

Children's Law Center of Indiana



Selected Indiana Cases on Modification of Custody¹

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This document summarizes some Indiana case law on custody modification between parents in selected dissolution and paternity cases arranged by topics. The cases discussed are published opinions of the Indiana Supreme and Appellate Courts.

A. Relocation:

In In Re Paternity of B.A.S., 911 N.E.2d 1252 (Ind. Ct. App. 2009), the Court held that Mother's due process rights were not violated by allowing the trial court to determine whether Mother's relocation out of state with the children was in their best interests. Mother first argued that the trial court erred in modifying custody to Father because the trial court relied on Baxendale, where both parents resided in Valparaiso, and the mother wanted to move out of state. Mother contended her case was different because she lived in Valparaiso and wanted to move to Norfolk, Virginia due to her husband's naval deployment. Father already lived out of state in Illinois. The Court noted that "a nonrelocating parent is someone 'who has, or is seeking: (1) custody of the child; or (2) parenting time with the child; and does not intend to move the individual's principal residence.'" Id. at 1256. Since Father's principal residence was Illinois, and he did not intend to move, he qualified as a nonrelocating parent. Id. Mother next argued that her due process rights had been violated. The Court again cited Baxendale, noting "the interaction between a parent's right to travel and a child custody order. The court [also] recognized that a 'chilling effect on travel can violate the federal Constitution,' but also acknowledged that 'other considerations may out-weigh an individual's interest in travel.'" Id. (citing Baxendale v. Raich, 878 N.E.2d 1252, 1259 (Ind. 2008)). The Court stated that a child's interests are powerful countervailing considerations that do not become irrelevant simply because a parent wishes to relocate. Id. at 1256. The Court also pointed out that the nonrelocating parent's interest in the child also has a

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constitutional dimension. Id. Consequently, the Court concluded that “Mother’s due process right to travel and parent her children may be impinged upon where relocation is not in the children’s best interests.... decisions as to the custody of children always involve a balancing between competing, legitimate parental interests...” Id. at 1257. Mother’s final argument was that requiring the wife of a member of the armed services to make a choice between remaining with her husband or retaining custody of her children was violative of public policy. The Court acknowledged the dilemma, but stated “Mother appears to argue that such military service, here by a step-parent, trumps Indiana’s statutory and common law consideration of the best interests of the children. This is not the case.” Id.

In In Re Paternity of J.J., 911 N.E.2d 725 (Ind. Ct. App. 2009), the Court held that when the trial court does not consider each factor in the relocation statute, the trial court’s subsequent modification of custody constitutes an abuse of discretion. Mother filed a notice of intent to relocate with the minor child to Florida. Although Mother had custody, Father testified that he was the primary caretaker, and that he did not pay child support. The trial court modified custody to Father. The Court initially noted that custody modifications are only permitted if the modification is in the best interests of the child, and there has been a substantial change in one or more of the factors identified in I.C. 31-17-2-8. Id. at 728. The Court also pointed out that modification due to relocation is covered in I.C. 31-17-2.2, which is summarized by Baxendale v. Raich, 878 N.E.2d 1252 (Ind. 2008). Id. When the parent who is not relocating seeks custody of the child in response to the proposed relocation, instead of filing a motion to prevent relocation, the court must take the following factors into consideration when deciding whether to allow the proposed relocation: “(1) the distance involved in the proposed change of residence; (2) the hardship and expense involved for the nonrelocating individual to exercise parenting time or grandparent visitation; (3) the feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time and grandparent visitation arrangements, including consideration of the financial circumstances of the parties; (4) whether there is an established pattern of conduct by the relocating individual, including actions by the relocating individual to either promote or thwart a nonrelocating individual’s contact with the child; (5) the reasons provided by the: (A) relocating individual for seeking relocation; and (B) nonrelocating parent for opposing the relocation of the child; (6) other factors affecting the best interest of the child.” Id. at 729, citing I.C. 31-17-2.2-1. The Court stated that while the relationship between the child and the nonrelocating Father was properly considered as a factor, Father was the primary caregiver because Father was not employed and not paying child support as ordered. Id. at 729. Mother was working two and sometimes three jobs in order to support herself and the child, and was complying with the Indiana Parenting Time Guidelines by offering Father the chance to provide daycare. Id. It was not permissible to punish Mother for following the IPTG. Id. Mother also argued that the trial court committed reversible error when it failed to consider all the factors in the relocation statute. The Court looked to precedent, which stated that “the parent seeking to modify a custody order due to the other parent’s relocation must present evidence on each of the statutory factors.” Id. at 731, citing Wolljung v. Sidell, 891 N.E.2d 1109, 1113 (Ind. Ct. App. 2008). The trial court’s order did not address all the statutory factors, such as the hardship and expense for Father to exercise parenting time, the ability to preserve the relationship between the child and Father through parenting time, the financial situation of both parties, and whether Mother has engaged in a pattern of promoting or

thwarting the relationship between Father and child. *Id.* at 731. The Court consequently remanded the case to the trial court to fully consider all the statutory factors. *Id.*

In Green v. Green, 889 N.E.2d 1243 (Ind. Ct. App. 2008), *trans. denied*, the Court held, *inter alia*, that it was not an abuse of discretion to deny Father's petition to modify custody.² Previously, in Green v. Green, 843 N.E.2d 23 (Ind. Ct. App. 2006), this Court held that the trial court abused its discretion in denying Father's petition to modify custody because it failed to consider the factors in I.C. 31-17-2-8. On remand, the trial court allowed Mother to submit additional evidence, and denied Father's petition to modify custody. The trial court, as ordered, entered findings of fact and conclusions of law. In addressing Father's argument that the trial court erred in denying his petition to modify custody, the Court noted that the case arose within the context of Mother's desire to relocate with the parties' child. On appeal, Father argued that the evidence did not support the trial court's findings on the statutory elements. The Court concluded that the trial court had issued findings on all elements of I.C. 31-17-2-8 and I.C. 31-17-2-23, and concluded that the trial court did not abuse its discretion. *Id.* at 1249-52. These findings included evidence showing the strong relationship between the child and Mother and Father; the strong relationship between the child and his extended family on both sides; the child's adjustment to his old community as well as to his new one; the detriment to the child resulting from his reduced contact with Father, and the detriment that would result to the child if he had reduced contact with Mother; Father's ability to travel with ease to see the child and Mother's inability to do the same in return; Father's inability to place his child's interests ahead of his own; Mother's good faith reason for moving; and the comparable nature of the two communities. *Id.* at 1246-47.

In Baxendale v. Raich, 878 N.E.2d 1252 (Ind. 2008) (Sullivan, J., dissenting), the Indiana Supreme Court vacated the Court of Appeals decision in Baxendale v. Raich, 866 N.E.2d 333 (Ind. 2008). *Id.* at 1253. The Supreme Court, unlike the Court of Appeals, affirmed the trial court's order giving custody to Father who previously was the noncustodial parent. *Id.* at 1260. The Court found that it was not clearly erroneous for the trial court to balance relevant considerations when it is requested to modify custody because of the custodial parent's relocation. *Id.* at 1253. On July 1, 2006, an entirely new chapter 2.2 governing relocation in child custody cases was added to the "Custody and Visitation Rights" article of the Family Law title in the Indiana Code (IC 31-17-2.2). *Id.* at 1255. Regarding the issue of first impression presented by the interplay of the application of the previous statutory relocation provision and this new one, the Supreme Court held that under the new chapter 2.2 the trial court may, but is not required to, order a change in custody upon relocation. *Id.* at 1253, 1254. The Court agreed with the Court of Appeals that relocation does not require modification of a custody order, but disagreed with the Court of Appeals' finding that IC 31-17-2-21, the general provision governing custody modification, requires a change in one of the Section 8 (IC 31-17-2-8) factors for originally determining custody before a change may be ordered after a relocation. *Id.* at 1256-57. The Court noted that, because IC 31-17-2.2-2(b) of the relocation chapter expressly permits the court to consider a proposed relocation of a child "as a factor in determining whether to modify a custody order," and IC 31-17-2.2-1(b) contains a list of relocation-oriented factors for the court to consider in making its custody determination, IC 31-17-2.2-2(b) seems to authorize a court to entertain a custody

² This case was not decided under I.C. 31-17-2.2 because the motions for relocation and modification of custody were filed in 2005, prior to the July 1, 2007 legislative addition of I.C. 31-17-2.2.

modification in the event of a significant proposed relocation without regard to any change in the Section 8 factors. *Id.* at 1257. Thus, the Court stated, “We therefore adhere to the view under the current statute that relocation may or may not warrant a change of custody.” *Id.*

