

VIII. Domestic Relations

Helen Garfield*

A. Adoption

Ever since the United States Supreme Court announced, in *Stanley v. Illinois*,¹ that an unwed father has a due process right to a hearing on his fitness as custodian of his children,² courts and legislatures have been concerned with the rights of the fathers of illegitimate children.³ Defining these rights presents a complex problem because there may be irreconcilable conflicts between the rights of the father and the rights and interests of the children. During the survey period, the Indiana Court of Appeals decided two cases dealing with the right of the father of an illegitimate child to consent to the adoption of his child.⁴

In *In re Adoption of Infant Male*,⁵ the child had been conceived after the mother and the putative father were divorced, but during a period when they had resumed cohabitation. At that time, the ex-husband neither acknowledged paternity⁶ nor offered to pay medical expenses. After adoption proceedings had been instituted, however, he asserted a claim of paternity and asked for custody. On these facts, the trial court found that the child's father was "unknown" and granted the petition for adoption.⁷ The court of appeals affirmed, holding that the evidence supported the trial court's negative finding on the paternity issue.⁸

*Associate Professor of Law, Indiana University School of Law—Indianapolis. J.D. University of Colorado, 1967.

¹405 U.S. 645 (1972).

²The father in *Stanley* had been deprived of the children's custody without a hearing after the death of their mother as a result of a statutory presumption that unwed fathers were unfit parents. The Supreme Court concluded that Stanley had a due process right to a hearing on his fitness as a parent and that the Illinois statute denying a hearing to unmarried fathers, while granting one to other parents, violated the equal protection clause of the fourteenth amendment, U.S. CONST. amend. XIV, § 1. *Id.* at 657-58.

³The Supreme Court recently has decided two cases dealing with the unwed father's rights in connection with adoption of his children. *Caban v. Mohammed*, 99 S. Ct. 1760 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

⁴*Unwed Father v. Unwed Mother*, 379 N.E.2d 467 (Ind. Ct. App. 1978); *In re Adoption of Infant Male*, 378 N.E.2d 885 (Ind. Ct. App. 1978).

⁵378 N.E.2d 885 (Ind. Ct. App. 1978).

⁶The mother did file a paternity suit against him, which was ultimately dismissed for lack of prosecution. *Id.* at 887.

⁷*Id.*

⁸*Id.* at 888. There was no presumption of legitimacy because the child was conceived after the parents' divorce. The burden was therefore on the father to prove paternity. *Id.* at 886-87.

The holding of *Infant Male* is not remarkable, but the court's discussion of *Quilloin v. Walcott*⁹ has disturbing implications for future cases. The *Infant Male* court said that "had paternity been established," the putative father "would likely have acquired a veto authority" over the adoption under *Quilloin*.¹⁰ The court construed *Quilloin* as implying that such a veto could be acquired during the adoption proceedings themselves, even though there had been no *prior* adjudication of paternity.¹¹ This suggests that, if the putative father had been able to prove paternity in *Infant Male*, he would have been constitutionally entitled to prevent the child's adoption, regardless of the interests of the child or the wishes of the mother. If this is an accurate reading of *Quilloin*, then in any future case in which the evidence of paternity is uncontroverted, a belated claim of paternity by a previously disinterested natural father would be sufficient to give him a constitutional right to veto the child's adoption. Fortunately, *Quilloin* does not support this interpretation.

Although *Quilloin* did discuss the natural father's ability to acquire "veto authority" over the adoption of his child, the Supreme Court was describing what Georgia law provided and not what the Constitution required:

Generally speaking, *under Georgia law* a child born in wedlock cannot be adopted without the consent of each living parent In contrast, only the consent of the mother is required for adoption of an illegitimate child. [GA. CODE § 74-403(3) (1975)] *To acquire the same veto authority possessed by other parents*, the father of a child born out of wedlock must legitimate his offspring, either by marrying the mother and acknowledging the child as his own, § 74-101, or by obtaining a court order declaring the child illegitimate and capable of inheriting from the father, §74-103.¹²

The father in *Quilloin* had filed his petition for legitimation at the same time as he filed his objections to the proposed adoption of the child by his stepfather. *Under Georgia law*, the effect of granting the petition for legitimation would have been to give the father an absolute veto over the adoption. The trial court, however, denied the petition, and the Supreme Court of Georgia affirmed.¹³

The only issue on appeal to the United States Supreme Court was whether the father, whose status as such was not in dispute,

⁹434 U.S. 246 (1978).

¹⁰378 N.E.2d at 888.

¹¹*Id.*

¹²434 U.S. at 248-49 (emphasis added).

¹³*Id.* at 251-52. Like the petitioner in *Infant Male*, the father in *Quilloin* was granted a hearing. Therefore, the *Stanley* due process issue did not arise.

was denied due process or equal protection when the Georgia courts refused to allow him to veto the adoption, without first finding that he was an unfit parent.¹⁴ The constitutionality of the state procedures involved was not before the Court. Nothing in *Quilloin* can be read as holding that a state is constitutionally *required* to accept a petition for legitimation (or paternity),¹⁵ which is filed in conjunction with an objection to adoption. In fact, there are clear implications to the contrary. While the Court did not accept the stepfather's argument that the father had forfeited his rights by "his failure to petition for legitimation during the 11 years prior to filing of . . . [the] adoption petition,"¹⁶ the Court placed considerable emphasis on the fact that the father had "never exercised actual or legal custody over his child, and thus [had] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."¹⁷ *Quilloin* thus implies that an unwed father cannot claim constitutional protection for his parental rights *unless* he actually has assumed parental responsibilities.¹⁸ A subsequent Supreme Court opinion makes this implication explicit: "In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child."¹⁹

If an unwed father can claim a veto power over his child's adoption in Indiana, the power is not derived from the United States Constitution, but from the Indiana adoption statutes. Section 6 of the adoption statutes gives the father of an illegitimate child a veto power over its adoption by requiring his consent to the adoption whenever a court proceeding has established his paternity.²⁰ Unlike the

¹⁴434 U.S. at 253. The Supreme Court held that *Quilloin's* constitutional rights had not been violated. *Id.* at 256.

¹⁵There are important differences between the petition for legitimation authorized by Georgia law and the paternity claim involved in *Infant Male* which are discussed in the text accompanying notes 20-21 *infra*.

¹⁶434 U.S. at 254.

¹⁷*Id.* at 256.

¹⁸The same implication was discernible in *Stanley v. Illinois*, 405 U.S. 645 (1972), because *Stanley* had actual custody of his children after their mother's death and had had close contact with them over an 18-year period.

¹⁹*Caban v. Mohammed*, 99 S. Ct. 1760, 1768 (1979). The Court held in *Caban* that the equal protection rights of a natural father, who had participated in the rearing of his children, were violated when a New York court allowed the children to be adopted by their stepfather over the natural father's objections.

²⁰IND. CODE § 31-3-1-6(a)(2) (Supp. 1979) provides:

(a) Except as otherwise provided in this section, a petition to adopt a child under eighteen (18) years of age may be granted only if written consent to adoption has been executed by:

. . . .

(2) the mother of a child born out of wedlock *and the father of such a*

Georgia legitimation proceeding discussed in *Quilloin*, a paternity proceeding is often involuntary;²¹ therefore, a finding of paternity does not necessarily indicate that the father has any real interest in the child.²² The Indiana statute provides an escape hatch, however. The statute gives the adoption court power to override the father's veto, if the court finds that his consent is being unreasonably withheld.²³ The trial court in *Quilloin* allowed the stepfather to adopt the child under Georgia law by simply denying the father's belated petition for legitimation. If a similar case arose in Indiana, the court would have difficulty dismissing a paternity petition in a case in which the evidence of paternity was uncontested, as it was in *Quilloin*. The court would have to make a finding of paternity, which automatically would give the father a veto power over the adoption.²⁴ If the court felt that an adoption would be in the child's best interest, the court would have to find that the father's consent was being unreasonably withheld.²⁵ In any case in which the father had never assumed any responsibility for the child beyond the financial responsibility compelled by the paternity order, a court could find that the father's consent was unreasonably withheld without violating either the Indiana statute or the holding of *Quilloin*.

*Unwed Father v. Unwed Mother*²⁶ involved a human problem which was virtually impossible to resolve satisfactorily by the time of appeal. For two years after the child's birth, the mother had successfully blocked the father's attempts to obtain custody of his child. She even had prevented him from discovering the child's whereabouts; she had revealed only that the child was living in an adoptive home somewhere outside the state. By the time the case came to the court of appeals, there was little chance that the father's interests could be recognized without seriously jeopardizing the child's emotional stability. As the court observed, after the child had experienced the stability of a two-parent home for two years, "the prospect of uprooting the child appears to be undesirable."²⁷

child whose paternity has been established by a court proceeding
(emphasis added). See also *id.* § 31-3-1-6(g)(2).

²¹*Id.* §§ 31-6-6.1-1 to -19. Under the new paternity statute, actions can be brought by the mother, the putative father, or the child. See note 261 *infra* and accompanying text.

²²A finding of paternity in an involuntary proceeding is less relevant to the father's right to veto his child's adoption than is the voluntary legitimation proceeding involved in *Quilloin*.

²³IND. CODE § 31-3-1-6(g)(6) (Supp. 1979).

²⁴*Id.* § 31-3-1-6(a)(2) (Supp. 1978), quoted in note 20 *supra*.

²⁵*Id.* § 31-3-1-6(g)(6).

²⁶379 N.E.2d 467 (Ind. Ct. App. 1978).

²⁷*Id.* at 472.

One can only hope that *Unwed Father* will provide useful guidelines which will prevent such injustice in future cases.

The child had been conceived while his parents were students in Minnesota. The parents did not wish to marry; nor did they wish the pregnancy to be terminated by abortion, although the mother did consider this alternative after the father indicated his desire to have custody.²⁸ The mother insisted that the child be placed for adoption and that the adoptive parents remain anonymous. Ultimately, her wishes prevailed. The child was born and placed for adoption at a location known only to the mother. Even in the habeas corpus action brought by the father, she refused to divulge the child's whereabouts, and the trial court did nothing to aid the father's discovery efforts. After the final hearing, the court held that the father was estopped from asserting his parental rights because he had promised the mother at one point during the pregnancy that he would consent to adoption.²⁹ The court found that the mother had relied on his promise in failing to go through with the planned abortion and that the pregnancy was too far advanced for her to have an abortion by the time he told her that he would not consent to the adoption. The trial court therefore denied the father's petition for a writ of habeas corpus and awarded the mother "damages" of \$3,000.³⁰

The court of appeals reversed, holding that the trial court had erred in finding an estoppel against the father and in refusing to order the mother to answer the father's interrogatories concerning the whereabouts of the child.³¹ An oral promise to consent to adoption of a child is not an enforceable promise under Indiana law;³² therefore, it could not form the basis for an estoppel.

The right of the father of an illegitimate child to a court determination of his claim to custody of his child is now firmly established.³³ The trial court should have made the determination here, instead of

²⁸The father even provided money for an abortion, but the mother failed to go through with it. *Id.* at 468. He also promised to pay all expenses connected with the birth. *Id.*

²⁹The father's version was that he had promised to consent because he "wanted to ease Mother's anguish." He said he planned to adopt the child himself without telling her. *Id.* at 469.

³⁰*Id.* at 470. The legal theory underlying the award of damages was not explained in the trial court's order.

³¹*Id.* at 470-71. The court of appeals stated further that the court should have imposed sanctions upon the mother when she failed to comply with his discovery order under IND. R. TR. P. 37(B). *Id.* at 471.

³²Under Indiana law, the consent must be in writing and must be given *after* the birth of the child. IND. CODE § 31-3-1-6(a), (b) (Supp. 1979).

³³*E.g.*, *Caban v. Mohammed*, 99 S. Ct. 1760 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Hyatte v. Lopez*, 366 N.E.2d 676 (Ind. Ct. App. 1977).

allowing the mother, in effect, to usurp the court's function by deciding the custody issue unilaterally. Because of the time required to perfect an appeal, her decision may well have become irreversible. Even though she lost the appeal, she probably succeeded in depriving the unwed father of his constitutional right to a hearing on his fitness as a parent.³⁴ Although the father prevailed in the court of appeals, it is unlikely that he could now succeed in gaining custody. On remand, the trial court must consider the child's interests, and it is hardly likely that the best interests of the child would be served by removing it from a stable home environment and delivering it into the custody of a stranger.

B. Child Custody

1. *Jurisdiction.*—In *Campbell v. Campbell*,³⁵ the Indiana Court of Appeals reversed and remanded a custody modification decision, without considering the merits, because the trial court had failed to question its own jurisdiction over the custody issue.³⁶ Neither party had raised the issue of jurisdiction, but the court of appeals indicated that the trial court should have raised the issue *sua sponte*. The Uniform Child Custody Jurisdiction Law³⁷ was interpreted as imposing an affirmative duty upon the trial court to determine, as a threshold issue in every case, whether the jurisdictional standards of the statute had been met.³⁸ Reversal in this case was necessary "in order to further the laudable objectives of the Act and to bring to the attention of the practicing bar the necessity, in jurisdictional and practical terms, of complying with and implementing the provisions of the Act."³⁹

Campbell is a particularly appropriate case for the appellate court to use for this purpose because its facts indicate that it is at least questionable whether the jurisdictional requirements of the statute were met. The original Indiana divorce decree had awarded custody of the three children to the mother. Proceedings to modify the custody provisions were commenced by the father shortly after the mother and children had moved to Texas. Thereafter, the father moved to Florida. Nevertheless, the proceedings continued in Indiana, culminating in an order awarding two of the children to the

³⁴The doctrine of estoppel invoked by the trial court is inapplicable in light of *Stanley*, which held that an unwed father has a due process right to a hearing on his fitness for custody. Only a knowing waiver can justify depriving him of the hearing to which he is constitutionally entitled. *Cf. Fuentes v. Shevin*, 407 U.S. 67, 95 (1972).

