VIII. Domestic Relations

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A. Adoption

Under Indiana law, parental rights may be terminated voluntarily or involuntarily through court action. If parental rights are terminated in connection with an adoption proceeding, adoption statutes apply.[1] If they are terminated by the state as a result of abandonment, neglect, or abuse, the juvenile code applies.[2] The statutes set out strict criteria which must be met to effectuate involuntary termination,[3] but few safeguards exist for voluntary terminations.[4]

A problem which arises with some regularity in conjunction with voluntary terminations is that of the withdrawal of parental consent once it is given. In *Snyder v. Shelby County Department of Public Welfare*,[5] the mother signed a consent to the *adoption* of her children and her voluntary relinquishment of parental rights but later sought to withdraw the consent, claiming that she had a right to make a timely withdrawal and that she had signed under duress and without understanding the consequences of her signature.[6] The court of appeals held that no right to make a timely withdrawal of consent exists, "[t]herefore, a parent who executes a voluntary relinquishment of parental rights is bound by the consequences of such

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[1]IND. CODE § 31-3-1-6 (Supp. 1981).

[2]*Id.* § 31-6-5-4.

[3]For involuntary termination of parental rights in connection with an adoption proceeding, see *id.* § 31-3-1-6(g). For involuntary termination under the juvenile code, see *id.* § 31-6-5-4.

[4]*Id.* § 31-6-5-2 provides that for a voluntary consent to be effective in a *juvenile proceeding*, the contesting parent must be advised of his constitutional and other legal rights. It further provides that a parent who is incompetent may give his consent only with approval of the court or his guardian. *Id.* § 31-6-5-2(e).

[5]418 N.E.2d 1171 (Ind. Ct. App. 1981).

[6]During the trial court proceedings, conflicting evidence was presented concerning the duress issue. The mother sought to discover the contents of the caseworker's notes claiming they would substantiate her claim of duress. *Id.* at 1176. The trial court ruled that the caseworker's notes were "work product" and therefore not subject to discovery. Such material is subject to discovery only upon a showing of good cause. *See* IND. R. TR. P. 26(B)(2). The appellate court held that a caseworker's notes are not work product and are therefore subject to discovery. 418 N.E.2d at 1178.

action, unless the relinquishment was procured by fraud, undue influence, duress, or other consent-vitiating factors."[7]

When consent is not given in an adoption proceeding, parental rights will be terminated if a parent fails for one year to communicate significantly with the child without justifiable cause and when able to do so.[8] In *Herman v. Arnold*,[9] the child's parents were divorced in 1974 and the mother retained custody. In the year of the divorce, the father was convicted of two counts of murder and at the time of the adoption proceeding was serving a life sentence in prison. The mother remarried in 1974 and subsequently her second husband, who had cared for and supported the child since the marriage, sought to adopt the child without the father's consent. The father claimed that his incarceration had prevented him from supporting and communicating with his child. The court of appeals held that incarceration did not automatically toll the running of the one year statutory period because the father's continued communication with others through letters and telephone calls was evidence that he could have communicated with his child.[10] The court also stated that the one year period of no communication need not be for the year just prior to the petition to terminate.[11] Concurring separately, Judge Garrard stated that the pre-incarceration evidence concerning the father's lack of interst in the child supported an unfavorable inference concerning the father's attitude toward his child.[12] Judge Garrard stated further that, without such an inference, incarceration might constitute a justifiable cause for failure to communicate.

The court of appeals applied the new juvenile code[13] in the case of *In re Miedl*,[14] another involuntary termination case. This much-cited case offers a valuable interpretation of Section 4 of the juvenile code,[15] which sets out five conditions which must be met before a petition to terminate parental rights without consent can be granted.[16]

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[7]418 N.E.2d at 1180. The appellate court remanded the case for a determination on the duress issue. *Id.* at 1178.

[8]IND. CODE § 31-3-1-6(g) (Supp. 1981).

[9]406 N.E.2d 277 (Ind. Ct. App. 1980).

[10]*Id.* at 280.

[11]*Id.* at 279. In the concurring opinion, Judge Garrard expressed concern that a one year period of non-communication might be used several years later to effectuate a termination of parental rights. *Id.* at 281.

[12]*Id.* at 281.

[13]IND. CODE §§ 31-6-1-1 to -11-21 (Supp. 1981). The "new" juvenile code was enacted in 1978 as part of P.L. 136 and took effect Oct. 1, 1979.

[14]416 N.E.2d 491 (Ind. Ct. App. 1981).

[15]IND. CODE § 31-6-5-4 (Supp. 1981).

[16]*Id.* It should be noted that this section applies only to cases where the child has been adjudicated a delinquent child or a child in need of services. *Id.* § 31-6-5-3(6)(A) (Supp. 1981).

The court in *Miedl* identified ambiguities in Section 4(1) and attempted to resolve them. Subsection (1) provides that a child must be removed from his parent for at least six months under a dispositional decree before involuntary termination can take place.[17] The court construed this to mean that the parent must not have had *physical custody* of the child for six months *immediately preceeding* the filing of the petition.[18] The welfare department agreed that the six month period must be immediately preceeding the petition for termination but contended that removal from the parent need not be physical but might be accomplished by making the child a ward of the court without removing the child from the parent.[19] In refusing to accept this interpretation, the court emphasized the use of the word "removed," interpreting it to mean *physical* removal.[20]

In *Washington County Department of Public Welfare v. Konar*,[21] the mother of a two day old infant signed a voluntary termination of parental rights. Two months later the welfare department filed a petition to terminate parental rights and the mother then filed a notice of rescission on the voluntary relinquishment. The trial court, applying the old juvenile code,[22] denied the rescission. The appellate court ruled that the new code was applicable,[23] which allows a natural parent to recant a voluntary relinquishment of parental rights.[24] To support this position, the court cited a section which is applicable only to *involuntary* terminations.[25] One must assume that the court inferred such a statutory right from the two preceeding sections which apply to consensual terminations.[26] These sections do not explicitly give parents a right to recant, but they do provide that such parental consent must be given in open court unless (1) the consent was given in writing; (2) the parents were given notice of their legal rights prior to the signing of the consent; *and* (3) the parents failed to appear in court.[27] This provision implicitly gives parents the right to withdraw their consent prior to a court ruling.

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[17]*Id.* § 31-6-5-4(1) (Supp. 1981).

[18]416 N.E.2d at 494.

[19]*Id.*

[20]*Id.* at 494-95.

[21]416 N.E.2d 1334 (Ind. Ct. App. 1981).

