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MODIFICATION OF CHILD CUSTODY AWARDS IN INDIANA: THE NEED FOR STATUTORY GUIDELINES

One of the most perplexing problems facing the judiciary is that of providing for the continuing care of children after a divorce decree.¹ Indiana's long-recognized interest in the normal development and emotional stability of these children² is reflected in its strict standard for modification of child custody decrees. However, failure of the Indiana courts to apply this standard uniformly, owing in part to the inherent vagueness of the standard, suggests that a statutory statement of the requirements for modification and closer guidance from the appellate courts³ may be required.

STANDARD FOR MODIFICATION OF CUSTODY

Indiana's standard for the modification of custody decrees is a variant of the universally recognized⁴ "changed circumstances" and "best interests" rule. This standard is twofold in nature. First, there must have been a decisive change in circumstances since the initial custody decree.⁵ Modification of custody can be supported upon changes

1. R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS (1968) [hereinafter cited as LEVY]; Foster & Freed, *Child Custody* (pts. 1-2), 39 N.Y.U.L. REV. 423, 615 (1964).

2. The first case recognizing the state's interest was *Stone v. Stone*, 158 Ind. 628, 64 N.E. 86 (1902).

3. In Indiana, jurisdiction over the custody of minor children continues in the court which granted the original decree. IND. CODE § 31-1-12-15 (1971), IND. ANN. STAT. § 3-1219 (1961); accord, *Haag v. Haag*, 240 Ind. 291, 163 N.E.2d 243 (1959); *Manners v. State*, 210 Ind. 648, 5 N.E.2d 300 (1936); *Duckworth v. Duckworth*, 203 Ind. 276, 179 N.E. 773 (1932); *McDonald v. Short*, 190 Ind. 338, 130 N.E. 536 (1921); *Stone v. Stone*, 158 Ind. 628, 64 N.E. 86 (1902).

While giving full faith and credit to foreign decrees (a matter beyond the scope of this note, well treated in Note, *Ford v. Ford* [371 U.S. 187 (1962)]: *Full Faith and Credit to Child Custody Decrees*, 73 YALE L.J. 134 (1963)), Indiana has assumed the right to modify such orders because of changed circumstances. *Neighley v. Neighley*, —Ind.—, 266 N.E.2d 793 (1971); *White v. White*, 214 Ind. 405, 15 N.E.2d 86 (1938).

4. See *Shipley v. Shipley*, —Iowa—, 182 N.W.2d 125 (1970); *Fish v. Fish*, 21 Mich. App. 183, 175 N.W.2d 343 (1970); *Snook v. Hall*, 33 App. Div. 2d 876, 307 N.Y.S.2d 679 (1969); Note, *The Changed Circumstances Rule in Child Custody Modification Proceedings*, 47 Nw. U.L. REV. 543 (1952).

5. The substance of this is that courts may modify the decree awarding the custody of children in divorce cases, but such modification must be upon matters which have arisen *subsequent* to the decree.

Dubois v. Johnson, 96 Ind. 6, 12 (1884) (emphasis in original). This requirement conforms to prevailing *res judicata* principles. The original custody decree is *res judicata* as to conditions then existing but is subject to modification upon showing of material changes in circumstance affecting the welfare of the child or children. Note, *The Changed Circumstances Rule in Child Custody Modification Proceedings*, 47 Nw. U.L. REV. 543 (1952).

in circumstance respecting any of the three principal parties: the child,⁶ the custodial parent⁷ or the non-custodial parent.⁸ Second, the welfare and happiness of the child must necessitate the change in custody.⁹ *Adams v. Purtlebaugh*¹⁰ is most often cited as establishing this rule and articulating its underlying policies. *Adams* focused on the child's welfare as the paramount and controlling consideration and firmly established the policy that permanence of environment is crucial to the welfare of adolescents. The court considered constant change of custody, with its attendant instability and readjustment, detrimental to emotional development.¹¹ Thus, permanence and stability are the prime goals of the strict standard for modification.

A minor alteration of circumstances ordinarily will not support a modification. For example, the fact that the children express a desire to live with the non-custodial parent does not warrant modification.¹² Like-

6. In *Brickley v. Brickley*, 247 Ind. 201, 210 N.E.2d 850 (1965), the modification was based, in part, on expert testimony that the child was suffering from both an anxiety and a depression complex which developed while she was in the custody of the father. *Accord*, *Bowles v. Bowles*, —Ind.—, 261 N.E.2d 228 (1970).

