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90 Hot Tips in Estate, Trust and Probate Practice

Indiana Continuing Legal Education Forum (ICLEF)

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December 21, 2021
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90 HOT TIPS
IN ESTATE, TRUST AND PROBATE PRACTICE

December 21, 2021

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DISCLAIMER

The information and procedures set forth in this practice manual are subject to constant change and therefore should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein. Further, the forms contained within this manual are samples only and were designed for use in a particular situation involving parties which had certain needs which these documents met. All information, procedures and forms contained herein should be very carefully reviewed and should serve only as a guide for use in specific situations.

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Agenda

8:30 A.M.	**Registration and Coffee**
8:55 A.M.	Welcome and Course Introduction *Curtis E. Shirley*, Program Chair
9:00 A.M.	5 Tips on Special Needs Trusts - *Robert W. Fechtman*
9:20 A.M.	5 Tips on Will Contests - *John A. Cremer*
9:40 A.M.	5 Tips on Trust Contests - *Lisa M. Dillman*
10:00 A.M.	5 Tips on Lessons Learned in 35 Years of Mediation - *Brian C. Hewitt*
10:20 A.M.	**Break**
10:35 A.M.	5 Tips on Common Mistakes to Avoid - *Rodney S. Retzner*
10:55 A.M.	5 Tips on Retirement Accounts and the SECURE Act - *Rebecca W. Geyer*
11:15 A.M.	5 Tips on Filing and Defending Claims - *Nathan S.J. Williams*
11:35 A.M.	5 Tips on Recent Legislation RE: Will Executions - *Ronald M. Katz*
11:55 A.M.	5 Tips on Recent Cases - *MaryEllen K. Bishop*
12:15 P.M.	**Lunch Break**
1:15 P.M.	5 Tips on New Advance Directives for Health Care - *Jeffrey S. Dible*
1:35 P.M.	5 Tips on Fees Under the VA Claim Process - *Tamatha A. Stevens*
1:55 P.M.	5 Tips on Clients Involved in Divorce - *James A. Reed*
2:15 P.M.	5 Tips on Business Succession Planning - *Richard O. Kissel, II*
2:35 P.M.	5 Tips on Better Filings with the Courts - *Hon. Andrew R. Bloch*
2:55 P.M.	**Break**
3:10 P.M.	5 Tips on Spousal Limited Access Trusts (SLATs) - *John A. Gardner*
3:30 P.M.	5 Tips on How to Avoid Probate Court - *Shawn M. Scott*
3:50 P.M.	5 Tips on Wrongful Death Estates - *Kent M. Frandsen*
4:10 P.M.	5 Tips on Guardianships - *Anne Hensley Poindexter*
4:30 P.M.	**Adjournment**

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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.

Hon. Andrew Bloch
Magistrate, Hamilton County Superior Court, Noblesville

Magistrate Andrew R. Bloch serves as Magistrate for the Hamilton Superior Court, where he hears a variety of family, civil, and criminal matters. He is a Certified Family Law Specialist (Family Law Certification Board) and serves as the District 19 Representative to the Indiana Judge's Association where he represents Magistrates from Carroll, Tippecanoe, Benton, Fountain, Montgomery Warren, Clinton, Grant, Madison, Hancock, Henry, Rush, Boone, Hamilton, Hendricks, Morgan, Johnson, Shelby, Batholomew, Brown, Jackson, Lawrence, Monroe, Daviess, Martin, Pike, Dubois, Spencer, Know, Gibson, Posey, Vanderburgh, and Warrick counties.

Prior to his appointment to the bench, he was a Registered Family Law Mediator, Trained Family Law Arbitrator, Trained Guardian Ad Litem, and Trained in Collaborative Family Law (CIACP). He received his B.S.B.A. in Information Systems from Xavier University and his J.D. from the Indiana School of Law – Indianapolis (n/k/a Robert McKinney School of Law), where he was also awarded the Norman Lefstein Award of Excellence. Drew was named a "Super Lawyer" for 2019 as well as a “Rising Star” in Family Law in 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, and 2018, as published in Indianapolis Monthly. He is a member of the Domestic Relations Committee, as appointed by the Indiana Supreme Court, Hamilton County Bar Association; Indianapolis Bar Association (Family Law Executive Committee); and Indiana State Bar Association (Family Law Executive Committee). Drew is a Co-Chair of the current Indiana State Bar Summer Study Committee of Presumptive Joint Physical Custody. He previously served as a member of the American Bar Association (Chair of the Bankruptcy Committee - Family Law Section). As well as a member of the Muncie Bar Association (Executive Committee) and a former member of the Ratliff-Cox Inns of Court.

Drew serves as Secretary on the Board of the Indiana Continuing Legal Education Forum (ICLEF) and is a four-time chair of the Advanced Family Law (South) Program.

Drew is a sought-after presenter for several organizations and a featured speaker on a variety of topics across the state of Indiana. Formerly, as a Partner at Cross, Pennamped, Woolsey & Glazier, P.C., he devoted 100% of his practice to family law matters including mediation, arbitration, trial work, and appeals. Before joining Cross, Pennamped, Woolsey & Glazier, P.C. Drew served as a Commissioner in the Marion Circuit Court – Paternity Division, hearing custody, visitation, and child support cases. He also served as Judge Pro Tem in Hamilton, Delaware, and Marion County in a variety of family law, civil, and criminal matters.

In addition to his service on the Board at ICLEF, Drew served as the Indianapolis Alumni Chapter President for Xavier University for six years. He is a member of the Lew Hirt Society at Xavier University. He also served as a Board Member on multiple charter school board across the state of Indiana and has lectured on Open Door Law in Indiana with respect to charter schools.

MaryEllen K. Bishop
Cohen Garelick & Glazier, Indianapolis

With nearly four decades of experience in law, *MaryEllen Bishop* represents her clients with focused estate planning, probate, litigation and tax services. She is a Board Certified Indiana Trust and Estate Lawyer.

She is very actively involved in the legal community and holds multiple professional leadership positions. She has also written several professional papers and presented many lectures focusing on the areas of probate, probate and trust litigation and estate planning.

With her passion for meeting new people and learning about their families, MaryEllen helps clients plan for the future and maneuver very difficult times in life.

In her free time, she enjoys spending time with family, gardening, and traveling.

Practice Areas

- Board Certified Indiana Trust and Estate Lawyer (Certified by TESB)
- Business Planning
- Estate and Probate Administration
- Estate Planning
- Individual and Fiduciary Taxation
- Trust Litigation

Education

- Indiana University Robert H. McKinney School of Law, JD- 1982
- Indiana University, Marketing, BS- 1979

Bar Admissions

- Indiana, 1983
- U.S. District Court Northern District of Indiana, 1983
- U.S. District Court Southern District of Indiana, 1983
- U.S. Supreme Court, 1989

- U.S. Tax Court, 1983

Published Works

- Co-Chair Midwest Estate Tax & Business Planning Institute
- Indiana Law Survey, 2013-present
- Recent Legislation and Cases in Estate Planning & Probate, 2004-present
- What's New in Estate Planning and Administration, 2002-present
- Basic Will and Trust Drafting
- The Long and Winding Road to Probate Court

Honors / Awards

- Fellow of the American College of Trust & Estate Council (ACTEC)
- Board of Trustees, Indiana University
- Indiana Super Lawyer in Practice Area of Estate Planning/Trusts
- Best Lawyers in America in Practice Area of Estates and Trusts and Trust and Estate Litigation
- Best in Client Satisfaction Wealth Manager, Five Star
- Master Fellow, Indiana Bar Foundation
- Distinguished Fellow, Indianapolis Bar Foundation

Professional Affiliations

- Indiana University Alumni Association, Past International Chair
- Indiana University Robert H. McKinney School of Law, Past Secretary to the Board of Visitors
- Indiana University School of Medicine, Past Co-Chair of Planned Giving Committee
- Indiana University Women's Philanthropy Leadership Counsel
- Indianapolis Bar Association, Past Chair for Estate Planning and Administration Section
- Indianapolis Bar Association, Past Vice President to Board of Managers
- Indiana State Bar Association, Written Publications Committee of Res Gestae, Past Co-Chair
- Indiana State Bar Association, Probate Review Committee, 2005-present
- Estate Planning Council of Indianapolis
- American College of Trust and Estate Council, Fellow

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JOHN A. CREMER, born Indianapolis, Indiana, July 17, 1962; admitted to bar, 1989, Indiana. *Preparatory and legal education*: Indiana University (B.A., 1986; J.D., 1989). Author: Contributing Editor, Henry's Indiana Probate Law and Practice. *Member:* Indiana State (Probate, Trust and Real Estate Property Section) Bar Association; Estate Planning Council of Indianapolis; Fellow-American College of Trust and Estate Counsel. **PRACTICE AREAS**: Trusts, Estate, and Guardianship Litigation; Estate and Trust Planning; Estate and Trust Administration; Appellate Practice.

Presentations and Publications.

Date	**Chair or Faculty**	**Program Title**	**Topic**
March 1998	Faculty	Probate Litigation ICLEF	Trust Litigation
May 1997	Faculty	Probate Litigation ICLEF	Overview of Deadman's Statute
May 2000	Faculty	Probate Litigation ICLEF	Will Contests
April 2001	Faculty	Probate Litigation ICLEF	Trust Litigation
January 2004		State Bar Association	Powers of Attorney
February 2004		Indianapolis Bar Association	Presumption of Undue Influence in Fiduciary Transactions
December 14, 2004	Co-Chair	Probate Litigation ICLEF	Recent Power of Attorney Cases and Implications for Indiana Estate Planners
March 24, 2006	Faculty	Probate Litigation ICLEF	Litigation Update
July 18, 2006	Faculty	Probate Litigation ICLEF	Overview of Estate Litigation

August 10, 2006	Faculty	Probate Litigation ICLEF	Strategies to Avoid Litigation
April 22, 2008	Faculty	Advanced Estate Planning	Strategies in Anticipation of a Will or Trust Contest
September 13, 2008	Faculty	Estate Specialization Training	Estate, Trust, and Guardianship Litigation
December 11, 2008	Faculty	Estate Planning & Administration Potpourri	
May 27, 2009	Chair	Estate Litigation	
July 21, 2009	Chair	Advanced Estate & Business Succession Planning	Estate Litigation Issues
October 15, 2009	Faculty	The Full Spectrum of Estate & Trust Planning	
October 23, 2009	Faculty	Estate Specialization Training	Estate, Trust, & Guardianship Litigation
December 22, 2009	Faculty	120 Hot Tips in Estate, Trust & Probate Practice	Will Contests
December 21, 2010	Faculty	120 Hot Tips in Estate, Trust & Probate Practice	Will Contests
November 18, 2011	Chair	Probate Litigation	
December 20, 2011	Faculty	120 Hot Tips in Estate, Trust & Probate Practice	Dead Man's Statute in Estate Litigation
June 8, 2012	Faculty	39th Midwest Estate, Tax & Business	

		Planning Institute	
December 21, 2012	Faculty	120 Hot Tips in Estate, Trust & Probate Practice	Ways to Discourage Probate Litigation
December 20, 2013	Faculty	120 Hot Tips in Estate, Trust & Probate Practice	Will Contests
June 12, 2014	Faculty	41st Midwest Estate, Tax & Business Planning Institute	Evidentiary Matters in Probate Litigation
March 12, 2014	Faculty	Probate Litigation	Protecting the Estate Plan with Clinical Capacity Assessments
December 22, 2014	Faculty	120 Hot Tips in Estate, Trust & Probate Practice	Contracts to Devise
December 22, 2015	Faculty	120 Hot Tips in Estate, Trust & Probate Practice	Contract to Devise
December 21, 2016	Faculty	120 Hot Tips in Estate, Trust & Probate Practice	5 Tips on Claims
August 22, 2017	Chair	Probate & Trust Litigation	

Publications.

To What Extent May Non-Probate Transfers be made to Defeat the Spousal Election Under I.C. 29-1-3-1 – Res Gestae September 2001

Protecting the Estate Plan with Clinical Assessments - ACTEC Big Ten Meeting, Chicago, IL December 14, 2013

Jeffrey S. Dible
Frost Brown Todd LLC, Indianapolis

Jeff Dible concentrates his practice in estate planning, taxation and general business law. He prepares wills and trusts, supervises the administration of estates and trusts, represents various parties in guardianships and contested will or trust litigation, and provides gift tax and estate planning advice to professionals and business owners in the larger context of business succession. Jeff regularly lectures to attorneys and other estate planning professionals on a variety of estate planning and tax topics. He has frequently testified before committees of the Indiana General Assembly in favor of or against various bills to amend Indiana's trust, estate and guardianship laws, including the 2012-13 repeal of the Indiana inheritance tax. He is a Fellow of the American College of Trust and Estate Counsel and has been certified as an Indiana Trust and Estate Lawyer by the Indiana Trust and Estate Specialty Board (TESB).

Lisa M. Dillman
Applegate & Dillman Elder Law, Indianapolis

Lisa Dillman has been practicing law for 20 years, the first 10 of which were spent in the courtroom fighting for her clients' rights. She uses that same advocacy experience to fight for Applegate & Dillman Elder Law clients.

Lisa also has the wisdom to know when a fight isn't the best thing for her clients or their families. She is a registered civil mediator, helping families work through disputes that arise when navigating elder care and financial issues rather than going through a long, expensive court battle.

It's a personal issue for Lisa. When several members of her family needed help navigating the long-term care landscape, they asked for her assistance. She learned first-hand what it was like to be a caregiver, and to obtain VA and Medicaid benefits to offset nursing home costs for her own family. Through this experience, she learned just how important it is for families to rely on a trusted advisor when they are confronted with the uncertainties associated with paying for long-term care and planning for the future. Lisa brings the necessary compassion, legal knowledge and patience to every one of her current and potential clients.

Lisa joined her firm with Carol Applegate's practice in 2019 in order to expand to multiple Central Indiana locations and add Life Care Planning as a service to clients. She also practices in the areas of Family Law, Guardianships, Probate Administration and Litigation. Her vast litigation and appellate experience was developed through numerous bench and jury trials, court hearings and appeals to the Indiana Court of Appeals, Indiana Supreme Court and United States Circuit Courts of Appeal.

Lisa is admitted to practice law in the State of Indiana and the United States District Courts of Indiana. She is accredited by the Veterans' Administration and is a registered civil law mediator. She is also a member of the Elder Law Section of the Indiana State Bar Association and chairs the Veterans' Affairs Committee. She is a member of the National Academy of Elder Lawyers and ElderCounsel.

Lisa recognizes that hunger and poor nutrition often impact the elderly. That's why she has been involved with Meals on Wheels of Central Indiana for years and is now the Chair for their Board of Directors.

In her spare time, Lisa enjoys spending time with her daughters, Emery and Anaya,

and husband, Bryan. She also loves gardening, kayaking and reading historical fiction and non-fiction.

ROBERT W. FECHTMAN, JD, CELA

Robert Fechtman is a life-long resident of Indiana. He graduated from Northwestern University with a degree in music and a major in economics, and he received his JD from Rutgers School of Law. He also attended the University of San Diego's Institute on International and Comparative Law at Magdalen College, Oxford University. In 6th and 7th grade, Mr. Fechtman went away to school to sing with the American Boychoir in Princeton, New Jersey.

Mr. Fechtman focuses his practice on the problems of older and disabled persons, particularly special needs trusts, estate planning and trusts, health law, Medicaid planning, guardianships and decedents' estates. He is a frequent writer and speaker on a variety of estate planning, disability and elder law topics. He has been certified as an elder law attorney by the National Elder Law Foundation.

Mr. Fechtman is a member of the National Academy of Elder Law Attorneys, and he is a two-time Past President of the Indiana Chapter of the National Academy of Elder Law Attorneys. He is a member and a Past President of the Special Needs Alliance, which is a national, non-profit, invitation-only network of lawyers dedicated to disability and public benefits law. He is also a member of the Elder Law Section and the Probate, Real Property and Trusts Section of the Indiana State Bar Association, and a member of the Indianapolis Bar Association. Mr. Fechtman is a sustaining member of the Indiana Trial Lawyers Association. He is currently serving on the Boards of Directors of the National Elder Law Foundation, which is the accrediting organization for elder law attorneys, and of the Indianapolis Bar Association Estate Planning and Administration Section Executive Council, and the current President of the Board of The Indianapolis Children's Choir.

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KENT FRANDSEN has practiced with the firm since 1977, concentrating in civil litigation, electric utility, zoning and land use, and education law. Following graduation from law school in 1975, Mr. Frandsen served as a law clerk to The Honorable James E. Noland, Judge of the United States District Court for the Southern District of Indiana.

Mr. Frandsen has tried nearly 100 civil jury trials in state and federal courts, representing both plaintiffs and defendants. He has represented parties on appeal in over fifty cases in state and federal appellate courts. In three cases he has persuaded the Indiana Supreme Court to reverse published decisions of the Court of Appeals.

He has also served as the panel chair in over 300 medical malpractice proceedings administered by the Indiana Department of Insurance. Mr. Frandsen is a certified civil mediator and has conducted nearly 400 civil mediations. He has also served as an arbitrator for the American Arbitration Association in both construction and tort disputes.

He currently serves as general counsel for the Lebanon and Western Boone school districts, the Indiana CPA Society, Home National Bank, and Boone REMC.

Education

J.D., Indiana University McKinney School of Law, 1975, *summa cum laude*
B.S., Indiana University, 1972, *magna cum laude*

Appearances/Publications

Mr. Frandsen has made numerous presentations on topics of education, electric utility, insurance and tort law to attorneys and other professionals through the Indiana Continuing Legal Education Forum, National Business Institute, Indiana Trial Lawyers Association, Indiana School Boards Association, and National Rural Electric Cooperatives Association.

Reported Appellate Decisions of Interest

· Benefiel v. Wright Hardware, 128 N.E.3d 458 (Ind. App. 2019) [reversing a defense verdict in wrongful death action based on improper admission of expert testimony]

· Boyland v. Castle Farms, Inc., 71 N.E.3d 81 (Ind. App. 2017) [upholding a trial court's judgment in boundary dispute awarding title to land through adverse possession]

· SCI Propane v. Frederick, 15 N.E.3d 1015 (Ind. 2015) [in a case of first impression, reversing decisions of the trial court and Court of Appeals which awarded multi-million dollars of attorney's fees to plaintiff in wrongful death action]

· Pope v. Central Indiana Power, 937 N.E.2d 1242 (Ind. App. 2010) [affirming a directed verdict for electric utility in a negligence case arising from power outage]

· Deiss v. Greenhouse Dev., 926 N.E.2d 63 (Ind. App. 2010) [affirming a board of zoning appeals' construction of term "drive-through" facilities in zoning ordinance]

· Porter Dev. v. First Nat'l Bank, Valparaiso, 866 N.E.2d 775 (Ind. 2007) [reversing trial and Court of Appeals denial of attorney fees to a bank which initiated an interpleader action]

· Babyback's Int'l v. Coca-Cola Enterprises, 841 N.E.2d 557 (Ind. 2006) [rejecting the use of part performance and promissory estoppel as exceptions to Indiana's statute of frauds in the multi-year contract setting]

· Biomet v. Barnes & Thornburg, 791 N.E.2d 760 (Ind. App. 2003) [in a case of first impression, reversing decisions of trail court and Court of Appeals and adopting the "continuous representation" rule to toll the statute of limitations in legal malpractice actions]

· Jay County REMC v. Wabash Valley Power Assn., 692 N.E.2d 905 (Ind. App. 1998) [affirming issuance of injunction prohibiting an electric distribution cooperative from withdrawing as member of a generation and transmission cooperative]

· Lueder v. NIPSCO, 633 N.E.2d 1340 (Ind. App. 1997) [reversing a defense verdict based on incorrect jury instructions in negligence action involving injuries from a power line contact]

· Bradley v. Eagle-Union Schools, 647 N.E.2d 672 (Ind. App. 1995) [rejecting a landowner's challenge to school district's right to engage in pre-eminent domain testing of land]

· Lantis v. Astec Industries, 648 F.2d 1118 (7th Cir. 1981) [reversing a defense verdict in a products liability case based on incorrect jury instructions]

Professional and Community Associations

Long active in community affairs, he was a founding director of The Community Foundation of Boone County and has served as president of Ulen Country Club, Crooked Stick Golf Club, the Boone County Economic Development Corporation, Greater Lebanon Community Vision Committee, and Boone County Chamber of Commerce.

Mr. Frandsen is a member of the American Association for Justice. He has served on the ethics and land use committees of the Indiana State Bar Association and the board of the Indiana Trial Lawyers Association. He is now a member of the Defense Research Institute and the National Council of School Board Attorneys. Between 1999 and 2002, he was one of two public board members of the Indiana CPA Society. He currently serves on the Executive Committee of the Indiana Council of School Attorneys.

Since 2009, Mr. Frandsen has hosted a weekly radio show, WHAT'S UP, BOONE COUNTY (91.1 FM) in which he has conducted over 600 interviews of individuals who affect the quality of life in the community. Among his guests have been then-Butler Men's Basketball Coach Brad Stevens (a Boone County native) and Mitch Daniels, once as Governor of Indiana and once as President of Purdue University.

Honors/Awards

Upon graduation from Indiana University, Mr. Frandsen was awarded the Branch McCracken Memorial Scholarship for post-graduate studies.

Mr. Frandsen has been named an Indiana SuperLawyer every year since 2005.

In 2002, Mr. Frandsen was presented with the Chairman's Award for outstanding service to the Indiana CPA Society. That same year he and his wife Charlotte received the Philanthropists of the Year award from The Community Foundation of Boone County. In 2007, he received the Isaac Grainger award for volunteer service to the United States Golf Association.

An avid golfer, Mr. Frandsen was captain of the Indiana University golf team in college. He has been the Indiana State Amateur champion three times and in 1990 was inducted into the Indiana Golf Hall of Fame.

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Rebecca W. Geyer
Rebecca W. Geyer & Associates, PC, Indianapolis

Rebecca W. Geyer is the founder of Rebecca W. Geyer & Associates, PC where her practice concentrates in estate planning, estate and trust administration, elder law, tax planning, and business services. A board certified Indiana trust and estate specialist* and a Fellow of the American College of Trust and Estate Counsel, Rebecca is also an adjunct professor of elder law at the Indiana University Robert H. McKinney School of Law.

Rebecca completed her undergraduate degree at Indiana University, majoring in Political Science. She went on to earn her Juris Doctor in 1998 at the Indiana University Maurer School of Law. An avid volunteer in both the legal community and the Indianapolis community at large, Rebecca often speaks and writes on estate planning and elder law topics, and annually provides pro bono legal services to individuals through her work with the Indianapolis Bar Association and the Albert and Sara Reuben Senior Resource and Community Center.

As a frequent lecturer and seminar presenter, Rebecca has authored numerous seminars with ICLEF, ISBA, IBA, and National Business Institute. Her recent presentations include “Alternatives to Guardianship,” “Elder Law Update,” “Estate Planning Under Our Guardianship Statutes,” “Estate Planning with Retirement Assets” and “Estate Planning for Same-Sex Couples in Light of Obergefell.”

Rebecca is Secretary of the Indianapolis Bar Association, Past President of the Indianapolis Bar Foundation, a former Chair of the Elder Law Section of the Indiana State Bar Association, and a Past President of the Indiana Section of the National Academy of Elder Law Attorneys (NAELA). She served on the Board of Governors of the Indiana State Bar Association from 2016-2018. Since 2014, Rebecca has been named to the prestigious list of Super Lawyers® for estate planning, and has been designated as one of the top 50 attorneys in Indiana and one of the top 25 women lawyers in Indiana in since 2016 by Law & Politics Magazine and Indianapolis Monthly. She was also named to the Indianapolis Business Journal’s 2014 40 Under 40 Class, which recognizes individuals making a difference in their professions and communities prior to the age of 40. In 2018, Rebecca was recognized by the Indianapolis Bar Association for service to the profession, and was awarded the Indianapolis Bar Association’s Dr. John Morton Finney Award for Excellence in Legal Education in 2013. Rebecca also volunteers in the community where she serves as Past President of Congregation Beth-El Zedeck, and Treasurer of the Indianapolis Section of the National Council of Jewish Women.

Rebecca is chair of the Indianapolis Bar Association’s Estate Planning and

Administration Section, and a member of its Women and the Law Division. Her professional memberships also include the Probate, Trust and Real Property Section and the Elder Law Section of the Indiana State Bar Association, the Indiana Probate Review Committee, Estate Planning Council of Indiana, and the National Academy of Elder Law Attorneys. Rebecca was recognized as a distinguished fellow by the Indianapolis Bar Foundation in 2010.

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BRIAN C. HEWITT, ESQ.

Brian Hewitt is the founder and owner of Hewitt Law & Mediation LLC. The firm focuses on probate, trust and commercial litigation, estate planning and closely held business representation.

Brian has also served as a mediator for over 35 years and has conducted over 1,000 will and trust mediations. He has spoken about dispute resolution to Bar and Mediator Associations across the United States.

Ronald M. Katz
Katz Korin Cunningham PC, Indianapolis

Ronald M. Katz is a co-founding partner of Katz Korin Cunningham PC, and leads the firm's tax, estate and business succession planning practices. He also remains actively involved in representing and advising clients involved in real estate development in the State of Indiana.

"Envisioning opportunities for our clients and our community" is not just a motto for the firm that Ronnie helped foster – it is the foundation of our firm's culture. It requires an understanding of the numbers, client goals, governmental implications and the impact of tax consequences.

The goal is to provide the exceptional legal services efficiently at reasonable rates, without the frustration of delays, excess costs and bureaucracy.

Ronnie counsels on the importance of developing plans that meet the needs of the client. His services include a broad range of other matters that may be required as part of the planning process. With respect to estate planning matters, this may involve entity agreements, real estate transfers, and coordinating beneficiary designations of retirement accounts and life insurance with a client's overall plan. Ronnie also represents and advises beneficiaries of estate and trusts, and advises corporate and individual trustees regarding their responsibilities. With the assistance of our firm's litigation group, Ronnie also initiates and defends claims on behalf of heirs and beneficiaries.

For the past several years, Ronnie has strongly advocated that medical and legal professionals take a greater proactive role in advocating for their respective patients and clients about end-of-life decisions. He has focused his research and education on the legal, ethical and practical implications for patients, physicians, caregivers and attorneys.

Ronnie has served as an adjunct Professor of Law and guest lecturer for the Indiana University Robert H. McKinney School of Law (Real Estate Transactions; Trust & Estates) and, since 1993, has taught the Indiana Bar Review courses on Real Estate Law and Probate, Wills, Trusts and Administration. He has been involved in educating his peers for the past quarter century, primarily through continuing legal education courses offered through The Indiana Continuing Legal Education Forum, the Indianapolis Bar Association and the American Bar Association.

Richard O. Kissel II
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RICHARD O. KISSEL II has been practicing in the field of estate planning for 36 years. He focuses his practice on the areas of estate, business succession, and charitable planning and gifting as well as tax, corporate transactions, buy-sell agreements, employee benefits, and other matters affecting closely-held businesses. Rick has advised corporate executives, owners of closely-held businesses, and other individuals on a variety of domestic and international tax issues. He has also been involved in the creation of numerous publicly supported charities and private foundations. Rick is a Board Certified Indiana Trust and Estate Lawyer, as certified by the Trust and Estate Specialty Board, and is a member of the American College of Trust and Estate Counsel. He is recognized by Indiana Super Lawyers for estate planning and probate and by Best Lawyers in America® for closely held companies and family businesses law. Rick is also ranked in the Chambers High Net Worth Guide for Private Wealth Law in Indiana.

Rick has been involved in projects that include the recapitalization of closely-held businesses, disputes among trust beneficiaries, and trust and will contests. He has also prepared required trust language and represented corporate trustees in numerous situations.

Anne Hensley Poindexter
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Anne Hensley Poindexter was admitted to the bar in Indiana in 1988. Her undergraduate degree was obtained from Ball State University in 1984 and for her law degree she graduated, cum laude, from Indiana University in 1988. Prior to joining the firm, Mrs. Poindexter worked for the Inheritance Tax Division of the Indiana Department of Revenue, where she was the administrator from 1987-1988. She was a partner at the law firm of Campbell Kyle Proffitt, LLP between 1998 and 2016, and is a founding member of ALTMAN, POINDEXTER & WYATT LLC. Mrs. Poindexter's practice concentrates in the areas of civil litigation including business and contract disputes, receiverships, will and trust contests, probate and trust administration, estate and wealth transfer planning including various aspects of public utility law, as well as government services law. She and her husband, the Honorable Brian Poindexter, live with their daughter in Carmel.

James A. Reed
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Jim Reed has concentrated his practice in the legal aspect of relationship transitions of all types since graduating from law school. He has been involved in divorce cases with some of the largest marital estates in Indiana. He represents many professionals (medical, legal, accounting, financial), business owners and executives, community leaders, high-profile individuals in entertainment, sports and politics, and the spouses/partners of these individuals. Because of his experience and the personal nature of the practice, Jim has helped individuals and families find solutions to complex relationship and legal transitions. His practice includes counseling cohabitating partners in implementing plans for estate transitions, health care decision making, joint ownership and survivorship, as well as representing partners in the conclusion of relationships, custody and support of their children, and the division of property and assets. Jim approaches the representation of his clients with years of diverse experience and from a broad perspective.

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.

Shawn M. Scott is a partner at Hall Scott LLP. She concentrates her practice in the areas of estate planning, probate and trust administration, business law and business succession planning. She is licensed to practice law in both Indiana and Illinois. After graduating from Hanover College (B.A., Political Science 2000), she attended The John Marshall Law School in Chicago, Illinois (J.D., LL.M. Intellectual Property 2004). Shawn frequently presents at legal seminars on the topics of estate and trust administration and estate planning.

Shawn serves on the boards of the Indianapolis Bar Association Estate Planning and Administration Section, the Indiana Trust and Estate Specialty Certification Board, and the Indianapolis Bar Foundation. Shawn is the past president of the Estate Planning Council of Indianapolis and past Chair of the Probate, Trust, and Real Property Section of the Indiana State Bar Association. She is also a member of the Planned Giving Council at The Children's Museum of Indianapolis.

Shawn has been named several times to the lists of Rising Star® and Super Lawyers® for estate planning by *Law & Politics Magazine* and *Indianapolis Monthly*. She is also a trust and estate specialist, as certified by the Indiana State Bar Association Trust & Estate Specialty Board.

Shawn lives in Indianapolis with her husband and three children. She is a hot yoga enthusiast and enjoys practicing and teaching in her free time.

Tamatha A. Stevens
Stevens & Associates, PC, Indianapolis

After an award-winning performance in law school at Indiana University in which she received deans honors and graduated cum laude, *Tamatha Stevens* followed her academic career, which included clerkships in the legal departments of Eli Lilly and Company and Ameritech, with decade of experience in the Indiana Tax Court and other law firms. She then set out to establish something completely different - Stevens & Associates offers families and businesses a personalized, caring law practice that emphasizes relationships, integrity and understanding.

Admitted to practice law before the United States Supreme Court, both the Northern and Southern Federal District Courts in Indiana, and all Indiana state courts, Tamatha is also accredited by the Department of Veterans Affairs to practice within its realm assisting our Veterans and their families. Tamatha additionally holds the title of Certified Elder Law Attorney by the National Elder Law Foundation. She is a current and former member of the American Bar Association, Indiana Bar Association, Indianapolis Bar Association, Probate & Real Property Bar Section, Elder Law Bar Section, Indiana NAELA Bar, National Academy of Elder Lawyers (NAELA), National Association of Women Business Owners, National Health Lawyers Association, National Planned Giving Committed, Indiana Planned Giving Committee, Estate Planning Council of Indianapolis, Inc., Indiana Leadership Forum, and many other professional organizations. She is a current or former Board Member to the Indiana Zoological Society, Planned Giving Committee, Joy's House Adult Day, HealthNet, PrimeLife Enrichment, Indiana NAELA, St. Joseph Institute for the Deaf and Hard of Hearing, KidsFirst Foundation. She is a member of Northview Christian Church and is active there and in other social and charitable community affiliations.

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

Special Needs Issues and Updates

by Robert W. Fechtman

90 Hot Tips in Estate, Trust & Probate Practice
December 21, 2021

Section One

Special Needs Issues and Updates……...Robert W. Fechtman

DISCLAIMER

Although every effort has been made to obtain the best information available for presentation herein, the reader must recognize that many of the issues in this area, particularly as they relate to public benefits, are part of a rapidly changing body of law and administrative interpretation.

The author makes no warranties about the legal conclusions stated herein and this is not intended as legal advice to any individual. Application of the principals discussed in this paper to specific cases should only be taken upon the advice of knowledgeable counsel.

Special Needs Issues and Updates

by Robert W. Fechtman

I. Self-Settled Special Needs Trusts

A. The Self-Settled Special Needs Trust Under OBRA '93[1]

A special needs trust is a trust that can hold funds for the benefit of a disabled individual, and can use those funds to provide items and services for that individual to improve his or her quality of life, without jeopardizing eligibility for public benefits, such as Medicaid and Supplemental Security Income ("SSI").

The trustee of the special needs trust must have sole and absolute discretion over the use of the trust funds for the sole benefit of the recipient of public benefits. This means that the trust must be worded so that the trustee is not required to make any payments of income or trust principal directly to the recipient of public benefits.

Even though the special needs trust is designed to preserve eligibility for public benefits such as Medicaid and SSI, it is actually quite surprising to see the many different ways that special needs trust funds have been used for the benefit of recipients of public benefits, without causing any problems with those public benefits.

A self-settled special needs trust, which is a special needs trust that holds assets originally belonging to the recipient of public benefits, such as Medicaid and SSI, must meet certain requirements if it is not to interfere with eligibility for those public benefits:

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[1] 42 U.S.C. §1396p(d)(4).

1. The recipient of public benefits must be less than sixty-five (65) years old at the time the trust is established.
2. The special needs trust must be established by the disabled individual, a parent, grandparent or guardian of the disabled individual, or by a court.
3. The special needs trust must be irrevocable.
4. The trust must include a provision that states that any funds remaining in the trust at the death of the trust beneficiary (the recipient of public benefits) are available to reimburse the state or states for Medicaid costs paid on behalf of that trust beneficiary. Although, in the case of a pooled special needs trust, such as The Arc of Indiana Master Trust, the trust is allowed to retain a portion of any remaining funds for the benefit of other beneficiaries of the pooled trust, prior to the reimbursement to the State. The Arc Trust retains one-half (1/2) of any funds remaining at the death of the trust beneficiary.

II. Third-Party Special Needs Trusts.

When the special needs trust holds assets that originally belonged to someone other than the disabled individual (a parent or grandparent, for example) the trust **does not** need to include a provision that states that any funds remaining in the trust at the death of the trust beneficiary (the recipient of public benefits) are available to reimburse the state or states for Medicaid costs paid on behalf of that trust beneficiary. Also, in the case of a pooled special needs trust, such as The Arc of Indiana Master Trust, the trust does not necessarily retain a portion of any remaining funds for the benefit of other beneficiaries of the pooled trust. In fact, The Arc retains none of the funds remaining at the death of the trust beneficiary, unless the individual who funded the trust wishes to leave any of the remaining funds for the benefit of other beneficiaries of The Arc.

So, the parent of a child with special needs can use a special needs trust to make sure that their child is taken care of after they are gone, and the parent can ensure that any of the trust funds that are not used for the benefit of that child go to other members of the family when that child passes away. This is the best of both worlds. Medicaid and SSI can assist the disabled individual, the special needs trust can supply supplemental items and services to improve the quality of life, and the trust funds remaining at the death of the disabled individual can come back to the family, without Medicaid or SSI having any claim to any of these funds.

The Indiana Health Coverage Program Policy Manual ("IHCPPM") Section 2615.75.20.10 deals with trusts established on or after August 11th, 1993 that are not governed by OBRA '93. It says, these trusts "must be reviewed for the purpose of determining the 'availability' of the trust. Some examples are trusts created by a Will (testamentary trust) . . . ." The general rule regarding availability of resources is given at IHCPPM Section 2605.15.00, which states: "Resources are available if the owner has the unrestricted right, authority or legal ability to liquidate or dispose of the property or his share of the property. Resources must be available in order to be counted in the eligibility determination."

A. A Testamentary Special Needs Trust for a Surviving Spouse

405 IAC 2-3-1.1 includes language regarding a Medicaid transfer penalty that will be implemented if the Medicaid applicant or recipient failed to take action to receive assets which they were entitled to receive by law.

This aspect of the rule will impact a nursing home spouse, if the community spouse happens to be the first to die, and he or she does not leave enough to the nursing home spouse to satisfy the spousal allowance specified by Ind. Code §1-4-1 and/or the statutory right of election specified by Ind. Code §1-3-1. The rule will invoke a Medicaid transfer penalty, even if the

surviving, nursing home spouse simply fails to elect to take against the Will of the deceased community spouse. However, the rule also provides knowledgeable counsel with a very effective solution to the potential problem of the Medicaid transfer penalty. Under 405 IAC 2-3-1.1(i)(4), the rule states:

> "In the case of a surviving spouse who fails to take a statutory share of a deceased spouse's estate, no penalty will be imposed if the deceased spouse has made other equivalent arrangements to provide for a spouse's needs. 'Other equivalent arrangements' includes, but is not limited to, a trust established for the benefit of the surviving spouse."

Since, in this scenario, the surviving spouse is a nursing home spouse who is receiving Medicaid assistance, the community spouse will want to use a special needs trust for the benefit of that surviving spouse. The special needs trust will be designed to leave all of the discretion regarding the distribution of income and principal with the trustee of the trust, so that the trust assets can be used to supplement, not supplant, the Medicaid assistance to which the surviving spouse is entitled.

The community spouse will not want to use an *inter vivos* trust as the special needs trust. An *inter vivos* trust established after August 11th, 1993, and funded with the assets of the Medicaid recipient or the Medicaid recipient's spouse, will be governed by 42 U.S.C. 1396p(d)(4)(A). Accordingly, the entire principal of the trust will be considered as a countable resource of the Medicaid recipient, even though the trust is worded as a special needs trust.

A testamentary special needs trust will not cause a problem with the ongoing Medicaid eligibility of the nursing home spouse, because the special needs language leaves all of the discretion regarding distributions to the trustee, and the trust assets are not "available" to the Medicaid recipient. Counsel should be sure to fund the special needs trust with enough of the community spouse's assets to satisfy the spousal allowance and the statutory right of election

relevant to the particular case. The author has recently been using the following language for this purpose:

> "In the event my *husband/wife, *, survives me by thirty (30) days, then I devise and bequeath to *, as Trustee, in trust for the benefit of *(spouse), an amount sufficient to prevent any period of ineligibility for Medicaid for *(spouse) based on the statutory rights of a spouse to elect to Take Against the Will of a deceased spouse as set forth in Ind. Code §29-1-3, or any successor section, and also based on the Surviving Spouse Allowance as set forth in Ind. Code §29-1-4, or any successor section."

For clients who have utilized an *inter vivos* trust to avoid the necessity of opening a probate estate for administration through a court, the special needs trust described above should still be established through a Will. However, there is no need to do away with the *inter vivos* trust. Simply specify that the proper funds will go from the *inter vivos* trust to the trustee of the special needs trust created in a Will, and this special needs trust will come into being at the death of the testator or testatrix, as a result of the Will being spread of record with a court pursuant to Ind. Code §29-1-7-3.

B. The "Tandem" Special Needs Trust

Parents or grandparents who establish third-party special needs trusts for children or grandchildren with special needs very often choose only a succession of family members to be the trustees. It is certainly possible that most family members will be able to do the job of trustee with a reasonable amount of guidance from the attorney who drafted the special needs trust, but there may be times when another source of help to the trustee will be desirable.

A "tandem" special needs trust works by pairing the third-party special needs trusts with The Arc of Indiana Master Trust. In this arrangement, family members act as trustees, to be in charge of the investments, but the The Arc, with its many years of experience with thousands of beneficiaries of its pooled special needs trust, is in the best position to manage the actual trust distributions and the resulting need to report these trust distributions to the pertinent public benefits agencies.

C. Special Needs Trusts Incorporating the Power to Withdraw Additions

It is possible to incorporate the power to withdraw additions with the concept of a special needs trust, if the testator wishes additions to the special needs trust to qualify for the annual exclusion for estate tax purposes. It is important, however, not to do this by using the typical *Crummey* powers, which allow the beneficiary of the trust to withdraw these additions. If the beneficiary has the power to withdraw additions, the local Medicaid authorities would certainly have a good argument that this power changes the character of the money that is in the special needs trust, making the trust a self-settled special needs trust rather than a third-party special needs trust.

The way around this problem is to simply give someone other than the disabled beneficiary of the special needs trust the power to withdraw the additions. This is supported by the Tax Court case of *Cristofani v. Commissioner*, 97 T.C. 74 (1991), where the tax court allowed the annual exclusion for gifts to a trust where the power to withdraw the additions was held by vested contingent remaindermen.

III. The Special Needs Trust Fairness Act

When the Omnibus Budget Reconciliation Act of 1993 (OBRA '93) was passed, there was apparently a mistake in the wording of the statute as it relates to special needs trusts, because the individual him or herself was not included in the list of individuals and entities eligible to establish a special needs trust. Considering the fact that OBRA '93 was passed more than 24 years ago, a fix for this mistake has been a long time coming!

The Special Needs Trust Fairness Act has been making its way through Congress for years, and, finally, President Obama signed it into law on December 13, 2016, as part of the 21st Century Cures Act (P.L. 114-255). Therefore, as of December 13, 2016, an individual with a disability may establish his or her own special needs trust.

IV. Military Survivor Benefit Plans

Section 624 of the National Defense Authorization Act of 2015, known as the Disabled Military Child Protection Act, provides that a military Survivor Benefit Plan can name a self-settled special needs trust to receive the benefits for the veteran's child who has a disability. This is a major change to the law that allows veterans to leave money for the benefit of children who have disabilities without causing them to lose eligibility for needs-based public benefits.

V. The ABLE Act

The Achieving a Better Life Experience ("ABLE") Act[2] was signed into law on December 19, 2014. The law allows eligible individuals with disabilities the ability to establish, or to have established for them by their legal representatives, "ABLE accounts" that will be similar to 529 college savings plans, although the expenditures from the ABLE accounts must be on "qualified disability expenses." ABLE accounts allow more individual choice and control over spending on qualified disability expenses, while preserving eligibility for needs-based public benefits, such as Medicaid and SSI.

The ABLE Act creates a new form of 529 account, which is tax-favored in various ways, but this new form of 529 account is also quite different from the 529 college savings plans.

The ABLE Act required the Secretary of the Treasury to issue regulations or other necessary guidance within six months of enactment of the law. The Secretary did so by issuing proposed regulations in the Federal Register on June 22, 2015. During the 90-day comment period, and at the public hearing, which was held on October 14, 2015, interested parties identified three areas of concern with these proposed regulations, and the Internal Revenue

[2] 26 U.S.C. §529A

Service ("IRS") announced changes in all three of these areas on November 20, 2015. There were other concerns with issues raised by The ABLE Act itself, and changes to the Act were implemented through the Consolidated Appropriations Act of 2016 (commonly known as the "Tax Extenders Bill"). The IRS has now issued its final regulations, and these final regulations are generally favorable to ABLE account owners.

On March 21, 2016, the Social Security Administration ("SSA") issued an update to its Program Operations Manual System ("POMS") regarding The ABLE Act. SI 01130.740 doesn't seem to include any surprises, but it is interesting to note that it includes a list of "qualified disability expenses" as follows:

(1) Education;

(2) Housing (this is the same as the rules for "in-kind support and maintenance");

(3) Transportation;

(4) Employment training and support;

(5) Assistive technology and related services;

(6) Health;

(7) Prevention and wellness;

(8) Financial management and administrative services;

(9) Legal fees;

(10) Expenses for ABLE account oversight and monitoring;

(11) Funeral and burial; and,

(12) Basic living expenses.

On March 21, 2016, Governor Mike Pence signed S.B. 11, and Indiana thereby implemented The ABLE Act. Yes, this is the same day that the SSA issued its updated POMS,

and, perhaps not coincidentally, Indiana's ABLE legislation contains a list of "qualified disability expenses" that is almost identical to the list above. The only real difference is that basic living expenses is not on the list, and (12) is instead "other expenses approved by the federal government for a qualified ABLE program."

Senate Enrolled Act 11 establishes an ABLE Board of Authority, consisting of the Treasurer of the State of Indiana, the Secretary of the Indiana Family and Social Services Administration ("FSSA"), the Budget Director, and the Executive Director of the Indiana Housing and Community Development Authority, plus five members to be appointed by the governor. One member who has significant experience in actuarial analysis, accounting, investment management, or other areas of finance that are relevant to the Authority, **one member who has significant legal expertise and knowledge of estate planning**, one member who is a representative of a statewide organization that advocates on behalf of individuals with disabilities, one member who is an individual with a disability, and one member who is a family member of an individual with disability. Not more than three of the appointed members of the board may belong to the same political party!

The official name of the program is INvestABLE Indiana. The website for the program is located at in.savewithable.com. The ABLE account may be started with as little as $25.00. Investment costs range from 0.34% to 0.38%. There is a quarterly maintenance fee of $15.00, but subtract $3.75 from this quarterly fee with e-mail delivery of statements and confirmation of distributions. Investment options include FDIC-insured bank accounts, and mutual fund and ETF allocations that reflect the owner's risk tolerance. The owner of the ABLE account may name an Authorized Agent (e.g., a financial advisor) with one of four different levels of access to and control over the account.

A. Key Characteristics of ABLE Accounts

1. An eligible individual may have only on ABLE account. This is different than 529 college savings plans, where an individual may be the beneficiary of more than one account.

2. Originally, the ABLE account was required to be established in the state where the eligible individual resides, but this restriction was removed in the Tax Extenders Bill.

3. The eligible individual may establish his or her own ABLE account. This is a departure from the original rules for what are usually called self-settled special needs trusts under 42 U.S.C. §1396p(d)(4)(A), where the beneficiary of the trust was not allowed to establish the trust for him or herself, until that was changed by the Special Needs Trust Fairness Act, as described above, on December 13, 2016.

4. An ABLE account may not receive annual contributions in excess of the annual gift tax exemption under 26 U.S.C. §2503(b). According to the regulations, the states will have to return these excess contributions to the individual contributors, but, happily, these distributions from the ABLE accounts will not be included in the gross income of the beneficiaries of the ABLE accounts. This rule is relaxed for working account owners, who may contribute an additional amount to their own ABLE account. This individual amount is equal to the federal poverty level of income for a single-person household, in the state in which the account owner resides, or the gross wages of the account owner, whichever is less.

5. An ABLE account may not hold aggregated contributions in excess of the individual states' limits for 529 accounts. Again, according to the regulations, the

states will have to return these excess contributions to the individual contributors, but these distributions from the ABLE accounts will not be included in the gross income of the beneficiaries of the ABLE accounts. The current limit for 529 accounts in Indiana is $450,000.00.

6. If the ABLE account balance exceeds $100,000, the beneficiary will lose eligibility for SSI, but not for Medicaid. On the bright side of things, these SSI benefits will not be terminated due to the excess funds in the ABLE account, but will merely be suspended until the account balance goes back down below $100,000.

7. Payments made from an ABLE account for food and shelter costs of the owner of the account will not count as In-kind Support and Maintenance for SSI purposes. See page 22 of this paper for a full description of the concept of In-kind Support and Maintenance (ISM). When you understand this concept, you will see that the fact that distributions from an ABLE account do not count as ISM, and therefore do not reduce SSI, is one of the best features of an ABLE account!

8. ABLE accounts may only be established for individuals whose onset of disability was prior to age 26. If the individual was receiving Social Security benefits under Title II of the Social Security Act (Social Security Disability Insurance) or Title XVI of the Social Security Act (SSI) prior to age 26, this will obviously be enough to prove that the onset of their disability was prior to age 26. Otherwise, they will have to complete a "disability certification." Originally, this disability certification was required to include a copy of the individual's diagnosis relating to the individual's relevant impairment or impairments, signed by a physician who met the criteria of section 1861(r)(1) of the Social Security Act, but this restriction was removed in the Tax

Extenders Bill. Now, the disability certification need only indicate that the eligible individual has received a signed physician's diagnosis, and this diagnosis will be retained by the eligible individual and presented to the IRS upon request.

9. ABLE accounts may only be used for "qualified disability expenses." Qualified disability expenses include expenses for education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses that may be included in the regulations. The regulations state the Treasury Department's intent, based on the legislative purpose of assisting individuals with disabilities, to construe the term "qualified disability expenses" broadly to permit the inclusion of basic living expenses, and not to limit those expenses to items for which there is a medical necessity, or to items that benefit no one other than the disabled individual. They use the specific example of smart phones, which they say could be considered qualified disability expenses if they are an effective and safe communication or navigation aid for a child with autism.

