

## XVIII. Trusts and Decedents' Estates

*Debra A. Falender\**

During the survey period, several interesting developments occurred in the areas of trusts, wills, intestate succession, guardianships, and fiduciary duties. In addition to the principal cases reviewed in this Survey, Indiana courts discussed missing heirs,<sup>1</sup> claims against decedents' estates,<sup>2</sup> and constructive trusts<sup>3</sup> and the legislature made several minor changes in the Probate Code<sup>4</sup> and Trust Code.<sup>5</sup>

### A. Trusts

The most significant Indiana case involving trusts and decedents' estates decided during the survey period was *Leazenby v. Clinton County Bank & Trust Co.*<sup>6</sup> In 1951, Cloyd and Elsie Leazenby were married; it was the second marriage for each of

---

\*Assistant Professor of Law, Indiana University School of Law—Indianapolis. A.B., Mount Holyoke College, 1970; J.D., Indiana University School of Law—Indianapolis, 1975.

<sup>1</sup>*In re Estate of Jaques*, 354 N.E.2d 283 (Ind. Ct. App. 1976) (heir could seek modification of a court order decreeing him a missing heir, pursuant to IND. CODE § 29-1-17-12(b) (1976), on application filed, as provided in *id.* § 29-1-1-21, within one year after discharge of personal representative on final settlement).

<sup>2</sup>*Paidle v. Hestad*, 348 N.E.2d 678 (Ind. Ct. App. 1976) (right of a tenant in common to recover contribution from other cotenants is an equitable lien on other cotenants' shares until all the equities of the cotenants are adjusted, and failure to file a claim against a deceased cotenant's estate does not bar enforcement of the lien, under IND. CODE § 29-1-14-1(e) (1976), upon subsequent partition).

<sup>3</sup>*Hall v. Indiana Dep't of State Revenue*, 351 N.E.2d 35 (Ind. Ct. App. 1976) (because of confidential attorney-client relationship at time of transfer of property from client to attorney, burden of proof is on attorney to show fairness of the transaction and absence of undue influence in a subsequent action by client to impose a constructive trust).

<sup>4</sup>Obsolete language regarding homestead, widow's, and family allowance was deleted from IND. CODE § 29-1-3-7 (1976). Death benefits payable under insurance policies are now included as obligations payable under the small estates procedure. *Id.* § 29-1-8-1(c) (1977). Once a petition for unsupervised administration is granted, the personal representative's authority under that order is not open to collateral attack on grounds other than the issuing court's lack of jurisdiction. *Id.* § 29-1-7.5-2(b). The new Probate Code sections clarify the duties and liabilities of persons who assist a personal representative or deal with him for value. *Id.* §§ 29-1-10-12.5, 29-1-17-10(c).

<sup>5</sup>IND. CODE § 30-4-3-3(a)(5) (1976) was amended to allow trustees to purchase and sell stock options. *Id.* § 30-4-3-31 was amended to authorize court modification of charitable remainder trusts created after July 31, 1969, and before January 1, 1978, to conform to Internal Revenue Code provisions.

<sup>6</sup>355 N.E.2d 861 (Ind. Ct. App. 1976).

them. In 1969, Elsie executed a revocable inter vivos trust agreement in which the Clinton County Bank, as trustee, was to pay the income to Elsie for life with power to expend income and corpus, in its sole discretion, for Elsie's "care, use, maintenance, and/or benefit."<sup>7</sup> The remainder beneficiaries were Elsie's two daughters, a granddaughter, and Cloyd, who was given the right to reside in Elsie's home for six months after her death. In addition to Elsie's reserved interest in income and corpus, and her right to revoke, alter, or amend the trust, she also reserved some power to control the actions of the trustee. The trust provided: "It is the intent of the parties hereto that this trust be run as a convenience for the Settlor, and that the Trustee, in the absence of directions from Settlor, may exercise the broad discretion given it herein."<sup>8</sup>

Eventually all of Elsie's property was placed in the trust. After Elsie's death,<sup>9</sup> Cloyd argued that the trust was "colorable and illusory and a fraud upon him because it defeated his statutory right to share in his spouse's estate."<sup>10</sup> The Indiana Court of Appeals held, without qualification, that the surviving spouse has no right to reach the assets of a valid inter vivos trust to satisfy his or her elective share of the decedent's estate. The *Leazenby* court rejected the illusory transfer test<sup>11</sup> and the "fraud on the marital rights" test,<sup>12</sup>

---

<sup>7</sup>*Id.* at 862.