[22]IND. CODE § 31-5-7-1 (1976) (repealed 1978). The "old" code was effective at the date of the originial filing, June 8, 1979, but the new code was effective at the time of trial, April 23, 1980.

[23]416 N.E.2d at 1334-35. In applying the new code, the appellate court stated that any dispositional decree entered before the effective date of the new code (Oct. 1, 1979) would come under the old code but any pending case would come under the retroactive application of the new code. *Id.*

[24]*Id.* at 1335.

[25]*Id.* at 1334 (citing IND. CODE § 31-6-5-4 (Supp. 1981)).

[26]IND. CODE §§ 31-6-5-2, -3 (Supp. 1981).

[27]*Id.* § 31-6-5-2(c).

However, the next section, entitled "Advice to Parents," states that parents must be advised that "their consent is permanent and cannot be revoked or set aside unless it was obtained by fraud or duress, or unless the parent is incompetent."[28] These two sections, read together, indicate that the court will guard against parental consents obtained through fraud or duress by refusing to accept a written consent if the parent appears personally at the termination proceeding. It also indicates that once oral consent is given in court *or* the court is convinced of the validity of a written consent, the consent is permanent unless the consenting parent can prove fraud or duress.

In re Leckrone[29] involved an involuntary termination of parental rights in connection with an adoption proceeding.[30] On appeal, the court stated that although a lower court ruling will generally not be set aside unless clearly erroneous, when a fundamental right such as the integrity of the family unit is involved, a higher standard of review will be imposed. Under this higher standard, the lower court's ruling will be set aside unless "the evidence clearly, cogently, and indubitably establishes one of the . . . criteria for granting an adoption without consent."[31] The court reiterated this standard of review in *Graham v. Starr*[32] and further stated that a court need not consider the child's best interests in the adoption until one of the statutory requirements allowing adoption without consent has been met.[33]

In *Johnson v. Capps*,[34] the court of appeals held that the trial court had jurisdiction over a case which terminated the parental rights of a California mother in a child who resided in Illinois. The father, a resident of Indiana, sued in Indiana to have the mother's rights terminated to clear the way for a possible adoption by his spouse should he remarry. The trial court terminated the mother's parental rights.[35] On appeal, the mother claimed that the lower court lacked subject matter jurisdiction under the Uniform Child Custody

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[28]*Id.* § 31-6-5-3(1).

[29]413 N.E.2d 977 (Ind. Ct. App. 1980).

[30]*Id.* The children had been found to be dependent children and were made wards of the court in 1976. The welfare department had worked with the mother prior to this time and continued to work with her subsequently to help her improve her living conditions but their efforts had failed. *Id.* at 978-79.

[31]*Id.* at 979.

[32]415 N.E.2d 772 (Ind. Ct. App. 1981).

[33]*Id.* at 774. The stepfather sought to adopt his wife's daughters thus terminating the natural father's parental rights without consent. The stepfather claimed that the father had failed, unjustifiably, to contribute to the girls' support. The court ruled that the failure to support was justified by the father's ill health and inability to work. *Id.*

[34]415 N.E.2d 108 (Ind. Ct. App. 1981).

[35]*Id.* at 110.

Jurisdiction Act (UCCJA).[36] Due to a lack of a directly pertinent statute, the appellate court, ruling that UCCJA was inapplicable to the case because this was not a custody determination, applied the adoption statute[37] to determine subject matter jurisdiction. The adoption statute confers jurisdiction over adoption proceedings on the court which has probate jurisdiction in the county in which the "petitioner" resides. Applying this statute, the court held that the trial court had subject matter jurisdiction.

This decision seems to run counter to logic. The two people whose rights were directly affected by this ruling were subject only by waiver to the court's personal jurisdiction. The state of Indiana's interest in the case was tenuous, resting on future uncertainties: the child involved *might* be adopted by a potential spouse of the father at some later date and then *might* reside in the state. As the dissent points out, the adoption statute applied in this case by the majority describes "petitioner" as "a resident desirous of adopting."[38] Not only was this not an adoption proceeding but the petitioner was the natural father who of course would never petition to adopt the child. The Indiana adoption code also provides for two other instances under which jurisdiction may be found: when the child resides in the state, or when the custodial agency is located within the state.[39] In this case, Indiana was neither the residence of the child nor the location of the custodial agency and the father did not fit within the definition of "petitioner" in the remaining category which allows jurisdiction. Construing literally the relevant statutory provisions, no subject matter jurisdiction existed. Because subject matter jurisdiction is never waived,[40] the termination proceeding should have been dismissed.

B. Child Custody

1. Jurisdiction.—The case of *In re Lemond*,[41] merits note in this Survey for a second consecutive year. In the 1980 Survey, the court of appeals decision that Indiana lacked jurisdiction over the case was discussed.[42] Subsequent to the court of appeals decision, the petitioner was granted a stay by the circuit court pending an ap-

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[36]IND. CODE §§ 31-1-11.6-1 to -24 (Supp. 1981).

[37]*Id.* § 31-3-1-1 (1976).

[38]*See id.*

[39]*Id.*

[40]IND. R. TR. P. 12(b)(1), 12(h).

[41]413 N.E.2d 228 (Ind. 1980).

[42]Garfield, *Domestic Relations, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 315, 322-23 (1981) (discussing *In re* Lemond, 395 N.E.2d 1287 (Ind. Ct. App. 1979)).

peal to the Indiana Supreme Court. The supreme court denied the transfer and dissolved the stay.[43]

In *Lemond*, the father, mother, and daughter were all residents of Hawaii at the time of the divorce and the original custody decree was issued by an Hawaiian court. The court gave the couple joint custody, with the father retaining physical custody. The decree also provided that if either party left Hawaii for a change of residence, physical custody would be transfered to the mother.[44] The father remarried and moved to Indiana, bringing the child with him. He sought custody modification through the Indiana courts but the court of appeals held that the Indiana courts lacked jurisdiction. When the mother traveled to Indiana to get her daughter, she was denied custody by the Indiana court.[45] The reason for the denial soon became apparent. The father and his attorneys were attempting to circumvent the Indiana Supreme Court order by having the child declared a child in need of services under the juvenile code.[46] The judge who was presented with the petition to have the child declared in need of services stated that he believed the action to be an "end run,"[47] but instead of dismissing the action, he disqualified himself and a special judge was chosen to preside. The special judge found the child to be in need of services even though no evidence was presented to support the decision.[48] The mother's counsel moved for dismissal claiming that the court lacked jurisdiction and was acting in defiance of the supreme court order, but the motion was denied.[49]

One week after the mother was to have received custody of the child pursuant to the supreme court's order, the court of appeals and the Indiana Supreme Court issued an order to show cause, requiring the father, his attorney and the lower court judges[50] to appear and "show cause why they should not be held in indirect criminal contempt."[51] Five days later, the courts, in joint session, ordered the daughter to be immediately turned over to her mother.[52] The courts found that the juvenile proceedings were a sham and held the

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[43]413 N.E.2d at 228.

