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August 28, 2020
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  - The Dead Man's Statutes have long been criticized by legal scholars, practitioners and appellate judges. Today, they remain the law in a small minc 35
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PROBATE AND TRUST LITIGATION

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PROBATE AND TRUST LITIGATION

Agenda

8:30 A.M. **Registration**

8:55 A.M. Welcome and Introductions
- John A. Cremer, Program Chair

9:00 A.M. Deadman Statutes
- Gregg S. Gordon

9:45 A.M. No Contest Clauses
- Sarah C. Jenkins

10:30 A.M. **Coffee Break**

10:45 A.M. Point / Counterpoint: Multiple Instrument Challenges and the New Statute
- Gregory L. Padgett, Nathan S.J. Williams

12:15 A.M. **Lunch Break (on your own)**

1:30 P.M. Top Ten Tips for Trial of a Will and Trust Contest
- Curtis E. Shirley, John A. Cremer

2:00 P.M. Will, Trust, POA Contests
- William J. Barkimer, Rodney S. Retzner
    - Incorporating "in the presence of" Requirements
    - Challenges, Defenses
    - Planning in Anticipation of a Dispute or Contest

2:45 P.M. **Refreshment Break**

3:00 P.M. Probate and Trust Mediation
- Michael P. Bishop

3:45 P.M. Defeating the Spousal Right of Election
- Jonathan E. Lamb

4:30 P.M. **Adjourn**

August 28, 2020

PROBATE AND TRUST LITIGATION

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August 28, 2020

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John A. Cremer practices with Cremer & Cremer in Fishers. He has practiced in the areas of estate and trust planning, administration and litigation in Indianapolis, maintaining a statewide practice representing both plaintiffs and defendants in various estate and trust related disputes. He has also served as co-counsel to assist lawyers with estate and trust litigation. Areas of Practice: Estate and Trust Planning Administration and Litigation Bar Admissions: Indiana, 1989 U.S. District Court Southern District of Indiana, 1989 Education: Indiana University School of Law, Indianapolis, Indiana, 1989 J.D. Indiana University, 1986 B.A. Published Works: Henry's Indiana Probate Law and Practice, (Co-Author), Matthew Bender & Co., Inc., 2005 "To What Extent May Non Probate Transfers Be Made to Defeat the Spousal Election Under I.C. 29-1-3-1?", Res Gestae, 2001 "New Tax Laws Provide Relief for Families", Indy's Child, December, 1997 "Powers of Attorney Their Usefulness and Concern", Indy's Child, January, 1997 Classes/Seminars Taught: "Legislative Changes to the Indiana Trust Code and POA Act from a Litigation Perspective", Allen County Bar Association, 2005 "Direct Exam Demonstration of Attorney who Drafted Estate Plan and Treating Physician for Probate Litigation Seminar", Indiana Continuing Legal Education Forum (ICLEF), 2004 "Summary of Recent Probate and Trust Decisions", ICLEF, 2004 "The Presumption of Undue Influence in Fiduciary Transactions", Indianapolis Bar Association, 2004 "Summary of Recent Probate Decisions", ICLEF, 2004 "Trust Litigation", ICLEF, 2001 "Will Contests", ICLEF, 2000 "Recent Discussions in Probate and Trust Litigation", ICLEF, 1999 "Trust Litigation", ICLEF, 1998 "Unforeseen Consequences of Dying Without a Will", Senior Community Group, 1997 "Will Contests", ICLEF, 1997 "Indiana's Dead Man's Statutes: An Overview", ICLEF, 1997 Professional Associations and Memberships: Probate Litigation ICLEF Seminar, 1994 - 2004 Co-Chair Indianapolis Bar Association Indiana State Bar Association Indiana Trial Lawyers Association Estate Planning Council of Indianapolis.

William J. Barkimer
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William Barkimer is an attorney in the firm's Litigation Practice Group. Mr. Barkimer concentrates his practice in the areas of commercial litigation, financial services, tort claims, and contractual disputes.

Mr. Barkimer's litigation experience spans more than eight years. Prior to joining Krieg DeVault, he served as an attorney litigating a variety of cases throughout the state of Indiana involving creditor's rights and civil collections, insurance defense, personal injury, landlord-tenant disputes, contract disputes, mechanic liens, and collections.

REPRESENTATIVE EXPERIENCE:
- Represented individuals and small businesses in various areas of law including commercial litigation, tort claims, criminal law, and contractual disputes
-Litigated cases throughout the state in both federal and state court
-Responsible for developing and managing a growing collections practice with clients including medical providers, financial institutions, and utility companies
-Represented individuals and small businesses in various areas of law including insurance litigation, tort claims, and contractual disputes

EDUCATION:
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- American Intellectual Property Association, Student Member
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Named as an *Indiana Super Lawyer* in the area of litigation beginning in 2004, Michael Bishop concentrates his practice in the areas of mediation, arbitration, and probate and trust litigation. He is recognized by *Best Lawyers in America* in Alternate Dispute Resolution and Arbitration and Trust and Estate Litigation since 2006. In 2008, he was selected as a Member of the *American Arbitration Association National Roster of Neutrals*. Michael has an **AV Peer Rating** from *Martindale-Hubbell*. Michael received his Juris Doctorate from Indiana University Robert H. McKinney School of Law in 1980. Following graduation, he served as Law Clerk to the Honorable James E. Noland, United States District Court, Southern District of Indiana. Michael is a **Fellow** of the International Academy of Mediators, **Fellow** of the *American College of Civil Trial Mediators*, and **Fellow** of the *National Academy of Distinguished Neutrals*.

Mr. Bishop is a member of the faculty of the *Indiana Trial Advocacy College* and is the Chair of the annual *Advanced Civil Mediator Training coarse* in Indiana. Michael was a founding member of the IBA Settlement Week in 1986. He served as Chair of the ISBA ADR Section, was a member of the Board of Directors for Indiana Continuing Legal Education Forum, and is Past President to the Board of Directors for the Indiana Bar Foundation. Michael received the **"Excellence in Continuing Legal Education Award"** from ICLEF, its highest award of achievement for commitment to continuing legal education. Michael is also past President of the Sagamore American Inn of Court, where he continues to serve as one of the founding Benchers of the Inn.

GREGG S. GORDON is the managing member of Gordon Law Office, LLC located in Martinsville, Indiana. While Mr. Gordon's practice is focused largely on litigation involving wills and trusts, he also has extensive experience in general business litigation. Mr. Gordon is a military veteran having served in the United States Air Force from 1980 through 1989 first with the Air Force Security Police and then as a Special Agent with the Air Force Office of Special Investigations. Mr. Gordon earned his B.S. *With Highest Distinction*, from Indiana University – Indianapolis in 1993 and his J.D. Cum Laude from the Indiana University School of Law – Indianapolis in 1996. Admitted to the Indiana Bar in 1996, Mr. Gordon completed the Indiana Trial Advocacy College in 2003 and civil mediation training in 2008.

Mr. Gordon is a frequent lecturer on probate litigation matters. He has been a presenter at numerous seminars with the Indiana Continuing Legal Education Forum, the Vincennes University Wills, Trusts, and Ethics Institute, the Indianapolis Bar Association, and the National Business Institute. He has been published in Res Gestae (Where There Is A Will, There Probably Is A Trust - Bringing Trusts into Line with Wills: Mental Capacity, *50 Res Gestae* 34 (September 2006) and has several reported opinions including *In re Trust of Rawlings*, 113 N.E.3d 675, 677 (Ind. Ct. App. 2018), *transfer denied sub nom. Rawlings v. Rawlings*, 123 N.E.3d 133 (Ind. 2019), *In re Markey v. Estate of Markey*, 38 N.E.3d 1003 (Ind. 2015), *Gast v. Hall*, 858 N.E.2d 154 (Ind. Ct. App. 2006), *In re Nobbe*, 831 N.E.2d 835 (Ind. Ct. App. 2005) and *Carter v. Estate of Davis*, 813 N.E.2d 1209 (Ind. Ct. App. 2004)

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Overview

Sarah Jenkins collaborates closely with clients to understand their business and financial goals as she guides them through commercial, appellate and probate litigation. Sarah is a trusted advisor to banks and financial institutions and has been retained as an expert witness regarding probate matters.

Fiduciary and Probate/Trust Litigation

Sarah advises and represents individuals, corporate fiduciaries and charitable nonprofits in:

- Will and trust contests
- Breach of fiduciary duty actions
- Contests of inter vivos transfers
- Accounting contests
- Guardianships and Commitment proceedings

Risk Management

Skilled at representing clients in litigation, Sarah also encourages clients to take proactive measures to manage the risk of legal action, including but not limited to assisting clients to minimize the risk of their legacies being contested.

Leadership & Community

Professional Associations

- American Bar Association — Section of Real Property, Trust and Estate Law
- Indiana State Bar Association — Probate, Trust & Real Property Section (Chair, 2014-15); Guardianship Registry Committee, 2011-15; Legal Ethics Committee, 2010-13; Improvements in the Judicial System Committee, 2010-12; Probate Review Committee; Litigation Section; and Appellate Practice Section
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Overview

Dom Gosheff helps individuals plan for the future and establish their legacies. He assists with estate planning, business succession planning, estate administration and planned charitable giving.

Dom counsels individuals throughout northern Indiana on strategies to maximize the transfer of family wealth while minimizing tax burden. He also advises individuals on income tax planning for estates and trusts.

In addition, Dom counsels individuals on guardianships and other protective proceedings for minors and incapacitated persons.

Leadership & Community

Professional Associations

- Indiana State Bar Association — Probate, Trust & Real Property Section
- Allen County Bar Association — Probate, Tax and Trust Section (Chair, 2010-12)
- Fort Wayne Estate Planning Council

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2020

Jonathan Lamb has been with Cremer & Cremer Law firm for 7 years. His primary area of practice there is in Trust and Estate Litigation, Estate Planning, Estate Administration, and Guardianship Proceedings. Jonathan litigates cases concerning Attorney-in-fact abuse, Will and Trust challenges, probate claims, non-probate transfers, the spousal right of election, contracts to devise, guardianship disputes, accountings for trusts, guardianships, and estate administrations, and any other matter filed or raised in an estate, trust, or guardianship proceeding. He has served as Guardian-Ad-Litem in disputed guardianship proceedings and served as personal representative in estate matters. Jonathan's practice includes appearances in trial courts around the state and appellate practice. Jonathan is an active member to the Indiana State Bar Association, Probate, Trust and Real Property Section. In 2020 Jonathan was selected as a Rising Star by Super Lawyers.

Jonathan previously served as a Deputy Attorney General under Gregg Zoeller, from 2011 through 2012 in the tax litigation section, representing the Department of Revenue and the Inheritance Tax Division. Jonathan received his MBA with a focus in accounting from the Indiana University, Kelley School of Business. He received his JD from the Indiana University Robert H. McKinney School of Law, and his Bachelors of Science in both Operations Management and Information Systems from the Indiana University, Kelley School of Business.

Jonathan has presented at numerous seminars with the Indiana Continuing Legal Education Forum and the Indiana State Bar Association, including but not limited to presentations on the laws of Intestacy; Federal Gift and Estate Tax; Probate Claims, their Defense, Prosecution, and Preemptive Planning Thereon; and The Fiduciary Detective, Asset Marshalling. He also assists with annual updates to Henry's Indiana Probate Law and Practice.

From 2018- 2019 Jonathan served as president of the Kiwanis Club of Fishers. Jonathan is a runner and enjoys running half and full marathons. He is actively involved in the local tennis community, playing in 4.0 and 8.0 mixed USTA leagues and previously serving as head IU Women's Tennis manager and club president of the IU Tennis Club while attending college.

Gregory L. Padgett is licensed to practice law in Indiana. After graduating from DePauw University *summa cum laude* in 1981, Mr. Padgett attended Northwestern University School of Law, graduating in the top third of his class in 1984. Mr. Padgett then joined the Kirkland & Ellis firm in Chicago, beginning his training as a trial lawyer in complex commercial litigation, including class-action antitrust and trade regulation matters, intellectual property litigation, employment litigation and other business matters. Mr. Padgett also gained valuable experience in the federal courts, arguing and winning his first appeal before the United States Court of Appeals for the Seventh Circuit at age 26.

Mr. Padgett returned home to central Indiana in 1988, joining Baker and Daniels and beginning his work in probate and trust litigation. In addition to gaining first-chair experience on several cases at trial, Mr. Padgett briefed, argued and won two more federal appeals and one state court appeal prior to joining Johnson, Hall and Lawhead in 1992.

As a partner at Johnson, Hall and Lawhead, Mr. Padgett learned a great deal about the intricacies of wills, trusts and probate administration from some of the best trust, estate and tax counsel in the Indianapolis area, including Richard Hall, Weldon Johnson and Lawrence Lawhead.
Mr. Padgett has handled virtually all forms of trust and estate litigation, including will contests, claims in estates, accountings and objections, determinations of heirship, complex trust disputes and contested guardianships.

Mr. Padgett has represented clients in the courtrooms of more than 40 Indiana counties. He first earned Martindale-Hubbel's prestigious “A-V” Rating in 1993, after just nine years in practice. Mr. Padgett was first selected to be profiled in “Who’s Who in American Law” in 1995, and has appeared every year since. He is a frequent chair or lecturer at continuing legal education seminars dealing with estate and trust matters. He was named one of the “Outstanding Lawyers of America” in 2003.

Mr. Padgett launched Padgett Law LLC in March of 2004, with the idea of creating an Indiana law firm focused exclusively on estate and trust litigation matters. He was first designated an Indiana "SuperLawyer" by his peers in 2011.

Rodney S. Retzner
Krieg DeVault LLP, Carmel

Rodney Retzner is the Chair of the firm's Estate Planning and Administration Practice Group. His practice is concentrated in the areas of estate and business succession planning, estate and trust administration and estate and trust litigation. In the practice of succession planning, Mr. Retzner has worked with many closely-held family businesses in order to assist in the transition of the business to future generations with the least amount of impact as possible from taxation as well as family relationships. Mr. Retzner's practice in the area of estate planning has included work with individuals with nominal estates up to individuals with over a billion dollars in net worth.

Curtis E. Shirley
The Law Office of Curtis E. Shirley, Indianapolis

Curtis Shirley graduated from the University of Evansville (BME '83), Indiana University at Bloomington (MM '85), and received his law degree from the Indiana University at Indianapolis (JD '91), summa cum laude. After law school, Mr. Shirley clerked for the Honorable James E. Noland of the United States District Court (1991-92), and the Honorable Daniel A. Manion of the United States Court of Appeals for the Seventh Circuit (1992-93).

Mr. Shirley has served as an adjunct professor of law at Indiana University in Indianapolis, teaching Advanced Probate Litigation, and Trusts & Estates as needed. His article, "Tortious Interference with an Expectancy", Res Gestae, Vl.41 No.4 (1997), in Res Gestae was cited as authority by the Indiana Court of Appeals in Keith v. Dooley, 802 N.E.2d 54 (Ind.App. 2004).

Mr. Shirley is admitted to practice before the United States Supreme Court, United States Tax Court, the Seventh Circuit, and all federal and state courts in Indiana. He is a member of the Indiana State Bar Association, Indianapolis Bar Association, Indiana Trial Lawyers Association, American Association for Justice, named in the Bar Register of Preeminent Lawyers, the Indiana Super Lawyers magazine, a Patron Fellow of the Indiana State Bar Foundation, a Distinguished Fellow of the Indianapolis Bar Foundation, received the IBA's Dr. John Mortin-Finney Excellence in Legal Education Award, and the ISBA's Pro Bono Publico Award. Mr. Shirley manages his own law firm, serves on the Boards of the Indianapolis Legal Aid Society, the Indianapolis Legal Aid Foundation, Indianapolis Childrens' Dyslexia Center, Chairs the Board of Extended Hand Prison Ministries, and has served on the planned giving committees for the University of Evansville and United Way of Central Indiana.

Mr. Shirley represents clients throughout the United States in will contests, trust contests, claims, guardianship disputes, and complex business litigation. His clients include many of the foremost attorneys, law professors, and law firms throughout Indiana, and he testifies as an expert witness on estate and trust matters, the fiduciary standard of an attorney and trustee, and attorney fee disputes. Mr. Shirley is a certified civil mediator.

Nathan S.J. Williams
Shambaugh, Kast, Beck & Williams, LLP, Fort Wayne

Nate Williams: I began my undergraduate career working toward a degree in social work. I liked the idea of being able to work with and help others. However, I also recognized that I wanted to be able to do that in a way that allowed me some creativity and independence in the manner that I was able to help. Upon graduation, I had the opportunity to work with individuals who had disabilities. This enjoyable work confirmed my desire to pursue a career in law as a means to serving others.

My areas of practice include estate and personal planning, estate and trust administration, guardianships, probate litigation, charities, business organizations, general litigation, and taxation. I came to work in these particular areas because I truly enjoy the role of attorney as a counselor, helping clients meet their goals and personal objectives. I often work with individuals or families where there is a special need or disability, putting to use my education and experience.

When not practicing law, I am usually hanging out with my wife, Amanda, and playing with our two beautiful daughters, Hannah and Bethany, or our tornado of a son, Sam.

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Section One

“Dead Men Tell No Tales – Or Do They?” – Indiana Deadman Statutes

By

Gregg S. Gordon

Probate & Trust Litigation

Presented August 28, 2020

Indiana Continuing Legal Education Forum
230 E. Ohio St., Suite 300
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Section One

"Dead Men Tell No Tales – Or Do They?" Indiana Deadman Statutes……………………………..….Gregg S. Gordon

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These seminar materials and the seminar presentation are intended to stimulate thought and discussion, and to provide those attending the seminar with useful ideas and guidance in the areas of probate litigation. The materials and the comments of Mr. Gordon do not constitute, and should not be treated as, legal advice or other legal technique, device or suggestion, or any of the consequences associated with them. Although we have made every effort to ensure the accuracy of these materials and the seminar presentation, neither Mr. Gordon or Gordon Law Office, LLC assumes any responsibility for any individual's reliance on the written or oral information presented during the seminar. Each seminar attendee should verify independently all statements made in the materials and during the seminar presentation before applying them to a particular fact pattern, and should determine independently the consequences of using any particular device, technique or suggestion before recommending the same to a client or implementing the same on a client's or his or her own behalf.

I. INTRODUCTION

It is the author's opinion that the application of a "Deadman Statute" is one of the most misunderstood topics in the realm of probate litigation. As Judge Kirsch noted in his dissenting opinion in *Childress Cattle, LLC v. Estate of Cain*, 88 N.E.3d 1121, 1126 (Ind. Ct. App. 2017):

> The Dead Man's Statutes have long been criticized by legal scholars, practitioners and appellate judges. Today, they remain the law in a small minority of states. . . . Dean Wigmore stated that America's judicial system is based on presuming one is innocent until proven guilty, but by their very nature, Dead Man's statutes prevent an entire class of persons from testifying because of an assumption that all witnesses are bound to lie when the lips of one are sealed due to death. Finally, as noted several years ago by Michael Simon and William Hennessey in their survey of Florida law, "The mere mention of the [Dead Man's] statute is enough to make most practitioners shudder.

Dead man statutes are intended to impose a rule of fairness based on the idea that when the lips of one party to a transaction are sealed by death, then the law seals the lips of the surviving party. But this "rule of fairness" is not necessarily the same as a privilege which general bars the admission of evidence. Rather, and as Judge Kirsh pointed out, a dead man statute serves to render an entire class of witnesses from being competent to testify *if* all the conditions identified within the statute have been met. The failure of even one condition, however, can render the statute in applicable and allow a witness to testify. Moreover, even if all the conditions have been met (and the protection afforded by such a statute has not been otherwise waived), a witness can still be rendered competent to testify. In short, when it comes to a Deadman Statue, there are no absolutes.

This presentation provides a brief overview of the Indiana Code provisions which collectively comprise Indiana's Deadman Statutes and is directed at helping a practitioner know when and how to invoke the protection afforded by such statues. It is also intended to help practitioners recognize and negate instances where a Deadman Statute is incorrectly asserted.

II. THE DEADMAN STATUTES AND RELATED CODE PROVISION

Indiana Has Two "Deadman Statutes" which are found in Title 34, Article 45 (Witnesses) of the Indiana Code.

A. Ind. Code § 34-45-2-4

(a) This section applies to suits or proceedings:

(1) in which an executor or administrator is a party;

(2) involving matters that occurred during the lifetime of the decedent; and

(3) where a judgment or allowance may be made or rendered for or against the estate represented by the executor or administrator.

(b) This section does not apply in a proceeding to contest the validity of a will or a proceeding to contest the validity of a trust.

(c) This section does not apply to a custodian or other qualified witness to the extent the witness seeks to introduce evidence that is otherwise admissible under Indiana Rule of Evidence 803(6).

(d) Except as provided in subsection (e), a person:

(1) who is a necessary party to the issue or record; and

(2) whose interest is adverse to the estate;

is not a competent witness as to matters against the estate.

(e) In cases where:

(1) a deposition of the decedent was taken; or

(2) the decedent has previously testified as to the matter;

and the decedent's testimony or deposition can be used as evidence for the executor or administrator, the adverse party is a competent witness as to any matters embraced in the deposition or testimony.

B. Ind. Code § 34-45-2-5

(a) This section applies to suits by or against heirs or devisees founded on a contract with or demand against an ancestor:

(1) to obtain title to or possession of property, real or personal, of, or in right of, the ancestor; or

(2) to affect property described in subdivision (1) in any manner.

(b) This section does not apply in a proceeding to contest the validity of a:

(1) will; or
(2) trust.

(c) Except as provided in subsection (d), neither party to a suit described in subsection (a) is a competent witness as to any matter that occurred before the death of the ancestor.

(d) A custodian or other qualified witness in a suit described in subsection (a) may present evidence that is admissible under Indiana Evidence Rule 803(6).

In addition, three other code provisions should be noted because of their potential interplay with these statutes.

C. Ind. Code § 34-45-2-6

(a) This section applies:

(1) when an agent of a decedent testifies on behalf of an executor, administrator, or heirs concerning any transaction the agent had:

(A) with a party to the suit, or the party's assignor or grantor; and

(B) in the absence of the decedent; or

(2) if any witness testifies on behalf of the executor, administrator, or heirs, to any conversation or admission of a party to the suit, or the party's assignor or grantor, made in the absence of the deceased.

(b) The party against whom the evidence is adduced, or the party's assignor or grantor, is competent to testify concerning the matters described in subsection (a).

D. Ind. Code § 34-45-2-9

When the husband or wife is a party, and not a competent witness in his or her own behalf, the other shall also be excluded.

E. Ind. Code § 34-45-2-10

(a) In all cases in which:

(1) executors, administrators, heirs, or devisees are parties; and

(2) one (1) of the parties to the suit is incompetent under this chapter to testify against the parties described in subdivision (1);

the assignor or grantor of a party making the assignment or grant voluntarily shall be considered a party adverse to the executor or administrator, heir, or devisee.

(b) However, in all cases referred to in sections 4 through 9 of this chapter, any party to the suit has the right to call and examine any adverse party as a witness.

(c) The court may require any party to a suit or other person to testify. Any abuse of the court's discretion under this subsection is reviewable on appeal.

III. KNOWING WHEN THE DEADMAN STATUTES APPLY

It is established case law that “the only purpose of the dead man’s statutes is to preserve decedents’ *estates* from spurious claims or defenses. *Summerlot v. Summerlot*, 408 N.E.2d 820, 827 (Ind. Ct. App. 1980) (emphasis added). *See also In re Estate of Rickert,* 934 N.E.2d 726, 731 (Ind. 2010) (“The Dead Man's Statute establishes as a matter of legislative policy that claimants to the estate of a deceased person should not be permitted to present a court with their version of their dealings with the decedent.”); *In re Estate of Holt,* 870 N.E.2d 511, 516 (Ind. Ct. App. 2007) (holding that the controversy does no concern a claim against the assets of the estate

and therefore dead man statute inapplicable); *In re Estate of Lambert*, 785 N.E.2d 1129, 1132 (Ind. Ct. App. 2003) ("We have held that the Dead Man's Statute applies to all cases in which a judgment may result for or against the estate, notwithstanding the parties' positions as plaintiff or defendant.")

"Rather than excluding evidence, the statute prevents a particular class of witnesses from testifying as to claims against the estate." *Bedree v. Bedree*, 747 N.E.2d 1192, 1195 (Ind. Ct. App. 2001). A person is a member of this class of witnesses when all the following requirements are met[1]

a) the action is one in which the administrator or executor is a party[2];

b) the action involves matters which occurred within and during the lifetime of the decedent;[3]

c) a judgment may be made or rendered for or against the estate represented by such administrator or executor;[4]

---

[1] Regarding Ind. Code § 34-45-2-5, *See Summerlot v. Summerlot*, 408 N.E.2d 820, 825 (Ind. Ct. App. 1980) (Ind. Code § 34-1-14-7 [now Ind. Code § 34-45-2-5] "the action must be first and foremost "'by or against an heir or devisee as such' . . . and "applies where the decedent held the property at the time of death and where the party took title to the property in controversy under either the laws of intestacy as an heir or the will as a devisee or legatee.")

[2]*Cf. In re Unsupervised Estate of Harris*, 876 N.E.2d 1132, 1135 (Ind. Ct. App. 2007) ("Under the Dead Man's Statute, a witness is incompetent to testify when: (1) an administrator or executor is a party, *or one of the parties is acting in the capacity of an administrator or executor* . . .")(emphasis added).

[3] *See Kalwitz v. Estates of Kalwitz,* 759 N.E.2d 228, 232 (Ind. Ct. App. 2001) ("The application of the statute is limited to circumstances in which the decedent, if alive, could have refuted the testimony of the surviving party."); *See also Johnson v. Estate of Rayburn,* 587 N.E.2d 182, 185 (Ind. Ct. App. 1992) *superceded by statute on other grounds* (Witness was not incompetent to testify when testimony pertained to matters which were not subject to being refuted by the decedent).

[4] *See Riggs v. Hill*, 84 N.E.3d 699, 703 (Ind. Ct. App. 2017) ("the Dead Man's Statute prohibits the testimony of an alleged surviving spouse about her relationship with the decedent where she is seeking to inherit a portion of the decedent's estate."); *Cf.*

d) the witness is a necessary party to the issue[5]; and

e) the witness is adverse to the estate and testifies against the estate.[6]

Id. at 1196.

In the recent decision of *Bergal v. Bergal*, No. 19A-CT-1062, 2020 WL 4331518 (Ind. Ct. App. July 28, 2020), the appellate court concluded that the Deadman Statute applied to testimony of a defendant who received trust assets from an inter vivos trust. The defendant on appeal argued that prior case law established that the Dead Man's Statute did not apply to trusts. *See Given v. Cappas,* 486 N.E.2d 583 (Ind. Ct. App. 1985); *See also In re Knepper*, 856 N.E.2d 150, 156 (Ind. Ct. App. 2006) (holding that the Dead Man's Statute did not apply to non-probate payable on death account because "[n]o estate was ever opened ... and [the guardian of the decedent] was never an executor or administrator of such an estate" so "the Dead Man's Statute—on its face—does not apply here").

The Court Of Appeals in *Bergal*, nevertheless, found that "the Trust at issue is so central to [Decedent's] overall estate plan that it is akin to the estate itself." *Id.* at *9. The Court also noted that "the Dead Man's Statute applies where one of the parties is acting in the capacity of an administrator or executor. . . . We have little difficulty concluding that [Plaintiff], who is the trustee of the Trust, which included the bulk of

[5] *See Satterthwaite v. Satterthwaite's Estate*, 420 N.E.2d 287, 290 (Ind. Ct. App. 1981) ("An interest which would render a witness incompetent is one by which the witness will gain or lose by the direct legal operation of that judgment. The interest must be direct, present, certain and vested. It must be a real and legal interest. A bias or sentiment is not sufficient to cause a witness to be incompetent.")(citations omitted) *See also Morfin v. Estate of Martinez*, 831 N.E.2d 791, 798–99 (Ind. Ct. App. 2005).

[6] *See Gabriel v. Gabriel*, 947 N.E.2d 1001, 1009 (Ind. Ct. App. 2011) (testimony at hearing to determine heirship not adverse to estate because it has yet been determined who has an interest); *See also Johnson*, 587 N.E.2d at 186 (personal representative with no interest in estate not incompetent under Dead Man Statute).

[Deceased's] estate, is acting in the capacity of an administrator or executor." *Id. at *8, fn 10.*

IV. KNOWING WHEN THE DEADMAN STATUTES DOESN'T APPLY

A. THE DEADMAN STATUTES DO NOT APPLY TO WILL OR TRUST CONTESTS

Both Ind. Code §§ 34-40-2-4 and 5 expressly provide that neither section apply to proceedings contesting a will or trust.

B. THE DEADMAN STATUTES DO NOT APPLY TO DISCOVERY

The Indiana Supreme Court has made it clear that the dead man statutes have no application to discovery matters:

> The position held by this Court is that the mere taking of a deposition does not waive the applicability of the Dead Man's statute. . . . We add that requesting an admission does not constitute a waiver of the incompetency of the witness receiving that request, i.e. a party may request admissions from an opposing party and still raise the incompetency objection if that party attempts to testify at trial. Discovery, as its name suggests, exists in order for parties to explore and investigate. It is for this reason that the discovery rules explicitly allow the discovery of inadmissible information. . . . Treating material discovered as a waiver of protections such as the Dead Man's statute would inhibit, not facilitate, the acquisition of information that might lead to admissible evidence.

Taylor v. Taylor, 643 N.E.2d 893, 895 (Ind. 1994) (citations omitted).

C. THE DEADMAN STATUTES CAN BE WAIVED

Waiver of the dead man statutes can occur in two ways. First, the claimant may offer evidence such as designating deposition testimony from a witness that would otherwise be incompetent under the dead man statute. If a timely objection/motion to strike based on the dead man statute is not made, then any exclusion available under the dead man statute will be waived. *See Taylor*, 643 N.E.2d at 896. Likewise, if an estate itself offers evidence that would otherwise be excluded by the dead man statute, then the protection afforded by the statute is waived. *See Carlson v. Warren,* 878 N.E.2d 844, 849 (Ind. Ct. App. 2007). *See also Matter of Estate of Palamara,* 513

N.E.2d 1223, 1232 (Ind. Ct. App. 1987) ("A personal representative may make a witness competent by calling the witness on the estate's behalf. . .; by failing to object when the adverse party calls himself to testify on his own behalf. . .; or by questioning beyond the scope of direct examination.") (citations omitted).

D. THE DEADMAN STATUE CAN OVERRULED

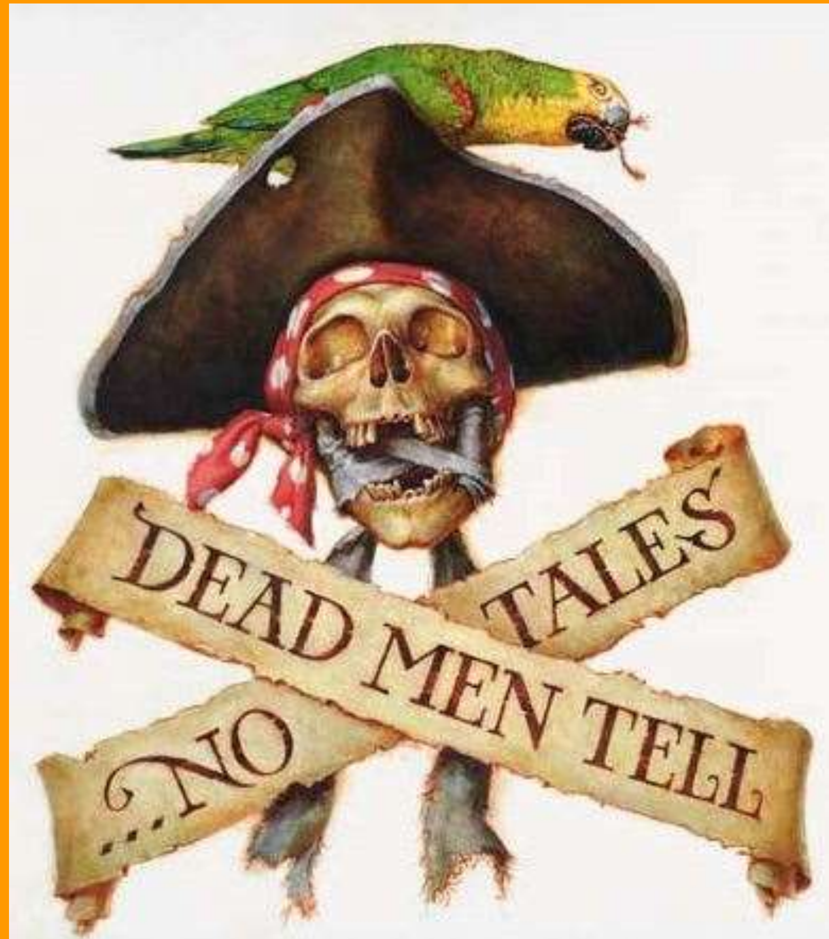
Ind. Code § 34-45-2-10 can also be used to allow the testimony of a witness otherwise rendered incompetent by the Dead Man Statutes. For this to occur, the plaintiff needs to make a prima facie case through other evidence. Once this has been accomplished, a trial court can require an incompetent witness to testify. *Wilhoite v. Beck*, 141 Ind. App. 543, 548, 230 N.E.2d 616, 620 (1967). *See also Alexander's Estate v. Alexander,* 138 Ind. App. 443, 450, 212 N.E.2d 911, 915 (1966) ("We conclude from the record in the case before us that a *prima facie* case for the appellee was established by other evidence before the appellee was required to testify. It is our opinion therefore that the testimony of the appellee was cumulative and served only to clarify the evidence already in the case."); *Ewell v. King*, 133 Ind. App. 172, 177, 180 N.E.2d 774, 777 (1962) (Error to allow witness, over objection, to testify to matters during the lifetime of decedent before a prima facia case was established).

E. OFFERS OF PROOF

One additional point should be noted when it comes to dealing with the Dead Man Statutes and that is what should be done if a trial court sustains an objection rendering a witness incompetent: Make an Offer of Proof. In *White v. White*, 655 N.E.2d 523, 529, n. 13 (Ind. Ct. App. 1995), the appellate court pointed out that "recent decisions have seemingly required an offer of proof even when the trial court has found a witness incompetent or when it has otherwise prevented a witness from giving any

testimony." *See also Childress Cattle*, 88 N.E.3d at 1124-25 ("Without facts about the substance of the proposed testimony on other matters, we cannot review whether it would be allowed or precluded under the Dead Man's Statute."); *Paullus v. Yarnelle*, 633 N.E.2d 304, 307 (Ind. Ct. App. 1994) ("In order to determine whether the statute should be applied to proffered evidence the party offering the testimony must make an offer of proof without which neither the trial court or a reviewing court can decide if the testimony concerns matters or transactions concerning the decedent, or matters which merely occurred while the decedent was alive. Absent an offer of proof, neither this court nor the trial court can adequately determine the admissibility and relevance of the proffered testimony.")

"Dead Men Tell No Tales – Or Do They?" Indiana Deadman Statutes



"Dead Men Tell No Tales – Or Do They?" Indiana Deadman Statutes

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"Dead Men Tell No Tales – Or Do They?" Indiana Deadman Statutes

"Dead Men Tell No Tales – Or Do They?"
Indiana Deadman Statutes

"Dean Wigmore stated that America's judicial system is based on presuming one is innocent until proven guilty, but by their very nature, Dead Man's statutes prevent an entire class of persons from testifying because of an assumption that all witnesses are bound to lie when the lips of one are sealed due to death."

-Judge Kirsch, *Dissenting Opinion in Childress Cattle, LLC v. Estate of Cain, 88 N.E.3d 1121, 1126 (Ind. Ct. App. 2017)-*

Criteria:

(Bedree v. Bedree, 747 N.E.2d 1192, 1195 (Ind. Ct. App. 2001)

Is the action one in which the administrator or executor is a party?

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Criteria:

(Bedree v. Bedree, 747 N.E.2d 1192, 1195 (Ind. Ct. App. 2001)

Does action involve matters which occurred within and during the lifetime of the decedent?

Criteria:

(Bedree v. Bedree, 747 N.E.2d 1192, 1195 (Ind. Ct. App. 2001)

Can a judgment be made or rendered for or against the estate represented by such administrator or executor?

Criteria:

(Bedree v. Bedree, 747 N.E.2d 1192, 1195 (Ind. Ct. App. 2001)

Is the witness a necessary party to the issue?

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Criteria:

(Bedree v. Bedree, 747 N.E.2d 1192, 1195 (Ind. Ct. App. 2001)

Is the witness adverse to the estate and testifying against the estate?

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Holding:

"since the [Dead Man's] statute in this case established an exception to the general rule of the competency of parties to testify, it must be construed strictly to 'apply only to such cases as the wording of the provisions manifestly intended, and, unless the wording of the particular provision embraces the exception its application will not be extended.'"

Summerlot v. Summerlot, 408 N.E.2d 820, 824 (Ind. Ct. App. 1980)

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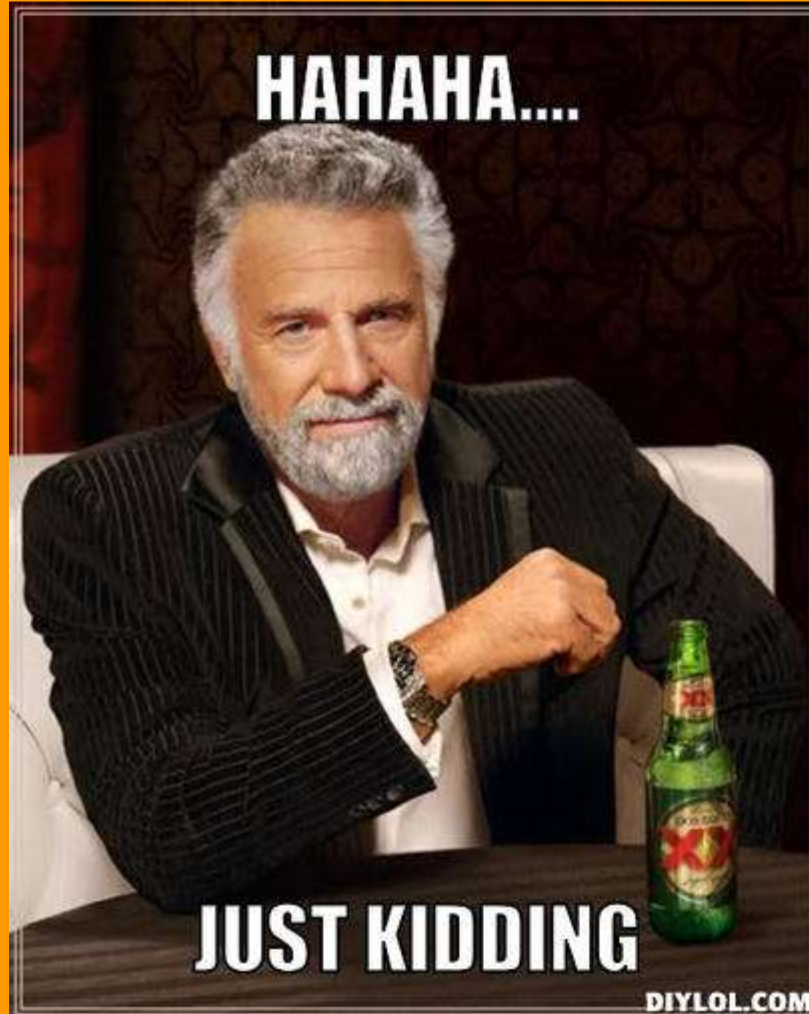

Bergal v. Bergal, No. 19A-CT-1062, 2020 WL 4331518 (Ind. Ct. App. July 28, 2020)

Holding:

(Following a 14-day jury trial)

“In this case, the evidence in the record shows that the Trust was the primary piece of [Decedent’s] overall estate plan. Specifically, the will that was created at the same time as the Trust was “a pour over Will . . .into the Trust so that everything would be in the Trust ultimately at the time of his death.” . . . Therefore, while the Trust itself is non-probate, we are convinced that it is sufficiently related to probate that the outcome of this case will affect his overall estate. . . .In sum, we find that in this particular case, the Trust at issue is so central to [Decedent’s] overall estate plan that it is akin to the estate itself. Under these circumstances, we find that the trial court did not err by finding that the Dead Man's Statute prevented [subsequent childless spouse] from testifying about statements made by [Decedent].”

Bergal v. Bergal, No. 19A-CT-1062, 2020 WL 4331518, at *8–9 (Ind. Ct. App. July 28, 2020)

Holding:

(Following a 14-day jury trial)

“In this case, the evidence in the record shows that the Trust was the primary piece of [Decedent’s] overall estate plan. Specifically, the will that was created at the same time as the Trust was “a pour over Will . . .into the Trust so that everything would be in the Trust ultimately at the time of his death.” . . . Therefore, while the Trust itself is non-probate, we are convinced that it is sufficiently related to probate that the outcome of this case will affect his overall estate. . . . In sum, we find that in this particular case, the Trust at issue is so central to [Decedent’s] overall estate plan that it is akin to the estate itself. Under these circumstances, we find that the trial court did not err by finding that the Dead Man's Statute prevented [subsequent childless spouse] from testifying about statements made by [Decedent].”

Bergal v. Bergal, No. 19A-CT-1062, 2020 WL 4331518, at *8–9 (Ind. Ct. App. July 28, 2020)

Holding:

(Following a 14-day jury trial)

“To the extent that [subsequent childless spouse] also argues that there is no executor or administrator who is a party to this litigation, we note that this Court has held that even if an administrator or executor is not a party to the action, the Dead Man's Statute applies where one of the parties is acting in the capacity of an administrator or executor. *In re Unsupervised Estate of Harris, 876 N.E.2d 1132, 1135* (Ind. Ct. App. 2007). We have little difficulty concluding that [Decedent’s son], who is the trustee of the Trust, which included the bulk of [Decedent’s] estate, is acting in the capacity of an administrator or executor.”

Bergal v. Bergal, No. 19A-CT-1062, 2020 WL 4331518, at *8, fn 10 (Ind. Ct. App. July 28, 2020)

Holding:

(Following a 14-day jury trial)

"To the extent that [subsequent childless spouse] also argues that there is no executor or administrator who is a party to this litigation, we note that this Court has held that even if an administrator or executor is not a party to the action, the Dead Man's Statute applies where one of the parties is acting in the capacity of an administrator or executor. *In re Unsupervised Estate of Harris, 876 N.E.2d 1132, 1135* (Ind. Ct. App. 2007). We have little difficulty concluding that [Decedent's accountant], who is the trustee of the Trust, which included the bulk of [Decedent's] estate, is acting in the capacity of an administrator or executor."

Bergal v. Bergal, No. 19A-CT-1062, 2020 WL 4331518, at *8, fn 10 (Ind. Ct. App. July 28, 2020)

THE DEADMAN STATUTES DO NOT APPLY TO WILL OR TRUST CONTESTS

THE DEADMAN STATUTES DO NOT APPLY TO DISCOVERY

THE DEADMAN STATUTES CAN BE WAIVED

THE DEADMAN STATUTES DO NOT APPLY TO INDIANA RULE OF EVIDENCE 803(6)

THE DEADMAN STATUE CAN OVERRULED

Ind. Code § 34-45-2-10:

(b) However, in all cases referred to in sections 4 through 9 of this chapter, any party to the suit has the right to call and examine any adverse party as a witness.

(c) The court may require any party to a suit or other person to testify. Any abuse of the court's discretion under this subsection is reviewable on appeal.

“Dead Men Tell No Tales – Or Do They?”
Indiana Deadman Statutes

Ind. Code § 34-45-2-10:

(b) However, in all cases referred to in sections 4 through 9 of this chapter, any party to the suit has the right to call and examine any adverse party as a witness.

(c) The court may require any party to a suit or other person to testify. Any abuse of the court's discretion under this subsection is reviewable on appeal.

Holding:

“after the plaintiff has made out a prima facie case by the testimony of other witnesses there is no abuse of discretion in the trial court requiring an incompetent witness to testify.”

Wilhoite v. Beck, 141 Ind. App. 543, 548, 230 N.E.2d 616, 620 (1967).

OFFER

“Dead Men Tell No Tales – Or Do They?”
Indiana Deadman Statutes

OF

PROOF

OFFER

OF

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“Dead Men Tell No Tales – Or Do They?” Indiana Deadman Statutes

Holding:

“In order to determine whether the statute should be applied to proffered evidence the party offering the testimony must make an offer of proof without which neither the trial court or a reviewing court can decide if the testimony concerns matters or transactions concerning the decedent, or matters which merely occurred while the decedent was alive. Absent an offer of proof, neither this court nor the trial court can adequately determine the admissibility and relevance of the proffered testimony.”

Paullus v. Yarnelle, 633 N.E.2d 304, 307 (Ind. Ct. App. 1994)

Holding:

“In order to determine whether the statute should be applied to proffered evidence the party offering the testimony **must** make an offer of proof without which neither the trial court or a reviewing court can decide if the testimony concerns matters or transactions concerning the decedent, or matters which merely occurred while the decedent was alive. Absent an offer of proof, neither this court nor the trial court can adequately determine the admissibility and relevance of the proffered testimony.”

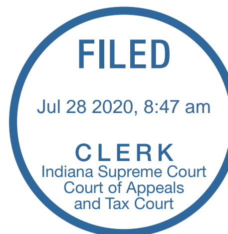
Paullus v. Yarnelle, 633 N.E.2d 304, 307 (Ind. Ct. App. 1994)

"Dead Men Tell No Tales – Or Do They?"
Indiana Deadman Statutes

The words of a dead man are modified in the guts of the living.

— W. H. Auden —

AZ QUOTES



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IN THE COURT OF APPEALS OF INDIANA

Linda S. Bergal,

Appellant-Defendant,

v.

David A. Bergal and Joseph M. Sanders, as Successor-Trustee of the Milton B. Bergal Trust,

Appellees-Plaintiffs

July 28, 2020

Court of Appeals Case No. 19A-CT-1062

Appeal from the Porter Superior Court

The Honorable Mary R. Harper, Special Judge

Trial Court Cause No. 64D02-1702-CT-1500

Baker, Judge.

