

VII. Decedents' Estates and Trusts

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In a decision that may appeal particularly to will drafters as opposed to their clients, the Indiana Supreme Court during the survey period determined that the statute of limitations applicable in an action by a disappointed will beneficiary against the drafting lawyer for malpractice in drafting a will is a two-year statute that begins to run at the date of the decedent's death. This decision, and two court of appeals decisions, one dealing with the doctrine of equitable election and the other resolving a variety of estate administration issues, are discussed in the first three sections of this Survey. Other significant developments in the decedents' estates area are reviewed in the following subsections of the fourth section: will contests, contracts affecting the distribution of decedents' estates, other issues affecting the distribution of decedents' estates, appointment and removal of the personal representative, the purchase of estate property by the personal representative, the dead man's statute, the common-law presumption of death, and statutory amendments affecting decedents' estates. The fifth and final section of this Survey includes significant trust cases involving: lapse and conditions of survival, breach of trust and removal of the trustee, and constructive trusts. There were no modifications of the trust code enacted during the survey period.

The decision of the court of appeals in *Criss v. Bitzegaio*,¹ reversing a summary judgment entered in favor of the plaintiff, Bitzegaio, was vacated when the supreme court granted the plaintiff's petition to transfer and affirmed the summary judgment.² Although the supreme court's decision was rendered after the survey period, a discussion of it is included here to complete the review of the case contained in last year's Survey.³ Summary judgment was rendered in favor of Bitzegaio on the theory that a purchase money resulting trust arose in his favor as a consequence of an oral agreement whereby Bitzegaio and two other men (Criss and Swango) were each to contribute one-third of the purchase price for equal interests in a parcel of real estate they planned to purchase. Only Criss and Swango actually paid the purchase money to the seller of the prop-

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¹402 N.E.2d 1279 (Ind. Ct. App. 1980), *vacated*, 420 N.E.2d 1221 (Ind. 1981).

²*Criss v. Bitzegaio*, 420 N.E.2d 1221 (Ind. 1981).

³Falender, 1980 *Survey of Recent Developments in Indiana Law, Decedents' Estates and Trusts*, 14 IND. L. REV. 291, 308 (1980).

erty on the day of sale, and the deed to the property was made out only to them. Criss died without having executed a deed conveying any interest to Bitzegaio, and thereafter Bitzegaio brought an action to enforce a purchase money resulting trust as to an undivided one-third interest in the real estate.⁴

In Indiana, when a conveyance is made to one person, but the consideration for the conveyance is paid by another, a so-called purchase money resulting trust arises in favor of the one who paid the purchase money if "by agreement, and without any fraudulent intent, the party to whom the conveyance was made . . . was to hold the land or some interest therein in trust for the party paying the purchase-money or some part thereof."⁵ The agreement of the grantee to hold an interest for the party paying the purchase money must be made before the grantee acquires title to the property and must be supported by valuable consideration.⁶

The trial court in the Criss case found that Bitzegaio's pleadings, affidavit, and exhibits established all the elements necessary for the existence of a purchase money resulting trust: an agreement, free from fraud, entered into before Criss and Swango acquired title, and supported by the consideration of Bitzegaio's promise to pay one-third of the purchase money.⁷ In rendering summary judgment in favor of Bitzegaio, the trial court also found that the defendants had not raised a genuine issue of material fact regarding the existence of any of these elements.⁸ The supreme court agreed that no factual issue had been raised and affirmed the trial court's judgment, although the court of appeals had reversed and had directed that summary judgment be entered in favor of the defendants.

The consideration that Bitzegaio alleged in support of the resulting trust was his oral promise to pay one-third of the purchase money. The majority of the court of appeals had decided that, because of the Statute of Frauds would have prevented enforcement of the oral promise, Bitzegaio had not established sufficient consideration to support a resulting trust in his favor.⁹ The majority of the supreme court, however, held that the summary judgment in favor of Bitzegaio should stand because the defendants had presented "no evidence . . . to challenge the existence" of an enforce-

⁴The defendants in the action were Swango and the heirs and personal representative of Criss.

⁵IND. CODE § 30-1-9-8 (1976).

⁶420 N.E.2d at 1224 (citing *Auten v. Sevier*, 136 Ind. App. 434, 202 N.E.2d 274 (1964)).

⁷420 N.E.2d at 1224. Thus, as a matter of law, the plaintiff was entitled to the relief granted.

⁸*Id.* at 1224.

⁹402 N.E.2d at 1281, *vacated*, 420 N.E.2d 1221 (Ind. 1981).

able agreement among the three men.¹⁰ Neither the defendants, nor the court of appeals, could properly raise on appeal an issue of fact that had not been raised at the summary judgment hearing.

A. *Malpractice Statute of Limitations*

In *Shideler v. Dwyer*,¹¹ the five justices of the Indiana Supreme Court agreed that the statute of limitations applicable in a malpractice action brought against the drafting lawyer by a disappointed will beneficiary is the two-year statute applicable in actions “[f]or injuries to personal property.”¹² The justices did not agree, however, on the issue of when the cause of action accrued and the statute of limitations began to run.

The decedent died on December 14, 1973, and his will was admitted to probate on December 21, 1973. The will contained a clause directing a shareholder of a coporation, in which the decedent was also a shareholder, to “ ‘cause the Corporation to pay [the plaintiff] as a retirement benefit the sum of \$500 per month.’ ”¹³ The plaintiff retired October 31, 1974, and after she did not receive payment of the benefit in November, she asked the probate court to construe the decedent’s will.¹⁴ Although the plaintiff argued that the clause

¹⁰420 N.E.2d at 1223. The defendants had raised the Statute of Frauds defense in their answer to the plaintiff’s complaint. Bitzegaio, however, had filed an affidavit and other materials establishing the lack of an issue of fact regarding the existence of an agreement. The court stated that the defendants could “not rest upon [their] pleadings but must come forth with specific facts showing that there is a genuine issue for trial.” 420 N.E.2d at 1223. The defendants had filed a counter-affidavit reciting “some historical information,” but the counter-affidavit included nothing “to challenge the existence of the agreement among the three men prior to the purchase of the property.” *Id.*

¹¹417 N.E.2d 281 (Ind. 1981) (superseding 386 N.E.2d 1211 (Ind. Ct. App. 1979)). The *Shideler* case is reviewed in Comment, *Shideler v. Dwyer: The Beginning of Protective Malpractice Actions in Indiana*, 14 IND. L. REV. 927 (1981). A careful reading of this Comment is recommended. This Survey discussion is intended only to call attention to the decision and to highlight the particular ramifications of the decision upon lawyers involved in estate planning and probate.

¹²The quoted language appears in the first clause of IND. CODE § 34-1-2-2 (1976). Because the only issue before the court was that of the statute of limitations, the court expressly declined to render an opinion on the right of the disappointed beneficiary to maintain a malpractice action against the drafting lawyer. Many states, however, recognize a cause of action in the disappointed beneficiary. See Annot., 45 A.L.R.3d 1181, 1195 (1972).

¹³417 N.E.2d at 284.

¹⁴Prior to her retirement, the plaintiff was advised that the drafting lawyer, who was then serving as the attorney for the decedent’s estate, was of the opinion that the plaintiff would not be entitled to the retirement benefit described in the will unless she met the qualifications of the corporation’s profit-sharing plan. The plaintiff did not meet these qualifications, but she retired nonetheless, and then sought to have the pro-

was enforceable, the probate court, on June 30, 1975, held the clause void and ineffective as precatory.¹⁵ On June 29, 1977, the plaintiff filed the malpractice action against the drafting lawyer, alleging that the decedent had intended for the plaintiff to receive \$500 per month as a retirement benefit and that the lawyer should have known that the clause would not effectuate that intent. The plaintiff contended that the cause of action against the lawyer did not accrue, and the statute of limitations did not commence to run, until June 30, 1975, the date when the probate court decreed that the clause was void. Two justices agreed with the plaintiff, but the majority held that the cause of action accrued, and the statute began to run, the day the decedent died, in the case of a plaintiff with no reasonable grounds for questioning the validity of the clause.¹⁶

The two dissenting justices pointed out the fallacies and unfairness inherent in the majority's reasoning and conclusions regarding the time when the statute commenced to run¹⁷ and succinctly exposed the impossibility of the plaintiff's position under the majority's rule:

Upon probate of the will, [the beneficiary] presumes he is to benefit under the will, thus he bides his time waiting for the proper authority to fulfill the bequest. Some time later, he learns that the administrator of the estate has no intention of fulfilling the bequest. He still takes the position the bequest is valid and institutes proceedings in the Probate

bate court mandate payment to her. A declaratory judgment would have been a safer course of action.

¹⁵The probate court decreed the clause void and precatory because the shareholder could not cause the corporation to pay the retirement benefit to the plaintiff. 417 N.E.2d at 284. This decree was not appealed.