[44]*Id.* at 231.

[45]*Id.* at 233.

[46]IND. CODE § 31-6-4-3 (Supp. 1981).

[47]413 N.E.2d at 223.

[48]*Id.*

[49]*Id.* In dismissing the motion, the special judge stated: "This is a new case, it has nothing to do with the other case. This cause is new to me, it is filed in this Court under a new number, it is not any part of the other case." *Id.* at 240.

[50]The order was issued to the regular judge of the lower court, as well as to the special judge.

[51]*Id.* at 234.

[52]*Id.* at 236-37.

attorneys and the judges in contempt of court, fining them $500 each.[53] The courts issued the following warning:

> It is not often that either of these Courts is forced to exercise its inherent contempt powers. These courts earnestly hope that this case sounds a clear warning to the bench and bar that behavior of the sort presented in this case will not be tolerated. Moreover, while only a fine was imposed here, these Courts also have the authority to impose prison terms, and quite likely will exercise this prerogative in the future.[54]

In *Schleiffer v. Meyers*,[55] the United States Court of Appeals for the Seventh Circuit was faced with another jurisdictional question, this one involving a foreign country. In this case, a son was born in Sweden to an American father and a Swedish mother. The couple later received a divorce in Sweden and custody was awarded to the mother. The father brought the child to the United States and sought modification of the custody decree. Judge Meyers of the Whitley County Circuit Court found that the Indiana Uniform Child Custody Jurisdiction Act (UCCJA)[56] applied to the case and that it provided for international recognition of foreign decrees.[57] Therefore, the court held that Indiana did not have jurisdiction and ordered that the Swedish decree be enforced.[58]

The child, by next friend, sought an injunction in federal court against enforcement of the circuit court order. The federal district court, finding that the case involved only child custody issues, and not civil rights violations, refused to grant the requested injunctive relief.[59] On appeal to the court of appeals, the child claimed that his constitutional right to live in the United States was being violated and that the lower court's ruling amounted to deportation.[60] The appellate court noted that domestic relations is "generally considered a state law matter outside federal jurisdiction"[61] but proceeded to rule on the constitutional claim. The court held that the Indiana court's recognition of the Swedish decree did not violate the child's constitutional right to reside in the United States and did not amount to deportation[62] because the child retained his United States

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[53]*Id.* at 237-38. The courts did not find the father in contempt.
[54]*Id.* at 249.
[55]644 F.2d 656 (7th Cir. 1981) (applying Indiana law).
[56]IND. CODE §§ 31-1-11.6-1 to -24 (Supp. 1981).
[57]*Id.* § 31-1-11.6-23.
[58]644 F.2d at 659.
[59]*Id.* at 660.
[60]*Id.* at 662.
[61]*Id.* at 663.
[62]*Id.*

citizenship and his right to choose his residence when he reaches majority.

2. Rights of the Homosexual Parent.—In *D.H. v. J.H.*,[63] the mother and father had been married for fourteen years and had three children at the time of dissolution of marriage. At the custody hearing, both parents claimed to be devoted to the care and upbringing of the children. Evidence was introduced which indicated that the mother had had two homosexual affairs and that she was not a model housekeeper. No evidence was introduced concerning the father's housekeeping habits.

Indiana statutory law provides, by negative implication, that evidence of a parent's sexual activity is relevant only to the extent that it has an effect on the best interests of the child.[64] However, up to this time, the sexual activity considered by the courts had been heterosexual, rather than homosexual. Although in this case it appeared that the children had little, if any, knowledge of homosexual activity on the part of the mother, the trial court gave custody to the father. The appellate court ruled that evidence of homosexual activity should be treated in the same manner as evidence of heterosexual activity and, therefore, "such evidence alone is insufficient, without evidence of an effect on the children, to render the parent unfit."[65] However, the court also held that the lower court's finding could be based on other criteria, such as the mother's habits of leaving dirty dishes stacked in the sink and leaving laundry on the furniture rather than putting it away and therefore, the lower court's ruling was not so unsubstantiated as to constitute an abuse of discretion.[66]

3. Custody Modification.—In the case of *Whitman v. Whitman*,[67] the father petitioned the court to modify its original decree giving custody to the mother. He offered evidence that the mother had failed to adequately care for the children for a period of months during the previous year.[68] The trial court granted the modification and gave custody to the father. On appeal, the court ruled that Indiana law requires that custody modification occur only when there has been a substantial and continuous change in circumstances.[69] Since the mother had remedied the inadequacies prior to the request for modification, the changed circumstances were not continuous and modification was not allowed.[70]

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[63]418 N.E.2d 286 (Ind. Ct. App. 1981).
[64]IND. CODE § 31-1-11.5-21 (1976).
[65]418 N.E.2d at 293.
[66]*Id.* at 296.
[67]405 N.E.2d 608 (Ind. Ct. App. 1980).
[68]*Id.* at 610.
[69]*Id.* at 610-11 (citing IND. CODE § 31-1-11.5-22(d) (1976)).
[70]405 N.E.2d at 611.

In *Needham v. Needham*,[71] the court was required to interpret the statutory requirement for custody modification of a substantial change in circumstances.[72] The circuit court ruled that the mother's antagonistic attitude toward the father and her attempts to "poison" the minds of the children against the father constituted substantial change, justifying modification of the decree.[73] The appellate court stated that it would not reverse the decision of the lower court unless it was clearly erroneous. It further stated that:

> At first glance, we did not see how a change of custody from the mother to the father would appreciably change this situation. However, it is apparently the trial court's determination that the change of custody will substantially diffuse the harm that is being caused to the children by reducing the amount of exposure to the mother and providing a more stable environment.[74]

It appears that the "strong continuing antagonism between the divorced parents,"[75] though arguably substantial and continuous, existed at the time of the original decree and so was not a *change* in circumstances. The appellate court seemed to be aware of this problem, stating that "there are other changes which no doubt were a factor in the trial court's decision."[76] It went on to recount the mother's remarriage and divorce and the husband's seemingly stable remarriage. Although the *change* in circumstances in this case may have been marginal, the court emphasized the best interests of the children, and recognized that the present arrangements were problematic.