7. *Neighley v. Neighley*, —Ind.—, 266 N.E.2d 793 (1971) (custodian's conduct harmful to child); *Brickley v. Brickley*, 247 Ind. 201, 210 N.E.2d 850 (1965) (custodian a busy surgeon unable to care for child).

8. *Perdue v. Perdue*, —Ind.—, 257 N.E.2d 827 (1970) (non-custodial mother remarried); *Brickley v. Brickley*, 247 Ind. 201, 210 N.E.2d 850 (1965) (non-custodial parent's drinking addition no longer required treatment).

9. *Wible v. Wible*, 245 Ind. 235, 196 N.E.2d 571 (1964); *Adams v. Purtlebaugh*, 230 Ind. 269, 102 N.E.2d 499 (1951).

The best interests and welfare of the child have not always controlled modification. Parental rights and interests originally controlled the decisions:

So far as [the child's] interests can be promoted with a due regard to the rights and feelings of both parents, it should be done.

Darnall v. Mullikin, 8 Ind. 152, 154 (1856) (emphasis added). It was not until later that the courts acknowledged that the state had a vital interest in the nurture and proper training of children involved in a divorce decree. *Stone v. Stone*, 158 Ind. 628, 64 N.E. 86 (1902). Finally, in 1908, it was recognized that both the state's interest and the best interests of the child might well dictate that neither parent should retain custody. *Keesling v. Keesling*, 42 Ind. App. 361, 85 N.E. 837 (1908). The rule that the child's best interests control is now firmly established.

10. 230 Ind. 269, 102 N.E.2d 499 (1951). The initial decree awarded care and custody of the child to his paternal grandmother. On petition for modification custody was given to the mother. The father appealed, and the supreme court reversed, stating:

In the instant petition there is no averment of a change in conditions occurring since the last hearing, of such character as to make it necessary that the care and custody be changed; and no evidence to support a finding that there had been any change in conditions during that period of any kind.

Id. at 275, 102 N.E.2d at 502.

11. *Accord*, *Watson, The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55 (1969); *Note, The Dangers of a Change of Parentage in Custody and Adoption Cases*, 83 L.Q. REV. 547 (1967).

12. *Abair v. Everly*, 130 Ind. App. 192, 163 N.E.2d 34 (1959).

wise, temporarily relinquishing custody to a third party¹³ or moving to another location and school district¹⁴ is insufficient. However, under some circumstances, remarriage of the non-custodial mother may support modification.¹⁵

*Brickley v. Brickley*¹⁶ is one of the few decisions in which the Indiana Supreme Court has indicated the type of changes it considers sufficiently decisive to warrant modification. The court allowed modification under the *Adams* formula where the non-custodial mother showed that (1) her drinking addiction, which prompted the original award in favor of the father, no longer required treatment; (2) the father was such a busy surgeon that it was necessary to hire a housekeeper to watch the child; (3) the child had reached the elementary school age; and (4) the child had symptoms of an anxiety complex, being torn between mother and father, as well as a depression complex which developed while she was in the father's custody. The key elements necessitating change were the danger to the child's emotional stability and the continuing absence of the custodial parent. While no single change dictated modification, the whole new set of circumstances indicated that the child's interests would be served best by modification.

Unfortunately, non-uniform application has limited the effectiveness of Indiana's standard. In four of the eight relevant supreme court decisions rendered since 1967 it is questionable whether the requirements of the standard were met.¹⁷ Apparently the supreme court has been

13. In *Morrison v. Morrison*, 130 Ind. App. 270, 164 N.E.2d 113 (1960), the custodial mother gave temporary custody to an aunt and uncle while she attempted to finish college. The appellate court affirmed the trial court's refusal to order modification.

14. In *Wible v. Wible*, 245 Ind. 235, 196 N.E.2d 571 (1964), the father sought modification on the ground that the mother took the children out of school in Kokomo and moved them to Indianapolis. The court refused modification:

There is no evidence, however, which shows that this change in the schooling of the children was unwarranted, unreasonable, or, in fact, was injurious to the children.

Id. at 238, 196 N.E.2d at 572.

