person does not commit an offense if the person pays the amount due within *ten days* after *receiving* notice that the check was not paid.

The check deception statute also states that the drawee's refusal to pay and reasons thereof printed, stamped, written, or attached to the check constitute prima facie evidence that due presentment was made and that the check was dishonored for the reasons stated.[288]

VIII. Decedents' Estates and Trusts

*Debra A. Falender**

Although the developments during the survey period in the areas of wills, guardianships, and administration of decedents' estates were far from earthshaking, several cases resolved issues of first impression in Indiana.[1] In addition, several sections of the Probate Code were amended.

A. Judicial Developments

1. Execution of Wills.—In *Arnold v. Parry*,[2] the court dealt with a will contestant's allegation that the will admitted to probate was not properly published.[3] The statute setting forth the requirements for the due execution of a will provided: "[T]estator shall signify to the attesting witnesses that the instrument is his will."[4] In *Arnold*, the only surviving witness to the probated will could not positively state that the testator had signified to her that the instrument was his will. She testified that she knew the instrument was

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[288] *Id.* § 35-43-5-5(b).

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[1] The title of this discussion is misleading because, during this survey period, no trust cases were decided. In addition to the cases presented in the text, *see* Anderson Fed. Sav. & Loan Ass'n v. Guardian of Davidson, 364 N.E.2d 781 (Ind. Ct. App. 1977) (discussing the impropriety of a court order directing a bank to turn over a ward's savings certificate to the ward's successor guardian because the bank had no opportunity to present evidence of its right to a security interest in the certificate).

[2] 363 N.E.2d 1055 (Ind. Ct. App. 1977).

[3] The contestant was a beneficiary under a prior will. The contestant raised other issues for review in addition to the publication issue. One issue, involving an allegation of undue influence, is discussed at notes 12-16 *infra* and accompanying text.

[4] IND. CODE § 29-1-5-3(a)(1) (1976) (amended 1978).

the testator's will, but could not remember whether it was the testator or his attorney who had informed her of that fact.[5] Thus, the contestant argued, absent clear proof that the testator himself told the witness that the instrument was his will, the will was not properly executed.

The *Arnold* court refused to read the statutory language so strictly as to require that the testator alone make the signification by some utterance. The testimony revealed that, in the presence of the witnesses, either the testator or his attorney referred to the instrument as the testator's will. The court held that, even if the testator had not himself referred to the instrument as his will, he properly published the will by signing it after he heard his lawyer tell the witnesses that the document was his will.[6]

The *Arnold* decision is significant because it is the first decision in Indiana to deal directly with the statute's publication requirement. In arriving at its conclusion, the *Arnold* court noted that the purpose of the publication requirement is merely to make sure that the witnesses are aware that the testator knows he is executing a will.[7] The court also looked to publication cases in other jurisdictions[8] and to cases dealing with the similar requirement that the testator request the witnesses to attest.[9] The *Arnold* decision is a

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[5]The witness also testified that she did not read the attestation clause above her signature. If she had read the clause, or if it had been read to her, and if the clause had recited that the testator had signified to the witnesses that the instrument was his will, then a rebuttable presumption would have arisen that the recited act occurred. *E.g.*, Goff v. Knight, 201 Okla. 411, 206 P.2d 992 (1948). *See* 2 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 19.141 (rev. ed. 1960). When the clause has been read by or to the witness, it may be used to refresh the memory of the witness or to impeach hostile testimony by the witness. If, however, the clause is not read by or to the witness, the clause creates no presumption that the recited acts occurred. *See generally* Severns, *The True Function of the Attestation Clause in a Will*, 11 CHI.-KENT L. REV. 11 (1932).

[6]363 N.E.2d at 1061. The court emphasized that the testator was able-bodied and in full possession of his faculties. Thus, whatever was said for him in his immediate presence could, without danger, be taken as understood and adopted by him as his act. If the testator had been old and feeble, the court might have "examine[d] more carefully what [took] place before him." *Id.* at 1060 n.3 (quoting Heath v. Cole, 15 Hun. 100, 103 (N.Y. Sup. Ct. 1878)).

[7]363 N.E.2d at 1058.

[8]Some cases recognize the validity of publication from one other than the testator on agency grounds. *E.g.*, Gilbert v. Knox, 52 N.Y. 125 (1873). Others do not speak in agency terms, but instead talk of the testator's inferred assent to statements made by others in his presence and hearing. *E.g.*, King v. Westerrell, 284 Ill. 401, 120 N.E. 241 (1918).

