

XVII. Trusts and Decedents' Estates

The law of estates generally develops only by slow accretion, and hence the developments in any particular year are often unspectacular. This survey period was no exception. Although several novel cases arose, few significant changes occurred in the law.¹

¹The courts decided several cases of minor importance during the survey period. *In re Estate of Garwood*, 382 N.E.2d 1020 (Ind. Ct. App. 1978) involved an appeal from an interlocutory order for the sale of real property in the course of probate administration. The majority refused to consider the appeal because the record had not been timely filed. *Id.* at 1022. In a concurring opinion, however, Judge Lybrook discussed the propriety of classifying the appeal as interlocutory. Although he agreed with the majority's decision to dismiss the appeal, he disagreed with the classification of the appeal as interlocutory. In particular, he expressed concern that the majority had failed to consider the provisions of IND. R. TR. P. 54(B) before dismissing the appeal. *Id.* at 1022 (Lybrook, J., concurring).

In *Gaunt v. Peoples Trust Bank*, 379 N.E.2d 495 (Ind. Ct. App. 1978), the executor of the estate of Clara Gaunt filed a complaint alleging that the bank had been negligent in allowing the decedent to open a joint account with right of survivorship without ascertaining her wishes or informing her that at her death the proceeds would pass to her son rather than to her estate. Actually, the son, not the decedent, took the steps necessary to create a joint account: He got a card from the bank permitting his name to be added to the decedent's account, obtained the decedent's signature, and returned the card to the bank. The court of appeals affirmed judgment in favor of the bank, holding that the relationship between a bank and its customers does not, in most circumstances, impose such a duty of inquiry. *Id.* at 496. The court did not specify the circumstances under which such a duty might arise. *Id.*

In *In re Estate of Swank*, 375 N.E.2d 238 (Ind. Ct. App. 1978), the court of appeals dealt with an attempt by the testatrix's daughter either to have the testatrix's son removed as personal representative or to have a special administrator appointed to examine a questioned real estate transaction between the testatrix and the son. The trial court had dismissed the removal petition. In response to the daughter's first contention that the son's motion to dismiss her petition for removal was untimely for failure to comply with the 20-day responsive pleading requirement of IND. R. TR. P. 6(C), the court of appeals held that the petition was not a complaint instituting a new action. *Id.* at 240. Instead, "the filing . . . [was] merely ancillary to the probate of [the] will and the administration of [the] estate." *Id.* Hence, the personal representative was not obligated to file a responsive pleading pursuant to IND. R. TR. P. 6(C). *Id.* The court held that the personal representative's motion to dismiss operated as a written objection to the daughter's removal petition. *Id.* As such, timeliness of the motion was governed by § 29-1-1-10 of the Probate Code, and could be filed at any time prior to the day of the hearing. 375 N.E.2d at 240 (citing IND. CODE § 29-1-1-10 (1971) (current version at *id.* § 29-1-1-10 (1976))).

The court next held that the trial court's refusal to appoint a special administrator was not improper in light of the daughter's failure to allege "fraud, unlawful influence or incompetency" in connection with the transaction 10 years earlier between the testatrix and the personal representative. 375 N.E.2d at 241. In addition, the court did not find error in the lower court's refusal to remove the personal representative in light of the daughter's failure to allege any statutory grounds therefor under § 29-1-10-6 of the Probate Code. *Id.* (citing IND. CODE § 29-1-10-6 (1971) (current version at *id.* § 29-1-10-6 (1976))).

A. Judicial Developments

1. *Assignment of Expectancy.*—The most significant change in the law during the survey period occurred in the area of assignment of expectancy. In *Kuhn v. Kuhn*,² the court of appeals revised the Indiana version of the doctrine of assignment of expectancy by deleting from it the requirement that the ancestor from whom the expectancy is derived know and approve of the assignment. Although the change brought Indiana's version into line with the version accepted in most jurisdictions,³ the case creates several problems because the assignment at issue was actually of a vested interest rather than of an expectancy.

In *Kuhn*, the adult children of Charles Kuhn brought an action in equity to enforce a written assignment of a two-thirds expectant interest in their grandmother's estate that had been executed by Charles during a divorce in 1964.⁴ Apparently, the children sought to procure an interest in real property then held by Charles and his second wife as tenants by the entirety.⁵ Charles had acquired a vested remainder interest⁶ in the real property as a result of a devise from his grandfather in 1954. The interest was subject to the

²385 N.E.2d 1196 (Ind. Ct. App. 1979).

³RESTATEMENT OF PROPERTY § 316 (1940), provides:

A person who is an expectant distributee has the power, for a fair consideration, by an otherwise effective transaction inter vivos

- (a) to relinquish his interest or any part thereof;
- (b) to bind his interest, or any part thereof, so that any specified interest, otherwise derivable by him as a realization upon such interest, shall belong, when derived, to his obligee.

Most states uphold the assignability of an expectant interest provided fair consideration is furnished. *E.g.*, *Bridge v. Kedon*, 163 Cal. 493, 126 P. 149 (1912); *Thornton v. Louch*, 297 Ill. 204, 130 N.E. 467 (1921); *Betts v. Harding*, 133 Iowa 7, 109 N.W. 1074 (1906); *In re Stephens*, 64 N.Y.S. 990 (Sur. Ct. 1900); *Hale v. Hollon*, 90 Tex. 427, 39 S.W. 287 (1897); *Hoyt v. Hoyt*, 61 Vt. 413, 18 A. 313 (1889).

