Claims By and Against Decedents' Estates

Debra A. Falender*

I. Introduction

Several cases decided during the survey period resolved issues concerning claims made by and against decedents' estates and decedents' successors.[1] The discussion of these cases will be divided into three parts: claims and actions by decedents' estates; claims against decedents' estates; and actions to impose constructive trusts on decedents' successors.

II. Claims by Decedents' Estates

The most interesting of the recent cases[2] involving claims made by

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

[1]An important development related to claims and actions by decedent's successors was the amendment of the will contest statute, Ind. Code § 29-1-7-17 (Supp. 1986), changing the contest filing period to "five months after the [will] has been spread of record or the date of the first published notice to creditors, whichever occurs later." The legislature removed the former unfortunate reference to the time the will was offered for probate. The amendment is certainly applicable to estates of decedents who die after its effective date, which is September 1, 1986. *See* Ind. Code § 1-1-3-3 (1982). Perhaps it is also applicable to estates opened after its effective date or to contests filed after its effective date, because the amendment extends and clarifies the time for contest.

Two will contest cases were decided during the survey period: Farner v. Farner, 480 N.E.2d 251 (Ind. Ct. App. 1985) (affirming the trial court's judgment in favor of the will over allegations of undue execution, undue influence, and unsoundness of mind), and *In re* Estate of Parlock, 486 N.E.2d 567 (Ind. Ct. App. 1985) (holding that inconsistency between the attestation clause and the will was not fatal to the will's validity when the inconsistency concerned something not required for the will's validity, namely, the testator's signature on every page). The *Farner* case extensively reviews the law of undue influence and evidence in will contest actions.

[2]One recent, interesting case held that the personal representative could sue to recover a lump-sum child support arrearage owed the deceased custodial parent. In that case, Lizak v. Schultz, 480 N.E.2d 962 (Ind. Ct. App. 1985), the court decided that the divorce court does not lose "subject-matter jurisdiction to reduce support arrearage to a lump sum upon the death of the custodial parent." 480 N.E.2d at 963. The court applied an exception to the general rule, *see* State *ex rel.* Paxton v. Porter Superior Court, 467 N.E.2d 1205 (Ind. 1984), that divorce proceedings terminate entirely upon the death of one of the parties. Furthermore, the court held that the support arrearage is "money owed" the deceased custodial parent at the time of his death, if he had expended his own funds to satisfy the support needs of the children; thus, pursuant to Ind. Code § 29-1-13-3 (1982), the custodial parent's personal representative may sue the noncustodial parent to recover this "money owed." *Lizak*, 480 N.E.2d at 964.

Two other cases concerned actions to recover damages for wrongful death. The courts' decisions in these cases were based on well-settled Indiana precedent. In Andis v. Hawkins,

decedents' estates and decedents' successors was *Bailey v. Martz*,[3] which arose out of an action to recover damages for malpractice against attorneys who allegedly let the statute of limitations run on actions to recover for personal injury suffered by a deceased minor.[4] In resolving the malpractice issue, the *Bailey* court considered the relationship among three sections of the statutes of limitations,[5] namely, Indiana Code section

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489 N.E.2d 78 (Ind. Ct. App. 1986), the court held that punitive damages are not recoverable in an action by parents under IND. CODE § 34-1-1-8 (1982) to recover for the wrongful death of their child, because Indiana judicial decisions have restricted the recovery to pecuniary loss. *See, e.g.*, Boland v. Greer, 409 N.E.2d 1116 (Ind. Ct. App. 1980) (transfer denied). In dicta, the *Andis* court stated that punitive damages also are not recoverable in an action for the wrongful death of an adult, because IND. CODE § 34-1-1-2 (1982) specifies the elements of recoverable damages, and punitive damages are not specified. 489 N.E.2d at 82.

In another wrongful death case, Community Hospital of Anderson v. McKnight, 482 N.E.2d 280 (Ind. Ct. App. 1985), the court held that pursuant to the wrongful death statute, IND. CODE § 34-1-1-2 (1982), the only person who can bring an action for wrongful death based on medical malpractice is the decedent's personal representative, who must be appointed within two years of the decedent's death. The decedent's widow and child unsuccessfully argued that an order of no administration within two years of death was a substitute for appointment of a personal representative.

[3]488 N.E.2d 716 (Ind. Ct. App. 1986).

[4]The child's father first asked one lawyer to pursue each of at least three actions: one to recover for the personal injuries suffered when the child was rendered quadriplegic as a result of a motorcycle collision with a train; another to recover for injuries suffered when the child was burned by a malfunctioning heart monitor; and another to recover for the child's wrongful death, allegedly caused by a malfunction in lung stimulation equipment and by delay in sending an ambulance when the child had stopped breathing. The child's father discharged the first lawyer, who had not pursued any of the claims, and hired two other lawyers to pursue all claims, including a possible malpractice action against the first lawyer.

Twenty months after the child's death, the two lawyers withdrew their representation because they saw a potential conflict of interest between themselves and their client. They concluded that the eighteen-month survival-of-action statute, IND. CODE § 34-1-2-7 (1982), possibly had run while they were representing the father; and if it had run, the father had a cause of action for malpractice against them. When they withdrew, the two lawyers had not filed an action against anyone.

