2020 Civil Caselaw Update

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Matters of First Impression in Civil Cases.

Henderson v. New Wineskin Ministries Corporation, 160 N.E.3d 582 (Ind Ct. App. 2020). Indiana Code section 34-31-7-2 provides nonprofit religious organization owe persons who enter their premises with permission only 2 duties: (1) to warn of hidden dangers and (2) to refrain from intentionally harming them. Henderson slipped and fell in the parking lot of New Wineskin Ministries and sued the nonprofit organization for negligence. In a matter of first impression, the Indiana Court of Appeals concluded "premises" as used in the statute includes parking lots.

Kluger v. J.J.P. Enterprises, Inc., 159 N.E.3d 82 (Ind. Ct. App. 2020), *reh'g denied*. In a suit brought by homeowners asserting claims for violations of the Home Improvement Contracts Act (HICA), as a matter of first impression the Indiana Court of Appeals held the homeowners' contract with the contractor satisfied the $150 contract-price threshold for application of the HICA despite the contractor never invoicing the homeowners for its work. Although the contractor's standard practice is to send an invoice after services are completed, it failed to do so because the project had "slipped through the cracks." The Court held the contractors' responsibilities under HICA are not excused merely because it inadvertently failed to bill the homeowners for the work. The Court noted that the contractor had already violated HICA when it commenced work when it failed to provide a contract price that had been agreed to by the homeowners before it began work on the project.

In re C.G, 157 N.E.3d 543 (Ind. Ct. App. 2020). A high school basketball player filed a complaint against her school corporation alleging she suffered injuries as a result of the negligence of the school's employee, her coach. The Court of Appeals upheld the trial court's grant of summary judgement in favor of the school corporation, applying the limited new rule created by the Indiana Supreme Court that "a sports participant breaches no duty as a matter of law by engaging in conduct 'ordinary . . . in the sport." *Pfenning v. Lineman*, 947 N.E.2d 392, 403-04 (Ind. 2011). The Court of Appeals, as a matter of first impression, held that the coach was a sports participant engaged in conduct ordinary to the sport of basketball.

McGowen v. Montes, 152 N.E.3d 654 (Ind. Ct. App. 2020). A truck driver stopped at the scene of a vehicle accident and asked the injured driver if he was okay and wanted him to call 911. Montes failed to slow down as he approached the scene of the accident and rear-ended the truck. Both the truck driver and Montes were injured. The truck drive sued Montes, claiming negligence, and McGowan countersued for negligence. The Court of Appeals applied the Good Samaritan Law and, as a matter of first impression, concluded "from the unambiguous language of the GSL that stopping and asking if a person who has been involved in an accident needs help is 'emergency care.'"

Clark v. Mattar, 148 N.E.3d 988 (Ind. 2020). In a matter of first impression the Indiana Supreme Court addressed the issue of the "reluctant juror" in the context of a challenge for bias under Jury Rule 17(a)(8). In a medical malpractice jury trial, a prospective juror stated on his jury questionnaire that he did not want to serve and during voir dire he said he would have difficulty putting a dollar amount on noneconomic damages. The trial court denied plaintiff's motion to strike the juror for cause. Plaintiff's counsel preserved her objection for appeal and used her final peremptory challenge on the prospective juror. The trial proceeded and the jury found the doctor

was not negligent. The Supreme Court agreed with the Court of Appeals that there was bias, noting "[t]his is not to say that every unwilling or reluctant juror is biased as there are times these unwilling reluctant jurors can be rehabilitated, but under these circumstances [the prospective juror] stated repeatedly and emphatically that he could not render a decision about noneconomic damages." The Court found the trial court's decision to deny Plaintiff's for-cause challenge was illogical, and because Plaintiff was forced to exhaust her last peremptory on this perspective juror, a new trial was appropriate.

Blackford v. Welborn Clinic, 150 N.E.3d 687 (Ind. Ct. App. 2020). In 2003, the Clinic informed patient that her test results for hepatitis were negative. In 2014, she learned they had actually been positive and she sued the Clinic for medical malpractice. In a matter of first impression, the Court of Appeals held that the Clinic fraudulently concealed material medical information from the patient regarding her diagnosis and the five-year nonclaim limitation imposed by the Indiana Trust Act was tolled due to that fraudulent concealment.

Walters v. Corder, 146 N.E.3d 965 (Ind. Ct. App. 2020). As a matter of first impression, the Indiana Court of Appeals held that Father's biological children retained their status as beneficiaries under trusts established by their great-grandmother even though they were adopted by their stepfather, because the adoption occurred after the settlor's death. The Court determined there was no evidence in the trusts or in the surrounding circumstances of an intent to exclude the children because of an unanticipated adoption.

In re Paternity of M.S., 146 N.E.3d 951 (Ind. Ct. App. 2020). Grandmother filed a motion to intervene in a child custody case, alleging she was the child's de factor custodian. The trial court awarded Father custody and denied Grandmother's motion to intervene. As a matter of first impression, the Court of Appeals ruled the six-month period relevant to establishing de factor custodianship was not tolled after the child custody proceeding had been commenced and concluded. It also found the failure to recognize Grandmother as the de facto custodian was not harmless.

Estabrook v. Mazak Corporation, 140 N.E.3d 830 (Ind. 2020). Plaintiff was injured while working on a machine owned by his employer, which had bought the machine from Defendant. The machine has been delivered new eleven years before Plaintiff's injury. Plaintiff filed a product-liability suit against Defendant in federal district court, alleging the machine was unsafe due to a design defect. The district court certified to the Indiana Supreme Court the question, *inter alia*, whether the statute of repose codified in I.C. § 34-20-3-1(b) could be extended by post-sale repair/refurbishment/reconstruction of the product. In a matter of first impression, the Court held that I.C.§ 34-20-3-1(b) is a statute of repose that cannot be extended by the manufacturer's post-delivery repair, refurbishment, or reconstruction.

In re M.S., 140 N.E. 3d 279 (Ind. 2020). The Indiana Supreme Court considered whether a party to a CHINS proceeding may move for a continuance that places the action outside of the legislatively prescribed timeframe and then seek dismissal because the codified deadline has expired. In a matter of first impression, the Court reviewed the statute's procedural timeline, noting all parties to a CHINS action are also subject to the Indiana Rules of Trial Procedure and that "'to the extent a statute is at odds with [those rules], the rule governs on matters of procedure."

The Court held that because the trial rules trump statutes on matter of procedure, Trial Rule 53.5 allows extension of the 120-day deadline in I.C. § 31-34-11-1(b), provided a party can show "good cause." Accordingly, where there is good cause for a continuance, Trial Rule 53.5 controls and a trial court has discretion to grant a continuance without the risk of mandatory dismissal for failure to complete the factfinding hearing within 120 days.

Schmidt v. Allstate Property and Casualty Insurance Company, 141 N.E. 3d 1251 (Ind. Ct. App. 2020). Plaintiff was injured in an accident while riding with a fried who was insured by Allstate. Plaintiff, who qualified as an insured under her friend's policy, also demanded the underinsured motorist coverage limits from Allstate because the driver of the other vehicle was underinsured. As a matter of first impression, the Indiana Court of Appeals held that a driver's underinsured motorist insurance carrier owes a duty of good faith and fair dealing to an injured passenger of the insured even though she was not the policyholder.

