

# Indiana Case Law and Statutory Update

May 2, 2015 through February 26, 2016

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Prepared by:

David L. Morris  
Senior Deputy Prosecutor  
Marion County Prosecutor's Office  
Child Support Division  
251 E. Ohio Street, Suite 700  
Indianapolis, IN 46204  
[David.Morris@indy.gov](mailto:David.Morris@indy.gov)

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**\*\*Special thanks to Elodie Meuser of the [Mediation Option, LLC](#) and Marion County Deputy Prosecutors Emily Shrock and Megan Smith for their painstaking review of this memorandum\*\***

**I. LEGISLATION - <http://iga.in.gov/><sup>1</sup>**

**A. SB 1 - Administrative law study commission.**

1. Legislative Digest - Establishes the 12 member administrative law study commission (commission) to study issues concerning whether administrative law judges and environmental law judges should be replaced by an administrative court that conducts administrative hearings and other duties currently conducted by administrative law judges and environmental law judges. Requires the commission to submit a final report to the legislative council concerning the commission's findings and recommendations before November 1, 2016.
2. Effective Date: Upon passage, if enacted.
3. Citations Affected: IC 2-5.
4. Status as of March 4, 2016: 02/29/2016 - Signed by the President Pro Tempore; 03/02/2016 - Signed by the Speaker of the House.

**B. SB 150 - Senior prosecuting attorneys.**

1. Legislative Digest - Provides that a deputy prosecuting attorney who was employed as a Title IV-D prosecutor may be appointed as a senior prosecuting attorney to charge and prosecute nonsupport of a child cases.
2. Effective Date: July 1, 2016, if enacted.
3. Citations Affected: IC 33-39-10-1.
4. Status as of March 4, 2016: January 5, 2016, read first time and referred to Committee on Judiciary.

**II. CHANGES TO INDIANA RULES OF COURT**

**A. Proposed Orders Amending Indiana Administrative Rules -**

1. Under IC 4-22-2-23, the Department of Child Services intends to adopt a rule.  
<http://www.in.gov/legislative/iac/20160210-IR-465160054NIA.xml.html>

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<sup>1</sup> Where specified, additions appear in bold text; deletions are marked with a strikethrough.

2. The proposed rule, notice of which was posted on 2/10/16, would:
  - a. Makes numerous changes to 465 IAC 1-1 to delete obsolete references, defines the "department" as the "Indiana department of child services" and replaces "division of family and children" with the "department" or "central collection unit" as appropriate throughout the rule.
  - b. Amends 465 IAC 1-1-1 to include parent locator services as a part of child support services, includes a definition of the term "fees," clarifies "nonpublic assistance recipient" and makes other technical changes.
  - c. Amends 465 IAC 1-1-2 regarding child support services fees paid by persons who have not received federal public assistance.
  - d. Amends 465 IAC 1-1-11 regarding recoupment of overpayments of child support. Repeals 465 IAC 1-1-4, 465 IAC 1-1-7, 465 IAC 1-1-9, and 465 IAC 1-1-10.
  - e. Comments and questions may be addressed to the Small Business Regulatory Coordinator for this rule. Statutory authority: IC 31-25-2-18.

B. Order Amending Indiana Child Support Guidelines - Order issued November 5, 2015, effective January 1, 2016.

<http://www.in.gov/judiciary/files/order-rules-2015-1105-child-support.pdf>

1. Guideline 1 - Preface -

- a. Guideline 1 adds language to clarify that the Guidelines are employed to provide appropriate awards for educational support, not just child support.
- b. Text - "Guidelines to determine levels of child support **and educational support** were developed by the Judicial Administration Committee of the Judicial Conference of Indiana and adopted by the Indiana Supreme Court. The guidelines are consistent with the provisions of Indiana Code Title 31 which place a duty for child support **and educational support** upon parents based upon their financial resources . . ."

2. Guideline 2 - Use of the Guidelines -

- a. Guideline 2 clarifies that the Guidelines shall be "**applied in every instance in which child support is established, including, but not limited to, dissolutions of marriage, legal separations, paternity actions, juvenile proceedings, petitions to establish support and Title IV-D proceedings.**"

- b. Guideline 2 retains its language relating to minimum child support orders: “The court may consider \$12.00 as a minimum child support order; however, there are situations where a \$0.00 support order is appropriate.” However, the Commentary specifically deletes reference to \$12.00 as a minimum weekly order. Moreover, although the Commentary deletes discussion of \$12.00 as the Guideline amount for one child where the combined weekly adjusted gross income is \$100.00, the Guideline Schedule makes no change; it remains \$12.00.
  - c. The Commentary is amended to specify that a Line 1D deduction for spousal maintenance is no longer limited to prior marriages.<sup>2</sup>
    - (1) “*Spousal Maintenance*. The worksheet provides a deduction for spousal maintenance paid ~~as a result of a former marriage~~ (Line 1D). . . . No such deduction is given for amounts paid by an obligor as the result of a property settlement ~~resulting from a former marriage~~, although that is a factor the court may wish to consider in determining the obligor's ability to pay the scheduled amount of support at the present time.” *See also*, Guideline 3(C), *infra*.
3. Guideline 3(A) - Definition of Weekly Gross Income (Line 1 of Worksheet) -
- a. Formerly, only alimony or maintenance received *from other marriages* may be included in a parent’s income. The revised Guideline strikes language limiting the income to other marriages.<sup>3</sup>
  - b. Guideline 3(A)(1): is amended as follows: “Weekly gross income of each parent includes income from any source. . . and includes, but is not limited to, income from salaries, wages, commissions . . . and alimony or maintenance received ~~from other marriages~~.”
  - c. Guideline 3(A) itself is otherwise unchanged. The Commentary to Guideline 3(A), however, makes some notable changes.

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<sup>2</sup>This change appears to be consistent with the Indiana Supreme Court’s decision in *Young v. Young*, 891 N.E.2d 1045 (Ind. 2008). In *Young*, the high court opened the door, at least, to applying a credit even where the maintenance order arose not from a prior marriage but from an order *between the parties*. The Court of Appeals walked through this open door in *Ashworth v. Ehrgott*, 934 N.E.2d 152, 159-60 (Ind.Ct.App. 2010), and allowed a father a deduction for spousal support payments he was required to pay to the mother.

<sup>3</sup>Compare the commentary to Guideline 2, *supra*, which references *prior* marriages, not *other* marriages. In any event, it appears the revised Guidelines permit consideration of spousal support obligations arising from a party’s prior, current or subsequent marriage.

(1) “*c. Potential Income.* (5) When a parent is unable to obtain employment because that parent suffers from debilitating mental illness, a debilitating health issue, or is caring for a disabled child, it may be inappropriate to attribute any potential income to that parent. ~~Another example may be when the cost of child care makes employment economically unreasonable.~~”

(2) “*d. Imputing Income.* Whether or not income should be imputed to a parent whose living expenses have been substantially reduced due to financial resources other than the parent's own earning capabilities is also a fact-sensitive situation... **If there were specific living expenses being paid by a parent which are now being regularly and continually paid by that parent’s current spouse or a third party, the assumed expenses may be considered imputed income to the parent receiving the benefit.**”

4. Guideline 3(B) - Income Verification -

- a. Guideline 3(B) - The revised Guidelines make no changes to Guideline 3(B).
- b. The Commentary has been altered as follows: “If the parties disagree on their respective gross incomes, the court ~~should~~ **shall** include in its order the gross income it determines for each party.”

5. Guideline 3(C) - Computation of Weekly Adjusted Income (Line 1E of Worksheet) -

- a. Adjustment for Subsequently-born Child(ren) (Line 1A) - Formerly, the Guideline defined a subsequently-born child as one who is born after *the existing support order*. The revised Guideline defines a subsequently-born child as one who is born after *the birthdate(s) of the child(ren) subject of the child*.<sup>4</sup> In addition, the credit on Line 1A is changed from permissive to mandatory. The Commentary reflects these changes.

(1) “1. *Adjustment for Subsequent-born or **Legally Adopted Child(ren)** (Line 1A of Worksheet).* ~~In determining a support order,~~ ~~There should~~ **shall** be an adjustment to Weekly Gross Income of parents who have a legal duty or court order to support children ~~who were naturally~~ **(1) born or legally adopted subsequent to the existing support order birthdates(s) of the child(ren) subject of the child support order** and **(2) that parent is actually meeting or paying that obligation.**”

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<sup>4</sup>The revised Guidelines (still) do not address the situation in which a parent’s other child is born between the two or more children who are the subject of the present calculation.

- b. Court Orders for Prior-born Child(ren) (Line 1B) - Credit for court-ordered child support for prior-born children on Line 1B is changed from permissive to mandatory. The Commentary reflects these changes. In addition, in discussing credit for a prior-born child, the former Commentary commented on the opposite situation. That is, the former Commentary proscribed credit for children born of a subsequent marriage when modifying a support order. The revised Commentary deletes this discussion.
- (1) ~~“2. *Modification of Support in Prior Marriage*. When considering a petition to modify support arriving out of a prior marriage, no deduction is allowed for support ordered as the result of a second or subsequent marriage. Establishment of a support order in a second marriage should not constitute a change in circumstance in the first marriage which would lead to modification of the support order from the prior marriage. Each child is being supported from the money from which they could have expected to be supported had the dissolution not occurred.”~~
  - (2) ~~“Likewise, if support is being established or modified for a child born out of wedlock, the date of birth of the child would determine whether or not a deduction for the support of other children is allowed in arriving at weekly adjusted income. If a child is born out of wedlock before the children of the marriage, no deduction for the children of the marriage is allowed. A deduction for children of the marriage is allowed in establishing support for a child born out of wedlock after the children of the marriage.”~~
- c. Legal Duty of Support for Prior-born Child(ren) (Line 1C) - The revised Guideline provides that an amount reasonably necessary for the support of a prior-born child that is **actually paid, or funds actually expended** shall be deducted from the parent’s weekly gross income. Although the bolded language is now added to the revised Guideline, the both the former and revised Commentary allow credit for “support actually paid or funds actually expended.” Thus in practice little has changed. The revised Commentary, however, makes two notable changes:
- (1) “A ~~custodial~~ parent should be permitted to deduct his or her portion of the support obligation for prior-born children living in his or her home. It is recommended that these guidelines be used to compute **a deduction from weekly gross income support.**” Query whether credit for a prior-born child, at least one that lives with the parent, should be determined using the parent’s income under the Guideline Schedules.
  - (2) The Commentary deletes the method of determining a parent’s legal duty credit by calculating what the parent would have paid for a child had custody been

placed with the other parent. “~~EXAMPLE: In establishing support for children of a subsequent marriage, the custodial spouse should be permitted to deduct the support he or she would pay in the prior marriage (pursuant to Line 6 of Worksheet) if custody had been placed with the former spouse. This necessitates the computation in the second dissolution of the support that would be paid by each spouse in the former marriage. This amount is inserted on Line 1C of the Worksheet.~~”

- d. Alimony or Maintenance from Prior Marriage (Line 1D) - As the subtitle suggests, the revised Guideline deduction for spousal maintenance is no longer limited to prior marriages.<sup>5</sup> *See also*, Guideline 2, *supra*. The commentary to these Guidelines comports with the Rule changes.
6. Guideline 3(D) - Basic Child Support Obligation (Worksheet Line 4) -
    - a. The revised Guideline deletes special treatment of child care expenses for children who live partially at home, partially at school, as follows:
    - b. “The Basic Child Support Obligation should be determined using the attached Guideline Schedules for Weekly Support Payments. For combined weekly adjusted income amounts falling between amounts shown in the schedule, basic child support amounts should be rounded to the nearest amount. The number of children refers to children for whom the parents share joint legal responsibility and for whom support is being sought, excluding children for whom a **Section Two of the** Post-Secondary Education Worksheet is used to determine support. ~~Work-related child care expense for these children is to be deducted from total weekly adjusted income in determining the combined weekly adjusted income that is used in selecting the appropriate basic child support obligation.~~”
    - c. The Commentary to Guideline 3(D) remains unchanged.
  7. Guideline 3(E) - Additions to the Basic Child Support Obligation (Worksheet Lines 4A and 4B) -
    - a. Guideline 3(E) and its Commentary remain unchanged with regard to work-related child care expenses, Line 4(A). Guideline 3(E) also continues to reference Guideline 7 and 8 for extraordinary health care and educational expenses, respectively.

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<sup>5</sup>See Footnote 3, *supra*.

- b. The revised Commentary, however, alters language relating to health insurance costs:
- (1) “*Cost of Health Insurance for Child(ren) (Worksheet Line 4B)*. The weekly costs of health insurance premiums only for the child(ren) should be added to the basic obligation so as to apportion that cost between the parents. The parent who actually pays that cost then receives a credit towards his or her child support obligation on Line 7 of the Worksheet. (See Support Guideline 3G. Adjustments to Parent's Child Support Obligation). Only that portion of the cost actually paid by a parent is added to the basic obligation. **If coverage is provided without cost to the parent(s), then zero should be entered as the amount.** If health insurance coverage is provided through an employer, only the child(ren)'s portion should be added. ~~and only if the parent actually incurs a cost for it.~~ **In determining the amount to be added, only the amount of the insurance cost attributable to the child(ren) subject of the child support order shall be included, such as the difference between the cost of insuring a single party versus the cost of family coverage. In circumstances where coverage is applicable to persons other than the child(ren) subject of the child support order, such as other child(ren) and/or a subsequent spouse, the total cost of the insurance premium shall be prorated by the number of persons covered to determine a per person cost.”**
8. Guideline 3(F) - Computation of Parent's Child Support Obligation (Worksheet Line 6) -
- a. The revised Guideline provides that a trial court shall state a factual basis for deviating from the Guideline amount.
- b. “*2. Deviation from Guideline Amount*. If, after consideration of the factors contained in IC 31-16-6-1 and IC 31-16-6-2, the court finds that the Guideline amount is unjust or inappropriate in a particular case, the court ~~may~~ **shall** state a factual basis for the deviation and proceed to enter a support amount that is deemed appropriate.”
- c. The prior Commentary already required such findings; no changes were made.
9. Guideline 3(G) - Adjustments to Parent's Child Support Obligation (Worksheet Line 7) -
- a. Rule 3(G)(5)(a)(1) - Effect of Social Security Benefits on Custodial Parent’s Current Support Obligation -
- (1) Rule 3(G)(5)(a)(1) clarifies that when a child receives Social Security derivative benefits on account of the custodial parent’s disability, the benefit is included in the custodial parent’s income (Line 1) and then deducted from the custodial parent’s child support obligation (Line 7).

(2) “1. *Custodial parent*: Social Security benefits received for a child based upon the disability of the custodial parent are not a credit toward the child support obligation of the noncustodial parent. ~~It is a credit to the custodial parent’s child support obligation.~~ **The amount of the benefit is included in the custodial parent’s income for the purpose of calculating the child support obligation, and the benefit is also a credit toward the custodial parent’s child support obligation.**”

b. Rule 3(G)(5)(a)(3) - Effect of Social Security Benefits; Modification -

(1) The revised Rule clarifies that filing a petition to modify *may* entitle the noncustodial parent to a reduction in support.

(2) “3. The filing of a petition to modify on grounds a Social Security Disability determination has been requested will not relieve the parent’s obligation to pay the current support order while the disability application is pending. Filing of the petition to modify support **may** entitles the noncustodial parent to a retroactive reduction in support to the date of filing of the petition for modification and not the date of filing for the benefits. If the modification of support is granted, any lump sum payment of retroactive Social Security Disability benefits paid shall be credited toward the modified support obligation.”

c. Commentary to Guideline 3(G) - The revised Commentary mostly makes technical corrections. Notably however, the revised Commentary now conforms to the Rule, which remains unchanged, as follows:

(1) Rule 3(G)(5)(b)(2) - Arrearages - “2. Application of current Social Security Disability benefits. The amount of the benefit which exceeds the child support order may be treated as an ongoing credit toward an existing arrearage.”

(2) Commentary - “The ~~new~~ language in Guideline 3.G.5.b.2. directs that the excess SSD benefit ~~shall~~ **may** be applied as payment toward an existing arrearage. Once the arrearage is satisfied, any portion of the SSD benefit that exceeds the current support obligation is considered a gratuity.”

10. Guideline 4 - Modification -

a. No changes were made to the Rule itself. The Commentary, however, was modified to clarify in gross support orders for multiple children remain unchanged unless an

until the order is modified.<sup>6</sup> The revised Commentary also reflects the state's emancipation age of nineteen.

- b. *“Emancipation: Support Orders for Two or More Children.* **In child support orders issued under these Guidelines**, support **amounts** ~~orders~~ for two or more children, ~~under the Guidelines~~, are stated as an in gross or total amount, rather than on a per child basis. **Absent judicial modification of the order**, ~~the total obligation will not decrease when the oldest child reaches twenty-one~~ **nineteen (21)** years of age, or **the child is emancipated after** ~~upon~~ the occurrence of ~~some other series of events that gives rise to emancipation, absent judicial modification of the order.~~ **Parents should seek to modify child support orders when the legal obligation to pay child support terminates for any child or any child is emancipated. See Ind. Code § 31-16-6-6.** ~~Conversely, the law recognizes that where an order is framed in terms of an amount per child, an abatement of respective shares will occur upon each child's emancipation.”~~
- c. ~~“It is recommended that such a delineation should be an exception and not the rule. It is incumbent upon counsel who represent Parents~~ **should seek to modify or terminate a support order when a child(ren) becomes emancipated under Indiana law.** ~~to attempt to familiarize them with the need to judicially amend the order of support when children are emancipated and to discuss with the parties what constitutes emancipation.”~~

#### 11. Guideline 6 - Parenting Time Credit -

- a. The Rule is unchanged. The Commentary adds language clarifying “education expenses” in the context of controlled expenses. It also makes a technical correction to the number of overnights under the Parenting Time Guidelines and notes that overnights may vary depending on school calendars.
- b. *“Controlled Expenses.* This type of expense for the child(ren) is typically paid by the custodial parent and is not transferred or duplicated. Controlled expenses are items like clothing, education, school books and supplies, ordinary uninsured health care and personal care. For example, the custodial parent buys a winter coat for the child. The noncustodial parent will not buy another one. The custodial parent controls this type of expense. **“Education” expenses include ordinary costs assessed to all**

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<sup>6</sup>In gross orders terminate completely by operation of law when all of the children covered by the order are emancipated. See IC 31-16-6-6; *Whited v. Whited*, 859 N.E.2d 657, 661 (Ind. 2007) (“[W]hen a court enters an order in gross, that obligation [] continues until the order is modified and/or set aside, or *all* the children are emancipated, or *all* of the children reach the age of twenty-one.”) (emphasis in original).

**students, such as textbook rental, laboratory fees, and lunches, which should be paid by the custodial parent. The cost of participating in elective school activities such as sports, performing arts and clubs, as well as related extracurricular activities are “optional” activities covered by the paragraph on “Other Extraordinary Expenses” in Guideline 8.”**

- c. *“Computation of Parenting Time Credit.* If the parents are using the Parenting Time Guidelines without extending the weeknight period into an overnight, the noncustodial parent will be exercising approximately ~~98~~**96-100** overnights. **The actual number of overnights may vary based on differing school calendars.”**

12. Guideline 7 - Health Care / Medical Support -

a. Summary -

- (1) Both the former and revised Guideline requires courts to order one or more parents to provide health insurance for the child when accessible to the child at a reasonable cost. Unlike the former Guideline, however, the revised version provides that such insurance may be public, such as Medicaid or Hoosier Healthwise.
- (2) In addition, the revised Guideline deletes its definition of a “reasonable cost” as essentially 5% or less of a parent’s weekly gross income. Instead, the revised Guideline presumes that parents have health insurance available to the child at a reasonable cost. “The presumption may be rebutted by providing: (1) an Exemption Certificate under the Affordable Care Act showing the parent has been granted an exemption from the requirement to purchase insurance; or (2) sufficient evidence to demonstrate the parent’s income is below the federal tax filing threshold.”
- (3) Because the revised Guideline has deleted its reasonable cost definition, it has also deleted the Health Insurance Premium Worksheet, along with pages of instructions on how to complete it.
- (4) The Commentary provides, in a new section entitled Parental Self-Monitoring and Compliance, that courts should encourage parents to cooperate with each other to ensure the child(ren) remain insured at all times, and may require proof of coverage annually. The Commentary also notes that tax penalties may arise when an obligated parent fails to provide health insurance coverage. In such circumstances, the court should consider imposing sanctions on the non-compliant parent.

(5) The provision specifying “Title IV-D” actions for child support has been deleted from the provision relating to birth and pregnancy expenses.<sup>7</sup>

b. Guideline Text (quotations omitted) -

(1) The court shall order one or both parents to provide ~~private health care~~ insurance when accessible to the child at a reasonable cost. **Health insurance may be public, for example, Medicaid, or Children’s Health Insurance Program (CHIP), Hoosier Healthwise, or private, for example, Affordable Care Act (ACA) or employer-provided.**

(2) *Accessibility.* ~~Private Health~~ insurance is accessible if it covers the geographic area in which the child lives. The court may consider other relevant factors such as ~~the managed care regions used by Hoosier Healthwise, the accessibility and~~ **provider network**, comprehensiveness of covered services and likely continuation of coverage.

(3) *Reasonable cost.* ~~The cost of private health insurance for child(ren) is considered reasonable, if it does not exceed five percent (5%) of the Weekly Gross Income of the parent obligated to provide medical support. The cost of private health insurance for the child(ren) is not considered reasonable when it is combined with that party’s share of the total child support obligation (Line 4 of the Worksheet) and that sum exceeds fifty percent (50%) of the gross income of the parent responsible for providing medical support. There is a rebuttable presumption that parents have health insurance available at a reasonable cost. The presumption may be rebutted by providing: (1) an Exemption Certificate under the Affordable Care Act showing the parent has been granted an exemption from the requirement to purchase insurance; or (2) sufficient evidence to demonstrate the parent’s income is below the federal tax filing threshold.~~

(4) ~~A consideration of the foregoing factors is addressed in the Health Insurance Premium Worksheet (HIPW), which should be utilized in determining the appropriate adjustments for the child(ren)’s health insurance on the Child Support Obligation Worksheet.~~

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<sup>7</sup>The former IC § 31-14-4-2 required a prosecuting attorney to file a paternity action upon the request of a mother, alleged father, child or others, and to represent the child in that action. That section was repealed by P.L.206-2015, Sec.45. Effective July 1, 2015, IC § 31-14-4-1 is amended to read: “A paternity action may be filed by the following persons: (7) If the paternity of a child has not been established: (A) the department; or (B) a prosecuting attorney operating under an agreement or contract with the department described in IC 31-25-4-13.1.” P.L.206-2015, Sec.44.

c. Commentary Text (quotations omitted) -

- (1) *Health Insurance Coverage and Costs Premiums*. The court is federally mandated to order **parents to obtain** accessible private health care insurance if **accessible at a reasonable cost**. ~~the cost is at or below 5% of the Weekly Gross Income of a parent as indicated in the Child Support Obligation Worksheet. If above 5% of Weekly Gross Income, the court has discretion to require the health insurance premium be paid by a parent if the court indicates the reason for the deviation.~~ **The rebuttable presumption that all children have insurance available at a reasonable cost recognizes the purpose of the Affordable Care Act. Courts should consider any exemption under the Affordable Care Act as sufficient to rebut the presumption that insurance is available at a reasonable cost.**
- (2) ~~The 50% cap is not a federal requirement. The basis is the Consumer Credit Protection Act (CCPA) income withholding limits. The 50% cap places less burden on employers when they do income withholding. Without the cap, they would have to figure out whether to withhold child support or health insurance first and how to divide what they can legally withhold. One of the most common questions employers ask child support agencies in states without a cap concerns cases where the combined amount does exceed the CCPA cap. In addition to being less burdensome on employers, it is also commonsense not to set child support at more than what can be legally withheld. Indiana already has that attribute as evident in the last column of the schedule.~~
- (3) ~~When parents agree one or both parents will provide private health insurance, the HHPW need not be completed and filed.~~
- (4) ~~Private h~~**Health insurance coverage should normally be provided by the parent who can obtain the most comprehensive coverage at the least cost. If a separate policy of private insurance is purchased for the children, determining the weekly cost should be no problem, but in the most common situation coverage for the child(ren) will occur through an employer group plan. If the employer pays the entire cost of coverage, no addition to the basic obligation will occur. If there is an employee cost, it will be necessary for the parent to contact his or her employer or insurance provider to obtain appropriate documentation of the parent's cost for the child(ren)'s coverage. A parent bears the burden of demonstrating to the court the cost of health insurance for the child(ren). A parent shall provide the court with proof of existing public or private health insurance for the child through an employer, a retirement plan, Tricare, a Veteran's Health Care Program, Medicaid, the Children's Health Insurance**

**Program (CHIP) or the Affordable Care Act. If the child is not currently covered, the parent must provide the court with proof of the cost of health insurance or an Exemption Certificate. (Please refer to Guideline 3, E. 2. for additional information regarding determining the cost of insurance coverage.)**

- ~~(5) At low income levels, giving the noncustodial parent credit for payment of the private health insurance premium may reduce support to an unreasonably low amount. In such instance the court may, in the exercise of its discretion, deny or reduce the credit.~~
- ~~(6) A number of different circumstances may exist in providing private health insurance coverage, such as a situation in which a subsequent spouse or child(ren) are covered at no additional cost to the parent who is paying for the coverage. The treatment of these situations rests in the sound discretion of the court, including such options as prorating the cost.~~
- ~~(7) There may be situations where neither parent has the opportunity or ability to afford private health insurance. In those cases, the court may direct the parties to investigate the cost of health insurance and/or may require the parties to obtain health insurance when it is reasonable and accessible.~~
- ~~(8) Where one or both parents have a history of changing jobs and/or health insurance providers, both parents may be ordered to carry health insurance when it becomes available at a reasonable cost to the parent. Where one parent has a history of maintaining consistent insurance coverage for the child(ren), there is no need to order both parents to provide health insurance for the child(ren).~~
- ~~(9) The court may order both parents to provide health insurance and in those cases both parents should have the cost of the child(ren)'s portion of the health insurance premium included in the calculation of the support order. In such cases both parents receive a credit.~~
- (10) ***Parental Self-Monitoring and Compliance.* Courts should encourage parents to cooperate with one another to ensure the child(ren) remain insured at all times. The court may order the parent providing health insurance to show proof of coverage and give notice of any coverage changes, including termination of coverage, to the other parent. Because the Affordable Care Act exemptions must be renewed annually, the court may order a parent who is not required to provide health insurance, because of an exemption, to show proof annually of a continuing exemption.**

- (11) **Problems may arise if the parent who was ordered to provide health insurance fails to do so. The other parent may face a tax penalty under the Affordable Care Act if he or she claims the dependent tax exemption for the uninsured child. The court should consider imposing sanctions against a parent who fails to provide health insurance as ordered or who fails to notify the other parent of changes in insurance status.**
- (12) *Birth expenses.* There is no statute of limitations barring recovery of birthing expenses, providing the paternity, ~~Title IV-D~~ or child support action is timely filed. . . .

