

FAMILY LAW FOCUS

NBB Announces Fourth Partner

With the new year comes a name change for our firm . . . and our great pleasure in announcing that Lana Lennington Pendoski has become a partner with us, effective January 1.

Admittedly, pronouncing our new name — Newton Becker Bouwkamp Pendoski — might prove to be a bit of a tongue-twister. But there your difficulties should end.

Dedicated to Giving Our Very Best

Regardless of the number of syllables in our name, we remain dedicated to giving you our very best in providing the legal services you need.

Lana is a key person in that effort. With us since early 2005, she has nearly a decade of experience practicing law in Indiana and Tennessee.

Interest in Domestic Relations Law

She has a strong interest in working with the emotionally-charged issues often inherent in domestic relations law — in addition to the nuances of estate planning.

Lana was raised in Muncie, Indiana. A *cum laude* graduate of Ball State University as well as Valparaiso University School of Law, she is married and the proud owner of Murphy, a fawn-colored pug. ♦

College Support Stops



Daughter's wedding terminates court order for college support.

While many fathers bask in a celebratory glow after the marriage of their children, the dad in this case headed straight to court.

Divorced in 1989 and subject to an order making him pay 92% of the rest of his daughter's college costs, Father felt this obligation should end with her wedding.

Two days after the ceremony, he filed a petition, alleging "as of the date of her marriage he should no longer be required to pay her college expenses."

Father Files for Appeal

The trial court disagreed, and the Father appealed.

In its analysis, the Court of Appeals noted that although a parent is under no absolute legal duty to provide a college education for his children, a court may order a parent to pay part or all of

such costs when appropriate.

Such orders are modifiable, it stated, "only upon a showing of changed circumstances so substantial and continuing as to make the current terms unreasonable."

Such was the case herein.

Son-in-law's Pay Equal to Dad's

The son-in-law made about the same amount of money as the Father — and this fact had not been accounted for by the trial court.

Therefore, "we must conclude that the additional resources available to (the daughter) after her marriage renders the prior college expenses order unreasonable," said the Court in reversing the lower court.

See *Borum v. Owens*, 852 N.E.2d 966 (Ind.App. 2006). ♦

SPOTLIGHT ON:

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Court gives custody of two kids to the paternal grandparents.

REALITY CHECKS:

If you or yours are slated to appear in court, here are some tips from a family law judge:

- ✓ Try to limit or do away with distractions because they take away from your case.
- ✓ Wear appropriate clothing to court, leaving the muscle shirts and tight tops at home.
- ✓ Don't stare daggers at your opponent while answering a question. (It suggests anger and bitterness and that maybe you are the problem after all.)
- ✓ Look at the person asking you the question.
- ✓ Make eye contact with the judge and the person asking the question while answering the question.
- ✓ Your family should sit quietly in the courtroom, rather than reacting when the other attorney tries to ask a question.
- ✓ Leave your cell phone off.

SOURCE: Judge Steve David, Boone County Circuit Court.

Grandparents Fight Mother for Custody of Two Children

Flying in the face of the belief that children belong with their parents, the Court of Appeals recently affirmed an award of custody to the paternal grandparents.

The parents were married in the fall of 2001, and by summer of 2002, Mom had petitioned for a divorce. She also requested custody of the couple's two Children.

After a hearing, a provisional order was entered in early 2003, giving physical custody of the Children to the Father. He immediately placed them with his parents where he sometimes lived.

Grandparents Ask for Custody

A final custody hearing was set for October of 2005. Prior to that date, the Grandparents filed a "Motion to Intervene and Petition for DeFacto Custodianship."

At the hearing, Father testified the Grandparents' residence was his "primary residence." He also offered the opinion the Children should stay in this "stable" home.

Children Go to Grandparents

The trial court "found that Grandparents had been *de facto* custodians of the Children, and awarded them custody."

In its findings, the Court also reiterated its conclusion from the original custody order "that the

presumption favoring custody in a natural parent had been overcome by clear and convincing evidence."

The Mother appealed, arguing there was insufficient evidence that such a placement was in the Children's best interests.

The Court of Appeals disagreed, affirming the lower court.

Best Interests of the Child

Before placing a child with a person other than the natural parent, it noted, "a court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement."

In its findings, the lower court looked at the parents' lack of finances, their limited work histories, their sporadic homelessness and the Mother's infrequent involvement with her Children.

No Child Support Provided

For nearly three years prior to the hearing, Grandparents had been the primary caretakers of the Children. "They did not receive regular child support from either parent."

The Guardian Ad Litem perhaps summarized it best: "[The parents] can barely take care of themselves, let alone two children in addition to themselves."

See *Truelove v. Truelove*, 855 N.E.2d 311 (Ind.App. 2006).♦

Dad Blocks Name Change of Son



Trial court judge errs in sending boy's father from courtroom.