S.H. v. D.W., 139 N.E. 3d 214 (Ind. 2020). Respondent contested the issuance of a second two-year protection order sought by Petitioner. At the hearing, Petitioner admitted that Respondent had not violated the prior order, visited her residence, visited her place of employment, or contacted her directly. The trial court issued another two-year protection order. The Indiana Supreme Court, in a matter of first impression, reversed the trial court judgment and remanded with instructions to vacate the entry of the second protection order. "Entering one protective order does not, by itself, justify entering a second order—or renewing or extending the first order. . . . [T]he circumstances leading to entry of a prior order generally cannot be the sole basis for entering a new order or renewing or extending the previous one."

Selected Civil Cases.

Valuation of Business. *Hartman v. BigInch Fabricators & Construction Holding Co.*, 148 N.E.3d 1017 (Ind. Ct. App. 2020). A shareholder agreement required the company to purchase the shares of any shareholder who was involuntarily terminated as an officer or director of the company based on an appraised market value by a third-party valuation company. After Hartman was involuntarily terminated from his position as a director and officer of BigInch. BigInch retained a third-party valuation company to value Hartman's 17.77% interest in the company. The resulting business valuation discounted Hartman's interest by a combined 32% lack of control discount and marketability discount. The trial court entered summary judgment affirming application of the discounts. On appeal, the Indiana Court of Appeals reversed, determining that lack of control and marketability discounts do not apply to compelled return of ownership interests to a controlling party where there is a ready-made market.

The Court distinguished divorce cases where lack of control and marketability discounts may be applied and trial courts have broad discretion when determining the value of marital property. *See Alexander v. Alexander*, 927 N.E.2d 926 (Ind. Ct. App. 2010). The Court of Appeals viewed the trial court in BigInch as attempting to prevent a windfall to the majority as opposed to the *Alexander* trial court simply trying to value an interest that was not being sold. The Court of Appeals also interpreted the prior rejection of discounts in *Wenzel v. Hopper & Galliher, P.C.*, 779 N.E.2d 30 (Ind. Ct. App. 2002) as applicable to all sales occurring in a closed market, regardless of whether a "fair value" statutory standard or other valuation standard applied. As a result of this analysis, the Court of Appeals concluded that the value of Hartman's shares under the buyback provision in the shareholder agreement, which required the application of the "appraised market valuation," could not be discounted for lack of control and marketability.

BigInch reinforces the distinction between divorce and other business litigation valuation principles and expands the rejection of discounts in a range of compulsory transactions, following trends in Indiana and other jurisdictions.

Attorney's Fees. *In re Paternity of C.B. and S.B.*, 144 N.E.3d 759 (Ind. Ct. App. 2020). Mother's former counsel did not have a right separate and apart from Mother to request appellate fees in her own name from Father. The Court noted she could seek them from Mother.

River Ridge Development Authority v. Outfront Media, LLC et al., 146 N.E.3d 906 (Ind. 2020). "The guardrails of zealous advocacy must leave ample room for a party to make its case. But when a party veers off course by intentionally introducing groundless arguments, harassing other parties, or acting in bad faith, courts can punish the behavior. Generally, the American Rule requires each party to pay its own attorney's fees. While this rule has narrow exceptions that allow a court to order one party to pay another's fees, it is a hefty burden to demonstrate that such an award is warranted."

Annexation/Unconstitutional Special Legislation. *Eric Holcomb, in his official capacity as Governor of the State of Indiana v. City of Bloomington*, 158 N.E.3d 1250 (Ind. 2020). In 2017, the state legislature passed a statute which stopped the City of Bloomington's proposed annexation of several areas of land and prohibited Bloomington from trying to annex the areas for 5 years.

The City challenged the constitutionality of the statute in a declaratory judgment action. The trial court, Special Judge Frank M. Nardi presiding, found the statute unconstitutional. The Indiana Supreme Court, on direct appeal, in a 3 to 2 decision, concluded Bloomington could challenge the statute in a declaratory judgment action against the Governor, because the City had suffered an injury and due to the unique way the statute was drafted. The Court went on the reach the merits of the case due to "[p]rudential concerns" and concluded "the statute is unconstitutional special legislation in violation of Article 4, Section 23 of the Indiana Constitution because the legislature enacted a special law—one that targeted only Bloomington—when it could have enacted a law that applied generally throughout Indiana."

The dissent argued "Bloomington lacked standing here, which meant the courts lack jurisdiction, and prudential considerations cannot fix this fatal flaw."

<u>Insurance Coverage.</u> *Glover v. Allstate Property & Casualty Ins. Co.*, 153 N.E.3d 1114 (Ind. 2020). Shelina Glover died in a car accident that was not her fault. Her estate requested underinsured-motorist coverage under her parents' Allstate policy. Allstate opposed the claim, *inter alia*, contending Shelina was not a "resident relative" under the policy, because her parents had not notified Allstate she had been living with them. The Indiana Supreme Court determined Shelina met the policy's definition of a resident, because she was physically living in her parents' home with the intention to remain there. Allstate nevertheless argued she was not an "insured person," because her parents never notified Allstate there was a new resident relative to be added to the policy. The policy's plain language stated the notice requirement applies "whenever an operator becomes a resident of your household." The policy did not define "operator," nor did Allstate propose a definition in briefing before the Court of Appeals or the Supreme Court. The Supreme Court held, "Given the policy's silence and the term's plain meaning, we interpret 'operator' to be a person which is or will be operating one of the vehicles covered under the policy." Because Shelina had her own car when she moved in with her parents, and her parents did not anticipate Shelina would operate their vehicles listed on the Policy, the Court also held Shelina was not an operator and her parents did not have to notify Allstate that she had moved in with them. "Thus, Shelina was a 'resident relative' as to whom the notice requirements did not apply, making her an 'insured person' under the Glovers' Allstate policy."

<u>Procedure.</u> *M.G. v. S.K.,* ___ N.E.3d ___ (Ind. Ct. App. 2020). The Indiana Court of Appeals found the trial court did not enter an order in compliance with Indiana Trial Rule 52(A) adequate to permit meaningful review. The trial court signed Father proposed order after making certain deletions, which contained "sparse factual findings."

<u>Forum-Selection</u>. *Sullivan Corporation v. Rabco Enterprises, LLC*. 160 N.E.3d 1124 (Ind. Ct. App. 2020). Indiana Code section 32-28-3-17 provides: "[a] provision in a contract for the improvement of real estate in Indiana is void if the provision: (1) makes the contract subject to the laws of another state; or (2) requires litigation, arbitration, or other dispute resolution process on the contract occur in another state." The Indiana Court of Appeals found that because the General Assembly did not include language limited the application of this section to situations involving mechanics liens, it applied to all contracts for the improvement of real estate in Indiana and, therefore, the forum-selection clause requiring litigation occur in another state was unenforceable.

