

2022 Family Law Update

Presented by:

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Property Division



Haggarty v. Haggarty,
176 N.E.3d 234 (Ind. Ct. App. 2021)

- **Affirmed 2-1 (partial dissent)**
- **Premarital Agreement “ordinary living expenses” ambiguous; parol evidence admissible**
- **No pre-judgment interest since trial court had to exercise discretion in interpreting**
- **Wife signed releases so no post-judgment interest**
- **Partial dissent – wife removed the word “fully” from release so interest issue open; attorneys’ fees award not warranted**

Hudson v. Hudson,
176 N.E.3d 464 (Ind. Ct. App. 2021)

- **Affirmed**
- **Wife brought home into marriage**
- **Husband inherited and was gifted property during the marriage**
- **Equal division of marital estate affirmed**
- **Husband keeps 2020 proceeds from farming operation while paying wife fair market rent for use of the tillable farmland; just and reasonable solution**

Kearney v. Claywell,
181 N.E.3d 336 (Ind. Ct. App. 2021)

- **Affirmed**
- **2 ½ year marriage**
- **Husband's pre-marital assets \$841,361.48; wife's pre-marital assets \$394,951.60**
- **No comingling of assets during the marriage; similar earning ability; no dissipation**
- **60%/40% division favoring husband but husband wanted 68%**
- **Wife let Tennessee nursing license lapse and husband told wife she did not have to work; wife was financially disadvantaged by the divorce**

Johnson v. Johnson,
181 N.E.3d 364 (Ind. Ct. App. 2021)

- **Affirmed in part, reversed in part, and remanded**
- **Husband had Federal Employee Retirement Services (FERS) pension with a survivor benefit, FERS supplement, and Thrift Savings Account (TSP)**
- **Husband had accumulated leave valued at \$142,912.79**
- **Marital estate divided 41.63% to husband and 58.37% to wife**
- **Accumulated leave not a marital asset since not vested**
- **Wife to receive full survivor benefit**

Holland v. Ketcham,
181 N.E.3d 1030 (Ind. Ct. App. 2021)

- **Reversed and remanded**
- **Uniform Fraudulent Transfer Act**
- **Sale of real estate without wife paying \$205,098.75 to husband**
- **Concerted effort of wife and new husband to defraud**
- **There was sufficient indicia of intent to defraud**

Roetter v. Roetter,
182 N.E.3d 221 (Ind. 2022)

- **Reversed and vacated Indiana Court of Appeals opinion**
- **5 ½ year marriage**
- **Set aside of husband's 401(k), IRA, and two life insurance policies**
- **Set aside of wife's pre-marital student loan debt**
- **55% to wife and 45% to husband**
- **Affirmed property division; no substitution of judgment**
- **Dicta that length of marriage may be considered**

Reibel v. Kavensky,
184 N.E.3d 642 (Ind. Ct. App. 2022)

- **Affirmed in part, reversed in part, and remanded with instructions**
- **Husband's retirement account to be used for marital residence maintenance and then divided**
- **Although no time limit, five years too long**
- **Even though no provision in the settlement agreement, permissible interpretation and enforcement; not an impermissible modification**
- **Needed evidence in support of attorneys' fee award**

Tyagi v. Tyagi,
184 N.E.3d 1159 (Ind. Ct. App. 2022)

- **Affirmed**
- **Husband asked for 58% of the marital estate at trial**
- **The trial court divided the marital estate 55% to wife and 45% to husband**
- **Affirmed on appeal; husband did not ask for 50% until appeal so that issue was waived**

Rambo v. Rambo,
187 N.E.3d 301 (Ind. Ct. App. 2022)

- **Reversed**
- **Provisional order requiring auction of marital residence, tractor, and camper**
- **Interlocutory appeal**
- **Provisional sale of property not authorized by Ind. Code 31-15-4-8; only provides for possession of property**

Alifimoff v. Stuart,
21A-DN-2320, 2022 WL 3008929 (Ind. Ct. App. July 29, 2022)

- **Affirmed**
- **Suspended passive activity losses are not marital property**
- **Too remote and speculative; not marital property under Ind. Code 31-9-2-98**
- **Vested property interest in installment sales agreement; see also *Henderson v. Henderson*, 139 N.E.3d 227 (Ind. Ct. App. 2019)**

Procedural Issues



Rotert v. Stiles,
174 N.E.3d 1067 (Ind. 2021)