[9]Indiana has no statutory requirement that the testator request the witnesses to sign the will. However, because of the idea that attestation is necessarily by invitation, it is held that the testator must request the witnesses to attest and subscribe the will. The request from one other than the testator may be assented to and adopted by the

realistic non-technical application of the unambiguous statutory requirement that the testator himself or herself affirmatively signify to the witnesses that the instrument is his or her will. By signing the document after hearing another person inform the witnesses that the document is the testator's will, the testator "is adopting the declaration of the will as his own act and communicating his publication of it to the witness[es] fully and unequivocally."[10] To require that the testator do something more, such as nod his head or murmur, as an absolute prerequisite to a legally operative publication would be to substitute " 'a fetish for a rule of reason' " and defeat the purpose underlying the requirement.[11]

The contestant in *Arnold* also alleged that the question of whether undue influence had been exerted by the testator's lawyer-draftsman should have been submitted to the jury.[12] The contestant posited that the existence of a "long standing friendship and attorney-client relationship"[13] between the testator and the drafting attorney was evidence from which the jury could have inferred that the attorney exerted undue influence on the client. The court responded: "A preposterous proposition! And one that would virtually sound the death knell for the valid execution of wills."[14]

The *Arnold* court recognized that the proposition would not be preposterous, or, in other words, that an inference of undue influence might well be raised, if the attorney or a member of his family were a beneficiary under the will. The court stated, however, that the request in the will that the executor name the draftsman as attorney to the estate raises no legal presumption of undue influence.[15] Even the draftsman's "remote connection" with the Salvation Army, the major beneficiary under the will, raised no inference of undue influence.[16]

2. Will Construction.—In *Collins v. Held*,[17] the trial court was asked to construe a devise in a 1936 will. In that will, the testator

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testator. Bundy v. McKnight, 48 Ind. 502, 506-07 (1874) (quoting and following Gilbert v. Knox, 52 N.Y. 125 (1873) (statute required that witnesses sign at request of testator; words of request from another will be regarded as request from testator where circumstances show that testator assented to and adopted those words)).

[10]363 N.E.2d at 1061 n.5.

[11]*Id.* at 1061 (quoting *In re* Petkos' Will, 54 N.J. Super. 118, 124, 148 A.2d 320, 323 (1959)).

[12]The trial court had granted defendant's motion for judgment on the evidence.

[13]363 N.E.2d at 1062.

[14]*Id.*

[15]*Id.* at 1062-63 n.7 (quoting Breadheft v. Cleveland, 184 Ind. 130, 133, 108 N.E. 5, 6 (1915) (holding that naming the draftsman executor and trustee creates no legal presumption of undue influence)).

[16]363 N.E.2d at 1063. The nature of the "remote connection" is undisclosed in the case.

[17]369 N.E.2d 641 (Ind. Ct. App. 1977).

had devised his real estate to his wife for life, then to his daughters for life, then to his grandchildren in fee simple. The devise to the grandchildren was worded in pertinent part as follows:

> [I]t is my will that my daughters . . . shall each take and hold the undivided one-half interest in said real estate for and during the term of their natural lives respectively, the fee simple of asid [sic] real estate to be vested in my grandchildren, children of my two said daughters. . . . On the death of either of my said daughters it is my will that *the children of such deceased daughter living at the time of her death* shall take and hold absolutely and in fee simple free and clear of any interest or claim of such surviving daughter the part or interest in said real estate held by their deceased mother as life tenant.[18]

The trial court determined that the grandchildren were given a vested remainder, which descended to the heirs of two grandchildren who predeceased their mothers.

Despite the use of the general term "vested," the court of appeals held that the language italicized above unambiguously expressed the testator's intent to create contingent remainders in fee in the grandchildren.[19] Although contingent remainders are not favored in Indiana, and a remainder will be construed as vested if it possibly can be,[20] contingent remainders are lawful and will be given effect if the testator by unambiguous language sees fit to create them.[21] The *Collins* court reaffirmed this principle.

In *Collins*, the court was also required to decide what disposition should be made of a life estate pur autre vie[22] following the intestate death of the tenant pur autre vie and prior to the death of the tenant whose life established the duration of the estate. The court adopted the rule embodied in the *Restatement of Property*.[23] The *Restatement* provides that, if no taker has been designated in the original creation or in the transfer of the life estate, then the estate passes to the personal representative of the tenant pur autre vie to

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[18] *Id.* at 643 (emphasis added).

[19] *Id.* at 645. A remainder is contingent if it is subject to a condition precedent. *See generally* RESTATEMENT OF PROPERTY § 157 (1936). Here, the italicized language expresses the condition precedent that the grandchildren must survive their mothers to take their interest.

[20] *E.g.*, Spence v. Second Nat'l Bank, 126 Ind. App. 125, 130 N.E.2d 667 (1955); Busick v. Busick, 65 Ind. App. 655, 115 N.E. 1025 (1917).

[21] *E.g.*, Epply v. Knecht, 141 Ind. App. 491, 230 N.E.2d 108 (1967); Chicago, I. & L. Ry. v. Beisel, 122 Ind. App. 448, 106 N.E.2d 117 (1952).

[22] A life estate pur autre vie is a life estate in one person for the life of another.

[23] 369 N.E.2d at 648.

be distributed in the same manner as the tenant's personal property.[24] Thus, despite dictum in an early Indiana decision suggesting that life estates pur autre vie are not descendable,[25] the *Collins* court held that the life estate descended to the heirs at law of the intestate tenant pur autre vie.[26]

3. Personal Representative's and Attorney's Fees.—In *In re Estate of Newman*,[27] the Indiana Court of Appeals held that fee awards of $4,000 for the personal representative and $8,000 for her attorney were clearly excessive and an abuse of the trial court's statutory discretion to allow "reasonable and just" fees.[28] The total value of the decedent's intestate estate was $37,902.96, and $29,652.96 of these assets were liquid.[29] Forty-three bills were paid by the personal representative during the fifteen-month administration. Four uncontested claims were filed against the estate and paid by the personal representative. Only one contested claim was filed—a claim of $3,000 for child support, which resulted in an award of $1,160.