4. Visitation.—A parent has a statutory right to visit his child unless it can be shown that such visitation will result in a substantial risk of harm to the child.[77] However, in *In re Joseph*,[78] the court of appeals ruled that once a child is found to be in need of services (CHINS),[79] the state has a compelling interest in protecting the child which justifies the court in looking only to the best interests of the child.[80] The standard of proof required to prevent visitation also

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[71]408 N.E.2d 562 (Ind. Ct. App. 1980).

[72]*Id.* (citing IND. CODE § 31-1-11.5-22(d) (1976)).

[73]408 N.E.2d at 564.

[74]*Id.*

[75]*Id.*

[76]*Id.*

[77]IND. CODE § 31-1-11.5-24 (1976). A parent also has a fundamental right to maintain the integrity of the family under U.S. CONST. amend. XIV. *See* Stanley v. Illinois, 405 U.S. 645 (1972).

[78]416 N.E.2d 857 (Ind. Ct. App. 1981).

[79]IND. CODE § 31-6-4-3 (Supp. 1981). CHINS is the acronym for the Child in Need of Services statute.

[80]416 N.E.2d at 858-59.

changes once a child is found to be a CHINS. When a fundamental right such as parental visitation is involved and the state is seeking to intervene, the standard of proof is "clear and convincing" because only one individual's fundamental rights are at stake, but when a child has been ruled a CHINS, two persons' rights are involved, the parent's and the child's.[81] Therefore, the state is required to show only by a "preponderance of the evidence" that it would be in the child's best interest to deny visitation.[82]

During the survey period, the Indiana General Assembly passed a bill permitting grandparents to petition for visitation rights when separated from their grandchild due to divorce or death of a parent.[83] The statute provides that the court may provide grandparents with a right of visitation if it finds that such visitation would be in the child's best interests.

The case of *Krieg v. Glassburn*[84] was decided before the effective date of the new grandparent visitation statute[85] but seems to be consistent with the new statute. In *Krieg*, the maternal grandparents claimed visitation rights. Their daughter and son-in-law had obtained a divorce ten years earlier and the father had been granted custody. The father remarried and his second wife filed a petition for adoption. The location of the mother was unknown at the time of this petition.[86] The grandparents claimed not only a right to visit but also a right to intervene in the adoption.[87] The trial court ruled that grandparents have no right to visitation and therefore have no standing to intervene in an adoption.[88] However, the court of appeals held that although Indiana provided no statutory right of visitation,[89] the courts have held that grandparents can obtain visitation by overcoming the parent's prima facie rights with a proper showing that visitation would be in the child's best interest.[90] The court held further that Indiana's adoption statutes give grandparents no standing to intervene in an adoption proceeding.[91] Although the right to

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[81]*Id.* at 864.

[82]*Id.* at 863.

[83]IND. CODE §§ 31-1-11.7-1 to -6 (Supp. 1981).

[84]419 N.E.2d 1015 (Ind. Ct. App. 1981).

[85]IND. CODE §§ 31-1-11.7-1 to -6 were adopted by the General Assembly on April 27, 1981.

[86]419 N.E.2d at 1016.

[87]*Id.* at 1016-17.

[88]*Id.* at 1017.

[89]*Id.* at 1019. *But see* IND. CODE §§ 31-1-11.7-1 to -6 (Supp. 1981).

[90]419 N.E.2d at 1019.

[91]*Id.* at 1020. The court further noted that any visitation rights existing in the grandparents would be automatically terminated by a final decree of adoption. *Id.* at 1021 n.6.

visitation is now a *statutory* right provided to grandparents, it appears that cases like *Krieg* will be unaffected.

C. Child Support

1. Duty to Support.—In *Johnson v. Ross*,[92] the child involved was born out of wedlock two years before the child's mother married. After the marriage, the husband executed an affidavit of legitimation, claiming the child to be his own. One year later, the couple was divorced and no support was awarded because both parties had stated that no children were born of the marriage.[93] Several years later, the mother brought suit under the Indiana Uniform Reciprocal Enforcement of Support Act (URESA)[94] seeking child support. The circuit court ordered the former husband to pay support.[95] On appeal, the former husband claimed that under URESA, there must be a pre-existing judicial determination of a duty to support before support can be imposed. He also claimed that since both he and his former wife agreed that he was not the natural father, he had no duty to support the child. The court of appeals held that a court acting under URESA can make the initial determination of a duty to support and that the former husband's voluntary legitimation provided ample evidence on which to base a decision to impose the statutory duty to support.[96]

In *Dorsey v. Dorsey*,[97] the child was born out of wedlock but the mother married the natural father after the child's birth. The child did not carry the father's surname and the mother did not seek the establishment of paternity.[98] When the couple divorced, neither party listed any children of the marriage but both admitted to the court that they were the natural parents of a child.[99] The trial court, on its own motion, changed the child's surname to that of the father and ordered him to pay support.[100] The appellate court affirmed the decision stating that the best interests of the child were of paramount importance and that it could only be in the child's best interest to order support.[101]

2. Delinquency in Payment of Support.—In *Rohn v. Thuma*,[102]

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[92]405 N.E.2d 569 (Ind. Ct. App. 1980).
[93]*Id.* at 570-71.
[94]IND. CODE §§ 31-2-1-1 to -39 (Supp. 1981).
[95]405 N.E.2d at 569.
[96]*Id.* at 571.
[97]409 N.E.2d 1233 (Ind. Ct. App. 1980).
[98]*Id.* at 1234.
[99]*Id.*
[100]*Id.*
[101]*Id.* at 1235.
[102]408 N.E.2d 578 (Ind. Ct. App. 1980).

the husband and wife were divorced in 1967, and the mother was awarded custody of the two sons, aged nine and ten years. The support order contained a provision which required the father to provide each child with a four year undergraduate education[103] and to pay all extraordinary dental bills approved by the father.[104]

Both sons were gifted students and were accepted for admission to Vassar and the University of Chicago respectively. Both also received partial scholarships and worked part time but the remaining expenses equalled $3,732 per year. The father interpreted the support order as meaning that he was obligated to provide only enough money for an education at a state university. He therefore sent each son $481 per semester and refused to pay more. The father also refused to pay dental bills for work that he had not approved.[105]

The mother filed suit charging the father with contempt for failure to pay the full amount needed for school and the dental bills. The trial court agreed with the father's interpretation of the original decree[106] and the mother appealed. The appellate court ruled that the father could not be found in contempt because the support provisions were subject to different interpretations. Therefore, the father was not guilty of willful disobedience.[107] The court went on to interpret the provisions of the original decree which were in question. The court stated:

> We believe that since in the *absence* of any agreement, a father's duty to educate depends upon the social and financial circumstances, so, too, where an ambiguous education provision is *included* in the decree those same social and financial considerations are relevant in determining the limits of a father's financial responsibility.[108]

Since the father's ability to pay was not at issue at the trial court level, the decision relieving him of a duty to pay more for his sons' education was reversed. The court also held that it was an abuse of discretion for the trial court to fail to require the father to pay the dental bills.[109] The dental work was necessary, so the failure to obtain the father's approval was not substantial non-compliance with the support provision.