Exactly two years after his child's death, the father retained other counsel. Six months later, an estate was opened for the child, and two months after that, the instant malpractice action was filed by the father against the two lawyers. The alleged malpractice consisted of failure to file any of the actions described above and wrongful withdrawal from representation. One of the lawyers' defenses was that neither their withdrawal nor their failure to file the actions caused harm to the father or to his son's estate. They contended, inter alia, that no statute of limitations had run against the claims while they were representing the father, and that the father had four months left on the applicable statute of limitations after their withdrawal to seek other counsel to pursue the claims. The trial court entered summary judgment in favor of the lawyers. The two-year statute of limitations on the wrongful death actions clearly had not run by the time of the lawyers' withdrawal. IND. CODE § 34-1-1-2 (1982). Arguments in the case centered around the personal injury statutes of limitations.

[5]488 N.E.2d at 723-24.

34-1-2-2(1), which is the two-year statute of limitations for personal injuries;[6] Indiana Code section 34-1-2-5, which provides that "[a]ny person . . . under legal disabilities when the cause of action accrues may bring his action within two . . . years after the disability is removed;"[7] and Indiana Code section 34-1-2-7, which provides an eighteen-month extension of the limitations period for persons who die before bringing an action or being sued.[8]

The court in *Bailey* reasoned that the applicable personal injury statute of limitations of two years, Indiana Code section 34-1-2-2(1), was not running when the minor died because it was tolled by Indiana Code section 34-1-2-5 until the minor's eighteenth birthday.[9] When the minor died prior to attaining majority, the two-year personal injury limitations period of section 34-1-2-2(1) *then* began to run.[10] Thus, the court held, the eighteen-month death time survival period of Indiana Code section 34-1-2-7 would not apply for two reasons: first, because the applicable two-year personal injury statute had not begun to run and consequently could not be "extended" when the minor died, and secondly, because application of the eighteen-month period would have shortened the two-year personal injury statute of limitations.[11]

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[6]IND. CODE § 34-1-2-2(1) (1982) [hereinafter personal injury statute of limitations] provides: "The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterwards: (1) For injuries to person or character, for injuries to personal property, and for a forfeiture of penalty given by statute, within two (2) years."

[7]IND. CODE § 34-1-2-5 (1982) [hereinafter disability statute of limitations].

[8]IND. CODE § 34-1-2-7 (1982) [hereinafter death-time survival statute of limitations] provides:

> If any person entitled to bring, or liable to, any action, shall die before the expiration of the time limited for the action, the cause of action shall survive to or against his representatives, and may be brought at any time after the expiration of the time limited within eighteen (18) months after the death of such person.

[9]The court said, "Thus, had Mark lived, running of the applicable statute of limitations would have been tolled until . . . his 18th birthday." 488 N.E.2d at 722.

[10]Using the court's analysis, if the minor had survived to majority, then the two-year personal injury statute, IND. CODE § 34-1-2-2(1) (1982), would have begun to run on his eighteenth birthday.

[11]The court stated:

> Contrary to Bailey's claim, I.C. 34-1-2-7 does not apply here. Our [s]upreme [c]ourt has determined this code section applies only to cases where the party dies after the applicable statute of limitations has begun to run and before the time limit has expired. Here, however, the applicable limitations statute was not running at the time Mark died. Further, the [s]upreme [c]ourt determined the effect of this section is to *extend* the time of limitations only, *never* to diminish it. . . . The application for which Bailey contends would have shortened the 2 year period for the filing of this action by 6 months. I.C. 34-1-2-7 is not the statute of limitations which applies here.

488 N.E.2d at 722 (citations omitted, emphasis in original).

The error in the court's analysis is its view that when a disability exists on the day a cause of action accrues, the general statute of limitations is tolled at the outset and does not begin to run. This approach is not supported by the language or the logic of the statutes. An approach consistent with the language of the statutes would identify two separate statutes of limitations under the special circumstances of disability or death. In all cases, by its terms, the applicable general statute of limitations begins to run when the cause of action accrues.[12] If at that time the plaintiff is under a disability, the general statute continues to run, but in addition, a special statute will begin to run when the disability is removed.[13] Then, if the plaintiff (or defendant) dies while either statute is running, another special death-time survival statute begins to run at the time of death.[14] In any event, under firmly entrenched Indiana Supreme Court precedent, the disability statute of limitations will never operate to shorten the general statute of limitations; likewise, the eighteen-month death-time survival statute will never operate to shorten either the general statute or the disability statute of limitations.[15]

The *Bailey* court correctly stated this well-entrenched precedent, but incorrectly applied it when the court determined that the death-time survival statute would shorten the general two-year statute, which according to the court began to run when the deceased minor died. Actually, when the minor died more than two years after the injuries, the only potentially applicable statutes of limitations were the two-year disability statute and the death-time survival statute. One could argue that the two-year disability statute was operable because when the minor died, his disability was removed for the first time.[16] Alternatively, one could argue that the only relevant statute of limitations at the time of the child's death was the death-time survival statute.[17] The *Bailey* court should have wrestled with the choice between the disability statute and the death-time survival statute, not the choice between the general statute and the death-time survival statute. The court should have decided whether the disability of minority is removed by a minor's death, kicking in the two-year disability statute, or whether the disability statute never kicks in, leaving the death-time statute as the only applicable statute.[18] If the

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[12]*See* IND. CODE § 34-1-2-2(1) (1982), *supra* note 6.

[13]*See* IND. CODE § 34-1-2-5 (1982), *supra* text accompanying note 7.

[14]*See* IND. CODE § 34-1-2-7 (1982), *supra* note 8.

[15]Harris v. Rice, 66 Ind. 267 (1879); McNear v. Roberson, 12 Ind. App. 87, 39 N.E. 896 (1894).

[16]The *Bailey* court said, "Mark's death removed his legal age disability." 488 N.E.2d at 722.

