Notre Dame Law School

NDLScholarship

Indiana Continuing Legal Education Forum 2022

Indiana Continuing Legal Education Forum

1-1-2022

49th Annual Midwest Estate, Tax & Business Planning Institute

Indiana Continuing Legal Education Forum (ICLEF)

Follow this and additional works at: https://scholarship.law.nd.edu/iclef_2022

Recommended Citation

Indiana Continuing Legal Education Forum (ICLEF), "49th Annual Midwest Estate, Tax & Business Planning Institute" (2022). *Indiana Continuing Legal Education Forum 2022*. 5.
https://scholarship.law.nd.edu/iclef_2022/5

This Article is brought to you for free and open access by the Indiana Continuing Legal Education Forum at NDLScholarship. It has been accepted for inclusion in Indiana Continuing Legal Education Forum 2022 by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Day 1 - 49th Annual Midwest Estate, Tax & Business Planning Institute
June 9, 2022
Index

IU Foundation Contact Information. 9
ICLEF Electronic Publications. 10
MANUAL - Day 1 49th Annual Midwest Estate, Tax & Business Planning Institute - June 9, 2022. 11
Agenda. 14
Faculty. 16
Faculty Bios. 17
Manual table of contents. 36
Section-1-Turney-P-Berry-Charles-A-Redd. 59
Section 1 - Turney P. Berry - Charles A. Redd. 59
Section 1 Table of Contents. 61
PART 1 – 2017 TAX ACT IS STILL WITH US. 65
A. Effective Date and Sunset. 65
B. New Basic Exclusion Amounts for Estate and Gift Taxes and New Generation-SkippingTransfer Exemption and Clawback. 65
C. Proposed Anti-Abuse Regulations. 67
D. Divorce – Income Tax.. 70
PART 2 – IS MORE TAX REFORM ON THE WAY?. 71
PART 3 – ESTATE PLANNING PRACTICE IN 2018 AND BEYOND. 78
I. WHERE WE ARE TODAY. 78
A. New Planning Approaches. 78
B. Portability Planning. 79
II. OBTAINING AND RETAINING BASIS. 81
A. Generally. 81
B. Swapping Assets with Existing Grantor Trusts. 81
C. Should Valuation Discounts Be Undone?. 82
D. Powers of Appointment For Basis Purposes. 83
PART 4 – FEDERAL RULINGS, CASES AND OTHER DEVELOPMENTS. 88
A. INCOME TAX MATTERS. 88
1. Consistent Basis Reporting. 88
2. Termination of Trust Results In Capital Gains. 88
3. Qualified Replacement Property and A Grantor Trust. 90
B. CHARITABLE AND TAX-EXEMPT MATTERS - Sections 170, 642, 664, 501, 509, 2055, 2522, and4940-4947. 90
1. Charitable Distributions From Trusts. 90
2. Use of Section 501(c)(4) Organizations to Facilitate Business Interest Ownership. 93
3. Estate Income Tax Deduction. 95
4. Conservation Easement Controversy. 95
5. Granted In Perpetuity and Protected In Perpetuity Requirements. 97
6. Protected In Perpetuity; Validity of Regulation. 102
7. Savings Clause In Easement Ineffective. 126
8. Government Language for Extinguishment Clause. 128
9. Pre-Arranged Sales. 129
10. Notes Owned By A Private Foundation. 133
11. Disqualified Person for Section 4958 Purposes. 135
12. Donor Challenge to Charity’s Promise. 137
13. LLC May Qualify As A Section 501(c)(3) Organization. 139
14. Basis of Assets of Former Public Charities for Section 4940 Purposes. 140
15. No Contemporaneous Written Acknowledgement Inferred From Gift Documents. 140
C. SECTION 408 — IRAs AND RETIREMENT PLANS. 142
1. SECURE Act Changes. 142
2. Waiver of 2020 Required Minimum Distributions. 144
3. Transfer to Inherited IRA Denied. 145
D. SECTIONS 671-678 -- GRANTOR TRUST RULES. 146
1. Section 678 and a Presently Exercisable General Power of Appointment As A Planning Device. 146
2. Grantor Trusts and Spouses. 152
3. DING Trusts.. 152
E. SECTION 1361 – S CORPORATIONS. 159

F. SECTIONS 2031 and 2512 – VALUATION. 159
1. Valuation of LLCs Holding Leased Property For Gift, Estate, and Charitable Purposes. 159
2. Valuation of Image and Likeness. 161
3. Validity of Buy-Sell Agreement and Effect of Life Insurance Paid to Company On The Value.. 164
G. SECTION 2032 — ALTERNATE VALUATION AND SECTION 2032A — SPECIAL USEVALUATION. 170
1. New Proposed Alternate Valuation Regulations. 170
H. SECTION 2033 – GROSS ESTATE. 171
I. SECTIONS 2035-2038 – RETAINED INTERESTS. 171
1. Tax Court Strikes A Blow Against Discount Planning. 171
2. Application of Section 2043 to Defective FLP Transfer. 176
J. SECTIONS 2041 AND 2514— GENERAL POWERS OF APPOINTMENT. 182
K. SECTIONS 61, 83, 409A, 2042 AND 7872 - LIFE INSURANCE. 182
1. Analysis of Split Dollar Plan. 182
L. SECTION 2053 and 2054 - DEBTS AND ADMINISTRATION EXPENSES. 203
M. SECTIONS 2056, 2056A AND 2519- MARITAL DEDUCTION. 203
1. Termination of QTIP Trust Creates Double Gifts. 203
N. SECTIONS 2501 TO 2524 – GIFTS. 211
1. Unusual Assignment Clause Produced A Gift. 211
2. Step-Transaction. 214
O. SECTION 2518 – DISCLAIMERS. 217
P. SECTIONS 2601-2654 - GENERATION-SKIPPING TRANSFER TAX. 217
1. Trust Amendment Approved. 217
Q. SECTIONS 2701-2704 - SPECIAL VALUATION RULES. 219
1. How Might The Doctrine Of Merger Be Used With A GRAT?. 219
2. GRAT Inclusion. 220
3. GRAT Invalidated. 225
4. Valuation of Publicly Traded Stock. 227
R. SECTION 6166 — EXTENSION OF TIME TO PAY TAX. 232
S. TAX ADMINISTRATION. 232
1. Priority Guidance Plan. 232
2. No Ruling Positions. 235
3. Meaning of Tax Reimbursement Clause. 239
4. CBO Publication, Understanding Federal Estate and Gift Taxes. 240
5. No Penalties Quite Yet. 242
6. Notices Creating “Listed Transactions” Require Notice and Comment. 244
T. MISCELLANEOUS. 248
PART 4 – STATE DEVELOPMENTS. 248
U. STATE DEVELOPMENTS. 248
1. Failure to Discuss Basis Planning. 248
2. Trust Protector As Fiduciary With A Duty To Whom?. 249
3. Declaratory Judgment Action Does Not Trigger No Contest Clause. 250
4. No-Contest Clause Applied. 254
5. In Terrorem Clause In An Undue Influence Situation. 256
6. Effect of No Contest Clause. 259
7. Georgia Allows Beneficiaries To Amend Trust To Give Themselves The Power To Remove And Replace Trustees. 261
8. Attorney Insurance Policy Does Not Cover Attorney Acting as Trustee. 263
9. Trusts Reformed to Avoid Reciprocity. 264
10. No “Adoption Out” Under Indiana Trust. 264
11. The Ethics of Lawyers Working Remotely. 267
12. Decanting.. 268
13. Entity Transparency. 271
14. Exercise of Power of Appointment. 271
15. Trust Termination Would Violate Material Purpose (Nebraska).. 276
16. Conflicts of Law –Will. 277
17. Accepting Will Benefits Precludes Will Contest. 279

18. Common-Law Same Sex Marriage Before Same Sex Marriage Allowed. 280
19. Non-Participants In Mediation Beware. 282
20. Court In One State Applying The Law of Another Is Problematic. 283
21. Trust Protector Subject To Indirect Undue Influence. 286
22. Attorney-Client Privilege After Client's Death. 289
23. Place of Celebration Controls Existence of Marriage. 292
24. Power to Appoint to Charity Does Not Create Countable Assets for Medicaid Purposes. 293
25. Amount of Wrongful Death Proceeds Included in An Estate. 294
26. Oregon Grabs Out of State QTIP for Estate Tax.. 295
27. Valuation of Two Simultaneous Fractional Gifts. 300
28. Effect of Entity Governing Instrument On Testamentary Dispositions. 304
29. Even A Small Interest In A Trust Confers Jurisdiction On A Beneficiary. 306
30. Letter From 1954 Remains A Fee Agreement. 309
31. Receiver Appointed And LLC Assets Liquidated – 10th Circuit. 313
32. Where Inheritance Taxes Are To Be Paid From An Insufficient Residue, The Excess Is Apportioned To The Recipients of Assets – Nebraska. 316
33. Attorney Has No Duty To Non-Client Prospective Beneficiaries. 317
34. Remote Signing Procedures During The Pandemic Not Followed – New York. 321
35. A Trust Is Not A Contract For Arbitration Purposes. 322
36. Action Against An Attorney-In-Fact May Not Require Production Of The Principal's Will.. 325
37. Not Simultaneous Deaths. 326
38. Interpretation of Situs Clause In Trust. 328
39. Power of Appointment Exercised To Unfunded Trust Was Valid. 331
40. No Distribution Outright Where Beneficiary Is Married – Upheld (Indiana).. 332
APPENDIX A - Biden Administration Greenbook. 335
TABLE OF CONTENTS. 336
1. Biden Tax Proposals. Language below taken from the Treasury Green Book.. 337
A. Increase the Top Marginal Income Tax Rate for High Earners.. 337
B. Reform the Taxation of Capital Income. 337
C. Treat transfers of appreciated property by gift or on death as realization events. 339
D. Impose a Minimum Income Tax on the Wealthiest Taxpayers (Billionaire's Tax). 341
E. Modify Income, Estate and Gift Tax Rules for Certain Grantor Trusts.. 343
F. Require Consistent Valuation of Promissory Notes. 345
G. Improve Tax Administration For Trusts and Decedents' Estates. 347
H. Limit Duration of Generation-Skipping Transfer Tax Exemption. 350
Section-2-Jeffrey-B-Kolb. 352
Section 2 - Jeffrey B. Kolb. 352
Section 2 Table of Contents. 354
A. INTRODUCTION. 357
B. BACKGROUND. 357
C. CONTEXT. 357
D. TYPE. 358
E. ROLE. 359
F. OTHER SOURCES OF ETHICS. 359
G. TEN RULES. 360
1. IDENTIFY THE CLIENT. 360
1.1. PROBLEMS. 361
1. 1. 1. REFERRALS. 361
1.1.2. FAMILY. 362
1.1.2.1. OPINION 2 OF 2001. 362
1.1.3. FIDUCIARY. 362
1.1.3.1. OPINION 4 OF 1997. 362
1.2. SOLUTIONS. 363
2. MONITOR CLIENT'S CAPACITY. 364
2.1. RULE. 364
2.2. PROBLEM. 365

2.3. SOLUTIONS. 368
3. CHECK FOR CONFLICTS. 370
3.1. RULE. 370
3.2. PROBLEMS. 370
3.2.1. PRIOR CLIENT. 370
3 .2.2. NON-CLIENT PAYS. 371
3.2.3. REFERRALS. 372
3.2.4. MULTIPLE CLIENTS. 373
3.2.5. FIDUCIARY. 374
3.2.6. LAWYER'S INTEREST. 375
3.2.7. LAWYER AS FIDUCIARY. 376
3.2.8. OTHER. 378
3.2.9. REPRESENTING CLIENT AS FIDUCIARY AND BENEFICIARY. 378
3.3. SOLUTIONS. 379
4. LIMITED REPRESENTATION. 380
4.1. RULE. 380
4.2. PROBLEMS. 380
4.3. SOLUTIONS. 382
5. DETERMINE FEE. 382
5.1. RULE. 383
5.2. PROBLEMS. 383
5.3. SOLUTIONS. 385
6. PRESERVE CLIENT'S CONFIDENTIAL INFORMATION. 385
6.1. RULE. 385
6.2. PROBLEMS. 387
6.2.1. REFERRALS. 387
6.2.2. MULTIPLE CLIENTS. 387
6.2.3. DECEDENT'S FILE. 387
6.3. SOLUTIONS. 388
7. COMMUNICATE WITH CLIENT. 388
7.1. RULE. 388
7.2. PROBLEMS. 388
7.3. SOLUTIONS. 389
8. BE DILIGENT. 389
8.1. RULE. 389
8.2. PROBLEMS. 389
8.3. SOLUTIONS. 393
9. DO NOT LIE. 393
9 .1. RULE. 393
9.2. PROBLEMS. 393
9.2.1. MEDICAID - OPINION 2 FOR 2003. 395
9.3 SOLUTIONS. 395
10. SAFEGUARD CLIENT'S PROPERTY. 395
IO.I. RULE. 395
10.2. PROBLEMS. 396
10.3. SOLUTION. 397
11. MISCELLANEOUS ISSUES.. 397
11.1. ADVERTISING.. 397
11.2. FEE SPLITTING. 398
11.3. CONTEMPT. 398
11.4. PARALEGAL. 399
11.5. SEX.. 400
11.6. SUBSTANCEABUSE. 400
11.7. RESPECT. 401
11.8. CONTACT WITH AN ADVERSE PARTY. 402

12, CONCLUSION. 403
APPENDIX A - ESTATE PLANNING LEGAL FEE AND EXPENSE AGREEMENT. 404
APPENDIX B - SPECIAL POWER OF ATTORNEY OF ___________________. 406
APPENDIX C - RELEASE OF LEGAL INFORMATION. 408
APPENDIX D - INDIANA STATE BAR ASSOCIATION LEGAL ETHICS COMMITTEE OPINION NO. 4 OF 1997. 409
APPENDIX E - INDIANA STATE BAR ASSOCIATION LEGAL ETHICS COMMITTEE OPINION NO. 1 FOR 2001. 417
APPENDIX F - LEGAL ETHICS COMMITTEE INDIANA STATE BAR ASSOCIATION OPINION NO.2 FOR 2001. 427
APPENDIX G - OPINION NO. 2 OF 2003. 440
Assessment of Older Adults with Diminished Capacities 2nd Edition. 449
Table of Contents. 451
Section-3-Jeff-R-Hawkins. 529
Section 3 - Jeff R. Hawkins. 529
Section 3 Table of Contents. 531
2022 Midwest – JRH – Creditors' Claim Enforcement Against Decedents' Property.pdf. 531
Part 1. Introduction. 534
1.1. Purpose. 534
1.2. Threshold Questions About a Decedent's Assets. 534
1.3. Two Major Channels Passing Decedents' Assets. 535
Part 2. Creditors' Claims in Decedents' "Probate Estates". 535
2.1. Probate Terminology Matters – What is a Decedent's "Estate?". 535
2.2. Decedents' Probate Property Title Passage. 536
2.2.1. Immediate Title Passage. 537
2.2.2. Title Passage to Distributees. 537
2.2.3. Testate Estate Title Passage Questions Concerning the Probate Estate's Suspended Existence. 537
2.2.4. Wills Must Be Admitted to Probate. 537
2.2.5. Race to the Courthouse to Resolve the Probate Estate's Suspended Existence. 539
2.3. Personal Representative's Power of Possession. 540
2.3.1. Personal Representative's Interception of Title Passage. 540
2.3.2. Personal Representative's Distribution Deed Distractions. 541
2.3.3. Refocusing on Intestate and Testate Title Passage. 542
2.3.4. Intestate Title Passage – a Family Thing. 542
2.3.5. Testate Title Passage – Decedent's Will Admitted to Probate. 542
2.4. Personal Representative's Administration of a Decedent's Probate Estate. 543
2.4.1. Personal Representative's Appointment. 543
2.4.2. Personal Representative's Fiduciary Duty to Distributees and Creditors. 543
2.4.3. Personal Representative's Management of a Decedent's Probate Estate. 544
2.5. Creditors' Claims Against a Decedent's Probate Estate. 545
2.5.1. Governmental Claims. 545
2.5.2. Family and Social Services Administration's Estate Recovery Against a Deceased Medicaid Recipient's Probate Estate. 545
2.5.3. Nongovernmental Claims Against a Decedent's Probate Estate. 546
2.6. Secured Claims Against a Decedent's Encumbered Property. 547
2.7. Requirements for a Claim Against a Decedent's Probate Estate. 547
2.8. Claim Collection Priorities for a Decedent's Probate Estate. 548
2.9. Creditors' Claims Against a Decedent's Probate Real Property.. 550
2.9.1. Brief History Lesson on Personalty Versus Realty. 550
2.9.2. Creditors' Interception of Probate Real Property Title passage. 550
2.9.3. Overview of Procedural Functions of IC 29-1-7-15.1. 550
2.9.4. The 5-Month & 7-Month Rules Governing a Personal Representative's Sale of a Decedent's Real Property Under IC 29-1-7-15.1(b)21F 551
2.10. Procedural Strategies for Distributees' Protection of Probate Assets Against Claims. 553
2.10.1. Strategy 1: Skip Probate Administration. 553
2.10.2. Strategy 2: Petition for Administration More Than 5 Months After Decedent's Death – No Claims Filed. 554
2.10.3. Strategy 3: Petition for Administration More Than 5 Months After Decedent's Death – Late Claims Filed. 554
2.10.4. Strategy 4: Pursue Real Property Under IC 29-1- 7-23(b)-(d) and (Temporarily) Abandon Low-Value Personal Property. 555
2.10.5. Strategy 5: Seek appointment of a Personal Representative to Scrutinize Claim Merits. 557
Part 3. Claims Against Nonprobate Transferees. 559

3.1. Procedural Policy for Claims Against Nonprobate Transferees. 559
3.2. Nonprobate Transfer Definitions. 560
3.3. Party Definitions and Liability of Nonprobate Transferees. 561
3.4. Apportionment of Nonprobate Transferees' Liability to the Probate Estate. 562
3.5. Abatement of Beneficiaries' Trust Interests by Nonprobate Transfer Claims. 562
3.6. Instrument's Apportionment Provisions Concerning Nonprobate Transferees' Liability. 563
3.7. Forum of Proceedings to Enforce Claims Against Nonprobate Transferees. 563
3.8. Claims Concerning Deceased Transferors Dying Before July 1, 2018. 563
3.9. Medicaid Estate Recovery Claim Deadline Exemption. 564
3.10. Medicaid Estate Recovery Exemptions of Nonprobate Transfers Established Before April 30, 2002, and Assets Determined by FSSA to be 564
3.11. Claims Concerning Assets Transferred Through Nonprobate Transfers Concerning Deceased Transferors Dying After June 30, 2018. 565
3.11.1. Deadline to File and Serve a Claim Against a Deceased Transferor's Probate Estate. 565
3.11.2. Deadline to File and Serve a Written Demand. 565
3.11.3. Written Demand Contents. 566
3.11.4. Requirement of a Claimant's Diligent Probate Estate Claim Prosecution. 567
3.11.5. Direct Claimant Action If Personal Representative Declines or Fails to Act. 568
3.11.6. Statutory Exoneration for a Personal Representative's Declination or Failure to Act. 568
3.11.7. Protection of Secured Creditors' Interests. 569
3.11.8. Deadline for Filing and Serving the Written Demand. 569
3.11.9. Deadline for Commencement of Proceedings Against Nonprobate Transferees Concerning Deceased Transferors Dying That June 30 569
3.11.10. Statutory Exoneration of Obligors and Trustees for Transfers to Non probate Transferees. 570
3.11.11. Obligations, Rights, and Priorities of Successful Personal Representatives and Claimants. 570
3.12. Counter-Punching as an Asset Protection Strategy Against Nonprobate Claims. 571
3.12.1. Avoid Filing a Petition for Administration Within 5 Months After the Deceased Transferor's Death. 571
3.12. Counter-Punching as an Asset Protection Strategy Against Nonprobate Claims. 572
3.12.1. Avoid Filing a Petition for Administration Within 5 Months After the Deceased Transferor's Death. 572
3.12. Counter-Punching as an Asset Protection Strategy Against Nonprobate Claims. 573
3.12.1. Avoid Filing a Petition for Administration Within 5 Months After the Deceased Transferor's Death. 573
3.12. Counter-Punching as an Asset Protection Strategy Against Nonprobate Claims. 574
3.12.1. Avoid Filing a Petition for Administration Within 5 Months After the Deceased Transferor's Death. 574
Appendix 1 - Estate Claim Form. 575
Appendix 2 - Personal Representative's Authority to Sell Decedent's Real Property Under IC 29-1- 7-15.1 (b)-(e). 576
Appendix 3 - Sample Real Property Title passage Affidavit – Multiple Fact Patterns. 577
Appendix 4 - Sample Real Property Title Passage Affidavit - Basic Template. 585
Appendix 5 - Affidavit of Title Passage Template. 588
Appendix 5 Affidavit of Title Passage Template.pdf. 588
1. The Affiant is ________________________ of ________________________ (the "Decedent"), who died on __ 588
2. The Decedent acquired a ________________________ interest (the "Decedent's Title Interest") in the real estate described in t 588
3. The last instrument recorded in the office of the Recorder of ________________________ County, Indiana, was the ______ 588
4. The marital relationship between the Decedent and ________________________ remained unbroken from the time they acquir 588
5. The Real Estate is located in ________________________ County, Indiana, and described by property tax parcel number, prop 589
6. The Decedent died testate, and the Decedent's Last Will and Testament, which was admitted to probate by order of the __________ 589
6.1. ________________________ % to ________________________ whose address is ____________ 589
6.2. ________________________ % to ________________________ whose address is ____________ 589
6.3. ________________________ % to ________________________ whose address is ____________ 589
6.4. ________________________ % to ________________________ whose address is ____________ 589
7. The Decedent died intestate, leaving as the decedent's heirs-at-law (the "Heirs at Law") the following persons by percentages or fractions:. 590
6. The Decedent died testate, and the Decedent's Last Will and Testament, which was admitted to probate by order of the __________ 590
6.1. ________________________ % to ________________________ whose address is ____________ 590
6.2. ________________________ % to ________________________ whose address is ____________ 590
6.3. ________________________ % to ________________________ whose address is ____________ 590
6.4. ________________________ % to ________________________ whose address is ____________ 590
7. The Decedent died intestate, leaving as the decedent's heirs-at-law (the "Heirs at Law") the following persons by percentages or fractions:. 591
6. The Decedent died testate, and the Decedent's Last Will and Testament, which was admitted to probate by order of the __________ 591
6.1. ________________________ % to ________________________ whose address is ____________ 591

