

# Legislative Developments in Family Law

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## I. GRANDPARENTAL VISITATION

Numerous states have enacted grandparental visitation statutes in recent years to deal with the situation where divorce or death of a parent has removed direct contact between grandparents and grandchildren.<sup>1</sup> The Indiana grandparental visitation statute was enacted in 1981.<sup>2</sup> Prior to its passage, the Indiana courts had recognized the propriety of giving grandparents a right to visitation<sup>3</sup> but had indicated that any visitation privileges the grandparents might have would be terminated by a final decree of adoption.<sup>4</sup> The 1981 legislation did not specifically address the effects of adoption on grandparental visitation.

Several cases decided under the 1981 legislation held that adoption precluded grandparents from seeking visitation<sup>5</sup> and would also terminate any visitation rights granted prior to the adoption.<sup>6</sup> The grandparental visitation provisions of the Indiana Code were amended in 1985 to deal with the problems created by the adoption of the grandchild by a stepparent.<sup>7</sup> The amendment expressly states that grandparental visitation rights survive the adoption of a grandchild by a stepparent.<sup>8</sup>

The amendment does not resolve the problems concerning visitation when a grandparent wishes to seek visitation while both parents of the grandchild are living and have not divorced.<sup>9</sup> The amendment also fails to address the visitation rights of a paternal grandparent when the paternity of a child born out of wedlock has not been established.<sup>10</sup> In addressing these situations, the Indiana courts have indicated that extending visitation rights beyond those specifically provided for in the statute should be left to the legislature and not to the courts.<sup>11</sup> Because the legislature did not address these two situations in the 1985 amendment, the opinions denying visitation are still the law in Indiana.

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<sup>1</sup>*E.g.*, MICH. COMP. LAWS § 722.27b (Supp. 1985); N.Y. DOM. REL. LAW § 72 (McKinney 1977); OKLA. STAT. ANN. tit. 10, § 5 (West Supp. 1984-1985).

<sup>2</sup>IND. CODE § 31-1-11.7-2 (1982).

<sup>3</sup>Krieg v. Glassburn, 419 N.E.2d 1015 (Ind. Ct. App. 1981).

<sup>4</sup>*Id.* at 1021 n.6.

<sup>5</sup>Lipinski v. Lipinski, 476 N.E.2d 924 (Ind. Ct. App. 1985).

<sup>6</sup>*In re* Visitation of Menzie, 469 N.E.2d 1225 (Ind. Ct. App. 1984).

<sup>7</sup>Act of September 1, 1985, Pub. L. No. 281-1985, 1985 Ind. Acts 305.

<sup>8</sup>IND. CODE § 31-1-11.7-2 (Supp. 1985).

<sup>9</sup>Matter of Meek, 443 N.E.2d 890 (Ind. Ct. App. 1983).

<sup>10</sup>*In re* Visitation of J.O., 441 N.E.2d 991 (Ind. Ct. App. 1982).

<sup>11</sup>*Id.* at 994 n.1.

## II. CHANGING THE RESIDENCE OF AN UNEMANCIPATED CHILD

In a 1974 opinion, the Indiana Supreme Court held that a custodial parent could change the residence of a child only with prior judicial sanction.<sup>12</sup> The Indiana General Assembly has now codified the requirement of prior judicial sanction for moving the child's residence.<sup>13</sup> A custodial parent who intends to move to a residence outside Indiana or one hundred miles or more from the residence at the time of the decree must file a notice of intent with the court that issued the original custody order.<sup>14</sup> The custodial parent must also notify the noncustodial parent if the noncustodial parent has visitation rights.<sup>15</sup> Either parent can then request a hearing for the purpose of reviewing and, if appropriate, modifying the custody, visitation, and support orders.<sup>16</sup> The court must consider the change of residence as a factor in deciding whether the custody, support, and visitation orders should be modified.<sup>17</sup> Thus, in addition to codifying the requirement of prior judicial sanction for a residence change, the statute also significantly broadens the use of change of residence as a ground for changes in custody, visitation, and support.

