

## XV. Trusts and Decedents' Estates

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Undoubtedly, the most interesting development during the survey period was the enactment of a comprehensive statute governing the disclaimer of all property interests, including interests acquired by devise or descent and interests of trust beneficiaries. This new statute will be reviewed in detail in section E. Additionally, significant recent decisions and legislation will be discussed in the following sections of this Survey: decedents' estates, inheritance taxation, trusts, and guardianships.

### A. Decedents' Estates

1. *Wrongful Death Recovery*.—In *S.M.V. v. Littlepage*<sup>1</sup> and *Hollingsworth v. Taylor*,<sup>2</sup> the issue presented was whether illegitimate children of a male victim could share the proceeds of a wrongful death action. The Indiana Wrongful Death Act provides, in pertinent part, that a wrongful death recovery shall “inure to the exclusive benefit of the widow or widower . . . and to the *dependent children*, if any, or dependent next of kin, *to be distributed in the same manner as the personal property of the deceased.*”<sup>3</sup> In thorough and well-reasoned opinions, the Indiana Court of Appeals held that an illegitimate child may be included in the class of “dependent children” of the putative father in one of two ways under this wrongful death provision.<sup>4</sup> The illegitimate child may be included if he has the right to inherit from his putative father's estate under the laws of descent and distribution<sup>5</sup> or has the right to enforce parental obligations under the paternity statute.<sup>6</sup> The court, by holding in the alter-

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<sup>1</sup>443 N.E.2d 103 (Ind. Ct. App. 1982).

<sup>2</sup>442 N.E.2d 1150 (Ind. Ct. App. 1982). *Hollingsworth* and *Littlepage* were rendered on the same day. *Littlepage* was written first, despite its citation which makes it appear to have been decided after *Hollingsworth*. The *Hollingsworth* case clearly relies on the reasoning and holding of *Littlepage*.

<sup>3</sup>IND. CODE § 34-1-1-2 (1982) (emphasis added).

<sup>4</sup>*Littlepage*, 443 N.E.2d at 110; *Hollingsworth*, 442 N.E.2d at 1152.

<sup>5</sup>IND. CODE § 29-1-2-7(b) (1982) provides that an illegitimate child is treated as the child of its father, for intestate succession purposes, only if paternity is judicially established during the father's lifetime or the father marries the mother and acknowledges the child as his own.

<sup>6</sup>The relevant paternity statute in *Littlepage* and *Hollingsworth* was IND. CODE §§ 31-4-1-1 to -33 (1976) (repealed 1978). The current paternity statute is IND. CODE §§ 31-6-6.1-1 to -19 (1982 & Supp. 1983). The current statute enumerates several circumstances in which a man is presumed to be a child's biological father. These presumptions were not statutorily defined under the prior law. See *Littlepage*, 443 N.E.2d at 108. See generally Garfield,

native, avoided choosing between the paternity statute, with significantly broad bases for establishing a parent-child relationship, and the more restrictive intestate succession provision.<sup>7</sup>

At first glance, the phrase in the wrongful death statute providing that the wrongful death recovery is "to be distributed in the same manner as the personal property of the deceased" seems to contemplate identical distribution of the wrongful death recovery and the personal property owned by the decedent at death.<sup>8</sup> Yet, under the holdings of these two cases, because the paternity statute recognizes methods to establish the parent-child relationship different from those in the inheritance statute, an illegitimate child might share the wrongful death proceeds and not share the father's intestate personal (or real) estate.<sup>9</sup> The legislature, in directing the "same manner" of distribution, could not have intended to mandate the identity of the distributees of the wrongful death proceeds and the personal property of the deceased. For example, the distributions would not be identical where the decedent was survived by dependent children, but left a will disposing of his personal estate to others. Because the "manner" of distribution was probably not intended to mandate the identity of the takers, the court's decision to define dependent children by using the paternity statute as well as the intestate succession provision is not necessarily inconsistent with the express language of the wrongful death act.

2. *Will Contests.*—In *Underhill v. Deen*,<sup>10</sup> two doctors were permitted to give expert testimony regarding the decedent's mental faculties and his inability to exercise his own will in matters pertaining to the disposition of his property. The decedent's will left the entirety of his estate to his brothers, sisters, nieces, and nephews, rather than to such natural objects of his bounty as his wife. Conflicting testimony was offered regard-

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*Domestic Relations, 1980 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 215, 254 (1980).

<sup>7</sup>Under some circumstances, an illegitimate child may recover through the paternity statute without a judicial determination or an acknowledgment by the father as required by the laws of descent and distribution. See *supra* notes 5-6. The courts' holdings were constitutionally inspired, but not constitutionally required. In *Littlepage*, the court reasoned that because a scheme precluding recovery by illegitimate children for the wrongful death of their putative fathers would violate equal protection, the wrongful death statute should be construed in favor of participation by illegitimate children. A construction choosing only one of the two statutes as the intended source for the definition of children probably would not have rendered the wrongful death provision unconstitutional. A construction choosing both statutes as alternatives, however, puts the constitutionality of the statute beyond question. 443 N.E.2d at 109.

<sup>8</sup>In *Littlepage*, when discussing this language, the court stated: "Manifest reference is thus made to the laws of intestate succession." 443 N.E.2d at 107.

<sup>9</sup>For example, a written acknowledgment of paternity is sufficient to establish a parent-child relationship under the paternity statute, IND. CODE § 31-6-6.1-9 (1982), while acknowledgment alone, even if in writing, is not sufficient under the intestate succession provision. *Id.* § 29-1-2-7(b).

<sup>10</sup>442 N.E.2d 1136 (Ind. Ct. App. 1982).

ing the decedent's soundness of mind when the will was executed.<sup>11</sup> The decedent's treating physicians gave expert opinion testimony of the decedent's senility, including testimony that he was not competent to manage his business and personal affairs.<sup>12</sup> Although neither doctor had talked with the decedent about the decedent's business and personal affairs, the doctors' conclusions of incompetence were properly admitted because they were supported by the doctors' other observations and conversations with the decedent.<sup>13</sup>

3. *Claims Against the Estate.*—The court, in *Pasley v. American Underwriters, Inc.*,<sup>14</sup> addressed the question of whether a tort claimant could bring an action against a decedent's estate when no estate had been opened and no administrator appointed.<sup>15</sup> Members, American Under-

<sup>11</sup>*Id.* at 1138.

<sup>12</sup>*Id.* at 1139.

<sup>13</sup>*Id.* at 1140. In another will contest case, *In re Estate of Niemiec*, 435 N.E.2d 999 (Ind. Ct. App. 1982), the court of appeals reiterated the fraud exception to the general rule that a will contest is barred if it is not brought within five months after the will is offered for probate. See IND. CODE § 29-1-7-17 (1982). The contestant's failure to file a timely contest is excused if such failure was induced by a fraudulent misrepresentation of the personal representative or other proponent of the will. See also *Carrell v. Ellingwood*, 423 N.E.2d 630 (Ind. Ct. App. 1981), noted in Falender, *Decedents' Estates and Trusts, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 415, 415-18, (1983). Equity will not step in and excuse the late filing, however, if the contestant should have discovered the fraud in time to commence the action. In *Niemiec*, the court of appeals seemingly found, as a matter of law, that public notice of the opening and closing of the estate established that the contestant could have discovered the fraud in time to commence the action. Unfortunately, the facts of the case are so abbreviated that it is difficult to pinpoint the holding of the case. However, the court expressly noted that a separate complaint for damages for fraud against the personal representative individually, under Indiana Code section 29-1-1-24, was not affected by the dismissal of the untimely complaint against the estate. 435 N.E.2d at 1001 n.3. In another will contest case of the same name involving this decedent's brother, *In re Estate of Niemiec*, 435 N.E.2d 570 (Ind. Ct. App. 1982), the court considered whether the deposition of the decedent's former attorney could be taken. This case is discussed in Harvey, *Civil Procedure and Jurisdiction, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 55, 66 (1983).