6.2. ________________________ % to ________________________ whose address is ______________ 591
6.3. ________________________ % to ________________________ whose address is ______________ 591
6.4. ________________________ % to ________________________ whose address is ______________ 591
7. The Decedent died intestate, leaving as the decedent’s heirs-at-law (the “Heirs at Law”) the following persons by percentages or fractions:. . . . 592
6. The Decedent died testate, and the Decedent’s Last Will and Testament, which was admitted to probate by order of the ____________ 592
6.1. ________________________ % to ________________________ whose address is ______________ 592
6.2. ________________________ % to ________________________ whose address is ______________ 592
6.3. ________________________ % to ________________________ whose address is ______________ 592
6.4. ________________________ % to ________________________ whose address is ______________ 592
7. The Decedent died intestate, leaving as the decedent’s heirs-at-law (the “Heirs at Law”) the following persons by percentages or fractions:. . . . 593
Appendix 6 - FSSA & Other Creditors' Claims Against Nonprobate Transferees of Decedents Dying After June 30, 2018. 593
Appendix 7 - GOVERNMENTAL CLAIMS AGAINST NONPROBATE TRANSFEREES [IC 32-17-13 for Decedent's dying after June 30, 2018]. 594
Appendix 8 - NON-GOVERNMENTAL CLAIMS AGAINST NONPROBATE TRANSFEREES [IC 32-17-13 for Decedents dying after June 30, 2018]. 596
Appendix 9 - WRITTEN DEMAND FOR PROCEEDINGS AGAINST NONPROBATE TRANSFEREES. 598
Appendix 9 Written Demand for Proceedings Against Nonprobate Transferees.pdf. 598
STATE OF INDIANA. 598
1. Joby Schmo (the “Decedent”) died intestate on November 31, 2021.. 598
2. The Court appointed Billy Bob Schmo to serve as the Decedent’s Personal Representative and the Clerk issued Letters of Administration to th 598
3. The Publisher’s Affidavit of the Schmo County Gazette states that it published the first notice to creditors on December 17, 2021.. 598
4. The Claimant filed his claim against the Decedent’s estate on February 29, 2022 (the “Claim”).. 598
5. More than three months and 15 days have elapsed since the first publication of notice to creditors and the Personal Representative has neithe 598
6. The Claimant filed a Petition to Set Claim for Trial in the Schmo Circuit Court on April 4, 2022, a date that was less than 30 days after the expi 598
Appendix 10 - PETITION TO SET CLAIM FOR TRIAL. 600
Appendix 10 Petition to Set Claim for Trial.pdf. 600
STATE OF INDIANA. 600
1. Joby Schmo (the “Decedent”) died intestate on November 31, 2021.. 600
2. The Court appointed Billy Bob Schmo to serve as the Decedent’s Personal Representative and the Clerk issued Letters of Administration to th 600
3. The Publisher’s Affidavit of the Schmo County Gazette states that it published the first notice to creditors on December 17, 2021.. 600
4. The Claimant filed his claim against the Decedent’s estate on February 29, 2022 (the “Claim”).. 600
5. More than three months and 15 days have elapsed since the first publication of notice to creditors and the Personal Representative has neithe 600
6. The Claimant is filing this petition on April 4, 2022, a date that is less than 30 days after the expiration of the Personal Representative’s deadli 600
Appendix 11 - VERIFIED COMPLAINT AGAINST NONPROBATE TRANSFEREES. 602
Appendix 11 Complaint Against Nonprobate Transferees.pdf. 602
STATE OF INDIANA. 602
1. Boss, the grand champion hog owned by Joby Schmo (the “Deceased Transferor”), entered the Plaintiff’s field and consumed $10,000 worth c 602
2. The Deceased Transferor died intestate on November 31, 2021.. 602
3. The Schmo Circuit Court appointed Billy Bob Schmo to serve as the Decedent’s Personal Representative and the Clerk issued Letters of Adm 602
4. The Publisher’s Affidavit of the Schmo County Gazette states that it published the first notice to creditors on December 17, 2021.. 603
5. Plaintiff filed his claim to recover $10,000 in damages against the Decedent’s estate (the “Claim”) on February 29, 2022.. 603
6. More than three months and 15 days have elapsed since the first publication of notice to creditors and the Personal Representative has neithe 603
7. Plaintiff filed a Petition to Set Claim for Trial in the Schmo Circuit Court on April 4, 2022, a date that was less than 30 days after the expiration 603
8. Plaintiff delivered a Written Demand for Proceedings Against Nonprobate Transferees under Ind. Code § 32-17-13-7 to each of the Personal F 603
9. The Schmo Circuit Court entered a judgment allowing the Claim on November 31, 2022 (the “Claim Allowance Judgment”) and finding that the 603
10. The Personal Representative has failed to commence proceedings against the Defendants, so Plaintiff is entitled to commence proceedings i 603
11. Plaintiff holds an allowed claim by the Claim Allowance Judgment in the amount of $10,000.00, and Plaintiff is entitled to judgment against th 603
PowerPoint - INDIANA REAL AND PERSONAL PROPERTY TITLE PASSAGE AND CREDITORS’ RIGHTS. 605
PART 1. INTRODUCTION. 606
PART 2. CREDITORS’ CLAIMS IN “PROBATE ESTATES”. 609
PART 3 – CLAIMS AGAINST NONPROBATE TRANSFEREES. 634
Section-4-Jeffery-D-Stinson. 640
Section 4 - Jeffery D. Stinson. 640
Section 4 Table of Contents. 642
I. What is Elder Law?. 644
II. Most Common Public Benefits Programs. 645
A. Medicaid. 645

1. Income Eligibility Rules.. 646
2. Resource Eligibility Rules for Single Individuals and Married Couples.. 649
3. Special Resource Eligibility Rules Where One Spouse is Institutionalized or Receiving Waiver Services and the Other Lives at Home.. 651
4. Planning for Future Medicaid Eligibility, When and If Needed.. 652
5. Planning for Immediate Medicaid Eligibility Using Exempt Assets.. 666
B. VA Pension Benefits. 666
1. The Three Elements of VA Pension Eligibility.. 667
A. Basic Eligibility Test.. 667
B. Disability Test.. 669
C. Financial Need Test.. 671
D. Determining the Amount of Benefit.. 675
E. Planning for VA Benefits. 675
C. Medicare. 677
D. Supplemental Security Income (SSI). 677
E. Temporary Assistance for Needy Families (“TANF”). 678
F. Federal Assisted Housing. 678
G. SNAP Benefits. 678
Appendix A - (Qualified Income Trust-State Template). 679
Appendix B - (Qualified Income Trust). 682
Appendix C - (Public Benefits Planning Authority for Power of Attorney). 689
Appendix D - (Public Benefits Planning Authority for Trustee). 696
Appendix E. 700
PowerPoint - EVERYTHING AN ESTATE PLANNER NEEDS TO KNOW ABOUT ELDER LAW IN 60 MINUTES. 701
About Jeffery D. Stinson, CELA. 702
AGENDA. 704
MEDICAID. 706
VA PENSION. 709
SUPPLEMENTAL SECURITY INCOME (SSI). 711
OTHER NEEDS-BASED PUBLIC BENEFITS PROGRAMS. 712
PLANNING OPTIONS. 714
EXEMPT PLANNING EXAMPLE. 715
TRANSFER PLANNING EXAMPLE. 721
MEDICAID DISCOUNT EXAMPLE. 727
VA PENSION EXAMPLE. 734
HELP YOUR CLIENT AVOID FUTURE TRANSFER ISSUES. 738
MEDICAID TRANSFER LENS. 739
VA TRANSFER RULES. 741
POTENTIAL TRANSFER PROBLEMS WITH PROMISSORY NOTES. 743
POTENTIAL TRANSFER PROBLEMS WITH LAND SALE CONTRACTS. 744
POTENTIAL TRANSFER PROBLEMS. 745
POTENTIAL TRANSFER PROBLEMS WITH ANNUITIES. 746
KNOW WHAT A MILLER TRUST IS AND WHAT IT DOES AND DOES NOT DO. 747
KNOW WHAT ABOUT MEDICAID ESTATE RECOVERY AND THOSE EXPENSES INCLUDED. 748
KNOW THE IMPORTANCE OF SPECIAL NEEDS TRUSTS IN ESTATE PLANING. 749
ENSURE YOUR CLIENT'S ESTATE PLAN HAS WHAT IT NEEDS FOR PUBLIC BENEFITS PLANNING. 751
GUARDIANSHIP AUTHORITY. 752
HELP YOUR CLIENT PREPARE FOR FUTURE MEDICAID ELIGIBILITY. 753
Key Takeaways. 754
Section-5-Gina-M-Giacone. 757
Section 5 - Gina-M. Giacone. 757

GIFT PLANNING WITH IU IS AN INVALUABLE ASSET

Left to right:

MATTHEW K. TREADWELL, JD
Gift Planning Attorney
Gift Planning Services
mktreadw@iu.edu
812-856-3003

CORINNE L. MOYNIHAN
Gift Planning Associate
Gift Planning Services
clmoynih@iu.edu
812-856-4512

BRIAN D. YELEY, JD
Associate Vice President
Gift Planning Services
byeley@indiana.edu
812- 856-1013

JENNIFER L. DILL-MCGILL, JD
Gift Planning Attorney
Gift Planning Services
jdillmcg@iu.edu
812-855-0588

CARRIE J. FLATT
Senior Administrative Assistant
Gift Planning Services
carflatt@iu.edu
812-856-4197

AILEEN E. WENZEL, JD
Gift Planning Attorney
Gift Planning Services
aiwenzel@iu.edu
812-855-3388

CONTACT THE IUF OFFICE OF GIFT PLANNING SERVICES TO:

- Discuss the advantages of documenting your clients' estate planning intentions in a gift agreement—the best way to ensure that IU can fulfill your clients' wishes
- Subscribe to and read past issues of *Options*, the IUF charitable estate planning newsletter
- Receive complimentary detailed projections for life income gifts such as charitable gift annuities and charitable remainder trusts, charitable life estates, and charitable lead trusts

Please note it is not necessary that you share the name of your client to discuss gift planning options with us.

Let the IU Foundation Office of Gift Planning Services help you meet your clients' philanthropic and gift planning needs for the support of Indiana University's campuses, schools, and programs.

For more information, visit **iufoundation.planmylegacy.org**.

INDIANA UNIVERSITY
FOUNDATION

Showalter House / P.O. Box 500 / Bloomington, IN 47402
800-558-8311 or 812-856-4237 / giftplan@indiana.edu / iufoundation.iu.edu

ICLEF®
INDIANA CONTINUING LEGAL EDUCATION FORUM

ICLEF Electronic Publications

Feature Release 4.1
August 2020

To get the most out of your *ICLEF Electronic Publication,* download this material to your PC and use Adobe Acrobat® to open the document. The most current version of the Adobe® software may be found and installed by clicking on one of the following links for either the free Adobe Acrobat Reader® or the full retail version of Adobe Acrobat®.

Feature list:

1. **Searchable** – All ICLEF Electronic Publications are word searchable. To begin your search, click on the "spyglass" icon at the top of the page while using the Adobe® software.
1. **Bookmarks** – Once the publication is opened using the Adobe Acrobat® software a list of bookmarks will be found in a column located on the left side of the page. Click on a bookmark to advance to that place in the document.
2. **Hypertext Links** – All of the hypertext links provided by our authors are active in the document. Simply click on them to navigate to the information.
3. **Book Index** – We are adding an INDEX at the beginning of each of our publications. The INDEX provides "jump links" to the portion of the publication you wish to review. Simply left click on a topic / listing within the INDEX page(s) to go to that topic within the materials. To return to the INDEX page either select the "INDEX" bookmark from the top left column or right-click with the mouse within the publication and select the words "*Previous View*" to return to the spot within the INDEX page where you began your search.

Please feel free to contact ICLEF with additional suggestions on ways we may further improve our electronic publications. Thank you.

Indiana Continuing Legal Education Forum (ICLEF)
230 East Ohio Street, Suite 300
Indianapolis, Indiana 46204
Ph: 317-637-9102 // Fax: 317-633-8780 // email: iclef@iclef.org
URL: https://iclef.org

ICLEF®
INDIANA CONTINUING LEGAL EDUCATION FORUM

49TH ANNUAL

MW

MIDWEST ESTATE, TAX & BUSINESS PLANNING INSTITUTE™

2022

June 9 - 10, 2022

ICLEF would like to thank the Indiana University Foundation
with offices in Bloomington & Indianapolis,
for their continued support of the Midwest Institute for 2022.

WWW.ICLEF.ORG

Copyright 2022 by Indiana Continuing Legal Education Forum

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.

The Indiana Continuing Legal Education Forum and contributing authors hereby disclaim any and all responsibility or liability, which may be asserted or claimed arising from or claimed to have arisen from reliance upon the procedures and information or utilization of the forms set forth in this manual, by the attorney or non-attorney.

Attendance of ICLEF presentations does not qualify a registrant as an expert or specialist in any discipline of the practice of law. The ICLEF logo is a registered trademark and use of the trademark without ICLEF's express written permission is prohibited. ICLEF does not certify its registrants as specialists or expert practitioners of law. ICLEF is an equal opportunity provider of continuing legal education that does not discriminate on the basis of gender, race, age, creed, handicap, color or national origin. ICLEF reserves the right to refuse to admit any person or to eject any person, whose conduct is perceived to be physically or emotionally threatening, disruptive or disrespectful of ICLEF registrants, faculty or staff.

INDIANA CONTINUING LEGAL EDUCATION FORUM

OFFICERS

TERESA L. TODD
President

LYNNETTE GRAY
Vice President

HON. ANDREW R. BLOCH
Secretary

SARAH L. BLAKE
Treasurer

ALAN M. HUX
Appointed Member

LINDA K. MEIER
Appointed Member

DIRECTORS

James H. Austen
Sarah L. Blake
Hon. Andrew R. Bloch
Melanie M. Dunajeski
Lynnette Gray
Alan M. Hux
Dr. Michael J. Jenuwine
Shaunda Lynch
Thomas A. Massey
Linda K. Meier
Whittley Pike
Richard S. Pitts
Jeffrey P. Smith
Teresa L. Todd

ICLEF

SCOTT E. KING
Executive Director

James R. Whitesell
Senior Program Director

Jeffrey A. Lawson
Program Director

49TH ANNUAL MIDWEST ESTATE TAX
& BUSINESS PLANNING INSTITUTE ™

INDIANA CONTINUING LEGAL EDUCATION FORUM

Agenda – Day 1

8:30 A.M. Registration & Coffee

8:50 A.M. Welcome & Introduction
- *MaryEllen K. Bishop & Jeffrey B. Kolb,* Institute Co-Chairs

9:00 A.M. Recent Developments of Interest to Estate Planners
- *Turney P. Berry & Charles A. Redd*

10:00 A.M. Coffee Break

10:15 A.M. Recent Developments of Interest to Estate Planners (continued)
- *Turney P. Berry & Charles A. Redd*

11:15 A.M. Ethical Considerations for Estate Planners
- *Jeffrey B. Kolb*

12:15 P.M. Lunch Break

1:15 P.M. Creditors' Claim Enforcement Against Decedents' Property
- *Jeff R. Hawkins*

2:15 P.M. Coffee Break

2:25 P.M. Everything an Estate Planner Needs to Know About Elder Law in 60-minutes
- *Jeffery D. Stinson*

3:25 P.M. Coffee Break

3:25 P.M. Charitable Giving for High-Net-Worth Clients
- *Gina M. Giacone*

4:35 P.M. Adjournment

June 9 - 10, 2022

49TH ANNUAL MIDWEST ESTATE TAX
& BUSINESS PLANNING INSTITUTE ™

ICLEF®
INDIANA CONTINUING LEGAL EDUCATION FORUM

Agenda – Day 2

8:40 A.M. **Welcome & Introduction**
- *MaryEllen K. Bishop & Jeffrey B. Kolb,* Institute Co-Chairs

8:45 A.M. Estate Planning for Retirement Benefits Under IRS' SECURE Act Regulations
- *Robert K. Kirkland*

10:15 A.M. Coffee Break

10:30 A.M. Current issues in Federal and State taxation, including The IRS doesn't think a K-1 is enough. Will you be required to file the 39-page K-2 and K-3 with your partnership or S Corp return?
- *Richard L. Bartholomew*

11:30 A.M. Legislative & Case Law Update
- *MaryEllen K. Bishop*

12:15 P.M. Lunch Break

1:15 P.M. Getting Acquainted With (and Using) Indiana's Uniform Trust Decanting Act
- *Jeffrey S. Dible*

2:15 P.M. Coffee Break

2:25 P.M. Covering Your Client's S (Corporation)
- *Professor Samuel A. Donaldson*

3:25 P.M. Coffee Break

3:35 P.M. The Estate Planner's Guide to the Federal Income Taxation of Partnerships and LLCs
- *Professor Samuel A. Donaldson*

4:35 P.M. Adjournment

June 9 - 10, 2022

WWW.ICLEF.ORG

49TH ANNUAL MIDWEST ESTATE TAX & BUSINESS PLANNING INSTITUTE ™

ICLEF
INDIANA CONTINUING LEGAL EDUCATION FORUM

Faculty

Ms. MaryEllen K. Bishop - Co-Chair
Cohen Garelick & Glazier
8888 Keystone Crossing Boulevard, Suite 800
Indianapolis, IN 46240
ph: (317) 573-8888
e-mail: marybishop@cgglawfirm.com

Mr. Jeffrey B. Kolb - Co-Chair
Kolb Roellgen & Traylor LLP
801 Busseron Street, P.O. Box 215
Vincennes, IN 47591
ph: (812) 882-2280
e-mail: kolb@emisonlaw.com

Day 1 – June 9

Mr. Turney P. Berry
Wyatt, Tarrant & Combs, LLP
400 West Market Street, Suite 2000
Louisville, KY 40202-3227
ph: (502) 562-7505
e-mail: tberry@wyattfirm.com

Ms. Gina M. Giacone
Ice Miller LLP
One American Square, Suite 2900
Indianapolis, IN 46282-0200
ph: (317) 236-5829
e-mail: gina.giacone@icemiller.com

Mr. Jeff R. Hawkins
Hawkins Elder Law
999 North Section Street
P.O. Box 382
Sullivan, IN 47882-0382
ph: (812) 268-8777
e-mail: jeff@hawkinselderlaw.com

Mr. Charles A. "Clary" Redd
Stinson LLP
7700 Forsyth Boulevard, Suite 1100
St. Louis, MO 63105
ph: (314) 259-4534
e-mail: charles.redd@stinson.com

Mr. Jeffery D. Stinson
Stinson Law Firm, LLC
1980 East 116th Street, Suite 125
Carmel, IN 46032
ph: (317) 622-8181
e-mail: jstinson@stinsonelderlaw.com

Day 2 - June 10

Mr. Richard L. Bartholomew
Girardot, Strauch & Co.
316 Main Street
P.O. Box 1497
Lafayette, IN 47902-1497
ph: (765) 423-5313
e-mail: richard@gsc-cpa.com

Mr. Jeffrey S. Dible
Frost Brown Todd LLC
201 North Illinois Street, Suite 1900
P.O. Box 44961
Indianapolis, IN 46244-0961
ph: (317) 237-3811
e-mail: jdible@fbtlaw.com

Professor Samuel A. Donaldson
Georgia State University, College of Law
85 Park Place NE, Room 306
Atlanta, GA 30303
ph: (404) 413-9190
e-mail: sdonaldson@gsu.edu

Mr. Robert K. Kirkland
Kirkland Woods & Martinsen LLP
132 Westwoods Drive
Liberty, MO 64068
ph: (816) 792-8300
e-mail: bkirkland@kwm-law.com

June 9 - 10, 2022

MaryEllen K. Bishop, Institute Co-Chair, 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

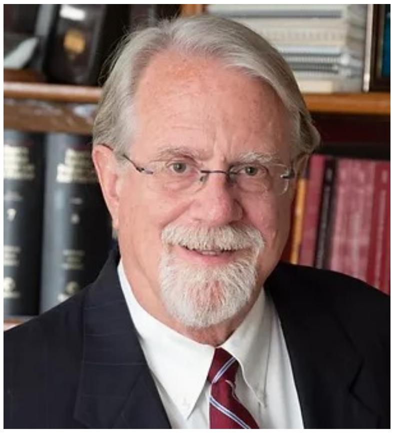
- Fellow of the American College of Trust & Estate Council (ACTEC)
- Board of Trustees, Indiana University
- Indiana Super Lawyer in Practice Area of Estate Planning/Trusts
- Best Lawyers in America in Practice Area of Estates and Trusts and Trust and Estate Litigation
- Best in Client Satisfaction Wealth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

MaryEllen K. Bishop
Cohen Garelick & Glazier
8888 Keystone Crossing Boulevard, Suite 800
Indianapolis, IN 46240
ph: (317) 573-8888
e-mail: marybishop@cgglawfirm.com

Jeffrey B. Kolb, Institute Co-Chair, Kolb Roellgen & Traylor LLP, Vincennes



Jeff Kolb graduated from Indiana University-Bloomington in 1973 and from its school of law in 1976 which is the year he joined the law firm.