10. If an ABLE account beneficiary is at any time no longer disabled, even temporarily, his or her ABLE account retains its ABLE account status, and no taxable distribution of the account balance is deemed to have occurred. The regulations also say that there may be no more contributions to the ABLE account beginning on the first day of the year following the year in which the account beneficiary ceased being disabled, and account distributions will not be qualified disability expenses if they are made during a time when the account beneficiary is not disabled.

11. Earnings on an ABLE account and distributions from the account for qualified disability expenses are not included in the gross income of the contributor or the account beneficiary. Contributions to an ABLE account must be made in cash from the contributor's after-tax income. In other words, the contributor does not get a tax deduction for making a contribution to an ABLE account, but, of course, he or she doesn't get a tax deduction for making a contribution to a 529 college savings plan, either. However, any contribution to an ABLE account is treated as a completed gift to the account beneficiary which is not a future interest in property, and it is not treated as a qualified transfer under 26 U.S.C. §2503(e).

12. If an ABLE account beneficiary moves to another state, the account balance may be rolled over to a new ABLE account in the new state. There are some restrictions on this provision of the law. According to the regulations, the rollover must happen with a period of 60 days, and an ABLE account may not be rolled over twice within the same 12-month period.

13. An ABLE account may be rolled over into an ABLE account for a different beneficiary, if the second beneficiary is a blind or disabled family member of the first beneficiary. This "family member" must be a sibling of the initial account beneficiary, and the rollover must occur during the lifetime of the initial account beneficiary.

14. A program will not be treated as a qualified ABLE program unless it provides that account beneficiaries may, directly or indirectly, direct the investments of any contributions to the program, or any earnings thereon, no more than two times in any calendar year. This provision of the Act must be the result of the

advocacy efforts of the crafters of the legislation, who understandably want individuals with disabilities to have a say in the investment of funds to be used by them for their own benefit.

15. At the time of the account beneficiary's death, <u>all</u> ABLE accounts must reimburse the state for its Medicaid expenses on behalf of the account beneficiary, whether the contributions to that account were made by the account beneficiary or by other individuals, such as the account beneficiary's parents or grandparents. This "payback" to the state is much more clearly defined, and is a little bit more lenient, than the payback required with self-settled special needs trusts under 42 U.S.C. §1396p(d)(4)(A) and (d)(4)(C), because it is specifically limited to those Medicaid expenses paid for the account beneficiary <u>after</u> the establishment of the account, and it is net of any premiums paid to a Medicaid Buy-In program under any State Medicaid plan. In Indiana, our Medicaid Buy-In program is called MED Works, and it is a Medicaid program for disabled workers, who pay small premiums for their Medicaid based on the amount of their income. If the ABLE account contains more than enough funds at the time of the account beneficiary's death to reimburse the state for its Medicaid expenses, any remaining funds may go to family members or other heirs of the account beneficiary. There may certainly be times when it makes sense for third parties, such as parents or grandparents, to fund ABLE accounts for their children and grandchildren, but it is worth noting that this is the first time we have ever been required to include a payback to the state for funds contributed by third parties.

B. When Would An Individual Choose to Establish and/or Fund an ABLE Account?

Given all the advantages and disadvantages of the ABLE accounts, as described them above, and weighing those against the advantages and disadvantages of a special needs trust (the full description of the advantages and disadvantages of a special needs trust is beyond the scope of this paper), when would an individual choose to establish and/or fund an ABLE account, for himself or for someone else?

We must exclude those individuals who are categorically ineligible, like those individuals who are not disabled according to Social Security criteria and/or whose onset of disability was not prior to age 26, or like those individuals who do not reside in a state that offers an ABLE program or has contracted with another state to offer an ABLE program for them. We must also rule out times when it is not possible or desirable to add funds to an existing ABLE account, like when contributions equal to the annual gift tax exclusion amount have already been added that year, or like when the ABLE account has accumulated funds equal to that state's limit on accumulation in a 529 account, or like when a further contribution to the ABLE account will make the balance exceed $100,000 and cause the account beneficiary to lose his or her eligibility for SSI.

In the author's humble opinion, we should also rule out, for the most part, contributions to ABLE accounts by third parties, due to the mandatory payback provision, which reimburses the state for its Medicaid expenses on the account beneficiary's behalf at the time of the account beneficiary's death. There are other ways for third parties to make contributions to an account for a disabled individual, without causing that individual to lose his or her eligibility for needs-based public benefits. A third-party special needs trust is almost always a good option. If the concern is responsible management of the funds, or a trustee who knows how to make

distributions without causing problems with public benefits eligibility, The Arc of Indiana Master Trust (a pooled special needs trust) has been handling these issues for 28 years now, and there is no payback provision in The Arc of Indiana Master Trust when the funds were contributed by third parties. The Arc of Indiana does charge a fee for managing the trust accounts, but, because The Arc of Indiana is a not-for-profit organization, its fees are relatively quite low, especially when compared to the average bank or trust company.

1. The SSI and/or Medicaid recipient who saves money. Even though SSI pays no more than $794 per month in 2021, there are some SSI recipients who still manage to save money. If they accumulate funds in excess of the SSI resource limit of $2,000, then they lose their SSI. This problem would only be compounded for an individual who is on Medicaid and receives SSDI, which is often a larger monthly amount than SSI, since it is based on the wages of the worker on whose account it is being drawn. The SSDI will not be affected by the accumulation of savings, but the Medicaid resource limit is $2,000, just like SSI. An ABLE account might be a very handy solution. Whenever the individual's personal bank account accumulates to nearly $2,000, the individual may simply move some of it over to his or her ABLE account.

2. The SSI and/or Medicaid recipient who receives a small inheritance or a small personal injury settlement. Keeping in mind the $2,000 resource limit for both SSI and Medicaid, a small inheritance or a small personal injury settlement could obviously cause an individual to lose these benefits. As long as the inheritance or settlement is less than the annual gift tax exclusion amount, then an ABLE account is probably a good solution to the public benefits eligibility problem. If the inheritance or settlement arrives in, let's say, December, it might even be possible to spread the contributions to the ABLE account out over two years,

thereby doubling the amount of money that can be dealt with in this way. With a settlement, it might even make sense to work a structured settlement annuity into the settlement, so the annual payments from the annuity are less than the annual gift tax exclusion amount, and then the ABLE account could be funded every year for the life of the annuity.

3. The parent or grandparent with a small estate and a fear of lawyers. As discussed above, the ABLE account is not generally attractive for funding by third parties, due to the payback provision. A special needs trust is probably a better option. However, it might make sense to use an ABLE account for a total bequest less than the annual gift tax exclusion amount, if the parent or grandparent doesn't care about the payback.

4. The parents very interested in giving their child more autonomy and control. Maybe the parents are more concerned about giving their child the sense of personal dignity and autonomy that would result from having control over at least small amounts of money, and they are less concerned about the payback provision and other limitations of the ABLE Act. The parents can't just put $10,000 into the child's personal bank account, because that would cause the child to lose his SSI and/or Medicaid. But, they could put that same $10,000 into and ABLE account for the child, thereby giving the child almost complete control over the use of the funds.

5. The trustee of the special needs trust who wants to give a beneficiary more control. Just like with family contributions, a trustee can't just put $10,000 into the trust beneficiary's personal bank account, because that would cause the beneficiary to lose his SSI and/or Medicaid. If the trust beneficiary receives SSI, the trustee can't give him or her a gift card, either, because the SSI rules count gift cards as income to the SSI recipient in the month they are received. It might be desirable for a trustee to fund an ABLE account for the trust beneficiary, from time to time.

VI. The SSA's Trust Review Process

The SSA has implemented a very extensive trust review process. In a nutshell, if an SSI applicant or recipient is the beneficiary of a trust, that trust is reviewed at the time of that individual's application for SSI, and also whenever changes are made to that trust or whenever there are changes in the SSI POMS relevant to that trust. According to the POMS, if there is a problem with the trust that is caused by a change in the SSI POMS that was implemented after the trust was submitted to the SSA and reviewed by them, then the SSA must give the SSI recipient 90 days to fix the problem with the trust. Otherwise, there is no grace period, and the individual will lose his or her SSI until the problem is fixed to the satisfaction of the SSA. The following is a list of a few of the issues that have been causing problems throughout the country.

A. The "Two Ten Buck Rule"

In the case of a self-settled special needs trust where the trust beneficiary receives SSI, it is important to understand the way the SSA thinks about two issues.

First, the SSA thinks that Indiana law does not allow an individual to establish a "dry" trust. So, if a parent or grandparent establishes a self-settled special needs trust for the trust beneficiary and does not "seed" the trust with a little bit of his or her own money before the trust beneficiary places his or her own funds into the trust, the SSA will determine that the trust is not a valid trust, and the trust beneficiary will therefore be disqualified from SSI. This is not an issue when the trust is established by a court.

Second, the SSA thinks that Indiana's statutory version of the Doctrine of Worthier Title indicates that a trust that purports to be irrevocable is actually revocable, if there is only one beneficiary of the trust. The SSA does not consider the state to be a trust beneficiary by way of the "pay-back" clause, and the SSA does not accept a general category of persons (such as "heirs at

law") to be a trust beneficiary, so it is important to make certain in these cases that there are at least two specific, named beneficiaries of the trust. Otherwise, the SSA will determine that the trust is revocable, which would obviously disqualify the trust beneficiary from SSI

The solution to both of these problems is something that David Lillesand, a National Academy of Elder Law Attorneys ("NAELA") member from Florida, calls the "Two Ten Buck Rule." Have the parent or grandparent who establishes the trust put $10 of his or her own money into the trust before the trust beneficiary adds his or her own funds to the trust. Then, specify that, when the trust beneficiary dies, someone else gets $10, after the pay-back to the state but before the heirs at law get the balance, if any.

B. Early Termination Provisions

In the case of (d)(4)(A) and (d)(4)(C) trusts (i.e., those trusts that have a "payback clause"), early termination of the trust (i.e., termination prior to the death of the beneficiary of the trust) triggers the payback. This rule is delineated in the POMS at SSI 01120.199.

It certainly makes sense to say the trust has been terminated early, if, during the lifetime of the trust beneficiary, the trust is actually terminated and the money is distributed to that beneficiary. However, the SSA believes that there are other events when the trust is being terminated early, such as when a (d)(4)(A) trust distributes money out to a (d)(4)(C) trust, or the other way around.

As mentioned above, the "tandem trust" is a way to leave a family member in charge of the trust investments, but rely on a pooled special needs trust, like The Arc of Indiana Master Trust, to handle the trust distributions and reporting requirements with the public benefits agencies. In the case of a tandem trust, a (d)(4)(A) trust is paired with a (d)(4)(C) trust, and money is allowed to flow from the (d)(4)(A) trust to the (d)(4)(C) trust, thereby making it possible for the trustee of the (d)(4)(A) trust to concentrate on investing the trust funds while relying on the trustee of the

(d)(4)(C) trust to manage the distributions of the funds without losing eligibility for needs-based public benefits.

Sad to say, the author has had to remove these tandem trust provisions from all of his (d)(4)(A) trusts. If the reader is relying on old trust forms provided by the author, please make a note of this change!

C. Legal Authority for a Parent or Grandparent to Establish a (d)(4)(A)

As mentioned earlier in this paper, a (d)(4)(A) trust must be established by a parent, a grandparent, a guardian or a court. However, it is important to note that the SSA requires a parent or grandparent to have some sort of legal authority to establish the trust. So, in the case of a minor or an incapacitated adult, a parent or grandparent must get that legal authority from a court, through a guardianship or a protective order. In the case of a competent adult, the author has developed a very limited power of attorney, to be signed by the intended beneficiary of the trust, that authorizes the parent or grandparent only to establish a trust as described in 42 U.S.C. §1396p(d)(4)(A).

D. The Sole Benefit Rule

As will be explained later in this paper, the SSA believes that self-settled special needs trusts must be for the sole benefit of the beneficiary, whatever that means. The author has only had a problem with this issue one time, but perhaps that problem was a sign of larger problems to come.

The author often has a long paragraph in each special needs trust that describes many of the ways that the trustee may use trust funds for the benefit of the disabled beneficiary of the trust, including paying family members as caregivers and making handicap modifications to a caregiver's home. In the lone case described above, the representative of the Social Security Field Office opined that a trust provision allowing family members to be paid as caregivers and allowing the trustee to use trust funds to make handicap modifications to a caregiver's home violated the

supposed sole benefit rule. The path of least resistance is to make whatever changes to the trust will prevent the necessity of an appeal, so, in this case, the author simply removed the offending paragraph.

E. Source of Funds

The source of the funds that were deposited into the special needs trust is obviously important when determining whether the trust is a self-settled or third-party special needs trust, and the ramifications of this distinction are paramount. A self-settled special needs trust will reimburse the state or states for their Medicaid expenses on behalf of the beneficiary at the time of the beneficiary's death, and a third-party special needs trust will not. The SSA seems to be obsessed with this issue for at least the last few years. If the trust is a third-party special needs trust, one must be prepared to prove that the funds came from a third-party source. Keep receipts or other paperwork related to the initial deposit. It is not enough to show that the funds came from the estate of so-and-so. Did the Will of the decedent leave the funds to a trust for the beneficiary, or did the Will leave the funds directly to that beneficiary? If there was no Will or other testamentary document, then there is nothing for it but to admit that any resulting special needs trust is self-settled.

VII. Tax Issues for Special Needs Trusts

A. Grantor Trust Rules

The income tax consequences of the trust must be considered in drafting the trust. Under the grantor trust rules[3], a self-settled special needs trust will generally be considered a grantor-type trust, because the income and principal are payable to the injured party, who is considered to be the

[3] Internal Revenue Code ("IRC") §§671-678.

grantor.[4] This is a beneficial result with respect to income taxation, because trust income tax rates are "compressed," which means that trusts reach the higher income tax rates more quickly than do individuals. Therefore, counsel will almost always want to qualify self-settled special needs trusts as grantor-type trusts for the purposes of income taxation, so the trust income will be taxed at the lower, personal income tax rates of the trust beneficiary.

A self-settled special needs trust will only be considered to be a grantor-type trust if the trust beneficiary is able to exercise sufficient control over the trust so as to create an ownership interest in the trust. The grantor trust rules do a good job of defining the elements of control that will create the necessary ownership interest, but it is the author's opinion that there is one such element of control which rises above the rest as the simplest way to create the ownership interest, without interfering with the special needs status of trust or the public benefits eligibility of the trust beneficiary. Give the trust beneficiary the power to reacquire the trust corpus by substituting other property of equal value.[5]

It is important that there not be any "adverse party" who can defeat the grantor-type trust status by interfering with the control that the trust beneficiary has over the trust. An adverse party is any person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or non-exercise of the power which he or she possesses respecting the trust.[6] A remainder beneficiary would have a substantial beneficial interest in the trust, and it is therefore important to make sure that the trust beneficiary does not have to get permission or approval from

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[4] IRC §677.

[5] IRC §675(4)(C).

[6] IRC §672(a).

any other party when exercising his or her control over the trust as discussed in the previous paragraph.

If the special needs trust is a grantor-type trust, then the income to the trust will flow through to the trust beneficiary's individual income tax return. This may cause the trust beneficiary to owe income taxes that he or she does not have the ability to pay, so the trust should include a provision that allows the trustee to pay the income tax liability of the trust beneficiary.

In the case of a grantor-type trust, it is probably easiest to invest the trust assets under the social security number of the trust beneficiary. That way, the trust beneficiary will simply receive a 1099 at the end of the year, and this 1099 may be added to any other tax documents received by the trust beneficiary, so that the beneficiary's tax preparer may prepare the beneficiary's personal income tax return (form 1040). In this situation, there will be no need for the trust to acquire a tax identification number of its own, or what the IRS calls an Employer Identification Number ("EIN"), and the trustee will not have to prepare a fiduciary income tax return (form 1041).

B. IRAs and Special Needs Trusts

1. Lifetime transfer of an IRA to an SNT

A Private Letter Ruling "PLR" from February 21, 2006, allows the lifetime transfer of an inherited IRA to a self-settled special needs trust. The PLR may be found at ftp://ftp.irs.gov/pub/irs-wd/0620025.pdf.

A decedent, age 69, and therefore not having reached his required beginning date, was the owner of an IRA naming his four sons as beneficiaries. One of his sons is disabled and on Medicaid and other public benefits. His mother is his legal guardian. Upon the decedent's death, the custodian of the IRA established separate shares for the four beneficiaries, and the disabled son's guardian got permission from a state court to establish a self-settled special needs

trust and to transfer the inherited IRA to the trust. The guardian, who was now also the trustee of the special needs trust, sought the PLR to indicate that the transfer to the trust would not be a taxable event, since the trust qualified as a grantor-type trust, and to allow the required minimum distributions from the IRA to be based on the age of the disabled beneficiary of the trust.

The PLR agrees that the transfer of the inherited IRA to the trust is not a taxable event, and that the disabled beneficiary's life expectancy is the proper basis for calculating the required minimum distributions from the IRA.

The PLR discusses four points that give some direction to those trying to apply its holding to other cases. These points are:

1. The trust is a grantor-type trust due to a power, held by the grantor alone or by a non-adverse party, to distribute any portion of income to the grantor or the grantor's spouse, or to accumulate income for future distribution. Since the trustee is the beneficiary's mother and an heir at law, she had previously executed a disclaimer of any remainder interest. The PLR assumes that this disclaimer is effective.

2. The PLR assumes that the required minimum distributions for the year following the year of the decedent's death and all subsequent years have been made, and that the division of the IRA into separate shares was properly accomplished by September 30th of the year following the year of the decedent's death.

3. The special needs trust permits payment of any or all of the trust principal or income to or for the benefit of the disabled beneficiary of the trust, or accumulation of undistributed income to be added to the trust principal. In other words, the trust is not a "conduit" trust requiring distribution of at least the required minimum distribution amount.

4. The IRA held in the special needs trust will not be the actual, inherited IRA, or even the separate share established by the IRA custodian after the decedent's death. The special needs trust will instead be funded by a trustee to trustee transfer of the separate share to a new IRA, naming the special needs trust as the owner.

On the negative side, it is important to remember that PLRs are only binding upon the IRS in the specific case for which they were obtained. On the positive side, though, this PLR did not make much of the fact that this was an *inherited* IRA, so there is some hope that these same principals may be applied to cases involving non-inherited IRAs.

2. The SNT as a beneficiary of an IRA

When naming a special needs trust as the beneficiary of an IRA, which is a common issue when parents are planning for the needs of a child with disabilities, it is important to make sure that one thinks about the Applicable Distribution Period ("ADP") for the IRA and the trust beneficiary whose life expectancy will determine the ADP.

If the trust qualifies as a "see-through trust," the IRA can be distributed in annual installments over the life expectancy of the oldest trust beneficiary. This will almost always be a longer ADP than would be the case if the trust did not qualify as a "see-through trust."

In order for the trust to qualify as a "see-through trust," a trust must satisfy five requirements from the regulations. These are found at Reg. §1.401(a)(9)-4, A-5(b), and they are:

1. The trust must be valid under state law;

2. The trust must be irrevocable, or it must, by its terms, become irrevocable upon the death of the retirement plan participant;

3. The beneficiaries of the trust who are beneficiaries with respect to the trust's interest in the retirement plan must be identifiable from the trust instrument;

4. The trustee must provide certain documentation to the retirement plan administrator, and this may simply be a copy of the trust document; and,

5. All trust beneficiaries must be individuals.

A conduit trust is a trust where the trustee is required by the terms of the trust to distribute to the individual trust beneficiary or beneficiaries any distribution the trustee receives from the retirement plan. A properly drafted conduit trust would certainly qualify as a "see-through trust." However, a conduit trust will obviously not work as a special needs trust,

because it is partly the accumulation of the trust income that makes a special needs trust effective in keeping the trust beneficiary eligible for needs-based public benefits.

An accumulation trust will qualify as a "see-through trust," as long as the trust principal will pass outright at the disabled trust beneficiary's death to other now-living individuals, such as the trust beneficiary's siblings. If this type of accumulation trust is used, a charity should not be named as a remainder beneficiary, since that would trigger a necessary five-year pay-out of the IRA. Also, the remainder beneficiaries of the accumulation trust should be individuals close in age to the disabled trust beneficiary, because the life expectancy of the oldest member of this group will determine the ADP. Remember that all of these remainder beneficiaries must be living at the time of the execution of the trust document. In other words, it is not enough to state that the remainder beneficiaries consist of a group, such as nieces and nephews, but those specific nieces and nephews must be listed, by name.

The SECURE Act has no doubt been discussed extensively during other parts of this program. Therefore, you know already that disabled beneficiaries of IRAs are allowed to play by the old rules. If clients have more than one child and one of those children has a disability, it is worth considering whether the child with a disability should get even more than his or her share of the pre-tax retirement accounts.

VIII. Supplemental Security Income

A. The POMS

While SSI eligibility is technically based on federal statutes (42 U.S.C. §§1381-1383f), and federal regulations (20 C.F.R. §§416.101-416.2227), the only thing that the SSA staff are going to look at is the SSA's own Program Operations Manual System (POMS). The POMS are

also the only set of detailed guidelines for you to use to draft and administer a Special Needs Trust (SNT) properly.

If it strikes you as strange, or even illegal, for an agency to rely more-or-less solely on its own manual for administering an enormous and complex program, get over it. They do it all the time! My friend and colleague, Nell Graham Sale, calls it the "ad hocracy." Besides, in the case of Chevron, *USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, the United States Supreme Court held that an agency's interpretation of the applicable statutes will be given deference, absent statutory or regulatory prohibitions. More to the point, in the case of *Washington State Dept. of Social & Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371, the U.S. Supreme Court specifically applied the *Chevron* holding to the SSA POMS.

You will find the POMS specific to SSI at https://secure.ssa.gov/apps10/poms.nsf/chapterlist!openview&restricttocategory=05. The concepts in the SSI POMS that bear on this presentation are "income," in-kind support and maintenance," and "deeming." Citations to particular SSI POMS will all start with SI, as in SI 00810.005.

B. Income

If you make a distribution from the SNT that will count as income for SSI purposes, you want to know about it, because income can cause the loss of the entire SSI benefit for the months when the income is paid.

According to SI 00810.005, income is any item an individual receives in cash or in-kind that can be used to meet his or her need for food or shelter.

Unfortunately for trustees, SI 01120.201.I.1.e, introduced in January 2009, considers gift cards and gift certificates to be cash equivalents. If a gift card can be used to buy food or shelter, it

is unearned income in the month of receipt, and any unspent balance becomes a resource beginning the month after the month of receipt. Even if the gift card is for a particular store, and that store does not sell food or shelter items, SI 00830.522 indicates that it is still unearned income, unless the card has a legally enforceable prohibition on the card being sold for cash.

There is a relatively new kind of credit card that works more-or-less like a gift card and is acceptable for SSI purposes, though. If the card is owned and controlled by the trustee, and if the card is restricted so that it cannot be used to purchase food, the possession and use of the card by the trust beneficiary and the payments made to the credit card by the trustee will not be considered to be income to or a resource of the trust beneficiary. See SI 01120.201.I.1.e. The POMS name the True Link Visa Prepaid Card as an example of this kind of "administrator-managed prepaid card." The authors have used True Link Visa cards fairly extensively in conjunction with various SNTs, and the cards work very well and have not affected public benefits eligibility.

C. In-Kind Support and Maintenance

If you make a distribution from the SNT that will count as In-Kind Support and Maintenance (ISM), you want to know about this, too, because there will be a reduction of the SSI benefit. However, ISM is subject to the Presumed Maximum Value (PMV) rule, which is described in SI 00835.300. The PMV is a cap on the amount of the ISM that can be charged by the SSA. In other words, the PMV means that there is a maximum amount that the SSI recipient's SSI can be reduced by ISM. In general terms, the amount of the PMV is one-third of the Federal Benefit Rate (the maximum SSI payment to an individual), plus $20.00. So, for a trust beneficiary receiving the usual monthly SSI benefit of $794.00 (for 2021), ISM in any given month reduces the SSI for that

month to no less than $509.00. For example, if the amount of the ISM is an electric bill in the amount of $500.00, the trust beneficiary will still receive $509.00 in SSI for that month.

Trust distributions to a third party for items that are for food or shelter for the SSI recipient are considered to be ISM. Shelter is defined by SI 00835.465D.1 as:

1. Mortgage payments (including property insurance required by the holder of the mortgage;
2. Real property taxes (reduced by any tax rebate or credit);
3. Rental payments;
4. Heating fuel;
5. Gas;
6. Electricity;
7. Water;
8. Sewer; and,
9. Garbage removal.

Obviously, ISM is much better for the trust beneficiary than income, and, therefore, a trustee can do much more to improve the quality of the life of the trust beneficiary with ISM than with any trust distribution that would be considered by the SSA to be income.

If a trust pays a credit card bill for the trust beneficiary, that credit card payment will count as ISM to the extent that the credit card was used to pay for food or shelter items, according to SI 01120.201.I.1.d.

D. Deeming

The definition of the "household" is essential to an understanding of the concept of "deeming." Income and assets of all of the other members of the household will be deemed to be

income and assets of the SSI recipient, and could obviously therefore affect his or her eligibility for SSI or the amount of SSI he or she is entitled to receive.

SI 01310.140 states that the household consists of a person, or group of persons sharing common living quarters and facilities, living in a residence under such domestic arrangements and circumstances as to create a single economic unit. In each case where there is a household, the household includes:

1. The eligible individual, his or her spouse, and any of the couple's children (or any children of either member of the couple); or,
2. The eligible child, his or her parent or parents, and any children of the parents.

SI 01310.115 defines an eligible child as a natural or adopted child under age 18 who lives in a household with one or both parents, is not married, and is eligible for SSI. SI 01310.145 defines a parent whose income and resources are subject to deeming as one who lives in the same household with an eligible child and is a natural parent of the child, an adoptive parent of the child, or the spouse of the natural or adoptive parent of the child.

When a trustee is asked to make a distribution that would be considered to be income to any member of the household of the trust beneficiary, or a distribution for the purchase of something that would be considered to be a non-exempt resource of any member of the household of the trust beneficiary, the trustee will certainly want to evaluate each of these requests carefully to determine what impact there will be on the SSI payment to the trust beneficiary.

E. The Sole Benefit Rule

The so-called Sole Benefit Rule does not apply to third-party SNTs!

Not all experts agree that there is even such a thing as the Sole Benefit Rule, and this author is among those who think that the whole thing was made up by bureaucrats who can't read or have

too much time on their hands. However, the reality of the situation is that the SSA embraces this concept, and a trustee therefore violates the Sole Benefit Rule at his or her peril.

SI 01120.201.F.2 is the only POMS section that addresses the rule, and it says: "Consider a trust established for the sole benefit of an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life." Note that the POMS section only pertains to the establishment of a trust, not the ongoing administration of the trust.

The section goes on to give exceptions to the rule when payments are made to third parties that result in the receipt of goods or services by the trust beneficiary, payment of third party travel expenses that are necessary in order for the trust beneficiary to obtain medical treatment, and payment of third party travel expenses to visit a trust beneficiary who resides in an institution, nursing home, or other long-term care facility (e.g., group homes and assisted living facilities), or other supported living arrangement in which a non-family member or entity is being paid to provide or oversee the individual's living arrangement (the travel must be for the purpose of ensuring the safety and/or medical well-being of the individual).

There is another exception to the rule for administrative expenses. It says: "The trust may also provide for reasonable compensation for a trustee(s) to manage the trust, as well as reasonable costs associated with investment, legal or other services rendered on behalf of the individual with regard to the trust. In defining what is reasonable compensation, consider the time and effort involved in providing the services involved, as well as the prevailing rate of compensation for similar services considering the size and complexity of the trust. NOTE: You should not routinely question the reasonableness of a trustee's compensation. However, you should consider whether

compensation is being provided to a family member or if there is some other reason to question the reasonableness of the compensation."

Obviously, the self-settled SNT cannot be drafted to name a specific person other than the disabled trust beneficiary who will benefit from the trust during the disabled trust beneficiary's lifetime, but the rule does not say that the trustee may not make any distributions to persons other than the disabled trust beneficiary.

There are certain debts and obligations of the trust beneficiary that it would seemingly be difficult or impossible for the trustee of an SNT to avoid paying from the SNT, even if the trustee is excessively worried about the Sole Benefit Rule. How could a trustee refuse to pay court-ordered child support or alimony, when this refusal could cause the trust beneficiary to be subject to criminal prosecution or enforceable civil judgments? Or, how could the trustee refuse to provide food, clothing and shelter to children in the care of the trust beneficiary, when that too could cause the trust beneficiary to be subject to criminal prosecution?

A trustee of a trust that holds the proceeds of a personal injury settlement or judgment should also consider the fact that the purpose of the settlement or judgment is to make the injured party whole, so that party can, among other things, support his or her family.

There is no federal law, federal regulation, or even an SSI POMS provision that addresses the use of self-settled SNT funds to support the disabled trust beneficiary's spouse or children. Self-settled trusts are generally not protected from the claims of legitimate creditors. Since there is no clear guidance in the law explaining what violates the Sole Benefit Rule, and since many of us are Sole Benefit Rule deniers, anyway, these questions all come down to judgment calls on the part of the trustee.

It probably makes the most sense to consider the underlying reasonableness of the request. If the family wants to take the disabled trust beneficiary on a vacation, obviously he or she can't go alone, so the trust will have to pay for at least one other person to go with him or her on the trip. Despite what the rule is in New Mexico (as explained above), it probably makes sense to pay mom $15 an hour to provide necessary care to her disabled trust beneficiary son, when it would cost at least twice that to hire skilled personnel through a home health care agency.

90 Hot Tips in Estate, Trust & Probate Practice

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Special Needs Trusts Tip #1:

For first-party or self-settled special needs trusts, follow the federal statute (42 U.S.C. 1396p(d)(4)(A)) and the SSI POMS (SI 01120.201) precisely when delineating the Medicaid reimbursement at the time of the trust beneficiary's death. In particular, the reimbursement must be to all states that provided Medicaid assistance to the trust beneficiary.

Special Needs Trusts Tip #2:

For first-party or self-settled special needs trusts, do not include anything in the trust document that the SSA might see as an "early termination" clause under the POMS (SI 01120.199). Such a clause would invalidate the trust for SSI purposes, and the exercise of the clause would trigger Medicaid reimbursement prior to the trust beneficiary's death in any case.

Special Needs Trusts Tip #3:

For first-party or self-settled special needs trusts, it is probably safest to minimize catalogs and descriptions of the trustee's distribution options. The SSA seems to take every opportunity to claim that possible trust distributions contemplated by the trust document cause the trust to be invalid or create income for the trust beneficiary for SSI purposes.

Special Needs Trusts Tip #4:

For third-party special needs trusts, consider allowing the trustee to establish a sub-account with The Arc of Indiana Master Trust (a pooled special needs trust as described in 42 U.S.C. 1396p(d)(4)(C)) for the benefit of the trust beneficiary. DON'T do this for first-party or self-settled special needs trusts, because the SSA considers it to be an early termination clause.

Special Needs Trusts Tip #5:

For third-party special needs trusts, consider giving the trustee the authority to amend the trust provisions if for whatever reason the settlor is unable to do so in the event that a change in law or policy frustrates the purpose of the trust or causes the trust to fail to preserve the public benefits eligibility of the trust beneficiary.

Section Two

5 Tips for Will Contest

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Section Two

5 TIPS FOR WILL CONTEST

John A. Cremer

TIP ONE: USE THE MAGIC LANGUAGE IN A POUR OVER WILL

a. Incorporate by reference the dispositive terms of the Revocable Trust to negate a successful Trust contest.
b. Spread will of record – without notice, if no probate administration necessary.

TIP TWO: UTILITIZE THE STATUTORY PROVISIONS TO CHALLENGE MULTIPLE INSTRUMENTS WHEN THE CIRCUMSTANCES DICTATE.

a. Where in sequence is your will to the probated Will?
b. Your ability to obtain attorney fees under I.C. 29-1-10-14.

TIP THREE: MAKE SURE YOUR NO CONTEST PROVISION HAS TEETH – PROVIDE ENOUGH OF A BEQUEST AS A DETERENT TO A CHALLENGE.

TIP FOUR: OBTAIN A NEUROPSYCHOLOGICAL ASSESSMENT THROUGH THE CLOAK OF WORK PRODUCT PRIVELEGE.

a. Lawyer contracts with the professional.
b. An adverse report may be shielded from discovery.

TIP FIVE: BEWARE OF THE VIDEOTAPED WILL EXECUTION

Section Three

Tips for Trust Contests

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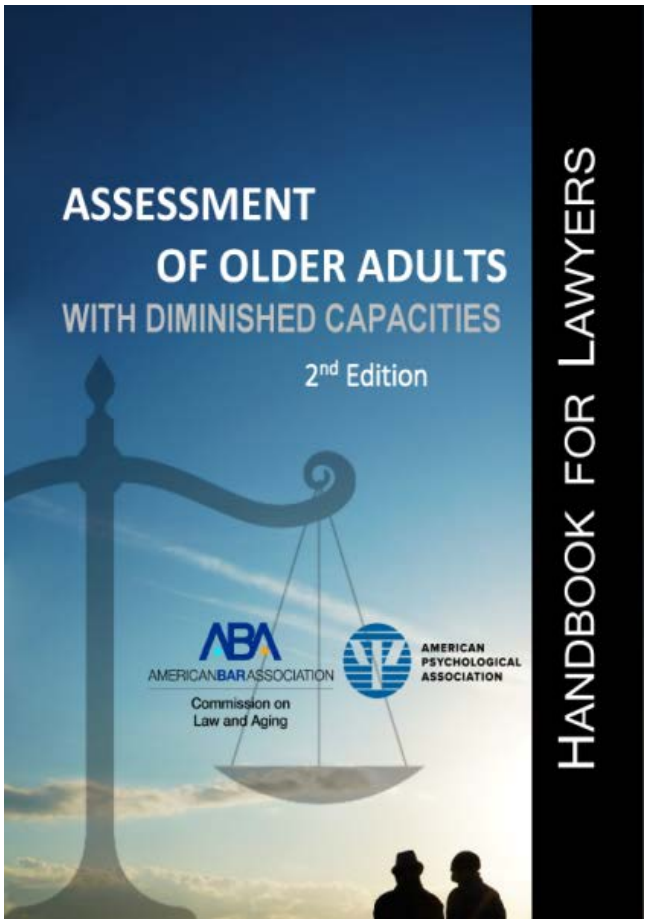
Section Three

TIPS FOR TRUST CONTESTS

Lisa M. Dillman

4 CAPACITY RESOURCE TIPS

a. ABA/APA Handbook: Assessment of Older Adults with Diminished Capacity



b. Decision Matrix Elder Safety Poster – Gerontological Advanced Practice Nurses Association ("GAPNA")

Capacity → Health ↓	Full cognitive function	Obvious Focal decline	Multiple focal and partial global decline	Full global decline
Full physical health/function, managed with medication	Community dweller, handling all aspects of life	Community dweller with minor deficits present, requiring assistance with one ADL	Community or institutional dweller with identified focal deficits, requiring assistance with one ADL	N/A
Mild health/function decline, corrected with medications or activity	Community dweller, requiring assistance with one ADL	Community or institutional dweller requiring assistance with some ADLs	Community or institutional dweller with identified focal deficits, requiring assistance with some ADLs; requiring assistance with some decision-making tasks	Community or institutional dweller with full global decline deficits; requiring assistance with most ADLS; requiring assistance with all decision-making tasks
Moderate health/function decline	Community or institutional dweller requiring assistance with some ADLs; has full decision-making capacities	Community or institutional dweller requiring assistance with multiple ADLs; requiring assistance with some decision-making tasks	Community or institutional dweller with identified focal deficits, requiring assistance with multiple ADLs; requiring assistance with most decision-making tasks	Community or institutional dweller with full global decline deficits; requiring assistance with all ADLS; requiring assistance with all decision-making tasks
Severe health/function decline	Community or institutional dweller requiring assistance with all ADLs; has full decision-making capacities	Community or institutional dweller requiring assistance with all ADLs; requiring assistance with some decision-making tasks	Community or institutional dweller requiring assistance with all ADLs; requiring assistance with all decision-making tasks	Community or institutional dweller with full global decline deficits; requiring assistance with all ADLS; requiring assistance with all decision-making tasks

c. Challenging capacity of settlor – revocable trusts vs. irrevocable trusts.

d. Challenging electronically signed documents impacting trusts.

TIPS/LESSONS LEARNED BY *ROTERT V. STILES*, 174 N.E.3d 1067 (Ind. Ct. App. 2021)

a. Settlor's intent

b. Public policy challenges

c. Treatment of spouses

Section Four

Lessons Learned in 35 Years of Mediation

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Section Four

Lessons Learned in 35 Years of Mediation……. Brian C. Hewitt

PowerPoint Presentation

Lessons Learned in 35 Years of Mediation

December 21, 2021

ICLEF: 90 Hot Tips in Estate, Trust and Probate Practice

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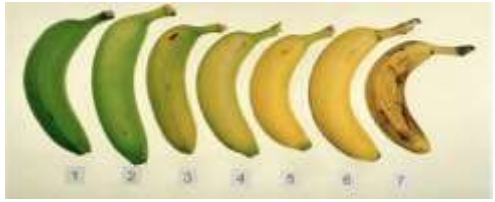
The Settlement is the Parties' Settlement, not the Mediator's. The Parties Have to Take Ownership of the Settlement.

If we are mediating with the passion we should be, it is easy to become discouraged when we feel a mediation slipping away. It is even easier to feel responsible for the failure of the parties to reach an accord. Remember, our job is to do our best, not give up, and provide measured, well-reasoned input. If we have done that and dispute resolution does not occur, don't be too hard on yourself. Sometimes the parties need reminded this is their settlement and they have to take ownership of it.

Know Your Audience and Work the Crowd

- I have spoken often about specific personality traits that drive behavior in mediation. I would be happy to provide that paper to anyone. Feel free to email me.
- In short, you need to engage what I call a personality driven approach ("PDA") to mediation. Identify key personality characteristics that drive behavior in mediation, understand the audience, take them as they are, and use their central personality traits to motivate productive behavior. It may seem disingenuous for us to be different people to different parties. There is nothing disingenuous about changing how you interact with parties to make them feel more comfortable. The more comfortable they feel, the less threatened they will feel by the process, and by you, and the more able they will be to participate productively and objectively.
- The four steps to PDA to mediation are:
  - Step One: Spend the first session or two identifying the specific personality trait of every participant (stay tuned);
  - Step Two: Build rapport by tailoring your interaction with each participant to a specific personality trait. This rapport building is personality trait specific;
  - Step Three: Identify what that participant needs, psychologically, not financially. The personality trait drives the dollar amount a participant will settle for, not the other way around;
  - Step Four: Acquire an offer that gives each participant what he or she needs, psychologically.

If the Case Doesn't Seem Ripe for Mediation, it isn't Ripe for Mediation



As neutrals, we want parties to take advantage of mediations and resolve disputes as soon and as inexpensively as possible. There's nothing wrong with that goal. Some cases that have few facts and little history can be mediated very early, with little to no discovery. Most cases, however, need some discovery and exchange of evidence so the parties feel educated enough to make meaningful concessions. Without a sufficient amount of education, the parties simply won't feel compelled to make concessions.

If you have a feeling a pre-suit or early-suit mediation is premature, schedule a conference call with counsel to discuss what information should be exchanged before a pre-suit or early litigation mediation. If early into mediation you realize the parties simply don't have a sufficient amount of information and are attempting to conduct discovery at an early mediation, discovery they will then have to review, suggest the mediation be continued and agree on a schedule for the exchange of discovery.

Phrases to Live (and act) by:

- **"I like to give a little as I take a little".** When a party is struggling to make another offer and has run out of energy, they may be experiencing analysis paralysis. They may also get fussy and claim they have given up far more than their opponent. Such parties are usually overcomplicating the process. Telling them "Don't think about what your opponent is getting, think about what you're keeping. Right now, you're simply making an offer to get an offer and every time you get another offer, you get closer to settlement."
- **"Work on structure first".** Every settlement requires two things. First, the parties have to agree on the structure of the settlement. What are the components, the building blocks, that are essential to settlement? Many mediations offer different options for settlement. This is particularly true in large dollar mediations that involved structured settlements, complicated business mediations, complicated tax mediations and will and trust mediations that involve numerous parties and various forms of assets. It is critical to discuss and agree on the structure of settlement first. Don't focus on the dollar values or asset values until you can agree on a structure. If you try to focus on dollars and assets first, you will end up wasting half the day and, ultimately, end up working on the structure before any meaningful progress will be made.
- **I explain it like this: Get on the same interstate; then get off at the same exit.** Until we agree on a structure for the settlement (the building blocks that are necessary to settle), you will be speaking Italian and they will be speaking French. We first have to start talking the same language and then we can roll up our sleeves and really get to work. Another way to put this phrase is that "until we agree on the same structure, the same building blocks for settlement, we are on parallel interstates that will never intercept". We first have to be driving on the same interstate in the same direction; that is the structure. We then need to get off at the same exit; that is the settlement.

Don’t Fixate on Where We Were or Where We Are, Fixate on Where We Are Going.

- Particularly after several hours of mediation, parties often get stuck. They can’t seem to find their way forward. They get stuck as they are fixated on prior offers and paralyzed in making additional offers. Every offer should have a purpose and every offer should be part of a plan. Getting parties to focus on the purpose and the plan equips them to look ahead and not dwell on the past.

Use Math, Not Argument, Whenever Possible

- Whenever you can explain a suggested strategy or proposal through simple mathematics, the need to engage in needless debate decreases dramatically. Math is more objective. Be aware, however, that parties and their counsel often make mathematical mistakes. Mediators argue about whether it is the mediator's job to correct math errors. Sometimes, merely saying "Are you sure about that math?" "Do you want to check those numbers again just to be sure?" avoids a party making an offer and later figuring out the offer was based on false math. That scenario usually sets the dialogue back.

Section Five

Five General Tips for Planning and Administration (Things We See or Don't See that Should Not or Should Be Happening)

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Section Five

Five General Tips for
Planning and Administration
(Things We See or Don't See that
Should Not or Should Be Happening)…….. Rodney S. Retzner

Five General Tips for Planning and Administration
(Things We See or Don't See that Should Not or Should Be Happening)

Rodney S. Retzner,
Krieg DeVault LLP

Tip #1 - "Estate Planning Overkill"

Tip #2 - "Failure to Properly Fund Trusts"

Tip #3 - "Blind Use of Form Documents (and horror stories of potential malpractice)"

Tip #4 - "Who Do You Represent?"

Tip #5 - "Cutting Off Fiduciary Liability"

Section Six

Tips on Retirement Plans and The SECURE Act

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Section Six

Tips on Retirement Plans and The SECURE Act…… Rebecca W. Geyer

TIPS ON RETIREMENT PLANS AND THE SECURE ACT

1. REVIEW BENEFICIARY DESIGNATIONS AND ESTATE PLANNING GOALS TO DETERMINE THE "BEST" BENEFICIARY OF THE RETIREMENT PLAN

2. AVOIDING THE 10-YEAR MAXIMUM TIMEFRAME PAYOUT: CAREFUL PLANNING FOR ELIGIBLE DESIGNATED BENEFICIARIES POST-SECURE ACT

3. ROTH IRA CONVERSIONS CANNOT BE UNDONE

4. REDUCE RMDS THROUGH A QUALIFIED LONGEVITY ANNUITY CONTRACT

5. ROLL FUNDS INTO IRAS AFTER RETIREMENT FOR GREATER FLEXIBILITY

6. DONATING REQUIRED MINIMUM DISTRIBUTION TO CHARITY

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According to the United States Department of Labor, more than 46 million workers are currently covered by employer-provided retirement plans, and such plans often represent some of the most significant assets an individual owns.[1] Almost every client estate planning attorneys encounter has a retirement plan which makes up part of his or her estate. As a result, it is important to understand the SECURE Act rules which govern retirement plans, and the income tax consequences which may affect both clients and beneficiaries.

TIP 1: REVIEW BENEFICIARY DESIGNATIONS AND ESTATE PLANNING GOALS TO DETERMINE THE "BEST" BENEFICIARY OF RETIREMENT PLAN

The SECURE Act ushered in what many are referring to as the "death of the stretch." Prior to the SECURE Act, non-spouse beneficiaries of a retirement plan could roll funds into an inherited IRA and would only be required to withdraw an amount annually from the inherited IRA based on their actuarial life expectancy. These rules allowed the inherited IRA distributions to be "stretched" over the beneficiary's life expectancy. The SECURE Act changed these rules, and with few exceptions, non-spouse beneficiaries must now withdraw all funds from an inherited retirement plan within ten tax years after the participant's death. As a result, participants who may not have an estate tax issue may have a substantial income tax issue due to the size of their retirement plans. Careful attention must be paid to beneficiary designations of retirement plans as a result of the SECURE Act. The following exceptions apply to the 10-year rule and still allow for stretch of the retirement plan funds under the SECURE Act:

- Surviving Spouse (the pre-2020 rules still apply)

[1] See https://www.dol.gov/ebsa/publications/qdros.html

- Minor child may still stretch the IRA until the child reaches his or her age of majority (18 in most states)
- Disabled individual as defined in IRC 72(m)(7)
- Chronically ill individual as defined in IRC 7702B(c)(2)
- Individual not more than 10 years younger than the deceased retirement plan owner

To meet one of the above exceptions, the individual must fall into one of the above categories (be an eligible designated beneficiary or "EDB") on the date of death of the account owner, which is a one-time determination.

As noted above, rules relating to surviving spouses remain the same, which means a surviving spouse is allowed to roll over a deceased spouse's IRA funds to his or her IRA, preserving its tax-deferred status. A surviving spouse has two options with an inherited IRA: (1) treat it as his or her own IRA by designating himself or herself as the account owner or (2) treat it as his or her own by rolling it over into his or her IRA. In either case, the surviving spouse may defer distributions until age 72. For unmarried individuals who designated a partner as a beneficiary prior to marriage, a new beneficiary form should be completed indicating that his or her beneficiary is now a spouse in order to take advantage of these spousal rollover options. If this is not done, the 10-year payout provisions of the SECURE Act will likely apply to the retirement plan since the beneficiary may be treated as a non-spouse beneficiary.

TIP 2: AVOIDING THE 10-YEAR MAXIMUM TIMEFRAME PAYOUT: CAREFUL PLANNING FOR ELIGIBLE DESIGNATED BENEFICIARIES POST-SECURE ACT

With the exception of five particular types of beneficiaries ("eligible designated beneficiaries"), the life expectancy payout has been replaced by a 10-year payout rule. Eligible designated beneficiaries are still entitled to a modified version of the Pre-SECURE Act life expectancy payout.[2] These are: (a) the surviving spouse; (b) minor child or children; (c) disabled beneficiaries;[3] (d) chronically ill beneficiaries;[4] and (e) a beneficiary LESS THAN 10 years younger than the participant in the plan.

Surviving Spouse

The surviving spouse still has the option to "roll over" inherited benefits to his or her IRA or (in the case of an inherited IRA) to elect to treat it as his or her own IRA. A conduit trust for the surviving spouse will be entitled to all the minimum distribution benefits of the surviving spouse so long as the surviving spouse is the sole beneficiary during his or her lifetime. The trust need not commence receiving required minimum

[2] IRC § 401(a)(9)(E)(ii).

[3] The disabled beneficiary must be disabled within the meaning of IRC § 72(m)(7) [The individual must be unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration.].

[4] The individual must be chronically ill within the meaning of IRC § 7702B(c)(2), which section relates to qualification of qualified long-term care insurance. Under this section, the term "chronically ill individual" means any individual who has been certified by a licensed health care practitioner as: (i) being unable to perform (without substantial assistance from another individual) at least 2 "activities of daily living" for a period of at least 90 days due to a loss of functional capacity; (ii) having a level of disability similar to the level of disability described in clause (i), or (iii) requiring substantial supervision to protect such individual from threats to health and safety due to severe cognitive impairment.

distributions until the end of the year in which the deceased participant would have reached age 72.[5]

Minor Children

For a limited time (until the age of majority), minor children of retirement plan participants are not subject to the 10-year payout rules applicable to beneficiaries who do not fall within the exceptions to the mandatory 10-year payout rules. A conduit trust for a minor child of the plan participant is entitled to the same treatment as the minor child as an EDB where the child is considered the "sole designated beneficiary" of the retirement plan. However, this entitlement does not last for the child's entire life—only until the child attains majority, at which point the trust becomes subject to the 10-year rule.[6] All benefits must then be distributed outright to the minor within the 10-year period after the child attains majority. Practice note: these rules are a maze to say the least, and it is important to communicate the consequences of these choices regarding minor children to clients.

