

XVIII. Trusts and Decedents' Estates

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Several interesting and significant developments in the areas of trusts, estates, and guardianships occurred during the survey period. The most important cases and statutes will be discussed within the following sections of this Survey: decedents' estates, trusts, powers of appointment, and guardianships.

A. Decedents' Estates

1. *Will Contests.*—In *Carrell v. Ellingwood*,¹ the court of appeals held that will contestants were entitled to rely on the personal representatives' misrepresentation of the date on which the will was offered for probate. In this case, the will had in fact been offered for probate on August 8, 1979. A complaint contesting the will was filed on January 11, 1980, which was three days beyond the five-month time period for filing a will contest.² Summary judgment was rendered for the proponents of the will, but was reversed on appeal because of the existence of genuine issues of material fact as to whether the attorney for the personal representatives was guilty of a fraudulent misrepresentation. The contestants alleged that the representation by the personal representatives' attorney to the contestants' attorney that the will had been offered for probate sometime in November was the effective cause of the contestants' failure to timely file the contest action.³

The crucial substantive issue⁴ addressed by the *Carrell* court was "whether under any circumstances a plaintiff will be permitted to file his complaint to contest a Will beyond the five-month period fixed by [statute]."⁵ In addressing this issue, the court cited several cases to support the statement that "it is well established in Indiana that the running of the five month period will not foreclose a plaintiff in a will contest from filing his action where he has been induced to refrain from a timely filing by a fraudulent misrepresentation of the

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¹423 N.E.2d 630 (Ind. Ct. App. 1981).

²See IND. CODE § 29-1-7-17 (1982).

³423 N.E.2d at 636.

⁴Other issues resolved by the *Carrell* court were whether the trial court treated the proponents' motion as a motion to dismiss or as a motion for summary judgment and, further, whether the trial court erred in not giving the parties a reasonable time to present material pertinent to the summary judgment motion. The court of appeals held that the trial court had treated the motion as a motion for summary judgment and that the trial court's failure to afford a reasonable time for presentation of additional material was reversible error.

⁵423 N.E.2d at 634.

defendant.”⁶ The cases cited, however, do not so clearly establish the proposition that fraudulent conduct will permit the extension of the statutory contest filing period. For example, one of the cases cited and quoted by the court, *Guy v. Schuldt*,⁷ involved the question whether fraud will extend the period of a statute of limitations. Yet, the case is inapposite to *Carrell* because the five-month contest period is categorized consistently, not as a statute of limitations, but as a jurisdictional condition precedent to the contest action.⁸

The other cases cited in support of the “well established” proposition have one major flaw when they are subjected to careful analysis. All of the cited cases rely upon the case of *Fort v. White*,⁹ which has been cited frequently as precedent for the proposition that the five-month contest period may be extended if there is fraud. Yet, the *Fort* court did not hold that the statutory time period would be extended as a result of the fraudulent conduct of the will proponents, but held that the burden of proof would not shift from the proponents to the contestants, under a statute that then placed the burden of proof on the first party to the courthouse, given that the proponents had fraudulently discouraged the contestants from attempting to win that race to the courthouse.¹⁰

Although the doctrine that fraud may relieve parties from non-compliance with the statutory contest filing period is not as well established as the *Carrell* court would have it believed, the question that must be addressed is whether such a doctrine *should* become well established. Certainly, if the statutory time period for will contests is extended for any reason, there is the possibility of delay in the settlement of decedents’ estates, and this possibility of delay contradicts the strong policy of the Probate Code, which is in favor of the speedy settlement of estates.¹¹ A three-day contest filing extension,

⁶*Id.* at 635 (citing, among others, *Modlin v. Riggle*, 399 N.E.2d 767 (Ind. Ct. App. 1980); *Squarcy v. Van Horne*, 163 Ind. App. 64, 321 N.E.2d 858 (1975); *Brown v. Gardner*, 159 Ind. App. 586, 308 N.E.2d 424 (1974); *Estate of Plummer v. Kaag*, 141 Ind. App. 142, 219 N.E.2d 917 (1966); *Fort v. White*, 54 Ind. App. 210, 101 N.E.2d 27 (1913)).

⁷236 Ind. 101, 138 N.E.2d 891 (1956) (dealing with the medical malpractice statute of limitations).

⁸*See, e.g.*, *Modlin v. Riggle*, 399 N.E.2d 767, 769 (Ind. Ct. App. 1980); *Squarcy v. Van Horne*, 163 Ind. App. 64, 68, 321 N.E.2d 858, 860 (1975).

⁹54 Ind. App. 210, 101 N.E. 27 (1913).

¹⁰*Id.* at 217, 101 N.E.2d at 30. When the *Fort* controversy arose, the statutory contest period was three years. The contestant filed the contest action within this three-year time period. *Id.* at 215, 101 N.E.2d at 29.

¹¹*See, e.g.*, *In re Estate of Kingseed*, 413 N.E.2d 917, 923 (Ind. Ct. App. 1980) (“[I]t is now a well established policy of the law, and one which this Court is committed to strictly oversee that estates shall be settled as speedily as possible.”) (citing *In re McGregor’s Estate*, 210 Ind. 546, 2 N.E.2d 395 (1936); *In re Estate of Hogg*, 150 Ind. App. 650, 276 N.E.2d 898 (1971); *Kuzman v. Peoples Trust & Savings Bank*, 132 Ind. App. 176, 176 N.E.2d 134 (1961)).

such as in the *Carrell* case, would not disrupt the orderly, efficient, and speedy settlement of an estate, but a three-month or three-year contest filing extension could cause great uncertainty and confusion. For example, if an estate has been distributed to the will's beneficiaries before the fraud is discovered, it may be inequitable to allow a late will contest, particularly if all the distributed assets could not be traced. Even if the distributed assets could be traced, it may be inequitable to demand the return of these assets pending the resolution of the contest action. Although fairness to the contestants in the *Carrell* case seemed to demand the potential extension of the contest filing period for three days, perhaps *Carrell* is one of those proverbial hard cases that make bad law, because nothing would preclude the possibility of extension of the filing period for a much longer period of time.

