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FALL 2006
VOLUME 5 / ISSUE 2

# FAMILY LAW FOCUS

# Court Says Dad Is Underemployed

What if a father could earn a large paycheck but refused to do so — and, instead, filed a motion to reduce his child support obligation accordingly?

At its simplest, that was the fact situation before it when the Court of Appeals handled this particular case.

Mom and Dad divorced in 2003, and he was ordered to pay Mom $349 per week in child support for their two minor children.

### Responsible for D.E.A. Chemicals

Dad was then working as a chemist at Eli Lilly where he "was responsible for certain D.E.A. watchlist chemicals" that are "used for the manufacture or precursor to a street drug."

(He holds both a bachelors degree in chemistry and a masters degree in synthetic organic chemistry.)

## SPOTLIGHT ON:



After concluding Dad "was involved in the unauthorized removal of Lilly chemistry material" from his lab, Dad was fired.

### Terminated from Job as Chemist

He next worked one month at Plants Galore before quitting and one month with a water company as a chemist before getting fired. There he earned $900 per week.

His third job was with FedEx, working roughly 15 hours per week.

Finally, Dad filed to retroactively modify his support payment.

### Trial Court Reduced Obligation

Due to an increase in Mom's income and anticipated reductions in child care expenses, the trial court reduced Dad's obligation.

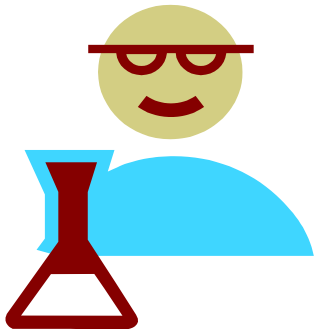
But in its computation, it imputed to Dad the gross weekly income he had earned while at Lilly.

Dad appealed, arguing the court erred in finding him voluntarily underemployed and in using his Lilly income in its computation.

### Court of Appeals Disagreed

The Court of Appeals disagreed with his contention, in part.

"[W]hen a parent has some history of working and is capable of entering the work force," it noted,



*After losing his job as a chemist, Dad was voluntarily underemployed.*

"but voluntarily fails or refuses to be employed *in a capacity in keeping with his or her capabilities,* such a parent's potential income should be determined to be a part of the gross income of that parent.

"The amount to be attributed as potential income in such a case would be the amount that the evidence demonstrates he or she was capable of earning in the past."

### Dad Could Get Job as Chemist

The record showed after leaving Lilly, Dad had gotten a job as a chemist at $900 per week . . . but it was less than was his salary at Lilly.

The Court, therefore, reversed and remanded to the trial court for a determination of support based on an imputed income of $900 per week.

See *Miller v. Sugden,* 849 N.E.2d 758 (Ind.App. 2006).♦

# Wrongful Death Case Required Proof of Paternity for Newborn

If ever there were a case "the little guy" should win, this was it.

After the father of her one-year-old was killed by a bus, an unmarried, pregnant Mom filed a wrongful death action against the bus company and driver on behalf of her baby and her unborn child.

The bus company and driver moved for a partial summary judgment, claiming the then-unborn child was not a "dependent child" under the wrongful death statutes.

### Paternity Petition Filed Late

The Mom, they argued, had not filed a "paternity petition" until nearly a year after the putative father's death — and Indiana law requires such a petition be filed within eleven months of the death.

Unconvinced, the trial court and Court of Appeals disagreed.

Noting the facts were not at issue, the Court focused on what is required to prove paternity by examining various state statutes.


*Mom sought help from friends after death of children's father.*

The question for it was if a worker's compensation petition, filed by Mom within the eleven months, "qualifie[d] as an action to establish paternity by law under the intestacy laws for purposes of the wrongful death statutes."

### Court Looks to Define Paternity

In addition to the worker's compensation statutes, the Court looked at law dealing with wrongful death, intestacy and paternity.

It ultimately concluded "the standard of proof for the factual determination of paternity in a worker's compensation claim is effectively the same as that used under the paternity statutes."

After carrying the burden of proof in the worker's compensation action in this case, Mom later furnished DNA evidence supporting her claim, as well.

### Action Filed within Limits

"Regardless of its caption," the action "was for our purposes a 'paternity' action which was filed within the applicable time limits of the intestacy statutes, i.e., within eleven months after (dad's) death."

As such, the then-unborn may be properly considered a dependent in the wrongful death action.

See *First Student, Inc. v. Estate of Meece*, 849 N.E.2d 1156 (Ind.App. 2006).♦

*Kids often act out during divorce, especially if parents are fighting.*

## REALITY CHECKS:

√ Following these simple rules will help to prevent hurting your child during a divorce.

√ Do whatever is necessary to ensure his or her needs are treated with respect.

√ Be cordial and respectful of your ex-spouse, even if you disagree with him or her.

√ Don't use derogatory or insulting terms when speaking to your ex-spouse, especially in the presence of your child.