³⁵388 N.E.2d 607 (Ind. Ct. App. 1979).

³⁶*Id.* at 608.

³⁷IND. CODE §§ 31-1-11.6-1 to -24 (Supp. 1979).

³⁸388 N.E.2d at 610.

³⁹*Id.* at 608.

father and one to the mother. Although a divorce court normally has continuing jurisdiction over the issues of custody and support because both are subject to future modification should circumstances change,⁴⁰ *Campbell* holds in effect that the trial court's jurisdiction over custody continues only as long as the court continues to meet the jurisdictional standards of the Uniform Child Custody Jurisdiction Law.⁴¹ Once conditions have so changed that the statutory standards are no longer met, the Indiana court loses subject matter jurisdiction over the issue of custody.

To this point, the court's reasoning is fully supported by the statute. Section 3, the jurisdictional provision, states: "*A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if . . .*"⁴² The clear import of this language is that an Indiana court has subject matter jurisdiction over custody *only if* the conditions listed in section 3 are met. The court of appeals is not on solid ground, however, with respect to what it describes as the statute's "second jurisdictional hurdle."⁴³ Section 7 contains the unique forum non conveniens provisions of the statute, designed to facilitate the resolution of conflicts between two or more states, each of which can meet the somewhat flexible jurisdictional requirements of section 3. Section 7 provides in pertinent part:

*A court which has jurisdiction under this chapter to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.*⁴⁴

The court of appeals observed that this section was "intended to vest only one state with jurisdiction at any given time."⁴⁵ This statement is true in spirit, but use of the word "vest" is unfortunate. Viewed as a whole, the court's discussion treats section 7 as a "jurisdictional hurdle"⁴⁶ which must be overcome *before* subject matter jurisdiction can "vest."⁴⁷ This language implies that section 7 is a

⁴⁰See IND. CODE §§ 31-1-11.5-17, -22(d) (1976 & Supp. 1979).

⁴¹*Id.* § 31-1-11.6-3(a) (Supp. 1979).

⁴²*Id.* (emphasis added).

⁴³388 N.E.2d at 609.

⁴⁴IND. CODE § 31-1-11.6-7(a) (Supp. 1979) (emphasis added). The section also lists in some detail the factors to be considered and the procedures to be used in making the determination to decline jurisdiction.

⁴⁵388 N.E.2d at 610 (emphasis added).

⁴⁶*Id.* at 609.

⁴⁷*Id.* at 610.

prerequisite to subject matter jurisdiction under the statute. The commissioners' notes, quoted by the court, describe the purpose of section 7 as being "to encourage *judicial restraint in exercising jurisdiction* whenever another state appears to be in a better position to determine the custody of a child."⁴⁸ This is consistent with the language of section 7, which states that a court which *already has* jurisdiction may decline to exercise that jurisdiction when another state can provide a more appropriate forum. The language used throughout section 7 is the permissive "may" rather than the mandatory "shall." Once a court determines that it is an inconvenient forum,⁴⁹ it "*may* dismiss the proceedings, or it *may* stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper."⁵⁰ Thus, even after the court determines that it is an inconvenient forum under section 7, the court is not automatically divested of the jurisdiction which has already vested under section 3. The court can, in its discretion, retain jurisdiction unless and until a court in another state assumes jurisdiction over the custody dispute.⁵¹ Nothing in section 7 supports the interpretation that it constitutes a condition precedent to custody jurisdiction.

Properly construed, section 7 requires custody courts to inquire into the forum non conveniens issue, regardless of whether the par-

⁴⁸*Id.* n.4 (emphasis added) (quoting UNIFORM CHILD CUSTODY JURISDICTION ACT § 7, Commissioners' Notes. The commissioners' notes state that § 7 "serves as a second check on jurisdiction once the test of [§§] 3 or 14 [modification of a decree of another state] have [*sic*] been met." *Id.* The court apparently concluded that the commissioners' "second check" on jurisdiction was equivalent to a "second jurisdictional hurdle" or a prerequisite to jurisdiction. *Id.* at 609. The commissioners' notes make it clear, however, that § 7 comes into play only *after* jurisdiction attaches under § 3.

⁴⁹The factors to be considered in making the determination are set out in IND. CODE § 31-1-11.6-7(c) (Supp. 1979):

- (1) [I]f another state is or recently was the child's home state;
- (2) if another state has a closer connection with the child and his family or with the child and one (1) or more of the contestants;
- (3) if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;
- (4) if the parties have agreed on another forum which is no less appropriate; and
- (5) if the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 1 of this chapter.

⁵⁰*Id.* § 31-1-11.6-7(e) (emphasis added).

⁵¹Before making a decision on the forum non conveniens issue, a court "may" communicate with a court in another state and exchange information with that court to aid in determining which can provide the better forum. *Id.* § 31-1-11.6-7(d). After the decision, the court "shall inform the court found to be the more appropriate forum of this fact." *Id.* § 31-1-11.6-7(h).

ties raise the issue. Such an interpretation is consistent with the statute's objective of avoiding "jurisdictional competition and conflict with courts of other states."⁵² The usual rule, that the forum non conveniens issue is considered waived unless it is raised by one of the parties, is not appropriate in custody cases because the parties to the action are not the only persons whose interests must be considered. The child's interests are also involved, and the court has a duty to protect them. The existence of this duty is sufficient justification for treating the forum non conveniens question differently in custody actions without treating it as a question of subject matter jurisdiction. Such jurisdiction is the very source of a court's power. Without it, no court is competent to proceed. Courts should always be wary of characterizing *any* issue as jurisdictional. In *Campbell*, section 3 is properly identified as a prerequisite to subject matter jurisdiction, and that fact alone provides a sufficient ground to support reversal of the trial court's custody order. Section 7 is not a prerequisite to subject matter jurisdiction and should not be so characterized.

In *Kelley v. Kelley*,⁵³ the father's attack on the trial court's jurisdiction was directed primarily toward its jurisdiction over his person. The wife had filed a dissolution action while the husband was in Germany with the parties' two sons. He was served in Germany by registered mail. The husband entered a special appearance in the action solely for the purpose of attacking the court's personal jurisdiction over him. However, when the husband and the sons returned to Indiana, he was personally served with a petition for temporary custody and support.⁵⁴ Thereafter, the parties filed an agreed entry allowing the husband to take their daughter to Germany; all three children were to be returned to the wife by July 8, 1977. The trial court approved the entry. The husband failed to return the children at the agreed time and did not attend the final hearing in the dissolution action, although he was represented by counsel at the hearing. The trial court awarded custody of all three children to the wife. The court of appeals affirmed, holding that the husband was estopped to deny the trial court's personal jurisdiction over him.⁵⁵ Having requested the court to exercise jurisdiction by submitting the agreed entry for its approval, he had voluntarily submitted himself to the court's jurisdiction. The wife's residence

⁵²*Id.* § 31-1-11.6-1(a)(1).

⁵³387 N.E.2d 452 (Ind. Ct. App. 1979).

⁵⁴The petition also requested an order restraining him from removing the parties' daughter from the state until temporary custody was determined. *Id.* at 453.

⁵⁵*Id.* at 453-54. Personal jurisdiction over both parties is required for adjudication of custody and other "incidents" of marriage. *Id.* at 454. See *May v. Anderson*, 345 U.S. 528 (1953); *In re Marriage of Rinderknecht*, 367 N.E.2d 1128 (Ind. Ct. App. 1977).

within the jurisdiction was held to satisfy the statutory requirements for in rem jurisdiction over the dissolution of the marriage.⁵⁶

2. *Parental Rights*.—Upon the death of the custodial parent, the other parent becomes entitled to custody. In *In re Guardianship of Phillips*,⁵⁷ the mother had been awarded custody of the children. After her death, the maternal grandmother and the brother of the deceased mother asked to be appointed as co-guardians of the children. The mother's will, executed prior to her divorce from the children's father, had requested that her parents be named as guardians in the event of her death. The trial court nevertheless awarded custody to the father. The court of appeals affirmed, holding that in Indiana custody "immediately and automatically" reverts to the surviving parent upon the death of the parent with custody.⁵⁸ The "automatic" reversion is not necessarily permanent, however. The presumption favoring the natural parent can be overcome by showing that the parent is unfit or that the parent has, by long acquiescence or voluntary relinquishment, consented to custody in another.⁵⁹ No such showing was made in *Phillips*.⁶⁰

In *In re Marriage of Myers*,⁶¹ the court of appeals reversed an award of custody on the ground that the trial court improperly applied a presumption favoring the mother.⁶² The Indiana Dissolution of Marriage Act provides that, in determining custody, "there shall

⁵⁶387 N.E.2d at 454. In *Kelley*, the court of appeals tested the court's jurisdiction only under the Indiana Dissolution of Marriage Act, IND. CODE § 31-1-11.5-6 (Supp. 1977) (amended 1979); *id.* § 31-1-11.5-20 (1976) (amended 1979). 387 N.E.2d at 454-55. The court did not discuss jurisdiction over the custody issue under the Uniform Child Custody Jurisdiction Law. *Id.* §§ 31-1-11.6-1 to -24 (Supp. 1979). Although jurisdiction over custody traditionally has been regarded as incidental to jurisdiction over the dissolution of marriage, adoption of the uniform law indicated an intent to make it "the exclusive source of authority to adjudicate a custody dispute." *Campbell v. Campbell*, 388 N.E.2d 607, 608 (Ind. Ct. App. 1979) (decided April 26, 1979, about a month after *Kelley*). *Campbell* implies that *all* assertions of jurisdiction over custody, including those which are incidental to jurisdiction over dissolution, should be evaluated under the standards set forth in the uniform law.

⁵⁷383 N.E.2d 1056 (Ind. Ct. App. 1978).

⁵⁸*Id.* at 1059 (citing *State ex rel. Gregory v. Superior Court*, 242 Ind. 42, 176 N.E.2d 126 (1961); *Bryan v. Lyon*, 104 Ind. 227, 3 N.E. 880 (1885)).

⁵⁹383 N.E.2d at 1059; *Hendrickson v. Binkley*, 161 Ind. App. 388, 393-94, 316 N.E.2d 376, 380 (1974); see Garfield, *Domestic Relations, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 157, 162-63 (1979).

⁶⁰383 N.E.2d at 1059. The court of appeals held that the petition in *Phillips* could not have succeeded in any case because IND. CODE § 29-1-18-21(a) (1976) prohibits appointment of more than one guardian of the person unless the co-guardians are husband and wife.

⁶¹387 N.E.2d 1360 (Ind. Ct. App. 1979).

⁶²*Id.* at 1364.

be no presumption favoring either parent.”⁶³ This means that when either parent would be competent to care for the child, the judge must award custody by “looking only to the best interest of the child” without favoring either parent.⁶⁴ Under the facts of *Myers*, the only way the trial court could have decided to award custody to the mother was by indulging in the forbidden presumption favoring her custody. The court of appeals held that this was an abuse of discretion.⁶⁵ The father had custody of the child for three years prior to entry of the decree dissolving the marriage and awarding custody to the mother. Nobody questioned the father’s ability to care for the child. The mother, on the other hand, had a history of mental illness and had three times attempted suicide.⁶⁶ The trial judge had indicated that he had “some concern” about the mother’s ability to take care of the child.⁶⁷

The facts of *Myers* offer considerable support for the appellate court’s decision. The court also relied upon remarks made by the judge during informal conferences, as reported in an affidavit filed by the husband’s attorney in support of his motion to correct errors. Judge Hoffman, in dissent, questioned the wisdom of basing a decision upon off-the-record remarks.⁶⁸ Judge Hoffman stated that such a practice could “only encourage a multitude of appeals based on events occurring outside the courtroom, thereby discouraging open communication between the bench and bar.”⁶⁹

In a somewhat similar fact situation, the court of appeals affirmed a judgment awarding custody of three children to the mother. In *Lovko v. Lovko*,⁷⁰ however, the issue on appeal was whether the trial court had properly used the “best interests of the child” standard in making a custody termination *after* the dissolution decree had been entered.⁷¹ Normally, a custody order entered after the original decree would be a modification of a prior order, which can

⁶³IND. CODE § 31-1-11.5-21(a) (1976) provides in part: “The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there shall be no presumption favoring either parent.”

⁶⁴387 N.E.2d at 1363.

⁶⁵*Id.* at 1364.

⁶⁶Two psychiatrists testified at the hearing. The only one of the two who had treated the wife stated that he could not rule out the possibility that future stresses related to full time care of the child might trigger a psychotic episode. *Id.*

⁶⁷*Id.* at 1363.

⁶⁸*Id.* at 1365-66 (Hoffman, J., dissenting).

⁶⁹*Id.* at 1366 (Hoffman, J., dissenting). Judge Hoffman did not believe the facts of the case in themselves warranted reversal. *Id.* at 1365.

⁷⁰384 N.E.2d 166 (Ind. Ct. App. 1978).

⁷¹*Id.* at 171, 175.

be made only upon a showing of "changed circumstances so substantial and continuing as to make the existing custody order unreasonable."⁷² But in *Lovko*, the dissolution decree specifically awarded the husband "temporary" custody of the children "until the end of the next school year."⁷³ The later order was therefore the trial court's first opportunity to make a permanent award of custody. The order was properly treated as an initial custody determination rather than as a modification. The "best interests of the children" standard was therefore appropriate.⁷⁴

In affirming the award of custody to the mother, the court of appeals expressly reserved approval of the unusual procedure followed in *Lovko*.⁷⁵ The original order granting temporary custody to the father was based upon an agreement of the parties, which apparently had been made because the wife was having problems with alcoholism. At the later custody hearing, there was evidence that the mother had overcome these problems.