¹⁶The majority, holding that the statute of limitations commences to run when damage has occurred, concluded that damage occurred to the plaintiff on the date the decedent died, at which time his will containing the questionable bequest became operative. The court explained the distinction between *damage*, in the sense of the irremediable injury that must occur to commence the running of the statute, and *damages* as a measure of compensation, which need not be known or ascertained when the statute commences to run. *Id.* at 289. Quoting from *Schmidt v. Merchants Dispatch Transp. Co.*, 270 N.Y. 287, 300, 200 N.E. 824, 827 (1936), the court stated:

"The injury occurs when there is a wrongful invasion of personal or property rights and then the cause of action accrues. Except in cases of fraud where the statute expressly provides otherwise, the statutory period of limitations begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury. Consequential damages may flow later from an injury too slight to be noticed at the time it is inflicted. No new cause of action accrues when such consequential damages arise."

417 N.E.2d at 289.

¹⁷417 N.E.2d at 295.

Court for enforcement of the bequest. At this time his bridge is still standing, and he is taking the position that it is sturdy enough to support him in his position. He, of course, would take the position that the attorney who drafted the instrument drafted a perfectly valid instrument. It would be unthinkable for him at that time to bring an action against the attorneys for drafting a bad instrument. His bridge does not collapse until the Probate Court makes a decision that the bequest in the will is unenforceable, and that he will take nothing under the terms of the will. Only then is he in a position to turn his attention to the drafters of the instrument which has failed him.¹⁸

The dissent thus describes what a reasonable beneficiary would think and do in the course of asserting the validity of a will or will clause in his favor. The majority, however, would likely force the beneficiary to be unreasonable and to do the unthinkable, namely, to assert the validity of the will or will clause in an action in the probate court at the same time he is asserting the invalidity of the clause in an action against the drafter. Perhaps the *Shideler* decision will render reasonable the advice that a will beneficiary should sue the drafting lawyer the day before the expiration of two years after death in every undistributed estate.

B. Equitable Election

The equitable principle that one who seeks equity must do equity is the basis of the doctrine of equitable election, which was explained and applied in *Citizens National Bank v. Stasell*.¹⁹ Application of the doctrine requires the one who asserts a claim to property under the terms of a will must acknowledge the full operation of that will and must recognize the equitable rights of others created by that will.²⁰

In the *Stasell* case, Eva Martin and her husband, Charles, owned a sixty-acre tract of real estate as tenants by the entireties. Eva, who died in 1952, devised this tract to her husband for life, remainder to her nieces and nephews. Eva also devised the residue of her estate to her husband, and the husband accepted substantial benefits pursuant to this residuary clause. After the husband died in 1975, his second spouse and the personal representative of his estate sued to quiet title to the sixty-acre tract. The trial court, applying the doctrine of equitable election, held that title should be quieted in

¹⁸*Id.*

¹⁹408 N.E.2d 587 (Ind. Ct. App. 1980).

²⁰See generally T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 138 (2d ed. 1953).

Eva's nieces and nephews. The court of appeals affirmed. All the requirements for application of the doctrine were present: Eva intentionally disposed of the sixty-acre tract; Eva had no testamentary power over the tract since at her death her surviving spouse Charles (the surviving tenant by the entirety) owned the entire fee; Eva's will put Charles on notice of the fact that her disposition of the sixty-acre tract was contrary to his rights as the sole owner in fee simple; Charles was a beneficiary under the residuary clause of Eva's will; and Charles accepted benefits under the residuary clause. Thus, Charles was bound to acknowledge the full operation of Eva's will, including the passing of the remainder interest in the sixty-acre tract to Eva's nieces and nephews.

In the *Stasell* case, both parties believed that a crucial issue was of ownership of the sixty-acre tract at the time of execution of Eva's will. The court of appeals, however, after noting that a will is ambulatory and inoperative until the testator's death, stated that ownership at the time of execution is irrelevant to the question of whether the doctrine of equitable election applies. The relevant issue is the intent of the testator to specifically dispose of the property of another by the will, and the crucial time for determining whether the property is property of another is the date of the testator's death. In *Stasell*, the former entirety property was owned solely by Eva's husband at the moment of Eva's death.

The message of *Stasell* to will beneficiaries is obvious: A beneficiary should carefully read all will provisions before happily accepting a devise or bequest. The message to drafters is equally clear: The drafter should carefully inquire about the ownership of all specifically devised or bequeathed property to be certain either that the testator owns the property, or if not, that the testator intends for an election to occur. Furthermore, because of the language in the *Stasell* opinion indicating that ownership at the time of execution of the will is irrelevant, the draftsman should warn the testator of potential frustration of intent whenever the testator sells or gives specifically devised property to another will beneficiary after executing the will.

C. *The Kingseed Saga: Estate Administration Issues*

Albert Kingseed died in July, 1969 leaving a will in which he devised his 160-acre farm and the two houses on it to the children of his deceased son Robert, \$10,000 to his daughter Geneva Wolff, \$5,000 to his granddaughter Marilyn Foland, and the residue of his estate in three equal shares, one to Robert's four children, one to Geneva Wolff, and one to Marilyn Foland. The will was admitted to probate shortly after Kingseed's death, and Joseph Noel was appointed executor of Kingseed's estate.

The controversies in *In re Estate of Kingseed*²¹ grew out of the final account filed by Noel following his resignation as executor in September 1976. In his final account, Noel reported the distribution of the 160-acre farm and its income to Robert's children in February 1970, relying on the fact that he had then advised Robert's children that they could thereafter make their own arrangements for use and rental of the farm property, which they did.²² Noel did not, however, obtain a court order authorizing distribution of the farm, and Geneva Wolff, a general and residuary devisee, objected to the reported "distribution." Noel also reported the payment of \$11,850 of attorney and executor fees to himself, again without court approval, and Wolff challenged the reasonableness of the fees.²³

A special judge was appointed to consider all matters related to Noel's discharge.²⁴ Several of the judge's determinations were the subject of appeal and cross-appeal. The following discussion will consider only the most significant issues resolved on appeal. Because of its complexity, the *Kingseed* case is one that should be read in its entirety.

1. *Attorney and Executor Fees.*—The judge determined that Noel should repay to the estate \$5,820 plus prejudgment interest²⁵ because reasonable attorney and executor fees would have been only \$6,030, not the \$11,850 which Noel had paid to himself. Noel contended on appeal that the reduction in requested fees was an abuse of discretion and contrary to the law and the evidence. Noting the settled Indiana rule that the determination of fees is within the sound discretion of the trial court,²⁶ the court of appeals found

²¹413 N.E.2d 917 (Ind. Ct. App. 1981).

²²The farm land was rented under a share-cropping arrangement in 1969, and the landlord's share of the rent for that year was paid into the estate. After being advised by Noel in February 1970 to make their own arrangements for the farm operation, Robert's children, through their mother and guardian Mildred Kingseed, rented the farm under a cash-rent arrangement and retained the rent for 1970 and all years thereafter. Furthermore, in 1972 and thereafter, Mildred rented the second house on the farm and retained the rent for the children.

²³Wolff also claimed that Noel had mismanaged a parcel of Kingseed's real estate in Amboy, Indiana. The trial judge did not require Noel to account for this alleged mismanagement, and the court of appeals found no error in the court's failure to require Noel to account. The evidence of mismanagement was not so clear as to lead only to the conclusion that Noel was responsible. 413 N.E.2d at 920, 934.

²⁴The regular judge disqualified himself on his own motion and submitted the issues involving Noel's final account to the special judge. *Id.* at 919.

²⁵The special judge determined that the rate of pre-judgment interest was 6%. The court of appeals held that the judge should have applied the statutory rate of interest, 8%, to Noel's repayment of fees and also to repayments ordered to be made to the estate by Kingseed's children. *Id.* at 934-35.

²⁶The court cited, *inter alia*, *In re Estate of Newman*, 369 N.E.2d 427 (Ind. Ct. App. 1977) for the proposition that attorney and executor fee allowances are left to the

substantial support for the reduction, especially "Noel's participation and acquiescence in the unreasonable and unexplained delays in settling the estate."²⁷ The message of the *Kingseed* case to executors and attorneys representing the estate was clearly stated: "When sanctions in the form of a reduction of fees become necessary to safeguard and enforce this central policy [to settle estates as expeditiously as possible], we are fully prepared to support them."²⁸ Although the court discussed other factors which supported the fee reduction, the court emphasized that delay alone would have been a sufficient reason to reduce Noel's requested fees.²⁹

2. *Authority of the Special Judge.*—The special judge determined that the general bequests to Wolff and Foland should have been distributed on March 1, 1971,³⁰ and ordered distribution with interest from March 1, 1971. Noel and Robert's children appealed this determination, and the court of appeals held that this portion of the order exceeded the jurisdiction conferred upon the special judge. The special judge had been appointed only for the purpose of hearing Noel's final account and objections to it, and the regular judge retained jurisdiction over all estate matters not submitted to the special judge.³¹ The *Kingseed* estate remained open after Noel's discharge; a successor personal representative had been appointed and was responsible for the continued administration and distribution. All matters of administration and distribution apart from the matter of Noel's discharge remained within the jurisdiction of the regular judge.³²

3. *Retroactive Approval of an Unauthorized Partial Distribution.*—The special judge retroactively approved Noel's partial distribution of the farm property to Robert's children, but determined that the distribution should have been made on March 1, 1971, instead of February 1970.³³ Consequently, pursuant to Indiana Code

discretion of the trial court and will be reversed on appeal only on a showing of abuse of discretion. 413 N.E.2d at 932.

