VI. Domestic Relations

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Survey-period developments in the law of domestic relations again spanned the familial spectrum. Among the case precedent and statutory developments examined herein, particular attention is directed to the analysis contained in Section E concerning the General Assembly's enactment of custodial and rehabilitative maintenance and the discussion included in Section F regarding the enforceability of oral property settlements. Those developments bear everyday if not profound consequences for the family law practitioner.

A. Adoption

1. The Adoptive Rights of Married Persons and Grandparents.— An unusual juxtaposition of factual circumstances in *Browder v. Harmeyer*[1] necessitated survey-period review of the constitutional rights of both married persons and grandparents to adopt. The natural parents of four-year-old Nathanial Browder divorced in 1980. Following the termination of their parental rights one year later, Nathanial was placed with paternal grandmother Mary Browder. There he resided for a period of five months, when both the paternal grandparents, Browder, and maternal grandparents, Harmeyer, filed petitions to adopt Nathanial. Prior to a consolidated hearing on the petitions, Mary Browder's husband, who had separated from her in 1980, withdrew his name from their petition to adopt. Based on Section 1 of the Adoption Act,[2] which prohibits adoption by a married person whose spouse does not join the petition, Browder's petition was dismissed. Following a hearing on the Harmeyers' petition, they were granted adoption rights. Browder challenged both rulings on appeal.

Browder argued the dismissal of her petition violated equal protection guarantees. Inasmuch as Section 1 permits an unmarried person to adopt as a single parent,[3] she maintained that the denial of that same privilege to her based on her married-but-separated status constituted a denial of her equal protection rights and, in turn, impaired her fundamental right

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[1]453 N.E.2d 301 (Ind. Ct. App. 1983).

[2]Ind. Code § 31-3-1-1 (1982).

[3]*Id.* The statute reads in pertinent part: "*Any* resident of this state desirous of adopting any person under eighteen (18) years of age . . . may . . . file a petition with the clerk of the court having jurisdiction . . . ." (emphasis added).

to marry. Following its extensive analysis of equal protection considerations,[4] the court of appeals applied the intermediate review standard of *Zablocki v. Redhail*[5] and concluded the state's interest in placing children in homes free of dissension justified the requirement that spouses join in petitions to adopt. For the majority, Judge Miller also concluded the applicability of the requirement should be unaffected by the fact Browder's husband was estranged: "Although the chances of reconciliation might be remote in this case, there has been no divorce proceeding either, which proceeding in and of itself can cause problems to which an adoptive child, already the victim of one marital misadventure, should not be exposed again."[6] Accordingly, the best interests of the minor child vindicate the statutory exception.

The court also rejected Browder's due process argument predicated on her in loco parentis relationship to Nathanial. She maintained the removal of him from her custody without a finding of unfitness violated her fundamental right to family integrity. With due respect for the rights of grandparents, the court refused to apply those strict standards required to justify the removal of a child from the care and custody of natural parents.[7] Carefully observing that Browder had received notice of the Harmeyers' petition and the evidentiary hearing thereon,[8] the court concluded the evidence supported the trial court's conclusion that Nathanial's best interests would be served via his adoption by the maternal grandparents.[9]

2. Notice: Due Process Rights of Putative Fathers.—The due process rights of putative fathers to notice of pending adoption proceedings were addressed in *Lehr v. Robertson*,[10] where the United States Supreme Court expanded the principle that a mere biological relationship with a child born out of wedlock is insufficient to warrant constitutional protection. At issue was New York's statutory scheme requiring that notice of adoption proceedings be supplied to putative fathers of various cir-

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[4]453 N.E.2d at 305-06.

[5]434 U.S. 374 (1978). *See also* Indiana High School Athletic Ass'n v. Raike, 164 Ind. App. 169, 329 N.E.2d 66 (1975).

[6]453 N.E.2d at 307 (citations omitted).

[7]A presumption exists that the best interests of the minor child are served if he remains in the care and custody of a natural parent. That presumption may be rebutted by evidence establishing either: 1) the unfitness of the parent; 2) prolonged acquiescence of the parenting role; or 3) the parent's voluntary relinquishment of his responsibilities to the extent the affections of the child and third party are so interwoven that severance would seriously endanger the happinesss of the child. Kissinger v. Shoemaker, 425 N.E.2d 208 (Ind. Ct. App. 1981). A petition to terminate parental rights, of course, requires proof of a "clear and convincing" nature. Santosky v. Kramer, 455 U.S. 745 (1982); *see also*, Act of Feb. 29, 1984, Pub. L. No. 131-1984, 1984 Ind. Acts 1176 (codified at IND. CODE § 31-6-7-13 (Supp. 1984)).

[8]453 N.E.2d at 309.

[9]*Id.* at 309-10.

[10]103 S. Ct. 2985 (1983).

cumstance,[11] including those whose names were filed in the state-maintained "putative father registry."[12] Conceding he satisfied none of the statutory criteria entitling him to notice, putative father Lehr asserted that "special circumstances gave him a constitutional right to notice and a hearing before Jessica [his alleged daughter] was adopted."[13] Those special circumstances included his filing of a petition to establish paternity of Jessica in the Westchester County Court one month after the natural mother and her husband had initiated adoption proceedings in Ulster County Court. Procedural confusion culminated in the granting of the adoption petition without a hearing.[14] Lehr's challenges to the Ulster court's decision were rejected by New York's appellate courts,[15] and the United States Supreme Court accepted jurisdiction to address concomitant contentions: 1) whether due process required Lehr be given notice and opportunity to be heard before he was deprived of his potential relationship with Jessica, and 2) whether the gender-based classifications of New York's adoption procedure violated the equal protection clause. On similar bases, both arguments were rejected.

Drawing upon its prior decisions concerning illegitimate children and the rights of biological fathers,[16] the Court focused its constitutional analysis on the "clear distinction between a mere biological relationship and an actual relationship of parental responsibility."[17] Only where the putative father acts on the biological link and assumes some significant role in the daily responsibilities of the child's upbringing is constitutional protection accorded the putative father's interest in the relationship. Consequently, the Court reduced Lehr's due process challenge to the question whether New York's statutory scheme "adequately protected

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[11] *Id.* at 2988. The classes of fathers entitled to notice included: 1) those whose paternity had been formally established by court order; 2) those identified as the father on birth certificates; 3) those who had openly resided with the natural mother and child; 4) those identified as the father in a sworn statement of the natural mother; and 5) those married to the child's mother prior to the child's attainment of six months. *Id.* at n.5 (quoting N.Y. Dom. Rel. Law. § 111-a(2) (McKinney Supp. 1983-84)).

[12] 103 S. Ct. at 2987 n.4 (quoting N.Y. Soc. Serv. Law § 372-c (McKinney 1983)). Filing a notice of intent to claim paternity could be accomplished by simply mailing a postcard containing the requisite information to the registry. 103 S. Ct. at 2995.

[13] 103 S. Ct. at 2988.

[14] *Id.* at 2988-89. Not withstanding the Ulster court's awareness of the paternity proceedings pending in Westchester County, and its order staying those proceedings pending ruling on a motion to consolidate the actions, it inexplicably granted the adoption petition without a hearing. Not surprisingly, these procedural circumstances figured significantly in the dissenting Justices' analysis. *Id.* at 2997 (White, Marshall, and Blackmun, JJ., dissenting). The majority deemed the issue outside federal jurisdiction. *Id.* at 2990 n.10.

[15] *See In re* the Adoption of Jessica XX, 54 N.Y.2d 417, 430 N.E.2d 896, 446 N.Y.S.2d 20 (1981), *aff'g* 77 A.D.2d 381, 434 N.Y.S.2d 772 (1980).

[16] Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972).

[17] 103 S. Ct. at 2992.

his opportunity to form such a relationship."[18] Observing that the adoption statutes provided for notice to various categories of putative fathers who likely had assumed some degree of parental responsibility, the Court concluded that Lehr's failure to avail himself of the opportunity to qualify himself for notice by filing with the putative father registry ultimately defeated his claim to due process protection.[19] Similarly, his equal protection argument was rejected on the basis of his failure to establish any relationship with Jessica prior to the initiation of the adoption hearings. The distinction between Lehr's limited interest in the child and the natural mother's custodial role neutered his claim of gender-based discrimination.[20]

B. Child Custody

1. Jurisdiction: The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act.—The jurisdiction labyrinth that is the Uniform Child Custody Jurisdiction Act (UCCJA)[21] should be rendered less intimidating, if not comprehensible, from study of the survey-period decision in *Funk v. Macaulay*.[22] Therein, the court of appeals clarified the concept of continuing and exclusive jurisdiction contained in the UCCJA and examined the jurisdictional implications of the Parental Kidnapping Prevention Act.[23]

Funk and Macaulay were divorced in Tippecanoe Superior Court in 1971. Macaulay was awarded custody of the parties' minor children and, one year later, moved to California on a permanent basis. Ten years of legal skirmishing in the Tippecanoe Superior Court led to Funk filing a petition to modify custody in that forum; he subsequently dismissed that petition and refiled it in California. Macaulay responded by filing a contempt action in the Tippecanoe Superior Court wherein she alleged that Funk, who continued to reside in Indiana, telephoned the children daily and encouraged the children to abuse their mother and engage in

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[18] *Id.* at 2994.

[19] *Id.* at 2994-95. The implications *Lehr* holds for Indiana's notice requirements are unclear. Indiana's statutory adoption scheme does not provide for a putative father registry. Subsection e of Indiana Code section 31-3-1-6 (1982) does require that notice be provided to putative fathers. On the other hand, subsection h eliminates the need to give notice to persons who, pursuant to subsection g(3), have relinquished their right by virtue of abandonment, nonsupport, or failure to communicate significantly with the child. *Lehr* provides constitutional support for an interpretation of these provisions which would obviate the notice requirement for a putative father guilty of abandonment. Still, abandonment may be a factual question not properly resolved without a putative father's opportunity to be heard; for example, in cases where the birth of the child was not made known to the putative father, estoppel principles are of dubious validity.

[20] 103 S. Ct. at 2996.

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

[22] 457 N.E.2d 223 (Ind. Ct. App. 1983).

[23] 28 U.S.C. § 1738A (1982).

acts of truancy. The trial court denied Funk's motion to dismiss based on lack of jurisdiction and found him in contempt.

