VIII. Decedents' Estates and Trusts

DEBRA A. FALENDER*

During the survey period in the area of wills and trusts, the significant cases[1] involved claims against decedents' estates, will contests, admissible evidence in a suit to enforce an alleged contract made by a decedent, final appealable judgments in probate proceedings, self-dealing by a fiduciary, res judicata, interpretation of a testamentary trust, and establishment of a purchase money resulting trust. It is interesting to note that most of the cases resolved procedural rather than substantive issues.

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

[1]Only one section of the Probate Code was amended during the survey period. This amendment is discussed in the section on claims against decedents' estates. Interesting but insignificant cases will be mentioned in footnotes within the related topic. A few cases that do not fall within the listed topics are noted here. In Tekulve v. Turner, 391 N.E.2d 673 (Ind. Ct. App. 1979), and Marsch v. Lill, 396 N.E.2d 695 (Ind. Ct. App. 1979), the court of appeals held that Indiana's statutory provision regarding inheritance by illegitimate children from their intestate fathers, IND. CODE § 29-1-2-7 (1976), is clearly constitutional in light of the United States Supreme Court's opinion in Lalli v. Lalli, 439 U.S. 259 (1978), and the Indiana Supreme Court's opinion in Burnett v. Camden, 253 Ind. 354, 254 N.E.2d 199, *rehearing denied*, 253 Ind. 361, 255 N.E.2d 650, *cert. denied*, 399 U.S. 901 (1970). Recent cases bearing upon the constitutionality of Indiana's statutory requirements for inheritance by illegitimate children from their fathers have been discussed at length in previous survey articles. Barton, *Trusts and Decedents' Estates, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 423, 434 (1980); Falender, *Trusts and Decedents' Estates, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 330, 334-37 (1978). *Tekulve* and *Marsch* are noteworthy only because the Indiana courts have now stated the obvious.

The *Marsch* opinion, 396 N.E.2d at 696-99, also contains an interesting discussion of when attorneys' fees are payable out of estate assets. The trial court exceeded the discretion accorded it in IND. CODE § 29-1-1-20 (1976) when it allowed fees from the estate to an attorney after the attorney had begun direct representation of the interests of a known and identifiable prospective heir. The statute provides for compensation of attorneys out of estate assets only when they are appointed to represent "any interested person who is an incompetent or whose present name, existence, or residence upon diligent inquiry is unknown and cannot be ascertained." *Id.* § 29-1-1-20(a). Regarding attorneys' fees, *see also* the recent case of Wyneken v. Long, 400 N.E.2d 1147 (Ind. Ct. App. 1980), wherein the trial court properly denied a claim against a guardian for attorneys' fees. The attorney was aware that his client was under guardianship, but nonetheless performed services without first obtaining the approval of the guardian.

In Arnold v. Dirrim, 398 N.E.2d 442 (Ind. Ct. App. 1979), the court of appeals, in the course of upholding the trial court's finding of the defendants' intent to defraud plaintiff creditors, noted that a transfer to a spendthrift trust with a retained life interest is "indicative of fraudulent intent." *Id.* at 447.

A. Claims Against Decedents' Estates

During the 1980 legislative session, Indiana Code section 29-1-14-1, the nonclaim statute, was amended by adding the italicized language below:

> (a) All claims against a decedent's estate, other than expenses of administration and claims of the United States, and of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent, unless filed with the court in which such estate is being administered within:
> (1) five (5) months after the date of the first published notice to creditors; *or*
> (2) *three (3) months after the court has revoked probate of a will, in accordance with IC 29-1-7-21, if the claimant was named as a beneficiary in that revoked will; whichever is later.*[2]

The amended statute provides for a potentially extended claim-filing time if the claimant was a beneficiary under a contested will, the probate of which was revoked.[3] The three-month claim-filing period will apply, by its terms, regardless of the reason for the claimant-beneficiary's failure to file a claim within the five-month time period[4] and regardless of the fact that the claimant may share in the

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[2]IND. CODE § 29-1-14-1(a) (Supp. 1980). A similar change was made in subsection (c) of the section, which now provides:

> No claim shall be barred by the statute of limitations which was not barred thereby at the time of the decedent's death, if the claim shall be filed within:
> (1) five (5) months after the date of the first published notice to creditors; or
> (2) *three (3) months after the court has revoked probate of a will, in accordance with IC 29-1-7-21, if the claimant was named as a beneficiary in that revoked will;*
> *whichever is later.*

Id. § 29-1-14-1(c). The italicized language was added.

[3]The phrase "potentially extended" is used because if the probate of a will is revoked within two months after the first published notice to creditors, the claim-filing time of the claimant-beneficiary will not be extended beyond the five-month general time period.

[4]The reason for the claimant-beneficiary's failure to file a claim is immaterial in deciding whether the three-month period applies. The amendment undoubtedly was intended to protect a claimant-beneficiary who refrained from filing because the bequest or devise in the contested will satisfied the decedent's obligation to him or her. The amended statute, however, will "protect" any beneficiary of a successfully contested will who failed, for any reason, to file a claim within the five-month general time period.

decedent's estate as an heir or as a beneficiary under another valid will.[5]

Three questions come to mind regarding the effect of the amended nonclaim statute. First, how will the three-month provision affect the time period for filing the surviving spouse's election to take against the decedent's will?[6] Indiana Code section 29-1-3-2 provides that the election of a surviving spouse to take a forced share "must be made not later than ten (10) days after the expiration of the time limited for the filing of claims."[7] Section 29-1-3-2 also provides that if an action is pending to test the validity of a will, the surviving spouse may make an election within "thirty (30) days after the final determination of the litigation."[8] Will the surviving spouse be required to make an election within thirty days after the termination of litigation which results in revocation of probate of a will, or will the surviving spouse be entitled to elect within ten days after the expiration of the extended three-month claim-filing period?[9]

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[5]Thus, the amended statute may protect claimants who are in no way prejudiced by the revocation of probate of a will. Protection of those who are not prejudiced by revocation of probate should not be considered objectionable. Placing limitations on the applicability of the three-month provision would encourage expensive and time-consuming litigation whenever the applicability of the limitation was questionable. The simple, unqualified three-month provision is preferable to a more complicated provision even though a more complicated provision might be tailored to protect only those who are prejudiced by revocation of probate of a will.

[6]The elective share provisions are found in IND. CODE §§ 29-1-3-1 through -3-7 (1976 & Supp. 1980).

[7]IND. CODE § 29-1-3-2 (1976) provides in full:

> The election by a surviving spouse to take the share hereinbefore provided must be made not later than ten (10) days after the expiration of the time limited for the filing of claims; provided that if, at the expiration of such period for making the election, litigation is pending to test the validity or to determine the effect or construction of the will, or to determine the existence of issue surviving the deceased, or to determine any other matter of law or fact which would affect the amount of the share to be received by the surviving spouse, the right of such surviving spouse to make an election shall not be barred until the expiration of thirty [30] days after the final determination of the litigation.

