding decree ordering the parent to support the child terminates automatically; support payments cease to accrue, and arrearages accrued in the period prior to emancipation are no longer enforceable by contempt.[107] Problems can arise, however, when there is a factual dispute as to whether early emancipation has occurred[108] or when an undivided support order covers more than one child. Both of these problems were present in *Ross v. Ross*.[109]

The 1967 decree in *Ross* ordered the father to pay $42.50 per week for the support of four minor children in the custody of the mother. By 1977, when the father was cited for contempt for nonpayment of support, three of the four children had been emancipated. The date of emancipation of one of the children was in dispute. Without resolving this factual dispute, the trial court found the father in contempt, ordered him to pay arrears computed at the full $42.50 per week but reduced his obligation for future support to $25.00 per week for the one remaining minor child.[110] The court of appeals affirmed, holding that the husband remained obligated to pay the full amount ordered as long as any of the children remained unemancipated; the original order remained in effect until modified by the trial court.[111] Without a court-ordered modification, the father was not entitled to a proportionate reduction of his support obligation each time one of the children was emancipated.[112]

The court of appeals reasoned that, in making a support order, a trial court considers other factors in addition to the children's needs.[113] The court must consider the financial resources and needs of the noncustodial parent and may order the parent to pay less sup-

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[106]*Id.* § 31-1-11.5-12(d).

[107]Corbridge v. Corbridge, 230 Ind. 201, 102 N.E.2d 764 (1952); Kuhn v. Kuhn, 389 N.E.2d 319 (Ind. Ct. App. 1979).

[108]"What constitutes emancipation of a minor child is a question of law, but whether there has been an emancipation is a question of fact." Brokaw v. Brokaw, 398 N.E.2d 1385, 1388 (Ind. Ct. App. 1980) (citing Stitle v. Stitle, 245 Ind. 168, 197 N.E.2d 174 (1964)).

[109]397 N.E.2d 1066 (Ind. Ct. App. 1979).

[110]The arrears were ordered paid at the rate of $25.00 per week. *Id.* at 1068.

[111]*Id.* at 1069.

[112]*Id.* at 1070. Under the court of appeals' analysis of the case, it was unnecessary for the trial court to determine the exact date of emancipation of each child. *Id.*

[113]IND. CODE § 31-1-11.5-12(a) (1976) requires the court to consider "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 educational needs; and (4) financial resources and needs of the noncustodial parent."

port than the children actually need in cases where the parent's resources are limited. In such cases it would be unfair to the remaining minor children to allow an automatic reduction of support each time a child becomes emancipated. The court of appeals chose instead to place the burden upon the noncustodial parent to petition for modification if he wishes to reduce the support payments.[114] The emancipation of a child would usually constitute a change of circumstances sufficient to justify modification if the needs of the remaining children could be met by a reduced support order.[115] That such modification would not automatically result in a proportionate reduction of support is well illustrated by the *Ross* order: The original order of $42.50 per week for four children was reduced to $25.00 per week for the one remaining child. Taking into account the inflation that had occurred since the original order was entered in 1967, this was nevertheless a substantial reduction.

In *Brokaw v. Brokaw*,[116] the original 1975 support order, based upon an agreement of the parties, provided for payments of $500 per month until the child reached the age of eighteen. The agreement was made "subject, however, to any limitations or modifications hereinafter imposed by any court having jurisdiction over such matters."[117] In 1977, the father obtained a modification of the custody provisions of the order, and retained custody of the son for approximately a year. When custody was returned to the mother in 1978, the court modified the support provisions of the original decree, ordering the father to pay $140 per week as support, and to pay the son's expenses for tuition, books, lab fees and similar fees "while [the son attended] the Fort Wayne Indiana-Purdue campus."[118] The father ceased making the weekly payments one month before the son's eighteenth birthday. In a contempt proceeding brought by the mother, the trial court again ordered the father to pay $140 per week "until [the son] completes his undergraduate college education provided he continues in a diligent fashion towards obtaining a

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[114]397 N.E.2d at 1070.

[115]IND. CODE § 31-1-11.5-17 (Supp. 1980) requires a "showing of changed circumstances so substantial and continuing as to make the terms [of the support order] unreasonable" to justify a modification.

[116]398 N.E.2d 1385 (Ind. Ct. App. 1980).

[117]*Id.* at 1387. Indeed, the support order would have been subject to modification even without this express provision. IND. CODE § 31-1-11.5-17(a) (Supp. 1980) provides for modification of any child support order, upon a showing of changed circumstances. When an agreement is approved by the court, as was the *Brokaw* agreement, it is "incorporated and merged" into the court's decree, becoming in effect an order of the court. *Id.* § 31-1-11.5-10(b). *See generally* Carson v. Carson, 120 Ind. App. 1, 9, 89 N.E.2d 555, 559 (1950) (decided under prior law).

[118]398 N.E.2d at 1387.

degree in the normal time period, or until he reaches 21 years of age, *whichever occurs later*."[119] The court of appeals affirmed, rejecting the father's contention that a modification of the prior support order could not properly be effected in a contempt proceeding.[120]

The father argued on appeal that the trial court's 1978 order, which simply directed him to pay $140 per week plus his son's college expenses, did not modify the original order terminating support when the son reached eighteen. He contended that the 1979 order, specifically extending support until the son finished college, was ineffective to revive the father's duty to pay support, because it arose in a contempt proceeding in which extension of support was not at issue. The court of appeals rejected this analysis, emphasizing the fact that the son did not in fact become emancipated on his eighteenth birthday.[121] The father's statutory duty of support therefore continued, at least until the son reached the age of twenty-one. Whether it would continue thereafter is somewhat uncertain under the present statute, and the *Brokaw* opinion did not directly address this question.

The ambiguity lies in section 12(d)(1) of the Indiana Dissolution of Marriage Act, which provides:

> The duty to support a child under this chapter ceases when the child reaches his twenty-first (21st) birthday unless:
>
> (1) The child is emancipated prior to his twenty-first (21st) birthday in which case the child support, except for educational needs, terminates at the time of emancipation; however, an order for educational needs may continue in effect until further order of the court.[122]

A careful reading of this statute indicates that an existing order for educational needs may continue in effect even though a child is emancipated prior to his twenty-first birthday. The more difficult question, not addressed in *Brokaw*, is whether an order for educational needs can properly extend *beyond* the child's twenty-first birthday, as the trial court's 1979 order purported to do.[123] Section

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[119]*Id.* (emphasis added). The court "admonished [the father] to petition this Court for modification of decree before taking any unilateral action regarding termination of support under claim of emancipation or change of circumstances, etc." *Id.*

[120]*Id.* at 1388-89.

[121]*Id.*

[122]IND. CODE § 31-1-11.5-12(d)(1) (Supp. 1980).

[123]The order terminated the father's duty of support when the son completed his undergraduate education or reached the age of twenty-one "whichever occurs later." 398 N.E.2d at 1387. *See* text accompanying note 117 *supra*. The son in *Brokaw* had

12(d)(1) provides that the duty of support terminates at twenty-one, unless the child is emancipated prior to twenty-one, in which case only the duty to pay for educational needs survives. The final clause of the section provides that, "however, an order for educational needs may continue in effect until further order of the court."[124] This proviso arguably might refer back only to the immediately preceding provision dealing with emancipation prior to twenty-one, in which case it would mean that an order for educational needs could extend beyond emancipation but would terminate at twenty-one under the opening clause of section 12(d). The alternative interpretation is that the proviso refers all the way back to the beginning of section 12(d) and modifies the provision terminating the duty of support at twenty-one. This would mean that any order for educational needs could extend beyond the child's twenty-first birthday. This is the interpretation adopted by the trial court in *Brokaw*, and it seems to be consistent with the overall intent of section 12(d). It would make little sense to say that a parent's duty to pay educational expenses could survive the actual emancipation of the child before age twenty-one, but that the duty would terminate automatically upon the child's emancipation by operation of law on his twenty-first birthday. It should be noted that section 12(d)(2), in language that is very similar to the language of the proviso in section 12(d)(1),[125] extends the duty of support beyond the age of twenty-one when the child is "incapacitated."[126] The better interpretation of section 12(d) is that the duty to pay child support terminates when the child is emancipated, at or before age twenty-one, except for educational needs and except when the child is incapacitated. At least by implication, this is the interpretation adopted by the court of appeals in affirming the *Brokaw* order.[127]

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just turned eighteen, so the potential duration of the order beyond his twenty-first birthday was not yet at issue.

[124]IND. CODE § 31-1-11.5-12(d)(1) (Supp. 1980).

[125]The duty to support an incapacitated child "continues during the incapacity or until further order of the court." *Id.* § 31-1-11.5-12(d)(2). *Compare id. with id.* § 31-1-11.5-9(c), for similar language dealing with the duty to support an incapacitated spouse.

[126]*Id.* § 31-1-11.5-12(d)(2).

