

Family Law Survey

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I. INTRODUCTION

The division of marital property remained in the spotlight during this survey period. The 1987 Indiana General Assembly resurrected and breathed new life into the Indiana Court of Appeals opinion in *Luedke v. Luedke*¹ which was vacated by the Indiana Supreme Court during the prior survey period. Indiana Code section 31-1-1.5-11 was amended to require trial courts to presume that an equal division of the marital property is just and reasonable.²

Also during this survey period, the Indiana Supreme Court issued two opinions which greatly affect the family law attorney in her everyday practice. First, the supreme court clarified certain issues surrounding educational expense support orders. Second, the supreme court interpreted Indiana's liens on real estate statutes to provide that where one spouse receives his property division in installments over time, the obligation of the payor becomes a lien on her real estate even if there is no specific award of such a lien. This article will discuss all three recent developments and their potential impact on the family law practitioner.

II. *Luedke v. Luedke*: WHO HAD THE LAST WORD?

When the Indiana Supreme Court vacated the Indiana Court of Appeals decision in *Luedke v. Luedke*,³ the presumption of a "fifty-fifty" division of the marital estate disappeared. The disappearance of the presumed equal division of property was short lived. In 1987, the Indiana General Assembly amended Indiana Code section 31-1-11.5-11(c) by placing in the statute the presumption of an equal division of the marital property.⁴ The 1987 amendment, effective with all cases filed on September 1, 1987, and thereafter, reads as follows:

(c) The Court shall presume that an equal division of the marital property between the parties is just and reasonable. However,

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¹476 N.E.2d 853 (Ind. Ct. App.), *vacated*, 487 N.E.2d 133 (Ind. 1985).

²IND. CODE § 31-1-1.5-11(c) (Supp. 1987).

³487 N.E.2d 133 (Ind. 1985).

⁴IND. CODE § 31-1-11.5-11(c) (Supp. 1987).

this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

- (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
- (2) The extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift.
- (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in that residence for such periods as the court may deem just to the spouse having custody of any children.
- (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.
- (5) The earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties.⁵

The 1987 amendment also changed the wording in Indiana Code section 31-1-11.5-11(c)(1) by removing "including the contribution of a spouse as a homemaker"⁶ and replacing the phrase with "regardless of whether the contribution was income producing."⁷ A cursory review of the 1987 amendments to section 11 may lead the practitioner to conclude that the court of appeals' opinion in *Luedke* has been completely resurrected. This article will address the possible effect of the 1987 amendments on the prior case law.

The division of the marital estate between the parties rests within the sound discretion of the trial court.⁸ Indiana Code section 31-1-11.5-11 provides the trial court with guidelines for the division.⁹ Prior to the 1987 amendments, Indiana Code section 31-1-11.5-11 simply stated that the court's division must be "just and reasonable" after considering the five factors listed in the statute.¹⁰ On appeal, the appellate court reviews the lower court's decision only for an abuse of discretion. An abuse of discretion exists only if the division is clearly against the logic and effect of the facts and circumstances before the court.¹¹

⁵*Id.*

⁶IND. CODE § 31-1-11.5-11(c)(1) (Supp. 1986).

⁷IND. CODE § 31-1-11.5-11(c)(1) (Supp. 1987).

⁸*Irwin v. Irwin*, 406 N.E.2d 317, 319 (Ind. Ct. App. 1980).

⁹*Id.*

¹⁰IND. CODE § 31-1-11.5-11(b) (Supp. 1986).

¹¹*Temple v. Temple*, 435 N.E.2d 259, 260 (Ind. Ct. App. 1982).

In the case *In re Marriage of Osborne*,¹² the court of appeals defined “just” as it is used in the dissolution statutes as follows:

The terms “just” as employed in the statute [Indiana Code section 31-1-11.5-11] evokes concepts of fairness and equity and of not doing wrong to either party. . . . It would therefore appear that the legislative intent to be considered in ascertaining what is just and reasonable depends upon the facts before the court and that those facts are to be analyzed essentially without reference to sex.¹³

The court of appeals in *Osborne* explained the relationship between the five factors considered by the trial court in determining a “just and reasonable” division as one in which the contribution of one spouse under one subparagraph may be largely offset by that of the other spouse under a different subparagraph.¹⁴ Thus, the appellate court concluded, the division of the marital estate between the parties does not necessarily have to be equal or relatively equal.¹⁵

The appellate court in *Osborne* attempted to ascertain its role in reviewing the trial court’s division, given the seemingly unlimited discretion. The court reasoned as follows:

What is less clear is the extent to which the court may consider evidence concerning one of the factors and then within its discretion properly minimize the impact of that factor in achieving its final result. We believe the answer lies in the primary, if somewhat nebulous, mandate that the court must be “just and reasonable.” In other words, there must be a rational basis for its action, and when there is none, error is committed. Having so said, we reiterate that in many cases other factors will offset a particular contribution by one spouse and will themselves provide the rational basis. This may occur even though there is no specific offsetting occurrence to point to. Thus, for example, the effect of one spouse bringing a vast amount of property into a marriage must be considered by the court. However, the effect of that contribution may in a given case be largely discounted where the property is consumed by the parties during married life or where it, or its equivalent, is maintained or increased through the efforts of both during many years of marriage. Depending upon the total circumstances it may be just

¹²174 Ind. App. 599, 369 N.E.2d 653 (1977).

¹³*Id.* at 604-05, 369 N.E.2d at 656.

¹⁴*Id.* at 605, 369 N.E.2d at 656.