After the decision of the Indiana Court of Appeals in *Kuhn*, only Michigan continues to require the knowledge and consent of the ancestor from whom the expectancy is to be derived. *See Stevens v. Stevens*, 181 Mich. 438, 148 N.W. 225 (1914). However, in Kentucky, any attempted assignment of an expectancy is void. *Engle v. Waller*, 282 Ky. 732, 140 S.W.2d 402 (1940). *See generally Evans, Certain Evasive and Protective Devises Affecting Succession to Decedents' Estates*, 32 MICH. L. REV. 478, 488-90 (1934); Note, *Descent and Distribution—The Right of a Prospective Heir to Release or Assign an Expectancy*, 35 N.C.L. REV. 127 (1956).

⁴By the instrument, Charles purported to assign "[a]ll right, title and interest to two-thirds (2/3) of his entire expectancy in the estate of the said Myrl Kuhn, which the assignor now holds or is entitled to upon the death of the said Myrl Kuhn." 385 N.E.2d at 1198.

⁵Although the court did not specifically state what property the children sought to procure, the real property was the only property discussed by the court.

⁶*Pointer v. Lucas*, 131 Ind. App. 10, 169 N.E.2d 196 (1960), is the most recent Indiana case defining a vested remainder. The court stated:

life estate interest of Charles' mother, Myrl Kuhn, and to Charles' attaining the age of thirty.⁷

Although the court's language is unclear, the children apparently contended that the real property was subject to the written assignment of expectancy because of an oral misrepresentation made by Charles to his first wife, Dorothy, at the time of execution of the assignment. Charles had stated that he held a mere expectant interest in the real property.⁸

The Indiana Court of Appeals, following the Bartholomew Circuit Court,⁹ held that the issue was one of assignment of expectancy.¹⁰ The court first disposed of the leading Indiana decisions on assignment of expectancy, *McClure v. Raben*,¹¹ by stating

"A remainder is to be considered vested when a presently identifiable person in being would have a right to the immediate possession on determination of the intermediate particular estate, although the remainder may terminate prior to the ending of the precedent estates, or may be divested by the exercise of an outstanding power to dispose of the fee. An estate in remainder is not rendered contingent by postponing the time of possession or enjoyment; the uncertainty which distinguishes a contingent remainder is the uncertainty of the right, not the uncertainty of enjoying possession."

Id. at 27, 169 N.E.2d at 204-05 (quoting 26 C.J.S. *Deeds* § 114, at 933-34 (1956)). See *Heilman v. Heilman*, 129 Ind. 59, 28 N.E. 310 (1891); *Summers v. Old-First Nat'l Bank & Trust Co.*, 105 Ind. App. 9, 13 N.E.2d 320 (1938).

If the interest in *Kuhn* had been subject solely to the life estate of the mother, a vested remainder would have resulted. The additional requirement, postponing enjoyment until the remainderman reached the age of 30, affected only the time of possession and not the certainty of the right, and thus the interest was still a vested remainder.

⁷385 N.E.2d at 1197.

⁸*Id.* at 1199.

⁹The Bartholomew Circuit Court had held that the case involved an assignment of expectancy and was thus governed by *McClure v. Raben*, 125 Ind. 139, 25 N.E. 179 (1890), *rehearing granted*, 133 Ind. 507, 33 N.E. 275 (1892). In accordance with *McClure*, the trial court held that the assignment was invalid for failure to obtain the consent of the ancestor from whom the expectancy was to be derived. The trial court also found the assignment invalid for lack of full and adequate consideration, because the assignment was executed by Charles as a gift to the children, and not as part of the divorce settlement. 385 N.E.2d at 1198.

¹⁰385 N.E.2d at 1199-1200.

¹¹125 Ind. 139, 25 N.E. 179 (1890), *rehearing granted*, 133 Ind. 507, 33 N.E. 275 (1892). The *McClure* decisions required that the assignment "appear to be a perfectly fair transaction, . . . that actual, full and fair market value [be] paid for the property, and . . . that [the assignment be] made known to the ancestor . . . from whom the estate is expected . . . and his consent obtained . . ." 125 Ind. at 146-47, 25 N.E. at 181-82. The court noted that the requirements were designed to prevent the perpetration of fraud upon the ancestor and stated that a strong presumption of fraud exists with respect to such assignments. *Id.* Other Indiana cases which have followed *McClure v. Raben* are: *Hight v. Carr*, 185 Ind. 39, 112 N.E. 881 (1916), and *Farmers' Loan & Trust Co. v. Wood*, 78 Ind. App. 147, 134 N.E. 899 (1922).

The *Kuhn* court held that in the case of family settlements, inadequate considera-

that they had been "limited to their facts, if not impliedly overruled, by *McAdams v. Bailey*."¹² The court then eliminated two elements from *McClure*'s definition of an assignment of expectancy—the knowledge and consent of the ancestor from whom the expectancy is to be derived. The court reasoned that the application of a standard of unconscionable conduct to the transaction would provide sufficient protection against fraud, and thus that the standards developed ninety years earlier to protect the ancestor from fraud were no longer needed.¹³

Apparently implementing what it perceived to be the *McAdams* version of the doctrine of assignment of expectancy, the court applied the doctrine of equitable assignment.¹⁴ The court observed that the conveyance of an expectancy and the subsequent "reliance or other consideration of the assignee" results in an executory contract which is enforceable in equity.¹⁵ The court examined the facts and held that Charles had a vested interest in the property, that he misrepresented to the children that the interest was an expectancy, that the children's guardian relied upon the assignment, and that Charles renounced the transfer to his gain. An equitable assignment was thus created.¹⁶

In analysis, the court unnecessarily overruled the *McClure* doctrine of assignment of expectancy, because no assignment of expectancy arose in this case. Instead, the issue before the court was whether grounds existed to take an oral assignment of a vested remainder out of the Statute of Frauds.

