

## Antenuptial Agreements After *In re Marriage of Boren*

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Persons contemplating a second marriage, or persons of substantial worth contemplating a first marriage, from time to time seek counsel from attorneys concerning the nature and validity of an antenuptial agreement, also commonly referred to as a pre-nuptial agreement. Interest in such agreements has increased in recent years as the incidence of marriage dissolutions has risen. Until recently, however, there has been considerable question about the efficacy and enforceability of such agreements in the event of a dissolution of marriage under Indiana's Dissolution of Marriage Act.<sup>1</sup>

This Article will briefly explore the confusion that has existed in Indiana concerning antenuptial agreements during approximately the past ten years. Following will be an analysis of *In re Marriage of Boren*,<sup>2</sup> the recent decision of the Supreme Court of Indiana which has substantially clarified the law. The Article will then conclude with a discussion of the practical aspects which counsel for a prospective husband and wife should consider in contemplating the negotiation and execution of an antenuptial agreement.

### I. A BRIEF OVERVIEW OF PRE-*Boren* INDIANA LAW

Antenuptial agreements have been favored for centuries, and since 1889, the Supreme Court of Indiana has enunciated the proposition that courts should not be allowed to set aside such contracts fairly made between consenting parties.<sup>3</sup> In *McNutt v. McNutt*,<sup>4</sup> the supreme court held concerning the binding nature of antenuptial agreements:

It is indeed difficult to find any principle upon which courts can set aside contracts made in good faith, with due deliberation, and by persons of mature age, even though that contract be one between a man and a woman contemplating marriage. It is stretching, as many of the authorities suggest, the power of the courts a great ways to declare that a man and a woman may not, even though the latter has no estate of her own, make their

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<sup>1</sup>IND. CODE §§ 31-1-11.5-1 to -26 (1982 & Supp. 1985).

<sup>2</sup>475 N.E.2d 690 (Ind. 1985).

<sup>3</sup>*McNutt v. McNutt*, 116 Ind. 545, 19 N.E. 115 (1888).

<sup>4</sup>*Id.*

own contracts. In earlier ages there was, perhaps, some reason for the old English law rule, for women were not educated then as now, and were far more under the dominion of the men than in these ages. The reason for the rule has failed, and where the "reason faileth the rule faileth."

. . . . .  
From the earliest years of the law, the courts of chancery, rejecting the iron rules of the common law, have favored contracts of this character, and this rule of equity has been engrafted into the body of American jurisprudence. . . . To remove all claims to each other's property was, it is very plain, the leading purpose of the parties, and the court would do wrong to frustrate that purpose. The contract has long existed, has been acted upon, one of the parties is dead, and the courts can not do otherwise than read the contract as the parties wrote it, and as they intended it should be read.<sup>5</sup>

Nine years later in *Buffington v. Buffington*,<sup>6</sup> the court expanded on the policy of the *McNutt* decision by stating that antenuptial agreements are favored by the law in that they promote domestic happiness. Consequently, courts should ascertain and give effect to the intention of the parties to such agreements. The court stated:

It is the firmly-established rule in this state that antenuptial contracts are not in such disfavor as to require rigid construction. On the contrary, they are favored by the law as promoting domestic happiness and adjusting property questions which would otherwise often be the source of fruitful litigation. No formality is required, and the rule of construction is to ascertain and give effect to the intention of the parties.<sup>7</sup>

Approximately fifteen years later in the case of *Mallow v. Eastes*,<sup>8</sup> the court expanded upon the principles previously enunciated in *McNutt* and *Buffington* to make it clear that trial courts should not attempt to substitute their judgment for the intentions of the contracting parties, even in situations where the complaining spouse's agreement left her destitute. The court said:

Our courts have uniformly upheld antenuptial contracts where fairly entered into, even though the effect be to leave the surviving

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<sup>5</sup>*Id.* at 549, 558-59, 19 N.E. at 117, 122.

<sup>6</sup>151 Ind. 200, 51 N.E. 328 (1898).

<sup>7</sup>*Id.* at 202, 51 N.E. at 329.

<sup>8</sup>179 Ind. 267, 100 N.E. 836 (1913).

wife very little, based upon the motives of marriage not being mercenary, but of the highest consideration in itself, and holding, under such contracts, that the considerations fixed by the parties will be deemed sufficient, even though the provisions for the contemplated wife be much less than the statutory right of widows, or even gives her no property interest.<sup>9</sup>

The supreme court's liberal construction of antenuptial agreements is evidenced by its statement that no particular form of words is required for a valid antenuptial agreement.<sup>10</sup> In *McNutt v. McNutt* the court stated:

No particular form of words is necessary to constitute a valid antenuptial contract. However informal the instrument may be, it will be given effect if the intention of the parties is manifested, and it is such as can, at law or in equity, be executed. . . . In truth, not only do the authorities affirm that no formality is required, but they go further, and declare that such contracts are to be construed with liberality and favor. They will be upheld if possible, and not overthrown unless the necessity leading to that result is imperious. . . . Reason and authority are both in favor of a liberal construction of these contracts, for their purpose is to prevent strife, secure peace, adjust rights, and settle the question of marital rights in property.<sup>11</sup>

The above decisions of the Indiana Supreme Court remain good law. The public policy of Indiana as expressed by the supreme court has, therefore, been to favor antenuptial agreements because they tend to promote marital harmony and eliminate unnecessary litigation. Accordingly, where such agreements have been fairly entered into, the contracts have been uniformly upheld and liberally interpreted to effect the intention of the parties.

Throughout the years, the courts of appeals of Indiana have either expressly or by implication embraced the supreme court's rulings on antenuptial agreements.<sup>12</sup> The following language from *Estate of Gillilan v. Estate of Gillilan*<sup>13</sup> is illustrative of the thrust of the prior holdings of the courts of appeals concerning antenuptial agreements:

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<sup>9</sup>*Id.* at 274, 100 N.E. at 839.