¹⁵*Id.*

and reasonable in either instance to accord little weight to a particular spouse's initial contribution in determining the final disposition of property.¹⁶

In the *Osborne* case, the court of appeals determined that the trial court had abused its discretion when it awarded the husband his inheritance from his mother, who had died just prior to the date of final separation,¹⁷ while awarding the wife virtually all of the assets which the parties had acquired together during the marriage.¹⁸ In reaching its decision the court of appeals reviewed the evidence relevant to each of the five factors of section 11.¹⁹ The *Osborne* opinion provides an attempt to present a clear picture of the interplay of the five factors which the trial court considers when dividing the marital estate. On appeal, however, the standard of review prevents the appellate court from reversing a lower court's decision unless there exists almost overwhelming evidence contrary to the decree.²⁰

The apparent frustration of the appellate courts in determining their role in reviewing the trial court's property division orders was relieved in the court of appeals opinion in *Luedke v. Luedke*.²¹ In *Luedke*, the court of appeals found the basis of more meaningful review in paragraph (b)(1) of Indiana Code section 31-1-11.5-11.²² Paragraph (b)(1) focused the court's attention on the contribution of each spouse to the acquisition

¹⁶*Id.* at 605, 369 N.E.2d at 656-57.

¹⁷The "date of final separation" is the date the petition for dissolution is filed. IND. CODE § 31-1-11.5-11(a) (Supp. 1987).

¹⁸*Osborne*, 174 Ind. App. at 605-06, 367 N.E.2d at 657. "There was no evidence that the wife had done anything to enable the husband to secure, protect or contribute to either the preservation of his mother's estate or his status as a beneficiary. Of course, the bulk of his intestate share had not been received at the time of dissolution. The amount of this inheritance, some \$39,000 roughly equalled the total assets produced from the marriage. It appears to us that under such circumstances, awarding substantially all the marital assets to the wife while reserving the inheritance to the husband was against the clear logic and effect of the circumstances within the mandate that the division should be fair and equitable to each. We, therefore, must reverse that part of the judgment decreeing the disposition of property." *Id.* at 606, 369 N.E.2d at 657.

¹⁹*Id.* at 605-06, 369 N.E.2d at 657.

²⁰*See* Lord v. Lord, 443 N.E.2d 847 (Ind. Ct. App. 1982). "Hence, our review of the exercise of discretion in most of these cases is meaningless. Absent an error of law, we merely pronounce in conclusionary terms whether there was an abuse of discretion in the particular circumstances." 443 N.E.2d at 851, n.4.

²¹476 N.E.2d 853 (Ind. Ct. App.), *vacated*, 487 N.E.2d 133 (Ind. 1985). *See* Claus and Perry, *Family Law: Equitable Distribution and Proper Valuation of Marital Property*, 20 IND. L. REV. 211, 213-22 (1987).

²²The five factors now found in section 31-1-11.5-11(c) were in section 31-1-11.5-11(b) in their pre-amended form. *Compare* IND. CODE § 31-1-11.5-11(c) (Supp. 1987) with IND. CODE § 31-1-11.5-11(b) (1982).

of the marital estate, including any contribution of a non-wage earner.²³ The court of appeals, in *Luedke*, held that where all other factors in subsection 11(b) are equal, factor (c)(1) requires an even division of the property between the wage earner and the non-wage earner unless one spouse seriously neglected his or her role.²⁴ The court of appeals went further and erected a rebuttable presumption in paragraph (b)(1) of Indiana Code section 31-1-11.5-11 that the contribution of the homemaker is equal to the contribution of the wage earner.²⁵ Thus, where the parties had assumed the traditional roles of breadwinner and homemaker, the trial court would start with an equal division of the marital estate. The equal division could be adjusted one way or the other depending upon the evidence regarding the remaining four factors in Indiana Code section 31-1-11.5-11(b).²⁶

It was the court of appeals' construction of the rebuttable presumption and the fifty-fifty starting point for the division of the marital estate in *Luedke* that caused the Indiana Supreme Court to vacate the court of appeals' decision and to affirm the trial court's original order.²⁷ The supreme court found that the court of appeals' presumption placed an unwanted structure on the fact-finding process which could ultimately impair the trial court's ability to weigh all the facts and circumstances of the parties.²⁸ The supreme court reasoned that if the legislature wanted that kind of structure to be applied to the division of property, it would have to change the language of Indiana Code section 31-1-11.5-11(b).²⁹ Indeed, the 1987 Indiana General Assembly changed the language of the statute.

The 1987 amendment to Indiana Code section 31-1-11.5-11 in subsection (c) requires the trial court to "presume that an equal division of the marital property between the parties is just and reasonable."³⁰ The "artificial structure" on the fact-finding process which concerned the supreme court is now part of Indiana's property division statute. Although the 1987 amendment to Indiana Code section 31-1-11.5-11(c) uses the same "rebuttable presumption" language found in the *Luedke* court of appeals opinion,³¹ the rebuttable presumption is placed in the

²³IND. CODE § 31-1-11.5-11(b)(1) (1982).

²⁴476 N.E.2d at 859-60.

²⁵*Id.* at 864-65.

²⁶*Id.* at 865.

²⁷*Luedke v. Luedke*, 487 N.E.2d 133, 134 (Ind. 1985), *vacating*, 476 N.E.2d 853 (Ind. Ct. App.).

²⁸487 N.E.2d at 134.

²⁹*Id.*

³⁰IND. CODE § 31-1-11.5-11(c) (Supp. 1987).

³¹*Luedke v. Luedke*, 476 N.E.2d 853 (Ind. Ct. App.), *vacated*, 487 N.E.2d 133 (Ind. 1985).

opening language of subsection (c) and does not appear in paragraph (c)(1).³² The obvious question for the practitioner is whether the 1987 amendment to Indiana Code section 31-1-11.5-11(c) resurrects the vacated court of appeals opinion in *Luedke*.