[127]Estate of Hinds v. State, 390 N.E.2d 172 (Ind. Ct. App. 1979) dealt with the duty to support an adult child, which existed under prior law. Before 1969, the parent of an adult child was responsible for the cost of his care and treatment in a state psychiatric hospital; an amendment effective August 18, 1969 redefined "responsible relative" to exclude "parents of patients over the age of eighteen (18) years of age who have been in a psychiatric hospital for a continuous period of twelve (12) months or longer." IND. CODE § 16-14-18-1(5) (1976). In *Hinds*, the court of appeals held that the 1969 amendment did not extinguish liability for care of an adult child accrued prior to the effective date of the statute. 390 N.E.2d at 173-74 (citing State *ex rel.* Mental Health Comm'r v.

3. Statute of Limitations.—Considerable confusion has been generated in recent years concerning the statute of limitations applicable to actions to enforce child support orders. The issue turns on whether a support order is a final judgment; if it is, then the statute of limitations for judgments obviously applies. The court of appeals first decided that a support order was not a final judgment, holding that a second judgment for arrears was necessary before such an order could be enforced.[128] The court also held that the two-year statute of limitations for injuries to personal property applied to an action for reimbursement of support not involving a court order.[129] In the second appeal of *Kuhn v. Kuhn*,[130] the court of appeals reconsidered its earlier reasoning and held that court-ordered installments of support become final judgments as they accrue; a second judgment for arrears is therefore unnecessary, and the ten-year statute of limitations for judgments applies.[131] This holding recognized and eliminated the conflict between the court's prior rulings and the Indiana rule that support orders are not retroactively modifiable.[132]

The Indiana Supreme Court revived the old anomalies in Indiana law by its reversal of the court of appeals in *Kuhn v. Kuhn*.[133] The most recent *Kuhn* decision held that a support order was not a final judgment, nor was it a debt or a contract; therefore, an action to enforce such an order was covered by the catch-all fifteen-year statute of limitations.[134] The court then underscored the anomaly by holding

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Estate of Lotts, 332 N.E.2d 234 (Ind. Ct. App. 1975)). The court went on to hold, however, that the state had failed to prove that the patient's father had been notified of the state's claim prior to October 21, 1966; the father's estate was therefore liable for the son's care only from that date until the effective date of the amendment. *Id.* at 178-79. Notice was necessary in order to give the parent the opportunity to contest liability, and to attempt to show his inability to pay the cost of his son's maintenance. *Id.* at 177.

[128]Kuhn v. Kuhn, 361 N.E.2d 919 (Ind. Ct. App. 1977) (dictum) (enforcement by contempt); Owens v. Owens, 354 N.E.2d 350 (Ind. Ct. App. 1976) (enforcement by execution).

[129]Strawser v. Strawser, 364 N.E.2d 791 (Ind. Ct. App. 1977).

[130]389 N.E.2d 319 (Ind. Ct. App. 1979). The trial court had applied the two-year statute of limitations in *Kuhn*. *See* discussion in Garfield, *supra* note 22, at 234-35.

[131]389 N.E.2d at 322. The statute of limitations began to run on each installment as it became due. *Id.*

[132]Zirkle v. Zirkle, 202 Ind. 129, 172 N.E. 192 (1930); Jahn v. Jahn, 385 N.E.2d 488 (Ind. Ct. App. 1979); *In re* Marriage of Honkomp, 381 N.E.2d 881 (Ind. Ct. App. 1978); Haycraft v. Haycraft, 375 N.E.2d 252 (Ind. Ct. App. 1978). Nonmodifiable support orders generally are treated as final judgments for enforcement purposes. *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 15.3 at 509 (1968).

[133]402 N.E.2d 989 (Ind. 1980).

[134]*Id.* at 991 (applying IND. CODE § 34-1-2-3 (1976), which provides: "All actions not limited by other statute shall be brought within fifteen (15) years.").

that the statute of limitations began to run on each installment as it became due, citing four cases from other jurisdictions, all of which applied the statute of limitations for *judgments* to past due child support payments.[135] Indeed, it is because an accrued installment of child support is treated as a judgment that the statute of limitations is held to run on each installment as it becomes due.[136] "Where a motion to enter a judgment for arrears is required, the statute should only begin to run from the time such a judgment is entered."[137] The Indiana Supreme Court, however, did not decide what would happen after the judgment for arrears was entered. Presumably, the ten-year statute of limitations for judgments would then become applicable and would begin to run from the date of entry of the judgment,[138] resulting in a potential combined total limitation period of twenty-five years for each support installment.

The *Kuhn* opinion contains little discussion either of policy or of precedent. It merely cites *Owens v. Owens*[139] and the first *Kuhn* decision,[140] without addressing the court of appeals' second *Kuhn* opinion[141] which effectively demonstrated that the earlier opinons had misconstrued and misapplied existing precedents.[142] The supreme court also relied upon a permissive statute which provides that, in an action to enforce a support order, "the court *may*: (1) enter a judgment against the person obligated to pay support,"[143] which hardly supports the court's holding that such a judgment is required in every case.

The argument that the supreme court seems to have considered most persuasive was a highly speculative one: If delinquent support

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[135]Miller v. Miller, 122 F.2d 209 (D.C. Cir. 1941); Mark v. Safren, 227 Cal. App. 2d 151, 38 Cal. Rptr. 500 (1964); Dent v. Casaga, 296 Minn. 292, 208 N.W.2d 734 (1973); Roberts v. Roberts, 69 Wash. 2d 863, 420 P.2d 864, 866 (1966) ("[E]ach installment of alimony or child support, when unpaid, becomes a separate judgment. . . .").

[136]"Where the local law decrees that the installments [of child support] constitute judgments when they fall due, it follows that the statute of limitations then begins to run as it would in the case of any other judgment." CLARK, *supra* note 132, § 15.3 at 511.

[137]*Id.*

[138]This is at least implied in the court's statement that "[w]e believe the analogy between a final judgment and accrued court-ordered support is too tenuous to justify the application of the statute of limitations for judgments to child support arrearages *which have not been reduced to a lump-sum judgment.*" 402 N.E.2d at 991 (emphasis added).

[139]354 N.E.2d 350 (Ind. Ct. App. 1976).

[140]361 N.E.2d 919 (Ind. Ct. App. 1977).

[141]389 N.E.2d 319, 321-22 (Ind. Ct. App. 1979).

[142]*E.g.*, Corbridge v. Corbridge, 230 Ind. 201, 102 N.E.2d 764 (1952); Grace v. Quigg, 150 Ind. App. 371, 276 N.E.2d 594 (1971).

[143]IND. CODE § 31-1-11.5-13(e) (Supp. 1980) (emphasis added).

installments were treated as final judgments, "a question would arise as to whether such a judgment would constitute a lien upon the real estate of the parent who becomes delinquent," which "could have a devastating effect upon the alienability of real estate."[144] No liens on real estate were involved in *Kuhn*, but if the court believed it would be "devastating" for a support judgment to constitute a lien on the delinquent parent's real estate, then all that was needed was an unequivocal statement that a judgment for child support would not constitute such a lien. Two Indiana cases cited in *Kuhn* support such a statement.[145] Apparently, however, the court cited these cases to show that delinquent support payments are not treated as final judgments for lien purposes; therefore, the court reasoned they should not be treated as final judgments for statute of limitations purposes either. This reasoning simply ignores the very different policy considerations involved. As the court itself recognized,[146] there is a strong public policy favoring free alienability of land which influences the outcome of the lien issue but is not at all involved in the statute of limitations question. Here, the relevant policy is that which strongly favors the effective enforcement of child support obligations, as evidenced by the special remedies provided for their enforcement.[147] That policy is frustrated by requiring a judgment for arrears in every case before action can be taken to enforce a support order.[148]

In seeking to avoid the anomaly of treating support orders differently for statute of limitations purposes than for lien purposes, the court created an even greater anomaly in the area of interstate enforcement of Indiana support orders. Interstate recognition under the full faith and credit clause[149] is accorded only to final judgments;

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[144]402 N.E.2d at 990.

[145]Myler v. Myler, 137 Ind. App. 605, 210 N.E.2d 446 (1965); Rosenberg v. American Trust & Sav. Bank, 86 Ind. App. 552, 156 N.E. 411 (1927). The court of appeals recently held that an alimony judgment does not constitute a lien upon the obligor's real estate insofar as future payments are concerned. Uhrich v. Uhrich, 362 N.E.2d 1163 (Ind. Ct. App. 1977).

[146]402 N.E.2d at 990.

[147]*E.g.*, IND. CODE §§ 31-1-11.5-13(e), -17(a) (1976); *id.* §§ 31-2-1-1 to -39 (Uniform Reciprocal Enforcement of Support Act). The Indiana statutes seem to contemplate that support orders will be enforced *as judgments. Id.* § 31-1-11.5-17(a) provides in part: "Terms of the [dissolution] decree may be *enforced by all remedies available for enforcement of a judgment* including but not limited to contempt or an assignment of wages . . . ." (Emphasis added).

[148]Little compensating advantage results from the longer statute of limitations, which often will merely extend the delinquent parent's support obligation beyond the time of the children's greatest need, to the benefit of the custodial parent rather than the children.