15. *Perdue v. Perdue*, —Ind.—, 257 N.E.2d 827 (1970): This position is not accepted in all jurisdictions. It is difficult to see how remarriage alone can decisively affect the child's welfare. See, e.g., *Rowe v. Rowe*, 45 Ala. App. 367, 231 So. 2d 144 (1970); *Andro v. Andro*, 97 Ariz. 302, 400 P.2d 105 (1965); *Peterson v. Peterson*, 77 Ida. 89, 288 P.2d 645 (1955); *Rahn v. Cramer*, 249 Iowa 116, 85 N.W.2d 924 (1957); *McReynolds v. Hughes*, 398 S.W.2d 482 (Ky. 1966); *Allen v. Allen*, 243 Miss. 23, 136 So. 2d 627 (1962); *Birritieri v. Swanston*, 311 S.W.2d 364 (Mo. App. 1958). A recent Indiana Supreme Court case gives some indication that its view may have changed. *Huston v. Huston*, —Ind.—, 267 N.E.2d 170 (1971) (wife remarried but modification denied).

16. 247 Ind. 201, 210 N.E.2d 850 (1965).

17. The decisions are *Partridge v. Partridge*, —Ind.—, 272 N.E.2d 448 (1971); *Rose v. Rose*, —Ind.—, 269 N.E.2d 365 (1971); *Huston v. Huston*, —Ind.—, 267 N.E.2d 170 (1971); *Neighley v. Neighley*, —Ind.—, 266 N.E.2d 793 (1971); *Bowles v. Bowles*, —Ind.—, 261 N.E.2d 228 (1970); *Perdue v. Perdue*, —Ind.—,

struggling with two competing policies. The court has sought to follow the standard of allowing modification where decisive changes have affected the welfare and happiness of the child. Competing with this rationale, however, is the policy of supporting the discretion of the trial judge (absent a showing of abuse) to weigh and determine the import of the evidence.¹⁸

The supreme court, it seems, views the latter policy as the more important.¹⁹ That it is willing to affirm a modification despite the absence of probative evidence supporting the change is illustrated by *Mikels v. Mikels*,²⁰ in which a modification of custody was affirmed although the only changed circumstance was that the non-custodial mother had become gainfully employed and permanently situated. The court set the tenor of the decision by stating that the trial judge was clothed with the responsibility of evaluation. It then explained:

[I]f there is any evidence, or legitimate inferences therefrom, to support the finding and judgment of the trial court, this court may not intercede or interfere and exercise its judgment as a substitute for that of the trial court. . . . While we do not regard the evidence as overwhelming, it is enough.²¹

The importance that the court attaches to trial court discretion is further exemplified by *Winkler v. Winkler*.²² In affirming a modification, the court failed to mention either the applicable standard or the facts justifying its holding. It merely stated that there was sufficient evidence

257 N.E.2d 827 (1970); *Winkler v. Winkler*, 252 Ind. 136, 246 N.E.2d 375 (1969); *Mikels v. Mikels*, 248 Ind. 585, 228 N.E.2d 20 (1967). Of these, *Neighley*, *Perdue*, *Winkler* and *Mikels* seem inconsistent with the strict standard.

18. The history of custody modification cases is replete with decisions based on this principle. A succinct statement of the rule is found in *Brickley*:

On appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal.

247 Ind. at 204, 210 N.E.2d at 852. The principle recognizes that the appellate court was not present to view the testimony at first hand.

19. Illustrative of this point is the fact that the supreme court has affirmed seven of the last eight trial court modification decisions reaching it. Four of the trial courts had awarded modification, and three had refused it. The one case of reversal involved unique circumstances. In *Partridge v. Partridge*, —Ind.—, 272 N.E.2d 448 (1971), the court reversed an order granting two months' visitation each year to the non-custodial father. Although the trial court had characterized the order as a visitation decision, the supreme court held that it was in effect a split-custody modification order granted without the requisite showing of changed circumstances. Thus, the only reversal since 1967 involved a difference of opinion over the character of a decree, not a review of discretion.

20. 248 Ind. 585, 228 N.E.2d 20 (1967).

21. *Id.* at 586, 228 N.E.2d at 20.

22. 252 Ind. 136, 246 N.E.2d 375 (1969).

of probative value to sustain the lower court judgment. The supreme court's failure even to allude to the modification standard is further evidence that its prime concern is the integrity of trial court discretion.

