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RECENT ILLINOIS PROBATE LAW AND THE UNIFORM PROBATE CODE

*Arthur M. Scheller, Jr.**

The author discusses problems of dispositive plans through an examination of recent Illinois litigation. He explores the implications of the proposed Uniform Probate Code upon Illinois law and suggests various ameliorative approaches to current probate issues.

INTRODUCTION

RECENTLY, Mr. Chief Justice Warren E. Burger stated:

The leaders of the bar of this country . . . should lend their active support not only to the acceptance of this new [Uniform Probate] Code but also to the process of continuing evaluation of its work so as to keep it up to date, and, above all, to maintain it as a procedure to serve the public at the lowest possible cost.¹

The Bar is not yet convinced, however, that the Uniform Probate Code (UPC) is the panacea for all probate ills. Only approximately twenty percent of the states have adopted the UPC² and controversy rages over the wisdom of the Code.³ Adoption of the UPC was pending in the last session of the Illinois General Assembly and many questions arose as to the Code's need and practicality. Whether the UPC will actually serve to cauterize the wounds that develop between family and friends during the administration of an estate is, of course, conjectural, but its adoption is bound to alter

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1. Remarks by Chief Justice Warren E. Burger to the American Law Institute on May 21, 1974.

2. JOINT EDITORIAL BOARD FOR THE UNIFORM PROBATE CODE, UNIFORM PROBATE CODE NOTES, No. 8, July, 1974. The UPC box score in enactment sequence is: Idaho, Alaska, North Dakota, Arizona, Wisconsin, Colorado, South Dakota, Montana, Minnesota, Nebraska.

3. See generally STATE BAR OF CALIFORNIA COMMITTEE ON PROBATE AND TRUST LAW, UNIFORM PROBATE CODE: ANALYSIS AND CRITIQUE (1973).

the map of Illinois Probate Law. Therefore, this Article will not only scrutinize the major Illinois probate decisions of the past year, but also explore what effect, if any, the UPC would have upon these cases.

UNFORESEEN CONTINGENCIES

During the past year, Illinois courts have continued to take an Olympian view when dealing with the effect of unforeseen contingencies—such as murder, stock splits, and lapse—upon a testator's attempts to plan the orderly disposition of his estate.

The ever-intriguing problem concerning the effect of murder on a dispositive scheme was the issue of *In re Estate of Moses*.⁴ A father-testator who died in 1952 created a complicated estate plan with sole assets of his home. The testator's son, however, murdered his stepmother (the testator's wife) and both the father's and wife's estates were probated with a son by a prior marriage serving as fiduciary. Administration extended over twenty-one years. The appellate court held that a surviving spouse award⁵ was waived by the wife by virtue of her failure to claim it and that her estate was barred from claiming it because of the sixteen year delay after her death.

The court's rationale was seemingly based on the *Restatement of Restitution*.⁶ Under the father's dispositive plan, the wife-victim was to receive a life estate in the realty and the son-murderer was to have a room during his lifetime (plus rents from another room), with remainder in the son if he had lawful issue, and, if none, a gift over, one-half to the father's nearest blood relative and one-half to the nearest blood relative of the father's first wife. Under the postulate of the *Restatement* that murderer should not benefit from his crime, the court held that:

4. 13 Ill. App. 3d 137, 300 N.E.2d 473 (1st Dist. 1973).

5. No time limit for *claiming* a surviving spouse's award is mentioned in the statute: ILL. REV. STAT. ch. 3, § 178 (1973). The death of the surviving spouse does not defeat the award, *In re Estate of Dillman*, 8 Ill. App. 2d 239, 131 N.E.2d 634 (4th Dist. 1955). See also *In re Estate of Scully*, 79 Ill. App. 2d 368, 223 N.E.2d 735 (4th Dist. 1967) (the right to receive a surviving spouse's award arises upon its approval by the court). See generally Greene, *Discussion of Recent Decisions*, 29 CHI.-KENT L. REV. 270 (1951).

6. RESTATEMENT OF RESTITUTION § 188, Comment c (1935).

- (1) the estate of the wife should receive the value of her life interest;
- (2) the son-murderer should receive the value of the rental room for his determined life expectancy plus the value of the use of his room for the determined life expectancy of the victim-stepmother (minus the years he was in the penitentiary for her murder);
- (3) the administration of the father's estate shall hold the balance remaining until the expiration of the determined life expectancy and then distribute it as follows:
 - (a) to the son-murderer if he is alive and has lawful issue,
 - (b) to the remaindermen (one-half to the father's "nearest blood relative" of his first wife).

By so doing, the court held that the possible life estate in the murderer-son is forfeited (*i.e.*, if at the expiration of the determined life estate of the victim-stepmother, the murderer-son had no lawful issue and was alive, he would have had a life estate). A serious question is raised about the consistency of the court's decision with the axiom that a murderer should not profit from his crime; a distinction would seem to lie between benefits resulting from the murder and benefits which fructify in the natural course of events.⁷

Illinois courts, however, have continued to subscribe to the traditional rule regarding post-will stock splits. In *In re Estate of Armstrong*⁸ the legatees of a specific bequest of twenty shares of stock purchased prior to the execution of a will unsuccessfully sought additional shares resulting from two stock splits occurring after the execution of the will and prior to the execution of a codicil. The case construes the well known principle that a stock split prior to an execution of a will has no impact on the specific will provision and the legatees take the number of shares specified, not the additional shares derived from a stock split, and a stock split after a will is executed (and prior to the death of the testator) results in the legatee receiving the additional shares.⁹ The execution of the codicil after the

7. Internecine rivalry of this nature is not a target of the UPC. Nor does the Illinois Probate Act, the administrative standard against which it should be measured, squarely meet the question. Section 15a of the IPA forbids an erstwhile heir profiting by murdering his ancestor, but leaves to the imagination of the common law court the fashioning of a remedy for the tragedy of this case. To the extent there is not a statutory section in the UPC analogous to 15a, it fails to set a tenor for guiding the court in these circumstances.

8. 13 Ill. App. 3d 325, 300 N.E.2d 265 (4th Dist. 1973).

