In *Simms v. Bethlehem Steel Corp.*,[100] the plaintiff brought an action in the United States District Court for the Northern District of Indiana for the loss of her husband's consortium as a result of injuries he sustained while working at the defendant's plant. The defendant filed a motion to strike the plaintiff's allegation that she suffered mental anguish on the ground that mental anguish is not compensable unless it is incurred in conjunction with a physical injury. Judge Sharp granted the motion and held that the physical injury suffered by the plaintiff's husband was insufficient to meet the requirement that plaintiff also suffer actual physical injury.[101] The holding in *Simms* should alert counsel to exercise care with semantics in cases involving loss of consortium. For example, the damages awarded for loss of consortium are based upon intangible emotional injuries such as deprivation of society, affection, comfort and sexual relations. In effect, recovery is permitted for mental distress under the guise of ancient terminology.

XIV. Trusts and Decedents' Estates

*Melvin C. Poland**

A. Wills

1. Will Contest—The Limitation Period

During the current survey period the Indiana Court of Appeals was called upon to decide two cases involving the period of time in which an interested party may contest a will. In *Wilkinson v. Ritzman*,[1] plaintiff-appellants[2] filed a complaint contesting a will approximately six and one-half months after the original petition for

court was permitted to stand. A similar example is found in the *Moore* case and in Richards v. Scroggham, 307 N.E.2d 80 (Ind. Ct. App. 1974). In *Richards*, the defendant failed to object to an instruction which permitted an award of punitive damages for the tort of conversion. Although the award of punitive damages for conversion was previously held by the *Moore* court to be improper, the *Richards* court upheld the instruction on the basis of the defendant's failure to make a timely objection.

[100]40 Ind. Dec. 473 (N.D. Ind. 1973).

[101]*Id.* at 475-76.

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The author wishes to express his appreciation to James Greives and Randy Young for their assistance in the preparation of this discussion.

[1]301 N.E.2d 847 (Ind. Ct. App. 1973).

[2]Hereinafter referred to as appellants.

probate was filed and the will admitted to probate. Defendant-appellees[3] filed a motion to dismiss pursuant to Trial Rule 12(B)(6) alleging that the contest action was barred by a six month limitation period which commenced when the will was offered for probate.[4] The trial court sustained the motion to dismiss and the court of appeals affirmed.

Appellants argued the limitation period for contesting the will did not commence when the will was offered for probate because the petition for probate was defective. This argument was grounded on the fact that the original petition for probate did not list all the devisees and legatees, their ages, relationships and addresses as required by statute.[5] This deficiency was corrected by the filing of an amended petition less than two months after the will had been admitted to probate.[6] On oral argument, the appellants, relying on *Estate of Cameron v. Kuster*,[7] also contended that, if there is a

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[3]Hereinafter referred to as appellees.

[4]IND. CODE § 29-1-7-17 (Burns 1972) states: "Any interested person may contest the validity of any will or resist probate thereof, at anytime within six (6) months after the same has been offered for probate . . . ."

[5]*Id.* § 29-1-7-5. The original petition, filed September 3, 1970, and admitted to probate September 4, 1970, contained the names, addresses, and ages of only five of the twenty-three devisees and legatees. It then added just below these names: "plus all the legatees and devisees named in the will." 301 N.E.2d at 848. The statute provides that a petition for probate "*shall* state . . . the name, age and place of residence of each legatee and devisee, in the event the decedent left a will, *so far as such are known or can with reasonable diligence be ascertained by the personal representative* . . . ." IND. CODE § 29-1-7-5 (Burns 1972) (emphasis added).

[6]The amended petition, also referred to as an "Application for Letters Testamentary," was entered of record on October 20, 1970, and contained the names, addresses and ages of all twenty-three devisees and legatees.

[7]142 Ind. App. 645, 236 N.E.2d 626 (1968). In *Cameron*, the trial court, upon motion of the executor to correct the record, admitted an alleged codicil to probate under a *nunc pro tunc* order nearly two years after the original will was admitted to probate. The trial court's order book entry stated:

> That such written instrument purporting to be a codicil to such decedent's Last Will and Testament was duly executed in all respects according to law, has been duly proven as a codicil to the Last Will and Testament of decedent herein and is entitled to be admitted to probate as such in such County.