Following *Winkler*, the court decided *Perdue v. Perdue*,²³ affirming modification under circumstances in which change of custody may, in fact, have been against the best interests of the child. With the exception of one five-week period, the custodial grandparents had cared for the child continuously for six and one-half years. Evidence was presented that the child had developed a familial attachment to her grandparents. No claim was made that the child's health or emotional stability was endangered by their continued custody. Against this background the only evidence adduced in support of the mother's petition for modification showed that (1) she had remarried, and her husband now supported her; (2) she lived in a house large enough for her daughter to have a room; (3) she had quit work and could look after her daughter; and (4) since the last decree she had gone to visit another child (in the custody of the father) more often than before.²⁴

23. —Ind.—, 257 N.E.2d 827 (1970). The original decree awarded custody of the daughter to the mother. Later, upon the father's application and a showing that the mother was destitute and unable to care for the child, the court awarded custody to the mother's parents. Still later, the mother was again awarded custody on a showing of changed circumstances; the supreme court affirmed.

24. Granting modification on the facts presented by the mother prompted a dissenting opinion by Judge DeBruler (Jackson, J., concurring) in which he declared:

The changes in *appellee's* circumstances are not changes so decisive as to require a change of custody for the welfare and happiness of the child.

Id. at —, 257 N.E.2d at 831 (emphasis in original).

While *Perdue* was a highly questionable application of the traditional standard and raised questions as to its continued vitality, four later cases have reaffirmed and more consistently applied the recognized guidelines. *Bowles v. Bowles*, —Ind.—, 261 N.E.2d 228 (1970), involved a father petitioning for modification on the ground of alleged mistreatment of the child. The only evidence introduced was that the step-father had severely disciplined the child on one occasion, although no medical treatment was required. The supreme court did not cite *Perdue* and refused to reverse, finding no abuse of discretion.

In *Huston v. Huston*, —Ind.—, 267 N.E.2d 170 (1971), the evidence was not conclusive as to the need to change custody. The court stated:

The gist of the appellant's evidence bears upon a change in her own personal circumstances. What evidence which [*sic*] does bear upon the welfare and happiness of the children was not so persuasive to the trial court as to necessitate a change in custody.

Id. at —, 267 N.E.2d at 172.

The evidence presented in *Rose v. Rose*, —Ind.—, 269 N.E.2d 365 (1971), showed that (1) the minor children were being cared for by a 67-year-old housekeeper who was hard of hearing, did not see well and showed little maternal affection toward them; (2) the children were listless, somewhat thinner and appeared to have less energy than before; and (3) the custodial father's business required that he be out of town for days at a time. The court refused to modify custody, citing *Wible* and *Huston*.

Partridge v. Partridge, —Ind.—, 272 N.E.2d 448 (1971), is discussed at note 19 *supra*.

In *Neighley v. Neighley*,²⁵ the most recent case involving questionable application of the standard, a unanimous court affirmed a modification decree supported by little evidence of probative value that the children's welfare dictated a change of custody. The evidence presented, while indicating that the children's environment was less than ideal, failed to show that their continued welfare necessitated a change of custody.²⁶ Again the court's chief concern appears to have been support of trial court discretion.²⁷

Thus, while the strict standard is purportedly still the rule, its application has been less than uniform. If the policies underlying the standard are permanence and stability,²⁸ *Mikels, Winkler, Perdue* and *Neighley* exemplify the danger flowing from an inordinate emphasis on trial court discretion. Since this emphasis tends to preclude meaningful appellate review, irrational application of the standard becomes almost an inevitable consequence.

POLICIES REQUIRING A STRICT STANDARD FOR MODIFICATION

A standard for modification of custody decrees should promote three interrelated policies: protection of the child's welfare, protection of the original decree and maximum judicial economy. Traditionally Indiana has recognized that maintaining permanence and stability in a child's environment is an important goal in custody disputes. Sociological and psychological studies indicate that a separation of child from custodian,²⁹

25. —Ind.—, 266 N.E.2d 793 (1971).

26. *But see* *Rose v. Rose*, —Ind.—, 269 N.E.2d 365 (1971). The court refused to require modification of custody even though the environment was less than ideal and would be improved by the change. The court concluded that the total welfare of the child must dictate change. *Id.* at —, 269 N.E.2d at 367.

27. While the evidence is not overwhelming we are not constrained to say that the trial court, being in a better position to evaluate that evidence, erred in granting the appellee's petition.

—Ind. at —, 266 N.E.2d at 795.

28. As the court said in *Wible v. Wible*:

[C]ustody should not continually be changed, and left uncertain, thus creating instability in the living conditions of the children.