In reviewing the award of attorney's fees, the court emphasized the principle that such awards are best left to the discretion of the trial court.[30] In exercising its discretion, however, the trial court should be governed by and confined within the standards widely recognized and accepted by members of the legal profession.[31] Such standards are found in Disciplinary Rule 2-106 of the Code of Professional Responsibility: "A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."[32] The court of appeals stated: "[B]eyond all ques-

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[24]RESTATEMENT OF PROPERTY § 151 (1936).

[25]Graham v. Sinclair, 83 Ind. App. 58, 61, 147 N.E. 634, 635 (1925). The rule at early common law was that a life estate pur autre vie could not descend. Unless the grantor of the life estate designated a taker, on the intestate death of the tenant pur autre vie, the estate could be possessed by the first taker, even a total stranger. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Bk. II, at 259-60 (Sharswood ed. 1872).

[26]The *Collins* court stated: "Whatever may have been the arcane logic of that rule at common law, its *ratio legis* has long been extinct." 369 N.E.2d at 648.

[27]369 N.E.2d 427 (Ind. Ct. App. 1977).

[28]*Id.* at 432-34 (construing IND. CODE § 29-1-10-13 (1976)).

[29]The decedent owned a $25,000 certificate of deposit and had $4,652.96 in a checking account.

[30]369 N.E.2d at 433 (citing *Ex parte* Hodge, 6 Ind. App. 487, 33 N.E. 980 (1893).

[31]369 N.E.2d at 433.

[32]ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-106(B). The following factors are listed in the Rule as guides in determining the reasonableness of a fee:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

tion, we are left with a definite and firm conviction that the attorney fee awarded . . . is a clearly excessive fee under the guidelines of DR 2-106."[33]

Although no similar standards have been adopted to gauge the reasonableness of a personal representative's fee,[34] the court concluded that the "simple nature of this estate, and thus the amount of work necessary to attend to the estate, do not seem to warrant an award of $4,000 out of total assets of $37,902."[35]

The appellant in *Newman* was decedent's minor heir. The appellant did not attend the hearing on the question of fees. The court held that appellant's absence from the hearing did not bar him from alleging error in the court's award and did not abrogate the statutory standard allowing only a "reasonable and just fee."[36] After the fee award was made, the appellant attempted to conduct discovery in order to attack the award. The *Newman* court, without elaboration, held: "[E]state proceedings are properly subject to discovery rules."[37]

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(3) The fee customarily charged in the locality for similar legal services.
(4) The amount involved and the results obtained.
(5) The time limitations imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent.

[33]369 N.E.2d at 433.

[34]Similar factors are discussed in cases reviewing the reasonableness of a representative's fee. The *Newman* court succinctly noted:

> In making the allowances the court may take into consideration the labor performed, the nature of the estate, the difficulties attending the recovery of the assets and location of heirs or devisees, settlements in the estate, the peculiar qualifications of the administrator, her faithfulness and care, and all other factors necessary to aid the court in a consideration fair to the estate and reasonable for the personal representative and the attorney.

Id. at 433 (citing Pollard v. Barkley, 117 Ind. 40, 17 N.E. 294 (1888); *Ex parte* Hodges, 6 Ind. App. 487, 33 N.E. 98 (1893)).

[35]369 N.E.2d at 434.

[36]*Id.* Appellant could assume that his presence was not "necessary to prevent the award of an unreasonable fee." *Id.*

[37]*Id.* An interesting procedural holding prefaced the court's consideration of the *Newman* appeal. The fee awards were ordered December 13, 1973. The appellant did not file a motion to correct errors within 60 days of that order. The court held that the order allowing the payment of fees was an appealable interlocutory order under IND. R. APP. P. 4(B)(1). Newman's failure to appeal the order at that time, however, was not a waiver of his appeal rights. *Cf.* Indiana High School Athletic Ass'n v. Raike, 329 N.E.2d 66 (Ind. Ct. App. 1975) (distinguished by the *Newman* court, 369 N.E.2d at 432, because *Raike* concerned the appealability of orders likely to quickly become moot, unlike the order in *Newman* for payment of money). *Newman* also held that the award of attorney fees was not a final appealable judgment within the meaning of IND. R. TR. P. 54(B). 369 N.E.2d at 431. An estate proceeding is viewed as a single in rem pro-

4. Sale of Real Estate.—In *Rainier v. Snider*,[38] an intestate decedent's spouse[39] contended that an order directing a sale of real estate was improper. The spouse was apparently a second childless spouse and entitled, therefore, to a life estate in one-third of decedent's land.[40] Indiana Code section 29-1-15-3 provides:

> Any real or personal property belonging to an estate may be sold, mortgaged, leased or exchanged under court order when necessary for any of the following purposes:
>
> (a) For the payment of claims allowed against the estate;
>
> (b) For the payment of any allowance made to the surviving spouse and dependent children under twenty-one (21) years of age of the decedent;
>
> (c) For the payment of any legacy given by the will of the decedent;
>
> (d) For the payment of expenses of administration;
>
> (e) For the payment of any gift, estate, inheritance or transfer taxes assessed upon the transfer of the estate or due from the decedent or his estate;
>
> (f) For making distribution of the estate or any part thereof;
>
> (g) For any other purpose in the best interests of the estate.[41]

