2019 Civil Law Update

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Matters of First Impression in Civil Cases.

Q.D.-A., Inc. v. Indiana Dep't of Workforce Development, 114 N.E.3d 840 (Ind. 2019). In determining whether a person is an employee for purposes of unemployment-compensation taxes, "if an enterprise undertakes an activity, not as an isolated instance, but as a regular or continuous practice, the activity will constitute part of the enterprise's usual course of business irrespective of its substantiality in relation to the other activities engaged in by the enterprise." (One of three prongs business must establish to show person was independent contractor and not an employee.)

City of Hammond v. Rostankovski, 119 N.E.3d 113 (Ind. Ct. App. 2019). While Indiana Code section 33-35-3-9, in combination with Indiana Trial *De Novo* Rule 2, limits an appeal from a judgment of a City Court to a *De Novo* trial for defendants only, no such limitations are incorporated in I.C. § 33-35-5-10. Indiana Code section 33-35-5-10 focuses on regular—non-*De Novo*—civil appeals from qualifying city courts.

Smith v. Indiana Dep't of State Revenue, 122 N.E.3d 484 (Ind. Tax Ct. 2019). In applying Indiana Code section 6-3-4-6 and -8.1-5-2, a federal Revenue Agent Report (RAR) is interlocutory and does not have "the necessary finality to comport with the statutory language requiring final changes to trigger a taxpayer's 120- or 180-day time limit."

Brenner v. All Steel Carports, Inc., 122 N.E.3d 872 (Ind. Ct. App. 2019). An employee is not required to file a workers' compensation claim against her employer prior to pursing litigation against a third-party tortfeasor.

Brewer v. PACCAR, Inc., 124 N.E.3d 616 (Ind. 2019). Under the Indiana Product Liability Act, "a manufacturer who produces a component party with only 1 reasonably foreseeable use has no duty, as a matter of law, to install safety features if (1) the final manufacturer was offered the safety features and declined them; or (2) the component party, once integrated, can be used safely without those safety features."

Tunstall v. Manning, 124 N.E.3d 1193 (Ind. 2019). Both an expert witness's professional-licensure status and the reasons for professional discipline may be admissible to challenge the expert's credibility.

Robinson v. Robinson, 125 N.E.3d 1 (Ind. Ct. App. 2019). As a matter of law, contingent interest in real estate conveyed by TOD that was recorded and executed prior to same real estate being transferred by quitclaim deed that was executed and delivered, but not recorded, was extinguished before owner's death.

Horner v. Curry, 125 N.E.3d 584 (Ind. 2019). The provision of Indiana's Civil Forfeiture Statute permitting the allocation of forfeiture revenue to reimburse law enforcement costs before the proceeds accrue to the Common School Fund is constitutional.

Golden Corral Corp. v. Lenart, 127 N.E.3d 1205 (Ind. Ct. App. 2019). The Indiana Court of Appeals was not persuaded by Golden Corral's argument that it was a manufacturer for purposes of the Indiana Product Liability Act because through the cooking process "it turns inedible, raw

chicken into a product that is edible and delicious. The Court of Appeals found that "[a]t the end of the cooking process, the chicken wing was still a chicken wing, although now (if cooked properly) safe for human consumption. The cooking process did not substantially alter the chicken wing or create a new product."

Wallen v. Hossler, 130 N.E.3d 138 (Ind. Ct. App. 2019). The Medical Malpractice Act does not require a plaintiff to accept a provider's offer of settlement.

Indiana Farm Bureau v. CNH Industrial America, LLC, 130 N.E.3d 604 (Ind. Ct. App. 2019). A corn head was an integral part of corm harvesting equipment, not other property and thus tort damages were precluded by the economic loss doctrine.

Global Caravan Technologies, Inc. v. Cincinnati Ins. Co., 135 N.E. 3d 584 (Ind. Ct. App. 2019). The voluntary intervention in a pending matter does not constitute a "suit" under which the duty for an insurer to defend an insured arises pursuant to an insurance contract.

Selected Civil Cases.

Subject Matter Jurisdiction. *Stewart v. McCray*, 135 N.E.3d 1012 (Ind. Ct. App. 2019). Trial court did not have subject matter jurisdiction over a dispute over church leadership that was purely ecclesiastical.