²⁷413 N.E.2d at 932. Noel represented the estate for nearly seven years. For a period of more than four years, between April of 1970 and August of 1974, "Noel failed to take any court action in any matter concerning the estate . . ." *Id.* at 931 (emphasized in original). In August of 1974, the trial court on its own motion ordered a hearing regarding a trial of claims continued in April of 1970. *Id.* at 931-32.

²⁸*Id.* at 932. The court of appeals, citing Indiana Code section 29-1-16-2, referred to "the clear policy of our Probate Code to settle estates as speedily as possible for the protection and in the interest of creditors and heirs alike." *Id.*

²⁹*Id.*

³⁰*Id.* at 928.

³¹See *Zaring v. Zaring*, 219 Ind. 514, 39 N.E.2d 734 (1942), *quoted in* 413 N.E.2d at 929.

³²413 N.E.2d at 929.

³³*Id.* at 928. See *id.* at 924 n.8 for a discussion of how the court arrived at the date of March 1, 1971.

section 29-1-17-7,³⁴ the judge ordered Robert's children to repay to the estate the income they received from rental of the farm land in 1970, along with prejudgment interest.³⁵ Robert's children appealed the portion of the order requiring repayment. Wolff contended that Noel or Robert's children should also have been required to account to the estate for the fair rental value of the houses on the farm property from the date of Kingseed's death to the court-approved distribution date of March 1, 1971. The appellate court's determinations regarding these issues are the most significant determinations in the *Kingseed* case. Another message, this time to will draftsmen, comes through loud and clear.

The court of appeals affirmed the trial judge's retroactive approval of the partial distribution of the farm to Robert's children. First, the court held that because Noel reported the distribution of the farm in his final account, the special judge had jurisdiction to approve or disapprove the distribution as part of his mandate to consider all matters related to Noel's final account and discharge.³⁶ Secondly, the court of appeals held that retroactive approval of a distribution was within the judge's authority.³⁷ An unauthorized payment or distribution, made in good faith, may be subsequently approved "if another's rights are not affected . . . and the result is that which the law would have accomplished" ³⁸ In the *Kingseed*

³⁴IND. CODE § 29-1-17-7 (1976) provides:

Unless the decedent's will provides otherwise, all income received by the personal representative during the administration of the estate shall constitute an asset of the estate the same as any other asset and the personal representative shall disburse, distribute, account for and administer said income as a part of the corpus of the estate.

³⁵See note 25 *supra* regarding the proper rate of interest.

³⁶In fact, if the special judge had not expressly considered the propriety of the distribution, an order discharging Noel would have worked as an implied approval of the reported distribution. See *In re Estate of Saltzman*, 145 Ind. App. 488, 251 N.E.2d 595 (1969) (the trial court's approval of an executor's current report was in effect a ratification of a prior unapproved disposition of property not included in that account). The special judge, therefore, necessarily had to resolve the issue of the unauthorized distribution in order to resolve the issues directly related to the approval of Noel's final account and discharge.

³⁷Wolff and Foland argued, in essence, that the unauthorized distribution was void and could not be retroactively validated. In support of their position that a court is without authority to render a retroactive approval, they cited Indiana Code section 29-1-13-1, which mandates the personal representative to take possession of the decedent's property and collect rents, and section 29-1-17-1, which provides the procedures for effectuating a partial distribution and thereby terminating the personal representative's statutory duties with respect to the distributed property. Wolff and Foland argued that they were prejudiced by the retroactive approval since they were thereby deprived of income that would have been distributable, in part, to them (as residuary devisees) pursuant to Indiana Code section 29-1-17-7. 413 N.E.2d at 922.

³⁸413 N.E.2d at 923.

case, the unauthorized partial distribution of the farm property to Robert's children was made in good faith to the proper distributees,³⁹ and the rights of the complaining residuary devisees to income from the property during administration of the estate was not sufficient to warrant disapproval of the distribution.⁴⁰

Finally, the court of appeals reasoned that if the trial court had the authority to render retroactive approval of an unauthorized distribution, it also had the authority to retroactively disapprove a part of the distribution.⁴¹ Thus, the court upheld the judge's authority to approve the distribution as of March 1, 1971, instead of the reported date of February 1970. Because this order in effect disapproved the children's receipt of income prior to March 1, 1971, the court of appeals held that the trial judge necessarily had to require the children to return to the estate the income they had collected prior to the court-approved date of distribution.⁴²

³⁹There was no showing of lack of good faith, and the children were the ones entitled to the farm.

⁴⁰The court of appeals said:

[O]ur Probate Code does not sanction extensive delay by residuary legatees to increase their share of the estate. "If the closing of the estate is long delayed as by the determination of the estate tax, justice would indicate a partial distribution to enable the distributee to obtain the yield from the property which might otherwise, under IC 29-1-17-7, go to the residuary legatee under the will." J. Grimes, 2A Henry's Probate Law & Practice, ch. 25, § 2 at 51 (7th ed. 1979).

413 N.E.2d at 923-24.

⁴¹413 N.E.2d at 926.

⁴²*Id.* The children were ordered to return all money collected from rental of the farm land in 1970.

This part of the *Kingseed* decision, affirming the order requiring return of the 1970 farm income to the estate, was based in part on the trial court's specific statutory authority to require the return of any property distributed by court order if the return is ordered before the decree of final distribution, and if the return "is for the best interest of the estate." IND. CODE § 29-1-17-1(a) (1976). The phrase "best interest of the estate" has been held to mean "when necessary for the payment of debts, legacies or claims." *Smith v. Smith*, 76 Ind. 236, 239 (1881), *overruled on other grounds*, *Cupp v. Ayers*, 89 Ind. 60, 63 (1883). In the *Kingseed* case, there was no showing that the income for the year 1970 was needed to pay debts, legacies, or claims. The use of section 29-1-17-1(a) as support for the order of return was therefore either misplaced, or an indication that "best interest of the estate" may include interests other than the payment of debts, legacies, or claims.

While the authority of the special judge may have extended to approval in part and disapproval in part of the unauthorized partial distribution, the judge's authority need not have extended to an order of return of the income to the estate because the issue of the propriety of that distribution was necessarily raised by Noel's final account. The children were not only devisees of the farm property, but also were residuary devisees who would share with Wolff and Foland any income earned during administration of the estate. The issue of the return of one year's income, when the cash was not required to pay debts, legacies, or claims, is an issue that might have

The court of appeals also remanded the case for a determination of whether Noel should account for his failure to collect rent for both farm houses prior to the authorized distribution date.⁴³ The court held that an executor "may be held accountable for failure to lease the property and collect the rents if it would have been in the best interest of the estate for him to do so."⁴⁴ The *Kingseed* holding, imposing upon the executor a duty of management and productivity akin to the duty imposed upon a trustee,⁴⁵ is the first explicit holding to that effect in an Indiana case. The imposition of a duty to manage and make estate assets productive is well-placed: It would be unreasonable, imprudent, and wasteful for an executor to let estate assets remain idle for a year or more of administration. Yet, the executor is placed in a delicate position. The primary duty of the executor, after collection of assets and payment of debts and taxes, is to distribute estate assets in kind as speedily as possible to the intended beneficiaries.⁴⁶ Therefore, when administration commences, the executor must evaluate the administrative complications that may delay partial and final distribution of estate assets to determine whether and on what terms to lease or otherwise invest estate

been left to be resolved on final distribution by the regular judge. Administrative savings to the estate resulting from the children's management of the farm property may well have occurred, and these savings should have been taken into account before the entire amount of income received was ordered returned to the estate.

Another possibility, not ostensibly considered by the *Kingseed* court, is that the executor should be the one liable to the residuary legatees for loss to them due to his premature unauthorized distribution. Certainly the children, in collecting the income, acted more in good faith than Noel acted when he turned the management over to them. Who should ultimately be responsible for the executor's neglect of duty in failing to obtain proper court authority for the distribution of the farm to the children? The children relied on the executor's advice that they could begin to collect the farm income in 1970. Wolff and Foland might properly recoup their losses from Noel, rather than from the children.

⁴³Robert's children had occupied the larger farmhouse during this period, and the smaller house remained vacant.

⁴⁴413 N.E.2d at 928 (citing 33 C.J.S. *Executors and Administrators* § 259(c)(1) (1942) and IND. CODE §§ 29-1-16-1(c), -15-3 (1976)). The court noted that this is the law in jurisdictions where the personal representative is charged with possession of the real estate during administration of the estate, as he is under Indiana Code section 29-1-13-1. *Contra, e.g.*, *Riling v. Cain*, 199 Kan. 259, 428 P.2d 789 (1967); *In re Estate of Reiman*, 272 Wis. 378, 75 N.W.2d 564 (1956) (where executor is not charged with possession of real property).

⁴⁵*See, e.g.*, IND. CODE § 30-4-3-6 (1976), expressing the trustee's duty to manage and invest trust assets as a reasonable man would do, with a view to the productivity as well as the safety of the trust corpus. Although the *Kingseed* holding is limited to the decision that an executor has a duty to lease real property if the leasing is in the best interest of the estate, it is probably correct to assume that the courts will impose upon executors a general duty to make personal property in an estate productive if that would be in the best interest of the estate.

⁴⁶IND. CODE § 29-1-17-2 (1976).

assets. To protect himself from later claims of mismanagement, the executor should keep a record of the factors that influenced his decision to invest or not.