The trial court found that the property should be sold for reasons given in sections 3(f) and 3(g). The trial court based its decision on two considerations: (1) The market value of the real estate was at an "apparent all-time high," so that the "sale would bring added monies into the estate,"[42] and (2) the "high probability of a later suit for partition . . . would result in considerable delay and expense" to the heirs.[43]

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ceeding. IND. CODE § 29-1-7-2 (1976), *construed in* Krick v. Farmers & Merchants Bank, 151 Ind. App. 7, 279 N.E.2d 254 (1972). According to the *Newman* court, the order awarding fees, made in the course of the administration of the estate, would be a final appealable judgment only "upon an express determination that there is no just reason of delay and upon an express direction for the entry of judgment." IND. R. TR. P. 54(B), *construed in In re* Estate of Newman, 369 N.E.2d at 431. Since the court did not make the determination and the direction required by the Rule, the order was an order "as to less than all the claims and parties" and was not final. IND. R. TR. P. 54(B).

[38]369 N.E.2d 666 (Ind. Ct. App. 1977).

[39]A major portion of the opinion dealt with whether the appellant was in fact and in law decedent's surviving spouse. *See* Garfield, *Domestic Relations, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 157, 189 (1978).

[40]IND. CODE § 29-1-2-1(b) (1976).

[41]*Id.* § 29-1-15-3.

[42]369 N.E.2d at 671.

[43]*Id.*

The court of appeals rejected the widow's contention that the sale was not necessary for any of the listed statutory purposes. The court reviewed authority in other jurisdictions with similar statutory language and noted that it has been held that the "purpose of subdivision (f) is to expedite distribution by providing an alternative to an expensive and time-consuming collateral partition proceeding."[44] Authority diverges as to the purpose and scope of section 3(g). In New York, for example, the phrase "best interest of the estate" allows consideration of the interest of all potential beneficiaries of the estate, including the consideration that the sale of the whole property by the personal representative might result in a higher price than a sale of parcels after partition or might be quicker and easier than a sale of the whole by several beneficiaries.[45] In Missouri, however, the scope of the phrase "best interest of the estate" is more limited.[46] The *Rainier* court consulted the Commission Comments to the Indiana statute and concluded that the broader interpretation of section 3(g) is more in line with the legislative intent.[47] Thus, the trial court's decision that a sale was necessary was properly based upon the two considerations stated above. Further, since the administrator had posted bond to cover any interest to which the widow might be entitled,[48] the order of sale was not an abuse of the trial court's discretion.

In *Rainier*, the sale at public auction occurred prior to the appeal. Once a sale has been authorized by the court and has occurred, the party objecting to the sale has no meaningful remedy, even if it is later found on appeal that the trial court abused its discretion in ordering the sale.[49] Furthermore, there is no way to prevent a sale authorized under section (f) or (g). Indiana Code section 29-1-15-4 provides that an order authorizing a sale "for the payment of obligations of the estate *shall* not be granted if any of the persons interested in the estate shall execute and file in the court a bond . . . ."[50]

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[44]*Id.* (citing Wade v. Bigham, 178 Misc. 305, 34 N.Y.S.2d 22 (1941)). The Indiana statute was based upon the New York statute construed in *Wade*. *See* IND. CODE ANN. § 29-1-5-3, Commission Comments (Burns 1972).

[45]*In re* Perkins' Will, 55 Misc. 2d 834, 286 N.Y.S.2d 586 (1967).

[46]McIntosh v. Connecticut Gen. Life Ins. Co., 366 S.W.2d 409 (Mo. 1963). In explaining the *McIntosh* approach, the *Rainier* court stated: "Under this view, neither the fact that it is desirable to sell land because of inability to satisfactorily partition, nor the fact that the land might bring a higher price as a whole is held related to the administration of the estate." 369 N.E.2d at 670.

[47]369 N.E.2d at 671.

[48]At the time of the sale, the appellant's status as surviving spouse had not been determined. *See* note 39 *supra*.

[49]The transferred property cannot be recovered because good faith purchasers are protected. *See* IND. CODE §§ 29-1-10-19, -15-19 (1976 & Supp. 1978).

[50]*Id.* § 29-1-15-4 (1976).

This section, by its explicit language, applies only when a sale is necessary for purposes listed in section 29-1-15-3(a), (b), (d), and (e).[51]

5. Absentee Estates.—Overpeck v. Dowd[52] was the most factually complicated case decided during the survey period. The appeal was taken from order of heirship entered in the course of the administration of three "absentees"—Alice, Ida, and Laura Hendrixson. The decrees did more than determine heirship; they contemplated distribution of property claimed by the appellant, Brian Overpeck.[53] Although Overpeck was not an heir of Alice, Ida, or Laura, the court of appeals found that he was a person aggrieved by the decrees and, therefore, had standing to appeal.[54] The appellate court then held that the trial court had no jurisdiction to grant letters of administration in the Hendrixson estates.[55] The statute permitting the opening of absentee estates applies only to persons who at some time have been residents of Indiana.[56] Since Alice, Ida, and Laura had never been residents of this state, the letters of administration were void.[57]

The administrator of the Hendrixson estates had sold a parcel of real property during the course of the administration, and the sale had apparently been approved by the trial court. At the time of the sale, the administrator was acting under the authority of his letters of administration and under the assumption that Alice, Ida, and

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[51]*Id.* These are the only sections that authorize a sale for payment of obligations of the estate.

