

Comment

Aunt Minnie's Portrait

BY JOHN S. GRIMES, A MALE CHAUVINIST*

We never speak
of Aunt Minnie
Her picture is
turned to the wall.¹

After the angels took dear Mama, that scheming woman got her claws into poor Papa. Now that Papa is gone that stepmother of mine wants all of what little of Papa's property she didn't make him spend on her while he was alive.

She even wants Aunt Minnie's portrait. She calls it a cute little antique. After Aunt Minnie ran off with that travelling man, Grandma turned her picture to the wall. But I always liked Aunt Minnie. Besides, it has a real good frame.

When Papa went to the hospital the last time I fixed her little red wagon real good. Jake, that's my husband, read a book about how to keep from paying money to lawyers. So he wrote up a will and I got Papa to sign it leaving to me what little of his property she hadn't spent. And I had him transfer his checking account at the bank to him and me jointly. His savings pass book he changed to him, as trustee for little Alfred, that's my boy.

He had some buildings and loan shares that read P.O.D. to my stepmother. I fixed the will so that they went to me. The will also gives me his life insurance money that she had him make her the beneficiary. He had some savings and loan money that she made him put in joint names, but that goes to me under the will.

Most of the furniture came from Grandma and is mine by rights. She made him buy some modern stuff, though.

His "E" bonds and his Water Company stock she had him buy in joint names. He even put the house and the farm in joint names. I changed all that in the will.

*Characterization provided by the author, who is Professor of Jurisprudence, Indiana University School of Law—Indianapolis. J.D., Indiana University, 1931.

¹Remainder of couplet expurgated as not suitable for a serious law review. The turning of the portrait to the wall was not limited to the errant female. When General Thomas stayed with the Union and refused to follow Lee into the Confederate ranks, his two maiden sisters in Richmond, Virginia, literally turned his portrait to the wall.

The will gives me Papa's company pension rights that she had him make her the beneficiary.

She claims some of the money that went to buy the farm came from her first husband. That guy never left her nothing but some empty bottles.

When Papa sold the farm on contract two years ago she didn't sign. Papa has been putting the payments into the savings account that goes to me under the will.

Now she has hired some cheap shyster who says it all goes to her. That lawyer says smart alect law professors, and you know what I think of them, says the legislature gives the money to her. Some stupid legislature! That's why I never vote.

There is some money she won't get her hands on. You can bet as soon as Papa died, I went to the bank and got that P.O.D. money. She won't get that.

She's not getting much on the house because Papa had a big mortgage on it before he transferred it to joint names.

She claims she worked and built the lake cottage on Papa's lot. She never worked nobody but poor Papa.

Jake, that's my husband, says he will swear on a stack of Bibles that Papa told him before Papa married that woman, if he did, which I don't believe, they wrote an agreement that she would not claim anything of Papa's property when he died. But you can bet she has hidden that.

She even won't give me Mama's wedding ring. That, she says, Papa let her have when they were married. I don't think they ever were.

Crafty Jake has opened up Pandora's box of surviving spouses' rights and of cotenancies in Indiana. Both have travelled thorn-strewn paths since 1816. Unfortunately, the courts and legislatures have gone far to justify the daughter's opinion of them.

Papa's property is considered in five estates: (a) Federal estate and gift taxes, (b) Indiana inheritance (now death) taxes, (c) property subject to creditors' claims, (d) the assets belonging to the bereaved spouse, and (e) the residue, which will go to the anxious heirs and legatees.

The death grip of the federal revenue² fastens itself on all of Papa's property, including life insurance held in his name at the time of his death or transferred to another within three years prior to death, to the extent that the other person cannot establish a contribution thereto. This, sadly, applies even to property held in two or more names at time of death. Such inter vivos transfers, whether

²See, e.g., I.R.C. §§ 2035, 2040, 2042, 2515.

or not in joint names, are also subject to gift taxes, except in the case of tenancy by entireties realty. While the community property differential has been eased by the federal marital deduction bounty, this does not alter the common law concept that the wife is still a mere luxury as regards her husband's earnings.

If, by chance, Papa's net estate is in excess of the credit provided by 26 U.S.C. § 2052, and subject to Indiana estate tax, the advantage of the cruel witch becomes a problem in the new mathematics. Although the transfer of the house into an entireties was not subject to gift tax under 26 U.S.C. §§ 2501, 2515, and 2523, this statement is not applicable to the personalty, tangible or intangible. And, of course, if the gifts to the second spouse were made within the time of 26 U.S.C. § 2035(b), they are subject to federal estate tax; if they were made earlier, they are subject to gift taxes as well as to the Indiana apportionment statute and death taxes.³

The Indiana General Assembly has not been as tax avaricious as the federal government. The house, which is entireties property, escapes Indiana death taxes, of course.⁴ Whether the proceeds from the sale of the entireties property is taxable cannot be determined under the facts given to us by stepdaughter, Cinderella. So much of the estate as consists of "non-probate" assets is, likewise, exempt under Indiana Code chapter 32-4-1.5.⁵ So if the proceeds of entireties property are transferred to a joint bank account they are not subject to Indiana death taxes, but if invested in other types of intangibles, these proceeds may still be taxable on death.⁶ If the entireties property were sold on contract, the remaining unpaid portion of the purchase price would still be entireties.⁷

The claims of the cruel stepmother, the fourth estate, have been the subject of a changing pattern throughout the centuries of the common law, and Jake's approach forces us to a review of the entire historical pattern of marital rights.

