VII. Domestic Relations

JAMES A. BUCK*

A. Termination of Parental Rights

During the 1981 survey period, the United States Supreme Court decided a case that affects the standard of proof applied by Indiana courts in termination of parental rights cases.[1] The Court held that the standard of proof in a termination of parental rights case must be at least that of clear and convincing evidence.[2] Recent Indiana decisions have held that the appropriate standard is the lower civil standard of proof, which is by a preponderance of the evidence.[3]

In *Santosky v. Kramer*,[4] the Supreme Court reversed a decision by a New York family court that had terminated the rights of the parents concerning three of their children, based upon a New York statute that allowed the State to terminate parental rights upon a finding that the child was permanently neglected. The trial court had rejected the parents' constitutional attack on the applicable New York statute, which required only a preponderance of the evidence to support this finding.[5] The Supreme Court held that the due process clause of the fourteenth amendment requires a higher standard of proof than the civil standard of proof, which is by a preponderance of the evidence.[6] The Court concluded that "[b]efore a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence."[7]

The Court applied the due process analysis that it had enunciated in *Mathews v. Eldridge*[8] and found that the New York statute was unconstitutional.[9] The *Eldridge* analysis involves balancing three distinct factors: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the counter-

---

*Senior partner with the firm of Buck, Berry, Landau, Breunig & Quinn. B.S., Butler University, 1951; J.D., Indiana University School of Law—Indianapolis, 1958.

[1]*See* IND. CODE § 31-6-7-13(a) (1982). For a discussion regarding termination of parental rights and other adoption issues in recent Indiana cases, see Murphy, *Implementing the Indiana Juvenile Code*, 15 IND. L. REV. 765, 772 (1982).

[2]Santosky v. Kramer, 102 S. Ct. 1388 (1982).

[3]*See, e.g.*, Puntney v. Puntney, 420 N.E.2d 1283 (Ind. Ct. App. 1981). *But see* Ellis v. Knox County Dep't of Pub. Welfare, 433 N.E.2d 847 (Ind. Ct. App. 1982) (holding that the part of the statute requiring preponderance of the evidence standard in termination of parental rights is not constitutional).

[4]102 S. Ct. 1388 (1982).

[5]*Id.* at 1393.

[6]*Id.* at 1391.

[7]*Id.*

[8]424 U.S. 319, 335 (1976).

[9]102 S. Ct. at 1396-97.

vailing governmental interest supporting use of the challenged procedure."[10] Balancing these factors, the Court concluded:

> In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight. Evaluation of the three *Eldridge* factors compels the conclusion that use of a "fair preponderance of the evidence" standard in such proceedings is inconsistent with due process.[11]

B. Child Custody

1. Jurisdiction.—In *Brokus v. Brokus*,[12] the court of appeals held that an Indiana court has jurisdiction to award child custody, even though the court has no jurisdiction over the dissolution of marriage. *Brokus* involved a complex set of facts that developed in both Indiana and Ohio. An action for custody was brought in Indiana by the wife as part of her petition for a dissolution of marriage; the father brought a similar action in Ohio. The three children had spent time with each parent in both states during the year immediately preceding the filings for dissolution. One month after the Indiana court granted the final dissolution and awarded custody of the children to the mother, the Ohio court awarded custody to the father. The father appealed the Indiana court's order alleging that the Indiana court had no jurisdiction over the custody and dissolution actions because the mother did not meet the jurisdictional six-month residency requirement.[13]

The Indiana Court of Appeals held that the Indiana court did have jurisdiction to decide the custody issue because the six-month jurisdictional residency requirement, by statute, does not apply to a petition for child support.[14] The court of appeals rejected the father's contention that the mandates of the Uniform Child Custody Jurisdiction Act (UCCJA),[15] as adopted in Indiana, required the trial court to defer to

---

[10]*Id.* at 1394 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[11]102 S. Ct. at 1396-97.

[12]420 N.E.2d 1242 (Ind. Ct. App. 1981). For a discussion regarding the dissolution issues, see *infra* notes 73-77 and accompanying text.

[13]IND. CODE § 31-1-11.5-6(a) (1982) provides, in pertinent part: "At the time of the filing of a petition . . . at least one (1) of the parties shall have been a resident of the state . . . for six (6) months immediately preceding the filing of each petition."

[14]420 N.E.2d at 1246 (citing IND. CODE § 31-1-11.5-6(c) (Supp. 1981)). IND. CODE § 31-1-11.5-6(c) (1982) provides: "In an action for child support . . . the above residence provisions shall not be required. However, one (1) of such parties must reside in the state and county at the time of the filing of the action." *Id.*

[15]IND. CODE §§ 31-1-11.6-1 to -24 (1982).

Ohio in the custody decision.[16] The court noted that the UCCJA "establishes two main places of initial jurisdiction: the 'home state' of the child and the state with a 'significant connection' to the child and one or both parents."[17]

The Indiana lower court did not have jurisdiction under the home state rule because the children had not lived in Indiana for six consecutive months immediately preceding the custody action. The court did, however, have jurisdiction under the significant connection rule because "during the five months the children had lived in Indiana, they were enrolled in nursery school and attended church regularly with their mother."[18] The Indiana appellate court found that the Ohio court lacked jurisdiction under either the "home state" or the "significant connection" requirement because the children had been in Ohio for less than one month.[19] In addition, the court of appeals found that, even though there was a simultaneous proceeding in another state, the trial court's exercise of jurisdiction did not violate the UCCJA because the Ohio proceeding was not in substantial conformity with the UCCJA.[20] The court of appeals, however, reversed the trial court's decision to award custody to the wife, because the appellate court found that the trial court had abused its discretion by being prejudiced in favor of the mother.[21]

2. Custody Modification.—In *Kissinger v. Shoemaker*,[22] the court of appeals held that if a custodial parent dies, the surviving parent is not automatically awarded custody.