[17]Obviously, to the extent that the estate's claim was for wrongful death, the statute of limitations on that claim would not begin to run until the date of death. IND. CODE § 34-1-1-2 (1982).

[18]The following hypothetical illustrates more clearly the difference between the *Bailey* court's approach and the suggested approach. Assume that a minor inherited real estate

decision was in favor of the former approach, summary judgment for the lawyers could have been affirmed.

III. Claims Against Decedents' Estates

A. Claims in General

In three claims cases, straightfoward fact situations resulted in non-controversial holdings. A personal representative was not unqualified to serve merely because he was a claimant.[19] A bank in which the decedent had made a general deposit of funds, and to whom the decedent owed money, was permitted to set off the deposit against the debt,[20] thereby, to the extent of the set-off, avoiding the claim-filing rules and claim-payment

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in 1970. In 1972, an adverse possessor began using the real estate actually, openly, notoriously, adversely, and exclusively, and continued his use through 1986. Assume that the minor died in 1983, at the age of 16. The statute of limitations for the recovery of possession of real estate is ten years. Ind. Code § 34-1-2-2 (1982). Ordinarily, that statute would have barred the owner's cause of action against the adverse possessor in 1982, but because of the owner's disability, the cause of action was not barred at the owner's death. Under the suggested approach, the minor's estate would have either eighteen months or two years after his death to bring an action to recover possession depending on whether the death-time survival statute or the disability statute was held to apply; using the *Bailey* court's approach, the minor's estate would have ten years after his death to recover possession.

[19]Estate of Jaworski v. Jaworski, 417 N.E.2d 89, 92 (Ind. Ct. App. 1985) (the personal representative properly was removed on the ground of unsuitability where the "animosity and ill-feeling" between the personal representative and other heirs "would interfere with and affect the orderly administration of the estate"). *See In re* Estate of Baird, 408 N.E.2d 1323 (Ind. Ct. App. 1980) (the personal representative was not unsuitable merely because he was a claimant and a legatee, but he was unsuitable because the animosity between him and other heirs would have interfered with orderly estate administration).

[20]First Nat'l Bank of Martinsville v. American Fletcher Nat'l Bank & Trust Co., 480 N.E.2d 964 (Ind. Ct. App. 1985). *First National* was a case of first impression in Indiana, but the result is supported by what the court identified as the "weight of authority." *Id.* at 966. In *First National*, the debt was unmatured, but the loan documents gave the bank the right to accelerate whenever it deemed itself insecure. The documents also referred to a possible right of set-off " 'under applicable law.' " *Id.* at 965 (quoting the note). The bank did not deem itself insecure until after the debtor-depositor's death, at which time it appeared that the debtor-depositor's estate was insolvent. The *First National* court believed that its holding was more in line with the "true relationship between the bank and its depositor" — namely, the bank owns the deposited funds; the depositor is a creditor of the bank, entitled to be paid what the debtor-bank owes him. *Id.* at 968. In *First National*, after the permitted set-off, the bank owed the decedent nothing.

Courts that have refused to permit an after-death set-off have been concerned with according the bank a priority. *E.g.*, *In re* Schenck's Estate, 63 Misc. 2d 721, 313 N.Y.S.2d 277 (1970), cited in *First National*, 480 N.E.2d at 966-67. If the bank has reserved the rights to accelerate and set-off when it deems itself insecure, recognizing those rights after death would not be according the bank more than it had bargained for.

priorities of the Probate Code.[21] A widow's claim was allowed against her husband's estate for the amount she had spent on her husband's funeral.[22] An heir or other person interested in the estate who pays claims against the estate is subrogated to the rights of the payee against the estate.[23] The payor, of course, is subject to the same claim-filing time constraints to which the payee was subject.[24]

The widow in *Kroslack v. Estate of Kroslack*[25] asserted her right to a survivor's allowance,[26] but the decedent's estate was insolvent. There were, however, funds held by the decedent and his son in multi-party accounts; these funds by statute are liable to pay the survivor's allowance if the estate is insufficient, a demand has been made of the personal representative, and proceedings to assert the liability are begun within a year after the decedent's death.[27] The son was prepared to argue that he had no liability to pay the allowance from the accounts because the widow did not commence a proceeding to assert that liability within one year after the decedent's death.[28] In the face of this argument, the special administrator of the husband's estate, with proper court approval, compromised the son's liability at less than the full amount of the survivor's allowance.[29] A majority of the court of appeals affirmed the compromise, while the dissenting judge would have disapproved it and ordered full payment of the allowance out of the accounts, because of the son's "*contemptible* self-dealing."[30]

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[21]IND. CODE § 29-1-14-1 (Supp. 1986) (five-month claim-filing requirement); IND. CODE § 29-1-14-9 (Supp. 1986) (claim-payment priorities, which would put unsecured creditors seventh in line after expenses of administration, reasonable funeral expenses, the survivor's allowance, debts and taxes preferred under the law of the United States, reasonable medical expenses, and debts and taxes preferred under Indiana law).

[22]Estate of Stack v. Venzke, 485 N.E.2d 907 (Ind. Ct. App. 1985). The *Stack* court also affirmed the trial court's decision that the widow's alleged post-nuptial waiver was unenforceable because the husband had failed to disclose more than $44,000 out of more than $149,000 worth of assets.

[23]*Id.* at 911 (citing Owen Creek Presbyterian Church v. Taggart, 44 Ind. App. 393, 89 N.E. 406 (1909); Chamness v. Chamness' Estate, 53 Ind. App. 225, 101 N.E. 323 (1913)).