3. *Visitation Rights*.—In *Hegedus v. Hegedus*,⁷⁶ the court of appeals decided that a mother could not be held in contempt for refusing to allow visitation by the child's father in the absence of a court order specifically granting him visitation rights.⁷⁷ Hegedus originally

⁷²IND. CODE § 31-1-11.5-22(d) (1976).

⁷³384 N.E.2d at 168-69.

⁷⁴*Id.* at 171. In discussing the standards, the court of appeals stated that under the Uniform Marriage and Divorce Act, the same standard would be used in a modification as in the original determination, *i.e.*, the "best interests of the child." *Id.* This is a misreading of the Act provision. Although the words "best interest of the child" are used in the Uniform Act, the overall intent of its modification provision is clearly to require a substantial change of circumstances before an existing custody order can be modified. UNIFORM MARRIAGE AND DIVORCE ACT § 409(b) provides in part:

[T]he court shall not modify a prior custody decree unless it finds . . . that a change has occurred in the circumstances of the child or his custodian, and that modification is necessary to serve the best interest of the child. In applying these standards the court shall retain the custodian appointed pursuant to the prior decree unless:

- (1) the custodian agrees to the modification;
- (2) the child has been integrated into the family of the petitioner with consent of the custodian; or
- (3) the child's present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him.

Id. (emphasis added). As limited by the other provisions of this section, the Uniform Act's "best interests" standard of modification may be even more stringent than the Indiana standard. *See id.*, Commissioners' Note.

⁷⁵384 N.E.2d at 172. Because no appeal had been taken from the original decree awarding temporary custody to the father, the propriety of that procedure was not before the court. *Id.*

⁷⁶383 N.E.2d 446 (Ind. Ct. App. 1978).

⁷⁷*Id.* at 448.

filed an action for dissolution but later amended his complaint to ask for a declaration of invalidity. The trial court's order declared the purported marriage "void from its inception" because "the defendant was in fact lawfully married to another person" at the time.⁷⁸ The order declared that a child had been born "during the time [the] plaintiff and defendant were living and cohabitating together," but it did not purport to determine custody or visitation rights.⁷⁹ Because there was no court order for the mother to violate, she could not be held in contempt. The trial court therefore had properly dismissed the father's petition for rule to show cause.⁸⁰

4. *Child Snatching.*—The problem of child snatching has commanded national attention in recent years. The Uniform Child Custody Jurisdiction Law was adopted in Indiana in 1977 to discourage child snatching by parents.⁸¹ The statute is particularly effective in cases in which a child is removed from the state in open defiance of an existing custody order by a parent who hopes to secure a legal change of custody in the courts of another state. This effectiveness should increase as more states adopt it.⁸² The uniform law cannot reach the covert child snatcher, however. The parent who steals his child away from its custodial home and conceals the child can be reached only by the criminal law. The Indiana legislature has amended the criminal code to make child snatching a crime, whether committed by a parent or by someone else.⁸³

The definition of "criminal confinement" has been expanded to include removing a "person, who is under eighteen (18) years of age, to a place outside Indiana when the removal violates a child custody order of a court."⁸⁴ Child snatching is a Class D felony if committed by a parent but a Class C felony if committed by a person other

⁷⁸*Id.* at 447-48.

⁷⁹*Id.* at 448. The order also failed to address the issue of the child's legitimacy. Under an 1873 Indiana statute, the issue of a bigamous marriage is legitimate only if "either of the parties . . . shall have contracted such void marriage in the reasonable belief that such disability did not exist" and then only if the issue was "begotten before the discovery of such disability by such innocent party" IND. CODE § 31-1-7-3 (1976). This seems to be a rather extreme example of the sins of the fathers (or, here, the mothers) being visited upon the children.

⁸⁰383 N.E.2d at 448.

⁸¹Pub. L. No. 305, 1977 Ind. Acts 1383 (codified at IND. CODE §§ 33-1-11.6-1 to -24 (Supp. 1979)). The act is discussed at notes 35-52 *supra* and accompanying text.

⁸²The Uniform Act had been adopted by 37 states, as of August 7, 1979. [1979] 5 FAM. L. REP. (BNA) 1151. For a general discussion of its effectiveness, see Bodenheimer, *Progress under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody and Excessive Modification*, 65 CALIF. L. REV. 978 (1977).

⁸³Act of April 22, 1977, Pub. L. No. 299, § 1, 1977 Ind. Acts 1383 (codified at IND. CODE § 35-42-3-3 (Supp. 1979)).

⁸⁴IND. CODE § 35-42-3-3(a)(3) (Supp. 1979).

than a parent.⁸⁵ The statute further provides that "it may be considered as a mitigating circumstance if the accused person returned the other person to the custodial parent within seven (7) days of the removal."⁸⁶

Definition of the crime in terms of "removal" from the state may limit its application in cases in which the parent takes the child out of state for visitation in compliance with a custody order and keeps it beyond the permitted time. If such a parent attempts to retain the child permanently and conceal its whereabouts from the custodial parent, his conduct would seem to be as reprehensible as that of the parent whose initial removal of the child from the state was in violation of a custody order. The effect on the child can be equally devastating in either case.⁸⁷ The Indiana legislature's narrow definition of the crime may be a manifestation of the reluctance of legislatures generally to subject child snatching parents to criminal penalties.⁸⁸ Some have argued that such a parent should not be treated as a criminal because he (or she) acts out of love for the child.⁸⁹ Even so, subjecting a child to the trauma of abduction and concealment merely to gratify the parent's own desire for custody is a strange kind of love. A parent may seek to rationalize child snatching by focusing on the deficiencies of the custodial parent; however, it is difficult to imagine a case in which the present custodial arrangement would be more detrimental to the child than abduction. If such a case were to exist, the best interests of the child would be better served by seeking a remedy through the courts than by child snatching. Criminalizing such irresponsible conduct by parents may

⁸⁵*Id.* § 35-4-3-3(a). Criminal confinement is a Class B felony if committed by a person armed with a deadly weapon or if it results in "serious bodily injury to another person." *Id.* Presumably this would apply even if the crime were committed by a parent.

⁸⁶*Id.* § 35-42-3-3(b).

⁸⁷The potential for trauma to the child may be somewhat greater when the child's removal from the state is in violation of a court order, especially when the actual abduction of the child is carried out by a person other than the parent. This potential arises, however, from the manner in which the child is taken from the other parent's custody and not from the legality of its removal from the *state*, which is the focus of the statutory definition of the crime. From the child's point of view, the act of removal from the state can be equally innocuous whether or not it is committed in violation of a custody order, which is the crime as the statute defines it. In either case, unless the method of abduction is traumatic, the real harm to the child results from being retained and concealed by the snatching parent.

If the child is not removed from the state but rather is snatched and concealed in Indiana, no crime is committed by the snatching parent. The parent would, however, be subject to the custody court's contempt power for violation of the custody order.

⁸⁸*See, e.g.,* Coombs, *The "Snatched" Child is Halfway Home in Congress*, 11 *FAM. L.Q.* 407 (1978) (discussing federal legislation).

⁸⁹*Id.* at 417.

have some effect as a deterrent. A more important result, however, is to make the criminal justice system available to assist in apprehending the snatching parent and returning the child to its home.

5. *Other Statutory Changes.*—An additional legislative change protects the rights of the non-custodial parent in cases in which the custodial parent wishes to change the child's name. Usually, this occurs when a mother having custody of the child has remarried and wants the child to adopt the stepfather's name. The amended statute now requires that the non-custodial parent consent to the name change.⁹⁰ If the parent fails to consent or files an objection to the name change, a hearing must be held.⁹¹ The court's decision is based on the "best interests of the child," but the statute establishes a presumption in favor of an objecting parent who has made support payments and has complied with the other terms of a custody decree.⁹²

C. Child Support

All of the child support cases decided during the survey period deal with some aspect of enforcement of support orders. Issues relating to modification of existing orders have arisen in the context of actions for enforcement by contempt or otherwise. These issues will be discussed under *modification*, regardless of the kind of enforcement proceedings involved. One case, which arose after the survey period, has made significant changes in Indiana law relating to enforcement of support orders and will therefore be discussed herein.⁹³

1. *Criminal Non-Support.*—In *Burris v. State*,⁹⁴ a father who had not contributed to the support of his three children since April 1970, was convicted of wilful nonsupport under the former Indiana statute.⁹⁵ The court of appeals reversed, holding that the State had failed to meet its burden of proving beyond a reasonable doubt that the defendant was able to support his children and that he had

⁹⁰IND. CODE § 34-4-6-2(b) (Supp. 1979). Consent is dispensed with in any case in which it would not be required for an adoption under *id.* § 31-3-1-6 (1976).

⁹¹*Id.* § 34-4-6-4(c) (Supp. 1979).

⁹²*Id.* § 34-4-6-4(d).

⁹³*Kuhn v. Kuhn*, 389 N.E.2d 319 (Ind. Ct. App. 1979). Another case, *Hexter v. Hexter*, 386 N.E.2d 1006 (Ind. Ct. App. 1979), is not discussed herein, although it deals with enforcement of an order for support. For a discussion of *Hexter*, see Townsend, *Secured Transactions and Creditors' Rights, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 369, 391 (1980).

⁹⁴382 N.E.2d 963 (Ind. Ct. App. 1978).

⁹⁵IND. CODE § 35-14-5-2 (1976) (repealed 1977) (current version at *Id.* § 35-46-1-5 (Supp. 1978)).

wilfully neglected to do so.⁹⁶ The defendant had been living in Arizona since the divorce in 1975. The State's only witness, his ex-wife, did not know whether he had been working or whether he was physically capable of working. The only evidence from which the trial judge could infer wilful nonsupport was testimony that the defendant had traveled to Indianapolis once after the divorce and that he had been married three times and divorced twice since leaving Indiana. The court of appeals held that this evidence was insufficient to support the conviction.⁹⁷ The problem of proof encountered in *Burris* should be relieved considerably under the new statute. The statute makes inability to support an affirmative defense, presumably shifting the burden of proof on this issue to the defendant.⁹⁸

2. *Modification.*—In Indiana, child support orders can be modified only as to future payments; they are not retroactively modifiable.⁹⁹ The ramifications of this rule were explored in three cases decided by the Indiana Court of Appeals during the survey period.¹⁰⁰

In *Haycraft v. Haycraft*,¹⁰¹ the parties had verbally agreed to increase the court-ordered child support from \$35 to \$40 per week, but the agreement was never submitted to any court for approval. The father paid \$40 per week from January 1974, to September 1976, when one of the two children began living with him. At that point, the father ceased making any payments. Two months later, the mother filed a petition seeking to have him held in contempt and requesting a judgment for arrears. The trial court found the father in contempt and ordered him to pay \$367.50 in arrears, calculated at \$17.50 per week (one-half of the support of \$35 per week due under the divorce decree). The court also modified its original decree, by awarding custody of the son to the father.¹⁰² The modified decree ordered the father to pay \$17.50 per week for the support of the

⁹⁶382 N.E.2d at 968.

⁹⁷*Id.* The State attempted to rely upon *Hudson v. State*, 370 N.E.2d 983 (Ind. Ct. App. 1977), in which the court held that an unemployed father who "deliberately [pursued] an irresponsible lifestyle" could be convicted of wilful nonsupport. *Id.* at 985. In *Hudson*, however, the wife testified both as to the defendant's state of health (capability of working) and his failure to seek employment. *Hudson* is discussed in Garfield, *supra* note 59, at 167-68.

⁹⁸See IND. CODE § 35-46-1-5(d) (Supp. 1978).

⁹⁹*Zirkle v. Zirkle*, 202 Ind. 129, 172 N.E. 192 (1930); see *Corbridge v. Corbridge*, 230 Ind. 201, 102 N.E.2d 764 (1952).

¹⁰⁰*Jahn v. Jahn*, 385 N.E.2d 488 (Ind. Ct. App. 1979); *In re Marriage of Honkomp*, 381 N.E.2d 881 (Ind. Ct. App. 1978); *Haycraft v. Haycraft*, 375 N.E.2d 252 (Ind. Ct. App. 1978).

¹⁰¹375 N.E.2d 252 (Ind. Ct. App. 1978).

¹⁰²*Id.* at 254.

daughter, who remained in the custody of her mother. The court of appeals affirmed,¹⁰³ but its opinion suggested that the trial court may have erred in calculating the judgment for arrears.¹⁰⁴

The father's appeal challenged the trial court's failure to credit him with the "overpayments" made from 1974 to 1976¹⁰⁵ under the parties' oral agreement. Because the agreement was ineffective as a modification of the court's original order, the father had paid \$5.00 more than he was legally obligated to pay for 139 weeks: a total of \$695. This sum exceeded the amount of the arrearage found to be due (\$367.50). The father therefore contended that the trial court had erred in finding him in contempt. The court of appeals held, however, that the trial court had correctly refused to treat the overpayments as a prepayment of future installments. The court reasoned that the purpose of a support order is to provide "regular, uninterrupted income" for the children's benefit.¹⁰⁶ To allow a parent to "build up a substantial credit" by prepayment and then to cease making payments for a lengthy period of time would defeat the purpose of requiring periodic payments.¹⁰⁷ The trial court was therefore correct in treating the excess payments as voluntary contributions to the children's support.

