

# TRUSTS AND DECEDENTS' ESTATES

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Some interesting developments took place in the areas of trusts and estates during this survey period. The most notable decisions and legislation are discussed in the following sections, covering decedents' estates, inheritance tax, trusts, powers of appointment, and guardianships.

## I. DECEDENTS' ESTATES

### A. Constructive Trust Arising from Murder of Decedent

In *Heinzman v. Mason*,<sup>1</sup> the court addressed the issue of whether a constructive trust should be imposed to prevent a husband's children from a previous marriage from inheriting the wife's property when the husband committed suicide immediately after taking the wife's life. The morning after being served with a restraining order and an order to appear in connection with a petition for dissolution of marriage filed by the wife, the husband went to the wife's workplace, shot and killed her, then shot and killed himself. Both the husband and wife died intestate.<sup>2</sup> The couple, married since 1982, had no children born of the marriage, but the husband had four adult children from a prior marriage. The wife had acted as a mother to these children, but had not adopted them. The wife's heirs at law were determined to be her aunts, uncles, and their issue, while the husband's heirs were his four adult children by a previous marriage.<sup>3</sup>

The administrator of the husband's estate filed a petition to set aside the determination of heirship in the wife's estate. She also moved for summary judgment, claiming: 1) under Indiana Code section 29-1-2-1(b)(3),<sup>4</sup> the wife's property passed to the husband as the surviving spouse; 2) Indiana Code section 29-1-2-12.1<sup>5</sup> did not apply because the husband was not convicted of a crime in

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1. 694 N.E.2d 1164 (Ind. Ct. App. 1998).

2. *See id.* at 1166.

3. *See id.*

4. IND. CODE § 29-1-2-1(b)(3) (1998).

5. *Id.* § 29-1-2-12.1. This section provides, in pertinent part:

(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 judgment of conviction is conclusive in a subsequent civil action to have the person declared a constructive trustee.

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(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, determined as if the constructive trustee had died immediately before the decedent. However, if any property that the constructive trustee

connection with his wife's death as mandated by that statute and that no other statute prevented the husband from inheriting his wife's estate; and 3) no equitable reason prevented the husband's children from receiving the wife's property.<sup>6</sup> Nevertheless, the court of appeals affirmed the trial court's judgment to impose a constructive trust on the wife's property in the husband's estate for the benefit of her heirs.<sup>7</sup>

The court conceded that Indiana Code section 29-1-2-12.1 was not applicable to the case because the husband was not charged with any crime for causing the wife's death.<sup>8</sup> It also conceded that there was no other applicable statute that mandated the creation of a constructive trust under the facts of this case.<sup>9</sup> But, despite the absence of statutory authority, the court concluded that established principles of equity supported its conclusion that it had the power to impose a constructive trust upon any property acquired by a wrongdoer or his estate when the wrongdoer kills his spouse and then commits suicide before he can be charged or convicted of causing the death.<sup>10</sup>

Specifically, the equitable principle that neither the one who feloniously kills his spouse nor his heirs should benefit from the killer's wrongdoing prevented

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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.

*Id.*

6. See *Heinzman*, 694 N.E.2d at 1166.

7. *Id.* at 1167-68. The court of appeals affirmed the trial court's grant of summary judgment in favor of the administrator of the wife's estate. *Id.* at 1168. The court stated with approval the trial court's finding that the proceeds from the wife's life insurance policy and the wife's bank accounts went to the husband as sole named beneficiary of the insurance policy and accounts, and then into his estate upon his death. *Id.* at 1166. Also, the wife's other property did pass to the husband as provided under Indiana Code section 29-1-2-1(b)(3), and then into his estate upon his death. See *id.* Finally, because it was the husband's wrongdoing that resulted in his wife's death, the trial court appropriately concluded that all of the wife's property, including the proceeds from the wife's life insurance policy, was subject to a constructive trust for the benefit of the wife's heirs. See *id.* (citing *National City Bank of Evansville v. Bledsoe*, 144 N.E.2d 710 (Ind. 1957); *New York Life Ins. Co. v. Henriksen*, 415 N.E.2d 146 (Ind. Ct. App. 1981); *Stacker v. Mack*, 130 N.E.2d 484 (Ind. App. 1955)).

8. *Id.* at 1167.

9. *Id.*

10. *Id.* (citing *Bledsoe*, 144 N.E.2d at 710). In *Bledsoe*, the Indiana Supreme Court imposed a constructive trust on one-half of the property held by the spouse and his deceased wife as tenants by the entireties when the spouse killed his wife then killed himself before he could be convicted, although no statute addressed such a situation. *Bledsoe*, 144 N.E.2d at 715. In support of its holding, the court stated that Indiana Code section 29-1-2-12 (providing for the imposition of a constructive trust when one was convicted of causing the death of the decedent), which was the predecessor of the current Indiana Code section 29-1-2-12.1, was "not intended to supersede but merely to supplement the prevailing equity rule . . ." *Id.*

the children in this case from inheriting the wife's property, even though they were not involved in any misconduct leading to her death.<sup>11</sup> Further, to allow the children to inherit would still confer a benefit upon the husband for his wrongdoing.<sup>12</sup> Almost as an afterthought, the court added that it could not overlook the possibility that the husband may have intended to benefit his heirs when he took his wife's life and then took his own.<sup>13</sup> Speculation as to the husband's intent seems unnecessary. The husband, by his wrongdoing, seized control of his wife's property, thereby denying her the right to dispose of her property as she saw fit.<sup>14</sup> Although his suicide prevented any lifetime transfer of her property, certainly he still retained control of her property by his death transfer.

### *B. Spouse's Statutory Election to Take Against the Will*

The court in *Dunnewind v. Cook*,<sup>15</sup> held that assets in an inter vivos trust are subject to a surviving spouse's statutory right to an elective share of the deceased spouse's estate<sup>16</sup> when the decedent had created the trust in contemplation of her own imminent death and with the purpose of defeating the surviving spouse's statutory elective share.<sup>17</sup> The decedent was survived by her spouse from a second marriage and her two children born of a prior marriage. No children were born of the second marriage. Upon her death in 1995, decedent left a will, executed in 1976, more than three years after her marriage to the surviving spouse, and a irrevocable inter vivos trust, created only a few months prior to her death.<sup>18</sup>

The decedent's will devised all of her solely owned property to her two children and made no provision for her surviving spouse. The decedent did not change her will or seek estate planning advice until early 1995, a few months after she was diagnosed with terminal cancer.<sup>19</sup> The decedent's daughter, who had arranged the decedent's meeting with the attorney, later testified that the decedent had stated that she wanted her children to receive her property. Following the attorney's advice, the decedent executed an irrevocable inter vivos

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11. See *Heinzman*, 694 N.E.2d at 1167.

12. See *id.*

13. *Id.* at 1167-68 (citing *In re Estate of Cox*, 380 P.2d 584 (Mont. 1963)).

14. Accord *Bledsoe*, 144 N.E.2d at 714. Although *Bledsoe* addressed the control of property held as tenants by the entireties, the same rationale used by the court in that case to support imposing a constructive trust could be applied here. The *Bledsoe* court reasoned: "There is no doubt the murderer in reality has profited from illegally causing the death of the victim spouse, as he has become the sole and exclusive owner of the fee, which he could thereupon alienate or dispose of as he alone saw fit." *Id.*

15. 697 N.E.2d 485 (Ind. Ct. App. 1998).

16. See IND. CODE § 29-1-3-11 (1998).

17. *Dunnewind*, 697 N.E.2d at 490.