Jeff is Board Certified Indiana Trust and Estate Lawyer by the Trust and Estate Specialty Board and supervises the firm's estate planning and estate administration practice. Jeff also does considerable work in elder law, oil and gas, coal, estate litigation, property, and business entities. Jeff practices in Indiana and Illinois.

Jeff has served on the Probate Trust and Real Property Section council since 1979. In 1981, he began a quarterly newsletter for the Section which he still edits today. In 1986-1987, he chaired the Section. In 1991, Jeff wrote the Indiana Power of Attorney Act. From 1996, to the present, he chaired the Probate Review Committee, which is responsible for almost all legislation during that period of time related to trusts and estates. He served on the Indiana State Bar Association Board of Managers and the Unauthorized Practice of Law Committee. He was president of the Indiana Bar Foundation from 2000 to 2002 and has been a Foundation fellow and Master fellow since 1988. He also served on the Board of Directors of the Indiana Continuing Legal Education Foundations. In 2012, he was instrumental in the repeal of all Indiana Death Taxes. In 2019, he wrote the Indiana Legacy Trust Act.

From 1988 to the present, he has been a member of the American College of Trust and Estate Council. From 1990 to the present, he has been a member of the National Academy of Elder Law Attorneys. He has served in the Volunteer Lawyer Program of Southwestern Indiana from 1999 to the present. In 1980 to 1982 he was appointed to the Probate Code Study Commission by Governor Bowen. He became a Board Certified Indiana Trust and Estate Lawyer in 2006 when he drafted the first test to certify lawyers in that specialty. In 2019, he wad reappointed to the Probate Code Study Commission by Governor Holcomb.

Jeff received numerous awards and recognitions for his legal work. In 1980, he received a Citation of Merit from the Indiana State Bar Association for an article written for its magazine "Res Gestae." In 1995, he received the ISBA award for the Probate Newsletter. From 2000 to present, he has been in Who's Who in American Law. From 2001 to the present, he has been in Best Lawyers in America. In 2015, he was selected by Best Lawyers as Lawyer of the Year in Indiana for estates, trusts and planning. In

2004, he received the Probate Trust and Real Property Section Lifetime Service Award of which he is the only recipient. From 2005 to present, he has been selected as a Super Lawyer by the Indianapolis monthly magazine and was in the Top 10 lawyers in Indiana in 2008 and the Top 50 lawyers in Indiana in 2007, and 2009 to 2013. In 2006, he was selected to the Hall of Fame by the General Practice Section of the Indiana State Bar Association. From 2009, he received a Presidential Citation for his work on the Unauthorized Practice of Law from the Indiana State Bar Association. In 2015, Jeff received the Top Lawyer in Indiana Trusts and Estates. In 2019, Jeff received the Sagamore of the Wabash which is Indiana's highest civil award.

Jeff has served on the YMCA Board of Directors since 1993 and was President from 1999 to 2001. From 1993 to 2010, he was a member of the Vincennes Education Foundation. He served on the Board of Directors from 1994 to 2010 and was President from 1998 to 1999. From 1998 to the present, he has served on the Knox County Community Foundation and on the Board of Directors from 1998 to 2002 and 2008 to the present. In 2000, he served as president. From 1989 to the present, he served on the Board of Directors of the Lincoln High School Academic Society. From 1988 to the present he served on the Wabash Valley Estate Planning Council, being a founding member and first president. In 1986, he was appointed and later reelected to the Vincennes Community School Corporation School Board where he served until 1997. He was president in 1989, 1991, and 1996. He served on the Knox County United Way as president in 1989 and the Vincennes Civitan Club where he was president in 1980. He also served on Old Town Players, Inc., Old Northwest Corporation and Fort Knox II Committee, an Ad Hoc Committee of the Indiana Historical Society. He is a founding member and first president of the Old Northwest Running Club in 1979.

He is married to Deborah with whom he recently celebrated their 47th anniversary. His three children; Justin, Joanna, and John, live in St. Paul, Minnesota; Pelham Manor, New York; and San Francisco, California respectively.

Kolb Roellgen & Traylor LLP
801 Busseron Street
P.O. Box 215
Vincennes, IN 47591
ph: (812) 882-2280
fax: (812) 885-2308
e-mail: kolb@emisonlaw.com

Richard L. Bartholomew, Girardot, Strauch & Co., Lafayette

Richard L. Bartholomew graduated from Indiana University with a BS in Business in 1978 and a JD from Indiana University School of Law in 1981. He joined the firm in 1991 and became a shareholder in 1996. His specialty areas include all areas of tax, estate planning, mergers, acquisitions and spin-off tax consulting, succession planning, continuing education presenter to the AICPA Federal Tax Conference, Indiana Continuing Legal Education Seminars, Annual Tax Symposiums in Minnesota, North Carolina, Ohio and North Dakota and Bisk Continuing Education DVD's distributed nationwide.

Richard has been actively involved in various organizations in the Lafayette community including Community Foundation of Greater Lafayette, Lafayette Rotary Club Foundation, Indiana CPA Society Litigation Services, Westminister Village Foundation, Lafayette Rotary Club,and East Tipp Summer Rec.

Richard has many interests outside of the firm including woodworking (he built all of the cabinets in his house as well as various pieces of furniture), snow skiing, fishing, golf, creating Power Point presentations for weddings and birthdays, drawing and playing with his dog, Zoe.

Richard L. Bartholomew
Girardot, Strauch & Co.
316 Main Street
P.O. Box 1497
Lafayette, IN 47902-1497
ph: (765) 423-5313
e-mail: richard@gsc-cpa.com

Turney P. Berry, Partner, Wyatt, Tarrant & Combs, LLP, Louisville

Turney Berry is the leader of the Firm's Trusts, Estates & Personal Planning Service Team, he also serves on the Firm's Executive Committee. He concentrates his practice in the areas of estate and business planning, estate and trust administration, and charitable giving and tax-exempt organizations.

Professional Activities and Memberships:

- American College of Trust and Estate Counsel Past Regent
- Past President, ACTEC Foundation
- Member and Past Chair, Charitable and Tax Exempt Organizations Committee; Member and Vice Chair, Estate and Gift Tax Committee; State Laws Committee
- State Chair for Kentucky

National Conference of Commissioners on Uniform State Laws:

- Member, Probate Code Revisions (2008); Principal and Income Act Update (2008); Real Property Transfer on Death Act (2009); Insurable Interests Amendment to the Uniform Trust Code (2010); Premarital and Marital Agreements (2012); Drafting Committee on Trust Decanting (2013); Chair, Drafting Committee on Revised Principal and Income Act (in progress); Chair, Power of Appointment Act (in progress); Chair, Study Committee on Trust Protectors (in progress); Vice-Chair, Drafting Committee on Divided Trusteeship (in progress)

Member, Advisory Council of the Heckerling Institute on Estate Planning:

- Trustee, Southern Federal Tax Institute
- Fellow, American College of Tax Counsel
- American Bar Association (Taxation and Real Property, Probate & Trust Law Sections) Vice Chair, Charitable Planning

Member, National Association of Estate Planners and Councils

Member, Joint Editorial Board for Trusts and Estates

Member, Advisory Board of Trusts and Estates Monthly

Co-Chair, Midwest/Midsouth Estate Planning Seminar (University of Kentucky)

Adjunct Professor, Vanderbilt University School of Law:

- Estate Planning and Drafting Seminar
- Representing the Family Business, Tax and Non-Tax Aspects
- Estate, Gift and Generation-Skipping Transfer Tax

Adjunct Professor, University of Louisville Brandeis School of Law:

- Estate Planning and Drafting (Non-Tax)

Adjunct Professor, University of Missouri School of Law:

- Representing the Family Business

Legal Advisory Subcommittee, Council on Foundations

Former Articles Editor, The Tax Lawyer

National Committee on Planned Giving (Kentucky Chapter)

Louisville Estate Planning Council

Associate Member, American Association of Life Underwriters

Louisville Bar Association (Sections of Estate Planning and Probate and Taxation)

Kentucky Bar Association (Probate Section)

Turney P. Berry
Wyatt, Tarrant & Combs, LLP
PNC Plaza
500 West Jefferson Street, Suite 2800
Louisville, KY 40202
ph: (502) 562-7505
fax: (502) 589-0309
e-mail: tberry@wyattfirm.com

Jeffrey S. Dible

Jeffrey S. "Jeff D" Dible has been practicing law since October 1979 and, for more than 36 years, has concentrated his practice in the areas of trust and estate administration, estate planning, related litigation, taxation, and business succession planning. He is a Fellow of the American College of Trust and Estate Counsel (ACTEC) and served as ACTEC's Indiana State Chair from March 2015 through January of 2020. Jeff Dible has frequently represented and advised the individual or corporate trustees of trusts. He often works on a consulting basis for lawyers and law firms in Indiana and other jurisdictions with respect to Indiana trust and estate law or federal gift and estate tax matters.

Jeff has frequently testified before legislative committees of the Indiana General Assembly regarding trust and estate law reform legislation and (in 2011 and 2012) inheritance tax repeal. In 2017 and early 2018, he was the chairperson of an ISBA Task Force that drafted the "electronic wills, trusts and POAs" legislation, which the General Assembly enacted in 2018 as P.L. 40-2018 (House Enrolled Act 1303). He also participated extensively in the drafting of 2021 Indiana legislation enacted to update signing and witnessing requirements for wills (House Enrolled Act 1255) and to overhaul Indiana's health care advance directive statutes (Senate Enrolled Act 204), and he testified in favor of both bills before their passage.

Jeffrey S. Dible
(317) 237-3811
jdible@fbtlaw.com

Professor Samuel A. Donaldson, Georgia State University, College of Law, Atlanta, GA

Professor Samuel A. Donaldson, Georgia State University, College of Law, Atlanta, Georgia

Education:

- LL.M., University of Florida College of Law
- J.D. Magna Cum Laude, University of Arizona College of Law
- B.A. with Highest Honors, Oregon State University

Biography:
Before joining the Georgia State Law faculty in 2012, Samuel A. Donaldson, professor of law was at the University of Washington School of Law for 13 years. During his tenure at the University of Washington, he was a five-time recipient of the Philip A. Trautman Professor of the Year award from the law school's Student Bar Association. He served for two years as an associate dean for academic administration and six years as the director of the law school's graduate program in taxation.

Donaldson teaches a number of tax and estate planning courses, as well as courses in the areas of property, commercial law and professional responsibility.

Donaldson is an academic fellow of the American College of Trust and Estate Counsel and a member of the Bar in Washington, Oregon, and Arizona. Among his scholarly works, Donaldson is a co-author of the popular West casebook, Federal Income Tax: A Contemporary Approach, and a co-author of the Price on Contemporary Estate Planning treatise published by Wolters Kluwer.

He has served as the Harry R. Horrow Visiting Professor of International Law at Northwestern University and a visiting assistant professor at the University of Florida Levin College of Law.

Donaldson, an amateur crossword constructor's puzzles have been published in The New York Times, The Los Angeles Times, The Washington Post, The Wall Street Journal and other outlets.

Professor Samuel A. Donaldson
Georgia State University, College of Law
85 Park Place NE, Room 306
Atlanta, GA 30303
ph: (404) 413-9190
e-mail: sdonaldson@gsu.edu

Gina M. Giacone, Ice Miller LLP, Indianapolis

Joined Ice Miller in 1995. Partner since 2004. Focuses on corporate, governance and tax issues for tax-exempt entities and gift, estate and trust taxation, estate planning, estate and trust administration and charitable giving.

Ms. Giacone regularly works with tax-exempt entities on corporate governance and federal tax matters, advanced planned giving and endowment management. Ms. Giacone advises colleges and universities on issues relating to unrelated business income tax (UBIT), sponsorship agreements, the use of affiliated entities (e.g., taxable subsidiaries, foundations and other tax-exempt subsidiaries), general corporate and tax-exempt compliance, grant agreements and donor intent and charitable contributions.

In her work with private foundations and donors, Ms. Giacone assists clients in developing philanthropic priorities, making and documenting charitable grants, assessing various vehicles for accomplishing their charitable purposes (e.g., direct grants, private foundations and donor advised funds) and advising with respect to the excise taxes applicable to private foundations and donors and how to structure transactions in an effort to avoid these taxes. Ms. Giacone advises private foundations and other grantmaking charities regarding social impact investments, sophisticated grants and program-related investments.

Ms. Giacone advises health care organizations regarding Form 990 compliance, physician compensation, joint ventures, UBIT, governance and structuring issues and the community benefit standard and Code Section 501(r) compliance. Ms. Giacone advises hospitals regarding permissible structures available for the use of restricted proceeds arising from the sale of hospital assets and all other aspects of the transfer, including maintenance of donor intent.

Ms. Giacone also advises tax-exempt entities with respect to Form 990, reasonableness of executive compensation (including the application of the intermediate sanctions regulations), navigating conflicts of interest, UBIT, corporate and tax structuring issues and all aspects of operations beginning with entity formation.

In addition to her work with tax-exempt organizations, Ms. Giacone also advised individuals on a wide range of issues involving federal estate, gift and generation skipping tax planning, preservation of wealth and charitable planning.

Ice Miller LLP
One American Square, Suite 2900
Indianapolis, IN 46282-0200
ph: (317) 236-5829
e-mail: gina.giacone@icemiller.com

Jeff R. Hawkins
Hawkins Elder Law
999 N. Section St.
PO Box 382
Sullivan, IN 47882-0382
Phone: 812-268-8777
Fax: 812-268-8838
Email: jeff@hawkinselderlaw.com
Website URL: www.hawkinselderlaw.com

Jeff and his wife, Jennifer Hawkins, have been law partners since their 1992 Indiana Bar admission. After an initial eight-year partnership in the former Greene County law firm of Rowe & Hawkins, the couple moved their practice to establish a Sullivan County elder law, trusts, and estates law firm known as Hawkins Elder Law in Sullivan, Indiana. Central and Southern Indiana clients engage the firm for asset protection planning, estate and trust administration, Medicaid eligibility for nursing home care, business startups, and business succession planning in West Central and Southwest Indiana. Jeff expanded the firm's practice region to East Central Illinois and Southeast Illinois after his 2012 Illinois Bar admission.

The **Indiana State Bar Association** (InSBA) elected Jeff to serve as one of its three elected executive officers in 2012, and he served as the InSBA's President during the Association's 2014-15 operating year. His other InSBA leadership roles have included service on the InSBA Board of Governors for 10 years; Past Chair of the House of Delegates; Past Chair of the Probate, Trust & Real Property Section; Past Chair of the Professional Legal Education, Admission, & Development Section (PLEADS); Past Chair of the Young Lawyers Section; and active participation on many committees and task forces.

Jeff was an inaugural member of the InSBA's Elder Law Section, and he is a member of the Illinois State Bar Association (ILSBA) Elder Law Section. He serves as a member of the Government Political Action Committee of the Indiana Chapter of the **National Academy of Elder Law Attorneys** (NAELA) and is a member of the **Illinois** NAELA Chapter.

Trust and estate law is a big part of Jeff's practice. The **Trust & Estate Specialty Board** (TESB) certified Jeff as a Board Certified Indiana Trust & Estate Lawyer in 2007. He was later appointed as a member of TESB, and then he served as the TESB's 2011-13 Co-Chair. The **American College of Trust and Estate Counsel** (ACTEC) elected him as a Fellow in 2011. Jeff was the InSBA's Probate, Trust & Real Property Section's 2009-10 Chair, and he still contributes as author and editor of multiple legislative proposals each year on the Section's Probate Review and Real Estate Review Committees. He is also a member of the **Illinois State Bar Association** (ILSBA) Real Estate Law Section and Trusts & Estates Section. In 2021, Lexis-Nexis Matthew Bender engaged Jeff as a co-author of *Henry's Indiana Probate Law and Practice*, an Indiana treatise and forms manual for Indiana probate law. Jeff has accepted engagements as a consulting expert in contested trusts and estates. He is is also a frequent faculty member for continuing legal education programs on elder law, trusts, and estates sponsored by the InSBA and the Indiana Continuing Legal Education Forum (ICLEF).

Jeff received a Bachelor of Science degree in Business Administration from the **Indiana University Kelley School of Business** with a corporate finance concentration in 1988. He focused his law school studies on corporations, partnerships, business startups, banking, securities, and taxes at the **University of Louisville Louis D. Brandeis School of Law**, from which he received his Juris Doctor degree in 1992. He is also a member of the InSBA Business Law Section and the ILSBA's Business Advice & Financial Planning Section.

Jeff and Jen sing in the *a cappella* worship-leading quartet of the Westside Church of Christ in Sullivan, Indiana. Jeff and one of his lifelong friends have shared preaching, teaching, and other pastoral roles as Westside's elders for almost two decades.

Although he would be one of the last possible invitees on earth to join the PGA or any music hall of hame, Jeff enjoys a friendly round of golf and torturing his more musically talented wife and friends with his guitar and banjo. He and Jen enjoy cooking and sharing their culinary creations on their back porch while all kinds of Southern Indiana wildlife play in their backyard and the woods surrounding their home.

Robert K. Kirkland, Managing Partner, Kirkland Woods & Martinsen LLP, Liberty, MO

Bob Kirkland is Managing Partner of the law firm of Kirkland Woods & Martinsen LLP, which has offices in Liberty, Missouri, Springfield, Missouri and Overland Park, Kansas. He is licensed to practice law in Missouri and Kansas. He works with a variety of individual clients, handling the preparation of Wills, Living Trusts, Durable Powers of Attorney, Irrevocable Trusts, Charitable Trusts and Minorâ€™s Trusts, and counseling clients in the areas of gifting techniques, asset protection, charitable planning and business succession planning. He also advises fiduciaries in estate, conservatorship and trust administration matters.

Mr. Kirkland is a Fellow of the American College of Trust and Estate Counsel ("ACTEC"), is a past Missouri State Chair of ACTEC, and a past member of the ACTEC Board of Regents and ACTEC Executive Committee. He is also a member of the Employee Benefits Committee, Sponsorship Advisory Committee (Chair), Digital Property Task Force, Membership Selection Committee, Long Range Planning Committee, and Communications Committee of ACTEC. He is listed in the last twenty (20) editions of The Best Lawyers in America and the most recent additions of Super Lawyers. Mr. Kirkland has successfully completed the Effective Probate Mediation Training course sponsored by ACTEC, and frequently serves as a mediator of trust and estate disputes.

Bob also served as the ACTEC Observer to the Uniform Law Commission Drafting Committee on Fiduciary Access to Digital Assets, is serving as the ACTEC Observer to the Uniform Law Commission Drafting Committee on Electronic Wills.

Among several professional and civic activities, Mr. Kirkland serves as a Vice Chair of the Missouri Bar Probate and Trust Committee, and a member of the editorial board of Trusts and Estates magazine.

Mr. Kirkland is a frequent author and lecturer in the estate planning and charitable giving areas. He has lectured on a variety of topics at seminars sponsored by ACTEC, The Heckerling Institute, ALI-CLE, Society of Trust and Estate Practitioners, The Missouri Bar, The Kansas Bar Association, The Oklahoma Bar Association, the Hawaii Tax Institute, the Southern Federal Tax Institute, the Notre Dame Estate Planning Institute, the Duke University Estate Planning Conference, the Florida Fellows Institute, the UCLA Institute on Estate Planning, The MO-KAN Trust Conference, the American Heart Association, and the Estate Planning Councils of Greenville, New York City, Baltimore, Louisville, Philadelphia and St. Louis.

Mr. Kirkland holds a B.S. in accounting from William Jewell College (1980), a J.D. from the University of Missouri-Kansas City School of Law (1983), and an L.L.M. in estate planning from the University of Miami, Florida School of Law (1985). During his tenure at the UMKC School of Law, he served as Managing Editor of the UMKC Law Review.

Robert K. Kirkland
Kirkland Woods & Martinsen LLP
132 Westwoods Drive
Liberty, MO 64068
ph: (816) 792-8300
fax: (816) 792-3337
e-mail: bkirkland@kwm-law.com

Charles A. (Clary) Redd, Partner, Stinson LLP, St Louis, MO

Charles A. Redd is a partner in the St. Louis, Missouri, office of the law firm of Stinson LLP. Mr. Redd concentrates his practice in estate planning, estate and trust administration and estate and trust-related litigation. Prior to joining Stinson, Mr. Redd was a partner in and Vice Chairman of the Trusts & Estates Practice Group at the law firm of SNR Denton US LLP (now Dentons US LLP). Mr. Redd was also previously a partner in the law firm of Armstrong, Teasdale, Schlafly & Davis (now Armstrong Teasdale LLP) and was Chairman of that firm's Trusts & Estates Department. He was previously employed as a Trust Administrator by First Wisconsin Trust Company (now U.S. Bank, N.A.), Milwaukee, Wisconsin, and as an Assistant Counsel by Centerre Trust Company of St. Louis (now Bank of America Private Bank).