9. In *Knight v. Bardwell*, 32 Ill. 2d 172, 205 N.E.2d 249 (1965), the specific legatees in a first codicil of 150 "[s]hares of the capital stock of the Texas Corporation as constituted when my will and codicil became effective . . ." were unsuc-

stock splits is the equivalent of an execution of a will in the first instance, since "the law assumes that when a testator executes a codicil he reexamines his entire [w]ill and makes whatever changes are necessary, so that the [w]ill and codicil together express his intent as of the date of the execution of the codicil."¹⁰

Justice Smith's opinion, however, ignored a landmark Massachusetts decision, *Bostwick v. Hurstel*, which forwarded a new rule to comport with the corporate realities of stock splits and a testator's intent:

in the absence of anything manifesting a contrary intent, a legatee of a bequest of stock is entitled to the additional shares received by a testator as a result of a stock split occurring in the interval between the execution of his will and his death.¹¹

This result is in line with the majority view.¹² Hopefully this approach will be handled in an intellectually defensible manner in future decisions.¹³

cessful in seeking the increase of two two-for-one stock splits. The first split occurred after the execution of the will but before the execution of the first codicil, and the second stock split occurred after the execution of all the codicils but before the death of the testatrix. See also *In re Estate of Raab*, 132 Ill. App. 2d 281, 268 N.E.2d 909 (4th Dist. 1971), where a stock dividend occurred prior to the execution of a will and the testator gave legacies of lesser amounts of stock than the shares existing at the execution of the will. Apparently the Court in the *Raab* case attached no significance to the distinction between a stock dividend and a stock split: a stock dividend is an increase in a corporation's capitalization by transferring retained earnings to the capital account while a stock split is an increase in the number of a corporation's outstanding shares without an increase in the amount of its capital. Justice Schaefer in the *Knight* case stated: "Frequently the only difference between a stock dividend and split is the manner in which the transaction is accounted for on the corporate books. Surely this is of no concern to the ordinary testator." 32 Ill. 2d at 179, 205 N.E.2d at 253.

10. 13 Ill. App. 3d at 326, 300 N.E.2d at 266 (4th Dist. 1973).

11. *Bostwick v. Hurstel*, — Mass. —, 304 N.E.2d 186, 192 (1973).

12. See 46 A.L.R.3d 7 for a discussion of this premise.

13. The characterization of property such as additional shares of stock acquired in a stock split may be within the spirit but not the actual scope of the UPC. A statutory presumption to include such a split in the share taken by the legatee might serve several purposes. It would allow for an adversary setting in which more parole evidence could be introduced to prove the testator's intent rather than relegate the decision to the clean-cut rule of *Knight v. Bardwell*, 32 Ill. 2d 172, 205 N.E.2d 249 (1965), thus allowing the interest to pass by the dictates of testator's bounty. It would square with reality to the extent that the execution of a mere codicil is not always accompanied by a close scrutiny by testator of his entire will, if in fact that ever occurs. Finally, it would pose this drafting issue at the will conference between the attorney and his client.

In re Estate of Lindsey,¹⁴ concerned a dispute between the specific devisees (five children of the decedent) and the residuary legatee (decedent's wife) as to proposed distributions in the estate. The testator devised specifically a motel business to his children and the executors operated it at a net profit of \$10,282.26. The court held that the gift of the land, building and furnishings¹⁵ carried with it the right to the net income therefrom,¹⁶ although the will language was insufficient to cover money on deposit in the motel business bank account. The rental income on other real estate¹⁷ passed to the children, rather than to the mother (residuary beneficiary), under the following will language: "Third, I give and devise any and all other real estate owned by me at the time of my death, except such real estate as is held in joint tenancy, to my five children."¹⁸

Finally, the doctrine of equitable conversion applied to a "contract for deed" executed by the testator seven days prior to his death and hence the realty affected was considered as personalty, thereby passing with the residue.¹⁹

14. 13 Ill. App. 3d 717, 300 N.E.2d 572 (5th Dist. 1973).

15. Decedent's will provided as follows:

Second: I give, devise and bequeath the Egyptian Trail Motel and the Egyptian Trail Restaurant together with the real estate upon which the same are located . . . together with all equipment, furnishings and other personal property in or about said Motel and Restaurant and the real estate upon which the same are located . . . [to his 5 children].

16. Although the Court did not cite the provision, ILL. REV. STAT. ch. 30, § 163(3) (1973) provides: "The legatee or devisee of property specifically bequeathed or devised shall be entitled to the income earned or accrued on the property during the period of administration less expenses . . ."

17. Apparently the executor took possession of this realty and collected the rents therefrom pursuant to ILL. REV. STAT. ch. 3, § 219(a) (1973).

18. 13 Ill. App. 3d at 718, 300 N.E.2d at 573 (5th Dist. 1973). This clause obviously is a *general* devise (and the court so found in another connection), and would seem to fall under the general rule that income during administration passes with the residue; this rule is expressed in ILL. REV. STAT. ch. 30, § 163(1) (1973) as follows: "All income to which the personal representative is entitled, earned or accrued during the period of administration of the estate of such testator and not payable to others or otherwise disposed of by Will, shall be distributed . . . to persons entitled to the residuary estate. . ."

19. The doctrine of equitable conversion was also construed in *In re Keller v. Schobert*, 13 Ill. App. 3d 637, 300 N.E.2d 800 (3d Dist. 1973). A family dispute among six brothers and sisters arose over their mother's will which involved the plan of selling the real estate and dividing the proceeds equally. The appellate court affirmed the dismissal of a complaint seeking partition by finding that the doctrine of equitable conversion applied to the executor's imperative power of sale and that re-

A brief opinion in *In re Estate of Wood*²⁰ concerned an unsuccessful attempt to avoid the application of the anti-lapse statute.²¹ A thirty-four-year-old will left the residuary estate equally to two sisters, one of whom was the petitioner's mother who had predeceased the testatrix by six years. The court held that the statute clearly applied to the will as drafted.²²

Unforeseen contingencies also caused problems in *In re Estate of Bentley*.²³ A father's family plan, originating about fifty years ago,²⁴ was tested for clarity by an unusual sequence of deaths. His will left the residue of his estate, outright and in equal shares, to his wife and daughter.²⁵ Complications arose when, subsequent to the execution of the will, the testator converted a life insurance policy into an annuity trust providing for monthly interest pay-

conversion did not occur by the mere passage of two and one-half years. When the testator makes a positive direction in his will to sell his real estate, "the duty and obligation to convert are imperative." *Grove v. Willard*, 280 Ill. 247, 117 N.E. 489 (1917). If the will confers discretionary power of sales, and there is no actual sale, there is no equitable conversion of the land. *Vierieg v. Krehmke*, 293 Ill. 265, 127 N.E. 735 (1920).

20. 13 Ill. App. 3d 595, 300 N.E.2d 560 (5th Dist. 1973).

21. ILL. REV. STAT. ch. 3, § 49 (1973).

22. Under the UPC § 2-605, the same result would occur. In this situation, involving the possibility of a lapsed legacy, neither statutory scheme can really be faulted. An attempt at allowing the pre-deceased to "take it with him," and the specter of reopening an estate militate against a codified remedy for this mistake of a drafter's hand. See Fleming & James, *The New Anti-Lapse Statute*, 43 ILL. BAR J. 848 (1955) (treatment of development of lapsed devices and legacies prior to July 1, 1955 amendment of § 49); Fleming, *Disposition of Lapsed Gifts Under Subdivided Residues*, 49 ILL. BAR J. 268 (1960) (discussion of effects of lapsed devices or legacies which under § 49 pass under the residuary estate rather than become part of the intestate estate).