Charles held a vested remainder interest in the property, and thus his interest was not an expectant one.¹⁷ The rule is clear that a vested remainder interest can be assigned.¹⁸ Once having identified

tion—instead of the full and adequate consideration established by *McClure*—would be acceptable. 385 N.E.2d at 1199.

¹²385 N.E.2d at 1199 (citing *McAdams v. Bailey*, 169 Ind. 518, 82 N.E. 1057 (1907)).

¹³385 N.E.2d at 1200.

¹⁴*Id.* at 1199. The doctrine of equitable assignment has been used infrequently in Indiana, and thus it is not well developed. Courts state only that an equitable title can be enforced in equity, and that legal title is not necessary. *Crim v. Fleming*, 101 Ind. 154 (1885); *Board of Comm'rs v. Jameson*, 86 Ind. 154 (1882); *Burson v. Blair*, 12 Ind. 371 (1859). See generally Note, *Creation of an Equitable Assignment*, 21 ST. JOHN'S L. REV. 202 (1947).

¹⁵385 N.E.2d at 1199.

¹⁶*Id.*

¹⁷*Id.*

¹⁸The RESTATEMENT OF PROPERTY § 162(1) (1936) provides: "(1) The owner of any remainder or executory interest in land has the power, by an otherwise effective conveyance inter vivos, to transfer his interest or any part thereof." At common law, a vested remainder could be transferred because a right *in esse* existed. However, the common law refused to permit transfer of a contingent remainder. Courts of equity employed a nonrestrictive rule with respect to assignment of contingent remainder in-

the nature of Charles' interest, the next object of the court's inquiry should have been whether an assignment had taken place. The court stated that an assignment occurred,¹⁹ but was unclear as to how. Apparently, the court reasoned that the written assignment implicitly conveyed the interest because Charles had orally represented the interest as an expectancy subject to the assignment. Nevertheless, any actual assignment of the interest depended upon Charles' oral statement, and thus the assignment violated the Statute of Frauds.²⁰ The court stated that there was detrimental reliance on the part of the guardian of the children,²¹ but did not specifically mention what reliance brought the assignment out of the Statute of Frauds.²² Whether an equitable assignment was created is thus unclear.

Furthermore, the court improperly cited *McAdams* to overrule *McClure*. *McAdams* dealt with the alienability of a vested remainder²³ and limited the holding of *McClure* to the area of assignment of expectancy; the court refused to extend *McClure*'s holding

terests: "Equity, however, has . . . given effect to assignment of every kind of future and contingent interests and possibilities in real and personal property, when made upon a valuable consideration." 1 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 168 (5th ed. S. Symons 1941).

Although no Indiana case has explicitly held that vested remainders are transferable, Indiana courts have upheld assignments of vested remainders in cases in which the issue of their validity has arisen. *Oldham v. Noble*, 117 Ind. App. 68, 66 N.E.2d 614 (1946); *Dibble v. Lloyd*, 73 Ind. App. 320, 127 N.E. 453 (1920).

¹⁹"The legal signification of the word 'assign' is to transfer; to set over to another." *Reagan v. Dugan*, 112 Ind. App. 479, 489, 41 N.E.2d 841, 845 (1942).

²⁰IND. CODE § 32-2-1-1 (1976), which states in relevant part: "No action shall be brought in any of the following cases: . . . Fourth. Upon any contract for the sale of lands . . ." *Id.*

²¹385 N.E.2d at 1199.

²²The recent case of *Lawshe v. Glen Park Lumber Co.*, 375 N.E.2d 275 (Ind. Ct. App. 1978), offers a good discussion of the grounds for imposition of the doctrine of equitable estoppel. The doctrine is applicable if there exists detrimental reliance sufficient to bring a parol contract out of the Statute of Frauds.

The court stated:

The basis for the doctrine of equitable estoppel is fraud, either actual or constructive, on the part of the person estopped.

. . . .

The mere nonperformance of an oral promise which falls within the scope of the Statute does not constitute such a fraud as would warrant the intervention of a court of equity. But, if one party is induced by another, on the faith of an oral promise, to place himself in a worse position than he would have been in had no promise been made, and if the party making the promise derives a benefit as a result of the promise, a constructive fraud exists which is subject to the trial court's equity jurisdiction.

Id. at 278 (citations omitted).

²³In *McAdams*, a vested remainder was created by operation of a statute which prohibited a remarrying widow from transferring real estate acquired from her first husband to anyone but the offspring of the first marriage. 169 Ind. at 527, 82 N.E. at 1061.

to the area of alienability of a future interest.²⁴ The effect of *Kuhn* is to leave an area of law that had been clear for nearly ninety years in a state of confusion.

2. *Ademption by Extinction*.—In *Weaver v. Schultz*,²⁵ the court of appeals held that a bequest of the proceeds of a life insurance policy to the testator's daughter was adeemed when the testator, subsequent to the will's execution, changed the beneficiary of the policy to his wife and depleted the funds of the policy by borrowing against them.²⁶ The court reached its decision by finding that the provision constituted a specific legacy²⁷ and then applying what it termed the form and substance test of ademption.²⁸ The court held

²⁴The *McAdams* court stated:

It is scarcely necessary to state that the observations of the court in the [*McClure*] decisions . . . are to be limited to the facts before it, and that in such a case as this, in which the interest or right of the son was fixed by law, the theory that conveyances of bare expectancies are in fraud of the bounty of the ancestor can have no application. It is doubtless true that attempted conveyances of bare expectancies by presumptive heirs are narrowly watched by courts of equity, at least when it is necessary to invoke their jurisdiction, and that in such cases the burden is on the assignee to repel the inference of constructive fraud, yet it cannot be affirmed that such courts look with disfavor upon what are construed as executory contracts for the transfer of future interests

Id. at 527, 82 N.E. at 1060-61.