Mr. Redd has extensive experience and expertise in: (a) the drafting of wills, trust instruments, durable powers of attorney, marital agreements and other estate planning documents; (b) pre- and post-death tax planning for individuals, trusts and estates; (c) preparation and filing of estate tax returns, gift tax returns and fiduciary income tax returns; (d) representation and filing of estate tax returns, gift tax returns and fiduciary income tax returns; (e) representation of individual and corporate fiduciaries and (f) litigation in the Probate Division and other equity divisions of the Circuit Court. Mr. Redd has worked on estates and estate planning projects, some involving assets valued at over a billion dollars, and has successfully handled numerous estate tax, gift tax and generation-skipping transfer tax matters, will and trust construction cases, will contests, contests of trust agreements, alleged breach of fiduciary duty cases and other types of cases involving estates and trusts.

Mr. Redd is a member of the State Bar of Wisconsin, The Missouri Bar, the Illinois State Bar Association, The Bar Association of Metropolitan St. Louis and the Estate Planning Council of St. Louis.

Mr. Redd was Chairman of the Missouri Bar's Health Care Durable Power of Attorney Subcommittee, and he played a significant role in the drafting and enactment of the Missouri Durable Power of Attorney for Health Care Act. In 1991, Mr. Redd received The Missouri Bar President's Award.Mr. Redd was the principal draftsman of the recently enacted Missouri Family Trust Company Act.

Mr. Redd is an elected member of The American Law Institute and a Fellow of The American College of Trust and Estate Counsel (Past Missouri State Chair; Past Regent;

Past Chair of Communications Committee; Estate and Gift Tax Committee; and Fiduciary Litigation Committee). He was an adjunct professor of law (Estate Planning) at Northwestern University School of Law for fifteen years. He serves as Co-Chair of the Editorial Advisory Board of, and writes a regular column in, Trusts & Estates magazine. In 2018, he was inducted into the Estate Planning Hall of Fame® by the National Association of Estate Planners and Councils. Mr. Redd is listed in The Best Lawyers in America and is “Band 1” ranked by Chambers and Partners in their High Net Worth guide. He frequently writes and lectures nationally on topics in the trusts and estates field.

Charles A. “Clary” Redd
Stinson LLP
7700 Forsyth Boulevard, Suite 1100
St. Louis, MO 63105
ph: (314) 259-4534
fax: (314) 259-3952
e-mail: charles.redd@stinson.com

Since 1998, Jeffery Stinson has worked in the areas of elder law and special needs law. When he passed the bar in 2002, he focused his practice on elder law, estate planning, long term care planning, Medicaid planning, Veteran's Affairs benefits planning, special needs planning, guardianships, and estate administration and has maintained that focus throughout his career.

Jeff is a 1998 graduate of Indiana University-Purdue University Indianapolis where he received his Bachelor of Science degree in Criminal Justice with Highest Distinction. Jeff graduated from the Indiana University School of Law-Indianapolis in 2002. He is a member of the National Academy of Elder Law Attorneys (NAELA) and the Indiana State Bar Association. He is a Past President of the Indiana Chapter of NAELA and past Chair of the Elder Law Section of the Indiana State Bar Association. Jeff was named Outstanding Member of the Indiana Chapter of the National Academy of Elder Law Attorneys in 2010. Jeff has also been Certified as an Elder Law Attorney (CELA) by the National Elder Law Foundation, a distinction held by only a handful of lawyers in Indiana. In 2010, 2011, 2012, 2013, 2014, 2015, and 2016, Jeff was named as one of the State's "Rising Stars" in *Super Lawyer* magazine. In 2018, 2019, 2020, 2021, and 2022, Jeff was named as one of the State's "Super Lawyers" in *Super Lawyer* magazine. Jeff enjoys educating both clients and the public at large regarding issues effecting the elderly and disabled and speaks regularly. He is a frequent speaker at the Indiana Continuing Legal Education Forum's annual *Elder Law Institute* and has also presented multiple other continuing legal education courses.

He and his wife, Jennifer, have two children, Josie and Jonah.

Table of Contents

Section One

Notable Developments of Interest to Estate Planners............Turney P. Berry Charles A. Redd

PART 1 – 2017 TAX ACT IS STILL WITH US..1

A. Effective Date and Sunset..1

B. New Basic Exclusion Amounts for Estate and Gift Taxes and New Generation-Skipping Transfer Exemption and Clawback 1

C. Proposed Anti-Abuse Regulations...3

D. Divorce – Income Tax..6

PART 2 – IS MORE TAX REFORM ON THE WAY? 7

PART 3 – ESTATE PLANNING PRACTICE IN 2018 AND BEYOND..14

I. WHERE WE ARE TODAY 14

A. New Planning Approaches 14

B. Portability Planning...15

II. OBTAINING AND RETAINING BASIS 17

A. Generally 17

B. Swapping Assets with Existing Grantor Trusts 17

C. Should Valuation Discounts Be Undone? 18

D. Powers of Appointment For Basis Purposes..19

PART 4 – FEDERAL RULINGS, CASES AND OTHER DEVELOPMENTS 24

A. INCOME TAX MATTERS...24

1. Consistent Basis Reporting 24

2. Termination of Trust Results In Capital Gains 24

3. Qualified Replacement Property and A Grantor Trust 26

B. CHARITABLE AND TAX-EXEMPT MATTERS - Sections 170, 642, 664, 501, 509, 2055, 2522, and 4940-4947 26

1. Charitable Distributions From Trusts 26

2. Use of Section 501(c)(4) Organizations to Facilitate Business Interest Ownership...................29

3. Estate Income Tax Deduction 31

4. Conservation Easement Controversy..31

5. Granted In Perpetuity and Protected In Perpetuity Requirements 33

6. Protected In Perpetuity; Validity of Regulation 38

7. Savings Clause In Easement Ineffective...62

8. Government Language for Extinguishment Clause...64

9. Pre-Arranged Sales..65

10. Notes Owned By A Private Foundation 69

11. Disqualified Person for Section 4958 Purposes 71

12. Donor Challenge to Charity's Promise..73

13. LLC May Qualify As A Section 501(c)(3) Organization 75

14. Basis of Assets of Former Public Charities for Section 4940 Purposes....................................76

15. No Contemporaneous Written Acknowledgement Inferred From Gift Documents..................76

C. SECTION 408 — IRAs AND RETIREMENT PLANS 78

1. SECURE Act Changes 78
2. Waiver of 2020 Required Minimum Distributions 80
3. Transfer to Inherited IRA Denied 81

D. SECTIONS 671-678 -- GRANTOR TRUST RULES 82

1. Section 678 and a Presently Exercisable General Power of Appointment As A Planning Device 82
2. Grantor Trusts and Spouses 88
3. DING Trusts 88

E. SECTION 1361 – S CORPORATIONS 95

F. SECTIONS 2031 and 2512 – VALUATION 95

1. Valuation of LLCs Holding Leased Property For Gift, Estate, and Charitable Purposes 95
2. Valuation of Image and Likeness 97
3. Validity of Buy-Sell Agreement and Effect of Life Insurance Paid to Company On The Value 100

G. SECTION 2032 — ALTERNATE VALUATION AND SECTION 2032A — SPECIAL USE VALUATION 106

1. New Proposed Alternate Valuation Regulations 106

H. SECTION 2033 – GROSS ESTATE 107

I. SECTIONS 2035-2038 – RETAINED INTERESTS 107

1. Tax Court Strikes A Blow Against Discount Planning 107
2. Application of Section 2043 to Defective FLP Transfer 112

J. SECTIONS 2041 AND 2514 — GENERAL POWERS OF APPOINTMENT 118

K. SECTIONS 61, 83, 409A, 2042 AND 7872 - LIFE INSURANCE 118

1. Analysis of Split Dollar Plan 118

L. SECTION 2053 and 2054 - DEBTS AND ADMINISTRATION EXPENSES 139

M. SECTIONS 2056, 2056A AND 2519- MARITAL DEDUCTION 139

1. Termination of QTIP Trust Creates Double Gifts 139

N. SECTIONS 2501 TO 2524 – GIFTS 147

1. Unusual Assignment Clause Produced A Gift 147
2. Step-Transaction 150

O. SECTION 2518 – DISCLAIMERS 153

P. SECTIONS 2601-2654 - GENERATION-SKIPPING TRANSFER TAX 153

1. Trust Amendment Approved 153

Q. SECTIONS 2701-2704 - SPECIAL VALUATION RULES 155

1. How Might The Doctrine Of Merger Be Used With A GRAT? 155
2. GRAT Inclusion 156
3. GRAT Invalidated 161
4. Valuation of Publicly Traded Stock 163

R. SECTION 6166 — EXTENSION OF TIME TO PAY TAX 168

S. TAX ADMINISTRATION 168

1. Priority Guidance Plan 168
2. No Ruling Positions 171
3. Meaning of Tax Reimbursement Clause 175
4. CBO Publication, Understanding Federal Estate and Gift Taxes 176
5. No Penalties Quite Yet 178
6. Notices Creating "Listed Transactions" Require Notice and Comment 180

T. MISCELLANEOUS 184

PART 4 – STATE DEVELOPMENTS 184

U. STATE DEVELOPMENTS 184

1. Failure to Discuss Basis Planning 184
2. Trust Protector As Fiduciary With A Duty To Whom? 185
3. Declaratory Judgment Action Does Not Trigger No Contest Clause 186
4. No-Contest Clause Applied 190
5. In Terrorem Clause In An Undue Influence Situation 192
6. Effect of No Contest Clause 195
7. Georgia Allows Beneficiaries To Amend Trust To Give Themselves The Power To Remove And Replace Trustees 197
8. Attorney Insurance Policy Does Not Cover Attorney Acting as Trustee 199
9. Trusts Reformed to Avoid Reciprocity 200
10. No "Adoption Out" Under Indiana Trust 200
11. The Ethics of Lawyers Working Remotely 203
12. Decanting 204
13. Entity Transparency 207
14. Exercise of Power of Appointment 207
15. Trust Termination Would Violate Material Purpose (Nebraska) 212
16. Conflicts of Law – Will 213
17. Accepting Will Benefits Precludes Will Contest 215
18. Common-Law Same Sex Marriage Before Same Sex Marriage Allowed 216
19. Non-Participants In Mediation Beware 218
20. Court In One State Applying The Law of Another Is Problematic 219
21. Trust Protector Subject To Indirect Undue Influence 222
22. Attorney-Client Privilege After Client's Death 225
23. Place of Celebration Controls Existence of Marriage 228
24. Power to Appoint to Charity Does Not Create Countable Assets for Medicaid Purposes 229

25. Amount of Wrongful Death Proceeds Included in An Estate 230
26. Oregon Grabs Out of State QTIP for Estate Tax 231
27. Valuation of Two Simultaneous Fractional Gifts 236
28. Effect of Entity Governing Instrument On Testamentary Dispositions 240
29. Even A Small Interest In A Trust Confers Jurisdiction On A Beneficiary 242
30. Letter From 1954 Remains A Fee Agreement 245
31. Receiver Appointed And LLC Assets Liquidated – 10th Circuit 249
32. Where Inheritance Taxes Are To Be Paid From An Insufficient Residue, The Excess Is Apportioned To The Recipients of Assets – Nebraska 252
33. Attorney Has No Duty To Non-Client Prospective Beneficiaries 253
34. Remote Signing Procedures During The Pandemic Not Followed – New York 257
35. A Trust Is Not A Contract For Arbitration Purposes 258
36. Action Against An Attorney-In-Fact May Not Require Production Of The Principal's Will 261
37. Not Simultaneous Deaths 262
38. Interpretation of Situs Clause In Trust 264
39. Power of Appointment Exercised To Unfunded Trust Was Valid 267
40. No Distribution Outright Where Beneficiary Is Married – Upheld (Indiana) 268

APPENDIX A - Biden Administration Greenbook

Section Two

Ethical Considerations..Jeffrey B. Kolb

A. INTRODUCTION 1
B. BACKGROUND..1
C. CONTEXT 1
D. TYPE...2
E. ROLE...3
F. OTHER SOURCES OF ETHICS 3
G. TEN RULES 4

1. IDENTIFY THE CLIENT 4

1.1. PROBLEMS 5

1.1.1. REFERRALS...5
1.1.2. FAMILY 6

1.1.2.1. OPINION 2 OF 2001 6

1.1.3. FIDUCIARY...6

1.1.3.1. OPINION 4 OF 1997 6

1.2. SOLUTIONS 7

2. MONITOR CLIENT'S CAPACITY 8

2.1. RULE 8
2.2. PROBLEM...9
2.3. SOLUTIONS 12

3. CHECK FOR CONFLICTS 14

3.1. RULE 14
3.2. PROBLEMS 14

3.2.1. PRIOR CLIENT...14
3.2.2. NON-CLIENT PAYS 15
3.2.3. REFERRALS...16
3.2.4. MULTIPLE CLIENTS 17
3.2.5. FIDUCIARY..18
3.2.6. LAWYER'S INTEREST 19
3.2.7. LAWYER AS FIDUCIARY..20
3.2.8. OTHER 22

3.2.9. REPRESENTING CLIENT AS FIDUCIARY AND BENEFICIARY 22

3.3. SOLUTIONS 23

4. LIMITED REPRESENTATION 24

4.1. RULE 24
4.2. PROBLEMS 24
4.3. SOLUTIONS 25

5. DETERMINE FEE 26

5.1. RULE 27
5.2. PROBLEMS 27
5.3. SOLUTIONS 29

6. PRESERVE CLIENT'S CONFIDENTIAL INFORMATION 29

6.1. RULE 29
6.2. PROBLEMS 31

6.2.1. REFERRALS 31
6.2.2. MULTIPLE CLIENTS 31
6.2.3. DECEDENT'S FILE 31

6.3. SOLUTIONS 32

7. COMMUNICATE WITH CLIENT 32

7.1. RULE 32
7.2. PROBLEMS 32
7.3. SOLUTIONS 33

8. BE DILIGENT 33

8.1. RULE 33
8.2. PROBLEMS 33
8.3. SOLUTIONS 37

9. DO NOT LIE 37

9.1. RULE 37
9.2. PROBLEMS 37

9.2.1. MEDICAID – OPINION 2 FOR 2003 39

9.3. SOLUTIONS 39

10. SAFEGUARD CLIENT'S PROPERTY 39

10.1. RULE 39
10.2. PROBLEMS 40
10.3. SOLUTION 41

11. MISCELLANEOUS ISSUES 41

11.1. ADVERTISING 41
11.2. FEE SPLITTING 42
11.3. CONTEMPT 42
11.4. PARALEGAL 43
11.5. SEX 44
11.6. SUBSTANCE ABUSE 44
11.7. RESPECT 45
11.8. CONTACT WITH AN ADVERSE PARTY 46

12. CONCLUSION 47

Section Three

Creditors' Claim Enforcement Against Decedents' Property..Jeff R. Hawkins

Part 1. Introduction 1

1.1. Purpose.. 1

1.2. Threshold Questions About a Decedent's Assets 1

1.3. Two Major Channels Passing Decedents' Assets 2

Part 2. Creditors' Claims in Decedents' "Probate Estates" 2

2.1. Probate Terminology Matters – What is a Decedent's "Estate?" 2

2.2. Decedents' Probate Property Title Passage 3

2.2.1. Immediate Title Passage 3

2.2.2. Title Passage to Distributees 4

2.2.3. Testate Estate Title Passage Questions Concerning the Probate Estate's Suspended Existence 4

2.2.4. Wills Must Be Admitted to Probate.. 4

2.2.5. Race to the Courthouse to Resolve the Probate Estate's Suspended Existence 6

2.3. Personal Representative's Power of Possession 7

2.3.1. Personal Representative's Interception of Title Passage 7

2.3.2. Personal Representative's Distribution Deed Distractions 8

2.3.3. Refocusing on Intestate and Testate Title Passage 9

2.3.4. Intestate Title Passage – a Family Thing 9

2.3.5. Testate Title Passage – Decedent's Will Admitted to Probate 9

2.4. Personal Representative's Administration of a Decedent's Probate Estate....................... 10

2.4.1. Personal Representative's Appointment.. 10

2.4.2. Personal Representative's Fiduciary Duty to Distributees and Creditors.................... 10

2.4.3. Personal Representative's Management of a Decedent's Probate Estate 11

2.5. Creditors' Claims Against a Decedent's Probate Estate.. 12

2.5.1. Governmental Claims 12

2.5.2. Family and Social Services Administration's Estate Recovery Against a Deceased Medicaid Recipient's Probate Estate 12

2.5.3. Nongovernmental Claims Against a Decedent's Probate Estate 13

2.6. Secured Claims Against a Decedent's Encumbered Property 14
2.7. Requirements for a Claim Against a Decedent's Probate Estate 14
2.8. Claim Collection Priorities for a Decedent's Probate Estate 15
2.9. Creditors' Claims Against a Decedent's Probate Real Property. 17
2.9.1. Brief History Lesson on Personalty Versus Realty 17
2.9.2. Creditors' Interception of Probate Real Property Title passage 17
2.9.3. Overview of Procedural Functions of IC 29-1-7-15.1 17
2.9.4. The 5-Month & 7-Month Rules Governing a Personal Representative's Sale of a Decedent's Real Property Under IC 29-1-7-15.1(b) 18
2.10. Procedural Strategies for Distributees' Protection of Probate Assets Against Claims.... 20
2.10.1. Strategy 1: Skip Probate Administration 20
2.10.2. Strategy 2: Petition for Administration More Than 5 Months After Decedent's Death – No Claims Filed 21
2.10.3. Strategy 3: Petition for Administration More Than 5 Months After Decedent's Death – Late Claims Filed 21
2.10.4. Strategy 4: Pursue Real Property Under IC 29-1- 7-23(b)-(d) and (Temporarily) Abandon Low-Value Personal Property 22
2.10.5. Strategy 5: Seek appointment of a Personal Representative to Scrutinize Claim Merits 24
Part 3. Claims Against Nonprobate Transferees 26
3.1. Procedural Policy for Claims Against Nonprobate Transferees 26
3.2. Nonprobate Transfer Definitions 27
3.3. Party Definitions and Liability of Nonprobate Transferees 28
3.4. Apportionment of Nonprobate Transferees' Liability to the Probate Estate 29
3.5. Abatement of Beneficiaries' Trust Interests by Nonprobate Transfer Claims 29
3.6. Instrument's Apportionment Provisions Concerning Nonprobate Transferees' Liability. 29
3.7. Forum of Proceedings to Enforce Claims Against Nonprobate Transferees 30
3.8. Claims Concerning Deceased Transferors Dying Before July 1, 2018 30
3.9. Medicaid Estate Recovery Claim Deadline Exemption 30
3.10. Medicaid Estate Recovery Exemptions of Nonprobate Transfers Established Before April 30, 2002, and Assets Determined by FSSA to be Exempt or Unavailable Before April 30, 2002 31
3.11. Claims Concerning Assets Transferred Through Nonprobate Transfers Concerning Deceased Transferors Dying After June 30, 2018 32
3.11.1. Deadline to File and Serve a Claim Against a Deceased Transferor's Probate Estate 32

3.11.2. Deadline to File and Serve a Written Demand 32

3.11.3. Written Demand Contents 33

3.11.4. Requirement of a Claimant's Diligent Probate Estate Claim Prosecution 34

3.11.5. Direct Claimant Action If Personal Representative Declines or Fails to Act 35

3.11.6. Statutory Exoneration for a Personal Representative's Declination or Failure to Act 35

3.11.7. Protection of Secured Creditors' Interests 36

3.11.8. Deadline for Filing and Serving the Written Demand 36

3.11.9. Deadline for Commencement of Proceedings Against Nonprobate Transferees Concerning Deceased Transferors Dying That June 30, 2018 36

3.11.10. Statutory Exoneration of Obligors and Trustees for Transfers to Non probate Transferees 37

3.11.11. Obligations, Rights, and Priorities of Successful Personal Representatives and Claimants 37

3.12. Counter-Punching as an Asset Protection Strategy Against Nonprobate Claims 38

3.12.1. Avoid Filing a Petition for Administration Within 5 Months After the Deceased Transferor's Death 38

3.12.2. Seeking Appointment as Personal Representative 39

3.12.3. Personal Representative's Duty to Scrutinize Claim Merits 39

3.12.4. Personal Representative's Role as the Claim Procedures Enforcer 39

3.12.5. Claim Settlement Negotiations 40

3.12.6. Pursue Asset Values in Claim Enforcement Sales 40

Part 4. CONCLUSION 41

Section Four

Elder Law for the Estate Planner.................................Jeffery D. Stinson

What is Elder Law 1

Most Common Public Benefits Programs..2

Medicaid 2

VA Pension Benefits...23

Medicare 34

Supplemental Security Income 34

Temporary Assistance for Needy Families ("TANF") 35

Federal Assisted Housing 35

SNAP Benefits..35

Appendix A (Qualified Income Trust-State Template)...36

Appendix B (Qualified Income Trust) 39

Appendix C (Public Benefits Planning Authority for Power of Attorney).................46

Appendix D (Public Benefits Planning Authority for Trustee) 53

Appendix E (Medicaid Authorized Representative form) 57

Section Five

Charitable Giving for
High-Net Worth Clients……………………………………….. Gina M. Giacone

Section Six

The Secure ("Setting Every Community Up for Retirement Enhancement" or "Sending Everyone Cowering Under Reduced Expectations") Act and Other Recent Developments in Estate Planning for Retirement Assets...Robert K. Kirkland

I. Introduction...1

II. Designation of Individuals as Beneficiaries of Qualified Plans/IRAs............................3

III. Leaving Retirement Assets to Trusts...28

IV. Estate Planning in Light of The Secure Act...48

V. Miscellaneous Provisions from The Secure Act Proposed Regulations..........................51

VI. Creditor Access to Inherited IRAs...52

VII. IRA Owners/Retirement Plan Administrators Behaving Badly 57

VIII. Naming Charity(s) as Beneficiary of the IRA 62

IX. Lifetime Gifts of Qualified Retirement Benefits to Charity 71

Section Seven

Current Issues in Federal & State Tax
K-2 and K-3.. Richard L. Bartholomew

PowerPoint Presentation

Section Eight

Legislation and Current Cases in Estates, Trusts and Guardianships..........................MaryEllen K. Bishop