[52]364 N.E.2d 1043, *modified on rehearing*, 368 N.E.2d 1175 (Ind. Ct. App. 1977).

[53]The decrees directed the Hendrixson administrator to file his final accounting and petition for distribution and closing of the estates. 364 N.E.2d at 1048. The only property to be distributed from the estates was property in which Overpeck claimed an interest.

[54]*Id.* at 1048 (construing IND. CODE § 29-1-1-22 (1976)). The statute provides in part: "Any person considering himself aggrieved by any decision of a court having probate jurisdiction in proceedings under this code may prosecute an appeal to the court having jurisdiction of such appeal." IND. CODE § 29-1-1-22 (1976).

[55]364 N.E.2d at 1049.

[56]IND. CODE § 29-2-5-1 (1976) provides in part:

> When any resident of this state shall have absented himself from his usual place of residence and gone to parts unknown for a period of five (5) years, . . . the court shall have jurisdiction over the estate of such person in the same manner and to the same extent as if he were dead, and shall appoint an administrator of his estate, who shall have all of the powers and rights over such estate and be subject to all of the liabilities and duties in relation thereto that appertain to administrators of decedent's estates.

See id. §§ 32-6-6-1, -2, which provides a procedure for quieting title to real estate claimed by an absent nonresident.

[57]The court stated: "When a court is without jurisdiction, it possesses the power to do nothing except enter an order of dismissal." 364 N.E.2d at 1049 (citing Squarcy v. Van Horne, 321 N.E.2d 858 (Ind. Ct. App. 1975)).

Laura were the owners of the property. The appellate court, in its original opinion, stated that the trial court did not possess jurisdiction to order the sale.[58] On rehearing, the court of appeals modified its opinion by recognizing that acts lawfully performed by a personal representative under the apparent authority of letters of administration are valid, even though the authority of the personal representative is subsequently terminated.[59]

The decision of the court regarding the trial court's lack of jurisdiction over the Hendrixson estates was correct in light of the language of the absentee estate statute. The later decision regarding the validity of the acts of the Hendrixson administrator was likewise proper. Other statements in the *Overpeck* opinion, however, are misleading. Because the setting of the case is so unusual, a few comments on the course of events leading up to the appeal are necessary.

The opening of the Hendrixson estates was prompted by a decree in the estate of Ruth Cox Vaught, who died December 9, 1972. Soon after Vaught's estate was opened, the executor of her estate filed a petition for the construction of the will of James W. Puett, who died in 1909. Apparently, the Vaught executor wanted to determine if Vaught owned any of the real estate devised by Puett in his will. James Puett, in his will, devised all his real estate to his wife, Jane, for her life.[60] Puett devised the remainder interest in one tract (Tract I) of his real estate to a niece and the remainder interest in the rest of his real estate (Tract II) to Ruth Cox Vaught for life, then in fee to the children of Ruth Vaught who survived her, and if no children survived her, in fee to Alice, Ida, and Laura Hendrixson.[61]

The trial court, in the Vaught estate proceeding, construed Puett's will and, on January 21, 1974, decreed: (1) Ruth Vaught took only a life estate in Puett's real estate, (2) title to Tract I vested in fee simple in Brian Overpeck at Vaught's death,[62] and (3) title to Tract II vested in Alice, Ida, and Laura if they had survived Ruth Vaught.[63] If Alice, Ida, and Laura had not survived Ruth Vaught, the

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[58]364 N.E.2d at 1051.

[59]368 N.E.2d at 1176 (citing IND. CODE § 29-1-10-19 (1976)).

[60]Apparently, Jane was also the residuary beneficiary of Puett's estate. 364 N.E.2d at 1048.

[61]*Id.* at 1045-46. This is merely a summary of the language of Puett's will. The language is quoted in part at note 63 *infra*.

[62]Overpeck was an heir at law of Jane Puett. Apparently, he was also an heir or devisee of the niece who was given Tract I by the terms of James Puett's will. *See* text accompanying note 61 *supra*.

[63]Ruth Vaught did not have children. Thus, the alternative devise to Alice, Ida, and Laura was effective. The court in construing Puett's will determined that the

court decreed that the devise of Tract II had lapsed, and title to Tract II vested in the heirs of Puett's wife, Jane, who had been Puett's residuary beneficiary and who had died intestate. Because the court did not know whether Alice, Ida, and Laura had survived Ruth Vaught, the decree stated that the court was without sufficient evidence "to complete the construction of the last will and testament of James W. Puett as to Tract II."[64] The trial court directed the guardian ad litem appointed to represent Alice, Ida, and Laura to "take such steps as he may deem necessary and proper to protect the interest of said missing heirs under the laws of the State of Indiana pertaining to missing heirs."[65]

The day after this decree in Vaught estate, petitions were filed to open absentee estates for Alice, Ida, and Laura. Soon after the estates were opened, the administrator petitioned the court for interim distribution of Tract II.[66] The trial court responded to this