<u>**Selected Family Law Cases.**</u>

<u>**Procedural.**</u>

<u>"Clear Error Review" in Hague Convention Cases.</u> *Monasky v. Taglieri*, 140 S.Ct. 719 (2020). The United Stated Supreme Court clarified the standard for "habitual residence" in a case brought under the Hague Convention. The Supreme Court held the determination of "habitual residence" did not turn on the existence of an actual agreement. Because locating a child's home is a fact-driven inquiry, courts must be "sensitive to the unique circumstances of the case and informed by common sense." The Supreme Court's conclusion that a child's habitual residence depends on the particular circumstances of each case is bolstered by the views of treaty partners to the Hague Convention. With respect to the appropriate standard of appellate review of an initial "habitual residence" determination, the Court found absent a treaty or statutory prescription, the appropriate level of deference to a trial court's "habitual residence" determination depends on whether that determination resolves a question of law, a question of fact, or a mixed question of law and fact. Generally, questions of law are reviewed *de novo* and questions of fact for clear error, while the appropriate standard of appellate review for a mixed question "depends...on whether answering it entails primarily legal and factual work." The Supreme Court reasoned that clear error review has a particular virtue in Hague Convention cases, as a deferential clear error standard of review speeds up appeals and thus serves the Hague Convention's premium of expedition. The Supreme Court found that a remand would consume time and interfere with the Hague Convention's objective of swift resolution. In the exhaustive record before the District Court, the absence of any reason to anticipate the District Court's judgment would change on remand that neither party sought, and the protraction of proceedings, the Supreme Court affirmed the judgment of the Sixth Circuit.

<u>Birth Certificates for Children of Same-Sex Couples.</u> *Henderson v. Box*, 947 F.3d 482 (7th Cir. 2020). The United States District Court for the Southern District of Indiana issued an injunction requiring Indiana to treat children born into female-female marriages as having two female parents who under the injunction must be listed on the birth certificate. *Henderson v. Box*, 209 F. Supp. 3d 1059, 1079-80 (S.D. Ind. 2016). Because Indiana lists only two parents on a birth certificate, this effectively prevented the state from treating as a parent the man who provided the sperm, while it requires the identification as parent of one spouse who provided neither sperm nor egg. The district court concluded that its approach was required by the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution, which is understood in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), to oblige governmental bodies to treat same-sex couples identically to opposite-sex couples. Because Indiana lists a husband as a biological parent (when a child is born during a marriage) even if he did not provide the sperm, the trial court concluded it must treat a wife as a parent even if she did not provide an egg. (The trial court's understanding of *Obergefell* had been confirmed by *Pavan v. Smith*, 137 S. Ct. 2075 (2017), which held that same-sex and opposite-sex couples must have the same rights with respect to the identification of children's parentage on birth certificates.) The district court found forbidden discrimination by reading together three of Indiana's statutes: I.C. §§ 31-9-2-15 (defining "child born in wedlock"), 31-9-2-16 (defining "child born out of wedlock"), and 31-14-7-1 (regarding a man presumed to be a child's biological father). It treated the presumption in I.C. § 31-14-7-1(1)(A) as the principal problem, *i.e.*, a husband is presumed to be a child's biological father so that both spouses are listed as parents on the birth certificate and the child is deemed to

be born in wedlock. The state argued that more weight should be given to the "birth worksheet" rather than the statute.

The United States Court of Appeals for the Seventh Circuit noted that those statutes were inactive long before *Obergefell* and *Pavan*. The Circuit Court agreed with the district court that, after *Obergefell* and *Pavan*, a state cannot presume that a husband is the father of a child born in wedlock while denying an equivalent presumption to parents in same-sex marriages. Because I.C. § 3114-7-1(1) does that, its operation was properly enjoined. The district court's order requiring Indiana to recognize the children of the plaintiffs as legitimate children born in wedlock and to identify both wives in each union was affirmed. The injunction and declaratory judgment were affirmed to the extent they provided that the presumption in the statute violated the Constitution.

Change of Gender and Name. *In re Name and Gender Change of R.E.*, 142 N.E.3d 1045 (Ind. Ct. App. 2020). R.E. was a transgender male, born female but identifying as a male. R.E., *pro se*, filed a petition for change of name and gender. After a hearing, the trial denied R.E.'s request to seal the record and the request for waiver of publication. After R.E. had satisfied the trial court's demand to publish notice of his petition, the trial court held a second hearing on his petition to change his name and gender marker, which was continued to allow R.E. to attempt to obtain his medical records. R.E. filed a statement with the trial court in which he attached both his physician's statement that R.E. "has the appropriate clinical treatment for gender transitions of a new gender, male" and the physician's affirmation to the Indiana Bureau of Motor Vehicles of R.E.'s gender change. R.E. asked the trial court to inform him if his submissions would not be admissible at the upcoming hearing. One week later, the trial court informed R.E. that "the documents submitted are not admissible" because they "fail to comply with Rule 702, [703], 704, 705, and 803" of the Indiana Rules of Evidence. At the hearing, the trial court informed R.E. that his medical records went to the ultimate fact and that his treating physician was not permitted to express an opinion. The trial court then informed R.E. that it needed to know what information and procedures R.E.'s treating physician was "relying on to make that determination, of R.E.'s new gender identity in order for the court to accept his physician's opinion." The trial court then continued the hearing on R.E.'s petition. R.E. obtained counsel and counsel moved to seal the trial court records of the proceedings based on the need to prevent harm to R.E. At the ensuing hearing, R.E. once again testified that he sought to seal the trial court records in order to avoid the potential for harm that he might face as a transgender person. The trial court and R.E.'s counsel engaged in a lengthy exchange. At the close of the hearing, the trial court refused to seal the record and found insufficient evidence to support the change of gender, and also denied the name change request. R.E. appealed and requested the Indiana Court of Appeals to seal the appellate and trial court records.

The Court of Appeals granted that request shortly thereafter and subsequently reversed the trial court. The Court reversed and remanded with instructions to the trial court to grant R.E.'s petition to change his name on government-issued identifying documents and the gender marker on his birth certificate without further delay. Addressing the trial court's refusal to seal R.E.'s court records, the Court of Appeals determined that the trial court's decision was clearly against the Court of Appeals' unambiguous precedent, in *In re Petition for Change of Birth Certificate*, 22 N.E.3d 707, 709-10 (Ind. Ct. App. 2014), and that the trial court was specifically informed of the relevant case law. The Court also instructed the trial court that the case remain sealed and

addressed the fact that the trial court failed to treat R.E. with the respect R.E. deserved and that was expected from fellow judicial officers. It noted that this was not the first such occasion where it had to publicly admonish one of Indiana's trial courts for such derision.

Failure to Serve Notice of Decree. *Penley v. Penley*, 145 N.E.3d 874 (Ind. Ct. App. 2020). The trial court entered its final order in the dissolution action on November 8, 2018, but the Chronological Case Summary did not contain any notation to indicate the order was sent to the parties. On March 25, 2019, wife's counsel notified husband's counsel that the CCS indicated that the trial court had entered the final order. On March 26, 2019, husband filed a motion for leave and to reconsider, which he treated as a motion seeking leave to file a belated motion to correct error. On May 16, 2019, the trial court held a hearing on husband's motion. On July 18, 2019, the trial court issued an order finding the husband had failed to timely file a motion to correct error and that no good cause had been shown that would justify relief. Husband appealed and the Indiana Court of Appeals reversed.

The Court of Appeals noted that the Indiana Supreme Court has held that Ind. Trial Rule 72 is the "sole vehicle" for a party to obtain relief when seeking to expand a filing deadline based upon a claim of failure to receive notice of a final judgment. Pursuant to Ind. Trial Rule 72(D), the trial court clerk, upon noting the decree in the Chronological Case Summary, had a duty to immediately serve a copy of the decree on the parties and make a record of such service. It was undisputed that husband did not receive notice of the decree. The Court of Appeals found the trial court abused its discretion by denying husband's request for leave to file a belated motion to correct error since husband did not receive notice of the decree and the CCS contained no record that the clerk had served notice of the decree.