## III. ENFORCEMENT OF CHILD SUPPORT

The United States Congress strengthened the Title IV-D child support enforcement and paternity establishment provisions of the Social Security Act<sup>18</sup> by adopting the Child Support Enforcement Amendments of 1984 (CSEA).<sup>19</sup> The amendments primarily affect the states by increasing the obligations of states in the handling of IV-D cases. The amendments require that each state enact all laws necessary to implement the procedures and enforcement mechanisms outlined in the act.<sup>20</sup> The enforcement mechanisms available under CSEA include wage withholding,<sup>21</sup> imposition of bonds,<sup>22</sup> liens on real and personal property,<sup>23</sup> interception of federal<sup>24</sup> and state<sup>25</sup> income tax refunds, and provision of support arrearage information to consumer reporting agencies.<sup>26</sup>

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<sup>12</sup>Marshall v. Reeves, 262 Ind. 107, 311 N.E.2d 807 (1974).

<sup>13</sup>Act of Sept. 1, 1985, Pub. L. No. 278-1985, 1985 Ind. Acts 305.

<sup>14</sup>IND. CODE § 31-1-11.5-21.1(a).

<sup>15</sup>*Id.*

<sup>16</sup>*Id.* § 31-1-11.5-21.1(b).

<sup>17</sup>*Id.*

<sup>18</sup>42 U.S.C. §§ 651-667 (1982).

<sup>19</sup>Pub. L. No. 98-378, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 1305.

<sup>20</sup>42 U.S.C.A. § 654(20) (West. Supp. 1985).

<sup>21</sup>*Id.* § 666(b).

<sup>22</sup>*Id.* § 666(a)(6).

<sup>23</sup>*Id.* § 666(a)(4).

<sup>24</sup>*Id.* § 664.

<sup>25</sup>*Id.* § 666(a)(3)(a).

<sup>26</sup>*Id.* § 666(a)(7).

The Indiana legislature has enacted new code provisions and amended existing provisions to bring Indiana law into conformity with these new federal requirements.<sup>27</sup> This legislation affects custodial parents who are not receiving Aid to Families with Dependent Children (AFDC) as well as those parents who are receiving such assistance. Private attorneys may now refer their non-AFDC clients to the IV-D agency (the county prosecutor) for support enforcement services.

Remedies available for support enforcement have been greatly expanded. When a court establishes, modifies, or enforces an order for child support, the court must now also enter a separate income withholding order which must be activated by the IV-D agency when the support obligor is one month delinquent in support payments.<sup>28</sup> The order may also be activated upon petition to the court by the person entitled to receive the child support.<sup>29</sup> The only prerequisites to activation of the income withholding order are notice to the support obligor<sup>30</sup> and to the income payor.<sup>31</sup> The support obligor may also request activation of the income withholding order.<sup>32</sup> The support obligor may contest the nonconsensual activation of the income withholding order within twenty days after the notice is mailed.<sup>33</sup> However, the only basis for contesting the activation of the order is a mistake of fact.<sup>34</sup> If the order is not contested, it may become effective at the end of the twenty-day period.<sup>35</sup>

Once an income withholding order has been activated, a number of obligations are imposed upon the income payor. The payor may withhold a fee of two dollars from the obligor's income each time income is forwarded to the clerk of court.<sup>36</sup> If the income payor fails to forward the funds as required by the income withholding order, the payor is liable for the amounts not forwarded.<sup>37</sup> The legislation also provides that a support obligor who has been discharged from employment, refused employment, or disciplined because of the income withholding order may bring a civil action against the income payor.<sup>38</sup> The obligor is entitled to recover an amount of not less than one hundred dollars, and

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<sup>27</sup>Act of Sept. 1, 1985, Pub. L. No. 53-1985, 1985 Ind. Acts 26.

<sup>28</sup>IND. CODE §§ 31-2-10-7, -8 (Supp. 1985).

<sup>29</sup>*Id.* § 31-2-10-8(b)(2).

<sup>30</sup>*Id.* § 31-2-10-9.

<sup>31</sup>*Id.* § 31-2-10-12.

<sup>32</sup>*Id.* § 31-2-10-8(b)(1).

<sup>33</sup>*Id.* § 31-2-10-13. The time period for contesting the activation of the support order may be less than twenty days if a petition to activate the order has been filed by the person entitled to receive the support. *Id.* § 31-2-10-10.

<sup>34</sup>*Id.* §§ 31-2-10-10(a)(6), -13(b).

<sup>35</sup>*Id.* § 31-2-10-16(b).

<sup>37</sup>*Id.* § 31-2-10-19.

