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FAMILY LAW FOCUS

Privilege Doesn't Extend to Abuse

As disturbing as the facts were in this case, the trial court was never able to consider them in its deliberations about a sexual battery charge.

Instead, it ruled such evidence was not admissible because it was obtained in violation of the counselor/client privilege.

Fortunately, however, this scenario included a protective father.

Divorced in 2002, the Dad and Mom shared legal custody of a son (born in 1996) and a daughter (born in 1998). The mother had physical custody of the two children.

Touching was "Inappropriate"

In 2007, the girl informed Dad that her brother had "touched her inappropriately." He reported it to Child Protective Services (CPS).

The incident was investigated by CPS, and the teen "was charged as a juvenile (in circuit court) with Class D felony sexual battery." A no-contact order between the siblings was imposed by the court.

Juvenile spent months in therapy, but his records were inadmissible.

(The girl moved in with grandparents during the proceedings.)

After the charges were filed, the boy entered therapy with a clinical social worker in November 2007.

Boy Admitted to Sexual Battery

In May 2008, he admitted to the sexual battery charge and was adjudicated a delinquent by the court.

That month, his therapist wrote in a report the teen was "at **HIGH RISK** to reoffend" and recommended that "he have NO ACCESS to former or potential victims."

In January 2009, the therapist noted he was "extremely concerned for the safety of his sister/victim."

Even so, in April, the young man was discharged from therapy, and the no-contact order was lifted.

Dad filed to modify custody. At that hearing, the trial court barred evidence of the boy's "behavioral issues," as noted by the therapist, because of the counselor/client evidentiary privilege.

But the Court of Appeals disagreed and reversed.

Communications Are Privileged

This privilege protects confidential communication between a counselor and his or her client.

But there are exceptions. It may not render evidence inadmissible in "[c]ircumstances under which privileged communication is abrogated under Indiana law." Ind.Code §25-23.6-6-1 (8).

In particular, this privilege is unavailable in proceedings that result from a report of child abuse or neglect. Ind.Code §31-32-11-1.

Is Proceeding Related to Abuse?

In line with these statutes, therefore, "we conclude that the instant case is a proceeding within the purview of Section 31-32-11-1," the Court declared. It is one "in which the counselor/client privilege does not apply."

Reversed and remanded.

See *J.B. v. E.B.*, 935 N.E.2d 296 (Ind.App. 2010).♦

SPOTLIGHT ON:

REALITY CHECKS:

If you're a romantic at heart, being asked to sign a prenuptial agreement may stir up a hornet's nest. Not doing so may be worse.

√ Despite being considered a contemporary document, prenuptial agreements were used historically by the royalty of Europe.

√ A contract between two people who plan to wed, it spells out how assets will be divided in the event of a divorce or death.

√ If dependents exist or if one person is wealthier than the other, he or she may wish to enter into a prenup for protection.

√ During the legal process of negotiating and drafting a prenup, it is wise for each person to have individual representation.

√ In Indiana, once a couple is married, all of their assets become shared marital property.

√ Unless there is a specific legal document that outlines how their assets are to be handled, it is up to a court to split them in the event of a divorce or death.

√ Utilized less than a prenup, a postnuptial agreement may be drafted after the wedding. There are more technical requirements to be observed, however.

See *The Indianapolis Star*, 24 January 2003; *Indianapolis Woman*, January 2006.♦

Property Settlement Needs To Be in Dissolution Decree

Timing is everything. Just ask the Husband in the case at hand.

Wed in 1969, he filed for divorce in October 2007. A month later, Wife filed a cross-petition.

Ordered by the court to mediate their property division disputes, the parties failed to settle. But their lawyers kept negotiating and even drafted settlement documents.

In April 2008, Wife died without a will. As such, her property passed by statute to her Husband.

At the time, there was a property agreement signed by Husband . . . but yet to be signed by Wife.

Both Lawyers Signed Agreement

It was marked "Approved as to Form" and signed by both lawyers.

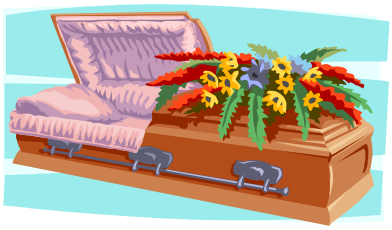
The Wife's Estate, through the couple's adult children, argued that this property settlement document was an enforceable contract, while Husband asserted it was void.

In November 2009, the court declared the property settlement agreement was enforceable.

The Husband appealed.

In its analysis, the Court of Appeals focused on the provisions of Ind.Code §31-15-2-17.

This section allows parties in a divorce to "craft an agreement providing for the disposition of their marital property" between them.



Divorce proceedings terminate upon death of one of parties.

"Settlement agreements [are] binding contracts when incorporated into the dissolution decree," the Court observed, "and are interpreted according to the general rules for contract construction."

But "[d]issolution proceedings, including property settlement matters, terminate upon the death of one of the parties," it continued.

In this case, therefore, "due to the death of a party, no dissolution decree was forthcoming."