Transgender Name Change. *In re Name Change of Jane Doe*, 148 N.E.3d 1147 (Ind. Ct. App. 2020). Petitioners were transgender men who were born in Mexico and brought to the United States by their respective families around the age of 5. Petitioners individually filed with the trial court verified petitions for a change of name. After hearings in the respective cases, the trial court issued orders denying the petitions for name change based on each petitioner's inability to provide proof of United States citizenship under I.C. §34-28-2-2.5(a)(5). The trial court made abundantly clear in its finding that the petitioners were seeking a name change in good faith and not for fraudulent or unlawful purposes and further indicated that it could easily grant the petitions if it were not for the citizenship requirement that it believed existed in the statute. Each petitioner appealed and the appeals were consolidated.

The Court of Appeals reversed, addressing list of information the statute states must be submitted with a name change petition for an individual who is at least 17 years of age. The Court interpreted that provision as requiring submission of the enumerated information whenever possible. The Court found Petitioners were unable to provide proof that they were United States citizens and that they were absolved of providing such proof. The Court of Appeals concluded that the applicable statutes did not require United States citizenship in order to obtain a name change and remanded with instructions for the trial court to grant petitioners' respective petitions for a name change.

Drug Test Reports Exception to Hearsay Rule. *In re K.R., J.T.R., J.L.R., & E.R.*, 154 N.E.3d 818 (Ind. 2020). Addressing the conflict between panels of the Court of Appeals about whether drug test reports fit the records of a regularly conducted activity exception to the hearsay rule pursuant to Indiana Rules of Evidence 803(6), the Indiana Supreme Court ruled they do.

Adoption of Submitted Proposed Order. *Berg v. Berg*, 151 N.E.3d 321 (Ind. Ct. App. 2020). The Indiana Court of Appeals once again noted a trial court had adopted one party's proposed findings verbatim and pointed out while that weakens confidence that the findings were the result of considered judgment, a trial court is not prohibited from doing so.

Paternity.

Rescinding Paternity Affidavit. *In re the Support of J.O.*, 141 N.E.3d 1246 (Ind. Ct. App. 2020). Father signed a paternity affidavit even though he suspected he was not the child's biological father. Nineteen months later a child support action was initiated by the prosecutor's office at Mother's request. Father moved to dismiss and the trial court ordered the parties to submit to genetic testing. After the testing showed Father was not the biological father, the trial court granted Father's motion to dismiss. The state of Indiana appealed and the Indiana Court of Appeals reversed. Father's request to rescind the paternity affidavit took place more than 60 days after the execution of the paternity affidavit, so he was required to establish fraud, duress, or material mistake of fact in connection with the execution. See I.C. § 16-37-2-2.1(l). The trial court found no evidence of fraud or duress, and the Court of Appeals agreed that the evidence in the record did not support such claims. The Court of Appeals noted prior decisions that recognized where setting aside paternity would leave a child fatherless, the child would be "a *filius nullius*." The paternity statute was created to avoid such an outcome and the trial court erred by granting Father's motion to dismiss. Father was child's legal father with all attendant legal consequences, and it was too late to find otherwise.

Child Not Born of the Marriage. *In re J.G.*, 149 N.E.3d 1192 (Ind. Ct. App. 2020). Mother gave birth the J.G. during her marriage to Husband. Five years later, the State of Indiana filed a paternity action as child's next friend, seeking to establish paternity in Putative Father. Mother moved to dismiss on the ground that the State had failed to name Husband as a party, the State had not timely filed the petition within two years of child's birth, and Putative Father had not registered with the putative father registry. The State then filed a motion to join Husband as a party, and Putative Father registered with the putative father registry. The trial court ordered the parties to submit to DNA tests and the results indicated there was a greater than 99% change Putative Father was child's biological father. At the hearing, Putative Father presented as evidence a petition Husband had filed to dissolve his marriage to Mother in which he stated the child was born during his marriage to Mother, but "is not a child of the marriage" and Husband's verified motion for provisional orders in which he did not list the child even though he listed other children as children of the marriage. The trial court denied Mother's motion to dismiss and found Putative Father is the father of the child. The trial court's order was affirmed on appeal. The Indiana Court of Appeals found pursuant to I.C. § 31-14-5-3(b)(3), the State was not required to file its petition within two years of the child's birth. The Court of Appeals also noted I.C. § 31-14-7-1(1) explicitly provides that a husband's marriage only creates a rebuttable presumption of paternity, noting "it is well settled that the fact that a child was born while his mother was married 'does *not* establish

that the child was born during wedlock.' *K.S. v. R.S.*, 669 N.E.2d 399, 402 (Ind. 1996) (emphasis added)." Finally, the Court of Appeals found that because the child was not the subject of an adoption proceeding, Putative Father was not required to register with the putative father registry before the State could file the paternity petition.

Finding of Contempt Not a Substitute for Determining Best Interest. *In re B.Y.*, 159 N.E.3d 575 (Ind. 2020). Father filed petition to establish custody, parenting time, and child support of infant child. Mother was a flight attendant and required to return to Florida or she would face termination. Pending a formal hearing, the trial court allowed Mother to take the child out of state on the strict understanding she would return to Indiana for the final hearing. After evidence was heard at that hearing, but before the trial court issued a formal order, Mother objected to Marion County as a proper venue and field a motion for transfer to the proper forum. In an interim order, the Marion County court found Hamilton County was the proper forum and also issued a temporary restraining order that the child could not be relocated from Indiana pending further hearing. After the case was venued in Hamilton County, Father filed a petition for rule to show cause alleging Mother had violated the Marion County order by relocating the child from Indiana. The trial court found Mother in contempt for relocating the child out of Indiana and denying Father parenting time, and awarded Father sole legal and physical custody of the child. The Court of Appeals affirmed the trial court. The Indiana Supreme Court reversed because "the trial court appears to have conflated Mother's contempt of court with B.Y.'s best interests when it established legal and physical custody," awarded Mother sole legal custody and joint physical custody to Mother and Father consistent with the status quo prior to the Hamilton County trial court's order. and remanded with instructions to the trial court to decouple its finding of contempt from the best interests of the child and determine whether a modification of custody is warranted with these principles in mind.

Adoption.

Implied Consent to Adoption. *In re Adoption of C.A.H.*, 136 N.E.3d 1126 (Ind. 2020). Father filed a motion contesting the adoption of his child by maternal grandparents. Father failed to appear at the hearing and the trial court entered the decree of adoption. A divided Court of Appeals affirmed the trial court. The Indiana Supreme Court reversed and remanded for a hearing on the merits of Father's motion to contest the adoption, finding a parent's implied consent to the adoption of a child may not be based solely on the parent's failure to appear at a single hearing.

Failure to Communicate and to Provide Support. *In re the Adoption of I.B.*, 151 N.E.3d 774 (Ind. Ct. App. 2020). Trial court ruled Mother's consent to adopt was not required after finding, *inter alia*, Mother had not spent any significant time on the telephone with the child and had not provided support for the child. On appeal, the Indiana Court of Appeals found the trial court clearly erred in placing complete emphasis on the average number of minutes Mother called child each month and that step-mother presented no evidence that there was not one "significant" communication in Mother's multiple telephone calls to child within the relevant six-month and one-year time periods. With respect to the issue of failure to provide support, there was no evidence to support the trial court's finding that Mother could have paid child support during her brief periods of employment. To the extent the trial court relied on its findings that Mother did not use student loan money to pay child support, it clearly erred in two respects. First, there was no evidence in the record that Mother was permitted to use student loan money to pay child support.