<sup>14</sup>433 N.E.2d 838 (Ind. Ct. App. 1982).

<sup>15</sup>*Id.* at 840. IND. CODE § 29-1-14-1 (1982) provides, in pertinent part, for the filing of claims against a decedent's estate:

(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 . . . .

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(f) Nothing in this section shall affect or prevent the enforcement of a claim for injury to person or damage to property arising out of negligence against the estate of a deceased tort-feasor within the period of the statute of limitations provided for such tort action and for the purpose of enforcing such a tort claim the estate of the tort-feasor may be opened or reopened and suit filed against

writers' insured, injured Pasley and then died instantly.<sup>16</sup> The day before the expiration of the statute of limitations period, Pasley filed a complaint against "Jimmie Members (deceased), John Doe, or Mary Doe, heirs and descendants of Jimmie Members."<sup>17</sup> The court of appeals held that Pasley did not follow the proper procedure in filing his personal injury claim against Members' estate. Pasley was required by statute to enforce the claim "against the estate of [the] deceased tort-feasor."<sup>18</sup> An estate, however, does not exist, and cannot be a party to an action, without a personal representative.<sup>19</sup> Therefore, Pasley failed to perfect his tort claim because he failed to sue Members' personal representative within the limitations period. Since no personal representative had been appointed for Members, Pasley should have opened an estate for Members and sought the appointment of a personal representative before filing his tort action.<sup>20</sup>

4. *Antenuptial Agreements.*—An antenuptial agreement provided that the husband should have a life estate in certain property of his wife, but that the husband "shall not claim any right to any other property owned by the [wife] at the time of their marriage, and shall not claim or hold any interest therein by virtue of any laws of descent or by virtue of his status as surviving widower."<sup>21</sup> The court of appeals held, in *Eagleson v. Viets*,<sup>22</sup> that the husband was entitled to the \$8500 survivor's allowance,<sup>23</sup> but only out of property acquired by the wife after the marriage.<sup>24</sup> The court noted that the allowance is unavailable to a surviving spouse who takes under a will if "it clearly appears from the will" that the provision was intended to be in lieu of the statutory allowance.<sup>25</sup> The court held, however, that the antenuptial agreement, not being executed with testamentary formalities and not being intended by the parties to be a will, was

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the special representative of the estate within the period of the statute of limitations of such tort. However, any recovery against the tort-feasor's estate shall not affect any interest in the assets of the estate unless such suit was filed within the time allowed for filing claims against the estate.

<sup>16</sup>433 N.E.2d at 839.

<sup>17</sup>*Id.*

<sup>18</sup>IND. CODE § 29-1-14-1(f) (1982). See also *id.* § 34-1-1-1.

<sup>19</sup>See, e.g., *Carr v. Schneider's Estate*, 114 Ind. App. 149, 51 N.E.2d 392 (1943).

<sup>20</sup>Pasley clearly would be an "interested person" entitled to petition for the appointment of a personal representative. See IND. CODE §§ 29-1-7-4, 29-1-1-3 (1982).

<sup>21</sup>*Eagleson v. Viets*, 443 N.E.2d 343, 345 (Ind. Ct. App. 1982).

<sup>22</sup>443 N.E.2d 343 (Ind. Ct. App. 1982).

<sup>23</sup>See IND. CODE § 29-1-4-1 (1982). The court noted that any action by a surviving spouse to obtain a survivor's allowance is not a will contest, but is a statutory right. 443 N.E.2d at 346.

<sup>24</sup>The trial court erred in ordering payment of the \$8500 allowance without conducting a hearing to determine if there was sufficient after-acquired property to pay part or all of the allowance. 443 N.E.2d at 346-47.

<sup>25</sup>*Id.* at 346 (quoting IND. CODE § 29-1-3-7 (1982)). See *In re The Estate of Ringel*, 426 N.E.2d 696 (Ind. Ct. App. 1981).

not a proper source of the intention that the survivor's allowance be unavailable.<sup>26</sup>

5. *Statutory Amendments.*—Two statutory amendments enacted during the survey period are of interest in decedents' estates. Indiana Code section 29-1-7-25, regarding the probate in Indiana of a will proved or allowed in any other state or in any foreign country, was amended to provide that the foreign will "may be received and recorded in this state within three (3) years after the decedent's death."<sup>27</sup> The former statute did not expressly specify a time limit.

Indiana Code section 29-1-5-3, regarding self-proved wills, was amended by the addition of all the language after the word "following" in subsection (c) below:

(c) As an alternative to the method of execution and self-proof set out in subsections (a) and (b), a will may be executed, witnessed, and self-proved by the signatures of the testator and witnesses on a document that substantially contains the following:

UNDER PENALTIES FOR PERJURY, we, the undersigned testator and the undersigned witnesses, respectively, whose names are signed to the foregoing instrument declare:

- (1) that the testator executed the instrument and signified to the witnesses that the instrument is his will;
- (2) that, in the presence of both witnesses, the testator signed or acknowledged his signature already made or directed another to sign for him in his presence;
- (3) that the testator executed the will as his free and voluntary act for the purposes expressed in it;
- (4) that each of the witnesses, in the presence of the testator and of each other, signed the will as a witness;
- (5) that the testator was of sound mind; and
- (6) that to the best of his knowledge the testator was at the time eighteen (18) or more years of age, or was a member of the armed forces or of the merchant marine of the United States or its allies.<sup>28</sup>

This new language is nearly identical to the existing language in subsection (b) of the same section.<sup>29</sup>

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<sup>26</sup>443 N.E.2d at 346.

<sup>27</sup>Act of Apr. 11, 1983, Pub. L. No. 274-1983, § 1, 1983 Ind. Acts 1752, 1752 (codified at IND. CODE § 29-1-7-25 (Supp. 1983)).

<sup>28</sup>Act of Apr. 18, 1983, Pub. L. No. 273-1983, § 1, 1983 Ind. Acts 1750, 1751 (codified at IND. CODE § 29-1-5-3(c) (Supp. 1983)).

<sup>29</sup>IND. CODE § 29-1-5-3(b) (1982) provides:

(b) An attested will may at the time of its execution or at any subsequent date be made self-proved, by the acknowledgment of the will by the testator and

The amendment to subsection (c) was, at best, an exercise in futility. No substantive change was made by the addition of the words. Both before and after the amendment, to execute an unquestionably valid self-proved will, the testator and the witnesses must sign twice. They must sign the will, and they must sign the self-proving provision, in which they declare, under penalties for perjury, that their names are signed to the foregoing instrument.<sup>30</sup> If the testator or the witnesses sign only the self-proving affidavit and not the will itself, a court *might* find that the will is not valid.<sup>31</sup> Certainly, a clearly worded statute could provide for validation of a self-proved will with only one set of signatures. Until such a statute is enacted in Indiana, however, the safest practice is to have the testator and the witnesses sign a self-proved will twice. In fact, this would be the safest practice even if a clearly worded statute were enacted in Indiana because of the possibility that a will might have to be probated in a jurisdiction without a clear statutory or judicial indication of the validity of a self-proved will without two sets of signatures.