The *Kingseed* court gives some guidance as to the factors to be evaluated by the executor in deciding whether to lease or otherwise invest estate property. When the court remanded the case for a determination of Noel's liability to be surcharged for the rental value of the smaller house on the farm property, and for a determination of the liability of Robert's children for their use and occupancy of the larger house, the court cautioned that "the interests of all potential beneficiaries of the estate warrant consideration."⁴⁷ The court stated that "it may well have been a proper exercise of discretion for Noel to permit Mildred and the Kingseed children to occupy the larger house in return for maintenance and upkeep."⁴⁸ Thus, although the executor may consider the interests and well-being of intended estate beneficiaries, the court intimates that the executor's discretion must be exercised with a view to the pecuniary soundness of the investment decision. The executor, it seems, cannot, without authority in the will, decide not to lease or otherwise invest estate property, or decide to allow the intended beneficiaries to enjoy possession of the property, without some quid pro quo benefitting the estate.

Here lies a message to drafters. If it is contemplated that devisees may desire to occupy real estate specifically devised to them, the drafters should propose a will provision authorizing the devisees to occupy rent-free during the period of administration.⁴⁹ The drafter might also consider a provision expressly authorizing the devisee to manage the property and collect the income during administration. Such provisions, of course, would not be operative to defeat the rights of creditors of the estate, but the abatement status of the rental income or fair rental value could be clarified in the will.⁵⁰ Furthermore, the liability of the specific devisee who is authorized to occupy or manage the property for mortgage payments, taxes, insurance, and maintenance should be established in the will.

⁴⁷413 N.E.2d at 928.

⁴⁸*Id.*

⁴⁹"It certainly is but a simple matter for a testator to avoid the application of [Indiana Code section 29-1-17-7] if he so wishes, by the addition of the appropriate language to the will." 413 N.E.2d at 925 (quoting *In re Estate of Darby*, 154 Ind. App. 238, 241, 289 N.E.2d 542, 544 (1972)).

⁵⁰A specific devise abates last, unless otherwise provided in the will. IND. CODE § 29-1-17-3 (1976). The will should clarify whether or not the rent-free occupancy is to have the same abatement status as the specific devise itself.

D. Other Decedents' Estates Developments

1. *Will Contests.*—Indiana Code section 29-1-7-17 provides that “[a]ny interested person may contest the validity of any will . . . ; and the executor and all other persons beneficially interested therein shall be made defendants” in the will contest action.⁵¹ In *Cook v. Loftus*,⁵² the court discussed and distinguished the interest required to establish the contestant’s standing to contest a will, and the interest that renders a person a necessary party-defendant in a will contest action. The court in *Cook* held, in a decision of first impression on the issue, that heirs-at-law are not necessary parties-defendant to a will contest. The phrase describing necessary parties, “persons beneficially interested therein,” refers to persons beneficially interested in the will being contested, and heirs-at-law are not interested in the will being contested “unless they take some beneficial interest under the will.”⁵³

2. *Contracts Affecting Distribution of Estates.*—In *Estate of Gillilan v. Estate of Gillilan*,⁵⁴ Charles and Mae had entered into an antenuptial agreement which provided that if Charles predeceased Mae, Mae would receive “the entire net income from his estate for and during the term of her natural life,” in full satisfaction of all dower and homestead rights and all other claims that Mae might assert as his widow or heir.⁵⁵ Charles and Mae were subsequently

⁵¹IND. CODE § 29-1-7-17 (1976).

⁵²414 N.E.2d 581 (Ind. Ct. App. 1981).

⁵³*Id.* at 587, quoting from 2A HENRY'S PROBATE LAW AND PRACTICE 781 (7th ed. J. Grimes 1979) as follows:

“I.C. 29-1-7-17 would appear to differentiate between those who may contest a will and those who are necessary parties to a will contest. As seen heretofore all heirs may contest unless disinherited under a previous will. But only those ‘beneficially interested therein’ need be made parties. This would seem to indicate that only the executor, the legatees, and the devisees are necessary parties. Other heirs are not unless they take some beneficial interest under the will.”

The *Cook* court also reiterated the requirements for establishing an interest to contest a will when that interest arises under a prior will. The devisee under a prior will is an interested party, with standing to contest under section 29-1-7-17, if that devisee establishes facts which would authorize the probate of the prior will under which he or she claims. 414 N.E.2d at 585. It is not sufficient that the devisee under the prior will merely prove that an instrument exists purporting to be a prior will of the testator.

Because the issue was not raised, the court did not determine whether devisees under a prior will are necessary parties to the will contest action. Applying the logic of the decision, it seems that for the purpose of a will contest action, the devisees under a prior will are in the same position as the heirs, and are not necessary parties to the will contest action.

⁵⁴406 N.E.2d 981 (Ind. Ct. App. 1980).

⁵⁵*Id.* at 983. The agreement also provided that Charles would provide a home for and support Mae during their marriage and that if Mae survived Charles, Charles would not make any claims to any part of Mae’s estate.

married, and Charles predeceased Mae,⁵⁶ leaving a will which made substantial provision for Mae, but which did not literally comply with the antenuptial agreement.⁵⁷ Mae filed a timely election to take against the will, asserting that Charles's execution of the non-complying will could be treated as an offer to rescind the antenuptial agreement.⁵⁸ The executor of Charles's estate contended that the antenuptial agreement was enforceable and not rescinded. The trial court rendered summary judgment ordering that the agreement be enforced by its terms, and the court of appeals affirmed this judgment.

Early in the opinion, the *Gillilan* court suggested that an antenuptial contract cannot be rescinded, absent mutual agreement, after the marriage of the parties, because the parties cannot be restored to the status quo once the contract is partially performed by consummation of the marriage.⁵⁹ Later in the opinion, however, the court recited the traditional contract law principle that a material breach of a contract may justify rescission at the instance of the non-breaching party.⁶⁰ In other words, the non-breaching party to an antenuptial contract may consider his obligation to perform terminated upon material breach of contract by the other party. A material breach was described as a breach that substantially defeats the purpose of the contract, or a breach whereby the breaching party puts it "beyond his power to carry out his contract."⁶¹

Under the *Gillilan* facts, the court of appeals determined that the provisions of Charles's will substantially accomplished the purpose of the antenuptial agreement and his minor breach was easily remedied by allowing Mae the entire net income pursuant to the contract. Because Charles substantially performed his part of the contract, Mae could not consider her obligation under the contract

⁵⁶Charles died on May 28, 1975, and Mae died on October 27, 1975.

⁵⁷In his will, Charles created several trusts. A substantial part of the income from these trusts was payable to Mae during her life. It is not clear whether Mae was given the equivalent of the entire net income from the estate. The court of appeals noted that "Mae's Estate presents no evidence to show that she would have been better off under the antenuptial agreement." 406 N.E.2d at 991.

⁵⁸Mae sought to establish rescission of the contract in order to be free to assert her statutory elective share of one-third of Charles's net real and personal estate. See IND. CODE § 29-1-3-1 (1976). (Mae was a second spouse, but it appears that Charles left no surviving descendants. Thus, Mae's elective share of the real estate was not limited to a life estate in one-third of that real estate. See *id.*) Mae sought to be free from performance of her promise to accept the benefits described in the antenuptial agreement in lieu of her elective share.

⁵⁹406 N.E.2d at 987.

⁶⁰*Id.* at 990.

⁶¹*Id.* at 989 (quoting *Mallow v. Eastes*, 179 Ind. 267, 273, 100 N.E. 836, 838 (1913)).

excused, and she was bound to perform her agreement to take the income in lieu of all other interest in Charles' estate.

If Charles had left Mae nothing in his will, however, it is likely that the court still would have found the contract enforceable. Charles had agreed to give his wife all the net income from his estate. The fact that Charles failed to leave a will giving his wife all the net income does not mean that he put it "beyond his power to carry out his contract."⁶² Even if there is no actual "performance" of the contract by the breaching spouse, if it is possible to mandate performance, the other spouse will not be permitted to overthrow the entire contract and "work a fraud upon the marriage" consummated in partial performance of the agreement.⁶³ Thus, whenever the only performance required of the surviving spouse is the acceptance of limited benefits from the estate of the deceased spouse, if those benefits can be provided from the estate of the deceased spouse, the surviving spouse will not be excused from performance of his or her agreement to accept only the limited benefits.

Two cases were decided during the survey period involving contracts allegedly arising out of joint, as opposed to mutual but separate, wills.⁶⁴ In each case, the joint will gave rise to an argument that the will was executed pursuant to a contract not to revoke it.⁶⁵ In each case, the trial court had determined that the evidence was not sufficient to establish clearly and unequivocally the existence of such a contract, and, in each case, the court of appeals affirmed the trial court's judgment.

These two cases illustrate why no sensible drafter should ever consider the execution of a joint will. As is apparent from the fact that in both cases the only evidence offered of the existence of a contract not to revoke was the will itself, unless the existence of a contract is specifically and carefully negated in the will, a contractual argument is nearly always plausible when a joint will has been used. Furthermore, at the time of death of the first to die, when the joint will is first probated, those who are to become beneficiaries upon the death of the survivor are made aware of the provisions in their favor in the survivor's will. The survivor's will is not private,

⁶²406 N.E.2d at 989.