Second, even if Mother were permitted to use student loans to pay child support, there is no evidence in the record that the student loans were in an amount sufficient to allow her to make such payments or that any student loan money was remaining after Mother used it for her education-related and/or necessary living expenses.

Findings to Support Dispensing with Parent's Consent Required by Statute. *W.M. v. H.T.*, 157 N.E.3d 1231 (Ind. Ct. App. 2020). Trial court granted petition to adopt over biological father's objection. The Indiana Court of Appeals held the trial court was required to make findings under the adoption statute that would support dispensing with Father's consent to the adoption and remanded to the trial court for further findings as required by statute.

Property Division.

Retirement Benefits. *Story v. Story*, 148 N.E.3d 1155 (Ind. Ct. App. 2020). Husband left the U.S. Army Reserves after more than 30 years of service and subsequently filed a petition for dissolution of marriage. The parties entered into a mediated settlement agreement that provided wife would receive 50% of husband's approved vested monthly benefits from the military reserve annuity retirement and she would be treated as surviving spouse for the purpose of any pre-retirement survivors benefits and be entitled to receive her military reserve survivor pension. The settlement agreement also provided that wife should be treated as husband's irrevocable beneficiary for husband's military reserve annuity retirement and that husband would make the necessary election in a timely manner to effectuate survivor coverage for wife.

Unlike active duty members of the U.S. military who generally receive their military retirement pay upon retirement, reservists who leave the military prior to reaching retirement age must wait to receive their military retired pay. Husband was 51 years of age and was not entitled to his military retired pay until he was 57. Husband executed a "Survivor Benefit Plan ("SVP") Election Statement for Former Spouse Coverage." The SVP was optional and provided survivor benefits to wife should husband predecease her. The premiums for the SVP were to be deducted from husband's military retired pay. Because the SVP started before husband would receive his military retired pay, premiums for survivor coverage during the pre-retirement period "accrue" and would be due when husband started receiving his military retirement pay. That coverage could cost as much as $100,000.00 during husband's life.

Wife's counsel later prepared an addendum to the mediated settlement agreement for the parties' signatures to include the necessary information to meet the DFAS requirements of calculating the division of husband's military retired pay. Despite his initial cooperation, husband refused to sign the addendum because the cost of the premiums for the SVP had not been accounted for in the settlement agreement. Wife filed a request for the trial court's intervention to secure husband's cooperation in signing the addendum. The trial court ordered that each party should pay one-half of the premium. In response to husband's motion to clarify the trial court's order, the trial court clarified that wife was entitled to receive a portion of husband's post-retirement divided asset, or SVP, as well as the pre-retirement RC-SVP. Husband appealed and the Indiana Court of Appeals affirmed. The Court determined that husband's survivor coverage to wife was effective during husband's pre-retirement period, and that coverage continued until husband's death and provided survivor benefit coverage for wife whether husband dies before or after his retirement age.

Ferrill v. Ferrill, 143 N.E.3d 350 (Ind. Ct. App. 2020). Husband elected to leave active duty in the United States Army prior to accumulating the 20 years of service required for a military pension. In exchange for leaving active duty before qualifying for a military pension, husband was to receive Voluntary Separation Incentive ("VSI") payments. Eight years later the parties entered into a settlement agreement as part of their dissolution. The agreement provided that husband would keep his military retirement pension and husband would pay to wife the sum of $11,000.00 annually from his VSI account within 10 days from the date he received payment. It also provided if the VSI account was converted to any other form of payment, husband would pay the $11,000.00 obligation from the source *pro rated* as received. Husband subsequently returned to active duty. Once he accumulated the 20 years of active duty service required to receive the full amount of the military pension, he was no longer eligible to receive the VSI payments and he was required to repay all the VSI monies he had received. Husband notified Wife he was going to stop making the annual payments of $11,000 to her. Wife filed a petition for contempt. The trial court found husband in contempt and stated the future payments husband was to pay wife.

The Indiana Court of Appeals reversed the trial court. The Court addressed the alleged conflict between the two provisions of the settlement agreement stating that husband received his military retirement pension as his sole and separate property and the VSI provision. It noted that courts in other jurisdictions had held that when a divorce settlement agreement or divorce decree has given a percentage of a spouse's military retirement to the other spouse, if the receiving spouse thereafter unilaterally forfeited military retirement payments by accepting VSI payments the other spouse was entitled to receive the expected monies from the VSI payments. The Court interpreted wife's request as the inverse, *i.e.*, that her entitlement to a portion of husband's VSI payments under the settlement agreement converted into an entitlement to a portion of husband's military pension when husband became eligible for the pension instead of VSI. The Court distinguished this case, noting that the settlement agreement contained provisions that disposed separately of military pension and VSI payments, and declined to follow the other cases. Because the settlement agreement stated that husband's military retirement pension was "his sole and separate property," the trial court erred in ordering husband to pay any of those pension monies to wife and abused its discretion by finding husband in contempt.

Business Valuation. *Bringle v. Bringle*, 150 N.E.3d 106 (Ind. Ct. App. 2020). Prior to the parties' marriage, husband formed a company that was organized for tax purposes as an S Corporation. Husband was the sole shareholder. During the marriage, and prior to filing the petition for dissolution of marriage, the company "sold" husband the real estate where it was located for $480,000.00. The company later transferred the real estate to an entity owned by husband and his son from a previous marriage. The company also paid various personal expenses for husband. Those transactions would later appear as a $659,707.00 receivable "due from shareholder" on the company's balance sheet. Wife filed a petition to dissolve the parties' marriage.

At the final hearing, husband acknowledged that he had mingled personal and business expenses. He also testified that during the marriage and while the divorce case was pending, he paid personal bills "out of the company" and explained that it was advantageous to "run bills through the company" because those payments were treated as "dividends" rather than earned income subject to payroll taxes. Husband testified that the transfer of the business real estate and personal expenses

paid by the Company were shown as "shareholder debt" on the Company's balance sheet "for tax purposes" to avoid having to pay income taxes "at that time." Husband also testified that the shareholder debt would "be paid whenever."

In connection with the divorce case, husband and wife jointly retained Houlihan Valuation Advisors to appraise the fair market value of the company. Houlihan arrived at a $1,050,000.00 value of the Company using a combination of market-based and income-based valuation methods. In its valuation, Houlihan stated that the $659,707.00 note due from shareholder would be deemed a non-operational asset and should be included on the marital balance sheet since the receivable was included in the value of the Company. The trial court awarded the Company to husband, valued the Company at the Houlihan appraised value of $1,050,000.00, but did not recognize the $659,707.00 receivable due from shareholder or shareholder debt as a liability of the marital estate.