In *Kissinger*, the mother had been awarded custody of the children in the dissolution decree. Less than a year later, and one month after her marriage to the stepfather, the mother died in an accident. The children's natural father filed a petition for a writ of habeas corpus, seeking the return of his children who were being detained by the stepfather.[23] The trial court, after hearing the evidence, denied the petition.

---

[16]420 N.E.2d at 1248. An action for child custody is commenced by filing a petition for support or a petition for dissolution. The court stated that it would look at the content of a petition, not just the headings, to determine the true nature of the request. The court found that the mother's petition was a valid child support petition. *Id.* at 1246.

[17]*Id.* at 1247 (citing IND. CODE § 31-1-11.6-3(a)(1), -3(a)(2) (Supp. 1981)).

[18]420 N.E.2d at 1248.

[19]*Id.*

[20]*Id.* at 1248-49 (citing State v. Marion County Superior Court, 403 N.E.2d 806 (Ind. 1980)).

[21]420 N.E.2d at 1249. "The partial manner in which the trial court conducted this hearing, in effect, denied Robert of his right to a fair trial, and therefore the judgment must be reversed." *Id.*

[22]425 N.E.2d at 208 (Ind. Ct. App. 1981).

[23]The stepfather filed a petition for temporary and permanent custody of the

On appeal, the father contended that "when a parent, who is granted custody of the children in a dissolution decree dies, custody of the children automatically inures to the surviving parent."[24] The court of appeals stated, however, that the "rights of parents are not absolute and must yield to the welfare and best interest of the child."[25] The court outlined a three-step analysis to be used in determining whether a particular custody award would be in the best interests of the child.

> First, it is presumed it will be in the best interests of the child to be placed in the custody of the natural parent. However, this is a rebuttable presumption. Therefore, secondly, to rebut this presumption, it must be shown that there is, (a) unfitness, (b) long acquiescence, or (c) voluntary relinquishment such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child. The third step is that upon a showing of one of these above three factors, then it will be in the best interests of the child to be placed with the third party.[26]

Applying this analysis to the father's petition, the court of appeals held that the trial court had not abused its discretion in finding that the evidence presented by the stepfather rebutted the presumption favoring the natural parent.[27] The appellate court found that although there was no evidence of either voluntary relinquishment or long acquiescence by the father, there was sufficient evidence of the father's unfitness.[28] The court, therefore, affirmed the trial court's denial of the father's petition. The appellate court, however, did not determine whether custody should be awarded to the stepfather, because that question was for a custody proceeding.[29]

3. Visitation.—In re Marriage of Ginsberg[30] presented the court of appeals with the question whether the trial court's order allowing a child an extended visit with the noncustodial parent was a modification of custody or of visitation rights. In that case, the mother, who

---

children, which was separated from the hearing on the father's petition for writ of habeas corpus. 425 N.E.2d at 210.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 210-11 (citing Hendrickson v. Binkley, 161 Ind. App. 388, 393-94, 316 N.E.2d 376, 380 (1974), *cert. denied*, 423 U.S. 868 (1975)).

[27] 425 N.E.2d at 211.

[28] *Id.* The evidence supporting the finding that the father was unfit included evidence that he had failed to make any support payments as ordered, that he had neither visited nor communicated with the children, that his employment history showed instability, and that he had previously mistreated the children.

[29] 425 N.E.2d at 211.

[30] 425 N.E.2d 656 (Ind. Ct. App. 1981).

was the noncustodial parent, petitioned for a modification of the custody order. The dissolution decree had granted the mother reasonable visitation rights; however, the mother, who was living in Italy, wanted to have the child during the summer because it was impractical to schedule weekend or holiday visits as contemplated by the dissolution decree.

Although the trial court found that there was not a change in circumstances that made the original terms of the decree unreasonable,[31] the trial court granted the petition and gave the mother "temporary custody" during the summer.[32] The father appealed the trial court's decision. He contended that the court had abused its discretion by modifying the custody order without finding a change in circumstances so substantial and continuing as to make the terms of the decree unreasonable, which is required by the Dissolution Act when modifying an earlier decree.[33]

The court of appeals held that the trial court did not err because the court had modified "visitation," not "custody," and because the trial court had found that a substantial and continuing change in circumstances did exist to make the mother's visitation rights unreasonable.[34] The court stated:

> It may well be that the line between visitation and divided custody becomes blurred in cases such as this where one parent moves so far in distance from the custodial parent that a traditional visitation schedule is impractical or impossible. However, here it is reasonable to conclude Mother's "temporary custody" of the child during the summer months is visitation because of her residence in Italy for a period of three years. We specifically limit this holding to the facts of this case and do not pretend to predict our ruling would be the same if the noncustodial parent lived within a reasonable proximity of the custodial parent or was absent for a shorter period of time.[35]

C. Child Support

1. Modification of Order.—In *Meehan v. Meehan*,[36] the Indiana Supreme Court clarified several issues relating to child support. In *Meehan*, the supreme court addressed the following issues: (1) whether

---

[31]*Id.* at 657.

[32]*Id.*

[33]IND. CODE § 31-1-11.5-22(d) (1982).

[34]425 N.E.2d at 658. The correct standard to apply when modifying visitation is "best interests of the child." IND. CODE § 31-1-11.5-24 (1982). The court of appeals held the trial court's application of the incorrect standard to be harmless error. 425 N.E.2d at 658 n.2.

[35]425 N.E.2d at 658.

[36]425 N.E.2d 157 (Ind. 1981).

the court may "incorporate" a settlement agreement, which includes the terms for child support, into the final decree; (2) whether a decree that incorporates a settlement agreement may be modified; and (3) whether the standard for modifying an incorporated agreement is the same as the standard for modifying a dissolution decree.

