identifiable conduct occurring after the imposition of the first sentence. The continued validity of the *Anderson* decision has been placed in doubt, however, by another decision of the United States Supreme Court which was decided subsequent to *Anderson*. In *Chaffin v. Stynchcombe*,[188] the Supreme Court held that the *Pearce* rule does not apply when a jury imposes the penalty after a retrial following an appeal, provided that the jury is not informed of the prior sentence. Since the penalty in the *Anderson* case was, in fact, imposed by the jury after the trial de novo, the *Anderson* ruling is clearly no longer required by any of the decisions of the United States Supreme Court.

VII. Domestic Relations*

A. Adoption

The "best interests of the child" continues to be the polestar of adoption proceedings.[1] But prior to reaching this consideration, the trial court normally determines whether or not consent of the parties is required in order to grant the adoption petition. Before the 1969 amendment to Indiana's adoption law,[2] the Indiana Supreme Court was faced with the question of whether or not the refusal to pay support payments constituted a waiver of the consent required in adoption proceedings.[3] The court had answered this issue in the affirmative.

In *Jackson v. Barnhill*[4] the respondent-father refused to pay support to his former wife and children on the grounds that his

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[188]411 U.S. 903 (1973).

*David C. Campbell, Lawrence D. Giddings, James G. Scantling, Joseph A. Walsh.

[1]Ind. Code § 31-3-1-6 (1971).

[2]Prior to the amendment, the trial court had discretionary authority to find that failure to provide support payments for a period of one year was a waiver of the consent required in adoption proceedings. Under the 1969 amendment, specific requirements are laid out in order to find waiver: payments required by law or judicial decree, ability of the father to make the payments, and willful refusal to make the same. *Id.* § 31-3-1-6(g)(1).

[3]Reynard v. Kelly, 252 Ind. 632, 251 N.E.2d 413 (1969).

[4]277 N.E.2d 162 (Ind. 1972).

former wife was living with another man. Respondent contended that under these facts no wilful waiver of consent could be found merely because he failed to provide child support payments. He further alleged that his former wife was not a fit mother for the children.[5] The court held that prior case law was equally applicable to the amended statute and that when a parent is financially able to make support payments and refuses to do so, the trial court is justified in finding a wilful refusal. In such a case, there has been a waiver of the consent required for adoption.[6]

Following a precedent set by the supreme court in 1946,[7] the court of appeals has held that welfare reports may not be considered by the trial court in determining the best interests of the child in a contested adoption proceeding.[8] The appellate court reiterated the rule that welfare reports may only be considered as evidence where the adoption is an *ex parte* proceeding.[9] When the adoption is contested, the proceeding becomes an adversary one, and as such requires the observance of elementary rules of evidence.[10]

B. Divorce

1. Doctrines of Indivisibility and Equitable Estoppel

In 1970, Eugene Alderson, the appellant, filed a suit for divorce, and Myrtle Alderson, the appellee, cross-complained, also seeking an absolute divorce. The trial court found for the appellee on her cross-complaint and granted her an absolute divorce and awarded her custody of their minor child. The trial court also ordered that the appellee should receive certain real estate and household goods. On appeal the appellant contested neither the validity of the divorce decree nor the award of custody, but rather alleged that the trial court had abused its discretion in determining the amount of the property settlement awarded to the appellee. While the appeal was pending, the appellant remar-

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[5]The wife was not a party to the action and, therefore, this allegation was not properly in issue.

[6]The court stated that "we cannot presume the legislature intended to vest natural fathers with the ability to unilaterally pass judgment . . ." as to when not to comply with support orders. 277 N.E.2d at 164.

[7]Attkisson v. Usrey, 224 Ind. 155, 65 N.E.2d 489 (1946).

[8]Jeralds v. Matusz, 284 N.E.2d 99 (Ind. Ct. App. 1972).

[9]*Id.* at 101-02.

[10]*In re* Adoption of Force, 126 Ind. App. 156, 131 N.E.2d 157 (1956).

ried. The appellee then filed a motion to dismiss the appeal on the ground that the appellant, by his remarriage, had recognized the validity of the judgment below.

The court of appeals sustained the motion to dismiss, relying on *Sidebottom v. Sidebottom,*[11] and held that the doctrines of indivisibility and equitable estoppel prevented appellant from challenging the trial court's judgment.[12] The Indiana Supreme Court, in an unanimous decision, overruled *Sidebottom,* and held that the doctrine of indivisibility is no longer viable law.[13] Therefore, since appellant did not question the validity of the marital dissolution, he was not estopped to challenge the property settlement portion of the decree even though he had remarried.

The doctrine of estoppel is founded upon the equitable concept that one who accepts the benefits of a judgment is estopped from further questioning the fairness of that judgment.[14] As applied to divorce proceedings, the concept is that one who acknowledges the validity of a divorce decree by remarrying is estopped from denying the validity of the dissolution of the prior marital relationship on appeal.[15] This application of the doctrine serves logical ends, because "it would be ludicrous to permit a party . . . to have the second marriage, on his motion, rendered bigamous on appeal."[16]

The doctrine of indivisibility has its basis in the concept that each part of the trial court's judgment in a divorce proceeding, including marital status, property settlement, alimony, and child custody, is so integral to the judgment as a whole that no part thereof can be considered on appeal without considering the whole.[17] When the doctrines of estoppel and indivisibility

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[11]249 Ind. 572, 233 N.E.2d 667 (1968).

[12]Alderson v. Alderson, 274 N.E.2d 710 (Ind. Ct. App. 1971), *rev'd,* 281 N.E.2d 82 (Ind. 1972).

[13]Alderson v. Alderson, 281 N.E.2d 82 (Ind. 1972).

[14]274 N.E.2d at 711 (Staton, J., dissenting).

[15]*Id.* This doctrine was first established in Indiana in Garner v. Garner, 38 Ind. 139 (1871). The court cited no authority for this proposition and decided the case on its merits. Thus, the court's pronouncement of the estoppel doctrine was merely dictum. *See also* Stephens v. Stephens, 51 Ind. 542 (1875).

[16]281 N.E.2d at 83.