[1] Linda Bergal (Linda) appeals after a jury found in favor of David Bergal (David) and Joseph Sanders on David and Sanders's complaint related to assets that were originally part of the trust of Milton Bergal (Milton), who was David's father and Linda's husband. Linda raises the following arguments: (1) the trial court erred by denying her motion to dismiss the breach of contract claim; (2) the trial court made a number of erroneous evidentiary rulings; (3) the trial court gave the jury an erroneous instruction and improper verdict forms; (4) the jury was permitted to craft an inappropriate equitable remedy; and (5) the verdict resulted in a double recovery. We find that one of the assets at issue was never a part of the trust and consequently reverse the verdict with respect to that asset. In all other respects, we affirm and remand for further proceedings.

Facts

Underlying Facts

[2] Linda married Dr. Milton Bergal in 2009. Milton had four adult children—three daughters[1] and one son, David.

[3] In September 2009, Milton created an estate plan with the help of his attorney, Ben Roth, and his accountant, Sanders. To that end, Milton executed the

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[1] Milton disinherited his daughters, who do not participate in this appeal.

Milton B. Bergal Estate Trust (Trust) and a will. Milton was the trustee during his life, and in the event Milton was no longer able to act as trustee, Linda and Sanders were named as successor co-trustees. The Trust also provided for two sub-trusts to be funded upon Milton's death—Trust A, of which Linda was the primary beneficiary (with Linda and Sanders serving as co-trustees); and Trust B, of which David was the primary beneficiary and sole trustee. The Trust was funded with assets that included real and personal property.

[4] At some point, Milton lost ambulatory abilities and succumbed to multiple conditions affecting his mental status, including dementia and Alzheimer's disease.[2] During those years, six non-real-estate assets (the Assets) were moved out of the Trust,[3] with Linda being named as the primary beneficiary of the Assets. The Assets include the following accounts:

- Vanguard Rollover IRA Account (Vanguard IRA). This one is unique among the six because it was never included in the Trust. Milton designated Linda as its primary beneficiary on April 23, 2010.
- JPMorgan Chase IRA Account (JPMorgan IRA). Milton designated Linda as the primary beneficiary on March 1, 2013.
- Nicholas Fund Asset (Nicholas Fund). In October 2015, Linda transferred this asset by using her power of attorney from US Bank as Custodian to the JPMorgan IRA.
- JPMorgan Chase Brokerage transfer on death account (JPMorgan TOD). Milton named Linda as primary beneficiary on November 19, 2015.

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[2] Milton was formally diagnosed with dementia and Alzheimer's disease in September 2015.

[3] Of the six assets listed, only one—the first—was never included in the Trust to begin with.

- Fidelity Brokerage transfer on death account (Fidelity TOD). Milton named Linda as the primary beneficiary on March 28, 2016.
- Vanguard Brokerage transfer on death account (Vanguard TOD). Milton named Linda as primary beneficiary on June 28, 2016.

Roth and Sanders were not made aware of these transfers. The total value of the Assets amounted to approximately $8 million, and these changes resulted in the Trust receiving approximately $200,000 instead of $8 million from the Assets. This change effectively resulted in David's disinheritance.

[5] Milton died on November 22, 2016. Shortly after Milton's death, Roth and Sanders learned of the diversion of the Assets from the Trust to Linda.

[6] On December 15, 2016, a meeting took place between Linda, Roth, Sanders, and David. At that meeting, Linda admitted to re-titling the Assets and admitted that Milton did not intend to disinherit David. Linda agreed to resign as co-trustee and replace all the Assets into the Trust in exchange for David's agreement to refrain from filing a lawsuit and to try to restore family harmony. She began performance within days by resigning as co-trustee and disclaiming her status as primary beneficiary of one account—the Vanguard TOD—resulting in David receiving the entire amount of that asset, totaling approximately $1.5 million. Linda took no further action on the remaining Assets.

The Litigation

[7] When it became apparent that Linda did not intend to return the rest of the Assets to the Trust, David filed a complaint. He filed a first amended

complaint on April 20, 2018. Linda filed a motion to dismiss. While that was pending, the trial court issued a case management order setting a discovery deadline and expert disclosure date of January 4, 2019, and a jury trial[4] start date of March 4, 2019. The trial court granted Linda's motion to dismiss for two of the three counts.

[8] David filed a second amended complaint on January 7, 2019.[5] His complaint includes the following relevant claims: undue influence, lack of testamentary capacity, breach of fiduciary duty, fraud and constructive fraud, conversion, and breach of contract. Linda filed a new motion to dismiss and motion for summary judgment on the second amended complaint. On February 19, 2019, the trial court denied the motions. Linda had argued, among other things, that the contract stemming from the December 2016 meeting—pursuant to which she had agreed to return the Assets to the Trust—must have been in writing to be enforced. The trial court disagreed, noting that because David alleged that "the parties also agreed to 'restore family harmony' in addition to staying out of court," the contract need not have been in writing. Appellant's App. Vol.

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[4] Linda demanded a jury trial.

[5] Linda also filed a second amended cross-claim against Sanders as Trustee. Sanders filed a motion for summary judgment, which the trial court granted in part on February 21, 2019. The trial court later granted a directed verdict for Sanders on the remaining portion of the cross-claim. Linda has not appealed these orders.

XVIII p. 38.[6] On February 28, 2019, Linda filed her answer and affirmative defenses.

[9] Before the trial began, David filed a motion in limine seeking, among other things, to prohibit Linda from testifying about statements made by Milton. In making this argument, David directed the trial court to the Dead Man's Statute. Ind. Code ch. 34-45-2. On February 28, 2019, the trial court granted the motion, holding that Linda "may not testify about what Dr. Bergal said or testify about actions that constitute an assertion by Dr. Bergal." Appellant's App. Vol. XX p. 22.

[10] On March 4, 2019, the trial court entered a pretrial order (PTO), which included Linda's affirmative defenses, and the jury trial began. The next day, David filed a motion to strike the affirmative defenses. The trial court granted the motion to dismiss with respect to seventeen of Linda's forty-five affirmative defenses on March 18, 2019, subsequently amending the PTO to that effect. Appellant's App. Vol. XXI p. 18-19 (a chart attached to the trial court's order carefully and thoroughly goes through each of Linda's forty-five affirmative defenses).

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[6] As part of this order, the trial court also held, in response to arguments made by Linda, that David was a real party in interest who was entitled to bring the complaint on behalf of the Trust. While Linda quarrels with this holding, she does not raise the issue until her Reply Brief—which is too late. Ind. Appellate Rule 46(C); *see also Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 593 n.6 (Ind. 2001) ("Because [the appellant] raised this issue for the first time in his reply brief, it is waived."). Therefore, we will not consider this issue herein.

[11] On March 21, 2019, David filed a motion in limine seeking to restrict the testimony of Dr. Mark Simaga, a physician who treated Milton; the trial court granted the motion the same day. The trial court ordered that Dr. Simaga was only permitted to testify "as to his opinions which relate to his period of treatment [of Milton] . . . , including treatment of his patient, his opinion on the mental status of [Milton], his diagnoses, the prognosis for the patient, and the patient's executive function," as well as to how Milton "appeared over the years from 2000 to 2014 or 2015, at their hospital board meetings." *Id.* at 44.

[12] Following the fourteen-day jury trial, the jury received its final instructions. Linda objected to the instruction regarding fraud, and the trial court overruled the objection.

[13] On March 22, 2019, the jury unanimously found in favor of David and against Linda on all of David's claims and Linda's counterclaims. On the verdict form, the jury was able to indicate which of the Assets should be restored to the Trust by virtue of each claim; as the Assets and claims were overlapping, many of the Assets fell under multiple claims. Specifically, each of the Assets was ordered to be restored to the Trust for the following reasons:

- Vanguard IRA: breach of contract.
- JPMorgan IRA: undue influence; breach of contract.
- Nicholas Fund: undue influence; Milton's lack of testamentary capacity; breach of fiduciary duty; fraud; constructive fraud; conversion.
- JPMorgan TOD: undue influence; Milton's lack of testamentary capacity; breach of contract.
- Fidelity TOD: undue influence; Milton's lack of testamentary capacity; breach of contract.

- Vanguard TOD: undue influence; Milton's lack of testamentary capacity; breach of contract.

Appellant's App. Vol. XXI p. 105-22. The trial court entered an oral judgment in David's favor from the bench following the verdict. Am. Tr. Vol. X p. 74.[7]

[14] On April 25, 2019, the trial court entered a first amended judgment. On May 22, 2019, the trial court entered a second amended judgment.[8] The order largely recounts the jury's verdict. It also explicitly notes the need, given the overlapping claims, to avoid duplicative recovery. To that end, the trial court ordered as follows:

> Though the verdict directed recovery of certain accounts under multiple causes of action, each account shall only be delivered once to the Trust, subject to one recovery of the entirety of each account (including its income and gains). This Court's hearing on Linda Bergal's accounting for all accounts she received as a result of Dr. Bergal's death will allow for an appropriate review of credit and/or recovery for disbursements made by Linda Bergal from Dr. Bergal's accounts, including required minimum distributions taken out of Dr. Bergal's IRA accounts. Of further note, is that the Jury found in favor of [David] on the [Nicholas Fund] in the amount of $1,963,237.82 based on multiple theories . . . ; accordingly, that amount is awarded in favor of

[7] There were some court reporter issues with respect to the transcript in this case. Eventually, a second amended transcript was filed. But its pagination was wholly different from the pagination of the (first) amended transcript, which is what was used by the parties in writing their briefs. To aid this Court in its review, we directed that the (first) amended transcript be filed in Odyssey, and that is the transcript version to which we cite herein.

[8] The trial court also entered a modified second amended judgment that is stamped May 22, 2019, but may not actually have been filed until August 20, 2019—after this appeal had commenced. As such, we will frame our analysis herein around the second amended judgment.

> [David] and on behalf of the Trust . . . , subject to one recovery. The issue of credits for gains and income for each account delivered to the Trust can be addressed by this Court in its review of the accounts delivered to the Trust and Linda Bergal's accounting with appropriate credit.

Appellant's App. Vol. XXI p. 150-51. Linda now appeals.

Discussion and Decision

I. Denial of Motion to Dismiss Breach of Contract Claim

[15] Linda argues first that the trial court erred by denying her motion to dismiss the breach of contract claim. She contends that under these circumstances, the contract must be in writing.

[16] We apply a de novo standard of review to a trial court's ruling on a motion to dismiss for the failure to state a claim pursuant to Indiana Trial Rule 12(B)(6). *Shi v. Yi*, 921 N.E.2d 31, 36 (Ind. Ct. App. 2010). The grant or denial of a motion to dismiss turns only on the legal sufficiency of a claim—that is, whether the allegations in the claim establish any set of circumstances under which a plaintiff would be entitled to relief. *Id.* at 37. The grant or denial of a motion to dismiss turns only on the legal sufficiency of the claim and does not require determinations of fact. *Id.* at 36-37.

[17] Generally, oral agreements are enforceable. *Vernon v. Acton*, 732 N.E.2d 805, 809 (Ind. 2000). Linda contends that in this case, the general rule does not apply for two reasons: (1) Indiana Code chapter 30-4-7 required the agreement

to be in writing; and (2) the terms of the oral agreement were not sufficiently settled to be enforceable.

[18] Indiana Code chapter 30-4-7 applies, in relevant part, "to the compromise of a contest or controversy with respect to . . . [t]he administration of a trust." I.C. § 30-4-7-1(3). An agreement of compromise relating to the administration of a trust must be in writing. I.C. § 30-4-7-6.

[19] "Administration" is not defined in the statute and has not been construed by this Court. To "administer" is "to manage or supervise the execution, use, or conduct of." *Merriam-Webster Dictionary*, at https://www.merriam-webster.com/dictionary/administer (last visited July 10, 2020). Chapter 5 of the Indiana Trust Code is entitled, "Rules Governing the Administration of a Trust[.]" I.C. ch. 30-4-5. It references, among other things, the following:

- The trustee's duty to provide written statements of accounts;
- The trustee's ability to obtain a nonjudicial settlement of accounts; and
- The trustee's right to reasonable compensation.

I.C. §§ 30-4-5-12 through -21. These examples of the administration of a trust all relate to the trustee's managerial functions, which falls squarely under the general definition of "administer" quoted above.

[20] As a matter of policy, it makes great sense that the legislature imposed an in-writing requirement for settlements that go to the operation, dispersal, or management—the administration—of trusts, which must, themselves, be in writing. I.C. § 30-4-2-1.5. It follows that agreements that alter the terms of the

trust—by affecting the trust's construction or validity, the rights afforded to the beneficiaries, or the management of the trust's corpus and methods of distribution—should be in writing, too. But the legislature has decided (by omission) that the same is not true for agreements that do not impact the construction, operation, or management of a trust.

[21] What we must decide here is whether the agreement reached at the December 2016 meeting related to the administration of the Trust. Linda had engineered the reassignment of the Assets from the Trust to herself as primary beneficiary. At the meeting, she agreed, in exchange for David's promise not to file a lawsuit and to maintain peace in the family, to disclaim those Assets.

[22] Linda's portion of the agreement—disclaiming the Assets so that they could be returned to the Trust—did not relate to the administration of the Trust. It did not concern the management or supervision of the Trust, nor did it relate to how, when, or to whom assets were to be directed or disbursed, nor did it concern the manner in which assets were to be invested or safeguarded. Likewise, David's portion of the agreement—refraining from filing a lawsuit and working to maintain family harmony—did not relate to the management or supervision of the Trust or to anything else that could reasonably be considered to fall under trust administration.

[23] Linda argues, essentially, that because the agreement *relates* to a trust, it necessarily falls under Indiana Code chapter 30-4-7, which requires an agreement be in writing. But the General Assembly did not draft that chapter

so broadly. Instead, it limited the statute's reach to the *administration* of trusts. We agree with David that our legislature "could not have intended 'administration' to include the return of wrongly taken property back to the trust's corpus." David's Br. p. 17.

[24] The agreement here did not impact the Trust's construction, operation, or management. It neither changed nor enforced the terms of the Trust, nor did it alter Milton's intent regarding the supervision of the Trust's assets. Instead, it concerned property wrongly taken outside of the Trust, which Linda agreed to return. Therefore, the agreement need not have been in writing and the trial court did not err by denying the motion to dismiss on this basis.

[25] Next, Linda contends that even if the agreement need not have been in writing, its terms were not settled enough for it to be enforceable. What she is *actually* arguing here is that the evidence is insufficient to support the jury's conclusion that David proved that an agreement existed and that she breached the terms of that agreement. Our standard of review on a challenge to the sufficiency of the evidence supporting a jury verdict is the same in civil as in criminal cases. *Auto Liquidation Ctr., Inc. v. Chaca*, 47 N.E.3d 650, 654 (Ind. Ct. App. 2015). Thus, we consider only the evidence most favorable to the verdict and the reasonable inferences to be drawn therefrom. *Id.* We will neither reweigh the evidence nor assess witness credibility, and we will affirm unless we conclude that the verdict "is against the great weight of the evidence." *Id.*

[26] Four people were present when the December 2016 agreement was formed—David, Roth, Sanders, and Linda. Roth, Sanders, and David each testified that the agreement existed:

- Roth: Linda "agree[d] to put everything back into the Trust[.]" Am. Tr. Vol. I p. 161. "Linda, David, [Sanders], and I agreed that assets would be placed back into Dr. Bergal's Trust." Am. Tr. Vol. II p. 6.
- Sanders: At the meeting, Linda said "Mr. Roth, I don't agree [with replacing the Assets in the Trust], but in order to maintain peace with David and the family I will do it. . . . Linda's point was that [she] want[ed] to maintain a relationship with David and the family." *Id.* at 184.
- Sanders: When the meeting was adjourned, it was "[my] understanding that there was an agreement between the parties to put back into the B Trust those assets that Dr. Bergal had originally intended to be [in the Trust.]" *Id.* at 187-88.
- David: At the meeting, Linda "said, [']Milton and I did some alterations to his estate, uh, but I want things to go back to the way it was in [the] 2009 Will and Trust.['] . . . [A]t which point I believe Mr. Roth said, [']Then there's no need for us. We're all in agreement then. We all agree.['] And then—and I said, Yes. And I said yes. Linda said yes. [Roth and Sanders] said yes. We all agreed. And [I] believe about this time [Roth] said, [']So there's no reason to pursue . . . litigation.['] And we all said there's no reason, no. No reason. . . . Linda's putting everything back in." Am. Tr. Vol. VII p. 30-31.

[27] Linda directs our attention to her own testimony, which runs counter to what the above witnesses stated. But it was for the jury to weigh the conflicting evidence and assess the credibility of the witnesses, and we will not second-guess its assessment. There is credible evidence in the record establishing that an agreement was reached—that Linda would put the Assets back in the Trust—in exchange for consideration—David's promises not to sue and to

maintain peace in the family. This evidence supports the jury's conclusion that an oral contract was made.

[28] That said, we must address the Vanguard IRA, which is unique among the Assets. The Trust was created in 2009, and the Vanguard IRA was never included.[9] In 2010, Milton made Linda the primary beneficiary of that asset—many years before anyone has suggested his mental capacity began to deteriorate. As noted above, all the evidence in the record supporting a conclusion that an oral contract was created shows that Linda agreed to "put everything back," "to replace," and to "put back into" the Trust the assets that had been removed. Am. Tr. Vol. I. p. 161; Vol. II p. 184, 187-88. As the Vanguard IRA was never in the Trust to begin with, these promises cannot have encompassed that account.

[29] Consequently, we can only find that the evidence supporting the jury's verdict on breach of contract with respect to the Vanguard IRA is insufficient. And as that claim is the only one related to the Vanguard IRA, the only possible outcome with respect to this asset is that Linda may retain it. Therefore, we reverse the judgment with respect to the Vanguard IRA.

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[9] David claims that Milton's "estate plan contemplated that *all IRAs* would flow to the Trust," but does not offer a citation to the record in support of that assertion, nor can we find any such evidence. David's Br. p. 44 (emphasis in original).

II. Evidentiary Issues

[30] Next, Linda argues about three evidentiary issues that arose before and during the trial: (1) the trial court erred by relying on the Dead Man's Statute in prohibiting her from testifying about statements made by Milton; (2) the trial court erred by striking some of her affirmative defenses; and (3) the trial court made erroneous rulings related to the parties' respective expert witnesses.

A. Dead Man's Statute

[31] As noted above, before the trial began, David filed a motion in limine seeking, among other things, to prohibit Linda from testifying about statements made by Milton. In making this argument, David directed the trial court to the Dead Man's Statute. In relevant part, Indiana Code section 34-45-2-4 provides as follows:

> (a) This section applies to suits or proceedings:
>
> (1) in which an executor or administrator is a party;
>
> (2) involving matters that occurred during the lifetime of the decedent; and
>
> (3) where a judgment or allowance may be made or rendered for or against the estate represented by the executor or administrator.
>
> ***
>
> (d) . . . a person:

(1) who is a necessary party to the issue or record; and

(2) whose interest is adverse to the estate;

is not a competent witness as to matters against the estate.

The trial court granted David's motion, holding that while Linda was not "per se incompetent[, s]he may not testify about what Dr. Bergal said or testify about actions that constitute an assertion by Dr. Bergal." Appellant's App. Vol. XX p. 22. Linda argues that this order was erroneous.

[32] The general purpose of the Dead Man's Statute "is to protect a decedent's estate from spurious claims." *Fisher v. Estate of Haley*, 695 N.E.2d 1022, 1026 (Ind. Ct. App. 1998) (interpreting prior version of statute that was virtually identical to current one). It is a rule "of fairness and mutuality requiring that, 'when the lips of one party to a transaction are closed by death, the lips of the surviving party are closed by law.'" *Id.* at 1026-27 (quoting *Johnson v. Estate of Rayburn*, 587 N.E.2d 182, 184 (Ind. Ct. App. 1992)). Rather than excluding evidence, the statute prevents a particular class of witnesses from testifying about claims against the estate. *Id.* at 1027. The statute does not render the surviving party incompetent for all purposes; instead, its application "'is limited to circumstances in which the decedent, if alive, could have refuted the testimony of the surviving party.'" *Id.* (quoting *Johnson*, 587 N.E.2d at 185).

[33] Linda's primary argument is that the Dead Man's Statute does not apply to cases involving trusts because trusts are distinct from estates.[10] *Compare* Ind. Code tit. 29 (concerning estates) *with* Ind. Code tit. 30 (concerning trusts). She directs our attention to *Given v. Cappas*, 486 N.E.2d 583 (Ind. Ct. App. 1985), which considered the application of the Dead Man's Statute to litigation involving stock held by a trust:

> The General Assembly, in enacting the Dead Man's Statute for the protection of the assets of an estate and to prevent fraudulent claims did not intend for the statute to prevent testimony which could not in any way affect the estate assets. . . . It is uncontroverted that the stock at issue is held [in a trust]. It is not and never was an asset of [the decedent's] estate. The complaint in the instant case requests the court to declare that the stock is held for the plaintiffs and to direct that the stock be conveyed to the plaintiffs. The stock is held and necessarily would be conveyed by [the trustee] in her capacity as trustee. The judgment that could have been and was, in fact, rendered was against the trust, not the estate of [the decedent]. If the assets of the estate can not be affected, the Dead Man's Statute has no application and witnesses may not be rendered incompetent on that basis.

Id. at 588 (internal citation omitted), *abrogated on other grounds by Wilbur v. KeyBank Nat'l Assoc.*, 962 F. Supp. 1122 (N.D. Ind. 1997); *see also In re Knepper*,

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[10] To the extent that Linda also argues that there is no executor or administrator who is a party to this litigation, we note that this Court has held that even if an administrator or executor is not a party to the action, the Dead Man's Statute applies where one of the parties is acting in the capacity of an administrator or executor. *In re Unsupervised Estate of Harris*, 876 N.E.2d 1132, 1135 (Ind. Ct. App. 2007). We have little difficulty concluding that Sanders, who is the trustee of the Trust, which included the bulk of Milton's estate, is acting in the capacity of an administrator or executor.

856 N.E.2d 150, 156 (Ind. Ct. App. 2006) (holding that the Dead Man's Statute did not apply to non-probate payable on death account because "[n]o estate was ever opened . . . and [the guardian of the decedent] was never an executor or administrator of such an estate" so "the Dead Man's Statute—on its face—does not apply here").

[34] On the other hand, we also have *Reddick v. Keesling*, which, while centuries old, is still standing precedent from our Supreme Court. 28 N.E. 316, 129 Ind. 128 (1891). In *Reddick*, our Supreme Court considered the application of the Dead Man's Statute[11] to a dispute regarding trust assets. The *Reddick* Court rejected a husband's attempt to testify "to matters that occurred between him and his wife . . . prior to the time of her death" about the proper disbursement of trust assets. *Id.* at 318-19. Our Supreme Court reasoned that because the wife's mouth "was closed by death, we think the law closed the mouth of the [husband]." *Id.* at 319. And more recently, while assessing whether a party had waived the right to invoke the Dead Man's Statute, our Supreme Court did not object to the statute applying in a case involving non-probate transfers. *In re Estate of Rickert*, 934 N.E.2d 726, 731-32 (Ind. 2010).[12]

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[11] Obviously, *Reddick* considered a prior version of the Dead Man's Statute. But there are no material differences relevant to this case between the version in place in 1891 and the version in place today.

[12] Clearly, given the case name, *Rickert* was a case in which an estate had been opened. But the relevant issue concerned whether the Non-Probate Transfer Act is implicated in the context of transfer on death accounts and joint accounts. *Id.* at 729.

[35] In this case, the evidence in the record shows that the Trust was the primary piece of Dr. Bergal's overall estate plan. Specifically, the will that was created at the same time as the Trust was "a pour over Will, which said that if Dr. Bergal owned anything in his name it would pour over into the Trust so that everything would be in the Trust ultimately at the time of his death." Am. Tr. Vol. I p. 115. As part of the overall estate plan, Milton intended that all his assets—including the Assets—should be placed in the Trust. Therefore, while the Trust itself is non-probate, we are convinced that it is sufficiently related to probate that the outcome of this case will affect his overall estate. *Cf. Fulp v. Gilliland*, 998 N.E.2d 204, 205 (Ind. 2013) (observing that "[r]evocable trusts are popular substitutes for wills, intended to provide non-probate distribution of people's estates after their death, allowing them to retain control and use of their assets during their lifetimes").[13], [14]

[36] In sum, we find that in this particular case, the Trust at issue is so central to Milton's overall estate plan that it is akin to the estate itself. Under these circumstances, we find that the trial court did not err by finding that the Dead

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[13] Linda argues that she was subjected to unfair surprise because the trial court had ruled earlier in the case that the Dead Man's Statute did not apply. But trial courts are free to "reconsider, vacate, or modify any previous order" until the entry of final judgment. *P.R. Mallory & Co. v. Am. Cas. Co. of Reading, Pa.*, 920 N.E.2d 736, 747 (Ind. Ct. App. 2010) (internal quotation marks omitted). Therefore, we find no error in this regard. Likewise, whether or not Linda's testimony would be admissible under an exception to the rule against hearsay has no bearing on our resolution of this issue.

[14] Linda also argues that David opened the door to her testimony by calling her to testify and asking her questions about the asset transfers. We disagree, as the questions focused on Linda's actions rather than on what Milton said about them. Therefore, we decline to find error on this basis.

Man's Statute prevented Linda from testifying about statements made by Milton.

B. Affirmative Defenses

[37] Next, Linda argues that the trial court erred by granting David's motion to strike some of her affirmative defenses, thereby modifying the PTO. She contends that the trial court erred by concluding that she had untimely filed her affirmative defenses and by modifying the PTO in the middle of trial.

[38] Pretrial orders are intended to "limit the issues for trial to those not disposed of by admissions or agreement of counsel, and such order when entered shall control the subsequent course of action, unless modified thereafter to prevent manifest injustice." Ind. Trial Rule 16(J). In deciding whether to modify a pretrial order, the trial court must consider "'both the danger of surprise or prejudice to the opponent, and the goal of doing justice to the merits of the claim.'" *Chacon v. Jones-Schilds*, 904 N.E.2d 286, 289 (Ind. Ct. App. 2009) (quoting *Daugherty v. Robinson Farms, Inc.*, 858 N.E.2d 192, 198 (Ind. Ct. App. 2006)).

[39] In considering timeliness of the affirmative defenses, we must go back closer to the beginning of the litigation. David filed his original complaint in February 2017; Linda filed an answer and eleven affirmative defenses. David filed his first amended complaint in April 2018; the trial court granted Linda's motion to dismiss the first two counts of that complaint but gave David a roadmap for refiling. Linda filed an answer to the remaining count plus thirty affirmative

defenses. On January 7, 2019, David filed his second amended complaint; Linda filed an answer plus forty-five affirmative defenses (seventeen of which were filed for the first time) on February 28, 2019, just a few days before the trial was scheduled to begin. Partway through the trial, the trial court partially granted David's motion to strike Linda's affirmative defenses. Specifically, it struck the seventeen affirmative defenses that had not been filed with her answer to his first amended complaint. Appellant's App. Vol. XXI p. 16-19.

[40] Linda argues that she should have been permitted to raise new affirmative defenses because David's second amended complaint included significant changes and additions that warranted newly-raised affirmative defenses. We disagree. David's first complaint included two counts against Linda—one demanding that Linda return the Assets based loosely on breach of fiduciary obligations, undue influence, testamentary capacity, and fraud; and a second requesting an accounting from Sanders. Linda filed an answer and affirmative defenses related to both counts.

[41] David's first amended complaint added a third count—breach of contract. The trial court dismissed two counts of the first amended complaint but provided him with a roadmap to refile; the new breach of contract claim survived. Linda filed an answer and affirmative defenses regarding the breach of contract claim.

[42] When David filed his second amended complaint, it followed the trial court's roadmap and did not add anything substantive that would justify a whole host of new affirmative defenses that had never before been raised.[15]

[43] The trial court observed that "[y]ou know, and I note that [David's] latest complaint did not really change much from the prior [complaint], in terms of what the Court had ruled. But it sure brought out a plethora of defenses . . . ." Am. Tr. Vol. VI p. 141. The trial court also noted that many of Linda's affirmative defenses were actually counterclaims that the trial court had struck, which she was trying to revive as affirmative defenses. It is apparent, from reviewing the transcript, that the trial court was frustrated with the way in which Linda had litigated the case, which involved a great deal of delay and obfuscation and little in the way of attempts to present and prove her case. We decline to second-guess the trial court's ruling on this issue, as it is evident that the trial court carefully considered each affirmative defense and made a separate ruling on each one. We also note that the trial court allowed Linda to retain all the affirmative defenses that she had pleaded in response to David's original and first amended complaints.

[44] In striking Linda's affirmative defenses, which had originally been included in the PTO, the trial court modified the PTO. Given the trial court's conclusions

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[15] While the second amended complaint did add a number of paragraphs about how David was a real party in interest, it was implicit from the outset that this was his position. Moreover, whether or not he was a real party in interest is an issue of law that Linda raised—and lost—when she moved to dismiss the second amended complaint. Appellant's App. Vol. XVI p. 102-13.

that the problematic affirmative defenses had been untimely filed and that some of them were ill-advised attempts to make an end-run around the trial court's order striking Linda's counterclaims, it is apparent that the trial court found that modifying the PTO was necessary to prevent a manifest injustice. We decline to find error with respect to the trial court's decision in this regard.

C. Witness Rulings

[45] Next, Linda argues that the trial court erred in the way it handled one of her witnesses and one of David's expert witnesses. A ruling regarding the admissibility of expert testimony is within the trial court's broad discretion. *McDaniel v. Robertson*, 83 N.E.3d 765, 772 (Ind. Ct. App. 2017). We presume that the trial court's decision is correct, and the burden is on the challenging party to persuade us that the trial court erred. *Id.* at 773.

1. Dr. Simaga

[46] One of Linda's witnesses was Dr. Mark Simaga, a physician who treated Milton. Linda did not designate Dr. Simaga as an expert witness, instead designating him as a fact witness with personal knowledge about Milton. Appellant's App. Vol. XVIII p. 69-70.

[47] After David filed a motion in limine seeking to limit Dr. Simaga's testimony, the trial court granted it in part, allowing Dr. Simaga to "testify as to his opinions which relate to his period of treatment . . . including treatment of his patient, his opinion on the mental status of [Milton], his diagnoses, the prognosis for the patient, and the patient's executive function." Appellant's

App. Vol. XXI p. 44. Dr. Simaga was also permitted to testify regarding how Milton "appeared over the years from 2000 to 2014 or 2015, at their hospital board meetings." *Id.*

[48] Dr. Simaga was not permitted to present general expert testimony not based on his treatment of Milton—because he had not been designated as an expert witness. We find no error in this regard.

2. Dr. Shaw

[49] One of David's expert witnesses was Dr. Geoffrey Shaw.[16] Linda directs our attention to the following portions of Dr. Shaw's report, which was admitted into evidence:

- "It is my opinion that Dr. Bergal engaged in these financial transactions due to undue influence from his wife." Appellant's App. Vol. XXIV p. 12.
- "The financial transactions that were made in 2015-2016 were executed while [Milton] suffered from Dementia and physical frailty and were unduly influenced by his wife . . . ." *Id.* at 13.
- During the relevant period of time, Milton "lacked the capacity" to make decisions, engage in financial transactions, and understand his actions and their consequences. *Id.*

Linda argues that these statements amounted to legal conclusions that are not admissible. Ind. R. Evid. 704(b). When Linda objected to these portions of the

[16] It appears, though it is not wholly clear, that Linda argues that the trial court erred by giving David an extension of time to produce Dr. Shaw's final, written expert report. She does not, however, make any cogent argument or cite to authority in support of this argument. Consequently, we decline to address it.

report at trial, she focused primarily on the phrase "unduly influenced[.]" Am. Tr. Vol. V p. 36-37. The trial court struck the word "unduly[.]" *Id.* at 37. As Linda did not make more thorough arguments to the trial court or direct its attention to other specific words or phrases, we decline to reverse on this basis.[17,18]

[50] Next, Linda notes that in reaching his conclusions, Dr. Shaw relied on findings from other physicians, a therapist, and a social worker. Although Linda argues that this amounted to reliance on inadmissible hearsay, we note that Indiana Rule of Evidence 703 allows experts to "testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field." More specifically, our Supreme Court has held that "information which aided in the formation of the [expert's] opinion, though hearsay in nature and though not falling within any hearsay exception, may nevertheless be admissible." *Miller v. State*, 575 N.E.2d 272, 274 (Ind. 1991). Therefore, we find no error on this basis.

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[17] Linda also argues that the trial court failed to properly redact Dr. Shaw's report, which identified his opinion as an "independent medical opinion[.]" Appellant's App. Vol. XXIV p. 2. The word "independent" was redacted with a piece of tape, and after photocopying the document, the word was still somewhat visible. But she did not make this argument to the trial court and has consequently waived it; furthermore, we find that any error in this regard was harmless, given that there is no evidence that the jury could see through the taped copy and the trial court did not highlight the redactions.

[18] We also note that when Dr. Shaw testified during the trial, he did not testify about undue influence, instead focusing on Milton's susceptibility resulting from his diagnoses.

III. Jury Issues

[51] Next, Linda raises several issues related to the jury: she argues that (1) the trial court gave erroneous jury instructions; (2) the verdict forms were improper; and (3) the jury fashioned an equitable remedy, which is impermissible.

A. Instructions

[52] First, with respect to the jury instructions, we must consider whether the challenged instructions (1) correctly state the law; (2) are supported by evidence in the record; and (3) are covered in substance by other instructions. *Wal-Mart Stores, Inc. v. Wright*, 774 N.E.2d 891, 893 (Ind. 2002).

[53] Linda focuses her argument on Jury Instruction Number 11, which instructed the jury on fraud.[19] The instruction reads as follows:

> Fraud is an act, course of action, omission, or concealment by which a person cheats or deceives another person.
>
> "Omission" means leaving out.
>
> "Concealment" means hiding.
>
> To recover damages for fraud, David Bergal must prove by the greater weight of the evidence that:

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[19] Linda later gives a broad, vague summary of her objections to Instructions 8, 9, 12, and 13, stating that "due to word constraints" she was "unable to maintain strict compliance with Indiana Appellate Rule 46(A)(8)(e)[.]" Appellant's Br. p. 51. It is for parties to evaluate their arguments and decide how to allocate their space in appellate briefs. Linda decided not to offer specific arguments related to these instructions—she also failed to cite any authority related to these arguments—and we decline to articulate and analyze arguments on her behalf. We are unable to address the vague and general arguments related to these other instructions.

(1) Linda Bergal made false statements of important past or existing fact;

(2) Linda Bergal knew the statements were false, or made them recklessly without knowing whether they were true or false;

(3) Linda Bergal made the statements to cause action upon them;

(4) The actor justifiably or reasonably relied and acted upon the statements; and

(5) David Bergal as trustee was damaged as a result.

David Bergal must prove his claim by the greater weight of the evidence.

Appellant's App. Vol. XXI p. 86.

[54] Linda complains, among other things, that the instruction labels David as "trustee"[20] and that the instruction led the jury to believe that fraud could be found if Linda merely caused harm to David.[21] Even if this instruction were erroneous, it would be harmless. The only Asset that the jury ordered to be recovered pursuant to the fraud count was the Nicholas Fund. But the jury also ordered that Asset to be recovered pursuant to the claims for undue influence, testamentary capacity, breach of fiduciary duty, constructive fraud, and

[20] While David is not a trustee of the Trust, he *is* the trustee of Trust B. Therefore, while imprecise, the language in the instruction is not per se incorrect.

[21] We note that Linda did not make either of these specific arguments below; instead, she made a general argument that the instruction was confusing and misstated the law, without explaining the specific reasons she believed it to be so.

conversion. Consequently, even if the fraud instruction contained erroneous language, it would not affect the jury's ultimate determination with respect to the Nicholas Fund. Linda is not entitled to relief on this basis.

B. Verdict Forms

[55] Next, Linda contends that the trial court gave the jury special verdict forms, which have been abolished. Ind. Trial Rule 49; *see also Tincher v. Davidson*, 762 N.E.2d 1221, 1225 (Ind. 2002) (observing that the adoption of Trial Rule 49 was intended to "curtail[] the practice of asking juries to disclose the basis for their verdicts"). A "special verdict" is one "that gives a written finding for each issue, leaving the application of the law to the judge." *Black's Law Dictionary* 1555 (7th ed. 1999).

[56] Linda conclusorily argues that the jury in this case was presented with a "Special Interrogatory Verdict Form." Appellant's Br. p. 53. She does not explain why the verdict form qualifies as such, nor does she cite to specific portions of the forms as evidence of her contention.

[57] The forms were entitled "Verdict Form." Appellant's App. Vol. III p. 34-55. And the forms simply offered the jury a yes-no selection on (1) liability and (2) which accounts required return based on the liability finding. The forms did not ask the jury to provide factual findings, answer questions about the decision-making process, or give their element-by-element analysis on the claims.

[58] It is not entirely clear, but the crux of Linda's argument on this issue appears to focus on the fact that, for each claim and theory of liability, the jury had to select which accounts were required to be restored. In the context of this case, that was essentially the only practical way to proceed. David brought overlapping claims, seeking both the restoration of particular accounts under multiple theories and the return of multiple accounts under particular theories. For example, David argued that Linda committed six different torts with respect to the Nicholas Fund account; he also argued that her repeated instances of undue influence resulted in the improper transfer of five separate accounts on five separate dates. The question for the jury, then, was which accounts required return under which theories. Under these circumstances, the verdict form used by the trial court was sensible and appropriate.

C. Remedy

[59] Next, Linda argues that the "jury verdict returned was an equitable remedy, in direct contradiction of Indiana Trial Rules and Indiana caselaw." Appellant's Br. p. 54. As a general matter, a jury trial is not permissible when the claim is a cause founded in equity. *Stacey-Rand, Inc. v. J.J. Holman, Inc.*, 527 N.E.2d 726, 728 (Ind. Ct. App. 1988). According to Linda, because the jury "did not award the Trust (or David) actual damages (a legal remedy)," but instead ordered the trust corpus to be restored, the relief was equitable rather than legal. Appellant's Br. p. 55.

[60] Initially, we note that Linda knew all along that David's claims sought the return of the Assets to the Trust. Yet she did not assert that those claims were equitable and could not be submitted to a jury. Instead, she demanded a jury trial. She did not complain that the case could not be submitted to a jury until after the jury returned a verdict against her. Therefore, if there was any error, it was invited, and she has waived the argument by failing to raise it until after the verdict was returned.

[61] And on the merits of the argument, we note briefly that the relief sought by David was the return of misappropriated money and compensatory damages to make up for whatever Linda has dissipated. The latter is unquestionably legal in nature. The former—the return of wrongly taken money—has been treated by courts as a relief sounding in law, rather than equity. *Gates v. City of Indianapolis*, 991 N.E.2d 592, 593 (Ind. Ct. App. 2013) (holding that replevin suits are legal in nature). Consequently, this argument is unavailing.

IV. Double Recovery

[62] Finally, Linda contends that the jury verdict resulted in a double recovery. As Linda acknowledges, "[n]o actual/monetary damage was assessed against Linda by the jury." Appellant's Br. p. 57. Instead, as noted above, the jury considered each theory of liability and determined which of the Assets was covered by that theory:

- Vanguard IRA: breach of contract.
- JPMorgan IRA: undue influence; breach of contract.

- Nicholas Fund: undue influence; Milton's lack of testamentary capacity; breach of fiduciary duty; fraud; constructive fraud; conversion.
- JPMorgan TOD: undue influence; Milton's lack of testamentary capacity; breach of contract.
- Fidelity TOD: undue influence; Milton's lack of testamentary capacity; breach of contract.
- Vanguard TOD: undue influence; Milton's lack of testamentary capacity; breach of contract.

Appellant's App. Vol. XXI p. 105-122. Obviously, if, for example, David actually recovered six times the amount represented by the Nicholas Fund because it fell under six different theories of liability, there would be a substantial problem. But that is not what happened.

[63] Instead, in the second amended judgment, the trial court explicitly notes the need, given the overlapping claims, to avoid duplicative recovery. To that end, the trial court ordered as follows:

> Though the verdict directed recovery of certain accounts under multiple causes of action, *each account shall only be delivered once to the Trust*, subject to one recovery of the entirety of each account (including its income and gains). This Court's hearing on Linda Bergal's accounting for all accounts she received as a result of Dr. Bergal's death will allow for an appropriate review of credit and/or recovery for disbursements made by Linda Bergal from Dr. Bergal's accounts, including required minimum distributions taken out of Dr. Bergal's IRA accounts. Of further note, is that the Jury found in favor of [David] on the [Nicholas Fund] in the amount of $1,963,237.82 based on multiple theories . . . ; accordingly, that amount is awarded in favor of [David] and on behalf of the Trust . . . , *subject to one recovery*. The issue of credits for gains and income for each account delivered to the Trust can be addressed by this Court in its review of the accounts delivered

> to the Trust and Linda Bergal's accounting with appropriate credit.

Appellant's App. Vol. XXI p. 150-51 (emphases added). In other words, the trial court reserved the issue of the actual amount of damages—which would include each Asset only once—to be determined following an accounting and a hearing. It is not at all uncommon to bifurcate the issue of liability from the issue of damages, and we see no problem with the trial court's decision to handle this case in that way. Indeed, it seems entirely prudent given the fact that the accounting had not yet been made at the time the jury considered liability; therefore, neither the amount that needed to be restored to the Trust nor the amount, if any, that Linda will have to pay out of pocket could have been determined at that time.

[64] In reviewing the verdict forms and the trial court's orders, it is apparent that David is correct that there is no risk of duplicative or excessive recovery: "the recovery under the judgment is explicit: each subject account, regardless of how many of theories of liability under which it must be returned to the Trust, will (and can) be returned only once, and [Linda] is personally liable for making those accounts whole (plus interest and costs) to the extent she depleted them in amounts lower than the respective dates on which she diverted them." David's Br. p. 42.

[65] On the verdict forms, the trial court had written in an approximate amount contained in each account. That decision led to some confusion, which the trial court seemed to realize. Therefore, it was later made clear in an amended order

that the actual amount owed by Linda would be determined following an accounting and a damages hearing. Under these circumstances, we find no reversible error on this basis.[22]

[66] To the extent that Linda argues that the jury verdict is excessive, we can only find that this argument is premature. The trial court has reserved adjudication of the specific recoverable amounts for the hearing on Linda's accounting; that hearing has been stayed pending this appeal. We cannot consider whether any error has occurred because the trial court has not yet exercised its discretion in ruling on Linda's arguments regarding the amounts owed.[23]

[67] Linda filed a motion for guidance with this Court, which we granted in part with respect to the transcript. She also asked that she be reimbursed for the fee she paid the court reporter for the transcript preparation. We remand this issue to the trial court, to be considered as part of the further proceedings below.

[68] The judgment of the trial court is affirmed in part, reversed in part with respect to the Vanguard IRA, and remanded for further proceedings.

May, J., and Vaidik, J., concur.

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[22] Linda briefly argues that the evidence does not support the jury's award regarding the Nicholas Fund based on testamentary capacity. Even if that were true, given the fact that the jury found that this asset needs to be returned to the Trust under multiple theories of liability, whether or not there is evidence supporting this particular finding is of no consequence to the ultimate resolution.

[23] To the extent that Linda points out that she has already disclaimed the Vanguard TOD account, we note that this is for the trial court to evaluate following her accounting. Obviously, if she has already disclaimed this account and if it is now owned by David, Linda need take no further action regarding this Asset.

Section Two

Drafting, Planning, and Litigating No Contest Clauses in Indiana

Faegre Drinker Biddle & Reath LLP: Sarah Jenkins & Damian Gosheff[1]

[1] Material has been used and taken from *How Testators Can Leverage Indiana's Repeal of the Prohibition on No Contest Clauses* by Sarah Jenkins published in the October 24, 2018, *Res Gestae*.

Section Two

Drafting, Planning, and Litigating No Contest Clauses in Indiana....................................Sarah Jenkins Damian Gosheff

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I. Introduction

Effective July 1, 2018, Indiana's General Assembly repealed the prohibition on no contest clauses. No contest clauses (also referred to as "forfeiture" or "in terrorem" clauses) are provisions that reduce or eliminate a beneficiary's inheritance due to that beneficiary's conduct. The prohibition on no contest clauses has been repealed in both the Probate Code and the Trust Code. The main purpose of no contest clauses is to deter disgruntled beneficiaries from challenging the validity of a will or a trust.

II. Code Sections

The Indiana "No Contest Statutes" are Indiana Code (referred to as "IC" or the "Codes") §§ 29-1-1-3; 29-1-6-2 (pertaining to wills) and §§ 30-4-1-2; 30-4-2.1-3 (pertaining to trusts). The Codes define a no contest clause as "a provision in a will [or trust] that, if given effect, would reduce or eliminate the interest of a beneficiary of the will [or trust] who, directly or indirectly, initiates" an action against the admissibility, validity, or terms, or against any other act that would "frustrate or defeat the testator's [or settlor's] intent." Sections 29-1-6-2 and 30-4-2.1-3 contain exceptions for when challenges to estate instruments are admissible without subjecting the challenger to the penalty of the no contest clause. These amended statutes are attached for convenient reference.

III. Application of No Contest Clauses Drafted Before Enactment

Some practitioners had already been including no contest clauses in their clients' estate plans with the hope that the legislation would change or on the chance that the client would move to one of the other 48 jurisdictions that have historically permitted such clauses. There may be some initial uncertainty as to whether these provisions drafted prior to the enactment of

the Indiana No Contest Statutes will be considered valid since Indiana case law previously treated them as void. Nonetheless, IC § 29-1-1-2(a) provides: "[t]he procedure herein prescribed shall govern all proceedings in probate brought after January 1, 1954[.]" Because of the absence of judicial guidance, it appears the prior case law treatment and new legislation may conflict. It is our assumption that the new legislation will govern, invalidating the prior case law that relied on the prior legislation, and that no contest clauses previously drafted will be enforced.

IV. Aligning With the Majority of States

Until enactment of the Indiana No Contest Statutes, only Indiana and Florida prohibited the use of these clauses in estate plans. Specifically, Indiana previously deemed any no contest clause void. Indiana's prohibition of no contest clauses was drastically different from the laws of other states. For example, Texas has enforced no contest clauses since as early as 1908.[2] The Indiana No Contest Statutes create a new tool that attorneys can use when drafting estate planning instruments for clients to safeguard their legacies.