In *Meehan*, the father petitioned in 1979, to modify his child support obligation. The father presented evidence that since the 1976 dissolution decree, his ex-wife had remarried and her new husband had assumed the cost of most of the living expenses. Additionally, the ex-wife was now operating her own small business. The father's income, however, had not kept pace with inflation. One of the four children was now emancipated and no longer lived with his mother. A second child was in college and was at home only during the summer months. Additionally, the youngest child now wanted to live with the father. The trial court granted the father's petition to modify the earlier order that he pay "the sum of $500.00 a month for the care and keep" of the children.[37]

The ex-wife appealed the modification alleging that the trial court had abused its discretion by modifying the decree, which was an incorporated settlement agreement between the parties.[38] The ex-wife also argued that the trial court had abused its discretion by modifying the decree without a showing of a change in circumstances so substantial and continuing as to make the terms of the original decree unreasonable, as required by statute.

In reversing the trial court's modification, the court of appeals found that the settlement agreement had been incorporated into the dissolution decree by "paraphrase and reference" and, therefore, could only be modified by a showing that the terms had become "clearly unreasonable."[39] The father appealed that decision and the supreme court granted transfer.

According to the Indiana Code, there are six provisions in a dissolution decree that can always be modified by the court when dependent children are involved. These provisions concern: (1) the custody of the children;[40] (2) the support of the dependent children;[41] (3) the noncustodial parent's visitation rights;[42] (4) the health care of the children; (5) the children's religious upbringing; and (6) the children's educational costs and requirements.[43] This modification can

---

[37]*Id.* at 158-59.

[38]Meehan v. Meehan, 415 N.E.2d 762, 765 (Ind. Ct. App. 1981).

[39]*Id.* at 767.

[40]IND. CODE § 31-1-11.5-22(d) (1982).

[41]*Id.* § 31-1-11.5-17.

[42]*Id.* § 31-1-11.5-24(b).

[43]*Id.*

occur whether the court's dissolution decree incorporates the parties' agreement on these issues, pursuant to Indiana Code section 31-1-11.5-10, or whether the court enters a separate decree after a trial on these issues.

In a four to one decision written by Justice Hunter, the supreme court vacated the court of appeals' decision and reinstated the trial court's modification of the child support order.[44] The supreme court first addressed the issue of the incorporation of the agreement in the decree. Because under section 31-1-11.5-10(b)[45] the trial court has the discretion to accept, to modify, or to reject an agreement, the supreme court held that to effectively incorporate the parties' settlement agreement into the dissolution decree, the trial court must do so by express and unequivocal language.[46] The court stated that "[a]bsent an effective incorporation and merger . . . a settlement agreement or its unincorporated portions is not binding on the parties."[47] This should be a good lesson to domestic relations practitioners because it reflects the trend of both the court of appeals and the supreme court, which has been to take the words of the statute one by one, to analyze them, and to concentrate on their exact meaning in order to give the legislative intent every opportunity to survive judicial scrutiny.

The supreme court went further and found that, even if the incorporation were effective, the court of appeals had erred in reversing the trial court.[48] Justice Hunter found that the standard pronounced in section 17(a) of the Dissolution Act,[49] which allows a modification upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable, is the only standard to apply when modifying child support orders, regardless of how the terms had originated.[50] Justice Hunter stated that it was imperative that the sec-

---

[44]425 N.E.2d at 157-58.

[45]IND. CODE § 31-1-11.5-10(b) (1982) provides:

> In an action for dissolution of the marriage the terms of the agreement if approved by the court shall be incorporated and merged into the decree and the parties ordered to perform them, or the court may make provisions for disposition of property, child support, maintenance, and custody as provided in this chapter.

[46]425 N.E.2d at 159. Otherwise, particularly where a partial acceptance and rejection was at issue, the resolution of whether the trial court intended to incorporate and merge a settlement agreement or particular portions thereof would depend on conjecture. *Id.*

[47]*Id.* (citing Anderson v. Anderson, 399 N.E.2d 391 (Ind. Ct. App. 1979); Grace v. Quigg, 150 Ind. App. 371, 276 N.E.2d 594 (1971)).

[48]425 N.E.2d at 159.

[49]IND. CODE § 31-1-11.5-17(a) (1982).

[50]425 N.E.2d at 160. In other words, even though a child support order has been incorporated into the terms of a settlement agreement and has been intended to be a permanent determination by the parties, it is of no consequence to the question whether the order should subsequently be modified. *Id.*

tion 17(a) standard be followed even if it "flies in the face of our visceral inclinations as jurists to rule that 'a contract is a contract.' "[51] Thus, the court of appeals deviated from the statutory standard when it required that in order to modify a support agreement, which was incorporated in the court's decree, there must be a showing that the terms of the agreement are *clearly unreasonable*.[52] The supreme court found that the court of appeals' decision rested in contract law and not in the requirements and policy of the Dissolution Act.[53] Thus, the court of appeals incorrectly treated the modification of a child support order with the same deference due a negotiated property settlement agreement.

To bolster its decision, the supreme court noted that due to the Meehans' situation, if the trial court had refused to modify the support order, the $500 payment to the ex-wife would have become de facto spousal maintenance.[54] That result would be contrary to law because there was no evidence of the ex-wife's physical or mental incapacity presented to support an award of maintenance.

2. Delinquency in Payment of Support.—A long line of Indiana decisions holds that a parent may neither reduce the amount of support he is ordered to pay nor change the method by which he pays support without receiving a modification in court.[55] Additionally, Indiana case law holds that reduction can only apply prospectively.[56] Applying these rules in *Isler v. Isler*,[57] the court of appeals had little difficulty in reversing the trial court's computation of the husband's arrearages in support, because the computed arrearage was inconsistent with the amount the husband owed, yet no modification order existed. In an opinion denying the husband's petition for rehearing, however, the court of appeals suggested that in certain factual situations equitable considerations *may* create a "narrow exception" to these rules.[58]

Although the husband admitted owing over $5,000, the trial court had awarded $1,200 to the wife.[59] On appeal, the court reasoned that the trial court could have arrived at the $1,200 figure only by giving

---

[51]425 N.E.2d at 160. Justice Hunter goes on to state: "If our courts deviate even slightly from this delicate balance struck by the legislature, parties will be inhibited in their negotiations and the purpose of the Act will be frustrated." *Id.*

[52]425 N.E.2d at 160-61.