[149]U.S. CONST. art. IV, § 1.

for full faith and credit purposes, finality means that support installments already accrued are no longer subject to modification.[150]

> Support decrees entered in those states which hold that each installment of support constitutes a final judgment when it accrues are . . . constitutionally entitled to enforcement in all other jurisdictions as to such accrued and unpaid installments. *Decrees of those relatively few states which require the entry of judgment for arrears before the amount becomes finally due are not entitled to enforcement as a matter of constitutional rule until such a judgment is entered.*[151]

Indiana support orders are not retroactively modifiable,[152] but the Indiana Supreme Court declared in *Kuhn* that they were not final judgments either and that a judgment for arrears was necessary before an Indiana support order could be enforced. At the very least, this creates confusion in an area in which there is a crucial need for certainty. Evasion of support duties is a serious problem of national scope, and *Kuhn* unnecessarily complicates the already difficult task of securing interstate enforcement of Indiana support orders.

Kuhn has a similar effect as far as local enforcement is concerned. It mandates that before a delinquent support order can be enforced a judgment for arrears must be secured, whether or not such a judgment is necessary in order to ascertain the amount of the delinquency. In many cases in which payments are made through the court clerk, the amount of the arrears should be readily ascertainable without an evidentiary hearing. Indeed, that would seem to be the purpose of the statutory provision authorizing this method of payment.[153] To mandate a new judgment in every such case merely wastes the courts' time and assists delinquent parents in evading their support obligations. The court of appeals considered and discussed the local enforcement problems before concluding that support orders should be treated as final judgments and that a judgment for arrears should not be required in every case. The supreme court reversed without discussing these problems at all.

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[150]*E.g.*, Sistare v. Sistare, 218 U.S. 1 (1909). *See generally* CLARK, *supra* note 132, § 15.4 at 516-17. "To the extent that the [support] order is valid and final by the law of the state where it was originally entered it must be enforced by all other states." *Id.* at 516.

[151]CLARK, *supra* note 132, §15.4 at 517 (emphasis added).

[152]*E.g.*, Zirkle v. Zirkle, 202 Ind. 129, 172 N.E. 192 (1930); Jahn v. Jahn, 385 N.E.2d 488 (Ind. Ct. App. 1979).

[153]IND. CODE § 31-1-11.5-13(a), (b) (Supp. 1980).

Ironically, the lien problem which the supreme court considered so potentially "devastating" in *Kuhn* has been taken care of by a legislative amendment. A new statute provides that a delinquent support order cannot be made a lien on real estate unless a judgment for arrears has been entered or a certified copy of a judicial finding of the amount in arrears has been placed on the lis pendens docket of the court.[154] In cases where no lien on real estate is sought, there now is no reason whatsoever for the second judgment required by *Kuhn*, but the requirement will remain until the Indiana Supreme Court decides to reconsider that decision.

D. Dissolution of Marriage

1. Property Division.—Section 11 of the Indiana Dissolution of Marriage Act directs the court on dissolution to divide all property owned by either spouse, including property acquired prior to the marriage and property acquired by gift or inheritance during the marriage, "in a just and reasonable manner."[155] The statute defines property very broadly, at least with regard to the manner of its acquisition. Essentially *all* property acquired by either party at any time prior to separation is subject to division. The statute also gives the court broad powers with respect to the manner in which property can be divided. The court can divide property in kind, order it sold and divide the proceeds, or award all or part of it to one party and order *either* party to pay the other "such sum . . . as may be just and proper."[156] The language of section 11 suggests that the legislature intended the divorce court, sitting in equity, to have the broadest possible power and discretion to effect a "just and reasonable" division of property.[157] The only limits to that discretion imposed by the legislature are the five enumerated factors which must be considered by the court in "determining what is just and reasonable."[158]

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[154]*Id.* § 31-1-11.5-13(f).

[155]*Id.* § 31-1-11.5-11(b).

[156]*Id.* As written, the statute would authorize a cash award to a spouse, even though all of the parties' property had been awarded to that spouse. It states in part: "[T]he court shall divide the property of the parties . . . in a just and reasonable manner . . . by setting the same or parts thereof over to one (1) of the spouses and requiring *either* to pay such sum, either in gross or in installments, as may be just and proper . . . ." *Id.* (emphasis added). The restrictive interpretations given the statute by the courts would preclude this result, however, even in cases where the equities would seem to require it.

[157]*Id.*

[158]*Id.* The five factors are:

(1) the contribution of each spouse to the acquisition of the property, including the contribution of a spouse as homemaker;

A series of restrictive interpretations by the Indiana Court of Appeals has robbed section 11 of the flexibility necessary if the courts are to reach a just result in the many and varied fact situations which occur when parties' financial affairs must be disentangled upon dissolution of marriage. It is now impossible in some instances for the courts to carry out the legislative mandate to divide property "in a just and reasonable manner."[159] *Wilcox v. Wilcox*[160] superimposed upon the broad framework of section 11 an incongruously narrow definition of property, stating in effect that only a vested present interest in tangible property could qualify for division. *Wilcox* attempted to draw a hard and fast dividing line between property division and maintenance, stating 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"[161] which would violate the restrictions on maintenance contained in section 9(c).[162] The court thereby converted any division of intangible property into a forbidden award of maintenance and removed from the operation of section 11 all intangibles, including but not limited to pension rights and retirement pay.[163]

In *In re Marriage of McManama*,[164] the court of appeals distinguished *Wilcox* in affirming an award of $3,600 to the wife, even though it exceeded the value of the physical assets of the mar-

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(2) the extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift;
(3) 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;
(4) the conduct of the parties during the marriage as related to the disposition or dissipation of their property;
(5) 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.

Id.

[159]*Id.*

[160]365 N.E.2d 792 (Ind. Ct. App. 1977).

[161]*Id.* at 794. No authority was cited to support this statement.

[162]IND. CODE § 31-1-11.5-9(c) (Supp. 1980). Section 9(c) prohibits maintenance awards unless a spouse is "physically or mentally incapacitated to the extent that the ability of such incapacitated spouse to support himself or herself is materially affected . . . ."

[163]*See, e.g.*, Savage v. Savage, 374 N.E.2d 536 (Ind. Ct. App. 1978). It is now impossible for a court to effect a just and reasonable division of property in any case where the only substantial asset is a pension. In cases where other assets exist, the pension rights can be "considered," but not divided, and an offsetting award of other property can be made. *See, e.g.*, Libunao v. Libunao, 388 N.E.2d 574, 577 (Ind. Ct. App. 1979).

[164]386 N.E.2d 953 (Ind. Ct. App. 1979), *rev'd* 399 N.E.2d 371 (Ind. 1980).

riage.[165] This award clearly did not represent any form of maintenance. It was given to the wife under a statute which directed the trial court to consider "the conduct of the parties . . . as related to the disposition or dissipation of their property"[166] to compensate her for sums actually expended on the husband's legal education. The court treated the $3,600 as the wife's share of marital assets "dissipated" for the sole benefit of the husband.[167] Without questioning the equity of the award, which should be the primary consideration under section 11, the Indiana Supreme Court reversed,[168] repeating without much discussion the *Wilcox* dicta: "[A]ny award over the value of the marital assets must represent some form of maintenance and since there was no showing of physical or mental incapacitation of appellee-wife pursuant to [section 9(c)] the court had no power or authority to make the award."[169]

Whatever validity this line of reasoning may have had in *Wilcox*, when the wife was seeking a share of the husband's future income, it makes no sense at all in the factual context of *McManama*. The $3,600 award bore no relationship to the wife's support needs, nor was it intended as "an award of the husband's future income,"[170] as the supreme court majority opinion states. The award undoubtedly would be paid out of future income, as would any cash award payable in installments,[171] but the court of appeals clearly did not intend to treat the husband's future income as an asset subject to division under section 11, the approach rejected in *Wilcox*. What the court of appeals apparently did intend to do was to ignore the *Wilcox* dictum limiting divisions of property to tangible assets, in order to avoid an inequitable result. The court of appeals refused to allow the *Wilcox* dictum to override section 11, which requires the court to consider dissipation of assets as one of the factors in effecting an equitable division of property.[172]

The supreme court's decision in *McManama* will lead to

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[165]All of the parties' tangible property was divided before the cash award was made. *Id.* at 954.

[166]IND. CODE § 31-1-11.5-11(b)(4) (Supp. 1980).

[167]386 N.E.2d at 955.

[168]*In re* Marriage of McManama, 399 N.E.2d 371 (Ind. 1980).

[169]*Id.* at 372.

[170]*Id.* at 373.

[171]IND. CODE § 31-1-11.5-11(b) (Supp. 1980) specifically authorizes cash awards, payable "either in gross or in installments." Any time property is awarded to one spouse with an offsetting cash award to the other, as contemplated by section 11, the cash award is likely to be paid out of future income. To read *Wilcox* as prohibiting any such award would completely emasculate section 11, and make property division impossible in any case in which property could not be either sold or divided in kind.

[172]*Id.* § 31-1-11.5-11(b)(4).

anomalous results in cases where there has been dissipation of marital property. If other property remains (that is, if the dissipation has been less than complete), the court may equitably award all or most of that property to the non-dissipating spouse. But under *McManama*, the amount of property available for distribution to the other spouse will decrease in inverse ratio to the magnitude of the dissipation. The greater the dissipation, the smaller the amount of property left for distribution. The lesson to the dissipating spouse is obvious: Do a thorough job; dissipate all of the property if you can, and nothing will be left to divide with your spouse. Can this be what the legislature intended when it mandated a just and reasonable division of property?