A few important points to also understand regarding the EDB exception to the 10-year rule:

1. It applies only to minor children of the plan participant; not grandchildren or other people's children
2. The exception ENDS once the child reaches majority age.
3. If the minor dies prior to attaining majority, the 10-year rule would kick in at that time (and be applicable to the contingent beneficiary).

[5] IRC § 401(a)(9)(B)(iv)(I).

[6] IRC § 401(a)(9)(E)(iii).

4. The rules remain unclear where the beneficiary of the retirement plan is a trust for multiple children of the participant, and not all of the children-beneficiaries are minors.

Disabled or Chronically Ill Beneficiaries

The beneficiary's status as "disabled" or "chronically ill" is determined as of the date of the participant's death. What this means is that a beneficiary, not disabled or chronically ill on the date of the participant's death, who becomes disabled at some later date may NOT switch over to a life expectancy payout.

As with other eligible designated beneficiaries, the life expectancy payout period terminates on the death of the disabled or chronically ill beneficiary and the 10-year rule then begins to apply.

Less Than 10 Years Younger Beneficiary

In limited circumstances this exception will work where a client chooses plan beneficiaries that are siblings or friends, so long as they are not less than 10 years younger than the beneficiary.

TIP 3: ROTH IRA CONVERSIONS CANNOT BE UNDONE

Many individuals may consider converting their tax-deferred retirement plans into Roth IRAs if they are in a lower income tax bracket then the beneficiaries who will inherit from them. The Roth conversion will result in the participant paying income tax on the funds in the retirement plan now, and then the after-tax dollars will grow tax-free in a Roth IRA, which will be left to the beneficiaries the participant designates. While Roth conversions are a great strategy for some, the income tax bill can result in sticker shock for

the participant. It is important to know that once a Roth IRA Conversion is begun, it can no longer be undone. The Tax Cuts and Jobs Act of 2017 eliminated the taxpayer's right to recharacterize or undo a ROTH IRA Conversion. When assets are converted, the taxable amount of the conversion is the value at the time the amount is initially converted, even if the assets have declined in value. For instance, if an individual converted assets valued at $100,000, and the assets declined in value to $50,000, the individual must pay tax on $100,000. As a result, prior to The Tax Cuts and Jobs Act of 2017, many individuals chose to recharacterize conversions that dropped in value, thus removing any tax liability associated with the conversion. For any Roth IRA Conversions made since 2018, the taxpayer is unable to undo the conversion.

Attorneys and participants should also be aware that proposed legislation would prohibit the conversion of after-tax assets in traditional IRAs and employer-sponsored retirement plans into Roth accounts after December 31, 2021. Before accelerating plans for a Roth conversion, be sure to fully understand the impact it could have on the client's overall financial situation, from taxes to estate planning. It's still not certain that these new restrictions will become law, so before making a move, client's should consult with their tax advisor and accountant to weigh options.

TIP 4: REDUCE RMDS THROUGH A QUALIFIED LONGEVITY ANNUITY CONTRACT

Although required minimum distributions (RMDs) are not required to begin until age 72 under the SECURE Act, many people may still have large RMDs which must be distributed annually. A participant may use a portion of his or her IRA or 401K funds to purchase a longevity annuity without the need to comply with the required minimum distribution (RMD) rules. Previously, RMD rules required that an annuity purchased inside

a traditional IRA or 401K had to start distributions when the owner turned 70 ½ (72 post-SECURE Act), even if the owner did not need the money at that time. There was no real option to defer the annuity start date, so as to allow the annuity to grow in value inside the IRA and begin larger payouts at a later date. In short, the RMD rules previously clashed with the goal of planning for lifetime income. Thus, for those who wanted to defer the annuity start date, often the only option was to purchase an annuity outside the traditional IRA with after-tax dollars, or use after-tax dollars inside a Roth IRA.

The Qualified Longevity Annuity Contract Rule, which can be found in IRS Notice 2014-66, allows owners of traditional IRAs the ability to put a portion of their portfolio into a longevity annuity to provide for guaranteed income beginning at a future date, which can begin as late as age 85. By permitting this deferred start date, the rule allows for the interim growth of the annuity contract, and hence higher payouts beginning at a future date. The longer pay outs are deferred, the more money the owner receives. In short, the rule allows retirees to insure themselves against the risk of outliving their money, because they can provide lifetime income for themselves starting later in life.

There are some requirements of the rule, including the following: (1) Only up to 25% of the IRA account value, capped at $135,000, can be used to purchase a Qualifying Longevity Annuity Contract ("QLAC"); (2) the annuity must begin payout by age 85; and (3) the annuity must be irrevocable once purchased. The rule also permits the contract to have a "return of premium" feature: if the IRA owner dies before receiving back all of the annuity premium payment, the difference will be paid back to his or her beneficiary. Also, the $135,000 cap will be subject to cost of living adjustments. Retirees who choose to take advantage of this option can still invest the remaining 75% of their IRA or 401(k) account

balance in other assets, as before, with the understanding that only these assets will be used to calculate the RMD's with the mandatory start date at age 72. This rule is especially significant for those persons who are not yet ready to retire or who do not need to begin drawing on their traditional IRA or 401K at age 72.

The SECURE Act also made it easier for 401(k) plans to offer annuities as part of the plan structure. Pre-SECURE, employers had to hire costly financial experts to audit an annuity provider's books or do it themselves. Post-SECURE, employers can now rely on state insurance departments in making a determination whether an insurer can deliver on promises related to an annuity they wish to offer. The SECURE Act also extended "safe harbor" protections for plan sponsors when they select annuities as an investment option.

TIP 5: ROLL FUNDS INTO IRAS AFTER RETIREMENT FOR GREATER FLEXIBILITY

Employer-provided retirement plans, such as 401(k)s, are governed by ERISA. While the required distribution rules for employer-provided retirement plans are the same as those which apply to traditional IRAs, employer-sponsored plans can often be less flexible for participants. For example, under ERISA rules a married participant may not designate a non-spousal beneficiary to receive more than 50% of his or her retirement plan without the consent of his or her spouse (unless a premarital agreement is in place specifically addressing such issue). Spousal waivers, however, are not required for IRA rollovers.

Another drawback of employer-provide retirement plans is that they are limited to the investments offered by the specific plan. Moving the plan to a rollover IRA allows the

participant to choose his or her investment choices from all those offered by the company with whom the account is held.

Clients with large retirement plans who do not need their annual RMD for living expenses may wish to avoid income tax on the RMD by donating the money directly to a qualifying charity. This concept is discussed in more detail in Tip 6 below, but charitable contributions can only be made from IRAs, not 401(k)s or similar types of retirement accounts. Clients wishing to reduce their income tax liability in retirement may wish to rollover their employer-provided plan to an IRA to allow this type of charitable planning.

TIP 6: DONATING REQUIRED MINIMUM DISTRIBUTION TO CHARITY

After years of contributing to tax-deferred retirement plans, income tax is due when a participant takes withdrawals in retirement. Annual withdrawals from traditional retirement accounts are now required after age 72, and the penalty for skipping a required minimum distribution is 50 percent of the amount that should have been withdrawn. However, if a participant is in the fortunate position of not needing his or her required minimum distribution for living expenses and is charitably inclined, he or she can avoid income tax on the required withdrawal by donating the money directly to a qualifying charity.

IRA owners must be age 70 1/2 or older[7] to make a tax-free charitable contribution. Those who meet the age requirement can transfer up to $100,000 per year directly to an eligible charity without paying income tax on the transaction. If the participant files a joint tax return, the participant's spouse can also make a charitable contribution of up to

[7] Although the age for required beginning date for RMDs was raised to 72 by the Secure Act, the law makes clear that participants may still do QCDs at age 701/2.

$100,000, meaning couples can exclude up to $200,000 of their retirement savings from income tax if they donate it to charity. If a participant donates more than the maximum allowable amount it is considered income and could be subject to income tax. Qualified charitable contributions must be made by December 31 each year in order to exclude that amount from taxable income.

Charitable contributions can only be made from IRAs, not 401(k)s or similar types of retirement accounts. A participant might need to roll funds over from a 401(k) to an IRA to make tax-free charitable contributions from a retirement plan. The participant does not need to itemize taxes in order to make an IRA charitable distribution. However, the participant **cannot** additionally claim a charitable contribution tax deduction on a charitable distribution from the IRA. Because the participant is not getting taxed on the distribution from the IRA, the participant doesn't get to count the transfer to the charity as a charitable deduction as well. The participant should still request an acknowledgment of the donation from the charity for tax purposes to prove the RMD should not be included in the participant's gross income.

A $100,000 charitable contribution from an IRA could save the participant tens of thousands of dollars in taxes, depending on the participant's tax rate. For a retiree in the 25 percent tax bracket, an IRA charitable contribution of $5,000 could reduce the retiree's income tax bill by $1,250. Even a $1,000 donation would save the retiree $250 in taxes. The benefits of making a charitable contribution from the participant's IRA are even bigger for those in higher tax brackets. Because the participant is not receiving the distribution, he or she is not taxed on the distribution; it goes straight to the charity.

Funds must be transferred directly from the IRA to an eligible charity by the IRA trustee in order to qualify for the tax break. If the participant withdraws the money from his or her IRA and later donates it, it won't qualify as a tax-free qualified charitable distribution. The charity must also be a 501(c)(3) organization in order to receive the tax-free IRA charitable contributions. Charities that do not qualify include private foundations and donor-advised funds. A participant can also distribute his or her required minimum distribution to multiple charities in the same year.

Section Seven

Five (5) Hot Tips
Filing & Defending Claims
in an Estate

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Section Seven

Five (5) Hot Tips
Filing & Defending Claims in an Estate……. Nathan S.J. Williams

Tips

Five (5) Hot Tips

Filing and Defending Claims in an Estate[1]

Tip #1

Know Your Statutes.

The process of dealing with claims within the context of an estate is driven almost entirely by statute. In fact, the entire chapter at IC 29-1-14 is dedicated to the claim process. As questions arise, the first place to find answers is generally in a statute:

- Is it a claim?

Indiana Code §29-1-1-3**(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. However, for purposes of *IC 29-1-2-1* and *IC 29-1-3-1*, the term does not include taxes imposed by reason of the person's death.

- When does the Claim need to be filed? See Indiana Code §29-1-14-1.

- What form does the Claim need to take? See Indiana Code §29-1-14-2.

- What is the process if a Claim is not allowed (or not allowed in full)? See Indiana Code §29-1-14-12.

- What happens if the Personal Representative has a claim? See Indiana Code §29-1-14-17.

There are other statutory references which are discussed, below. And the statutes are not without annotations[2], and have been addressed in various cases. But the statutes are definitely the place to start in the review and analysis of any issue with a claim. And the process of working through any issue with a claim is likely to be filtered through the statutory architecture.

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[1] By Nathan Williams, SHAMBAUGH, KAST, BECK & WILLIAMS, LLP. Immeasurable thanks to Steve Williams, Ben Williams, and the others that I am privileged to practice with, attorneys and paralegals alike, who have helped to form and shape an understanding of the nuance of the probate code and the claims elements.

[2] For examples which go beyond the scope of a Hot Topics discussion, see *Markey v. Estate of Markey*, 38 N.E.3d 1003 (Ind. 2015) (assessing whether an allegation that the decedent had breached a contract to make a Will was a "Claim"); *Tilly v. Hall*, 149 N.E.2d 628 (Ind. App. 2020)(assessing a dissatisfied beneficiary's intervention in a matter that involved a challenge to a lifetime deed of property).

Tip #2

Pay Attention to Your Notices.

The Claims process in Indiana starts with the provision of notice. The Personal Representative has an obligation to discover the reasonably ascertainable creditors[3] of the decedent within one (1) month of the first publication of notice. *See I.C. §29-1-7-7.5(a).* Reasonable diligence looks like this:

- Conducting a review of the decedent's financial records that are reasonably available to the Personal Representative; and
- Making reasonable inquiries of persons who are likely to have knowledge of the decedents debts and are known to the Personal Representative.

Once a Personal Representative has conducted such due diligence, she or he has an obligation to give notice of the administration to such creditor. *See I.C. §29-1-7-7.* The obligation to provide notice is ongoing, and does not cease after the Personal Representative has been appointed and the estate has been opened.

In addition to conducting the due diligence and providing notice, the Personal Representative should make a record of the parties or persons to whom notice is given and when, as the timing in which a Claim is required may depend upon when notice was given and the ability to prove when notice was given. Creditors who are known at the time of the filing of the Petition to Appoint a Personal Representative will be set forth in the Petition. A Personal Representative shall also file with the Clerk a "schedule" of creditors ascertained after the opening of the Estate and to whom notice is later given. *See I.C. §29-1-7-7(f).*

Notice is only required to be served by first class mail, and is not required to be sent by registered mail. *See I.C. §29-1-7-7(c).* That keeps cost to a minimum; however, without a signature, it is imperative that the Personal Representative (or, more likely, the office staff of the attorney representing the Personal Representative) is able to prove that notice was actually given by Regular U.S. Mail. While the "schedule" required to be filed does not specify any particular form, it is wise to express that in the form of an affidavit to be signed by a person with knowledge (and that's usually some administrative staff in the attorney's office) that notice was sent by Regular U.S. Mail to the named creditors at specified addresses.

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[3] While we are paying attention to statutes, see I.C. §29-1-7-7.5(c), regarding the filing of an affidavit with the probate Court representing that the Personal Representative has conducted her or his "due diligence", and obtaining an Order from the Court that any creditors not discovered are "not reasonably ascertainable".

Tip #3

Pay Attention to the Calendar.

Indiana's statutory framework for claims includes pretty tight deadlines for the creditor to file the Claim. Note: to "file" a Claim, the creditor must actually file it with the Clerk of the Court in which the estate is administered. *See I.C. §29-1-14-2.* Sending something in writing to the Personal Representative or to counsel for the Personal Representative is not sufficient.

The deadline for filing a Claim will depend, initially, upon when and how notice was served:

- For creditors who were served Notice at the time of the appointment of a Personal Representative, or within one (1) month after the first publication of Notice, the Claim period is three (3) months from the date of the initial publication of Notice. *See I.C. §29-1-14-1(a), (c); see also IC §29-1-7-7(e).*
- For creditors upon whom the Personal Representative serves Notice more than one (1) month after the initial publication of Notice, the Claim period is extended an additional two (2) months from the date on which Notice is provided, but not more than nine (9) months after the date of the decedent's death. *See I.C. §29-1-7-7(e).*
- For all Claims, regardless of notice, there is a nine (9) month period after the death of the decedent that operates as a statute of repose; it is a non-claim statute. If the Claim is not filed within that time, the Claim does not exist. It is not susceptible to an argument that the Claim period has been equitably tolled by action of the Personal Representative.[4] *See I.C. §29-1-14-9(d).*
- Well, *maybe* not all Claims. Per I.C. §29-1-14-1(a)(2): if a person is a devisee under a Will which was initially admitted to probate but then probate of that Will is revoked, the devisee has a period of three (3) months from the date on which the probate of the Will was revoked to file a Claim. Note: there is not a clear indication that this necessarily will allow filing of a Claim beyond the nine-month period.

The passage of the Claim period will act as a strong filter for any Claims. There is an obligation on the part of the Personal Representative to give notice. But at that point, the obligations shift to the creditor to get a Claim on file in a proper and timely manner.

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[4] Also beyond the scope of a Hot Topics discussion: whether action by the Personal Representative in failing to give notice to a Creditor, or to take action to frustrate the ability of a creditor to file a claim in a timely manner gives rise to a cause of action by the creditor against the Personal Representative for breach of fiduciary duties.

Tip #4

Be Aware of the Dead Man's Statute

Indiana's Dead Man's Statute is found at Indiana Code §34-45-2-4.[5] It is a rule of witness competency, which applies in situations where:

- The Personal Representative is a party. Procedurally, when a Claim is disallowed, the matter is "set over" into a new cause number, in which the Claimant is the Plaintiff and the Personal Representative is the Defendant. As such, a disallowed Claim clearly fits this condition of the Dead Man's Statute.
- Involving matters that occurred during the lifetime of the decedent. By the nature of the definition of a "Claim", it is something that could have been asserted against the decedent and reduced to judgment in her or his lifetime. Again, a disallowed Claim clearly fits this condition.
- Judgment can be rendered for or against the estate. In the context of a disallowed Claim, if the Claimant is successful, it will result in a judgment against the estate in favor of the Claimant.

Technically, the Dead Man's Statute clearly applies in the context of a disallowed Claim. What that means in practice is that the Claimant is not competent to testify. These are the practical implications for each of the Creditor and the Personal Representative:

The **Creditor/Claimant** needs to have independent documentation of the debt and Claim. In many arms'-length or commercial situations, that is not likely a problem. But in family situations, there is often not documentation or something in writing. In such situations, it may be impossible for the Claimant to satisfy her or his burden of proof with respect to the Claim and her or his entitlement to any compensation or other award.

The **Personal Representative** should be cautious to not waive the Dead Man's Statute. The rule of witness competency can be waived. And it is not self-executing: the objection should be made, both at the outset of any hearing on the Claim, as well as throughout to be certain that it is preserved.

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[5] Indiana Code §34-45-2-5 also expresses a different element of Indiana's Dead Man's Statute, which applies in cases which seek to affect the title to assets of a deceased person. To the extent that the Dead Man's Statute applies within the context of a contested and disallowed Claim, it is within the format of Indiana Code §34-45-2-4.

Tip #5

Pay Attention to Priorities.

Even if a Claim is allowed, there still need to be assets to pay the Claim.[6] Indiana Code §29-1-14-9 spells out the prioritization of who gets paid out of an estate, when there are not sufficient assets to pay all of the claims:

1. Costs and Expenses of Administration. This includes both a reasonable attorney fee and a reasonable Personal Representative's fee.
2. Reasonable Funeral Expenses. Note that a Claim should likely be filed for these, as well, to ensure that the right to reimbursement is perfected. *See Kitchen v. Estate of Blue*, 498 N.E.2d 41, 47 (Ind. App. 1986).
3. Allowances under Indiana Code §29-1-4-1. Note that these Allowances (either for spouse or dependent children) do not need to be filed as a Claim.
4. Federal Taxes. This includes both taxes due in the current year of the decedent's death, as well as any taxes assessed and owing for prior years.
5. Expenses of the Decedent's Last Illness. Note: in the course of any discovery related to a Claim, it may be important to determine the etiology of the "last illness".
6. State Taxes. As with Federal Taxes, this may include both prior and current years' taxes. It may be advisable for the Personal Representative to file a Form 4810 with the IRS, requesting prompt assessment of any income taxes owed.
7. All Other Claims.

What the priority of Claims and payments allows a Personal Representative to do is to leverage that priority to minimize the liability to legitimate claimants. Two things of particular note to optimize that leverage:

- There can be a fair amount of wiggle room within the meaning of "reasonable" as it relates to the costs of administration. That is true of attorney fees and a personal representative's fee. But it is also true as it relates to the expenses of maintaining any property administered as part of the estate.
- If the Personal Representative is a surviving spouse, pay attention to the language of Indiana Code §29-1-4-1(and subsection (c), in particular), which allows the surviving spouse to make certain elections regarding how the Allowance is to be satisfied. Depending upon the nature of a creditor Claim and whether it is secured by collateral, the election may provide additional leverage.

[6] Also beyond the scope of a Hot Topics presentation: the extent to which Indiana Code 32-17-13 can increase the pot of funds available to satisfy creditors, to include non-probate transfers. Short answer: it can. But there are procedures for how to do it and time limits on when to do it.

Section Eight

5 Tips on Recent Legislation Regarding Will Executions

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Section Eight

5 Tips on Recent Legislation Regarding Will Executions…… Ronald M. Katz

5 Tips on Recent Legislation Regarding Will Executions

Presented by Ronald M. Katz[1]

ICLEF "Hot Tips" in Probate Seminar

December 21, 2021

Roadmap:

1. Execution of Wills

2. Wills: Affidavits of Compliance and Updated Self-Proving Clauses

3. Execution of Trusts

4. Execution of Powers of Attorney

5. Other Planning Related Document Execution Changes

Exhibit A: Required Information in Affidavit of Compliance Relating to Execution of Will

Appendix I: House Enrolled Act 1255

Appendix II: House Bill 1056

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1. Execution of Wills

House Enrolled Act 1255 *(attached as Appendix I)* addressed numerous changes to the Probate Code relating to the execution of Wills, Trusts and Powers of Attorney, many of which were addressed in response to the emergency Indiana Supreme Court orders issued at the beginning of the pandemic in March of 2020. With respect to Wills:

- New definitions of "presence," "in the presence of," "observe," and "observing" were added to the Probate Code [*to IC 29-1-1-3(a) regarding traditional will signing ceremonies and IC 29-1-21-3 regarding electronic wills*] relating to the presence of witnesses with the testator or testatrix. If the Testator and witnesses are not directly present with each other in the same physical space, the "presence" requirement is satisfied if the witnesses and testator are able to interact with each other in real time through the use of any audiovisual communications technology now known or later developed.

- For traditional paper wills, electronic wills, and POAs signed on paper or electronically, understand the expanded responsibilities of counsel and "directed paralegals" [*newly defined in IC 29-1-1-3(a)(9)*).[2]

- Counterpart Will executions now specifically addressed: A will may be signed by the testator and the two witnesses on separate but identical paper counterparts, which must be combined after signing into a single composite document containing all signatures [*IC 29-1-5-3(c) and (d)]*. This signing method will be useful to competent testators who are unable to use electronic or digital signature technology and in situations where the testator and the witnesses cannot physically manage the single original will printed on paper.

- When a **testator** is signing a will that is governed by the Indiana Probate Code as an Indiana will, the testator must comply with Indiana execution

[2] "Directed paralegal" means a nonlawyer assistant who is employed, retained, or otherwise associated with a licensed attorney or law firm and whose work is directly supervised by a licensed attorney, as required by Rule 5.3 of the Rules of Professional Conduct.

requirements, and should not use or rely on on-line document assembly services (e.g., Willing.com, LegalZoom.com) that purport to rely on and invoke the law of another jurisdiction (e.g., Nevada) that has looser standards for remote witnessing.

2. Wills: Affidavits of Compliance and Updated Self-Proving Clauses

- If a will is going to be signed and witnessed in counterparts:
  - An attorney or directed paralegal **must** supervise the execution and witnessing of the will in counterparts.
  - The attorney or paralegal who supervises **must** sign an "affidavit of compliance" after assembling the will that was signed and witnessed in counterparts.
  - When an attorney or directed paralegal supervises the execution of a will in counterparts [*as described in IC 29-1-5-3(c)],* the attorney or directed paralegal **must** sign, date, and complete an affidavit of compliance within a reasonable time after all paper counterparts of the will have been signed by the testator and the witnesses. An affidavit of compliance under this subsection must be sworn or affirmed by the signing attorney or directed paralegal under penalties of perjury.
  - The affidavit of compliance **must** be filed with the probate petition or *at any later time ordered by the probate court*.
  - If the will was signed in counterparts *without* the required supervision by an attorney or directed paralegal, the will is not void but is **voidable** in the discretion of the probate court, or if an objection to probate is filed under IC 29-1-7-16, or if a timely will contest is filed under IC 29-1-7-17.
  - *See* Exhibit A for information to be addressed in "Affidavit of Compliance" to be used.

- ***See* IC 29-1-5-3.1(e) for a new form of self-proving clause to be used for wills signed in counterparts.** Note: the required form of self-proving clause under IC 29-1-21-4(e) for electronic wills is also modified for non-counterpart wills to address "presence" requirements of the statute.

- It is now unnecessary for a testator to re-execute a will signed on or after March 31, 2020 and before January 1, 2021, where remote witnessing was used in reliance on the Indiana Supreme Court's order in Case MS-237 [new IC 29-1-5-3.3].

- The execution and witnessing requirements for electronic wills were amended [in IC 29-1-21-4] to permit "remote witnessing," so long as the testator and the witnesses interact in real time in ways that satisfy the new, broader definitions of "presence" and "observe."[3]

- New requirements for electronic wills [*under IC 29-1-21-4(b) and (c)*] <u>involving remote witnesses</u>:

    - An attorney or a directed paralegal must supervise the execution and witnessing of that electronic will.

    - The attorney or paralegal who supervises the execution and remote witnessing of the electronic will <u>must</u> sign an Affidavit of Compliance as required and described above.

    - If that electronic will is offered for probate, the proponent must file a copy of the affidavit of compliance with the probate petition or later *when ordered* to do so by the probate court.

    - If the electronic will was signed with remote witnessing but without the required supervision by an attorney or directed paralegal, the electronic will is not void but is voidable in the discretion of the probate court, or if an objection to probate is filed under IC 29-1-7-16, or if a timely will contest is filed under IC 29-1-7-17.

[3] In the prescribed self-proving clause for electronic wills in IC 29-1-21-4(e) and elsewhere in IC 29-1-21-4, the words "actual presence" and "actual and direct physical presence" are replaced by "presence."

3. Execution of Trusts

2020 amendments to the Trust Code specifically permitted a trust settlor to direct a third party to sign the trust instrument in the settlor's presence and at the settlor's direction, which procedure was already authorized under the Probate Code and the Powers of Attorney statute. However, those amendments did not limit who could act to sign the settlor's name on a trust instrument at the settlor's direction. In light of the fact trust instruments can be validly signed with just the settlor's signature (no witnesses or notarization required under the Indiana Trust Code), there was nothing in the statute that specifically addressed the potential of a third party acting in the best interests of someone other than the settlor.

HEA 1255 amends the Trust Code [*IC 30-4-1.5-4* (electronic trust instruments) and *IC 30-4-2-1* (trust instruments signed on paper) to prohibit the following persons from signing the trust instrument at the settlor's direction:

- A trustee named in the trust instrument.
- A relative of the settlor.
- A person who is entitled to receive a beneficial interest in the trust assets or a power of appointment under the terms of the trust.

If settlor's signature is placed on the trust instrument by an eligible individual who signs for the settlor and at the settlor's direction, the trust instrument must state that the signer is not in any of the above three categories.

If an adult electronically signs the trust instrument under subdivision (4), the trust instrument must state (a) "the adult signer is signing at the direction of the settlor and in the settlor's direct physical presence", and (b) "the adult signer is not a relative of the settlor, is not a trustee named in the electronic trust instrument, and is not entitled to any beneficial interest or power of appointment under the electronic trust instrument."[4]

[4] What is interesting about this provision is what if the settlor's designee to sign the trust instrument never read the instrument? Is a designee now under a duty to review the trust instrument before signing? What if the settlor only wants his designee to sign the instrument and not read the entire document? Remember, this issue only will arise with a settlor who for reasons UNRELATED to competency of the Settlor. [e.g., Settlor's writing hand is incapacitated due to injury; Settlor is suffering from an illness which causes her to be very weak at the time of trust execution.

4. Execution of Powers of Attorney

HEA 1255 addressed numerous changes to Indiana's Powers of Attorney Statute (IC 30-5). Highlights of these changes are addressed below.

- New IC 30-5-4-1.3 permits using the signatures of two or more attesting witnesses in lieu of a notarized acknowledgement. This change is intended to permit a competent principal to sign a durable POA with two witnesses if it is logistically too difficult to arrange for a notary public. This applies to POAs executed on and after March 30, 2020.[5]

- New IC 30-5-4-1.5 specifies the signing procedures required when a durable POA is signed on paper with two attesting witnesses instead of a notary. If the POA is signed in paper counterparts with 2 attesting witnesses, an attorney or a "directed paralegal" must supervise the signing and requires that the supervising attorney or paralegal make and keep an "affidavit of compliance" in accordance with the statute.

- Optional Self-proving clauses with two attesting witnesses permitted in lieu of notary (under new IC 30-5-4-1.7). The statute sets forth the form of self-proving clauses to be used when the POA is not signed and witnessed in separate counterparts, and it is signed in counterparts.
  ~ Though the self-proving clause is not mandatory, why not use such a clause, given the effect of such properly executed clause creates a presumption of validity of the POA.

- Audio and/or video recordings or photographs made during part or all of the POA execution is admissible evidence to demonstrate validity and compliance with signing formalities (under new IC 30-5-4-1.9).

- Regarding electronic POA signings, the statute permits electronic signing in the presence of a notary or in the presence of two witnesses (IC 30-5-11-4). The "in the presence" requirement is satisfied where the execution of the document is observed by the principal and notary (or witnesses in lieu of the use of a notary).

[5] This statute spells out "disqualifications" of subscribing witnesses ~ those "having an interest in the power of attorney" as well as spouse and descendants of the principal.

- For durable POAs that are signed electronically, definitions of "observe" and "observing" (added to IC 30-5-11-3) were added to the statute where interaction through the use of audiovisual technology now known or later developed is used in electronic signing situations (similar to Probate and Trust code changes).[6]

- HEA 1255 also addressed witnessing requirements relating to TOD transfers of tangible personal property to a designated beneficiary that is to take effect upon the death of the grantor, whether through a deed of gift, bill of sale or "other writing". In lieu of the notary requirement that was already in the statute, such written instrument can alternatively be signed in the presence of a disinterested witness (IC 32-17-14-12).[7]

5. Other Important Document Execution Changes

House Bill 1056 *(attached as Appendix II)* was passed unanimously by the House on January 26 of this year by the Senate on February 15, and signed by Gov. Holcomb on February 18, 2021. Note these important changes to the Indiana Code:

- Adds a broad definition of "instrument" including electronic documents as used in document recording statutes (new IC 32-21-2-1.5).

- Adds a detailed definition of "proof" regarding notarial acts (new IC 32-21-2-1.7).

- Revision and Restructuring of Notarial Act Statute (IC 32-21-2-3) to address proof or acknowledgement requirements, and provides that if a recordable instrument is signed in a foreign country and if the acknowledgement or

[6] IC 30-5-11-3 (14) literally provides a definition of "observe":
"Observe" means to perceive another's actions or expressions of intent through the senses of eyesight or hearing, or both. The term includes perceptions involving the use of technology or learned skills to:
(A) assist the person's capabilities of eyesight or hearing, or both; or
(B) compensate for an impairment of the person's capabilities of eyesight or hearing, or both.

[7] IC 32-17-14-12 (d) For purposes of this section, a witness is disinterested if the witness is not:
(1) the designated transferee beneficiary;
(2) the spouse of the designated transferee beneficiary;
(3) a descendant of the designated transferee beneficiary; or
(4) the spouse of a descendant of the designated transferee beneficiary.

proof is not in English, then the instrument must include a translation into English.

- Revisions and Clarifications of Recording Statute pertaining to conveyances and mortgages (IC 32-21-4-1), expanding scope of "conveyances" to include TOD deeds, land contracts or land contract memoranda, transfer affidavits, and other non-testamentary instruments "concerning land or an interest in land," (in addition to previous categories of deeds, mortgages, and leases for more than 3 years), including electronic records.

- Specifically provides that the new changes to the recording statute discussed above are intended to express the original legislative intent more clearly and will not upset any vested substantive rights (new IC 32-21-4-0.5). In essence this change deals with the potential situation of an instrument recorded prior to the effective date of the legislation which was not in technical compliance with the prior statute at that time (but conforms to the requirements of the current statute).

Exhibit A

Sample for Electronic and Counterpart Wills

Required Information in Affidavit of Compliance Relating to Execution of Will

1. Name and residence address of testator.

2. The name and residential address or business address for each witness who signs the will.

3. The address, city, and state in which the testator was physically located at the time the testator signed [the electronic will] *or* [an original counterpart of the will].

4. The city and state in which each attesting witness was physically located when the witness signed [the electronic will] *or* [an original counterpart of the will]as a witness.

5. A description of the method and form of identification used to confirm the identity of the testator to the witnesses and to the supervising attorney or directed paralegal, as applicable.

6. A description of the audiovisual technology or other method used by the supervising attorney or paralegal, as applicable, the testator, and the witnesses for the purpose of interacting with each other in real time during the signing process.

7. a brief description of the method used to add or capture the electronic signature of the testator and the witnesses.

7. A description of the method used by the testator and the witnesses to identify the location of each page break within the text of the will and to confirm that the separate paper counterparts of the will were identical in content.

8. A general description of how and when the attorney or paralegal, as applicable, physically combined the separate, signed paper counterparts of the will into a single composite paper document containing the will, the signature of the testator, and the signatures of all attesting witnesses.

8 or 9. The name, business or residence address, and telephone number of the attorney or directed paralegal who supervised the execution and witnessing of [the electronic will] *or [*the will in counterparts].

9 or 10. Any other information that the supervising attorney or directed paralegal, as applicable, considers to be material with respect to: (A) the testator's capacity to sign a valid will; and (B) the testator's and witnesses' compliance with [IC 29-1-21-4(a)] *or* [IC 29-1-5-3(c)].

Sworn or affirmed by the signing attorney or directed paralegal under the penalties of perjury.

APPENDIX I

First Regular Session of the 122nd General Assembly (2021)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type.~~

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 2020 Regular Session of the General Assembly.

HOUSE ENROLLED ACT No. 1255

AN ACT to amend the Indiana Code concerning probate.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 29-1-1-3, AS AMENDED BY P.L.231-2019, SECTION 5, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3. (a) The following definitions apply throughout this article, unless otherwise apparent from the context:

(1) "Child" includes an adopted child or a child that is in gestation before the death of a deceased parent and born within forty-three (43) weeks after the death of that parent. The term does not include a grandchild or other more remote descendants, nor, except as provided in IC 29-1-2-7, a child born out of wedlock.

(2) "Claimant" means a person having a claim against the decedent's estate as described in IC 29-1-14-1(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. However, for purposes of IC 29-1-2-1 and IC 29-1-3-1, the term does not include taxes imposed by reason of the person's death.

(4) "Court" means the court having probate jurisdiction.

(5) "Decedent" means one who dies testate or intestate.

(6) "Devise" or "legacy", when used as a noun, means a testamentary disposition of either real or personal property or both.

(7) "Devise", when used as a verb, means to dispose of either real or personal property or both by will.

(8) "Devisee" includes legatee, and "legatee" includes devisee.

(9) "Directed paralegal" means a nonlawyer assistant who is employed, retained, or otherwise associated with a licensed attorney or law firm and whose work is directly supervised by a licensed attorney, as required by Rule 5.3 of the Rules of Professional Conduct.

~~(9)~~ **(10)** "Distributee" denotes those persons who are entitled to the real and personal property of a decedent under a will, under the statutes of intestate succession, or under IC 29-1-4-1.

~~(10)~~ **(11)** "Estate" denotes the real and personal property of the decedent or protected person, as from time to time changed in form by sale, reinvestment, or otherwise, and augmented by any accretions and additions thereto and substitutions therefor and diminished by any decreases and distributions therefrom.

~~(11)~~ **(12)** "Expenses of administration" includes expenses incurred by or on behalf of a decedent's estate in the collection of assets, the payment of debts, and the distribution of property to the persons entitled to the property, including funeral expenses, expenses of a tombstone, expenses incurred in the disposition of the decedent's body, executor's commissions, attorney's fees, and miscellaneous expenses.

~~(12)~~ **(13)** "Fiduciary" includes a:

(A) personal representative;

(B) guardian;

(C) conservator;

(D) trustee; and

(E) person designated in a protective order to act on behalf of a protected person.

~~(13)~~ **(14)** "Heirs" denotes those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the real and personal property of a decedent on the decedent's death intestate, unless otherwise defined or limited by the will.

(15) For purposes of IC 29-1-5, and with respect to testators and attesting witnesses, "in the presence of" has the meaning set forth in subdivision (16).

(16) For purposes of IC 29-1-5, and with respect to testators and attesting witnesses, "presence" means a process of signing and witnessing in which:

(A) the testator and witness are:

(i) directly present with each other in the same physical

space; or

(ii) able to interact with each other in real time through use of any audiovisual communications technology now known or later developed;

(B) the testator and witness are able to positively identify each other; and

(C) each witness is able to interact with the testator and with each other by observing:

(i) the testator's expression of intent to make a will;

(ii) the testator's actions in executing or directing the execution of the testator's will; and

(iii) the actions of other witnesses when signing the will.

The term includes the use of technology or learned skills for the purpose of assisting with hearing, eyesight, and speech, or for the purpose of compensating for a hearing, eyesight, or speech impairment.

~~(14)~~ **(17)** "Incapacitated" has the meaning set forth in IC 29-3-1-7.5.

~~(15)~~ **(18)** "Interested persons" means heirs, devisees, spouses, creditors, or any others having a property right in or claim against the estate of a decedent being administered. This meaning may vary at different stages and different parts of a proceeding and must be determined according to the particular purpose and matter involved.

~~(16)~~ **(19)** "Issue" of a person, when used to refer to persons who take by intestate succession, includes all lawful lineal descendants except those who are lineal descendants of living lineal descendants of the intestate.

~~(17)~~ **(20)** "Lease" includes an oil and gas lease or other mineral lease.

~~(18)~~ **(21)** "Letters" includes letters testamentary, letters of administration, and letters of guardianship.

~~(19)~~ **(22)** "Minor" or "minor child" or "minority" refers to any person under the age of eighteen (18) years.

~~(20)~~ **(23)** "Mortgage" includes deed of trust, vendor's lien, and chattel mortgage.

~~(21)~~ **(24)** "Net estate" refers to the real and personal property of a decedent less the allowances provided under IC 29-1-4-1 and enforceable claims against the estate.

~~(22)~~ **(25)** "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.

(26) "Observe" means to perceive another's actions or expressions of intent through the senses of eyesight or hearing, or both. The term includes perceptions involving the use of technology or learned skills to:

(A) assist the person's capabilities of eyesight or hearing, or both; or

(B) compensate for an impairment of the person's capabilities of eyesight or hearing, or both.

(27) "Observing" has the meaning set forth in subdivision (26).

~~(23)~~ **(28)** "Person" means:

(A) an individual;

(B) a corporation;

(C) a trust;

(D) a limited liability company;

(E) a partnership;

(F) a business trust;

(G) an estate;

(H) an association;

(I) a joint venture;

(J) a government or political subdivision;

(K) an agency;

(L) an instrumentality; or

(M) any other legal or commercial entity.

~~(24)~~ **(29)** "Personal property" includes interests in goods, money, choses in action, evidences of debt, and chattels real.

~~(25)~~ **(30)** "Personal representative" includes executor, administrator, administrator with the will annexed, administrator de bonis non, and special administrator.

~~(26)~~ **(31)** "Petition for administration" means a petition filed under IC 29-1-7-5 for the:

(A) probate of a will and for issuance of letters testamentary;

(B) appointment of an administrator with the will annexed; or

(C) appointment of an administrator.

~~(27)~~ **(32)** "Probate estate" denotes the property transferred at the death of a decedent under the decedent's will or under IC 29-1-2, in the case of a decedent dying intestate.

~~(28)~~ **(33)** "Property" includes both real and personal property.

~~(29)~~ **(34)** "Protected person" has the meaning set forth in IC 29-3-1-13.

~~(30)~~ **(35)** "Real property" includes estates and interests in land, corporeal or incorporeal, legal or equitable, other than chattels real.

~~(31)~~ **(36)** "Unit" means the estate recovery unit of the office of Medicaid policy and planning established under IC 12-8-6.5-1.

~~(32)~~ **(37)** "Unit address" means the unit's mailing address that appears on the unit's Internet web site.

~~(33)~~ **(38)** "Will" includes all wills, testaments, and codicils. The term also includes a testamentary instrument which merely appoints an executor or revokes or revives another will.

(b) The following rules of construction apply throughout this article unless otherwise apparent from the context:

(1) The singular number includes the plural and the plural number includes the singular.

(2) The masculine gender includes the feminine and neuter.

SECTION 2. IC 29-1-5-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3. (a) This section applies to a will executed before, on, or after July 1, 2003. A will, other than a nuncupative will, must be executed by the signature of the testator and of at least two (2) witnesses on:

(1) a will under subsection (b);

(2) a self-proving clause under section 3.1(c) of this chapter; or

(3) a self-proving clause under section 3.1(d) of this chapter.

(b) A will may be attested as follows:

(1) The testator, in the presence of two (2) or more attesting witnesses, shall signify to the witnesses that the instrument is the testator's will and either:

(A) sign the will;

(B) acknowledge the testator's signature already made; or

(C) at the testator's direction and in the testator's presence have someone else sign the testator's name.

(2) The attesting witnesses must sign in the presence of the testator and each other.

An attestation or self-proving clause is not required under this subsection for a valid will.

(c) Under the supervision of an attorney or directed paralegal, the testator and the witnesses may execute and complete the will in two (2) or more original counterparts that exist in a tangible and readable paper form with:

(1) the testator's signature placed on one (1) original counterpart in the presence of attesting witnesses; and

(2) the signatures of the witnesses placed on one (1) or more different counterparts of the same will;

in a tangible and readable paper form. If a will is signed and witnessed in counterparts under this subsection, the testator or an individual acting at the testator's specific direction must physically assemble all of the separately signed paper counterparts of the will and the signatures of the testator and all attesting witnesses not later than five (5) business days after all the paper counterparts have been signed by the testator and witnesses. If the testator directs another individual to assemble the separate, signed paper counterparts of the will into a single composite paper document, the five (5) business day period does not commence until the compiling individual receives all of the separately signed paper counterparts. Any scanned copy or photocopy of the composite document containing all signatures shall be treated as validly signed under this section and may be electronically filed to offer the will for probate under IC 29-1-7. If the testator dies after executing a will under this subsection but before the separate counterparts are assembled into a single composite paper document, the intervening death of the testator shall not affect the validity of the will.

(d) An attorney or directed paralegal must supervise the execution of a will that is signed and witnessed in counterparts as described in subsection (c). An attorney or directed paralegal may supervise the execution of a will in counterparts even if the supervising attorney or directed paralegal is one (1) of the will's attesting witnesses. When an attorney or directed paralegal supervises the execution of a will in counterparts as described in subsection (c), the attorney or directed paralegal must sign, date, and complete an affidavit of compliance within a reasonable time after all paper counterparts of the will have been signed by the testator and the witnesses. An affidavit of compliance under this subsection must be sworn or affirmed by the signing attorney or directed paralegal under the penalties of perjury and must contain the following information:

(1) The name and residence address of the testator.

(2) The name and:

(A) residential address; or

(B) business address;

for each witness who signs the will.

(3) The address, city, and state in which the testator was physically located at the time the testator signed an original counterpart of the will.

(4) The city and state in which each attesting witness was physically located when the witness signed an original counterpart of the will as a witness.

(5) A description of the method and form of identification used to confirm the identity of the testator to the witnesses and to the supervising attorney or directed paralegal, as applicable.

(6) A description of the audiovisual technology or other method used by the supervising attorney or paralegal, as applicable, the testator, and the witnesses for the purpose of interacting with each other in real time during the signing process.

(7) A description of the method used by the testator and the witnesses to identify the location of each page break within the text of the will and to confirm that the separate paper counterparts of the will were identical in content.

(8) A general description of how and when the attorney or paralegal, as applicable, physically combined the separate, signed paper counterparts of the will into a single composite paper document containing the will, the signature of the testator, and the signatures of all attesting witnesses.

(9) The name, business or residence address, and telephone number of the attorney or directed paralegal who supervised the execution and witnessing of the will in counterparts.

(10) Any other information that the supervising attorney or directed paralegal, as applicable, considers to be material with respect to:

(A) the testator's capacity to sign a valid will; and

(B) the testator's and witnesses' compliance with subsection (c).

(e) When a party files a petition under IC 29-1-7 to probate a will that was executed and witnessed in counterparts under subsection (c), the party shall file a true copy of the affidavit of compliance under subsection (d) with the petition or at any time ordered by the court. A party who files a copy of the affidavit of compliance may redact private information from the affidavit in a manner consistent with Rule 5 of the Indiana Rules on Access to Court Records. If a will is executed and witnessed in counterparts under subsection (c) but without the supervision of an attorney or

directed paralegal and that will is later offered for probate under IC 29-1-7, the will is voidable in the discretion of the court, upon objection to probate filed under IC 29-1-7-16, or upon a timely filed will contest under IC 2-29-7-17.

~~(e)~~ **(f)** A will that is executed substantially in compliance with subsection (b) will not be rendered invalid by the existence of:

(1) an attestation or self-proving clause or other language; or

(2) additional signatures;

not required by subsection (b).

~~(d)~~ **(g)** A will executed in accordance with subsection (b) is self-proved if the witness signatures follow an attestation or self-proving clause or other declaration indicating in substance the facts set forth in section 3.1(c) or 3.1(d) of this chapter.

~~(e)~~ **(h)** This section shall be construed in favor of effectuating the testator's intent to make a valid will.

SECTION 3. IC 29-1-5-3.1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3.1. (a) This section applies to a will executed before, on, or after July 1, 2003. When a will is executed, the will may be:

(1) attested; and

(2) made self-proving;

by incorporating into or attaching to the will a self-proving clause that meets the requirements of subsection (c) or (d). If the testator and witnesses sign a self-proving clause that meets the requirements of subsection (c) or (d) at the time the will is executed, no other signatures of the testator and witnesses are required for the will to be validly executed and self-proved.

(b) If a will is executed by the signatures of the testator and witnesses on an attestation clause under section 3(b) of this chapter, the will may be made self-proving at a later date by attaching to the will a self-proving clause signed by the testator and witnesses that meets the requirements of subsection (c) or (d).

(c) A self-proving clause must contain the acknowledgment of the will by the testator and the statements of the witnesses, each made under the laws of Indiana and evidenced by the signatures of the testator and witnesses (which may be made under the penalties for perjury) attached or annexed to the will in form and content substantially as follows:

We, the undersigned testator and the undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument declare:

(1) that the testator executed the instrument as the testator's will;

(2) that, in the presence of both witnesses, the testator signed or acknowledged the signature already made or directed another to sign for the testator in the testator's presence;
(3) that the testator executed the will as a free and voluntary act for the purposes expressed in it;
(4) that each of the witnesses, in the presence of the testator and of each other, signed the will as a witness;
(5) that the testator was of sound mind when the will was executed; and
(6) that to the best knowledge of each of the witnesses the testator was, at the time the will was executed, at least eighteen (18) years of age or was a member of the armed forces or of the merchant marine of the United States or its allies.

_____
Testator

_____ _____
Date Witness

_____
Witness

(d) A will is attested and self-proved if the will includes or has attached a clause signed by the testator and the witnesses that indicates in substance that:
(1) the testator signified that the instrument is the testator's will;
(2) in the presence of at least two (2) witnesses, the testator signed the instrument or acknowledged the testator's signature already made or directed another to sign for the testator in the testator's presence;
(3) the testator executed the instrument freely and voluntarily for the purposes expressed in it;
(4) each of the witnesses, in the testator's presence and in the presence of all other witnesses, is executing the instrument as a witness;
(5) the testator was of sound mind when the will was executed; and
(6) the testator is, to the best of the knowledge of each of the witnesses, either:
(A) at least eighteen (18) years of age; or
(B) a member of the armed forces or the merchant marine of the United States or its allies.

(e) If the testator and the attesting witnesses executed the will in two (2) or more counterparts on paper under section 3(c) of this chapter, the self-proving clause, if applicable, for the will must

substantially be in the following form:

"We, the undersigned testator and undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument, declare the following:

(1) That the undersigned testator and witnesses interacted with each other in real time through the use of technology, and each witness was able to observe the testator and other witnesses throughout the signing process.

(2) That the testator executed a complete counterpart of the instrument, in a readable form on paper, as the testator's will.

(3) That, in the presence of both witnesses, the testator:

(A) signed the paper counterpart of the will;

(B) acknowledged the testator's signature already made; or

(C) directed another individual to sign the paper counterpart of the will for the testator in the testator's presence.

(4) That the testator executed the will as a free and voluntary act for the purpose expressed in the will.

(5) That each of the witnesses, in the presence of the testator and of each other, signed one (1) or more other complete paper counterparts of the will as a witness.

(6) That each paper counterpart of the will that was signed by the witness was complete, in readable form, and with content identical to the paper counterpart signed by the testator.

(7) That the testator was of sound mind when the will was executed.

(8) That, to the best knowledge of each witness, the testator was at least eighteen (18) years of age at the time the will was executed or was a member of the armed forces or of the merchant marine of the United States or its allies.".

~~(c)~~ **(f)** This section shall be construed in favor of effectuating the testator's intent to make a valid will.