[8]*Id.*

[9]If the spouse is devised property under the will, the devise may or may not abate for the payment of creditor's claims, depending on the classification of the devise as specific, general, or residual, and depending on the intent of the testator. *See* IND. CODE § 29-1-17-3 (1976) regarding the order of abatement. The surviving spouse will ordinarily need to know the amount of claims filed against the estate, and consequently the extent of abatement, in order to make an intelligent decision to elect to take against the will. Thus, the first-stated rule of § 29-1-3-2 gives the spouse ten days after the claim-filing period to make an intelligent choice. *See* text at note 7 *supra*. The proviso in § 29-1-3-2 would only lengthen the elective share filing period under the original nonclaim statute: The proviso would allow the spouse an additional thirty days after the termination of any litigation "which would affect the amount of the share to

Second, will the three-month claim-filing period apply when a successful collateral attack has been made upon the validity of a probated will? Ordinarily, a will contest must be filed within five months after a will is offered for probate.[10] In *Estate of Cameron v. Kuster*,[11] the court of appeals held that a collateral attack, after the five-month contest period, is proper when the will, on its face, clearly violates the execution requirements of the Probate Code.[12] Will the three-month claim-filing period apply when a *Kuster* collateral attack results in revocation of probate of a will?[13] Certainly, applying the three-month period in the event of a *Kuster* collateral attack is within the spirit of the recently amended nonclaim provision.[14]

Third, will the three-month period only if probate of a will is successfully revoked or also if probate of a will is initially refused? The Probate Code distinguishes between revocation of probate and refusal of probate,[15] and apparently section 29-1-14-1 maintains the

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be received by the surviving spouse." IND. CODE § 29-1-3-2 (1976). In some cases, the new three-month period for filing creditor's claims will reverse the effect of the proviso in § 29-1-3-2: Whenever litigation results in revocation of probate of a will, the election-filing period may be shortened, by literal application of the proviso, to thirty days after termination of the litigation instead of ten days after the new three-month claim-filing period. Such a literal application of § 29-1-3-2 would mean that the spouse may be forced to decide to elect or not before that spouse knows of all the claims against the decedent's estate.

If § 29-1-3-2 is not amended to clarify its relationship to § 29-1-14-1, the courts should construe § 29-1-3-2 to always allow the spouse ten days after the expiration of the claim-filing time (either the five-month or the three-month period) to give full effect to the legislative intent that the spouse be afforded an opportunity to make an intelligent decision to elect or not.

[10]IND. CODE § 29-1-7-17 (1976 & Supp. 1980).

[11]142 Ind. App. 645, 236 N.E.2d 626 (1968), discussed at notes 56-58 *infra* and accompanying text.

[12]*Id.* at 652, 263 N.E.2d at 628-29. In *Kuster*, an unsigned and unattested codicil had been admitted to probate. Objections were filed and allowed after the five-month will contest period.

[13]The three-month nonclaim provision specifically refers to a revocation of probate pursuant to § 29-1-7-21, which provides in full: "If such determination be against the validity of such will or the competency of the proof, the court shall refuse or revoke the probate thereof; but if it be in favor of the validity and due execution of such will, probate thereof shall be admitted or ratified." The language of § 29-1-7-21 is broad enough to encompass a determination to revoke probate made after a *Kuster* collateral attack.

[14]See notes 4-5 *supra*. A claimant-beneficiary is prejudiced by not filing a claim in reliance on the validity of a bequest or devise in any will regardless of the reason for or the time of revocation of probate of that will.

[15]IND. CODE § 29-1-7-13(a) provides:

> When a will is offered for probate, if the court finds that the testator is dead and that the will was executed in all respects according to law, it shall be admitted to probate as the last will of the deceased, unless objections are filed as provided in section [29-1-7-16].

distinction by its reference to revocation of probate and its omission of any reference to refusal of probate.[16]

In two cases decided during the survey period, the pre-amendment nonclaim provision barred the claims of the creditors. In *Rising Sun State Bank v. Fessler*,[17] a doctor sued the personal representatives to recover for medical services rendered to two decedents. The doctor's suit was filed in a court that did not have probate jurisdiction.[18] The trial court rendered a judgment in favor of the doctor, but the court of appeals reversed, holding that the doctor was precluded from recovering against these personal representatives because of his failure to comply with section 29-1-14-1.[19]

Section 29-1-7-16 provides for the filing of objections before the will is admitted. If objections to probate are properly filed before the will is admitted to probate, then "[w]hen and if such will is thereafter offered for probate, it shall be impounded by the clerk, copied in the will record and its probate continued for thirty (30) days." IND. CODE § 29-1-7-16 (1976). The will will be admitted to probate "[i]f an action to resist the probate of such will is not commenced, as provided in section [29-1-7-17], within this time . . . ." *Id.* Thus, there are two distinct courses of events. By one, a will is admitted to probate, and then if a will contest is successful, the probate of the will is *revoked*. By the other, a will is objected to before it is admitted to probate, and then if an action to *resist* probate is successful, the probate of the will is *refused*. Section 29-1-7-17 maintains the distinction by providing: "Any interested person may contest the validity of any will or resist the probate thereof . . . ." IND. CODE § 29-1-7-17 (1976). Section 29-1-7-20 refers specifically to the two distinct procedures: "In any suit to resist the probate, or to test the validity of any will after probate . . . ." *Id.* § 29-1-7-20. Section 29-1-7-21, reprinted in full at note 13 *supra*, also distinguishes between refusal and revocation of probate. *Id.* § 29-1-7-21.

[16]The reference to revocation of probate and not to refusal of probate in the amended nonclaim statute may have been inadvertent. The only real distinction between resisting probate and contesting probate is the time when objections to the validity of a will are filed with the court. Why should the mere timing of filing objections to validity affect the applicability of the three-month claim-filing period? Arguably, a claimant-beneficiary may rely more justifiably on the validity of an admitted will than on the validity of an impounded will. Thus, perhaps the legislature intended that claimant-beneficiaries of wills whose probate is resisted should not be allowed the additional three months in which to file a claim.

[17]400 N.E.2d 1164 (Ind. Ct. App. 1980).

[18]The doctor sued the personal representatives in the Ohio County Court, which had no jurisdiction over probate matters. IND. CODE §§ 33-4-4-3, 33-10.5-3-2 (1976). The estate was being administered in the Ohio Circuit Court.

[19]The appellate court decision does not indicate when the doctor's lawsuit was filed. If the lawsuit was filed beyond the five-month time limit of § 29-1-14-1, then the appellate court's decision to reverse was correct: A party "cannot seek to 'revive' a claim which should have been filed against a decedent's estate by bringing an action against the executor or administrator" after the filing period has run. 400 N.E.2d at 1166. If, however, the lawsuit was filed within the five-month time limit, albeit in the wrong court and not as part of the probate proceeding, the trial court's judgment for the doctor might have been affirmed by recognition of the principles embodied in IND. R. TR. P. 75(B) and the case of State *ex rel.* Townsend v. Tipton Circuit Court, 242 Ind. 226, 177 N.E.2d 590 (1961). In *Townsend*, a will contest was filed in the court where

In *Anson v. Estate of Anson*,[20] the creditor was a legatee and, as such, by statute was entitled to a mailed copy of the published notice to creditors to file claims against the decedent's estate.[21] The creditor-legatee's notice of publication was not mailed until nearly six months after the notice to creditors was published,[22] and the

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the estate was being administered. The will contest was given a civil cause number, but the trial court changed the cause number to the number of the estate proceeding filed in the same court. The Indiana Supreme Court held that nothing prevents this sort of renumbering, "so long as the rights of the parties are not prejudiced thereby in the trial of the merits of the action or defense." *Id.* at 231, 177 N.E.2d at 593. The Indiana Supreme Court also stated:

> Actions to contest or resist the probate of a will are statutory. Although they have in many respects the characteristics of a civil action, they are also at the same time connected with the estate proceedings. Even though they may proceed as a separate action on the civil side of a court, the estate proceedings in the probate side of the court must take cognizance of and judicial notice of the rulings and ultimate determination of the so-called "civil action" to contest the validity or resist the probate of the will. The same situation exists with reference to claims against an estate placed on the trial docket.

