NEWTON BECKER BOUWKAMP PENDOSKI, PC
ATTORNEYS AT LAW
3755 E. 82nd Street, Suite 220
Indianapolis, Indiana 46240
317 • 598 • 4529
317 • 598 • 4530 (fax)
http://www.nbbplaw.com

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FAMILY LAW FOCUS

Beware of Husbands Bearing Gifts

Husband suggested name on car title always indicated ownership of car.

Never did the Wife dream, when her Husband called "come out [of the house] and see the car I bought you," that they'd end up in court . . . over that very car.

Married in 2004, the Husband and Wife signed a prenuptial agreement the day before their wedding.

They agreed "all jointly held assets shall be apportioned . . . in accordance with each Party's contribution to the acquisition" of the assets.

Gift Becomes Separate Property

The two also agreed either party may gift his or her respective spouse, and "that gift shall become the separate property of the donee spouse."

Before their marriage, the Wife had owned a Ford that the Husband had urged she give to her grandson.

Telling her he'd buy a car to replace the Ford, he bought a Pontiac, saying it was her car — but keeping it titled in his name only. She drove the car regularly.

During their marriage, Husband traded in the Pontiac for a Lucerne.

He paid for it entirely with his own funds but titled the car in both their names. Then he drove it home and announced the gift to his wife.

In 2007, the Husband filed for divorce, and it was granted in two months. The Wife was given the Lucerne in the division of property.

On appeal, the Husband argued the court erred when it found the Lucerne was a gift to his Wife.

Issue of First Impression

In its analysis, the Court of Appeals noted that this case presented an issue of first impression.

Can a person make a "gift of an automobile where his or her name remains on the certificate of title after the gift has been delivered?" asked the Court.

The answer was yes.

With regard to the relationship between the certificate of title and ownership, the law of Indiana parallels that of other states.

Where a donor gives a gift but retains his or her name on the title, "a presumption arises that the donor did not have donative intent to make a gift," observed the Court.

But "[t]he donee can overcome this presumption by demonstrating clear and convincing evidence of the donor's donative intent."

"See New Car I Bought You"

The evidence to that effect was uncontroverted in that the Husband gave the Lucerne to his wife with the words: "Come out and see the new car I bought you."

In addition, the Wife primarily drove the vehicle for her own use. And, in a fit of angry retaliation at her, the Husband damaged it.

Never did the Husband present any evidence to negate his donative intent, aside from his name appearing on the certificate of title.

Affirmed.

See *Brackin v. Brackin*, 894 N.E.2d 206 (Ind.App. 2008).♦

SPOTLIGHT ON:

REALITY CHECKS:

If you're divorced and want to relocate with your child, you must give notice to each non-relocating individual and the court that issued your custody or parenting time order.

√ This notice must contain your proposed moving date as well as the telephone number and address of your intended new residence.

√ You must provide a statement of the specific reasons for your proposed relocation of the child.

√ Also include a proposal for a revised schedule of parenting time or grandparent visitation.

√ Send this notice by registered or certified mail, not later than 90 days before your moving date.

√ A notice must be sent to each individual who has parenting time or grandparent visitation.

√ The parent who receives notice of the relocation has 60 days to file a motion asking the court to prevent the relocation of the child.

√ The court will take into account the distance involved in changing the residence of the child.

√ It will look at the hardship and expense of exercising parenting time or grandparent visitation for the nonrelocating individual.

SOURCE: See *Indiana Code, IC §31-17-2.2-1 through IC §31-17-2.2-6.*♦

Grandma Challenges Mom on Her Religious Authority

Mother put birthdays and holidays off-limits for her little girl.

For the little girl, special visits to Grandma's house meant Easter eggs and birthday presents . . . until Mom took up the practices embraced by the Jehovah's Witness.

Raised in this religious tradition that celebrates neither holidays nor birthdays, the mother left. Then she "decided to go back to it because [she] felt it was the best thing for [her] and [her] children."

Mom's rejoining of this group had a decided impact on the child. Until then, she had been afforded visitations with Grandma that were largely in conformity with the Indiana Parenting Time Guidelines.

Grandma Denied Future Visits

But when the child was nine, Mom refused to let her go to Grandma's on Christmas. Then she told the grandmother she "would [be] denied any future visitation."

The Grandmother filed a petition for visitation, and it was granted after the trial court considered the best interests of the child.

Mom appealed. She argued, among other issues, that she had a constitutional right "to control the upbringing, education and religious training" of her child.

Court of Appeals Agreed

The Indiana Court of Appeals agreed.

"[T]he award of such extensive visitation to [Grandma] clearly interferes with [Mother's] constitutionally recognized fundamental right to control the upbringing, education and religious training" of her child, it noted.

The Indiana legislature, in fact, only grants this authority to custodial parents, said the Court.

Authority May Be Limited

Furthermore, "[s]uch authority may be limited 'after motion by a noncustodial *parent*' only if the trial court finds that the child's 'physical health would be endangered' or 'emotional development would be significantly impaired,'" it continued.

In short, there is no statutory authority on the part of a grandparent to ask a court "to limit the custodial parent's right to raise that child as the parent sees fit."

Reversed.

See *Hoeing v. Williams*, 880 N.E.2d 1217 (Ind.App. 2008).♦

Maintenance Is Wrongly Modified

Ailing Wife relied on baking bread and family help to support herself.

For the Wife in this case, the health care system got a lot more treacherous when she and Husband divorced in January of 2005.