⁶³406 N.E.2d at 991 (quoting *Cantor v. Cantor*, 174 N.E.2d 304, 315 (Ohio P. Ct. 1959)).

⁶⁴*Moore v. Harvey*, 406 N.E.2d 354 (Ind. Ct. App. 1980); *Wisler v. McCormack*, 406 N.E.2d 361 (Ind. Ct. App. 1980).

⁶⁵In each case, the attempted revocation occurred after the death of the first to die and after the acceptance by the survivor of benefits conferred by the joint will. While the revocation in *Wisler* was occasioned by the surviving spouse's execution of a subsequent will, the revocation in *Moore* occurred because of the surviving spouse's inter vivos transfer of the subject matter of a devise.

and if the survivor revokes it, the beneficiaries, who know that their hopes have been dashed, will be tempted to litigate the contractual issue. Reciprocal and identical provisions may be accomplished in separate, mutual wills, and the privacy of each testator's will may be better assured. In any event, each separate, mutual will should contain a specific provision indicating whether or not the will is revocable or executed pursuant to a contract not to revoke.

3. *Distribution of Estates.*—In *Key v. Sneed*,⁶⁶ the testator bequeathed one-half of his personal property and a life estate in one-third of his real estate to his wife, and the rest and residue of his estate to a trustee to pay the income from the trust property to the testator's daughter.⁶⁷ In the decree of final distribution, the income earned by the estate during administration was to be distributed to the trustee. The testator's wife contended that she should receive a share of that income, and the court of appeals agreed. The bequest to the wife was "expressed in terms of [a] fractional interest in the entire estate,"⁶⁸ namely, one-half of the testator's personal property and, therefore, was a bequest of that fractional share of the property available for distribution.⁶⁹ The court of appeals referred to and

⁶⁶408 N.E.2d 1305 (Ind. Ct. App. 1980).

⁶⁷*Id.* The dispositive clause describing the wife's share read as follows: "It is my will and I do hereby give and bequeath to my beloved wife . . . one-half ($\frac{1}{2}$) of my personal property and a life estate in one-third ($\frac{1}{3}$) of my real estate." *Id.* at 1305-06. The devise of the residue to the trust was in the article following the devise to the wife and read in part as follows: "It is my will and I do hereby give, devise and bequeath all the rest and residue of my estate, both real and personal, unto the [trustee] . . . in trust." *Id.* at 1306.

⁶⁸*Id.* at 1307.

⁶⁹*Id.* at 1308. The court stated:

The proper analysis involves the method by which the amount of the bequest is determined. If a bequest is for a sum certain, even if a general bequest, the legatee gets that amount, and no more. Likewise, if the bequest is specific, such as an identifiable object, property, or fund, the legatee gets that object, property, or fund, and no more. On the other hand, where the bequest is expressed in terms of a fractional interest in the entire estate, as we have here, and the amount of the bequest can be ascertained only by reference to all of the assets of the estate and all of the liabilities, then all of the estate assets must be considered. The question then is whether income is a distributable asset in this context.

Id. at 1307. The court then decided that: "Inasmuch as Ind. Code 29-1-17-7 assigns to income earned during administration the role of an asset of the estate and orders it distributed as a part of the corpus of the estate, it necessarily follows that [the wife] should receive her portion of the income." *Id.* at 1308. (Section 29-1-17-7 is reprinted in full at note 34 *supra*.) Thus, the wife was entitled to one-half of the personal property available for distribution and the trust was entitled to the other half of the personal property available for distribution. The court distinguished *In re Estate of Darby*, 154 Ind. App. 238, 289 N.E.2d 542 (1972) (bequest of a sum certain) and *In re Estate of Brown*, 145 Ind. App. 591, 252 N.E.2d 142 (1969), *overruled on other grounds*, *Pepka v.*

relied upon a previous appellate decision regarding this same estate, in which case the court had decided that the wife's fractional share of the estate was required to bear a "proportionate share of the debts and expenses" of the estate.⁷⁰

In *Diaz v. Duncan*,⁷¹ the court of appeals affirmed the applicability of the anti-lapse statute to a lapsed residuary devise where the deceased devisee was a descendant of the decedent and left surviving descendants.⁷² An interesting aspect of the opinion is the court's commitment, in dicta, to adhere to decisions under the former law⁷³ that held that the other residuary devisees take the deceased residuary devisee's lapsed share when the anti-lapse provisions do not operate to save the lapsed share for descendants of the deceased devisee.⁷⁴ Thus, even though Indiana Code section 29-1-6-1(g) is capable of the construction that a lapsed residuary devise passes by intestacy and does not pass to other residuary devisees,⁷⁵ the well-established former law, passing lapsed residuary devises to the other residuary devisees, may be adhered to in the future.⁷⁶

Another issue addressed by the court involved the effect of the failure of an interested party to file specific written objections to the administrator's final account and proposed distribution prior to the date of the hearing on the account and distribution. The trial court had continued the hearing to allow the objectors to file their

Branch, 155 Ind. App. 637, 294 N.E.2d 141 (1973) (specific bequest of an identifiable fund).

⁷⁰408 N.E.2d at 1307. Judge Buchanan had rendered a decision in a prior appeal involving the estate, *American Fletcher Nat'l Bank & Trust Co. v. American Fletcher Nat'l Bank & Trust Co.*, 161 Ind. App. 166, 314 N.E.2d 810 (1974), in which the court held that the wife's "interest was a fractional bequest, in that it was expressed in terms of a fractional share of the entire estate, and that under the law . . . her interest was required to bear its proportionate share of the debts and expenses." 408 N.E.2d at 1307. The *Key* court considered itself bound by Judge Buchanan's prior ruling that the wife's one-half interest "should be computed on the basis of the net estate available for distribution." *Id.*

⁷¹406 N.E.2d 991 (Ind. Ct. App. 1980).

⁷²See IND. CODE § 29-1-6-1(g)(2) (1976).

⁷³406 N.E.2d at 998-99.

⁷⁴*E.g.*, *West v. West*, 89 Ind. 529 (1883); *Carey v. White*, 126 Ind. App. 418, 126 N.E.2d 255 (1955).

⁷⁵The language supporting this construction is the following language in IND. CODE § 29-1-6-1(g)(1) (1976) (emphasis added): "If a devise of real or personal property, *not included in the residuary clause of the will*, is void, is revoked, or lapses, it shall become a part of the residue, and shall pass to the residuary devisee."

⁷⁶Of course, if the residuary devise is to a class, and one of the class members predeceases the testator, the remaining surviving class members share the residuary devise unless the anti-lapse statute saves the lapsed devise for descendants of the deceased devisee. Compare *Robbins v. Springer*, 119 Ind. App. 560, 88 N.E.2d 573 (1979) with T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 140 at 782-83 (2d ed. 1953).

specific objections in writing.⁷⁷ The administrator contended that the continuance was improper because the probate judge had no "jurisdiction to distribute the proceeds of an estate in a manner other than suggested by the administrator if, on the date set for hearing on said proposed distribution, no specific objections have been filed."⁷⁸ The court of appeals stated that the trial judge has the right to modify a proposed distribution even if no objections are filed.⁷⁹ The court concluded that, under Indiana Code section 29-1-1-7, the trial judge, in ordering the continuance, formulated "an appropriate rule of procedure for the particular case before him."⁸⁰

4. *Appointment and Removal of Personal Representatives.*—In two cases decided during the survey period, the court of appeals reviewed probate court judgments rendered on matters of appointment and removal of personal representatives.⁸¹ In each case, the court of appeals emphasized the considerable discretion of the probate court in such matters.⁸² In reviewing for an abuse of discretion, each court examined the reasons given to justify the manner in which the trial court exercised its discretion.⁸³ In one case, *In re Estate of Sandefur*,⁸⁴ the court of appeals found an abuse of discretion, but in the other case, *In re Estate of Baird*,⁸⁵ the court found no abuse.

In *Sandefur*, the trial court abused its discretion when it ordered removal of an executrix on a finding that the executrix "refuses to carry out the provisions of the last will and testament

⁷⁷406 N.E.2d at 1001. The situation in the case was unusual in that the objectors had filed objections earlier in the proceeding, but the trial judge had ruled that the objections were filed prematurely. At the hearing on the final account, the objectors orally moved to reinstate the prior objections. The trial court denied the motion because the objections were not sufficiently specific, but continued the hearing to allow the objectors time to file more specific written objections.

⁷⁸*Id.* The administrator cited Indiana Code sections 29-1-1-10 and 29-1-16-7 in support of his position.

⁷⁹406 N.E.2d at 1001. Pursuant to Indiana Code section 29-1-17-2(b), the court has the final responsibility to determine how an estate should be distributed.

⁸⁰406 N.E.2d at 1003. A procedure that "aid[s] the judge in distribution of the estate pursuant to the law and according to the wishes of the testator" is "not unlawful but, rather, commendable." *Id.* at 1002, 1003.

⁸¹Recent cases dealing with the removal of trustees are reviewed in the text accompanying notes 158-68 *infra*.

⁸²*See, e.g.,* Hauck v. Second Nat'l Bank of Richmond, 153 Ind. App. 245, 286 N.E.2d 852 (1972); Helm v. Odle, 129 Ind. App. 478, 157 N.E.2d 584 (1959).

