affirmed a verdict for the plaintiff, concluding that the instructions were not contradictory and, taken as a whole, were not prejudicially misleading.[200] The decision seems somewhat suspect however, since in considering loss of love and affection the jury may have awarded damages for the sorrow and mental distress of the parents rather than the actual pecuniary loss resulting from the death of the child.

XIX. Trusts and Decedents' Estates

*Melvin C. Poland**

Although the development of case law in this area produced no "landmark" decisions during the current survey period, two cases involving claims against a decedent's estate and one involving the constitutionality of a family protection statute warrant review. This survey also contains a brief comment on new sections of the Indiana Code, which are primarily concerned with non-probate transfers. Creation of multi-party accounts under the new statutes is of particular significance in administration of estates.

A. *Case Development*

1. *Claims Against Decedents' Estates*

In *Richardson v. Richardson*,[1] the court of appeals held that funeral expenses are "unquestionably" a claim against a decedent's estate but are not to be considered part of the expenses of administration. The effect of this holding is to make claims for

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Indiana adheres to the position (probably a minority one) that the value of lost services and contributions from the child after he has reached majority may not be recovered. This limitation has been criticized since the parents have already incurred a large cost in raising a child who is approaching majority and yet the child will often not become a financial asset to his parents until he is near to or has reached majority. *See* C. McCormick, Law of Damages § 101 (1935).

[200]The court was willing to concede, however, that an instruction which more closely follows the language of *Hahn* is preferable.

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The author thanks Stephen J. Spoltman for his assistance in the preparation of this discussion.

[1]345 N.E.2d 251 (Ind. Ct. App. 1976). For another discussion of this case, see Townsend, *Secured Transactions and Creditors' Rights*, *supra* at 333.

funeral expenses subject to the two limitation periods set forth in Indiana Code section 29-1-14-1.[2] The decedent, a Florida resident, died intestate in October 1969 and administration of his estate was commenced in that state within a matter of days. The decedent's widow was named administratrix in the Florida probate proceeding. In April 1973, upon petition by the widow, ancillary administration was opened in Madison County, Indiana. On May 14, 1973, appellee, the decedent's son, filed a claim against the estate for funeral expenses he had paid.[3] The court allowed the claim and this appeal followed.

Appellee argued that funeral expenses are a part of the expenses of administration, and therefore are specifically excepted from the limitation periods of the statute. This argument was based on certain language in a case decided in 1909, *Hildebrand v. Kinney*,[4] to the effect that funeral expenses "stand in the same category as the expenses of administration."[5] The court noted that the *Hildebrand* holding was based on two statutes which are substantially different from the present non-claim statute. One of the statutes on which *Hildebrand* was grounded refers to debts and obligations arising before the death of the decedent.[6] Since funeral expenses are not debts of the decedent they are not "accounts against him or his estate" within the meaning of that statute. The second ground of the *Hildebrand* decision, a non-claim statute, was

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[2]The statute specifically excludes expenses of administration but not funeral expenses from the two limitation periods. It provides in pertinent part:

> (a) All claims against a decedent's estate, other than expenses of administration and claims of the United States, and of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent, unless filed with the court in which such estate is being administered within five [5] months after the date of the first published notice to creditors.
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> . . . .
>
> (d) All claims barrable under the provisions of subsection (a) hereof shall, in any event, be barred if administration of the estate is not commenced within one [1] year after the death of the decedent.

IND. CODE § 29-1-14-1 (Burns Supp. 1976).

[3]The court noted that "a similar claim had been filed against the Florida estate and was still pending," but that it appeared there would be insufficient assets in the Florida estate to satisfy the claim if it were allowed. 345 N.E.2d at 251 n.1.

[4]172 Ind. 447, 87 N.E. 832 (1909).

[5]*Id.* at 451, 87 N.E. at 834, *quoted in* 345 N.E.2d at 252-53.

[6]Ch. 38, § 37, 1881 Ind. Acts Spec. Sess. 240 [now IND. CODE § 34-1-2-1 (Burns 1973), a general statute of limitations on accounts and contracts, rather than a non-claim statute].

also restricted to "claims against the decedent."[7] In contrast, the present non-claim statute is all-inclusive, referring to claims "against decedent's estate."[8] Since it was a claim against the estate, and since it was not filed within one year of the death of the decedent, the claim for funeral expenses was barred by Indiana Code section 29-1-14-1.