Id. at 646, 236 N.E.2d at 626-27.

The purported "codicil" was neither signed by the testatrix nor attested to by two witnesses as required by law; hence the finding that the codicil was executed in all respects according to law was unwarranted. The court noted that, although generally an attack on the validity of a will must be made within the period allowed by IND. CODE § 29-1-7-17 (Burns 1972), there is nevertheless a very limited exception to the rule, *i.e.*, when the instrument for which admission to probate is sought shows on its face that it was non-testa-

statutory defect in the probate proceedings, a will contest is proper at any time. In responding to this argument, the court stated that the *Cameron* court only recognized the right of collateral attack after the statutory time "when there was a statutory *defect* in the will" and not in the petition.[8]

In response to the appellants' principal argument, the court noted that no notice is required for admission of a will to probate.[9] It is only necessary that the court find the decedent to be dead and the will duly executed according to law.[10] A defect in the petition for admission will not invalidate the proceedings because the Probate Code specifically provides that "no defect in form or substance in any petition nor the absence of a petition, shall invalidate any proceeding."[11]

In *Brown v. Gardner*,[12] the plaintiff-appellant,[13] alleging generally the statutory grounds for contest,[14] instituted an action to contest the will of the decedent nearly fifteen months after it was admitted to probate. Defendant-appellees filed a motion to dismiss pursuant to Trial Rule 12(B)(6) asserting the action was barred by the six month limitation period for contest.[15] The trial court sustained the motion to dismiss and the court of appeals affirmed. It was the appellant's contention that, having alleged fraud in her

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mentary, because it was not duly executed, such order admitting the instrument to probate may be collaterally attacked at any time.

[8]301 N.E.2d at 849.

[9]IND. CODE § 29-1-7-4 (Burns 1972).

[10]*Id.* § 29-1-7-13.

[11]*Id.* § 29-1-1-9. It could be argued that the court might have based its decision on the lack of any defect in the original petition. The only claimed defect, as previously stated, was the failure to list the ages, addresses and relationships of all legatees and devisees. The Probate Code requires such listings only "so far as known or can with reasonable diligence be ascertained." *Id.* § 29-1-7-5. The court said the omitted data was unknown at the time of the first petition but was provided by amended petition. Thus it would appear that the original petition was also in compliance with the requirements of the statute.

[12]308 N.E.2d 424 (Ind. Ct. App. 1974).

[13]Hereinafter referred to as appellant.

[14]IND. CODE § 29-1-7-17 (Burns 1972) reads as follows:

> Any interested person may contest the validity of any will or resist the probate thereof, at any time within six (6) months after the same has been offered for probate, by filing in the court having jurisdiction of the probate of the decedent's will his allegations in writing verified by affidavit, setting forth the unsoundness of mind of the testator, the undue execution of the will, that the same was executed under duress, or was obtained by fraud, or any other valid objection to its validity or the probate thereof; and the executor and all other persons beneficially interested therein shall be made defendants thereto.

[15]*Id.*

complaint, she was not bound by the six month limitation period for three reasons: (1) Indiana Code section 29-1-1-21,[16] which permits the vacation of orders entered during the administration of an estate, extends the time for contesting a will, (2) under the doctrine of *Estate of Cameron v. Kuster*,[17] the order of the probate court was subject to collateral attack, and (3) equity would permit her belated attack.

Appellant's first argument was rejected. The court, after examining the relevant Code provisions,[18] concluded that to construe the general section relative to vacation and modification broadly enough to include will contests would be contrary to the statute's intended coverage and contrary to the Probate Code's general policy of expediting the administration of estates.[19] The court thus rejected a broad construction and held that the limitation period of the statute relating to will contests was controlling.