Despite being ordered by the trial court to "maintain [Wife] on his insurance or pay for her COBRA coverage until she shall qualify for [M]edicaid or [M]edicare," the Husband refused to do so.

In the spring of 2007, Husband filed a petition to modify the dissolution decree, contending that his financial situation had changed.

Because he had wed his girlfriend with whom he was living, he had taken over making the mortgage payments on her house — despite not being on the mortgage.

Did Wife Apply for Medicaid?

He also alleged Wife had not shown that she "has applied for Medicaid or has attempted to secure other health coverage."

He did concede, though, his income from his pension and Social Security had not diminished.

At the hearing, Wife testified she had been denied both Social Security Disability and Medicaid benefits because she had a life insurance policy with a cash value of $700 and $3,000 in an IRA.

Wife Bakes Bread for Money

She stated she had not worked since 2005 because of her medical conditions and that she is supported by her family and by baking bread for her daughter's employer.

Finally, she noted she was 57 years old and would not be eligible for Medicare for nine more years.

In May of 2007, the trial court's order of modification directed Husband to keep Wife under COBRA through July, 2007, "at which time [Wife] shall either need to qualify for Medicaid or find her own medical insurance."

No Factual Basis Was Argued

On appeal, the Wife argued that there was no factual basis for the court's termination of the maintenance insurance provision.

In Indiana, spousal maintenance is awarded when 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.

According to Ind.Code §31-15-7-3, it may be changed "only upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable."

In its analysis, the Court turned to *In re Marriage of Erwin*, 840 N.E.2d 385 (Ind.App. 2006).

There, the trial court ceased spousal maintenance at the same time [Mrs. Erwin's] COBRA health insurance coverage ceased and before there was evidence to support an inference [she] could find or maintain full-time work.

Trial Court Abused Discretion

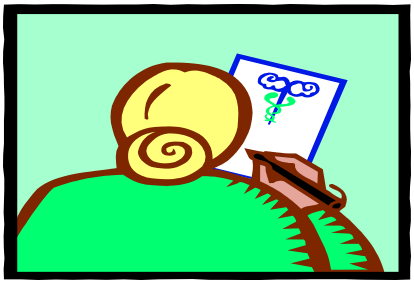
As such, "complete termination of [Mrs. Erwin's] maintenance payments at this time was an abuse of discretion by the trial court."

Relying on *Erwin*, the Court reversed the modification order of May, 2007, and sent it back to the trial court for further proceedings.

Then it noted the trial court may hear evidence, so as to determine Husband's insurance maintenance obligation under the present circumstances of the parties.

Reversed and remanded.

See *Cox v. Cox*, 882 N.E.2d 283 (Ind.App. 2008).♦



Wife was left with no money to pay insurance premiums under COBRA.

Dad Rescinds Paternity of Toddler

Even though public policy favors establishing the paternity of a child born out-of-wedlock, there is a "co-existing substantial public policy in correctly identifying parents and their offspring."

In May of 2005, Mom gave birth to M.M. out-of-wedlock and Dad executed a paternity affidavit.

When the baby was 16 months old, he was ordered to pay support.

The following month, Dad and the toddler took part in genetic testing, purportedly with Mom's approval. The results indicated he was not the biological father of M.M.

Was Affidavit Based on Fraud?

Dad thereby moved to modify his child support, alleging "the paternity affidavit was the product of fraud or material mistake of fact."

The trial court denied his petition in deference to the overriding public policy in favor of establishing paternity, and he appealed.

According to Ind.Code §16-37-2-2.1(h), a man who has executed a paternity affidavit may, within 60 days, file a court action to request an order for a genetic test.

When more than 60 days have passed, this affidavit may not be rescinded, absent a finding of fraud, duress or material mistake of fact.

Test Must Exclude Man as Father

Furthermore, the man also must have "ordered a genetic test, and the test indicates that the man is excluded as the father of the child." Ind.Code §16-37-2-2.1(i).

In court, Dad testifed without contradiction that Mom had advised him "he was the only potential father." But genetic testing said no.

Thus, he provided unrefuted testimony of circumstances that amounted to either fraud or a material mistake of fact.

"A paternity affidavit may not be rescinded unless the court, at the request of the legal father, has ordered a genetic test, and the court-ordered test indicates that the man is excluded as the father of the child."

Court gives Dad permission to get genetic testing for paternity.

Was Public Policy Contravened?

Dad's request for testing was denied, apparently due to the court's perception that disestablishment of paternity contravenes public policy.

In the face of such strong public policy, though, "some extraordinary circumstances will permit a challenge to paternity," noted the Court.

Judgment reversed and remanded to the trial court with instructions to order a genetic test.

See *In re Paternity of M.M.*, 889 N.E.2d 846 (Ind.App. 2008).♦

NEWTON BECKER BOUWKAMP PENDOSKI, PC

ATTORNEYS AT LAW

317 • 598 • 4529 | http://www.nbbplaw.com | 317 • 598 • 4530 (fax)

M. Kent Newton	knewton@nbbplaw.com
Carl J. Becker	cbecker@nbbplaw.com
Alan A. Bouwkamp	abouwkamp@nbbplaw.com
Lana Pendoski	lpendoski@nbbplaw.com
Judith Vale Newton	jnewton@nbbplaw.com
Leah Brownfield, Paralegal	lbrownfield@nbbplaw.com
Courtney Haines, Paralegal	chaines@nbbplaw.com
Jane Callahan, Administrator	jcallahan@nbbplaw.com
Mary Myers, Legal Assistant	mmyers@nbbplaw.com