The court of appeals properly treated the parties' oral modification of the support order as ineffective to alter the support obligations imposed by the divorce decree. When the father failed to make the payments as agreed, the mother could not enforce the oral agreement; she was entitled only to the amount due under the original decree. The father was precluded from using the agreement to reduce or offset the amounts due under the decree. The lesson of *Haycraft* is that all modifications of support agreed to by the parties should be promptly submitted to the court for approval. No such agreement can modify an existing order until *after* the court has entered a formal order of modification.

Much can be learned from an additional issue *not* decided in *Haycraft*. The divorce decree apparently had ordered the father to pay \$35 per week for the support of the parties' "two minor children," who were in the custody of their mother,¹⁰⁸ without specifying the amount per child. After the contempt hearing, the order was modified to provide that the father would thereafter pay \$17.50 for the support of the daughter, who remained in the mother's

¹⁰³*Id.* at 256.

¹⁰⁴*Id.* at 254 n.3. The court of appeals did not consider the issue because the mother had failed to file a brief or allege cross errors. *Id.*

¹⁰⁵*Id.* at 255.

¹⁰⁶*Id.*

¹⁰⁷*Id.*

¹⁰⁸*Id.* at 253.

custody. The arrearages ordered, however, were for the period *before* the court's modification. Because the mother failed to preserve the issue for appeal, the court of appeals never resolved the question whether the trial court had correctly computed the arrearage at the rate of \$17.50 per week. The opinion suggests that this method of computing the arrearage may have amounted to a retroactive modification of the \$35 per week support order, which would be improper under Indiana law.¹⁰⁹ One would hope, however, that the Indiana courts will avoid such a mechanical application of the rule allowing only prospective modification of support orders. Generally, the rule operates benignly. It provides a measure of certainty to Indiana support decrees and assures that they will be recognized and enforced in other states. In the minority of states in which retroactive modification is permitted,¹¹⁰ the amount due under a support order is not certain until the arrearage has been reduced to judgment. Such support orders are not final and therefore are not entitled to full faith and credit in other states.¹¹¹ The Indiana modification rule does not have to be changed to avoid inequitable results in situations such as occurred in *Haycraft*, when the son's custody was transferred to the father. In any case in which custody is transferred to the parent obligated to pay support and the decree fails to break down the support payments into *X* dollars per child, the court should be able to apportion the payments ordered. It would be a simple exercise in mathematics. An Indiana court should then be able to hold, on appropriate evidence, that the support required by the order had been furnished in kind to the child, the real beneficiary of the support order.¹¹² Payment to the other spouse accordingly should be excused. Such difficulties could be avoided altogether if support orders were drafted more carefully. A support order should indicate the amount due for each child, the duration of the payments, and the conditions which would result in their termination, including a transfer of custody.

In *Jahn v. Jahn*,¹¹³ the father was ordered to pay \$50 per week for the support of his two children. The husband made all payments as due, except during weeks when the children were in his care.¹¹⁴

¹⁰⁹See *id.* at 254-55 n.3.

¹¹⁰See cases cited in Annot., 6 A.L.R.2d 1277 (1949).

¹¹¹*Sistare v. Sistare*, 218 U.S. 1 (1910). Retroactively modifiable orders *are* being recognized increasingly as a matter of comity. See *Worthley v. Worthley*, 44 Cal. 2d 465, 283 P.2d 19 (1955); *Kniffen v. Courtney*, 148 Ind. App. 358, 266 N.E.2d 72 (1971).

¹¹²In such a case, the custodial parent is not really requesting retroactive modification of the support order but rather is arguing that he has substantially complied with the order. See H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 15.3, at 514-16 (1968).

¹¹³385 N.E.2d 488 (Ind. Ct. App. 1979).

¹¹⁴The *Jahn* opinion does not indicate how long the periods were, stating merely that the father did not make payments "when the children were in his custody for

The mother brought a contempt action alleging arrearages totalling \$345.¹¹⁵ The trial court refused to hold the father in contempt, stating that he was not obligated to pay support "when the children were in his custody."¹¹⁶ The court of appeals reversed, holding that the trial court's action, in effect, permitted retroactive modification of the support order.¹¹⁷

The temporary visits of the children with their father in *Jahn* are substantially different from the permanent change in custody that occurred in *Haycraft*. In *Jahn*, the custody of the children remained always with the mother, although the children stayed with the father for a week or more on occasion. Presumably, the permanent expenses connected with custody (shelter, clothing, medical care, and so forth) also remained with the mother, although she undoubtedly saved something by not having to feed the children during these visits. If it had been contemplated that support payments would cease during such visits, then it seems reasonable to require that this be set out in the dissolution decree. In the absence of such a provision, support payments should continue to be paid, as the court of appeals stated, "in the manner, amount, and at the times required by the support order . . . until such order is modified or set aside."¹¹⁸

*In re Marriage of Honkomp*¹¹⁹ also involved an attempt by the non-custodial parent to obtain credit against his child support obligation, but in this case the payments for which credit was claimed had nothing to do with the child. In a contempt action brought by the mother, the trial court reduced the amount of support due under the support order to compensate the father for amounts garnished from his wages to pay a debt of the mother's. The court of appeals reversed, holding that this amounted to a retroactive modification of the support order.¹²⁰ The court pointed out that support payments are for the benefit of the children and are "received by the custodial parent in a fiduciary-like capacity."¹²¹ The nature of support payments

more than a weekend." *Id.* at 490. The amount of the arrears claimed (\$345) indicates, however, that the periods involved were relatively brief.

¹¹⁵The mother also asked for an increase in the support allowance and for a declaratory judgment that she was entitled to claim one child as an exemption on her federal income tax return, contrary to a provision of the decree of dissolution. Denial of both requests for modification of the decree was affirmed by the court of appeals. *Id.* at 492.

¹¹⁶*Id.* at 490. Because no actual transfer of custody occurred in *Jahn*, the court's use of the word "custody" in this context is inaccurate.

¹¹⁷*Id.* at 490-91.

¹¹⁸*Id.* at 490.

¹¹⁹381 N.E.2d 881 (Ind. Ct. App. 1978).

¹²⁰*Id.* at 882.

¹²¹*Id.*

would preclude any set off of amounts garnished to pay a marital debt against support payments. The court also held that evidence that the father was being subjected to continuing garnishment to pay the wife's debt was insufficient to establish the "substantial change of circumstances" necessary to justify a prospective modification of the support order.¹²² Although the evidence concerning the garnishments may have been sufficient to justify the trial court's refusal to hold the father in contempt, the garnishments could not excuse his liability for support due for the benefit of the child.¹²³

3. *Statute of Limitations.*—The Indiana Court of Appeals re-examined a number of earlier cases and overruled two of its own recent decisions in *Kuhn v. Kuhn*.¹²⁴ *Kuhn's* implications in relation to enforcement of child support orders extend far beyond the narrow statute of limitations issue actually decided.

In a previous decision in the same controversy,¹²⁵ the court of appeals had held that a child support order could not be enforced by contempt after the child had been emancipated.¹²⁶ The court stated further, however, that denial of the contempt citation was proper because the ex-wife had failed to obtain a second judgment establishing the amount of the arrearage.¹²⁷ This aspect of the earlier *Kuhn* decision was critically re-examined in the present case. After the first *Kuhn* decision, the ex-wife had sought a judgment fixing the amount of support in arrears. The trial court, however, held that her action was barred by the two-year statute of limitations for injuries to personal property, relying on another recent court of appeals decision, *Strawser v. Strawser*.¹²⁸ The court of appeals reversed,

¹²²*Id.* at 883.

¹²³*Id.* Inability to pay is generally recognized as a defense to a contempt citation, but not to the underlying obligation to pay support. See H. CLARK, *supra* note 112, § 15.3, at 510.

¹²⁴389 N.E.2d 319 (Ind. Ct. App. 1979). Although *Kuhn* was decided after the end of the survey period, it makes significant changes in prior law and therefore merits discussion here. The present *Kuhn* decision overruled *Strawser v. Strawser*, 364 N.E.2d 791 (Ind. Ct. App. 1977), and *Owens v. Owens*, 354 N.E.2d 350 (Ind. Ct. App. 1976), insofar as they were inconsistent with the court's new reasoning.

¹²⁵*Kuhn v. Kuhn*, 361 N.E.2d 919 (Ind. Ct. App. 1977), *discussed in* Garfield, *Domestic Relations, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 149, 175 (1978).

¹²⁶This holding was consistent with prior Indiana law, *Corbridge v. Corbridge*, 230 Ind. 201, 102 N.E.2d 764 (1952), and was not disturbed in the later *Kuhn* decision.

¹²⁷In this aspect of the case, the court relied on its own recent decision in *Owens v. Owens*, 354 N.E.2d 350 (Ind. Ct. App. 1976), which was overruled by the present *Kuhn* decision.

¹²⁸364 N.E.2d 791 (Ind. Ct. App. 1977), *overruled*, 389 N.E.2d at 320.

overruling *Strawser* and re-examining its reasoning in the first *Kuhn* decision.¹²⁹

Strawser is easily distinguishable from *Kuhn* because no court order of support had ever been issued in *Strawser*; the mother in *Strawser* was merely seeking reimbursement from the father for expenditures she had made for the children prior to their emancipation.¹³⁰ The mother in *Kuhn* was enforcing a court order requiring the father to make payments of \$35 per week for the support of his children, none of which had been paid prior to the children's emancipation in 1972. The court of appeals held in the second *Kuhn* decision that the statute of limitations applicable to such a case was the ten-year statute relating to judgments.¹³¹ The court also disapproved the reasoning of *Strawser*, which had resulted in the application of the two-year statute of limitations for injuries to personal property to an action for reimbursement of support.¹³²

In determining that the statute of limitations for judgments should apply in actions to enforce court-ordered support, the court had to deal with the contrary implications in *Owens v. Owens*.¹³³ The court had held in *Owens* that a second judgment for the amount in arrears was necessary before a support order could be enforced by execution.¹³⁴ In the first *Kuhn* opinion,¹³⁵ the court had followed *Owens* in stating that a second judgment was also necessary before a child support judgment could be enforced by contempt.¹³⁶ In the second *Kuhn* opinion, the court recognized that the requirement of a sec-

¹²⁹389 N.E.2d at 320, 322. The result of the earlier *Kuhn* decision was upheld, although the reasoning was questioned. *Id.* at 322, n.4.

¹³⁰*Strawser* is discussed in some detail in Garfield, *supra* note 59, at 168-69.

¹³¹389 N.E.2d at 322 (applying IND. CODE § 34-1-2-2 (1976)).

¹³²The court of appeals explained its action:

The *Strawser* court reasoned as follows: first, the right to sue on a debt is a chose in action; second, a chose in action is personalty; therefore, the statute of limitations is that for injury to personal property (and not for an action in debt). The defect in our reasoning is that while the first two propositions are correct statements of the law, the conclusion does not naturally follow because the statutes of limitation apply to the nature of the right being enforced, and not the right to bring the action; that is, one does not generally base an action on injury to the right to bring suit. . . . We are constrained to hold, therefore, that our reasoning in *Strawser* was inappropriate and, insofar as it conflicts herewith, it is overruled.

389 N.E.2d at 320. The court expressed no opinion as to the correctness of the result in *Strawser*. *Id.*

¹³³354 N.E.2d 350 (Ind. Ct. App. 1976). See Garfield, *supra* note 59, at 169 n.82.

¹³⁴354 N.E.2d at 352.

¹³⁵361 N.E.2d at 921.

¹³⁶This determination was not essential in resolving *Kuhn* because contempt enforcement is not available when the children involved are emancipated. See Garfield, *supra* note 125, at 175.

ond judgment was inconsistent with the usual analysis of support orders in a jurisdiction such as Indiana where support orders are not retroactively modifiable. Payments due under such a support order are regarded as becoming final judgments as they accrue.¹³⁷ Unless a support order is retroactively modifiable, a second judgment fixing the amount due is unnecessary because the overdue payments are already final judgments.¹³⁸ Recognizing the inconsistency, the court held in the second *Kuhn* opinion that support installments become judgments as they accrue, "and a second action on the original judgment is unnecessary."¹³⁹

In any case where the amount due under a support order is disputed, it may still be necessary or desirable to obtain a judgment for arrears in Indiana. The number of such cases should decline, however, if full use is made of the Indiana Dissolution of Marriage Act provision authorizing the courts to require that support payments be made through the clerk of the circuit court.¹⁴⁰ Judgments for arrears may also be desirable in some cases when support orders are to be enforced in other states, although they certainly would be unnecessary in many such cases.¹⁴¹ The need for a second judgment for arrears in some cases, however, does not justify requiring a second judgment in all cases. The second *Kuhn* decision wisely eliminates this requirement, thereby eliminating the possibility of the requirement being used as a delaying tactic in future cases.

4. *U.R.E.S.A.*—In *State ex rel. Greebel v. Endsley*,¹⁴² the Indiana Supreme Court held that a proceeding to enforce a support

¹³⁷Such an analysis is implicit in the Indiana Court of Appeals decision of *Kniffen v. Courtney*, 148 Ind. App. 358, 266 N.E.2d 72 (1971). The *Kniffen* court held that a *Kentucky* support order, which the court presumed to be modifiable only prospectively as an Indiana order would be, could be enforced in Indiana without the arrearage being first reduced to judgment in Kentucky. *Id.* at 365, 266 N.E.2d at 76. The same analysis is used by the United States Supreme Court in cases involving interstate recognition of support decrees. See *Sistare v. Sistare*, 218 U.S. 1 (1910).

¹³⁸See H. CLARK, *supra* note 112, § 15.3, at 509; Garfield, *supra* note 125, at 174.