Legislative Update for 2022...1

Senate Enrolled Act 66 – Solvent Supervised Estates..1

Senate Enrolled Act 67 – Small Estates...1

Senate Enrolled Act 193 – Probate Code Study Commission..1

Senate Enrolled Act 149 – Marion Superior Court...1

Senate Enrolled Act 131 – Implements the Uniform Electronic Legal Material Act......1

House Enrolled Act 1208 – Various Probate and Trust Matters 1

House Enrolled Act 1205 – Uniform Trust Decanting Act and Trustee Duties 2

Case Law Update for 2021-2022 3

Probate 3

Deadman's Statute – LLC Ownership – Summary Judgment.............................3

Gift or Loan – Statute of Frauds – Part Performance – Unjust Enrichment........3

Spouse – Competency to Marry..5

Guardianship Cases...5

Guardianship – Venue – Sufficiency of Evidence – Appellate Fees...................6

Guardianship – Defacto custodians 7

Wrongful Death Cases 8

Wrongful Death – Death of Defendant – Dismissal – Substitution.....................8

Wrongful Death – Grandson – Personal Representative of Father's Estate – Right to Pursue...9

Power of Attorney Cases 10

Power of Attorney – Accounting – Burden of Proof..10

Trust Cases 11

Beneficiary – Identification – Reasonable Certainty – "Others" 11

Restraint on Marriage – Not Applicable to Trusts 11

Section Nine

Getting Acquainted With (and Using) Indiana's Uniform Trust Decanting Act..............................Jeffrey S. Dible

(1) Overview of House Enrolled Act 1205 (P.L. 161-2022): One new provision in I.C. 30-4-3 *and* enactment of the Uniform Trust Decanting Act.......1

(2) CRUCIAL practice pointer: Time to use the "old" decanting statute § 30-4-3-36 before its June 30th repeal is quickly running out.......2

(3) Trusts that are subject to the new Indiana trust decanting Act.......3

(4) Gaps in and shortcomings of old section 30-4-3-36.......3

(5) New specifically defined terms in the new Decanting Act.......4

(6) Decanting requirements, rules and procedures under old § 30-4-3-36 that are continued (but usually in more detail) under the new Act.......7

(7) Requirements for the "pre-decanting notice" and the "record of exercise" of the decanting power under the Indiana Act.......9

(8) Differences between "second trust" modifications that are possible with "expanded distributive discretion" vs. "limited distributive discretion".......11

(9) Changes (compared to the first trust) that are possible under the Act with respect to the interest of a "beneficiary with a disability".......13

(10) Protecting "charitable interests" under the first trust when the decanting power is exercised.......16

(11) Tax-driven restrictions on decanting under section 49 of the new Act.......17

(12) A potpourri of miscellaneous rules in the Indiana UTDA.......19

Appendix 1: The "old" decanting statute, I.C. § 39-4-3-36, being repealed after June 30, 2022.......22

Appendix 2: The text of I.C. 30-4-10, the new Indiana Uniform Trust Decanting Act, effective July 1, 2022.......24

Section Ten

Covering Your Client's S (Corporation)……. Professor Samuel A. Donaldson

I. S Corporation Eligibility Requirements……2

A. Number of Shareholders……3

B. Types of Shareholders……5

1. No Nonresident Aliens……5

2. No Entity Shareholders……7

3. Trusts as Shareholders……8

C. Single Class of Stock Requirement……12

D. Election……14

1. Mechanics……14

2. Reasons Not to Elect Subchapter S Status……16

3. S Elections by Partnerships……19

4. Termination of S Election……20

E. Qualified Subchapter S Subsidiaries……21

II. Pass-Thru Rules……23

A. Pass-Thru of Tax Items and Shareholder's Share……23

1. Pass-Thru Items……23

2. Shareholder's Share……25

3. Limitation on Pass-Thru of Losses……27

B. Basis Adjustments Under IRC §1367……29

1. Stock Basis……29

2. Debt Basis……31

C. Worldly S Corporations 31

1. LIFO Recapture 33

2. Tax on Built-in Gains Under §1374....................33

3. Tax on Excess Net Passive Income Under §1375 35

4. Death Penalty Under §1362....................37

III. Distribution Rules....................37

A. Pure S Corporations....................38

B. Worldly S Corporations....................39

IV. Other Income Tax Rules for S Corporations 43

A. At-Risk Rules....................43

B. Two-Percent Shareholder-Employees 44

V. Tax Planning Strategies for S Corporations....................45

A. Recapitalize Shares Into Voting and Nonvoting Classes....................45

B. The Employment Tax Loophole for Single-Shareholder S Corporations 46

C. Leverage the Purchase of Additional Shares 47

D. S Corporations as Partners of Family Limited Partnerships....................48

E. Turn Your Head and Cough: A Checkup for the Buy-Sell Agreement..............50

VI. Other Income Tax Issues Involving S Corporations....................51

A. Open Account Debt....................51

B. Transfers of Built-in Gain Property to NIMCRUTs....................52

C. Valuation of S Corporation Shares 53

D. ESBT Deduction for Interest Paid on Loan Used to Buy S Corporation Stock ..54

E. Filing Bankruptcy Does Not Terminate S Election....................54

F. Can Grantor Trusts with *Crummey* Powers Hold S Corporation Stock?............55

G. Custodial IRAs as Shareholders......56

Section Eleven

The Estate Planner's Guide to the Income Taxation of Partnerships and Limited Liability Companies................................ Professor Samuel A. Donaldson

I. Formation of the Partnership 2

A. Investment Company Partnerships [§721(b)] 2

1. Gain Recognition 2

2. Planning to Avoid §721(b)..3

B. Contributions of Encumbered Property [§752]........................5

C. Use of the Cash Method..6

II. Operation of the Partnership 7

A. Income and Deduction Allocations..7

1. Generally..7

2. Special Rule for family Partnerships [§704(e)(2)]........................8

3. The Peril of Restricting and Distributions 9

B. Distributions..9

C. Gift Transfers of Partnership Interests..10

1. Giving the Gift of Basis 10

2. Transferring Interests Where Debt Exceeds Basis........................11

D. Death of a Partner 12

1. Close of Taxable Year 12

2. Adjustment to Basis 12

III. Liquidation of the FLP..13

A. Asset Sale and Final Distributions..14

B. In-Kind Distributions to Partners..14

1. Section 704(c)(1)(B) Built-in-Gain........15

2. Section 737 Gain Recognition to Contributing Partner........16

3. Section 731(c)Treatment of Marketable Securities as Cash........17

4. Ordering Rules........20

5. Thoughts on the Ordering Rules........32

IV. Conclusion........32

Section
One

NOTABLE DEVELOPMENTS OF INTEREST TO ESTATE PLANNERS

Turney P. Berry
WYATT, TARRANT & COMBS, LLP
400 West Market Street, Suite 2000
Louisville, Kentucky 40202-3227
502.562-7505 – Direct Dial
tberry@wyattfirm.com

Disclaimer: This information is intended as a resource for attorneys, fiduciaries, and wealth management professionals, but it does not constitute legal advice and reliance thereon does not establish an attorney-client relationship. This information is not a substitute for an attorney's judgment and application of the relevant law to a client's circumstances.

The author thanks Charles A. Redd for his contribution to these materials. Mistakes are the author's own.

The ethical rules of the Kentucky Bar may require identification of this information as advertising material.
THIS IS AN ADVERTISEMENT.

Copyright 2022 Turney P. Berry

Section One

Notable Developments of Interest to Estate Planners...........Turney P. Berry Charles A. Redd

PART 1 – 2017 TAX ACT IS STILL WITH US... 1

A. Effective Date and Sunset... 1
B. New Basic Exclusion Amounts for Estate and Gift Taxes and New Generation-Skipping Transfer Exemption and Clawback.. 1
C. Proposed Anti-Abuse Regulations.. 3
D. Divorce – Income Tax.. 6

PART 2 – IS MORE TAX REFORM ON THE WAY?.. 7

PART 3 – ESTATE PLANNING PRACTICE IN 2018 AND BEYOND.. 14

I. WHERE WE ARE TODAY... 14

A. New Planning Approaches.. 14
B. Portability Planning.. 15

II. OBTAINING AND RETAINING BASIS.. 17

A. Generally.. 17
B. Swapping Assets with Existing Grantor Trusts.. 17
C. Should Valuation Discounts Be Undone?... 18
D. Powers of Appointment For Basis Purposes... 19

PART 4 – FEDERAL RULINGS, CASES AND OTHER DEVELOPMENTS... 24

A. INCOME TAX MATTERS.. 24

1. Consistent Basis Reporting.. 24
2. Termination of Trust Results In Capital Gains... 24
3. Qualified Replacement Property and A Grantor Trust... 26

B. CHARITABLE AND TAX-EXEMPT MATTERS - Sections 170, 642, 664, 501, 509, 2055, 2522, and 4940-4947... 26

1. Charitable Distributions From Trusts... 26
2. Use of Section 501(c)(4) Organizations to Facilitate Business Interest Ownership................ 29
3. Estate Income Tax Deduction.. 31
4. Conservation Easement Controversy.. 31
5. Granted In Perpetuity and Protected In Perpetuity Requirements................................. 33
6. Protected In Perpetuity; Validity of Regulation.. 38
7. Savings Clause In Easement Ineffective... 62
8. Government Language for Extinguishment Clause.. 64
9. Pre-Arranged Sales... 65
10. Notes Owned By A Private Foundation.. 69
11. Disqualified Person for Section 4958 Purposes.. 71
12. Donor Challenge to Charity's Promise.. 73
13. LLC May Qualify As A Section 501(c)(3) Organization.. 75
14. Basis of Assets of Former Public Charities for Section 4940 Purposes........................ 76
15. No Contemporaneous Written Acknowledgement Inferred From Gift Documents.............. 76

C. SECTION 408 — IRAs AND RETIREMENT PLANS 78

1. SECURE Act Changes 78
2. Waiver of 2020 Required Minimum Distributions 80
3. Transfer to Inherited IRA Denied 81

D. SECTIONS 671-678 -- GRANTOR TRUST RULES 82

1. Section 678 and a Presently Exercisable General Power of Appointment As A Planning Device 82
2. Grantor Trusts and Spouses 88
3. DING Trusts 88

E. SECTION 1361 – S CORPORATIONS 95

F. SECTIONS 2031 and 2512 – VALUATION 95

1. Valuation of LLCs Holding Leased Property For Gift, Estate, and Charitable Purposes 95
2. Valuation of Image and Likeness 97
3. Validity of Buy-Sell Agreement and Effect of Life Insurance Paid to Company On The Value 100

G. SECTION 2032 — ALTERNATE VALUATION AND SECTION 2032A — SPECIAL USE VALUATION 106

1. New Proposed Alternate Valuation Regulations 106

H. SECTION 2033 – GROSS ESTATE 107

I. SECTIONS 2035-2038 – RETAINED INTERESTS 107

1. Tax Court Strikes A Blow Against Discount Planning 107
2. Application of Section 2043 to Defective FLP Transfer 112

J. SECTIONS 2041 AND 2514 — GENERAL POWERS OF APPOINTMENT 118

K. SECTIONS 61, 83, 409A, 2042 AND 7872 - LIFE INSURANCE 118

1. Analysis of Split Dollar Plan 118

L. SECTION 2053 and 2054 - DEBTS AND ADMINISTRATION EXPENSES 139

M. SECTIONS 2056, 2056A AND 2519- MARITAL DEDUCTION 139

1. Termination of QTIP Trust Creates Double Gifts 139

N. SECTIONS 2501 TO 2524 – GIFTS 147

1. Unusual Assignment Clause Produced A Gift 147
2. Step-Transaction 150

O. SECTION 2518 – DISCLAIMERS 153

P. SECTIONS 2601-2654 - GENERATION-SKIPPING TRANSFER TAX 153

1. Trust Amendment Approved 153

Q. SECTIONS 2701-2704 - SPECIAL VALUATION RULES 155

1. How Might The Doctrine Of Merger Be Used With A GRAT? 155
2. GRAT Inclusion 156
3. GRAT Invalidated 161
4. Valuation of Publicly Traded Stock 163

R. SECTION 6166 — EXTENSION OF TIME TO PAY TAX 168

S. TAX ADMINISTRATION 168

1. Priority Guidance Plan 168
2. No Ruling Positions 171
3. Meaning of Tax Reimbursement Clause 175
4. CBO Publication, Understanding Federal Estate and Gift Taxes 176
5. No Penalties Quite Yet 178
6. Notices Creating "Listed Transactions" Require Notice and Comment 180

T. MISCELLANEOUS 184

PART 4 – STATE DEVELOPMENTS 184

U. STATE DEVELOPMENTS 184

1. Failure to Discuss Basis Planning 184
2. Trust Protector As Fiduciary With A Duty To Whom? 185
3. Declaratory Judgment Action Does Not Trigger No Contest Clause 186
4. No-Contest Clause Applied 190
5. In Terrorem Clause In An Undue Influence Situation 192
6. Effect of No Contest Clause 195
7. Georgia Allows Beneficiaries To Amend Trust To Give Themselves The Power To Remove And Replace Trustees 197
8. Attorney Insurance Policy Does Not Cover Attorney Acting as Trustee 199
9. Trusts Reformed to Avoid Reciprocity 200
10. No "Adoption Out" Under Indiana Trust 200
11. The Ethics of Lawyers Working Remotely 203
12. Decanting 204
13. Entity Transparency 207
14. Exercise of Power of Appointment 207
15. Trust Termination Would Violate Material Purpose (Nebraska) 212
16. Conflicts of Law – Will 213
17. Accepting Will Benefits Precludes Will Contest 215
18. Common-Law Same Sex Marriage Before Same Sex Marriage Allowed 216
19. Non-Participants In Mediation Beware 218
20. Court In One State Applying The Law of Another Is Problematic 219
21. Trust Protector Subject To Indirect Undue Influence 222
22. Attorney-Client Privilege After Client's Death 225
23. Place of Celebration Controls Existence of Marriage 228
24. Power to Appoint to Charity Does Not Create Countable Assets for Medicaid Purposes 229

25. Amount of Wrongful Death Proceeds Included in An Estate 230
26. Oregon Grabs Out of State QTIP for Estate Tax...231
27. Valuation of Two Simultaneous Fractional Gifts...236
28. Effect of Entity Governing Instrument On Testamentary Dispositions.................................240
29. Even A Small Interest In A Trust Confers Jurisdiction On A Beneficiary............................242
30. Letter From 1954 Remains A Fee Agreement...245
31. Receiver Appointed And LLC Assets Liquidated – 10th Circuit...249
32. Where Inheritance Taxes Are To Be Paid From An Insufficient Residue, The Excess Is Apportioned To The Recipients of Assets – Nebraska..252
33. Attorney Has No Duty To Non-Client Prospective Beneficiaries..253
34. Remote Signing Procedures During The Pandemic Not Followed – New York....................257
35. A Trust Is Not A Contract For Arbitration Purposes..258
36. Action Against An Attorney-In-Fact May Not Require Production Of The Principal's Will...261
37. Not Simultaneous Deaths..262
38. Interpretation of Situs Clause In Trust...264
39. Power of Appointment Exercised To Unfunded Trust Was Valid 267
40. No Distribution Outright Where Beneficiary Is Married – Upheld (Indiana) 268

APPENDIX A - Biden Administration Greenbook

NOTABLE DEVELOPMENTS OF INTEREST TO ESTATE PLANNERS

PART 1 – 2017 TAX ACT IS STILL WITH US

On December 22, 2017 was enacted "An Act To Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018," Pub. L. No. 115-97, ("2017 Tax Act"). The 2017 Tax Act makes significant income tax changes, the effects of which will not really be understood for some time, particularly after regulations are issued. The major transfer tax change is the doubling of the wealth transfer exclusion.

A. Effective Date and Sunset

Most provisions in the 2017 Tax Act became effective January 1, 2018. Except with respect to the change in the calculation of inflation adjustments, many of the changes to business taxes and other changes, discussed below, many of the provisions of the 2017 Tax Act will sunset on January 1, 2026 and the law in effect on December 31, 2017 will become effective again, unless legislation is enacted altering this sunset.

B. New Basic Exclusion Amounts for Estate and Gift Taxes and New Generation-Skipping Transfer Exemption and Clawback

For estate and gift tax purposes, the 2017 Tax Act increased the basic exclusion amount under section 2010(c)(3) to $10 million as adjusted for inflation with a 2010 base year (the same base year as under prior law). Thus, the basic exclusion amount for 2022 for gift and estate tax purposes, and the generation-skipping transfer ("GST") exemption amount under section 2631(c), is $12,060,000. Under the current applicable exclusion amount, the number of decedent's estates subject to federal estate tax may only reach a few thousand, and taxpayers have the ability to make larger gifts during their lives free of gift tax. Just as important, taxpayers with less than the exclusion amount may transfer assets among themselves in order to include assets in the estate of a taxpayer most likely to die soonest. This creates enormous basis planning opportunities.

On November 26, 2019, final clawback regulations were issued (§20.2010-1(c)). T.D. 9884. In a nutshell, the regulations take the positions that (1) donors who paid gift tax on gifts prior to 2017 in excess of the original basic exclusion amount can make up to $5 million of gifts in 2018-2025 which will be protected from tax by the additional basic exclusion amount and (2) donors who die after 2025 and who made gifts in 2018-2025 that were protected from gift tax by the additional basic exclusion amount will be able to preserve the additional basic exclusion amount used against those gifts when their estate taxes are determined. So there is no "clawback" but in order to preserve the additional basic exclusion amount, a gift will have to be made. In other words, a donor who makes only a $5 million gifts before 2025 and dies after 2025 will not benefit from the additional exclusion.

Suppose the first spouse dies before 2026 and portability is elected. The surviving spouse may use the full unused exclusion amount of the first spouse, even after January 1, 2026. Examples 3 and 4 of the final regulations state:

> (iii) Example 3. Individual B's predeceased spouse, C, died before 2026, at a time when the basic exclusion amount was $11.4 million. C had made no taxable gifts and had no taxable estate. C's executor elected, pursuant to §20.2010-2, to allow B to take into account C's $11.4 million DSUE amount. B made no taxable gifts and did not remarry. The basic exclusion amount on B's date of death is $6.8 million. Because the total of the amounts allowable as a credit in computing the gift tax payable on B's post-1976 gifts attributable to the basic exclusion amount (zero) is less than the credit based on the basic exclusion amount allowable on B's date of death, this paragraph (c) does not apply. The credit to be applied for purposes of computing B's estate tax is based on B's $18.2 million applicable exclusion amount, consisting of the $6.8 million basic exclusion amount on B's date of death plus the $11.4 million DSUE amount, subject to the limitation of section 2010(d).
>
> (iv) Example 4. Assume the facts are the same as in Example 3 of paragraph (c)(2)(iii) of this section except that, after C's death and before 2026, B makes taxable gifts of $14 million in a year when the basic exclusion amount is $12 million. B is considered to apply the DSUE amount to the gifts before applying B's basic exclusion amount. The amount allowable as a credit in computing the gift tax payable on B's post-1976 gifts for that year ($5,545,800) is the tax on $14 million, consisting of $11.4 million in DSUE amount and $2.6 million in basic exclusion amount. This basic exclusion amount is 18.6 percent of the $14 million exclusion amount allocable to those gifts, with the result that $1,031,519 (0.186 x $5,545,800) of the amount allowable as a credit for that year in computing gift tax payable is based solely on the basic exclusion amount. The amount allowable as a credit based solely on the basic exclusion amount for purposes of computing B's estate tax ($2,665,800) is the tax on the $6.8 million basic exclusion amount on B's date of death. Because the portion of the credit allowable in computing the gift tax payable on B's post-1976 gifts based solely on the basic exclusion amount ($1,031,519) is less than the credit based solely on the basic exclusion amount ($2,665,800) allowable on B's date of death, this paragraph (c) does not apply. The credit to be applied for purposes of computing B's estate tax is based on B's $18.2 million applicable exclusion amount, consisting of the $6.8 million basic exclusion amount on B's date of death plus the $11.4 million DSUE amount, subject to the limitation of section 2010(d).

The Preamble also has a “warning” styled an Anti-abuse Rule which states:

> 6. Anti-abuse Rule
>
> A commenter recommended consideration of an anti-abuse provision to prevent the application of the special rule to transfers made during the increased BEA period that are not true inter vivos transfers, but rather are treated as testamentary transfers for transfer tax purposes. Examples include transfers subject to a retained life estate or other retained powers or interests, and certain transfers within the purview of chapter 14 of subtitle B of the Code. The purpose of the special rule is to ensure that bona fide inter vivos transfers are not subject to inconsistent treatment for estate tax purposes. Arguably, the possibility of inconsistent treatment does not arise with regard to transfers that are treated as part of the gross estate for estate tax purposes, rather than as adjusted taxable gifts. An anti-abuse provision could except from the application of the special rule

> transfers where value is included in the donor's gross estate at death. Although the Treasury Department and the IRS agree that such a provision is within the scope of the regulatory authority granted in section 2001(g)(2), such an anti-abuse provision would benefit from prior notice and comment. Accordingly, this issue will be reserved to allow further consideration of this comment.

The 2017 Tax Act did not change the transfer tax rates. The regulations dealing with clawback do not mention GST because, the Preamble states, GST is beyond the scope of the project. However, the Preamble also notes that nothing in the statute indicates that sunset would affect allocation of GST exemption when available.. The Blue Book stated that during 2018-2025 additional GST exemption was available. Presumably Treasury does not believe that exemption disappears once allocated.