13. Guideline 8 - Extraordinary Expenses<sup>8</sup> -

- a. Guideline 8 establishes rules governing educational and other extraordinary expenses, such as those “related to summer camp, soccer leagues, scouting and the like.” These expenses are, of course, outside the IV-D ambit. Guideline 8, however, also contemplates child support calculations where a child resides partly at home, partly away at school. These provisions are relevant to IV-D practitioners and remain unchanged from the prior Guideline. No substantive changes were made to the Post-Secondary Educational Worksheet (PSEW). Relevant changes to Guideline 8 are as follows:
- (1) a. *Elementary and Secondary Education.* If the expenses are related to elementary or secondary education, the court may want to consider whether the expense is the result of a personal preference of one parent or whether both parents concur; **if whether** the parties would have incurred the expense while the family was intact; and whether or not education of the same or higher quality is available at less cost.
- (2) b. *Post-Secondary Education.* “. . . **When determining whether or not to award post-secondary educational expenses, the court should consider each parent’s income, earning ability, financial assets and liabilities. If the expected parental contribution is zero under Free Application for Federal Student Aid (FAFSA), the court should not award post-secondary educational expenses. If the court determines an award of postsecondary**

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<sup>8</sup>It may be somewhat difficult to distinguish Guideline 8 from its commentary in the 2016 revision. In every other Guideline, the entire commentary follows the rule. In Guideline 8, however, the commentary is interspersed in four separate places, making it unclear where the commentary ends and the rule again begins. Guideline 8 in the 2010 version contained no commentary. Thus comparing the 2010 and 2016 versions makes clear what is rule and what is commentary. They are separated in this memorandum for clarity.

**educational expenses would impose a substantial financial burden, an award should not be ordered.”**

- (3) A determination of what constitutes educational expenses will be necessary and will generally include tuition, books, lab fees, **course related** supplies, **and** student activity fees. and the like. Room and board ~~will~~ **may also** be included when the ~~student child does not reside with either parent. resides on campus or otherwise is not with the custodial parent.~~
  - (4) “The impact of an award of post-secondary educational expenses is substantial upon the custodial and non-custodial parent and a reduction of the Basic Child Support Obligation attributable to the child **under the age of nineteen years in question** will be required when the child **does not reside with either parent. resides on campus or otherwise is not with the custodial parent.”**
  - (5) *c. Use of Post-Secondary Education Worksheet.* The Worksheet makes two ~~determinations~~ **calculations**. Section One ~~determines~~ **calculates** the ~~obligation~~ **contribution** of each parent for payment of post-secondary education expenses based upon his or her **pro-rata percentage** share of the weekly adjusted income from the Child Support Obligation Worksheet after contribution from the student toward those costs. **Notwithstanding this calculation, the court retains discretion to award and determine the allocation of these expenses taking into consideration the ability of each parent to meet these expenses and the child’s reasonable ability to contribute to his or her educational expenses.** The method of paying such ~~obligation~~ **contribution** should be addressed in the court's order.
  - (6) **In situations** ~~When~~ the student, **under age nineteen (19)**, remains at home with the custodial parent while attending an institution of higher learning, generally no reduction to the noncustodial parent's support obligation will occur and Section Two of the Worksheet need not be completed.
- b. The Commentary — newly added to the 2016 Guideline — makes technical changes to reflect Indiana’s 19-year age of emancipation. It also informs that child support and educational support are separate and discrete obligations. Finally, the new Commentary reiterates IC § 31-16-6-6(c) through (e) with regard to the time in which to file for educational expenses.
- (1) **Parents should consider whether an educational support order is necessary or appropriate to address educational needs prior to the child reaching nineteen (19) years of age.**

- (2) ***Time for Filing Petition for Post-Secondary Educational Expenses.*** There is a distinct difference between an order for child support and an order for post-secondary educational expenses. An order for educational expenses can continue after an order for child support has ended. If an order for child support was issued before July 1, 2012, a petition for educational support can be filed until the child reaches twenty-one (21) years of age. If an order for child support was issued or modified after June 30, 2012, a petition for educational support must be filed before the child reaches nineteen (19) years of age.
- (3) **With the modification of the age of emancipation from age twenty-one (21) to age nineteen (19), Section Two of the Post-Secondary Education Worksheet will only be applicable in a limited number of cases. However, it remains a valuable tool to calculate child support for a child under age nineteen (19) who does not reside with either parent during the school year but returns to the home of the custodial parent during school breaks and recess. Section Two of the Post-Secondary Education Worksheet should not be utilized once the child attains age nineteen (19).**
- (4) **The costs of participating in elective school activities such as sports, performing arts and clubs, including the costs of participating in related extracurricular activities, are “Other Extraordinary Expenses.”**

14. Guideline 9 - Accountability, Tax Exemptions, Rounding Support Amounts -

- a. The revised Guideline now requires, rather than just permits, a court to review the dependency exemption on an individual basis. In addition, Guideline reiterates IC § 31-16-6-1.5 in requiring a child support obligor to be sufficiently compliant with his child support obligation in order to claim the exemption. The revised Guideline also provides that when allocating the exemption, a court is *required* to consider the relevant specified factors, “including health insurance tax subsidies or tax penalties under the Affordable Care Act.”
- b. The Guideline makes no alteration to IC § 31-25-4-13.1(g), which provides: A prosecuting attorney or private attorney who contracts or agrees under this section to undertake activities required to be performed under Title IV-D is not required to mediate, resolve, or litigate a dispute between the parties relating to: (1) the amount of parenting time or parenting time credit; or (2) the assignment of the right to claim a child as a dependent for federal and state tax purposes.”

c. Guideline Text (quotations omitted) -

- (1) *Tax Exemptions*. Development of these Guidelines did not take into consideration the awarding of the income tax exemption. Instead, it is ~~recommended~~ **required** that each case be reviewed on an individual basis and that a decision be made in the context of each case. . . . ~~Judges may wish to consider ordering the release to be executed on an annual basis, contingent upon support being current at the end of the calendar year for which the exemption is ordered as an additional incentive to keep support payments current. It may also be helpful to specify a date by which the release is to be delivered to the other parent each year.~~ **Courts shall include in the support order that a parent may only claim an exemption if the parent has paid at least ninety-five percent (95%) of their court ordered support for the calendar year in which the exemption is sought by January 31 of the following year.** Shifting the exemption for ~~minor children dependents~~ does not alter the filing status of either parent.
- (2) ~~The noncustodial parent must demonstrate the tax consequences to each parent as a result of releasing the exemption and how the release would benefit the child(ren). A court is required to specify in a child support order which parent may claim the child(ren) as dependents for tax purposes. In determining when to order a release of exemptions, it is recommended~~ **required** that at minimum the following factors be considered: . . . (7) **any other relevant factors, (including health insurance tax subsidies or tax penalties under the Affordable Care Act).**

- d. Commentary Text - (quotations omitted) - **Under the Affordable Care Act, premium tax subsidies, dependent tax exemptions, and tax penalties for failure to provide health insurance are inextricably linked. Problems can arise when a parent purchases health insurance through the health insurance marketplace under the Affordable Care Act and needs access to premium tax subsidies in order to make the insurance affordable. Only the parent who claims a child as a dependent on a federal tax return is eligible for the subsidies and liable for the tax penalties.**

15. Worksheets and Guideline Schedules -

- a. Child Support Obligation Worksheet (amended) - Lines 4B and 7 are amended to delete references to the Health Insurance Premium Worksheet.
- b. Parenting Time Credit Worksheet (unchanged) - The Guidelines make no changes to the Parenting Time Credit Worksheet and Parenting Time Credit Table.

- c. Health Insurance Premium Worksheet (deleted) - This worksheet has been deleted. The revised Guidelines removes any definition of a “reasonable cost” for health insurance coverage. This change renders the HIPW, which employed tests to determine reasonableness, unnecessary.
  - d. Post-Secondary Education Worksheet (amended) - No substantive changes were made. The only addition is a shaded space in the far right-hand column on the line labeled “Total Credits (Part C — Line 1-5).
  - e. Guideline Schedules for Weekly Support Payments (amended) - For the most part, the Guideline Schedule remain unchanged. Minor changes have been made to Guideline amounts for combined weekly gross incomes between \$6,810 and \$7,190, inclusive.
- C. Orders Amending Indiana Rules for the Admission To the Bar and Discipline of Attorneys -
- 1. Mandatory Continuing Judicial Education (Rule 28) and Mandatory Continuing Legal Education (Rule 29).
    - a. Order issued February 15, 2016, effective January 1, 2017 - Increases the hours of credit available through interactive Distance Education from six to nine.  
<http://www.in.gov/judiciary/files/order-rules-2016-94S00-1602-MS-86.pdf>
- D. Orders Amending Indiana Rules of Appellate Procedure -
- 1. Appellate Rule 23 - Filing -
    - a. Order issued August 17, 2015, effective January 1, 2016 - Amends Appellate Rule 23(C)(9) to require to be filed with an appeal “An original and one (1) copy of any Notice that must be filed per Administrative Rule 9(G)(5).”  
<http://www.in.gov/judiciary/files/order-rules-2016-94S00-1602-MS-86.pdf>
- E. Orders Amending Indiana Rules of Trial Procedure -
- 1. Trial Rule 86 - Electronic Filing -
    - a. Order issued and effective on November 9, 2015 - Amends Trial Rule 86 to provide for appearances in E-filing cases.  
<http://www.in.gov/judiciary/files/order-rules-2015-1109-trial.pdf>

- b. Order issued and effective on July 23, 2015 - Amends Trial Rule 86 to require the Division of State Court Administration, with the approval of the E-Filing Steering Committee, to establish and publish an E-Filing Implementation Schedule. Such shall be posted on the Supreme Court website. <http://courts.in.gov/efile>  
<http://www.in.gov/judiciary/files/order-rules-trial86-2015-0723.pdf>

### III. CASE LAW - MAY 2, 2015 THROUGH FEBRUARY 26, 2016<sup>9</sup>

#### A. Appeals -

1. Failure to Raise Issue in Motion to Correct Error - A failure of a party to raise an issue in a motion to correct error under Trial Rule 59 does not preclude the party from raising the issue on appeal. "A motion to correct error is not a prerequisite for appeal. . . ." Ind. Trial Rule 59(A). *Gamester v. Gamester*, No. 52A05-1506-DR-545 (Ind.Ct.App. 2/16/16) (memorandum). (See also *Guidelines* and *Modification*, this outline.)
2. Standard of Review for Arbitration Awards - The standard of appellate review for awards under the Family Law Arbitration Act (FLAA), see IC § 34-57-5-1 *et seq*, is the same standard of appellate review that applies to the review of trial court decisions in marriage dissolution cases. In so holding, the high court observed that an arbitrator under the FLAA performs essentially the same function as a trial judge in a marriage dissolution case. That fact "strongly favors application of the same standard of appellate review to both trial court decisions and arbitration awards. This is especially true in the absence of the legislature's choice not to include in the FLAA the narrow, deferential standard of review it included in Indiana's adoption of the Uniform Arbitration Act in 1970. Furthermore, unlike the FLAA, the UAA does not require the arbitrator to make written findings of fact and conclusions of law." Finally, the high court noted that while there may be some ambiguity in the FLAA's provision authorizing an appeal, the phrase "as may be taken after a judgment in a civil action" is consistent with parallel standards of appellate review for FLAA awards and trial court dissolution judgments. *Masters v. Masters*, 43 N.E.3d 570 (Ind. 10/16/15).

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<sup>9</sup>This outline consists primarily of published Indiana appellate cases decided May 2, 2015 through February 26, 2016, including those appearing in Thomson West's Advance Sheets, Indiana Cases, through No. 7, February 17, 2016, 44 N.E.3d 139 (Northeastern Reporter through 44 N.E.3d 377). Indiana memorandum opinions as well as appellate decisions from other jurisdictions may also appear. Throughout this outline, quotations and citations to other cases may be omitted without notation for readability. Unless otherwise noted, references to Indiana trial courts are to county courts. Thus a reference to the Marion Circuit Court means the Circuit Court of Marion County, Indiana.

My nationwide survey of UIFSA cases relevant to IV-D practitioners from February 14, 2015 through February 26, 2016 may be available on the Eastern Regional Interstate Child Support Association website, <http://www.ericcsa.org/>. Navigate to the 2016 ERICSA conference materials. Alternatively, contact me at [David.Morris@indy.gov](mailto:David.Morris@indy.gov).

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### 3. Standing to Appeal -

- a. The State IV-D prosecutor had standing to appeal a trial court's judgment setting aside the judgment of another division of that court. Father argued that because the State would recoup its TANF expenditures in full, it would suffer no harm. Therefore, he argued, the State lacked standing to appeal the trial court's order. Rejecting this argument, the appellate court observed that the State, by IV-D Prosecutor, had intervened in the matter and thus had standing to appeal. "Where a party is allowed to intervene, that party may appeal a decision adverse to its interests even if the original parties forego pursuing an appeal. *Hoosier Outdoor Adver. Corp. v. RBL Mgmt, Inc.*, 844 N.E.2d 157 (Ind.Ct.App. 2006), *trans. denied*. The intervenor may appeal from subsequent orders in the action and is treated as if it were an original party with equal standing." *State v. Gaw*, — N.E.3d — (Ind.Ct.App., No. 48A02-1504-PL-207, 12/10/15). (This case is also discussed in *Litigation and Modification*, this outline.)
  - b. In order to have standing to pursue an appeal of an order, a party must have a sufficient stake in an otherwise justiciable controversy. The point of the standing requirement is to insure that the party before the court has a substantive right to enforce the claim that is being made in the litigation. In order to have standing, the challenging party must show adequate injury or the immediate danger of sustaining some injury. *O'Banion v. Ford Motor Co.*, 43 N.E.3d 635, 642 (Ind.Ct.App. 9/9/15) (citations and quotations omitted).
4. Waiver - As a general rule, a party may not present an argument or issue to an appellate court unless the party raised that argument or issue to the trial court. This rule exists because trial courts have the authority to hear and weigh the evidence, to judge the credibility of witnesses, to apply the law to the facts found, and to decide questions raised by the parties. Appellate courts, on the other hand, have the authority to review questions of law and to judge the sufficiency of the evidence supporting a decision. The rule of waiver in part protects the integrity of the trial court; it cannot be found to have erred as to an issue or argument that it never had an opportunity to consider. Conversely, an intermediate court of appeals, for the most part, is not the forum for the initial decisions in a case. Consequently, an argument or issue not presented to the trial court is generally waived for appellate review. *Merrillville 2548, Inc. v. BMO Harris Bank N.A.*, 39 N.E.3d 382, 389-90 (Ind.Ct.App. 6/9/15) (citations omitted).

**B. Arrearage -**

1. Credit for Nonconforming Payments vs Retroactive Modification - The Perry Circuit Court erred in finding that Wyoming was powerless to determine a noncustodial father's child support arrearage under the original order it had issued after everyone had left the state. Allowing Father credit for payments made to third parties in contravention of the order was not the same thing as retroactively modifying child support. *Hays v. Hays*, — N.E.3d — (Ind.Ct.App., No. 62A04-1501-DR-33, 1/12/16). (For a full discussion of this case, see *UIFSA*, this outline.) Said the appellate court:

[T]here is a difference between retroactive modification of a child support order and a credit toward a child support obligation. The Wyoming court heard evidence of Father's financial contributions toward the maintenance of the parties' children by *making payments* to various people and determined Father's current child support arrears *have been reduced* to \$0 (appellate court emphasis in original). The taking of evidence regarding payment and the finding that the payments reduced the arrearage indicates the Wyoming court was not retroactively modifying the arrearage, but was giving Father a credit toward his arrearage for payments made outside the strict parameters of the Decree (which required payment to the county clerk via income withholding order).

2. Fraudulent Dissolution - An Alaska trial court did not abuse its discretion in setting aside a couple's 1986 dissolution and child support judgment, along with the husband's child support arrears, after it found that the divorce was a sham intended to shield marital property from his bankruptcy creditors and that the family continued to live together after the marriage was dissolved. Agreeing with the lower court that the parties' dissolution "used the court system as a tool to defraud creditors and thus undermined the court's integrity," the Alaska Supreme Court affirmed its determination that the dissolution was a fraud upon the court. Thus upholding its grant of relief to the father pursuant to Rule 60(b)(6), the high court said that the wife was not entitled to collect arrears under the 1986 support order after the parties separated for good in 2007. *Fernandez v. Fernandez*, 358 P.3d 562 (AK 8/28/15).
3. Sufficiency of the Evidence - The Marion Circuit Court did not abuse its discretion in holding that a noncustodial father did not have a child support arrearage where the custodial mother failed to introduce evidence that Father actually had an arrearage and failed even to request that the court adjudicate the matter. *In re the Paternity of J.A.S.*, No. 49A05-1407-JP-345 (Ind.Ct.App. 5/18/15) (memorandum). (See also *Surname of Child*, this outline.)

- a. Mother gave birth to the child out-of-wedlock in November 2011. The following month, Father filed his petition to establish paternity, parenting time, child support and related matters. His petition included a request for DNA testing, which the trial court ordered in March 2012. After tests confirmed Father's paternity, the trial court on August 15, 2012, the trial court entered its Preliminary Agreed Order. The order established Father's paternity, awarded Mother primary physical custody, and required Father to pay \$246 in weekly child support. The order stated that all remaining issues, including the child's surname, would be addressed at the final hearing.
  - b. At the evidentiary hearings held in March 2013 and January 2014, the parties presented evidence and argument regarding the child's last name, parenting time, and child support. On June 25, 2014, the court issued its final order on the pending matters. The trial court held, in part, that "Mother did not present evidence of Father having retro-active child support arrears" and that "[i]t is the Court's determination that Mother accepted all the gifts on Father's behalf to settle any retro-active child support arrears." Mother appealed.
  - c. Mother acknowledged on appeal that she had failed to raise the arrearage issue at the second evidentiary hearing held in January 2014. Her omission, she claimed, was because at the first evidentiary hearing in March 2013, she had alleged — and Father had agreed — that he was then in arrears approximately \$7,000. Father countered that there existed no child support order until August 12, 2013. Moreover, the discussion at the first evidentiary hearing was nothing more than statements made by Father's counsel to explain how he derived Father's child support obligation. The appellate court, finding that Mother neither raised the issue of arrearage in her pleadings nor introduced evidence that Father was in fact behind on court-ordered child support payments, affirmed the trial court.
4. Surety Bond - The Vanderburgh Superior Court did not err in ordering a man to pay \$200 per week by income withholding as a guarantee that he would meet his obligations to pay for his children's college expenses. The appellate court observed that Ind. Code Sections 31-16-6-5 and 31-16-8-3 allow a court to impose a "security, bond, or other guarantee" in a child support proceeding. "These statutes allow for trial courts to be creative in fashioning guarantees of future support where it appears that a parent may not voluntarily pay support as ordered." *In re Paternity of Jo.J.*, 992 N.E.2d 760, 774 (Ind.Ct.App. 2013). In this case, given Father's history of noncompliance, together with the sudden change in one of the children's health needs, the trial court was within its discretion to order Father to pay an amount that, as Mother testified at the evidentiary hearing on the

- petitions, would allow her to pay expenses as they arose. *Carlson v. Carlson*, No. 82A01-1410-DR-448 (Ind.Ct.App. 6/3/15) (memorandum).
5. To Whom Is the Arrearage Owed? - The Howard Superior Court did not abuse its discretion in finding that a father's child support arrearage that had accrued prior to receiving custody was owed to the former custodial mother. It therefore erred in ordering Father's arrearage to be placed in a trust for the child's benefit. *Vore v. Vore*, No. 34A02-1505-DR-264 (Ind.Ct.App. 2/15/16) (memorandum). (This case is also discussed in *Guidelines*, this outline.)
- a. The parties' 2013 dissolution decree awarded Mother custody of the parties' minor child and required Father to pay \$100 in weekly support. Nearly a month later, Father won \$1,000,000 in the Hoosier Lottery. Mother filed a petition to modify support and Father filed a petition to modify custody, parenting time and support.
  - b. The trial court's order entered in March 2015 awarded Father custody, terminated his support obligation and ordered Father to pay the arrearage into a trust for the child. The trial court's order requiring Father to pay his arrearage into a trust was premised on its findings that Mother had failed to present any evidence that she had expended any additional funds to make up for Father's shortfall, and that Mother and child continued to live the same "life-style." Mother appealed, arguing Father's arrearage should have been paid to her, not to a trust.
  - c. The appellate court reversed. It cited *Hicks v. Smith*, 919 N.E.2d 1169, 1171-72 (Ind.Ct.App. 2010) as holding that, "[g]enerally, the noncustodial parent maintains an ongoing obligation to pay child support, and the custodial parent maintains an ongoing obligation to care for the child. However, when the noncustodial parent fails to pay support, the 'custodial parent who has advanced his or her own funds to provide food, clothing, and shelter to the child has discharged the trusteeship and is entitled to collect the arrears from the noncustodian.' This rule, the appellate court said, creates a presumption "that the custodial parent has made up any shortfall that resulted from the noncustodial parent's failure to fulfill his or her child-support obligations." *Sickels v. State*, 982 N.E.2d 1010, 1014 (Ind. 2013).
  - d. Thus, it was neither Mother's burden to prove she made up any shortfall, nor Mother's burden to prove the child's life-style had changed. Moreover, the evidence presented favored an award of the arrearage to Mother. In support of its holding, the appellate court noted that Father did not file his petition for custody until nearly nineteen months after Mother had filed her petition for modification of child support. "[W]e are convinced the trial court likely would have increased Father's child

support obligation had the matter been heard closer to the time of Mother's filing and when Child was still in Mother's custody. Therefore, it is likely Mother would have had use of the increase for the care of Child during that time, and any arrearages that accrued would have been awarded to Mother based on the law discussed above."

### C. Bankruptcy -

1. Dischargeability - Attorneys' fees incurred fighting a mother's "meritless and misleading" motion regarding parenting time are dischargeable, as such fees are not considered a "domestic support obligation" even though they were incurred in the "context of a custody dispute." The federal district court opined that the award of attorneys' fees to the father was not intended to benefit the parties' child, but rather to punish the mother. Thus the fee award was not in the nature of support and was therefore dischargeable. *In re Olsson*, 532 B.R. 810 (D.C. Oregon 6/17/15).
2. Fraudulent Dissolution - An Alaska trial court did not abuse its discretion in setting aside a couple's 1986 dissolution and child support judgment, along with the husband's child support arrears, after it found that the divorce was a sham intended to shield marital property from his bankruptcy creditors and that the family continued to live together after the marriage was dissolved. Agreeing with the lower court that the parties' dissolution "used the court system as a tool to defraud creditors and thus undermined the court's integrity," the Alaska Supreme Court affirmed its determination that the dissolution was a fraud upon the court. Thus upholding its grant of relief to the father pursuant to Rule 60(b)(6), the high court said that the wife was not entitled to collect arrears under the 1986 support order after the parties separated for good in 2007. *Fernandez v. Fernandez*, 358 P.3d 562 (AK 8/28/15).

### D. Contempt -

1. Collateral Attack of Underlying Order - Collateral attack of a previous order is allowed in a contempt proceeding only if the trial court lacked subject matter or personal jurisdiction to enter the order. Even an erroneous order must be obeyed unless and until reversed on appeal. A party's remedy for an erroneous order is appeal; disobedience of the order is contempt. *Wagler v. West Boggs Sewer Dist., Inc.*, 29 N.E.3d 170, 174 (Ind.Ct.App., 4/15/15) (citations omitted).
2. Due Process - IC §§ 34-47-3-5 and 31-16-12-6 -
  - a. The Hamilton Superior Court did not afford an alleged contemnor his due process rights under IC § 34-47-3-5 and also failed to indicate the manner in which the

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contemnor could purge himself of contempt. Accordingly, the trial court's contempt order was erroneous. The case involved civil indirect contempt for failing to provide information related to income. *Reynolds v. Reynolds*, No. 29A04-1505-DR-265 (Ind.Ct.App. 2/16/15) (memorandum).

