INDIANA CONTINUING LEGAL EDUCATION FORUM
"ADVANCED FAMILY LAW – THE MASTERS SERIES"
December 15-16, 2005

"UNIQUE ISSUES IN CUSTODY CASES"

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"UNIQUE ISSUES IN CUSTODY CASES"

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I. Gay & Lesbian Parents.

***Mariga v. Flint*, 822 N.E.2d 620 (Ind. Ct. App. 2005).** In 1992, Lori and Julie began an intimate relationship. Lori was previously divorced and had two children from that prior marriage. In 1996, Julie sought to adopt Lori's children under Indiana's stepparent adoption statute. The children's biological father agreed to terminate his parental rights. The trial court approved the adoption. In 1998, Lori and Julie separated, and both children remained with Lori. Julie's parenting time with the children became increasingly sporadic, and support payments Julie paid to Lori by an informal agreement eventually stopped.

Lori subsequently filed a petition to establish support. While that petition was pending, Julie filed a petition to vacate her original adoption of the children. Julie's petition to vacate the adoption was denied, and Julie was ordered to pay weekly child support and be subject to the "six percent rule" on uninsured medical expenses.

On Julie's appeal, the Court of Appeals wholly rejected Julie's argument that the adoption should have been vacated, noting that Julie had legally and properly become the parent of the children, and the responsibilities attendant with that outcome cannot be set aside simply because the underlying domestic partnership concludes.

***A.B. v. S.B.*, (Ind. November 23, 2005)** Dawn and Stephanie were involved in a nine-year, same-sex domestic relationship. During the relationship, Dawn and Stephanie decided to have a child together, which they subsequently accomplished when Stephanie had a child by artificial insemination; the sperm donor was Dawn's brother. Dawn was present at the child's birth, and all birth expenses were paid from the parties' joint account. Following the birth, Dawn filed – with Stephanie's consent – a petition to adopt the child. While that matter was pending, the parties separated, and Stephanie withdrew her consent to the adoption. During separation, Dawn enjoyed parenting time with the child, and provided financial support. At some point, Stephanie unilaterally terminated Dawn's parenting time and rejected her

support.

Dawn then filed a declaratory judgment action, seeking to be recognized as the child's parent, with all of the rights and responsibilities attending to that designation. The trial court dismissed that action, based upon its failure to state a claim for which relief could be granted.

The Court of Appeals reversed the trial court holding that by virtue of her agreement with A.B., Mother, Dawn is a "legal parent." The Indiana Supreme Court granted transfer. The Court reversed the trial court's dismissal and remanded to the trial court for further proceedings, noting that dismissal of the Trial Rule 12 (B)(6) are "rarely appropriate." The Court noted that Indiana court's have the authority to determine "whether to place a child with a person other than a non-custodial parent," which the court held necessarily includes the authority to determine whether the person has the rights or obligations of a parent.

***In re: the Adoption of K.S.P*., 804 N.E.2d 1253 (Ind. Ct. App. 2004).** Mother and Father were divorced with two children in 1994. Mother retained custody of the children. In 2003, Mother's domestic partner ("Melissa") filed a petition to adopt both children. Mother and Father each filed written consents to Melissa's adoption; Father's consent included a relinquishment of parental rights. Following an uncontested hearing for the adoption, the trial court issued an order stating that the proposed adoption was not allowed by statute, since the petitioner was not married to the biological mother.

Melissa appealed. The Court of Appeals, siding with Melissa, agreed with the trial court that a strict reading of the applicable adoption statute supported the trial court's order; however, the legislature surely could not have intended that result. "We conclude that where, as here, the prospective adoptive parent and the biological parent are both in fact acting as parents, Indiana law does not require a destructive choice between the two parents. Allowing continuation of the rights of both the biological and adoptive parent, where compelled by the best interests of the child, is the only rational result." *K.S.P.*, 804 N.E.2d at 1260 (internal citations omitted).

***In re: M.M.G.C.*, 785 N.E.2d 287 (Ind. Ct. App. 2003).** In 1999, Shannon adopted three children through international adoptions. In 2001, Shannon's domestic partner, Amber, filed a petition to adopt all three of Shannon's children as a second parent. Amber's petition was denied by the trial court, citing that, by Indiana statute, Amber may adopt Shannon's children only if Amber and Shannon are legally related or, alternatively, if Shannon's parental rights were terminated.

