

THE LEGACY OF LAWRENCE W. INLOW

by Curtis E. Shirley

Lawrence W. Inlow was survived by four children from his first marriage and a wife and one child from his second marriage. Larry died without a Will, with an estate worth approximately 180 million dollars, consisting largely of stock in Conseco when the share price was much higher than in recent times.

The Trial Court appointed and replaced several executors. First appointed was his oldest child, Jason. He then renounced in favor of Marvin Frank. The court, *ex parte*, removed Mr. Frank and appointed Karl Kindig, who had been nominated by Larry's widow, Anita. After a hearing on all this the Court appointed Jason and Karl as co-executors. This did not last, so the Court removed Jason in favor of Karl serving alone.

I.

Karl employed Henderson Daily to represent him. They filed a fee petition and the Trial Court awarded an interim amount of \$750,000.00. Jason and his siblings appealed. *Inlow v. Inlow*, 735 N.E.2d 240 (Ind.App. 2000). The Court of Appeals reversed, holding that (1) attorneys may not recover fees for time spent preparing and defending the fee petition; (2) attorneys are entitled to be paid for exploring the possibility of a wrongful death action; (3) the risk that any malpractice committed in connection with the representation could exceed policy limits is a proper consideration to increase a fee; and (4) remand was required because the Trial Court should provide detailed findings and conclusions where the fee award is contested.

II.

Karl hired Ernst & Young to provide accounting services to the Estate. Jason and his siblings sued Ernst & Young for negligence; not for services rendered to Larry before he died, but for services rendered to Karl as executor. The Trial Court dismissed the amended complaint and they appealed. *Inlow v. Ernst & Young*, 771 N.E.2d 1174 (Ind.App. 2002).

The Court of Appeals held that heirs of an estate had standing to sue the accountant employed by the executor because the accountant's activities could impact the amount ultimately inherited. But the heirs had no vested right to possess real or personal property because the executor is charged with managing and protecting those assets, which might be exhausted to pay claims, expenses or taxes. So the Court of Appeals held

that the personal representative rather than the heirs was the real party in interest because it was the executor who hired the accountant and it was the executor who had the authority and responsibility for taking action against an accountant for inadequate service.

Judge Sharpnack dissented. He argued that Jason and his siblings (ultimately 40% intestate shares) should not be permitted standing to sue for damages that would otherwise flow to all of the heirs. The dissent argued they had no standing because the executor is charged with the obligation to bring such claims and is subject to removal or liability for not doing so. The dissent also would hold that the executor acting as a fiduciary cannot assign the right to sue or the proceeds of such a case to heirs in exchange for a personal release. Of course, the Court could permit an heir to receive such an assignment as a partial distribution to be credited against his or her share under 29-1-17-1.

The author would here also mention that the Court also would have the option to order the executor to abandon the claims against the accountant and distribute them to certain heirs under 29-1-13-8.

The Supreme Court of Indiana granted transfer, vacating the decision, and after the parties settled the issues, dismissed the appeal. 788 *N.E.2d* 1236 (*Ind.* 2003). It is interesting to note that in dismissing the case the Supreme Court described the case as follows: “The Court of Appeals held in this case that heirs to an estate had standing to file a free-standing lawsuit against the estate’s accountant for malpractice and negligence, to which action the personal representative could later become substitute plaintiff.”

III.

As if Larry’s widow did not have enough problems, enter the case of *Anita Inlow v. Wilkerson*, 774 *N.E.2d* 51 (*Ind.App.* 2002). Wilkerson was married to Larry’s sister, Carryl, who suffered from breast and brain cancer. The Court had appointed Larry, and after he died, Anita, as guardian over Carryl. After she died, Wilkerson sued Anita asking to disinter and reinter his wife’s remains, and damages for tortious interference with his rights to visit Carryl in the hospital and to arrange for her funeral and burial. The Jury awarded Wilkerson \$3,500 for wrongful interment, \$250,000.00 in compensatory and \$500,000.00 in punitive damages. The Trial Court reversed, holding that (1) Wilkerson did not attempt to exercise any right to make final funeral arrangements for Carryl or to inter her remains. (2) Anita did not engage in any extreme or outrageous conduct that deserved compensatory damages. And (3) she did not act in any malicious, oppressive, or intentional manner deserving of punitive damages.

IV.

Shortly before he died, Larry signed an irrevocable life insurance trust, designed to pass about ten million dollars to his children. Henderson Daily drafted the document, which named Larry as trustee. This was a classic incident of ownership that risked having the IRS tax the ten million as part of Larry's estate, even though it was funded by tax free gifts.

Jason and his siblings sued Henderson Daily and a variety of other defendants for harms caused to Larry and his estate, which diminished the value of the estate. The Trial Court dismissed the case and Jason appealed. *Inlow v. Henderson Daily*, 787 N.E.2d 385 (Ind.App. 2003). The Court of Appeals affirmed, holding that only the executor had authority to maintain a suit for any demand due the decedent or the estate based on 29-1-13-3, in essence adopting Judge Sharpnack's dissenting opinion in the earlier case now vacated.

The Court noted that heirs as interested persons can (1) file an intermeddler petition under 29-1-13-10; (2) file a petition asking the Court to order the executor to maintain an action or (if a conflict exists) appoint a special administrator to do so under 29-1-13-16; (3) petition to remove an executor for failing to perform his duties under 29-1-10-6; (4) sue the executor for failing to perform his duties under 29-1-16-1; and/or (5) object to the executor's accounting under 29-1-16-3. The Supreme Court of Indiana denied transfer. 787 N.E.2d 385 (2003).