The *Carrell* court held that for fraudulent misrepresentation to permit late filing of a contest action, the fraudulent misrepresentation must be of a kind that would entitle a plaintiff to relief; namely, it must be a material misrepresentation of past or existing fact, that is false, that is made with scienter, and that causes detrimental reliance on the part of those who now must seek an extension of the filing period.¹² The court's discussion of the reliance element is most interesting in light of the facts of the case. In *Carrell*, the contestants' attorney did not actually know when the will had been offered for probate, but he "understood from his clients that it was sometime during the month of September."¹³ In fact, the will had been offered on August 8, 1979, four days after the decedent's death. The contestants' attorney did not check the probate court records, which would have disclosed the date of offer. Throughout the fall of 1979, the contestants' attorney and the personal representatives' attorney negotiated for a settlement of their differences. On January 4, 1980, when the contestants' attorney told the personal representatives' attorney that he needed a response to a settlement proposal because time for filing a contest was "running short," the personal representatives' attorney replied that the contestants "had plenty of time to file [their] action because the will was probated in November."¹⁴ In spite of the inconsistent information received from his clients and his

¹²423 N.E.2d at 635.

¹³*Id.* at 632.

¹⁴*Id.* The court does not quote the representation of the personal representatives' attorney, but the court's paraphrase indicates that the personal representatives' attorney represented as a fact only the date of probate of the will. The date of probate, however, is irrelevant in determining when the statutory contest filing period begins to run. The contest time period begins when the will is offered for probate. IND. CODE § 29-1-7-17 (1982). Ordinarily, however, unless objections to probate are filed prior to the offer for probate, the offer and admission are on the same day. *See id.* § 29-1-7-13. In *Carrell*, the will was offered and admitted to probate on the same day.

opponents, the contestants' attorney still did not check the probate court records. Instead, he waited until January 11, 1980, when the personal representatives' attorney had promised to "get back to him." On January 11, the contestants' attorney first became actually aware of the true date of the offer and admission of the will to probate, when the personal representatives' attorney called to say that his clients would not settle and that the contest period had expired.¹⁵

The *Carrell* court cited several cases in support of the proposition that a fraudulent misrepresentation may be relied upon by someone without actual knowledge of the true facts, even though the true facts are a matter of public record.¹⁶ In none of these cases, however, was the person relying on the misrepresentation an attorney, as in the *Carrell* case, and in none of these cases was the misrepresented fact one that the person relying should have known was certainly a matter of public record. The *Carrell* court could have decided that an attorney engaged in representing the contestants of a will, as a matter of law, did not exercise "ordinary care and diligence to guard against fraud"¹⁷ when he failed to check the public records to discover the precise date that the statute that might eventually bar his clients' contest action began to run. Instead, the court decided that the question of the reasonableness of the conduct of the contestants' attorney was a question of fact, which precluded the entry of summary judgment.

2. *Claims Against the Estate.*—Two years ago, in the case of *In re Estate of Williams*,¹⁸ the court of appeals held that an action to enforce a corporate stock buy-sell agreement against the estate of a deceased shareholder was not a claim barred by the failure to file against the shareholder's estate within the five-month claim filing period set forth in Indiana Code section 29-1-14-1.¹⁹ The court further

¹⁵423 N.E.2d at 632.

¹⁶*Id.* at 635 (citing *Backer v. Pyne*, 130 Ind. 288, 30 N.E. 21 (1892); *Fisher v. Tuller*, 122 Ind. 31, 23 N.E. 523 (1890); *Ledbetter v. Davis*, 121 Ind. 119, 22 N.E. 744 (1889); *Dodge v. Pope*, 93 Ind. 480 (1884); *Campbell v. Frankem*, 65 Ind. 591 (1879); *Shuee v. Gedert*, 395 N.E.2d 804 (Ind. Ct. App. 1979)).

¹⁷423 N.E.2d at 635.

¹⁸398 N.E.2d 1368 (Ind. Ct. App. 1980), noted in Falender, *Decedents' Estates and Trusts, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 291, 298-301 (1981).

¹⁹398 N.E.2d at 1370. The assertion of enforceability of the buy-sell agreement, under which the estate of the first to die of the two shareholders was obligated to sell his stock to the survivor, was not a claim barred by failure to file within the time constraints of IND. CODE § 29-1-14-1 (1982). A claim is "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." (*In re Estate of Williams*, 398 N.E.2d 1368, 1370 (Ind. Ct. App. 1980) (quoting *Vonderahe v. Ortman*, 128 Ind. App. 381, 387, 146 N.E.2d 822, 825 (1958)).

held, however, that failure to assert the enforceability of the buy-sell agreement within the five-month period of Indiana Code section 29-1-14-21 barred the adjudication of enforceability as a part of the estate proceeding.²⁰ The case left several questions unresolved, including whether it is possible to assert the enforceability of the agreement outside the estate proceeding.²¹

During the 1982 survey period, in the case of *Williams v. Williams*,²² the court of appeals held that the same buy-sell agreement that was at issue in the first *Williams* case was enforceable in a court other than the probate court against the heirs or devisees who succeeded to the decedent's interest in the stock.²³

Both *Williams* cases, however, leave several questions unresolved. One question is whether the personal representative is a necessary party to the enforcement proceeding. Another question is whether the personal representative, if made a party, can be considered the representative of heirs and devisees who are not, or cannot be, made parties. The second *Williams* court stated that "[e]nforcement of the agreement may be pursued in other courts against the heirs or devisees who succeed to [the decedent's] interest in the stock."²⁴ The court, however, made no mention of the personal representative as a party to the action despite the fact that in *Williams*, the personal representative, who was also the successor to the decedent's interest in the stock, was a party, both as an individual and as a personal representative. Because the issue of necessary and proper parties was not expressly raised, the court's statement, which recognizes an action against heirs or devisees, but fails to mention the personal representative, is not controlling on the issue whether the personal

²⁰398 N.E.2d at 1371. IND. CODE § 29-1-14-21 (1982) 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.