Restrictive Covenants. *Heraeus Medical, LLC. v. Zimmer, Inc.*, 135 N.E.3d 150 (Ind. 2019). "A court can blue-pencil unreasonable provisions from a restrictive covenant is the covenant is clearly divisible into parts and if a reasonable restriction remains to be enforced after the unreasonable portions have been eliminated." The "blue pencil doctrine" is actually an eraser. The reviewing court "may delete, but not add, language to revise unreasonable restrictive covenants. And parties to noncompetition agreements cannot use a reformation clause to contract around this principle."

Fifth Amendment. *In the Matter of Ma.H.*, 135 N.E.3d 41 (Ind. 2019). The Indiana Supreme Court reiterated that in civil proceedings, a court can draw a negative inference from a client of the Fifth Amendment privilege against self-incrimination.

Landlord-Tenant. *Rainbow Realty Group, Inc. v. Carter*, 131 N.E.3d 168 (Ind. 2019). Rent-to-buy contract for a single family house not currently habitable is subject to the protection afforded by the residential landlord-tenant statutes. Those statutes "are not about vindicating parties' freely bargained agreements. They are, rather, about protecting people from their own choices when the subject is residential property and their contract bears enough markers of a residential lease."

Protection Order. *N.E. v. L.W.*, 130 N.E.3d 102 (Ind. Ct. App. 2019). The minimum requirements for a hearing under the Civil Protection Order Act include the opportunity to testify, as well as call and cross-examine witnesses. A trial court must allow the petitioner to testify, present evidence, and call witnesses before denying her petition. The fact the respondent is subject to a non-contact order as to petitioner, in a criminal proceeding, does not prohibit a petitioner from seeking a protection order.

> "[A] protection order and a criminal no-contact order are not interchangeable, and . . . a criminal no-contact order cannot provide [a petitioner] all the relief that a protection order can. Criminal no-contact orders can be imposed as a condition of a condition of a defendant's pre-trial release, an executed sentence, or probation, and such orders direct that the defendant refrain from "any direct or indirect contact with an individual." *See* Ind. Code §§ 35-33-8-3.2(a)(4), 35-38-1-30, and 35-38-2-2.3(a)(18) (2017), respectively. A protection order, under the CPOA, is broader and can be issued immediately, without notice or hearing, and additional relief (such as attorney fees and reimbursement for certain expenses related to the domestic violence) can be afforded a petitioner after notice and a hearing. *See* Ind. Code § 34-26-5-9.

Id. at 108.

Evidence. *Zartman v. Zartman*, 127 N.E.3d 242 (Ind. Ct. App. 2019). "In a summary judgment context, it would be illogical to read [Evidence] Rule 1008 as requiring a trial judge to disregard completely the undisputed designated evidence as to the content of a lost writing. Rather, the more pragmatic reading of the rule is that it requires evidentiary disput3es about the content of a lost writing be determined by a jury only *during a jury trial*." (Emphasis added.)

Transgender name change. *In re Name Change of K.H.*, 127 N.E.3d 257 (Ind. Ct. App. 2019); *In re Name Change of M.E.B.*, 126 N.E.3d 932 (Ind. Ct. App. 2019). Transgender persons are entitled to waiver of publication of notice of name change and sealing of record upon showing of significant risk of substantial harm as provided in former Administrative Rule 9.

Preferred Venue. *Morrison v. Vasquez*, 124 N.E.3d 1217 (Ind. 2019). A domestic organization's actual principal office and not the location of its registered agent is the appropriate preferred venue for purposes of determining preferred venue pursuant to Trial Rule 75(A)(4).

Forum selection. *O'Bryant v. Adams*, 123 N.E.3d 689 (Ind. 2019). A valid forum-selection clause in which the parties agree by contract to litigate their disputes in a specific forum does not deprive a trial court of personal jurisdiction over parties that would otherwise be subject to the court's jurisdiction. An unambiguous forum-selection clause, however, is mandatory and warrants dismissal if the complaint is filed in a different jurisdiction.

Propriety of trial court findings. *Hazelett v. Hazelett*, 119 N.E.3d 153 (Ind. Ct. App. 2019). A trial court's findings must indicate what the trial court, as the trier of fact, determines to be true. Findings that are a recitation of each party's contentions, arguments, proposed findings, or portions of relevant statutory provisions are insufficient to support an order.