- b. The Hamilton Superior Court denied an alleged contemnor his due process rights in finding him in indirect civil contempt without adequately complying with procedural requirements of IC §§ 34-47-3-5 and 31-16-12-6. *Stanke v. Swickard*, 43 N.E.3d 245 (Ind.Ct.App. 8/31/15).
- c. The parties' 2013 dissolution awarded Mother custody of the parties' two children, provided for Father's parenting time and required Father to pay child support. In 2014, Mother filed a contempt action against Father for failing to comply with the parenting time order and for failing to pay child support. The trial court found Father in contempt. Father appealed.
- d. Father argued in part that he was not afforded the due process required to find him in contempt of court because the court's rule to show cause order did not meet the statutory requirements for such an order and did not properly notify him of the allegations against him.
- e. The appellate court first observed that the matter involved indirect civil contempt. Contempt of court, it said, involves disobedience of a court which undermines the court's authority, justice, and dignity. Contempt is indirect if it involves actions outside the trial court's personal knowledge. Willful disobedience of any lawfully entered court order of which the offender had notice is indirect contempt.
- f. As an action for indirect contempt, the procedural protections detailed in IC § 34-47-3-5 apply.<sup>10</sup> The appellate court noted that where a rule to show cause does not

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<sup>10</sup>Ind. Code § 34-47-3-5 provides:

(a) In all cases of indirect contempts, the person charged with indirect contempt is entitled:

- (1) before answering the charge; or
- (2) being punished for the contempt;

to be served with a rule of the court against which the contempt was alleged to have been committed.

(b) The rule to show cause must:

- (1) clearly and distinctly set forth the facts that are alleged to constitute the contempt;
- (2) specify the time and place of the facts with reasonable certainty, as to inform the defendant of the nature and circumstances of the charge against the defendant; and
- (3) specify a time and place at which the defendant is required to show cause, in the court, why the defendant should

comply with these statutes, a trial court may lack the authority to hold a person in contempt. It acknowledged, however, that "[s]trict compliance with the rule to show cause statute may be excused if it is clear the alleged contemnor had clear notice of the accusations against him, for example because he received a copy of an original contempt information that contained detailed factual allegations, or if he appears at the contempt hearing and admits to the factual basis for a contempt finding" (citations omitted).

- g. In this case, the trial court's order to appear failed to "clearly and distinctly set forth the facts" underlying Father's contempt citations regarding parenting time. It therefore failed to comply with IC § 34-47-3-5(b). As it related to the nonpayment of child support, "the court's order does not comply with Ind. Code § 31-16-12-6(c) as it fails to include when the court issued its order for support, [Father's] history of child support payments, or the amount of his arrearage." The appellate court noted that Father claimed to be unemployed during the relevant time period, and thus did not admit to the factual basis of the contempt allegations regarding nonpayment of child support.
- h. In addition, the appellate court noted that Mother's contempt motion did not contain detailed factual allegations, and neither clearly and distinctly set forth the facts she alleged to constitute contempt nor specified with reasonable certainty the time and place of the facts supporting the allegations of contempt. "For these reasons, we conclude that [Father's] due process rights were violated and that the court erred in finding [Father] in contempt of court."

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not be attached and punished for such contempt.

- (c) The court shall, on proper showing, extend the time provided under subsection (b)(3) to give the defendant a reasonable and just opportunity to be purged of the contempt.
- (d) A rule provided for under subsection (b) may not issue until the facts alleged to constitute the contempt have been:
  - (1) brought to the knowledge of the court by an information; and
  - (2) duly verified by the oath of affirmation of some officers of the court or other responsible person.

Additionally, with respect to contempt for failure to pay child support, Ind. Code § 31-16-12-6 provides in part:

- (c) The court may order a party who is alleged to be in contempt of court under this section to show cause as to why the party should not be held in contempt for violating an order for support. The order to show cause must set forth:
  - (1) the contempt allegations;
  - (2) the failure to pay child support allegations;
  - (3) when the court issued the order for support;
  - (4) the party's history of child support payments;
  - (5) the specific:
    - (A) date and time when; and
    - (B) place where;the party is required to show cause in the court; and
- (6) the party's arrearage.



withholding orders, he still demanded that Kelley follow the trial court's directive to submit the income withholding order to the court.

- d. Harrington testified that when Kelley told him the employer would withhold child support from Father's income, Harrington replied that the employer would be doing so voluntarily. Therefore, Harrington advised Kelley a court-approved income withholding order was required so that there existed an enforceable order. The trial court replied with: "It looks like I signed it . . . Saturday, I think." Harrington testified to \$649.00 in fees associated with this matter. The trial court ordered Kelley to pay Harrington's \$649.00 in attorney's fees "for his time and for her failure to comply with the Court's Order." Kelley appealed.
- e. The appellate court affirmed. It observed that the order which Kelley was alleged to have violated was clear and certain. In violation of the order, Kelly submitted the withholding order directly to Father's employer, substituted her own name as the "issuing official" and then never told Harrington about it until after he had filed his motion for contempt. Kelley only submitted the withholding order to the court on the last business day before the contempt hearing and did not notify Harrington that she had done so. In addition, Kelley failed to appear at the contempt hearing.
- f. Kelley argued on appeal that the trial court had never expressly determined that she had "willfully disobeyed" the trial court's order or even mentioned the word "contempt." Moreover, she argued, there was no basis for such an order. The appellate court rejected her arguments, saying that Kelley's initial failure to submit the income withholding order could have been considered an oversight, but even after the contempt action had been filed, Kelley *continued* to disobey the court's order. The appellate court added:

Moreover, the order to appear for the show cause hearing did *not* state that Father and Kelley were *either* to comply with the court's previous order *or* appear for the hearing; it simply ordered them to appear. When Kelley submitted the Income Withholding Order to the trial court, she did not request that the show cause hearing be vacated. She also did not notify Mother's counsel so that he would know in advance of the hearing that she had complied. Kelley therefore had no legitimate reason to believe the hearing would not be held and further willfully disobeyed the court in failing to appear when ordered to do so. Finally, Kelley was given the opportunity to be heard regarding her conduct but did not avail herself of it by appearing at the show cause hearing.

- g. In light of Kelley's conduct, the trial court did not abuse its discretion in requiring her to pay Mother's attorney fees.

**E. Criminal - State -**

1. Enhancement to Class C Felony - The Fulton Superior Court erred in entering convictions for both Class C and Class D felonies for the same offense. The appellate court remanded for entry of judgment on the Class C felony conviction only. *Dinwiddie v. State*, No. 25A03-1405-CR-148 (Ind.Ct.App. 5/20/15) (memorandum). (For a full discussion of this case, see *Sentencing*, this section.)
2. Jurisdiction - The Fulton Superior Court had subject matter jurisdiction to convict criminal nonsupport defendant Roy E. Dinwiddie even though the custodial mother resided in Cass County at the time of trial. *Dinwiddie v. State*, No. 25A03-1405-CR-148 (Ind.Ct.App. 5/20/15) (memorandum). (For a full discussion of this case, see *Sentencing*, this section.)
3. Sentencing -
  - a. The Madison Circuit Court did not abuse its discretion in sentencing criminal nonsupport defendant Richard Lee Nicholson to eight years with four years suspended to probation and ordered that two years of his executed time be served in the Department of Correction and two years at the Madison County Work Release Facility. *Nicholson v. State*, No. 48A02-1506-CR-605 (Ind.Ct.App. 1/12/16) (memorandum).
    - (1) Nicholson pleaded guilty to criminal nonsupport as a Class C felony; his arrearage was \$27,482.72 as of June 30, 2014. He alleged on appeal the trial court abused its discretion in sentencing him to an extended period of incarceration merely to send a message to other potential offenders.
    - (2) The appellate court rejected this contention, noting that the amount of Nicholson's arrearage was nearly twice that required to constitute a Class C felony and that Nicholson had faced repeated civil contempt hearings and other administrative actions, all of which were unsuccessful. Although the trial judge's admonition to him was stern, it was neither inappropriate nor smacked of vindictive justice. The sentence was also appropriate in light of Nicholson's character, especially considering his past criminal history that included robbery and criminal mischief.

- b. The Dearborn Superior Court did not err in sentencing defendant Donald Probst to 545 days of fully executed time in the Indiana Department of Correction for criminal nonsupport as a Class D felony.<sup>11</sup> Such was not inappropriate in light of the nature of the offense and the character of the offender. *Probst v. State*, No. 15A04-1412-CR-586 (Ind.Ct.App. 6/30/15) (memorandum).
- (1) As to the nature of the offense, the appellate court noted that Probst was over \$11,581.00 in arrears on a \$38 per week order and had paid a total of \$273.24 between 2008 and 2014. Although Probst was incarcerated on other offenses for part of the time, “even during the years where Probst was not incarcerated, he failed to contribute a single cent toward his support obligation.”
- (2) As to Probst’s character, the appellate court detailed a litany of his prior offenses, including burglary, battery, possession of burglary tools and receiving stolen property (in Kentucky), forgery (in Ohio), theft, resisting law enforcement, criminal trespass, criminal mischief, false reporting, public intoxication and dealing in a Schedule I, II, or III controlled substance. Probst also had two prior probation violations and stated that he was on probation at the time of the instant offense. Most notably, Probst has been convicted of nonsupport of his other dependent children on two occasions previous to the instant offense. While Probst’s guilty plea was counted as a mitigator, “the remaining evidence overwhelmingly demonstrates Probst’s habitual disregard for the law and authority of the court.” Sentence affirmed.
- c. The Fulton Superior Court did not err in sentencing defendant Roy E. Dinwiddie to six years imprisonment for criminal nonsupport as a Class C felony. Such was not inappropriate in light of the nature of the offense and the character of the offender. *Dinwiddie v. State*, No. 25A03-1405-CR-148 (Ind.Ct.App. 5/20/15) (memorandum). (See also, *Enhancement and Jurisdiction*, this section.)

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<sup>11</sup>In a footnote, the appellate court noted the following:  
“Effective July 1, 2014, Indiana Code section 35-46-1-5 was amended such that nonsupport of a dependent child is now a Level 6 felony. For a crime committed after June 30, 2014, a Level 6 felony is punishable by a term of six months to two and one-half years, with the advisory sentence being one year. IC § 35-50-2-7(b) (2014). However, the offense is a Level 5 felony ‘if the person has a previous conviction under this section.’ IC § 35-46-1-5(a) (2014). A Level 5 felony is punishable by a term of one to six years, with the advisory sentence being three years. IC § 35-50-2-6(b) (2014). In the present case, the charged offense represents Probst’s third conviction for nonsupport of a dependent child. Even though Probst committed a portion of his crime and was charged after the enactment of the revised criminal code, he was charged under the prior version of Indiana Code section 35-46-1-5 with a Class D—rather than Level 5—felony.” (quotations omitted)

- (1) Mother and Dinwiddie had four children between them. In 2002, the Fulton Circuit Court issued the parties' dissolution decree, which awarded Dinwiddie custody but provided for equal parenting time and did not enter a child support order. The Circuit Court in 2005 awarded temporary custody to Mother but did not enter a child support order. In 2007, Mother sought the assistance of the Fulton County IV-D agency and filed her petition for support. In 2008, the dissolution court entered its order on Mother's petition and ordered Father to pay \$157 in weekly support. Numerous contempt and compliance hearings followed. The dissolution court, for example, required Dinwiddie to pay support and complete a log of job applications. When Dinwiddie failed to do either, the dissolution court found him in contempt and sentenced him to sixty days incarceration.
- (2) In March 2012, the State charged Dinwiddie with two counts of criminal nonsupport: Count 1 as a Class D felony, Count II as a Class C felony for nonsupport in excess of \$15,000.<sup>12</sup> After a jury trial in the Fulton Superior Court, the trial judge entered convictions on both counts. It sentenced Dinwiddie to three years incarceration on the Class D felony and to a concurrent six-year term on the Class C felony. The trial court characterized Dinwiddie's crimes as "particularly egregious," considering they followed a series of attempts by the dissolution court, over the course of years, to get Dinwiddie to meet his child support obligation, including several contempt citations and sixty days incarceration for civil contempt. Dinwiddie appealed.
- (3) *Subject Matter Jurisdiction* - Dinwiddie first argued the trial court lacked subject matter jurisdiction over the case. He noted that at the March 2014 jury trial Mother testified that her address was in Logansport — which is Cass County — and "no questions were asked of the mother about where the children lived or when the children lived in Cass or Fulton County or when the mother moved from Fulton to Cass County" and that "there is nothing in the record to indicate where the children lived." Therefore, Dinwiddie claimed, the Fulton County Superior Court lacked subject matter jurisdiction.
- (4) Rejecting this argument, the appellate court characterized Dinwiddie's argument as "misguided." Subject matter jurisdiction, it said, refers to the power of courts to hear and decide a class of cases. The issue of subject matter jurisdiction is resolved by determining whether the claim involved falls within the general

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<sup>12</sup>The appellate court noted that, effective July 1, 2014, a new version of this statute was enacted, but because Father committed the offense prior to 2014, it would apply the statute in effect that time. *See* Ind. Code 35-46-1-5(a).

scope of authority conferred on the court by the Indiana Constitution or by statute. Certainly, the Fulton Superior Court was empowered to hear Dinwiddie's criminal nonsupport. Dinwiddie's argument confused subject matter jurisdiction with venue. Moreover, Dinwiddie never complained at trial of improper venue and thus waived the issue for appeal.

- (5) Waiver notwithstanding, the appellate court found no error. Pursuant to Article 1, Section 13 of the Indiana Constitution, a defendant has a right to a public trial in the county in which the offense shall have been committed, and this right is also codified at IC § 35-32-2-1. However, venue is not an element of the offense, and the State may establish venue by a preponderance of the evidence and need not prove it beyond a reasonable doubt.
- (6) The appellate court went on to observe that when Mother filed her petition for support, she was residing in Fulton County. In subsequent contempt and compliance hearings, Dinwiddie never alleged improper venue. Said the appellate court (citations and quotations omitted):

That Mother was residing in Logansport, *i.e.*, Cass County, at the time of trial in March 2014 is not evidence that she and the children were not living in Fulton County when Father was ordered to, but did not, pay any child support or provide any other financial support for the children from July 1, 2009 through February 1, 2012, the cut-off date chosen by the State for purposes of the charging information. We find that the evidence supports the reasonable inference that the children resided with Mother in Fulton County during the relevant time frame.

- (7) *Enhancement* - Although not raised by either party, the appellate court *sua sponte* addressed the trial court's conviction of both the Class D and Class C charges for the same offense. The Class C conviction, it said, was merely an enhancement of the Class D offense. The appellate court explained (citations and quotations omitted):

As our Supreme Court recognized, "The class C felony has no independent meaning without the underlying class D offense." *Sanjari v. State*, 961 N.E.2d 1005, 1007 (Ind. 2002). That is, the elements of the Class C offense include the elements of the Class D offense. The statute establishes the Class C felony as an enhancement of the Class D felony, when the total amount of unpaid support equals or exceeds \$15,000. The offense of nonpayment of support is singular in nature, penalizing

knowing or intentional failure to provide support to the person's child, but that same offense may result in a stiffer penalty — *i.e.*, it may be enhanced — if the unpaid support equals or exceeds \$15,000. However, the accumulation of support arrearage is not, in and of itself, a separate offense.

- (8) The State admitted at trial the two counts were "the same basic crime, failing to support a dependent child," but were separated into two counts for purposes of addressing the level of the crime. Accordingly, the appellate court held, "[b]ased on the principles outlined in *Sanjari*, the Class C felony conviction constituted an enhancement of the Class D felony, not a separate offense, and it was error for the trial court to enter judgment on both the Class D felony and Class C felony convictions. Therefore, we vacate the Class D felony conviction and remand to the trial court for entry of judgment on the Class C felony conviction only."
- (9) *The Propriety of the Sentence* - Having found that it was error to enter judgment of conviction of the Class D felony, it examined the appropriateness of the sentence imposed on the Class C felony conviction, which carries a fixed term of between two and eight years, with the advisory being four years. IC § 35-50-2-6. The appellate court affirmed the sentence, noting that the evidence was clear that Dinwiddie did not meet, or even attempt to meet, his child support obligations when not incarcerated. Thus the nature of the offense supported a sentence above the advisory term. Moreover, the State introduced evidence of Dinwiddie's continued unwillingness to look for work, complete a job log or pay support. It also introduced evidence of Dinwiddie's criminal history, including two convictions for DWI and a Class D battery resulting in bodily injury on a child less than fourteen years of age. In sum, the appellate court held, "Father has failed to convince us that his character warrants a reduction in his sentence. His six-year sentence was not inappropriate."

#### **F. Dependency Exemption -**

1. Burden of Proof - The Lake Circuit Court did not err refusing to require a custodial mother to execute a waiver to allow the noncustodial father the dependency exemption for their minor child, where the father failed to show the tax consequences to each parent of transferring the exemption and how such a transfer would benefit the child. *Mikicich v. Mikicich*, No. 45A05-1407-DR-355 (Ind.Ct.App. 5/19/15) (memorandum). (See also *Guidelines*, this outline.) The appellate court summarized as follows:

26 U.S.C. § 152(e) (2000) automatically grants a dependency exemption to a custodial parent of a minor child but permits an exception where the custodial parent executes a written waiver of the exemption for a particular tax year. A trial court under certain circumstances may order the custodial parent to sign a waiver of the dependency exemption. *Sims v. Sims*, 770 N.E.2d 860, 866 (Ind. Ct. App. 2002). The Child Support Guidelines were developed without taking into consideration the award of the dependency exemption. *Id.* Courts are instead to review each case on an individual basis. *Id.* (citing Ind. Child Support Guideline 6, cmt. ("Tax Exemptions")).

Husband, as the noncustodial parent, bears the burden to show the tax consequences to each parent of transferring the exemption *and how such a transfer would benefit the child*. *Id.* (emphasis added). Husband offers no argument regarding the tax consequences to either parent of transferring the exemption or how transferring the exemption would benefit the child. Nor does he direct us to anything in the record indicating he made any such showing before the trial court. Therefore, we cannot say the trial court abused its discretion in its award of tax exemptions.

## G. Guidelines -

### 1. Calculating Child Support -

#### a. Child Care Expense -

- (1) The Steuben Circuit Court did not err when, in considering a custodial mother's child care expenses for child support purposes, it did not consider the tax credit the mother would be eligible to receive on her federal tax return. While the appellate court acknowledged that the possibility of such an adjustment is mentioned in the Official Commentary to Child Support Guideline 3(E), the father failed to raise the issue at trial and therefore waived the matter for appeal. Said the appellate court, "a party cannot raise a previously-available issue for the first time in a motion to correct Error." *Otefi v. Ebrahim*, No. 76A03-1506-DR-662 (Ind.Ct.App. 1/12/16) (memorandum).
- (2) The St. Joseph Superior Court did not err when, in calculating a noncustodial father's child support obligation, it included the custodial mother's full-time child care costs even though she did not work every day. The trial court also did not err in refusing to include costs of an overnight nanny even though Mother occasionally worked nights. Father appealed on grounds the trial court should not

have included the full-time child care costs and Mother appealed on grounds the court should have included the cost of the nanny. "It is clear that the trial court was well aware of the circumstances and attempted to balance [Mother's] alternating and unpredictable work schedule, the parties' distance, and [Father's] previous refusal to reimburse [Mother] for child care expenses based on his reading of the settlement agreement. Under these circumstances, we cannot conclude that the trial court's handling of the work-related child care expenses was clearly erroneous." *Whitlatch v. Wolfe*, No. 71A05-1502-DR-64 (Ind.Ct.App. 9/9/15) (memorandum). (See also *Legal Duty* and *Submission of Worksheets*, this section, and *Modification*, this outline.)

- (3) The Hendricks Circuit Court erred in ordering a father to reimburse a mother for child care expenses she had paid from 2012 to 2014, where the mother failed to show that the child care was work-related or income producing, and the need for child care itself was totally obviated by Father's ability to watch the children. The appellate court observed that child care expenses are "an income-producing expense of the parent." See Guideline 3(E), cmt. Moreover, it said, "This evidence does not support a finding that the child care expenses Mother paid to ABC123 or the YMCA were reasonable—as Father's availability to care for the children obviated the need for child care expenses to be incurred at all—and further does not support a finding that the expenses were work-related or income-producing—as Mother was either not working during that time or was working minimally and she failed to connect the child care expenses to her hours of employment. We therefore conclude the trial court's judgment in this regard is clearly erroneous." *In re the Paternity of M.R.A.*, 41 N.E.3d 287 (Ind.Ct.App. 7/16/15). (For a full discussion of this case, see *Modification*, this outline.)
- b. FICA Deduction - The Hamilton Superior Court did not err in refusing to deduct from a noncustodial father's income the self-employment tax he paid. The appellate court acknowledged that Guideline 3(A)(2) provides that "[t]he self-employed shall be permitted to deduct that portion of their FICA tax payment that exceeds the FICA tax that would be paid by an employee earning the same Weekly Gross Income." However, it noted, the trial court had relied on Father's own worksheet in deriving his income. "Indeed, the trial court used precisely the same calculations, and arrived at precisely the same result, as Father did." Accordingly, the trial court did not err in determining Father's income. To the extent there was an error, Father had invited it. *Laux v. Ferry*, 34 N.E.3d 690 (Ind.Ct.App. 6/3/15), *reh'g denied*. (See also *Health Insurance*, *Imputed Income* and *Retroactive Support*, this section).

c. Health Insurance Premium -

- (1) The Clay Superior Court did not err when, in calculating a noncustodial father's child support obligation, it included Mother's \$88.52 weekly cost for insuring the parties' child, even though such cost did not meet the first of two reasonableness tests on the Health Insurance Premium Worksheet.<sup>13</sup> *Mitten v. Mitten*, 44 N.E.3d 695 (Ind.Ct.App. 9/14/15). (See also *Parenting Time Credit* and *Retroactive Support*, this section.)
- (a) Father argued on appeal that Mother's \$88.52 weekly premium for insuring the parties' child far exceeded 5% of Mother's \$794 weekly gross income, and thus failed the 5% reasonable cost threshold. Therefore, he argued, the trial court erred in including such costs on the Child Support Obligation Worksheet, even though Mother's cost was reasonable under the HIPW's second test of reasonableness.
- (b) The appellate court acknowledged that the 2010 Guidelines provided two independent tests for reasonableness of health insurance premiums.<sup>14</sup> Although Mother's cost was not reasonable under the 5% test, it was under the second test. Moreover, Guideline 7 provided that a court may still include an unreasonable cost if it explains its reasons for deviating from the Guidelines. Here, the trial court noted that it was deviating "for the reason [that] the only testimony before the Court is that these are the actual medical costs incurred by [Mother][.]"
- (c) In addition, the trial court noted that the Guidelines allow trial courts wide latitude in fashioning child support orders, saying that the "Guidelines are not immutable, black letter law, but provide room for flexibility," quoting *Bogner v. Bogner*, 29 N.E.3d 733, 739 (Ind. 2015) (citing Child Supp. G. 1, cmt). The appellate court went on to remark that Mother in fact paid \$88.52 every week, the child has been diagnosed with ADHD, and "he is actively being treated

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<sup>13</sup>Both the HIPW and the Guidelines' definition of "reasonable cost" for health insurance premiums have been deleted from the 2016 Child Support Guidelines. The 2016 Guidelines now rebuttably presume a parent has health insurance available to the child at a reasonable cost under the Affordable care Act. See Ch. Supp. G. 7 (2016).

<sup>14</sup>Guideline 7 of the 2010 Guidelines provided: "The cost of private health insurance for child(ren) is considered reasonable, if it does not exceed five percent (5%) of the Weekly Gross Income of the parent obligated to provide medical support. The cost of private health insurance for the child(ren) is not considered reasonable when it is combined with that party's share of the total child support obligation (Line 4 of the Worksheet) and that sum exceeds fifty percent (50%) of the gross income of the parent responsible for providing medical support."

for it, taking ‘top tier’ daily medications and attending doctor visits every few months.” In addition, Father had not indicated that he can or will provide insurance or that any equivalent insurance is available at a lesser weekly cost. Under the facts of this case, the trial court did not abuse its discretion by including Mother’s health insurance premium costs in its child support calculation.

- (2) The Hamilton Superior Court erred in attributing to a custodial mother health insurance benefits for her child that were provided by her new husband. The appellate court observed that the trial court had refused to impute income to Mother based either on her new husband’s income or the in-kind benefits he provided her. Accordingly, the trial court should have also considered Mother and her new husband separate entities for purposes of the health insurance premium. *Laux v. Ferry*, 34 N.E.3d 690 (Ind.Ct.App. 6/3/15), *reh’g denied*. (See also *FICA Deduction, Imputed Income and Retroactive Support*, this section.) The appellate court explained as follows:

The weekly cost of Child's health insurance is undisputed. It is also undisputed that Stepfather, rather than Mother, pays this cost when it is deducted from his paycheck. We have already found above that it was not erroneous for the trial court to decline to impute Stepfather's income to Mother. In other words, it was not erroneous for the trial court to treat Stepfather and Mother as separate financial entities. But the trial court then changed course and elected to treat Stepfather and Mother as the same, or coexistent, financial entities for the purpose of the cost of Child's health insurance. We do not believe that this inconsistency can stand.

Had the trial court elected to impute Stepfather's income to Mother, it would have also made logical sense for it to credit Mother for Stepfather's payment of the health insurance premium, and there would have been no error. But having decided not to impute that income to Mother, the trial court erred by changing tack and crediting her for payments he had made. Under these circumstances, we believe the trial court abused its discretion by crediting Mother for the cost of Child's healthcare premium. We reverse and remand with instructions to recalculate the parties' respective child support obligations with no credit to Mother for the cost of Child's healthcare premium.