No Settlement without Decree

Since a decree is "the only vehicle available to distribute marital assets," there is no marital property settlement without a decree.

Accordingly, the Court reversed the order for enforcement of the marital property settlement and remanded to the lower court to address the Husband's ability to inherit from his Wife's Estate.

Reversed and remanded.

See the case of *Murdock v. Estate of Murdock*, 935 N.E.2d 270 (Ind.App. 2010).♦

Grandpa Tries to Adopt Grandkid

Admittedly, the adoption laws in this state often contemplate circumstances in which the adoptive parent of a child is married to a biological parent of the child.

But, in the case at hand, this was hardly the situation.

Instead, the maternal Grandfather filed an uncontested petition to adopt his grandchild.

A review of the facts indicates Mom was the daughter of Grandfather. She and the child's Dad were the biological parents of A.M. who was born in September 2005.

Grandpa Filed Adoption Petition

In April 2009, Grandfather filed an adoption petition of A.M.

Not only did the mother consent to this adoption, but she joined in "for purposes of maintaining her maternal rights."

Dad also filed a consent to the adoption. But Grandfather's petition was denied by the trial court.

There was one issue, noted the court: "whether or not the adoption could be done under Indiana law."

Despite his age, Grandfather petitioned to adopt grandchild.

Grandfather appealed, arguing he and his daughter were "not proposing a 'new adoptive family.'" Rather, they intended nothing at all should change in A.M.'s life.

At the heart of the Court of Appeals' analysis was the Indiana Supreme Court's holding that "the best interests of the child is the primary concern in an adoption proceeding."

How Is Statute to Be Construed?

This same Court also cautioned that although the adoption statute is to be strictly construed, the statute is not to be so strictly construed as to defeat its purposes.

Because Ind.Code §31-19-15-1 and §2 envision an adoptive parent who is married to a biological or a previous adoptive parent, they are problematic, if strictly construed.

What is more instructive is the statute Ind.Code §31-10-2-1. It speaks to the general policy and purpose of the state's adoption laws.

Law Recognizes Family's Value

Among other things, the statute states the policy of Indiana and the purpose of this title is "to recognize the importance of family and children in our society."

It also attempts "to strengthen family life by assisting parents in fulfilling their parental obligations."

To this end, Ind.Code §31-10-2-1(10) provides a procedure for fair hearings. It also recognizes and enforces the legal rights of children and parents as well as their accountability to each other.

Nowhere, however, did the state legislature define "family."

According to Ind.Code §31-9-2-44.5, though, "[a]n individual is a 'family or household member' of another person if the individual . . . is related by blood or adoption to the other person."

"Thus," observed the Court, "Grandfather is considered family under the statute."

Mom and Child Lived Nearby

While Mom did not live with Grandfather, she resided nearby. He was regularly involved with the child each week, providing both discipline and financial support.

In short, the Court concluded Grandfather and Mom "are both acting as parents" and, as such, the petition to adopt should not have been denied by the lower court.

Reversed and remanded. Dissent with separate opinion.

See *In Re Adoption of A.M.*, 930 N.E.2d 613 (Ind.App. 2010).♦

When the child spent weekends with Grandpa, it was a busy house.

Boy's Rehab Is No Longer Option

One of the teenager's offenses was kicking in a front door.

Taken one by one, the offenses perpetrated by the juvenile in this case may not have warranted a commitment to the Indiana Department of Correction (DOC).

But, collectively, they did.

J. J. was 15 years old when he began to commit the delinquent offenses that eventually landed him in the Indiana Boy's School.

Since the age of twelve, he had been struggling with mental health problems, substance abuse and anger management issues.

It was then that J. J. was suspended from school after taking in shotgun shells and a knife.

During that period, he suffered behavioral issues and violent outbursts which had been met with assorted efforts to rehabilitate him.

His first more serious delinquent offense involved being combative and disorderly in class.

When the police responded, he warned one officer to stand away from him "because I will kill you."

In March 2008, he kicked in the front door of a house.

J.J. "Posed Danger to Students"

In September, he was permanently barred from school as his "anger issues pos[ed] a danger to himself and the students and staff."

Later that fall, he was arrested for public intoxication and illegal alcohol consumption. His mother also reported him as a runaway.

In May 2009, J. J. was staying at a motel and refused to come home. If forced, he warned, "there would be dead bodies." He also threatened to burn down the house.

That same month, he was arrested for drug possession, public intoxication and curfew violations.

The next month, he was picked up for receiving stolen property.

At a hearing in August 2009 on multiple offenses, the juvenile court sent him "to the DOC for placement at the Indiana Boy's School."

J. J. appealed, arguing, in part, that placement with the DOC was an abuse of the court's discretion. But the Court of Appeals disagreed.

The boy has been in every rehabilitative program offered, it noted.

"J.J., quite simply, has made too many bad choices . . . and has left the juvenile justice system with no alternative but to order that he be committed to the DOC."

Affirmed in part; reversed in part; remanded with instructions.

See *J.J. v. State,* 925 N.E.2d 796 (Ind.App. 2010).♦

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