The appellant's second argument was the same as was made on oral argument in *Wilkinson*—that the contest was permitted under the doctrine of *Cameron*. The *Wilkinson* court held that *Cameron* allows a collateral attack after the time permitted by statute for contest only when a statutory defect appears on the face of the purported will. In the instant case it appeared from the pleadings that the will was regular on its face and executed in all respects according to law. Therefore, the allegations did not bring the case within the *Cameron* doctrine.

The gist of appellant's third argument was that an allegation of fraud, per se, avoids the statutory bar. At the outset of its opinion, the court noted that a will contest proceeding is a statutory action and generally only can be brought and successfully maintained within the time and upon the grounds prescribed by the statute.[20] However, the court also noted that an exception to this

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[16]*Id.* § 29-1-1-21 provides in part:

> For illegality, fraud or mistake, upon application filed within one (1) year after the discharge of the personal representative upon final settlement, the court may vacate or modify its orders, judgments and decrees or grant a rehearing therein.

[17]142 Ind. App. 645, 236 N.E.2d 626 (1968).

[18]IND. CODE §§ 29-1-1-21, -7-17 (Burns 1972).

[19]This conclusion was reached after an examination of the two Code provisions, *id.*, the statutes they replaced, and the relevant Commission comments. These indicated that the only change intended by the most recent amendments was that of reducing the limitation period in each statute.

[20]Evansville Ice & Cold-Storage Co. v. Winsor, 148 Ind. 682, 48 N.E. 592 (1897); Estate of Plummer v. Kaag, 141 Ind. App. 142, 219 N.E.2d 917 (1966). In *Plummer*, the court, after first noting that IND. CODE § 29-1-7-17 (Burns 1972) is the only statutory means of questioning an order of probate under our present code, stated:

> After a will has been probated in Indiana and thus judicially de-

rule was recognized in the case of *Forte v. White.*[21] In *Forte,* the plaintiff complained that through the active fraudulent misrepresentation of the defendants, he had been induced to refrain from filing objection to probate within the proper time. The court sustained this complaint.[22] The *Brown* court noted, however, that the exception is a narrow one, applicable only when the fraud is the "efficient cause for the failure to timely commence action, and the other elements entitling the party to equitable relief are present."[23] In *Brown,* the only fraud asserted was that one of the devisees named in the will was identified by a married name that she allegedly did not acquire until after the will had been executed. This allegation in no way indicated that the purported fraud was responsible for the delay in commencing the action and, therefore, the case was not within the *Forte* exception. The court further held that a defense based on the statute of limitations may properly be raised by a motion to dismiss under Trial Rule 12(B)(6).[24]

2. Will Construction

Contrary to the majority of jurisdictions,[25] the Indiana courts have consistently held that when language of survivorship is used by a decedent in the disposition of his property, it is presumed that such language is not intended to postpone vesting and means survivorship of the testator only—not survivorship to the day of distribution.[26] This result has been reached by applying certain well-

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> clared to be duly executed, only a will contest can present any question of the validity of the instrument or of its execution. Such contests are purely statutory; they can only be brought within the time and upon the grounds prescribed by statute.

141 Ind. App. at 152, 219 N.E.2d at 922. The *Plummer* court also noted that statutory will contests are all encompassing and include actions to set aside a will because it has been revoked, proceedings to have probate annulled with a later will admitted, and actions to substitute a non-probated will for one probated.

[21]54 Ind. App. 210, 101 N.E. 27 (1913).

[22]As the *Brown* court noted, the exception established in *Forte* was recognized by dicta in Wilkinson v. Ritzmann, 301 N.E.2d 847 (Ind. Ct. App. 1973), and Estate of Plummer v. Kaag, 141 Ind. App. 142, 219 N.E.2d 917 (1966).

[23]308 N.E.2d at 428.

[24]This follows the holding in Wilkinson v. Ritzmann, 301 N.E.2d 847 (Ind. Ct. App. 1973).

[25]2 L. Simes & C. Smith, The Law of Future Interests § 577, at 15-16 (2d ed. 1956).

