TIPS ON SPECIAL ADMINISTRASTORS

By Curtis E. Shirley

THE PROBLEM OF STANDING

There are Indiana appellate cases which hold that heirs do not have standing to file a complaint on behalf of the estate, leaving any such lawsuit up to the personal representative or special administrator to file:

> *Inlow v. Inlow, 797 N.E.2d 810 (Ind.App. 2003); Inlow v. Henderson Daily, 787 N.E.2d 385 (Ind.App. 2003)*; *Inlow v. Ernst & Young, LLP, 771 N.E.2d 1174 (Ind.App. 2002)* (vacated by the Indiana Supreme Court and then settled); *Newton v. Hunt, 103 N.E.2d 445 (Ind.App. 1952)* (administrator of estate can bring action to recover assets of estate for distribution to beneficiaries); *Umbstead v. Preachers' Aid Society, 58 N.E.2d 441 (Ind. 1944)* (noting that personal property of the decedent and the right to any action passes to the personal representative); *Baker v. State Bank of Akron, 44 N.E.2d 257 (Ind.App. 1942)* (only personal representative can bring action to recovery money or personal assets of the decedent necessary to administer the estate); *Smith v. Massie, 179 N.E. 20 (Ind.App. 1931)* (the right to sue to recover money and personal property belongs to personal representative and not surviving widow or widower); *Magel v. Milligan, 50 N.E. 564 (Ind. 1898)* (heirs have no right to sue to recover debts owed to the estate); *Holland v. Holland, 30 N.E. 1075 (Ind. 1892)* (unless given permission by administrator, legatee has no standing to bring action to recover estate assets from third party); *Clegg v. Bamberger, 9 N.E. 700 (Ind. 1887)* (administrator can bring action for conversion against attorney hired by decedent); *Henry v. State ex rel. Franklin, 98 Ind. 381 (1884)* (administrator represents creditors in collection against estate and may bring action for conversion to secure assets due the estate); *Schee v. Wiseman, 79 Ind. 389 (1881)* (personal property of decedent and right to cause of action for trespass passes to administrator); *Smith v. Dodds, 35 Ind. 452 (1871)* (administrator is proper person to bring action for conversion and trespass to protect property of decedent); *Walpole's Administrator v. Bishop, 31 Ind. 156 (1869)* (only administrator may bring cause of action on behalf of estate); *Grimes v. Blake, 16 Ind. 160 (1861)* (administrator of estate may bring suit to recover overpayment to creditor).

Conversely, there are Indiana appellate cases which hold that individual heirs do have standing to file a complaint against those they believe owe something to the estate:

> *Ohlfest v. Rosenberg, 71 N.E.2d 614, 616 (Ind.App. 1947)* (The real estate is in the name of the heirs, subject only to the claims of creditors and the spousal allowance); *Graves v. Summit Bank, 541 N.E.2d 974 (Ind.App. 1989)* (non-probate property does not involve the personal representative); *McCoy v. Like, 511 N.E.2d 501, 502 n.1 (Ind.App. 1987)* and *Blake v. Blake, 391 N.E.2d 848 (Ind.App. 1979)* (interested persons have standing); *Umbstead v. Preachers' Aid Soc., 58 N.E.2d 441 (Ind. 1944)* (heirs and legatees are the proper parties to maintain an action to set aside deeds and other transfers involving undue influence or fraud, and the executor need not even

be made a party); *Hutchinson's Estate v. Arnt, 1 N.E.2d 585 (Ind. 1936)* (the wife's duty to preserve her husband's estate assets was to the remainderman, not to the estate of her husband. "Any right of action for conversion is in the remainderman. They are the real persons in interest."); *Leazenby v. Clinton County Bank, 355 N.E.2d 861, 863 (Ind.App. 1976)* (electing spouse may sue to collect "such property as would have passed under the laws of descent and distribution"); *Barkley v. Barkley, 106 N.E. 609 (Ind. 1914)* (the father had conveyed real estate to son in 1900, and much later the grandchildren allowed to sue and collect their one third intestate share of what should have passed to their mother who died in 1901); *Villanella v. Godbey, 632 N.E.2d 786, 788-89 (Ind.App 1994)* (heirs of the estate sued executor in his individual capacity on grounds of undue influence where the unlawful transfers purportedly occurred in 1987 and 1988 where the decedent died in 1991); *Hunter v. Milhous, 305 N.E.2d 448 (Ind.App. 1973)* (wife permitted to sue to set aside deeds although the Court had appointed a non-relative guardian of the estate); *Keys v. McDowell, 100 N.E. 385 (Ind.App. 1913)* (heirs of the estate of decedent who died in 1907 sued church trustees for alleged undue influence in obtaining real estate deeds in 1902); *Folsom v. Buttolph, 143 N.E. 258 (Ind.App. 1924)* (mother died intestate in 1920 and thereafter decedent's daughter sued decedent's son alleging undue influence in procuring deeds to real estate in 1917); *Banko v. National City Bank, 602 N.E.2d 1024, 1030 (Ind.App. 1992)* (even after an investigation convinces an executor not to pursue an action, any person interested in the estate has standing to pursue a claim, in this case for possible conversion of estate assets), *vacated on other grounds, 622 N.E.2d 476 (Ind. 1993).*

For example, in *Darlage v. Cheryl Drummond, 576 N.E.2d 1303 (Ind.App. 1991)*, the decedent's sister was appointed executrix and failed to request a proper accounting of the decedent's partnership assets. The executrix was found to have misappropriated estate property in concert with the decedent's surviving partner and father (Darlage). The decedent's prior spouse (Cheryl) was a creditor of the estate and also *guardian ad litem* of her children as beneficiaries. Darlage argued that a non-executor does not have standing as the real party in interest. The Court disagreed:

> "While Indiana Code Sections 23-4-1-42 and 29-1-13-3 do provide for a deceased partner's estate to pursue claims against the continuing partner, these statutes in no way foreclose enforcement of the deceased partner's rights by other persons. The legislature could not have intended to prevent enforcement of such rights where, as here, the executrix has failed to act on behalf of the estate for many years, and enforcement remains doubtful.
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> "We further note that the likelihood of Jane ever enforcing the estate's rights against her father is slim. . . . Cheryl, as creditor of the estate and as guardian of the estate's devisees, not only has standing to assert this claim, but is the only one affected thereby who is willing to assert such a claim. We find Cheryl has standing)."

