The most important scholarly publication of 1975 in the area of professional responsibility is *Lawyers' Ethics in an Adversary System* by Dean Monroe H. Freedman.[51] Dean Freedman analyzes a number of ethical problems, making vigorous arguments on behalf of the adversary system as the fairest and most efficient way of determining the truth. Further, he inveighs against the present Code restrictions on advertising, which he views as an interference with the duty of the profession to make legal counsel available, particularly to persons who may otherwise be ignorant of their rights.

The most important impact of this book will be to point the way for analysis of professional responsibility in terms of the functions of institutions and roles assigned to persons in those institutions. Freedman disagrees with the traditional approach to professional responsibility. He feels that the traditional approach has two characteristics: (1) It is committed in general terms to all that is good and true, and (2) it answers specific questions by uncritically relying on legalistic norms, regardless of the context in which the attorney acts or of the motives and consequences of the act.[52] In contrast, Freedman views ethics as part of a functional sociopolitical system concerned with the administration of justice in a free society.[53] Thus, his system attempts to deal with ethical problems in context, giving due regard to both the motives of the individual lawyer and the consequences of the lawyer's actions to society as a whole.

XIV. Property*

The Indiana courts decided two significant property cases during this survey period. In *Barnes v. Macbrown & Co.*,[1] the First District Court of Appeals refused to extend to subsequent vendees the implied warranty of habitability for purchasers of residential dwellings from the builder-vendor. This case is discussed in the section on contracts and commercial law.[2]

In *In re* Estate of Fanning,[3] the Third District Court of Appeals dealt with the ownership of certificates of deposit made out

[51] FREEDMAN, note 3 *supra*.

[52] *Id.* at 45.

[53] *Id.* at 46.

*Bruce A. Hewetson

[1] 323 N.E.2d 671 (Ind. Ct. App. 1975).

[2] *See* pp. 141-42 *supra*.

[3] 315 N.E.2d 718 (Ind. Ct. App. 1974). In a recent decision the Indiana Supreme Court unanimously affirmed the holding of the Third District Court

by the purchaser in the name of multiple parties. Wildus Fanning purchased two certificates of deposit—one for $10,000, the other for $5,000—both made out to her or her daughter Marcella Seavey "either of them with the right of survivorship and not as tenants in common." The mother kept the certificates in her safety deposit box; the daughter did not know of their existence until they were found after her mother's death, at which time she obtained possession of the certificates, received interest on them, cashed them, and retained the principal and interest. The mother had died intestate, and her estate sued the daughter for possession of the certificates.[4]

The trial court applied the so-called gift theory, adopted by the Third District Court of Appeals less than two years previously in *Zehr v. Daykin*.[5] The trial court apparently found that there had been no delivery to the daughter prior to the donor's death.[6] Since delivery is one of the elements necessary to establish a valid *inter vivos* gift,[7] the court awarded possession of the certificates to the estate.

Court of Appeals and adopted Judge Staton's majority opinion. *In re* Estate of Fanning, 333 N.E.2d 80 (Ind. 1975).

[4]The opinion does not say how the daughter obtained possession of the certificates. Probably, the bank where the mother's safety deposit box was located delivered the certificates to the daughter. A banking institution can pay any one of the joint parties and the receipt of the funds by the joint party releases the bank from any liability. IND. CODE § 28-1-20-1 (Burns 1973). The opinion is not clear, but the daughter possibly had obtained interest on and cashed the certificates before the estate sued her. If this was the situation, the estate was attacking the daughter's retention of the proceeds. If the courts had ultimately found for the estate, it probably could have attached the proceeds of the certificates on a constructive trust or equitable lien theory if it could trace them into the daughter's hands.