¹³⁹389 N.E.2d at 322. Some of the confusion concerning support judgments arises out of their nature. The original order to the parent to pay future support is an equitable decree (in effect, a mandatory injunction). As the payments become due and unpaid, however, they become indistinguishable from other judgments for money and have been treated as such for purposes of interstate enforcement. Thus, the Supreme Court has held that past-due installments under a child support order, when they are not subject to retroactive modification in the state where rendered, are entitled to full faith and credit in other states; that is, they must be enforced in other states as any other money judgment would be. *Sistare v. Sistare*, 218 U.S. 1 (1910).

¹⁴⁰IND. CODE § 31-1-11.5-13(a)-(c) (Supp. 1979).

¹⁴¹See, e.g., *Kniffen v. Courtney*, 148 Ind. App. 358, 266 N.E.2d 72 (1971). Enforcement under the Uniform Reciprocal Enforcement of Support Act, IND. CODE §§ 31-2-1-1 to -39 (1976 & Supp. 1979), normally would not require that the arrearage be first reduced to judgment.

¹⁴²379 N.E.2d 440 (Ind. 1978).

order of another state under the Uniform Reciprocal Enforcement of Support Act (U.R.E.S.A.)¹⁴³ was analogous to proceedings supplemental.¹⁴⁴ The trial court was therefore not required to grant the father's motion for a change of venue, and his petition for a writ of mandate and prohibition to compel the court to do so was denied.¹⁴⁵

The proceeding in *Greebel* was brought by the mother to enforce a support order contained in a Pennsylvania divorce decree. The mother was invoking the "additional remedies" for enforcement of "foreign support orders" contained in U.R.E.S.A.¹⁴⁶ The father's argument that this was really a "new and independent cause of action for which a change of venue should be permitted"¹⁴⁷ was clearly not applicable to this type of proceeding. The argument might apply, however, to actions brought under other sections of U.R.E.S.A.,¹⁴⁸ which authorize a *new* determination of support to be made by a court in the responding state. Such a determination can be made even though no prior order of support has been entered in any state and can be based upon duties of support imposed by the law of the responding state.¹⁴⁹ If a prior support order exists, the U.R.E.S.A. order does not purport to enforce it¹⁵⁰ but instead constitutes a separate, parallel remedy.¹⁵¹ Such an order might well be characterized as a "new and independent cause of action,"¹⁵² for which a change of venue arguably should be permitted. The Indiana Supreme Court could have avoided any confusion by carefully distinguishing between the two kinds of remedies available under U.R.E.S.A.

Heretofore, the term "foreign support orders" as used in the Indiana version of U.R.E.S.A. referred to an order entered in another state, the District of Columbia, or in a territory or possession of the United States, in which reciprocal legislation had been

¹⁴³IND. CODE §§ 31-2-1-1 to -39 (1976 & Supp. 1979).

¹⁴⁴379 N.E.2d at 441.

¹⁴⁵*Id.*

¹⁴⁶IND. CODE §§ 31-2-1-32 to -37 (1976 & Supp. 1979). Section 32 bears the heading "Foreign support order: additional remedies." Sections 32 to 37 provide for registration and enforcement of support orders entered in other states.

¹⁴⁷379 N.E.2d at 441.

¹⁴⁸IND. CODE §§ 31-2-1-7 to -31 (1976 & Supp. 1979).

¹⁴⁹*Id.* § 31-2-1-7 (Supp. 1979).

¹⁵⁰*Id.* § 31-2-1-29 (1976) provides:

No order of support issued by a court of this state when acting as a responding state shall supersede any other order of support but the amounts for a particular period paid pursuant to either order shall be credited against amounts accruing or accrued for the same period under both.

See *Banton v. Mathers*, 159 Ind. App. 634, 309 N.E.2d 167 (1974).

¹⁵¹See IND. CODE § 31-2-1-3 (1976), which states: "The remedies herein provided are in addition to and not in substitution for any other remedies."

¹⁵²379 N.E.2d at 441.

enacted.¹⁵³ A 1979 amendment to the definition section makes all provisions of the Indiana statute applicable to foreign countries as well, if they have adopted reciprocal legislation substantially similar to U.R.E.S.A.¹⁵⁴

D. Dissolution of Marriage

1. *Maintenance.*—Only one case involving a maintenance award was decided during the survey period. In *Farthing v. Farthing*,¹⁵⁵ the Indiana Court of Appeals affirmed an order reducing a 1975 maintenance award to the wife from \$55 to \$40 per week. In an appeal brought by the husband, the court held that he had failed to show that the circumstances of the parties had so changed since the original order was entered that the maintenance award was no longer justified under section 9(c) of the Indiana Dissolution of Marriage Act.¹⁵⁶ In so holding, the court first determined the standard for modification of a maintenance order because the Indiana statute¹⁵⁷ does not contain a specific provision relating to modification of maintenance.¹⁵⁸ The court held that the standard for modification of child support orders should be applied to maintenance orders as well: "Such modification shall be made only upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable."¹⁵⁹

The trial court in *Farthing* made specific findings that the wife had "substantially recovered physical health but . . . [had] not fully recovered her mental health," and that the husband "had suffered a substantial loss in income in 1975."¹⁶⁰ These findings supported the

¹⁵³IND. CODE § 31-2-1-2(a) (1976). Such legislation has been enacted in all fifty states, the District of Columbia, Puerto Rico and The Virgin Islands. See Fox, *The Uniform Reciprocal Enforcement of Support Act*, 12 FAM. L.Q. 113, 113 (1978).

¹⁵⁴See IND. CODE § 31-2-1-2(a) (Supp. 1979). Some states have already made reciprocal arrangements with West Germany. See [1979] 5 FAM. L. REP. (BNA) 1153, 2185.

¹⁵⁵382 N.E.2d 941 (Ind. Ct. App. 1978).

¹⁵⁶*Id.* at 944, 947. IND. CODE § 31-1-11.5-9(c) (Supp. 1979) provides that maintenance can be awarded to a spouse only "when the court finds a spouse to be physically or mentally incapacitated to the extent that [his or her] ability . . . to support himself or herself is materially affected."

¹⁵⁷IND. CODE §§ 31-1-11.5-1 to -24 (1976 & Supp. 1979).

¹⁵⁸The legislature clearly intended maintenance awards to be modifiable because § 9(c) authorizes them to be made "during said incapacity, subject to further order of the court." *Id.* § 31-1-11.5-9(c) (Supp. 1979).

¹⁵⁹382 N.E.2d at 943-44; IND. CODE § 31-1-11.5-17(a) (1976). The heading of § 17(a) refers to "modification and termination of provisions for maintenance, support and property disposition" but the body of § 17(a) contains no mention of *maintenance* modification. See *id.*

¹⁶⁰382 N.E.2d at 943.

trial court's order reducing the amount of the maintenance payments but did not support the husband's argument that the trial court was required by the statute to terminate maintenance altogether. Evidently, the husband's argument was directed toward the issue of whether there had been sufficient evidence of incapacity to support the court's original maintenance award. The finding of incapacity in the dissolution decree had been based only on evidence that the wife suffered from "nerves," but the husband had not appealed that judgment.¹⁶¹ The issue of whether evidence of a "nervous condition" is sufficient to support a maintenance award under section 9(c) was therefore not before the court in *Farthing*. This issue remains unresolved.

The United States Supreme Court's recent decision on the constitutionality of statutes allowing awards of alimony (or maintenance) only to wives¹⁶² should have little effect on Indiana law. Section 9(c) already allows maintenance to be awarded to *either* spouse, provided that spouse is incapacitated.¹⁶³

2. *Property Division*.—In three cases decided during the survey period, the Indiana Court of Appeals continued to treat pensions and other retirement benefits as assets to be "considered" but not divided upon dissolution of marriage.¹⁶⁴ In *Libunao v. Libunao*,¹⁶⁵ substantial marital assets were awarded to the wife.¹⁶⁶ The husband contested the property division, alleging that the trial court had abused its discretion by considering his pension and profit sharing plan and his Keough retirement plan without first ascertaining their precise present value.¹⁶⁷ The court of appeals affirmed the division,

¹⁶¹*Id.* at 945. "[T]he Husband is in effect attempting to collaterally attack the basis for the original judgment." *Id.*

¹⁶²*Orr v. Orr*, 99 S. Ct. 1102 (1979), in which it was held that an Alabama statute permitting alimony to be awarded to wives but not to husbands constituted gender-based discrimination in violation of the equal protection clause, U.S. CONST. amend. XIV, § 1. 99 S. Ct. at 1113-14.

¹⁶³IND. CODE § 31-1-11.5-9(c) (Supp. 1979). The Indiana Court of Appeals has been restrictive in interpreting the statutory requirement of incapacity. *See, e.g., Wilcox v. Wilcox*, 365 N.E.2d 792 (Ind. Ct. App. 1977); *Liszkai v. Liszkai*, 343 N.E.2d 799 (Ind. Ct. App. 1976).

¹⁶⁴*See Savage v. Savage*, 374 N.E.2d 536, 538-39 (Ind. Ct. App. 1978), *discussed in Garfield*, *supra* note 59, at 182-85.

¹⁶⁵388 N.E.2d 574 (Ind. Ct. App. 1979).

¹⁶⁶The wife was awarded real estate and cash valued at more than \$250,000. *Id.* at 576. The husband received his interest in the medical building, cash, notes, and stock in the medical corporation, as well as his interests in a pension and profit plan and a Keough plan. The present value of some of these assets was never precisely ascertained, but their total value appears to have been somewhat less than \$200,000. *See id.*

¹⁶⁷The court of appeals defined the issue on appeal as being whether an abuse of discretion was shown "because the marital assets were *divided* in such a manner that one spouse received substantially all of the tangible assets and the other spouse retained

holding that the trial court might “consider the future value of an asset, but [that] the final distribution [had to] be just and equitable” taking into account the “present vested interest” in the asset.¹⁶⁸ For this purpose, the trial court did not have to establish the precise present value of each asset, as long as there was sufficient evidence as to the overall value of the marital property.¹⁶⁹ The court held that the Libunao division was fair in light of the husband’s considerable earning capacity,¹⁷⁰ the wife’s limited earning capacity, and her contributions to her husband’s medical practice.¹⁷¹

In *Hiscox v. Hiscox*,¹⁷² the husband’s military retirement pay had a value which far exceeded that of the other assets accumulated during the marriage. Based on his life expectancy, the husband could expect to receive \$499,545 in retirement pay, which had been earned during the marriage; the wife assessed its discounted present value at \$220,265. Aside from this, the only marital assets were “items of personal property,” worth approximately \$16,000, most of which were awarded to the wife.¹⁷³ The wife argued on appeal that the trial court had erred in refusing to award her any portion of the husband’s retirement pay. The court of appeals held that the trial

only his interest in a pension or retirement fund.” *Id.* at 577. This seems to be somewhat of an overstatement because, as the court itself pointed out, the husband did receive other substantial assets. *Id.*; see note 166 *supra*. It is true, however, that the property distributed to the husband consisted predominantly of intangibles and future interests. Even the medical building was held in a Clifford trust for the benefit of the children; however, the property would revert to the husband on termination of the trust. See 388 N.E.2d at 576.

¹⁶⁸388 N.E.2d at 577.

¹⁶⁹*Id.* at 576-77.

¹⁷⁰He was a physician earning gross income “well in excess of \$100,000 a year.” *Id.* at 576. The wife had not completed high school, but was “capable of performing various types of office work.” *Id.*

¹⁷¹The wife had worked as a bookkeeper in her husband’s office. *Id.* The court also pointed out that the husband had “received over \$20,000 in cash and a substantial amount of equity in his medical practice and stock [in his medical corporation].” *Id.* at 577.

The court of appeals refused to consider the husband’s second allegation of error, relating to the propriety of awarding the parties’ residence to the wife because he had failed to preserve the issue in his motion to correct errors. *Id.* at 578.

¹⁷²385 N.E.2d 1166 (Ind. Ct. App. 1979).

¹⁷³*Id.* at 1166. The wife received personal property valued by the husband at \$13,600. Personalty awarded to the husband was valued by him at \$2,840. The husband also was awarded his interest in real property owned by him jointly with his mother and was ordered to pay the wife \$15,000 (apparently to offset the value of this real property interest). This real property was subject to division under IND. CODE § 31-1-11.5-11 (1976) (amended 1979), but the court evidently did not consider it to be an “asset of the marriage.” See 385 N.E.2d at 1166-67. In addition, both parties were awarded their respective retirement benefits. *Id.* at 1167. No valuation of the wife’s retirement benefits is reported in the *Hiscox* opinion.

court's division was correct because the retirement pay was "not a vested present interest."¹⁷⁴ Because the husband already had retired and was receiving monthly retirement payments at the time of the hearing, the court's characterization of these benefits as not being "vested" warrants closer examination.

The definition of vesting used by the court of appeals in *Hiscox* was derived from *Savage v. Savage*,¹⁷⁵ an earlier case in which the husband had retired and was receiving railroad retirement benefits at the time of the divorce.¹⁷⁶ The court held in *Savage* that the husband did not have "a sufficient vested present interest" in his future pension payments to qualify them as property subject to division under the Indiana Dissolution of Marriage Act¹⁷⁷ because the payments were "contingent upon his continued survival."¹⁷⁸ In *Savage*, the court had relied in turn upon *Wilcox v. Wilcox*,¹⁷⁹ in which it was held that a husband's future earnings were not property subject to division on dissolution because he had no "vested present interest" in them.¹⁸⁰ Although the court conceded in *Savage* that there might be "material differences" between future earnings and future pension payments,¹⁸¹ it nevertheless treated them the same, apparently because both constituted "income to be received in the future."¹⁸² The court ignored important differences between future earnings and future pension payments that far outweigh any such superficial similarity. For purposes of dividing the property of divorcing spouses "in a just and reasonable manner,"¹⁸³ the crucial distinction would seem to be that future earnings are to be earned in the future, *after* the marriage is dissolved, whereas future retirement benefits are earned *during* the marriage, although they may not be payable until after dissolution. Retirement benefits are a form of deferred compensation, a fringe benefit derived from a spouse's employment during the marriage.¹⁸⁴ The court of appeals implicitly recognized this by holding in *Libunao* that retirement benefits should be "considered" in making an equitable division of

¹⁷⁴385 N.E.2d at 1168.