[17]The doctrine has its origins in dicta found in Rariden v. Rariden, 33 Ind. App. 283, 70 N.E. 398 (1904).

are applied in conjunction with each other, remarriage by one of the parties to the divorce proceeding completely bars an appeal by that party of any part of the divorce judgment.[18] This was the rule established in *Sidebottom*[19] and seemingly applied to the situation which confronted the court in *Alderson v. Alderson.*[20]

In *Alderson,* the court noted that the doctrine of indivisibility, summarily applied, produced results "which [were] neither logical nor reasonable," and that the consequences of applying the doctrine of estoppel in conjunction with the doctrine of indivisibility were "severe results which border on absurdity."[21] The court hypothesized that the only logical reason for the adoption of the rule was that, at that time, it was believed the state had an overriding interest in preserving its citizens' marital status and was thereby obligated to discourage divorce. Furthermore, the origins of the rule as well as the authority for it were somewhat questionable."[22]

The court stated that the general application of the doctrine of estoppel as set forth in *Sidebottom* was restricted somewhat in *O'Connor v. O'Connor.*[23] In that case the court held that although the appellant had accepted the benefits of the divorce decree by selling an automobile that had been awarded him, this was not such an unqualified acceptance of the decree as to preclude any appeal questioning the validity of the divorce. The *Sidebottom* decision was distinguished on the ground that the appel-

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[18] *See* Sidebottom v. Sidebottom, 249 Ind. 572, 233 N.E.2d 667 (1968); Finke v. Finke, 135 Ind. App. 65, 191 N.E.2d 516 (1963); Smith v. Smith, 125 Ind. App. 658, 129 N.E.2d 374 (1955); Arnold v. Arnold, 95 Ind. App. 553, 183 N.E. 910 (1933). For an excellent examination of the rule, see Judge Staton's dissenting opinion in *Alderson,* 274 N.E.2d at 711.

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> The overwhelming weight of authority is to the effect that an appellant having recognized the validity of a judgment and decree of divorce . . . by accepting the favorable and/or beneficial provisions thereof, financial and/or marital, accruing to him thereunder, in the absence of fraud, is estopped from questioning the validity of such judgment or decree from and after the acceptance of such benefit or benefits. From and after such acceptance, an appellant is prohibited from proceeding to perfect or maintain any appeal from the same.

233 N.E.2d at 672.

[20] 281 N.E.2d 82 (Ind. 1972).

[21] *Id.* at 83.

[22] *See* 274 N.E.2d at 711 (Staton, J., dissenting).

[23] 253 Ind. 295, 253 N.E.2d 250 (1969).

lant had remarried in *Sidebottom,* whereas in *O'Connor* the only act of acceptance was the sale of an automobile.[24] The *O'Connor* court thus distinguished between acceptance of a *marital* benefit and the acceptance of a *financial* benefit.

The *Alderson* court, however, viewed a *summary* application of the doctrine, even in its more restricted form, as producing results which ill-serve the needs of our society. The court expressed its concurrence with Judge Staton's dissenting opinion in *Alderson v. Alderson,* in which he stated that the rule worked to penalize a party for remarrying and thus senselessly forced a postponement of a restoration to normal and productive living.[25]

The court concluded that the doctrine's result could no longer be justified, and therefore it overruled *Sidebottom* and held that the summary application of the doctrine of estoppel when the appellant has remarried pending appeal, even though the appellant raised no question on appeal concerning the validity of the marital dissolution, is no longer the law in Indiana.[26] Thus, the court struck down the long-standing doctrine of indivisibility, a rule

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[24]In *O'Connor* the court stated:

> It is true that the acceptance of financial benefits accruing to a spouse from the granting of a divorce *may* in some cases estop that spouse from the prosecution of an appeal. However, there are obvious limitations to this theory where the acceptance of certain financial benefits is the *only* evidence available to support the proposition that a spouse has unqualifiedly accepted the benefits of the decree and hence is precluded from appeal. . . . To require a spouse to incur *liabilities or losses* in order to be free of an allegation of accepting the benefits of a divorce decree is an anomaly indeed. Likewise, a requirement that possession of all assets, regardless of their nature, be frozen in the spouse to which they are awarded if an appeal is contemplated is unreasonable, unrealistic and unnecessary.

Id. at 298-99, 253 N.E.2d at 251-52 (citations omitted).

[25]Judge Staton, in his dissenting opinion in *Alderson,* said:

> Divorce is not an uncommon or infrequent occurrence in our society today. If a party is penalized for remarrying while his or her appeal is pending on matters other than the validity of their marital status, a restoration to normal and productive living is senselessly postponed. The order and tranquillity of our society is ill served by insisting on a semistatic marital relationship during a long drawn out appeal.

274 N.E.2d at 712.

[26]The court also noted that the doctrine was in direct conflict with Indiana Rule of Trial Procedure 59(G), which provides that only those errors raised in a motion to correct errors can be considered on appeal.

which was based not on reason, but upon arbitrary and questionable authority.

2. Statutory Developments

The following discussion is a comparison of Indiana's prior divorce law[27] and the new dissolution statute,[28] with special emphasis upon the procedural requirements under the Dissolution of Marriage Act, effective September 1, 1973. The act may be divided into the three areas of dissolution procedures, property settlement, child support, and separation agreements.[29]

A dissolution proceeding[30] is commenced by filing a petition entitled, "In the Marriage of ———— and ————." The petition must set out the place and duration of residence of each party, the date of marriage, the date of separation, the names, ages, and addresses of all living children,[31] the grounds for dissolution, and the relief sought.[32] One of the parties must have been a resident of the state for six months and of the county in which the petition is filed for three months immediately preceding the filing.[33] The petition may be filed by one or both of the parties.[34] Only in the former instance must a copy of the petition and summons be served upon the other.

The most significant aspect of the new statute is that it expressly abolishes the existing grounds for absolute and limited divorce.[35] The act provides that dissolution of marriage shall be

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[27]The following laws were specifically repealed: IND. CODE §§ 31-1-14, -17 to -22; 31-2-1, -3, -4; 35-2-1-2 (1971).

[28]Ind. Pub. L. No. 297 (April 12, 1973).

[29]*Id.* § 1.

[30]*Id.* The new no-fault act has repealed IND. CODE § 31-1-22-1 (1971), which provided an action for separation from bed and board on the grounds of adultery, desertion, habitual cruelty, habitual drunkenness, and gross and wanton neglect.

[31]The petition must also indicate whether or not the wife is pregnant.

[32]Ind. Pub. L. No. 297, § 4 (April 12, 1973).

[33]*Id.* § 6. Under prior law, the residency requirements were one year in the state and six months in the county. Ch. 241, § 1, [1933] Ind. Acts 1097.