The Court in *Baxendale*, 878 N.E.2d 1252, also gave substantial consideration to Mother’s argument that, here, the trial court’s order violated her federal constitutional right to travel by forcing her to choose between relocating to another state and retaining custody of her child. The Court found the formulation in *Clark v. Atkins*, 489 N.E.2d 90 (Ind. Ct. App. 1986), *trans denied*, did not give appropriate recognition to the rights of the relocating parent, and discussed the approach other States have taken to the interaction between a parent’s right to travel and a child custody order. *Id.* at 1259. The Court expressed agreement with a recent Colorado Supreme Court decision requiring the balancing of conflicting interests. *Id.* It noted that Indiana’s statutes regarding custody reflect these balancing concerns by considering whether the relocation is bona fide, and explicitly acknowledging the child’s interest and the effect on nonrelocating persons, including a nonrelocating parent. *Id.* at 1260. The Court held that, here, where Mother retains significant involvement with the child, and the child’s interests in continuity of education and contact with other family members, and Father’s interest in parenting the child are significant, the trial court’s custody order is justified. *Id.*

In *Kirk v. Kirk*, 770 N.E.2d 304 (Ind. 2002), the Court affirmed the trial court’s finding that modification of custody was not in the child’s best interests. The Court noted that the child had no family in Rockford, Illinois besides Father “whom she fervently wishes to avoid.” *Id.* at 308. The Court also asserted that, while Mother may be the reason for the child’s estrangement from her Father, modifying the custody arrangement would only serve to disrupt every aspect of the child’s life. *Id.* Further, while the Court speculated that a neutral third party might be better situated to serve as custodian, the trial court would be better situated to make such a determination. *Id.* Therefore, the Court affirmed the trial court’s decision and could not find that the trial court erred in refusing to modify the custody arrangement. *Id.*

In *Lamb v. Wenning*, 600 N.E.2d 96 (Ind. 1992), Mother and Father agreed that they would share joint legal custody of their child. The court approved the proposal and incorporated it into the decree, and eleven days later, Mother notified Father and the court that she planned to move outside of Indiana. *Id.* at 97. Father filed a petition for emergency custody, and the court ordered that temporary physical custody of the child be with Father until the end of the spring school term and with Mother until the week before the start of the fall term. The Court reversed the decision, holding that the Mother’s move out of state was not a sufficient change in circumstances as a matter of law to warrant modification of custody. A significant factor considered when a court awards joint custody is that the parents would live in close proximity to each and that they plan to do so. The Court found that whether a move out of state is of such a nature as to require change in custody was a matter within the sound discretion of the trial court; therefore the case was remanded to the trial court for evaluation of the evidence according to the change in custody standard. *Id.* at 99.

In *Green v. Green*, 843 N.E.2d 23 (Ind. Ct. App. 2006), the Court reversed the trial court’s denial of Father’s petition for modification of custody and remanded the issue back to the trial court. At the time of the modification hearing, Mother had physical custody of the child and

wished to relocate to Iowa. Id. at 23. The Court found that the trial court should have considered the close relationship that the child had with his stepbrother, Father's step-son. Id. at 28. The child and his step-brother were the same age, shared a close friendship, were in the same class at school, and played on several of the same sports teams. Id. The Court also found that the trial court should have considered the closeness of the child's relationship with his paternal grandmother. Id. The child's grandmother had been an almost daily presence in his life since birth. Id. The Court also instructed the trial court to consider the child's adjustment to his home. Id. The child was adjusted well to his schools in Indiana and had a strong involvement in community sports and recreation programs and had many friends among his cousins, schoolmates, teammates, and neighbors. Id. The Court found that the evidence strongly suggested that the child's best interests may better be served through a custody modification allowing him to remain in Indiana with his Father. Id. at 29. Therefore, the Court reversed the trial court's denial of Father's petition to modify custody and instructed the trial court to determine if the effect of Mother's relocation to Iowa was of such a nature as to require a modification in custody. Id.

In Bettencourt v. Ford, 822 N.E.2d 989 (Ind. Ct. App. 2005), Mother and Father shared joint legal custody and joint physical custody of their child on an alternate, two week schedule. While divorce was pending Mother expressed a desire to move with the child to Florida, but Father objected. Shortly thereafter, Mother filed a notice of intent to move, indicating that she and her child would be moving to Florida. Mother moved to Florida without prearranged employment or permanent housing. While Mother lived in Florida, she and her child changed residences five to six times, and the child did not have a bedroom in many of those places. Mother's move to Florida negatively affected the child's relationship with Father, and deprived the child of significant contacts he had developed in Indiana, including his paternal grandparents. Id. at 995, 996. The Court affirmed the trial court's finding that it was in the child's best interests that custody be modified, and that Father be granted sole custody. Id. at 996.

In In Re the Paternity of B.D.D., 779 N.E.2d 9 (Ind. Ct. App. 2002), the Court reversed the trial court's decision and held that custody modification was in the children's best interests. The trial court granted permission to Mother to remove the parties' younger child to Texas. Id. at 11. The Court of Appeals noted that while split custody may be a reasonable alternative when the children involved live in the same community, and even more so when the children attend the same school, as was originally true in the present case, it is difficult to believe that split custody remains an equally reasonable alternative that is in the best interests of the children when they are to live apart in separate communities and, as here, in separate states. Id. at 15. Therefore, the Court reversed the trial court's decision, found that the trial court had abused its discretion, and found that the custody modification to place custody of the younger child with Father and the older child was in the best interests of both children. Id.

In Fields v. Fields, 749 N.E.2d 100 (Ind. App. 2001), *trans. denied*, the Court affirmed the trial court's decision to grant Father temporary custody of the children in light of Mother's intended move to Illinois and upheld the trial court's order, without a hearing, awarding Mother sole physical custody of the children after she moved back to Indiana. The Court found that "excellent extended family support from both the maternal and paternal grandparents as well as other family members exists for both [the children] and 100% of that

support is available in the Miami and Fulton County area,” and because the children would be substantially more isolated in Illinois than in Indiana, the move would effect a substantial change in the children’s lives. Id. at 109. In addition, the Court found that Mother’s emotional life was unsettled, thus causing the children’s lives to be inconsistent and unsettled as well and found that Mother’s move was also influenced by her desire to remove herself from Father’s contact and influence on her. Id. The trial court realized, however, that since Mother is a superior parent and better equipped with parenting skills and to provide the children with emotional support than Father, that if Mother moved back to Indiana within six months, then sole physical custody should be restored in Mother without a hearing. Id. at 110. Therefore, the Court affirmed the trial court’s decision to grant Father temporary custody of the children and upheld the trial court’s order, without a hearing, awarding Mother sole physical custody of the children after she moved back to Indiana. Id. at 111.

In Fridley v. Fridley, 748 N.E.2d 939 (Ind. App. 2001), the Court affirmed the trial court’s decision denying Father’s motion to modify the custody agreement because Mother moved out of state. The trial court denied Father’s petition for modification of custody, but afforded Father new visitation rights, ordered Mother to pay transportation costs during the Christmas holiday, and provided that Father would not be obligated to pay child support over summer break from school. Id. at 940-41. The evidence showed that while the children’s extended family lived in Indiana and the children had been involved in activities in that state, that the move did not adversely affect the children. Id. at 942. Further, since Mother’s move to Arizona was “at least in part motivated by the need to find employment in her field with a flexible schedule to allow her to spend time with the children,” and not to undermine Father’s relationship with the children, the Court concluded that the trial court did not err in failing to modify the custody arrangement. Id.

In Klotz v. Klotz, 747 N.E.2d 1187 (Ind. Ct. App. 2001), the parents agreed in a provisional order to have joint legal custody, with Mother having actual physical custody of their children. Shortly thereafter, Father filed a Petition for Modification of the provisional order after Mother expressed her intention to move out of the state with the children. The trial court did not rule on Father’s petition, but awarded sole legal and physical custody of the children to Mother at the final hearing. The evidence proved that Mother was the primary caretaker of the children. The Court rejected Father’s argument that this was a relocation case which should fall within the I.C. 31-17-2-23. Father did not direct the Court to any statute or case law that required that a relocation conducted while provisional orders are in place required the same steps that a post decree relocation did. Id. at 1191. Since there was no final decree entered by the trial court, I.C 31-17-2-23 was not applicable; therefore, Mother was not required to follow the procedure once she decided to relocate with the children. Id. Based on the evidence the Court affirmed the trial court’s decision.

In Faraq v. DeLawter, 743 N.E.2d 366 (Ind. App. 2001), the Court affirmed the trial court’s decision modifying a joint legal and joint physical custody order by allowing Mother and Father to continue to share joint legal custody of the child, with Mother having primary physical custody of the child. When their child was not even one year old, Mother and Father ended their marriage. Id. at 367. Both agreed to joint legal and joint physical custody and set up a visitation schedule. When the child was five years old, Mother informed Father two weeks prior to her move of her intent to move away from Peru, Indiana to Bedford, Indiana,

because her new husband had found new employment. *Id.* at 368. The Court found that permanence and stability could not be accomplished through joint physical custody. *Id.* at 370. Mother's relocation in and of itself did not impose any burden of proof upon her. *Id.* Therefore, the Court affirmed the trial court's award of primary physical custody to Mother. *Id.*

In *In Re Paternity of Winkler*, 725 N.E.2d 124 (Ind. Ct. App. 2000), the Court affirmed the trial court's decision to modify the custody of the child by granting permanent custody to Father. When the child was two years of age, Mother moved into a house two doors down from Father, where Mother and child lived for the next ten years. *Id.* at 126. Father pursued visitation with the child and was actively involved in the child's life. *Id.* When the child was twelve years old, Mother expressed her intention to move from the South Bend/Mishawaka area to Virginia, where her husband had a new job, and to make Virginia the child's permanent residence. *Id.* The Court held that the evidence supported the trial court's finding that Mother's move to Virginia would cause a substantial change in the child's relationship with her Father, his extended family, her step-sister, and friends, and that it would be in the best interests of the child and the child's sense of permanence and stability for custody to be granted to Father. *Id.* at 128.