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d. Imputed Income -

- (1) The Henry Circuit Court erred in attributing to a noncustodial father only \$500 per week in gross income when determining his child support obligation, even though Father had testified that he had become a part-time employee in order to attend counseling and regain custody of his three children. Notwithstanding this testimony, Father also testified that he had averaged \$1,391 in weekly income and had potential to earn up to \$1,800 per week. Under these facts, the custodial grandmother established the trial court's *prima facie* error in using only \$500 per week. *M.L. v. M.F.*, No. 33A01-1505-DR-318 (Ind.Ct.App. 9/25/15) (memorandum).<sup>15</sup>
- (2) The Hamilton Superior Court did not err in finding a man voluntarily unemployed without just cause and thus requiring him to contribute to his child's college expenses, even though the man was caring for his mother who was ill with ovarian cancer. *In re Paternity of Pickett*, 44 N.E.3d 756 (Ind.Ct.App. 9/23/15).
  - (a) The case involved Father's challenge to the trial court's order requiring him to contribute to his child's college expenses. Affirming, the appellate court observed that while child support and college expenses are separate and distinct, college expenses are "in the nature of child support." Thus when determining whether Father should contribute to his child's college expenses, the court examined his potential income under the child support Guidelines.
  - (b) The appellate court noted that Guideline 3(A)(3) provides that "[i]f a court finds a parent is voluntarily unemployed or underemployed without just cause, child support shall be calculated based on a determination of potential income." It opined that nothing in this provision requires the court to find that a parent is evading his child support obligation before it can impute potential income to that parent. Said the appellate court:

One purpose of potential income is to discourage a parent from taking a lower paying job to avoid the payment of significant support. [Ind.

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<sup>15</sup>Editor's note: The trial court's opinion completely omits any discussion of whether Father was voluntarily underemployed "without just cause." See Ch. Supp. G 3(A) and cmt. Indeed, the appellate court's opinion cited to *Meredith v. Meredith*, 854 N.E.2d 942, 947 (Ind.Ct.App. 2006), decided three years before the Supreme Court added "without just cause" to Guideline 3(A) in 2009. See [Order Amending Indiana Child Support Rules and Guidelines](#), issued 9/15/09, effective 1/1/10.

Ch. Supp. G 3(A)(3), cmt 2c.] On some occasions, this Court has rephrased this principle as follows, "A trial court has wide discretion with regard to imputing income to ensure the child support obligor does not evade his or her support obligation." *Miller v. Sugden*, 849 N.E.2d 758, 761 (Ind.Ct.App. 2006), *trans. denied*; *see also Kondamuri v. Kondamuri*, 852 N.E.2d 939, 950 (Ind.Ct.App. 2006) ("The trial court has discretion to impute potential income to a parent if it is convinced the parent's underemployment 'has been contrived for the sole purpose of evading support obligations.'") (quoting *In re Marriage of Turner v. Turner*, 785 N.E.2d 259, 265 (Ind. Ct. App. 2003)); *Apter v. Ross*, 781 N.E.2d 744, 761 (Ind.Ct.App. 2003) ("With regards to imputing income, the trial court enjoys wide discretion to ensure the child support obligor does not evade his support obligation."), *trans. denied*. We caution that this rephrasing should not be interpreted to mean that potential income may not be imputed unless the court finds that the parent is avoiding the payment of significant child support. While the Guidelines clearly indicate that a parent's avoidance of child support is grounds for imputing potential income, it is not a necessary prerequisite. For example, the relevant commentary states, "When a parent is unemployed by reason of involuntary layoff or job termination, it still may be appropriate to include an amount in gross income representing that parent's potential income." Ind. Ch. Supp. G 3(A)(3), cmt 2c(4). Thus, it is within the trial court's discretion to impute potential income even under circumstances where avoiding child support is not the reason for a parent's unemployment.

We also note that another panel of this Court has stated, "Where a parent is unemployed or underemployed for a legitimate purpose other than avoiding child support, there are no grounds for imputing potential income." *Trabucco v. Trabucco*, 944 N.E.2d 544, 550 (Ind.Ct App. 2011) (citing *Kondamuri*, 852 N.E.2d at 950), *trans. denied*. We believe that this statement is overbroad and is unsupported by the Guidelines. Indeed, our supreme court has emphasized, "While legitimate reasons may exist for a parent to leave one position and take a lower paying position other than to avoid child support obligations, this is a matter entrusted to the trial court and will be reversed only for an abuse of discretion." *Bojrab v. Bojrab*, 810 N.E.2d 1008, 1015 (Ind. 2004). . . .

- (c) Under the facts of this case, the trial court did not err in imputing income to Father, as he had “elected to serve as a caretaker for his mother rather than seek additional employment, or tend to the businesses that are currently paying his bills.”
- (d) The appellate court also ruled that: (1) the trial court erred in basing Father’s college contribution on the cost of a private college; (2) the trial court erred in ordering Father to contribute to college expenses incurred before Mother filed her request for college expenses<sup>16</sup>; and (3) the trial court did not abuse its discretion by ordering Father to pay \$2000 of Mother's attorney's fees.
- (3) The Marion Superior Court did not err in attributing to a noncustodial father with a doctorate of pharmacy degree only \$518 in weekly gross income when determining his child support obligation. *In the Matter of Paternity of H.J.*, No. 49A02-1412-JP-825 (Ind.Ct.App. 6/30/15) (memorandum).
- (a) Father testified that his past business ventures had not been successful, and that his steady income at Health Plus Pharmacy, although lower than that of many pharmacists, might eventually lead to something bigger. Mother argued on appeal that because Father has a doctorate of pharmacy degree, he is voluntarily underemployed and is working for a wage far less than he is capable of earning while helping to grow a business in which he owns no interest. Mother asserted the trial court should have imputed potential income to him when calculating his child support obligation.
- (b) The appellate court affirmed, saying that Mother's arguments were merely requests for the appellate court to reweigh the evidence, which it refused to do. “The trial court had the opportunity to hear the evidence presented at the hearing and to observe the witnesses and make a credibility determination based on its observations; we defer to that judgment because the trial court viewed the evidence firsthand and we only review a cold documentary record. We, therefore, conclude that the trial court did not abuse its discretion in not imputing income to Father and in modifying Father's child support obligation.”

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<sup>16</sup>The appellate court observed that retroactive modification is impermissible in ordinary child support orders. It was not persuaded, however, that the bright-line rule in child support cases is applicable to an *initial* order requiring payment of college expenses. Nevertheless, under the facts of this case, the trial court erred in making Father’s contribution retroactive to a date prior to when Mother filed her request. Here, it noted, Father’s child support order had continued during the child’s first semester and did not terminate until just three days before she turned nineteen.

- (4) The Jasper Superior Court did not err when, in calculating a noncustodial father's child support order, it imputed the custodial mother to a minimum wage income. Mother asserted on appeal that because of her physical disabilities, she was unable to work, even at a minimum-wage job. The appellate court rejected Mother's argument, noting that at the final hearing, Mother submitted as an exhibit a child support obligation worksheet that attributed minimum-wage income to her. The dissolution court adopted the calculation of Father's child support obligation as indicated on that exhibit. As such, any error was invited, and Mother "cannot now complain." See *Balicki v. Balicki*, 837 N.E.2d 532, 541 (Ind. Ct. App. 2005) (reiterating doctrine of invited error is grounded in estoppel and precludes a party from taking advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct), *trans. denied. Gough v. Gough*, No. 37A03-1411-DR-414 (Ind.Ct.App. 6/30/15) (memorandum).
- (5) The Hamilton Superior Court did not err in refusing to impute to a custodial mother the income of her new husband, which was substantially higher. *Laux v. Ferry*, 34 N.E.3d 690 (Ind.Ct.App. 6/3/15), *reh'g denied*. (See also *FICA Deduction, Health Insurance and Retroactive Support*, this section.)
- (a) The appellate court opined that trial courts have wide latitude in fashioning child support awards, and that "whether or not income should be imputed to a parent whose living expenses have been substantially reduced due to financial resources other than the parent's own earning capabilities is also a fact-sensitive situation requiring careful consideration of the evidence in each case." Guideline 3(A), cmt.
- (b) Moreover, the appellate court added, "while there is ample authority standing for the proposition that a trial court may impute the income of a parent's spouse, we have found none—and Father directs us to none—that requires it." By the same token, the trial court did not err in refusing to impute Mother income based on the in-kind benefits her new husband provides her.
- (6) The Tippecanoe Superior Court erred in denying a noncustodial father's petition to reduce his child support order because it had imputed income to him after finding the man voluntarily underemployed without just cause. The trial court found that Father had refused to relocate in order to obtain employment commensurate with his education and experience. The appellate court reversed. The trial court based its decision not on a determination that Father's career choices were made to avoid paying child support or upon a consideration of his

credentials, past earnings, *and* prevailing opportunities, but rather on Father's refusal to relocate in order to pursue a relationship with his long-term girlfriend. The appellate court went on to say that it could "find no support in the law for the proposition that a parent can or should be required to move in order to continue earning at his or her highest potential or risk being ordered to pay child support based on imputed income." *Deignan v. Deignan*, No. 79A02-1407-DR-515 (Ind.Ct.App. 5/11/15) (memorandum).

- (7) The Lake Circuit Court did not err in refusing to impute income to a custodial mother who only worked part-time (30 hours per week) even though there were available shifts where she worked for more hours. The appellate court opined that the trial court *may* have decided not to impute income to her for being part-time because it had already increased Mother's income on account that Mother lived with her parents cost-free. The appellate court noted that because the parties proceed at the evidentiary hearing in summary fashion, the trial court could base its findings and conclusions on counsel's arguments. *See Bogner v. Bogner*, 29 N.E.3d 733 (Ind. 4/28/15). Under the circumstances of this case, the trial court did not commit clear error. *Gryniewicz v. Shih*, No. 45A03-1412-DR-437 (Ind.Ct.App. 5/27/15) (memorandum). (See also *Parenting Time Credit*, this section.)
- (8) The Lake Circuit Court did not err in imputing income, for child support purposes, to a noncustodial father who had been fired in 2012 from ArcelorMittal (a steel and mining company) for theft of copper. *Mikicich v. Mikicich*, No. 45A05-1407-DR-355 (Ind.Ct.App. 5/19/15) (memorandum). (See also *Dependency Exemption*, this outline.)
- (a) The appellate court cited Guideline 3(A) in saying that "[i]f a parent's intentional misconduct directly results in a reduction of his or her income, no corresponding decrease in his or her child support obligation should follow, because such misconduct results in 'voluntary underemployment' according to the Child Support Guideline 3(A)(3), and the income the parent was earning before that misconduct should be imputed to that parent." In support of its holding, the appellate court cited *Carmichael v. Siegel*, 754 N.E.2d 619 (Ind.Ct.App. 2001), in which a lawyer suspended for lying to a bankruptcy court was attributed the income he earned before his suspension. Said the appellate court:

We noted [in *Carmichael v. Siegel*] that when a criminal act or its consequences is the primary cause of an obligor-parent's failure to pay

child support, abatement of the obligation is not warranted. *Id.* at 632. We acknowledged Siegel had not been convicted of a crime, but we "perceive[d] no reason to limit the rationale of [*Holsapple v. Herron*, 649 N.E.2d 140 (Ind.Ct.App. 1995) and *Davis v. Vance*, 574 N.E.2d 330, 331 (Ind.Ct.App. 1991)] [both disapproved on other grounds by *Clark v. Clark*, 902 N.E.2d 813 (Ind. 2009)] to only those cases where willful misconduct has resulted in a criminal conviction." *Id.* at 633. We remanded for the trial court to impute to Siegel the income he was earning before he was suspended from practicing law. *Id.* at 633.<sup>17</sup>

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<sup>17</sup>Editor's Note - The appellate court has vacillated as to whether voluntary unemployment/underemployment requires a showing that a parent intended to gain advantage in a child support order. In *Mikicich*, the appellate court failed to examine Guideline 3(A) as amended by Supreme Court Order, effective January 1, 2010 to provide: "If a court finds a parent is voluntarily unemployed or underemployed *without just cause*, child support shall be calculated based on a determination of potential income." (emphasis added). Moreover, the appellate court, in support of its holding, cited cases decided before 2010.

Compare Guideline 3(A): "If a court finds a parent is voluntarily unemployed or underemployed without just cause, child support shall be calculated based on a determination of potential income" with the opening line of Guideline 3(A), cmt 2(c), in which "just cause" is not mentioned: "Potential income may be determined if a parent has no income, or only means-tested income, and is capable of earning income or capable of earning more." The phrase "just cause" is mentioned later, in cmt 2(c)(2): "When a parent has some history of working and is capable of entering the work force, but without just cause voluntarily fails or refuses to work or to be employed in a capacity in keeping with his or her capabilities, such a parent's potential income shall be included in the gross income of that parent."

What appears to be the general application of Guideline 3(A) is that trial courts have wide latitude in determining whether a parent is voluntarily underemployed or unemployed. See *In re Paternity of Pickett*, 44 N.E.3d 756 (Ind.Ct.App. 9/23/15) ("We caution that this rephrasing [regarding 'evading support' as discussed in case law] should not be interpreted to mean that potential income may not be imputed unless the court finds that the parent is avoiding the payment of significant child support. While the Guidelines clearly indicate that a parent's avoidance of child support is grounds for imputing potential income, it is not a necessary prerequisite.")

In *Herzog v. Herzog*, No. 19A01-1407-DR-318 (Ind.Ct.App. 2/13/15), the appellate court opined as follows: "Guideline 3(A) requires the trial court to make its determination concerning a parent's underemployment after making preliminary determinations of his employment and earnings potential. In other words, the Guideline clearly anticipates that the trial court will indicate in its findings that it has considered the evidence presented regarding the parent's work history, occupational qualifications, prevailing job opportunities, and earning levels within his community and issue a conclusion indicating that it considered whether the parent acted without just cause. See Ind. Child Supp. G. 3(A), cmt. c(2) (explaining that imputing income based on underemployment is appropriate where underemployment is voluntary and without just cause, *meaning that parent is capable but fails or refuses to work*)." (emphasis added).

But the language of prior appellate decisions work in the opposite direction. Said the Indiana Supreme Court in *Lambert v. Lambert*:

- e. Income from Settlement Annuity - The Marion Superior Court erred when, in calculating a noncustodial father's child support obligation, it refused to include income Father received from a structured annuity settlement resulting from a personal injury claim. The trial court erred in holding that because the annuity income was not taxable under the Internal Revenue Code, it was therefore not income for child support purposes. *Carmer v. Carmer*, — N.E.3d — (Ind.Ct.App., No. 49A05-1411-DR-539, 10/30/15). (See also *Modification*, this outline.)
- (1) Prior to the parties' marriage in 1994, Father was injured in an automobile accident. Father's main source of income was the structured annuity settlement as a result of this accident. He also earned \$450 per week at Walmart. The trial court's dissolution decree attributed to Father his Walmart income for child support purposes. It refused, however, to include income from Father's annuity settlement on grounds that the annuity income was not subject to federal taxation under § 104(a)(2) of the IRC. Mother appealed.
  - (2) Reversing, the appellate court observed that the Indiana Child Support Guidelines provide a broader definition of income than the Internal Revenue Code. *See* Commentary to Ind. Child Supp. G. 3(A) (explaining that "in calculating weekly gross income, it is helpful to begin with total income from all sources. This figure may not be the same as gross income for tax purposes"); quoting *Harris v. Harris*, 800 N.E.2d 930, 939 (Ind.Ct.App. 2003) (stating "the definition of 'weekly gross income' is broadly defined to include not only actual income from employment, but also potential income and imputed income from 'in-kind' benefits"), *trans. denied*. Moreover, Father's settlement funds benefitted the family during the marriage and would have continued to benefit the family had it remained intact.

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The Guideline provisions on "voluntary unemployment or underemployment" reflect this approach. The commentary to Ind. Child Support Guideline 3(A)(3) states: "Potential income may be determined if a parent has no income, or only means-tested income, and is ... *capable of earning more*." Child. Supp. G. 3(A)(3) (emphasis added). As the example most relevant to the current situation, the commentary uses the case of a parent who "is capable of entering the work force, but voluntarily fails or refuses to work or to be employed." Child. Supp. G. 3 cmt. 2(c)(2) (emphasis added). This provision indicates that the concept of "voluntary unemployment or underemployment" as used in the Guidelines requires *both* the ability to earn more income, and the conscious choice on the part of a parent to reduce income.

*Lambert v. Lambert*, 861 N.E.2d 1176, 1179-80 (Ind. 2007) (emphasis in original). *See also Douglas v. State, Indiana Family & Social Services Admin.*, 954 N.E.2d 1090, 1094 (Ind.Ct.App 2011); *Nunley v. Nunley*, 955 N.E.2d 824 (Ind.Ct.App. 2012) (an obligor's choice to commit a crime and his decision to avoid child support obligations are not one and the same, even where the obligor is incarcerated for criminal nonsupport).

- (3) The appellate court also pointed to *Knisely v. Forte*, 875 N.E.2d 335, 340 (Ind.Ct.App. 2007), which held that payments for personal injury may be included in the gross weekly income calculation. Moreover, Guideline 3(A) includes income from annuities in the definition of weekly gross income. It added that while structured settlement payments are not specifically included in the Guidelines' definition of gross income, both annuities and structured settlement payments are certain sums of money paid periodically or yearly. The appellate court thus remanded to determine Father's child support obligation including income received from the structured settlement.
- (4) Mother also argued the trial court erred in failing to consider her request for retroactive support back to the date on which Father had filed his petition for dissolution. The appellate court agreed and thus remanded for the trial court's consideration of her request. The appellate court added, however, that it is "within the trial court's discretion to retroactively apply a child support award back to the date of filing or any date thereafter. *See Haley v. Haley*, 771 N.E.2d 743, 752 (Ind.Ct.App. 2002).
- f. Legal Duty Credit - The St. Joseph Superior Court did not "arbitrarily" allow a custodial mother a legal duty credit for her other two children with another man when calculating a noncustodial father's child support obligation. Mother testified she did not receive support from the other father, had not spoken to him in seven years, and was unable to track him down. Based on the forgoing, the trial did not clearly err in using minimum wage as the other father's income in deriving Mother's legal duty credit.<sup>18</sup> *Whitlatch v. Wolfe*, No. 71A05-1502-DR-64 (Ind.Ct.App. 9/9/15) (memorandum). (See also *Child Care* and *Submission of Worksheets*, this section, and *Modification*, this outline.)
- g. Lottery Winnings - The Howard Superior Court did not abuse its discretion in using only the after-tax amount of a father's lottery winnings as a measure of his income for child support purposes. The appellate court observed that Father received a one-time payment of a large sum of money, the net income was the only amount of money made available to Father, and the money had a single impact on Father's net worth. Under these circumstances, the trial court was within its discretion in attributing only the net proceeds of Father's lottery winnings. *Vore v. Vore*, No. 34A02-1505-DR-264 (Ind.Ct.App. 2/15/16) (memorandum). (This case is also discussed in *Negative Child Support Amount*, this section, and *Arrears*, this outline.)

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<sup>18</sup>The 2016 Commentary to Guideline 3(C) deletes reference to computing a legal duty credit by calculating support for the other children as if custody had been placed with the other parent.

- (1) The parties' 2013 dissolution decree awarded Mother custody of the parties' minor child and required Father to pay \$100 in weekly support. Nearly a month later, Father won \$1,000,000 in the Hoosier Lottery. After paying taxes on his winnings, Father received around \$540,000.
- (2) On July 8, 2013, less than a week after Father won the lottery, Mother filed a petition to modify child support. Mother later filed a Supplemental and Second Petition to Modify Support and Father filed a petition to modify child custody, support, and parenting time. On March 9, 2015, the trial court heard argument on the parties' petitions. The trial court's order issued two weeks later awarded Father custody, modified Father's child support obligation to \$259 a week retroactive to July 8, 2013, terminated Father's child support obligation to Mother, and ordered Father to pay the arrearage into a trust for the child.
- (3) Mother first appealed the trial court's award of primary physical custody to Father, which the appellate court affirmed. Mother also appealed the trial court's orders related to child support.
- (4) Mother argued, *inter alia*, the trial court erred when it calculated Father's modified child support obligation. Specifically, Mother contended the trial court erred in using only the net portion of Father's lottery winnings instead of his total winnings. Affirming, the appellate court cited *Harris v. Harris*, 800 N.E.2d 930 (Ind.Ct.App. 2003), *trans, denied*. In *Harris*, the appellate court affirmed a trial court's use of *net* proceeds from a wrongful termination settlement when calculating a parent's income for child support purposes. Quoting *Harris*, the appellate court opined, quoting *Harris v. Harris*, 800 N.E.2d at 940:

The nature of a settlement award is a one-time payment of money. As such, it has a single impact on an individual's financial circumstances and net worth. It is reasonable to state that the award would have ultimately benefitted the children if the family had remained intact. Even then, the settlement award would have only been beneficial after the appropriate taxes were deducted.

Therefore, we agree with the trial court that the gross amount of the settlement award was an irregular and non-guaranteed form of income, which the trial court, in its discretion, could exclude from its determination of gross income. Here, the trial court considered the settlement award and concluded that it was reasonable to include the net

portion, as only that amount would have been available to the family. This decision ensured that the children are given the support they need.

- (5) As discussed above, the appellate court noted that Father received a one-time payment of a large sum of money and the money had a single impact on Father's net worth. In addition, had the family remained intact, Father's net income from the lottery winnings would have ultimately benefitted the child. The trial court did not err in attributing to Father only the net portion of his lottery winnings.
- h. Military Income - A Montana trial court did not err in including both Basic Allowance for Housing (BAH) and Basis Allowance for Subsistence (BAS) in a noncustodial father's income when determining his child support obligation, the Montana Supreme Court ruled. *Shelhamer v. Hodges*, — P.3d — (Mont., No. DA 15-0420, 2/9/16).
- (1) Father argued on appeal that the BAH and BAS defrayed the cost of actual housing. The high court, however, observed that when calculating support under Montana's child support guidelines, all persons are awarded a personal allowance in order to address their food and housing costs. Thus not including the benefits would afford Father a double credit. Moreover, it noted that although BAH and BAS payments are intended to assist with a service member's housing and food expenses, "there are no requirements for how the money is spent, no accounting of any expenditures is required, and the payments are made with each paycheck. In addition, the military distinguishes BAH and BAS from per diem travel payments and allowances."
- (2) The high court further opined that, in the proper context of the entire rule which ordinarily excludes housing and food costs, those concern "additional expenses that are incurred because of the parent's work, not the regular mortgage or rent payments and grocery bills that would otherwise have to be paid from any parent's regular source of income. . . . The infirmity of [Father's] argument is further illustrated when considering other items that the rule does include as actual income. Specifically, Admin R. M. 37.62.105(2)(c) (2012), considers actual income to include 'the value of noncash benefits, including . . . housing, . . . food, utilities, etc.' Thus, if we were to accept [Father's] interpretation of the rule, it would lead to the paradoxical conclusion that the cash value of employer-provided housing and food is considered income, but the actual cash to pay for housing and food is not."

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i. Parenting Time Credit -

- (1) The Clay Superior Court did not err when, in calculating a noncustodial father's child support obligation, it determined his annual overnight parenting time credit to be less than 52 overnights, where although the order *allowed* 98 overnights, Father's actual number of overnights was far less than 52. *Mitten v. Mitten*, 44 N.E.3d 695 (Ind.Ct.App. 9/14/15). (See also *Health Insurance* and *Retroactive Support*, this section.)
- (a) Father argued that the parties' 2014 agreement provided for Father to have 98 overnights per year. Father exercised only minimal visitation with the child, however, because he felt the child did not want to see him, and Father feared the child would become upset, given the child's ADHD. Father continued that, even if the child did not exercise the overnights, he nevertheless believed he should receive credit for 98 overnights, given that he was being considerate in not wanting to force visitation and upset the child. "Why should I be penalized for . . . thinking about his welfare?"
- (b) The appellate court rejected Father's argument, saying that "the rationale behind the parenting time credit is that overnight visits with the noncustodial parent may alter some of the financial burden of the custodial and noncustodial parents in caring for the children," quoting *Young v. Young*, 891 N.E.2d 1045 (Ind. 2008). In this case, Father's actual number of annual overnights with the child was far less than 52. The trial court did not abuse its discretion when it decided to credit Father with 0-51 overnights annually.
- (2) The Lake Circuit Court did not err in deviating from the Guideline child support amount when calculating a noncustodial father's child support obligation. Although Father had been awarded parenting time under the parties' prior order, the mother had repeatedly frustrated Father's attempts to visit with his child. Father had on several occasions filed contempt actions and sought injunctions against Mother. In addition, although the parties agreed that overnight visits were currently inappropriate due to the child's mental condition, numerous therapists had opined that Father should have visitation with the child and that the parties should work toward potential future overnight visits between Father and the child. Thus although Father was not actually exercising the 103 annual overnights the trial court awarded him, it did not err by entering a support order that deviated from the Guideline amount by the amount of parenting time credit the trial court awarded him. The appellate court noted that because the parties proceeded at the evidentiary hearing in summary fashion, the trial court could base its findings and

conclusions on counsel's arguments. See *Bogner v. Bogner*, 29 N.E.3d 733 (Ind. 4/28/15). Under the circumstances of this case, the trial court did not commit clear error. *Gryniewicz v. Shih*, No. 45A03-1412-DR-437 (Ind.Ct.App. 5/27/15) (memorandum). (See also *Imputed Income*, this section.)