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[103]*Id.* at 579.
[104]*Id.*
[105]*Id.* at 583.
[106]*Id.* at 579.
[107]*Id.* at 581-82.
[108]*Id.* at 583.
[109]*Id.* at 584.

In *Whitman v. Whitman*,[110] the mother sued for delinquent support. The father admitted his delinquency but introduced evidence proving that he had supplied the children with toys, clothing, food, and entertainment. The trial court awarded the mother delinquent support but, in calculating the amount due, it deducted the value of the father's contribution "in kind."[111] The appellate court reversed, holding that one purpose of an award of support is to give the custodial parent the ability to budget the combined resources and use his or her discretion in the use of those resources.[112] For support "in kind" to be credited in the manner used by the lower court, there must be a provision in the decree allowing such a credit, or the decree must be modified.[113]

The Indiana General Assembly added a support provision which allows courts to assess an interest charge on delinquent support payment.[114] However, since this is an amendment to the paternity statute rather than to the divorce statute, it apparently applies only in the case of illegitimate children. The interest charge is to equal one percent per month of the unpaid balance and can be collected in the same manner as support payments.

D. Dissolution

1. Legal Separation.—During the past year, the general assembly passed legislation which provides for legal separations.[115] A decree for legal separation shall be issued[116] based upon a finding by a court that conditions render living together intolerable for both parties. The proceedings commence with the filing of a petition.[117] The only residency requirement is that one of the parties reside in the state for six months[118] and in the county for three months[119] before filing the petition. A provisional decree or order for legal separation will remain in effect until it expires or a petition or counter petition for dissolution is filed.[120] The legal separation decree may not include an order for maintenance payments extending beyond the legal separation period.[121]

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[110]405 N.E.2d 608 (Ind. Ct. App. 1980).
[111]*Id.*
[112]*Id.* at 613-14.
[113]*Id.* at 614.
[114]IND. CODE § 31-6-6.1-15.5 (Supp. 1981).
[115]*See* IND. CODE §§ 31-1-11.5-1 to -20 (Supp. 1981).
[116]*Id.* § 31-1-11.5-3(c).
[117]*Id.* § 31-1-11.5-4(b).
[118]*Id.* § 31-1-11.5-6(a).
[119]*Id.* § 31-1-11.5-6(b).
[120]*Id.* § 31-1-11.5-8.5.
[121]*Id.* § 31-1-11.5-9.

2. Maintenance.—The Indiana courts have limited power to award spousal maintenance,[122] so the number of cases involving maintenance awards is small. In *Melnik v. Melnik*,[123] the single case on this issue decided during the survey period, the wife appealed the trial court's refusal to award maintenance payments to her. She claimed that the trial court incorrectly based its decision on her husband's ill health, rather than considering only her inability to work and thereby acted contrary to the statute. The court of appeals, after determining that the trial court did not need to make a specific finding regarding the wife's inability to support herself, held that the statute allows a court to make a maintenance award when a spouse is incapacitated, but does not require it to do so.[124] The *Melnik* court relied on the rule established in *Temple v. Temple*[125] which interpreted Indiana statutory law[126] as allowing the court to consider "the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance."[127]

3. Property Settlements.—In several cases decided during the survey period, the court of appeals refused to find that the trial court abused its discretion in dividing marital property unequally.[128] The only reversal for abuse of discretion in a property division case occurred in *Wilson v. Wilson*.[129] In *Wilson*, the trial court failed to treat property inherited by the husband as marital property subject to division.[130] The appellate court, in setting aside the judgment, held that the trial court abused its discretion in considering the inherited property only to the extent of calculating its value.[131] The *Wilson* court applied the rule established in *In re Marriage of*

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[122]*See id.* §§ 31-1-11.5-9(c) & -11(c) (Supp. 1981).

[123]413 N.E.2d 969 (Ind. Ct. App. 1980).

[124]*Id.* at 972.

[125]164 Ind. App. 215, 219-20, 328 N.E.2d 227, 229-30 (1975).

[126]IND. CODE § 31-1-11.5-9(c) (1976) (amended 1981).

[127]164 Ind. App. at 219-20, 328 N.E.2d at 229-30.

[128]*See* Cornett v. Cornett, 412 N.E.2d 1232 (Ind. Ct. App. 1980); Wilson v. Wilson, 409 N.E.2d 1169 (Ind. Ct. App. 1980); Tener v. Tener, 407 N.E.2d 1198 (Ind. Ct. App. 1980); Irwin v. Irwin, 406 N.E.2d 317 (Ind. Ct. App. 1980).

The Indiana dissolution statutes provide for a "just and reasonable" division of marital property. IND. CODE § 31-1-11.5-11 (Supp. 1981). Because the disposition of those assets is within the discretion of the trial court, Irwin v. Irwin, 406 N.E.2d 317 (Ind. Ct. App. 1980), the appellate courts will only reverse if the trial court has abused its discretion. *Id.*

[129]409 N.E.2d 1169 (Ind. Ct. App. 1980).

[130]*Id.* at 1174-75. By excluding the husband's inherited property from the marital property to be divided, the trial court awarded more than eighty percent of the assets. *Id.* at 1172.

[131]*Id.* at 1174.

Dreflak,[132] that "[t]he 'one pot' theory preserved by Ind. Code 31-1-11.5-11(b) specifically prohibits the exclusion of any assets from the scope of the trial court's power to divide and award."[133] In *Wilson*, the appellate court held that, under the *Dreflak* rule, the trial court abused its discretion.[134] While the court must consider inherited property, factors such as the length of time such property was held during the marriage may affect how the property is divided.[135]

In *Melnik v. Melnik*,[136] the court of appeals allowed an order to stand which, in effect, divided the assets based on the value as of the date of separation. The trial court held that "the assets of the parties should be equally divided."[137] Before the final decree was issued, the wife gave $25,000.00 to the grandchildren. The court ordered that the $25,000.00 be considered part of the $203,000.00 awarded to her as her share of the property. The court of appeals held that this decision was not error and that the court could consider individual acts of dissipation after separation.[138]

In *Irwin v. Irwin*,[139] however, payments of debts by the husband after the final hearing but before the decree were not credited to him.[140] The trial court awarded sixty percent of the assets to the wife. The husband sought credit for payments which he had made on various debts.[141] The court, on appeal, refused to grant credit for two reasons: first, the trial court had heard testimony as to payments the husband made and the court of appeals could not reweigh evidence;[142] second, the parties agreed that debts were to be paid out of the proceeds from the sale of marital property, so "the husband must be deemed to have volunteered the amounts he expended on the parties' debts."[143] The decision in *Irwin* is consistent with

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[132]393 N.E.2d 773 (Ind. Ct. App. 1979).