<sup>10</sup>*McNutt v. McNutt*, 116 Ind. 545, 19 N.E. 115 (1888).

<sup>11</sup>*Id.* at 557-58, 19 N.E. at 121.

<sup>12</sup>*See, e.g.*, *Estate of Gillilan v. Estate of Gillilan*, 406 N.E.2d 981 (Ind. Ct. App. 1980); *McClain's Estate v. McClain*, 133 Ind. App. 645, 183 N.E.2d 842 (1962); *Baugher v. Barrett*, 128 Ind. App. 233, 145 N.E.2d 297 (1957); *Roush v. Hullinger*, 119 Ind. App. 342, 86 N.E.2d 714 (1949); *Moore v. Harrison*, 26 Ind. App. 408, 59 N.E. 1077 (1901).

<sup>13</sup>406 N.E.2d 981 (Ind. Ct. App. 1980).

In considering an antenuptial agreement we are cognizant of certain well recognized principles of law which are applicable. It is settled that antenuptial contracts entered into between an adult husband and adult wife in contemplation of marriage are favored by the law in that they tend to promote domestic happiness and adjust property questions which might otherwise become the source of much litigation, and, as often pointed out, the marriage itself is the consideration for such agreements which perhaps may be the most valuable and highly respected consideration of the law. No formality is required, and such agreements are given a liberal rather than a strict construction, and a construction will be given in each case giving effect, if possible, to the intention of the parties.<sup>14</sup>

The longstanding public policy of Indiana favoring antenuptial agreements has also been incorporated into the statutory law respecting probate estates. Two sections of the Indiana Probate Code are applicable to antenuptial and postnuptial agreements: the provision concerning waiver of the right to elect against a spouse's will,<sup>15</sup> and the section which provides for waiver of a beneficiary's expectancy.<sup>16</sup> The former provision states:

The right of election of a surviving spouse hereinbefore given may be waived before *or after* marriage by a written contract, agreement or waiver, signed by the party waiving the right of election, after full disclosure of the nature and extent of such right, provided the thing or the promise given such party is a fair consideration under all the circumstances. The promise of marriage, in the absence of fraud, shall be a sufficient consideration in the case of an agreement made before marriage.<sup>17</sup>

The Indiana Code also provides that a spouse may waive the right to take an intestate share in a writing:

The intestate share or other expectancy which the spouse or any other heir may be entitled to may be waived at any time by a written contract, agreement or waiver signed by the party waiving such share or expectancy. *The promise of marriage, in the absence of fraud, shall be a sufficient consideration in the case of an agreement made before marriage. . . .* Except as otherwise provided therein, such waiver executed by the decedent's spouse

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<sup>14</sup>*Id.* at 988.

<sup>15</sup>IND. CODE § 29-1-3-6 (1982).

<sup>16</sup>*Id.* § 29-1-2-13 (1982).

<sup>17</sup>*Id.* § 29-1-3-6 (1982) (emphasis added).

shall be deemed a waiver of the right to elect to take against the decedent's will and the written contract, agreement, or waiver may be filed in the same manner as is provided in this article for the filing of an election.<sup>18</sup>

The cases construing these two sections of the Probate Code have unanimously upheld them.<sup>19</sup> With respect to property distributions upon the death of a spouse, antenuptial agreements have been uniformly enforced according to their terms so long as fraud or duress has not been practiced upon the surviving spouse.<sup>20</sup> Consequently, in Indiana the surviving spouse has not been permitted to litigate the validity of an antenuptial agreement on the grounds that it is unfair or inequitable.

Most of the Indiana case law during the past century concerning antenuptial agreements arose in the probate area.<sup>21</sup> In the past twenty years, however, the courts have often considered the enforcement of antenuptial agreements in the context of divorce.<sup>22</sup> The old mores of society with regard to division of labor among the sexes and the consequential dominant role of the male in marriage and society resulted in the reluctance of many courts to recognize certain parts of antenuptial agreements in divorce cases.<sup>23</sup> These courts were generally concerned

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<sup>18</sup>*Id.* § 29-1-2-13 (1982) (emphasis added).

<sup>19</sup>For examples of cases affirming IND. CODE § 29-1-3-6, see *Russell v. Walz*, 458 N.E.2d 1172 (Ind. Ct. App. 1984); *Estate of Gillilan v. Estate of Gillilan*, 406 N.E.2d 981 (Ind. Ct. App. 1980); *Baugher v. Barrett*, 128 Ind. App. 233, 145 N.E.2d 297 (1957). For examples of cases affirming IND. CODE § 29-1-2-13, see *Russell v. Walz*, 458 N.E.2d 1172 (Ind. Ct. App. 1984); *Estate of Gillilan v. Estate of Gillilan*, 406 N.E.2d 981 (Ind. Ct. App. 1980); *Johnston v. Johnston*, 134 Ind. App. 351, 184 N.E.2d 651 (1962); *McClain's Estate v. McClain*, 133 Ind. App. 645, 183 N.E.2d 842 (1962).

<sup>20</sup>*See, e.g., McClain's Estate v. McClain*, 133 Ind. App. 645, 183 N.E.2d 842 (1962); *Baugher v. Barrett*, 128 Ind. App. 233, 145 N.E.2d 297 (1957).

<sup>21</sup>*See, e.g., McClain's Estate v. McClain*, 133 Ind. App. 645, 183 N.E.2d 842 (1962); *Baugher v. Barrett*, 128 Ind. App. 233, 145 N.E.2d 297 (1957).

<sup>22</sup>*See, e.g., LeFevers v. LeFevers*, 240 Ark. 992, 403 S.W.2d 65 (1966); *In re Marriage of Dawley*, 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976); *McHugh v. McHugh*, 181 Conn. 482, 436 A.2d 8 (1980); *Carnell v. Carnell*, 398 So. 2d 503 (Fla. Dist. Ct. App. 1981); *Matlock v. Matlock*, 223 Kan. 679, 576 P.2d 629 (1978); *Hafner v. Hafner*, 295 N.W.2d 567 (Minn. 1980); *Lamborn v. Lamborn*, 56 A.D.2d 623, 391 N.Y.S.2d 679 (1977).