2. College Expenses - Ind. Code § 31-16-6-6, which provides for a parent to pay for post-secondary educational expenses, is not by its express terms limited to undergraduate school. Said the appellate court: "Indiana Code Section 31-16-6-6(c) prescribes the timing of a petition for educational expenses, limiting the file date to that preceding a child's twenty-first birthday. The provision contains no corresponding limitation on the permissible educational institution, although the Legislature would have been free to enact such a limitation. Mother, in essence, asks that we read in an express limitation to undergraduate expenses. We cannot do so, as courts 'will not read into [a] statute that which is not the expressed intent of the legislature.' *N.D.F. v. State*, 775 N.E.2d 1085, 1088 (Ind. 2002)." *Allen v. Allen*, No. 13A01-1411-DR-476 (Ind.Ct.App. 7/24/15) (memorandum).
3. Deviation for Travel Expenses Related to Visitation - The Morgan Superior Court properly ordered a noncustodial mother to pay \$0.00 in child support in light of the travel expenses she would incur in exercising parenting time with her child who resided with the custodial father in California. Mother argued on appeal in part that the trial court's custody order was erroneous because she would incur significant expense in exercising visitation. Rejecting her contention, the appellate court observed that in lieu of this expense, the trial court reduced her child support obligation to zero. Such was entirely reasonable under the circumstances. *Dillon v. Dillon*, 42 N.E.3d 165, 170 (Ind.Ct.App. 8/21/15).
4. Negative Child Support Amount - The Howard Superior Court did not abuse its discretion in refusing to require a custodial father to pay child support to the noncustodial mother, where although Father earned significantly more income, the parties did not exercise equal parenting time. *Vore v. Vore*, No. 34A02-1505-DR-264 (Ind.Ct.App. 2/15/16) (memorandum). (This case is also discussed in *Lottery Winnings*, this section, and *Arrears*, this outline.)
  - a. The parties' 2013 dissolution decree awarded Mother custody of the parties' minor child and required Father to pay \$100 in weekly support. Nearly a month later, Father won \$1,000,000 in the Hoosier Lottery. After paying taxes on his winnings, Father received around \$540,000.

- b. On July 8, 2013, less than a week after Father won the lottery, Mother filed a petition to modify child support. Mother later filed a Supplemental and Second Petition to Modify Support and Father filed a petition to modify child custody, support, and parenting time. On March 9, 2015, the trial court heard argument on the parties' petitions. The trial court's order issued two weeks later awarded Father custody, modified Father's child support obligation to \$259 a week retroactive to July 8, 2013, terminated Father's child support obligation to Mother, and ordered Father to pay the arrearage into a trust for the child.
- c. Mother argued, *inter alia*, the trial court erred in terminating Father's child support obligation. Specifically, Mother argued that the combination of Father's much larger income and her 98 overnights of parenting time resulted in circumstances in which Father, as the custodial parent, should pay child support to her as the noncustodial parent. The trial court erred, she argued, by terminating Father's child support order.
- d. Affirming, the appellate court quoted Guideline 3(F)(1):

The total child support obligation is divided between the parents in proportion to their weekly adjusted income. A monetary obligation is computed for each parent. The custodial parent's share is presumed to be spent directly on the child. *When there is near equal parenting time*, and the custodial parent has significantly higher income than the noncustodial parent, application of the parenting time credit should result in an order for the child support to be paid from a custodial parent to a noncustodial parent, absent grounds for a deviation.

Guideline 3(F)(1) (emphasis in original by appellate court).<sup>19</sup>

- e. The appellate court held this to mean that "before a custodial parent can be ordered to pay child support to a noncustodial parent, two facts must be present: 1) the parents share near equal parenting time, and 2) there is a large disparity in the parent's [sic] incomes." Because Mother was only entitled to guideline parenting time, *i.e.*, 98 overnights per year, the parties did not share equal parenting time. Accordingly, the trial court did not err in refusing to require the custodial father to pay child support to the noncustodial Mother.

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<sup>19</sup>This Guideline is unchanged in the 2016 version.

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## 5. Retroactive Support -

- a. The Clay Superior Court did not abuse its discretion in ordering a noncustodial father to pay child support retroactive to the first Friday following the parties' dissolution, even though the custodial mother had not sought a provisional order during the 12-month pendency of their dissolution. *Mitten v. Mitten*, 44 N.E.3d 695 (Ind.Ct.App. 9/14/15). (See also *Health Insurance* and *Parenting Time Credit*, this section.)
  - (1) Father filed his dissolution action on July 16, 2013. The trial court held a hearing on the matter March 4, 2014 and subsequently issued findings and conclusions. The trial court's order established Father's child support obligation at \$235 per week, retroactive to the first Friday following the date the petition was filed. This created an arrearage of \$13,360.00. However, the decree allowed Father a credit of \$2,216.40 against that arrearage; the credit represented 33.3% of the payments Father had voluntarily made during the pendency of the matter toward the mortgage and utilities on the marital residence.
  - (2) Father appealed. He first argued the trial court erred in making the support order retroactive to the first Friday following the date the dissolution petition was filed. Father cited to *Boone v. Boone*, 924 N.E.2d 649, 652 (Ind.Ct.App. 2010), where the opinion included the statement that "we must presume that [Mother] was satisfied with whatever contribution Father was making to support the child because she never engaged the courts, as was her right, to seek more than he was giving."
  - (3) The appellate court held that *Boone* was distinguished from the present facts. In *Boone*, the custodial mother requested support for a period *prior* to the date on which the father filed his dissolution action. The issue on appeal was whether the trial court had the authority to order the father to pay child support retroactive to a date preceding the filing of the petition for dissolution. *Boone* held the trial court had no such authority. Moreover, the *Boone* decision expressly recognized, "[o]ur courts have held that an initial child support order can be retroactive to the date of the petition for dissolution." *Id.* In sum, the trial court did not err in requiring Father to pay retroactive support back to the first Friday after the Father had filed his dissolution petition.
  - (4) Father next argued the trial court erred when, in ordering the retroactive support, it credited Father with only 33.3% of what he had paid toward the mortgage, utilities and homeowner's insurance. Father argued on appeal that he should have received a dollar-for-dollar-credit for those expenditures. The trial court found

that “payments made by [Father] for the mortgage, REMC, and homeowners insurance was largely for the purpose of preserving the marital residence and is considered by this Court to be both a form of temporary spousal maintenance and, in part, child support for the minor child.” It therefore awarded Father a credit of \$2,216.40, which was 33.3% of the total Father had paid for these expenses.

(5) Father cited to *R.R.F. v. L.L.F.*, 935 N.E.2d 243 (Ind.Ct.App. 2010), which held that child support payments made to benefit the child should have been credited against his obligation. The appellate court distinguished *R.R.F.* by noting that there, payments were made for the sole benefit of the child. Here, Father's payments toward mortgage and utility bills were not solely for the child's use and benefit. The trial court did not abuse its discretion in applying 33.3% of what Father paid in mortgage and utility payments toward Father's owed child support obligation.

- b. The Hamilton Superior Court did not err in calculating a noncustodial father's retroactive support resulting from an increase in his child support obligation. The parties' 1999 dissolution required Father to pay \$1,000 per month for their one child. Mother on August 20, 2013 filed her modification request. After evidentiary hearings in 2014, the trial court increased Father's support obligation to \$443 per week, retroactive to August 20, 2013. Father argued that in making the order retroactive to the date of filing, and thus adding \$8,905 to his arrearage, the trial court ignored Father's \$100 monthly extra payments he had made to Mother during this time. The appellate court rejected Father's contention, saying that he had presented no evidence of when he began making these payments and did not offer any documentation to support his assertions. The trial court did not err in calculating Father's retroactive support. *Laux v. Ferry*, 34 N.E.3d 690 (Ind.Ct.App. 6/3/15), *reh'g denied*. (See also *FICA Deduction, Health Insurance and Imputed Income*, this section.)

## 6. Submission of Worksheets -

- a. A custodial mother's challenge to a noncustodial father's income for child support purposes was waived, where the mother failed to introduce her own worksheets at trial and offered no testimony controverting the father's proffered worksheets. In addition, the appellate court soundly rejected the mother's belated attempt to submit alternate worksheets in her motion to correct error. The appellate court observed that a motion to correct error can be used to address “[n]ewly discovered material evidence . . . capable of production within thirty (30) days of final judgment which, with reasonable diligence, could not have been discovered and produced at trial.” Ind.

- Trial Rule 59(A)(1). Mother could have introduced this evidence at trial and failed to do so. The Marion Superior Court, therefore, did not err in denying Mother's motion to correct error with regard to Father's income. *Scanlon v. Scanlon*, No. 49A02-1507-DR-731 (Ind.Ct.App. 2/18/16) (memorandum).
- b. A custodial mother's challenge to the Miami Superior Court's order requiring the noncustodial father to pay \$80.00 in weekly child support was waived, where despite requests from the trial court, neither party submitted child support worksheets. Thus to the extent Mother claimed error on appeal, she had invited it. In support of its decision, the appellate court cited *Witte v. Mundy ex rel. Mundy*, 820 N.E.2d 128, 133 (Ind. 2005) (it is well settled that a party may not take advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct). "Neither Wife nor Husband submitted child support worksheets to the trial court. If this were simply a case of oversight, we would be tempted to remand so that the trial court could consider additional evidence. But in this case, the trial court explicitly requested such evidence and neither party provided it. . . The trial court's order does lack the evidence and findings typically seen in child support orders, but this lack was invited by Wife's inaction, and is therefore not appealable." *Gamester v. Gamester*, No. 52A05-1506-DR-545 (Ind.Ct.App. 2/16/16) (memorandum). (See also *Appeals* and *Modification*, this outline.)
- c. The St. Joseph Superior Court did not commit reversible error in adjudicating a noncustodial father's child support obligation even though no worksheets were admitted into the record as evidence. The appellate court noted that Guideline 3(B)(1) does not require that worksheets be submitted into evidence. Instead the Guideline only requires that "a copy of the worksheet . . . shall be completed and filed with the court when the court is asked to order support." In addition, it was clear from the record that the parties submitted worksheets to the trial court and discussed them at length during the hearing. *Whitlatch v. Wolfe*, No. 71A05-1502-DR-64 (Ind.Ct.App. 9/9/15) (memorandum). (See also *Child Care* and *Legal Duty*, this outline, and *Modification*, this outline.)
7. Tax Exemption for Dependent - The Porter Superior Court did not err in allowing a Mother to claim a child as a dependent on her 2012 federal and state tax returns and in denying the father's motion for contempt against Mother for claiming the deduction exemption. *Rehtorik v. Rehtorik*, No. 64A03-1411-DR-402 (Ind.Ct.App. 7/8/15) (memorandum).
- a. Father argued that IC § 31-16-6-1.5(d) conditions the allocation of the dependency exemption where "the parent has paid at least ninety-five percent (95%) of the

parent's child support for the calendar year for which the parent is ordered to claim the child as a dependent by January 31 of the following year.” Father asserted that he had paid at least 95% of his obligation for tax year 2012, and therefore was entitled to claim the exemption for that year. Mother claimed the exemption in that year, which formed the basis for Father’s contempt action against her. The trial court denied Father’s motion.

- b. Affirming, the appellate court acknowledged the 95% threshold under IC 31-16-6-1.5. However it said, the parties court-approved agreement provided for Father to claim the exemption “*if* he is current in child support at years end” (emphasis in original by appellate court). Father admitted at trial that while he was at least 95% compliant, he still owed *some* arrearage for that year. Thus, the appellate court said, Mother was entitled to claim the exemption for that tax year, and properly dismissed Father’s motion for contempt.

## H. Income Withholding -

1. Failure to Submit Income Withholding Order - Contempt - The Hendricks Superior Court did not abuse its discretion in finding attorney Stacy Kelley in contempt for failing to submit an income withholding order on behalf her client, and in ordering Kelley to pay Mother’s attorney fees. *Thompson v. Smith*, No. 32A04-1412-JP-556 (Ind.Ct.App. 7/16/15) (memorandum). (This case is fully discussed in *Contempt*, this outline.)

## I. Jurisdiction -

1. Jurisdiction of Juvenile Court - The Posey Circuit Court did not have jurisdiction to entertain a third party’s petition for custody of a child where the Juvenile Court had original exclusive jurisdiction in a pending CHINS action. The appellate court acknowledged that under certain circumstances, a juvenile court’s original jurisdiction may be concurrent with a dissolution or paternity court *with regard to custody*. See IC §§ 31-30-1-1; 31-30-1-12 [dissolution court], 31-30-1-13 [paternity court].<sup>20</sup> *M.B. v. Barnes*, 40 N.E.3d 930 (Ind.Ct.App. 7/29/15).
2. Personal Jurisdiction - The Marion Superior Court erred in finding that a husband had consented to Indiana’s personal jurisdiction over him as to custody and child support, but

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<sup>20</sup>Ind. Code § IC 31-30-1-10 provides that “[a] circuit court has concurrent original jurisdiction with the juvenile court, including the probate court described in IC 33-31-1-9(b), for the purpose of establishing the paternity of a child in a proceeding under: (1) IC 31-18.5 [UIFSA];(2) IC 31-1.5 (before its repeal); or (3) IC 31-2-1 (before its repeal); to enforce a duty of support.”

had not consented to Indiana's jurisdiction over other matters, such as the distribution of the parties' marital assets. The appellate court opined that when an individual consents to a court's exercise of jurisdiction over him in a particular cause, it follows that the court is authorized to adjudicate all issues necessary to dispose of that cause properly. *Harris v. Harris*, 31 N.E.3d 991 (Ind.Ct.App. 5/7/15).

- a. Husband and Wife were married in 1995 in Watertown, New York. They have one daughter (Daughter), born in 1996. In 2005, Wife separated from Husband and moved to Indiana. In 2008, Wife filed a petition for dissolution of marriage in Marion County, seeking primary custody of Daughter and a distribution of the marital property. At that time, Husband was a resident of North Carolina, but stationed in Germany as a member of the U.S. military.
- b. Upon Wife's petition for dissolution, the trial court dissolved the marriage, awarded Wife custody of the parties' minor child, required Husband to pay child support, and made property allocations. Husband appealed, claiming lack of personal jurisdiction. The appellate court found that the trial court did not err in dissolving the marriage, as changing the parties' status from married to unmarried takes the form of an *in rem* proceeding, in which "the trial court may, upon *ex parte* request of a resident party, dissolve a marriage without obtaining personal jurisdiction over the other party." *Harris v. Harris*, 922 N.E.2d 626, 634 (Ind.Ct.App. 2010).
- c. Following remand, the parties in 2011 entered into an agreed entry with regard to custody, child support and the child's post-secondary education and health insurance. That same day, Wife filed for spousal maintenance and an equitable division of marital assets. On August 26, 2014, the trial court issued an order terminating Husband's child support obligation but refused to resolve other issues. Wife appealed.
- d. The appellate court reversed. It first held that its prior appellate decision in 2010 did not permanently preclude the trial court's determination of the *in personam* issues. "Indiana Trial Rule 4.4 provides that 'a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitutions of this state or the United States.' Due process requires that a court's exercise of jurisdiction over an individual 'not offend traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. State of Wash.*, 326 U.S. 310, 316 (1945). Second, it held that by entering into an agreement on *some* *in personam* issues, Husband consented to Indiana's personal jurisdiction for *all* issues related to the dissolution. Said the appellate court:

It has long been observed that a court may acquire personal jurisdiction over a party through that party's consent. *Brady v. Richardson*, 18 Ind. 1, 2 (1862). As this Court noted in the prior appeal, "[a] defendant can waive lack of personal jurisdiction and submit himself to the jurisdiction of the court if he responds or appears and does not contest the lack of jurisdiction." *Harris*, 922 N.E.2d at 632. Additionally, "a party shall be estopped from challenging the trial court's jurisdiction where the party has voluntarily availed itself or sought the benefits of the court's jurisdiction." *Maust v. Estate of Bair*, 859 N.E.2d 779, 783 (Ind.Ct.App. 2007).

On July 19, 2011, Husband asked the trial court to approve an agreed entry for decree of dissolution. In so doing, Husband availed himself of the benefits of the trial court's jurisdiction and thereby consented to the court's exercise of jurisdiction over him. At that point, this Court's decision as to the trial court's jurisdiction as it existed in 2010 no longer applied.

Second, the trial court incorrectly determined that Husband had submitted to the court's jurisdiction only as to specific matters. "Personal jurisdiction" refers to "[a] court's power to bring a person into its adjudicative process." Black's Law Dictionary (10th ed. 2014). When an individual consents to a court's exercise of jurisdiction over him in a particular cause, it follows that the court is authorized to adjudicate all issues necessary to dispose of that cause properly.

## J. Litigation -

1. Trial Rule 15(B) - Notice Pleading - The Marion Superior Court did not deny a noncustodial mother due process in adjudicating her liability for her children's unreimbursed medical expenses, where the custodial father provided overt notice to her that he would be seeking reimbursement at trial, and Mother failed to insist on a strict adherence to the issues raised at trial or ask for a reasonable continuance. *Porter v. Naum*, No. 49A02-1409-DR-623 (Ind.Ct.App. 6/9/15) (memorandum). To summarize the applicable law (citations and quotations omitted):
  - a. Due process requires notice, an opportunity to be heard, and an opportunity to confront witnesses. Before an action affecting a party's interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment proceeds, the State at a minimum must provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Such notice must reasonably

convey the required information to the affected party, must afford a reasonable time for that party to respond, and is constitutionally adequate when the practicalities and peculiarities of the case are reasonably met.

- b. While Indiana is a notice pleading state, issues may be tried without an overt pleading pursuant to Ind. Trial Rule 15(B). Trial Rule 15(B) provides in part: “When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.”
  - c. The purpose behind T.R. 15(B) is to provide the parties with some flexibility in litigating a case, and to promote justice by permitting evidence brought in at trial to determine the liability of the parties. The function of the issues, whether formed by the pleadings, pre-trial orders, or contentions of the parties, is to provide a guide for the parties and the court as they proceed through trial. Either party may demand strict adherence to the issues raised before the trial. If the trial court allows introduction of an issue not raised before trial, an objecting party may seek a reasonable continuance in order to prepare to litigate the new issue. However, where the trial ends without objecting to the new issue, the evidence actually presented at trial controls. Consequently, neither pleadings, pre-trial orders, nor theories proposed by the parties should frustrate the trier of fact from finding the facts that a preponderance of the evidence permits.
  - d. Because fairness compels certain restraints, however, there are limits upon the principle of amending pleadings through implied consent. For example, a party is entitled to some form of notice that an issue that was not pleaded is before the court. Notice can be overt, as where the unpleaded issue is expressly raised prior to or sometime during the trial but before the close of the evidence, or implied, as where the evidence presented at trial is such that a reasonably competent attorney would have recognized that the unpleaded issue was being litigated.
2. Trial Rule 19 - Indispensable Parties - It is within the trial court's discretion to determine the indispensability of a party. An action need not be dismissed merely because an indispensable party was not named. Where an indispensable party subject to process is not named, the correct procedure calls for an order in the court's discretion that he be made a party to the action or that the action should continue without him. The rule governing joinder of parties does not set forth a rigid or mechanical formula for making the determination, but rather is designed to encourage courts to apprise themselves of the practical considerations of each individual case in view of the policies underlying the rule. Therefore, an appellate court employs a fact-sensitive, flexible analysis. [LBLHA](#),

- LLC v. Town of Long Beach*, 28 N.E.3d 1077, 1086 (Ind.Ct.App. 3/26/15) (citations omitted).
3. Trial Rule 24 - Intervention - *JPMorgan Chase Bank, N.A. v. Claybridge Homeowners Ass'n, Inc.*, 39 N.E.3d 666, 669 (Ind. 8/27/15) (citations and quotations omitted):
    - a. Post-judgment intervention is generally disfavored and only appropriate in certain extraordinary and unusual circumstances. Once the trial court enters a judgment, any attempt to intervene is effectively a motion to set aside that judgment under Trial Rule 60.
    - b. A party's motion to intervene as a matter of right is governed by T.R. 24(A), which states that trial courts "shall" grant a motion to intervene "when a statute confers an unconditional right to intervene," Trial R. 24(A)(1), or if the intervenor "shows (1) an interest in property which is the subject of the action, (2) that disposition of the action may practically impair that interest, and (3) that no existing party is adequately representing the moving party's interest." Trial R. 24(A)(2).
    - c. But intervention as a matter of right "shall" be granted only "[u]pon *timely* motion." T.R. 24(A) (emphasis added). And after entry of final judgment, our trial rules go a step further to state that intervention "*may* be allowed" by the trial court—the word "shall" no longer applies. *See* Trial R. 24(C) (emphasis added). Timely intervention serves two goals: first, it prevents prejudice to the existing parties who have spent time and energy litigating a matter without regard to the intervenor's interests. Second, it preserves the orderly process of the courts, a process that must be predictable, expedient, and economical. Timeliness is primarily a shield that protects the existing parties and the courts, not a sword to sanction would-be intervenors who are tardy in making their application.
  4. Trial Rule 26(E) - Discovery - Supplementation - *O'Banion v. Ford Motor Co.*, 43 N.E.3d 635, 645-46 (Ind.Ct.App. 9/9/15) (citations and quotations omitted):
    - a. The duty to supplement discovery under T.R. 26(E)(1)(b) is absolute and does not require a court order. If a party fails to comply with Trial Rule 26(E) by not supplementing discovery responses, the trial court may, in its discretion, exclude the testimony of a witness.
    - b. On appeal, trial court sanctions for failing to comply with discovery orders are reviewed for an abuse of discretion. Trial courts are presumed to act in accord with what is fair and equitable in each case, and an appellate court will only reverse if the

trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the trial court has misinterpreted the law. The conduct and equities will vary with each case, and an appellate court will thus generally leave that determination to the sound discretion of the trial court.

- c. Trial courts, being closer to the litigation, have a better sense than appellate courts of what sanctions for discovery violations will adequately protect the litigants in any given case, and what sanctions are necessary to maintain the court's dignity, secure obedience to its process and rules, rebuke interference with the conduct of business, and punish unseemly behavior. In exercising this power, however, trial courts should attempt to apply sanctions that have a minimal impact on the evidence presented at trial and the merits of the case, nor should sanctions be imposed that are unjust.
  - d. If offending conduct is primarily attributable to counsel and not the client, and there is little prejudice to the opposing party, courts should give due consideration to imposing sanctions directed primarily at counsel that minimize prejudice to the client and the merits of the case, while giving appropriate incentives to counsel to engage in proper behavior in the future.
5. Trial Rule 27 - Depositions Before Action or Pending Appeal - Excerpted from *Cleveland Range, LLC v. Lincoln Fort Wayne Associates, LLC*, 43 N.E.3d 622, 625-27 (Ind.Ct.App. 2015) (citations omitted):
- a. Discovery is generally allowed only after an action has been commenced. However, Indiana Trial Rule 27 creates an exception to this rule and authorizes deposition discovery where necessary to perpetuate the testimony of a party or witness. 22 Ind. Prac., Civil Trial Practice § 22.25 (2d ed.). Deposition by oral or written examination is one of the permissible methods of discovery. *Id.*
  - b. A prospective litigant has no absolute entitlement to perpetuate testimony. A court may order depositions if it is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice. Rule 27 is to be used when a certain witness' testimony might become unavailable over time, and not to provide a method of discovery to determine whether a cause of action exists. In other words, the rule may be invoked to memorialize evidence that is already known, rather than as a pre-trial discovery device.
  - c. Perpetuation of testimony in advance of litigation will generally be appropriate if there is some impediment to bringing suit, but there may be a case in which perpetuation of testimony is proper even though the petitioner is not technically

precluded from initiating the lawsuit. We offered an example in *Sowers [v. Laporte Superior Court, No. II]*, 577 N.E.2d 250 (Ind.Ct.App.1991): “if a member of the armed forces observed an accident but was scheduled to leave the country soon afterward, it would not be an abuse of discretion to allow perpetuation of testimony if a lawsuit could not be filed within that time.” 577 N.E.2d at 253 n. 3.

- d. Rule 27 is not a substitute for discovery; it is available in special circumstances to preserve testimony that could otherwise be lost. The rule is to be used when a witness' testimony might become unavailable over time, and not to provide a method of discovery to determine whether a cause of action exists. In other words, the rule may be invoked to memorialize evidence that is already known, rather than as a pre-trial discovery device. Litigants should not use the rule as a “fishing expedition” to discover grounds for a lawsuit, and, if found, to determine against whom the action should be initiated.
6. Trial Rule 59 - Motion to Correct Error - A custodial mother’s challenge to the noncustodial father’s income for child support purposes was waived on appeal, where the mother failed to introduce her own worksheets at trial and offered no controverting testimony to Father’s proffered worksheets. In addition, the appellate court soundly rejected Mother’s belated attempt to submit alternate worksheets in her motion to correct error. The appellate court observed that a motion to correct error can be used to address “[n]ewly discovered material evidence . . . capable of production within thirty (30) days of final judgment which, with reasonable diligence, could not have been discovered and produced at trial.” Ind. Trial Rule 59(A)(1). Mother could have introduced this evidence at trial and failed to do so. The Marion Superior Court, therefore, did not err in denying Mother’s motion to correct error with regard to Father’s income. *Scanlon v. Scanlon*, No. 49A02-1507-DR-731 (Ind.Ct.App. 2/18/16) (memorandum).
  7. Trial Rule 60(B) - Relief from Judgment - The Madison Circuit Court No. 5 erred in granting a noncustodial father’s T.R. 60(B) motion to set aside a 2001 judgment issued by the Madison Circuit Court No. 2 that denied the father’s previous motion to modify. *State v. Gaw*, — N.E.3d — (Ind.Ct.App., No. 48A02-1504-PL-207, 12/10/15). (See also *Appeals and Modification*, this outline.)
    - a. The parties’ 1998 dissolution required Father to pay child support. In 2001, Father filed a petition to reduce or abate his support obligation during his incarceration. Madison Circuit Court 2 denied that motion on April 27, 2001. The IV-D prosecutor intervened in 2008.