[26]Burrell v. Jean, 196 Ind. 187, 146 N.E. 754 (1925); Alsman v. Walters, 184 Ind. 565, 106 N.E. 879 (1916); Aldred v. Sylvester, 184 Ind. 542, 111 N.E. 914 (1916); Busick v. Busick, 65 Ind. App. 655, 115 N.E. 1025 (1917); Smith v. Smith, 59 Ind. App. 169, 109 N.E. 60 (1915).

established rules of construction.[27] However, the presumption in favor of early vesting is a rebuttable presumption. Thus, if the testator by clear and unambiguous language shows an intention to postpone vesting, then it becomes not only unnecessary but improper to resort to rules of construction.[28]

In *Moorman v. Moorman*,[29] the Indiana Court of Appeals reversed the trial court and held that the language of survivorship found in decedent's will related to the death of the testator and not to the death of the life tenant. In paragraph five of his will, after giving his son a life estate in certain real property, the decedent gave "to all his [the son's] legitimate children *living at the time of his passing* the fee simple to said lands . . . or their legitimate descendants, share and share alike, in equal proportions and *subject to the life estate of John D. Moorman, Jr.* therein."[30] This giving of a life estate in the first part of the limitation, followed by a gift in remainder in fee simple to the legitimate children of the life tenant "living at the time of his passing," raised the question of when the testator intended the remainder interest to vest—at the death of the life tenant or of the testator. The court of appeals recognized that, had paragraph five contained only the language creating the life estate in the son, with the remainder to his surviving children, it would have indicated an intent on the part of the testator to make the remainder interest contingent on the survival of the life ten-

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[27]Although these rules have been stated in various ways in earlier cases, the rules of construction now generally alluded to are those set forth in Aldred v. Sylvester, 184 Ind. 542, 111 N.E. 914 (1916), as follows:

> (1) The law so favors the vesting of estates at the earliest opportunity and is so adverse to a postponement thereof that they will be deemed as vesting at the earliest possible period, in the absence of a *clear manifestation* of the contrary intention; (2) words of postponement are presumed to relate to the beginning of the enjoyment of the estate, rather than to its vesting; (3) words of survivorship are presumed to relate to the death of testator, rather than that of the first taker if they are fairly capable of such interpretation. . . .
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> It is also well settled by our decisions that courts will not construe a limitation into an executory devise when it can take effect as a remainder, nor a remainder to be contingent where it can be taken as vested.

Id. at 548-49, 111 N.E. at 916. The effect of applying these rules of construction is to hold that the survivorship provision relates to the death of the testator, *i.e.*, a substitutionary construction, rather than to hold that it relates to some later period of time such as death of the life tenant, *i.e.*, a contingent remainder construction.

[28]Aldred v. Sylvester, 184 Ind. 542, 111 N.E. 914 (1916). The rule was held applicable in the inter vivos transfer situation of Allen v. McKee, 128 Ind. App. 329, 148 N.E.2d 343 (1958).

[29]297 N.E.2d 836 (Ind. Ct. App. 1973).

[30]*Id.* at 837 (emphasis added).

ant.[31]. However, because the testator gave the remainder interest in *fee simple*, the court of appeals found the language making the remainder interest "subject to the life estate" inconsistent with postponing the vesting of the fee simple.[32] Having found the language ambiguous and without a clear manifestation of contrary intent, the court applied the rules of construction and concluded that *survivorship* related to the death of the testator and not to the death of the life tenant.

B. Trusts

In *First Federal Savings & Loan Association v. Baugh*,[33] the validity of a "Totten trust"[34] was expressly recognized for the first time in Indiana.[35] A "Totten trust" arises when a person deposits funds in a savings account in the name of the depositor "as trustee" for another person. It is presumed that the depositor intended to create a trust, "revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary."[36] The trust is absolute only as to the balance on hand at the death of the depositor.[37] In the *First Federal* case, two such accounts were opened at First Federal—one in the name of the depositor as trustee for a named son and the other in the name of the depositor as trustee for a named daughter. At the death of the depositor, his wife's