²¹See Falender, *supra* note 18, at 300.

²²427 N.E.2d 727 (Ind. Ct. App. 1981), *reh'g granted in part*, 432 N.E.2d 417 (Ind. Ct. App. 1982). For a discussion concerning the effects on shareholders, see Galanti, *Business Associations, 1982 Recent Developments in Indiana Law*, 16 IND. L. REV. 25, 40 (1983).

²³427 N.E.2d at 731. The permissive language of IND. CODE § 29-1-14-21 (1982) ("may file"), and the failure of that section to provide that an interest not asserted within five months is "forever barred," can only mean that an interest in property of the type described in that section may be asserted outside the estate proceeding even if not asserted within five months in the estate proceeding.

²⁴427 N.E.2d at 731.

representative should be joined in the enforcement action. Prudence, however, would dictate the joinder of the personal representative whenever the estate is still open.

In any event, the two *Williams* cases are a reminder that there is some hope for a claimant who discovers that he has missed the five-month claim filing period of Indiana Code section 29-1-14-1. If the claim can be couched as an interest in property in the possession of the personal representative, then the property interest claim can be asserted against the decedent's successors in interest outside the probate proceeding and after the five-month claim filing period.

In *Fort Wayne National Bank v. Scher*,²⁵ the court of appeals stated that the trial court did not abuse its discretion when it allowed the payment of funeral expenses equal to more than one-half the value of the decedent's estate, because the value of the decedent's estate is only one of several factors to be considered in determining whether the amount claimed is reasonable.²⁶ In regard to funeral expenses, it is interesting to note that the only Probate Code provisions that refer to reasonableness are the provisions of Indiana Code section 29-1-14-9, which deal with priorities. Only reasonable funeral expenses are entitled to priority over all claims, except costs of administration.²⁷ Nothing specific in the Code precludes the allowance of even unreasonable funeral expenses, yet the *Scher* court assumed without discussion that only reasonable funeral expenses may be allowed.²⁸

Two other claim cases are worthy of brief mention. In *First National Bank & Trust Co. v. Coling*,²⁹ the court of appeals affirmed the trial court's grant of the claimant's Trial Rule 60(B) motion for relief from judgment. The appellate court determined that in light of documented errors on the part of the court clerk and documented diligence of counsel, the trial court did not abuse its discretion in granting the motion.³⁰ In *Hicks v. Fielman*,³¹ the court held that an ex-wife is a creditor of her deceased ex-husband's estate to the extent that an award to her constitutes a property settlement payable in installments, but not to the extent that an award to her constitutes maintenance, because maintenance ceases at death.

3. *Dead Man's Statutes.*—In *Satterthwaite v. Estate of Satterthwaite*,³² a son filed a claim against his deceased father's estate

²⁵419 N.E.2d 1308 (Ind. Ct. App. 1981).

²⁶*Id.* at 1312. Other factors are "the necessity for the amount expended or incurred, the reasonableness of the price charged for the articles or services, and the decedent's rank or condition in life . . ." *Id.*

²⁷IND. CODE § 29-1-14-9(2) (1982).

²⁸*See* 419 N.E.2d at 1312.

²⁹419 N.E.2d 1326 (Ind. Ct. App. 1981).

³⁰*Id.* at 1331.

³¹421 N.E.2d 716 (Ind. Ct. App. 1981).

³²420 N.E.2d 287 (Ind. Ct. App. 1981).

to enforce the father's alleged promise to devise a farm to him. Before the trial on the claim, the father's surviving spouse, the son's mother, quitclaimed her interest in the farm to the son. Although one section of the dead man's statute provides that a party's grantor is incompetent as a witness in a lawsuit that may result in judgment for or against the estate, the court decided that this statute was not intended to apply to render the son's mother an incompetent witness.³³ The purpose of the statutory provision rendering a party's grantor incompetent is to prevent an incompetent witness from transferring his claim against, or interest in, the decedent's estate to another, thereby avoiding the bar placed on this testimony by other sections of the dead man's statute. In *Satterthwaite*, the mother was not an incompetent witness prior to the transfer to the son and the transfer did not render her incompetent within the intent of the statute.³⁴

4. *Personal Representatives*.—The 1982 legislature amended the statute that specifies the qualifications for being a personal representative in Indiana.³⁵ Nonresidence is no longer a disqualifying factor.³⁶ Effective June 1, 1982, a nonresident may serve as a joint personal representative with a resident by filing a bond in an amount not less than the probable value of the decedent's personal property plus the estimated rents and profits that may be derived from the property during the period of administration of the estate, and not greater than the probable value of the decedent's gross estate.³⁷ A nonresident may also serve as a sole personal representative or as a joint personal representative with another nonresident by filing the above-described bond and by filing notice of his acceptance of the appointment as personal representative and notice of the appointment of a resident agent to accept service of process.³⁸ If a personal representative becomes a nonresident, he will not be disqualified if he files the above-described bond.³⁹

5. *Unsupervised Administration*.—Effective for estates of decedents who die after May 31, 1982, a petition for unsupervised administration may be granted without the joinder or consent of heirs

³³IND. CODE § 34-1-14-10 (1982). *See id.* §§ 34-1-14-6, -7 (rendering parties incompetent witnesses).

³⁴420 N.E.2d at 290.