[53]*Id.* at 161 n.1.

[54]*Id.* at 163.

[55]*See, e.g.*, Whitman v. Whitman, 405 N.E.2d 608, 614 (Ind. Ct. App. 1980).

[56]Jahn v. Jahn, 385 N.E.2d 488 (Ind. Ct. App. 1979).

[57]422 N.E.2d 416 (Ind. Ct. App. 1981).

[58]Isler v. Isler, 425 N.E.2d 667, 669 (Ind. Ct. App. 1981) (denying petition for rehearing).

[59]422 N.E.2d at 418.

the husband "credit" for the amount owed for the support of a son who was emancipated prior to age twenty-one and for the amount spent when the husband had the children in his home.[60] Because the father could not "claim, without a judicial modification, any reduction of the undivided support order until *all* the children [were] emancipated, and . . . [he could not] claim credit against accrued support for the weeks [two of the children] lived with him,"[61] the court of appeals held that the trial court erred in its calculation of the accrued support arrearage. In his petition for rehearing, the husband requested that the appellate court reconsider its application of the general rule.[62]

In its opinion denying the petition for rehearing, the court of appeals noted that two categories exist for cases that involved nonconforming payments. The first category includes cases in which the parent makes expenditures for the children during short visits, for gifts, and as payments in cash. Because theses types of expenditures are not easily proven, the courts have refused to accept them as claims for credit. To promote stability, the courts have required that the payments be made in the prescribed manner.[63] The second general category includes cases in which the support order is indivisible for several dependent children. On his own volition, the obligated parent often will reduce the support payment pro rata, as the children become emancipated. However, because the amount in the original decree is usually inadequate but all that the parent could afford to pay, courts will generally deny a request for a reduction in payments, in order to ease the burden on the custodial parent.[64]

In recognizing a "narrow exception" to the general rule, the court of appeals found that there may be cases that do not fit in either of these two general categories.[65] This narrow exception is applicable when a de facto change of custody has occurred by agreement between the parents.[66] In such an instance, the court may "allow credit against the accrued support for the reason that the obligated parent

---

[60]*Id.*

[61]*Id.* at 419 (citing Ross v. Ross, 397 N.E.2d 1066 (Ind. Ct. App. 1979); Jahn v. Jahn, 385 N.E.2d 488 (Ind. Ct. App. 1979); Haycraft v. Haycraft, 375 N.E.2d 252 (Ind. Ct. App. 1978)).

[62]425 N.E.2d at 668.

[63]*Id.* at 669.

[64]*Id.* at 669-70.

[65]*Id.*

[66]425 N.E.2d at 670. A de facto custodial change could occur:

> where the obligated parent, by agreement with the custodial parent, has taken the child or children into his or her home, has assumed custody of them, has provided them with food, clothing, shelter, medical attention, and school supplies, and has exercised parental control over their activities and education for an extended period of time . . . .

Id.

has merely furnished support in a different manner under circumstances easily susceptible of proof. Such a result would be equitable, and would not conflict with the holdings of the reported cases."[67] Thus, although the court of appeals affirmed its prior order to remand the case for retrial on the issue of the computation of arrearages, its opinion in denying the petition for rehearing gives further instructions for the court on retrial of this issue.

In *Statzell v. Gordon*,[68] the mother appealed the denial of her request to recover the son's college expenses from the father. Under the original child support order, the father was to pay all college expenses. He made the payments for approximately two years, then stopped. The mother paid the remaining expenses from her own funds. After the son had graduated and was emancipated, the mother sought reimbursement from the father. The trial court found that the mother had "volunteered" to pay the expenses, and that the dissolution decree "vested no rights in [the mother] and did not constitute a judgment in her favor."[69] The mother appealed.

The court of appeals characterized the basic issue in the case as whether the mother had to file an independent complaint in a separate lawsuit in order to recover the college expenses. The court of appeals concluded that under *Kuhn v. Kuhn*,[70] the mother's petition for reimbursement was sufficient to establish the sum of the delinquent payments; thus, the court of appeals reversed the trial court's judgment and remanded the case.[71] The court also noted that the child's emancipation was irrelevant because "notwithstanding the inability of a custodial parent to enforce support orders by contempt after the child's emancipation, college expenses advanced by the custodial parent . . . may be recovered even after the child's emancipation."[72]

As a practical matter, to recover either the support or college expenses, or both, the custodial parent could either file an original action or file a new action under the old dissolution of marriage cause number, both of which seem to be procedurally acceptable. In any event, strict proof of the expenditures by the spouse seeking reimbursement will be required.

---

[67]425 N.E.2d at 670.

[68]427 N.E.2d 732 (Ind. Ct. App. 1981).

[69]*Id.* at 733.

[70]402 N.E.2d 989 (Ind. 1980).

[71]427 N.E.2d at 734.

[72]*Id.* The court cited IND. CODE § 31-1-11.5-12(d) (1982) as a "statutory exception for educational expenses to the general rule that a parent's support duty terminates at the time of emancipation." *Id.* ; see also Linton v. Linton, 166 Ind. App. 409, 336 N.E.2d 687 (1975).