245 Ind. 235, 241, 196 N.E.2d 571, 574 (1964). *See* text accompanying notes 10-11 *supra*.

29. *See* Note, *The Dangers of a Change in Parentage in Custody and Adoption Cases*, 83 L.Q. Rev. 547 (1967):

Today, most child psychologists believe that even without any special aggravating features in the individual case there is always a risk that a child may suffer severe emotional disturbance if he is removed from an established home where he is happy and well adjusted. At best, the disturbance may be only temporary—at worst, it can seriously impair the child's emotional development toward mature and responsible adulthood. It is also widely accepted that the gravity of the risk varies with the age of the child, so that on the whole the risk becomes less serious as the child grows older.

Id. at 549.

with the resultant destruction of an affection-relationship,³⁰ may have detrimental effects on a child's emotional development. Indiana courts have recognized this basic behavioral fact by their acceptance of the "interwoven affections" doctrine:

The principle of the welfare of the child may be applied to defeat the claims of a parent when the parent has voluntarily relinquished to others the care and custody of the child until the affections of the child and its foster parent become so interwoven that to sever them would seriously mar and endanger the future happiness and welfare of the child.³¹

There is no sound reason why the same principles should not apply when the competing parties are parents. The detrimental effects attending separations may be minimized by procedures at the initial stage of a custody award calculated to further the child's best interests³² and by substantive statutory guidelines which allow modification only when the child's physical health or emotional development is endangered.

A standard limiting modification to "changed circumstances" is also necessary to protect the original decree from relitigation. The lenient change of venue rule in Indiana, absent such a strict standard, would allow a dissatisfied party to petition for modification, file for change of venue and then relitigate the custody award before a different judge.³³ Concern over this possibility may be one explanation for the

30. Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 (1963). An affection-relationship between parent and child arises early in the child's life and continues to develop through childhood and adolescence. Protection of this relationship is essential, for all future interpersonal relationships develop from it.

The trauma of separating a child from the custody of an adult with whom an affection-relationship exists may be psychologically equivalent in its detriment to the orphaning of that child. While, in all probability, the child will eventually form a new affection-relationship, this tie may be of a lesser quality and strength. And a series of separations might have a cumulative effect on the child's ability to form new affection-relationships.

Id. at 161.

31. *Glass v. Bailey*, 233 Ind. 266, 118 N.E.2d 800 (1954); *accord*, *Brown v. Beachler*, 224 Ind. 477, 68 N.E.2d 915 (1946).

32. See IND. CIVIL CODE STUDY COMM'N, PROPOSED DISSOLUTION OF MARRIAGE ACT § 302 (1970); Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 (1963).

33. Under the rule in *Julian v. Julian*, 60 Ind. App. 520, 111 N.E. 196 (1916), a venue change out of the county where a custody modification petition was originally filed is impermissible. In *Rhinehalt v. Rhinehalt*, 73 Ind. App. 211, 127 N.E. 10 (1920), however, the court allowed a change of judge in a support modification case. The language used in *Rhinehalt* indicates that the same rule would apply to custody modification actions. Thus, under IND. TR. 76 a change of judge would be permissible:

In all cases where the venue of a civil action may now be changed from the judge or county, such change shall be granted.

development of a strict standard in Indiana. Uniform application of the standard would alleviate that concern by preventing any review of the initial award outside the appellate review system.

A standard that minimizes relitigation is desirable for several other reasons. The adversarial process is likely to be a traumatic experience for the children involved.³⁴ Emotional stability is hardly furthered by subjecting a child to the mutual animosities often aired in a custody dispute. Indeed, one objective in awarding custody is to provide the child with a normal and stable family relationship. Further, relitigation places a substantial financial burden on the custodian. It seems reasonable that at least some custodians are unable to bear that burden without a concomitant diminution of resources available to support the child.³⁵ Finally, such a standard lessens the possibility that a court will utilize the threat of modification as a device to secure compliance with a decree setting out visitation rights.³⁶ Contempt remedies are better designed to enforce compliance and offer less potential harm to the child than the threat of modification.