18. See *id.* at 487.

19. See *id.*

trust. The trust provisions gave the decedent's spouse a life estate in the marital residence and a life estate in the household goods and personal property used in the marital residence.<sup>20</sup> It also provided that upon the decedent's death the surviving spouse would receive \$24,500.<sup>21</sup> Although the surviving spouse was aware of the trust, he never inquired about the trust provisions and was not informed of the provisions. The decedent's children were named as the trust's remainder beneficiaries. Interestingly, the trust did not make any provisions for the decedent during her lifetime, and the trial court found no evidence that the trust was created to assist the decedent in the management of her affairs.<sup>22</sup> Yet, despite the failure of the trust to provide for the decedent, the decedent's daughter continued to pay all the trust's income to the decedent until the decedent's death a few months later.<sup>23</sup>

After the decedent's death, the surviving spouse petitioned the court to determine the assets of the estate and to set aside the trust. The trial court held, and the court of appeals agreed, that the assets remaining in the trust at the decedent's death were subject to the surviving spouse's election because the trust's only purpose was to avoid the statutory election of the surviving spouse.<sup>24</sup>

Relying on *Walker v. Lawson*<sup>25</sup> and *Crawfordsville Trust Co. v.*

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20. *See id.*

21. *See id.* Pursuant to Indiana Code section 29-1-3-1(a), the surviving spouse in *Dunnwind* would be entitled to take one-third of the decedent-spouse's net personal estate plus a life estate in one-third of the decedent-spouse's real estate because he was a subsequent spouse who did not have children by the decedent-spouse and the decedent-spouse left surviving children who were born of a previous marriage. IND. CODE § 29-1-3-1(a) (1998). Presumably, by electing to take his statutory elective share, the spouse in *Dunnwind* stood to receive more than what was provided in the trust.

22. *See Dunnwind*, 697 N.E.2d at 488. The trust provisions and the circumstances surrounding the creation of this trust can easily be distinguished from the inter vivos trust in *Leazenby v. Clinton County Bank & Trust Co.*, 355 N.E.2d 861 (Ind. App. 1976) (holding that a valid inter vivos trust defeated the surviving spouse's statutory election to take against the will). *See infra* note 25 (discussing the Indiana Supreme Court's efforts in *Walker v. Lawson*, 526 N.E.2d 968 (Ind. 1988), to distinguish the inter vivos trust in *Leazenby* from property transfers in contemplation of death that are made in an attempt to deprive the spouse of a share in the property).

23. *Dunnwind*, 697 N.E.2d at 488.

24. *Id.* at 490.

25. 526 N.E.2d 968 (Ind. 1988). In *Walker*, the court held that an attorney was not negligent for his failure to advise a testatrix that her spouse could make a statutory election to take against the will when the testatrix sought the attorney's advice regarding how to dispose of her estate in contemplation of her impending death. *Id.* at 969-70. The *Walker* testatrix approached the attorney for estate planning advice shortly after discovering she had cancer. She mentioned to the attorney that she desired her two children receive her entire estate. In response, the attorney prepared a will that provided that the entire estate would pass in trust for the benefit of the testatrix's children. *See id.* at 969. The will specifically acknowledged that the spouse was purposely omitted from receiving her estate because he benefitted from residing in the residence during the testatrix's lifetime and would continue to reside there as the guardian of the testatrix's children. The *Walker*

*Ramsey*,<sup>26</sup> the court noted that Indiana law will not permit a gift to withstand a spouse's statutory election to take against the will when it is a *gift causa mortis* or testamentary in effect.<sup>27</sup> Employing an intent test that considers such factors as the settlor's motive in creating such a trust and the timing of the creation of the trust, the court found that the irrevocable inter vivos trust in *Dunnwind* was testamentary in effect.<sup>28</sup> The case facts strongly support this finding. First, the decedent had sought estate planning advice from an attorney only after discovering that she was terminally ill and death was imminent.<sup>29</sup> Second, the decedent had made the statement that she wanted to ensure her children received her property. This statement, combined with the fact that she followed the attorney's advice to create a trust instead of amending her will, showed that she intended to defeat her spouse's share.<sup>30</sup> Third, the trust was testamentary in nature because it failed to provide the decedent with income or the right to reside in her own home, which, in turn, implied that the "gifts"—the res of the trust—were not to take effect until the decedent's death.<sup>31</sup>

### C. Will Contests

The issues presented in *Fitch v. Maesch*<sup>32</sup> arose from the question of whether a will's execution properly complied with statutory requirements.<sup>33</sup> Here, the

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court also rejected the claim that the attorney could have prevented the surviving spouse from exercising his statutory right to an elective share by utilizing another method to dispose of the estate, such as creating a trust similar to the trust in *Leazenby*, 355 N.E.2d at 861, or a joint tenancy between the testatrix and her children. In so finding, the court relied on *Crawfordsville Trust Co. v. Ramsey*, 100 N.E. 1049 (Ind. App. 1913), which advanced "the established law that a spouse cannot by gifts in contemplation of death deprive a surviving spouse of his or her statutory share in the estate." *Walker*, 526 N.E.2d at 969. It is important to point out that the *Walker* court distinguished the trust in *Leazenby* by observing that the settlor in *Leazenby* had established the trust for the purpose of obtaining assistance in handling her personal affairs and, as time passed, the trust res was actually used to pay for the settlor's nursing home care. *Id.* Also, the *Walker* court noted that the surviving spouse in *Leazenby* presumably knew of the trust and consented to it, and there was no evidence that the settlor's intent in creating the trust was to frustrate her husband's right to a statutory share in her estate. *Id.*

26. 100 N.E.2d 1049 (Ind. App. 1913) (finding stocks and bonds were subject to a surviving spouse's statutory election and were treated as *gift causa mortis*, rather than a valid inter vivos gift, when the donor assigned the stocks and bonds in anticipation of his death and in an attempt to defraud his spouse).

27. *Dunnwind*, 697 N.E.2d at 489.

28. *Id.* at 490.

29. *See id.*

30. *See id.*

31. *See id.* *See also supra* note 25 (discussing the distinguishing features of the valid inter vivos trust in *Leazenby*.)

32. 690 N.E.2d 350 (Ind. Ct. App. 1998).

33. *See* IND. CODE § 29-1-5-3(a)(1998). That section provides, in pertinent part:

court of appeals held that evidence of the attorney's habit and routine in supervising the execution of his client's wills could be considered when determining the events surrounding the execution of a will.<sup>34</sup> Also, a witness's testimony regarding the execution of the will, to the extent it conflicts with the events set forth in the will's attestation clause, presents a question of fact for the jury.<sup>35</sup>

The will at issue in *Fitch* contained an attestation clause recounting the events surrounding the execution of the will,<sup>36</sup> which if true, would satisfy the statutory execution requirements.<sup>37</sup> Nonetheless, the court, faced with a deceased witness, the attorney who prepared the will and oversaw its execution, and the only surviving witness offering testimony that conflicted with the events described in the attestation clause, had to determine whether the statutory

The execution of a will . . . must be by the signature of the testator and of at least two (2) witnesses as follows:

(1) The testator, in the presence of two (2) or more attesting witnesses, shall signify to them that the instrument is the testator's will and . . .

(A) sign the will;

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(2) The attesting witnesses must sign in the presence of the testator and each other.

*Id.*

34. *Fitch*, 690 N.E.2d at 353.

35. *See id.* at 354 (citing *Munster v. Marcrum*, 393 N.E.2d 256, 258 (Ind. App. 1979)).

36. The attestation clause in the will stated:

The above and foregoing instrument, consisting of three (3) typewritten pages, was signed, sealed, published and declared by the said [testatrix] as and for her last will and testament, in the presence of us who, at her request and in her presence and in the presence of each other, have hereunto set our names as subscribing witnesses to the due execution of this will. . . .