D. Dissolution

1. Attacks on Dissolution Decrees.—In *Brokus v. Brokus*,[73] the husband appealed the granting of the wife's dissolution petition, which also served as the basis of a custody determination.[74] At the time of the marriage and until a few months prior to the filing of the dissolution petition, the husband had been in the Army. During their marriage, the parties and their children had lived in numerous states, including Indiana. The parties came to Indiana in June 1978 to live with the wife's mother while the husband sought employment. The husband eventually found a job in Ohio and moved, while the rest of the family remained in Indiana. The wife filed her dissolution petition on November 14, 1978—one month short of the six-month residency requirement of the Indiana Dissolution Act.[75] During this time, the husband was attempting to gain custody of the children through proceedings in Ohio. The Indiana trial court granted the wife's petition for dissolution, finding as fact that she had lived in Indiana since June 1978 and that the petition was filed in November 1978.[76] The court of appeals reversed the trial court's decision holding that the six-month residency requirement was jurisdictional and, therefore, the court had no authority to grant the dissolution petition.[77]

2. Distribution and Division of Property.—In *In re Marriage of Taylor*,[78] the trial court reviewed the equities of the situation and chose the date of informal separation as the specific date to use when determining the value of the parties' marital property in a dissolution case; however, the trial court was reversed on appeal. In *Taylor*, the parties separated in October 1974 and informally divided their personal assets and belongings. Each party became financially independent. During the separation, the wife remained in the house, which was owned by the parties as tenants by the entireties. The wife took over the mortgage payments, maintained the house and supported their child.

In June 1979, over four years after the parties had informally separated, the wife filed her petition for dissolution. The trial court awarded the marital residence to the wife and, using the valuation of the property as of October 1974, ordered the wife to pay her hus-

---

[73]420 N.E.2d 1242 (Ind. Ct. App. 1981). For a discussion of the custody issue, see *supra* notes 12-21 and accompanying text.

[74]*Id.* at 1244.

[75]IND. CODE § 31-1-11.5-6 (1982).

[76]420 N.E.2d at 1245.

[77]*Id.* at 1245-46.

[78]425 N.E.2d 649 (Ind. Ct. App. 1981), *vacated sub nom.*, Taylor v. Taylor, 436 N.E.2d 56 (Ind. 1982).

band $2,000 for his share of the equity in the house.[79] The husband appealed the award, claiming that the trial court had abused its discretion by using the 1974 value of the house instead of the 1979 value. Judge Shields, writing for the majority, found that there was a necessity for a date certain to be used in determining the value of marital property and reversed the trial court's decision.[80] The majority reasoned that if the trial court were allowed to decide which date should be used to value the property based on the "equities of the case," as argued by the dissent, then the statutory requirement of a "just and reasonable" division would be ignored. Relying upon the "just and reasonable" mandate of section 31-1-11.5-11(a), Judge Shields used the "date of final separation," which was the date the petition was filed, as the most reasonable date to be used in determining the property's value.[81]

Dissenting strongly, Chief Judge Buchanan stated that he would have affirmed the trial court's decision based on the "equities of the case." He stated:

> The repeated call for *just*, *proper*, and *reasonable* property divisions and the requirement that the trial court's decision in dividing property be an *informed* one convince me that in evaluating marital property, the trial court may choose any method of evaluation based on the evidence before it that best suits the equities of the case. Evaluation therefore becomes

---

[79]425 N.E.2d at 650.

[80]*Id.* Judge Shields wrote:

> In a marriage of any duration the possible equitable valuation dates are limitless. Hence, the necessity for a date certain is obvious. Meaningful settlement discussions would be virtually impossible; trials would be lengthened; fees for experts would skyrocket as they assimilate the necessary data to have an opinion on the fair market value of the numerous items of marital property on any number of dates, including, for example, the date of first separation, the date of final separation, the date of filing the petition, the date of filing the cross-petition, and the date of trial. Therefore, the statutory mandate of a just and reasonable division requires the division of marital property be based on values determined as of a date certain.

Id.

[81]425 N.E.2d at 651 (citing IND. CODE § 31-1-11.5-11(a), (b) (Supp. 1981)). Judge Shields reasoned:

> Thus, the date has significance in determining the property within the marital pot. If that date puts a lid on the pot, it is logical to simultaneously determine the value of its contents. If the value of items in the marital pot increases or decreases after the date of final separation due to the conduct of the parties, the trial court may, of course, take this into account under IC 31-1-11.5-11. Valuation of marital property on the date of final separation will also assist the parties in marshalling the evidence and appraisals of property in preparation for the final hearing date.

Id.

> an indispensable part of division. The power to evaluate can reasonably be inferred from the power to divide; indeed it is a necessary component.
>
> . . . It was neither unjust nor inequitable for the court to conclude as to that appreciation that since [the husband] suffered no pains, he should take no gains.[82]

Upon granting the wife's petition for transfer, the supreme court vacated the appellate court decision and affirmed the trial court decision.[83] Justice Hunter, writing for the court, quoted Chief Judge Buchanan's dissenting opinion with approval.[84] The supreme court concluded that the issue of which date should be used to value the property is a question for the legislature, not the courts. Therefore, because the legislature has not acted, the supreme court concluded that a trial court is not limited to a specific date to value the property. Rather, a trial court is guided only by what is "just and reasonable" under the particular circumstances of each case. In the instant case, the court found that the trial court's decision to determine the value of the property as of the date the parties informally separated was proper because, in reaching that decision, the trial court considered each spouse's contribution to the property's maintenance, and each spouse's conduct as well as each individual's economic circumstances.[85] The supreme court held that, therefore, the trial court had not abused its discretion in determining the value of the property.[86]

In practice, the trial lawyer is presented with the problem of choosing a date for valuation only "when the equities of the case" dictate that such a choice be made. In the event that the parties have been informally separated for a number of years before one party files a petition for dissolution, the appraisal values for the marital property that are submitted by each party could be vastly different. For example, one of the parties might submit all appraisals based on the date of informal separation, while the other party submits appraisals based on the date of the statutory separation, the date the petition was filed. In such a case, the attorneys might be wise to seek a pretrial conference and an early judicial determination of the "date of separation for valuation purposes," in order to avoid a morass of conflicting testimony at trial as to property value.

In another property division case, *Swinney v. Swinney*,[87] the court

---

[82]425 N.E.2d at 652 (Buchanan, C.J., dissenting).