Justice Hunter's dissent in *McManama* argues that a professional degree should be treated as an intangible asset, subject to division as marital property.[173] Any difficulties in valuation of the asset can be avoided by looking "to the amount of money expended in achieving the degree,"[174] as the trial court did in *McManama*. This also avoids the treatment of future earnings as property, in violation of the holding of *Wilcox*, because the spouse's recovery is limited to restitution of sums actually expended by or for the other spouse.

> This is not an award of future income based upon a right of the wife in that income, or an enlargement of the marital estate beyond that property in which the parties maintain a present vested interest, but is a repayment of expended assets which is entirely proper for a court of equity to order.[175]

The specific problem of restitution for the spouse who pays for the other spouse's education is now covered by an amendment to section 11,[176] but the wider implications of *McManama* and *Wilcox* in other dissipation cases remain.

A case in point is *Armstrong v. Armstrong*[177] in which dissipation of assets was also a factor. During the marriage, the husband served time for passing bad checks, and the wife declared bankruptcy.

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[173]399 N.E.2d at 373 (dissenting opinion). A number of jurisdictions have treated professional degrees, or the increased earning power resulting therefrom, as assets subject to division. *E.g.*, *In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978); Inman v. Inman, 578 S.W.2d 266 (Ky. Ct. App. 1979). Justice Hunter argues that the "majority overly narrows the statute" (section 11) by refusing to treat professional degrees as property. 399 N.E.2d at 374.

[174]399 N.E.2d at 374-75.

[175]*Id.* at 375. "I feel it is clear that the holder of the degree has a present vested interest in the professional degree." *Id.* at 374.

[176]IND. CODE § 31-1-11.5-11(c) (Supp. 1980).

[177]391 N.E.2d 855 (Ind. Ct. App. 1979).

The parties' home had to be sold, and most of the $8,000 proceeds were used to retire the husband's worthless checks. At the time of the divorce, little property remained,[178] but the trial court nevertheless ordered the husband to pay the wife $8,000 as a division of property. The court of appeals reversed, holding that the trial court had abused its discretion because the cash award "was substantially in excess of the marital assets."[179] The court stated its belief that the "intent of the Legislature as set forth in the statute is clear. *While the law may result in inequities in some cases*, any change must come from the legislature."[180] One must implore the court to look at the statute again. Its expressed intent is to effect a "just and reasonable" division of property—that is, an *equitable* division. If the law results in inequities in some cases, that is a direct violation of the legislative intent. Such inequities result, not from the statute, but from the restrictive definition of property adopted by the courts, without any foundation either in the statute or in precedent.[181] As Judge Buchanan has observed in another context,

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[178]The husband owned only undivided one-half interests in an Arabian horse and a 1977 Pontiac, both owned jointly with a woman with whom he was living. There is no mention of any property owned by the wife at the time of the dissolution. *Id.* at 856.

[179]*Id.* at 857. Although *Armstrong* was decided before the supreme court reversed *In re* Marriage of McManama, 386 N.E.2d 953 (Ind. Ct. App. 1979), the second district court of appeals in *Armstrong* declined to follow the third district's reasoning in *McManama*, though conceding the "apparent equities" of the *McManama* decision. 391 N.E.2d at 857.

[180]391 N.E.2d at 857 (emphasis added).

[181]The court of appeals' pronouncement in *Wilcox* that "any award over and above the actual physical assets of the marital relationship must represent some form of support or maintenance," which effectively limits the division of property to tangible assets, was made without citing any authority whatsoever. 365 N.E.2d at 794. The subsequent repetition of this dictum in case after case has given it the aura of an axiom, accepted without reason and without question. Yet there is nothing in the statute itself to indicate that the legislature intended to exclude intangible assets from division under section 11, even when division of intangibles is necessary to achieve an equitable result.

The proposition that a "vested present interest must exist" before property can be divided was put forth in *Wilcox*, *id.* at 795, on the authority of Loeb v. Loeb, 261 Ind. 193, 301 N.E.2d 349 (1973), a case involving an interest in a trust probably best described as a vested future interest subject to divestment on the happening of a condition. This is hardly solid precedent for a concept which has exempted from division most forms of pensions and retirement plans, even when they constitute the only substantial asset acquired in a lengthy marriage. *See, e.g.*, Hiscox v. Hiscox, 385 N.E.2d 1166 (Ind. Ct. App. 1979). In another context, the court of appeals has said that "future interests are *valuable property rights*." Kuhn v. Kuhn, 385 N.E.2d 1196, 1200 (Ind. Ct. App. 1979) (emphasis added). One can only add that such valuable property rights as future interests, and all forms of intangible property, should be subject to the courts' equitable power under section 11. It is irrelevant that such rights usually cannot be divided in kind, since the court is empowered to divide property by setting it

courts should not permit themselves "to be bound in a strait jacket under the guise of intrinsic limitations. . . . [S]tatute[s] should be construed to prevent hardship or injustice."[182] This is particularly true when the statute itself expressly mandates a just result. "A dissolution action is an equitable proceeding; the statute should not be construed to lead to inequitable results."[183]

Equity does not necessarily mean equality in property division, especially when a brief marriage is involved. Section 11 does not expressly make the length of the marriage a factor to be considered by the court, but it does so indirectly. Section 11(b)(1) requires the court to consider "the contribution of each spouse to the acquisition of the property, including the contribution of a spouse as homemaker."[184] A spouse's contribution to the acquisition of property usually will be much greater in a long marriage than in a brief one. Section 11(b)(2) states that the court must consider "the extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift."[185] The length of the marriage may well affect the weight to be given this factor. In a brief marriage, the fact that one spouse brought a greater amount of property into the marriage is an important consideration, but its impact may well diminish in a longer marriage.[186] In *Dahlin v. Dahlin*,[187] the parties were married less than four years and had no children. The husband contributed considerably more property to the marriage than did the wife. Although the husband's earning ability[188] was considerably greater than the wife's, he was due to retire on a $500 per month pension within a year and a half of the decree. Under these circumstances, the court of appeals held that a near-equal division of property was an abuse of the trial court's discretion and reversed a

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over to one spouse and ordering that spouse to pay a portion of its value to the other. IND. CODE § 31-1-11.5-11(b) (Supp. 1980). *See* note 156 *supra* and accompanying text.

[182]R.D.S. v. S.L.S., 402 N.E.2d 30, 36 (Ind. Ct. App. 1980) (Buchanan, J., dissenting), discussed *infra*, notes 265-75 and accompanying text.

[183]402 N.E.2d at 37.

[184]IND. CODE § 31-1-11.5-11(b)(1) (Supp. 1980).

[185]*Id.* § 31-1-11.5-11(b)(2).

[188][T]he effect of one spouse bringing a vast amount of property into a marriage must be considered by the court. However, the effect of that contribution may in a given case be largely discounted where the property is consumed by the parties during married life or where it, or its equivalent, is maintained or increased through the efforts of both during many years of marriage.

Osborne v. Osborne, 369 N.E.2d 653, 657 (Ind. Ct. App. 1978).

[187]397 N.E.2d 606 (Ind. Ct. App. 1979).

[188]The parties' earning ability and financial circumstances at the time of divorce are also factors to be considered by the court. IND. CODE § 31-1-11.5-11(b)(3), (5) (Supp. 1980).

decree awarding $44,000 to the wife and $43,000 to the husband.[189] The trial court had divided the property in the mistaken belief that section 11 required it to "equalize the parties' financial position upon a dissolution of their marriage."[190] The court of appeals found no such requirement in section 11, "nor any language which can be said to fairly imply such a requirement."[191]

An unequal division of property (60%/40% in favor of the husband) was affirmed by the court of appeals in *Davis v. Davis*.[192] The wife objected particularly to the trial court's awarding the family corporation, which encompassed most of the parties' income-producing assets, to the husband, with an offsetting cash award to the wife, even though the wife had made substantial contributions of time and money to the corporation. The court of appeals rejected her contention that the assets were divided in this way because she was a woman, holding that the award was justified because the husband had been solely responsible for the corporation in recent years, the corporation was his only source of income, and there was

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[189]397 N.E.2d at 608.

[190]*Id.* at 609. The trial court had stated in a memorandum: "The Court interprets [section 11(a)(3)] as *requiring some economic parity* of the spouses' position[s] after dissolution and that [section 11(a)(5)] permits the court to consider their earning ability to try to accomplish this result." *Id.* (emphasis added).

[191]*Id.* The unfairness of the trial court's economic parity approach was obvious in *Dahlin*, due to the brief marriage. The wife brought approximately $10,000 into the marriage; four years later, she walked out with $44,000. A higher degree of economic parity would be anticipated after a long marriage than after a brief one. The longer the marriage, the more reasonable it becomes for the court to find that the wife had "contributed" to the maintenance of the property or to the increase in its value under IND. CODE § 31-1-11.5-11(b)(1) (Supp. 1980).