- **Reversed and vacated Indiana Court of Appeals opinion**
- **A trust contained a sub-trust for Rotert's share and appointed Stiles as trustee**
- **A trust provision said that in the event Rotert was married at the time of Borcharding's death, the trust would become effective**
- **Rotert had been married to his third wife for at least eight years**
- **Trial court granted Stiles's motion for summary judgment, finding that the trust terms were not void for public policy**
- **The Indiana Court of Appeals reversed**
- **The Indiana Supreme Court reversed; Ind. Code 29-1-6-3 prohibits restraints against marriage only if the restraint is in a "devise to a spouse"**
- **Justice Goff concurred in result, but found that the Indiana Trust Code prohibited conditions in restraint of marriages as a violation of public policy; applies to trusts and not just wills**

In re Change of Name and Gender of H.S.,
175 N.E.3d 1184 (Ind. Ct. App. 2021)

- **Affirmed 2-1 (with a separate concurrence)**
- **Majority affirmed the trial court's conclusion that mother failed to establish it was in the best interest of child to change gender marker**
- **Judge Pyle concurred, but reiterated that there is no statutory authority to change gender marker**
- **Judge Crone dissented, agreeing that any application of Ind. Code 16-37-2-10 to a child must be accompanied by a best interest analysis in that the totality of a child's medical history is highly relevant**

Calvert v. State,
177 N.E.3d 107 (Ind. Ct. App. 2021)

- **Affirmed**
- **I.R.E. 901; distinctive characteristics**
- **Authenticity can be established by direct or circumstantial evidence**
- **Cell phone and related records admissible**

Nail v. Smith,
178 N.E.3d 801 (Ind. Ct. App. 2021)

- **Affirmed**
- **Ind. Trial Rule 33 requires answers to interrogatories “must be responsive, full, complete, and un-evasive”**
- **Simply directing proponent to rummage through discovery material falls short of obligations imposed by Ind. Trial Rule 33**
- **A party has a duty to supplement discovery responses regarding the identity and location of persons having knowledge of discoverable matters**

Smith v. State,
179 N.E.3d 1074 (Ind. Ct. App. 2022)

- **Affirmed**
- **I.R.E. 901**
- **Reasonable probability this item what the proponent claims it is (authenticity)**
- **Then any inconclusiveness goes to weight and not admissibility**

Duff v. Rockey,
180 N.E.3d 954 (Ind. Ct. App. 2022)

- **Reversed**
- **Ind. Rule of Professional Conduct 3.7 disqualification**
- **An attorney disqualified for one post-dissolution matter is not automatically disqualified from a second, later arising post-dissolution matter, if the basis for the first disqualification no longer exists**

Bixler v. Delano,
185 N.E.3d 875 (Ind. Ct. App. 2022)

- **Reversed**
- **Notice issue**
- **Mother knew of father's relocation and new address, but did not serve; father would have contested mother's motion**
- **Ind. Trial Rule 4.1(A)(1) requires a return receipt for certified mail service**

Cruz v. Cruz,
186 N.E.3d 152 (Ind. Ct. App. 2022)

- **Reversed**
- **An annulment proceeding is not a divorce proceeding**
- **The Indiana General Assembly created distinct statutes for annulment of marriage and dissolution of marriage**
- **An annulment petition cannot be an amendment of a divorce petition**

Estate of Estridge v. Taylor,
187 N.E.3d 275 (Ind. Ct. App. 2022)

- **Affirmed**
- **Estate petition to annul marriage**
- **Trial court denies petition**
- **Estridge understood the marriage contract and was mentally competent**
- **No void marriage under Ind. Code 31-11-8-4**

In re Change of Gender of O.J.G.S.,
187 N.E.3d 324 (Ind. Ct. App. 2022)

- **Affirmed**
- **Lead opinion noted that Ind Code 16-37-2-10 does not authorize a gender marker change**
- **Judge Bailey concurred; an equitable action could not accomplish the desired objective where the best interest of a child must be demonstrated**
- **Judge Mathias dissented; cited statistics regarding the LGBTQIA+ population that indicated there were a sizable of Indiana transgender children; equity jurisprudence**

Israel v. Israel,
189 N.E.3d 170 (Ind. Ct. App. 2022)

- **Affirmed in part, reversed in part, and remanded**
- **Non-disparagement clause**
- **Prohibiting parents from disparaging the other in child's presence furthers a compelling state interest in protecting the best interest of children and did not violate the First Amendment**
- **Non-disparagement clause prohibiting a parent from "making disparaging comments" about the other in the presence of "anyone" even when child was not present was an unconstitutional prior restraint on speech and overbroad**