The court on appeal first found that Macaulay's contempt petition fell within the ambit of the UCCJA in that via her contempt action, Macaulay sought modification of Funk's visitation rights.[24] The court then turned to the question whether Indiana or California was the proper forum to adjudicate the contempt petition. Recognizing that California was the "home state" of the minor children and Macaulay pursuant to subsection 3(a)(1) of the UCCJA,[25] the court also determined that Indiana retained "significant connections" with Funk and the children per subsection 3(a)(2)[26] of the Act's jurisdictional standards. Those "connections" included Funk's continued residency in Indiana, the semiannual visits of the children in Indiana, and the fact that all court records pertaining to the parties' prolonged legal battle concerning the children were located in Indiana. The court concluded that these circumstances bestowed subject matter jurisdiction on Indiana. The court relied heavily on the principle that it is the purpose of the UCCJA to provide that exclusive and continuing jurisdiction remain in the state of the initial custody decree.[27]

Given its determination that the Tippecanoe Superior Court retained subject matter jurisdiction, the court methodically proceeded to the next hurdle of the UCCJA: whether the trial court's decision to exercise that jurisdiction was justified. Observing that the UCCJA is designed to eliminate forum shopping, the court concluded that purpose would have

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[24]457 N.E.2d at 225. The Uniform Child Custody Jurisdiction Act (UCCJA) sets forth which state has subject matter jurisdiction to make a "child custody determination." IND. CODE § 31-1-11.6-3 (1982). A "child custody determination" is defined in Indiana Code section 31-1-11.6-2 (1982) as any court determination involving custody or visitation rights; excluded therefrom are matters of child support and monetary obligations. In the latter respect, see the survey-period decision in Lee v. DeSheney, 457 N.E.2d 604 (Ind. Ct. App. 1983), where it was held that an order entered in the State of Washington for attorney fees, costs of litgation, and travel expenses was outside the purview of the UCCJA.

[25]The "home state" jurisdictional standard applied to California because Macaulay and the children resided there for more than six months prior to the filing of the petition. *See* IND. CODE § 31-1-11.6-3(a)(1) (1982).

[26]Indiana Code section 31-1-11.6-3(a)(2) (1982) provides a corollary basis for subject matter jurisdiction where:

> it is in the best interest of the child that a court of this state assume jurisdiction because (A) the child and his parents, or the child and at least one (1) contestant, have a significant connection with this state, and (B) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships . . . .

Id. See generally In re Marriage of Hudson, 434 N.E.2d 107 (Ind. Ct. App. 1982).

[27]The court's authority for that proposition was Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L.Q. 214 (1981). Professor Bedenheimer was the reporter for the commission which drafted the UCCJA. 457 N.E.2d at 226.

been contravened had the trial court failed to exercise jurisdiction.[28] The court also noted that the best hope for ending the turmoil in the children's lives was to resolve the dispute in Indiana, rather than reopening the litigation in a new forum.[29]

Finally, the court of appeals buttressed its application of the UCCJA by reference to the Parental Kidnapping Prevention Act (PKPA)[30] and its principles of continuing jurisdiction and full faith and credit. The court found that the two-step test for jurisdiction defined in the PKPA had been satisfied; accordingly, other jurisdictions were required to afford the Indiana decision full faith and credit.[31] This attention to the PKPA and the methodical approach[32] utilized by Chief Judge Buchanan render *Funk* indispensable to intelligent UCCJA application.

2. Procedural Aspects of Custody Modifications.—Two survey-period decisions yielded numerous developments in the law of child custody modification procedure. Due process and default-type custody modifications were the focus of that precedent.

Provisions of the Soldiers' and Sailors' Civil Relief Act of 1940[33] were at issue in *Kline v. Kline*.[34] As noncustodial parent, the natural mother filed an emergency petition to modify custody on December 22, 1981, and a hearing date of January 20, 1982, was set. The custodial parent filed a motion for a continuance based on the fact that his military assignment in Okinawa precluded his attendance at the hearing. The motion was granted and, ultimately, hearing on the emergency petition was rescheduled for March 19, 1982. On that date, the father, by counsel, again moved for a continuance; in support thereof, an affidavit from the father's marine commander was submitted which indicated the absence of Sergeant Kline "'at this time would adversely

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[28]457 N.E.2d at 228.

[29]*Id.*

[30]28 U.S.C. § 1738A (1982).

[31]457 N.E.2d at 229.

[32]One commentator has reduced the *Funk* analysis to the following general methodology:

> [a]Where in Indiana was the custody determination sought to be modified made?
> [b]Then, does that court still have (and want) jurisdiction of the subject matter, case and person under Indiana law?
> [c]Then, does that court still have (and want) jurisdiction under the UCCJA?
> [d]Then, has the child or some contestant remained a resident of Indiana continuously since the determination?
> [e]If the last three questions are answered "yes", the court which made the original determination still has jurisdiction.

The Honorable Robert L. Justice (Cass County Circuit Court), Indiana Jurisdiction Under the Uniform Child Custody Jurisdiction Act, Part II (1984), ICLEF, "Child Custody in Indiana" § 8, pp. 3-4 (1984). Judge Justice indicated that if the last three questions are answered affirmatively as to another jurisdiction, Indiana lacks subject matter jurisdiction.

[33]50 U.S.C. app. §§ 501-91 (1982).

[34]455 N.E.2d 407 (Ind. Ct. App. 1983).

(sic) effect (sic) the capability of this team to accomplish its mission.'"[35] Counsel indicated his client would not be eligible for leave from Okinawa until late 1982. The trial court denied the motion for a continuance, proceeded to hearing, and granted the petition to change custody.

The court of appeals found the trial court had abused its discretion in failing to grant the father's second motion for a continuance. Relying on provisions of the Soldiers' and Sailors' Relief Act,[36] the court determined that the father's absence at the hearing was the direct result of a "military order based upon a legitimate military interest"[37] and that proceeding without his presence was necessarily prejudicial to his interests. The court did not address the fact that the husband's second motion for a continuance in effect sought an additional six-month delay in the disposition of an *emergency* petition to modify custody. It is posited that circumstances of a compelling and immediate nature might arise wherein the interests of minor children should also be weighed in the implementation of the Act.[38]

A custody modification granted in the absence of a parent was also the subject of *In re Marriage of Henderson*.[39] There, the court of appeals found the custodial parent had been deprived of her due process right to notice of a hearing to be held on the pending petition to modify custody; in short, no notice of a hearing date was provided to the wife because the trial court failed to set or conduct a hearing on the petition. The elemental nature of that omission belies the complexity of the procedural circumstances present in *Henderson*. The case gave rise to a virtual primer on the mechanical aspects of modification procedure. Included therein was a recitation of the trial court's procedural responsibilities once a petition to modify is filed: "(1) setting the cause for hearing; (2) giving appropriate notice to the parties of the hearing date; and (3) conducting a full hearing on the evidence as to change of custody."[40] The latter task was particularly emphasized by the appellate court which held that a modification of child custody without a hearing and submission of evidence is never proper, even where one party has failed to appear after proper notice.[41] Recognizing a petition to modify child custody as a matter of grave consequence to all interested parties,[42]

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[35]*Id.* at 409 (quoting the affidavit of Kline's Team Commander).

[36]50 U.S.C. app. § 521 (1982).

[37]455 N.E.2d at 410.

[38]*Kline* is consistent with authority rendered in other jurisdictions, however. *See, e.g.*, Coburn v. Coburn, 412 So. 2d 947 (Fla. Dist. Ct. App. 1982); Lackey v. Lackey, 222 Va. 49, 278 S.E.2d 811 (1981).

[39]453 N.E.2d 310 (Ind. Ct. App. 1983).

[40]*Id.* at 313 (citations omitted).

[41]*Id.* at 315.

[42]*Id.* at 316. Relying on Duckworth v. Duckworth, 203 Ind. 276, 179 N.E. 773 (1932), the court of appeals found three interests are at stake in matters involving the custody of children: 1) the child's interests; 2) the parents' interests; and 3) the state's

the court reasoned that its effective disposition necessitated evidence to establish that the proposed modification in fact would serve the best interests of the child. Albeit the appropriate and natural progression of existing case precedent, the *Henderson* evidentiary requirement is technically dictum, given the court of appeals' determination that proper notice had not been provided to the absent party.[43]

3. Race as a Factor in Custody Determinations.—The rare occasion of United States Supreme Court review of a state court's custody determination occurred in *Palmore v. Sidoti*,[44] where certiorari was granted to address the role of racial classifications in questions of child custody of a minor child. In *Palmore*, the father sought transfer of the child because the mother had married a person of another race. Although the trial court acknowledged that the mother and her new spouse were otherwise suitable persons to care for the child, it ordered the change in custody because of "peer pressures" and "social stigmatization" which it concluded the child would inevitably endure as a result of the interracial marriage.[45] Writing for a unanimous Supreme Court, Chief Justice Burger recognized the continued existence of racial and ethnic prejudices, but unequivocally rejected the notion that such private biases should be sanctioned in law:

> The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.
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> . . .
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> Whatever problems racially-mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917. The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.[46]

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interests. 453 N.E.2d at 316 n.6. The state's interest was characterized in the survey-period decision of Palmore v. Sidoti, 104 S. Ct. 1879 (1984), as "a duty of the highest order to protect the interests of minor children." *Id.* at 1882.

[43]The *Henderson* court expressly recognized its analysis as dictum, but proceeded to address the evidentiary issue as "one which has not been directly addressed in this jurisdiction." 453 N.E.2d at 315. Other authority has established, however, that when the best interests of minor children are involved, a factual basis for the court's order must be established, even though it be the product of the parties' stipulation. *See, e.g.*, Stevenson v. Stevenson, 173 Ind. App. 495, 364 N.E.2d 161 (1977) (oral agreement for custody); Delong v. Delong, 161 Ind. App. 275, 315 N.E.2d 412 (1974) (child support); IND. CODE § 31-1-11.5-21(g) (Supp. 1984) (joint custody).

[44]104 S. Ct. 1879 (1984).

[45]*Id.* at 1881.

[46]*Id.* at 1882 (footnote omitted).

On equal protection grounds, the trial court's change of custody was reversed.[47]

C. Child Support

1. Emancipation.—The survey-period brought statutory perspective to the fact-sensitive question of what circumstances result in the emancipation of a minor child and, in turn, trigger cessation of the duty of support. Practitioners charged with the uncertain task of advising clients in this troublesome area will find relief in the 1984 amendments to section 12,[48] wherein the General Assembly codified existing case precedent, defined nonexclusive criteria of emancipation, and gave legal effect to the ameliorative concept of "partial emancipation."

The statutory amendments generally embody the essence of emancipation: via change in the child's socioeconomic circumstances, a new relationship is created between parent and child which relieves the former of the legal obligation of support.[49] Consistent therewith, the legislature embraced precedent that marriage and military service are emancipating events as a matter of law.[50] A child's attainment of twenty-one years remains unchanged as the legislature's de jure standard of emancipation.[51] Significantly, however, a de facto basis of emancipation was established for children eighteen years or older. Those conditions are that "the child: (A) is at least eighteen (18) years old; (B) has not attended a secondary or postsecondary school for the prior four (4) months and is not enrolled in such a school; and (C) is or is capable of supporting himself through employment . . . ."[52] The objective nature of subsections A and B suggests their application will be accompanied by little factual or legal dispute. Subsection C will be the subject of both, however, for the legislature failed to address the distinction between capability of employment and its availability. Obviously, while the unskilled eighteen-year-old high school graduate may be both physically and mentally capable of and willing to assume employment, his self-supportive abilities

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[47]*Id.* at 1883. Other jurisdictions addressed the *Palmore* issue but reached differing results. *See* Annot., 10 A.L.R. 4TH 796 (1981). The role of racial and ethnic heritage has been raised but not reached in this jurisdiction. *See In re* Marriage of Davis, 441 N.E.2d 719, 723 (Ind. Ct. App. 1982).