In *Sordelet v. Golsteyn*, 697 N.E.2d 943 (Ind. Ct. App. 1998), *trans. denied*, the trial court denied the Father's petition for modification of custody, and approved the child's change of residence from Indiana to Tennessee, with Mother retaining primary physical custody. The evidence from the doctor showed that if the child moved from Indiana to Tennessee, that she would adjust. The doctor stated that the child would suffer from anxiety whether she moved with her Mother or stayed in Indiana due to the altered time with either parent, but the move would not cause the child harm. *Id.* at 944. The Court concluded that the trial court findings were not supported by the evidence and reversed the decision and instructed the trial court to vacate its order and conduct a new hearing. *Id.* at 947.

In *Palm v. Palm*, 690 N.E.2d 364 (Ind. Ct. App. 1998), *trans. denied*, Mother and Father were divorced and the parties were granted joint legal custody of their two children, with physical custody awarded to the Mother. Shortly thereafter, Mother moved to Florida with the two children. The older child moved back to Indiana with Father, but Father also started to express concern for the younger child's emotional state and need for counseling in Florida. The Mother remarried in Florida. The doctor who evaluated the younger child reported that the therapy should address recent changes in the child's life: sharing his Mother with his stepfather; the loss of living with his grandmother; and moving away from his best friend and cousin. *Id.* at 366. The blended family began counseling with this doctor, but that prevented the child from getting individual therapy that was suggested for him to address issues. The Father's home was more stable, relaxed, and less dysfunctional. Therefore, the Court affirmed the trial court's order modifying custody to Father, finding that there had been a substantial change in the interaction and interrelationship of the child with his parents, his stepbrothers and his stepfather which significantly affected the child's best interests. *Id.* at 369.

In *Hanks v. Arnold*, 674 N.E.2d 1005 (Ind. Ct. App. 1996), Mother was awarded custody of the child when the parents divorced, and Father had reasonable visitation. Years later, Mother

remarried and filed a notice of intent to change residence with the court. The mother planned to move the child from Indiana to Wyoming, so Father filed a petition to modify the custody. The trial court found that custody would remain with Mother unless she moved to Wyoming, whereupon, Father would become the custodial parent. *Id.* at 1008. “A custodial parent’s relocation out of state, which makes visitation inconvenient, does not in itself warrant child custody modification.” *Id.* at 1007. However, the evidence presented showed that there would be a substantial change in the child’s relationship with his Father, other family, friends, school, and his extracurricular activities; therefore, it would be in the child’s best interests to remain in Indiana with his Father. *Id.* at 1008.

In *Van Schoyck v. Van Schoyck*, 661 N.E.2d 1 (Ind. Ct. App. 1996), Mother was the residential parent of the child, while Father had reasonable visitation, and Father or paternal grandparents also provided child care for the child while Mother was working. A few years later Mother moved from the city where Father lived in Indiana to another city with her new boyfriend. Father petitioned to modify custody and the trial court changed the residential custodian to Father. The Court found that the distance between Mother’s new home and Father’s home was relatively short and should not affect the parent’s joint custody, and that Mother should not be penalized for putting her child in day care. Therefore, the Court reversed the decision to change the child’s residential custodian to Father. *Id.* at 6.

In *Winderlich v. Mace*, 616 N.E.2d 1057 (Ind. Ct. App. 1993), the Court reversed the trial court’s modification of custody. The Court found that the fact that Mother lived in three different locations in four years was not evidence of detriment to the children’s welfare in her custody. *Id.* at 1060. The fact that Mother moved 100 miles from her former residence was not a significant factor as visitation had continued as before the move. *Id.* The fact that most of the children’s relatives lived near Father was merely an inconvenience. *Id.* Additionally, Mother’s voluntary decision to stop working to become a college student was a potentially positive change. *Id.* at 1061. Therefore, the Court reversed the trial court’s decision and found that there was no indication that the changed circumstances were of such a decisive nature as to make modification of the custody order necessary. *Id.*

B. Changes in Physical or Mental Health:

In *In Re V.C.*, 867 N.E.2d 167 (Ind. Ct. App. 2007), consolidated CHINS and paternity cases, the Court upheld the trial court’s findings that Mother engaged in a pattern of behavior that was harmful to the child’s emotional and mental health, and that the same behavior had a detrimental effect on the child’s relationship with Father, Mother, and other family members. The Court noted as evidence supporting the trial court’s findings that Mother spent several years coaching her daughter to fabricate allegations of molestation against Father; took her daughter, from the age of two to the age of five, to three different counselors; and regularly performed examinations of her daughter’s genitals after visits with Father. *Id.* at 180-81. The court affirmed the trial court’s CHINS adjudication and findings that there was a substantial and continuing change in circumstances which warranted a custody modification and that the custody modification was in the child’s best interests. *Id.* at 176.

In *Heagy v. Kean*, 864 N.E.2d 383 (Ind. Ct. App. 2007), *trans. denied*, a paternity case, the Court affirmed the trial court’s denial of Father’s petition to modify custody among other

things. The Court held that there was no substantial change in the child's health and Father's testimony supported the trial court's conclusion that the child's best interests would be served by maintaining the existing custody arrangement. *Id.* at 391. Father had alleged that the child's exposure to second hand smoke was a substantial change in circumstance justifying a modification of custody. *Id.* at 385. As the person filing the motion, Father had the burden to demonstrate a change in circumstances. *Id.* at 388. The Court pointed out that the family doctor had pronounced the child healthy and noted trial court findings that the Mother had made the house smoke-free, witnesses testified that there was no smoke in the house any longer, and Father's experts only presented generalized studies regarding second-hand smoke without taking into account the individual child. *Id.* at 389-90.

In *Leisure v. Wheeler*, 828 N.E.2d 409 (Ind. Ct. App. 2005), Mother who sought modification of custody from Father, alleged that there had been changes in the child's physical health due to some bumps, bruises, and missing one doctor's appointment. The trial court was unpersuaded by Mother's allegations that the child's relationship with his paternal grandmother was characterized by violence. Based on its review, the Court found that Mother provided no competent evidence that paternal grandmother caused child's injuries. *Id.* at 417.

In *Carrasco v. Grubb*, 824 N.E.2d 705 (Ind. Ct. App. 2005), *trans. denied*, the Court affirmed the trial court's custody order granting permanent change of child custody of one of the two children to Father. The child in question had become abusive toward Mother, who was fearful for her and her other child's safety. *Id.* at 712-13. The child in question had verbally and physically attacked Mother. *Id.* at 713. There had been a substantial deterioration in the child's relationship with his sibling, and Mother had developed an inability to control the child's behavior that threatened the children's physical and emotional safety. *Id.* After a temporary change in custody to Father, the child's psychiatrist recommended that he no longer needed to take psychotropic medication or undergo counseling. *Id.* Therefore, the Court found that it was reasonable for the trial court to have concluded that it was in the children's best interests to split the custody arrangement and grant custody of the child in question to Father. *Id.*

In *Higginbotham v. Higginbotham*, 822 N.E.2d 609 (Ind. Ct. App. 2004), the Court affirmed the trial court's decision to reject Mother and Father's agreement to continue joint legal custody and to modify legal and physical custody to Mother. The child was not getting her medication during visitation with Father. *Id.* at 612. The child returned to Mother's house emotionally distressed and upset. *Id.* Mother and Father could not agree on the child's medication for her anxiety and ADHD. *Id.* Therefore, the Court found that there was evidence in the record to support the trial court's conclusion that joint legal custody was no longer in the child's best interest. *Id.*

In *Arms v. Arms*, 803 N.E.2d 1201 (Ind. Ct. App. 2004), where Mother had physical custody of the child, a caseworker stated that Mother's current coping methods presented a risk for physical and emotional harm to her child. Mother spoke ill of Father and his girlfriend, calling them names in the child's presence. The child visited a psychologist who determined that the child's awareness of conflict had emerged and the child was being emotionally harmed by the behavior. The Court also found that Mother was playing mind games, with the child and coaching him on what to say to professionals, which taught the child how to lie.

These “jeopardizing circumstances” caused the child great harm, and for the sake of the child’s mental health, the Court concluded that Father had presented sufficient evidence to support the trial court’s finding that it would be in the child’s best interest to modify custody of the child to Father and eliminate overnight visitation with Mother to protect the child from psychological and emotional harm. Id. at 1207, 1208.