While the judgment may be correct based on a proper construction of present statutes, one may question whether the result is a desirable one. Limitation statutes designed to promote expeditious administration should not foreclose recovery on a claim unless absolutely essential to that purpose. This is particularly pertinent in respect to estate expenses such as taxes, expenses of administration, funeral expenses, and family allowances.[9]

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[7]The governing statute at the time was ch. 45, § 86, 1881 Ind. Acts Spec. Sess. 443, *quoted in pertinent part in* 345 N.E.2d at 253.

[8]See note 2 *supra*. If the court were limited to the language of IND. CODE § 29-1-14-1 (Burns Supp. 1976) it could be argued that no language contained therein requires a court to hold that funeral expenses are not includable within the meaning of administration expenses. However, section 29-1-14-1 is not the only statute to be considered. The definition section separately lists expenses and assigns each a different priority in case of insufficient funds.

" 'Claims' include liabilities of the decedent which survive, whether arising in contract or otherwise, *funeral expenses*, the expense of a tombstone, *expenses of administration* and all estate and inheritance taxes." IND. CODE § 29-1-1-3 (Burns Supp. 1976) (emphasis added). The "classification of claims and allowances" statute also separately lists administration expenses and funeral expenses and assigns each a different priority in case of insufficient funds. *Id.* § 29-1-14-9 (Burns 1972), which reads in pertinent part:

> All claims and allowances shall be classified in one [1] of the following classes. If the applicable assets of the estate are insufficient to pay all claims and allowances in full, the personal representative shall make payment in the following order:
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> 1. Costs and expenses of administration.
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> 2. Reasonable funeral expenses: Provided, That in any estate in which the decedent was a recipient of public assistance under "The Welfare Act of 1936", the amount of funeral expenses having priority over any claim for the recovery of public assistance shall not exceed the limitations provided for under . . . "The Welfare Act of 1936," as amended or as superseded by replacement.
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> 3. Allowance made to the surviving spouse or dependent children of the decedent.

In a case involving public assistance, the court in Abbott v. Department of Public Welfare, 243 Ind. 596, 602, 189 N.E.2d 417, 420 (1963), stated, "Reasonable funeral expenses are of greater priority than any other items except costs of administration," thus recognizing funeral expenses and costs of administration as separate and distinct claims.

[9]It may be noted that "family allowances" are not listed as a claim within the definition statute. IND. CODE § 29-1-1-3 (Burns Supp. 1976).

Prior to the 1976 amendment the statute drew a distinction between "claims" and "allowances" and listed allowances made to widow and children as a third priority. However, as amended in 1976 the statute now provides in

In *White v. White*[10] the principal issue on appeal was whether the unpaid balance on a prior alimony judgment was a valid claim against the estate of the decedent. In 1971 the decedent had obtained a divorce from appellee. In addition to an award of certain real and personal property, the court decreed that plaintiff (decedent) should pay to the defendant as "alimony in lieu of property settlement the sum of One Hundred Thousand Dollars ($100,-000.00), as follows: Thirty-four Thousand Dollars ($34,000.00) cash, and the sum of Sixty-six Thousand Dollars ($66,000.00), payable at the rate of Six Thousand Dollars ($6,000.00), beginning January 15, 1972, and the sum of Six Thousand Dollars ($6,000.00) each January thereafter, to and including January 15, 1982."[11] On the death of her former husband the appellee filed a claim against his estate for the unpaid balance of that judgment.[12] The claim was disallowed by the appellant, decedent's personal representative, and the matter was brought before the Vanderburgh Superior Court. After a finding that the $48,000 had not been paid, the trial court held that appellee was entitled to judgment in the amount of $37,283.34 together with interest from date of judgment, and directed the personal representative to pay the award. Appellant presented two arguments to support her contention that the claim should not have been allowed. She first argued that the trial court in the divorce proceedings had exceeded its statutory authority in the award of alimony, contending that the award was in fact one of "periodic" payments not permitted by statute.[13] The court concluded that the alimony award in this instance was a "gross" alimony award payable in

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pertinent part: "All claims shall be classified in one [1] of the following classes . . . (3) Allowance made to the surviving spouse or dependent children of the decedent." IND. CODE § 29-1-14-9 (Burns Supp. 1976). Thus it is now arguable that family allowances are claims within the limitation statute, *id.* § 29-1-14-1, and unless a claim is filed within the limitation periods stated therein, the survivor's allowance under *id.* § 29-1-4-1 would be barred. Perhaps an exception should be made for all estate claims—funeral expenses, family allowances and expenses of administration—in regard to this section of the statute, providing for a loss of priority in the case of funeral expenses and family allowances if they are not filed within five months after the first notice to creditors and for a complete bar if no administration is opened within one year.