<sup>23</sup>*See, e.g., In re Marriage of Newman*, 44 Colo. App. 307, 616 P.2d 982 (1980) (provision in antenuptial agreement where spouse waives entitlement to maintenance is not binding; interspousal support obligation imposed by law cannot be contracted away); *In re Marriage of Gudenkauf*, 204 N.W.2d 586 (Iowa 1973) (provisions of antenuptial agreements which prohibit alimony are void as against public policy); *see also Duncan v. Duncan*, 652 S.W.2d 913 (Tenn. Ct. App. 1983); *Crouch v. Crouch*, 53 Tenn. App. 594, 385 S.W.2d 288; *Caldwell v. Caldwell*, 5 Wis. 2d 146, 92 N.W.2d 356 (1958); *cf. Mulford v. Mulford*, 211 Neb. 747, 320 N.W.2d 470 (1982) (where court modified antenuptial agreement in favor of husband where agreement provided that each spouse forfeited property rights in event of divorce). *But see Unander v. Unander*, 265 Or. 102, 506 P.2d

with whether parties contemplating marriage could legally contract with respect to a husband's recognized "duty to support his wife."<sup>24</sup> While the basis for such older decisions generally was not well articulated, the underlying rationale was that a husband who wished to terminate his "duty to support his wife" might have had a strong motive for seeking a divorce, thus leaving a wife entirely without adequate support.<sup>25</sup> In other words, courts had been of the opinion that a husband's duty to support his wife was an incident of marriage of such public importance that it could not be left to the parties to control by their antenuptial contracts.<sup>26</sup>

The rationale of the earlier American cases has eroded dramatically during the last twenty years with the advent of "no fault" divorce statutes and dissolution acts, such as have been adopted in Indiana.<sup>27</sup> These statutes recognize the overwhelming incidence of divorce and, generally speaking, replace the "alimony/support" concept of divorce awards with "division of property" rules absent spousal disability.<sup>28</sup> The better reasoned American decisions of more recent vintage began to hold rather consistently that the terms and provisions of an antenuptial agreement with respect to property division must be enforced by divorce courts when the agreement was not induced through fraud, duress, or coercion.<sup>29</sup>

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719 (1973) (antenuptial agreement providing that no alimony shall be paid will be enforced unless spouse has no other reasonable source of support).

<sup>24</sup>See, e.g., *Motley v. Motley*, 255 N.C. 190, 120 S.E.2d 422 (1961) (husband cannot avoid duty of supporting wife by an antenuptial agreement); *accord Lindsay v. Lindsay*, 163 So. 2d 336 (Fla. Dist. Ct. App. 1964) (husband may not absolve himself of obligation to support his wife); *Norris v. Norris*, 174 N.W.2d 368 (Iowa 1970) (antenuptial agreement which relieves husband of duty to support wife is against public policy); *Connolly v. Connolly*, 270 N.W.2d 44 (S.D. 1978) (antenuptial agreement cannot alter statutory obligation of husband to support wife); *cf. Eule v. Eule*, 24 Ill. App. 3d 83, 320 N.E.2d 506 (1974) (forfeiture clause in antenuptial agreement where both spouses waived all right to alimony and support, temporary and permanent, if the marriage failed within seven years was an attempt to relieve other spouse of duty to support during marriage and was void); *Ranney v. Ranney*, 219 Kan. 428, 548 P.2d 734 (1976) (provision in antenuptial agreement where husband fulfilled duty of support both during and after dissolution of the marriage by paying "alimony" was against public policy).

<sup>25</sup>See, e.g., *Lindsay v. Lindsay*, 163 So. 2d 336 (Fla. Dist. Ct. App. 1964); *Norris v. Norris*, 174 N.W.2d 368 (Iowa 1970).

<sup>26</sup>See generally *Crouch v. Crouch*, 53 Tenn. App. 594, 385 S.W.2d 288 (1964); *Fricke v. Fricke*, 257 Wis. 124, 42 N.W.2d 500 (1950); CLARK, LAW OF DOMESTIC RELATIONS 28-29 (1974); Annot., 57 A.L.R.2d 942 (1958).

<sup>27</sup>IND. CODE §§ 31-1-11.5-1 to -26 (1982 & Supp. 1985).

<sup>28</sup>See, e.g., IND. CODE § 31-1-11.5-11 (Supp. 1985) (providing for equitably division of property in event of dissolution); *id.* § 31-1-11.5-11(e) (court may grant maintenance in event of spousal disability); *accord* DEL. CODE ANN. tit. 13, § 1513 (1981); *id.* § 1512; IDAHO CODE § 32-712 (1983); *id.* § 705; 23 PA. CONS. STAT. ANN. § 401 (Purdon Supp. 1985); *id.* § 501.

<sup>29</sup>See, e.g., *Newman v. Newman*, 653 P.2d 728 (Colo. 1982); *Posner v. Posner*, 233

The law in Indiana regarding antenuptial agreements remained relatively clear until 1976. The general consensus among practicing lawyers essentially was that antenuptial agreements professionally drafted and voluntarily executed by competent adults following a fair (if not full) disclosure, and preferably after review by independent counsel for both parties, were binding according to their terms whether the prospective marriage ended by death or divorce. Then in *Tomlinson v. Tomlinson*,<sup>30</sup> the court addressed the validity of an antenuptial agreement that predated the Dissolution of Marriage Act.<sup>31</sup> *Tomlinson* arose from an appeal of a divorce decree. The antenuptial agreement at issue stated that in the event of divorce, the wife would not attempt to receive any property acquired by the husband prior to marriage. The court took note of the growing trend in America to recognize the validity and enforceability in dissolution proceedings of antenuptial agreements, if fairly entered, whether or not they dealt with property or support rights. The court of appeals then held that an antenuptial agreement which speaks to a proposed distribution in the event of divorce is not *per se* void as against public policy, but rather is presumed to be valid.<sup>32</sup>