23. 14 Ill. App. 3d 630, 303 N.E.2d 166 (1st Dist. 1973).

24. The father's will was executed on December 22, 1923, and at his death four years later he left an estate in excess of \$480,000.

25. The residuary clause provided as follows:

All the rest, residue and remainder of my estate, real, personal or mixed, and of whatsoever kind or wheresoever situated; I give, devise and bequeath to my beloved wife, MARTHA, . . . , and my beloved daughter, VIRGINIA BENTLEY BIRD, in equal parts, share and share alike; and in the event of my said daughter having died before my death, her share shall go to her child or children; and in the event of my said daughter having died without leaving a child or children, her share of my estate shall go to my beloved wife; and in the event of my said wife dying before my death, then her said share of my estate shall go to my said daughter, or if she be deceased, then to her child or children, if there be any.

14 Ill. App. 3d at 631, 303 N.E.2d at 167 (1st Dist. 1973).

ments to his daughter for life, with corpus to his then surviving grandchildren, and if none, to his "executors, administrators or assigns."²⁶ Not having covered the implications of his daughter dying childless many years after his wife's death and the annuity trust corpus coming back to his "executors, administrators or assigns," it was inevitable that the planning gap would occur—and it did. Three competing groups converged to claim the annuity trust corpus after the testate death²⁷ of the childless daughter forty years after the testator's wife died: the nephew of the father who was his only living heir; a friend of the testator's daughter who was executor and sole beneficiary of her estate;²⁸ and finally, a niece of the second husband of the testator's surviving spouse. The appellate court held that the annuity trust corpus passed to the successors-in-interest of the residuary legatees under the residuary clause of the father's will—one-half to the niece of the second husband of the mother, and one-half to the sole beneficiary of the daughter's testate estate. The language of the annuity trust created alternative contingent remainders and upon their creation, a reversion subject to complete divestment remained with the testator; furthermore, the alternative contingent in the testator's representatives became vested (thus divesting the reversion) and thereby passed to the successors-in-interest of the residuary legatees under the residuary clause.

In *In re Estate of Dalton*,²⁹ the Third District Appellate Court, in a split decision, permitted the children of a prior marriage to utilize an *ex parte* order, obtained by them in their capacity as conservators, for renunciation of their stepfather's will, thereby creating an estate

26. In this regard, the annuity trust provided that:

Upon receipt of the proof of the death of Virginia B. Bird, the said proceeds, amounting to twenty-five thousand two hundred eighty seven dollars and three cents (\$25,287.03), with accrued interest to the date of death, shall be payable immediately to such of her children, share and share alike, as shall then be living, or, if none be thus living, then payable to the executors, administrators, or assigns of Leon A. Bentley [the father].

Id. at 632, 303 N.E.2d at 167.

27. Although the opinion recites that she died "intestate," it obviously is a printing mistake since it then goes on to refer to her friend, Roscoe Morris, who is the sole beneficiary of her estate and who winds up with one-half of the annuity trust corpus in this case. *Id.* at 632, 303 N.E.2d at 168.

28. It is interesting to speculate that if, in planning her estate, there had been a careful review of all the facts, the problem presented herein might have been avoided if she had adopted her friend and sole beneficiary.

29. 16 Ill. App. 3d 186, 306 N.E.2d 49 (3d Dist. 1973).

in their ninety-three-year-old incompetent mother in excess of \$83,000.³⁰ In the absence of renunciation,³¹ their mother would have received the joint assets passing outside probate, some \$13,000, plus a surviving spouse's award³² and the benefits of the will which merely authorized the executor to use estate income for the wife's care and comfort. The remainderman sought to strike the renunciation on the theory that it was an *ex parte* order (e.g., the order of authorization in the conservatorship proceeding) given without notice and the opportunity to contest the merits. The majority and minority opinion noted the language of *In re Reighard's Estate*,³³ wherein the supreme court stated that an *ex parte* proceeding by an incompetent conservator seeking a probate order directing the conservator to renounce the ward's deceased spouse's will is proper when filed under the court's authority, and all persons interested in the will need not be made parties to the proceeding.

Both the majority and the dissent noted that *Reighard* gave the executor's attorney prior notice of the hearing. However, the case turned on the fact that the probate proceeding orders are final like any other judgment and hence are binding and conclusive. It would seem, though, that where a surviving spouse is incompetent and an issue exists as to whether a guardian or conservator should renounce the deceased spouse's will, the best interests of the incompetent surviving spouse can best be ascertained in a true adversary proceeding.³⁴

30. The incompetent mother received \$13,000 in jointly held assets plus the share of a spouse on renunciation, which, under ILL. REV. STAT. ch. 3, § 16 (1973), is one-third if there are descendants and one-half if there are no descendants. The case is not clear as to whether there were descendants. The stepfather's probate estate was approximately \$207,000 and hence the incompetent mother's children would ultimately receive either \$83,000 (one-third plus joint assets), or \$116,000 (one-half plus joint assets), plus a minimum surviving spouse award under ch. 3, § 178.

31. Renunciation of a will by a surviving spouse, ILL. REV. STAT. ch. 3, §§ 16-17 (1973), is a personal right and if not exercised by the surviving spouse during his or her lifetime, expires on death. *Rock Island Bank & Trust Co. v. First Nat'l Bank*, 26 Ill. 2d 47, 185 N.E.2d 890 (1962); *Andrykouski v. Theis*, 40 Ill. App. 2d 182, 189 N.E.2d 3 (1st Dist. 1973). However, if the surviving spouse is incompetent, renunciation by the surviving spouse's guardian or conservator lies in the discretion of the court. *Kinnett v. Hodd*, 25 Ill. 2d 600, 185 N.E.2d 888 (1962).

32. ILL. REV. STAT. ch. 3, § 178 (1973). The decedent died in March of 1971 and the law at that time provided for a minimum award of \$2500.

33. 402 Ill. 364, 84 N.E.2d 345 (1949).