[83]Taylor v. Taylor, 436 N.E.2d 56 (Ind. 1982), *vacating In re* Marriage of Taylor, 425 N.E.2d 649 (Ind. Ct. App. 1981).

[84]436 N.E.2d at 59.

[85]*Id.*

[86]*Id.*

[87]419 N.E.2d 996 (Ind. Ct. App. 1981).

of appeals reversed the trial court's award of substantially all the marital property to the wife, even though the parties acquired most of the property through gifts from the wife's father. The court of appeals held that the ninety-seven percent to three percent distribution ratio indicated that the trial court had excluded the gifts from the "marital pot" and thus, the distribution award was an abuse of discretion.[88]

Under the Dissolution Act, the trial court is not required to divide the marital assets in any set proportions.[89] The legislative mandate is to divide the property "in a just and reasonable manner."[90] In past decisions, various extreme proportions have been upheld.[91] *Swinney* presented the court with the difficult issue of how to make a "just and reasonable" disposition of marital property that was obtained primarily by gift or inheritance from one spouse's family.

Although the court cannot systematically exclude property received by gift or inheritance,[92] the court must consider the source of the property in determining a "just and reasonable" division.[93] If the trial court awards nearly all the property to the spouse who received the gift or the inheritance, as in *Swinney*, the judgment could be reversed on appeal, if the appellate court fails to find sufficient evidence to justify the award.

Exactly what evidence would support an award of nearly all the property to the spouse who received the gift or the inheritance appears to be unclear because the supreme court, in a three to two decision, denied transfer in *Swinney*.[94] Justice Hunter filed a dissenting opinion to the denial in which he noted the many "unique circumstances" in the case that would support the trial court's decision.

When a case is as clearly black and white as *Swinney*, logic dictates that the majority's opinion is incorrect. By following the majority's reasoning, a trial court would have to give the husband some of the gifts the wife received and give the wife some of the gifts the husband received. As Justice Hunter advocates in his dissent,[95] the trial court should have the discretion to determine what would be a "just and reasonable" disposition in cases where one spouse receives substantial property through gift or inheritance.[96]

---

[88]*Id.* at 999.

[89]IND. CODE § 31-1-11.5-11 (1982).

[90]*Id.* § 31-1-11.5-11(b).

[91]*See, e.g.*, Libunao v. Libunao, 388 N.E.2d 574 (Ind. Ct. App. 1979); *In re* Marriage of Lewis, 172 Ind. App. 463, 360 N.E.2d 855 (1977); Johnson v. Johnson, 168 Ind. App. 653, 344 N.E.2d 875 (1976).

[92]Wilson v. Wilson, 409 N.E.2d 1169 (Ind. Ct. App. 1980).

[93]Swinney v. Swinney, 426 N.E.2d 658, 659 (Ind. 1981) (Hunter, J., dissenting).

[94]426 N.E.2d 658 (Ind. 1981).

[95]*Id.* (Hunter, J., dissenting).

[96]*See* McBride v. McBride, 427 N.E.2d 1148, 1152 (Ind. Ct. App. 1981).

The court of appeals adopted a new rule in *In re Marriage of Church*[97] concerning the burden of proving the value of the marital property. The husband in *Church* appealed the trial court's division of the marital property, claiming that the court had abused its discretion by failing to place a value on certain assets before distributing them to the wife.[98]

In affirming the trial court's distribution, the court of appeals acknowledged a line of case law that supported the husband's allegation of error;[99] however, the court relied on another line of cases that upholds the distribution of unvalued property by a trial court, if the property were "not unique and [did] not require expertise for evaluation."[100] The court of appeals stated that "[t]he proper role of a court in dividing property pursuant to a dissolution is to review carefully all the evidence and then to divide the property based on a consideration of the factors listed in IC 31-1-11.5-11(b)."[101] The court reasoned, therefore, that the burden of proving the valuation of the marital property should be on the parties, not on the court. Thus, the court held that the trial court's distribution of nonvalued property was not in error because "any party who fails to introduce evidence as to the specific value of the marital property at the dissolution hearing is estopped from appealing the distribution on the ground of trial court abuse of discretion based on the absence of that evidence."[102]

Gower v. Gower[103] presented the court with a novel situation in which the adopted children of a couple intervened[104] in the dissolution action and sought a share of the marital property. The children claimed that they were entitled to part of the marital property because the social security and Veterans Administration benefits they had received from their deceased natural father had been "commingled with the marital estate and used in part for the acquisition of marital property."[105] Although the trial court found that in "fairness and equity" the children were entitled to an award, the court refused to grant one because there was no legal basis for making such an

---

[97]424 N.E.2d 1078 (Ind. Ct. App. 1981).

[98]*Id.* at 1081. The trial court had awarded the wife a car, a refrigerator, a dryer, and a stove without assigning a value to them. *Id.* at 1080.

[99]*Id.* at 1081 (citing Howland v. Howland, 166 Ind. App. 572, 337 N.E.2d 555 (1975); Hardiman v. Hardiman, 152 Ind. App. 675, 284 N.E.2d 820 (1972)).

[100]424 N.E.2d at 1082 (citing Cross v. Cross, 159 Ind. App. 592, 308 N.E.2d 717 (1974); Jackman v. Jackman, 156 Ind. App. 27, 294 N.E.2d 620 (1973)).

[101]424 N.E.2d at 1082 (citation omitted).

[102]*Id.* at 1081 (footnote omitted).

[103]427 N.E.2d 703 (Ind. Ct. App. 1981).

[104]For the proposition that third-parties may intervene in dissolution actions, see State *ex rel.* Kleffman v. Bartholomew Circuit Court, 245 Ind. 539, 200 N.E.2d 878 (1964); State *ex rel.* American Fletcher Nat'l Bank & Trust Co. v. Spencer Circuit Court, 242 Ind. 74, 175 N.E.2d 23 (1961).