<sup>38</sup>*Id.* § 31-2-10-20.



this remedy does not affect any other legal remedies the obligor may have against the payor.<sup>39</sup>

Other changes implemented by the recent legislation allow for the creation of liens against the real and personal property of a support obligor who is delinquent in payments.<sup>40</sup> The lien holder has the priority of an unperfected secured creditor in any enforcement proceedings against the property.<sup>41</sup> The new legislation also makes support arrearage information available to consumer reporting agencies requesting the information.<sup>42</sup>

These new support enforcement mechanisms supplement the remedies already available under Indiana law, including imposition of bonds as security for payment of support<sup>43</sup> and interception of federal and state income tax refunds.<sup>44</sup> The new legislation, in conjunction with these existing provisions, should provide for more efficient enforcement of support orders, and cooperation with county agencies should make it easier for the private bar to serve its clients well.

#### IV. INCLUSION OF FUTURE RETIREMENT BENEFITS IN PROPERTY SETTLEMENTS

A new state law adopted by the 1985 Indiana General Assembly<sup>45</sup> requires courts in divorce proceedings to include rights in and to certain pension and retirement benefits in property subject to division in a property settlement, even though such benefits are not presently payable,<sup>46</sup> and makes clear that the court may divide between the divorcing spouses the rights to collect payments from these plans as received.<sup>47</sup>

Prior to the effective date of the 1985 act,<sup>48</sup> property to be divided between the parties to a divorce action<sup>49</sup> included "all the assets of either party or both parties, including a present right to withdraw pension or retirement benefits."<sup>50</sup> Under this definition of "property," Indiana courts consistently have held that a court cannot award "an interest in a

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<sup>39</sup>*Id.*

<sup>40</sup>*Id.* § 31-1-11.5-13(g).

<sup>41</sup>*Id.* § 31-1-11.5-13(h).

<sup>42</sup>*Id.* § 12-1-6.1-15.3.

<sup>43</sup>IND. CODE § 31-1-11.5-15 (1982).

<sup>44</sup>*Id.* § 6-8.1-9.5-2.

<sup>45</sup>Pub. L. No. 279-1985 (codified at IND. CODE §§ 31-1-11.5-2, -9 & -11 (Supp. 1985)).

<sup>46</sup>IND. CODE § 31-1-11.5-2(d) (Supp. 1985).

<sup>47</sup>*Id.* § 31-1-11.5-11(b).

<sup>48</sup>The effective date is September 1, 1985.

<sup>49</sup>Rules for disposition of property upon "final separation" are found at IND. CODE § 31-1-11.5-11 (Supp. 1985).

<sup>50</sup>IND. CODE § 31-1-11.5-2(d) (1982).

spouse's *future* income, whether that income constitutes salary, pension, or retirement benefits."<sup>51</sup> The 1985 act, however, changes this result in two ways. First, the definition of "property" is broadened to include, in addition to the limited rights to current pension or retirement benefits allowed prior to the 1985 enactment, "the right to receive pension or retirement benefits that are not forfeited upon termination of employment or that are vested, as that term is defined in Section 411 of the Internal Revenue Code, but that are payable after the dissolution of marriage; and . . . the right to receive disposable retired or retainer pay, as defined in 10 U.S.C. 1408(a), acquired during the marriage that is or may be payable after the dissolution of marriage."<sup>52</sup> Secondly, the 1985 act expands the court's ability to divide the property of the parties to include ordering the distribution of the benefits added to the "property" definition when such benefits are payable after the dissolution of the marriage "by setting aside to either of the parties a percentage of those payments either by assignment or in kind at the time of receipt."<sup>53</sup>

The 1985 act was made possible by two recently-enacted federal statutes: the Former Spouses' Protection Act<sup>54</sup> and the Retirement Equity Act.<sup>55</sup> The Former Spouses' Protection Act was enacted in 1982. This act provided for the first time that retired or retainer military pay could be assigned to former spouses of military personnel for property distributions made in accordance with a final decree of dissolution or legal separation, including property settlements incident to such decrees.<sup>56</sup>

Of more general application is the Retirement Equity Act, enacted in 1984. The Employee Retirement Income Security Act (ERISA)<sup>57</sup> generally prohibits assignment or alienation of benefits under a pension, profit-sharing, or stock bonus plan.<sup>58</sup> Because these ERISA provisions supersede state law,<sup>59</sup> courts have held that ERISA's non-assignment (or "spendthrift") provisions preempt a state law (such as a community property law) which purports to give the non-employee spouse a right to receive qualified retirement or pension benefits following dissolution

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<sup>51</sup>Sadler v. Sadler, 428 N.E.2d 1305, 1307 (Ind. Ct. App. 1981) (emphasis added); see also *In re Marriage of Delgado*, 429 N.E.2d 1125, 1127-28 (Ind. Ct. App. 1982).