<sup>8</sup>*Id.*

<sup>9</sup>Upon Cloyd's petition for appointment of a personal representative and for the issuance of letters testamentary for Elsie's estate, the court appointed the Clinton County Bank as executor. Cloyd's arguments were made in objection to a petition by the bank, as executor, to rescind the order of appointment because there was no probate estate (all of Elsie's assets were in the trust) and no need for an executor. *Id.* at 862-63.

<sup>10</sup>*Id.* at 863. Elsie's will made no provision for Cloyd. As a second childless surviving spouse, Cloyd could elect to take against the will one-third of Elsie's net personal estate and a life estate in one-third of her land. IND. CODE § 29-1-3-1(a) (1976). However, unless the assets transferred to the trust in Elsie's lifetime could somehow be considered part of Elsie's estate, Cloyd's election consisted of the right to take one-third of nothing.

<sup>11</sup>In some states, an otherwise valid trust may be partially invalid as against the surviving spouse of the settlor if the settlor reserved so much dominion and control over the trust as to render the trust illusory. *E.g.*, *Montgomery v. Michaels*, 54 Ill. 2d 532, 301 N.E.2d 465 (1973); *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937) (changed by statute). The *Leazenby* court decided that this test is unsatisfactory because of vagueness and uncertainty as to the degree of dominion and control sufficient to render the trust illusory. 355 N.E.2d at 864.

<sup>12</sup>A few courts will set aside an inter vivos transfer if made with intent to defeat the surviving spouse's rights. *E.g.*, *Wanstrath v. Kappel*, 356 Mo. 210, 201 S.W.2d 327 (1947). See also *Stroup v. Stroup*, 140 Ind. 179, 39 N.E. 864 (1895) (fraud on marital rights discussed, but trust otherwise invalid because trustee possessed only naked or nominal title, which did not impair full ownership rights of settlor-husband). The *Leazenby* court reasoned that if a surviving spouse had no right or interest in the pro-

both of which have been used by courts to partially invalidate otherwise valid inter vivos trusts in favor of the surviving spouse's elective share.<sup>13</sup> After *Leazenby*, it seems that in Indiana no special test will be applied to subject a valid trust to a surviving spouse's elective claim against the will of the deceased settlor.

In affirming the trial court's decision upholding the validity of Elsie's trust, the court of appeals reviewed the trust in light of the following circumstances, which could have rendered it invalid. The court noted that the trustee possessed more than a nominal title without powers or duties related to the administration of the trust.<sup>14</sup> The trustee was not merely an agent of the settlor.<sup>15</sup> The settlor intended to create vested interests in the beneficiaries when the property was placed in the trust.<sup>16</sup> Finally, there was no undue in-

---

property of the deceased spouse during the deceased spouse's lifetime, a valid inter vivos trust agreement could not be fraudulent as to the survivor. 355 N.E.2d at 865. However, it should be noted that Cloyd and Elsie kept their property separate during the marriage, and Cloyd presumably was aware of the existence of the trust. *Id.* at 861-62, 866. If these circumstances do not exist in a subsequent case which seeks to invalidate a trust, *Leazenby* might be distinguished.

<sup>13</sup>Other courts have examined all aspects of the inter vivos transaction, including its fairness in light of the size of decedent's estate and in light of decedent's responsibilities to the surviving spouse. *E.g.*, *Whittington v. Whittington*, 205 Md. 1, 106 A.2d 72 (1954). This all-inclusive test is as objectionable in its uncertainty as the illusory transfer test, discussed in note 11 *supra*, but it does afford protection to a surviving spouse in need.

