trust beneficiaries contended that they were entitled to the income from the trusts as of the date of the decedent's death rather than as of the date the trusts were funded.

The court based its decision on Indiana Code section 29-1-17-7[46] which provides that *all* income received by the administrator during the administration shall be part of the corpus of the estate, unless the testator provides otherwise. There was no language in the will providing for distribution of the income during administration; therefore, the application of the statute was clear. The case law cited by the beneficiaries in support of their position was decided prior to the enactment of the Probate Code.[47] Adherence to the clear language of the statute promotes the uniformity which is the purpose of the Probate Code.[48]

X. PROPERTY*

A. Real Property

In *Erie-Haven, Inc. v. First Church of Christ*[1] the determinable easement was recognized in Indiana for the first time.[2] The

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[46]The statute provides:

> Unless the decedent's will provides otherwise, all income received by the personal representative during the administration of the estate shall constitute an asset of the estate the same as any other asset and the personal representative shall disburse, distribute, account for and administer said income as a part of the corpus of the estate.

IND. CODE § 29-1-17-7 (1971).

[47]*E.g.*, Alig v. Levey, 219 Ind. 618, 39 N.E.2d 137 (1942). One of the cases cited was decided after enactment of the Probate Code. *In re* Estate of Brown, 145 Ind. App. 591, 252 N.E.2d 142 (1969). This case, however, was held by the court not to support the position of the trust beneficiaries. 289 N.E.2d at 544.

[48]*See* IND. ANN. STAT. § 7-1107, Comments (1953). *See also* Rheinstein, *Some Observations on Wills Under the Indiana Probate Code of 1953*, 30 IND. L.J. 152, 161-63 (1955); Note, *Possession and Control of Estate Property During Administration: Indiana Probate Code Section 1301*, 29 IND. L.J. 251, 264-65 (1954).

*Robert T. Thopy.

[1]292 N.E.2d 837 (Ind. Ct. App. 1973).

[2]As with estates in land, an easement which will terminate automatically upon the happening of a particular event or contingency may be created.

agreement out of which the easement arose provided that the railroad switch track which ran across the servient estate would be the subject of a permanent easement and that the right to use it would be perpetual. It further provided that if any business maintained on the servient tract should be "abandoned and completely discontinued to the extent that the [switch tracks were] no longer being used in connection with the [dominant estate],"[3] then the easement terminated. The stipulated facts showed that there was no business activity on the dominant tract for three years. In reversing the trial court, the court of appeals held that, according to the terms of the agreement, the easement terminated automatically. The case was remanded for a determination of whether or not appellants had knowledge of improvements made by appellee on the dominant tract, and if so, whether an equitable estoppel would arise to preclude appellants from asserting the termination.

Franklin v. Dragoo,[4] a case of first impression in Indiana, determined that the spouse of a cotenant could acquire absolute title to the cotenancy property subsequent to a tax sale. Plaintiff-appellant, Ruth Patterson Franklin, claimed a one-fifth interest in appellee's land by virtue of a cotenancy established on the death of appellant's father, Thomas Patterson. One of the other cotenants, appellant's sister, Blanche Patterson Kilgore, and her husband took possession of the cotenancy property upon the death of Thomas Patterson. The appellees were descendants of Mr. and Mrs. Kilgore. The Kilgores lost possession of the property in 1932 when it was sold to a third party at a tax sale. However, in 1936 Mr. Kilgore reacquired title to the property, but in his name alone. The court of appeals extended the doctrine of inurement[5] to include tax sale acquisitions of cotenancy property by the spouse of a cotenant.[6] However, the primary issue was whether

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Irvin v. Petitfils, 44 Cal. App. 2d 496, 112 P.2d 688 (1941). *See generally* Annot., 154 A.L.R. 5, 33 (1945).

[3]292 N.E.2d at 839.

[4]294 N.E.2d 165 (Ind. Ct. App. 1973).

[5]

> Where one of several tenants in common of an estate purchases the common property at a tax sale, he cannot set up his title thus acquired against the common title, but his tax title inures to the common benefit of himself and his co-tenants . . . .

294 N.E.2d at 166, *quoting from* Butler v. Butler, 63 Ind. App. 533, 537, 114 N.E. 760, 762 (1917).

[6]Other jurisdictions have likewise extended the doctrine to include spouses of cotenants. *See* Annot., 153 A.L.R. 678 (1944).

or not the doctrine applied to acquisitions from third parties after the cotenancy had terminated. The cotenancy ended on expiration of the redemption period following the tax sale to the third party.[7] The court held that in the absence of fraud or collusion, once the cotenancy terminated, the need for the inurement rule was obviated. Since the cotenancy no longer existed, acquisition of the property by Kilgore, the spouse of a former cotenant, could not possibly be against the interest of the appellant, another former cotenant.[8] The 1936 acquisition by Kilgore was clear of any interest claimed by appellant and title vested in him absolutely.