V. Public Policy Considerations

Both the Restatement and much of the case law addressing no contest clauses discuss the competing public policies for and against forfeiture. The Restatement of Property notes several public policies supporting penalty clauses, including preserving the transferor's donative intent, avoiding waste of the estate in litigation, and avoiding use of a will contest to coerce a more favorable settlement to a dissatisfied beneficiary.[3] *See* RESTATEMENT § 9.1 cmt. a. However, as the Restatement also notes, there are countervailing public policy considerations such as the

[2] *See Perry v. Rogers*, 52 Tex. Civ. App. 594, 114 S.W. 897, 899 (1908).
[3] Restatement (Second) of Property: Donative Transfers § 9.1 cmt. a. (1983).

interest of allowing access to the courts to prevent probate of wills procured by or resulting from fraud, undue influence, lack of capacity, improper execution, forgery, or subsequent revocation by a later document.[4] Of course, the overriding consideration discussed in most cases is making effective the intent of the testator, a principle that has long been echoed throughout Indiana case law.[5]

VI. Exceptions to Enforceability

The exceptions to enforceability of no contest clauses vary widely based on jurisdiction. Some states, like California, have enacted fairly comprehensive legislation defining no contest clauses and outlining when they will be enforced.[6] Other states, like Oklahoma, have developed a body of case law outlining the exceptions to enforcement of a no contest clause.[7] And some states, like Arizona, rely on a hybrid of statutes and case law.[8] Although Indiana's statutory scheme is not as comprehensive as California's, it does outline multiple exceptions to enforceability.

One such exception in Indiana is if a fact-finder determines that a contest was brought for "good cause."[9] Indiana's "good cause" exception is loosely modeled after the "probable cause" rule adopted by the Uniform Law Commission's Uniform Probate Code ("UPC").[10] UPC § 2-

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[4] *Id.*
[5] *See, e.g., Seemes v. Gary Nat. Bank*, 242 N.E.2d 517, 521 (Ind. Ct. App. 1968) (recognizing the public policy that "where the intent of the testator can be reasonably determined that that intent be given preference and authority").
[6] Cal. Prob. Code §§ 21310-21315.
[7] *See In re Estate of Westfahl*, 674 P.2d 21, 23 (Okl. 1983) ("The validity of no contest clauses has been explicitly and implicitly acknowledged by this Court.").
[8] *In re the Shaheen Trust*, 341 P.3d 1169, 1171 (Ariz. Ct. App. 2015) ("In short, although no-contest provisions in wills are governed by statute, and no-contest provisions in trusts are governed by the Restatement, the standard for evaluating the enforceability of such clauses does not differ between wills and trusts. Accordingly, we find the trial court did not err in . . . concluding that the no-contest provision would be invalid if the Robertses had probable cause to bring their petition.").
[9] Ind. Code § 29-1-6-2(b)(1) & Ind. Code § 30-4-2.1-3(b)(1).
[10] *See State Laws: No-Contest Clauses* by T. Jack Challis and Howard M. Zaritsky (2012), published at https://www.actec.org/assets/1/6/State_Laws_No_Contest_Clauses_-_Chart.pdf. Updated research was done on

517 provides: "[a] provision in a will [or trust] purporting to penalize an interested person for contesting the will [or trust] or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." Most states follow the "probable cause" exception in some form.[11] However, they may interpret "probable cause" differently. For example, even though Arizona's statute provides that no contest clauses are unenforceable when "probable cause" exists for the contest, Arizona's Supreme Court has determined that this encompasses "good faith" because a "subject belief in the basis of the challenge is part of the required belief in the substantial likelihood of success."[12] There is another group of states that will enforce no contest clauses regardless of whether "probable cause" is established.[13] Arkansas will not enforce no contest clauses if "good faith" is established for bringing an indirect contest (such as seeking to probate a subsequent will), but does not recognize a "good faith" exception for direct will contests.[14] Other states require that both "good faith" and "probable cause" are established.[15] Lastly, there is a group of states that completely deviate from the previous standards and have developed their own tests.[16]

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each state for accuracy and current status of each state's law. Reference the supplement for citing information to each state's statutes and common law.

[11] For example, Minnesota follows the UPC definition. See supplement for other state statutes.

[12] *In re Estate of Shumway*, 9 P.3d 1062, 1066 (Ariz. 2000).

[13] For example, New York statutory language provides: "(b) A condition…is operative despite the presence or absence of probable cause…" N.Y. Est. Powers & Trusts Law § 3-3.5 (McKinney). Nonetheless, New York's statutory scheme still provides some exceptions such as "Such a condition is not breached by a contest to establish that the will is a forgery or that it was revoked by a later will, provided that such contest is based on probable cause." *See* supplement for other state statutes and case law. "

[14] *Seymour v. Biehslich*, 266 S.W.3d 722 (2007); *Sharp v. Sharp*, 447 S.W.3d 622, 627 (Ark. Ct. App. 2014) ("There is no good-faith exception to a direct attack on a will that contains a no-contest clause. We decline to expand Seymour as argued by appellant."). Illinois is unclear on its standard, but held in *Wojtalewicz's Estate v. Woitel*, 418 N.E.2d 418 (1981) that the challenge was made in "good faith" and the clause was unenforceable because it interfered with public policy.

[15] For example, Nevada requires "good faith" and "probable cause." Nev. Rev. Stat. Ann. § 137.005(4)(d) *See* supplement for other state statutes and common law.

[16] For example, California has a different standard. Additionally, Vermont law is unsettled on the enforceability of no contest provisions. See supplement for other state statutes and common law.

The Indiana No Contest Statutes are peculiar because the "good cause" exception is not relied upon by most jurisdictions, particularly without also requiring "probable clause." Further, "good cause" is not defined by Indiana's Probate or Trust Codes. As a result, Indiana courts may look to definitions adopted in other contexts, such as labor law, in crafting an appropriate instruction for the fact-finder.[17] Indeed, the Arizona Court of Appeals originally looked at the definitions of "probable cause" used in criminal cases and civil cases dealing with false arrest or malicious prosecution in crafting a definition to use in probate proceedings.[18] Courts may also consider the similar "probable cause" definitions developed in other jurisdictions or uniform codes. For instance, the Restatement (Third) of Property provides as follows: "[p]robable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful."[19]

One key question is to what extent a "good faith" inquiry will involve a subjective or an objective determination. Earlier this year the Court of Appeals of Washington addressed such an issue and determined that a "presumption of good faith" may exist under certain circumstances. In the case *In re Estate of Gillespie*, the appellate court determined that beneficiaries had triggered a no contest clause by filing a complaint claiming that certain assets belonged to an LLC instead of to the estate.[20] The trial court had previously determined that challenges brought

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[17] In the labor law context: "Good cause" has been defined by the courts to mean (1) that the reason for leaving employment is such that a reasonable, prudent person, under similar circumstances would quit; (2) that the reason for leaving is "objectively" related to the job. *M & J Mgmt., Inc. v. Review Bd. of Dep't of Workforce Dev.*, 711 N.E.2d 58, 60 (Ind. Ct. App. 1999).
[18] *See In re Estate of Shumway*, 9 P.3d 1062 (Ariz. 2000) (in which the Arizona Supreme Court stated it had "little quarrel . . . . . with the tests laid down by the court of appeals, but we believe will contests are somewhat *sui generis,* influenced as they are by the conflicting public policies described above" and crafted a new definition of "probable cause.").
[19] Restatement (Third) of Property: Donative Transfers § 8.5 cmt. c. (2003).
[20] 456 P.3d 1210 (Wash. App. 2020).

in “good faith” would be excepted from enforcement of the no contest clause, and that ruling was never appealed by any of the parties. Because that ruling was res judicata, the appellate court in this later challenge ruled that “the party challenging the application of an in terrorem clause bears the burden of proving they initiated a lawsuit in good faith and on the advice of fully informed counsel.”[21] Further, the Court elucidated that “[o]nce a petitioner has made a prima facie showing, there is a rebuttable presumption of good faith which the opposing party may overcome with evidence of the intentional violation of a court order, dishonesty, improper or sinister motive, the lack of any factual basis for the asserted claims, or the intentional withholding of material factual information from counsel.”[22] A key question in this determination was whether the contesting party “fully and fairly disclosed all material facts to counsel” before such counsel advised to bring the contest.[23]

Another issue courts have faced in implementing the “probable cause” exception is determining whether and to what extent a contestant may use facts learned through a full development of the record to demonstrate what evidence existed at the time of instituting the proceeding, regardless of the challenger’s prior knowledge of such evidence.[24] The Restatement’s definition seems to imply that the finding of “probable cause” must be based on evidence known at the time the contest was initiated. Courts also have considered whether a legal presumption of undue influence—such as the benefitting attorney-in-fact occupying a confidential relationship with the testator—is sufficient “probable cause” to except enforcement of a no contest provision.[25] In the case of *In re Estate of Shumway*, the Arizona Supreme Court

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[21] *Id.* at 1218.
[22] *Id.*
[23] *Id.* at 1219.
[24] *See In re Estate of Shumway*, 9 P.3d 1062 (Ariz. 2000) (holding that “it is the information known at the time of filing that is significant.”).
[25] *See In re Estate of Shumway*, 9 P.3d 1062 (Ariz. 2000).

considered such a presumption, as well as other facts, in determining that the losing contestant did have probable cause to challenge the will.[26]

Outside of the "good cause" exception, the Indiana No Contest Statutes provide other carve-outs that protect challengers. For example, no contest clauses will not divest a beneficiary who objects to a discretionary action taken by a fiduciary (e.g. an objection to a trustee's excess fees or self-dealing) or an action brought by the attorney general requesting clarification of the terms of a charitable trust.[27] Additionally, actions to determine the interpretation or the construction of an instrument, non-judicial settlement agreements and "action[s] to determine whether a proposed or pending motion or proceeding constitutes a contest" will not trigger a no contest clause.[28]

Because the statutes provide that actions "to determine whether a proposed or pending motion or proceeding constitutes a contest" cannot trigger the clause, IC § 34-14-1-11 may allow for beneficiaries to receive a declaratory judgment on whether an action constitutes a contest before risking forfeiture. This procedure has been permitted by other courts, like Georgia.[29] However, courts have determined that proposed declaratory judgment actions seeking an "interpretation" or "construction" that would remove a beneficiary or a trustee, likely trigger a no contest clause.[30] One issue Indiana courts may have to resolve is whether the deadline to bring a

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[26] *Id.* at 1068 ("Based on the circumstances surrounding the drafting and execution of this will, the doctor's concern regarding Decedent's competence, the lack of clarity of Decedent's intent, the presumption of undue influence, and the policy of Arizona law on this subject, we conclude there was probable cause to contest the will.").

[27] Ind. Code §§ 29-1-6-2(b)(6) & 30-4-2.1-3(b)(6);
Ind. Code §§ 29-1-6-2(b)(7)(a)(i) & 30-4-2.1-3(b)(7)(a)(i).

[28] Ind. Code §§ 29-1-6-2(b)(3) & 30-4-2.1-3(b)(3);
Ind. Code §§ 29-1-6-2(b)(5) & 30-4-2.1-3(b)(5);
Ind. Code §§ 29-1-6-2(b)(4) & 30-4-2.1-3(b)(4).

[29] *In re Estate of Johnson*, 834 S.E.2d 283, 285 (Ga. Ct. App. 2019) (noting "our Supreme Court has sanctioned the use of a declaratory judgment action to determine whether a proposed future declaratory action by the petitioner would violate an in terrorem clause.").

[30] *See id.*

will contest, which is a statute or repose, can be extended pending the court's ruling on the declaratory judgment action.

VII. How Will Indiana Courts Construe No Contest Clauses

The newness of the Indiana No Contest Statutes leaves great uncertainty for attorneys who are eager to incorporate them into clients' estate plans. As with other areas of law, usually the best instruction would be to look to the body of case work provided by other states. Even though the exceptions of other states might be different, the decisions can still provide guidance.

Many jurisdictions claim to "strictly construe" no contest clauses. For example, *Redman-Tafoya v. Armijo* is a frequently cited case in which the court interpreted the UPC provision and held that no contest clauses must be "strictly construed," which in that court's estimation meant narrowly construed.[31] The problem then becomes what exactly "strict construction" means. In one case, the California Court of Appeals noted that its "cases have approached the meaning of 'strict construction' in different ways."[32] It noted that some courts applied "strict construction" to emphasize the written word found within the four corners of the document whereas other California courts emphasized the testator's intent as the primary determinant and allowed extrinsic evidence of that intent. New Hampshire has even codified how such provisions are to be construed, providing that, "It is the intent of this section to enforce the testator's intentions as reflected in a no-contest provision . . . to the greatest extent possible."[33] Some states have adopted the view that "strict construction" means enforcing forfeiture "even [ ] against infants who were parties to the contest and even [ ] where the application of the clause had the effect of

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[31] *Redman-Tafoya v. Armijo*, 126 P.3d 1200, 138 N.M. 836 (N.M. App. 2005).
[32] *Jacobs-Zorne v. Superior Court*, 46 Cal.App.4th 1064, 1073 (1996).
[33] N.H. Rev. Stat. §§ 551:22(IV).

disinheriting all the members of the testator's family."[34] If there is one takeaway to just these few examples, it is that each jurisdiction may construe no contest clauses in very different ways, and predicting how Indiana courts will construe the Indiana No Contest Statutes is a soothsayers' endeavor.

VIII. Considerations to Discuss With Clients

When discussing the possibility of implementing no contest clauses into a client's estate plan, there are a few issues that should be considered. These questions include but are not limited to the following:

- Does the client have potentially disgruntled beneficiaries who are likely to challenge her estate? And importantly, is the client involved in a second marriage with children from the prior marriage?
- Is the client leaving unequal shares of property to beneficiaries who would expect to receive equal shares?
- What value does the client place on ensuring that a contest is not brought after his/her death?
- Is the client comfortable with the notion that a contesting beneficiary would be disinherited? Would the client also want the beneficiary's children and heirs disinherited?
- Are there other instruments that comprise the client's estate, such as beneficiary designations, stock redemption agreements, or joint accounts that are divided unevenly among beneficiaries?

[34] *Keener v. Keener*, 682 S.E.2d 545, 548 (Va. 2009).

- Is it possible that a beneficiary could file a claim in the client's estate for services rendered or some other contractual obligation?
- Is the client naming one child or beneficiary as the fiduciary?
- What are the client's goals in preventing any post-mortem litigation?

These questions lead us to the four primary considerations for the estate planners.[35]

1. The Beneficiary Must Have An Interest

It is essential to understand that a beneficiary will only forfeit her interest if the beneficiary is actually named as a beneficiary in the will or trust that contains the no contest provision. A disgruntled family member who goes unnamed in the testator's will has nothing to lose by challenging the instrument. Thus, when planning, it is important to identify which family members, friends, or other individuals may become upset by not receiving any form of inheritance. The best use of a no contest clause as to these disgruntled individuals might be to include them as beneficiaries with a substantial enough interest that it would be unreasonable for them to risk a potential contest. Now you might ask, why would my client want to include as a beneficiary an individual who they intended to completely disinherit? This is a valid question and one that might raise the eyebrows of your client. But based on the size of the client's estate and the grounds of a potential contest, it could be advantageous to the overall administration of the estate in order to avoid costly litigation.

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[35] *How Testators Can Leverage Indiana's Repeal of the Prohibition on No Contest Clauses* by Sarah Jenkins, published October 24, 2018, in *Res Gestae*.

2. How the Testator Wishes for Forfeitures to be Distributed

In the situation where the no contest clause is held as valid and enforced against a contesting beneficiary, it will be of the utmost importance to clarify where the forfeited property should be distributed. Georgia's statute provides that the no contest provision is void unless there is a "direction in the will as to the disposition of property if the condition in terrorem is violated."[36] The Indiana No Contest Statutes do not contain a similar requirement but being diligent in drafting a thoughtfully crafted no contest clause is critical nonetheless. No contest clauses should be drafted around Indiana's anti-lapse statute rather than relying on its effect.[37] An estate attorney should discuss with the client the effect of the disinherited beneficiary predeceasing the testator and draft a forfeiture clause that accomplishes the client's goal. Estate attorneys should include examples of how and to whom distributions would be made if the no contest clause is triggered. For example, language could provide "*in the case Beneficiary 1's interest is forfeited under the no contest provision, then Beneficiary 1's interest should be split and distributed in equal shares to Beneficiary 2 and Beneficiary 3*." Such a small and simple step can go a long way in ensuring that your client's wishes are met postmortem.

3. Specify the Acts or Conduct That are Prohibited Under the No Contest Clause

Courts vary on the level of specificity required in drafting a no contest clause. Because most jurisdictions employ strict scrutiny in construing such clauses, being as detailed as possible is the best policy. In some jurisdictions courts have held that no contest clauses are void because

[36] *Cox v. Fowler*, 614 S.E.2d. 59, 60 (Ga. 2005) (citing OCGA A § 53-4-68(b), which provides "A condition in terrorem shall be void unless there is a direction in the will as to the disposition of the property if the condition in terrorem is violated, in which event the direction in the will shall be carried out.").
[37] Ind. Code § 29-1-6-1(g).

the terms of the clause are too general or overly broad.[38] A California court stated "[g]eneric no contest clauses [ ] are obsolete. Estate planning practitioners must draft each no contest clause with particularity, considering each case which instruments are intended to be subject to the no contest clause, and specifically identifying each such instrument."[39] Beyond wills and trusts, other estate planning documents may also be subject to forfeiture clauses. In one instance, a beneficiary lost her interest when she challenged a corporate stock redemption agreement as the court held that the agreement was the "cornerstone" of the testator's estate plan.[40] These serve as just a few examples that clarity and descriptiveness in the overall drafting of the no contest clause is vital in having a court determine what the testator intended by the clause.

4. Explicitly State the Testator's Intent

It is well recognized that courts heavily rely on the testator's intent to control their determinations. Indiana is no exception. It is wise to include a clear statement of the testator's intent when drafting a no contest clause. Inclusion of a statement of the testator's intent will allow for the court to more easily understand why the clause was included in the will, trust, or other instrument and enforce the clause as the client intended.

IX. Sample Clauses and Subsequent Litigation

Of course, the hope is that inclusion of a no contest clause will deter litigation. But that isn't always the case. The following cases contain previously litigated no contest clauses and serve as examples of how a court may rule if a contest occurs.

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[38] *See In re Sand's Estate*, 66 Pa. D & C 551, 551 (Pa. Orph. 1948).
[39] *Aviles v. Swearingen*, 16 Cal. App. 5th 485, 492 n.4, 2017 WL 4769071 (2d Dist. 2017) (internal citation and quotation omitted).
[40] *Genger v. Delsol*, 66 Cal. Rptr. 2d 527, 535 (Cal. App. 1997).

Arkansas recognizes a "good faith" exception to indirect contests, as applied by the Supreme Court of Arkansas in *Seymour v. Biehslich*.[41] (It should be noted, however, that the "good faith" exception was not subsequently applied by the Arkansas Court of Appeals to a case involving a "direct contest" or a contest that challenged the instrument itself.[42]) Arkansas' "good faith" exception might be an example that Indiana courts could look to for guidance on its "good cause" standard. The no contest clause in *Seymour* provided:

> *If any one person [or] persons named [or] referred to in this instrument contest my will, that person [or] persons will automatically be dropped from my will and their part will be equally divided among the other parties named and/or referred to herein.*

Seymour involved a situation where two children (referred to as the "first child" and the "second child") of the Testator petitioned for probate using different wills. The first child filed for probate of a will executed on 5/6/2002. The will was probated, and the court appointed the first child as personal representative. This first will contained the above no contest provision. The second child, subsequently, petitioned for probate of a second "handwritten" will that was executed on 5/13/2002. The second will was in the second child's handwriting and was denied probate. The first child then filed against the second child on the basis that her inheritance from the first will was forfeited based on her petition to probate the second will. The circuit court ruled that the no contest provision was enforceable and excluded the second child from her inheritance. The Supreme Court of Arkansas stated that the Court's "decision is bolstered by cases from other jurisdictions that indicate that such an action, if not taken in good faith, can constitute the kind of challenge that triggers a will's no-contest clause." *Id.* 364. The Court

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[41] 371 Ark. 359, 360, 266 S.W.3d 722 (2007).
[42] *Sharp v. Sharp*, 2014 Ark. App. 645, 1, 447 S.W.3d 622, 623 (2014).

cited to *In re: Estate of Westfahl,* 674 P.2d 21 (Okla. 1984), for guidance on the exception. The *Westfahl* court stated "[a]n attempt in good faith to probate a later purported will, spurious in fact, but believed to be genuine by the one presenting it for probate, does not render the offeror subject to the forfeiture provisions of no contest clauses if…she has probable cause to believe that the instrument is genuine and entitled to probate[.]" The Supreme Court of Arkansas affirmed the circuit court's decision determining that the offer to probate by the second child did not constitute a "good faith" offer in that the instrument offered was not genuine.

In *Keener v. Keener*,[43] the no contest provision read as follows:

At my death:

1. Any person that objects to or contests any provision of this Trust, in whole or in part, shall forfeit his or her entire distribution otherwise payable under this Trust and receive only $1.00 under this Trust and will receive no other distribution from my Trust nor from my estate.

The Decedent had executed a "pour-over" will in which his property passed to his revocable trust. The Decedent had seven children and it was the Decedent's intent to provide for the children equally. The Decedent's eldest son (the "Son") was named as the successor Trustee. The Decedent provided, in subsequent addendums, that the inheritance of three of his children was to be put towards the repayment of different loans that the children had yet to satisfy. The no contest provision was added by addendum after the Decedent and one his daughters (the "Daughter") had a dispute over the Decedent's estate plan. The no contest provision was only added to the trust but not the Decedent's will.

[43] 278 Va. 435, 439, 682 S.E.2d 545 (2009).

Upon the Decedent's death, the Son did not offer the will to probate, claiming that no will had been executed. The Daughter then investigated whether the Son's assertion about the will was true. The Daughter did not find any evidence that the will existed, so she applied for the issuance of letters of intestate administration. The Daughter was granted the letters of administration. Subsequent to her authorization, the Son, accompanied by his brother and sister (whose inheritance would be not advanced towards loan repayment), filed suit against the Daughter alleging that she had violated the no contest clause and forfeited her interest. The petitioners also asked the court to probate the Decedent's will. The Daughter counterclaimed alleging that the Son had breached his fiduciary duty as Trustee.

The circuit court ruled that the Daughter's conduct "triggered" the no contest clause because her opening an intestate estate would have thwarted the Decedent's intent as his property would have been distributed to his heirs at law instead of through his trust. The Supreme Court of Virginia reversed and remanded this decision. The Court's strict construction of the trust did not support the finding that the Daughter's conduct violated the no contest provision because she had not brought a contest or objection to "any provision of this Trust." The Supreme Court acknowledged that Daughter's action "if successful, would have thwarted the testator's purpose of funding the trust through the will." However, the Court found that the Decedent's purpose was not a provision of the trust and the will did not contain any forfeiture provision. Thus, she had not expressly violated the terms of the trust.

In *Parker v. Benoist*,[44] the no contest provision read as follows:

If any beneficiary hereunder (including, but not limited to, any beneficiary of a trust created herein) shall contest the probate or validity of this Will or any

[44] 160 So.3d 198 (Miss. 2015).

provision thereof, or shall institute or join in (except as a party defendant) any proceeding to contest the validity of this Will or to prevent any provision thereof from being carried out in accordance with its terms (regardless of whether or not such proceedings are instituted in good faith and with probable cause), then all benefits provided for such beneficiary are revoked and such benefits shall pass to the residuary beneficiaries of this Will.

This case involved two beneficiaries who were the children of the testator. The testator had previously executed a valid will in which the beneficiaries were to receive equal interests in the estate. Subsequently, the testator executed a second will that gave a much larger share to one beneficiary and also included the above no contest provision. The disgruntled beneficiary brought a will contest on the grounds of undue influence. The Court rejected the testator's attempt to require forfeiture despite probable cause and good faith, finding that the clause violated the public policy that courts should be able to ascertain the truth. The court ultimately held the contest was made in good faith and with probable cause and thus, the no contest clause was unenforceable against the challenging beneficiary.

In *Harrison v. Morrow*,[45] the no contest provision read as follows:

E. Beneficiary Disputes. If any bequest requires that the bequest be distributed between or among two or more beneficiaries, the specific items of property comprising the respective shares shall be determined by such beneficiaries if they can agree, and if not, by my Executor. Any further dispute between or among the beneficiaries regarding distribution percentages or procedures shall permanently disqualify that person from any distribution. If a bequest is contested this share

[45] 977 So.2d 457 (Ala. 2007).

shall be distributed proportionately to the other distributee(s) listed as beneficiaries."

This case involved three beneficiaries, two who brought will contests. The contestants alleged the will was forged. The court ultimately held that the no contest clause only forfeited a beneficiary's interest if the contest was about the distribution or amount that the beneficiary was to receive and not the disposition of the estate under the testator's will. Thus, the court found that, although the no contest clause was enforceable, it should be "construed narrowly to avoid a forfeiture." In other words, the Court's holding hinged on its interpretation of the word "distribution" used in the no contest clause.

In *Gowdy v. Cook*,[46] the Supreme Court of Wyoming considered the following no contest clause:

The right of a beneficiary to take any interest given to him or her under this trust or any trust created under this trust instrument will be determined as if the beneficiary predeceased [the testatrix] without leaving any surviving descendants if that beneficiary, alone or in conjunction with any other person, engages in any of these actions:

...

seeks to obtain adjudication in any court proceeding that [the trust] or any of its provisions is void, or otherwise seeks to void, nullify, or set aside [the trust] or any of its provisions[.]

A contesting beneficiary brought an action against the attorneys who had drafted the trust instrument and served as trustee and trust protector, alleging malpractice and breach of fiduciary

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[46] 455 P.3d 1201 (Wyom. 2020).

duty. Within that lawsuit, he also sought to decant the trust into a new instrument that would remove the corporate trustee qualifications outlined in the trust instrument because he was having difficulty finding a successor trustee with assets or insurance coverage of at least one hundred million dollars. The trustee counterclaimed for enforcement of the no contest provision, asserting that the proposed change was an attempt to void, nullify or set aside a provision of the trust. The Supreme Court of Wyoming agreed, determining that the no contest provision was "clear and unambiguous" and the testatrix "plainly intended that any beneficiary who attempts to obtain a court ruling voiding, nullifying or setting aside any of the trust provisions forfeits his rights under the trust."

The above cases show the importance of specificity when drafting no contest clauses. In *Keener*, the Court's strict construction of the trust instrument caused the no contest clause to not be enforceable against the beneficiary. In *Parker*, even though the no contest clause itself specifically stated that it should be enforced regardless of "good faith" or "probable cause" challenges, the court found that because of public policy, the clause was void. And finally, in *Harrison,* the specificity of the no contest clause allowed for the beneficiaries to challenge the validity of the document without forfeiting their interests.

X. Litigation Considerations

Now that no contest clauses are being incorporated into Hoosiers' estate plans, lawyers will need to carefully consider how they will advise clients who are concerned about a decedent's estate plan or the actions (or inactions) that a fiduciary is taking in administration of an estate or trust. This will involve a careful analysis of any no contest clause at issue to determine whether bringing a court action to address the client's concerns could trigger a forfeiture. For example, indirect contests, such as seeking the probate of a later instrument,

could be construed as triggering the forfeiture clause if the later instrument is determined to be invalid.[47] A practitioner should also study the statutory exceptions discussed above. If the client can bring a declaratory judgment action to determine whether an action will trigger the clause, for example, that would be prudent.

More than ever, attorneys need to conduct due diligence on the circumstances and facts surrounding the controversy to advise the client on whether he or she could pursue a contest in "good faith." And such due diligence should be documented for the benefit of the client who may have to prove that the contest was brought in "good faith." For example, a practitioner should examine what evidence exists that the testator/testatrix was mentally infirm, lacked capacity, or was otherwise susceptible to undue influence. The Restatement provides some guidance on this, giving examples of what does (or does not) constitute "probable cause." For example, where the only basis for a claim of undue influence is the inequality of treatment between the beneficiaries, the Restatement provides that no probable cause exists. In that vein, attorneys and their clients should undertake and document an investigation of the circumstances surrounding the execution of an instrument and the testator's capacity. If the personal representative refuses to provide information about the execution of the plan or to release the testator's medical records, then having such documentation may be critical in later justifying the client's actions if the contest is unsuccessful.

Counsel also may want to consider retaining the advice of a consulting expert to determine if "good faith" exists prior to bringing the litigation. The Restatement provides that "A factor that bears on the existence of probable cause is whether the beneficiary relied upon the

[47] *See, e.g., In re Estate of Peppler*, 971 P.2d 694 (Colo. Ct. App. 1998) (finding that offer of subsequent will for probate constituted attack that triggered no contest clause and remanding for determination of whether beneficiary acted in good faith and with probable cause in attacking the will).

advice of independent legal counsel sought in good faith after a full disclosure of the facts. The mere fact that the person mounting the challenge was represented by counsel is not controlling, however, since the institution of a legal proceeding challenging a donative transfer involves representation by legal counsel."[48] Thus, having such an independent opinion from counsel, who has been provided with all the factual background and information available to the client, would further protect the client's decision to proceed with litigation.

XI. Increased Malpractice Exposure

It also bears noting that attorneys should advise their clients, preferably in writing, of the risks in bringing a contest or other litigation. Failure to do so could result in a malpractice lawsuit. Moreover, the risk of triggering a clause in a will or trust should be continuously evaluated. A case in point is *Tamposi v. Denby et al*.[49] In that case, a client brought suit against her former law firm for malpractice, aiding and abetting breach of fiduciary duty, and unjust enrichment. The client, upon advice of her former counsel, had initiated litigation that triggered a no contest clause. Her suit was unsuccessful. In fact, a court found that it was brought in "bad faith" and violated the no contest clause. As a result, the client forfeited her interest under several trusts, was required to reimburse the trust for money dispersed to her after the suit was initiated, and also was ordered to pay the attorneys' fees of the trusts' investment directors. In the subsequent action brought against the client's former law firm, the Massachusetts District Court denied the law firm's motion to dismiss, determining the client had properly alleged causes of action for legal malpractice and also aiding and abetting breach of fiduciary duty since one of the firm's attorneys had been acting as trustee. The District Court noted, "Taking the

[48] Restatement (Third) of Property § 8.5(c).
[49] 974 F.Supp.2d 51 (D. Mass. 2013).

facts pleaded in the light most favorable to the plaintiff, the claim is that [the attorneys] actively encouraged the filing and prosecution of the New Hampshire Action which led to the harm [client] suffered without fully researching the law or fully advising the plaintiff of the realistic risks."

XII. Conclusion

In the estate planning practice area, maximizing the transfer of an individual's wealth to his or her intended beneficiaries is one of our critical objectives. The Indiana No Contest Statutes create a new tool to help us carry out this objective. Although there is great uncertainty in the area of no contest clauses, these provisions can be extremely beneficial to clients and their families in order to minimize the possibility of contests to wills and other estate planning documents and make certain that the client's wishes are ultimately fulfilled.

Supplement of Indiana Codes

Ind. Code Ann. § 29-1-1-3 Definitions; construction

Sec. 3. (a) The following definitions apply throughout this article, unless otherwise apparent from the context:

(22) "No contest provision" refers to a provision of a will that, if given effect, would reduce or eliminate the interest of a beneficiary of the will who, directly or indirectly, initiates or otherwise pursues:

(A) an action to contest the admissibility or validity of the will;
(B) an action to set aside a term of the will; or
(C) any other act to frustrate or defeat the testator's intent as expressed in the terms of the will.

Ind. Code Ann. § 29-1-6-2 Contest of wills; admission prevented; forfeiture of benefits

Sec. 2. (a) Except as provided in subsection (b), a no contest provision is enforceable according to the express terms of the no contest provision.
(b) Subsection (a) does not apply to the following proceedings:
(1) An action brought by a beneficiary if good cause is found by a court.
(2) An action brought by an executor or other fiduciary of a will that incorporates a no contest provision, unless the executor or other fiduciary is a beneficiary against whom the no contest provision is otherwise enforceable.
(3) An agreement, including a nonjudicial settlement agreement, among beneficiaries and any other interested persons to settle or resolve any other matter relating to a will or estate.
(4) An action to determine whether a proposed or pending motion or proceeding constitutes a contest.
(5) An action brought by or on behalf of a beneficiary to seek a ruling regarding the construction or interpretation of a will.
(6) An action or objection brought by a beneficiary, an executor, or other fiduciary that seeks a ruling on proposed distributions, fiduciary fees, or any other matter where a court has discretion.
(7) An action brought by the attorney general that:
(A) seeks a ruling regarding the construction or interpretation of:
(i) a will containing a charitable trust or charitable bequest; or
(ii) a no contest provision contained in a will or trust that purports to penalize a charity or charitable interest; or
(B) institutes any other proceedings relating to:
(i) an estate; or
(ii) a trust;
if good cause is shown to do so.

Ind. Code Ann. § 30-4-1-2 Other definitions

Sec. 2. As used in this article:
(11) "No contest provision" refers to a provision of a trust instrument that, if given effect, would reduce or eliminate the interest of a beneficiary of the trust who, directly or indirectly, initiates or otherwise pursues:

(A) an action to contest the validity of:

(i) the trust; or

(ii) the terms of the trust;

(B) an action to set aside or vary any term of the trust; or

(C) any other act to frustrate or defeat the settlor's intent as expressed in the terms of the trust.

Ind. Code Ann. § 30-4-2.1-3 No contest provision enforceable; exceptions

Sec. 3. (a) Except as provided in subsection (b), a no contest provision is enforceable according to the express terms of the no contest provision.
(b) Subsection (a) does not apply to the following proceedings:

(1) An action brought by a beneficiary if good cause is found by a court.

(2) An action brought by a trustee or other fiduciary serving under the terms of the trust that incorporates a no contest provision, unless the trustee or other fiduciary is a beneficiary against whom the no contest provision is otherwise enforceable.

(3) An agreement, including a nonjudicial settlement agreement, among beneficiaries and any other interested persons to settle or resolve any other matter relating to a trust.

(4) An action to determine whether a proposed or pending motion or proceeding constitutes a contest.

(5) An action brought by or on behalf of a beneficiary to seek a ruling regarding the construction or interpretation of a trust.

(6) An action or objection brought by a beneficiary, executor, or other fiduciary that seeks a ruling on proposed distributions, fiduciary fees, or any other matter where a court has discretion, including actions under IC 30-4-3-22.

(7) An action brought by the attorney general that:

(A) seeks a ruling regarding the construction or interpretation of:

(i) a charitable trust or a trust containing a charitable interest; or

(ii) a no contest provision contained in a trust that purports to penalize a charity or charitable interest; or

(B) institutes any other proceedings relating to a trust if good cause is shown to do so.

Sample State Statutes and Common Law on No Contest Clauses

State	Provision(s)
Alabama	See *Harrison v. Morrow*, 977 So.2d 457 (Ala. 2007). The Supreme Court of Alabama held "the will contest commenced by Morrow and Anderson was not within the purview of the in terrorem provision of this case." *Id.* at 462.
Alaska	Alaska Stat. Ann. § 13.16.555 (West) Alaska Stat. Ann. § 13.36.330 (West)
Arizona	Ariz. Rev. Stat. Ann. § 14-2517 (West) *But see In re Estate of Shumway,* 9 P.3d 1062 (Ariz. 2000). ("While we agree that good faith is not the sole test, we believe subjective belief in the basis of the challenge is part of the required belief in the substantial likelihood of success.")
Arkansas	See *Seymour v. Biehslich,* 371 Ark. 359, 366, 266 S.W.3d 722, 728 (2007). "In the instant case, while the trial court did not specifically state its reasons for declaring that Seymour's petition to probate the May 13 will invoked the no-contest provision in the May 6 will, we hold that sufficient evidence is found in the record to support a conclusion that Seymour was not acting in good faith when she procured the May 13 will and offered it for probate." *Id*. at 366. *Sharp v. Sharp*, 447 S.W.3d 622, 626 (Ct. App. Ark. 2014). *"Seymour* applied the good faith, probable cause exception to what we may conveniently term an 'indirect contest' of a will . . . . Here, of course, Gary initiated a 'direct contest' of Decedent's 2010 will, arguing it was the product of undue influence and/or that Decedent lacked testamentary capacity. Seymour's application of the good faith, probable cause exception does not easily transfer to a direct contest."
California	Cal. Prob. Code § 21310 (West)
Colorado	Colo. Rev. Stat. Ann. § 15-11-517 (West)
Connecticut	See *S. Norwalk Tr. Co. v. St. John*, 92 Conn. 168, 101 A. 961 (Conn. 1917). "Where the contest has not been made in good faith, and upon probable cause and reasonable justification, the forfeiture should be given full operative effect." *Id.* at 963.
Delaware	Del. Code Ann. tit. 12, § 3329 (West)

District of Columbia	See *Ackerman v. Genevieve Ackerman Family Tr.*, 908 A.2d 1200 (D.C. 2006). "Enforcing a 'no contest' provision of the trust, the trial court then declared that appellant had lost any and all interests he may have had under the trust and his mother's will. Appellant challenges the latter ruling, but we affirm." *Id*. at 1201.
Florida	**No contest provisions are UNENFORCEABLE in the State of Florida.** Fla. Stat. Ann. § 732.517 (West) Fla. Stat. Ann. § 736.1108 (West)
Georgia	Ga. Code Ann. § 53-4-68 (West)
Hawaii	Haw. Rev. Stat. Ann. § 560:3-905 (West)
Idaho	Idaho Code Ann. § 15-3-905 (West)
Illinois	See *Wojtalewicz's Estate v. Woitel*, 93 Ill. App. 3d 1061, 418 N.E.2d 418, 420 (1981). "Generally, conditions in a clause against contesting the will or attempting to set it aside are valid. (See Page on Wills (1962), s 44.29 p. 469.) Even where they are held valid, though, conditions against contests are so disfavored by the courts that they are construed very strictly." *Id.* at 1063.
Iowa	See *In re Estate of Cocklin*, 236 Iowa 98, 105, 17 N.W.2d 129, (1945). "A few courts have held the condition inoperative where the beneficiary has probable cause for the contest of the will, while still others reject all these distinctions as arbitrary, and hold the condition valid and enforceable in all cases, whether the gift be of realty or personalty, and without regard to the cause or ground of contest. The latter view appears to be the one now generally held, and to our minds is most in consonance with reason and sound principle." *Id.* at 132.
Kansas	See *Hamel v. Hamel*, 296 Kan. 1060, 299 P.3d 278, 281 (2013).
Kentucky	See *Johnson v. Smith*, 885 S.W.2d 944 (Ky. 1994)
Louisiana	See *In re Succession of Scott*, 2005-2609 (La. App. 1 Cir. 11/3/06), 950 So. 2d 846, 848, writ denied, 2006-2813 (La. 1/26/07), 948 So. 2d 176. The Court of Appeal ***did not*** conclude that in terrorem provisions were void.
Maine	Me. Rev. Stat. tit. 18-C, § 3-905

Maryland	Md. Code Ann., Est. & Trusts § 4-413 (West)
Massachusetts	Mass. Gen. Laws Ann. ch. 190B, § 2-517 (West)
Michigan	Mich. Comp. Laws Ann. § 700.2518 (West)
Minnesota	Minn. Stat. Ann. § 524.2-517 (West)
Mississippi	Miss. Code. Ann. § 91-8-1014 (West)
Missouri	Mo. Ann. Stat. § 474.395 (West) Mo. Ann. Stat. § 456.4-420 (West)
Montana	Mont. Code Ann. § 72-2-537 (West)
Nebraska	Neb. Rev. Stat. Ann. § 30-2408 (West)
Nevada	Nev. Rev. Stat. Ann. § 137.005 (West)
New Hampshire	N.H. Rev. Stat. Ann. § 551:22
New Jersey	N.J. Stat. Ann. § 3B:3-47 (West)
New Mexico	N.M. Stat. Ann. § 45-2-517 (West)
New York	N.Y. Est. Powers & Trusts Law § 3-3.5 (McKinney)
North Carolina	See *Ryan v. Wachovia Bank & Tr. Co.*, 235 N.C. 585, 70 S.E.2d 853 (1952) "The court found as a fact that the plaintiff had plausible and probable ground for joining in the contest of the will and acted in good faith in so doing and was not barred by the forfeiture clause, and rendered judgment in favor of the plaintiff." *Id.* at 854.
North Dakota	N.D. Cent. Code Ann. § 30.1-20-05 (West)
Ohio	See *Bradford v. Bradford*, 19 Ohio St. 546 (1869)
Oklahoma	See *Matter of Estate of Zarrow*, 1984 OK 27, 688 P.2d 47 "As we noted, however, forfeiture provisions in a will are to be strictly construed against forfeiture, enforced as written, and interpreted reasonably in favor of the beneficiary." Id. at 50.
Oregon	Or. Rev. Stat. Ann. § 112.272 (West)
Pennsylvania	20 Pa. Stat. and Cons. Stat. Ann. § 2521 (West)
Rhode Island	See *Elder v. Elder*, 84 R.I. 13, 21, 120 A.2d 815 (1956)
South Carolina	S.C. Code Ann. § 62-3-905
South Dakota	S.D. Codified Laws § 29A-2-517
Tennessee	Tenn. Code Ann. § 35-15-1014 (West)
Texas	Tex. Est. Code Ann. § 254.005 (West)
Utah	Utah Code Ann. § 75-3-905 (West)
Vermont	Vermont law has not touched on whether no contest provisions are enforceable in wills and trusts.
Virginia	See *Keener v. Keener*, 278 Va. 435, 442, 682 S.E.2d 545 (2009) "Because the testator relied on the trust for the disposition of his property, we consider it appropriate to give full effect to

	no-contest provisions in such trusts for the same reasons that support the enforcement of such provisions when they appear in wills." *Id.* at 548.
Washington	See *Matter of Estate of Rathbone*, 190 Wash. 2d 332, 346, 412 P.3d 1283 (2018)
West Virginia	See *Dutterer v. Logan*, 103 W. Va. 216, 137 S.E. 1 (1927)
Wisconsin	Wis. Stat. Ann. § 854.19 (West)
Wyoming	See *EGW v. First Fed. Sav. Bank of Sheridan*, 413 P.3d 106 (Wyo. 2018)

Section Three

THE CONTEST OF MULTIPLE WILLS OR TRUSTS: PLAINTIFF'S PERSPECTIVE

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Section Three

The Contest of Multiple Wills or Trusts: Plaintiff's Perspective……………………………………Gregory L. Padgett

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Introduction

As estate litigation, including Will contests and Trust contests, has increased in recent decades, one recurring question is whether and how an interested person may contest more than one Will, or multiple Trust amendments, in one action. The need to address these questions through statutes and caselaw has increased as well, as there is very little legal guidance out there. Why do these situations arise? Perhaps because it has become fairly common for clients revise their Wills or Trusts more often than they had in the past. Perhaps that is due to changing family structures, which have become common in recent decades. Second and third marriages, in particular, generate changes in estate plans and the preparation of new Wills and new Trust amendments. Increased disposable income and successful family businesses have also likely contributed to the phenomenon of many people revising their estate plans three and four times over the course of their last 15 or 20 years.

This article will attempt to provide some guidance to practitioners who are called upon to represent the plaintiffs in challenging more than one dispositive instrument. Hopefully, as we all gain more experience with these kinds of cases and more appeals of them occur, we will get a better handle on how these cases should proceed.

I. THE UNCHARTED REALM OF CHALLENGING MULTIPLE WILLS OR TRUSTS

A. THE DOCTRINE OF "DEPENDENT RELATIVE REVOCATION"

What happens when a probated Will has been invalidated? If there is no prior Will that was made by the decedent, then he or she died intestate and the estate would then be distributed according to our intestacy statute, I.C. 29-1-2-1.

However, if the deceased executed a prior Will which is available to the parties, then one or more of them may wish to offer it for probate. Indiana has recognized the doctrine of "dependent relative revocation" since at least 1952. *See Roberts v. Fisher,* 230 Ind. 667, 105 N.E.2d 595 (Ind. 1952). Our Courts hold that an instrument revoking a prior instrument (such as a Will or deed) is not effective where the intent to revoke is dependent upon presumed validity of the new instrument. For example, in *Estate of Oliva v. Oliva*, 880 N.E.2d 1223 (Ind. Ct. App. 2008), the Court upheld a trial court's determination on summary judgment that, even if a later 2002 Will were found to be invalid, an earlier 1995 Will "would be revived and create the same result." 880 N.E.2d at 1226. The Court examined the facts concerning the revocation of the earlier instrument and found that there could have been no intent to revoke it apart from the deceased's confidence that the latter Will was valid. *Id. See also Flagle v. Martinelli*, 360 N.E.2d 269 (Ind. Ct. App. 1977) (where the later instrument was not validly executed, there could be no revocation of the prior instrument).

Thus, the successful contest of the original probated Will of a decedent results not in intestacy, but in resurrection of the most immediately succeeding prior Will. But what if the plaintiff does not benefit under that Will either? This is where we get to the heart of the matter: Is there a prior Will (hopefully not too far back in time) that benefits your client, the plaintiff? Is there a sufficient evidentiary basis upon which a successful attack can be mounted against not just the original probated Will, but the one just prior to it as well, resulting in the (hopefully final) probate of a Will made prior to that? And what is the proper procedure for going about it?

B. THE *STIBBINS* CASE AND ATTORNEY'S FEES

To date, no reported Indiana appellate decision has dealt squarely with the question of a challenge to multiple Wills or multiple Trust instruments. However, Indiana's own Court of Appeals has recently suggested that allowing plaintiffs to leapfrog past three or four Wills in a single bound -- to get back to one more to their liking -- may be a bridge too far. In *Stibbins v. Foster*, 45 N.E.3d 419 (Ind. Ct. App. 2015), the Court addressed whether attorney fees could be recovered by an unsuccessful Will contester who was not named in the immediately preceding Will, but only in one made years earlier with two intervening Wills to also overcome. The Court, rejecting the plaintiff's claim to the payment of her attorney's fees from the estate under I.C. 29-1-10-14, stated that she "and her children were not devisees of the Will being challenged *or* of the next Will in line. Instead, their status as devisees is far more attenuated." 45 N.E.3d at 425 (emphasis in original). The Court's reference to "the next Will in line" may be instructive, as it underscores the procedural fact that invalidation of the last Will executed

by the deceased actually revives the prior Will which otherwise had been revoked. *E.g. Roberts v. Fisher*, 105 N.E.2d 595 (Ind. 1952). However, the *Stibbins* Court did not address whether a plaintiff may challenge multiple Wills in an action; it only addressed access to attorneys' fees from the Estate.

