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90 Hot Tips in Estate, Trust and Probate Prcatice

Indiana Continuing Legal Education Forum (ICLEF)

90 Hot Tips in Estate, Trust and Probate Practice
December 21, 2022
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90 HOT TIPS
IN ESTATE, TRUST AND PROBATE PRACTICE

December 21, 2022

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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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90 HOT TIPS IN ESTATE, TRUST AND PROBATE PRACTICE

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 Will and Trust Mediation – Turn it up a Notch - *Brian C. Hewitt*
9:20 A.M.	5 Tips on New Cases and Legislation - *MaryEllen K. Bishop*
9:40 A.M.	5 Tips on Will and Trust Contests - *John A. Cremer*
10:00 A.M.	5 Tips on the Uniform Directed Trust Act - *Ronald M. Katz*
10:20 A.M.	**Break**
10:35 A.M.	5 Tips on Trust Planning to Maximize Creditor Protection - *John A. Gardner*
10:55 A.M.	5 Tips on Retirement Accounts or ILITs - *Rebecca W. Geyer*
11:15 A.M.	5 Tips on the Secure Act - *Rodney S. Retzner*
11:35 A.M.	5 Tips on Trust Decanting Under the New 2022 Act - *Jeffrey S. Dible*
11:55 A.M.	5 Tips on Connecting with a Jury - *Gregg S. Gordon*
12:15 P.M.	**Lunch Break**
1:15 P.M.	5 Tips on the New Health Care Advance Directive - *Robert W. Fechtman*
1:35 P.M.	5 Tips on VA Disability and Social Security Appeals- *Tamatha A. Stevens*
1:55 P.M.	5 Tips on Estate Planning and 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 Attorney Fees - *Robert W. York*
2:55 P.M.	**Break**
3:10 P.M.	5 Tips on Physician Reports in Guardianship - *Hon. Andrew R. Bloch*
3:30 P.M.	5 Tips on Guardianship Litigation - *Lisa M. Dillman*
3:50 P.M.	5 Tips on Estate and Trust Settlement Agreements - *Christopher J. Mueller*
4:10 P.M.	5 Tips on Probate and Small Estate Administration - *Arlene Kline*
4:30 P.M.	**Adjournment**

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Curtis E. Shirley, Law Office of Curtis E. Shirley, LLC, Carmel

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.

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

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, Bartholomew, 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; the Domestic Relations Bench Book Committee, as appointed by the Indiana Supreme Court; Hamilton County Bar Association; Indianapolis Bar Association; American Bar Association; and Indiana State Bar Association (Family Law Executive Committee). Drew was a Co-Chair of the Indiana State Bar Summer Study Committee of Presumptive Joint Physical Custody (2021). He previously served as the Chair of the Bankruptcy Committee - Family Law Section of the American Bar Association. 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 Family Law 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 boards across the state of Indiana and has lectured on Open Door Law in Indiana with respect to charter schools.

John A. Cremer, Attorney

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

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).

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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, Fechtman Law Office, Indianapolis

Bob 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.

He 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.

John A. Gardner, Faegre Drinker Biddle & Reath LLP, Indianapolis

The estate planning aspects of *John Gardner's* practice focus on addressing his client's family and business financial concerns in an increasingly complex federal tax environment. He also represents individual and corporate executors and trustees in the settlement of estates and the administration of trusts.

Certifications

- Indiana Certified Estate Planning & Administration Specialist

Honors

- Indiana Super Lawyers — Estate Planning Probate, since its first publication in 2004 to 2015
- The Best Lawyers in America — Trusts and Estates, 1999-2015
- 2010 FIVE STAR Wealth Manager (SM)

Professional Associations

- Indianapolis Bar Association — Estate Planning Section (Executive Committee Chair, 2002-03)
- Indiana State Bar Association
- American Bar Association
- Estate Planning Council of Indianapolis

Civic Activities

- The Children's Museum of Indianapolis — Board of Trustees, 2000-present (Secretary, 2007-10)
- Jameson Camp, Inc. — Board of Directors, 1989-98 (President, 1993-95)

Presentations

- Portability Aspects of the American Taxpayer Relief Act of 2012; ICLEF, 2013
- Applying the Pension Protection Act of 2006; ICLEF, 2007
- Charitable Giving; ICLEF, 2002
- Discount Strategies; ICLEF, 2002
- Indiana Prudent Investor Act; Indianapolis Bar Association, 2001
- The Basics of Trusts; ICLEF, 2001
- Indiana Prudent Investor Act; ICLEF, 2000
- Charitable Remainder Trusts as Retirement Planning Vehicles; ICLEF, 1999
- Generation-Skipping Planning: Estate Tax Inclusion Period; ICLEF, 1998
- Family Limited Partnerships; ICLEF, 1996

- Estate Planning With Retirement Benefits; Indiana Pension Conference, 1995
- The Encyclopedia of Indiana Wills, Trusts and Estate Planning Forms; Indianapolis Bar Association, 1994
- Unsupervised Administration; Indianapolis Bar Association, 1993
- Estate Planning Workshop; ICLEF, 1993
- Elder Law; ICLEF, 1993
- Probate Litigation; ICLEF, 1990
- Indiana's New Guardianship Law: An Update; ICLEF, 1989
- Estate Planning for a Subsequent Marriage; ICLEF, 1987

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.

*Certified by the Indiana Trust and Estate Specialty Board

Gregg S. Gordon, Nickloy Albright & Gordon, LLP, Noblesville

Gregg S. Gordon is a partner with Nickloy Albright & Gordon, LLP. While Mr. Gordon's practice is focused largely on litigation involving wills and trusts, he also has extensive experience in general business litigation. Viewing trials as the last resort to dispute resolution, Mr. Gordon strives to assist his clients, both before and during litigation, to make informed and meaningful decisions that will avoid protracted litigation. But, if resolving a matter through trial is the only possible option, then Mr. Gordon will zealously advocate for his clients in the courtroom.

Mr. Gordon is a military veteran having served in the United States Air Force from 1980 through 1989 first with the Air Force Security Police and then as a Special Agent with the Air Force Office of Special Investigations. While Mr. Gordon is a trial lawyer, he is also an avid horseman with a passion to serve the equine community. Using the experience he has gained from litigating cases for almost seventeen years, Mr. Gordon's practice also includes professional legal services in the area of equine law. Such issues include advising his clients who own and/or operate equine facilities on how to provide an environment that complies with Indiana law with the ultimate goal of providing a safe environment for both the people and the horses at those facilities.

Brian C. Hewitt, Hewitt Law & Mediation, LLC, Indianapolis

Brian Hewitt is a highly respected trust and estate litigator who has practiced in Indiana for more than three decades, describing himself as a “specialized generalist” because of his diverse areas of expertise. Named to the distinguished list of Indiana Super Lawyers every year since 2009, Brian has represented financial institutions and other fiduciaries in some of the state’s most high-profile cases, including the estates of Indianapolis Colts owner Robert Irsay and commercial property mogul Melvin Simon.

Brian is an accomplished litigator, but his first and greatest love is mediation. He relishes the opportunity to resolve a complex legal situation in just a single day—and to help the people involved avoid expensive, messy, and emotionally draining litigation. Brian’s colleagues will tell you that he has an unbelievable gift for understanding people’s needs and charting a course that allows both sides to leave mediation feeling satisfied. His track record will tell you the same: he has settled nearly 1,000 trust and estate cases and hundreds of real estate, commercial, and professional malpractice cases, with a success rate of more than 90 percent.

Brian is a frequent speaker and author on important topics related to trust and estate mediation and litigation, giving regular presentations to the American College of Trust and Estate Counsel (ACTEC), the Indiana State Bar Association, and the Indiana Continuing Legal Education Forum. As a recognized expert in the field of trust and estate law, he is regularly asked to consult or testify as an expert witness in cases involving trusts, estates, commercial law, malpractice, and civil procedure.

Outside the office, Brian writes music for voice and guitar, is currently serving as the Vice Chair of the Board of Directors for the Benjamin Harrison Presidential Site, and is an avid supporter of the Indianapolis Children’s Choir, where two of his children sang for many years. He and his wife, Veronica, are active members of Resurrection Lutheran Church.

Ronald M. Katz, Stoll Keenon Ogden PLLC, Indianapolis

Ronnie Katz joined Stoll Keenon Ogden as a Member in July 2022 as part of the firm's merger with Katz Korin Cunningham, an Indianapolis firm which Ronnie co-founded with Offer Korin in 1994. "Envisioning opportunities for our clients and our community" is not just a motto for the firm that Ronnie helped foster – it is also part of the foundation of Stoll Keenon Ogden's culture. It requires an understanding of client goals, the numbers, governmental implications and the impact of tax consequences. The goal is to provide exceptional legal services efficiently at reasonable rates, without the frustration of delays, excess costs and bureaucracy.

Ronnie has maintained an AV Martindale-Hubbell Peer Review Rating © since 1992 and is listed in The Best Lawyers in America (for Real Estate and Trusts & Estates) and as an Indiana Super Lawyer. In 2021, Ronnie received The Indiana Lawyer Leadership in Law Distinguished Barrister Award, an honor limited to 15 lawyers in the State of Indiana each year. Ronnie was recently named the 2023 "Lawyer of the Year" in Central Indiana for his work involving "Business Organizations (including LLCs and Partnerships)" by U.S. News Best Lawyers® in America. He has also been recognized as a Life Fellow and Distinguished Fellow of the Indianapolis Bar Foundation, a Fellow of the Indiana Bar Foundation and as a 2002 recipient of the Indianapolis Bar Association Dr. John Morton-Finney Excellence in Legal Education Award.

Ronnie is a leader in the firm's Trusts & Estates, Business Services, Tax and Real Estate groups. He has also 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, Taft Stettinius & Hollister LLP, Indianapolis

Richard O. Kissel II has been practicing in the field of estate planning for 35 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 has been certified as an Estate Planning and Administration Specialist by the Indiana State Bar Association 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.

Arlene Kline, Law Office of Arlene Kline, Indianapolis

Arlene Kline is the founding owner of the Law Office of Arlene Kline. At present, the only attorney, but ready to assist you. The Firm's practice focuses on estate planning and estate administration or probate. Her experience as a probate paralegal, prior to obtaining her law degree, gives her the advantage of knowing how to get things done with applying the proper law.

Born Indianapolis, Indiana, 1961; graduate of Indiana University School of Law May 2004; Bachelors Indiana University, December 1999. Real estate license May 2001; Chairman VITA tax program 2002-2004; Dean Lipstein Gold Pro Bono Award; Fraternity Phi Delta Phi (External Affairs officer 2003); Civil Mediator 2005.

Law experience: Feeney & Ward, paralegal,1987-1991; Cremer & Burroughs, paralegal, 1992-2003, Probate Paralegal Services, consultant, 1989-2004 (a service to assist attorneys throughout the State of Indiana and out-of-state clients with estate administration and guardianship matters, or serving as personal representative) Law Office of Curtis Shirley 2003-2004; Law Offices of Arlene Kline 2004 to present.

Member: Indianapolis and Indiana State Bar Association, Estate Planning & Adm. ; American Bar Association, Probate & Trust, Litigation, Real Property; Association of Trial Lawyers of America. Speaker at Indianapolis Paralegal Association and IVY Tech College, Paralegal Program, Indianapolis Bar Associate . Main focus is estate planning, estate administration, probate litigation and guardianships.

Christopher J. Mueller, Hewitt Law & Mediation, LLC, Indianapolis

Chris Mueller spends his day representing clients in legal matters related to trusts and estates, real estate, business law, tax planning, and general/commercial litigation. He represents clients in complex litigation but also helps businesses and individuals plan wisely for the future. As a registered civil mediator sharing Brian Hewitt's passion for mediation, Chris relishes the opportunity to settle cases to the satisfaction of everyone involved.

Chris brings an innate curiosity to every case he tackles. He has earned multiple degrees in different fields, including chemistry and music—he has a scientist's love of rigorous process and an artist's ability to find creative solutions. This dual perspective serves his clients well, as the cases he handles are often multifaceted and require not just deep knowledge of multiple legal areas, but also an ability to see hidden connections and solve problems in unexpected ways.

Chris is a native of Cedarburg, Wisconsin, who moved to Indianapolis after he met his wife, Laura. They and their son enjoy hiking, biking, and cooking; Chris particularly loves long, involved cooking projects that require managing multiple processes at once. (No surprise there.) He and his wife are enthusiastic supporters of the Indianapolis Symphony Orchestra and the Indianapolis Symphonic Choir, and Chris spent many years actively involved on the Advisory Board of Indiana YMCA Youth and Government.

James Reed, Cross Glazier Reed Burroughs, PC, Carmel

Jim Reed has dedicated his nearly 40-year legal career to all aspects of relationship transitions, from the needs of a couple entering a new relationship to the legal and financial matters involved in the dissolution of a relationship. 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.

Mr. Reed's clients are often high-profile individuals in entertainment, sports and politics, professionals, business owners and executives, and the spouses/partners of these individuals. For many business owners, their business is their most valuable asset. Mr. Reed works with business owners and their partners to identify how to protect the business in the beginning of a relationship. He also understands the complexities that often arise in divorce involving business owners, such as dividing a business, ownership questions, and business valuation.
Mr. Reed has been consistently selected for inclusion in the Indiana Super Lawyers and The Best Lawyers in America in the field of Family Law. He is a sought-after source for insight on matrimonial and family law matters in Indiana and beyond.

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.

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.

Robert W. York, Robert W. York & Associates, Indianapolis

Robert W. York has been a practicing Indiana Attorney since 1973 having obtained his Doctor of Jurisprudence with honors from Indiana University School of Law. He is a former Deputy Prosecuting Attorney, a former Indiana Administrative Law Judge and, currently, a frequent Special Judge presiding over major felony criminal cases. He is the senior lawyer of Robert W. York & Associates in Indianapolis, Indiana and devotes his practice to participating in trials in courts throughout Indiana. He is admitted to the bar of the United States Supreme Court and all of the courts of Indiana. He has memberships in a number of trial lawyer associations and Bar Associations. He is a recognized author in a number of legal publications and was Editor of Verdict magazine for 12 years. He and his wife, Donna, have been married for 46 years and are the parents of two sons, ages 36 and 29. He has been certified by the United States Hockey Association as a Master Coach and has coached 40 youth hockey and baseball teams.

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Section One

Will and Trust Mediation – Turn It Up A Notch

Brian C. Hewitt
Hewitt Law & Mediation, LLC
Indianapolis, Indiana

Section One

Will and Trust Mediation –
Turn It Up A Notch……...… Brian C. Hewitt

PowerPoint Presentation

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90 HOT TIPS IN ESTATE, TRUST AND PROBATE PRACTICE
DECEMBER 21, 2022

WILL AND TRUST MEDIATION – TURN IT UP A NOTCH

MEN ARE PIGS

THE LEGAL SYSTEM IS NOT ABOUT MORALITY. JUSTICE IS LEFT TO A HIGHER AUTHORITY

DID I MENTION FEES?

INDIANA CODE 29-1-7-17.5
WHY AREN'T MANY ATTORNEYS USING IT AS LEVERAGE?

THE GHOST OF THE YELEY'S CASE
959 N.E.2d 888 (Ind. Ct. App. 2011)

MEDIATION IS A SHELL GAME

LET'S PRETEND IT'S FIVE O'CLOCK FOR NOW AND I MAKE A MEDIATOR'S OFFER

Section Two

RECENT LEGISLATION AND CASES

IN

ESTATES AND TRUSTS

ICLEF

DECEMBER 2022

MaryEllen K. Bishop
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Section Two

Recent Legislation and Cases in Estate and Trusts……...MaryEllen K. Bishop

LEGISLATION

1. Senate Enrolled Act 67 Small estates. Increases the value of estates that may be distributed via affidavit from $50,000 to $100,000. Increases the threshold for summary procedures for unsupervised estates from $50,000 to $100,000.

2. House Enrolled Act 1205 Uniform trust decanting act and trustee duties. Allows a trustee of an irrevocable trust to appoint a successor trustee or multiple trustees. Provides that a trustee's power to appoint a successor trustee includes the power to allocate trustee powers to one or more trustees. Enacts the uniform trust decanting act. Creates a definition of the decanting power to include a power by a trustee to make limited modifications to an irrevocable trust, including an asset transfer to a new trust. Requires that a modification be consistent with a settlor's or charitable organization's intent. Permits the trustee of an existing trust to make modifications to or distributions from an existing trust for the benefit of a disabled beneficiary. Prohibits a trustee from being required to decant. Requires advanced notice to all qualified beneficiaries. Provides that the decanting power of an authorized fiduciary is not precluded by certain terms.

CASES

PROBATE

3. DEADMAN'S STATUTE – LLC OWNERSHIP – SUMMARY JUDGMENT. *Arnett v. Estate of Beavins*, 184 N.E.3d 679 (Ind. Ct. App. 2022). Joel Beavins filed articles of organization for Stewart Properties in 2001. His wife, Jill, owned 10%. In 2012 Joel and Arnett, old high school friends, began conducting business together. Arnett was responsible for managing four of the properties that were owned by Stewart Properties, including three rental properties. The fourth property, Arnett resided in and used for his Auto-Annex business. Arnett collected rents, executed leases with tenants, made capital improvements, preformed maintenance and paid utility bills. In 2019, Joel and Arnett sought a commercial loan which would allow Arnett to purchase the rental properties. In 2019, Joel and Arnett allegedly executed an Operating Agreement where Arnett would own 82% of Stewart Properties and Joel would own the remaining 18%. However, the Operating Agreement for Stewart Properties said that no one could become a member without the unanimous consent and Joel's wife, Jill, did not consent. Later in 2019, Joel and Arnett executed a $280,000.00 note whereby Stewart Properties would transfer the properties to Arnett. The first payment was to be made November 1, but Joel died in a plane crash on October 5 before any payments were made. Joel's estate filed a Complaint requesting possession of the residence and the other rental properties and amounts of rent collected by Arnett. The estate filed a Motion for Summary Judgment. The first issue was

whether Arnett was a member of Stewart Properties. Arnett filed opposing affidavits which the estate moved to strike under the Dead Man's Statute and for authentication. The trial court granted in part, the Motions to Strike and gave the estate partial summary judgment on the membership issue.

The Court of Appeals affirmed. Most of the affidavits filed by Arnett were properly stricken under the Dead Man's Statute. Arnett attempted to avoid the Dead Man's Statute by arguing the affidavits covered issues which could not be disputed by the decedent. The Court of Appeals did not accept this way around the Dead Man's Statute. The remaining evidence in opposition to the Motion for Summary Judgment was stricken for lack of authentication. This included the email and attached Operating Agreement that would have given Arnett 82% of Stewart Properties. Finally, the Court of Appeals agreed with the trial court and the estate that the Operating Agreement for Stewart Properties clearly required Jill's consent before Arnett could become a member. It was clear that Jill never gave that consent and Arnett was never a member of Stewart Properties.

4. POWER OF ATTORNEY – ACCOUNTING – BURDEN OF PROOF. *DeHart v. DeHart,* 181 N.E.3d 989 (Ind. Ct. App. 2021). DeHart had two children, Jeff and Christine. DeHart and Christine signed an Indiana Durable Power of Attorney naming Christine as Darlene's attorney-in-fact. Darlene moved in with Christine. Son filed verified petition for accounting under power of attorney, alleging that his sister had signed the document naming herself as their mother's attorney-in-fact, that he had not seen document, and that he believed sister was misappropriating mother's funds. Mother moved to intervene and objected to petition. The court, granted mother's objection, concluding that it was not in Darlene's best interest to require an accounting in the absence of incapacity,undue influence, abuse, or misappropriation. Son appealed.

Prior to 2019, Indiana Code §30-5-6-4 provided in relevant part: "attorney in fact shall render a written accounting if an accounting is ordered by a court ... [or] requested by ... a child of the principal." In 2019, the statute was amended to state that the attorney in fact shall provide a written accounting to a child of the principal "unless a court finds that such a rendering is not in the best interests of the principal." DeHart provided the court with a letter from a nurse practitioner who examined her for over an hour less than a month before the evidentiary hearing stating she was of clear mind. DeHart told the trial court she approved of Christine's efforts as her agent; her daughter discussed her bills with her; she believed Jeff was only interested in her money, and she opposed his request for an accounting because she felt her finances were none of his business. In affirming the lower court's decision, the Court of Appeals noted there was ample evidence to support the decision that an accounting was not in DeHart's best interest because she was competent to appoint and maintain Christine as her agent and she was entitled to privacy in the management of her finances.

5. GUARDIANSHIP – DEFACTO CUSTODIANS. *Geels v. Morrow*, 182 N.E.3d 237 (Ind. App., 2022) and 2022 Ind. App. LEXIS 133 (opinion corrected on rehearing). Scott Geels and Erica Leitch (collectively, "Scott and Erica") appealed the trial court's denial of their petition for custody of A.R. ("Child"). Child was born on September 9, 2016, to Desiree Morrow ("Mother") and Sean Riley ("Father"). Erica provided daycare to Child from November 2017 to January 2018. In January 2018, Mother asked Scott and Erica to care for Child on a full-time basis after she lost heat in her apartment. In October, 2018, Mother asked Scott and Erica to return Child to Mother's care. They refused and Mother called police. Police contacted the Department of Child Services ("DCS"), which investigated. DCS found Mother's residence appropriate and released Child into Mother's care. Child lived with Mother for ten days until Mother returned Child to Scott and Erica where she stayed from late November 2018 until March, 2019. On March 5, 2019, Mother retrieved Child from Scott and Erica's care. On April 9, 2019, Mother allowed Scott and Erica to see Child, for the last time. On June 7, 2019, Scott and Erica filed a petition to establish guardianship of Child. From approximately June 2019 until May 2020, Child resided with Father and his girlfriend. On May 16, 2020, Mother retrieved Child from Father's care and Child has remained with Mother since. On April 29, 2021, the trial court issued its order denying Scott and Erica's petition for guardianship of Child. Scott and Erica appealed.

The Court of Appeals stated, "(w)hen we examine child custody decisions involving third parties, it is well-established that there is a presumption that fit parents act in the best interests of their children.... [S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. 182 N.E.3d at 241 (citing Troxel v. Granville, 530 U.S. 57, 68, 120 S. Ct. 2054, 147 L.Ed.2d 49 (2000)). The Court went on to say, "[b]efore placing a child in the custody of a person other than the natural parent, a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement. The presumption in favor of the natural parent will not be overcome merely because a third party could provide better things for the child..." 182 N.E.3d at 24, 242 (citing to Truelove v. Truelove, 855 N.E.2d 311, 314 (Ind. Ct. App.2006)). The trial court determined Scott and Erica were de facto custodians of Child pursuant to Indiana Code section 31-9-2-35.5. The Court outlined numerous factors to be considered in the determination of the best interest of the child. In affirming the denial of guardianship, they court noted that Mother had provided an appropriate home for Child and the circumstances in her life had improved. While Scott and Erica may have the financial means to give Child a "better" life by some standards, their ability to so does not overshadow Mother's natural and constitutional right to raise Child. 182 N.E.3d at 246. Judgment affirmed.

Scott and Erica requested a rehearing because the Court of Appeal mischaracterized their action as a guardianship proceeding instead of a Petition to Establish De Facto Custodian Status and

for Physical and Legal Custody of Minor Child. The court acknowledged that separate sections of the Indiana Code address guardianships and legal custody by a de facto custodian. I.C. § 29-3-5-3 indicates findings that must be made to appoint a guardian and I. C. § 31-17-2-8.5 defines how a de facto custodian can have legal custody of the child. The Court noted that both types of proceedings, when commenced with regards to a minor, requires inquiry into the existence of de facto custodians, which are defined in Indiana Code section 31-9-2-35.5. In addition, both types of proceedings require determination of what is in the best interests of the minor. Because the appellate review standards for guardianship cases and de facto custodian cases are used interchangeably by the Court of Appeals and the Indiana Supreme Court, the Court felt any erroneous reference in their ruling to a guardianship proceeding did not warrant a reexamination of the merits of the appeal. The Court noted that its decision was based on affirmation of the trial court's determination that Child's best interests were served by remaining in the custody of her Mother. That determination prohibited a ruling in Appellants' favor regardless of whether the proceeding was for guardianship or custody as de facto custodians and the Court declined Appellants' request to modify their prior decision.

Section Three

5 Tips for Pre-Mortem Will and Trust Contests New Legislation

John A. Cremer
Cremer & Cremer
Fishers, Indiana

Section Three

5 Tips for Pre-Mortem Will and Trust Contests
New Legislation……. John A. Cremer

TIP ONE: DOES THIS MECHANISM ALREADY EXIST?

TIP TWO: DEATH BY 1000 CUTS.

TIP THREE: I.C. 29-1-7-16.5(m) IS NOT RECIPROCAL.

TIP FOUR: BIRTH OF THE CONDITIONAL WILL.

TIP FIVE: CONSEQUENCES OF THIS STATUTE.

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

5 TIPS FOR PRE-MORTEM WILL AND TRUST CONTESTS NEW LEGISLATION

John A. Cremer

TIP ONE: DOES THIS MECHANISM ALREADY EXIST?

a. By Statute I.C. 34-14-1-4
b. By common law – *Duncan v. Yocum,* 179 N.E.3d 988 (Ind. Ct. App. 2021)

TIP TWO: DEATH BY 1000 CUTS.

TIP THREE: I.C. 29-1-7-16.5(m) IS NOT RECIPROCAL.

TIP FOUR: BIRTH OF THE CONDITIONAL WILL.

TIP FIVE: CONSEQUENCES OF THIS STATUTE.

a. Increased Guardianship Litigation
b. Destruction of Families

PRELIMINARY DRAFT
No. 3286

PREPARED BY
LEGISLATIVE SERVICES AGENCY
2023 GENERAL ASSEMBLY

DIGEST

Citations Affected: IC 29-1-7; IC 30-4-6-14.

Synopsis: Premortem validation of wills and trusts. Provides that a testator or a testator's agent may send written notice of the existence of a will to certain persons. Provides that if a testator's will includes a provision exercising a power of appointment, the testator or the testator's agent may notify certain persons of the existence of the will. Provides that a written notice of the existence of a will contains certain information. Provides for a procedure to contest certain wills. Provides that if a notice to contest the validity of a trust pertains to a trust created by a settlor who is still living, a complete copy of the trust instrument must be sent with the notice to each recipients. Sets forth certain complaint and notice requirements if a trust is being contested.

Effective: July 1, 2023.

A BILL FOR AN ACT to amend the Indiana Code concerning probate.

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

SECTION 1. IC 29-1-7-16.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2023]: **Sec. 16.5. (a) A testator or a testator's agent at the testator's direction may send a written notice under this section to the following:**

(1) Any person named as a beneficiary in the testator's will.

(2) Any person who would be entitled to inherit from the testator under IC 29-1-2-1 if the testator died intestate on the date the notice is received.

(3) Any person who the testator wishes to bar from contesting the validity of the testator's will under IC 29-1-7.

(b) If a testator's will includes a provision exercising a power of appointment, the testator or the testator's agent acting at the testator's direction may send a written notice that complies with this section to the following:

(1) Any person named in the exercise of the power of appointment as a beneficiary.

(2) Any person who would be entitled to receive property for which the testator exercises the power of appointment if the testator failed to validly exercise the power of appointment.

(3) A trustee of a trust holding property subject to the power of appointment.

(4) A person the testator wishes to be bound to the validity of the exercise of the power of appointment under the testator's will.

(c) A testator or a testator's agent must send a written notice under this section to a recipient described in subsection (a) by:

(1) first class mail;

(2) certified mail;

(3) registered mail; or

(4) private courier.

(d) A written notice under this section must include the following:

(1) A copy of the testator's will.

(2) The name and address of each person to whom the testator has sent the written notice.

(e) A person who wishes to contest the validity of the will must file a proceeding to contest the will within ninety (90) days after the receipt of the notice, unless the will testator dies before the ninety (90) day period has elapsed.

(f) A written notice under this section that is sent to the last known address of a person is presumed to be received by the person absent evidence to the contrary. A person is deemed to have received a written notice under this section if the written notice was sent to any person who under IC 29-1-1-20 may represent and bind that person.

(g) A person who receives a written notice under this section and wishes to contest the will or the testator's exercise of a power of appointment must file a proceeding in the court that would have subject matter jurisdiction of the testator's will, as a separate cause of action, not later than ninety (90) days after the person's receipt of the written notice.

(h) A proceeding to contest filed under subsection (g) must name the following persons, if the persons exist or are living, as party defendants:

(1) The testator.

(2) The testator's spouse.

(3) Any person who would be entitled to inherit under IC 29-1-2-1 if the testator died intestate on the date of the written notice sent under this section.

(4) Beneficiaries named or who are discernable as part of a class identified in the will.

(5) The primary personal representative nominated in the will.

(6) Any person who was sent a written notice under this section.

(i) A proceeding filed under subsection (g) must allege at least one (1) of the following:

(1) The will does not meet the requirements for the execution of a valid will under IC 29-1-5-3 or IC 29-1-21-4.

(2) The testator was of unsound mind at the time the will was executed.

(3) The will was unduly executed.

(4) The will was executed under duress or was obtained by fraud.

(5) Any other objection to the validity of the will, the probate of the will, or the testator's exercise of a power of

appointment.

(j) If:

(1) a testator resided in Indiana at the time of death;

(2) a notice sent under subsection (c) was received by a person;

(3) ninety (90) days or more have passed after the person received the notice before the testator's death; and

(4) the person did not file a will contest under this section within ninety (90) days after the person's receipt of the notice;

that person is barred from filing a proceeding under section 17 of this chapter or under this section. That person may not seek relief as a co-plaintiff or intervenor in a proceeding commenced by another person under section 17 of this chapter or this section.

(k) If the testator dies before the end of the ninety (90) day period under subsection (e), the bar and limitation set forth under subsection (g) do not apply to the testator's will that was disclosed under subsection (d), and section 17 of this chapter applies to a will contest after the entry of an order admitting a will of the testator to probate.

(l) If the ninety (90) day period described in subsection (e) has not expired as of the date of the death of the testator, the bar and limitation under subsection (g) do not apply to the testator's will that was disclosed in the written notice.

(m) The failure of a testator to adhere to the requirements of this section may not be offered or cited as evidence that a trust is not valid.

(n) Nothing in this section precludes a testator who provides a written notice under this section from executing a later will or codicil, but the written notice sent with respect to an earlier will or a proceeding under this section has no effect on a determination of the validity of the later will or codicil.

(o) Nothing in this section shall be construed as abrogating the right or cutting short the time period for a spouse to seek an elective share under IC 29-1-3-1.

SECTION 2. IC 29-1-7-17, AS AMENDED BY P.L.194-2017, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2023]: Sec. 17. **Except as provided in section 16.5 of chapter,** any interested person may contest the validity of any will in the court having jurisdiction over the probate of the will within three (3) months after the date of the order admitting the will to probate by filing in the same court, in a separate cause of action, the person's allegations in writing verified by affidavit, setting forth:

(1) the unsoundness of mind of the testator;

(2) the undue execution of the will;

(3) that the will was executed under duress or was obtained by fraud; or

(4) any other valid objection to the will's validity or the probate of the will.

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

SECTION 3. IC 30-4-6-14, AS AMENDED BY P.L.51-2014, SECTION 26, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2023]: Sec. 14. (a) A person must commence a judicial proceeding to contest the validity of a trust that ~~was~~ **is irrevocable or** revocable at the settlor's death, **or revocable at the time the notice under this section is given,** within the earlier of the following:

(1) Ninety (90) days after the person receives from the trustee, **the settlor, or the agent of the trustee or settlor,** a copy of a trust certification required by IC 30-4-4-5 and a notice that:

(A) informs the person of the trust's existence;

(B) states the trustee's name and address;

(C) states:

(i) the person's interest in the trust, as described in the trust document; or

(ii) that the person has no interest in the trust; and

(D) states the time allowed for commencing the proceeding.

(2) Three (3) years after the settlor's death.

(b) If a notice under subsection (a) pertains to a trust created by a settlor who is still living, the settlor, the trustee, or the agent of the settlor or trustee must send a complete copy of the trust instrument for that trust with the notice to each person to whom the notice under subsection (a) is sent.

~~(b)~~ **(c)** More than one hundred twenty (120) days after the death of the settlor of a trust that was revocable at the settlor's death, the trustee may distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for the distribution unless:

(1) the trustee knows of a pending judicial proceeding contesting the validity of the trust; or

(2) a potential contestant notifies the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced not later than sixty (60) days after the contestant sends the trustee the notification.

~~(c)~~ **(d)** A beneficiary of a trust that is determined to be invalid shall return any distribution received.

(e) The complaint or petition for a proceeding filed under subsection (a) must name all of the following, if they exist or are living, as party defendants:

(1) The settlor.

(2) The settlor's spouse.

(3) Each qualified beneficiary identified by name or discernable as part of a class identified in the trust instrument.

(4) The currently serving trustee or first priority successor trustee identified in the trust instrument.

(5) Any other person who received a notice under subsection (a).

(f) Notice of the filing of a complaint or petition under subsection (a) must be served upon each party defendant as required by the Indiana Rules of Trial Procedure.

(g) The burden of proving an allegation set forth in a complaint or petition that is filed under subsection (a) is on the person who commenced the proceeding.

(h) The failure of a trustee to adhere to the requirements of this section may not be offered or cited as evidence that a trust is not valid.

(i) If a notice sent under subsection (a) is concerning a revocable or irrevocable trust and the trust is later:

(1) amended;

(2) restated; or

(3) lawfully modified;

a person who received the written notice is not precluded from commencing a proceeding to contest the validity of the amended, restated, or modified trust.

Section Four

Hot Tips on Indiana Directed Trusts

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Section Four

Hot Tips on Indiana Directed Trusts…….. Ronald M. Katz

PowerPoint Presentation

Hot Tips on Indiana Directed Trusts

ICLEF 2022 Hot Tips in Estate, Trust & Probate Practice
December 21, 2022
Indianapolis, Indiana

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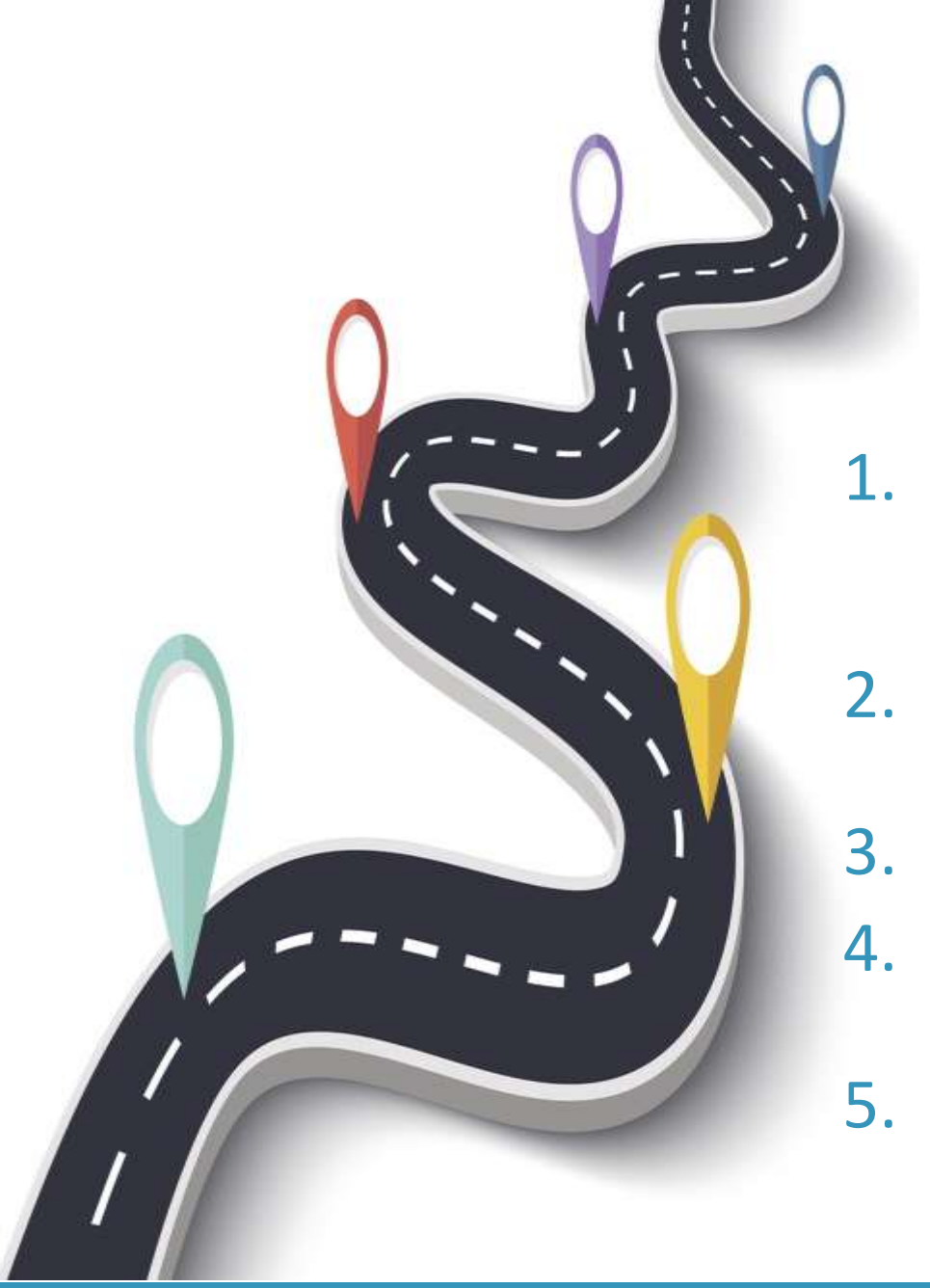
The views expressed herein are solely those of the author and should not be construed as legal advice.



Hot Tips Roadmap

1. Indiana's 2019 Adoption of Uniform Directed Trust Act: IC 30-4-9 (UDTA)Recognizing the Need for Separation of Duties
2. Determining When Segregation of Trust Administration Duties is Appropriate
3. Fiduciary Duties and Liabilities
4. Distinction between Powers of Direction vs. nonfiduciary powers of appointment
5. Application of Directed Trusts

Introduction

a. A trustee is the fiduciary appointed by the settlor to manage and administer the trust, holding a fiduciary duty to administer the trust in accordance with its terms which duties extend to the trust beneficiaries.

b. In a directed trust, the trustee generally also has a duty to follow the direction of a “trust director”, a person appointed by the settlor to have decision-making authority over one or more aspects of the trust.

….Introduction

- By granting someone other than the trustee decision-making authority, conflicts and liability issues may arise between the trustee and the trust director.

- The UDTA is aimed at explicitly authorizing this division of power between a trustee and a trust director, minimizing conflict between the two, and clarifying the respective duties and liabilities.

1. IN Uniform Directed Trust Act *IC 30-4-9*

a. Addressing potential segregation of duties of retaining and administering investment of liquid or publicly traded trust assets, as compared to other types of trust assets that could be held in a trust.

b. Trust purposes and beneficiary issues, independent of "how" trust assets are invested, significantly impact consideration of forming a directed trust.

c. A directed trust permits the settlor to appoint a trustee and to also grant a trust director "decision-making authority" over one or more aspects of the trust.

…. 1. IN Uniform Directed Trust Act *IC 30-4-9*

- By granting someone other than the trustee decision-making authority, conflicts and liability issues may arise between the trustee and the trust director.
- Directed trust legislation is aimed at explicitly authorizing this division of power between a trustee and a trust director, minimizing conflict between the two, and clarifying the duties and liabilities of the different trust-related decision makers.

…. 1. IN Uniform Directed Trust Act *IC 30-4-9*

d. Key Terms:

(1) "Directed trust" means a trust for which the terms of the trust grant a power of direction. *IC 30-4-9-2(2)*.

(2) "Directed trustee" means a trustee that is subject to a trust director's power of direction. *IC 30-4-9-2(3)*.

(3) "Power of direction" means a power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not serving as a trustee. The term includes a power over the investment, management, or distribution of trust property or other matters of trust administration. *IC 30-4-9-2(5)*.

…. 1. IN Uniform Directed Trust Act *IC 30-4-9*

….Key Terms:

(4) "Trust director" means a person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary or settlor of the trust. *IC 30-4-9-2(9)*.

e. History

- Legislation passed in 2019
- Limited case law

2. Determining When Segregation of Trust Administration Duties is Appropriate.

a. Factors Impacting Necessity of Distinguishing Duties
   - Type of trust assets managed [e.g., liquid or publicly traded assets; real estate (and type of real estate); closely held business]
   - Trust purposes [including qualification standards relating to distribution]
   - Ascertainable standards applicable to beneficiaries
   - Who best understands the issues relating to the trust purposes and the beneficiaries?

….2. Determining When Segregation of Trust Administration Duties is Appropriate.

b. Determining the suitable parties for trust administration
   - Trustee’s ability
   - Trust director’s ability
   - Settlor’s intent

3. Fiduciary Duties and Liabilities

a. A trust director has the same fiduciary duties and liabilities with respect to the exercise and non-exercise of a power of direction as a trustee would have in similar circumstances. *IC 30-4-9-7* and *30-4-9-8*.

b. A directed trustee is required to take reasonable action to comply with the trust director's direction unless complying would require the directed trustee to engage in willful misconduct. *IC 30-4-9-9*.

….3. Fiduciary Duties and Liabilities

c. A directed trustee is not liable for complying with the trust director's direction unless complying would require the directed trustee to engage in willful misconduct. *IC 30-4-9-9*.

d. The terms of a trust may impose a duty or liability on a trust director or a trustee in addition to the duties and liabilities under the UDTA. *IC 30-4-9-8(c)* and *IC 30-4-9-9(e)* .

4. Distinction between Powers of Direction vs. nonfiduciary powers of appointment

a. Under the UDTA, a “power of appointment” means a power that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over trust property. *IC 30-4-9-5(a)*.

….4. Distinction between Powers of Direction vs. nonfiduciary powers of appointment

b. UDTA does not apply to a:

- power of appointment;
- power to appoint or remove a trustee or trust director;
- power of a settlor over a trust to the extent the settlor has a power to revoke the trust;
- power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects the beneficiary interest of: (A) the beneficiary; or (B) another beneficiary represented by the beneficiary with respect to the exercise or nonexercise of the power; or
- power over a trust if: (A) the terms of the trust provide that the power is held in a nonfiduciary capacity; and (B) the power must be held in a nonfiduciary capacity to achieve the settlor's tax objectives under the Internal Revenue Code.

IC 30-4-9-5(b).

….4. Distinction between Powers of Direction vs. nonfiduciary powers of appointment

c. Unless the terms of a trust provide otherwise, a power granted to a person to designate a recipient of an ownership interest in or power of appointment over trust property that is exercisable while the person is not serving as a trustee is a power of appointment and not a power of direction. *IC 30-4-9-5(c)*.

5. Application of Directed Trusts

a. Directed trusts can be revocable or irrevocable.

b. Powers of Direction: Unless the terms of a trust provide otherwise:

- a trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the director; and
- trust directors with joint powers must act by majority decision.

IC 30-4-9-6.

….5. Application of Directed Trusts

c. Directed trusts are not a “one size fits all” type of instrument in terms of drafting.

- Impacted by trust purposes
- Impacted by the parties selected to serve as fiduciaries
- Impacted by the needs to be addressed with respect to the intended beneficiaries
- Impacted by facts, circumstances and any conditions relating to trust distributions.

….5. Application of Directed Trusts

d. Duties between trustee and trust director ~ Review required information to be provided between the parties as required under *IC 30-4-9-10* and *11*.

e. Causes of Action; Statute of Limitations

- An action against a trust director for breach of trust must be commenced within the same limitation period as an action against a trustee under *IC 30-4-6-12* (within three (3) years after receipt of the final account or statement). *IC 30-4-9-13(a)*.

- A report or accounting has the same effect on the limitation period for an action against a trust director for breach of trust that the report or accounting would have under *IC 30-4-6-12* in an action for breach of trust against a trustee who is in a like position and under similar circumstances. *IC 30-4-9-13(b)*.

Section Five

TRUST PLANNING TO MAXIMIZE CREDITOR PROTECTOR FOR THE BENEFICIARY

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Section Five

Trust Planning to Maximize Creditor Protector for the Beneficiary……..….John A. Gardner

1. Include Spendthrift Clause

2. Name Independent Trustee

3. Avoid Mandatory Distributions to the Beneficiary

4. Avoid Ascertainable Standard for Discretionary Distributions to the Beneficiary

5. Limit Powers of Appointment to Special Powers

TRUST PLANNING TO MAXIMIZE CREDITOR PROTECTOR FOR THE BENEFICIARY

John Gardner

1. **Include Spendthrift Clause**

2. **Name Independent Trustee**
   - Non-related/non-subordinate party
   - Prohibit beneficiary from serving as trustee
   - Limit trustee removal for cause
   - Name a fiduciary as the party with the trustee removal and replacement authority

3. **Avoid Mandatory Distributions to the Beneficiary**
   - No mandatory distributions of income
   - No mandatory distributions of corpus

4. **Avoid Ascertainable Standard for Discretionary Distributions to the Beneficiary**
   - Absolute trustee discretion for discretionary distributions

5. **Limit Powers of Appointment to Special Powers**
   - Power of appointment held by beneficiary should not be exercisable in favor of the beneficiary, the beneficiary's creditors or the creditors of the beneficiary's estate

Section Six

5 Tips for Irrevocable Life Insurance Trusts

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Section Six

5 Tips for Irrevocable Life Insurance Trusts……. Rebecca W. Geyer

PowerPoint Presentation

5 TIPS FOR IRREVOCABLE LIFE INSURANCE TRUSTS

Rebecca W. Geyer

TIP1: UNWIND AN UNNECESSARY ILIT THROUGHBUY BACK OR SUBSTITUTION

An irrevocable life insurance trust (ILIT) is a trust created during an insured's lifetime that owns and controls a term or permanent life insurance policy or policies. It can also manage and distribute the proceeds that are paid out upon the insured’s death, according to the insured's wishes. In addition, an irrevocable life insurance trust protects the benefits stemming from a life insurance policy from estate taxes.

ILITs were commonly used when the estate tax exemption was lower. Individual and second to die life insurance policies were purchased and placed in ILITs to provide liquidity to pay estate taxes. As the federal estate tax exemption has risen, many clients find themselves paying for insurance policies they no longer need, but since an ILIT is irrevocable, it generally cannot be altered or undone after it's created. This is frustrating for the grantor of the trust, who has no authority to terminate the trust as the grantor cannot be the Trustee and must avoid any incident of ownership in the life insurance policy to keep the policy outside of his or her taxable estate.

Substitution

- Often the simplest way to unwind an ILIT is to extract the life insurance policy out of it by having the grantor either buy the policy back or "substitute" another asset for an equivalent value in exchange for the life insurance policy.
- In fact, the power to substitute replacement assets of equivalent value into a trust under IRC Section 675(4) is often used as one of the key powers to *make* an ILIT into a grantor trust in the first place. Especially since Revenue Ruling 2011-28 affirmed that the power of substitution is *not* treated as an "incident of ownership" that would cause the life insurance to be included in the decedent's estate under IRC Section 2042 in the first place.
- Accordingly, one of the most straightforward ways to extract a life insurance policy out of an ILIT is to simply swap out the life insurance policy for an asset of equivalent value (e.g., cash). Notably, the substitution should still be for an asset (or cash) of *equivalent* value… which at a minimum means the policy's cash surrender value. On the plus side, since the ILIT is a grantor trust – which means the trust itself is treated as an extension of the grantor's own identity for income tax purposes – there's no taxable event associated with the substitution to extract the life insurance policy out.

Buy Back

- Alternatively, if the ILIT doesn't have a substitution power, it may also be feasible for the grantor to *buy* the policy back from the trust for its fair market value. Here, again, the purchase would not be treated as a taxable event, since the ILIT as a grantor trust is already the grantor's alter ego for income tax purposes. In addition, since the grantor is the insured who's purchasing the policy, the death benefit will remain tax-free and not be subject to the transfer-for-value rules under IRC Section 101(a)(2).
- While a substitution or purchase of the life insurance policy does extract it out of the ILIT and eliminates the need for future premium gifting and Crummey notices, it doesn't fully eliminate and unwind the ILIT itself. The ILIT will still hold the *cash* (or other substituted value) proceeds from the transaction. Completely unwinding the ILIT is discussed below.

TIP 2: LAPSE THE (TERM)POLICY THAT'S NO LONGER NEEDED

Lapse the Term Policy

- The next option to "unwind" an ILIT, especially if the life insurance itself is no longer needed, is simply to stop making premium payments and allow the insurance policy itself to lapse. As typically the *only* asset in an ILIT is the life insurance policy that it owns. At the point that the policy lapses – especially if it's a term insurance policy with no cash value – the ILIT may technically still be in existence, but it will literally own nothing, so practically speaking the ILIT can simply be ignored from that point forward.
- Unfortunately, though, the situation is more complicated if the ILIT owns a permanent insurance policy, as there again is existing cash value that must be contended with. If the ILIT policy is a universal life policy, it *is* feasible to simply stop making premium payments, and allow the cash value to cover the policy expenses as long as it can. Whenever the cash value runs out, the universal life insurance policy will lapse (with no value and thus also no tax event)… but ostensibly, if the coverage was no longer needed anyway, that's an acceptable resolution.
- In the case of a whole life insurance policy, though, premium payments *must* be made to continue the policy in force. And while loans can be made against the policy to then re-deposit in the form of new premiums, doing so will accrue a loan against the life insurance policy that more quickly erodes its remaining cash value and hastens its demise. And while that may be "fine" if there was no intention or desire to keep the life insurance anyway, lapsing a hole life insurance policy with a loan may cause a tax event (as the cumulative value of the loan is treated as net proceeds that, if greater than premiums, results in a taxable gain). This is different from a universal life insurance policy that runs its value (and tax liability) down to zero once premium payments stop.

TIP 3: CONSIDER LIFE SETTLEMENT OPTIONS

Life Settlement Options

Reasons to Value a Life Insurance Policy

No longer needed for estate tax planning

Policy is too expensive to maintain

Insured is outliving coverage

Business owner is retiring

Cash flow concerns

Take pressure off adult children

Create generational wealth

Spouse pre-deceases other insured

Create liquidity for planning needs

Need to fund caregiving or long-term care

Funding retirement needs

Bankruptcy/Divorce

Donor outliving gift to charity

Fund new insurance opportunities

Life Settlement Options (continued)

- Life insurance has the same property rights of any other asset.
- This includes the right to sell, transfer or gift.
- EXAMPLE: UNIVERSAL LIFE POLICY

Death Benefit: $1 million

Premiums Paid to Date: $175,000

Cash Surrender Value: $5,000

Individual Sells Policy for $200,000

No taxation up to amount of premiums paid; $25,000 taxable as long-term capital gain

Life Settlement Options (Continued)

- Insured must be age 70 or older (or younger with major health impairments)
- Any policy type $100K-$50M in value
- No medical exam required, change in health since policy issue

Life Settlement Options (continued)

Planning Scenario

Life policy was underfunded and sitting in an ILIT

Settlement removed the burden of future premiums and funded healthcare needs of the insured

Female, Age 84 with a change in health

$1.5M second-to-die policy, male deceased

Cash surrender value = $25K

Life Settlement Value = $475K (after 14 bids)

TIP 4: BUILD FLEXIBILITY INTO THE ILIT

Consider Adding Trust Protector Provisions

- A trust protector provision authorizes someone other than the beneficiaries and trustees to make problem-solving modifications to the trust. The trust protector's authority can be as broad or narrow as the estate planning client desires. It is usually best to limit the authority to a narrow range of actions to avoid creating a conflict of interest for the trust protector so that the trust protector can remain independent and unbiased about the outcome. Common trust protector powers include the power to change trustees, to change how beneficiaries receive distributions or make other subtle changes in response to unexpected changes in applicable laws.
- Best practice is for trust protector to not be related or subordinate to the grantor or any beneficiary under Section 672(c) to avoid certain undesirable taxation consequences such a issues with Grantor trust status and power of appointment issues.

Trust Protector Provisions (continued)

Authority to Terminate Trusts

If, at any time, the Trust Protector determines that the trust agreement or any trust created hereunder is no longer economical, is otherwise inadvisable to administer as a trust, if due to circumstances not anticipated by the grantor, termination will further the purposes of the grantor, or if the Trust Protector deems it to be in the best interest of the beneficiaries, the Trust Protector, without further responsibility, may terminate the trust and distribute the trust property, including any undistributed net income, to the beneficiaries of trust principal.

Add the Power to Substitute

- The Grantor shall have the right at any time to acquire any property held in any trust hereunder by substituting other property of equivalent value. Such right is exercisable without the approval or consent of any Trustee. To the extent that the Grantor exercises such right, the Grantor shall certify in writing that the substituted property is of equivalent value to the property for which it is substituted, and the Trustee shall independently verify such certification of value.

TIP 5: PETITION TO TERMINATE TRUST

Terminate the Irrevocable Trust

IC 30-4-3-24.4 Modification or termination of trust by court

(a) The court may modify the administrative or dispositive terms of a trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

(b) The court may modify the administrative terms of a trust or terminate the trust if:

- (1) the purpose of the trust has been fulfilled; or
- (2) continuation of the trust on the trust's existing terms would:
  - (A) be illegal, impossible, impracticable, or wasteful; or
  - (B) impair the trust's administration.