[24]*Id.*

[25]489 N.E.2d 650 (Ind. Ct. App. 1986).

[26]*See* IND. CODE § 29-1-4-1 (Supp. 1986).

[27]IND. CODE § 32-4-1.5-7 (1982).

[28]*Kroslack*, 489 N.E.2d at 653.

[29]*Id.* at 652.

[30]The son refused to turn over funds in the accounts, in defiance of a court order and two contempt citations. Eventually, a special administrator had to be appointed to attempt to collect. The dissent concluded:

> I cannot agree with a result which allows an executor to wrongfully withhold funds clearly due an estate, in effect blackmailing the special administrator into a compromise so that the widow can get at least some portion of her statutory allowance. Such a result is not consistent with the law, principles of equity, or

In *Estate of Nay*,[31] the court held that the county welfare department is an arm of the state and is therefore exempt from the five-month claim-filing requirement.[32] This decision serves as a reminder that state and county reimbursement claims may be asserted against the personal representative at any time before the estate is closed.[33] Presumably, even after the estate is closed, reimbursement claims may be asserted against the decedent's successors.[34] This and every other exception[35] to the five-month claim-filing requirement diminishes the certainty that ordinarily follows the expiration of the claim-filing period and the closing of an estate. This decreased certainty, however, clearly was contemplated and intended by the legislature.[36]

B. Joint and Several Obligations

Upon the death of one who is jointly and severally liable on an

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good policy. The trial court's approval of the "compromise" was an abuse of discretion. I would reverse.

Id. at 655-56 (footnote omitted) (Staton, J., dissenting).

[31]489 N.E.2d 632 (Ind. Ct. App. 1986). The county's claim was for reimbursement for old age assistance provided to the decedent. *Id.* at 633.

[32]IND. CODE § 29-1-14-1(a) (Supp. 1986) provides in part: "All claims against a decedent's estate, other than . . . claims . . . of the state and any subdivision thereof. . . shall be forever barred against the estate" unless they are filed within "five months after the date of the first published notice to creditors." Before 1954, the claim filing provision did not contain any exceptions for a state or its subdivisions. 489 N.E.2d at 634.

[33]In *Nay*, the claim was filed more than a year after the expiration of the five-month period, but the estate was still open. 489 N.E.2d at 634.

State and county reimbursement claims also may be asserted against guardians. *See In re* Estate of Keeler, 476 N.E.2d 917 (Ind. Ct. App. 1985), upholding a judgment ordering payment of the county's claim for reimbursement out of funds received by the minor's guardian in settlement of a wrongful death action following the death of the minor's parents. The county's claim was for reimbursement for expenditures made on behalf of the minor while the minor was a ward of the welfare department. The court held that the wrongful death proceeds were assets of the minor and were "available for the care and support furnished . . . dependents during their minority, whether furnished by the Welfare Department or by anyone else." *Id.* at 921.

[34]Of course, the claims must be asserted within the applicable statute of limitations. *See, e.g.*, Lee v. Cain, 476 N.E.2d 922, *on rehearing*, 479 N.E.2d 105 (Ind. Ct. App. 1985) (fifteen-year statute of limitations of IND. CODE § 34-1-2-3 (1982) applied and barred a substantial portion of a former spouse's claim against her deceased former husband for back child support). The claims should not be enforceable beyond the amount received by the decedent's successors from the decedent.

[35]Other exceptions to the claim-filing bar include claims of subdivisions of the United States, claims for expenses of administration, and claims of liens and other property interests. IND. CODE §§ 20-1-14-1(a), (d); -14-21 (1982). The exception for tort claims contained in IND. CODE § 29-1-14-1(f) will not affect estate assets. There is also uncertainty caused by the availability of constructive trust actions. *See infra* notes 50-78 and accompanying text.

[36]The *Nay* court held that the exceptions contained in IND. CODE § 29-1-14-1(a) are unambiguous. 489 N.E.2d at 634.

obligation,[37] the creditor may choose to file a claim for all or part of the debt against the estate of the deceased joint obligor,[38] or the creditor may forgo the filing of a claim and collect the entire debt from the surviving joint obligor.[39] When the joint obligation is secured by a mortgage, the creditor's choices increase. The secured creditor may rely solely on the security for repayment, or rely solely on the personal obligation of one or both of the joint obligors, or if the security is inadequate, rely on the security to the extent of its value and the personal obligation of one or both of the joint obligors to the extent the security is deficient.[40] If the creditor intends to rely in whole or in part on the personal obligation of the deceased joint obligor, the creditor must file a claim against the deceased obligor's estate within the five-month claim-

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[37]IND. CODE § 29-1-14-5 (1982) provides:

> Every contract executed jointly by the decedent with any other person or persons, and every joint judgment founded on such contract, shall be deemed to be joint and several for the purpose contemplated in section 4 of this chapter [requiring the filing of a claim to enforce such joint obligation]; and the amount due thereon shall be allowed against the estate of the decedent as if the contract were joint and several.

[38]The only way the creditor may collect from the decedent's estate is by filing a claim. IND. CODE § 29-1-14-4 (Supp. 1986) so provides:

> No action shall be brought by way of complaint and summons against any personal representative and any other person or persons, or his or their legal representatives, upon any contract executed jointly, or jointly and severally, by the deceased and such other person or persons, or upon any joint judgment founded thereon; but the holder of said contract or judgment shall enforce the collection thereof against the estate of the decedent only by filing his claim as provided in section 2 [IND. CODE § 29-1-14-2] of this chapter.

[39]*E.g.*, McLochlin v. Miller, 139 Ind. App. 443, 217 N.E.2d 50 (1966).