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[31]*Id.*

[32]*Id.* One may question whether the use of the words "fee simple" alone would not have been sufficient to make the devise ambiguous. In Alsman v. Walters, 184 Ind. 565, 567, 106 N.E. 879, 880 (1916), the testator bequeathed certain land to his son "during his natural life and after his death to his children surviving him in fee simple . . . ." In holding that the words "fee simple" were sufficient to create an ambiguity, the court said:

> Appellee's contention would appeal with much stronger force were the phrase "in fee simple" eliminated; in such case, the term "surviving him" might better denote an intent to limit the vesting of the absolute estate in those children only who might survive the first taker. However, considering the language used in its entirety, we are of the opinion that a clear intention to create such an estate as is contended for by appellee is not manifested, and therefore it is necessary to resort to established rules for the construction of ambiguous devises.

Id. at 567, 106 N.E. at 880-81.

[33]310 N.E.2d 101 (Ind. 1974).

[34]The "Totten trust" derived its name from the famous New York case, *In re* Totten, 179 N.Y. 112, 71 N.E. 748 (1904). It is also commonly referred to as a "tentative trust" or "savings bank trust."

[35]The court recognized that dicta in Tullis v. First Nat'l Bank, 60 Ind. 556 (1878), impliedly supported its conclusion in the instant case.

[36]*In re* Totten, 179 N.Y. 112, 125, 71 N.E. 748, 752 (1904).

[37]*Id.*

name was substituted as trustee on the accounts and new signature cards were issued specifically reserving to the wife the right to revoke the trusts. Thereafter the newly named trustee borrowed two separate sums of money from First Federal, each time executing forms purportedly transferring and assigning the one account as security for the loan. At the death of the depositor's wife, the personal representative of her estate initiated this action to recover the balances in the two accounts for her estate, naming as defendants First Federal, the two children named as beneficiaries of the accounts and another son of the depositor. In holding that the named beneficiaries were the only parties with an interest in the respective accounts as of the date of the depositor's death, the court applied the rule set forth in *In re Totten*[38] and stated that "a presumption arises that absolute trusts as to the balances in the accounts as of that date were created in favor of the respective beneficiaries . . . ."[39] The court felt that this conclusion was supported not only by the authorities cited,[40] but also by the statutory language of section 28-1-20-1(b) of the Indiana Code, which authorizes banks or trust companies, on the death of the trustee, to pay the amount of the deposit with interest thereon "to the person for whom the deposit was made."[41]

In an action by the plaintiff to establish a constructive trust on certain property held by the defendant, the Indiana Court of Appeals, in *Melloh v. Gladis*,[42] reversed a trial court decree which held that plaintiff was the beneficiary of a resulting trust. Granting a petition to transfer, the Indiana Supreme Court[43] held that,

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[38]179 N.Y. 112, 71 N.E. 748 (1904).

[39]310 N.E.2d at 104. The court further held that if a trust is created by deposits in the manner stated, it does not violate the general rule in Indiana that "use of the words 'trust' or 'trustee' in connection with deposits is not controlling" since "the facts merely create a presumption" of trust "which may be rebutted by a showing that the depositor did not intend a trust." *Id.*

[40]RESTATEMENT (SECOND) OF TRUSTS § 58 (1959); G. BOGERT, TRUSTS AND TRUSTEES § 47 (2d ed. 1965); 1 A. SCOTT, LAW OF TRUSTS §§ 58-58.6 (3d ed. 1967).

[41]IND. CODE § 28-1-20-1(b) (Burns 1973) provides in part:

> Whenever any deposit shall be made in any bank or trust company by any person which is in form in trust for another, and no other notice of the existence and terms of a valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the deposit or any part thereof, together with any interest thereon may be paid to the person for whom the deposit was made.

[42]301 N.E.2d 659 (Ind. Ct. App. 1973).

[43]Melloh v. Gladis, 309 N.E.2d 433 (Ind. 1974). The trial court first found a constructive trust, as the plaintiff had alleged, but changed its finding to read "resulting trust." 309 N.E.2d at 439. The basis of the court of appeals' finding that plaintiff had proved a resulting trust is not entirely clear. The court noted that while parol evidence is admissible to establish such a trust, it

although the pleadings and evidence would not support a finding of a *resulting trust*, they were sufficient to sustain a judgment in favor of a *constructive trust*.[44] In brief, the plaintiff alleged and the trial court found that a deed, absolute on its face, conveyed real property from plaintiff's and defendant's mother to the defendant. This conveyance was made so that the defendant (plaintiff's brother) could administer the family affairs during the mother's declining health. The conveyance was made on the defendant's promise that, upon his mother's death, he would pay to plaintiff "an amount equal to one-half of the value of the property entrusted to his care after the expenses" of his mother's illness and burial were deducted.[45] The trial court further found that, at the time the defendant made the promise to his mother, he had already formed the intent to keep all the property for his own use and benefit. There was also some indication that the court of appeals was in agreement with the trial court's finding of fact concerning defendant's promise to pay plaintiff one-half of the value of the property in order to obtain title and that, at the time of the promise, he had formed the intent to obtain title and keep the benefits for himself.[46] The supreme court held that on the basis of these findings the "imposition of a constructive trust is particularly appropriate."[47] The court further

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must be received with caution. The court then proceeded to apply this standard to appellate review, placing considerable weight on the conflicting testimony of plaintiff, defendant, and two witnesses. 301 N.E.2d at 662. If this was the basis for finding no resulting trust, the supreme court stated it was contrary to the ruling precedent of Friend v. Lafayette Joint Stock Land Bank, 213 Ind. 408, 13 N.E.2d 213 (1938), which held that, if there is any evidence which fairly tends to establish the facts found, the findings will not be disturbed.

The trial court also found that the promises of the defendant, and his intent to obtain title to the property and keep the benefits, constituted a fraud on the part of the defendant. The court of appeals held that this finding precluded a resulting trust because IND. CODE § 30-1-9-8 (Burns 1972) requires that the agreement giving rise to the resulting trust be free from fraudulent intent. 301 N.E.2d at 662. The supreme court held that the court of appeals erred in this conclusion. The supreme court said that it is necessary to read IND. CODE §§ 30-1-9-6, -7 and -8 (Burns 1972) together. By doing this, it becomes clear that the reference to "fraudulent intent" relative to the purchase money resulting trust in section 30-1-9-8 actually refers back to the presumption of fraudulent intent contained within section 30-1-9-7. This statute is designed to prevent fraud by the grantor or the beneficiary committed individually or in collusion with the grantee. A fraud perpetrated by the grantee to the detriment of the grantor and the beneficiary, the other parties to the agreement, is simply not the concern of the statute. 309 N.E.2d at 438.

[44]309 N.E.2d at 440.

[45]*Id.* at 435.

[46]*Id.* at 437.

[47]*Id.* at 439.

A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the

held that the label attached by the trial court, *i.e., a resulting trust,* should not be determinative. Both resulting and constructive trusts are creatures of equity; to treat this as a constructive trust as alleged in plaintiff's complaint would do more justice.[48]

One of the issues which the Indiana Supreme Court was called upon to decide in *Loeb v. Loeb*[49] was whether the defendant-husband's beneficial interest in a trust should have been included in the divorce action property settlement. The trial court awarded the plaintiff-appellant a divorce, custody of the minor children and certain property, excluding the defendant's interest in the trust. The court found the beneficial interest of the defendant to be a vested

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ground that he would be unjustly enriched if he were permitted to retain it. The duty to convey the property may arise because it was acquired through fraud, duress, undue influence or mistake, or through a breach of a fiduciary duty, or through the wrongful disposition of another's property. The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it.