[5]288 N.E.2d 175 (Ind. Ct. App. 1972). In *Zehr* the decedent purchased certificates of deposit and had orally requested the bank to make them payable to himself and his son as joint tenants with right of survivorship and not as tenants in common. The decedent retained possession of the certificates during his lifetime and received all the interest from them. On his death the bank paid the certificates and the remaining interest to the son. In an action by the co-administrator for possession of the certificates and interest, the trial court held that the certificates of deposit were a part of the decedent-purchaser's estate because there was no delivery and therefore no valid *inter vivos* gift. The Third District Court of Appeals affirmed, Judge Staton dissenting. For an evaluation of *Zehr*, see 8 VAL. U.L. REV. 140 (1973).

[6]315 N.E.2d at 723.

[7]288 N.E.2d at 176. The *Zehr* court listed all the formal elements required for establishing a valid *inter vivos* gift:

> (a) [T]he donor must be competent to contract, (b) there must be freedom of will, (c) the gift must be completed and nothing left undone, (d) the property must be delivered by the donor and accepted by the donee and (e) the gift must go into immediate and absolute effect.

The appellate court reversed, holding that the daughter had contractual rights in the certificates as a third party donee-beneficiary. *Zehr* was expressly overruled.[8] The court explained its actions as follows:

> We have adopted the contract theory instead of the gift theory which was properly followed by the trial court in the light of Zehr v. Daykin. Only the gift theory was argued in Zehr v. Daykin,[9] and we responded accordingly. The elemental requirements of the gift theory tend to frustrate the intent of the donor. Some of the requirements—in particular the delivery requirement—defy the usual donor's inclination. Other jurisdictions have adopted the contract theory. We are impressed with and persuaded by the apparent success of the contract theory in these jurisdictions.[10]

In adopting the contract theory for certificates of deposit, the court first noted that Indiana has long recognized the "inherent contractual nature of certificates."[11] The court next quoted the rule for third party donee-beneficiary contracts given in the *Restatement of Contracts*[12] and then elaborated upon the rule. It pointed out that the donee-beneficiary does not have to know of a certificate's existence in order to have a contract right in the certificate.[13] However, "Indiana recognizes the right of a donor-

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The *Zehr* and *Fanning* courts both considered delivery to be the crucial element in establishing a gift in certificate of deposit cases under the gift theory.

[8]315 N.E.2d at 720, 723.

[9][Author's footnote]. In *Fanning* the daughter specifically argued the contract theory on appeal. *Id.* at 720.

[10]*Id.* at 723 (footnotes and citations omitted). The court named the following states as having adopted the contract theory: Iowa, Ohio, South Dakota, Tennessee, Texas, and Wisconsin.

[11]*Id.* at 720-21, *citing* Long v. Strauss, 107 Ind. 94, 6 N.E. 123 (1886); Mock v. Stultz, 97 Ind. App. 138, 179 N.E. 561 (1932); DeVay v. Dunlap, 7 Ind. App. 690, 35 N.E. 195 (1893); 8 VAL U.L. REV. 140, 144 n.30 (1973).

[12]

> "(1) Where performance of a promise in a contract will benefit a person other than a promissee, that person is . . .
>
> (a) A donee-beneficiary, if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promise in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed nor asserted to be due from the promise to the beneficiary;
>
> . . . .
>
> (2) Such a promise as is described . . . is a gift promise. . . ."

315 N.E.2d at 721, *quoting from* RESTATEMENT OF CONTRACTS § 133 (1932).

[13]315 N.E.2d at 721, *citing* RESTATEMENT OF CONTRACTS §§ 133 *et seq.* (1932). The specific citation would be to *id.* § 135, Comment (a).

creditor to rescind or modify a third party beneficiary contract";[14] the purchase of the certificate in the name of the purchaser and another constitutes a present gift of only a contingent contract right.[15]