The amended Indiana Code section 31-1-11.5-11(c) requires the trial court to presume that an equal division of marital property is just and reasonable.³³ The presumption can be rebutted by evidence concerning the *five* factors found in paragraph (c).³⁴ The court of appeals in *Luedke* called for a fifty-fifty starting point when dividing the marital property. The starting point of an equal division could be adjusted after considering the evidence regarding the *four* factors in paragraphs (c)(2) through (c)(5).³⁵ In addition, the court of appeals in *Luedke* found a "rebuttable presumption" in paragraph (c)(1) that the contribution of the homemaker is equal to that of the wage earner.³⁶ The amended Indiana Code section 31-1-11.5-11(c)(1) has no specific presumption. The practitioner must ask whether there is any substantive difference between the amended statute and the *Luedke* opinion of the court of appeals. Clearly, both the amended statute and the court of appeals opinion in *Luedke* start with a fifty-fifty division of marital property. The amended statute allows the parties to rebut the presumption of a fifty-fifty division by providing evidence relevant to the five factors listed in Indiana Code section 31-1-11.5-11(c).³⁷ The *Luedke* opinion of the court of appeals called for an equal division of marital property where one spouse was the breadwinner and the other the homemaker and the other four factors in Indiana Code section 31-1-11.5-11(c) were equal.³⁸ If, however, one spouse had neglected his or her role as breadwinner or homemaker, the mandate for equality in the division disappeared.³⁹ Therefore, the substantive difference between the amended property division statute and the court of appeals opinion in *Luedke* rests in the absence of any direction from the legislature to the trial court as to how to apply subparagraph (c)(1) of Indiana Code section 31-1-11.5-11.

To illustrate the problem, assume the following facts are before the trial court. John Doe earns \$25,000 per year working for Big Company, Inc. Jane Doe, John's wife, earns \$25,000 per year at Giant Enterprises, Inc. Each spouse has worked throughout the marriage and earned equal

³²IND. CODE § 31-1-11.5-11(c) (Supp. 1987).

³³*Id.*

³⁴*Id.*

³⁵476 N.E.2d at 865.

³⁶*Id.* at 864-65.

³⁷IND. CODE § 31-1-11.5-11(c) (Supp. 1987).

³⁸*Luedke*, 476 N.E.2d at 859-60.

³⁹*Id.*

amounts. Neither spouse inherited any property and neither received any property by gift. Neither spouse dissipated any assets. Each spouse has the same earning ability and each has the same prospective economic circumstances. The only relevant difference between them is that the husband did very little at home and wife did most of the homemaking chores. Given these facts, must the trial judge divide the marital property equally or must Jane receive more than John because of her non-income producing contributions (homemaking activities)?

Indiana Code section 31-1-11.5-11(c) requires the trial court to presume an equal division unless the presumption is rebutted by evidence regarding the five factors in paragraphs (c)(1) through (c)(5).⁴⁰ Looking at the evidence, the only difference between the parties is Jane's "extra" contribution of homemaking activities. The judge must grapple with the question of whether Jane has rebutted the presumption of an equal division because of her homemaking contribution. If she has, then Jane should receive more than fifty percent of the marital property.

In *Temple v. Temple*,⁴¹ the wife appealed the trial court's property division alleging that the court had failed to recognize her contribution as a homemaker and wage earner.⁴² The wife had worked full-time or part-time and at all times she was the primary homemaker.⁴³ The court of appeals affirmed the trial court's division which awarded the wife more than fifty percent of the property.⁴⁴ Regarding the wife's dual contributions, the appellate court stated as follows:

Wife made a contribution to the acquisition of the property as a wage earner *and* homemaker. Thus, contrary to *Patus*, we find the statutory mandate to consider the contribution of each spouse to the acquisition of the marital property, including the contribution of a homemaker, is a recognition by the legislature that the homemaking endeavors of both spouses in a marriage have a marital value which contributes to the acquisition of marital property. There is no justification for limiting this factor exclusively to a non-wage earner, primary homemaking spouse. Rather, both functions, homemaking and wage earning, are considerations.⁴⁵

In the vacated opinion of the court of appeals in *Luedke*, the appellate court recognized the "marital value" approach to homemaking contri-

⁴⁰See *supra* notes 4-5 and accompanying text.

⁴¹435 N.E.2d 259 (Ind. Ct. App. 1982).

⁴²*Id.* at 260.

⁴³*Id.* at 262.

⁴⁴*Id.* (the wife received sixty-nine percent of the assets).

⁴⁵*Id.*

butions found in *Temple*.⁴⁶ "The 'marital value' approach to homemaker contributions recognizes the marriage as a voluntary association of co-equals, with implied equal rights, duties and contributions, in which the parties define, assign, and carry out their roles."⁴⁷ Thus, each spouse accepts the role assumed by the other spouse and accepts the contributions of each as equal.⁴⁸ Presumably, if one spouse did not accept the contribution of the other as equal, he or she could get out of the marriage.

Because the court of appeals' opinion in *Luedke* was vacated, there is little Indiana case law specifically discussing the problem of the spouse (or spouses) with dual contributions as a homemaker and as a wage earner. It would appear, however, that *Temple* would call for the trial court to divide John and Jane Doe's marital property equally between them.⁴⁹ Using the reasoning found in *Temple* the trial court would assume that each of the parties had accepted the other party's contribution as equal to his or her own contribution. Thus, with all of the other factors in Indiana Code section 31-1-11.5-11(c) being equal, the trial court would divide the property equally. At the trial, if Jane attempted to introduce evidence that she had done virtually all the work around the house and John had done very little, John would object to the introduction of this evidence citing *Temple* and *In re Marriage of Patus*.⁵⁰

In *Patus*, the trial court divided the marital estate equally between the parties. The wife appealed alleging the trial court erred because it failed to award her more than fifty percent where the evidence showed she had been an equal wage earner during the marriage as well as a homemaker.⁵¹ The court of appeals affirmed the trial court's division of property.⁵² In so doing, the appellate court found the legislature's intent in Indiana Code section 31-1-11.5-11(c)(1) was to allow for circumstances where:

- (1) one spouse is not employed outside the home,
- (2) that the unemployed spouse is *solely* a homemaker, and
- (3) that the unemployed, homemaking spouse is the *primary* homemaker.⁵³

⁴⁶*Luedke v. Luedke*, 476 N.E.2d 853, 864 (Ind. Ct. App.), *vacated*, 487 N.E.2d 133 (Ind. 1985).