Publication 5332 (Rev. 2-2021) showed a decline in the number of estate tax returns form 15,191 in 2010 to 6409 in 2019. The top states with estate tax returns filed were California, Florida, New York, Texas, and Illinois but on a per capita basis Wyoming and the District of Columbia led the field. In 2020 there were 174,026 gift tax returns but 173,511 were non-taxable returns, so 516 were taxable returns.

C. **Proposed Anti-Abuse Regulations**.

Treasury has issued Proposed Regulations dealing with "Abuses" under section 2010. Reg-118913-21. The general theory of the proposed regulations is that if a taxpayer wants to use the "bonus exclusion" – the amount "added" by the 2017 Tax Act – the taxpayer must totally part with the gifted amount. A taxpayer who retains an interest, as in a QPRT or a GRAT, and has the gifted assets added back (as, for instance, happens if the taxpayer dies during the term) will have the original gift washed out under 2001(b) but will only benefit from whatever the exclusion amount is in the taxpayer's year of death. The proposed regulations do not affect trusts in which a spouse has an interest (unless section 2036 applies) but may affect gifts triggered by section 2519. The proposed regulation is short and provides:

> § 20.2010-1 Unified credit against estate tax; in general.
>
> * * * * *
>
> (c) * * *
>
> (3) Exception to the special rule —(i) Transfers to which the special rule does not apply. Except as provided in paragraph (c)(3)(ii) of this section, the special rule of paragraph (c) of this section does not apply to transfers includible in the gross estate, or treated as includible in the gross estate for purposes of section 2001(b), including without limitation the following transfers:
>
> (A) Transfers includible in the gross estate pursuant to section 2035, 2036, 2037, 2038, or 2042, regardless of whether all or any part of the transfer was deductible pursuant to section 2522 or 2523;
>
> (B) Transfers made by enforceable promise to the extent they remain unsatisfied as of the date of death;

> (C) Transfers described in § 25.2701-5(a)(4) or § 25.2702-6(a)(1) of this chapter; and
>
> (D) Transfers that would have been described in paragraph (c)(3)(i)(A), (B), or (C) of this section but for the transfer, relinquishment, or elimination of an interest, power, or property, effectuated within 18 months of the date of the decedent's death by the decedent alone, by the decedent in conjunction with any other person, or by any other person.
>
> (ii) Transfers to which the special rule continues to apply. Notwithstanding paragraph (c)(3)(i) of this section, the special rule of paragraph (c) of this section applies to the following transfers:
>
> (A) Transfers includible in the gross estate in which the value of the taxable portion of the transfer, determined as of the date of the transfer, was 5 percent or less of the total value of the transfer; and
>
> (B) Transfers, relinquishments, or eliminations described in paragraph (c)(3)(i)(D) of this section effectuated by the termination of the durational period described in the original instrument of transfer by either the mere passage of time or the death of any person.

The supplementary Information explains the proposal as follows:

> Section 2001(b) (flush language) excludes from the term "adjusted taxable gifts" gifts that are includible in the gross estate. Section 2701(e)(6) and § 25.2701-5 similarly remove from adjusted taxable gifts transfers includible in the gross estate that previously were subject to the special valuation rules of section 2701. See also § 25.2702-6 (excluding from adjusted taxable gifts certain transfers includible in the gross estate that previously were subject to the special valuation rules of section 2702) and Rev. Rul. 84-25, 1984-1 C.B. 191 (excluding from adjusted taxable gifts completed transfers that will be satisfied with assets includible in the gross estate). In keeping with the statutory distinction between completed gifts that are treated as adjusted taxable gifts and completed gifts that are treated as testamentary transfers, these proposed regulations generally would deny the benefit of the special rule to includible gifts.
>
> Regardless of whether a gift is treated as an adjusted taxable gift or as an includible gift for estate tax purposes, the Code ensures that the gift is treated consistently with respect to the credits allowable in the year in which the gift was made. See discussion of the five statutory steps of the estate tax computation in part III, Federal Estate Tax Computation Generally, in the Background section of the preamble to the notice of proposed rulemaking under section 2010 (REG-106706-18) published in the Federal Register (83 FR 59343) on November 23, 2018. The exclusion from adjusted taxable gifts of transfers includible in the gross estate does not affect the second step of the estate tax computation, the determination of a hypothetical gift tax referred to as the gift tax payable. Gift tax payable is based upon all post-1976 taxable gifts, whether or not included in the gross estate. See sections 2001(b)(2) and (g)(1), requiring the determination of a hypothetical gift tax on all post-1976 taxable gifts, which is a gift tax reduced, but not to below zero, by the credit amounts allowable in the years of the gifts. Both the hypothetical gift tax and the credit amounts are computed using the gift tax rates in effect at the date of death. Thus, for purposes of computing the estate tax, an includible gift receives credit for all credit amounts, including those attributable to the increased BEA, allowable in the years in which the gift was made.

***

The purpose of the special rule is to ensure that bona fide inter vivos transfers of property are consistently treated as a transfer of property by gift for both gift and estate tax purposes. Bona fide inter vivos gifts are subject to the gift tax based on the values, gift tax rates, and exclusions applicable as of the date of the gift. While such a gift is treated as an adjusted taxable gift for purposes of determining the estate tax rate to be applied to the value of the taxable estate, the gift is not includible in the donor's gross estate at death and is not subject to the estate tax. The special rule avoids the imposition of the estate tax on the gift by ensuring that the gifted property is treated solely as an adjusted taxable gift and not also as property includible in the gross estate.

Unlike an adjusted taxable gift, however, a gift of property that is includible in the donor's gross estate is subject to estate tax based on the values, estate tax rates, and exclusions applicable as of the date of death. The Code itself ensures that an includible gift is not treated as both an adjusted taxable gift and an inclusion in the gross estate. See section 2001(b) (flush language), excluding from “adjusted taxable gifts” gifts that are includible in the gross estate. The Code also ensures that an includible gift receives credit for any credit amounts allowable in the years in which the gift was made. See sections 2001(b)(2) and (g)(1). The treatment of an includible gift for estate tax purposes results in the correct outcome without any application of the special rule: The property is included in the gross estate and subject to the BEA in effect at the donor's death.

There is a subset of includible gifts that the Code treats in a different fashion, but still in a way that results in the correct outcome without the application of the special rule. That subset consists of gifts made during an increased BEA period that are essentially testamentary, but the entire value of which is deductible for gift tax purposes by reason of the charitable or marital deduction (or both). Such transfers are excluded from adjusted taxable gifts because they never were taxable gifts in the first place. See section 2503(a), defining taxable gifts as the total amount of gifts made during the calendar year less the deductions provided in sections 2522 and 2523 for charitable and marital gifts, respectively. As a result of the exclusion of charitable and marital gifts from taxable gifts, and thus from adjusted taxable gifts, there would be no credits allocable to these gifts attributable to the BEA in computing gift tax payable within the meaning of section 2001(b)(2). Because no BEA is applicable to the deductible gifts, there will be no difference between the BEA applicable to these gifts attributable to the increased BEA and the BEA applicable to the decedent's estate. As a result, there is no possibility of inconsistent gift and estate taxation of such an includible gift, and thus no need for the application of the special rule.

Without additional rules, however, the application of the special rule to includible gifts results in securing the benefit of the increased BEA in circumstances where the donor continues to have the title, possession, use, benefit, control, or enjoyment of the transferred property during life. In those circumstances, there is no possibility of the inclusion of the gift in adjusted taxable gifts at the death of the donor, and therefore no need for the application of the special rule to transfers of such property. In those circumstances, it is appropriate that the amount includible or treated as includible as part of the gross estate (rather than as an adjusted taxable gift) is subject to estate tax with the benefit of only the BEA available at the date of death. Section 2001(g)(2) directs the Secretary to prescribe such regulations as may be necessary or appropriate to carry out section 2001 with respect to any difference between the BEA applicable at the time of the decedent's death and the BEA applicable with respect to any gifts made by the decedent. Given the plain language of the Code describing the computation of the estate tax

> and directing that certain transfers, including transfers made within three years of death that otherwise would have been includible in the gross estate, are treated as testamentary transfers and not as adjusted taxable gifts, it would be inappropriate to apply the special rule to includible gifts. This is particularly true where the inter vivos transfers are not true bona fide transfers in which the decedent "absolutely, unequivocally, irrevocably, and without possible reservations, parts with all of his title and all of his possession and all of his enjoyment of the transferred property." *Commissioner* v. *Church's Estate,* 335 U.S. 632, 645 (1949). To prevent this inappropriate result, these proposed regulations would create an exception to the special rule applicable to includible gifts.

A number of examples, some confusing, are included. The effect of the proposed regulation is to penalize the middle-rich; those who can afford to make large gifts but not necessarily to sever all connection to the gifted assets.

D. Divorce – Income Tax.

The 2017 Tax Act repealed section 682, which provided that if one spouse created a grantor trust for the benefit of the other spouse and the spouses divorced, thereafter the trust income would not be taxed to the grantor spouse to the extent of any income that the donee-spouse is entitled to receive. These changes are effective for divorce decrees and separation agreements entered into after 2018. Thus, taxpayers seeking a divorce during 2018 will likely benefit if the divorce is finalized before the end of the calendar year. Modifications entered into after 2018 are subject to the 2017 Tax Act if the modification expressly states that this provision of 2017 Tax Act applies. 2017 Tax Act § 11051(c)(2). No sunset applies to the repeal of the above provisions regarding alimony and separate maintenance payments and section 682. The IRS intends to issue regulations regarding the application of section 682 before its repeal is effective. Notice 2018-37. In the Notice, the IRS requested comments on whether guidance is needed regarding the application of sections 672(e)(1)(A), 674(d), and 677 following a divorce or separation in light of the repeal of section 682.

In light of the repeal of section 682, sections 672(e)(1)(A), 674(a) and 677(a) may have the effect of triggering grantor trust status due to the non-grantor spouse's powers over a trust even after the spouses divorce. Section 672(e)(1)(A) provides that the grantor of a trust shall be treated as holding any power or interest in such trust held by any individual who was the spouse of the grantor at the time of the creation of such power or interest. Section 674(a) provides, in general, that the grantor shall be treated as the owner of any portion of a trust in respect of which the beneficial enjoyment of the trust assets is subject to a power of disposition, exercisable by the grantor or a nonadverse party, or both, without the approval or consent of any adverse party. However, section 674(d) provides that section 674(a) shall not apply to a power solely exercisable (without the approval or consent of any other person) by a Trustee or Trustees, none of whom is the grantor or spouse living with the grantor, to distribute, apportion or accumulate income to or for a beneficiary or beneficiaries, or to, for, or within a class of beneficiaries, if such power is limited by a reasonably definite external standard that is set forth in the trust instrument. Section 677(a) provides that the grantor of a trust shall be treated as the owner of any portion of a trust, whether or not the grantor is treated as such owner under section 674, whose income without the approval or consent of any adverse party is, or, in the discretion of the grantor or a nonadverse party, or both, may be distributed to the grantor or the grantor's spouse, or held or accumulated for future distribution to the grantor or the grantor's spouse.

PART 2 – IS MORE TAX REFORM ON THE WAY?

As of Memorial Day, 2022, the Senate has a Democrat majority derived from the Vice-President's power to break tie votes. The existing filibuster rules remain because a majority of current senators dread minority status more than they enjoy majority status; that is, by nature they prefer to block what they perceive as awful more than they hope to enact what they think is likely to improve things a little. For purposes of "hammering the rich" this suggests small steps rather than grand efforts. Might the applicable exclusion be reduced sooner than January 1, 2026? Sure, although that would be a largely cosmetic step; the increase is already in budget projections so the additional revenue would be that from 2022-2025, a mere four years. Might it be reduced below the "sunset" level? Perhaps – it was $3.5 million not very long ago (2009). The Tax Policy Center (www.taxpolicycenter.org) projects that a restoration of the 2009 estate tax ($3.5 million, no indexing, 45% rate) would subject 0.65% of estates taxable by 2030 and raise $67.2 billion, versus making the current rules permanent which would tax 0.10% of estates and raise $22.3 billion. One could imagine a principle that we would not have a generally applicable tax unless it applied to at least 1% of taxpayers. Congress is not in the principles business but such in this instance would lead to an interesting discussion: apply the estate tax more broadly or repeal it?

What of other suggestions? Wealth taxes have been discussed - a rare instance of US political figures who generally admire European leadership not liking what they have done, which is reject wealth taxes – because it would generate "instant" revenue. Some supporters of such taxes are in the Biden administration. Over the long expanse of history wealth taxes generally are imposed when a country stares in the face of war. Accordingly other approaches may be more likely. Some are within the existing system: eliminating valuation discounts as "allowed" after Rev. Rul. 93-12 and/or changing the effect of Rev. Rul. 85-13 to eliminate or limit the benefits of sales to grantor trusts or the effectiveness of GRATs. Others are new or novel.

Ending the step-up in basis seems like an obvious move if it contains provisions to "protect" those who do not pay estate tax now. A benefit of reducing the applicable exclusion is that it would reduce the number of taxpayers who feel entitled to both no estate tax and a step-up, so that the step-up could then be eliminated with less cost. At least theoretically. Other proposals such as imposing the estate tax on assets held in grantor trusts (a Sanders proposal) seem like long-shots. What about having capital gains realized at death? That perhaps is not quite as long a long-shot but at this point the proposals are hardly thought through enough to consider in any detail. For instance, farms and businesses might be protected but what is a business? Suppose I practice law but own a rental house? Is that a business? Suppose I own 25 rental houses?

If capital gains rates increase, there may be a rationale to end the step-up because otherwise "everyone" will just hold assets until death. If Congress started down that path, it might want to eliminate other planning, such as using grantor trusts.

Lawyers in high-cost areas like New York and Washington have long proclaimed that at low enough tax rates taxpayers will pay taxes rather than tax lawyers. In most of the country the cost of tax planning is so inexpensive that rates are irrelevant to the planning decision. A rate of 40% or 45% is not foreordained for the estate tax; within the last generation the marginal rate was as high as 60%. A return to graduated rates, perhaps steep, could be perceived as striking a blow against "the rich." Similarly, on the income tax side steeply graduated rates could yield interesting results – both budget and sociological – if Congress were willing. Suppose there were no step-up in basis but there were a lower capital gains rate if assets were sold within two years of a decedent's death. Such innovation would require creativity and where creativity might come from is unclear.

The chart discusses the proposals from 2021. In a nutshell, the House did not like the broad wealth tax proposals the Senate suggested, and the Senate didn't like the House tinkering. Whether the Senate would have suggested any proposal is uncertain because nothing was ever voted on. The majority appeared determined to avoid being charged with increasing "death taxes."

Of more interest in 2022 are the proposals from President Biden's Green Book released on March 20, 2022. The language is attached on Appendix A and is worth reading in full. Bad ideas in Washington never disappear, they persist to be enacted at an opportune moment.

Among the highlights are:

- 39.6% maximum income tax rate if a taxpayer has $450,000 in taxable income on joint return, $400,000 for those not married
- Same for capital gains and qualified dividends if $1,000,000 in taxable income
- Deemed realization of capital gains upon gift and at death
- 20% "wealth tax" – expansive definition of "income
- GRATS
    - Minimum and maximum terms
    - Minimum remainder value of greater of 25% or $500,000
- Gain to be recognized in sale or exchange transactions with grantor trusts
- Allocated GST exemption to expire when the following have died: first and second generation trust beneficiaries and any longer generation beneficiaries who were alive when trust created.

POSSIBLE 2021 FEDERAL TAX LEGISLATION OF INTEREST TO ESTATE PLANNERS

	STEP Act[1] **S. ___** **(Discussion Draft)[2]** **Sen. Van Hollen, et al.[3]** **March 29, 2021**	**For the 99.5% Act** **S. 994** **Sen. Sanders, et al.[4]** **March 25, 2021**	**H.R. 2286** **Rep. Pascrell** **March 29, 2021**	**American Families Plan** **(Fact Sheet)** **President Biden** **April 28, 2021**	**"Greenbook"[5]** **Treasury Department** **May 28, 2021**
Transfer Tax Rates		45% up to $10 million 50% up to $50 million 55% up to $1 billion 65% at and over $1 billion		45% (informally floated during campaign and **NOT** part of American Families Plan)	
Transfer Tax Exemptions		$3.5 million for estate tax and GST tax $1 million for gift tax		$3.5 million for estate tax (informally floated during campaign and **NOT** part of American Families Plan)	
Income Tax Rates				39.6% ordinary income top rate; 39.6% LTCG rate if household income $1 million or more	39.6% ordinary income top rate; 39.6% LTCG and qualified dividends rate if household income $1 million or more
Valuation		No discounts for non-business assets inside entity; no entity-level discounts if transferor, transferee and family have control or majority ownership unless entity equity is actively traded			

[1] The "Sensible Taxation and Equity Promotion Act of 2021."

[2] There is proposed legislative language, but the STEP Act has not been formally introduced.

[3] In addition to Senator Van Hollen, Senators Booker, Sanders, Whitehouse and Warren signed on to the STEP Act discussion draft.

[4] In addition to Senator Sanders, Senators Gillibrand, Whitehouse, Van Hollen and Reed signed on to the For the 99.5% Act.

[5] The formal title of the Greenbook is "General Explanations of the Administration's Fiscal Year 2022 Revenue Proposals."

	STEP Act[1] **S. ___** **(Discussion Draft)**[2] **Sen. Van Hollen, et al.**[3] **March 29, 2021**	**For the 99.5% Act** **S. 994** **Sen. Sanders, et al.**[4] **March 25, 2021**	**H.R. 2286** **Rep. Pascrell** **March 29, 2021**	**American Families Plan** **(Fact Sheet)** **President Biden** **April 28, 2021**	**“Greenbook”**[5] **Treasury Department** **May 28, 2021**
Basis Adjustment At Death		Not for assets held in decedent’s grantor trust that’s not included in decedent’s gross estate		Not for gains of over $1 million (single) or $2.5 million (spouses); exemptions for family-owned businesses and farms if family continues to operate	
Deemed Sale Rules	Gifted assets deemed sold for FMV; assets held at death deemed sold for FMV (LTCG tax deductible for estate tax purposes); above rules don’t apply to “ordinary” TPP or to assets passing to spouse, QTIP trust, charity, trust for charity or grantor trust includable in gross estate; all assets held in trust (other than in an excepted trust) deemed sold for FMV every 21 years (or on 12/31/26 if trust created before 2006); assets in grantor trust deemed sold for FMV – **if**: • Assets are distributed; • Grantor trust status ceases; or • Includability in gross estate ceases		Gifted assets deemed sold for FMV; assets held at death deemed sold for FMV; above rules don’t apply to “ordinary” TPP or to assets passing to spouse, QDOT trust the entirety of which spouse can appoint, charity or grantor trust includable in gross estate; certain trust modifications and decantings would be deemed sales for FMV; assets held 30 years in trust (other than in an excepted trust) deemed sold for FMV every 30 years (or on 01/01/22 if then already held 30 years); assets in grantor trust deemed sold for FMV – **if**: • Assets are distributed;		Gifted assets deemed sold for FMV; assets held at death deemed sold for FMV (capital gains tax deductible for estate tax purposes); above rules don’t apply to “ordinary” TPP or to assets passing to surviving “U.S.” spouse or to charity (special rule for transfers to split-interest trusts); assets held in trust, partnership or non-corporate entity deemed sold for FMV every 90 years (or on 01/01/30 if then already held 90 years); appraisal costs income tax deductible; no underpayment of estimated tax penalties for tax arising from deemed sales at death; capital gains tax would

	STEP Act[1] **S. ___** **(Discussion Draft)[2]** **Sen. Van Hollen, et al.[3]** **March 29, 2021**	**For the 99.5% Act** **S. 994** **Sen. Sanders, et al.[4]** **March 25, 2021**	**H.R. 2286** **Rep. Pascrell** **March 29, 2021**	**American Families Plan** **(Fact Sheet)** **President Biden** **April 28, 2021**	**"Greenbook"[5]** **Treasury Department** **May 28, 2021**
	Appraisal costs income tax deductible; no underpayment of estimated tax penalties for tax arising from deemed sales at death; 6166-type deferral possible for up to 15 years; $100,000 indexed) lifetime exclusion of gain; $1 million (indexed) exclusion of gain at death (reduced by amount of lifetime exclusion used)		• Grantor trust status ceases; or • Includability in gross estate ceases 6166-type deferral possible for up to 7 years; $1 million (indexed after 2022) exclusion of net capital gain; annual exclusion gifts also excluded		not be due on family-owned and operated businesses; 6166-type deferral possible for up to 15 years (except for publically traded securities, etc.); $1 million (indexed after 2022) aggregate exclusion of gain (portable to spouse) for transfers during life and at death; current basis rules would apply to those transfers; value of "partial interests" determined without discounts; transfers into or out of trusts (unless deemed wholly-owned and revocable by "donor"), partnerships or other non-corporate entities deemed sold for FMV
GRATs		Minimum term 10 years; maximum term 10 years plus life expectancy; $500,000 or 25% minimum remainder interest at outset; no decrease in annuity payment amount during term			

	STEP Act[1] **S. ___** **(Discussion Draft)[2]** **Sen. Van Hollen, et al.[3]** **March 29, 2021**	**For the 99.5% Act** **S. 994** **Sen. Sanders, et al.[4]** **March 25, 2021**	**H.R. 2286** **Rep. Pascrell** **March 29, 2021**	**American Families Plan** **(Fact Sheet)** **President Biden** **April 28, 2021**	**"Greenbook"[5]** **Treasury Department** **May 28, 2021**
Treatment of Grantor Trusts		Included in gross estate; distributions are gifts; cessation of grantor trust status is gift – **if**: • Grantor is deemed owner; or • Non-grantor is deemed owner and engages in sale or exchange with trust			
GST Exemption		Allocation to trust lasts for 50 years from date of trust creation or date of statute's enactment			
Annual Exclusion Gifts		**Per donor** limit of double annual exclusion amount – **if**: • Gift in trust; • Gift of pass-through entity interest; or • Gifted asset can't be sold or liquidated immediately			
Reporting to IRS	Annual full accounting; names, addresses and EINs of grantor, Trustee and all beneficiaries – **if** trust: • Is over $1 million; **or** • Has over $20,000 in gross income		Name and EIN of transferee of asset(s) along with asset description(s), basis and FMV; basis and FMV also to be reported to recipient		

	STEP Act[1] **S. ___** **(Discussion Draft)[2]** **Sen. Van Hollen, et al.[3]** **March 29, 2021**	**For the 99.5% Act** **S. 994** **Sen. Sanders, et al.[4]** **March 25, 2021**	**H.R. 2286** **Rep. Pascrell** **March 29, 2021**	**American Families Plan** **(Fact Sheet)** **President Biden** **April 28, 2021**	**"Greenbook"[5]** **Treasury Department** **May 28, 2021**
Effective Date(s)	Deaths and transfers after 12/31/**20**	Various	Deaths and transfers after 12/31/21		Deaths and transfers after 12/31/21[6]

[6] It would appear, however, that the proposal to increase the long-term capital gains tax rate would be effective as to gains required to be recognized after April 28, 2021 (the "date of announcement").