[10]338 N.E.2d 749 (Ind. Ct. App. 1975).

[11]*Id.* at 751.

[12]Appellee's claim alleged that of the $66,000 in delayed payments, $18,000 had been paid and $48,000 remained wholly due and owing. *Id.*

[13]This contention raises questions concerning proper construction of Indiana alimony statutes, including whether Indiana Code provisions preceding present law permitted a periodic payment alimony award, installment payment of a gross award, etc. These issues are discussed in Proffitt, *Domestic Relations*, *supra* at 224, and will not be covered here.

installments, and that existing statutes, properly construed, permitted such an award.[14] The second argument against allowance of the claim, assuming the alimony decree was proper, was based on the fact that the court had not made the future payments a lien upon the estate of the decedent, or otherwise required security, since payments were not due and payable at the time of the judgment debtor's death. Thus the judgment could not be a valid claim against his estate. In response to this contention, the court noted that while the divorce court could have made the future payments a lien on the real estate and chattels of the husband,[15] failure to so decree did not mean that the obligation created by that judgment was destroyed. The court held the only effect to be that the claimant was required to press her claim "as a general creditor of the estate rather than as a secured creditor."[16]

2. *Constitutionality of Family Protection Statute*

From the beginning Indiana probate legislation designed to provide a measure of protection for the family unit, including

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[14]In effect, the court found that the governing alimony award statutes permitted awards of gross alimony payable in installments as well as "periodic" payment awards. 338 N.E.2d at 753-56. The language of the court leaves unanswered the question of whether an award of "periodic payments" would give rise to a claim against the estate of a party against whom such an award was decreed.

[15]The statute expressly provided that the judgment would be "a lien upon the real estate and chattels real of the spouse liable therefor to the extent that it is payable immediately *but shall not be such a lien to the extent that it is payable in the future unless and to the extent such decree so provides expressly*." Ch. 120, § 3, 1949 Ind. Acts 310 (repealed 1973) (emphasis added).

[16]338 N.E.2d at 756. Another case involving a claim against a decedent's estate is State *ex rel.* Murray v. Heithecker, 333 N.E.2d 308 (Ind. Ct. App. 1975). One of the issues on appeal was whether the personal representative bcame a party to a trial court proceeding which concerned allowance of a claim against the estate. Plaintiff-appellant filed a claim against the estate in the circuit court, which was allowed on the same day. Thereafter, defendant-appellee, the personal representative, filed an answer to the claim with a request for trial by jury. The trial resulted in a judgment in favor of the estate and an appeal followed. After reviewing three code provisions, IND. CODE §§ 29-1-14-10, 29-1-14-12, 29-1-14-13 (Burns Supp. 1976), all of which clearly set forth the active role of the personal representative in approval, disallowance, and trials with respect to such claims, the court concluded that the personal representative becomes a party by operation of law upon the filing of a claim against the estate. This conclusion is supported by prior Indiana case law. Hull v. Burress, 120 Ind. App. 507, 93 N.E.2d 213, (1950); Bowman v. Citizens Nat'l Bank, 25 Ind. App. 38, 56 N.E. 39 (1900). In the *Hull* case, the court stated: "After the filing of the claim against the estate as required by law, the executrix became a party by operation of law, and the appellee's failing to name the executrix in her statement of claim did not invalidate the same." *Id.* at 513, 93 N.E.2d at 216.

statutes concerning the homestead, widow's allowance, and family allowance,[17] limited that protection to the "widow" or "widow and minor children." In 1953 the homestead right was extended to a surviving husband,[18] but different treatment accorded spouses based on sex was continued in the widow and family allowance provisions until the Probate Reform Act of 1975, which became effective January 1, 1976.[19] Although no vested rights would have been affected, the changes which granted rights to the widower as well as the widow were not made retroactive. Consequently, the estates of persons who died before January 1, 1976, are governed by the law existing at the date of the decedent's death. The result: a challenge to the constitutionality of former Indiana Code section 29-1-4-2, which provided for a "widow's" allowance, and to that portion of former Indiana Code section 29-1-4-3 which limited the family allowance to "widows."