In reversing the trial court, the Court of Appeals noted that the trial court applied the law incorrectly when it set forth an ostensible requirement that Shannon and Amber be related, or that Shannon's parental rights must be terminated. Since the statute does not expressly either allow (or prohibit) two unmarried parties to have parental rights over a child, the Court concluded that historical considerations and public policy (including the advantage of a two-parent home) favor construing this ambiguity in favor of allowing such adoptions within a same-sex relationship.

***Downey v. Muffley*, 767 N.E.2d 1014 (Ind. Ct. App. 2002).** Mother and Father divorced in 1996 with two young children. Initially, Mother and Father shared joint legal and physical custody of the children. Mother subsequently became involved in a same-sex cohabitation relationship. During a later modification, the trial court issued an order that included the following restriction:

Parental Living Arrangements: Neither parent shall allow an unrelated adult member of the opposite sex, or of the same sex if they are involved in a homosexual relationship with the parent, to spend overnight with them while a child is in their care.

Mother appealed that portion of the order. Citing the *Teegarden* case, *infra*, the Court of Appeals reversed this portion of the order, holding that any overnight restriction must be predicated upon a finding made by the trial court that some harm or adverse effect would exist as to the children under the restricted circumstances. Here, since no such harm or adverse effect arising from exposing the children to these circumstances was advanced by the trial court, the overnight restriction was an abuse of discretion. The *Downey* Court did not, however, part ways with its prior *Marlow* decision (discussed, *infra*), instead distinguishing that case by noting that, in *Marlow*, the trial court articulated findings of adverse affects on the children – nightmares, bedwetting, *etc*. – arising from the children's inability to understand the exposure that their Father was giving them to his new homosexual lifestyle.

***Marlow v. Marlow*, 702 N.E.2d 733 (Ind. Ct. App. 1998).** Father and Mother's marriage was dissolved in 1996, after Father recognized his own homosexuality. The parties had three children. The trial court awarded custody of the children to Mother, and imposed two restrictions on Father's parenting time: (1) no non-blood related persons could be present during overnight parenting time, and (2) during periods of Father's visitation, Father could not include the children in "any social, religious, or educational functions sponsored by or which otherwise promote the homosexual lifestyle." Father appealed.

In this case, significant evidence was presented to the trial court, including in the form of expert testimony, of emotional distress that was being caused for the children, who were previously raised in a very conservative environment. The Court of Appeals thus reasoned that the limitations on Father's overnights were not an abuse of the trial court's discretion. The Court of Appeals also rejected Father's constitutionally-based claims, observing that the trial court's motivation for the restrictions was predicated on advancing the children's best interests, not promoting a bias against Father.

***Teegarden v. Teegarden*, 642 N.E.2d 1047 (Ind. Ct. App. 1994).** Mother and Father divorced with two children in 1990. Father received custody of the children, subject to Mother's parenting time. Father later remarried with Stepmother. Father subsequently died, and a custody dispute of the children arose between Mother and Stepmother. After a hearing, Mother – now in a lesbian relationship – was granted custody of the children subject to two conditions: (1) that Mother not cohabitate with any women with whom she has a lesbian relationship; and (2) that Mother not engage in "homosexual activity" in the present of the children. The trial court further ordered Mother and the children to counseling "to aid [the children] in making the transition to their new home." The trial court issued these conditions

despite making a specific finding that the Mother's lifestyle had no adverse effect on the children.

Mother appealed these conditions. On appeal, the Court of Appeals reversed the imposition of these conditions, noting that there was no evidence to suggest that Mother behaved inappropriately in front the children and, indeed, the trial court made a finding that the Mother's lesbian relationship did not adversely affect the children; therefore, the imposition of conditions upon the custodial award to Mother was inappropriate.