5 A. SCOTT, LAW OF TRUSTS § 404.2 (3d ed. 1967). In Westphal v. Heckman, 185 Ind. 88, 113 N.E. 299 (1916), the court did not find a constructive trust, but made the following statements:

> A constructive trust arises in cases where the transaction involved is tainted by fraud, actual or constructive. In such cases, in order to prevent the wrongdoer from reaping a benefit from his fraud, a court of equity will construct a trust such as equity and good conscience requires in order to do justice to the parties affected by the fraudulent transaction. . . .
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> If the fraud is inherent in the transaction which results in the execution of the deed, such fraud renders the whole contract, including the deed, voidable. When fraud is shown in such a case, the court will not enforce the contract as made, but it will set aside the contract and deed when such a course will meet the ends of justice. If the ends of justice cannot be attained by setting aside the deed, a court of equity will suffer the title to rest in the fraudulent grantee as a trustee maleficio, and such a trust will be constructed by the court as will subserve the ends of justice and fair dealing. . . .
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> . . . .
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> The finding does not show that at the time the conveyence was made the grantee intended to obtain the title to the land by means of the promise, and then to hold it for his own use and benefit, and that he then had the formed intention of not carrying out his promise. Such facts, if found, would show a fraud inherent in the transaction which would render it voidable from its inception, and which would be sufficient to justify a court of equity in annulling the whole contract and in declaring a constructive trust.

Id. at 97, 113 N.E. at 302-03.

[48]There were other issues, not treated in this case survey, relative to the inadmissibility of evidence under IND. CODE § 34-1-14-7 (Burns 1973) and the admissibility of parol evidence to establish a constructive trust.

[49]301 N.E.2d 349 (Ind. 1973).

remainder subject to complete defeasance.[50] Recognizing that the wife's interest under a trust, when she is not a beneficiary, can be no greater than her husband's interest, the court concluded that the trial court correctly refused to include the property in the award, referring to it as a "remote interest in property," and one in which the defendant had "no present interest of possessory value."[51] The issue was one of first impression, and the court relied upon authority from without the state but cited no cases involving a vested remainder subject to complete defeasance. However, the court found a sufficient analogy in those cases in which the husband's beneficial interest was a mere expectancy or one subject to the complete and uncontrolled discretion of the trustee.[52] In each case, the court noted the wife would not be able to reach the beneficial interest to satisfy a claim for alimony and support unless and until the beneficiary had a right to the trust funds. In the opinion of the Indiana court, this should be true of one whose beneficial interest is a vested remainder subject to complete defeasance. It would appear that the court established as a test in such cases not whether the beneficiary has a beneficial interest which has a present value, but rather whether the beneficiary has a present right to beneficial enjoyment.[53]

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[50]In 1955, the defendant's mother created an inter vivos trust reserving unto herself the life income and providing that, on her death, the trust was to terminate with the principal and any undistributed income to be paid over and transferred to Barbara Loeb Alexander, Carol Loeb Wallach, and Edward S. Loeb, the defendant, in equal shares, subject to the following:

> In the event any of said principal beneficiaries does not survive the said Gertrude Loeb, then the share of such deceased principal beneficiary shall be paid over, assigned, transferred and delivered to the issue, if any, of such deceased principal beneficiary per stirpes; and in the event such deceased principal beneficiary does not leave issue him or her surviving, then such share shall go in equal portions to the remaining principal beneficiaries . . . .

Id. at 352.

[51]*Id.* at 353.

[52]Meeks v. Kirkland, 228 Ga. 607, 187 S.E.2d 296 (1972) (the husband's interest was a mere expectancy in his father's Georgia estate); *In re* Natts, 160 Kan. 377, 162 P.2d 82 (1945) (the interest of the husband was subject to the uncontrolled discretion of the trustee); Shelly v. Shelly, 223 Ore. 320, 354 P.2d 282 (1960) (the husband's right to corpus was subject to the absolute discretion of the trustee); Collins v. Collins, 239 S.C. 170, 122 S.E.2d 1 (1961) (the husband had no present interest); Storm v. Storm, 470 P.2d 367 (Wyo. 1970) (the husband's interest was an expectancy of inheriting a one-half interest in his father's ranch if he survived until the trust ended).

[53]After recognizing the wife's interest could never be greater than her beneficiary husband's interest, the court stated, "She cannot reach his beneficial interest to satisfy a claim for alimony or support unless and until he has rights to the trust funds." 301 N.E.2d at 353.