⁴⁷*Id.* In contrast with the "marital value" approach is the "market value" approach in which the homemaker spouse's services are valued at the market price required to purchase labor to perform the various household chores. *Id.* at 863-64, n.11.

⁴⁸*Id.* at 860, n.6.

⁴⁹*See Temple v. Temple*, 435 N.E.2d 259 (Ind. Ct. App. 1982).

⁵⁰175 Ind. App. 459, 372 N.E.2d 493 (1978).

⁵¹*Id.* at 460, 372 N.E.2d at 495.

⁵²*Id.*

⁵³*Id.* at 461, 372 N.E.2d at 495.

The court of appeals refused to interpret the statute in a manner which would call for a "detailed inquiry into the private activities of the home."⁵⁴ The appellate court justified its interpretation as follows:

When each marital partner brings earnings into the marriage, and those earnings are substantially equal, we do not believe that an exhaustive examination of who washed dishes, who took out the trash, who painted the house, who changed the oil in the car, who changed the diapers, who paid the bills, and who mowed the lawn is constructive. Of course, there may be extreme circumstances in which one partner makes virtually no home-making contribution, but that was not the case in the *Patus* home.

We decline to encourage trial courts, by reweighing evidence on appeal, to elicit volumes of self-serving testimony regarding homemaking contributions; the "no-fault" system of divorce would be lost in the mire of who-did-what for the home. The judgment of the trial court will be reversed only for a clear abuse of discretion. The earnings of the parties were reliable indices of the relative contributions to the acquisition of marital property. No abuse was demonstrated in the trial court's "50/50" division of property.⁵⁵

As discussed earlier, the court of appeals in *Temple* disagreed with the interpretation of the statute in the *Patus* case.⁵⁶ Looking at both cases, it appears that each calls for an extremely limited review, if any, of the homemaking activities of either spouse. With this precedent, the effect of the amended Indiana Code section 31-1-11.5-11(c) is unclear. The new language in subsection (c) requires an equal division of property between the spouses unless there is evidence presented relevant to the five factors in subsection (c) which *rebutts* the fifty-fifty division.⁵⁷ The amended statute should allow the parties to present evidence of any "non-income producing" contributions (presumably including home-making contributions) pursuant to Indiana Code section 31-1-11.5-11(c)(1). Therefore, any interpretation of *Temple* and *Patus* which would prevent a party from introducing evidence of homemaking contributions would be contrary to the new amended statute. A question remains, however, as to the extent to which a party can present evidence of what chores he or she did around the home. Again, the reasoning and analysis of

⁵⁴*Id.* at 462, 372 N.E.2d at 496.

⁵⁵*Id.*

⁵⁶*Temple v. Temple*, 435 N.E.2d 259 (Ind. Ct. App. 1982).

⁵⁷IND. CODE § 31-1-11.5-11(c) (Supp. 1987).

the opinion of the court of appeals in *Luedke* may provide guidance.

In *Luedke*,⁵⁸ the court of appeals rejected the limited view of the homemaking contributions taken by the appellate court in *Patus*⁵⁹ in favor of the broader view in *Temple*.⁶⁰ The court reasoned that the view taken in *Patus* would write paragraph (c)(1) out of the property division statute where a spouse contributes both as a wage earner and as a homemaker.⁶¹ The court adopted the "marital value" approach to homemaking contributions as discussed in *Temple* but went further to find a rebuttable presumption that the contribution of the homemaker is equal to the contribution of the wage earner.⁶² The court reasoned that the presumption of equal contribution recognizes "the reality of the marriage relationship as a common enterprise, a voluntary union of co-equals in which the parties define and agree upon their roles."⁶³ The court also stated as follows:

The presumption of equal distribution avoids these problems by recognizing as paramount the agreement of the parties to their role in the marriage, whatever the socioeconomic characteristics of the particular household. The presumption also accounts for the intangible yet beneficial contributions the homemaker makes to the marriage, and it eliminates the time and expense necessary for presentation of volumes of evidence, including expert testimony, of "who-did-what" for the marriage. In addition, the presumption of equal division implicit in paragraph 11(b)(1) serves to focus the litigation on the remaining factors in subsection 11(b) thus directing the trial court's attention to the more concrete considerations involving specific, identifiable property (paragraphs 11(b)(2) and (4)) and economic matters generally susceptible of direct proof (paragraphs 11(b)(3) and (5)).⁶⁴

Returning to John and Jane Doe's case, questions still remain. Should the trial judge allow Jane to introduce the evidence of her homemaking contributions? If he does allow the evidence, must Jane receive more than an equal division of the marital estate? Given the opening language of the amended Indiana Code section 31-1-11.5-11(c), Jane should be

⁵⁸*Luedke v. Luedke*, 476 N.E.2d 853 (Ind. Ct. App.), *vacated*, 487 N.E.2d 133 (Ind. 1985).

⁵⁹*In re Marriage of Patus*, 175 Ind. App. 459, 435 N.E.2d 259 (Ind. Ct. App. 1982).

⁶⁰*Temple v. Temple*, 372 N.E.2d 493 (1978).

⁶¹*Luedke*, 476 N.E.2d at 863.

⁶²*Id.* at 864-65.

⁶³*Id.* at 866.