SECTION 4. IC 29-1-5-3.2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3.2. Subject to the applicable Indiana Rules of Trial Procedure **and the Indiana Rules of Evidence,** a ~~videotape~~ **video recording, one (1) or more photographs, or an audio recording made or captured during part or all of a will's execution** may be admissible as evidence of the following:

(1) The proper execution of a will.

(2) The intentions of a testator.

(3) The mental state or capacity of a testator.

(4) The authenticity of a will.

(5) Matters that are determined by a court to be relevant to the probate of a will.

SECTION 5. IC 29-1-5-3.3 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 3.3. (a) This section applies to a will that is signed and witnessed:**

(1) on or after March 31, 2020;

(2) before January 1, 2021; and

(3) in reliance on the Indiana supreme court's order signed and filed on March 31, 2020, under case number 20S-MS-237, or, as supplemented or extended by the supreme court's order signed and filed on May 1, 2020, under case number 20S-MS-237, and by the supreme court's orders signed and filed on May 29, 2020, and November 10, 2020, under case number 20S-CB-123.

(b) Notwithstanding any other law or provision, a will described in subsection (a) that was signed and witnessed in compliance with:

(1) the procedures and requirements set forth in the Indiana supreme court's order signed and filed on March 31, 2020, under case number 20S-MS-237, or, as supplemented or extended by the supreme court's order signed and filed on May 1, 2020, under case number 20S-MS-237 and by the supreme court's order signed and filed on November 10, 2020, under case number 20S-CB-123; or

(2) the procedures and requirements set forth in section 3.1 of this chapter or IC 29-1-21-4;

is not required to be reexecuted or reratified by the testator or the witnesses in compliance with the witnessing procedures specified under section 3 or 3.1 of this chapter as those chapters existed on June 30, 2020.

(c) A proponent who offers a will for probate may demonstrate prima facie compliance with subsection (b) by relying on the contents of a self-proving clause or by describing compliance in a verified petition under IC 29-1-7-4. A person contesting the validity of a will described in subsection (a) has the burden of proving noncompliance with subsection (b).

SECTION 6. IC 29-1-21-3, AS AMENDED BY P.L.231-2019, SECTION 18, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3. The following terms are defined for this chapter:

~~(1) "Actual presence" means that:~~

~~(A) a witness; or~~

~~(B) another individual who observes the execution of the electronic will;~~

~~is physically present in the same physical location as the testator. The term does not include any form of observation or interaction that is conducted by means of audio, visual, or audiovisual telecommunication or similar technological means.~~

~~(2)~~ **(1)** "Affidavit of regularity" means an affidavit executed by a custodian or other person under section 13 of this chapter with respect to the electronic record for an electronic will or a complete converted copy of an electronic will.

~~(3)~~ **(2)** "Complete converted copy" means a document in any format that:

(A) can be visually perceived in its entirety on a monitor or other display device;

(B) can be printed; and

(C) contains:

(i) the text of the electronic will;

(ii) the electronic signatures of the testator and the witnesses;

(iii) a readable copy of any associated document integrity evidence that may be a part of or attached to the electronic will; and

(iv) a self-proving clause concerning the electronic will, if the electronic will is self-proved.

~~(4)~~ **(3)** "Custodian" means a person, other than:

(A) the testator who executed the electronic will;

(B) an attorney;

(C) a person who is named in the electronic will as a personal representative of the testator's estate; or

(D) a person who is named or defined as a distributee in the electronic will;

who has authorized possession or control of the electronic will. The term may include an attorney in fact serving under a living testator's durable power of attorney who possesses general authority over records, reports, statements, electronic records, or estate planning transactions.

~~(5)~~ **(4)** "Custody" means the authorized possession and control of at least one (1) of the following:

(A) A complete copy of the electronic record for the electronic will, including a self-proving clause if a self-proving clause is executed.

(B) A complete converted copy of the electronic will, if the complete electronic record has been lost or destroyed or the electronic will has been revoked.

(5) "Directed paralegal" means a nonlawyer assistant who is employed, retained, or otherwise associated with a licensed attorney or law firm and whose work is directly supervised by a licensed attorney, as required by Rule 5.3 of the Rules of Professional Conduct.

(6) "Document integrity evidence" means the part of the electronic record for the electronic will that:

(A) is created and maintained electronically;

(B) includes digital markers showing that the electronic will has not been altered after its initial execution and witnessing;

(C) is logically associated with the electronic will in a tamper evident manner so that any change made to the text of the electronic will after its execution is visibly perceptible when the electronic record is displayed or printed;

(D) will generate an error message, invalidate an electronic signature, make the electronic record unreadable, or otherwise display evidence that some alteration was made to the electronic will after its execution; and

(E) displays the following information:

(i) The city and state in which, and the date and time at which, the electronic will was executed by the testator and the attesting witnesses.

(ii) The text of the self-proving clause, if the electronic will is electronically self-proved through use of a self-proving clause executed under section ~~4(c)~~ **4(f)** of this chapter.

(iii) The name of the testator and attesting witnesses.

(iv) The name and address of the person responsible for marking the testator's signature on the electronic will at the testator's direction and in the ~~actual~~ presence of the testator and attesting witnesses.

(v) Copies of or links to the electronic signatures of the testator and the attesting witnesses on the electronic will.

(vi) A general description of the type of identity verification evidence used to verify the testator's identity.

(vii) The text of the advisory instruction, if any, that is provided to the testator under section 6 of this chapter at the time of the execution of the electronic will.

(viii) The content of the cryptographic hash or unique code used to complete the electronic record and make the

electronic will tamper evident if a public key infrastructure or similar secure technology was used to sign or authenticate the electronic will and if the vendor or the software for the technology makes inclusion feasible.

Document integrity evidence may, but is not required to, contain other information about the electronic will such as a unique document number, client number, or other identifier that an attorney or custodian assigns to the electronic will or a link to a secure Internet web site where a complete copy of the electronic will is accessible. The title, heading, or label, if any, that is assigned to the document integrity evidence (such as "certificate of completion", "audit trail", or "audit log") is immaterial.

(7) "Electronic" has the meaning set forth in IC 26-2-8-102.

(8) "Electronic record" has the meaning set forth in IC 26-2-8-102. The term may include one (1) or both of the following:

(A) The document integrity evidence associated with the electronic will.

(B) The identity verification evidence of the testator who executed the electronic will.

(9) "Electronic signature" has the meaning set forth in IC 26-2-8-102.

(10) "Electronic will" means the will of a testator that:

(A) is initially created and maintained as an electronic record;

(B) contains the electronic signatures of:

(i) the testator; and

(ii) the attesting witnesses; and

(C) contains the date and times of the electronic signatures described by clause (B)(i) and (B)(ii).

The term may include a codicil that amends an electronic will or a traditional paper will if the codicil is executed in accordance with the requirements of this chapter.

(11) "Executed" means the signing of an electronic will. The term includes the use of an electronic signature.

(12) "Identity verification evidence" means either:

(A) a copy of the testator's government issued photo identification card; or

(B) any other information that verifies the identity of the testator if derived from one (1) or more of the following sources:

(i) A knowledge based authentication method.

(ii) A physical device.

(iii) A digital certificate using a public key infrastructure.

(iv) A verification or authorization code sent to or used by the testator.

(v) Biometric identification.

(vi) Any other commercially reasonable method for verifying the testator's identity using current or future technology.

(13) "Logically associated" means electronically connected, cross referenced, or linked in a reliable manner.

(14) "Observe" means to perceive another's actions or expressions of intent through the senses of eyesight or hearing, or both. The term includes perceptions involving the use of technology or learned skills to:

(A) assist the person's capabilities of eyesight or hearing, or both; or

(B) compensate for an impairment of the person's capabilities of eyesight or hearing, or both.

(15) "Observing" has the meaning set forth in subdivision (14).

(16) "In the presence of" has the meaning set forth in subdivision (17).

(17) "Presence" means a process of signing and witnessing a will in which:

(A) the testator and the witnesses:

(i) are directly present with each other in the same physical space; or

(ii) are able to interact with each other in real time through the use of audiovisual technology now known or later developed;

(B) the testator and witnesses are able to positively identify each other; and

(C) each witness is able to interact with the testator and with each other by observing:

(i) the testator's expression of intent to execute the electronic will;

(ii) the testator's actions in executing or directing the execution of the testator's electronic will; and

(iii) the actions of every other witness in signing the will.

The term includes the use of technology or learned skills for the purpose of assisting with hearing, eyesight, and speech, or for the purpose of compensating for a hearing, eyesight, or speech impairment.

~~(14)~~ **(18)** "Sign" means valid use of a properly executed electronic signature.

~~(15)~~ **(19)** "Signature" means the authorized use of the testator's name to authenticate an electronic will. The term includes an electronic signature.

~~(16)~~ **(20)** "Tamper evident" means the feature of an electronic record, such as an electronic will or document integrity evidence for an electronic will, that will cause any alteration of or tampering with the electronic record, after it is created or signed, to be perceptible to any person viewing the electronic record when it is printed on paper or viewed on a monitor or other display device. The term applies even if the nature or specific content of the alteration is not perceptible.

~~(17)~~ **(21)** "Traditional paper will" means a will or codicil that is signed by the testator and the attesting witnesses:

(A) on paper; and

(B) in the manner specified in IC 29-1-5-3 or IC 29-1-5-3.1.

~~(18)~~ **(22)** "Will" includes all wills, testaments, and codicils. The term includes:

(A) an electronic will; and

(B) any testamentary instrument that:

(i) appoints an executor; or

(ii) revives or revokes another will.

SECTION 7. IC 29-1-21-4, AS ADDED BY P.L.40-2018, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 4. (a) To be valid as a will under this article, an electronic will must be executed by the electronic signature of the testator and attested to by the electronic signatures of at least two (2) witnesses in the following manner:

(1) ~~The testator and the attesting witnesses must be in each other's actual presence when the electronic signatures are made in or on the electronic will. The testator and witnesses must directly observe one another as the electronic will is being signed by the parties.~~ **The testator, the attesting witnesses, and any individual who signs for the testator under subdivision (4)(B) must be in each other's presence when the electronic signatures are made in or on the electronic will. A person, including an attorney or directed paralegal, who supervises the execution of the electronic will may act and sign as one (1) of the attesting witnesses if the person does not sign the electronic will at the testator's direction under subdivision (4)(B). The testator and witnesses must be able to interact**

with each other and the witnesses must be able to observe the testator and each other as the electronic will is being signed.

(2) The testator and attesting witnesses must comply with:

(A) the prompts, if any, issued by the software being used to perform the electronic signing; or

(B) the instructions by the person, if any, responsible for supervising the execution of the electronic will.

(3) The testator must state, in the ~~actual~~ presence of the attesting witnesses, that the instrument to be electronically signed is the testator's will.

(4) The testator must:

(A) electronically sign the electronic will in the ~~actual~~ presence of the attesting witnesses; or

(B) direct another adult individual who is not an attesting witness to sign the electronic will on the testator's behalf in the ~~actual~~ presence of the testator and the attesting witnesses.

(5) The attesting witnesses must electronically sign the electronic will in the ~~actual~~ presence of:

(A) the testator; and

(B) ~~one another;~~ **each other;**

after the testator has electronically signed the electronic will.

(6) The:

(A) testator; or

(B) other adult individual who is:

(i) not an attesting witness; and

(ii) acting on behalf of the testator;

must command the software application or user interface to finalize the electronically signed electronic will as an electronic record.

The process described in this section may include as part of the electronic record for the electronic will any identity verification evidence pertaining to the testator or any document integrity evidence for the electronic will.

(b) If the testator and the witnesses are not in each other's physical presence when the electronic will is signed and witnessed and if the testator and the witnesses use audiovisual technology to satisfy the presence requirement in subsection (a) and section 3(17) of this chapter, an attorney or a directed paralegal must supervise the signing and the witnessing of the electronic will.

(c) Within a reasonable time after an attorney or a directed paralegal supervises the signing and witnessing of an electronic will in the manner described in subsection (b), the attorney or directed

paralegal must sign an affidavit of compliance. An affidavit of compliance under this subsection must be sworn to or affirmed by the signing attorney or directed paralegal under the penalties of perjury and must contain:

(1) the name and residential address of the testator;

(2) the name and:

(A) residential address; or

(B) business address;

for each witness who signs the electronic will;

(3) the address, city, and state in which the testator is physically located at the time the testator signs the electronic will;

(4) the city and state in which each attesting witness is physically located when the witness signs the electronic will as a witness;

(5) a description of the method and form of identification used to confirm the identity of the testator to the witnesses and supervising attorney or directed paralegal;

(6) a description of the method used by the supervising attorney or paralegal, testator, and the witnesses for the purpose of interacting with each other in real time during the signing process;

(7) a brief description of the method used to add or capture the electronic signature of the testator and the witnesses;

(8) the name, business or residential address, and telephone number of the attorney or directed paralegal who supervised the execution of the electronic will; and

(9) any other information that the supervising attorney or directed paralegal considers to be material to:

(A) the testator's capacity to sign a valid will; and

(B) the testator's and witnesses' compliance with subsection (a).

(d) When a party files a petition under IC 29-1-7 to probate an electronic will that was executed and witnessed in the manner described in subsection (b), the party shall file a true copy of the affidavit of compliance under subsection (c) with the petition or at any time ordered by the court. A party who files a copy of the affidavit of compliance may redact private information from the affidavit in a manner consistent with Rule 5 of the Rules on Access to Court Records. If an electronic will is executed and witnessed under subsection (c) but without the supervision of an attorney or directed paralegal and that will is later offered for probate under

IC 29-1-7, the will is voidable in the discretion of the court, upon objection to probate filed under IC 29-1-7-16, or upon a timely filed will contest under IC 29-1-7-17.

~~(b)~~ **(e)** An electronic will may be self-proved:

(1) at the time that it is electronically signed; and

(2) before it is electronically finalized;

by incorporating into the electronic record of the electronic will a self-proving clause described under subsection ~~(c).~~ **(f).** An electronic will is not required to contain an attestation clause or a self-proving clause in order to be a valid electronic will.

~~(c)~~ **(f)** A self-proving clause under subsection ~~(b)~~ **(e)** must substantially be in the following form:

"We, the undersigned testator and the undersigned witnesses, whose names are signed to the attached or foregoing instrument, declare:

(1) That the testator executed the instrument as the testator's will;

(2) That, in the ~~actual and direct physical~~ presence of both witnesses, the testator signed the will or directed another individual who is not one of the witnesses to sign for the testator in the testator's presence and in the witnesses' ~~actual and direct physical~~ presence;

(3) That the testator executed the will as a free and voluntary act for the purposes expressed in it;

(4) That each of the witnesses, in the ~~actual and direct physical~~ presence of the testator and each other, signed the will as a witness;

(5) That the testator was of sound mind when the will was executed; and

(6) That, to the best knowledge of each attesting witness, the testator was, at the time the will was executed, at least eighteen (18) years of age or was a member of the armed forces or of the merchant marine of the United States or its allies.

_____ _____

(insert date) (insert signature of testator)

_____ _____

(insert date) (insert signature of witness)

_____ _____

(insert date) (insert signature of witness)".

A single signature from the testator and from each attesting witness may be provided for any electronic will bearing or containing a self-proving clause.

~~(d)~~ **(g)** An electronic will that is executed in compliance with subsection (a) shall not be rendered invalid by the existence of any of

the following attributes:

(1) An attestation clause.

(2) Additional signatures.

(3) A self-proving clause that differs in form from the exemplar provided in subsection ~~(c).~~ **(f).**

(4) Any additional language that refers to the circumstances or manner in which the electronic will was executed.

~~(c)~~ **(h)** This section shall be construed in a manner that gives effect to the testator's intent to execute a valid will.

SECTION 8. IC 29-1-21-4.1 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 4.1. (a) This section applies to a will or codicil that is electronically signed and witnessed:**

(1) on or after March 31, 2020;

(2) before January 1, 2021; and

(3) in reliance on the Indiana supreme court's order signed and filed on March 31, 2020, under case number 20S-MS-237, as supplemented or extended by the supreme court's order signed and filed on May 1, 2020, under case number 20S-MS-237, and by the supreme court's orders signed and filed on May 29, 2020, and November 10, 2020, under case number 20S-CB-123.

(b) Notwithstanding any other law or provision, a will or codicil described in subsection (a) that was electronically signed and witnessed in compliance with:

(1) the procedures and requirements set forth in the Indiana supreme court's order signed and filed on March 31, 2020, under case number 20S-MS-237 and as supplemented or extended by the supreme court's order signed and filed on May 1, 2020, under case number 20S-MS-237 and by the supreme court's order signed and filed on November 10, 2020, under case number 20S-CB-123; or

(2) the procedures and requirements set forth in section 4 of this chapter;

does not need to be reexecuted or reratified in compliance with the witnessing procedures specified under section 4 of this chapter or IC 29-1-5-3 as they existed on June 30, 2020.

(c) A proponent who offers an electronic will for probate may demonstrate prima facie compliance with subsection (b) by relying on the contents of a self-proving clause or by describing compliance in a verified petition under IC 29-1-7-4. A person contesting the validity of an electronic will described in subsection

(b) has the burden of proving noncompliance with subsection (b).

SECTION 9. IC 29-1-21-5, AS ADDED BY P.L.40-2018, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 5. Subject to the **applicable** Indiana Rules of Evidence and the Indiana Rules of Trial Procedure, a video recording, **one (1) or more photographs, or an audio recording of part or all** of an electronic will's execution or a video recording of a testator either before or after the execution of an electronic will may be admissible as evidence of the following:

(1) The proper execution of an electronic will in compliance with section 4 of this chapter.

(2) The intentions of the testator.

(3) The mental state or capacity of the testator.

(4) The absence of undue influence or duress with respect to the testator.

(5) Verification of the testator's identity.

(6) Evidence that a complete converted copy of an electronic will should be admitted to probate.

(7) Whether a will whose execution failed to fully comply with section 4 of this chapter should be admitted to probate as a valid traditional paper will.

(8) Any other matter the court considers relevant to the probate of an electronic will.

SECTION 10. IC 29-1-21-6, AS ADDED BY P.L.40-2018, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 6. (a) As used in this section, "form vendor" means any person who provides a testator with an electronic will form or a user interface for creating, completing, or executing an electronic will. The term includes:

(1) an attorney who prepares an electronic will for a testator; and

(2) any vendor or licensor of estate planning software of digital estate planning forms.

(b) It is consistent with best practices to provide the following advisory instruction with each electronic will:

"IMPORTANT Instructions to the ~~Signatory of~~ **Person Signing** an Electronic Will

A. The procedure for proper execution (electronic signing and witnessing) of your electronic will is as follows:

(1) You (the testator) and the two (2) attesting witnesses must be ~~actually present in the same location~~ **able to interact with each other in real time** throughout the execution process **and the witnesses must be able to observe you and each other as**

your electronic will is being signed. Effective on and after _____, 2021 and on or after March 31, 2020 in some situations covered by emergency orders of the Indiana Supreme Court, Indiana law ~~does not permit~~ **has permitted** attesting witnesses to observe or participate in the signing process from a location that is apart or separate from the testator's location ~~or~~ **and to** act as ~~an attesting witness~~ **witnesses** through use of remote audio, remote visual, or remote audiovisual software or technology.

(2) Both attesting witnesses must be adults and should not be individuals who will be gifted money or other property under the terms of your electronic will. If a witness named in the electronic will is named as a beneficiary or legatee or entitled to money or property under the terms of the electronic will, the beneficiary or legatee named in the electronic will may only receive money, property, or shares reserved for them under state intestacy laws.

(3) You, as the testator, must inform the attesting witnesses that the document you will be signing is your will.

(4) You (the testator) and the two (2) attesting witnesses may use the same computer or device or different computers and devices to make your respective electronic signatures on the electronic will.

(5) The online user interface or software application for your will may require you and the attesting witnesses to use a password, validation code, token, or other security feature in order to prevent identity theft or impersonation and permanently link each of you, as individuals, to your respective electronic signatures.

(6) You (the testator) and the two (2) attesting witnesses should follow the instructions provided by the online user interface or software application when making your respective electronic signatures on your electronic will. You (the testator) should electronically sign the electronic will first followed by each of the attesting witnesses. If you (the testator) are physically unable to type, press keys, or otherwise enter commands on the computer or device being used to electronically sign the electronic will, you may instruct another adult who is not an attesting witness to enter your electronic signature on your electronic will for you. Any individual who enters **or makes** your electronic signature on your electronic will on your behalf must do so in your ~~actual~~ presence. **For this purpose, and on**

and after _____, 2021, the requirement of presence is satisfied by use of any two-way audiovisual communication method that allows you and the witnesses to interact and observe each other in real time as described in subdivision (1).

(7) The software application or online user interface may create a date and time stamp for your electronic signature and for the electronic signature of each attesting witness.

(8) The execution of your electronic will is complete after you and the attesting witnesses have completed making your electronic signatures by clicking or executing a command that saves or submits your respective electronic signatures in the software application or online interface.

(9) You are strongly encouraged to save a complete copy of your electronic will in a portable and printable format. An electronic will preserved in this manner should include all information related to the execution process of your electronic will, including information that is compiled or stored by the software application or online user interface. The related information described in this subdivision should be viewable and printable as a self-contained and permanent part of the electronic record for your electronic will.

B. If you used a software application or an online user interface to generate, finalize, and sign your electronic will, the software or user interface may also offer you the ability to securely store the electronic record of your electronic will. You may be required to create or establish a user identification, password, or other security feature in order to store the electronic record of your electronic will in this way. You should carefully safeguard your user identification, password, security questions, and personal information used to securely save or store your electronic will. The information that you are being asked to safeguard will likely be required in order to:

(1) generate;

(2) replace;

(3) retrieve; or

(4) revoke;

your electronic will at a later date.

C. The only proper and valid way for you to revoke your electronic will is to:

(1) sign a new electronic will or a traditional paper will that revokes all previous wills executed by you; or

(2) permanently and irrevocably make unreadable and nonretrievable the electronic record for your electronic will.

If you are holding the electronic record for your electronic will on your own computer or digital storage device and not making use of a third party custodian or online storage or cloud based document storage service to store or safeguard your electronic will, you may personally delete permanently or make unreadable the electronic record associated with your electronic will. Before doing so, you are encouraged to make and save a printable, permanent copy of the complete electronic record associated with your electronic will, including any related information pertaining to the execution or signing process of your electronic will, so that the contents of your revoked electronic will may be discovered later by a probate court or any other interested persons in the event of a dispute concerning the validity of any later will that you decide to make.

If you are making use of a third party custodian or online or cloud based document storage service to store or safeguard your electronic will, the valid revocation of your electronic will requires you to personally issue a written or electronic revocation document to each third party custodian who has custody of a copy of the electronic record associated with your electronic will. A valid revocation document must instruct the custodian to permanently delete or make unreadable and nonretrievable the electronic record associated with your electronic will. A valid revocation document must be signed by you and two (2) attesting witnesses while following the same procedures required for the execution of a new traditional paper will or new electronic will.".

(c) A failure to provide the text of the advisory instruction in subsection (b) does not affect the validity of the electronic will if the electronic will is otherwise properly executed in the manner set forth in this chapter.

(d) A failure to provide the advisory instruction described in subsection (b) may not be the predicate for any form of civil or other liability.

SECTION 11. IC 29-1-21-8, AS ADDED BY P.L.40-2018, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 8. (a) This section describes the exclusive methods for revoking an electronic will. Before a testator completes or directs the revocation of an electronic will, the testator shall:

(1) comply with; or

(2) direct a third party custodian to comply, as applicable, with; subsection (e).

(b) A testator may revoke and supersede a previously executed electronic will by executing a new electronic will or traditional paper will that explicitly revokes and supersedes all prior wills. However, if the revoked or superseded electronic will is held in the custody or control of more than one (1) custodian, the testator shall use the testator's best efforts to contact each custodian and to instruct each custodian to permanently delete and render nonretrievable each revoked or superseded electronic will in the manner described in subsection (d).

(c) If a testator is not using the services of a custodian to store the electronic record for an electronic will, the testator may revoke the electronic will by permanently deleting each copy of the electronic record associated with the electronic will in the testator's possession or control or by rendering the electronic record for the associated electronic will unreadable and nonretrievable.

(d) The testator may revoke the testator's electronic will by executing a revocation document that:

(1) is signed by the testator and two (2) attesting witnesses in a manner that complies with IC 29-1-5-3(b) or with section 4 of this chapter;

(2) refers to the date on which the electronic will that is being revoked was signed; and

(3) states that the testator is revoking the electronic will described in subdivision (2).

A revocation document under this subsection may be signed and witnessed with the electronic signature of the testator and two (2) attesting witnesses, or signed and witnessed with signatures on paper as described in IC 29-1-5-6.

(e) If a testator is using the services of an attorney or a custodian to store the electronic record associated with the testator's electronic will, the testator may revoke the electronic will by instructing the custodian or attorney to permanently delete or make unreadable and nonretrievable the electronic record associated with the electronic will. An instruction issued under this subsection must be made in writing to the custodian or attorney as applicable. A custodian or attorney who receives a written instruction described in this subsection shall:

(1) sign an affidavit of regularity under section 13 of this chapter with respect to the electronic will to be revoked by the testator;

(2) create a complete converted copy (as defined in section ~~3(3)~~ **3(2)** of this chapter) of the electronic will being revoked;

(3) make the signed affidavit of regularity a permanent attachment to or part of the complete converted copy;

(4) follow the testator's written instruction by:

(A) permanently deleting the electronic record for the revoked electronic will; or

(B) rendering the electronic record associated with the revoked electronic will unreadable and nonretrievable; and

(5) transmit or issue the complete converted copy of the revoked electronic will to the testator.

(f) If the electronic record for a particular electronic will or a complete converted copy of the electronic will cannot be found after the testator's death, the presumption that applied to a lost or missing traditional paper will shall be applied to the lost or missing electronic will.

SECTION 12. IC 29-1-21-16, AS ADDED BY P.L.40-2018, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 16. (a) As used in this section and for the purpose of offering or submitting an electronic will in probate under IC 29-1-7, the "filing of an electronic will" means the electronic filing of a complete converted copy of the associated electronic will.

(b) When filing an electronic will, the filing of any accompanying document integrity evidence or identity verification is not required unless explicitly required by the court.

(c) If a person files an electronic will:

(1) for the purpose of probating the electronic will; and

(2) including accompanying:

(A) document integrity evidence;

(B) identity verification evidence; or

(C) evidence described in both clauses (A) and (B);

in the filing or in response to a court order under subsection (e)(2), the person shall file a complete and unredacted copy of the evidence described in clauses (A) and (B) as a nonpublic document under Ind. Administrative Rule 9(G). All personally identifying information pertaining to the testator or the attesting witnesses shall be redacted in the publicly filed copy.

(d) If an electronic will includes a self-proving clause that complies with section ~~4(c)~~ **4(f)** of this chapter, the testator's and witnesses' compliance with the execution requirements shall be presumed upon the filing of the electronic will with the court without the need for any additional testimony or an accompanying affidavit. The presumption described in this subsection may be subject to rebuttal or objection on the grounds of fraud, forgery, or impersonation.

(e) After determining that a testator is dead and that the testator's electronic will has been executed in compliance with applicable law,

the court may:

(1) enter an order, without requiring the submission of additional evidence, admitting the electronic will to probate as the last will of the deceased testator unless objections are filed under IC 29-1-7-16; or

(2) require the petitioner to submit additional evidence regarding:

(A) the proper execution of the electronic will; or

(B) the electronic will's freedom from unauthorized alteration or tampering after its execution.

The court may require the submission of additional evidence under subdivision (2) on the court's own motion or in response to an objection filed under IC 29-1-7-16.

(f) The additional evidence that the court may require and rely upon under subsection (e)(2) may include one (1) or more of the following:

(1) Readable copies of the document integrity evidence or the identity verification evidence associated with the electronic will.

(2) All or part of the electronic record (if available) in a native or computer readable form.

(3) A sworn or verified affidavit from:

(A) an attorney or other person who supervised the execution of the electronic will; or

(B) one (1) or more of the attesting witnesses.

(4) An affidavit signed under section 9(b) of this chapter by a person who created a complete converted copy of the electronic will.

(5) A sworn or verified affidavit from a qualified person that:

(A) describes the person's training and expertise;

(B) describes the results of the person's forensic examination of the electronic record associated with:

(i) the electronic will at issue; or

(ii) any other relevant evidence; and

(C) affirms that the electronic will was not altered or tampered with after its execution.

(6) Any other evidence, including other affidavits or testimony, that the court considers material or probative on the issues of proper execution or unauthorized alteration or tampering.

(g) If the court enters an order admitting an electronic will to probate after receiving additional evidence, any of the additional evidence may be disputed through a will contest that is timely filed under IC 29-1-7-17.

SECTION 13. IC 29-1-21-18, AS ADDED BY P.L.40-2018, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE

UPON PASSAGE]: Sec. 18. (a) For ~~purpose~~ **purposes** of IC 29-3, IC 30-5, and IC 32-39:

(1) the electronic record for an electronic will is a "digital asset" as that term is defined in IC 32-39-1-10;

(2) the electronic record for an electronic will is not an "electronic communication" as defined in 18 U.S.C. 2510(12) or IC 32-39-1-12;

(3) the digital or electronic transfer or transmission of the electronic record for an electronic will between any two (2) persons other than the testator and the testator's attorney is an electronic communication as defined in 18 U.S.C. 2510(12) or IC 32-39-1-12;

(4) a custodian (as defined in section ~~3(4)~~ **3(3)** of this chapter) of an electronic will is a "custodian" as defined in IC 32-39-1-8; and

(5) the following individuals are "users" for purposes of IC 32-39 if the testator, attorney, or other authorized person contracts with another person to store the electronic record for the electronic will:

(A) The testator of an electronic will.

(B) The attorney representing the testator.

(C) Any other person with authorized possession of or authorized access to the electronic record for the electronic will.

(b) The execution or revocation of an electronic will is not a contract or a "transaction in or affecting interstate or foreign commerce" for purposes of the federal E-SIGN Act, 15 U.S.C. 7001.

(c) The execution or revocation of an electronic will is not a contract or "transaction" for purposes of IC 26-2-8 and the exclusion stated in IC 26-2-8-103(b)(1) continues in effect with respect to electronic wills and codicils.

SECTION 14. IC 29-3-14-7, AS ADDED BY P.L.68-2019, SECTION 4, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 7. (a) A supported decision making agreement must:

(1) name at least one (1) supporter;

(2) describe the decision making assistance that each supporter may provide to the adult and how supporters may work together; and

(3) if appropriate, be executed by the adult's guardian.

(b) A supported decision making agreement may:

(1) appoint more than one (1) supporter;

(2) appoint an alternate to act in the place of a supporter under circumstances specified in the agreement; or

(3) authorize a supporter to share information with any other supporter or others named in the agreement.

(c) A supported decision making agreement must be:

(1) in writing;

(2) dated; and

(3) signed by the adult in the presence of a notary.

(d) A supported decision making agreement must contain a separate consent signed by each supporter named in the agreement indicating the supporter's:

(1) relationship to the adult;

(2) willingness to act as a supporter; and

(3) acknowledgment of the duties of a supporter.

(e) An adult who meets the requirements to enter into a supported decision making agreement under section 4 of this chapter may sign a supported decision making agreement in any manner, including electronic signature, permitted under ~~IC 30-5-4-1(5)~~ **IC 30-5-4-1(b)** or IC 30-5-11-4(a).

SECTION 15. IC 30-4-1.5-4, AS AMENDED BY P.L.56-2020, SECTION 8, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 4. (a) Any of the following persons may create a valid inter vivos trust by electronically signing an electronic trust instrument, with no witness requirement or acknowledgment before any notary public, if the electronic trust instrument sufficiently states the terms of the trust in compliance with ~~IC 30-4-2-1(b).~~ **IC 30-4-2-1(c):**

(1) A settlor.

(2) An agent of a settlor who is an attorney in fact.

(3) A person who holds a power of appointment that is exercisable by appointing money or property to the trustee of a trust.

(4) An adult who **is not an ineligible person under subsection (b) and who electronically signs the electronic trust instrument:**

(A) ~~is not a trustee named in the electronic trust instrument;~~ **at the settlor's direction;** and

(B) ~~electronically signs the electronic trust instrument:~~ **in the direct physical presence of the settlor.**

~~(i) at the settlor's direction; and~~

~~(ii) in the direct physical presence of the settlor.~~

If an adult electronically signs the trust instrument under subdivision (4), the trust instrument must indicate that the adult signer is signing at the direction of the settlor and in the settlor's direct physical presence

and must state that the adult signer is not a relative of the settlor, is not a trustee named in the electronic trust instrument, and is not entitled to any beneficial interest or power of appointment under the electronic trust instrument. For all purposes under this article, a trust instrument electronically signed under ~~subdivisions~~ **subdivision** (1), (2), or (4) is the creation of the named settlor.

(b) The following persons are ineligible to sign an electronic trust instrument at the direction of the settlor under subsection (a)(4):

(1) A trustee named in the electronic instrument.

(2) A relative of the settlor.

(3) A person who is entitled to receive a beneficial interest in the trust or a power of appointment under the electronic trust instrument.

~~(b)~~ **(c)** The following persons may use the electronic record associated with an electronic trust instrument to make a complete converted copy of an electronic trust instrument immediately after its execution or at a later time when a complete and intact electronic record is available:

(1) The settlor.

(2) A trustee who accepts appointment under the electronic trust instrument.

(3) An attorney representing the settlor or the trustee.

(4) Any other person authorized by the settlor.

If a complete converted copy is generated from a complete and intact electronic record associated with an electronic trust instrument, the person who generates the complete converted copy is not required to sign the affidavit described in subsection ~~(d).~~ **(e).**

~~(c)~~ **(d)** If:

(1) a person discovers an accurate but incomplete copy of an electronic trust instrument;

(2) the electronic record for the electronic trust instrument becomes:

(A) lost; or

(B) corrupted; or

(3) freedom from tampering or unauthorized alteration cannot be authenticated or verified;

a living settlor, attorney, custodian, or person responsible for the discovery of the incomplete electronic trust instrument may prepare a complete converted copy of the electronic trust instrument using all available information if the person creating the complete converted copy of the electronic trust instrument has access to a substantially

complete, nonelectronic copy of the electronic trust instrument.

~~(d)~~ **(e)** A person who creates a complete converted copy of an electronic trust instrument under subsection ~~(c)~~ **(d)** shall sign an affidavit that affirms or specifies, as applicable, the following:

(1) The date the electronic trust instrument was created.

(2) The time the electronic trust instrument was created.

(3) How the incomplete electronic trust instrument was discovered.

(4) The method and format used to store the original electronic record associated with the electronic trust instrument.

(5) The methods used, if any, to prevent tampering or the making of unauthorized alterations to the electronic record or electronic trust instrument.

(6) Whether the electronic trust instrument has been altered since its creation.

(7) Confirmation that an electronic record, including the document integrity evidence, if any, was created at the time the settlor made the electronic trust instrument.

(8) Confirmation that the electronic record has not been altered while in the custody of the current custodian or any prior custodian.

(9) Confirmation that the complete converted copy is a complete and correct duplication of the electronic trust instrument and the date, place, and time of its execution by the settlor or the settlor's authorized agent.

~~(e)~~ **(f)** A complete converted copy derived from a complete and correct electronic trust instrument may be docketed under IC 30-4-6-7 or, absent any objection, offered and admitted as evidence of the trust's terms in the same manner as the original and traditional paper trust instrument of the settlor. Whenever this article permits or requires the trustee of a trust to provide a copy of a trust instrument to a beneficiary or other interested person, the trustee may provide a complete converted copy of the electronic trust instrument. A complete and converted copy is conclusive evidence of the trust's terms unless otherwise determined by a court in an order entered upon notice to all interested persons and after an opportunity for a hearing.

SECTION 16. IC 30-4-2-1, AS AMENDED BY P.L.56-2020, SECTION 9, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 1. (a) A trust in either real or personal property is enforceable only if there is written evidence of the terms of the trust bearing the signature of any of the following persons:

(1) The settlor.

(2) The settlor's authorized agent.

(3) An adult who **is not an ineligible person under subsection (b) and who signs the trust's written terms:**

(A) ~~is not a trustee named in the trust's written terms;~~ **at the settlor's direction;** and

(B) ~~signs the trust's written terms:~~ **in the direct physical presence of the settlor.**

~~(i) at the settlor's direction; and~~

~~(ii) in the direct physical presence of the settlor.~~

If an adult signs at the settlor's direction under subdivision (3), the written evidence of the trust's terms must identify that adult signer, ~~and~~ must state that the adult is signing at the direction of the settlor and in the settlor's direct physical presence, **and must state that the adult signer is not a relative of the settlor, is not a trustee named in the trust's terms, and is not entitled to any beneficial interest or power of appointment under the trust's terms.**

(b) The following persons are ineligible to sign the written terms of a trust at the direction of the settlor under subsection (a)(3):

(1) A trustee named in the trust's written terms.

(2) A relative of the settlor.

(3) A person who is entitled to receive a beneficial interest in the trust or a power of appointment under the trust's written terms.

~~(b)~~ **(c)** Except as required in the applicable probate law for the execution of wills, no formal language is required to create a trust, but the terms of the trust must be sufficiently definite so that the trust property, the identity of the trustee, the nature of the trustee's interest, the identity of the beneficiary, the nature of the beneficiary's interest, and the purpose of the trust may be ascertained with reasonable certainty.

~~(c)~~ **(d)** It is not necessary to the validity of a trust that the trust be funded with or have a corpus that includes property other than the present or future, vested or contingent right of the trustee to receive proceeds or property, including:

(1) as beneficiary of an estate under IC 29-1-6-1;

(2) life insurance benefits under section 5 of this chapter;

(3) retirement plan benefits; or

(4) the proceeds of an individual retirement account.

~~(d)~~ **(e)** A trust created under:

(1) section 18 of this chapter for the care of an animal; or

(2) section 19 of this chapter for a noncharitable purpose;

has a beneficiary.

~~(e)~~ **(f)** A trust has a beneficiary if the beneficiary can be presently ascertained or ascertained in the future, subject to any applicable rule against perpetuities.

~~(f)~~ **(g)** A power of a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

~~(g)~~ **(h)** A trust may be created by exercise of a power of appointment in favor of a trustee.

SECTION 17. IC 30-5-2-3.6 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 3.6. "Directed paralegal" means a nonlawyer assistant who is employed, retained, or otherwise associated with a licensed attorney or law firm and whose work is directly supervised by a licensed attorney, as required by Rule 5.3 of the Rules of Professional Conduct.**

SECTION 18. IC 30-5-4-1, AS AMENDED BY P.L.101-2008, SECTION 9, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 1. **(a)** To be valid, a power of attorney must meet the following conditions:

(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:

(A) in the presence of a notary public; **or**

(B) in the presence of witnesses as described under sections 1.3, 1.5, 1.7, and 1.9 of this chapter.

~~(5)~~ **(b)** 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.

SECTION 19. IC 30-5-4-1.3 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 1.3. (a) This section applies to a power of attorney executed in the presence of witnesses under section 1 of this chapter on or after March 31, 2020.**

(b) Any person who, at the time of attestation, is competent to be a witness in this state may act as an attesting witness to the execution of a power of attorney. A subsequent incapacity of an attesting witness does not impair the effectiveness of a previously executed power of attorney.

(c) A power of attorney executed under section 1(a)(4)(B) of this chapter is void if:

(1) a subscribing witness to the execution of the power of attorney has an interest in the power of attorney as described in subsection (d); and

(2) the power of attorney cannot be proved without the witness's testimony or proof of the witness's signature as a witness.

(d) A person serving as a subscribing witness to the execution of a power of attorney has an interest in the power of attorney if:

(1) the power of attorney names the person as the principal's attorney in fact or successor to the attorney in fact;

(2) the power of attorney grants a power or beneficial interest to the person other than an appointment of the person as the principal's attorney in fact or successor to the attorney in fact; or

(3) the witness is related to a person described in subdivision (1) or (2).

(e) For purposes of this section, a witness is related to a person described in subdivision (1) or (2) if the person is:

(1) the spouse of the witness; or

(2) a descendant of the witness.

SECTION 20. IC 30-5-4-1.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 1.5. (a) This section applies to a power of attorney executed in the presence of witnesses under section 1 of this chapter on or after March 31, 2020.**

(b) A power of attorney executed in the presence of witnesses under section 1(a)(4)(B) of this chapter must be executed by the signatures of the principal and at least two (2) witnesses on:

(1) a power of attorney under subsection (c);

(2) a self-proving clause under section 1.7(c) of this chapter; or

(3) a self-proving clause under section 1.7(d) of this chapter.

(c) A power of attorney may be attested as follows:

(1) By having the principal, in the presence of two (2) or more attesting witnesses, signify to the witnesses that the instrument is the principal's power of attorney and:

(A) sign the power of attorney;

(B) acknowledge the principal's signature already made; or

(C) at the principal's direction and in the principal's presence, have someone else sign the principal's name.

(2) By having the attesting witnesses sign, in the presence of the principal and each other, the power of attorney.

An attestation or self-proving clause is not required under this subsection in order to execute a valid power of attorney.

(d) Only if the execution and completion of the power of attorney is supervised by an attorney or directed paralegal, a principal and at least two (2) attesting witnesses may execute and complete a power of attorney in two (2) or more original counterparts that exist in a tangible and readable paper form with:

(1) the principal's signature placed on one (1) original counterpart in the presence of attesting witnesses; and

(2) the signatures of the remaining witnesses placed on one (1) or more different counterparts affiliated with the same power of attorney;

in a tangible and readable paper form. If a power of attorney is signed and witnessed in counterparts under this subsection, the principal or an individual acting at the principal's specific direction must physically assemble all of the separately signed paper counterparts of the power of attorney and the signatures of the principal and all attesting witnesses not later than five (5) business days after all the paper counterparts have been signed by the principal and witnesses. If the principal directs another individual to assemble the separate, signed paper counterparts of the will into a single composite paper document, the five (5) business day period does not commence until the compiling individual receives all of the separately signed paper counterparts. Any scanned copy or photocopy of the composite document containing all signatures shall be treated as validly signed under this section.

(e) An attorney or directed paralegal must supervise the execution of a power of attorney in counterparts as described in subsection (d). An attorney or directed paralegal may supervise the execution of a power of attorney in counterparts even if the supervising attorney or directed paralegal is one (1) of the power of attorney's attesting witnesses.

(f) Within a reasonable time after an attorney or a directed paralegal supervises the execution of a power of attorney in counterparts as described in subsection (d), the attorney or directed paralegal must sign an affidavit of compliance. An affidavit of compliance under this subsection must be sworn to or affirmed by the signing attorney or directed paralegal under the penalties of perjury and must contain:

(1) The name and residential address of the principal.

(2) The name and:

(A) residential address; or

(B) business address;

for each witness who signs the power of attorney.

(3) The address, city, and state in which the principal was physically located at the time the principal signed an original counterpart of the power of attorney.

(4) The city and state in which each attesting witness was physically located when the witness signed an original counterpart of the power of attorney as a witness.

(5) A description of the method and form of identification used to confirm the identity of the principal to the witnesses and to the supervising attorney or paralegal, as applicable.

(6) A description of the audiovisual technology or other method used by the supervising attorney or paralegal, as applicable, the principal, and the witnesses for the purpose of interacting with each other in real time during the signing process.

(7) A description of the method used by the principal and the witnesses to identify the location of each page break within the text of the principal and to confirm that the separate paper counterparts of the power of attorney were identical in content.

(8) A general description of how and when the attorney or paralegal, as applicable, physically combined the separate, signed paper counterparts of the power of attorney into a single composite paper document containing the power of attorney, the signature of the principal, and the signatures of all attesting witnesses.

(9) The name, business or residential address, and telephone number of the attorney or directed paralegal who supervised the execution and witnessing of the power of attorney in counterparts.

(10) Any other information that the supervising attorney or paralegal, as applicable, considers to be material with respect to:

(A) the principal's capacity to sign a valid power of attorney; and

(B) the principal's and witnesses' compliance with subsection (c).

After the attorney or directed paralegal signs an affidavit of

compliance under this subsection, the attorney or directed paralegal must preserve an accurate copy of the signed affidavit with a scanned copy or photocopy of the completely signed power of attorney. An affidavit of compliance signed under this subsection is admissible as prima facie evidence that the principal and witnesses executed the power of attorney in counterparts that comply with the requirements of subsection (c).

(g) A power of attorney that substantially complies with subsections (c) and (d) may not be rendered invalid by the existence of:

(1) an attestation or self-proving clause;

(2) additional signatures; or

(3) other additional language;

not required by subsection (c).

(h) A power of attorney executed in accordance with subsections (c) and (d) is self-proved if the witness signatures follow an attestation or self-proving clause or other declaration indicating, in substance, the facts set forth in section 1.7(d) or 1.7(e) of this chapter.

(i) This section shall be construed to favor the effectuating of the principal's intent to make a valid power of attorney.

SECTION 21. IC 30-5-4-1.7 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 1.7. (a) This section applies to a power of attorney executed in the presence of witnesses under section 1 of this chapter on or after March 31, 2020.**

(b) When a power of attorney is executed, the power of attorney may be:

(1) attested; and

(2) made self-proving;

by incorporating into or attaching to the power of attorney a self-proving clause that meets the requirements of subsection (d) or (e). If the principal and witnesses sign a self-proving clause that meets the requirements of subsection (d) or (e) at the time the power of attorney is executed, no other signature of the principal or witnesses is required in order for the power of attorney to be validly executed and self-proved.

(c) If a power of attorney is executed by the signatures of the principal and witnesses on an attestation clause under section 1.5(c) of this chapter, the power of attorney may be made self-proving at a later date by attaching to the power of attorney a self-proving clause that:

(1) is signed by the principal and witnesses; and

(2) meets the requirements specified in subsections (d) and (e).

(d) A self-proving clause must:

(1) contain the acknowledgment of the power of attorney by the:

(A) principal; and

(B) statements of the witnesses;

under the laws of Indiana;

(2) evidence the acknowledgment described in subdivision (1) by the signatures of the principal and witnesses (which may be made under the penalties of perjury); and

(3) be attached or annexed to the power of attorney in a form that is substantially as follows:

"We, the undersigned principal and the undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument declare that:

(1) the principal executed the instrument as the principal's power of attorney;

(2) in the presence of both witnesses, the principal signed or acknowledged the signature already made or directed another to sign for the principal in the principal's presence;

(3) the principal executed the power of attorney as a free and voluntary act for the purposes expressed in it;

(4) each of the witnesses, in the presence of the principal and of each other, signed the power of attorney as a witness;

(5) the principal was of sound mind when the power of attorney was executed; and

(6) to the best knowledge of each witness, the principal was, at the time the power of attorney was executed, at least eighteen (18) years of age or was a member of the armed forces or the merchant marine of the United States or its allies.

Date _____

Principal _____

Witness _____

Witness _____".

(e) A power of attorney is attested and self-proved if the power of attorney includes or has attached a clause signed by the principal and the witnesses that indicates that:

(1) the principal signified that the instrument is the principal's power of attorney;

(2) in the presence of least two (2) witnesses, the principal signed the instrument or acknowledged the principal's

signature already made or directed another to sign for the principal in the principal's presence;

(3) the principal executed the instrument freely and voluntarily for the purposes expressed in it;

(4) each of the witnesses, in the principal's presence and in the presence of all other witnesses, is executing the instrument as a witness;

(5) the principal was of sound mind when the power of attorney was executed; and

(6) the principal is, to the best knowledge of each of the witnesses:

(A) at least eighteen (18) years of age; or

(B) a member of the armed forces or the merchant marine of the United States or its allies.

(f) If the principal and the attesting witnesses executed the power of attorney in two (2) or more counterparts on paper under section 1.5(d) of this chapter, the self-proving clause, if any, for that power of attorney must substantially be in the following form:

"We, the undersigned principal and the undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument declare:

(1) that the undersigned principal and witnesses interacted with each other in real time through the use of technology and the witnesses were able to observe the principal throughout the signing process;

(2) that the principal executed a complete counterpart of the instrument, in readable form on paper, as the principal's power of attorney;

(3) that, in the presence of both witnesses, the principal signed the paper counterpart of the power of attorney or acknowledged the principal's signature already made or directed another individual to sign the paper counterpart of the power of attorney for the principal in the principal's presence;

(4) that the principal executed the power of attorney as a free and voluntary act for the purposes expressed in it;

(5) that each of the witnesses, in the presence of the principal and of each other, signed one (1) or more other complete counterparts of the power of attorney as a witness;

(6) that each paper counterpart of the power of attorney that was signed by a witness was complete, in readable form, and with content identical to the paper counterpart signed by the

principal;

(7) that the principal was of sound mind when the power of attorney was executed; and

(8) that, to the best knowledge of each of the witnesses, the principal was, at the time the power of attorney was executed, at least eighteen (18) years of age or was a member of the armed forces or the merchant marine of the United States or its allies.