³⁵Act of Feb. 18, 1982, Pub. L. No. 173, § 1, 1982 Ind. Acts 1326 (currently codified at IND. CODE § 29-1-10-1 (1982)).

³⁶*Id.* (currently codified at IND. CODE § 29-1-10-1(b) (1982)).

³⁷*Id.* (currently codified at IND. CODE § 29-1-10-1(c) (1982)).

³⁸*Id.* (currently codified at IND. CODE § 29-1-10-1(d) (1982)). One who qualifies under this section submits personally to the jurisdiction of the Indiana courts. IND. CODE § 29-1-10-1(f) (1982).

³⁹*Id.* (currently codified at IND. CODE § 29-1-10-1(e) (1982)). One who qualifies under this section submits personally to the jurisdiction of the Indiana courts. IND. CODE § 29-1-10-1(f) (1982).

or devisees if the decedent authorized unsupervised administration in his will.⁴⁰ Why the statute is not effective for all estates is a good question.

B. Trusts

1. *Trusts and Adopted Children.*—In *In re Walz*,⁴¹ the settlor had established an inter vivos trust containing the following clause:

“The balance of the income may be accumulated by the trustee or in its discretion may be distributed among the descendants of the Grantor, per stirpes. Upon the death of Lorraine I Walz, the remainder of the trust property shall be divided and distributed among the children of the Grantor, namely Donald Walz and Jacqueline Keown, equally, share and share alike or to the Grantor’s descendants per stirpes, as their absolute property forever.”⁴²

After execution of the trust, the settlor adopted Michael, the son of his wife, Lorraine. Following the settlor’s death, the trustee sought instructions as to whether Michael was an intended discretionary income beneficiary of the trust. The court of appeals concluded that, because “[t]he entire trust establishes a design of specific property benefiting specific individuals,”⁴³ Michael was not an intended income beneficiary of the trust.

In *Walz*, the specific phrase in the trust agreement that disposed of income read: “‘among the descendants of the Grantor, per stirpes.’”⁴⁴ This language could be interpreted either to include Michael or not to include him. To discern the settlor’s intent in regard to Michael, the court examined not only the language of this ambiguous phrase, but also the language of the entire trust. The court concluded that the subsequent naming of Donald and Jacqueline individually, albeit in a disposition of principal and not income, created a presumption that the settlor intended to benefit Donald and Jacqueline specifically rather than the class of children, or descendants, of the settlor, into which class Michael might or might not fall.⁴⁵ The presumed intent was confirmed, in the court’s view, by the fact that at

⁴⁰Act of Feb. 24, 1982, Pub. L. No. 172, 1982 Ind. Acts 1325 (currently codified at IND. CODE § 29-1-7.5-2(a) (1982)). Of course, all the other requirements for unsupervised administration must be met; namely, the estate must be solvent, and the personal representative must be qualified to administer the estate without court supervision. *Id.*

⁴¹423 N.E.2d 729 (Ind. Ct. App. 1981).

⁴²*Id.* at 730-31 (quoting trust provision).

⁴³*Id.* at 737. The intent of the settlor is the “polestar for construing trust provisions.” *Id.* at 733.

⁴⁴*Id.* at 734.

⁴⁵*Id.* at 736.

the time of the trust's execution the settlor had two children, Donald and Jacqueline; he had been married to Lorraine for six years; and Michael had lived with Lorraine and the settlor during the entire six-year period.⁴⁶

Because of the court's conclusion regarding the settlor's intent to benefit specific individuals, the court did not reach the question whether an adopted child is presumptively included within a class described as "children" or "descendants." In dicta, however, the court made the following significant comment:

[W]e find the Probate Code to strongly represent the public policy of this state that an adopted child is to be treated as though the natural child of the adopting parent. We certainly give that strong public policy due consideration when construing trust terms. Or, for example, we may well refer to the rules for interpretation of wills, I.C. 29-1-6-1, under the Probate Code to *aid* our interpretation of trust provisions.

. . . .

. . . However, we do conclude that the Probate Code does not *control* the interpretation and construction of the terms of inter vivos trusts.⁴⁷

If this dicta is followed, courts construing inter vivos trust provisions may refer to the rules of construction of the Probate Code. The specific rules of the construction that may be of benefit in construing trust terms are the rules regarding gifts to "heirs" or "next of kin,"⁴⁸ and the rules regarding adopted children⁴⁹ and illegitimate

⁴⁶The intent of the settlor is to be discerned from an examination of the trust language "in the light of the facts and circumstances surrounding the settlor at the time the trust was executed." *Id.* at 734.

⁴⁷*Id.* at 733 (emphasis added by court).

⁴⁸IND. CODE § 29-1-6-1(c) (1982) provides:

A devise of real or personal estate, whether directly or in trust, to the testator's or another designated person's "heirs" or "next of kin" or "relatives," or "family," or to "the persons thereunto entitled under the intestate laws" or to persons described by words of similar import, shall mean those persons, including the spouse, who would take under the intestate laws if the testator or other designated person were to die intestate at the time when such class is to be ascertained, domiciled in this state, and owning the estate so devised. With respect to a devise which does not take effect at the testator's death, the time when such class is to be ascertained shall be the time when the devise is to take effect in enjoyment.

⁴⁹*Id.* § 29-1-6-1(d) provides:

In construing a will making a devise to a person or persons described by relationship to the testator or to another, any person adopted prior to his twenty-first (21st) birthday before the death of the testator shall be considered the child of his adopting parent or parents and not the child of

children.⁵⁰ Of these rules of construction, it would seem that only the rules regarding adopted children and illegitimate children could be said to be representative of a strong public policy of the state of Indiana. Therefore, perhaps only those rules of construction will be looked to in construing trust terms. Certainly, the enactment of a specific trust code provision similar to the Probate Code provision would be preferable to borrowing rules from wills statutes that were never intended to apply to trusts. Because Indiana does not have such a trust code provision, however, the Probate Code is clearly a logical source for guidance in the construction of trust documents, which often are used as will substitutes.