Statutes in some jurisdictions have afforded partial resolution of the conflict between the policy of protecting the surviving spouse from disinheritance and the policy of allowing free alienation of property. In New York, under certain circumstances, a revocable trust can be reached by the surviving spouse to satisfy his or her elective share. N.Y. EST., POWERS & TRUSTS LAW § 5-1.1 (McKinney 1967). Section 2-202 of the Uniform Probate Code adopts the concept of an "augmented estate" for the purpose of computing the surviving spouse's elective share. The value of property gratuitously conveyed by the deceased spouse in his or her lifetime without the consent of the surviving spouse is included in the "augmented estate," and the value of property acquired by the surviving spouse from the decedent is then deducted. The surviving spouse is entitled to elect to take one-third of the "augmented estate." UNIFORM PROBATE CODE § 2-201.

<sup>14</sup>355 N.E.2d at 864. If the trustee has no powers or duties, title vests directly in the beneficiary. IND. CODE § 30-4-2-9 (1976). One exception is the so-called Illinois Land Trust. *Id.* § 30-4-2-13. Elsie's trustee was vested with broad discretionary powers and duties.

<sup>15</sup>355 N.E.2d at 864. The distinction between a trustee and an agent is found in RESTATEMENT (SECOND) OF TRUSTS § 8 (1959). A right to income for life, the reserved power to revoke or modify, and the power to control the trustee in administration does not render the trust a mere agency. *Id.* § 57. Elsie appeared to reserve to herself some control over the trustee's exercise of its powers. *See* text accompanying note 8 *supra*. However, the court felt that Elsie's failure to exercise her power to direct the trustee evidenced her intention that the trustee was not to act as her agent. 355 N.E.2d at 866.

<sup>16</sup>"Where no interest in the trust property is created in a beneficiary other than the settlor before the death of the settlor, the disposition is testamentary and is in-

fluence, duress, mistake, or a tendency to deceive surrounding the transfer of the settlor's property into trust.<sup>17</sup>

### B. Wills

In *Haverstick v. Banet*,<sup>18</sup> decedent's heirs attempted to waive the decedent's physician-patient privilege in an effort to invalidate the decedent's will. The Indiana Court of Appeals rather reluctantly followed Indiana precedent in affirming the trial court's decision to disallow the physician's testimony at trial. This precedent allowed only the personal representative of the decedent to waive the physician-patient privilege,<sup>19</sup> and then only when seeking to protect or conserve the interests of the estate<sup>20</sup> or when seeking to uphold the validity of the decedent's will.<sup>21</sup> Clearly, the Indiana view did not always allow the presentation of all the relevant facts in a will contest.

In a decision rendered after the end of the survey period, the Indiana Supreme Court overruled this precedent and adopted the majority rule, which permits the heirs of the deceased patient, as well as the personal representative, to waive the physician-patient privilege in an action to contest the will.<sup>22</sup> In almost every other jurisdiction, by case law or by statute, the privilege may be waived not only by decedent's personal representative, but also by decedent's heirs, next of kin, or legatees. Because all parties in a will contest claim under, and not adversely to, the decedent, and

---

valid unless the requirements of the Statute of Wills are complied with." RESTATEMENT (SECOND) OF TRUSTS § 56, at 145 (1959). Settlor's reservation of a life interest and a power to revoke and a power to control the trustee as to administration does not render the trust testamentary. *Id.* § 57. Recall the extensive control that may be reserved in a Totten trust, which is not testamentary. *Id.* § 58.

<sup>17</sup>355 N.E.2d at 865. Because the trust paid for Elsie's medical bills and nursing home care, Cloyd must have been aware of the trust. There was no evidence that Cloyd "did not know and fully approve of the trust arrangement." *Id.* at 866.

<sup>18</sup>349 N.E.2d 282 (Ind. Ct. App. 1976), *rev'd and remanded*, 370 N.E.2d 341 (Ind. 1977).

