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FAMILY LAW FOCUS

NBR Expands Services by Adding New Lawyer

With the new year comes a new face—and we are so very pleased that attorney Alan A. Bouwkamp has joined us in an "Of Counsel" capacity.

Bringing additional areas of expertise to our firm's practice, Alan represents individuals, businesses and insurers in litigation. He has been in and out of the courtroom for 15 years, concentrating on issues that involve insurance coverage and litigating matters that concern contractual disputes.

Holding leadership roles within the community as well as within various professional groups, Alan now shares his good humor and his skills with us.

A *cum laude* graduate of the Indiana University School of Law in Indianapolis, he is married and the father of a seven-year-old daughter.♦

SPOTLIGHT ON:

Changes in Child Support Rules and Guidelines are intended to better balance financial contributions of each parent.

Revisions in Support Guidelines Try to Make Contributions Fairer

Even before the revisions to the Indiana Child Support Guidelines took effect on January 1, 2004, attorneys around the state were concerned about the impact of its changes.

The result of nearly two years of work by the Domestic Relations Committee of the Indiana Judicial Conference, these modifications attempt to make financial contributions between the parents more equitable.

In essence, the changes are based on the commonsense thought that the more time a non-custodial parent spends with his or her child, the less money that parent should owe in child support.

More Equitable Formula

With the input of an economist, the Committee developed a formula that resulted in a fairer sharing of the support costs—discarding, in the process, the fixed 10% credit for a non-custodial parent.

The new rules offer financial credit to the non-custodial parent that is based upon the number of overnight visits each year with the child. The more overnight visits the non-custodial parent has with the child, the less that parent pays in child support.

It is the Committee's hope that this new sliding scale might act as a financial incentive for the non-custodial parent to spend more time with his or her child.

Fostering Less Parenting?

Some attorneys remain skeptical, however. They are concerned that the new calculation might, in fact, foster less parenting time by the non-custodial parent.

Custodial parents (especially if they have low incomes), these lawyers believe, may well be less willing to offer more parenting time

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Mediation (Instead of Litigation) Gives Both Parties More Control

When our clients ask us whether they should try mediating the difficult and potentially explosive issues that arise in their cases, we very rarely suggest otherwise.

Mediation makes great sense. In effect, the process allows each party to stay in control of his or her own case . . . and his or her own future.

Why turn over any part of your life—let alone the lives of your children, to a judge . . . despite your appearing before the very best, the very fairest judge in the state?

Judges Need Information

Even judges will admit that they do not receive and cannot amass enough information to make a completely informed decision—as compared with the result that the parties can reach through mediation.

This process, in fact, can be viewed as a "win-win" situation that it is almost too good to believe.

If you and the other party fail to reach a settlement resolving all matters, everything that anyone discussed during the process is considered confidential. No one who took part can be forced to reveal, in court, what happened during the mediation.

Parties Learn about Cases

In the midst of trying to settle any or all of the assorted issues, each party learns about his or her own case—through objective and informed analysis by the mediator.

Each person also hears about the other party's case, discovering what is important and what might be able to be compromised.

Negotiating without Lawyers

Sometimes, the attorneys even stay out of the room while their clients are engaged in mediation.

With proper preparation, relatively equal bargaining power and legal counsel available outside the door or on the phone, the parties can be empowered to take charge of their own case to reach a better and speedier solution.

In the case of divorce, for example, we tell our clients that after their final hearing before a judge, it may be as though their marriages had been cut in two with an axe.

Parties Maintain Control

If these parties had engaged in mediation instead, they would have had the opportunity to carefully construct a comprehensive, detailed and workable result that would have benefited them as well as any of their children.

It might have been possible for them to have escaped relatively unscathed from the experience.

For them, an old adage of trial lawyers becomes an uncomfortable reality: even a mediocre settlement is better than a good trial.♦

Talking can lead to compromises between the two parties.

Changes in Support Effective January 1

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if it means that they will receive less in child support.

Other family law practitioners point out some non-custodial parents might receive credits for a certain number of overnights—but then take their children for fewer overnights than that number.

Stuck Paying the Costs

The custodial parent, in that instance, is left with the costs that were supposed to have been transferred to the non-custodial parent.

At this point, only weeks into the new year, the proverbial "jury is still out" on the changes to the Child Support Guidelines.

It is the belief of the Committee members and those around the state who worked for the formulation of the alterations that the positives will outweigh the negatives.

Nonetheless, quite a few lawyers foresee more arguments about parenting time—and possibly a flurry of requests for modification of parenting time and support.♦

Just Friendly Advice—or Professional Therapy?