2. *Revocation of Trusts.*—In *Breeze v. Breeze*,⁵¹ the settlor established a revocable inter vivos trust, on the eve of his marriage, naming himself as trustee and as life income beneficiary, and naming his nieces and nephews as remainder beneficiaries. The settlor did not specify a method for revoking the trust. After the settlor died, the trial court, in a lawsuit instituted by the settlor's surviving spouse, concluded that the trust had been revoked by the settlor's failure to fulfill his duties as trustee.⁵² Therefore, the assets of the trust were assets of the settlor's estate. The court of appeals, however, reversed the trial court. According to the appellate court, failure of the settlor-trustee to fulfill his duties as trustee did not revoke the trust; there must be a manifestation of intent to revoke, and such a manifestation was lacking in the *Breeze* case.⁵³

3. *Statutory Amendments.*—A new chapter that was added in 1982, Indiana Code sections 30-2-10-1 through -10, specifies new and more detailed requirements for the establishment of funeral trusts, and is effective for trusts created after July 1, 1982.⁵⁴ Further, after

his natural or previous adopting parents: Provided, that if a natural parent or previous adopting parent shall have married the adopting parent before the testator's death, the adopted person shall also be considered the child of such natural or previous adopting parent. Any person adopted after his twenty-first (21st) birthday by the testator shall be considered the child of the testator, but no other person shall be entitled to establish relationship to the testator through such child.

⁵⁰*Id.* § 29-1-6-1(e) provides:

In construing a will making a devise to a person described by relationship to the testator or to another, an illegitimate person shall be considered the child of his mother, and also of his father, if, but only if, his right to inherit from his father is, or has been, established in the manner provided in IC 1971, 29-1-2-7.

⁵¹428 N.E.2d 286 (Ind. Ct. App. 1981).

⁵²*Id.* at 287.

⁵³*Id.* at 288. One court has held that a trust may be revoked upon the execution of a will with a revoking provision in it. *In re Estate of Lowry*, 93 Ill. App. 3d 1077, 418 N.E.2d 10 (1981).

⁵⁴This new chapter has replaced IND. CODE §§ 30-2-9-1 to -8 (1976 & Supp. 1981),

recent amendments, Indiana Code section 30-4-3-31 now provides that charitable trusts, and even transfers not in trust, may be amended to qualify for federal income tax advantages under appropriate circumstances.⁵⁵

C. Powers of Appointment

1. *Choice of Law.*—In 1931, the decedent's mother, a resident of New York, created a testamentary trust for the benefit of the decedent for life and with the power in the decedent to appoint the corpus of the trust by will. The decedent died in 1973, a resident of Indiana. The decedent's will contained a general residuary clause but did not mention the power of appointment. Under Indiana law, a will does not operate as an exercise of a power of appointment unless the "will specifically indicates that the testator intended to exercise said power."⁵⁶ Under New York law, however, a general residuary clause in a will is rebuttably presumed to be an exercise of a general power of appointment.⁵⁷ The question raised in *White v. United States*⁵⁸ was whether the power of appointment had been exercised in the general residuary clause in the will of the decedent, the donee of the power.

The federal district court in *White* concluded that there was evidence, particularly that of "the tax effect and the resulting dissipation" of the donee's estate, to rebut the presumption of exercise under New York law.⁵⁹ The *White* court concluded, in the alternative, that New York law would not apply to determine whether the donee, an Indiana domiciliary, intended to exercise the power.⁶⁰

which was amended in 1982 to apply to funeral trusts created after June 30, 1978, and before July 1, 1982.

⁵⁵IND. CODE § 30-4-3-31 (1982).

⁵⁶IND. CODE § 29-1-6-1(f) (1982).

⁵⁷N.Y. EST. POWERS & TRUSTS LAW § 10-6.1(a)(4) (McKinney 1967). A general power of appointment is a power exercisable in favor of the donee or his estate. New York law also raises a rebuttable presumption that a general residuary clause is an exercise of a special power of appointment. *Id.* A special power of appointment is a power that is not exercisable in favor of the donee or his estate.

⁵⁸511 F. Supp. 570 (S.D. Ind. 1981) *aff'd*, 680 F.2d 1156 (7th Cir. 1982). In *White*, the Internal Revenue Service argued that the power had been exercised and thus, the value of the appointed property was included in the decedent's taxable estate. The executor of the decedent's estate argued that the power had not been exercised. Under the facts of the case, the takers of the property appear to be the same regardless if the power was deemed exercised by the residuary clause, because the takers in default of appointment were the decedent's "issue," and the residuary devisees were the decedent's three surviving children who were the decedent's only surviving issue.

⁵⁹*Id.* at 576. The difference was not which people took the money, but that the same people would have taken \$112,216.52 less as a result of tax liability, if the power was deemed exercised. *See supra* note 58.

⁶⁰511 F. Supp. at 576-79.

In deciding that New York law would not apply, the court acknowledged that it should look to the Indiana choice of law rule to determine the applicable law, but the court noted that Indiana has no choice of law rule regarding the exercise of powers of appointment.⁶¹ Although the general choice of law rule would look to the law of the donor's domicile (New York),⁶² not the law of the donee's domicile (Indiana), to determine whether the donee intended to exercise the power, the *White* court decided that Indiana would not follow this much criticized general rule. Instead, the federal court determined that Indiana would apply the "better reasoned and more practical choice of law rule" that looks to the law of the donee's domicile for resolving matters of construction of the donee's will.⁶³

Certainly, the choice of law rule that looks to the law of the donee's domicile to decide if the donee of a power of appointment properly manifested the intent to exercise that power is more likely to promote the reasonable expectations of the donee than the rule that prefers to look to the law of the donor's domicile when attempting to discern the donee's intent. This is obvious after considering the typical facts of a case like *White*, where the donee and the donor were not domiciled in the same state. A testator domiciled in Indiana, as was the donee in the *White* case, would not likely consider that his will would be construed by applying the law of New York.⁶⁴ An Indiana domiciliary would likely draft his will in light of Indiana law.