- b. On April 4, 2014, Father filed a motion to set aside judgment under Indiana Trial Rule 60(B)(8) in Madison Circuit Court 5, seeking to undo the 2001 order of Madison Circuit Court 2 denying his petition to reduce or abate his support obligation during his incarceration. Court 5 granted Father's motion and abated the child support arrearage calculations for the period of April 19, 2001 through May 1, 2009, during which time Father was incarcerated. It then entered an order reflecting a new calculation for Father's arrearage. The State appealed.
- c. As a threshold matter, Father argued that because the State would recoup its TANF expenditures in full, it would suffer no harm. The appellate court rejected this argument, saying that because the State had intervened in the action, it had standing to appeal the trial court. (This issue is discussed more fully in *Appeals*, this outline.)
- d. The appellate court next observed that the Madison Circuit Court is a unified court of general jurisdiction comprised of six divisions in which various dockets are maintained. By local rule, civil dockets may be maintained in each of the six divisions. However, Madison County's caseload plan provides that Madison Circuit Court 5 is not initially allocated any of the dissolution proceedings, although transfers to that specific division are not prohibited.
- e. The appellate court went on to note that Father sought relief via Trial Rule 60(B)(8) from Court 2's denial of his petition for modification of support. He did so by filing what he called an "independent action" in Court 5.

Case law has established, nonetheless, that actions brought under 60(B)(8) must be filed in the court which issued the judgment or order. Furthermore, it is axiomatic that a court that issues a dissolution decree retains exclusive and continuing responsibility for any future modifications and related matters concerning the care, custody, control, and support of any minor children. This is so because various policy reasons reaffirm that the original dissolution court is in the best position to conduct the necessary factual determinations involved.

- f. The appellate court also observed that the Indiana Supreme Court made clear its disfavor of efforts to circumvent decisions of dissolution courts absent an emergency, citing *In State ex rel. Meade v. Marshall Superior Court II*, 644 N.E.2d 87 (Ind. 1994). Circuit Court 5 erred by setting aside the 2001 Circuit Court 2 judgment denying Father's modification request.

- g. The appellate court acknowledged the relief available to incarcerated obligors under *Lambert v. Lambert*, 861 N.E.2d 1176 (Ind. 2007), and *Clark v. Clark*, 902 N.E.2d 813 (Ind. 2009) (decided years after Circuit No. 2 denied Father’s original petition to modify). “Of course, this accommodation must yield to the longstanding rule that a court may not retroactively modify child support obligations that have accrued. *Whited v. Whited*, 859 N.E.2d 657, 661 (Ind. 2007).”
8. Trial Rule 75 - Venue - Indiana Trial Rule 75 provides that, “[a]ny case may be venued, commenced and decided in any court in any county.” Ind. Trial Rule 75(A). However, if a party files a pleading or a motion to dismiss pursuant to Trial Rule 12(B)(3), the trial court shall order the case transferred to a county or court selected by the party filing such motion or pleading if the trial court determines that the county or court where the action was filed does not meet preferred venue requirements or is not authorized to decide the case and that the court or county selected has preferred venue and is authorized to decide the case. T.R. 75(A). The trial rule lists several criteria under which preferred venue can lie. T.R. 75(A)(1)-(10). The rule does not create a priority among these subsections establishing preferred venue. Preferred venue may lie in more than one county, and if an action is filed in a county of preferred venue, change of venue cannot be granted. *Strozewski v. Strozewski*, 36 N.E.3d 497, 500 (Ind.Ct.App. 6/16/15) (citations omitted).
9. Trial Rule 79 - Special Judge - Although a Marion Superior Court Magistrate may have erred in entering an order modifying custody and child support after a special judge had been appointed, the noncustodial father had waived the matter on appeal by failing to raise the issue before the trial court. Said the appellate court: “[I]t has been the long-standing policy of this court to view the authority of the officer appointed to try a case not as affecting the jurisdiction of the court. Therefore, the failure of a party to object at trial to the authority of a court officer to enter a final appealable order waives the issue for appeal.” *Houzanme v. Houzanme*, No. 49A04-1505-DR-434 (Ind.Ct.App. 10/14/15) (memorandum).
10. Attorney Admission and Discipline -
- a. New York Bar applicant Cesar Vargas’ “undocumented” immigration status, in and of itself, did not reflect adversely upon his general fitness to practice law, where Vargas did not unlawfully enter the United States in violation of immigration laws of his own volition, but rather came to the United States at age of five at the hand of his mother. Although upon attaining his majority Vargas continued to stay in the United States in violation of federal immigration laws, it was unrealistic to expect him to leave the only country that he had known since he was five to return to a country with which he had little more than connection by birth. In addition, Vargas

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had applied for “deferred removal” under a program entitled Deferred Action for Childhood Arrivals, for which he was eventually approved. *In re Vargas*, 131 A.D.3d 4 (N.Y.A.D. 2 Dept., 6/3/15).<sup>21</sup>

- b. The Indiana Supreme Court on August 19, 2015 suspended attorney Dana Daniels for one year without automatic reinstatement for numerous violations of Indiana's Professional Conduct Rules. Daniels was retained by a noncustodial father in a modification petition filed by the custodial mother. The Supreme Court found that Daniels had, among other things, failed to respond to Mother's discovery requests, failed to meaningfully respond to Father's frequent inquiries regarding the status of his case, did not raise the issues Father sought to raise, and did not submit a child support obligation worksheet or any proposed orders. Daniels also falsely informed Father that Mother's counsel had failed to submit a child support obligation worksheet and thus Father's support obligation would not be changed. When the trial court eventually issued an order increasing Father's support obligation, Daniels did not inform him; Father only became aware of his increased support obligation when the new income withholding order took effect. Daniels also falsely told Father's wife, without explanation, that the trial court's support order was not appealable. Daniels' suspension became effective October 2, 2015. *In the Matter of Daniels*, 39 N.E.3d 639 (Ind. 8/19/15).
11. Attorney Fee-Shifting Provision - The Jasper Superior Court did not err in construing a fee-shifting provision of the parties dissolution decree so as to deny a wife her request for attorney fees, even though the husband was unsuccessful in his attempt to modify child support and parenting time. *Capellari v. Capellari* — N.E.3d — (Ind.Ct.App., No. 37A05-1505-DR-479, 12/22/15).
- a. The parties' 2012 agreement — incorporated into their dissolution — provided for custody, child support, parenting time and other matters. The agreement also provided:

In the event that any action is filed with regard to this Agreement, the unsuccessful party in the action shall pay to the successful party, in addition to all sums that either party may be called upon to pay, a reasonable sum for the successful parties [sic] attorney fees at the discretion of the court.

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<sup>21</sup>The oath of office for New York attorneys is set forth in § 1 of Article XIII of the New York State Constitution, as follows: “I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of [attorney and counselor-at-law], according to the best of my ability.”

- b. Father in 2013 filed, among other things, a petition to modify child support and parenting time, which the trial court denied. Mother requested attorney fees in accordance with the agreement, saying that the “shall pay” language required Father to pay her attorney fees. Following the trial court’s denial of Mother’s request for attorney fees, Mother appealed.
- c. Affirming, the appellate court observed that the fee-shifting agreement included the phrase “at the discretion of the court.” Accordingly, the trial court did not err in refusing to award Mother attorney fees under the facts of the case. More importantly, the appellate court expressed its disfavor with a fee-shifting provision for child support and parenting time orders, saying (citations and quotations omitted):

We write further today, however, to express concern with fee-shifting provisions in agreements related to child support and parenting time in light of our state's public policy. Our statutes provide that a trial court may, in its discretion, order the payment of attorney fees in litigation concerning the enforcement or modification of parenting time orders. Ind. Code § 31-17-4-3; also IC § 31-15-10-1 (pertaining to attorney fees in initial dissolution proceedings). Such statutory provisions have as their purpose ensuring that a party, who otherwise could not afford an attorney in connection with dissolution proceedings, have access to an attorney's services by providing that the other party is responsible for paying the attorney fees. Unlike the statutory scheme, fee-shifting provisions in contracts generally serve not to ensure access to the courts, but rather to ensure that the prevailing party in a contract dispute is made whole.

The purpose of fee-shifting provisions in the typical contract matter may contrast unfavorably with the public policy of this state with respect to the rights of children to a relationship with both parents, and to child support. The Indiana Supreme Court has long held that the right of parents to visit their children is a precious privilege that should be enjoyed by noncustodial parents. Children are not to be treated as nothing more than a bargaining chip. . . . [A]n agreement to contract away a child's right to receive parenting time must also be held as void as a matter of public policy. . . . [C]hild support is duty owed by a parent to a child. Thus, child support is not subject to the same negotiation and agreement as other civil matters.

The fee-shifting provision at issue here, construed as Mother suggests, would serve to penalize any unsuccessful effort at the modification of parenting time or child support. This outcome creates a significant disincentive for parents

to seek additional parenting time with their children, and seems at odds with this state's public policy concerning the primacy of the best interest of the child with respect both to parenting time and child support. Here, however, the trial court was within the law and its discretion in interpreting its own order and reaching its conclusion denying Mother's request for attorney fees.

12. Contemporaneous Objection Rule - The contemporaneous objection rule requires parties to voice objections in time so that harmful error may be avoided or corrected and a fair and proper verdict will be secured. *Purifoy v. State*, 821 N.E.2d 409, 412 (Ind.Ct.App. 2005). The purpose of the rule is to promote a fair trial by preventing a party from sitting idly by and appearing to assent to an offer of evidence or ruling by the court only to cry foul when the outcome goes against him. *In re Peeples*, 37 N.E.3d 502, 511 (Ind.Ct.App. 6/19/15) (citations omitted).
13. Judicial Bias - A divorced wife failed to establish that a Marion Superior Court Judge was biased against her when awarding custody of her child to her former husband in the context of a dissolution proceeding. The wife accused the judge of being combative with her during testimony, of inappropriately commenting on her mental stability, and of stating that her behavior was not age appropriate. It was the wife, however, who exhibited emotional, irrational, and uncooperative behavior and often gave evasive and equivocal answers to clear and direct questions. Appropriately, the judge intervened in order to admonish the wife, to maintain control of trial, and to aid in fact-finding necessary to determine best interests of the parties' children. *Richardson v. Richardson*, 34 N.E.3d 696 (Ind.Ct.App. 6/10/15). Summarizing the applicable law, the court stated as follows (citations and quotations omitted):

The law presumes that a trial judge is unbiased. To overcome that presumption, the party asserting bias must establish that the trial judge has a personal prejudice for or against a party. Clear bias or prejudice exists only where there is an undisputed claim or the judge has expressed an opinion on the merits of the controversy before him or her. Adverse rulings and findings by the trial judge do not constitute bias per se. Instead, prejudice must be shown by the judge's trial conduct; it cannot be inferred from his [or her] subjective views. Said differently, a party must show that the trial judge's action and demeanor crossed the barrier of impartiality and prejudiced that party's case.

...

As our supreme court recently noted, “[w]e afford trial judges ample ‘latitude to run the courtroom and maintain discipline and control of the trial.’” *In re J.K.*, 30 N.E.3d 695, 698 (Ind.2015) (quoting *Timberlake v. State*, 690 N.E.2d 243, 256 (Ind.1997)). During bench trials, judges have considerable discretion to

question witnesses sua sponte to aid in the fact-finding so long as the judge maintains an impartial manner and refrains from acting as an advocate for either party.

14. Magistrate Signing Orders - A March 24, 2015 order signed by a Vanderburgh Superior Court magistrate — without approval from the Superior Court judge — was procedurally erroneous but was not a jurisdictional defect precluding appeal of the contested issues. Thus where the parties failed to raise the matter at any point, it was waived on appeal. The case involved parental relocation and custody modification. The relevant statute has since been amended.<sup>22</sup> *In the Matter of Paternity of S.G.*, No. 82A01-1504-JP-262 (Ind.Ct.App. 12/22/15) (memorandum).

We note that the final order was issued by a magistrate, and was not approved by the superior court judge. Under Indiana law, magistrates do not have authority to issue final, appealable decisions in civil cases unless they are sitting as a judge pro tempore or special judge. Ind. Code § 33-23-5-5. However, it has been the long-standing policy of the supreme court to view the authority of the officer appointed to try a case not as affecting the jurisdiction of the court — and so the failure of a party to object at trial to the authority of a court officer to enter a final appealable order waives the issue for appeal. As neither party has ever raised the issue of the magistrate's authority in the instant case, it is waived on appeal and does not affect jurisdiction.

*Paternity of S.G.*, fn 1 (citations and quotations omitted).

15. Offers of Proof - The Marion Superior Court committed harmless error by refusing to allow a noncustodial mother to make an offer of proof after the court refused to allow a child to testify in a custody proceeding. *Porter v. Naum*, No. 49A02-1409-DR-623 (Ind.Ct.App. 6/9/15) (memorandum). In its opinion the appellate court reviewed the applicable law:

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<sup>22</sup> Effective July 1, 2015, IC § 33-23-5-5 was amended by P.L. 173-2015, § 4 to provide:  
A magistrate may do any of the following:

- ...
- (17) Approve agreed settlements concerning civil matters.  
(18) Approve:  
    (A) decrees of dissolution;  
    (B) settlement agreements; and  
    (C) any other agreements;  
of the parties in domestic relations actions or paternity actions.

Older case law suggests that when the objection "is to the right of the witness to testify at all, the party introducing that witness need not state what he expects to prove by him, as the question for the court to pass upon in such a case is not as to the competency of the [witness'] testimony, but as to the competency of the witness himself." *Sullivan v. Sullivan*, 32 N.E. 1132, 1133 (Ind. 1893). However, more recent case law has held that an offer of proof is required even when the trial court has found a witness incompetent or when it has otherwise prevented a witness from giving any testimony. *Bedree v. Bedree*, 747 N.E.2d 1192, 1196 (Ind.Ct.App. 2001), *trans. denied*. In *Donaldson v. Indianapolis Pub. Transp. Corp.*, 632 N.E.2d 1167, 1170 (Ind.Ct.App. 1994) (internal reference omitted), we noted:

During direct examination, when the trial court rules that a witness may not testify, the proponent of the excluded testimony must make an offer of proof to preserve the ruling for appellate review. An offer of proof provides the appellate court with the scope and effect of the area of inquiry and the proposed answers, in order that it may consider whether the trial court's ruling excluding the evidence was proper.

Thus, failure to make an offer of proof results in waiver of the evidentiary issue. *Bedree*, 747 N.E.2d at 1196.

Because an appellant may be subject to waiver if he or she fails to make an offer of proof, we believe that generally, the better course of action is for the trial court to allow an offer of proof so that a record can be made for this court on appeal. *See id.* However, we do not believe that the trial court committed reversible error in this particular instance by disallowing Mother's offer of proof of [the child's] purported testimony. [The substance of what the child would have testified to was apparent from the record and would not have affected the outcome of the custody modification proceeding.]

16. Right to Be Advised of Right to Counsel - The Tippecanoe Superior Court did not err in failing to advise a child support obligor of his right to counsel in advance of a contempt hearing because the record failed to show that the obligor was indigent at the time of the hearing. "Father neither alleges nor directs us to any evidence in the record to show that he was indigent at the time of the contempt hearing. As such, Father has not demonstrated that he had a right to counsel at the contempt hearing, and the dissolution court did not err when it did not give an advisement." *Royer v. Royer*, No.79A02-1408-DR-615 (Ind.Ct.App. 5/13/15) (memorandum).

17.  Servicemembers Civil Relief Act  - The Warrick Superior Court did not violate a noncustodial father’s rights under the Servicemembers Civil Relief Act when it denied his motion to enjoin the custodial mother from relocating, where the father did not request a preliminary hearing on his request to enjoin the mother from staying in Washington pending a hearing on the relocation. Father could have been represented by counsel at a preliminary hearing, but instead asked that the trial court set a hearing on the matter upon his return to Indiana.  *Shaw v. Shaw* , No. 87A04-1411-DR-527 (Ind.Ct.App. 6/9/15) (memorandum). The appellate court summarized the applicable law:

The Servicemembers Civil Relief Act was “enacted to protect those who have been obliged to drop their own affairs to take up the burdens of the nation from exposure to personal liability without an opportunity to appear and defend in person or through counsel.”  *Collins v. Collins* , 805 N.E.2d 410, 414 (Ind.Ct.App. 2004) (internal quotations removed). Section 522 of the Act provides that it applies to any civil action or proceeding, including any child custody proceeding, in which the plaintiff or defendant at the time of filing an application under this section 1) is in military service or is within 90 days after termination of or release from military service, and 2) had received notice of the action or proceeding. Section 522 grants court the authority, if certain conditions are met, to stay a proceeding in which a servicemember is a party: "at any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, the court may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than [ninety] days." 50 App. U.S.C. § 522.

18.  Special Prosecutor  -  *Larkin v. State* , 43 N.E.3d 1281, 1285-86 (Ind.Ct.App. 9/30/15) (citations and quotations omitted):
- a. The appointment of a special prosecutor in Indiana is governed by IC § 33–39–10–2. The purpose of the special prosecutor statute is to protect the State's interest in preserving the public confidence in the criminal justice system and ensuring that the prosecutor serves the ends of justice. The public trust in the integrity of the judicial process requires that any serious doubt be resolved in favor of disqualification.
  - b. It is well-settled that once the elected prosecuting attorney is disqualified, his or her whole office is disqualified from representing the State in a particular case. If the “elected prosecutor (as opposed to a deputy prosecutor) is disqualified from a case and special prosecutor is appointed, the elected prosecutor's ‘entire staff of deputies must be recused in order to maintain the integrity of the process of criminal justice.’”  *Jones v. State* , 901 N.E.2d 655, 658 (Ind.Ct.App.2009) (quoting  *State ex rel.*

*Goldsmith v. Superior Court of Hancock County*, 386 N.E.2d 942, 945 (Ind. 1979)). When an elected prosecutor is disqualified, his or her entire staff of deputies must be recused because “a prosecuting attorney exercises authority over and speaks through his deputies.” *Goldsmith*, 386 N.E.2d at 945.

- c. It is not, however, necessary to disqualify a prosecutor's entire staff or to dismiss an indictment because a deputy prosecutor has a conflict of interest. The conflict of one deputy prosecutor will not have an impact on other deputy prosecutors in the office. *Goldsmith*, 386 N.E.2d at 945. Accordingly, the conflict of a deputy prosecutor does not require the recusal of the entire staff of the prosecutor. *Id.*

#### 19. Statutory & Rule Construction -

- a. Where a state trial rule is patterned after a federal rule, the appellate courts will often look to the authorities on the federal rule for aid in construing the state rule. *Cleveland Range, LLC v. Lincoln Fort Wayne Associates, LLC*, 43 N.E.3d 622, 624 (Ind.Ct.App. 2015).
- b. “It is well-established that a judicial interpretation of a statute, particularly by the Indiana Supreme Court, accompanied by substantial legislative inaction for a considerable time, may be understood to signify the General Assembly's acquiescence and agreement with the judicial interpretation. It is of course permissible to revisit judicial authority interpreting a statute. However ‘if a line of decisions of this Court has given a statute the same construction and the legislature has not sought to change the relevant parts of the legislation, the usual reasons supporting adherence to precedent are reinforced by the strong probability that the courts have correctly interpreted the will of the legislature.’” *Layman v. State*, 42 N.E.3d 972, 978 (Ind. 9/18/15).
- c. Clear and unambiguous statutes leave no room for judicial construction. But when a statute is susceptible to more than one interpretation it is deemed ambiguous and thus open to judicial construction. If the statutory language is clear and unambiguous, an appellate court will require only that the words and phrases it contains are given their plain, ordinary, and usual meanings to determine and implement the legislature's intent. Courts may not “engraft new words” onto a statute or add restrictions where none exist. *See Kitchell v. Franklin*, 997 N.E.2d 1020, 1026 (Ind.2013). *Fifty Six LLC v. Metropolitan Development Com'n of Marion County*, 38 N.E.3d 726, 733-34 (Ind.Ct.App. 8/12/15), *rehearing denied*.

**K. Modification -**1. Final v. Provisional Orders -

- a. When entering a final order of child support under IC § 31-16-8-1, the parties do not need to show any change of circumstance between a provisional order and the final dissolution order; the amount set in the final dissolution order should be based off of the factors listed in IC § 31-16-6-1 and the child support worksheets. Parties are not bound to the amount set in a provisional order. *Gamester v. Gamester*, No. 52A05-1506-DR-545 (Ind.Ct.App. 2/16/16) (memorandum). (See also *Appeals and Guidelines*, this outline.)
- b. The Hendricks Circuit Court erred in failing to consider the parties' 2013 agreed entry a final order of the court with regard to paternity, custody, parenting time and child support. It therefore erred in ordering Father to pay child support prior to 2013 upon petitions to modify subsequently filed by both Mother and Father. *In re the Paternity of M.R.A.*, 41 N.E.3d 287 (Ind.Ct.App. 7/16/15).
  - (1) Prior to the Mother's marriage to another man in 2007 marriage, Mother gave birth to M.R.A. Father executed a paternity affidavit for this child. During her marriage, Mother gave birth to L.R.A.. Mother and her husband divorced in 2012. Subsequently, Father filed a petition to establish paternity of L.R.A and to determine issues of custody, support, and parenting time with respect to both children. Subsequent DNA testing confirmed Father's paternity of L.R.A.
  - (2) On January 3, 2013, the parties submitted an agreed order with respect to all pending issues. The trial court on January 16, 2013 entered an "Order Approving Agreement." Paragraphs 9 and 13 of the agreed entry provided as follows:
    9. That there shall be a \$0.00 support order against each of the parents and the parties are deviating from the Indiana Child Support Guidelines on account of the equal split parenting time, [M]other's current unemployment and the specific expenses [F]ather will be paying: [Father] shall pay all uninsured medical expenses incurred by the children (including reimbursement to [Mother] of any necessary such expense out of her pocket upon presentation of the receipt) and all educational expenses including any day care and/or pre-school.
    13. That in the event any provision in this agreement shall be rejected by the Judge or subsequently determined to be invalid, all provisions not

affected thereby shall remain in force and effect; and it is the express intent of the parties that this agreement shall be honored by them prior to approval by the Court and without the necessity of approval by the Court, subject to the issues reserved for decision to the Court and both parties agree to cooperate with any such decisions as promptly as possible.

- (3) Both parties thereafter filed petitions to modify raising various issues including custody and support. At the hearing held July 3, 2014, Mother's counsel advised the trial court that the parties were there for a final hearing on custody and support. Father's counsel objected, saying the 2013 agreement was a final order, and that parties were there to litigate the pending modification petitions filed subsequent to that agreement. The trial court, after meeting with the parties in chambers, determined that its January 16, 2013 order was preliminary in nature and not a final order. The trial court then ordered Father to pay \$142 in weekly support retroactive to January 1, 2012, the date the parties ceased to cohabit, and set Father's child support arrearage at \$17,645. The trial court also ordered Father to pay \$3,046.80 to Mother as reimbursement of work-related child care expenses dating back to January of 2012 and ordered Father to pay Mother's attorney's fees of \$19,000. Father appealed.
- (4) The appellate court reversed. As a threshold matter, it noted that there is no authority in Indiana's paternity statutes for a provisional order, such as there is in the dissolution statutes. *See* Ind. Code § 31-15-4-8. "Nonetheless, as the underlying principle behind both the paternity and the dissolution statutes is the best interests of the child, as there is no *prohibition* on provisional orders in the paternity statutes, and in recognition of the realities of litigation, we see no particular reason why a trial court could not make an appropriate provisional order in a paternity case."<sup>23</sup> (emphasis in original).
- (5) Regardless, the appellate court held, the agreement between the parties was not a provisional order. The parties presented to the trial court an agreement regarding custody, child support, and parenting time. There was no indication in their testimony or in the written agreement itself that it was intended to be a provisional agreement subject to further consideration. Although the parties did specifically reserve two issues for the trial court's future determination, neither of those issues substantively impacted custody, support, or parenting time as between Father and Mother. The appellate court continued:

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<sup>23</sup>*See* Footnote 24, *post* at 77, regarding provisional orders in paternity cases.

There is also no indication in the trial court's approval of the agreement that its approval was provisional only or that it contemplated any future action with regard to the issues of custody, support, or parenting time. No future hearing was set, and the chronological case summary describes the case as "disposed" as of January 16, 2013. If no disputes had arisen between the parties about these issues, there is no indication that the trial court would have taken these issues up again. Moreover, when disputes thereafter did arise, the parties filed petitions for *modification* of the 2013 Order, rather than requesting a final hearing. Further, Father's counsel noted at the outset of the July 3, 2014 hearing that they believed it was a modification hearing, and he questioned Father as to changes in circumstances since the 2013 Order. The trial court may now think that approving the agreement was improvident, but that does not change the essential nature of the 2013 Order: it was an order approving a full and final agreement between the parties as to custody, support, and parenting time.

- (6) *In re the Paternity of M.R.A.*, 41 N.E.3d at 294. Accordingly, IC § 31-14-5-11(a), providing that a child support obligation may include the period dating from the birth of the child, was inapplicable. Instead, the case involved a modification under IC § 31-16-8-1, which may not be ordered prior to the date on which the petition for modification is filed. The trial court erred in ordering support prior to the date on which Mother filed her petition for modification.
- (7) The trial court also erred in ordering Father to reimburse Mother for work-related child care expenses Mother had incurred from the time she and Father separated in January 2012 until March 2014, where the evidence did not support a finding that the expenses were reasonable or work-related. The appellate court noted that during the relevant time period, Mother's need for child care was totally obviated by Father's availability to watch the children. Moreover, the evidence did not support a finding that the expenses were work-related or income-producing — as Mother was either not working during that time or was working minimally, and Mother failed to connect the child care expenses to her hours of employment. The trial court's order in this regard was clearly erroneous.

## 2. Incarcerated Obligor -

- a. The Madison Circuit Court No. 5 erred in granting a noncustodial father's T.R. 60(B) motion to set aside a 2001 judgment issued by the Madison Circuit Court No. 2 denying the father's previous motion to modify as a result of his incarceration. Said

the appellate court, “Indiana has created avenues by which inmates may seek to revisit issues like child support, but collateral attack is not one of them. We reverse.” *State v. Gaw*, — N.E.3d — (Ind.Ct.App., No. 48A02-1504-PL-207, 12/10/15). (This case is also discussed in *Appeals and Litigation*, this outline.)