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devise to Alice, Ida, and Laura not only was subject to the contingency that Ruth Vaught died without children surviving her, but also was subject to the contingency that Alice, Ida, and Laura survive Ruth Vaught. This conclusion seems questionable in light of the lack of survivorship language in reference to Alice, Ida, and Laura. The devise read, in pertinent part, as follows:

> Also after the death of my said wife I give and devise the residue of my real estate [Tract II] to said Ruth P. Cox, to have and hold during her life time and upon the death of my said wife and said Ruth, I give and devise said residue of my real estate to the children of said Ruth P. Cox, then living whether they be born before or after my death, it being my intention and will that said residue shall after the expiration of said life estate therein descend to and become the property in fee simple of such child or children as she may hereafter bear and have living at such time whether the same be born before or after my death, but should there be none living at such time then I give and devise such residue of my real estate to the three daughters of my sister Lousia Hendrixson by her second marriage, namely Alice, Ida and Laura.

364 N.E.2d at 1045-46.

[64]364 N.E.2d at 1046.

[65]*Id.* The guardian ad litem had been appointed some time prior to the court's first decree construing Puett's will.

[66]This petition was filed after the court in the Vaught estate, on April 15, 1974, made a nunc pro tunc entry regarding Tract II as follows:

> Court further finds that under the language of Item Second of the will of James W. Puett, a remainder interest in all of the remaining real estate owned by James W. Puett at the time of his death, herein referred to as Tract II, was limited to the three daughters of the testator's sister, Lousia Hendrixson, by her second marriage, namely, Alice, Ida and Laura.

364 N.E.2d at 1046. The relevant language of Item Second of the last will of James Puett is quoted at note 63 *supra*. The appellees in *Overpeck* insisted that the language of this nunc pro tunc finding "vested descendible title in Alice, Ida, and Laura." 364 N.E.2d at 1050. The court of appeals disagreed, stating that the language of the finding was ambiguous. *Id.* On the one hand, the language of the finding suggests that the court was no longer committed to its earlier conclusion that the devise to Alice, Ida,

petition by entering an order directing the executor of the Vaught estate to "surrender, turn over and deliver" Tract II to the administrator of the Hendrixson estates.[67] Subsequently, but before the survivorship status of Alice, Ida, and Laura was determined, Tract II was sold by the Hendrixson administrator. This transaction was the sale referred to at the start of this discussion.[68]

After the sale of Tract II, the court was presented with evidence that Alice, Ida, and Laura had predeceased Ruth Vaught. This discovery prompted another decree in the Vaught estate proceeding.[69] On June 25, 1975, the trial court decreed that the devises from Puett to Alice, Ida, and Laura had lapsed and that their interests reverted to Puett's estate, passed under Puett's residuary clause to his widow, Jane, and passed upon her death intestate to her heirs.[70] Brian Overpeck, an heir of Jane Puett, claimed by virtue of this decree an interest in the proceeds of Tract II. Thus, subsequently, when the court in the Hendrixson estates entered the order contemplating distribution of the proceeds,[71] Overpeck brought the present appeal.

The appellees in *Overpeck* were the apparent heirs of Alice, Ida, and Laura. The appellees argued on appeal that Overpeck had waived any claim to the proceeds of the sale of Tract II "when he failed to object to the opening of the Hendrixson estates, the interim distribution from the Vaught estate, and the sale of the real estate by the Hendrixson estates."[72] Although the *Overpeck* court's conclusion that the trial court was without jurisdiction to administer the Hendrixson estates answered all of the heirs' contentions, the court of appeals nonetheless explained why it would not have found a waiver by Overpeck even if the trial court had possessed jurisdiction. In the course of the explanation, the court reached conclusions that are arguably correct only when read in light of the fact that no appeal was ever taken in the Vaught estate proceeding.

First, the *Overpeck* court stated: "We hold that the trial court had jurisdiction to construe the Puett Will as part of the proceedings in the Vaught estate."[73] The only statute cited in support of

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and Laura was contingent upon their survival of Ruth Vaught. *See* discussion in note 63 *supra*. On the other hand, the court, in the April 15 entry, made no order concerning the title to Tract II, only this finding of fact. In a later decree, discussed in the text accompanying note 69 *infra*, the court again attached the condition of survivorship to the devises to Alice, Ida, and Laura.

[67]364 N.E.2d at 1047.

[68]*See* text accompanying notes 57-58.

[69]This was the third decree in the Vaught estate. The second decree is discussed at note 66 *supra*.

[70]364 N.E.2d at 1046-47.

[71]*See* note 53 *supra* and accompanying text.

[72]364 N.E.2d at 1049.