***Pennington v. Pennington*, 596 N.E.2d 305 (Ind. Ct. App. 1992), *trans denied*.** Mother and Father divorced, with one child, in 1991. Mother received custody, subject to Father's reasonable visitation schedule. However, Father objected to a restriction on his overnight visitation schedule that "[Father's] overnight visitation is restricted only to the extent that Ashley D. Barrow shall not be present during said visitation, for the reason that the Court specifically finds that said presence would be injurious to the minor child's emotion development." Mother presented evidence that she suspected Father and Mr. Barrow had a homosexual relationship; Father insisted it was merely a close friendship.

Father appealed this conditional visitation, but the Court of Appeals affirmed. The Court concluded that the evidence presented to the trial court was sufficient for a finding that Mr. Barrow's involvement in the visitation periods could be injurious and, thus, the order of the trial court imposing the restriction was not an abuse of discretion.

***D.H. v. J.H.*, 418 N.E.2d 286 (Ind. Ct. App. 1981).** Father and Mother divorced in 1981, with three children. During the final hearing, significant evidence was presented about Mother's alleged lesbian relationships with other women. While Mother did not testify as to the alleged relationships, both other women did testify as to the relationships with Mother. Father was awarded custody of the children, from which Mother appealed. The Court of Appeals concluded, as a matter of first impression, that "homosexuality standing alone without any evidence of adverse effect upon the welfare of the child does not render the homosexual parent unfit as a matter of law to have custody of the child." Nevertheless, the Court of Appeals affirmed the custody award to Father on other grounds, noting that, setting aside the issues of Mother's apparent homosexuality, there were legitimate ground for awarding custody to Father, including that Father had been the primary parent to the children in recent years of the marriage.

II. Relocation Disputes.

In a dissolution of marriage action, Ind. Code §31-17-2-4 requires written notice with the clerk and a copy to the other parent of an intent to move at the time of or after the granting of a final order to a place outside Indiana or at least 100 miles from the residence specified in a party's pleadings. Either party may request a hearing, and the court shall take into account distance, hardship, and expense in determining whether to modify the custody, visitation and support orders. Except in cases of extreme hardship, the court may not award attorney fees.

See Ind. Code §31-17-2-23. Ind. Code §31-14-13-10 provides a similar notice requirement for paternity cases based upon county of residence.

Klotz v. Klotz, **747 N.E. 2d 1187 (Ind. Ct. App. 2001)** The parties entered an Agreed Provisional Order for joint legal custody of the children, which gave Mother physical custody. Father subsequently filed a Petition for Modification and a Provisional Order after Mother declared her intention to move to Nebraska with the children. The trial court then awarded sole legal and physical custody to Mother in the dissolution proceedings. Father appealed. The evidence showed that the Mother had always been the caregiver to the children. Father argued that this was a relocation case, and therefore, fell within the relocation statute. The Court held the relocation statute applied to final custody Orders, and not Provisional Orders, and was therefore not relevant to the case. Thus, the relocation statute applies only after the entry of final Decree, not during the pendency of the case.

Bojrab v. Bojrab**, 810 N.E. 2d 1008 (Ind. 2004).** In *Bojrab* the Indiana Supreme Court held that an Indiana trial court may not prospectively order an automatic change of custody in the event of any significant future relocation by the custodial parent.

Farag v. DeLawter, **743 N.E. 2d 366 (Ind. Ct. App. 2001).** In joint physical custody case where one parent moved away, each parent bore the burden to show he or she was in a better position to serve the child's best interests.

(Allen) Swonder v. Swonder**, 642 N.E. 2d 1376 (Ind. Ct. App. 1994).** The custodial parent challenged the trial court's judgment modifying the marriage Dissolution Decree, which changed custody to the Father in the event she moved to a different state. The Indiana Court of Appeals reversed the trial court and remanded. The Court concluded that the trial court abused its discretion when it found that the custodial parent's plan to move out of state presented a substantial and continuing change in circumstance and that the existing custody Order was unreasonable, and conditioned custody on that parent's relinquishing plans to relocate. A child's desire to live with the non-custodial parent was an insufficient change to warrant modification of custody. The Father did not show that the boy's anxiety about the move was at a level to warrant a substantial and continuing change in circumstance upon which the trial court modification order could be based. The Father offered no evidence the new schools, church, and playmates would somehow be detrimental to the child's welfare.

Hoos v. Hoos 562 N.E. 2d 1292 (Ind. Ct. App., 1990). It was proper to deny Mother's Petition to Move to California because the move would have a substantial adverse impact on the child's relationship with his Father. The only reason for the move was Husband's desire for a new job.

III. Disabled Children/Disabled Parents.

Winkler v. Winkler, **689 NE2d 447 (Ind. Ct. App. 1997)** In *Winkler*, the Mother, who was deaf, was awarded custody of the couples two deaf children. After she placed the children in a residential program for deaf children, the Father, who was also deaf, petitioned for custody.

The trial court granted Father's petition and the Mother sought review. The Mother contended that the trial court erred in basing the change of custody solely on her decision to place the children in the residential school, and that the evidence was insufficient to show a substantial change in circumstance occurred. The Indiana Court of Appeals affirmed finding that the trial court's decision to award custody to the Father was based on the best interest of the children, and that it had considered the Mother's refusal to equip the children with hearing aids, the children's desire to be integrated with the hearing world, and the children's preference to live with the Father. The Custody Order did not violate federal law because federal disabilities law did not preclude the court from ordering a change of custody. The trial court's finding that there was substantial change in circumstance that warranted a change in custody was supported by the record.

***Gorman v. Zeigler*, 690 N.E. 2d 729 (Ind. Ct. App., 1998).** The Father and the Mother were divorced and had joint legal custody of the two children. The daughter developed a brain tumor. The Mother found that a hospital near her new home, Los Angeles, California, could provide better treatment than the treatment the daughter was receiving in Indiana. Upon this fact, the lower court found that the illness itself created an extreme emergency and granted the Mother temporary custody for the duration of the radiation treatment. The Father argued the trial court erred in granting the Mother's Petition for a Temporary Change in Custody. The Indiana Court of Appeals affirmed the trial court's decision. The Court found that the daughter's serious illness and the parties' dispute over her treatment constituted an extreme emergency. Also, several of the relevant factors substantiate a change since the original custody determination. The Mother was in a better position to care for the daughter on a full-time basis.

IV. Joint Legal Custody in Paternity Cases.

***Fuchs v. Martin,* 836 N.E. 2d 1049** (Ind. Ct. App., 2005). The Mother and Father met from mutual friends and dated each other. The child was born January 20, 1999. On May 11, 2000, the Father filed a Petition to Establish Paternity. The Court entered its' Order on November 1, 2004 establishing paternity, granting joint legal custody to the Mother and Father, with sole physical custody to Mother, ordering parenting time for Father and establishing child support. The Indiana Court of Appeals affirmed the Order of joint legal custody.

V. First Right of Refusal – Indiana Parenting Time Guidelines.

***Shelton v. Shelton,* 845 N.E. 2d 513 (Ind. Ct. App., 2005).** This case defines "family member" under the Indiana Parenting Time Guidelines in determining whether a parent has the right of first refusal to provide childcare. The Court determined the best interest of the child is served by extending the parental childcare to a responsible family member within the custodial parent's household. The Court found that the definition most appropriate of family member is limited to a person within the household of the parent with physical custody. Mother argued that grandmother was not a hired a childcare provider and should be deemed a family member. The Court found the relationship was not sufficient to overcome the preference of parental childcare because the grandmother did not live with the Mother. "When the parent with physical custody

or a responsible member of that parent's household cannot care for the child, the non-custodial parent is to be offered the right of first refusal regardless of whether a non-household family member can care for the child without cost." The Court of Appeals reversed the trial court and remanded the court to modify its' Opinion, granting right of first refusal.

VI. Miscellaneous Issues.

A. Gifted Children/Learning Disabled Children

B. Disputes Over Overnight Parenting Time with Very Young Children (Breastfeeding and how it impacts schedule for young children).

C. Inter-faith Marriages/Disputes Regarding Children's Religious Upbringing.

D. Custody Cases Where One Parent is a Citizen of Another County that is not a signatory to the Hague Convention.

- Visit the U.S. Department of State website www.state.gov
- First click on "Travel and Living Abroad"
- Then Click on "International Parental Child Abduction" under Emergencies and Warnings heading.