Survival of Right of Action. *Horejs v. Milford*, 117 N.E.3d 559 (Ind. 2019). A husband's claim for survivor damages following his wife's death did not abate upon his death and is not dependent on the existence of an heir. In the absence of a will, however, the claim can only continue if the party seeking survivor damages to which husband was entitled is either a legal representative or successor in interest to the husband.

Selected Family Law Cases.

Procedural Issues.

Motion to Continue Final Hearing. *Smith v. Smith*, 136 N.E.3d 275 (Ind. Ct. App. 2019). Trial court impeded Husband's ability to show good cause why his motion to continue should be granted when it denied the motion without hearing any argument. The trial court also demonstrated a "myopic insistence upon expeditiousness, by telling Husband he was going to split the martial assets right down the middle before hearing any evidence.

Paternity.

Disestablishments of paternity. *Linton v. Baugh*, 122 N.E.3d 1034 (Ind. Ct. App. 2019). Mother's joint petition to establish paternity with biological father was barred by the doctrine of res judicata. She had been a party to both a paternity affidavit and prior paternity proceedings with legal father, which established child's paternity. Biological father did not meet the statutory requirements of Indiana Code section 31-14-5-3 to file a paternity action in his own name.

In dicta the Court noted that although biological father was barred under I.C. § 31-14-5-3 from establishing paternity as next friend of the child or requesting a prosecuting attorney to file a paternity action in an adoption proceeding, he was not time barred by from filing as the child's next friend to establish paternity if he was acting in the child's best interest. The Court "respectfully invite[d] the General Assembly to address this inconsistency."

Property Division.

Gifts and Inheritance. *Baglan v. Baglan*, 137 N.E.3d 271 (Ind. Ct. App. 2019). Trial court abused its discretion in excluding from the marital estate shares of stock gifted to Wife, as well as the parties' vehicles and other stock owned by the parties.

Military Pension. *Edwards v. Edwards*, 132 N.E.3d 391 (Ind. Ct. App. 2019). The appellate court ruled the U.S. Supreme Court's decision in *Howell v. Howell*, 581 U.S. ___, 137 S.Ct. 1400, 197 L.Ed.2d 781 (2017), was to be applied prospectively only. In Howell, Supreme Court held that state courts are not permitted to order a veteran to indemnify a divorced spouse for the loss of a spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits.

Spousal Maintenance. *Campbell v. Campbell*, 118 N.E.3d 817, *reh'g denied* (Ind. Ct. App. 2019). The Court of Appeals upheld a trial court finding that a wife was not incapacitated to the extent her ability to support herself was materially affected, even though she was receiving SSD payments and husband had supplemented those payments during the marriage. "There will come a time in the lives of most of us when we are unable to work, whether because of age or disability. To reverse in this case would imply that if one of the divorcing parties is elderly and receiving SSD, maintenance is always required."

Custody and Parenting Time.

Parenting Time in Guardianship Proceeding. *Blankenship v. Duke*, 132 N.E.3d 410 (Ind. Ct. App. 2019). The trial court erred is awarding father parenting time in a guardianship proceeding "as agreed upon by the parties" in light of the evidence he and the guardian did not get along. Trial court must order specific parenting time for father and children after balancing father's right to visit the children with their best interests.

Active-Duty Status. *Purnell v. Purnell*, 131 N.E.3d 622 (Ind. Ct. App. 2019). Although is it an abuse of discretion for a trial court to consider parent's active duty status in the military as a factor in determining custody or permanently modifying custody, a custody determination supported by findings and evidence as to other factors will be upheld.

Legal Custody. *In re Paternity of W.R.H.*, 120 N.E.3d 1039 (Ind. Ct. App. 2019). Trial court may not sua sponte order a change of legal custody in relocation action. Legal custody is not automatically at issue once a parent has requested a hearing on the other parent's motion of intent to move. "Physical distance does not prevent parents, especially given today's technology, from communicating effectively about education, health care, religions, and other aspects of a child's upbringing. And for this reason a parent who wants a change in legal custody must ask for one."

Child Support.

Social Security Benefits. *Barrand v. Martin*, 120 N.E.3d 565 (Ind. Ct. App. 2019). Excellent discussion of the effect of Social Security benefit on child support obligations and the distinction between SSR benefits and disability benefits. "[A] trial court *may* use its discretion to credit SSR benefits to a noncustodial parent's child support obligation, which disability benefits *must* be applied as a credit." The Court of Appeals urged all trials court to follow the "flexible methodology endorsed in *Johnson* [*v. Johnson*, 999 N.E.2 56, 62 (Ind. 2013)] and reflected in the Child Support Guidelines" and "carefully consider the possible impact of SSR benefits when determining whether to provide a credit to a non-custodial parent for his or her child support obligation."