<sup>52</sup>IND. CODE § 31-1-11.5-2(d) (Supp. 1985).

<sup>53</sup>IND. CODE § 31-1-11.5-11(b)(4) (Supp. 1985).

<sup>54</sup>Pub. L. No. 97-252, 96 Stat. 730 (codified at 10 U.S.C. § 1408 (1982 & Supp. 1985)).

<sup>55</sup>Pub. L. No. 98-397, 98 Stat. 1426 (codified at 29 U.S.C. §§ 1001 *et seq.* (1982 & Supp. 1985) & 26 U.S.C. §§ 401 *et seq.* (1982 & Supp. 1985)).

<sup>56</sup>10 U.S.C. § 1408 (Supp. 1985).

<sup>57</sup>29 U.S.C. § 1001 (1982).

<sup>58</sup>29 U.S.C. § 1056(c) & (d) (1982).

<sup>59</sup>29 U.S.C. § 1144 (1982).

of the marriage with the employee spouse.<sup>60</sup> Further, a retirement plan which does not include the "spendthrift" provisions does not qualify for the favorable federal income tax treatment given to qualified retirement plans.<sup>61</sup> The Retirement Equity Act provides that an assignment of pension benefits in dissolution cases pursuant to a "qualified domestic relations order" ("QDRO")<sup>62</sup> is an exception to the ERISA prohibition against assignment<sup>63</sup> and that such an assignment would not disqualify the plan under the Internal Revenue Code.<sup>64</sup>

Indiana's 1985 Law, made possible by enactment of the Former Spouses' Protection Act and the Retirement Equity Act, is one with which domestic relations law practitioners must become familiar in order to access accurately the rights of spouses involved or about to become involved in divorce proceedings.

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<sup>60</sup>*See, e.g.,* McCarty v. McCarty, 453 U.S. 208 (1981) in which the United States Supreme Court held that, despite the existence of California's community property law, a California court could not order an assignment of a portion of the husband's nonvested retirement benefits to the wife in a property settlement pursuant to a divorce decree. *Id.*

<sup>61</sup>26 U.S.C. § 411 (1982).

<sup>62</sup>A QDRO must:

(1) Create or recognize the existence of an alternate payee's right to, or assign to an alternate payee, the right to receive all or a portion of the benefits payable to a participant (employee spouse) under a plan. An alternate payee may be a spouse, former spouse, child or dependent of the participant. Dependents of the alternate payor, if not also dependents of the participant, do not qualify as successor alternate payees.

(2) Contain the name and last known mailing address of the participant and the name and mailing address of each alternate payee covered by the order.

(3) Specify the amount or percentage of the participant's benefits to be paid by the plan to each alternate payee or, in the alternative, it may establish a procedure for determining an unknown percentage.

(4) Establish the number of payments or the period to which the order applies.

(5) List every plan to which the order applies.

(6) Be restricted to child support, alimony payments, or payments pursuant to property settlement rights.

(7) Be made pursuant to state domestic relation law.

26 U.S.C. § 1056(d)(3). A domestic relations order will not meet the requirements of ERISA if any of these requirements is not met nor if it exceeds the type or form of benefits, or any option, provided by the plan in question. It must not require the plan to provide increased benefits. It must not require benefits to be paid to a subsequent alternate payee which previously were ordered paid to a different alternate payee in a prior QDRO. *Id.*

<sup>63</sup>29 U.S.C. § 1056(d)(3) (Supp. 1985).

<sup>64</sup>26 U.S.C. § 401(a)(13)(B) (1982 & Supp. 1985); *see generally* S. Rep. No. 98-575, *reprinted at* U.S. CODE CONG. & AD. NEWS 2547, 2564-69.



## V. TAX CONSEQUENCES OF PROPERTY SETTLEMENT TRANSFERS

Internal Revenue Code section 1041 states that no gain or loss will be recognized on a transfer of property to a spouse incident to a divorce.<sup>65</sup> It should be noted, however, that the transferee takes the basis of the transferor, and therefore, may recognize tax consequences on the sale or transfer of that property to a third party.<sup>66</sup> The 1984 amendments to the Code also exempted from taxation the transfer of Individual Retirement Accounts ("IRA's")<sup>67</sup> to a former spouse incident to a divorce.<sup>68</sup> The amendments additionally exempted certain qualified pension plans from taxation if rolled over to a qualifying IRA by the transferee within sixty days of distribution.<sup>69</sup>