Certain anthropologists maintain that when genus homo first came down from his arboreal habitat, the early species homo robustus died out because the thickening of the thighs resulting from use of the leg muscles prevented the female robustus from giving easy birth to a normal-headed child. Homo sapiens survived because the head of the child at birth was small, subject to future growth. This in turn limited the activities of the baby and required the

³IND. CODE §§ 29-2-12-1 to -7, 6-4.1-2-1 to -7, 6-4.1-5-1, 6-4.1-11-1 to -6 (Burns Supp. 1976).

⁴See *id.* § 6-4.1-3-7.

⁵*Id.* §§ 32-4-1.5-1 to -15 provide that transfers of such assets are not testamentary.

⁶See, *e.g.*, IND. CODE §§ 6-4.1-1-5, 6-4.1-2-2(3) (Burns Supp. 1976).

⁷*Id.* § 32-4-3-1 (Burns 1973).

attention of the mother for long years until the child reached self-sufficient age. From this it followed that the male was required to protect the female during immaturity of the child for a much greater period of time than is normal among other animals. Hence, the female, of necessity, degenerated into a status inferior to the male. In the medieval period this, of course, was augmented by the military characteristics required in feudalism and consequently the status of the male was maintained at a level above that of the female.

At this point we find a peculiar contrast.

Tacitus speaks of the contempt the "noble Roman" held for the Germans with whom he was in touch, because the latter held females in high esteem. We presume that he was speaking of the Suebi, who, when they migrated to Spain, contaminated the ultimately dominant Visigoth with this heresy. Hence, rooted in Spanish law is the concept of the double yoke: the husband and wife pulling as a team and each contributing an equal amount to the family estate. This infection crept into Mexico and thence into the Mexican-dominated territories of what is now the United States, and is responsible for the false doctrine known as "community property."

In 1943, along with a number of other states attracted by the income tax break given community property estates, Indiana almost adopted the community property concept. It was saved from this fate only by the courageous action of its Attorney General, who declared the concept unconstitutional. Of course, common law states which fell into this trap subsequently repealed their statutes when the marital deduction became a part of federal income tax law.

Archaeological evidence would indicate that the Mesopotamian, and perhaps other early cultures, solved the problem of the widow by burying her alive at her husband's funeral ceremonies. Or, perhaps, the stepdaughter would prefer the Hindu custom, surviving until the 1850's, of burning the stepmother on her husband's funeral pyre.

Neither the civil nor the common law took these approaches.

The wife in England lost all personal property on her marriage except as might be saved to her by the scheme of the Use and, after the sixteenth century, by the Trust. But, by gradual development from the Anglo-Saxon right to "set by the fire" for the balance of her days, the widow acquired the right to require the heirs to set off to her a one-third interest in all her husband's realty held by him in a fee simple absolute at any time during his lifetime for her own life with reversion to his heirs. This was not in recognition of her efforts as a housewife, but rather for the benefit of the rate payers, to keep her off the streets.

Beginning in 1852, Indiana yielded to the demands of the women suffragettes and eased off from the common law precepts. The 1852 legislature, recognizing the perils arising from the avaricious

childless stepmother, provided her only a one-third life estate in her husband's property. But in 1881 the supreme court reversed several earlier decisions and gave her the interest in fee, with the children by the first marriage reduced to her forced heirs. The 1889 legislature attempted to restore her life estate in the deceased husband's realty, but the act was unconstitutional.

In 1901 another enactment restored the original one-third for life as an inchoate interest, and in 1947 this interest was extended to the second childless husband. Statutes were expanded by judicial decision to give the wife a fee interest instead of a life estate if the husband's property was divested by judicial sale. If, however, the relic remarried, her interest died during such coverture and became either a defeasible fee upon her death with a shifting use to children by the first marriage or such children became her forced heirs.

These acts, except as applied to the second childless spouse, were all repealed by enactment of the Probate Code in 1954. But if, as purported by the Probate Code Commission, the Code merely reenacted the old law, we have the question of whether the pre-1954 statutes were revived and the possibility that, regardless of any election under the will, the stepmother has a one-third interest in fee in the farm, dating back to possibly the date of the contract and, consequently, to a one-third interest in all monies paid thereunder. This is further complicated by the question of whether the 1971 repeal of Indiana Code section 29-1-2-3⁸ operated retroactively, so that if the interests of the widow did not vest immediately upon the execution of the contract of sale, the husband could sell the property and so defeat the one-third given to the wife under section 29-1-2-1. If sections 29-1-2-1 to -3 did, as suggested, merely give an inchoate interest to the wife, then, of course, such could be erased by the repeal of section 29-1-2-3. If, however, the interests of the wife had vested on the date of the execution of the contract, repeal of section 29-1-2-1 could not take away a property right.