### B. Inheritance Tax

When the settlor of a trust retains "any interests" in the trust, an inheritance tax is imposed at the settlor's death on all property subject

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the verifications of the witnesses, each made under the laws of Indiana, and evidenced by the signatures of the testator and witnesses, attached or annexed to the will in form and content substantially as follows:

UNDER PENALTIES FOR PERJURY, we, the undersigned testator and the undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument declare:

- (1) that the testator executed the instrument as his will;
- (2) that, in the presence of both witnesses, the testator signed or acknowledged his signature already made or directed another sign for him in his presence;
- (3) that the testator executed the will as his free and voluntary act for the purposes expressed in it;
- (4) that each of the witnesses, in the presence of the testator and of each other, signed the will as witness;
- (5) that the testator was of sound mind; and
- (6) that to the best of his knowledge the testator was at the time eighteen (18) or more years of age, or was a member of the armed forces or of the merchant marine of the United States, or its allies.

<sup>30</sup>IND. CODE § 29-1-5-3(b) and (c) (Supp. 1983).

<sup>31</sup>Cases have held, under statutes worded similarly to Indiana Code section 29-1-5-3(b) and (c), that a will or codicil is not validly executed if the witnesses merely sign the self-proving affidavit and not the will or codicil itself. *In re Estate of Mackaben*, 617 P.2d 765 (Ariz. 1980); *In re Estate of Sample*, 572 P.2d 1232 (Mont. 1977); *In re Estate of McDougal*, 552 S.W.2d 587 (Tex. Civ. App. 1977). The courts reason that unless the will is separately signed by the testator and the witnesses, there is no valid will to self-prove. *Contra In re Estate of Charry*, 359 So. 2d 544 (Fla. Dist. Ct. 1978); *In re Estate of Cutsinger*, 445 P.2d 778 (Okla. 1968) (allowing proof of attestation to be supplemented in the self-proving affidavit). This latter view is the better view, in that the testator's intent is not thwarted by what might be seen as a technicality.

to the retained interest.<sup>32</sup> In *Indiana Department of State Revenue v. Daley*,<sup>33</sup> a remote reversionary interest retained by the settlor subjected the entire corpus of an irrevocable, inter vivos trust to inheritance tax when the settlor died.<sup>34</sup> The 81-year-old settlor retained the right to "any balance remaining in the trust estate" if he survived two 60-year-old income beneficiaries.<sup>35</sup> Not surprisingly, the settlor predeceased the beneficiaries, but because of his retained reversionary interest in the trust estate, the entire corpus of the trust was taxable on the settlor's death.<sup>36</sup> The tax is imposed regardless of the remoteness of the retained interest, its uncertainty, or its lack of value.

In *Indiana Department of State Revenue v. Estate of Cohen*,<sup>37</sup> the maker of promissory notes owed to the decedent was insolvent before the decedent's death, but was a residuary beneficiary of the decedent's estate. The maker of the notes was ultimately entitled to receive from the estate more than six times the face amount of the notes. The court held that the value of promissory notes at the death of a decedent depended on their collectibility.<sup>38</sup> Since the notes in this case were collectible from the maker's distributive share of the estate,<sup>39</sup> the notes were valued at their face amount and taxed accordingly.<sup>40</sup>

In *Indiana Department of State Revenue v. Estate of Puett*,<sup>41</sup> a future interest, owned by a decedent who died in 1917, did not become possessory

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<sup>32</sup>IND. CODE § 6-4.1-2-6 (1982).

<sup>33</sup>434 N.E.2d 149 (Ind. Ct. App. 1982).

<sup>34</sup>The statute applied in the *Daley* case, IND. CODE § 6-4-1-1 (1971) (repealed 1976), has been replaced in relevant part by IND. CODE § 6-4.1-2-6 (1982); however, the language of the two provisions is identical in all respects relevant to the holding of the *Daley* court on this issue.

<sup>35</sup>434 N.E.2d at 151.

<sup>36</sup>*Id.* at 154. The trial court had erroneously concluded that the trust was subject to taxation only to the extent of the value of the settlor's retained interest, which value was about \$240. The trust corpus was valued at more than \$15,000.

An unusual feature of the trust in *Daley* was a provision that income was to be accumulated and payments to the two income beneficiaries were not to commence until 30 days after the settlor's death. The court did not decide whether this trust provision rendered the trust corpus taxable as a gratuitous transfer "intended to take effect in possession or enjoyment at or after the death of the transferor." 434 N.E.2d at 151-52. See IND. CODE § 6-4-1-1 (1971) (repealed and replaced by substantially identical language in IND. CODE § 6-4.1-2-4(a)(3) (1982)).

<sup>37</sup>436 N.E.2d 832 (Ind. Ct. App. 1982).

<sup>38</sup>*Id.* at 837.

<sup>39</sup>The court distinguished *Estate of Harper v. Commissioner of Internal Revenue*, 11 T.C. 717 (1948), in which the United States Tax Court held that the value of the obligations of a devisee-maker was the value of the assets held as security for the notes plus the net worth of the makers prior to the testator's death. The court noted that *Harper* involved federal estate tax, which is imposed on the estate property, while *Cohen* involved inheritance tax, which is imposed on the right of the heirs to succeed to property rights. 436 N.E.2d at 836.

<sup>40</sup>436 N.E.2d at 837.

<sup>41</sup>435 N.E.2d 298 (Ind. Ct. App. 1982).

until 1977.<sup>42</sup> When the interest became possessory, the decedent's estate was reopened to receive and administer it. No inheritance tax was due, however, because tax liability, if any, arose in 1917 and was barred by the ten-year statute of limitations of a 1937 inheritance tax statute.<sup>43</sup> Today, there is no statute of limitations on the imposition and collection of the inheritance tax, so that personal representatives and heirs remain personally liable until the taxes are paid.<sup>44</sup>

### C. Trusts

1. *Approval of Accounts.*—In *In re Willey Trust*,<sup>45</sup> the court of appeals for the first time clearly adopted the general rule regarding the burden of proof when a trustee seeks court approval of the trust accounts. Relying on cases dealing with beneficiaries' exceptions to an estate's accounts,<sup>46</sup> the court noted that the trustee bears the burden of proving the propriety of items in the trust account. However, if the trustee "files specific accounts and make[s] a *prima facie* showing that the accounts are proper. . . . the burden of persuasion shifts to the beneficiaries to produce contradictory evidence and to show specific instances of impropriety."<sup>47</sup>

2. *Removal of Trustee.*—*In re Guardianship of Brown*<sup>48</sup> illustrates one situation where the removal of one or more trustees was justified because hostility interfered with the proper administration of the trust.<sup>49</sup> In *Brown*, the removed trustee was one of four children of the settlors of the trust. All of the children were remaindermen of the trust, and two of the children were named cotrustees. Both cotrustees had been removed by the trial court, but only one of them contested the ruling. The removal was affirmed as being in the best interests of the trust because there was evidence of lack of cooperation between the cotrustees and substantial ill will, distrust, and animosity among the four children, such that further litigation could be expected if one child remained the sole trustee of the trust.<sup>50</sup>

<sup>42</sup>*Id.* at 299. The contingencies of survival were judicially determined in *Overpeck v. Dowd*, 173 Ind. App. 610, 364 N.E.2d 1043 (1977).