Date _____

Principal _____

Witness _____

Witness _____".

(g) This section shall be construed to favor the effectuating of the principal's intent to make a valid power of attorney.

SECTION 22. IC 30-5-4-1.9 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 1.9. (a) Subject to the Indiana Rules of Evidence and the Indiana Rules of Trial Procedure:**

(1) a video or audio recording of a principal captured or made either before or after the execution of a power of attorney; or

(2) a video recording, one (1) or more photographic images, or an audio recording capture made during part or all of the execution of a power of attorney;

may be admissible as evidence under this section.

(b) Recordings or images described in subsection (a) may be admissible as evidence of the following:

(1) The proper execution of a power of attorney.

(2) The intentions of the principal.

(3) The mental state or capacity of a principal.

(4) The authenticity of a power of attorney.

(5) Matters that are determined by a court to be relevant to the probate of a power of attorney.

SECTION 23. IC 30-5-4-2, AS AMENDED BY P.L.143-2009, SECTION 27, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 2. (a) Except as provided in subsection (b), a power of attorney is effective on the date the power of attorney is signed in accordance with section ~~1(4)~~ **1(a)(4)** of this chapter.

(b) A power of attorney may:

(1) specify the date on which the power will become effective; or

(2) become effective upon the occurrence of an event.

(c) If a power of attorney becomes effective upon the principal's incapacity and:

(1) the principal has not authorized a person to determine whether the principal is incapacitated; or

(2) the person authorized is unable or unwilling to make the determination;

the power of attorney becomes effective upon a determination that the principal is incapacitated that is set forth in a writing or other record by a physician, licensed psychologist, or judge.

(d) A person authorized by the principal in the power of attorney to determine that the principal is incapacitated may:

(1) act as the principal's personal representative under the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. 201 et seq.) and any rules or regulations issued under that act; and

(2) obtain access to the principal's health care information and communicate with the principal's health care provider.

SECTION 24. IC 30-5-11-3, AS AMENDED BY P.L.231-2019, SECTION 39, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3. The following terms are defined for this chapter:

(1) "Affidavit of regularity" means an affidavit executed by a custodian or other person under section 9 of this chapter with respect to the electronic record for an electronic power of attorney or a complete converted copy of an electronic power of attorney.

(2) "Complete converted copy" means a document in any format that:

(A) can be visually viewed in its entirety on a monitor or other display device;

(B) can be printed; and

(C) contains the text of an electronic power of attorney and a readable copy of any associated document integrity evidence that may be a part of or attached to the electronic power of attorney.

(3) "Custodian" means a person other than:

(A) the principal who executed the electronic power of attorney;

(B) an attorney; or

(C) a person who is named in the electronic power of attorney as an attorney in fact or successor attorney in fact under the power of attorney.

(4) "Custody" means the authorized possession and control of at least one (1) of the following:

(A) A complete copy of the electronic record for the electronic power of attorney.

(B) A complete converted copy of the electronic power of attorney if the complete electronic record has been lost or destroyed or the electronic power of attorney has been revoked.

(5) "Directed paralegal" means a nonlawyer assistant who is employed, retained, or otherwise associated with a licensed attorney or law firm and whose work is directly supervised by a licensed attorney, as required by Rule 5.3 of the Rules of Professional Conduct.

~~(5)~~ **(6)** "Document integrity evidence" means the part of the electronic record for the electronic power of attorney that:

(A) is created and maintained electronically;

(B) includes digital markers showing that the electronic power of attorney has not been altered after its initial execution by the principal;

(C) is logically associated with the electronic power of attorney in a tamper evident manner so that any change made to the text of the electronic power of attorney after its execution is visibly perceptible when the electronic record is displayed or printed;

(D) will generate an error message, invalidate an electronic signature, make the electronic record unreadable, or otherwise display evidence that some alteration was made to the electronic power of attorney after its execution; and

(E) displays the following information:

(i) The city and state in which, and the date and time at which, the electronic power of attorney was executed by the principal.

(ii) The name of the principal.

(iii) The name and address of the person responsible for marking the principal's signature on the electronic power of attorney at the principal's direction and in the principal's presence, as applicable.

(iv) A copy of or a link to the electronic signature of the principal on the electronic power of attorney.

(v) A general description of the type of identity verification evidence used to verify the principal's identity.

(vi) The content of the cryptographic hash or unique code used to complete the electronic record and make the electronic power of attorney tamper evident if a public key infrastructure or a similar secure technology was used to sign or authenticate the electronic power of attorney and if the vendor or software for the technology makes inclusion feasible.

Document integrity evidence may, but is not required to, contain other information about the electronic power of attorney such as a unique document number, client number, or other identifier that an attorney or custodian assigns to the electronic power of attorney or a link to a secure Internet web site where a complete copy of the electronic power of attorney is accessible. The title, heading, or label, if any, that is assigned to the document integrity evidence (such as "certificate of completion", "audit trail", or "audit log") is immaterial.

~~(6)~~ **(7)** "Electronic" has the meaning set forth in IC 26-2-8-102.

~~(7)~~ **(8)** "Electronic power of attorney" means a power of attorney created by a principal that:

(A) is initially created and maintained as an electronic record;

(B) contains the electronic signature of the principal creating the power of attorney;

(C) contains the date and time of the electronic signature of the principal creating the power of attorney; and

(D) is notarized.

The term includes an amendment to or a restatement of the power of attorney if the amendment or restatement complies with the requirements described in section 5 of this chapter.

~~(8)~~ **(9)** "Electronic record" has the meaning set forth in IC 26-2-8-102. The term may include one (1) or both of the following:

(A) The document integrity evidence associated with an electronic power of attorney.

(B) The identity verification evidence of the principal who executed the electronic power of attorney.

~~(9)~~ **(10)** "Electronic signature" has the meaning set forth in IC 26-2-8-102.

~~(10)~~ **(11)** "Executed" means the signing of a power of attorney. The term includes the use of an electronic signature.

~~(11)~~ **(12)** "Identity verification evidence" means either:

(A) a copy of a government issued photo identification card belonging to the principal; or

(B) any other information that verifies the identity of the principal if derived from one (1) or more of the following sources:

(i) A knowledge based authentication method.

(ii) A physical device.

(iii) A digital certificate using a public key infrastructure.

(iv) A verification or authorization code sent to or used by the

principal.

(v) Biometric identification.

(vi) Any other commercially reasonable method for verifying the principal's identity using current or future technology.

~~(12)~~ **(13)** "Logically associated" means electronically connected, cross referenced, or linked in a reliable manner.

(14) "Observe" means to perceive another's actions or expressions of intent through the senses of eyesight or hearing, or both. The term includes perceptions involving the use of technology or learned skills to:

(A) assist the person's capabilities of eyesight or hearing, or both; or

(B) compensate for an impairment of the person's capabilities of eyesight or hearing, or both.

(15) "Observing" has the meaning set forth in subdivision (14).

~~(13)~~ **(16)** "Sign" means valid use of a properly executed electronic signature.

~~(14)~~ **(17)** "Signature" means the authorized use of the principal's name to authenticate a power of attorney. The term includes an electronic signature.

~~(15)~~ **(18)** "Tamper evident" means the feature of an electronic record, such as an electronic power of attorney or document integrity evidence for an electronic power of attorney, that will cause the fact of any alteration or tampering with the electronic record, after it is created or signed, to be perceptible to any person viewing the electronic record when it is printed on paper or viewed on a monitor or other display device. The term applies even if the nature or specific content of the alteration is not perceptible.

~~(16)~~ **(19)** "Traditional paper power of attorney" means a power of attorney or an amendment to or a restatement of a power of attorney that is signed by the principal on paper.

SECTION 25. IC 30-5-11-4, AS ADDED BY P.L.40-2018, SECTION 4, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 4. (a) A principal, or person acting at the principal's direction, may ~~in the presence of a notary,~~ create a valid power of attorney by electronically signing an electronic power of attorney:

(1) in the presence of a notary; or

(2) in the presence of witnesses under sections 4.3, 4.5, 4.7, and 4.9 of this chapter.

(b) The:

(1) principal;

(2) attorney in fact under the electronic power of attorney;

(3) attorney representing the principal or attorney in fact; or

(4) other person authorized by the principal;

may use the electronic record to make a complete converted copy of the electronic power of attorney on or near the time of its execution or at a later time when the full electronic record is available.

(c) A complete converted copy derived from a complete and correct electronic power of attorney may be offered and admitted into evidence as though it were an original and traditional paper power of attorney without the need for additional proof or evidence of authenticity. Whenever this article permits or requires an attorney in fact to provide a copy of a power of attorney to an interested person, the attorney in fact may provide a complete converted copy of the electronic power of attorney. A complete and converted copy is conclusive evidence of the power of attorney's terms unless otherwise determined by a court in an order entered upon notice to all interested persons and after an opportunity for a hearing.

SECTION 26. IC 30-5-11-4.1 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 4.1. (a) This section applies to a power of attorney that is electronically signed and notarized:**

(1) on or after March 31, 2020; and

(2) before January 1, 2022.

(b) If a power of attorney described in subsection (a) was electronically signed and notarized by a notary public using audiovisual communication technology to positively identify the principal or someone signing at the principal's direction, the resulting power of attorney must be treated as validly executed under this chapter if it complies with all other requirements of section 4 of this chapter as they existed on June 30, 2020.

SECTION 27. IC 30-5-11-4.3 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 4.3. (a) This section applies to an electronic power of attorney executed in the presence of witnesses under section 4(a)(2) of this chapter on or after March 31, 2020.**

(b) Any person who, at the time of attestation, is competent to be a witness in this state may act as an attesting witness to the execution of an electronic power of attorney, and the witness's subsequent incapacity will not impair the effectiveness of the

power of attorney.

(c) An electronic power of attorney is void if:

(1) a subscribing witness to the execution of the power of attorney has an interest in the power of attorney; and

(2) the power of attorney cannot be proved without the witness's testimony of proof or the witness's signature.

(d) For purposes of this section, a person serving as a subscribing witness to the execution of an electronic power of attorney has an interest in an electronic power of attorney if:

(1) the power of attorney names the person as the principal's attorney in fact or successor to the attorney in fact;

(2) the power of attorney grants a power or beneficial interest to the person other than appointment of the person as the principal's attorney in fact or successor to the attorney in fact; or

(3) the witness is related to a person described in subdivision (1) or (2).

(e) For purposes of this section, a witness is related to a person described in subsection (d)(1) or (d)(2) if the person is:

(1) the spouse of the witness; or

(2) a descendant of the witness.

SECTION 28. IC 30-5-11-4.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 4.5. (a) This section applies to an electronic power of attorney executed in the presence of witnesses under section 4(a)(2) of this chapter on or after March 31, 2020.**

(b) An electronic power of attorney executed in the presence of witnesses under section 4(a)(2) of this chapter must be executed by the signatures of the principal and at least two (2) witnesses on:

(1) an electronic power of attorney under subsection (c);

(2) a self-proving clause under section 4.7(c) of this chapter; or

(3) a self-proving clause under section 4.7(d) of this chapter.

(c) An electronic power of attorney may be attested as follows:

(1) The principal, in the presence of two (2) or more attesting witnesses, shall signify to the witnesses that the instrument is the principal's power of attorney and:

(A) sign the power of attorney;

(B) acknowledge the principal's signature already made; or

(C) at the principal's direction and in the principal's presence, have someone else sign the principal's name.

(2) The attesting witnesses must sign in the presence of the principal and each other.

An attestation or self-proving clause is not required under this subsection for a valid power of attorney.

(d) If the principal and the attesting witnesses are not in each other's physical presence when the electronic power of attorney is signed and witnessed and if the principal and the witnesses use audiovisual technology to satisfy the presence requirement in subsection (a), an attorney or a directed paralegal must supervise the signing and the witnessing of the electronic power of attorney.

(e) Within a reasonable time after an attorney or a directed paralegal supervises the signing and witnessing of an electronic power of attorney in the manner described in subsection (d), the attorney or directed paralegal must sign an affidavit of compliance. An affidavit of compliance under this subsection must be sworn to or affirmed by the signing attorney or directed paralegal under the penalties of perjury and must contain:

(1) the name and residential address of the principal;

(2) the name and:

(A) residential address; or

(B) business address;

for each attesting witness who signs the electronic power of attorney;

(3) the address, city, and state in which the principal is physically located at the time the principal signs the electronic power of attorney;

(4) the city and state in which each attesting witness is physically located when the witness signs the electronic power of attorney as a witness;

(5) a description of the method and form of identification used to confirm the identity of the principal to the witnesses and supervising attorney or directed paralegal;

(6) a description of the method used by the supervising attorney or paralegal, principal, and the witnesses for the purpose of interacting with each other in real time during the signing process;

(7) a brief description of the method used to add or capture the electronic signature of the principal and the witnesses;

(8) the name, business or residential address, and telephone number of the attorney or directed paralegal who supervised the execution of the electronic power of attorney; and

(9) any other information that the supervising attorney or

directed paralegal considers to be material to:

(A) the principal's capacity to sign a valid power of attorney; and

(B) the principal's and witnesses' compliance with subsection (a).

After the attorney or directed paralegal signs an affidavit of compliance under this subsection, the attorney or directed paralegal must preserve an accurate copy of the signed affidavit with a scanned copy or photocopy of the completely signed power of attorney. An affidavit of compliance signed under this subsection is admissible as prima facie evidence that the principal and witnesses executed the power of attorney in counterparts that comply with the requirements of subsection (c).

(f) An electronic power of attorney that is executed in substantial compliance with subsection (c) will not be rendered invalid by the existence of:

(1) an attestation or self-proving clause or other language; or

(2) additional signatures;

not required by subsection (c).

(g) An electronic power of attorney executed in accordance with subsection (c) is self-proved if the witness's signatures follow an attestation or self-proving clause or other declaration indicating, in substance, the facts set forth in section 4.7(d) or 4.7(e) of this chapter.

(h) This section shall be construed to favor the effectuation of the principal's intent to make a valid power of attorney.

SECTION 29. IC 30-5-11-4.7 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 4.7. (a) This section applies to an electronic power of attorney executed in the presence of witnesses under section 4(a)(2) of this chapter on or after March 31, 2020.**

(b) When an electronic power of attorney is executed, the power of attorney may be:

(1) attested; and

(2) made self-proving;

by incorporating into or attaching to the power of attorney a self-proving clause that meets the requirements of subsection (d) or (e) at the time the electronic power of attorney is executed and no other signatures of the principal and witnesses are required for the power of attorney to be validly executed and self-proved.

(c) If an electronic power of attorney is executed by the

signatures of the principal and witnesses on an attestation clause under section 4.5(c) of this chapter, the power of attorney may be made self-proving at a later date by attaching to the power of attorney a self-proving clause signed by the principal and witnesses that meets the requirements of subsection (d) or (e).

(d) A self-proving clause must contain the acknowledgment of the power of attorney by the principal and the statements of the witnesses, each made under the laws of Indiana and evidenced by the signatures of the principal and witnesses (which may be made under the penalties of perjury) attached or annexed to the power of attorney in a form and with content substantially similar to the following:

"We the undersigned principal and the undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument declare:

(1) that the principal executed the instrument as the principal's power of attorney;

(2) that the principal and the witnesses interacted with each other in real time either in the same physical space or through the use of technology and the witnesses were able to observe the principal throughout the signing process;

(3) that, in the presence of both witnesses, the principal electronically signed the power of attorney or acknowledged the principal's electronic signature already made or directed another individual to electronically sign for the principal in the principal's presence;

(4) that the principal executed the power of attorney as a free and voluntary act for the purpose expressed in it;

(5) that each of the witnesses, in the presence of the principal and each other, signed the electronic power of attorney as a witness;

(6) that the principal was of sound mind when the power of attorney was executed; and

(7) that, to the best knowledge of each of the witnesses, the principal was, at the time the power of attorney was executed, at least eighteen (18) years of age or was a member of the armed forces or the merchant marine of the United States or its allies.

Date _____
Principal _____
Witness _____
Witness _____".

(e) An electronic power of attorney is attested and self-proved if the electronic record for the power of attorney includes a clause signed by the principal and the witnesses that indicates, in substance, that:

(1) the principal signified that the instrument is the principal's power of attorney;

(2) in the presence of at least two (2) witnesses, the principal electronically signed the instrument or acknowledged the principal's electronic signature already made or directed another individual to sign for the principal in the principal's presence;

(3) the principal executed the instrument freely and voluntarily for the purposes expressed in it;

(4) each of the witnesses, in the principal's presence and in the presence of each other, electronically signed the instrument as a witness;

(5) the principal was of sound mind when the power of attorney was executed;

(6) the principal was, to the best knowledge of each witness, either:

(A) at least eighteen (18) years of age; or

(B) a member of the armed forces or the merchant marine of the United States or its allies.

(f) This section shall be construed to favor the effectuating of the principal's intent to make a valid power of attorney.

SECTION 30. IC 30-5-11-4.9 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 4.9. (a) Subject to the Indiana Rules of Evidence and the Indiana Rules of Trial Procedure:**

(1) a video or audio recording of a principal captured or made either before or after the execution of an electronic power of attorney; or

(2) a video recording, one (1) or more photographic images, or an audio recording captured or made during part or all of the execution of an electronic power of attorney;

may be admissible as evidence under this section.

(b) Recordings for images described in subsection (a) may be admissible as evidence of the following:

(1) The proper execution of an electronic power of attorney.

(2) The intentions of the principal.

(3) The mental state or capacity of a principal.

(4) The authenticity of an electronic power of attorney.

(5) Matters that are determined by a court to be relevant to the probate of an electronic power of attorney.

SECTION 31. IC 32-17-14-12, AS ADDED BY P.L.143-2009, SECTION 41, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 12. (a) A deed of gift, bill of sale, or other writing intended to transfer an interest in tangible personal property is effective on the death of the owner and transfers ownership to the designated transferee beneficiary if the document:

(1) expressly creates ownership in beneficiary form;

(2) is in other respects sufficient to transfer the type of property involved; and

(3) is executed by the owner and acknowledged before a notary public or other person authorized to administer oaths **or executed in the presence of a disinterested witness.**

(b) A beneficiary transfer document described in this section is not required to be supported by consideration or delivered to the transferee beneficiary.

(c) This section does not preclude other methods of transferring ownership of tangible personal property that are permitted by law and have the effect of postponing enjoyment of the property until after the death of the owner.

(d) For purposes of this section, a witness is disinterested if the witness is not:

(1) the designated transferee beneficiary;

(2) the spouse of the designated transferee beneficiary;

(3) a descendant of the designated transferee beneficiary; or

(4) the spouse of a descendant of the designated transferee beneficiary.

(e) A disinterested witness may prove the owner's execution of a deed of gift, bill of sale, or other writing under this section as a witness may prove the signature of a grantor, principal, or affiant making a conveyance, mortgage, or other instrument of writing under IC 32-21-2-3(a).

SECTION 32. IC 32-21-1-11 IS REPEALED [EFFECTIVE UPON PASSAGE]. ~~Sec. 11. If executed in a foreign country, conveyances, mortgages, and other instruments in writing that would be admitted to record under the recording laws of this state must be acknowledged by the grantor or person executing the instrument and proved before any diplomatic or consular officer of the United States, duly accredited, or before any officer of the foreign country who, by the laws of that country, is authorized to take acknowledgments or proof of conveyances. If the acknowledgment or proof is in the English~~

~~language and attested by the official seal of the officer acknowledging it, the instrument may be admitted to record. However, if the acknowledgment or proof is in a language other than English or is not attested by an official seal, then the instrument must be accompanied by a certificate of a diplomatic or consular officer of the United States attesting:~~

~~(1) that the instrument is duly executed according to the laws of the foreign country;~~

~~(2) that the officer certifying the acknowledgment or proof had legal authority to do so; and~~

~~(3) to the meaning of the instrument, if the instrument is made in a foreign language.~~

SECTION 33. IC 32-21-1-12 IS REPEALED [EFFECTIVE UPON PASSAGE]. ~~Sec. 12. It is not necessary to affix a private seal or ink scroll necessary to validate a conveyance of land or an interest in land executed by a natural person, business trust, or corporation. It is not necessary for the officer taking the acknowledgment of the conveyance to use an ink scroll or seal unless the officer is required by law to keep an official seal.~~

SECTION 34. IC 32-21-1-13, AS AMENDED BY P.L.231-2019, SECTION 46, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 13. (a) **As used in subsection (b), "conveyance" means any electronic record (as defined in IC 26-2-8-102) or any paper or other tangible medium or document that is:**

(1) ~~Except for a bona fide~~ **a** lease **or memorandum of lease** for a term ~~not~~ exceeding three (3) years;

(2) a ~~conveyance~~ **deed** of:

(A) land; or

(B) ~~of~~ any interest in land; ~~shall be made by a deed that is:~~

(3) a mortgage; or

(4) a land contract or memorandum of land contract for the sale and purchase of land.

(b) A conveyance must:

(1) ~~written; and~~ **be in writing;**

(2) ~~subscribed, sealed, and acknowledged~~ **be executed or signed** by the:

(A) lessor or landlord;

(B) grantor (as defined in IC 32-17-1-1); or ~~by the grantor's attorney.~~

(C) land contract seller; and

(3) have an acknowledgment (as defined in IC 33-42-0.5-2) or

a proof (as defined in and permitted under IC 32-21-2).

~~(b)~~ **(c)** If a transfer on death deed under IC 32-17-14 has been recorded before the death of the owner (as defined in IC 32-17-14-3) with the recorder of deeds in the county in which the real property is situated, a subsequent conveyance of the real property is void if it is not recorded before the death of the owner with the recorder of deeds in the county in which the real property is situated.

SECTION 35. IC 32-21-1-14 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 14. A conveyance of land by **an** attorney **in fact (as defined in IC 30-5-2-2)** is not good unless the attorney **in fact** is empowered by a ~~written instrument~~ **power of attorney (as defined in IC 30-5-2-7)** that:

(1) is ~~subscribed, sealed, and acknowledged by the attorney's principal in the same manner that is required for a conveyance by the attorney's principal.~~ **executed or signed by the principal (as defined in IC 30-5-2-8); and**

(2) has an acknowledgment (as defined in IC 33-42-0.5-2) or a proof (as defined in and permitted under IC 32-21-2).

SECTION 36. IC 32-21-2-4 IS REPEALED [EFFECTIVE UPON PASSAGE]. ~~Sec. 4. (a) This section applies when a conveyance, mortgage, or other instrument that is required to be recorded is acknowledged in any county in Indiana other than the county in which the instrument is required to be recorded.~~

~~(b) The acknowledgment must be:~~

~~(1) certified by the clerk of the circuit court of the county in which the officer resides; and~~

~~(2) attested by the seal of that court.~~

~~However, an acknowledgment before an officer having an official seal, if the acknowledgment is attested by that official seal, is sufficient without a certificate.~~

SECTION 37. IC 32-21-2-5 IS REPEALED [EFFECTIVE UPON PASSAGE]. ~~Sec. 5. To record in Indiana a conveyance that is acknowledged outside Indiana but within the United States, the conveyance must be:~~

~~(1) certified by the clerk of any court of record of the county in which the officer receiving the acknowledgment resides; and~~

~~(2) attested by the seal of that court.~~

~~However, an acknowledgment before an officer having an official seal that is attested by the officer's official seal is sufficient without a certificate.~~

SECTION 38. IC 32-21-2-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 6. ~~A deed may be~~

~~proved according to the rules of common law before any officer who is authorized to take acknowledgments. A deed that is proved in the manner provided in this section~~ **An instrument that complies with this article, IC 33-42, and IC 36-2-11** is entitled to be recorded.

SECTION 39. IC 32-21-2-7 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 7. **(a)** The ~~following~~ **form set forth in this subsection ~~or~~ and** any other form substantially the same ~~is a~~ **are** good or sufficient ~~form of~~ **forms for an** acknowledgment of ~~a~~ **an instrument that is described in section 3 of this chapter and to be recorded:** ~~deed or mortgage:~~

(1) An acknowledgment that complies with IC 33-42-0.5-2 and IC 33-42-9-12.

(2) An acknowledgment for a remote notarial act that complies with:

(A) IC 33-42-0.5-2;

(B) IC 33-42-0.5-26;

(C) IC 33-42-9-12; and

(D) IC 33-42-17-7.

(3) An acknowledgment that complies with IC 33-42-0.5-2 and IC 33-42-9-12(a) and contains the following or substantially the same information:

"Before me, E.F., **a** _____ ~~(judge or justice, as the case may be)~~ **(describe the notarial officer type)** this _____ day of _____, A.B. acknowledged the execution of the **foregoing or** annexed _____ ~~deed, (or mortgage, as the case may be.)~~ **(describe the type of instrument).".**

(b) The form set forth in this subsection and any other forms substantially the same are good or sufficient forms for a proof of an instrument that is described in section 3 of this chapter and to be recorded:

(1) A proof that complies with section 1.7 of this chapter and IC 33-42-9-12.

(2) A proof that complies with section 1.7 of this chapter and IC 33-42-9-12(a) and contains the following or substantially the same information:

"Before me, E.F., a _____ (describe the notarial officer type) this _____ day of _____, appeared A.B. being personally known to me or identified to me by a sufficient credential, whose name is subscribed as a witness to the foregoing instrument, who, being duly sworn by me, deposes and says that the foregoing instrument was executed and delivered by C.D. (describe the signer or principal to the

instrument) while being personally observed by A.B.".

SECTION 40. IC 32-21-2-8 IS REPEALED [EFFECTIVE UPON PASSAGE]. ~~Sec. 8. (a) If before a public officer authorized to receive acknowledgment of deeds:~~

~~(1) the grantor of a deed intends to sign the deed with the grantor's mark; and~~

~~(2) in all other cases when the public officer has good cause to believe that the contents and purport of the deed are not fully known to the grantor;~~

~~it is the duty of the public officer before signature to fully explain to the grantor the contents and purport of the deed.~~

~~(b) The failure of the public officer to comply with subsection (a) does not affect the validity of a deed.~~

SECTION 41. IC 32-21-2-9 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 9. ~~A certificate of the acknowledgment of a conveyance or other instrument in writing that is required to be recorded, signed, and sealed by the officer taking the acknowledgment shall be written on or attached to the deed. When by law the certificate of the clerk of the proper county is required to accompany the acknowledgment, the certificate shall state that:~~

~~(1) the officer before whom the acknowledgment was taken was, at the time of the acknowledgment, acting lawfully; and~~

~~(2) the clerk's signature to the certificate of acknowledgment is genuine.~~

An instrument's acknowledgment or proof as required under section 3 of this chapter is incomplete when the instrument does not include the certificate described in IC 33-42-9-12.

SECTION 42. IC 32-21-2-11 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 11. ~~(a) This section applies to a conveyance or other instrument entitled by law to be recorded.~~

~~(b) The recorder of the county in which the land included in a conveyance or other instrument is situated shall record the deed or other instrument together with the requisite certificate of acknowledgment or proof endorsed on the deed or other instrument or annexed to the deed or other instrument.~~

~~(c) Unless a~~ **If an instrument is recorded without an acknowledgment's or proof's** certificate ~~of acknowledgment is recorded with a deed,~~ **as required under this article and IC 33-42-9-12,** the ~~record of the conveyance or other~~ instrument or a transcript **of the instrument** may not be read or received in evidence.

SECTION 43. IC 32-21-2-12 IS AMENDED TO READ AS

FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 12. The:

(1) **acknowledgment's or proof's** certificate of ~~the acknowledgment of a conveyance or~~ **an** instrument ~~of writing;~~ **as required under this article and IC 33-42-9-12;**

(2) ~~the record;~~ **instrument;** or

(3) ~~the~~ transcript of the ~~record;~~ **instrument;**

is not conclusive and may be rebutted and the force and effect of it contested by a party affected by the ~~conveyance or~~ instrument.

SECTION 44. IC 32-21-2-15, AS ADDED BY P.L.127-2017, SECTION 7, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 15. ~~Beginning January 1, 2018, a document~~ **An instrument** concerning real property that may be recorded with a county recorder under this title may be recorded electronically **as an electronic document** as provided under IC 32-21-2.5.

SECTION 45. IC 32-21-2.5-1, AS ADDED BY P.L.127-2017, SECTION 8, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 1. As used in this chapter, "document" **or "documents"** means ~~information that is:~~

~~(1)~~ **an electronic record (as defined in IC 26-2-8-102) or information that is:**

(1) inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and

(2) eligible to be recorded in the land records maintained by a county recorder.

SECTION 46. IC 32-21-2.5-7, AS ADDED BY P.L.127-2017, SECTION 8, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 7. ~~(a) This section is effective January 1, 2018.~~

~~(b)~~ **(a)** If a law requires, as a condition for recording, that a document:

(1) be an original;

(2) be on paper or another tangible medium; or

(3) be in writing;

the requirement is satisfied by an electronic document ~~satisfying~~ **that satisfies** this chapter, **IC 32-21-2, IC 36-2-11, and the notarial act requirements set forth under IC 33-42 for an acknowledgment as defined under IC 33-42-0.5-2 or for a proof as defined under IC 32-21-2-1.7.**

~~(c)~~ **(b)** If a law requires, as a condition for recording, that a document be signed, the requirement is satisfied by an electronic signature.

~~(d)~~ **(c)** ~~A requirement~~ **If a law requires, as a condition for recording,** that a document or a signature associated with a document be notarized, ~~acknowledged, verified, witnessed, or made under oath~~ **the requirement** is satisfied if the electronic ~~signature of the person authorized to perform that act, and all other information required to be included, is attached to or logically associated with the document or signature. A physical or an electronic image of a stamp, impression, or seal does not have to accompany an electronic signature.~~ **document:**

(1) has an electronic signature; and

(2) complies with IC 32-21-2-3.

SECTION 47. IC 32-21-2.5-8, AS ADDED BY P.L.127-2017, SECTION 8, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 8. (a) As used in this section, "paper document" **or "paper documents"** means a ~~document~~ **tangible record** that is received by a county recorder in a form that is not electronic.

(b) ~~Beginning January 1, 2018,~~ **On or before July 1, 2022,** a county recorder **shall receive for recording, indexing, storage, archiving, access to, searching of, retrieval, and transmittal all electronic documents proper for recording. A county recorder shall also accept electronically any fee or tax that the county recorder is authorized to collect under applicable laws. A county recorder shall**

~~(1) who implements any of~~ **implement** the **processing of electronic documents proper for recording** ~~functions listed in this section shall do so~~ in compliance with:

(1) this article;

(2) IC 33-42;

(3) IC 36-2-7.5;

(4) IC 36-2-11; and

(5) IC 36-2-13; and

the standards ~~established~~ **adopted** by the electronic recording commission created under section 9 of this chapter.

~~(2) may receive, index, store, archive, and transmit electronic documents;~~

~~(3) may provide for access to, and for search and retrieval of, documents and information by electronic means.~~

~~(4)~~ **(c) A recorder** who accepts electronic documents for recording shall:

~~(A)~~ **(1)** continue to accept paper documents as authorized by state law; and

~~(B)~~ **(2)** place entries for ~~both types of~~ **paper documents and electronic** documents in the same index.

~~(5)~~ **(d) A recorder who accepts electronic documents for recording** may:

(1) convert paper documents accepted for recording into electronic form;

~~(6)~~ **(2)** ~~may~~ convert into electronic form information recorded before the county recorder began to ~~record~~ **accept and index** electronic documents; **or**

~~(7) may accept electronically any fee or tax that the county recorder is authorized to collect; and~~

~~(8)~~ **(3)** ~~may~~ agree with other officials of a state or a political subdivision of a state, or of the United States, on procedures or processes to facilitate the electronic satisfaction of prior approvals and conditions precedent to recording and the electronic payment of fees and taxes.

SECTION 48. IC 32-21-2.5-10, AS ADDED BY P.L.127-2017, SECTION 8, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 10. In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to ~~its subject matter among states that enact it.~~ **this article, the Uniform Electronic Transactions Act under IC 26-2-8, IC 33-42, IC 36-2-7.5, and IC 36-2-11, as well as similar laws enacted in other states.**

SECTION 49. IC 32-21-2.5-12 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 12. (a) The recorder shall record a paper or tangible copy of an electronic record (as defined in IC 26-2-8-102) that is otherwise eligible under Indiana law to be recorded if the paper or tangible copy of the electronic record:**

(1) contains an image of an electronic signature or signatures;

(2) contains an acknowledgment or proof as required by IC 32-21-2-3; and

(3) has been certified by a notarial officer, as described in IC 33-42-9-7(a), to be a true and correct copy of the electronic record as provided in subsection (c).

(b) A printed document that is a paper or tangible copy of an electronic record and certified to be a true and correct copy as described in subsection (c) satisfies any requirement of law that, as a condition for recording, requires the printed document to:

(1) be an original or be in writing;

(2) be signed or contain an original signature if the document contains an electronic signature of the person required to sign the document; and

(3) have an acknowledgment or proof according to Indiana law if the document contains an electronic signature of the notarial officer authorized to perform that act and all other information required to be included.

(c) A notarial officer who makes an acknowledgment or proof under IC 32-21 or IC 33-42 may certify that a paper or tangible copy of an electronic record is a true and correct copy of an electronic record by:

(1) executing and attaching the notarial officer's official seal to a tangible paper certificate; or

(2) affixing or attaching the certificate to the paper or tangible copy of an electronic record.

(d) The form of the certificate required under subsection (c) must be substantially as follows:

"State of _____

County of _____

I certify that the foregoing and attached document entitled _____ (insert document title), dated _____ (insert document date) and containing _____ pages, is a true and correct copy of an electronic record printed by me or under my supervision. I further certify that, at the time of printing, no security features present on the electronic record indicated any changes or errors in an electronic signature or other information in the electronic record after the electronic record's creation or execution.

Signed this _____ day of _____, _____

_____ (signature of notarial officer)

_____ (printed name of notarial officer)

_____ (include notarial officer's commission number, official seal, commission county of residence or employment, and commission expiration date as required by applicable law).".

SECTION 50. IC 32-21-3-2.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 2.5. As used in this chapter, "proof" has the meaning set forth in IC 32-21-2-1.7.**

SECTION 51. IC 32-21-9-1 IS REPEALED [EFFECTIVE UPON PASSAGE]. ~~Sec. 1. (a) In addition to the acknowledgment of written instruments and the performance of other notarial acts in the manner and form otherwise authorized by the laws of this state, a person:~~

~~(1) who is serving in or with the armed forces of the United States wherever located;~~

~~(2) who is serving as a merchant seaman outside the limits of the~~

United States included within the fifty (50) states and the District of Columbia; or

(3) who is outside the limits of the United States by permission, assignment, or direction of any department or office of the United States government in connection with any activity pertaining to the prosecution of any war in which the United States is engaged;

may acknowledge any instruments, attest documents, subscribe oaths and affirmations, give depositions, execute affidavits, and perform other notarial acts before any commissioned officer with the rank of second lieutenant or higher in the active services of the Army of the United States or the United States Marine Corps or before any commissioned officer with the rank of ensign or higher in the active service of the United States Navy or the United States Coast Guard, or with equivalent rank in any other component part of the armed forces of the United States.

(b) The commissioned officer before whom a notarial act is performed under this section shall certify the instrument with the officer's official signature and title in substantially the following form:

With the Armed Forces (or other component part of))
) ss
the armed forces) of the United States at [+]_____)

The foregoing instrument was acknowledged this _____
day of _____ 20___ by [‡]_____ serving (in) the armed forces of the
(with)
United States) _____ (as a merchant seaman outside the limits of the United States) (as a person not in the armed forces, but outside the limits of the United States by permission, assignment, or direction of a department of the United States Government in connection with an activity pertaining to the prosecution of the war), before me, a commissioned officer in the active service of the (Army of the United States) (United States Marine Corps) (United States Navy) (United States Coast Guard) (or equivalent rank in any other component part of the armed forces).

(Signature of officer)

_____

Rank and Branch

Footnote 1. In the event that military considerations preclude disclosure of the place of execution or acknowledgment the words "an undisclosed place" may be supplied instead of the appropriate city or county, state, and country.

Footnote 2. If by a natural person or persons, insert name or names; if by a person acting in a representative or official capacity or as

~~attorney-in-fact, then insert name of person acknowledging the instrument, followed by an accurate description of the capacity in which he acts including the name of the person, corporation, or other entity represented.~~

SECTION 52. IC 32-21-9-2 IS REPEALED [EFFECTIVE UPON PASSAGE]. ~~Sec. 2. An acknowledgment or other notarial act made substantially in the form prescribed by section 1 of this chapter is prima facie evidence:~~

~~(1) that the person named in the instrument as having acknowledged or executed the instrument:~~

~~(A) appeared in person before the officer taking the acknowledgment;~~

~~(B) was personally known to the officer to be the person whose name was subscribed to the instrument; and~~

~~(C) acknowledged that the person signed the instrument as a free and voluntary act for the uses and purposes set forth in the instrument;~~

~~(2) if the acknowledgment or execution is by a person in a representative or official capacity, that the person acknowledging or executing the instrument acknowledged it to be the person's free and voluntary act in such capacity or the free and voluntary act of the principal, person, or entity represented; and~~

~~(3) if the acknowledgment or other notarial act is by a person as an officer of a corporation, that the person was known to the officer taking the acknowledgment or performing any other notarial act to be a corporate officer and that the instrument was executed and acknowledged for and on behalf of the corporation by the corporate officer with proper authority from the corporation, as the free and voluntary act of the corporation.~~

SECTION 53. IC 32-21-9-3 IS REPEALED [EFFECTIVE UPON PASSAGE]. ~~Sec. 3. An instrument acknowledged or executed as provided in this chapter is not invalid because of a failure to state in the instrument the place of execution or acknowledgment.~~

SECTION 54. IC 32-21-9-4 IS REPEALED [EFFECTIVE UPON PASSAGE]. ~~Sec. 4. An acknowledgment or other notarial act made substantially as provided in this chapter constitutes prima facie proof of the facts recited in the instrument and, without further or other authentication, entitles any document so acknowledged or executed to be filed and recorded in the proper offices of record and received in evidence before the courts of this state, to the same extent and with the same effect as documents acknowledged or executed in accordance with any other provision of law now in force or that may be enacted.~~

SECTION 55. IC 32-39-2-4, AS AMENDED BY P.L.163-2018, SECTION 23, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 4. If a deceased user consented to, or a court directs, disclosure of the contents of electronic communications of the user, the custodian shall disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the personal representative gives the custodian the following:

(1) A written request for disclosure in physical or electronic form.

(2) A certified or authenticated copy of the death certificate of the user.

(3) A copy of the letters (as defined in ~~IC 29-1-1-3(a)(18))~~ **IC 29-1-1-3(a)(21))** of the personal representative or of the order of no supervision or order of unsupervised administration issued to the personal representative under IC 29-1-7.5.

(4) Unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the content of electronic communications.

(5) If requested by the custodian:

(A) a number, username, address, or other unique subscriber identifier or account identifier assigned by the custodian to identify the user's account;

(B) evidence linking the account to the user; or

(C) a finding by the court that:

(i) the user had a specific account with the custodian, identifiable by the information specified in clause (A);

(ii) disclosure of the content of electronic communications of the user would not violate 18 U.S.C. 2701 et seq., 47 U.S.C. 222, or other applicable law;

(iii) unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or

(iv) disclosure of the content of electronic communications of the user is reasonably necessary for administration of the user's estate.

SECTION 56. IC 32-39-2-5, AS AMENDED BY P.L.163-2018, SECTION 24, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 5. Unless the user prohibited disclosure of the user's digital assets or a court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalogue of electronic communications sent or received by the user

and digital assets, other than the content of electronic communications, of the user, if the personal representative gives the custodian:

(1) a written request for disclosure in physical or electronic form;

(2) a certified or authenticated copy of the death certificate of the user;

(3) a copy of the letters ~~(as defined in IC 29-1-1-3(a)(18))~~ **(as defined in IC 29-1-1-3(a)(21))** of the personal representative or of the order of no supervision or order of unsupervised administration issued to the personal representative under IC 29-1-7.5; or

(4) if requested by the custodian:

(A) a number, username, address, or other unique subscriber identifier or account identifier assigned by the custodian to identify the user's account;

(B) evidence linking the account to the user;

(C) an affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the user's estate; or

(D) a finding by the court that:

(i) the user had a specific account with the custodian, identifiable by the information specified in clause (A); or

(ii) disclosure of the user's digital assets is reasonably necessary for administration of the user's estate.

SECTION 57. IC 32-39-2-12, AS AMENDED BY P.L.163-2018, SECTION 25, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 12. (a) The legal duties imposed on a fiduciary charged with managing tangible property, including:

(1) the duty of care;

(2) the duty of loyalty; and

(3) the duty of confidentiality;

also apply to a fiduciary charged with managing digital assets.

(b) A fiduciary's or designated recipient's authority with respect to a digital asset of a user:

(1) except as otherwise provided in section 1 of this chapter, is subject to the applicable terms of service;

(2) is subject to other applicable law, including copyright law;

(3) is limited by the scope of the fiduciary's duties; and

(4) may not be used to impersonate the user.

(c) A fiduciary with authority over the property of a decedent, protected person, principal, or settlor has the right to access any digital asset:

(1) in which the decedent, protected person, principal, or settlor

had a right or interest; and

(2) that is not held by a custodian or subject to a terms-of-service agreement.

(d) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, protected person, principal, or settlor for the purpose of applicable computer fraud and unauthorized computer access laws, including IC 24-4.8-2, IC 24-5-22, IC 35-43-1-7, IC 35-43-1-8, IC 35-43-2-3, and IC 35-45-13.

(e) A fiduciary with authority over the tangible, personal property of a decedent, protected person, principal, or settlor:

(1) has the right to access the property and any digital asset stored in the property; and

(2) is an authorized user for the purpose of computer fraud and unauthorized computer access laws, including IC 24-4.8-2, IC 24-5-22, IC 35-43-2-3, and IC 35-45-13.

(f) A custodian may disclose information in an account to a fiduciary of the user when the information is required to terminate an account used to access digital assets licensed to the user.

(g) A fiduciary of a user may request that a custodian terminate the user's account. A request for termination must be in writing, in either physical or electronic form, and must be accompanied by:

(1) if the user is deceased, a certified or authenticated copy of the death certificate of the user;

(2) a copy of:

(A) the letters ~~(as defined in IC 29-1-1-3(a)(18))~~ **(as defined in IC 29-1-1-3(a)(21))** of the personal representative or of the order of no supervision or order of unsupervised administration issued to the personal representative under IC 29-1-7.5;

(B) the court order;

(C) the power of attorney; or

(D) the trust;

giving the fiduciary authority over the account; and

(3) if requested by the custodian:

(A) a number, username, address, or other unique subscriber identifier or account identifier assigned by the custodian to identify the user's account;

(B) evidence linking the account to the user; or

(C) a finding by the court that the user had a specific account with the custodian, identifiable by the information specified in clause (A).

SECTION 58. IC 33-42-0.5-18, AS ADDED BY P.L.59-2018, SECTION 25, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE

UPON PASSAGE]: Sec. 18. "Notarial act" means the following acts with respect to either a tangible or an electronic record:

(1) Taking an acknowledgment.

(2) Administering an oath or affirmation.

(3) Taking a verification on an oath or affirmation.

(4) Attesting to or witnessing a signature.

(5) Attesting to or certifying a copy of:

(A) a tangible document or record; or

(B) an electronic document or record.

(6) Taking a proof (as defined in IC 32-21-2-1.7).

~~(6)~~ **(7)** Noting a protest of a negotiable record.

~~(7)~~ **(8)** Any other act authorized by common law or the custom of merchants.

SECTION 59. IC 33-42-9-7, AS AMENDED BY P.L.59-2018, SECTION 47, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 7. (a) A notarial act may be performed by the following individuals:

(1) Notaries public.

(2) An official court reporter acting under IC 33-41-1-6.

(3) Judges and justices of Indiana courts.

(4) The secretary of state.

(5) The clerk of the supreme court.

(6) Mayors, clerks, clerk-treasurers of towns and cities, township trustees, in their respective towns, cities, and townships.

(7) Clerks of circuit courts and master commissioners in their respective counties.

(8) Judges of United States district courts of Indiana, in their respective jurisdictions.

(9) United States commissioners appointed for any United States district court of Indiana, in their respective jurisdictions.

(10) A precinct election officer (as defined in IC 3-5-2-40.1) and an absentee voter board member appointed under IC 3-11-10 or IC 3-11.5-4, for any purpose authorized under IC 3.

(11) A member of the Indiana election commission, a co-director of the election division, or an employee of the election division as defined under IC 3-6-4.2.

(12) County auditors in their respective counties.

(13) County recorders in their respective counties.

~~(13)~~ **(14)** Any member of the Indiana general assembly anywhere in Indiana.

~~(14)~~ **(15)** The adjutant general of the Indiana National Guard, specific active duty members, reserve duty members, or civilian

employees of the Indiana National Guard designated by the adjutant general of the Indiana National Guard for any purpose related to the service of an active duty or reserve member of the Indiana National Guard.

(b) The signature and title of an individual performing a notarial act in Indiana is prima facie evidence of the fact that:

(1) the signature is genuine; and

(2) the individual holds the designated title.

SECTION 60. IC 33-42-9-12, AS AMENDED BY P.L.177-2019, SECTION 19, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 12. (a) A notarial act must be authenticated by a certificate bearing the date of the notarial act and the signature of the notarial officer. A properly completed certificate must conform to the following conditions:

(1) The certificate must be completed contemporaneously with the performance of the notarial act.

(2) The certificate must be signed and dated by the notarial officer. If the notarial officer is a notary public, the certificate must be signed in the manner on file with the secretary of state for the specific notary public.

(3) The certificate must identify the jurisdiction in which the notarial act is performed as follows:

(A) For a notarial act that is not a remote notarial act, the county and state in which the principal **or witness** appears before the notarial officer.

(B) For a remote notarial act, the information required by IC 33-42-17-7(a)(3).

(4) The certificate must display the title of the notarial officer.

(5) If the notarial officer is a notary public, the certificate must display:

(A) the expiration date of the notary public's commission; and

(B) either of the following:

(i) The Indiana county of the notary public's commission.

(ii) If the notary public is not a resident of Indiana but is primarily employed in Indiana, the Indiana county where the notary public is primarily employed.

(b) A notary public who performs a notarial act on a tangible record shall:

(1) affix, display, or emboss the notary public's official seal; and

(2) print or type the notary public's name underneath the notary public's signature on a certificate of acknowledgment, ~~jurat,~~ **proof (as defined in and permitted under IC 32-21-2),** or other

official record unless the name of the notary public:

(A) appears in printed form on the record; or

(B) appears as part of the notary public's official seal; and

is legible when the record is photocopied.

(c) If a notarial act is performed on a public record by a notarial officer other than a notary public, the information described in subsection (a)(2) through (a)(4) must be affixed, displayed, or embossed upon the certificate and accompanied by the notarial officer's official seal.

(d) If a notarial act is performed on an electronic record by a notary public:

(1) the electronic notarial certificate must contain the information described in subsection (a)(2) through (a)(5); and

(2) the notary public's electronic seal must be attached to or associated with the electronic notarial certificate.

(e) If a notarial act is performed on an electronic record by a notarial officer other than a notary public:

(1) the electronic notarial certificate must contain the information described in subsection (a)(2) through (a)(4); and

(2) the notarial officer's official seal must be attached to or associated with the electronic notarial certificate.

(f) A certificate of a notarial act or an electronic notarial certificate is sufficient if it meets the requirements described in subsections (a) and (b) and:

(1) is in a form permitted by the laws of this state;

(2) is in a form permitted by the laws of the jurisdiction in which the notarial act was performed; or

(3) sets forth the actions of the notarial officer.

(g) By executing a certificate of a notarial act or an electronic notarial certificate, a notarial officer certifies that the notarial officer has complied with this chapter.

(h) A notarial officer may not affix a signature to or associate a certificate of a notarial act or an electronic notarial certificate with a record until a notarial act has been performed.

(i) A certificate of a notarial act or an electronic notarial certificate must be attached to or associated with each tangible record or electronic record in a manner consistent with the applicable requirements of subsections (a) through (f).

(j) An official:

(1) certificate of a notarial act bearing a notarial officer's official seal; or

(2) electronic notarial certificate bearing a notarial officer's

electronic seal;

constitutes presumptive evidence of the facts stated in cases, where, by law, the notarial officer is authorized to certify facts.