[48]Act of Feb. 29, 1984, Pub. L. No. 151-1984, § 1, 1984 Ind. Acts 1297, 1297-98 (codified at IND. CODE § 31-1-11.5-12(d), (e) (Supp. 1984)).

[49]*See, e.g.*, Green v. Green, 447 N.E.2d 605, 609 (Ind. Ct. App. 1983), *transfer denied*, June 21, 1983.

[50]IND. CODE § 31-1-11.5-12(e)(1), (2) (Supp. 1984). The case law which preceded the legislation is Green v. Green, 447 N.E.2d 605 (Ind. Ct. App. 1983), *transfer denied*, June 21, 1983 (marriage), and Corbridge v. Corbridge, 230 Ind. 201, 102 N.E.2d 764 (1952) (military service).

[51]IND. CODE § 31-1-11.5-12(d) (Supp. 1984).

[52]IND. CODE § 31-1-11.5-12(d)(3) (Supp. 1984).

remain dependent upon the existence of entry-level job opportunities. In that respect, a literal application of the phrase "is capable of supporting himself through employment" would defeat the intent of the 1984 amendment. The vast majority of eighteen-year-olds not enrolled in higher education are physically and mentally "capable" of supporting themselves; significantly, however, it is age twenty-one which the legislature retained as the standard for determining that *as a matter of law* a child is or should be self-supporting.

This analysis of the legislature's intent is further buttressed by its recognition of "partial emancipation," a concept likely to play a significant role in the law of child support. If a trial court finds "the conditions set forth in clauses (A) through (C) are met but that the child is only partially supporting himself or capable of only partially supporting himself, the court may order that support be modified instead of terminated."[53] Inclusion of this proviso in section 12 reflects a welcome acknowledgment of the fact that emancipation is neither automatic nor immediate, that socioeconomic independence normally arrives in halves, and that part-time employment and minimum wages often bridge the gap between minority and majority status.[54] The law's recognition of this human experience and its concomitant pro rata reduction of support will perpetuate confidence in the justness of the law, a matter long-complicated by the popular lay myth that age eighteen is and always has been the de jure standard of emancipation in Indiana.[55]

Last, the statutory amendments to section 12 include the provision that emancipation occurs if the child "is not in the care or control of either of his parents."[56] Again, a literal application of the statutory language should be approached with caution. "Care or control" likely does not refer solely to physical custody and caretaking, but also embraces economic independence of the child. Any other interpretation would ignore well-grounded law that a parent is liable for the costs of necessities provided a child by a third party.[57]

2. Support Guidelines, Schedules, and Automatic Annual Adjustments.—A trial court's usage of support guidelines and its automatic annual adjustment of support orders based on those guidelines were endorsed as "laudable judicial advances" in *Herron v. Herron*.[58] On appeal, the wife had challenged the propriety of a Hendricks Circuit

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[53]*Id.*

[54]An enlightening look at the peculiar historical origins of the concept of emancipation is contained in H. CLARK, THE LAW OF DOMESTIC RELATIONS § 8.3 at 240 (1968).

[55]It is the author's personal experience that pro se respondents routinely resist support enforcement actions on the basis that the minor child has attained the age of eighteen. *See also* Hayden v. Hite, 437 N.E.2d 133 (Ind. Ct. App. 1982).

[56]IND. CODE § 31-1-11.5-12(e)(3) (Supp. 1984).

[57]Wagoner v. Joe Mater & Assocs., 461 N.E.2d 706 (Ind. Ct. App. 1984); *see generally* Scott County School Dist. 1 v. Asher, 263 Ind. 47, 324 N.E.2d 496 (1975).

[58]457 N.E.2d 564, 571 (Ind. Ct. App. 1984).

Court decree fixing support, obligating each parent to submit annual written disclosures of income to the court, and ordering that an annual review and adjustment of the support obligation would occur as of December 31 of each year. The wife asserted that the court's procedure violated the letter and spirit of section 17[59] in that it permitted modification of the support order without a hearing or proof of a change of circumstances so substantial and continuing as to render the existing order unreasonable. A divided court of appeals rejected the wife's contentions.

The *Herron* majority focused on *Branstad v. Branstad*[60] and considerations of judicial economy to support its conclusions. In *Branstad*, a support order containing an "escalator clause" provision requiring annual adjustments based on the cost of living index was upheld as consistent with public policy and the purposes of the Dissolution of Marriage Act.[61] Reiterating the *Branstad* analysis, the majority noted that support orders with built-in flexibility serve the best interests of the child by maintaining the purchasing power of the original support order.[62] Likewise, the *Herron* majority amplified the *Branstad* court's invocation of judicial economy concerns, indulging in a discourse on the role support guidelines play in reducing the "ever-increasing crust of litigation"[63] plaguing the judicial system. Noting that the support guidelines at issue were locally-researched and tailored to the court's socioeconomic environs, the majority concluded that there were no reasonable objections to court orders incorporating such guidelines as the measure of child support in dissolution decrees.[64]

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[59]Indiana Code section 31-1-11.5-17(a) (Supp. 1984) reads in pertinent part: "Provisions of an order with respect to child support . . . may be modified or revoked. Such modification shall be made only upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable."

[60]400 N.E.2d 167 (Ind. Ct. App. 1980).

[61]For the unanimous *Branstad* court, Judge Ratliff explained the policy considerations:

> In summary, we approve the court's order prescribing an adjustment in the amount of child support based upon changes in the Consumer Price Index because the provision (1) gives due regard to the actual needs of the child, (2) uses readily obtainable objective information, (3) requires only a simple calculation, (4) results in judicial economy, (5) reduces expenses for attorney fees, and (6) in no way infringes upon the rights of either the custodial parent or the non-custodial parent to petition the court for modification of the decree . . . .

Id. at 171 (footnote omitted). In Howard v. Reeck, 439 N.E.2d 727 (Ind. Ct. App. 1982), the inclusion of escalator clauses was entrusted to the trial court's discretion.

[62]457 N.E.2d at 570.

[63]Support guidelines no doubt serve that purpose insofar as provisional orders and final decrees are concerned. Judge Young's dissent properly challenges the role of suppport guidelines in postdissolution support actions, however. *See infra* note 65 and accompanying text.

[64]457 N.E.2d at 571.

Judge Young dissented,[65] raising a reasoned challenge to the majority's conclusion that the automatic annual adjustment based on a support guideline necessarily results in judicial economy. He observed the procedure required the trial court to annually monitor and review all of its existing support orders, a time-consuming administrative task not statutorily mandated. Additionally, he questioned whether the annual financial statements filed by ex-spouses might result in repeated litigation where the accuracy of those reports is challenged. Finally, he found the Hendricks Circuit Court's procedure violated the evidentiary standard set out in section 17.

It should be noted that in *Herron*, the wife challenged the trial court's procedure *prospectively*.[66] For that reason, the debate will and must continue. In resolving unsettled issues, two matters must be recognized. First, a support "guideline" which is utilized without a hearing to modify a support order is in fact a "mandatory schedule."[67] Second, there is a distinct difference between an annual adjustment based on the cost of living index, as in *Branstad*, and annual review which, as in *Herron*, also factors in the respective incomes of the parties; the former generally results in a modest adjustment, while the latter may effect a dramatic redistribution of the support obligations of parents.[68] Within this framework and in the context of a post adjustment challenge to the administrative approach applied by the Hendricks Circuit Court, its procedure awaits further assessment against the strictures of Section 17.[69]

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[65]*Id.*

[66]Both the majority and dissenting opinions suffer from the lack of a factual context in which to assess fully the effects of the Hendricks Circuit Court's procedure. In that respect, *Herron* has an advisory quality which weighs against its value as precedent. Whether the issue was ripe for review is arguable, a matter complicated by the majority's express refusal to dispose of the question on the basis of the "invited error" doctrine even though its applicability was recognized. *Id.* at 569.

[67]Likewise, the phrase "adjustment of support" is but a euphemism for "modification of support" when the parties' respective incomes are considered by the court. Semantics should not obscure the debate.

[68]Herein lies the gist of the wife's procedural argument that the automatic modification placed an unfair burden upon her to disprove any annual adjustment by the court. Assuming an annual review results in a drastic reduction of the husband's obligation, the *Herron* majority found nothing amiss in the fact that the burden of proof has apparently shifted to the wife to establish a change of circumstances so substantial and continuing as to render the *modified* support order unreasonable. That result seems clearly to contravene Indiana Code section 31-1-11.5-17(a) (Supp. 1984), particularly where the validity of income figures submitted by sometimes vexatious spouses is subject to different interpretations. It is not uncommon, for instance, for spouses to place assets in a third party's name to avoid increases or enforcement of support obligations.

[69]Given the *Herron* majority's emphasis on "judicial economy," it is perhaps appropriate that in the final assessment of the procedure employed by the Hendricks Circuit Court, the admonition of Judge Sullivan in Hardiman v. Hardiman, 152 Ind. App. 675, 284 N.E.2d 820 (1972), should also be considered:

3. Health and Hospitalization Insurance.—Pursuant to Section 12[70] of the Dissolution of Marriage Act, a support order may include "special medical, hospital or dental expenses" incurred on behalf of the minor child. The scope of the trial court's authority to ensure that health care is provided to the minor children of divorcees was expanded by the 1984 General Assembly which, via enactment of section 12.1, granted the court discretion to require that a parent maintain "basic health and hospitalization insurance coverage for the child."[71] When a title IV-D agency petitions the court for such an order, however, the trial court must "consider" granting the petition if the insurance coverage "is available to the parent at reasonable cost."[72] Identical provisions were also inserted in Section 13 of the Paternity Act.[73]

D. Interspousal Surveillance

Marital litigation is one of the three major catalysts for the private usage of surveillance in the United States.[74] That unsettling conclusion was part of the legislative history underlying congressional passage of title III,[75] which proscribes the intentional interception and recording of

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> We are not unaware that tedium predominates in most divorce trial calenders, and that such occupy much of a trial judge's time. . . . However, we cannot condone expeditious disposition of the issues involved in each individual divorce action merely because the successive hearing of many such actions may be less than exciting or professionally challenging. The parties to the litigation, and to be sure, our very system of justice are entitled to a full and complete airing of the *material* issues.

Id. at 680, 284 N.E.2d at 823-24 (emphasis added).

[70]IND. CODE § 31-1-11.5-12 (Supp. 1984).

[71]Act of Feb. 29, 1984, Pub. L. No. 152-1984, § 1, 1984 Ind. Acts 1299, 1299-1300 (codified at IND. CODE § 31-1-11.5-12.1 (Supp. 1984)).

[72]*Id. See also* Act of Feb. 19, 1984, Pub. L. No. 152-1984, § 3, 1984 Ind. Acts 1299, 1300 (codified at IND. CODE § 31-1-11.5-17.1 (Supp. 1984)). A title IV-D agency is statutorily entitled to obtain an order for health insurance coverage by initial or modification proceedings. Curiously, no statutory language authorizes an individual to seek such an award by *modification* proceedings. That dichotomy is surely an oversight rather than a reflection of a legislative obsession for reimbursement of public assistance rendered.