At all events, despite Indiana legislative and judicial history which reveals a slow erosion of the concept that "papa is all," it is clear that Indiana contemplates that whenever property is taken in the name of the husband and wife a gift has resulted to the wife unless she contributed to the acquisition by her separate income or estate. Thus, Jake's program, both as to the will and to the inter vivos transfers, encounters much legal difficulty, since Indiana's legislature and courts have largely thwarted his valiant efforts. Despite

⁸Former Indiana Code sections 29-1-2-1, -1-2-2 and -1-2-3 authorized the wife's interest, which could not be defeated unless the husband, complying with section 29-1-2-3, obtained a written waiver.

shameful retreats, Indiana has not wholly departed from the common law position that the married woman performs in her household duties no useful task. She is entitled only to such food, clothing, and shelter as her lord and master sees fit to give her. Her efforts as a homemaker do not contribute to any augmentation of the family fortune; she is deemed a contributor only to the extent that she adds a separate property or earnings from outside work to the family income. Fearlessly, it is suggested that the repeal of section 29-1-2-1 reduced the other spouse to the status of a mere designated heir, protected only by Indiana Code section 29-1-2-2 as to creditors⁹ and section 29-1-3-2¹⁰ as to wills, and that this applies retroactively.

If Papa did "get wise" to his wife and transferred property during his lifetime to his darling daughter, *Crawfordsville Trust Co. v. Ramsey*¹¹ will also rear its head. It is apparent that, with or without the daughter's able assistance, the commingling of the joint affairs of the husband and wife presents innumerable complications.

Indiana Code section 29-1-4-1,¹² effective January 1, 1976, gives the spouse, if surviving, and if no spouse any dependent children, a "claim" against the decedent's estate in a lump sum of \$8,500. It is paid primarily out of personalty, with any deficit coming out of and being a lien upon realty. The Uniform Probate Code spoke of "children," but Indiana Code section 29-1-4-1 changed this to "dependent children." (Whether this refers to those under 18, those over 18 but incompetent, and those over 18 but financially dependent, such as students, must be later determined by the courts.)

⁹IND. CODE § 29-1-2-2 (Burns 1972) protects the widow's interest against the demands of creditors as to one-third of realty valued to \$10,000, one-fourth of real property valued to \$20,000, and one-fifth of such property valued in excess of \$20,000.

¹⁰This statute provides that if litigation is pending which may affect the surviving spouse's share, an election is not barred until 30 days after a final determination of the issues.

¹¹55 Ind. App. 40, 100 N.E. 1049 (1913). This case established, *inter alia*, that conveyances of real estate made by the husband during coverture in order to defeat the wife's rights are, as to her, fraudulent and void.

¹²IND. CODE § 29-1-4-1 (Burns Supp. 1976) provides:

The surviving spouse of a decedent who was domiciled in Indiana at his death is entitled from the estate to an allowance of eight thousand five hundred dollars [\$8,500] in personal property. If there is no surviving spouse, the dependent children of the decedent are entitled, per stirpes, to the same allowance to be divided equally among them. If there is less than eight thousand five hundred dollars [\$8,500] in personal property in the estate, the spouse or dependent children, 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 and eight thousand five hundred dollars [\$8,500]. The amount of that difference is a lien on the real estate. An allowance under this section is not chargeable against the distributive shares of either the surviving spouse or the children.

This allowance is not chargeable against the distributive share of the spouse or children. Presumably children share equally, if at all. Whether as a claim it must be filed under section 29-1-14-1 is not clear.¹³ It is believed, however, that the answer is in the negative. Although the allowance is payable primarily out of personalty, it is believed that any resulting abatement would be apportioned by contribution from realty in the case of specific bequests and devises.

Another unsolved problem is whether, if the spouse is "unworthy" she would take under Indiana Code section 29-1-4-1, as she did under the former statute.¹⁴ Again, the answer is believed to be in the negative.

The 1976 General Assembly did not amend Indiana Code section 29-1-3-7, referring to "homestead, widows or family allowance."¹⁵ It is presumed, however, that the present provisions of section 29-1-4-1 are a substitute. It will be noted that Indiana Code section 29-1-3-7, considered with section 29-1-3-1,¹⁶ may have changed the former law,

¹³IND. CODE § 29-1-14-1(a) (Burns Supp. 1976) provides:

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.

¹⁴See *In re Mertes' Estate*, 181 Ind. 478, 104 N.E. 753 (1914), holding that a wife convicted of killing her husband cannot be denied her statutory allowance.