¹⁷⁵374 N.E.2d 536 (Ind. Ct. App. 1978).

¹⁷⁶The *Savage* opinion did not identify the payments as railroad retirement benefits, but the *Hiscox* court did. 385 N.E.2d at 1167.

¹⁷⁷IND. CODE § 31-1-11.5-11 (Supp. 1979).

¹⁷⁸374 N.E.2d at 538-39.

¹⁷⁹365 N.E.2d 792 (Ind. Ct. App. 1977). Both *Wilcox* and *Savage* are discussed in Garfield, *supra* note 59, at 178-84.

¹⁸⁰365 N.E.2d at 795.

¹⁸¹374 N.E.2d at 539.

¹⁸²*Id.*

¹⁸³IND. CODE § 31-1-11.5-11 (Supp. 1979).

¹⁸⁴*See Brown v. Brown*, 15 Cal. 3d 838, 843, 544 P.2d 561, 563, 126 Cal. Rptr. 633, 635 (1976).

property.¹⁸⁵ The Indiana Court of Appeals has not answered one vital question: How *can* pension rights be "considered" in a case in which there is no other property to divide? The question seems unanswerable. The court has held in *Wilcox*¹⁸⁶ and *Savage*¹⁸⁷ that any award of property over and above the value of the tangible assets of the marriage would constitute an award of maintenance in violation of section 9(c).¹⁸⁸ Under this holding, no award can be made in any case in which pension rights constitute the only substantial asset.

In these pension cases, the Indiana Court of Appeals has used the term "vested" in a sense that is very different from the term's usual meaning in pension matters. In federal legislation governing pension rights, the word "vesting" refers to pension rights that are not forfeited when the employee terminates his employment.¹⁸⁹ Similarly, in pension cases from other states, the term "vested" is used to indicate "a pension right which survives the discharge or voluntary termination of the employee."¹⁹⁰ Such a vested pension right is subject to division on dissolution of marriage in many states,¹⁹¹ and some states allow non-vested pension rights to be divided as well.¹⁹² In states in which pensions cannot be divided as property, pensions *can* be considered in awarding alimony or

¹⁸⁵388 N.E.2d at 577.

¹⁸⁶365 N.E.2d at 794-95.

¹⁸⁷374 N.E.2d at 539.

¹⁸⁸IND. CODE § 31-1-11.5-9(c) (Supp. 1979). See Garfield, *Indiana's Displaced Homemakers*, 23 RES GESTAE 80 (1979).

¹⁸⁹The Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1053 (1976), describes pension rights which are nonforfeitable under the heading "minimum vesting standards." It specifies that a right is not considered forfeitable merely because it is contingent upon the employee's survival. *Id.* § 1053(a)(3)(A). "Non-forfeitable" is defined as a pension benefit or right arising from employment "which is unconditional, and which is legally enforceable against the plan." *Id.* § 1002(19).

¹⁹⁰*In re Marriage of Brown*, 15 Cal.3d 838, 843, 544 P.2d 561, 563, 126 Cal. Rptr. 633, 635 (1976). *Brown* distinguishes between a "vested" pension right and one that has "matured:"

Depending upon the provisions of the retirement program, an employee's right may vest after a term of service even though it does not mature until he reaches retirement age and elects to retire. Such vested but immature rights are frequently subject to the condition, among others, that the employee survive until retirement.

Id. Under this definition, the pension rights in *Hiscox* and *Savage* were both "vested" and "matured."

¹⁹¹*E.g.*, *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975); *Swope v. Mitchell*, 324 So. 2d 461 (La. Ct. App. 1975); *Hutchins v. Hutchins*, 71 Mich. App. 365, 248 N.W.2d 276 (1976); *Schafer v. Schafer*, 3 Wis. 2d 166, 87 N.W.2d 803 (1958).

¹⁹²*E.g.*, *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). When too many uncertainties exist to permit division of future pension rights at the time of the divorce, the court can award the other spouse a portion of each payment as it is received. *Id.* This is precisely the method that was used by the trial court in *Savage*.

maintenance because retirement income is clearly relevant to a spouse's ability to pay.¹⁹³ In Indiana, however, if the pension itself cannot be divided, the other spouse may get nothing. The spouse can be awarded other property, if there is any, or he or she can receive maintenance, if incapacitated. If no other property exists and the other spouse is not incapacitated, an Indiana court cannot make *any* award regardless of the value of the pension rights. In such a situation, no truly equitable resolution of the spouses' financial affairs is possible.

A recent decision of the United States Supreme Court has confused the picture further. In *Hisquierdo v. Hisquierdo*,¹⁹⁴ the Court held that California could not treat anticipated benefits under the Railroad Retirement Act¹⁹⁵ as community property upon dissolution of marriage.¹⁹⁶ The decision is based upon the Court's interpretation of the federal statute, particularly the provision prohibiting assignment or anticipation of benefits.¹⁹⁷ The Court also noted that benefits under the statute have some of the attributes of a social welfare plan and were designed in part as a substitute for social security.¹⁹⁸ Although Congress has provided social security benefits

¹⁹³Several states have expressly held that retirement income should be considered in awarding maintenance or alimony. *E.g.*, *Ellis v. Ellis*, 552 P.2d 506 (Colo. 1976); *Howard v. Howard*, 196 Neb. 351, 242 N.W.2d 884 (1976). In no other state, with the possible exception of Pennsylvania, is the decision about whether pensions are properly subject to division on dissolution as crucial as it is in Indiana. In all other states, except Pennsylvania and Texas, awards of alimony or maintenance can be made on divorce without the limitation of incapacity contained in the Indiana statute. *See Freed & Foster, Divorce in the Fifty States: An Overview as of August 1, 1978*, [1978] 4 FAM. L. REP. (BNA) 4033, 4038. In Texas, pension rights are treated as community property subject to division on divorce. *E.g.*, *Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1977). 1977).

¹⁹⁴99 S. Ct. 802 (1979).

¹⁹⁵45 U.S.C. § 231 (1976 & Supp. I 1977).

¹⁹⁶99 S. Ct. at 813.

¹⁹⁷The statute provides, in part:

Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, *no annuity or supplemental annuity shall be assignable* or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, *nor shall the payment thereof be anticipated.*

45 U.S.C. § 231m (1976) (emphasis added). There is an exception to this provision for child support or alimony. *Id.* § 659.

¹⁹⁸The *Hisquierdo* court described the benefits under the statute:

[T]he Act resembles both a private pension program and a social welfare plan. It provides two tiers of benefits. The upper tier, like a private pension, is tied to earnings and career service. . . .

The lower, and larger, tier of benefits corresponds exactly to those an employee would expect to receive were he covered by the Social Security Act.

99 S. Ct. at 804-05.

for divorced spouses, it has made no similar provision concerning benefits under the Railroad Retirement Act.¹⁹⁹ The *Hisquierdo* decision is limited by its reasoning to railroad retirement benefits because it rests upon the Court's interpretation of the Railroad Retirement Act. *Hisquierdo* should not be construed as establishing a general federal rule against treating pensions and other types of retirement benefits as community property or as property subject to equitable division on divorce.²⁰⁰

The effect of *Hisquierdo* on divorcing couples in California and in most other states may be minimal because a spouse's pension rights can be taken into account in making an award of alimony or maintenance.²⁰¹ Having lost her community property right to a share of her husband's retirement benefits, Mrs. Hisquierdo can probably qualify for an award of alimony, which can then be enforced against the retirement benefits.²⁰² In Indiana, however, the effect of the *Hisquierdo* interpretation of the Railroad Retirement Act would have been much more drastic, if *Savage* and *Hiscox* had not already led to the same result. *Hisquierdo* makes it less likely that the Indiana courts will change their treatment of pensions on dissolution of marriage because such a change could not affect railroad retirement benefits. Under *Hisquierdo*, railroad benefits could only be made available to the other spouse through an award of maintenance, which is not possible in most cases under the Indiana statute. Evidently, Congress assumed that state divorce laws would authorize that a provision be made for nonworking spouses in the form of alimony or maintenance when it provided an exception to the provision prohibiting anticipation of Railroad Retirement Act benefits which apply to alimony awards.²⁰³ This exception, however, is largely ineffective in Indiana.

¹⁹⁹A proposal to amend the statute to provide a benefit to divorced spouses was specifically rejected in 1974. *Id.* at 810.

²⁰⁰A somewhat similar question may arise under the Employee Retirement Income Security Act (ERISA), which contains a provision against assignment or alienation. 29 U.S.C. § 1056(d)(1) (1976). See Bass, *ERISA and the Treatment of Pensions etc., as Property Divisible on Divorce*, [1978] 4 FAM. L. REP. (BNA) 4009, 4010. The reasoning of *Hisquierdo*, however, would not foreclose a different result under ERISA.

²⁰¹In determining to treat unvested pension rights as community property rather than as the basis for an award of alimony, the California Supreme Court reasoned that the nonworking spouse's entitlement to a share of the working spouse's pension should be a matter of right, rather than dependent upon the trial court's discretion, as alimony awards are. *In re Marriage of Brown*, 15 Cal. 3d 838, 848, 544 P.2d 561, 567, 126 Cal. Rptr. 633, 639 (1976).

²⁰²The prohibition against alienation of benefits under the Railroad Retirement Act contains an exception for alimony and child support. 42 U.S.C. § 659 (1976); see *Hisquierdo*, 99 S. Ct. at 806.

²⁰³42 U.S.C. § 659 (1976).

In *Goodwill v. Goodwill*,²⁰⁴ the wife received \$6,000 in cash as part of a property division. This award was made a lien upon the husband's anticipated railroad retirement benefits.²⁰⁵ Because the parties' property was heavily encumbered, the \$6,000 exceeded the net value of the marital assets. The trial court made no finding of incapacity that would justify the payment as an award of maintenance. The court of appeals reversed, citing *Savage*.²⁰⁶ Because no tangible property existed,²⁰⁷ the wife was entitled to nothing. Neither the husband's present earning capacity nor his pension rights could be considered under these circumstances. Even if the cash award could have been justified as a division of property, it could not be made a lien on the husband's railroad retirement benefits under *Hisquierdo*. Although *Goodwill* was decided before *Hisquierdo*, the Indiana decision is thus consistent with the Supreme Court's reading of the Railroad Retirement Act. The ultimate outcome of *Goodwill*, however, was probably not one that was anticipated either by Congress or by the Supreme Court. The denial of any financial settlement to the wife in *Goodwill* results from *Wilcox* and *Savage*, which effectively limit property available for division on dissolution to tangible assets.

The tangible asset limitation of *Wilcox* was avoided by the court of appeals in *In re Marriage of McManama*,²⁰⁸ which affirmed an award of \$3,600 to a wife who had contributed to her husband's expenses as a student at Notre Dame Law School. The dissolution decree also awarded the wife the only substantial asset owned by the parties, a residence in South Bend; she was made responsible for the mortgage on it. Each party received the personal property in his

²⁰⁴382 N.E.2d 720 (Ind. Ct. App. 1978).

²⁰⁵The cash award was designated as an "alimony judgment," but the court of appeals treated it as an "attempted property division" because alimony is no longer awarded under the present Indiana statute. *Id.* at 721-22.

²⁰⁶*Id.* at 722-23.

²⁰⁷The parties' real estate and furniture were subject to encumbrances which exceeded their value. The only other asset was a 1966 Pontiac. The wife received household furniture worth \$1,500, in addition to the cash award, but this phase of the division was not appealed. Thus, the court did not have to determine whether this cash award also constituted an award in excess of the value of the tangible assets of the marriage. *See id.* at 721.

²⁰⁸386 N.E.2d 953 (1979). Judge Staton, in dissent, observed that *McManama* is inconsistent with *Wilcox* because the cash award "of the husband's future income to the wife is above the total value of the marital assets." *Id.* at 956 (Staton, J., dissenting). The relevant conflict with *Wilcox* is the fact that the award exceeded the value of the marital assets, not the fact that it was payable out of the husband's future income. An award payable out of the other spouse's future income would not be inconsistent with *Wilcox* if tangible property of equal or greater value had been awarded to the paying spouse.

or her possession, and the husband was made responsible for debts totalling \$1,080.²⁰⁹ The parties' tangible assets had been divided before the cash award was made to the wife, with the bulk of the assets going to the wife. The \$3,600 was therefore an award "over and above the actual physical assets of the marital relationship," which, under *Wilcox*, "must represent some form of support or maintenance."²¹⁰ The two cases are distinguishable, however. In *McManama*, the wife did not receive the cash award to compensate her for the husband's greater earning power as the wife had sought to do in *Wilcox*.²¹¹ The *McManama* award was in the nature of restitution for sums contributed by the wife to her husband's legal education. The court of appeals relied on the provision of the property division statute which permits the trial court to consider "the conduct of the parties . . . as related to the disposition or dissipation of their property."²¹² The court interpreted the \$3,600 award as compensating the wife for marital assets "dissipated" for the sole benefit of the husband.²¹³

Although it is difficult to reconcile *McManama* with the broad statements in *Wilcox* limiting property available for division to "actual physical assets,"²¹⁴ the court of appeals is certainly correct in its conclusion that the *McManama* award bears little resemblance to maintenance. Unlike the wives in *Wilcox* and *Savage*, Mrs. *McManama* was probably not entitled to maintenance even if the Indiana statute allowed it. Such an award would have to be based upon her need and her husband's ability to pay.²¹⁵ At the time of the separation, she was earning considerably more than her husband;²¹⁶

²⁰⁹The debts were for the husband's medical bill (\$500), a balance due on his law school tuition (\$220), and a federal tax liability (\$360). *Id.* at 954.