[34]Ind. Pub. L. No. 297, § 5 (April 12, 1973). Under prior law, the petition was actually a complaint filed by the innocent party. Ch. 43, § 7, [1873] Ind. Acts 107.

[35]Ind. Pub. L. No. 297, §§ 1, 3 (April 12, 1973). The former grounds for divorce were: adultery, impotency existing at the time of marriage, abandon-

decreed only upon a finding of one of the following grounds: (1) irretrievable breakdown, (2) the conviction of either party, subsequent to the marriage, of an infamous crime, (3) impotency, existing at the time of the marriage, (4) incurable insanity of either party for a period of at least two years.[36] Of all these grounds "irretrievable breakdown" is least definitive as to what type of proof will be required to sufficiently establish grounds for divorce. This problem can only be resolved by judicial decision. Under the previous law a divorce was an action by one spouse against the other, and the court, before granting a divorce, found one spouse at fault. However, under the no-fault statute it is the marriage which is at issue, not the conduct of the parties. The relative guilt of each spouse is no longer the primary determination of the court.

In an action for dissolution, the final hearing can be held no earlier than sixty days after the filing of the petition.[37] However, pending the final hearing either party may seek provisional relief by means of a motion for temporary maintenance, accompanied by an affidavit setting forth the factual basis for the motion and the relief sought.[38] If the motion is granted, the movant obtains temporary support or custody of a child of the marriage or possession of property. At the final hearing, upon presentation of all the evidence, if the court finds that the material allegations of the petition are true, it may enter a dissolution decree. However, if the court finds that there is a reasonable possibility of reconciliation, it may continue the matter and order the parties to seek reconciliation through any available counseling. Within forty-five days after the continuance either party may move for dissolution, and the court must enter a dissolution decree. If no motion for dissolution is filed within ninety days after the date of continuance, the matter may be dismissed automatically.[39] The decree is final when entered, subject to the

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ment for two years, cruel and inhumane treatment of either party by the other, habitual drunkenness of either party, the husband's failure to make reasonable provision for his family for a period of two years, the conviction, subsequent to the marriage, in any country of either party of an infamous crime, and incurable insanity for a period of at least five years prior to the action for divorce. Ch. 43, § 8, [1873] Ind. Acts 107; ch. 87, § 1, [1935] Ind. Acts 248.

[36]Ind. Pub. L. No. 297, § 3 (April 12, 1973).

[37]*Id.* § 8.

[38]*Id.* § 7.

[39]*Id.* § 8.

right of appeal. An appeal from the decree which does not challenge the findings as to the marriage will not delay the finalty of the dissolution, so the parties may remarry pending appeal.[40]

The new statute is consistent with prior law in that there are no provisions for alimony. While the prior law referred to alimony, it is clear from the decisions that it provided for only a property settlement.[41] The new law provides that the court shall make no provision for maintenance (alimony) except when it finds a spouse to be mentally and physically incapacitated to the extent that the ability of the spouse to be self-supporting is materially affected.[42]

Under this act, the court will divide the property in a just and reasonable manner. The statute provides that the court may divide the property among the parties, award it to one and require that that party pay the other, or order the property sold and the profits divided. The court in determining what is "just and reasonable" is to consider the contribution of each spouse to the net worth of the marital property, premarital acquisitions or acquisitions by gift or inheritance, the economic circumstances of the spouses at the time the disposition of the property is to become effective, the conduct of the parties during the marriage as related to the disposition or dissipation of their property, and the earning capacity of each party.[43] No property order may be revoked or modified, except when fraud is asserted within two years from the date of the order.[44]

An action for child support is the second action recognized by the no-fault act. This proceeding is commenced by filing a petition entitled, "In re the Support of ————." The petition may be filed by anyone entitled to receive child support pay-

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[40] *Id.* § 9.

[41] IND. CODE § 31-1-12-17 (1971) uses the term alimony. Case law, however, has held that alimony in Indiana is not in the nature of support in the future for the wife. Smith v. Smith, 131 Ind. App. 38, 169 N.E.2d 130 (1960). Alimony is awarded in Indiana for the purpose of making a present and complete settlement of the property rights of the parties and does not include future support for the wife. Sidebottom v. Sidebottom, 140 Ind. App. 657, 225 N.E.2d 772 (1967). *See also* McDaniel v. McDaniel, 245 Ind. 551, 201 N.E.2d 215 (1964). *See generally* Note, *Indiana's Alimony Confusion*, 45 IND. L.J. 595 (1970).

[42] Ind. Pub. L. No. 297, § 9 (April 12, 1973).

[43] *Id.* § 11.

[44] *Id.* § 17.

ments.[45] The only residency requirement is that one of the parties involved be a resident of the state and county at the time of filing the petition.[46] The petition must state the relationships of the parties, the present residence of each party, the names and addresses of any living children of the marriage, and the relief sought.[47]

In an action for dissolution or child support the court may order either parent to pay any amount reasonable for the support of the child, without regard to marital misconduct. The court will consider the financial resources of the parents, the standard of living which the child would have enjoyed had the marriage not been dissolved, the physical or mental condition of the child, and the educational needs of the child.[48] This statute differs significantly from the prior child support statute in that it abolishes the consideration of marital misconduct and provides that either parent may be ordered to pay child support. Under the prior law only the father could be required to pay child support.[49] However, much like the prior statute, the new statute allows expenses for college education to be included in support payments.[50] The act also provides that necessary medical, hospital, or dental expenses be included in the support order. The duty to support a child ceases when the child becomes emancipated; however, the court may order educational support to continue until the child reaches the age of twenty-one. Of course, if the child is incapacitated the court may order that support continue indefinitely.

Any provision of a support order may be modified or revoked. Modification will only be made upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable. Also, unless otherwise agreed in writing, when the

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[45] *Id.* § 4.

[46] *Id.* § 6.

[47] *Id.* § 4.

[48] *Id.* § 12.

[49] IND. CODE § 31-1-12-15 (1971). The idea that the father is responsible for support is based on the common law. Requiring the father to do so by statute was merely a confirmation of the common law. Crowe v. Crowe, 247 Ind. 51, 211 N.E.2d 164 (1965).

