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Indiana Family Law Update

September 13, 2022

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Topics We Will Cover Today

- A. Property Division
- B. Preliminary Order in Dissolution Cases
- C. Non-Disparagement Clauses in Court Orders
- D. Change of Gender Marker on Birth Certificate
- E. Grandparent Visitation
- F. Changes to Indiana Parenting Time Guidelines

Additional Cases In Materials

- A. Adoption
- B. Child Custody
- C. Procedural Cases
- D. Family Law Collections
- E. Family Law Attorney Disqualification Case
- F. Annulment
- G. Hague Convention
- H. Decree Enforcement

Prop/Div—Rotert v. Stiles (Ind)

- HELD: Court of Appeals opinion vacated. Trust provision requiring beneficiary's distribution placed in trust if beneficiary is married is not a restraint on marriage
- Husband's mother created trust with provision for one of her two children (Husband) to have any distribution placed in trust if he is married at time of her death.
- Trial court denied Husband's summary judgment motion seeking declaration finding provision void as restraint on marriage
- Court of Appeals reversed, finding the language of the trust could ONLY be interpreted as an encouragement for Husband to divorce his wife
- Supreme Court held statutory prohibition against restraints applies ONLY to dispositions to a spouse by will, not dispositions made by trust.

Prop/Div—Roetter v. Roetter (Ind)

- HELD: Clarified trial court’s application of division statute—identify property included, then determine whether to deviate—need not follow rigid, technical approach, consider all property, justify deviation from presumed equal division
- Trial court awarded each party assets/debts brought into marriage, then divided *balance* of marital estate 55/45 in favor of Wife
- Court of Appeals ruled trial court improperly “set off” certain property to each party before making its division of balance of marital estate
- Supreme Court affirmed trial court decision, but advised better approach to include all assets/liabilities and do division rather than “set offs”
- Found trial considered all assets and liabilities and made findings to support ultimate overall division

Prop/Div—Smith v. Smith (Ind App)

- HELD: T/C within discretion to divide INPRS pension by requiring H to pay W, upon receipt, $\frac{1}{2}$ of after-tax value of each payment
- HELD: T/C within discretion to value pension based upon presumed age 62 retirement, even though present value of pension could have been larger if H retired at age 55
- HELD: T/C erred by not awarding W either survivor's benefits or other protection for her interest, like life insurance

Prop/Div—Smith v. Smith (Ind App)con't

- INPRS pensions are not subject to in-kind division—QDRO not available option.
- At trial, various valuations of H's pension offered, including valuation at different dates of retirement—55 and 62. Value at 55 greater than value at normal retirement age of 62
- CPA gave opinion estimating H's effective tax rate at age 62 would be 22%
- H proposed he pay \$2,602 per month to W—1/2 of value of his expected monthly benefit at 62, less 22% for his income taxes
- W proposed H be awarded all of his retirement benefits valued at presumed age 55 retirement which would result in a very large property settlement payment due her
- All valuations well over \$1 million, with the age 55 being the highest
- T/C essential adopted H's proposal

Prop/Div—Smith v. Smith (Ind App)con't

- Court of Appeals deferred to the T/C's valuation approach given the evidence sufficient to uphold the T/C's decision. Noted the Supreme Court's prior admonishment preventing "involuntary retirement"
- No abuse of discretion regarding the means of distributing the value of husband's pension. W asking the appellate court to reweigh the evidence
- Court endorsed T/C's tax-affecting the pension payments. To not tax-affect payments would make H responsible for ALL taxes, thus making intended 50/50 division illusory
- T/C erred by failing to award W survivor's benefits or life insurance to secure payment because under terms of pension all payments to Husband would end at his death, even if prior to assumed life expectancy used in the valuation
- Remanded for further evidence and consideration regarding the security

Prop/Div—Johnson v. Johnson (Ind App)

- HELD: T/C erred when it treated H's accumulated sick days as a marital asset, subject to valuation and award in property division
- HELD: Affirmed unequal division of marital estate in W's favor where H moved from marital residence four years before petition, failed to contribute to joint marital pot and failed to financially support minor child
- Wife valued H's accumulated sick days (3,369 hours x pay rate = \$142,912) as a marital asset. T/C adopted W's valuation in decree
- Court of Appeals rejected sick pay as marital asset—H could not convert to cash during employment or upon retirement. Limited ability to use, purpose is for protection in case of short-term illness
- Court found H's lack of contribution after move valid basis for unequal division of marital estate in W's favor