Id. at 229-30, 177 N.E.2d at 592.

In *Fessler*, the doctor's lawsuit was not filed in the court with jurisdiction over the estate proceeding. *See* note 18 *supra*. Therefore, more than merely renumbering the cause of action was required to validate the doctor's claim. IND. R. TR. P. 75(B) provides the vehicle for considering the doctor's claim as filed in the proper court. The rule provides:

> Whenever a claim or proceeding is filed which should properly have been filed in another court of this state, and proper objection is made, the court in which such action or proceeding is filed shall not dismiss the same, but shall order said cause transferred to the court in which it should have been filed. The person filing such claim or proceeding shall pay such costs as are chargeable upon a change of venue and the papers and records shall be certified to the court of transfer in like manner as upon change of venue. Such action shall be deemed commenced as of the date of filing the claim in the original court.

Thus, if the doctor's lawsuit had been filed within the five-month claim-filing period, even though in the wrong court, the suit should have been transferred to the court with probate jurisdiction. Then, by the *Townsend* rationale, the court with probate jurisdiction should have taken judicial notice of the civil action "so long as the rights of the parties are not prejudiced thereby in the trial of the action or defense." 242 Ind. at 231, 177 N.E.2d at 593. If the doctor's lawsuit was filed, and summons served, so that the personal representatives were notified of the claim within the five-month claim-filing period, it seems that no rights would have been prejudiced by correcting the filing error.

[20]399 N.E.2d 432 (Ind. Ct. App. 1980).

[21]IND. CODE § 29-1-7-7 (1976) provides in part: "A copy of [the published] notice shall also be served by ordinary mail on each heir, devisee and legatee whose name and address is set forth in the petition for probate or letters . . . ."

[22]There is a strong suggestion of unfair play in the facts of the case. The appellant was a child of the decedent and a residuary trust legatee, but his residuary trust interest (and his entire interest in his father's estate) was only one dollar. The dece-

creditor-legatee did not file his claim until nearly ten months after the first published notice to creditors. The creditor-legatee argued that the estate should be estopped from denying his claim because he relied to his detriment on receiving personal notice of publication as a legatee. The court of appeals, quoting from a 1962 case, rejected this argument:

> The rule of waiver or estoppel has no application to a nonclaim statute. . . . [T]he time element in a nonclaim is a part of the right of action itself and is not a defense. Such statutes are not extended by the disability, fraud or misconduct of the parties. The time to act cannot be waived by the parties or lengthened by the court.[23]

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dent's widow received one-half of the estate outright, and the decedent's other children and grandchildren shared the corpus of the trust of the other one-half of the property. The personal representative was the decedent's widow. The original petition for probate did not list the names and addresses of any of the residuary trust legatees, all of whom were the decedent's children and grandchildren. Thus, when the notice to creditors was first published on September 23, 1975, since no names and addresses of legatees were "set forth in the petition for probate," IND. CODE § 29-1-7-7 (1976), no mailed notices were sent to the legatees. Not until March 19, 1976, nearly six months after the first published notice, did the personal representative file an amended petition for probate which included the names and addresses of the trust legatees, and not until March 19, 1976, were mailed copies of the notice to creditors sent to these residuary legatees.

IND. CODE § 29-1-7-5(2) (1976) provides that a petition for probate shall state "the name, age and place of residence of each legatee and devisee, in the event the decedent left a will, so far as such are known or can with reasonable diligence be ascertained by the personal representative." It would be logical to assume that the decedent's widow, acting as personal representative, could have ascertained with reasonable diligence the names and addresses of the decedent's children and grandchildren (the residuary trust legatees) in time to include them in the original petition for probate or at least shortly thereafter. Yet the personal representative waited six months to comply with § 29-1-7-5(2). Interestingly, in September 1975, the time limit for filing claims was six months after the first published notice to creditors, *id.* § 29-1-14-1(a) (amended to five months effective January 1, 1976), and the time limit for filing a will contest was six months after the will was offered for probate, *id.* § 29-1-7-17 (amended to five months effective January 1, 1976). The will was admitted to probate on September 19, 1975, exactly six months before the amended petition with names and addresses was filed. The timing, coupled with the fact that the appellant was effectively cut out of decedent's estate, leads one to suspect that the appellant was intentionally kept in the dark.

[23]399 N.E.2d at 435 (quoting Donella v. Crady, 135 Ind. App. 60, 63, 185 N.E.2d 623, 625 (1962)). This position may seem harsh to creditors, especially if fraud or disability has prevented them from timely filing, but it must be remembered that the purpose of the nonclaim statute is to promote the expeditious distribution of claim-free property. 399 N.E.2d at 436. Creditors may not sleep on their rights or rely on assurances of others that their rights will be protected regardless of their compliance with the statutory procedures.

The creditor-legatee in *Anson* also argued that compliance with the personal notice requirement is required for the commencement of the running of the nonclaim statute. This argument was answered by reference to a 1959 case, which decided the same question adversely to the claimant.[24] Thus, the court of appeals affirmed the trial court's dismissal of the claim as untimely filed.[25]

The most significant "claim" case during the survey period was *In re Estate of Williams*.[26] In *Williams*, the plaintiff corporation sought enforcement of a corporate stock buy-sell agreement[27] against the estate of a deceased shareholder. The plaintiff filed its "Petition for an Order Directing Executrix to Perform an Agreement" nearly one year after the first published notice to creditors.[28] The court of appeals held that the nonclaim statute, section 29-1-14-1, did not apply, because the obligation sought to be enforced by the plaintiff (to sell to the corporation any shares of stock of the corporation that the decedent owned at death) was not "'a debt or demand of a pecuniary nature which could have been enforced against the decedent in his lifetime and could have been reduced to a simple money judgment.'"[29] The court of appeals, however, held that Indiana Code section 29-1-14-21 did prevent enforcement of the buy-sell agreement in the estate proceeding.[30] Section 29-1-14-21 provides:

> When any person claims any interest in any property in the possession of the personal representative adverse to the estate, he may file, prior to the expiration of five (5) months after the date of the first published notice to creditors, a petition with the court having jurisdiction of the estate setting out the facts concerning such interest, and thereupon the court shall cause such notice to be given to such parties as it deems proper, and the case shall be set for trial and tried as in ordinary civil actions.[31]

The court of appeals held that section 29-1-14-21 "requires a person who claims an interest in the property in the possession of the personal representative to file a petition within five months after the first published notice if that person wishes to resolve the issue

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[24]Lewis v. Smith's Estate, 130 Ind. App. 390, 162 N.E.2d 457 (1959).

[25]399 N.E.2d at 437.

[26]398 N.E.2d 1368 (Ind. Ct. App. 1980).

[27]A controversy over the proper construction of the agreement was not resolved by the court. *Id.* at 1370 n.1.

[28]*Id.* at 1369. At the time, the claim-filing period was five months after the first published notice to creditors.

[29]*Id.* at 1370 (quoting Vonderahe v. Artman, 128 Ind. App. 381, 387, 146 N.E.2d 822, 825 (1958) (defining "claim")).

[30]398 N.E.2d at 1371.