The author has two observations concerning the holdings in this case. First, this should discourage any person or financial institution (with any sense) from accepting any appointment as an executor. Prior to this case it was generally understood that any interested heir could file any lawsuit on behalf of an estate (at his or her expense). If the interested person wanted to get paid by the estate, then he or she would have to file a petition asking for appointment as a special administrator. If an interested person did not file such a lawsuit, and then objected to the executor's final accounting for failing to do so, the executor could at least argue that the interested person should have filed the action if it could have provided a benefit.

Because of this *Inlow* case, 787 N.E.2d 385, any interested person can wait until the final accounting, object that the executor did not take proper action against a would-be defendant, (hold what in essence is a trial within a trial) and hold the executor liable for not suing a defendant that is probably now free from liability because of a limitations problem. No

one in their right mind would accept such a responsibility in a 180 million dollar estate.

Although the Court of Appeals dismissed the case filed against Henderson Daily, now Fifth Third Bank will probably have to defend against the exact same complaint framed as objections to its final accounting. Think of the possibilities: After objections are filed to the executor's final accounting, the Trial Court could find that Henderson Daily did not properly draft Larry's irrevocable life insurance trust. Because two years have passed since his date of death, Henderson Daily may be off the hook for any malpractice allegations. But the executor is not. If the estate paid too much in tax because of the problem, Fifth Third Bank could get surcharged, and its own lawyers who pressed for the result in this case could walk away without any potential liability.

Second, the author observes the lack of case citations to support the holdings. At least in *Inlow v. Ernst & Young*, 771 N.E.2d 1174 (Ind.App. 2002), vacated and dismissed, 788 N.E.2d 1236 (Ind. 2003), the Court of Appeals cited many cases to illustrate that only an Executor could bring suit on behalf of the estate: *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).

But a great many cases, including Supreme Court of Indiana cases and many seminal cases cited in estate litigation matters, argue against such an interpretation. Contrary to the holdings in this case, 787 N.E.2d 385, interested persons have filed suits on behalf of the estate for years: 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, 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) (a 1914 case where the father had conveyed real estate to son in 1900, and much later 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).

The Court of Appeals' holdings also conflict with Darlage v. Cheryl Drummond, 576 N.E.2d 1303 (Ind.App. 1991). There, 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 made the same argument that Ernst & Young made in

the one Inlow case and Henderson Daily made in this Inlow case — that a non-executor does not have standing as the real party in interest. The Court of Appeals in Darlage vehemently 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.

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.

See 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).

If another appellate court case does not overturn Inlow v. Henderson Daily, 787 N.E.2d 385 (Ind.App. 2003), transfer denied, 787 N.E.2d 385 (2003), the undersigned believes the Banks (and any other person interested in serving as an executor) should seek a legislative change giving interested persons the standing they had before, and requiring interested persons to file lawsuits they feel appropriate (or waive the matter). Otherwise, the Probate Code holds Banks (and any other executor) liable for damages they should have collected for the estate, while the should-be defendants (whether an Ernst & Young, Henderson Daily, etc.) walk away whistling a merry tune.

V.

Jason and his siblings brought yet another lawsuit in which they sued their step mother, challenging a partial distribution she received from the estate on theories of unjust enrichment, conversion and failure to make restitution. As background, all of the heirs together agreed on a partial distribution to Anita. The executor agreed to make a special election so that

Anita would pay any income taxes attributable to the 18 million distribution. But after the Court signed the partial distribution order (which said nothing about who paid what tax), the executor unilaterally changed its decision and paid the income taxes from the estate, saving Anita about 6.8 million dollars.

The Trial Court granted summary judgment for Anita and the kids appealed. *Jason Inlow v. Anita Inlow*, 797 N.E.2d 810 (Ind.App. 2004). The Court of Appeals noted that the Estate remains open, and there had been no final accounting to determine whether any of the heirs have received distributions in excess of their intestate share. The Trial Court found that the executor altered course because Anita would otherwise get taxed more than the kids had on prior distributions to them, and any discrepancy could be adjusted when he made future distributions. So the Court of Appeals found no unjust enrichment. The conversion count failed because Anita could not exert unauthorized control over property she received pursuant to a Court order, and in any event the property involved was not owned by the kids.

Just as in the prior cases, Jason and his siblings may have lost another battle but may end up winning the war. Although the Court of Appeals affirmed summary judgment for Anita, it basically gave her a partial distribution income tax free. But in the final accounting the executor must account for all prior distributions, and if the total tax burden is not shared proportionately, adjustments may have to be made.

VI.

In *Jason Inlow v. Anita Inlow*, 797 N.E.2d 810 (Ind.App. 2004), the Supreme Court of Indiana denied transfer, 812 N.E.2d 797, although Chief Justice Shepard would have remanded the case for the imposition of sanctions against counsel for the Inlow Children as suggested by Judge Baker in his concurring opinion. This must have been prophetic because in the published decision involving Henderson Daily, the Trial Court later ordered the attorneys for the Inlow Children to pay \$71,343.58 to the Insurance Brokers and \$283,744.12 to Great-West for filing a frivolous, unreasonable and groundless complaint, disputing whether the insurance policy included a "Direction for Settlement". Jason and his siblings appealed, and the Court of Appeals affirmed. *Inlow v. Henderson Daily*, 804 N.E.2d 833 (Ind.App. 2004).

VII.

In addition to all of the civil actions in Indiana state court, various members of the Inlow family and a special administrator filed suit in

federal court against the helicopter manufacturer under the Indiana Products Liability Act. The federal district court granted summary judgment to the defendants, and the Seventh Circuit affirmed. *First national Bank v. American Eurocopter*, 378 F.3d 682 (7th Cir. 2004). Larry died a tragically, when the rotor blade struck him walking from the helicopter toward the private jet. The Court held that Indiana's "sophisticated intermediary doctrine" prevented his estate from blaming others.