NECESSITY FOR A STATUTORY SCHEME: THE UNIFORM MARRIAGE AND DIVORCE ACT

Non-uniform application of the law stems from both the inherent vagueness of the standard and the relatively uncontrolled discretion exercised by trial courts. Discretion in custody cases "is far less a product of [the judge's] learning than of his personality and temperament, his background and interests, his biases and prejudices, conscious or unconscious."³⁷ This problem might be alleviated by the establishment of firm legislative guidelines regulating modification. Rather than entrusting such crucial decisions to wholly discretionary interpretations of abstract standards like "changes affecting the welfare and happiness of the child," a statutory scheme would provide not only more substantive guidelines but also a basis for meaningful appellate review. A statutory

34. See LEVY, *supra* note 1, at 236-37.

35. *Quaere*: Would an extension of IND. CODE § 31-1-12-11 (1971), IND. ANN. STAT. § 3-1216 (1968), as interpreted by O'Connor v. O'Connor, —Ind.—, 253 N.E.2d 250 (1969), permit a custodial mother to receive attorney's fees from her ex-husband to use in defending the petition to modify?

36. In *Wible v. Wible*, 245 Ind. 235, 196 N.E.2d 571 (1964), the court said: [T]he custody of children cannot be used as a means of punishing the parents. It is the children's welfare—not the parents'—that must control the actions of the court.

Id. at 237, 196 N.E.2d at 572.

37. Fain, *Our Child Custody Laws and Policies—Are They in Need of Revision or Change?*, [1963] ABA FAMILY LAW SECTION 27, 29.

scheme would necessarily involve judicial discretion. However, such decisions would be guided and controlled by an articulated policy statement and a procedural framework. Such a scheme has been proposed by the National Conference of Commissioners on Uniform State Laws. Their proposed provision for modification of custody awards, § 409 of the Uniform Marriage and Divorce Act,³⁸ provides a substantive "child protection" standard and a procedural framework which maximizes stability and judicial economy.

Focusing on the policy that a stable environment is of the highest priority, § 409 prohibits modification petitions for one year after the initial custody decree. This presupposes that any emergency arising during that period which threatens the child's physical safety can be handled by the juvenile courts.³⁹ Also implicit is the assumption that the original custody decree was made with the child's welfare as the controlling consideration.

Reduction of frivolous claims is provided by § 409's requirement of a two-year waiting period between petitions to modify.⁴⁰ Such a

38. (a) No motion to modify a custody decree may be made earlier than one year after the date of the initial decree. If a motion for modification has been filed, whether or not it was granted, no subsequent motion may be filed within 2 years after disposition of the prior motion, unless the court decides on the basis of affidavits (Section 410), that there is reason to believe that the child's present environment may endanger his physical health or significantly impair his emotional development.

(b) [If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act,] the court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child. In applying these standards the court shall retain the custodian established by the prior decree unless:

- (1) the custodian agrees to the modification;
- (2) the child has been integrated into the family of the petitioner with the consent of the custodian; or
- (3) the child's present environment endangers his physical health or significantly impairs his emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

The entire Act, the comments thereon and the recommendations of the ABA Family Law Section may be found at 5 FAMILY L.Q. 123 (1971).

39. Original and continuing jurisdiction in the juvenile court is provided by IND. CODE § 33-12-2-3 (1971), IND. ANN. STAT. § 9-3103 (1956) and IND. CODE § 31-5-7-7 (1971), IND. ANN. STAT. § 9-3207 (1956), respectively. The acts which constitute abuse and neglect, and their penalties, are specified in IND. CODE §§ 35-14-1-2 to 35-14-1-4 (1971), IND. ANN. STAT. §§ 10-813 to 10-815 (1956).

40. Unfortunately many petitions to modify custody are not motivated by a desire to protect the child's welfare:

When a party seeks to have a prior custody award modified, the court not only

provision not only protects the child from further parental animosity, but also contributes to judicial economy. Flexibility is maintained by the provision that, upon filing of an affidavit⁴¹ showing that "the child's present environment may endanger his physical health or significantly impair his emotional development," the court may hear a petition for modification prior to the expiration of the two-year period.⁴² The affidavit method also furthers judicial economy by bringing the relevant information before the judge, who can dispose of the matter summarily if he believes that the facts presented do not warrant a hearing.

Section 409 provides two substantive guidelines for application of "the best interests of the child" standard. First, the provision creates a presumption that continued care by the present custodian is in the best interests of the child. Thus, the petitioning party must show both that the present environment endangers the child's physical health or significantly impairs his emotional development and that the advantages of a

must cope with many of the difficult problems inherent in custody matters but also must face what may be an attempt to re-litigate the original issue in a more propitious forum. Under a claim of changed circumstances, a litigant may be forum shopping or seeking a second round in a running battle.