In Nienaber v. Nienaber, 787 N.E.2d 450 (Ind. Ct. App. 2003), the Court affirmed the trial court’s decision to modify the custody order and transfer custody to Father. Because of Mother’s suffering from multiple sclerosis (“MS”), Mother had begun to experience difficulty driving. Id. at 453. Mother acknowledged that she sometimes had to use her hands to move her foot from the brake to the accelerator and vice versa. Id. Mother had been involved in several minor accidents. Id. Nevertheless, Mother continued to drive with the children in the vehicle. Id. Therefore, the Court affirmed the trial court’s decision to modify the custody order and transfer custody to Father. Id. at 456.

In Apter v. Ross, 781 N.E.2d 744 (Ind. Ct. App. 2003), *trans. denied*, Father challenged the trial court’s judgment modifying the joint custody order and child support order between him and his former wife. Both parents were uncooperative with each other and unable to communicate reasonably for the best interests of the children to the point that joint custody had become damaging to the children. Id. at 760. Because the evidence before the court revealed that the joint custody arrangement was placing the children’s mental and physical welfare at risk and the children adamantly expressed their desire to remain in the custody of Mother, the Court held that the trial court did not abuse its discretion modifying the joint custody order and in awarding Mother sole legal custody. Id.

In Wiggins v. Davis, 737 N.E.2d 437 (Ind. App. 2000), the Court affirmed the trial court’s decision to grant Father’s modification petition and award him sole legal custody of both children. The trial court’s preliminary order granted primary custody of one of the children to Father and primary custody of the other child to Mother. Id. at 439. Father then filed an emergency petition to modify custody, and it was granted, giving him primary custody of both children with only supervised visitation for Mother. Id. To demonstrate that a modification of custody was in the child’s best interests, Father presented evidence showing that “the child’s condition and general well-being had improved . . . [and] that the child’s cleanliness and manners significantly improved and that he appeared happier.” Id. at 442. The Court also found that there was sufficient evidence showing ongoing molestation and neglect of the child in Mother’s custody to support the trial court’s decision to modify the custody arrangement, granting Father sole custody of both children. Id.

In Albright v. Bogue, 736 N.E.2d 782 (Ind. Ct. App. 2000), the Court affirmed the trial court’s order modifying custody from Mother to Father. Mother testified that the child stated that he had been molested by the child’s paternal grandmother while in Father’s care. Id. at 784. Mother also presented a video tape that showed Mother questioning the child about alleged sexual abuse by grandmother. Id. at 785. An office of family and children caseworker testified that the videotape was insignificant because Mother asked many leading questions after the child repeatedly denied having been molested. Id. at 787. Mother was causing harm to the child by placing pressure on him to say that he was being molested and by attempting to interfere with Father’s visitation. Id. at 789. According to a psychologist’s

opinion, if the child were left in Mother's care, the child would have severe psychological problems as a result of Mother's inappropriate suggestions. *Id.* at 790. Therefore, the Court found the trial court's findings adequate to support the ultimate conclusion that modification of custody was in the child's best interests. *Id.* at 791.

In *Palm v. Palm*, 690 N.E.2d 364 (Ind. Ct. App. 1998), *trans. denied*, Father filed a motion for a psychological evaluation for his child who lived with Mother in Florida, due to the child's display of emotional problems during visitation with Father. The doctor who conducted the evaluation concluded that the child was at risk for numerous emotional difficulties and had continued to deteriorate. The doctor recommended that Mother, her husband (child's step-father), and the child participate in family therapy. The Court found that the trial court's custody modification was supported by evidence that Mother failed to comply with specific therapy recommendations and that the child had difficulty adjusting to his environment, and that remaining in Florida affected the child's mental health and well-being. *Id.* at 369.

In *Gorman v. Zeigeler*, 690 N.E.2d 729 (Ind. Ct. App. 1998), the trial court found that the child's newly diagnosed brain tumor in itself had created an extreme emergency and granted Mother temporary custody of the child for the duration of the radiation treatment. The Court affirmed the decision stating that the parent's disagreement regarding treatment of the child's illness was an extreme emergency that constitutes a substantial change in the child's health. The Court found that Mother was actively participating in the child's treatment in California, and she works only a few hours each month so she spends most of her days with the child. *Id.* at 734. However, Father works five days a week from around 7:00 a.m. – 5:30 p.m., and until 3:30 p.m. on Friday. Father's girlfriend would have to care for the child during most of the day if the child moved back to Indiana with him. The Mother also hired a tutor for the child which allowed her to study during her radiation treatment. *Id.* Based on the evidence the Court agreed with the trial court's conclusion that the child's physical and emotional needs were being better met by her Mother.

In *Hanson v. Spolnik*, 685 N.E.2d 71 (Ind. Ct. App. 1997), *trans. denied*, the child's psychologist indicated that Mother had not taken appropriate action in resolving the incident where the child was inappropriately touched by her older sister. The trial court found that Mother's comments and allegations against Father were directed at alienating the child from Father, and that behavior endangered the child's emotional and psychological development. *Id.* at 76. The evidence showed that the child's mental and physical welfare was in jeopardy due to the parties' animosity, and inability to communicate with each other in regard to the child's activities, education, and church attendance. Therefore, the Court concluded that there had been a substantial change in circumstances which justified a modification in custody. *Id.* at 78, 79.

In *Dwyer v. Wynkoop*, 684 N.E.2d 245 (Ind. Ct. App. 1997), *trans. denied*, Mother had physical custody of the child after the parent's divorce. Father remarried shortly thereafter. Mother called the stepmother to pick up the child, and upon arrival the stepmother learned that Mother had tried to commit suicide over a dispute in a relationship. *Id.* at 246. After several hearings, the trial court modified custody, granting sole legal and physical custody to Father. Mother also suffered from a mixed personality disorder, psychopathology, poor work history, instability, poor planning, and relationship difficulties. *Id.* at 250. The Court

affirmed the trial court's modification of custody to Father, concluding that this evidence was material to the statutory factor of "mental and physical health of all individuals involved." Id. The Court also found that because information about Mother's mental health was not previously considered by the trial court, that such new information constituted a change in a statutory factor. Id.

In Joe v. Lebow, 670 N.E.2d 9 (Ind. Ct. App. 1996), the child was born with a number of health problems, including spinal neurological degeneration, scoliosis, which necessitated surgery, and a learning disability. When the parents divorced Mother moved the child from Indianapolis to Maryland. During a summer visit to Father's home, Father recognized depression, unhappiness, and rapid weight gain in his child, who was already an obese child. A doctor then diagnosed the child with being morbidly obese and suffering from high blood pressure. Id. at 24. This weight gain contributed to the child's difficulty with mobility. As to the child's mental health, she had become depressed and articulated thoughts of suicide or self-harm. The child also felt alone and isolated while living with her Mother, who was not aware of the level of her daughter's rapid weight gain or extreme depression. "A parent that is really focused on and concerned about a child would pick up on some of the apparent degrees of sadness and or depression that was there and pursue that." Id. at 25. The Court found that while the child was in her Father's care, that her blood pressure returned to normal levels, and that her mobility improved, and her mood seemed better. Therefore, the Court affirmed the trial court's decision to award Father permanent custody of his child.

C. Educational Needs:

In Walker v. Nelson, 911 N.E.2d 124 (Ind. Ct. App. 2009), the Court affirmed the trial court's decision to modify custody and reversed and remanded the case for findings to support a visitation restriction or the entry of an order which does not contain a visitation restriction. Id. at 130. The Court held the evidence was sufficient to establish that a modification of custody was in the best interests of the child. Evidence showed that the child's grades declined in Mother's custody, and the child was receiving failing grades. Id. at 128. The child was absent for the first ISTEP testing day, and failed the ISTEP in seventh grade. Furthermore, Mother lied about the child's absence from the first ISTEP testing day. The child was suspended from school for insubordination six times, and was absent eighteen times. The Court found that this evidence, *inter alia*, was sufficient to support the trial court decision to modify custody. Id. at 128-29. Mother's contention that Father had proven none of these things was a mere request to reweigh the evidence and re-judge the credibility of the witnesses, which the Court declined to do. Id.

In Webb v. Webb, 868 N.E.2d 589 (Ind. Ct. App. 2007), the Court affirmed the trial court's decision to modify custody "based on a substantial change in the children's academic performance, resulting in a determination that it would be in their best interest to award sole custody to Father." Id. at 593-94. The Court noted that, when Father sought testing through the school to address the children's behavior problems, poor grades, and failure of the ISTEP, the Mother resisted, and, when Father attempted to address the younger child's behavior problems through mental health testing, the Mother also resisted. Id. at 593. The Court, "like the trial court" found "it in the children's best interest to modify custody to Father who is

sensitive to their educational needs and who will actively aid them to reach their full academic potential.” Id. at 594.