*Tomlinson*, however, contained dicta which seriously clouded Indiana law concerning the practical efficacy of antenuptial agreements in dissolution situations. The court stated:

However, such an agreement is not binding upon the court. Since circumstances existent at the time of divorce may be substantially different than those which existed at the time of the agreement, a valid agreement is but one factor to be considered among the several factors upon which the court customarily relies to make an equitable distribution of property. Here, the decision of the trial court to consider the antenuptial agreement was within these perimeters. We therefore find no error in the acceptance into evidence and the consideration of the antenuptial agreement.<sup>33</sup>

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So. 2d 381 (Fla. 1970); *Scherer v. Scherer*, 249 Ga. 635, 292 S.E.2d 662 (1982); *Volid v. Volid*, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972); *Frey v. Frey*, 298 Md. 552, 471 A.2d 705 (1984); *Marschall v. Marschall*, 195 N.J. Super. 16, 477 A.2d 833 (1984); *Hudson v. Hudson*, 350 P.2d 596 (Okla. 1960).

<sup>30</sup>170 Ind. App. 331, 352 N.E.2d 785 (1976).

<sup>31</sup>IND. CODE §§ 31-1-11.5-1 to -26 (1982 & Supp. 1985). The court in *Tomlinson*, however, did not decide the issue whether an "after-acquired property" clause in antenuptial agreements was valid in a dissolution proceeding because the agreement in that case did not place a maximum limitation upon the husband's property settlement liability.

<sup>32</sup>170 Ind. App. at 340, 352 N.E.2d at 791.

<sup>33</sup>*Id.*

Such language apparently had its genesis in some dicta which appeared in the earlier case of *Flora v. Flora*.<sup>34</sup> In *Flora* the court stated that a trial court, pursuant to the Dissolution of Marriage Act,<sup>35</sup> has discretion to alter the disposition of a husband and wife's property notwithstanding a contrary agreement by the parties.<sup>36</sup> This dicta was employed by the court of appeals in a subsequent dissolution of marriage case, *Stockton v. Stockton*,<sup>37</sup> to support the proposition that a trial court has discretion to accept, reject, or modify property postnuptial "settlement agreements" subject only to review for abuse of discretion.<sup>38</sup>

The question for lawyers then became whether or not the above dicta from *Tomlinson* authorized the exercise of discretion by a trial court in a dissolution case to discard selected provisions of an antenuptial agreement. Many lawyers felt that the abuse of discretion standard mentioned in *Tomlinson* and later applied in *Stockton* to postnuptial settlement agreements should not be applied to antenuptial agreements. There were several reasons for this conclusion. First, such a standard appeared to abrogate the age-old policy first expressed by the Indiana Supreme Court in *McNutt v. McNutt*<sup>39</sup> that antenuptial agreements were to be enforced according to their terms absent fraud. This abuse of discretion standard also violated the equally well-established principle that such agreements would be liberally construed to effectuate the clear intention of the parties.<sup>40</sup> Second, antenuptial and postnuptial separation agreements are wholly distinct in content and purpose, thus warranting different analysis by a reviewing court. Antenuptial agreements are intended as a means of preserving the status quo as to property interests existing before marriage and, in many instances (subject to the respective wishes of the contracting parties), to secure to each party the benefit of the growth and appreciation of that party's premarital assets. Separation agreements, on the other hand, resolve claims regarding property interests which have already matured because of the marriage status of the parties. In further contrast to separation agreements, antenuptial

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<sup>34</sup>166 Ind. App. 620, 337 N.E.2d 846 (1975).

<sup>35</sup>IND. CODE §§ 31-1-11.5-1 to -26 (1982 & Supp. 1985).

<sup>36</sup>166 Ind. App. at 629, 337 N.E.2d at 851.

<sup>37</sup>435 N.E.2d 586 (Ind. Ct. App. 1982).

<sup>38</sup>The trial court's discretion in deciding whether to enforce an antenuptial agreement derives from specific language in the Indiana Code:

In an action for dissolution of marriage the terms of the agreement *if approved by the court* shall be incorporated and merged into the decree and the parties ordered to perform them, or the court may make provisions for disposition of property, child support, maintenance, and custody as provided in this chapter.

IND. CODE § 31-1-11.5-10(b) (1982) (emphasis added).

<sup>39</sup>116 Ind. 545, 19 N.E. 115 (1889).

<sup>40</sup>See, e.g., *Norris v. Norris*, 174 N.W.2d 368 (Iowa 1970); *Ranney v. Ranney*, 219 Kan. 428, 548 P.2d 734 (1976).

agreements are executory in nature until the marriage actually occurs and have as their principal consideration the marriage itself. Antenuptial agreements do not dispose of or divide any property, but, rather, they fix the rights of the parties with respect to the specified property and any consequential appreciation or accumulations regardless of the duration of the marriage. Consequently, antenuptial and postnuptial separation agreements should be analyzed differently by a reviewing court. A rule of law which permits a court at its discretion to enforce only selected provisions of an antenuptial agreement arguably would encourage dissolutions of marriage by offering the hope of financial reward to a spouse who anticipates that a trial court's exercise of "discretion" will result in a larger settlement than that specified in the antenuptial agreement. The confusion regarding the power of a reviewing court to alter antenuptial and postnuptial separation agreements was resolved in *In re Marriage of Boren*.<sup>41</sup>

## II. THE PRESENT LAW IN LIGHT OF *In re Marriage of Boren*

On March 26, 1985, the Supreme Court of Indiana decided *In re Marriage of Boren*.<sup>42</sup> *Boren* essentially ended the cloud created by the dicta that had appeared in *Tomlinson*,<sup>43</sup> *Flora*,<sup>44</sup> and *Stockton*,<sup>45</sup> and held that antenuptial agreements that are entered into fairly, and without fraud, coercion, or undue influence, and which are not otherwise unconscionable, must be honored and enforced, as written, by trial courts in dissolution matters.<sup>46</sup> The supreme court's decision thus vacated the 1983 decision by the court of appeals which had held that section 10(b) of the Dissolution of Marriage Act grants trial courts in dissolution cases the discretion to award a spouse a recovery that would otherwise be barred by the parties' antenuptial contract.<sup>47</sup>

In *Boren*, the trial court had awarded the wife \$188,500 as a property settlement instead of the \$5,000 limit that had been set out in the antenuptial agreement as the maximum award upon the dissolution of marriage by divorce or death.<sup>48</sup> The husband was fifty-nine years of age at the time he proposed marriage to the wife, his first wife of over thirty years having recently died. The new wife was fifty-five years of age and had been married on three prior occasions. In 1969, she was

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<sup>41</sup>475 N.E.2d 690 (Ind. 1985).