²¹⁰365 N.E.2d at 794. No maintenance award would be permissible under the facts of *McManama* because the wife was not "incapacitated," as required by IND. CODE § 31-1-11.5-9(c) (Supp. 1979).

²¹¹IND. CODE § 31-1-11.5-11(e) (1976) (amended 1979) permits a court to consider the "earnings or earning ability of the parties" in making an equitable division of property on dissolution. The wife in *Wilcox* had argued that the court should consider the husband's future income as an asset subject to division. 365 N.E.2d at 794.

²¹²386 N.E.2d at 955; IND. CODE § 31-1-11.5-11(d) (1976) (amended 1979).

²¹³386 N.E.2d at 955. When the husband began his law school career, the parties had \$6,000 in cash, most of which was spent during his first year in law school. The wife worked full-time during this period, and the parties separated the following summer. *Id.* at 953-54.

²¹⁴365 N.E.2d at 794.

²¹⁵*See, e.g.*, UNIFORM MARRIAGE AND DIVORCE ACT § 307.

²¹⁶She earned \$14,785 during the preceding year working as a full-time school psychologist. He had earned \$1,250 on a summer job as an assistant in the public defender's office. 386 N.E.2d at 953-54. On these facts, it is doubtful that she could have shown the need for maintenance. *See In re Marriage of Graham*, 574 P.2d 75, 78-79 (Colo. 1978) (Carrigan, J., dissenting).

therefore, an award based on her support needs would have been difficult to justify. In similar situations, some state courts have treated advanced education, or the increased earning capacity resulting therefrom, as an asset subject to division on dissolution of marriage,²¹⁷ but such an interpretation apparently is foreclosed in Indiana by the holdings of *Wilcox* and *Savage*. In any event, the Indiana legislature has now amended the property division statute²¹⁸ to authorize the kind of award made in *McManama*.²¹⁹

One additional property division case deserves mention.²²⁰ Generally, disputes over the amount of fees ordered to be paid by one spouse to the attorney of the other²²¹ are resolved without much discussion. Such awards are confirmed absent a "clear abuse of discretion."²²² In *Greiner v. Greiner*,²²³ however, the propriety of an

²¹⁷*In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978); *Inman v. Inman*, 578 S.W.2d 266 (Ky. Ct. App. 1979).

²¹⁸Act of Apr. 10, 1979, Pub. L. No. 9, § 1, 1979 Ind. Acts 1375 (amending IND. CODE § 31-1-11.5-11 (Supp. 1979)).

²¹⁹A new § 11(b) now provides:

When the court finds there is little or no marital property, it may award either spouse a money judgment not limited to the existing property. However, this award may be made only for the financial contribution of one (1) spouse toward tuition, books, and laboratory fees for the higher education of the other spouse.

IND. CODE § 31-1-11.5-11(b) (Supp. 1979). Unfortunately, this carefully limited amendment may be interpreted as confirming the tangible assets limitation of *Wilcox* and *Savage*. In extending relief *only* to the working spouse who helps put her husband through school, the amendment implies that, in all other cases, awards are properly "limited to the existing property." *Id.*

²²⁰Other cases decided during the survey period present issues of limited general interest. *In re Marriage of Hirsch*, 385 N.E.2d 193 (Ind. Ct. App. 1979), was mainly concerned with a dispute over property valuations.

In *Blake v. Hosford*, 387 N.E.2d 1335 (Ind. Ct. App. 1979), the parties had been divorced in Arizona, but the decree failed to mention real property owned by the parties in Indiana. The court of appeals held that a letter written by the wife was insufficient under the Statute of Frauds, IND. CODE § 32-3-1-1 (1976), as a memorandum of an oral agreement by the wife to convey her interest in the real estate to the husband.

Henderson v. Henderson, 381 N.E.2d 451 (Ind. 1978), held that the signature of the husband's attorney, "approving" a divorce decree, indicated approval as to form only and did not constitute a waiver of errors. The case was transferred to the court of appeals for a decision on the merits.

In re Marriage of Brown, 387 N.E.2d 72 (Ind. Ct. App. 1979), held that the wife's motion for change of venue, filed within 30 days after she filed her petition for dissolution, should have been granted by the trial court under IND. R. TR. P. 76(3). Because a responsive pleading is permissive rather than mandatory in dissolution cases, the court held that the 10-day limitation of IND. R. TR. P. 76(2) had no application to such cases.

²²¹IND. CODE § 31-1-11.5-16 (1976) authorizes the award of reasonable attorney's fees.

²²²*E.g.*, *In re Marriage of Hirsch*, 385 N.E.2d 193, 197 (Ind. Ct. App. 1979); *Farthing v. Farthing*, 382 N.E.2d 941, 947 (Ind. Ct. App. 1978).

²²³384 N.E.2d 1055 (Ind. Ct. App. 1979).

award of \$12,400 to the wife's attorney was the only issue on appeal, and the court of appeals affirmed the award in a split decision.²²⁴ The fee awarded was admittedly more than could be justified on an hourly basis.²²⁵ The case was ultimately resolved as a non-contested matter, with a property settlement agreement prepared by another attorney.²²⁶ The trial court evidently believed, however, that work done by the wife's original attorney of record, largely in discovery proceedings aimed at ascertaining the value of assets held by the husband, may have contributed to the ultimate resolution of the case.

Judge Staton argued, in dissent, that the trial court improperly relied on the Hammond bar fee schedule in determining what a reasonable attorney's fee would be. Because the schedule permitted a fee based on a percentage of the property settlement, reliance on the schedule to determine fees came perilously close to authorizing a contingent fee.²²⁷ This argument is somewhat diluted because the fee actually awarded in *Greiner* was approximately one-half of the amount prescribed by the bar schedule. The majority concluded that the trial court could consider the bar schedule as evidence of a reasonable fee and noted that under Indiana cases a judge could "take judicial notice of what a reasonable fee would be, even in the absence of any evidence in the record."²²⁸

E. Marriage

The Indiana Supreme Court, in *Miller v. Morris*,²²⁹ invalidated a provision of the Indiana marriage statutes which prohibited the issuance of a marriage license to any person who had not complied

²²⁴*Id.* at 1060. Judge Staton dissented. *Id.* at 1060-63 (Staton, J., dissenting).

²²⁵There was testimony that a fee based on the hourly rate usually charged in the area would have been \$4,800 or \$5,000. *Id.* at 1058.

²²⁶Mrs. Greiner did not discharge her attorney but agreed to the settlement against her own attorney's advice. *Id.* at 1057, 1059.

Judge Staton's dissent expressed the belief that the trial court had erred in treating the dissolution as a "contested matter" because neither party contested the dissolution itself. *Id.* at 1060-61 (Staton, J., dissenting). In dissolution of marriage actions, however, the real contest usually takes place over financial matters or custody. The fact that an action is ultimately resolved on an agreed property settlement does not necessarily mean that there was no contest. In the view of the majority, there was sufficient evidence that the attorney's work was difficult to justify the award. *Id.* at 1060.

²²⁷*Id.* at 1062 n.1 (Staton, J., dissenting). Contingent fees are not permitted in divorce cases. *Barelli v. Levin*, 144 Ind. App. 576, 247 N.E.2d 847 (1969).

²²⁸*Geberin v. Geberin*, 360 N.E.2d 41, 47 (Ind. Ct. App. 1977), *quoted in* 384 N.E.2d at 1060. The court noted that the presumption in favor of a trial court's determination of attorney fees in dissolution cases is "one of the strongest presumptions applicable" in an appeal. 384 N.E.2d at 1060.

²²⁹386 N.E.2d 1203 (Ind. 1979).

with a court order for support of his minor children.²³⁰ The court affirmed a trial court decision holding that this provision violated the equal protection clause²³¹ under *Zablocki v. Redhail*.²³² The United States Supreme Court held in *Zablocki* that a Wisconsin statute similar to Indiana's deprived marriage license applicants with dependent children of equal protection because it unduly burdened their fundamental right to marry.²³³ Because the statutory classification²³⁴ "significantly interfere[d]" with a fundamental right, it was subjected to the court's highest level of scrutiny: the state was required to show that the statute furthered "important state interests" and that it was "closely tailored to effectuate only those interests."²³⁵ Although the state's interest in the welfare of children was conceded to be substantial, the Court held that the statute was neither necessary to further this interest, nor carefully tailored to achieve its objective.²³⁶

²³⁰IND. CODE § 31-1-3-3 (Supp. 1979) provides that no license shall be issued to persons adjudged "of unsound mind," afflicted with a "transmissible disease," or "under the influence of an intoxicating liquor or narcotic drug" at the time of application for the license. The statute also provides: "[N]or shall a license be issued to any person who has dependent children unless that person accompanies his application with satisfactory proof that he is supporting or contributing to the support of each dependent child in compliance with any court order or orders issued for their support." *Id.*

²³¹U.S. CONST. amend. XIV, § 1.

²³²434 U.S. 374 (1978). The Indiana trial court held that this portion of the statute was severable from the remaining provisions of IND. CODE § 31-1-3-3 (Supp. 1978). 386 N.E.2d at 1204.

²³³434 U.S. at 383, 386-87. The Supreme Court criticized the Wisconsin statute: Some of those in the affected class, like appellee . . . are absolutely prevented from getting married. Many others, able in theory to satisfy the statute's requirements, will be sufficiently burdened by having to do so that they will in effect be coerced into foregoing their right to marry. And even those who can be persuaded to meet the statute's requirements suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental.

Id. at 381. The decision to marry is one of the personal decisions which the Court has held to be protected by the due process right to privacy. *Id.* at 384 (citing *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

²³⁴The Court identified the class created by the Wisconsin statute as, in the words of the statute, any "Wisconsin resident having minor issue not in his custody and which he is under an obligation to support by any court order or judgment." 434 U.S. at 375 (quoting WIS. STAT. § 245.10 (1973)).

²³⁵434 U.S. at 388. Although the Court did not use the words "compelling state interest," the analysis used in *Zablocki* seems to be identical to that used in other equal protection cases in which state statutes were held to burden the fundamental right of interstate movement. *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969).

²³⁶*See* 434 U.S. at 388-91. The State claimed that the statute provided an incentive for parents to make support payments. However, the Court found the incentive unnecessary because many other remedies for enforcement of support obligations already existed. *Id.* at 388. The statutory classification was found to be underinclusive because

The Indiana statute was somewhat less restrictive than the Wisconsin statute invalidated in *Zablocki* because it did not require a court order in every case in which a parent was obligated to support dependent children not in his custody. Nor did it require a showing that the children were not likely to become public charges.²³⁷ The effect of the Indiana statute, however, was to deny the right to marry to many persons who were unable to demonstrate compliance with prior support orders, regardless of the reason for the noncompliance.²³⁸ The interests advanced in justification of the Indiana statute were similar to those advanced by the State of Wisconsin in *Zablocki*, and the Indiana court's answers paralleled those of the Supreme Court.²³⁹ The argument advanced in *Miller*, but not in *Zablocki*, that "members of the affected class can seek modification of their support orders" and then be free to marry,²⁴⁰ is untenable in view of the Indiana rule that support obligations are not retroactively modifiable.²⁴¹ A support order might be modified as to future payments, but presumably "compliance" under the statute would require that all arrears be paid. If the applicant could not pay the arrears, he would be unable to obtain a marriage license and would be effectively foreclosed from exercising his fundamental right to marry.²⁴²

F. Paternity

1. *Presumptions.*—A strong presumption exists that a child born during marriage is legitimate, which can be rebutted only by

it did not limit any new financial commitments except marriage and overinclusive because it failed to take into account the possibility that remarriage (to a working spouse) might actually improve an applicant's ability to satisfy prior support obligations. *Id.* at 390. The Court pointed out that the statute might result in more children being born out of wedlock. *Id.* An additional purpose asserted by the State, that of encouraging persons with prior support obligations to obtain counseling, was rejected because the statute contained no provision for counseling. *Id.* at 388-89.

²³⁷See 386 N.E.2d at 1206 (Ind. 1979) (Pivarnik, J., dissenting).

²³⁸The statute might have been salvaged if it had been interpreted as being inapplicable to anyone who could show that his noncompliance was due to inability to pay. The Supreme Court, however, impliedly rejected any such interpretation when it stated in *Zablocki* that having to seek a court order might in itself coerce many persons into foregoing their right to marry. See 434 U.S. at 387.

²³⁹386 N.E.2d at 1204-05 (citing *Zablocki v. Redhail*, 434 U.S. 374 (1978)).

²⁴⁰386 N.E.2d at 1204.

²⁴¹For a discussion of cases dealing with modification of support orders, see notes 99-123 *supra* and accompanying text.

²⁴²Justice Pivarnik's dissent conceded that the right to marry is fundamental, but concluded that the statute was a "permissible exercise of the state's power to regulate family life and to assure the support of minor children." 386 N.E.2d at 1206 (Pivarnik, J., dissenting). The statute therefore bore a "rational relation to a constitutionally permissible objective." *Id.* This is not the standard of review utilized for statutes which violate fundamental rights, however. Such statutes must be shown to be necessary to further a compelling state interest. See note 235 *supra* and accompanying text.