√ Avoid encouraging your child to take your side in a conflict with your ex-spouse.

√ Always remember that it is in the best interests of your child to have two parents who love and care for him or her.

√ Accept that, even though you are divorced, your ex-spouse will always be a parent of your child with you.

SOURCE: *The Co-Parenting Survival Guide* by Elizabeth Thayer and Jeffrey Zimmerman, New Harbinger Publications.

# Disability Counts in Child Support

*U*sually the Supreme Court of Indiana is reluctant to deal with family law issues. It is even more unusual for it to be involved with the computation of child support.

But, in this case, it was.

Mom and Dad divorced in December of 2000, and she got custody of their son. Dad was ordered to pay weekly support of $110.

Over the next two years, Dad failed to make his support payments, and this prompted additional orders from the court.

### Surgery Prevented His Working

During at least part of the time, he was unable to work because of his back injuries and surgery.

By May of 2003, his arrearage was $7,595, and he was ordered to pay $50 in support and $10 toward the arrearage each week.

The order also noted that Dad was soon to have back surgery and that he had applied for Social Security disability benefits.

In June of 2003, after his application for benefits had been approved, his son received a lump-sum check of $10,377 from the Social Security Administration.

### Retroactive Payment for Benefits

It was described as a retroactive payment for benefits to which the son was entitled as Dad's dependent. The son also began to receive monthly payments.

***Dad wanted retroactive credit in child support for disability.***

Before learning of this payment, Dad had petitioned the trial court to modify his support.

He suggested "his impending back surgery and his application for . . . benefits constituted substantial changes of circumstances to merit a modification."

When Dad learned of the retroactive payment to his son, he filed a motion, asking the court for a reimbursement of $10,377.

### Back Support Already Paid

Arguing he had already paid $7,545 in back child support, he claimed to be entitled to a reimbursement of $10,377.

The trial court held the retroactive payment was not child support and Dad was not entitled to a credit for it against his arrearage.

The Court of Appeals agreed, but the Supreme Court did not.

On appeal, Dad urged that the lump-sum distribution to his son be credited as child support — "either to satisfy the accumulated arrearage or prospectively against future support obligations."

After surveying cases from other jurisdictions, the Court found such authority persuasive.

### Credit for Support Obligations

"[W]e hold that a disabled parent is entitled to have child support obligations credited with the Social Security disability benefits received by the child because of that parent's disability."

But such lump-sum payments "cannot be credited against child support arrearages that are accumulated before the noncustodial parent has filed a petition to modify based on the disability."

See *Brown v. Brown*, 849 N.E.2d 610 (Ind. 2006).♦

## Same-sex Couple Allowed to Adopt

*S*ince we discussed *In Re Infant Girl W.*, 845 N.E.2d 229 (Ind.App. 2006) in the last issue of **FAMILY LAW FOCUS**, the Supreme Court has denied transfer, refusing to take it on appeal.

The Court declined to hear arguments about unmarried couples adopting, thereby upholding the earlier Court of Appeals' ruling that allowed adoption by joint petition — a procedure that gives both partners custody.♦

# Grandparents Battle for Grandson

*Grandson had been living with grandparents most of his life.*

Some grandparents bake chocolate-chip cookies, while others tuck away presents for their grandkids.

Still others take great delight in "spoiling the kids rotten" — and then sending them home to their parents.

The grandparents in this particular case, though, went one step further. They adopted their grandson over the objections of his mother.

### Mother Gave Birth at Age 15

The mother was fifteen when she gave birth, and the Grandma's son was established to be the baby's father. The parents never married.

When the baby was five months old, the Grandparents began caring for him. Some ten months later, the court formalized this arrangement.

Three years later, Grandparents filed a Petition for Adoption of the little boy, supported by a consent signed by their son.

### Adoption Granted over Objection

The mother objected, but the adoption was granted on the basis of Indiana Code §31-19-9-8(a)(2).

According to this statute, consent is not required of a parent if, for a period of a least one year, the parent "(A) fails without justifiable cause to communicate significantly with the child when able to do so."

Or "(B) knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree."

### Mother Disagreed with Court

On appeal, the mother disputed the court's finding she had failed to communicate with her son, arguing Grandma had stopped her visits.

A review of the record showed otherwise. Grandma first encouraged the visits, but "I just gave up because it just wasn't happening."

Any communication and visitation Mom had with her son had "been sporadic over the last few years, . . . no longer than ten to fifteen minutes at a time."

### Only Contact Was Coincidental

Moreover, the record indicated the parties had once "lived close to each other, in the same apartment complex," and that their only contact had been coincidental.

Because under I.C. §31-19-9-8(a)(2), only one of the two criteria needs to be met, the court opted not to address mother's second argument on appeal.

The adoption was affirmed.

See *In Re Adoption of C.E.N.*, 847 N.E.2d 267 (Ind.App. 2006).♦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