¹⁵IND. CODE § 29-1-3-7 (Burns 1972) provides:

When a surviving spouse makes no election to take against the will, he shall receive the benefit of all provisions in his favor in the will, if any, and shall share as heir, in accordance with the provisions of . . . [sections 29-1-2-1 and 29-1-2-2] in any estate undisposed of by the will. The surviving spouse shall not be entitled to take any share against the will by virtue of the fact that the testator made no provisions for him therein, except as he shall elect pursuant to this [Probate] Code. By taking under the will or consenting thereto, he shall not thereby waive the rights of homestead, or to a widow's or family allowance, unless it clearly appears from the will that the provision therein made for him was intended to be in lieu of such rights.

¹⁶IND CODE § 29-1-3-1 (Burns 1972) provides:

When a married person dies testate as to any part of his estate, the surviving spouse shall have a right of election to take against the will under the limitations and conditions hereinafter stated.

(a) The surviving spouse, upon election to take against the will, shall be entitled to one-third [1/3] of the net personal and real estate of the testator; provided, that if the surviving spouse be a second or other subsequent spouse who did not at any time have children by the decedent and the decedent left surviving him a child or children or the descendants of a child or children by a previous spouse, such surviving second or subsequent

which did not require the spouse to formally elect against the will if the instrument left her nothing. Now, apparently, election is required in all events, even if the will purports to devise entireties property. This places stepmother in a dilemma. Under section 29-1-3-7 she may take the survivor's allowance provided by section 29-1-4-1 if she does not elect against the will. But if she does elect against the will, section 29-1-3-1(c), which is not yet interpreted, may deprive her of that interest. The matter would be of particular importance if the estate is insolvent.

It is submitted that since section 29-1-4-1 probably makes the spouse's allowance a "claim,"¹⁷ section 29-1-3-1(c) is no longer effective, and stepmother would not be forced to an election to take assets in which she had a property right prior to Papa's death.

Let us now speak, somewhat timidly, of Aunt Minnie's portrait and Mama's wedding ring.

Effective January 1, 1977, under section 32-4-1.5-15, household goods acquired during coverture and in the possession of both spouses "become the sole property" of the surviving spouse unless a clear contrary intention is expressed in a written instrument. Does this create a present inter vivos interest in household goods though one spouse provides all the funds? Or, does the contribution factor

childless spouse shall upon such election take one-third [1/3] of the net personal estate of the testator plus a life estate in one-third [1/3] of the lands of the testator.

In determining the net estate of a deceased spouse for the purpose of computing the amount due the surviving spouse electing to take against the will, the court shall consider only such property as would have passed under the laws of descent and distribution.

(b) When the value of the property given the surviving spouse under the will is less than the amount he would receive by electing to take against the will, such surviving spouse may elect to retain any or all specific bequests or devises given him in the will at their fair market value as of the time of such election and receive the balance due him in cash or property.

(c) In electing to take against the will, the surviving spouse is deemed to renounce all rights and interest of every kind and character in the personal and real property of the deceased spouse, and to accept such elected award in lieu thereof.

(d) When a surviving spouse elects to take against the will, he shall be deemed to take by descent, as a modified [modified] share, such part of the net estate as does not come to him by the terms of the will. Where by virtue of an election pursuant to this article [29-1-3-1—29-1-3-8] it is determined that such spouse has renounced his rights in any devise, either in trust or otherwise, the will shall be construed with respect to the property so devised to him as if such surviving spouse had predeceased the testator.

¹⁷While section 29-1-4-1, which authorizes payment of the allowance, does not expressly call the obligation a "claim," section 29-1-14-9, which lists the priority of "claims," includes the survivor's allowance.

enter in, as it does in joint tenancies? Does this create a tenancy by the entireties with consequent immunity from creditors inter vivos or post-mortem? The last clause of section 15 exonerates household goods from state death taxes, but not federal gift or estate taxes. We have not yet learned whether this section can be defeated by the will of the contributing spouse. In this case, while the portrait might be considered "household goods," it was not acquired during coverture; therefore section 32-4-1.5-15 does not apply.

After January 1, 1976, a judge must spend the midnight oil determining whether Indiana Code section 29-1-4-1 makes the \$8,500 allowance a charge on individual items of personalty, or whether he has the authority to shift a part of the lien on to realty. It is feared that in this hypothetical, unless the personalty exceeds the \$8,500, Cinderella will not triumph. Stepmother could include the portrait and the frame, together with the ring, in her \$8,500 allowance.

But would she be wise in so doing? She is entitled to the full ownership of personalty under Indiana Code section 29-1-4-1, but she has only a life estate in one-third of realty under section 29-1-2-1. If the value of the personalty is less than \$8,500 (and how do we now determine this, since former Indiana Code section 29-1-12-4, the appraisal statute, was repealed effective January 1, 1976?) how does this affect her real estate? If the deficit is a lien, presumably we are faced with a forced sale of the realty. Then out of the proceeds of the sale we take costs of sale and costs of administration. Then appears the funeral director. Does he stand behind stepmother under Indiana Code sections 29-1-4-1 and 29-1-14-9?¹⁸ There is a further enigma: are the "children" who are in the third priority intended to be the alternative beneficiaries under section 29-1-4-1 or does "children" refer to all heirs under section 29-1-2-1? Presumably the former. Does all this mean that in distributing the proceeds of the sale, stepmother gets the deficit after the debts and the funeral director are satisfied, and then the net is distributed by giving her the value of her life estate in one-third according to the mortality tables? Or, does it mean that stepmother's one-third is of the gross realty before the deduction?