[73]*Id.* at 1051.

this statement was Indiana Code section 29-1-6-5, which provides:

> The court in which a will is probated shall have jurisdiction to construe it. Such construction may be made on a petition of the personal representative or of any other person interested in the will; or, if a construction of the will is necessary to the determination of an issue properly before the court, the court may construe the will in connection with the determination of such issue. When a petition for the construction of a will is filed during administration of the estate, notice of the hearing thereon shall be given to interested persons. If the estate has been closed prior to the filing of such petition, notice shall be given as in civil actions.[74]

By its explicit language, this section gave the court the authority to construe only the probated will (the Vaught will). It did not give the court the authority to construe another will (the Puett will) even though it was tangentially related to the Vaught probate proceedings. The jurisdiction to construe the Puett will, however, was never challenged. The Hendrixson heirs were represented in the Vaught proceeding by a guardian ad litem appointed to represent their predecessors in interest, Alice, Ida, and Laura.[75] All the interested parties were apparently represented when the Puett will was construed. Thus, it seems that the decrees construing Puett's will are binding on the parties before the court, even though the court technically did not have jurisdiction to construe that will under section 29-1-6-5.

Second, the *Overpeck* court stated: "[T]he June 25, 1975, decree in the Vaught estate adjudicated vesting of title to Tract II in the heirs of Jane Puett."[76] In the course of the administration of a decedent's estate, the court exercising probable jurisdiction has the authority to adjudicate title to real estate in only one situation—upon a petition to sell or mortgage real property if the petition to sell or mortgage seeks such relief.[77] A binding adjudication of

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[74]IND. CODE § 29-1-6-5 (1976). The court did not cite the statute establishing the power and jurisdiction of the Parke County Circuit Court. Perhaps, by this statute, the court did have "jurisdiction" to construe the Puett will. *See id.* § 33-4-4-3.

[75]*See id.* § 29-1-1-20(a), (d) regarding the effect of representation by a guardian ad litem.

[76]364 N.E.2d at 1051.

[77]IND. CODE § 29-1-15-12 (1976) provides:

> Upon any petition to sell or mortgage real property the court shall have power to investigate and determine all questions of conflicting and controverted title, remove clouds from any title or interest involved, and invest purchasers or mortgagees with a good and indefeasible title to the property

title, however, apparently did, in fact, occur by virtue of the decree in the Vaught estate proceeding. Even though there was no petition for sale or mortgage requesting an adjudication of title, all the interested claimants were represented when the decrees were rendered, and they all were bound by the unappealed final judgment in the Vaught estate.

B. Statutory Developments

Several amendments to the Probate Code were enacted during the survey period.[78] The survivor's allowance provision now provides

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sold or mortgaged. When the petition to sell or mortgage seeks such relief notice shall be given as in civil actions of like nature and the court is authorized to issue appropriate process and notices in order to obtain jurisdiction to so proceed against adverse parties.

[78]The following statutory changes should be noted. IND. CODE § 29-1-2-12 (Supp. 1978), *as amended by* Act of Mar. 9, 1978, Pub. L. No. 2, § 2901, 1978 Ind. Acts 568, now provides that a "person who is convicted of murder, causing suicide, or voluntary manslaughter shall . . . become a constructive trustee of any property acquired by him from the decedent or his estate because of the offense . . . ." Prior to the amendment, the statute provided that a person "legally convicted of intentionally causing the death of another, or of aiding or abetting therein, shall . . . become a constructive trustee of any property, real or personal, acquired by him from the decedent or his estate because of such death . . . ." IND. CODE § 29-1-2-12 (1976). The deletion of the word "legally" is insignificant. The amended statute applies only to persons convicted of the specified offenses. Query whether property acquired *because of the offense* is somehow a less inclusive description than property acquired *because of the death.*

IND. CODE § 29-1-7.5-2(a)(4) (Supp. 1978), *as amended by* Act of Mar. 7, 1978, Pub. L. No. 132, § 8, 1978 Ind. Acts 1171, includes the guardian of an heir, legatee, or devisee as a person who must freely consent to and understand the significance of unsupervised adminstration before a petition for unsupervised administration will be granted. IND. CODE §§ 29-1-7.5-6, -7 (Supp. 1978), *as amended by* Act of Mar. 7, 1978, Pub. L. No. 132, §§ 4, 5, 1978 Ind. Acts 1170, provide that the claim of a person under a disability is barred if not asserted within the time periods set forth in these sections. IND. CODE § 29-1-15-19(c) (Supp. 1978), *as added by* Act of Mar. 7, 1978, Pub. L. No. 132, § 10, 1978 Ind. Acts 1173, specifically provides for the protection of good faith purchasers of real estate from an unsupervised personal representative.

IND. CODE § 29-1-8-4.5 (Supp. 1978), *as added by* Act of Mar. 7, 1978, Pub. L. No. 132, § 6, 1978 Ind. Acts 1170, will aid in the collection of small estates by affidavit. The claimant may present his affidavit to the court and receive, without notice or hearing, a court order "that the claimant is entitled to payment or delivery of the property." This should satisfy creditors wary of paying or delivering property on the strength of the affidavit alone.

IND. CODE § 29-1-14-17(a) (Supp. 1978), *as amended by* Act of Mar. 7, 1978, Pub. L. No. 132, § 8, 1978 Ind. Acts 1171, now provides that the personal representative may act upon a claim in his favor which accrued during the decedent's lifetime if "all heirs and legatees who would be affected by the allowance of the claim consent in writing to it." Prior to this amendment, the personal representative's claim was treated as disallowed and transferred for trial in all cases. Now it is treated as disallowed only if all affected heirs and legatees do not consent.

that, if there is no surviving spouse, the "decedent's children who are under eighteen (18) years of age at the time of the decedent's death" are entitled to share equally the $8,500 allowance.[79] The prior provision referred to the decedent's "dependent children."[80] Certainly it will be easier for the courts to apply the age rather than the dependency provision, and probably the same children would take under either description in the vast majority of cases.