[50] Ind. Pub. L. No. 297, § 12 (April 12, 1973). For decisions under prior law, see Lipner v. Lipner, 267 N.E.2d 393 (Ind. 1971); Dorman v. Dorman, 251 Ind. 219, 241 N.E.2d 50 (1968); Chaleff v. Chaleff, 144 Ind. App. 438, 246 N.E.2d 768 (1969).

parent obligated to pay support dies, the support order may be modified or revoked upon petition of representatives of the estate.[51]

A child custody proceeding may be commenced in the court by a parent or other person by filing a petition (similar to the child support petition) seeking a determination of custody of the child.[52] The court will determine custody in accordance with the best interests of the child. In determining the best interests of the child, the court will consider the age and sex of the child, the wishes of the child's parents, the wishes of the child, the child's adjustment to his home, school and community, and the mental and physical health of all individuals involved.[53] There is no presumption favoring either parent. The party awarded custody may determine the child's upbringing, unless upon motion by a non-custodial parent, the court finds that the child's physical health or emotional development would be significantly impaired.

The court in reaching its final determination may interview the child in chambers and may permit counsel to be present at the interview.[54] Also the court may order an investigation concerning the custodial arrangements for the child to be made by the court social service agency, the staff of the juvenile court, the local probation or welfare department, or a private agency employed by the court for that purpose.[55] The statute clears up many of the evidentiary problems which have surrounded these investigative reports, such as the admissibility of these reports in evidence, counsels' right to examine these reports, and the parties' right to know the identity of the people consulted.[56] Under the no-fault statute the court must mail the report to counsel and to any party not represented by counsel at least ten days prior to the hearing. The investigator's file of underlying data, reports, and the names and addresses of all persons whom he has consulted is also available. If these requirements are met, the report is admissible at the hearing and may not be excluded on grounds that it is hearsay or otherwise incompetent.[57]

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[51]Ind. Pub. L. No. 297, § 17 (April 12, 1973).

[52]*Id.* § 20.

[53]*Id.* § 21.

[54]*Id.*

[55]*Id.* § 22.

[56]*See* Watkins v. Watkins, 221 Ind. 293, 47 N.E.2d 606 (1943); Tumbleson v. Tumbleson, 117 Ind. App. 455, 73 N.E.2d 59 (1947).

[57]Ind. Pub. L. No. 297, § 22 (April 12, 1973).

Finally, the noncustodial parent is entitled to reasonable visitation rights unless such would be harmful to the child's well-being. Any visitation order may be modified.[58]

To promote the amicable settlements of marital disputes the statute permits agreements between the parties providing for maintenance, the disposition of property, and the custody and support of children.[59] As in the prior statute, separation agreements are favored.[60] The terms of the agreement, if approved by the court, shall be incorporated and merged into the decree. A property settlement agreement so incorporated is not subject to modification unless the agreement so provides or both parties consent.

C. Interspousal Immunity

In 1964, Patricia Brooks filed a personal injury action against Gene Robinson for injuries arising out of an automobile accident.[61] Five years later, while the action was pending, Brooks and Robinson were married. Robinson filed a motion for summary judgment which the trial court, holding that the doctrine of interspousal immunity barred Brooks' action, sustained. On appeal, the Indiana Appellate Court[62] concluded that the doctrine of interspousal immunity was the law in Indiana and under the doctrine marriage extinguished all rights of action between spouses for injuries to person or character.[63] Therefore, the trial court's decision was affirmed. In an opinion by Justice Hunter, the Indiana Supreme Court, finding the reasoning upon which the doctrine was founded judicially unsound, abrogated the common law doctrine of interspousal immunity.[64]

The common-law doctrine was based upon the theory that, legally, the husband and wife were one person, and that person

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[58]*Id.* § 23.

[59]*Id.* § 10.

[60]*See* ch. 120, § 2, [1949] Ind. Acts 310. *See also In re* Webb, 160 F. Supp. 544 (S.D. Ind. 1958).

[61]Brooks was a guest passenger and, therefore, the complaint alleged wanton and wilful misconduct on the part of Robinson, the operator of the vehicle.

[62]That court is now the Indiana Court of Appeals.

[63]Brooks v. Robinson, 270 N.E.2d 338 (Ind. Ct. App. 1971), *rev'd*, 284 N.E.2d 794 (Ind. 1972).

[64]Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972), *noted in* 6 IND. L. REV. 558 (1973).

was the husband.[65] The wife had no separate personal or property rights, for her legal existence merged with that of her husband upon marriage.[66] The result of this legal fiction was that all actions between spouses were barred.[67] The doctrine was first applied in Indiana[68] in the early case of *Barnett v. Harshbarger*,[69] in which the court applied it to a contract action between spouses. The first case to apply the doctrine to a personal tort action was *Henneger v. Lomas*, decided in 1896.[70] From that time until 1972, the doctrine had been repeatedly recognized as the law in Indiana.[71]

The common-law legal relationship between husband and wife has been modified by statute,[72] and consequently the restrictive effect of the interspousal immunity doctrine has been lessened

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[65]*In re* Estate of Pickens, 255 Ind. 119, 263 N.E.2d 151 (1970); Barnett v. Harshbarger, 105 Ind. 410, 5 N.E. 718 (1886); W. PROSSER, LAW OF TORTS § 122, at 859 (4th ed. 1971); 1 W. BLACKSTONE, COMMENTARIES *422 (1768).

[66]W. PROSSER, LAW OF TORTS § 122, at 859 (4th ed. 1971); 1. W. BLACKSTONE, COMMENTARIES *442 (1768).

[67]No suit could be brought due to an absence of parties to the controversy. McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030 (1930). *See, e.g.*, Thompson v. Thompson, 218 U.S. 611 (1910); Henneger v. Lomas, 145 Ind. 287, 44 N.E. 462 (1896); W. PROSSER, LAW OF TORTS § 122, at 860 (4th ed. 1971).

[68]As part of the common law, the doctrine of interspousal immunity became Indiana law pursuant to IND. CODE § 1-1-2-1 (1971). Hanna v. Hanna, 143 Ind. App. 490, 241 N.E.2d 376 (1968).

[69]105 Ind. 410, 5 N.E. 718 (1885). The court noted that to disturb such a long-standing policy of the common law would, because of the theory behind the doctrine, create dissensions between husband and wife

> . . . by requiring the wife to use the husband during the existence of the marital relation or lose her rights by lapse of time, thus creating discord and strife which it was the purpose of the common law to prevent.

Id. at 415, 5 N.E. at 720.

[70]145 Ind. 287, 44 N.E. 462 (1896). The court there explained the doctrine's theoretical basis:

> [T]he common law rule that marriage extinguished all rights of action in favor of the wife against the husband . . . was founded upon the principle of the unity of husband and wife, and not upon the theory that the wife was under a legal disability.

Id. at 293, 44 N.E. at 464.