*Id.*

37. The will did not include a self-proving affidavit, which was available under Indiana Code section 29-1-5-3(b) & (c) (Supp. 1983) in effect at the time of the will's execution. Pursuant to Indiana Code § 29-1-7-13(c) (1998), a self-proved will eliminates the need for the witnesses to testify upon filing the will to prove its authenticity, *see* IND. CODE § 29-1-7-9 (1998), by creating a rebuttable presumption of compliance with statutory signature requirements and other execution requirements, unless there is proof of fraud or forgery affecting the self-proving affidavit.

Even so, it should be noted that "[t]he leading rule even prior to the self-proved statute was that the attachment of an attesting clause created a presumption of proper execution of will. [*See, e.g., Gardner v. Balboni*, 588 A.2d 634 (Conn. 1991); *In re Estate of Smith*, 668 N.E.2d 102 (Ill. App. Ct. 1996).] It is presumed that [Indiana Code section] 29-1-7-13(c) carries an even stronger presumption if there is a self-proving clause." 2A JOHN S. GRIMES, HENRY'S PROBATE LAW & PRACTICE OF THE STATE OF INDIANA 653 (7th ed. 1979).

And *see Gardner*, 588 A.2d at 634, for an exhaustive discussion and survey of the law regarding the evidentiary value of an attestation clause to show compliance with the statutory formalities for executing a will.

execution requirements were actually satisfied.

The court of appeals found that the trial court properly admitted the testimony of the attorney's secretary regarding the attorney's habit and routine practice in supervising the execution of his clients' wills.<sup>38</sup> The court looked to Rule 406 of the Indiana Rules of Evidence,<sup>39</sup> for support in allowing this testimony into evidence. At trial, the secretary testified that, based on sixteen years in the employ of the attorney and witnessing more than 500 wills when the attorney supervised the will execution, she was aware of the attorney's habit and routine practice.<sup>40</sup> She recounted the attorney's specific routine in supervising the execution of clients' wills, which comported with the events recited in the attestation clause, and that the attorney habitually placed the executed will in a sealed envelope. She also identified the sealed envelope containing the testatrix's will as that of the attorney's law firm and the signature appearing on the envelope as that of the attorney.<sup>41</sup> The *Fitch* court rejected the complainant's argument that the secretary's testimony was irrelevant and inadmissible because it did not concern the attorney's habit under the distinct circumstances of the case at bar.<sup>42</sup> Criticizing the complainant for placing "too fine a point on the matter," the court stated: "The supervision of the execution of wills is the conduct in question and the evidence is relevant to prove how [the attorney] supervised the execution of [the testatrix's] will."<sup>43</sup> Here, the secretary's testimony served not only to establish that the attorney's routine for executing a will was the same as those recounted in the attestation clause, but also to authenticate the attorney's signature as an attesting witness.<sup>44</sup>

After determining the secretary's testimony was admissible, the court moved to the second issue of whether the probate of the will could be supported when the surviving attesting witness did not remember specific aspects of the will's execution. While acknowledging that the witness's testimony raised questions as to what actually occurred during the execution of the testatrix's will,<sup>45</sup> the

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38. *Fitch*, 690 N.E.2d at 353.

39. Indiana Rule of Evidence 406 states, in pertinent part: "Evidence of the habit of a person . . . whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit or routine practice." IND. R. EVID. 406.

40. *See Fitch*, 690 N.E.2d at 353.

41. *See id.*

42. *Id.* Apparently, the complainant attempted to draw a distinction between the attorney's habit in supervising will executions when his wife and/or secretary served as an attesting witness and the attorney's habit in such situations when other individuals served as attesting witnesses, as was the case in *Fitch*.

43. *Id.*

44. *See id.*

45. *Id.* at 354. The surviving witness did authenticate her signatures found on the will, one of which appeared at the end of the attestation clause, and even recalled that the purpose of the document was to provide the testatrix's brother with a portion of the testatrix's assets. *See id.* However, her testimony conflicted with the attestation clause inasmuch as she could not recall if

*Fitch* court pointed to the established rule that “where testimony of the attesting witnesses contradicts the substance of the attestation clause from the will, the conflict presents a question of fact for the jury.”<sup>46</sup> The trial court’s findings that the will’s execution complied with statutory formalities and the witness’s testimony was unpersuasive were adequately supported by the will’s attestation clause, the envelope containing the will that had been signed by the attorney, and the secretary’s testimony as to the attorney’s habit and routine in supervising the execution of his client’s wills.<sup>47</sup> Therefore, because the will was properly executed and authenticated, the court held that it was properly admitted to probate.<sup>48</sup>

#### D. Determination of Heirship

*Estate of Lamey v. Lamey*,<sup>49</sup> addressed the issue of whether a decedent’s brother had standing to petition the court for an order requiring the decedent’s former wife and daughter to submit to blood testing to ascertain whether the daughter was the biological child of the decedent and thus was the heir of the estate. With one exception not disputed in this case, Indiana law looks to the time of death to determine the heirs of the estate.<sup>50</sup> Decedent died intestate without a spouse. The daughter, presumed to be his issue because she was born during the marriage of the decedent and his former wife,<sup>51</sup> was his only surviving child and thus heir to his entire estate.<sup>52</sup>

The uncle attempted to challenge the child’s right to inherit the decedent’s estate by crafting an argument that Indiana Code section 29-1-2-7 provided him with an avenue to request paternity blood testing so long as the request was made

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anyone other than the testatrix was in the room when she signed the will as a witness or whether she or anyone else was present when the testatrix signed the will. *See id.* Also, she testified that she had not been aware that the document was a will. *See id.*

46. *Id.* (citing *Munster v. Marcrum*, 393 N.E.2d 256, 258 (Ind. App. 1979) (holding that where the testimony of two attesting witnesses contradicted the events set forth in the attestation clause it presented a question of fact for the jury, and on appeal, the court refused to disturb the finding of the jury that the witnesses’ testimony was unpersuasive when the evidence and inferences presented at trial did not lead to a conclusion opposite that reached by the jury).

47. *See id.*

48. *Id.* at 355.

49. 689 N.E.2d 1265 (Ind. Ct. App. 1998).

50. *See* IND. CODE § 29-1-2-6 (1998). That section provides:

Descendants of the intestate, begotten before his death but born thereafter, shall inherit as if they had been born in the lifetime of the intestate and had survived him. With this exception, the descent and distribution of the intestate estates shall be determined by the relationships existing at the time of the death of the intestate.

*Id.*

51. *See id.* § 31-14-7-1(A) & (B).

52. *See id.* § 29-1-2-1(d)(1).

within five months of the decedent's death.<sup>53</sup> Additionally, he argued, the presumption that a child born during a marriage is the biological child of the father may be rebutted by direct, clear, and convincing evidence<sup>54</sup> and blood test results could provide the necessary evidence.<sup>55</sup>

The trial court ordered the blood tests, but the court of appeals, in an opinion construing probate and paternity law, reversed the trial court's judgment and vacated the order for paternity blood testing.<sup>56</sup> The court of appeals, while recognizing the uncle's standing as a potential heir<sup>57</sup> to petition the court to determine heirship,<sup>58</sup> nonetheless found that this did not automatically give the uncle standing to petition the court to order paternity blood testing.<sup>59</sup> Facts working against the uncle were that he was not claiming to be the putative father of the child and that he was attempting to disestablish paternity of a child born into an intact marriage.