In Higginbotham v. Higginbotham, 822 N.E.2d 609 (Ind. Ct. App. 2004), the Court affirmed the trial court’s decision to reject Mother and Father’s agreement to continue joint legal custody and to modify legal and physical custody to Mother. The child was not getting the help she needed with her homework and medications during her visitations with Father. Id. at 612. The child’s grades were below average, and she did not pass the ISTEP relating to English and Language Arts. Id. Therefore, the Court found that there was evidence in the record to support the trial court’s conclusion that joint legal custody was no longer in the child’s best interest. Id.

In Nienaber v. Nienaber, 787 N.E.2d 450 (Ind. Ct. App. 2003), the Court affirmed the trial court’s decision to modify the custody order and transfer custody to Father. Evidence presented at trial showed that a general deterioration in the children’s situation had occurred in Mother’s home. Id. The older child performed poorly in school, failing the sixth grade. Id. The older child also experienced frequent disciplinary problems. Id. Therefore, the Court affirmed the trial court’s decision to modify the custody order and transfer custody to Father. Id. at 456.

In Haley v. Haley, 771 N.E.2d 743 (Ind. App. 2002), the Court affirmed the trial court’s modification of custody. Mother lacked a commitment to fostering the child’s educational needs. Id. at 748. The Court considered the improvement in the child’s test scores after having stayed with Father in comparison to those when she stayed with Mother. Id. The Court noted that this constituted a “substantial change in D.H.’s educational development.” Id. at 749. The Court found that the trial court was within its discretion in granting Father’s motion to modify custody. Id. at 750.

In Winderlich v. Mace, 616 N.E.2d 1057 (Ind. Ct. App. 1993), the Court reversed the trial court’s modification of custody from Mother to Father. The fact that the children would attend a school with a smaller student-teacher ratio if they lived with Father was not a changed circumstance. Id. at 1060-61. One child’s testimony as to the “rough” atmosphere in the new school he attended due to Mother’s move was a legitimate concern, but there was nothing in the record to suggest that Mother had failed to deal responsibly with her sons’ education or with the expected problems of bringing stepchildren together as a family. Id. at 1061. Therefore, the Court reversed the trial court’s decision and found that there was no indication that the changed circumstances were of such a decisive nature as to make modification of the custody order necessary. Id.

D. Neglect and Abuse:

In Walker v. Nelson, 911 N.E.2d 124 (Ind. Ct. App. 2009), the Court affirmed the custody modification judgment, finding that the evidence was sufficient to establish that a modification of custody was in the best interests of the child. Evidence showed that the child’s grades began declining in Mother’s custody, and that the child was suspended six times, absent eighteen times, and missed the first day of ISTEP testing. Id. at 126. Evidence also showed that the child had witnessed drug use, that Mother and her boyfriend had frequent

bouts of domestic violence, and that the water at Mother's home had been disconnected for approximately four days. Id. at 126, 128. The Court noted that it reviewed custody modification for an abuse of discretion and was guided by "a preference for granting latitude and deference to our trial judges in family law matters." Id. at 127. The Court characterized Mother's challenges as requests to reweigh the evidence and re-judge the credibility of the witnesses, and the Court declined to do so. Id. at 128-129. The Court concluded that the trial court findings supported its judgment. Id. at 128-29.

In In Re Paternity of M.P.M.W., 908 N.E.2d 1205 (Ind. Ct. App. 2009), the Court held that the trial court's modification of custody from Mother to Father was based on a substantial change in circumstances and the best interests of the child. Mother argued on appeal that the trial court had changed custody only to punish her for absconding with the child. The Court stated that "the trial court did include language regarding punishing Mother for violating the trial court's previous order and absconding the state with [the child]," but found that the trial court had noted other factors "that led to its decision that a substantial change in circumstances had occurred and that it was in the best interests of [the child] that Father be awarded custody." Id. at 1208. The Court noted these other factors: Mother fled to Michigan with the child and deprived Father of a relationship with the child; Mother dyed the child's hair while in Michigan to avoid being found; Mother withdrew the child from daycare and did not re-enroll the child while in Michigan; Mother skipped a dentist appointment by going to Michigan; the child's teeth required oral surgery, and Mother's neglect contributed to this; Mother falsely and repeatedly reported Father to Child Protective Services; and the child's immunizations were not kept up to date by Mother. Id. at 1208-09. The Court concluded "that the trial court based its decision on proper considerations, and it did not err in its decision to modify custody to Father." Id. at 1209.

In Nienaber v. Nienaber, 787 N.E.2d 450 (Ind. Ct. App. 2003), the Court affirmed the trial court's decision to modify the custody order and transfer custody to Father. Evidence showed that Mother persisted in attempting to discipline the children primarily through yelling. Id. Mother's parenting was "clearly verbally abusive" and "ineffective." Id. Mother's interactions with her children were "psychologically abusive." Id. Mother also refused to send the older child's medicine with him when he went to stay at Father's house. Id. at 453. Father was unable to obtain any medication that the child could take while at Father's house because only one prescription with no refills could be issued at a time. Id. Therefore, the Court affirmed the trial court's decision to modify the custody order and transfer custody to Father. Id. at 456.

In Wiggins v. Davis, 737 N.E.2d 437 (Ind. Ct. App. 2000), the Court affirmed the trial court's decision to grant Father's modification petition and award him sole legal custody of both children. The trial court's preliminary order granted primary custody of one of the children to Father and primary custody of the other child to Mother. Id. at 439. Father then filed an emergency petition to modify custody, and it was granted, giving him primary custody of both children with only supervised visitation for Mother. Id. The Court found that evidence of molestation of the child by his half-brother constituted a "substantial change in the child's 'interaction and interrelationship' with his siblings." Id. at 442. Therefore, the Court found that there was sufficient evidence showing ongoing molestation and neglect to support the

trial court's decision to modify the custody arrangement, granting Father sole custody of both children. Id.

In Albright v. Bogue, 736 N.E.2d 782 (Ind. Ct. App. 2000), the Court affirmed the trial court's order modifying custody from Mother to Father. Mother testified that the child stated that he had been molested by the child's paternal grandmother while in Father's care. Id. at 784. Mother also presented a video tape that showed Mother questioning the child about alleged sexual abuse by grandmother. Id. at 785. An office of family and children caseworker testified that the videotape was insignificant because Mother asked many leading questions after the child repeatedly denied having been molested. Id. at 787. A detective testified that there were many, many things wrong with the manner in which Mother attempted to interview the child. Id. Therefore, the Court found the trial court's findings adequate to support the ultimate conclusion that modification of custody was in the child's best interests. Id. at 791.

In Hanson v. Spolnik, 685 N.E.2d 71 (Ind. Ct. App. 1997), *trans. denied*, the child's older sister displayed inappropriate sexual behavior toward the child. The Court did not base its decision on the past incident, but rather based its decision on Mother's failure, since the divorce, to protect the child from further incidents by failing to provide appropriate counseling and discipline for the child's older sister. Id. at 77. Based on Mother's failure to acknowledge that the incident between the two children actually occurred, the Court found that it was appropriate to consider this evidence in determining whether a custody modification was warranted. Id.

In Dwyer v. Wynkoop, 684 N.E.2d 245 (Ind. Ct. App. 1997), *trans. denied*, the Court found that new knowledge regarding Mother's psychological problems constituted "a substantial change in a relevant factor" used to determine custody. The Court also stated that it would be careless in its duty to the child to place the child in the care and custody of Mother, who suffered from a personality disorder that would likely result in emotional harm to the child. Id. at 248.

In Doubiago v. McClarney, 659 N.E.2d 1086 (Ind. Ct. App. 1996), the trial court granted Father's petition to modify custody, giving him sole legal custody subject to Mother's reasonable visitation. The evidence established that Mother regularly engaged in violent angry outbursts, often associated with her consumption of alcohol, and although she always had a bad temper, it had escalated since the divorce. On one occasion, Mother struck her current husband in the head, and she had also been arrested for disorderly conduct. Id. at 1088. Several of Mother's tantrums involved the child or occurred in his presence. A clinical psychologist conducted a custody evaluation of Mother, and was concerned with Mother's emotional stability, her suspicious nature, her difficulties she was having in her relationships, her tendency to blame others for problems, her self-centeredness, and her propensity to respond and over-react aggressively and with anger. Id. Therefore, the Court affirmed the trial court's decision to modify the custody arrangement.

E. Stability:

In Barger v. Pate, 831 N.E.2d 758 (Ind. Ct. App. 2005), the Court found that evidence did not warrant changing physical custody of the child from Mother to Father. The Court found that Father had failed to establish a substantial change in any of the applicable statutory factors. Id. at 762. The child's time with Mother was reduced because of Mother's college schedule, but the Court found "this reduction was not significant" and "the overall positive effects her education may have on [Mother]'s single-parent family far outweigh any short-term temporary restriction it may have regarding actual parent-child time." Id. at 762-63. Therefore, the Court affirmed the trial court's dismissal of Father's petition to modify custody. Id.