The court concluded its analyses of third party donee-beneficiary contracts in the context of certificates of deposit by stating that the intent of the donor controls.[16] Furthermore, although several legitimate reasons can be imagined for a purchaser's putting a certificate in multiple names,[17] "without an expression to the contrary, the third party donee-beneficiary contract creates a rebuttable presumption that the usual rights incident to jointly owned property with the rights of survivorship was intended."[18] Seemingly, the purchaser's signature on a certificate made out to both the purchaser and the donee suffices to raise the presumption of the purchaser's donative intent. Thus, no other document, such as a deposit agreement with the bank, is needed to create the third party contract.[19] Since the presumption raised by the

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[14]315 N.E.2d at 721, *citing* 17 AM. JUR. 2D *Contracts* § 317 (1964). *Cf.* Zimmerman v. Zehender, 164 Ind. 466, 73 N.E. 920 (1905).

[15]315 N.E.2d at 721, *citing* Hibbard v. Hibbard, 118 Ind. App. 292, 73 N.E.2d 181 (1947).

[16]315 N.E.2d at 722, *citing* Voelkel v. Tohulka, 236 Ind. 588, 141 N.E.2d 344 (1957).

[17]The court gives three examples of other possible intentions of the donor: (1) Avoiding probate of his estate; (2) establishing a short term, revocable donee-beneficiary contract while the donor is ill or out of state; and (3) using the certificate as a security. 315 N.E.2d at 722. An analogous testamentary device recently recognized in Indiana is the so-called "Totten trust" which arises when a donor deposits funds in a savings account in the name of the donor as trustee for the donee-beneficiary. The trust is revocable at will by the donor but upon his death the balance of the account passes to the beneficiary. The trust is presumed from the intent of the donor. First Fed. Sav. & Loan Ass'n v. Baugh, 310 N.E.2d 101 (Ind. 1974), *discussed in* Poland, *Trusts and Decedents' Estates, 1974 Survey of Indiana Law*, 8 IND. L. REV. 278, 284 (1974).

[18]315 N.E.2d at 722. *Cf.* IND. CODE §§ 28-1-20-1, 28-4-4-2 (Burns 1973).

[19]This is the crucial factual difference in the results of *Zehr* and *Fanning*. The *Zehr* court stated that had the donor and donee both signed some type of agreement with the bank, the court would have awarded the certificate to the donee. Although the court stated that where the parties signed these agreements the contract theory would control, it seems rather to be engrafting an exception onto the gift theory; where these writings are present, delivery is not necessary because the writings constitute "conclusive proof of a gift." 288 N.E.2d at 177. In dissent, Judge Staton stated that "the signing of signature cards or other standard forms is at best an artificial distinction. It should not be used to thwart the clear, obvious, and unequivocal intent of the donor." 288 N.E.2d at 177 (Staton, J., dissenting). However, Judge Staton seemed to be relying upon the gift theory.

Although he also adopted the contract theory, Judge Staton carried into the majority opinion he wrote in *Fanning* the same idea of clearly expressed

written document is rebuttable, by implication, the party opposing the donee's right to recover may use parol evidence to show that the purchaser did not intend to give the other party a joint tenancy with rights of survivorship in the certificate. The opposing party also carries the burden of proof.[20] Once the purchaser's donative intent is established, the third party beneficiary contract can be varied only by a showing of fraud, undue influence, duress, or mistake. The opposing party also has the burden of proof in establishing any of these defenses, and he may use parol evidence.[21]

Applying these rules to the stipulated facts, the *Fanning* court found that the daughter was entitled to possession of the certificates. Her lack of knowledge of the existence of the certificates could not be a bar. Most importantly, the court found that the mother clearly intended that the daughter receive the certificates upon the mother's death.[22] Therefore, the daughter's contingent contract right in the certificates vested upon her mother's death when the daughter accepted these rights.[23] The estate did not establish one of the defenses which could have divested the daughter of possession of the certificates.