[40]The secured creditor need not file a claim to protect his right to foreclose against the security, because the five-month claim-filing period does not apply to an action to enforce a lien or mortgage. IND. CODE § 29-1-14-1(e) (Supp. 1986). Unless authorized by the court, foreclosure proceedings may not be commenced until five months after the decedent's death; and if a foreclosure action is initiated while the estate is open, the personal representative must be joined. IND. CODE § 29-1-14-16 (Supp. 1986). Of course, foreclosure is not available until an event of default has been properly noticed by the creditor.

Unless otherwise provided in the note or mortgage, the creditor may forgo the security, sue on the note, obtain a personal judgment against the obligor, and collect the judgment out of other assets of the debtor. *See, e.g.*, Mitchell v. Ringle, 151 Ind. 16, 50 N.E. 30 (1898).

The creditor's right to elect to file a claim against the estate of the deceased obligor, or to forgo filing and collect the debt from the survivor seems to give the creditor some control over distribution of the deceased obligor's estate. The court of appeals observed, however, that the apparent "control" accorded the creditor is accorded "because that is what the parties themselves agreed to." Estate of Leinbach v. Leinbach, 486 N.E.2d 2, 3 (Ind. Ct. App. 1985).

filing period.[41] The creditor may file a claim whether the obligation is due or not, contingent or absolute, or current or in default.[42]

If the surviving joint obligor intends to pursue a right to contribution from the deceased joint obligor, the survivor should file a claim against the decedent's estate within the five-month claim-filing period.[43] *Estate of Leinbach v. Leinbach*[44] contains holding and dicta that are instructive regarding the proper procedure to follow in asserting rights to payment and contribution when one of two joint obligors dies. In *Leinbach*, a husband and wife both had signed a note and mortgage securing real estate which they owned as tenants by the entireties. When the husband died, the mortgagee filed a claim against his estate for the full outstanding balance of the mortgage debt.[45] The widow also filed a claim against the husband's estate for contribution for one-half the amount due on

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[41]IND. CODE § 29-1-14-1 (Supp. 1986).

[42]The secured creditor need not file a claim to protect his right to foreclose against the security, because the five-month claim-filing period does not apply to an action to enforce a lien or mortgage. IND. CODE § 29-1-14-1(e) (Supp. 1986).

[43]The right to contribution is an equitable right between the debtors, permitting "one who has paid the debt to recover from the other the portion he should have borne." Estate of Leinbach v. Leinbach, 486 N.E.2d 2, 3 (Ind. Ct. App. 1985) (citing Judd v. Small, 107 Ind. 398, 8 N.E. 284 (1886)). If the estate paid the entire debt, it would be entitled to contribution from the surviving joint obligor. Magenheimer v. Councilman, 76 Ind. App. 583, 125 N.E. 77 (1919).

The survivor may file a claim for contribution whether the joint obligation is due or not, and whether the liability of the decedent is contingent or absolute. IND. CODE § 29-1-14-1 (Supp. 1986). If the survivor does not file a claim, and if the survivor eventually is forced to pay more than his share (normally one-half) of the joint obligation, the survivor could claim an equitable lien on property relieved of the security interest by the survivor's payment. Enforcement of this lien would not be barred by failure to file a claim. IND. CODE § 29-1-14-1(e) (Supp. 1986). Enforcement of the lien could be an effective substitute for assertion of the right of contribution via the claims procedure only if an ownership interest in the mortgaged property was distributed to the deceased obligor's heirs or devisees. If the mortgaged property was owned by the joint obligors with right of survivorship, then the surviving joint obligor would have no lien to enforce as a substitute for the barred right of contribution. The survivor, however, would have succeeded to ownership of the entire property.

[44]486 N.E.2d 2 (Ind. Ct. App. 1985).

[45]This claim was properly filed whether the mortgage debt was due or not. In *Leinbach*, the mortgagee asserted in its claim that the balance was due and payable at the decedent's death. *Id.* at 2. Perhaps the mortgage contained an acceleration clause that operated in the event of death of one of the obligors.

Even if the mortgage balance was not due and payable at the deceased co-owner's death, the mortgagee could have filed a claim for all or part of the mortgage debt. In fact, if the mortgagee failed to file a claim, the mortgagee would have been barred from pursuing the deceased obligor's personal liability against his successors. If the mortgage balance was not due at the time of decedent's death, the court would allow it at its present value and order it paid "as in the case of an absolute claim." IND. CODE § 29-1-14-3 (Supp. 1986).

the mortgage note. The court of appeals held that the widow was entitled to contribution only if and when she paid more than her share (presumably one-half) of the mortgage debt.[46]

In dicta, the court commented upon a portion of the trial court's ruling that was not appealed. The trial court had ordered the estate to pay only one-half the debt to the mortgagee and had held that the estate was liable for the other half only if the widow did not pay and only if the security was insufficient.[47] The court of appeals indicated that if the mortgagee had appealed, it would have found error: "As to the trial court's judgment in favor of the bank, we think the court erred in anticipating a right to contribution and granting judgment outright for only half the debt and finding the [e]state secondarily liable for the other half."[48] One could add that the trial court was creative but incorrect when it conditioned the estate's secondary liability on the adequacy of the security.

Leinbach serves as a reminder to estate planners that they must understand joint and several liability to understand the potential ultimate distribution of a client's estate when that client is a joint obligor and particularly when the joint obligation is secured by survivorship property. The entire ownership interest in survivorship property may end up in the surviving joint owner, but the deceased joint owner's estate may be obligated to pay half of the joint obligation.[49] This result occurs because the parties agreed to it; the planner must be aware of and take into account such agreements.