<sup>43</sup>435 N.E.2d at 302.

<sup>44</sup>See IND. CODE § 6-4.1-8-1 (1982); *Indiana Dep't of State Revenue v. Lees*, 418 N.E.2d 226 (Ind. Ct. App. 1980). Note that the 10 or 15 year catch-all provision of Indiana Code § 34-1-2-3 (Supp. 1983) might apply.

<sup>45</sup>433 N.E.2d 1191 (Ind. Ct. App. 1982).

<sup>46</sup>See *Pohlmeyer v. Second Nat'l Bank*, 118 Ind. App. 651, 81 N.E.2d 709 (1948); *Gary State Bank v. Gary State Bank*, 102 Ind. App. 342, 2 N.E.2d 814 (1936).

<sup>47</sup>433 N.E.2d at 1193-94.

<sup>48</sup>436 N.E.2d 877 (Ind. Ct. App. 1982).

<sup>49</sup>See *Massey v. St. Joseph Bank & Trust Co.*, 411 N.E.2d 751 (Ind. Ct. App. 1980) (court hinted, in dictum, that hostility between the trustee and the beneficiaries was not a per se ground for removal of the trustee).

<sup>50</sup>436 N.E.2d at 886 (citing with approval RESTATEMENT (SECOND) OF TRUSTS § 107



3. *Creation of a "Second" Trust.*—In *Grutka v. Clifford*,<sup>51</sup> the court of appeals applied secular trust law to a controversy over control of a church cemetery. Grutka, as Bishop of the Diocese, was deemed by church law to be the trustee of the cemetery. He objected to a "second," irrevocable trust purportedly created without his consent for the care of the cemetery. A majority of the court determined that a valid "second" trust may be created if "all of the beneficiaries of the initial trust . . . make a second trust of their equitable interest, or the trustee of the initial trust . . . consent[s] to the creation of a second trust."<sup>52</sup> In this case, the court found that the second trust was not created by all of the beneficiaries of the initial trust.<sup>53</sup> However, the case was remanded to determine whether the Bishop, as trustee of the initial trust, had in fact consented.<sup>54</sup>

4. *Statutory Change.*—Effective July 1, 1983, specific language was added to the Trust Code authorizing the trustee, when directed to distribute particular trust assets to two or more beneficiaries entitled to receive fractional shares in the assets, to distribute the assets without distributing a pro rata share of each asset to each beneficiary.<sup>55</sup> The trustee, however, must distribute to each beneficiary a pro rata share of the date of distribution value of the assets and must cause a fair and equitable distribution of capital gain or loss.<sup>56</sup>

(1959) and comments thereto). The Indiana Trust Code provides for the removal of a trustee but does not state specific grounds for such removal. IND. CODE § 30-4-3-29 (1982). Thus, the court relied on the Restatement and one commentator who stated that "where there are several trustees and the relations between them are such that they cannot co-operate in the affairs of the trust, all or one of them may be removed." G. BOGERT, TRUSTS AND TRUSTEES § 527 (2d Rev. Ed. 1978).

<sup>51</sup>445 N.E.2d 1015 (Ind. Ct. App. 1983).

<sup>52</sup>*Id.* at 1020. The dissenting judge did not agree that a "second" trust may be created with the consent of the trustee. *Id.* at 1025 (Garrard, J., dissenting). Only one of the cases cited by the majority mentioned a second trust or "subtrust" created by the trustee alone, and in that case the "subtrusteeship" was not clearly conceived. *Hord v. Bradbury*, 156 Ind. 20, 27, 59 N.E. 27, 30 (1901) ("so-called subtrusteeship").

Creation of a subtrusteeship is not enumerated in the statutory powers of a trustee. IND. CODE § 30-4-3-3(a) (1982). Thus, such action is proper only if expressly authorized by the trust terms or if "necessary or appropriate for the purposes of the trust." *Id.* Further, unless the trust provides otherwise, the trustee has a duty "to take possession of and maintain control over the trust property." *Id.* § 30-4-3-6(b)(3). The trustee has a duty "not to delegate to another person the authority to perform acts which the trustee can reasonably perform personally." *Id.* § 30-4-3-6(b)(11). Thus, consent to the creation of a subtrusteeship would be an improper delegation of the trustee's duties unless expressly or impliedly authorized by the circumstances or by the trust terms.

<sup>53</sup>445 N.E.2d at 1020-21.

<sup>54</sup>*Id.* at 1025.

<sup>55</sup>Act of Apr. 4, 1983, Pub. L. No. 277-1983, § 1, 1983 Ind. Acts 1756, 1759 (codified at IND. CODE § 30-4-3-3(d) (Supp. 1983)).

<sup>56</sup>IND. CODE § 30-4-3-3(d)(1)-(2) (Supp. 1983). Additionally, the prudent man rule was changed to the prudent person rule. *Id.* § 30-4-3-3(c).

### D. Guardianships

1. *Disposition of Assets.*—Indiana Code section 29-1-18-33(c), which provides that a court may authorize gifts by a guardian on behalf of his ward under certain circumstances, was amended to take effect retroactively on January 1, 1983.<sup>57</sup> The amendments eliminated the requirement of “showing that the ward will probably remain incompetent during his lifetime,” so that gifts can be authorized even if the ward does not appear to be facing a lifetime of wardship.<sup>58</sup> The amendments also expanded the powers of guardians beyond the mere making of dispositions. The court may now authorize the guardian to disclaim an interest on behalf of the ward, to waive the right of the ward to disclaim an interest, or to exercise or release a power of appointment vested in the ward.<sup>59</sup>

The prior version of Indiana Code section 29-1-18-33(c)<sup>60</sup> was construed by the court of appeals for the first time in *Boone County State*

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<sup>57</sup>Act of Apr. 13, 1983, Pub. L. No. 275-1983, 1983 Ind. Acts 1752 (codified at IND. CODE § 29-1-18-33 (Supp. 1983)).

<sup>58</sup>Act of Apr. 13, 1983, Pub. L. No. 275-1983, § 1, 1983 Ind. Acts 1752, 1753 (codified at IND. CODE § 29-1-18-33(c) (Supp. 1983)). Still, the gift can be authorized only out of such property “as the court may determine to be in excess of that likely to be required for the future care, maintenance and education of the ward . . . [or] of his dependents during the ward’s lifetime.” *Id.*

<sup>59</sup>IND. CODE § 29-1-18-33(c)(2)-(3) (Supp. 1983). The court is directed to determine whether the planned disposition, renunciation, disclaimer, release, or exercise is consistent with the apparent intention of the ward, which determination shall be made on the basis of evidence as to the ward’s declarations, practices, or conduct or, in the absence of such evidence, upon the court’s determination as to what a reasonable and prudent man would do under the same or similar circumstances as are shown by the evidence presented to the court.

*Id.* § 29-1-18-33(d). This prudent man standard was discussed in *Boone County State Bank v. Andrews*, 446 N.E.2d 618 (Ind. Ct. App. 1983).