34. The litigation arising from the *ex parte* order for renunciation of testator's will by the conservator of the surviving spouse, thus reducing the share of the remain-

SAVINGS BANK PROBLEMS

Common dispository schemes often involve "Totten trusts," "Pay on Death" accounts, and jointly held bank accounts. Arguably, however, the depositor may *not* have intended to dispose of his savings, but may merely have established the account for his own convenience or benefit. Illinois courts have resolved this dilemma by analyzing the facts and circumstances surrounding the conduct of both parties.³⁵

This approach is reflected in the landmark case of *In re Montgomery v. Michaels*,³⁶ where a second husband was successful in limiting the effectiveness of Totten trusts as a method to disinherit in the marriage relationship. His wife had placed virtually all of her assets in a Totten trust,³⁷ naming her two children of a prior marriage as beneficiaries. On her intestate death, her husband, Dr. Earl Montgomery, apparently was confronted with a no-probate asset estate and the Totten trusts. He challenged the validity of his wife's plan by first having himself appointed administrator,³⁸ and then filing a citation petition³⁹ which alleged that the Totten trusts were a fraud on his marital rights⁴⁰ and were illusory. The

derman, is directly covered by UPC §§ 5-405(b) and 1-401(a) which require that notice of such a proceeding be given interested parties to the proceeding. Although the conservatorship is under the control of the court, UPC § 5-408, IPA § 122, notice under the UPC must be given to interested parties before an order can be entered. Under the IPA, after initial notice of probate proceedings is given under IPA § 64, the court is under no specific statutory duty to give notice of subsequent proceedings as it would be under the UPC. In fact, in this case, the notice of petition for renunciation and the entered order were delivered to the attorney of the estate, and subsequently to testator's heirs after the order had been entered, 16 Ill. App. 3d 186, 187, 306 N.E.2d 49 (3d Dist. 1973).

35. See BOGERT ON TRUSTS § 20 (5th ed. 1973).

36. 54 Ill. 2d 532, 301 N.E.2d 465 (1973). See generally Note, *Totten Trusts—Rights of Surviving Spouse Prevail over Illusory Transfers*, 23 DEPAUL L. REV. 1247 (1974) for an indepth discussion of this case.

37. "Totten trusts" are savings accounts where the depositor is the trustee with the right to withdraw or revoke any or all of the account and use as his own whatever he may withdraw. The beneficiary receives any part remaining on deposit when the depositor-trustee dies. See *In re Estate of Petralia*, 32 Ill. 2d 134, 204 N.E.2d 1 (1956). Although improper, many parents use the social security number of a child-beneficiary to attribute the income to the beneficiary; this practice is so widespread that it is known as the "poor man's income splitting" device.

38. He was entitled to preference under ILL. REV. STAT. ch. 3, § 96 (1973) and apparently met the qualifications of this section.

39. See ILL. REV. STAT. ch. 3, §§ 183-187(a) (1973).

40. The court stated: "The minimum statutory share of a surviving spouse is that

supreme court determined that a savings account in trust for another—a “Totten trust”—cannot be used to cut out a depositor’s surviving spouse’s statutory share under the theory that a Totten trust is sufficiently testamentary in nature so that, by analogy, the statutory policy of permitting a surviving spouse to renounce a deceased spouse’s will and share in the proceeds of the estate is applicable to Totten trusts.⁴¹ The court also adopted the rules outlined in the *Restatement of Trusts*, in reference to creditors of the depositor: if there are insufficient other assets, Totten trust assets may be used to pay funeral expenses and expenses of administration.⁴²

provided in event of intestacy if there are both a spouse and descendants, namely a one-third interest therein to the surviving spouse. The surviving spouse takes one-half of the estate if there is no descendant. ILL. REV. STAT. ch. 3, §§ 11, 16.” 54 Ill. at 533-34, 301 N.E.2d at 466 (1973). The thought is expressed murkily; the rights of a surviving spouse, in summary fashion, are:

(a) Where a spouse dies intestate, the surviving spouse is entitled to the statutory share specified in ILL. REV. STAT. ch. 3, § 11 (1973) (one-third of estate if decedent is survived by descendants; or if no descendants, then the entire estate to the surviving spouse) of all assets owned in decedent’s sole name; in addition, the surviving spouse is entitled to a *minimum* surviving spouse’s award (§ 178) of \$5,000, which may be based in part on the goods and chattels of the decedent specifically selected by the surviving spouse (§ 181).

(b) Where a spouse dies testate (and assuming no will contest under § 90), the surviving spouse has two choices: first, the surviving spouse may take the benefits, if any, conferred by the will plus the surviving spouse’s minimum award of \$5,000 (unless the will expressly provides otherwise under § 182), which may be based in part on goods and chattels of the decedent not specifically bequeathed but specifically selected by the surviving spouse; or alternatively, the surviving spouse may renounce the will (§§ 16-17) in which event the surviving spouse will receive one-third of the assets owned in decedent’s sole name if decedent was survived by descendants or one-half of the assets owned in decedent’s sole name if the decedent leaves no descendants plus, in either case, a *minimum* surviving spouse’s award of \$5,000, which may be based in part on goods and chattels of the decedent not specifically bequeathed but specifically selected by the surviving spouse.

In addition, under appropriate circumstances, the surviving spouse is entitled to an estate of homestead to the extent in value of \$10,000. ILL. REV. STAT. ch. 52, § 1 (1973).

41. The *Montgomery* decision could have been handled under UPC §§ 2-201, 202. The augmented estate available for the elective share includes, under § 2-202 (1)(ii) “. . . any transfer to the extent that decedent retained at the time of his death a power . . . to revoke . . . the principal for his own benefit. . . .” The purpose of this section, despite UPC § 6-104 and the Comment to UPC § 6-101, is to prevent the owner of wealth from defeating the surviving spouse’s right to an elective share by means other than probate. See Comment, UPC § 2-202. The IPA does not extend to this situation.

42. See RESTATEMENT OF TRUSTS § 58, Comment d (1935).

Problems of joint bank accounts were construed in *In re Estate of Macak*.⁴³ A widower placed \$10,000 in a savings and loan association which issued a savings certificate in his name alone, although the signature card at the association was signed by the widower and his niece in joint tenancy. On the other side of the signature card, the widower had signed as an individual account holder. Six months later, the widower died intestate, his administrator initiated a successful citation proceeding, and the trial court held that the entire \$10,000 should be included in the estate. The appellate court reversed, holding that there was insufficient evidence to overcome the presumption of donative intent arising from the language in a statutory joint bank account contract (signature card), and that a certificate of deposit is not determinative of ownership since the certificate is merely a receipt for the deposit of money which the bank holds, especially since the certificate is non-negotiable.⁴⁴

Similarly, in *In re Estate of Baxter*,⁴⁵ the testator died owning a bank certificate of deposit made payable to decedent and two others as joint tenants with right of survivorship. The Administrator with Will Annexed sought to reach this non-probate asset through a citation proceeding, thereby raising the issue of whether it was a valid joint tenancy—and thus pass to the surviving joint tenants—or an invalid joint tenancy—and thus pass to the estate. Both the trial court and the Fourth District Appellate Court⁴⁶ held that under the Joint Rights and Obligations Act⁴⁷ a joint tenancy in a bank certificate of deposit could only be created by an agreement in writing signed by the parties. In reversing the lower courts, the supreme court concluded that a separate signature card signed by all parties is not necessary for the creation of a valid joint tenancy in a certificate of deposit since it fell within the statutory exception of "other instrument in writing" contained in the introductory

43. 14 Ill. App. 3d 261, 302 N.E.2d 436 (1st Dist. 1973).