(k) A notarial officer may subsequently correct any information included or omitted from a certificate of a notarial act or an electronic notarial certificate executed by the notarial officer.

(l) Changes or corrections may never be made to the impression of an official seal.

SECTION 61. IC 33-42-17-7, AS ADDED BY P.L.59-2018, SECTION 64, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 7. (a) An electronic notarial certificate of a remote notarial act must:

(1) specify that the notarial act is a remote notarial act;

(2) include a space in which a remote notary public may indicate whether the principal in the remote notarial act appeared before the remote notary public under section 4(a)(1) or 4(a)(2) of this chapter; and

(3) specify the:

(A) city and county in Indiana in which the remote notary public is physically located when the remote notary public performs the remote notarial act; and

(B) city, county, state or province, and country in which the principal is physically located when the principal signs the document.

(b) Completion of either of the following forms satisfies the requirements of this section **where a principal appears before a remote notary public:**

"State of Indiana
County of_____
City of_____
I certify that the attached or associated electronic record entitled_____ and dated_____ was signed by the 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.
Signed_____, remote notary public.
Printed name of remote notary public_____
Date notary public commission expires_____".

"State of Indiana
County of_____
City of_____
I certify that the attached or associated electronic record entitled_____ and dated_____ was acknowledged and signed by the 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.
Signed_____, remote notary public.
Printed name of remote notary public _____
Date notary public commission expires_____".

SECTION 62. IC 33-42-17-12, AS ADDED BY P.L.59-2018, SECTION 64, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 12. ~~(a) An individual performing a notarial act as described in IC 33-42-9-8, IC 33-42-9-9, IC 33-42-9-10, or IC 33-42-9-11 may not perform the notarial act as a remote notarial act unless:~~

~~(1) the individual performing the remote notarial act is:~~

~~(A) a notary public commissioned by the secretary of state under IC 33-42-2; and~~

~~(B) registered as a remote notary public under section 2 of this chapter;~~

~~(2) the remote notarial act is performed in accordance with this chapter; and~~

~~(3) the individual performing the remote notarial act complies with this chapter.~~

~~(b)~~ A remote notarial act performed in accordance with this chapter is considered to have been performed in Indiana, regardless of the physical location of the principal at the time the remote notarial act is performed.

SECTION 63. IC 34-41-1-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 2. The circumstances under which seals are required on deeds and other instruments conveying land are governed by ~~IC 32-21-1-12 and~~ IC 34-37-1.

SECTION 64. IC 36-2-11-3, AS AMENDED BY P.L.127-2017, SECTION 71, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE

UPON PASSAGE]: Sec. 3. **(a)** The recorder shall keep the recorder's office in a building provided at the county seat by the county executive. The recorder shall keep the recorder's office open for business during regular business hours on every day of the year except Sundays and legal holidays. However, the recorder may close the recorder's office on days specified by the county executive according to the custom and practice of the county.

(b) If a county office is closed for three (3) or more business days pursuant to an executive order issued under IC 10-14-3, the county executive and the county recorder shall provide notice to the public on an Internet web site maintained by or on behalf of the county executive and the recorder. The notice must be provided to the public within five (5) business days of the executive order being issued. The notice may include information on how the public can submit documents to the recorder's office in paper, electronic, or digital formats and how payment must be provided for services rendered by a specific county office.

(c) A county office's failure to comply with subsection (b) shall not:

(1) invalidate any instrument submitted to the recorder pursuant to:

(A) IC 29-1-7-23(d);

(B) IC 32-21; or

(C) this chapter; or

(2) subject the recorder, the recorder's office, or any county office personnel to civil liability under IC 34-13-3 or any other provision of Indiana law.

SECTION 65. IC 36-2-11-16, AS AMENDED BY P.L.129-2008, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 16. (a) This section does not apply to:

(1) an instrument executed before November 4, 1943;

(2) a judgment, order, or writ of a court;

(3) a will or death certificate; or

(4) an instrument executed or acknowledged outside Indiana.

(b) Whenever this section prescribes that the name of a person be printed, typewritten, or stamped immediately beneath the person's signature, the signature must be written on the instrument, directly preceding the printed, typewritten, or stamped name, and may not be superimposed on that name so as to render either illegible. However, the instrument may be received for record if the name and signature are, in the discretion of the county recorder, placed on the instrument so as to render the connection between the two apparent.

(c) Except as provided in subsection (d), the recorder may receive for record an instrument only if all of the following requirements are met:

(1) The name of each person who executed the instrument is legibly printed, typewritten, or stamped immediately beneath the person's signature or the signature itself is printed, typewritten, ~~or~~ stamped, **or logically associated with the instrument.**

(2) The name of each witness to the instrument is legibly printed, typewritten, or stamped immediately beneath the signature of the witness or the signature itself is printed, typewritten, ~~or~~ stamped, **or logically associated with the instrument.**

(3) The name of each ~~notary public~~ **notarial officer** whose signature appears on the instrument is legibly printed, typewritten, or stamped immediately beneath the signature of the ~~notary public~~ **notarial officer** or the signature itself is printed, typewritten, ~~or~~ stamped, **or logically associated with the instrument.**

(4) The name of each person who executed the instrument appears identically in the body of the instrument, in the acknowledgment or ~~jurat,~~ **proof (as defined in and permitted under IC 32-21-2)** in the person's signature, and beneath the person's signature.

(5) The execution of the instrument and the acknowledgment or proof (as defined in and permitted under IC 32-21-2), complies with IC 33-42.

~~(5)~~ **(6)** If the instrument is a copy, the instrument is marked "Copy".

(d) The recorder may receive for record an instrument that does not comply with subsection (c) if all of the following requirements are met:

(1) A printed or typewritten affidavit of a person with personal knowledge of the facts is recorded with the instrument.

(2) The affidavit complies with this section.

(3) The affidavit states the correct name of a person, if any, whose signature cannot be identified or whose name is not printed, typewritten, or stamped on the instrument as prescribed by this section.

(4) When the instrument does not comply with subsection (c)(4), the affidavit states the correct name of the person and states that each of the names used in the instrument refers to the person.

(5) If the instrument is a copy, the instrument is marked "Copy".

(e) The recorder shall record a document presented for recording or a copy produced by a photographic process of the document presented for recording if:

(1) the document complies with other statutory recording

requirements; and

(2) the document or copy will produce a clear and unobstructed copy.

(f) An instrument, document, or copy received and recorded by a county recorder is conclusively presumed to comply with this section. A recorded copy shall have the same effect as if the original document had been recorded.

SECTION 66. **An emergency is declared for this act.**

Speaker of the House of Representatives

President of the Senate

President Pro Tempore

Governor of the State of Indiana

Date: _____ Time: _____

APPENDIX II

First Regular Session of the 122nd General Assembly (2021)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type.~~

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 2020 Regular Session of the General Assembly.

HOUSE ENROLLED ACT No. 1056

AN ACT to amend the Indiana Code concerning property.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 32-21-2-1.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 1.5. As used in this chapter, "instrument" means:**

(1) an electronic document as defined in IC 32-21-2.5-3; or

(2) any paper document as defined in IC 32-21-2.5-8(a);

that is submitted to a county recorder for recording under IC 29-1-7-23(d), IC 32-21-2, IC 32-21-2.5, IC 32-21-3, IC 32-21-4, IC 32-21-8-7(b), or IC 36-2-11.

SECTION 2. IC 32-21-2-1.7 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 1.7. As used in this chapter, "proof", with respect to a notarial act, means a proof:**

(1) under common law; or

(2) where the witness:

(A) appears before a notarial officer;

(B) was personally known by the notarial officer or identified by the notarial officer through satisfactory evidence;

(C) was not a party to, or a beneficiary of, the record being signed by the principal and the witness; and

(D) took an oath or gave an affirmation and testified to the

following:

(i) The witness signed the record.

(ii) The witness identified the principal who signed the record.

(iii) The witness personally observed the principal sign the same record that the witness signed.

SECTION 3. IC 32-21-2-3, AS AMENDED BY P.L.80-2020, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3. ~~(a) Except as provided in subsection (c), a conveyance, a mortgage, or an instrument of writing to be recorded must be:~~

~~(1) acknowledged by the grantor; and~~

~~(2) proved before a:~~

~~(A) judge;~~

~~(B) clerk of a court of record;~~

~~(C) county auditor;~~

~~(D) county recorder;~~

~~(E) notary public;~~

~~(F) mayor of a city in Indiana or any other state;~~

~~(G) commissioner appointed in a state other than Indiana by the governor of Indiana;~~

~~(H) minister, charge d'affaires, or consul of the United States in any foreign country;~~

~~(I) clerk of the city county council for a consolidated city, city clerk for a second class city, or clerk-treasurer for a third class city;~~

~~(J) clerk-treasurer for a town; or~~

~~(K) person authorized under IC 2-3-4-1.~~

(a) Any instrument to be recorded must have one (1) of the following notarial acts:

(1) An acknowledgment (as defined in IC 33-42-0.5-2).

(2) A proof.

(b) A notarial act described in subsection (a)(1) must be performed:

(1) by a notarial officer (as defined in IC 33-42-0.5-19);

(2) by a remote notary public (as defined in IC 33-42-0.5-27); or

(3) in compliance with:

(A) IC 33-42-9-8;

(B) IC 33-42-9-9;

(C) IC 33-42-9-10; or

(D) IC 33-42-9-11.

(c) The notarial act described in subsection (a)(2) must be performed:

(1) by a notarial officer (as defined in IC 33-42-0.5-19); or

(2) in compliance with:

(A) IC 33-42-9-8;

(B) IC 33-42-9-9;

(C) IC 33-42-9-10; or

(D) IC 33-42-9-11.

~~(b)~~ **(d)** In addition to the requirements **specified** under **subsections (a) and (b), an instrument** ~~subsection (a), a conveyance~~ may not be recorded ~~after June 30, 2007,~~ unless it meets the requirements **of:**

(1) this article;

(2) the notarial requirements for an acknowledgment or for a proof; and

(3) IC 36-2-11. ~~of this subsection. The conveyance~~

(e) A conveyance must include a statement containing substantially the following information:

"The mailing address to which statements should be mailed under IC 6-1.1-22-8.1 is [insert proper mailing address]. The mailing address of the grantee is [insert proper mailing address].".

The mailing address for the grantee must be a street address or a rural route address. A conveyance complies with this subsection if it contains the address or addresses required by this subsection at the end of the conveyance and immediately preceding or following the statements required by IC 36-2-11-15.

~~(c) This section does not apply to the Indiana department of transportation.~~

(f) If the instrument is executed in a foreign country, where the instrument, its acknowledgment, or its proof is in a language other than English, the instrument must include a translation from the other language into English.

SECTION 4. IC 32-21-4-0.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 0.5. For purposes of section 1 of this chapter, the general assembly makes the following findings:**

(1) It is in the public interest for any conveyance, as defined in section 1(a) of this chapter, and any mortgage recorded in the office of the Indiana county recorder to not be attacked due to technical deficiencies.

(2) The ability to rely upon documents indexed and recorded in the public land records of an Indiana county recorder provides stability to the ownership of Indiana real property

and to Indiana's statewide and local real estate economies.

(3) Making or keeping these subsections in section 1 of this chapter, retroactive will not upset any vested substantive rights, liabilities, or duties.

(4) This section is intended to express the original legislative intent of IC 32-21-4-1 more clearly.

SECTION 5. IC 32-21-4-1, AS AMENDED BY P.L.236-2015, SECTION 7, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 1. (a) ~~The following~~ **As used in this section, "conveyance" means an electronic document as defined in IC 32-21-2.5-3 or a paper document as defined in IC 32-21-2.5-8(a) that is:**

(1) a deed or other instrument concerning land or an interest in land, except a last will and testament;

(2) a lease or memorandum of lease for a term exceeding three (3) years;

(3) a transfer on death deed as defined under IC 32-17-14-3(16) or an affidavit pursuant to IC 32-17-14-26(b)(20); or

(4) a land contract or a memorandum of land contract for the sale and purchase of land.

(b) A conveyance or mortgage must be recorded in the recorder's office ~~of~~ **in** the county where the land is ~~situated.~~ **located.**

~~(1) A conveyance or mortgage of land or of any interest in land.~~

~~(2) A lease for more than three (3) years.~~

~~(b)~~ **(c)** A conveyance **or** mortgage ~~memorandum of lease, or lease~~ takes priority according to the time of its ~~filing~~ **recording.** The conveyance **or** mortgage ~~memorandum of lease, or lease~~ is fraudulent and void as against any subsequent purchaser, lessee, or mortgagee in good faith and for a valuable consideration if the purchaser's, lessee's, or mortgagee's deed, mortgage, or lease is first recorded.

~~(c)~~ **(d)** This subsection applies regardless of when an instrument is recorded. If:

(1) an instrument ~~referred to in subsection (a)~~ is recorded; and

(2) the instrument: ~~does not comply with the:~~

(A) **does not comply with the** requirements of:

(i) IC 32-21-2-3, **including whether there was both an acknowledgment and proof on the instrument;** or

(ii) IC 32-21-2-7; ~~or~~

(B) **does not comply with the** technical requirements of IC 36-2-11-16(c);

(C) was executed and included an acknowledgment

executed pursuant to the terms of any executive order issued by the governor or an order of the supreme court; or

(D) was recorded and indexed by a county recorder as an electronic record (as defined in IC 26-2-8-102);

the instrument is validly recorded and provides constructive notice of the contents of the instrument as of the date of ~~filing~~ **recording.**

SECTION 6. **An emergency is declared for this act.**

Speaker of the House of Representatives

President of the Senate

President Pro Tempore

Governor of the State of Indiana

Date: _____ Time: _____

Hot Tips on Recent Legislation Regarding Will Executions

ICLEF 2021 Hot Tips in Estate, Trust & Probate Practice
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The views expressed herein are solely those of the author and should not be construed as legal advice.

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Hot Tips Roadmap

1. Execution of Wills
2. Wills: Affidavits of Compliance and Updated Self-Proving Clauses
3. Execution of Trusts
4. Execution of Powers of Attorney
5. Other Planning Related Document Execution Changes

1. Execution of Wills

- The Law's Response to Technology Advancements:
  - Increasing use of Electronic Wills
  - New definitions of "presence," "observe" and variations thereof
  - Expanded Responsibilities of counsel and the "directed paralegal in Supervising Remote Executions
- The "Counterpart" Will ~ special rules

….1. Execution of Wills

New **IC 29-1-21-4.1 Wills executed in reliance on Supreme Court order**

Sec. 4.1. (a) This section applies to a will or codicil that is electronically signed and witnessed:

(1) on or after March 31, 2020;

(2) before January 1, 2021; and

(3) in reliance on the Indiana Supreme Court's order signed and filed on March 31, 2020, under case number 20S-MS-237, as supplemented or extended by the supreme court's order signed and filed on May 1, 2020, under case number 20S-MS-237, and by the supreme court's orders signed and filed on May 29, 2020, and November 10, 2020, under case number 20S-CB-123.

….1. Execution of Wills

….New **IC 29-1-21-4.1 Wills executed in reliance on Indiana Supreme Court order**

(b) Notwithstanding any other law or provision, a will or codicil described in subsection (a) that was electronically signed and witnessed in compliance with:

(1) the procedures and requirements set forth in the Indiana supreme court's order signed and filed on March 31, 2020, under case number 20S-MS-237 and as supplemented or extended by the supreme court's order signed and filed on May 1, 2020, under case number 20S-MS-237 and by the supreme court's order signed and filed on November 10, 2020, under case number 20S-CB-123; or

(2) the procedures and requirements set forth in section 4 of this chapter;

does not need to be re-executed or re-ratified in compliance with the witnessing procedures specified under section 4 of this chapter or IC 29-1-5-3 as they existed on June 30, 2020.

(c) A proponent who offers an electronic will for probate may demonstrate prima facie compliance with subsection (b) by relying on the contents of a self-proving clause or by describing compliance in a verified petition under IC 29-1-7-4. A person contesting the validity of an electronic will described in subsection (b) has the burden of proving noncompliance with subsection (b).

2. Wills ~ Affidavits of Compliance

- Required with Counterpart Wills and Electronic Wills
- Must Be Completed within a “reasonable time” of execution
- The attorney or directed paralegal must be the party completing the document.
- Failure to complete this could come back to haunt counsel.

2. Wills ~ Affidavits of Compliance

Required Information in Affidavit of Compliance Relating to Execution of Will:

Note applicability to Electronic vs. Counterpart Wills below.

1. Name and residence address of testator.

2. The name and residential address or business address for each witness who signs the will.

3. The address, city, and state in which the testator was physically located at the time the testator signed [the electronic will] or [an original counterpart of the will].

4. The city and state in which each attesting witness was physically located when the witness signed [the electronic will] or [an original counterpart of the will] as a witness.

5. A description of the method and form of identification used to confirm the identity of the testator to the witnesses and to the supervising attorney or directed paralegal, as applicable.

….2. Wills ~ Affidavits of Compliance

6. A description of the audiovisual technology or other method used by the supervising attorney or paralegal, as applicable, the testator, and the witnesses for the purpose of interacting with each other in real time during the signing process.

7. a brief description of the method used to add or capture the electronic signature of the testator and the witnesses.

7. A description of the method used by the testator and the witnesses to identify the location of each page break within the text of the will and to confirm that the separate paper counterparts of the will were identical in content.

8. A general description of how and when the attorney or “directed paralegal”, as applicable, physically combined the separate, signed paper counterparts of the will into a single composite paper document containing the will, the signature of the testator, and the signatures of all attesting witnesses.

….2. Wills ~ Affidavits of Compliance

8. or 9. The name, business or residence address, and telephone number of the attorney or directed paralegal who supervised the execution and witnessing of [the electronic will] *or* [the will in counterparts].

9. or 10. Any other information that the supervising attorney or directed paralegal, as applicable, considers to be material with respect to: (A) the testator's capacity to sign a valid will; and (B) the testator's and witnesses' compliance with [IC 29-1-21-4(a)] *or* [IC 29-1-5-3(c)].

Sworn or affirmed by the signing attorney or directed paralegal under the penalties of perjury.

….2. Wills ~ Self-Proving Clauses: Counterpart Wills

Under new subsection (e) of IC 29-1-5-3.1, if the testator and the attesting witnesses executed the will in two (2) or more counterparts on paper…, then the self-proving clause, if applicable, for the will must substantially be in the following form:

"We, the undersigned testator and undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument, declare the following:

(1) That the undersigned testator and witnesses interacted with each other in real time through the use of technology, and each witness was able to observe the testator and other witnesses throughout the signing process.

(2) That the testator executed a complete counterpart of the instrument, in a readable form on paper, as the testator's will.

(3) That, in the presence of both witnesses, the testator:

(A) signed the paper counterpart of the will;

(B) acknowledged the testator's signature already made; or

(C) directed another individual to sign the paper counterpart of the will for the testator in the testator's presence.

….2. Wills ~ Self-Proving Clauses (Counterpart Wills)

(4) That the testator executed the will as a free and voluntary act for the purpose expressed in the will.

(5) That each of the witnesses, in the presence of the testator and of each other, signed one (1) or more other complete paper counterparts of the will as a witness.

(6) That each paper counterpart of the will that was signed by the witness was complete, in readable form, and with content identical to the paper counterpart signed by the testator.

(7) That the testator was of sound mind when the will was executed.

(8) That, to the best knowledge of each witness, the testator was at least eighteen (18) years of age at the time the will was executed or was a member of the armed forces or of the merchant marine of the United States or its allies.".

….2. Wills ~ Self-Proving Clauses (Electronic Wills)

Under subsection (f) of IC 29-1-21-4, if the testator and the attesting witnesses executed the will in two (2) or more counterparts on paper…, then the self-proving clause, if applicable, for the will must substantially be in the following form:

"We, the undersigned testator and the undersigned witnesses, whose names are signed to the attached or foregoing instrument, declare:

(1) That the testator executed the instrument as the testator's will;

(2) That, in the presence of both witnesses, the testator signed the will or directed another individual who is not one of the witnesses to sign for the testator in the testator's presence and in the witnesses' presence;

(3) That the testator executed the will as a free and voluntary act for the purposes expressed in it;

(4) That each of the witnesses, in the presence of the testator and each other, signed the will as a witness;

(5) That the testator was of sound mind when the will was executed; and

(6) That, to the best knowledge of each attesting witness, the testator was, at the time the will was executed, at least eighteen (18) years of age or was a member of the armed forces or of the merchant marine of the United States or its allies.

3. Execution of Trusts

HEA 1255 amends the Trust Code [*IC 30-4-1.5-4* (electronic trust instruments) and *IC 30-4-2-1* (trust instruments signed on paper) to prohibit the following persons from signing the trust instrument at the settlor's direction:

- A trustee named in the trust instrument.
- A relative of the settlor.
- A person who is entitled to receive a beneficial interest in the trust assets or a power of appointment under the terms of the trust.

….3. Execution of Trusts

If settlor’s signature is placed on the trust instrument by an eligible individual who signs for the settlor and at the settlor’s direction, the trust instrument must state that the signer is not in any of the above three categories.

4. Execution of Powers of Attorney

Highlights of HEA 1255 Changes to Indiana's Powers of Attorney Statute (IC 30-5):

- New IC 30-5-4-1.3 permits using the signatures of two or more attesting witnesses in lieu of a notarized acknowledgement.
- New IC 30-5-4-1.5 specifies the signing procedures required when a durable POA is signed on paper with two attesting witnesses instead of a notary. [similar concept of counsel or directed paralegal supervising process with counterpart documents]
- Optional Self-proving clauses with two attesting witnesses permitted in lieu of notary (under new IC 30-5-4-1.7).
- Audio and/or video recordings or photographs made during part or all of the POA execution is admissible evidence to demonstrate validity and compliance with signing formalities (under new IC 30-5-4-1.9).

….4. Execution of Powers of Attorney

- For electronic POA signings, the statute permits electronic signing in the presence of a notary or in the presence of two witnesses (IC 30-5-11-4).
- Like the Probate Code changes regarding electronic wills, for durable POAs that are signed electronically, definitions of “observe” and “observing” (added to IC 30-5-11-3) were added to the statute where interaction through the use of audiovisual technology now known or later developed is used in electronic signing situations.

5. Other Document Execution Changes

House Bill 1056 addresses corrective amendment to Title 32 regarding recordable instruments.

- New IC 32-21-2-1.5 adds a broad definition of “instrument” including electronic documents as used in document recording statutes.
- New IC 32-21-2-1.7 adds a detailed definition of “proof” regarding notarial acts (new IC 32-21-2-1.7).

Sec. 1.7. As used in this chapter, "proof", with respect to a notarial act, means a proof:

(1) under common law; or

(2) where the witness: (A) appears before a notarial officer; (B) was personally known by the notarial officer or identified by the notarial officer through satisfactory evidence; (C) was not a party to, or a beneficiary of, the record being signed by the principal and the witness; and (D) took an oath or gave an affirmation and testified to the following: (i) The witness signed the record; (ii) The witness identified the principal who signed the record; and (iii) The witness personally observed the principal sign the same record that the witness signed.

….5. Other Document Execution Changes

….House Bill 1056 addresses corrective amendment to Title 32 regarding recordable instruments.

- Revision and Restructuring of Notarial Act Statute (IC 32-21-2-3) to address proof or acknowledgement requirements, and provides that if a recordable instrument is signed in a foreign country and if the acknowledgement or proof is not in English, then the instrument must include a translation into English.
- Revisions and Clarifications of Recording Statute pertaining to conveyances and mortgages (IC 32-21-4-1), expanding scope of “conveyances” to include TOD deeds, land contracts or land contract memoranda, transfer affidavits, and other non-testamentary instruments “concerning land or an interest in land,” (in addition to previous categories of deeds, mortgages, and leases for more than 3 years), including electronic records.

….5. Other Document Execution Changes

….House Bill 1056 addresses corrective amendment to Title 32 regarding recordable instruments.

- Specifically provides that the new changes to the recording statute discussed above are intended to express the original legislative intent more clearly and will not upset any vested substantive rights (new IC 32-21-4-0.5). In essence this change deals with the potential situation of an instrument recorded prior to the effective date of the legislation which was not in technical compliance with the prior statute at that time (but conforms to the requirements of the current statute).

Thank you.

RONALD M. KATZ is a co-founding partner of KATZ KORIN CUNNINGHAM PC and leads the firm's tax, estate planning, and business succession planning practice. Additional information about the firm can be found on the firm's website, www.kkclegal.com.

Section Nine

RECENT ESTATE

AND

TRUST CASES

ICLEF

DECEMBER 2021

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Section Nine

Recent Estate and Trust Cases…….MaryEllen K. Bishop

PROBATE

WILL – CONSTRUED – GIFT OR OPTION TO PURCHASE. *Schaefer v. Estate of Cletus P. Schaefer*, 167 N.E.3d 1173 (Ind. Ct. App. 2021). Cletus Schaefer ("Cletus") had four children: Joy, Jill, Donald, and Kenneth. Cletus executed a Last Will and Testament and three codicils. This case involves the language in the third codicil ("Third Codicil"). Cletus and Kenneth jointly owned Schaefer & Schaefer, LLC. and Cletus and Kenneth owned the farm real estate as joint tenants with rights of survivorship.

The language of the Third Codicil stated "unto my son, Kenneth J. Schaefer, I bequeath the following: all my interest and ownership in Schaefer and Schafer, LLC, any and all farm machinery, tools and farm vehicles, all conditioned upon said Kenneth paying unto my estate the sum of one thousand Dollars ($1,000.00) per acre for the approximate 240 acres more specifically described in Deeds bearing instrument numbers 2009R-03979 and 2009R-03980 which said sum shall be paid within five (5) calendar months from the date of my estate being opened for administration, and I hereby direct my Co-Executrixes to distribute said sum unto my daughters, Joy Brock and Jill Mehling, and my son, Donald Schaefer, share and share alike equally as joint tenants with rights of survivorship and not as tenants in common. Should my son, Kenneth, not fully perform this condition precedent, then, and upon that event, farm machinery, tools, farm vehicles, and my interest in Schaefer and Schaefer, LLC shall be sold and the proceeds shall be divided equally, share and share alike among my four (4) children as joint tenants with rights of survivorship and not as tenants in common."

When Cletus died, the title to the real estate referenced above vested in Kenny automatically by virtue of joint title on the deeds. Within five months of Cletus' death, Kenneth paid the monies as directed under the Third Codicil and the Estate accepted the payment.

The Personal Representatives filed a Petition for Beneficiary Kenneth Schaefer to Disclose Assets, Respond to Discovery Request, and Permit Appraisal of the assets owned by the LLC and held by Kenneth. Kenneth objected arguing that the Personal Representatives of the Estate were not entitled to proceed with the collection and investment of the various farm equipment because Kenneth purchased the equipment in question under the terms of the Third Codicil three years prior. The Personal Representatives took the position that Kenneth's payment pursuant to the Third

Codicil was a condition precedent to the vesting of a specific bequest of the stated assets (farm machinery, tools and farm vehicles instead of option to purchase, and that paying the required $1,000.00 per acre he purchased his bequest free and clear of any claim by the beneficiaries.

The trial court declared that Cletus' intent from the language the Third Codicil was to provide a gift to Kenneth that was contingent upon the satisfaction of the condition precedent. Accordingly, the property covered by paragraph D (2) of the Third Codicil was subject to abatement and the Personal Representatives were authorized to conduct discovery regarding the property. Kenneth appealed.

On appeal, Kenneth argued that the trial court erred when it held the language created a gift; contending the language created an option to purchase. If the language created a gift, the property was still part of the estate, and subject to abatement. If the language created an option to purchase, Kenneth would own the property free and clear and it is not subject to abatement for debts of the estate. The Court of Appeals identified the issue to be the interpretation of the language to evince Cletus' intent to bequeath a gift or as an option to purchase. The Court of Appeals analyzed the amount Kenneth paid pursuant to that language, and noted it was not the market value of the property at the time Kenneth purchased it. Relying on *Drake v. Old Nat'l Trust Co*., 871 N.E.2d 352, 355 (Ind. Ct. App. 2007), reh'g denied, trans. denied., the Court described an option to purchase when the party may purchase something at its appraised value, not at a greatly reduced price. The Court reached its decision that the portion Kenneth paid for, $277,500, was a testamentary option to purchase and the remaining value of the property was a testamentary gift.

WRONGFUL DEATH – GRANDSON – PERSONAL REPRESENTATIVE OF FATHER'S ESTATE- RIGHT TO PURSUE. *Johnson v. Harris,* 176 N.E.3d 252 (Ind. Ct. App. 2021). In 2013, the two-year-old son of BobbyNicley (Father) and Michelle Nicley (Mother), drowned in the backyard swimming pool of the **Harris'** (Maternal Grandparents). Mother soon filed for divorce from Father. Father retained a lawyer to discuss a possible wrongful death lawsuit against Maternal Grandparents. A dissolution decree was entered ending Mother and Father's marriage. Father died four days later. Paternal Grandmother, as PR of Father's (her son's) estate, brought a wrongful death action for the death of her grandson under the Child Wrongful Death Statute (CWDS) contained in I.C.§ 34-23-2-1. The trial court granted Maternal Grandparent's motion for summary judgment and Paternal Grandmother appealed.

Maternal Grandparents and Mother alleged that the CWDS does not authorize the Paternal Grandmother to file a wrongful death action and that the Mother was entitled to parental immunity. The Court of Appeals noted that wrongful death actions are purely statutory and therefore the statutes must be strictly construed. The CWDS provides in relevant part under Ind. Code § 34-23-2-1:

> (c) An action may be maintained under this section against the person whose wrongful act or omission caused the injury or death of a child. The action may be maintained by:
>
> (1) the father and mother jointly, or either of them by naming the other parent as a codefendant to answer as to his or her interest;
>
> (2) in case of divorce or dissolution of marriage, the person to whom custody of the child was awarded; and
>
> (3) a guardian, for the injury or death of a protected person.
>
> (d) In case of death of the person to whom custody of a child was awarded, a personal representative shall be appointed to maintain the action for the injury or death of the child.
>
> (e) In an action brought by a guardian for an injury to a protected person, the damages inure to the benefit of the protected person.

Paternal Grandmother claims her authority to sue under the CWDS arose under subsection (d) of Ind. Code § 34-23-2-1, in conjunction with Indiana Code § 29-1-13-3. Indiana Code § 29-1-13-3 provides that a personal representative has power to maintain any suit, in his name as such personal representative, for any demand of whatever nature due the decedent or his estate.... Maternal Grandparents argued that Father was never granted custody so subsection (d) could not apply, and that subsection (d) would only allow a PR to continue an action already filed. The Court of Appeals, in affirming the decision of the trial court reasoned that "strictly construed, the plain language of the CWDS authorizes three categories of people to "maintain"a child wrongful death lawsuit: 1) parents; 2) the child's guardian; and 3) the personal representative of the estate of a person who had been awarded custody of the child. I.C. § 34-23-2-1(c), (d). To avoid any violation of a non-custodial parent's right to equal protection under the Fourteenth Amendment,

we have interpreted the CWDS "to permit non-custodial parents [as well as custodial parents] standing to bring an action for the wrongful death of a child," despite contrary language in the CWDS. *Chamness v. Carter,* 575 N.E.2d 317, 319-21 (Ind. Ct. App. 1991) (interpreting an earlier version of the child wrongful death statute, then codified as Indiana Code § 34-1-1-8)."

"Father had a right under the CWDS to file a wrongful death lawsuit during his lifetime. I.C. § 34-23-2-1(c). However, Father's right to file the lawsuit for the wrongful death of his child expired at Father's death under the CWDS. I.C. § 34-23-2-1(c). As neither Father nor Mother ever filed a wrongful death lawsuit against Maternal Grandparents, Maternal Grandparents owed nothing to either Father or his estate as a result of son's death. Therefore, Paternal Grandmother, as personal representative of Father's estate, had nothing to collect from Maternal Grandparents under Indiana Code § 29-1-13-3." Judgment affirmed.

GUARDIAN – POWERS AFTER DEATH – CHECK – ESTATE PLANNING. *In re Donnell Lee Roberts*, 169 N.E.3d 148 *(*Ind. Ct. App. 2021). Frady and Roberts were longtime friends. They opened a joint checking account with Greenfield Banking Company ("Greenfield Bank"). Several months later, Frady petitioned for appointment as guardian over the person and estate of Roberts with Roberts consent. Merrill Lynch issued Roberts a required minimum distribution check ("RMD Check") from his Individual Retirement Rollover Account in the amount of $145,754.33.

After Roberts received the RMD Check, he prepared a deposit ticket, and gave the check and the deposit slip to Frady. Before Frady and Roberts could get to the bank that week Roberts passed away. Frady deposited the RMD Check in the joint Greenfield Bank account on the same day that Roberts died. Roberts died intestate, but Roberts and his attorney had discussed writing a will in which Roberts intended to leave almost everything to Frady. However, the attorney never drafted anything for Roberts.

An Estate was opened for Roberts, and his nephew was appointed as Personal Representative. Frady submitted a final accounting in the guardianship and a petition to approve the final accounting. The Estate filed objections to the final accounting in the guardianship, including an objection to the deposit of the RMD Check after Roberts' death, claiming that the RMD Check became an asset of the Estate when Roberts died.

Nearly a year after Roberts' death, Frady filed a request for authority to exercise estate planning powers: the first requested authority to change the beneficiary designation on a Merrill Lynch bank account containing over $700,000; and for authority to make gifts on behalf of Roberts. The following day, without holding a hearing, the trial court denied both petitions. The trial court held a hearing on the petition to approve the final accounting and the Estate's objections. The trial court concluded, in part, that: "The RMD Check was received by [Roberts] prior to his death, and Merrill Lynch reflected the RMD Check funds as having been withdrawn from the Merrill Lynch IRRA on November 17, 2017. The Guardian Final Accounting also reflects the disbursement of the RMD Check funds on November 17, 2017, from the Merrill Lynch IRA, and the corresponding addition to the Greenfield Bank Account ending in 1415 on November 22, 2017. Frady testified at the hearing that Roberts had not endorsed the check at the time of his death. The RMD Check funds became an asset of the Estate at the time of Roberts's passing, and Frady as guardian was required to deliver the RMD Check to the representative of the Estate, pursuant to IC 29-3-12-1(e)(1) (B)." Frady appealed arguing that the deposit of the check was valid and that the trial court should have held a hearing on estate planning for Roberts.

The Court of Appeals held that even though a Guardian's powers cease upon the protected person's death, the guardian may "exercise other powers that are necessary to complete the performance of the guardian's trust." Ind. Code § 29-3-12-1(e)(1)(A). The Court found that the record was clear that Roberts gave Frady the RMD check to be deposited in the Greenfield Bank account. The fact that the account was jointly owned by Roberts and Frady was a coincidence, and did not negate the fact that depositing the check constituted the completion, as guardian, of a task entrusted to him. The Court concluded that Frady depositing a check as instructed after the death of Roberts falls within the purview of Indiana Code section 29-3-12-1(e)(1)(A). Therefore, the trial court erred in sustaining the Estate's objection regarding the RMD check. As to estate planning for Roberts, the Court held that upon Roberts' death and the termination of the guardianship, the guardian's ability to estate plan does not constitute an action necessary to "complete the performance of the guardian's trust." The court concluded that the trial court was not required to hold a hearing prior to dismissing Frady's petition to exercise estate planning.

TRUST

FRAUDULENT TRANSFERS – BADGES OF FRAUD. *Mandir Trust v. Mich. City, 170 N.E.3d 247 (*Ind. Ct. App. 2021). This case involves efforts by Michigan City to satisfy default judgments against Sheonarayan and Jaidevi for incurred and future investigation and remediation costs associated with property where the Erincraft Manufacturing facility operated (the "Erincraft Property"). In 1985, the President of Erincraft Enclosures, Inc., filed an "Assumed Business Name Certificate" for Erincraft Manufacturing Co. located on the Erincraft Property. The certificate named twelve partners, including three of Sheonarayan and Jaidevi's children; Sheela, Srawan and Anil, who resided in Michigan City. Srawan and Anil conveyed the Erincraft Property to Jaidevi in 1994. In August 2001, Sheonarayan executed a deed as "settler" establishing a public trust in the name of his deceased mother, with its registered office in India. Twelve originating trustee members, including Sheonarayan and Anil, signed the deed which indicated that Sheonarayan was to serve as the first managing trustee. In 2003, the Redevelopment Commission authorized an environmental assessment at the Erincraft Property. The assessment revealed soil and groundwater contamination above the default closure concentrations. In 2006, Michigan City obtained ownership of the Erincraft Property from Jaidevi through court action. In 2009, Jaidevi, Sheonarayan, and the trust, signed an agreement written in Hindi which, when translated into English, indicated that Jaidevi and Sheonarayan were "in need of money for [their] personal matters" and addressed the transfer to the trust of eight parcels of property in LaPorte County (the "Parcels") purportedly owned and possessed by them, including their primary residence. On July 20, 2015, Michigan City filed a complaint against several prior owners and operators, including Jaidevi, Erincraft, Inc., to recover costs associated with investigating and remediating the properties. On August 3, 2015, Jaidevi deeded the Parcels to Sheonarayan, and Srawan served as a witness. On December 4, 2017, the court entered a default judgment against Jaidevi and held her liable for Michigan City's incurred and future investigation and remediation costs, prejudgment interest, and reasonable attorney fees and expenses. On June 4, 2019, Michigan City sought to add Sheonarayan as a new defendant, as well as Srawan, Anil, and various Erincraft entities. The court granted the motion, as well as Michigan City's motion for leave to serve by publication, indicating it had attempted to serve Sheonarayan by certified mail in August and that the summonses and complaint were returned unserved. In September 2019, Sheonarayan recorded a notarized Indiana general warranty deed purporting to convey seven of the Parcels, including their

residence, to the trust and Jaidevi recorded a notarized Indiana general warranty deed purporting to convey the eighth Parcel to the trust. On March 20, 2020, the trust manager filed a response to the motion to set aside fraudulent transfers, providing a spreadsheet that listed purported payment amounts, dates, and check numbers and an affidavit stating the trust purchased the property. On July 31, 2020, the court held a hearing. The trust was represented by counsel, but neither Jaidevi nor Sheonarayan appeared by counsel or in person. The court heard arguments from Michigan City and the trust and took the matter under advisement. On September 3, 2020, the trial court entered its order granting Michigan City's Motion to Set Aside Fraudulent Transfers as voidable under I.C. 32-18-2-14 (Indiana UFTA).

The Court of Appeals affirmed. The decision includes a thorough discussion of the Indiana UFTA. In support of their finding that the trial court did not commit error, the Court concluded there was an absence of sales disclosure forms or other documents proving the payment of consideration, and therefore a reasonable factfinder could conclude the trust was not a good faith purchaser of the Parcels for reasonably equivalent value. Further, the evidence failed to reveal any receipts, cancelled checks, or other documentary evidence indicating that any payments, including the $10.00 initial payment, have, in fact, been made, or that the balance due has been paid in full. "This lack of evidence gives rise to the reasonable inference, as the trial court concluded, that 'there was no consideration."

TRUSTEE – BREACH – DAMAGES – FEES. *Zartman v. Zartman, 168 N.E.3d 770 (*Ind. Ct. App. 2021). William Zartman Jr. ("William Jr.") and Marilyn Zartman were married and had three children: William III, Brenda, and Paul. William Jr. and Marilyn owned a 303-acre farm in Miami County and Fulton County. In 1980, William Jr. and Marilyn established the William Zartman Jr. Revocable Trust ("William Jr.'s Trust") and the Marilyn Zartman Revocable Trust ("Marilyn's Trust"). In 1993, William Jr. and Marilyn executed First Amendments to both trusts. This appeal concerns only Marilyn's Trust. This is the second appeal in this matter. The parties only have the first and last pages of Marilyn's Trust and were unable to locate a copy of the First Amendment to her Trust. William Jr. and Marilyn showed the First Amendment of their respective trusts to Paul shortly after the documents were signed. Paul read the documents, which were identical except for the names of the trusts, signatures, and the pronouns used in the documents. Paul saw the documents again in 2009. In a deposition, William III testified that the First

Amendment of William Jr.'s Trust and the First Amendment of Marilyn's Trust were identical except for the names.

By 2003, each trust owned a one-quarter interest in the farm, and William III and his wife, Kim, owned a one-half interest in the farm. Marilyn died in August 2004, and William Jr. died in February 2010. In March 2011, William III, as trustee of Marilyn's Trust, conveyed Marilyn's Trust's one-quarter interest in the farm to himself and his wife, Kim, as tenants in common. In the trustee's deeds, William III warranted that he was appointed the successor trustee under the trust and that, under the trust agreements, he had the "full power to execute" the trustee's deeds. William III and Kim immediately transferred the one-quarter interest in the farm to Zartman Farms, of which William III and Kim are member managers. William III and Kim warranted as Grantors in the deeds that they were lawfully seized of said land in fee simple; and that they had good right and lawful authority to sell and convey said land. The other family members filed a motion for summary judgment and argued, in part, that the March 2011 deeds conveying Marilyn's Trust's one-quarter interest in the farm to William III and Kim were void. In February 2018, the trial court denied the motion for summary judgment. The trial court determined that the content of Marilyn's Trust had to be resolved by a jury. The jury returned a verdict For William III and the siblings filed the first appeal.

On remand after the first appeal, it was determined that upon Marilyn's death, William Jr. and William III became co-trustees of Marilyn's Trust. Upon the death of William Jr., William III and Brenda became the co-trustees of Marilyn's Trust. Therefore, William III's transfer of Marilyn's Trust's interest in the farm to himself and his wife violated Indiana Code Section 30-4-3-4 because the power to transfer property was required to be exercised by the co- trustees jointly. The Trustee's Deeds dated March 14, 2011, were therefore null and void. On remand the trial court: (1) determined the content of Marilyn's Trust; (2) determined that William III committed breach of trust by transferring the property to himself; (3) voided the transfer of property; (4) ordered William III to pay for lost income to the trust; and (5) ordered William III to pay Appellees' attorney's fees. The trial court ordered the payment of $134,799.98 in lost income for 2011 to 2019. The trial court then ordered William III to pay reasonable attorney fees in the amount of $110,000.00 as a result of his breach of trust as authorized by Indiana Code Section 30-4-3-22(e), William III appealed that decision.

The Court of Appeals opinion contains a great review of Indiana law on breach of trust and remedies for breach of trust. The court reasoned that given the extraordinarily lengthy litigation, which involved complex issues, two summary judgment proceedings, a jury trial, and two appeals, we cannot say that the trial court abused its discretion when it awarded Appellees $110,000.00 in attorney's fees. Further, the trial court properly granted summary judgment to Appellees, voided the deeds at issue here, ordered Appellants to pay lost profits, and ordered William III to pay Appellees' attorney's fees. Judgment affirmed.

2019 Opinion CONTENTS – PROOF – BEST EVIDENCE RULE. *Zartman v. Zartman, 127 N.E.3d 242 (Ind. Ct. App. 2019). There were three children of the deceased: Brenda, Paul and William III. William Jr. operated a farm and, in later years William III worked the farm with his father. William Jr. and Marilyn each established revocable trusts. Each trust held one-quarter of the farm, and the remaining half of the farm had been transferred to William III. Marilyn died in August 2004, and William Jr. died in February 2010. Thereafter, William III, as a trustee of Marilyn's trust, transferred to himself the one-quarter of the farm held by her trust. Paul and Brenda first initiated litigation against William III in Florida after the death of William Jr., who was a resident of Florida. The Florida court determined that William III had committed a breach of the trust and removed William III as trustee. It also declared that it had no jurisdiction over Indiana real estate. Back in Indiana, Paul and Brenda filed suit against William III seeking, among other things, to set aside William III's conveyance and to recover lost income on that land. Following a trial, however, the jury returned a verdict in favor of William III.*

The Court of Appeals reversed and remanded. Paul and Brenda presented four issues on appeal but one was particularly dispositive, that being whether the trial court erred in its application of Evidence Rule 1008, the best evidence rule. None of the parties had a complete copy of either Marilyn's trust document or the amendments. Because the parties had only the first and last pages of Marilyn's original trust document, they turned to the series of rules about "best evidence" to prove the content of the trust and the amendment. The Court reviewed Evidence Rules 1002, 1004, 1007 and 1008. Designated evidence included a copy of William Jr.'s First Amendment, and deposition testimony of William III that he saw the First Amendments to the trusts of both parents and that the only difference was the substitution of names. Evidence also showed that Paul had seen the First Amendment to Marilyn's trust shortly after it was signed, and, with the exception of the substitution of names, gender pronouns, and the like where appropriate, Marilyn's First Amendment was the same as William Jr.'s. This evidence was undisputed and established the content of Marilyn's First Amendment. However, in denying Paul and Brenda's motion, the trial court interpreted Rule 1008 as demanding that disputes about the content of a lost writing be decided by the jury. Paul and Brenda, however, argued the content in the context of a summary judgment motion. In that case, the Court concluded that it would be illogical to read Rule 1008 as requiring a trial judge to disregard undisputed designated evidence and held that Rule 1008 required evidentiary disputes about the content of a lost writing to be determined by a jury only during a jury trial and not during summary judgment. The trial court misconstrued its role in determining the contents of Marilyn's trust for purposes of deciding summary judgment. The case

was therefore remanded so that the trial court could reconsider its ruling on summary judgment in accordance with these directions and sustain the present judgment, or not, accordingly.

RESTRAINT ON MARRIAGE – NOT APPLICABLE TO TRUSTS. *Roger D. Rotert v. Connie S. Stiles,* 174 N.E.3d 1067 (Ind. Ct. App. 2021). Borcherding executed a revocable living trust that divided her property between her son, Rotert; her daughter, Stiles; and her four stepchildren. The trust created a separate trust for Rotert's share and appointed Stiles as trustee. The trust contained the following provision:

> In the event that (Rotert's) is unmarried at the time of my death, I give, devise and bequeath his share of my estate to him outright and the provisions of this trust shall have no effect. However, in the event that he is married at the time of my death, this trust shall become effective, as set out below.

Rotert had been married to his third wife when Borcherding executed the trust. But before the trust's execution, Rotert's wife filed for divorce. The couple later reconciled and were married when Borcherding died. After Borcherding's death, Stiles, as trustee, distributed the cash in Rotert's trust to him but agreed that his real property would stay in his trust. Rotert filed suit, alleging the provision in the trust was a void restraint against marriage.

After a hearing, the trial court found that the trust's terms were not void for public policy; and denied Rotert's motion for summary judgment and granted Stiles motion. Rotert appealed and argued, that the trial court violated his due-process rights by not permitting him to respond to Stiles cross-motion for summary judgment (a procedural issue I am not addressing in this summary); and, second, that the challenged trust provision is void as a restraint against marriage. The Court of Appeals held that the challenged provision is an impermissible restraint against marriage and found in Rotert's favor, *Rotert v. Stiles,* 159 N.E.3d 46, 53 (Ind. Ct. App. 2020). Stiles sought transfer, which was granted.

The Indiana Supreme Court held that the statutory prohibition of restraints against marriage applies only to dispositions to a spouse by will and not to dispositions by trust. (Emphasis added). The Court affirmed the trial court. The Court referenced that the Indiana Probate Code says that "[a] devise to a spouse with a condition in restraint of marriage shall stand, but the condition shall be void." Ind. Code § 29-1-6-3. Further, the Court noted that 29-1-1-3(a) sets out the definitions that apply throughout the probate code. When used as a noun in the probate code,

"devise" means "a testamentary disposition of either real or personal property or both." Id. § 29-1-1-3(a)(6). And a "testamentary disposition", though not defined by subsection 29-1-1-3(a), is something our Court has long considered the distinguishing feature of a will. The Court held that this matter involved neither a testamentary devise nor a devise to a spouse, but a disposition by a revocable trust to a child and therefore the statutory prohibition under Indiana's probate code did not apply.

The Court examined Indiana's Trust Code and noted that it does not prohibit conditions in restraint of marriage at all. According to the statute: "The rules of law contained in this article"— referring to the trust code—"shall be interpreted and applied to the terms of the trust so as to implement the intent of the settlor and the purposes of the trust." I.C. § 30-4-1-3. As a result, the section continues, "[i]f the rules of law and the terms of the trust conflict, the terms of the trust shall control unless the rules of law clearly prohibit or restrict the article which the terms of the trust purport to authorize." Because the probate code's bar against restraints on marriage does not apply to trusts or gifts to children, Borcherding's disposition by a revocable trust to her son is valid. The Court affirmed the trial court's entry of summary judgment.