The traditional choice of law rule, which applies the law of the donor's domicile to determine if the donee intended to exercise the power of appointment, does have some logic to support it. A power of appointment is said to emanate from the donor; the donee is merely a conduit for the transfer of property from the donor to the ultimate takers. Therefore, when the donee appoints the property, the appointment is ordinarily treated as if it were written into the donor's will.⁶⁵

⁶¹*Id.* at 576. The court cited *Sexton v. United States*, 300 F.2d 490 (7th Cir.), *cert. denied*, 371 U.S. 820 (1962), in support of the rule that the federal court sitting in Indiana must apply Indiana choice of law rules. The parties were in agreement as to the nonexistence of an Indiana choice of law rule.

⁶²See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 275 (1969).

⁶³511 F. Supp. at 578.

⁶⁴Unless, of course, the testator owned real property in New York, in which case the general choice of law rule would conclude that the testator's disposition of the real property should be governed by and construed by the law to be chosen by the situs of the real property. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 240 (1969).

⁶⁵The conduit description is acknowledged in two recent cases reviewed in this Survey, *Indiana Dep't of State Revenue v. Estate of Martindale*, 423 N.E.2d 662 (Ind. Ct. App. 1981), and *Indiana Dep't of State Revenue v. Estate of Hungate*, 426 N.E.2d 433 (Ind. Ct. App. 1981). See *infra* notes 77-88 and accompanying text. Furthermore, for example, in considering whether a power or an appointment under it violates the rule against perpetuities, the exercise is read into the will of the donor of the power.

Thus, the traditional choice of law rule is but a simple extension of this conventional fiction; if the power is treated as if written into the donor's will, then it is the donor's will that is being construed to determine whether the power was exercised. This simple extension of conventional fiction, however, is truly a perversion when applied to the facts of nearly any given case. Whatever rhetoric is used to describe the creation and exercise of a power of appointment, the plain fact remains that the donor gave the donee the power to appoint and whether the donee appoints is purely a matter of the donee's intent, which must be properly manifested under the law that applies to determine the donee's intent. If that intent appears in a will, then the law of the donee's domicile should apply when interpreting that will for any purpose, including determining whether a power of appointment has been exercised.⁶⁶

The entire choice of law problem would be avoided by careful and thorough drafting. When creating the power, the donor should provide that the law of the donee's domicile is applicable in determining whether the power had been exercised.⁶⁷ The donee should be clear in stating his or her intention to exercise the power or not to exercise it, thus not leaving the interpretation of a general residuary clause in the hands of the courts.⁶⁸

2. *Power or Vested Interest.*—In a straightforward trust interpretation case, *Lincoln National Bank & Trust Co. v. Figel*,⁶⁹ the court of appeals followed the strong preference of Indiana law for the early vesting of estates⁷⁰ and, reversing the trial court, held that the following clause in a testamentary trust was not merely a power of appointment, but gave the testator's daughter, Gloria, a vested interest in the trust upon her attaining the age of 35:⁷¹

⁶⁶This was the general principle followed in the *White* case, where the court stated:

It is more logical to conclude that the law of the domicile of the testator at his death should apply to interpreting a will for all purposes, including whether or not a power is exercised. This is the view followed in the Uniform Probate Code and most recently followed by federal courts in power of appointment cases and other similar litigation.

511 F. Supp. at 574. Of course, the law chosen by the situs of the real property governs the construction of a will that disposes of that real property. *See supra* note 64.

⁶⁷The donor could provide that the law of his or her own domicile should be applied in determining the donee's exercise or not, but that would be illogical and impractical for the same reasons that the choice of law rule that chooses the donor's domicile is illogical and impractical. The donor could, of course, be precocious and choose the law of Timbuktu as the controlling law.

⁶⁸No good draftsman will rely on rules of construction to carry the day in promoting his or her client's intent. The intent should be stated clearly and precisely, whether the intent is that the power be exercised or not.

⁶⁹427 N.E.2d 5 (Ind. Ct. App. 1981).

⁷⁰*See, e.g.,* *Burrell v. Jean*, 196 Ind. 187, 146 N.E. 754 (1925); *Aldred v. Sylvester*, 184 Ind. 542, 111 N.E. 914 (1916).

⁷¹427 N.E.2d at 9.

“When my wife shall no longer be living and my daughter shall have attained the age of thirty-five (35) years, or at any time thereafter upon her request, the Trustee shall distribute and pay over the entire trust estate . . . to my daughter but if my daughter shall die before attaining age thirty-five (35), then at the death of the survivor of my wife and daughter the Trustee shall distribute the entire trust estate to or hold the same for such spouse, issue, spouses of issue, and widows or widowers of deceased issue of my daughter as my daughter shall by will appoint.”⁷²

The dispute in *Figel* arose after Gloria's death. Her executor and her children disagreed as to the proper distribution of the trust assets. Gloria had survived the testator's wife and had lived past the age of thirty-five.⁷³ Gloria's children did not convince the court, however, that Gloria had only a power of appointment, which, upon her failure to exercise it, passed to them as the takers in default.⁷⁴ For several reasons, each based on the language used by the testator, the court agreed with the executor that Gloria had a vested interest in the trust property, which passed to her own residuary trust upon her death.⁷⁵ The most convincing reasons were that the testator clearly knew how to establish a power of appointment, as evidenced by his creation of a testamentary power of appointment in favor of Gloria if she died before attaining the age of thirty-five, so that if he had also intended the creation of an inter vivos power he would have said so more specifically and, that the trustee was instructed to pay over and to distribute the entire trust estate, and nothing less, which implies a vesting of interest, rather than a power of appointment.⁷⁶

3. *Inheritance Tax and Powers.*—The relevant facts of two recent

⁷²*Id.* at 6. The clause, in part, further provided:

To the extent that the entire trust estate is not effectively appointed by such power of appointment the same shall be distributed per stirpes among the then living issue of my daughter but if any issue shall not have attained the age of twenty-one (21) years, then the share of the trust estate which would have been distributed to such minor issue shall be held in trust by the Trustee for the benefit of such issue until such issue attains the age of twenty-one (21) years.