44. The *Macak* decision could have been summarily handled under UPC § 6-104(a): "Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created." The IPA leaves this question to the court.

45. 56 Ill. 2d 223, 306 N.E.2d 304 (1973).

46. *In re Estate of Baxter*, 9 Ill. App. 3d 92, 291 N.E.2d 851 (4th Dist. 1973).

47. See ILL. REV. STAT. ch. 76, § 2(a)-(b) (1973).

paragraph of Section 2 of the Act in relation to Joint Rights and Obligations, and "other evidences of indebtedness or of interest" contained in proviso (b) of Section 2. The certificate of deposit was prepared by an employee of the bank at the direction of an officer who directed this registration upon being advised by the decedent that he wanted to be sure the certificate of deposit was registered in such a manner that it would pass to the other parties at his death. No separate signature card was signed and decedent gave possession of the certificate of deposit to his co-owners, who placed it in their safety deposit box for safekeeping.

The *Baxter* rule was re-inforced by *In re Estate of White*.⁴⁸ In *White*, the certificate of deposit bore the legend "Thomas White or Howard Bishop as joint tenants." Although there was an accompanying signature card purportedly bearing the signatures of the parties, the survivor-nephew admitted that he had no knowledge of the certificate of deposit until after his uncle's death and that he did not sign the signature card nor did anyone sign for him. The appellate court decision was reversed by Mr. Justice Davis who relied on the *Baxter* rule.⁴⁹

Another joint account problem was dissected in *In re Estate of Ak-senas*.⁵⁰ The deceased placed \$18,000 in a joint tenancy savings account with a friend four months prior to his death. His father,

48. 56 Ill. 2d 265, 307 N.E.2d 122 (1974).

49. In *Baxter* and *White*, the same result would not be obtained under UPC § 6-104(a) without resort to the "other evidence of indebtedness" language of the Illinois Joint Rights and Obligations Act which precludes the necessity of all parties signing a signature card creating joint tenancy. Notice that the delivery to the defendants of the certificate of deposit raises a strong presumption that an intended gift was made without resort to a right of survivorship pursuant to the statutory language of ch. 76, § 2(b). Note, however, that Justice Kluczynski in his dissent states that:

[T]his is a deposit, and it must therefore be governed by section 2(a) of the Joint Rights and Obligations Act, [not by section 2(b) which considers it an evidence of indebtedness which does not require an agreement to be signed to create a joint tenancy] which also pertains to passbook and checking accounts. Further, to hold as the majority does emasculates the explicit legislative intent expressed in section 2(a) which requires a separately signed agreement by all necessary parties in order to create a valid joint tenancy for a "deposit in any bank . . . transacting business in this State"

56 Ill. 2d at 233, 306 N.E.2d at 310. See also *Doubler v. Doubler*, 412 Ill. 597, 601, 107 N.E.2d 789, 791 (1952); *In re Estate of Wilson*, 404 Ill. 207, 216, 88 N.E.2d 662 (1949) (a separate signed agreement was necessary to create a joint tenancy).

50. 14 Ill. App. 3d 809, 303 N.E.2d 473 (1st Dist. 1973).

as administrator and only heir, filed a citation to discover assets and subsequently a citation to recover assets.⁵¹ The friend testified that the purpose of adding his name to the passbook was to see to it that after decedent's death, his father would be paid \$150 per month during his lifetime. Hence, the account was one of convenience; in order to establish a claim, the friend would have to establish that a gift of fund was intended or that an oral express trust existed with the father as life tenant and the friend as remainderman. The evidence on these grounds was insufficient.⁵²

A seemingly controversial solution to joint bank account problems was reached in *In re Estate of Taggart*.⁵³ Father Taggart died testate on December 3, 1968, leaving an estate in excess of \$337,000. In 1953 he and his niece, Helen Taggart Pellegrini, signed a signature card creating a joint tenancy at the City National Bank of Murphysboro. One year later the decedent executed a will providing: "FIFTH: I give and bequeath to my niece, Helen Pellegrini, all my interest in the joint bank accounts which I have with my niece in the City National Bank of Murphysboro, Illinois." Subsequently, the decedent withdrew \$25,000 from the joint account and purchased a time certificate of deposit in his name alone, leaving approximately \$4,000 in the joint account, which accumulated to \$13,000 at death. The niece never made any deposits or withdrawals.

On a petition to construe paragraph five, the trial court held that the niece was entitled to the amount actually on deposit in the joint account—\$13,000—but was not entitled to the \$25,000 certificate purchased with the funds transferred from the joint account. The appellate court affirmed, ruling that a surviving joint tenant in a bank account is entitled only to the balance as of the date of death and cannot "trace" proceeds withdrawn *inter vivos*⁵⁴ unless

51. A permissible technique under ILL. REV. STAT. ch. 3, § 183 (1973).

52. The *Aksenas* decision could also have been handled under UPC § 6-104(a)—if decedent's friend had never taken the witness stand and remained mute.

53. 15 Ill. App. 3d 1079, 305 N.E.2d 301 (5th Dist. 1973).

54. The court placed heavy stress upon the reasoning enunciated in *Medeiros v. Cotta*, 134 Cal. App. 2d 452, 286 P.2d 546 (1955), that to do so "would tend to make every joint tenancy account suspect and would promote instability rather than stability in ownership." See *Murgic v. Granite City Trust & Savings Bank*, 31 Ill. 2d 587, 591, 202 N.E.2d 470, 472 (1964); *In re Taggart*, 15 Ill. App. 3d 1074, 1086, 305 N.E.2d 301, 306 (5th Dist. 1973). The *Taggart* case has achieved notoriety as the Feb. 28, 1974, issue of the N.Y. Times indicates.

there was a "wrongful act" of the other joint tenant—*e.g.*, fraud, misrepresentation, unfair dealings, overreaching, or some similar wrongdoing. Hence, in the absence of some "wrongful act" or some "special agreement" between the joint tenants, no accountability lies for a unilateral withdrawal. Thus the holding seemingly conflicts with the *Macak* case⁵⁵ which stated: "the nature of a joint tenancy agreement is such that it may not be terminated by a unilateral action of one of the parties, even though each has the authority to draw out all of the money."⁵⁶

"Pay on Death" accounts have also been the subject of litigation during the past year.⁵⁷ One year prior to his death the decedent opened a bonus savings account with the Farmers State Bank of Ferris, Illinois, denominated "Charles Wright, Pay on Death to Mary Lowe." Mary was then his friend of four months. On decedent's testate death, his executor-son filed a citation proceeding to reach the P.O.D. account on the theory that as a general rule such bank accounts are invalid except where recognized by statute.⁵⁸

55. See note 43 *supra*. It should be noted, however, that the court found that the order in which decedent signed the joint tenancy agreement, whether before or after beneficiary, was *not* destructive of the joint tenancy relationship which is determinative of ownership. The entire passage reads:

If the individual account were signed last with an intent to revoke the joint tenancy, it would still be in effect, because the nature of a joint tenancy agreement is such that it may not be terminated by a unilateral action of one of the parties, even though each has authority to draw out all of the money.