(1) In this case, Father in 2001 sought to reduce or abate his child support order due to his incarceration. The Madison Circuit Court No. 2 denied that petition. In 2014, Father filed in Madison Circuit Court No. 5 his motion to set aside Court 2's earlier denial of his petition to modify. The trial court granted the motion and the State appealed.

(2) Reversing, the appellate court rejected Father's attempt to circumvent Circuit Court 2's earlier ruling by filing a T.R. 60(B) motion in a different court years later. The appellate court noted the relief available to incarcerated obligors under *Lambert v. Lambert*, 861 N.E.2d 1176 (Ind. 2007), and *Clark v. Clark*, 902 N.E.2d 813 (Ind. 2009) (decided years after Circuit No. 2 denied Father's original petition to modify). “Of course, this accommodation must yield to the longstanding rule that a court may not retroactively modify child support obligations that have accrued. *Whited v. Whited*, 859 N.E.2d 657, 661 (Ind. 2007).”

- b. The Wells Circuit Court erred in modifying an incarcerated noncustodial father's child support obligation to \$12 per week plus \$30 per week toward the arrearage, where Father's total income while incarcerated was \$22 per month. In the appeal, the State agreed the order was beyond Father's ability to pay. The appellate court remanded for a determination of a proper order of current support and arrearage payment. Judge Riley dissented in part, saying Father should be relieved of all obligation to pay the arrearage until further order of the court. *Mills v. Fisher*, No. 90A05-1504-JP-176 (Ind.Ct.App. 9/21/15) (memorandum).

### 3. Retroactive Application -

- a. The Perry Circuit Court erred in finding that Wyoming was powerless to determine a noncustodial father's child support arrearage under the original order it had issued after everyone had left the state. Allowing Father credit for payments made to third parties in contravention of the order was not the same thing as retroactively modifying child support. *Hays v. Hays*, — N.E.3d — (Ind.Ct.App., No. 62A04-1501-DR-33, 1/12/16). (For a full discussion of this case, see *UIFSA*, this outline.) Said the appellate court:

[T]here is a difference between retroactive modification of a child support order and a credit toward a child support obligation. The Wyoming court heard evidence of Father's financial contributions toward the maintenance of the parties' children *by making payments* to various people and determined Father's current child support arrears *have been reduced* to \$0 (appellate court emphasis in original). The taking of evidence regarding payment and the finding that the payments reduced the arrearage indicates the Wyoming court was not retroactively modifying the arrearage, but was giving Father a credit toward his arrearage for payments made outside the strict parameters of the Decree (which required payment to the county clerk via income withholding order).

- b. The Marion Superior Court erred in failing to address a custodial mother's request for retroactive child support to the date on which the noncustodial father had filed his petition for dissolution. The appellate court remanded but added that it is "within the trial court's discretion to retroactively apply a child support award back to the date of filing or any date thereafter. *See Haley v. Haley*, 771 N.E.2d 743, 752 (Ind.Ct.App. 2002). On remand, we also direct the trial court to enter a finding concerning whether its child support order should be retroactive to the date of filing." *Carmer v. Carmer*, — N.E.3d — (Ind.Ct.App., No. 49A05-1411-DR-539, 10/30/15). (For a full discussion of this case, see *Guidelines*, this outline.)
- c. The Marion Superior Court erred when it modified a noncustodial father's child support payments retroactively, based on his notice of intent to relocate, before either he or the mother had filed a petition to modify child support. The trial court held that when Father filed notice of intent to move and his petition to modify custody, the court was also authorized to modify support. The appellate court disagreed, holding that the retroactive support order was contrary to law because the relocation statute requires a party to file a petition to modify a child support order. Judge Baker dissented, arguing that the majority's view of Indiana's relocation statutes was "overly technical." *Taylor v. Taylor*, 42 N.E.3d 981 (Ind.Ct.App. 8/13/15), *trans denied*.
  - (1) A 2007 permanent custody order following the parties' 2004 dissolution awarded the parties joint physical custody of their two children. In 2009, the trial court ordered Father to pay child support. Father filed on April 15, 2011 his notice of his intent to relocate from Indianapolis to Alabama. The relocation notice stated that Father "anticipated a change in custody, child support, and/or child support orders." The relocation notice also contained a statement informing Mother that she "may file a petition to modify a custody order, parenting time order, grandparent visitation order, or child support order." That same day, Father filed

a petition to modify child custody with respect to their lone, unemancipated child. Mother objected and filed her own emergency petition for temporary change of custody. Neither of Mother's filings requested a modification of child support.

- (2) Father moved from Indianapolis on or before May 4, 2011, but the issues remained unresolved in the trial court. On March 6, 2013, Mother filed a motion to, among other things, "Complete Pending Modification of Custody and Support." At hearings held in August and September 2014, the parties discussed their respective incomes from 2011 onward. On November 5, 2014, the trial court entered its order, modifying Father's child support obligation retroactive to May, 4, 2011. Father appealed. He argued that the court's retroactive modification of his child support payments was contrary to law because neither party had filed a petition to modify child support. Therefore, neither party had placed the issue of child support before the court at that time. At best, he argued, Mother's March 6, 2013 motion to "Complete Pending Modification of Custody and Support" is the earliest date on which the trial court could reasonably construe that anyone had filed a request to modify support.
- (3) The appellate court agreed with Father. Reversing the trial court, the appellate court observed that IC § 31-17-2.2-3 requires a relocation notice to contain a statement "that a nonrelocating individual may file a petition to modify a custody order, parenting time order, grandparent visitation order, or child support order." And, "*upon motion of a party*, the court shall set the matter for a hearing to review and modify, if appropriate, a custody order, parenting time order, grandparent visitation order, or child support order." IC § 31-17-2.2-1(b) (emphasis added). "Neither a relocation nor a change in child custody requires a child support modification." In sum, the appellate court said:

On April 15, 2011, when Father filed his relocation notice, as required by statute[,] he notified Mother that she could file a petition to modify child support. It was not until March 6, 2013, that Mother filed a motion that could be construed as a petition to modify child support. While Father anticipated a possible modification of his child support payments, anticipation is not equivalent to the petition and actual notice required before the issue can be litigated. There is no evidence in the record before us that Husband waived or acquiesced in a retroactive child support order. Thus, we reverse and remand with instructions to the trial court to recalculate Father's arrearage from March 6, 2013.

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4. Substantial Change of Circumstances / 20% Difference -

- a. The DeKalb Superior Court erred when, in adjudicating a noncustodial father's request to modify his child support obligation, it failed to consider that one child's emancipation constitutes a substantial and continuing change of circumstances that may warrant a modification, even if the amount of the change from the previous order is not more than 20%. *Patton v. Patton*, — N.E.3d — (Ind.Ct.App., No. 17A04-1503-DR-137, 12/11/15).
- (1) The parties' 2011 dissolution decree awarded Mother custody of the parties' three children and required Father to pay an in-gross child support order for all three. In 2014, Father sought a reduction in his support obligation based on one of the children's emancipation. The trial court denied Father's petition, finding that Father's support order would not decline by more than 20% from the existing order. Father appealed.
  - (2) Reversing, the appellate court observed that there are two independent grounds to modify a support obligation under IC 31-16-8-1: (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or (2) upon a showing that: (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.
  - (3) Because the difference was not more than 20% from Father's existing order, Father was required to prove a substantial and continuing changes of circumstances making the terms unreasonable. Finding that an emancipation of a child covered by an in-gross order for multiple children constitutes such a substantial and continuing change, the court remanded the case back to the trial court with instructions to lower Father's support obligation.
- b. The St. Joseph Superior Court did not err in finding that a substantial and continuing change of circumstances existed where the noncustodial father no longer exercised overnight parenting time because of his military deployment overseas and no longer reimbursed the custodial mother for her child care expenses. Father argued that because the parties' incomes were unchanged since entry of their prior order, no substantial and continuing change of circumstances existed. *Whitlatch v. Wolfe*, No. 71A05-1502-DR-64 (Ind.Ct.App. 9/9/15) (memorandum). (See also *Guidelines*, this outline.)

**L. Paternity -**1. Provisional Orders in Paternity Cases -

- a. The Hendricks Circuit Court erred in failing to consider the parties' 2013 agreed entry a final order of the court with regard to paternity, custody, parenting time and child support. It therefore erred in ordering Father to pay child support prior to 2013 upon petitions to modify subsequently filed by both Mother and Father. In so holding, the appellate court opined that while provisional orders are not expressly provided for under Indiana's paternity statutes, neither are they expressly prohibited. *In re the Paternity of M.R.A.*, 41 N.E.3d 287 (Ind.Ct.App. 7/16/15). (This case is more fully discussed in *Modification*, this outline.) Said the appellate court:

Provisional orders are temporary in nature and designed to maintain the status quo while issues are more fully developed. Notably, there is no authority in the paternity statutes for a provisional order, such as there is in the dissolution statutes. *See* Ind. Code § 31-15-4-8. Nonetheless, as the underlying principle behind both the paternity and the dissolution statutes is the best interests of the child, as there is no *prohibition* on provisional orders in the paternity statutes, and in recognition of the realities of litigation, we see no particular reason why a trial court could not make an appropriate provisional order in a paternity case.

*In re Paternity of M.R.A.*, 41 N.E.3d at 293 (citations omitted, emphasis in original).<sup>24</sup>

- b. The Tippecanoe Circuit Court did not err in entering a provisional order in a paternity action. Although there exists no express statutory language regarding provisional orders in paternity cases, such accords with a trial court's inherent authority to make proper judgments. *In re Paternity of C.A.*, No. 79A04-1502-JP-79 (Ind.Ct.App. 2/10/16) (memorandum).
- (1) The appellate court observed that the matter had been squarely decided by *In re Paternity of C.J.A.*, 3 N.E.3d 1020, 1029-30 (Ind.Ct.App. 1/27/14), *opinion vacated*. "Although our earlier opinion was vacated, it was vacated on grounds not affecting the substance of our holding. We therefore adopt this language from

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<sup>24</sup>In a footnote, the appellate court remarked as follows: "*In re Paternity of C.J.A.*, 3 N.E.3d 1020, 1030 (Ind.Ct.App. 2014) squarely addressed this very issue and determined that issuing a provisional order in a paternity action was appropriate and consistent with a trial court's statutory authority. This decision was vacated, however, when the Indiana Supreme Court granted transfer and dismissed the appeal. *In re Paternity of C.J.A.*, 12 N.E.3d 876 (Ind. 2014)."

our earlier opinion and again hold that the trial court did have authority to enter a provisional order in the paternity action.” Said the appellate court (internal citations and quotations omitted):

Provisional orders are designed to maintain the status quo of the parties. A provisional order is temporary in nature and terminates when the final dissolution decree is entered or the petition for dissolution is dismissed. Ind. Code § 31-15-4-14. Great deference is given to the trial court's decision in provisional matters, as it should be. The trial court is making a preliminary determination on the basis of information that is yet to be fully developed. A provisional order is merely an interim order in place during the pendency of the dissolution proceedings, which terminates when the final dissolution decree is entered.

As in dissolution proceedings, trial courts are called upon to make weighty decisions concerning the care and custody of a child in paternity actions. To that end, Indiana Code section 31-14-10-1 provides that after paternity of a child is established, “the court shall, in the initial determination, conduct a hearing to determine the issues of support, custody, and parenting time.” The trial court “shall determine custody in accordance with the best interests of the child. In determining the child's best interests, there is not a presumption favoring either parent.” IC § 31-14-13-2. In making a custody determination, the trial court “shall consider all relevant factors. . .” The trial court must also determine reasonable parenting time rights for the noncustodial parent. *See* I.C. § 31-14-14-1.

Because these issues may reasonably require multiple hearings to resolve, entering a provisional order in a paternity proceeding concerning parenting time and custody is quite appropriate while relevant issues are developed for resolution in a final hearing, if necessary, and a final order. Moreover, issuing a provisional order in a paternity proceeding is consistent with Indiana Code section 33-28-1-5, which allows trial courts to “[m]ake all proper judgments, sentences, decrees, orders, and injunctions, issue all processes, and do other acts as may be proper to carry into effect the same, in conformity with Indiana laws and Constitution of the State of Indiana.” *See also* Ind. Code § 33-29-1-4 (stating that the “judge of a standard superior court ... has the same powers relating to the conduct of business of the court as the judge of the circuit court of the county in which the standard superior court is located”).

2. Retroactive Support - The Warrick Superior Court did not err when, in adjudicating a man's paternity and allocating college expenses for an 18-year-old child, it refused the mother's request for retroactive child support back to the child's date of birth. *Mazzotti v. Dill*, No. 87A01-1506-JP-725 (Ind.Ct.App. 2/24/16) (memorandum).
  - a. In support of her argument for retroactive support pursuant to IC § 31-14-11-5,<sup>25</sup> Mother cited *In re McGuire-Byers*, 892 N.E.2d 187 (Ind.Ct.App. 2008), *trans. denied*, in which the appellate court held that the trial court did not abuse its discretion by ordering the father to pay child support retroactive to the child's birth. *Id.* at 192.
  - b. The appellate court distinguished *McGuire-Byers*, saying that there, the father disappeared and made himself impossible to locate. In the instant action, Father had paid significant support throughout the child's life and the child had resided with him between 2013 and 2014. Moreover, the appellate court said, "*McGuire-Byers*' holding that it wasn't an abuse of discretion to order retroactive support payments does not mean that it is an abuse of discretion to deny it." The trial court did not err in denying Mother's request for retroactive support.
3. Setting Aside Paternity -
  - a. The Hamilton Circuit Court properly denied a mother's petition to set aside a judgment of paternity and support on grounds of fraud, where the mother knew about the alleged fraud at its inception, participated in it herself, failed to challenge the decree on this basis in a direct appeal, and cited no relevant authority for the proposition that she may disestablish the father's paternity. *In re Paternity of Anderson*, No. 29A05-1504-JP-161 (Ind.Ct.App. 8/7/15) (memorandum).
    - (1) In December 2005, Mother gave birth to a child out of wedlock. At that time, Mother and Father executed a paternity affidavit stating that Father is Child's natural father. Initially, Mother and Father lived together with Child. When the cohabitation ended, the parties agreed that Child would live with Mother.
    - (2) In 2008, Father filed his petition to establish paternity, and in 2009 filed an emergency petition for temporary custody. Eventually, in December 2014, the trial court awarded primary custody to Father. The trial court denied Mother's

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<sup>25</sup>IC § 31-14-11-5, governing retroactive support in paternity actions, provides: "The support order: (1) may include the period dating from the birth of the child; and (2) must include the period dating from the filing of the paternity action."

request for DNA testing. Mother did not appeal. In March, 2015, Mother filed a motion to set aside the paternity decree, asserting that she signed the paternity affidavit “as a matter of necessity” because she “was in dire financial straits,” that she and Father never had sexual relations, and that Father knew that he was not Child's biological father. The trial court denied her motion and Mother appealed.

(3) The appellate court affirmed, saying:

Here, Mother was aware of Father's alleged fraud in signing the paternity affidavit when Child was born in 2005, and she herself participated in the alleged fraud by also signing the affidavit. Moreover, Mother remained aware of the alleged fraud when the trial court issued the paternity decree in 2014, yet she did not file a direct appeal and challenge the decree on that basis. And furthermore, Mother cites no relevant authority for the proposition that she may compel DNA testing and disestablish Father's paternity under these circumstances. In sum, Mother has failed to show that she is entitled to the extraordinary remedy of relief from the paternity decree.

(4) Following remand, the trial court issued an order awarding Father custody and restricting Mother's parenting time based on her alienating behaviors. Mother again appealed. She argued that the trial court's order for supervised parenting time was an abuse of discretion because it was based on a voidable paternity affidavit. Specifically, Mother maintained that the paternity is voidable because she had stated under oath “that she never had sex with Father, then the signature of Father is not valid[.]”

(5) The appellate court rejected her contentions, saying not only was this argument raised for the first time on appeal and thus waived for appellate review, the appellate court had already considered Mother's assertions of fraud and voidability with respect to the paternity affidavit in the prior appeal. *Ingco v. Anderson, Jr.*, No. 29A05-1507-JP-833 (Ind.Ct.App. 2/18/16) (memorandum).

b. The St. Joseph Probate court erred in granting a father's request to set aside a paternity judgment after the parties had executed a paternity affidavit and the mother had repeatedly affirmed the father's paternity at trial. *In re Paternity of A.D.*, No. 71A03-1502-JP-58 (Ind.Ct.App. 8/4/15) (memorandum).

(1) The appellate court observed that the paternity affidavit had not been set aside, and that "provisions of Title 31, Article 14 provide the means to establish

paternity, not to disestablish it. If we were to hold otherwise, our courts could create a 'filius nullius,' which is exactly what paternity statutes were created to avoid." The appellate court also opined that being declared a "filius nullius" would undoubtedly carry with it countless detrimental financial and emotional effects.

- (2) In addition, the appellate court acknowledged that due to the mother being less than eighteen at the time of the child's birth, the child's paternal grandmother was appointed as the child's guardian. The trial court apparently set aside the paternity judgment, which had been filed by the State a year after the child's birth, on grounds that the guardian had not been notified of the paternity proceedings in the case, citing *White v. White*, 796 N.E.2d 377, 379 (Ind.Ct.App. 2003) (holding that a guardian who had physical custody of a child was entitled to notice of a petition to change custody).
- (3) The appellate court distinguished *White*, noting that in the instant action there was no evidence that the guardian had ever been awarded physical custody or was entitled to receive child support payments from either parent. Moreover, the appellate court said, affirming the trial court's order setting aside the judgment would effectively modify Father's order retroactively, contravening Indiana law.

#### **M. Social Security -**

1. Credit Against Arrearage - The Lake Circuit Court did not err in awarding credit against a noncustodial father's child support arrearage, even though he had agreed at trial to the custodial mother's \$21,847.44 arrearage figure as of July 20, 2014. The appellate court opined that Father had merely acquiesced to Mother's arrearage figure based on what he knew he had paid, but Father had not contemplated the Social Security dependent benefits Mother received that had more than liquidated his arrearage and interest. *Russell v. Betancourt*, No. 45A03-1507-DR-1011 (Ind.Ct.App. 2/18/16) (memorandum).
  - a. The parties' 2003 dissolution decree awarded Mother custody of the parties' child and required Father to pay \$100 in weekly support, plus \$20 per week toward the arrearage that accrued under a provisional order. Father began to receive Social Security disability ("SSD") benefits in 2007 following a motorcycle accident in 2006. Sometime thereafter, Mother started to receive SSD payments on behalf of the child, whose portion of the SSD payments totaled \$209.77 per week. Other than this, however, Father only sporadically paid toward his child support arrearage.

- b. On October 26, 2009, the trial court entered an order following various motions the parties had filed. The court determined that Father owed no current child support in light of the SSD dependent benefits but set Father's arrearage at \$10,204.00. It ordered Father to pay \$40 per week on the arrearage and also assessed interest.
- c. Custody changed to Father on July 20, 2014. At that point, Father began to receive the SSD payments on behalf of the child. At another hearing held on March 24, 2015, the parties informed the trial court that they had agreed to certain matters. Among them was that Father's arrearage for child support and uninsured medical expenses was \$21,847.44 as of July 20, 2014.<sup>26</sup> The trial court then heard evidence regarding Mother having received the child's portion of the SSD payments.
- d. On April 28, 2015, the trial court entered an order finding that Father's child support obligation and arrearage had been satisfied by Mother receiving the child's portion of Father's SSD payments. Mother appealed, arguing that the parties had agreed to Father's \$21,847.44 arrearage. The trial court thus erred, she argued, in finding that Father had no support arrearage as of April 28, 2015.
- e. The appellate court affirmed. It observed that pursuant to Guideline 3(G)(5)(a)(2) provides that "Social Security benefits received by a custodial parent, as representative payee of the child, based upon the earnings or disability of the noncustodial parent *shall* be considered as a credit to satisfy the noncustodial parent's child support obligation . . ." (emphasis in original by appellate court). Accordingly, Father was entitled to a credit against his support obligation.
- f. The appellate court found that what the trial court did was not improper. "Although the parties may stipulate to certain facts, they may not stipulate to questions of law. *See Pond v. McNellis*, 845 N.E.2d 1043, 1055 (Ind.Ct.App. 2006) (noting that questions of law are beyond the power of agreement by the attorneys or parties, and any agreement purporting to stipulate to a question of law is a nullity) (quoting *Price v. Freeland*, 832 N.E.2d 1036, 1043 (Ind.Ct.App. 2005))."
- g. Moreover, Father's "agreement" was nothing more than his mere acquiescence to Mother's allegation of his arrearage, which did not consider the derivative SSD benefits. The appellate court noted that Guideline 3(G)(5)(b)(2) provides that if an arrearage exists, "[t]he amount of the benefit which exceeds the child support order *may* be treated as an ongoing credit toward an existing arrearage" (emphasis added by appellate court). While this language is permissive, the trial court did not err in

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<sup>26</sup>The opinion's reference to 2015 appears to be a typographical error.

allowing Father a credit against his arrearage under the facts of this case. The appellate court explained as follows:

. . . Mother was receiving over double the amount of Father's child support obligation. We therefore decline to hold that the trial court erred in applying the \$109 excess to Father's arrearage for child support and uninsured medical expenses. This is especially true given that Father appears to be dependent upon his own SSD benefits and pension for his own support. The trial court could reasonably conclude that requiring Father to pay even more money, though \$209.77 per week of his SSD benefits were already going toward the support of Child, would be unjust under the circumstances.

- h. Thus, despite the fact that the parties stipulated that Father was in arrears in his payment of child support and uninsured medical expenses, the trial court properly applied the law to the facts before it. It did not err in determining that the SSD benefits applied automatically to satisfy Father's child support obligation and the excess applied to satisfy his arrearage. In sum, the trial court did not err in finding that Father's child support arrearage had been satisfied.

#### **N. Statute of Limitations -**

1. Statutes of Limitation vs Nonclaim Statutes - An ordinary statute of limitations can be waived and is subject to equitable tolling, but a nonclaim statute is not. A nonclaim statute is one which creates a right of action and has inherent in it the denial of a right of action. It imposes a condition precedent—the time element which is part of the action itself. While nonclaim statutes limit the time in which a claim may be filed or an action brought, they have nothing in common and are not to be confused with general statutes of limitation. The former creates a right of action if commenced within the time prescribed by the statute, whereas the latter creates a defense to an action brought after the expiration of the time allowed by law for bringing of such an action. Thus, a statute is a nonclaim statute when there is clearly evidenced a legislative intent in the statute to not merely withhold the remedy, but to take away the right of recovery where a claimant fails to present his claim as provided in the statute. While equitable principles may extend the time for commencing an action under statutes of limitations, nonclaim statutes impose a condition precedent to the enforcement of a right of action and are not subject to equitable exceptions. *In re Adoption of K.M.*, 31 N.E.3d 533, 537-38 (Ind.Ct.App. 4/28/15) (citations omitted).

**O. Surname of Child -**

1. Sufficiency of the Evidence - The Marion Circuit Court did not abuse its discretion in granting a father's request to change the last name of the parties' child to his under the facts and circumstances of the case. *In re the Paternity of J.A.S.*, No. 49A05-1407-JP-345 (Ind.Ct.App. 5/18/15) (memorandum). (See also *Arrearage*, this outline.)
  - a. Mother gave birth to the child out-of-wedlock in November 2011. The following month, Father filed his petition to establish paternity, parenting time, child support and related matters. His petition included a request for DNA testing. On August 15, 2012, the trial court entered its Preliminary Agreed Order, which established paternity, awarded Mother primary physical custody of the child, granted Father parenting time and required Father to pay \$246 in weekly child support. The order stated that the issue of the child's last name and all other issues would be heard at the final hearing.
  - b. At the evidentiary hearings held in March 2013 and January 2014, the parties presented evidence and argument regarding the child's last name, parenting time, and child support. On June 25, 2014, the court entered a final order addressing all issues.
  - c. With regard to Father's request to change the child's surname from Mother's to his, the trial court found as follows: (1) Father wanted to sign the paternity affidavit at the hospital but Mother would not give her permission; (2) Father testified that his surname has a family history, and the child should not be excluded from that history; (3) Father did not want to have the conversation later with the child as to why he does not have his Father's surname like other boys of his age, and felt it important for his son to not be confused with other kids that have their father's surname; (4) Father testified that the child having Father's surname would help connect him with his half sibling on Father's side; (5) the child did not presently have any siblings on Mother's side of the family with Mother's surname but has a younger biological sibling with Father that has Father's surname; (6) the child had been baptized in the Catholic faith with the Mother's surname at two months old; and (7) the child was almost three years old at the time of the order, and there was no evidence presented that the child could not learn his father's surname.
  - d. The trial court granted Father's request to change the child's surname to his. Mother appealed, saying the trial court relied on inappropriate factors in changing the child's surname.

- e. The appellate court affirmed. It first observed that when a surname change is sought in a paternity action, among other factors the trial court may properly consider are: (1) whether the child holds property under a given name; (2) whether the child is identified by public and private entities and community members by a particular name; (3) the degree of confusion likely to be occasioned by a name change; (4) the child's desires if the child is of sufficient maturity; (5) the birth and baptismal records of the child; (6) the school records of older children; (7) health records; and (8) the impact of a name change when there are siblings involved whose names would not be changed. *See C.B. v. B.W.*, 985 N.E.2d 340, 348 (Ind.Ct.App. 2013), *trans. denied*.
- f. On balance, the trial court's decision was not clearly against the logic and effect of the facts and circumstances before it. The appellate court noted that in addition to the trial court's findings of fact, the evidence showed that Father and Mother shared joint legal custody, and that Father had petitioned to establish paternity approximately one month after the child's birth. In that petition, the appellate court noted, Father had asked the court to award him reasonable parenting time and order him to pay Mother reasonable child support.