⁸³The standard of review for an abuse of discretion "requires that a reason stated by the trial court justify the manner in which it exercised its discretion." *In re Estate of Baird*, 408 N.E.2d 1323, 1328 (Ind. Ct. App. 1980) (citing *City of Elkhart v. Middleton*, 265 Ind. 514, 356 N.E.2d 207 (1976)).

⁸⁴413 N.E.2d 309 (Ind. Ct. App. 1980).

⁸⁵408 N.E.2d 1323 (Ind. Ct. App. 1980).

of the decedent.'"⁸⁶ On the same day that he executed his will, the decedent executed a deed conveying a parcel of real estate to himself and his mother as joint tenants with right of survivorship. In his will, the decedent stated that it was his intent not to dispose of this real estate through the will unless at the time of his death his mother had predeceased him, leaving him as the surviving joint tenant. Although the decedent in fact predeceased his mother, the executrix of the decedent's estate filed an action against the mother to recover the real estate, alleging that the joint tenancy was created as security for a loan to the decedent. The mother responded to this action by filing a petition requesting the removal of the executrix on the grounds that the executrix had refused to carry out the provision of the will in which the decedent expressed his intent not to include the real estate in his estate if his mother survived him. The court of appeals concluded that the executrix's actions could not "be classified as an attack upon the will itself or a refusal to carry out the terms of the will."⁸⁷ The court noted that the executrix had obtained prior court approval before bringing the action to recover the real estate and further noted that the executrix had a duty to seek to recover the real estate "if she in good faith believed the real estate was properly an asset of the estate," in spite of language to the contrary in the will.⁸⁸ Clearly, then, the probate court abused its discretion in ordering the removal of the executrix.

The executrix initially had moved to dismiss the removal petition on the grounds that the mother was not an "interested person" within the meaning of the removal statute.⁸⁹ The probate court did not dismiss the mother's petition, but instead ordered the executrix to appear and show cause why she should not be removed. Although the mother was not an "interested person" within the meaning of the removal statute,⁹⁰ the probate court did not commit error in failing to dismiss the petition on the ground of the mother's lack of interest, because the removal statute authorizes the court on its own motion to order the personal representative "to appear and show cause why he should not be removed."⁹¹

⁸⁶413 N.E.2d at 310.

⁸⁷*Id.* at 311.

⁸⁸*Id.*

⁸⁹IND. CODE § 29-1-10-6(a) (1976).

⁹⁰413 N.E.2d at 310. Because the decedent gave nothing to his mother in his will, the mother did not have a present interest in the estate sufficient to authorize her to petition for removal of the executor. *See, e.g.,* Fowler v. Ball, 82 Ind. App. 167, 141 N.E. 64 (1923) (an heir at law given nothing in the testator's will does not have a sufficient interest to petition for removal).

⁹¹IND. CODE § 29-1-10-6(a) (1976).

In *In re Estate of Baird*, the court of appeals affirmed the trial court's conclusion that a nominated co-executor was unsuitable to serve.⁹² The trial court had determined that the named co-executor "was a legatee under the will, that he had a prospective claim against the estate, and that antagonism and animosity existed between" the two named co-executors.⁹³ The court of appeals held that neither the executor's interest as a beneficiary nor his interest as a potential claimant rendered him unsuitable to serve as executor. The court of appeals also held, however, that the hostility existing between the nominated co-executors was sufficient to render the executor unsuitable, since the trial court could have reasonably concluded that this hostility would interfere with the orderly and efficient administration of the estate.⁹⁴

5. *Purchase of Estate Property by the Personal Representative.*—In *Hensley v. Hensley*,⁹⁵ the testator's will provided, in the pertinent part, that the testator's son "will have first refusal of the farm known as 'the home place' at the estate appraisal."⁹⁶ The son, who was also the executor of the estate, had the property appraised and purchased it for the appraised value without giving notice to the heirs and devisees. The son notified the trial court of the sale and the trial court approved it, but when the residuary devisees challenged the sale on the grounds of lack of notice,⁹⁷ the trial court set it aside.

Indiana Code section 29-1-15-2 provides that a personal representative who acts under authority given in the will may proceed to sell property without first obtaining a court order and, consequently, without complying with the provisions of Indiana Code section 29-1-15-11 requiring prior notice to heirs and devisees.⁹⁸ The trial court concluded that the son had not acted pursuant to a power

⁹²408 N.E.2d at 1329. Unsuitability is a ground for finding that a personal representative does not qualify for appointment, IND. CODE § 29-1-10-1(b)(6) (1976), or should be removed, *id.* § 29-1-10-6.

⁹³408 N.E.2d at 1328.

⁹⁴*Id.* at 1329. The court, quoting *Comstock v. Bowles*, 295 Mass. 250, 260, 3 N.E.2d 817, 822-23 (1936), stated that unsuitability is "not restricted to instances of absolute unfitness but [includes] an unfitness arising out of the situation of the person in connection with the estate." 408 N.E.2d at 1328; *cf.* *Massey v. St. Joseph Bank & Trust Co.*, 411 N.E.2d 751, 758 (Ind. Ct. App. 1980) ("hostility between the trustee and the beneficiaries is not a per se ground for removal of the trustee").

⁹⁵413 N.E.2d 315 (Ind. Ct. App. 1980).

⁹⁶*Id.* at 316.

⁹⁷The devisees also alleged improper valuation, but there was no evidence indicating that the farm was improperly appraised. *Id.* at 318 n.1.

⁹⁸The executor acting under a power granted in the will need not comply with § 29-1-15-3 (court order) or § 29-1-15-11 (notice) of the Indiana Code. IND. CODE § 29-1-15-2 (1976).

granted in the will and, therefore, was not excused from complying with the notice requirements of the probate code. The trial court concluded that a first refusal sale requires a third party bid, which the son had not obtained. The court of appeals, however, found that the language regarding the appraisal was sufficient to allow the son to exercise his "first refusal" without a third party bid.⁹⁹ Thus, the court held that the son had specific authority in the will to purchase the estate property at its appraised value and was not required to comply with the notice provisions of the probate code.¹⁰⁰

The residuary devisees argued that "the sale of estate property by an executor to himself, as an individual, is prohibited under any circumstances by Indiana law."¹⁰¹ The devisees relied on *In re Estate of Garwood*,¹⁰² in which the Indiana Supreme Court held that a sale of estate property by an executor to himself will be set aside without a showing of fraud or unfairness, and in spite of a showing that the sale was in good faith or was beneficial to the estate.¹⁰³ In *Garwood*, however, the supreme court had intimated that the testator may empower an executor to purchase estate property,¹⁰⁴ and the *Hensley* court concluded that the testator's language regarding first refusal at the estate appraisal was clearly the sort of authority that the *Garwood* court had anticipated.¹⁰⁵

6. *The Dead Man's Statute*.—In *Summerlot v. Summerlot*,¹⁰⁶ the court of appeals held that the dead man's statute, Indiana Code section 34-1-14-7,¹⁰⁷ does not apply in a suit against a surviving tenant by the entireties to enforce a contract for sale of the entireties

⁹⁹413 N.E.2d at 317.

¹⁰⁰*Id.*

¹⁰¹*Id.* at 318.

¹⁰²400 N.E.2d 758 (Ind. 1980), noted in Falender, 1980 Survey, supra note 3, at 303-04.

¹⁰³400 N.E.2d at 764.

¹⁰⁴*Id.* at 767.

¹⁰⁵413 N.E.2d at 318.

¹⁰⁶408 N.E.2d 820 (Ind. Ct. App. 1980).

¹⁰⁷IND. CODE § 34-1-14-7 (1976) provides:

In all suits by or against heirs or devisees, founded on a contract with or demand against the ancestor, to obtain title to, or possession of property, real or personal, of, or in right of, such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matter which occurred prior to the death of the ancestor.

The court stated that the companion statute, Indiana Code section 34-1-14-6, which applies in all suits in which a personal representative is a party, is plainly intended "to protect the decedent's estate while it is represented by an executor or administrator, but unfortunately affords no protection thereafter if the executor or administrator assigns claims to an heir or legatee." 408 N.E.2d at 826. Indiana Code section 34-1-14-7 was "ostensibly enacted" to protect the estate in the event the executor or administrator had assigned claims to an heir or devisee. 408 N.E.2d at 826.

property allegedly entered into while both entireties owners were alive. The statute does not preclude the admission of testimony regarding conversations between the plaintiff and the deceased entireties owner, because neither the plaintiff nor the surviving entireties tenant is an "heir" within the sense that the term "heir" is used in the statute.¹⁰⁸ Furthermore, the statute is not intended to apply if the estate of a decedent is not affected by the outcome of the lawsuit.¹⁰⁹ A suit seeking to obtain title to or possession of the entireties property will not affect the estate of the decedent cotenant, because entireties property never becomes part of the deceased cotenant's estate.¹¹⁰

7. *Presumptions of Death.*—In *Roberts v. Wabash Life Insurance Co.*,¹¹¹ a case involving claims by life insurance beneficiaries for payment of policy proceeds, the court of appeals discussed the common-law presumption of death after a seven-year unexplained, continuous absence.¹¹² The court held that the presumption is a rebuttable presumption, which is "not evidence of the ultimate fact" of death, and which serves no purpose in the case once the opponent introduces rebuttal evidence.¹¹³ The court also held that Indiana Code section 29-2-7-1,¹¹⁴ which provides that the presumption of death of Indiana Code section 29-2-5-1¹¹⁵ after a five-year unexplain-

¹⁰⁸The surviving spouse is, of course, an heir of his or her deceased spouse, but the surviving spouse is not an heir as to the entireties property. Both tenants by the entireties own the whole estate during their lives, and the surviving entireties owner acquires nothing new by virtue of his survivorship. 408 N.E.2d at 825 (quoting *Spurgeon v. Olinger*, 64 Ind. App. 176, 115 N.E. 680 (1917)). Technically, then, the action to enforce the contract was not an action brought by or against an heir or devisee in respect of the property at issue in the lawsuit.