Foster & Freed, *Child Custody*, 39 N.Y.U.L. REV. 615, 622 (1964).

It has been suggested that an additional safeguard against frivolous claims should be added to § 409 in the form of a new section providing:

Attorney fees and costs shall be assessed against a party seeking modification if it is found that there has been no substantial change of circumstances since the prior custody award and that the modification action is vexatious and constitutes harassment.

Report on the Uniform Marriage and Divorce Act of the Joint Meeting Between the Representatives of the Section of Family Law and the National Conference of Commissioners on Uniform State Laws held in New Orleans on April 3 and 4, 1971, 5 FAMILY L.Q. 125, 132 (1971).

41. A party seeking a temporary custody order or modification of a custody decree shall submit together with his moving papers an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceeding, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

Uniform Marriage and Divorce Act § 410.

42. Uniform Marriage and Divorce Act § 409(a). Section 409 is inconsistent with traditional *res judicata* principles. Ordinarily a custody decree is conclusive not only as to circumstances governing the initial judgment but also to those which might have been presented. Under the proposed § 409, facts that were unknown at the time of the initial decree may later support a modification. The trend in the law may be toward this view. It results from the policy determination that safeguarding children who are innocent victims of divorce may dictate an exception to harsh application of the rule of *res judicata*. See *Juri v. Juri*, 61 Cal. App. 2d 815, 143 P.2d 708 (1943); *Harms v. Harms*, 323 Ill. App. 154, 55 N.E.2d 301 (1944); *Contra*, *Dubois v. Johnson*, 96 Ind. 6 (1884); *West v. West*, 94 Mo. App. 683, 68 S.W. 753 (1902); *White v. White*, 77 Ohio App. 447, 66 N.E.2d 159 (1945).

custodial change outweigh any potential ill effects. These requirements differ significantly from the present standard by providing for a clear-cut comparison between the purported advantages and the possible detrimental effects of modification. The increasingly apparent fact that any change in environment may detrimentally effect an adolescent renders this calculation seemingly necessary. Further, the substantive requirements of § 409 leave less discretion in the trial court to determine the allowance of modification than does the present "decisive change" standard. Under the current standard a modification is often allowed under circumstances that fall short of endangering physical health or emotional development. Adoption of the requirements and guidelines proposed by § 409 would preclude the possibility of a custody modification based upon criteria other than the child's best welfare. This paramount concern with the child's welfare is further reflected in § 409's recognition that, when a child has been integrated into a "family" and has built affection-relationships, maintenance of that environment is of utmost importance.⁴³

Finally, the proposed provision provides a mechanism for avoiding the financial burdens and traumatic effects that the adversary system places on litigants and children. Unlike the present standard, it allows modification based on the consent of the custodial parent.⁴⁴ Thus, where the custodian recognizes that another environment would be more conducive to the child's welfare, the change can be effected without litigation. While such consensual modification presents potential hazards, the advantages of such a flexible provision outweigh the disadvantages. A provision allowing the court to refuse the proposed consensual change in the interest of the child's welfare, however, would seem advisable.⁴⁵

43. Uniform Marriage and Divorce Act § 409(b) (2).

44. Uniform Marriage and Divorce Act § 409(b) (1). On the need for such a procedure, see LEVY, *supra* note 1, at 238:

[M]ost commentators suspect that in custody cases traditional adversary methods often produce more hostility than they shed light on the real issues which require resolution.

45. Objection to § 409's one-year ban on petitions and the two-year limitation after disposition of a prior motion resulted in unanimous disapproval of § 409 by the ABA Family Law Section. The reasons for disapproval were contentions that the waiting periods (1) would be unconstitutional and (2) would result in loss of the state's power to protect abused children.

The Family Law Section did not specify which constitutional principle § 409 offends. The state's interest in modifying custody arrangements is at least as substantial as its interest in regulating marriage and divorce, and most state laws governing these matters involve waiting periods of various lengths. A provision like § 409, based upon the state's concern for the proper growth and development of children, would seem well within the power of the state as *parens patriae*. It is only during the one-year period after the initial decree that a court is ousted from jurisdiction over petitions for modification. The provisions regarding cruelty and neglect contained in juvenile codes like Indiana's (see note 39 *supra*) are adequate to protect the child during this initial period.

