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FAMILY LAW FOCUS

Legislators Craft Bills to Keep Children Safer

Even though the recent General Assembly included walk-outs over a proposed constitutional amendment to ban same-sex marriage, a variety of bills to protect our children were sent to the Governor's office.

Despite being a session that was marked by some arguably lackluster legislation, all of us who work with families and children have reason to applaud the "child-friendly" bills that were passed:

House Enrolled Act No. 1194
Effective 07/01/04

• In documenting child abuse or neglect, a Child Protective Service report may conclude that abuse or neglect is "indicated." (Current law allows only "substantiated" or "unsubstantiated" findings.)

• Records held by the state that are relevant to the facts and circumstances which surround the death of a child must be disclosed to any person who requests the record.

General Assembly passes bills to protect the welfare of children.

• A criminal history check of each person residing in the designated location is required for a temporary out-of-home placement, including with a blood or adoptive relative caretaker.

• Statewide and local child fatality review teams will be established for reviewing a child's death that is "sudden, unexpected or unexplained."

• The penalty for falsifying child abuse or neglect information, or interfering with a child abuse investigation has been stiffened.

House Enrolled Act No. 1029
Effective 07/01/04

• A custodial parent may petition the court to seize the state income tax refund of the person who is obligated to pay child support. This provision applies if the obligator is at least $1,500 behind and intentionally has violated the terms of the most recent child support order.

Senate Enrolled Act No. 83
Effective 03/16/04

• In determining visitation, the court may talk privately with a child in chambers. Counsel may be permitted at the interview, but only then may a record be made.

House Enrolled Act No. 1245
Effective 07/01/04

• The neglect of a dependent will be classified as a Class A felony (punishable by a maximum of 50 years in jail), instead of a Class D felony (punishable by a maximum of three years in jail), if the neglect results in the death of a dependent who is less than 14

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Two of Our Newsletters May Be One Too Many

Some of you may have received two issues of our Winter 2004 *Family Law Focus* newsletter. Thanks to a data base malfunction that we discovered well into mailing, you may have been sent an extra copy. We apologize for any inconvenience.♦

SPOTLIGHT ON:

Spouse's Medical Expenses Outlast Marriage

Because spousal maintenance upon the dissolution of a marriage may only be awarded upon very narrow grounds in Indiana, the family law practitioners of this state are paying particular attention to a recent case.

Generally, such awards are limited to situations in which a spouse is "physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself or herself is materially affected."

Even then the court is not required to award spousal maintenance, and any such award may be terminated at a later date.

Spousal Maintenance Upheld

In *Augspurger v. Hudson*, 802 N.E.2d 503 (Ind.App. 2004), the Court of Appeals held that an award of spousal maintenance to the Wife—including a substantial sum for future medical treatment—was appropriate.

The Husband disagreed, correctly noting that debts incurred by a party after the dissolution petition has been filed are not to be included in the marital pot.

"The award for Wife's future medical treatment," responded the Court in its opinion, "cannot fairly be characterized as part of the trial court's distribution of marital assets and debts."

Severe Fatigue and Confusion

Evidence offered at the trial court level showed that the Wife suffered from fibromyalgia and extensive mineral deficiencies.

She was also ill with "electromagnetic dysthymia, which meant her body's electrical system was out of balance, causing severe fatigue and mental confusion."

Health care costs survive divorce.

Expert testimony supplied the necessary link between these conditions and the woman's greatly diminished ability to be engaged in meaningful employment.

Intensive Treatment Program

Medical experts recommended that the Wife be involved in an intensive treatment program, followed by physical and mental exercise and training, together with a proper diet.

The Husband was ordered to pay a substantial part of the cost of such care.

In view of the clarification—as well as the legal authority—supplied by this Court, there is greater opportunity for financial assistance to be ordered in other situations of this nature.

The holding of this Court also underscores the importance of having well-informed, thoroughly prepared expert testimony. ♦

Bills Help Guard State's Children

Continued from Page 1

Penalties have been made stiffer to protect children.

years old and is committed by a person at least 18 years of age.

• Contributing to the delinquency of a minor is a Class C felony (instead of a Class A misdemeanor) if a person furnishes alcohol or a controlled substance to a minor—and consumption of that alcohol or drug is the proximate cause of the death of any person.

Senate Enrolled Act No. 194
Effective 07/01/04

• A child will be placed under the supervision of the welfare department if the following are met: the child lives in a household with a child who has been a victim of a sex offense; the child lives with an adult who has committed a sex offense; and the child needs care and treatment that are unlikely to be provided without coercive intervention by the court. ♦

High Court Orders Mediation for Parties in Adoption Case

Will the process of mediation find a home in family law?

In a move the *Indiana Lawyer* found virtually without precedent, the Indiana Supreme Court recently ordered the parties appearing before it in an adoption case to seek a settlement agreement.