The court rejected the uncle's use of Indiana Code section 29-1-2-7 as a

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53. See *Lamey*, 689 N.E.2d at 1270; see also IND. CODE § 29-1-2-7(b) (1998). That section provides:

For the purpose of inheritance (on the paternal side) to, through, and from a child born out of wedlock, the child shall be treated as if the child's father were married to the child's mother at the time of the child's birth, if:

(1) the paternity of the child has been established by law in a cause of action that is filed:

(A) during the father's lifetime; or

(B) within five (5) months after the father's death; or

(2) the putative father marries the mother of the child and acknowledges the child to be his own.

*Id.*

54. See *Lamey*, 689 N.E.2d at 1268. In support of his argument, the uncle pointed to the holding in *K.S. v. R.S.*, 669 N.E.2d 399 (Ind. 1996), that a "child born to a married woman, but fathered by a man other than her husband, is a 'child born out of wedlock' for purposes of the [paternity] statute." *Id.* at 402 (permitting a third party's action to seek to establish his paternity in a child born of an intact marriage), noted in Paula J. Schaefer & Michael G. Ruppert, *Indiana Survey of Family Law in 1996*, 30 IND. L. REV. 1073, 1095 (1997).

55. See IND. CODE § 31-14-7-1(4) (1998).

56. *Lamey*, 689 N.E.2d at 1270. A concurring judge agreed with the majority that the trial court abused its discretion, but sought to limit the result to facts similar to this case. Precisely, a third party should not be allowed to challenge the paternity of a child born during an intact marriage where the decedent-father was conclusively bound to the establishment of paternity because he acknowledged paternity in a divorce decree dissolving the marriage. See *id.* (Kirsch, J., concurring in result). However, this judge was reluctant to conclude along with the majority that under no circumstances could the heirship of a child born during an intact marriage be challenged. *Id.*

57. See IND. CODE § 29-1-2-1(d)(3) (1998).

58. See *id.* § 29-1-6-6(a). This section provides, in pertinent part: "At any time during the administration of a decedent's estate . . . any interested person may petition the court to determine the heirs of said decedent and their respective interests in the estate or any part thereof . . ." *Id.*

59. *Lamey*, 689 N.E.2d at 1268.

vehicle for asserting his request, finding that the statute merely offered a limited opportunity to an illegitimate child or a putative father to establish paternity in a decedent, as opposed to third parties attempting to disestablish paternity following a presumptive father's death.<sup>60</sup> Moreover, the court found that the uncle, who was not claiming to be the child's biological father, had no standing under Indiana paternity law to establish or disestablish the child's paternity.<sup>61</sup> Specifically, the court refused to extend the recent Indiana Supreme Court holding in *K.S. v. R.S.*,<sup>62</sup> permitting a putative father's action to establish paternity in a child of an intact marriage, to a third party who is not claiming paternity but is trying to illegitimize a child so that he may become eligible to inherit the father's estate.<sup>63</sup>

### *E. Claims Against the Estate*

Two Indiana Court of Appeals decisions handed down during the survey period underscore the necessity that to perfect a tort claim against a deceased tortfeasor's estate, the complaint must be filed against the personal representative of the estate within the tort statute of limitations and, if the estate has not already been opened and/or a personal representative not yet appointed, the onus is on the tort claimant to accomplish this before the statute of limitations has run.<sup>64</sup>

In *Clark v. Estate of Slavens*,<sup>65</sup> the court upheld summary judgment in favor of the estate when a tort claimant failed to open an estate and seek appointment of a personal representative within the limitations period of the applicable tort statute.<sup>66</sup> The day before the expiration of the two-year statute of limitations, the

60. *Id.* The court also noted that paternity had been established and conclusively bound the decedent and the former wife upon their divorce when they had agreed to the finding in the divorce decree that the child was born of the marriage. *Id.* at 1269.

61. *Id.* at 1268-70.

62. 669 N.E.2d 399 (Ind. 1996). *See also supra* note 54.

63. *Lamey*, 689 N.E.2d at 1270.

64. *See Indiana Farmer's Mut. Ins. Co. v. Richie*, 694 N.E.2d 1220 (Ind. Ct. App. 1998); *Clark v. Estate of Slavens*, 687 N.E.2d 246 (Ind. Ct. App. 1997).

65. 687 N.E.2d 246 (Ind. Ct. App. 1997).

66. Providing for the filing of claims against a decedent's estate, Indiana Code section 29-1-14-1 mandates, in pertinent part:

(a) Except as provided in [Indiana Code section] 29-1-7-7, all claims against a decedent's estate, other than expenses of administration and claims of the United States, the state, or a subdivision of the state, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, shall be forever barred against the estate, the personal representative, the heirs, devisees, and legatees of the decedent, unless filed with the court in which such estate is being administered within:

(1) Five (5) months after the date of the first published notice to creditors; or

(2) Three (3) months after the court has revoked probate of a will, in

tort claimant filed a lawsuit against the estate of the decedent, simply named in the complaint as "Estate of Andrea E. Slavens,"<sup>67</sup> her brother, and her parents<sup>68</sup> for injuries sustained in an automobile accident caused by the driver of the defendants' vehicle. However, no estate existed at that time, and the estate could not be a party to the action without a personal representative.<sup>69</sup> Only after the expiration of the two-year statute of limitations did the tort claimant attempt to open an estate for the decedent, requesting that her attorney be appointed as the decedent's personal representative.<sup>70</sup> The court of appeals held that the tort claimant no longer had a viable claim against the decedent's estate<sup>71</sup> and was no

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accordance with [Indiana Code section] 29-1-7-21, if the claimant was named as a beneficiary in that revoked will; whichever is later.

\* \* \*

(d) All claims barrable under subsection (a) shall be barred if not filed within one (1) year after the death of the decedent.

\* \* \*

(f) Nothing in this section shall affect or prevent the enforcement of a claim for injury to person or damage to property arising out of negligence against the estate of a deceased tortfeasor within the period of the statute of limitations provided for the tort action. A tort claim against the estate of the tortfeasor may be opened or reopened and suit filed against the special representative of the estate within the period of the statute of limitations of the tort. Any recovery against the tortfeasor's estate shall not affect any interest in the assets of the estate unless the suit was filed within the time allowed for filing claims against the estate. The rules of pleading and procedure in such cases shall be the same as apply in ordinary civil actions.

IND. CODE § 29-1-14-1 (1998). *See also* IND. CODE § 34-1-2-2(1) (1998) (defining statute of limitations for injuries to person, character, or personal property as two years).

67. *Clark*, 687 N.E.2d at 248.

68. *See id.* Unsure of who had been driving the defendants' car when the accident occurred, the tort claimant named the decedent and her brother, the occupants of the defendants' car, as defendants. The decedent's mother and father were also named as defendants because, pursuant to Indiana Code section 9-24-9-4(a) (1998), *see infra* note 75, the mother had agreed to be jointly and severally responsible for any liability the deceased might incur and the father had agreed to be jointly and severally responsible for any liability the brother might incur. *See Clark*, 687 N.E.2d at 248.

69. *See Clark*, 687 N.E.2d at 250 (citing 1 DEBRA A. FALENDER, HENRY'S INDIANA PROBATE LAW AND PRACTICE § 601 (8th ed. 1989)); *see also* Pasley v. American Underwriters, Inc., 433 N.E.2d 838 (Ind. Ct. App. 1982), *noted in* Debra A. Falender, *Trusts and Decedents' Estates*, 17 IND. L. REV. 387, 389-90 (1984); Carr v. Schneider's Estate, 51 N.E.2d 392 (Ind. App. 1943).

70. *See Clark*, 687 N.E.2d at 250. Indiana Code section 29-1-7-4 provides in pertinent part: "Any interested person . . . may petition the court having jurisdiction of the administration of the decedent's estate . . . [f]or the appointment of an administrator for the estate of any person dying intestate." IND. CODE § 29-1-7-4 (1998). *See also id.* § 29-1-1-3 (stating that "[i]nterested persons" include anyone "having a property right in or claim against the estate of a decedent being administered").