The Indiana General Assembly added a new section to the property disposition provisions of the Indiana Code<sup>70</sup> in an attempt to recognize these federal changes and clarify a potential conflict in caselaw concerning the recognition of tax consequences in the distribution of marital property.<sup>71</sup> The new section states that "[t]he court, in determining what is just and reasonable in dividing property . . . shall consider the tax consequences of the property disposition with respect to the present and future economic circumstances of each party."<sup>72</sup> Under prior caselaw, courts were split as to whether the trial court must consider the potential tax consequences in a property settlement.<sup>73</sup>

In *Burkhart v. Burkhart*,<sup>74</sup> the husband contended that the trial court had abused its discretion in its award of the marital estate because it had not considered the capital gains tax which he would have incurred as a result of selling his stock in order to satisfy property settlement obligations to his wife. The First District Court of Appeals of Indiana rejected his contention, stating that where the settlement decree could be satisfied without a sale of the stock, it would be improper to consider

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<sup>65</sup>I.R.C. § 1041(a) (1985).

<sup>66</sup>*Id.* § 1041(b).

<sup>67</sup>*Id.* § 408(a).

<sup>68</sup>*Id.* § 408(d)(6).

<sup>69</sup>*Id.* § 408(d)(3).

<sup>70</sup>Act of April 9, 1985, Pub. L. No. 280-1985, 1985 Ind. Acts 33 (codified in IND. CODE § 31-1-11.5-11.1 (Supp. 1985)).

<sup>71</sup>*See* *Wright v. Wright*, 471 N.E.2d 1240 (Ind. Ct. App. 1984) (court need not consider tax consequences in distribution of marital property); *Burkhart v. Burkhart*, 169 Ind. App. 588, 349 N.E.2d 707 (1976) (same). *Contra In Re Marriage of Mulvihill*, 471 N.E.2d 10 (Ind. Ct. App. 1984) (court did not abuse its discretion where it considered tax consequences in property disposition).

<sup>72</sup>Act of April 9, 1985, Pub. L. No. 280-1985, 1985 Ind. Acts 33 (codified at IND. CODE § 31-1-11.5-11.1 (Supp. 1985)).

<sup>73</sup>*See supra* note 71.

<sup>74</sup>169 Ind. App. 588, 349 N.E.2d 707 (1976).

such a speculative obligation as the capital gains tax.<sup>75</sup> In reaching its conclusion the court did state “[t]his is not to say that the tax consequences are to be ignored” when considering a property settlement.<sup>76</sup>

*Burkhart* can be contrasted with *In re Marriage of Mulvihill*<sup>77</sup> where the Third District Court of Appeals of Indiana determined that the trial court had not abused its discretion in deducting the husband’s estimated tax liability on his pension plan when valuing the plan for property settlement purposes.<sup>78</sup> The court distinguished *Burkhart* because Mulvihill at some point in his life would have incurred tax liability for withdrawal of monies from his HR-10 plan, whereas Burkhart’s obligation to pay capital gains tax was merely speculative.<sup>79</sup>

Less than thirty days after *Mulvihill* was decided, this issue was addressed again in a similar factual context by the First District Court of Appeals in *Wright v. Wright*.<sup>80</sup> The husband in *Wright* contended that it was error for the trial court in its disposition of property to distribute his pensions plan without considering the resulting tax consequences. The court reached a contrary conclusion from *Mulvihill* and held that the trial court did not abuse its discretion in failing to consider such “speculative” tax consequences.<sup>81</sup> In reaching its conclusion, the court adopted the same reasoning of its prior opinion in *Burkhart* that where it was uncertain whether the husband would “cash in” his pension plan to satisfy the terms of the property settlement, the trial court was correct in not considering the tax consequences.<sup>82</sup>

The current amendment to Indiana’s dissolution of marriage statute appears to resolve this case conflict by mandating a consideration of the tax consequences of a property disposition. It must be noted, however, that the amendment would not necessarily result in an absolute reduction of marital assets when considering tax consequences because these consequences may be spread over a number of years, particularly where a spouse will receive deferred income.

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<sup>75</sup>*Id.* at 593, 349 N.E.2d at 711.

<sup>76</sup>*Id.*

<sup>77</sup>471 N.E.2d 10 (Ind. Ct. App. 1984).

<sup>78</sup>*Id.* at 14.

<sup>79</sup>*Id.*

<sup>80</sup>471 N.E.2d 1240 (Ind. Ct. App. 1984).

<sup>81</sup>*Id.* at 1245.

<sup>82</sup>*Id.*