¹⁰⁹The court stated:

[T]he only purpose of the dead man's statutes is to preserve decedents' estates from spurious claims or defenses. If the *estate* of the decedent is not affected, either directly or indirectly, the statute is not intended to apply. It is elementary, of course, that entireties property does not become part of the decedent's estate.

408 N.E.2d at 827 (emphasis in original). See also, e.g., *Durham v. Shannon*, 116 Ind. 403, 19 N.E. 190 (1888); *Sloan v. Sloan*, 21 Ind. App. 315, 52 N.E. 413 (1898).

¹¹⁰408 N.E.2d at 827.

¹¹¹410 N.E.2d at 1377 (Ind. Ct. App. 1980).

¹¹²The court described the common-law presumption of death as follows: "When a person is inexplicably absent from home for a continuous period of seven years, fails to communicate with those persons who would be most likely to hear from him, and cannot be found despite diligent inquiry and search, that person is presumed to be dead." *Id.* at 1382 (citing *Equitable Life Assurance Society v. James*, 73 Ind. App. 186, 127 N.E. 11 (1920); *Metropolitan Life Insurance Co. v. Lyons*, 50 Ind. App. 534, 98 N.E. 824 (1912)).

¹¹³410 N.E.2d at 1383 (citing *Sumpter v. State*, 261 Ind. 471, 306 N.E.2d 95 (1974); *Kaiser v. Happel*, 219 Ind. 28, 36 N.E.2d 784 (1941)).

¹¹⁴IND. CODE § 29-2-7-1 (1976).

¹¹⁵*Id.* § 29-2-5-1.

ed, continuous absence relates back to the day of disappearance, "relates only to the settlement of estates of absentees and has no application independently in determining rights under insurance contracts."¹¹⁶

8. *Statutory Developments.*—The 1981 legislature has afforded a new method of establishing a custodianship for a minor.¹¹⁷ The Indiana Uniform Gift to Minors Act¹¹⁸ was amended by adding a new section,¹¹⁹ allowing a testator or settlor to devise or transfer property to a person designated in the will or trust as custodian for a minor¹²⁰ and allowing a personal representative or trustee to distribute, with court approval, a minor's property to a custodian if "the court finds that the distribution is in the best interest of the minor . . . [and] the applicable will, if any, or trust instrument authorizes such a transfer."¹²¹ The section describes the persons who may serve as custodian,¹²² the type of property that may be distributed to a custodian,¹²³ and the effect of such a devise or transfer to a custodian.¹²⁴ A testator or settlor who contemplates a devise or transfer of money, securities, an insurance policy, or an annuity contract to a minor should consider a will or trust provision either designating a custodian or authorizing a transfer to a custodian to avoid the more cumbersome guardianship proceedings and accountings. In fact, such a custodianship may be desirable in small estates in lieu of a testamentary trust for minor children.

The legislature also amended Indiana Code sections 6-4.1-8-4 and -4.5 to allow the transfer of money held in a joint checking account without the written consent of the county assessor or department of state revenue.¹²⁵ The person in possession of the account must, however, notify the department when the money is transferred to the

¹¹⁶410 N.E.2d at 1384.

¹¹⁷IND. CODE § 30-2-8-2.5 (Supp. 1981). Minor housekeeping amendments were made to Indiana Code sections 29-1-7.5-3 (reference to 2(b) changed to 2(c)); 29-1-17-3, -4 (reference to "widow's or family allowance" changed to "the allowance provided by IC 29-1-4-1"); 29-1-18-43 (reference to code sections clarified); 30-2-1.5-2 (minor clarification).

¹¹⁸IND. CODE §§ 30-2-8-1 to -10 (1976 & Supp. 1981).

¹¹⁹IND. CODE § 30-2-8-2.5 (Supp. 1981).

¹²⁰*Id.* § 30-2-8-2.5(a).

¹²¹*Id.* § 30-2-8-2.5(b).

¹²²*Id.* § 30-2-8-2.5(c) limits the persons who may serve as custodians to adult members of the minor's family, a guardian of the minor, or a trust company.

¹²³*Id.* § 30-2-8-2.5(d) limits the type of property that may be transferred to this custodianship to money, securities, life or endowment policies, or annuity contracts. The property is to be transferred or distributed to the custodian in the same manner as it is transferred to a custodian under *id.* § 30-2-8-2.

¹²⁴*Id.* § 30-2-8-2.5(e), (f).

¹²⁵*Id.* § 6-4.1-8-4. This follows last year's amendment of the same section, which allowed transfers of jointly owned personal property to a surviving spouse without the written consent of the department of revenue or county assessor.

surviving joint tenant.¹²⁶ Thus, institutions that offer checking accounts may allow immediate withdrawal of funds by a surviving joint tenant without any delay in arranging for an appointment with department of revenue officials. The amendment should obviate the need for a separate account in the joint owner's name to assure the availability of funds for the survivor immediately after the death of a joint checking account owner.

E. Trust Developments

1. *Lapse and Conditions of Survival.*—In *Hinds v. McNair*,¹²⁷ the court of appeals discussed, *inter alia*, the issue of lapse of a beneficial interest in a trust and the circumstances in which a condition of survival may be attached by implication to the trust beneficiary's interest. McNair and his wife created an oral irrevocable inter vivos trust in 1931, and this trust was recognized as existing and valid by the Indiana Supreme Court in 1955.¹²⁸ McNair was the sole trustee until his death in 1969, at which time the trust property was to be divided equally between his son and daughter.¹²⁹

McNair's daughter died in 1962, prior to the time for distribution of the trust corpus, and McNair's son argued that the daughter's interest in the trust property lapsed upon her death and passed by way of resulting trust to the settlor, McNair.¹³⁰ The court of appeals noted that a trust beneficiary's interest might lapse if the beneficiary predeceased the creation of the trust;¹³¹ however, in the

¹²⁶*Id.* § 6-4.1-6-4.5(d). Problems may arise over the definition of a checking account.

¹²⁷413 N.E.2d 586 (Ind. Ct. App. 1980).

¹²⁸*Hinds v. McNair*, 235 Ind. 34, 129 N.E.2d 553 (1955). The trust corpus was stock, and the trust's creation predated the enactment of Indiana Code section 30-4-2-1, which first established the requirement of a writing to create an enforceable trust of personal property. The terms of the oral trust were described by the settlor, McNair, when he testified in the prior action in response to questions apparently requiring him to "articulate 'each and every term' of the trust." 413 N.E.2d at 600 n.11. When the settlor articulated the terms of the trust, he did not mention a reserved power to revoke. *Id.* at 595. The *Hinds* court in the present action concluded that the presumption of irrevocability was not overcome by evidence that the settlor had reserved a power to revoke or modify. *Id.* at 596. Herein the settlor, McNair, Sr., is referred to as McNair, and the son, McNair, Jr., is referred to as the son.

¹²⁹The cosettlors were divorced in 1948, and the wife then relinquished all her interest in the stock forming the trust corpus. Thus, the time for division of the corpus was the time of death of McNair in 1969. 413 N.E.2d at 592.

¹³⁰*Id.* at 596. There was no gift over in the event of the death of the son or daughter. Thus, if one of their interests failed, that interest would return to the settlor by way of resulting trust. See note 149 *infra*.

¹³¹*Id.* at 597. The court noted that the RESTATEMENT (SECOND) OF TRUSTS § 112, Comment f, relied upon by the son, was inapplicable because the daughter survived the creation of the trust. 413 N.E.2d at 596-97. The RESTATEMENT indicates that:

A person who has died prior to the creation of a trust can not be a

Hinds case, the daughter was alive in 1931 when the trust was created, and her interest did not lapse upon her death in 1962. Instead, whatever interest the daughter owned at her death passed intact to her heirs.¹³²

The court's discussion of the lapse issue could have been clearer. The court's repeated statements emphasizing that the daughter's interest was vested might lead the casual reader to conclude that a crucial factor in the resolution of the lapse issue was the determination that the daughter's interest was vested as opposed to contingent.¹³³ Actually, the only relevant factor for lapse purposes was whether the daughter survived the creation of her beneficial interest.