[31]IND. CODE § 29-1-14-21 (1976).

as a part of the estate proceeding."[32] The court emphasized that the five-month time period in section 29-1-14-21 only bars assertion of the adverse interest "as a part of the estate proceeding."[33] The interest asserted is not "forever barred" by failure to file within five months,[34] but the interest apparently may be asserted only against the decedent's successor in interest if not filed within five months.[35]

The corporation made several arguments as to the inapplicability of section 29-1-14-21, but these arguments did not persuade the appellate court.[36] The corporation argued that the stock was not in the possession of the personal representative because application of the doctrine of equitable conversion left the estate with only an action to collect the agreed purchase price.[37] The court of appeals might have soundly rejected the applicability of the doctrine of equitable conversion in a purchase and sale of personal property.[38] Instead, the court merely stated that the authorities cited by the corporation were not on point.[39]

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[32]398 N.E.2d at 1371. In another statement of this same holding, the court italicized the words "as a part of the estate proceeding." *Id.*

[33]*Id.* The court, therefore, gave effect to the permissive language of the statute, which states "that a person 'may' file rather than 'shall' file." *Id.*

[34]The "forever barred" language of IND. CODE § 29-1-14-1 (Supp. 1980) is not used in *id.* § 29-1-14-21. The absence of the "forever barred" language is consistent with the permissive language of *id.* § 29-1-14-21, *See* note 33 *supra.*

[35]In *Williams*, then, the corporation could assert the enforceability of the buy-sell agreement against the heirs or devisees who succeed to the deceased shareholder's interest in the stock. The decedent's obligations under the buy-sell agreement are restrictions attached to the stock and should be enforceable against anyone who is not a bona fide purchaser for value.

[36]398 N.E.2d at 1370-71.

[37]*Id.* The doctrine of equitable conversion is based on the availability of the equitable remedy of specific performance of real estate contracts. Equity treats as done those things that ought to be done and, thus, treats the purchaser of land as the equitable owner of real estate and the seller of land as the owner of the unpaid purchase money.

[38]The continued viability of the equitable conversion doctrine in real estate contracts is unquestioned. *See, e.g.*, J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 146-54 (2d ed. 1975). There is no sound reason for extending this questionable doctrine into the personal property area.

[39]398 N.E.2d at 1371. The Indiana authorities cited involved real estate contracts. A Missouri case was cited which supports the theory of equitable conversion in personal property contracts, Strumberg v. Mercantile Trust Co., 367 S.W.2d 535 (Mo. 1963), but the Indiana court merely distinguished the Missouri case from the *Williams* case on the basis that Missouri had no statute similar to IND. CODE § 29-1-14-21 (1976).

Another part of the corporation's argument was that the interest of the corporation was not adverse to that of the estate because enforcement of the buy-sell agreement involved merely an exchange of stock for cash. The court responded in a footnote: "Liquidity, however, is not always the primary goal in estate administration. Ancillary advantages or benefits may emanate from possession of the stock. These would be lost if the stock were exchanged for cash." 398 N.E.2d at 1370 n.2.

The corporation also argued: "'If the rule were that interests under executory sale and purchase agreements, such as that involved here, were within IC 29-1-14-21, the executor could be deprived of a beneficial bargain by the simple neglect of the purchaser to file any claim.'"[40] The court, after pointing out that the case cited in support of the argument did not refer to section 29-1-14-21, concluded, with no explanation, that the corporation's "argument is not persuasive."[41] The court might have clarified its opinion had it pointed out (1) that the personal representative could sue to enforce a beneficial bargain even if the other party did not comply with sections 29-1-14-21, and (2) that apparently the "claimant" may assert his interest dehors the estate proceeding, directly against the successors to the property subject to the interest.[42]

It is submitted that if an interest in property is asserted beyond the five-month filing period of section 29-1-14-21, the personal representative should be allowed, and in certain circumstances required, to litigate the issue as part of the estate proceeding—to assure proper distribution of the estate and to protect the decedent's heirs and legatees from subsequent litigation. For example, in *Williams*, those who succeed to the decedent's interest in the stock will find that they have succeeded also to litigation over the enforceability of the buy-sell agreement. The enforceability of the buy-sell agreement will affect the value of the successors' interests in the stock, and litigation costs may reduce substantially the value of the successors' shares. It is submitted that the successors in interest should be able to require the personal representative to litigate the issue as part of the estate proceeding, if they desire,[43] and the personal representative should be permitted to litigate the issue if the personal representative is willing to do so.[44] It is, however, impossible to tell whether the appellate court would accept a construction of the per-

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[40]398 N.E.2d at 1371.

[41]*Id.*

[42]*See* note 35 *supra* and accompanying text.

[43]The *Williams* court stated that its construction of § 29-1-14-21 of the Indiana Code "simply promotes the expeditious conclusion of estate proceedings." 398 N.E.2d at 1371. The statute, however, if it is strictly construed to absolutely prevent litigation of the issues raised by petitioners who claim an interest in property in the personal representative's possession, will not promote the interests of decedent's successors. Distribution of the estate may be expedited, but the distributees will also receive an unwanted lawsuit. Most distributees would probably want litigable issues to be resolved before distribution, even if distribution were delayed somewhat.

[44]Ordinarily, litigation over conflicting interests in property in the possession of the personal representative, being administered as estate property, would always be more efficiently and appropriately conducted by the personal representative at the expense of the estate.

missive language of section 29-1-14-21 which would permit flexibility in the application of the five-month time period.

B. Will Contests

The appellants in two will contest cases appeared to be grasping for grounds for appeal. In *Munster v. Marcrum*,[45] the appellants-contestants, relying on the testimony of the attesting witnesses, contended that there was no evidence showing that the testatrix had published and properly signed her will.[46] The witnesses' testimony, however, was contradicted by the attestation clause included in the will and read by both witnesses[47] and was contradicted by a verified affidavit signed by one of the witnesses when the will was offered for probate.[48] The court of appeals held that the attestation clause and the affidavit served as evidence to support the jury's verdict of the will's validity.[49]

The inclusion of an attestation clause will always aid the proponents of a will, as in the *Munster* case, if the clause is proved to have been read by or to the witnesses at the time of execution of

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[45]393 N.E.2d 256 (Ind. Ct. App. 1979).

[46]The two attesting witnesses testified that the testatrix's signature was on the will when they gathered to attest it, and that the testatrix did not acknowledge the signature in their presence, or expressly signify to them that the instrument was her will, as required by IND. CODE § 29-1-5-3(a)(1)(ii) (1976 & Supp. 1980). The contestants had the burden of proving invalidity of the will, *id.* § 29-1-7-20, and were therefore appealing a negative judgment. It should be noted that the witnesses testified that the testatrix and the witnesses were present, and the testatrix did not object, when her husband referred to two instruments as "'our wills.'" 393 N.E.2d at 257. This acquiesced-in statement of testatrix's husband probably satisfies the publication requirement, as interpreted in Arnold v. Parry, 363 N.E.2d 1055 (Ind. Ct. App. 1977), discussed in Falender, *Decedent's Estates and Trusts, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 142 (1979).

[47]The attestation clause stated, in part, that the "'instrument was signed, published and declared by said [testatrix], as and for her Last Will and Testament, in our presence, and in the presence of each of us . . . .'" 393 N.E.2d at 257.

[48]The affidavit stated that the testatrix "'signified that such instrument was his/her Last Will and Testament, and duly executed same, in the presence of the subscribing witnesses thereto . . . .'" *Id.* at 258.