Significant travel expenses. *Hazelett v. Hazelett*, 119 N.E.3d 153 (Ind. Ct. App. 2019). Trial court erred by failing to consider the significant travel expenses a parent will incur to exercise parenting time with the child.

Grandparent Visitation.

Survival of Grandparent Visitation Order. *Campbell v. Eary*, 132 N.E.3d 413 (Ind. Ct. App. 2019). An existing order for grandparent visitation does not survive when the biological parents legitimize their children by their subsequent marriage.

Standing. *Matter of E.H.*, 121 N.E.3d 592 (Ind. Ct. App. 2019). After the parental rights of children's biological parents were terminated, the children's biological maternal uncle (now Father) and his significant other adopted the children. Father and his significant other are not married. The children's biological maternal grandparents (and now the legal paternal

grandparents) filed petition for grandparent visitation as maternal grandparents and then amended the petition for grandparent visitation as paternal grandparents. The Court of Appeals ruled the grandparents did not have standing under their theory the children were born out of wedlock because Father was single when he adopted them, so they were born out of wedlock. "There is clearly a difference between being 'born out of wedlock' and being adoption by an unmarried person. . . . An adoption is not a birth." The Court also noted (1) the GVA does not apply where grandparents seek visitation over the objection of a custodial parent who is their own child and (2) the children did not meet the statutory definition of "child" for purposes of the GVA, because the statutory definition does not include children adopted by single, unmarried persons.

Preservation of Rights to Grandparent Visitation. *Walker v. Knight*, 119 N.E. 3d 573 (Ind. Ct. App. 2019). The act of filing a petition for grandparent visitation before adoption finalized does not preserve the right to grandparent visitation. The "visitation rights" that survive under Indiana Code section 31-17-5-9(1) are those which have already been established by court order before an adoption.

CHINS/Termination of Parental Rights.

Fifth Amendment. *In the Matter of MaH.*, 134 N.E.3d 41 (Ind. 2019). In CHINS and TPR proceedings, a court may not compel a parent's admission to a crime under the threat of losing parental rights if the admission could be used against him or her in a subsequent criminal proceeding. A trial court's order that does not compel a parent to admit guilt to a crime, but does require the parent to select and complete a course of sex-offender treatment, is not a constitutional violation, even if the course selected by the parent required an admission of wrongdoing after a voluntary polygraph showed deceptive denials of misconduct.

Evidence: Laboratory Reports.

In the Matter of L.S., 125 N.E.3d 628 (Ind. Ct. App. 2019). Exhibits containing parent's drug tests did not fall under the business records exception to the rule against hearsay. "Although the affidavits state that the laboratory reports were maintained in the normal court of business activity as business records, what we consider is whether a business depends on those records to function. Forensic Fluids Laboratories does not depend on these records to operated or to conduct business. Rather the drug test results were documented for the benefit of DCS. Therefore, these exhibits were inadmissible as hearsay . . . ."

In re Matter of A.B., 130 N.E.3d 122 (Ind. Ct. App. 2019). Exhibits containing drug test results do not fall under the business records exception to the rule against hearsay. Admission of this evidence requires expert testimony and the opportunity for cross-examination.

In re K.R., 133 N.E.3d 754 (Ind. Ct. App. 2019). Admission of parents' drug test results under the business records exception to the rule against hearsay upheld. "Forensic Fluids [Laboratories] functions independently from any law enforcement body or state agency. Rather, its services are presumably available to any person, public or private, corporate or individual, who wishes to pay the lab fees. In addition, the chemical analyses performed at Forensic Fluids appear to be routing

procedures, done for whomever request them. . . . [D]rug test results do indeed fit into the business records exception to the hearsay rule."

Doctrine of Res Judicata. *In re the Matter of Eq.W.*, 124 N.E. 3d 1201 (Ind. 2019). The claim preclusion branch of the doctrine of res judicata applies to bar a repeated filing of a CHINS petition based in evidence that could have been produced in previous filings, because of the heightened due process protections to be given to children and parents involved in CHINS proceedings. The application, however, is not without limits.