[105]427 N.E.2d at 707.

award.[106] The two children joined their mother in an appeal and alleged that, in light of the court's own finding, the trial court had erred in not granting the award.

The court of appeals affirmed the trial court's decision not to make an award to the children.[107] Because the legislature has set out specific guidelines concerning the distribution of marital property for courts to follow in dissolution cases, the court refused "to add a provision to this statute which the legislature clearly chose not to include."[108] The court held that because there was neither a statutory nor a case law basis for an award of part of the marital property to the children, the trial court had not erred in refusing to grant such an award. In addition, the court noted that the wife, who had custody of the children, had received three times more property than the husband, thus the trial court's distribution of property was not an abuse of discretion, despite the trial court's finding concerning "fairness and equity."[109]

In *Hasty v. Hasty*,[110] the court of appeals reversed part of the trial court's property division order that required the husband to pay the wife eleven and one-half percent interest on the wife's award of $404,177 until the award was paid in full. The husband claimed that the trial court's rate of interest was above the current legal maximum of eight percent.[111] The court stated:

> Our holding is made in full realization that the current posture of the law encourages defendants to delay satisfaction of money judgments until the last possible moment. During the period he retains control of the judgment amount, a defendant may by investment earn thereon an amount far in excess of the statutory interest rate permitted. Remedial measures in this respect, however, lie within the sole prerogative of our General Assembly.[112]

In *In re Marriage of Bradley*,[113] the court of appeals reiterated the importance of careful drafting of dissolution property settlement

---

[106]*Id.*

[107]*Id.* at 708. For further statutory guidelines, see generally IND. CODE §§ 31-1-11.5-1 to -24 (1982).

[108]427 N.E.2d at 707-08. *See* IND. CODE § 31-1-11.5-11 (1982).

[109]427 N.E.2d at 707-08. The court of appeals also noted that there was no evidence that the children had been deprived by the family's use of their benefits, nor was there evidence that the father had tried to defraud them on their benefits.

[110]427 N.E.2d 1119 (Ind. Ct. App. 1981).

[111]*Id.* at 1120. The husband relied upon IND. CODE § 24-4.6-1-101 (1976). The statutory rate of interest is currently 12%. IND. CODE § 24-4.6-1-101 (1982).

[112]427 N.E.2d at 1120.

[113]433 N.E.2d 54 (Ind. Ct. App. 1982).

agreements. In *Bradley*, the former wife sought to have a commissioner appointed to sell the marital home that was held by the parties as tenants in common. The property settlement agreement contained a provision that the house, in which the husband lived, was to be sold when the husband remarried.[114] The wife contended that this provision had been met by the husband's cohabitation with another woman, thus requiring the sale of the house.[115] The trial court denied the wife's petition, resting its decision on the terms of the agreement.

The court of appeals affirmed the trial court's denial of the wife's petition. The court based its decision on the policy expressed by the legislature encouraging parties to reach agreements.[116] The court also noted that the parties had bargained fairly for the terms of the property settlement. Relying on Indiana contract cases, the court of appeals concluded that the courts are not at liberty to make contracts for individuals.[117] Also, the court recognized the "black-letter" rule that the intent of the parties should be determined by the language employed in the contract, unless it is ambiguous.[118] The court held that the terms of the agreement were not ambiguous and the intent of the parties was clear from the contract.[119] It should be noted that pursuant to section 10 of the Dissolution Act, the parties could well have made "cohabitation" one of the "events," which would then require a sale of the real estate.

It should be noted that in determining the marital pot, the application of Indiana Code section 31-1-11.5-2(d),[120] which provides that "[t]he term 'property' means all the assets of either party or both parties, including a present right to withdraw pension or retirement benefits," now fixed by the date of filing as the date of separation, can produce unusual results. For example, suppose the parties had been married to each other three different times.[121] In both divorce

---

[114]*Id.* at 54-55. The pertinent clause in the agreement provides:

a. At the end of ten (10) years from the date of the dissolution of this marriage; or

b. Upon the husband's remarriage; or

c. In the event that the wife becomes disabled and unable to work for a continuous period of 180 days due to her disability.

Id.

[115]*Id.* at 55.

[116]433 N.E.2d at 55.

[117]*Id.* (citing Automobile Underwriters v. Camp, 217 Ind. 328, 27 N.E.2d 370 (1940); Workman v. Douglas, 419 N.E.2d 1340 (Ind. Ct. App. 1981)).

[118]433 N.E.2d at 55 (citing Albert Johann & Sons Co. v. Echols, 143 Ind. App. 122, 238 N.E.2d 685 (1968)).

[119]433 N.E.2d at 55 ("In the present case, the terms of the agreement are clearly stated. None of the conditions decided upon have been met. Therefore, there is no right to have the property sold.").

[120]IND. CODE § 31-1-11.5-2(d) (1982).

[121]This fact situation was an actual case handled by this author.

actions, the husband was awarded his professional practice, an operating bar, and a tract of real estate. In the second divorce, however, the real estate was subject to a substantial lien in the wife's favor. The question now arises as to whether, by virtue of the third marriage of the parties and the operation of section 2(d), there is a merger of the wife's lien with the husband's interest in the real estate. It seems obvious that further legislation is needed to clear up the definition of the term "property" to address these kinds of problems.