In *In re Estate of Parson*[20] the surviving widower petitioned to recover the statutory widow's allowance and family allowance.[21] The trial court[22] denied the petition and the widower appealed, contending that the different treatment accorded persons similarly situated based on the sex of the parties violated the equal protection clause of the fourteenth amendment.[23] In affirming the trial court, the court of appeals relied primarily on the language of *Indiana High School Athletic Association v. Raike*[24] and *Kahn v. Shevin.*[25] The *Raike* court noted that classification based upon sex "has not yet been determined to be a 'suspect classification' by a majority of the United States Supreme Court," and held that

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[17]Ch. 27, § 28, 1852 Ind. Acts 248 (homestead); Pub. L. No. 403, § 1, 1971 Ind. Acts 1892 (widow's allowance); *id.* § 2 (family allowance) (all repealed 1975).

[18]Ch. 112, § 401, 1953 Ind. Acts 295. The amendment changed the prior statute in several particulars, one of which was to give a right to use of the dwelling to both spouses. The homestead allowance was abolished by the Probate Reform Act of 1975. See Pub. L. No. 288, 1975 Ind. Acts 1583; IND. CODE § 29-1-4-1 (Burns Supp. 1976); Poland, *Trusts and Decedents' Estates, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 371, 381 (1975).

[19]See IND. CODE §§ 29-1-4-1 to -3 (Burns Supp. 1976); Poland, *supra* note 18, at 381-82. The new allowance is made available to the "surviving spouse."

[20]344 N.E.2d 317 (Ind. Ct. App. 1976).

[21]Under the law existing at decedent's death, a widow would have been entitled to a widow's allowance in the amount of $3,000 and a family allowance not to exceed $50 per week for not more than one year. See statutes cited note 17 *supra*.

[22]Suit was brought in the Posey County Circuit Court.

[23]344 N.E.2d at 319. Parson argued that the classification bears no relation to the purpose of the statutes.

[24]329 N.E.2d 66 (Ind. Ct. App. 1975).

[25]416 U.S. 351 (1974).

when legislation is challenged on the basis of the equal protection clause and the classification is not suspect the standard of review to be applied is whether the classification is "reasonable" and bears a "*fair and substantial relation to the object of the legislation*, so that all persons similarly circumstanced shall be treated alike."[26]

In *Kahn v. Shevin*,[27] the United States Supreme Court considered essentially the same constitutional issue as considered by the *Parson* court: the constitutionality of a Florida statute which provided certain benefits to widows and not to widowers. Applying the "fair and substantial relation" test, the Court held the classification valid, since the object of the statute was reduction of "disparity between the economic capabilities of a man and a woman."[28] The Indiana Court of Appeals found the reasoning of *Kahn* persuasive and upheld the constitutional validity of the challenged statutes.

In further support of its decision, the court observed that to hold otherwise would result in "complete abrogation" of the widow's and family allowance, "a result not expressly desired by either party."[29] The court's logic is not inescapable. It would seem that extension of coverage of the former statutes to widowers as well as widows would be an alternative to holding that the discriminatory underinclusion is ground for declaring the statutes constitutionally invalid. Precedent for this construction can be found in *Moritz v. Commissioner of Internal Revenue*,[30] an action challenging the validity of a tax deduction statute which accorded different treatment based on sex classification. In *Moritz*, the court found the classification to be "invidious discrimination" and therefore

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[26]329 N.E.2d at 76, *quoting from* Reed v. Reed, 404 U.S. 71, 76 (1971) (emphasis in original). For a further discussion of the standards of judicial review applicable when classifications are challenged as being in violation of the equal protection clause, see Eastwood, *The Double Standard of Justice: Women's Rights Under the Constitution*, 5 VAL. L. REV. 280, 283 (1971); Stroud, *Sex Discrimination in High School Athletics*, 6 IND. L. REV. 661, 670 (1973); Torke, *Constitutional Law, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 94, 104 (1974).

[27]416 U.S. 351 (1974).

[28]344 N.E.2d at 320. The court of appeals quoted at length from the *Kahn* opinion regarding the disparity of economic opportunity available to men and women, justifying the conclusion that a classification based on sex bears a fair and substantial relation to the purpose which the statute seeks to accomplish. This justification is also discussed in Murray, *Economic and Educational Inequality Based on Sex: An Overview*, 5 VAL. L. REV. 237 (1971).

[29]344 N.E.2d at 320.