[71]*See, e.g.*, Hanna v. Hanna, 143 Ind. App. 490, 241 N.E.2d 376 (1968); Hunter v. Livingston, 125 Ind. App. 422, 123 N.E.2d 912 (1955); Blickenstaff v. Blickenstaff, 89 Ind. App. 529, 167 N.E. 146 (1929).

[72]IND. CODE § 31-1-9-1 (1971).

considerably. Although the Married Women's Act[73] all but destroyed the unity concept underlying the doctrine, the interspousal immunity doctrine remained quite viable, especially in tort actions.[74] Indiana Rule of Trial Procedure 17(D), adopted in 1970, further diminished the unity theory by allowing each spouse to singularly sue or be sued notwithstanding the marital relationship, *except* in tort actions.[75] Indiana case law has also produced a narrowing of the immunity doctrine. As early as 1889, it was held that a married woman could maintain an action against her husband for injuries to her property.[76] The law permits either spouse to enforce an agreement by the other to repay monies borrowed,[77] and the doctrine has been found inapplicable in wrongful death actions.[78] Despite these encroachments and the increasing criticism by both legal writers and courts,[79] the doctrine remained in force in tort actions[80] until the Indiana Supreme Court acted in *Brooks v. Robinson.*[81] The court first traced the historical development of the interspousal immunity doctrine and its attendant criticism, and then considered two arguments frequently advanced in support of the doctrine. The first argument is that tort actions between spouses would tend to disrupt the peace and harmony of the marriage. The court was unimpressed by this argument, in part because of the nontort actions which may be maintained between

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> Married women, without reference to their age, shall be liable for torts committed by them, and an action may be prosecuted against them for torts committed, as if unmarried. Husbands shall not be liable for the contracts or the torts of their wives.

Id. § 31-1-9-4.

[74]*See* Hanna v. Hanna, 143 Ind. App. 490, 241 N.E.2d 376 (1968); Hary v. Arney, 128 Ind. App. 174, 145 N.E.2d 575 (1957).

[75]IND. CODE § 34-5-1-1 (1971).

[76]Crater v. Crater, 118 Ind. 521, 21 N.E. 290 (1889). *Accord,* Atkinson v. Atkinson, 167 F.2d 793 (7th Cir. 1948); Pavy v. Pavy, 121 Ind. App. 194, 98 N.E.2d 224 (1951).

[77]Harrell v. Harrell, 117 Ind. 94, 19 N.E. 621 (1889); Hinton v. Dragoo, 77 Ind. App. 563, 134 N.E. 212 (1922).

[78]*In re* Estate of Pickens, 255 Ind. 119, 263 N.E.2d 151 (1970).

[79]*See, e.g., id.* at 124-25, 263 N.E.2d at 154; Hunter v. Livingston, 125 Ind. App. 422, 428, 123 N.E.2d 912, 915 (1955); W. PROSSER, LAW OF TORTS § 12, at 863 (4th ed. 1971); Note, *Interspousal Immunity in Indiana,* 3 IND. LEGAL F. 297 (1969).

[80]IND. CODE § 34-5-1-1 (1971).

[81]284 N.E.2d 794 (Ind. 1972).

spouses.[82] Furthermore, as stated by Dean Prosser, it is fallacious to assume that there is a state of peace and harmony left to be disturbed after one spouse has become sufficiently outraged to sue the other.[83]

The second theory frequently offered to support interspousal immunity in tort actions is that such actions between spouses will tend to promote fraud, collusion, and trivial litigation, especially when insurance is involved. The theory is that such suits would not constitute a truly adversary proceeding because the likelihood of collusion would be increased by the common interests of the parties. The court was equally unpersuaded by this reasoning since it incorrectly assumes that the judical system is "so ill-fitted to deal with such litigation that the only reasonable alternative to allowing husband-wife tort litigation is to summarily deny all relief to this class of litigants."[84] Noting that the possibility of

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> We find it difficult to understand how an action in tort would disrupt the tranquillity of the marital state to any greater degree than would actions in ejectment, partition, or contract.

Id. at 796.

[83]

> The chief reason relied upon by all these courts, however, is that personal tort actions between husband and wife would disrupt and destroy the peace and harmony of the home, which is against the policy of the law. This is on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy—and this even though she has left him or divorced him for that very ground, and although the same courts refuse to find any disruption of domestic tranquillity if she sues him for a tort to her property, or brings a criminal prosecution against him. If this reasoning appeals to the reader, let him by all means adopt it.

W. Prosser, Law of Torts § 122, at 863 (4th ed. 1971).

[84]284 N.E.2d at 796-97. The court quoted the following language from a California decision with approval:

> It would be a sad commentary on the law if we were to admit that the judicial processes are so ineffective that we must deny relief to a person otherwise entitled simply because in some future case a litigant may be guilty of fraud or collusion. Once that concept were accepted, then all causes of action should be abolished. Our legal system is not that ineffectual. Klein v. Klein, 58 Cal. 2d 692, 696, 26 Cal. Rptr. 102, 105, 376 P.2d 70, 73 (1962).

284 N.E.2d at 797.

fraud and collusion exists in all litigation, the court held that the danger is not so great as to justify the summary denial of judicial relief merely because the litigation is between spouses.[85]

The appellee next contended that if the doctrine of interspousal immunity were to be abrogated, it should have been accomplished by the legislature, and not the courts. The court observed that the doctrine was a creation of common law, and, therefore, was judicially created. Noting that the common law can and must be adapted to keep pace with changes in our society,[86] the court said that it should not hesitate to "alter, amend, or abrogate the common law when society's needs so dictate."[87]

The appellee further argued that the legislature had considered and rejected a proposal to abolish the doctrine of interspousal immunity in tort actions, and that, therefore, the courts are bound to uphold the doctrine. This assertion was based upon the history of the enactment of Indiana Rule of Trial Procedure 17(D) which provides:

> For the purposes of suing or being sued there shall be no distinction between men and women . . . because of marital or parental status; provided, however, that this subsection (D) shall not apply to actions in tort.[88]

When this rule was originally proposed it did not contain the proviso limiting the applicability of the subsection to actions other than actions in tort, and the appellee contended that the amendment should be regarded as indicative of an affirmative legislative intent to retain the doctrine. The court did not agree

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[85]The court noted that the traditional safeguards are also present in this type of case:

> [T]he testimony of both parties will be extremely vulnerable to impeachment at trial on the grounds of bias, interest and prejudice. The trial court's responsibility, indeed, its duty, to properly instruct the jury on the credibility of witnesses and the rules governing the weight of evidence will remain unchanged . . . .