<sup>42</sup>*Id.*

<sup>43</sup>170 Ind. App. 331, 352 N.E.2d 785 (1976).

<sup>44</sup>166 Ind. App. 620, 337 N.E.2d 846 (1975).

<sup>45</sup>435 N.E.2d 586 (Ind. Ct. App. 1982).

<sup>46</sup>475 N.E.2d at 694.

<sup>47</sup>*Boren v. Boren*, 452 N.E.2d 452 (Ind. Ct. App. 1983), *vacated*, 475 N.E.2d 690 (Ind. 1985).

<sup>48</sup>*Id.* at 454.

managing a motel in Daytona Beach when the husband proposed to her and asked her to execute an antenuptial agreement. The agreement was signed six days prior to the marriage, upon the husband's insistence, even though the wife was reluctant to execute such an agreement. Nevertheless, the wife accepted the husband's proposal, liquidated her assets totaling approximately \$40,000, resigned her employment, and moved to Indiana. The agreement basically provided that each party would retain his or her premarital assets, and would also retain sole ownership and control of any property he or she acquired during marriage. Additionally, each party agreed to claim no part of the other's estate, except that the wife would be entitled to a cash settlement of \$5,000 either upon the termination of the marriage or upon the husband's death.

The parties married in 1969, and the wife filed her petition for dissolution of marriage on April 30, 1981. During the marriage, the husband had continued his farming operation, and the wife had maintained the household, including the performance of some tasks around the farm. At the time that the dissolution action was filed, the marital pot consisted of \$3,306,061.24, which contained a \$40,000 contribution from the wife. The remainder of the assets had been brought into the marriage by the husband, or inherited or earned by him during the marriage.

The judge of the circuit court at the dissolution trial determined that the agreement had been entered into fairly, voluntarily, and with adequate disclosure, but that the agreement could be modified by section 10(b) of the Act<sup>49</sup> by invalidating its provisions with respect to assets acquired after the marriage. The trial court awarded the wife \$183,500 in addition to the \$5,000 specifically provided by the terms of the antenuptial agreement.<sup>50</sup> The trial court further ordered the husband to pay \$12,000 for attorney fees and \$4,500 for the cost of appraising the marital property.<sup>51</sup> The court of appeals then upheld the trial court's modification of the antenuptial agreement.<sup>52</sup>

In vacating the judgment of the court of appeals, the Indiana Supreme Court held, "We cannot agree with the Court of Appeals' holding that the language of Ind. Code 31-1-11.5-10 (Burns 1980) precludes the trial court's being bound by a valid antenuptial agreement."<sup>53</sup> Indiana Code section 31-1-11.5-10 provides:

- (a) To promote the amicable settlements of disputes that have arisen or may arise between the parties to a marriage attendant

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<sup>49</sup>IND. CODE § 31-1-11.5-10(b) (1982).

<sup>50</sup>452 N.E.2d at 454.

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>475 N.E.2d at 695.

upon the dissolution of their marriage, the parties may agree in writing to provisions for the maintenance of either of them, the disposition of any property owned by either or both of them and the custody and support of their children.

(b) In an action for dissolution of the marriage the terms of the agreement if approved by the court shall be incorporated and merged into the decree and the parties ordered to perform them, or the court may make provisions for disposition of property, child support, maintenance, and custody as provided in this chapter.

(c) The disposition of property settled by such an agreement and incorporated and merged into the decree shall not be subject to subsequent modification by the court except as the agreement itself may prescribe or the parties may subsequently consent.<sup>54</sup>

The court continued its analysis as follows:

Apparently relying upon the words "if approved" in subsection (b), the Court of Appeals held that the trial judge has the discretion to accept, reject, or modify *all* agreements between the parties, without respect to when those agreements were made. We find, however, that the distinction between ante-nuptial agreements, i.e., those entered into in contemplation of marriage, and settlement agreements, i.e., those entered into as a consequence of dissolution proceedings, cannot be ignored and that the legislature, in enacting the Dissolution of Marriage Act, intended only to vest the trial court with discretion regarding post-nuptial agreements. The statute provides that the trial court may approve agreements entered into to settle disputes "between the parties to a marriage *attendant upon* the dissolution of their marriage."<sup>55</sup>

Thus, the supreme court recognized the ability of a trial court to modify settlement agreements, but rejected their ability to modify antenuptial agreements in a dissolution action. Consequently, to the extent that *Tomlinson*<sup>56</sup> and *Flora*<sup>57</sup> held otherwise, the supreme court disapproved them.<sup>58</sup> The court expressed its rationale for the decision, declaring, "Moreover, were we to construe Ind. Code 31-1-11.5-10 as did the Court of Appeals, a valid ante-nuptial agreement would be subject

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<sup>54</sup>IND. CODE § 31-1-11.5-10 (1982).

<sup>55</sup>475 N.E.2d at 695 (emphasis added).

<sup>56</sup>170 Ind. App. 331, 352 N.E.2d 785 (1976).

<sup>57</sup>166 Ind. App. 620, 337 N.E.2d 846 (1975).