[73]Act of Feb. 19, 1984, Pub. L. No. 152-1984, § 5, 1984 Ind. Acts 1299, 1300-02 (codified at IND. CODE § 31-6-6.1-13 (Supp. 1984)).

[74]Witnesses testifying before 1968 congressional committees concerned with title III included G. Robert Blakely, Notre Dame Professor and author of the Act, who observed that "private bugging in this country can be divided into two broad categories, commercial espionage and marital litigation." *Hearings on the Right to Privacy Act of 1967 Before the Subcomm. of Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 413 (1967). Other testimony corroborated Blakely's view. *See* Pritchard v Pritchard, 732 F.2d 372 (4th Cir. 1984).

[75]18 U.S.C. §§ 2510-20 (1982). Extensive analysis of the Act's applicability to interspousal surveillance is contained in Note, *Interspousal Electronic Surveillance and Title III*, 12 VAL. U.L. REV. 537 (1978).

oral and wire communications.[76] Since its inception, the applicability of the Act to interspousal electronic surveillance is a matter which has troubled courts, resulting in dichotomous case precedent. Some courts have followed the lead of *Simpson v. Simpson*,[77] where the Fifth Circuit Court of Appeals concluded that Congress did not intend the Act to reach interspousal surveillance. The Sixth Circuit Court of Appeals' decision in *United States v. Jones*,[78] that the marital relationship was within the scope of the Act's prohibition, has been invoked by other courts.[79] The survey-period saw the balance tipped.

In *Pritchard v. Pritchard*,[80] the Fourth Circuit Court of Appeals confronted the question whether title III authorized a civil action against a former spouse for her interception and recordation of conversations conducted over the family telephone. Relying on *Simpson*, the district court had dismissed the suit. The Fourth Circuit examined the language and legislative history of title III and found no support for the *Simpson* court's conclusion that interspousal surveillance was implicitly exempted from the Act.[81] Concurring in the *Simpson* court's resolution that "state and not federal courts are better suited to handle domestic conflicts,"[82] the Fourth Circuit nevertheless reinstated the civil cause of action and remanded it to the district court. A similar result was reached in *Burgess v. Burgess*,[83] where a divided Florida Supreme Court found that the

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[76]Title III establishes both criminal and civil sanctions for its violation. 18 U.S.C. § 2511 (1982) (criminal penalties), 18 U.S.C. § 2520 (1982) (civil penalties).

[77]490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974). Courts which have implemented a *Simpson* approach include Beaber v. Beaber, 41 Ohio Misc. 95, 322 N.E.2d 910 (1974) and Baumrind v. Ewing, 276 S.C. 350, 279 S.E.2d 359, *cert. denied*, 454 U.S. 1092 (1981).

[78]542 F.2d 661 (6th Cir. 1976).

[79]Flynn v. Flynn, 560 F. Supp. 922 (N.D. Ohio 1983); Heyman v. Heyman, 548 F. Supp. 1041 (N.D. Ill. 1982); Citron v. Citron, 539 F. Supp. 621 (S.D.N.Y. 1982); Gill v. Willer, 482 F. Supp. 776 (W.D.N.Y. 1980); Kratz v. Kratz, 477 F.Supp. 463 (E.D. Pa. 1979); Rickenbaker v. Rickenbaker, 290 N.C. 373, 226 S.E.2d 347 (1976).

[80]732 F.2d 372 (4th Cir. 1984).

[81]*Id.* at 374. The Fourth Circuit unequivocally rejected the twin postulates of the *Simpson* rationale. First, it found no ambiguity in the language of title III to warrant resort to rules of statutory interpretation. *Id.* at 373. Second, it found the legislative history indicated Congress was fully aware of the extent of interspousal surveillance and, having failed to create an express exception for such conduct, intended it to fall within the statutory proscription. *Id.* at 373-74.

[82]*Id.* at 374. The implications for principles of comity and federalism which troubled the *Simpson* court are examined in Note, *supra* note 75, at 550-51.

[83]447 So. 2d 220 (Fla. 1984), *rev'g* 417 So. 2d 1173 (Fla. Dist. Ct. App. 1982) (applying state law). The majority's observations regarding the juxtaposition of electronic surveillance and the sanctity traditionally accorded the marital relationship are noteworthy:

> It is undisputed that spying and prying by one spouse into the private telephone conversations of the other does not contribute to domestic tranquility or assist in preserving the marital estate. . . . Eavesdropping, by nature, undermines the faith and trust upon which the institution of marriage is founded.

Id. at 222-23 (citation omitted). *Accord* Note, *supra* note 75, at 551.

doctrine of interspousal tort immunity still extant in that state did not preclude a civil remedy for one spouse's electronic surveillance of the other.

This increasing tendency of courts to cast aside protection for spouses who engage in electronic surveillance of their marital partners warrants the attention of Indiana practitioners, whose courts have held that evidence acquired by such surreptitious techniques is admissible for impeachment purposes.[84] Whatever strategic value the fruits of interspousal electronic surveillance may have in dissolution proceedings, eavesdropping should be used only with recognition of the potential for civil and criminal liability.[85]

E. Maintenance

1. Statutory Developments: Maintenance for the Custodial Parent and the Displaced Homemaker.—Dramatic statutory changes in the law of maintenance were promulgated by the 1984 General Assembly. Effective September 1, 1984, spouses whose availability for employment is effectively precluded by their responsibilities as the custodial parent may be eligible for maintenance "in an amount and for a period of time as the court deems appropriate."[86] Similarly, spouses whose marital role as homemaker has adversely affected their employability may seek "rehabilitative maintenance"[87] for a period not in excess of two years. With these amendments to section 11, the legislature has radically restructured the framework in which a client's dissolution case must be assessed.

The provisions for "custodial maintenance" provide:

> If the court finds a spouse lacks sufficient property, including marital property apportioned to him, to provide for his needs and that spouse is the custodian of a child whose physical or mental incapacity requires the custodian to forego employment, the court may find that maintenance is necessary for that spouse in an amount and for a period of time as the court deems appropriate.[88]

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[84]*In re* Marriage of Lopp, 268 Ind. 690, 378 N.E.2d 414 (1978); *see also*, Jacks v. State, 271 Ind. 611, 394 N.E.2d 166 (1979). The Act expressly precludes the use of the fruits of electronic surveillance for evidentiary purposes. 18 U.S.C. § 2515 (1982).

[85]Criminal penalties include a $10,000 fine and/or imprisonment for a period not in excess of five years. 18 U.S.C. § 2511 (1982). Civil penalties include actual damages not less than $1,000, punitive damages, and attorney fees and costs. 18 U.S.C. § 2520 (1982). The doctrine of interspousal tort immunity was abrogated in Indiana in Brooks v. Robinson, 259 Ind. 16, 284 N.E.2d 794 (1972).

[86]Act of Mar. 2, 1984, Pub. L. No. 150-1984, § 2, 1984 Ind. Acts 1290, 1292-93 (codified at IND. CODE § 31-1-11.5-11(d)(2) (Supp. 1984).

[87]*Id.*

[88]*Id.*

Two prerequisites for an award of custodial maintenance are established. First, there must exist a child whose "physical or mental incapacity *requires* the custodian to forego employment."[89] The vagueness inherent in the concept of a minor child's physical or mental incapacity must be interpreted by reference to the legislature's use of the mandatory term "requires": unemployment must be necessitated by the custodial role. Consequently, the extent of job opportunities and the custodian's qualifications for employment should not be considered germane.[90] The focus must be the individual condition and circumstances of the minor child and the resulting demands upon the custodian. The experience of other jurisdictions with similar legislation[91] indicates that factors relevant to those considerations include the number and ages of children,[92] their physical and emotional needs,[93] the suitability and availability of third party assistance to meet those needs,[94] and a child's enrollment in school.[95]

The second prerequisite to an award of custodial maintenance is that the custodian lacks "sufficient property, including marital property apportioned to him, to provide for his needs."[96] Obviously, satisfaction of this requirement cannot be established until the trial court has calculated the manner in which the marital assets will be distributed; not until that point in time can the resources of the custodian be reduced to a sum certain. On the other hand, the needs of the custodial parent can be established at final hearing with the presentation of evidence

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

[90]Those factors are part of the remedy of rehabilitative maintenance. *See infra* notes 101-06 and accompanying text.

[91]Other jurisdictions generally have adopted the language of the Uniform Marriage and Divorce Act, wherein the award of custodial maintenance is made dependent upon the existence of "a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home," together with a lack of financial resources "to provide for his [the custodian's] reasonable needs." UNIF. MARRIAGE AND DIVORCE ACT, § 308 9A U.L.A. 160 (1979). *See In re* Marriage of Thornqvist, 79 Ill. App. 3d 791, 399 N.E.2d 176 (1979); Inman v. Inman, 578 S.W.2d 266 (Ky. Ct. App. 1979); Cook v. Cook, 614 P.2d 511 (Mont. 1980).

[92]*See, e.g.*, Reyna v. Reyna, 78 Ill. App. 3d 96, 398 N.E.2d 641 (1979) (four children, including a two-year-old); *In re* Marriage of Vashler, 183 Mont. 444, 600 P.2d 208 (1979) (nine-year-old child). Indiana precedent suggests, however, that age alone should not be dispositive of the question whether a child is incapacitated. *Cf.* Bole v. City of Ligonier, 130 Ind. App. 362, 161 N.E.2d 189 (1959) (addressing whether advanced age of itself can be considered as a ground for incapacity).

[93]*See* Smith v. Smith, 105 Ill. App. 3d 980, 434 N.E.2d 1151 (1982) (ten-year-old child with emotional problems).

[94]Babysitting and day care expenses routinely figure in the calculation of child support obligations. Where such services are available and do not impair the best interests of the child, the custodian may be capable of employment. *Cf.* Richie v. Richie, 596 S.W.2d 32 (Ky. Ct. App. 1980) (enrollment in school enabled mother to work outside the home).

[95]*Id.*

[96]IND. CODE § 31-1-11.5-11(d)(2) (Supp. 1984).

regarding the monthly costs of those needs. Existing Indiana precedent dictates that the statutory term "needs" be regarded as a relative term defined with reference to the standard of living established in the marriage.[97]

It also should be recognized that the trial court has authority to award custodial maintenance of virtually unlimited duration: "for a period of time as the court deems appropriate."[98] This provision potentially bears significant adverse consequences for the legislature's policy of encouraging amicable settlements of marital dissolutions. Spouses who might otherwise accept the noncustodial parenting role may opt to litigate custody in the face of the significant economic consequences which can follow from their acquiescence. That specter should be tempered by the realization that maintenance awards bear tax benefits[99] and are subject to modification if conditions so warrant.[100]

The concept of "rehabilitative maintenance" represents the General Assembly's overdue response to the reality of the "displaced homemaker."[101] Following the nationwide assault upon the concept of alimony

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[97]One factor in the calculation of Indiana's traditional maintenance awards has been the standard of living established in the marriage. *See* Temple v. Temple, 164 Ind. App. 215, 328 N.E.2d 227 (1975). Other jurisdictions have applied the standard to custodial and rehabilitative maintenance. *See, e.g., In re* Marriage of Rimmele, 102 Ill. App. 3d 88, 429 N.E.2d 879 (1981). "Needs" are not automatically commensurate with the marital standard of living, of course. Brueggemann v. Brueggemann, 551 S.W.2d 853 (Mo. Ct. App. 1977).