[133]*Id.* at 776.

[134]409 N.E.2d at 1175.

[135]A petition for rehearing of the *Dreflak* decision was denied. 402 N.E.2d 1284 (Ind. Ct. App. 1980). The court of appeals emphasized that it would "engage in any reasonable presumption in favor of the trial court's judgment." *Id.* at 1285. The court also noted that the ambiguity of the judgment precluded a finding of abuse of discretion. *Id.* For a discussion of the 1979 opinion, see Garfield, *Domestic Relations, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 315, 345-46 (1981).

[136]413 N.E.2d 969, 972-73 (Ind. Ct. App. 1980). For a discussion of additional issues in *Melnik*, see notes 122-24 *supra* and accompanying text.

[137]*Id.* at 972.

[138]*Id.* at 973.

[139]406 N.E.2d 317 (Ind. Ct. App. 1980).

[140]*Id.* at 320.

[141]*Id.* at 318.

[142]*Id.* at 320.

[143]*See* note 175 *infra* and accompanying text.

Melnik to the extent that the court of appeals, in both cases, refused to find an abuse of discretion.

Treatment of property to be received by one spouse in the future has been considered in several cases.[144] While statutory law prevents division of property received after the final separation,[145] there is some support for the consideration of future income, such as a vested pension, in determining a "just and reasonable" division of the property.[146] Inclusion in the marital assets of an award of $2,240.00 received by the husband, after the final separation, was error, although the appellate court noted that the amount could be "taken into consideration by the trial court in determining the just and reasonable manner in which the parties' total marital assets are to be distributed."[147]

4. Attacks on Dissolution Decrees.—In *Scherer v. Scherer*,[148] the husband appealed a summary judgment denying his petition for dissolution. The central issue was whether Indiana would recognize a divorce obtained in the Dominican Republic, for which only the wife had applied in person, but for which the husband had executed a special power of attorney.[149] The court stated that, in most cases, recognition of foreign decrees is limited to cases in which at least one spouse was domiciled in the foreign country.[150] In this case, however, although only the wife had appeared in person in the Dominican Republic and neither party was domiciled there, the husband was estopped from denying the validity of the decree which incorporated a separation agreement signed in Indiana by both parties. The husband had claimed that he did not fully understand the effect of the power of attorney form that he signed. The court ruled that even if his claims were true, his later conduct estopped him from denying the validity of the decree.[151] Not only had the husband told friends about the divorce and announced his plans to remarry, but his wife had in fact remarried in reliance on the decree. Because

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[144]*See* Morgan v. Cooper, 415 N.E.2d 729 (Ind. Ct. App. 1981); Wilson v. Wilson, 409 N.E.2d 1169 (Ind. Ct. App. 1980); Irwin v. Irwin, 406 N.E.2d 317 (Ind. Ct. App. 1980).

[145]IND. CODE § 31-1-11.5-11(b) (Supp. 1981). The statute authorizes consideration of "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.* § 31-1-11.5-11(b)(5), as well as "the economic circumstances of the spouse at the time the disposition is to become effective." *Id.* § 31-1-11.5-11(b)(3).

[146]*Id.* § 31-1-11.5-11(b).

[147]406 N.E.2d at 319-20.

[148]405 N.E.2d 40 (Ind. Ct. App. 1980).

[149]*Id.* at 43.

[150]*Id.* at 44.

[151]*Id.* at 47-48.

the husband behaved inconsistently with his objections, he had waived his right to object.[152]

While acknowledging that summary judgment is not an appropriate method of granting a divorce, the court recognized the Dominican Republic decree as a defense to a dissolution action. Thus, summary judgment was appropriate.[153]

5. Enforcement of Judgments.—In *Neal v. Neal*,[154] the wife attempted to recover unpaid alimony[155] through a contempt of court proceeding. The trial court entered judgment increasing the husband's weekly payments by $25.00 and ordered him to pay the remainder of the arrearage when he was financially able.[156]

The court of appeals reversed, holding that "contempt proceedings may not be used to enforce collection of an alimony judgment."[157] The wife asserted that statutory law provided that the "[t]erms of the [divorce] decree may be enforced by all remedies available for enforcement including but not limited to contempt."[158] The court cited *State ex rel. Shaunki v. Endsley*,[159] which interpreted that statutory provision to mean that certain aspects of the dissolution decree may be enforced by contempt, but that an order compelling the payment of money may not[160] because contempt cannot be used to enforce a money judgment.[161] Applying the *Shaunki* rule, the court reversed the trial court's judgment.[162]

6. Non-Nuptial Agreements.—The most significant case in the area of marriage and dissolution did not, in actuality, involve either marriage or dissolution of marriage. In *Glasgo v. Glasgo*,[163] facts similar to those in the much-publicized *Marvin v. Marvin*[164] case confronted the Indiana Court of Appeals. Jane and Laurel Glasgo, parents of two children, were divorced in 1967. In 1973, they began living together again. During the next five years, the family built and furnished a new home. Although he told her that everything he

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[152]*Id.*

[153]405 N.E.2d at 45 n.2. *See also* Wagoner v. Wagoner, 147 Ind. App. 696, 263 N.E.2d 657 (1970).

[154]412 N.E.2d 319 (Ind. Ct. App. 1980).

[155]The alimony judgment was contained in a separation agreement between the parties which had been incorporated into the dissolution decree as provided for in IND. CODE § 31-1-11.5-10(b) (1976). 412 N.E.2d at 320.

[156]412 N.E.2d at 320.

[157]*Id.*

[158]IND. CODE § 31-1-11.5-17(a) (Supp. 1981).

[159]266 Ind. 267, 362 N.E.2d 153 (1977).

[160]*Id.* at 269, 362 N.E.2d at 154.

[161]*See* 412 N.E.2d at 320 n.1.

[162]*Id.* at 321.

[163]410 N.E.2d at 1325 (Ind. Ct. App. 1980).