284 N.E.2d at 797.

[86]*Id., quoting from* Troue v. Marker, 253 Ind. 284, 290, 252 N.E.2d 800, 804 (1969):

> The common law must keep pace with changes in our society, and in our opinion the change in the legal and social status of women in our society forces us to recognize a change in the doctrine with which we are concerned in this opinion.

[87]284 N.E.2d at 797.

[88]Ind. Code § 34-5-1-1 (1971).

and viewed the legislature's action as nothing more than legislative awareness of the doctrine. The court held that the proviso did not purport to abolish tort actions between husband and wife, but rather provided that if any "distinction" between husband and wife existed in tort actions, such distinction was not removed by the rule, but was subject to change by the court.

The court, having found no valid reason for the existence of the doctrine, abrogated the doctrine of interspousal immunity. In doing so, the court followed the spirit of the Indiana Constitution[89] and joined a rapidly growing majority of state courts that have abolished this doctrine which so offends the modern sense of justice and equality.[90]

D. Juveniles

During the current survey period, the question of waiver of jurisdiction in juvenile proceedings arose in an Indiana Supreme Court decision, *Atkins v. State.*[91] The ramifications of this case are as equally applicable to the domestic relations counselor as they are to the criminal lawyer or juvenile judge. On February 27, 1969, Rodman Atkins, age seventeen, was arrested and charged with disorderly conduct arising out of certain peaceful but disruptive demonstrations in front of Shortridge High School.[92] Juvenile proceedings were initiated via a criminal court grand jury indictment. This procedure, however, did not properly vest jurisdiction in juvenile court, and new charges were filed.[93] The prosecutor then filed a petition for waiver of

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[89]IND. CONST. art. 1, § 2 provides:

> All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

[90]Indiana is the twenty-fourth state to abrogate the common-law doctrine.

[91]290 N.E.2d 441 (Ind. 1972).

[92]Atkins and several other students began creating a disturbance and after a warning were arrested pursuant to IND. CODE § 35-27-2-1 (1971).

[93]After the arrest the prosecutor obtained an indictment from the grand jury of the criminal court. Upon receipt of the indictment the criminal court transferred the case to the juvenile court. Atkins challenged the jurisdiction of the juvenile court, and the Indiana Supreme Court in State *ex rel.* Atkins v. Juvenile Court, 252 Ind. 237, 247 N.E.2d 53 (1969), found the jurisdiction improper.

The court held in the first *Atkins* case that the juvenile court has exclusive jurisdiction of children under eighteen and that a prosecutor cannot

jurisdiction and, after a hearing, the petition was granted.[94] Atkins challenged the propriety of the waiver procedure, and the Indiana Supreme Court reversed.[95]

The United States Supreme Court in *Kent v. United States*[96] held that waiver of jurisdiction by a juvenile court is a critical proceeding during which fundamental fairness and due process are required. The Indiana Supreme Court held in *Summers v. State*[97] that the *Kent* requirements were constitutionally mandated[98]

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seek a grand jury indictment against a child *known* to be under eighteen unless a statute confers jurisdiction of the offense in criminal court. *See* IND. CODE §§ 33-12-2-3, 31-5-7-4, -14 (1971). However, if it is not known that the child is under eighteen, then, upon discovery of age, transfer to a juvenile court does vest jurisdiction properly in the juvenile court. *Id.* § 31-5-7-13. For a criticism of this jurisdictional dichotomy, see 252 Ind. at 244, 247 N.E.2d at 56 (Givan, J., dissenting).

If there is no statute vesting exclusive jurisdiction in juvenile court and the district attorney has discretion in determining in which court to proceed, there may be no requirements for a waiver hearing under Kent v. United States, 383 U.S. 541 (1966). *See* People v. Bombacino, 51 Ill. 2d 17, 280 N.E.2d 697 (1972), *cert. denied*, 409 U.S. 912 (1972).

[94]*See* IND. CODE § 31-5-7-14 (1971).

> If a child fifteen (15) years of age or older is charged with an offense which would amount to a crime if committed by an adult, the judge, after full investigation, may waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult. . . .

Id.

[95]Atkins v. State, 290 N.E.2d 441 (Ind. 1972). The decision was three to two, with Justice DeBruler writing for the majority.

[96]383 U.S. 541 (1966). *Kent* held that for a waiver order to be valid there must be a full hearing on the waiver issue, the presence of counsel to represent the child, full access by the child to social records used in the waiver decision, and a statement of reasons accompanying the waiver order.

[97]248 Ind. 551, 230 N.E.2d 320 (1967). *Summers* required the specific rights delineated in *Kent*. *See* note 5 *supra*. In addition, *Summers* discussed the child's right to confront and cross-examine adverse witnesses, to present evidence, and to receive a record. The *Summers* court attached particular importance to the sufficiency of the statement of reasons accompanying the waiver order. Specifically, the statement must be sufficient to demonstrate unequivocally that the statutory requirement of a hearing and full investigation has been met and that a conscientious determination of the waiver question has been made, and must contain sufficient detail to permit meaningful judicial review.

[98]*Summers* followed the majority of jurisdictions in recognizing that *Kent* has constitutional dimensions. *See* Powell v. Hocker, 453 F.2d 652

and that waiver could be effectuated only if the offense had specific prosecutive merit in the opinion of the prosecuting attorney, was heinous or of an aggravated character, or was less serious but part of a repetitive pattern of juvenile offenses which would lead to a determination that the juvenile might be beyond rehabilitation under regular juvenile procedures, or if waiver was in the best interests of the public welfare or security. The *Atkins* decision appears to limit the *Summers* standards with the result that waiver is now more difficult to obtain.

The *Atkins* decision centered upon the specific waiver order. The order contained the statements that the child was over fifteen and under seventeen years of age and was charged with an offense which would be a crime if committed by an adult.[99] The order also stated that the matter had specific prosecutive merit and that there was no disposition available reasonably calculated to effect rehabilitation since Atkins at the time of disposition would be eighteen and not subject to commitment to a state institution.[100] The *Atkins* majority found that the order was not clear enough to permit meaningful review.