[98]IND. CODE § 31-1-11.5-11(d)(2) (Supp. 1984).

[99]See *infra* note 110 for a discussion of tax aspects.

[100]Since the inception of Indiana's Dissolution of Marriage Act in 1973, maintenance awards based on the physical or mental incapacity of a spouse have been subject to "further order of the court." IND. CODE § 31-1-11.5-9 (c) (Supp. 1984). Curiously, no such qualification was included in the statutory amendments authorizing custodial or rehabilitative maintenance. This legislative oversight should not preclude the potential modification of either of the latter forms of maintenance. The spirit of the legislation must prevail: if the recipient of maintenance has remarried, obtained gainful employment, inherited significant sums, or won the Irish sweepstakes, it would defy the purpose of custodial or rehabilitative maintenance to deny the obligated spouse recourse to the courts for relief from the obligation. Pursuant to Farthing v. Farthing, 178 Ind. App. 336, 382 N.E.2d 941 (1978), modification of a maintenance award is governed by the standard of proof enunciated in Indiana Code section 31-1-11.5-17(a) (Supp. 1984): "a showing of changed circumstances so substantial and continuing as to make the terms unreasonable."

[101]The term "displaced homemaker" is generally attributed to Justice Gardner in his landmark opinion in *In re* Marriage of Brantner, 67 Cal. App. 3d 416, 136 Cal. Rptr. 635 (1977), where he bluntly capsulized the concept:

> The new Family Law Act, and particularly Civil Code, section 4801, has been heralded as a Bill of Rights for harried former husbands who have been suffering under prolonged and unreasonable alimony awards. However, the Act may not be used as a handy vehicle for the summary disposal of old and used wives. A woman is not a breeding cow to be nurtured during her years of fecundity, then conveniently and economically converted to cheap steaks when past her prime. If a woman is able to do so, she certainly should support

which marked American jurisprudence in the early 1970's, courts and commentators alike recognized the inequitable fate which befell spouses who, by virtue of their marital roles, held no reasonable postdissolution prospect of employment.[102] Historically, our culture has imposed that inequity upon ex-wives.[103] Without regard to gender, however, the 1984 legislature has provided that for a transitional period not in excess of two years from the date of final decree, spouses may be awarded maintenance while they rehabilitate their employment skills.

The propriety and amount of the rehabilitative award are governed by specific statutory considerations:

> (A) the educational level of each spouse at the time of marriage and at the time the action is commenced;
>
> (B) whether an interruption in the education, training, or employment of a spouse who is seeking maintenance occurred during the marriage as a result of homemaking or child care responsibilities, or both;
>
> (C) the earning capacity of each spouse, including educational background, training, employment skills, work experience, and length of presence in or absence from the job market; and
>
> (D) the time and expense necessary to acquire sufficient education or training to enable the spouse who is seeking maintenance to find appropriate employment.[104]

The statutory considerations parallel those given effect in sister states, where extensive litigation has established the issue as a fact-sensitive matter of competing policy considerations.[105] Both spouses' circumstances must be weighed, for it is the purpose of rehabilitative maintenance to promote individual self-sufficiency. Given the two year time limitation present in our statutory scheme, that goal will not be realized in every case.[106] Nonetheless, the remedy of rehabilitative maintenance represents a valuable transitional vehicle for the homemaker's postdissolution economic footing.

> herself. If, however, she has spent her productive years as a housewife and mother and has missed the opportunity to compete in the job market and improve her job skills, quite often she becomes, when divorced, simply a "displaced homemaker."

67 Cal. App. 3d at 420, 136 Cal. Rptr. at 637.

The concept is discussed in the context of Indiana authority in Garfield, *Indiana's Displaced Homemakers*, 23 RES GESTAE 80 (1979).

[102]Garfield, *supra* note 101, at 80.

[103]As Professor Garfield parenthetically noted in her article, "Because the househusband was unknown 20-30 years ago, she [the displaced homemaker] will invariably be female." *Id.* at 81. An excellent analysis of these historical and policy considerations is found in Turner v. Turner, 158 N.J. Super. 313, 385 A.2d 1280 (1978), where the remedy of rehabilitative maintenance was invoked by the court.

[104]IND. CODE § 31-1-11.5-11(d)(3) (Supp. 1984).

[105]See authorities collected in Annot., 97 A.L.R. 3d 740 (1980) and UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 160 (1979).

[106]Some spouses may be rendered permanently unemployable by a juxtaposition of

2. Findings of Fact and the Award of Maintenance.—The General Assembly complemented its survey-period amendments authorizing custodial and rehabilitative maintenance with legislation which requires the trial court to make findings of fact whenever any form of maintenance is awarded.[107] The legislature thereby rendered moot the debate raised in *Coster v. Coster*,[108] where Judge Ratliff challenged the majority's conclusion that such findings were not necessary to support an award of maintenance.[109] The legislature's mandate ensures the type of maintenance awarded will be identified in the final decree, a matter important to appellate review and principles of continuing jurisdiction. Likewise, the fact-finding requirement will eliminate doubts as to the tax ramifications of any particular award and, in turn, ensure the trial court has apprised itself of all monetary aspects of its decree.[110]

F. Property

1. Property Settlements: Oral versus Written Agreements.—No single survey-period decision in domestic relations potentially bears such workaday consequences for the family law practitioner as *McClure v. McClure*.[111] In *McClure*, the court of appeals dealt a setback to certainty in the law of property settlements.

Consistent with the General Assembly's stated policy "[t]o promote the amicable settlements of disputes"[112] which attend the breakup of

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local economic conditions, age, and their prolonged absence from the job market; other jurisdictions accommodate this inevitable consequence with permanent awards of maintenance subject to further order of the court. *See, e.g.*, Kalmutz v. Kalmutz, 299 So. 2d 30 (Fla. Dist. Ct. App. 1974); *In re* Marriage of Wisniewski, 107 Ill. App. 3d 711, 437 N.E.2d 1300 (1982). Indiana's statutory scheme precludes such awards absent physical or mental incapacity of a spouse. The two year limitation does serve two purposes: 1) the obligated spouse is provided with certainty as to the nature and extent of his obligation; and 2) indolence is discouraged as the recipient is provided with an immediate time period in which to pursue training or employment. *See* Turner v. Turner, 158 N.J. Super. 313, 385 A.2d 1280 (1978).

[107]Act of Mar. 2, 1984, Pub. L. No. 150-2984, § 1, 1984 Ind. Acts 1290, 1290-91 (codified at IND. CODE § 31-1-11.5-9(c) (Supp. 1984). The amendment states that "[t]he court may order maintenance in final decrees entered under subsections (a) and (b) after making the findings required under section 11(d) of this chapter."

[108]452 N.E.2d 397 (Ind. Ct. App. 1983.)

[109]*Id.* at 404 (Ratliff, J., concurring).

[110]Payments by one spouse for the support of the other are "income" to the recipient and deductible by the payor. Property distributed pursuant to a final decree does not necessarily bear those tax ramifications. *See* Hicks v. Fielman, 421 N.E.2d 716 (Ind. Ct. App. 1981) (citing 26 U.S.C. §§ 71 (a)(1), 215 (1967)). An express finding that an award is maintenance alleviates the need to resort to the subjective set of factors developed to distinguish between awards of maintenance and property settlements. *See* Pfenninger v. Pfenninger, 463 N.E.2d 115 (Ind. Ct. App. 1984).

[111]459 N.E.2d 398 (Ind. Ct. App 1984) (Sullivan, J., concurring).

[112]IND. CODE § 31-1-11.5-10(a) (1982). *See generally* Meehan v. Meehan, 425 N.E.2d 157 (Ind. 1981); Stockton v. Stockton, 435 N.E.2d 586 (Ind. Ct. App. 1982).

a marriage, authority for parties to "agree *in writing*" to the disposition of property is contained in Section 10[113] of the Dissolution of Marriage Act. Notably, no statutory authority for the *oral* settlement of property issues exists in the Act. In the 1977 decision of *Waitt v. Waitt*,[114] however, the court of appeals held it is not error for a trial court to adopt and incorporate an oral property settlement if it determines on the basis of those factors enumerated in Section 11[115] that the agreement is just and reasonable.

McClure involved a factual interpolation of these two basic rules of property settlements. The final dissolution hearing of Mildred and Emory McClure was set on the trial court's calendar as a contested matter. As commonly occurs, the parties and their attorneys arrived at the courthouse for final hearing and entered into ex parte negotiations which culminated in an oral agreement for the disposition of their property. The parties then convened in open court and, in conjunction with the necessary evidence regarding the breakdown of their marriage and the status of their children,[116] orally stipulated the terms of their proposed property settlement into the record. Both the wife and the husband personally indicated their assent to the agreement. At the prompting of the trial judge, both attorneys verbally represented that the agreement would be reduced to writing. The hearing concluded with the following discussion between court and counsel:

> "The Court: Fine. I do wish both counsel would sign it though, because I had another one in here, well all the time you get one, they don't pass it to the other counsel and all of a sudden, why, someone wants to set aside the Divorce Decree and all that so, have everybody sign it. [Counsel for Mildred] Both counsel will sign it.

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[113]IND. CODE § 31-1-11.5-10(a) (1982).

[114]172 Ind. App. 357, 360 N.E.2d 268 (1977).

[115]IND. CODE § 31-1-11.5-11 (Supp. 1984). The factors enumerated therein are:

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

(2) The extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift.

(3) The economic circumstances of the spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell therein for such periods as the court may deem just to the spouse having custody of any children.

(4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.

(5) The earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties.

[116]IND. CODE § 31-1-11.5-8 (1982) (dealing with final hearings). The McClures' children were emancipated.