C. EFFECT OF TRIAL RULE 42(B)

While from the plaintiff's perspective it would usually be best to have one trial (usually a jury trial) in which all the evidence comes in, including all the Wills sought to be challenged, it is doubtful that a trial court would be willing to proceed that way, unless all of the Wills being challenged were executed within a short period of time, perhaps a year. That is because the issue of testamentary capacity "is determined on the date that the Will was executed," and thus that is where the evidence and the attention of the trier of fact needs to be directed. *See Estate of Verdi ex rel. Verdi v. Toland*, 733 N.E.2d 25 (Ind. Ct. App. 2000). Similarly, "undue influence must be directly connected with execution of the Will and must operate at the time it was executed." *Arnold v. Parry*, 173 Ind. App. 300, 312 (Ind. Ct. App. 1977). Taken together, these rules of law seem to suggest that it would be best if the trial of multiple Wills or Trust instruments proceed in stages or steps, so that it is easier for the jury and the Court to focus on determining the validity of each instrument.

Trial Rule 42(B) states clearly that the trial court is empowered to do exactly that:

> **(B) Separate Trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any

number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury.

Again, from the plaintiff's perspective, breaking the proceedings into pieces is usually not ideal. Nevertheless, unless the instruments being challenged were all executed close together in time that is probably the approach the trial court, spurred on by the arguments of defense counsel, will want to take.

D. RELY ON THE UNIFORM DECLARATORY JUDGMENT ACT AND TRIAL RULE 57

Plaintiffs seeking to challenge multiple Wills or Trust amendments should, in their Complaint, cite and rely on Indiana's Declaratory Judgment Act, I.C. 34-14-1-1 *et seq*. as the basis for such a suit. The following sections are particularly pertinent when seeking to challenge multiple dispositive instruments:

IC 34-14-1-2
Persons who may obtain declaratory judgment
Sec. 2. Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.
As added by P.L.1-1998, SEC.9.

and

IC 34-14-1-4
Declarations regarding trusts or estates
Sec. 4. Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust, or of the estate of a decedent, a person under eighteen (18) years of age, or a mentally incompetent person may have a declaration of rights or legal relations:
(1) to ascertain any class of creditors, devisee, legatees, heirs, next of kin, or others;
(2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(3) to determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.
As added by P.L.1-1998, SEC.9.

Likewise, Trial Rule 57 provides support for the plaintiff faced with multiple Wills or Trust instruments believed to be invalid:

IC 34-14-1-4
Declarations regarding trusts or estates
Sec. 4. Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust, or of the estate of a decedent, a person under eighteen (18) years of age, or a mentally incompetent person may have a declaration of rights or legal relations:
(1) to ascertain any class of creditors, devisee, legatees, heirs, next of kin, or others;
(2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or
(3) to determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.
As added by P.L.1-1998, SEC.9.

These statutes and rules constituted the sum of guidance that counsel could look to in seeking to challenge multiple instruments in a single proceeding -- until Indiana's new statute, enacted in 2019, that is discussed later herein.

E. GUIDANCE FROM OTHER JURISDICTIONS

Unfortunately, we have no Indiana caselaw on point to provide practical guidance as to how to prepare and try these cases. However, Will contest cases from a couple of other jurisdictions do offer some useful guidance on how a trial court, using Trial Rule 42(B), can simplify and conduct Will contest proceedings where multiple Wills or Trust amendments are being challenged.

In *Matter of Will of Hester*, 360 S.E.2d 801 (N. Car. 1987), the Supreme Court of North Carolina upheld the trial court's decision to bifurcate a trial where three different documents (1981, 1982, 1983) purporting to be the last Will of the deceased were

admitted into evidence. The trial court declined to allow the jury to simultaneously consider all three. It allowed them to address only the validity of the last-dated document executed by the deceased. The Supreme Court held:

> Moreover, the interests of judicial economy and convenience were well served by separate presentation of issues as to the 1983 script. Had the jury determined that the 1983 script was in fact a valid last will and testament, the issues as to the earlier scripts would have been mooted and the proceeding need not have continued. The judge logically may have considered submission of the issue as to the other scripts premature until the 1983 issues were answered. Bifurcation was the most reasonable and sensible approach under the circumstances.

360 S.E.3d at 743-744. *See also Succession of E.M. Sturgis*, 516 So.2d 1293 (La. Ct. App. 1987) (also concerning a bifurcated Will contest, in which the trial court first ruled on the validity of the last-dated alleged Will of the decedent; and finding it invalid, the Court then in a later proceeding evaluated and upheld a prior Will).

From the plaintiff's perspective -- and this may apply with equal force to the defense -- if a trial of multiple Wills or Trust instruments is necessary, and it is to proceed in steps, it would be best to utilize the same jury to address each successive instrument going back in time. That would be far more sensible than having to re-educate an entirely new jury about who the parties and players in the drama are, what the key background facts are, et cetera. Then in "step 2" or "step 3," there should be an opportunity to present additional evidence as needed to address the particular circumstances of preparation and execution of each of the prior documents.

II. INDIANA'S NEW STATUTE

A. A CONSERVATIVE APPROACH

Probably as a result of the fact that litigation challenging multiple Wills or Trust instruments is becoming more common, and because so little guidance on the subject is

available so far, our Probate Code Study Commission decided to address the question head on. Effective as of July 1, 2019, I.C. 29-1-7-17.5 has been added to our Probate Code. It provides:

29-1-7-17.5 Contest of two or more wills; attorney's fees

> Sec. 17.5. (a) The court, in its discretion and upon application of any party instituting an action under section 16 or 17 of this chapter, may permit the contest of two (2) or more wills if there is *prima facie* evidence that:
>
> (1) the decedent suffered from an irreversible medical or psychiatric condition that predated the earliest will to be challenged; or
>
> (2) a party beneficially interested in one (1) or more challenged wills had a direct and active nexus with the preparation or execution process for each will to be challenged on the basis of undue influence.
>
> The *prima facie* preliminary evidentiary showing under subdivision (1) shall be made by an affidavit of the decedent's treating physician or through the records of a health care provider obtained during discovery and tendered to the court under Rule 803(6) of the Indiana Rules of Evidence.
>
> (b) If the court exercises its discretion to permit the challenge to two (2) or more wills in one (1) proceeding, a challenger is eligible to request attorney's fees under IC 29-1-10-14 if the challenger stands to directly benefit from a successful suit. The court shall review the attorney's fee claims at the conclusion of the will contest. The award and allocation of attorney's fees paid from the estate shall be solely at the discretion of the court.
>
> I.C. 29-1-7-17.5

So far as the author can discern, there is no official commentary explaining how the statute is supposed to operate in practice; nor does there seem to be any analog for the statute in the Probate or Trust Codes of other jurisdictions. So it remains for all of us as practitioners and judges to work out its practical meaning in each case that attempts to challenge multiple instruments.

B. HOW DOES IT WORK IN PRACTICE?

1. A "Probable Cause" Hearing?

The statute makes plain that there is no inherent right of an interested person to challenge the validity of multiple Wills in one proceeding. The default setting of the statute is clearly that there is no such right -- unless and until the trial court grants it "in its discretion. . . ." Thus, the contest of multiple Wills is something that a Court "may permit" -- but only upon making the required showing. Importantly, the statute clearly requires the plaintiff to make application to proceed with the contest of multiple instruments. But they only need to show that "there is *prima facie* evidence" of the decedent's "irreversible medical or psychiatric condition" that extends back to a point predating "the earliest Will to be challenged." Moreover, the *prima facie* showing can be made in either of two ways: (1) by obtaining and presenting an affidavit from "the decedent's treating physician;" or (2) by presenting "records of a healthcare provider obtained during discovery" which are admissible under Indiana Rule of Evidence 803(6).

Given HIPAA restrictions, it is already rather difficult to get medical providers to produce their medical records, but usually a subpoena served on the healthcare providers will produce compliance, especially if accompanied by a release form signed by the Personal Representative. Plaintiff's counsel may have difficulty getting the treating physician of the deceased (even if they had one) to cooperate in preparing and executing such an affidavit. Presumably if such cooperation cannot be secured, a deposition would suffice and could be substituted for the "affidavit." And with respect to the deceased's healthcare records -- it is unclear what would need to appear in the healthcare records for the plaintiff to make the required showing. (Dementia? What if it is characterized as

"moderate" or "mild" -- or not characterized at all?) But at least medical records have dates; and so if an appropriate and persuasive record can be obtained that predates the earliest Will being challenged, plaintiff's counsel can then presumably make the required *prima facie* showing.

Section (a)(2) of the statute is even more difficult to discern and apply. This appears to be the "undue influence" prong of the statute, with Section (a)(1) evidently being the "testamentary capacity" prong. Importantly, this undue influence prong does seem to focus on the idea that to invalidate a Will, the undue influence must go to the making of the instrument, as it calls for a *prima facie* showing that the (alleged) undue influencer "had a direct and active nexus with the preparation or execution process" for each Will being challenged, and that such person also must be beneficially interested in each such instrument.

2. A Complete Evidentiary Hearing?

From the plaintiff's perspective I would certainly argue that the statute should be interpreted to allow as much latitude as possible for the discovery and presentation of relevant evidence in order to reach a just result. The "preliminary evidentiary showing" should be limited in scope, like a "probable cause" hearing. It would be an unfair burden on plaintiffs and their counsel to force them to present comprehensive evidence, as if they were trying the Will contest before they are actually required to do that. The statute also clearly sets up an "abuse of discretion" standard applicable to the decision of the trial judge as to whether to allow the proceeding to go forward as a challenge to more than one Will. Since the statute clearly calls for the presentation of *prima facie* evidence, and makes clear that presentation of that evidence is sufficient for the trial court to permit the

contest of multiple instruments, it would seem that, rather than mounting any specific defense or rebuttal to the evidence presented, defense counsel's role would be relegated to arguing that the evidence presented does not meet even the relatively low standard of a *prima facie* showing.

In support of this view, one could look to a simple definition of what a *primia facie* case really is. It is good to be reminded; law school was so long ago:

> ***PRIMA FACIE* CASE.** A case sufficient on its face, being supported by at least the requisite minimum of evidence, and being free from palpable defects. State of facts that entitles a party to have the case go to the jury. *See* 105 N.E.2d 454, 458. One that will usually prevail in the absence of contradictory evidence; "one in which the evidence is sufficient to support but not to compel a certain conclusion and does no more than furnish evidence to be considered and weighed but not necessarily to be accepted by the trier of the facts." 185 N.E.2d 115, 124. Sufficient to avoid a directed verdict or a motion to dismiss. *See* presumption; *prima facie*.

Barron's Law Dictionary, 2d Ed.

3. Difficulties for Plaintiffs in Meeting the Standard Set by the Statute

The statute has been added to the Probate Code to impose some kind of a standard where there really was none before. It remains to be seen just how high of a barrier the statute has erected against contests of multiple Wills. Prior to July 1, 2019, no such showing had to be made by plaintiffs to so proceed; now defense counsel has been handed a fairly formidable fence barring such cases unless they can fit through the rather narrow gate prescribed. As stated above, it is not easy for plaintiffs to get a treating physician to cooperate with the preparation of an affidavit benefitting their case -- even assuming that the deceased had a treating physician who feels that they are in a position to address the decedent's mental condition going back as far as the first instrument to be challenged. Often people change physicians over their later years for a variety of

reasons, including the fact that a number of physicians have left private practice during the last 10 to 15 years.

Similarly, making even a *prima facie* showing that "a party beneficially interested" in the challenged Wills "had a direct and active nexus with the preparation or execution process" for each of them could be especially difficult, as undue influencers are not known to be particularly forthcoming about their involvement in the making of a Will.

Still, the statute appears to address only the question of allowing a plaintiff, in one single lawsuit, to attack multiple Wills made over a period of several years. While it would be more cumbersome and difficult to do it, plaintiffs appear to retain the option of challenging only one Will at a time; and if they succeed in having the probated one invalidated, then attempt as best they can to get their preferred Will probated next, forcing others to challenge it if they wish to do so. Defense counsel will presumably do that on the basis of dependent relative revocation, or the fact that the now-probated substitute Will was itself revoked by a later Will which has not been revoked or invalidated. In any case, I think plaintiff's counsel should stress to the Court the judicial economy value of allowing multiple documents to be challenged in one proceeding because that is more efficient from the standpoint of discovery, document productions, depositions, et cetera; but then agreeing that with respect to the trial itself, it needs to proceed in a stairstep fashion so that the jury's attention is properly focused on the validity of one instrument at a time.

Conclusion

The new Indiana statute, while seeming to erect some significant barriers to the challenge of multiple Wills in one proceeding, at least gives the parties and trial courts some guidance in how such cases should be organized and addressed. It will be interesting to see how the Court of Appeals and/or our Supreme Court apply the statute in the years to come. But because of the built-in "abuse of discretion" standard, it would seem unlikely that an appellate court would reverse any trial court's decision to allow, or not allow, a contest of multiple Wills or Trust instruments.

THE CONTEST OF MULTIPLE WILLS OR TRUSTS: PLAINTIFF'S PERSPECTIVE

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Trial Rule 42(B):

(B) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury.

IC 34-14-1-2
Persons who may obtain declaratory judgment

Sec. 2. Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

As added by P.L.1-1998, SEC.9.

IC 34-14-1-4

Declarations regarding trusts or estates

Sec. 4. Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust, or of the estate of a decedent, a person under eighteen (18) years of age, or a mentally incompetent person may have a declaration of rights or legal relations:

(1) to ascertain any class of creditors, devisee, legatees, heirs, next of kin, or others;

(2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(3) to determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

As added by P.L.1-1998, SEC.9.

29-1-7-17.5 Contest of two or more wills; attorney's fees

Sec. 17.5. (a) The court, in its discretion and upon application of any party instituting an action under section 16 or 17 of this chapter, may permit the contest of two (2) or more wills if there is *prima facie* evidence that:

(1) the decedent suffered from an irreversible medical or psychiatric condition that predated the earliest will to be challenged; or

(2) a party beneficially interested in one (1) or more challenged wills had a direct and active nexus with the preparation or execution process for each will to be challenged on the basis of undue influence.

Cont'd

29-1-7-17.5 (Cont'd)

The prima facie preliminary evidentiary showing under subdivision (1) shall be made by an affidavit of the decedent's treating physician or through the records of a health care provider obtained during discovery and tendered to the court under Rule 803(6) of the Indiana Rules of Evidence.

(b) If the court exercises its discretion to permit the challenge to two (2) or more wills in one (1) proceeding, a challenger is eligible to request attorney's fees under IC 29-1-10-14 if the challenger stands to directly benefit from a successful suit. The court shall review the attorney's fee claims at the conclusion of the will contest. The award and allocation of attorney's fees paid from the estate shall be solely at the discretion of the court.

I.C. 29-1-7-17.5

PRIMA FACIE CASE

A case sufficient on its face, being supported by at least the requisite minimum of evidence, and being free from palpable defects. State of facts that entitles a party to have the case go to the jury. *See* 105 N.E.2d 454, 458. One that will usually prevail in the absence of contradictory evidence; "one in which the evidence is sufficient to support but not to compel a certain conclusion and does no more than furnish evidence to be considered and weighed but not necessarily to be accepted by the trier of the facts." 185 N.E.2d 115, 124. Sufficient to avoid a directed verdict or a motion to dismiss.

Barron's Law Dictionary, 2d Ed.

Section Three

Will Contest Defense
In the Time of Multiple Will Contests

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Section Three

Will Contest Defense
In the Time of Multiple Will Contests………………. Nathan S.J. Williams

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Will Contest Defense

In the Time of Multiple Will Contests

By Nathan S.J. Williams

Shambaugh, Kast, Beck & Williams, LLP[1]

The legal defense of a Will contest is necessarily tricky and difficult under the best of circumstances. Varied legal issues of technical, evidentiary and procedural nature end up spiked with the punch of family dynamics that may have fermented over decades. On a good day, it can be a difficult horse on which to remain astride.

Though it remains to be seen exactly how it will play out in actual practice, Indiana Code §29-1-7-17.5, allowing for the contest of multiple Wills as the same time, has the potential to be a "looking-glass" statute: taking us into a completely different dimension of difficulty in managing clients, legal issues, discovery, trial preparation, and case management.

Counsel defending a Will contest matter can play a key role in keeping the matter "on the rails". The role of the defense counsel requires a needle-threading mix of the scientific and artistic sides of litigation management. Counsel is also, almost universally, representing the personal representative of the estate in such matters. The

[1] The author is forever grateful and thankful for his association with the firm of Shambaugh, Kast, Beck & Williams, and the privilege that it is for him to practice with the excellent attorneys there. He is particularly grateful for the opportunity to practice with his father, Stephen J. Williams, and his brother, Benjamin S.J. Williams; the insights in this article (at least the good ones) have been honed in collaboration with them over the years, and possibly more than a few adult beverages.

representation also, therefore, is affected by the fiduciary obligations which counsel's client owes to various parties.

The purpose of this article is to speak to that defense counsel, and to think through what that defense looks like. The concepts discussed below are not unique to a contest of multiple Wills; each is important in the defense of a single Will, as well. But within the context of a contest of multiple Wills, each of these concepts takes on added importance in the pursuit of the objective of managing the litigation effectively.

PRELIMINARY POINTS

There are two key points that serve as an overlay to the discussion of defending a contest of multiple Wills:

1. Read the Statute. This point may be obvious, but it warrants special consideration and emphasis in any situation where a statute has authorized some variation of the "normal".[2] The statute authorizing the contest of multiple Wills is found at Indiana Code §29-1-7-17.5. Without limiting any attorney's own, individual reading of the statute, there are a few things that stand out as "moving parts", and elements to be seized upon in the defense of a potential matter:
    a. Discretion. The question of whether to allow for the contest of multiple Wills is committed to the discretion of the trial court. I.C. §29-1-7-17.5(a).

[2] See, e.g., Indiana Code 29-1-21, authorizing the execution of "electronic Wills".

b. Prima Facie Evidence. This is expressed as a key to the Court exercising that discretion. I.C. §29-1-7-17.5(a). But what constitutes "prima facie evidence" is also somewhat fluid and, therefore, discretionary on the part of the trial court.

c. "Irreversible medical or psychiatric condition". I.C. §29-1-7-17.5(a)(1).

d. "Direct and active nexus with the preparation or execution process". I.C. §29-1-7-17.5(a)(2).

2. Prepare for Mediation. As a practical matter, most civil cases are going to settle. This is also true of Will contest matters. Mediation thrives on the unknown, the variables in any particular dispute which have not been narrowed down. Historically, one of the cudgels used in arriving at a defense-favorable mediated settlement was the idea that a contestant may need to win multiple Will contests before actually receiving any benefit (or, in many cases, the right to recover attorney fees). On its face, §I.C. 29-1-7-17.5 seems to change that variable, taking some of the wind out of the defense negotiating leverage. Whether the statute actually does change the variable is debatable, and may likely vary from case to case. But often in mediation, and in the assessment and utilization of negotiating leverage, perception means more than the actual results. So:

   a. Gear your preparation on a mediated timeline, not necessarily a timeline for trial.

   b. Select a mediator who knows the subject matter.

A. Client Management.

If the goal is to help a client successfully navigate the defense of a Will contest, this is the most important function that counsel will play. How this is done, and the relative level of difficulty in any particular case, will depend upon the facts of the situation.

Regardless of the specific nuances of any given situation, there are certain things which counsel can and should do to properly manage the litigation matter.

1. Formal Matters.

    a. **Identify who your client is**. This seems pretty elemental. But there may be various different scenarios:

        - Is your client an individual, immediate family member? If so, are they also a beneficiary under the Will(s)? Are they the person who is alleged to have exercised undue influence?
        - Is your client a slightly-removed, "neutral" individual? If so, and even if "neutral", what is their relationship to the individual, beneficially interested parties?
        - Is your client a corporate fiduciary? And if so, what is their relationship to the individual beneficiaries or defendants?
        - If your client is a corporate fiduciary, whose beneficiaries are individual family members? Or are the beneficiaries charities?

There are some concepts which are fundamental to a proper understanding of the question of "who is my client", and counsel who understands those concepts will be better-suited to affirmatively and proactively address some of the fuzzier variables.

An attorney-client relationship is consensual, and is created only when both parties to the relationship agree to it.

See In re Kinney, 670 N.E.2d 1294, 1297 (Ind. 1996). One of the most significant things for a probate attorney to remember, particularly from the standpoint of managing professional liability, is that you cannot be forced to take a client. There is no such thing as an attorney-client contract of adhesion. With that being said…

The existence of an attorney-client relationship may be implied from the conduct of the parties.

See Hacker v. Holland, 570 N.E.2d 951, 955 (Ind. Ap. 1991). And…

In determining whether an attorney-client relationship should be implied, the putative client's subjective belief is one of the most significant factors.

See In re Anonymous, 655 N.E.2d 67, 70 (Ind. 1995). The procedural context of *Anonymous* was a disciplinary action. The question was whether or not an attorney-client relationship was created. The Supreme Court cited cases from other jurisdictions which held, generally, that an attorney-client relationship can be implied where the putative clients seeks advice or assistance from an attorney, where the advice sought pertains to matters within the attorney's professional competence, and where the

attorney gives the desired advice or assistance. *Id*, at 70. Of significance to the *Anonymous* court was the finding that the attorney in question did nothing, in the course of multiple meetings with the putative client, to dispel the client's belief that the attorney was acting as his attorney. *Id*, at 71.

The facts in *Anonymous,* where an attorney and putative client had multiple meetings to discuss a matter, where the attorney provided advice, and did nothing to dispel the client's belief that an attorney-client relationship existed, represent one end of a spectrum. At the other end of the spectrum is *Hacker v. Holland*. There, the attorney in question represented one side of a real estate transaction; the putative client was the counterparty to the transaction. The Court of Appeals, in the context of a malpractice action, did not dispose of an estoppels claim, finding that there was a genuine issue of material fact whether the attorney had "promised" to protect the interests of the counterparty in the transaction. *Hacker*, 570 N.E.2d 951, 956 (Ind. App. 1991). Given the opposition of interests between the attorney's actual client and the putative client, the Court did decline to find that an attorney-client relationship could be implied in that situation. *Id*, at 955.

Beneficiaries of an estate are not "clients" when an attorney represents a personal representative, trustee, or guardian.

See Inlow v. Henderson, Daily, Withrow & DeVoe, 787 N.E.2d 385 (Ind. App. 2003). In that case, the Court did not come out and say, in so many words, that "beneficiaries of a fiduciary estate are not clients of the attorney for the fiduciary". However, the

beneficiaries brought an action against the attorney for the former personal representative, seeking to recover for loss to the estate. *See id*, at 390.

Inlow was decided in the context of determining who has standing to sue for alleged malpractice. The case and the questions necessarily implicate issues of privity and the relationship. This will also serve as a reminder that an "estate lawyer" really represents the personal representative of an estate. See I.C. §29-1-10-20(a). That statute has been enacted since the *Inlow* ruling. More to the point, an "estate lawyer" is an attorney who has been retained by a personal representative for the purpose of performing services for the estate.

The fact that beneficiaries of a fiduciary estate are not "clients" of the attorney for the fiduciary does not mean that the attorney owes no duties to such beneficiaries. It does mean that the scope of such duties is much more limited than it would be if the beneficiaries were clients. For instance, an attorney may still not knowingly make a false statement of fact or law to a beneficiary. See Ind. R. Prof. Conduct 4.1(a). And, like your mother should have told you, a partial truth is equal to a whole lie. See Ind. R. Prof. Conduct 4.1, cmt. 1 ("Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.").

With all of that in mind, the caption to this section is probably more directly stated as: "Identify who is calling the shots". And if that person is not your client, then be prepared to either (a) revise the attorney-client relationship, or (b) advise your client about the risks and pitfalls of such manner of Will contest defense.

b. **Have an engagement letter**. Again, this may be elemental; though, anecdotally, it seems that this is an elemental matter that is often neglected by counsel. The key components of such an engagement letter are as follows:

   i. **Identifying the client**. (See above).

   ii. **Identify the scope of the work to be done**. Have you been retained for the purpose of defending the Will contest solely? Are you doing any work related to the administration of the Estate? Spell it out, whatever the result is.

   iii. **Identify your compensation**. This applies both to the manner of compensation, and the manner in which you will be billing for it and expect payment.

   iv. **Address issues of privilege**. This goes hand-in-hand with the idea of identifying the client and the decision-makers. If you will be having discussions with the PR and with parties who are beneficially interested in the Will contest defense, but who are not your clients, those discussions are outside the scope of the attorney-client privilege. You cannot address, sort out or avoid such problems by any one-size-fits-all approach or language in an engagement letter. But it is good to address that. Some recommended language:

I want to address the issue of attorney-client communications in this matter. As you know, as a general rule, communications between and attorney and client are considered to be privileged and confidential. In a situation where a client is a fiduciary (whether that is as a trustee, personal representative, guardian or attorney-in-fact) the edges of that general rule become somewhat blurry. The fiduciary owes duties to certain individuals, and one of those duties (generally) is to provide information regarding the fiduciary's activities. Indiana law is unsettled on this point, but that obligation to disclose may, in certain circumstances, override the attorney-client privilege. It is my opinion that the retention of counsel for the purpose of addressing a pending or threatened conflict or litigation with a beneficiary is a situation which gives greater legitimacy and effect to the privilege. That is good, as it allows us to have more honest and frank discussion about how to best deal with this situation. My recommendation to you is that we each treat all of our communications as privileged, and exercise some discretion with respect to how and with whom any communications are shared outside of the two of us.

2. **Informal Matters**. The determination of who your client is, and the framing of that attorney-client relationship are important. Just as important – if not more so – to the goal of successfully managing the Will contest defense litigation, is the informal element of client management. Largely, this is a function of effective communication. It will be unique in every situation, based upon the personalities and facts involved. But, particularly in the context of a contest of multiple Wills, the following things will be almost universally important:
    a. **Listen to the client**. If this is a situation where you are representing a truly independent third party, listening will be more a process of narrowing in

on and prioritizing their objectives. But if your clients are family members, you will likely need to let them vent.

b. **Don't overreact**. There is some needle-threading here, where you let the client or family member vent, but don't continue to give oxygen or fuel to grievance. The venting can provide you with some useful information and insight. But at some point, the client (or the decision-maker) is going to be called on to make decisions about how to proceed with the defense of the matter and/or the settlement of the case. Grievances are hot helpful to the settlement of cases. The truth is that – particularly in the context of a contest of multiple Wills – a decision-making party is not going to feel vindicated if they go through even a successful Will contest defense. Practically speaking, that party needs to be able to logically assess risks, costs, benefits, etc.; your role as attorney, as a counselor, is to help them do so and to make informed decisions. Establishing yourself as the detached voice of reason starts on Day 1.

c. **Be informed**. See "Read the Statute", above. Also, to the extent that you can do so early on, try to synthesize all of the dates, documents, beneficiaries, and related moving parts. Build a "matrix" of the documents and the facts, to help you keep all of that information straight. It is important in the defense of the matter. But it is also a key to effectively communicating with your clients throughout, and in managing their

reaction to the contest generally, the contest of multiple wills specifically, and to managing their expectations.

d. **Have a plan**. This plan need not, and should not, be written in stone. But clients approaching any Will contest defense are likely to be angry and anxious about how long this will take to play out, what the costs will be, and will want some direction and guidance. Be prepared early on to make some concrete recommendations on what the next steps will look like, how long that will take, and what the results might be.

B. Discovery.

In many ways, the process of discovery within a Will contest is not different than the process of discovery in any civil litigation matter. There are some specific things, though, which are unique to a Will contest, generally. And there are other matters which are even more unique to, and useful for, a defense of a contest of multiple Wills.

1. **The Estate Planning File**. The evidence which will have the biggest and most significant effect upon the outcome of the case and the parties' leverage leading up to trial is the testimony of the drafting attorney. Stated differently: the best evidence you can have to defend against any Will contest is the well-supported testimony of the drafting attorney that the testator or testatrix was competent, and that the process for making the Will free from external influence or extraordinary elements.

Within the context of a contest of multiple Wills, this evidence takes on additional significance, when considering the elements of I.C. §29-1-7-17.5:

- Was the "irreversible medical or psychiatric condition" something which affected the ability to make a Will, and did it predate any of the Wills or the earliest in a string of Wills? The testimony of the drafting attorney, and perhaps any para-professional staff, may cast doubt on the proof of this element. At the very least, the file can help to establish the time frame within which all of the other facts will be considered.
- What did the "execution process" look like? If the drafting attorney can and will testify that the process of discussing, drafting, and execution of the Will was free from anything out of the ordinary, it may be able to take the issues of I.C. §29-1-7-17.5(a)(2), off the table completely.
- Can any of this sway the trial court's discretion? There are innumerable moving parts to this calculus. But as you look to exploit any variable you can to gain additional leverage for your client, one of the most significant things may be having the solid testimony of an attorney who may be a long-time, upstanding member of a local bar.

As you look to preserve this element of the evidence and discovery, there are a couple of important points to consider:

a. Conflicts. If you are that drafting attorney or he or she is your partner or is otherwise associated wit your firm, you should carefully consider your role in

the defense and in representing the personal representative, at least with respect to the Will contest defense. Rule of Professional Conduct 3.7 will intervene to disqualify an attorney from acting as a witness. Rather than trying to walk the fine line to determine whether the technical rules of disqualification will apply in any particular case, it is an important element of the attorney's duty to advise the client that the client's best interests – and the best interests of any beneficiaries to whom the client may owe fiduciary duties – are best served by the attorney acting as a witness, rather than as an advocate.

b. Privilege. The estate planning file for the testator or testatrix will generally be considered susceptible to discovery and production. Indiana recognizes the testamentary exception to the attorney-client privilege, and the contours of this exception are well-expressed at *Gast v. Hall*, 858 N.E.2d 154, 163 (Ind. App. 2007).

2. **Medical Records**. Medical records are necessarily going to be part of the discovery process in any Will contest. In light of I.C. §29-1-7-17.5(a)(1), and the concept of an "irreversible" medical or psychiatric condition that predates the earliest Will to be challenged, it is best to get them at the outset. Some considerations to make the process as efficient and effective as possible:

    a. Cast the net as wide as possible in terms of providers. It is common that, as the defender of the Will, your client or your decision-maker is going to be the person most knowledgeable about the identity of

providers. Part of an initial intake interview should be trying to pin down those providers, particularly in locations where there may be multiple systems providing health care.

b. Pin down the time frames first. Medical providers will want the third party requests for production to be limited in some way by time. Frame out the temporal scope: figure out when the first Will was executed, and use that to limit the requests for medical records.

3. **Depositions**. Depositions as a means of trial preparation are going to be a key in any Will contest defense. The use and purpose is obvious: determining the facts, and a full exploration of the knowledge and testimony of potential and known witnesses. In the context of a contest of multiple Wills, the deposition can also serve, very effectively, as a means of promptly narrowing down the facts and information which can fit through the filters of I.C. §29-1-7-17.5(a). How this plays out in any given situation is going to be unique and will likely warrant review and consideration on the facts of any given case. But there are a couple of things which may be universally important and/or effective:

   a. **The drafting attorney.** To acknowledge the dark elephant in the room: this is a function of preserving testimony. This testimony may have out-sized significance in the lead up to mediation and in the trial. Under normal circumstances, it may be that you have an older attorney who has drafted the documents and you want to preserve such testimony. Under current, pandemic-tinted circumstances, you

should consider the testimony of any attorney something to be preserved, regardless of the number of rings on the tree.

b. **The Plaintiff**. As with a number of things, this is likely obvious. But in light of the evidentiary standard prescribed by I.C. §29-1-7-17.5(a), it provides some additional purpose and significance, beyond just "beating up on" the other party for a bit. Some specific deposition questions that you can eventually get to:

- "What evidence do you have to indicate that this condition was 'irreversible'?"
- "What evidence do you have that this condition affected your father's ability to know the nature and extent of his property, as of the date of the first Will?"
- "What evidence do you have that your brother was actively involved with the preparation or execution of each of these Wills?"

Stated a little differently: the statute puts a fairly stringent burden upon the plaintiff to come forward with evidence and to do so in a manner that will convince the trial court judge to exercise her or his discretion to allow this to proceed as a contest of multiple Wills. To the extent that the exercise can be shown to be a generic Airing of Grievances[3] by the Plaintiff, you will have a better opportunity to convince the trial

[3] And if it is an "airing of grievances", it should be tied to the Festivus Pole and left there to bake in the sun.

court judge that her or his discretion is best exercised to no permit the matter to proceed as a contest of multiple Wills.

C. ***Attorney Fees***.

One of the variables that can serve as leverage or a cudgel to compel settlement of a Will contest matter is that of fees. In any situation of civil litigation, the parties need to be aware and mindful of their own costs and expenses. Aside from the means by which food is placed on the attorneys' respective tables, attorney fees serve as a sort of "moral hazard" that will limit and constrain the actions of the parties to any piece of litigation. In a Will contest defense, that variable and the corresponding moral hazard and conduct is cut loose from its usual moorings.

Indiana common law generally follows the "American Rule," under which each party bears its own legal fees and expenses unless otherwise provided by statute. *Porter Dev., LLC v. First Nat. Bank of Valparaiso*, 866 N.E.2d 775, 779 (Ind. 2007). As it relates to Will contest actions, there is a statute which can allow a party to recover her fees from the estate. Indiana Code §29-1-10-14 is that authority. Prior to July 1, 2019, it read as follows:

> When any person designated as executor in a will, or the administrator with the Will annexed, or if at any time there be no such representative, then any devisee therein, defends it or prosecutes any proceedings in good faith and with just cause for the purpose of having it admitted to probate, whether successful or not, he shall be allowed out of the estate his necessary expenses and disbursements including reasonable attorney's fees in such proceedings.

A will contestant who challenges a probated will in good faith for the purpose of having an earlier will admitted to probate may recover attorney fees from the estate, and

may do so even though the earlier will is never admitted to probate. *Estate of Clark v. Foster & Good Funeral Home*, 568 N.E.2d 1098, 1101 (Ind. App. 1991).

A devisee of a prior Will can, under certain circumstances, recover fees from the estate if he prosecutes proceedings in good faith and with just cause to have a subsequent, probated Will declared invalid. *Stibbins v. Foster*, 45 N.E.3d 419, 425-26 (Ind. App. 2015). To be sure, the "certain circumstances" do have some limitations:

- The litigant must be a devisee of the prior will and would stand to directly benefit if the challenged will was set aside. *Id,* at 426.
- In addition, the contest of the Will must be "in good faith and with just cause". See I.C. §29-1-10-14(b). And,
- The fees must be "reasonable". *See Foster*, at 1101.

The statute for recovery of attorney fees has been amended, contemporaneous with the passage of I.C. §29-1-7-17.5; it now reads as follows:

> **(a)** As used in this section, "devisee" shall include any person prosecuting or defending any will under *IC 29-1-7-16* or *IC 29-1-7-17.5* and, if multiple wills are being challenged under *IC 29-1-7-17.5*, any person prosecuting or defending a will next prior to the earliest will being challenged under *IC 29-1-7-17.5*.
>
> **(b)** When any person designated as executor in a will, or the administrator with the will annexed, or if at any time there be no such representative, then any devisee therein, defends it or prosecutes any proceedings in good faith and with just cause for the purpose of having it admitted to probate, whether successful or not, the devisee shall be allowed out of the estate the devisee's necessary expenses and disbursements including reasonable attorney's fees in such proceedings.

Practically speaking, prior to the passage of I.C. §29-1-7-17.5, the existence of multiple Wills which may have disinherited a particular beneficiary, served to limit the access of a contestant to the relief and leverage provided for by I.C. §29-1-10-14 and by I.C. §29-1-7-17.5(b). Subsection (b) is, in reality, the fulcrum on which pivots the distinction between a long, costly Will contest matter, and a less untidy resolution of the same. That subsection reads as follows:

> If the court exercises its discretion to permit the challenge to two (2) or more wills in one (1) proceeding, a challenger is eligible to request attorney's fees under I.C. §29-1-10-14 if the challenger stands to directly benefit from a successful suit. The court shall review the attorney's fee claims at the conclusion of the will contest. The award and allocation of attorney's fees paid from the estate shall be solely at the discretion of the court.

I.C. §29-1-7-17.5(b).

And the point of that fulcrum is this: "*If the court exercises its discretion* to permit the challenge of two (2) or more wills in one (1) proceeding". (Emphasis added). More directly:

- If you can convince the Court not to proceed with a contest of multiple Wills, you still have the argument under *Stibbins* that the attorney fees for the plaintiff are not on the table unless and until he or she wins at least the first Will contest. You have limited the scope of the potential loss to the estate – win or lose – by a significant degree.
- If the Court does proceed with a contest of multiple Wills, then it is necessary for you to have a conversation with your client that, yes, even though the Wills were clear and (*assuming*) even though your brother had no contact

> with your father for the last twenty years, and even if we go through this litigation over the next two years and win, there is a non-negligible risk that you will still end up paying his attorney (who you hate) tens of thousands of dollars.

All of this boils down to the essence of the Court's discretion. The reality, very clearly, is therefore that all of the first phase of a Will contest defense that does, or may, involve multiple Wills is directed toward getting the trial Court to decline to exercise that discretion. That does not resolve everything. But if you are able to do so, you will be able to effectively limit the universe of bad outcomes to something that is much more manageable.

Section Four

Will & Trust Contests

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Section Four

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WILL & TRUST CONTESTS

Curtis E. Shirley, Esq.

INTRODUCTION TO WILL CONTESTS

It is the rare circumstance where a plaintiff files a will contest because he or she received what would otherwise be an intestate share. Children that inherit equally rarely force the high cost or emotional cost of litigation. When a testator signs a will that treats heirs differently, watch out. Although no person deserves to inherit anything, feelings and emotions say otherwise. The reasons for an unfair inheritance might be apparent. But reasons often do not help resolve the family turmoil left behind.

In the years to come will contests should increase for several reasons. The baby boom generation is passing away. The recent decades have led to more children out of wedlock, and more step-parents and step-children. Which set of kids inherits usually depends on which parent survives the longest. The elderly have the choice of a nursing home or in home care. With kids not handling day to day responsibility, care takers are inheriting more than ever. The ethical standards of fiduciaries also appear on the decline. Witnesses to wills inherit. Powers of attorney control everything. Even attorneys are drafting documents that benefit themselves or members of their family.

INTRODUCTION TO TRUST CONTESTS

There are many reasons clients choose a Trust over a Will. The same Trustee can keep investment authority over the Settlor's property for decades after death. This reason alone has the insurance industry, investment brokers, and financial planning companies recommending them. If the decedent signed a poorly written Will, Courts are very reluctant to change it. But Courts have discretion to reform, rescind or even terminate a Trust for just about any reason that sounds good, such as correcting a mistake by the drafting attorney, or a change in circumstances.

Trusts are also easier to prepare and sign. It needs no formal language; any writing qualifies if it sufficiently describes the Trust property and a beneficiary's interest. Although an attorney in fact cannot sign another's Will, which takes two witnesses, there are no such niceties in signing and funding a Trust. Its terms can even provide for modifications by someone other than the Settlor.

Avoiding probate has advantages. Executors must pay for bonds and notices in the newspaper. Trustees need not. Executors cannot be a convicted felon - Trustees can administer property from their jail cell. Executors collect assets and file an inventory - Trustees file accountings only with income beneficiaries once a year. A more secretive affair. Executors better get written permission from all heirs or Court authority to sell any property. Trustees have the freedom to sell or distribute property immediately to beneficiaries. Even after most estate matters are concluded it usually takes an extra month

for the Court to examine the final accounting and give heirs an opportunity to object at a hearing.

But probate has its advantages. Creditors have only three months after the first published notice to file a claim. If the Settlor is dead, the nine months claim period applies to creditors who must also timely protect their rights to recover Non-Probate property pursuant to I.C. 32-17-13. Creditors of a Trust should be able to use the two to ten-year limitations periods. Executors are released from liability with Court approval of a final accounting. Even complaints based upon fraud are extinguished after a year. Trustees have at least two years of liability after a beneficiary has reason to know of the Trustee's conversion, mistake, or fraud. Considering how many beneficiaries are unborn or minors, limitation periods against Trustees might never end.

Plaintiffs file Will Contests usually when he or she has a greater slice of the pie in a prior Will. The doctrine of dependent relative revocation looms large. Indiana Code Section 29-1-5-6 states that a prior Will is revived if "it shall appear by the terms of such revocation to have been his intent to revive it." The cases have used this as a platform to hold that a testator is presumed to have revoked a prior Will by signing a subsequent Will only if that subsequent Will proves effective. *See Roberts v. Fisher, 105 N.E.2d 595 (Ind. 1952); Flagle v. Martinelli, 360 N.E.2d 1269 (Ind.App. 1977).* This rule operates pretty smoothly unless the testator tore up a prior Will and got around to signing a subsequent Will much later.

But what about dependent relative revocation for a Trust? The simple case would be a plaintiff that contests a Trust Amendment, and if successful the amendment is ignored and the Trust terms control. The more difficult case is where the Trust is fully funded, then revoked, and the property transferred to a subsequent Trustee. Because a Will is ambulatory (in that it takes effect only upon a person's death), and a Trust takes effect when signed, the Courts will have difficulty fashioning any definitive rules concerning dependent relative revocation in Trust contests. Yet this issue goes to the very heart of filing it in the first place. If the plaintiff asks the Court to throw out a Trust, the property may go into the Estate (and not into a prior Trust); if a Will pours into a defective Trust, everything may go by intestacy.

STANDING

To have standing to complain about an estate plan, the petitioner must be an interested person. *I.C. 29-1-1-3*. This includes a family member who would inherit under the laws of intestacy if there was no will, and a beneficiary under a prior or later document. A nominated fiduciary in a prior or later document also has standing.

OBJECTIONS TO PROBATE

If a beneficiary believes a will exists that should be contested, he or she may file an objection to its probate. *I.C. 29-1-7-16.* Although such an objection to probate is usually filed soon after a death, it can be filed before the testator has passed away.

Objections to probate have an interesting history. Prior to 1954, if objections were filed, the probate code placed the burden of proof on the petitioner who wanted to probate the will in the first place. Since 1954 the probate code places the burden of proof on the contestant, whether or not framed as objections to probate, an action to resist probate, or a will contest. *I.C. 29-1-7-20*. One benefit to filing objections to probate verses a will contest is the court will appoint a special administrator rather than the usual *ex parte* process of naming the executor nominated in the will. *I.C. 29-1-10-15*. Keep in mind, however, courts still look at the executor nominated in the contested will in appointing a special administrator.

FILING THE WILL CONTEST COMPLAINT

Governed by statute, plaintiffs have a simple road map in filing a will contest. Indiana Code Section 29-1-7-17 states as follows:

"Any interested person may contest the validity of any will in the court having jurisdiction over the probate of the will **within three (3) months** after the date of the order admitting the will to probate by filing in the same court, **in a separate cause of action**, the person's allegations in writing verified by affidavit, setting forth:

(1) the unsoundness of mind of the testator;
(2) the undue execution of the will;
(3) that the will was executed under duress or was obtained by fraud; or
(4) any other valid objection to the will's validity or the probate of the will.

The executor and all other persons beneficially interested in the will shall be made defendants to the action."

Indiana Code Section 29-1-7-18 states: "(a) When an action is brought to contest the validity of any will as provided in this article, **notice is served upon the defendants in the same manner as required by the Indiana Rules of Trial Procedure**. (b) A contesting party shall also serve a copy of the complaint on the counsel of record, if any, for the personal representative. The court may not enter a default judgment for the contesting party unless proof of service on the counsel for the personal representative is made to the court."

Trial Rule 3 states as follows: "A civil action is commenced by [1] filing with the court a complaint or such equivalent pleading or document as may be specified by statute, [2] by payment of the prescribed filing fee or filing an order waiving the filing fee, and, [3] where service of process is required, by **furnishing to the clerk as many copies of the complaint and summons as are necessary**."

Trial Rule 4 states in pertinent part as follows:

"(A) Jurisdiction Over Parties or Persons--In General. **The court acquires jurisdiction over a party or person who under these rules commences or joins**

in the action, is served with summons or enters an appearance, or who is subjected to the power of the court under any other law.

(B) Preparation of Summons and Praecipe. **Contemporaneously with the filing of the complaint or equivalent pleading, the person seeking service or his attorney shall furnish to the clerk as many copies of the complaint and summons as are necessary**. **The clerk shall examine, date, sign, and affix his seal to the summons and thereupon issue and deliver the papers to the appropriate person for service. Affidavits, requests, and any other information relating to the summons and its service as required or permitted by these rules shall be included in a praecipe attached to or entered upon the summons.** Such praecipe shall be deemed to be a part of the summons for purposes of these rules. Separate or additional summons shall, as provided by these rules, be issued by the clerk at any time upon proper request of the person seeking service or his attorney.

(C) Form of Summons. **The summons shall contain**: **(1) The name and address of the person on whom the service is to be effected; (2) The name, street address, and telephone number of the court and the cause number assigned to the case; (3) The title of the case as shown by the complaint, but, if there are multiple parties, the title may be shortened to include only the first named plaintiff and defendant with an appropriate indication that there are additional parties; (4) The name, address, and telephone number of the attorney for the person seeking service; (5) The time within which these rules require the person being served to respond, and a clear statement that in case of his failure to do so, judgment by default may be rendered against him for the relief demanded in the complaint.** The summons may also contain any additional information which will facilitate proper service.

(D) Designation of Manner of Service. **The person seeking service or his attorney may designate the manner of service upon the summons. If not so designated, the clerk shall cause service to be made by mail or other public means provided the mailing address of the person to be served is indicated in the summons or can be determined.** If a mailing address is not furnished or cannot be determined or if service by mail or other public means is returned without acceptance, the complaint and summons shall promptly be delivered to the sheriff or his deputy who, unless otherwise directed, shall serve the summons.