[30]469 F.2d 466 (10th Cir. 1972).

invalid.[31] However, the court went on to find, "Where a court is compelled to hold such a statutory discrimination invalid, it may consider whether to treat the provisions containing the discriminatory underinclusion as generally invalid, or whether to extend the coverage of the statute . . . ."[32] The court held that the benefit of the deduction should be extended to the taxpayer, stating, "Here, extending the coverage of the deduction provisions seems logical and proper, in view of their purpose and the broad separability clause in the act."[33] Extension of the former widow's and family allowances to widowers in those cases governed by pre-1976 law seems a logical and proper alternative to disposition of the matter in *Parson v. Grabert.*[34]

B. Legislative Developments

In the common practice in which the owner of money establishes a multi-party account, naming himself and some other person or persons as joint owners, questions arise concerning the intention of the creator. He may have intended to make a present gift of an interest in the account, thus raising a question of whether the prerequisites for a gift of present interest have been met. If he intended only an interest at death, the validity of such an account may be questioned on the ground of its testamentary nature. Perhaps he only intended to create a convenience account with no real interest in the non-owning parties. As a result of this confusion, these accounts have been a prolific source of litigation,[35]

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[31] *Id.* at 470.

[32] *Id.*

[33] *Id.* The separability clause referred to in the opinion is 26 U.S.C. § 7852(a) (1970), which provides: "If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby."

[34] Admittedly, the separability provision of the Indiana Probate Code does not lend itself to extending coverage as well as the U.S.C. provision. The Probate Code provides in pertinent part:

> If any provision of this [Probate] Code or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the [Probate] Code which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

IND. CODE § 29-1-1-2 (Burns 1972).

[35] Not only have the multi-party accounts been a source of much litigation, but they have also produced an abundance of literature on the subject. Two articles which point up some of the special problems such accounts create are: Kepner, *Five More Years of the Joint Bank Account Muddle*, 26 U. CHI. L. REV. 376 (1959); Wellman, *The Joint and Survivor Account in Michigan—Progress Through Confusion*, 63 MICH. L. REV. 629 (1965).

including several recent Indiana cases.[36] Though by no means speaking to all the questions raised concerning these accounts, adoption by the 1976 General Assembly[37] of Article VI, the non-probate transfers provisions of the Uniform Probate Code (U.P.C.),[38] should significantly reduce litigation in this area.

It is important to recognize that Article VI of the U.P.C., which is now Indiana statutory law,[39] concerns non-probate trans-

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[36]The most recent Indiana case in this area is Robison v. Fickle, 340 N.E.2d 824 (Ind. Ct. App. 1976) in which the decedent had issued certificates of deposit and common stock in her name and the names of her niece and nephew as joint tenants with right of survivorship and not as tenants in common. The decedent had also created a joint savings account in her own name and that of her niece and had signature cards prepared which indicated that a gift and delivery were intended. The executor of the decedent's estate filed a declaratory judgment action seeking to resolve conflicting ownership claims between the residuary legatees and the niece and nephew. The trial court entered judgment in favor of the niece and nephew, upholding their claim as surviving joint tenants.

The appellate court affirmed. It is not clear whether the decision is based on a theory of third party beneficiary or on the creation of a joint tenancy. Joint savings accounts do not lend themselves to a joint tenancy construction in the absence of an equal right in the parties to withdraw during the lifetime of the creator, but may be sustained on the basis of third party beneficiary construction, while the stocks may be sustained as joint tenancy.

The court emphasized decedent's use of words of joint tenancy with right of survivorship and the absence of evidence indicating a different intent or that decedent had been defrauded or coerced. Neither the fact that the decedent had retained control of the property and received the benefits during her lifetime nor absence of the common law requirement of unity of time were considered sufficient to defeat recognition of the valid creation of a joint tenancy.

In Seavey v. Fanning, 333 N.E.2d 80 (Ind. 1975), the decedent purchased certificates of deposit made payable to either the decedent or his daughter with right of survivorship and not as tenants in common. After the decedent's death the certificates of deposit were delivered to the daughter, who had been unaware of the transaction, and the administrators of decedent's estate brought suit to recover them. The Indiana Supreme Court held that the certificates of deposit were third party beneficiary contracts and the daughter was deemed a donee beneficiary.

A different result had been reached by the court of appeals in Zehr v. Daykin, 153 Ind. App. 537, 288 N.E.2d 174 (1972), a case in which decedent purchased certificates of deposit and orally requested the bank to prepare them in his own name and that of another party as joint tenants. No signature card, deposit agreement or other writing was ever signed by decedent or delivered to the other person. The court found that since there had been no delivery of the certificates they were not the subject of a valid inter vivos gift.

[37]IND. CODE §§ 32-4-1.5-1 to -15 (Burns Supp. 1976) (effective Jan. 1, 1977).

[38]UNIFORM PROBATE CODE §§ 6-101 to -113, 6-201 [hereinafter cited as U.P.C.].