We may dismiss the efforts of the testator to affect stepmother's taking by way of a third party beneficiary in the life insurance or the pension plan. Each can be affected only by inter vivos action of the deceased as an insured or a retired employee. "That woman's" interest in the E bonds could have been altered only by mutual

¹⁸IND. CODE § 29-1-14-9 (Burns Supp. 1976) classifies claims and directs the personal representative to pay them in the following order: administration, funeral expenses, allowance to the surviving spouse or dependent children, federal taxes, medical expenses of the last sickness, state taxes, other claims.

consent of the spouses. A testamentary instrument can affect only assets of the testator and cannot diminish rights of others, such as third party beneficiaries in life insurance policies or the property rights of survivors in cotenancies.

The P.O.D. situation is not so clear. No case has been found which has determined that a Pay on Death provision creates a property right *inter vivos* in the payee and such a right is not contemplated by Indiana Code chapter 32-4-1.5. It is also uncertain whether, excepting federal securities, P.O.D. language prior to January 1, 1976 was testamentary and hence void as an invalid bequest.

Jake's concern about personal property held in dual names includes three situations: (1) federal securities, (2) other intangibles, and (3) "non-probate assets" under the 1975 Act.

Treasury regulations provide that in the case of federal securities the surviving cotenant or P.O.D. payee takes the whole. The courts have disagreed about whether this regulation operates as a rule of property, or if it is merely a federal rule of accounting convenience. It is believed that in the case of federal E and H bonds the federal regulations prevail as to the right of possession, as well as to the passage of title on death, as a valid non-testamentary instrument. As to other federal securities, however, the regulations relate only to passing on death. *Inter vivos* it is believed that the securities are not held by the entireties, so that ownership can be severed *inter vivos* by action of either party or involuntarily.

The federal regulations on passage at death do not tell us whether the property is a joint tenancy, a tenancy in common with right of survivorship, or life estates with cross remainders. It is doubted that a tenancy by the entireties arises in the case of husband and wife. It is believed that the protection against creditors given by the concept of a tenancy by the entireties is of such unique character that a tenancy in entireties cannot be created in personalty other than the fruits or proceeds or realty so held, despite all attempts of the parties.

The 1976 General Assembly adopted Indiana Code chapter 32-4-1.5, the "Non-Probate Transfer" concept of the Uniform Probate Code, after rejecting it in 1975. Effective January 1, 1977, this statute is part of the periodic adoption of parts of the U.P.C., undertaken on the principle that it is less painful to amputate a limb an inch at a time.

The "Non-Probate Transfer" is an attempt to be helpful in three cloudy areas: the Totten Trust, the P.O.D., and the cotenancy in certain intangible property, by clarifying and to some extent unifying relationships between parties holding together interests in accounts.

The "remedial" provisions are unfortunately limited to accounts in Indiana "financial institutions." They do not deal with securities

issued by these institutions except "certificates of deposit" and "share accounts." Presumably, this phraseology applies to all short term paper, whatever its particular designation, but not to long term debentures or equity stocks, and there is a gray area of mutual funds which is not believed to be embraced.

One of the major difficulties of uniform laws is that they are not uniform. The draftsmen are inclined to use phraseology to which they are accustomed in their own jurisdiction, under the principle that "any fool knows that." However, language incorporated in the uniform code may be adopted in a state which has placed judicial construction on the language entirely different from that of the state of the draftsmen. Here, unless the official comments of the framers of the uniform code have pointed out the proper interpretation, the lawyer in the adopting state is placed in the dilemma of following the principle that where a statute is adopted from another state the decisions under the law of that state are available for construction but are not binding, as against the rule that the local law is not considered changed by statute unless the phraseology to that effect is clear.

This is happening in the U.P.C. Since legislatures adopting the Code in whole or in part are, as Indiana is doing, making substantial changes in the "uniform" phraseology, the greatest care must be taken in interpreting Indiana law by application of the U.P.C. Commission Comments or decisions from other states which have purportedly adopted the Code.

When the Indiana legislature adopted Indiana Code chapter 32-4-1.5, the repeal of chapter 32-4-1 was ignored. Hence, we had in Indiana no applicable statute as to cotenancies in personalty between January 1, 1976 and January 1, 1977 as to the above-mentioned three joint tenancies. We now have seven applicable periods governing personalty: (a) joint tenancy as to rights arising before 1852, the effective date of Indiana Code chapter 32-4-1 prior to amendment, (b) Indiana Code chapter 32-4-1 after 1852 and before the 1949 amendment, (c) Indiana Code chapter 32-4-1, as amended, between 1949 and 1971, (d) between 1971 and 1976, (e) common law joint tenancy between January 1, 1976 and January 1, 1977, (f) Indiana Code section 32-4-1.5-15¹⁹ after January 1, 1977 (except

¹⁹IND. CODE § 32-4-1.5-15 (Burns Supp. 1976) provides:

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;

possibly as to building and loan or savings and loan certificates and trusteeships), and (g) the period after the amendment to Indiana Code section 34-4-1.5-15 adopted by the 1977 General Assembly.