The Indiana Supreme Court has rendered recent and strong precedent that Trial Rules 3 and 4 have real teeth. *See Robinson v. Estate of Hardin, 587 N.E.2d 683 (Ind. 1992)*; *Blackman v. Gholson, 46 N.E.2d 975 (Ind.App. 2015)*; *Willman v. Railing, 529 N.E.2d 122 (Ind.App. 1988)*. *See Estate of Kitterman v. Pierson, 661 N.E.2d 1255, 1257 (Ind.App. 1996)* (will contests must strictly comply with the statutes); *Robinson v. Estate of Hardin, 587 N.E.2d 683 (Ind. 1992)* (the Indiana Supreme Court applies the Trial Rules to Will Contests); *Avery v. Avery, 953 N.E.2d 470 (Ind. 2011)* (Defendants in Will Contest must answer only after receiving timely summons). In *Blackman v. Gholson, 46 N.E.2d 975, 980 (Ind.App. 2015),* “Roger did not tender summonses for Karen and James

and thus they were not personally served with the will contest, nor did he pay a filing fee. Such actions clearly are necessary to initiate a civil suit under the Trial Rules. ... Additionally, given that a will contest is deemed an independent action, failure to serve Karen and James would impact the trial court's personal jurisdiction over them." The Court in Blackman then affirmed the dismissal of the Will Contest for failure to properly serve the Defendants. *See Willman v. Railing, 529 N.E.2d 122 (Ind.App. 1988)* (Will Contest dismissed for lack of proper service of summons); *Ray-Hayes v. Heinamann, 760 N.E.2d 172 (Ind. 2002)* (Plaintiff must submit complaint and summons to the Clerk at the same time, dismissing case where summons tendered three days after filing the complaint). *Accord, Voyles v. Hinds, 114 N.E. 865 (Ind. 1917)*; *McGeath v. Starr, 61 N.E. 664 (Ind. 1901).*

WILL CONTEST CHECKLIST

1. A complaint must be filed within three months of the court's order probating the will.

2. The complaint must include summons and a filing fee.

3. The complaint must name as defendants the executor and all persons named in the will. The petition to open the estate in the first place should provide all of this information in detail. If the plaintiff files against one defendant, case law has allowed the plaintiff to amend and include any omitted defendants. Case law has also allowed amendments to add plaintiffs. If there is an appointed personal representative, the plaintiff must serve the estate attorney before asking for a default judgment.

One tricky situation is the case where a beneficiary has the court probate a will but there is no petition to open an estate. This is more common where a trust owns the property and no estate was contemplated. Three months come and go and any will contest is barred, even though the only way to discover the Order probating the Will is to inquire of the Clerk or the online docket. To contest such a will, the defendants would include all those named in the will and I suggest you file a petition for the court to appoint a special administrator to defend it – then amend to include the newly named administrator.

4. The text of the complaint should copy the language of Indiana Code Section 29-1-7-17. The most common reason for contesting a will is the testator was of unsound mind when he or she signed it. Others include undue execution, the will was a product of duress, fraud, undue influence, or an insane delusion, or the existence of a later will. Trial Rule 9 applies, so the complaint should attach a copy of any contested document, and plead any alleged fraud with particularity. *E.g., Estate of Parlock, 486 N.E.2d 567 (Ind.App. 1985).* Fraud and undue influence usually do not happen in public places; so I suggest simply quoting the statute and in the face of any motion to dismiss for not being more particular, ask the court for more time to conduct discovery on this. Defendants can also file Trial Rule 12 motions, such as for more definite statements,

motions to strike, etc. See *Lincoln National Bank v. Mundinger,* 528 N.E. 2d 829 (Ind. Ct. App. 1988) (Shotgun approach simply citing statutory grounds held sufficient.)

5. The plaintiff should verify the complaint. *I.C. 29-1-20-1*. In fact, the Probate Code requires petitioners verify almost everything. But such a requirement is often overlooked and when noticed can be cured without a jurisdictional problem.

6. Will contests may be tried to a jury if timely requested. *Lamb v. Lamb, 5 N.E. 171 (Ind. 1886)*. This has an interesting history. Trial Rule 38 begins, " Issues of law and issues of fact in causes that prior to the eighteenth day of June, 1852, were of exclusive equitable jurisdiction shall be tried by the court; issues of fact in all other causes shall be triable as the same are now triable." Will Contests are triable by a Jury because Indiana by statute had a specific code section which allowed a Jury on and before 1852. (FYI, I know of only two copies of the 1852 Indiana Code accessible to attorneys to research such an issue).

FILING THE TRUST CONTEST COMPLAINT

1. There is no order probating a trust. Compared to Will Contests which mention a three-month deadline, the Trust Contest limitations period may be as short as 90 days, or up to three years. Indiana Code Section 30-4-6-14 is the starting point:

"(a) A person must commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of the following:

> (1) Ninety (90) days after the person receives from the trustee a copy of a trust certification required by IC 30-4-4-5 and a notice that: (A) informs the person of the trust's existence; (B) states the trustee's name and address; (C) states: (i) the person's interest in the trust, as described in the trust document; or (ii) that the person has no interest in the trust; and (D) states the time allowed for commencing the proceeding.
>
> (2) Three (3) years after the settlor's death."

Note that a petition to docket the Trust is not a pre-requisite to filing a Trust Contest. *See Schrage v. Seberger, 52 N.E.3d 54 (Ind.App. 2016).*

2. The Indiana Trial Rules specifically apply to all matters arising under the Trust Code, including Trust Contests. *I.C. 30-4-6-13.*

3. Venue in a Will Contest is proper in the county where the estate is pending, or if none where the decedent resided. Venue in a Trust Contest is different. The Trust itself may provide for a preferred county of venue, or else venue is "in the county in which the principal place of administration of the trust is located," which is where the trust records are kept, or if none, the trustee's residence. *I.C. 30-4-6-3*.

4. Proceedings under the Trust Code are initiated by a petition or a complaint. *I.C. 30-4-6-5.* "Notice must be given to any person or his personal representative who is named as a party in a petition or complaint, whose rights may be affected or upon whom a liability might be imposed by any proceeding; to the Attorney General if the trust is for a benevolent public purpose; and to any other person whom the court may order to be given notice." The form of notice and the manner of service are the same as a customary summons. "or in such other form as may be ordered or approved by the court". *I.C. 30-4-6-6.* This now includes electronic notice. *I.C. 30-4-6-6.5.*

5. The definition, case law, and jury instructions concerning "soundness of mind" in a Will Contest also apply to Trust Contests. Indiana Code Section 30-4-2-10 states:

> "(a) If a trust is created by a will, the settlor's capacity that is required to create the trust is determined by the applicable probate law.
>
> (b) The capacity of a settlor that is required to create, amend, revoke, or add property to a revocable trust is the same as the capacity of a testator that is required to make a will.
>
> (c) To create or add property to an irrevocable trust, the settlor or transferor must be of sound mind and have a reasonable understanding of the nature and effect of the act and the terms of the trust.
>
> (d) To direct the actions of the trustee of a trust, the settlor or other person must: (1) have the capacity to hold and deal with property for the settlor's or person's own benefit; (2) be at least eighteen (18) years of age; and (3) be of sound mind."

6. If a Will mentions a writing of any kind, it is incorporated into the Will. *I.C. 29-1-6-1(h)*. Thus, if there is a pour over Will into a Trust, the best practice is to file both a timely Will and Trust Contests.

7. The jury is still out on whether or not you can request or require a trial by jury in a Trust Contest. Pardon the pun.

ATTORNEY FEES IN WILL CONTESTS

"When any person designated as executor in a will, or the administrator with the will annexed, or if at any time there be no such representative, then any devisee therein, defends it or prosecutes any proceedings in good faith and with just cause for the purpose of having it admitted to probate, whether successful or not, he shall be allowed out of the estate his necessary expenses and disbursements including reasonable attorney's fees in such proceedings." *I.C. 29-1-10-14*.

Prior to 1954 there was a race to the courthouse to either probate a will or file objections to probate. If objections were filed, the Clerk impounded the Will and the nominated personal representative or an heir pursued the litigation at his or her own risk – only if successful would the proponent of the Will receive attorney fees and expenses. The purpose of the change in the statute was to eliminate the unseemly race to the courthouse and permit attorney fees and expenses to the proponent of any Will which might be offered to probate. *Estate of Goldman, 813 N.E.2d 784 (Ind.App. 2004).*

The Indiana Probate Code encourages personal representatives and heirs to probate or resist the probate of Wills without compelling any party to risk financial loss by underwriting the fees and expenses of the proceedings. *Fickle v. Scampmorle, 183 N.E.2d 838 (Ind. 1962); Brown v. Edwards, 640 N.E.2d 401 (Ind.App. 1994); Estate of Clark v. Foster, 568 N.E.2d 1098 (Ind.App. 1991)*; *Dunnuck v. Mosser, 546 N.E.2d 1291 (Ind.App. 1989); Estate of Workman, 262 N.E.2d 408 (Ind.App. 1970).* The caveat is the claims must be made in good faith and for just cause, which the Indiana Court of Appeals recently stated means "reasonable grounds or probable cause." *Stibbins v. Foster, 45 N.E.3d 419 (Ind.App. 2015).*

Notably, the *Stibbens* case held that any will contest Plaintiff who seeks to probate a Will more than once removed from the probated Will is not a "devisee" entitled to fees under I.C. 29-1-10-14, *Stibbens* did not eliminate the right of action as to such Plaintiff, only the entitlement to fees from the estate. New legislation was enacted in 2019 resolving a previously undecided issue as to whether multiple Wills could be attacked in a single proceeding. I.C. 29-1-7-17.5. Now litigants can challenge two or more Wills in a single proceeding if *prima facie* evidence is made of an irreversible psychiatric condition or undue influence which pertains as to multiple Wills. The decision to permit multiple challenges is discretionary with the trial judge I.C. 29-1-7-17.5(a). If the Court exercises its discretion to permit multiple Wills to be challenged in one proceeding, the challenger is eligible for fees under I.C. 29-1-10-14. I.C. 29-1-7-17.5(b)

ATTORNEY FEES IN TRUST CONTESTS

In a Trust Contest, Trustees with a fiduciary duty to defend the Trust will be compensated out of the trust property. As compared to Will Contests, there is no corresponding statutory authority in the Trust Code for plaintiffs to receive attorney fees. Plaintiffs who are successful may argue they are entitled to attorney fees from the trust property for providing a benefit. However, plaintiffs who are not successful are not entitled to attorney fees.

POTENTIAL LIST OF DOCUMENTS TO DRAFT

Appearance in the Estate Caption
Petition for Notice of All Pleadings and Papers & proposed order
Petition to convert to supervised administration & proposed order
Petition for Attorney Fees and Expenses

Appearance in the Trust Caption
Petition to Docket the Trust & proposed order

Appearance in the Will and/or Trust Contest
Filing fee
Verified Complaint with documents as exhibits
Summons
Jury Demand
Notice of Bond Posting & Proposed Order of Sufficient Bond
Motion for Change of Judge
Interrogatories
Requests for Production
Requests for Admission
Subpoenas for medical records, drafting attorney file, financial records
Notices of Deposition
Prepare outline and questions for witnesses at depositions
Motions to dismiss, more definite statement, summary judgment
Mediation Statement
Potential Settlement Agreement
Petition to Approve Settlement Agreement & proposed order
Motions in Limine
Preliminary Jury Instructions
Final Jury Instructions
Verdict Forms
Outline of questions for *voire dire*
Opening Statement
Final Argument
Responses to anticipated objections at trial
Motions for judgment on the evidence, judgment notwithstanding the verdict, for new trial.

PROPER QUESTIONS AT TRIAL

Indiana Evidence Rule 401: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Authentic document or thing
Competent witness
Hearsay with exception
Personal knowledge
Proper opinion
Not otherwise objectionable

Once evidence is offered that you dispute or need to challenge, the door is opened to raise questions concerning the following:

Bias (interest, prejudice, motives, etc.)
Character evidence
Impeachment

When asking a DIRECT QUESTION, this involves the use of the words, "Who, what, where, when, how, why, describe, explain, share, …"

When asking a question on CROSS EXAMINATION, suggest you never ask a question of which you do not know the answer; suggest you limit the possible answer of the witness to a yes or no (and never allow a witness to give a long winded answer or narrative); and recognize that in cross examination it is the attorney (and not the witness) that is testifying.

POTENTIAL OBJECTIONS AT TRIAL

It takes years of experience to appreciate the nuances of the many objections an attorney might raise to what questions are asked and what documents are offered. For the more critical facts, documents, and legal issues, attorneys usually research well before trial and have a plan on what to do. What I recommend is attorneys simply review the list of the potential objections prior to trial so that you have a working knowledge of how to address the Court when something bothers you or impacts the strength of your client's case:

Accrediting or bolstering witness before impeachment
Addressing juror by name
Ambiguous question
Argumentative
Asked and answered
Assumes fact not in evidence
Authentication or identification problem
Best evidence rule
Broad
Business record exception not established
Character not admissible or attacked
Child witness not competent
Closing argument
Collateral matter
Competency not established
Completeness rule
Complex, compound or multiple question
Compromise offers or settlement not admissible
Calls for conclusion
Coaching

Confusing question
Convictions of crime not admissible
Corroborative evidence not proper
Cross examination goes beyond scope of direct
Cumulative
Deadman's statute
Deceptive question
Defaming character
Discretion of the court for any reason
Document speaks for itself
Exhibit or witness not on pretrial list
Expert testimony not proper
Extrinsic evidence not admissible
First hand knowledge not shown
Foundation lacking
- No factual predicate for witness statement
- Lay witness answering expert question
- Beyond demonstrated expertise of the expert
- Hearsay
- Witness not present for photograph, recording or telephone call
- Equipment functioned properly
- Chain of custody

Habit, routine and practice not proper
Harassment
Hearsay
Hearsay exception does not apply
- Declarant available
- Declarant not available

Hypothetical question not proper
Identification lacking
Illegally obtained evidence
Immaterial or not relevant
Impeachment not proper
Incompetent witness
Inflammatory
Insurance issue not proper
Interpreter not qualified
Irrelevant or immaterial
Jencks Act violation (FRCP 26.2)
Job offer argument
Judge cannot be a witness
Judicial notice not proper
Judicial questioning not proper
Juror cannot be witness
Leading
Liability insurance improper

Limited admissibility
Mischaracterization or misquoting of witness prior testimony
Misleading question
Missing evidence
Missing witness
Misstates the facts or law
Mistrial
Motion to strike (where objection not made)
Multiple or compound question
Must accept witness answer
Narrative not proper
Non-responsive answer
Not relevant to issues raised in the pleadings
Not relevant to impeachment purpose
Not reasonably calculated to lead to admissible evidence (deposition only)
Notes being used without foundation
Offer of proof required
Opening statement
Argumentative
Discusses law
Mentions improper facts
Opinion of witness not proper
Original document rule
Parol evidence rule
Payment of medical bills
Personal knowledge lacking
Personal opinion of attorney
Photograph not proper

- Inflammatory
- Misleading
- Re-creation or dramatization going beyond illustration
- Reveals evidence not admissible

Plea bargaining not admissible
Poverty or wealth of a party
Prejudicial
Presumptions
Pretrial conference order eliminated issue
Prior inconsistent statement not admissible

- Witness called only for this purpose
- Statement not inconsistent with prior testimony
- Witness is permitted opportunity to explain inconsistent statement
- Statement concerns a collateral matter not within issues at trial

Privacy concerns
Privileges

- Accountant client
- Attorney client

- Crime victim counselors
- Doctor patient
- Executive
- Fifth Amendment
- Government
- Husband wife
- Immunity
- Informer
- Journalist
- Medical provider patient
- Priest penitent
- Social workers
- Trade secrets

Rape shield Statute
Reading from document not in evidence
Redaction not proper
Redirect examination beyond the scope of cross
Refreshing recollection not proper

- Witness testifying to contents of document, not refreshed memory
- Intent to have Jury speculate about contents of inadmissible exhibit
- Witness not shown to need the document

Not relevant or material
Religious matters
Remarriage matters
Remedial matters or repairs
Repetitious question
Self-serving recollection
"Send a message" argument
Settlement offers or compromise efforts
Side bar should have been requested
Speculation
Statute of frauds
Stipulation applies
Subsequent remedial measures
Summary not admissible

- Originals not voluminous
- Source materials not admissible nor made available
- Summary not accurate

Surprise (e.g., concealed during discovery)
Attorney testifying
Unfair question
Unintelligible question
Vague
Vouching for witness not permitted
Waste of time
Witness or exhibit not on pretrial list

POTENTIAL RESPONSES TO OBJECTIONS AT TRIAL

It also takes years of experience to appreciate the nuances of how to respond to the many objections an attorney might face when asking questions or offering documents. Again, for the more critical facts, documents, and legal issues, attorneys should research well before trial and have a plan on what to do. What I recommend is attorneys simply review the list of why a potential objection should not apply:

Objection goes to weight and sufficiency, not competency
Rephrase the question
Connect it up later
Other side opened the door
Agree to limiting instruction
If objection sustained, DO NOT forget to an offer of proof

PRACTICAL TIPS FOR TODAY

To follow are some common questions of witnesses at trial concerning soundness of mind, based on the pattern jury instructions and the seminal case of *Farner v. Farner, 480 N.E.2d 251 (Ind.App. 1985)*:

Do you have an opinion concerning the decedent's soundness of mind?
What is that opinion?
On what do you base that opinion?
Did it appear to you shortly before and after the decedent signed his Will [or Trust] he knew what property he owned? The values?
Did it appear to you shortly before and after the decedent signed his Will [or Trust] he knew his family members? Their names? The nature of their relationship?

To these questions and any others you believe will arise, you should anticipate objections and be prepared to respond to the Court with case citations. Here are some examples:

OBJECTION: The lay person is not qualified as an expert to give an opinion on soundness of mind.

RESPONSE: Indiana law allows lay persons to give an opinion on soundness of mind. This is not restricted to expert witnesses. *See Stewart v. Manship, 140 N.E. 543 (Ind. 1923); Spry v. Logansport Loan, 133 N.E. 827 (Ind. 1922); Swygart v. Willard, 76 N.E. 755 (Ind. 1906); Guardianship of Carrico v. bennett, 319 N.E.2d 625 (Ind.App. 1974); Norman v. Norman, 169 N.E.2d 414 (Ind.App. 1960); Haas v. Haas, 96 N.E.2d 116 (Ind.App. 1951).*

OBJECTION: What the witness observed before or after the date when the decedent signed the document is not relevant. This case is about the decedent's soundness of mind only when he signed it.

RESPONSE: The decedent's mental condition both prior to and after the execution of the document is relevant. How remote a period of time between the witness' observations and the signing of the document goes to weight, not admissibility. *See Ball v. Ball, 29 N.E.2d 358 (Ind.App. 1040); Griffith v. Thrall, 29 N.E.2d 345 (Ind.App. 1940); Rice v. Rice, 175 N.E.2d 540 (Ind.App. 1931)*; *Taylor v. Taylor, 93 N.E. 9 (Ind. 1910)* ("much latitude should be allowed in the admission of the testator's condition."). Observations for five to seven minutes may be enough. *Blake v. State, 390 N.E.2d 158 (Ind. 1979).*

OBJECTION: Lack of foundation for the witness to give any opinion concerning the decedent's soundness of mind.

RESPONSE: Lay the foundation. Evidence Rule 701 requires opinion testimony by lay witnesses to be "rationally based on the witness's perception; and helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue." A foundation is laid where you show the witness had an opportunity to observe the decedent. Ask the witness when he or she spoke or met with the decedent. Then ask the witness questions to show he or she is testifying about personal perceptions. *What did you see, hear, observe, etc.*? Show the testimony is not based on hearsay or opinions of others. *McCall v. State, 408 N.E.2d 1218 (Ind. 1980); Wisehart v. State, 484 N.E.2d 949 (Ind. 1985).* Then ask about the detailed facts which support a witness's opinion on soundness of mind.

OBJECTION: The prior Will is not admissible because it has no relevance on whether or not the decedent was of sound mind to sign the new one.

RESPONSE: ?

OBJECTION: The inventory is not admissible because the property in the estate is not relevant. Only the property known to the decedent when he signed his Will is relevant.

RESPONSE: ?

OBJECTION: Lack of foundation for the witness to give any opinion concerning undue influence on the decedent.

RESPONSE: Good luck. *See Lasater v. House, 841 N.E.2d 553 (Ind. 2006).*

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ICLEF Seminar,
August 28, 2020

Top Ten Tips for Trial of a Will and Trust Contest

1. Who has standing to file a Will or Trust Contest?

2. Very short time limitations

3. What a Plaintiff must file

4. What a Plaintiff may file

5. How Defendants may respond

6. How are attorneys paid?

7. Direct Examination at Trial

8. Know the pertinent objections

9. Cross Examination at Trial

10. Understanding expert witnesses

Bonus: Practical Tips to consider

Section Five

COVID-19'S EFFECT ON "IN THE PRESENCE OF" REQUIREMENT AND OTHER EXECUTION REQUIREMENTS OF ESTATE-PLANNING DOCUMENTS

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Section Five

COVID-19's Effect on "In the Presence of" Requirement and Other Execution Requirements of Estate-Planning Documents..............................Rodney S. Retzner William J. Barkimer

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Traditionally, the in-person services of notaries and witnesses has been required to properly execute a wide variety of estate-planning documents. As a result of the ongoing COVID-19 pandemic, it has become necessary for these services to be provided remotely to ensure compliance with stay-at-home orders or social distancing measures recommended by medical experts. As such, Indiana and other states have issued various orders that modify or temporarily relax the requirements relating to the execution of wills and other documents where strict compliance with such requirements would have prevented, hindered or delayed essential estate-planning actions. The relaxation of such execution requirements has allowed individuals, especially those who are must susceptible to the COVID-19 virus, to obtain critical estate planning advice and assistance in a manner that reduces in-person contact and promotes social distancing. This article discusses Indiana's general requirements for executing various estate planning documents, the Indiana Supreme Court's Orders relaxing these requirements, how other states have addressed the on-going pandemic, how video conferencing or similar avenues may qualify for "in the presence of," and what potential challenges attorneys may face relating to these issues.

1. <u>Execution requirements for Wills, Trusts, Powers of Attorney and Living Wills.</u>

Wills

Pursuant to Indiana Code § 29-1-5-3(a), other than nuncupative wills, all wills must be executed by the signature of the testator and of at least two (2) witnesses. In order to serve as an attesting witness, an individual must be competent at the time of attestation. Ind. Code § 29-1-5-2(b). An attesting witness is interested only if the will gives the witness some interest. Ind. Code. § 29-1-5-2(d). If a will cannot be proved without the testimony of the attesting witness receiving an interest, such will is void as to the provisions devising any interest in the decedent's estate to that individual and persons claiming under him. *See* Ind. Code § 29-1-5-2(c). However, there is an exception if the witness would have been entitled to a distributive share of the testator's estate except for such will (i.e., under intestate law). *Id.*

Publication of a will is required, and consists of the act of making it known in the presence of witnesses that the instrument to be signed is the testator's last will and testament. *Callaway v. Callaway,* 932 N.E.2d 215, 220 (Ind. Ct. App. 2010). The purpose of publication is to assure the witnesses are aware that the testator knows he is about to execute a will, in order to lessen the likelihood of fraud. *Id.* This is accomplished when the testator, in the presence of two (2) or more attesting witnesses, signifies to the witnesses that the instrument is the testator's will and then either:

(A) signs the will;
(B) acknowledges the testator's signature already made; or
(C) at the testator's direction and in the testator's presence, has someone else sign the testator's name.

Ind. Code § 29-1-5-3(b)(1). For a valid will, the witnesses must both:

- Either witness the testator's signature to the will, witness the signature of someone who signs the will at the testator's direction, or have the testator acknowledge the testator's signature to the witnesses if the testator previously signed the will.
- Execute the will or a self-proving clause attached to the will in the testator's and each other's presence.

Ind. Code § 29-1-5-3; *Scampmorte v. Scampmorte*, 180 N.E.2d 385 (Ind. Ct. App. 1962).

There is no requirement that the witnesses read the will or be apprised of the provisions contained within in the will. Further, the witnesses need not see the testator sign the document, provided the testator makes known to the witnesses that he or she signed the will. *Simmons v. Simmons,* 116 N.E. 49 (Ind. Ct. App. 1917). However, the attesting witnesses must sign in the presence of the testator and each other. Ind. Code § 29-1-5-3(b)(2). As long as the will is signed in one continuous transaction in the presence of one another, the actual order of signing is immaterial. *Harmening v. Harmening,* 150 N.E. 376 (Ind. Ct. App. 1926).

Indiana now permits electronic wills executed on or after July 1, 2018. *See* Ind. Code §§ 29-1-21-1 to 29-1-21-18. The basic requirements for signing and witnessing an electronic will are generally the same as for a traditional will. However, for an electronic will, all signatures will be electronic signatures. An electronic will must include either: (1) the testator's electronic signature, or (2) the electronic signature of another adult individual, not an attesting witness, made at the testator's direction. Ind. Code. § 29-1-21-4(a). In addition, and similar to typical wills, an electronic will must be attested to by the electronic signatures of at least two witnesses. *Id.* When executing an electronic will, the testator and witnesses are typically separately signing digital counterparts of the will that each views on a screen, even when the testator and witness are in the same room. The digitally-signed will is then combined into an encrypted PDF by the software being used.

Although using a self-proving affidavit is not a requirement for a valid will or electronic will, it is good practice to include one. A self-proving clause creates a rebuttable presumption that the will was properly executed and is itself evidence that the testator published his will. *Scribner v. Gibbs,* 953 N.E.2d 475, 481 (Ind. Ct. App. 2011). A will that is self-proved may generally be admitted to probate without having to submit additional proof that the will was properly executed. Ind. Code § 29-1-5-3 and cmt. If the will does not contain a self-proving affidavit, Indiana Code § 29-1-7-9 generally requires the testimony of at least one attesting witness before a will may be admitted to probate. This testimony must include that at least two competent attesting witnesses subscribed the will at the request of, and in the presence of, the testator. *Scampmorte,* 180 N.E.2d at 386.

The form of a self-proving affidavit is codified in Ind. Code § 29-1-5-3.1(c) (for a traditional will) and § 29-1-21-4(c) (for an electronic will). The testator must sign any self-proving clause attached to the will. However, separate signatures for the will and self-proving affidavit are not required.

A single signature of each of two witnesses in each other's presence and in the testator's presence serves to witness the will and to make the will self-proving. Ind. Code § 29-1-5-3.1(a); *Dellinger v. First Source Bank*, 793 N.E.2d 1041, 1043-45 (Ind. 2003).

A will can be made “self-proved” at the time it is originally signed or at a later date. If the testator executes the will and the witnesses execute it on an attestation clause, the will may be made self-proving later by attaching a self-proving clause signed by the testator and the witnesses that meets the requirements of the statute. Ind. Code § 29-1-5-3.1. Electronic wills, however, must be self-proved at signing and before they are electronically filed. Ind. Code § 29-1-21-4(b).

There is no requirement for a will to be notarized in Indiana and they are not typically notarized. *Outlaw v. Danks,* 832 N.E.2d 1108, 1111 (Ind. Ct. App. 2005), *trans denied*. Indiana statutes do not require a detailed attestation clause or any particular language “as long as it is clear that attestation is what is intended by the witnesses.” *Estate of Dellinger v. 1st Source Bank,* 793 N.E.2d 1041, 1044 (Ind. 2003). An attestation clause is typically added to Indiana wills in the following form:

> "Signed, sealed, published and declared by [TESTATOR NAME] the testator above named, as and for [his/her] last will and testament, in our presence, and we, in [his/her] presence, and the presence of each other, have hereunto subscribed our names as witnesses on [DATE]."

The witnesses sign the will and provide their addresses in the space directly below the attestation clause.

Trusts

Execution requirements for revocable trusts are much simpler than traditional wills. In Indiana, a valid revocable trust requires the settlor's or the settlor's authorized agent's signature on written evidence of the terms of the trust. Ind. Code § 30-4-2-1(a). Generally, revocable trusts include the trustee's signature. The trustee must accept the trust and the signature of the person named as trustee on the trust instrument or in a separate written acceptance is conclusive evidence that the named person accepted the trust. Ind. Code § 30-4-2-2(b). However, a trustee signature is not required for a valid revocable trust, as there are additional ways that the trustee may accept the trust. If the person named as trustee exercises powers or performs duties under the trust, the name trustee will be presumed to have accepted the trust. Ind. Code § 30-4-2-2(c). A trustee can be held in breach of trust after he begins performance. *Ridenour v. Wherritt,* 30 Ind. 485 (1868). However, the performance of duties will not be presumed acceptance if the person is acting to preserve the trust estate where an immediate risk of damage exists and the person delivers a written rejection to the creator of the trust within a reasonable time frame. Ind. Code § 30-4-2-2(d).

Indiana law does not require the execution of a revocable trust to be witnessed for the trust to be valid. An instrument creating an *inter vivos* trust does not need to be executed as a

testamentary instrument to validly create that trust. Ind. Code § 29-1-5-9. Generally, practitioners do not have the trust execution witnessed.

Indiana law does not require a revocable trust to be notarized to be valid. Ind. Code §§ 30-4-2-1(a) and 30-4-2-1.5(b). Trust signatures may be notarized or acknowledged for a variety of reasons, such as required proof of validity of recording. However, these issues are typically addressed by using a notarized certification of trust. Therefore, practitioners generally do not have the signatures to the trust itself notarized.

Powers of Attorney

To be valid, a power of attorney must:

1. be in writing,
2. name an attorney in fact,
3. give the attorney in fact the power to act on behalf of the principal,
4. be signed by the principal or at the principal's direction in the presence of a notary public.

Ind. Code § 30-5-4-1. In the case of a power of attorney signed at the direction of the principal, the notary must state that the individual who signed the power of attorney on behalf of the principal did so at the principal's direction. *Id*.

A power of attorney does not need to be recorded except in a situation where such is necessary. Ind. Code § 30-5-3-3. For instance, if an attorney in fact is authorized to convey property, the power of attorney must be recorded before the deed can be recorded. When such recording is necessary, the power of attorney must comply with recording requirements such as notary and preparation statements. Ind. Code § 30-5-3-3(d).

In regard to recording, on July 1, 2020, an obscure change to the relevant Indiana recording statute became effective requiring lawyers to change how they prepare powers of attorney and other documents that must be recorded in an Indiana County recorder's office. Indiana Code § 32-21-2 and other relevant statutes previously provided flexibility to Indiana county recorders to accept written instruments that contain *either* an acknowledgment of the grantor's or other signer's signature before certain authorized notarial officers *or* a common law "proof" described in Indiana Code § 32-21-2-6. During the general session of the 2020 Indiana General Assembly, Senate Enrolled Act 340 changed a critical conjunction in Indiana Code § 32-21-2-3(a) from "or" to "and," culminating in two significant outcomes:

1. The long-standing flexibility provided by the word "or" was destroyed; and
2. The use of "and" in the Indiana Code 32-21-2-3(a) amendment with other related recording statutes created the requirement for ***both*** an acknowledgment for any signer ***and*** a proof related to a witness' viewing

the signer's execution of the instrument as well as the witness' signature of the instrument in order to record that instrument.

In sum, a power of attorney that is to be recorded must be: (1) executed by the appropriate individual, (2) executed by a witness, and (3) both the individual who executed the document and the witness must have their signatures notarized (previously only the individual executing the document needed a notarization of his/her signature since no witness was needed).

This result was not the intended result of the Indiana Recorder's Association efforts in relation to the amendment of Indiana Code § 32-21-2-3(a). The Indiana State Bar Association's Probate Trust & Real Property Section is working with other associations on proposed legislation for the 2021 regular session to provide clarity as to the notarial acts and certificates required for instruments to be property submitted and accepted for recording by an Indiana county recorder. Until such legislation is enacted, the following two notarial certificates should be included within instruments submitted to the office of an Indiana county recorder:

1. An acknowledgment(s) (as defined in Indiana Code § 33-42-0.5-2) pertaining to the signer(s) of an instrument who appears before a notarial officer as defined in Indiana Code § 33-42-0.5-19 and 33-42-9; and
2. A common law proof, disclosing the authentication of a disinterested witness' signature on the instrument and identity and disclosing the witness' viewing the signing of the instrument by a grantor or other signer to the instrument.

Living Wills

A living will can only be made by an individual who is eighteen (18) years of age, competent, and of sound mind. Ind. Code § 16-36-4-8(a). Pursuant to Indiana Code § 16-36-4-8, a living will declaration must be:

(1) voluntary,
(2) in writing,
(3) signed by the person making the declaration or by another person in the declarant's presence and at the declarant's express direction,
(4) dated, and
(5) signed in the presence of at least two (2) competent witnesses who are at least eighteen (18) years of age.

The statute sets limitations as to who can serve as a witness to a living will. Ind. Code § 16-36-4-8(c). A witness may not be: a parent, spouse, or child of the declarant; entitled to any part of the person's estate; financially responsible for the declarant's medical care; or the individual who signed the declaration on behalf of and at the direction of the declarant. *Id.*

2. Elements of Challenges To Estate Planning Documents.

Under Indiana Code § 29-1-7-17, any interested person may contest the validity of a will within three (3) months after the date of the order admitting the will to probate by filing a separate cause of action in the same court. The contesting party must submit a verified affidavit setting forth:

(1) the testator's unsoundness of mind,
(2) the undue execution of the will,
(3) that the will was executed under duress or was obtained by fraud, or
(4) any other valid object to the will's validity.

Id.

When contesting the validity of a revocable trust, Indiana Code § 30-4-6-14(a) provides that such a challenge must be commenced within the earlier of:

1. Ninety (90) days after the contesting party receives from the trustee a copy of the trust certification and notice that:
   a. Informs the person of the trust's existence;
   b. States the trustee's name and address;
   c. States:
      i. The person's interest in the trust, as described in the trust document; or
      ii. That the person has no interest in the trust; and
   d. States the time allowed for commencing the proceeding.
2. Three (3) years after the settlor's death.

In regard to challenging a trust, the same challenges that one may make in regard to a will (i.e. incapacity, undue influence, fraud), may be asserted in regard to the validity of a trust.

Incapacity

Indiana law presumes that every person is of sound mind to execute a will until the contrary is shown. *Gast v. Hall,* 858 N.E.2d 154, 165 (Ind. Ct. App. 2006). To rebut this presumption and prove a testator was incapacitated at the time of executing a will, a party must show that the testator lacked the capacity to know (1) the extent and value of his property; (2) those who are the natural objects of his bounty; and (3) their deserts, with respect to their treatment of and conduct toward him. *Hays v. Harmon,* 809 N.E.2d 460, 464 (Ind. Ct. App. 2004). In regard to a trust, the capacity of a settlor that is required to create, amend, or revoke a revocable trust is the same capacity of a testator that is required to make a will. Ind. Code § 30-4-2-10(b).

In other words, "[t]he real question is the mental soundness of the testator, whether his mind was, in fact, unduly influenced in the making of the will. *Kronmiller v. Wangberg,* 665 N.E.2d 624,

628 (Ind. Ct. App. 1996). It is only the testator's soundness of mind at the time of executing the will which is controlling. *Id.* If the testator is of sound mind to execute his will at the time he does so, it is immaterial what may have been his condition at some other time. *Farner v. Farner,* 480 N.E.2d 251, 259 (Ind. Ct. App. 1985). Mere unsoundness of mind is not itself sufficient to show a testator lacked testamentary capacity. In *Spry v. Logansport Loan & Trust Co.,* 133 N.E. 827 (Ind. 1922), the Indiana Supreme Court held that a person contesting a will must also show that the mental condition influenced or controlled the testator in disposing of his property.

Undue Influence

Undue influence is "the exercise of such control by one person over another person so as to destroy his or her free agency and compel him or her to do something he or she would not have done if such control had not been exercised." *Scribner,* 953 N.E.2d at 484 (*citing Carlson v. Warren,* 878 N.E.2d 844, 851 (Ind. Ct. App. 2007)). "Such control may result from the abuse of a relationship in which confidence is reposed by one party in another with resulting superiority and influence exercised by the other." *Id.*

In order to prove undue influence, a party contesting a will or trust must prove:

1. the exercise of sufficient control over the person,
2. the validity of whose act is brought into question,
3. to destroy his [or her] free agency and constrain him [or her] to do what he would not have done if such control had not been exercised.

Trent v. National City Bank of Indiana, 918 N.E.2d 646, 651 (Ind. Ct. App. 2009) (trust dispute); *In re Rhoades*, 993 N.E.2d 291, 300 (Ind. Ct. App. 2013) (trust dispute); *Gast v. Hall*, 858 N.E.2d at 166 (will contest action).

As one who seeks to use undue influence typically does so in private, proving undue influence is difficult. As such, undue influence may be proven by circumstantial evidence, and "the only positive and direct proof required is of facts and circumstances from which undue influence may reasonably be inferred. *Gast,* 858 N.E.2d at 166. When considering potential undue influence, courts may consider the following:

1. the character of the beneficiary [i.e. if testator is subordinate to beneficiary];
2. any interest or motive the beneficiary might have to unduly influence the testator; and
3. the facts and surrounding circumstances that might have given the beneficiary an opportunity to exercise such influence.

Id.

Certain relationships raise a presumption of confidence and trust as to the subordinate party on the one hand and a corresponding influence as to the dominant party on the other. *In re Estate of Wade*, 768 N.E.2d 957, 961 (Ind. Ct. App. 2002) (citing *Lucas v. Frazee,* 471 N.E.2d 1163, 1166 (Ind. Ct. App. 1984)). Relationships included in this category are those of the attorney and client, guardian and ward, principal and agent, pastor and parishioner, and parent and child. The law will impose a presumption that a transaction was the result of undue influence where the plaintiff's evidence shows: (a) there was such a relationship, and (b) the dominant party benefits from a questioned transaction. *In re Rhoades,* 993 N.E.2d at 301. Once this presumption is established, the burden shifts to the dominant party to rebut the presumption by clear and convincing proof. *Id.* A dominant party may rebut the presumption by establishing that he acted in good faith, did not take advantage of his position of trust, and that the transaction was fair and equitable. *Id.*

Fraud

Indiana courts define the elements of fraud as "1) material misrepresentations of past or existing facts; 2) which misrepresentation is made with knowledge or reckless ignorance of the falsity; 3) which causes reliance to the detriment of the person relying." *Matter of Estate of Wilson,* 610 N.E.2d 851, 855 (Ind. App. Ct. 1993) (citing *Carrell v. Ellingwood*, 423 N.E.2d 630, 635 (Ind. Ct. App. 1981)). When contesting a will or trust on the basis of fraud, the specificity pleading requirements of Indiana Trial Rule 9 apply.

Similar to undue influence, presumptions of fraud can arise as a result of certain relationships. In *Villanella v. Godbey,* 632 N.E.2d 786 (Ind. Ct. App. 1994), the Indiana Court of Appeals recognized that a presumption of fraud attaches to transactions entered into during the existence of a fiduciary relationship regardless of whether the fiduciary actually used his fiduciary powers to complete the transactions. "The law presumes fraud when a person with a fiduciary duty benefits from a questioned transaction." *Clarkson v. Whitaker,* 657 N.E.2d 139, 144 (Ind. Ct. App. 1995).

3. **Requirements under Indiana's Remote Notarial Acts Statute.**

In 2018, the Indiana General Assembly recognized the remote notarization of documents. On July 1, 2019, Indiana's Remote Notarial Acts statute, codified at Indiana Code § 33-42-17, became effective. Remote notarization permits a notary who is outside the physical presence of an individual to use audio-visual communication technology to notarize an act. Under Indiana Code § 33-42-17-2(a), a notary public may perform a remote notarial act only after registering as a remote notary public with the secretary of state. In order to register as a remote notary public, the statute requires that the notary public:

(1) holds a current commission as a notary public in Indiana;
(2) complies with certain continuing education requirements;
(3) is able to competently:
  (A) operate audiovisual communication technology; and

(B) use identity proofing and credential analysis technology;

(4) pays a registration fee in the amount of five dollars ($5); and

(5) passes a remote notarial act examination administered by the secretary of state.

Ind. Code § 33-42-17-2(b).

Under Indiana Code § 33-42-17-3(b), a remote notary public who is physically present in Indiana may perform the following notarial acts as remote notarial acts:

(1) taking an acknowledgment;
(2) administering an affirmation or oath;
(3) taking a verification on an oath or affirmation;
(4) attesting to or witnessing a signature; or
(5) attesting to or certifying a copy of a document or record.

The statute goes on to provide that "if a remote notarial act relates to a statement made in or a signature executed on a record, the principal shall appear before the remote notary public: (1) physically; or (2) by means of audiovisual communication described in section 6 of this chapter." Ind. Code § 33-42-17-4.

In regard to the audiovisual component, the statute provides several guidelines as to what technology is acceptable and how the recording of the notarial act should be conducted. First, Indiana Code § 33-42-17-6 addresses the "Authorized Technology" and provides that the technology must first be approved by the secretary of state. Ind. Code § 33-42-17-6(a). A list of the approved "Remote Notary Technology Vendors" can be found on the Indiana Secretary of State's website at https://inbiz.in.ogv/certification/notary#verticalTab5.

Next, the remote notarial act must be recorded. Ind. Code § 33-42-17-3(f). The parties must be informed of the recording and the recording must include the following:

(1) A recitation of the following by the remote notary public:
   a. Identifying information sufficient to identify the specific remote notarial act performed.
   b. A statement explaining one (1) of the following:
      i. That the principal's identity is authenticated through the remote notary public's personal knowledge of the principal's identity.
      ii. That the identity of the principal is authenticated by a credible witness.

(2) A confirmation by the principal that the principal's electronic signature is freely and voluntarily issued.

The identity of the principal may be verified by any of the following:

1) The remote notary public's personal knowledge of the principal's identity.
2) A credible witness's knowledge of the principal's identity.
3) All of the following:
   a. Remote presentation by the principal of a credential identifying the principal.
   b. Credential analysis and visual inspection by the remote notary public of the credential described in clause (a).
   c. Identity proofing of the principal, which may include a dynamic knowledge based authentication assessment or use of a public key infrastructure.
4) Another method that uses technology that meets or exceeds the standards for approval established by the secretary of state under Ind. Code § 33-42-16-2.

Ind. Code § 33-42-17-5.

Finally, Indiana Code § 33-42-17-7 lays out the requirements of an electronic notarial certificate and provides two examples of acceptable certificates as set forth below:

State of Indiana
County of___________
City of___________

I certify that the attached or associated electronic record entitled ___________ and dated___________ was signed by the principal___________ *[name of principal]* who was located in this city___________, county_____, state or province___________, and country___________ and notarized by me, the remote notary public, on this date___________ in this city and county_____, Indiana.

___________, remote notary public.
[Signature of remote notary public]

____
[Printed name of remote notary]
Date notary public commission expires___________
Commission number___________

An example of an audio-visual notarization certificate is below:

State of Indiana
County of___________
City of___________

I certify that the attached or associated electronic record entitled ___________ and dated___________ was signed by the principal___________ *[name of principal]* who was located in this city___________, county___________, state or province___________, and country_____ and who appeared by audio visual communication on this date, was notarized by me, the remote notary public, on this date___________ in this city and county_____, Indiana.

___________, remote notary public.
[Signature of remote notary public]
[Printed name of remote notary]
Date notary public commission expires___________
Commission number___________

One final thing to keep in mind, Indiana Code § 33-42-16-2(g) provides that the "secretary of state may amend rules adopted under this section as determined necessary as a result of changes in electronic and remote notarial act technology." As technology continues to evolve and businesses develop other ways to communicate during the ongoing COVID-19 pandemic, this provision allows the secretary of state to amend these rules to conform with the constantly evolving technology and operations.

4. **How Do These Orders Effect Indiana's Execution Requirements Of "In The Presence Of" Witnesses and Others.**

As set forth above, the execution of various estate planning documents requires the presence of witnesses. Under Indiana Code § 29-1-5-3, a will must be attested "in the presence of two (2) or more" witnesses. These witnesses must sign in the presence of the testator and each other. Ind. Code § 29-1-5-3(b)(2). Similarly, Indiana Code § 16-36-4-8 requires living wills to be executed in the presence of two witnesses.

For an electronic will, the testator and the attesting witnesses must be in each other's "actual presence" when the electronic signatures are made and the testator and witnesses must "directly observe one another" as the electronic will is being signed. Ind. Code § 29-1-21-4(a)(1). The statute relating to electronic wills requires various other things to occur in "in the actual presence of" the witnesses to properly attest and execute an electronic will. Ind. Code § 29-1-21-4(a). Indiana Code § 29-1-21-3 defines "actual presence" as the witness is "physically present in the same physical location as the testator" and "does not include any form of observation or interaction that is conducted by means of audio, visual, or audiovisual telecommunication or similar technological means."

Prior to the recent COVID-19 orders, a will was not entitled to probate where the witnesses and testator were out of each other's presence when they signed the document and the witnesses failed to observe the attestation of the decedent. *See Flagle v. Martinelli,* 360 N.E.2d 1269 (Ind.

Ct. App. 1977). However, for the time being, the recent orders relax this requirement. Instead, remote witnessing and notarization accomplished via audio-visual teleconferencing technology appears to be at least a temporary substitute for the "in the presence of" requirement.

5. Indiana Supreme Court's Orders Relaxing Execution Requirements.

As a result of the ongoing COVID-19 pandemic, the Indiana Supreme Court issued various orders that modified and relaxed the requirements relating to the execution of wills and other documents. First, on March 31, 2020, the Indiana Supreme Court issued an Order, under the caption *In the Matter of Emergency Procedures for the Witnessing of Wills Relating to the 2019 Novel Coronavirus (COVID-19),* suspending the provisions of Indiana Code chapters §29-1-5 and §29-1-21 which require a testator and two attesting witnesses to be physically present together when executing a will and self-proving clause. The Order specifically provided that the Indiana Supreme Court "temporarily deems as substantial compliance" with these provisions to include "simultaneous or contemporaneous remote appearance by audio-visual communication technology." The March 31, 2020 Order went on to require the following:

1. The document being executed references the Order preceding the attestation or self-proving clause;
2. The document contains a description, within an attestation or self-proving clause, of the methods used for remote appearance and for securing signatures by specifying the technology platform and electronic processes used within an attestation or self-proving clause;
3. The document contains a statement, preceding the attestation or self-proving clause, which acknowledges or confirms that the document shall be re-ratified or re-executed in compliance with regular statutory witness procedures "within 90 days after the health emergency expires."

On May 1, 2020, the Indiana Supreme Court issued a second Order confirming that the March 31, 2020 Order shall remain in effect until further order from the Court "declaring that the 'health emergency' contemplated in this matter has expired."

On May 29, 2020, in Supreme Court Case No. 20S-CB-123, the Indiana Supreme Court issued a third Order providing that the previously issued orders regarding modified procedures for witnessing wills "shall expire at 12:01 a.m. on January 1, 2021." The May 29, 2020 Order also provided that "all laws, rules, and procedures setting time limits . . . in all other civil and criminal matters before Indiana trial courts" are tolled through August 14, 2020.