71. *Clark*, 687 N.E.2d at 250. The court quoted:

longer an “interested person” who had standing to open an estate.<sup>72</sup> Furthermore, because the tort claimant did not have standing to open an estate for the decedent, the estate could not be given legal recognition, and the tort claimant’s attempt to substitute the “Estate’s” personal representative for the party defendant “Estate of Andrea E. Slavens” in her complaint also had no effect.<sup>73</sup>

The tort claimant’s failure to take timely action to open an estate and appoint a personal representative also caused the *Clark* court to affirm summary judgment in the mother’s favor.<sup>74</sup> The mother had been named as a party in the tort claimant’s complaint because she had agreed to be jointly and severally responsible for the liability of the decedent under Indiana Code section 9-24-9-4(a).<sup>75</sup> Inasmuch as the statute only provided for responsibility in the event that the minor decedent was liable in damages<sup>76</sup> and summary judgment had been granted in favor of the minor decedent’s estate, the court found that the mother could not be held liable for the decedent’s negligence.<sup>77</sup> Interestingly, the court stated in dicta that the tort claimant would also be barred from bringing an action against the mother based on grounds that she might be in possession of the

[Indiana Code 29-1-14-1(f)] allows a claimant to open the decedent tortfeasor’s estate during the applicable tort statute of limitations. Therefore, as long as the estate of a decedent tortfeasor is opened and a personal representative appointed within the statute of limitations, a tort action is not barred.

*Id.* (quoting *Langston v. Estate of Cuppels*, 471 N.E.2d 17, 20 (Ind. Ct. App. 1984)) (alteration in original).

72. *Id.*

73. *See id.* at 248-50. The amended complaint failed to relate back to the date of the filing of the original complaint under Indiana Rule of Trial Procedure 15(C). *See id.* at 250. *Compare id.* with *Zambrana v. Anderson*, 549 N.E.2d 1078 (Ind. Ct. App. 1990) (permitting the tort claimant to amend the complaint to name the estate as a party after the tort statute of limitations had run and the amendment related back to the filing of the original complaint because the requirements of Rule 15(C) had been satisfied when, prior to the expiration of the statute of limitations: 1) the estate had been opened; 2) the original complaint had been filed; 3) a special representative for purposes of proceeding with the tort action had been appointed and had received service of the summons and complaint for the tort; and 4) both the special representative and insurer for the decedent had timely notice of the action and knew that but for the mistake concerning the proper identity of the party the complaint would have been brought against the special representative).

74. *Clark*, 687 N.E.2d at 250-51. The *Clark* court also affirmed summary judgment in favor of the brother and father on other grounds. *See id.* at 251-56.

75. *See id.* at 250. Indiana Code section 9-24-9-4(a) provides:

An individual who signs an application for a permit or license under this chapter agrees to be responsible jointly and severally with the minor applicant for any injury or damage that the minor applicant causes by reason of the operation of a motor vehicle if the minor applicant is liable in damages.

IND. CODE § 9-24-9-4(a) (1998).

76. *Clark*, 687 N.E.2d at 251 (citing *Wenisch v. Hoffmeister*, 342 N.E.2d 665, 667 (Ind. Ct. App. 1976)).

77. *Id.*

deceased's property. "Only a duly authorized personal representative" can recover the assets of an heir in possession and only such a representative can collect the assets in payment of any debts excepted under Indiana Code section 29-1-14-1(f).<sup>78</sup>

A later decision in the survey period, *Indiana Farmers Mutual Ins. Co. v. Richie*,<sup>79</sup> involved a situation similar to *Clark*. Immediately before the expiration of the statute of limitations, the tort claimant filed a complaint against "Leanne M. Smith, (deceased)," who had been involved in a automobile accident with the claimant that resulted in her death and injury to the claimant.<sup>80</sup> Three months later, the tort claimant petitioned for the appointment of a special administrator for the decedent's estate, and the estate was opened that day with an appointed administrator. In addition, the tort claimant moved to amend his complaint to change the named defendant to the special administrator for the deceased's estate. Tracking the same reasoning used by the *Clark* court, the *Richie* court reversed the trial court's judgment and granted summary distribution against the tort claimant.<sup>81</sup> A majority of the court held that the estate could not be given legal recognition and that the tort claimant's attempt to substitute the named defendant in an effort to "save" his claim was to no avail.<sup>82</sup> Relying on *Clark*, the court stated that, after the expiration of the statute of limitations, the tort claimant did not have standing to open an estate or petition for appointment of an administrator because he was no longer an "interested person."<sup>83</sup>

#### F. Statutory Amendment

Effective July 1, 1998, Indiana Code section 29-1-8-3, providing for the summary closing of a small estate, applies to a gross estate, which, less liens and encumbrances, does not exceed \$25,000 plus administration costs and funeral expenses.<sup>84</sup> With this recent amendment, the general assembly continues what

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78. *Id.* (quoting 1 FALENDER, *supra* note 69, § 405).

79. 694 N.E.2d 1220 (Ind. Ct. App. 1998).

80. *See id.* at 1221.

81. *Id.* at 1223.

82. *Id.* The dissenting judge did not agree that Indiana Code section 29-1-14-1(f) barred the tort claimant's action to the extent he sought "to realize upon any casualty insurance proceeds available to indemnify against decedent's negligence, and does not seek to affect any interest in the assets of the estate." *Id.* (Bailey, J., dissenting).

83. *Id.* at 1223.

84. Act of March 11, 1998, Pub. L. No. 42-1998, § 2, 1998 Acts 1038 (codified as amended at IND. CODE § 29-1-8-3 (1998)). Indiana Code section 29-1-8-3 now provides, in pertinent part:

(a) If it appears that the value of a decedent's gross probate estate, less liens and encumbrances, does not exceed the sum of:

- (1) twenty-five thousand dollars (\$25,000);
- (2) the costs and expenses of administration; and
- (3) reasonable funeral expenses;

the personal representative or a person acting on behalf of the distributees, without

now appears to be an ineffective attempt, beginning with a 1997 amendment, to relax the conditions under which summary distribution of an estate will be allowed.

Prior to the 1997 amendment, section 29-1-8-3 provided for summary distribution only when the gross probate estate, less liens and encumbrances, did not exceed the survivor's allowance, if any was payable, plus administration costs and funeral expenses. This meant that summary distribution of an estate was limited to situations where distribution would be made to a surviving spouse or dependent children claiming the survivor's allowance, cost claimants, and/or funeral claimants. The 1997 legislature amended section 29-1-8-3 by substituting the amount of \$15,000 for the survivor's allowance in the equation.<sup>85</sup> However, the survivor's allowance, although no longer specifically referenced in the amendment, still could have been construed as representing the figure of \$15,000 because the 1997 legislature also amended the amount of the survivor's allowance provided under section 29-1-4-1 to \$15,000.<sup>86</sup> In addition, section 29-

giving notice to creditors, may immediately disburse and distribute the estate to the persons entitled to it and file a closing statement as provided in section 4 of this chapter.

(b) If an estate described in subsection (a) includes real property, an affidavit may be recorded in the office of the recorder in the county in which the real property is located. The affidavit must contain the following:

\* \* \*

(2) The following statement: "It appears that the decedent's gross estate, less lien and encumbrances, does not exceed the sum of the following: twenty-five thousand dollars (\$25,000), the costs and expenses of administration, and reasonable funeral expenses."

\* \* \*

IND. CODE § 29-1-8-3.