²⁵380 N.E.2d 601 (Ind. Ct. App. 1978).

²⁶*Id.* at 602.

²⁷*Id.* If a will names the beneficiary, courts generally hold that the devise is a specific legacy. *Carter v. First Nat'l Bank*, 237 Ala. 47, 185 So. 361 (1938); *Prudential Ins. Co. v. Newsom*, 408 S.W.2d 161 (Mo. App. 1966); *In re Huff's Estate*, 52 Misc. 2d 93, 274 N.Y.S.2d 996 (Sur. Ct. 1966); *Minnesota Life Ins. Co. v. Allen*, 55 Tenn. App. 405, 401 S.W.2d 589 (1965).

²⁸380 N.E.2d at 603. The courts have used two basic tests to determine whether an ademption has occurred. Under the discarded "Ancient Rule," the testator's intent controlled the application of the doctrine of ademption. Extrinsic evidence could be admitted to show intent. The identity theory of ademption simply involves the question whether the property is found in the testator's estate at his death. The *Weaver* court applied the form and substance test, which it termed a third test of ademption. Most courts, however, consider the form and substance test as an escape device to avoid the harsh results achieved through application of the identity theory. Under the form and substance test, only substantial changes cause an ademption. The problem with the form and substance test is that the distinction between formal and substantial changes is often imprecise. See T. ATKINSON, HANDBOOK ON THE LAW OF WILLS § 134 (2d ed. 1953).

Recently, some commentators have indicated that the identity theory, even with its exceptions, is too harsh, and have recommended that the testator's intent be considered, but not be determinative, in deciding whether a devise is adeemed, Note, *Ademption in New York: The Identity Doctrine and the Need for Complete Abrogation by Legislation*, 25 SYRACUSE L. REV. 978, 1004 (1974), or that the intent theory be readopted, Paulus, *Ademption by Extinction: Smiting Lord Thurlow's Ghost*, 2 TEX. TECH. L. REV. 195, 228 (1971).

that because the bequest had been changed in substance and not merely in form, it was adeemed.²⁹

The court's analysis is seriously flawed by its assumption that a testamentary bequest was created. The language of the will stated: "During my lifetime, I have arranged my insurance program so my daughter, Nancy Lee Schultz is beneficiary on part of my life insurance, and it is my will that the proceeds from this life insurance policy shall be her share in my said estate."³⁰ The provision was nontestamentary in character, because instead of naming the testator's daughter as beneficiary of the insurance proceeds, it simply acknowledged the testator's prior naming of his daughter as beneficiary.³¹ Thus, the provision amounted to a recognition of an inter vivos gift.

Despite its erroneous characterization of the provision at issue as testamentary, *Weaver* reaffirmed Indiana's adoption of the identity theory of ademption incorporating the form and substance test. In *Pepka v. Branch*,³² the second district court of appeals overturned the "Ancient Rule" (intent theory) of ademption by extinction which the first district court of appeals had used only four years earlier in *In re Estate of Brown v. Schaffer*.³³ *Weaver*, a decision by the first district court of appeals, should officially bury *Brown* and eliminate what one commentator has called "the somewhat confusing and conflicting approaches taken by the Indiana Courts of Appeal"³⁴ in ademption cases. Nevertheless, Indiana's adoption of the identity theory incorporating the form and substance test comes at a time when other states are shifting back to some form of intent-based theory of ademption.³⁵

3. *Joint Wills.*—*a. Contract not to revoke a joint will.*—In *In re Estate of Maloney v. Carsten*,³⁶ the court of appeals dealt with the issue of the effect of a subsequent will executed by the surviving

²⁹380 N.E.2d at 603.

³⁰*Id.* at 602.

³¹1 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 5.4 (1960). A description of a past act of the testator is likely not to be testamentary in nature. T. ATKINSON, *supra* note 28, at § 81.

³²155 Ind. App. 637, 294 N.E.2d 141 (1973). For a discussion of *Pepka v. Branch*, see *Probate and Trusts, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 212, 218-20 (1973).

³³145 Ind. App. 591, 252 N.E.2d 142 (1969).

³⁴Note, *Ademption by Extinction in Indiana*, 11 IND. L. REV. 849 (1978). *Pepka* was decided by the second district court of appeals, and although the case purported to overrule the first district case of *Brown*, the author remained unconvinced that the first district would accept the demise of the intent theory. *Id.* at 869-70.

³⁵See, e.g., KY. REV. STAT. § 394.360 (1972); WIS. STAT. ANN. § 853.35 (1971).

³⁶381 N.E.2d 1263 (Ind. Ct. App. 1978).

spouse on a prior inconsistent joint will executed by the wife and the now deceased husband.³⁷

Correctly noting that a joint will is equally subject to the rules of revocation,³⁸ the court stated that a subsequent inconsistent instrument had revoked the will.³⁹ Nevertheless, an accompanying agreement not to revoke a joint will may be enforced in equity by the imposition of a constructive trust "in favor of the beneficiaries under the joint will."⁴⁰ Although the court did not find an express agreement not to revoke, the court found an implied agreement by examining the stated purposes of the will⁴¹ and the disposition of property under the will.⁴² The court explained that the implied agreement fulfilled the "intentions of the testators and the clearly-stated purpose for which the will was executed."⁴³ Based upon this implied agreement, the court created a constructive trust in favor of the beneficiaries of the joint will.⁴⁴ A court will rarely imply an agreement when the court's finding depends entirely on the terms of the joint will.⁴⁵

b. Lapse.—*Maloney* also presented an issue of lapse. The claimants were heirs of two beneficiaries who had survived the husband but predeceased the wife. The claimants sought to enforce the agreement not to revoke the joint will.⁴⁶

Concluding that the Indiana anti-lapse statute⁴⁷ was inapplicable because the beneficiaries were not descendants of the testator, the

³⁷*Id.* at 1267.