The court began its analysis of the order by turning to the statutory presumption that a child is to be handled within the juvenile system and that waiver is an alternative of last resort.[101]

(9th Cir. 1971); United States *ex rel.* Turner v. Rundle, 438 F.2d 839 (3d Cir. 1971); Kemplen v. Maryland, 428 F.2d 169 (4th Cir. 1970); P.H. v. Alaska, 504 P.2d 837 (Alas. 1972); *In re* Doe, 50 Hawaii 620, 446 P.2d 564 (1968) (by implication); State v. Halverson, 197 N.W.2d 765 (Iowa 1972); Smith v. Commonwealth, 412 S.W.2d 256 (Ky.), *cert. denied*, 389 U.S. 873 (1967); People v. Fields, 199 N.W.2d 217 (Mich. 1972); State *ex rel.* Arbeiter v. Reagan, 427 S.W.2d 371 (Mo. 1968); Kline v. State, 86 Nev. 59, 464 P.2d 460 (1970); *In re* State *ex rel.* H.C., 106 N.J. Super. 583, 256 A.2d 322 (1969); State v. Yoss, 10 Ohio App. 2d 47, 225 N.E.2d 275 (1967); Bouge v. Reed, 459 P.2d 869 (Ore. 1969); Freeman v. Superintendent of State Correctional Inst., 212 Pa. Super. 422, 242 A.2d 903 (1968); State v. Pische, 74 Wash. 2d 9, 442 P.2d 632, *cert. denied*, 393 U.S. 969 (1968); *In re* Winburn, 32 Wis. 2d 152, 145 N.W.2d 178 (1966). *Contra*, Commonwealth v. Roberts, 285 N.E.2d 919 (Mass. 1972); Commonwealth v. Marten, 244 N.E.2d 303 (Mass. 1969).

[99]These are statutory requirements for waiver. IND. CODE § 31-5-7-14 (1971).

[100]These findings are necessary to meet the *Summers* requirements.

[101]IND. CODE § 31-5-7-1 (1971).

> The purpose of this act is to secure for each child within its provisions such care, guidance and control, preferably in his own home, as will serve the child's welfare and the best interests of the State; and when such child is removed from his own family, to secure

Thus, waiver is the exception and must be "explicitly justified in the waiver order."[102] With this standard in mind, the court examined the language of the order. The finding that, in the opinion of the prosecutor, the case had specific prosecutive merit was subjected to strict scrutiny. Although the *Summers* court used this language as a guideline for waiver, the *Atkins* court found the language meaningless.[103] Specifically, it was unclear whether the language means that the prosecutor would prosecute, that he could do so successfully, or that waiver was in the best interests of the child. Since the language was not definitive and did not demonstrate the necessity of waiver for the best interests of the child and the state, the statutory presumption was not overcome and the order was not sufficient to justify waiver.[104]

The juvenile court also justified waiver on the grounds that because Atkins would be over eighteen at the time of disposition, he could not be committed to a state institution. Practically, Atkins could have been committed to a number of institutions, although by statute he could not be committed to the boys' school.[105]

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for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents.

Id.

[102]290 N.E.2d at 443.

[103]In *Summers* the court held:

In this regard, we would say that an offense committed by a juvenile may be waived to a criminal court if the offense has prosecutive merit in the opinion of the prosecuting attorney. . . .

248 Ind. at 561, 230 N.E.2d at 325.

[104]The court stated that the crucial question was whether or not jurisdiction *should* be waived. Ultimately this is a finding to be made by the juvenile court. Consequently, the *Summers* guideline of specific prosecutive merit *in the opinion of the prosecutor* can never be sufficient for waiver. 290 N.E.2d at 443.

The *Atkins* analysis leaves in doubt the *Summers* holding that the prosecutor may file a waiver petition if, in his opinion, the case has specific prosecutive merit. Since specific prosecutive merit is now a phrase of unknown meaning it is questionable as to what circumstances will permit a prosecutor to file a petition. Although the *Atkins* court is correct in labeling the phrase fatally ambiguous, it does not correct that ambiguity.

[105]IND. CODE § 11-3-2-3 (1971) precludes commitment of a child over eighteen to the boys' school. However, pursuant to *id.* § 31-5-7-15, the juvenile court still has the option to commit the children to "any suitable public institution or agency, which shall include, but is not limited to, the state institutions for feeble-minded, epileptic, or insane."

Therefore, the question facing the supreme court was why the unavailability of commitment to boys' schools required the juvenile court to waive jurisdiction. Noting the absence of any explanatory statements, the court held this section of the waiver order too ambiguous to permit meaningful review.[106]

The court went another step and examined possible assumptions which might have been the basis of the waiver order. One assumption could have been that all the juvenile dispositions were meaningless absent the ultimate sanction of commitment to the boys' school. Also the juvenile court may have decided that commitment was the only proper disposition and, absent commitment, waiver was the only alternative. The court analyzed both of these possible assumptions and concluded that upon the facts both were unjustified. The determinative facts were that Atkins had been in no previous trouble; he and his parents voluntarily cooperated with the juvenile court; and he was duly enrolled and attending high school.[107] Consequently, the court concluded that there was no evidence that the less severe dispositions available to the juvenile court would be inadequate.[108] Thus, waiver upon these facts was error.

In a strong dissent, Justice Arterburn criticized the majority for severely limiting the trial judge's discretion.[109] After indicating that the waiver order technically conformed to *Summers*,[110] the dissent contended that now the juvenile court must

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> Review should not be remitted to assumptions. In order to engage in a meaningful review this court must have a statement of the juvenile court's reasons, which motivated the waiver, including of course, a statement of the relevant facts. We may not assume there are adequate reasons . . . .

248 Ind. at 551, 230 N.E.2d at 324.

[107]Two appellants with Atkins had been in previous trouble, and their cases were remanded for a redetermination of the waiver issue. 290 N.E.2d at 445.

[108]Dispositions less severe than commitment include ordering probation or wardship, taking the case under advisement and postponing judgment, and making further disposition in the best interests of the child. IND. CODE § 31-5-7-15 (1971).

[109]290 N.E.2d at 448.

[110]It is apparent that the order did technically conform to *Summers*. But, as *Summers* held that a mere recitation of the statute is not sufficient to justify waiver, *Atkins* held that mere recitation of the *Summers* criteria is not enough to justify the waiver.

show that there are no juvenile dispositions available before waiver can be effectuated. In one light the dissent's interpretation of the majority is correct. Because the majority did not stop at finding the order insufficient to permit meaningful review, but also indicated that even if it had been sufficient, there was still error, the majority has, in effect, promulgated a principle that the waiver order must explicitly justify waiver as the only alternative open to the juvenile court. If under any set of facts in the record it appears that a juvenile is amenable to a juvenile disposition, then waiver will be improper. This reasoning goes considerably beyond the standards expressed in *Summers.*

The majority opinion probably severely restricts the situations in which waiver will be allowed. Nonetheless, one can read it to mean that waiver cannot be based on any recitation of predefined standards or criteria and that for a waiver to be valid the juvenile court must merely state clear reasons for waiver on the facts of the case. This less restrictive application, however, seems unlikely when one considers the presumption in favor of caring for a child within the juvenile system if that system provides any conceivable remedy.