It was economic parity that was the real problem in Wilcox v. Wilcox, 365 N.E.2d 792 (Ind. Ct. App. 1977), in which the wife sought to have the husband's future income treated as property. Implicit in her argument was the theory that courts should attempt to equalize the parties' income even after divorce. It was this theory which was erroneous, not the fact that future income (or present earning ability) constituted intangible property, or the fact that the husband (a tenured full professor) had no "vested present interest" in income to be earned in the future. Indiana law with respect to the division of property on divorce might have developed along far different, and more equitable, lines if the court had dealt with the problem in terms of economic parity, instead of attempting to redefine "property" in terms sufficiently narrow to exclude future income. The court's definition unfortunately is so narrow that it excludes dissipated property, pensions, and all other intangibles, and often forces courts to violate the letter and spirit of section 11.

[192]395 N.E.2d 1254 (Ind. Ct. App. 1979). The award would have been more nearly equal if the $100,000 cash award to the wife had been included in full rather than reduced to present value ($73,949), in which case the split would have been $256,825 for the husband to $229,577 for the wife. The court conceded, however, that the reduction to present value was proper, citing Burkhart v. Burkhart, 349 N.E.2d 707 (Ind. Ct. App. 1976).

evidence that the family businesses could "be operated most efficiently as a single unit."[193]

The wife also argued that the trial court abused its discretion by failing to order the husband to provide security for the cash award. Section 15 of the Dissolution of Marriage Act authorizes the court to provide for "security, bond or other guarantee . . . to secure the division of property."[194] The statute is permissive rather than mandatory, however, and even though the court of appeals was "troubled by the fact that Bonnie was dispossessed of her [corporate] holdings . . . in exchange for . . . an unsecured personal debt," it refused to hold that this was an abuse of the trial court's discretion.[195] Unless there was some indication in the record that the husband would be greatly disadvantaged by having to give security, it is difficult to see why the court of appeals did not protect the wife's interests by insisting on security in this case.

The court of appeals affirmed the division of property in *Dreflak v. Dreflak*,[196] even though the trial court had improperly ruled that property inherited by the husband during the marriage was "not marital property subject to disposition" under section 11.[197] Although the trial court improperly characterized the property, the court of appeals held in effect that the court properly awarded the property to the husband, while giving the wife somewhat more than half of the other property. The result was justified because the in-

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[193]395 N.E.2d at 1258. The wife also argued that she should have been compensated for her services to the corporation, but the court held there was evidence indicating she may have agreed to forego compensation for her work "in order to increase operating capital and encourage corporate growth." *Id.* at 1259. Therefore, the trial court might reasonably have concluded that she would be adequately compensated by the division of assets.

[194]IND. CODE § 31-1-11.5-15 (Supp. 1980).

[195]395 N.E.2d at 1259.

In two other cases decided during the survey period, the court of appeals affirmed unequal property divisions. In Johnson v. Johnson, 389 N.E.2d 719 (Ind. Ct. App. 1979), there was conflicting evidence as to the value of certain property. Whether the division was equal or not, and in whose favor, depended upon whose valuation was accepted, and the trial court made no findings concerning the disputed values. The court of appeals refused to reweigh the evidence and reiterated that the property division need not be equal in order to be equitable. *Id.* at 722. .

In *In re* Marriage of Julien, 397 N.E.2d 651 (Ind. Ct. App. 1979), the division was 76/24 percent, in favor of the husband, and the evidence as to valuations was in conflict. The court of appeals affirmed, declining to "second guess the court and assume the role of fact-finder." *Id.* at 655.

[196]393 N.E.2d 773 (Ind. Ct. App. 1979). The property division was also unequal, in favor of the wife. How unequal it was depends on whose valuations are accepted. The split was $21,820 to $17,952 in the wife's version; it was $29,518 to $16,748 in the husband's, excluding the husband's inheritance. *Id.* at 774 n.1.

[197]*Id.* at 776 (emphasis deleted).

heritance was a business run by the husband's family which he had helped operate; it was received within a year before the parties separated, and its value was substantial in relation to the parties' other assets.[198] *Dreflak* merely confirms what the court of appeals indicated in *Osborne v. Osborne*,[199] that when an inheritance occurs near the date of separation, unless there are countervailing factors favoring the other spouse, the inheritance should be distributed to the inheriting spouse, with little, if any, counterbalancing distribution of other assets to the other spouse. The *Dreflak* trial court erred only in stating that it *could not* divide the inheritance along with the other property. What the court of appeals said in *Osborne* was that, in most such cases, the trial court *should not* divide a recently acquired inheritance. The difference is more than semantic. If the trial court's view were correct, the courts would lack the power to divide inherited property even in cases where strong countervailing equities existed. This would effectively nullify the provision of section 11 which defines property subject to division on dissolution to include inherited property.[200]

Property settlement decrees, except those based upon agreements of the parties, must be final; they are not subject to future modification by the courts.[201] Two cases decided by the court of appeals overturned property awards containing contingencies which destroyed their finality. In *Wilhelm v. Wilhelm*,[202] the trial court granted the wife a "property settlement judgment" of $126,000 which would terminate upon her remarriage.[203] The court of appeals reversed, holding that the termination provision "saddles [the wife] with an offensive restriction upon her personal activities and completely disregards the difference between property awards [and] alimony or maintenance."[204]

The contingent feature of the property award in *Henderson v. Henderson*[205] was a $5,500 lien granted the husband on real estate awarded to the wife. The lien was to be paid whenever the wife decided to sell the real estate, at which time the husband would also be entitled to up to $4,000 as his share of the parties' equity. When and whether the sale would take place was left entirely to the wife's

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[198] *Id.* "[T]he inherited interest would have comprised thirty-three percent to forty percent of the parties' net assets had it been totally included in the disposition." *Id.*

[199] 369 N.E.2d 653 (Ind. Ct. App. 1978).

[200] IND. CODE § 31-1-11.5-11(b) (Supp. 1980).

[201] *See id.* §§ 31-1-11.5-10(c), -17(a) (1976).

[202] 397 N.E.2d 1079 (Ind. Ct. App. 1979).

[203] *Id.* at 1080 (emphasis deleted). The termination provision was ineffective during the first ten years following the decree.

[204] *Id.*

[205] 401 N.E.2d 73 (Ind. Ct. App. 1980).

discretion. The court of appeals held that it was an abuse of discretion for the trial court to delegate to one of the parties the power to decide when, if ever, to divide the parties' property.[206]

2. Statutory Definitions.—A new legislative attempt to define property subject to division on divorce is unlikely to have much effect on the courts' treatment of intangible property under section 11. An amendment to the definition section provides: "The term 'property' means all the assets of either party or both parties, including a present right to withdraw pension or retirement benefits."[207] Although including "all the assets" in the definition of property arguably would require the courts to divide intangible property, the reference to "a present right to withdraw pension . . . benefits" permits a narrow interpretation. It may only serve to reinforce the courts' insistence on a "vested present interest."[208] At best, the amendment makes it clear that a pension plan that is "a fully vested fund of money under a defined contribution plan payable in a lump sum either on retirement or on resignation"[209] is subject to division on dissolution.[210]

An amendment to section 11 clarifies the provision which limits property subject to division on dissolution to that acquired "prior to final separation of the parties."[211] A new section 11(a) defines "final separation" as "the date of filing of the petition for dissolution of marriage."[212] Although it may be argued that this will encourage early filing of petitions in dissolutions, this provision should eliminate many difficult factual disputes concerning the date of separation.

3. Relief from Dissolution Decrees.—The court of appeals reversed trial court decisions denying petitions to set aside decrees in three cases decided during the survey period.[213] In *Pactor v. Pac-*

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[206]*Id.* at 74. The court cited two Colorado cases, Santilli v. Santilli, 169 Colo. 49, 453 P.2d 606 (1969), and Mock v. Mock, 508 P.2d 136 (Colo. Ct. App. 1973).

[207]IND. CODE § 31-1-11.5-2(d) (Supp. 1980).

[208]Wilcox v. Wilcox, 365 N.E.2d 792, 795 (Ind. Ct. App. 1977).

[209]Savage v. Savage, 374 N.E.2d 536, 539 (Ind. Ct. App. 1978). The court used this language to distinguish the kind of plan involved in Stigall v. Stigall, 151 Ind. App. 26, 277 N.E.2d 802 (1972) (decided under prior law) from the retirement benefits involved in *Savage*.

[210]Although such pension rights may not be divisible in kind, the "award" of the pension to the spouse who earned it could be offset by a cash award to the other spouse, regardless of the existence of other marital property. Under present law, an offsetting award to the other spouse can be made only to the extent that there is other tangible property subject to division. *See, e.g.*, Hiscox v. Hiscox, 385 N.E.2d 1166 (Ind. Ct. App. 1979); Savage v. Savage, 374 N.E.2d 536 (Ind. Ct. App. 1978).

[211]IND. CODE § 31-1-11.5-11(b) (Supp. 1980).

[212]*Id.* § 31-1-11.5-11(a). The former section 11(a) is now renumbered 11(b).