There remain two related problems which § 409 does not confront. First, seemingly irrational decisions can result not only from the existence of Indiana's abstract standard but also from the inability of trial courts to obtain the relevant data on which to base a decision. This apparent failing of the adversarial system might be remedied in some counties by use of the recently established Domestic Relations Court system.⁴⁶ These courts now have both the mechanism and the power to gather those facts most relevant to an informed decision safeguarding the child's welfare. This fact-finding ability, coupled with a standard providing substantive guidelines, might go far toward insuring rational modification decisions grounded on sound policy. Second, the effect that psychological and sociological evidence should have on a determination of the child's "best interests" remains uncertain. Neither § 409 nor the Domestic Relations Court Act provides guidelines for determining the respective roles of the expert and the judge in the decision-making process.

The dilemma lies in the fact that complete deference to expert psychiatric evidence would not only transfer the effective role of decision maker from the judge to the doctor but would soon lead to a position whereby no judge would feel that he ought to make an order removing a child from a settled home because of the risks involved.⁴⁷

Insofar as psychological data and other information about a child's health are important to the resolution of custody disputes, the proper weight to be accorded to testimony in this area remains an important undecided issue.

Statutory provisions concerning modification of child custody decrees, however, are uncommon. Of the three states which have enacted progressive divorce codes in recent years,⁴⁸ none has included a specific provision concerning requirements for modification of custody. That such provisions were excluded raises no negative implication, of course, concerning the need for a provision in Indiana. The omission may indicate

Moreover, the initial waiting period is strongly supportable on the rationale that stability during the time immediately following divorce is arguably more important to the child than at any other time.

46. Pub. L. No. 419, [1971] Ind. Acts 1956. The Act provides that the judges in certain judicial circuits may establish a Domestic Relations Court and appoint professionally qualified domestic relations referees and counselors with the duty, *inter alia*, of making post-divorce studies of problems of custody, support and visitation.

47. Note, *The Dangers of a Change in Parentage in Custody and Adoption Cases*, 83 L.Q. REV. 547, 550 (1967).

48. CAL. CIV. CODE §§ 4500-5138 (West 1970); FLA. STAT. ANN. §§ 61.011-61.19 (Supp. 6, 1971); IOWA CODE ANN. §§ 598.1-598.34 (Supp. 1971).

no more than that the other states are satisfied with the operation of their common law standards.⁴⁹ The present Indiana rule does provide a more substantive standard than that applied in many states, but it is still highly abstract and rests largely on broad trial court discretion. A statutory scheme such as § 409 has potential for remedying both deficiencies.

CONCLUSION

The state has a responsibility to protect children during the period between their parents' divorce decree and their own majority. Unless it chooses to institutionalize these children and, thus, keep them under its direct tutelage, the state must discharge its protectional responsibility by supervising closely all aspects of the custody into which it places them, including any changes in the identity of the custodian. Four cases involving custody modification have reached the Indiana Supreme Court already in 1971.⁵⁰ Apparently none of these was decidable solely by reference to a predecessor, since each was accorded full opinion treatment. This seems eloquent testimony that Indiana's case law standards are somehow unsatisfactory and have not provided adequate guidelines for trial courts.

A statutory provision could provide firm criteria for deciding modification controversies, thereby insuring more uniform application of the law. Section 409 of the Uniform Marriage and Divorce Act is oriented toward protection of children and satisfies the policies underlying the strict standard which the case law now purports to uphold. The Uniform Act (1) establishes a standard which focuses on the child's physical health and emotional development, (2) protects the original decree from non-appellate review and (3) furthers judicial economy by discouraging frivolous petitions to modify. The General Assembly would do well to give it careful consideration.

EDWARD T. BULLARD

49. *But see* MICH. COMP. LAWS ANN. § 722.27 (Supp. 1971), a statutory provision dealing specifically with custody modification. The act, passed in 1970, allows modification of custody only upon "clear and convincing evidence that it is in the best interests of the child" [§ 722.27(d)]. It also provides that sociological and psychological community services may be utilized in making a decision regarding a custody dispute. Unfortunately the provision suffers from the same defect as the Indiana standard. Inherent vagueness permits wholly discretionary interpretation and application. Without substantive guidelines, the potential for non-uniform application remains.

50. *Partridge v. Partridge*, —Ind.—, 272 N.E.2d 448 (1971); *Rose v. Rose*, —Ind.—, 269 N.E.2d 365 (1971); *Huston v. Huston*, —Ind.—, 267 N.E.2d 170 (1971); *Neighley v. Neighley*, —Ind.—, 266 N.E.2d 793 (1971).