<sup>58</sup>475 N.E.2d 690, 695 (Ind. 1985).

to one interpretation upon the death of a spouse and another upon the dissolution of a marriage. We see no logic in such a result."<sup>59</sup>

Accordingly, with the supreme court's decision in *Boren* the domestic relations lawyer can (at least in the foreseeable future) approach the draftsmanship of antenuptial agreements with a great deal more confidence than has been the case during the past decade. This is not to say that *Boren* has settled all issues that might arise in the future regarding antenuptial agreements in the context of dissolution actions, or to say that the legislature is powerless to affect the decision in *Boren* by legislative enactment. At least for the present, however, attorneys are not totally adrift when it comes to advising clients about the wisdom, practicality, and binding effect of properly drafted and fairly negotiated antenuptial agreements.

### III. DRAFTSMANSHIP OF POST-*Boren* ANTENUPTIAL AGREEMENTS

Now, more than ever, it will be incumbent upon the draftsman of an antenuptial agreement to do all within his power to create a contract that is legally binding and enforceable in the event of the dissolution of marriage or the death of the parties. This is so because, now that *Boren* has removed from dissolution courts the power to "modify" antenuptial agreements on account of changed circumstances or other equitable considerations, courts no doubt will more often be urged to strike down the antenuptial agreement as invalid or unenforceable. With the focus, therefore, shifting from modification to invalidity, lawyers who draft unenforceable antenuptial agreements will have a lot of explaining to do to their clients and possibly to their malpractice carriers as well.

Certain considerations in the drafting of an antenuptial agreement hardly bear mention. The agreement should be discussed and negotiated by the prospective husband and wife well in advance of the proposed wedding. As one author has commented, an antenuptial agreement presented to and signed by the bride "as she is adjusting her veil" may be unenforceable as having been executed under coercive circumstances.<sup>60</sup> Equally important, each party should be represented by competent and independent counsel. The agreement itself should contain a "binding effect" clause specifically providing that the agreement binds not only the parties but also their respective heirs, devisees, legatees, administrators, executors, guardians, assigns, and successors in interest. The effective date of the agreement should be expressed as the date upon which the parties solemnize their marriage. The agreement should then

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<sup>59</sup>*Id.* at 696.

<sup>60</sup>Pantzer, *Inter-vivos Agreements between Spouses for Disposition of Assets on Death*, in *FAMILY LAW PRACTICE* (1974).

be solemnized by signatures affixed before a notary public containing an acknowledgment that each party understands the agreement, signs it voluntarily, and wishes to be bound by its provisions. It is also prudent for each attorney to attach his certificate attesting both that he has fully advised his client of his or her rights and obligations under the agreement and has also received from his client an express acknowledgment of the truth of the statements made by the client to the notary public. Additionally, it is prudent to provide that the parties may, by mutual agreement in writing, amend, revoke, or rescind the antenuptial agreement. It should also be kept in mind that the parties may move from Indiana to another jurisdiction with a different law regarding antenuptial agreements. It is possible to anticipate such a situation with the following clause:

The domicile of the parties at the time this agreement is written and executed is the State of Indiana, and the law of such state shall govern. The parties recognize that they may change their domicile to another jurisdiction by agreement. If they do so, they shall consult an attorney conversant with the property law of such new jurisdiction and shall amend this agreement, if necessary, so as to coordinate as nearly as possible the intention of this agreement with the law of the new jurisdiction.

The agreement must specify how the respective property of the parties will be affected by the marriage and subsequent dissolution of marriage or death of either party. Furthermore, the prospective husband and wife should use their own judgment about the property provisions to be included in the antenuptial agreement. In this author's view, a full disclosure of the property of each party is essential to the validity of an antenuptial agreement. Therefore, the agreement itself must make adequate reference to the property owned presently by each spouse. The attorney representing the party with the greater net worth must insure that his client's disclosure of net worth is reasonably accurate in order to avoid litigation over the validity of the agreement.<sup>61</sup>

When determining how the parties' property ownership will be affected by the marriage, a threshold issue is whether there will be any transfer of properties between parties at the inception of the marriage, or whether the property brought into the marriage by each party will remain entirely his or her individual property. The antenuptial agreement should contain a provision regarding how the parties are going to support themselves and pay family expenses during the marriage. If both parties

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<sup>61</sup>Indeed, unless the draftsman is competent to calculate net worth of an individual of substantial means, it is this author's opinion that the task should be delegated to a certified public accountant.

have independent means of support, this should be stated in the agreement, even if the parties intend for one of them to provide support and maintenance for the other during the course of the marriage.

In addition to addressing the disposition of property brought into the marriage, the antenuptial agreement should also address the disposition of after-acquired property, unless the parties, through their negotiations, intentionally determine to make no provision therefor. In the latter event, the property acquired by the parties during the marriage will not be covered by the antenuptial agreement and, in the event of a later dissolution of marriage, the trial court clearly would be entitled to consider after-acquired property of both parties as being in the marital "pot." If, however, the parties decide to address after-acquired property in the antenuptial agreement, there are several alternatives. They could state that neither party shall have an interest in the other party's after-acquired property, or each spouse could be given complete ownership of the other spouse's after-acquired property, or there could be any variation between these two extremes. Further, as parties acquire title to property after marriage in various forms, the draftsman should consider provisions which adequately anticipate the effect of these forms. For example, the draftsman should consider the consequences of jointly owned real and personal property and assets that are disposed of by beneficiary designation, such as life insurance, company benefit plans, and IRA's.

In light of the supreme court's decision in *Boren*, the draftsman should also consider the effects of including a modest pecuniary benefit to an intended spouse upon dissolution or death. In *Boren*, the antenuptial agreement simply gave the wife the sum of \$5,000 from the husband's substantial estate in the event of either a dissolution of marriage or his death. Although the *Boren* marriage lasted more than twelve years, and Mr. *Boren*'s estate had appreciated significantly, the trial court nevertheless found that the antenuptial agreement was fair and equitable, even though it attempted to modify the agreement by placing all post-marriage property in the marital pot.<sup>62</sup> If the trial court had anticipated the eventual reversal of the case on appeal, it is conceivable that it would not have found the agreement fair and equitable in its original findings. Accordingly, it cannot be assumed from a reading of *Boren* that one party who has superior net worth always will be safe in providing an exceedingly modest pecuniary benefit to his intended spouse upon dissolution or death.