[39]This is not the first attempt in Indiana to deal statutorily with survivor-

fers and has major significance apart from the effect of multi-party accounts on decedents' estates and the administration thereof.[40] The first thirteen sections deal with multi-party accounts in financial institutions.[41] Of these, six sections concern protection for the financial institution on payment out of such an account and the right to setoff.[42] These sections are beyond the scope of this survey, which deals only with those sections affecting decedents' estates and trusts.

To understand the new multi-party accounts provisions, it is essential to have a grasp of the terminology used therein. "Financial institutions" include, but are not limited to, "banks and trust companies, building and loan associations, industrial loan and investment companies, savings banks, and credit unions."[43] A "multiple-party account" is one which has two or more names on the account and includes the joint account, P.O.D. account, and trust account.[44] A "joint account" is one which is payable on request to one or more of two or more parties whether or not mention is

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ship rights in jointly held property. Prior to 1971, the Indiana Code provided that in the case of persons holding personal property as joint tenants, except as to obligations of the United States government, the survivor should have only the rights of a survivor of tenants in common, "unless otherwise expressed in the instrument." In 1971, amendments were enacted, in IND. CODE § 32-4-1-1, to provide that household goods acquired during coverture and in the possession of both husband and wife, promissory notes, bonds, certificates of deposit or other written or printed instruments evidencing an interest in tangible or intangible personal property in the name of both husband and wife, including certificates of title to automobiles, should upon the death of either become the sole property of the surviving spouse, unless a clear contrary intention was expressed in the written instrument.

In 1975, as part of the Probate Reform Act, the Probate Code Study Commission recommended adoption of Article VI of the U.P.C. in lieu of the aforementioned statute. The General Assembly failed to adopt Article VI, but proceeded to repeal IND. CODE § 32-4-1-1, presumably resulting in a return to the common law, which preferred joint tenancy with right of survivorship in the absence of a contrary intention expressed in the instrument.

[40]IND. CODE §§ 32-4-1.5-1 to -15 (Burns Supp. 1976) (effective Jan. 1, 1977).

[41]*Id.* §§ 32-4-1.5-1 to -13.

[42]*Id.* §§ 32-4-1.5-8 to -13. For a comment on these bank protection provisions see UNIFORM PROBATE CODE PRACTICE MANUAL §§ 15.8-15.11 (R. Wright ed. 1972) [hereinafter cited as U.P.C. PRACTICE MANUAL].

[43]IND. CODE § 32-4-1.5-1(3) (Burns Supp. 1976) (effective Jan. 1, 1977).

[44]A multiple party account does not include:

> [A]ccounts established for deposit of funds of a partnership, joint venture, or other association for business purposes, or accounts controlled by one [1] or more persons as the duly authorized agent or trustee for a corporation, unincorporated association, charitable or civic organization or a regular fiduciary or trust account where the relationship is established other than by deposit agreement.

Id. § 32-4-1.5-1(5).

made of a right of survivorship.[45] The "P.O.D. account" is one which is payable to a named beneficiary on death,[46] and the "trust account" covered by the statute is the one usually referred to as the Totten or tentative trust.[47]

As between the parties[48] named on the account, the code spells out the ownership of the beneficial interest during the lifetime and at the death of any party to the account. Lifetime interests in the account, though of major significance, do not bear directly on decedents' estates and administration thereof, in view of subsequent code provisions relative to survivorship rights. For our purposes, it is sufficient to note that the code provides, in the absence of clear and convincing evidence to the contrary, that the account belongs during his lifetime to the person who provided the money establishing the account, whether it is a joint account, a P.O.D. account, or a trust account.[49] Generally, however, most "joint" ac-

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[45] *Id.* § 32-4-1.5-1(4).

[46] *Id.* § 32-4-1.5-1(10).

[47] "Trust account" means an account in the name of one [1] or more parties as trustee for one [1] or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account; it is not essential that payment to the beneficiary be mentioned in the deposit agreement. A trust account does not include a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or a fiduciary account arising from a fiduciary relation such as attorney-client.

Id. § 32-4-1.5-1(14).

[48] The code defines "party" as

[A] person who, by the terms of the account has a present right, subject to request, to payment from a multiple-party account. A P.O.D. payee or beneficiary of a trust account is a party only after the account becomes payable to him by reason of his surviving the original payee or trustee. Unless the context otherwise requires, it includes a guardian, conservator, personal representative, or assignee, including an attaching creditor, of a party. It also includes a person identified as a trustee of an account for another whether or not a beneficiary is named, but it does not include any named beneficiary unless he has a present right of withdrawal.