(c) If the trust terminates under this section, the court shall direct the trustee to distribute the trust property in a manner consistent with the purposes of the trust.

Terminate the Irrevocable Trust Continued

- Requires docketing of trust and filing of petition to terminate with Court
- Requires the consent of the grantor and the beneficiaries; Court may still terminate even if not all beneficiaries consent if the non-consenting beneficiary's rights will be adequately protected
- An agent can consent for the grantor if given the authority in a power of attorney
- Under IC 30-4-3-24.4(c), the court shall direct the trustee to distribute the trust property in a manner consistent with the purposes of the trust. Where do funds go? To the trust's beneficiaries, not to the grantor

Section Seven

5 Tips on the SECURE Act

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Section Seven

5 Tips on the SECURE Act…….…. Rodney S. Retzner

Tip #1 – The 10-Year Distribution Rule

SECURE Act was passed with overwhelming bipartisan support in 2020.

The major change implemented by the SECURE Act for estate planning was the "10-year distribution rule." This new rule requires most non-spousal beneficiaries of retirement plans after January 1, 2020, to distribute the entire inherited account within 10 years of the account owner's passing (traditional plans and Roth plans).

Exceptions to the 10-year distribution rule include those accounts passing to:

(a) Surviving spouse

(b) Minor child (10-year rule applies once the minor reaches the age of majority)

(c) Disabled individual

(d) Chronically ill individual

(e) An individual who is not more than 10 years younger than the deceased participant/account owner

Prior to this law, beneficiaries could take minimum distributions based on their own life expectancy. The beneficiaries could stretch the amount of time these accounts stayed open, simultaneously reaping the tax benefits in the process.

Trusts could be used for that "stretch" but only if the trust was an "accumulation trust" or a "conduit trust".

Tip #2 - Accumulation Trust or just "Heck with It" and Take the 5-Year Rule

Moving forward, people who wish to leave their retirement accounts to beneficiaries in trust should consider an accumulation trust because it may be the best fit. The Trustee of an accumulation trust can decide how much of the retirement funds are distributed and when. Instead of money being distributed directly to the beneficiary, the funds are distributed to the trust. Within 10 years the retirement account must leave the retirement account and be held entirely by the trust, but the Trustee controls the money and can decide if he or she wishes to distribute the funds to the beneficiary.

The Trade-Off: If the funds are held by the trust, they will likely be taxed at a higher rate unless the beneficiary is already in the highest tax rate because trusts are taxed at higher rates than individuals for the same amount of income but the maximum rate is the same; however, the money will be protected.

The Unknown: Prior to the SECURE Act one of the requirements of an accumulation trust was that the trust could have no possibility of a beneficiary older than the current beneficiary (the "disinheritance requirement"). It is unclear as to whether accumulation trusts still have this requirement in an environment where the trust gets ten years to empty the retirement account anyway. Worst case, the trust gets the five year rule instead of the ten year rule. Advise clients, who will likely just say "heck with it" as they will want control over distribution of funds rather than worry about the possibility of five year deferment of tax.

Tip #3 - Conduit Trusts Still Work (but not as well)

Conduit Trust still have the requirements:
1. The trust must be valid under state law;
2. The trust must be irrevocable upon the account owner's death;
3. The trust beneficiaries must be identifiable; and
4. A copy of the trust, or a certified list of trust beneficiaries, must be provided to the plan administrator by October 31st of the year following the account owner's death.
If the requirements are met, we are able to "look through" the Conduit Trust to the Income Beneficiary to determine application of the rules.

However, if the Beneficiary is a Non-Eligible Designated Beneficiary (i.e., not one of the five specified groups of individual beneficiaries treated as such), then the trust will be subject to the 10-Year Rule (which is better than the 5-year rule for a Non-Designated Beneficiary, but still not a full life expectancy 'stretch'.)

By contrast, if the Income Beneficiary of the Conduit Trust is an Eligible Designated Beneficiary, then the trust will be able to 'stretch' distributions over the Eligible Designated Beneficiary's life expectancy.

The downside to Conduit Trusts is that the full distribution required must flow straight to the Beneficiary when required to distribute from the trust. For Non-Eligible Designated Beneficiary, then, the trust can last a maximum of ten years. Basically, the Conduit Trust for these beneficiaries is merely requiring the ten year distribution rather than giving the beneficiary the option to withdraw immediately.

Tip #4 – IRS v. Industry on RMD of Inherited Accounts

The SECURE Act eliminated life expectancy payments as a payout option for many beneficiaries. But, most in the industry expected that the replacement with the 10-Year Rule meant that ANY beneficiary would be allowed the full ten years. The IRS recently disagreed.

The Industry Interpretation of the 10-Year Rule

For deaths that occur on or after January 1, 2020, most industry professionals believed that beneficiaries subject to the 10-year rule were not required to take annual distributions during the first nine years. (Example: If an IRA owner died on March 20, 2022, it was assumed that the beneficiary could move the assets into an inherited IRA and have until December 31, 2032, to deplete the account balance—without any other requirements.)

The IRS's Interpretation of the 10-Year Rule

The IRS regulations agreed and proposed RMD regulations state that the 10-year rule should operate similar to the "5-year rule" that applies to account owners dying before their RBD (like the above). However, the proposed RMD regulations contain one unexpected change: *if an account owner dies on or after the RBD, beneficiaries who are subject to the 10-year rule must also take annual distributions during the first nine years, with such distributions based on the longer of the deceased account owner's age or the beneficiary's age*. (Example: Betty (age 75) died in March 2022. Betty's daughter Marissa (age 48) is the sole primary beneficiary of her Traditional IRA. Under the proposed RMD regulations, Marissa is subject to the 10-year rule, so she would have until December 31, 2032, to distribute her entire inherited IRA. But she would also need to take annual minimum distributions for the first nine years (based on her single life expectancy, nonrecalculated), and then distribute the remaining balance in year 10).

Regulations on this had been proposed to become effective January 1, 2022 but are still tentative and looking to become effective as of January 1, 2023. But the IRS interpretation likely WILL be the rule.

Tip #5 - Secure 2.0 is on the Horizon

Bipartisan support but currently three bills that need to be reconciled, voted on and signed into law. All expect this to be the law, possibly by January 1, 2023, after the current "lame duck session."

Major changes:
(a) RMDs (Required Minimum Distributions) would push out to age 75 over the next decade:
- RMD of 73 starting in 2023 for those turning 72 after 12/31/2022 and 73 before 1/1/2030.
- RMD of 74 starting in 2024 for those turning 73 after 12/31/2029 and 74 before 1/1/2033.
- RMD of 75 starting in 2033 for those turning 74 after 12/31/2032.

(b) Several other changes designed to encourage participation in retirement plans:
- Lower RMD penalty (25% rather than 50% excise tax).
- 401(k) plan participation changes for part-time workers drops the timeline before part-time workers are eligible to contribute to a company 401(k) plan from three years to two years.
- Catch-up contribution changes would stay at existing $6,500 for 401(k) and 403(b) catch-up contributions for those aged 50 to 61, but would increase to $10,000 for those aged 62 to 64.
- The current IRA catch-up contribution for those aged 50 and above is $1,000 but that would now be indexed to inflation.
- The catch-up limit for SIMPLE plans would rise from $3,000 to $5,000 and would be indexed to the limit for inflation.

(c) QCD (Qualified Charitable Distribution) currently allows amounts up to $100,000 to be donated each year from a traditional IRA to charity you choose in lieu of the RMD. This cap on QCDs would be indexed to inflation and one, additional QCD transfer to a charitable gift annuity or charitable remainder trust would be allowed, up to $50,000.

(d) There MIGHT be a "student loan matching" provision allowing employers to match student loan payments in the same way 401(k) contributions to an employer-sponsored plan are often matched now. Another version allows employers to contribute additional funds to an employee's retirement plan based on an employee's student loan payments.

(e) Mandatory automatic enrollment. Employers would be ***required*** to enroll eligible new hires into a defined-contribution plan at a pre-tax rate of 3% of the employee's pay, with an annual increase of 1% up to at least 10%. Although employees may select a different contribution if they wish. (Note - Some employers would be exempt from the mandatory enrollment, including small businesses with 10 or fewer employees, employers that have been in business for less than three years, churches and governments).

(f) Roth matching contributions. Starting in 2023, employer matching contributions could be treated as Roth contributions. Currently, employer match contributions must be put into a pre-tax 401(k).

(g) The Senate version also includes a provision, for an employer-sponsored emergency savings account (ESA) to allow employers to offer an ESA whereby employees could make pre-tax contributions to their accounts, and employers could match those contributions up to $2,500. Employees could withdraw from the ESA penalty-free at any time.

Section Eight

5 Tips for the 2022 Indiana Trust Decanting Act

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Section Eight

5 Tips for the 2022 Indiana Trust Decanting Act…….... Jeffrey S. Dible

PowerPoint Presentation

5 Tips for the 2022 Indiana Trust Decanting Act

December 21, 2022

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(1) The new Indiana version of the Uniform Trust Decanting Act (P.L. P.L. 161-2022, HEA 1205) became effective July 1, 2022 and replaced the old decanting statute (I.C. § 30-4-3-36), which was REPEALED

- The repealed statute was only 574 words
- The new Act is new chapter 10 of the Trust Code (I.C. 30-4-100 runs 7,642 pages
- The new Act applies to all *existing* or later created irrevocable trusts that have an Indiana governing law provision *OR* an Indiana situs of administration, ***except***:
  - Trusts that have only charitable beneficiaries
  - Trusts whose written terms explicitly prohibit decanting as a modification method

(2) Analysis of whether decanting can be used, and what modifications can be made, is more complicated under the new Act, so be prepared to review the new Act frequently

- The repealed statute (§ 30-4-3-36) allowed decanting if the original or first trust's terms gave the trustee some discretion (even limited discretion) to distribute principal
- The repealed statute contained an extremely short list of changes that could NOT be made through decanting (I.C. § 30-4-3-36(b)(2) and (b)(3))
- The brevity of the repealed statute allowed trustees to make numerous ill-considered changes through decanting
- ***In contrast***, the new Act contains 47 defined terms and numerous restrictions to protect a wider variety of vested rights, to protect charitable beneficiaries' interests, and to prevent the loss of important tax benefits that were claimed or claimable with respect to the first or original trust
- The new Act also introduces a crucial distinction between "expanded distributive discretion" and "limited distributive discretion" held by the trustee of the first trust

(3) Understand the restrictions on the power to decant when the trustee of the current (first) trust has "limited distributive discretion" to distribute principal

- "***Expanded distributive discretion***" (I.C. § 30-4-10-14) is a discretionary power of distribution that is not limited to an ***ascertainable standard*** or a ***reasonably definite standard***"
- When the trustee has expanded distributive discretion to distribute principal, the trustee has maximum power to use decanting make substantive modifications to beneficiaries' interests, except as specifically limited in the Act
- ***In contrast***, when the trustee's discretion to distribute principal is limited by HEMS or some other ascertainable standard, that trustee has "limited distributive discretion" (§ 30-4-10-42(a), and the use of decanting to modify is limited:
  - Unless a beneficiary of the first trust is a "beneficiary with a disability," the second trust must grant each beneficiary of the first trust a "substantially similar interest" as under the first trust
  - A wide variety of administrative changes can still be made

(4) The new Decanting Act permits modifications for the benefit of a "beneficiary with a disability" that would not have been possible under the repealed statute

- Indiana's most significant change to the text of the Uniform Trust Decanting Act was our addition of a broad specific definition of a "beneficiary with a disability" (I.C. §30-4-10-6)
- If there is a beneficiary with a disability, then even if that beneficiary's interest in the current (first) trust is a vested interest to receive a mandatory distribution(s) (such as a life income interest) or to withdraw trust assets –
  - The trustee or another specially appointed fiduciary can decant to replace the disabled beneficiary's "mandatory" interest with a discretionary interest in the second trust
  - New § 30-4-10-43 allows self-settled or non-self-settled special needs trusts to be created through decanting for a "beneficiary with a disability"
  - The "preserving tax benefits" rules in § 30-4-10-49 can trump and supersede the § 43 rules and prevent a change through decanting if a marital deduction or an annual gift exclusion was claimed for the interest of the disabled beneficiary in the current or first trust

(5) The rest of the new Decanting Act is a mixture of familiar procedures and detailed NEW requirements and restrictions

- As under the repealed statute, the new Act:
  - Does not require probate court approval or the consent of beneficiaries of the first trust (exceptions in sections 46 and 48), before the trustee can decant
  - Does not permit new beneficiaries to be added in the second trust, but if the trustee has expanded distributive discretion, a power of appointment can be added or modified (§ 30-4-10-41(g)(3))
  - Requires the trustee to send a pre-decanting notice to all qualified beneficiaries of the first trust, 60 days in advance of the decanting (§ 30-4-10-35 & 36)
  - Requires the trustee to make and sign a "record of exercise" of the decanting power, with specified content (§ 30-4-10-40)
- Section 44 in the new Act contains important restrictions which prevent the use of decanting to change or eliminate a charitable beneficiary's vested or "determinable charitable interest" (such as a remainder interest under a CRAT or CRUT)
- The rules for preservation of tax benefits claimed for or provided under the first trust (§ 30-4-10-49) are detailed and can prohibit a change through decanting that would otherwise be allowed under the rest of the Act

Section Nine

5 Tips on Connecting with a Jury

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Section Nine

5 Tips on Connecting with a Jury……...…Gregg S. Gordon

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

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

TIP No. 1:

Don't Be Afraid of Trying Your Case to a Jury if the Facts Support Your Case

- In general, jury trials are declining.[1]

- Jury trials are time consuming and increase the costs and expenses of trial as compared to a bench trial.

- It is the author's perception that judges tend to apply the law to the facts while jurors tend to apply the facts to the law.

- A jury may better connect to a plaintiff's case of undue influence, duress and/or lack of capacity because the personal experience of a juror will shape the juror's perception of the evidence.

[1] *Disappearing Act: Jury Trials On The Decline, But Options Available To Reverse Trend,* Olivia Covington, The Indiana Lawyer, March 2021

TIP No. 2:

Use Voir Dire to Connect with Your Jury

- Probe whether a juror has an estate plan (or is contemplating creating an estate plan) and whether they would want such a plan respected.

- Probe whether a juror has had personal experience with family members moving into their later years of life and whether that move impacted their cognitive abilities.

- Probe whether a juror has had personal experience with persons who has/had issues with cognitive impairment.

- Probe whether they or someone they know has been involved with probate proceedings (i.e. estate/trust administration and/or will/trust contests.

- Ask whether they have an opinion as to whether people can be manipulated and, if so, how?

- Depending on your case, explore their family relationships such as whether they have siblings and how they get along with them.

Tip No. 3

Use Screens to Communicate Your Case to Your Jury

- It has been reported that the average American spends 7 hours and 4 minutes looking at a screen every day.[2]

- Using screens to communicate information to a juror is consistent with their normal habits and facilitates the juror's assimilation of the information.

- A concise PowerPoint presentation during opening can infinitely improve the jury's understanding of the case and help them understand the evidence during trial. Such a presentation can be used to:

    - Explain how a decedent's estate was to function; and/or

    - Establish a chronology of significant events

[2] *See* www.dataportal.com

- **Such a presentation should not be used as a substitute for an opening statement by counsel – it should only serve to accentuate counsel's opening statement.**

- During trial, use screens to show and discuss documentary evidence with witnesses.
    - Jurors are usually provided trial binders with paper copies of documentary evidence to which they can refer to during trial.
    - By using screens to discuss documentary evidence with witnesses, you can not only help keep the jurors focused on the

evidence but to also highlight key portions of that evidence.

- For some documentary evidence, the evidence itself can directly impact a jury's perception such as a marked degradation of a person's signature over time.

- Using screens during closing gives you the opportunity to refresh the jury's recollection of key documentary evidence shortly before they begin deliberations.

- **And just as for an opening statement, such a presentation should not be used as a substitute for a closing statement by counsel – it should only serve to accentuate counsel's closing statement by highlighting the key evidence.**

Tip No. 4

Preparation Equals Respect of Your Jury's Time

- A lack of preparation can be interpreted as a lack of respect for the jury.

- Conversely, being well prepared can be interpreted as respect for the jury.

- Lack of preparation wastes time – *the jury's time.*

- Preparation means:

    - Doing as much as possible *before* trial to streamline the presentation of exhibits *at* trial. *See Attachment A.*

    - Knowing your exhibits and always maintaining control of them during trial.

    - Knowing how the technology you are using works and having a fall back if the technology should fail.

- Knowing exactly what evidence needs to be obtained from each of your witnesses and focusing your questioning to obtain that evidence in the least amount of time as needed.

- Surgically use cross-examination – make the points that need to be made in the least amount of time as possible.

- Preparation keeps your jury engaged. Lack of preparation…

Tip No. 5

Tell Your Jury a Story and Avoid Making the Case About Money

- At its most basic level, probate litigation is almost always about money.

- Presenting your case as one about recovering money could alienate jurors and/or jade the jury's perception of your case.

- Presenting your case as a story involving people, the dynamics of their relationships and the effects of the defendant's conduct on those relationships can make your case far more interesting and actively engage the jury's attention.

- Returning to *Tip No. 2*, your jury should have common points of reference based on their life experiences.

- If monetary damages are sought, only seek monetary damages consistent with your story. Do Not Overreach.

- Asking the jury for monetary damages that are borderline speculative, can potentially corrupt the jury's perception of your client.

Section Ten

Five Tips on Indiana's New Health Care Advance Directive

by Robert W. Fechtman

90 Hot Tips in Estate, Trust & Probate Practice
December 21, 2022

Section Ten

Five Tips on Indiana's New Health Care Advance Directive……Robert W. Fechtman

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 the immediate Past-President of the Board of The Indianapolis Children's Choir.

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.

Five Tips on Indiana's New Health Care Advance Directive

by Robert W. Fechtman

I. Indiana's New Advance Directive for Health Care

Senate Enrolled Act 204 (P.L. 50-2021) became effective on July 1, 2021. It created a new single type of health care advance directive that could be signed and used anytime on or after July 1, 2021, to appoint one or more health care representatives and/or state specific instructions, wishes, and/or treatment preferences. This is codified under I.C. § 16-36-7.

We are nearing the end of a one-and-a-half-year transition period that will end on December 31, 2022. At that point, the new-style health care advance directive will replace the durable power of attorney for health care under I.C. § 30-5-5-16, the appointment of health care representative under I.C. § 16-36-1-7, and the living will declaration under I.C. § 16-36-4-10. The most notable feature of this "replacement" aspect of the new statute is that health care powers included in general powers of attorney signed after December 31, 2022, will be void.

Indiana's advance directive statutes were in great need of this update, due to conflicts between the statutes, outdated language, and unclear decision standards for legal representatives. Moreover, the old statutes required forms to be signed "in the physical presence" of the declarant, which posed technology and transportation barriers.

The basic elements of the new Indiana advance directive are that:

1. There is no official or mandatory form for the advance directive;
2. The declarant my name one or more health care representatives;

3. The declarant may state specific health care decisions and/or treatment preferences, including preferences for life-prolonging procedures or palliative care; and,
4. The declarant may disqualify named individuals from serving as health care representative or receiving delegated authority from a health care representative.

The new advance directive has new and more flexible signing requirements:

1. The declarant may sign on paper or electronically, OR may direct someone else to sign the declarant's name in the declarant's physical presence;
2. The declarant may sign in the "presence" of two adult witnesses, OR in the "presence" of a notary public; and,
3. The two witnesses or the notary public may also sign the advance directive on paper OR electronically.

There are three options for signing the new advance directive remotely:

1. The declarant and the two witnesses OR the declarant and the notary public sign identical counterparts on paper and interact using two-way audiovisual technology, in which case the signed counterparts must be assembled within ten business days;
2. The declarant and the two witnesses OR the declarant and the notary public sign electronically using two-way audiovisual technology; or,
3. The declarant and two witnesses sign with audio-only interaction by telephone during signing.

There will be a set of basic presumptions and rules if the advance directive does not explicitly state otherwise:

1. The advance directive is effective upon signing and remains in effect until or unless the advance directive is revoked in writing;

2. A later-signed advance directive supersedes and revokes an earlier-signed advance directive;
3. Unless the health care representatives are listed in priority order, two or more health care representatives named in the same advance directive have concurrent, equal, and independently exercisable authority and are not required to act jointly;
4. If the declarant still has capacity to consent to health care, orders and instructions by the declarant will control over any decisions by a health care representative;
5. Any health care representative can delegate authority under the advance directive in writing to any competent adult or adults;
6. The health care representative has authority to complete anatomical gifts, to authorize an autopsy, and to arrange for burial or cremation of the declarant's remains after the declarant's death;
7. The health care representative can access the declarant's medical records and health information without a specific HIPAA release;
8. The health care representative has authority to consent to mental health treatment for the declarant;
9. Each health care representative has authority to sign a POST form or an out-of-hospital Do Not Resuscitate (DNR) declaration for the declarant;
10. The health care representative has authority to apply for public benefits (including Medicaid) for the declarant and to access the declarant's financial records for that purpose; and,
11. Each health care representative is entitled to reasonable compensation and expense reimbursement for services performed and payments made for or on behalf of the declarant.

Optional provisions that may be added to the advance directive include:

1. The advance directive may prohibit or restrict the delegation of authority by the health care representative to other specific persons;
2. The advance directive may require another person to witness or approve a revocation of or amendment to the advance directive;
3. The advance directive may name two or more health care representatives in a stated order of priority;
4. The advance directive may require multiple health care representatives to act jointly or on a majority-vote basis to exercise some or all health care powers;
5. The advance directive may prohibit a health care representative from being compensated, or may state an hourly rate or other standard for determining reasonable compensation; and,
6. The advance directive may designate some person other than the health care representative to serve as an advocate or monitor.

90 Hot Tip in Estate, Trust & Probate Practice: Indiana's New Health Care Advance Directive

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Indiana's New Advance Directive for Health Care: I.C. 16-36-7

This is a new single type of health care advance directive that will replace the old durable power of attorney for health care (I.C. 30-5-5-16), the old appointment of health care representative (I.C. 16-36-1-7, and the old living will declaration (I.C. 16-36-4-10) effective January 1, 2023.

After December 31, 2022, health care powers included in a general power of attorney will be void!

Reasons for the New Advance Directive for Health Care

Conflicts between the three statutes.

Outdated language in the old statutes.

Unclear decision standards for legal representatives.

The old statutes required forms to be signed “in the physical presence” of the declarant, which posed technology and transportation barriers.

Basic Elements of the New Indiana Advance Directive

There is no official or mandatory form.

The declarant may name one or more health care representatives (HCRs).

The declarant may state specific health care decisions and/or treatment preferences, including preferences for life-prolonging procedures or palliative care.

The declarant may disqualify named individuals form serving as HCR or receiving delegated authority from an HCR.

New and More Flexible Signing Requirements

The declarant may sign on paper or electronically, OR may direct someone else to sign the declarant's name in the declarant's physical presence.

The declarant may sign in the "presence" of two adult witnesses, OR in the "presence" of a notary public.

The two witnesses or the notary public may also sign the advance directive on paper OR electronically.

Options for signing remotely

The declarant and the two witnesses OR the declarant and the notary sign identical counterparts on paper and interact using two-way audiovisual technology – signed counterparts must be assembled within ten business days.

The declarant and the two witnesses OR the declarant and the notary sign electronically using two-way audiovisual technology.

The declarant and two witnesses sign with audio-only interaction by telephone during signing.

Basic Presumptions if Advance Directive Does Not Say Otherwise

The advance directive (AD) is effective upon signing and remains in effect until or unless revoked in writing.

A later-signed AD supersedes and revokes an earlier-signed AD.

Unless HCRs are listed in priority order, two or more HCRs have concurrent, equal, and independently exercisable authority and are not required to act jointly.

If the declarant still has capacity, then orders and instructions by the declarant will control over decisions by an HCR.

Basic Presumptions if Advance Directive Does Not Say Otherwise

Any HCR can delegate authority under the AD in writing to any competent adult or adults.

The HCR has authority regarding anatomical gifts, autopsies, and burial or cremation.

The HCR does not need a HIPAA release.

The HCR has authority to consent to mental health treatment.

Basic Presumptions if Advance Directive Does Not Say Otherwise

Each HCR has authority to sign a POST form or out-of-hospital DNR.

The HCR has authority to apply for public benefits (including Medicaid) and to access the financial records for that purpose.

Each HCR is entitled to reasonable compensation and reimbursement.

Optional Provisions that May Be Added to the Advance Directive

The AD may restrict the delegation authority of the HCR.

The AD may name two or more HCRs in a stated order of priority.

The AD may require multiple HCRs to act jointly or on a majority-vote basis.

The AD may prohibit an HCR from being compensated, or may state an hourly rate, etc.

This is not an exhaustive list.

Section Eleven

5 TIPS ON VA DISABILITY AND SOCIAL SECURITY APPEALS

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Section Eleven

5 tips on VA Disability and Social Security Appeals……Tamatha A. Stevens

Tamatha A. Stevens is founding partner of STEVENS & ASSOCIATES, PC. She is a 1992 graduate of Indiana University School of Law and has spent her career focused in estate planning, elder law, special needs, veterans and equine law. She is a Certified Elder Law Attorney by the National Elder Law Foundation and is accredited by the Department of Veteran Affairs. She is dedicated to protecting clients' interests in the event of death, disability, or long-term care, and assists families with Medicaid and end of life planning. She is a member of the National Academy of Elder Law Attorneys and Indiana NAELA, Indiana and Indianapolis Bar Associations, Estate Planning Council of Indianapolis, and numerous other professional organizations. Tammy is admitted to practice law before the Indiana Supreme Court, United States Supreme Court, Federal Claims Court, U.S. Tax Court and the United States District Courts in Indiana. Tammy has and continues to be active with and has served on numerous charitable boards in central Indiana.

TIP #1. THE PACT ACT EXPANDS

DISABILITY COMPENSATION'S SERVICE & CONDITION PRESUMPTIONS.

The PACT Act is arguably the largest health care and benefit expansion in VA history. The PACT Act is the nickname of the law which is entitled The Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act. The PACT Act expands VA health care and benefits for Veterans exposed to burn pits, Agent Orange, and other toxic substances. The PACT Act adds to the already lengthy list of health conditions that are presumed to be caused by exposure to these substances.

Specifically, the PACT Act:

- Expands and extends eligibility for VA health care for Veterans with toxic exposures and Veterans of the Vietnam, Gulf War, and post-9/11 eras.
- Adds 20+ more presumptive conditions for burn pits, Agent Orange, and other toxic exposures.
- Adds more presumptive-exposure locations for Agent Orange and radiation.
- Requires the VA to provide a toxic exposure screening to every Veteran enrolled in VA health care.
- Helps to improve research, staff education, and treatment related to toxic exposures.

Typically to get a VA disability rating, your disability must connect to your military service. For many health conditions, you need to prove that your service caused or contributed to your condition. Remember military service is 24/7, unless you have willful misconduct and supervening, nonservice related condition or event, was more likely to cause the condition.

Presumptive Conditions are conditions that the VA automatically presumes that your service caused your condition. In cases with presumptive conditions, there is no need to prove the service cause or contribution to the condition. You only need to meet the service requirements for the presumption. All Veterans should know the presumptive conditions for their service.

OVERVIEW OF THE VA'S PRESUMED CONDITIONS LEADING TO DISABILITY COMPENSATION WITH PACT ACT NEW PRESUMPTIONS IN BOLD

Gulf War era and post-9/11 Veteran eligibility:

The following cancers: **brain cancer, gastrointestinal cancer of any type; glioblastoma; head cancer of any type; kidney cancer; lymphatic cancer of any type; lymphoma of any type; melanoma; neck cancer of any type; pancreatic cancer; reproductive cancer of any type; and respiratory cancer of any type.**

Asthma that was diagnosed after service;

Chronic bronchitis;

Chronic obstructive pulmonary disease (COPD);

Chronic rhinitis;

Chronic sinusitis;

Constrictive bronchiolitis or obliterative bronchiolitis;

Emphysema;

Granulomatous disease;

Interstitial lung disease (ILD);

Pleuritis;

Pulmonary fibrosis;

Sarcoidosis.

Burn Pit Presumptive Exposure if you served in any of these locations and time periods:

On or After 9/11/2001 in Afghanistan; Djibouti; Egypt; Jordan; Lebanon; Syria; Uzbekistan; Yemen; and the airspace of any of these locations.

On or After 8/2/1990 in Bahrain; Iraq; Kuwait; Oman; Qatar; Saudi Arabia; Somalia; United Arab Emirates (UAE); and the airspace of any of these locations.

AGENT ORANGE (PACT added in bold)

PRESUMPTIVE CONDITIONS: Bladder cancer, chronic B-cell leukemia, Hodgkin's disease, multiple myeloma, non-hodgkin's lymphoma, prostate cancer, respiratory cancers, some soft tissue sarcomas, **High blood pressure (hypertension), Monoclonal gammopathy of undetermined significance (MGUS),** AL amyloidosis, Chloracne and other types of acneiform disease if at least 10% within 1 year of exposure, diabetes mellitus type 2, hypothyroidism, ischemic heart disease, Parkinsonism, Parkinson's disease, Peripheral neuropathy, early onset if at least 10% within 1 year of exposure, porphyria cutanea tarda, if 10% within 1 year of exposure.

PRESUMPTIVE SERVICE:

Between 1/9/1962 and 5/7/1975: In the Republic of Vietnam, Aboard a US military vessel that operated in the inland waterways of Vietnam, on a vessel operating not more than 12 nautical miles seaward from the demarcation line of the waters of Vietnam and Cambodia, **any US or Royal Thai military base in Thailand from 1/9/62 to 6/30/76, Laos from 12/1/65 to 9/30/69, Cambodia at Mimot or Krek, Kampong Cham Province from 4/16/69 to 4/30/69, Guam or American Samoa or in the territorial waters of Guam or American Samoa from 1/9/62-7/31/80, Johnston Atoll or on a ship that called at Johnston Atoll from 1/1/72 to 9/30/77, you served in or near Korean DMZ from 9/1/67 to 8/31/71, you served on active duty in a regular Air Force unit location where a C-123 aircraft with traces of Agent Orange was assigned and had repeat contact with the aircraft due to your flight, ground, or medical duties, you were involved in transporting, testing, storing, or other uses of Agent Orange during your military service, or you were assigned as a Reservist to certain flight, ground or medical crew duties at one of the following locations: Lockbourne/Rickenbacker Air Force Base in Ohio 1969-1986 (906th and 907th Tactical Air Groups or 355th and 356th Tactical Airlift Squardrons; Westover Air Force Base in Massachusetts 1972-1982 (731st Tactical Air Squadron and 74th Aeromedical Evacuation Squadron, or 901st Organizational Maintenance Squadron), Pittsburgh International Airport in Pennsylvania 1972 to 1982 (758th Airlift Squadron).**

Asbestos

Get tested if you have illnesses that affect your lungs (asbestosis, pleura plaques, or cancers) and worked in mining, milling, shipyards, construction, carpentry, or demolition or worked with products like flooring, roofing, cement sheet, pipes, insulation, clutch facing and brake linings (friction products).

Birth Defects For Spina Bifida

Child's biological mother or father served in Republic of Vietnam or Thailand between 1/9/62-5/7/75 or in a unit in or near the DMZ between 9/1/67-8/31/71 and the child was dx with a form of spina bifida other than spina bifida occulta and conceived after the parent first entered the Republic of Vietnam, Thailand or the DMZ.

Burn Pits and other Specific Environmental Hazards

If you served in Iraq, Afghanistan, or certain other areas, you may have had contact with toxic chemicals in the air, water or soil.

A large sulfur fire at Mishraq State Sulfur Mine near Mosul, Iraq

Hexavalent chromium at the Qarmat Ali water treatment plan in Basra, Iraq

Pollutants from waste incinerator near the Naval Air Facility at Atsugi, Japan

Presumptive Conditions: Brain Cancer, Gastrointestinal cancer of any type, Glioblastoma, Head cancer of any type, Kidney cancer, Lymphatic cancer of any type, Lymphoma of any type, Melanoma, Neck cancer of any type, pancreatic cancer, Reproductive cancer of any type, Respiratory cancer of any type, Asthma diagnosed after service, Chronic bronchitis, Chronic obstructive pulmonary disease (COPD), Chronic rhinitis, Chronic sinusistis, Constrictive bronchiolitis or obliterative bronchiolitis, Emphysema, Granulomatous disease, Interstitial lung disease (ILD), Pleuritis, Plumonary fibrosis, sarcoidosis.

MUSTARD GAS (AKA SULFUR MUSTARD, YPERITE, OR NITROGEN MUSTARD) OR LEWISITE, A NATURAL COMPOUND THAT CONTAINS POISON ARSENIC

If you served at the German bombing of Bari, Italy in WWII or worked in certain other jobs you may have had contact with mustard gas.

Army: Bari, Italy; Bushnell, FL; Camp Lejeune, NC; Camp Sibert, AL; Dugway Proving Ground, UT; Edgewood Arsenal, MD; Naval Research Lab, Washington DC; Ondal, India; Rocky Mountain Arsenal, CO; San Jose Island, Panama Canal Zone.

Navy: Bari, Italy; Camp Lejeune, NC; Charleston, SC; Great Lakes Naval Training Center, IL; Hart's Island, NY; Naval Training Center, Bainbridge, MD; Naval Research Laboratory, VA; Naval Research Laboratory, Washington, DC; and USS Eagle Boat 58

Merchant Seamen: Bari, Italy

Service Members testing in Finschhafen, New Guinea and Porton Down, England

Gulf War Illness in Southwest Asia

Southwest Asia Theater includes Iraq, Kuwait, Saudi Arabia, neutral zone between Iraq and Saudi Arabia, Bahrain, Qatar, and the United Arab Emirates (U.A.E.), Oman, The Gulf of Aden and Gulf of Oman, The waters of the Persian Gulf, the Arabian Sea, and the Red Sea, the airspace above these locations.

Dx while on active duty or before 12/31/21

Ill 6 moths or more and 10% disability rating

Functional gastrointestinal disorders, chronic fatigue syndrome, fibromyalgia, other undiagnosed illnesses, including but not limited to cardiovascular disease, muscle and joint pain, and headaches.

Dx within 1 year of date of separation: brucellosis, campylobacter jejuni, Coxiella burnetiid (Q fever), nontyphoid salmonella, shigella, west nile virus, malaria.

Dx anytime after separation from service: mycobacterium tuberculosis or visceral leishmaniasis

Gulf War Illness in Afghanistan

Started while on active duty or after 9/19/2001 and resulted in 10% disability rating. brucellosis, campylobacter jejuni, Coxiella burnetiid (Q fever), nontyphoid salmonella, shigella, west nile virus,

Dx anytime after separation from service: mycobacterium tuberculosis or visceral leishmaniasis

Project 112/SHAD

Part of chemical and biological warfare testing for Project 112 or Project Shipboard Hazard and Defense (SHAD), you may be at risk for illnesses believed to be causes by chemical testing. The Department of Defense's Deseret Test Center in Fort Douglas, Utah, conducted this testing which took place aboard ships and on land in various locations from 1962 to 1974.

Coverage for Veterans and qualified survivors

Ionizing Radiation Exposure: Radiation

Presumptive Locations: Cleanup of Enewetak Atoll from 1/1/77 to 12/31/80; cleanup of Air Force B-52 bomber carrying nuclear weapons off the coat of Palomares, Spain from 1/17/66 to 3/31/67; and response to the fire onboard an Air Force B-52 bomber carrying nuclear weapons near Thule Air Force Base in Greenland from 1/21/68 to 9/25/68.

Atmospheric nuclear weapons test participation claims

Hiroshima and Nagasaki occupation claims (Hiroshima or Nagasaki, Japan 9/45 to 7/1/46

Other exposure claims
Presence conceded if military records do not establish presence or absence from site
Radiogenic disease manifesting at the designated period.
Radiogenic disease manifesting 5 years or more after exposure except as noted:
All forms of leukemia except chronic lymphatic (lymphocytic) leukemia at any time after exposure;
Thyroid cancer;
Breast cancer;
Lung cancer;
Bone cancer within 30 years after exposure;
Liver cancer;
Skin cancer;
Escphageal cancer;
Stomach cancer;
Colon cancer;
Pancreatic cancer;
Kidney cancer;
Urinary bladder cancer;
Salivary gland cancer;
Multiple myeloma;
Posterior subcapsular cataracts 6 months or more after exposure;
Non-malignant thyroid nodular disease;
Ovarian cancer;
Parathyroid adenoma;
Tumors of the brain and central nervous system;
Cancer of the rectum;
Lymphomas other than hodgkin's disease;
Postate cancer; and
Any other cancer.
Polycythemia vera

CAMP LEJEUNE WATER CONTAMINATION (see Tip#2)

TIP #2. CAMP LEJEUNE WATER CONTAMINATION

Camp Lejeune shut down two on-base water wells in 1985 finding they contained Trichloroethylene (TCE), Perchloroethylene (PCE), Benzene, Vinyl chloride, and other compounds.

Marine Corps Base Camp Lejeune or Marine Corps Air Station (MCAS) New River in North Carolina

Contaminants in drinking water

Served as a Veteran, Reservist, or Guardsman at Camp Lejeune or MCAS New River for at least 30 cumulative (not consecutive) days from 8/1953 to 12/1987, and were not dishonorably discharged.

Diagnosed with: Adult leukemia, aplastic anemia and other myelodysplastic syndromes, bladder cancer, kidney cancer, liver cancer, multiple myeloma, non-hodgkin's lymphoma, or Parkinson's disease.

Veterans and/or their family members diagnosed with bladder cancer, breast cancer, esophageal cancer, female infertility, hepatic steatosis, kidney cancer, leukemia, lung cancer, miscarriage, multiple myeloma, myelodysplastice syndromes, neurobehavioral effects, non-hodgkin's lymphoma, renal toxicity, and scleroderma are eligible for health care and may qualify for reimbursement of their out-of-pocket health care costs for case related to these conditions if you lived on Camp Lejeune during 1/1/57 to 12/31/87 for care after 8/6/2012 for up to 2 years before the date of your application or if you lived on Camp Lejeune during 8/1/53 to 12/31/56 for care you received after 12/16/14 up to 2 years before the date you apply for benefits.

TIP #3. EVEN IF THE VETERAN IS DECEASED,

THERE MAY STILL BE BENEFITS AVAILABLE TO THE VETERANS' SURVIVORS

1. A monthly VA Dependency and Indemnity Compensation (VA DIC) payment if the veteran died from the service connected disability;

2. A one-time accrued benefits payment if the veteran was owed unpaid benefits at the time of their death; and

3. A survivors' pension if the veteran served during wartime and other eligibility requirements are met. Note: the VA deems the widow of a veteran no longer eligible for benefits if she divorced the veteran or remarried after the veteran's death except in rare specifically defined circumstances. The VA does recognize same sex spouses.

TIP #4. DON'T LEAVE MONEY ON THE TABLE

ENCOURAGE ELIGIBLE INDIVIDUALS TO APPLY IN 2022.

The PACT Act-related benefits will begin processing January of 2023 when funding approval from Congress is received. Applications for benefits can be made before the funding is approved. Further, it is anticipated that any benefits filed in 2023 and approved will be backdated and paid retroactively to the date of the bill signing on August 10, 2022.

TIP #5. MORE VETERANS CAN NOW ENROLL IN VA HEALTH CARE UNDER THE PACT ACT.

Veterans who were discharged or released on or after 10/1/2013 and served in a theater of combat operations during a period of war after the Persian Gulf War or served in combat against a hostile force during a period of hostilities after 11/11/1998 are eligible to receive free VA health care for any condition related to service for up to 10 years from the date of their most recent discharge or separation. Others can still receive care but may have a small copay.

Veterans discharged or released before 10/1/2013 may also enroll during the special enrollment period from 10/1/22 to 10/1/23 if:

You must have served in a theater of combat operations during a period of war after the Persian Gulf War or in combat against a hostile force during a period of hostilities after November 11, 1998.

You must have been discharged or released from service between 9/11/2001 and 10/1/2013; and

You have not enrolled in the VA health care before.

Enrollment is free.

BONUS TIP. SOCIAL SECURITY ADMINISTRATION INCREASED PRESUMPTIVE ATTORNEY'S FEES AS OF NOVEMBER 30, 2022.

Despite predictions of its demise as babyboomers started turning 65 in 2011, Social Security is still here 12 years later and it continues to increase. In fact, in 2023, we will see the largest cost of living adjustment increase in Social Security benefits since the early 80s with a 8.7% increase.

Social Security is an important source of income for many households. Social Security is payable to a variety of people in a variety of circumstances. Not all are easily obtained independently and many require an appeal to be maximized. There are four levels of appeal:

- Request for Reconsideration (SSA-561-U2),
- Request for Hearing by Administrative Law Judge (HA-501-U5), or
- Request for Review of Hearing Decision/Order (HA-520-U5)
- Federal Court review.

Covid has improved some functions. It has acted to allow Social Security to handle video hearings maximizing traveling tribunal's time cutting out their travel time. In 2017, the National average appeal wait was 605 days with many offices taking over 750 days. In 2021, the National average appeal wait was 326 days. Indiana's average is 7 months, 49% approval of benefits, 43% denied benefits and 8% dismissed.

Social Security allows attorneys to enter into any agreement with clients as long as those fees do not exceed 25% of the retro-benefit awarded or $6,000 whichever is less. **As of November 30, 2022, the presumptive attorneys are increasing for the first time in 13 years to 25% of the retro-benefits due or $7,200. Attorney's fees in excess of thee presumed limit is only permitted if extenuating facts exist, those excess fees are justified and if a Petition for Fees is awarded by the tribunal.**

COLA INCREASES BY YEAR

YEAR	COLA %	YEAR	COLA %
1975	8.0	1999	2.5
1976	6.4	2000	3.5
1977	5.9	2001	2.6
1978	6.5	2002	1.4
1979	9.9	2003	2.1
1980	14.3	2004	2.7
1981	11.2	2005	4.1
1982	7.4	2006	3.3
1983	3.5	2007	2.3
1984	3.5	2008	5.8
1985	3.1	2009	0.0
1986	1.3	2010	0.0
1987	4.2	2011	3.6
1988	4.0	2012	1.7
1989	4.7	2013	1.5
1990	5.4	2014	1.7
1991	3.7	2015	0.0
1992	3.0	2016	0.3
1993	2.6	2017	2.0
1994	2.8	2018	2.8
1995	2.6	2019	1.6
1996	2.9	2020	1.3
1997	2.1	2021	5.9
1998	1.3	2022	8.7

Source: Social Security Administration

SOCIAL SECURITY DISABILITY

Generally, to be eligible for Social Security benefits as a **WORKER**, you must be a U.S. citizen or lawfully present alien, 62 or older, or disabled, or blind and considered "insured" meaning you have adequate work credits. Necessary work credits are determined:

Born After 1929 Become Disabled at Age	Work Credits Needed
Before 24	6 work credits in the 3 year period before disability
24 to 31	credit for having worked half the time between age 21 and the time you become disabled.
31 to 42	20
44	22
46	24
48	26
50	28
52	30
54	32
56	34
58	36
60	38
62 or older	40

SSI

SSI benefits for 2023 are $914 for an eligible individual, $1,371 for an eligible individual with an Eligible Spouse and $458 for each additional dependent.

BENEFITS FOR THE SPOUSES OF RETIREES

The spouse of a retiree who is already drawing Social Security is eligible to receive a spousal benefit. The payment equals up to one-half of the retired spouse's monthly payment. In order to receive this benefit, the spouse receiving the spousal benefit must be at least 62 years old or be caring for a child who is younger than 16 or who receives Social Security disability benefits.

You must have reached full retirement in order to receive the entire one-half of your retired spouse's PIA. That age is 66 years and two months for people born in 1955 and rises by two months per year of birth until it reaches 67 for those born in 1960 or later. If you opt to receive benefits before that time, you will be penalized according to a formula similar to that used to compute the reduced benefits of workers who retire early.

At the time you are eligible for the spousal benefit, you may be eligible to receive more from Social Security based on your own earnings record than you would receive through that of your spouse. If this is the case, the Social Security Administration automatically provides you with the greater benefit.

BENEFITS FOR SURVIVING SPOUSES

Survivor benefits are available to widows or widowers, based on their late spouse's earnings record. To receive these benefits, the surviving spouse must be at least 60 years old, or 50 if disabled. (The disability must have begun before or within seven years of the worker's death.)

A younger widow or widower can also be eligible for survivor benefits if they are caring for a child of the deceased worker who is under the age of 16 or disabled and receiving dependent benefits based upon their late parent's earnings record. Survivors who have reached their normal retirement age can receive 100% of their deceased spouse's benefit. For survivors who are at least 60, the benefit ranges from 71.5% to 99.6% of their deceased spouse's benefit.

The survivor has some additional options. For example, a 60-year-old spouse could apply for survivor benefits now and then switch to a retirement benefit based on their own work history at age 62 (or later), if that would result in a higher monthly payment.

Social Security will also provide a one-time lump-sum payment of $255 upon the death of a spouse, provided the spouses were living in the same residence at the time of the spouse's death.

BENEFITS FOR DIVORCED SPOUSES

If you are divorced from a retired worker, you're eligible to receive an amount equal to one-half of your former spouse's benefits if you were married for at least 10 years.

The rules are similar to those for spousal benefits described above, with a notable exception: You can begin receiving benefits even before your former spouse has begun to do so. However, you have to be at least 62 years old, and the divorce must have been finalized for at least two years if you have not yet reached your normal retirement age.

Divorced spouses who had more than one marriage that lasted at least 10 years do not receive multiple benefit checks or one for each marriage. But the Social Security Administration does automatically choose the former marriage that will yield the largest benefit to the ex-spouse.

BENEFITS FOR MINOR CHILDREN AND DEPENDENT MINOR GRANDCHILDREN

Children can qualify for a benefit as the survivor of a deceased worker or as the dependent of a living parent who receives Social Security retirement or disability benefits. Children need to be under the age of 18 (or 19 if they are a full-time student in elementary or secondary school).

Benefits paid to a child will not decrease a living parent's retirement benefit. The value of the benefits the child could receive, added to the parent's benefits, may help the parent decide if taking their own benefits sooner may be more advantageous.

If grandchildren become dependents of their grandparents due to the death of their own parents or for other reasons, they can be eligible to receive benefits based upon the earnings record of either of their grandparents. Great-grandchildren do not qualify for dependent benefits.

SSI Benefits for Children

Supplemental Security Income is a separate program for Americans with limited incomes and few other resources. Recipients must generally be 65 or older, blind, or disabled. But SSI is also available to children under age 18 in certain cases. To qualify for SSI benefits:

- The child must have a physical or mental impairment(s) that results in marked and severe functional limitations.
- The impairment or impairments must have lasted or be expected to last for a continuous period of at least 12 months or be expected to result in death. In the case of blindness, that duration requirement doesn't apply.
- A child who isn't blind must not earn more than **$1,470** per month in 2023. A child who is blind must not earn more than **$2,460** per month.

Benefits for Adult Disabled Children of A Deceased, Disabled or Retired Parent

Children with disabilities can be eligible for Social Security benefits on their parents work record. The child must have a physical or mental condition that severely limits their activity and is expected to last more than one year or result in the child's death. The disability must have began no later than age 22.

Benefits for Dependent Parents Based on a Deceased Child

Some parents legally depend on a child due to economic circumstances or disability. The dependent parents of a deceased worker who is 62 or older can receive 82.5% of the worker's benefit for one parent or 75% each for two parents.

Family Benefit Maximum

Benefits to dependents are subject to a maximum monthly retirement and survivor payout from Social Security to the family as a whole. This total figure is based on the worker's own monthly payment. The total payout to the family varies, but dependent benefits typically range between 150% (for disabled workers) to 180% (for deceased workers) of the worker's payment.

For the family of a worker who becomes age 62 or dies in 2023 before attaining age 62, the total amount of benefits payable will be computed so that it does not exceed:

(a) 150 percent of the first $1,425 of the worker's benefit, plus
(b) 272 percent of the worker's benefit over $1,425 through $2,056, plus
(c) 134 percent of the worker's benefit over $2,056 through $2,682, plus
(d) 175 percent of the worker's benefit over $2,682.

Benefits to former spouses are not counted in your family maximum benefit, so they do not affect that maximum.

Section Twelve

Five Estate Planning Tips for Clients Involved in Divorce

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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.

DOUBLE BONUS TIP: *Rotert v. Stiles*, 174 N.E.3d 1067 (Ind. 2021)

HELD: Vacating the Court of Appeals' contrary determination, the Indiana Supreme Court held that a trust's distribution provision, which hinged on whether the beneficiary was married, was not an unlawful restraint against marriage.

FACTS AND PROCEDURAL HISTORY:

Rotert was one of two adult children of Marcille, who passed away in 2016. Prior to Marcille's death, she executed a revocable trust. Operative to Rotert's share of the trust property was this:

> In the event that [Rotert] 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. . . .

At the time of Marcille's death, Rotert was, in fact, married. Rotert later petitioned to docket the trust and requested summary judgment that the above provision was void as a restraint on marriage and against public policy. That summary judgment motion was denied, from which Rotert appealed.

In 2020, the Indiana Court of Appeals reviewed an extended history of Indiana case law expressing skepticism towards restraints on marriage. Applying that history to *Rotert*, the Court concluded that "the marriage provision simply cannot be interpreted as anything other than an encouragement for Rotert to divorce his wife of almost twenty years upon the opening of the estate . . ." Thus, the Court concluded, the provision was void as a restraint on marriage and against public policy.

The Indiana Supreme Court granted transfer, thus vacating the Court of Appeals' decision. 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 made by trust.

The Indiana Probate Code provides 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. Concluding that the word "devise" applies to wills, but not to trusts, the code section does not apply to dispositions made by trust. Further, the Indiana Trust Code does not include a similar provision that proscribes conditions in restraint of marriage. The trial court's summary judgment against Rotert was affirmed.

Justice Goff wrote a lengthy concurrence in result to opine that he would conclude that the prohibition against restraints on marriage apply to testamentary trusts as well as wills. However, he nevertheless concurred in the result of the case, reasoning that the terms of the trust in question amount to a permissible condition of acquisition, rather than an impermissible condition of retention (as opposed to, for example, a trust term that granted a beneficiary an interest in property that would be subject to divesting in the event the unmarried beneficiary later married.)

Section Thirteen

5 TIPS ON BUSINESS SUCCESSION PLANNING

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Section Thirteen

5 Tips on Business Succession Planning…….Richard O. Kissel II

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Partner
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Indianapolis, Indiana

RICHARD O. KISSEL II has been practicing in the field of estate planning for 37 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.

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 desires of everyone (business owner, spouse, children, and descendants) 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 tax payment and other 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 be held in an ILIT and be 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

FIVE KEY PRACTICE TIPS REGARDING ATTORNEY'S FEES IN PROBATE CASES

90 Hot Tips in Estate, Trust and Probate Practice
ICLEF Seminar, December 21, 2022

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Section Fourteen

Five Key Practice Tips Regarding Attorney's Fees in Probate Cases……..……Robert W. York

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- Born, Fort Wayne, Indiana;
- Indiana University-Fort Wayne (B.S., 1969); Indiana University School of Law-Indianapolis (J.D., *cum laude*, 1973).
- Admitted to bar: Indiana, 1973; U.S. District Court, Northern and Southern Districts of Indiana; 1973; U.S. Tax Court, 1984; U.S. Supreme Court; 1991; *Pro Hac Vice*, U.S. District Court, Wyoming, 2012.
- Intern, Marion County Prosecuting Attorney, 1972-73. Marion County Deputy Prosecuting Attorney, 1973-74.
- Administrative Law Judge, Indiana, 1974-83. Frequent Special Judge, major felony jury trials 1992-2011, 2016-2018. Frequent Hearing Officer, attorney discipline matters 2013-2020, 2022. Frequent court-appointed estate, guardianship and trust fiduciary. Mediator.
- Bar Register of Preeminent Lawyers, (1999-2022).
- Martindale-Hubble Rating, AV (1999-2022).
- Indiana Trial Lawyers Association (President, 1998-1999; Board of Directors, 1983 - 2022, College of Fellows, 1993-2022, Emeritus Director, 1999-2022).
- Indianapolis Bar Association (1973-2022: Board of Directors 2006-2012, 2014; Vice-President, 2008, 2014; Chair various committees, 2006-2022); Indiana State Bar Association, 1973-2022; American Bar Association, 1973-2022.
- Indianapolis Bar Foundation (Distinguished Fellow; Senior Fellow)
- Chairman, Marion County Local Probate Rules Committee, 2009-2014.
- Editor, Verdict Law Journal, 1986-1998.

- Litigation Counsel of America - 2007-2022: Fellow and Senior Fellow; Order of Justicia (100 + Jury/Court Trials); Member, Diversity Law Institute, 2022; Member, Trial Law Institute, 2022; and additional professional organizations.

- Current Practice Focus: Litigation and appeals involving: estates; trusts; probate; guardianships; business; contracts; insurance; death and injury, in all Indiana state and federal courts.

- Probate Publications and Seminar Presentations:

  "Motion Practice – Oral Arguments," IBA Seminar, Las Vegas, 2010;

  "Top Ten Rules To Follow In First Probate Case," ISBA Women in the Law Bench/Bar Retreat, Culver, Indiana, March 5, 2011;

  "Evidence in Probate/Trust Litigation," ICLEF Seminar, Indianapolis, IN, November 18, 2011;

  "Five Key Cases of 2011: 120 Hot Tips in Estate Practice," ICLEF Seminar, Indianapolis, IN, December 20, 2011;

  "New Marion County Local Probate Rules and Forms," IBA Seminar, Indianapolis, IN, January 25, 2012;

  "Jury Trials in Will Contest Actions," IBA Seminar, Sedona, AZ, November 16, 2012;

  "Claims Against Decedents' Estates," IBA Seminar, Sedona, AZ, November 16, 2012;

  "Five Key Cases of 2012: 120 Hot Tips in Estate Practice," ICLEF Seminar, Indianapolis, IN, December 21, 2012;

  "Traps for the Non-Probate Practitioner," IBA Seminar, Louisville, KY, June 14, 2013;

  "Estate & Trust Litigation," ICLEF Seminar, Indianapolis, IN, July 16, 2013;

  "Pitfalls for the Non-Probate Practitioner," IBA Seminar, Indianapolis, IN, December 5, 2013;

  "Five Key Cases of 2013: 120 Hot Tips in Estate Practice," ICLEF Seminar, Indianapolis, IN, December 20, 2013;

  "Five Key Cases of 2014: 120 Hot Tips in Estate Practice," ICLEF Seminar, Indianapolis, IN, December 22, 2014.

"Five Key Cases of 2015: 120 Hot Tips in Estate Practice," ICLEF Seminar, Indianapolis, IN, December 22, 2015.

"York's Top Ten Probate Decisions - With Practice Pointers," ICLEF Seminar, Indianapolis, IN, March 24, 2016.

"Five Key Cases of 2016: 120 Hot Tips in Estate Practice," ICLEF Seminar, Indianapolis, IN, December 21, 2016.

"Evidentiary Problems in Probate Litigation: Probate & Trust Litigation," ICLEF Seminar, August 22, 2017.

"Five Key Cases of 2017: 120 Hot Tips in Estate Practice," ICLEF Seminar, Indianapolis, IN, December 20, 2017.

"Five Tips on Managing Abusive and Vexatious Litigation:" 120 Hot Tips in Estate Practice, ICLEF Seminar, Indianapolis, IN, December 19, 2018.

"Tips on Obtaining or Opposing Attorney's Fees in Will and Trust Contests:" 120 Hot Tips in Estate Practice, ICLEF Seminar, Indianapolis, IN, December 22, 2020.

"Five Key Practice Tips Regarding Attorney's Fees in Probate Cases:" 90 Hot Tips in Estate Practice, ICLEF Seminar, Indianapolis, IN, December 21, 2022.

FIVE KEY PRACTICE TIPS REGARDING ATTORNEY'S FEES IN PROBATE CASES

Robert W. York

This presentation provides the following five tips:

Tip 1. Know Content of the Instrument.

Tip 2. Always Have A Written Fee Agreement

Tip 3. Know The Court's Authority

Tip 4. Understand Principles For Determining Reasonable Fees

Tip 5. How To Obtain Fees In Wrongful Death Cases

TIP 1. KNOW CONTENT OF THE INSTRUMENT

Since your receipt of or opposition to attorney's fees may well depend upon the precise content of the Will, Trust, Power of Attorney or other estate planning document, it is a critical first step to make sure that you know all of the actual content in the instrument.

For example, I am the successor trustee of what has become well known in Indiana judicature as the Mary Ruth Moeder Trust. As explained in the sixth appeal initiated by Susan Moeder:

> "After withdrawing her share of funds from a family trust, Susan Moeder (Susan) spent the next 15 years trying to claim her disabled brother's remaining equal share as well. Several settlements, multiple court orders, and five appeals drove the trust's legal fees for administering and defending her brother's share to around $500,000. Susan now challenges the trial court's imposition of attorney's fees and a finding that her latest request for Trust information violated an agreement between the parties that she refrain from exactly that sort of conduct. We affirm the trial court in all respects and remand for a determination of appellate attorney's fees."

In re Moeder, 196 N.E.3d 691, 693 (Ind.App., 2022).

That published opinion also issued the following admonition to Susan's attorney:

> FN 12: "The Trust seeks an award of appellate attorney fees only against Susan, and we remand for that purpose. But we remind Susan's counsel, who has represented her for at least eight years, that attorneys may be personally sanctioned for pursuing groundless claims on behalf of a client. See, e.g., Ind. Trial Rule 11(A) (allowing for "appropriate

> disciplinary action" when counsel willfully signs a frivolous pleading); Geico Ins. Co. v. Rowell, 705 N.E.2d 476, 482-83 (Ind. Ct. App. 1993) (ordering, sua sponte, under former Indiana Appellate Rule 15(G) that appellant's counsel pay appellee's attorney fees arising from bad faith appeal)."

A previous appeal by Susan was rejected based upon the precise language in the trust instrument: "the language of Mother's Trust reveals that its primary purpose, that is, the very reason for its creation was to provide for Mary Ruth during her lifetime and to distribute the assets in Mother's Trust upon her death equally to John and Susan," *In re Moeder*, 2012 WL 5328124, at *5 (Ind.App.,2012). Susan's unsuccessful sixth appeal challenged my construction of two terms of the trust which construction was approved by the trial court and on appeal.

I have also been involved in many Will contests, Trust contests and guardianships where the language in the pertinent instrument governed the final outcome and I suggest that your starting point should always be a thorough review of and complete understanding of the instrument.

TIP 2: ALWAYS HAVE A WRITTEN FEE AGREEMENT: [1]

I begin with the case of *Hanson v. Valma M. Hanson Revocable Trust*, 855 N.E.2d 655, 667 (Ind.App.,2006) where the trial court ordered the trustee to pay the beneficiaries' attorney's fees but reduced the fees by more than fifty percent because the court concluded in part that "there was no written agreement to corroborate the terms counsel has alleged were agreed upon" and "there was insufficient testimony by (a beneficiary) to suggest she understood that her counsel was charging her on a quarter/hour basis." The Appellant's attorney was nevertheless saved by the Court of Appeals who determined that his monthly billing statements to his clients

[1] This could also have a subcategory of "know your local rules" and I have set forth selected Local Probate Rules from certain counties.

reflected calculations in quarter-hour increments. This case is just one of the reasons to always have a written fee agreement.

Many attorneys involved in trust or will contests agree to be paid fees on a contingent basis and that invokes the following Rule of Professional Conduct requiring a written fee agreement containing the described particularities when contingent fees are involved:

> Rule 1.5(c): "A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination."

The right to fees by a losing will contestant was established by the 3-2 Supreme Court's decision in *Fickle v. Scampmorte*, 243 Ind. 165, 168, 183 N.E.2d 838, 839, (Ind. 1962), where the court upheld a $900.00 contingent attorney's fee but also found that any such fee had to be reasonable. The dissent would have not allowed the contingent fee because the losing party lost and the contingency therefore never occurred. *Id.* at 173-174.

Lutz v. Belli, 516 N.E.2d 95, 98 (Ind.App.,1987) held that contingent fee contracts involving will contests are enforceable in Indiana when freely and fairly entered and that "when an attorney seeks recovery on a contingent fee contract the actual recorded time spent on the case is completely immaterial." The concurring opinion stated that nevertheless: "Contingent fees are subject to the 'reasonableness' and 'clearly excessive' tests of the Rules [of Professional Conduct, Rule 1.5(a)] and the Code [of Professional Responsibility.]" *Id*. at 103.

With respect to hourly fees, see *Hanson v. Valma M. Hanson Revocable Trust*, 855 N.E.2d 655, 668–69 (Ind.App.,2006):

> "We are unable to find any authority supporting the proposition that the absence of a written fee agreement precludes an attorney fee award or supports a reduction in the requested award. Indiana Professional Rule of Conduct 1.5 requires that a contingent fee agreement must be in writing, but does not require that an attorney who charges an hourly rate—as in this case—must execute a written fee agreement with his clients. Furthermore, attorney fees may be acceptable under a quantum meruit theory even in the case of an oral contingent fee agreement."

However, Trial Rule 81 and Ind. Code § 34-8-1-4 authorize courts to adopt local procedure rules "intended to standardize the practice within that court, to facilitate the effective flow of information, and to enable the court to rule on the merits of the case. Their role is to help the parties and the court. It is true that once made, all litigants and the court are bound by the rules of the court." *Meredith v. State*, 679 N.E.2d 1309, 1310–11 (Ind.,1997).

The Probate Code, at Ind. Code § 29-1-1-7, authorizes the Probate Court to promulgate rules and forms of procedure for probate proceedings. To the best that I can determine the courts in more than fifteen counties have adopted local probate rules, not all of which are lengthy in number but all of which address attorney's fees in some form.

The Marion County Local Probate Rules [2] provide the following with respect to fees as well as a "Form 402.2. Suggested Form Of Attorney Fee Agreement" in the form attached to the end of this paper:

402.2 Fee Agreements. If a disagreement arises with regard to attorneys' fees, the Court will consider a written contract or countersigned engagement letter as evidence of the fee agreement between the parties. All fiduciaries in supervised estates and guardianships shall be informed by counsel that fees to the attorney and fiduciary are subject to final court approval prior to payment.

420.1 No fees for personal representatives, guardians or attorneys shall be paid from the assets of any guardianship or supervised estate without prior written order of the Court. In guardianships

[2] Drafted by a 14-member Local Probate Rules Committee that I chaired and approved by the Marion Superior Court for implementation on January 1, 2012.

and supervised estates, fees deposited with an attorney as advancement against future fees, sometimes known as a retainer, are not to be paid from the estate of the protected person or deceased person without prior Court approval.

420.2 Fees shall be in the amount determined by the Court to be reasonable, irrespective of whether a fee agreement requires payment from estate assets of fees in excess of that amount.

420.3 A petition for fees must be signed or approved in writing by the personal representative or guardian.

420.4 Partial fees in a supervised estate may be requested when:
1. An intermediate accounting has been approved, or
2. The Court finds upon petition that a tax advantage will result from payment of partial fees.

420.5 In all other cases, payment of fees in supervised estates shall be authorized as follows:
1. One-half upon the filing of an inheritance tax return or upon a Court determination of no taxes due: and
2. The remaining one-half upon approval of the final account.

420.6 A guardian or guardian's attorney may petition for fees at the time of filing an inventory. Other than as provided hereafter, no further petition for fees may be filed until a biennial, annual, or final accounting has been filed. When unusual circumstances require substantial work in a guardianship, the Court may award fees prior to the approval of an account.

420.7 All petitions for fees for personal representatives, guardians or attorneys shall specifically set forth all services performed in detail as well as the amount of the fee requested and how it has been calculated.

420.8 Unjustified delays in carrying out duties by the personal representative, guardian or attorney will result in a reduction of fees.

Selected Local Probate Rules of Hamilton County provide:

711.50 Where contracts for legal services have been entered into prior or subsequent to the opening of an estate or guardianship, the Court reserves the right to approve or disapprove the fee contracts consistent with this court's fee guidelines.

711.60 All petitions for fees for the attorney and/or fiduciary shall conform to the guidelines for fees enumerated in 711.70 below and shall specifically set forth all services performed in detail as well as the amount of the fee requested and how it has been calculated.

711.70 Pursuant to relevant statute, if a testator does not provide for compensation of the personal representative and/or the attorney performing services for the estate, the Court may award “just and reasonable” fees. In determining a “just and reasonable” amount of fees, the Court may consider several factors, including: the labor performed, the nature of the estate, difficulties in recovering assets or locating devises, and the peculiar qualifications of the administrator and/or attorney. Additionally, for attorneys, the Court may consider the guidelines

for determining legal fees as set forth in Rule 1.5 of the Indiana Rules of Professional Conduct. In all fee determinations, the key factor considered by the Court will be that the fees are reasonably commensurate to the time and work involved.

Lake County Local Probate Rule 14 provides:

In a supervised estate, any petition for the allowance of fees, pursuant to the Fee Guidelines, for the Attorney and/or the Personal Representative shall set forth a description of the services performed and a calculation of the amount of the fee requested. At the time the petition is considered by the Court, the Attorney must be present. No fee request will be considered as a part of the final report or account in a supervised estate. A separate petition must be filed requesting such fee determination. No fee shall be paid without the prior approval of the Court. No Attorney or Personal Representative fees will be authorized for payment until a Final Account is filed with the Court. If an Interim Account is filed with the Court, a petition for Attorney or Personal Representative Fees may be filed for the Court's review and approval.

Allen County Local Probate Rule 20 sets forth multiple fee requirements and a fee schedule providing:

Gross Estate Services-Minimum Fee of $500.00 Plus:

Up to $100,000. Not to exceed 6%
Next $100,000. Not to exceed 4%
Next $100,000. Not to exceed 3%
Next $100,000. Not to exceed 2%
Over $400,000. Not to exceed 1%

So, whether it is because of maintaining a fully understood attorney-client relationship, or because you have agreed to accept contingent fees or whether a local probate rule requires or suggests the same, it is wise to always have a written fee agreement.

TIP 3: KNOW THE COURT'S AUTHORITY

"The probate of a will and the administration of an estate shall be considered one (1) proceeding for the purposes of jurisdiction. The entire proceeding and the administration of a decedent's estate is a proceeding *in rem.*" Ind. Code § 29-1-7-2. The probate court, therefore, has subject matter jurisdiction over all matters pertaining to a decedent's probate estate.

Illustrative of this broad jurisdiction is the decision in *Community Hospitals of Indiana, Inc. v. Estate of North*, 661 N.E.2d 1235, 1242 (Ind.App.,1996), *trans. denied*, where the hospital

filed a claim against the estate, the estate asserted a class action counterclaim against hospital seeking declaration that the hospital's charges were excessive and return of overpayments made by proposed class members. The Court of appeals upheld the trial court's denial of the hospital's motion to dismiss for lack of jurisdiction and for failure to state a claim.

Probate jurisdiction includes: (1) adjudicating claims against the estate, Ind. Code § 29-1-14-1 *et seq.*, which includes such things as an action for breach of a contract to make and not revoke mutual wills, *Markey v. Estate of Markey*, 38 N.E.3d 1003 (Ind.,2015); (2) objection to a will and will contests, Ind. Code § 29-1-7-16 through 29-1-7-21; (3) all matters pertaining to trusts, Ind. Code § 30-4-1-1 *et seq.* – "Jurisdiction in this state for all matters arising under this article shall be with the court exercising probate jurisdiction, Ind. Code § 30-4-6-1 and "Except as otherwise provided in this article, the article shall not be construed to limit the general equity powers of the court over the administration of trusts." Ind. Code § 30-4-3-30; (4) all matters pertaining to guardianships, Ind. Code § 29-3-1-1 *et seq.*; and (5) all matters pertaining to Powers of Attorney Ind. Code § 30-5-1-1 *et seq.*

Administration Fees

In estate administration matters, Ind. Code § 29-1-10-13 describes the probate court's authority regarding attorney's fees by providing in pertinent part:

> "An attorney performing services for the estate at the instance of the personal representative shall have such compensation therefor out of the estate as the court shall deem just and reasonable. Such compensation may be allowed at the final settlement; but at any time during administration a personal representative or his attorney may apply to the court for an allowance upon the compensation of the personal representative and upon attorney's fees."

Will Contest Fees

With respect to attorney's fees in objections to a will or a will contest, the Probate Code, at Ind. Code § 29-1-10-14, long provided as follows:

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

The purpose of such statute was well-described in *In re Estate of Goldman*, 813 N.E.2d 784, 787 (Ind.App.,2004) as follows:

> "That section was adopted to "encourage the probating or the resisting of the probate of a will where there are reasonable grounds or probable cause for such proceedings in good faith, without requiring any party to underwrite the expense associated with loss." *Estate of Clark v. Foster & Good Funeral Home, Inc.*, 568 N.E.2d 1098, 1100–01 (Ind.Ct.App.1991) (footnote omitted). In addition, the statute "eliminated the unseemly race to the court house to be first in probating or preventing the probate of a will." *Fickle v. Scampmorte*, 243 Ind. 165, 168, 183 N.E.2d 838, 839 (1962) (discussing the adoption of Probate Code Section 7–414, which contained identical language to today's Ind.Code § 29–1–10–14)."

In the above-cited *Scampmorte* decision, our Supreme Court held that the unsuccessful will contestants were entitled to have their attorneys' fees paid by the estate.

Nonetheless, *Stibbins v. Foster*, 45 N.E.3d 419, 426 (Ind.App.,2015), *trans. denied*, held that a "'devisee' pursuant to Indiana Code section 29-1-10-14 includes only devisees of the will being challenged and devisees of the next will in line who would directly benefit if the challenged will were set aside." Since the plaintiffs in that cause did not fit within that definition, the trial court's award of $171,360.64 in the will contestants' total attorneys' fees was reversed.

Following the *Stibbins* decision, Ind. Code § 29-1-10-14 was amended and now reads as follows:

> "(a) As used in this section, "devisee" shall include any person prosecuting or defending any will under IC 29-1-7-16 or IC 29-1-7-17.5 and, if multiple wills are being challenged under IC 29-1-7-17.5, any person prosecuting or defending a will next prior to the earliest will being challenged under IC 29-1-7-17.5.

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

Also, the legislature enacted within the same Act an entirely new statute at Ind. Code § 29-1-7-17.5 to supplement the above amended statute and which eliminates the impact of the *Stibbins* decision as follows:

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

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

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

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

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

Trust Fees

As provided by the Trust Code at Ind. Code § 30-4-5-16, "the trustee is entitled to reasonable compensation from the trust estate for acting as trustee" and is "entitled to be reimbursed out of the trust property, with interest as appropriate for expenses that were properly incurred in the administration of the trust;" and that as provided by Ind. Code § 30-4-3-18, the trustee is entitled to a lien against the trust estate for his advances and "for the value of his

services for which he is entitled to, but has not received, compensation as provided either under the terms of the trust or under 30-4-5-16."

Additionally, as provided by the Trust Code at Ind. Code § 30-4-3-3(a)(16)(A), the trustee has the power to employ an attorney to advise and assist the trustee in the performance of the trustee's duties." Note that it is likely that the pertinent trust instrument also grants the trustee the same power.

There are no comparable statutes within the Trust Code regarding trust contests with provisions similar to the Probate Code as to will contests.

But, if the Trust Contest involves a claim for breach of trust, Ind. Code § 30-4-3-11(b)(4) provides "(b) If the trustee commits a breach of trust, the trustee is liable to the beneficiary for: (4) reasonable attorney's fees incurred by the beneficiary in bringing an action on the breach."

The trustee is entitled to charge the trust with attorney fees for defending the trust contest because the trust instrument likely permits payment of the fees and:

> "Of course, the trustee is generally entitled to charge the trust with reasonable attorney fees incurred defending the trust, although such charges may be imposed upon the trustee personally where he is determined to be in breach of his obligations to the trust." (Internal citations omitted).

Matter of Guardianship of Brown, 436 N.E.2d 877, 891 (Ind.App., 1982).

See also: "In a proceeding in which the trustee is found to be in breach of trust, the court may in its discretion either deny him all compensation, allow him a reduced compensation, or allow him full compensation." Ind. Code § 30-4-5-17.

Note that if the trust being challenged is a testamentary trust, then pursuant to the Will Contest statutes, attorneys' fees may be permitted.

Guardianship Fees

As set forth in the guardianship statutes and Local Probate Rules:

Ind. Code § 29-3-4-4 provides:

> "If not otherwise compensated for services rendered, any guardian, attorney, physician, or other person whose services are provided in good faith and are beneficial to the protected person or the protected person's property is entitled to reasonable compensation and reimbursement for reasonable expenditures made on behalf of the protected person. These amounts may be paid from the property of the protected person as ordered by the court."

Ind. Code § 29-3-9-9 provides:

> "(a) Whenever a guardian is appointed for an incapacitated person or minor, the guardian shall pay all expenses of the proceeding, including reasonable medical, professional, and attorney's fees, out of the property of the protected person.
>
> (b) The expenses of *any other proceeding under this article that results in benefit to the protected person* or the protected person's property shall be paid from the protected person's property as approved by the court." (Emphasis added).

Ind. Code § 34-9-2-1 provides:

> "All courts have the authority to:
>
> (1) appoint a guardian ad litem to defend the interests of any person under eighteen (18) years of age impleaded in a suit; and
>
> (2) permit any person, as next friend, to prosecute a suit in a minor's behalf.

Ind. Code § 29-3-2-3 provides in pertinent part:

> (T)he (probate) court shall appoint a guardian ad litem to represent the interests of the alleged incapacitated person or minor if the court determines that the alleged Incapacitated person or minor is not represented or is not adequately represented by counsel.

Marion County Local Probate Rule <u>MSCPR 413.4 Appointment of Guardian Ad Litem or Attorney</u> provides:

> "The Court may in its discretion determine that the alleged incapacitated person should have a guardian ad litem or attorney appointed to represent his or her interests, and the hearing for appointment of a guardian for the alleged incapacitated person may be continued by the Court for that purpose. *A guardian ad litem will be paid reasonable compensation, considering the needs of the alleged incompetent person, the nature and relative difficulty of the services provided, local custom, the availability or limitations of resources of the alleged incompetent person's estate, and, in the discretion of the Court, any other considerations deemed relevant under the circumstances of the case*." (Emphasis added)

See also the above-cited local probate rules regarding guardianship fees and, for example, Porter County local family law rule LR64-FL00-2400.5 Fees, which provides in pertinent part:

> "(1) When a Guardian Ad Litem is selected, the Court shall order each party to pay a lump sum in the Clerk of Court, to the prospective Guardian Ad Litem, or into the trust account of one of the party's attorneys, to be held for payment of Guardian Ad Litem fees.
>
> (2) The Guardian Ad Litem shall file a fee affidavit or motion with the Court if the Guardian Ad Litem needs additional fees to bring the fees current or to cover fees anticipated for the completion of the investigation, preparation of the report or appearance in court.
>
> (3) The Court may order the parties to pay additional monies into the Clerk, directly to the Guardian Ad Litem or into the trust account of Counsel as it becomes necessary.

Case authority provides further guidance:

> "The compensation of a guardian *ad litem* for services rendered may be allowed as an expense of administration, or out of the ward's interest in the proceedings in such amount as the court in its discretion shall determine. *The court may hear evidence to assist him in determining the amount of compensation to be paid, since the services are rendered at the instance of the court, or it may summarily fix the amount of compensation upon the knowledge of the judge as to the work done by such guardian without the aid of outside evidence*."

State ex rel. Keating v. Bingham, 121 N.E.2d 727, 730, 233 Ind. 504, 507–08 (Ind. 1954), (internal citations omitted and emphasis added).

With respect to payment of fees to a guardian ad litem who is an attorney, *In re Paternity of N.L.P.*, 926 N.E.2d 20, 24–25 (Ind.,2010), (Internal citations omitted), is instructive

> "(W)e disagree with our colleagues on the Court of Appeals that a person acting as a guardian *ad litem* and as an attorney should bill separately for her service and failing to do so means that the resulting fees are presumptively unreasonable. Both attorney and non-attorney guardians *ad litem* have the same statutory responsibility: representing and protecting the best interests of a (ward) and providing the (ward) with services that are requested by the court which include researching, examining, advocating, facilitating, and monitoring the (ward's) situation. The lines are blurred when a guardian *ad litem* is also an attorney. *A two-tiered billing system that attempts to parse which particular services are unique to an attorney and which are not is in our view at least unnecessary and at most unworkable*. We also observe that some courts have largely addressed the issue of guardian *ad litem* fees by local rule." (Emphasis added)

> "(W)hen ruling on an attorney fee petition in a guardianship proceeding, the trial court should consider not only the outcome of the proceedings but also "(1) whether the parties acted reasonably and in good faith in incurring the fees, (2) whether the facts were in dispute, (3) whether the legal issues were complex, and (4) whether any party's misconduct caused the proceedings." A trial court may not award fees to a party whose misconduct necessitated the proceedings." (Internal citations omitted).

In re Guardianship of N.R., 26 N.E.3d 97, 100 (Ind.App.,2015)

Power of Attorney Fees

As provided by Ind. Code § 30-5-4-5:

> "(a) Except as stated otherwise in the power of attorney, an attorney in fact is entitled to reimbursement of all reasonable expenses advanced by the attorney in fact on behalf of the principal.
>
> (b) Except as otherwise stated in the power of attorney, an attorney in fact is entitled to a reasonable fee for services rendered. The attorney in fact shall, not later than twelve (12) months after the date the service is rendered, notify the principal in writing of the amount claimed as compensation for rendering the service."

Likely all Power of Attorney instruments make direct reference to or otherwise incorporate all or most of the powers granted by Ind. Code §§ 30-5-5-1 through 18. With respect to attorney's fees, Ind. Code § 30-5-5-11(8) provides the power to:

> "(8) Hire, discharge, and compensate an attorney, accountant, expert witness, or other assistant when the attorney in fact considers the action to be desirable for the execution of a power permitted under this section."

See also Ind. Code § 30-5-9-11 providing for attorney's fees:

> "An attorney in fact that violates this article is liable to the principal or the principal's successors in interest for damages and an amount required to reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid as a result of the violation.

Bad Faith Fees

In the benchmark case of *River Ridge Development Authority v. Outfront Media, LLC*, 146 N.E.3d 906 (Ind., 2020) our Supreme Court, *per curiam*, discussed "three grounds, under Indiana law, that enable a court to award a party attorney's fees:"

> "First, the common-law "obdurate behavior" exception empowers a court to order a party, under certain circumstances, to pay the opposition's attorney's fees. Second, the General Recovery Rule, Indiana Code section 34-52-1-1, similarly allows an award of attorney's fees "to the prevailing party" based on another party's actions during litigation. And finally, courts are inherently authorized to sanction parties by shifting fees, even if no other exception applies." (Internal citations omitted).

As described by the Court, the General Recovery Rule "allows a court "[i]n any civil action" to award attorney's fees "as part of the cost to the prevailing party" if another party "(1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless; (2) continued to litigate the action or defense after the party's claim or defense became frivolous, unreasonable, or groundless; or (3) litigated the action in bad faith." I.C. § 34-52-1-1(b)." *Id.* at 913. "The statute balances an attorney's duty to zealously advocate with the goal of deterring unnecessary and unjustified litigation… The General Recovery Rule is strictly construed because it "is in derogation of the American Rule observed under the common law." *Id.*

To recover under the General Recovery Rule, a party must (be a prevailing party) and obtain a favorable judgment on the merits or comparable relief to qualify as a "prevailing party." *Id.* at 912-13.

The Court referenced (*Id.* at 914) its adoption, at 543 N.E. 2d 627, of *Kahn v. Cundiff*, 533 N.E.2d 164 (Ind.App.,1989) which in turn defined the obdurate behavior exception which "provides that a court may award attorney fees if a party has filed or continued a knowingly baseless claim and the trial court determines that such conduct was "vexatious and oppressive in the extreme and a blatant abuse of the judicial process," *Kahn Id.* at 171, and stated that "the General Recovery Rule does not require a party to have acted with "an improper motive," whereas the obdurate behavior exception does."