PART 3 – ESTATE PLANNING PRACTICE IN 2018 AND BEYOND

I. WHERE WE ARE TODAY

A. New Planning Approaches

1. Given the large Applicable Exclusion Amount, it becomes clear that for many even traditional clients the estate tax has disappeared as an issue. This could change depending on political developments and is to change anyway on January 1, 2026; many client couples are under $24 million but above $12 million.

2. As 2026 approaches, absent change, we will be faced with enormous pressure to enable clients to make gifts to use the soon to exercise basis exemption amount. Laying the groundwork today for such a possibility seems wise. Gifts into trusts with "trap doors" and flexibility seem wise. Both operated by fiduciaries may be safer than not, but in some instances a fiduciary might be unable to act. Unless an individual needs or wants a trust distribution, the individual need not be a trust beneficiary at any given moment.

3. Estate planners will focus more of the tax planning for clients on the income tax, rather than the transfer taxes. In particular, it is likely estate planning will focus on tax basis planning and maximizing the "step-up" in basis at death.

4. Because the "step-up" in basis may come at little or no transfer tax cost, estate planners will seek to force estate tax inclusion in the future.

5. The state of residence of the client and his or her beneficiaries will greatly affect the estate plan. In other words, if a client is domiciled in California, and his or her beneficiaries living in California, then dying with the assets may be the extent of the tax planning. On the other hand, if the beneficiaries live in a state like Texas that has no state income tax, then transferring the assets out of the estate during the lifetime of the client may be warranted. As a result, estate planners will need to ask clients two questions that, in the past, did not significantly matter: (a) Where are you likely to be domiciled at your death? and (b) Naturally, at your death, your children, grandchildren, and other beneficiaries will be lovingly at your bedside, but where are they likely to be domiciled then?

Another example of the importance of domicile can be seen in Shaffer v. Commissioner of Revenue, 148 N.E.3d 1197 (Ma. 2020), in which the first spouse to die did so domiciled in New York leaving a QTIP trust for the survivor who later died domiciled in Massachusetts in 2011. Massachusetts had an estate tax based on the size of the federal estate, which included the QTIP assets. The estate argued no Massachusetts QTIP election had been made but the court determined that was not relevant here. The estate also argued that the estate tax was unconstitutional when applied in this manner. The court concluded that the state could tax transfers of property rights and that the decedent's right in the QTIP transferred to the remainder beneficiaries at her death. The US Supreme Court declined to hear the case.

B. Portability Planning

1. Portability, at least in theory, can provide additional capacity for the surviving spouse's estate to benefit from a "step-up" in basis with little or no transfer tax costs. The extent to which portability is being used is uncertain. The 2017 IRS statistical data showed only 681 nontaxable portability returns filed.

2. In traditional by-pass trust planning, upon the death an individual who has a surviving spouse, assets of the estate equal in value to the decedent's unused Applicable Exclusion Amount fund a trust (typically for the benefit of the surviving spouse and, perhaps, descendants). The trust is structured to avoid estate tax inclusion at the surviving spouse's estate. The marital deduction portion is funded with any assets in excess of the unused Applicable Exclusion Amount. The by-pass trust avoids estate tax inclusion at the surviving spouse's estate. From an income tax standpoint, however, the assets in the by-pass trust do not receive a "step-up" in basis upon the death of the surviving spouse. Furthermore, while the assets remain in the by-pass trust, any undistributed taxable income above minimal amounts will be subject to the highest income tax rates at the trust level.

3. In portability planning, the decedent's estate would typically pass to the surviving spouse under the marital deduction, and the DSUE Amount would be added to the surviving spouse's Applicable Exclusion Amount. Because all of the assets passing from the decedent to the surviving spouse in addition to the spouse's own asset will be subject to estate taxes at his or her death, the assets will receive a "step-up" in basis. Additional income tax benefits might be achieved if the assets that would otherwise have funded the by-pass trust are taxed to the surviving spouse, possibly benefiting from being taxed a lower marginal income tax bracket. In addition, if the by-pass trust would have been subject to a high state income tax burden, having the assets taxed to a surviving spouse who moves to a low or no income tax state would provide additional income tax savings over traditional by-pass trust planning.

4. Of course, there are other considerations, including creditor protection, "next spouse" issues and potential "Medicaid" planning, which would favor by-pass trust planning. From a tax standpoint, the trade-off is the potential estate tax savings of traditional by-pass trust planning against the potential income tax savings of portability planning. Because the DSUE Amount does not grow with the cost-of-living index, very large estates will benefit more with traditional by-pass trust planning because all of the assets, including any appreciation after the decedent's death, will pass free of transfer taxes. On the other hand, smaller but still significant estates should consider portability as an option because the combined exclusions -- the DSUE Amount frozen but the surviving spouse's Applicable Exclusion Amount growing with the cost-of-living index -- is likely to allow the assets to pass at the surviving spouse's death with a full step-up in basis with little or no transfer tax costs (unless the assets are subject to significant state death taxes at that time).

Estates where a surviving spouse may need to qualify for government assistance should consider a modified by-pass trust type planning; the trust for the surviving spouse is designed specifically with governmental assistance in mind. For example, perhaps a child or other person should be allowed to terminate the spouse's interest in the trust (or otherwise modify it). Consider a trust "for" the surviving spouse in which the descendants are beneficiaries. A trusted child or other person could have a lifetime special power of appointment in favor of anyone; that power would be exercised every month, quarter, or year in favor of the spouse until that was inappropriate. The spouse would say accurately that no trusts were for his or her benefit. For Medicaid purposes, trusts under Will are favored over trust agreements.

5. In evaluating the income tax savings of portability planning, planners will want to consider that even for very large estates, the surviving spouse has the option of using the DSUE Amount by making a taxable gift to a grantor trust. The DSUE Amount is applied against a surviving spouse's taxable gift first before reducing the surviving spouse's Applicable Exclusion Amount (referred to as the basic exclusion amount). The grantor trust would provide the same estate tax benefits as the by-pass trust, but the assets would be taxed to the surviving spouse as a grantor trust thus allowing the trust assets to appreciate out of the surviving spouse's estate without being burdened by income taxes. If the assets appreciate, then this essentially solves the problem of the DSUE Amount being frozen in value. Moreover, the grantor trust likely provides for a power to exchange assets of equivalent value with the surviving spouse who can exchange high basis assets for low basis assets of the grantor trust prior to death and essentially effectuate a "step-up" in basis for the assets in the grantor trust.

6. Although a "step-up" in basis is great in theory, no tax will be saved if there is a loss at the time of death resulting in a "step-down" in basis or the asset is income in respect of a decedent (IRD). Furthermore, even if the assets receive a "step-up" in basis, will anyone benefit? Many assets, like family-owned businesses, may never be sold or may be sold so far in the future that the benefit of a step-up is attenuated. On the other hand, if the asset that receives a "step-up" in basis is either depreciable or depletable under the Code, the deductions that arise do result in tax benefits to the owners of that asset. Similarly, an increase in the tax basis of an interest in a partnership or in S corporation shares may not provide immediate tax benefits, but they do allow additional capacity of the partner or shareholder to receive tax free distributions from the entity. These concepts and how certain assets benefit or don't benefit from the basis adjustment at death are discussed in more detail below.

7. Portability planning is slightly less appealing to couples in community property states because, as discussed below, all community property gets a "step-up" in basis on the first spouse's death. Thus, the need for additional transfer tax exclusion in order to benefit from a subsequent "step-up" in basis is less crucial. This is not true, however, for assets that are depreciable (commercial real property) or depletable (mineral interests). As discussed below, these types of assets will receive a "step-up" in basis but over time, the basis of the asset will be reduced by the ongoing depreciation deductions. As such, even in community property states, if there are significant depreciable or depletable assets, portability should be considered.

II. OBTAINING AND RETAINING BASIS

A. Generally

1. As discussed above, estate planning will increasingly focus on the income tax savings resulting from the "step-up" in basis. Estate planners will seek to maximizing the "step-up" up in basis by ensuring that the assets that are includible in the estate of a decedent are the type of assets that will:

a. Benefit from a "step-up" (avoiding the inclusion cash or property that has a basis greater than fair market value)

b. Benefit the most from the "step-up" (for example, very low basis assets, collectibles, and "negative basis" assets); and

c. Provide significant income tax benefits to the beneficiaries (assets are likely to be sold in a taxable transaction after "step-up" or depreciable/depletable assets giving rise to ongoing income tax deductions).

2. In addition to the foregoing, estate planners will increasingly seek to:

a. Maximize the value of certain assets because the step-up" in basis is based on fair market value (rather than trying to reduce the value for transfer tax purposes); and

b. Intentionally create estate tax inclusion, especially if the decedent lives in a state with no state death tax and if the decedent has significant unused Available Exclusion Amount above his or her assets.

B. Swapping Assets with Existing Grantor Trusts

1. Many individuals have made significant taxable gifts, using all or a significant portion of their Available Exclusion Amounts. Many of those gifts were made to grantor trusts.

2. A common power used to achieve grantor trust status for the grantor trust is one described under section 675(4)(C), namely giving the grantor, the power, in a non-fiduciary capacity, to reacquire the trust corpus by substituting other property of an equivalent value. For income tax purposes, transactions between the grantor and the grantor trust will be disregarded, at least as of now. As such, grantors may exercise the power to swap high basis assets for low basis assets without jeopardizing the estate tax includibility of the assets and without having a taxable transaction for income tax purposes.

3. To maximize the benefits of the swap power, it must be exercised as assets appreciate or are sold over time. When exercised properly, this can ensure that only those assets that benefit the most from the step-up will be subject to estate inclusion.

a. If grantor does not have sufficient other assets, repurchase will be difficult - although the donor could borrow cash from a third party. What are the results if cash is borrowed by the grantor, the grantor buys assets from the trust, the trust loans the cash back to the grantor, the grantor pays back the third party lender and, at death, the grantor's estate satisfies the note to the trust with assets having fair market value basis?

b. The income tax consequences if a note is used to repurchase property are uncertain because the trust's basis in note may equal grantor's original carryover basis in the asset given to the trust and now reacquired so paying off the note may generate gain). In other words, if grantor trust status terminates because the grantor dies, and the trust owns a note from the grantor – now the grantor's estate – the note likely does not receive a step-up in basis so when the estate pays it off the trust will have gain.

c. Because the sudden or unexpected death of the grantor may make a repurchase difficult or impossible, estate planners may want to consider drafting "standby" purchase instruments to facilitate fast implementation of repurchase.

C. Should Valuation Discounts Be Undone?

1. Where assets have been divided among generations to create discounts, consideration should be given to undoing those arrangements if the effect is to depress the value of an estate below the amount of Available Exemption Amount in order to increase the income tax basis of the assets.

2. Discount entities could be dissolved or restated to allow the parties to the entity to withdraw.

a. An option could be given to a parent allowing the sale of the parent's interest to a child or children for undiscounted fair market value at death. Giving such an option to a parent would be a gift unless accompanied by adequate and full consideration.

b. If undivided interests in property are owned, agreements could be entered into that require all generations to consent to the sale of the property as one tract if any one owner wanted to sell. Quite obviously such agreements may be contrary to other estate planning or ownership goals of the family.

c. The ability of the IRS to ignore provisions of an agreement that increase the value of assets in the hands of a parent, but not in the hands of a child, is uncertain. By its literal terms, section 2703 of the Code applies only to provisions that reduce value and to restrictions on the right to sell or use property. To illustrate, in Estate of James A. Elkins, Jr., et al. v. Commissioner, 140 T.C. No. 5 (2013), the Tax Court applied section 2703 to ignore a family co-tenancy agreement requiring all owners of fractional interests in art to agree before the art could be sold. The purpose of that agreement was to limit the marketability of a fractional interest.

But what might the effect on value be of an agreement which provided, instead, that any fractional owner could compel the sale of the entire asset? Similarly, a provision that allowed a shareholder in business to put stock to the business at death for fair market value would seem to be outside the scope of the section. In many instances, amending old agreements to include such provisions will be more likely to create gift from the younger owners to the older than would terminating an old agreement and creating a new one.

D. Powers of Appointment For Basis Purposes

1. Generally

a. Consideration should be given to using a "circumscribed general power" that has the following characteristics: (1) a testamentary power, (2) in favor of the creditor of the powerholder's estate, (3) with the consent of a non-adverse party, (4) only over assets with a fair market value in excess of basis, and (5) capped such that the amount subject to the power when added to the other assets of the powerholder produces a total that is $1,000 less than the powerholder's Basic Exclusion Amount.

b. The rights of creditors to property over which a powerholder has a testamentary general power is worth considering. The majority view at common law is that the powerholder of a power, conferred on the powerholder by another, is treated as the beneficial owner of the appointive property for purposes of creditors' rights only if (1) the power is general *and* (2) the powerholder exercises the power. No distinction is made between a testamentary and a presently exercisable power. Creditors of a powerholder of a *non*general power, on the other hand, cannot reach the appointive assets even if the power was effectively exercised. The theory is that the donor who creates a nongeneral power did not intend to benefit the powerholder.

When the powerholder of a general power exercises the power by will, the view that the appointed property is treated as if it were owned by the powerholder means that the creditors of the powerholder's estate can reach the appointed property for the payment of their claims. See, e.g., Clapp v. Ingraham, 126 Mass. 200 (1879). The rule prevails even if this is contrary to the expressed wishes of the donor of the power. See, e.g., State Street Trust Co. v. Kissel, 19 N.E.2d 25 (Mass. 1939).

The exercise of the power by will does not confer actual beneficial ownership of the appointive assets on the powerholder for all purposes. The assets do not ordinarily become part of the powerholder's probate estate. Thus, in terms of priority, the powerholder's own estate assets are ordinarily used first to pay estate debts, so that the appointive assets are used only to the extent the powerholder's probate estate is insufficient.

Under the majority view at common law, the powerholder's creditors can reach the appointive assets only to the extent the powerholder's exercise was an *effective* exercise. A few states, however, follow the view that even an ineffective exercise entitles the powerholder's creditors to reach the appointive assets. See, e.g., Estate of Breault, 211 N.E.2d 424 (Ill. App. Ct. 1965). Moreover, even in states adhering to the majority view, an ineffective exercise can sometimes "capture" the appointive assets for the powerholder's estate, in which case the appointive assets become part of the powerholder's probate estate for all purposes, including creditors' rights.

When the powerholder of a general power makes an inter vivos appointment, treating the appointed assets as if they were owned by the powerholder does not automatically mean that the powerholder's creditors can subject the appointed assets to the payment of their claims. If the appointment is in favor of a *creditor*, the powerholder's other, unsatisfied creditors can reach the appointed assets only by having the appointment avoided as a "preference" in bankruptcy proceedings. Apart from bankruptcy, the powerholder can choose to pay one creditor rather than another with his or her owned assets, and the same is true with respect to appointive assets. If the appointment is in favor of a *volunteer* (i.e., the appointment is gratuitous), the powerholder's creditors can reach the appointed assets only if the transfer is the equivalent of a fraudulent transfer under applicable state law.

In a minority of jurisdictions, the powerholder of a general power, conferred on him or her by another, is *not* treated as the owner of the appointive property even if the power is exercised. See, e.g., St. Matthews Bank v. DeCharette, 83 S.W.2d 471 (Ky. 1935). Of course, if the powerholder exercises the power in favor of himself or herself or his or her estate, the appointed property becomes owned in the technical sense, and creditors even in states adhering to the minority view would be able to subject the assets to the payment of their claims to the same extent as other property owned beneficially by the powerholder. A few states have enacted legislation that affect the rights of the powerholder's creditors. The legislation is not uniform. Some of the legislation expands the rights of the powerholder's creditors and some contracts them.

The Uniform Powers of Appointment Act takes the following position. If the power is conferred by another, the rights of the powerholder's creditors depend on whether the power is general or nongeneral. If the power is general, the appointive property is subject to a claim of (1) a creditor of the powerholder, to the extent the powerholder's property is insufficient, if the power is presently exercisable (whether or not actually exercised), and (2) a creditor of the powerholder's estate, to the extent the estate is insufficient, subject to the right of a decedent to direct the source from which liabilities are paid. See Uniform Act §502. If the power is nongeneral, the general rule is that creditors have no rights in the appointive property. See Uniform Act §504(a). Some states (including Kentucky) have reversed this rule when adopting the act.

The safest general power of appointment is a "Circumscribed General Power" which has five elements: (1) a power exercisable by Will, (2) to appoint to the creditors of the powerholder's estate, (3) with the consent of a non-adverse person, (4) up to a cap that won't increase the family's taxes (e.g., the amount of the applicable exclusion less the fair market value of other assets included in the powerholder's estate less $10,000), and (5) only over assets with a fair market value in excess of basis.

2. Power of Appointment Not Subject to Fiduciary Standard. In In re Estate of Zucker, 2015 WL 5254061 (Pa. Superior Ct. 2015), decedent's wife, Syma, exercised a power of appointment in favor of two of three children. The third, Wendy, objected claiming:

> Wendy alleged that Syma's appointment was not a proper exercise of the power as it was done "in bad faith, based on hate and malice toward Wendy, contrary to [the Decedent's] intent to benefit his issue equally (absent a good faith reason to the contrary) and the duty imposed on Syma to act in good faith when exercising a testamentary power imposed by Pennsylvania law."

The court disagreed, declining even to impose a good faith standard. The opinion states:

> We have reviewed the language contained in Decedent's will and in the codicil to Syma's will in which she directed that the principal contained in the marital trust be divided into two trusts for the benefit of Scott and Karyn and their issue. We have also reviewed the case law provided by the parties and the orphans' court. We conclude that none of the cases, in which challenges to the exercise of the power of appointment were raised, direct that the appointments must be made in good faith. Rather, we state again that a donee's duty is to the donor and the donee must exercise that power within the donor's established conditions. Moreover, the donee has the right to select some of the potential appointees to the exclusion of others. See Estate of Kohler, 344 A.2d at 472. No duty of good faith has been established. Therefore, we conclude that the orphans' court's grant of Scott and Karyn's motion for judgment on the pleadings was proper. The orphans' court did not commit an error of law.

The court notes that Syma was not the trustee. Does that matter? Suppose she had been; her exercise of a testamentary power of appointment would seem to occur after service as trustee ended. May a trustee exercise an inter vivos power without following a fiduciary standard?

The California Court of Appeals held in Tubbs v. Berkowitz, 47 Cal.App.5th 548 (Cal.App. 2020), that where a surviving spouse is named both as trustee of a marital trust and is given a lifetime general power of appointment over the marital trust assets, the surviving spouse could exercise the nonfiduciary power of appointment even while serving as trustee. The opinion states:

> A trustee "has a duty to administer the trust according to the trust instrument ...." (§ 16000.) A trustee also only has the powers conferred by the trust instrument and the powers conferred by statute, unless limited by the trust instrument. (§ 16200.) Here, the very language of the Marital Trust allowed Berkowitz to act in his capacity as the surviving spouse (not the trustee) and designate himself as the recipient of the Trust assets. The Marital Trust then required the trustee to distribute the assets to any person designated by the surviving spouse, including the surviving spouse himself. Thus, under the plain terms of the Marital Trust, Berkowitz (acting as the trustee) was required to transfer the assets once he exercised the power of appointment in his favor. He could not possibly have breached any fiduciary duties by doing something that was expressly authorized and required under the terms of the Marital Trust. (*Hearst v. Ganzi* (2006) 145 Cal.App.4th 1195, 1207-1208, 52 Cal.Rptr.3d 473 [trustees did not breach their fiduciary duties where their actions were explicitly authorized by the trust].)
>
> Finally, we note that Berkowitz's exercise of his power of appointment would have been unobjectionable if he had resigned as trustee before exercising the power. In that scenario, the successor trustee (Tubbs) would have been required to transfer the assets to Berkowitz once he exercised the power of appointment in his favor. Tubbs claims "those are not the facts before this Court," but we see no reason why the result should be different where Berkowitz was both the donee

> and the trustee who had no discretion but to follow the terms of the power of appointment.

No authority is cited on the point (either way).