<sup>19</sup>*See, e.g.*, *Towles v. McCurdy*, 163 Ind. 12, 71 N.E. 129 (1904) (heirs seeking to invalidate decedent's will may not waive the privilege over objection of other heirs and devisees); *Gurley v. Park*, 135 Ind. 440, 35 N.E. 279 (1893) (only the patient or, in event of his death, his legal representative may waive the physician-patient privilege); *Morris v. Morris*, 119 Ind. 341, 21 N.E. 918 (1889) (in a will contest, only the legal representative of the patient seeking to maintain the will may waive the physician-patient privilege). *Cf.* *Stayner v. Nye*, 227 Ind. 231, 85 N.E.2d 496 (1949) (heirs and personal representative may jointly waive the privilege in an action against a third party transferee to set aside a fraudulent deed).

<sup>20</sup>*Scott v. Smith*, 171 Ind. 453, 85 N.E. 774 (1908).

<sup>21</sup>*Heaston v. Kreig*, 167 Ind. 101, 77 N.E. 805 (1906); *Morris v. Morris*, 119 Ind. 341, 21 N.E. 918 (1889).

<sup>22</sup>*Haverstick v. Banet*, 370 N.E.2d 341 (Ind. 1977).

since the decedent's interests are furthered by the ascertainment of the truth as to the validity of his will, the better rule allows either the executor or the heirs or devisees to waive the privilege.<sup>23</sup>

In *Flagle v. Martinelli*,<sup>24</sup> Flagle unsuccessfully argued that an improperly executed will, though not admissible to probate, so substantially complied with the statutory execution formalities<sup>25</sup> as to be effective to revoke a prior will. Although Indiana courts have upheld wills in spite of slight irregularities in form,<sup>26</sup> the execution of the will in *Flagle* did not even approach substantial compliance with the statutory requirements. The will was signed by the testatrix outside the presence of the witnesses, and the witnesses did not sign in the presence of each other.<sup>27</sup> Furthermore, if Flagle's argument had been upheld, the effect would have been a revocation of the prior will in favor of intestacy. The doctrine of dependent relative revocation presumes that the testator's intent to revoke a prior will is dependent on the validity of a new will.<sup>28</sup>

### C. Intestate Succession

A recent decision of the United States Supreme Court calls into question the constitutionality of Indiana's statutory provision regard-

---

<sup>23</sup>See MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 102 (2d ed. E. Cleary 1972). Decedent's estate "can only be protected by establishing or defeating the [will] as the truth so ascertained may require." *Winters v. Winters*, 102 Iowa 53, 59, 71 N.W. 184, 185 (1897). For a discussion of the various jurisdictional holdings, see Annot., 97 A.L.R.2d 393 (1964).

<sup>24</sup>360 N.E.2d 1269 (Ind. Ct. App. 1977).

<sup>25</sup>IND. CODE § 29-1-5-3 (1976). By statute, a will may be revoked only by physical act or by a writing executed with the same formalities required for the execution of wills. *Id.* § 29-1-5-6.

<sup>26</sup>See, e.g., *Herbert v. Berrier*, 81 Ind. 1 (1881) (testator's signature affixed by one of subscribing witnesses at his direction); *Bundy v. McKnight*, 48 Ind. 502 (1874) (request to witnesses need not be directly from testator); *Thrift Trust Co. v. White*, 90 Ind. App. 116, 167 N.E. 141 (1929) (handwritten superscription by testatrix declaring the document to be "the will of Belle Stockman" satisfied statutory requirement that the will be signed by testatrix).

<sup>27</sup>The court noted that another problem with the will was the fact that one of the witnesses was a primary legatee and was therefore incapacitated under IND. CODE § 29-1-5-2 (1976). However, the interest of a witness will not necessarily destroy the validity of the will. If the will cannot be proved without the testimony of the interested witness or proof of his signature, the will is void as to him and he will be compelled to testify as if no interest passed to him. *Id.* § 29-1-5-2(b).

<sup>28</sup>See *Roberts v. Fisher*, 230 Ind. 667, 105 N.E.2d 595 (1952).