> The Court: We're really in no hurry for it. Get it in the first part of next week, that's alright if everybody can sign it. Okay, thank you gentlemen."[117]

The trial court then entered the following entry into its order book: "Dissolution granted; *hold for decree and property settlement.*"[118]

The trial court's observation that "all of a sudden, . . . someone wants to set aside the Divorce Decree and all that" then turned prophecy. Sometime subsequent to the final hearing, the wife recanted her acceptance of the terms of the agreement. Two weeks after final hearing, with the record still lacking a signed written agreement,[119] the wife filed a petition to set aside the oral settlement. She asserted that stress suffered by her at the time of the final hearing precluded her knowing acceptance of the property settlement terms;[120] she also posited a *Waitt*-based argument that the oral in-court agreement could not be made binding upon the parties because the trial court had not received and heard evidence establishing that the settlement was in fact just and reasonable. Following a hearing, the trial court denied the wife's petition and "approved" the property settlement "as it appears in transcript" of final hearing.[121] A decree of dissolution and a document delineating the terms of the oral property agreement were subsequently filed with the court. The latter document bore only the signatures of the husband and his counsel. The dissolution decree and document of property disposition were approved and signed by the trial judge and the parties were ordered to effectuate the terms of their settlement as orally tendered at final hearing. The wife's motion to correct errors was denied and she appealed. On appeal, the wife reiterated her *Waitt*-based argument. The court of appeals, however, ignored that contention and its precedential foundation. The appellate court instead disposed of the wife's appeal on the basis of her claim that the trial court had erred in adopting a property settlement which she had timely repudiated.[122] For the majority, Chief

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[117]459 N.E.2d at 399 (quoting the trial court record).

[118]*Id.* (quoting the trial judge's order book entry of Nov. 24, 1982).

[119]It is unclear whether the delay prompted the wife's change of heart or the wife's recantation precipitated the delay.

[120]Although this issue was not addressed on appeal, it underscores the attention *McClure* warrants. Emotion pervades divorce; stress, vacillation, and vindictiveness commonly attend the breakup of a marriage. A written and signed agreement militates against the ability of a party to successfully assert, for whatever reason, that the terms of a settlement were not knowingly or voluntarily accepted or that counsel acted improperly in binding the party to the agreement. *See generally* Bramblet v. Lee, 162 Ind. App. 654, 320 N.E.2d 778 (1974).

[121]459 N.E.2d at 400 (emphasis omitted).

[122]*Id.* at 401. It is interesting to observe that the wife regarded her *Waitt*-based argument as the more compelling of her contentions. The "Argument" portion of her brief began with her *Waitt* argument, which continued for 13 of the 15 pages devoted

Judge Buchanan emphasized at the outset of his opinion that the "salient fact in this case is that there never was a property settlement agreement in writing between the parties for the court to approve."[123] Chief Judge Buchanan quoted Section 10 of the Dissolution of Marriage Act and observed, "The plain language of this provision requires a written agreement."[124] He also noted that paragraph b of Section 10 requires the court's approval, incorportion, and merger of the terms of the agreement into the dissolution decree. Unsettling language was then injected into the opinion: "The simple two-step process necessary to bring a valid property settlement agreement into existence never occurred in this case."[125] Given the unequivocal nature of the court's language and the analysis preceding it, the reader might justifiably conclude that the court ruled only *written* property settlements are valid in Indiana.

That was not the basis for the court's holding, however, as its subsequent factual analysis reveals. Ultimately, the court's conclusion that the agreement was not properly binding on the parties was predicated on two bases: 1) the trial court did not *formally approve*[126] the agreement at the hearing where it had been orally tendered, but rather required submission in writing; and 2) the wife repudiated the agreement prior to its submission in writing.[127] Chief Judge Buchanan characterized the trial court's requirement of a written agreement as a "condition precedent" to approval and concluded that "[the wife's] right to repudiate

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to that section. Brief for Appellant at 4-15; 459 N.E.2d at 400 (wife's attack premised on court's failure to determine the reasonableness of agreement). The prominence of *Waitt* in the wife's brief highlights the majority's unwillingness to rely on *Waitt*.

[123]459 N.E.2d at 400.

[124]*Id.* (footnote omitted). Section 31-1-11.5-10(a) of the Indiana Code provides "the parties may agree in writing" to the disposition of their property. Those who would argue the "plain language" of section 10(a) does not *require* a written agreement should realize the majority's statement is supported by precedent not cited in its opinion. Our appellate tribunals have held it is not the judiciary's prerogative to expand the Dissolution of Marriage Act beyond that authority expressly or implicitly granted by its statutory terms. *See, e.g.*, Taylor v. Taylor, 436 N.E.2d 56 (Ind. 1982), *rev'g* 425 N.E.2d 649 (Ind. Ct. App. 1981); Lord v. Lord, 443 N.E.2d 847 (Ind. Ct. App. 1982). In section 10(a), authority is granted for written property settlements; the use of oral agreements was neither approved nor disapproved. Obviously, the majority wished to avoid the question whether oral agreements were permissible, for it neither invoked the rule found in *Lord* and *Taylor* nor expressly recognized the *Waitt* court's conditional approval of the use of oral property settlements.

[125]459 N.E.2d at 401.

[126]*Id.* Again, the majority opinion suffers a lack of clarity. In the husband's brief, he specifically argued that the trial court had approved the oral agreement at final hearing. Brief for Appellee at 17, 23; 459 N.E.2d 400. Inasmuch as the husband's factual assertions were not addressed by the majority, it must be assumed the court relied on the rule that a court speaks only through its official orders and entries. *See* Meehan v. Meehan, 425 N.E.2d 157, 159 (Ind. 1981). The trial court did not expressly approve the McClures' agreement *in its docket and order book* entry for the final hearing. 459 N.E.2d at 399.

[127]459 N.E.2d at 401.

before the two-step process is complete has been upheld by this court. . . . We need not elaborate further, but would emphasize that our decision is grounded solely on error by the trial court in approving an agreement that was timely repudiated.[128]

The closing caveat clarifying the import of the majority opinion dispels any notion that its langauge necessarily should be interpreted to preclude the use of oral agreements. Indeed, Chief Judge Buchanan stated in footnote one of his opinion that the majority was not deciding the "validity of a stipulated oral agreement."[129] Ultimately, no black letter rule of law can be drawn from *McClure*. Apparently, however, had the trial court formally approved the agreement at the close of the final hearing, the wife's posthearing renunciation of the agreement would have been without consequence. Solely on this basis did Judge Sullivan join the majority opinion. In his concurring opinion, he carefully disassociated himself from the implication in the majority's analysis that only written property settlements may be valid.[130]

Practitioners should warily recognize this aspect of *McClure* and do the obvious: *whenever possible, reduce any property agreement to writing prior to final hearing*. In that respect, the vagueness of *McClure* serves a positive purpose, for the physical act of reducing an oral agreement to written and signed form is deemed to ensure that the parties have carefully considered and accepted its terms.[131] Lacking that document, however, a practitioner who proceeds to an uncontested final hearing without a written agreement should recognize two priorities: 1) presenting evidence to establish the terms of the agreement are just and reasonable, in accordance with *Waitt*; and 2) attempting to obtain formal approval of the agreement on the trial court's order book entry, as per the implication of *McClure*. The need for an immediate ruling by the trial court which *McClure* fosters is unfortunate. The trial court's responsibility to determine that, based on the evidence presented, the terms of an oral agreement are just and reasonable necessarily includes the license to take that question under advisement. Caution is particularly demanded when the parties' agreement also embraces matters of custody, as commonly occurs.[132] A trial court's exercise of that prerogative should not be

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[128]*Id.*

[129]*Id.* at 400 n.1. Ironically, the footnote ends with a citation to Waitt.

[130]*Id.* at 401 (Sullivan, J., concurring). In his concurring opinion, Judge Sullivan cited Bramblett v. Lee, 162 Ind. App. 654, 320 N.E.2d 778 (1974), where it was held that pursuant to Indiana Code section § 34-1-60-5, an attorney has authority to orally bind a client to an agreement, even where it is presented by telephone and results in judgment of paternity. Practitioners should recognize that authority no longer extends to paternity default determinations. *See infra* note 177 and accompanying text.

[131]Waitt v. Waitt, 172 Ind. App. at 362, 360 N.E.2d at 272.

[132]To be sure, the trial court's authority to reject or modify a *property* settlement is limited to instances of "unfairness, unreasonableness, manifest inequity . . . or [where] the execution of the agreement was procured through fraud, misrepresentation, coercion,

restricted by the possibility that an otherwise just and reeasonable agreement may be jeopardized by the effects a brief delay may work on the hearts and minds of persons experiencing divorce.

Given the practical significance to parties and practitioners of the questions raised by *McClure*, the legislature should act immediately to define the capacity of parties to submit oral property settlements. The present confusion may be the result of our appellate tribunals' traditional unwillingness to expand the Dissolution of Marriage Act beyond its letter.[133] Authority for the oral settlement of property rights either should be expressly granted or denied. If granted, it is submitted that a proviso be included whereby, absent good cause shown, parties to an oral agreement tendered in open court be bound thereto for a period of not less than ten days.[134]

2. Alimony in Gross: Interest versus Present Value Discounted.— Section 11 of the Dissolution of Marriage Act authorizes trial courts to "divide the property of the parties . . . either by division of the property in kind, or by setting the same or parts thereof over to one (1) of the spouses and *requiring either to pay such sum, either in gross or in installments, as may be just and proper.*"[135] The Act is silent, however, regarding whether a monetary award made payable in installments, characterized by one court as "alimony in gross,"[136] should bear interest. The failure of trial courts to award interest on installment plan awards recently has been attacked by ex-spouses; their appellate challenges have resulted in an edifying collection of precedent regarding the valuation of such awards. The focus of that precedent is the economic principle of "present value discounted" or, as described in the survey-period

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duress, or lack of full disclosure." Stockton v. Stockton, 435 N.E.2d 586, 589 (Ind. Ct. App. 1982). It is not uncommon, however, for the parties' property settlement to also embrace matters of custody, visitation and support. *See, e.g.*, Meehan v. Meehan, 425 N.E.2d 157, 158 (Ind. 1981). Agreements concerning minor children demand stricter scrutiny from trial courts. *Cf.* Stevenson v. Stevenson, 173 Ind. App. 495, 364 N.E.2d 161 (1977) (factual basis must be established for custody agreement); Delong v. Delong, 161 Ind. App. 275, 315 N.E.2d 412 (1974) (factual basis must be established for support agreement). Practitioners also should recognize that, because of *McClure*, a trial court, like the court in *McClure*, might refrain from approval of an oral agreement pending written submission for the purpose of ensuring a party has carefully considered and accepted its terms. *See supra* note 131 and accompanying text. That occurrence is more probable when one of the parties proceeds *pro se*. *E.g.*, Stockton v. Stockton, 435 N.E.2d 586 (Ind. Ct. App. 1982).

[133]*See supra* note 124. This reluctance perhaps explains the narrow and technical approach employed by the appellate court in *McClure* as well as its refusal to utilize the precedent established in *Waitt*.

[134]The ten day period of presumptive enforceability would perpetuate the trial court's prerogative to take the propriety of an oral agreement under advisement.

[135]IND. CODE § 31-1-11.5-11(b) (1982) (emphasis added). The authority of the court to make a monetary award payable in installments was summarily affirmed during the survey period. Boren v. Boren, 452 N.E.2d 452, 455 (Ind. Ct. App. 1983).