³⁸*Id.* See *Mountz v. Brown*, 119 Ind. App. 38, 45, 81 N.E.2d 374, 377 (1948) (joint will to take effect after death of both husband and wife); *Manrow v. Deveney*, 109 Ind. App. 264, 267, 33 N.E.2d 371, 372 (1941) (joint and mutual will).

³⁹The court's brief discussion of the subsequent will reveals only that the instrument disposed of the widow's estate in a manner substantially different from that set forth in the original will executed by her in 1951. 381 N.E.2d at 1267. Presumably, the subsequent will revoked the joint will by implied revocation. The court did not consider the possibility that provisions in the first will consistent with provisions in the second will were not revoked. See generally Annot., 59 A.L.R.2d 11 (1958).

⁴⁰381 N.E.2d at 1267 (citing *Sample v. Butler Univ.*, 211 Ind. 122, 4 N.E.2d 545 (1936)); *Lawrence v. Ashba*, 115 Ind. App. 485, 59 N.E.2d 568 (1945). See *Costigan, Constructive Trusts Based on Promises Made to Secure Bequests, Devises, or Intestate Succession*, 28 HARV. L. REV. 237, 250 (1915).

⁴¹The stated purposes of the will were "to protect each other in the disposition of our property [and] to make final disposition thereof upon the death of the survivor of us." 381 N.E.2d at 1267.

⁴²The property was to be divided equally upon the death of the survivor "with one-half going to the family of each." *Id.*

⁴³*Id.*

⁴⁴*Id.* at 1267-68.

⁴⁵*Janes v. Rogers*, 224 Ark. 116, 271 S.W.2d 930 (1954); *Thompson v. Boyd*, 217 Cal. App. 2d 365, 32 Cal. Rptr. 513 (1963).

⁴⁶381 N.E.2d at 1268.

⁴⁷IND. CODE § 29-1-6-1(g)(2) (1976).

court applied a common law exception to the doctrine of lapse and held that the doctrine "is not applicable where there is a 'contract or agreement controlling and binding upon the testator in respect to such legacy or devise.'" ⁴⁸ The court explained that the rationale of the lapse doctrine "is that a will by its very nature is ambulatory and does not become operative until the death of the testator and until that event, a legacy has never vested."⁴⁹ The court stated that this rationale could not apply to contracts binding the testator to devise the property,⁵⁰ and allowed the heirs of the deceased beneficiaries to enforce the agreement not to revoke the joint will.⁵¹

The court properly refused to apply the doctrine of lapse. As the court recognized, Indiana law already allows a third-party beneficiary to enforce a promise made for his benefit if someone acts upon or accepts that promise.⁵² The court should have resolved the single issue whether the beneficiaries' rights under the contract could be distributed to an heir or devisee of the beneficiaries.⁵³ Under ordinary contract rules, the beneficiary has the right to assign his contract rights to an heir or devisee.⁵⁴

c. After-acquired property.—The third issue raised by *Maloney*, concerning joint wills, was whether property acquired by the survivor after the death of the co-testator was subject to the contract not to revoke a joint will. By statute, property acquired by the testator after the execution of the will passes "as if title thereto was vested in him at the time of making the will."⁵⁵ Recognizing that the after-acquired property would pass according to statute "had the joint will been probated," the court decided that a different distribution should not result through enforcement of the contract not to revoke the joint will.⁵⁶

d. Jointly held property.—The fourth issue raised by *Maloney* was whether jointly held property was subject to the contract not to revoke a joint will. The executor of the widow's estate argued that because the widow "took title to [jointly held] property by operation of law and not as a result of the will, she was not bound to dispose of the property pursuant to the terms of the will."⁵⁷ The court held

⁴⁸381 N.E.2d at 1268 (quoting *Ballard v. Camplin*, 161 Ind. 16, 67 N.E. 505 (1903)).

⁴⁹381 N.E.2d at 1268 (citing *Farmers & Merchants State Bank v. Feltis*, 150 Ind. App. 284, 276 N.E.2d 204 (1971)).

⁵⁰381 N.E.2d at 1268.

⁵¹*Id.* at 1269.

⁵²*Blackard v. Monarch's Mfrs. & Distrib., Inc.*, 131 Ind. App. 514, 522, 169 N.E.2d 735, 739 (1960).

⁵³*See Doyle v. Fischer*, 183 Wis. 599, 198 N.W. 763 (1924).

⁵⁴A. CORBIN, CORBIN ON CONTRACTS § 867 (1952).

⁵⁵381 N.E.2d at 1269 (quoting IND. CODE § 29-1-6-1(a) (1976)).

⁵⁶381 N.E.2d at 1269.

⁵⁷*Id.*

that the joint will contemplated the distribution of the jointly held property; thus, the jointly held property was subject to the contract not to revoke the joint will.⁵⁸

4. *Constructive Trusts*.—In *Givens v. Rose*,⁵⁹ the Indiana Court of Appeals reversed a lower court decision and imposed a constructive trust on misappropriated funds belonging to the estate of a deceased incompetent.⁶⁰ Mary Ellen Givens had been a total incompetent since birth. During the last sixteen years of her life,

⁵⁸*Id.*

⁵⁹383 N.E.2d 448 (Ind. Ct. App. 1978).