[213]In a fourth such case, *In re* Marriage of Jones, 389 N.E.2d 338 (Ind. Ct. App.

tor,[214] the wife sought to set aside a court order approving the parties' property settlement agreement and incorporating it into the dissolution decree, alleging that the husband had concealed property worth approximately $100,000.[215] The wife's petition was filed twenty-one months after entry of the dissolution decree, which would place it beyond the one-year limitation of Trial Rule 60(B)(3).[216] The court of appeals held, however, that section 17(a) of the Indiana Dissolution of Marriage Act[217] permits a property division decree to be set aside for fraud if the claim is asserted within two years of the order and that section 17(a) applies to decrees based on agreements of the parties as well as to court-ordered divisions of property.[218] The court further held that the allegations of fraud contained in the wife's petition were sufficiently detailed to satisfy Trial Rule 9(B).[219]

In *Rose v. Rose*,[220] the husband asked for relief from a decree under Trial Rule 60(B),[221] alleging that he had no notice of the final

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1979), the court of appeals affirmed the trial court's denial of relief under IND. R. TR. P. 60(B) to a husband who sought termination of monthly payments of $500 to the wife, under a property settlement agreement approved by the trial court and incorporated into their dissolution decree. The husband filed his motion for relief from judgment two and one-half years after the decree was entered, too late for relief from mistake under Trial Rule 60(B)(1), (8). The husband's argument that the trial court erred in accepting the parties' agreement "without establishing a factual basis for maintenance" should have been raised on appeal. 389 N.E.2d at 340. An error such as the husband alleged is cognizable under Trial Rule 60(B)(2) only if it could not have been discovered with due diligence, and only if the motion for relief is filed within one year. IND. R. TR. P. 60(B)(8).

[214]391 N.E.2d 1148 (Ind. Ct. App. 1979).

[215]*Id.* at 1149. The wife also asked the court to order an accounting, to hold a hearing to determine a fair division of the property, and to order the husband to pay her reasonable attorney fees. *Id.*

[216]IND. R. TR. P. 60(B)(3) provides that a motion for relief from judgment on grounds of "fraud . . . misrepresentation or other misconduct of an adverse party" must be made "not more than one [1] year after the judgment, order or proceeding was entered or taken."

[217]IND. CODE § 31-1-11.5-17(a) (Supp. 1980).

[218]*Id.* provides in part that "*orders as to property disposition entered pursuant to section 9* . . . may not be revoked or modified, except in case of fraud which ground shall be asserted within two (2) years of said order." (Emphasis added). The court of appeals held that orders "entered pursuant to section 9" included orders based on property settlement agreements as well as court-ordered divisions. 391 N.E.2d at 1150. Therefore, the wife's petition here was timely filed. *Id.* at 1151.

[219]IND. R. TR. P. 9(B) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be specifically averred." Even if the wife's petition had been deficient in this regard, the proper remedy would have been a motion for more definite statement or the use of discovery procedures, rather than outright dismissal. 391 N.E.2d at 1152 (citing State Farm Mut. Auto. Ins. Co. v. Shuman, 370 N.E.2d 941, 949-50 (Ind. Ct. App. 1977)).

[220]390 N.E.2d 1056 (Ind. Ct. App. 1979).

[221]IND. R. TR. P. 60(B).

hearing in the dissolution action filed by his wife. The trial court proceeded with the hearing and, based on wife's evidence alone, awarded her "a substantial share" of the marital property.[222] The husband claimed that the attorney he had hired in Kentucky (his new residence) had misinformed him concerning the hearing and concerning the hiring of local counsel in Indiana. Upon conferring with an Indiana attorney after the decree was entered, he petitioned the court to set aside the decree under Trial Rule 60(B) for "mistake, inadvertance, surprise or excusable neglect."[223] The trial court denied him relief, but the court of appeals reversed, holding that the Kentucky attorney's negligence should not be imputed to the client in "those instances where the attorney's neglect is of that extreme degree amounting to positive misconduct, and the person seeking relief is relatively free from negligence."[224] Conceding that, in most cases, the attorney's negligence is imputed to the client and relief can only be granted when the neglect is excusable,[225] the court concluded that uncontroverted evidence in *Rose* indicated that the husband "was conscientious and diligent in his own right, but fell prey to unexplainable and inexcusable misfeasance and nonfeasance by [his] Kentucky attorney."[226] The husband was therefore "entitled to his day in court with respect to the disposition of the marital property."[227]

The wife in *Munden v. Munden*[228] was a patient in a mental health center at the time the husband filed his petition for dissolution of their marriage. The summons was served upon her by certified mail, addressed "c/o Administrator" at the mental health center. The return receipt was signed by a statistician at the center. There was no indication in the record that the complaint had been delivered to the wife or that she had been afforded the opportunity to retain counsel as required by Trial Rule 4.3.[229] The court of ap-

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[222]390 N.E.2d at 1057.

[223]*Id.*

[224]*Id.* at 1058 (quoting Buckert v. Briggs, 15 Cal. App. 3d 296, 301, 93 Cal. Rptr. 61, 63-64 (1971)).

[225]390 N.E.2d at 1058 (citing Moe v. Koe, 165 Ind. App. 98, 330 N.E.2d 761 (1975)).

[226]390 N.E.2d at 1058.

[227]*Id.* The court found that the husband had alleged sufficient facts to show that he had a meritorious defense to the action, as required by Trial Rule 60(B). *Id.* at 1057-58.

[228]398 N.E.2d 680 (Ind. Ct. App. 1979).

[229]*Id.* at 681-82. IND. R. TR. P. 4.3 provides:

> Service of summons upon a person who is imprisoned or restrained in an institution shall be made by delivering or mailing a copy of the summons and complaint to the official in charge of the institution. *It shall be the duty of said official to immediately deliver the summons and complaint to the person being served* and allow him to make provisions for adequate representation by counsel. *The official shall indicate upon the return whether the per-*

peals reversed a default decree awarded to the husband, holding that the requirements of Trial Rule 4.3 must be followed whenever the defendant is an inpatient in a mental institution, even though she entered voluntarily.[230] The trial court also erred in failing to appoint a guardian ad litem to represent the wife as required by Trial Rule 17(C).[231]

4. Collateral Attack on Decree.—In *Anderson v. Anderson*,[232] the parties had executed a property settlement agreement, but the dissolution decree entered three days later did not mention the agreement.[233] Less than a year later, the wife filed a separate action against the husband, an attorney, seeking damages for fraud and legal malpractice, alleging that he had discouraged her from hiring independent counsel and had misrepresented the value of the assets she received under the agreement. The trial court dismissed the wife's complaint on the ground that the dissolution decree was a final adjudication of the parties' property rights and could not be subjected to collateral attack.[234] The court of appeals affirmed, holding that the wife's only remedy was to seek a division of property in the original dissolution proceeding.[235] Because the dissolution court had made no division of property, that court retained "exclusive jurisdiction over the issue of the parties' property rights,"[236] and until the proposed division was effected, the wife could show no damages to sustain her claims for legal malpractice and attorney deceit.[237]

The court of appeals clearly was correct in holding that the trial

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son has received the summons and been allowed an opportunity to retain counsel.

(Emphasis added.)

[230]398 N.E.2d at 682.

[231]IND. R. TR. P. 17(C) provides in part: "If an infant or incompetent person is not represented, or is not adequately represented, the court *shall* appoint a guardian ad litem for him." (Emphasis added). The court of appeals further held that the husband had failed to make disclosure of the wife's mental condition, as required by IND. R. TR. P. 4.2(C), but stated: "The fact that summons was directed to appellant at a mental institution is sufficient to enjoin upon the court the duty to make inquiry and use the powers under [Trial Rule 17(C)] to 'make such orders as is deemed proper for the protection of such parties or persons.'" 398 N.E.2d at 682.

[232]399 N.E.2d 391 (Ind. Ct. App. 1979).

[233]The dissolution decree contained no order dividing the marital property, "nor any indication the agreement was submitted to the Court." *Id.* at 394.

[234]*Id.* at 395-96.

[235]Id. at 401. "In that proceeding the question of [the husband's] concealment or misrepresentation of the marital property will properly be in issue and the appropriate relief obtained." *Id.*

[236]*Id.*

[237]*Id.* at 401-04.

court retained jurisdiction to dispose of the parties' property rights after the dissolution decree was entered.[238] Under the Indiana statute, the court has a duty to effect a division of property on dissolution, whether or not the parties have agreed to a division,[239] and the *Anderson* trial court had not done so. It is not so clear, however, that a judicial division of property should be the exclusive remedy in this kind of case. In order to reach its conclusion, the court of appeals made two preliminary holdings. First, it followed prior law in holding that a divorce decree "operated as an absolute bar to maintaining an independent action involving property rights growing out of, or connected with, the marriage, *regardless of whether the divorce decree adjudicated the parties' property rights.*"[240] Second, the court held that a property settlement agreement executed by the parties had "no legal efficacy" as a contract,[241] because it had not been approved by the dissolution court and incorporated and merged into the decree under section 10(b) of the Indiana Dissolution of Marriage Act.[242] Both of these holdings are highly questionable under present-day divorce law.