The language in the May 29, 2020 Order is likely general enough to apply to all statutory deadlines under the Probate Code with respect to estate administration, will contests, elections against the will, etc., including the deadlines for filing creditor claims and objections to closing statements. This potentially means that if a testator dies prior to August 14, 2020, the creditor would have until nine months after August 14th to file a will dispute. However, it is possible that probate courts across the state may interpret this language differently.

6. Other States' Reaction to Pandemic and Remote Execution.

In light of the COVID-19 pandemic and mounting pressure from legal advocacy groups, states across the country have issued similar orders relaxing the general execution requirements and allowing remote witnessing and notarization. The American College of Trust and Estate Counsel has aggregated information on which states have passed emergency remote notarization and remote witnessing orders. This information can be found at https://www.actec.org/emergency-remote-notarization-and-witnessing-orders/.[1]

As of March 2020, twenty-three states have passed laws that enable their notaries to conduct remote notarizations for one purpose or another on a permanent basis. These states include: Arizona, Florida, Idaho, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin. Nearly every other state legislature has submitted a remote online notarization bill for consideration and most have at least allowed temporary remote notarization during the ongoing pandemic.

However, far fewer states allow for the remote witnessing of wills. States that temporarily allow both remote witnessing and notarization of wills include: Alabama, Alaska, Arkansas, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, New York, North Carolina, Tennessee, and Wyoming. In the vast majority of these states, the relevant orders are open ended and stay in effect until the "state of emergency ends."

Some states require notaries, witnesses, and/or the testator to be physically present within the state while others allow for witnesses to be located anywhere. Indiana does not have a requirement that such signatories be located within the State of Indiana. Maine, New York, and Tennessee require the individual signing the document to either show a photo identification at the time of the execution or be personally known to the notary. In addition, Maine requires that before any documents are signed, the notary must be able to view by camera the entire space in which the signatory and any witness is located. In other words, Maine requires a 360-degree scan of the rooms in which witnesses and/or testators are located. Maine is the only state that we are aware that requires such a scan, but as will be discussed below, this is probably advisable to potentially avoid a future contest regarding the validity or proper execution of the document.

Similar to the language required by the Indiana Supreme Court, some other states have particular language required in documents where remote execution procedures have been utilized. For instance, in Alaska, a will must contain the following language:

[1] The website makes clear that "LAWS ARE RAPIDLY CHANGING IN RESPONSE TO COVID19 AND INFORMATION CONTAINED HEREIN IS SUBJECT TO CHANGE."

> Under penalty of perjury, I assert that I am a member of a group that has been declared by the World Health Organization or the United States Centers for Disease Control and Prevention to be at higher risk for severe illness from novel coronavirus disease (COVID-19), or I have been advised by a health care provider or a state, local, or federal agency that being in the physical presence of others may expose me or others to a health risk related to novel coronavirus disease (COVID-19).

Alaska also requires that the witness statement contain the following language:

> Under penalty of perjury, I assert that (1) the testator has informed me that the testator is a member of a group that has been declared by the World Health Organization or the United States Centers for Disease Control and Prevention to be at higher risk for severe illness from novel coronavirus disease (COVID-19), or I have been advised by a health care provider or a state, local, or federal agency that being in the physical presence of others may expose me or others to a health risk related to novel coronavirus disease (COVID-19); and (2) I am satisfied that the will to which this statement is attached is either the original will signed by the testator or is an exact facsimile of the original will.

Delaware requires a statement or a separate certification that it was "notarized and/or witnessed pursuant to the 11th Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat approved on April 15, 2020, and provide the Authorized Notarial Officer's Name and Bar Number/License Number."

To our knowledge, Indiana is the only state that currently requires estate documents to be re-executed after the state of emergency expires.

7. <u>Potential Challenges and Defenses.</u>

The COVID-19 pandemic prompted a large number of people to think about their estate-planning needs. Without the issuance of Indiana's and other states' orders at least temporarily allowing for the remote execution of estate-planning documents, many individuals would have been unable to obtain assistance to properly execute such estate-planning documents. To request witnesses and/or notaries to physically participate in a document execution ceremony is irresponsible, and in many cases, impossible due to various state and federal stay at home orders or social distancing requirements. The Indiana Supreme Court's Orders temporarily permit a person to duly execute their estate planning documents in the virtual presence of the requisite witnesses and/or notaries, while all remain socially distanced in their own homes or offices. The Indiana Supreme Court's Orders avoid the risk of exposure to the COVID-19 virus and provide for those most susceptible to have their estate-planning documents properly executed.

While these temporary protocols are a welcome measure, the concept of remote witnessing and notarization is novel. It remains to be seen how Indiana's courts and legal practitioners will adapt

to the use of remote witnessing procedures, including whether additional testimony will be sought from witnesses or others where the procedures are employed. It also remains to be seen whether dissatisfied beneficiaries or other interested persons will assert novel legal theories to attempt to set aside an estate-planning document where remote witnessing or notarization was used.

On the other hand, the use of remote witnessing procedures might make it easier to get a will or other document signed through duress, impersonation, undue influence, or concealment of the testator's lack of capacity. It can be assumed that a video camera and/or audio-video teleconferencing technology is going to show a remote witness less information and a narrower field of view than what that same witness would see if he were in the same room with the testator. As discussed above, only Maine requires a 360-degree scan of the rooms in which the testator or witnesses are located. Without such a scan, it is probably only a matter of time before a will is contested alleging that the will was executed under duress as a result of intimidation from another individual present in the room who may not have been visible on camera.

Lack of or improper publication seems to be another potential issue that may result from remote execution. As previously stated, the purpose of publication is to assure the witnesses are aware that the testator knows he is about to execute a will, in order to lessen the likelihood of fraud. If the witness is not physically present in the same room, how can the witnesses confirm that he or she is signing the same document as the testator or that the testator is fully aware of what he or she is signing?

Finally, what about situations where remote witnessing or notarization is necessary, however it is not possible for the testator to digitally or electronically sign a document? In other words, how do you deal with a situation where a testator is physically isolated and unable to physically exchange the "paper original" of the document that is to be signed and witnessed? This potential scenario involves a situation where (a) the testator and the witnesses are physically separate for social distancing or other reasons, (b) the testator or witnesses interact through audio-video technology, and (c) it is impossible or not feasible to physically transfer a single paper original from the testator's location to the location of the witnesses within a reasonable time frame after the testator signs. Tennessee, which temporarily allows for both remote witnessing and notarization of a will, contemplated this situation and provided that the remote execution, witnessing or notarization of a document must be memorialized by either: (1) persons, while in different locations, execute, witness, or notarize separate signature pages in counterparts; or (2) the document is executed by the signatory, and then the applicable notary public or witness no later than ten calendar days from the date of the execution of the document. *See* April 9, 2020 Executive Order No. 26.

For these reasons, in-person witnessing remains preferable in cases where the testator and others are able to take adequate measures to protect health and safety. However, this is not always achievable and attorneys should develop their own best practices, with the understanding that there may be a time when these documents are probated and/or contested.

8. **Recommended Practices.**

A practitioner should first consider what type of estate planning document(s) are necessary. As previously stated, the execution requirements for revocable trusts are less rigorous compared to wills, which may make a revocable trust a good alternative if the current circumstances do not permit the execution of a valid will. Given that the challenges to trusts are similar to wills, this does not mean that one would avoid potential challenges relating to the capacity of the settlor or potential undue influence.

If the remote witnessing of a document is going to be accomplished through the use of audio-video technology (e.g. Facetime, Zoom, Skype), it is advisable to record and maintain a comprehensive video recording of the proceeding. A practitioner employing an audio-visual technology would be best served to ensure that all parties can see each other and all stay within view of the camera. A practitioner should consider asking whether there are any other individuals in the rooms and if so, what is their relationship. While not required in Indiana, a 360-degree scan of the room in which the testator is located may avoid contests down the road that the testator executed the document under duress.

Next, some states such as Indiana require language in the documents relating to the use of remote witnessing. In order to avoid contests relating to lack of publication, it is advisable that such language also be expressed and recorded in any video recording. For example, it is recommended that the testator and witnesses confirm both orally and in writing that in-person witnessing, within the same physical space and with direct "actual presence," could not be arranged or accomplished as a result of the ongoing COVID-19 pandemic. Such a statement may be included in the will and audio-video recording and may include the following:

> I, _______, intend the foregoing instrument dated ________, 2020 to constitute my valid Last Will and Testament. Due to the COVID-19 pandemic, I am unable to sign (or have determined that it is not safe for me to sign) my will in the physical presence of my two individual witnesses. However, my attorney, _______, and _______________, have remotely witnessed my signed of this Will by [Facetime/Skype/Zoom, etc.].

Keep in mind, a recording of the execution ceremony may provide ammunition for those who later wish to challenge the validity of a remotely witnessed will or other document. Certain elderly testators or those who have significant disabilities may satisfy the low threshold of possessing testamentary capacity, but may not come across as competent in the audio-video recording.

As discussed above, Indiana law currently requires the re-execution of documents in compliance with regular statutory witness procedures "within 90 days after the health emergency expires." As such, a practitioner should schedule with the client to re-execute the document in person once it is feasible and acceptable to do so.

Finally, besides developing your own best practices, a practitioner should attempt to maintain consistency. This way when a contest does arise, a practitioner can testify that "this is what I've done for every will I have prepared and executed remotely."

9. Proposed Indiana Legislation.

Lastly, the Indiana State Bar Association Probate Review Committee is working on proposed amendments to statutes that would address remote witnessing and notarization issues and make it easier for anyone who has capacity to sign a valid will or durable power of attorney, either on paper or with electronic signatures. The following proposed amendments are being discussed:

- For traditional wills or codicils, add specific definitions of "observe" and "presence" to Indiana Code § 29-1-3-1 so that the "in the presence of" requirement is satisfied by the testator's and the attesting witnesses' use of audio-video technology to interact with each other throughout the signing and witnessing process;

- Amend Indiana Code § 29-1-5-3 to allow a traditional will or codicil to be signed by the testator and witnesses on separate paper counterparts that are later assembled into a single document;

- For electronically signed wills and codicils, revise the definition of "presence" and add a definition of "observed" in Indiana Code § 29-1-21-3 so that the "in the presence of" requirement is satisfied for an electronic will if the testator and witnesses use audio-video technology to interact with each other;

- Add a pair of provisions to Indiana Code § 29-1-5 (for wills signed on paper) and Indiana Code § 29-1-21 (for electronically signed wills) to make it unnecessary for the testator and witnesses to re-execute or re-ratify the will in a face-to-face setting as currently required under Indiana Supreme Court's March 31, 2020 emergency order;

- For powers of attorney signed on paper or electronically, amend the relevant sections in Indiana Code § 30-5-4 and in Indiana Code § 30-5-11 to allow the principal to sign the power of attorney in the presence of two attesting witnesses as an alternative instead of signing and acknowledging the power of attorney in the presence of a notary public;

- Allow a power of attorney signed on paper (under Indiana Code § 30-5-4-1) to be signed by the principal and the witnesses in separate "counterparts" that are later assembled into a single document that combines the complete text of the power of attorney with the signatures of the principal and both witnesses.

- Add a provision to Indiana Code § 30-5-11 to retroactively validate all durable powers of attorney that were electronically signed and notarized on or after March 31, 2020 in

reliance on the Indiana Supreme Court's emergency order, so that it is not necessary for the principal to re-execute the power of attorney with notarization under current law.

COVID-19'S EFFECT ON "IN THE PRESENCE OF" REQUIREMENT AND OTHER EXECUTION REQUIREMENTS OF ESTATE-PLANNING DOCUMENTS

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Execution Requirements for Wills

- Indiana Code § 29-1-5-3(a) - must be executed by the signature of the testator and at least two (2) witnesses.
- Publication required, and consists of the act of making it known in the presence of witnesses that the instrument to be signed is the testator's last will and testament. *Callaway v. Callaway,* 932 N.E.2d 215, 220 (Ind. Ct. App. 2010).
- Accomplished when the testator, in the presence of two (2) or more attesting witnesses, signifies to the witnesses that the instrument is the testator's will and then either:
  - signs the will;
  - acknowledges the testator's signature already made; or
  - at the testator's direction and in the testator's presence, has someone else sign the testator's name.

Execution Requirements for Wills (Cont'd)

- For a valid will, the witnesses must both:
  - Either witness the testator's signature to the will, witness the signature of someone who signs the will at the testator's direction, or have the testator acknowledge the testator's signature to the witnesses if the testator previously signed the will.
  - Execute the will or a self-proving clause attached to the will in the testator's and each other's presence.

Ind. Code § 29-1-5-3.

- The attesting witnesses must sign in the presence of the testator and each other. Ind. Code § 29-1-5-3(b)(2).
- Electronic wills now permitted in Indiana and the basic requirements are the same.

Execution Requirements for Trusts

- Simpler than wills
- Revocable trust requires the settlor's or the settlor's authorized agent's signature on written evidence of the terms of the trust. Ind. Code § 30-4-2-1(a).
- Trustee must accept the trust and the signature of the person named as trustee on the trust instrument or in a separate written acceptance is conclusive evidence that the named person accepted the trust. Ind. Code § 30-4-2-2(b).
- Revocable trust is not required to be witnessed.
- Revocable trust is not required to be notarized.

Execution Requirements for Power of Attorney

- A power of attorney must:
  - be in writing,
  - name an attorney in fact,
  - give the attorney in fact the power to act on behalf of the principal,
  - be signed by the principal or at the principal's direction in the presence of a notary public.

Ind. Code § 30-5-4-1.

Execution Requirements for Living Wills

- A living will can only be made by an individual who is eighteen (18) years of age, competent, and of sound mind. Ind. Code § 16-36-4-8(a).
- A living will declaration must be:

  (1) voluntary,

  (2) in writing,

  (3) signed by the person making the declaration or by another person in the declarant's presence and at the declarant's express direction,

  (4) dated, and

  (5) signed in the presence of at least two (2) competent witnesses who are at least eighteen (18) years of age.

Challenges to Estate-Planning Documents

- Under Indiana Code § 29-1-7-17, any interested person may contest the validity of a will within three (3) months after the date of the order admitting the will to probate by filing a separate cause of action in the same court.
- The contesting party must submit a verified affidavit setting forth:
  - (1) the testator's unsoundness of mind,
  - (2) the undue execution of the will,
  - (3) that the will was executed under duress or was obtained by fraud, or
  - (4) any other valid object to the will's validity.

Challenges to Estate-Planning Documents (Cont'd)

- When contesting the validity of a revocable trust, Indiana Code § 30-4-6-14(a) provides that such a challenge must be commenced within the earlier of:
  - Ninety (90) days after the contesting party receives from the trustee a copy of the trust certification and notice; or
  - Three (3) years after the settlor's death.

- In regard to challenging a trust, the same challenges that one may make in regard to a will (i.e. incapacity, undue influence, fraud), may be asserted in regard to the validity of a trust.

Incapacity

- Indiana law presumes that every person is of sound mind to execute a will until the contrary is shown. *Gast v. Hall,* 858 N.E.2d 154, 165 (Ind. Ct. App. 2006).
- To rebut this presumption and prove a testator was incapacitated at the time of executing a will, a party must show that the testator lacked the capacity to know (1) the extent and value of his property; (2) those who are the natural objects of his bounty; and (3) their deserts, with respect to their treatment of and conduct toward him. *Hays v. Harmon,* 809 N.E.2d 460, 464 (Ind. Ct. App. 2004).
- In other words, "[t]he real question is the mental soundness of the testator, whether his mind was, in fact, unduly influenced in the making of the will. *Kronmiller v. Wangberg,* 665 N.E.2d 624, 628 (Ind. Ct. App. 1996).
- Mere unsoundness of mind is not itself sufficient to show a testator lacked testamentary capacity. In *Spry v. Logansport Loan & Trust Co.,* 133 N.E. 827 (Ind. 1922), the Indiana Supreme Court held that a person contesting a will must also show that the mental condition influenced or controlled the testator in disposing of his property.

Undue Influence

- Undue influence is "the exercise of such control by one person over another person so as to destroy his or her free agency and compel him or her to do something he or she would not have done if such control had not been exercised." *Scribner,* 953 N.E.2d at 484 (*citing Carlson v. Warren,* 878 N.E.2d 844, 851 (Ind. Ct. App. 2007)).
- "Such control may result from the abuse of a relationship in which confidence is reposed by one party in another with resulting superiority and influence exercised by the other." *Id.*
- In order to prove undue influence, a party contesting a will or trust must prove:
  - the exercise of sufficient control over the person,
  - the validity of whose act is brought into question,
  - to destroy his [or her] free agency and constrain him [or her] to do what he would not have done if such control had not been exercised.

Undue Influence (Cont'd)

- Can be proven by circumstantial evidence
- Courts consider the following factors:
  - the character of the beneficiary [i.e. if testator is subordinate to beneficiary];
  - any interest or motive the beneficiary might have to unduly influence the testator; and
  - the facts and surrounding circumstances that might have given the beneficiary an opportunity to exercise such influence.

Undue Influence (Cont'd)

- Certain relationships raise a presumption of confidence and trust as to the subordinate party on the one hand and a corresponding influence as to the dominant party on the other. *In re Estate of Wade*, 768 N.E.2d 957, 961 (Ind. Ct. App. 2002) (citing *Lucas v. Frazee,* 471 N.E.2d 1163, 1166 (Ind. Ct. App. 1984)).
- Relationships included in this category are those of the attorney and client, guardian and ward, principal and agent, pastor and parishioner, and parent and child.
- The law will impose a presumption that a transaction was the result of undue influence where the plaintiff's evidence shows:
  - (a) there was such a relationship, and
  - (b) the dominant party benefits from a questioned transaction.
- Once this presumption is established, the burden shifts to the dominant party to rebut the presumption by clear and convincing proof. *Id.* A dominant party may rebut the presumption by establishing that he acted in good faith, did not take advantage of his position of trust, and that the transaction was fair and equitable. *Id.*

Fraud

- Indiana courts define the elements of fraud as:
  - material misrepresentations of past or existing facts;
  - which misrepresentation is made with knowledge or reckless ignorance of the falsity; and
  - which causes reliance to the detriment of the person relying.

Indiana's Remote Notarial Acts Statute

- In 2018, the Indiana General Assembly recognized the remote notarization of documents.
- On July 1, 2019, Indiana's Remote Notarial Acts statute, codified at Indiana Code § 33-42-17, became effective.
- Remote notarization permits a notary who is outside the physical presence of an individual to use audio-visual communication technology to notarize an act.

Indiana's Remote Notarial Acts Statute (Cont'd)

- Under Indiana Code § 33-42-17-2(a), a notary public may perform a remote notarial act only after registering as a remote notary public with the secretary of state.
- Under Indiana Code § 33-42-17-3(b), a remote notary public who is physically present in Indiana may perform the following notarial acts as remote notarial acts:
  - taking an acknowledgment;
  - administering an affirmation or oath;
  - taking a verification on an oath or affirmation;
  - attesting to or witnessing a signature; or
  - attesting to or certifying a copy of a document or record.

Indiana's Remote Notarial Acts Statute (Cont'd)

- The statute goes on to provide that "if a remote notarial act relates to a statement made in or a signature executed on a record, the principal shall appear before the remote notary public:
  - (1) physically; or
  - (2) by means of audiovisual communication described in section 6 of this chapter."
- In regard to the audiovisual component, the statute provides several guidelines as to what technology is acceptable and how the recording of the notarial act should be conducted.
- The technology must first be approved by the secretary of state. Ind. Code § 33-42-17-6(a).
- A list of the approved "Remote Notary Technology Vendors" can be found on the Indiana Secretary of State's website at https://inbiz.in.ogv/certification/notary#verticalTab5.

Indiana's Remote Notarial Acts Statute (Cont'd)

- Remote notarial act must be recorded.
- The parties must be informed of the recording and the recording must include the following:
  - A recitation of the following by the remote notary public:
    - Identification of the specific remote notarial act performed.
    - A statement explaining one (1) of the following:
      - That the principal's identity is authenticated through the remote notary public's personal knowledge of the principal's identity.
      - That the identity of the principal is authenticated by a credible witness
  - A confirmation by the principal that the principal's electronic signature is freely and voluntarily issued.

Indiana's Remote Notarial Acts Statute (Cont'd)

- The identity of the principal may be verified by any of the following:
  - The remote notary public's personal knowledge of the principal's identity.
  - A credible witness's knowledge of the principal's identity.
  - All of the following:
    - Remote presentation by the principal of a credential identifying the principal.
    - Credential analysis and visual inspection by the remote notary public of the credential described in clause (a).
    - Identity proofing of the principal, which may include a dynamic knowledge based authentication assessment or use of a public key infrastructure.
  - Another method that uses technology that meets or exceeds the standards for approval established by the secretary of state under Ind. Code § 33-42-16-2.

Ind. Code § 33-42-17-5.

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"In The Presence Of"

- The execution of various estate planning documents requires the presence of witnesses.
- Various statutes require "actual presence" of witnesses and the testator
- Indiana Code § 29-1-21-3 defines "actual presence" as the witness is "physically present in the same physical location as the testator" and "does not include any form of observation or interaction that is conducted by means of audio, visual, or audiovisual telecommunication or similar technological means."
- Prior to the recent COVID-19 orders, a will was not entitled to probate where the witnesses and testator were out of each other's presence when they signed the document and the witnesses failed to observe the attestation of the decedent. *See Flagle v. Martinelli,* 360 N.E.2d 1269 (Ind. Ct. App. 1977).

Indiana Supreme Court Orders

- On March 31, 2020, the Indiana Supreme Court issued an Order suspending the provisions of Indiana Code chapters §29-1-5 and §29-1-21 which require a testator and two attesting witnesses to be physically present together when executing a will and self-proving clause.
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Other States' Reactions to COVID-19 Pandemic

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- https://www.actec.org/emergency-remote-notarization-and-witnessing-orders/.
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Potential Challenges

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- Will additional testimony be sought from witnesses or others where the procedures are employed?
- Will dissatisfied beneficiaries or other interested persons assert novel legal theories to attempt to set aside an estate-planning document where remote witnessing or notarization was used?

Potential Challenges (Cont'd)

- Remote witnessing procedures might make it easier to get a will or other document signed through duress, impersonation, undue influence, or concealment of the testator's lack of capacity.
- Only Maine requires 360 degree scan of the room
- Intimidation from individual not visible in recording?
- Issues relating to publication?

Recommended Practices

- Consider what type of estate-planning documents are necessary?
- If remote witnessing is necessary:
  - Record and maintain comprehensive video recording of the proceeding
  - Ensure that all parties can see each other and all stay within view of the camera.
  - Ask whether there are any other individuals in the rooms and if so, what is their relationship.
  - 360-degree scan of the room in which the testator is located may avoid contests down the road that the testator executed the document under duress.

Recommended Practices (Cont'd)

- Required language in documents and expressed and recorded in any video recording.
- Schedule a time to re-execute the document in person once it is feasible and acceptable to do so.
- Maintain consistency

Proposed Legislation

- For traditional wills or codicils, add specific definitions of “observe” and “presence” to Indiana Code § 29-1-3-1 so that the “in the presence of” requirement is satisfied by the testator’s and the attesting witnesses’ use of audio-video technology to interact with each other throughout the signing and witnessing process;
- Amend Indiana Code § 29-1-5-3 to allow a traditional will or codicil to be signed by the testator and witnesses on separate paper counterparts that are later assembled into a single document;
- For electronically signed wills and codicils, revise the definition of “presence” and add a definition of “observed” in Indiana Code § 29-1-21-3 so that the “in the presence of” requirement is satisfied for an electronic will if the testator and witnesses use audio-video technology to interact with each other;
- Add a pair of provisions to Indiana Code § 29-1-5 (for wills signed on paper) and Indiana Code § 29-1-21 (for electronically signed wills) to make it unnecessary for the testator and witnesses to re-execute or re-ratify the will in a face-to-face setting as currently required under Indiana Supreme Court’s March 31, 2020 emergency order;

Proposed Legislation (Cont'd)

- For powers of attorney signed on paper or electronically, amend the relevant sections in Indiana Code § 30-5-4 and in Indiana Code § 30-5-11 to allow the principal to sign the power of attorney in the presence of two attesting witnesses as an alternative instead of signing and acknowledging the power of attorney in the presence of a notary public;
- Allow a power of attorney signed on paper (under Indiana Code § 30-5-4-1) to be signed by the principal and the witnesses in separate "counterparts" that are later assembled into a single document that combines the complete text of the power of attorney with the signatures of the principal and both witnesses.
- Add a provision to Indiana Code § 30-5-11 to retroactively validate all durable powers of attorney that were electronically signed and notarized on or after March 31, 2020 in reliance on the Indiana Supreme Court's emergency order, so that it is not necessary for the principal to re-execute the power of attorney with notarization under current law.

Section Six

PROBATE AND TRUST MEDIATION

PROBATE AND TRUST LITIGATION

ICLEF

August 28, 2020

Michael P. Bishop

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Section Six

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I.

PERFECTING THE MEDIATED SETTLEMENT

A.

IC 29-1-9
Chapter 9. Adjudicated Compromise of Controversies

IC 29-1-9-0.1
Application of certain amendments to chapter

Sec. 0.1. The amendments made to section 2 of this chapter by P.L.118-1997 do not apply to an individual whose death occurs before July 1, 1997.
As added by P.L.220-2011, SEC.475.

IC 29-1-9-1
Persons represented; creditors; taxing authorities

Sec. 1. The compromise of any contest or controversy as to:
(a) admission to probate of any instrument offered as the last will of any decedent,
(b) the construction, validity or effect of any such instrument,
(c) the rights or interests in the estate of the decedent of any person, whether claiming under a will or as heir,
(d) the rights or interests of any beneficiary of any testamentary trust, or
(e) the administration of the estate of any decedent or of any testamentary trust,
whether or not there is or may be any person interested who is a minor or otherwise without legal capacity to act in person or whose present existence or whereabouts cannot be ascertained, or whether or not there is any inalienable estate or future contingent interest which may be affected by such compromise, shall, if made in accordance with the provisions of this article, be lawful and binding upon all the parties thereto, whether born or unborn, ascertained or unascertained, including such as are represented by trustees, guardians of estates and guardians ad litem; but no such compromise shall in any way impair the rights of creditors or of taxing authorities.
(Formerly: Acts 1953, c.112, s.901.) As amended by Acts 1982, P.L.171, SEC.27.

IC 29-1-9-2
Terms of agreement; execution; guardian ad litem

Sec. 2. (a) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons having interests or claims which will or may be affected by the compromise, except those who may be living but whose present existence or whereabouts is unknown and cannot after diligent search be ascertained.

(b) Any interested person may then submit the agreement to the court for its approval and for the purpose of directing the agreement's execution by the personal representative of the estate, by the trustees of every testamentary trust which will be affected by the compromise, and by the guardians of the estates of minors, of incapacitated persons, of unborn and unascertained persons, and of persons whose present existence or whereabouts is unknown and cannot after

diligent search be ascertained, who might be affected by the compromise.

(c) IC 29-1-1-20 applies if there is any person who, if living, has an interest which may be affected by the compromise, but whose present existence or whereabouts cannot after diligent search be ascertained, or who is a minor or incapacitated and has no guardian of the estate, or if there is any future contingent interest which might be taken by any person not then in being and which might be affected by the compromise.

(Formerly: Acts 1953, c.112, s.902.) As amended by P.L.33-1989, SEC.38; P.L.118-1997, SEC.18.

IC 29-1-9-3

Notice; order approving agreement

Sec. 3. Upon due notice, in the manner directed by the court, to all interested persons in being, or to their guardians, and to the guardians of all unborn persons who may take contingent interests by the compromise, and to the personal representative of the estate and to all trustees of testamentary trusts which would be affected by the compromise, the court shall, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries is just and reasonable, make an order approving the agreement and directing the fiduciaries and guardians ad litem to execute such agreement. Upon the making of such order and the execution of the agreement, all further disposition of the estate shall be in accordance with the terms of the agreement.

(Formerly: Acts 1953, c.112, s.903.)

B.

IC 30-4-7

Chapter 7. Adjudicated Compromise of Controversies

IC 30-4•7-1
Application of chapter

Sec. I. This chapter applies to the compromise of a contest or controversy with respect to the following:

(!) The construction, validity, or effect of a trust instrument.
(2) The identity, rights, or interests of a beneficiary of a trust.
(3) The administration of a trust.

As added by P.L.200-1991, SEC.6.

IC 30-4-7-2
Binding effect of compromise

Sec. 2. A compromise executed under this chapter is binding on all parties to the compromise, including a party represented by a guardian or guardian ad !item.

As added by P.L.200-1991, SEC.6.

IC 30-4-7-3
Rights of creditors or taxing authorities

Sec. 3. A compromise executed under this chapter does not impair the rights of creditors or taxing authorities that are not parties to the compromise.

As added by P.L.200-1991, SEC.6.

IC 30-4-7-4
Appointment of guardian or guardian ad litem

Sec. 4. The court may appoint a guardian or a guardian ad !item to represent the following persons or interests in a compromise executed under this chapter if the persons or interests do not have a guardian or guardian ad !item:

(!) A minor.
(2) A person who is without legal capacity to personally act.
(3) A person whose present existence or whereabouts cannot be ascertained.
(4) A person who is not yet born or adopted.
(5) An inalienable estate.
(6) A future contingent interest.

As added by P.L.200-1991, SEC.6.

IC 30-4-7-5
Law governing appointment of guardian or guardian ad !item

Sec. 5. IC 29-1-1-20 applies to the appointment of a guardian or guardian ad !item under section 4 of this chapter.

As added by P.L.200-1991, SEC.6.

IC 30-4-7-6
Agreement of compromise

Sec. 6. The terms of a compromise executed under this chapter

must be set forth in an agreement that is:

(1) in writing; and

(2) executed by all persons or the guardians or guardians ad litem appointed under section 4 of this chapter of all persons who:

(A) have an interest in the trust; or

(B) have a claim against the trust.

As added by P.L.200-1991, SEC.6.

IC 30-4-7-7

Docket of documents

Sec. 7. After a compromise is executed, an interested person may docket the trust and submit the following documents to the court for the court's approval:

(1) The agreement executed under section 6 of this chapter.

(2) A copy of the trust instrument.

(3) Any other relevant documents.

As added by P.L.200-1991, SEC.6.

IC 30-4-7-8

Notice and hearing on agreement

Sec. 8. After notice has been given in the manner directed by the court to:

(1) all interested persons;

(2) the guardians or guardians ad litem of interested persons;

(3) the personal representative of an estate affected by the agreement; and

(4) the trustee of a trust affected by the agreement;

the court shall hold a hearing on the agreement.

As added by P.L.200-1991, SEC.6.

IC 30-4-7-9

Court order

Sec. 9. If the court finds:

(1) the contest or controversy is in good faith; and

(2) the effect of the agreement on the interests of all the parties is just and reasonable;

the court shall enter an order approving the agreement submitted under section 7 of this chapter and directing the trustee and the parties to the agreement to carry out the terms of the agreement.

As added by P.L.200-1991, SEC.6.

IC 30-4-7-10

Effect of entry of order

Sec. 10. If the court enters an order under section 9 of this chapter, all further disposition of the trust that is within the scope of the agreement shall be made under the terms of the agreement.

As added by P.L.200-1991, SEC.6.

C.

30-4-5-25 Nonjudicial settlement agreements; validity; matters which may be resolved; declaratory relief

Sec. 25. (a) As used in this section, "interested person" means a person whose consent would be required to achieve a binding settlement were the settlement to be approved by the court.

(b) Except as provided in subsection (c), an interested person may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust. This procedure is not intended to foreclose or limit any other procedure for settlement available under other applicable law.

(c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this article or other applicable law. A nonjudicial settlement may not be used to produce a result not authorized by other provisions of this article, including but not limited to terminating or modifying a trust in an impermissible manner.

(d) Subject to subsection (c), matters that may be resolved by a nonjudicial settlement agreement include the following:

(1) The interpretation or construction of the terms of a trust.

(2) The approval of a trustee's report or accounting or waiver of the preparation of a trustee's report or accounting.

(3) Direction to a trustee to refrain from perfom1ing a particular act or the grant to a trustee of any necessary or desirable power.

(4) The resignation or appointment of a trustee and the detem1ination of a trustee's compensation.

(5) Transfer of a trust's principal place of administration.

(6) Liability or release of a trustee for an action relating to a trust.

(7) The criteria for distribution to a beneficiary where a trustee is given discretion.

(8) The resolution of a dispute arising out of the administration or distribution of a trust.

(9) An investment action.

(10) The appointment of and powers granted to a trust director.

(11) Direction to a trust director to perform or refrain from performing a particular act or the grant of a power to a trust director.

(e) Before or after the parties enter into a nonjudicial settlement agreement, an interested person may request the court to approve a nonjudicial settlement agreement to detem1ine whether the representation under IC 30-4-6-10.5 was adequate and to detennine whether the agreement contains tenns and conditions the court would approve.

As added by P.L.221-2019, SEC.7, eff. July 1, 2019. Amended by P.L.231-2019, SEC.28, eff. July 1, 2019.

II.

SAMPLE MEDIATION STATEMENTS AND AGREEMENTS

<u>A.</u>

June 3, 2016

CONFIDENTIAL MEDIATION STATEMENT

Re: Estate of _______

Dear Mediator:

This letter will serve as the Confidential Mediation Statement of Beth_______ , as Personal Representative of the Estate of _______, deceased; Beth___, as Trustee of the 2006_____ Revocable Trust; Beth ____, as Personal Representative of the Estate of________, deceased; Christy ____; and Mary _____.

I. Facts

Beth , Christy , and Mary t are biological daughters of the decedent, ________ (Ken). Ken divorced their biological mother and married Karen _____ in 1977. Karen had a son from a previous marriage, Scott____. Scott was approximately 2 years old at the time his mother married Ken. Scott was never adopted by Ken.

The three girls and Scott never lived together as a family at one time, as the three girls were older than Scott and lived for some time with their mother. Christy and Mary Kay moved out of Indiana and Beth remained. She maintained a close relationship with Ken and a cordial relationship with Karen and Scott. Scott is married to Marcy_______ and has two young children.

In 2004, Ken was 72 years of age and Karen was 57 years of age. On April 4, 2004, Karen signed a will that left all of her assets to Ken and then after his death, to Scott, Beth, Christy, and Mary Kay, equally. It has been alleged that Ken signed an identical will on the same day. This will has never been located. At the time Karen signed her will, all of her assets, including her retirement funds from _____, were either titled jointly with Ken or provided that Ken would be the beneficiary.

On October 1, 2005, Karen died as a result of a defective medical device and medical negligence. On April 27, 2006, Karen's will was spread of record but no estate administration was required.

On April 27, 2006, Ken signed a pour over will and revocable trust that were prepared by _____. These documents provided that Beth and Scott would serve as co-personal representatives and trustees and that all assets would be divided equally between Scott, Beth, Christy and Mary Kay.

On September 14, 2006, Ken opened a probate estate for Karen to file a wrongful death claim being handled by _________. Ken was appointed the personal representative of the estate.

Prior to Karen's death, Ken gave Scott and Marcy a lot that was located directly behind his residence. Scott and Marcy built a home on this lot and lived behind Ken and Karen. After Karen's death, Scott and Marcie continued to look in on Ken, help him with yard work, and occasionally prepare meals for him. During the summer of 2006, Marcy would visit with Ken in his home where they would share a cocktail or wine. On some of these occasions, Marcy would confide in Ken regarding marital problems with Scott and other issues regarding Scott's personality. On one of these visits in August, 2006, Ken propositioned Marcy. Marcy rebuked him and left Ken's home. There was little or no contact with Marcy and Scott until September, 2006. Ken was planning a yard sale of Karen's belongings and Beth, Mary Kay and Marcy agreed to conduct the sale. As Beth was preparing the items for display, Marcy approached her and explained the sexual advances by Ken. This was the first time that Beth had heard of this event. Soon thereafter, Beth was in Ken's home when Scott barged in the back door and, in an angry tone, uttered profanities at Ken regarding the incident with Marcy.

On October 12, 2006, Ken signed a new pour over will and an amended revocable trust prepared by _____. This estate plan provided that Beth would be the personal representative and trustee, and left all of Ken's assets to Beth, Christy, and Mary Kay, equally. Scott was not listed as a beneficiary in either the will or trust.

According to Scott, Marcy, Scott, and Ken reconciled in October, 2006. For a brief period after the incident, Scott and Marcy would not allow Ken to visit their two daughters. Until that time, Ken was a frequent visitor and babysitter for his granddaughters. After the reconciliation, Scott and Marcy believed that Ken was free to see his grandchildren at their home but that the kids did not want to see Ken because he always smelled of alcohol. Ken did consume alcohol on a regular basis but was not known to be an alcoholic or conduct himself inappropriately. According to correspondence from Ken and from Beth's observations, Scott and Marcy refused to allow Ken to see his grandchildren as a form of punishment for the incident with Marcy. Scott and Marcy moved from the house behind Ken's in 2008.

On August 22, 2010, Ken died following an illness of several months. On October 25, 2010, Ken's estate was opened and Beth appointed the personal representative.

On January 31, 2011, ____, on behalf of Scott, filed a Complaint for Breach of Contract, for Constructive Fraud and for Constructive Trust; a separate Complaint to Contest the _____ Revocable Trust; a claim in the Ken estate (identical to the breach of contract claim) and a claim in the Karen estate.

On March 15, 2011, Beth, in her individual capacity and as represented by ______, filed a Motion for Summary Judgment on the Complaint for Breach of Contract. The estate, trust and other beneficiaries have joined in this motion. If the mediation does not resolve the parties' disputes, the court has ordered Scott to respond to the Motion for Summary Judgment within thirty (30) days of conclusion of the mediation.

II. Breach of Contract

Scott's claim for a breach of contract is premised on an alleged oral agreement between Ken and Karen to not revoke the estate plan that was outlined in Karen's Will of April 4, 2004. Scott claims that he was told by Ken after Karen's death and in the presence of Beth and Marcy, that he wanted to continue his promise to leave the estate equally to all four children. Beth never heard any such promise nor was she present at any meeting or conversation where this was discussed. Thus, with no reciprocal will from Ken, and no witness, other than Scott and Marcy, who could substantiate this alleged oral contract, this case has been contested. Two weeks ago, _____ produced the Affidavit of _______, dated March 23, 2011, that presents in unusually elaborate detail, the agreement between Karen and Ken to divide their estates equally among the four children. A copy of _____ Affidavit is attached. A telephone conversation with the two witnesses to Karen's will of 2004 demonstrated that they had no knowledge of any such agreement and did not want to be involved in this family dispute.

The summary judgment is predicated on Keenan vs. Butler 869 N.E.2d 1284 (Ind. App. 2007) which stands for the proposition that a breach of contract action must be filed within the three month period allowed for will contests under the Probate Code. Scott failed to timely file his contact action within the three month period from either Karen's probated will or Ken's.

The remainder of Scott's claims and allegations have not been substantiated through any of the discovery. There is no evidence of Ken's unsoundness of mind or any undue influence upon him to set aside the trust. To the contrary, Ken remained independent, and somewhat stubborn and unyielding until his death.

III. Estate Assets

Following the commencement of the litigation, Bob York requested, and we voluntarily produced, a list of all probate and non-probate assets that are within Ken's estate. A summary of those assets, as of May 11, 2011 is attached. Also attached is a breakdown of the products

liability and wrongful death proceeds from the wrongful death litigation. As the summary indicates, all probate and non-probate assets total 2,417,361.92. To date, Beth has received distributions of $683,418.52; Christy distributions of $641,798.19; and Mary distributions of $540,501.20. Scott has received distributions of 43,028.32 (life insurance plus 5 to 9 distributions to his children), along with the $50,000 lot that was gifted to him during Ken's lifetime. The assets that remain for distribution total $722,796.64, now reduced by Indiana Inheritance Tax of approximately $80,000 that we just paid.

IV. Settlement

A settlement of these disputes will be challenging because of the emotional aspects within this family. Recently, all parties were present during the depositions of Beth, Scott, and Marcy where substantial amounts of mud, venom and unsupported allegations were tossed about. Until we received the highly suspect Affidavit of __________, there was absolutely no substantiation for this alleged contract between Ken and Karen to divide all assets equally among the four children. There is some sense that it could be unfair to distribute all of Karen's wrongful death proceeds to Ken's daughters, even though this follows the language of the Indiana law.

I look forward to working with you in attempting to resolve this matter at the mediation.

Sincerely,

COHEN GARELICK & GLAZIER

Michael P. Bishop

MPB/dlm
Enclosure

<u>B.</u>

STATE OF INDIANA) IN THE HAMILTON SUPERIOR COURT
)ss.
COUNTY OF HAMILTON) CAUSE NUMBER:

IN THE MATTER OF THE TRUST UNDER)
AGREEMENT CREATED BY THE SETTLOR)
DATED ______ ("Trust"))

MEDIATED SETTLEMENT AGREEMENT

The undersigned, being the affected parties to the above captioned matter, do hereby acknowledge, settlement of these proceedings by mediation occurring on _________, as follows:

1. Within thirty days of the date hereof, the ________ ("Trust") or the Limited Partnership ("____") will pay the sum of ______ ($________) (hereinafter "Settlement Sum") to the __________ Estate ("Estate") in full and final satisfaction of any interest that the Estate has in the Trust,_______ and_______ Family Corporation.

2. Counsel for the Trust will prepare and the parties will execute and file the following pleadings:

   a. Subject to the payment of the Settlement Sum, a dismissal with prejudice of the Complaints and petitions for relief pending under this cause number.

3. The mediator will file necessary pleadings with this Court to report settlement by mediation.

4. The Estate and _______ will divide and be responsible for payment of the mediator's fee.

5. __________, as Executrix of the Estate of _________, ___________, individually and as Trustee of the Trust, and as President of ______(defined below), the general partner of ________ Family Corporation ("___") by its authorized President, and _____Limited Partnership by its authorized general partner, (hereinafter "Signatories"), conditioned upon the performance of this Settlement Agreement, the sufficiency of which is hereby acknowledged,

hereby forever release and discharge each other, their heirs, personal representatives, attorneys, agents, partners, shareholders, officers, directors and assigns, none of whom admit any liability to the Signatories, but all dispute any liability to the Signatories, of and from any and all manner of actions, causes of action, suits, accounts, contracts, debts, claims, and demands whatsoever, at law or in equity, and however arising, on or before the date of this release, including but not limited to, all matters asserted, or which could have been asserted, by any of the Signatories in that certain action pending in the Hamilton Superior Court, State of Indiana, as above entitled under Cause No. ________________________ and any other matters involving the estate of __________ or and the Trust and further as to ________, in any capacity.

6. It is understood and agreed that the performance of this Settlement Agreement is not to be construed as an admission of liability and that performance of the terms of this Settlement Agreement is made and accepted in full accord and satisfaction of, compromise of, any and all disputes, that do, or may exist, between the Signatories and for the purpose of terminating all such disputes and associated litigation.

7. Each party shall be responsible for bearing any attorney's fees incurred by them.

8. This Settlement Agreement shall be binding upon the parties' heirs, assigns and executors.

9. The parties agree to cooperate or execute any such further documentation as may be necessary to effect the terms of this Settlement Agreement.

10. The parties agree that this is a good faith compromise of a disputed claim and the effect of this Settlement Agreement upon the interests of the parties represented is just and reasonable.

11. If any of the parties to this Settlement Agreement is required to initiate legal action to enforce the terms of this settlement, the prevailing party(ies) shall be entitled to recover their reasonable attorney's fees from the non-prevailing party(ies).

__________individually and as Trustee of the Trust, and President of ____and as general partner of ___
Dated:__________________

________, as Executor of the Estate of
Dated:__________________

Michael P. Bishop, Esq.
COHEN GARELICK & GLAZIER
Attorney for __________
8888 Keystone Crossing, Suite 80
Indianapolis, IN 46240
Dated:__________________

C.

STATE OF INDIANA) IN THE MADISON CIRCUIT COURT
)SS:
COUNTY OF MADISON) CAUSE NO.

IN THE MATTER OF THE SUPERVISED)
ESTATE OF)

)

)
Plaintiff,)
)
vs.)
)
)
)
)
Defendant.)

FAMILY SETTLEMENT AGREEMENT

THIS FAMILY SETTLEMENT AGREEMENT (the "**Agreement**") is executed by and among _________ ("_______"), daughter and heir at law of the Estate of _________., deceased (the "**Estate**"), and ________, ("________") daughter and personal representative of the Estate, (collectively the "**Parties**"). The Parties desire to settle any and all pending disputes, including all the _______ pending claims in the Estate on an amicable basis, and in consideration of avoiding the delay, expenses and uncertainties of litigation and in further consideration of the mutual promises and valuable considerations herein set forth, IT IS AGREED AS FOLLOWS:

BACKGROUND

A. __________ ("_______"), died testate on the __th day of ___, 201_ and at the time of his death, was domiciled in Madison County, Indiana.

B. On _____________, ________ purportedly signed a Last Will and Testament (the "**Will**").

C. Pursuant to the terms of the probated Will all probate assets were distributed to _____.

D. On ___________, ______ filed a petition for Probate. The Estate was opened and the Will was probated in the Madison County Circuit Court, Cause No. (the "**Court**") on ____________

E. On _______________, _______ filed a claim in the Estate and a Verified Complaint to Contest the Purported Will.

F. A controversy exists concerning the validity of the Will and other matters involving the Parties (the "**Controversy**").

G. In order to avoid the delay, expense and uncertainty of litigation regarding the Controversy, the Parties agree to administer and distribute the assets of the Estate pursuant to the terms of this Agreement.

H. Upon approval of this Agreement by the Court, ___________ agrees to dismiss all claims and actions against the Estate and to proceed with this compromise of her disputes pursuant to Indiana Code §§ 29-1-9-1 et seq. (governing will contests and controversies). All Parties consent to the waiver of any notice from the Court regarding the approval of the Family Settlement Agreement.

NOW, THEREFORE, for valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the recital provisions set forth above are incorporated into the body of this Agreement as if fully set forth herein and the Parties agree as follows:

1. ________ hereby waives her objections to any and all transactions of the Estate.

2. _______, as Personal Representative for the Estate, agrees to distribute ______________ ($______) of Estate assets to ________, in care her attorneys, Cohen Garelick & Glazier, for distribution to ________. Such distribution from the Estate shall be made within 2 business days of the entry of the Court Order approving such settlement.