<sup>60</sup>The previous Indiana Code section 29-1-18-33(c) provided:

(c) Upon application of the guardian or any interested party, and after such notice to all other interested persons and such other persons as the court shall direct, and upon a showing that the ward will probably remain incompetent during his lifetime, the court may, after hearing and by order, authorize the guardian to apply or dispose of such principal or income of the ward’s estate as the court may determine to be in excess of that likely to be required for the future care, maintenance and education of the ward, or for the future care, maintenance and education of his dependents during the ward’s lifetime, in order to effect and carry out such estate planning as the court may determine to be appropriate for the purposes of minimizing current and prospective income and estate or other taxes payable out of the principal or income of the ward’s estate or by reason of the property in the ward’s estate at his death, including authorization for the guardian to make gifts, outright or in trust, on behalf of the ward, to or for the benefit of prospective legatees, devisees or heirs apparent of the ward, which may include any person serving as guardian of the ward, or to other individuals or charities, as to whom or which it may be shown that the ward had an interest. In addition, the court may also authorize the guardian to apply or dispose of the excess principal or income for any other purpose the court decides is in the best interests of the ward, his estate, his spouse, or his family. In any hearing

*Bank v. Andrews*.<sup>61</sup> Nieces and nephews, who were heirs apparent of the ward, petitioned the trial court for a disposition of the ward's property for the purposes of estate planning.<sup>62</sup> The Boone County State Bank, conservator and guardian ad litem, unsuccessfully argued that nieces and nephews of the ward were not entitled to petition for a disposition to themselves. The bank asserted the statute required that the disposition be in the "best interests of the ward, his estate, his spouse, or his family,"<sup>63</sup> which language does not encompass collateral relatives.

The court noted that the "best interests" language applies only to dispositions "for reasons other than tax savings."<sup>64</sup> Initially, the statute provided that a "guardian or *any interested party*" may petition the court for a disposition of excess principal or income for the purpose of minimizing taxes.<sup>65</sup> The court held, therefore, that the nieces and nephews, as heirs apparent of the ward, were clearly "interested parties" entitled to petition for a tax-minimizing disposition.<sup>66</sup>

Indiana Code section 29-1-18-33(c)(1) currently allows disposition of "excess principal or income for any . . . purpose [other than for tax savings] the court decides is in the best interests of the ward, his estate, his spouse, or his family."<sup>67</sup> Indiana Code subsections 29-1-18-33(c)(2) and (3), providing for the disclaimer or waiver of a ward's interest and the exercise or release of a power of appointment vested in the ward, do not include language regarding the "best interests" of the ward or his direct descendants.<sup>68</sup> Thus, under the *Andrews* court's interpretation of the statute, the exercise, waiver, or release of a ward's property interest and power of appointment need not be in the "best interests" of the ward or his direct descendants.

2. *Removal of a Guardian*.—In *In re Guardianship of Brown*,<sup>69</sup> the court held that removal of a guardian was not an abuse of discretion

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upon such application, the court shall determine whether the planned disposition is consistent with the apparent intention of the ward, which determination shall be made on the basis of evidence as to the ward's declarations, practices or conduct or, in the absence of such evidence, upon the court's determination as to what a reasonable and prudent man would do under the same or similar circumstances as are shown by the evidence presented to the court.

IND. CODE § 29-1-18-33(c) (1982) (amended 1983).

<sup>61</sup>446 N.E.2d 618 (Ind. Ct. App. 1983).

<sup>62</sup>The 98 year-old ward had assets of approximately \$900,000. The court ordered gifts of \$6,000 to each of the ward's heirs apparent.

<sup>63</sup>IND. CODE § 29-1-18-33(c) (1982) (amended 1983).

<sup>64</sup>446 N.E.2d at 620.

<sup>65</sup>IND. CODE § 29-1-18-33(c) (1982) (emphasis added) (amended 1983). The 1983 amendments did not change this language.

<sup>66</sup>446 N.E.2d at 620. If it had been necessary, the court might also have reasonably concluded that heirs apparent are included in the phrase "best interests of the . . . [ward's] family." IND. CODE § 29-1-18-33(c) (1982) (amended 1983).

<sup>67</sup>IND. CODE § 29-1-18-33(c)(1) (Supp. 1983).

<sup>68</sup>*Id.* § 29-1-18-33(c)(2), (3).

<sup>69</sup>436 N.E.2d 877 (Ind. Ct. App. 1982).

where the guardian had deposited guardianship funds in a checking account to which a nonguardian had full access, even though no funds were diverted to nonguardianship uses.<sup>70</sup> The same guardian had, however, also virtually imprisoned the wards, his parents, by isolating them from contact with family and friends.<sup>71</sup> This imprisonment may well have been the primary basis for the court's decision.<sup>72</sup> Nevertheless, fiduciaries should heed the warning of this case and should not, even temporarily or in good faith, commingle guardianship funds.<sup>73</sup>

### E. Disclaimers

Effective July 1, 1983, the Indiana legislature enacted a comprehensive disclaimer of property interests statute,<sup>74</sup> which repealed and replaced both the Probate Code renunciation provision,<sup>75</sup> and the Trust Code disclaimer provisions.<sup>76</sup> This new chapter is intended to provide the exclusive requirements for the disclaimer of all property interests, since each disclaimer section, including a residuary-type provision covering interests

<sup>70</sup>*Id.* at 887-88.

<sup>71</sup>*Id.* at 888.

<sup>72</sup>However, a co-guardian (another son) was also removed because of his "inability and failure to attend to the . . . medical [needs] and diets of his parents." *Id.* at 890.

<sup>73</sup>The court stated:

While no showing exists that [the guardian] was guilty of converting any of the guardianship funds for his personal use, the fact that the funds were commingled makes an accounting difficult and constitutes a breach of trust. Certainly, this manner of manipulating funds is not how a guardian should handle the assets of his wards.

*Id.* at 887.

In another guardianship case, the court of appeals decided that a guardian was not liable to another depositor for withdrawal of the ward's funds deposited in a multi-party bank account. The court reasoned that the guardian had a statutory duty to withdraw and invest those funds. *Kuehl v. Terre Haute First Nat'l Bank*, 436 N.E.2d 1160, 1163 (Ind. Ct. App. 1982). See IND. CODE §§ 29-1-18-30, -28(b) (1982); see also *id.* § 32-4-1.5-1(7) (stating that a guardian is a proper party to a multi-party account).

Also during the survey period, a probate court judgment approving the guardian's final account and discharging the guardian was held *res judicata* in a tort action by the ward to recover damages for his guardian's mismanagement, *Moxley v. Indiana Nat'l Bank*, 443 N.E.2d 374 (Ind. Ct. App. 1982), and a petition for an order to show cause why a guardian should not be removed and a petition objecting to the guardian's final report were deemed civil actions to which Trial Rule 76 governing automatic change of venue applied. *In re Goetcheus*, 446 N.E.2d 39 (Ind. Ct. App. 1983).

<sup>74</sup>Act of Apr. 11, 1983, Pub. L. No. 293-1983, § 1, 1983 Ind. Acts 1806, 1806-10 (codified at IND. CODE § 32-3-2-1 to -15 (Supp. 1983)).

<sup>75</sup>IND. CODE § 29-1-6-4 (1982) (repealed 1983).