85. Act of May 13, 1997, Pub. L. No. 118-1997, § 17, 1997 Acts 1284 (codified as amended at IND. CODE § 29-1-4-1 (1998)).

86. Act of May 13, 1997, Pub. L. No. 118-1997, § 11, 1997 Acts 1284 (codified as amended at IND. CODE § 29-1-4-1 (1998)). Indiana Code section 29-1-4-1, as amended to clarify wording, provides:

The surviving spouse of a decedent who was domiciled in Indiana at his death is entitled from the estate to an allowance of fifteen thousand dollars (\$15,000). The allowance may be claimed against the personal property of the estate or a residence of the surviving spouse, or a combination of both. If there is no surviving spouse, the decedent's children who are under eighteen (18) years of age at the time of the decedent's death are entitled to the same allowance to be divided equally among them. If there is less than fifteen thousand dollars (\$15,000) in personal property in the estate and residence of the surviving spouse, the spouse or decedent's children who are under eighteen (18) years of age at the time of the decedent's death, as the case may be, are entitled to any real estate of the estate to the extent necessary to make up the difference between the value of the personal property plus the residence of the surviving spouse and fifteen thousand dollars (\$15,000). The amount of that difference is a lien on the

1-8-4(a), which remained unamended, mandates that, in order to close the estate, the personal representative must file an affidavit with the court stating, among other items, that the gross probate estate, less liens and encumbrances, does not exceed *the allowance provided under section 29-1-4-1*, administration costs, and funeral expenses.<sup>87</sup>

During the current survey period, the legislature once again amended section 29-1-8-3, this time to permit summary distribution if the gross probate estate, less liens and encumbrances, does not exceed \$25,000, an amount now exceeding the survivor's allowance, administration costs, and funeral expenses.<sup>88</sup> Thus, section 29-1-8-3 now provides that a summary distribution of an estate could be made even in situations where heirs of a decedent's estate might receive assets beyond the survivor's allowance. Nevertheless, section 29-1-8-3, as newly amended, now conflicts with section 29-1-8-4, which remains unamended. Therefore, despite the apparent attempt by the legislature to ease the restrictions for the summary distribution and closing of a small estate, it appears that for now such procedures are still limited to those estates that, less liens and encumbrances, are not in excess of the survivor's allowance, administration costs, and funeral expenses.

## II. INHERITANCE TAX

In order to make a valid qualified terminable interest property ("QTIP") election for Indiana inheritance tax purposes,<sup>89</sup> a QTIP election form, as

remaining real estate. An allowance under this section is not chargeable against the distributive shares of either the surviving spouse or the children.

IND. CODE § 29-1-4-1.

87. Indiana Code section 29-1-8-4(a) provides, in pertinent part:

Unless prohibited by order of the court and except for estates being administered by supervised personal representatives, a personal representative or a person acting on behalf of the distributees may close an estate administered under the summary procedures of section 3 [Indiana Code section 29-1-8-3] of this chapter by filing with the court, at any time after disbursement and distribution of the estate, a verified statement stating that:

- (1) to the best knowledge of the personal representative, or person acting on behalf of the distributees the value of the gross probate estate, less liens and encumbrances, did not exceed the sum of:
  - (A) the allowance, if any provided by [Indiana Code section] 29-1-4-1;
  - (B) the costs and expenses of administration; and
  - (C) reasonable funeral expenses[.]

\* \* \*

IND. CODE § 29-1-8-4(a) (1998).

88. Act of March 11, 1998, Pub. L. No. 42-1998, § 2, 1998 Acts 1038 (codified as amended at IND. CODE § 29-1-8-3 (1998)). See *supra* note 84.

89. See IND. CODE § 6-4.1-3-7(a) (1998). This section provides that a decedent's property interests passing to the surviving spouse are exempt from Indiana inheritance tax. This includes

prescribed by Indiana Department of State Revenue (“IDSR”) regulations, must be attached to the inheritance tax return.<sup>90</sup> However, the estate in *Department of State Revenue v. Estate of Phelps*<sup>91</sup> initially attempted to make a QTIP election by attaching the decedent’s will and revocable trust agreement to the return. In the 1994 decision of *Estate of Hibbs v. Indiana Department of State Revenue*,<sup>92</sup> the tax court found the attachment to the return of a decedent’s will and trust, which contained directives unequivocally commanding the personal representative to make the QTIP election, satisfied the statutory requirements of a writing for purposes of making the election.<sup>93</sup> Unfortunately, after the decision in *Hibbs* but before the decedent’s death in *Phelps*, the IDSR regulation prescribing the form and content of a QTIP election came into effect.<sup>94</sup> Thus, the attachment of the will and trust to the inheritance tax return in *Phelps* was an ineffective election.<sup>95</sup>

The estate attempted to rectify its mistake and salvage the election by filing a second inheritance tax return, with the appropriate QTIP election form attached, prior to the due date of the return. In an attempt to circumvent the requirement that the QTIP election be “attached to the *original* Indiana inheritance tax return,”<sup>96</sup> the estate argued this language should be interpreted to

the transfer of a life estate to the surviving spouse. *Id.* § 6-4.1-3-7(b). But the transfer of the remainder interest is usually subject to inheritance tax, which can be postponed or avoided by making a QTIP election pursuant to Indiana Code section 6-4.1-3-7(c) (1998). Indiana Code section 6-4.1-3-7(d) mandates, in part, that the election must be in writing and attached to the inheritance tax return, if one is required to be filed. IND. CODE § 6-4.1-3-7(d) (1998).

90. See IND. ADMIN. CODE tit. 45, r. 4.1-3-5(b)(4) (1996). That section provides: The election must be in form and content substantially as follows:

Pursuant to [Indiana Code section] 6-4.1-3-7, an election is hereby made to treat the following property passing from the decedent in which the surviving spouse has a qualifying income interest for life as a property interest which a decedent transfers to the decedent’s surviving spouse:

Qualified Property	Percentage
It is understood that this QTIP election is irrevocable and cannot be reversed.	
Signature _____	
Title _____	

*Id.*

- 91. 697 N.E.2d 506 (Ind. Tax Ct. 1998).
- 92. 636 N.E.2d 204 (Ind. Tax Ct. 1994).
- 93. *Id.* at 210.
- 94. See *Phelps*, 697 N.E.2d at 510 n.4. Title 45, rule 4.1-3-5 of the Indiana Administrative Code became effective on July 1, 1994. IND. ADMIN. CODE tit. 45, r. 4.1-3-5 (1996).
- 95. See *Phelps*, 697 N.E.2d at 510.
- 96. IND. ADMIN. CODE tit. 45, r. 4.1-3-5(b)(3) (emphasis added). That rule prescribes: “The

include supplemental inheritance tax returns, that is, a second return filed before the due date of the return.<sup>97</sup> The court, admitting that it was not without sympathy for the estate's position, acknowledged the IDSR regulations were "unnecessarily inconsistent with federal regulations governing federal estate tax returns" and that it could see no harm in allowing the filing of amended returns adding the QTIP election before the due date.<sup>98</sup> Also, the court pointed out an inconsistency between Indiana Code section 6-4.1-3-7(d), which reflects the possibility of a valid QTIP election in some instances without the filing of an inheritance tax return,<sup>99</sup> and the IDSR regulation, which requires the filing of an inheritance tax return for a QTIP election.<sup>100</sup> Further, the court noted that the IDSR regulation does not prohibit a QTIP election in a late filed initial return, which gives the effect of treating late filed initial returns more favorably than timely filed amended returns.<sup>101</sup> Yet, despite parading these inconsistencies and inequities, the court in the end declined to do anything except to enforce the will of the IDSR as expressed in its regulation.<sup>102</sup> Therefore, when the inheritance return initially filed does not contain the necessary QTIP election form, an estate cannot salvage the QTIP election by filing a subsequent inheritance tax return containing the proper election form.<sup>103</sup>

### III. TRUSTS

The court of appeals in *Regan v. Uebelhor*,<sup>104</sup> addressed the issue of whether a contingent remainderman of a testamentary trust was an interested party bound by a decree of final settlement in the decedent's estate with regard to the sale of an estate asset made during the administration of the estate. In addition, the court addressed whether the contingent remainderman had standing to sue the trustee regarding income earned from trust assets.