3. The Parties agree to submit, or cause to be submitted, this Agreement to the Court, and to seek the Court's approval. Each Party waives notice of hearing on the Petition to be filed with the Court asking for approval of this Agreement and the Parties consent to the approval of it by the Court. This Agreement shall become effective upon the issuance of an order by the Court approving this Agreement such that thereafter all further administration of the Estate shall be in accordance with the substantive provisions of this Agreement.

4. Each Party may enforce this Agreement in accordance with its terms, and the Court shall retain jurisdiction hereof in the Estate and over the Parties individually until the distributions provided for herein have been made. If any of the Parties to this Agreement are required to initiate legal action to enforce the terms of this Agreement, the prevailing party or parties shall be entitled to recover their reasonable attorney's fees from the non-prevailing party or parties.

5. The Parties agree to cooperate and facilitate the administration of the Estate and to execute, acknowledge, and deliver any additional documents as may be necessary in order to carry out the terms of this Agreement.

6. Each of the Parties will be responsible for their own respective legal fees incurred for their individual or joint representation relating to the Estate.

7. The Parties hereby waive, compromise and settle any and all claims, pending matters, controversies and disputes whatsoever existing between or among them or against the Estate.

8. The Parties hereby release, discharge, and acquit the Estate, and each other, their agents, representatives, attorneys, successors, and assigns of and from any and all claims, demands, actions, rights of actions, obligations, and liabilities, known and unknown, of any kind arising

out of, related to, or which may have been raised by any party in any proceeding or forum.

9. The Parties agree that this Agreement is a good faith compromise of disputed claims and the effect of this Agreement upon their interests is just and reasonable. The Parties acknowledge that they have been given the opportunity to seek the advice of their own legal counsel before entering into this Agreement. Each of the Parties represent that the terms of this Agreement are fully understood and voluntarily accepted by them. It is understood and agreed by the Parties that the performance of this Agreement is not to be construed as an admission of liability and that performance of the terms of this Agreement are made and accepted in full accord, satisfaction and compromise of any and all disputes, that do or may exist between or among the Parties and for the purpose of terminating all such disputes and associated litigation.

10. This Agreement may be signed in several counterparts; each counterpart shall be considered a duplicate original agreement. Signatures transmitted electronically shall be deemed satisfactory for purposes of satisfying the requirements hereunder. The Parties agree to cooperate or execute any such further documentation as may be necessary to effect the terms of this Settlement Agreement.

11. If any provision of this Agreement is declared by a court of competent jurisdiction to be invalid for any reason, such invalidity shall not affect the remaining provisions of this Agreement. The remaining provisions shall be fully severable, and this Agreement shall be construed and enforced as if the invalid provision had never been included in this Agreement.

12. This Agreement constitutes the entire Agreement between and among the Parties with respect to the subject matter hereof and supersedes all prior written or oral agreements and all contemporaneous oral agreements, understandings, and negotiations.

13. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Indiana.

14. This Agreement shall be binding and enforceable upon and inure to the benefit of, the executors, administrators, personal representatives, heirs, successors, and assigns of each of the Parties.

15. In the event there is any conflict between the terms of any will signed by Shetterly and this Agreement, the terms of this Agreement shall be controlling.

(REMAINDER OF PAGE INTENTIONALLY LEFT BLANK)

IN WITNESS WHEREOF, the Parties have executed this Agreement on the dates set forth below.

____

Date:

____

UPON APPROVAL BY THE COURT, THIS AGREEMENT IS TO BE EXECUTED BY THE PERSONAL REPRESENTATIVE OF THE ESTATE OF _____________.

____________________________________   ____________________
__________, Personal Representative   Date

D.

STATE OF INDIANA)
)SS:
COUNTY OF MADISON)

IN THE MADISON CIRCUIT COURT

CAUSE NO.

IN THE MATTER OF THE UNSUPERVISED)
ESTATE OF ____________________)

)

)
Plaintiff,)
)
vs.)
)
)
)
)
Defendant.)

PETITION FOR APPROVAL OF FAMILY SETTLEMENT AGREEMENT

_________ (**"Petitioner"**), daughter and heir at law of the Estate of _______ deceased (the **"Estate"**), and __________, ("______") daughter and personal representative of ________________ (collectively the **"Parties"**), petition the Court as follows:

1. Certain parties have alleged certain claims against the Estate of _______.

2. The Parties herein, persons interested in the Estate, have determined and concluded that it would be in their best interests to compromise and settle any and all controversies therein. After consultation and negotiations, the Parties herein have reached an agreement with each other and with all interested persons for the compromise of the various matters, claims, and disputes arising out of the Estate. The terms of such compromise have been set forth in a written agreement entitled "Family Settlement Agreement," an executed copy of which is attached hereto and marked Exhibit A.

3. All parties who have executed the Family Settlement Agreement are competent persons having any interest or claim which will or may be affected by such Agreement.

4. The Family Settlement Agreement has been executed by the Parties thereto in good faith and in the belief that it will serve not only the best interests of the Parties thereto, but also the best interests of the Estate. The Petitioner believes that the effect of the Family Settlement Agreement upon the interests of the Parties is just and reasonable.

WHEREFORE, the Parties submit the Family Settlement Agreement to the Court for its approval and further note that as all Parties have signed the Family Settlement Agreement, that all Parties have consented to waive notice, that the Court will not require any further notice to these Parties and upon reviewing this Petition and giving notice to any other interested persons, that the Court proceed as follows:

1. That the Court find that the Family Settlement Agreement signed by all interested parties is just and reasonable and approve the same;

2. That the Court make and enter an Order approving the Family Settlement Agreement and directing the Personal Representative of decedent's Estate to execute such an Agreement as an additional party thereto;

3. That the Court adjudicate that all further disposition of the Decedent's Estate shall be in accordance with the terms and conditions of the Family Settlement Agreement; and,

4. That the Court grant to the Parties and all other persons interested in the Estate all other relief and rights which are proper in the premises.

____

Michael P. Bishop,
Counsel for ________

STATE OF INDIANA) IN THE MADISON CIRCUIT COURT
)SS:
COUNTY OF MADISON) CAUSE NO.

IN THE MATTER OF THE UNSUPERVISED)
ESTATE OF)

)

)
Plaintiff,)
)
vs.)
)
)
)
Defendant.)

ORDER APPROVING FAMILY SETTLEMENT AGREEMENT

Petitioners, having filed their Petition for Approval of Family Settlement Agreement, which Petition is on file with the Court and is part of the Court's records.

And the Court having examined said Petition and being duly advised now finds as follows:

1. That certain parties have alleged certain claims against the Estate of ______.

2. All parties desiring to avoid further litigation and its related expenses, and to avoid the uncertainty of its outcome and without admitting any of the others' allegations, have reached a settlement of all issues that must be resolved in order to close the Decedent's Estate.

3. As a result of consultation and negotiations, the Parties have reached an agreement with each other for the compromise of the various matters, claims, and disputes arising out of said controversy. The terms of such compromise are set forth in a "Family Settlement Agreement," a copy of which has been presented to the Court and is part of the Court's records.

4. The Family Settlement Agreement has been executed by all Parties whose rights in the Decedent's Estate are affected by said agreement.

5. The Estate of __________ is solvent.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the Family Settlement Agreement filed concurrently herewith, is hereby in all respects approved and confirmed;

That ______, as Personal Representative of the Estate of __________, is directed to execute such agreement and thereafter to carry out the terms and provisions of the Family Settlement Agreement under the direction of the Court;

That the claims of the Petitioners are hereby compromised and determined in accordance with the provisions of the Family Settlement Agreement and the disposition of the Estate shall be in accordance with and governed by the terms of this Agreement.

SO ORDERED THIS _____ day of _______________, 2013.

____
Judge, Madison Circuit Court

Distribution:

Michael P. Bishop
COHEN GARELICK & GLAZIER
8888 Keystone Crossing, Suite 800
Indianapolis, Indiana 46240

III.

BEYOND KUMBAYA: What Trust and Estate Lawyers Need to Know About Mediation

Roselyn L. Friedman
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BEYOND KUMBAYA:

What Trust and Estate Lawyers Need to Know About Mediation

2014 ACTEC Annual Meeting

THE VIEW FROM A TRUST AND ESTATE MEDIATOR

Roselyn L. Friedman, Esq.

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BEYOND KUMBAYA:

What Trust and Estate Lawyers Need to Know About Mediation

2014 ACTEC Annual Meeting

THE VIEW FROM A TRUST AND ESTATE MEDIATOR

Roselyn L. Friedman, Esq.[1]

I. Introduction

This century is witnessing the largest transfer of inherited wealth in American history.[2] Although some transfers may be amicable and predictable, others may generate conflicts fueled by emotion and family dynamics. At the death of a matriarch or patriarch, it is not unusual for relationships among siblings or other family members to change and escalate to trust and estate litigation.

The unprecedented transfer of wealth appears to be accompanied by a corresponding groundswell of litigation, and it has become increasingly common for family members to bring lawsuits against one another or against fiduciaries and other professionals. In light of this trend, trust and estate attorneys and fiduciaries need to be aware of various forms of alternative dispute resolution ("ADR") that are available to avoid or at least limit full-scale litigation. In particular, facilitative mediation is a form of ADR which is currently gaining popularity for resolving trust and estate disputes.

The best strategy for an advocate in any type of mediation, in addition to properly preparing the case and the client, is to understand the process fully. It can be a challenge to do so given the variety of ADR processes, the different styles of mediators and other neutrals, and the puzzle of different state rules and laws which control. Accordingly, this article is intended to provide an overview of using facilitative mediation to settle trust and estate disputes and to answer some practical questions about the process.

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[1] Roselyn L. Friedman, Esq., a Senior Mediator and Facilitator for ADR Systems of America, LLC, Chicago, Illinois (www.adrsystems.com), concentrates her mediation practice on estate, trust, elder, and family business disputes. This outline is based on materials first provided for the 14th Annual Advanced ALI-ABA course of study, entitled "Representing Estate and Trust Beneficiaries and Fiduciaries", which were co-authored with Erica E. Lord, Esq.

[2] Researchers had projected that over the 55-year period from 1998 to 2052, $41 trillion will be transferred between generations and estimated that figure may even double or triple. *See Millionaires and the Millennium: New Estimates of the Forthcoming Wealth Transfer and the Prospects for a Golden Age of Philanthropy*, John J. Havens and Paul G. Schervish, Boston College Social Welfare Research Institute (October 19, 1999).

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II. How is Facilitative Mediation Different from Other Types of ADR?

A. Facilitative Mediation in the ADR Control Spectrum

Facilitative mediation is a negotiation of a dispute where a neutral third party mediator controls the process but not the outcome and facilitates the parties' communication about the disputed issues in order to reach a mutually beneficial result.

1. There are other key differences when comparing litigation and arbitration to mediation, including the following:

    a. In litigation, the parties give up control of both the process and the outcome to the judge who is required to look to the past, as well as to legal precedent, to decide who is right and who is wrong. So there will be a winner and a loser.

    b. Arbitration, also an adversarial process, has similarities to litigation. The arbitrator, who is a neutral third party (or a panel of neutrals), controls both the process and outcome, looks to the past to determine right and wrong based on legal precedent, and decides who wins and who loses. Nevertheless, the parties have more control than in litigation as they select the arbitrator and determine the rules of the process without being subject to all the formalities and requirements of litigation.

2. Mediation is different from litigation and arbitration.

    a. In mediation, the parties retain more control than in litigation or arbitration. The parties select a mediator, a neutral third party who will control and facilitate the negotiation, but the parties retain control of the outcome. Different from litigation, the mediator has no authority to impose an outcome on the parties and is not the decision-maker. Even with mandatory mediation, settlement is optional.,

    b. The mediation process itself is also different because it focuses on communication and collaboration, and looks to the future by considering the mutual interests of the parties without being limited solely by their legal rights. The intention is to reach a solution which satisfies the needs and interests of the parties, rather than to decide who wins and who loses.

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3. There are other forms of ADR, some of which are variations on arbitration. These include processes which are adversarial and binding, such as private judging; those which are advisory and non-binding, such as early neutral evaluation; or a combination, such as mediation-arbitration (med-arb) where the parties agree ahead that, if the mediation fails, they will proceed to arbitration.[3]

B. Other Styles of Mediation

1. An evaluative mediator is an expert in a field who, after hearing both sides of the dispute, evaluates the respective parties' likelihood of success in litigation. It is not uncommon for facilitative mediators to employ some evaluative techniques in "reality testing" to help the parties better assess the strength and weaknesses of their own and their opponent's case, and thereby to set more realistic expectations which encourage settlement.[4]

2. In transformative mediation, the primary goal may not necessarily be to reach an agreement. Proponents of this mediation model generally view the true goal of the process as communication. In this model, the parties may control the process as well as the outcome, with the mediator as a guide offering procedural and substantive suggestions. Transformative mediation, which looks towards total reconciliation of disputing parties in order to repair relationships, is thought to be effective in family situations where preserving relationships can be important. However, considering the potential cost and duration of transformative mediation, it may be impractical for trust and estate disputes where there are deadlines for filing tax returns or accountings,

[3] *See generally* Harold I. Abramson, *Mediation Representation: Advocating as a Problem-Solver* (Wolters Kluwer Law & Business 3rd. 2013), Chapter 8: Breaking Impasses with Alternatives to Mediation, at 449-450 (suggesting that the parties to med-arb need to select different parties as mediator and arbitrator in order to preserve the integrity of both processes).

[4] Several states, in some cases after debating whether an evaluative assessment by a mediator constitutes giving legal advice and is the unauthorized practice of law, have enacted legislation restricting or even prohibiting evaluative mediation. *See e.g.,* Section D of the Virginia's Standards of Ethics and Responsibilities for Certified Mediators, adopted by the Judicial Council of Virginia (Virginia Code Section 8.01-576 et. al., effective July 1, 2011). This provision requires written informed consent by the parties to the entire mediation process before it takes place, including (without limitation) understanding of and consent to: the role of the mediator; the style and approach of the mediator (*e.g.*, facilitative, evaluation, etc.); that the mediator is not practicing law, but that the mediation process may affect the legal rights of the parties and/or have procedural effects on the underlying case pending in court; and that the parties or mediators may terminate the process.

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and where the parties often want to expedite resolution and move on with their lives.

C. Divorce Mediation v. Trusts and Estates Mediation

1. There are similarities between trust and estate mediation and divorce mediation, the latter often being referred to as "family mediation". For example, both often include the emotional aspects of a dispute as well as an emphasis on financial and tax issues.

2. On the other hand, there are significant differences between the two fields of mediation. One commentator notes that these differences may be the reason divorce mediation has flourished throughout the country, while trust and estate mediation has lagged behind.[5]

3. For example, it takes only two parties to sign the settlement agreement for a divorce lawsuit; with a trust or estate settlement agreement, however, there are often multiple parties who must sign (including representatives of minor and unborn beneficiaries). When the requirements can be met, virtual representation statutes may be useful in limiting that number.

4. Also, the legal doctrine of wills and trusts law differs from current divorce law. With no-fault divorce law, settlement is intended to be forward-looking in order to reach an agreement regarding how the parties are to proceed whether financially or with respect to child custody. This outlook favors negotiation or mediation for dispute resolution. To the contrary, traditional will and trust laws require that a court look backwards to determine the decedent's intent as it relates to which party should prevail in a lawsuit.

III. Why Is Facilitative Mediation Particularly Well-Suited to Trust and Estate Disputes?

A. Consistency with the Family Settlement Doctrine[6]

1. Historically, probate and chancery courts have favored intra-family settlement of trust and estate disputes in lieu of resolving these

[5] *See generally* Ray D. Madoff, *Lurking in The Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 75 So. Calif. Law Rev. 161 (2002)

[6] *See generally* Mary F. Radford, *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters*, 34 Real Prop. Prob. & Trust J. 601 (2000).

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emotionally-charged conflicts through the courts. As a result of the family settlement doctrine, courts generally uphold family settlement agreements in the absence of fraud, undue influence or the breach of a confidential relationship.[7]

2. Facilitative mediation is consistent with this judicial preference for the internal, independent resolution of family disputes. The approach is similar to that historically used by the team of advisors, including the trust officer, attorney, and accountant, working together to help family members reach a mutually satisfying settlement, either without court intervention altogether or by involving the court only to obtain approval of the settlement agreement.

B. Provides a Confidential Forum

1. Mediation offers families a private and confidential forum for dispute resolution. Wealth transfer and estate planning conflicts often involve personal issues which families do not want to become a matter of public record. A family's reputation or business interests could be damaged if its competitors, or the press in high profile matters, were to gain access to confidential information which would be disclosed in the course of litigation.

2. The use of mediation to maintain privacy in the case of a wealth transfer dispute is consistent with the historic use of revocable trusts. One reason individuals purposefully create funded revocable trusts is to avoid a probate court proceeding and maintain the family's privacy. However, if a lawsuit were filed, a trust could become a matter of public record and scrutiny, defeating the grantor's intention of shielding the family's matters by using the trust form.

3. Although state law and court rules vary greatly, some states have adopted the Uniform Mediation Act (the "Act") or similar statutes to require that mediation remain confidential and that the mediator privilege attaches to protect the process from future court proceedings.[8] Absent a statute, or in some states superseding a statute

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[7] *Id.* at 645.

[8] Uniform Mediation Act ("UMA") (Nat'l Conference of Comm'rs on Unif. State Laws 2001, amended 2003). As of 2013, UMA has been enacted in District of Columbia, Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington, and introduced in Massachusetts and New York.

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or by agreement of the parties, mediation would be subject to a private confidentiality agreement.

C. Preservation of Relationships

1. Estate and trust conflicts often involve related parties. Although family relations are likely to suffer damage when disputes escalate, they are more likely to suffer irreparable harm when the conflicts become openly adversarial as in litigation. The very act of filing a lawsuit against a family member is likely to cause lasting grudges and permanent damage to the family and necessarily "stokes the parties' emotions."[9]

2. The mediation process can resolve such conflicts while still preserving relationships because it fosters communication and collaboration, rather than controversy, among the parties. Additionally, mediation can be entered into before one or both parties are forced into fixed, adversarial positions with the filing of a legal complaint.

D. Forum for Acknowledging Emotions

1. Trust and estate advisors are well aware that these conflicts are frequently fueled by emotional responses in addition to violations of legal rights or objective legal standards. These disagreements may involve power struggles stemming from sibling rivalries, childhood disputes, perceived parental favoritism, and sentimental attachments.

2. Mediation provides the parties to a dispute with a chance to tell their stories, particularly in joint conferences when they can speak directly with one another (as well as when each party is meeting separately with the mediator in caucus). It is not unusual for a party to leave a mediation feeling that he has finally had his "day in court." This approach is different from litigation, where the disputant rarely has an opportunity to tell his side of the story fully, due to procedural rules, litigation strategies and limitations on testimony.

3. The role of the facilitative mediator is to create an environment of communication and to encourage dialogue about issues which may have prevented the parties from reaching a settlement previously. In providing a forum for emotions to be aired, the mediator should be skilled at acknowledging and validating the parties' emotions, while

[9] Steve Schwartz, *Family Business Litigation: The Remedy Can Be Worse Than the Malady,* 61 Bench & Bar Minn. 40 (April 2004).

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also controlling the process without reacting to or allowing abusive, emotional outbursts which might otherwise occur among the parties and interfere with the resolution process.

E. Developing Flexible and Creative Solutions

1. Because mediation can address issues underlying a conflict, the solution reached through the process may be more comprehensive and durable than otherwise possible. Certain emotional resolutions may have considerable value to the parties, yet would be disregarded by courts or arbitrators.

2. It is not unusual for trust and estate disputes to involve matters where no remedy in law or equity may be sufficient to satisfy the parties. Therefore, finding a creative, non-legal solution which provides both sides with a win-win result may be the key to breaking deadlock.[10] For example, a family member may be intent upon proving that other siblings were favored by their parents and that he or she had never been treated fairly; that family member may not be satisfied with any settlement, unless it includes a personal apology from the "alleged wrong-doers."

F. Potential for Costs and Time Savings[11]

1. There are substantial financial costs associated with litigating any dispute, and when the dispute concerns property of relatively small financial value, litigation costs may be disproportionate to the amount at issue.[12] Mediation has the potential to result in a faster, less expensive settlement, particularly compared to a litigated case that actually goes to trial.

2. If, through mediation, the family members can reach a comprehensive agreement that all perceive to be fair, ongoing squabbles may be eliminated.

3. In addition, mediation of family disputes can reduce the societal costs of litigation by eliminating these disputes from already crowded court dockets, in harmony with the family settlement doctrine.

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[10] *See* Roger Fisher, William L. Ury & Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In*. (2d Ed.) (Penguin 1991).
[11] *See* Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 Wake Forest L. Rev. 397 (1997).
[12] *Id.* at 431.

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G. Caution: Facilitative Mediation Is Not Appropriate in Every Situation

1. There are circumstances where facilitative mediation is inappropriate and other dispute resolution techniques should be employed, which in some cases means requiring litigation. For example, as a general rule a question about the validity of a will cannot be mediated and needs to be adjudicated. But when a dispute involves an incapacitated beneficiary or where a power imbalance otherwise exists between the parties, accommodations may be possible so that the weaker party is adequately protected in the ADR process through a representative or otherwise; if adequate protections are not feasible, then a court-supervised proceeding would be necessary.[13]

2. Some fact-specific disputes (such as those involving trustee fees or asset valuations) might be more efficiently resolved by either arbitration or by evaluative instead of a facilitative mediation.

3. In family disputes over an estate plan, the tension exists between (a) a judicial process to determine the testator's intent with respect to the plan which controls the legal result and focuses on who was right and therefore the winner; and (b) a private resolution process whether by negotiation, mediation or otherwise to look for a creative, forward-looking solution.[14]

IV. When Should Mediation Be Used for Trust and Estate Disputes?

A. At any time, but the sooner the better!

Mediation can be used at any time in trust or estate administration, whether a conflict is already being litigated or arises in the course of administration.

1. Mediation During the Course of Litigation or When Litigation Looms.

   It is appropriate to mediate a dispute in whole or in part when (a) it is likely a lawsuit will be filed or after a lawsuit has been filed, (b) before or after discovery, (c) before or after key motions, or (d) before trial. Although the vast majority of cases settle before trial, it can still be cost efficient to settle earlier rather than later. Early entry into the mediation process encourages parties to limit discovery to that which is necessary for settling as opposed to more extensive and expensive discovery necessary for trial. It is also possible to mediate any portion

[13] *See* Paragraph 3C of Section VD infra.
[14] *See* Madoff *supra*, at note 5.

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of a case, such as disputes over the disposition of tangible personal property which can be encumbered with non-legal issues.

2. Mediation During Trust or Estate Administration.

Mediation can be incorporated at any stage of trust or estate administration, particularly when the trustee and other advisors are unable to resolve a dispute informally and administration is stalled as a result.

3. Mediation During the Estate Planning Phase.

One of the most creative uses of mediation begins in the estate planning phase to avoid an ultimate dispute over issues such as the disposition of the family business or how to be fair in a second marriage situation where stepchildren are involved. In such a case, the parties might benefit by the early use of mediation to design a solution with the assistance of an estate planning attorney who is comfortable addressing sensitive non-tax issues.[15]

4. Elder Mediation.

The term "elder mediation" generally refers to a mediation process which addresses the health, financial and other concerns of a senior family member, although the term "adult family mediation" may be a better description. Family crises and the attending conflict are likely to occur with a change in an aging parent's circumstances, such as the loss of a spouse or a decline in mental or physical capabilities, while the parent still does not want to give up control. This type of mediation focuses on preserving the dignity, self-determination and autonomy of the "elder," while teaching a constructive model for adult family problem solving going forward. The relevant aspects of facilitative mediation otherwise discussed herein are applicable; however, this model presents additional challenges such as being certain that the elder is adequately protected and represented.

B. When Might a Fiduciary Use Mediation?

1. Disputes over Administrative Matters.

[15] *See generally* David Gage, John Gromala and Edward Kopf, *Holistic Estate Planning and Integrating Mediation into the Estate Planning Process,* 39 Real Prop. Prob. & Tr. J. 507 (2004).

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Mediation may be useful in reducing duplicative administrative tasks for an executor or trustee. A disgruntled beneficiary may be making repeated requests or filing numerous complaints through the fiduciary's internal compliance procedures. If mediation were used to identify and address the underlying issues when the tension first became apparent, unnecessary time and energy required of the fiduciary to respond to such beneficiaries might be reduced or eliminated.[16]

2. Requests by the Fiduciary for Court Instructions.

Within the context of construction suits, a court of equity has general authority for the supervision of trusts and, to some degree, authority to instruct the trustee as to its powers and duties when not clear. Therefore, a trustee might bring a court action for instructions regarding the use of mediation or, at least, for approval of a mediation settlement, in order to protect the fiduciary in implementing the settlement agreement and in the future administration of the trust.

3. When Discussions are Hampered by Professional Conflicts.

In light of the Rules of Professional Responsibility, prohibiting attorneys from representing multiple clients where there is a conflict, absent a waiver or the situation where each side is represented by separate counsel, a family meeting regarding a controversial issue may result in having as many lawyers as beneficiaries in attendance. Even absent a formal mediation, an executor or trustee might consider introducing a mediator who is trained to facilitate such a meeting and is adept at controlling the process in order to make the meeting less adversarial and more productive.

C. Examples of Situations for Facilitative Mediation

1. An estate cannot be closed or a trust funded due to family conflict, and negotiations between the parties have not resulted in settlement (whether or not the parties are already in litigation).

2. Disputes among family members interfere or are likely to interfere ultimately with the operations of the family business and/or the smooth transition of management to younger generations.

[16] *See generally* Robert Whitman, *Procedure to Resolve Trust Beneficiaries' Complaints*, 39 Real Prop., Prob. & Tr.J. 829 (Winter 2005).

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3. Trustee and beneficiaries cannot agree over trustee's distribution policy or investment decisions.

4. Adult children disagree over the care and management of an elderly parent (whether or not a petition for guardianship is already pending or powers of attorney are in place).

V. Frequently Asked Questions

A. How Do You Select a Mediator?[17]

1. Be sure there are no conflicts such as prior representation of parties (by the mediator or an attorney at the same law firm).

2. Review the candidates' training and experience.

   a. As a start, look to certification as required by court rule or statute or otherwise, as well as panels of approved neutrals. Also review carefully the quality and quantity of programs in which the candidate has trained, as well as the number of mediations he or she has conducted. Both may provide evidence of relevant experience.

   b. Consider subject-matter expertise, which is a widely-debated topic. Some contend that a skilled mediator can resolve any type of conflict. Others believe that subject-matter expertise is an integral part of problem solving, particularly in complicated and technical areas of legal practice such as trusts and estates.

3. Studies have shown that personality traits can be indicia of mediator success.[18]

   a. Perhaps the most important trait is the mediator's ability to build trust and rapport with the parties. People are likely to respond favorably to a mediator's empathy and understanding.

   b. Other attributes of a skillful mediator include tenacity, creativity and hard work in tackling impediments to settlement.

   c. The mediator should never give up trying to break impasse, whether it means staying late into the evening of a mediation

[17] *See generally* Abramson, supra note 18, at 178-186.
[18] *Id.* at 182-183.

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conference and/or following up with attorneys for days (or weeks or months) if a mediation does not settle during the initial conference.

4. Identify the mediator's style, whether facilitative (or predominantly facilitative), transformative or other.

    a. As noted, some styles may be preferable to others depending upon the matter.

    b. Whatever the purported style, some mediators may be very forceful in trying to reach a settlement and this may or may not be effective when dealing with highly-charged emotional issues. This behavior must not interfere with the parties' right to self-determination which is one of the required criteria for mediation.

5. Consider co-mediators. In complicated family disputes it might be advisable to engage one mediator with subject-matter expertise and another who is trained in family dynamics.

6. Interview candidates to assess all of the above before making a decision as to a mediator.[19]

B. What are the Steps in a Mediation Process?

As with many mediation issues, there seems to be a divergence of opinion about how the process is to be conducted. However, the following suggests an overview as to common elements:

1. The mediator designs the mediation process with the attorneys in a premediation conference by phone or in person. Agreement is to be reached upon the following:

    a. Logistics

    The mediator and attorneys collaborate on the logistics of the process; how much time should be scheduled, location and date, who should attend, and the agenda for the joint mediation conference. It can be helpful to have clients input on the agenda, as they may want to include non-legal issues for discussion.

[19] *See generally* Lee Jay Berman, *12 ways to Make Your Mediator Work Harder for You*, Advocate Magazine (October 2009).

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b. Discovery

Matters related to the court case are considered, including deadlines for discovery and exchange of information, or whether discovery should be delayed until after the mediation if the case does not settle.

c. Mediator Submissions

Sometimes these submissions are defined by the court's or mediator's circumscribed requirements. Regardless of the format, these submissions will include the factual content of the case, the known issues to be resolved, the current positions of the parties and, if any, the summary of prior efforts to reach settlement (including offers). Attachments and exhibits include relevant court documents if litigation is pending.

d. Confidentiality of Mediation Submissions

Submissions may be directed confidentially to the mediator, or to both the mediator and opponents with only sensitive information being treated as confidential. Attorneys seem to prefer total confidentiality for fear of divulging too much information, while mediators are likely to encourage the exchange of information among the parties to the extent feasible to expedite joint problem solving.

2. The mediator controls the process, starting with the initial joint session.

a. Opening Statements

The conventional wisdom is that the mediator's statement (in part explaining the process, guidelines, and rules) starts the joint session. This is followed by opening statements presented by all sides of the case, which, although less argumentative than in court, are to provide the disputant's view of the case to the opposition. However, some mediators and attorneys believe this part of the process fuels the flames of anger and discontent among the parties, and prefer to limit or even omit opening statements.

b. Joint Sessions v. Shuttle Diplomacy

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There is also a difference of opinion among mediators as to how much of the process is to be conducted in joint sessions and how much in separate meetings. *(caucuses)*.

Some facilitative mediators are trained to conduct the entire mediation in joint sessions among all the parties and attorneys, in order to facilitate collaborative problem solving. These mediators will use caucuses sparingly if at all, only as they deem necessary or upon the request of the parties or attorneys. Other mediators work almost entirely thorough caucuses after the opening session, by delivering proposals back and forth to parties in separate rooms (*"shuttle diplomacy"*). That approach is more typical with evaluative mediators.

Many mediators employ some type of compromise by using both joint sessions and caucuses, based on how the mediation is developing and whether issues need to be discussed collaboratively or separately.

3. The Mediator Focuses on Settlement.

   a. Notwithstanding the significant differences among mediators on many topics, there should be no doubt that any style of mediator must be able to keep the parties focused on settlement and keep the process going until settlement is reached.

   b. If the parties settle during the mediation conference, a fully-executed memorandum of agreement is usually signed, so that the attorneys will have additional time to prepare the complete documentation. The mediator remains available to assist if any new or open issues arise over finalizing the written agreement, and should be kept apprised of the matter until everything is completed.

C. What Techniques Does a Facilitative Mediator Use?

1. The mediator creates an atmosphere of collaboration and trust, starting with the first phone call. As required, the mediator's impartiality and neutrality as demonstrated by language and actions can provide a comfort zone for otherwise distraught and angry parties to the mediation.

2. The mediator models problem–solving behavior in controlling the process. Siblings sharing in an estate or trust may never have had an

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adult conversation while their parents were still alive, and may revert to old behaviors from their childhood. The mediator is trained to control and limit angry outbursts from the parties, in order to attend to the difficult work of joint problem solving.

3. The facilitative mediator intends to alter the dynamics of a negotiation with a focus on settlement by some of the following means:

- "Encourage exchanges of information,
- Provide new information,
- Help the parties to understand each other's views,
- Let them know that their concerns are understood,
- Promote a productive level of emotional expression,
- Deal with differences in perceptions and interests between negotiators and constituents (including lawyer and client),
- Help negotiators realistically assess alternatives to settlement,
- Encourage flexibility,
- Shift the focus from the past to the future,
- Stimulate the parties to suggest creative settlements,
- Learn (often in separate sessions with each party) about those interest the parties are reluctant to disclose to each other, and
- Invent solutions that meet the fundamental interests of all parties."[20]

4. The facilitative mediator's toolbox includes the following techniques:

a. Providing the disputant an opportunity to vent emotions in a controlled environment and to have these acknowledged and validated, perhaps for the first time;

b. "Active listening" to solicit information and identify the parties' needs and interest to be addressed in settlement, as effective facilitative mediation usually involves interest-based rather than positional bargaining;

c. "Reality testing" to help parties understand the weaknesses as well as strengths of their own case, and the strengths of their opponents' case; this may be one of the key factors in successful mediations, and attorneys should not hesitate to ask

[20] Steven B. Goldberg, Frank E. A. Sanders and Nancy H. Rogers, *Dispute Resolution* (2d Ed.) (Aspen Law & Business), at 103.

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for the neutral's assistance in reality testing to manage the client's expectations; and

d. Brainstorming to invent options for mutual gain, beyond the legal determination of who is right and who is wrong; creative and joint problem solving among the mediator, attorneys and clients provides opportunities for settlement and is one of the most important differences between mediation and litigation or other types of ADR.

D. Who Should Attend the Mediation?

1. All of the parties at the mediation should have an interest in a negotiated settlement and enough information to make an informed decision. The attendance of parties with settlement authority is mandatory.

2. When mediation occurs in the litigation context, the parties to the dispute will be represented by legal counsel who should attend the mediation. All parties, including the fiduciary and fiduciary's counsel as well as the beneficiaries' counsel, are to participate in collaborative and creative problem solving in order to resolve the dispute at issue.

3. When mediating an estate, trust, elder or family business dispute, it may be practical to include all "interested parties", meaning not only the parties who have a legal interest in and settlement authority for the matter, but also those who may be impacted in other ways.

   a. For example, assume the purpose of a mediation is to resolve a conflict over family business succession. In that mediation, it might be advisable to include all family members, whether or not working in the business, who are beneficiaries of the senior generation's estate plan, wish to participate in the mediation, and could be directly affected by the result.

   b. If it were not advisable for such other "interested parties" to participate in a joint mediation conference, then consider whether they might be able to participate in separate caucuses with the mediator.

   c. The interests of all the necessary parties for settlement must be protected in mediation. All states have some statutes to protect minors and incapacitated parties, whether (a) by the court, (b)

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by a court-appointed special representative or guardian at litem, (c) through parental representation, or (d) by a virtual representation statute. Unless all the parties can represent themselves or be adequately represented otherwise, mediation is not appropriate.

E. What is the Role of the Attorney Representing Clients in Mediation?

1. The attorney is central to the process as counselor and problem solver, a role which is more collaborative and less adversarial than in litigation even when making the client's best case to the opposing side. The goal is for all the attorneys and parties to help in building consensus and to participate in joint, creative problem solving. This can be difficult for seasoned litigators who are used to positional bargaining and more comfortable with adversarial negotiations.

2. Effective mediation advocacy requires great diligence in preparation. Just as with litigation, the attorney needs (a) to know the facts, the file and the law regarding the case, (b) to design a plan, strategies and tactics of the case, and (c) to prepare the advocacy submission, if requested by the mediator, in the form requested. The submission should also advise the mediator as to the results of previous negotiations and any previous offers. In most cases, the submission will not be as extensive as a brief in litigation. However, it is intended to accomplish the same purpose of setting forth sufficient information to persuade the mediator and opposing parties of the strength of the case. If the case is already in litigation, it will include some, if not all, of the court filings.[21]
   See Appendix A and Appendix C for Mediation Preparation Checklists.

3. For successful mediation advocacy, the attorney must prepare the client thoroughly for what to expect. Otherwise, the client may be surprised by the more collaborative style of the attorney in the mediation, and may think that aggressive tactics should be used as in trial. Once the client understands the problem–solving focus of the proceeding, the attorney's role as well as the mediator's role should be clarified. Hopefully the client will then become a willing party to the creative problem–solving forum.
   See Appendix C for Client Preparation Checklist.

[21] *See generally* Karen K. Klein, *Representing Clients in Mediation: A Twenty-Question Preparation Guide for Lawyers*, 84 N.D. L. Rev. 877 (2008); Abramson, supra note 18, at 364.

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a. Assuming the client can do so effectively, it can be advantageous to have the client participate in the process by telling his or her own story in opening statements. Because trust and estate disputes can be fueled by emotional issues, the client may be best-suited to explain such issues to the mediator and opposing party, as well as to express the repercussions to the client from the perceived wrong. In addition, the mediation process may be valuable to client just by having an opportunity to be heard.

b. During this process, the mediator will be reality testing to make the client aware of the weaknesses in his or her own case as well as the opponent's strongest arguments. The attorney may have tried to accomplish this in the past to no avail; however, in this context, the mediator's efforts may help the client to face the risks of litigation as well as the potential financial, time and emotional costs for the first time in making settlement decisions.

4. The attorney and clients should all participate in inventing options for mutual gain with the mediator as a guide. The mediation process does not require a legal finding of right and wrong, but instead looks forward using creative ideas for dispute resolution. This allows for flexibility and consideration of non-legal options for settlement where appropriate. For example, if a dispute has arisen between a fiduciary and the sole income beneficiary regarding distributions of trust accounting income, subject to the provisions of state law and the document all the parties and beneficiaries might consider converting the vehicle to a total return trust in order to avoid an ongoing controversy.

5. The attorney also needs to use confidential private meetings (caucuses) with the mediator effectively. Be open about asking the mediator for suggestions and ideas for effective negotiating, such as the following:

a. Develop and test settlement proposals with the mediator.[22] It can be useful for the attorney to brainstorm with the mediator in caucus; this provides an opportunity to develop new settlement options and determine how best to present them to the other side. The mediator brings a fresh prospective based

[22] *See* Abramson , supra note 18, at 239.

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on experience in other mediations as well as previous joint sessions and caucuses with the opposing parties, and may be able to help package the proposal in a manner which the other side finds more positive whether or not yet acceptable. Also consider asking the mediator to test the other side with hypothetical settlements, in order to anticipate better their possible response to future actual proposals.

b. Seek the mediator's assistance in breaking impasse.[23] The mediator is trained to identify the cause of impasse and formulate ways to overcome impediments to settlement. For example, a facilitative mediator may try further reality testing the parties so that they have a better understanding of the downsides of litigation and the reason for continuing settlement discussions rather than walking away.

F. How Do State Laws and Court Rules Affect Mediation?

1. The laws affecting mediation vary greatly among the states. The only apparent consistency is that each state has some type of provision for divorce/family mediation, at least with respect to child custody matters.[24]

b. Some states, such as Texas, California and Florida, have comprehensive statutes governing the practice, while a majority of states do not.[25]

c. Some court systems have court-annexed mediation or other types of court programs, but these rules and procedures may differ greatly even within the same state.[26] Court-ordered mediation will have its own set of rules imposed upon the process.

d. In most states which have enacted the Uniform Trust Code ("UTC"), Section 111(b) authorizes nonjudicial dispute

[23] *Id.* at 240.
[24] *See* http://CourtADR.org for the ADR Resource Center established by Resolution Systems Institute ("RSI").
[25] *Id.*
[26] *Id.*

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resolution with respect to trust matters, subject to certain requirements and definitions.[27]

2. Confidentiality is a critical aspect of mediation, but is not necessarily treated the same from state to state.

    a. In states that have enacted the Uniform Mediation Act ("UMA"),[28] a mediator privilege is created to protect against disclosure for mediation communications so that, except for certain limited exceptions, a mediator may refuse to testify in court proceedings or otherwise disclose the content of the mediation. The privilege protects all parties, making all mediation communications privileged and not subject to discovery or admissible in evidence in a proceeding unless waived, precluded by misuse, agreed to otherwise in writing, available in the public record, or restricted or exempted under certain other limited circumstances.[29]

    b. States which have not enacted the UMA may have adopted similar protection for confidentiality and mediator privilege. For example, Florida has enacted the Mediation Confidentiality and Privilege Act[30] as part of its comprehensive mediation legislation.

    c. Absent the protection of a statute, it is very important that the mediation be subject to a private confidentiality agreement.

3. Changes to the ABA Model Rules of Professional Conduct for Lawyers, adopted in 2002, first added provisions for ADR including mediation. Among the changes are the recognition of neutral roles for lawyers (Rule 2.4), and the duty of lawyers to advise clients of ADR options in resolving disputes (Rule 2.1, Comment 5). The latter has been controversial, and differing positions have been taken among the states.

[27] Unif. Trust Code §111(b) (2000), C.U.L.A. 2006; *See also* Gil E. Mautner & Heidi L.G. Orr, *A Brave New World: Nonjudicial Dispute Resolution Procedures Under the Uniform Trust Code and Washington's and Idaho's Trust and Estate Dispute Resolution Acts,* 35 ACTEC J. 159 (Fall 2009).
[28] Uniform Mediation Act ("UMA"), note 10 supra.
[29] *Id.* at §§4-6.
[30] FLA Statutes 2012, Title V, Chapter 44, Sections 401-406).

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4. The regulation of mediators varies even more dramatically. Some states have formal certification procedures and/or training requirements, but others do not.[31]

5. In addition, Model Standards of Conduct for Mediators were originally developed in 1994, and revised in 2005, and adopted in both forms by the American Bar Association Section of Dispute Resolution, the Association of Conflict Resolution, and the American Association of Arbitration in 1994 and revised in 2005. These are the ethical guidelines applicable to all mediators, including attomey-mediators, but do not include and enforcement procedures and are not binding.

   a. The Model Standards of Conduct address essential mediation concepts, inducing self-determination of the parties, impartiality and competence of the mediator, and the quality of the process.

   b. The Model Standards are intended to be a guide for mediator conduct; to inform the mediating parties about the process; and to promote public confidence in mediation as a process for resolving disputes.

G. What are the Relevant Tax Considerations of Trust and Estate Mediation?

1. The critical tax considerations of trust and estate mediation are similar to those for any negotiated settlement, and are fully considered in many resources from ACTEC and others.[32]

2. It is important to note that advocates in mediation need not only be knowledgeable about the relevant tax rules, but also be mindful of their impact on the negotiations. It is a delicate balance knowing when to focus on

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[31] *ABA Section of Dispute Resolution Task Force Report on Mediator Credentialing and Quality Assurance* (2010) (2012) (failing to reach consensus on or to support a national model of credentialing, but supporting local initiatives and innovations in the field of credentialing which follow the Section guidelines); *Association of Conflict Resolution (ACR) Task Force on Mediation Certification Report and Recommendations to the Board of Directors* (2011) (setting forth final recommendation for national Model Standards for Mediation Certification which were adopted by ACR).

[32] *See generally* M. Patricia Culler, Laird A. Lile and Donald R. Tescher, *Uncle Sam: The Silent Party at Estate and Trust Settlement,* ACTEC Annual Meeting (2005); Mary F. Radford, *Tax Considerations and Other Issues Unique to Mediation of Trust and Estate Cases,* University of Miami School of Law, 19th Annual Heckerling Institute on Estate Planning (2005).

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tax issues early enough in the process to address them fully as the parties are working towards a realistic proposal, but not so early that it can distract the parties from addressing other high-priority issues. The mediator is trained to provide guidance with this "negotiation dance".

VI. Conclusion

Facilitative mediation offers an additional tool for resolving disputes that arise in many aspects of a trusts and estates practice. The process is particularly well-suited to these types of disputes for a variety of reasons, including that (a) it permits the parties to retain control over the outcome, (b) it can provide a private forum for communication about sensitive family issues and an opportunity for acknowledging the emotions involved, and (c) it allows an opportunity for creative problem solving without the limitations imposed by litigation or arbitration. As trust and estate litigation continues to increase, facilitative mediation is likely to become a favored technique for resolving disputes earlier and more efficiently. For this reason it is important that attorneys, fiduciaries and other advisors involved with trusts and estates have a thorough understanding of the facilitative mediation process, as well as when and how it can be utilized effectively.

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Appendix A

EXCERPT FROM AND REPRODUCED WITH THE PERMISSION OF: Karen K. Klein, Representing Clients in Mediation: **A Twenty- Question Preparation Guide for Lawyers**, 84 N.D. L. Rev. 877 (2008).

REPRESENTING CLIENTS IN MEDIATION: A LAWYER'S PREPARATION GUIDE

1. Are you ready and willing to serve as a problem solver and not as an adversary when you advocate for your client during mediation?

2. What discussions have you had with your client about settlement? Have you asked about your client's motivations for litigating, your client's impressions of the legal system, and your client's expectations? Have you explained the mediation process to your client?

3. What is your client's emotional state? Have you regularly monitored your client's emotions over time? Have you tried to promote a healthy client attitude toward settlement?

4. What facts or legal issues will most affect settlement value? Have you developed these facts and researched these issues? What information may be important to settlement but not relevant to the legal dispute? How will you gather this information?

5. Have you evaluated the strengths of your client's case? Have you realistically assessed the weaknesses? What are the strengths and weaknesses of the other party's case? Have you adequately considered the strengths and weaknesses in your settlement evaluation? Does this assessment include litigation cost as well as risk of outcome?

6. Have you discussed with your client his/her needs and interests which might affect the client's desire for settlement or for trial? Have you anticipated the other party's needs and interests? To what extent are your client's needs and interests and those of the other party compatible, or at least not incompatible?

7. What remedies are available through litigation? What remedies would address the needs and interests of the parties, but are not available through litigation?

8\. A. If your client is a business entity or has insurance coverage, who makes the final settlement decisions for your client? Have you talked to that person about settlement? Who will attend the mediation on behalf of the client? Does that person have sufficient authority to make the final decision at mediation? If not, have you informed the mediator?

8\. B. If your client is a governmental entity, has the entire board met with you in an executive session to discuss settlement evaluation and negotiation strategy? Will the

representative(s) who attend the mediation have reasonable authority parameters? If the case can be settled only beyond those parameters, will the attending representative(s) have sufficient credibility with the other board members to make a strong recommendation for settlement? Do you know when the full board can meet to approve any settlement?

9. Is there insurance coverage in this case? What are the limits? Is there a dispute over coverage? If so, should the coverage dispute be negotiated before, during, or after negotiation of the underlying dispute? If global negotiations are best, will coverage counsel attend the mediation? Have you informed the mediator of the coverage dispute and the identity of coverage counsel?

10. Are there subrogation interests or outstanding liens? Have you verified the amounts? Have you informed counsel for the other party of these liens and the amounts? Are the liens negotiable? If so, can you resolve them in advance of mediation, contingent upon settlement of the case? If not, will/should a representative of the lien holder attend the mediation in person or by telephone? Have you informed the mediator of these interests and names of lien holder representatives?

11. Is there a person who may have a strong influence on your client's settlement decision? Will that person help or hinder settlement of the case? Should that person attend mediation with your client? Have you informed the mediator of this person's influence?