In describing a court's inherent authority to assess attorney's fees, the *River Ridge* decision states:

> "Courts necessarily have inherent, implied power to manage their own affairs. This includes the authority to fashion an appropriate sanction, such as an award of attorney's fees… and, a court may invoke its inherent power to award attorney's fees at any point in litigation… Specifically, a court may award attorney's fees after finding "that a party has acted in bad-faith and such conduct is calculatedly oppressive, obdurate, or obstreperous"—even when no statutory or common-law exception to the American Rule applies. *Id.* at 915–16. (Internal citations omitted).

TIP 4: UNDERSTAND PRINCIPLES FOR DETERMINING REASONABLE FEES

It should be first noted that parties do not have the right to have a jury determine a reasonable amount of fees in the absence of a contract or an agreement providing for such. *Storch v. Provision Living, LLC*, 47 N.E.3d 1270, 1275–76 (Ind.App.,2015).

Therefore, the following legal principles are pertinent to a trial judge's determination of a reasonable fee (with some internal citations omitted).

The Court Has Wide Discretion

"A trial court has wide discretion in awarding attorney's fees." Benaugh v. Garner, 876 N.E.2d 344, 347 (Ind.Ct.App.2007), *trans. denied*; *Gillette v. Gillette*, 835 N.E.2d 556, 564 (Ind.App.,2005).

As provided in *Cavallo v. Allied Physicians of Michiana, LLC*, 42 N.E.3d 995, 1009 (Ind.App.,2015): "the judge's knowledge of the proceedings and counsels' submitted affidavits of billing statements, which included the dates, times, fees, and nature of the services rendered, were sufficient to determine reasonable attorney fees" and could make such determination without holding a hearing. *Id.*

Trial Judge Is An Expert And May Take Judicial Notice

"(T)he reasonableness of attorney's fees is a matter regarding which the judge, being a lawyer, may take judicial notice." *Daimler Chrysler Corp. v. Franklin*, 814 N.E.2d 281, 288 (Ind.App.,2004).

The trial judge is deemed an expert on the issue of a reasonable fee, *Longest ex rel. Longest v. Sledge*, 992 N.E.2d 221, 231 (Ind.App.,2013), *trans. denied*; who "possesses personal expertise that he or she may use when determining reasonable attorney's fees." *Gillette, supra; Country Contractors, Inc. v. A Westside Storage of Indianapolis, Inc.*, 4 N.E.3d 677, 693 (Ind.App.,2014); and "Because the probate court may use its expertise to determine what constitutes reasonable attorney's fees and [the trustee] provided evidence of the fees it incurred, the court did not abuse its discretion in awarding the sum of $106,001.28 in attorney's fees and costs." *In re Moeder*, 27 N.E.3d 1089, 1103 (Ind.App. 2015), *trans. denied*, and

Fees Need To Be Incurred Not Paid

"(T)he trial court is not constrained to award attorney fees only when those fees have been directly billed to and paid by a party. Rather, the relevant inquiry is whether a party has *incurred* attorney fees." *Poulard v. Lauth*, 793 N.E.2d 1120, 1124 (Ind.App., 2003). (Emphasis in original text.)

Fees Should Be Determined By Need For The Litigation

"[T]he right to compensation at the cost of the estate should not depend upon the result of the litigation but rather upon the reasonable necessity for such litigation. It is apparent, therefore, that the amount of the recovery should have no impact on the amount of attorney fees to which the Appellants are entitled. Of more importance is whether the litigation was necessary, and inasmuch as the trial court explicitly concluded that "the services of an attorney were clearly needed to right [the] wrong," *Hanson v. Valma M. Hanson Revocable Trust*, 855 N.E.2d 655, 667 (Ind.App.,2006).

Fees Not Based Upon Amount Recovered

"Although the trial court is entitled to consider the amount involved in the lawsuit in determining the reasonableness of the requested fees, we have held that the trial court abuses its

discretion if it reduces an otherwise reasonable fee request based on the amount of the judgment." *Benaugh v. Garner*, 876 N.E.2d 344, 348 (Ind.App.,2007), *trans. denied*. Also, "In determining the reasonableness of an attorney fee award, the trial court should consider not merely the result, but whether the trustees are acting reasonably and in good faith, whether the issue on which they are divided is of little or momentous consequence to the estate or its beneficiaries, whether the facts are undisputed or are so controversial as to require an adversary proceeding for their determination, whether the legal questions are simple or complex, settled by precedents or open to serious debate, and any other matters that bear upon the reasonableness or the necessity for the litigation." *Hanson, Id.*

Fees Not Based Upon Opposing Counsel's Fees

"We find this explanation insufficient to justify the trial court's significant reduction of the attorney fee request. The trial court's overriding concern—the discrepancy in amount of time spent by Riddle's counsel versus Goins' counsel—is not one of the identified bases to determine an award of attorney fees." *In re Riddle*, 946 N.E.2d 61, 71 (Ind.App.,2011).

Client's Testimony Alone is Insufficient

A client's fee petition alone, unsupported by admissible evidence, does not provide the Court with the required evidence to determine the amount and reasonableness of the requested fees:

> "A client's mere testimony of what he has been charged by his attorney is inadequate to support an award of attorney's fees." *Lee & Mayfield, Inc. v. Lykowski House Moving Engineers, Inc.*, 489 N.E.2d 603, 611 (Ind. Ct. App. 1986).
>
> "(W)e conclude Moxley's assertions regarding the value of his attorney's services are insufficient to support the attorney fee award in the absence of admissible evidence including evidence such as the amount of time and labor required by the attorney, the difficulty of the questions presented to the trial court, the skill needed to perform the service properly, and the fee customarily charged in the community for similar services. *Henry B. Gilpin Co. v. Moxley*, 434 N.E.2d 914, 921 (Ind. Ct. App. 1982).

Combined Fees Of Multiple Attorneys

In *In re Estate of Inlow*, 735 N.E.2d 240, 255 (Ind.App.,2000), the Inlow children contended that the trial court erred in awarding fees to a law firm for "four attorneys participating in the fee hearing (including one sitting in the gallery billing), three attorneys attending depositions, while yet others reviewed the same depositions, and other unnecessary, overlapping, and duplicative services, such as conferences with and reviews of documents prepared by outside experts. In response, the court, under the heading "Double Billing," held:

> "Indiana courts have not addressed double billing in any detail, but we find the following description to be sufficiently instructive in the probate context (citing CJS):
>
> > Although employment of multiple attorneys by a personal representative is viewed with disfavor, whether additional legal counsel may properly be employed at the expense of the estate depends ultimately on the facts and circumstances of the individual case.
> >
> > However, the number of attorneys employed is not a determination [*sic*] factor in fixing the fee to be allowed. Indeed, where more than one attorney is unnecessarily employed by the representative, no more can be allowed for such attorneys' services than would amount to reasonable compensation if only one were employed, and in such case the single reasonable compensation allowed must be divided among the several attorneys rendering services. *Id.* at 255-256.
> >
> > Although we recognize that the participation of more than one attorney is reasonable in certain instances, and that determination of attorney fees is a matter of trial court discretion, we conclude that remand is proper where the trial court acknowledges that the fee petition itself does not permit a reasoned determination of whether there was unnecessary duplication of effort leading to double billing. To assist its determination on remand, the trial court may order [the law firm] to show cause why it cannot submit more detailed time and task reports, or it may hold additional hearings on this particular issue. Should the trial court find any instances of unnecessary duplication of effort, it must deduct such charges from (the law firm's) fee award. *Id.* at 256.

It is therefore suggested that where combined fees of attorneys and paralegals are being requested, there be included in the Petition an adequate description of the necessity for such double billing.

Paralegal Fees

Ind. Code § 1-1-4-6 defines "paralegal" and provides the description of what qualifies as compensable professional services for a paralegal:

> (a) As used in this section, "paralegal" means a person who is:
>
> (1) qualified through education, training, or work experience; and
>
> (2) employed by a lawyer, law office, governmental agency, or other entity;
>
> to work under the direction of an attorney in a capacity that involves the performance of substantive legal work that usually requires a sufficient knowledge of legal concepts and would be performed by the attorney in the absence of the paralegal.
>
> (b) A reference in the Indiana Code to attorney's fees includes paralegal's fees.

In *Daimler Chrysler Corp. v. Franklin*, 814 N.E.2d 281(Ind. Ct. App. 2004), Daimler argued that inclusion of paralegal fees in a fee award is only appropriate when the paralegal is performing legal services that involve professional legal skills. The court, noting the above statute, agreed: "(I)t is error to award support staff costs as an element of reasonable attorney's fees…We find that the trial court abused its discretion in including [paralegal] fees for copying and mailing documents, which is work that requires no particular knowledge of legal concepts and is more in the nature of clerical or support staff work." *Id.* at 287.

It is therefore suggested that a fee petition seeking paralegal fees should recite the education, training or work experience of a paralegal that qualifies him or her to provide "substantive legal work" requiring a "sufficient knowledge of legal concepts" to perform work that would otherwise "be performed by the attorney."

It is further suggested that what would normally be considered as clerical work, such as sending a letter or email, making file notes, follow up on medical payment, checking the court's

CCS, confirming balance in estate account, and, additionally, double billing for the same work product provided by the lawyer, should not be included in the petition.

Factors That May Be Considered

"When evaluating the reasonableness of an attorney fee award, the starting point is the hours worked and the hourly rate charged." *Zartman v. Zartman*, 168 N.E.3d 770, 783 (Ind. Ct. App. 2021), *trans. denied.* "(A) conscientious attorney with the expertise to administer such an estate will also be experienced at efficiently tracking and billing for time spent performing various services for the estate." *In re Estate of Inlow*, 735 N.E.2d 240, 254 (Ind.App.,2000).

"Huizar's attorney's fees were (permissibly) calculated under the lodestar method. The lodestar figure is the product of a reasonable number of hours spent on the litigation times a reasonable hourly rate." *Bank v. Huizar*, 178 N.E.3d 326, 343 n. 13 (Ind.App., 2021).

"The trial court may consider a number of other factors, including the responsibility of the parties in incurring the attorney fees and the judge's personal expertise and knowledge." *Willis v. Dilden Brothers, Inc.*, 184 N.E.3d 1167, 1187 (Ind.App., 2022), *trans. denied*.

"The determination of the reasonableness of an attorney fee requires consideration of all relevant circumstances, including the attorney's experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained." *Whiskey Barrel Platers Co., Inc. v. American GardenWorks, Inc.*, 966 N.E.2d 711, 724 (Ind.App., 2012), *trans. denied*.

"In addition, a court may consider the factors listed in Indiana Professional Conduct Rule 1.5(a) governing the reasonableness of a fee for disciplinary purposes, but it is not required to expressly do so." *Himsel v. Indiana Pork Producers Association*, 95 N.E.3d 101, 113-14 (Ind.App., 2018).

Rule 1.5(a) factors are as follows:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent.

TIP 5: HOW TO OBTAIN FEES IN WRONGFUL DEATH CASES

As set forth in Ind. Code § 34-23-1-1, Indiana's general wrongful death statute provides in pertinent part: "When the death of one is caused by the wrongful act or omission of another, the action shall be commenced by the personal representative of the decedent within two (2) years."

The Probate Code, at Ind. Code § 29-1-10-15(a)(5) provides that "A special administrator may be appointed by the court if … (5) no personal representative has been appointed and the appointment is sought for the sole purpose of pursuing damages for a decedent's wrongful death,"

Ind. Code § 29-1-10-18 permits a probate court to appoint "an administrator for the estate of a nonresident for the sole purpose of bringing an action to recover damages for the wrongful death of such nonresident. The appointment may be made in the county in which the death occurred; or in the county in which the injury causing the death was received; or in the county in

which any party defendant to the suit resides. The appointment shall in no way depend upon whether or not the decedent left assets."

In *Matter of Estate of Lewis*, 123 N.E.3d 670, 673–74 (Ind., 2019) our Supreme Court was confronted with facts that established that only four days after adult son's death, his father was appointed as special administrator *ex parte* and without notice to other interested parties. Clearly concerned with the problems resulting from such "races to the courthouse" the Court *per curiam* held as follows:

"**Though not required by statute or rule, an appointing or rescinding court should notify interested parties and hold a hearing.**

> Senior's race to the courthouse just days after the accident deprived other interested parties of the opportunity to seek their own appointment. One source of this problem is that the governing statute requires no notice to beneficiaries or other interested parties before the court appoints a special administrator. I.C. § 29-1-10-15. Compounding this problem is that the statute affords no right of appeal to someone aggrieved by the court's appointment. *Id.* Although the statute does not require it, to avoid potential due-process problems, a court faced with a motion for appointment as a special administrator should afford notice to beneficiaries or their legal representatives and hold a hearing. The motion should identify each potential beneficiary or legal representative likely to be interested in the appointment of a special administrator, along with each person's contact information. The court should then notify such persons of the motion and the date, time, and place for hearing on the motion. The hearing is to determine whether the movant would be a suitable special administrator and to permit other interested persons the opportunity to object or to file their own requests for appointment. If the motion does not identify a potential beneficiary or legal representative, it is more likely the trial court will have abused its discretion if it later refuses to rescind its appointment should that person, unnamed and unidentified in the initial motion, later come forward and assert an interest in the appointment. Though not required by Trial Rule 53.4, the trial court should promptly (within five days) schedule a hearing and provide notice when someone moves to reconsider the appointment of a special administrator.

Matter of Estate of Lewis, 123 N.E.3d 670, 675 (Ind., 2019).

Effective July 1, 2022, the legislature followed suit by adopting Ind. Code § 29-1-10-15.5 which provides that in all cases seeking the appointment of a special administrator to obtain wrongful death damages, the following procedure must be followed:

(b) The court or clerk shall set a date by which all objections or petitions for an alternate appointment must be filed in writing, and the clerk shall give notice to all interested persons that a petition for appointment of a special administrator to pursue a claim for decedent's wrongful death has been filed and will be acted upon by the court on the date set unless written objections or requests for an alternate special administrator are presented to the court on or before that date.

(c) In the petition for appointment as special administrator, the petitioner shall identify the names and addresses of all persons potentially interested in the wrongful death claim whose names and addresses are known to the petitioner or may by reasonable diligence be ascertained. The petitioner shall provide sufficient copies of the notice described in subsection (b), prepared for mailing to the clerk. The clerk shall send a copy of the notice by ordinary mail to each of such interested persons at least thirty (30) days prior to the hearing date. Any interested person may waive the service by mail of this notice. Neither a notice nor a hearing is required if all persons entitled to notice waive in writing the service of notice by mail and consent to the appointment of the special administrator without a hearing.

(d) If a person interested in the wrongful death claim is unknown or cannot be located, the petitioner may give notice by one (1) publication in a newspaper of general circulation, published in the county in which the petition is pending.

(e) The deadline for filing an objection or request for an alternate special administrator is fourteen (14) days before the hearing date. The notice described in subsections (b) and (c) shall state that objections or a request for an alternate special administrator must be filed in writing at least fourteen (14) days before the hearing date.

It is therefore clear that the first step in obtaining attorney's fees in such proceedings is to make sure you fully comply with that statute.

Next you must be mindful of our Supreme Court's decision in *SCI Propane, LLC v. Frederick*, 39 N.E.3d 675, 680 (Ind.,2015), where the Court determined that wrongful death compensatory damages did **not** include attorney's fees under the General Wrongful Death Statute "when the decedent died leaving a surviving spouse and/or dependents." *Id.* at 681.

Therefore, it is suggested that in such cases your fee agreement contain language providing how you are to be compensated for your services in obtaining a successful verdict or settlement.

It is important to note though, that *SCI Propane* did not eliminate attorney's fees recoverable under the "Adult Wrongful Death Statute," Ind. Code § 34-23-1-2, which pertains to

the death of an unmarried adult without dependents or to the death of a married adult who does not have any dependents and whose death was caused by his/her spouse.

SCI Propane also did not eliminate attorney's fees recoverable under the "Child Wrongful Death Statute," Ind. Code § 34-23-2-1, where the death was of an unmarried person under the age of twenty years or is less than twenty-three years of age and enrolled in a postsecondary educational institution.

Also, be aware of Ind. Code § 34-23-2-1, which provides:

> An administrator collecting damages for personal injury resulting in the death of any decedent, may, at any time, file in the court where he was appointed his final report with respect to such proceeds, and the same may be approved by the court, and it shall not be necessary to publish any notice of the final settlement of such estate unless the same is ordered by the court. In the event that said administrator was appointed for the sole purpose of collecting such damages it shall not be necessary to publish any notice of the issuance of letters of administration."

And be certainly aware of pertinent local rules. See for example Delaware County local rule LR18-AR00-DLR Rule 0008 which provides for attorney's fees in "Wrongful Death Claim Administration" as follows: If a wrongful death claim is settled before trial, the fee should not exceed thirty-three and one-third percent (33 ⅓ %) of the settlement amount. If a wrongful death action proceeds to trial by court or by jury, the attorney fee should not exceed forty percent (40%) of the court or jury award. If a wrongful death action is appealed after trial, the attorney fee should not exceed fifty percent (50%) of the court or jury award. The fee guidelines for wrongful death actions does not preclude the attorney from recovering litigation expenses incurred in preparing for trial or in pre-trial discovery proceedings."

Note that most local rules require all proposed wrongful death settlements to be approved by the Probate Court, including Marion County's LR49-PR00 Rule 416.

That Rule also provides:

416.3 When a judgment has been paid or a petition for approval of settlement is filed in any estate, a petition shall be filed showing proposed distribution, in accordance with I.C. §§ 34-23-1-1, 34-23-1-2 and 34-23-2-1. Such petition must set out the proposed distribution to the appropriate statutory damage distributees, such as:

1. Expenses of administration;

2. Providers of funeral and burial expenses;

3. Providers of medical expenses in connection with last illness of decedent;

4. Surviving spouse;

5. Dependent children;

6. Dependent next of kin (if there is no surviving spouse or dependent children).

A proposed order shall be presented to the Court, ordering distribution in accordance with the above cited statutory provisions and requiring that a final account as to the wrongful death proceeds be filed within thirty (30) days.

I appreciate the opportunity to share the above information and encourage the reader to call or email me with any questions.

Bob York

MARION COUNTY PROBATE FORM 402.2. SUGGESTED FORM OF ATTORNEY FEE AGREEMENT

The following suggested form of engagement letter does not necessarily address all issues (regarding the scope of the attorney's work, the attorney-client relationship with the fiduciary, or the determination, billing and payment of the attorney's fee) that should be addressed with respect to a particular estate or guardianship.

Date

Petitioner	Co-Petitioner (if any)
Address	Address

RE: Estate of _____

Dear _____:

I am pleased that you have chosen me and my law firm to represent your interests with respect to the matters involving the estate of _____ (deceased) (protected person). Under the Indiana Rules of Professional Conduct, it is advisable that we confirm in writing the terms and conditions under which this law firm will provide services to you so that both we and you can concentrate on the provision of the services you require.

You have agreed to pay for the legal services provided by me at the rate of $ _____ an hour. From time to time, it may be necessary to also utilize the services of other professional members of the firm in order to properly provide appropriate representation for you. Our fees for legal services will be billed on an hourly basis according to the billing rates charged by each attorney or paralegal of our firm. These rates currently range from $ _____ per hour for beginning associates to $ _____ per hour for more senior associates and to $ _____ per hour for partners. Paralegal time is charged at $ _____ per hour. These billing rates are subject to adjustment at the beginning of a calendar year.

In matters involving supervised probate estates and guardianship estates, the Court will determine the amount of attorneys' fees, expenses and fees to you and our firm

that it will permit the estate to pay as costs of administration. In the event the Court authorizes fees in an amount less than you agree to in this agreement, you (agree) (do not agree) to personally pay the difference. Almost always, the fees and expenses we collect are in the amount authorized by the Court but given unforeseen circumstances that may apply to this case, I cannot make that commitment at the outset.

Our fees are not contingent in any way upon the outcome of your case, but will reflect the uniqueness, complexity and the difficulty of obtaining the resolution of the matters at issue. Due to the many variables which affect the time needed to provide the services you have requested, I am unable to provide you with an estimate of your total fees.

I have requested advancement against attorney fees and expenses of _____ ($). In the event of a supervised estate or guardianship, this advancement and all future advancements, if any, may not be paid from the assets of the estate without order of the Court. That amount will be placed into my trust account for your credit towards payment of the future fees and expenses of this law firm. You agree to keep that amount current in my trust account so that I will always have money in the trust account to pay on your behalf the attorney fees and expenses as they are incurred.

The following are firm billing policies which you should know. We will provide you with invoices on a monthly basis. The invoices will describe our services and itemize our expenses in accordance with our standard firm policies. These invoices reflect attorney services rendered during the month, the incurrence of litigation expenses and the current balance of your amount in our trust account. If the statement reflects an amount due you are expected to pay the amount upon receipt of the bill and replenish the retainer as set forth above. The bill for services rendered represents our time devoted to your case and our expenditures made on your behalf during the preceding month. Therefore, the services and costs may have been rendered up to thirty days or more prior to your receipt of the bill. Expenses which you agree to pay include such items as: _____. If we anticipate that certain major expenses will be incurred, we may request that you pay these expenses directly in advance of when they are incurred.

Payment of each invoice is due upon receipt. Subject to any limitations imposed by the Indiana Rules of Professional Conduct, our firm will be entitled to cease work on any aspect of this representation if any invoices are not paid within thirty (30) days after the invoice is mailed. If any attorney fees or expenses remain unpaid by the time the bills are prepared for the following month, we reserve the right to assess a one

percent late fee on all unpaid balances. If we are required to resort to collection proceedings to recover any amounts from you, we will also be entitled to recover all costs incurred concerning such collection proceedings including reasonable attorneys' fees incurred either by us or separate counsel.

You shall have the right at any time to terminate our services and representation upon written notice to the firm. Such termination shall not, however, relieve you of the obligation to pay for all services rendered and costs or expenses incurred on your behalf prior to the date of such termination. As permitted by law, we reserve the right to retain your files until all invoices have been paid in full.

We reserve the right to ask the Court's permission to withdraw from your representation if, among other things, you fail to honor the terms of this engagement letter, you fail to cooperate or follow our advice on a material matter, or any fact or circumstances would, in our view, render our continuing representation unlawful or unethical. If we elect to withdraw from your representation, you agree to take all steps necessary to free us of any obligation to perform further, including the execution of any documents reasonably necessary to complete our withdrawal, and we will be entitled to be paid for all services rendered and costs and expenses incurred on your behalf through the date of withdrawal.

During the course of our representation of you, I encourage you to call to discuss any questions or concerns that you may have. I have found that communication is the best means available for avoiding misunderstanding or undue anxiety regarding a pending case. You will find that I may not always be available to speak with you over the telephone. Commitments to other clients, regularly scheduled court appearances, depositions and other responsibilities both within and outside my office sometimes precludes my availability to speak with a client when such calls are received. I have given you all of my telephone numbers and want you to feel free to try to reach me after normal business hours.

By signing this letter, you agree with the terms of this engagement letter. I have enclosed an additional original of this letter for your signature. Please sign in the appropriate space and return it to me in the enclosed self-addressed, stamped envelope.

Again, I welcome the opportunity to represent you in this case. Please keep a copy of this letter for your files.

Sincerely,

LAW FIRM
Attorney

The undersigned acknowledges that she and he have read this letter and agree to all of the terms set forth herein.

_____	_____
Date	Name
_____	_____
Date	Name

Section Fifteen

5 Tips on Physician Reports in Guardianship

Hon. Andrew R. Bloch
Hamilton County Superior Court
Noblesville, Indiana

Section Fifteen

Five Tips for Physician's Reports

Most Adult Guardianship cases involve the use of a physician's report. Here are five tips to consider in your next Adult Guardianship matter:

1. The Physician's Report must be completed by a medical doctor. If the report covers multiple areas of expertise or uses evaluations by other professionals, all the evaluating professionals must sign off on the report.
2. The testing or evaluations relied on in the report must be from the past three months. So getting a guardianship may require additional testing or evaluation.
3. The ability of a the protected person to appear in Court takes on a new meaning in the post-Covid 19 world. The Indiana Supreme Court's amendment to Administrative Rule 14 allows the Court to hold a remote hearing when the Court finds "good cause shown". Since many facilities now have the ability for the protected person to appear on an IPAD, make sure the physician distinguishes between the protected person's ability to travel to Court, versus their capacity to appear by video. They are now very distinctive concepts.
4. What if you can't have a physician's report completed by the Physician? The Report is meant to act as a substitute for the physician appearing in Court. Let them know that a properly completed report may mean they don't have to appear in Court. That's often enough incentive. if you still can't get them to appear, subpoena them. You may have to have the doctor present anyway if the Guardianship is contested due to potential hearsay objections.
5. While important, Physician's Reports are not the end all be all when determining capacity. The Trial Court's observations of the protected person at trial can form the sole basis of determining capacity. See ***Duncan v. Yocum***, 179 N.E.3d 988 (Ind. Ct. App. 2021). Over a two day trial the Court observed that Mr. Yocum followed the proceedings, assisted his attorney, and was able to testify coherently about his condition under direct and cross examination. Mr. Yocum had also been living alone for one year and handled most of his affairs without incident. The Court found that Mr. Yocum was in fact not incapacitated, which was affirmed on appeal.

I've attached a sample Physician's Report and Subpoena for your reference.

STATE OF INDIANA	)	IN MARION COUNTY SUPERIOR COURT
	)SS:	PROBATE DIVISION
COUNTY OF MARION	)	CAUSE NO.:

IN THE MATTER OF THE GUARDIANSHIP OF)
)
IP* ADULT.)

PHYSICIAN'S REPORT

Dr. _____, a physician licensed to practice medicine in all its branches in the State of Indiana, submits the following Report on _____, the alleged incapacitated person ("Person") named above, based on an examination of said person conducted within the last three (3) months, on the ___ day of _____, 20___.

1. The nature and type of the Person's disability or other incapacity is:
_____
_____
_____

2. The Person's mental and physical condition, and, when appropriate, their educational condition, adaptive behavior and social skills are:
_____
_____

3. In my opinion, the Person is [ ] totally or [ ] only partially incapable of making personal and financial decisions.

A. The kinds of decisions which the Person can and cannot make are:
_____
_____
_____

B. The facts and/or reasons supporting this opinion are: _____
_____
_____
_____
_____

4. In my opinion, the most appropriate living arrangement for the Person is:
_____
_____
_____

A. The most appropriate treatment or rehabilitation plan for the Person is:
_____
_____

B. The facts and / or reasons supporting this opinion are: _____
_____
_____
_____

5. The Person [ ] can [ ] cannot appear in Court without creating a threat to his or her health or safety.

Explain the specific risk to the Person's health or safety if he or she appears in Court.
_____
_____

The report must be signed by a physician. If the description of the Person's mental, physical and educational condition, adaptive behavior or social skills is based on evaluations by other professionals, all professionals preparing or contributing evaluations must sign the report. Evaluations on which the report is based must been performed within three (3) months of the date of the filing of the petition.