In another revocation-of-wills case decided during the survey period, *In re Estate of Miller*, 359 N.E.2d 270 (Ind. Ct. App. 1977), the court of appeals decided that evidence that the testator was placed in a nursing home approximately six months after the execution of his will until his death was not sufficient to rebut the presumption of revocation that arises when an executed copy of the will is traced to testator's possession and cannot be found after his death.

ing inheritance rights of illegitimate children.<sup>29</sup> In *Trimble v. Gordon*,<sup>30</sup> the Supreme Court concluded that an Illinois intestate succession statute violated the equal protection clause of the fourteenth amendment by invidiously discriminating against illegitimate children. The Illinois statute provided that an illegitimate child is the heir of his or her father only if the parents intermarry and the father acknowledges the child as his own.<sup>31</sup> The Illinois Supreme Court had found that the statute was justified by the "state interests in encouraging family relationships and in establishing an accurate and efficient method of disposing of property at death."<sup>32</sup>

The United States Supreme Court did not deny the appropriateness of the state's interest in promoting the family unit but found no rational relationship between the statute and the stated purpose.<sup>33</sup> According to the Court, imposing sanctions on children born of illegitimate relationships is an "ineffectual—as well as an unjust—way"<sup>34</sup> of influencing the conduct of the parents. The Court was more impressed with the state's interest in "establishing an accurate and efficient method of disposing of property at death."<sup>35</sup> The Court stated, "The more serious problems of proving paternity [and the related danger of spurious claims] might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally."<sup>36</sup> The constitutional flaw in the Illinois statute, however, was its exclusion of some significant categories of illegitimate children whose paternal inheritance rights could be recognized without jeopardizing the state's interest in efficient and accurate disposition of property. The statute was not "carefully tuned to alternative considerations."<sup>37</sup>

In *Trimble*, the facts illustrated the constitutional infirmity. The Circuit Court of Cook County, Illinois, prior to decedent's death, had entered a paternity order finding him to be the child's father and

<sup>29</sup>IND. CODE § 29-1-2-7 (1976).

<sup>30</sup>430 U.S. 762 (1977).

<sup>31</sup>ILL. REV. STAT., ch. 3, § 12 (1973) (repealed 1976) (recodified in part at *id.* § 2-2 (1976)).

<sup>32</sup>430 U.S. at 766 (construing *In re Estate of Karas*, 61 Ill. 2d 40, N.E.2d 234 (1975)).

<sup>33</sup>The Supreme Court rejected the argument that statutory classifications based on illegitimacy are suspect and trigger strictest scrutiny of the statutory justifications. 430 U.S. at 767. However, the scrutiny "is not a toothless one." *Id.* (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)).

<sup>34</sup>430 U.S. at 770 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

<sup>35</sup>*Id.* at 766.

<sup>36</sup>*Id.* at 770.

<sup>37</sup>*Id.* at 772 (quoting *Mathews v. Lucas*, 427 U.S. 495, 513 (1976), wherein the careful attunement test was first announced).

ordering him to make weekly support payments. The decedent had supported the child in accordance with the court order and openly acknowledged her as his own. If the statute were "carefully tuned to alternative considerations," the Court reasoned, the adjudication of paternity "should be equally sufficient to establish [the illegitimate's] right to claim a child's share of [the decedent's] estate, for the State's interest in the accurate and efficient disposition of property at death would not be compromised in any way by allowing her claim in these circumstances."<sup>38</sup>

The Indiana statute allows illegitimate children to inherit from intestate fathers in only two circumstances: either when the father marries the mother *and* acknowledges the child to be his own, or when paternity of the child has been "established by law" during the father's lifetime.<sup>39</sup> In 1970, the Indiana Supreme Court decided that the statute is not unconstitutional as a denial of equal protection in light of its purpose to "prevent fraudulent claims on the estate of one deceased."<sup>40</sup>

In light of *Trimble*, the constitutionality of Indiana's statute is uncertain. The Indiana statute is clearly more "carefully tuned to alternative considerations" than was the offending Illinois statute<sup>41</sup> but perhaps not as carefully tuned as the United States Supreme Court demands. In a footnote, the *Trimble* Court stated:

Evidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy and inefficiency than others. The States, of course, are free to recognize these differences in fashioning their requirements of proof. Our holding today goes only to those forms of proof which do not compromise the States' interests. This clearly would be the case, for example, where there is prior adjudication or formal acknowledgment of paternity. Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity.<sup>42</sup>

---

<sup>38</sup>*Id.* at 772.