A problem with the contract theory not discussed in *Fanning* concerns the rights of a donee-beneficiary when the beneficiary becomes aware of the certificates before the donor's death. Under the contract theory put forward in *Fanning*, the donee has no right in the certificate until the donor's death. Situations may arise, however, where the donee acts in reliance on the certificates and thus may be held to have caused an enforceable contract right to

intent that he emphasized in his *Zehr* dissent. 315 N.E.2d at 722-23. Chief Judge Hoffman, who wrote the majority opinion in *Zehr*, dissented in *Fanning* partly on his acceptance of the reasoning in *Zehr*. *Id.* at 724 (Hoffman, C.J., dissenting). The donor's intent was not specifically listed by the majority in *Zehr* as one of the formal elements under the gift theory, but it is beyond dispute that no gift is made unless the donor intends one. Thus, a common element in both the gift and the contract theories is the donor's intent. The specific elements of both theories are designed to assure that the donor's intent is carried out. The gift theory relies on formalities to accomplish this purpose; the contract theory gives the court more discretion. The problem for the appellate courts is to find the set of rules best designed to effectuate the donor's intent.

[20]315 N.E.2d at 722.

[21]*Id.* at 722 & n.5.

[22]*Id.* at 722-23.

[23]*Id.* at 722. The court does not state whether the vesting of the contract rights after the mother's death was automatic or whether the daughter's accepting possession of the certificates or asserting ownership rights in the certificates by receiving interest on them and cashing them constituted acceptance of the contract rights. Acceptance will be presumed if the contract is beneficial to the donee. Copeland v. Summers, 138 Ind. 219, 35 N.E. 514 (1893); Waterman v. Morgan, 114 Ind. 237, 16 N.E. 590 (1887).

develop.[24] While Indiana courts have decided that certificates of deposit made out by the purchaser in multiple names create a contingent contract right in the donee that vests upon the death of the donor, it is altogether unclear whether they will hold that the vesting can be triggered by other occurrences.

XV. The Real Estate Settlement Procedures Act of 1974

*Sheila Suess**

The Real Estate Settlement Procedures Act of 1974[1] was intended to correct what Congress saw as "abusive practices" within the "real estate settlement process."[2] The stated purposes

[24]Blackard v. Monarch's Mfrs. & Distribs., Inc., 131 Ind. App. 514, 169 N.E.2d 735 (1960); RESTATEMENT OF CONTRACTS § 143(a) (1932). The *Blackard* court stated the rule as follows:

> It is a general rule that where a contract for the benefit of a third person has been accepted or acted upon, it cannot be rescinded by the parties without the consent of the third person.

131 Ind. App. at 522, 169 N.E.2d at 739. The *Restatement of Contracts* section 143(a) states the rule as follows:

> A discharge of the promisor by the promisee in a contract or a variation thereof by them is effective against a creditor beneficiary if,
>
> (a) the creditor beneficiary does not bring suit upon the promise or otherwise materially change his position in reliance thereon before he knows of the discharge or variation . . . .

*Member of the Indiana Bar. B.S., Indiana University, 1964; J.D., Indiana University Indianapolis Law School, 1973.

[1]12 U.S.C.A. §§ 2601-16 (Supp. 1, 1975) [hereinafter referred to as the Act].

[2]*Id.* § 2601. The 1975 Indiana General Assembly, perceiving some of the same problems, amended the Indiana Uniform Consumer Credit Code. IND. CODE §§ 24-4.5-2-101 to -6-203 (Burns 1974). The amendment provides that an additional charge may be contracted for in connection with a consumer loan

> (d) with respect to a debt secured by an interest in land, the following closing costs, if they are bona fide, reasonable in amount, and not for the purpose of circumvention or evasion of this article:
>
> (i) fees or premiums for title examination, abstract of title, title insurance, surveys, or similar purposes;
>
> (ii) fees for preparation of a deed, settlement statement or other documents, if not paid to the lender or a person related to the lender;
>
> (iii) escrows for future payments of taxes, including assessments for improvements, insurance, and water, sewer and land rents;
>
> (iv) fees for notarizing deeds and other documents, if not paid to the lender or a person related to the lender; and