12. Does the defendant have the financial ability to pay a judgment or settlement in the likely range? If not, what financial information will substantiate the defendant's claim of inability to pay? Can you bring that information to mediation? Will you need to bring an accountant or other financial person to explain it? What payment terms might the defendant need? Have you mentioned the financial concerns to the other attorney(s) and the mediator?

13. Do you have concerns about your client's unreasonable expectations and your ability to manage them? Have you contributed to the client's frame of mind? Have you tried to conduct a reality check on the client? Have you or will you request the mediator's assistance in persuading your client to become more reasonable?

14. How well do you know your mediator? Does the mediator use mostly joint sessions or private caucus meetings? Is the mediator's style facilitative or evaluative, or does it change depending on the circumstances? Which mediation style would work better in this case? Will the mediator primarily address counsel or the clients? Are you and your client ready for this?

15. How much time has the mediator set aside for the session? How can you best use the time? If you or your client's travel arrangements may conflict with the schedule, have you informed the mediator and the other attorney(s)?

16. Is an award of attorney's fees an issue in the case? If so, have you and your client discussed the potential for a conflict of interest between you? Do you know the current amount of the fees and costs? Are you prepared to show verification of the amount without infringing on work product or privilege?

17. Is there a rationale for the settlement proposal you will make at mediation? Are you prepared to share that rationale with the mediator and the other party? Are there calculations or documents you can bring to show the rationale? Do you have evidence adverse to and unknown by the other party that significantly affects settlement value in your client's favor? Have you weighed the risks and benefits of revealing the evidence to the other party? Have you disclosed the evidence to the mediator?

18. Are you expected to prepare a written mediation statement? When is it due? Does your statement address all of the mediator's requirements? Is it balanced and candid, or is it argumentative? Will the statement assist the mediator in guiding the parties toward a settlement?

19. Have there been prior negotiations in the case? What was the last settlement proposal of each party? Have you sent any "non-offer" signals to the other party's lawyer? Have you revealed the full negotiation history to the mediator, including any "non-offer" signals made to the other party's lawyer?

20. Are there special terms your client will want in the final settlement documents? Is confidentiality of settlement terms an issue? Are payment terms an issue? Will you insist upon certain language in the release(s)? What other special issues does your client have? Have you revealed these special issues to the mediator?

Appendix B

Checklist: Preparing Mediation Representation Plan

Reproduced with the permission of Wolters Kluwer Law & Business, from Harold I. Abramson, *MEDIATION REPRESENTATION: ADVOCATING AS A PROBLEM-SOLVER* (3rd ed.), Chapter V – Preparing Your Case for Mediation, pages 364-370, Copyright 2013.

21. Checklist: Preparing Mediation Representation Plan

Consistent with the primary Mediation Representation Triangle, this checklist consists of three parts. Parts 1 and 2 cover preparing for the negotiation and the mediation—the homework that you should do before you prepare your representation plan. Part 3 covers what to include in your representation plan for the key six junctures in the mediation process.

Part 1: Prepare for Negotiation

☐ 1. Identify interests to meet
  ☐ a. Your client's

- ☐ 2. Identify impediments to overcome
  - ☐ a. Relationship
  - ☐ b. Data
  - ☐ c. Value
  - ☐ d. Interests
  - ☐ e. Structural
- ☐ 3. Research legal case (public BATNA).
  - ☐ a. Research law
  - ☐ b. What information do you need?
  - ☐ c. Should you file any cleanup motions?
- ☐ 4. Develop with your client her personal alternatives to settlement (personal BATNA).

Part 2: Prepare for Mediation

- ☐ 1. Decide who should attend the mediation session.
  - ☐ a. Should you attend?
  - ☐ b. Should your client attend?
  - ☐ c. How do you involve an institutional client?
    - ☐ i. Who should participate on behalf of an institutional client?
    - ☐ ii. Does the person have sufficient and flexible settlement authority?
    - ☐ iii. How can you convince the client representative to participate?
    - ☐ iv. What should be the role of an in-house counsel?
  - ☐ d. Should any other people participate (advisors)?
    - ☐ i. Expert witnesses?
    - ☐ ii. Fact witnesses?
    - ☐ iii. Personal advisors or supporters (family members or friends)?
    - ☐ iv. Other?
- ☐ 2. Identify who your audience is in the session.
- ☐ 3. Prepare presentation of the legal case.
  - ☐ a. How can you productively present the legal case?
  - ☐ b. When do you want to present it—in opening statements or later?
- ☐ 4. Prepare presentation of complete case.
  - ☐ a. Story
  - ☐ b. BATNAs
  - ☐ c. What does your client want?
  - ☐ d. What would you like the mediator to do?
- ☐ 5. Prepare for initial information exchange
  - ☐ a. Prepare questions.
  - ☐ b. Resolve what information to share and when and where.
- ☐ 6. Consider level of confidentiality that you need.
  - ☐ a. Is confidentiality necessary?

- ☐ b. What are the sources? Look at mediation contract, any binding private mediation rules, and local laws.
- ☐ c. What do the sources cover?
- ☐ d. What are the exceptions?
- ☐ e. Is the applicable level of confidentiality sufficient?
- ☐ f. If not sufficient, how does it affect your willingness to share information?
- ☐ g. Do you want to withhold any information even with confidentiality protections?

☐ 7. Consider how to abide by conduct rules and mediation law.
- ☐ a. Check local professional conduct rules relevant to mediation representation, including truth telling obligations.
- ☐ b. Check whether a local obligation to participate in good faith applies and how it is interpreted.
- ☐ c. Check for any other relevant mediation law that may establish parameters for your representation.

☐ 8. Identify the mediator's possible contributions to resolving the dispute.
- ☐ a. *Approaches to dispute.* You want the mediator to use the following approaches:
  - ☐ i. Manage the process by primarily facilitating, primarily evaluating, or following another approach.
  - ☐ ii. View the problem broadly or narrowly.
  - ☐ iii. Involve clients actively or restrictively.
  - ☐ iv. Use caucuses extensively, selectively, or not at all.
- ☐ b. *Useful techniques.* You want the mediator to use her techniques to:
  - ☐ i. Facilitate the negotiation of a problem-solving process.
  - ☐ ii. Promote communications through questioning and listening techniques.
  - ☐ iii. Deal with the emotional dimensions of the dispute.
  - ☐ iv. Clarify statements and issues through framing and reframing.
  - ☐ v. Deal with power inequalities.
  - ☐ vi. Overcome the impediments to settlement.
  - ☐ vii. Overcome the chronic impediment of clashing views of the court outcome (public BATNA).
  - ☐ viii. Create options for settlement (e.g., brainstorming).
  - ☐ ix. Fashion creative solutions.
  - ☐ x. Facilitate claiming of options.
  - ☐ xi. Close any final gaps (consider your preferred methods for closing gaps).
  - ☐ xii. Deal with ______________.
- ☐ c. *Control over mediation stages.* You want the mediator to use his or her control over the mediation process in the following ways:
  - ☐ i. Use the mediator's opening statement to set up a problem-solving process.

- ☐ ii. Use the information gathering stage for venting and securing information for the specific purposes of understanding issues, interests, and impediments. (Opening statements of participants, first joint session, and first caucus)
- ☐ iii. Use the stage of identifying issues, interests, and impediments to ensure that key information is clearly identified.
- ☐ iv. Use the agenda formulation stage to ensure that key issues and impediments will be addressed.
- ☐ v. Use the overcoming impediments stage to overcome known impediments.
- ☐ vi. Use the generating options stage to ensure that creative ideas are developed. (Inventing stage)
- ☐ vii. Use the assessing and selecting options stage to ensure that your client's interests are met. (Claiming stage)
- ☐ viii. Use the concluding stage to ensure that any written settlement meets your client's interests, or if there is no settlement, that a suitable exit plan is formulated

☐ 9. Contact mediator before session.
- ☐ a. Inquire whether the mediator plans to hold a premediation conference.
- ☐ b. If not planning one, request one if you determine that it would be useful.
- ☐ c. Inquire whether the mediator wants a premediation submission. If so:
  - ☐ i. Determine what the mediator wants included.
  - ☐ ii. Determine whether the mediator will share any information in the submission with the other side.
  - ☐ iii. If the mediator plans to share any information, determine whether he wants you to send the entire submission or a portion to the other side.
- ☐ d. If the mediator does not want a premediation submission, request one if you determine that it would be useful.

☐ 10. Consider what to bring to the mediation session.
- ☐ a. What will you bring to the session?
- ☐ b. How will you visually present key information?

Part 3: Prepare Representation Plan for Six Junctures

Develop a representation plan based on your preparation in Parts 1 and 2 for the negotiation and mediation. You should form a plan to advance your client's interests, overcome any impediments, and share relevant information at each of the key junctures in the mediation process. Your plan, which includes enlisting assistance from the mediator, should be consistently developed throughout the junctures.

Plan for Each Key Juncture (Use the Information You Collected and the Choices You Made When Preparing Parts 1 and 2)

☐ 1. **Select mediator (with rationale for each choice).**
- ☐ a. Select person who is facilitative, evaluative, or other.
- ☐ b. Select person who views problem broadly or narrowly.
- ☐ c. Select person who involves clients actively or restrictively.
- ☐ d. Select person who uses caucuses extensively, selectively, or not at all.
- ☐ e. Select person with relevant credentials.
  - ☐ i. What training and experience would be suitable?
  - ☐ ii. What subject matter knowledge would be helpful, if any?
  - ☐ iii. Which key personal traits would be suitable?

☐ 2. **Premediation conference**
- ☐ a. Verify mediator's mix of approaches to the mediation.
- ☐ b. Verify other side's approaches to the mediation.
- ☐ c. Verify attendance by the other side's best client representatives with sufficient and flexible settlement authority.
- ☐ d. Verify date, time, place, and length of session.
- ☐ e. Resolve what information you need from the other side before or by the start of the session.
- ☐ f. Determine whether the mediator plans to have any ex parte conversations with each side before the session.
- ☐ g. Consider signaling the likely interests of your client.
- ☐ h. Consider broaching a discussion of possible impediments.
- ☐ i. Ask about the premediation submission, if questions are still unresolved.
  - ☐ i. Determine whether the mediator wants you to submit any premediation materials.
  - ☐ ii. Determine what the mediator wants included in the premediation submission.
  - ☐ iii. Determine whether the mediator will share any information in the submission with the other side.
  - ☐ iv. Determine, if the mediator plans to share any information, whether he wants you to send the entire submission or a portion to the other side.
- ☐ j. Identify any other issues that need to be resolved in the premediation conference.

☐ 3. **Premediation submission (assuming you're planning one)**
- ☐ a. What are the overall goals that you want to accomplish?

- ☐ b. Consider whether and how you want to cover the following points in the submission:

  Description of dispute and legal case
  - ☐ a. "Factual summary," including a chronology of events, description of key undisputed facts, and description of key disputed facts
  - ☐ b. "Critical legal issues" in dispute, including your client's view on each issue and key cites
  - ☐ c. "Relief" sought, including a particularized itemization of all damages claimed
  - ☐ d. "Motions" filed and their status
  - ☐ e. "Discovery status," including what still needs to be done to be ready for trial

  Settlement analysis
  - ☐ a. "Interests of your client" that you want met in mediation
  - ☐ b. "Settlement discussions," including any offers or counter-offers previously made
  - ☐ c. "Why not settled," covering your views on the obstacles to settling this dispute and ways to overcome them
  - ☐ d. "What you want out of the mediation," especially what you want the mediator to do and what inventive settlement concepts you would like the other side to consider

  Other information
  - ☐ a. "Who will attend" the mediation session and the title of any client representatives
  - ☐ b. Attach critical documentary evidence

☐ **4. Opening statements**
- ☐ a. What are the overall goals that you want to accomplish?
- ☐ b. Prepare statements.
  - ☐ i. Tone
  - ☐ ii. Content
    - ☐ (a) Tell story.
    - ☐ (b) Cover public BATNA (legal case).
    - ☐ (c) Cover Personal BATNAs.
    - ☐ (d) Suggest what your client wants out of the mediation (no specific proposals yet).
    - ☐ (e) Suggest how the mediator might help the parties resolve the dispute.
- ☐ c. Should your client present an opening statement?
- ☐ d. How should you divide the opening statements between you and your client?
  - ☐ i. Story
  - ☐ ii. Public BATNA (legal case)

- ☐ iii. Other BATNAs—personal and other
- ☐ iv. What you want out of the mediation
- ☐ v. How you want the mediator to help resolve the dispute.

☐ e. Should you or your client speak first?

☐ **5. Joint sessions**

- ☐ a. Determine how to generate movement to advance and meet interests at each mediation stage.
  - ☐ i. When venting and gathering information
  - ☐ ii. When identifying issues, interests, and impediments
  - ☐ iii. When formulating agenda
  - ☐ iv. When overcoming impediments
  - ☐ v. When generating options
  - ☐ vi. When assessing and claiming options for settlement
- ☐ b. Determine ways to enlist assistance of the mediator at each stage.
- ☐ c. Determine how and when to present your legal case.
- ☐ d. Decide how to split responsibilities between you and your client as mediation unfolds.

☐ **6. Caucus**

- ☐ a. Select purposes that you want to accomplish and ways to generate movement in any caucuses (purposes that cannot be accomplished as effectively in a joint session).
- ☐ b. Determine what information you want to share initially or only with the mediator.

Appendix C

Checklist: Preparing Client

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10. Checklist: Preparing Client

- ☐ 1. Explain mediation process to your client.
  - ☐ a. Remind your client that mediation is a continuation of the negotiation process.
  - ☐ b. Explain that it is a problem-solving process.
  - ☐ c. Review stages of the mediation.
  - ☐ d. Review techniques of mediators.
  - ☐ e. Show a videotape of an actual mediation.
  - ☐ f. Review the level of confidentiality.
  - ☐ g. Determine whether any information should be withheld from the joint sessions or mediator.
  - ☐ h. Advise your client to be patient and open-minded.
- ☐ 2. Explain your different role in the mediation session.
- ☐ 3. Reinterview your client.
  - ☐ a. Clarify interests.
  - ☐ b. Clarify impediments.
  - ☐ c. Prod for creative solutions.
- ☐ 4. Review what essential information your client needs before the mediation session and the risks of incomplete discovery.
- ☐ 5. Review strengths and weaknesses of the legal case (public BATNA).
- ☐ 6. Probe for your client's personal benefits and costs of litigating (personal BATNA).
- ☐ 7. Finish developing your mediation representation plan.

- ☐ 8. Prepare your client to answer likely questions.
- ☐ 9. Finalize the opening statements.
  - ☐ a. Will your client present a statement?
  - ☐ b. How will you divide the presentation of the story and determine public and personal BATNAs, what your client wants, and what you want the mediator to do?
  - ☐ c. Will your client speak first?

Section Seven

Defeating the Spousal Right of Election

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Section Seven

**Defeating the Spousal
Right of Election……………………………………………..…. Jonathan E. Lamb**

PowerPoint Presentation

Case Metrics

ICLEF

Probate & Trust Litigation

Defeating the Spousal Right of Election

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08-28-2020

I. The Spousal Right of Election

I.C. 29-1-3-1

- I.C. 29-1-3-1
- Testate
- Forced Share:
  - ½ net personal and ½ real estate; or
  - 1/3 net personal and ¼ of fair market value of real estate minus liens and encumbrances
- Applies only to property as would have passed under the laws of descent and distribution

I. The Spousal Right of Election

(additional considerations)

- Timely election (I.C. 29-1-3-2)
- Personal Right – I.C. 29-1-3-4
- Survivor's Allowance? – *Estate of Calcutt v. Calcutt*, 576 N.E.2d 1288 (Ind. Ct. App. 1991)
- Right waivable – I.C. 29-1-3-6
- Devolution subject to election – 29-1-7-23

II. Other Statutes on Right of Election

a) - IC 30-4-2-16

IC 30-4-2-16 Election by surviving spouse to take share against settlor's will; distribution of remainder

Sec. 16. (a) This section applies to:

(1) property in a trust that is subject to a spouse's right of election under IC 29-1-3; and

(2) a trust that receives property from the settlor's estate;

if the settlor's spouse files an effective election to take a share of the settlor's estate against the settlor's will under IC 29-1-3.

(b) The trustee shall dispose of the assets received from the settlor's estate and the portion of the trust remaining after the spouse's election as if the settlor's spouse had died before the

settlor died.

As added by P.L.200-1991, SEC.4.

II. Other Statutes on Right of Election

a) - IC 30-4-2-16

- "Esther also argues that Ind.Code § 30–4–2–16(a)(1) draws trust assets into the estate for the purpose of determining the value of the spouse's elective share. In that we have determined that the grant of summary judgment in favor of the Bank was in error, we need not address what if any application this statute may have under the circumstances of this case." *Estate of Weitzman* – 724 N.E.2d 1120 (Ind. Ct. App. 2000)

II. Other Statutes on Right of Election

a) - IC 30-4-2-16

- 26 Ind. Prac., Anderson's Wills, Trusts & Est. Plan. § 3:132 (2019-2020 ed.);
- "If a trust receives property from the settlor's estate and the surviving spouse files an election under the settlor's will, then the trustee must dispose of the assets received from the settlor's estate" - **IC 30-4-2-16**

Defeating the Spousal Right of Election

II. Other Statutes on Right of Election

b) - IC 32-17-14-25 (Transfer on Death Property Act)

I.C. 32-17-14-25(a) ~~An election under Ie 29 1 3 1 does not apply to a valid transfer on death transfer~~. In accordance with IC 32-17-13, a transfer on death transfer may be subject to the payment of the surviving spouse and family allowances under IC 29-1-4-1…..

- 2011 Amendment - P.L. 36-2011, SEC 15.

II. Other Statutes on Right of Election

b) - IC 32-17-14-25

The Probate Code Study Commission reports that "the Section believes that there could be circumstances on which the election does apply especially if the transfer on death transfer is done as a fraud against the marriage." 9-7-2010 Probate Code Study Commission Minutes.

III. Defeating the Spousal Right of Election

a) Overview

- Non-probate assets and certain lifetime gifts are, however, subject to the surviving spouse's right of election under I.C. 29-1-3-1 when the decedent, through the creation and funding of said non-probate assets and or gifts, improperly defeats the surviving spouse's right of election.
- Seven Indiana Appellate Cases on point

III. Defeating the Spousal Right of Election

a) Overview (cont.)

"The threshold question is whether the lifetime transfer, whether by gift, by creation of joint accounts, or through the creation of a living trust, is tainted with a motive to defeat the surviving spouse's election under Ind. Code Section 29-1-3-1. Because the holdings in the cases turn on peculiar fact patterns, the Indiana decisions are difficult to synthesize in order to form a clear statement of the law." – **Henry's Indiana Probate Law and Practice** § **27.17(2019).**

III. Defeating the Spousal Right of Election

b) Policy Considerations

"The question involves a conflict between two public policy considerations, one of which favors a provision for support of a surviving spouse in case of disinheritance by the deceased spouse, and the other which favors unfettered inter vivos alienability of one's real or personal property." - *Leazenby v. Clinton County Bank & Trust*, 355 N.E.2d 861 (Ind. Ct. App. 1976).

III. Defeating the Spousal Right of Election

c) Types of transfers

- Gifts Causa Mortis
  - "A gift causa mortis is consummated when a person in peril of death, and under the apprehension of approaching dissolution from an existing disorder, delivers, or causes to be delivered, to another, or affords the other the means of obtaining possession of, any personal goods for his own use, **upon the express *or implied condition* that in case the donor shall be delivered from the peril of death the gift shall be defeated.**" *Crawfordsville Trust Co. v. Ramsey*, 55 Ind. App. 40 (Ind. Ct. App. 1913) (emphasis supplied) [Conduct of parties made decedent's assignment of stocks and bonds gift causa mortis]

III. Defeating the Spousal Right of Election

c) Types of transfers (cont.)

- Deeds that are testamentary in nature
  - *Stroup v. Stoup et al*., 39 N.E. 864 (Ind. 1895). [decedent deeded land to son, but made conveyance subject to: (i) a life estate in decedent; (ii) a trust, wherein upon decedent's death, son would sell and split the proceeds pursuant to the decedent's wishes set forth therein; and (iii) the right by the decedent to at anytime demand a sale of the property, with the proceeds being returned to the decedent.

III. Defeating the Spousal Right of Election

c) Types of transfers (cont.)

- Revocable and Irrevocable Living Trusts
  - Leazenby v. Clinton County Bank & Trust, 355 N.E.2d 861 (Ind. Ct. App. 1976).
  - Walker v. Lawson, 526 N.E.2d 968 (Ind. 1988)
  - Dunnewind v. Cook, 697 N.E.2d 485 (Ind. App. 1998)
  - Estate of Weitzman, 724 N.E.2d 1120 (Ind. App. 2000)
  - Matter of Sarkar, 145 N.E.3d 802 (Ind. Ct. App. 2020)(Sarkar II)

III. Defeating the Spousal Right of Election

d) *Matter of Sarkar*

- Matter of Sarkar 145 N.E.3d 802 (Ind. Ct. App. 2020)
  - 56 year marriage.
  - Separate revocable living trusts disinheriting each other.
    - First executed 22 years prior to decedent's date of death;
    - Latest amendment executed 1 year prior to death, when decedent voiced concerns over dying;
    - Evidence of some estate and income tax planning efforts;
    - Retained control as trustee; *Fulp v. Gilliland* – 998 N.E.2d 204
    - Initially used same estate planning attorney;
  - Both spouses aware of the other's intentions and finances.

III. Defeating the Spousal Right of Election

d) *Matter of Sarkar, (cont.)*

Two part inquiry on whether spousal right of election improperly defeated:

- (1) Whether the trust was created in contemplation of death; and
- (2) Whether the decedent intended to frustrate/defeat the surviving spouse's right to a statutory elective share.

III. Defeating the Spousal Right of Election

d) *Matter of Sarkar (cont.)*

(1) Whether the trust was created in contemplation of death.

- Sole purpose of trust testamentary in nature?
- Created when decedent had expectation of dying?
- Funded when decedent had expectation of death?

(2) Whether the decedent intended to frustrate/defeat the surviving spouse's right to a statutory elective share.

- "As there is no conclusive evidence that there was a secreting of the real ownership of the property, or that [Dipa] did not know and fully approve of the trust agreement, we conclude that Anil did not create the Trust with the intent to disinherit Dipa."

III. Defeating the Spousal Right of Election

e) Applying *Walker* to *Matter of Sarkar*

- Walker v. Lawson, 526 N.E.2d 968 (Ind. 1988).
  - Malpractice case;
  - Decedent's expressed goal: leave her estate to two minor sons from a prior marriage, disinherit spouse;
  - Drafting Attorney Lawson did not advise of right of election. Instead, drafted a will;
  - Decedent suffering from cancer;

III. Defeating the Spousal Right of Election

e) Applying *Walker* to *Matter of Sarkar (cont.)*

- "Lawson was faced with the established law that a spouse cannot by gifts in contemplation of death deprive a surviving spouse of his or her statutory share in the estate."
- "Lawson was also faced with the existing case law holding that the statute, Ind. Code § 29–1–3–1, is designed to make it impossible for a spouse to deprive the surviving spouse of a full one-third of the property. *Haas v. Haas* 96 N.E.2d 116 (Ind. Ct. App. 1951)."

III. Defeating the Spousal Right of Election

e) Applying *Walker* to *Matter of Sarkar (cont.)*

"The other alternative of establishing a joint tenancy among Sybille and her sons was equally flawed and would have been considered a transfer in contemplation of death and thus treated as a testamentary instrument subject to Ind.Code § 29–1–3–1." *See Stroup v. Stroup, et al.* (1894),140 Ind. 179, 39 N.E. 864; 2B *Henry's Probate Law and Practice* § 22, at 92 (J. Grimes 7th ed. 1979)."

III. Defeating the Spousal Right of Election

e) Applying *Walker* to *Matter of Sarkar (cont.)*

- Applying the holding in *Walker*, what if the *Sarkar* decedent came to you for estate planning advice, but expressed a desire to (i) conceal his assets and estate plan from his wife and (ii) defeat her right of election under 29-1-3-1?

Defeating the Spousal Right of Election

IV. Estate Planning Considerations

- Estate planning considerations:
  - Do you take the case?
    - Walker provides protection as to beneficiaries. What about the disinherited spouse?
  - Issues of Fact, so document/create the narrative
    - Health;
    - Manufacture a purpose other than defeating the right of election;
    - Spousal Knowledge;

Defeating the Spousal Right of Election

IV. Estate Planning Considerations (Cont.)

- Estate planning considerations:
  - Life time gifting
  - Obtain Waiver – I.C. 29-1-3-6
  - Preserve confidentiality as to the estate planning file:
    - Who witnesses the Will? - *Brown v. Edwards*, 640 N.E.2d 401, 406 (Ind. Ct. App. 1994).
    - Who is nominated as personal representative?
    - Is there a Will?

Defeating the Spousal Right of Election

V. Litigation Considerations

- Timely elect.
  - Without a timely filed election, no cause of action exists.

- What cause of action to file?
  - Quiet title alleging fraud; - *Stroup*
  - Complaint to set aside transfer and declare transfer void; - *Ramsey*
  - Objections that trust is illusory and a fraud upon the surviving spouse; - *Leazenby*
  - Petition to Determine Assets of the Estate and to set aside irrevocable trust - *Dunnewind*
  - Docket trust and petition to include the assets in the estate - *Weitzman*

- What if there is no Will?
  - Complaint to Determine Assets Subject to Spousal Inheritance

Defeating the Spousal Right of Election

V. Litigation Considerations (cont.)

- Is a probate claim under I.C. 29-1-14 required?
  - I.C. 29-1-1-3(a)(3) "Claims" includes liabilities of a decedent which survive, whether arising in contract or in tort or otherwise, expenses of administration, and all taxes imposed by reason of the person's death. See *Estate of Markey*, 38 N.E.3d 1003, (Ind. 2015)
  - Non-Probate Transfer Act

Defeating the Spousal Right of Election

V. Litigation Considerations (cont.)

- Non-Probate Transfer Act –

  "Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to a deceased transferor's probate estate for:

  (1) allowed claims against the deceased transferor's probate estate; and

  (2) statutory allowances to the decedent's spouse and children;

  to the extent the decedent's probate estate is insufficient to satisfy those claims and allowances. – I.C. 32-17-13-2(c)

Defeating the Spousal Right of Election

V. Litigation Considerations (cont.)

- Dead Man's Statute Applicability

  "Since a judgment 'against the estate' could result and an alleged 'contract with' the decedent is involved, Josephine's election, or waiver of right to elect, to take against the will would ordinarily have rendered her testimony incompetent. However, any exclusion that might have been available under the Dead Man's statute has been waived by the use of the depositions….*Taylor v. Taylor*, 643 N.E.2d 893 (Ind. 1994).

Stroup v. Stoup et al., 39 N.E. 864 (Ind. 1895).	
Was Spousal Right Defeated?	**Yes**
Trial Court Holding	Judgment sustaining demurrer to the complaint for want of sufficient facts.
Court of Appeals/Supreme Court Holding	The law will conclusively fix a fraudulent intent to the deeds and subject them to the spouse's right of election because deeds were testamentary in nature – e.g. acted like a will, and because they were illusory in nature - e.g. decedent could force a sale.
Type of Transfer	Deed - Purchase of land titled in son's name, but subject to (i) life estate in decedent and (ii) subject to trust, wherein upon the decedent's death, the son would sell and split the proceeds as follows: to wife: $1,000 (which was 6.6% of the FMV of land); to children: residue. Further, the son was required, during the decedent's lifetime, to assist the decedent with selling the land, at his request, and give 100% of the sales proceeds to the decedent.
Cause of Action	Quiet Title action alleging fraud - Fraudulently induced surviving spouse to join in sale of land, when purpose was to "defraud the [surviving spouse] of an inchoate interest" by using said money to purchase land that would be titled in name of decedent's son to sell upon decedent's death.
Probate claim filed?	No
Time between Transfer and Death	11 years
Duration of Marriage	11 years
Was property held separately?	Not discussed
Who earned/contributed money	The record is unclear, but the surviving spouse appears to have contributed 30% of the transfer that defeated her interest.
Divorce pending	No
Did the Decedent relinquish control during life	No. While the decedent transferred land to son, it was subject to (i) life estate and (ii) a condition that son, upon request by the Decedent, sell land and give decedent 100% of proceeds.
Was there otherwise a valid purpose?	No. "Such a trust has no validity, and the trustee possesses only a naked or nominal title, which does not impair the full ownership of the cestui que trust or beneficiary" - Rev.St. 1894, § 3403 (Rev. St. 1881, § 2981)
Testate or Intestate Estate	Intestate
Testamentary in Nature	Yes. "Was the disposition such as to cut off the seisin of the husband, and at the same time reserve to him the use of the property during his life, and to dispose of it absolutely to the exclusion of the rights of his wife upon his death? In other words, was it testamentary in its nature,–did it operate substantially as a will would have operated? Where this appears, I apprehend that all speculations about the motives or intent of the husband are idle. The law will conclusively fix to his act a fraudulent intent."
Causa Mortis	Not discussed
Made in contemplation of death	Not discussed
Date of Health Issues	Not discussed
Type of Health Issues	Not discussed
Specific Intent to Defeat Spousal Right?	Not stated in opinion, but "that all speculations about the motives or intent of the husband are idle. The law will conclusively fix to his act a fraudulent intent."
Surviving spouse aware of transfer?	No. Decedent "caused the same to be conveyed as aforesaid, without her knowledge or consent."

	Crawfordsville Trust Co. v. Ramsey, 100 N.E. 1049 (Ind. App. 1913).
Was Spousal Right Defeated?	**Yes**
Trial Court Holding	Spousal right defeated: "The intent and purpose….was to prevent his wife, appellee, from taking her stautory interest."
Court of Appeals/Supreme Court Holding	The gifts of the stocks and bonds were not valid inter vivos gifts. "But whether said gift be held to be a gift causa mortis or testamentary in effect, it is clear under the authorities that, when made under the circumstances and conditions disclosed by the finding in this case, it will not operate to defeat the widow's interest in the property so given."
Type of Transfer	Two separate assignments of the same property: The first assignment is of Stocks and bonds to the trustee, to be distributed upon decedent's death pursuant to the terms set forth in his Will. The second, subsequent assignment is identical to the first, except upon advice of counsel, the terms of the will are fully set forth in the second assignment.
Cause of Action	Complaint to set aside transfer and declare transfer void, due, in part, to allegations of undue influence.
Probate claim filed?	No
Time between Transfer and Death	less than 1 month
Duration of Marriage	24 years
Was property held separately?	Not discussed
Who earned/contributed money	Not discussed
Divorce pending	No
Did the Decedent relinquish control during life	Arguably no. The decedent assigned the same stocks and bonds twice, indicating he retained control. The delivery was not to the trustee, but to a secretary, to "take care of them." The conduct of the parties suggested the decedent retained control. Finally, the bank did not record the transfers on their books, and the bank's name was not added to the stocks.
Was there otherwise a valid purpose?	No. Assignments directly mirrored decedent's testamentary scheme, as set forth in his wills.
Testate or Intestate Estate	Testate, but successful will contest.
Testamentary in Nature	Suggests yes, "But whether said gift be held to be a gift causa mortis or testamentary in effect, it is clear under the authorities that, when made under the circumstances and conditions disclosed by the finding in this case, it will not operate to defeat the widow's interest in the property so given."
Causa Mortis	Suggests yes, "But whether said gift be held to be a gift causa mortis or testamentary in effect, it is clear under the authorities that, when made under the circumstances and conditions disclosed by the finding in this case, it will not operate to defeat the widow's interest in the property so given."
Made in contemplation of death	Yes. The deceased, on each of the occasions when he made the assignments of the stocks and bonds above referred to, and for some time prior thereto, knew the character of his illness, knew that it was fatal, and that he had but a short time to live."
Date of Health Issues	Earliest mention of health issues occurred a year prior to assignments. As of the date of assignments, Decedent knew he was ill, and knew the illness was fatal, and that he had a short time to live.
Type of Health Issues	Pneumonia, under care of physician, suffering from acute Bright's disease.
Specific Intent to Defeat Spousal Right?	Yes. "After making his last will said Ramsey obtained information that the trust fund there in created could be diminished by his widow electing to take under the law instead of taking under the will."
Surviving spouse aware of transfer?	No. "Each and all of said assignments were made secretly by the said Ramsey, without the knowledge or consent of his wife."

	Leazenby v. Clinton County Bank & Trust, 355 N.E.2d 861 (Ind. Ct. App. 1976)
Was Spousal Right Defeated?	**No**
Trial Court Holding	Trial court entered judgment in favor of trustee and the estate.
Court of Appeals/Supreme Court Holding	Trust was a valid inter vivos trust because the purpose of the trust was for the decedent's convenience, to allow someone else to handle the decedent's finances. Given the trust's validity, the surviving husband had no right to subject said trust to his right of election.
Type of Transfer	Revocable Living trust, income for life to decedent, principal to decedent for "care, use, maintenance, and/or benefit," and upon decedent's death, remainder to issue, with husband given the right to reside in decedent's home for 6 months.
Cause of Action	Objections that the trust was colorable and illusory and a fraud upon the surviving spouse because it defeated the surviving spouses' statutory right to share in his wife's estate.
Probate claim filed?	No
Time between Transfer and Death	3 years
Duration of Marriage	21 Years
Was property held separately?	Yes. "The testimony at trial showed that Elsie and Cloyd kept their accounts separately."
Who earned/contributed money	Decedent. "Since Cloyd had no right or interest in the property of his deceased wife during her lifetime."
Divorce pending	No
Did the Decedent relinquish control during life	No. Trust remained revocable. However, "It is apparent from the evidence that Elsie wished that someone else would handle, care for, and invest her property; it would be a convenience for her not to be bothered with its management."
Was there otherwise a valid purpose?	Yes. "It is apparent from the evidence that Elsie wished that someone else would handle, care for, and invest her property; it would be a convenience for her not to be bothered with its management."
Testate or Intestate Estate	Testate - pour over will into Trust. No provision for surviving spouse.
Testamentary in Nature	Not discussed
Causa Mortis	Not discussed
Made in contemplation of death	Not discussed
Date of Health Issues	Not discussed
Type of Health Issues	Not discussed
Specific Intent to Defeat Spousal Right?	Not discussed
Surviving spouse aware of transfer?	Yes - "no conclusive evidence that there was a secreting of the real ownership of the property, or that Cloyd did not know and fully approve of the trust arrangement.... Because the trust paid for his wife's nursing home care and medical bills, it may reasonably be inferred that he was aware of the trust."

	Walker v. Lawson, 526 N.E.2d 968 (Ind. 1988)
Was Spousal Right Defeated?	NA (Malpractice case)
Trial Court Holding	No material issue of fact, granted summary judgment in favor of drafting attorney.
Court of Appeals/Supreme Court Holding	
Type of Transfer	Malpractice - Drafting attorney allegedly failed to advise decedent that surviving spouse could elect to take against the will
Cause of Action	Malpractice - Drafting attorney allegedly failed to advise decedent that surviving spouse could elect to take against the will
Probate claim filed?	NA (Malpractice case)
Time between Transfer and Death	Less than a year between meeting with drafting attorney and death
Duration of Marriage	
Was property held separately?	Not discussed
Who earned/contributed money	Yes. Bulk of estate, house, was purchased using proceeds from life insurance policy paid out on death of first husband.
Divorce pending	Not discussed
Did the Decedent relinquish control during life	Not applicable
Was there otherwise a valid purpose?	Opinion suggests there could not have been an otherwise valid purpose upon the decedent expressing his wishes to disinherit his spouse.
Testate or Intestate Estate	Testate
Testamentary in Nature	It would have been. - "The other alternative of establishing a joint tenancy among Sybille and her sons was equally flawed and would have been considered a transfer in contemplation of death and thus treated as a testamentary instrument subject to Ind.Code § 29–1–3–1. See Stroup v. Stroup, et al. (1894)"
Causa Mortis	Not discussed
Made in contemplation of death	It would have been. - "The other alternative of establishing a joint tenancy among Sybille and her sons was equally flawed and would have been considered a transfer in contemplation of death and thus treated as a testamentary instrument subject to Ind.Code § 29–1–3–1. See Stroup v. Stroup, et al. (1894)"
Date of Health Issues	Yes, cancer as of the meeting with drafting attorney
Type of Health Issues	Cancer
Specific Intent to Defeat Spousal Right?	Yes, had drafting attorney advised.
Surviving spouse aware of transfer?	Not discussed

	Dunnewind v. Cook , 697 N.E.2d 485 (Ind. App. 1998)
Was Spousal Right Defeated?	**Yes**
Trial Court Holding	Trial Court: Spousal right of election defeated, trust assets subject to elective right.
Court of Appeals/Supreme Court Holding	The sole purpose of Florence executing the Trust, and transferring her assets to the Trust was to prevent Husband from effectively exercising his statutory right ... that the trust failed to provide the Decedent with income or the right to reside in her own home....implies that neither the trust's beneficiaries nor the Decedent intended the gifts to take effect until the Decedent's death. These facts give the trust a testamentary character.
Type of Transfer	Irrevocable Trust Agreement. No income to decedent, no right of decedent to live in marital home (though decedent's daughter paid income to decedent for remainder of decedent's life.) Upon decedent's death, spouse receives life estate in marital residence, life estate in all household goods and personal property, and $24,500. Upon surviving spouse's death, all remaining assets to decedent's children.
Cause of Action	Petition to Determine Assets of the Estate and to Set Aside Irrevocable Trust.
Probate claim filed?	No
Time between Transfer and Death	Five months
Duration of Marriage	22 years
Was property held separately?	Not discussed
Who earned/contributed money	Not discussed
Divorce pending	No
Did the Decedent relinquish control during life	Yes. Trust is irrevocable.
Was there otherwise a valid purpose?	No, "there was no showing that the trust was executed to assist the Decedent with business or financial affairs."
Testate or Intestate Estate	Testate
Testamentary in Nature	Yes. "We also note that the trust failed to provide the Decedent with income or the right to reside in her own home. The lack of such provisions implies that neither the trust's beneficiaries nor the Decedent intended the gifts to take effect until the Decedent's death. These facts give the trust a testamentary character thereby failing to defeat the spouse's share under Leazenby."
Causa Mortis	No
Made in contemplation of death	"The evidence presented at the hearing supports the trial court's findings that the Decedent executed the trust in contemplation of her impending death."
Date of Health Issues	Learned of cancer diagnosis in 1994, "Doctors told her in November, 1994 that she had 8 months to live." Died on July 9, 1995.
Type of Health Issues	Terminal Cancer
Specific Intent to Defeat Spousal Right?	Yes. "The sole purpose of Florence executing the Trust, and transferring her assets to the Trust was to prevent Husband from effectively exercising his statutory right as a subsequent surviving spouse to the assets of Florence Cook."
Surviving spouse aware of transfer?	"Husband was told a trust had been made, but was not informed of its terms. He did not ask to be informed of its terms."

	***Estate of Weitzman*, 724 N.E.2d 1120 (Ind. App. 2000)**
Was Spousal Right Defeated?	Issue of fact, remanded for trial
Trial Court Holding	Summary judgment granted in favor of Bank, denying surviving spouse's cross-motion for summary judgment on her petition to subjecting the trust assets to her elective share.
Court of Appeals/Supreme Court Holding	Remand for trial. Issue of material fact whether (i) trust created in contemplation of death and (ii) whether decedent intended to defeat elective share.
Type of Transfer	Revocable living Trust agreement. Bank is trustee. Decedent retained right to direct investments, receive income, add or withdraw assets. At decedent's death, surviving spouse received $75,000 and annual payments of $30,000. Value of Trust at date of death was 2.3 million.
Cause of Action	Petition the court to take jurisdiction over the Trust assets so that they would be included in the estate and thus subject to her elective share.
Probate claim filed?	No
Time between Transfer and Death	6 years
Duration of Marriage	10 years
Was property held separately?	Yes
Who earned/contributed money	Upon getting married, the decedent moved into surviving spouse's home. Surviving spouse paid mortgage, decedent paid utilities and country club dues.
Divorce pending	No
Did the Decedent relinquish control during life	No, revocable living trust.
Was there otherwise a valid purpose?	Remand - "The record is silent as to whether Paul had stated to his attorney or anyone else his purpose for creating the Trust."
Testate or Intestate Estate	Testate
Testamentary in Nature	Not discussed, other than "When a testator executes a trust in contemplation of his impending death and does so in order to defeat the surviving spouse's statutory share, the trust will be considered testamentary in nature and will not defeat the spouse's share."
Causa Mortis	Not discussed
Made in contemplation of death	Remand - "So, the determinative question before us is whether the trial court properly found that Paul did not establish the Trust in contemplation of his death and with the purpose of defeating Esther's statutory share."
Date of Health Issues	Remand - "The record does not reflect when Paul was diagnosed with cancer or informed of the diagnosis. Rather, the designated evidence reflects only that in the fall of 1996 a trust officer at the Bank “first became aware that [Paul] had been diagnosed with cancer.”
Type of Health Issues	"He had prostate problems and had been hospitalized a number of times prior to the creation of the Trust and during the last five to six years of his life. At some point before or during the autumn of 1996, Paul was diagnosed with cancer and hospitalized."
Specific Intent to Defeat Spousal Right?	Remand - "The record is silent as to whether Paul had stated to his attorney or anyone else his purpose for creating the Trust."
Surviving spouse aware of transfer?	Remand - "there was no evidence that Esther was aware of the provisions and effect of the Trust."

	Matter of Sarkar, 84 N.E.3d 666 (Ind. Ct. App. 2017) (Sarkar I)
Was Spousal Right Defeated?	**Remand.** Election timely filed, motion to amend should have been granted, remand for trial on issue of whether right of election defeated.
Trial Court Holding	Summary judgment granted in favor of child from prior marriage, that (i) surviving spouse's election filing untimely and (ii) decedent's IRA properly payable to decedent's trust
Court of Appeals/Supreme Court Holding	Remanded for evidentiary trial
Type of Transfer	3/31/1997 - **Revocable living trust**. Distribution stated therein: "[b]ecause my spouse, [Dipa], has more assets than I have and will not need my money or property to support herself, I choose to leave nothing to her" Seven amendments, final amendment on 3/14/2014, gave spouse $50,000. Trust estate as of date of death ~ $2,000,000
Cause of Action	**Initial Petition to Docket Trust and for Relief**: (1) the Will had been admitted to probate and provided that Anil's residuary estate be distributed to the Trust; (2) at the time of Anil's death, the couple had been married for fifty-six years; (3) on the date of Anil's death, nearly all of his assets were owned by the Trust; (4) the Trust was created in 1993, restated in 1997, and amended seven times; (5) one of the Trust assets consists of an IRA and because Dipa signed spousal consent regarding the beneficiary of the IRA under duress, the IRA should be removed from the Trust; (6) prior to his death, Anil diverted his social security payments to the Trust, which has left the probate estate with no assets. **Amended Petition: C**hallenges the validity of the Trust and requests that the Trust assets be included in the probate estate
Probate claim filed?	No
Time between Transfer and Death	22 years between original trust and death. Seven amendments. Last amendment of March 14, 2014, was executed 1 year before death (2/24/2015)
Duration of Marriage	56 Years
Was property held separately?	
Who earned/contributed money	The decedent's social security funded a portion of the trust. Approximately half of the trust was funded with the decedent's IRA.
Divorce pending	No
Did the Decedent relinquish control during life	
Was there otherwise a valid purpose?	
Testate or Intestate Estate	Testate
Testamentary in Nature	
Causa Mortis	
Made in contemplation of death	
Date of Health Issues	
Type of Health Issues	
Specific Intent to Defeat Spousal Right?	
Surviving spouse aware of transfer?	

	Matter of Sarkar, 145 N.E.3d 802 (Ind. Ct. App. 2020)(Sarkar II)
Was Spousal Right Defeated?	**No**
Trial Court Holding	"The [c]ourt finds no evidence that Anil's intent in creating the [T]rust was to frustrate Dipa's right to a statutory elective share. The [c]ourt further finds that Anil's [T]rust was not created in contemplation of his death and is therefore not testamentary. Therefore, the [c]ourt finds that Anil's [T]rust assets are not subject to Dipa's statutory elective share."
Court of Appeals/Supreme Court Holding	Affirmed
Type of Transfer	3/31/1997 - **Revocable living trust** . Distribution stated therein: "[b]ecause my spouse, [Dipa], has more assets than I have and will not need my money or property to support herself, I choose to leave nothing to her" Seven amendments, final amendment on 3/14/2014, gave spouse $50,000. Trust estate as of date of death ~ $2,000,000
Cause of Action	**Amended Petition:** Challenges the validity of the Trust and requests that the Trust assets be included in the probate estate
Probate claim filed?	No
Time between Transfer and Death	22 years between original trust and death. Seven amendments. Last amendment of March 14, 2014, was executed 1 year before death (2/24/2015)
Duration of Marriage	56 Years
Was property held separately?	Yes, "Anil and Dipa kept their financial affairs divided with separate bank accounts, pension plan accounts, and investment accounts."
Who earned/contributed money	The decedent's social security funded a portion of the trust. Approximately half of the trust was funded with the decedent's IRA.
Divorce pending	No
Did the Decedent relinquish control during life	No, the decedent "had check writing authority on his [T]rust and could amend or modify it at any time."
Was there otherwise a valid purpose?	Yes, "for the purpose of obtaining assistance in personal and business affairs as well as disposing of his property at death….. [the decedent's] Trust, created after he retired, was initially utilized as part of his estate and income tax planning efforts, and it later held and managed the trust assets... with the decedent acting as trustee.
Testate or Intestate Estate	Testate
Testamentary in Nature	Trial Court order: "decedent's [T]rust was not created in contemplation of his death and is therefore not testamentary."
Causa Mortis	Not discussed
Made in contemplation of death	No. "There is no evidence that any amendment was effectuated in expectation of death. Rather, the amendments only fluctuated the amount left to each remainder beneficiary, leading us to conclude that internal family relationships played a significant role in the creation of the amendments and not any belief that Anil was to die shortly."
Date of Health Issues	The decedent voiced his concern in 2013 of an impending death. (twenty years after the execution of the original trust).
Type of Health Issues	Cardiac health problems
Specific Intent to Defeat Spousal Right?	Per opinion, no. But arguably yes. Attorney advised as to right of election.
Surviving spouse aware of transfer?	Yes. "Dipa was aware of Anil's [T]rust and its provisions because it was identical to hers."