⁶⁴*Id.* At the time of the opinion, subsection (c) of Indiana Code Section 31-1-11.5-11 was subparagraph (b).

allowed to introduce evidence of her contribution as a homemaker and as a wage earner. If the trial court prohibited her from introducing this evidence, Jane would be left without the ability to rebut the presumption of an equal division which is contrary to the explicit language of Indiana Code section 31-1-11.5-11(c).⁶⁵ Also, Jane should be allowed to show she has made a contribution under Indiana Code section 31-1-11.5-11(c)(1) in order to prevent John from receiving the benefit of the presumption. Jane, however, should not be able to drone on for hours going over the individual jobs she had done during the marriage—the self-serving “who-did-what” evidence. Looking at *Patus*,⁶⁶ *Temple*,⁶⁷ and the vacated opinion of the court of appeals in *Luedke*⁶⁸ the appellate courts likely will place some kind of limit on the “who-did-what” evidence. Now that the legislature has rejected the supreme court’s view of the division of marital property, the reasoning of the court of appeals in *Luedke* becomes even more persuasive. Therefore, it may be safe to assume that Jane Doe’s evidence regarding her non-income producing contributions is admissible to the extent that it is relevant to rebut the presumption of a fifty-fifty division of the marital estate. Eventually, the appellate courts may find the same kind of rebuttable presumption of equal contributions in paragraph (c)(1) of Indiana Code section 31-1-11.5-11 as the court of appeals did in *Luedke*. Thus, the contributions of each spouse would be presumed equal even if one spouse made both financial contributions and non-income producing contributions. The only relevant circumstances would be when one spouse totally neglected his or her role in the marriage.

The courts must deal with conflicting policy considerations which have been expressed through case law and through the amendments to the property division statute. On the one hand, the trial court is mandated to presume that an equal division of marital property is “just and reasonable.” Each spouse can introduce evidence relevant to the five statutory factors in an attempt to rebut that presumption.⁶⁹ One of the considerations is a spouse’s non-income producing contribution. If the evidence regarding every other factor is equal, then in order to reach a “just and reasonable division,” the spouse who made dual contributions under Indiana Code section 31-1-11.5-11(c)(1) should receive more of the marital estate. On the other hand, from a practical perspective, the final hearing of a dissolution of marriage petition cannot become a

⁶⁵See IND. CODE § 31-1-11.5-11(c) (Supp. 1987).

⁶⁶*In re Marriage of Patus*, 175 Ind. App. 459, 372 N.E.2d 493 (1978).

⁶⁷*Temple v. Temple*, 435 N.E.2d 259 (Ind. Ct. App. 1982).

⁶⁸*Luedke v. Luedke*, 476 N.E.2d 853 (Ind. Ct. App.), *vacated*, 487 N.E.2d 133 (Ind. 1985).

⁶⁹IND. CODE § 31-1-11.5-11(c)(1)-(5) (Supp. 1987).

forum for a recounting of each and every job and chore a spouse performed during the marriage. Appellate courts should attempt to limit the scope of this kind of evidence in a method similar to the "rebuttable presumption" the court of appeals found in Indiana Code section 31-1-11.5-11(c)(1) in its vacated *Luedke* opinion.⁷⁰ The trial court would presume an equal contribution by both spouses in paragraph (c)(1). As part of the presumption, the court would presume that whatever roles the parties had assumed during the marriage, it was with the other's approval or acquiescence. Thus, the only "who-did-what" evidence that would be relevant would be to rebut that presumption. At some point in time, however, the policy makers may have to look at the factors in Indiana Code section 31-1-11.5-11(c) to examine whether the spouse who is employed *and* does all (or virtually all) the homemaking chores is being adequately compensated for that dual contribution. The social impact of the "two-paycheck" family may call for further refinement of Indiana's property division statute.

Family law practitioners may find that the amendments to Indiana Code section 31-1-11.5-11(c) will affect their clients in other ways. Because of the statutory presumption of an equal division of the marital estate, more clients may be unwilling to settle for a division which varies from the fifty-fifty division. More clients may wish to "gamble" in court and take their chances with the judge following the equal division presumption, especially where large inheritances or short-term marriages are involved. Thus, the amendments may actually increase rather than reduce the number of contested trials.

III. *Martin v. Martin*: EDUCATIONAL EXPENSE ORDERS

During the survey period, the Indiana Supreme Court seized an opportunity to clarify Indiana's law regarding a divorced parent's obligation for his child's college expenses beyond the child's twenty-first birthday. In *Martin v. Martin*⁷¹ the supreme court vacated the court of appeals' decision and held that if an educational needs support order existed prior to the child's twenty-first birthday, that order could be enforced and/or modified even after age twenty-one.⁷² Both the supreme court and the court of appeals reached the same result, reversing the trial court's finding that no prior education order existed, and thus no education order could be extended beyond age twenty-one.⁷³ Contrary to the trial court's findings, both the supreme court and the court of

⁷⁰476 N.E.2d 853 (Ind. Ct. App.), *vacated*, 487 N.E.2d 133 (Ind. 1985).

⁷¹495 N.E.2d 523 (Ind. 1986).

⁷²*Id.* at 525.

⁷³*Id.* at 523-24.

appeals found a prior existing educational needs order which allowed both appellate courts to reverse the trial court. What makes this case noteworthy is the reasoning and analysis of the appellate courts in their respective opinions using the same set of facts as the trial court.

Gaye Martin (mother) and Harold Martin (father) were divorced on May 29, 1974. The parties had two daughters. When the older daughter married, Rebecca's (the younger daughter's) support was fixed at \$22.50 per week. After graduation from high school, Rebecca enrolled and attended Northwestern University. Upon her twenty-first birthday (November 24, 1982), her father stopped paying support.⁷⁴ On January 26, 1983 the mother filed her petitions with the trial court seeking enforcement of the prior support order and modification of the order to increase the amount to help defray Rebecca's college expenses.⁷⁵ At the hearing on the petitions, the trial court found that the father's duty of support terminated on Rebecca's twenty-first birthday. The trial court also found that because no order for educational expenses existed prior to Rebecca's twenty-first birthday, no such order could be entered subsequent to that date.⁷⁶ Rebecca appealed the trial court's decision.

On appeal, the court of appeals rebuked the father's contention that under Indiana case law an order for a child's education expenses terminates when the child reaches age twenty-one.⁷⁷ Citing Indiana Code section 31-1-11.5-12, the court of appeals stated that a parent's obligation for a child's educational expenses may continue beyond the child's twenty-first birthday.⁷⁸ The court of appeals then considered "whether or not there must be an order for educational expenses in existence prior to the child's twenty-first birthday in order for such order to continue beyond that time."⁷⁹

Looking at the existing support order for Rebecca, the court of appeals found that it provided for educational expenses even though there was no "separate and distinct" order for educational needs.⁸⁰ Relying on its earlier opinion in *Howard v. Reeck*,⁸¹ the court of appeals found the support order at issue to include education expenses because "I.C. 31-1-11.5-12 includes educational expenses as an element of support as opposed to a separate and distinct award or allowance."⁸² Apparently,

⁷⁴*Id.* at 525.