No mention of federal securities is made in Indiana Code section 32-4-1.5-15. While this is the subject of litigation, it is believed the Indiana courts will pay tribute to the federal regulations despite the sweeping phraseology of the statute.

The Indiana Supreme Court's recognition of the Totten Trust, the bank account with little Jimmy as beneficiary, and its interpretation of section 32-4-1.5-1(5)²⁰ brought to Indiana a maze of problems from other jurisdictions which had recognized such a trust. Until the adoption of Indiana Code chapter 32-4-1.5, it is believed that P.O.D. provisions had no effect in Indiana except to protect a bank paying out under such a provision or in the case of copartnership and, possibly, federal bonds. Likewise, "and," "or" and "and/or" had only such limited operation. In all other situations, unless there were clear words of survivorship, two persons as cotenants held as tenants in common as to personalty, except between January 1, 1976 and January 1, 1977, when they held as joint tenants unless otherwise provided. Under the amendment of 1977, a cotenancy between husband and wife is not clearly defined.

Indiana Code section 32-4-1.5-3 indicates that a joint account belongs during the lifetime of all parties to the parties in proportion

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 Code sections 6-4-1-1 to 6-4-1-40].

The 1977 General Assembly amended the section to read as follows:

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, 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.

²⁰IND. CODE § 32-4-1.5-1(5) (Burns Supp. 1976) defines a multiple party account as:

"Multiple-party account" is any of the following types of account:

- (i) a joint account;
- (ii) a P.O.D. account; or
- (iii) a trust account.

It does not include accounts 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;

to their contributions thereto, unless there is clear and convincing evidence of different intent. A P.O.D. account belongs to the original payee during his lifetime and not the payee and payees. If more than one person is named as original payee during their lifetimes the rights between them are governed by that of a joint account.

The trust account belongs beneficially to the trustee during his lifetime, or if there are two or more parties as trustee, rights between them are governed by their net contribution. However, if there is an irrevocable trust the account belongs beneficially to the named beneficiary.

Upon death of a party to a joint account,²¹ the amount remaining on deposit belongs to the surviving party as against the estate of the decedent, absent clear and convincing evidence of a different intention at the time the account was created. If there is more than one surviving party, then ownership during their lifetimes is in proportion to their previous ownerships augmented by an equal share for each survivor of any interest that the decedent had in the account at the time of his death, but the right of survivorship continues between the survivors.

If it is a P.O.D. account, when the original payee or the survivor of two or more original payees dies, any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of one of them if one dies before the primary payee of the P.O.D. account. But, if there are two or more payees surviving, there is no right of survivorship as among the payees thereafter, unless the terms of the deposit specifically provide for survivorship.

If the account is a trust account, on the death of the trustee or the survivor of two or more trustees, any sums remaining on deposit belong to the person or persons named as beneficiaries, if they are surviving, or to the survivor if there is more than one and one dies before the trustee, again unless there is clear and convincing evidence to the contrary. If two or more beneficiaries survive, there is no right of survivorship on the death of one of them thereafter unless the terms of the account so require.

The death of any party to a multi-party account, other than specified above, has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of his estate, unless, possibly, the parties are husband and wife under the 1977 amendment to Indiana Code section 32-4-1.5-15.

Survivorship provisions are determined by the form of the account as of the death of a party.²² After an account has once been opened it can be altered by written order given by a party to the

²¹IND. CODE § 32-4-1.5-4 (Burns Supp. 1976).

²²*Id.* § 32-4-1.5-5.

financial institution to change the form of the account or to stop for failure of payments under the terms of the account, but it must be signed by the party, received by the financial institution during his lifetime, and not countermanded by other written order of the same party during his lifetime. This should bar wills bequeathing P.O.D. or Totten Trusts to other than the payee or beneficiary. Valid gifts *causa mortis*, however, would be effective.

Transfers resulting from the survivorship provisions are effective by reason of the accounts themselves and the statute, and are not considered testamentary or subject to the provisions of the Indiana Code.

There is, however, a major exception to this rule under section 32-4-1.5-7, because a multi-party account cannot transfer to the survivor sums needed to pay claims, taxes, and expenses of administration, including the statutory allowance to the surviving spouse or dependent children, if the other assets of the estate are insufficient.