In Williamson v. Williamson, 825 N.E.2d 33 (Ind. Ct. App. 2005), the trial court found that the relationship between the son and Father had been lacking throughout the duration of the parents' divorce. The two had very little emotional bonding, and interacted only on a limited basis. The son also had a poor relationship with Father's spouse. However, the son wished to live with his Mother, and had a positive, rewarding relationship with Mother's spouse. The evidence presented the following circumstances: Father and son's relationship worsened since the divorce; son had met many friends his age and secured employment when visiting with Mother; son engaged in family appropriate social activities with Mother's spouse; had strong desire to live with Mother. Therefore, the Court decided that the evidence of deterioration in the son's strained relationship with Father and Father's wife was a substantial change and affirmed the trial court's modification of custody to Mother. Id. at 41, 42.

In Bettencourt v. Ford, 822 N.E.2d 989 (Ind. Ct. App. 2005), Mother moved to Florida without proper job or residence for her child. Mother had six different residences, and had been employed at no fewer than nine different places of employment since she moved to Florida. Mother's life was one of instability and impermanence, and so had her child's since she moved him across the country. The Court found that Father had a much more stable life in Indiana, where he was re-married, had two other children, and lived in a comfortable home with his family. Id. at 995. Therefore, the Court concluded that Mother's move to Florida was not in the child's best interests, and there had been a substantial change in one or more of the factors to justify modification of custody from Mother to Father. Id.

In Cunningham v. Cunningham, 787 N.E.2d 930 (Ind. Ct. App. 2003), the Court affirmed the trial court's decision not to modify a custody agreement. The Court found that although Mother had moved twice in a one-year period, the evidence supported that trial court's finding that Mother's home was a stable one. Id. at 935. Both children experienced problems adjusting to their new home and blended family. Id. at 936. The Court noted that Father placed great emphasis on the reports of the psychologist and the GAL. Id. However, after reviewing the experts' reports and their testimony at the hearing, the Court was troubled by the fact that both experts only spent approximately three hours interviewing and observing the children, parents, and other relevant individuals. Id. The Court affirmed the trial court's decision not to modify custody despite the opinions of the psychologist and the GAL. Id. at 937.

In Rea v. Shroyer, 797 N.E.2d 1178 (Ind. Ct. App. 2003), the Court affirmed the trial court's decision to modify custody by a modification of sole physical custody of the child to Father while ordering both Mother and Father to maintain joint legal custody. Within a span of one year, Mother and her two daughters lived: in a three-bedroom home with Mother's brother and his girlfriend (during that time Mother's brother was on home detention but Mother had no knowledge of the type of crime her brother had committed and did not think it was important), in a two-bedroom apartment with a friend (who also had two daughters staying with her), and in a new apartment with help from a friend (whose arrest record Mother testified she had no knowledge of because she did not care if he had been arrested). Id. at 1183. The Court found that this evidence supported the trial court's finding that Mother's living arrangements had been "a little concerning." Id. The child had lived with Father over seventy percent of the time in the fourteen months prior to the trial court's grant of temporary custody to Father even though Mother technically had physical custody of the child. Id. at 1184. Therefore, the Court found that continuity and stability weighed in favor of keeping the child with Father and found that there was evidence in the record to support the trial court's decision. Id.

In In Re Paternity of M.J.M., 766 N.E.2d 1203 (Ind. Ct. App. 2002), the Court affirmed the trial court's modification of custody, granting Father sole physical custody. There was evidence to show that Mother moved four to six times within the last two years, that Mother was more concerned with her own personal and emotional needs than the needs of her child, and that Mother recently became the care provider for a total of three foster children, which generated income for Mother and substantially changed the child's environment. The Court affirmed the trial court's finding that, since Father would provide more continuity and stability in the child's life, it would be in the child's best interests for Father to have sole legal and physical custody. Id. at 1210.

In Dwyer v. Wynkoop, 684 N.E.2d 245 (Ind. Ct. App. 1997), *trans. denied*, the trial court found that the child was well adjusted in his Father's new home with Father's wife and her children, and the child had a good relationship with Father. Based on the evidence, the Court found that it was in the child's best interests that her custody be changed from her Mother to Father. Id. at 250.

In Spencer v. Spencer, 684 N.E.2d 500 (Ind. Ct. App. 1997), after the parents divorced, Mother was granted custody of the child. A few years later the parents temporarily agreed to share legal custody of their child, with Father having physical custody of the child and Mother having reasonable visitation. The judge modified the temporary agreement and issued an order transferring physical custody to Father, with joint legal custody and substantial visitation for Mother. Id. at 503. The Court found that the Father had custody for some time and the arrangement appeared to have stabilized the child, and Mother received substantial visitation; therefore, it was no need to disturb the arrangement. Id. Father had remarried, purchased a home, and obtained a job which enabled him to be with his family four days a week, and when Father was not home the child could stay with his stepmother. The Court recognized that "the child's interest in a stable home environment was an appropriate basis for a custody modification." Id.

In Hanks v. Arnold, 674 N.E.2d 1005 (Ind. Ct. App. 1996), the Court affirmed the trial court's decision to modify custody of the child from Mother to Father. "The policy of stability may also support a child custody modification, particularly, where an older child has formed many relationships which would end if the child moved to another state." Id. at 1008. The Court found that this child's life would not be significantly disrupted if he lived with Father, since they already spent a lot of time together and have a good relationship. It was also found that the child had established many relationships with friends and family in Indiana, and those relationships would continue if the child lived with the Father in Indiana. Id. at 1009.

In Wallin v. Wallin, 668 N.E.2d 259 (Ind. Ct. App. 1996), *trans. denied*, the evidence showed that Mother had moved six times within the year preceding the modification hearing. During this time Mother also shared homes with two different men and one of the homes was in very poor condition, including a leaking roof and leaking hot water heater, and electrical problems. Mother's frequent moves showed lack of stability in the children's lives, and that mother was having difficulty providing appropriate shelter for her children. However, Father appeared able to provide the stability that was lacking in the children's lives. Father had remarried, and was living in a four bedroom home that he shared with his wife, his father-in law and two other children. Therefore, the Court affirmed the trial court's decision that it was in the best interests of the children to transfer custody from Mother to Father. Id. at 262.

F. Parent Settlement Agreements:

In Sabo v. Sabo, 858 N.E.2d 1064 (Ind. Ct. App. 2006), the Court affirmed the trial court's decision that the child would live with Mother during the school year and Father during the summer, a reverse of the parties' past custody practice. The original settlement agreement between the parties stated that custody would be joint, and that the child would live with one parent during the school year, and with the other during the summer. Id. at 1066. The agreement did not specify criteria to determine which parent was to have the summer time custody and which parent would have the school year custody. Id. at 1070. However, initially Mother took summer time and Father took the school year because Mother's job required a lot of travel at that time. Id. at 1066. When Mother's job was more stable and the child was eleven years old, approaching adolescence, the child expressed the desire to spend the school year with Mother, and Mother petitioned for modification of custody to make that happen. Id. The Court noted (1) that the trial court was not asked to modify the terms of the parties' agreement or alter the arrangement upon which the parties had agreed, but instead to choose between two alternatives permissible under that agreement; and (2) that all factors other than the child's impending adolescence and her wish to live with her Mother were in equipoise, that is they did not tip the balance one way or the other with respect to which parent should be awarded school-year custody. Id. at 1068, 1071.

In Akers v. Akers, 849 N.E.2d 773 (Ind. Ct. App. 2006), the Court reversed the trial court, and held that the trial court could not adopt a settlement agreement regarding custody modification, child support, and parenting time, which was repudiated by Wife before it was either presented to the trial court in written form or orally recited in open court on the record. Id. at 774, 776. The Court noted that, under I.C. 31-15-2-17, until the parties' agreement is memorialized either in writing or on the trial court record, there is nothing for the trial court to approve, and either party is free to repudiate the alleged agreement. Id. at 776.

In In Re Paternity of K.J.L., 725 N.E.2d 155 (Ind. Ct. App. 2000), Mother and Father reached an oral custody agreement and submitted their agreement in writing for the trial court's review and approval. However, Mother repudiated the agreement prior to its reduction to writing and approval by the court, but the trial court enforced the agreement and granted modification of custody to Father. Mother argued that the oral agreement was not legally binding and that the trial court's decision constituted an abuse of discretion. "No agreement between parties that affects custody, regardless of whether it is in the first instance or upon modification, is automatically binding upon the trial court." Id. at 158. The Court found that the trial court erred in determining that the oral settlement agreement regarding the modification of custody, support, and visitation was an enforceable agreement, after Mother had repudiated the agreement and without holding a hearing. Id. at 159.

In Mundon v. Mundon, 703 N.E.2d 1130 (Ind. Ct. App. 1999), the divorced parents entered into a custody agreement, which was approved and made an order of the court. Indiana law "expressly encourages" divorcing spouses to reach agreements. The trial court found that "the provisions of the Agreement are automatic and have taken effect and the primary physical custodian has changed from Mother to Father, as provided in the Agreement, and . . . trial court could not rewrite the terms and impose a different result." Id. at 1134. However, the Court explained that "the same principles and standards cannot apply to child custody and support provisions of proffered settlement agreements." Id. at 1136. Therefore, the Court reversed the trial court's decision that automatically shifted custody from Mother to Father.