IV. Actions to Impose Constructive Trusts

If a claimant seeks to recover specific property from the decedent or his successors, the claimant could bring an action to impose a constructive trust on that property. A constructive trust will be imposed when the decedent or his successors would be unjustly enriched by retention of the property.[50] If the constructive trust action is begun within the five-month claim-filing period, and if the subject property is in the

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[46]486 N.E.2d at 5 (following McLochlin v. Miller, 139 Ind. App. 443, 217 N.E.2d 50 (1966)).

[47]*Id.* The trial court then concluded that the widow's claim for contribution was moot. *Id.*

[48]*Id.*

[49]The assumption is made that if the estate is asked to pay the creditor the full amount of the debt, the estate will pursue its right of contribution against the surviving obligor.

[50]*E.g.*, Melloh v. Gladis, 261 Ind. 647, 309 N.E.2d 433 (1974). Unjust enrichment may occur because the property was obtained by the decedent or his successors "through fraud, duress, undue influence or mistake, or through a breach of a fiduciary duty, or through the wrongful disposition of another's property." *Id.* at 656, 309 N.E.2d at 438, *quoted in* Given v. Cappas, 486 N.E.2d 583, 589 (Ind. Ct. App. 1985).

possession of the decedent's personal representative, the action may be asserted against the personal representative.[51] If the action is begun after the five-month claim-filing period,[52] or if the subject property is not in the possession of the personal representative,[53] the action can be asserted against only the decedent's successors.

A. Given v. Cappas

In two recent constructive trust cases, the trusts were asserted against the decedent's successors. In *Given v. Cappas*,[54] the trial court found that certain shares of stock were assets of a law partnership, acquired in part by purchase and in part as compensation for services rendered to a client. At the time of the lawsuit, the shares were held by a spouse of a deceased partner as trustee of an express trust for his children.[55] In order to prevent unjust enrichment of the spouse and children at the expense of the surviving partners, the trial court imposed a constructive trust and directed the spouse to transfer the other partners' shares to them, and the court of appeals affirmed.[56] The court of appeals stated

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[51]IND. CODE § 29-1-14-21 (Supp. 1986). *See* Williams v. Williams, 427 N.E.2d 727 (Ind. Ct. App. 1981) (even though enforcement of a property interest was barred against the personal representative because of failure to assert the interest within the five-month period, enforcement outside the estate proceeding against the decedent's successors was not barred); *In re* Estate of Williams, 398 N.E.2d 1368, 1371 (Ind. Ct. App. 1980) (a petition claiming an interest in property in the possession of the personal representative, here the enforcement of a corporate stock buy-sell agreement, must be filed within the five-month period if the claimant "desires the issue to be adjudicated *as a part of the estate proceeding*") (emphasis in original).

[52]Williams v. Williams, 427 N.E.2d 727 (Ind. Ct. App. 1981) (even though a claim of property interest was barred against the personal representative because of failure to assert it within the five-month period, enforcement outside the estate proceeding against the decedent's successors was not barred).

[53]For example, if the property interest is claimed in survivorship property or property placed or held by the decedent in an inter vivos trust, the personal representative would not be involved in the action.

[54]486 N.E.2d 583 (Ind. Ct. App. 1985).

[55]*Id.* at 585. The *Given* court discussed the dead man's statute, IND. CODE § 34-1-14-6 (1982), and held that if assets of the decedent's estate will not be affected by the judgment, the dead man's statute will not render witnesses incompetent to testify. 486 N.E.2d at 588. The fact that the personal representative of the decedent's estate has been made a party does not necessarily mean that assets of the decedent's estate will be affected by a judgment in the action. *Id.* Furthermore, the dead man's statute does not apply unless the witness is a party to the issue to be tried; to be a party to the issue, the witness must have a present, certain, vested interest that will be won or lost by the direct operation of the judgment. *Id.* at 583; *see also* Satterthwaite v. Satterthwaite, 420 N.E.2d 287 (Ind. Ct. App. 1981). In *Given*, the stock at issue was not an asset of the decedent's estate, and therefore the dead man's statute was inapplicable. 486 N.E.2d at 588. Furthermore, the witnesses were not parties to the issue. *Id.*

[56]*Given*, 486 N.E.2d at 585.

that the relationship among partners is a fiduciary relationship.[57] Thus, fraud is presumed or inferred without proof of actual dishonesty when one partner benefits from the use of partnership property.[58]

A constructive trust will not be imposed if the transferee is a bona fide purchaser for value. In *Given*, although the transferee was innocent of wrongdoing, and did not have notice of wrongdoing, she was a donee and not a purchaser for value; thus, the transferee's bona fide purchaser defense did not succeed.[59]

Because a constructive trust is an equitable remedy, imposition of the trust may be barred by the equitable doctrine of laches. In *Given*, however, because there was no inexcusable delay in the trust claimant's assertion of rights, and no prejudice to the transferee-defendant, the defense of laches was properly rejected by the trial court.[60] The right

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[57]*Id.* at 589-90. The court cited McKinley v. Long, 222 Ind. 639, 88 N.E.2d 382 (1949), and IND. CODE § 23-4-1-21 (1982), a section of the Indiana Partnership Act.

[58]*Given*, 486 N.E.2d at 590 (citing Hunter v. Hunter, 152 Ind. App. 365, 283 N.E.2d 775 (1972)).