In re Paternity of A.M.,
189 N.E.3d 619 (Ind. Ct. App. 2022)

- **Affirmed; 2-1**
- **Motion to withdraw**
- **Ten-day notice requirement not followed; breakdown of attorney-client relationship; material misrepresentation of fact**
- **Dissent said abuse of discretion to deny continuance request**

Dennis v. Dennis,
189 N.E.3d 1115 (Ind. Ct. App. 2022)

- **Reversed**
- **Exceptions to trial courts losing jurisdiction of divorce cases when a party dies**
- ***Edwards v. Edwards*, 80 N.E.3d 939 (Ind. Ct. App. 2017)**
- **Divorce courts retain continuing jurisdiction to re-examine property settlement where the nature of the examination is to clarify a prior order**
- **Enforcement – in this case, in order to implement complete implementation of property division**

Ramey and McHenry v. Ping,
190 N.E.3d 392 (Ind. Ct. App. 2022)

- **Affirmed**
- **Indiana False Reporting Statute (Ind. Code 31-33-22-3); statute allows for either direct or indirect communication of a report for liability**
- **Therapist and a parent collaborated to make a false abuse or neglect report; parent coached child**
- **Both therapists and parents can be liable for actual damages**

Spousal Maintenance



Roetter v. Roetter,
182 N.E.3d 221 (Ind. 2022)

- **Reversed and vacated Indiana Court of Appeals opinion**
- **Trial court ordered rehabilitative maintenance for eighteen (18) months**
- **\$12,000 “advance” toward her anticipated share**
- **\$12,000 already received and \$7,800 to be additional “monthly maintenance” payments**
- **Wife challenged the trial court’s eighteen-month award of rehabilitative maintenance; not the amount**
- **Wife offered no evidence and raised no arguments on whether her future requirement required education or training**

Child Support



In re Paternity of W.M.T.,
180 N.E.3d 290 (Ind. Ct. App. 2021)

- **Affirmed**
- **Discrepancies between the language of Indiana Child Support Guideline 3(A)(1) and the Commentary to Guideline 3(A) regarding survivor benefits**
- **Guideline includes survivor benefits as part of gross income, while the Commentary does not**
- **Inclusion of child survivor benefits in weekly gross income would result in a windfall for mother, since mother would be deriving a benefit from the child's survivor benefits meant for child in the form of a reduction in her child support obligation**
- **Order that mother pay grandmother \$46.00 per week in child support**

Tyagi v. Tyagi,
184 N.E.3d 1159 (Ind. Ct. App. 2022)

- **Affirmed**
- **At a 2018 preliminary hearing, husband verified his income was \$5,000.00 per week**
- **Husband later attempted to average his income as \$2,413.14 per week**
- **Trial court properly maintained husband's weekly income at \$5,000.00 based on husband's ability to manipulate his income for tax purposes and ease-of-access to additional funds from his role as CEO of a business and son of owner**

Walters v. Walters,
186 N.E.3d 1186 (Ind. Ct. App. 2022)

- **Affirmed in part, reversed in part, and remanded**
- **Another three-year average case**
- **\$3,875.00 based on average weekly income from 2016-18; husband told wife that they should get a divorce, he would not pay child support, and he would become a “deadbeat” and a “bum”**
- **Husband properly determined to be voluntarily underemployed after leaving twenty years of experience in the pipeline industry and becoming a car salesman**
- **Remand as to considering job opportunities and earnings levels in husband’s current location in the relevant community**

Custody/Parenting Time



Day-Ping v. Ramey,
175 N.E.3d 844 (Ind. Ct. App. 2021)

- **Reversed**
- **DCS report by father**
- **Mother files §1983 action claiming that two DCS family case managers violated her civil rights**
- **\$988,000.00 settlement**
- **Father's and father's girlfriend's fraudulent behavior lead to re-examination of evidence and warranted reversal**

Ellenburg v. Kropp,
175 N.E.3d 1208 (Ind. Ct. App. 2021)

- **Affirmed**
- **In 2020, mother was convicted twice and arrested once for conduct involving alcohol and the operation of a motor vehicle**
- **Mother violated terms of probation**
- **Although mother took remedial steps, modification of physical custody of children warranted due to a substantial change in circumstances, making modification in children's best interests**
- **Father's petition not too vague on the issue of legal custody and Ind. Code 31-17-2-15 factors supported granting father sole legal custody**