According to one legal commentator, "[r]ather than issuing its own opinion in the adoption case . . . , the high court . . . issued an order remanding the case and appointed . . . a licensed social worker to serve as mediator."

Dismissal of Appeal Granted

With the help of this mediator, the family worked through the various issues raised in *Winters v. Talley*, 792 N.E.2d 49 (Ind. 2003)—and their "Joint Stipulation to Dismiss Appeal" was granted by the Court in February of 2004.

Although formal mediation has its roots in the 1970s, only recently has it been used extensively. For the practice of family law, this means that the animosity often implicit with this area can be lessened.

Avoid Morass of Litigation

Perhaps in the case of divorce, for example, more people will find that the morass of litigation which accompanies a dissolution may be minimized through mediation.

One might hope that in the more contentious proceedings, parties may begin to view litigation as their last—rather than only—resort.

Because litigation intrinsically encourages hostility—while mediation relieves both parties of the need to vilify each other—the use of mediation by the Supreme Court is to be commended. ♦

REALITY CHECKS:

√ Co-habitation agreements are equally important for homosexual couples as well as heterosexual couples who decide to live together but not marry.

√ Such agreements can detail specifically each partner's responsibility to pay rent or to contribute to household expenses.

√ These documents also provide a legal basis for collecting if one party fails to pay his or her share.

√ Co-habitation agreements, like premarital agreements, cannot address issues of child custody, parenting time or child support.♦

Resist urge to use child as a weapon in divorce.

Kids Should Never Become Weapons

Was joint custody appropriate—or even possible—in a case marked by a bitter custody battle over a four-year-old? Could these parents work together for the best interests of their little boy?

In such a matter, the Court in *Arms v. Arms*, 803 N.E.2d 1201 (Ind.App. 2004) answered: "No!"

Coaching Her Son to Lie

Evidence showed that Mother was coaching her son to speak badly about Father to authorities.

She was "training him to lie." She was a "disruptive influence" at his school. And she was habitually unreliable about getting him to and from school as well as to meetings with his Father on time.

Boy "Was Frightened"

The testimony even indicated that the boy "was frightened of his mother" and scared of what would happen if she learned about what he had revealed.

Not surprisingly, the Court supported sole legal custody to Father, while severely restricting Mother's visitation.♦

Catch up Child Support . . . or Risk Going to Jail?

For those who deal with the ins-and-outs of child support, a 2004 decision by the Indiana Court of Appeals offers a cautionary note.

Even though an order for back support can be enforced by contempt, this recent case reiterates—in the face of statutory language which suggests otherwise—that the age of the child for whom the support is ordered is key.

One must ask: Is the child emancipated?

Paternity Found for Three Children

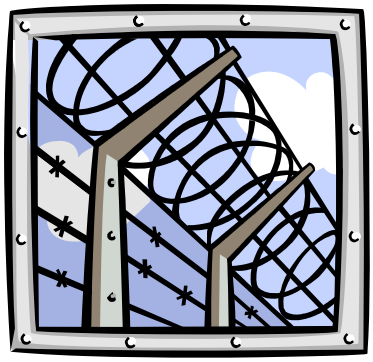
In *Paternity of L.A. Ex Rel. Eppinger v. Adams*, 803 N.E.2d 1196 (Ind.App. 2004), the paternity of L.A., C.A. and L.S.A. had been established in 1971, 1973, and 1980, respectively.

Despite being ordered to pay support for these three children over several decades, the Father failed to do so.

Even though the trial court entered a judgment against him that represented the amount of the arrearages, it refused to sanction the use of contempt remedies in collecting it because the children were emancipated.

Court of Appeals Agreed

The Court of Appeals agreed.



Court of Appeals looks at time in jail for back child support.

Stating that a parent's obligation to provide support "is founded in nature, not in contract," it declared therefore that the constitutional proscription against being imprisoned for a debt did "not prevent the use of contempt to enforce child support obligations."

But, according to a line of cases, when a child reaches its majority, a "court has no right to coerce back payments of support by imprisonment."

Statute Amended in 2002

Nonetheless, the General Assembly in 2002 amended the state's statutory language to the contrary.

Its intent, the legislature explained, was to make contempt remedies available for the enforcement of support orders regardless of whether the child had attained legal age.

Is Child Emancipated?

With this legislation, the issue of whether or not the child is emancipated was again placed before the state's appellate court.

In its latest decision on this matter, the Court wrote: "While we recognize the importance of providing appropriate tools to enforce child support orders, so too do we recognize that these enforcement tools must be constitutional."

Unconstitutional Language

Pointing to a 1952 Supreme Court case that held a parent could not be jailed for failure to pay support after a child was emancipated, it concluded the revised statutory language was unconstitutional.

"Therefore," the Court found, "despite the 2002 amendment to Indiana Code section 31-16-12-1, we must conclude that the use of contempt (as in the aforementioned situation) . . . is prohibited by Article One, Section Twenty-Two of the Indiana Constitution." ♦

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