<sup>39</sup>IND. CODE § 29-1-2-7 (1976). The testimony of the mother may be received to establish paternity and acknowledgment, but "no judgment shall be made upon the evidence of the mother alone." *Id.* The phrase "established by law" contemplates a judicial proceeding in which "the finding of paternity is necessary for the result reached and the quantum of proof establishing such paternity meets the standard set forth in the inheritance statute." *Burnett v. Camden*, 253 Ind. 354, 357, 254 N.E.2d 199, 201, *cert. denied*, 399 U.S. 901 (1970).

<sup>40</sup>*Burnett v. Camden*, 253 Ind. 354, 361, 254 N.E.2d 199, 201 (1970).

<sup>41</sup>The illegitimate child in *Trimble* could have inherited from the putative father in Indiana. The paternity order entered in the father's lifetime would have satisfied IND. CODE § 29-1-2-7(a) (1976).

<sup>42</sup>430 U.S. at 772 n.14.

Indiana's statute requires marriage to the mother in addition to the father's formal acknowledgment of paternity before allowing an inheritance claim, unless there has been a successful paternity suit. However, formal acknowledgment alone, by affidavit or in a written contract, for example, would seem to satisfy the state's interest in preventing fraudulent inheritance claims. Thus, it is questionable whether the statute is "carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity."<sup>43</sup>

#### D. Guardianship

In *Wurm v. Haessly*,<sup>44</sup> an elderly widow appealed from a judgment appointing guardians over her estate. Mrs. Wurm contended that the only reason for appointing the guardians was her physical inability to manage her property. She argued that to determine competency on purely physical grounds is unconstitutional.<sup>45</sup> The Indiana Court of Appeals agreed that a determination of incompetency must include an evaluation of the person's mental capacity.<sup>46</sup> A physically incapacitated but mentally competent person has the option of choosing an agent to manage his property. The majority of the court held that a determination of incompetency must include an evaluation of "mental awareness" or "mental physiology."<sup>47</sup>

Judge Staton, in a dissenting opinion, considered the majority's mental awareness test too broad. The test, said Judge Staton, is a statutory one, and involves a determination of the person's ability to reasonably exercise his will and judgment in managing his property, in caring for himself, or in choosing a competent agent to stand in his stead.<sup>48</sup>

Judge Staton also disagreed with the majority as to whether there was sufficient evidence to support the judgment of the trial court. The majority decided that although there was "little oral testimony . . . to the effect that Martha Wurm was mentally in-

---

<sup>43</sup>*Id.* See note 39 *supra* and accompanying text. The only statute that has been successfully put to the test of "careful attunement" was a Social Security Act provision, 42 U.S.C. §§ 402(d)(3), 416(h)(3) (Supp. V 1975), delineating when an illegitimate child is entitled to a presumption of dependency. This statute allowed such a presumption if the decedent "in writing had acknowledged the child to be his." *Mathews v. Lucas*, 427 U.S. 495, 499 (1976).

<sup>44</sup>360 N.E.2d 12 (Ind. Ct. App. 1977).

<sup>45</sup>*Id.* at 14. Mrs. Wurm relied on *Schafer v. Haller*, 109 Ohio St. 322, 140 N.E. 517 (1923).

<sup>46</sup>IND. CODE § 20-1-18-1(c)(2) (1976) defines an "incompetent" as any person who is "[i]ncapable by reason of insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness, excessive use of drugs, old age, infirmity or other incapacity, of either managing his property or caring for himself or both."

<sup>47</sup>360 N.E.2d at 15.