Even though his son never bore his last name, Dad was determined the child would never be known by his stepfather's surname.

In 1990, Mom gave birth to a son. Although Mom and Dad were not wed, Dad was named the boy's father on the birth certificate.

After the birth, Dad paid the uninsured expenses from the birth and financially supported the child.

He paid about \$8800 annually to Mom as child support, in addition to paying rent on a duplex and buying household furnishings.

Dad Adjudicated Boy's Father

In 1997, Dad was adjudicated the boy's father in a paternity action filed by Mom. The child, however, continued to carry her name.

One year later, Dad created an irrevocable trust to provide child support for the boy and deposited \$280,000 in that trust. The child was listed as "owner" of the trust.

While the boy had visited with

Dad 10 to 20 times during his lifetime, he had not visited him since the summer of 2003. At all times, he had lived with the Mom.

Mom Married Stepfather

In 1999, Mom married Stepfather, and they had two children. Six years later, Mom petitioned the court to change her son's last name to that of his Stepfather's.

After a hearing — at which Dad's request for a separation of witnesses was granted but, as a result and over his objection, he was ordered out of the courtroom until after he had testified — the court granted her request.

On appeal, Dad argued "that the trial court erred when it prevented him from being present in court during the hearing."

The Court of Appeals agreed.

"Matter of First Impression"

Calling "[t]he definition of 'party' in the context of a name change proceeding . . . a matter of first impression," the Court turned to the law surrounding paternity.

"Upon a determination of paternity," it observed, "both the mother and father potentially enjoy equal legal rights as parents."

"Hence, it is only reasonable to allow them equal rights in the naming of the child."

Furthermore, if a party to an action "claims an interest relating

to the subject of the action and is so situated that the disposition of the action in his absence may . . . as a practical matter impair or impede his ability to protect that interest," that person is a necessary party to a proceeding and must be joined. (Indiana Trial Rule 19.)

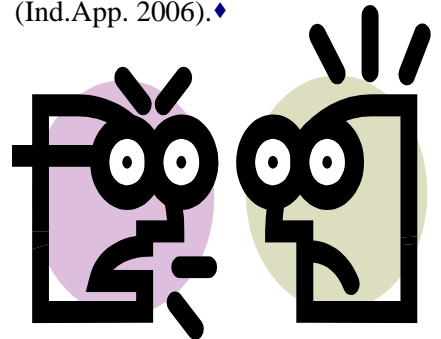
Change Is Not Adversarial

While an action to change a person's name is not an adversarial proceeding in the traditional sense, "[i]t is reversible error to extend the separation of witnesses to those who have a substantial interest in the subject matter."

"By sequestering Father with other witnesses, the trial court deprived him of the opportunity to assist his counsel during the proceeding," it concluded.

As such, the decision was reversed and the case was remanded with instructions for a hearing in accordance with this opinion.

See *In Re Change of Name of Fetkavich*, 855 N.E.2d 751 (Ind.App. 2006).♦



Adjudicated dad stops his child from getting stepfather's name.

Figure Irregular Income with Care

Despite some initial procedural jockeying by both parties, this case ended up making new law in the area of child support.

In October of 1996, Mother and Father were divorced, and Mother was awarded primary physical custody of their eight-year-old son.

Father was ordered to pay weekly child support in the amount of \$161, and, at the time, he was employed as a foundry worker.

Father Voluntarily Retired

In 2004, in order to increase his monthly pension by \$300, he retired early after working 29.3 years.

Because of the change in his income, Father moved to modify his child support which was denied.

On appeal, Father argued the trial court's calculation of child support owed was in error because the amount was wrongly based on pre-retirement earnings that included a large amount of overtime.



Child support should be based on sources of dependable income.

The potential income attributed to him was not dependable, he urged, and, in addition, he would be forced to make decisions based only on the size of potential paychecks.

The Court agreed, reversing and remanding to the lower court to determine Father's potential income for purposes of his paying support.

Calculation of Potential Income

In examining whether the calculation of potential income should include irregular overtime income when the obligor has voluntarily retired, the Court looked to the

Child Support Guidelines.

"Overtime, commissions, bonuses, and other forms of irregular income are included in the total income approach provided for by the Guidelines," it noted, "but each is also very fact-sensitive."

Totality of Circumstances Test

Given the totality of the circumstances herein, the Court found the trial court improperly relied on Father's federal income tax returns — including irregular overtime pay — in determining his potential income.

"Of course, because Father voluntarily left his employment and is still capable of working, some potential income must be imputed to him," it observed.

The Court then provided three appropriate possibilities for the calculation of potential income during Father's retirement years.

See *Meredith v. Meredith*, 854 N.E.2d 942 (Ind.App. 2006). ♦

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