B. Personal Property

The frequently litigated issues of intent and delivery arose in two cases concerning gifts inter vivos. In *Gary National Bank v. Sabo*[9] the court of appeals affirmed the trial court's finding of a gift inter vivos of a $17,000 certificate of deposit. The issue before the court was whether or not there had been sufficient delivery with donative intent. The court cited an 1882 United States Supreme Court decision which stated the general rule for delivery of a chose in action—the instrument or document representing same must evidence a subsisting obligation and be delivered to the donee to vest in him equitable title to the fund it represents and to irrevocably divest the donor of present dominion and control.[10] In *Sabo,* the donor and donee maintained a checking account in joint tenancy with right of survivorship. Plaintiff-appellant bank, executor of the estate of defendant's donor, contended that equitable title did not pass to the donee-defendant because the certificate was endorsed restrictively by the donor.[11] The court stated that when the donor placed his signature on the back of the certificate, the donee had the right to deposit the funds

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[7]The redemption period in 1936 was, as it is today, two years. IND. CODE § 6-1-57-3 (1971).

[8]The court recognized a split of authority on the question and cited the following cases, among others, as representing the more valid position: Koch v. Kiron State Bank, 230 Iowa 206, 297 N.W. 450 (1941); Pease v. Snyder, 169 Kan. 628, 220 P.2d 151 (1950); Ford v. Jellico Grocery Co., 194 Ky. 552, 240 S.W. 65 (1922); Jones v. Jones, 240 La. 174, 121 So. 2d 734 (1960); Corn v. First Texas Joint Stock Land Bank, 131 S.W.2d 752 (Tex. Civ. App. 1939).

[9]279 N.E.2d 248 (Ind. Ct. App. 1972).

[10]Basket v. Hassell, 107 U.S. 602 (1882).

[11]The endorsement consisted of a stamped inscription which read "Pay to the order of Gary National Bank for Deposit Only Bartol Sikich, Sr." This was followed by the signature of the donor. 279 N.E.2d at 250.

represented by it into the joint account. However, the issue of the vesting of equitable title in the donee turned on whether or not the donee could withdraw the proceeds from the account after such a deposit and put the proceeds to her own use without accounting to the cotenant.[12] To decide this issue the court looked to the intent of the donor at the time he signed the certificate. The court held the evidence to be sufficient to support the inference that the stamped restrictive endorsement was placed on the certificate out of habit and that the donor intended the certificate to be a gift at the time he signed it.[13]

In *Zehr v. Daykin*,[14] defendant's claim of a valid inter vivos gift failed for lack of donative intent and proper delivery. The deceased "donor" had purchased four certificates of deposit which he had orally requested the bank to place in his and defendant's names as joint tenants. Neither a signature card nor a deposit agreement was signed or delivered to the defendant. The certificates remained in the exclusive possession of the donor from time of purchase until his death and all interest was received by him. When he died the certificates were found in his private safety deposit box. In applying a well-settled rule, the court found it obvious that no actual or constructive delivery had occurred.[15] Citing an earlier Indiana Supreme Court decision,[16] the majority opinion indicated that the alleged gift failed for a more serious defect than lack of delivery. The cited case stated that merely depositing money in the name of the owner and another is not sufficient to show donative intent. The dissent implied that intent was shown by such action, and stated that when intent is clear, the rules concerning delivery should be liberally construed so as to give effect to that intent.[17]

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[12]For a discussion of the right to withdraw funds from a joint account during the lifetime of the cotenant, see Annot., 77 A.L.R. 799 (1932).

[13]There was no evidence of outstanding bills for which the $17,000 may have been needed. A nurse who cared for the donor in his last illness testified that he was very intelligent, that he handled his own business affairs up to the time of his death, and that he had said he was leaving almost everything to his daughter. 279 N.E.2d at 253.

[14]288 N.E.2d 174 (Ind. Ct. App. 1972).

[15]*See, e.g.*, Lewis v. Burke, 248 Ind. 297, 226 N.E.2d 332 (1967).

[16]Ogle v. Barker, 224 Ind. 489, 68 N.E.2d 550 (1946).

[17]288 N.E.2d at 177 (Staton, J., dissenting). For a thorough consideration of this area, see Annot., 43 A.L.R.3d 971, 1015 (1972).