Section Ten

5 Tips for the New Advance Directive for Health Care

Jeffrey S. Dible
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Section Ten

5 Tips for the New Advance Directive for Health Care

December 21, 2021

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(1) Know where to find the new statute (P.L. 50-2021, SEA 204) and what other statutes have *not* changed.

- All the key provisions regarding the new "Advance Directive" [AD] are in new chapter I.C. 16-36-7 (26 pages within 75-pp. SEA 204)
- SEA 204 also made technical and conforming amendments to the chapters in title 16 for old-style appointments (16-36-1), living wills (16-36-4), out-of-hospital DNR declarations (16-36-5), and POST (16-36-6). *These statutes were not repealed.*
- Finally, SEA 204 amended some health care POA provisions in IC 30-5 in light of the 18-month transition period which ends on 12-31-2022
- An AD confers the same priority to make anatomical gifts or to authorize burial, cremation or autopsy as does a health care POA

(2) Understand the effective date and what documents are permitted during and after the 18-month transition period

- SEA 204 in general and the new Advance Directive provisions in IC 16-36-7 became effective July 1, 2021
- The transition period began on 7-1-2021 and ends on Dec. 31, 2022
- During the transition period, a Hoosier can sign either a new Advance Directive [AD] or a durable POA for health care and/or HCRA under prior law, and the last such document signed will control unless it states that a prior document is preserved
- After 12-31-2022, a Hoosier who wants to sign a *new* document to name a health care representative [HCR] must sign a new Advance Directive
- Any health care POA signed before Jan. 1, 2023 will remain valid and enforceable indefinitely after 2022 until it is later replaced or revoked
- Health care powers stated in a durable POA signed *after* 12-31-2022 will be treated as void, but the rest of the POA will be valid and enforceable

(3) Understand the permissible elements or contents of a new-style advance directive

A new Advance Directive [AD] can contain any one, more or all of the following provisions *(see* I.C. § 16-36-7-28(a)

- Appoint one or more Health Care Representatives [HCRs]
- State specific health care decisions by the signer (declarant)
- State preferences, desires or treatment preferences for future care in a wide variety of settings (NOT limited to end-of-life or terminal illness; no limitations)
- Disqualify named individuals from being appointed as a HCR for the signer or from acting as a proxy to make health care decisions for the signer
- Separate ADs could be signed by the same declarant at different times to cover different issues, but be mindful of the presumption that a later-signed AD will revoke all earlier ADs by that declarant unless otherwise stated

(4) Understand (and know where to find) the presumptions and "default settings" if the Advance Directive is silent ***AND*** the optional provisions that are permitted under SEA 204

- New chapter IC 16-36-7 was intentionally designed to make the default settings and presumptions as similar as possible to those in the durable POA statute
- With an advance directive (AD), the lawyer's drafting flexibility is as broad as with a health care POA, but with ***increased*** latitude to express clients' treatment preferences and end-of-life wishes
- Default settings and presumptions are in I.C. §§ 16-36-7-34 and 16-36-7-36; opt out of default settings by including wording in the AD
- A non-exclusive list of optional provisions is in I.C. § 16-36-7-29
- A lawyer can custom-tailor the content of an advance directive to each specific client's needs, wishes, and concerns, but only after reading and understanding the sections in IC 16-36-7 which state the presumptive default settings and options

(5) Know the requirements for completion of a valid Advance Directive and signing methods available under I.C. § 16-36-7-28

- An advance directive (AD) must be signed by the declarant (or by an adult other than a health care representative or a witness, signing at the declarant's direction and in the declarant's presence)
- The AD must have ***either*** a notarized acknowledgement of the declarant's signature ***or*** the signatures of two adult witnesses (at least one not a spouse or relative)
- Electronic signing with or without remote witnessing and with or without remote online notarization is permitted; similar to the rules for Wills in HEA 1255
- Signing on paper in "counterparts" is permitted so long as the declarant and the witnesses or notary interact in real time to satisfy "presence" requirement
- The declarant and 2 witnesses can use audio-only telephonic interaction to complete the signing of the AD if the witnesses can positively identify declarant
- ***Oral*** revocation of an AD is possible only in the direct presence of a health care provider, but a declarant with capacity can always directly make decisions

5 Tips for the New Advance Directive for Health Care
Supplementary Stuff from Jeff Dible

General Assembly's PDF version of Senate Enrolled Act 204 (P.L. 50-2021):
http://iga.in.gov/legislative/2021/bills/senate/204#document-da83451c

URL for just Chapter 7 (Advance Directive chapter) of IC 16-36:
http://iga.in.gov/legislative/laws/2021/ic/titles/016#16-36-7

Resources about Advance Directives from the Indiana Patient Preferences Coalition:
https://www.indianapost.org/patients/

Fillable on-line instructions and simple form for the Indiana Advance Directive, from PREPARE: https://prepareforyourcare.org/advance-directive-state/in

***Planned 2022 Technical Corrections*:**

- Replace "testator" with "declarant" in I.C. § 16-36-7-19 [definition of "presence"].
- Clarify that if the same individual signs a durable POA *and* an Advance Directive, both of which give two different persons authority to make a public benefits application on behalf of the individual, the authority of the attorney in fact (§§ 30-5-5-12 and 30-5-5-14) will control if there is a conflict with the health care representative's authority (§§ 16-36-7-10(2) and 16-36-7-36(a)(6).

COMMENTS ON "FORMS"

By intentional design, SEA 204 did not mandate a standard or official form for the Advance Directive, and the Indiana State Department of Health (ISDH) is not required to develop a standard form. In a few years, ISDH may overcome its institutional reluctance and produce a simplified "safe harbor" form for the Advance Directive.

Patient advocacy organizations, some hospital chains, and some non-profit organizations are in the process of develop short, simple, "plain language" Advance Directive forms that could be understood by individuals who don't have attorneys, who can't afford to hire attorneys, and who may have low levels of functional literacy. The objective is to remove as many obstacles as possible to the desired outcome: To have an Advance Directive signed by every adult Hoosier who has the capacity to consent to his, her or their own health care.

The 4th through the 7th pages of this supplementary material contain *discussion drafts* of two short, plain-language Advance Directive forms which were developed by Jeff Dible and by Steve Chupp, the North Central Indiana coordinator for Honoring Choices.

The first sample form provides the signer (declarant) with a choice between making the Advance Directive immediately effective upon signing or "springing" so that the health care representative's authority is effective only at times when the signer is not capable of consenting to health care.

The second sample form would be effective immediately upon signing (the presumption and default setting under I.C. § 16-36-7-34(1)), but would preserve at all times the declarant's power to give instructions or consents that overturn or reverse decisions made by the health care representative or stated in the Advance Directive.

Quick Reference Guide to the Indiana Advance Directive for Health Care (2021)

Source: Indiana Code, Title 16, Article 36, Chapter 7 (Part of Public Law 50-2021)

Basic elements of the new Indiana advance directive (AD)

(1) No official or mandatory form for the AD

(2) Basic permitted and typical contents:

  (a) Name 1 or more health care representatives (HCRs)

  (b) State specific health care decisions and/or treatment preferences, including preferences for life-prolonging procedures or palliative care [*The statute contains no limitations on the expression of treatment preferences]*

  (c) [*Optional*] Disqualify named individual(s) from receiving delegated authority or serving as a HCR

(3) Signing requirements:

  (a) Declarant (patient or signer) signs on paper or electronically ***OR*** directs some adult (not a health care representative and not a witness) to sign declarant's name in declarant's direct presence

  (b) Declarant signs in the "presence" of 2 adult witnesses ***OR*** signs in the "presence" of a notary public or other notarial officer [*see back page for ways to satisfy "presence' requirement*]

  (c) The 2 witnesses ***OR*** the notarial officer also sign the AD electronically or on paper

Basic presumptions and rules IF the advance directive (AD) does NOT explicitly say otherwise:

A. The AD and the authority of each named HCR is effective upon signing and remains in effect until the AD is revoked in writing (Oral revocation possible only in the direct presence of a health care provider)

B. A later-signed AD supersedes and revokes an earlier-signed AD by the same Declarant

C. Unless HCRs are listed in order of priority (primary & backup, etc.), 2 or more HCRs named in the same AD have concurrent, equal, and independently exercisable authority and are not required to act jointly

D. If Declarant still has capacity to consent to health care, orders and instructions by Declarant will control over any decisions by a HCR and any specific instructions stated in in the AD

E. Any health care representative (HCR) can delegate authority under the AD in writing to any competent adult(s) or other persons (a delegation should be signed in the same manner as an AD)

F. The HCR has authority to compete anatomical gifts, to authorize an autopsy, and to arrange for burial or cremation of the Declarant's remains after Declarant's death

G. The HCR can access Declarant's medical records & health information under HIPAA and state law

H. The HCR has authority to consent to mental health treatment for the Declarant

I. Each HCR has authority to sign a POST / POLST or an out-of-hospital DNR declaration for Declarant if Declarant is found to be a qualified [eligible] person

J. The HCR has authority to apply for public benefits (including Medicaid and CHOICE) for Declarant and to access Declarant's financial and asset records for that purpose

K. Each HCR is entitled to collect reasonable compensation and expense reimbursement for actions taken and services performed for or on behalf of Declarant

Compiled by Jeffrey S. Dible, J.D. and Susan E. Hickman, Ph.D.

Standard of conduct for each health care representative:

- Defer to Declarant's personal decisions and judgment at all times when Declarant has capacity to consent to health care and is able to communicate instructions, wishes, and treatment preferences
- Take into account Declarant's explicit or implied intentions and preferences and make only the health care decisions that Declarant would have made
- Act in good faith and in Declarant's best interests if Declarant's specific preferences are not known
- Remain reasonably available to consult with Declarant's health care providers and to provide informed consent for Declarant if Declarant does not have capacity

Optional provisions that CAN be included in an advance directive (AD) [*see I.C. §§ 16-36-7-29 and 16-36-7-34; not a complete list*]:

1. State a delayed effective date or triggering event (*e.g.*, future incapacity) and/or a specific ending date for the AD or for any HCR's authority
2. Keep an earlier-signed AD or an earlier-appointed HCR's authority in effect after a new AD is signed
3. Prohibit or restrict the delegation of authority by the HCR to other specific persons
4. Require another person to witness or approve a revocation of or amendment to the AD
5. Name 2 or more HCRs in a stated order of priority or confirm that they are authorized to act alone and independently
6. Require multiple HCRs to act jointly or on a majority vote basis to exercise some or all health care powers
7. Prohibit an HCR from collecting compensation or state an hourly rate or other standard for determining HCR's reasonable compensation
8. Designate some person other than a HCR to serve as an advocate or monitor
9. Authorize any person (proxy) who is listed in I.C. §16-36-7-42 and -43 to make a written demand that any HCR provide a written accounting or report of the HCRs actions on behalf of Declarant

Methods for signing that satisfy the "presence" requirement between Declarant and the 2 witnesses or between the Declarant and the notarial officer [*see* I.C. §§ 16-36-7-19 and -28]:

In-Person Options		Remote Options		
Declarant and 2 witnesses or Declarant and the notarial officer sign on paper in direct physical presence of each other	Declarant and 2 witnesses or Declarant and the notarial officer sign electronically in direct physical presence of each other	Sign identical counterparts on paper; Declarant & witnesses or notary interact using 2-way audiovisual technology; assemble signed counterparts within 10 business days	Declarant and 2 witnesses or Declarant and notary sign electronically while interacting using 2-way audiovisual technology	Declarant and 2 witnesses sign with audio-only interaction by telephone during signing [*Witnesses must be able to positively identify Declarant & confirm capacity*]

NOTE: An Indiana notary public must comply with Indiana law and regulations, including regulations for "remote notarial acts," if Declarant and notary interact at a distance using audiovisual technology.

ADVANCE DIRECTIVE
Indiana Health Care Representative

With this document I authorize my Health Care Representative to make health care decisions for me (*initial one*)

_____ Immediately after signing this document.

_____ Only when I am unable to communicate my own decisions.

If can communicate my instructions for my care, I keep the right to make my own health care decisions and to overrule my Health Care Representative.

If I have a serious illness or injury that makes me unable to communicate my own instructions for my care, my Health Care Representative may refuse, start, or stop any medical treatment or life support and may arrange for pain medication and comfort care.

My Health Care Representative must follow my wishes and values, including my ideas about dignity and quality of life. If my Health Care Representative does not know my wishes, my Health Care Representative must act in good faith according to my best interests.

I name _____ who can be contacted at _____ as my primary Health Care Representative.

If my primary Health Care Representative named above is not able or available to act for me, I name _____ who can be contacted at _____ as my backup Health Care Representative.

Date signed: _____ _____

My signature (Declarant)

_____ _____

Printed name of adult (if any) who signs for Declarant

My printed name (Declarant)

_____ I have initialed the space at left if I signed this Advance Directive after talking with and listening to two (2) witnesses by telephone only.

Initial

Complete this Form by using either the left or the right block below.

Signatures of 2 Adult Witnesses

Each of the undersigned Witnesses confirms that he or she has received satisfactory proof of the identity of the Declarant and is satisfied that the Declarant is of sound mind and has the capacity to sign the above Advance Directive. **At least one of the undersigned Witnesses is not a spouse or other relative of the Declarant**.

_____

Signature of Adult Witness 1

_____

Printed Name of Adult Witness 1

_____

Signature of Adult Witness 2

_____

Printed Name of Adult Witness 2

Notarization

STATE OF INDIANA)

) SS:

COUNTY OF_____)

Before me, a Notary Public, personally appeared _____ [*name of signing Declarant*], who acknowledged the execution of the foregoing Advance Directive as his or her voluntary act, and who, having been duly sworn, stated that any representations therein are true.

Witness my hand and Notarial Seal on this _____ day of _____, 20____.

_____

Signature of Notary Public

_____

Notary's Printed Name (*if not on seal*)

_____

Commission Number (*if not on seal*)

_____

Commission Expires (*if not on seal*)

_____

Notary's County of Residence

ADVANCE DIRECTIVE
Indiana Health Care Representative

With this document I authorize my Health Care Representative to make health care decisions for me.

If can communicate my instructions for my care, I keep the right to make my own health care decisions and to overrule my Health Care Representative.

If I have a serious illness or injury that makes me unable to communicate my own instructions for my care, my Health Care Representative may refuse, start, or stop any medical treatment or life support and may arrange for pain medication and comfort care.

My Health Care Representative must follow my wishes and values, including my ideas about dignity and quality of life. If my Health Care Representative does not know my wishes, my Health Care Representative must act in good faith according to my best interests.

I name _____ who can be contacted at _____ as my primary Health Care Representative.

If my primary Health Care Representative named above is not able or available to act for me, I name _____ who can be contacted at _____ as my backup Health Care Representative.

Date signed: _____ _____

My signature (Declarant)

_____ _____

Printed name of adult (if any) who signs for Declarant

My printed name (Declarant)

_____

Initial

I have initialed the space at left if I signed this Advance Directive after talking with and listening to two (2) witnesses by telephone only.

Complete this Form by using either the left or the right block below.

Signatures of 2 Adult Witnesses

Each of the undersigned Witnesses confirms that he or she has received satisfactory proof of the identity of the Declarant and is satisfied that the Declarant is of sound mind and has the capacity to sign the above Advance Directive. **At least one of the undersigned Witnesses is not a spouse or other relative of the Declarant**.

_____

Signature of Adult Witness 1

_____

Printed Name of Adult Witness 1

_____

Signature of Adult Witness 2

_____

Printed Name of Adult Witness 2

Notarization

STATE OF INDIANA)

) SS:

COUNTY OF_____)

Before me, a Notary Public, personally appeared _____ [*name of signing Declarant*], who acknowledged the execution of the foregoing Advance Directive as his or her voluntary act, and who, having been duly sworn, stated that any representations therein are true.

Witness my hand and Notarial Seal on this _____ day of _____, 20____.

_____

Signature of Notary Public

_____

Notary's Printed Name (*if not on seal*)

_____

Commission Number (*if not on seal*)

_____

Commission Expires (*if not on seal*)

_____

Notary's County of Residence

5 Tips for the New Advance Directive for Health Care
Supplementary Stuff from Jeff Dible

Primary Section of SEA 204 which defines the permissible contents of and signing methods before the new "Advance Directive"

IC 16-36-7-28

Sec. 28. (a) An advance directive signed by or for a declarant under this section may accomplish or communicate one (1) or more of the following:

(1) Designate one (1) or more competent adult individuals or other persons as a health care representative to make health care decisions for the declarant or receive health information on behalf of the declarant, or both.

(2) State specific health care decisions by the declarant.

(3) State the declarant's preferences or desires regarding the provision, continuation, termination, or refusal of life prolonging procedures, palliative care, comfort care, or assistance with activities of daily living.

(4) Specifically disqualify one (1) or more named individuals from:

(A) being appointed as a health care representative for the declarant;

(B) acting as a proxy for the declarant under section 42 of this chapter; or

(C) receiving and exercising delegated authority from the declarant's health care representative.

(b) An advance directive under this section must be signed by or for the declarant using one (1) of the following methods:

(1) Signed by the declarant in the presence of two (2) adult witnesses or in the presence of a notarial officer.

(2) Signing of the declarant's name by another adult individual at the specific direction of the declarant, in the declarant's presence, and in the presence of the two (2) adult witnesses or a notarial officer. However, an individual who signs the declarant's name on the advance directive may not be a witness, the notarial officer, or a health care representative designated in the advance directive.

(c) An advance directive signed under this section must be witnessed or acknowledged in one (1) of the following ways:

(1) Signed in the declarant's ~~direct physical~~ presence by two (2) adult witnesses, at least one (1) of whom may not be the spouse or other relative of the declarant.[1]

---

[1] NOTE: SEA 204 erroneously included the phrase "direct physical presence" instead of the defined term "presence" in subsection (c)(1) on page 35 of the Enrolled Act. This error was corrected in the Conference Committee Report (CCR) for House Bill 1436. That CCR was approved by the House and Senate on April 22, 2021.

(2) Signed or acknowledged by the declarant in the presence of a notarial officer, who completes and signs a notarial certificate under IC 33-42-9-12 and makes it a part of the advance directive.

If the advance directive complies with either subdivision (1) or (2), but contains additional witness signatures or a notarial certificate that is not needed, the advance directive is still validly witnessed and acknowledged. A remote online notarization or electronic notarization of an advance directive that complies with IC 33-42-17 complies with subdivision (2).

(d) A competent declarant and the witnesses or a notarial officer may complete and sign an advance directive in two (2) or more counterparts in tangible paper form, with the declarant's signature placed on one (1) original counterpart and with the signatures of the witnesses, if any, or the notarial officer's signature and certificate on one (1) or more different counterparts in tangible paper form, so long as the declarant and the witnesses or notarial officer comply with the presence requirement as described in section 19 of this chapter, and so long as the text of the advance directive states that it is being signed in separate paper counterparts. If an advance directive is signed in counterparts under this subsection:

(1) the declarant;

(2) a health care representative who is designated in the advance directive;

(3) a person who supervised the signing of the advance directive in that person's presence; or

(4) any other person who was present during the signing of the advance directive;

must combine all of the separately signed paper counterparts of the advance directive into a single composite document that contains the text of the advance directive, the signature of the declarant, and the signatures of the witnesses, if any, or the notarial officer. The person who combines the separately signed counterparts into a single composite document must do so not later than ten (10) business days after the person receives all of the separately signed paper counterparts. Any scanned copy, photocopy, or other accurate copy of the composite document that contains the complete text of the advance directive and all signatures will be treated as validly signed under this section. The person who creates the signed composite document under this subsection may include information about compliance within this subsection in an optional affidavit that is signed under section 41 of this chapter.

(e) If facts and circumstances, including physical impairments or physical isolation of a competent declarant, make it impossible or impractical for the declarant to use audiovisual technology to interact with the two (2) witnesses and to satisfy the presence requirement under section 19 of this chapter, the declarant and the witnesses may use telephonic interaction throughout the signing process. A potential witness cannot be compelled to use telephonic interaction alone to accomplish the signing of an advance directive under this section. A declarant and a notarial officer may not use telephonic interaction to accomplish the signing of an advance directive or other document under this chapter.

(f) If an advance directive is signed under subsection (e), the witnesses must be able to positively identify the declarant by receiving accurate answers from the declarant that:

(1) authenticate the identity of the declarant; and

(2) establish the capacity and sound mind of the declarant to the satisfaction of the witness.

(g) The text of the advance directive signed under subsection (e) must state that the declarant and the witnesses used telephonic interaction throughout the signing process to satisfy the presence requirement.

(h) An advance directive signed under subsection (e) is presumed to be valid if it recites that the declarant and the witnesses signed the advance directive in compliance with Indiana law.

(i) A health care provider or other person who disputes the validity of an advance directive signed under subsection (e) has the burden of proving the invalidity of the advance directive or noncompliance with subsection (e) by a reasonable preponderance of the evidence.

(j) If a declarant resides in or is located in a jurisdiction other than Indiana at the time when the declarant signs a writing that communicates the information described in subsection (a), the writing must be treated as a validly signed advance directive under this chapter if the declarant was not incapacitated at the time of signing and if the writing was:

(1) signed and witnessed or acknowledged in a manner that complies with subsections (b) and (c); or

(2) signed in a manner that complies with the applicable law of the jurisdiction in which the declarant was residing or was physically located at the time of signing.

Section Eleven

5 Tips on Fees Under the VA Claim Process

Tamatha A. Stevens
Stevens & Associates, PC
Indianapolis, Indiana

Section Eleven

5 Tips on Fees Under the VA Claim Process…….... Tamatha A. Stevens

PowerPoint Presentation

Fee Agreement (Representation before VA)

Fee Agreement (Representation before CAVC and VA)

Authorization to Release Government Records

Fee Agreement (Representation before CAVC)

How to Apply for VA Accreditation as an Attorney or Claims Agent

Standards of Conduct for VA-Accredited Attorneys, Claim Agents, and VSO Representatives

Presumptive Disability Benefits

Application for Accreditation as Service Organization Representative

5 Tips on fees under the VA Claim process

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Who Are We Talking About: Our Indiana Veteran Population

- Total 402,387
- Wartime Veterans 299,604
- Gulf War 153,177
- Vietnam Era 128,733
- Korean Conflict 19,144
- WWII 4,780
- Peacetime 102,782

- Female 36,293
- Male 366,094
- Va.gov/vetdata/veteran_population.asp (fiscal year 2021)
- Exclusive of widows and dependents that might be entitled to benefits.

Most Common VA Benefits Sought

- Housing Vouchers and Grants
- Health
- Disability Compensation
  - Know The Presumptive List
  - Burn Pit Exposure & Registry
- Low Income, Housebound and Aid & Attendance Pension
- Assistance with VBA, VHA and Fiduciary Collection Efforts
- Burial

- For most VA benefits, you have 1 year from the date of the decision notice to request a decision review to ensure the earliest possible effective date.
- If you miss the time frame to review a decision, then you can only have your decision reviewed based on clear and unmistakable error or a supplemental claim. A late-filed supplemental claim will result in an effective date for any award based on the date the VA receives the supplemental claim generally.

Recognized Attorney Advocacy: The Right To Seek Review of a VA Decision

	Supplemental Claim	Higher Level of Review	Board Appeal
What is This?	A reviewer will determine whether new & relevant evidence changes the prior decision.	An experienced claims adjudicator will review your decision using the same evidence VA considered in the prior decision.	A Veterans Law Judge at the Board of Veterans' Appeals (Board) will review your decision.
By Selecting This Option	You are adding or identifying new and relevant evidence to support your claim that the VA did not previously consider. The VA will assist you in gathering new and relevant evidence that you identify to support your claim.	You have no additional evidence to submit to support your claim, but you believe there was an error in the decision. You can request an optional, one-time, informal conference with a Higher-Level Reviewer to identify specific errors in the case, although requesting this conference may delay the review.	You must choose a docket: 1. Direct Review – you do not want to submit evidence or have a hearing. 2. Evidence Submission – you choose to submit additional evidence without a hearing. 3. Hearing – you choose to have a hearing with a Veterans Law Judge
Goal To Complete	125 days on average	125 days on average	365 days on average for direct review. Longer for a hearing.
Form to File To Select	VA 20-0995	VA 20-0996	VA 10182
Further Options After This Decision	You may request another supplemental claim, a higher-level review, or a board appeal	You may request a supplemental claim or a board appeal	You may request a supplemental claim or appeal to the U.S. Court of Appeals for Veterans Claims

Tip #1. First and foremost, Know What is Required to Represent a Veteran or Claimant

- You must also be accredited to provide any specific Veteran, Widow or Dependent VA benefit advice.
- Attorney Accreditation is easy.
  - Apply using VA Form 21a to the Office of General Counsel.
    - Mailed, Faxed 202.495.5457, or emailed ogcaccreditationmailbox@va.gov
  - Self-Certification of admission information concerning practice before any other court, bar or State or Federal agency.
  - Affirmative determination of character and fitness by the VA
  - And no written exam for licensed attorneys in good standing. Online exam for non-attorneys seeks to become accredited.
  - The 3 hours of CLE on VA benefits after admission within the first year.
- Rules on Accreditation can be found at va.gov/ogc/accreditation.asp
- United States Department of Veterans Affairs Accreditation Search can be done at va.gov/ogc/apps/accreditation/index.asp

VA Fee History

- The VA's history of limitation of attorney's fees dates back to the Civil War. In 1862, Congress first imposed a $5 limitation on attorneys and agents assisting persons applying for a pension, etc. In 1864, Congress raised the fee to $10 and at that time stated that attorneys or agents who violated the limit could be fined up to $300, imprisoned at hard labor for up to two years or both. Congress initial and continuing intent is to protect veterans from unscrupulous representatives who overcharge for work that consisted primarily of filling out what they considered to be uncomplicated forms to obtain benefits that the VA wanted for its veterans and to prevent attorney involvement that could at times make the process adversarial.

- The $10 cap remained in effect for more than 120 years! This fee was upheld by the U.S. Supreme Court as constitutional on its face. Walters, 473 U.S. at 334=35. Nevertheless, the virtual bar preventing representation in most instances was finally recognized.
- In the 1980s, the Veterans/ Judicial Review Act of 1988 allowed attorneys retained within one year of a final Board of Veterans Affairs decisions to charge a "reasonable fee" to represent a claimant.
- 18 years after the Veteran's Judicial Review Act, President George W. Bush signed the Veteran's Benefits, Health Care, and Information Technology Act of 2006 allowing attorneys to charge a reasonable fee for representation before the RO or BVA after a notice of disagreement if the NOD was dated after June 20, 2007.
- Today, for claims being pursued under the new modernized claims and appeals system, attorneys may charge a reasonable fee for representation before the agency of original jurisdiction or Board after the RO has issued notice of any initial decision on or after February 19, 2019, even without waiting for a claimant to make any formal filings after the decision. 38 C.F.R. 14.636(c)(1)(i) and (ii) (2021).

Tip #2. Know The Who, When & How of VA Fees

- Who can Pay The Fees?
- When are Fees Allowed?
- How Can Fees Be Structured?
- What Determines Reasonable and Not Excessive Fees before the VA?
- Special Provisions Before the U.S. Court of Appeals for Veterans Claims
- Fees in VA Negligence and Medical Malpractice Actions

Fee Payments by Disinterested Third Parties

- Reporting rules apply regardless who is paying the fee.
- Charging a Fee rules do not apply if paid by a truly "disinterested third party"
- A spouse, child, parent, housemate, or anyone who will stand to benefit financially from the successful outcome (i.e. assisted living facilities) carry a rebuttable presumption of being "interested'.
- Disinterested party fees do have some rules:
  - The Fee cannot be contingent of favorable outcome in who or in part on whether the matter is resolved favorably to the claimant
  - An additional statement is required when filing disinterested third-party fee agreements that "I certify that no agreement, oral or otherwise, exists under which the claimant or appellant will provide anything of value to the third-party payer in this case in return for payment of my fee including but not limited to reimbursement of any fees paid."

Fees for Consultation Pre-Claim

- The VA Office of General Counsel opined that attorneys may charge a fee for work done before a claim for VA benefits is filed (pre-filing consultation) stating:
  - "[A]ttorneys may charge veterans for pre-filing consultation without violating the attorney fee limitation. . . . [W]e assume that services rendered by attorneys in such situations would generally include review of records, research, counseling, and any other assistance that a potential VA claimant might need short of actually preparing and presenting a specific claim for benefits. We are not aware of anything in the law governing representation of veterans that would prohibit attorneys from charging fees for this kind of pre-filing consultation." Letter from Tim S. McClain, Gen. Coun., VA OGC to The Hon. Lane Evans, Ranking Democratic Member, Comm. On Veterans' Affairs (May 24, 2004).
- Although the VA acknowledged the General Counsel's opinion, it declined to formalize it in the regulations published May 2008.
- The VA made it clear that preparation of a claim is not considered pre-filing consultation and that no fee should be charged after the decision has been made to file a claim. Delaying the decision to file a claim may be against the best interest of the claimant as a delay from March 29 to April 3 costs the claimant one month in benefits.

Fees Prior to Filing a NOD or Notice of the Regional Office's Initial Decision on a Claim

- With the exception of payment of fees by a "disinterested third party" and consultation prior to the filing, or better yet the decision to file, a VA claim, a claimant pursuing a claim is prohibited from paying an attorney and the attorney is prohibited from charging a fee prior to:
  - A Notice of Disagreement (NOD) in Legacy cases
  - An adverse decision, meaning any decision that is not fully favorable to the claimant and to their satisfaction in new modernized claims and appeals

Fees After Filing a Post-June 19, 2007 NOD on a Legacy Claim and after an Adverse Decision on a Modernization Claim

- Finally, fees are allowed as this point is the first point the VA recognizes themselves to be in an adverse position to the Claimant they are intending to serve.

Fee Structures

- Contingent Fees.
  - Historically, the statute and VA regulations have provided a 20% of past-due benefits ceiling on presumptively reasonable fees.
  - The 20% ceiling continues for direct payment of fees.
  - The 2008 current fee regulations continues the 20% presumption and adds an additional presumption that fees that exceed 33 1/3% of the past-due benefits will be presumed unreasonable.
- Hourly Fees.
- Flat Fee.
- A combination of these.

Fee Must be Reasonable and Not Excessive

- Of course, all fees must not be excessive or unreasonable.
- General criteria set forth that the VA relies on to determine reasonable fees is:
  - The extent and type of services the representative performed;
  - The complexity of the case:
  - The level of skills and competence required of the representative in providing the services;
  - The amount of time the representative spent on the case;
  - The results the representative achieved, including the amount of any benefits recovered;
  - The level of review to which the claim was taken and the level of review at which the representative was retained;
  - Rates charged by other representatives for similar services;
  - Whether, and to what extent, the payment of fees is contingent upon the results achieved;
  - And, if applicable, the reasons why the representative was discharged or withdrew from representative before the date of the decision awarding benefits.

Fees Before the U.S. Court of Appeals of Veterans' Claims

- The fee agreement may provide for a basic retainer to initiate work, an hourly rate, a flat fee, a contingency fee from an award of past-due benefits, a Court award of fees under the Equal Access to Justice Act or a combination of these forms of payment.
- All fee agreements need to be filed with the CAVC, even if the attorney is not charging the claimant. There is no duty to file the fee agreement with the VA unless the matter is remanded to be decided before the RO or BVA.
- If the attorney is entitled to fees based on a fee agreement and the CAVC awards fees for the same work, then Congress has mandated that the attorney cannot keep both amounts. Rather, the attorney can keep the higher of the two fees and must refund to the Claimant the lesser of the two amounts.
- The CAVC in 2019 overturned standing precedent that the "same work" includes all representation of a claim in in pursuit of a claim at all stages and determined that representation before the agency and CAVC are not the "same work" unless the CAVC decision results in overturning the agency denial of benefits and awarding past-due benefits. Ravin v. Wilkie, 31 Vet. App. 104, 110 (2019).
- Attorney Lien provisions in an engagement letter against any sums recovered on a claim for VA benefits is prohibited.

Fees Under the Equal Access To Justice Act

- The Equal Access to Justice Act was enacted in 1980 "to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions."
- The EAJA provides:
  - '[a] court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in a civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought . . . against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."
- Note: A timely proper petition for attorney's fees is required and the award is to the prevailing party not to the attorney for the prevailing party.
- Prevailing parties do have a net worth ceiling of $2 mil at the time the appeal was filed, attain success on a significant issue in litigation. Success is defined as a material alteration of the legal relationship of the parties, it can include reversal of a Board decision, vacating a Board decision and remanding the matter predicated on agency error, or an actual award of benefits sought. Success is not deemed a remand for judicial efficiency with no agency error determined.

Fees In VA Negligence or Medical Malpractice Claims

- Injuries or deaths that result from negligence or malpractice during the provisions of VA healthcare potentially compensated by the VA fall under two different statutes. First, the claimant may apply for Section 1151 benefits which treat and compensate the death or injury as if it were a service-connected death or injury. The other remedy is to file an administrative claim, and if necessary, a lawsuit against the United States under the Federal Tort Claim Act. It is possible to choose either one or both of these remedies.
- Claims under the Federal Tort Claim Act are not controlled by VA benefits laws and are not discussed here. Claims under Section 1151 are compensation benefits and are subject to the benefits fee rules.

Tip #3 You Need a Valid Fee Agreement

- Must only be for work before the VA. Any other work must be detailed in a separate fee agreement.
- Must be in writing, signed by both the attorney and the claimant, contain the name of the veteran, the claimant if different than the veteran, the disinterested third-party payer if any, the VA file number, and specific terms for determining the amount of fees to be paid. The fee agreement must also clearly specify if the VA is to pay the attorney directly out of past due benefits.
- If an attorney is representing a claimant without charging the Claimant then the pro bono fee agreement does not need to be filed.
- All Fee Agreements are No longer required to be filed with the Office of General Counsel. 38 C.F.R. 14.636(g) and (h).
  - Any fee agreement calling for direct payment to the representative from the claimant's past-due benefits must be filed with the VBA Regional Office within 30 days of execution.
  - Any fee agreement that does not require direct payment is filed with the OGC within 30 days of execution at VA Accreditation Program (022D), 810 Vermont Ave., N.W., Washington DC 20420or via fax to 202.495.5457.
- Violation of these rules can result in loss of accreditation to practice before the VA 38 C.F.R. 14.633(c)(1).

Review of Fee Agreement at the Conclusion

- "Only after the proceedings have come to a close, and the amount of the fee is determined, can there be an informed decision whether a particular fee is, in fact, 'excessive or unreasonable.'" Nagler v. Derwinski, 1 Vet. App. 297, 304-05 (1991).
- Review of Fee Agreements and Agreements on Expenses is conducted by the VA OGC within 120 days of the VA's final action on the case either commenced by the OGC on its own motion or on the motion of the claimant. 38 C.F.R. 14.636(i) (2021).
  - The OGC or Claimant as the moving party must notify the attorney setting forth the reason(s) why the fee is question is unreasonable along with any supporting evidence and the attorney is permitted 30 days to respond with any relevant evidence to the motion for review.
  - The Claimant will be given 15 days to reply to the Attorney's response.
  - The OGC may order a reduction in the fee called for if it finds by a preponderance of the evidence, or by clear and convincing evidence in the case of a fee presumed reasonable . . . that the fee is unreasonable. 38 C.F.R. 14.636(i)(2021).
  - Either party may appeal the OGC decision by filing a NOD. If no NOD is filed, then the excessive fee must be refunded by the expiration of the period in which a NOD could be filed.

Tip #4 Reimbursement of Expenses Requires a Valid Agreement Too

- The statutory provisions of when and how an attorney can charge a fee do not apply to the attorney's recovery of expenses. The only guidance is in VA regulations. 38 C.F.R. 14.637 (2021).
- The regulation states that whether an attorney will be reimbursed and the method of reimbursement must be set forth in the fee agreement.
- Expenses are defined as nonrecurring expenses directly in prosecution of a claim for benefits on behalf of a claimant. (i.e. cost of traveling to a hearing, of obtaining medical records and other outside documentation, of experts)
- All agreements for reimbursement of expenses must be filed with the OGC

The Impact of Death of Claimant on Entitlement of Fees and Expenses

- If the appellant dies while an appeal is pending before the CAVC and an eligible survivor (surviving spouse, minor child, or person who bore the expense of the last sickness or burial) becomes a prevailing party by substituting for the deceased appellant and receiving from the CAVC a reversal or remand of the Board denial that is subject of the appeal, then the survivor has the right to seek attorneys' fees.
- If the appellant dies before the case is submitted to the CAVC for decision and there is no survivor eligible to receive accrued benefits, the appeal will be dismissed and no award of fees would be possible.
- The personal representative of the Estate may only be a substituted party for a claim of attorney's fees if claimant's death is after (1) a favorable CAVC decision has been entered or approved a joint motion for remand or settlement making the claimant a prevailing party or (2) the case was submitted to the Court for decision (I.e. after being fully briefed or the joint motion for remand or settlement was submitted to the Court for approval).
- A petition for fees must be filed within 30 days after the decision becomes final (60 days after it was entered).

Tip #5 To Collect Your Fee You Must Be Set Up In The VA System or Chase Your Client

- Direct Payment of Fees requires you to be vendorized just one time with the VA's Financial Management System.
- You must complete Form 10091 VA-FSC Vendor File Request Form and fax the same to 512.460.5221.
- To check your status on the FSC Nationwide Vendor File Customer Service email vafscvendot@va.gov or call 877.353.9791.
- Non-direct payments and payment of reimbursement of expenses is paid directly from the Claimant. Note payment to a Claimant is to the Claimant or their Fiduciary not in a check co- with Counsel.

Thank you for allowing me to share my 5 Hot Tips on Fees and the VA

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Additional Resources:

- To Search for VA Accredited Attorneys, Claims Agents and Veterans Service Organizations go to va.gov/ogc/apps/accreditation/index.asp

- All VA forms can be found at va.gov/vaforms

- My favorite resource is the annual publication with the 2021-2022 edition recently released: Lexis Nexus Veterans Benefit Manual, Federal Veterans Laws, Rules and Regulations and Companion Recent Cited Cases (July 2020 – June 2021).

Fee Agreement (Representation before VA)

[Client], and [Attorney], agree as follows:

1. The Client hires the Attorney to act on his/her behalf regarding the Client's claim for VA benefits. This claim is for [describe claim]. The Attorney will represent the Client before the VA on this claim.
2. The Attorney agrees to perform all acts which, in the judgement of the Attorney, are necessary to enforce and protect the rights of the Client on this claim. The Attorney may exercise his/her professional judgment as to the manner of seeking relief.
3. In consideration of the services to be rendered by the Attorney, the Client agrees to pay the Attorney one-fifth (20%) of any amount owed by the VA to the Client as a lump-sum and representing Client's retroactive benefits, from the date benefits begin through the date benefits are awarded for this claim. These fees shall be paid to the Attorney by the VA from the Client's retroactive benefits as provided by 38 C.F.R § 14.636(h). If the VA does not ultimately award any additional benefits to the Client on this claim, the Client will not owe the Attorney any money for the Attorney's work on this claim. In addition to the 20% fee described above, the Client also agrees to pay all out-of-pocket expenses incurred in connection with the case, such as copies of medical records, minus costs recovered from the VA. The Attorney will absorb cost such as mailing, long distance telephone charges, in-office copying and computer research.

Client's Signature	Attorney's Signature
Printed Name	Printed Name
Date	Date
VA Claim File #	

Fee Agreement (Representation before CAVC and VA)

[Client], and [Attorney], agree as follows:

1. The Client hires the Attorney to act on his/her behalf regarding the client's claim for VA benefits, which the Board of Veterans' Appeals denied on [date]. This claim is for [describe claim]. The Attorney will represent the client before the U.S. Court of Appeals for Veterans Claims (the Court) in an appeal of the Board's denial of this claim. If the Court decides to remand this claim to the VA for a new decision, the attorney will represent the Client before the VA on this claim.

2. The Attorney agrees to perform all acts which, in the judgment of the attorney, are necessary to enforce and protect the rights of the client on this claim. The attorney may exercise his/her professional judgment as to the manner of seeking relief.

3. In consideration of the services to be rendered by the attorney, the client agrees to pay the attorney one-fifth (20%) of any amount owed by VA to the client as a lump-sum and representing client's retroactive benefits, from the date benefits begin through the date benefits are awarded from this claim. These fees shall be paid to the attorney by the VA form the client's retroactive benefits as provided by 38 C.F.R. § 14.636(h). In addition to the 20% fee described above, the client also agrees to pay all out-of-pocket expenses incurred in connection with the case, such as copies of medical records, minus costs received from the VA. The attorney will absorb costs such as mailing, long-distance telephone charges, in-office copying and computer research.

4. If the Court either awards benefits or remands this claim to the VA for a new decision, the attorney may seek an order from the Court directing the VA to pay attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. If the Court awards attorney's fees under the EAJA, the entire amount of the award shall be paid to the attorney.

5. If (a) the Court awards attorney's fees under the EAJA, and (b) the Court awards VA benefits on this claim, then the fee owed to the attorney will be as follows. If 20% of the amount owed by VA to the client as a lump-sum and representing client's retroactive

benefits is greater than the amount of the EAJA fee received by the attorney, then the fee owed by the client to the attorney will be 20% of the lump-sum owed by the VA to the client minus the award of attorney's fees that the attorney received under the EAJA. These fees shall be paid to the attorney by the VA form the client's retroactive benefits as provided in 38 C.F.R. § 14.636(h). If 20% of the amount owed by VA to the client as a lump-sum and representing client's retroactive benefits is less than the amount of the EAJA fee received by the attorney, then the client will be entitled to 100% of the lump-sum and the attorney will receive no additional money as a fee. If (a) the Court awards attorney's fees under the EAJA, and (b) the Court remands the case to the VA for a new decision, and the VA ultimately awards benefits on this claim, then the attorney is entitled to a fee of 20% of the amount owed by VA to the client as a lump-sum and the full amount of the EAJA fee award.

Client's Signature	Attorney's Signature
Printed Name	Printed Name
Date	Date
VA Claim File #	

Authorization to Release Government Records

I, [Name] (VA Claims File # C_____), consent to the release of all records, whether related to my claim or not, requested by my attorney, _____, from any VA Regional Office, VA Medical Facility, the Board of Veterans' Appeals, or other government or military office (including the Social Security Administration). If the information to be released includes information related to substance or alcohol abuse, infection with the HIV virus, AIDS, or sickle cell anemia, I specifically consent to the disclosure of those records as well.

Date: _____ _____

Name

Fee Agreement (Representation before CAVC)

[Client], and [Attorney], agree as follows:

1. The Client hires the Attorney to act on his/her behalf regarding the client's claim for VA benefits, which the Board of Veterans' Appeals denied on [date]. This claim is for [describe claim]. The Attorney will represent the client before the U.S. Court of Appeals for Veterans Claims (the Court) in an appeal of the Board's denial of this claim. If the Court decides to remand this claim to the VA for a new decision, the attorney will represent the Client before the VA on this claim.

2. The Attorney agrees to perform all acts which, in the judgment of the attorney, are necessary to enforce and protect the rights of the client on this claim. The attorney may exercise his/her professional judgment as to the manner of seeking relief.

3. The attorney will absorb costs such as mailing, long-distance telephone charges, in-office copying and computer research. There is also no charge to the client for the lawyer's services. The Client does agree, however, that if the Court either awards benefits or remands the claim to the VA for a new decision, the attorney may seek an order from the Court directing the VA to pay the attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. If the Court awards attorney fees under the EAJA, the entire amount of the award shall be paid to the attorney.

4. This retainer is expressly limited to representation at the Court. If the Court sends the case back to the VA for a new decision on this claim, the attorney does not agree to continue to represent the client before the VA unless there is a new decision and separate retainer agreement for that additional work. If the Court affirms the Board's decision, the attorney does not agree to represent the client in an appeal of the Court's decision to the U.S. Court of Appeals for the Federal Circuit unless there is a new and separate retainer agreement for that additional work.

Client's Signature	Attorney's Signature
Printed Name	Printed Name
Date	Date
VA Claim File #	

VA ACCREDITATION PROGRAM

HOW TO APPLY FOR VA ACCREDITATION AS AN ATTORNEY OR CLAIMS AGENT

WHAT AN APPLICANT SHOULD KNOW ABOUT APPLYING FOR DEPARTMENT OF VETERANS AFFAIRS (VA) ACCREDITATION AS AN ATTORNEY OR CLAIMS AGENT

What is the VA accreditation program?

- The VA accreditation program exists to ensure that Veterans and their family members receive appropriate representation on their VA benefits claims. VA accreditation is for the sole and limited purpose of preparing, presenting, and prosecuting claims before VA.

When is VA accreditation required?

- An individual generally must first be accredited by VA to assist a claimant in the preparation, presentation, and prosecution of a claim for VA benefits—even without charge.[1] VA accredits three types of individuals for this purpose:
  - Representatives of VA-recognized veterans service organizations (VSO)[2]
  - Attorneys (accredited in their individual capacity, not through a law firm)
  - Claims agents (accredited in their individual capacity, not through an organization)

How do I apply to become a VA-accredited attorney or claims agent?

Step 1: > Complete VA Form 21a

- Be sure to fill out all portions of the form.

Step 2: > It is recommended that you attach any necessary documents to VA Form 21a

- We recommend that you attach a recently dated certificate of good standing from all state bars, courts, or Federal or state agencies to which you are admitted. (This applies to both attorneys and claims agents).
- On VA Form 21a, if you answer "yes" to question 13A, 14A, 15A, 16, 17, 18, 20, 22, 23A or 24A, please attach a detailed explanation of the surrounding circumstances.

Step 3: > Submit your VA Form 21a and any attachments to OGC (Please only choose 1 method of submission)**:**

- Mail: Office of the General Counsel (022D), 810 Vermont Avenue, NW, Washington, DC20420.
- Fax: (202) 495-5457.

[1] VA regulations allow a one-time exception to this general rule, which allows VA to authorize a person to prepare, present, and prosecute one claim without accreditation. The assistance must be without cost to the claimant, is subject to the laws governing representation, and may not be used to evade the accreditation requirements.

[2] To apply for accreditation as a VSO representative, please contact the organization's certifying official.

FAQs

Q1: How long will it take to process my application?

A1: Attorney applications generally take between 60 to 120 days from submission. Because there are more steps involved with claim agent applications, those applications take, on average, 1 year to process.

Q2: If I am accredited as an attorney or claims agent, what must I do to maintain my VA accreditation?

A2: You must: (1) Complete 3 hours of qualifying continuing legal education (CLE) requirements during the first 12-month period following the date of initial accreditation by VA, and an additional 3 hours no later than 3 years from the date of your accreditation, and every 2 years thereafter; (2) Provide a copy of your training certificate or certify in writing to VA's Office of the General Counsel your completion of the qualifying CLE, including the CLE title, date, time, and provider; (3) Submit an annual certification of good standing for any court, bar, or Federal or State agency to which you are admitted to practice.

Q3: Can I be accredited to help veterans with their claims if I am a federal employee?

A3: No. An employee of the Federal government generally cannot provide representational services before VA. However, if you are currently serving in a Reserve component of the Armed Forces, you are not considered a Federal employee as long as you are not on active duty or active duty for training.

Q4: May an accredited attorney or claims agent charge fees for preparing an initial VA claim?

A4: No. An accredited attorney or claims agent may generally charge claimants a fee only **after** an agency of original jurisdiction (e.g., a VA regional office) has issued a decision on a claim, a notice of disagreement has been filed, and the attorney or agent has filed a power of attorney and a fee agreement with VA.

Q5: If I advise veterans and their family members on VA benefit claims but do not file their applications for them, do I need to be accredited?

A5: Yes. You must be accredited to aid in the preparation, presentation, or prosecution of a VA benefit claim. Advising a claimant on a specific benefit claim or directing the claimant on how to fill out the application, even if you never put pen to paper, is considered claims preparation.

Q6: Can I use my VA accreditation to as a method to advertise or promote my other business interests?

A6: No. VA accredits individuals solely for purposes of ensuring VA claimants receive responsible, qualified representation when preparing presenting and prosecuting claims before the Department. You may not use your VA accreditation for promoting any other businesses, including financial services, referral businesses, or homecare businesses. If VA determines that an accredited agent or attorney is using VA accreditation for an improper purpose, VA may suspend or cancel the individual's accreditation. VA may also collaborate with state law enforcement authorities in the event that it is suspected that the individual's actions may have implications under State laws.

Q7: Are there standards of conduct that I must follow as an accredited individual?

A7: Yes. You must abide by the standards of conduct listed in 38 C.F.R. § 14.632 and summarized on the fact sheet labeled "How to File a Complaint Regarding Representation."