#### P. UIFSA -

1. Duration of Support - A Connecticut trial court properly applied Florida law in determining that a noncustodial father's child support obligation should continue indefinitely for his adult autistic child, the Connecticut Supreme Court ruled. It was of no moment that Connecticut had modified Florida's child support order after everyone had moved to Connecticut following the parties' 2002 dissolution. *Studer v. Studer*, — A.3d — (Conn., No. SC 19508, 2/23/16).
  - a. The parties' 2002 Florida dissolution decree awarded Mother custody and required Father to pay child support until the child "reaches the age of [eighteen], become[s] emancipated, marries, dies, or otherwise becomes self-supporting" or "until [the] age [of nineteen] or graduation from high school whichever occurs first, if a child reaches the age of [eighteen] and is still in high school and reasonably expected to graduate prior to the age of [nineteen]." Both parties were aware that the child was autistic at the time of the dissolution, and the Florida judgment specifically referenced the child's condition.
  - b. Following the dissolution, both parties and the child relocated to Connecticut. In 2003, Father registered the Florida child support order in Connecticut and moved to modify it. The court granted Father's motion and reduced his child support obligation. In 2010, Mother moved for post-majority support in Connecticut. Mother

claimed that, as a result of the child's autism, the child would not graduate from high school until after her twenty-first birthday. Consequently, Mother claimed that the child was entitled to support beyond her eighteenth birthday under Florida law. Applying Florida law, the trial court granted Mother's motion for post-majority support and ordered Father to continue paying child support until the child's high school graduation.

- c. Before the child's graduation from high school in June, 2013, Mother filed a second motion for post-majority support seeking to extend Father's child support obligation indefinitely beyond the child's high school graduation. The trial court concluded that Florida law controlled the duration of Father's child support obligation and ordered him to pay child support indefinitely.
  - d. Father appealed. He argued that because Connecticut had modified the Florida order, Connecticut, not Florida, law controlled the duration of support. Since Connecticut law does not allow for post-majority support past a child's 21<sup>st</sup> birthday, he continued, the trial court erred in requiring him to pay child support indefinitely.
  - e. The Supreme Court affirmed in a lengthy but well-worded decision. The high court observed that under UIFSA, Florida had issued the original controlling order in 2002. The duration of support was thus governed by Florida law, and Connecticut's subsequent support modifications did not impact that fact. Connecticut law on post-majority support was thus irrelevant, as was the fact that Connecticut had determined Father's consolidated arrearage. The high court went on to say that post-majority support was available under Florida law. The trial court did not err in finding that Florida's duration of support controlled and in requiring Father to pay indefinite support for his adult disabled child.
2. Jurisdiction to Enforce When All Parties Have Left the State - The Perry Circuit Court erred in finding that Wyoming was powerless to determine a noncustodial father's child support arrearage under the original order it had issued after everyone had left the state. Allowing Father credit for payments made to third parties in contravention of the order was not the same thing as retroactively modifying child support. Moreover, Mother's challenge to the Wyoming's arrearage determination should have been by way of appeal in Wyoming, not through collateral attack in an Indiana tribunal. Under the facts of this case, Indiana was required to give Wyoming's determination that Father owed no child support arrearage full faith and credit under UIFSA and FFCCSOA. *Hays v. Hays*, — N.E.3d — (Ind.Ct.App., No. 62A04-1501-DR-33, 1/12/16).

- a. The parties' 2008 Wyoming dissolution decree awarded Mother custody of their three children, determined Father's child support obligation and set his arrearage. Father thereafter relocated to Wisconsin and Mother to Indiana. Father filed petitions in both Wisconsin and Wyoming seeking custody of all three children. In 2011, Wyoming transferred custody jurisdiction to Wisconsin. In 2012, Mother registered the Decree and petitioned for modification of child support in Indiana, where she and two of the children were residing. The parties agreed Wisconsin would have jurisdiction regarding the oldest child, who was living with Father, and Indiana would have jurisdiction regarding the two younger children, who were living with Mother. Father then filed a petition to determine his child support arrearage in the Wyoming court.
- b. The Wyoming court — after a hearing Mother did not attend<sup>27</sup> — found in 2013 that Father had made child support payments directly to third parties who were caring for his children and adjudicated his arrearage to be \$0.00. Father was eventually given legal custody of all three children. In December 2014, on Mother's Trial Rule 60(B) motion, the Indiana court declared the Wyoming order on Father's arrearage null and void. The trial court ruled that after everyone had left Wyoming, that state no longer retained continuing exclusive jurisdiction and thus could not adjudicate Father's request to determine his child support arrearage. Father appealed.
- c. Reversing, the appellate court observed that the 2013 Wyoming arrearage determination was entitled to full faith and credit under Article IV, § 1 of the U.S. Constitution.

[W]hen a court in a sister state fully considers and finally determines jurisdiction, even if the determination is erroneous, we must give the judgment full faith and credit. Here, the Wyoming court order states the court conducted a thorough inquiry of the other jurisdictions potentially involved in this matter and concluded that it does have jurisdiction over the child support arrears determination. Indiana may not reconsider the Wyoming court's determination regarding jurisdiction.

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<sup>27</sup>Mother was afforded notice and opportunity to be heard in the Wyoming arrearage proceeding. The Wyoming trial court noted in its order: "The court understands it was financially not possible for [Mother] to travel to Wyoming but she could have appeared by telephone. The court is aware that [Mother] did, in fact, telephone with respect to that hearing, albeit after the hearing had concluded and too late for her to participate. Beyond that belated telephone call, however, [Mother] did nothing with respect to this case. She did not file an answer or provide any information that could assist the court in its determination."

- d. Such was consistent also with UIFSA and FFCCSOA. With regard to UIFSA, the appellate court opined:

“A basic principle of UIFSA is that throughout the process the controlling order remains the order of the tribunal of the issuing state . . . until a valid modification. The responding tribunal only assists in the enforcement of that order.” UIFSA § 604 cmt. The law of the responding state controls with regard to enforcement procedures, but the law of the issuing state governs the nature, extent, amount, and duration of current payments; the computation and payment of arrearages and interest; and the existence and satisfaction of other obligations under the child support order. UIFSA § 604; *accord* Ind. Code § 31-18.5-6-4. “Thus, the calculation of whether the obligor has fully complied with the payment of current support, arrears, and interest on arrears is also the duty of the issuing tribunal. . . . [T]he law of the issuing state . . . governs whether a payment made for the benefit of a child . . . should be credited against the obligor's child support obligation.” UIFSA § 604 cmt.

- e. The appellate court acknowledged that after everyone had left Wyoming, that state no longer retained subject matter jurisdiction to modify support, noting that “[t]he time to measure whether the issuing tribunal has continuing, exclusive jurisdiction to modify its order, or whether the parties and the child have left the state, is explicitly stated to be at the time of filing a proceeding to modify the child-support order.” UIFSA § 205 cmt. It said, however, that awarding credit to Father for payments made directly to third parties was not tantamount to modifying support.

[T]here is a difference between retroactive modification of a child support order and a credit toward a child support obligation. The Wyoming court heard evidence of Father's “financial contributions toward the maintenance of the parties' children *by making payments* to various people” and determined Father's “current child support arrears *have been reduced* to \$0.” (appellate court emphasis in original). The taking of evidence regarding payment and the finding that the payments reduced the arrearage indicates the Wyoming court was not retroactively modifying the arrearage, but was giving Father a credit toward his arrearage for payments made outside the strict parameters of the Decree (which required payment to the county clerk via income withholding order).

- f. The appellate court went on to say that it was not for an Indiana court to decide if the Wyoming order was in error. Mother's recourse was through the appellate process in Wyoming, not through a collateral attack in Indiana of a sister state's order. The trial court erred in granting Mother's TR 60(B) motion for relief.

#### **IV. NEWS OF THE WILD, WACKY AND JUST PLAIN INTERESTING**

A. Idaho approves child support bill, removing treaty roadblock. 5/18/15.

1. An Idaho child support bill that was initially rejected over concerns that it could force the state to follow Islamic law, and which endangered American participation in an international treaty, passed on Monday after the governor called legislators back for a special session. The April vote had national implications, potentially cutting American children off from the benefits of the treaty. At least 32 countries, along with the European Union, have ratified the agreement. It also had major implications in Idaho: a refusal to comply with national guidelines, said federal officials, would have meant the loss of about \$46 million in federal funds, effectively dismantling the state's child support enforcement system and cutting funds for programs, like Head Start, that help low-income children. "It's sovereignty issue," said State Representative Kathleen Sims, a Republican who twice voted against the bill, adding that she was concerned about "involving foreign nations in our laws."
2. <http://www.nytimes.com/2015/05/19/us/idaho-approves-support-bill-removing-treaty-roadblock.html>

B. Child Support Agency writes to dad — 37 times in one day. 5/28/15.

1. CANBERRA, AUSTRALIA — A man who received 37 letters from the Child Support Agency in one day is not an isolated case, with the public service outfit battling for years to control a computer system that just cannot stop spewing out correspondence. Complaints bureau [said] the Commonwealth Ombudsman has been trying for at least six years to stem the tsunami of paper coming from the Child Support Agency to fathers with family law groups describing the volume of letters as "staggering." The West Australian man, who cannot be named for legal reasons, says he has been deluged with thousands of letters from the agency since his marriage broke up in 2010 with the frenzy of correspondence reaching a crescendo in 2013 when he was hit with 228 "assessment administrative notices" in just three months.
2. <http://www.canberratimes.com.au/national/public-service/child-support-agency-writes-to-dad--37-times-in-one-day-20150528-ghbpae.html>

C. The science of how women can have twins with two different fathers. 5/8/15.

1. It's rare, but not impossible. Paternity tests usually give a straightforward answer—a man either is or isn't the father. But, for a woman in New Jersey suing for child support,

things are a little more complicated. It turns out the man she thought was the father of her twins was only the father of one of the pair. That result is rare—so rare that the condition has the improbable name “superfecundation.” But it turns out a lot of things can happen when it comes to birthing multiple children at the same time. Multiple births include “superfecundation twins” — when a woman has intercourse with two different men in a short period of time while ovulating, it’s possible for both men to impregnate her separately. In this case, two different sperm impregnate two different eggs. This is what happened to the woman in New Jersey. One child was the product of her relationship with the man she brought to court, and the other child was conceived during a separate encounter with another man. While this phenomenon is rare, research suggests it does happen from time to time. A 1992 study found that superfecundation twins were at the root of more than 2% of paternity suits in the United States involving twins.

2. <http://time.com/3851843/twins-complications/>

D. Jury convicts father accused of tossing daughter off cliff to avoid support payments. 5/13/15.

1. LOS ANGELES, CA – A father was convicted Wednesday of first-degree murder for tossing his 4-year-old daughter off a sea cliff nearly 15 years ago to get revenge against the girl’s mother and avoid support payments. Cameron Brown showed no emotion as the verdict in the long-running case was read in Los Angeles Superior Court, while the mother of Lauren Sarene Key breathed heavily and began crying in the gallery. Brown, 53, faces a mandatory term of life in prison without parole when sentenced June 19 for the murder and special circumstances that he lay in wait and killed the girl for financial gain. “Judge, I’m innocent, I have no comment,” Brown said when asked about the sentencing date. The former airline baggage handler hurled the girl off the 120-foot cliff in November 2000 because he never wanted the child and was locked in a bitter dispute with her mother over child support and custody, prosecutors said. Brown told police the girl tripped and fell as she ran toward the cliff’s edge at Inspiration Point in Rancho Palos Verdes. Defense lawyer Aron Laub argued that his client was a bad dad, but not a murderer and asked jurors to convict him of manslaughter.
2. <http://sacramento.cbslocal.com/2015/05/13/jury-convicts-father-accused-of-tossing-daughter-off-cliff-to-avoid-custody-payments/>

E. Gun licence discrimination claim by Justice Neville Abolish Child Support and Family Court dismissed by VCAT. 6/17/15.

1. MELBOURNE, AUSTRALIA — A man who maintained Knox Police wouldn’t give him a gun licence because of his unusual name — Justice Neville Abolish Child Support

and Family Court — has had his discrimination claim dismissed. Victorian Civil and Administrative Tribunal Judge Marilyn Harbison, on handing down her decision, said the police rejected the man’s application because he did not use his birth name of Neville Brewer, and would have investigated just as closely if someone using the name of “Mickey Mouse” had applied for a gun licence. Mr. Brewer, who changed his name legally to Justice Neville Abolish Child Support and Family Court in 1996 applied for the firearms licence in this name at the Knox Police complex in Wantirna South early in 2013. However, police dug deeper into his application because of the unusual name and knocked Mr. Brewer back for the firearm licence. It was recorded at the VCAT hearing that when the police investigated records on the name Justice Neville Abolish Child Support and Family Court, it was revealed he’d once been the subject of an intervention order. Tribunal documents also showed Mr. Brewer had been involved in a psychiatric incident where he was hospitalized in 1994.

2. [http://www.heraldsun.com.au/leader/outer-east/gun-licence-discrimination-claim-by-justice-neville-abolish-child-support-and-family-court-dismissed-by-vcap/news-story/6aa8754493ee1f04b02a709989e3924d?=-](http://www.heraldsun.com.au/leader/outer-east/gun-licence-discrimination-claim-by-justice-neville-abolish-child-support-and-family-court-dismissed-by-vcap/news-story/6aa8754493ee1f04b02a709989e3924d?=)

F. Torry Hansen may be \$30K behind in payments to Russian child. 6/10/15.

1. A former Shelbyville resident who sent her adopted child back to Russia in 2010 may have to pay up to \$30,000 in back child support, following a decision by the Tennessee Court of Appeals. Torry Hansen has not made monthly court-ordered payments of \$1,000 since early 2013, according to documents in the case. Hansen had adopted Justin, born as Artem Vladimirovich Saveliev, from Russia in 2009. But in April 2010, after experiencing difficulties with the boy, she placed him on a one-way flight to his home country, seeking to annul the adoption. The case sparked worldwide outrage and an international incident, with Russia imposing a ban on adoptions by Americans in 2013.
2. <http://www.t-g.com/story/2203417.html>

G. Woman pistol-whips ex-husband when he offers \$200 for child support. 8/24/15.

1. CLEVELAND, OH — A woman pistol-whipped her ex-husband during a meeting to collect child support after the man offered her only \$200, according to a Cleveland police report. The incident happened Friday night at East 30th Street and St. Clair Avenue. The man told police that he walked up to his ex-wife's car to give her \$100. When she said that wasn't enough, he pulled out another \$100. The woman pulled out a revolver and struck him over the head in front of their two children, according to the report. The man fell to the ground and held onto the car door. His ex-wife grabbed the cash and drove

away, dragging the man about 50 feet, the report said. The man took himself to Cleveland Clinic for treatment. The ex-wife, who lives in Pennsylvania, has not been arrested. No charges have been filed as of Monday.

2. [http://www.cleveland.com/metro/index.ssf/2015/08/woman\\_pistol-whips\\_ex-husband.html](http://www.cleveland.com/metro/index.ssf/2015/08/woman_pistol-whips_ex-husband.html)

H. Best Footnote Ever: a lawyer downplays a Congressional bill's importance in arguments, cites Schoolhouse Rock. 9/2/15.

1. In a bankruptcy pleading, a lawyer responded to the claim by his opponent that Congress supported his position, saying “Finally, and surprisingly, the Defendant claims that the United States Congress is on its side. The Defendant states in the Defendant’s Motion to Dismiss that ‘Congress has recognized’ that parents receive reasonably equivalent value when paying their adult child’s college tuition. In reality, all that has happened is two members of the House of Representatives have filed a bill. The bill referenced by Defendant’s counsel is just a bill. It is not the law.” The footnote said “*See* <https://www.youtu.be/tyeJ55o3E10> I’m Just a Bill (Schoolhouse Rocks!)” (The updated URL is <https://www.youtube.com/watch?v=tyeJ55o3E10>.)

2. <https://twitter.com/katystech/status/639064969397555200>

I. Teen does not have to visit dad, but appeals court suspends child support. 9/15/15.

1. BROOKLYN, NY - A Brooklyn judge had discretion to determine that a 13-year-old “vehemently opposed” to visiting his father should not be compelled to do so, a New York appeals court ruled. But, under the circumstances of this case, the judge should have granted the pro se father’s alternative motion to suspend child-support payments, the Appellate Division, Second Department, said in its September 2 decision. The court cited the mother’s “inappropriately hostile” attitude toward the father, Robert Coull, who had not seen the boy since early 2010 and was not kept informed about his schooling and medical history. “The forensic evaluator testified that there was a ‘pattern of alienation’ resulting from the mother’s interference with a regular schedule of visitation,” the appeals court wrote, noting that the mother, Pamela Rottman, who was also pro se, had “many times” said she “would do whatever it takes” to prevent visitation.

2. [http://www.abajournal.com/news/article/teen\\_does\\_not\\_have\\_to\\_visit\\_dad\\_but\\_appeals\\_court\\_suspends\\_child\\_support](http://www.abajournal.com/news/article/teen_does_not_have_to_visit_dad_but_appeals_court_suspends_child_support)

J. Alaska court erupts in laughter as right-wing extremist asks to be deported to heaven. 9/28/15.

1. DILLINGHAM, AK — An Alaskan “sovereign citizen” drew laughs during a court appearance on felony child support charges. Kevin Francis Ramey, who goes by the name “Birdman” in a series of YouTube videos and other online postings, was indicted on criminal nonsupport charges, reported KDLG-AM. The 57-year-old Ramey, who claims he is not required to follow U.S. or state laws as a so-called sovereign citizen, was arrested after he failed to show up last week for his arraignment on felony charges. The presiding judge asked Ramey if he understood his rights, and the radio station reported that courtroom observers laughed at his convoluted response. “It says if you’re not a U.S. citizen you could be deported,” Ramey said. “I know I have three citizenships: No. 1, in heaven, No. 2, in America, No. 3, in California — and that my primary citizenship, is of course, in heaven. So I was kind of wondering, are you guys going to deport me to heaven?”
2. <http://www.rawstory.com/2015/09/alaska-court-erupts-in-laughter-as-right-wing-extremist-asks-to-be-deported-to-heaven/>

K. The Investigators: DCFS garnishes wrong person's paycheck for child support. 11/30/15.

1. BATON ROUGE, LA — It sounds like a story some would see on TV, but it's become a Baton Rouge man's real life. He's happily married to the mother of his three kids, yet his paychecks started getting garnished for "child support" for kids Johnathan Smith said he's never even heard of. Smith has three kids, 1, 4, and 6-years-old, and he's married to the mother of his three children. He said he does not have any other kids, but in October, his employer received a letter from the Louisiana Department of Children and Family Services, or DCFS. It told his employer to deduct \$243.89 every two weeks for child support. The letter is regarding a person by the name of Johnathan D. Smith. "My name is Johnathan L. Smith. The name on the case is Johnathan D. Smith," said Smith.
2. <http://www.ksla.com/story/30633561/the-investigators-dcfs-garnishes-wrong-persons-paycheck-for-child-support>

L. SC DSS child support tracking program delayed by 18 years. 11/4/15.

1. COLUMBIA, S.C. — The Department of Social Services says a centralized computer system to track deadbeat parents won’t be running statewide until October 2019, representing another delay in a system that’s already 18 years overdue. Katie Morgan, the director of child support enforcement who has overseen the project for the state

Department of Social Services, told a panel of senators that officials now believe it will be cheaper to transfer an automated child support enforcement system used in Delaware than to try and complete the system developed by Hewlett-Packard that is the subject of a dispute.

2. [http://www.snow.com/news/state/article\\_85eddad6-85f6-11e4-8e5b-fbd4b9d795c6.html](http://www.snow.com/news/state/article_85eddad6-85f6-11e4-8e5b-fbd4b9d795c6.html)

M. Pizza delivery driver claims she's losing \$1,400 tip, Domino's says that's not the case. 12/15/15.

1. KNOXVILLE, TENN — A woman who received a \$1,400 tip from an East Tennessee church is now claiming that money is being taken away from her. Last month, Audrey Martin received a surprise \$1,400 tip from the Covenant Life Church in Rocky Top after she delivered pizzas to the church. The story went viral online and social media. On Tuesday, she posted on Facebook claiming Domino's Pizza has taken the money because the story went viral. We reached out to Domino's Pizza to get it's side of the story. The manager said the State of Tennessee was attempting to reach Martin after seeing the story because officials didn't know she had a job and was behind on child support payments. He also said the \$1,400 tip was not taken from Martin by Domino's, rather the back child support payments were being taken out of her pay checks.
2. <http://www.wowt.com/home/headlines/Pizza-delivery-driver-claims-shes-losing-1400-tip--361079501.html>

N. Same-sex couples sue state over birth certificates. 12/8/15.

1. Jackie Phillips-Stackman watched nurses whisk away her newborn daughter to the neonatal intensive care unit while her wife, blood pressure tanking, hemorrhaged on the c-section operating table. Baby Lola Jean had been a long time in the making. Years ago, Phillips-Stackman had harvested her eggs and found a donor to create embryos — before she ever met Lisa, before Lisa offered to carry their child, before they got married. And then during Lisa's pregnancy, they found out Lola had fluid in her brain and a rare chromosome deletion. With Lisa encountering complications, doctors decided to deliver Lola early. But if anything happened to either Lola or Lisa, Jackie would be helpless, because the state of Indiana wasn't legally recognizing her as Lola's mother. Now she is seeking to change that. Along with another Central Indiana couple, the Phillips-Stackmans filed a lawsuit Monday in the U.S. Southern District of Indiana in Indianapolis against the state and local health departments to have both same-sex parents named on their children's birth certificates.

2. <http://www.indystar.com/story/news/politics/2015/12/08/same-sex-couples-sue-state-over-birth-certificates/76743502/>

O. Couple seeks right to marry. The hitch? They're legally father and son. 11/3/15.

1. ALLEGHENY COUNTY, PA — The legalization of same-sex marriage has given way to a new problem for a Pennsylvania couple, who technically are father and son. Before states across the country began striking down bans on same-sex marriage and the Supreme Court ultimately decided the issue nationwide, some gay couples used adoption laws as a way to gain legal recognition as a family, and the related benefits such as inheritance and hospital visitation rights. Nino Esposito, a retired teacher, adopted his partner Roland "Drew" Bosee, a former freelance and technical writer, in 2012, after more than 40 years of being a couple. Now, they're trying to undo the adoption to get married and a state trial court judge has rejected their request, saying his ability to annul adoptions is generally limited to instances of fraud.
2. <http://www.cnn.com/2015/11/03/politics/same-sex-marriage-adoption-father-son-pennsylvania/index.html?sr=twCNN110315same-sex-marriage-adoption-father-son-pennsylvania0249PMVODtopLink&linkId=18464321>

P. Surrogate mom carrying triplets fights biological parents on abortion. 12/16/15.

1. NEW YORK — A surrogate mother carrying triplets says she wants to have all three babies, despite pressure from the biological mom and dad. Brittanyrose Torres, who is 17 weeks pregnant, told The New York Post that the couple asked her to undergo a selective abortion on one of the three fetuses, to reduce the risk of medical complications and developmental disabilities. About 90 percent of triplets are born premature, greatly increasing the chances of problems with their lungs, brain development, and other organ systems. Torres told the paper she agreed to be a surrogate after reading about the childless couple's plight on Facebook. She reportedly signed a surrogacy contract that would pay her at least \$30,000 -- \$25,000 for carrying one baby and another \$5,000 if there were twins or more. Torres, who lives in southern California, said she was initially implanted with two fertilized eggs, but one split in half and all three -- two male twins and one female -- have continued to develop. She says, so far, all three are healthy and she's offered to adopt one of them rather than abort. The biological parents "knew from the beginning that we wouldn't want to abort unless it was a life-and-death situation," she told The Post. But the biological parents claim the surrogacy contract gave them the right to decide on an abortion.
2. <http://www.cbsnews.com/news/surrogate-mom-with-triplets-fights-biological-parents-on-abortion/>

Q. New Hampshire couple seeking to undo their divorce gets turned down. 12/27/15.

1. CONCORD, N.H. — Should those irreconcilable differences suddenly become reconcilable, don't go looking to get un-divorced in New Hampshire. The state's Supreme Court this month upheld a lower court ruling refusing to vacate a New Castle couple's 2014 divorce after 24 years of marriage. Terrie Harmon and her ex-husband, Thomas McCarron, argued on appeal that their divorce decree was erroneous because they mended fences and are a couple once more. But the justices, in a unanimous ruling issued December 2, said the law specifically allows them to grant divorces — not undo them. Harmon and McCarron did not return calls seeking the answer to the question: Why not just remarry?
2. <http://www.nbcnews.com/news/us-news/new-hampshire-couple-seeking-undo-their-divorce-gets-turned-down-n486406>

R. Stepparents who 'aggressively' fight exes for custody can be liable for child support, Pa. Supreme Court rules. 12/29/15.

1. PENNSYLVANIA - Stepparents who "aggressively" fight for shared custody of their ex-spouses' children can be required to pay child support as if they were a biological parent, a divided Pennsylvania Supreme Court ruled Tuesday. Chief Justice Thomas G. Saylor dissented on that decision, however, arguing that the majority on his court had improperly stepped into an issue that would be best addressed by the state Legislature.
2. [http://www.pennlive.com/news/2015/12/stepparents\\_who\\_aggressively\\_f.html](http://www.pennlive.com/news/2015/12/stepparents_who_aggressively_f.html)
3. *See A.S. v. I.S.*, 108 A.3d 1280 (Pa. 12/29/15).