14 Ill. App. 3d 261, 263, 302 N.E.2d 436, 437 (1st Dist. 1973). The court relied on *Siemanoski v. United State Bank*, 242 Ill. App. 390 (1st Dist. 1926) as authority that

even though he [decedent] could have withdrawn the entire amount and deposited it in his own name [only], however, the *account* could be terminated altogether only by mutual agreement of the parties. [Emphasis added]

41 Ill. App. 3d at 263, 302 N.E.2d at 438. Cf. ILL. REV. STAT. ch. 32 § 770 (1973).

56. The dispute over Reverend Taggart's activity in the joint account could have been specifically handled under the UPC. Section 6-104(a) holds that title in the account proceeds at the time of death is in the niece. The withdrawals from that account during Reverend Taggart's lifetime were valid to the extent they did not exceed his contributions or deposits, § 6-102(a). The niece did not make any deposits, and the presumption of the donative intent requisite to a completed gift would not occur until Taggart's death. The IPA does not include analagous provisions.

57. *In re Estate of Wright*, 17 Ill. App. 3d 894, 308 N.E.2d 319 (3d Dist. 1974).

58. P.O.D. bank accounts in savings and loans are valid in Illinois under ILL. REV. STAT. ch. 32, § 770(c) (1973). The executor-son's argument in this regard is concisely stated: "Appellee, on the other hand, argues that 'payable on death' ac-

The court went to great lengths to sustain the account for Mary Lowe by holding that it was either a valid "Totten trust" or a valid third-party beneficiary contract.⁵⁹

ANTENUPTIAL CONTRACTS

The common legal tool relied on to resolve wealth transmission problems in an "elderly second marriage" has frequently been the antenuptial contract.⁶⁰ The validity and wisdom of this device has once more been reiterated by *Lee v. Central National Bank & Trust Co. of Rockford*,⁶¹ which involved several unusual variants in the theme—specifically, the old revocation by marriage problem, the validity of memorandum to remove an oral antenuptial agreement from the bar of the Statute of Frauds, and admissible evidence issues.

In 1949, Bert and Olive Vogeler, a childless couple, executed wills embodying a common dispositive plan—all to survivor and then "over" to nieces and nephews of both. Bert died three years later leaving an estate of approximately \$135,000. Approximately ten years later Olive at seventy-two married⁶² Orin Cox, a seventy-four year-old widower with seven adult children. Prior to their mar-

counts in banks are alien to the common law, and until rendered effective by affirmative legislative action, they must be held violative of public policy unless in compliance with the Statute of Wills (ILL. REV. STAT. 1971, ch. 3, § 43)." 17 Ill. App. 3d at 899, 308 N.E.2d at 322.

59. *Wright* falls under the purview of UPC § 6-104(b): "If the account is a P.O.D. account, on the death of the original payee . . . any sums remaining on deposit belong to the P.O.D. payee or payees if surviving . . ." The IPA has no analogous provision.

60. See generally Winstein, *Antenuptial Agreements—What the Law Now Says*, 62 ILL. B.J. 604 (1974).

61. 56 Ill. 2d 394, 308 N.E.2d 605 (1974).

62. This had the effect of leaving Olive intestate as ILL. REV. STAT. ch. 3, § 46 prior to 1965 provided in part that ". . . marriage of the testator revokes a will executed by the testator before the date of the marriage." Although this provision was amended in 1965 to read in part (as it does today), "No will or any part thereof shall be revoked by any change in the circumstances, condition or marital status of the testator . . ." it was restricted to wills of decedents dying after December 31, 1965. This would not help Olive because as the appellate court noted in the same case, 11 Ill. App. 3d 60, 61-62, 296 N.E.2d 81, 83 (2d Dist. 1973), "The 1965 Act further provided in substance, however, that a will revoked in any manner, in this case by the marriage prior to the effective date of the Act, would not be revived except by re-execution." See *Stolte v. Stolte*, 37 Ill. App. 2d 425, 226 N.E.2d 615 (1st Dist. 1962).

riage, the parties verbally agreed that they each disclaimed any interest in any property the other owned.⁶³ Two years later this agreement was reduced to writing and signed by the parties. Olive died in February, 1970, and Orin died three months later. Olive's 1949 will was denied probate, no appeal being taken. The nieces and nephews of Olive who were beneficiaries under the 1949 will sought all of Olive's assets on the theory that the verbal antenuptial agreement, reduced to writing after marriage, along with the 1949 revoked will, constituted an equitable assignment to the will beneficiaries.

The evidence problems involved the admissibility of a letter from Olive to her first husband's sister—admitted, although hearsay, because it fell within the hearsay exception of intent, motive, design or plan—and oral statements of her second husband—admitted since they were admissions against interest.

The more difficult problem was the precedent of *McAnnulty v. McAnnulty*,⁶⁴ which Justice Schaefer distinguished on the grounds that in the present case the parties had undisputedly signed the document, and the agreement specifically referred to the fact that each of the parties had entered into an oral agreement before their marriage with each other and in consideration thereof. As a result, the court concluded that the written document was a sufficient memorandum to remove the oral antenuptial agreement from the bar of the Statute of Frauds.

COMMON LAW MARRIAGES

In re Estate of Stahl,⁶⁵ involves the difficult problem of trying to establish property rights where parties have cohabited without marriage. The claimant attempted to utilize the theory of common law marriage elsewhere⁶⁶ without factual success. The second ap-

63. *But see* ILL. REV. STAT. ch. 59, § 1 (1973) which provides in part: "That no action shall be brought, whereby . . . to charge any person upon any agreement made upon consideration of marriage . . . unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith. . . ."

64. 120 Ill. 26, 11 N.E. 397 (1887).

65. 13 Ill. App. 3d 680, 301 N.E.2d 82 (1st Dist. 1973).

66. In this instance, in Texas, where under Vernon's Texas Code Annotated, Family Code § 1.91(a)(2) (special pamphlet, 1970) a common law marriage is recognized if "They agreed to be married, and after the agreement they lived together

proach of the claimant—the theory of inter vivos gift—was also unsuccessful.

A common law wife likewise received no relief in *Williams v. Teachers Insurance and Annuity Association*.⁶⁷ The common law wife bore four children of the decedent and at the time of suit was pregnant with a fifth child. She unsuccessfully sought to impose a trust upon the proceeds of a life insurance policy—the decedent's most significant asset—payable to the mother of the deceased.⁶⁸ The common law wife took the family home as surviving joint tenant, but it was the subject of a foreclosure suit, and she was named the beneficiary of two other insurance policies which only amounted to \$2,200. No evidence was available to establish a constructive trust and the theory of resulting trust was not applicable. The court took the unusual step of suggesting at the close of the oral argument that the case was an appropriate one for compromise but when the parties reported they could not reach an equitable agreement, the court proceeded to the unhappy task of awarding all the funds to the mother, an equally innocent party.