<sup>76</sup>*Id.* §§ 30-4-2-3, -4 (1982) (repealed 1983). The trustee rejection provision of section 30-4-2-2 was left intact. See *infra* note 84 and accompanying text. Also, the power of appointment renunciation provision of section 32-3-1-1 was left intact. See *infra* note 100 and accompanying text.

that have devolved by means other than those more specifically referred to in prior sections,<sup>77</sup> provides that the “disclaimer . . . is effective only if” the requirements of that section are complied with.<sup>78</sup> This discussion will summarize the provisions of the new statute that affect decedents’ estates and trusts and will highlight some of the changes made by the statute.<sup>79</sup>

1. *Applicability of the Statute.*—The statute provides that “[a] person to whom an interest devolves by whatever means may disclaim the interest in whole or in part as provided in this chapter.”<sup>80</sup> The terms “property,”<sup>81</sup> “interest,”<sup>82</sup> and “person”<sup>83</sup> are broadly defined. The definitions clearly encompass all property interests, including, for example, the interest of a donee of a power of appointment, the interest of a taker in default of appointment, the equitable present or future interest of a trust beneficiary, the interest of a party to a multi-party bank account, the interest of the donee of a gift or of the grantee of a deed or of the promisee of a contract, the interest of a landlord or a tenant, the interest of a contract purchaser of real estate or personal property, and the interest of the beneficiary of an insurance policy or annuity contract.<sup>84</sup>

One issue that may arise, given the broad and comprehensive definitions of “property,” “interest,” and “person” in the new statute, is to what extent the statute is intended to govern the disclaimer of legal title by a trustee, in other words, the trustee’s rejection of a devise or transfer in trust. Although the broad language in the definitions supports the conclusion that the disclaimer statute is intended to encompass rejection of

<sup>77</sup>IND. CODE § 32-3-2-6 (Supp. 1983).

<sup>78</sup>*Id.* §§ 32-3-2-3 to -6.

<sup>79</sup>For a similar discussion, see G. HENRY, PROBATE LAW AND PRACTICE OF THE STATE OF INDIANA Ch. 25, § 12 (7th ed. J. Grimes 1978, Supp. 1983).

<sup>80</sup>IND. CODE § 32-3-2-2 (Supp. 1983). The right to disclaim exists in spite of a spendthrift provision, as under former section 29-1-6-4(e). *Id.* § 32-3-2-12.

<sup>81</sup>“‘Property’ means tangible or intangible property, regardless of its location, that is either real or personal. The term includes: (1) the right to receive proceeds under a life insurance policy or annuity; and (2) an interest in an employee benefit plan.” *Id.* § 32-3-2-1.

<sup>82</sup>“‘Interest’ means a present or future interest that is either equitable or legal. The term includes a power in trust and a power to consume, appoint, or apply an interest for any purpose.” *Id.*

<sup>83</sup>“‘Person’ means any individual, corporation, organization, or other entity that is entitled to possess, enjoy, or exercise power over an interest. The term includes a trustee and a person succeeding to a disclaimed interest.” *Id.*

<sup>84</sup>The introductory comments provide, in part:

The Chapter is intended to govern every disclaimer of an interest, no matter when created, in property, including real estate, no matter where located, and no matter by what means the interest devolves so long as a relationship exists between Indiana and the persons, property or means of devolution involved in the disclaimer. Such a relationship must have enough substance to justify the exercise of Indiana’s jurisdiction.

IND. CODE ANN. § 32-3-2 introductory comments (West Supp. 1983-84).

a devise or transfer in trust by the named trustee of that trust, it is also likely that the intent was to leave intact the trustee rejection provision of Indiana Code section 30-4-2-2. When enacting the disclaimer statute, the legislature repealed two Trust Code provisions, sections 30-4-2-3 and 30-4-2-4, but did not repeal section 30-4-2-2, thereby indicating the intent to leave section 30-4-2-2 in effect. The Trust Code provision, section 30-4-2-2, should stand either as the exclusive statutory pronouncement on trustee rejection of a trust or at least as an alternative to the procedure set forth in the disclaimer statute.

Three sections of the new chapter may apply to a disclaimer by an heir or devisee of a decedent, depending on whether or not the interest is a survivorship interest.<sup>85</sup> Similarly, four sections of the new chapter may apply to a disclaimer of a trust beneficiary's interest, depending on whether the beneficiary has an interest devolved from a decedent,<sup>86</sup> or an interest with the right of survivorship,<sup>87</sup> or an interest devolving by other means.<sup>88</sup>

Other sections of the new chapter, specifically the section dealing with waiver of the right to disclaim<sup>89</sup> and the sections describing events that bar the right to disclaim,<sup>90</sup> apply to all disclaimers, including disclaimers by heirs, devisees, and trust beneficiaries.

2. *Requirements Generally.*—Section 32-3-2-2 provides that all disclaimers “shall: (1) be in writing; (2) describe the property and the interest in the property to be disclaimed; and (3) be signed by the person to whom the interest devolve[d], or his personal representative, guardian, or conservator.”<sup>91</sup> As under former law, the disclaimer may be in whole or in part,<sup>92</sup> though for partial disclaimers in particular, care must be taken to describe the disclaimed interest with reasonable certainty.<sup>93</sup>

<sup>85</sup>IND. CODE § 32-3-2-3 (Supp. 1983) governs the disclaimer of all interests devolved from a decedent, except survivorship interests, which are governed by sections 32-3-2-5 and 32-3-2-7.

<sup>86</sup>*Id.* § 32-3-2-3.

<sup>87</sup>*Id.* §§ 32-3-2-5, -7.

<sup>88</sup>*Id.* §§ 32-3-2-6, -7.

<sup>89</sup>*Id.* § 32-3-2-9.

<sup>90</sup>*Id.* §§ 32-3-2-10, -11.

<sup>91</sup>*Id.* § 32-3-2-2.

<sup>92</sup>The commission comments provide:

Partial disclaimers are permitted of a portion or a fractional part of the property or the interest; also of any limited interest or estate in the property. For example, the recipient of a fee may disclaim only a life estate and retain the remaining interest. A power of appointment, or a power in trust such as an investment or administrative power, or other powers relating to property may be disclaimed either entirely, or partially by reducing or limiting the power as to amount or object or subjecting the power to a condition.

IND. CODE ANN. § 32-3-2-2 commission comments (West Supp. 1983-84).

<sup>93</sup>The commission comments state:

The disclaimer must also describe the interest with sufficient particularity to iden-

An effective disclaimer is “irrevocable . . . [and] binding upon the disclaimant and all persons claiming through or under him.”<sup>94</sup> Additionally, the right to disclaim may be waived in writing<sup>95</sup> and may be barred by events, listed in the statute, inconsistent with a disclaimer, such as acceptance of a benefit to the extent of such acceptance,<sup>96</sup> transferring, encumbering, or pledging the interest,<sup>97</sup> or permitting a sale by judicial process.<sup>98</sup>

3. *Interests Devolved from a Decedent.*—Section 32-3-2-3, applicable to disclaimers by heirs and devisees, including beneficiaries of testamentary trusts,<sup>99</sup> provides:

(a) Subject to subsections (b) and (c), a disclaimer of an interest (except for an interest with the right of survivorship) that has devolved from a decedent either by the laws of intestacy or under a testamentary instrument, including a power of appointment exercised by a testamentary instrument, is effective only if it is:

(1) filed in court in which proceedings concerning the decedent's estate are pending, or, if no proceedings are pending, in a court in which proceedings could be pending if commenced; and

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tify the property and the interest therein disclaimed. A formula which provides a means whereby the property and the interest therein disclaimed can be identified is sufficient. This requirement of identification is mandatory in every case and is particularly important when the disclaimer relates to real estate because of the requirement of the Chapter that the disclaimer to be effective must be recorded to provide readily accessible title information.

*Id.*

<sup>94</sup>IND. CODE § 32-3-2-9(a) (Supp. 1983).

<sup>95</sup>*Id.* § 32-3-2-9(b). This section is new substantive law. Formerly, section 29-1-6-4(d) provided that a “waiver of the right to renounce . . . bars the right to renounce as to the property.” IND. CODE § 29-1-6-4(d) (1982) (repealed 1983). Nothing else was said about waiver.

A written waiver is “irrevocable upon signing.” IND. CODE § 32-3-2-9(b)(1) (Supp. 1983). This is a new provision, and it could create substantial problems of proof. For example, the right to disclaim may be waived whenever a credible witness can testify that he saw the disclaimant sign a waiver, regardless of whether the signed waiver can be found.

<sup>96</sup>IND. CODE § 32-3-2-11 (Supp. 1983). Previously, acceptance barred the right to renounce under section 29-1-6-4(d). IND. CODE § 29-1-6-4(d) (1982) (repealed 1983).

<sup>97</sup>IND. CODE § 32-3-2-10(1) (Supp. 1983). Contracting to transfer, encumber, or pledge also bars the right to disclaim. *Id.* § 32-3-2-10(2). The same actions barred the right to renounce under section 29-1-6-4(d). IND. CODE § 29-1-6-4(d) (1982) (repealed 1983).

<sup>98</sup>IND. CODE § 32-3-2-10(3) (Supp. 1983). Sale or other disposition previously barred the right to renounce under section 29-1-6-4(d). IND. CODE § 29-1-6-4(d) (1982) (repealed 1983).

<sup>99</sup>Although testamentary trust beneficiaries formerly had the option of renouncing under either the Trust Code provisions or the Probate Code provisions, *In re Estate of Newell*, 408 N.E.2d 552 (Ind. Ct. App. 1980), after July 1, 1983, all will beneficiaries, including testamentary trust beneficiaries, and all heirs at law must follow Indiana Code chapter 32-3-2 to disclaim interests devolved from a decedent.

(2) delivered in person or mailed by first class United States mail to the personal representative of the decedent, or to the holder of the legal title to the property to which the interest relates.

(b) A disclaimer of an interest in real property is effective under subsection (a) only if it is recorded in each county where the real property is located.

(c) A disclaimer is effective under this section only if the requirements of subsection (a) and, if applicable, subsection (b) are accomplished not later than nine (9) months after the death of the decedent if a present interest is disclaimed, or, if a future interest is disclaimed, not later than nine (9) months after the later of:

(1) the event by which the final taker of the interest is ascertained; or

(2) the day on which the disclaimant attains the age of twenty-one (21).

(d) If provision has not been made for another devolution, an interest disclaimed under this section devolves as if the disclaimant had predeceased the decedent. A disclaimer under this section relates back for all purposes that relate to the interest disclaimed to a time immediately before the death of the decedent.<sup>100</sup>

Several changes are made by this section. First, if the disclaimed interest is an interest in real property, the disclaimer is not effective unless and until it is recorded in the county or counties where the real property is located.<sup>101</sup>

Second, the relation back language in the new chapter is slightly different from the relation back language in the repealed Probate Code renunciation statute.<sup>102</sup> However, the relation back language of the new statute should be just as effective as the former language to negate the disclaimant's liability for inheritance tax.<sup>103</sup>

Third, the disclaimer period is extended beyond nine months after the death of the decedent if the interest disclaimed is a future interest.

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<sup>100</sup>IND. CODE § 32-3-2-3 (Supp. 1983).

<sup>101</sup>Under prior law, the disclaimer of an interest in real property was presumably effective against anyone with notice or knowledge of it, without recording. Recording would afford constructive notice. IND. CODE § 29-1-6-4 (1982) (repealed 1983).

<sup>102</sup>In the former Probate Code provision, the disclaimer related back "for all purposes to the date of death of the decedent." IND. CODE § 29-1-6-4(c) (1982) (repealed 1983). Under the new statute, the disclaimer "relates back for all purposes that relate to the interest disclaimed to a time immediately before the death of the decedent." IND. CODE § 32-3-2-3(d) (Supp. 1983).

<sup>103</sup>The commission comments provide:

[T]he phrase "for all purposes" . . . means that the effect of the disclaimer is the same as though the disclaimed interest had never been created in the disclaim-



In such cases, the disclaimer period is extended until nine months after the “event by which the final taker of the interest is ascertained”<sup>104</sup> or “the day the disclaimant attains . . . age twenty-one,”<sup>105</sup> whichever is later. Under prior law, there was no extension for the disclaimant’s minority, regardless of whether the interest disclaimed was a present or a future one. However, there was an extension until nine months after “the event by which the taker is finally ascertained” for both present and future interests.<sup>106</sup>

Finally, in the new statute, there is no shortening of the disclaimer period in the event the estate is closed before the relevant nine-month period has run. Under prior law, there was a shortening of the disclaimer period to the time of estate closing if the estate was closed within the relevant nine-month period.<sup>107</sup>

ant. As a consequence creditors of the disclaimant and his estate, including Indiana inheritance tax and other taxing authorities, have no claim against or right in the disclaimed property nor does anyone claiming through the disclaimant or his estate.

IND. CODE ANN. § 32-3-2-3 commission comments (West Supp. 1983-84) (citation omitted).

<sup>104</sup>IND. CODE § 32-3-2-3(c)(1) (Supp. 1983). The commission comments state that this phrase is *intended* to refer to the time of possession and enjoyment:

The phrase “*event by which the final taker of the interest is ascertained*” . . . means the event by which the holder of the future interest becomes entitled to present possession and enjoyment even though the interest may still be limited by its nature (such as a life estate or a life estate on special limitation) or by a condition subsequent.

IND. CODE ANN. § 32-3-2-3 commission comments (West Supp. 1983-84).

The example given in the comments indicates that a condition subsequent, which might divest an interest, does not postpone ascertainment of the taker. Thus,

in the case of a gift to a daughter if she survives a son but if a daughter survives the son and attains 60 years without issue then over to charity on the daughter’s death, the event by which the interest of the daughter is finally ascertained . . . is when the daughter survives the son and not when the daughter attains 60 years with issue and the absolute interest of the daughter can no longer be defeated.

*Id.*

What if the gift was “to husband for life, then to my daughter if she attains age 25?” If the husband is still alive when the daughter reaches 25, the daughter is not entitled to actual possession because of the husband’s life estate, yet the daughter’s attaining age 25 appears to be the “event by which the taker is finally ascertained.” Must the daughter renounce within nine months of attaining age 25 or does she have until nine months after the husband’s death?

<sup>105</sup>IND. CODE § 32-3-2-3(c)(2) (Supp. 1983).

<sup>106</sup>IND. CODE § 29-1-6-4(b) (1982) (repealed 1983). The following is one example of the difference between the provisions. Under the new statute, if a will contest occurs and is not decided within nine months after the decedent’s death, all will beneficiaries who are devised a present interest, and heirs at law since they would nearly always receive a present interest, must nonetheless decide whether to disclaim within nine months after death, even though the final taker of the interest is not ascertained. Under prior law, the heirs and devisees would have had nine months after resolution of the will contest to decide whether to disclaim. *Id.* A similar difference would occur if a will construction action was brought to determine the takers of the decedent’s property.

<sup>107</sup>*Id.*

4. *Survivorship Interests.*—Section 32-3-2-5 applies to the “disclaimer of an interest in a joint tenancy created by any means, including an intestacy, a testamentary instrument, or the exercise of a power of appointment by a testamentary interest.”<sup>108</sup> In the disclaimer statute, the term “joint tenancy” is defined as “any interest with the right of survivorship.”<sup>109</sup>

As in section 32-3-2-3, a disclaimer of a survivorship interest in real property must be recorded,<sup>110</sup> and the disclaimed interest will pass as though the disclaimant died immediately before creation of the interest.<sup>111</sup> The disclaimer must be mailed “either to the transferor of the interest or his personal representative, or to the holder of the legal title to the property to which the interest relates.”<sup>112</sup>

Under section 32-3-2-5, those who are devised a survivorship interest, or those to whom a survivorship interest descends,<sup>113</sup> have a significantly longer time to disclaim than they had under the former law.<sup>114</sup> Survivorship interests may be disclaimed “not later than nine (9) months after the event by which the final taker of the entire interest is ascertained.”<sup>115</sup> Thus, if *O* devised Blackacre to *A*, *B*, and *C* as joint tenants with rights of survivorship, the survivor of *A*, *B*, and *C* would be able to disclaim within nine months after the death of the second to die of *A*, *B*, and *C*, unless the survivor had waived the right to disclaim or the right was deemed barred by his conduct.<sup>116</sup> The death triggering the running of the nine-month period might not occur until several years after the creation of the joint tenancy.<sup>117</sup> Potentially, the entire joint tenancy could be disclaimed several years after its creation.

<sup>108</sup>IND. CODE § 32-3-2-5(b) (Supp. 1983).

<sup>109</sup>*Id.* § 32-3-2-5(a).

<sup>110</sup>*Id.* § 32-3-2-7(b).

<sup>111</sup>*Id.* § 32-3-2-5(c). The relation back language is essentially identical to that in section 32-3-2-3. See *supra* notes 98-106 and accompanying text.

<sup>112</sup>*Id.* § 32-3-2-7(a).

<sup>113</sup>The only time a survivorship interest would descend is if real estate were distributed in kind to the surviving parents or grandparents of the decedent. *Id.* § 29-1-2-1(c)(2), (c)(3), (c)(5), (c)(6), (c)(7).

<sup>114</sup>The former law was found in IND. CODE § 29-1-6-4(b) (1982) (devises) (repealed 1983) and IND. CODE § 30-4-2-3(b) (1982) (trusts) (repealed 1983).

<sup>115</sup>IND. CODE § 32-3-2-5(b)(2) (Supp. 1983). See *supra* note 104 for the commission comments regarding the meaning of the similar phrase “event by which the final taker of the interest is ascertained.”

<sup>116</sup>Neither the statute nor the comments mention the effect of a severance of the survivorship interests, but logically, the new tenants in common would have nine months after severance to disclaim.

<sup>117</sup>If, for example, *B* and *C* survived *A*, and ultimately *C* survived *B*, *C* can disclaim within nine months of *B*'s death. Then *B*'s personal representative would have nine months after *C*'s disclaimer to disclaim. If *B*'s personal representative did not disclaim, then the property would remain in *B*'s estate. If *B*'s personal representative did disclaim, then *A*'s personal representative would have nine months after *B*'s disclaimer to disclaim. *A*'s estate might need to be reopened, and if *A* disclaims, *O*'s estate might need to be reopened. Of

5. *Other Interests.*—Sections 32-3-2-6 and 32-3-2-7 apply to the disclaimer of all other property interests, including nonsurvivorship beneficial interests in inter vivos trusts.<sup>118</sup> The disclaimer period is nine months after creation of the interest if the interest is a present interest,<sup>119</sup> or nine months after the “event by which the final taker of the interest is ascertained”<sup>120</sup> or the “day on which the disclaimant obtains the age of twenty-one,” whichever is later, if the interest is a future interest.<sup>121</sup>

If the disclaimed interest is an interest in real property,<sup>122</sup> the disclaimer is not effective unless or until it is recorded in the county or counties where the real property is located.<sup>123</sup> The disclaimer is effective only if it is delivered in person or mailed “to the transferor of the interest or his personal representative, or to the holder of the legal title to the property to which the interest relates.”<sup>124</sup>

A disclaimed interest passes as if the disclaimant had predeceased its creation.<sup>125</sup> The disclaimer “relates back for all purposes that relate to the interest disclaimed to the time immediately before the creation of the interest.”<sup>126</sup>

6. *Effective Dates.*—The new chapter became effective July 1, 1983. Retroactive application of the chapter validates any renunciation or disclaimer made between December 31, 1976, and July 1, 1983, that would have been valid under the provisions of the new chapter.<sup>127</sup> If the right

course, *A*, *B*, or *C* may have waived the right to disclaim or the right may be deemed barred by their conduct. See *supra* notes 101-05.

<sup>118</sup>IND. CODE § 32-3-2-4 (Supp. 1983), which is not discussed in the text, applies to the disclaimer of interests under life insurance policies and annuities, which must be accomplished within nine months after the death of the insured.

<sup>119</sup>Creation of the interest is defined as “the date on which the person creating the interest no longer has a power to: (1) revoke the transfer; or (2) determine by any means the recipient of the interest or of its benefits.” *Id.* § 32-3-2-1.

<sup>120</sup>See *supra* note 104 for the commissioner comments regarding the meaning of the quoted phrase.

<sup>121</sup>IND. CODE § 32-3-2-6(a) (Supp. 1983). Under a former Trust Code provision, IND. CODE § 30-4-2-3 (1982) (repealed 1983), the disclaimer period was nine months after the beneficiary “receives written notice of his interest and that interest has been indefeasibly fixed as to both quality and quantity.” *Id.* This former disclaimer provision provided no different period for the disclaimer of present and future interests, and contained no extension for minors. In essence, however, the disclaimer period of the former statute encompassed in part what is in the new statute an extension only for disclaimants of future interests.

<sup>122</sup>Presumably, Indiana Code section 30-4-2-7 applies to establish whether a trust beneficiary’s interest is real or personal property.

<sup>123</sup>IND. CODE § 32-3-2-7(b) (Supp. 1983). Under prior law, the disclaimer of an interest in real property was presumably effective against anyone with notice or knowledge of it, without recording. IND. CODE § 30-4-2-3(b) (1982) (repealed 1983). There was no recording requirement under the Trust Code.

<sup>124</sup>IND. CODE § 32-3-2-7(a) (Supp. 1983).

<sup>125</sup>*Id.* § 32-3-2-6(b).

<sup>126</sup>*Id.* See *supra* note 102. The former Trust Code, IND. CODE § 30-4-2-4 (1982) (repealed 1983), contained no broad relation back language.

<sup>127</sup>IND. CODE § 32-3-2-15(b) (Supp. 1983).

to disclaim existed on July 1, 1983, a present interest may be disclaimed by complying with the new chapter before April 1, 1984, and a future interest may be disclaimed by complying with the new chapter not later than nine months after the "event by which the final taker of the interest is ascertained"<sup>128</sup> or nine months after the "day on which the disclaimant attains the age of twenty-one," whichever is later.<sup>129</sup>

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<sup>128</sup>*Id.* § 32-3-2-15(a)(1).

<sup>129</sup>*Id.* § 32-3-2-15(a)(2).