[49]*Id.* The court noted that the contestants' "attempt to argue to this court that the attestation clause from the will and the affidavit should not be considered as substantive evidence for various reasons." *Id.* at 258 n.2. The court then stated that, because contestants introduced the will and affidavit into evidence, they could not "challenge the use of these exhibits as substantive evidence." *Id.* This points up a Catch-22 for will contestants. The contestants could not successfully contest a will's validity without introducing that will into evidence. Yet, the moment the contestants introduce a will with an attestation clause, they cannot complain when the clause is used as substantive evidence of the will's validity. Of course, the clause must be proved to have been read to or by the witnesses in order to serve as any evidence that the recited acts occurred. *See* note 50 *infra*.

the will.[50] In another recent case, *Modlin v. Riggle*,[51] it is evident that the absence of an attestation clause has no effect on the validity of a will, because an attestation clause is not required for due execution.[52] The contestant-appellant in *Modlin* filed an action to set aside probate of a will more than five months after the will was admitted to probate.[53] The contestant attempted to avoid the jurisdictional bar of the five-month time limitation for contesting a will by asserting that, when the will witnesses are unavailable to testify as to the facts of due execution, the absence of both an attestation clause and a self-proving provision[54] is a defect on the face of the will "clearly showing its nontestamentary character."[55] Thus, the contestant argued, a collateral attack upon the judgment admitting the will to probate is permissible within the doctrine of *Estate of Cameron v. Kuster*,[56] which allowed a collateral attack when the will admitted to probate "was *on its face* clearly violative of our Probate Code."[57] In *Modlin*, the court of appeals held that the absence of an attestation clause and a self-proving provision did not render the instrument admitted to probate in any way irregular on its face so as to bring the case within the *Kuster* doctrine.[58]

C. *Evidence*

The court of appeals in *In re Estate of Voelker*,[59] considered the issue of whether unsigned wills in the possession of a decedent's attorney are protected under the attorney-client privilege. The plaintiff in *Voelker*, seeking specific performance of the decedent's alleged promise to convey certain real and personal property, requested a discovery order for copies of any of the decedent's unsigned wills.

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[50]If the clause is not read by or to the witnesses, it has no effect either as substantive evidence or as a means to impeach the contradictory testimony of the witnesses at trial. *See generally* Severns, *The True Function of the Attestation Clause in a Will*, 11 CHI.-KENT L. REV. 11 (1932).

[51]399 N.E.2d 767 (Ind. Ct. App. 1980).

[52]*Id.* at 770.

[53]IND. CODE § 29-1-7-17 (1976) provides that a will contest must be filed within five months after a will is offered for probate. In *Modlin*, the record did not reveal when the will was offered for probate, but obviously it was offered before or on the same day it was admitted to probate. It is interesting to note that no one is entitled to notice that a will has been offered or admitted to probate. *Id.* § 29-1-7-4(d).

[54]*Id.* § 29-1-5-3(b) (1976 & Supp. 1980).

[55]399 N.E.2d at 768.

[56]142 Ind. App. 645, 236 N.E.2d 626 (1968).

[57]399 N.E.2d at 770 (emphasis in original). The *Kuster* codicil was unsigned and unattested. *See* notes 12-13 *supra*.

[58]399 N.E.2d at 770. *Accord*, Brown v. Gardner, 159 Ind. App. 586, 308 N.E.2d 424 (1974); Wilkinson v. Ritzman, 158 Ind. App. 186, 301 N.E.2d 847 (1973).

[59]396 N.E.2d 398 (Ind. Ct. App. 1979).

The trial court granted the order. The court of appeals reversed the discovery order, holding that the unsigned wills were protected by the attorney-client privilege.[60] Although the attorney-client privilege is "waived or terminated by operation of law" when a will is executed, the same is not true when "the metamorphosis from mere pages of writing to the status of a will was never achieved."[61] The attorney-client privilege may, however, be waived by the decedent's personal representative, heirs, or legatees.[62]

D. Final Appealable Judgments

In *In re Estate of Garwood*,[63] one of the decedent's heirs filed a petition to set aside a contract for the sale of estate property, which contract had been entered into after the decedent's death between one of two co-executors, individually, and the two co-executors on behalf of the estate.[64] After a hearing, the trial court entered a judgment declaring the contract valid and enforceable. The objecting heirs appealed by filing a motion to correct errors. The court of appeals,[65] *sua sponte*, dismissed the appeal on the ground that the trial court's decision was not a final appealable judgment, but was an interlocutory order, the appeal of which was not timely filed.[66] The supreme court, on transfer, vacated the decision of the court of appeals and held that the trial court's judgment was a final appealable judgment.[67] A final judgment "'is one which determines the rights of

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[60]*Id.* The court of appeals quoted from Coleman v. Heidenreich, 381 N.E.2d 866 (Ind. 1978), where the supreme court held: "'[W]hen an attorney is consulted on business within the scope of his profession, the communications on the subject between him and his client should be treated as strictly confidential.'" 396 N.E.2d at 398.

[61]396 N.E.2d at 399.

[62]*See* Haverstick v. Banet, 267 Ind. 351, 357, 370 N.E.2d 341, 344 (Ind. 1977), *discussed in* Falender, *Trusts and Decedents' Estates, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 330, 333-34 (1978).

[63]400 N.E.2d 758 (Ind. 1980).

[64]One ground for objection was that the purchase price was less than the amount of a bid of one of the heirs; however, there is no information in the facts of the case about this alleged bid. The facts do indicate that the property was appraised at $92,200, but sold to the co-executor for $92,001. *Id.* at 759. Another ground for objection was the self-dealing of the co-executor; this is discussed in the following section.

[65]*In re* Estate of Garwood, 382 N.E.2d 1020 (Ind. Ct. App. 1978), *noted in* Barton, *Trusts and Decedents' Estates, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 423 n.1 (1980). No question was raised by the parties whether the trial court's ruling was an interlocutory order or a final appealable judgment.

[66]An appeal from an interlocutory order must be filed within thirty days after the trial court's ruling on the order. IND. R. APP. P. 3(B). All other appeals must be filed within ninety days "from the date of the judgment or the ruling on the motion to correct errors, whichever is later." *Id.*

[67]The court of appeals had relied on cases holding that orders for the sale of real estate to make assets available for the payment of liabilities are interlocutory orders.

the parties in the suit, or a distinct and definite branch of it, and reserves no further question or direction for further determination.'"[68] The judgment here was final because the merits of the entire case on the issue of the enforceability of the contract were before the trial court, the rights of the parties in and to the real estate were fully and finally determined by the trial court's order, the trial court reserved no power to deny the validity of the sale, and the issue of the sale would never come before the trial court again.[69]

E. Self-dealing by a Fiduciary

After finding that the appeal was timely filed, the *Garwood* court considered the issues of the case on the merits and stated: "The question of the validity of the sale of estate property by the personal representative to himself was decided by this court as early as 1859."[70] A fiduciary "'cannot put himself in a situation where it becomes his interest that the property should bring the least sum.'"[71] The sale by the fiduciary to himself will be set aside, without proof that the fiduciary has made an advantageous bargain.[72]

The supreme court noted that the cases relied upon by the court of appeals were inapposite, because the sale and order in the case at hand were not made to pay liabilities of the estate. 400 N.E.2d at 760-61.

[68]*Id.* at 761 (quoting Zumpfe v. Piccadilly Realty Co., 214 Ind. 282, 287, 13 N.E.2d 715, 717 (1938)). Later in the opinion, the *Garwood* court quoted the case of Inheritance Tax Div. v. Estate of Calloway, 232 Ind. 1, 8, 110 N.E.2d 903, 906 (1953): "'The distinction between an order and a judgment is one of finality, and the question is whether the order is a final determination of the rights of [the] parties.'" 400 N.E.2d at 762.

In Geib v. Estate of Geib, 395 N.E.2d 336 (Ind. Ct. App. 1979), decided during the survey period, the court of appeals held that denial of a petition to revoke letters improvidently issued is a final appealable judgment. The supreme court had held, in Meyer v. Anderson Banking Co., 243 Ind. 145, 177 N.E.2d 662 (1961), that a judgment removing an administrator is a final appealable judgment. In *Geib*, the court of appeals stated: "What is at stake in a petition to revoke letters improvidently issued is closely analogous to what is at stake in a petition to remove an administrator and, consequently, the former is also a final, appealable judgment." 395 N.E.2d at 337.