WILL CLAUSES

*In re Estate of Appel*⁶⁹ indicates the practical impact of a tax burden clause⁷⁰ upon residuary beneficiaries, whose benefits can, under some circumstances, amount to little more than a "gracious but futile gesture." Because of the peculiar language employed by the testator,⁷¹ the residuary beneficiaries had a strong possibility of

in the state as husband and wife and there represented to others that they were married."

67. 15 Ill. App. 3d 542, 304 N.E.2d 656 (1st Dist. 1973).

68. The insurance company had deposited the amount of the policy with the clerk of the court and apparently the litigants stipulated that a disbursement could be made from the proceeds for funeral expenses.

69. 13 Ill. App. 3d 546, 300 N.E.2d 845 (1st Dist. 1973).

70. Article II of the decedent's will provided as follows: "All inheritance, estate, and succession taxes (including interest and penalties thereon) payable by reason of my death shall be paid out of and be charged generally against the principal of my residuary estate without reimbursement from any person." 13 Ill. App. 3d at 547, 300 N.E.2d at 846. In the absence of such a clause, inheritance taxes are payable by each legatee and devisee; see *In re McDonald's Estate*, 314 Ill. App. 148, 41 N.E.2d 128 (2d Dist. 1942).

71. Article V of the decedent's will provided as follows: "If my residuary estate shall contain any shares of stock of Carters Nationally Famous Jewelers, Inc., an Illinois corporation. . . I give and bequeath such shares, in equal parts to . . ."

broadening their asset base by arguing the inclusion of the assets passing under article V. The appellate court, however, held that the assets in article V constituted a specific bequest not subject to taxes. Prescinding from the problem of when to properly use a tax burden clause, the case is a reminder of the careful word scrutiny⁷² that occurs in will construction cases.⁷³

Attestation clause issues concerned two recent Illinois decisions. In *In re Estate of Jaeger*,⁷⁴ the appellate court affirmed the trial court's denial of a petition to admit a will to probate. The will proponent was a stranger to the decedent. Although the will contained an attestation clause, it was of no avail⁷⁵ since it was admitted that the witnesses did not sign in the presence of each other. One witness, whose character was impeached, testified to all the appropriate will execution formalities;⁷⁶ the other attesting witness was deceased.⁷⁷ Proof of the handwriting of the deceased attesting wit-

Article VI of the decedent's will provided as follows: "I devise and bequeath all my residuary estate, being all property wherever situated in which I may have any interest at the time of my death not otherwise effectively disposed of, but not including any property over which I may have power of appointment, as follows. . . ." 13 Ill. App. at 547, 300 N.E.2d at 846.

72. . . . Words strain,
Crack and sometimes break, under the burden,
Under the tension, slip, slide, perish,
Decay with imprecision, will not stay in place,
Will not stay still. . . .

From "Burnt Norton," first appearing in T.S. Eliot's *COLLECTED POEMS* (1936) and republished in *FOUR QUARTETS* in 1943 (copyright by T.S. Eliot).

73. Under the UPC § 916(b), the estate taxes would be apportioned among all persons interested in the estate in proportion to the value of their interest. Notice, however, that for federal estate tax purposes, which are normally a larger liability for all but relatively small estates (adjusted gross estates of \$60,000 or less), a state court decision to which the federal government was not a party need not be followed. *In re Estate of Busch*, 387 U.S. 456 (1967). Absent a tax clause, the burden of the federal estate tax in Illinois estates falls on the residue of the probate estate (the residuary estate being that left after payment of all the claims mentioned in IPA § 202, and after payment of specific legacies and devises). This rule is generally considered to have been settled by *First National Bank of Chicago v. Hart*, 383 Ill. 489, 50 N.E.2d 461 (1943).

74. 16 Ill. App. 3d 872, 307 N.E.2d 202 (5th Dist. 1974).

75. A prima facie case in favor of due execution of the will is established if an attestation clause shows that the formalities required by law have been met and the signatures on the instrument are admittedly genuine; see *In re Estate of Koss*, 84 Ill. App. 2d 59, 228 N.E.2d 510 (1st Dist. 1967).

76. See ILL. REV. STAT. ch. 3, § 69 (1973) for the necessary requirement.

77. In case of the death of a witness, proof of his handwriting has the same effect as if he had appeared and testified in his own person. ILL. REV. STAT. ch. 3, § 74 (1973).

ness was given by an employee of his; however, the wife and son of the deceased attesting witness both testified on behalf of the contestants that it was not his signature. A non-attesting witness also testified that he observed both attesting witnesses sign. Although witness credibility was the main issue, the case does underscore the importance of the attestation clause conforming in fact to the realities of will execution and attestation.

In *In re Estate of Salzman*,⁷⁸ the decedent prepared his own will, disposing of a \$20,000 estate. It was witnessed by two women on December 6 and 7, 1970, respectively. At the hearing to admit the will to probate, the first witness testified that she did not see the decedent sign the will nor did she recall seeing his signature although the decedent expressly acknowledged the instrument to be his will;⁷⁹ the second witness, in the trial court's opinion, was inconsistent with respect to the decedent's proper acknowledgment of the will as his act. Hence, the trial court denied admittance of the will. The appellate court unhappily referring to decedent's will as a holographic will (purists insist that a holographic will is an unwitnessed will in the handwriting of the decedent), held that the second witness believed she was signing the decedent's will based on conduct as a sufficient indicia of acknowledgment, and hence the will was proven.⁸⁰

CLAIMS AGAINST THE ESTATE

*In re Estate of Barbera*⁸¹ involved a dispute between the estate of a deceased lawyer and his partner of twenty-five years (oral partnership) over fees collected on 741 open cases. The partnership had been retained, prior to death, on a contingent fee basis. Reversing the trial and appellate court,⁸² the supreme court entered

78. 17 Ill. App. 3d 304, 308 N.E.2d 83 (5th Dist. 1974).

79. This is sufficient under ILL. REV. STAT. ch. 3, § 69 (1973), which states in substance that a will is sufficiently proved if each of two attesting witnesses testifies to the requirements therein, one of which, § 69(a), provides in part, disjunctively, "or that the testator acknowledged *it* to the witness as his act . . ."; the "it" refers to the will and not the signature in Illinois. See 127 A.L.R. 382 (1940).

80. The attestation problem here would have been solved under the UPC. If there was any doubt under IPA § 69 as to what the witnesses felt they had signed, the general policy of the UPC to validate wills whenever possible would probably, under the facts here, validate the instrument as a holographic will under § 2-503; see UPC Comment, 2-502.