Subsection c, added to section 29-1-5-3, specifically provides that a will may be made self-proved by execution of a document "that substantially contains the declarations set out in" the self-proved will provision.[81] The self-proved will provision itself sanctions substantial compliance in the form and content of the declaration.[82] The amendment merely clarifies, but does not change, existing law.

Previously, section 29-1-15-15 required that specified notice procedures be followed by a personal representative in sales of real property at public auction.[83] This section was amended to provide that all sales of real property, whether at public or private sale, may be made with or without notice as directed by the court.[84] If notice is required by the court, the personal representative "shall give such notice as the court orders."[85]

Since 1972, under the guardianship provisions of the Probate Code, "upon a showing that the ward will probably remain incompetent during his lifetime," a guardian may apply for and receive court authority to dispose of principal or income of the ward's estate in excess of the amount likely to be required for the future care of the ward "in order to effect and carry out such estate planning as the court may determine to be appropriate for the purposes of minimizing current and prospective income and estate or other taxes . . . ."[86]

Finally, it should be pointed out that, effective January 1, 1979, the Marion County Probate Court is abolished, and jurisdiction over probate matters will reside exclusively in the newly created Marion County Superior Court. *See* IND. CODE § 33-5-35.1-4 (Supp. 1978), *as amended by* Act of Apr. 21, 1977, Pub. L. No. 313, § 4, 1977 Ind. Acts 1440.

[79]IND. CODE § 29-1-4-1 (Supp. 1978), *as amended by* Act of Mar. 7, 1978, Pub. L. No. 132, § 1, 1978 Ind. Acts 1167.

[80]IND. CODE § 29-1-4-1 (1976) (amended 1978).

[81]IND. CODE § 29-1-5-3(c) (Supp. 1978), *as added by* Act of Mar. 7, 1978, Pub. L. No. 132, § 2, 1978 Ind. Acts 1167.

[82]IND. CODE § 29-1-5-3(b) (Supp. 1978). The subsection provides that the self-proving declaration must be in "form and content substantially as" worded in the statute.

[83]*Id.* § 29-1-15-15 (1976) (amended 1978).

[84]*Id.* (Supp. 1978), *as amended by* Act of Mar. 7, 1978, Pub. L. No. 132, § 11, 1978 Ind. Acts 1167. The amended statute adopts for all sales of real estate the rule previously applicable only to private sales.

[85]IND. CODE § 29-1-15-15 (Supp. 1978).

[86]*Id.* § 29-1-18-33(c) (1976) (amended 1978).

This provision has now been made even more flexible by the inclusion of the following language: "In addition, the court may also authorize the guardian to apply or dispose of the excess principal or income for any other purpose the court decides is in the best interest of the ward, his estate, his spouse, or his family."[87]

IX. Domestic Relations

*Helen Garfield**

A. Adoption

1. Abandonment.—When a child with living parents is to be adopted, the consent of the child's natural parents is normally required.[1] Certain specific instances where consent is not required are enumerated in the adoption statutes;[2] the first of these is abandonment.[3] Three decisions interpreting the abandonment section were handed down by the Indiana Court of Appeals during the survey period.[4] None of these cases was concerned with the traditional common law concept of abandonment, which involves an *intentional* relinquishment of *all* parental rights and duties to the child.[5] They dealt, rather, with the less stringent statutory grounds for dispensing with the consent of a non-custodial parent.[6] These provisions permit a court to make what is, in effect, a finding of abandonment without the stringent proof of intent to abandon which would otherwise be required.[7]

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[87]IND. CODE § 29-1-18-33(c) (Supp. 1978), *as amended by* Act of Mar. 7, 1978, Pub. L. No. 132, § 11, 1978 Ind. Acts 1167.

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[1]IND. CODE § 31-3-1-6(a)(1) (1976).

[2]*Id.* § 31-3-1-6(g). These include abandonment, voluntary relinquishment of the right to consent, and prior involuntary termination of parental rights. *Id.*

[3]*Id.* § 31-3-1-6(g)(1).

[4]Rosell v. Dausman, 373 N.E.2d 185 (Ind. Ct. App. 1978); *In re* Adoption of Dove, 368 N.E.2d 6 (Ind. Ct. App. 1977); Young v. Young, 366 N.E.2d 216 (Ind. Ct. App. 1977). *Rosell* and *Young* deal with the statute as it existed prior to the 1975 amendments, Act of Apr. 14, 1971, Pub. L. No. 421, § 1, 1971 Ind. Acts 1962, 1963 (amended 1975, 1978).

[5]*See* Murphy v. Vanderver, 349 N.E.2d 202, 203 (Ind. Ct. App. 1976).

[6]IND. CODE § 31-3-1-6(g)(1) (1976).

[7]The version of the statute in effect from 1975 until 1978 made it fairly clear that the legislature intended to establish a lesser category of abandonment. This intent is less clear under the 1978 amendments. The earlier version, IND. CODE § 31-3-1-6(g)(1) (1976) (amended 1978), provided: