XV. Trusts and Decedents' Estates

Debra A. Falender*
Kristin G. Fruehwald**

A. Decedents' Estates

1. Illegitimate's Entitlement to Survivor's Allowance.—In *In re Estate of Hendren*,[1] a case of first impression in Indiana, the Indiana Court of Appeals[1] held that a child who was not born in wedlock and not determined to be a deceased father's child by court order was entitled to an allowance from the deceased father's estate.[2] Indiana law provides that if a decedent has no surviving spouse, the decedent's children who are under the age of eighteen years are entitled, collectively, to an allowance of $8,500 from the deceased parent's estate.[3] Indiana law further provides that an illegitimate child shall be treated the same as if he were a legitimate child of the father if the paternity of the child "has been established by law" during the father's lifetime.[4]

In *Hendren*, a paternity action was initiated during the father's lifetime and prior to the child's birth. Blood tests indicated a ninety-six percent probability that the alleged father was the child's biological father. The child's mother and the alleged father reached an agreement which, among other matters, stated that the alleged father was the child's biological father. An order embodying that agreement was prepared but was marked "denied" by the trial court because of its provisions concerning social security benefits. The order was resubmitted but was not entered until three days after the alleged father's death.[5] An allowance was awarded in the father's estate, and the executors appealed on the basis that the statutory language "has been established by law" meant that the father had to be determined to be the child's father *by court order* prior to the father's death.[6]

An analysis of several United States Supreme Court cases on the issue disclosed that judicial determinations of paternity are desirable

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

**Partner with the law firm of Barnes & Thornburg—Indianapolis, Indiana. B.S., University of Nebraska, 1968; J.D., Indiana University School of Law—Indianapolis, 1975.

[1]459 N.E.2d 437 (Ind. Ct. App. 1984).

[2]*Id.* at 442.

[3]Ind. Code § 29-1-4-1 (1982).

[4]Ind. Code § 29-1-2-7(b) (1982).

[5]459 N.E.2d at 438.

[6]*Id.* at 439.

because of the peculiar problems of proof in establishing paternity and the desirability of having these proof problems resolved in an adversarial setting, a setting which permits the father an opportunity to respond.[7] After analyzing these cases, the *Hendren* court noted the constitutional problems involved in statutes affecting illegitimates and determined that the desire to allow fathers to protect themselves against fraudulent claims must be balanced against the illegitimates' rights to reasonable opportunities to establish paternity.[8]

The court found that Indiana's statute promoted accuracy and fairness by ensuring that determinations of paternity take place in adversarial contexts.[9] To balance this requirement in the instant case against the child's rights to an opportunity to determine paternity, the court decided that the policy behind the statute had been served since an adversarial context had existed and, except for the entry of a decree, a resolution had been reached during the father's lifetime. Since the statute's purpose had been fulfilled, the child was entitled to an allowance from his father's estate even though a timely decree determining paternity had not been entered.[10]

Judge Hoffman dissented on the very point with which the authors of the majority opinion had difficulty—the clear language of the statute required the entry be made during the father's lifetime.[11] The majority circumvented the actual language of the statute by looking through the form of the statute to its substance.[12] Judge Hoffman found no basis for ignoring the clear statutory language since the statute was presumptively constitutional as written[13] and had to be strictly construed because it was in derogation of the common law.[14] In spite of the appealing facts of this case, Judge Hoffman believed that the majority's decision opened the door to paternity litigation after a father's death. He further believed that if the language of the statute were flawed, the Indiana legislature must change it.[15]

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[7]*See* Lalli v. Lalli, 439 U.S. 259 (1978) (The Supreme Court upheld the constitutionality of a New York statute which required that a judicial determination of paternity be entered during a father's lifetime before an illegitimate was entitled to inherit.). *See also* Trimble v. Gordon, 430 U.S. 762 (1977).

[8]459 N.E.2d at 441 (citing Pickett v. Brown, 103 S. Ct. 2199, 2204-05 (1983); Mills v. Habluetzel, 456 U.S. 91, 99-101 (1982)).

[9]459 N.E.2d at 442.

[10]*Id.*

[11]*Id.* (Hoffman, J., dissenting).

[12]*Id.*

[13]*Id.* at 443. Judge Hoffman noted that not only are statutes presumed to be constitutional, no party in the instant case was asserting that the statute was unconstitutional. *Id.* Moreover, the Supreme Court upheld a statute similar to Indiana's in Lalli v. Lalli, 439 U.S. 259 (1978).

[14]459 N.E.2d at 443 (citing Reger v. Reger, 242 Ind. 302, 316, 177 N.E.2d 901, 907 (1961)).

[15]459 N.E.2d at 444.

2. Antenuptial Agreements and Waivers of Expectancy.—The importance of complying with statutory requirements respecting antenuptial agreements and waivers was evident in the case of *Bohnke v. Estate of Bohnke*.[16] In *Bohnke*, the husband's estate tried to limit the wife's interests in the estate by requesting court enforcement of a written waiver of expectancy, an oral antenuptial agreement, and a written "rental agreement" disposing of certain funds deposited by the husband and wife in nursing home accounts.[17]

A waiver of expectancy was executed by the wife shortly after her husband's death. In this waiver, the wife waived her right to an elective share of her husband's estate and her right to the $8,500 survivor's allowance. The waiver itself did not contain a listing of the wife's rights; it merely contained a statement that the wife had been "'fully informed as to [her] rights in the estate of [her] deceased husband, Frank E. Bohnke, and as to the provisions of I.C. 29-1-3-1 and [her] right to survivor's allowances as provided in I.C. 29-1-4-1.'"[18] The court held that this waiver was not enforceable with respect to the survivor's allowance because Indiana law requires that, to be valid, a waiver of an expectancy can be made only after full disclosure of the nature and extent of the rights being waived.[19] Disclosure is also required with respect to a waiver of the right to elect against a decedent's estate.[20] The court reasoned that the allusion in the waiver to the wife's statutory rights, which was unaccompanied by a discussion of the nature of those rights, was not a sufficient disclosure of the nature of those rights.[21] Because the wife was not advised of her statutory right to elect against the decedent's estate or of her right to obtain a survivor's allowance when the waiver was signed, the waiver was not valid.[22]

The court also noted that the fact that the husband and wife had an alleged underlying oral agreement between them in which each agreed not to make any claim on the estate of the other did not convert the invalid waiver into a valid one.[23] While antenuptial agreements are generally favored, Indiana law requires that these agreements be made in writing and that they be signed only after a full disclosure of the

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[16]454 N.E.2d 446 (Ind. Ct. App. 1983), *transfer denied*, Jan. 30, 1984.

[17]*Id.* at 448.

[18]*Id.* at 449 (quoting the disputed waiver).

[19]*Id.* at 448 (citing IND. CODE § 29-1-2-13 (1982)). The survivor's allowance was an "expectancy" and its waiver was, hence, governed by the general rules with respect to waivers of expectancies. Because no statutory provision provides for a method for withdrawing waivers, they are generally irreversible if they comply with statutory requirements. 454 N.E.2d at 448.

[20]454 N.E.2d at 448 (quoting IND. CODE § 29-1-3-6 (1982)).

[21]454 N.E.2d at 449.

[22]*Id.*

[23]*Id.* at 450.

rights being waived.[24] Since the antenuptial agreement was not in writing, the court held that it failed to meet the statutory requirement, was not enforceable, and could not be used to validate a subsequently written, but invalid, waiver.[25]

The court also ruled that the rental agreement was not an enforceable antenuptial agreement with respect to the amounts subject to the rental agreement.[26] While the rental agreement was in writing and was signed by both the husband and wife, it merely provided that the balance of each of their accounts at the nursing home would pass to each of their estates. It contained no other language by which the parties waived their rights with respect to each other's estate, and the court found that this requisite language could not be implied. The court concluded that the agreement clearly did not constitute an agreement that the survivor would make no claims on the estate of the first to die and was not, therefore, an enforceable antenuptial agreement.[27]

Another issue concerning antenuptial agreements faced the court in the case of *Russell v. Walz*.[28] There, the antenuptial agreement was entered into by the parties prior to marriage, was in writing, and was presumptively effective. The agreement gave the decedent's wife the right to one-third of the decedent's net estate if he predeceased her. At the time of the execution of the agreement, the decedent owned two parcels of real estate which would have been subject to the wife's one-third share under the agreement. After the execution of the agreement, and before death, the decedent arguably gave one parcel of real estate to his children. If the gift were found to be effective, the main issue in the case would have been whether the gift served to extinguish the wife's rights under the agreement to one-third of that property, or whether the gift was in fraud of the agreement and was, therefore, ineffective to extinguish her rights.[29]

The court noted the following generally recognized rules concerning antenuptial agreements: (1) antenuptial agreements are generally favored by the courts and will, when possible, be liberally construed;[30] (2) consideration will be given to the language in the agreement, the conditions surrounding the parties at the time the agreement is made, the legal rights of the parties as they would exist before and after the marriage

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[24]IND. CODE § 29-1-3-6 (1982).

[25]454 N.E.2d at 450.

[26]*Id.*

[27]*Id.*

[28]458 N.E.2d 1172 (Ind. Ct. App. 1984). For a further discussion of this case, see Krieger, *Property, 1984 Survey of Recent Developments in Indiana Law* 18 IND. L. REV. 347, 350-58 (1985).

[28]458 N.E.2d 1172 (Ind. Ct. App. 1984).

[29]*Id.* at 1174-78.

[30]*Id.* at 1179 (citing Baugher v. Barrett, 128 Ind. App. 233, 238-39, 145 N.E.2d 297, 299 (1957), *transfer denied*, Jan. 30, 1958; Moore v. Harrison, 26 Ind. App. 408, 411, 59 N.E. 1077, 1077-78 (1901)).

if no agreement were made, and the adequacy of the consideration supporting the agreement;[31] and (3) agreements will only be enforced if they are executed and performed with the utmost good faith.[32] In two conclusions on property law grounds,[33] the court found that the decedent's inter vivos conveyance was ineffective to transfer title to the real estate.[34] The court noted, however, that had the conveyance effected a valid inter vivos transfer, the transfer was susceptible to an argument that it was fraudulent and in violation of the wife's rights under the antenuptial agreement.[35]

Under the court's suggested argument, a wife would benefit greatly by having an antenuptial agreement similar to the one in *Russell* since she arguably is then entitled to share in any property disposed of by her husband prior to his death. Under Indiana elective and intestate law, she would be entitled only to an intestate or elective share of the decedent's probate estate as it exists at death, without regard to predeath and nonprobate transfers.[36] Even if the decedent effectively disposed of some property prior to death, a spouse cannot increase his or her elective or intestate portion of the estate through "augmentation"—the estate's inclusion of nonprobate property for the purposes of determining the size of the elective or intestate share—since Indiana has rejected this concept even when predeath transfers are intended to defeat a surviving spouse's rights.[37] By having an antenuptial agreement, and under the

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[31]458 N.E.2d at 1180 (quoting Baugher v. Barrett, 128 Ind. App. 233, 239, 145 N.E.2d 297, 300 (1957), *transfer denied*, Jan. 30, 1958)).

[32]458 N.E.2d at 1180 (citing Kratli v. Booth, 99 Ind. App. 178, 182, 191 N.E. 180, 182 (1934)).

[33]For a discussion of the property issues involved in the *Russell* case, see Krieger, *Property, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 347, 352 (1985).

[34]458 N.E.2d at 1184.

[35]*Id.* at 1184-85. The court reached this conclusion in spite of language in the agreement which gave each of the parties "'the full right to own, control, and dispose of his or her separate property the same as if the marriage relations did not exist, and each of the parties is to have full right to dispose of and sell any and all real or personal property.'" *Id.* at 1175 (quoting the antenuptial agreement). Although the court did not specifically consider this language, the fact that the agreement did not mention gifts or sales for less than an adequate consideration may indicate that the parties did not intend that a survivor's rights could be defeated through gifts.

[36]IND. CODE §§ 29-1-2-1, -3-1 (1982).

[37]*See* Leazenby v. Clinton County Bank & Trust Co., 171 Ind. App. 243, 355 N.E.2d 861 (1976). The rule was firmly established in *Leazenby* that a spouse has no right to reach property held in a deceased spouse's inter vivos revocable trust. *Id.* at 252, 355 N.E.2d at 866. This is true even if the trust were created for the sole purpose of defeating the surviving spouse's lawful rights. *Id.* at 251-52, 355 N.E.2d at 865. If, however, the trust is invalid for some reason, it can be set aside. As the *Leazenby* case indicates, inter vivos validity is of crucial importance in determining whether or not the inter vivos transfer is effective. In *Leazenby*, the transfer was effective because the decedent's husband had no rights in the decedent's property during the decedent's lifetime; he had only an

court's reasoning in *Russell*, a spouse could "lock in" his or her interests in the decedent's estate regardless of any attempt by the decedent to defeat the spouse's rights. This provides the surviving spouse with substantial protection against a deceased spouse's predeath transfers.

3. Decedent's Disposition of Property Not Owned by the Decedent.— In *Apple v. Kile*,[38] one issue was whether or not a decree in final settlement of an estate was a final judgment with respect to all property inventoried in the estate and was binding on all interested parties.[39] Indiana law states that a decree in final judgment in an estate binds all interested parties with respect to the matters set forth therein unless for fraud, mistake, or otherwise the probate court modifies or vacates the order within one year.[40] The *Apple* case was not concerned with a probate court's modification of its decree, but rather with a collateral attack on the decree in a quiet title action.

In *Apple*, the father died in 1958, leaving a will which devised a thirty acre tract of land to his daughter, Kile. Kile's brother, Apple, served as the executor of his father's estate and sent notice of the probate proceedings to Kile. Under the belief that the thirty acre tract was jointly owned by his father and mother, Apple neither inventoried the property nor distributed it during the course of the estate proceedings. The father's estate was duly closed and the mother continued in possession of the tract until her death in 1975. The mother's will devised the thirty acre tract to Apple. The real estate was inventoried in the mother's estate and was distributed, under a final decree, from the estate in 1976.[41]

Because these transactions created a flaw in the chain of title which surfaced when Apple attempted to secure a loan on the tract, he attempted to obtain a quit claim deed from Kile. This put Kile on notice of her interest in the tract, and she filed a quiet title action to determine the title to the real estate.[42] The trial court, relying on the equitable doctrine of unclean hands, held that Apple had a duty to distribute the property from his father's estate to the person entitled thereto. Having failed to perform his statutory duty, the trial court held that he could not now

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expectancy. The transfer could not, therefore, be in fraud of his rights. *Id.* at 251, 355 N.E.2d at 865. In *Russell*, arguably and ignoring the quoted language in *supra* note 19, the wife had more than an expectancy. She had a right under the agreement to one-third of the decedent's property. Because the transfers were designed to defeat actual, not expectant, property interests, the court's argument would allow the transfers to be set aside simply on the basis that they were not valid inter vivos transfers even if they had not, on property law grounds, been otherwise ineffective. For a complete discussion of the *Leazenby* case, see Falender, *Protective Provisions for Surviving Spouses in Indiana: Considerations for a Legislative Response to* Leazenby, 11 IND. L. REV. 755 (1978).

[38]457 N.E.2d 254 (Ind. Ct. App. 1983), *transfer denied*, Mar. 16, 1984.

[39]*Id.* at 258.

[40]IND. CODE § 29-1-1-21 (1982).

[41]457 N.E.2d at 255.

[42]*Id.*

profit by his wrongdoing and was estopped to claim title to the property through his mother's estate.[43]

The court of appeals found that a decree of distribution has no applicability to property not owned by a decedent and is, *ab initio*, totally ineffective to determine title to any such property.[44] Because a probate court can only determine who is entitled to property owned by the decedent, administration and distribution of an asset not owned by the decedent cannot serve to pass title.

The court did note one exception to this general rule, and that is if the probate court has addressed the question of title in a manner presumably notorious enough to advise the person whose property is being administered of that person's rights to the property.[45] The court did not directly address several Indiana cases which hold that a decedent may devise property which he does not own.[46] These cases do not rely upon the finality of a probate court's distribution of the property, but rather rely upon an equitable election made when a person agrees to allow a decedent's will to dispose of property owned by that person in exchange for other benefits that person receives under the decedent's will. If that person does not so agree, he is forced to elect against the will to retrieve his property from the decedent's estate and cannot then accept any of the other benefits under the will. For property to be disposed of in this manner, the testator must intend to dispose of property belonging to another; the property must be specifically mentioned in the will; the true property owner must receive benefits under the will; and he or she must not elect against the will.[47] As this theory applies to the instant case, it is not clear whether or not Kile received any benefits under her mother's will. If she did, this line of Indiana cases would prevent her from receiving these benefits and recovering her property

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[43] *Id.*

[44] *Id.* at 258-59. It is, however, in all other respects a final judgment binding on all parties and it cannot be collaterally attacked more than one year after it is entered. *Id.* at 258.

[45] *Id.* at 256-57.

[46] *See* Young v. Biehl, 166 Ind. 357, 77 N.E. 406 (1906); Citizens Nat'l Bank v. Stasell, 408 N.E.2d 587 (Ind. Ct. App. 1980), *reh'g denied*, 415 N.E.2d 150 (1981); Moore v. Baker, 4 Ind. App. 115, 30 N.E. 629 (1892). The *Moore* court noted:

> [W]hen the testatrix elected to avail herself of the benefits of her husband's will, she was thereby estopped to deny his right to dispose of the bank stock, though the title was in her. The doctrine of election is of equitable origin, and is universally recognized in this country and England. There can be no election unless the testator confers some benefit upon the devisee, and by the terms of the will assumes to dispose of some right of the latter. Election consists in the exercise of the choice thus offered the devisee of accepting the devise and surrendering that right of his which the will undertakes to dispose of, or retaining such right and rejecting the devise.

Id. at 117-18, 30 N.E. at 629-30.

[47] *See* Citizens Nat'l Bank v. Stasell, 408 N.E.2d 587, 592 (Ind. Ct. App. 1980).

at the same time. Because of the equitable nature of this doctrine, however, Kile might be able to prevent its normal operation since her ownership interest in the property was arguably hidden from her through the other claimant's breach of a fiduciary duty.

4. Will Construction.—In *Graham v. Anderson*,[48] the decedent's will left her estate equally to six of her brothers and sisters. Only one of these six brothers and sisters (the mother of the attorney who drafted the will) survived the decedent. The children of the deceased brothers and sisters argued that the bequest to their parents should not lapse, but should pass to them by the laws of intestate succession.[49]

The court first examined the will to determine whether or not it was ambiguous with respect to the identity of the beneficiaries. Because the will did not contain any language which required the bequests to be paid to deceased brothers or sisters or which carried their shares to their descendants, no language was present which would make the will ambiguous.[50] A will is not, therefore, ambiguous just because beneficiaries named in the will predecease the decedent.

In response to the children's attack on the operation of Indiana's antilapse statute,[51] the court found that the statute did not "save" the bequests in this case and that the resulting lapse which occurred was not contrary to public policy nor in violation of common law principles.[52] This holding is in line with the clear language of the antilapse statute and in accordance with prior decisions of the Indiana courts.[53]

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[48]454 N.E.2d 870 (Ind. Ct. App. 1983).

[49]*Id.* at 871. The children also attacked the will on the basis of the attorney-draftor's interests in the identity of the decedent's beneficiary under the will. This argument was rejected because, at the time the will was drafted, all but one of the decedent's brothers and sisters were living, and there was no way the attorney could have known who among these would eventually survive the decedent. *Id.* at 872 n.2. While the argument was rejected, it does warrant some attention in that this case, among others, raises some conflict of interest questions which can arise when an attorney drafts a will under which he or a close family member receives a benefit.

[50]*Id.* at 872-73. Indiana case law has long noted a distinction between patent and latent ambiguities and the admissibility of extrinsic evidence to clarify the ambiguities. Patent ambiguities are apparent on the face of a will because the language used in the will either conveys no definite meaning or conveys a confused meaning. No extrinsic evidence is admissible to explain or remove a patent ambiguity. A latent ambiguity arises not on the face of the instrument, but in attempting to apply the words used in the instrument to the facts. Extrinsic evidence is admissible to explain or clarify a latent ambiguity. *See* Hauck v. Second Nat'l Bank of Richmond, 153 Ind. App. 245, 286 N.E.2d 852 (1972) (citing various cases defining the two concepts). After examining the provisions of the will in *Graham*, the court found that there was no ambiguity of either sort since its language was clear and could be applied without difficulty. 454 N.E.2d at 872-73.

[51]IND. CODE § 29-1-6-1(g) (1982).

[52]454 N.E.2d at 873.

[53]*See, e.g.*, Carey v. White, 126 Ind. App. 418, 126 N.E.2d 255 (1955), *transfer denied*, Apr. 17, 1956.

In the case of *Pleska v. Zakutansky*,[54] the court again dealt with ambiguities in will language, this time with respect to language contained in a will's tax charging clause. The will clause provided that all taxes were to be paid "'out of the corpus of my estate.'"[55] The decedent's taxable estate included small amounts of probate property and large amounts of jointly held property. Because the taxes imposed on the estate were greater than the value of the probate property, no property would be available for transmittal to the beneficiaries under the will if the tax charging clause were construed so as to require the payment of taxes out of probate property.[56]

The court noted that if language in a will is ambiguous, other language contained in the will can be examined to see if it sheds any light on the testator's intent. Since the will left very specific bequests of probate property to certain distributees in certain specified amounts, the court reasoned that the decedent did not intend to deplete his probate estate by the taxes on nonprobate property, but, rather, intended that property pass under his will to the beneficiaries of his estate.[57] Read in this light, the tax charging clause that required all the taxes to be paid out of the "corpus of the estate" was not a sufficient direction to require that taxes due on nonprobate property be paid out of the probate estate. Because the will did not provide for an apportionment of taxes, Indiana's tax apportionment statute[58] was held to control the identity of the source of the tax payments.[59]

This case emphasizes the need for incorporating specific directions with respect to tax apportionment in order to overcome Indiana's tax apportionment statute. If it is intended that taxes on nonprobate property be paid out of the probate estate, this must be specifically stated in the will.

5. Tax Deduction for Claims Against Estates.—In the case of *Estate of Thompson v. Commissioner of Internal Revenue*,[60] the Seventh Circuit Court of Appeals, interpreting Indiana law with respect to what claims are enforceable against an Indiana estate, found that an unfiled claim was enforceable against an estate and, hence, was deductible on a decedent's federal estate tax return.[61] In *Thompson*, the creditor did not

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[54]459 N.E.2d 745 (Ind. Ct. App. 1984), *transfer denied*, June 5, 1984.

[55]*Id.* at 747 (quoting the Pleska will).

[56]*Id.*

[57]*Id.* at 748-49.

[58]IND. CODE § 29-2-12-2 (1982).

[59]459 N.E.2d at 749.

[60]730 F.2d 1071 (7th Cir. 1983) (per curiam).

[61]*Id.* at 1072. The estate claimed deductibility under § 2053 of the INTERNAL REVENUE CODE OF 1954, as amended. This section only allows a deduction for claims which are enforceable under state law. I.R.C. § 2053(a)(4).

file a claim against the estate within the six month period allowed by statute.[62] The estate and the creditor, however, entered into a compromise agreement with respect to the claim within the six month period, and this compromise was approved almost five years later by the probate court. The Internal Revenue Service challenged the deductibility of the debt, and the tax court agreed with the Service's position.[63]

With respect to a debt's enforceability under state law, the Indiana statutes contained two arguably relevant provisions. One provision clearly stated that any payments within six months would be considered proper payments if they were approved by the court in the personal representative's next accounting.[64] Another provision stated that compromises of claims could be made by an executor, but they did not bind an estate unless the personal representative received either prior authorization or subsequent approval of the compromise.[65] No compromise made after the six month period was valid unless a claim had been filed in the estate.

Since the estate did not pay the debt within the six month period, the creditor had to rely upon the compromise statute for the enforcement of its claim. The Seventh Circuit found that, since a compromise was entered into within the six month period and the estate did receive subsequent approval by a court of the compromise, the compromise was binding on the estate and was a deductible legal obligation of the estate.[66]

Two prior Indiana cases concerning the enforceability of unfiled debts are distinguishable from *Thompson*. In these cases, the personal representative, or the personal representative's attorney, promised either to pay the debt or to file a timely claim on the claimant's behalf.[67] The

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[62]IND. CODE § 29-1-14-1 (1971), *repealed by* Act of Apr. 22, 1975, Pub. L. No. 288-1975, 1975 Ind. Acts 1582 (current version at IND. CODE § 29-1-14-1 (1982) (requiring claims to be filed within five months)).

[63]730 F.2d at 1073-74.

[64]IND. CODE § 29-1-14-19(b) (1971), *repealed by* Act of Apr. 22, 1975, Pub. L. No. 288, 1975 Ind. Acts 1582 (current version at IND. CODE § 29-1-14-19(b) (1982) (requiring payments within five months)).

[65]IND. CODE § 29-1-14-18 (1971), *repealed by* Act of Apr. 22, 1975, Pub. L. No. 288-1975, 1975 Ind. Acts 1582 (current version at IND. CODE § 29-1-14-18 (1982)).

[66]730 F.2d at 1076.

[67]*In re* Estate of Ropp, 142 Ind. App. 1, 232 N.E.2d 384 (1968), *transfer denied*, Mar. 21, 1968; Donnella v. Crady, 135 Ind. App. 60, 185 N.E.2d 623 (1962), *transfer denied*, July 3, 1963. The fact that the claimants relied upon the estate's promises to pay their claims was of no help to the claimants since Indiana's claim statute is not a statute of limitations, but is, rather, a nonclaim statute. Compliance with the terms of a nonclaim statute, including its time limitations, is necessary to confer jurisdiction on a court. The *Donnella* court noted:

> The rule of waiver or estoppel has no application to a nonclaim statute. As pointed out above, the time element in a nonclaim statute is a part of the right of action itself and is not a defense. Such statutes are not extended by

promises were subsequently repudiated by the estates. In both cases, the Indiana courts found that the debts were not enforceable against the estates as they were not filed in accordance with Indiana law, nor were they paid within the time permitted by law.[68] The distinguishing factor between these cases and the *Thompson* case was the fact that, in *Thompson*, the estate not only did not repudiate the debt, it compromised it in a timely and binding fashion and continued to acknowledge its existence.[69]

It should be noted that if unfiled claims are compromised within the claims period, but will not be paid until after the period expires, adequate records which reflect the compromise and the date of the compromise should be kept. If at all possible, court approval of the compromised debt should be requested as soon as possible and, ideally, within the claims period.

B. Guardianships

1. Breach of Fiduciary Duty and Presumptions of Undue Influence.— As several cases in this section indicate, Indiana courts do not look kindly upon fiduciaries who benefit from breaches of their duties. The courts are particularly harsh on attorneys who serve in fiduciary capacities and who benefit from breaches of their trusts. This was clearly evident in the case of *Briggs v. Clinton County Bank & Trust Co.*,[70] wherein an attorney, Briggs, prepared and supervised the execution of various documents just prior to obtaining an appointment of himself as the client's guardian. These documents included: (1) a codicil to the client's will and an affidavit stating that the client wished the attorney to act as her guardian; (2) a legal services agreement in which the client agreed to pay the attorney $10,000 for all services he might render to her prior to her death, to be paid through a $1,000 bequest in her will, also prepared by Briggs, and a $9,000 certificate of deposit to be held jointly by the client and Briggs; and (3) a check on the client's account in the amount necessary to purchase the $9,000 joint certificate.[71]

After several months of being under Briggs' care in the conservatorship proceedings, the client contacted another attorney for the purpose of having Briggs removed as conservator.[72] Her new attorney filed a

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the disability, fraud or misconduct of the parties. The time to act cannot be waived by the parties or lengthened by the court.

Id. at 63, 185 N.E.2d at 625.

[68]*In re* Estate of Ropp, 142 Ind. App. 1, 6-7, 232 N.E.2d 384, 387 (1968), *transfer denied*, Mar. 21, 1968; Donnella v. Crady, 135 Ind. App. 60, 65, 185 N.E.2d 623, 625 (1962), *transfer denied*, July 3, 1963.

[69]730 F.2d at 1075-76.

[70]452 N.E.2d 989 (Ind. Ct. App. 1983).

[71]*Id.* at 995.

[72]*Id.*

petition to discharge Briggs as conservator and to appoint a new conservator. Briggs then filed a petition to terminate the conservatorship. This petition was granted by the trial court and Briggs was directed to file his final accounting. In this final accounting, Briggs claimed that he was entitled to fees for services rendered the client during her lifetime and to fees for services rendered during the conservatorship, both as attorney and as conservator. The trial court refused to allow him any fees for services rendered either as attorney or conservator.[73]

The court of appeals agreed on the basis that a contract entered into between an attorney and client is presumptively invalid as the product of undue influence. To rebut this presumption, an attorney must show that the contract was fair and equitable and that the client freely and voluntarily executed it with full understanding. There must be no hint that the attorney was taking advantage of the client.[74] In *Briggs*, because of the client's condition and the fact that she was found to be incompetent shortly after the signing of the contract, the presumption of undue influence was not overcome and, therefore, Briggs was not entitled to enforce the contract.[75]

Because the contract for attorney fees could not be enforced, Briggs fell back on a quantum meruit theory to recover fees for services rendered as the client's attorney. Quantum meruit recovery is equitable in nature, so that one must have clean hands in order to gain relief.[76] Since Briggs exercised undue influence, he did not have clean hands, and he was not, therefore, entitled to equitable relief.[77]

Upon Briggs' contention that he was entitled to fees for services rendered the conservatorship, either as attorney or as conservator, the court denied him any fees because he, as conservator, had breached his fiduciary duty to the ward because of his delay in terminating the conservatorship after the order of termination had been entered.[78] On the whole, the court concluded that Briggs' conflicts of interest and his behavior during the proceedings were such that his actions were often in his, rather than the ward's, best interests.[79]

In related matters, the court found that an attorney-client privilege exists in conversations between attorneys and clients with respect to their wills.[80] This privilege continues after the client's death when a claimant

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[73] *Id.* at 996.

[74] *Id.* at 999 (citing Sweeney v. Vierbuchen, 224 Ind. 341, 347-48, 66 N.E.2d 764, 766 (1946); Blasche v. Himelick, 140 Ind. App. 255, 210 N.E.2d 378 (1965); 7 AM. JUR. 2D *Attorneys at Law* §§ 123-24, 249 (1980)).

[75] 452 N.E.2d at 999-1000.

[76] *Id.* at 1004 (citing 27 AM. JUR. 2D *Equity* § 136 (1966)).

[77] 452 N.E.2d at 1004.

[78] *Id.* at 1010-11.

[79] *Id.* at 1011.

[80] *Id.* at 1012 (citing Gurley v. Park, 135 Ind. 440, 35 N.E. 279 (1893)).

is adverse to the interests of the client, his estate, or his successors.[81] In this case, because Briggs' claim was adverse to his client's successors; the attorney-client privilege applied to exclude any testimony by any attorney regarding the provisions of any prior wills made by the client.[82]

Finally, the court, disgusted with Briggs' failure to present a cogent summary of his case and with the misleading and outrageously erroneous state of his brief, invoked the damages rule under Appellate Rule 15(G)[83] and awarded attorney fees to the client's successors.[84] While the rule only permits a court to award damages up to ten percent of a judgment, the court found that it could use its inherent equitable powers to award attorney fees even where no damages were awarded when the party has acted in bad faith.[85]

2. Jurisdiction of Probate Courts.—The jurisdiction of the probate court was brought into question in the case of *In re Guardianship of Neff*.[86] Pursuant to Indiana Code section 29-1-18-9, an individual petitioner, against the wishes of a minor's father, sought the appointment of a temporary guardian for the minor in the probate division of the Madison Superior Court. The Madison Superior Court appointed the Madison County Department of Public Welfare as the child's guardian.[87]

The father appealed on the grounds that the entry of this order was an improper exercise of the court's probate jurisdiction, and that such an order could be entered only by a court having juvenile jurisdiction, which was vested in another division of the Madison Superior Court.[88]

The Indiana Court of Appeals, in an odd construction of Indiana Code section 29-1-18-6, reversed the trial court, apparently holding that a probate court *never* has jurisdiction to appoint a guardian for a person who has a natural guardian in Indiana.[89] This is a patently incorrect construction of the statute because the statute itself gives a court having probate jurisdiction the authority to appoint a guardian for any incompetent "except a minor having a natural guardian in this state *who is properly performing his duties as natural guardian*."[90] In *Neff*, since the natural guardian was found not to be performing his duties as natural

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[81]452 N.E.2d at 1012 (citing Doyle v. Reves, 112 Conn. 521, 152 A. 882 (1931); *In re* Smith's Estate, 263 Wis. 441, 57 N.W.2d 727 (1953)).

[82]452 N.E.2d at 1012.

[83]This rule provides, "If the court on appeal affirms the judgment, damages may be assessed in favor of the appellee not exceeding ten per cent (10%) upon the judgment, in money judgments, and in other cases in the discretion of the court; and the court shall remand such cause for execution." IND. R. APP. P. 15(G).

[84]452 N.E.2d at 1015.

[85]*Id.*

[86]456 N.E.2d 1045 (Ind. Ct. App. 1983), *transfer denied*, Mar. 21, 1984.

[87]*Id.* at 1045.

[88]*Id.* at 1046.

[89]*Id.*

[90]IND. CODE § 29-1-18-6 (1982) (emphasis added).

guardian, the statute should have conferred jurisdiction on the probate court to appoint such a guardian. Nothing in the juvenile code appears to deprive the probate court of this type of jurisdiction.[91]

It is possible that the appellate court's reasoning was that, while a probate court has jurisdiction to appoint a guardian for a minor having a natural guardian, a probate court's jurisdiction to determine parental fitness is preempted by the juvenile code. This reasoning would make a juvenile court hearing a prerequisite to the appointment of a guardian for any minor having a natural guardian in the state. Whether the juvenile code actually preempts jurisdiction in this situation is not clear either from the language in the juvenile code or its legislative history. Nonetheless, if the *Neff* court's reasoning was along this line, this reasoning does not appear in the court's opinion which merely states that "[t]he trial court lacked jurisdiction because [the father] is [the child's] natural guardian."[92]

Judge Ratliff, in his concurring opinion which is probably the most illuminating portion of the court's opinion, points out that the proceeding in this case was, in reality, an action concerning a child in need of services (a CHINS action), and not an action for the appointment of a guardian.[93] The true nature of the proceeding was evidenced by the fact that the Madison County Department of Public Welfare was appointed as the child's guardian rather than the individual petitioning for the guardianship. Because the matter was not truly a guardianship matter, but was rather a CHINS action, the juvenile code grants exclusive jurisdiction over this action to a court having juvenile jurisdiction.[94] It is only with the additional background furnished by the concurring opinion that the result in this case makes any sense. Based on the majority opinion alone, the case represents an unfortunate restriction on a probate court's jurisdiction with respect to guardians of minors.

C. Joint Accounts

In *In re Guardianship of Walters*,[95] the court of appeals had to determine whether or not the trial court's disposition of a joint account on the death of an incompetent joint tenant was correct. The account was established by a husband and wife but was funded mainly with the wife's assets. The signature card on the account clearly termed the account as joint tenants with rights of survivorship. The card additionally specified that the husband and wife, during their lifetimes, had the rights to those

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[91]IND. CODE § 31-6-2-1 (Supp. 1984).

[92]456 N.E.2d at 1046.

[93]*Id.* at 1047 (Ratliff, J., concurring).

[94]*Id.*

[95]460 N.E.2d 1011 (Ind. Ct. App. 1984).

funds in the account which were attributable to their individual deposits.[96]

When the wife became incompetent, the wife's daughter was appointed as her guardian. She withdrew the wife's funds from the joint account and opened another savings account. The husband objected to this withdrawal and the trial court ordered the reestablishment of the joint bank account under the same terms which controlled the original account.[97] The guardian did not appeal this decision, the determination of which would have been of great interest.[98] After the wife's death, the trial court split the balance of the account between the wife's estate and the husband. The husband appealed this decision, asserting that he was entitled to the entire funds on deposit in the account, and the court agreed.[99]

Such a result is clearly mandated by the applicable statute unless clear and convincing evidence of a different intention is presented by the party claiming the account.[100] No such evidence was shown by the cards signed by the parties in this case, and a prior antenuptial agreement was not sufficient to negate the subsequent actions of the wife in creating the survivorship account.

D. Trusts

In *In re Watson*,[101] it was determined in a prior proceeding that an income beneficiary of a trust owed money to the trust. The successor trustee of the trust filed an accounting which reflected that the beneficiary's share of undistributed net income was being held as security for repayment of the beneficiary's debt to the trust.[102] The beneficiary

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[96]*Id.* at 1012.

[97]*Id.*

[98]The disposition by a guardian of joint account assets was an issue in a recent Indiana case which basically held, under present Indiana law, that a guardian has a duty to take possession of joint accounts and to preserve the incompetent's interests therein for the benefit of the incompetent. Kuehl v. Terre Haute First Nat'l Bank, 436 N.E.2d 1160 (Ind. Ct. App. 1982). In *Kuehl*, the guardian withdrew the ward's funds from a joint account and deposited them in another account, presumably in the guardian's name. Because the joint account had survivorship features, it would have passed to the surviving joint owner on the ward's death. Since the funds in the account were withdrawn and kept in an account in the guardian's name, the funds presumably passed to the ward's distributees at death. By making such withdrawals, a guardian can dramatically affect a ward's estate plan. It is questionable whether guardians should be given this power or whether, as in the instant case, they should be required to preserve the account, while having access to the account for the ward's support and maintenance to the extent of the ward's contribution to the account.

[99]460 N.E.2d at 1012.

[100]IND. CODE § 32-4-1.5-4 (1982).

[101]449 N.E.2d 1156 (Ind. Ct. App. 1983).

[102]*Id.* at 1157.

filed objections to the trustee's accounting claiming that the trust terms required the trustee to distribute the income to her, and it was, therefore, a breach of the trust for the trustee to fail to distribute such income. The beneficiary alternatively argued that if it were not a breach of trust, the trust should have applied the withheld income against the debt owed to the trust by the beneficiary.[103]

The court found that there was no doubt that a trustee could set off or withhold a beneficiary's distributive share in order to reimburse the trust for a debt owed to it by a beneficiary. The court also found that there was no breach in the trustee's failure to apply the withheld income against the beneficiary's debt, thereby lessening the impact of interest payments on the debt, because a previous agreement between the trustee and the beneficiary provided that no distributions of income would be made to any beneficiary until all litigation between the parties was completed.[104] Because the court found the beneficiary's arguments to be without merit and frivolous, the court imposed a ten percent penalty.[105]

E. The Rule Against Perpetuities: Merrill v. Wimmer

In *Merrill v. Wimmer*,[106] an interesting question was raised concerning the rule against perpetuities.[107] The trial court held that part of a proposed distribution of the corpus of a testamentary trust violated the rule and concluded that the violative portions were totally invalid and void.[108] The court of appeals agreed that parts of the trust provision violated the rule, but did not agree that the violative portions should be totally void.[109] The court of appeals adopted and applied a new doctrine, the equitable doctrine of approximation, to avoid total invalidation of the violative dispositions and to effectuate the transferor's intent.

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[103]*Id.* at 1158-59.

[104]*Id.* at 1159.

[105]*See supra* note 83 and accompanying text. Disgusted with the amount of litigation already generated by the trust beneficiary, the court took the unusual step of looking into the future to see what other possible litigated matters could arise with respect to this trust. The court decided that the beneficiary would challenge the trustee's payment from trust assets of its attorney fees incurred in pursuing the appeal. The court held that these fees were chargeable to the trust income rather than the principal. The beneficiary's interest in the trust would, therefore, bear the brunt of the fees which her litigious nature had caused the trust to incur. 449 N.E.2d at 1160 n.6.

[106]453 N.E.2d 356 (Ind. Ct. App. 1983).

[107]The common law rule against perpetuities is codified in Indiana at IND. CODE § 32-1-4-1 (1982). *See infra* note 118 and accompanying text.

[108]453 N.E.2d at 358. *See infra* notes 113-14 and accompanying text for further explanation of the trial court's ruling.

[109]453 N.E.2d at 362.

The following discussion of the *Merrill* case will be divided into three parts. First, the facts of the case will be set forth. Second, the existence of a rule violation will be assumed, and the operation of the approximation doctrine will be explained. Third, the existence of a rule violation will be questioned, and a possible misunderstanding of the rule and its operation will be pointed out.

1. The Facts.—The testator, Newell, established a testamentary residuary trust in which he devised the income to his three children, Judith, Dennis, and Walter, during their lives.[110] Regarding distribution of the trust corpus, the trust provided:

> "E. That when my youngest grandchild reaches the age of twenty-five (25) years, said Trust shall terminate as to two-thirds (2/3), of the corpus of said Trust, and that said two-thirds (2/3), together with the accumulated income to be credited to said two-thirds (2/3) interest, shall be divided as follows, to-wit: One-Third (1/3) shall be divided one-half (1/2) to my daughter, Judith I. Yarling, and one-half (1/2) to her children, share and share alike; One-Third (1/3) shall be divided one-half (1/2) to my son, Dennis A. Merrill, and one-half (1/2) to his children, share and share alike; One-Third (1/3) of the corpus of said Trust, together with any accumulated income, to be credited to said one-third (1/3) interest, shall be continued in Trust for my son, Walter O. Merrill, and he shall have the income from this Trust for and during his natural life and upon his death, if he has bodily issue, then one-half (1/2) of his one-third (1/3), in Trust, shall go to his bodily issue and the other one-half (1/2) of the one-third (1/3), in Trust, or all of said one-third (1/3), in Trust, in the event he has no bodily issue, shall go to my grandchildren, living at the time of the termination of said Trust, share and share alike."[111]

When the testator died, he was survived by his three children and several grandchildren.

The trial court held, and the court of appeals agreed, that the provisions distributing corpus to Judith's children and Dennis' children violated the rule.[112] The trial court, after finding this rule violation, eliminated the condition restricting distribution to the time when the

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[110] *Id.* at 358.

[111] *Id.* (quoting the Newell trust).

[112] *Id.* at 359. In fact, appellants *conceded* this rule violation and more: "Appellants concede the proposed distribution of two-thirds of the corpus to Judith, Dennis and their children when the youngest grandchild reached 25 violates the rule against perpetuities . . . ." *Id.* (citation omitted).

youngest grandchild attained twenty-five and modified the trust by awarding outright one-third of the corpus to Judith and one-third to Dennis.[113] The trial court found that the provision of the trust regarding Walter did not violate the rule and left it intact.[114]

The court of appeals agreed with the trial court's conclusions regarding the existence of rule violations.[115] The court of appeals did not agree, however, with the modification of the provisions in favor of Judith and Dennis, or with the failure to modify Walter's provision.[116] In rejecting the trial court's approach, the court of appeals pointed to the testator's clear intent that the ultimate beneficiaries of the corpus of his estate be his grandchildren, not his children.[117]

2. The Rule and the Approximation Doctrine.—The rule against perpetuities is codified at Indiana Code section 32-1-4-1:

> An interest in property shall not be valid unless it must vest, if at all, not later than twenty-one (21) years after a life or lives in being at the creation of the interest. It is the intention by the adoption of this chapter to make effective in Indiana what is generally known as the common law rule against perpetuities, except as provided in sections 2, 3, 4 and 5 of this chapter.[118]

The rule, at common law and as codified in Indiana, deals in possibilities, not probabilities, so that any possibility of vesting after the rule period renders the violative interest void.[119] Furthermore, when a gift is made to a class of beneficiaries, such as grandchildren, the traditional all-or-nothing rule requires that the entire class gift stand or fall as a unit.[120] Thus, if the interest of any potential class member might possibly vest beyond the rule period, the entire class gift is void.

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[113]*Id.* at 358.

[114]*Id.*

[115]*Id.* at 359-60.

[116]*Id.* at 360.

[117]*Id.*

[118]IND. CODE § 32-1-4-1 (1982).

[119]*See, e.g.*, Bailey v. Bailey, 142 Ind. App. 119, 232 N.E.2d 372 (1967), *transfer denied*, Mar. 29, 1968. *See generally* L. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS § 127, at 264-65 (2d ed. 1966) [hereinafter cited as SIMES]. The rule also does not require certainty of vesting within the rule period. The rule merely requires that the interest vest or fail within the period. In other words, the "vesting decision" must be certain to be made within the rule period or the interest is void. *See generally id.* § 127.

[120]This much criticized rule grew out of the controversial case of Leake v. Robinson, 2 Mer. 363 (1817). *See generally* SIMES, *supra* note 119, § 134, at 289-92. In other words, the class must close within the rule period. Several exceptions have developed to lessen the severity of the rule. *See id.* Some courts have refused to follow this rule. *See, e.g.*, Carter v. Berry, 243 Miss. 321, 330, 140 So. 2d 843, 851 (1962).

In the *Merrill* case, the appellate court, using the all-or-nothing rule and also the presumption of perpetual fertility,[121] reasoned as follows:

> Here, it is possible the youngest grandchild may reach the age of 25 years more than 21 years after the death of the lives in being, Newell's children, at the creation of the interests. While the youngest grandchild living at the time of trial was sixteen, Newell's children are all still alive. We are required to presume they are still capable of having more children.
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> . . . Under the will's terms, it was possible for one or more of Newell's children to outlive him (as they did), and then have a child which would not reach the age of 25 within 21 years of Newell's child's death. Therefore, the possibility exists that grandchild's interest would not vest within the time required by the rule. For that reason, the entire gift fails.[122]

Following the court's analysis, if the age had been twenty-one instead of twenty-five, there would have been no rule violation. Any afterborn grandchild would necessarily reach twenty-one or not within twenty-one years after the death of his parent, a life in being. Alternatively, if the gift had been limited to the grandchildren alive at the decedent's death who reached age twenty-five, then all of the grandchildren alive at the decedent's death would have been lives in being, and all of them would have reached twenty-five or not within their lives. Thus, the rule against perpetuities would not have been violated.[123]

The court of appeals was well aware of the modifications that might have rendered the grandchildren's interests valid. The court specifically considered both the age modification and the modification limiting the gift to grandchildren living at the decedent's death as possible ways to effectuate the testator's intent.[124] Ultimately, the court adopted the latter, using the doctrine of approximation and the following reasoning:

> We believe the grandchildren's age requirement of 25 years before distribution of the corpus was to be made indicates Newell believed the trust's distributees then would be mature enough to make responsible decisions concerning the property distributed

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[121]Traditional rule analysis deals in possibilities. Thus, all persons, whether toddlers or octogenarians, are conclusively presumed to be capable of having children. *See, e.g.*, Reasoner v. Herman, 191 Ind. 642, 134 N.E. 276 (1922). *See generally* SIMES, *supra* note 119, § 133, at 287-88. Several states have legislatively altered the rule. *See, e.g.*, ILL. ANN. STAT. ch. 30, § 194 (c)(3)(B) (Smith-Hurd Supp. 1984).

[122]453 N.E.2d at 359 (citations and footnote omitted).

[123]Also, if the exact gifts given had been coupled with a saving clause providing that vesting or failing of all interests should be determined no later than twenty-one years after lives in being, the gifts would not have violated the rule.

[124]*Id.* at 362.

> to them. A distribution of Newell's property only to those grandchildren alive at his death seems to be the scheme least disruptive of his apparent intent.[125]

The approximation doctrine is to private trusts that violate the rule what cy pres is to charitable trusts.[126] In applying the doctrine of equitable approximation, the court seeks to effectuate, as near as possible, the dominant intent of the transferor. The exact intent of the transferor cannot be fully carried out because of the rule violation. But if it is possible to discard or modify the "least critical contingency" that gives rise to the rule violation, the court will discard it or modify it to effectuate the dominant intent of the transferor.[127]

Several states have adopted the equitable approximation doctrine to avoid the harsh effects of the rule.[128] In adopting such a doctrine, the states have reaffirmed the rule itself and the important policies underlying it.[129] The rule still operates to invalidate interests that vest too remotely and cannot be modified to vest sooner in a manner consistent with the transferor's intent; the rule still sets the limits beyond which a transferor cannot go in placing conditions on the ownership of property. Equitable approximation is merely used to change a violative provision and bring it within these limits.[130]

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[125]*Id.*

[126]The court specifically said that the approximation doctrine "is applied to private trusts in the same manner and for the same policy reasons as the cy pres doctrine is used in regard to charitable trusts." *Id. See* IND. CODE § 30-4-3-27(1982). Cy pres is applied to charitable trusts when a particular charitable purpose has become impossible, impracticable, or illegal to carry out, but the settlor has manifested a more general charitable intent that can be carried out by a court-ordered modification of the trust. Cy pres, as codified in Indiana, is only applicable to charitable trusts. 453 N.E.2d at 361.

[127]*See generally In re* Estate of Chun Quan Yee Hop, 52 Hawaii 40, 469 P.2d 183 (1970); Carter v. Berry, 243 Miss. 321, 140 So. 2d 843 (1962); Berry v. Union Nat'l Bank, 262 S.E.2d 766 (W.Va. 1980).

[128]*See, e.g.*, cases cited at *supra* note 127. *See also* Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891). Some courts call this doctrine cy pres, while others call it equitable modification.

[129]The policies underlying the rule have been described as follows: "[T]he rule strikes a fair balance between the desires of the living generation to dispose of the property which it enjoys and the desires of future generations to dispose of the property which they will enjoy." SIMES, *supra* note 119, § 121, at 254. The *Merrill* court, in applying approximation, specifically "endorse[d] the rule and its purposes." 453 N.E.2d at 362 n.6.

[130]The *Merrill* court described the application of the doctrine as a process of will construction, not will modification. 453 N.E.2d at 359-60, 362. Other courts have done the same thing. *See, e.g.*, Carter v. Berry, 243 Miss. 321, 140 So. 2d 843, (1962). The *Merrill* court complained that the trial court had "rewritten" the testator's will, something that "it may not do." 453 N.E.2d at 360. Yet, the court of appeals in fact rewrote the testator's will when it applied the approximation doctrine. Any court applying equitable approximation is effectively rewriting the offending will or trust, whether it is willing to admit that fact or not.

In the *Merrill* case, the court described two doctrines that were inapplicable and therefore distinguishable from the approximation doctrine. Cy pres was inapplicable because, as codified in Indiana, it applies only to charitable trusts.[131] The trust in *Merrill* was not charitable. Equitable deviation was inapplicable because, as codified in Indiana,[132] it permits deviation "from the mechanical means of administration of the trust,"[133] and from "administrative detail."[134] In the *Merrill* case, more than "mere deviation" was involved.[135]

After clearly describing the two doctrines that were inapplicable, the *Merrill* court created some uncertainty when it introduced the approximation doctrine by quoting from *Black's Law Dictionary*: "[T]he 'equitable doctrine of approximation' merely authorizes a court of chancery to vary the details of administration, in order to preserve the trust, and carry out the general purpose of the donor."[136] This definition is disconcerting because it follows directly on the heels of the court's assertion that more than "mere deviation" from "administrative detail" was involved in the *Merrill* case.[137] This definition is also disconcerting because other cases cited with approval by the *Merrill* court suggest that more

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A court's reluctance to admit that it is engaged in the process of "rewriting" a will is understandable. The reluctance likely stems from the strong traditions and policies underlying statutes mandating that all wills be in writing, signed by the testator, and witnessed in a formal manner. So the argument goes: If a written formalized will is changed after the decedent's death as a result of testimony and other documentation that is less formal than the documentation required to execute a valid will, then the statutory will execution requirements will be rendered meaningless and the policies underlying the execution requirements will be disserved. Yet, if the approximation doctrine itself is acceptable, and if its application is appropriate in a particular case, rewriting of the will is necessarily going to occur.

A court applying equitable approximation should not try to hide the fact that it is modifying or rewriting a decedent's will. It should not attempt to classify its decision as a will construction decision. If the court can truly reach the result it wants by construing the language of the decedent's will, then it does not need the aid of the equitable approximation doctrine. Construction of a will is the process of determining testator's intent when the language of the will is ambiguous. Intent is determined by reading the ambiguous language in light of circumstances surrounding the testator at the time of execution. The language of the will is not changed by the process of construction; the language is merely given meaning. A court that adopts and uses equitable approximation to save a rule-violative provision is going beyond the traditional bounds of will construction and is in fact changing, adding, or deleting language of a rule-violative will to effectuate the decedent's intent as nearly as possible.

[131]453 N.E.2d at 361. *See supra* note 126 and accompanying text.

[132]IND. CODE § 30-4-3-26(a) (1982).

[133]453 N.E.2d at 361 (quoting Sendak v. Trustees of Purdue University, 151 Ind. App. 372, 379-80, 279 N.E.2d 840, 845 (1972)).

[134]453 N.E.2d at 361.

[135]*Id.*

[136]*Id.* (citation omitted) (quoting BLACK'S LAW DICTIONARY 632 (rev. 4th ed. 1968)).

[137]453 N.E.2d at 361.

than mere variance of details of administration is usually involved when approximation is applied. The approximation doctrine has been used frequently to modify substantive conditions precedent to the enjoyment of property, such as age attainment requirements. Reductions in age attainment requirements from age forty to age twenty-one,[138] and from age twenty-five to age twenty-one,[139] seem to go beyond mere variance of "details of administration," as described in the *Black's* quote.

It is hoped that the *Merrill* court intended to approve the doctrine as it is generally applied, and not merely the more limited doctrine described in the *Black's* quotation. Other language suggesting the breadth of the doctrine confirms this hope. For example, the court said that the "doctrine has been used frequently in recent years to give effect to a testator's intent when his general purpose, i.e. to create a plan for the distribution of his assets after his death, cannot be effectuated due to some other legal principle such as the rule against perpetuities coming into play."[140] Furthermore, the court stated that the doctrine is to be "applied to private trusts in the same manner and for the same policy reasons as the cy pres doctrine is used in regard to charitable trusts."[141]

The only specific guidance offered by the *Merrill* court as to the proper circumstances for applying approximation is its statement that the goal is to discern and modify the "least critical contingent" of the violative provision, with the aim of doing "the least violence to the testator's intent."[142] Unlike other courts which have applied the approximation doctrine,[143] the *Merrill* court found the time of distribution to be a critical contingent.[144] Instead of modifying the age attainment requirement, the court held that the term "grandchild" in the first line of the questionable paragraph of the testator's will[145] was to be taken to mean "'grandchild alive at my death.'"[146]

At least two sets of questions arise from the *Merrill* court's discussion of the "least critical contingent." First, what burdens must be met to establish the least critical contingent? Will there be cases where a least critical contingent cannot be discerned, and if so, is approximation

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[138]Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891).

[139]*See, e.g.*, Carter v. Berry, 243 Miss. 321, 140 So. 2d 843 (1962).

[140]453 N.E.2d at 361-62 (citations omitted). The doctrine is thus not apparently limited to rule-violative cases, but can also be used to remedy other intent-defeating legal principles, such as the rule against accumulations.

[141]*Id.* at 362. *See supra* note 126.

[142]453 N.E.2d at 362.

[143]*See, e.g., supra* notes 127-28.

[144]453 N.E.2d at 362.

[145]*See supra* note 111 and accompanying text.

[146]453 N.E.2d at 362 (citation and footnote omitted). This "construction" eliminated the possibility that an afterborn grandchild would share in the decedent's estate. *Id.* at n.9.

inappropriate in those cases? Or, will there always be a *least* critical contingent? How are courts to choose between two seemingly equal contingents, such as the age modification and the limitation to living takers in *Merrill*?

Second, does *Merrill* establish that age modification is always or usually less appropriate than some other modification? In other words, does *Merrill* establish, as a presumption or a rule of law, that an age requirement is never or rarely the least critical contingent? The court made the following very general statement: "We believe the grandchildren's age requirement of 25 years before distribution of the corpus was to be made indicates Newell believed the trust's distributees then would be mature enough to make responsible decisions concerning the property distributed to them."[147] Must it now be said that whenever the testator sets an age requirement, he or she probably believed in the importance of attaining that age?

The major shortcomings of the *Merrill* decision all involve its detail rather than its ultimate policy choice. Moreover, these shortcomings are overshadowed by the fact that the court was willing to embrace a logical and equitable tool to eliminate the harshness of the rule against perpetuities while adhering to the rule's laudable purpose of preventing the tying up of property in perpetuity.[148] The court should be applauded for its adoption of equitable approximation.

3. The Rule Violation.—Although the *Merrill* court should be applauded for adopting the approximation doctrine, the *Merrill* lawyers should be berated for conceding a rule violation that arguably did not exist.[149] As explained below, there was arguably no rule violation in the provisions in favor of Judith, Dennis, and their children, because there was no express, and probably no implied, condition precedent that prevented the vesting of all their interests within the rule period.

The rule requires that interests must vest or fail to vest within twenty-one years after lives in being at the creation of the interest. Vested is a term of art used to describe a remainder[150] that is subject to no condition precedent to possession and enjoyment other than the natural

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[147]453 N.E.2d at 362.

[148]IND. CODE § 32-1-4-1 (1982). *See supra* text accompanying note 118.

[149]*See supra* note 112 and accompanying text. Moreover, there was a rule violation in the provision regarding Walter, although the lawyers and the court agreed there was not. *See infra* note 163 for an explanation of the rule problem with respect to Walter's one-third.

[150]*See generally* SIMES, *supra* note 119, § 11, at 19:

> A remainder is a future interest having the following characteristics: (a) it is created in a transferee; (b) it is created simultaneously with a prior estate; (c) it is so limited that it can become a present interest at the termination of the prior interest; (d) the prior interest must be of a lesser duration than the interest of the transferor.

Id.

expiration of the preceding estate.[151] Thus, to comply with the rule, a remainder must be or become subject to no condition precedent within twenty-one years after lives in being.

Lives in being must be actual lives in being at the creation of the interest.[152] In the *Merrill* case, because of the fertile octogenarian rule,[153] the court had to assume that the decedent's children might have had more children after the decedent's death. Thus, the class of decedent's grandchildren was not closed at the decedent's death, and the class could not be considered lives in being. The decedent's children, however, were lives in being; the entire class of children could be lives in being because the class closed physiologically at the decedent's death.

Judith, Judith's children, Dennis, and Dennis' children have future interests, remainders in two-thirds of the corpus of the trust created by the decedent. Their interests were to be paid to them free of trust upon termination of the trust, which was to occur when the decedent's youngest grandchild reached the age of twenty-five. Because of the possibility of afterborn grandchildren who might not reach age twenty-five within twenty-one years after the deaths of all the decedent's children,[154] and because of the rule that class gifts stand or fall as a unit,[155] it is very clear that termination of the trust could possibly occur after expiration of the rule period. The rule, however, is generally not concerned with the duration of trusts.[156] The rule is concerned only with the vesting of interests. Vesting, in turn, depends on the nonexistence of conditions precedent. The interests of Judith, Dennis, and their children arguably were or would be free of conditions, and therefore had vested or would vest well within the rule period.

First of all, the interests of Judith and Dennis arguably were vested at the decedent's death, being subject to no express condition precedent other than the natural expiration of the preceding life estates. Similarly, the interests of Judith's and Dennis' existing children arguably were vested at the decedent's death. Moreover, the interests of potential afterborn children arguably would vest as soon as each afterborn child was born, which would occur within the lives of Judith and Dennis.[157]

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[151]*See generally id.* § 90, at 186: "[I]n general, we can say that, if a future interest is subject to no condition precedent, other than the termination of prior estates, however and whenever that may occur, it is vested; otherwise it is contingent." *Id.*

[152]*See generally id.* § 127, at 265-66.

[153]*See supra* note 121 and accompanying text.

[154]*See supra* note 122 and accompanying text.

[155]*See supra* note 120 and accompanying text.

[156]*See generally* SIMES, *supra* note 119, § 144, at 314: "A trust is not void merely because it may last longer than lives in being plus twenty-one years." *Id. See also id.*, § 127, at 264: "The word 'vest' refers to a vesting in interest and not in possession." *Id.* (footnote omitted).

[157]Actual periods of gestation may be used to extend the rule period. "[A] person is in being for purposes of the rule against perpetuities at the time he is begotten, if he

The ultimate issue that should have been addressed in *Merrill* was whether or not there was a condition precedent to possession and enjoyment other than the natural expiration of the supporting life estates. No condition precedent or subsequent was expressed.[158] The only condition that might have been found to exist, thus causing a violation, would have been an implied condition of survivorship to the time of termination of the trust. Implication of the condition of survivorship to the time of distribution depended on the testator's intent as determined from the language read in light of various complex rules of construction.[159] Under the *Merrill* facts, several factors existed negating the implication of a survivorship condition: the absence of an alternative or a supplanting limitation, the gift of income to the future interest owners during the time preceding termination of the trust, and the lack of a word or phrase describing the beneficiaries as ones who must survive to a later date, such as "if living."[160] The existence of these negative factors, coupled with the commitment of Indiana courts to the earliest possible vesting of interests,[161] makes it unlikely that a condition precedent of survivorship should have been implied in the *Merrill* trust provision. If no condition of survivorship to the time of trust termination were implied as a condition precedent to Judith's, Dennis', and their children's right to enjoy their share of the trust corpus, their interests would certainly vest well within the rule period.[162]

In any event, it appears that no one argued the existence or nonexistence of a condition precedent in the *Merrill* case. It appears that a rule violation may have been conceded merely because of the possibility that the trust would terminate beyond the rule period, even though the time of trust termination is generally irrelevent to the rule-

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is subsequently born." SIMES, *supra* note 119, § 127, at 267 (footnote omitted).

[158]*See id.* §§ 11, 91.

[159]The recent case of Hinds v. McNair, 413 N.E.2d 586 (Ind. Ct. App. 1980), extensively discussed the factors negating and affirming the existence of a condition of survival. For a discussion of this case, see Falender, *Decedents' Estates and Trusts, 1981 Survey of Recent Developments in Indiana Law,* 15 IND. L. REV. 175, 198-200 (1982).

[160]453 N.E.2d at 358. The latter factor is particularly telling in light of the fact that in the same paragraph, in describing the takers of Walter's one-third share of the corpus, the testator expressed a clear condition of survivorship of his grandchildren to the time of termination. Thus, the testator obviously knew how to express a condition of survivorship. The absence of an express condition in certain parts of the same paragraph in which a condition is expressed is a strong indication that no condition was intended unless expressed. *See infra* note 162.

[161]*See, e.g.*, Chicago Indianapolis & Louisville Ry. v. Beisel, 122 Ind. App. 448, 456, 106 N.E.2d 117, 121 (1952); Busick v. Busick, 65 Ind. App. 655, 670, 115 N.E. 1025, 1030, (1917), *transfer denied*, Nov. 16, 1917. *But see generally* SIMES, *supra* note 119, § 91 (noting criticism of the rule favoring a vested construction).

[162]If a condition precedent of survivorship is implied, the children's interests would violate the rule. *See supra* notes 150-55 and accompanying text.

violation decision.[163] The distinction between vesting in interest, with which the rule is concerned, and vesting in possession, with which the rule is not concerned, may well be a common misunderstanding about the reach of the rule.

F. Recent Legislation

1. Indiana Uniform Gifts to Minors Act.—Indiana's version of the Uniform Gifts to Minors Act (IUGMA)[164] was revised to broaden the scope of allowable custodianship assets to include (1) proceeds of life or endowment insurance policies and annuity contracts, (2) beneficial interests in employee benefit plans, and (3) interests in land trusts.[165] Two additional changes were made to IUGMA. The first was made to correct an oversight in the original version which only allowed a nondonor custodian to resign and to appoint his successor by an instrument in writing. A donor custodian could only resign by petitioning a court to allow him to do so and to designate a successor custodian. A nondonor custodian could also resign in this manner.[166] Under the amendment, any custodian can now resign by executing an instrument in writing which sets forth the custodian's resignation and which designates a successor custodian. Alternatively, any custodian can execute an instrument of resignation which can then be filed with the court, together with a petition requesting the court to designate a successor custodian.[167] This amendment should substantially ease the process by which donor custodians can resign.

The second change made by the amendment was intended to allow donors to extend the date for paying custodial assets to a minor. The term "minor" in the statute now refers to a person under twenty-one years of age. The custodial term, however, must be designated by the donor and must terminate at an age not "less than eighteen (18) or

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[163]Walter's present life estate and the future interest in Walter's bodily issue are both clearly valid. The provision giving all or one-half of Walter's one-third to the decedent's "grandchildren, living at the time of the termination of said trust, share and share alike," imposes an express condition of survivorship to the time of termination. Probably the condition is precedent because the language of gift is so intimately tied to the survivorship phrase. *See generally* SIMES, *supra* note 119, § 91. If survival to the time of termination is required as a condition precedent to possession and enjoyment of the interest, the limitation to the grandchildren living at termination violates the rule. *See supra* notes 150-55 and accompanying text.

[164]IND. CODE § 30-2-8-1 to -10 (1982), *amended by* IND. CODE §§ 30-2-8-1 to -10 (Supp. 1984).

[165]Act of Mar. 8, 1984, Pub. L. No. 148-1984, Secs. 1-7, 1984 Ind. Acts 1278, 1278-89 (codified at IND. CODE §§ 30-2-8-1 to -10 (Supp. 1984)).

[166]IND. CODE § 30-2-8-7 (1982), *amended by* IND. CODE § 30-2-8-7 (Supp. 1984).

[167]Act of Mar. 8, 1984, Pub. L. No. 148-1984, Sec. 7, 1984 Ind. Acts 1278, 1288-89 (codified at IND. CODE § 30-2-8-7 (Supp. 1984)).

greater than twenty (20)."[168] If the donor makes no designation, the custodial term will end on the minor's attainment of age eighteen.

The language "greater than twenty" in the statute is puzzling. It clearly does not allow the custodial term to extend to the minor's attainment of age twenty-one, the age at which he ceases being a "minor" for purposes of the statute. The language may also not allow the term to extend until the minor attains age twenty since, at that point, he is actually "greater than twenty." The longest term allowable under the statute, then, would end on the day before the minor attains age twenty. It is doubtful that this result was intended and this language should be clarified in the next legislative session.

2. Disclaimers.—Indiana's disclaimer statute [169] provided that a joint tenant could not disclaim any joint asset if the tenant furnished any of the consideration for the asset. In order to facilitate disclaimers by joint tenants, the legislature added language to the disclaimer statute which provides that a joint tenant is deemed *not* to have furnished any consideration for the tenant's interest in a joint asset in the absence of clear and convincing evidence to the contrary.[170]

This addition does not permit a broader range of disclaimers than under the unamended statute, but it does make a joint tenant's disclaimer presumptively valid and, presumably, less subject to attack by taxing authorities. Other changes of a technical nature were also made to the disclaimer statute.[171]

3. Summary Procedures in Small Estates.—Indiana provides that small estates may be collected through a small estate affidavit procedure[172] and distributed through a summary distribution procedure.[173] Under the former version, neither procedure was available if a decedent died owning real estate.

In an attempt to correct this deficiency, the legislature amended the summary distribution statute to incorporate a small estate affidavit procedure which would be available to pass title to real estate.[174] The statute, as amended, will not have much impact as the value of most real estate will exceed the dollar limitation set forth in the statute. This limitation

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[168]Act of Mar. 8, 1984, Pub. L. No. 148-1984, Sec. 2, 1984 Ind. Acts 1278, 1281-83 (codified at IND. CODE § 30-2-8-2 (Supp. 1984)).

[169]IND. CODE §§ 32-3-2-1 to -15. (Supp. 1983), *amended by* IND. CODE §§ 32-3-2-1 to -15 (Supp. 1984).

[170]Act of Feb. 24, 1984, Pub. L. No. 160-1984, Sec. 1 1984 Ind. Acts 1336, 1337 (codified at IND. CODE § 32-3-2-5 (Supp. 1984)).

[171]Act of Feb. 24, 1984, Pub. L. No. 160-1984, Secs. 1, 2, 1984 Ind. Acts 1336, 1337 (codified at IND. CODE §§ 32-3-2-5, -14 (Supp. 1984)).

[172]IND. CODE § 29-1-8-1 (1982).

[173]IND. CODE § 29-1-8-3 (1982), *amended by* IND. CODE § 29-1-8-3 (Supp. 1984).

[174]Act of Feb. 29, 1984, Pub. L. No. 146-1984, Sec. 2, 1984 Ind. Acts 1274, 1275-76 (codified at IND. CODE § 29-1-8-3 (Supp. 1984)).

is based on the survivor's allowance, "if any," provided by Indiana Code section 29-1-4-1 ($8,500) and the costs and expenses of administration and reasonable funeral expenses.[175]

Even if a survivor's allowance were allowable, it would be only a very small, probably unimproved, or heavily mortgaged parcel of real estate that could be summarily distributed. If no survivor's allowance were available, the unencumbered value of the real estate could not exceed the costs and expenses of administration and reasonable funeral expenses, and the persons entitled to the estate's assets would be its creditors. To distribute real estate summarily under this procedure, each of the creditors would have to receive an undivided portion of the real estate. This may prove less than acceptable to the creditors and, it is likely that an estate would, despite this "simplified" procedure, sell the real estate rather than distribute it.

It should be noted that the summary distribution procedure will not always be available to protect a person distributing assets collected under the small estate affidavit procedure since that procedure allows the collection of assets by affidavit when the gross probate estate, less liens and encumbrances, does not exceed $8,500.[176] As previously noted, the $8,500 amount, which is equivalent to the survivor's allowance whether it is available to the estate or not, may not always be applicable under the summary distribution procedure.

4. Trusts.—The Indiana legislature incorporated a new section into Indiana's Trust Code which relieves a trustee, under certain conditions, from breaches of trust if the trust instrument incorporates a provision to that effect.[177] This provision will not relieve a trustee from liability for breaches of trust committed in bad faith, intentionally, or with reckless indifference to a beneficiary's interests, or from any liability for a breach profitable to the trustee. The trust provision will likewise not relieve the trustee from liability if the provision was incorporated into the trust agreement on account of the trustee's abuse of a fiduciary or confidential relationship.

By enacting this amendment, the legislature evidently intended to ease the administration of trusts by protecting trustees with respect to technical breaches of trust. The incorporation of such a provision in a trust should not be interpreted by trustees as a blank check for disregarding any of the substantive terms of a trust since such a breach would probably be regarded as "intentional" and, hence, not protected under the statute.

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[175]IND. CODE § 29-1-4-1 (1982).

[176]IND. CODE § 29-1-8-1 (1982).

[177]Act of Feb. 29, 1984, Pub. L. No. 149-1984, Sec. 1, 1984 Ind. Acts 1290, 1290 (codified at IND. CODE § 30-4-3-32 (Supp. 1984)).

5. Constructive Trusts.—Effective May 1, 1984, Indiana Code section 29-1-2-12 was repealed and replaced by Indiana Code section 29-1-2-12.1. This new section was enacted in direct response to the decision of the Indiana Court of Appeals in *Turner v. Estate of Turner*,[178] allowing a son who had shot and killed his parents to share nonetheless in their intestate estates. In *Turner*, the trial court had imposed a constructive trust on the property acquired by the son from his intestate parents, but the court of appeals reversed because the son had been found not responsible by reason of insanity in a criminal proceeding brought to determine his accountability for his parents' deaths.[179]

The basis of the *Turner* court's decision is that one who does not, or cannot, intend that his acts result in death of his victim should not, in equity, be made a constructive trustee of property acquired from the victim.[180] The decision is definitely in accord with the overwhelming trend of cases in other jurisdictions.[181] Equitable principles generally bar a person from profiting from wrongful conduct, but generally do not bar profit when there is no legal wrong. The finding of insanity by a criminal jury negates the legal wrongfulness of the insane person's conduct, and equity has no wrong to right.

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[178]454 N.E.2d 1247 (Ind. Ct. App. 1983), *transfer denied*, Mar. 14, 1984. The Indiana Supreme Court heard oral arguments in the case on March 8, 1984, but denied transfer on March 14, 1984, leaving the court of appeals decision intact. The author's similar, but more extensive, discussion of the *Turner* case and the new Indiana Code section 29-1-2-12.1 appears in G. HENRY, 2A HENRY'S PROBATE LAW & PRACTICE OF THE STATE OF INDIANA, ch. 25, § 13 (J. Grimes 7th ed. D. Falender Supp. 1984) [hereinafter cited as 2A HENRY'S].

[179]454 N.E.2d at 1248. The court noted that three jury verdicts were available when the son was tried: guilty, not guilty, and not responsible by reason of insanity. *Id.* n. 5. The court also noted that the legislature had since added a verdict of guilty but mentally ill, but limited its holding to cases in which the not responsible verdict was rendered. 454 N.E.2d at 1248.

The trial court had also ordered that certain life insurance proceeds payable to the son be held in trust pending the outcome of the appeal; the court of appeals reversed this decision and ordered the proceeds paid to the son. *Id.* at 1252.

[180]*Id.* at 1249.

[181]The *Turner* court reviewed cases from several jurisdictions, all of which allowed one who had been found not guilty by reason of insanity to share in the estate of the victim or to take insurance proceeds payable by reason of the death of the victim. *See, e.g.*, Estate of Ladd, 91 Cal. App. 3d 219, 224, 153 Cal. Rptr. 888, 892 (1979) (statute precluded inheritance only when the killing was unlawful and intentional); Anderson v. Grasberg, 247 Minn. 538, 546-47, 78 N.W.2d 450, 456 (1956) (An insane person "cannot fairly be said [to have] committed a wrong for which the law should upset the customary legal rights of property ownership."); Simon v. Dibble, 380 S.W.2d 898, 899 (Tex. Civ. App. 1964) (insane husband allowed to receive life insurance proceeds following acquittal for death of the insured wife). *See generally* Annot., 25 A.L.R. 4TH 787, 819-20, 863-68 (1983) (trend decidedly in favor of letting the insane killer share in the estate of the victim).

Indiana Code section 29-1-2-12 did not apply to mandate a constructive trust in the *Turner* case because the son had not been convicted of "intentionally causing the death of another, or of aiding or abetting therein."[182] The statute would not, however, have precluded the court from imposing a constructive trust if the prevailing rules of equity, apart from the statute, had demanded it.[183] In *Turner*, as noted above, equitable principles did not call for a trust.

The *Turner* court invited the legislature to change the law if it found the resulting law "unpalatable,"[184] and the legislature accepted the invitation. The new section, 29-1-2-12.1, adds specific language in a new subsection (b) dealing with the precise fact situation in the *Turner* case. Subections (a) and (c) essentially retain and rearrange much of the language of the former section, 29-1-2-12, adding a few new phrases and reworking a few of the former provision's phrases. The new section provides in full as follows:

> (a) A person is a constructive trustee of any property that is acquired by him or that he is otherwise entitled to receive as a result of a decedent's death, if that person has been found guilty, or guilty but mentally ill, of murder, causing suicide, or voluntary manslaughter, because of the decedent's death. A verdict is conclusive in a subsequent civil action to have the person declared a constructive trustee.
>
> (b) A civil action may be initiated to have a person declared a constructive trustee of property that is acquired by him, or that he is otherwise entitled to receive, as a result of a decedent's death, if:
>
> (1) the person has been charged with murder, causing suicide, or voluntary manslaughter, because of the decedent's death; and
>
> (2) the person has been found not responsible by reason of insanity at the time of the crime. If a civil action is initiated under this subsection, the court shall declare that the person is a constructive trustee of the property if by a preponderance of the evidence it is determined that the person killed or caused the suicide of the decedent.

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[182]454 N.E.2d at 1249 n.4. The *Turner* court quoted and applied the language quoted here, even though the killings and all other relevant events in the case occurred after the 1978 amendments had changed the statutory language to refer to a conviction of "murder, causing suicide, or voluntary manslaughter." Under either language, however, the result is the same. The key fact is that the son was not convicted of anything.

[183]In National City Bank of Evansville v. Bledsoe, 237 Ind. 130, 141, 144 N.E.2d 710, 715 (1957), the Indiana Supreme Court stated that IND. CODE § 29-1-2-12 was intended to supplement, but not to supersede, general equitable principles. *See also Turner*, 454 N.E.2d at 1251-52 (discussing the *Bledsoe* case).

[184]454 N.E.2d at 1252.

> (c) If a constructive trust is established under this section, the property that is subject to the trust may be used only to benefit those persons, other than the constructive trustee, legally entitled to the property. However, if any property that the constructive trustee acquired as a result of the decedent's death has been sold to an innocent purchaser for value who acted in good faith, that property is no longer subject to the constructive trust, but the property received from the purchaser under the transaction becomes subject to the constructive trust.[185]

Subsection (a) of the new section mandates a constructive trust if a "person has been found guilty, or guilty but mentally ill, of murder, causing sucide, or voluntary manslaughter, because of the decedent's death."[186] Assuming that these findings must be findings in a criminal proceeding,[187] subsection (a) does not apply to mandate a constructive trust unless a criminal proceeding has been completed and has resulted in a finding of guilty or guilty but mentally ill.

The new statute provides, in subsection (a), that "[a] verdict is conclusive in a subsequent civil action to have the person declared a constructive trustee."[188] Certainly, a verdict of guilty or guilty but mentally ill is conclusive in the civil constructive trust action under this new language, since those verdicts are expressly referred to in a prior sentence in the same subsection. Is a verdict of not guilty also conclusive? If it is conclusive, a verdict of not guilty would preclude establishment of a constructive trust. Similarly, is a verdict of guilty of an offense other than one of the listed offenses conclusive to avoid establishment of a constructive trust? In other words, does the statutory language, "A verdict is conclusive," apply to render any verdict conclusive, or is it intended to render conclusive only the two verdicts specifically mentioned in the section in which the language appears? It is hoped that the new statute is not intended to mandate total dependence on the criminal process, such that all verdicts are conclusive.[189] Such dependence would be an unfortunate and undue restriction on the power and flexibility of courts of equity to impose a constructive trust when the equities demand it.

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[185]IND. CODE § 29-1-2-12.1 (Supp. 1984).

[186]*Id.* § 29-1-2-12.1(a).

[187]*See* 2A HENRY'S, *supra* note 178, ch. 25, § 13 (Supp. 1984).

[188]IND. CODE § 29-1-1-12.1(a) (Supp. 1984). The former statute provided, "Such conviction shall be conclusive in any subsequent suit to charge him as such constructive trustee." IND. CODE § *29-1-2-12 (1982), repealed by* Act of Mar. 1, 1984, Pub. L. No. 147-1984, Sec. 2, 1984 Ind. Acts 1277, 1278. The word "such" provided a definite reference back to prior language in the statute, referring to a conviction of murder, causing suicide, or voluntary manslaughter. Thus, a conviction of one of the three listed offenses was conclusive, but nothing else was by statute rendered conclusive.

[189]*See* 2A HENRY'S, *supra* note 178, ch. 25, § 13 (Supp. 1984) (further discussing *Turner*).

Subsection (b) of the new statute responds directly and specifically to the *Turner* case by providing that a civil action may be initiated to establish a constructive trusteeship if a person has been charged with one of the listed offenses and "has been found not responsible by reason of insanity at the time of the crime."[190] The subsection then mandates a constructive trust if, in the civil action, "by a preponderance of the evidence it is determined that the person killed or caused the suicide of the decedent."[191] Thus, the son in *Turner* would have been a constructive trustee if the new statute had applied, in spite of the son's insanity at the time of the killing.

A legislative intent question arises here. Is subsection (b) intended to be an exhaustive description of the times when a civil action may be initiated in homicide cases to have a person declared a constructive trustee? By enacting a statute permitting a civil action ("may be initiated") if two very specific requirements are met ("charged with" one of the listed offenses, and "found not responsible"), the legislature implies that if the two very specific requirements are not met, the civil action may not be initiated. *Inclusio unius est exclusio alterius.* If subsection (b) is intended as a description of the only times when a civil action for a constructive trust may be initiated, subsection (b) would operate as a narrowing of the power and flexibility of the courts of equity to determine whether the facts are ripe to right a wrong.[192] In light of the statute's history and purpose, the construction that leaves to the courts their former broad power to impose a trust apart from the statute is probably the construction that best tracks the legislative intent.[193] Thus, a nonexclusive construction of subsection (b) seems called for.

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[190]IND. CODE § 29-1-12.1(b)(2) (Supp. 1984).

[191]*Id.*

[192]A court of equity, unless restrained by a restrictive construction of subsection (b), could impose a constructive trust based on a civil finding of appropriate wrongdoing, regardless of whether a person was charged in a criminal action and regardless of the verdict in the criminal action. The Supreme Court of Indiana so stated in dicta in National City Bank of Evansville v. Bledsoe, 237 Ind. 130, 141-42, 144 N.E.2d 710, 713 (1957):

> [T]he murderer should be precluded from taking the property if it is established in the civil proceeding that he committed the murder even though he has not been convicted in a criminal proceeding; either because he committed suicide before he was tried, or because the criminal proceeding has not been completed, or even because he has been acquitted in the criminal proceeding.

Id. (footnote omitted).

[193]There is no indication that the legislative intent in enacting IND. CODE § 29-1-2-12.1 (Supp. 1984) was to limit National City Bank of Evansville v. Bledsoe, 237 Ind. 130, 144 N.E.2d 710 (1957), or to limit the power of equity generally. In fact, all indications of legislative intent point to broadening of the power of the courts to impose constructive trusts. The *Turner* case raised a concern because ultimately, after appeal, no constructive trust was imposed even though the son most certainly had shot and killed his parents. The legislature acted in order to correct the *Turner* result and to assure that a constructive trust

Subsections (a) and (b) contain the following language describing the property over which the constructive trust is established: "any property that is acquired by [the killer] or that he is otherwise entitled to receive as a result of [the] decedent's death."[194] This new language is different from corresponding language in the previous two versions of the statute, one of which called for a constructive trust on "property . . . acquired . . . because of such death" of the decedent,[195] and the other of which called for constructive trust on "property acquired . . . because of the offense."[196]

The new language, like the former language, certainly encompasses interests acquired by will or by intestate succession and interests acquired by law at the decedent's death, such as the statutory survivor's allowance or the statutory elective share. The new language, unlike the former language, also certainly encompasses life insurance proceeds and similar pay-on-death contractual arrangements, such as annuities, pension payments, or retirement accounts with deathtime payments.[197] The new language, unlike the former language, arguably covers some part of the interest of the survivor of a tenancy by the entireties, some part of any jointly owned survivorship interest, and some part of the interest of a remainderman-killer following the life estate of the victim.[198]

Subsection (c) of the new statute rewords and clarifies former language protecting bona fide purchasers of the constructive trustee. Subsection (c) also restates the former provision that the constructive trust may benefit only "those persons, other than the constructive trustee, legally entitled to the property."[199] As formerly, the constructive trustee is not statutorily deemed to predecease the victim. Thus, if C^1 kills T,

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would be imposed under the *Turner* facts in the future.

[194]IND. CODE § 29-1-2-12.1(a) (Supp. 1984). Except for minor differences, *id.* § 29-1-2-12.1(b) contains the same language.

[195]IND. CODE § 29-1-2-12 (1976), *repealed by* Act of Mar. 1, 1984, Pub. L. No. 147-1984, Sec 2, 1984 Ind. Acts 1277, 1278.

[196]IND. CODE § 29-1-2-12 (1982), *repealed by* Act of Mar. 1, 1984, Pub. L. No. 147-1984, Sec. 2, 1984 Ind. Acts 1277, 1278.

[197]The former language, "acquired because of the offense," did not so clearly cover life insurance proceeds or other pay-on-death contractual arrangements. Under the former language, it might have been argued that the beneficiary's rights under an inter vivos contractual arrangement were acquired by reason of the inter vivos contracts, and the death of the insured with the policy in force merely satisfied a condition precedent to the receipt of benefits acquired before death. Use of the word "received" makes it easier to conclude that the proceeds of such contractual arrrangements are now intended to be covered by the statute.

Although IND. CODE § 29-1-2-12.1 appears in the chapter of the Probate Code entitled Intestate Succession, the broad language of the section shows that it is clearly not intended to be limited to intestate succession property.

[198]*See* 2A HENRY'S, *supra* note 178, ch. 25, § 13 (Supp. 1984).

[199]IND. Code § 29-1-2-12.1(c) (Supp. 1984).

and T dies intestate survived by children C^1 and C^2, and by C^1's child GC^1, C^1 will hold as a constructive trustee for C^2 only. GC^1 will not be legally entitled to any portion of T's intestate estate; GC^1 is not an heir of T since he is excluded by his ancestor C^1.[200]

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[200] *See generally* 2A HENRY'S, *supra* note 178, ch. 25, § 13, at 118-19 (7th ed. 1978); *id.* (Supp. 1984). Since the constructive trustee is not statutorily deemed to predecease the victim, the antilapse statute will not apply to save a devise for descendants of the constructive trustee. Nor will a will provision necessarily apply if it makes a gift to a substitute taker in the event the constructive trustee (devisee) predeceases the testator.