Id. at 6-7 (quoting the trust agreement).

⁷³The executor argued that the assets of the trust should be included in Gloria's estate and distributed to her residuary trust, because she had attained the age of 35 at her mother's death and the trust estate had vested in her at that time. Gloria's children argued that Gloria had only a power to appoint the trust estate and that, upon her failure to exercise the power, the trust estate should be distributed to them at age 21 as takers in default under Gloria's father's will. *Id.* at 7. See *supra* note 72.

⁷⁴See *supra* note 72.

⁷⁵427 N.E.2d at 9.

⁷⁶*Id.* at 8.

court of appeals cases⁷⁷ were identical: the husband established a testamentary trust that provided his wife with income for life, with an unrestricted power to invade corpus during her life, and with an unrestricted power to appoint by will the corpus remaining at her death. In each case, the wife appointed the property to her estate at her death, and the issue was whether the wife's appointment was a transfer that is subject to the Indiana inheritance tax imposed on "property interest transfers" made by a decedent.⁷⁸ The courts reached opposite conclusions regarding the tax consequences.

In *Indiana Department of State Revenue v. Estate of Martindale*,⁷⁹ the second district court of appeals held that the appointment was not subject to the inheritance tax. The court reasoned that the creation of a power of appointment merely renders the donee a conduit for the transfer of property from the donor of the power to the appointee. The interest of the donee is not a property interest owned by the donee at her death, even if the donee has the power to invade the corpus of the appointable estate during her lifetime.⁸⁰ Furthermore, the death-time exercise of a power of appointment is not a taxable event, not only because the donee has no property interest to transfer, but also because the legislature intended to exclude exercise as a taxable event.⁸¹ This legislative intent is found in the 1929 repeal of a provision that made the exercise of a power of appointment a taxable event.⁸²

In *Indiana Department of State Revenue v. Estate of Hungate*,⁸³ the first district court of appeals took note of, but disagreed with, the conclusions of the *Martindale* court. The *Hungate* court held that the appointment was subject to the inheritance tax.⁸⁴ The court acknowledged that ordinarily the exercise of a power of appointment is not taxable, because the donee, as a conduit, is not transferring

⁷⁷Indiana Dep't of State Revenue v. Estate of Hungate, 426 N.E.2d 433 (Ind. Ct. App. 1981); Indiana Dep't of State Revenue v. Estate of Martindale, 423 N.E.2d 662 (Ind. Ct. App. 1981).

⁷⁸IND. CODE § 6-4.1-2-1(a) (1982).

⁷⁹423 N.E.2d 662 (Ind. Ct. App. 1981).

⁸⁰*Id.* at 665. The court noted that the power to invade corpus was the equivalent of an inter vivos power of appointment. Until a power of appointment is exercised in favor of the donee, the donee has no property interest that can be transferred. The donee is merely a conduit for the transfer from the donor to the appointee. The court held that the inter vivos power of appointment does not enlarge the donee's interest to anything more than a power to designate the takers of the donor's estate. *Id.* The court relied on analogous cases holding that a life estate is not enlarged into a fee by the existence of an inter vivos power to dispose of the fee.

⁸¹*Id.* at 666 & n.5.

⁸²Act of Mar. 11, 1921, ch. 275, § 7, 1921 Ind. Acts 854, 859-61, *repealed by* Act of Mar. 9, 1929, ch. 65, § 6, 1929 Ind. Acts 186, 209-10.

⁸³426 N.E.2d 433 (Ind. Ct. App. 1981), *aff'd*, 439 N.E.2d 1148 (Ind. 1982).

⁸⁴*Id.* at 435.

an interest owned by that donee. When the donee has an inter vivos power to invade corpus, however, the donee is no longer a mere conduit but is substantially an owner of the property. The exercise of the power of appointment, when the power is coupled with an inter vivos power to invade and to enjoy the appointable corpus, is a transfer of an interest owned by the deceased donee at her death and, thus, is taxable.⁸⁵

The question in both *Martindale* and *Hungate* was ultimately whether the legislature intended to tax the death-time exercise of a power of appointment when it is coupled with an inter vivos power to enjoy the corpus of the appointable estate. The legislature has not spoken to clarify its intent as to the taxability of such an appointment, and the conclusion of each court has logical support.

Both courts agreed that the legislature has expressed its intent to tax only property interest transfers of a decedent. Both courts agreed that the donee of a power of appointment is not the owner of an interest in the appointable property, but is a conduit for naming the taker of the property. Thus, the appointee takes from the donor of the power, not from the donee. The point of departure for the courts was on the issue of whether an unexercised right to use the corpus of the appointable property should enlarge the donee's interest into an ownership interest, rendering the appointment a transfer of property by the donee as owner, not as a conduit.