⁷⁵*Id.*

⁷⁶487 N.E.2d 1321, 1322 (Ind. Ct. App.), *vacated*, 495 N.E.2d 523 (Ind. 1986).

⁷⁷*Id.* at 1323.

⁷⁸*Id.* (citing *Thiele v. Thiele*, 479 N.E.2d 1324 (Ind. Ct. App. 1985)).

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹439 N.E.2d 727 (Ind. Ct. App. 1982).

⁸²*Martin v. Martin*, 487 N.E.2d 1321, 1323 (quoting *Howard*, 439 N.E.2d at 730), *vacated*, 495 N.E.2d 523 (Ind. 1986).

according to the court of appeals, any support order necessarily included educational expenses and no "separate and distinct"⁸³ order need exist. Therefore, Rebecca had a prior educational expenses order which could continue beyond age twenty-one.⁸⁴

Within seven months after the court of appeals issued its decision, the Indiana Supreme Court granted transfer and vacated the lower appellate court's opinion.⁸⁵ The supreme court, however, did not disagree with the result reached by the court of appeals. The supreme court did not disagree with the appellate court's finding that an educational expenses order can continue beyond the child's twenty-first birthday. The supreme court did, however, provide more analysis of the issue.

The supreme court first looked to the governing statute—Indiana Code section 31-1-11.5-12.⁸⁶ Justice Dickson, writing for the court, provided the following review of the statute:

The statute enumerates two exceptions to the provision that child support duties cease when the child reaches twenty-one. The first exception is emancipation before 21, and the second exception applies where the child is incapacitated. It is within the first exception that we find the crucial language:

"[h]owever, an order for educational needs may continue in effect until further order of the court."

While this provision is located within the exception applicable to emancipation prior to age 21, we do not limit its application to situations where a child is emancipated before 21. We will not attribute to the legislature an intention to create a special

⁸³487 N.E.2d at 1323.

⁸⁴*Id.*

⁸⁵495 N.E.2d 523 (Ind. 1986).

⁸⁶The relevant provisions read as follows:

(a) In an action pursuant to [dissolution or child support], the court may order either parent or both parents to pay any amount reasonable for support of a child,

(b) Such child support order may also include, where appropriate:

(1) sums for the child's education in schools and at institutions of higher learning, taking into account the child's aptitude and ability and the ability of the parent or parents to meet these expenses;

(d) The duty to support a child under this chapter *ceases* when the child reaches his twenty-first birthday *unless*:

(1) the child is emancipated prior to his twenty-first birthday in which case the child support, except for education needs, terminates at the time of emancipation; however, an order for educational needs *may continue* in effect until further order of the court; or

(2) the child is incapacitated in which case the child support continues during the incapacity or until further order of the court. IND. CODE § 31-1-11.5-12 (1982) (emphasis added).

privilege for children who are emancipated before age 21. Furthermore, under such a restrictive interpretation, the above-quoted language would be mere surplusage. The immediately preceding phrase clearly allows education support to continue notwithstanding emancipation before age 21. Thus, for the statutory language to be meaningful, we must construe it to permit educational support beyond the cessation of the general duty to support a child, regardless whether the cessation is at age 21 or by reason of prior emancipation.⁸⁷

Justice Dickson further found that the statutory provision regarding educational expenses specifically states that such an order "may continue" and does not state that it may be first initiated after age twenty-one. He stated:

The statute does not authorize adult children to use post-dissolution proceedings to finance the expenses of college commenced or resumed later in life. If this had been the intention of the General Assembly, we presume that the enacted statute would have so provided. It does not. The statutory language is clear. Where educational needs are expressly included in a support order enacted prior to a child's emancipation or attaining age 21, the trial court is authorized to continue to address such educational needs.⁸⁸

Finally, the supreme court noted that Indiana Code section 31-1-11.5-17 expressly permits a modification of a child support order. Therefore, not only can an order for educational expenses continue beyond age twenty-one, it may be modified after age twenty-one.⁸⁹

Looking at the order regarding Rebecca, the supreme court found that it encompassed her educational needs although no separate and distinct provision existed.⁹⁰ The court looked to a July 17, 1977, modification order in which the trial court found that the older daughter had educational needs. The court inferred that the trial judge intended the same for both the older daughter *and* Rebecca. The supreme court found that specific reference to the oldest daughter's educational needs was sufficient for a finding that a prior education order existed for Rebecca.⁹¹

The lesson for the practitioner is clear. When drafting any support provision, make sure the issue of educational needs is specifically ad-

⁸⁷495 N.E.2d 523, 525 (Ind. 1986).

⁸⁸*Id.*

⁸⁹*Id.*

⁹⁰*Id.* at 525-26.

⁹¹*Id.*

dressed. Even if the parties cannot agree on who shall pay what, at least recite that there exists a need for educational expenses. The court of appeals in *Martin*⁹² apparently found any support order to encompass educational expenses. The supreme court in *Martin*⁹³ searched for a specific reference to educational needs. The practitioner cannot rely on a future court to make that same kind of search.