[69]400 N.E.2d at 761.

[70]*Id.* at 762.

[71]*Id.* at 763 (quoting Martin v. Wyncoop, 12 Ind. 266, 268 (1859)).

[72]400 N.E.2d at 763. The *Garwood* court quoted Potter v. Smith, 36 Ind. 231, 239 (1871):

> "The cestui que trust is not bound to prove, nor is the court bound to decide, that a trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power distinctly and clearly to show it. There may be fraud, and yet the party not be able to show it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the cestui que trust to come at his own option, and, without showing essential injury, to in-

F. Res Judicata

Because courts handling probate matters in Indiana are courts of general jurisdiction,[73] litigants must be careful to litigate all issues raised in petitions in probate proceedings in order to avoid a later defense of res judicata. *Blake v. Blake*[74] illustrates the danger. James Blake died intestate, survived by his wife Patricia, two sons, and two daughters. James died as the result of a gunshot wound inflicted by his wife, who later pled guilty to involuntary manslaughter. During the course of administration of James' estate, the administrator filed a pleading asking the probate court[75] to determine the title to parcels of real property held by James and Patricia as tenants by the entireties. Shortly after the administrator filed the petition in the probate court, James' son and daughter filed a complaint in the superior civil court,[76] asking that court to impose a constructive trust on property held by James and Patricia as tenants by the entireties.[77] The son and daughter subsequently ap-

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sist upon having the experiment of another sale."
400 N.E.2d at 763.

[73]*See* IND. CODE § 33-4-4-3 (1976) for jurisdiction of circuit courts, which handle probate matters in counties where a superior court with probate jurisdiction has not been organized. *See id.* tit. 33, art. 5 for jurisdiction of organized superior courts.

[74]391 N.E.2d 848 (Ind. Ct. App. 1979).

[75]At the time this pleading was filed, the Madison County Superior Court, No. 1, herein referred to as the "probate court," "had general jurisdiction, concurrent with the Circuit Court, in all civil and probate matters." *Id.* at 850 n.2. *See* IND. CODE § 33-5-33-6 (1971) (repealed effective February 24, 1976). During the course of the litigation, the Madison County Superior Courts, Nos. 1 and 2, were restructured into one Superior Court with three judges. After the restructuring, the superior court had the same general, concurrent probate and civil jurisdiction as Superior Court, No. 1, had before the restructuring. *Id.* § 33-5-33.1-4 (1976).

[76]This complaint was originally filed in Madison County Superior Court, No. 2, which is herein referred to as the "superior civil court." During the course of the litigation, this court was abolished in the restructuring described in note 75 *supra*. The jurisdiction of Madison County Superior Court, No. 2, was established in IND. CODE § 33-5-34-3 (1971) (repealed effective February 24, 1976).

[77]Upon James' death, legal title to the entire tenancy by entireties property remained in Patricia as the surviving co-tenant. The heirs contended that Patricia should hold all or part of the property as a constructive trustee for their benefit, to prevent her unjust enrichment from the wrongful act of killing her co-owner husband. According to National City Bank v. Bledsoe, 237 Ind. 130, 144 N.E.2d 710 (1957), a constructive trust will be imposed for the benefit of the deceased co-tenant's estate (and through the estate to the decedent's creditors and successors other than the slayer) on one-half of the property upon clear and convincing proof that the surviving tenant by the entireties intentionally caused the co-tenant's death. The trust is imposed on one-half the property because the intentional killing is said to work a severance of the entireties relationship into a tenancy in common. The fact that Patricia pled guilty to involuntary manslaughter does not preclude a showing of intentional killing in the constructive trust proceeding.

peared in the probate court and contended that the probate court did not have jurisdiction to decide the administrator's petition.[78] They explained to the probate court that they had filed a complaint in the superior civil court, and they asked the probate court to "refuse to determine any interests in said real property until such time as it may be judged that any of said real property falls within the jurisdiction of the estate."[79] The son and daughter chose not to pursue their constructive trust claim in the probate court.[80] On March 25, 1976, the probate court rendered a judgment that Patricia, James' surviving spouse, was "'entitled to . . . all right, title and interest in and to said real property.'"[81] Later, the judge in the superior civil court dismissed the son and daughter's complaint for a constructive trust on the grounds that the probate court judgment was res judicata. The daughter appealed that dismissal.

The court of appeals upheld the superior civil court's dismissal of the action.[82] The issue before the probate court was the same issue presented to the superior civil court, namely, whether the widow's fee simple legal title was subject to an equitable claim on the part of the decedent's heirs.[83] The probate court had subject matter jurisdiction of this issue,[84] and the probate court rendered a

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[78]The basis of their contention was that the tenancy by the entireties property did not pass into the deceased co-tenant's estate and would not be administered as part of the estate proceeding.

[79]391 N.E.2d at 852 n.4 (quoting the "Surviving Children's Petition to Remove the Determination of Interests in Real Property and to Remove the Administrator").

[80]They did not appear in the probate court on the date set for a hearing on the administrator's petition, though they were afforded "full opportunity to be heard." 391 N.E.2d at 854.

[81]*Id.* at 850.

[82]*Id.* at 855.

[83]The court of appeals noted that the issue was more "succinctly" presented in the heirs' complaint. *Id.* at 853. Nonetheless, both the administrator's petition and the heirs' complaint stated that Patricia held legal titles as the surviving tenant by the entireties. *Id.* The court found, therefore, that the administrator's "mention of a controversy in the widow's interest could only refer to the possible adverse interest in the heirs who claimed equitable title." *Id.* In any event, even "if the surviving children's claim was not actually identifiable as an issue in the administrator's petition, it surely would be a compulsory counterclaim." *Id.* Unasserted compulsory counterclaims are barred in subsequent actions if the other elements of res judicata are present. *Id.* (citing Middelkamp v. Hanewich, 364 N.E.2d 1024, 1034 (Ind. Ct. App. 1977)).

[84]Subject matter jurisdiction is the power to entertain the class of cases to which the controversy belongs. *See generally* State *ex rel.* Dean v. Tipton Circuit Court, 242 Ind. 642, 181 N.E.2d 230 (1962); State *ex rel.* Johnson v. Reeves, 234 Ind. 225, 125 N.E.2d 794 (1955). Lack of subject matter jurisdiction cannot be waived. Probate courts in Indiana have general subject matter jurisdiction. *See* note 73 *supra*. Jurisdiction of the particular case is the power to entertain the precise action before the court. Improper venue is one form of lack of jurisdiction of the particular case. *See* State *ex rel.* Dean v. Tipton Circuit Court, 242 Ind. 642, 181 N.E.2d 230 (1962). Failure to comply with statutory prerequisites may mean that jurisdiction of the particular case is lack-

decision on the merits[85] after affording the parties adequate opportunity for presentation of their case. Thus, all the elements of the res judicata defense were present.[86]

The decision of the son and daughter to pursue their constructive trust claim only in the superior civil court was definitely a devastating tactical error. Because the probate court had the power to decide the question of the heirs' equitable interest in the entireties property, the children should not have ignored the probate court proceeding. The assertion by the probate court of jurisdiction of the particular case should have been appealed if the children thought it was erroneous. In the absence of an appeal, the question of improper jurisdiction of the particular case was waived.[87]

G. Interpretation of Trust Terms

In *In re Geake*,[88] the testator left the residue of his estate in trust, with certain of his relatives as income beneficiaries. The trust provided for a disposition of the trust corpus to the Indiana Masonic Home and the Shriners Hospital for Crippled Children in the event that the testator's wife and son should predecease him or in the event that his son should predecease his wife. The trust, however,

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ing. *See* State *ex rel.* Johnson v. Reeves, 234 Ind. 225, 125 N.E.2d 794 (1955). Jurisdiction of the particular case may be waived. *Id.*

[85]The court of appeals noted that the question for application of the res judicata defense is whether the prior decision was "on the merits, rather than whether the issues were fully litigated." 391 N.E.2d at 855. The probate court's decision was on the merits, not on a procedural basis.