⁶⁰*Id.* at 456. Although *Givens* limited the grounds for raising a constructive trust, the restriction appears to have been unintentional. *Westphal v. Heckman*, 185 Ind. 88, 113 N.E. 299 (1916), is the basic authority for the imposition of constructive trusts in Indiana. The *Westphal* court stated:

A constructive trust arises in cases where the transaction involved is tainted by fraud, actual or *constructive*. In such cases, in order to prevent the wrongdoer from reaping a benefit from his fraud, a court of equity will construct a trust such as equity and good conscience requires in order to do justice to the parties affected by the fraudulent transaction.

Id. at 97, 113 N.E. at 302 (citations omitted) (emphasis added).

The court in *Givens* apparently limited the definition of constructive fraud to "a breach of duty arising out of a confidential or fiduciary relationship which necessitates the presumption that fraud be inferred." 383 N.E.2d at 453.

Although Indiana has not precisely defined constructive fraud, recent cases advance the concept of "fraud that arises by operation of law from conduct which, if sanctioned by the law, would secure an unconscionable advantage." *Lawshe v. Glen Park Lumber Co., Inc.*, 375 N.E.2d 275, 278 (Ind. Ct. App. 1978) (citation omitted). See *Koenig v. Leas*, 240 Ind. 449, 165 N.E.2d 134 (1960); *Brown v. Brown*, 235 Ind. 563, 135 N.E.2d 614 (1956); *Beecher v. City of Terre Haute*, 235 Ind. 180, 132 N.E.2d 141 (1956); *Leader Publishing Co. v. Grant Trust & Savings Co.*, 182 Ind. 651, 108 N.E. 121 (1915); *Hoosier Ins. Co. v. Ogle*, 150 Ind. App. 590, 276 N.E.2d 876 (1971); *Smart & Perry Ford Sales, Inc. v. Weaver*, 149 Ind. App. 693, 274 N.E.2d 718 (1971); *Ballard v. Drake's Estate*, 103 Ind. App. 143, 5 N.E.2d 671 (1937).

A second definition of constructive fraud favored by the Indiana courts originated in *Daly v. Showers*, 104 Ind. App. 480, 8 N.E.2d 139 (1937), in which the court stated: "Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feisor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence or to injure public interests." *Id.* at 486, 8 N.E.2d at 14 (quoting 26 C.J. *Fraud* § 3, at 1061 (1921)). See *Koenig v. Leas*, 240 Ind. 449, 165 N.E.2d 134 (1960); *Brown v. Brown*, 235 Ind. 563, 135 N.E.2d 614 (1956); *Budd v. Board of County Comm'rs*, 216 Ind. 35, 22 N.E.2d 973 (1939); *Coffey v. Winger*, 156 Ind. App. 233, 296 N.E.2d 154 (1973); *McKinley v. Overbay*, 132 Ind. App. 272, 177 N.E.2d 389 (1961).

Therefore, constructive fraud apparently has a broader definition than the one suggested by *Givens*. The court's erroneous statement of the grounds for raising a constructive trust appears to have been based on its reliance on *Hunter v. Hunter*, 152 Ind. App. 365, 283 N.E.2d 775 (1972), cited in *Givens v. Rose*, 383 N.E.2d at 453. *Hunter* was another case in which the court narrowly defined constructive fraud as arising out of a fiduciary relationship. However, because the grounds for raising a constructive trust were narrowed without comment in both *Hunter* and *Givens*, the revision appears to have been unintentional.

Mary received social security payments through her representative payees—her father, mother, and sister Betty. Her father used part of the funds to care for Mary and, pursuant to social security regulations,⁶¹ deposited the remainder in joint certificates of deposit in the name of Mary and either her father, mother, or sister Betty.⁶² Due to the death of Mary's father, the placement of her mother in a nursing home, and the illness of her sister Betty, most of the funds were transferred to a joint checking account in the names of Mary and her sister, Pauline Rose. Following Mary's death in 1973, Pauline paid the expenses of administration out of the account. Subsequently, Pauline withdrew \$8,500 of the remaining \$8,866.69 for her own benefit, and the administrator of Mary's estate brought an action to recover the funds. The appellate court, affirming the trial court, found for the estate and imposed a constructive trust on the \$8,500.⁶³

In discussing the grounds for imposing a constructive trust, the court recognized that such a trust is a creation of equity, designed to remedy the wrongful or fraudulent acquisition of one's property by another.⁶⁴ According to the court, constructive trusts are imposed in Indiana only if actual fraud exists or "there exists a breach of duty arising out of a confidential or fiduciary relationship which necessitates the presumption that fraud be inferred."⁶⁵ The court noted that such a breach of duty is presumed when a party in a superior position deals with another "in such a way as to sustain a substantial advantage."⁶⁶ Proof of a confidential relationship

⁶¹20 C.F.R. § 404.1605 (1979) states in relevant part:

Payments certified to a relative or other person on behalf of a beneficiary which are not needed for the current maintenance of the beneficiary . . . shall be conserved or invested on the beneficiary's behalf. . . . Surplus funds deposited in an interest—or dividend—bearing account in a bank or trust company, in a savings and loan association, or in a credit union, must be in a form of account which clearly shows that the representative payee has only a fiduciary, and not a personal, interest in the funds.

⁶²383 N.E.2d at 451.