The court of appeals made it clear in *Anderson* that it was applying collateral estoppel or "issue preclusion" rather than res judicata ("claim preclusion").[243] Generally, collateral estoppel bars relitigation only of issues actually litigated in an earlier proceeding.[244] Yet, the Indiana rule applied in *Anderson* holds that a

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[238]*See* Lewis v. Lewis, 360 N.E.2d 855 (Ind. Ct. App. 1977).

[239]*See* Nagel v. Nagel, 130 Ind. App. 465, 165 N.E.2d 628 (1960). IND. CODE § 31-1-11.5-11(b) (Supp. 1980) provides that in a divorce action "the court *shall divide* the property of the parties." (Emphasis added.) *Id.* § 31-1-11.5-10(b) (1976) provides that, where the parties have agreed to a division of property, "the terms of the agreement if approved by the court *shall be incorporated and merged* into the decree, *or the court may make provisions* for the disposition of property." (Emphasis added.) In *Anderson*, the trial court neither approved the parties' agreement nor made its own provision for property division.

[240]399 N.E.2d at 397 (emphasis added; footnotes omitted). The court acknowledged that the rule is otherwise in most other jurisdictions. *Id.* n.11.

[241]*Id.* at 398.

[242]IND. CODE § 31-1-11.5-10(b) (1976).

[243]399 N.E.2d at 397 n.9A. The broader doctrine of res judicata would not have been applicable in *Anderson*, because the two suits involved were not on the same cause of action.

[244]The differences between res judicata and collateral estoppel were clearly set out in Town of Flora v. Indiana Serv. Corp., 222 Ind. 253, 53 N.E.2d 161 (1944). Where the subsequent suit is on the same cause of action as the first, the first judgment "is a complete bar to any subsequent action on the same claim or cause of action, between the same parties . . . . Every question which was within the issues, and which, under the issues, might have been proved, will be presumed to have been proved and adjudicated." *Id.* at 256, 53 N.E.2d at 163. Where the second suit between the parties is

divorce decree operates as an "absolute bar" to a later action involving marital property rights, even though those rights were not adjudicated in the divorce action.[245] This is an extraordinary application of collateral estoppel which should not be continued without first reexamining its rationale. The early cases enunciating this rule were decided under statutes and concepts of marital property rights materially different from those of today. Prior to adoption of the present Indiana Dissolution of Marriage Act, all property rights were settled by an award of alimony to the wife.[246] Alimony was considered incidental to the divorce action and had to be adjudicated in that action "or not at all."[247] After the divorce, the court was considered to have "lost jurisdiction" over the issue of property rights.[248] Today, however, the concept of divisible divorce recognizes separate and distinct jurisdictional bases for dissolution of marriage and for the incidents of marriage, including property rights.[249] In *Anderson*, the court of appeals expressly held that the divorce court still retained jurisdiction over the property issue five years after the decree was entered. This holding is inconsistent with the rationale of the early cases cited to support the collateral estoppel rule followed in *Anderson*.[250] Because the law now permits property rights to be determined long after the divorce decree has been entered, it makes no sense to continue applying a rule based on the

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on a different cause of action, however, the first suit is not a complete bar. In such a case, "it is well settled that the judgment in the first suit *operates as an estoppel only as to the point or question actually litigated and determined*, and not as to other matters which might have been . . . determined." *Id.* at 257, 53 N.E.2d at 163 (emphasis added). *See also* Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 2 (1942), *quoted in In re* Estate of Nye, 157 Ind. App. 236, 249-50 n.9, 299 N.E.2d 854, 862 n.9 (1973).

[245]399 N.E.2d at 397. This rule is derived from early Indiana cases, *e.g.*, Walker v. Walker, 150 Ind. 317, 50 N.E. 68 (1898); Wagner v. Treesh, 71 Ind. App. 551, 125 N.E. 242 (1919).

[246]*E.g.*, Smith v. Smith, 35 Ind. App. 610, 615, 74 N.E. 1008, 1010 (1905).

[247]Muckenberg v. Holler, 29 Ind. 139, 141 (1867). *See also* Smith v. Smith, 35 Ind. App. 610, 614, 74 N.E. 1008, 1010 (1905).

[248]*See* Wagner v. Treesh, 71 Ind. App. 551, 556, 125 N.E. 242, 243 (1919).

[249]*See, e.g.*, Abney v. Abney, 374 N.E.2d 264 (Ind. Ct. App. 1978), *cert. denied*, 439 U.S. 1069 (1979); *In re* Marriage of Rinderknecht, 367 N.E.2d 1128 (Ind. Ct. App. 1977). The concept of divisible divorce is derived from Estin v. Estin, 334 U.S. 541 (1948).

[250]In Walker v. Walker, 150 Ind. 317, 328, 50 N.E. 68, 71 (1898), the Indiana Supreme Court defended its holding that a divorce decree "must . . . be held to have adjudicated all property rights arising out of or connected with the marriage" by saying that its rule "is a salutary one, as it certainly would not be proper after the divorce, to leave open and unsettled questions in regard to property which the wife might have received from the husband during the marriage." These are precisely the kind of questions which the court of appeals now holds *are* left open and unsettled in cases, such as *Anderson*, in which the decree is silent as to the division of property.

assumption that all property rights had to be settled at the time the divorce was granted. Collateral estoppel should apply in divorce cases, as in all other cases, to bar only those issues actually litigated in the divorce action. Because property rights were not adjudicated in the *Anderson* divorce proceeding, the decree should not bar the wife's subsequent fraud suit against the husband.

Even if the collateral estoppel issue were resolved in the wife's favor, however, a second obstacle to her recovery would exist in the court's holding that no fraud action could be based upon the parties' property settlement agreement. The court considered the agreement to have no legal effect as a contract, because it had not been approved by the court and "incorporated and merged" into the divorce decree as contemplated by section 10(b) of the Dissolution of Marriage Act.[251] If it *had* been approved, incorporated, and merged into the decree, the agreement would indeed have lost its separate existence as a contract,[252] but no good reason appears for denying its legal efficacy as a contract in the absence of court approval. Section 10(a) encourages the parties to settle their differences by contract:

> To promote the amicable settlements of disputes that have arisen or may arise between the parties to a marriage attendant upon the dissolution of their marriage, *the parties may agree in writing* to provisions for the maintenance of either of them, the disposition of any property owned by either or both of them and the custody and support of their children.[253]

Nothing in section 10 expressly requires the parties to submit their agreement to the court. Section 10(b) merely states that *if* the agreement is approved by the court, it "shall be incorporated and merged into the decree";[254] otherwise, the court "*may* make provisions for the disposition of property, child support, maintenance and custody."[255] Because section 11 of the statute does state that the court "shall divide the property of the parties,"[256] the court of appeals undoubtedly was correct in holding that it was the "*mandatory duty*" of the trial court to divide the parties' property,[257] but nothing in the statute places a mandatory duty on the *parties* to submit their agreement to the court. Where the court has failed to

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[251]IND. CODE § 31-1-11.5-10(b) (1976); 399 N.E.2d at 398.

[252]*See* CLARK, *supra* note 132, § 16.14 at 565.

[253]IND. CODE § 31-1-11.5-10(a) (1976) (emphasis added).

[254]*Id.* § 31-1-11.5-10(b).

[255]*Id.* (emphasis added).

[256]*Id.* § 31-1-11.5-11(b) (Supp. 1980).

[257]399 N.E.2d at 398 (emphasis by the court).

fulfill its duty, as occurred in *Anderson*, it seems unnecessary to penalize the parties by treating their agreement as a legal nullity. Although the divorce court remains open for either party to seek a belated division of property, there is no reason to make this the exclusive remedy. The parties' agreement should be accorded at least prima facie validity as a contract, subject to the divorce court's power and duty to disapprove the agreement, if unfair, and make its own property division order. If a party elects to sue for fraud, as did the wife in *Anderson*, that remedy should be available to her.

E. Marriage

1. Domestic Violence.—A new statute establishes a fund to aid local government units and charitable organizations in setting up and maintaining centers for the prevention and treatment of domestic violence.[258] A ten-dollar surcharge added to the cost of every dissolution of marriage action will finance the program.[259] The interdepartmental board for the coordination of human services programs is authorized to make grants and enter into contracts for programs designed to establish prevention and treatment centers, establish personnel training programs, conduct research, or develop other means for prevention and treatment of domestic violence.[260] In order to be eligible to receive funds, a center must provide emergency shelter and transportation services, a twenty-four hour telephone system for crisis assistance, and other services to any person who has been assaulted by, or who "fears imminent serious bodily injury from [a] spouse or former spouse."[261]

The objective of the statute is laudable, although it is difficult to see the logic of requiring divorcing couples to finance the program. There are limitations on the grants allowed. No single domestic violence prevention and treatment center can receive more than $50,000 per year, or more than 75 percent of its operating costs.[262] It remains to be seen whether this will be adequate to maintain the kind of twenty-four hour emergency service and shelter facilities envisioned by the statute.

2. New Pre-Marital Tests.—Statutory amendments enacted over the governor's veto require tests for immunological response to rubella for all female marriage license applicants and Rh factor tests for applicants of both sexes, in addition to the tests for syphilis and

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[258]IND. CODE §§ 4-23-17.5-4, -5 (Supp. 1980).