In re Paternity of W.M.T.,
180 N.E.3d 290 (Ind. Ct. App. 2021)

- **Affirmed custody to grandparent**
- ***De facto* custodian**
- **Standard of proof regarding “best interest” is clear and convincing evidence for a third party and is higher for a third party than a natural parent**
- **Paternal grandmother's custody of child gave child a “substantial and significant advantage”**

G.S., Jr. v. H.L.,
181 N.E.3d 1040 (Ind. Ct. App. 2022)

- **Affirmed granting stepfather legal and physical custody of child**
- **Clear and convincing evidence existed that the best interest of child required placement with stepfather**
- **Mother and father each had substantial, unsupervised parenting time**

In re Paternity of J.K.,
184 N.E.3d 658 (Ind. Ct. App. 2022)

- **Affirmed**
- **“Balanced school calendar” and sports**
- **Some of the greatest challenges a trial court will likely face are challenges in parenting time cases and require a subtle balancing**
- **Overlap between significant distance and complexities of parenting time with respect to teenagers and extracurricular activities**
- **Trial court did not improperly restrict father’s parenting time by limiting the number of overnights to which he was entitled in the state of Texas**

McClendon v. Triplett,
184 N.E.3d 1202 (Ind. Ct. App. 2022)

- **Affirmed**
- **Mother's moves required one child to attend at least six different schools and another child to attend at least three different schools**
- **Mother blocked father from calling or texting mother's phone and father was unable to contact one child for four months**
- **Change of custody to father**
- **Denial of mother's motion for continuance not grounds for reversal**
- **I.R.E. 611; no violation of rule related to separation of witnesses**
- **Indiana Court of Appeals frowns upon parents calling their minor children as witnesses in custody proceedings that "pit" a child against the other parent**

Sanford v. Wilburn,
185 N.E.3d 451 (Ind. Ct. App. 2022)

- **Reversed**
- **Change of custody to father**
- **First Ruling: Although child wished to remain with mother, granting father custody would be best for the long-term health of child**
- **Second Ruling: Did not have findings supporting modification of custody to mother**
- **No change of physical custody from father to mother**

Cole v. Cole,
187 N.E.3d 957 (Ind. Ct. App. 2022)

- **Reversed**
- **ICARA**
- **Habitual residence under the Hague Convention**
- **Indiana was the place of the children's habitual residence**

Ferguson v. Brooks,
189 N.E.3d 1102 (Ind. Ct. App. 2022)

- Reversed
- Grandparent visitation is different from custodial parent; grandparents not afforded the same legal rights as parents and do not have a Constitutional liberty interest with their grandchildren
- Cross-country visitation with grandparents (Oregon to Indiana) was not in child's best interests; child's best interest not considered
- Father made a *prima facie* case of reversible error

Hahn-Weisz v. Johnson,
189 N.E.3d 1136 (Ind. Ct. App. 2022)

- **Reversed**
- **Grandparent successfully appealed**
- **Record silent as to whether the trial court found grandmother was a *de facto* custodian**
- **Trial court was required to, but did not determine, the best interests of child**
- **Court of Appeals assessed the evidence and determined that grandmother had demonstrated *prima facie* error in the trial court granting father's petition for modification of custody**

Golan v. Saada,
No. 20-1034, ___ S. Ct. ___, 2022 WL 2135489 (June 15, 2022)

- ICARA
- “Grave risk”
- The question of whether there is a grave risk is separate from the question of whether there are ameliorative measures that could mitigate the risk
- Consideration of ameliorative measures must: prioritize a child’s physical and psychological safety, abide by the Hague Convention’s requirement that courts addressing return petitions not adjudicate the underlying custody dispute, and must accord with the Hague Convention’s requirement that courts act expeditiously in proceedings for the return of children
- The Hague Convention requires courts to make a discretionary determination as to whether to order return after making a finding of “grave risk”

Shelton v. Hayes,
190 N.E.3d 951 (Ind. Ct. App. 2022)

- **Affirmed in part, reversed in part, and remanded with instructions**
- **Grandparent visitation**
- **No right to the appointment of a *Guardian Ad Litem***
- **Not authorized by the Grandparent Visitation Statute**

Shoemaker v. Shoemaker,
22A-DC-50, 2022 WL 2196528 (Ind. Ct. App. June 20, 2022)

- **Affirmed**
- **Domestic violence**
- **Henry County, Indiana v. Alabama**
- **Trial court considered Indiana an inconvenient forum**
- **UCCJA and UCCJEA**
- **Inconvenient Forum Statute (Ind. Code 31-21-5-8) contains a non-exclusive list of factors that trial courts may consider**
- **Domestic violence can be considered**
- **Alabama was the best state to protect wife and child**