While this author would not flatly state that an antenuptial agreement could not provide for a modest lump sum amount regardless of how

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<sup>62</sup>*Boren v. Boren*, 452 N.E.2d 452, 454 (Ind. Ct. App. 1983), *vacated*, 475 N.E.2d 690 (Ind. 1985).

long the marriage lasts, it would be wiser to provide for incremental increases as the marriage endures for the benefit of the party with the lesser net worth. The more difficult question is what guideline to follow in providing for incremental increases. One approach is to attempt to discern from one's trial experience the best result that one might achieve in the absence of an antenuptial agreement for the party with the greater net worth in the event of a dissolution at a given point in the marriage, and to provide the other party with an incremental sum at that point in time in the area of the forecasted amount or somewhat lower. Such an approach requires guesswork because the assets of the party with the greater net worth are subject to fluctuation in value. Whatever approach to this issue the draftsman takes, the amount awarded upon a dissolution of marriage to a spouse with the lesser net worth should be no different from the amount he or she would receive upon the death of the spouse. If the marriage thrives and one party wants to give a larger benefit to the spouse upon death than the antenuptial agreement would provide, this could be accomplished by rearranging property interests that would otherwise pass to the surviving spouse outside of the will.

Two other matters should be addressed in the antenuptial agreement where applicable. An earlier portion of this Article mentioned the statutory right of a surviving spouse to waive his or her right to elect against a spouse's will and to waive his or her right to an intestate share.<sup>63</sup> If the parties agree that such rights are to be relinquished, then specific reference to such relinquishment must be made in the antenuptial agreement. Additionally, it is quite common during the marriage of parties who have executed an antenuptial agreement to make gifts to one another. This eventuality should be expressly provided for in the antenuptial agreement so that it cannot later be claimed that such gifts constitute a modification or amendment of the agreement.

Another issue that must be addressed when drafting an antenuptial agreement is the validity of various provisions purporting to waive certain spousal obligations. These obligations include the legal duty of one party to support the other, the obligation of support *pendente lite*, and the obligation of post-dissolution support for an incapacitated spouse. Various state courts have addressed the issue of whether an antenuptial agreement can alter what would otherwise would be the legal duty of one party to support the other. This issue remains unsettled, however, in Indiana. Appellate courts in California, Colorado, Connecticut, Illinois, Iowa, and Ohio have limited antenuptial agreements to property rights only and have held that any waiver of support rights is against public policy and, hence, void.<sup>64</sup> The applicability of this law to Indiana

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<sup>63</sup>See *supra* notes 15-18 and accompanying text.

<sup>64</sup>*In re Nelson's Estate*, 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1964) (antenuptial

is questionable, however, because certain of these jurisdictions provide for alimony in addition to property settlement;<sup>65</sup> Indiana, on the other hand, is essentially a property division state.<sup>66</sup>

A related question is whether or not the right of support *pendente lite* could be waived by a spouse in an antenuptial agreement or whether, for example, sums paid for such support could be credited against the amount the needy spouse is entitled to receive upon the dissolution of the marriage. While this author is not prepared to say that such agreements would be unenforceable per se, the wisdom of such a clause in an antenuptial agreement is doubtful, particularly where the spouse with the greater income and/or net worth would be exceedingly capable of providing needed support *pendente lite*.

A waiver issue of greater significance is whether an antenuptial agreement could provide for a waiver and relinquishment of a spouse's statutory right under section 11(d) of the Dissolution of Marriage Act<sup>67</sup> to seek post-dissolution support where he or she is physically or mentally incapacitated or in need of "rehabilitative maintenance." This issue probably has not been foreclosed by the decision in *Boren*<sup>68</sup> because no waiver provision was at issue in the case. Several views are possible on this issue. Cases from jurisdictions which permit a waiver of property rights but prohibit a waiver of support rights as being against public policy could be raised to support the position that antenuptial agreements cannot divest a dissolution court of the "right" to provide for post-

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agreement invalid where spouse agreed not to seek alimony or support in event of divorce as contrary to public policy); *Newman v. Newman*, 653 P.2d 728 (Colo. 1982) (maintenance provision in an antenuptial agreement may be voidable for unconscionability at the time of marriage dissolution); *McNugh v. McNugh*, 181 Conn. 482, 436 A.2d 8 (1980) (antenuptial agreement providing that spouse would not be liable for support of children upon dissolution marriage held invalid); *Eule v. Eule*, 24 Ill. App. 3d 83, 320 N.E.2d 506 (1974) (antenuptial agreements attempting to regulate or modify husband's statutory duty of support will be analyzed upon a case by case basis and upheld if fair and reasonable); *In re Marriage of Gudenkauf*, 204 N.W.2d 586 (Iowa 1973) (antenuptial agreement which is assumed by the parties to prohibit alimony is contrary to public policy and, hence, void); *Norris v. Norris*, 174 N.W.2d 368 (Iowa 1970) (antenuptial provision prohibiting a wife, separated without just cause, from receiving separate maintenance was void as against public policy); *Gross v. Gross*, 11 Ohio St. 3d 99, 464 N.E.2d 500 (1984) (antenuptial agreements containing provisions for the disposition of property and monetary amounts of alimony are valid as long as the terms do not promote divorce).

<sup>65</sup>See, e.g., CAL. CIVIL CODE § 4800 (West Supp. 1985) (provides for division of community and quasi-community property in event of dissolution); *id.* § 4801 (court may also order one party to pay support for the other); OHIO REV. CODE ANN. § 3105.63 (Page 1980) (petition for dissolution of marriage shall incorporate a separation agreement providing for division of all property and alimony).

<sup>66</sup>IND. CODE § 31-1-11.5-11 (Supp. 1985).