[259]*Id.* § 4-23-17.5-4(b).

[260]*Id.* § 4-23-17.5-6.

[261]*Id.* § 4-23-17.5-7.

[262]*Id.* § 4-23-17.5-5(b).

sickle cell anemia already required.[263] The statute requires the examining physician to "explain the significance of the rubella and Rh factor test results" to the applicants.[264]

F. Paternity

1. Child Born During Marriage.—In *R.D.S. v. S.L.S.*,[265] the paternity issue arose in a dissolution of marriage proceeding. The child was born during the marriage but had been conceived before the parties met.[266] Although the wife admitted that the husband was not the child's biological father, the trial court found that the child "was born as a result of this marriage" and ordered the husband to pay child support.[267] The court of appeals reversed, holding that the duty of support could be imposed only upon a biological or adoptive parent,[268] because the Indiana Dissolution of Marriage Act defines "child" to mean "a child or children *of both parties* to the marriage."[269] A majority of the court concluded that the statute was determinative and commented that "without benefit of an appellee's brief, we are not in a position to consider the wisdom or application of any expansion of that statute."[270] This statement is inappropriate for two reasons: First, the dissent formulated the arguments on behalf of the wife as effectively as would a brief on her behalf;[271] second, application of an equitable doctrine such as estoppel would not have required expanding the statutory definition, because it would apply only to the facts and equities of this particular case. Liability could have been imposed on the husband in *R.D.S.* without reading the statute as imposing liability in all cases in which the wife gives birth to a child fathered by another man.[272]

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[263]*Id.* § 31-1-1-7.

[264]*Id.*

[265]402 N.E.2d 30 (Ind. Ct. App. 1980).

[266]At the time the parties met, the wife was visibly pregnant. They were married less than two months later. *Id.* at 31.

[267]*Id.*

[268]*Id.* at 34-35.

[269]IND. CODE § 31-1-11.5-2(c) (Supp. 1980) (emphasis added). The statutory definition includes "children born out of wedlock to such parties as well as children born or adopted during the marriage of such parties." *Id.* The child in *R.D.S.* was born *in* wedlock, but was admittedly not fathered by the husband.

> [H]ad husband sired the child, the child would have fallen within the [statutory] definition . . . regardless of whether she was born before the marriage, and hence born out of wedlock to the parties, or conceived before marriage but born after marriage, or conceived and born during marriage, or conceived during marriage but born after a dissolution of the marriage.

402 N.E.2d at 34.

[270]402 N.E.2d at 34.

[271]*Id.* at 35-38 (Buchanan, C.J., dissenting).

[272]*See id.* at 38 (Buchanan, C.J., dissenting).

In his dissent, Chief Judge Buchanan pointed to numerous facts which would justify holding the husband estopped to deny parentage in *R.D.S.*:

> Under the peculiar facts of this case, the only just result is to impose upon R.D.S. the support duty he willingly promised and undertook. When R.D.S. met S.L.S., she was *visibly pregnant*. When he proposed marriage to her, he urged her to drop a paternity suit for his own reasons: he did not want another man involved. He promised to care for her child, and he did so. He clearly undertook the responsibilities of a legal father, not as the result of any fraud. S.L.S. testified she "relied on his statements that he would take care of the child." . . . By the time the dissolution was granted, S.L.S. was precluded from bringing the paternity action.[273]

Judge Buchanan also pointed to the strong public policy favoring legitimacy of children and adequate provision for their support.[274] This policy certainly would be furthered by holding a husband estopped to deny paternity under the facts of *R.D.S.*[275]

2. Due Process.—Buck v. P.J.T.[276] arose under the former Indiana paternity statute which authorized issuance of a warrant "in lieu of summons."[277] Under the repealed statute, the court of appeals

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[273]*Id.* at 37 (Buchanan, C.J., dissenting) (emphasis in the original). Although it was still possible for the *child* to bring a paternity action, Chief Judge Buchanan thought that "[t]o shift this burden to the child, as R.D.S. suggests we should do, is wholly unjust. We could only speculate as to whether such paternity could be established, assuming the biological father could be found." *Id.*

The majority disputed Chief Judge Buchanan's statement that the husband had "promised to care for her child," *id.*, as not supported by the record. *Id.* at 35. Even if no direct promise was proved, the husband's conduct in asking the wife to drop a paternity suit against the putative father certainly implied his promise to care for the child. As the dissent pointed out, "R.D.S. took this child into his home and gave her his name *with full knowledge* of her biological paternity." *Id.* at 38.

[274]*Id.* at 37-38 (Buchanan, C.J., dissenting). "The interests of society in seeing that children are not bastardized subsequent to marriages, and in seeing that support is adequately provided must be taken into account judicially in carrying out legislative intent and fulfilling public policy." *Id.*

[275]The majority discussed several theories used by courts in other jurisdictions to justify imposing support obligations on husbands in fact situations similar to those of *R.D.S.* Theories included equitable adoption, equitable estoppel, in loco parentis, and promissory estoppel under RESTATEMENT (SECOND) OF CONTRACTS § 90 (tent. draft #2 1965). 402 N.E.2d at 32-33. All of these theories are variations on the theme of equitable estoppel, based on detrimental reliance on representations by the husband (either that he is the father or that he is willing to assume the duties of parenthood), making it unjust to allow the husband later to take a position inconsistent with paternity.

[276]394 N.E.2d 935 (Ind. Ct. App. 1979).

[277]IND. CODE § 31-4-1-13 (1976) (repealed effective October 1, 1979).

held, in *Neill v. Ridner*,[278] that the refusal of the trial court to recall outstanding warrants after valid service of summons had been made on a nonresident defendant violated his due process rights.[279] A majority of the court of appeals refused to apply the holding of *Neill* to a similar fact situation in *Buck*, because the defendant never specifically requested cancellation of the warrant after service of summons on him.[280] Judge Staton, in dissent, called the majority's attempts to distinguish *Neill* "specious."[281] In his view, it was the continuation of the warrant after good service had been obtained that constituted the denial of due process in *Neill* and in *Buck*. Once service was had, the warrant served "no legal purpose," and it was the denial of an opportunity to be heard without the "threat of incarceration" that constituted the violation of due process.[282] This problem should not arise under the present paternity statute which treats paternity strictly as a civil proceeding.[283]

3. Statutory Changes.—Amendments to the new paternity statute now authorize paternity actions to be filed by the state or county welfare department[284] in cases in which there has been an assignment of support rights under Title IV-D of the federal Social Security Act.[285] Where public assistance has been furnished for the benefit of the child, the statute of limitations for actions filed by the welfare department is extended from two years to five years.[286]

The new provision authorizing the court to order the parties to undergo human leukocyte antigen (HLA) tissue testing, as well as

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[278]153 Ind. App. 149, 286 N.E.2d 427 (1972).

[279]*Id.* at 156, 286 N.E.2d at 430 (construing U.S. CONST. amend. XIV, § 1; IND. CONST. art. I, § 12). The court also held in *Neill* that personal jurisdiction over the defendant was obtained by personal service upon him at his residence in Kentucky under IND. R. TR. P. 4.4(A)(2) ("causing personal injury or property damage by an act or omission done within the state"). 153 Ind. App. at 151-52, 286 N.E.2d at 428-29.

[280]394 N.E.2d at 937. The majority distinguished *Neill* on three grounds:

(1) The court in *Neill* had twice "specifically refused or failed to recall the outstanding warrants after a ruling that service had been made on the defendant," 286 N.E.2d at 431, whereas in *Buck*, the warrant was recalled when service of summons was attempted.

(2) When the warrant was reissued, there had been "no judicial determination of the adequacy of service." 394 N.E.2d at 937.

(3) At no point did Buck seek to have the warrant withdrawn.

[281]394 N.E.2d at 937 (Staton, J., dissenting).

[282]*Id.* at 938.

[283]*See* IND. CODE §§ 31-6-6.1-19, -7-4, -5 (Supp. 1980). An additional paternity case decided during the survey period dealt only with the sufficiency of the evidence. The court, in Moorehead v. Singleton, 403 N.E.2d 361 (Ind. Ct. App. 1980), held that the evidence supported the trial court's determination of paternity.

[284]IND. CODE § 31-6-6.1-2(b)(3) (Supp. 1980). *See also id.* §§ 31-6-6.1-6, -16.

[285]42 U.S.C. §§ 651-60 (1976 & Supp. II 1978).

[286]IND. CODE § 31-6-6.1-6(c) (Supp. 1980). The action must be brought "before the child's fifth birthday." *Id.*

the traditional blood grouping test, has been amended to make it clear that "the results of the tests may be received in evidence."[287] Under the former statute, the results of "grouping tests" could be received in evidence only to establish nonpaternity.[288] Under the new statute, blood tests and tissue tests apparently would be admissible to prove paternity, as well as to exclude it, reflecting significant advances made in such testing since 1953, when the former statute was adopted.

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[287] *Id.* § 31-6-6.1-8.

[288] *Id.* § 34-3-3-1 (1976) (repealed effective October 1, 1979). The results of such tests could "be received in evidence, but only in cases where definite exclusion [was] established." *Id.*