IV. *Franklin Bank and Trust Company v. Reed*: SECURING FUTURE PROPERTY SETTLEMENT PAYMENTS

In late 1986, the court of appeals issued an opinion which directly addressed the issues in a case involving future property settlement payments from one spouse to the other over an extended period of time. Generally, the trial court's decision to provide (or *not* to provide) security for property division payments over a period of time is discretionary.⁹⁴ The appellate courts will reverse a decision only if an abuse of discretion is shown.⁹⁵ For example, in *Johnson v. Johnson*,⁹⁶ the court of appeals reversed the trial court's order forcing the entire marital estate to be liquidated and placed in trust for the support of the wife and children. The appellate court found that the order went beyond merely providing security and that it failed to effect a "financial parting of the ways."⁹⁷

In *Wilson v. Wilson*,⁹⁸ the court of appeals affirmed the trial court's failure to provide security for payments equal to \$60,500 spread over 121 months. In an earlier case, *In re Marriage of Davis*,⁹⁹ the court of appeals discussed the broad discretion of the trial court in its decision to provide security. The court stated:

The statutory language obviously affords the court the broadest possible discretion in requiring security for the payment of support and the division of marital property. As we have made clear throughout this opinion, we will not substitute our judgment for that of the trial court. Neither will we impose a greater obligation upon the trial court to require security than the legislature has imposed. We are troubled by the fact that Bonnie was dispossessed of her holdings - a little less than one-half of

⁹²*Martin v. Martin*, 487 N.E.2d 1321, 1322 (Ind. Ct. App.), *vacated*, 495 N.E.2d 523 (Ind. 1986).

⁹³*Martin v. Martin*, 495 N.E.2d 523 (Ind. 1986).

⁹⁴*Wilson v. Wilson*, 409 N.E.2d 1169, 1175 (Ind. Ct. App. 1980).

⁹⁵*Id.*

⁹⁶460 N.E.2d 978 (Ind. Ct. App. 1984).

⁹⁷*Id.* at 979.

⁹⁸409 N.E.2d 1169, 1175 (Ind. Ct. App. 1980).

⁹⁹182 Ind. App. 342, 395 N.E.2d 1254 (1979).

the total stock outstanding - in exchange for certain valuable property and \$100,000.00 payable over 130 months. We question the wisdom of giving an unsecured, personal debt in exchange for such assets, but, in light of the statutory provisions and the evidence before the trial court, we are unable to deem it an abuse of discretion.¹⁰⁰

Thus, if the trial court failed to provide security for future payments that decision would likely be affirmed on appeal. When advising a client on the terms of a settlement which provides for future payments, the attorney must keep in mind that should the issue come before the trial court, there are no guarantees that the client will get that security.

In *Franklin Bank and Trust Co. v. Reed*¹⁰¹ the court of appeals reversed the trial court's finding that the ex-wife, Ruth Reed, had a prior, superior security interest in real estate owned by her ex-husband as to the bank which received the real estate from the ex-husband in satisfaction of his debts. In the original dissolution action, the trial court awarded Ruth a property settlement judgment against her ex-husband in the sum of \$170,000 to be paid over six years. The trial court made no specific finding that the judgment was to be a lien on the real estate of the husband. Ruth recorded a certified copy of her judgment in Johnson County (where the land at issue was located) on February 23, 1981. The ex-husband, on December 5, 1981, transferred title of the property to the bank.¹⁰² The issue before the court of appeals was deceptively simple. Was Ruth's judgment a lien on the Johnson County property? If so, was it superior to the bank's interest?¹⁰³

Ruth argued that a judgment lien existed because of the general lien statute, Indiana Code section 34-1-45-2¹⁰⁴ and, therefore, she was entitled to priority over the bank who received title subsequent to the recordation

¹⁰⁰*Id.* at 350, 395 N.E.2d at 1259 (footnote omitted).

¹⁰¹496 N.E.2d 596 (Ind. Ct. App. 1986), *vacated*, 508 N.E.2d 1256 (Ind. 1987).

¹⁰²496 N.E.2d at 598.

¹⁰³*Id.*

¹⁰⁴All final judgments for the recovery of money or costs in the circuit court and

other courts of record of general original jurisdiction sitting in the state of Indiana, whether state or federal, shall be a lien upon real estate and chattels real liable to execution in the county where, and only where, such judgment has been duly entered and indexed in the judgment docket as provided by law, from and after the time the same shall have been so entered and indexed, and until the expiration of ten (10) years from the rendition thereof, and no longer, exclusive of the time during which the party may be restrained from proceeding thereon by any appeal or injunction or by the death of the defendant, or by agreement of the parties entered of record.

IND. CODE § 34-1-45-2 (1982).

of her judgment.¹⁰⁵ The bank argued that Indiana Code section 31-1-11.5-15¹⁰⁶ controlled *exclusively* and, thus, because the trial court made no specific award of a lien, no lien existed.¹⁰⁷ The court of appeals agreed with the bank and held that the trial court has the option to create a lien or negate such a lien.¹⁰⁸ If the court is silent, no lien attaches because Indiana Code section 31-1-11.5-15 is exclusive.¹⁰⁹ Therefore, if no specific lien was awarded, the judgment was completely unsecured.

Approximately ten months after the court of appeals issued its opinion, the Indiana Supreme Court granted transfer and vacated the lower appellate court's decision.¹¹⁰ Justice Pivarnik, writing for the court, reviewed the parties' contentions as follows:

It is the Bank's contention that the marriage dissolution section, Ind. Code § 31-1-11.5-15, governs this matter exclusively and since the trial court failed to establish a lien, none exists. Ruth's contention is that a judgment lien exists by virtue of the general lien statute, Ind. Code § 34-1-45-2 and therefore she is entitled to priority over any interest obtained by the Bank as a result of Owen's subsequent assignment of his equitable interest in the Alexander property. Ruth reasons that prior to the advent of the new dissolution act, the prior act, Ind. Code § 31-1-12-17 (Burns 1973), expressly obviated the applicability of a judgment lien on money judgments paid by installments unless the court specifically created such a lien. However, the new dissolution statutes do not contain this prohibition. She urges that Ind. Code § 31-1-11.5-15 was noticeably shorn of that negative language, thus giving rise to the interpretation that the Legislature intended to allow a judgment to apply automatically unless a lower court, through its inherent power, eliminated the lien. Therefore, Ruth reasons the judgment lien statute and the dissolution statute are complementary and should not be interpreted as mutually exclusive. We agree with this interpretation of the above statutes.¹¹¹

¹⁰⁵*Franklin Bank*, 496 N.E.2d at 598.