On appeal, the Indiana Court of Appeals affirmed the trial court. As to their shareholder debt to the Company, the Court of Appeals rejected husband's contention that the trial court misunderstood the Houlihan valuation and that the trial court was confused or failed to consider husband's debt to the Company. As to the Houlihan footnote in the business valuation which indicated that the liability should be included in the marital balance sheet, the Court of Appeals found that comment to reflect routine accounting practice but concluded that did not end the trial court's responsibility as to the division of marital property. The Court of Appeals stated that a division of property does not require the mechanical, robotic application of accounting principles. In its review, the Court of Appeals recognized the limiting conditions on the Houlihan valuation and rejected husband's explanation and opinion of the Company's value. However, husband's valuation was significant because his valuation would eliminate the shareholder debt as a company asset. As to husband's contention that the trial court overstated the value of the marital estate when it included $659,707.00 receivable due from shareholder as an asset of the company but not showing the corresponding debt, the Court of Appeals focused on the Company being an S Corporation, which husband was the sole shareholder. The Court of Appeals determined that the "due from shareholder" item was not a current asset and was mischaracterized on the husband's balance sheet. While it might have been recorded as a "other asset," the Court of Appeals noted that the receivable was an obligation that husband owed to a company owned only by him and, hence, to himself. Husband could not be both a debtor and a creditor with respect to the same debt. Husband created most of the shareholder debt merely by transferring the real estate from one closely-held, related company to another. Because husband was both the debtor and creditor, the liability was inherently unenforceable.

The Court of Appeals added that the "shareholder debt" was a contingent liability, *i.e.*, a "contingent liability" as a "liability that will occur only if a specific event happens;" a "liability that depends on the occurrence of a future and uncertain event." The record revealed no assurance or certainty that husband would pay the shareholder debt. As such, that debt was a potential or contingent liability that may or may not become due. The Court of Appeals then looked to financial accounting standards and reference to a contingent liability as a "loss contingency" and indicated that a trial court must determine that it is probable or more likely than not that a party will pay a debt. In this case, the collectability of the receivable "due from shareholder" was questionable. A party who retains control over when or whether a condition will be fulfilled has an implied obligation to make a reasonable and good faith effort to satisfy that condition. *See Indiana State Highway Comm' v.*

Curtis, 704 N.E.2d 1015, 1019 (Ind. 1998). Husband's testimony and his valuation of the company revealed an ambivalence toward when, if ever, the shareholder debt would be repaid. The Court of the Appeals concluded that the evidence showed that the "due from shareholder" was a contingent liability in which the parties did not have a vested present interest. The mere possibility that husband would pay the "debt" at some time in the future, in his discretion and at his convenience, rendered the "due from shareholder" entry remote and speculative with respect to the division of marital property. As such, the trial court acted within its discretion when it determined that the "due from shareholder" was an uncertain obligation rather than a current liability to be included on the marital balance sheet and divided. Husband controlled both sides of the transaction and, thus, owned both the asset and the contingent liability just as he did before the "sale." It was husband's burden to establish that the receivable "due from shareholder" was a present, unconditional, and absolute liability of the marriage. Because husband appealed from a negative judgment, he was required to demonstrate that the trial court erred as a matter of law when it concluded, in effect, that personal expenses paid by the company and the husband's "sale" of the business real estate from one closely-held, related entity to another, while characterized as shareholder debt for tax purposes, did not create a current marital liability that should be attributed to the marital estate. The Court of Appeals declined to substitute its judgment for that of the trial court.

<u>Prenuptial Agreements.</u> *Thompson v. Wolfram*, ___ N.E.3d ___ (Ind. Ct. App. 2020)(2020WL 755042). Prenuptial agreement drafted by Husband's brother-in-law, who was an attorney, provided, in part, in the event of a divorce:

> A. All assets owned by each party and in the name of that party, all at the time of the marriage, and which assets are maintained separately by that party after the marriage, and which are not commingled with the other party's assets, or which are not listed under the joint name of the parties, shall remain the separate assets of that party and shall not be subject to division upon divorce.
> * * *
> D. Any assets acquired by the parties during their marriage to each other, other than as provided herein above, shall be considered joint marital assets and subject to equal division between the parties upon divorce.

During a bench trial, the parties disagreed about how to treat Husband's retirement accounts. Husband argued no part of his retirement accounts was marital property. Wife argued the value of the accounts at the time of the marriage should be set aside to Husband, but the remaining value in the accounts should be considered property of the marriage to be divided equally. The trial court concluded the prenuptial agreement did not exclude from the marital estate to be divided either contributions made during the marriage or earning and appreciation and thus, by default, requires that such contributions, earnings and appreciation be included in the marital estate to be divided equally. The trial court also ordered Husband to pay an equalization payment within thirty days of the order, even though it scheduled a future hearing to determine the value and distribution of other assets. Husband designated his appeal as one from a final judgment, even though it was an appeal from an interlocutory order.

The Court of Appeals noted the appeal was an interlocutory appeal of right because of the requirement that Husband pay the equalization payment within 30 days and affirmed the trial court.

Husband acknowledged the prenuptial agreement was silent as to how future contributions, earnings, or appreciation of assets should be handled, but argued that was the parties' intent at the time the agreement was drafted. The Court ruled that had the parties intended to exclude from the marital pot any increase above the specific values listed in the exhibits, the agreement could have provided that the property outlined in the financial statements including any increase in value through whatever means would remain a party's separate property. "Instead, the Retirement Accounts as listed on Exhibit A included a specific value as of a certain date with no provision for how to treat increases in that value through contributions or otherwise. To the extent the specific words used in the Agreement create an ambiguity, we construe them against the drafter – here, Thompson, by his counsel."

Custody and Parenting Time.

Joint Legal Custody. *Rasheed v. Rasheed*, 142 N.E.3d 1017 (Ind. Ct. App. 2020). The Indiana Court of Appeals reversed a trial court's award of joint legal custody, focusing on I.C. § 31-17-2-15(2) as to whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare. The Court of Appeals noted that factor was of particular importance in making legal custody determinations, and that where the parties have made child-rearing a battleground, joint legal custody is not appropriate. Based on the record, and in light of the parties' history of non-cooperation, the Court of Appeals concluded that the trial court erred in ordering the parties to share joint legal custody.

Different Standard Applied for Modification of Primary Physical Custody. *In re Paternity of I.P.*, 148 N.E.3d 1098 (Ind. Ct. App. 2020). Paternity of out-of-wedlock child was established by paternity affidavit in Ohio, where the parties were living when child was born. Seven years later, Father filed a petition for custody in Indiana, the child's home state and residence of both parties. The trial court awarded Father custody without issuing findings of fact or conclusions of law. Mother appealed. The Indiana Court of Appeals reversed, noting the difference in standards between an initial custody order and a modification of custody order in I.C. § 31-14-13-1, which provides that a biological mother of a child born out-of-wedlock has sole custody of the child unless a statute or court order provides otherwise. (Ohio had a similar statute.) The appellate court found that because Mother had legal and physical custody of the child for the seven years before Father filed his petition, Father's petition should have been construed as a petition to modify custody with Father required to meet the requirements of I.C. § 31-14-13-6. The Court of Appeals determined that Father failed to present evidence to show a substantial change in at least one of the I.C. § 31-14-13-2 factors. The Court also concluded that no evidence existed in the record by which it could conclude that modification of custody to Father was in the child's best interest and the trial court abused its discretion in granting custody of child to Father.

Parenting Time Coordinator. *Jones v. Gruca*, 150 N.E.3d 632 (Ind. Ct. App. 2020). The Indiana Court of Appeals affirmed the trial court's order that future issues regarding custody, support, or parenting time be addressed by a parenting coordinator before bringing those issues to the trial court. The Court of Appeals held that requiring the involvement of a parenting coordinator as a prerequisite for future filings did not constitute the trial court improperly delegating its judicial power.