I/We affirm under the penalties of perjury that the foregoing representations are true.

Physician:

Name: Signature:

_____ _____

Street Address:_____

City: _____ State: _____ Zip: _____ Phone: _____

Other professionals who performed evaluations upon which this report is based:

Name: Signature:

_____ _____

Profession: _____

Street Address:_____

City: _____ State: _____ Zip: _____ Phone: _____

Other professionals who performed evaluations upon which this report is based (continued)

Name: Signature:

_____ _____

Profession: _____

Street Address:_____

City: _____ State: _____ Zip: _____ Phone: _____

STATE OF INDIANA	)	IN MARION COUNTY SUPERIOR COURT
	)SS:	PROBATE DIVISION
COUNTY OF MARION	)	CAUSE NO.:

IN THE MATTER OF THE GUARDIANSHIP OF)
)
*IP, ADULT.)

SUBPOENA DUCES TECUM

TO: *NAME
*ADDRESS
*ADDRESS

You are hereby commanded to appear In Person at the Marion County Superior Court, Probate Division, via WebEx, a cloud-based platform which allows multiple parties to appear simultaneously, to give your testimony before the court on *DATE, commencing at *TIME. Please bring with you all records regarding *IP.

Your failure to appear in response to this Subpoena will subject you to punishment forcontempt of this Court.

IN WITNESS WHEREOF this Subpoena Duces Tecum is issued and signed by the undersigned as an officer of the Court in which the above-captioned cause is pending andin which the undersigned has appeared as an attorney of record on behalf of Co-Petitioners *NAME and *NAME.

DATED this *DAY day of *MONTH, 2022

Section Sixteen

Guardianship Litigation

Lisa M. Dillman
Applegate & Dillman Elder Law
Indianapolis, Indiana

Section Sixteen

Guardianship Litigation……... Lisa M. Dillman

PowerPoint Presentation

Guardianship Litigation

APPLEGATE & DILLMAN ELDER LAW

2011 Research

Notre Dame Law School

Professor Michael Jenuwine:

Adult Guardianships in Indiana to increase 300% by 2030.

APPLEGATE & DILLMAN ELDER LAW

Hot Topic #1
Who’s Side Are You On?

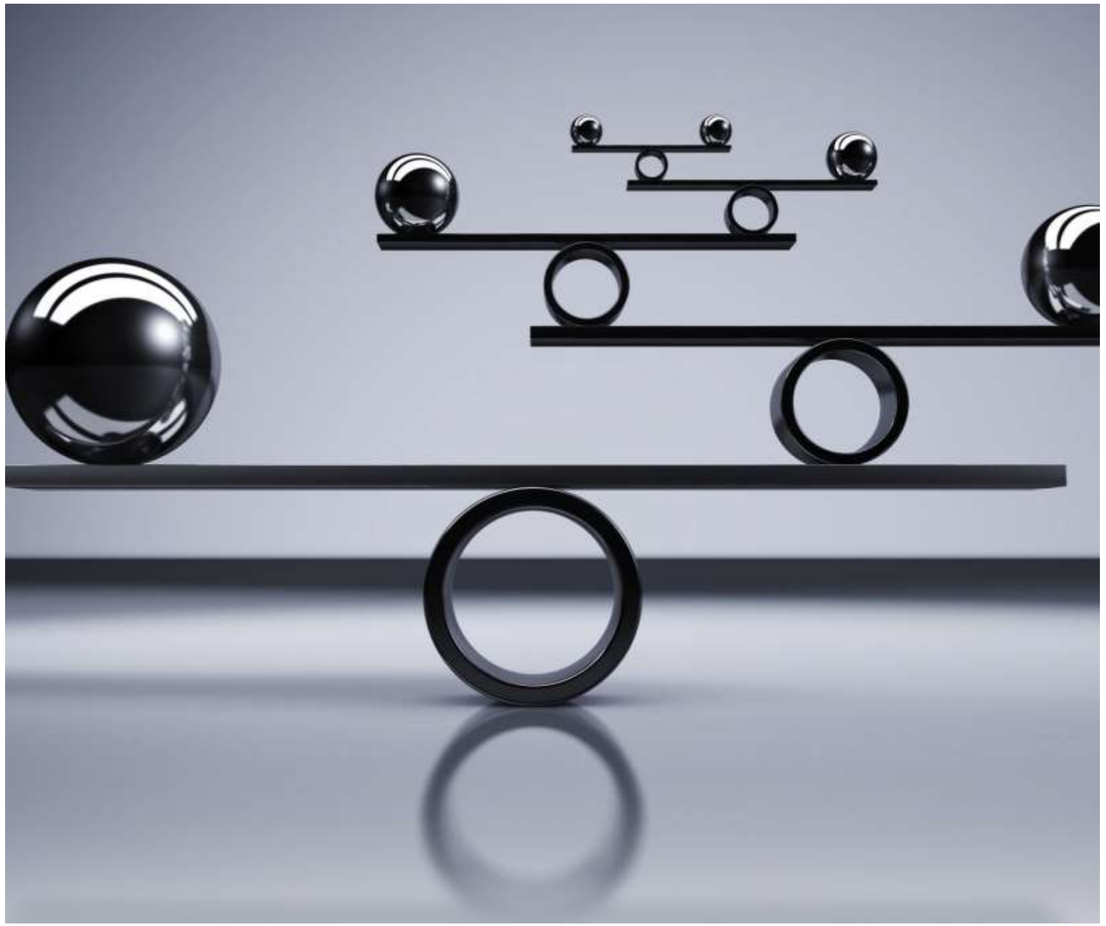
APPLEGATE & DILLMAN
ELDER LAW

Rule 1.14: Client with Diminished Capacity

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer ***shall***, as far as reasonably possible maintain a normal client-lawyer relationship with the client.

APPLEGATE & DILLMAN ELDER LAW

Rule 1.7 – Conflict of Interest: Current Clients



- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - the representation of one client will be directly adverse to another client; or
  - there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

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Rule 1.7 – Conflict of Interest: Current Clients

- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
    - the lawyer reasonably bleives that the lawyer willb e able to provide competent and diligent representation to each affected client;
    - the representation is not prohibited by law;
    - the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; ***and***
    - each affected client gives ***informed consent***, confirmed in writing.

APPLEGATE & DILLMAN ELDER LAW

ABA LEGAL ETHICS OPINION 1769:

CONFLICT—WHETHER AN ATTORNEY CAN REPRESENT THE DAUGHTER IN GAINING GUARDIANSHIP OF INCOMPETENT MOTHER WHO IS CURRENTLY A CLIENT IN ANOTHER MATTER.

Rule 1.14: Client with Diminished Capacity

- (b) When the lawyer reasonable believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer ***may take reasonably necessary protective action,*** including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, ***seeking the appointment*** of a guardian ad litem, conservator or guardian.

APPLEGATE & DILLMAN ELDER LAW

Rule 1.14: Client with Diminished Capacity

- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is ***impliedly authorized*** under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

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Rule 1.6(a) – Confidentiality of Information

- A lawyer shall not reveal information relating to representation of a client unless the client gives ***informed consent***, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

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Rule 1.14 – Cmnt. 3

- The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the ***attorney-client evidentiary privilege***.

APPLEGATE & DILLMAN ELDER LAW

Consider:
Joint Interest Agreement

APPLEGATE & DILLMAN ELDER LAW

Rule 1.14: Client with Diminished Capacity

- (d)This Rule is not violated if the lawyer acts in good faith to comply with the Rule.

APPLEGATE & DILLMAN ELDER LAW

Hot Topic #2
Capacity

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ELDER LAW

Dementia-Related Diseases & Cognitive Decline Process

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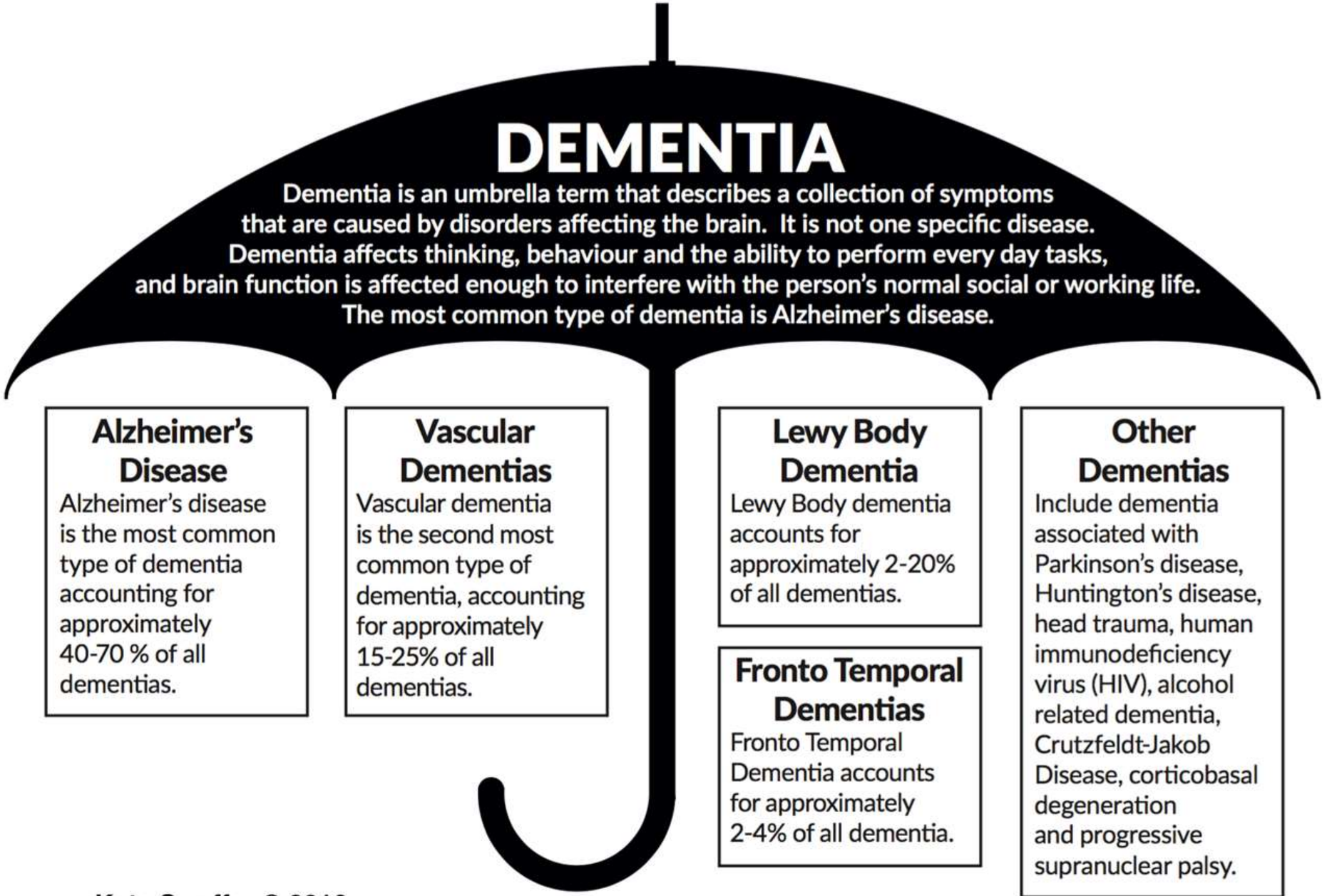
ELDER LAW

What is Dementia?

- "A PRIMARY AND PROGRESSIVE DECLINE OF INTELLECT AND/OR COMPORTMENT DUE TO A STRUCTURAL BRAIN DISEASE TO THE POINT THAT CUSTOMARY SOCIAL, PROFESSIONAL, AND RECREATIONAL ACTIVITIES OF DAILY LIVING BECOME COMPROMISED."
- Dementia is a disease process
  - Progressive decline in cognitive function
  - Memory loss
- Over 170 irreversible dementias
  - HIV, Vascular, Lewy Body, Parkinson's, Alzheimer's
- Some forms are reversible (treatable)
  - Thyroid disorders, drug interactions, dehydration



Continuum of Cognitive Impairment

Impairment does not interfere with activities of daily living

Impairment in two or more cognitive functions that interfere with activities of daily living

Mild cognitive impairment (MCI) is a known risk factor for dementia

Everyone who experiences dementia passes through MCI

10-20% of people aged 65 and older with MCI develop dementia over a one-year period

IS THIS AGING OR DEMENTIA?

Signs of Dementia

- MEMORY LOSS THAT DISRUPTS DAILY LIFE
- Trouble planning and problem-solving
- Difficulty completing familiar tasks

Normal Aging

- OCCASIONALLY FORGETTING APPOINTMENTS AND NAMES
- MAKING OCCASIONAL ERRORS IN HOUSEHOLD BILLS
- OCCASIONALLY NEEDING HELP TO USE COMPUTER OR SMART PHONE

DISTINGUISHING AMONG DEMENTIA & DEPRESSION

Dementia

- WHO AM I
- Gradual onset
- Months – years
- Progressive course
- Impaired orientation
- Memory impairment
- POOR ABSTRACT THOUGHT
- SLEEP – MULTIPLE AWAKENINGS
- SPEECH IMPAIRMENT
- SPATIAL IMPAIRMENT

Depression

- MY MEMORY IS BAD
- Tends to be acute
- Weeks – years
- Fluctuating course
- Orientation normal
- Normal memory
- Intact abstractthought
- SLEEP – EARLY, MIDDLE, LATE, HYPERSOMNIA
- COMPLAINTS OF WORD-FINDING
- NORMAL SPATIAL FUNCTION

Development of Documentary Support to Defend Functional Capacity

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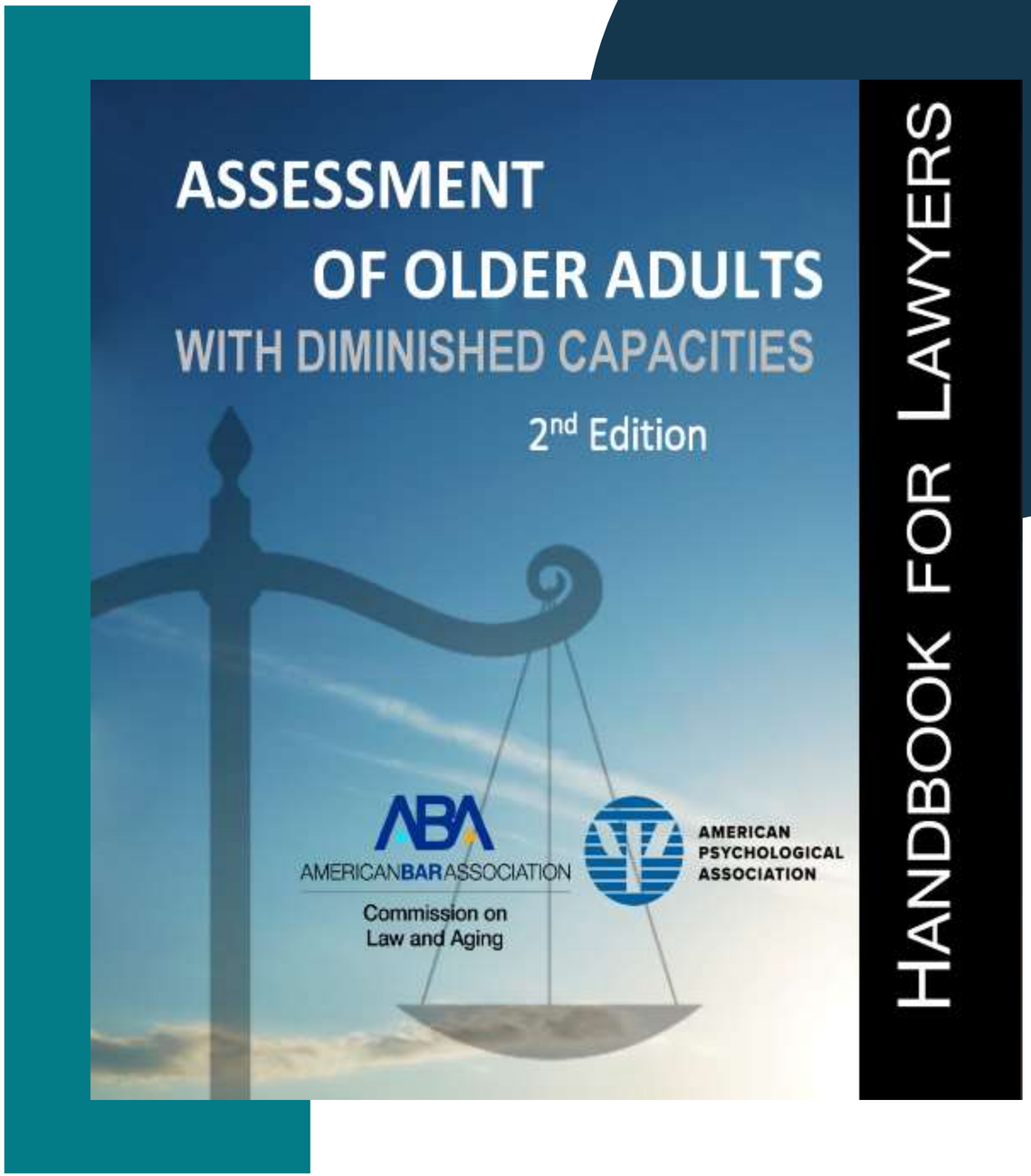
ABA/APA ATTORNEY HANDBOOK



Beginning of Representation

Doctor's Letters

Physician's Statements

Neuro Referral

Key Professionals for Capacity Consultation or Referral	
Physician	Any MD or DO
Geriatrician	MD specialist in aging
Geriatric Psychiatrist or Geropsychologist	Mental health specialists in aging
Forensic Psychologist or Psychiatrist	Mental health specialists in law
Neurologist	MD specialist in the brain functioning
Neuropsychologist	Psychologist specialist in cognitive testing
Geriatric Assessment Team	Multidisciplinary teams in aging

It's How You Ask!

Doctor's Letters

Physician's Statements

Neuro Referral

Be careful what you get back...

Doctor's Letters

Physician's Statements

Neuro Referral

How will each be cross examined?

Doctor's Letters

Physician's Statements

Neuro Referral

How to Test for Functional Capacity

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Hot Topic #3
Notice to Ward

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Hot Topic #4
Advocating For Limits

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Supported Decision Making

- Indiana Code § 29-3-14-1
    - ***“the process of supporting and accommodating an adult in the decision-making process to make, communicate and effectuate life decisions, without impeding the self-determination of the adult.”***
- A tool that allows Ward to retain decision- making capacity by choosing supporters to help them make choices.
- Research supports your argument and helps you develop expert opinion.

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Research on SDM

- Better quality of life, more employments and community integration.
  - Powers, 2012; Shogren, Wehmeyer, Palmer Rifenbark & Little, 2014
- Increased health, welfare and safety.
  - Khemka, Hickson and Reynolds, 2005
- Improved psychological health including better adjustment to increased care needs.
  - O’Connor & Vallerand, 1994

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Research on SDM

- When denied self-determination, people experience “low self-esteem, passivity and feelings of inadequacy and incompetency.”
  - Winick, 1995

- People subjected to overbroad or undue guardianship can experience a “significant negative impact on their physical and mental health, longevity, ability to function and reports of subjective well-being.”
  - Wright, 2010

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Hot Topic #5
Avoiding Future Litigation

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Consider:

Including In Initial Petition

- Benefits Planning
- Estate Planning
- Sale of Real Property
- Future Relocation Possible

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Dissolution/Separation/Annulment

Indiana Code § 29-3-9-12.2

- If GU determines dissolution/separation/annulment in best interest
- GU shall petition Court for authority
- Petition must set forth
  - Purpose
  - Names/Addresses Spouse and Children
- Notice
- Court sets hearing
- Clear and convincing evidence – action is in best interest

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Indiana Code § 29-3-9-12.2

- Does not require Petition if:
  - Defending action
  - Finalizing action
  - If action was filed before the GU established

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Questions?

Section Seventeen

5 Tips on Estate and Trust Settlement Agreements

Christopher J. Mueller
Hewitt Law & Mediation, LLC
Indianapolis, Indiana

Section Seventeen

5 Tips on Estate and Trust Settlement Agreements……. Christopher J. Mueller

PowerPoint Presentation

5 Tips on Estate and Trust Settlement Agreements

December 20, 2022

Christopher J. Mueller
Hewitt Law & Mediation, LLC
255 N. Alabama St. St. 300
Indianapolis, IN 46204
317-922-2822
cmueller@hewittlm.com

Estate and Trust Settlement Agreements

1. Court Approvals and Virtual Representation

- Court Approvals
  - Estates: Ind. Code § 29-1-9-1, et seq.
  - Trusts: Ind. Code § 30-4-7-1, et seq.
  - Guardianships: Ind. Code § 29-3-9-7
  - Think through all of the interested parties that must sign off on the settlement agreement
- Virtual Representation
  - Ind. Code § 29-1-1-20, § 30-4-6-10, § 30-4-6-10.5

Estate and Trust Settlement Agreements

1. Court Approvals and Virtual Representation

- **Court Approval; Effective Date**. This Agreement is conditioned upon approval of the courts presiding over the Estate and the Claims (collectively, the "Probate Court"). On or before ten business days after execution of this Agreement by all Parties, counsel for [plaintiffs] shall prepare and file a petition to approve this Agreement pursuant to Ind. Code § 29-1-9-1, *et seq*., and § 30-4-7-1, *et seq.*, as the case may be. On or before ten business days after execution of this Agreement, counsel for [plaintiffs] shall prepare and file a petition to conform the Trust to the terms of this Agreement and to terminate the Trust upon completion of all distributions from the Trust as provided by this Agreement. This Agreement shall be effective on date when the Probate Court has entered an order (or orders) approving this Agreement in its entirety and approving the reformation and termination of the Trust (the "**Effective Date**").

Estate and Trust Settlement Agreements

1. Court Approvals and Virtual Representation

- **Good Faith Compromise**. The Parties agree that this is a good faith compromise of a disputed claim and the effect of this Agreement upon the interests of the Parties represented is just and reasonable.

- **Waiver of Hearing**. All Parties acknowledge that a petition for Court approval of this Agreement will be filed hereafter, that each (i) received a copy of such petition, (ii) had a reasonable amount of time to read and understand the nature of such petition, (iii) hereby consents to the petition without the necessity of any hearing, (iv) hereby waives notice of filing of same and notice of hearing (if any is required), and (v) hereby warrants that he or she will not object to such petition.

Estate and Trust Settlement Agreements

1. Court Approvals and Virtual Representation

- **Binding Nature and Virtual Representation**. This Agreement is conditioned upon the binding of all interested persons to all terms of this Agreement by order of the Probate Court (including through virtual representation pursuant to Ind. Code § 29-1-1-20, § 30-4-6-10, § 30-4-6-10.5, or otherwise, as applicable), through a final non-appealable order entered by the Probate Court, after any further notice and due opportunity to be heard on all matters as to this Agreement and its effect as might be required by the Probate Court. The Parties agree to and hereby bind any and all minor, contingent, and unborn beneficiaries through virtual representation (pursuant to Ind. Code § 29-1-1-20, § 30-4-6-10, § 30-4-6-10.5, or otherwise).

Estate and Trust Settlement Agreements

2. Are they in or out?

- Did you buy out a beneficiary's interest?
  - Provide that the settlement payment is the final distribution of their interest.
- Did you agree on a new residuary split?
  - Provide that all after discovered assets are to be divided the same way.

Estate and Trust Settlement Agreements

2. Are they in or out?

- **Final Satisfaction of Beneficial Interest.** The Parties each acknowledge that the distributions provided for in paragraph 5 of this Agreement, once made, are made in full and final satisfaction of all claims, rights, title or interests each of them hold in and to the property of the [estate and trust]. The Parties further acknowledge that upon the Effective Date and performance of distributions provided for in paragraph 5 of this Agreement, they will no longer be "interested persons" (as that term is defined in Ind. Code § 29-1-1-3(15)) in or a "beneficiary" (as that term is defined in Ind. Code § 30-2-14-2) of the [estate and trust], and shall have no standing with respect to the proceedings or administration of the [estate and trust].

Estate and Trust Settlement Agreements

2. Are they in or out?

- **All Other Assets**. Any property payable to or owned by the Tom Rev. Trust after the Termination Date shall be distributed in the same proportions and manner described in paragraph 2 of this Agreement.

Estate and Trust Settlement Agreements

3. Simplify Finalizing Administration

- **Consent to Convert to Unsupervised Estate**. The Parties all hereby irrevocably consent to [the Estate] being converted to an unsupervised estate and finalizing administration in accordance with Ind. Code § 29-1-7.5-0.1, *et seq*. The Parties shall cooperate with [personal representative] to facilitate the conversion to unsupervised administration, including without limitation by signing and delivering the consents attached and incorporated as Exhibit 1.

Estate and Trust Settlement Agreements

3. Simplify Finalizing Administration

- **Waiver of Accountings**. Unless a court, *sua sponte*, orders otherwise, the Parties all hereby irrevocably waive any formal accounting of the [Estate/Trust] and each Party hereby waives any statutory requirement and notice of the same.

Estate and Trust Settlement Agreements

4. Dealing with Unrepresented Parties

- **Representation of Counsel**. The Parties acknowledge that each has been represented by counsel, or had sufficient opportunity to engage and consult with counsel of their choosing but voluntarily elected not to do so, and, for purposes of the rule of contract interpretation that construes a document against its drafter, the Parties agree that no Party or its counsel shall be considered the drafter of this Agreement. Specifically, [unrepresented party] acknowledges that she had the opportunity to retain counsel and to request information or documentation concerning the Claims and this Agreement and that no other Party's attorney(s) provided any legal advice to her.

Estate and Trust Settlement Agreements

4. Dealing with Unrepresented Parties

- **Tax Advice**. The Parties acknowledge that each has retained and sought advice of their own tax counselors, or had sufficient opportunity to engage and consult with counselors of their choosing but voluntarily elected not to do so. Each Party further acknowledges that the Trustee, his attorneys, and his accountant(s) provided no tax advice to any other Party, and that no other Party is relying on the tax advice of Trustee, his attorneys, or his accountant(s).

Estate and Trust Settlement Agreements

5. Income Tax Considerations: Is cash always king?

- Many of us do not like to give tax advice, but thinking through these issues can bring real value to your clients.