If the beneficiary or surviving party receives payment from a multi-party account after the death of the deceased, he must account to the personal representative of the deceased for amounts that the decedent owned beneficially immediately prior to his death to the extent necessary to discharge the above stated claims, if unpaid, after the whole of the decedent's estate has been applied thereto, excepting the \$8,500 allowance. Proceedings to assert this liability are commenced only upon demand of a surviving spouse, a creditor, or one acting for a dependent child of the decedent, and must be commenced not later than one year following the death of the decedent. Sums so recovered are administered as part of the decedent's estate. This does not effect the right of a financial institution to make payment according to the terms of the multi-party account or make the institution liable to the estate of the deceased party, unless before payment the institution has been served with process in a proceeding by the personal representative. Any sums in a joint account may be paid by the financial institution on request to any party, regardless of whether the other party is incapacitated or deceased at the time the payment is made. But payment cannot be made to the personal representatives or heirs of a deceased party, unless proof of death is presented to the financial institution showing that the decedent was the last surviving party or unless there is no right of survivorship.²³

The statute does not answer all questions about the nature of a joint account. It is presumed that even though the statute contemplates that even in the case of insolvency of the deceased the property becomes part of his estate, this does not affect the ability of the

²³*Id.* § 32-4-1.5-9.

depositors by contract to create a true joint tenancy with survivorship or tenancy in common with contractual right of survivorship in the deposit which does not become part of probate assets for any purpose. It is likewise presumed that the statutory right does not create, as between husband and wife, a tenancy by the entireties in personal property.

If the account is a P.O.D., then the original party to the account may demand payment of the financial institution at any time during his life.²⁴ Payments may be made to the personal representatives or heirs of a deceased original payee, if proof of death is presented to the financial institution showing that he was a survivor of all other persons named in the account either as an original payee or the P.O.D. payee. Totten Trust accounts may be paid on request to any trustee.²⁵ If the financial institution has not received written notice that the beneficiary has a vested interest, not dependent upon his surviving a trustee, the payment may be made to the personal representative or heirs of a deceased trustee upon proper proof of death presented at the institution showing that the decedent was the last survivor of all the persons named in the account either as trustee or beneficiary. Payments may be made to the beneficiary upon showing of proof of death and that the beneficiary or beneficiaries survived all persons as trustees.

The financial institution is protected on making payment regardless of whether payment is consistent with the beneficial ownership of the account if between the parties, P.O.D. payees, or beneficiaries of their successors.²⁶ It is not protected if after it has received written notice from any party able to request present payment to the effect that withdrawals should not be permitted. If such notice is given, and not withdrawn, the successor of any deceased party must concur in any demand for withdrawal if the financial institution is to be protected. No other notice or other information shown to be available to the financial institution affects its right to this protection, but the protection has no bearing on the rights of the parties in disputes between themselves or their successors regarding the beneficial ownership of funds in the multi-party accounts. Without regard to qualification of other statutory rights of setoff or liens, and subject to any contractual provision, the financial institution has the right of setoff against the account in which the party had immediately before his death a present right of withdrawal.²⁷ The amount of the account subject to setoff is that portion in which the debtor is or was

²⁴*Id.* § 32-4-1.5-10.

²⁵*Id.* § 32-4-1.5-11.

²⁶*Id.* § 32-4-1.5-12.

²⁷*Id.* § 32-4-1.5-13.

immediately before his death beneficially entitled and, in absence of proof of net contributions, to an equal share, with all parties having a right of withdrawal. The Act of 1976 also provided that provisions in insurance policies, contracts of employment, bonds, mortgages, promissory notes, deposit agreements, pension plans, trust agreements, conveyances, or other written instrument effective as a contract, gift, conveyance, or trust are deemed to be valid and non-testamentary.²⁸

The effect is that in particular instances there may be provisions for pay on death or survivorship which would be binding in respect to heirs of an intestate decedent or beneficiaries of a will, but would still leave the property subject to claims of creditors of the estate of the deceased. The right of the owner to alter the provision would depend on whether the third party beneficiary provision is irrevocable.

Stepdaughter is in trouble, however, over the P.O.D., despite her possession of the P.O.D. proceeds. Neither Indiana Code section 32-4-1.5-12 nor section 28-1-20-1 as amended in 1976 operates to transfer title. These are merely provisions to protect the financial institution which, in good faith and prior to notice, acts on the strength of phraseology accompanying the deposit. Although the Indiana legislature has long shown tender consideration for the dilemma of a banking institution when accounts are held in joint names, regardless of the phraseology of the account, it does not appear that the financial institution may close its eyes to facts which should, in equity, require it to withhold payments to the cotenant demanding the right to withdraw.

Daughter may smile if the second marriage was not by "bell, book and candle."²⁹ Indiana, having abolished common law marriage, has created a gray area of what steps are necessary to create a legal marriage. This state has not recognized the Illinois *tertium quid* of a "consensual marriage,"³⁰ somewhere between a common law and a legal marriage; nor has this God-fearin' state honored the mistress' rights to the extent some other jurisdictions have.

But wait. If the common law arrangement was entered into before 1958, is a marriage contract entered into before that date void?

²⁸*Id.* § 32-4-1.5-14.