⁶³*Id.* at 456. One certificate of deposit still was held in the name of Betty Bailey and Mary Givens at the death of Mary Givens in 1973; the heirs of Betty transferred the certificate to the joint checking account following her death later in 1973. *Id.* at 453-54.

⁶⁴*Id.* at 452. See *Koenig v. Leas*, 240 Ind. 449, 165 N.E.2d 134 (1960); *Brown v. Brown*, 235 Ind. 563, 135 N.E.2d 614 (1956); *Hunter v. Hunter*, 152 Ind. App. 365, 283 N.E.2d 775 (1972); *McKinley v. Overbay*, 132 Ind. App. 272, 177 N.E.2d 44 (1961). See generally G. BOGERT & G. BOGERT, *HANDBOOK OF THE LAW OF TRUSTS* § 77 (1973).

⁶⁵383 N.E.2d at 453. The stated grounds are more restrictive than those specified in many Indiana cases. See note 60 *supra*.

⁶⁶*Id.* (quoting *Hunter v. Hunter*, 152 Ind. App. 365, 372, 283 N.E.2d 775, 780 (1972)).

“establishes *prima facie* that *the dominant party . . . occupies a position of trust and confidence which he must not abuse.*”⁶⁷

In *Givens*, the court raised a constructive trust by reason of the confidential relationship which existed between Mary and her sister Pauline Rose, who held the funds in joint tenancy with Mary. Because of the confidential relationship and the fact that Pauline had failed to prove “good faith,” imposition of a constructive trust was deemed appropriate.⁶⁸

5. *Intestate Succession*.—A recent decision by the United States Supreme Court ended a two-year period during which the constitutionality of Indiana’s statutory provision regarding inheritance rights of illegitimate children has been in question.⁶⁹ In *Lalli v. Lalli*,⁷⁰ the Court upheld a New York statute which permitted an illegitimate child to inherit from his father only upon a judicial finding of paternity within the lifetime of the father and within a period encompassing the pregnancy of the mother and a two-year period after the birth of the child.⁷¹ The Court distinguished the New York statute from an Illinois statute held violative of the equal protection clause⁷² in *Trimble v. Gordon*.⁷³ The discriminatory aspect of the Illinois law was its requirement that the parents marry; the New York statute did not contain a similar provision.⁷⁴ The Court held that New York’s interest in insuring the orderly disposition of property upon death justified its requirement of proof of paternity against a contention that the requirement constituted a denial of equal protection.⁷⁵

Because the Indiana statute,⁷⁶ permitting proof of paternity to be made in a court proceeding at any point during the father’s life, is broader than the New York statute upheld in *Lalli*, the Indiana statute undoubtedly is constitutional.

6. *Expenses During Administration of Estate*.—In *In re Estate of Smith*,⁷⁷ the Indiana Court of Appeals held that an executor could not charge against the distributive share of the widow mortgage payments made on real estate during the period of administration of

⁶⁷*Id.*

⁶⁸*Id.* at 456.

⁶⁹See Falender, *Trusts and Decedents’ Estates, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 330, 334-37 (1978).

⁷⁰439 U.S. 259 (1978).

⁷¹*Id.* at 261 n.2.

⁷²U.S. CONST. amend. XIV, § 1.

⁷³430 U.S. 762 (1977).

⁷⁴439 U.S. at 268.

⁷⁵*Id.* at 275-76.

⁷⁶IND. CODE § 29-1-2-7 (1976).

⁷⁷388 N.E.2d 287 (Ind. Ct. App. 1979).

the decedent-mortgagor's estate.⁷⁸ Although the widow took the real estate subject to the mortgage, she was not personally liable for payment of the remaining debt, because only the decedent had executed the note and mortgage. The court noted that the distributive share of the widow can be charged if she is liable on an obligation or there is a prior lien on the estate which she is to receive.⁷⁹

In this case, the decedent had provided for payment of the mortgage by assigning to the mortgagee-executor part of the rental payments from other property. Thus, the court held that "the payments made during the administration of the estate were a proper liability of the estate which collected the rents that were the subject of the assignment."⁸⁰

The court also observed that the real estate subject to the assignment had been devised to other beneficiaries. By analogy to the statute,⁸¹ the court held that the mortgage payments had to be met by the assigned rent, because the removal of the encumbrance on the real estate subject to the assignment would increase the share of the distributees entitled to the encumbered asset.⁸²

7. *Effect of Amendment to Statute Specifying Time Allowed for Filing Claims on Filing Election to Take Against the Will.*—In *In re Estate of Wegmiller*,⁸³ the court of appeals considered the effect of a legislative reduction in the time permitted for filing of claims against a decedent's estate with respect to the surviving spouse's election to take against the decedent's will. An election to take against the will must be filed "not later than ten [10] days after the expiration of time limited for the filing of claims" against the estate.⁸⁴ The legislature had shortened the period for the filing of claims from six months⁸⁵ to five months, effective January 1, 1976.⁸⁶ In the present case, notice for filing of claims was published on October 4, 1975, and the spouse filed his election to take against the will on April 12, 1976—after five months and ten days, but before six months and ten days.

The court held that the relevant statutes created substantive rights and "impose[d] a condition precedent to asserting a statutory right"; they did not operate as statutes of limitation, which bar only the remedy.⁸⁷ Because the court regarded the statutes as substan-

⁷⁸*Id.* at 290.

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹IND. CODE § 29-1-14-20 (1976).

⁸²388 N.E.2d at 290.

⁸³377 N.E.2d 664 (Ind. Ct. App. 1978).

⁸⁴IND. CODE § 29-1-3-2 (1976).