The contingent remainderman's grandfather died in 1977, leaving a will that named her uncle as executor of the estate and trustee of the trust created under

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election must be in writing, signed by a person authorized to make the election, and attached to the original Indiana inheritance tax return at the time it is filed." *Id.* Further, title 45, rule 4.1-3-5(e) of the Administrative Code prescribes: "The failure to comply with subsection (b) as to any property that would qualify under Section 2056(b)(7) of the Internal Revenue Code means that an irrevocable election has been made not to treat the transfer as a QTIP transfer." IND. ADMIN. CODE tit. 45, r. 4.1-3-5(e) (1996).

97. See *Phelps*, 697 N.E.2d at 510.

98. *Id.* at 511.

99. Indiana Code section 6-4.1-3-7(d) mandates: "The election referred to in subsection (e) shall be made in writing and shall be attached to the inheritance tax return, *if one is required to be filed*. The election, once made, is irrevocable." IND. CODE § 6-4.1-3-7(d) (1998) (emphasis added).

100. *Phelps*, 697 N.E.2d at 511 (referring to IND. ADMIN. CODE tit. 45, r. 4.1-3-5(d) (1996)).

101. *Id.*

102. *Id.* (referring to IND. ADMIN. CODE tit. 45, r. 4.1-3-5(e) (1996)).

103. See *id.*

104. 690 N.E.2d 1222 (Ind. Ct. App. 1998).

the will.<sup>105</sup> The will also gave the uncle the exclusive right to purchase the grandfather's interest in an automobile dealership from the estate. Later in 1977, the uncle, acting in his capacity as executor of the estate, petitioned the probate court for authority to sell the grandfather's share of the dealership to himself. He also filed the necessary consents to the transaction, signed by the grandfather's widow (grandmother to the contingent remainderman) and the grandfather's daughter (mother to the contingent remainderman).<sup>106</sup> That same year the probate court approved the sale, and the uncle purchased the grandfather's interest in the dealership from the estate. The grandfather's estate was not closed until 1986. In 1987, the probate court entered an order approving the final distribution of the grandfather's estate and discharging the uncle as executor.<sup>107</sup>

The testamentary trust established under the grandfather's will was not funded until the closing of the estate. Under the provisions of the testamentary trust, all income was to be paid to the contingent remainderman's grandmother for life and the trustee was given the power to invade the principal, if necessary, for the benefit of the grandmother.<sup>108</sup> Upon the grandmother's death, the assets remaining after a lump sum payment to another named remainder beneficiary were to be distributed in equal shares, one-half to the uncle and one-half to the uncle, as trustee, for the benefit of the contingent remainderman's mother. After the mother's death, any remaining trust property held for her benefit was to be distributed to her children, which turned out to be the contingent remainderman involved in this lawsuit. The mother predeceased the grandmother, who, in turn, died in 1993.<sup>109</sup>

In 1995, the contingent remainderman filed a complaint against her uncle, alleging he breached his fiduciary duty when he purchased her grandfather's one-half interest in an automobile dealership from the estate below the market price and when he borrowed money from the estate and trust below the market interest rate.<sup>110</sup> Despite receiving two checks from the trust in 1993, the contingent remainderman claimed that she was not aware of the trust or her interest therein until March 1994. The trial court dismissed her complaint, and the court of appeals affirmed the dismissal.<sup>111</sup>

The court of appeals first addressed the claim relating to the uncle's purchase of the grandfather's one-half interest in the automobile dealership. The court

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105. *See id.* at 1223.

106. *See id.*

107. *See id.* at 1224.

108. *See id.* The relevant trust provision stated:

The trustee shall distribute to or on behalf of my wife during her lifetime all income and so much of the principal of the Trust as shall be necessary to provide my said wife with expenses of health, education, support or mode of living enjoyed by our family at the time of my death.

*Id.* at 1223.

109. *See id.* at 1224.

110. *See id.*

111. *Id.* at 1225-26.

rejected the contingent remainderman's argument that her cause of action against the uncle for breach of his fiduciary duty did not accrue until she first learned of the trust.<sup>112</sup> Under Indiana law a decree in final settlement of a decedent's estate is a final judgment that binds all interested parties and cannot be collaterally attacked more than one year after the judgment is rendered.<sup>113</sup> The court held that the contingent remainderman was an interested party bound by the final settlement of the grandfather's estate.<sup>114</sup>

In making its determination, the court relied primarily on Indiana Code section 30-4-6-10, which provides that an adjudication of a person's interest represented by a personal representative is binding on "all interested persons, whether born or unborn, whether notified or not notified and whether represented or not" when those persons "have interests similar to the predominant interests of any person so notified or represented."<sup>115</sup> When the uncle petitioned the court for authority to sell the dealership, he was acting as the executor of the estate, not the trustee of the testamentary trust, and thus represented the grandmother and mother, who had the predominant interests.<sup>116</sup> Because the remainderman's interest derived from the grandmother's and mother's interests, the court held that her interest was similar to theirs.<sup>117</sup> Thus, she was bound to the probate adjudications approving the sale of the automobile dealership in 1977 and approving the distribution and closing of the estate in 1987.<sup>118</sup> Her complaint represented a collateral attack on these adjudications, and because she did not bring her claim within the one-year statute of limitations, the trial court properly dismissed this portion of her complaint.<sup>119</sup>

The court of appeals also affirmed dismissal of the remaining portion of the complaint because the contingent beneficiary lacked standing to sue the uncle for allegedly breaching his fiduciary duty when he borrowed money from the estate

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112. *Id.* at 1225. The contingent remainderman argued that her action was subject to a two-year statute of limitations as set forth in *Malachowski v. Bank One, Indianapolis*, 590 N.E.2d 559, 563 (Ind. 1992) (holding that the limitations period begins to run "when the plaintiff knew, or in the exercise of ordinary diligence could have discovered, that an injury had been sustained as a result of the tortious act of another").

113. *See id.* at 1224 (citing *Apple v. Kile*, 457 N.E.2d 254, 258 (Ind. Ct. App. 1983)).

114. *Id.* at 1225-26 (construing IND. CODE §§ 29-1-1-21, -17-13, -17-2(d), 30-4-6-10 (1998)).

115. *Regan*, 690 N.E.2d at 1225 (quoting IND. CODE § 30-4-6-10 (1998)).

116. *See id.*

117. *Id.*

118. *See id.* Indiana Code section 29-1-17-2(d) provides, in pertinent part:

The decree of final distribution shall be a conclusive determination of the persons who are the successors in interest to the estate of the decedent and of the extent and character of their interest therein, subject only to the right of appeal the right to reopen the decree. It shall operate as the final adjudication of the transfer of the right, title and interest of the decedent to the distributees therein designated.

IND. CODE § 29-1-17-2(d) (1998).