[86]The court of appeals quoted Wright v. Kinnard, 147 Ind. App. 484, 488, 262 N.E.2d 196, 199-200 (1970), for a statement of the elements of the res judicata defense:

> "The basic elements of res judicata are fourfold: (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the matter now in issue was, or might have been, determined in the former suit; (3) the particular controversy adjudicated in the former action must have been between the parties to the present suit; and (4) judgment in the former suit must have been rendered on the merits . . . ."

391 N.E.2d at 851 (also citing subsequent other cases which quoted the same passage from the *Wright* case).

[87]The children probably would not have succeeded in contesting the probate court's jurisdiction of the particular case. In spite of statements in the *Blake* opinion indicating that "any interest in the estate of in the property was contingent upon a finding of some title held by the heirs," 391 N.E.2d at 853, according to National City Bank v. Bledsoe, 237 Ind. 130, 144 N.E.2d 710 (1957), the estate of the slain co-tenant is apparently the "beneficiary" of the constructive trust, so that unpaid creditors of the decedent would have the first claim to the constructive trust property. Absent creditors' claims, the heirs of the decedent (other than the slayer) are the ultimate beneficiaries, but apparently the estate will serve as the conduit for distributing the heirs' shares. Thus, the personal representative is specifically authorized by IND. CODE § 29-1-13-10 (1976) to petition the probate court for an adjudication of the alleged beneficial interest of the estate in the property.

[88]398 N.E.2d 1375 (Ind. Ct. App. 1980).

did not provide for disposition of the corpus in the event that the testator's wife survived him but predeceased his son, and, in fact, the testator's wife did survive him and did predecease his son. The trial court determined that, because the trust failed to specify a beneficiary under the circumstances that actually occurred, a resulting trust should be imposed for the benefit of the testator's son, Robert.[89]

A resulting trust for the benefit of the settlor's successors is properly imposed when an express gratuitous trust fails for lack of an identifiable beneficiary.[90] The trial court in *Geake* apparently read the trust terms literally and determined that no beneficiary was named to take the corpus under the circumstances that occurred. The court of appeals, however, found an implied intent on the part of the settlor-testator to benefit the Home and Hospital under all contingencies.[91] The court of appeals therefore reversed the trial court's judgment and held that the Home and Hospital were the intended remainder beneficiaries of the trust.[92] The testator's intent was undoubtedly promoted by this decision. Unfortunately, the time and money spent in litigation could have been avoided by more careful drafting of the testamentary trust.

H. Purchase Money Resulting Trusts

In *Criss v. Bitzegaio*,[93] the plaintiff brought an action to impose a resulting trust upon real estate located in Indiana. The trial court

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[89]Robert was the testator's only heir-at-law.

[90]When an express gratuitous trust fails, the trust corpus can either be returned to the settlor (or, if he is dead, to his successors) by way of a resulting trust or be retained by the trustee for his own benefit. The logical choice of returning the property to the settlor is explained in G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 75, at 282 (5th ed. 1973):

> [T]he settlor usually intends the trustee to get no advantage from the trust except his compensation. Usually the only defensible result is to return the property to the settlor or his successors, either on the theory that he would have intended that action if he had thought of the question, or on the basis of fair play and justice. Surely no one other than the settlor has any equitable or moral claim to the property, assuming that he has not provided in the trust instrument his intent for a different disposition of the property.

[91]398 N.E.2d at 1378. The court of appeals applied familiar rules of testamentary construction. The court looked to the will as a whole to determine the intention of the testator and was willing to "give effect to an intention or purpose indicated by implication where the express language of the entire will manifests such an intent and the testator has simply neglected to provide for the exact contingency which occurred." *Id.* The testator's "general scheme or design to benefit [his] relatives during their lives and thereafter to distribute the corpus to the Home and Hospital" prevailed over a literal reading of the trust terms. *Id.*

[92]*Id.* at 1378-79.

[93]402 N.E.2d 1279 (Ind. Ct. App. 1980).

granted the plaintiff's motion for summary judgment and ordered the defendants to convey to the plaintiff an undivided one-third interest in the property. The majority of the court of appeals, over a well-reasoned dissent, reversed the grant of summary judgment and directed that judgment be entered for the defendants.[94]

Criss and Swango purchased the real property at a tax sale in 1949. Each paid one-half of the purchase price. The plaintiff alleged, however, that Criss and Swango purchased the property "'with the understanding that plaintiff would repay to each the said Criss and Swango one-sixth of the purchase price and when said amounts were paid, Criss and Swango would convey to Plaintiff a one-third interest in the real estate.'"[95] This alleged understanding was the basis of the plaintiff's resulting trust argument.

A resulting trust arises by implication of law in three situations in the United States today: (1) When an express trust fails for any reason,[96] (2) when there has been full performance of the trust without exhausting the trust principle, and (3) when one person pays the purchase money for a conveyance of property to another.[97] The *Criss* case involved the third type of resulting trust, the so-called purchase money resulting trust.[98] By statute in Indiana, a purchase money resulting trust may be imposed "[w]hen a conveyance for a valuable consideration is made to one (1) person, and the consideration therefor [*sic*] paid by another,"[99] where

> it shall be made to appear that, by agreement, and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land or some interest therein in trust for the party paying the purchase-money or some part thereof.[100]

The purchase money must be supplied, or an absolute obligation to pay it incurred, before or as part of the original purchase transac-

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[94]*Id.* at 1282.

[95]*Id.* at 1281 (quoting plaintiff's pleadings). Criss died in 1960 without having conveyed any interest in the real estate to the plaintiff. The defendants in the case were Swango and the children of Criss.

[96]*See* note 90 *supra*.

[97]*See generally* G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS §§ 71-76 (5th ed. 1973); 5 A. SCOTT, THE LAW OF TRUSTS § 404.1 (3d ed. 1967) (*quoted in* Melloh v. Gladis, 261 Ind. 647, 655, 309 N.E.2d 433, 438 (1974)).

[98]402 N.E.2d at 1280.

[99]IND. CODE § 30-1-9-6 (1976).

[100]*Id.* § 30-1-9-8. This statute, combined with § 30-1-9-6, reverses the common law presumption that a resulting trust arises when one person pays the purchase money for a conveyance to another. In Indiana, the agreement to hold for the payor is not presumed but must be affirmatively shown.

tion.[101] The agreement must be for valuable consideration and must be entered into before title to the property is acquired.[102]

After Criss and Swango acquired the real estate in 1949, the plaintiff paid one-third of the taxes and insurance on the property, spent money for maintenance and improvements, and paid abstract fees and costs of purchasing an easement.[103] These expenditures, however, could not serve as consideration[104] to support the alleged agreement of Criss and Swango to hold one-third of the land for one plaintiff, because the expenditures were made by the plaintiff long after Criss and Swango acquired title.