In a case that is sure to make therapists think twice before giving advice at a party, the Indiana Court of Appeals looked at various factors that might create a "therapist-patient" relationship.

Even though other states have developed tests that help determine the existence of such a relationship, Indiana has not. The issue is still one being explored by the courts.

In this situation, a woman began working as a receptionist at a clinic staffed by a psychologist and a psychiatrist. Following several deaths in her family, she was prescribed antidepressants by the psychiatrist.

Indiana Court of Appeals examines patient-therapist relationship.

Sought Advice about Problems

The woman also sought advice from the psychologist, as well as other co-workers, about problems with her marriage and her children.

The psychologist often discussed the disabilities of one of her children and gave her advice on parenting. They also talked about her relationship with her husband, including its sexual aspects.

No Records Were Kept

Despite the nature of these discussions, the psychologist did not keep any records of their talks. The woman never made an appointment, nor was she billed for his services.

During this period, she also got involved in a sexual relationship with him that lasted about a year.

Later, the woman and her husband filed a complaint, claiming the therapist had failed in his "duty to conform to the applicable standard of care in (her) treatment."

Performing Affirmative Act

The psychologist, as her former boss and lover, responded he was not subject to their malpractice claims as the relationship had not been one of therapist-patient.

The Court disagreed. "The key inquiry is whether the physician has performed an affirmative act for a patient's benefit," it said.

Guidelines for Relationship

The Court also offered guidelines to consider when determining whether a therapist-patient relationship does exist:

- "Whether the individual consulted with or was examined by a therapist for the purpose of receiving treatment.
- Whether the therapist made a recommendation to the individual regarding his or her condition or as to any course of treatment.
- Whether the therapist performed some affirmative act which would support an inference that he or she consented to the establishment of a therapist-patient relationship."

If you would like a copy of Thayer v. OrRico., 792 N.E.2d 919 (Ind.App. 2003), please contact us or the legal counsel of your choice.♦

REALITY CHECKS:

√ Even "good kids" can become angry, bitter and resentful when told their parents are divorcing.

√ During a divorce, parents should attempt to keep familiar routines for their children.

√ Children should be encouraged to talk but not forced to do so.

√ Children should be frequently told that their welfare is foremost in the minds of both parents.

√ Children need continual reassurance that they are loved and that the divorce is not their fault.

√ Parents who use their children as "go-betweens" greatly add to the stress that the child is feeling.

√ Children should not be used as "bargaining chips," with one parent withholding support payments or visitation from the other.♦

Parents Modify Agreement without Court's Okay

Informal changes in support for sisters examined by Court of Appeals.

Adding even more confusion to the calculation of child support is a case that will trouble family law lawyers—as it did the panel of three Appellate judges who each wrote an opinion.

Challenging long established case law, this opinion raises the specter of modifications in custody and child support without a court order. . . if, in essence, an implied contract between the parents can be found to that effect.

Court-approved Agreement

The parties were married in 1976 and become the parents of two daughters. In 1996, they separated and entered into a court-approved settlement agreement that gave Mother physical custody of the children, and Father was to pay weekly support.

Almost immediately after the divorce was granted, one of the children began living with Father in Florida, while the other stayed with Mother.

During that time, Father paid no support because both parents had agreed that each would provide support for the child in his or her care.

In the summer of 1998, the parents switched children, and the Father did not pay any support in light of the agreement he had made with Mother.

No Modification of Court Decree

Neither party attempted to modify their court-ordered dissolution decree with respect to custody or support.

In April 2002, a petition was filed that sought "to determine the amount of arrears owing" by Father to Mother. The trial court decided he was responsible for paying the full amount of arrearages in child support, as specified in the court-ordered agreement.

On appeal, Father argued that he should be given credit for any support arrearages because he always had one of the daughters living with him until both had reached 21 years of age.

Express Contract Not Formed

The Court of Appeal agreed: "It is apparent that while (Father) and (Mother) did not enter into an express written contract concerning the custodial arrangement, their conduct gave rise to an agreement by implication. . . . (They) were able to communicate and cooperate with each other in deciding what was best for their children and what method of support was required."

The Court of Appeals concluded that if the lower court's order were allowed to stand, Father would be subjected to paying child support twice—once during the times each girl had lived with him and, again, "for the arrearage that the trial court determined was owed because neither party returned to court to modify the original terms of the settlement decree."

Case Draws Strong Dissent

Flying in the face of the prohibition of retroactively modifying child support without a court order, this case drew a strong dissent.

If you would like a copy of Smith v. Smith, 793 N.E.2d 282 (Ind.App. 2003), contact **NEWTON BECKER REICHERT** or the legal counsel of your choice.♦

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