Relocation. *McDaniel v. McDaniel*, 150 N.E.3d 283 (Ind. Ct. App. 2020). Mother, who was the custodial parent, filed a notice of intent to relocate. Father filed an objection to relocation and request for hearing. At the hearing, Mother testified she had already sold her home in Dearborn County and moved to Richmond, Indiana. The trial court's award of legal and physical custody to Father was affirmed on appeal. Of note, the Indiana Court of Appeals ruled the trial court did not lack the authority to "*sua sponte*" modify joint legal custody where Father did not request that in his petition to modify, because trial courts are not precluded from entering a custody arrangement not specifically advanced by either party so long as that custody arrangement is in the child's best interest. It determined *In re Paternity of W.R.H.*, 120 N.E.3d 1039 (Ind. Ct. App. 2019, was inapplicable in this case because *W.R.H.* involved a hearing on a request to relocate as a petition for custody and modification directly stemming from that request. The child's best interests is the touchstone of any custody determination and the trial court's discretion is "unfettered by the contents of a party's motion for the hearing."

But see Madden v. Phelps, 152 N.E.3d 602 (Ind. Ct. App. 2020). Mother appealed the trial court's order that modified existing custody orders and awarded Father primary physical and sole legal custody, arguing, *inter alia*, the issue of legal custody was not properly before the trial court. The Court of Appeals examined the substance of the parents' motion and determined their dispute pertained only to the physical custody of the child. Legal custody never was mentioned by either party. Nor did the parties consent to try the issue of joint legal custody during the hearing. The Court of Appeals reversed the portion of the trial court's order granting sole legal custody to Father.

Petition for Visitation May Not Be Denied Without a Hearing. *Prater v. Wineland*, 160 N.E.3d 540 (Ind. Ct. App. 2020). The Indiana Court of Appeals ruled the trial court erred when it denied Mother's petition for visitation with her daughter, who was under the guardianship of her grandparents, without a hearing.

Child Support.

Six Percent Rule. *Anselm v. Anselm*, 146 N.E.3d 1042 (Ind. Ct. App. 2020). Mother submitted two unsigned Child Support Obligation Worksheets at a hearing on child support, one of which calculated Father's recommended child support obligation to be $173 per week. Father stated he had no objection to the admission of either worksheet. The trial court ordered Father to pay child support in the amount of $173 per week and that he was "solely responsible for all uninsured medical costs based upon his having the Health Savings Account." The court did not award Father a credit for the 6% of the healthcare expenses that he was already paying or explain why such a credit would be inappropriate on the facts.

On appeal, the Indiana Court of Appeals noted that, "in general, a worksheet is improper if it is not signed or verified . . . [because] an unsigned worksheet 'has no sanction under either the child support guidelines or the rules of evidence and trial procedure,'" quoting *Cobb v. Cobb*, 588 N.E.2d 571, 574 (Ind. Ct. App. 1992). However, in the case at bar, the parties had stipulated to their respective income at the beginning of the hearing and those incomes were used on the unsigned CSOWs, so there was no risk Mother had misrepresented either party's income on her

CSOWs. Further, Father did not object to the worksheets or otherwise dispute the content, so he could not complain on appeal that the trial court had improperly relied on them.

However, with respect to the uninsured medical expenses, the trial court erred by ordering Father to pay them twice--through the prepayment when he paid his child support obligation (the 6% rule amount) and the actual, full payment when the uninsured healthcare expenses were incurred. The Court of Appeals found such double payments were precisely the scenario the 6% rule was designed to prevent.

IWO for Educational Support Order. *Eldredge v. Ruch*, 149 N.E.3d 1200 (Ind. Ct. App. 2020). The Indiana Court of Appeals ruled an income withholding order may be issued to enforce an educational support order.

Credit for Social Security Disability Benefits. *Hill v. Cox*,153 N.E.283 (Ind. Ct. App. 2020). The Indiana Court of Appeals held that the amount of lump sum social security disability benefits received by a child in excess of Father's then-existing child support arrearages must be credited toward any then-existing arrearage on the child's medical debt and the amount of periodic social security disability benefits received by the child in excess of Father's child support arrearage must also be credited toward any then-existing arrearage for the child's medical debt.

Mediation.

Berg v. Berg, 151 N.E.3d 321 (Ind. Ct. App. 2020). Husband and wife participated in mediation and negotiated a settlement agreement. Under the settlement agreement, each party retained all stock accounts held in his or her own name and husband retained all stock accounts the parties held jointly. At one point in the mediation, the parties made mutual representations and warranties that all assets had been correctly and truly revealed and reflected in the settlement agreement. The settlement agreement also provided for a full disclosure of all assets and liabilities, and stated that it was in final and complete settlement of all property rights. A year after the trial court approved the settlement agreement and incorporated its terms into a decree of dissolution of marriage, wife filed a verified Ind. Trial Rule 60(B) motion focused on a stock account husband held which was valued at about $122,000.00. Husband's counsel had disclosed that account to wife's lawyer, but did not include it on the wife's balance sheet and that was the balance sheet used at mediation. Husband filed a motion to strike, challenging the admissibility of the evidence attached to wife's motion arguing that any evidence concerning "what went on during mediation, what became part of the mediation agreement" was inadmissible. The trial court overruled husband's objection and eventually entered an order awarding wife half of the value of the account. The trial court found that "(1) fraud, constructive fraud, mutual mistake, or misrepresentation had occurred and (2) husband had breached a warranty." Husband appealed and the Indiana Court of Appeals, in a 2-1 decision, reversed.

The Court of Appeals noted that mediation is a "confidential process." Evidence discoverable outside of mediation should not be excluded merely because it was discussed or presented in the course of mediation. Ind. Alternative Dispute Resolution Rule 2.11(B)(2). However, mediations are settlement negotiations governed by Ind. Evid. Rule 401. Ind. Evid. Rule 408 has an exception that allows evidence to be admitted for another purpose, such as proving a witness's bias or

prejudice, negating and contention of undue delay, or approving an effort to obstruct a criminal investigation or prosecution, citing the opinion of the Indiana Supreme Court in *Horner v. Carter*, 981 N.E.2d 1210 (Ind. 2013). The Court of Appeals determined that trial court's judgment dividing the omitted stock account could not stand without evidence of what occurred at mediation, which could not be admitted, and because the mediation evidence was essential to the judgment, the judgment could not stand. The trial court also found that wife could not avoid the settlement agreement due to fraud, constructive fraud, mutual mistake, misrepresentation, or other misconduct, again because, without the mediation evidence, there is insufficient evidence to find that wife could avoid the settlement agreement.

The Court of Appeals further ruled that to the extent the judgment in favor of wife was based on principles of contract avoidance, the trial court also erred. The trial court had found that wife was entitled to relief because husband breached a warranty in the settlement agreement. Reviewing warranty law, the Court of Appeals determined that wife could not avoid the settlement agreement, in which she had asserted that all assets had been disclosed and reflected in the terms. Wife was thus estopped from claiming that her assertions were untrue.

Grandparent Visitation.

Sevilla v. Lopez, 150 N.E.3d 683 (Ind. Ct. App. 2020). A child born out of wedlock was found to be a CHINS and placed with grandparents. While the CHINS case was ongoing, the trial court ordered Father to complete a DNA test so paternity could be established, but Father was killed before it could be completed. Grandparents ensured a vial of Father's blood was collected and submitted for the DNA test and it confirmed Father was child's biological father. Mother filed a petition to establish paternity. The child was later returned to Mother's care and custody and the CHINS case closed. Grandparents filed a motion to intervene in the paternity action and requested grandparent visitation in that case. The trial court granted the petition to intervene. Mother and Grandparents reached an agreement on visitation with the child, which the court entered as an agreed order. Mother subsequently filed a motion to dismiss the paternity action and the trial court granted it over Grandparents' objection. Grandparents appealed.

The Court of Appeals determined that the issue presented was solely on a matter of law and applied a *de novo* standard of review. Ind. Trial Rule 41(A)(1)(a) provides that a plaintiff may dismiss her action without order of the court by filing a notice of dismissal. In this case, grandparents filed a petition to intervene in the paternity case. When the trial court granted their petition to intervene, grandparents formally became part of the paternity case. Upon becoming part of the case, the grandparents pursued their claim for the grandparent visitation and Mother eventually contested that claim. While paternity cases do not generally include counterclaims or cross-claims, the Court of Appeals could only conclude that the substantive nature of the request for a grandparent visitation equated to the same. To permit Mother to dismiss the paternity case after grandparents had already intervened would substantially prejudice, if not extinguish, their right to pursue visitation with their grandchild. The Court of Appeals reversed and remanded with instructions to enter a paternity order showing that Father was child's biological father and for further proceedings on the request for grandparent visitation.

CHINS/TPR

In re L.H., 146 N.E.3d 352 (Ind. Ct. App. 2020). After child was born, Father moved to Florida to live with his parents. Father planned to move Mother and child to Florida once he was settled. Before that occurred, Mother was removed from a homeless shelter and had no housing. Mother contacted DCS and admitted she was unable to care for child and Mother's other children due to her homelessness. DCS filed a CHINS petition and Father sought custody of child. A family case manager supervisor with DCS instructed Father that a home inspection in accordance with the Interstate Compact on the Placement of Children ("ICPC") was required before child could be placed with him. The family case manager supervisor sent the ICPC documents to DCS's Indianapolis office for processing and submission to Florida. Before Father's home inspection could be completed, child was adjudicated a CHINS. In its order on the CHINS fact-finding hearing, the trial court ordered DCS "to submit an ICPC for Father." The family case manager supervisor received a letter from Florida notifying her that they were unable to complete the ICPC process because Father advised Florida that he would be returning to Indiana. Father returned to Indiana and began staying with an individual identified by DCS as having substance abuse issues. While in Indiana, Father participated in some, but not all, services. DCS filed a petition for involuntary termination of Father's parental rights. At the termination fact-finding hearing, former family case managers testified as to concerns. One family case manager testified that she followed DCS policy over the law, and that she did not know what the law stated. The trial court entered an order terminating Father's parental rights. Father appealed. He did not challenge the findings or specific conclusions, but contended that the termination order must be reversed due to the tainted proceedings.

The Indiana Court of Appeals reversed and remanded. DCS's failure to place child with Father and requiring Father to complete the ICPC process, which was not required for natural parents, was a procedural error that resulted in the improper termination of Father's parental rights to child. *In re D.B.*, 43 N.E.3d 599 (Ind. Ct. App. 2015) held that the ICPC did not apply to placement with an out-of-state parent. The Court of Appeals was dismayed that DCS failed to understand the law regarding the ICPC's inapplicability to natural parents, or, assuming DCS understood the law, it had chosen to ignore it. The Court of Appeals further found it unconscionable that DCS continued to require an ICPC for natural parents despite the Court of Appeals' reiteration that an ICPC was not required for natural parents. DCS's procedural error tainted the proceedings so significantly that the Court of Appeals could not say that Father was afforded his due process rights in the CHINS and termination proceedings.

In re F.A., 148 N.E.3d 353 (Ind. Ct. App. 2020). DCS filed a petition to terminate parental rights as to 5 children following an altercation between Mother and one of the children, which occurred 15 days after DCS had filed a motion to close the CHINS case involving the children. The Indiana Court of Appeals reversed the termination of parental rights. The Court of Appeals noted "[a]s a matter of statutory elements, it has been established that DCS is not required to provide parents with services prior to seeking termination of the parent-child relationship. . . However, parents facing termination proceedings are afforded due process protections. . . . and procedural irregularities in a CHINS proceeding may deprive a parent of due process with respect to the termination of his or her parental rights." The Court also noted DCS's burden of proof for establishing the elements of the termination statute is one of clear and convincing evidence and

could not conclude that "in totality and under the circumstances" DCS made all reasonable efforts to reunify the parents with the children after the altercation.

In re Tre.S. and Tra.S. 149 N.E.3d 310 (Ind. Ct. App. 2020). "A.S. ("Mother") appeals the termination of her parental rights to her children, arguing that her due-process rights were violated when the trial court denied her attorney's emergency motion to continue and held the termination hearing without her attorney present. ***The State concedes that Mother's due-process rights were violated.*** We reverse the termination order and once again remind trial-level DCS attorneys and trial courts that they have a duty to ensure that parents' due-process rights in termination cases are not violated." *Id*. at 311 (emphasis added.)

The Court of Appeals called attention to its *Order*, No. 18A-JT-527 (July 8, 2018), in which it commended DCS for conceding error, but said it was "obligated to formally admonish DCS for its failure to afford litigants throughout this state the due process rights they are owed." *Id.* In that Order, the Court also reminded "the trial courts throughout this state of their duty to ensure that litigants' due process rights are not violated." *Id.*; *see also In re J.K.*, 110 N.E.3d 1164, 1166 (Ind. Ct. App. 2018). In this October 2020 decision the Court of Appeals stated: "Nearly two years after we issued this order, DCS continues to file motions to remand conceding that parents' due-process rights have been violated. This unfortunately means that throughout this state, there continues to be significant violations of parents' due-process rights in termination-of-parental-rights cases. This case is just one example. The trial court set the termination hearing for October 1, but the case was moved up because the pre-adoptive parents wanted it finalized sooner. On August 6, the court rescheduled the hearing for approximately two weeks later, August 21. On the day of the hearing, Mother's attorney filed an emergency motion to continue because she thought the hearing was still set for October 1 and was at an all-day mediation training. Indeed, the record is unclear whether Mother's attorney was even notified of the August 21 hearing date. The court denied the motion to continue and held the hearing without Mother or her attorney present, knowingly disregarding Mother's rights. Both the court and DCS knew that they were committing due-process violations and proceeded with the hearing anyway. This must stop. We therefore reverse the termination order and issue yet another reminder to trial-level DCS attorneys and trial courts that they have a duty to ensure that parents' due-process rights in termination cases are not violated." *Id*. at 313.

In re D.C., Jr., 149 N.E.3d 1222 (Ind. Ct. App. 2020). The written consent form signed by Mother voluntarily relinquishing her parental rights provided sufficient evidence that she received 8 of the 9 advisements required by statute. However, there was no indication in the record that the trial court gave the 9th advisement. The record was equivocal as to whether Mother received the statutory advisement that her consent could not be based on a promise regarding the child's adoption or contact of any type with the child after her voluntarily relinquish of her parental rights of the child after entry of an order terminating the parent-child relationship. The Court of Appeal reversed the termination of Mother's rights and remand for further fact-finding as to the 9th statutory advisement.

In re D.S., 150 N.E.3d 292 (Ind. Ct. App. 2020). The Court of Appeals held the trial court erred in adjudicating a child to be a CHINS where DCS did not carry its burden that Mother's actions or inactions have seriously endangered the child, finding her admitted drug use was insufficient to

support the adjudication. Mother claimed to only use marijuana when the child was not in her care and she never appeared to DCS caseworkers to be under the influence.