The alleged "understanding" that the plaintiff would pay Criss and Swango a total of one-third of the purchase price, according to the court of appeals, "falls far short of an absolute obligation to pay which would support a resulting trust."[105] The court reasoned that, even if a promise to pay for the land had been made by the plaintiff, the Statute of Frauds[106] would have prevented enforcement of the plaintiff's promise by Criss and Swango.[107]

The dissenting judge took issue with the majority's reversal of

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[101]402 N.E.2d at 1281 (citing, *e.g.*, Auten v. Sevier, 136 Ind. App. 434, 202 N.E.2d 274 (1964); Schwab v. Schwab, 130 Ind. App. 108, 162 N.E.2d 329 (1959); Boyer v. Leas, 116 Ind. App. 502, 64 N.E.2d 38 (1946); Rickes v. Rickes, 81 Ind. App. 533, 141 N.E. 486 (1923)).

[102]402 N.E.2d at 1281 (citing Auten v. Sevier, 136 Ind. App. 434, 202 N.E.2d 274 (1964)). Although the consideration requirement is frequently discussed in a way that makes it appear to be separate and distinct from the requirement that one party furnish the purchase money for the conveyance of land to another, whenever one party has furnished the purchase money, or has incurred an absolute obligation to pay it, the consideration requirement will always be fulfilled. The purchase money, or the obligation to furnish it, will serve as consideration for the agreement of the grantee to hold the property for the party paying for the conveyance. Furthermore, the conveyance itself should serve as consideration for the grantee's promise to hold the property for the payor.

[103]In addition, at an unspecified time, Criss and Swango allegedly agreed to allow the plaintiff a credit for one-third of the receipts from farming operations on the property. Apparently, after considering all the expenditures made by the plaintiff and after taking into account the alleged credit, the plaintiff only owed $39.76 in 1960. 402 N.E.2d at 1281.

[104]*See* note 102 *supra*.

[105]402 N.E.2d at 1281.

[106]IND. CODE § 32-2-1-1 (1976). *See* discussion at note 113 *infra*.

[107]402 N.E.2d at 1281. The court quoted from cases from other jurisdictions, namely, Nettles v. Doss, 161 S.W.2d 138 (Tex. Civ. App. 1942) and Gunstone v. Walker, 157 Wash. 475, 289 P. 53 (1930), to support its conclusion that an unenforceable oral agreement to pay the transferee a part of the purchase price after the conveyance to the transferee does not support a resulting trust in favor of the one who, in fact, contributed nothing, and was not bound to contribute anything, to payment of the purchase price. 402 N.E.2d at 1282.

summary judgment for the plaintiff.[108] The dissenting judge pointed out that the counter-affidavit filed by defendants Criss did not raise "a genuine issue of material fact in opposition to Bitzegaio's [plaintiff's] theory of resulting trust."[109] Therefore, the facts in the plaintiff's affidavit must be deemed admitted,[110] and "we must accept as true Bitzegaio's [plaintiff's] averment that the agreement represented his obligation to pay."[111] The majority, according to the dissenting judge, erroneously raised a factual issue to reverse the judgment.[112]

The dissenting judge's position seems logical: If the plaintiff averred his unconditional obligation to pay, and if the defendants did not controvert this averment in any way, then the appellate court should not have questioned the existence of the requisite "obligation." The majority's position, however, is more sound. The majority found that an obligation to pay did not exist because the Statute of Frauds would have prevented enforcement of the obligation by the obligees Criss and Swango.[113] The ultimate difference between the majority and the dissent is that the majority is unwilling to ignore the fact that the plaintiff's averment showed an agreement to repay that was entirely oral and within the Statute of Frauds at the time it was made. The majority would put the burden of overcoming the apparent Statute of Frauds problem on the plaintiff, whose burden it is to show payment of the purchase price, or the assumption of an *absolute* obligation to pay, in order to fall within the statutory purchase money resulting trust category.

The dissenting judge also took issue with the majority's conclusion that summary judgment should be granted in favor of the defendants:

> The majority have ordered that judgment be entered for defendants. This is wrong. Not only have they erred by raising a factual issue to overthrow the judgment, they have

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[108]402 N.E.2d at 1282-83 (Young, J., dissenting). Swango did not appeal, so the summary judgment entered against him stood, and the plaintiff therefore owned one-sixth of the real estate by virtue of this judgment.

[109]*Id.* at 1282. Plaintiff's affidavit explained the alleged understanding. Nothing in the counter-affidavit contravened plaintiff's affidavit. *Id.*

[110]*Id.* at 1283 (citing Carvey v. Indiana Nat'l Bank, 374 N.E.2d 1173, 1174 n.1 (Ind. Ct. App. 1978)).

[111]402 N.E.2d at 1283. The dissenting judge reasoned that the existence or not of plaintiff's absolute obligation to pay was a question of fact depending on the intent of the parties, and "the failure of the defendants to have demonstrated a genuine issue at the trial level now bars them from attacking the judgment on appeal on the ground that there is a genuine issue of material fact." *Id.* (citing Batchelder v. Haxby, 167 Ind. App. 82, 337 N.E.2d 887 (1975)).

[112]402 N.E.2d at 1283-84.

[113]*See* notes 106-07 *supra* and accompanying text.

> compounded the error by resolving this fact issue against Bitzegaio [plaintiff] and in favor of defendants. A more palatable position would be to remand for further proceedings so that at least Bitzegaio [plaintiff] has an opportunity to resolve this issue in his favor.[114]

In fact, a remand for further proceedings would have been the only palatable solution in light of the fact that the entry of summary judgment in favor of defendants is a final judgment on the merits.[115] The doctrine of res judicata will preclude the plaintiff's assertion of any issues that were or might have been litigated in the present action.[116]

One issue that might have been litigated is the issue of the imposition of a constructive trust on one-third of the property on the basis of the fraud or constructive fraud of Criss and Swango.[117] At the very least, a constructive trust might have been asserted to the extent of the monies plaintiff expended on taxes, insurance, maintenance, and improvements on the property, to prevent the unjust enrichment of Criss and Swango at the plaintiff's expense. Although the court of appeals correctly concluded that the plaintiff was not entitled to summary judgment declaring a purchase money resulting trust in his favor, the court's direction that summary judgment be entered in favor of the defendants is, in essence, a conclusion that a purchase money resulting trust was the only device available to protect the plaintiff under the facts alleged. The Indiana Supreme Court, however, has emphatically warned against a clear-cut separation of resulting and constructive trusts:

> *The label attached to the instant trust should not be determinative. Both resulting and constructive trusts are creatures of equity, imposed to do justice. This area is too overlapping, confused and ill-defined for the Court of Appeals to rely solely on the fact that the trial court labeled*

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[114]402 N.E.2d at 1284.

[115]*See, e.g.*, England v. Dana Corp., 147 Ind. App. 279, 259 N.E.2d 433 (1970).

[116]*See* note 86 *supra*.

[117]In Melloh v. Gladis, 261 Ind. 647, 656, 309 N.E.2d 433, 438-39 (1974), the court quoted 5 A. SCOTT, *supra* note 97, § 404.2, regarding constructive trusts:

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

> *the trust "resulting," and deem it to be controlled by IC 30-1-9-6 through 30-1-9-8. It would be preferable and do more justice to the law if it were merely deemed to be, and treated as, a constructive trust as alleged in Mary's complaint.*[118]

Although the plaintiff in Criss apparently did not use any label other than the resulting trust label in his pleadings and motions, the court of appeals has not done justice if there are, as there appear to be, facts alleged by the plaintiff which might justify the imposition of a constructive trust in his favor.

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[118]Melloh v. Gladis, 261 Ind. at 656-57, 309 N.E.2d at 439 (emphasis in original).