¹⁰⁶Upon entering an order pursuant to section 11 or 12 of this chapter, the court may provide for such security, bond or other guarantee that shall be satisfactory to the court to secure the obligation to make child support payments or to secure the division of property. IND. CODE § 31-1-11.5-15 (1982).

¹⁰⁷*Id.*

¹⁰⁸*Id.* at 602.

¹⁰⁹*Id.*

¹¹⁰508 N.E.2d 1256 (Ind. 1987).

¹¹¹*Id.* at 1258.

In reaching its conclusion, the supreme court reviewed the holding of a 1985 probate case, *Bell v. Bingham*.¹¹² The court of appeals in *Bell* affirmed the trial court's grant of summary judgment in favor of the sole heir of Mary Bell against the claim by Mary Bell's ex-husband that he was a secured creditor of Mary's estate because of his "alimony" judgment.¹¹³ The appellate court held that the dissolution court exercised its discretionary powers pursuant to Indiana Code section 31-1-11.5-15 by withholding a lien on a particular piece of real estate.¹¹⁴ The dissolution court had awarded Mary the real estate and found that the husband, Olin, should "have no further interest in said real estate located at 623 or 625 Adams whatsoever."¹¹⁵ The court of appeals found that the language of the dissolution court withheld a lien from Olin.¹¹⁶

The supreme court, in *Franklin Bank*,¹¹⁷ relied upon the same reasoning. Justice Pivarnik stated as follows:

It is clear the Legislature intended Ind. Code § 31-1-11.5-15 to give the dissolution court power to enforce its orders providing for division of the parties' property by ordering security bond or other guarantee. The court has many forms of security from which to choose in order to protect one or the other of the parties in their share of the property and yet sever the relationship of the parties to each other. The court also has the power to completely sever the interests of the parties in each other's share including any lien interest arising under Ind. Code § 34-1-45-2. Since § 34-1-45-2 is general in its application, however, giving a judgment lien to one obtaining a judgment in any action, such a lien is not automatically eliminated by the dissolution statute. Rather, the dissolution statute gives the court authority to overcome the judgment lien, or to augment it, or to limit it. But silence of the court does not eliminate the automatic provision in the judgment lien statute. The court may exercise its inherent power and eliminate a judgment lien only by positive action. There was no such action here.¹¹⁸

The supreme court disagreed with the appellate court's determination that Indiana Code section 34-1-45-2 and Indiana Code section 31-1-11.5-15 are mutually exclusive.¹¹⁹ If a spouse is awarded a judgment, payable

¹¹²484 N.E.2d 624 (Ind. Ct. App. 1985).

¹¹³*Id.*

¹¹⁴*Id.* at 627.

¹¹⁵*Id.*

¹¹⁶*Id.*

¹¹⁷508 N.E.2d 1256 (Ind. 1987).

¹¹⁸*Id.* at 1259.

¹¹⁹*Id.*

over a period of time, that judgment will automatically create a lien on any real estate of the obligated spouse *unless* the trial court specifically withholds that lien.

Franklin Bank contains several lessons. First, the attorney must make the trial court aware of the necessity of providing security for any future payments. Mrs. Reed may have been left out in the cold if the trial court had not awarded her a "judgment." If the language in the decree simply ordered the husband to pay her \$10,000 a year for so many years there would have been a real issue as to whether any lien would attach. The attorney must make the trial court aware of the problem. Second, the language regarding security should be clear. Why be silent when the decree could specifically award a lien on a certain piece of real estate? If that piece of real estate is in a county different from the dissolution court, the attorney should record a certified copy of the decree in that county where the land is located in order to perfect the lien.

Third, given the language in *Bell*,¹²⁰ the clause in the decree or settlement agreement which releases the rights of the obligee spouse should not be so broad as to negate the automatic judgment lien. For example, if the clause in the decree or agreement provides that "Husband shall have all right, title and interest in the real estate located at 1910 Main Street free and clear of any claim of Wife, whatsoever," and, later a clause awards the wife a judgment of \$15,000, there is a good argument that no lien attaches. The better practice would be to specifically award the wife a judgment lien on the real estate at 1910 Main Street. Finally, *Franklin Bank* shows how important the security issue can be in a dissolution case. The attorney must avoid the trap set for the unwary who think the negotiations are finished when the pay-off terms are agreed upon. Anytime there are payments to a spouse over an extended period of time, the attorney must deal with the security issues. Failing to do that leaves the job half done.

V. CONCLUSION

The survey period included three significant developments in Indiana's family law. The 1987 Indiana General Assembly amended Indiana Code section 31-1-11.5-11 and created a presumption of equal division of marital property in a dissolution of marriage action. The legislature's action came after the Indiana Supreme Court had rejected the court of appeal's attempt to create the same kind of presumption of equal division in *Luedke v. Luedke*.¹²¹ The amendment presents new opportunities for

¹²⁰*Bell v. Bingham*, 484 N.E.2d 624 (Ind. Ct. App. 1985).

¹²¹487 N.E.2d 133 (Ind. 1985).

family law practitioners in representing their clients in dissolution proceedings.

The Indiana Supreme Court issued two opinions which effect the family law practitioner. In *Martin v. Martin*,¹²² the supreme court attempted to clarify a confusing area of the law regarding educational needs orders. The court held that so long as an order existed prior to the child's twenty-first birthday which recognized the child's education needs, that order can be enforced and/or modified after age twenty-one.¹²³ In *Franklin Bank and Trust Company v. Reed*,¹²⁴ the supreme court interpreted two lien statutes to provide for an automatic lien on real estate of the payor when the trial court awards the payee a judgment even though no lien is specifically mentioned in the decree. Although this holding provides greater security for the payee, the automatic lien can cause problems for the payor in any subsequent real estate transactions.

¹²²495 N.E.2d 523 (Ind. 1986).

¹²³*Id.* at 525.

¹²⁴508 N.E.2d 1256 (Ind. 1987).