Id. § 32-4-1.5-1(7).

[49] (a) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

(b) A P.O.D. account belongs to the original payee during his lifetime and not to the P.O.D. payee or payees; if two [2] or more parties are named as original payees, during their lifetimes rights as between them are governed by subsection (a) of this section.

(c) Unless a contrary intent is manifested by the terms of the account or the deposit agreement or there is other clear and convincing counts are made payable on the signature of any one of the parties; thus although the interest of the party is limited to the extent of contribution,[50] the financial institution is protected if it pays out to a party without any present interest.[51]

It is the non-contributor's lack of present beneficial interest in the account which suggests the testamentary character of providing a survivorship interest in such a party. Under the new code sections this issue appears to be settled, since the statutes specifically provide that in the case of a joint account the balance belongs to the surviving party or parties "as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created."[52] The survivorship right is also expressly provided for on the death of the original payee or payees in the case of the P.O.D. account,[53] and on the death of the trustee or survivor of two or more trustees in

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> evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his lifetime, and if two [2] or more parties are named as trustee on the account, during their lifetimes beneficial rights as between them are governed by subsection (a) of this section. If there is an irrevocable trust, the account belongs beneficially to the beneficiary.

Id. § 32-4-1.5-3.

[50]*Id.*; U.P.C. PRACTICE MANUAL, *supra* note 42, § 15.6.

[51]IND. CODE § 32-4-1.5-8 (Burns Supp. 1976) (effective Jan. 1, 1977). It is arguable that if a non-contributing party has been given a right of withdrawal, particularly when there has been delivery of the passbook to facilitate such a withdrawal, this is clear and convincing evidence of an intent to make a gift of a present interest within the meaning of *id.* § 32-4-1.5-3(a).

[52]
> Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. If there are two [2] or more surviving parties, their respective ownerships during lifetime shall be in proportion to their previous ownership interests under section 3 [32-4-1.5-3] augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before his death; and the right of survivorship continues between the surviving parties.

Id. § 32-4-1.5-4(a).

[53]
> If the account is a P.O.D. account, on death of the original payee or of the survivor of two [2] or more original payees, any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or the survivor of them if one [1] or more die before the original payee: if two [2] or more P.O.D. payees survive, there is no right of survivorship in event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

Id. § 32-4-1.5-4(b).

the case of a trust account.[54] Furthermore, the code not only provides for survivorship as indicated, but also provides that transfers occurring under these rights of survivorship are not to be considered testamentary.[55] The code also provides that such rights of survivorship "cannot be changed by will."[56] While the code protects the survivorship rights of the non-contributor as against decedent's heirs, devisees, and legatees, the multi-party account is subject to claims of creditors of the deceased party, including the statutory allowance to the surviving spouse and minor children, taxes, and expenses of administration.[57] However, the right to reach the multi-party account for such purposes is limited to the beneficial interest owned by the decedent just prior to his death. The account may be reached to the extent of decedent's contribution, but only after probate assets have been exhausted, and only to the extent other assets of decedent's estate are insufficient to satisfy such claims.[58] Furthermore, the creditor, surviving spouse, or one acting for a dependent child must make a written demand on the personal representative before the representative may proceed to satisfy claims and expenses out of the account.

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[54]If the account is a trust account, on death of the trustee or the survivor of two [2] or more trustees, any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear and convincing evidence of a contrary intent; if two [2] or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

Id. § 32-4-1.5-4(c).

[55]*Id.* § 32-4-1.5-6.

[56]*Id.* § 32-4-1.5-4(e). Insofar as the trust is concerned, this is contrary to the general rule and the Restatement of Trusts position on the matter. RESTATEMENT (SECOND) OF TRUSTS § 58 (1959).

[57]No multiple-party account is effective against an estate of a deceased party to transfer to a survivor sums needed to pay claims, taxes, and expenses of administration, including the statutory allowance to the surviving spouse or dependent children, if other assets of the estate are insufficient. A surviving party, P.O.D. payee, or beneficiary who receives payment from a multiple-party account after the death of a deceased party shall be liable to account to his personal representative for amounts the decedent owned beneficially immediately before his death to the extent necessary to discharge the claims and charges mentioned above remaining unpaid after application of the decedent's estate. No proceeding to assert this liability shall be commenced unless the personal representative has received a written demand by a surviving spouse, a creditor or one acting for a dependent child of the decedent, and no proceeding shall be commenced later than one [1] year following the death of the decedent.