The son also argued that the daughter's interest terminated on her death because it was subject to a condition that she survive until the time for distribution. Although there was no express condition of survival attached to the daughter's interest, the son argued that a condition of survival should be implied.¹³⁴ The court of appeals, relying extensively on treatise authority,¹³⁵ carefully and exhaustively listed the factors tending to establish a condition of survival and the factors tending to negate the existence of such a condition.¹³⁶ Regarding the application of these factors in the analysis of a

beneficiary of the trust. Thus, if property is transferred inter vivos in trust for a named person who is dead at the time of the transfer, no trust is created. In such a case the transferee ordinarily holds upon a resulting trust for the transferor. [I]f a testator devises property in trust for a person who predeceases him, the devise of the beneficial interest lapses, and the person named as trustee ordinarily holds the property upon a resulting trust for the estate of the testator.

¹³²RESTATEMENT (SECOND) OF TRUSTS § 112, Comment f (1959) (references omitted). 413 N.E.2d at 599. The heirs take subject to the same conditions to which the beneficiary's interest was subject. Of course, if the interest of the beneficiary was subject to a condition of survival to a certain time, the interest ceases if the beneficiary fails to survive to that time. See 2 A. SCOTT, THE LAW OF TRUSTS § 128.8 (3d ed. 1967), quoted in 413 N.E.2d at 600.

¹³³The daughter's future interest in the trust corpus was technically a vested interest because it was in favor of an ascertainable person and was not subject to a condition precedent. See generally *Heilman v. Heilman*, 129 Ind. 59, 28 N.E. 310 (1891).

¹³⁴The court had concluded that rules of construction applicable to written instruments could be applied, especially since the settlor's intent had been memorialized in testimony. 413 N.E.2d at 600 n.11.

¹³⁵RESTATEMENT OF PROPERTY §§ 249, 250, 252, 254 (1940); R. POWELL & P. ROHAN, 2A THE LAW OF REAL PROPERTY ¶¶ 327-331 (2d ed. 1977).

¹³⁶These positive factors include: (1) the description of the beneficiary by the use of a term connoting survival, such as "heirs" or "next of kin;" (2) a word or phrase describing the beneficiary as one who survives to a later date, such as "if living" or "surviving children;" (3) an alternative limitation using the word "or," such as "to the beneficiary or his children;" or (4) a supplanting limitation containing a gift to the beneficiary and a secondary gift separated by words such as "but if" or "in case." 413

particular limitation, the court quoted from the Powell treatise: "[T]he persuasive value of each [negative] factor increases as it joins forces with another. The [negative] factors themselves vary considerably in persuasive force. Furthermore, these factors are weakened and often overcome by the presence of the positive factors"¹³⁷ The court affirmed the trial court's conclusion that a condition of survival was not attached to the daughter's interest in the trust.¹³⁸

Drafters, of course, should expressly include a condition of survival if one is intended and carefully negate the condition if it is not intended. The factors enumerated in the *Hinds* case should be reviewed by all will and trust drafters, in order to avoid the inadvertent use of language that does not clearly express the settlor's or testator's intent regarding a requirement of survival.

2. *Breach of Trust and Removal of Trustees.*—In two cases decided during the survey period, the court of appeals affirmed the trial courts' conclusions regarding the occurrence of, and liability for, a breach of trust and regarding the sought-for removal of the trustees. The issues of breach and removal are joined in this survey discussion because the issues were joined in the cases. Breach of trust is ordinarily a sufficient justification for removal of a trustee.¹³⁹

In *Forth v. Forth*,¹⁴⁰ the court of appeals held that the trustees had not breached their duty of non-delegation when they gave proxies to vote shares of corporate stock forming the corpus of the trust.¹⁴¹ The cotrustees also did not breach the precatory trust

N.E.2d at 600-01. The negative factors include: "(1) the absence of both an alternative and a supplanting limitation; (2) identification of the intended takers; (3) language of present gift; and (4) the gift to the future interest holder himself of the *income* from the subject matter of the gift for the period during which possession is denied to him." 413 N.E.2d at 601 (quoting 2A R. POWELL, *supra* note 153, ¶ 331 at 780) (emphasis in original).

¹³⁷2A R. POWELL, *supra* note 153, ¶ 331 at 780.

¹³⁸413 N.E.2d at 600 n.11. Each one of the negative factors was present: there was no limiting language; there was no alternative limitation; the daughter was an identified taker; the settlor used language of present gift in describing his intent that at his death the children would get the stock; and the settlor made a discretionary gift of income to the daughter during the time when possession was denied her. *Id.* at 601.

¹³⁹IND. CODE § 30-4-3-22 (1976) provides that one of the remedies available for breach of trust is removal of the trustee.

¹⁴⁰409 N.E.2d 1107 (Ind. Ct. App. 1980).

¹⁴¹*Id.* at 1115 (citing IND. CODE § 30-4-3-3(a)(15) (1976), which gives specific statutory authority to vote securities by proxy and overrides the general duty of non-delegation stated in *id.* § 30-4-3-6(b)(11)).

The testator's three children and his wife were successor cotrustees of the trust. The action was brought to set aside an election of directors of the corporation which shares formed the corpus of the trust, in which election the complaining cotrustee and her husband were voted off the board, and to instruct the cotrustees to vote the

terms, which expressed the settlor's "desire that there be no change in management so long as the corporation is operated profitably,"¹⁴² when they failed to vote the shares to reelect the complaining cotrustee to the corporate board of directors.¹⁴³ Furthermore, the trial court did not abuse its discretion when it refused to award attorney fees to the unsuccessful complaining cotrustee.¹⁴⁴

In *Donahue v. Watson*,¹⁴⁵ the court of appeals held that the trustee's allocation of capital gains from the sale of trust property to the income beneficiaries was a breach of trust.¹⁴⁶ The trustee was liable to restore the trust principal to the trust,¹⁴⁷ and the trustee was also liable for attorney fees incurred by the beneficiaries in bringing the action for breach of trust.¹⁴⁸ The trustee's breach of trust was sufficient justification for her removal,¹⁴⁹ although her

shares in a manner which would insure the complaining cotrustee a seat on the board. The complaining cotrustee also sought to remove the cotrustees and to recover attorney fees. 409 N.E.2d at 110.

¹⁴²409 N.E.2d at 1113.

¹⁴³*Id.* at 1113-14, applying well-settled rules of construction.

¹⁴⁴*Id.* at 1116. The court offered the following analysis:

"The right to compensation at the cost of the estate should not depend upon the result of the litigation but rather upon the reasonable necessity for such litigation. And on that subject a court passing on the question of allowances ought to consider not merely the result, but whether the trustees are acting reasonably and in good faith, whether the issue on which they are divided is of little or momentous consequence to the estate or its beneficiaries, whether the facts are undisputed or are so controversial as to require an adversary proceeding for their determination, whether the legal questions are simple or complex, settled by precedents or open to serious debate, and any other matters that bear upon the reasonableness or the necessity for the litigation and the multiple employment of attorneys therein."

Id. (quoting *Zaring v. Zaring*, 219 Ind. 514, 523, 39 N.E.2d 734, 737 (1942)).

¹⁴⁵411 N.E.2d 741 (Ind. Ct. App. 1980).

¹⁴⁶*Id.* at 747-48. The trustee was one of the income beneficiaries. The court of appeals held that the following clause did not give the trustee unfettered discretion in the allocation of income and principal:

If there be any uncertainty or question as to whether any part of said trust estate be principal or income, or as to whether any cost, charge, expense, tax or assessment thereon should be charged against principal or income, said trustees shall have power, in their discretion, to settle and determine such question.

Id. at 747.

¹⁴⁷*Id.* at 748 nn.1 & 2.

¹⁴⁸*Donahue v. Watson*, 413 N.E.2d 974 (Ind. Ct. App. 1980) (citing IND. CODE §§ 30-4-3-11(b)(4), -22(a) (1976)).

¹⁴⁹411 N.E.2d at 747-48. The trustee argued that the trial court was not properly presented with the issue of her removal, because objections were not properly filed by the complainants. The court of appeals, citing Indiana Code section 30-4-3-29 and RESTATEMENT (SECOND) OF TRUSTS § 107, stated: "In any event, it is not clear that the

nonresidence alone would not have been sufficient.¹⁵⁰

3. *Constructive Trusts.*—In *Forth v. Forth*,¹⁵¹ the court of appeals held that an action to establish a constructive trust was barred by the six-year statute of limitations applicable in fraud actions.¹⁵² The court concluded that the limitations period began to run at the time the alleged fraud was perpetrated and that the discovery rule, tolling the statute until the fraud was or should have been discovered, was inapplicable because there was no allegation of active and intentional concealment.¹⁵³ Neither repudiation by the alleged trustee nor an unsuccessful demand by the beneficiary is necessary to commence the running of the statutory period.¹⁵⁴ The limitations period begins to run when the conduct giving rise to the constructive trust remedy occurs.¹⁵⁵

civil court could not remove the trustee *sua sponte* upon finding sufficient grounds." 411 N.E.2d at 747.

¹⁵⁰411 N.E.2d at 747.

¹⁵¹409 N.E.2d 641 (Ind. Ct. App. 1980).

¹⁵²IND. CODE § 34-1-2-1 (1976).

¹⁵³409 N.E.2d at 644-45.

¹⁵⁴*Id.* at 644. The court contrasted this rule with that of the time of commencement of a cause of action for breach of express trust, where an open repudiation by the trustee or an unsuccessful demand for trust property by the trust beneficiary is required to commence the running of the statute of limitations. *Id.*

¹⁵⁵*Id.*