Darlage, 576 N.E.2d at 1308.

STANDARD FOR APPOINTMENT OF SPECIAL ADMINISTRATOR

Pursuant to Indiana Code Section 29-1-10-15, the Court should appoint a special administrator to take such action as it shall direct. *See Darlage v. Cheryl Drummond, 576 N.E.2d 1303 (Ind.App. 1991); McCoy v. Like, 511 N.E.2d 501, 502 n.1 (Ind.App. 1987).*

> "Whenever any interested person files with the court having jurisdiction of an estate a petition showing that such person has reason to believe and does believe that the personal representative of the estate or any other person is indebted to the estate, or that any property is in the possession of the personal representative of the estate or of any other person, and that diligent effort is not being made to collect such indebtedness or to secure possession of such property for the estate, the court shall hold a hearing upon such petition and shall determine what action, if any, shall be taken. Should the court decide that there is sufficient merit in the petitioner's claim to warrant action, it shall direct the personal representative to take such action as the court deems necessary; provided, however, where the person claimed to be indebted to the estate or having in his possession property belonging to the estate is the personal representative or where the court is of the opinion that the personal representative would not or could not for any reason prosecute such action with sufficient vigor, it shall appoint a special administrator to take such action as it shall direct."

Indiana Code Section 29-1-13-16. See *Powell v. Jackson, 111 N.E. 208 (Ind.App. 1916); see also Estate of Swank, 375 N.E.2d 238, 241 (Ind.App. 1978)* (allegations of fraud, unlawful influence or incompetency justify the appointment of special administrator).

In assessing whether to appoint a special administrator, the court should consider "the strength of a claim, the costs to the estate in pursuing it, and the desirability of closing the estate before certain assets depreciate in value." *Inlow v. Inlow, 797 N.E.2d 810, 819 (Ind.App. 2003) (Baker, J., concurring), citing Inlow v. Henderson Daily, 787 N.E.2d 385, 391 (Ind.App. 2003).*

> "First, the probate court--not the litigant--determines whether a petitioner's claim of a person's indebtedness has merit. Second, unless the personal representative either is the indebted person or will not prosecute an action with "sufficient vigor," he is presumed the proper party to collect the indebtedness. Third, if the presumption of personal representative fitness is overcome, then the probate court appoints a special administrator to prosecute the action."

Inlow, 787 N.E.2d at 393.

The question for the court is whether a special administrator should be appointed to investigate or if the petitioner has already established a *prima facie* case. *Estate of Banko v. National City, 602 N.E.2d 1024, 1029 (Ind.App. 1992), vacated on other grounds, 622 N.E.2d 476*; *Inlow v. Inlow, 797 N.E.2d 810, 818 (Ind.App. 2003)* ("Our review of the record shows that the Inlow Children fail to present a *prima facie* case with regard to either court of conversion against Anita").

In reviewing whether the petitioner has or can present facts with sufficient merit for the appointment of a special administrator, the court should consider any and all evidence in the light

most favorable to the petitioner, and which evidence if believed or left uncontradicted, would lead to a judgment in favor of the estate. *Mullins v. State, 646 N.E.2d 40, 51 (Ind. 1995)*; *Mariah Foods v. Indiana, 749 N.E.2d 646 (Ind.Tax 2001)*; *Earl v. American States, 744 N.E.2d 1025 (Ind.App. 2001).* Contradiction of *prima facie* evidence merely creates a question of fact that a Judge or Jury must resolve by way of a separate lawsuit. *Mullins, 646 N.E.2d 40, 51 (Ind. 1995)*; *Ramsey v. Madison County, 707 N.E.2d 814, 816 (Ind.App. 1999).*

The court should review the evidence as if it were ruling on a motion to dismiss or motion for directed verdict; that is, can Logan present enough evidence to support a judgment or verdict? *Indiana CPA Society v. GoMembers, 777 N.E.2d 747 (Ind.App. 2002)*; *Dominiack v. Dunbar, 757 N.E.2d 186 (Ind.App. 2001)*; *City of New Haven v. Allen County, 694 N.E.2d 306, 311 (Ind.App. 1998)* (allegations taken as true, and question is whether any set of facts entitle the plaintiff to relief). Likewise, has Logan presented enough evidence that a complaint should be filed and a more thorough investigation be had?

THE TRIAL COURT MAY ASSIGN THE CLAIMS

Undoubtedly the personal representative believes that what the petitioner seeks to file on behalf of the Estate does not have any merit. If so, the petitioner asks that the trial court order the Estate to abandon the claims and related causes of action which he seeks to pursue and assign them to him. *I.C. § 29-1-13-8* (Abandonment of property), states "When any property is valueless, or is encumbered, or is in such condition that it is of no benefit to the estate, the court may order the personal representative to abandon it." The Probate Code Study Commission Comments to *I.C. § 29-1-13-8* further indicate the trial court may order the Estate to distribute the claims and related rights of action, "If the rights involved have any prospective value, they may be transferred by way of distribution to the beneficiaries who will succeed to all rights of the deceased."

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