81. 55 Ill. 2d 235, 302 N.E.2d 302 (1974).

82. 7 Ill. App. 3d 169, 287 N.E.2d 230 (1st Dist. 1972).

a direct judgment for the estate permitting the estate to participate in the contingent fees collected minus sixty percent gross receipts as overhead (based on the average percentage of gross receipts for five years prior to death) and minus reasonable compensation to the surviving partner for his services in winding up the partnership affairs.

In *In re Estate of White*⁸³ a claim for housekeeping services for five years immediately preceding the decedent's death was made by the widow of his pre-deceased wife's brother. The claimant had resided with the deceased for fifteen years and based her argument on an implied contract theory. The appellate court, enumerating the factors rebutting or corroborating the presumption of gratuity and analyzing housekeeping claim cases, held that the claimant could not recover because there was no evidence that she ever told the deceased he was indebted to her.

In *In re Estate of Voss*,⁸⁴ the decedent died owning United States Treasury bonds which had a market value of approximately \$240,000, but which were used at their face value of \$300,000 to pay the Federal estate tax.⁸⁵ The executor used the \$240,000 value on the Illinois inheritance tax return. The Attorney General objected to the market-price valuation of the treasury bonds and although unsuccessful in the trial court, was successful in the Third District Appellate Court.⁸⁶ The supreme court, in a split decision, and citing conflicting authority, held that United States Treasury bonds for Illinois inheritance tax purposes should be valued at their market value and not their face value.

83. 15 Ill. App. 3d 200, 303 N.E.2d 569 (3d Dist. 1973).

84. 55 Ill. 2d 313, 303 N.E.2d 9 (1973).

85. INT. REV. CODE OF 1954, § 6312. This section has been repealed with respect to obligations issued after Mar. 3, 1971, Pub. L. No. 92-5, § 4(a)(2) (Mar. 17, 1971); 85 STAT. 5 (1971).

86. 5 Ill. App. 3d 320, 282 N.E.2d 178 (3d Dist. 1972). See generally *People v. Continental Illinois Bank & Trust Co.*, 344 Ill. 123, 176 N.E. 305 (1931) (inheritance tax provisions are strictly construed against the state and in favor of the taxpayer when a question of gift or inheritance tax is in controversy); *In re Graves' Estate*, 242 Ill. 212, 89 N.E. 978 (1909) (all property passing by will or intestacy is subject to inheritance tax at rates based on the fair market value of the property, irrespective of agreements made as to the distribution of the property). *But cf.* *Walker v. People*, 192 Ill. 106, 61 N.E. 489 (1901) (valuation of stock in decedent's estate is not limited to market quotations and can be extended, for purposes of finding fair cash value, to include testimony of "actual" value).

TRUST ADMINISTRATION

An intra-family fight over a gun business left in trust was disposed of by summary judgment in favor of the trustee-beneficiary-daughter who had been sued by her co-beneficiary sister seeking a surcharge for losses and misappropriations in *Pawlouski v. Darnall*.⁸⁷ The case affords no normative guides but it is of reflective value in assessing the problem of dispositive plans for sole proprietorships. In this case, the father-testator left his business in trust to his wife and daughter as trustees to operate the business for ten years and then sell it and divide the proceeds equally between the mother and two daughters. Any of the beneficiaries could buy the other's shares at "the fair cash market value thereof as determined by three disinterested appraisers." Obviously, such a plan is predicated on harmonious family relations, but here the plaintiff resided in California and the precarious financial condition of the particular business required defendant's family efforts. Alternative dispositive plans clearly were more appropriate.

In *MacDonald v. Joslyn*,⁸⁸ a son had unsuccessfully contested the will of his father, who had died in California in 1963. Thereafter the executor, both individually and in his fiduciary capacity, obtained two default judgments against the son in the sum of \$173,717.75 on the grounds that the will contest constituted malicious prosecution. The son was a co-beneficiary of two inter vivos non-spendthrift trusts created by his mother and father in 1935 with an apparent situs in Illinois. The California judgments were registered in Cook County in an attempt to collect trust income in excess of \$800,000 held by the co-trustees because of their inability to locate the son.⁸⁹ The appellate court held that income retained by the trustees because of the unknown whereabouts of the beneficiary in a non-spendthrift, non-support trust created by a third person is available to the judgment creditors of the beneficiary.

Problems have also arisen in the administration of land trusts as

87. 15 Ill. App. 3d 390, 304 N.E.2d 478 (4th Dist. 1973).

88. 17 Ill. App. 3d 52, 307 N.E.2d 601 (1st Dist. 1974).

89. The California executor was also the testamentary trustee under the father's will and also one of three co-trustees of the 1935 inter vivos trusts; however, he has been "suspended" from that position pending the conclusion of this litigation.

In re Estate of Morys indicates.⁹⁰ The decedent had apparently planned a simple, effective use of non-probate devices—a \$20,000 Totten trust and a land trust of her sole real estate—to transmit her wealth to a close friend. Unfortunately the plan failed because of the intricacies of gift law as it related to the assignment of a beneficial interest in a land trust. The decedent was hospitalized during the last two months of her life; she instructed her friend to go to the bank, which was the trustee of a land trust in which decedent held her apartment building for over ten years, and have the trustee prepare an assignment to her of decedent's beneficial interest in the land trust. Decedent then executed the bank-prepared assignment in the presence of a relative, who witnessed it, and a hospital administrator, who notarized it. The document was given by the decedent to her friend and subsequently accepted by the bank as being in proper form.

Eleven days later, the decedent signed a power of attorney authorizing, among other things, the payment of real estate taxes by her friend. Her friend opened a checking account for decedent in which were deposited rents the friend collected during the hospitalization period. Disbursements were made for bills and the personal affairs of the decedent. The appellate court reversed the trial court and held that the conduct of both the parties subsequent to the execution of the assignment of the beneficial interest in the land trust was totally inconsistent with the existence of a present donative intent by the decedent. The tragedy of the case is that the objectives of the decedent could have been achieved with a properly phrased amendment to the land trust.⁹¹

CONCLUSION

Several of these decisions point toward sections of the UPC that would encompass recent trends in litigation that do not have their counterparts in the Illinois Probate Act, particularly the sections dealing with the Multiple-Party Accounts,⁹² and the Augmented Estate,⁹³ with its ramification for protecting the spouse's interest. A

90. 17 Ill. App. 3d 6, 307 N.E.2d 669 (1st Dist. 1973).

91. Since the bank as land trustee prepared the assignment, some degree of accountability would seem to lie against them by the disappointed donee.

92. UPC §§ 6-100 *et seq.*

93. UPC §§ 2-200 *et seq.*

thorough analysis of the UPC is not within the purview of this paper, and has been well-documented elsewhere.⁹⁴ While the UPC would simplify the wealth transmission process in non-contested cases, its substantive worth is still an open question.

94. See note 3 *supra*.