Adoption/Paternity



*In the Matter of the Adoption of R.D.H. and R.K.H.,
181 N.E.3d 983 (Ind. Ct. App. 2021)*

- **Reversed**
- **Indiana has three narrow avenues for post-adoption contact for birth parents, birth siblings, and certain grandparents**
- **The Grandparent Visitation Act did not apply because grandparents' visitation rights must be established before the entry of an adoption decree**

D.G. v. D.H.,
182 N.E.3d 247 (Ind. Ct. App. 2022)

- **Affirmed**
- **Father's consent to step-father adoption required even though there were thirteen months of non-support**
- **Father had mental health issues and limited income**

In re I.B.,
185 N.E.3d 428 (Ind. Ct. App. 2022)

- **Reversed**
- **Father's consent was required for step-father's adoption**
- **Mother did not encourage communication between child and father**

B.A. v. D.D. and C.D.,
189 N.E.3d 611 (Ind. Ct. App. 2022)

- **Affirmed in part, reversed in part and remanded**
- **Summary judgment in favor of adoptive parents reversed; dispute over paternity affidavit**
- **Consent required if valid paternity affidavit**
- **Remand to determine if father was child's legal father**

Termination of Parental Rights/CHINS



In re To.R.,
177 N.E.3d 478 (Ind. Ct. App. 2021)

- **Affirmed**
- **CHINS adjudications focus on needs and conditions of child and culpability of the parents**
- **Sufficient evidence to support CHINS adjudication**

In re K.W. and R.W.,
178 N.E.3d 1199 (Ind. Ct. App. 2021)

- **Affirmed**
- **Ind. Code 31-34-11-1 requires a fact-finding hearing to occur not more than sixty days after a CHINS petition is filed**
- **Good reasons for continuance; judicial officer medical procedure**
- **Ind. Trial Rule 53.5 “good cause” trumps Ind. Code 31-34-19-1 on matters of procedure**

In re I.L.,
181 N.E.3d 974 (Ind. 2022)

- ***Per curiam* Indiana Supreme Court opinion adopting part of Indiana Court of Appeals opinion as precedent**
- **COVID-19 balancing of safety concerns and prompt adjudication balanced against the risk of error created by remote nature of hearings**
- **Potentially wider application**

In re R.A.M.O.,
190 N.E.3d 385 (Ind. Ct. App. 2022)

- **Affirmed**
- **Mother did not challenge the trial court's findings and conclusions; she argued the trial court abused its discretion in continuing the fact-finding hearing beyond the 120-day time frame set forth in Ind. Code 31-34-11-1(b); the trial court did not abuse its discretion**
- **No violation of due process rights; mother waived the argument by failing to file a motion to dismiss and had counsel**

In re C.S.,
190 N.E.3d 434 (Ind. Ct. App. 2022)

- **Affirmed**
- **No due process violation when CASA unsworn report admitted without cross-examination; no assertion that trial court denied other the opportunity to cross-examine**
- **Mother's counsel at first hearing did not object to admission of CASA report**
- **Mother's drug use was sufficient evidence for continued placement outside her home and there was sufficient evidence to support the trial court's finding that continuation of the parent-child relationship posed a threat to child's well-being**
- **Termination of parental rights was supported but the totality of the evidence**

In re B.P.,
190 N.E.3d 995 (Ind. Ct. App. 2022)

- **Reversed**
- **No evidence that the children were seriously endangered as a result of mother's mental illness or that the children's needs were unmet**
- **A parent's mental illness, without more, is insufficient to support a CHINS determination**

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- **Drew Soshnick is a partner in the law firm of Faegre Drinker Biddle & Reath LLP, who concentrates his practice in a wide array of family law matters, with particular emphasis on the economic aspects of matrimonial law. This concentration includes, among other things, addressing sophisticated financial issues such as valuing and dividing complex marital assets (including corporations, partnerships, professional practices and proprietorships), assessing executive compensation and benefits, coordinating tax analysis and planning, tracing of assets, and drafting premarital and post-marital agreements.**
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- **Drew is a frequent speaker at national and state family law seminars. Since 1999, Drew has presented the annual “Family Law Update” to Indiana jurists at the Judicial Conference of Indiana. Drew also writes extensively on family law in both national and state treatises and publications and is a faculty member of the National Family Law Trial Institute.**