In Wilson v. Wilson, 716 N.E.2d 486 (Ind. Ct. App. 1990), the Court found that the trial court erred in striking the parents' property settlement agreement provision which gave Mother the authority to determine religious decisions as to the minor child. The Court found that there was no evidence that the agreement was against the child's best interests. The Court also held that Father, as a non-custodial, parent, had the option to provide child care for his child while Mother was working. Id. at 491.

G. Child's Wishes:

In Sabo v. Sabo, 858 N.E.2d 1064 (Ind. Ct. App. 2006), the Court affirmed the trial court and held, among other things, that the child's desire to live with Mother during the school year was entitled to some consideration even though the child was only eleven years old. Id. at 1070. The custody evaluator indicated that the child's wishes to live with her mother were normal for a girl approaching adolescence. Id. at 1067. The child explicitly expressed to the custody evaluator that it was easier to talk to her mother about "puberty issues." Id. at 1070. The Court noted that, (1) while I.C. 31-14-13-2(3) states that the wishes of a child at least fourteen years of age are to be given more consideration, the statute does not direct courts to discount entirely the wishes of younger children; and (2) how much consideration to give them was the question. Id. The Court observed that all factors other than the child's impending adolescence and her wish to live with her Mother were in equipoise, that is they did not tip the balance one way or the other with respect to which parent should be awarded school-year custody. Id. at 1071.

In Williamson v. Williamson, 825 N.E.2d 33 (Ind. Ct. App. 2005), the child expressed a strong desire to reside with Mother. The law required the Court to give more consideration to the wishes of a child fourteen years of age or older. Id. at 40. At the time of the custody modification that resulted with the child living with Father, the child was fourteen years of age, and when Mother filed the petition he was seventeen years of age, and still wished to live with Mother. The Court concluded that the trial court properly considered the child's wishes to live with Mother. Id. at 42.

In Nienaber v. Nienaber, 787 N.E.2d 450 (Ind. Ct. App. 2003), the Court affirmed the trial court's decision to modify the custody order and transfer custody to Father. After visiting at Father's home, the couple's older child would constantly threaten to run away if Father forced him to return to Mother's home. Id. Both children had expressed a strong preference to live with Father. Id. Father testified that the older child had been "begging [him] for the last two years to file [the] motion for change of custody." Id. Therefore, the Court affirmed the trial court's decision to modify the custody order and transfer custody to Father. Id. at 456.

In Joe v. Lebow, 670 N.E.2d 9 (Ind. Ct. App. 1996), the child firmly wished to reside with her Father. These feelings were expressed to all of the experts and to her Mother. The Court found that the trial court's findings with respect to other substantial changes were supported by the evidence, and the child's strongly expressed desire to live with Father could have been appropriately viewed as a "substantial change." Id. at 25.

In Winderlich v. Mace, 616 N.E.2d 1057 (Ind. Ct. App. 1993), the Court reversed the trial court's modification of custody from Mother to Father. Both children testified that they preferred to live with Father. Id. at 1060. However, this testimony did not constitute a changed circumstance. Id. At the original dissolution of marriage hearing both parents testified to the children's preference to live with their Father. Id. Therefore, the Court reversed the trial court's decision and found that there was no indication that the changed circumstances were of such a decisive nature as to make modification of the custody order necessary. Id.

H. Criminal History/Character:

In Leisure v. Wheeler, 828 N.E.2d 409 (Ind. Ct. App. 2005), an investigator researched Mother's current husband's criminal history and submitted that information to the court. The report revealed that the husband had felony convictions for burglary, theft, and had been charged with possession of marijuana. Mother's husband's criminal history was admitted to show the husband's fitness to care for her child because if Mother were awarded custody her husband would live in the same household and help raise the child. Id. at 419. "A person's character may be a material fact in deciding who should have custody of children as fitness to provide care is of paramount importance." Id. Therefore, the trial court did not err by admitting evidence of Mother's current husband's criminal history.

I. Same-Sex Partners:

In Downey v. Muffley, 767 N.E.2d 1014 (Ind. Ct. App. 2002), the Court reversed the trial court's finding that prohibited Mother from cohabitating with her same-sex partner while

living with her children. The trial court conducted an emergency hearing for modification of custody on the issues of Mother's relocation to Indianapolis and whether the children should remain with Father during the proceedings. The trial court granted Mother's request to move to Indianapolis with the children. *Id.* at 1016. The trial court informed Mother of its intent to "impose the standard restriction prohibiting unrelated adults from spending the night while the children were present with Mother, even though the court acknowledged that the restriction as then written only applied to adults of the opposite sex." *Id.* There was no evidence showing that Mother's homosexuality was detrimentally affecting her children's lives. *Id.* at 1020. As such, the Court found that the trial court "erred by a priori imposing the restriction upon Mother without the requisite findings of harm." *Id.* at 1021.

J. Jurisdiction:

In *Novatny v. Novatny*, 872 N.E.2d 673 (Ind. Ct. App. 2007), the Court vacated the trial court's custody order finding that the trial court erred by assuming jurisdiction because, pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA), Virginia would have had jurisdiction as the children's home state when Father filed his petition for modification of custody. *Id.* at 681. The trial court dissolved the parties' marriage and, among other things, awarded physical custody of the children to Mother in 1999. In 2000, Father moved to Illinois. In 2004, with the court's permission, Mother moved with the children to Virginia where they continued to live. On August 22, 2006, Father, who still lived in Illinois, filed in the trial court to modify custody. *Id.* at 676. Despite Mother's objection to the trial court's assertion of jurisdiction, on November 2, 2006, the trial court modified custody to Father. *Id.* Mother appealed and argued that the trial court lacked jurisdiction under the UCCJA. *Id.* at 677-78. The Court concluded that none of the requirements of I.C. 31-17-3-3 (Indiana's UCCJA) necessary for assertion of jurisdiction by the trial court, were met. *Id.* at 680.

In *Cox v. Cantrell*, 866 N.E.2d 798 (Ind. Ct. App. 2007), *trans. denied*, the Court affirmed the trial court's decision to transfer jurisdiction of a child custody proceeding to Michigan, where a court had asserted emergency jurisdiction and placed the children in residential placement prior to the parents jointly filing a Stipulation of Change of Custody and Support with the trial court in June 2006. The trial court's involvement with the custody of the children dated back to 1998, but its last involvement prior to the 2006 stipulation filing was in 2002. The Mother, who had custody at the time, moved with the children to Michigan in about 2005. *Id.* at 801-02. In 2006, the trial court initially approved the parties' custody stipulation by decree on June 15, 2006, but subsequently, after being contacted by the Michigan court, the trial court transferred jurisdiction of the custody matter to the Michigan court on September 12, 2006. *Id.* at 802-04. Father appealed asserting, among other things, that Indiana's Uniform Child Custody Jurisdiction Law (UCCJL), specifically I.C. 31-17-3-7(a), precluded the trial court from transferring jurisdiction after it had issued its decree approving the parties' stipulation. *Id.* at 804-05. After extensive discussion and analysis, the Court found that the trial court's June 15, 2006 order was void as violating the full faith and credit clause (*see* I.C. 34-39-4-3), and, therefore, the trial court was not precluded from issuing its September 12, 2006 order transferring jurisdiction to the Michigan court. *Id.* at 807-08. The Court found that (1) the Michigan court had correctly asserted jurisdiction under the federal Parental Kidnapping Prevention Act (PKPA) which provides that a state court has jurisdiction if "it is necessary in an emergency to protect the child because the child...has been subjected to or threatened with

mistreatment or abuse.” 28 U.S.C. § 1738A(c)(2)(C)(ii)(2000); and (2) the trial court was required “to enforce, and not modify, custody orders entered by courts in other States if the court’s decision ‘was made consistently with the provisions of this Section.’” 28 U.S.C. § 1738A(a). Id. at 807-08. The Court also held that the trial court’s order transferring jurisdiction to the Michigan court did not fit the UCCJL’s definition of “decree.” Id. at 809.

In Westenberger v. Westenberger, 813 N.E.2d 343 (Ind. Ct. App. 2004), the Court affirmed the trial court’s decision that Arkansas was a more appropriate forum. Mother and the child had been living in Arkansas for fifteen months prior to Father petitioning to modify custody. Id. at 344. Father still resided in Indiana; therefore, under the Uniform Child Custody Jurisdiction Act (“UCCJA”), the Indiana trial court had jurisdiction over the modification process. Id. at 345. However, Section 7 of the UCCJA provides that a court having jurisdiction under the UCCJA nevertheless “may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.” Id. Substantial evidence concerning the children’s present or future care, protection, training, and personal relationships was more readily available in Arkansas than in Indiana. Id. There was no blatant attempt at forum shopping and no evidence had been gathered, aside from taking the parties’ depositions, nor had the trial court conducted any evidentiary hearings. Id. at 348. Therefore, the Court found that the trial court did not abuse its discretion in concluding that Indiana was an inconvenient forum and that it would be more appropriate to litigate Father’s petition to modify custody in Arkansas instead of Indiana. Id. at 349.