It is difficult to decide which conclusion is more sound and more in line with the probable legislative intent. The *Hungate* court's conclusion of taxability is supported by the fact that the donee looks like an owner, with full power to control the property inter vivos and at death. The *Martindale* court's conclusion of nontaxability, on the other hand, is supported by the fact that the donee becomes an owner of the appointable property only if the donee exercises the power in his or her favor. An unexercised power to invade corpus, like an unexercised power to revoke a trust, should not confer ownership status on the holder of the power. Perhaps the conclusion of the *Martindale* court, that the inter vivos right to invade corpus does not render the donee an owner of the property, is the better one, in that it is more consistent with the apparent legislative intent and supported by judicial decisions in analogous cases.⁸⁶

Another facet of the two cases is the fact that the power of appointment was exercised in favor of the donee's estate. Perhaps this fact, particularly when coupled with the fact that the donee has an

⁸⁵*Id.*

⁸⁶*See, e.g.,* Indiana Dep't of Revenue v. Monroe County State Bank, 390 N.E.2d 1104 (Ind. Ct. App. 1979); *In re* Estate of Bannon, 171 Ind. App. 610, 358 N.E.2d 215 (1976). *But see* Indiana Dep't of State Revenue v. Estate of Hungate, 439 N.E.2d 1148 (Ind. 1982) (ownership interest existed, therefore was taxable).

inter vivos power to invade corpus, should render the exercise taxable under Indiana's inheritance tax laws. At the conclusion of the *Hungate* opinion, the court mentioned the special status of the donee as appointee in further support of its conclusion that the exercise of power was a taxable event.

Hungate was not merely a donee, but in fact was the appointee, because she designated her estate to be the recipient of the trust corpus. . . . Hungate received no title through herself as a donee, however, she received the title through the donor . . . when she named herself the appointee. The exercise of the power of appointment to herself, vested title in her estate, and therefore, the trust corpus should be included in her estate.⁸⁷

This line of reasoning is quite persuasive. When the donee appoints to her estate, the recipients of that estate appear to have received a transfer, from the donee, of property owned by that donee at the moment of the donee's death. The donee, at the moment of the appointment, is no longer merely the donee but the appointee, and thus, is the owner of the appointed property. The donee became the owner of the property by appointing the property to her estate and, simultaneously, she transferred that ownership to the recipients of her estate. In the case of appointment to the estate of the donee, fairness would seem to dictate that the property be subject to the inheritance tax because the property will be transferred out of that estate exactly as all "inherited" property is transferred, either by the effect of the deceased donee's will or by the laws of intestate succession.

Ultimately, perhaps, the difficulty in both cases was the appointment to the estate of the donee. Such an appointment should be avoided. Presumably, by appointing the property to her estate, the donee must have intended that the property pass to her devisees or heirs at law. Instead of appointing the property to her estate, the donee should have appointed the property directly to the appropriate devisees or to her heirs at law. In fact, the appointment directly to devisees or heirs would avoid the possibility that the donee's spouse or creditors could successfully assert an interest in the property. Furthermore, appointment directly to devisees or heirs might have given the *Hungate* court less incentive to search for reasons to hold the exercise of the power a taxable event.⁸⁸

D. Guardianships

New statutory provisions provide that a foreign guardian may col-

⁸⁷*Hungate*, 426 N.E.2d at 435. The *Hungate* court seemed swayed by its belief that the donee had appointed to herself when she appointed to her estate.

⁸⁸See *Hungate*, 426 N.E.2d at 434-35.

lect assets of the incompetent in Indiana by affidavit,⁸⁹ that a foreign guardian may act in Indiana by filing authenticated copies of his appointment,⁹⁰ and that a foreign guardian submits personally to the jurisdiction of the Indiana courts if he collects assets or files copies of his appointment or does any other act as guardian in Indiana that would have given Indiana courts jurisdiction over him as an individual.⁹¹ Another new guardianship provision allows a parent or guardian to delegate, for a period not to exceed sixty days, certain powers regarding care, custody, and property of an incompetent by a properly executed power of attorney.⁹²

A nonresident may now presumably serve as guardian of the person or of the estate of an incompetent in Indiana. The guardianship provisions state that one who is qualified to serve as a personal representative under Indiana Code section 29-1-10-1 is qualified to serve as guardian.⁹³ Now that section 29-1-10-1 has been amended to remove nonresidence as a disqualification for service as a personal representative,⁹⁴ it follows that nonresidence is removed as a disqualification for service as a guardian. Thus, if a client wants Aunt Marie in Missouri to be the guardian of the estate or of the person of his or her children at his or her death, Aunt Marie may qualify and serve in Indiana. Undoubtedly, however, if Aunt Marie resides in Missouri, her first act as guardian in Indiana will be to petition to change the residence of the children to Missouri.⁹⁵ Aunt Marie will then need to be appointed guardian of the children in Missouri.

Certainly, a lawyer should advise his client to name Aunt Marie, the preferred guardian, as guardian in that client's will. To avoid the additional expense of qualification, bonding, appointment, and discharge in Indiana, the will could also state the testator's request that Aunt Marie not be required to qualify in Indiana, but that Aunt Marie be permitted to take the children to her place of residence and be appointed guardian there. This provision would not be binding in any way on an Indiana court or on any other court, but it would serve as an expression of the expectations of the testator regarding the guardianship and it might help to avoid an additional unnecessary guardianship in Indiana.

⁸⁹Act of Feb. 15, Pub. L. No. 175, 1982 Ind. Acts 1330 (currently codified at IND. CODE § 29-1-18-51 (1982)).

⁹⁰*Id.* (currently codified at IND. CODE § 29-1-18-52 (1982)).

⁹¹*Id.* (currently codified at IND. CODE § 29-1-18-4.5 (1982)).

⁹²Act of Feb. 25, Pub. L. No. 176, 1982 Ind. Acts 1331 (currently codified at IND. CODE § 29-1-18-28.5 (1982)).

⁹³*Id.* § 29-1-18-9 (1982).

⁹⁴*See supra* notes 35-39 and accompanying text.

⁹⁵This is permissible under IND. CODE § 29-1-18-8 (1982).