[164]18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

had was hers,[165] Laurel subsequently refused to marry Jane. After she and the children moved out of the home again,[166] Jane brought an action for half of the value of the property acquired by the family during the period of cohabitation.[167] Out of a net estate valued at $28,952.90, the trial court awarded Jane $6,062.03 plus a hutch, or $8,062.03 in the alternative if Laurel received the hutch. Laurel appealed the decision arguing first that claims by non-married persons are against public policy in Indiana and second that there was insufficient evidence to support the judgment under principles of either implied contract or equity.[168]

Laurel Glasgo relied heavily on the rationale of the Illinois Supreme Court in *Hewitt v. Hewitt*.[169] The Illinois court held that a claim for property division where the parties were not married was contrary to public policy and would not be recognized.[170] In so holding, the Illinois Supreme Court overruled the Illinois Court of Appeals which had adopted the reasoning of *Marvin v. Marvin*.[171] In *Marvin*, the California Supreme Court held that, on contract theory, agreements between unmarried partners would be enforced "except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services."[172] The California court also said that, in the absence of an express contract, the court should "inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture"[173] and that it might also impose a constructive or resulting trust, if equity so required. The court in *Marvin* recognized changing mores and the increasing frequency of cohabitation. While explicitly affirming the importance of marriage, the California court refused to impose a moral standard "so widely abandoned by so many."[174]

The *Glasgo* court, while considering the policy questions[175] raised

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[165]410 N.E.2d at 1326.

[166]Jane took with her the furniture and personal property she had brought into the relationship as well as a microwave oven, a sweeper, and a hutch built by Laurel and one of their sons which she had finished. *Id.*

[167]The property consisted of real estate, radio and airplane equipment, miscellaneous personal property, and a motorcycle. *Id.*

[168]*Id.* at 1327.

[169]77 Ill. 2d 49, 394 N.E.2d 1204 (1979).

[170]*Id.* at 66, 394 N.E.2d at 1211.

[171]18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

[172]*Id.* at 665, 557 P.2d at 110, 134 Cal. Rptr. at 819.

[173]*Id.*

[174]*Id.* at 683-84, 557 P.2d at 122, 134 Cal. Rptr. at 831.

[175]The questions include: whether recognition of legal rights arising out of non-marriage relationships would undermine the family; what rights children of such relationships would have; and whether recognition of such claims would, in effect, recreate

in *Hewitt*, declined to follow the Illinois Supreme Court's rationale. Noting that Indiana's abolition of the laws applying to common-law marriage.[176] had obviously not abolished cohabitation and acknowledged that Indiana courts and applied common-law principles to such claims even before the legal demise of the common-law marriage.[177] Therefore, the court found that Jane Glasgo's property claim was independent of the marriage and dissolution statutes and thus recognition of the claim would not reinstate common-law marriage in Indiana. The court refused to categorize the relationship as meretricious, largely because the Glasgos conducted themselves in the manner of a conventional American family.[178] Noting that "to deny recovery to one party in such a relationship is in essence to unjustly enrich the other,"[179] the court held that recovery could be based on either equitable or contractual grounds.[180] The court further held that, in view of the agreement between the parties, no presumption arose that the services of Jane Glasgo were gratuitous.[181]

Claims arising out of cohabitation relationships are increasingly being litigated throughout the nation.[182] If the conduct of two unrelated parties establishes either a contractual or equitable basis for recovery, the assertion of a claim should not give rise to any question of marital status, either legal or common-law. An interesting development which supports the view that contract or equity principles should apply is the action by many states to bring property claims arising out of non-marital relationships within the Statute of Frauds.[183] Such action increases the evidence required for recovery, but emphasizes the contractual nature of the claim. Application of the Statute of Frauds would encourage the parties to put their agreements in writing and would discourage fraudulent claims.

The *Glasgo* opinion is not clear, however, as to the basis for the amount awarded to Jane Glasgo. She did not receive half of the value of the joint property, so the division may have been based on a "quantum meruit" theory. Failure to specify the rationale for such

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the common-law marriage specifically eliminated by statute. 410 N.E.2d at 1329 (quoting 77 Ill. 2d at 58-59, 394 N.E.2d at 1207-08).

[176]IND. CODE § 31-1-6-1 (1976).

[177]*See* Moslander v. Moslander's Estate, 110 Ind. App. 122, 38 N.E.2d 268 (1941).

[178]410 N.E.2d at 1330.

[179]*Id.*

[180]*Id.* at 1331.

[181]The court held that Laurel could not argue both ways: he could not assert, on the one hand, that Jane should not be presumed to be his wife while asserting, on the other hand, that she rendered her services gratuitously. *Id.* at 1332.

[182]*See, e.g.*, Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973); Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979); Latham v. Latham, 274 Or. 421, 547 P.2d 144 (1976).

[183][1980] 6 FAM. L. REP. (BNA) 2206, 2439.

a division leaves open the question of whether the claim was actually allowed on contractual, quasi-contractual or equitable grounds.[184]

E. Paternity

1. Change of Name.—A voluntary paternity proceeding raised a question of first impression in Indiana as to whether the trial court can change the child's surname over the objection of a parent during a proceeding to determine paternity.[185] The mother of an illegitimate child appealed the determination of the trial court that the child should bear his father's surname. In a split decision, the court of appeals held that the court's action "was neither contrary to law, against the evidence, nor an abuse of discretion."[186]

The majority opinion ostensibly applied the "best interests of the child" standard,[187] noting that the mother's embarrassment could not outweigh the interests of the child. The court held that the "best interests" test provided a rational basis for the trial court's finding that a name change was appropriate and, therefore, the change of surname was not an abuse of discretion.[188] The trial record contained a remark by the trial judge expressing his opposition to women's liberation.[189] The court found that while such an expression was neither appropriate nor relevant, it did not require that the judgment be set aside.[190]

The concurring judge agreed only with the holding that the appellate court could not substitute its discretion for that of the trial judge.[191] He concurred with the dissenting judge's contention that the factors advanced in the majority opinion "should be given

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[184]The General Assembly enacted another significant piece of domestic relations legislation. IND. CODE § 35-42-2-1 (Supp. 1981) makes the second battery committed on a married person by their spouse a Class D felony. This explicit authorization should facilitate prosecution for repeated spouse abuse.

[185]D.R.S. v. R.S.H., 412 N.E.2d 1257 (Ind. Ct. App. 1980).

[186]*Id.* at 1259 (Buchanan, C.J.; Sullivan, J., concurring in the result and filing separate opinion; Shields, J., dissenting and filing opinion).

[187]*Id.* at 1263. The court of appeals determined that no statute in Indiana forbids a name change during a paternity proceeding before considering whether the change was in the best interest of the child. *Id.* at 1261.