²⁹In view of Indiana Code section 31-1-6-1 (Burns 1973), abolishing a common law marriage effected in Indiana after January 1, 1958, the question arises as to whether the person must have been married according to strict legal procedures or whether a more compassionate view can be taken, pointing to substantial compliance with requirements for a valid marriage.

³⁰Illinois has adopted a unique view, finding an intermediate status of a "consensual marriage" somewhere between a legally solemnized and a common law marriage. ILL. REV. STAT. ch. 89, § 4 (1971).

Or if the contract was entered into in a state which still approves common law marriages, would it be recognized in Indiana? An affirmative answer is suggested to the first question. A negative appears proper in the second, at least as to succession rights.

Another little unpolished gem in Indiana is the question of an attempted creation of an entirety in persons not husband and wife. Do the parties so "living in sin" take as joint tenants or tenants in common? It is believed that in view of Indiana Code section 32-1-2-7,³¹ Indiana will follow what appears to be the majority rule, that there is no survivorship in such cases. Household goods and other personal property held in co-ownership by those cohabiting without benefit of clergy are held in tenancy in common unless there is a written agreement or instrument to the contrary. Presumably, such instrument or written agreement could create a joint tenancy, a tenancy in common with right of survivorship, or life estates with cross remainders.

Stepdaughter must also fear the filing of a claim for services by her father's "concubine" if cruel stepmother was not wed to Papa.

In the event a valid marriage did take place, Jake's suspicions as to the premarital agreement, if correct, may be sufficient to defang his stepmother-in-law.

Indiana has long permitted a female by an antenuptial agreement or a post-nuptial jointure to agree with her prospective or existing husband as to the extent she will take from her spouse's estate. The 1852 Act, dating from the wise days of male superiority, placed more restrictions around the agreement of the wife, intended or present, than that of the male. The Indiana Probate Code twice contemplates this situation, in sections 29-1-2-13 and 29-1-3-6, and Indiana courts have shown a tender regard for antenuptial contracts, if proven. A slightly different view has been taken of post-marital jointures, since the courts formerly took cognizance of the now passe concept of the husband's dominance of the marriage. Existing decisions must be reviewed in light of the rapidity with which this concept is vanishing.

Jake's testimony faces three obstacles: parol agreements, overreaching, and lost instrument. Both Indiana Code sections 29-1-2-13 and 29-1-3-6 specify that the agreement must be in writing and signed. Whether this is a fiat or whether, as in the case of the Statute of Frauds, the doctrine of partial compliance may be applicable, remains to be determined.

"Overreaching," particularly in the case of the mistreated wife, has been a recognized pattern of avoiding marital agreements. Three

³¹IND. CODE § 32-1-2-7 (Burns 1973) states that conveyances of land shall be presumed to create estates in common and not joint tenancies.

factors have entered into this situation: good faith, full disclosure, and consideration. The latter two are specified in section 29-1-3-6; "good faith" is to be accepted.

If Jake cannot produce the alleged agreement, he is faced with a "lost or suppressed" instrument problem. Here arises a question of whether the proof is governed by contract or probate law. Does a marriage settlement agreement stand in the rank of a lost will? If so, stepmother's position would be that tracing the agreement into the deceased's possession would create an inference of revocation. Hopefully, the agreement was drawn by an attorney, but if the counsel represented the deceased and the helpless wife was without representation, would there not then be "overreaching"?

Daughter will be further mortified to find that stepmother can force the estate to pay off the mortgage on the house even if stepmother was personally liable on the debt secured. Even though Indiana Code section 29-1-17-9³² changed the common law and the former Indiana rule as respects exoneration of specifically devised encumbered property, the Code did not affect the rule of exoneration of property held by the entireties on the death of one tenant.

Daughter will also be unhappy to learn that household goods passing to stepmother and personal property held in both names avoid the Indiana inheritance (now death) taxes. But justice reasserts itself, because they are subject to federal estate tax and stepmother, under Indiana Code section 29-2-12-1 must bear the amount by which their addition to the taxable estate is augmented by their value.³³

Conclusion: The legal profession will not suffer as long as the law of marital rights remains in its present state.

³²IND. CODE § 29-1-17-9 (Burns 1972) provides:

When any real or personal property subject to a mortgage, pledge or other lien is specifically devised, the devisee shall take such property so devised subject to such mortgage unless the will provides expressly or by necessary implication that such mortgage be otherwise paid. If a mortgagee receives payment on a claim based upon the obligation secured by such mortgage, the devise which was subject to such mortgage shall be charged with the reimbursement to the estate of the amount of such payment for the benefit of the distributees entitled thereto.

³³Stepdaughter's lawyer can be grateful that Papa's death occurred before the 1977 amendment to Indiana Code chapter 32-4-1.5. This amendment, creating rights of survivorship in intangibles and automobiles held by husband and wife, does not determine whether the tenancy is merely a tenancy in common with statutory survivorship or a new tenancy by the entireties. The amendment is also unclear about how certificates of deposit are to be treated.