⁸⁵See *id.* § 29-1-14-1 (1971) (amended 1976).

⁸⁶*Id.* § 29-1-14-1 (1976).

⁸⁷377 N.E.2d at 666.

tive in nature, it found that an attempted retroactive application "would impair vested rights or violate some constitutional guaranty [sic]" ⁸⁸ Thus, the spouse's election had been timely filed.

B. Statutory Developments

The legislature amended several sections of the probate⁸⁹ and trust⁹⁰ codes during the survey period. The first, and most significant, legislative change was the creation of a new type of guardianship. The guardian is called a "limited guardian" and may "assist an incompetent in managing a *portion* of his property or his affairs."⁹¹ A limited guardian may be appointed for an incompetent's person or estate or both if the court finds that appointment is in the incompetent's best interest. The powers and duties of a limited guardian are confined to those specifically stated in the order of appointment.⁹²

A second amendment lengthened the period for a filing a renunciation of an interest from five months⁹³ to nine months after the death of the decedent or the time of closing of the estate, whichever occurs first.⁹⁴ If, however, the taker of the interest has not been ascertained within the above-described period, the renunciation must be filed within nine months after the event by which the taker is ascertained or the time of closing of the estate, whichever occurs first.⁹⁵

Third, the legislature provided a method of allowing "an interested person" to acquire information concerning the estate from the personal representative.⁹⁶ The statute requires that the interested person file a petition, limits the disclosure to "relevant materials," and authorizes the court to impose conditions on disclosure.⁹⁷

Fourth, the legislature added a provision which permits a guardian appointed solely because of the ward's minority to establish a trust for the ward's benefit.⁹⁸ The trust may be created "either with

⁸⁸*Id.*

⁸⁹IND. CODE §§ 29-1-1-1 to -2-18-2 (1976 & Supp. 1979).

⁹⁰*Id.* §§ 30-1-1-1 to -4-6-13.

⁹¹*Id.* § 29-1-18-1(f) (Supp. 1979) (emphasis added). The term "incompetent" is defined at *id.* § 29-1-18-1(c).

⁹²*Id.* § 29-1-18-21(c).

⁹³*Id.* § 29-1-6-4(b) (1976) (amended 1979).

⁹⁴*Id.* § 29-1-6-4(b) (Supp. 1979).

⁹⁵*Id.*

⁹⁶*Id.* § 29-1-7-6(b). The provision states: "Upon petition by an interested person, the court having jurisdiction over the estate may, in its discretion, under such terms and conditions as the court considers appropriate, order the personal representative to provide that interested person with relevant materials specified in the court's order."

⁹⁷*Id.*

⁹⁸*Id.* § 29-1-18-28(c).

consent of the ward or after notice to the ward and hearing upon petition to and approval by the court having jurisdiction over the guardianship.”⁹⁹ In deciding whether to establish a trust, the court must consider the ward’s ability to handle “his own business affairs relating to the assets being derived from the guardianship.”¹⁰⁰ The trust is subject to such terms and conditions as the court may establish and must end by the time the ward reaches twenty-one years of age.¹⁰¹

Fifth, the legislature broadened the scope of section 30-4-2-13, the “beneficiary-managed” trust exception¹⁰² to the Indiana equivalent of the Statute of Uses.¹⁰³ Under the prior version of section 30-4-2-13,¹⁰⁴ the Statute of Uses did not apply to defeat the trustee’s title to a passive trust if the trust consisted exclusively of real property. The new version, however, prevents title from vesting automatically in the beneficiary even though real property constitutes only part of the trust corpus.¹⁰⁵

Sixth, the legislature modified slightly the provisions allowing establishment of a funeral trust. The legislature added a new element to those already necessary for creating a funeral trust: such a trust must “be either a time deposit, or account, or certificate of deposit in a financial institution, in the names of the settlor and the beneficiary payable on death to the survivor, or name the designated institution as sole trustee.”¹⁰⁶ In addition, such a trust may now be held in a credit union.¹⁰⁷

Finally, the legislature made two minor modifications in the chapter dealing with non-probate transfers.¹⁰⁸ The legislature explained that the definition of the term “party” does not encompass “a person who is merely authorized to make a request as the agent

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Id.*

¹⁰²*Id.* § 30-4-2-13. A passive trust is not executed such that title vests directly in the beneficiary if:

(a) The beneficiary has the power to manage the trust property, including the power to direct the trustee to sell the property; and

(b) The trustee may sell the trust property only on direction by the beneficiary or other person or may sell it after a period of time stipulated in the terms of the trust in the absence of a direction. . . .

Id.

¹⁰³*Id.* § 20-4-2-9 (1976). Based upon the Statute of Uses, if a trust is passive, that is, if the trustee has no duties under the trust, title to the trust property will vest in the beneficiary. G. BOGERT & G. BOGERT, *supra* note 64, § 46.

¹⁰⁴IND. CODE § 30-4-2-13 (1976) (amended 1979).

¹⁰⁵*Id.* § 30-4-2-13 (Supp. 1979).

¹⁰⁶*Id.* § 30-2-9-1.5(b)(6).

¹⁰⁷*Id.* § 30-2-9-1(b)(5).

¹⁰⁸*Id.* §§ 32-4-1.5-1 to -15 (1976 & Supp. 1979).

of another."¹⁰⁹ The legislature also made it clear that an account with a financial institution is not subject to the personal property provisions of section 32-4-1.5-15.¹¹⁰

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¹⁰⁹*Id.* § 32-4-1.5-1(7) (Supp. 1979).

¹¹⁰*Id.* § 32-4-1.5-15.