[136]Van Riper v. Keim, 437 N.E.2d 130, 132 n.1 (Ind. Ct. App. 1982).

decision of *In re Marriage of Merrill*,[137] "the time value of money."[138]

In *Merrill*, the husband was ordered to pay the wife $10,415 in annual installments of $1,000. The wife challenged the failure of the trial court to award interest on the toal monetary sum, arguing the actual value of $10,415 made payable over eleven years was less than $7,000. The court of appeals agreed with her mathematical assessment of the total time would take on her award, but rejected her contention that the trial court had erred in failing to award her interest. Judge Staton explained:

> [T]he decision whether a lump sum award payable in installments will bear interest rests within the sound discretion of the trial court. . . . We presume that trial courts are aware of the time value of money and take it into consideration when dividing property and deciding whether interest should be awarded.[139]

The presumption that trial courts do consider the "time value" of money juxtaposes neatly with the 1982 decision of *Whaley v. Whaley*.[140] There, the trial court expressly refused to adjust an installment award to reflect its present value discounted because no evidence had been presented on which to base the mathematical computation. The court of appeals reversed, holding that the appropriate method for computing a monetary award was to discount the sum to its present value.[141] On remand, the trial court was instructed either to include a provision for interest or take judicial notice of annuity tables.[142]

The significant distinction between *Whaley* and *Merrill* is that in the former case, the trial court expressly refused to consider present value discounted, while in the latter case, the trial court's decree was silent with respect to the time value of money. In order to ensure that a trial court in fact does assess the impact of present value discounted on an award of alimony in gross, practitioners who find that their clients may receive such an award should: 1) specifically request an assessment of interest to accommodate the time value of any monetary award; 2) introduce annuity tables or move that judicial notice be taken of those tables; and 3) request that specific findings of fact be rendered by the court.[143] Two purposes are served by these prophylactic measures. A client is assured that the trial court has fully assessed the present value of an award of alimony in gross. In addition, an objective foundation

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[137]455 N.E.2d 1176 (Ind. Ct. App. 1983).

[138]*Id.* at 1178.

[139]*Id.* at 1177-78 (citing Van Riper v. Keim, 437 N.E.2d 130 (Ind. Ct. App. 1982)).

[140]436 N.E.2d 816 (Ind. Ct. App. 1982).

[141]*Id.* at 820.

[142]*Id.* at 821. An award of interest is governed by the provisions of Indiana Code section § 24-4.6-1-101 (Supp. 1984). *See, e.g.*, Van Riper v. Keim, 437 N.E.2d 130, 132 (Ind. Ct. App. 1982)

[143]IND. R. TR. P. 52.

for appeal is established. The latter purpose is important not only to a potential challenge to the trial court's refusal to award interest,[144] but also for the purpose of satisfying the "abuse of discretion" standard of appellate review, the standard applied to challenges to the overall disposition of marital assets and liabilities.[145]

3. Property Disposition: Assets, Liabilities, and the Effect of Financial Developments Pendente Lite.—Survey-period appeals from contested final hearings yielded numerous developments in the area of property disposition. Precedent collected herein involved circumstances of a recurrent nature not heretofore addressed by Indiana's appellate tribunals.

A philandering spouse's accumulation of assets in joint title with his paramour was the subject of *Kapley v. Kapley*.[146] The Kapleys' marriage spanned a period of forty years from nuptials to the date of "final separation."[147] Throughout the latter seven years of that marriage, however, the husband had physically separated from his wife and had engaged in a bigamous relationship which led to his accumulation of a joint titleship interest in real property located in Minnesota and Florida. In the Kapleys' dissolution decree, the wife was awarded a significantly larger portion of marital property than the husband, including sole ownership of the parties' 198 acre farm. On appeal, the husband's contention that the disproportionate distribution constituted "punishment" for his bigamous relationship was rejected; pursuant to Indiana Code section 31-1-11.5-11(b)(4), the bigamous relationship was viewed as conduct related to the dissipation of marital property. The court of appeals also rejected his assertion that the trial court improperly had attributed to him the entire fair market value of the property held jointly with his paramour. Employing a curious harmless error analysis, the court found that if such valuation had occurred, "it is of arguable detriment only to the wife for she received no portion of that property or its value."[148] That rationale is dubious, for it ignores the "one pot"

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[144]It should be recognized the trial court has two options by which to accommodate present value discounted: 1) an award of interest; or 2) an increase in the total monetary amount of the award commensurate to the decrease in present value which results from the deferred payment plan. In the latter instance, interest accrues on the unpaid balance once an installment is delinquent, unless the court dictates otherwise. Van Riper v. Keim, 437 N.E.2d at 130, 132 (Ind. Ct. App. 1982).

[145]The standard again was criticized by the court of appeals during the survey period stating that "absent an error of law, we review the evidence and pronounce in conclusory terms that the court's decision was or was not an abuse of discretion." Herron v. Herron, 457 N.E.2d 564, 566 n.2 (Ind. Ct. App. 1983) (citing Lord v. Lord, 443 N.E.2d 847, 850-51 n.4 (Ind. Ct. App. 1982)).

[146]453 N.E.2d 331 (Ind. Ct. App. 1983).

[147]"[F]inal separation" is defined as "the date of filing of the petition for dissolution." IND. CODE § 31-1-11.5-11(a) (Supp. 1984).

[148]453 N.E.2d at 335.

theory of distribution employed in Indiana property distribution.[149]

Developments after final separation were the subject of *DeMoss v. DeMoss*,[150] where, subsequent to the filing of the parties' petition for dissolution, the husband acquired a significant debt in connection with his farming operation. At the final hearing, an objection to testimony regarding the husband's post separation farming expenses was sustained. In the trial court's findings, however, the husband was charged with responsibility for those farming debts. The wife appealed, arguing the trial court had erred by including the debts in the marital estate, thereby reducing the net marital estate and, in turn, the share of assets awarded to her. The court of appeals disagreed, finding the trial court's evidentiary ruling "clearly indicated that the 1981 debt would *not* be considered."[151] *DeMoss* perpetuates the statutory principle that assets and debts incurred subsequent to the date of final separation are not subject to distribution as part of the marital estate.[152] At the same time, it should be recognized that the farming debt was part of the statutory framework for the trial court's property disposition, for it bore on "[t]he economic circumstances of the spouse at the time the disposition of the property [was] to become effective."[153] In that respect, practitioners should not be misled by the *DeMoss* court's generic use of the term "consider"; absent fraud, a postfinal separation change of economic circumstances is relevant to the distribution of the marital estate.[154] The statutory factor bears particular import, of course, in cases where a significant lapse of time has occurred between filing and final hearing.

The rule may also have ramifications subsequent to final hearing, as revealed in the survey-period decision of *Showley v. Showley*.[155] There, following the final hearing and presentation of evidence regarding the marital assets, liabilities, and distribution thereof, the trial court implemented the forty-five day reconciliation period contained in Section 8[156] of the Dissolution of Marriage Act. Attempts at reconciliation apparently

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[149]The "one pot" theory, as explained in *In re* Marriage of Dreflak, 181 Ind. App. 651, 393 N.E.2d 773 (1979), prohibits the trial court from excluding from consideration and distribution any assets of the marriage; conversely, where a trial court awards property to a spouse which is not part of the marital "pot," its distribution is predicated on an incorrect value of the total marital estate. Where one spouse is "awarded" all of those nonmarital assets, the share of the actual marital estate awarded that spouse is smaller than that percentage or interest calculated by the trial court.

[150]453 N.E.2d 1022 (Ind. Ct. App. 1983).

[151]*Id.* at 1025.

[152]*See, e.g.*, Sadler v. Sadler, 428 N.E.2d 1305 (Ind. Ct. App. 1981); Irwin v. Irwin, 406 N.E.2d 317 (Ind. Ct. App. 1980).

[153]IND. CODE § 31-1-11.5-11(b)(3) (Supp. 1984). *See, e.g.*, Showley v. Showley, 454 N.E.2d 1230 (Ind. Ct. App. 1983); Irwin v. Irwin, 406 N.E.2d 317, 320 n.3 (Ind. Ct. App. 1980).

[154]IND. CODE § 31-1-11.5-11(b)(3) (Supp. 1984).

[155]454 N.E.2d 1230 (Ind. Ct. App. 1983).

[156]IND. CODE § 31-1-11.5-8 (Supp. 1984).

failed and, after an inexplicable delay of fifteen months, dissolution was granted and a property disposition decreed. The wife appealed, arguing the fifteen month lapse from presentation of evidence to entry of decree violated the mandate of the trial court to consider the economic circumstances of the parties at the time the disposition becomes effective. For the majority, Judge Shields invoked a waiver analysis, holding that "*if for any reason* the entry of the decree is delayed, it is reasonable to impose the obligation upon the parties to seek the opportunity to submit additional evidence on a change in circumstances occurring during the delay."[157] The wife's argument was rejected because she did not seek to reopen the case for additional evidence. *Showley* has obvious and potentially significant application to cases taken under advisement.

Showley also resurrected the court of appeals' debate over the trial court's responsibilities where parties have failed to introduce evidence as to the value of marital property. Relying on *In re Marriage of Church*,[158] the majority summarily rejected the wife's contention that the trial court had erred by failing to act sua sponte to fill the evidentiary void regarding both the value of the marital property and the extent of each party's contribution to its acquisition. Chief Judge Buchanan dissented, likening a trial court's division of property without evidence of value to "depriving the carpenter of his hammer and saw or the bricklayer of his trowel."[159] Because the distribution had involved real property of significant value, not susceptible to valuation by reference to "rules of thumb," he argued for remanding the cause to determine the value of the property. Given the weaknesses inherent to Chief Judge Buchanan's approach,[160] its minority status likely will remain such. According to *Church* and *Showley*, the duty to supply those evidentiary "tools" necessary to a knowledgeable distribution continues to rest on the parties.

4. Post dissolution Attacks: Fraud and Misconduct.—A final property dispostion is subject to modification or revocation only in the event of

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[157]454 N.E.2d 1231 (emphasis added).

[158]424 N.E.2d 1078 (Ind. Ct. App. 1981).

[159]454 N.E.2d at 1233 (Buchanan, C.J., dissenting).

[160]To be sure, the circumstances of any particular case may justify the trial court's exercise of its inherent authority to require the submission of additional evidence. *See, e.g.*, Marsico v. Marsico, 154 Ind. App. 436, 290 N.E.2d 99 (1974). Whether the trial court's interposition into the adversarial process should be mandatory is another matter. Philosophical considerations aside, the question of *when* the duty would be triggered is problematic. For instance, Chief Judge Buchanan did not address wife Showley's assertion that the trial court also erred by failing to elicit evidence regarding each party's contribution to the acquisition of the property; that argument is not meritless, for Indiana Code section § 31-1-11.5-11(b) provides that the court "shall consider" that factor, as well as four other nonexclusive criteria specifically defined therein. In short, the would-be fact-seeking role of the trial court has potential for limitless expansion. Absent removal of marital dissolutions from the adversarial system, factual development should remain the burden of the parties.

fraud, which must be asserted within two years of the entry of the decree.[161] The survey period saw this statute of limitations upheld as not violative of equal protection. Additionally, Trial Rule 60(B)(3) was recognized as an adjunct to the two year period.