- For example, should you sell assets to fund a settlement payment?
  - Is there unrealized capital gain in those assets?
  - Will making in-kind distributions allow the parties to receive more value?
  - If assets must be sold and proceeds divided, make sure everyone pays their share of taxes.

Estate and Trust Settlement Agreements

5. Income Tax Considerations: Is cash always king?

- **Tax Allocation and Reporting**. The trustees of the shall cause all necessary tax reporting and filings to be timely made. The Parties acknowledge they are each individually responsible for paying any *pro rata* income tax attributable to them as a result of distributions received under paragraph 2 of this Agreement.

Estate and Trust Settlement Agreements

Bonus: Prevailing Party Attorney Fees

- **Attorneys' Fees**. If any party institutes any legal suit, action, or proceeding against the other party to enforce this Agreement, the prevailing party in the suit, action or proceeding is entitled to receive, and the non-prevailing party shall pay, in addition to all other remedies to which the prevailing party may be entitled, the costs and expenses incurred by the prevailing party in conducting or defending the suit, action, or proceeding, including reasonable attorneys' fees and expenses.

Section Eighteen

5 Tips on Probate and Small Estate Administration

Arlene Kline
Law Office of Arlene Kline
Indianapolis, Indiana

Section Eighteen

5 Tips on Probate and Small Estate Administration……..…. Arlene Kline

PowerPoint Presentation

ESTATE ADMINISTRATION

By Arlene Kline

Law Office of Arlene Kline

CHANGES IN MARION COUNTY PROBATE COURT

- New Judge in Marion County after December 31, 2022.
  - Thank you Judge Eichholtz
- David Certo
  - Welcome.
  - Staff changes unknown at this time.

- Advice from the Probate Clerks
- When E-Filing do not list any address or information except name and date of death. There is no representation by attorney of decedent.
- When filing a Motion to Reopen the Estate, you must submit new Letters at the time of filing.


LAW

ESTATE PROCEDURES

Which Procedure is best for the estate (heirs/legatees/creditors)

With the new law changes.

Supervised estate

Unsupervised estate

Summary administration

Small Estate

Petition for No Administration (Spread Will)

SMALL ESTATE AFFIDAVITS

AUTHORITY TO COLLECT BUT NO LEGAL AUTHORITY TO ACT OTHER THAN TO COLLECT/DISTRIBUTE ASSET

Limited to collection of personal property and other assets under IC 29-1-8-1

Must wait 45 days, and is subordinate to an estate being opened.

Is not filed with the Probate Court

Be sure all assets are included in its totality when calculating value.

Affidavit may be presented by or on behalf of the distribute

Now increased for decedent's dying after June 30, 2022 to $100,000.

- Supervise Estate
- Formal estate when there is no will or opened with court involvement
- Assets exceed $100,000
- Legal Authority is needed to act
  - i.e. mortgage foreclosures, personal injury suit or when required.

- Unsupervised Administration
- Estate with less court involvement by will or by Consents from the heirs/legatees
- Assets exceed $100,000

NOTE: LOTS OF CONFUSION WITH IC 29-1-7-23

SUMMARY ADMINISTRATION IC 29-1-8-3 AND 29-1-8-4

FOR ASSETS UNDER $100,000.00 INCLUDING REAL ESTATE

Value increased from $50,000 to $100,000 for personal property and real estate belonging to decedent.

For decedent's dying after June 30, 2022.

Proceeding can be done by court appointed personal representative

Or a person nominated by the distributees.

IC 29-1-8-3 and 29-1-8-4 (Cont.)

Advantages of the Summary Administration:

No Filing Fees

Use EM

Can be used to transfer real estate with the Court’s Approval promptly

Can be performed by:

(1) the personal representative of an unsupervised estate; or
(2) a person appointed by a court under this title to act on behalf of the decedent or the decedent's distributees.

Provides a chain of title, in accordance to statute, and approved by the court.

Forms of Petition for Summary Administration, Order, Affidavit and Closing Statement

PETITION FOR NO ADMINISTRATION (SPREAD WILL OF RECORD)

Purpose:

To prove the will

Can be used with combination of other procedures to show entitles the named executor/executrix is the proper person acting.

Preserves the will if filed to avoid the three year statute of limitation.

Note: There is no legal authority to act authorize by the court, and other procedures have their own rules and must be followed.

REOPENING THE ESTATE TO COLLECT UNDISCOVERED ASSETS

REOPENING THE ESTATE TO COLLECT DISCOVERED ASSETS PURSUANT TO 29-1-7.5-8

- Reopen the estate to have legal authority to act to collect asset
  - This can be for tax refunds, stock, unclaimed property, bank accounts or assets found
  - After the original estate has been closed for three months.
- If you are not original attorney, file an Appearance.
- Former Personal Representative can be reappointed and new Letters Issued
- Be sure you submit the Letters when you e-file your Motion or Petition.
- The Law and my Form Petition and Order are included in your material

Thank you and the staff for attending.
Best wishes for the upcoming holidays!

If you have questions, email me at attorneyarlene@gmail.com

IC 29-1-7-23 Real and personal property; devolution; prima facie evidence

Sec. 23. (a) When a person dies, the person's real and personal property passes to persons to whom it is devised by the person's last will or, in the absence of such disposition, to the persons who succeed to the person's estate as the person's heirs; but it shall be subject to the possession of the personal representative and to the election of the surviving spouse and shall be chargeable with the expenses of administering the estate, the payment of other claims and the allowances under IC 29-1-4-1, except as otherwise provided in IC 29-1.

(b) A person may sign and record an affidavit to establish prima facie evidence of the passage of real estate title to distributees under this section. An affidavit under this section may contain the following information:

(1) The decedent's name and date of death.
(2) A statement of the affiant's relationship to the decedent.
(3) A description of how the following deeds or other instruments vested in the decedent an ownership or leasehold interest in real property, with a cross-reference if applicable, under IC 36-2-7-10(l) to each deed or other instrument:
  (A) Deeds or other instruments recorded in the office of the recorder where the real property is located.
  (B) Deeds or other instruments that disclose a title transaction (as defined in IC 32-20-2-7).
(4) The legal description of the conveyed real property as it appears in instruments described in subdivision (3).
(5) The names of all distributees known to the affiant.
(6) An explanation of how each interest in the real property passed upon the decedent's death to each distributee by:
  (A) intestate succession under IC 29-1-2-1; or
  (B) the decedent's last will and testament that has been admitted to probate under section 13 of this chapter, with references to:
    (i) the name and location of the court that issued the order admitting the will to probate; and
    (ii) the date when the court admitted the decedent's will to probate.
(7) An explanation of how any fractional interests in the real property that may have passed to multiple distributees were calculated and apportioned.

(c) Upon presentation of an affidavit described in subsection (b), the auditor of the county where the real property described in the affidavit is located must endorse the affidavit as an instrument that is exempt from the requirements to file a sales disclosure form and must enter the names of the distributees shown on the affidavit on the tax duplicate on which the real property is transferred, assessed, and taxed under IC 6-1.1-5-7. After December 31, 2023, an auditor may not refuse to endorse an affidavit because the affidavit is an electronic document.

(d) Upon presentation of an affidavit described in subsection (b), the recorder of the county where the real property described in the affidavit is located must:

(1) record the affidavit; and

(2) index the affidavit as the most recent instrument responsible for the transfer of the real property described in subsection (b)(4).

(e) Any person may rely upon an affidavit recorded with the county recorder:

(1) made in good faith; and

(2) under this section;

as prima facie evidence of an effective transfer of the decedent's title to the real property interest under subsection (a) to the distributee described in the affidavit.

(f) If:

(1) at least seven (7) months have elapsed since the decedent's death;

(2) the clerk of the court described in subsection (b)(6)(B) has not issued letters testamentary or letters of administration to the court appointed personal representative for the decedent within the time limits specified under section 15.1(d) of this chapter; and

(3) the court described in subsection (b)(6)(B) has not issued findings and an accompanying order preventing the limitations in section 15.1(b) of this chapter from applying to the decedent's real property;

any person may rely upon the affidavit described in subsection (e) as evidence that the real property may not be sold by an executor or administrator of the decedent's estate to pay a debt or obligation of the decedent, which is not a lien of record in the county in which the real property is located, or to pay any costs of administration of the decedent's estate.

Formerly: Acts 1953, c.112, s.723. As amended by Acts 1976, P.L.125, SEC.2; Acts 1979, P.L.268, SEC.3; P.L.231-2019, SEC.10; P.L.56-2020, SEC.2; P.L.26-2022, SEC.4.

IC 29-1-8-1 Small estates; payment upon presentation of affidavit; vehicle or watercraft; securities; insurance death benefit; safe deposit box; digital asset

Sec. 1. (a) Forty-five (45) days after the death of a decedent and upon being presented an affidavit that complies with subsection (b), a person:

(1) indebted to the decedent; or

(2) having possession of personal property or an instrument evidencing a debt, an obligation, a stock, or a chose in action belonging to the decedent;

shall make payment of the indebtedness or deliver the personal property or the instrument evidencing a debt, an obligation, a stock, or a chose in action to a distributee claiming to be entitled to payment or delivery of property of the decedent as alleged in the affidavit.

(b) The affidavit required by subsection (a) must be an affidavit made by or on behalf of the distributee and must state the following:

(1) That the value of the gross probate estate, wherever located, (less liens, encumbrances, and reasonable funeral expenses) does not exceed:

(A) twenty-five thousand dollars ($25,000), for the estate of an individual who dies before July 1, 2006;

(B) fifty thousand dollars ($50,000), for the estate of an individual who dies after June 30, 2006, and before July 1, 2022; and

(C) one hundred thousand dollars ($100,000), for the estate of an individual who dies after June 30, 2022.

(2) That forty-five (45) days have elapsed since the death of the decedent.

(3) That no application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction.

(4) The name and address of each distributee that is entitled to a share of the property and the part of the property to which each distributee is entitled.

(5) That the affiant has notified each distributee identified in the affidavit of the affiant's intention to present an affidavit under this section.

(6) That the affiant is entitled to payment or delivery of the property on behalf of each distributee identified in the affidavit.

(c) If a motor vehicle or watercraft (as defined in IC 9-13-2-198.5) is part of the estate, nothing in this section shall prohibit a transfer of the certificate of title to the motor vehicle if five (5) days have elapsed since the death of the decedent and no appointment of a personal representative is contemplated. A transfer under this subsection shall be made by the bureau of motor vehicles upon receipt of an affidavit containing a statement of the conditions required by subsection (b)(1) and (b)(6). The affidavit must be duly executed by the distributees of the estate.

(d) A transfer agent of a security shall change the registered ownership on the books of a corporation from the decedent to a distributee upon the presentation of an affidavit as provided in subsection (a).

(e) For the purposes of subsection (a), an insurance company that, by reason of the death of the decedent, becomes obligated to pay a death benefit to the estate of the decedent is considered a person indebted to the decedent.

(f) For purposes of subsection (a), property in a safe deposit box rented by a decedent from a financial institution organized or reorganized under the law of any state (as defined in IC 28-2-17-19) or the United States is considered personal property belonging to the decedent in the possession of the financial institution.

(g) For purposes of subsection (a), a distributee has the same rights as a personal representative under IC 32-39 to access a digital asset (as defined in IC 32-39-1-10) of the decedent.

Formerly: Acts 1953, c.112, s.801; Acts 1965, c.379, s.2; Acts 1971, P.L.406, SEC.1; Acts 1975, P.L.288, SEC.12. As amended by Acts 1977, P.L.2, SEC.80; Acts 1977, P.L.298, SEC.1; P.L.71-1991, SEC.15; P.L.77-1992, SEC.5; P.L.118-1997, SEC.16; P.L.59-2000, SEC.1; P.L.61-2006, SEC.4; P.L.51-2014, SEC.3; P.L.137-2016, SEC.1; P.L.163-2018, SEC.9; P.L.231-2019, SEC.13; P.L.56-2020, SEC.4; P.L.151-2022, SEC.1.

IC 29-1-8-3 Disbursement and distribution of estate

Sec. 3. (a) As used in this section, "fiduciary" means:

(1) the personal representative of an unsupervised estate; or

(2) a person appointed by a court under this title to act on behalf of the decedent or the decedent's distributees.

(b) Except as otherwise provided in this section, if the value of a decedent's gross probate estate, less liens and encumbrances, does not exceed the sum of:

(1) an amount equal to:

(A) twenty-five thousand dollars ($25,000), for the estate of an individual who dies before July 1, 2006;

(B) fifty thousand dollars ($50,000), for the estate of an individual who dies after June 30, 2006, and before July 1, 2022; and

(C) one hundred thousand dollars ($100,000), for the estate of an individual who dies after June 30, 2022;

(2) the costs and expenses of administration; and

(3) reasonable funeral expenses;

the fiduciary, without giving notice to creditors, may disburse and distribute the estate to the persons entitled to it, followed by the filing of a closing statement, as provided in section 4 of this chapter.

(c) If an estate described in subsection (b) includes real property, an affidavit may be recorded in the office of the recorder in the county in which the real property is located. The affidavit must contain the following:

(1) The legal description of the real property.

(2) The following statements:

(A) If the individual dies after June 30, 2006, and before July 1, 2022, the following statement: "It appears that the decedent's gross probate estate, less liens and encumbrances, does not exceed the sum of the following: fifty thousand dollars ($50,000), the costs and expenses of administration, and reasonable funeral expenses.".

(B) If the individual dies before July 1, 2006, the following statement: "It appears that the decedent's gross probate estate, less liens and encumbrances, does not exceed the sum of the following: twenty-five thousand dollars ($25,000), the costs and expenses of administration, and reasonable funeral expenses.".

(C) If the individual dies after June 30, 2022, the following statement: "It appears that the decedent's gross probate estate, less liens and encumbrances, does not exceed the sum of the following: one hundred thousand dollars ($100,000), the costs and expenses of administration, and reasonable funeral expenses.".

(3) The name of each person entitled to at least a part interest in the real property as a result of a decedent's death, the share to which each person is entitled, and whether the share is a divided or undivided interest.

(4) A statement which explains how each person's share has been determined.

Formerly: Acts 1953, c.112, s.803; Acts 1959, c.239, s.1; Acts 1965, c.379, s.3; Acts 1971, P.L.406, SEC.2; Acts 1975, P.L.288, SEC.14. As amended by P.L.146-1984, SEC.2; P.L.118-1997, SEC.17; P.L.42-1998, SEC.2; P.L.95-2007, SEC.8; P.L.220-2011,

SEC.473; P.L.194-2017, SEC.4; P.L.231-2019, SEC.14; P.L.56-2020, SEC.5; P.L.105-2022, SEC.19; P.L.151-2022, SEC.2; P.L.162-2022, SEC.8.

IC 29-1-8-4 Closing of estate; statement

Sec. 4. (a) As used in this section, "fiduciary" means:

(1) the personal representative of an unsupervised estate; or

(2) a person appointed by a court under this title to act on behalf of the decedent or the decedent's distributees.

(b) Unless prohibited by order of the court and except for estates being administered by supervised personal representatives, a fiduciary may close an estate administered under the summary procedures of section 3 of this chapter by disbursing and distributing the estate assets to the distributees and other persons entitled to those assets, and by filing with the court, at any time after disbursement and distribution of the estate, a verified statement stating that:

(1) to the best knowledge of the fiduciary, the value of the gross probate estate, less liens and encumbrances, did not exceed the sum of:

(A) twenty-five thousand dollars ($25,000), for the estate of an individual who dies before July 1, 2006, fifty thousand dollars ($50,000), for the estate of an individual who dies after June 30, 2006, and before July 1, 2022, and one hundred thousand dollars ($100,000), for the estate of an individual who dies after June 30, 2022;

(B) the costs and expenses of administration; and

(C) reasonable funeral expenses;

(2) the fiduciary has fully administered the estate by disbursing and distributing it to the persons entitled to it; and

(3) the fiduciary has sent a copy of the closing statement to all distributees of the estate and to all known creditors or other claimants of whom the fiduciary is aware and has furnished a full accounting in writing of the administration to the distributees whose interests are affected.

(c) If no actions, claims, objections, or proceedings involving the fiduciary are filed in the court within two (2) months after the closing statement is filed, the closing statement filed under this section has the same effect as one filed under IC 29-1-7.5-4, and the appointment of the personal representative or the duties of the fiduciary, as applicable, shall terminate.

(d) A copy of any affidavit recorded under section 3(c) of this chapter must be attached to the closing statement filed under this section.

Formerly: Acts 1953, c.112, s.804; Acts 1971, P.L.406, SEC.3; Acts 1975, P.L.288, SEC.15. As amended by Acts 1976, P.L.125, SEC.4; Acts 1977, P.L.297, SEC.2; P.L.146-1984, SEC.3; P.L.95-2007, SEC.9; P.L.220-2011, SEC.474; P.L.194-2017, SEC.5; P.L.231-2019, SEC.15; P.L.56-2020, SEC.6; P.L.105-2022, SEC.20; P.L.151-2022, SEC.3; P.L.162-2022, SEC.9.

IC 29-1-7.5-8 Subsequently discovered estate; appointment of personal representative

Sec. 8. If other property of the estate is discovered after the estate has been settled and the personal representative discharged or three (3) months after a closing statement has been filed, the court upon petition of any interested person and upon notice as it directs may appoint the same or a successor personal representative to administer the subsequently discovered estate. If a new appointment is made, unless the court orders otherwise, the provisions of this title apply as appropriate; but no claim previously barred may be asserted in the subsequent administration.

STATE OF INDIANA	)	IN THE MARION COUNTY SUPERIOR COURT
	)SS:	PROBATE DIVISION
COUNTY OF MARION	)	CAUSE NO.

IN THE MATTER OF THE)
ESTATE OF _____, Deceased.)

PETITION FOR SUMMARY ADMINISTRATION
TO TRANSFER OWNERSHIP OF REAL ESTATE TO SPOUSE
UNDER IC §29-1-4-1 OR TO TRANSFER REAL ESTATE TO DISTRIBUTEES

Comes now _____, an interested party as the spouse and distributee of the late _____, and being duly sworn upon her oath, states as follows:

1. That _____ died on _____, intestate, while a resident of Indianapolis, Marion County, Indiana.

2. That no application or No petition for the appointment of a personal representative of the decedent is pending in any Court.

3. That the decedent was married at the time of death to _____, who resides at _____

4. That the only probate asset of the decedent was real estate with a value of Twenty Dollars ($20,000.00), as described below:

LEGAL DESCRIPTION

Commonly known as _____.

5. _____paid the funeral and burial expenses in the amount of $5,000.00 and cost of administration.

6. Said real estate shall be conveyed and transferred to _____ for her family allowance under IC §29-1-4-1, by the recording of the Affidavit To Transfer Real

Estate, a copy is attached as Exhibit "A." (Or show who and the percentage of ownership as the heirs and distributees).

WHEREFORE, _____, respectfully requests that the Court approve the petition as shown herein, and that distribution of said real estate be transferred to _____ as the sole distributee and spouse upon the recording of the Affidavit for Transfer of Real Estate, according to law.

Dated this _____ day of _____, 2022.

I affirm that the above and the foregoing is true to the best of my knowledge and belief.

_____

STATE OF INDIANA	)	IN THE MARION COUNTY SUPERIOR COURT
	)SS:	PROBATE DIVISION
COUNTY OF MARION	)	CAUSE NO.

IN THE MATTER OF THE)
ESTATE OF _____, Deceased.)

ORDER GRANTING SUMMARY ADMINISTRATION TO TRANSFER REAL ESTATE UNDER IC §29-1-8-3

A Petition for a Summary Administration to Transfer Real Estate was filed by _____, which is now before the court.

The Court, being duly advised in the premises, finds as follows:

1. That _____Died intestate on _____, while domiciled in Marion County, Indiana.

2. That the only asset is real estate, which value, less burial expenses, cost of administration, is less than the spousal allowance under IC §29-1-4-1.

3. That _____ is granted authority as a representative and as the interested party authority to file an Affidavit of Transfer of Real Estate transferring said real estate to her for the family allowance under Ind. Code §29-1-4-1. OR

3. That _____ is granted authority as a representative to file an Affidavit of Transfer of Real Estate to transfer the real estate to the following heirs, with their percentage of ownership as shown below:

4. That upon recording the Affidavit of Transfer of Real Estate a Closing Statement with a copy of the recorded Affidavit is required to be filed with the court.

DATED THIS _____.

_____
Judge, Marion County Superior Court
Probate Division

E-Notice to:

AFFIDAVIT OF TRANSFER OF REAL ESTATE PURSUANT TO IND. CODE §29-1-8-3

Comes now _____, affiant, and interested party, being first duly sworn upon his/her oath, hereby state as follows:

1. That _____, ("decedent"), passed away a resident of Indianapolis, Marion County, Indiana, intestate, on the _____ day of _____, 2022.

2. That under a Summary Administration, 49D08-2212-EM-_____ granted authority to _____ to transfer the real estate by this Affidavit to _____for his/her family allowance under Ind. Code §29-1-4-1 and §29-1-8-3.

4. The legal description of the real property is as follows:

Commonly known as _____.

5. It appears that the decedent's gross probate estate, less liens and encumbrances, does not exceed the sum of the following: one hundred thousand dollars ($100,000), the costs and expenses of administration, and reasonable funeral expenses.

6. The name of each person entitled to at least a part interest in the real property as a result of a decedent's death, the share to which each person is entitled, and whether the share is a divided or undivided interest.

7. A statement explaining how each person's share has been determined. Example, spouse _____ paid the funeral expenses in the amount of $_____ and $25,000.00 for her statutory allowance under Ind. Code §29-1-4-1, is entitled to the real estate as the only probate asset, valued at $30,000.00 (or split among heirs and show percentage, if value is over amount spouse is entitled).

I affirm under the penalties of perjury that the foregoing is true.

Dated this _____ day of _____, 2022.

_____
Affiant

STATE OF INDIANA)
)SS:
COUNTY OF MARION)

Before me, a Notary Public in and for said County and State personally appeared _____ affiant, who acknowledged the execution of the foregoing Affidavit of Transfer of Real Estate, and who, having been duly sworn, stated that any representations therein contained are true.

Witness my hand and Notarial Seal this _____day of _____, 2022.

_____
NOTARY PUBLIC
NOTARY NUMBER
MY COMMISSION EXPIRES:
Residing in _____County, Indiana

Real Estate Tax Statements to

Return Affidavit of Transfer of Real Estate to

Prepared by:

I affirm, under the penalties of perjury, that I have taken reasonable care to redact each social Security number in this document, unless required by Indiana law. Declarant
_____

STATE OF INDIANA	)	IN THE MARION COUNTY SUPERIOR COURT
	)SS:	PROBATE DIVISION
COUNTY OF MARION	)	CAUSE NO.

IN THE MATTER OF THE)
SUMMARY ADMINSTRATION)
OF _____, Deceased.)

CLOSING STATEMENT ON SUMMARY ADMINISTRATION

Comes now _____, as representative and distribute, and respectfully shows the court the following:

1. That _____died intestate on _____, while residing in Indianapolis, Marion County, Indiana.

2. That a summary administration was granted to the decedent's spouse, _____as the distribute, under Ind. Code §29-1-8-3 with authority to convey title of real estate, commonly known as _____, toward her statutory allowance under Ind. Code §29-1-4-1 of $25,000.00, by recording an Affidavit of Transfer of Real Estate with the Marion County, Assessor and Recorder. (Change this if by personal representative or if more than one distribute).

3. The Affidavit of Transfer of Real Estate was recorded with the Marion County Recorder, and a copy of said Affidavit is attached as Exhibit "A."

4. That the representative has fully administered the estate by disbursing and distributing the assets entitled to it. (If unpaid creditors or other distributes changes this and send a copy of the closing statement to them (see 29-1-8-4(b)(3).

5. All matters have been completed and this estate should be closed in ninety days after the filing of this Closing Statement pursuant to operation of law.

Dated this _____ day of _____, 2022.

I affirm under penalties for perjury that the foregoing representations are true.

_____

STATE OF INDIANA	)	IN THE MARION COUNTY SUPERIOR COURT
	) SS:	PROBATE DIVISION
COUNTY OF MARION	)	CAUSE NO.

IN THE MATTER OF THE UNSUPERVISED ADMINISTRATION OF THE ESTATE OF	)
	)
_____,	)
DECEASED.	)

PETITION/MOTION TO REOPEN ESTATE AND ISSUANCE OF LETTERS FOR THE PURPOSE OF COLLECTING AFTER DISCOVERED ASSET PURSUANT TO IC §29-1-7.5-8

Comes now _____, as the former Personal Representative of the Estate of _____, and being duly sworn upon his/her oath, respectfully reports to the Court as follows:

1. That _____ was appointed Personal Representative of the Estate of _____, which was closed on _____.

2. That after the closing of the estate it was discovered that the decedent was entitled to tax refunds from the Indiana Department of Revenue or that an assets was discovered that needs to be collected and distributed to the heirs/legatees.

3. That the estate will need to be re-opened, and _____appointed as Personal Representative with new Letters Testamentary/Letters of Administration issued in order for _____to have authority to collect and distribute said assets and pay any legal cost associated with the collection of said refunds.

5. Upon receipt and distribution of the funds, the estate will be re-closed and the personal representative be released.

WHEREFORE, _____as Personal Representative of the estate of _____, requests that the Court reopen the estate and issue new Letters of Administration or Letters Testamentary for the purpose of collecting tax refunds (transferring stock or collecting unclaimed property); making payment of any associated costs, and making distribution to the proper beneficiaries, then re-closing the estate.

I affirm, under the penalties for perjury, that the foregoing representations are true.

Dated this _____ day of _____, 2022.

_____

_____Personal Representative

of the _____

STATE OF INDIANA) IN THE MARION COUNTY SUPERIOR COURT
) SS: PROBATE DIVISION
COUNTY OF MARION) CAUSE NO.

IN THE MATTER OF THE UNSUPERVISED)
ADMINISTRATION OF THE ESTATE OF)
_____,)
DECEASED.)

ORDER REOPENING ESTATE AND FOR ISSUANCE OF LETTERS TESTAMENTARY/LETTERS OF ADMINISTRATION PURSUANT TO §29-1-7.5-8

Comes now _____ as the former Personal Representative of the Estate of _____having filed her verified Petition/Motion to Reopen Estate and for Issuance of Letters Testamentary/Letters of Administration for the Purpose of Collecting an After Discovered Asset, which is now before the court.

And the Court being duly advised grants said Petition.

IT IS THEREFORE ORDERED that:

1. The estate be re-opened and _____is appointed as Personal Representative for the purpose of collecting tax refunds/claiming unclaimed property/etc. due _____, decedent.

2. The Clerk shall issue new Letters Testamentary/Letters of Administration to _____.

3. Upon completion of the estate administration, the Personal Representative shall file a closing statement to re-close the estate.

ALL ORDERED THIS _____

_____
Judge Marion Superior Court
Probate Division