In Sudvary v. Mussard, 804 N.E.2d 854 (Ind. Ct. App. 2004), the question was whether a trial court which had jurisdiction under UCCJL at the time a petition to modify was filed can subsequently lose jurisdiction while that petition was pending because of a change in the parties’ circumstances. The trial court granted Father’s petition and ordered that he have physical custody of the child, and reaffirmed its prior ruling regarding jurisdiction. “Jurisdiction under the UCCJL is determined on the date that a petition to modify is filed and that a court cannot lose jurisdiction while a petition is pending.” Id. at 857. The Court found that Father’s move to Illinois from Indiana while the modification proceedings were pending did not divest the Indiana trial court of jurisdiction. Id. at 859.

K. Custody as a “Battleground”:

In Tompa v. Tompa, 867 N.E.2d 158 (Ind. Ct. App. 2007), the Court affirmed the trial court’s decision to modify custody by giving Father sole legal custody and modifying Mother’s primary physical custody to equal parenting time for both parents. The Court noted that, under the joint legal custody order, the parties’ child rearing had become a “battleground.” The Court cited examples of failures to communicate and cooperate, as well as Mother’s contentious conduct and failure to inform Father of matters such as planned medical procedures for the children. Id. at 163-64. The Court held that the evidence showed the trial court properly used its discretion in modifying the joint legal custody arrangement to sole legal custody in favor of Father. Id. at 164.

In Van Wieren v. Van Wieren, 858 N.E.2d 216 (Ind. Ct. App. 2006), the Court held the trial court did not abuse its discretion in refusing to modify the parties' split physical custody arrangement as to all but the oldest of the five children. Regarding joint legal custody, the Court said: "When divorced parents are charged with making major decisions as a unit, it is apparent that a relationship filled with hostility and resentment presents a significant obstacle. It follows, therefore, that when child-rearing becomes a 'battleground,' ... modification of joint legal custody is a sensible step to take for the best interests of the children." Id. at 222. However, the Court found modification to sole physical custody not to be effective in situations involving contentious parents: "If the trial court had awarded sole physical custody to either party, the 'winner' would have been well rewarded for obstreperous, disrespectful, and distasteful behavior." Id.

L. Third Party Custodians:

In K.I. ex rel. J.I. v. J.H., 903 N.E.2d 453 (Ind. 2009), the Court held that modification of custody from Grandmother to Father was justified, and in doing so, disapproved of In re Paternity of Z.T.H., 839 N.E.2d 246 (Ind. Ct. App. 2005). Father learned of his possible paternity of the child, when the child was approximately one year old; paternity was established thereafter. K.I., 903 N.E.2d at 455. For eighteen months, Father exercised regular and significant parenting time with the child; Father then filed a petition for a modification of custody, which was awarded by the trial court. The trial court also granted Grandmother visitation, and both parties appealed. The Court cited I.C. 31-14-13-6 as the appropriate standard for the trial court to apply when ruling on a parent's petition to modify custody of a child who is already in the custody of a third party. Id. at 457. The Court noted that the trial court had entered findings in support of modifying custody to Father, which included the consistent and substantial time spent together and their developing bond. Id. at 457-458. The Court cited the standard determined in In re Guardianship of B.H., 770 N.E.2d 283 (Ind. 2002), saying that "a trial court must be convinced that placement with a person other than the natural parent represents a substantial and significant advantage to the child." K.I. at 448. The issue to be determined was defined as whether the presumption that a child's best interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving that the child's best interests are substantially and significantly served by placement elsewhere. Id. Evidence pertaining to this issue would be evidence establishing a parent's unfitness or acquiescence, or demonstrating a strong emotional bond between the child and the third party; however the trial court is not limited to these criteria. Id. The Court concluded that Grandmother did not show any evidence in the record indicating that she carried her burden of overcoming the presumption by clear and convincing evidence that the child's best interests were best served by placement with Father. Id. at 459.

Grandmother contended that the facts of her case should be controlled by In Re Paternity of Z.T.H., 839 N.E.2d 246 (Ind. Ct. App. 2005), where the Court of Appeals noted that B.H. had involved an initial custody determination, and stated that when a parent seeks to modify the custody of a child with a third party, "the third party must rebut the parental presumption with 'evidence establishing the natural parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third party[.]' If the third party is able to rebut the parental presumption with clear and convincing evidence, the third party is essentially in the same position as any custodial parent objecting to the modification of

custody. In other words, the third party and the parent are on a level playing field, and the parent seeking to modify custody must establish the statutory requirements for modification by showing modification is in the child's best interests and that there has been a substantial change in one or more of the enumerated factors." K.I., 903 N.E.2d at 459, citing In re Paternity of Z.T.H., 839 N.E.2d 246 (Ind. Ct. App. 2005). The Court, after citing this passage, determined that the "distinctions between the statutory factors required to obtain initial custody and those required for a subsequent custody modification are not significant enough to justify substantially different approaches in resolving custody disputes." K.I., 903 N.E.2d at 460. "Indiana courts have long held that '[e]ven when a parent initiates an action to reobtain custody of a child that has been in the custody of another, the burden of proof does not shift to the parent ... [r]ather, the burden of proof is always on the third party.'" Id., citing In re Guardianship of J.K., 862 N.E.2d 686, 692 (Ind.Ct.App.2007). The natural parent seeking to modify custody from the third party must show the statutory requirements for modification by showing that modification is in the child's best interests, and that there has been a substantial change in one or more of the factors. K.I., 903 N.E.2d at 460. Because of the strong presumption in favor of the natural parent, the burden on the natural parent is minimal. Id. After the parent has met their minimal burden, the third party must then show by clear and convincing evidence that the best interests of the child are "substantially and significantly served by placement with another person." Id. at 461. If this burden is met, then the child remains in the custody of the third party. Id. The Court concluded that because Grandmother had failed to carry her burden, the trial court properly granted Father's petition to modify custody. Id.

M. Procedural Issues Related to Appeals:

In Oberlander v. Handy, 913 N.E.2d 734 (Ind. Ct. App. 2009), Mother appealed an order denying her request for relief from judgment when the trial court refused to modify custody. The Court held that Mother was not entitled to relief, but remanded the case for the trial court to consider whether modification of custody was warranted. Id. at 735. Mother and Father had an extremely violent relationship, and a protective order was entered against Father, forbidding him from having contact with Mother or the child. Id. at 735-36. Father pled guilty to class D felony domestic battery for battering Mother, and Father was sentenced to one and one-half years probation and six months home detention. Father also was convicted of class D felony resisting law enforcement in a separate proceeding in another county and was sentenced to eighteen months with ten days served in jail and the rest suspended to probation. Id. at 735. Mother took the child and fled to North Carolina Mother did not attend the final dissolution hearing in Indiana regarding custody of the minor child, due to her financial transportation expenses and her fear of Father. Mother attempted unsuccessfully to obtain a legal aid attorney to represent her. In Mother's absence, the trial court awarded custody to Father. Mother filed a request for relief from judgment because of fraud, stating that Father had perjured himself. The Department of Child Services became involved, and recommended that Mother have custody of the child, with supervised visitation for Father. The trial court refused to modify custody because Mother had not proven fraud. The Court concluded that Mother was entitled to neither a relief from judgment, nor a grant of a motion to correct error, as the trial court was entitled to proceed in Mother's absence. Id. at 738. Regarding the custody issue, the Court stated that the trial court that grants the initial custody decree has full and continuing jurisdiction during the minority of the children to periodically order and

modify custody. Id. at 739. The Court further concluded that because of this authority and the best interests of the child, considerations that trial courts must take into account, the trial court should have treated Mother's motion as a motion to modify custody. Id.

In Green v. Green, 889 N.E.2d 1243 (Ind. Ct. App. 2008), *trans. denied*, the Court held, *inter alia*, that an order granting Mother's motion for submission of additional and supplemental evidence was not an abuse of discretion. Previously, in Green v. Green, (Green II) 843 N.E.2d 23 (Ind. Ct. App. 2006), this Court had held that the trial court abused its discretion in denying Father's petition to modify custody because it failed to consider the factors in I.C. 31-17-2-8. Green, 889 N.E.2d at 1245. On remand, the trial court allowed Mother to submit additional evidence, and the trial court denied Father's petition to modify custody. Id. Father, on appeal again, contended that the trial court erred in granting Mother's Motion for Submission of Additional and Supplemental Evidence. The court stated that the trial court properly considered this evidence based on the Court's opinion in Green II. Green, 889 N.E.2d at 1248. Implicit in the ruling of Green II was that Father was entitled to a new judge and a new trial on his petition to modify custody. Consequently, the trial court did not abuse its discretion in allowing Mother to present new evidence. Id.