"irrefutable proof."²⁴³ The issue in *L.F.R. v. R.A.R.*²⁴⁴ was whether this presumption should apply when the child was born after the marriage had been dissolved and was conceived after the parties had separated and dissolution proceedings had been commenced by the husband. A majority of the Indiana Supreme Court held that the presumption *did* apply, vacating a court of appeals decision to the contrary.²⁴⁵

Although the testimony of the parties was in conflict, it was undisputed that the husband had access during the relevant period.²⁴⁶ Because he had access, his denial that the parties had sexual relations was insufficient to overcome the presumption that he was the child's father. When a child is born "in wedlock," the presumption of legitimacy can be overcome only by evidence proving conclusively that the husband could not have been the father.²⁴⁷ The child in *L.F.R.* was born out of wedlock only because the trial court had allowed the dissolution action to go to final hearing, over the wife's objections, before the child was born. The Indiana Supreme Court indicated that the trial court should have delayed the dissolution until after the child's birth. The presumption of legitimacy then unquestionably would have applied. The court reasoned that the "unusual procedural sequence" actually followed should not be allowed to render the presumption inapplicable.²⁴⁸

²⁴³*Buchanan v. Buchanan*, 256 Ind. 119, 123, 267 N.E.2d 155, 157 (1971).

²⁴⁴378 N.E.2d 855 (Ind. 1978).

²⁴⁵*Id.* at 857. The court of appeals had affirmed the trial court's determination, in the dissolution of marriage action, that R.A.R. was not the father of the child born to his former wife. 370 N.E.2d 936 (Ind. Ct. App. 1977), *vacated*, 378 N.E.2d 855 (Ind. 1978). Justice DeBruler dissented in the supreme court, in an opinion in which Justice Prentice concurred. 378 N.E.2d at 857 (DeBruler, J., dissenting).

²⁴⁶R.A.R. testified that he had seen and talked to L.F.R. after the separation, but denied having sexual relations with her. 378 N.E.2d at 856.

²⁴⁷*Id.* The evidence necessary to overcome the presumption was described as follows:

[T]he presumption could be overcome by proof that the husband was *impotent*; or that he was entirely absent so as to have had *no access to the mother*; or was entirely absent at the time the child in the course of nature must have been begotten; or was present only under such circumstances as to afford clear and satisfactory proof that there was no sexual intercourse.

Whitman v. Whitman, 140 Ind. App. 289, 292, 215 N.E.2d 689, 690 (1966), *quoted in* 378 N.E.2d 855, 856 (1978) (emphasis in original).

²⁴⁸378 N.E.2d at 857. The dissent believed, however, that the presumption should not apply unless the child was actually born "during wedlock." *Id.* (DeBruler, J., dissenting). Under this view, the trial court had complete power to control the application of the presumption because its application would depend upon the date set for final hearing in the dissolution action. In *L.F.R.*, the trial court could have made the presumption applicable simply by sustaining L.F.R.'s objection to holding the final hearing before the child was born.

In *Toller v. Toller*,²⁴⁹ the child had been born *before* the parties married but after the mother's first husband had filed a divorce complaint, alleging that she was pregnant by another man.²⁵⁰ The Tollers' marriage lasted about eighteen months. The mother then filed the present action for dissolution, alleging that the child had been born as the issue of the marriage. A final decree was entered, awarding custody to the mother and ordering the husband to pay child support. The husband made no objection to the decree. More than two years later, he filed a motion for relief from the judgment under Trial Rule 60(B)(8).²⁵¹ The trial court denied the motion, and the court of appeals affirmed, holding that the husband had waived any claim of error by failing to file his motion within a reasonable time.²⁵² The facts of *Toller* indicate that the weighty presumption recognized in *L.F.R.* can cut both ways. If Toller had raised the paternity issue during the dissolution action, rather than two years later, the wife probably could not have overcome the presumption that her *first* husband was the father of the child. The result could have been to deny the child any right to support from Toller, even though up to that point he had at least tacitly acknowledged that the child was his. In many similar situations, the ultimate result may be to leave the child without support from *either* husband.

2. *Procedure.*—Two other paternity cases decided during the survey period were concerned with procedural issues. In *D.M. v. C.H.*,²⁵³ nearly five years elapsed after the mother filed her complaint before any action was taken to set the case for hearing. The putative father, however, did not file his motion to dismiss for lack of prosecution²⁵⁴ until after the mother had requested a trial date. The court of appeals upheld the trial court's denial of the motion.²⁵⁵

In *J.Y. v. D.A.*,²⁵⁶ the court of appeals affirmed an order declaring J.Y. to be the father of D.A.'s child and ordering him to pay \$20 per week as child support. The trial court had imposed sanctions on the mother for failing to answer interrogatories after the court had

²⁴⁹375 N.E.2d 263 (Ind. Ct. App. 1978).

²⁵⁰The record in *Toller* is unclear about whether the divorce decree had been issued before or after the child was born. *Id.* at 264. In either case, under *L.F.R.*, a very strong presumption would have arisen that the first husband was the child's father, but *Toller* was decided before the Indiana Supreme Court decided *L.F.R.*

²⁵¹IND. R. TR. P. 60(B)(8) authorizes a court to grant relief from a judgment for "any other reason justifying relief from the operation of a judgment." The rule specifies that the motion "shall be made within a reasonable time." *Id.*

²⁵²375 N.E.2d at 265.

²⁵³380 N.E.2d 1269 (Ind. Ct. App. 1978).

²⁵⁴See IND. R. TR. P. 41(E).

²⁵⁵380 N.E.2d at 1270.

²⁵⁶381 N.E.2d 1270 (Ind. Ct. App. 1978).

ordered her to do so.²⁵⁷ The court later lifted the sanctions after the interrogatories had been answered. The court of appeals held that removal of the sanctions was not an abuse of the trial court's discretion.²⁵⁸

3. *Statutory Changes.*—Before the new Juvenile Code became effective October 1, 1979, its provisions relating to paternity actions were amended or repealed,²⁵⁹ and a new paternity statute enacted.²⁶⁰ The new statute recognizes the interests of the child and the father in the determination of paternity. A paternity action can now be filed by a man claiming to be the father (or expectant father) of a child, or by the child itself.²⁶¹ Under the former statute, the prosecuting attorney was authorized to act as the attorney for the mother on her request.²⁶² Now, *any* of the parties who can initiate the action can request that the prosecuting attorney initiate it, but when he does, he acts as the *child's* attorney.²⁶³ The new statute retains the two-year statute of limitations of the former statute,²⁶⁴ but it does not apply to an action brought by the child or to an action brought by a man alleging that he is the father, if the mother has acknowledged his paternity in writing.²⁶⁵

²⁵⁷The court had ordered that evidence concerning the matters contained in the interrogatories would be refused at trial under IND. R. TR. P. 37(B)(3).

²⁵⁸381 N.E.2d at 1271.

²⁵⁹Act of April 10, 1979, Pub. L. No. 277, § 4, 1979 Ind. Acts 1446 (repealing IND. CODE § 31-6-3-3 (Supp. 1978)); Act of April 10, 1979, Pub. L. No. 277, § 4, 1979 Ind. Acts 1446 (repealing IND. CODE § 31-6-6-1 to -22 (Supp. 1978)); Act of April 10, 1979, Pub. L. No. 277, § 2, 1979 Ind. Acts 1446 (amending IND. CODE § 31-6-7-8 (Supp. 1978)); Act of April 10, 1979, Pub. L. No. 277, § 3, 1979 Ind. Acts 1447 (amending IND. CODE § 31-6-7-15 (Supp. 1978)).

²⁶⁰Act of April 10, 1979, Pub. L. No. 277, § 1, 1979 Ind. Acts 1446 (codified at IND. CODE § 31-6-6.1-1 to -19 (Supp. 1979)).

²⁶¹IND. CODE § 31-6-6.1-2(a) (Supp. 1979). *Id.* § 31-6-6.1-2(a). Under the former statute, a father could file *only* if the mother joined in a voluntary petition to establish paternity. *Id.* § 31-6-6-8 (Supp. 1978) (repealed 1979). Otherwise, the action could be brought only by the mother. *Id.* § 31-6-6-9(a).

²⁶²*Id.* § 31-6-6-20 (Supp. 1978) (repealed 1979).

²⁶³*Id.* § 31-6-6.1-3 (Supp. 1979).

²⁶⁴*Id.* § 31-6-6-17 (Supp. 1978) (repealed 1979).

²⁶⁵*Id.* § 31-6-6.1-6(a)(4), (b) (Supp. 1979). The child may file a paternity petition at any time until his twentieth birthday. *Id.* § 31-6-6.1-6(b). However, any action must be filed within five years after the alleged father's death. *Id.* § 31-6-6.1-6(c). This is the only provision of the new statute indicating that the action survives the death of the alleged father. Under the former statute, paternity had to be established during the father's life, but the obligation (established either by court order or by his voluntary acknowledgement) was enforceable against his estate. *Id.* § 31-6-6-7 (Supp. 1978) (repealed 1979). The new statute contains no comparable provision authorizing enforcement of a support order against the father's estate, but if the action itself can be commenced after his death, it would seem to follow by necessary implication that an existing order could be enforced after his death. A child support order issued under the Indiana Dissolution Act survives the death of the obligor parent. *Id.* § 31-1-11.5-17(b) (Supp. 1979).

The new statute creates presumptions of paternity when (1) the putative father and the mother go through a ceremonial marriage and the child is born during the marriage, or within 300 days after its termination, even though the marriage turns out to be invalid, or (2) where the child's parents marry or attempt to marry after the child's birth, and the father has acknowledged paternity in a writing filed with the registrar of vital statistics or with a local board of health.²⁶⁶ If no presumption arises from an attempted marriage, then a man still is presumed to be the father if, with the consent of the mother, he *either* (1) receives the child into his home and openly acknowledges paternity, or (2) acknowledges paternity in writing with the registrar of vital statistics or a local board of health.²⁶⁷

The Indiana statute no longer assumes that the child always will remain with the mother. Under the new statute, the court is empowered not only to issue support orders once paternity is established, but also to determine custody and visitation rights.²⁶⁸ The statute contains provisions for the determination of custody and support which roughly parallel the provisions of the Indiana Dissolution of Marriage Act²⁶⁹ but with some interesting changes and omissions. For example, the court has greater power to limit the custodial parent's authority and to modify existing custody rights in a paternity action than it does in a dissolution or custody action.²⁷⁰ The court also has broader powers to modify visitation orders and support orders in a paternity action.²⁷¹

The new statute removes the quasi-criminal provisions which remained in the previous statute. The putative father no longer has a

²⁶⁶*Id.* § 31-6-6.1-9(a) (Supp. 1979). It remains to be seen whether this presumption will be given the same weight as the common law presumption involved in *L.F.R. v. R.A.R.*, 378 N.E.2d 855 (Ind. 1978).

²⁶⁷IND. CODE § 31-6-6.1-9(b) (Supp. 1979).

²⁶⁸*Id.* § 31-6-6.1-10(a).

²⁶⁹*Compare id.* §§ 31-6-6.1-11 to -16 (Supp. 1979) *with id.* §§ 31-1-11.5-21, -22(d), -24, -12, -17(a) -15, -14, -13 (1976).

²⁷⁰Under the dissolution statute, a court can limit the custodial parent's authority to determine the child's upbringing only if it finds that the child's physical or emotional health would otherwise be endangered and can modify a custody order only upon a showing of "changed circumstances so substantial and continuing as to make the existing custody order unreasonable." *Id.* §§ 31-1-11.5-21(b), -22(b) (1976). Under the paternity statute, the standard for either is the "best interests of the child." *Id.* §§ 31-6-6.1-11(b), (e) (Supp. 1979). A court may interview the child in chambers under either statute, but in a dissolution action, the court "may" allow counsel to be present and "may" make a record. In a paternity action, the court "shall" permit counsel to be present at the interview, "which must be on the record." *Compare id.* § 31-1-11.5-21(d) (1976), *with id.* § 31-6-6.1-11(d) (Supp. 1979).

²⁷¹*Compare id.* §§ 31-6-6.1-12(b), -13(f) (Supp. 1979), *with id.* §§ 31-1-11.5-24(b), -17(a) (1976).

right to remain silent,²⁷² and all references to punishment by contempt have been removed.²⁷³ In this respect, the legislature may have gone too far because child support orders issued under the dissolution statute remain enforceable by contempt under section 17(a) of the dissolution act.²⁷⁴ In transferring the various provisions of the dissolution act into the new paternity statute, however, this portion of section 17(a) was omitted. Other means of enforcement, including assignment of wages,²⁷⁵ are provided, but in some cases the threat of enforcement by contempt is the only effective means of securing compliance with a child support order. When the obligor parent changes jobs frequently or is self-employed, so that there are no wages to assign, and there is no property to attach, support orders issued under the new paternity statute may be impossible to enforce unless the courts rely on their inherent power to enforce support orders by contempt.²⁷⁶

²⁷²*Id.* § 31-6-3-3 (Supp. 1978) (repealed effective October 1, 1979).

²⁷³The 1979 amendment deleted all references to punishment for contempt of a support order entered in a paternity action. *Id.* § 31-6-7-15 (Supp. 1979).

²⁷⁴*Id.* § 31-1-11.5-17(a) (1976). The relevant portion provides: "Terms of the decree may be enforced by all remedies available for enforcement of a judgment including but not limited to contempt or an assignment of wages or salary."

²⁷⁵*Id.* § 31-6-6.1-16(e) (Supp. 1979).

²⁷⁶Courts assumed the inherent power to enforce support orders by contempt long before the divorce statutes provided for it. *See, e.g., Corbridge v. Corbridge*, 230 Ind. 201, 102 N.E.2d 764 (1952).