Preliminary Order—Rambo v. Rambo (Ind App)

- HELD: Unless both parties agree, trial court's preliminary order cannot order the sale of marital property
- At preliminary hearing in dissolution case, W asked T/C to order sale of marital residence. H asked that he be given temporary possession of the residence
- T/C ordered marital residence sold. H filed interlocutory appeal
- Court of Appeals reviewed statute regarding types of relief that can be granted—temporary possession of property listed, sale of property not
- Court of Appeals noted that this decision only applied to circumstances where one or both parties object to sale. Both parties can agree to the sale as a term in an agreed preliminary order

Non-Disparagement Clause—Israel v. Israel (Ind App)

- HELD: Dissolution court may not impose non-disparagement clause extending beyond prohibiting parents from disparaging each other in front of the children
- T/C's decree included clause prohibiting parents from making disparaging comments to their children or in their children's presence. Also prohibited making disparaging comments about the other to "friends, family members, doctors, teachers, associated parties, co-workers, employers, the parenting coordinator, media, the press, or anyone"
- Court of Appeals noted the First Amendment and prior restraint implications of the order. Found compelling interest in protecting children from being exposed to such language between the parents. Overbroad to apply to others

Change of Gender Marker—Matter of O.J.G.S. (Ind App)

- HELD: In three-opinion, divided decision, COA finds Indiana statute does not confer upon Indiana courts authority to change the gender marker on a birth certificate
- Facts/Procedural History: Child born in 2013, assigned male at birth, reflected on birth certificate. Child identified more and more as a female growing up. Ultimately, Mother filed petition seeking to change child's gender marker on birth certificate. Denied. Appeal consolidated in 2021 *Matter of A.B.* cases, remanded to trial court for application of best interests standard. On remand, T/C denied Mother's petition based on no finding that change was in child's best interests
- Second appeal—majority found no authority in statute to change birth certificate

2021 Program Birth Certificate Gender Change—A.B., O.S., and V.V. (Ind App)

- HELD: Parents have authority to seek change of gender marker on children's birth certificates
- HELD: Appropriate standard for granting adult's petition on behalf of child is whether change is in child's best interests (for adults, it is whether in good faith)
- Case is a consolidated appeal of three cases. Trial courts denied petitions in two cases without explanation, in third, trial court concluded petition was in good faith, but a parent lacks authority to seek gender marker change on behalf of a child.
- Court of Appeals first viewed issue as an important life decision for a child over which parent is vested with authority to make on behalf of a child

2021 Program A.B. (con't)

- Parents argued appropriate standard is same as for adults—made in good faith
- Court of Appeals rejected “adult standard” and found the appropriate standard is whether the change is in the child’s best interests.
- All three petitions remanded to be evaluated under the best interests standard
- Dissent argued this issue is for the General Assembly and not for the majority to construe existing statutes and case law to reach its conclusion

Grandparent Visitation (2 cases)

- Adoption of R.D.H and R.K.H (Ind App)
- HELD: Maternal grandmother's petition for visitation 4 years after stepmother adopted children failed. Indiana law provides that only grandparent visitation rights established PRIOR to an adoption will survive
- *Shelton v. Hayes* (Ind App)
- HELD: Neither GP Visitation Act nor GAL statute provides for appointment of GAL in a GP visitation proceeding. GP cannot request, and a T/C cannot appoint a GAL over the objection of a parent

Changes to Indiana Parenting Time Guidelines—1/1/22 (Ind)

- Removal of section on “parallel parenting”
- New section on “Shared Parenting” and how to put it into practice
- Parenting time during public health emergency
- Discourage using police station as a place to transfer children
- Restricting use of phone, tablet, other device as punishment ok, but can’t prevent use to communicate with other parent
- Clarifying make-up time
- Changes regarding potential 3rd party conflict during drop off/pick up
- Transportation to and from extracurricular activities



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