E. Paternity

The United States Supreme Court in *Mills v. Habluetzel*[122] held that a Texas statute that established a one-year statute of limitations on paternity suits was unconstitutional.[123] In a paternity suit that was brought by the mother and the welfare department when the child was nineteen months old, the alleged father used the Texas statute of limitations as a defense. Although recognizing Texas' interest in preventing fraudulent or stale claims, the Court concluded that the statute violated the equal protection clause of the fourteenth amendment.[124] The Court applied a two-pronged analysis to invalidate the Texas statute.[125] The Court stated:

> First, the period for obtaining support granted by Texas to illegitimate children must be sufficiently long in duration to present reasonable opportunity for those with an interest in such children to assert claims on their behalf. Second, any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims.[126]

The Court held that the one-year limitation failed the applicable test.[127] The one-year limitation allowed insufficient opportunity to assert claims in light of the mother's financial difficulties surrounding the birth of a child out-of-wedlock, the mother's likely continuing affection for the child's father, the mother's desire to avoid disapproval of the family and the community, and the mother's emotional strain and confusion.[128] All these factors would likely result in delaying the

---

[122]102 S. Ct. 1549 (1982). For Indiana's position, see *In re* M.D.H., 437 N.E.2d 119 (Ind. Ct. App. 1982).

[123]102 S. Ct. at 1556. TEXAS FAM. CODE ANN. § 13.01 (Vernon Supp. 1982) provides: "A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred."

[124]102 S. Ct. at 1556.

[125]*Id.* at 1555.

[126]*Id.*

[127]*Id.*

[128]*Id.*

assertion of a paternity action. The Court also held that the one-year limitation was not substantially related to Texas' asserted interests. The Court stated that it could "conceive of no evidence essential to paternity suits that invariably will be lost in only one year, nor is it evident that the passage of twelve months will appreciably increase the likelihood of fraudulent claims."[129]

A child born during a marriage is presumed to be legitimate.[130] "[This] presumption is one of the strongest known to the law and may only be rebutted by direct, clear, and convincing evidence."[131] In *H.W.K. v. M.A.G.*,[132] H.W.K., the alleged father, unsuccessfully relied on the presumption of legitimacy as a defense to a paternity action brought by the child's mother. In *H.W.K.*, the mother was married to another man at the time the child was conceived, but was estranged from him and living with H.W.K. Additionally, there was testimony that H.W.K. had admitted being the child's father. The trial court held that H.W.K. was the father.[133] H.W.K. appealed, arguing that the evidence presented by the mother was insufficient to rebut the presumption.

The court of appeals affirmed the trial court's determination that H.W.K. was the father of the child, despite Indiana case law, which has held that statements and admissions of the parties, alone, are insufficient to rebut the presumption of legitimacy.[134] The court held that this principle from case law was "factually limited to situations where there is evidence the husband had access to the mother during the period of conception."[135] In this case, the court of appeals found that the mother's evidence was sufficient to show that the husband had not had access to her during the crucial period of time.[136] Because the type of evidence presented avoided the application of the principle that the parties' statements alone are insufficient evidence, the

---

[129]*Id.* (footnote omitted). Justice O'Connor found a countervailing state interest in keeping the mothers and children off the welfare rolls. *Id.* at 1556-57 (O'Connor, J., concurring). Justice O'Connor also found that there was nothing "special about the first year following birth that compels the decision in this case." *Id.* at 1558. Justice O'Connor did not "read the Court's decision as prejudging the constitutionality of longer periods of limitation . . . . " *Id.*

[130]H.W.K v. M.A.G., 426 N.E.2d 129, 131 (Ind. Ct. App. 1981) (citing R.D.S. v. S.L.S., 402 N.E.2d 30 (Ind. Ct. App. 1980)). *See also* Buchanan v. Buchanan, 256 Ind. 119, 123, 267 N.E.2d 155, 157 (1971); Hooley v. Hooley, 141 Ind. App. 101, 226 N.E.2d 344 (1967); Whitman v. Whitman, 140 Ind. App. 289, 215 N.E.2d 689 (1966).

[131]426 N.E.2d at 131.

[132]426 N.E.2d 129 (Ind. Ct. App. 1981).

[133]*Id.* at 131.

[134]*See* L.F.R. v. R.A.R., 269 Ind. 97, 378 N.E.2d 855 (1978); Buchanan v. Buchanan, 256 Ind. 119, 267 N.E.2d 155 (1971).

[135]426 N.E.2d at 132.

[136]*Id.* at 132-33.

court held that the mother had met her burden of proof.[137]

In another case, *In re G.L.A.*,[138] the court of appeals reversed the trial court's order that three children involved in a paternity action change their surnames and take their father's surname. The mother appealed the order of the trial court, alleging that there was insufficient evidence in the record on the issue whether a change of the children's surname was in their best interests.[139] The court of appeals stated that the proper standard is whether the change is in the best interest of the child.[140] In addition, the majority opinion reasoned that because the child of an unwed mother bears the mother's name at birth, any party wishing to change the name has the burden of persuasion on the issue.[141] Thus, the court of appeals found that the trial court "indulged in an erroneous presumption that, absent extreme circumstances, a child should share the surname of its biological father as long as the father is contributing to its support."[142] Because the father had introduced evidence relevant only to issues of establishing paternity, custody, support and visitation, but no evidence relevant to the issue of changing the children's names, the court of appeals reversed the trial court's decision.

The dissenting judge found that the father's agreement to support the children and to provide medical insurance, and his "desire" for the children to have his surname were sufficient evidence to uphold the trial court's decision.[143]

---

[137]*Id.* at 132.

[138]430 N.E.2d 433 (Ind. Ct. App. 1982).

[139]*Id.* at 433.

[140]*Id.* The majority gave the following examples of evidence that would be relevant to the issue of the child's best interest:

> [E]vidence of the surname by which the child is known by "family" and the community; the convenience, if any, of retaining or assuming the surname of its custodial parent; the existence of property owned by the child under a particular surname, such as a U.S. savings bond; the identification of the child by a particular surname with private or public entities, such as insurance carriers and Social Security Administration; the degree of confusion to the child engendered by a change in surname; and, if a child is of sufficient maturity, the child's desire as to its surname.

Id. at 434 n.3.

[141]430 N.E.2d at 434.

[142]*Id.*

[143]*Id.* at 435 (Buchanan, C.J., dissenting). "Given such commendable expressions of paternalism on the father's part, the trial court's action is understandable—and supportable." *Id.*