<sup>48</sup>*Id.* at 16 (Staton, J., dissenting).



capable of handling her affairs,"<sup>49</sup> there was ample "other direct evidence" disclosing that Mrs. Wurm "had problems with advanced age and its attendant infirmities of confusion"<sup>50</sup> Thus, the court of appeals affirmed the trial court's judgment that Mrs. Wurm was "incapable of either managing her property or caring for herself by reason of old age, infirmity, and her inability to withstand undue and inappropriate pressures exerted upon her by certain of her children."<sup>51</sup> The dissent found the evidence to be "totally insufficient" to support the trial court's judgment. Since the evidence did not clearly show that Mrs. Wurm lacked the will and judgment to reasonably manage her property and to reasonably care for herself, Judge Staton reasoned that the taking away of her liberty was unconstitutional.<sup>52</sup>

Certainly, in determining the sufficiency of the evidence, an appellate court should not weigh the evidence or evaluate the credibility of the witnesses. An appellate court considers the evidence in the light most favorable to the judgment of the trial court because the trier of fact presumably based its judgment on that evidence. The troublesome feature of *Wurm* is the suggestion that the trier of fact

---

<sup>49</sup>*Id.* at 15. The court continued:

Of her seven children, four stated that she was physically incompetent to manage the business of her farm while simultaneously attesting to her mental capacity. Two of her children and her doctor opined that she was competent to manage her business affairs. Only one definitely felt that his mother was incompetent and incapable of understanding the extent of her property or the nature of her business affairs or her personal affairs. Such a mixture of testimony alone would appear to be inadequate in light of the important concerns we have expressed in protecting an aged person's free will.

*Id.*

<sup>50</sup>*Id.* The "other direct evidence" pointed out by the majority included evidence that (1) Mrs. Wurm did not understand the "essential thrust" of a power of attorney agreement executed by her; (2) on the night of her husband's funeral, she expressed a desire for the appointment of guardian, and although she visited an attorney and signed the guardianship papers, she later "became hostile" and attempted to renounce the guardianship document; (3) she was confused about the amounts of her savings and where they were located; (4) she told her doctor that she could not write him a check when she was capable of doing so; and (5) she did not know how much her daughter was spending from her checking account. Compare the evidence reviewed in the dissenting opinion. *Id.* at 17-20.

<sup>51</sup>*Id.* at 13. Apparently the trial court originally determined that Mrs. Wurm was "unable to take care of her major business affairs solely by reason of physical disability but that she was not mentally uncompetent [sic]." *Id.* at 20 n.3 (quoting Appellant's Brief at 22). Later, in response to argument on a motion to correct errors, and without hearing additional evidence, the trial court rendered the judgment in the language quoted in the text. The last clause of this judgment, regarding "inability to withstand undue and inappropriate pressures," has forboding connotations. If one can exert enough undue pressure on an elderly person so as to confuse that person, then the case for appointment of a guardian has been made.

<sup>52</sup>*Id.* at 20 (Staton, J., dissenting).

did not base its judgment on the essential question—the determination of Mrs. Wurm's mental incompetency.<sup>53</sup> If this is true, it seems inappropriate for the appellate court to review the evidence in order to determine if it is sufficient to support a finding of mental incompetence. Given the nature of the right to liberty that is denied by the imposition of a guardianship, justice would have been better served, at the very least, by a remand for findings on the issue of mental competence by the trier of fact.

### *E. Fiduciary Duties*

In *Pearson v. Hahn*,<sup>54</sup> the widow of a deceased partner sought the appointment of a receiver and an accounting against the surviving partners of the Martinsville Plaza Company and the Martinsville Leasing Company.<sup>55</sup> One of the surviving partners had qualified and acted as executor of the deceased partner's estate. While so acting, and pursuant to a provision in the Martinsville Plaza partnership agreement, and as surviving partner, he gave written notice to himself, as executor, of the surviving partners' intent to purchase the decedent's interest in the Martinsville Plaza Company.<sup>56</sup> Decedent's widow subsequently requested of the executor a financial accounting of the assets and liabilities of both partnerships, but the executor refused her request.