119. *See Regan*, 690 N.E.2d at 1225.

and trust at an interest rate far below the market rate.<sup>120</sup> Because the terms of the trust required the uncle to distribute all the trust income to the grandmother, any increased amount of interest income generated from the trust property would have been distributed to the grandmother.<sup>121</sup> As a result, the grandmother would have been the only person who could have been injured by the uncle's loans at a below-market interest rate.<sup>122</sup> Additionally, the trust principal would not have significantly changed over the years unless the uncle, exercising his discretion as trustee, would have distributed all, or a portion, of the principal to satisfy the grandmother's needs.<sup>123</sup> Therefore, the contingent remainderman was unable to show the requisite direct injury to her interest resulting from the uncle's conduct.<sup>124</sup>

#### IV. POWERS OF APPOINTMENT

The legislature amended Indiana Code section 30-5-6-4(b), adding the heir or legatee of the principal to the list of those who can request an accounting from an attorney-in-fact and providing that a requested accounting must be submitted in writing.<sup>125</sup> Subsections (c), (d), and (e) were added to section 30-5-6-4.<sup>126</sup>

Subsection (c) mandates that the attorney-in-fact must deliver the accounting to the person making the request within sixty days after receipt of the written request.<sup>127</sup> Subsection (d) provides that, unless the court orders additional accountings, the attorney-in-fact is not required to render more than one requested accounting under section 30-5-6-4 during a twelve-month period.<sup>128</sup> Finally, subsection (e) provides that the person requesting the accounting may bring an action in mandamus to compel the attorney-in-fact to render an accounting in the event the attorney-in-fact fails to deliver the requested accounting within the sixty-day period.<sup>129</sup> Furthermore, the person requesting the accounting may be awarded attorney's fees and court costs incurred in connection with bringing such an action, if the court finds that the attorney-in-

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120. *Id.* at 1226.

121. *See id.*

122. *See id.*

123. *See id.*

124. *See id.* at 1225-26 (citing *Schloss v. City of Indianapolis*, 553 N.E.2d 1204, 1206 (Ind. 1990) (holding that the judiciary can only resolve disputes in which the complainant has sustained, or is "in immediate danger of sustaining," a direct injury resulting from the conduct at issue); *Higgins v. Hale*, 476 N.E.2d 95, 101 (Ind. 1985)).

125. Act of March 12, 1998, Pub. L. No. 77-1998, § 1, 1998 Acts 1165 (codified as amended at IND. CODE § 30-5-6-4(a) (1998)).

126. Act of March 12, 1998, Pub. L. No. 77-1998, §1, 1998 Acts 1165 (codified as amended at IND. CODE §§ 30-5-6-4(c) to (e) (1998)).

127. IND. CODE § 30-5-6-4(c).

128. *Id.* § 30-5-6-4(d).

129. *Id.* § 30-5-6-4(e).

fact failed to render the account without just cause.<sup>130</sup>

## V. GUARDIANSHIPS

### A. *Disposition of Assets*

In *In re Guardianship of Hall*,<sup>131</sup> the majority of the court held that distribution of a portion of the guardianship estate to the incapacitated husband's financially dependent wife was not an abuse of discretion pursuant to the doctrine of necessities.<sup>132</sup> Shortly after their marriage but prior to the husband's incapacitation, the husband had insisted that his wife discontinue her employment, that he move into her home, and that he financially support her. Although the elderly husband, eighty-one years old at the time of the dispute, had only been married to the petitioning spouse for three years, the court found

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130. *See id.*

131. 694 N.E.2d 1168 (Ind. Ct. App. 1998).

132. *Id.* at 1170. While concurring that the trial court did not abuse its discretion in awarding the spouse monthly income from the ward's property, the dissenting judge did not agree with the majority's upholding of an additional \$10,000 distribution because, unlike the monthly income award, there was no evidence establishing the spouse's need for the additional \$10,000. *Id.* at 1171 (Hoffman, J., concurring in part and dissenting in part). Reasoning that the doctrine of necessities permits an award to cover only those needs which the debtor spouse is unable to personally satisfy, the dissenting judge would have remanded for a statement justifying the spouse's need for the \$10,000 or a vacation of the award. *Id.*

As a procedural note, the guardians argued on appeal that the trial court erred in granting the spouse's petition for a distribution of the assets based on the provisions of the Spousal Impoverishment Amendments of the Medicare Catastrophic Coverage Act (the "Act"), 42 U.S.C. § 1396 (1994 & Supp. II 1996). The *Hall* court noted that the petitioning spouse apparently conceded that the Act did not provide for a spouse's private right of action against the other spouse inasmuch as on appeal she did not claim that § 1396 gave her a private cause of action against the incapacitated spouse. *Hall*, 694 N.E.2d at 1169. Nevertheless, because neither party requested specific findings and conclusions and the trial court did not enter such findings and conclusions sua sponte, the *Hall* court concluded that "the trial court's judgment [was] a general one which [the court would] affirm on any theory supported by the evidence adduced at trial." *Id.* (citing *DeKalb Chiropractic Ctr., Inc. v. Bio-Testing Innovation, Inc.*, 678 N.E.2d 412, 414 (Ind. Ct. App. 1997)). The *Hall* court affirmed the trial court's judgment based on the "doctrine of necessities," which was supported by the evidence presented at trial. *Id.* at 1170.

Further, the *Hall* court noted that the petitioning spouse sought a distribution of the "marital" assets, and, if such were indeed the case, the court had no authority to distribute the marital assets in a guardianship proceeding. *Id.* Except in the case of a marital dissolution or in a more limited sense in a legal separation, no court action is required for either spouse to dispose of marital assets. *See id.* at 1169-70 (citing IND. CODE §§ 31-15-7-4, -4-8 (1998)). Regardless, the court established that the assets involved in this dispute belonged solely to the incapacitated spouse and were guardianship assets. *Id.* at 1170.

Indiana's doctrine of necessities<sup>133</sup> applicable because the petitioning spouse was unable to meet her expenses with her own funds and was "dependent upon her financially superior spouse."<sup>134</sup>

### *B. Statutory Amendment*

One statutory amendment enacted during the survey period is of interest in guardianships. Indiana Code section 29-3-3-1(a), providing for payment of a debt to a minor or delivery of a minor's property to any person having care or custody of the minor<sup>135</sup> without the appointment of a guardian, giving of bond or other court order, was amended to apply to debt or property not exceeding \$5000 in value.<sup>136</sup>

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133. *Id.* (citing *Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1 (Ind. 1993), noted in Andrew Z. Soshnick, *Indiana Family Law 1993: Much Ado About Some Things, 1993 Survey of Recent Developments in Indiana Law*, 27 IND. L. REV. 1093, 1116-17 (1994); Sally A. Sager, *Family Law Case Update*, 37 RES GESTAE 280, 283 (Dec. 1993)). The court in *Bartrom* gave an exhaustive history of the doctrine of necessities in Indiana and, synthesizing the law, held that the Indiana doctrine operated as follows:

Each spouse is primarily liable for his or her independent debts. . . . When, however, there is a shortfall between a dependent spouse's necessary expenses and separate funds, the law will impose limited secondary liability upon the financially superior spouse by means of the doctrine of necessities. We characterize the liability as "limited" because its outer boundaries are marked by the financially superior spouse's ability to pay at the time the debt was incurred. It is "secondary" in the sense that it exists only to the extent that the debtor spouse is unable to satisfy his or her own personal needs or obligations.

*Bartrom*, 618 N.E.2d at 8.

134. *Hall*, 694 N.E.2d at 1170.

135. In the guardianship code, a minor is a person less than eighteen years of age who is not emancipated. IND. CODE § 29-3-1-10 (1998).

136. Act of March 11, 1998, Pub. L. No. 42-1998, § 3, 1998 Acts 1038 (codified as amended at IND. CODE § 29-3-3-1(a) (1998)). The former statute only applied to debt or property not exceeding \$3500 in value.