IND. CODE § 32-4-1.5-7 (Burns Supp. 1976) (effective Jan. 1, 1977).

[58]*Id.*; U.P.C. PRACTICE MANUAL, *supra* note 42, § 15.5.

While the new non-probate transfer code provisions are primarily concerned with accounts in financial institutions, there are two provisions which concern the disposition of other kinds of personal property on the death of a party who has an interest therein. Indiana Code section 32-4-1.5-14 covers a variety of written instruments, including insurance policies, contracts of employment, bonds, mortgages, promissory notes, deposit agreements, pension plans, trust agreements, and conveyances or trusts which are deemed to be non-testamentary.[59] Thus a provision in a promissory note that on the death of the payee the note shall be paid to another is to be treated as non-testamentary; the balance is not an asset of the payee's estate, and the note is not required to be executed with formalities of a will. Similarly, a sale of land on contract with a provision that upon death of the vendor the unpaid balance is to be cancelled would be a valid non-testamentary gift.[60] It should be noted that this code provision also permits the decedent to designate either in the instrument or by separate writing the party to whom the money shall be paid or the property shall pass at death. This provision should provide greater flexibility in estate planning, while continuing to protect the interests preserved by formal requirements for testamentary disposition. Furthermore, the rights of creditors are in no way jeopardized.[61]

The last of the new sections provides that household goods acquired during coverture and in possession of both husband and wife become the property of a surviving spouse unless a clear

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[59] Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension plan, trust agreement, conveyance or any other written instrument effective as a contract, gift, conveyance or trust is deemed to be nontestamentary, and this title and title 29 [29-1-1-1—29-2-18-2] do not invalidate the instrument or any provision:

(1) That money or other benefits theretofore due to, controlled or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently;

(2) That any money due or to become due under the instrument shall cease to be payable in the event of the death of the promisee or the promisor before payment of demand; or

(3) That any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

IND. CODE § 32-4-1.5-14(a) (Burns Supp. 1976) (effective Jan. 1, 1977).

[60] U.P.C. PRACTICE MANUAL, *supra* note 42, § 15.12.

[61] IND. CODE § 32-4-1.5-14(b) (Burns Supp. 1976) (effective Jan. 1, 1977) provides: "Nothing in this section limits the rights of creditors under other laws of this state."

contrary intention is expressed in a written instrument.[62] This code provision is, unfortunately, much more restrictive in coverage than its predecessor,[63] which included promissory notes, bonds, certificates of deposit, or any other written or printed instrument evidencing an interest in tangible or intangible personal property, including certificates of titles to automobiles. While some of these items are covered in the first fourteen sections, certainly not all of them are. Though there may be omissions, it must be conceded the new code provisions concerning the covered nonprobate transfers do provide answers to many of the issues raised by such transfers. Whether other items should be covered is a matter for future legislative determination.

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[62]Personal property, other than an account, which is owned by two [2] or more persons is owned by them as tenants in common unless expressed otherwise in an instrument or written agreement. However, household goods acquired during coverture and in possession of both husband and wife shall upon the death of either become the sole property of the surviving spouse unless a clear contrary intention is expressed in a written instrument; provided, however, that this shall not create a presumption that the exercise of the right of the surviving spouse to the immediate ownership or possession in enjoyment of such property shall be deemed a transfer taxable under the provisions of [Indiana inheritance and estate tax statutes].

Id. § 32-4-1.5-15.

[63](a) Except as to obligations of the United States government, held jointly or on which there appears the name of surviving coowner, or as to certain personal property, tangible or intangible, acquired by a husband and wife during coverture, as provided for in subsection (c) of this section, the survivors of persons holding personal property in joint tenancy shall have the same rights only as the survivor of tenants in common, unless otherwise expressed in the instrument.

(b) The survivor of persons holding obligations of the United States government either jointly or as coowners shall become the sole owners of such obligations upon death of the joint owner and/or coowner.

(c) Household goods acquired during coverture and in the possession of both husband and wife and any promissory note, bond, certificate of title to a motor vehicle, certificate of deposit or any other written or printed instrument evidencing an interest in tangible or intangible personal property in the name of both husband and wife, shall upon the death of either become the sole property of the surviving spouse unless a clear contrary intention is expressed in a written instrument; Provided, however, that this shall not create a presumption that the exercise of the right of the surviving spouse to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of the [Indiana inheritance and estate tax statutes].

Id. § 32-4-1-1 (Burns 1973) (repealed 1975).