The Indiana Court of Appeals held:

[B]ecause of the conflict of interest which inherently exists between a surviving partner and the beneficiaries of a deceased partner's estate, in agreements to continue the partnership following a partner's death, the surviving partner(s) must make a full disclosure of all assets which

---

<sup>53</sup>*Id.* n.3. See discussion in note 51 *supra*.

<sup>54</sup>352 N.E.2d 767 (Ind. Ct. App. 1976).

<sup>55</sup>The Indiana Accounting by Surviving Partners Act, IND. CODE § 23-4-3-1 to -8 (1976), permits the probate court to appoint a receiver to settle the affairs of the partnership when the surviving partners fail to file the required inventory, appraisal, list of liabilities, and bond, or fail to settle the business of the partnership after the death of one of the partners. *Id.* § 23-4-3-5.

<sup>56</sup>352 N.E.2d at 767-71. The Martinsville Plaza partnership agreement provided that the surviving partners could purchase the interest of a deceased partner after giving written notice of their intent to do so within 60 days of the partner's death by paying either the book value or the fair market value determined by a fair appraisal, whichever was lower. After decedent's death, appraisers were hired by the widow and by the surviving partners. The only asset appraised was a 5.43 acre tract of land, and both appraisal reports showed liabilities in excess of assets. Thus, the surviving partners owed nothing upon their election to purchase the deceased partner's interest in the Martinsville Plaza Company. Martinsville Leasing Company apparently had no partnership assets, since all its assets and liabilities were held or owed by the partners and their wives as individuals. *Id.*

arguably belong to the partnership upon request of the deceased partner's executor, and if the surviving partner is serving in the capacity of executor or administrator of his deceased partner's estate, he must make an equally complete disclosure upon request of any interested beneficiary of the deceased partner.<sup>57</sup>

The court remanded the cause to the trial court with directions to have a complete audit conducted of the assets of both partnerships.<sup>58</sup>

## XIX. Workmen's Compensation

*Gregory J. Utken\**

Several noteworthy decisions were rendered in the area of workmen's compensation during the survey period, including cases of first impression.

### A. Dual Capacity

Workmen's compensation is an exclusive remedy for injuries arising out of and in the course of employment; civil actions against an employer for injuries at work are prohibited.<sup>1</sup> However, the Indiana Workmen's Compensation Act does permit initiation of civil actions against "some other person than the employer and not in the same employ."<sup>2</sup> Recently, attempts have been made to avoid the exclusivity provision of the statute by suing a defendant-employer in

---

<sup>57</sup>352 N.E.2d at 773-74.

<sup>58</sup>The court did not specifically address the widow's questions of whether the survivor's notice to himself as executor was the kind of notice contemplated by the partnership agreement and whether the notice made applicable the provisions of the Indiana Partnership Act, IND. CODE §§ 23-4-1-1 to -43 (1976), and the Indiana Accounting by Surviving Partners Act, IND. CODE §§ 23-4-3-1 to -8 (1976), regarding dissolution, posting of bonds, and appointment of receivers.

\*Member of the Indiana Bar. J.D., Indiana University School of Law—Indianapolis, 1974.

<sup>1</sup>IND. CODE § 22-3-2-6 (1976) states:

The rights and remedies herein granted to an employee subject to this act on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or death.

The courts have also consistently so held. *Crowe v. Ben Dee, Inc.*, 149 Ind. App. 280, 271 N.E.2d 509 (1971). *Burkhart v. Wells Elec. Corp.*, 139 Ind. App. 658, 215 N.E.2d 879 (1966). See also *Peski v. Todd & Brown, Inc.*, 158 F.2d 59 (7th Cir. 1946); *Stainbrook v. Johnson County Farm Bureau*, 125 Ind. App. 487, 122 N.E.2d 884 (1954).

<sup>2</sup>IND. CODE § 22-3-2-13 (1976) states in pertinent part:

Whenever an injury or death, for which compensation is payable under [this