E. Paternity and Legitimation

Lord Mansfield's rule of the presumption of legitimacy[111] was logically shaken in a recent Indiana Court of Appeals decision.[112] In an action brought by a second husband, seeking to be declared the father of his wife's child born during her previous marriage, the trial court awarded summary judgment to the first husband. The appellate court reversed.

The facts giving rise to this declaratory judgment action are not uncommon. Women often conceive during an adulterous relationship, and some of them marry the biological father after a divorce.[113] The threshold question in this suit was whether or

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[111]This common law rule forbids either spouse from offering evidence that the child born or conceived during wedlock is not the natural child of the husband. The rule has sustained surprising vitality largely through the application of stare decisis and the underlying feeling of courts that bastards are disfavored by the law. Legislatures have consistently reiterated the same moral judgments. *See* IND. CODE § 29-1-2-7(b) (1971).

[112]A.B. v. C.D., 277 N.E.2d 599 (Ind. Ct. App. 1972).

[113]*In re* Stroope's Adoption, 232 Cal. App. 2d 581, 43 Cal. Rptr. 40 (1965); Serway v. Galentine, 75 Cal. App. 2d 86, 170 P.2d 32 (1946); Melis v. Department of Health, 260 App. Div. 772, 24 N.Y.S.2d 51 (1951); *cf.*, Commonwealth v. Helton, 411 S.W.2d 932 (Ky. 1967).

not public policy would sanction a law suit which would in effect make a previously legitimate child illegitimate.[114] After acknowledging that other jurisdictions may well have modified their substantive law to conform with natural law, the court rejected the applicability of those decisions to Indiana.[115] The court first decided that there was no legal basis for making the child in question the legitimate child of the plaintiff.[116]

This disposition of the initial issue left the question of whether or not the plaintiff might have sufficient interest in being named the biological father of the child to grant him the standing to sue. At common law the father of an illegitimate had absolutely no rights with regard to the child.[117] This was also the law of Indiana until 1954 when the Probate Code[118] was enacted.[119] Under the Probate Code once paternity has been established, the father of an illegitimate becomes an heir apparent to the child.[120] Obviously the interest of an heir apparent cannot vest until death and that expectancy has no pecuniary value during the lifetime of the child. Nevertheless, the court held that even this mere expectancy

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[114]Since 1954 Indiana has had no provision for legitimating bastards. The Probate Code, IND. CODE §§ 29-1-1-1 to -20-1 (1971), provides for limited legitimation for purposes of inheritance and for purposes of descent but does not purport to affect the status of an illegitimate child. Prior to 1954, the illegitimate child could be legitimated for all purposes by a subsequent marriage of the mother and acknowledgment by the husband that the child was his own. This civil law rule was expressly repealed when the Probate Code became effective. *Id.* § 29-1-19-18. The new provision has been judicially construed not to be a legitimation statute. Thacker v. Butler, 134 Ind. App. 376, 184 N.E.2d 894 (1962).

[115]The court made it clear that for it to yield to the well-reasoned law outside Indiana, a new legislative enactment would be required:

> . . . If we assume, as well may be the case, that the 1953 Legislature did not really intend to discard the more lenient civil rule of legitimation and return to the harsher common law rule of non-legitimation, we must bear in mind that such legislative oversights can rarely be rectified by any human agency save the legislature itself.

277 N.E.2d at 606.

[116]Witt v. Schultz, 139 Ind. 142, 217 N.E.2d 163 (1966).

[117]At common law the bastard was *nullius filius*—the child of no one—and as such had no existence with respect to his father.

[118]IND. CODE §§ 29-1-1-1 to -20-1 (1971).

[119]L.T. Dickason Coal Co. v. Liddil, 49 Ind. App. 40, 94 N.E. 411 (1911).

[120]IND. CODE § 29-1-2-7 (1971).

was sufficient to raise standing for the illegitimate father to bring a paternity action. In addition the putative father was an interested party who can qualify under the Declaratory Judgment Act.[121]

The trial court ruled that this challenge to the status of a legitimate child was contrary to the policy of Indiana since it allowed an attack upon the presumption of legitimacy. The defendant contended that the plaintiff was estopped to challenge the paternity of the child because the divorce decree declared that the child was issue born of the marriage and the plaintiff had accepted the decree as valid as evidenced by his subsequent marriage to the child's mother. The court of appeals answered that, even had this tenuous argument been accepted, the child would not be affected by a judgment set up between the plaintiff and defendant when the child was not a party to the proceedings.[122] As for the policy argument, the court could find no logical reason for Indiana to regard "illegitimacy" as it was regarded at common law.[123]

At trial both defendant and plaintiff moved for summary judgment. Plaintiff's motion was supported by affidavits showing that blood tests confirmed that defendant could not be the child's father. A blood grouping test to which the child, the mother and the parties submitted showed that plaintiff was in the class of persons who could have been the father. The mother swore by affidavit that plaintiff was the only man with whom she had had sexual intercourse during the time of conception. She also alleged by affidavit that her former husband was impotent. Defendant's response rested entirely on policy grounds, *i.e.*, the presumption of legitimacy. The court of appeals took the view that the granting of summary judgment should not be used to establish paternity or nonpaternity "especially when the judgment would have the effect of rendering a previously legitimate child illegitimate."[124]

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[121]*Id.* §§ 34-4-10-1 to -16.

[122]*See* State *ex rel.* Evertson v. Cornett, 391 P.2d 277 (Okla. 1964).

[123]Nevertheless, the court refused to definitively state that no such policy existed but chose instead to rest its decision on plaintiff's standing to sue. It cannot be denied that the child's interest in retaining the status of a legitimate may outweigh his heirship expectancy from an illegitimate father. On the other hand, when the illegitimate father has a considerable estate, it may be to the child's pecuniary interest to be declared an illegitimate. The court made it clear that the presumption of legitimacy can be overcome only in an action to which the child is a party.

[124]277 N.E.2d at 619.