

# Children's Law Center of Indiana



## Selected Indiana Cases on Modification of Custody

by

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

### A. Relocation:

In In Re the Paternity of B.D.D., 779 N.E.2d 9 (Ind. 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 Kirk v. Kirk, 770 N.E.2d 304, 308 (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 step-brother, 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 Fields v. Fields, 749 N.E.2d 100 (Ind. App. 2001), 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 Ind. Code 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 dissolution did. Id. at 1191. Since there was no final decree entered by the trial court, Ind. Code 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), 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 a conduct a new hearing. Id. at 947.

In Palm v. Palm, 690 N.E.2d 364 (Ind. Ct. App. 1998), 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 Carrasco v. Grubb, 824 N.E.2d 705 (Ind. Ct. App. 2005), 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 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 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), 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), 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), 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), 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 *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 step-children 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 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. 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), 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), 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. 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), 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), the evidence showed that Mother had moved six times within the year preceding the modification hearing. During this time Mother also shared a home 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 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 *In Re Marriage of Jackson*, 682 N.E.2d 549 (Ind. Ct. App. 1997), the evidence showed that Father and Mother were granted joint custody of the children and Father was required to pay child support. Soon after this custody and support arrangement was established, Father and Mother verbally agreed that Father would have physical custody of the children and not pay support. *Id.* at 550. By the time of the Father’s child support modification hearing, the children had been living with Father for the past six years and he was their primary provider. Mother had seen the children only about three to four times a month, and provided only meals during that time, and gifts of clothing on occasion. *Id.* The narrow exception to the general rule that the obligor parent will not be allowed credit for payments not conforming to the support order exists when “the obligated parent and custodial parent agree that the obligated parent takes physical custody of the children and becomes the primary provider for the children for an extended period which demonstrates a permanent change in custody.” *Id.* at 551. Therefore, Father was not obligated to pay child support arrearage and Mother’s failure to support the children and prolonged acquiescence in Father’s custody of the children effectively modified custody by Mother’s consent. *Id.* at 552.

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 *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 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, 808 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. 859.