<sup>67</sup>*Id.* § 31-1-11.5-11(d) (Supp. 1985).

<sup>68</sup>*In re Marriage of Boren*, 475 N.E.2d 690 (Ind. 1985).

dissolution maintenance.<sup>69</sup> However, Indiana's probate and dissolution statutes<sup>70</sup> arguably indicate that there is no sound reason why a spouse cannot waive post-dissolution support rights in a properly drafted antenuptial agreement. There is no provision in the Probate Code whereby a widow who has waived the right to elect against the will or waived the right to an expectancy can recoup rights she would have had as a surviving spouse but for waiver provisions. Widows are as apt to be physically or mentally incapacitated, or as much in need of rehabilitative maintenance, as spouses in dissolution proceedings. Accordingly, as long as the probate law of Indiana makes no special provision for incapacitated widows, it could be argued that a dissolution trial court should have no greater power. Stated another way, there is no reason to extend greater rights to a spouse whose marriage ends in divorce than Indiana extends to a spouse who remains happily married until the death of his or her partner.

Another issue as yet undecided in Indiana is whether an antenuptial agreement can divest a dissolution court of the power it presently has under section 16 of the Act to order a party to pay reasonable amounts for attorney's fees, expert witness fees, appraisal costs, and the like.<sup>71</sup> In *Boren*, the trial court made a substantial award of attorney's fees and litigation costs notwithstanding the limitation in the antenuptial agreement that the wife would receive only \$5,000 upon a dissolution of marriage.<sup>72</sup> Such result, however, does not constitute a holding by the court that these costs are recoverable in every case regardless of the provisions of the subject antenuptial agreement. In *Boren*, no statement was made in the agreement that the \$5,000 limitation covered attorney's fees and litigation costs in the event of dissolution. The issue, therefore, remains whether an antenuptial agreement can expressly divest a dissolution court of the power to award costs and attorney's fees under section 16 of the Act. The attorney representing the party with the greater net worth perhaps should negotiate the inclusion of such a waiver provision in an antenuptial agreement. If no such provision appears in the agreement, its absence is an invitation to a substantial contest in a dissolution proceeding as to the validity of the antenuptial agreement. Stated another way, if the antenuptial agreement contains no clause expressly providing that section 16 costs are either waived or are to be credited against the amount to be received by the spouse who receives

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<sup>69</sup>See *supra* note 64.

<sup>70</sup>See IND. CODE § 29-1-2-13 (1982); IND. CODE § 29-1-3-6 (1982); IND. CODE §§ 31-1-11.5-1 to -26 (1982 & Supp. 1985).

<sup>71</sup>IND. CODE § 31-1-11.5-16 (Supp. 1985).

<sup>72</sup>*Boren v. Boren*, 452 N.E.2d 452, 454-55 (Ind. Ct. App. 1983), *vacated*, 475 N.E.2d 690 (Ind. 1985).

a payment, the decision in *Boren* means that attorney's fees and other litigation costs are recoverable in addition to any sum provided by the antenuptial agreement. As a consequence, any drawn-out litigation over the validity of an antenuptial agreement will substantially increase the cost of the dissolution proceeding to the party with the greater net worth.

A final question to be addressed in this Article is the validity of post-marriage (but pre-dissolution action) agreements. It appears that Indiana has never addressed the validity of such agreements, and there is little recent law on the subject. Postnuptial agreements are expressly authorized by the Indiana Probate Code,<sup>73</sup> but the question of the efficacy of such an agreement in the event of a dissolution remains. The principal issue concerning such agreements is whether there is adequate consideration to support the agreement. Where the agreement is made before marriage, Indiana law makes clear that the marriage itself is the consideration for such an agreement "which, perhaps, may be the most valuable and highly respected consideration of the law."<sup>74</sup> If the marriage has already taken place, and if one spouse has a much greater net worth than the other, what amount of consideration will it take for the other spouse to surrender a substantial portion of her interest in the other's estate? This question ultimately boils down to one of fairness under all of the circumstances, and no particular guidelines seem to be available to provide an answer to the question. The best solution is avoiding the problem by entering an antenuptial agreement prior to marriage. If it is too late for that, it would be prudent for the draftsman representing the spouse with the greater net worth to make a significant present transfer at the time the agreement is executed, either outright or in trust. This is true because the present value of a significant sum to be received a number of years hence can be a reasonable amount. Furthermore, many people still are inclined to abide by their written agreements, so the fact that the agreement may later not be upheld is not a sufficient reason, standing alone, to avoid drafting it in the first instance.

#### IV. CONCLUSION AND FINAL OBSERVATIONS

Antenuptial agreements are a favorite of the law and are liberally construed to effect the parties' intentions. Prior to *In re Marriage of Boren*, however, various Indiana cases contained dicta that, in the context of divorce, courts could modify selected provisions of an antenuptial agreement. The Supreme Court of Indiana resolved this question in *Boren* when it held that antenuptial agreements that are entered into fairly, without fraud and coercion, and are not otherwise unconscionable,

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<sup>73</sup>IND. CODE § 29-1-3-6 (1982).

<sup>74</sup>Estate of Gillilan v. Estate of Gillilan, 406 N.E.2d 981 (Ind. Ct. App. 1980).

must be enforced as written by trial courts in dissolution matters. Thus, the need for a properly drafted enforceable antenuptial agreement of substantial benefit to one's client becomes paramount.

The burden on the party contesting the antenuptial agreement is great.<sup>75</sup> He or she must prove that the agreement was not executed voluntarily or that, before execution of the agreement, he or she was not provided a fair and reasonable disclosure of the property or financial obligations of the other party and did not have, or reasonably could not have had, adequate knowledge of such property or obligations. It would also be the burden of such party to show that the agreement was unconscionable when it was executed even in the event the disclosures made were less than accurate.

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<sup>75</sup>Flora v. Flora, 166 Ind. App. 620, 630, 337 N.E.2d 846, 851 (1975).