The former ruling came in *In re Marriage of Murray*,[162] where the court of appeals also rejected a contention that implementation of the two year period should be barred by the doctrine of equitable estoppel. In *Murray*, the wife's motion to set aside an alleged fraudulently-obtained property settlement and decree was dismissed because it had been filed over two years subsequent to final dissolution. On appeal, she asserted her husband should be estopped from reliance on the limitations period because of his overtures of reconciliation during the two year period. She maintained she had not considered the marriage ended or the property division final until the month ending the two year period, when her ex-husband forced her to vacate the home awarded to him in the final decree. Her equitable estoppel defense was rejected by the court of appeals, which found she lacked a right to rely on her former husband's representations and to ignore the legal effect of their divorce: "Our divorce laws are not designed to be employed as an experiment in creative marriage enhancement."[163]

Meanwhile, in *Joachim v. Joachim*,[164] the court of appeals recognized that where postdissolution actions constitute "misconduct" and no fraud is involved, Trial Rule 60(B)(3) provides an alternative vehicle for challenging a disposition of marital property.[165]

G. Paternity

1. Limitations of Actions.—Reverberations from the 1982 decisions in *Mills v. Habluetzel*[166] and *In re M.D.H.*[167] continued during the survey period, bringing predictable refinements to the law surrounding paternity statutes of limitations. In *Pickett v. Brown*,[168] the United States Supreme Court expanded the principles laid down in *Mills* to unanimously find that Tennessee's two year statutory period of limitations on paternity actions denied equal protection to children born-out-of-wedlock.[169] The

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[161] IND. CODE § 31-1-11.5-17 (Supp. 1984).

[162] 460 N.E.2d 1023 (Ind. Ct. App. 1984).

[163] *Id.* at 1026.

[164] 450 N.E.2d 121 (Ind. Ct. App. 1983).

[165] A not uncommon postdissolution vindictiveness resulted in wife Joachim's refusal to cooperate in the sale of the marital residence. The relief granted to the husband was reversed because the trial court failed to conduct an evidentiary hearing on his petition as required by Trial Rule 60(B). 450 N.E.2d at 122.

[166] 456 U.S. 91 (1981).

[167] 437 N.E.2d 119 (Ind. Ct. App. 1982).

[168] 103 S. Ct. 2199 (1983).

[169] *Id.* at 2206.

Pickett decision vindicates the Indiana appellate court's decision in *M.D.H.* that the two year statute of limitations formerly applicable in Indiana[170] was constitutionally invalid. Moreover, the two courts' analyses run parallel in concluding that a two year period "does not provide certain illegitimate children with an adequate opportunity to obtain support and is not substantially related to the legitimate state interest in preventing the litigation of stale or fraudulent claims."[171]

The retroactive effect of these constitutional rulings was at issue in *R.L.G. v. T.L.E.*,[172] where, in 1981, minor child T.L.E. brought suit by her next friend to establish her paternity. In effect at the time of her birth in 1975 was the two year limitations ultimately struck down in *M.D.H.* Putative father R.L.G. filed a motion to dismiss T.L.E.'s action on the basis of the two year statute of limitations. The motion was granted, but T.L.E.'s subsequent motion to correct errors was granted and the cause reinstated.[173] The putative father appealed, arguing the trial court had erred by giving retroactive force to the twenty year period of limitations which took effect October 1, 1979.[174] He maintained that as of 1977, two years subsequent to T.L.E.'s birth, he had acquired a vested property right of absolution from T.L.E.'s support, precluding resurrection of the obligation. The court of appeals rejected his contentions, finding that the twenty year period for illegitimate children had not created or eliminated any existing rights, but rather provided another remedy for the enforcement of those rights.[175] The court buttressed its distinction with reliance on the principle that rights cannot accrue under an unconstitutional statute.[176] Given the remedial nature of the 1979 legislation and the *M.D.H.* holding, the trial court's reinstatement of T.L.E.'s paternity action was upheld.

2. Hampton v. Douglass: *Default Judgments and Retroactive Support Orders.*—The use of default judgments in paternity actions was unequivocally rejected in the survey-period decision of *Hampton v. Douglass.*[177]

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[170]IND. CODE § 31-4-1-26 (1974), *repealed by* Act of Mar. 10, 1978, Pub. L. No. 136, § 57, 1978 Ind. Acts 1196, 1286.

[171]103 S. Ct. at 2209. *Accord In re* M.D.H., 437 N.E.2d at 129.

[172]454 N.E.2d 1268 (Ind. Ct. App. 1983).

[173]The motion to correct errors was predicated on two bases: 1) the unconstitutional nature of the prior statute of limitations, and 2) the applicability of the paternity statute adopted in 1978. The trial court did not state which argument prompted its ruling. 454 N.E.2d at 1269.

[174]IND. CODE § 31-6-6.1-6(b) (Supp. 1984).

[175]454 N.E.2d at 1270 (relying on Malone v. Conner, 135 Ind. App. 167, 189 N.E.2d 590 (1963)). *See also* Tarver v. Dix, 421 N.E.2d 693 (Ind. Ct. App. 1981) (retroactive application of paternity statute).

[176] 454 N.E.2d at 1271 (citing Oolitic Stone Co. of Indiana v. Ridge, 174 Ind. 558, 91 N.E. 944 (1910)).

[177]457 N.E.2d 618 (Ind. Ct. App. 1983). For a criticism of this case, see Harvey, *Civil Procedure and Jurisdiction, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 91, 114 (1985).

Following the putative father's failure to appear for the paternity hearing, the natural mother in *Hampton* sought and was granted a default judgment on the issue of paternity. Evidence concerning attorney fees and support was then introduced and the trial court awarded the mother natal expenses, attorney fees, prospective support, and arrearages for support from the date of birth to the date paternity was established. The putative father's motion for relief from judgment was denied, and he appealed. Notwithstanding alternative procedural bases for its decision, the court of appeals analogized paternity actions to divorce and custody matters[178] and concluded that default judgments as defined in Indiana are not appropriate in paternity actions for two reasons: 1) no responsive pleading is required in paternity actions;[179] and 2) the determination of paternity is a matter of grave importance which engages the parens patriae interests of the state.[180] Accordingly, the cause was remanded for further proceedings.

Putative father Hampton also challenged the propriety of the trial court's award of retroactive support. Without addressing his specific contentions, the court of appeals summarily observed in a footnote[181] that, pursuant to *B.G.L. v. C.L.S.*,[182] "this court's position is clear that the duty of a father to maintain his minor children is imposed by law beginning at birth."[183] This dictum represents an unfortunate rush to judgment; the statutory language which figured so significantly in the *B.G.L.* determination has been repealed and replaced with dissimilar terms.[184] Notwithstanding the short shift given putative father Hampton's due process right to be heard,[185] it remains that a natural mother should

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[178] *In re* Marriage of Henderson, 453 N.E.2d 310 (Ind. Ct. App. 1983) (modification of custody without evidentiary basis improper); Scherer v. Scherer, 405 N.E.2d 40 (Ind. Ct. App. 1980) (dissolution of marriage via summary procedures improper).

[179] 457 N.E.2d at 620 (citing Roe v. Doe, 154 Ind. App. 203, 289 N.E.2d 528 (1972)). Consequently, the default judgment is not necessary in paternity proceedings for the purpose of preventing delay. Rather, the petitioner may proceed directly to the presentation of evidence and, in the absence of the respondent, obtain judgment.

[180] 457 N.E.2d at 260. Evidence is necessary to establish that the best interests of the child have been and will be served. *See, e.g.*, D.R.S. v. R.S.H., 412 N.E.2d 1257 (Ind. Ct. App. 1980); Stevenson v. Stevenson, 173 Ind. App. 495, 364 N.E.2d 161 (1977).

[181] 457 N.E.2d at 621 n.2.

[182] 175 Ind. App. 132, 369 N.E.2d 1105 (1977).

[183] 457 N.E.2d at 621 n.2.

[184] The statutory language relied on in *B.G.L.* included provisions permitting the wife to "recover" child support in an amount not more than "two [2] years accrued support furnished prior to the bringing of the action." IND. CODE §§ 31-4-1-3,-26 (1973), repealed by Act of Mar. 10, 1978, Pub. L. No. 136, § 57, 1978 Ind. Acts 1196, 1286. No express language pertaining to a retroactive support obligation is contained in the present Paternity Act. *See* IND. CODE §§ 31-6-6.1-1 to -19 (1982 & Supp. 1984).

[185] Given that the statutory bases for the *B.G.L.* decision had been repealed, it is axiomatic the court of appeals should have either abstained from reaching the question or reached its merits. As it is, Hampton's opportunity to be heard on remand was unnecessarily clouded by the court's dicta.

be eligible for a support order made retroactive to the date of the child's birth. As succinctly stated in *Denny v. Star Publishing Company*:[186]

> The duty of a father to provide for the maintenance of his minor children is a principle of natural law. The obligation of progenitors to support their offspring is universally acknowledged. To discharge this duty is a primal instinct of human nature. *The duty is imposed by law at least as early as at the birth of a child* and continues thereafter until legally terminated.[187]

This jurisprudential approach is also supported by less lofty considerations. The existing Paternity Act provides that the natural mother may recover the necessary expenses of her "pregnancy and childbirth, including the cost of prenatal care, delivery, hospitalization, and postnatal care."[188] It is doubtful the legislature intended to deprive a mother of reimbursement for support rendered from birth to determination of paternity, given the statutory award of natal expenses predating weekly support expenses. That conclusion is further supported by the fact that the state's interest in reimbursement for past public assistance rendered may be at stake.[189] It has also been recognized that a delay in initiating paternity proceedings is often attributable to human tendencies[190] or gamesmanship;[191] again, the economic circumstances of the minor child should not suffer from these actions of the parents. Indeed, equal protection guarantees arguably might preclude the denial of retroactive support to illegitimate children.[192] For all these reasons, the rule of *B.G.L.* should remain intact despite the changes in the statutory langauge underlying that precedent.

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[186]94 Ind. App. 300, 180 N.E. 685 (1932).

[187]*Id.* at 307-08, 180 N.E. at 687 (emphasis added) (citations omitted).

[188]IND. CODE § 31-6-6.1-17 (1982).

[189]IND. CODE § 12-1-7-1.1 (1982). *See also* Pickett v. Brown, 103 S. Ct. at 2204; D.R.S. v. R.S.H., 412 N.E.2d 1257, 1261 (Ind. Ct. App. 1980).

[190]Justice Rehnquist observed in Mills v. Habluetzel, 456 U.S. at 100:

> Financial difficulties caused by childbirth expenses or a birth-related loss of income, continuing affection for the child's father, a desire to avoid disapproval of family and community, or the emotional strain and confusion that often attend the birth of an illegitimate child all encumber a mother's filing of a paternity suit within 12 months of birth.

[191]*See, e.g.*, Unwed Father v. Unwed Mother, 177 Ind. App. 237, 379 N.E.2d 467 (1978) (difficulties of parents of children born out of wedlock).

[192]*See* Pickett v. Brown, 103 S. Ct. at 2206-09.