[59]The court suggested in passing the possibility that love and affection between a parent and child may constitute sufficient consideration to render the transferee a purchaser and not a donee. *Id.* at 591 (citing 76 AM. JUR. 2d *Trusts* § 275 (1975) and reciting the proposition that "the parent child relationship may constitute sufficient consideration to support the transfer of property"). The court ultimately avoided application of this proposition by finding that while the parent-partner was "instrumental in effecting the transfer [to the spouse as trustee for his children, that fact] does not make him the grantor of the property so that we may impute a meritorious consideration such as love and affection for his children." *Id.*

The court's discussion of the consideration issue is somewhat unfortunate. The court stated a parent-child consideration rule that is not necessarily applicable to a bona fide purchaser case. Even the cited source of the rule, 76 AM JUR. 2d *Trusts* § 275, at 496 (1975), fudges a bit when it cites a consideration-of-marriage case and states: "It has been held that marriage does constitute value for an antenuptial settlement on a wife of trust property or funds so as to cut off equities of the beneficiaries, where the wife takes in good faith and without notice." (citing Johnson v. Peterson, 101 Neb. 504, 163 N.W. 869 (1917)).

Whether the consideration of love and affection between a parent and child is sufficient to overcome the equities of the constructive trust claimant is a question that should be addressed directly. An underlying policy of the bona fide purchaser doctrine is protection of the reliance interest of a person who gave value in exchange for a transfer of property. *See generally* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 286 (2d ed. 1975). The kind of value that gives rise to protectable reliance is usually money or money's worth, as opposed to love and affection. *Id. See, e.g.*, Strong v. Whybark, 214 Mo. 341, 102 S.W. 968 (1907); Ten Eyck v. Witbeck, 135 N.Y. 40, 31 N.E. 994 (1892). Even if love and affection are considered to be value under the bona fide purchaser doctrine, they should not be sufficient to overcome automatically the equities of the constructive trust claimant, who has been deprived of property due to fraud or constructive fraud.

Furthermore, it is misleading for the court to state that "the parent-child relationship may constitute sufficient consideration to support the transfer of property." *Given*, 486 N.E.2d at 591. No consideration is necessary to support a transfer of property.

[60]486 N.E.2d at 592; *see also* Duran v. Komyatte, 490 N.E.2d 388 (Ind. Ct. App. 1986), discussed *infra* notes 67-78 and accompanying text, wherein the court stated that

to assert a trust may also be waived, but an effective waiver entails an intentional relinquishment of rights, which did not exist in *Given*.[61]

Expiration of the appropriate statute of limitations will bar a constructive trust action.[62] In *Given*, the transferee asserted expiration of the six-year statute of limitations for fraud,[63] because the transfer to her had occurred more than six years prior to commencement of the constructive trust action. Ordinarily, the limitations period begins to run when the fraud is accomplished; concealment of material facts, however, will toll the statute.[64] In *Given*, the court found concealment and tolling of the statute until the concealing partner died; before then, the constructive trust claimants did not actually know of that partner's claim of ownership of the partnership property, and the partner's fiduciary duty to disclose such material information excused his co-partners' duties to exercise due diligence to discover it.[65]

B. Duran v. Komyatte

As with any trust, a constructive trust requires a trust res—separate, identifiable, existing property that can be held in the trust.[66] In *Duran v. Komyatte*,[67] the lack of a trust res sounded the death knell for a

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the trust claimant's "failure to act . . . until now is another consideration we employed to determine that the equitable remedy of a constructive trust is not appropriate in this instance." 490 N.E.2d at 393.

In *Duran*, the plaintiff claimed a constructive trust as a remedy for breach of her former husband's breach of an agreement to make a will. *Id.* at 390. The will was to have been executed within ten days of the parties' final divorce decree and a copy was to have been sent to the plaintiff within another ten days. The plaintiff did not assert the breach of agreement until ten years later, after her former husband died. *Id.* Actually, the plaintiff's assertion of a remedy for her former spouse's breach of contract to make a will was timely. Such a contract is not breached until the death of the promisor, because the promisor could at any time before his death perform the agreement by executing the will. *See* B. Sparks, Contracts To Make Wills 179 (1956). The *Duran* court's language must relate to the plaintiff's failure to complain about her spouse's failure to make a will and send her a copy within ten days of the divorce decree.

[61]486 N.E.2d at 592.

[62]*See generally* Forth v. Forth, 409 N.E.2d 641 (Ind. Ct. App. 1980).

[63]*See* Ind. Code § 34-1-2-1 (1982).

[64]*Forth*, 409 N.E.2d at 644.

[65]486 N.E.2d at 592-93; *see also* Dotlich v. Dotlich, 475 N.E.2d 331 (Ind. Ct. App. 1985) (fiduciary relationship among corporate directors excused duty to exercise due diligence to discover a director's fraud).

[66]In a constructive trust, usually the property is "held" in trust only fictionally because the trust arises and is executed by the judgment of the court imposing it. There have been long-lived constructive trusts, however. *E.g.*, David v. Russo, 415 N.E.2d 531 (Ill. Ct. App. 1980), *remanded and appealed*, 456 N.E.2d 342 (Ill. Ct. App. 1983) (imposing a constructive trust on the holders of legal title, finding that they held such title only as security for a loan to the trust beneficiaries, and ordering an accounting by the trustees to the beneficiaries).