The factors considered under this standard were: 1) the *father's* traditional interest in having his child bear his name; 2) *society's* interest in strengthening the father-child bond; 3) any misconduct on the father's part; 4) the preference (if any) of the child; and, 5) the inference of illegitimacy arising from the use of the mother's name.

[188]*Id.* at 1266.

[189]"Well, this women's lib thing just makes me furious and I will put it on the record." *Id.* at 1269 (Shields, J., dissenting).

[190]*Id.* at 1266-67 (Sullivan, J., concurring).

[191]*Id.* at 1266 (Sullivan, J., concurring).

limited, if any, significance in a determination to change a child's surname from that of the natural mother to that of the biological father."[192]

The dissenting judge, while agreeing that the trial court had the authority to order a name change in the child's best interest, found an abuse of discretion in this case.[193] The dissent noted that there was no evidence on the record that the paternal surname would prove a financial asset to the child or increase his social standing in the community.[194] In addition, "a child bearing a different name from the mother is as likely, [as a child bearing the mother's name] if not more so, to raise inquiry as to the circumstances resulting in the discrepancy."[195] The dissent also indicated that the court should consider the child's preference, as well as the wrong-doing of either parent, but that it should not consider either the selfish interest of the parents or their monetary obligation because both parents have an obligation to support the child.[196] The dissenting judge further stated that the determination of the child's best interests was clearly biased by the trial judge's own prejudices, as expressed on the record.

The majority opinion, while applying the "best interest of the child" standard, heavily emphasized the father's interests.[197] The dissenting judge found that the mother's testimony was the only evidence on the record as to the child's best interest,[198] while the majority opinion did not discuss any evidence on the record.

2. Determination of Paternity in Conjunction with Other Proceedings.—Sandoval v. Hammersly[199] required the court of appeals to consider the determination of paternity during an adoption proceeding. The putative father filed a petition to establish paternity which was dismissed.[200] While his appeal was pending, the circuit court granted a petition for the child's adoption. The appeal from the adoption proceeding was consolidated with the appeal of the dis-

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[192]*Id.*

[193]*Id.* at 1267-69 (Shields, J., dissenting).

[194]*Id.* at 1268 (Shields, J., dissenting).

[195]*Id.*

[196]*Id.* at 1268 (Shields, J., dissenting). *See* IND. CODE § 31-4-1-2 (1976) (repealed 1978) and § 31-6-6.1-13 (Supp. 1981) (current statute requiring parents to support their children).

[197]412 N.E.2d at 1263.

[198]*Id.* at 1268.

[199]419 N.E.2d 813 (Ind. Ct. App. 1981).

[200]*Id.* at 814. The petition was dismissed for failure to timely file under IND. CODE § 31-4-1-26 (1976) (repealed 1978). The *Sandoval* court held that this statute, even when in effect, dealt with the enforcement of a support obligation, not determination of paternity and that the differing burden of proof in the two actions made the statute inapplicable. 419 N.E.2d at 815 n.4.

missal of the paternity petition.[201] The major issue raised on appeal was whether the trial court erred in not making a specific finding with regard to paternity on the grounds that the father's rights in the adoption proceeding depended on the determination of paternity.[202] The court of appeals held that such a finding was indeed essential "in order to render a just decision in the adoption."[203]

The issue of paternity was material in *Sandoval* because if Sandoval were found to be the father, his consent to the adoption would have to be obtained[204] or his parental rights terminated before the adoption could be completed.[205] The appellate court ordered the trial court to make a specific finding of fact regarding paternity because "a missing finding upon a material issue cannot be resolved by any presumption."[206]

The dissenting judge,[207] noting that Indiana Code section 31-3-1-6 provided that the father's consent was not required unless paternity had been determined by a court proceeding, argued that the trial court's finding that "the minor child . . . was born out of wedlock and [that the] child's paternity was never established"[208] was a specific finding of fact which could be overturned only if clearly erroneous.[209] Thus, there was sufficient evidence to sustain the trial court's finding.[210]

It is unclear whether the statement that "the child's paternity was never established" was a specific finding of fact with respect to paternity. As the dissenting judge stated, the father had the burden of proof in the paternity determination, so "[t]he trial court's finding that paternity was never established was a negative judgment against Sandoval."[211] However, the finding could refer to the dismissal of the paternity action. In that situation, the finding would be invalid because the dismissal was improper.

Another case in which the court determined paternity as part of

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[201]419 N.E.2d at 815.

[202]*Id.*

[203]*Id.*

[204]*See* IND. CODE § 31-3-1-6(a) (Supp. 1981) which provides that written consent of the mother and the father of an illegitimate child must be obtained before an adoption petition may be granted, and *id.* § 31-3-1-6(g) which states that consent to adoption is not required of a father whose paternity has not been established by court proceeding.

[205]IND. CODE § 31-3-1-7 (1976) (repealed 1978).

[206]419 N.E.2d at 816.

[207]*Id.* at 816-17 (Hoffman, J., dissenting).

[208]*Id.* at 815.

[209]*Id.* at 817. *See* IND. R. CIV. P. 52(A). The dissenting judge cited both the mother's statement that the child's father was unknown and Sandoval's failure to voluntarily establish paternity as he had with two prior children. 419 N.E.2d at 817.

[210]419 N.E.2d at 817.

[211]*Id.*

another proceeding was *Dorsey v. Dorsey*.[212] During a dissolution proceeding, the trial court declared the husband to be the father of a child born before the marriage because the husband, as well as the wife, acknowledged that the husband was the father. On appeal, the wife argued that the court lacked jurisdiction to determine pater nity and had abused its discretion in doing so.[213]

The appellate court affirmed the trial court action, holding that "[o]nce the court became aware that there was a child of the parties, it had a duty to provide for custody, support and visitation pursuant to the dissolution statutes. This could only be done, however, after a determination of paternity had been made."[214] The court, relying on the precedent of *Toller v. Toller*,[215] held that the trial court did not abuse its discretion in determining paternity.[216]

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[212]409 N.E.2d 1233 (Ind. Ct. App. 1980). *See* note 97 *supra* and accompanying text for a discussion of the facts of this case.

[213]*Id.* at 1234.

[214]*Id.*

[215]375 N.E.2d 263 (Ind. Ct. App. 1978).

[216]409 N.E.2d at 1234-35. Had there been a genuine issue with respect to paternity, the court would not have had jurisdiction because the dissolution proceedings were in the Hendricks County Superior Court and jurisdiction over paternity proceedings rested in the Hendricks Circuit Court.