Q8: If I violate the standard of conduct or engage in any other unlawful or unethical conduct, what will happen?

A8: If VA determines that an accredited individual has violated the standard of conduct, VA may suspend or cancel his or her accreditation. VA is authorized to report the suspension or cancelation of VA accreditation to other bar associations, courts, or agencies to which you are admitted as well as employing entities. In addition, VA may collaborate with state law enforcement authorities in the event that it is suspected that the individual's actions may have implications under State laws.

Q9: What if I have questions regarding my VA accreditation?

A9: You may submit inquiries regarding VA accreditation to ogcaccreditationmailbox@va.gov.

For More Information: Visit the VA Office of the General Counsel website at:
http://www.va.gov/ogc/accreditation.asp

VA ACCREDITATION PROGRAM

STANDARDS OF CONDUCT FOR VA-ACCREDITED ATTORNEYS, CLAIMS AGENTS, AND VSO REPRESENTATIVES

The standards of conduct in 38 C.F.R. § 14.632 establish the appropriate behavior for VA-accredited attorneys, agents, and representatives.

VA-accredited individuals providing VA claims assistance *shall:*

- Faithfully execute their duties on behalf of a VA claimant;
- Be truthful in their dealings with claimants and VA;
- Provide claimants with competent representation before VA; and
- Act with reasonable diligence and promptness in representing claimants.

See 38 C.F.R. §§ 14.632 (a) & (b).

VA-accredited individuals shall *not:*

(1) Violate the standards of conduct as described in 38 C.F.R. § 14.632.
(2) Circumvent the rules of conduct through the actions of another.
(3) Engage in conduct involving fraud, deceit, misrepresentation, or dishonesty.
(4) Violate one or more of the provisions of title 38, United States Code, or title 38, Code of Federal Regulations.
(5) Enter into an agreement for, charge, solicit, or receive a fee that is clearly unreasonable or otherwise prohibited by law or regulation.
(6) Solicit, receive, or enter into agreements for gifts related to representation provided before an agency of original jurisdiction has issued a decision on a claim or claims and a Notice of Disagreement has been filed with respect to that decision.
(7) Delay, without good cause, the processing of a claim at any stage of the administrative process.
(8) Mislead, threaten, coerce, or deceive a claimant regarding benefits or other rights under programs administered by VA.
(9) Engage in, or counsel or advise a claimant to engage in, acts or behavior prejudicial to the fair and orderly conduct of administrative proceedings before VA.
(10) Disclose, without the claimant's authorization, any information provided by VA for purposes of representation.
(11) Engage in any other unlawful or unethical conduct.

*In addition, in providing representation to a claimant before VA, VA-accredited attorneys shall not engage in behavior or activities prohibited by the rules of professional conduct of any jurisdiction in which they are licensed to practice law.

See 38 C.F.R. § 14.632(c) & (d).

If I violate a standard of conduct or engage in any other unlawful or unethical conduct, what will happen? If VA determines that you have violated the standards of conduct, VA may suspend or cancel your accreditation. VA is authorized to report the suspension or cancellation to any bar association, court, or agency to which you are admitted. In addition, VA may collaborate with State and Federal enforcement authorities if it is suspected that your actions may have implications under State or other Federal laws.

For More Information: Visit the VA Office of the General Counsel website at: http://www.va.gov/ogc/accreditation.asp

U.S. Department of Veterans Affairs
Veterans Benefits Administration

Presumptive Disability Benefits

What is "Presumptive" Service Connection?

VA presumes that certain disabilities were caused by military service. This is because of the unique circumstances of a specific Veteran's military service. If a presumed condition is diagnosed in a Veteran within a certain group, they can be awarded disability compensation.

What are "Presumptive" Conditions?

If you are diagnosed with a chronic disease within one year of active duty release, you should apply for disability compensation. Examples of chronic disease include: arthritis, diabetes or hypertension.

Or, if you served continuously for at least 90 days and are diagnosed with **amyotrophic lateral sclerosis (ALS)** after discharge, you can establish service connection for the disease.

Veterans in the following groups may qualify for "presumptive" disability benefits:

- **Former prisoners of war** who:
  - Have a condition that is at least 10 percent disabling
  - Depending on length of imprisonment, specific conditions are presumed
    - Imprisoned for any length of time:
      - Psychosis
      - Any of the anxiety states
      - Dysthymic disorder (or depressive neurosis)
      - Organic residuals of frostbite
      - Post- traumatic osteoarthritis
      - Heart disease or hypertensive vascular disease
      - Stroke and the residual effects
      - Osteoporosis, when the Veteran has posttraumatic stress disorder

- Imprisoned for at least 30 days:
    - Beriberi (including beriberi heart disease)
    - Chronic dysentery
    - Helminthiasis
    - Malnutrition (including optic atrophy)
    - Pellagra
    - Other nutritional deficiencies
    - Irritable bowel syndrome
    - Peptic ulcer disease
    - Peripheral neuropathy
    - Cirrhosis of the liver
    - Avitaminosis
    - Osteoporosis

- **Vietnam Veterans** who were:
    - Exposed to Agent Orange
    - Served in the Republic of Vietnam or on a vessel operating not more than 12 nautical miles seaward from the demarcation line of the waters of Vietnam and Cambodia between Jan. 9, 1962 and May 7, 1975
    - Specific presumed conditions are:
        - AL amyloidosis
        - B-cell leukemia
        - Chronic lymphocytic leukemia
        - Multiple myeloma
        - Type 2 diabetes
        - Hodgkin's disease
        - Ischemic heart disease (including but not limited to, coronary artery disease and atherosclerotic cardiovascular disease)
        - Non-Hodgkin's lymphoma
        - Parkinson's disease
        - Parkinsonism
        - Prostate cancer
        - Respiratory cancers
        - Soft-tissue sarcoma (not including osteosarcoma, chondrosarcoma, Kaposi's sarcoma or mesothelioma)
        - Bladder cancer
        - Hypothyroidism

        - The following conditions, if they become greater than 10 percent debilitating within a year of exposure to an herbicide agent:
            - Acute and subacute peripheral neuropathy
            - Chloracne or other similar acneform disease
            - Porphyria cutanea tarda

- **Atomic Veterans exposed to ionizing radiation** and who experienced one of the following:
    - Participated in atmospheric nuclear testing
    - Occupied or were prisoners of war in Hiroshima or Nagasaki
    - Served before Feb. 1, 1992, at a diffusion plant in Paducah, Kentucky, Portsmouth, Ohio or Oak Ridge, Tennessee
    - Served before Jan. 1, 1974, at Amchitka Island, Alaska Specific presumed conditions are:
        - All forms of leukemia, except chronic lymphocytic leukemia
        - Cancer of the thyroid, breast, pharynx, esophagus, stomach, small intestine, pancreas, bile ducts, gall bladder, salivary gland, urinary tract, brain, bone, lung, colon or ovary
        - Bronchioloalveolar carcinoma
        - Multiple myeloma
        - Lymphomas, other than Hodgkin's disease
        - Primary liver cancer, except if there are indications of cirrhosis or hepatitis B

- **Gulf War Veterans** who:
    - Served in the Southwest Asia Theater of Operations
    - Have a condition that is at least 10 percent disabling by Dec. 31, 2026
    - Specific presumed conditions are:
        - Medically unexplained chronic multi-symptom illnesses that exist for six months or more, such as:
            - Chronic fatigue syndrome
            - Fibromyalgia
            - Irritable bowel syndrome
        - Any diagnosed or undiagnosed illness that warrants a presumption of service connection, as determined by the Secretary of Veterans Affairs

- Signs or symptoms of an undiagnosed illness include:
    - Fatigue
    - Skin symptoms
    - Headaches
    - Muscle pain
    - Joint pain
    - Neurological or neuropsychological symptoms
    - Symptoms involving the upper or lower respiratory system
    - Sleep disturbance
    - Gastrointestinal symptoms
    - Cardiovascular symptoms
    - Weight loss
    - Menstrual disorders

- **Gulf War Veterans** who:
    - Served in the Southwest Asia Theater of Operations or in Afghanistan on or after September 19, 2001
        - Manifest one of the following infectious diseases to a degree of 10 percent or more within 1 year of separation:
            - Brucellosis
            - Campylobacter jejuni
            - Coxiella burnetii (Q fever)
            - Nontyphoid Salmonella
            - Shigella
            - West Nile virus
            - Malaria (or when accepted treatises indicate the incubation period began during a qualifying period of service)
        - Manifest to a degree of 10 percent or more at any time after separation:
            - Mycobacterium tuberculosis
            - Visceral leishmaniasis

- **Gulf War Deployed Veterans** who:
    - Served any length of time in the Southwest Theater of Operations during the Persian Gulf War, or
    - Served any length of time in Afghanistan, Syria, Djibouti or Uzbekistan on or after September 19, 2001 and
    - Manifests one of the following to any degree within 10 years from the date of separation from military service:
        - Asthma
        - Rhinitis
        - Sinusitis, to include rhinosinusitis

VA | U.S. Department of Veterans Affairs

Form Approved: OMB No. 2900-0018
Exp. Date: Feb 28, 2023
Respondent Burden: 15 minutes

APPLICATION FOR ACCREDITATION AS SERVICE ORGANIZATION REPRESENTATIVE

PRIVACY ACT AND PAPERWORK REDUCTION ACT NOTICE: The information requested on this form is solicited under 38 U.S.C., Section 5902, which authorizes VA to recognize representatives of approved organizations for the preparation, presentation, and prosecution of claims under laws administered by VA. The requested information will enable VA to determine your eligibility for accreditation as a representative of a recognized service organization. Your disclosure of this information to us is voluntary, but your failure to provide full information could delay or preclude your accreditation. The Privacy Act authorizes VA to disclose the information outside VA for certain routine uses, which have been published in the Federal Register with reference to a VA system of records entitled, "Accreditation Records-VA" (01VA022). Such routine uses include verification of the identity, status, and service organization affiliation of representatives, civil or criminal law enforcement, communications with members of Congress of their representatives, Government litigation, and notification to service organizations of information relevant to a refusal to grant or a suspension or termination of accreditation.

RESPONDENT BURDEN: VA may not conduct or sponsor, and you are not required to respond to, this collection of information unless it displays a valid OMB Control Number. The public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to VA Clearance Officer (005G2), 810 Vermont Avenue, NW, Washington, DC 20420. **Send comments only. Do not send** this form or requests for benefits to this address.

SECTION I - TO BE EXECUTED BY DESIGNEE *(Type or print)*

1. LAST NAME - FIRST NAME - MIDDLE NAME	2. BUSINESS ADDRESS

3. BRANCH OF SERVICE *(Check applicable boxes)*

☐ ARMY ☐ NAVY ☐ AIR FORCE ☐ MARINE CORPS ☐ COAST GUARD ☐ NON-VETERAN ☐ OTHER *(Specify)*

4. LIST OF DATES OF ALL ACTIVE SERVICE	5. CHARACTER OF DISCHARGE(S)	6. METHOD OF QUALIFICATION
		☐ COMPLETED APPROPRIATE TRAINING ☐ EXPERIENCE REPRESENTING CLAIMANTS

7A. NAME OF ORGANIZATION WHICH YOU WILL REPRESENT	7B. EMAIL AT ORGANIZATION *(Optional)*	7C. PHONE NUMBER AT ORGANIZATION *(Optional)*

7D. RELATIONSHIP TO ORGANIZATION		7E. COUNTY VETERANS SERVICE OFFICERS
ARE YOU A MEMBER IN GOOD STANDING OF THE ORGANIZATION SHOWN IN ITEM 7A?	ARE YOU A PAID EMPLOYEE OF THE ORGANIZATION SHOWN IN ITEM 7A, WORKING FOR THE ORGANIZATION FOR NOT LESS THAN 1000 HOURS ANNUALLY?	ARE YOU A PAID COUNTY EMPLOYEE: A) WHO WORKS FOR THE COUNTY NOT LESS THAN 1000 HOURS ANNUALLY; B) WHO HAS SUCCESSFULLY COMPLETED VA-APPROVED STATE TRAINING AND EXAMINATION; AND C) WHO WILL RECEIVE REGULAR STATE SUPERVISION AND MONITORING OR ANNUAL TRAINING?
☐ YES ☐ NO	☐ YES ☐ NO	☐ YES ☐ NO

8. ARE YOU ACCREDITED TO ANY OTHER ORGANIZATION(S)?

☐ YES ☐ NO *(If "YES," give name of organization(s))*

9A. ARE YOU EMPLOYED IN ANY CIVIL OR MILITARY DEPARTMENT OR AGENCY OF THE UNITED STATES GOVERNMENT?	9B. HAVE YOU EVER HELD A FEDERAL GOVERNMENT POSITION WHICH INVOLVED ANY ACTION RESPECTING CLAIMS IN THE DEPARTMENT OF VETERANS AFFAIRS OR THE VETERANS ADMINISTRATION?
☐ YES ☐ NO *(If "YES," give name of agency or department)*	☐ YES ☐ NO

It is understood and agreed that neither the designee nor the organization will charge or accept any fee or other gratuity for services rendered a claimant; that neither will publish or divulge any confidential information except as provided by law or regulation; and that any breach of these conditions will be sufficient basis for revocation of accreditation.

10. SIGNATURE OF DESIGNEE *(NEW CERTIFICATIONS ONLY) (Ink Signature)*	11. DATE OF SIGNATURE

SECTION II - TO BE EXECUTED BY PROPER CERTIFYING OFFICER OF RECOGNIZED ORGANIZATION

CERTIFICATION: Subject to the foregoing agreement, the undersigned hereby certifies that the designee is of good character and reputation, is qualified by training or experience to present claims, and that the foregoing statements are believed to be correct.

☐ We therefore recommend primary accreditation.

☐ We therefore recommend cross-accreditation based on the designee's accreditation with (*give name of organization*): _____

☐ We therefore recertify the qualifications of this representative.

12. SIGNATURE AND TITLE OF CERTIFYING OFFICER *(Ink Signature)*	13. NAME OF ORGANIZATION

14. ADDRESS OF CERTIFYING OFFICER	15. DATE OF SIGNATURE

PENALTY: The law provides that whoever makes any statement of a material fact, knowing it to be false, shall be punished by a fine or imprisonment or both (18 U.S.C. 1001).

Section Twelve

Five Estate Planning Tips for Clients Involved in Divorce

James A. Reed
Cross Glazier Reed Burroughs PC
Carmel, Indiana

Michael R. Kohlhaas
Cross Glazier Reed Burroughs PC
Carmel, Indiana

Section Twelve

Five Estate Planning Tips for Clients Involved in Divorce…….. James A. Reed
Michael R. Kohlhaas

CROSS | GLAZIER | REED | BURROUGHS, PC.®

Five Estate Planning Tips for Clients Involved in Divorce

By: James A. Reed
Cross Glazier Reed Burroughs

Written Materials: Michael R. Kohlhaas
Cross Glazier Reed Burroughs

1. **It generally makes sense to view divorce-related estate planning as a two-step process: (1) stopgap planning with the filing of the divorce, followed by (2) a comprehensive new estate plan once the divorce is finalized.**

The first step is typically about removing the spouse from the client's disability and estate planning documents. It is difficult when the divorce is just on file to do much more comprehensive planning because the pending divorce puts the client's finances in a state of great uncertainty.

Then, once the divorce is finalized, the client should give careful consideration to a comprehensive new estate plan, some of which may be required by the parties' divorce decree (*e.g.*, maintain life insurance, *etc*.).

2. **If possible, undertake the initial stage of revising the client's disability and estate planning documents <u>prior to</u> the filing of the divorce.**

Typically, once a divorce is on file, the divorce court will be receptive to efforts by either party to seek orders that preserve to maintain the status quo. By statute, a divorce court has clear authority to issue preliminary orders that restrain either party from transferring assets, selling property, or incurring additional debt in joint name. It is less clear whether a divorce court has authority to order a party not to make changes to life insurance beneficiary designations, retirement account beneficiary designations, or changes to estate plans.

The consensus is that such property interests represent future interests and, thus, current Indiana law does not grant the divorce court authority to limit changes in their allocation. However, that does not mean that the other party might not seek such orders anyway, and a divorce court could grant them. Therefore, it is preferable if estate plan changes are made prior to the divorce being on file, and preferably well in advance to the divorce being filed.

3. **Don't begin transferring or retitling assets in an effort to remove them from the marital estate.**

Some clients in a troubled marriage will think it is advantageous to begin surreptitiously transferring assets to friends or family in an effort to get that property out of the marital estate. However, Indiana law gives a divorce court later hearing the case the power to effectively make adjustments to the division of the marital estate to reflect the transfer of such assets, as well as to make attorney fee and expense awards against the dissipating party. So, this practice is not encouraged. This issue notwithstanding, there may be cases where, even in a troubled marriage, a spouse will cooperate with gift-splitting because it may not "cost" the other spouse to be cooperative. So, particularly in high net worth cases, before a divorce is filed, an opportunity to take advantage of gift-splitting should be given consideration.

As noted above, the other party may seek limitations on changes to estate plans, but unless and until there is a specific order to the contrary, it is advisable that the client's will and any trusts be revised to reflect the client's new beneficiaries – which will presumably not include the estranged spouse. In a typical case, the estate plan that it put together upon the filing of a divorce is simple and uncomplicated. For one, a complicated estate plan takes longer to assemble, and there is usually a sense of urgency to put a new will in place that does not benefit the estranged spouse. Second, the client's finances and property interests are in a state of great uncertainty until the divorce is concluded and final property settlement orders are issued. So, this temporary estate plan can best be viewed as a short term "bridge" that takes the client from the time of the divorce being filed, until the divorce can be finalized and a more comprehensive estate plan that reflects the client's final, post-divorce property interests can be developed.

4. **Be sure that planning for the benefit of children uses a trust, rather than leaving money or property to the children individually or, worse, to the former spouse.**

A complication for estate planning can arise when the parties have children together who are minors. On one hand, the client likely wishes not to leave the estranged spouse any share of the estate. However, the client presumably wishes to make sure the children are provided for appropriately. In this situation, the estate plan should be carefully drafted to provide that property for the children not go to the children outright; otherwise, upon death, the former spouse will presumably become the sole custodian of both the minor children – and the property the children receive under the client's estate plan. So, it is preferable to use a trust for the benefit of the children, which employs a third party who is trusted by the client – or a corporate fiduciary – as the trustee in this type of situation.

The same is true for life insurance. It is not uncommon to see life insurance, intended to provide security for a client's future child support obligations, name the former spouse as the beneficiary of the policy. The better practice is to use a life insurance trust for the children's benefit.

5. **Update beneficiary designations to remove spouse**

Clients often do not realize how many beneficiary designations they may have executed in favor of their spouse over many years, from life insurance to IRAs to bank POD accounts. All of these should be reconsidered. Many clients will have existing powers of attorney executed in favor of the estranged spouse. These need to be properly revoked immediately, particularly if the power of attorney is already in effect, and is not conditioned upon a lack of capacity. The client's financial institutions should also be advised of the revocation. Similarly, many clients will have

previously executed an advance health care directive (possibly coupled with a HIPAA authorization) in favor of the estranged spouse. The client should execute the documents necessary to appoint a new proxy. Again, the client's physician and other medical providers should be given notice of these changes, as well.

BONUS TIP: Always be mindful of the potential interplay between estate planning and any premarital agreement.

Not infrequently, unfortunately, estate planning attorneys will cause the client to take steps, usually motivated by tax or assets protection purposes, which may make sense for the average individual, but which was imprudent in that a particular case because of the parties' premarital agreement.

Years ago, we had a case that involved a title-based premarital agreement that essentially provided, in the event of a divorce, assets would be divided based upon how they were titled. Prior to the divorce, estate planners encouraged Husband to transfer most of his assets to Wife due to some impending creditor concerns. However, when the parties divorced shortly thereafter, Wife was well-positioned to argue that all of Husband's assets that were transferred to her became Wife's "separate property" and should be awarded to her in the divorce.

Section Thirteen

5 TIPS ON BUSINESS SUCCESSION PLANNING

Richard O. Kissel II
Taft Stettinius & Hollister LLP
Indianapolis, Indiana

Section Thirteen

5 TIPS ON BUSINESS SUCCESSION PLANNING

RICHARD O. KISSEL, II

TIP 1. Have a long (series of) talk(s) with your client. Poor expression of feelings and wants of everyone involved is a potential obstacle.

- What are the client's goals? Does the client know what he/she really wants?
    - Rough family justice?
    - Preserve relationships among family members?
    - Keep planning simple, straight forward and simple?
- Will more than one child be considered for succession?
- How long is it anticipated the planning process will take?
- Assuming there are other children who will not be directly involved in the business, will they be treated equally or "fairly"? If the owner is married, does his or her spouse agree with this decision?
- Which child gets control of the business and when?
- Is he or she capable of managing the business now or, if not, when will that occur?
- Has the child who is receiving control been fairly compensated for his or her efforts?
- Does the child who is receiving control already have an equity interest in the business? If not, have his or her efforts added sufficient value to the business to justify granting an equity interest or him or her?
- How much will other family members be involved in the process?
- How much is the business worth?

- Does the owner need funds from the business to support his or her lifestyle in retirement or have sufficient funds been taken out of the business to do so previously?

- Has the management transition been discussed with any lenders? Will the child who is receiving control be required to guaranty payment of any debt?

- Is planning for retention of key employees who are not family members required?

TIP 2. Recapitalize the business into voting and nonvoting interests.

- Allows the owner to retain control and to begin to pass economic interests in the business to the next generation. May also facilitate lack of marketability and minority interest discounts (assuming these discounts continue to exist).

- The child who receives control can ultimately receive voting interests while the other children may receive nonvoting interests (but must consider provisions for distributions, capital investment, etc.).

TIP 3. Divide the business into operating and non-operating entities.

- The child who receives control can receive interests in the operating entity while the other children may receive interests in the non-operating entity (such as an entity that owns the real estate upon which the business operates).

- Must consider, for example, long term, fair market value leases, lease renewal options, rights of first refusal, etc.

TIP 4. If it is appreciating in value, make current transfers of interests in the business.

- Sell interests (e.g. for a promissory note) if the owner needs cash flow from the business to fund his or her retirement lifestyle.

- Make gifts of interests in the business using unified gift and estate tax credit.

- Utilize GRATs and/or Intentionally Defective Grantor Trust(s) if the business is expected to appreciate in value.

TIP 5. Consider the purchase of life insurance.

- Life insurance proceeds can be used to help equalize the child(ren) who will not receive control of the business, or used to purchase the business interest to make business interest GST exempt.

- Structure so that the proceeds are not subject to estate or income tax (note the transfer for value rule if utilizing existing insurance).

- The business will likely need to fund premium payments through, e.g. bonuses to the owner or possibly a premium financing or split-dollar arrangement.

Section Fourteen

Tips on Better Filings with the Courts

Hon. Andrew R. Bloch
Magistrate, Hamilton County Superior Court
Noblesville, Indiana

Section Fourteen

Tips on Better Filings with the Courts

Hon. Andrew R. Bloch
Magistrate, Hamilton Superior Court

Tip #1:

If you are in an Odyssey County start doing this when you leave a blank for a hearing date or the Judge's signature date:

Instead of:

So, Ordered on the _____ day of _____, _____

Continued to the _____ day of _____, _____ at _____, am/pm, _____ choice.

Type this:

So, Ordered: _____

Continued to _____.

The Odyssey system has changed and it is far less time consuming to put one stamp (a date stamp) then it is to make three or more different text boxes to enter. Your local court staff will thank you.

Tip #2

When filing your initial case, please make sure that you choose the proper case type. (Ex: PL, CC, MI, DR, DN, ES, GU)

These designations have a meaning to the Indiana Supreme Court when weighted case load is calculated. Proper case types ensure that the Indiana Supreme Court calculates the proper weighted caseload and ensures the proper number of judicial officers are assigned to your County.

Some counties have very strict rules on what kinds of cases go with case types.

Tip #3

Most things now require a hearing before relief can be granted. Avoid submitting an Order for the relief you want at your initial filing. If you do submit an order granting relief, also submit a separate order setting the same matter for hearing.

Judicial Officers and Lawyers have been discipline for granting Ex Parte Relief.

Tip #4

A verified pleading filed on behalf of your client must be signed by your client. If your signature is the only one present on the Verified Petition, you are verifying the document instead of your client. You may not want to do that.

Section Fifteen

FIVE TIPS ON SPOUSAL LIMITED ACCESS TRUSTS

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Indianapolis, IN 46240

Section Fifteen

FIVE TIPS ON SPOUSAL LIMITED ACCESS TRUSTS (SLAT)

John Gardner

1. **Preserve Flexibility**
    - Consider adding children as current permissible beneficiaries
    - Provide discretionary spousal access to trust principal (income tax reimbursement)
    - Consider spousal limited power of appointment

2. **Define Who is the Spouse**
    - Current spouse during continuation of marriage?
    - Current spouse for lifetime?
    - Future spouse?

3. **Consider Benefits of Making SLAT Multi-Generational**
    - Using transfer tax exemption and GST exemption

4. **Avoid Personal Use Assets in SLAT.**
    - Grantor as only contributor
    - Grantor as indirect beneficiary

5. **Understand Application and Arrangement of Grantor Trust Rules**
    - SLAT as grantor trust during continuation of spouse's interest
    - SLAT as grantor trust after divorce
    - SLAT as grantor trust after termination of spouse's interest by reason other than divorce

Section Sixteen

5 TIPS ON HOW TO AVOID PROBATE COURT

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Section Sixteen

DISCLAIMER:

These seminar materials and this seminar presentation are intended to provide those attending with guidance in estate planning, probate administration and related issues. The materials and the presentation by the author do not constitute, and should not be treated as, legal advice. Although every effort has been made to ensure the accuracy of these materials, neither the author nor Hall Scott P.C. assumes any responsibility for an individual's reliance on these materials. The seminar attendee should independently verify all statements made in the materials and during the seminar before applying them to a particular fact situation.

5 Tips on How to Avoid Probate Court

Shawn M. Scott

TIP 1. Understand what Probate Court is and how you get there.

- Probate administration is the court administered process of distributing assets of a decedent pursuant to the terms of their Will or the laws of intestacy.

- Opening an estate is required when assets in a decedent's individual name exceed $50,000 with the limited exception of real estate under Indiana Code §29-1-7-23.

- Assets under $50,000 can be transferred to the heirs/beneficiaries by small estate affidavit under Indiana Code §29-1-8-1.

TIP 2. Gather complete information about your client's assets during the planning process.

- Request complete asset information in your initial questionnaire with specific prompts.

- Supplement the questionnaire as appropriate during your interview/initial meeting.

- Discuss client's assets with their financial advisor and/or tax preparer.

- Ask questions about unusual assets that could trigger the requirement to open a probate estate.
    - Property held as tenants in common with another individual
    - Outdated beneficiary designation forms
    - Notes payable

TIP 3. Create a revocable trust plan.

- A revocable trust plan including a "pour-over" Will to a trust when properly "funded" will avoid probate and allow for a prompt transition of assets to the successor trustee and access to trust assets to begin administration.

- Proper funding is crucial so the trust is the owner of the decedent's assets at death.

- Client's social security number is the taxpayer identification number.

Tip 4. Advise clients with respect to beneficiary designations and the Transfer on Death Property Act(Indiana Code §32-17-14, et seq.)

- Designate beneficiaries to retirement accounts and life insurance policies.

- Consider what other assets may be appropriate for beneficiary/transfer on death designation.

- Assign rights under Contracts (Indiana Code §32-17-14-10)

- Transfer on Death Deed (Indiana Code §32-17-14-11)
    - Must be recorded before death of transferor
    - Can be revoked (unlike granting of life estate interest)

TIP 5. Create a spreadsheet that lists client assets and your recommended action for each asset for probate avoidance.

- Include approximate value of each asset as provided by client and how the asset is currently titled.

- Include recommendation for re-titling assets to the revocable trust when appropriate.

- Assets that are not titled to the trust (or in joint name, if married) should have a beneficiary designation/transfer on death designation.

BONUS TIP. Set up a regular client touch system.

- Re-send your recommendation list/action items to the client and their advisor(s) thirty days after documents are signed to help ensure action items are completed.

- Reach out to the client every 3-5 years to recommend that they meet with you to review their estate plan and make updates as appropriate including re-visiting asset titling and beneficiary designations/transfers on death.

Section Seventeen

Five Tips Regarding Wrongful Death Estates

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Section Seventeen

Five Tips Regarding Wrongful Death Estates…….. Kent M. Frandsen

FIVE TIPS REGARDING WRONGFUL DEATH ESTATES

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I. Who may bring a wrongful death action?

The Probate Code identifies those eligible to be appointed as "personal representative" of a decedent's estate and establishes their priority to serve. IND. CODE § 29-1-10-1.

In Indiana, wrongful death actions are creatures of statute, which is to be strictly construed because that remedy was not available at common law. Each of the three actions has distinct criteria, elements and recoverable damages set forth in the statute.

The three types of wrongful death actions are:

A. General Wrongful Death (GWDS), IND. CODE §34-23-1-1, which applies to the death of one not leaving a spouse or dependent next of kin;

B. Adult Wrongful Death (AWDS), IND. CODE §34-23-1-2, which applies to decedents who are not children and leave no spouse or other dependents); and

C. Child Wrongful Death (CWDS), IND. CODE §34-23-2-1, which applies to a decedent under age 20 or under age 23 and enrolled in a post-secondary or vocational school at the time of death.

By statute, only the personal representative of the decedent's estate may bring the action under the GWDS or AWDS. *Robertson v. Gene B. Glick Co., Inc.*, 960 N.E.2d 179, *tr. denied* 968 N.E.2d 232 (2011).

The plaintiff is typically either the personal representative of the general estate or a "special administrator" appointed for the limited purpose of maintaining the action. The court is given wide discretion in making the appointment, but the

decision is subject to review on appeal. *In re Estate of Hutman*, 705 N.E.2d 1060 (Ind. App. 1999).

The decedent's parents, spouse and children lack standing to being an individual, independent claim for their damages under the GWDS and AWDS. *Robertson*, 960 N.E.2d 179.

In the CWDS setting, a probate estate is typically not opened for the deceased child, and only the child's parents, guardian or the personal representative of the parent or guardian may bring the action. IND. CODE 34-23-2-1(c) and (d); *Childs v. Rayburn*, 346 N.E.2d 655 (Ind. App. 1976); *Ruckman v. Pinecrest Marina, Inc.*, 367 F.Supp. 25 (N.D. Ind. 1973).

> In the event of the dissolution of the marriage of the deceased child's parents, the other parent is to be joined as a co-defendant to answer as to his or her interest. IND. CODE § 34-23-2-1(c).
>
> *Beware!* Though not required by statute, to avoid races to the courthouse and allow all interested persons to be heard concerning the appointment of a special administrator authorized to bring a wrongful death action, in 2019 our Supreme Court recently held that a court must require notice to all interested persons and hold a hearing before making the appointment. *In the Matter of Orlando C. Lewis, Jr.*, 123 N.E.3d 670 (Ind. 2019),
>
> *Beware, again!* In the recent unpublished decision in *Klotzsche v. Klotzsche*, No. 21A-CT-1143, Ind. Court of Appeals (Oct. 25, 2021), the court held that a timely appointed special administrator must obtain the trial court's authorization to file the wrongful death action *before* the statute of limitation has expired or else the action is time barred.

II. How is the damage award determined and allocated among family members?

The proceeds of a wrongful death claim are not subject to distribution to beneficiaries through the decedent's estate. Rather, the distribution is governed by the wrongful death statutes themselves.

Under the GWDS and AWDS, amounts recoverable for medical, hospital funeral and burial expenses inure to the exclusive benefits of the personal representative for the payment thereof. IND. CODE §34-23-1-1 (GWDS) and IND. CODE § 34-23-1-2(d) (AWDS).

In the GWDS setting, the remaining recovered damages passes to the surviving spouse and dependent children or next of kin "in the same manner as the personal property of the decedent." This has been construed to mean they pass to the surviving spouse and other dependents in accordance with the distribution formula contained in the intestacy statute. The pattern verdict form found in the INDIANA MODEL CIVIL JURY INSTRUCTIONS No. 5043(C) (2019 Ed.) contemplates a total, *gross* award of these remainder damages instead of being individually assessed and awarded to the statutory beneficiaries. The gross award is then allocated among the spouse and/or dependent children as set forth in the intestacy formula. The fact that the spouse or some of the dependent children may have had a more substantial relationship with the decedent (and therefore suffered a greater loss) than others is immaterial.

On the other hand, in the AWDS setting the remainder damages "inure to the exclusive benefit of a nondependent parent or nondependent child of the adult person." The statute specifies the jury is to assess the remaining damages and return a verdict that separately identifies the amount due each parent or child. IND. CODE §34-23-1-2(h). INDIANA MODEL CIVIL JURY INSTRUCTIONS No. 5047(C) (2019 Ed.)

Recognizing the difficulty in applying the somewhat these confusing damage valuations, it is not uncommon for the decedent's family members to reach agreement, either pre-verdict or post-verdict, as to a fair division of the recovery. Any such agreement should follow full disclosure and be approved by the court. Good luck in fashioning such an agreement where family members don't get along.

III. Are the plaintiff's attorney fees and litigation expenses recoverable in wrongful death actions?

It depends on the type of action:

> If the decedent leaves a surviving spouse or dependent children or next-of-kin, the action must be brought under the GWDS and based on the language of that statute fees are not recoverable. *SCI Propane, LLC v. Frederick*, 39 N.E.3d 675 (Ind. 2019).
>
> If the decedent leaves no surviving spouse or dependent children or next-of-kin, the action may be brought under the GWDS and based on its language in that context fees are recoverable. *SCI Propane, LLC v. Frederick*, 39 N.E.3d 675 (Ind. 2019).

Even though the statute is silent on the topic, in 2011 the Supreme Court held that the plaintiff's fees and expenses are recoverable in AWDS actions. In the adult context, plaintiff may bring the action under either the AWDS or GWDS. The doctrine of *in pari materia* requires those statutes be construed in harmony; therefore, because fees are recoverable in that context under the GWDS, they are also recoverable under the AWDS. *McCabe v. Comm'r of Ind. Dept. of Insurance*, 949 N.E2d 816 (Ind. 2011). The same is true for litigation expenses. *Hematology-Oncology of Indiana, Inc. v. Fruits*, 950 N.E.2d 294 (Ind. 2011).

Subsection (f) of the CWDS allows recovery of "reasonable attorney fees" for "administration of the child's estate." While child death cases are not typically brought via an estate, *Angel Shores Mobile Home Park, Inc. v. Crays*, 78 N.E.3d 718 (Ind App. (2017), in deciding an issue of first impression, upheld an award of fees and litigation expenses to the child's parents in successfully prosecuting the action.

IV. If attorney fees are recoverable, how should they be calculated?

Before answering this question, a few general principles merit attention.

The fee provisions of the GWDS, AWDS and CWDS are not fee-shifting statutes; the fees and expenses incurred in obtaining a recovery are elements of the estate's compensatory damages. *Indiana Patient's Compensation Fund v. Brown*, 949 N.E.2d at 824 (holding that under the AWDS "[A]ttorney fees, probate administration costs, and litigation costs are compensatory damages that remedy actual pecuniary losses."); Fruits, 932 N.E.2d at 703.

The purpose of compensatory damages is to make the plaintiff whole. Indiana law holds that "[W]hile the aggrieved party must be compensated, he should not be placed in any better position." *Wiese-GMC, Inc. v. Wells*, 626 N.E.2d 595, 597 (Ind. App. 1993). "Compensatory damages are meant to compensate a plaintiff for loss suffered as a result of another party's tortious act and to place him in the same financial position in which he would have been had the tort not occurred." *A.J.'s Automobile Sales, Inc. v. Freet*, 725 N.E. 955, 970 (Ind. App. 2000). The award is only intended to compensate the injured person for the damage sustained by him due to the tortfeasor's actions. *Remington Freight Lines, Inc. v. Larkey*, 644 N.E.2d 931, 941 (Ind. App. 1994).

> The recovery of fees is not a right belonging to counsel; rather it 'inures to the exclusive benefit of the estate for the payment of these expenses." *Hillebrand*, 914 N.E.2d at 851.

With these principles in mind, the question is: should the successful plaintiff who retains counsel on a typical 33% to 40% contingency fee basis and owes that fee to his counsel automatically be entitled to an equivalent add-on to the recovery? If the fee amount is reasonable under the factors enumerated in Rule of Professional Conduct 1.5(a) and the goal is fairly compensating the estate for the expense of obtaining a recovery, one would think such an add-on is due.

One advantage of such a view is it allows for the assessment and award of fees without a contentious, time-consuming and expensive fee hearing.

> But for a contrary holding, see *Grabach v. Evans*, 196 F.2d 746 (N.D. Ind. 2002) (in a CWDS action, the district court permitted the settling defendant to challenge the reasonableness of a plaintiff's 33% contingency fee on the settlement sought to be added to defendant's payment obligation.) If a court ruled the contingent fee amount was unreasonably high under RPC 1.5, surely the client would not have to pay it notwithstanding the terms of the fee agreement.

But what if the attorney is handling the death case on an hourly-fee basis? Certainly less common but possible. Such arrangement may require the court to play a greater role in assessing the estate's attorney fee and expense obligation to its counsel or determining the reasonableness of that fee. Again, if attorney fees are an element of damages like the decedent's medical and funeral expenses, the estate should be compensated for that element of its damages.

Should the hourly-rate fee due from the defendant be reduced commensurate with the defendant's actual percentage of fault? Assume a case where both plaintiff and defendant were found at trial to be 50% at fault. If attorney fees are to be treated like plaintiff's other damages, the defendant may have a good argument his damage liability should be 50% of the actual hourly-rate fee. But that would mean the client would owe the entire fee yet only recover from defendant half of that amount. Perhaps the plaintiff could use the rationale of *Crays*, discussed below, to obtain a full recovery of fees from the defendant. Or perhaps the plaintiff could persuade the court that an hourly fee of $xxx was needed to establish the defendant's 50% liability and require the defendant to reimburse plaintiff for the full amount.

These knotty questions await resolution by our courts in future cases where a wrongful death fee recovery is permitted.

V. Why a defendant may not wish to be the sole remaining defendant at verdict.

Angel Shores Mobile Home Park, Inc. v. Crays, 78 N.E.3d 718 (Ind App. (2017), points out the unfortunate risk confronting those defendants who remain a party at verdict.

In this CWDS action sounding in negligence, the deceased child's parents reached a pre-trial settlement with defendant Wagner and went to trial solely as to Angel Shores. Wagner remained on the verdict form as a nonparty defendant. The jury allocated 95% fault to Wagner and the remaining 5% to Angel Shores. The damages were assessed at $3 million, excluding attorney fees and litigation expenses which the parties had reserved for determination by the court after verdict. So, in addition to Angel Shores's $150,000 share of the general damages, plaintiffs' attention turned to their fees and litigation expenses.

Plaintiffs sought from Angel Shores $60,000 in contingent attorney fees (calculated as 40% of their $150,000 general recovery) as well as the entire $73,000 they incurred in litigation expenses. Angel Shores argued in opposition that (i) the parents' attorney fees and litigation expenses are not recoverable under the CWDS and (ii) if recoverable, its liability for litigation expenses should be limited to and calculated on its five percent share of the total fault for the child's death. The trial court allowed the entire recovery sought by plaintiffs.

On appeal, in an issue of first impression, the court reviewed recent cases upholding fees in the wrongful death context and found them recoverable under the CWDS. The 40% contingent fee award applicable to Angel Shores' $150,000 share of general damages was properly charged to it.

The court also found that litigation expenses were recoverable. But in doing so it treated such expenses as "costs" which under IND. CODE §34-52-1-5 are to be apportioned among the defendants remaining at judgment. The only defendant at that point was Angel Shores. As such, the trial court was within its discretion to assess the entire $73,000 in expenses as "costs" chargeable to Angel Shores with no reduction due for nonparty Wagner's 95% share of the fault.

This case poses a significant risk that non-settling defendants who bear a small percentage of fault on the verdict may end up owing a disproportionate share of plaintiff's litigation expenses.

Section Eighteen

5 Tips on Guardianship

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Section Eighteen

5 Tips on Guardianship……Anne Hensley Poindexter

1. AN ACTION TO ESTABLISH A MINOR CHILD GUARDIANSHIP IS, ESSENTIALLY, A CHILD CUSTODY PROCEEDING

- IC 29-3-5-5-4 (9), must appoint the person most suitable and willing, giving due regard to the best interest of the minor.
- Cases including a 2021 unpublished case In Re Guardianship of H.L.H, suggestthe Court can be guided by the factors of IC 31-14-13-2 and 31-17-2-8 used to determine best interests of the child in paternity and dissolution cases.
- IC 29-3-5-4 lists nine factors for consideration.
- IC 29-3-5-5 lists person for consideration and an order for consideration
- If more than one person has equal priority the Court should consider the mostqualified. However, acting in the best interest of the child, a Court can appoint a person with lower priority.
- In the best interest of the child should prevail.
- In Re Guardianship ARS 816 NE2d 1160 (2004) charge in one of the factors used in Child Custody Cases, allowed Father to terminate Guardianship and regain custody.

2. POWERS ON TERMINATION OF GUARDIANSHIP – NEW CASE LAW

- In Re Guardianship of Donnell Lee Roberts 169 NE3d 148 (2021) is a new case.
- Frady was Guardian of his friend Roberts. Roberts and Frady opened a joint checking account prior to the Guardianship. Roberts had an RMD check of $145K. Roberts made out a deposit slip and gave the check to Frady to deposit. Roberts died before it was deposited.

- IC 29-3-12-l(e)(l)(A) provides a Guardian may "exercise other powers that arenecessary to complete the performance ofthe Guardian's trust." Roberts gave the check with a deposit slip to Frady for deposit. Thus, completing the deposit after death was completion of a task entrusted to him and was proper.

- IC 29-3-12-1(d) provides:

> When a guardianship terminates otherwise than by the death of the protected person, the powers of the guardian cease, except that the guardian may pay the claims and expenses of administration that are approved by the court and exercise other powers that are necessary to complete the performance of the guardian's trust, including payment and delivery of the remaining property for which the guardian is responsible:
> (1) to the protected person;
> (2) in the case of an unmarried minor, to a person having care and custody of the minor with whom the minor resides;
> (3) to a trust approved by the court, including a trust created by the guardian, in which:
> (A) the protected person is the sole beneficiary of the trust; and
> (B) the terms of the trust satisfy the requirements of Section 2503(c) of the Internal Revenue Code and the regulations under that Section;
> (4) to a custodian under the Uniform Transfers to Minors Act (IC 30-2-8.5); or
> (5) to another responsible person as the court orders.

- IC 29-3-12-1(e) provides:

> When a guardianship terminates by reason of the death of the protected person, the powers of the guardian cease, except as follows:
> (1) The guardian may do the following:
> (A) Pay the expenses of administration that are approved by the court.
> (B) Exercise all other powers that are necessary to complete the performance of the guardian's trust. Permitted performances under this clause include the following:
> (i) The power to control the disposition of the deceased protected person's body.
> (ii) The power to make anatomical gifts.
> (iii) The power to request an autopsy.
> (iv) The power to make arrangements for funeral services.
> (v) The power to make other ceremonial arrangements as provided under IC 29-2-19-17.
> (C) Deliver the remaining property for which the guardian is responsible to the protected person's personal representative or to a person who presents the guardian with an affidavit under IC 29-1-8-1 or IC 29-2-1-2.
> (D) Request the health records of the protected person under IC 16-39-1-3(c)(4), except as provided in IC 16-39-1-3(d), if the protected person was an

incapacitated person. The power of a guardian under this clause terminates sixty (60) days after the date of the protected person's death.

(2) If the court approves the payment of expenses and obligations under this subdivision, then before the guardian delivers the remaining property under subdivision (1)(C), the guardian shall pay the following expenses and obligations in the amounts approved by the court and in decreasing order of priority:

(A) Final administration expenses of the guardianship as approved by the court under subdivision (1)(A).

(B) Unless prepaid by means of a funeral trust or before the protected person's death, the reasonable expenses for:

(i) the protected person's funeral;

(ii) a tombstone, monument, or other marker; and

(iii) the disposition of the protected person's bodily remains;

subject to the limitations provided in IC 29-1-14-9(a)(2).

(C) Any statutory allowances payable to the protected person's surviving spouse or surviving child under IC 29-1-4-1.

(D) The protected person's debts disclosed to the court and which could be filed and allowed as claims under IC 29-1-14, having the priority and preference established under IC 29-1-14-9(a)(4).

(E) Reasonable expenses of the protected person's last illness disclosed to the court and which could be filed and allowed as claims under IC 29-1-14, having the priority and preference established under IC 29-1-14-9(a)(5).

(F) The protected person's debts disclosed to the court and which could be filed and allowed as claims under IC 29-1-14, having priority and preference established under IC 29-1-14-9(a)(6).

(G) Any other obligations of the protected person disclosed to the court and which could be filed and allowed as claims under IC 29-1-14, having the priority established under IC 29-1-14-9(a)(7).

- Frady requested to engage in estate planning and under the same theory. IC 29-3-9-4.5(a) allows a Guardian to engage in estate planning consistent with theapparent intention, and based upon the protected person's declarations, practices, or conduct. However, estate planning is not a power that extends beyond death.

3. SUPPORTED DECISION MAKING IS ALIVE AND WELL

- In 2019 the condition precedent to establishing guardianship changed. Less restrictive measures including supported decision-making agreements must now be first considered. Chapter 14 of the Guardianship Code covers this topic.

- Agreements empower individuals, most often individuals with disabilities, to use supports to make their own decisions. In other words, individuals (...most often these with disabilities) make choices about their lives with support froma person or team they chose to help them. The Indiana Disability Rights Commission uses the analogy that supported decision making (SDM) is a support to make decisions just as a wheelchair is a support to an individual tohelp move around.
- The State website for the Governor's Council for People with Disabilities, sets forth a Spectrum of Support that ranges from Independence to Guardianship. In between are formalized supported decision-making agreements such as POA, HCR, &/ or Rep Payer. In a supported decision-making agreement, the individual make their own final decisions. This can be found at: in.gov/gpcpd/featured-projects/overview/supported-decision-making
    - Various forms of supported decision-making agreements can be found with a quick Google search "Charting The Life Course" is a great tool online for exploring decision making agreements. It explores the following topics.
        - Daily Life & Employment
        - Healthy Living
        - Social & Spiritually
        - Community Living
        - Citizenship & Advocacy

      It is also on the Governor's Council website.

- IC 29-3-14-7 sets forth the requirements of an agreement in which must include:
    - At least one supporter.
    - Description of assistance each supporter may provide.

- If appropriate, may be signed by the Ward's guardian.

- The agreement must be in writing, dated, signed before a notary and consentedto be each supporter.

4. VASIA (VOLUNTEER ADVOCATES FOR SENIOR OR INCAPACITATED ADULTS) ARE PROGRAMS TO PROVIDE GUARDIANS WHEN AN INDEPENDENT ONE IS NEEDED

- The VASIA statutes are forced in Chapter 8.5 of the Guardianship Code. IC29-3-8.5-1 et. Seq.
- The program is required to make 30-, 60-, and 90-day reports after appointment. The program may serve as Guardianship or investigation, and gather information as detected by the Court, facilitate service, advocate rights, facilitate legal representation and perform other responsibilities as required by the Court. IC 29-3-8.5-3
- The volunteers have civil liability immunity except for gross incompetence. IC 29-3-8.5.-8.
- VASIA programs can be established and may even qualify for a grant fromthe Indiana Supreme Court. When you do not have an appropriate family member check and see if a VASIA program exists in your County.

5. PROTECTIVE ORDERS UNDER THE GUARDIANSHIP CODE ARE OFTEN UNDERUTILIZED

- Chapter 4 of the Guardianship Code courses protective proceedings andsingle transactions. IC 29-3-4-1. Et. Seq.
- After a hearing a Court can enter a protective order for the benefit of an incapacitated person or minor. IC 29-3-4-1. The protective orders are for instances in which:

    - There is income requiring management.
    - Financial or business affairs are jeopardized or impaired or
    - There's estate property that needs to be managed to provide support orprotection of an incapacitate person, and the protected person cannot effectively manage the property or business affairs effectively. Then, the Court may enter appropriate Order.
- Orders may be entered for minors as well.
- Orders may include:
    - Annuity contracts
    - A contract for life care
    - A deposit contracts
    - A contract for learning and education as well as the addition to the establishment of a Trust.
- A Court must consider creditors & dependent prior to entry of a protected person. A limited Guardian to assist in setting up any arrangement may beordered. IC 29-3-4-3.