[67]490 N.E.2d 388 (Ind. Ct. App. 1986).

constructive trust claim. The asserted trust was to be in favor of the plaintiff's children and was to consist of all property owned by the plaintiff's former husband at the time of their divorce.[68] The basis for the trust was the former husband's breach of an agreement, made as part of the divorce settlement, to make a will leaving all his property to his and plaintiff's three children. The husband died ten years after the divorce without having made such a will. The court agreed that the husband had breached "his fiduciary duty to execute a will,"[69] but the court held that a constructive trust was not an available remedy.[70] The expenses of the husband's last illness had rendered his estate insolvent, so that even if he had made a will, there would have been no property left to pass under it to the three children.[71] Furthermore, the agreement to make a will did not refer to or require that any specific property be left to the children. Thus, the alleged constructive trust lacked a trust *res*.[72]

Because the decedent's estate was insolvent, a claim for damages for breach of the decedent's agreement to make a will would have gone unsatisfied. Furthermore, borrowing the court's analysis of the constructive trust issue, perhaps no damage would have been suffered. Under the court's interpretation of the property settlement agreement, the decedent's breach was merely a technical one of not signing a document called a will. According to the court, there was no other substance to that agreement:

> John was ordered to do no more than execute a will. No mention of any specific property to be left to the children is present. Nor is there any mandate that John have property at the time of his demise to leave to his children.[73]

The troubling feature of this interpretation of the agreement is its failure to consider the fundamental duty of good faith and fair dealing between parties to a contract. In an analogous case interpreting an antenuptial contract, *Russell v. Walz*,[74] the court of appeals stated that

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[68]*Id.* at 390.

[69]*Id.* at 393. A property settlement incorporated into the final decree of divorce is a binding contract. *Id.* at 392 (citing Anderson v. Anderson, 399 N.E.2d 391 (Ind. Ct. App. 1979)).

[70]*Id.*

[71]*Id.* at 392.

[72]*Id.*

[73]*Id.* The agreement itself provided, in pertinent part: "Husband agrees to have drawn and execute a last Will and Testament leaving all of his assets, real and personal to his living *3* children surviving at the time of his death and said will shall not be changed until his youngest present living child shall become emancipated. . . ." *Id.*

[74]458 N.E.2d 1172 (Ind. Ct. App. 1984).

a transferor breaches an implied obligation of good faith if he makes a transfer with " 'an actual intent thereby to subvert the antenuptial agreement,' " or if the transfer is " 'of a disproportionate and unreasonable amount of assets in relationship to the balance of the promisor's property.' "[75] An investigation into whether the husband's depletion of his estate was in good faith would seem similarly appropriate in the property settlement context of *Duran*.[76]

In any event, the *Duran* case and its dicta certainly serve as a warning that very careful drafting of will contracts is called for. It is not enough that the promisor agrees merely to make a will. A meaningful, enforceable agreement should include express provisions regarding the kinds or values of property that the parties agree will be devised by the will.[77] It is not in the promisor's best interest to guarantee that a certain property or value will be owned and be unencumbered at the promisor's death; yet, it is not in the promisee's best interest to leave the description of certain property or its value out of the will contract. Both parties'

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[75]*Id.* at 1185 (dicta) (quoting Dubin v. Wise, 354 N.E.2d 403, 408-09 (Ill. Ct. App. 1976), and citing for its dicta Crawfordsville Trust Co. v. Ramsey, 55 Ind. App. 40, 100 N.E. 1049 (1913)). According to *Dubin*, the disproportionate transfer test establishes "fraud implied in law." 354 N.E.2d at 409. *See also* Lawrence v. Ashba, 115 Ind. App. 485, 59 N.E.2d 568 (Ind. Ct. App. 1944), stating that a promisor under a contract not to revoke a will should "have the right to dispose of any or all of the corpus of the estate for his reasonable needs in the event the income should be inadequate for that purpose, but he could not dispose of it to defraud or defeat his obligation." *Id.* at 494, 59 N.E.2d at 572.

[76]In *Duran*, the court of appeals affirmed a summary judgment against the constructive trust claimant and in favor of the decedent's second wife. 490 N.E.2d at 393. One issue raised by the constructive trust claimant was that there was a genuine issue of material fact concerning the deceased husband's state of mind when he failed to execute the will and when he and his second wife purchased entireties property. *Id.* at 392. The former spouse alleged that the entireties purchase was "tainted by fraud." *Id.* Both of plaintiff's arguments indicated that she was concerned generally with the deceased husband's good faith.

The catch-22 in the *Duran* case is that there was no property in the husband's estate to remedy the breach of his obligation of good faith. There was, however, the entireties property. If it was purchased with funds of the deceased promisor, and if the second spouse was not a bona fide purchaser for value without notice of the contractual claims, then the entireties property could have been subjected to a constructive trust as a method of enforcing the contractual claims of the ex-spouse and children. The burden would be on the ex-spouse and children to prove the decedent's lack of good faith in divesting himself of property to avoid compliance with the will contract, and that might not be an easy burden to meet, considering the fact that the decedent's divestitures were in favor of his second spouse (by the purchase of the entireties property) and in favor of creditors, primarily those who rendered him medical service.

[77]One approach might be to use a kind of best efforts clause — for example, the promisor agrees to use his best efforts to retain *x* property or *y* amount of property in his estate.

perspectives might be best satisfied with the inclusion of a flexible and open-ended, express good faith clause.[78]

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[78]Different considerations apply to a contract to devise specific property and to a contract to make a will devising all or part of the promisor's net estate, whatever it may be at the time of the promisor's death. When the contract is of the latter variety, the parties need to include a more detailed definition of acceptable future conduct. For example, both parties should demand an express provision regarding the kinds of gifts that the promisor is entitled to make. *See generally* B. SPARKS, CONTRACTS TO MAKE WILLS 50-69 (1956).