To the contrary is Peterson v. Peterson, 835 S.E.2d 651 (Ga. App. 2019), a much litigated matter whose facts were described as follows:

> Charles Hugh Peterson died testate in 1994 and was survived by his wife, Mary, and their three sons Alex, David, and Calhoun. Mr. Peterson's will, which was probated in 1995, created two testamentary trusts: a marital trust for the primary benefit of Mary, and a residual "by-pass" trust for the benefit of Mary and the couple's three sons. Mary and her three sons were each designated a co-executor of the will and a co-trustee of both the marital and by-pass trusts. Item 5 of Mr. Peterson's will created a marital trust for Mary, while Item 6 created a by-pass trust for Mary and their three sons. The relevant portion of the will creating the terms of the by-pass trust reads as follows:
>
> > Trustees shall hold and manage the property in this trust and ... may encroach on such part of the principal thereof as the Trustees may deem necessary to provide for the support in reasonable comfort of my wife and to provide for the proper support and education of my descendants[.] To the extent practicable, however, I request the Trustees in making encroachment for the benefit of my wife to encroach first on any trust created for my wife ... before encroaching on this trust for my wife[.]
> >
> > My primary desire is that my wife be supported in reasonable comfort during her lifetime and that my children be supported in reasonable comfort during their lives; my secondary desire is that the principal of this trust be preserved as well as possible consonant with the consummation of my primary objective[.]
> >
> > [My wife] shall have no power to appoint [trust] property to herself, to her estate, to her creditors, or to the creditors of her estate.
>
> * * *
>
> Sometime after the will was probated, a dispute arose between the co-executors and co-trustees over the administration of the estate and the by-pass trust, pitting Mary and Calhoun against Alex and David. Alex and David filed petitions for accounting and damages for breach of duties as executors and trustees against Mary and Calhoun, and sought the removal of Mary and Calhoun as executors and trustees in probate court. Mary and Calhoun each moved for summary judgment on all claims, and the superior court granted their motions. Alex and David appealed those rulings.
>
> In the first appearance of this case before this Court, we reversed the trial court's grant of summary judgment to Calhoun in an unpublished opinion. See *Peterson I*. One month later, the Supreme Court of Georgia in *Peterson II* reversed the trial court's grant of summary judgment to Mary for similar reasons. Both cases held that material issues of fact remained with respect to Appellees' failure to fully fund the trusts at issue in the case and whether Appellees wasted assets. See *Peterson I*, slip op. at pp. 7-8, 10; *Peterson II*, 303 Ga. at 215-217 (3), 811 S.E.2d 309.

The trial court had held that Mary did not owe the other beneficiaries a fiduciary duty when exercising the power of appointment. Mary cited a Connecticut case, Connecticut Bank & Trust Co. v. Lyman, 170 A.2d 130 (Conn. 1961) but the Georgia court noted in Lyman the powerholder was not a trustee. The Georgia Court of Appeals went the other way, deciding Mary did have a fiduciary duty:

> In the present case, the potentiality of conflicts of interests with respect to Mary's requests for conveyance of all property in the by-pass trust to Calhoun is well documented in the litany of litigation that has transcended decades among the co-trustees and co-beneficiaries. As we find no law which could excuse Mary from her fiduciary duty under the trust, even if acting solely as a beneficiary under the trust, we find that the trial court erred in concluding that Mary could act exclusively in her capacity as a beneficiary of both trusts in exercising her appointment power to convey trust assets.

Having a power exercised when the powerholder is a trustee (or perhaps an advisor) is perilous.

Because the holder of a power of appointment is not a fiduciary, the holder of a lifetime power may have his or her actions attributed to a grantor or beneficiary. In the 1970s two cases dealing with the Goodwyn family established the principle that if a trust agreement prohibited the grantor from acting as de facto trustee the mere fact that the grantor did in fact act as de facto trustee would not established a retained interest under section 2036, Estate of Goodwyn, T. C. Memo. 1973-153, nor a power for the grantor trust provisions of sections 671ff, Estate of Goodwyn v. Commissioner, T.C. Memo. 1976-238.

> Under the terms of the deeds creating these trusts, the trustees were granted broad discretionary powers with respect to both the distribution of income to the beneficiaries and the investment and management of the corpus of the trusts. Notwithstanding the designation of Richards and Russell as trustees, it further appears that at all times from the establishment of the trusts until his last illness, the decedent exercised complete control with respect to the purchase and sale of trust assets, investment of any proceeds, and the determination of the amounts, if any, to be distributed to the respective beneficiaries.
>
> The assets of the various trusts, together with other trusts, as well as property owned by the decedent, were accounted for by a single set of records maintained in the offices of the decedent. Except for the Federal income tax returns prepared and filed by the decedent on behalf of the various trusts, no separate records were maintained showing the assets and income of any of these trusts.
>
> The respondent argues that the decedent should be treated as trustee, in fact, possessing such rights and powers as to cause the inclusion of the assets thereof in his gross estate, relying on sections 2033, 2036 (a)(2), and 2038. Section 2033 requires a finding that the decedent had an interest in the assets of the trusts at the time of his death. There is no basis for such a finding. Section 2038(a)(1) relates to "a power" exercisable by the decedent "to alter, amend, revoke, or terminate," the trusts. No such power was reserved by the decedent. Accordingly, in the final analysis the respondent's position is predicated on the determination that by reason of the de facto control exercised by the decedent the trusts are includable in his estate pursuant to section 2036(a)(2).[5] It is clear that the powers granted to the trustees would, if reserved by the decedent, be such as to require the inclusion of the assets of the trusts in the estate of the decedent. *United States v. O'Malley*

> [66-1 USTC ¶ 12,388], 383 U.S. 627 (1966). Does the fact that the decedent was able to exercise such powers through the cooperation of unrelated trustees require a different result? The question thus presented for decision is whether the value of such trusts is includable in the estate of the decedent by reason of the de facto control over the trusts exercised by the decedent, notwithstanding that no power to exercise such control was reserved to or by the decedent once he resigned his duties as trustee of certain of these trusts.

[footnotes omitted]

The Goodwyn rationales appear to be based on a trustee having authority; if an advisor who is not a fiduciary can direct a trustee, and the trustee must follow the direction, then will Goodwyn protect the grantor whose advisor follows the grantor's advice regularly. Similarly, where a grantor gives an inter vivos power of appointment to someone during the grantor's lifetime the Goodwyn rationale is inapplicable.

PART 4 – FEDERAL RULINGS, CASES AND OTHER DEVELOPMENTS

A. INCOME TAX MATTERS

1. **Consistent Basis Reporting**. Final regulations are coming but aren't here as of June 1, 2022.

2. **Termination of Trust Results In Capital Gains**. In PLR 201932001 the IRS considered the termination of a trust along actuarial lines. The facts presented were:

> On Date 1, a date prior to September 25, 1985, Settlor created an irrevocable trust, Trust, for the benefit of Son. The material purpose of Trust was to ensure that Son receive an income stream for his support. Under the terms of the Trust agreement, the trustees are required to distribute all of the net income of Trust to Son, and, upon his death, distribute the remainder to his issue, per stirpes. The Trust agreement does not authorize any distributions of principal during Son's life. Son has four living adult children (Current Remaindermen) and eight living grandchildren, four of whom are adults (Successor Remaindermen). None of Son's descendants has a predeceased child with living issue. Son and Bank are currently serving as co-trustees of Trust.
>
> State Statute provides, in relevant part, that matters that may be resolved by a nonjudicial settlement include termination of the trust, provided that court approval of such termination is obtained in accordance with this section, and the court must conclude that continuance of the trust is not necessary to achieve any material purpose of the trust. State Statute further provides that upon such termination, the court may order the trust property distributed as agreed by the parties to the agreement or otherwise as the court determines is equitably consistent with the purposes of the trust.
>
> On Date 2, Son, the Current Remaindermen and the Successor Remaindermen entered into Agreement. Agreement states that the continuance of Trust "is no longer necessary to achieve any clear material purpose of such trust because [[Son]'s net worth has grown significantly, such that he does not need income from [Trust] for his support." Agreement further provides for the termination of Trust and the distribution of Trust's assets among Son, the Current Remaindermen

> and the Successor Remaindermen in accordance with the actuarial value of each beneficiary's share (Proposed Distribution).,

The IRS concluded that the transaction was in substance a sale. The ruling states:

> Rev. Rul. 72-243, 1972-1 C.B. 233, provides that the proceeds received by the life tenant of a trust, in consideration for the transfer of the life tenant's entire interest in the trust to the holder of the remainder interest, are treated as an amount realized from the sale or exchange of a capital asset under § 1222. The right to income for life from a trust estate is a right in the estate itself. See McAllister v. Commissioner, 157 F.2d 235 (2d Cir. 1946), cert. denied, 330 U.S. 826 (1947).
>
> In Rev. Rul. 69-486, 1969-2 C.B. 159, a non-pro rata distribution of trust property was made in kind by the trustee, although the trust instrument and local law did not convey authority to the trustee to a make a non-pro rata distribution of property in kind. The distribution was effected as a result of a mutual agreement between the trustee and the beneficiaries. Because neither the trust instrument nor local law conveyed authority to the trustee to make a non-pro rata distribution, Rev. Rul. 69-486 held that the transaction was equivalent to a pro rata distribution followed by an exchange between the beneficiaries, an exchange that required recognition of gain under § 1001.
>
> Although the proposed transaction takes the form of a distribution of the present values of the respective interests of Son, the Current Remaindermen, and the Successor Remaindermen, in substance it is a sale of Son's and the Successor Remaindermen's interests to the Current Remaindermen. Rev. Rul. 69-486.
>
> The amounts received by Son as a result of the termination of Trust are amounts received from the sale or exchange of a capital asset to the Current Remaindermen. Rev. Rul. 72-243. Because Son's basis in the income interest of Trust is a portion of the entire basis of the property under § 1015(b), and because the disposition of Son's term interests is not part of a transaction in which the entire interest in Trust is transferred to a third party, Son's adjusted basis in Son's interest in Trust is disregarded under § 1001(e). Son's holding period in the life interests in Trust exceeds one year. Accordingly, based on the facts submitted and representations made, the entire amount realized by Son as a result of the early termination of Trust will be long-term capital gain under § 1222(3).
>
> Similarly, the amounts received by the Successor Remaindermen as a result of the termination of Trust are amounts received from the sale or exchange of a capital asset to the Current Remaindermen. Cf. Helvering v. Gambrill, 313 U.S. 11, 15 (1941), 1941-1 C.B. 364 (The phrase "property held by the taxpayer" under a prior law holding period rule relating to capital gains and losses includes not only full ownership, but also any interest owned whether vested, contingent, or conditional). The Successor Remaindermen's holding period in their interests in Trust also exceeds one year. Accordingly, under § 1222(3), the gain determined under § 1001(a) by the Successor Remaindermen as a result of the early termination of Trust will be long-term capital gain.
>
> In addition, to the extent that a Current Remainderman exchanges property, including property deemed received from Trust, for the interests of Son and the Successor Remaindermen, the Current Remainderman will recognize gain or loss on the property exchanged. Accordingly, based on the facts submitted and representations made, for purposes of determining gain or loss, the amount realized by each Current Remainderman on the exchange of property for Trust

> interests held by Son and the Successor Remaindermen will be equal to amount of cash and fair market value of the trust interests received in exchange for the transferred assets. Section 1.1001-1(a) and Rev. Rul. 69-486.

Interestingly, the taxpayer asked for the "sale" ruling, perhaps to ensure it was "at least" a capital transaction. Suppose the parties had amended the trust to add principal distribution provisions. Would that have been a gift by the consenting parties, even prior to an actual distribution? Would that have altered the result of the ruling?

As discussed elsewhere in these materials, another potential strategy would be to cause the trust to terminate by operation of law. That could occur if all of the beneficial interests in the trust were contributed to an LLC (and if the LLC or the managers of the LLC were also trustees of the trust).

3. Qualified Replacement Property and A Grantor Trust. Qualified replacement property (QRP) as defined by section 1042(c)(4) can be created with the proceeds of a sale to an ESOP. Doing so avoids recognition of gain on the proceeds, however "disposition" of the property triggers the gain. PLR 20220600 concludes that a transfer to the owner's grantor trust is not a disposition nor is the grantor's death if the trust is still a grantor trust.

B. CHARITABLE AND TAX-EXEMPT MATTERS - Sections 170, 642, 664, 501, 509, 2055, 2522, and 4940-4947

1. Charitable Distributions From Trusts. Suppose a trust does not provide for distribution to charity but the beneficiaries desire such distributions to occur. If the trust is modified validly under state law to allow charitable distributions, will that allow the trust to take a section 642(c) deduction? In CCA 201651013 the IRS concluded no because the trust after modification was not the "governing instrument." The ruling states:

> In Old Colony Trust Company v. Commissioner, 57 S.Ct. 813 (1937), the Supreme Court reversed a decision of the First Circuit (87 F. 2d 131). A trust document authorized but did not require the trustees to make current charitable payments if they could do so without jeopardizing the payment of annuities from the trust to non-charitable beneficiaries. The Board of Tax Appeals denied most of the income tax charitable deduction under the predecessor of § 642(c)(1) because it found that the taxpayer had not met its burden of proof regarding whether most of the payments were actually made from trust income during the year made. The First Circuit denied the entire deduction because the charitable payments were "not imperatively directed" by the trust. If the trustee exercised discretion in making the payments, they were not "pursuant to" the terms of the trust. The Supreme Court referred to the plain dictionary meaning of "pursuant to" as "acting or done in consequence or in prosecution (of anything), hence, agreeable; conformable; following; according," which standard was met by the authorization in the trust instrument.
>
> In Crown Income Charitable Fund v. Commissioner, 8 F.3d 571, 573 (7th Cir. 1993), *aff'g* 98 T.C. 327 (1992), the Seventh Circuit addressed the issue of commutation. The trust at issue in Crown contained a provision permitting the trustees to commute the charitable interest only if, as a matter of law, it was clear that doing so would not adversely affect the maximum charitable deduction otherwise available. The trustees of the Crown Income Charitable Fund distributed trust assets in excess of the annuity amount to the charitable beneficiary over a number of years and deducted, under § 642(c), the full amount

> distributed to the charitable beneficiaries. Both the Seventh Circuit and the Tax Court held that the excess distributions were not deductible under § 642(c) because those instruments were not made pursuant to the terms of the governing instrument.
>
> In Brownstone v. United States, 465 F.3d 525 (2nd Cir. 2006), a deceased husband's will created a marital deduction trust, which granted the husband's surviving wife a general testamentary power of appointment. When the wife died, she exercised her power in favor of her estate, the residue of which passed to charitable organizations. The trustee of the marital deduction trust distributed $1 million to the wife's estate and claimed a charitable contribution deduction under § 642(c), because the $1 million distribution passed entirely to the charitable beneficiaries under the wife's will.
>
> The Second Circuit in Brownstone held that the distribution to the charities was made pursuant to the wife's power of appointment and not pursuant to the governing instrument, the deceased husband's will. The Second Circuit interpreted the definition of governing instrument narrowly, stating that an instrument subject to the creating instrument (the wife's will) could not combine with the creating instrument (the husband's will) and qualify as the governing instrument. The sole governing instrument in Brownstone was the husband's original will; therefore, the marital deduction trust was not entitled to a deduction under § 642(c) since the distribution was made pursuant to the wife's will.
>
> * * *
>
> In Emanuelson v. United States, 159 F.Supp. 34 (D.C. Conn. 1958), decedent left two conflicting wills -- one which left 2/3 of the residue of decedent's estate to certain charities, and another which left the entire residue to non-charitable legatees. After decedent's death, a controversy arose among the beneficiaries of the two wills. The controversy was resolved in a written compromise agreement between the two sets of beneficiaries, under which 52/480 of the residue passed to the charities named in one of the wills. Payments made to the charities under the written compromise agreement were held to be made pursuant to the will. Rev. Rul. 59-15, 1959-1 C.B. 164, citing Emanuelson, held that a settlement agreement arising from a will contest qualifies as a governing instrument.
>
> In the current case, the taxpayer makes a summary argument that the payments qualify under § 642(c) because they are pursuant to the governing instrument, citing to Old Colony. They do not address the authorities concerning deductions under modified trust instruments. Here there was no conflict with respect to Trust B subsequent to the division of Parent Trust. The trust terms were unambiguous. The purpose of the court order was not to resolve a conflict in Trust B but to obtain the economic benefits which the parties believe they will receive from the modification of the Parent Trust. Neither Rev. Rul. 59-15 nor Emanuelson hold that a modification to a governing instrument will be construed to be the governing instrument in situations where the modification does not stem from a conflict of some sort. Additionally, both Crown and Brownstone have a narrow interpretation of what qualifies as pursuant to a governing instrument. Therefore, any payments to Foundation 1 and Foundation 2 after the modification of Trust B would not be considered to be made pursuant to the governing instrument, and Trust B is not entitled to a deduction for such payments under § 642(c).

The IRS also held that a 661, DNI, deduction would not be available. This result is controversial as the ruling notes. Commentators are divided, for instance:

> One standard treatise supports them on two policy grounds: "All of the courts but one [U.S. Trust District Court] that have considered this issue have sustained these regulations, even though they substantially exceed the scope of the statutory language . . . The cases supporting the regulations take the appropriate view because a contrary rule has the effect of giving both an estate tax deduction (for the charitable disposition) and an income tax deduction (for the item distributed to charity) for the same payment. "Also, as a result of deducting distributions of corpus to charity, the non-charitable legatees in effect receive the estate's income tax-free. The benefit of the income tax deduction inures to the noncharitable legatees, rather than to the charity, so the court decisions favoring the regulation seem fundamentally sound." [citations omitted] Danforth, Robert T., et al., Federal Income Taxation of Estates and Trusts [current through 2016], at 4.07[1]
>
> However, at least as many secondary sources in this area disagree with the disallowance under § 661(a), at least under some facts. Another standard treatise, Ferguson, M. Carr, et al, Federal Income Taxation of Estates, Trusts, & Beneficiaries (current through 2016), states at § 6.10: "The analysis [explaining why a single payment should not allow double deduction under §§ 642(c) and § 661(a)] does not, however, answer the question whether amounts that pass to charity in such a way as not to qualify for the deduction under § 642(c), such as amounts that pass to nonqualified quasi-charitable organizations or are used for purposes that are not exclusively charitable, escape the proscription of § 663(a)(2). Obviously, such amounts do *not* qualify 'for the deduction provided in § 642(c).' Are they therefore deductible as distributions under § 661? A literal reading of the statute strongly suggests that many such amounts should be. Even an undisputedly charitable beneficiary would be treated the same as any other beneficiary under the distribution rules, if it were not for §§ 642(c) and 663(a)(2). When no deduction is available under § 642(c), § 663(a)(2) seems to plainly not apply."

The taxpayer attempted to inspire the IRS to accept a bona fide state court modification to the trust instrument as being the "governing instrument" but the IRS rejected inspiration in CCA 201747005. The taxpayer and the IRS settled the case but the IRS did not concede the point.

There is no evidence that this is part of a larger exercise to limit the tax effect of prospective state court modifications (for instance, adding general power for basis). If a trust cannot be effectively amended, what can be done to obtain a charitable deduction for trust income? The assets of the trust could be contributed to an S corp. and the trust could become an ESBT. Or, distributions could be made to a 501(c)(4) organization, for which a section 661 deduction is allowable. A third way is that Rev. Ruling 2004-05 may help.

Gifts by partnerships or LLCs are deductible proportionately by the partners or members. IRC § 702(a)(4). Rev. Rul. 96-11 holds that when a partnership makes a charitable contribution of property, the basis of each partner's interest in the partnership should be decreased, but not below zero, by the partner's share of the partnership's basis in the property contributed. Similarly, a partner's charitable deduction for the contribution of appreciated property by the partnership does not seem to be limited to her share of the partnership's basis in the assets. See Private Letter Ruling 8405084. Thus, contributions of appreciated property by partnerships preserve the tax benefit of receiving a deduction at fair market value for the contribution of appreciated property; the unrealized appreciation is not transferred to the partner's interest in the partnership.

Rev. Rul. 2004-05 provides that a trust which is a partner will benefit from a charitable contribution made by the partnership even if the trust itself has no charitable beneficiaries. The Ruling does not state how the trust came to be a partner. May a trust with no charitable beneficiaries become a partner in a partnership which allows charitable contributions without the consent of the trust partner? Presumably the answer is yes so long as the beneficiaries are agreeable. See also Private Letter Ruling 200208019, in which the IRS considered whether the members of a partnership were entitled to a charitable deduction on account of the partnership's grant of a conservation easement to a charitable organization. The IRS concluded that each partner was entitled to a charitable deduction equal to each partner's distributive share of the gift. A trust could not benefit from that deduction because §642(c) allows only deductions for income.

PLR 201225004 involved a trust claiming the section 642(c) deduction for income distributed to charity and the requirement that the income be distributed "pursuant to the terms of the governing instrument." Here, the distribution was directed by a beneficiary's exercise of a lifetime special power of appointment and the IRS determined that satisfied the "pursuant to" requirement even though the governing instrument did not specify a charitable bequest. It only authorized exercise of the power in favor of charity. In PLR 9821029, an individual exercised a lifetime nongeneral power of appointment over a trust to create a charitable remainder trust for a term of years with the trust as the unitrust beneficiary. The IRS allowed the trust to be the beneficiary and allowed the charitable remainder trust to be created by the exercise of the power.

If a charity is given the right to withdraw a portion of the income and gains from a trust then the charity is the owner of that portion under section 678 which avoids the need for a section 642(c) deduction. This is a "BDOT solution".

2. **Use of Section 501(c)(4) Organizations to Facilitate Business Interest Ownership**. Under the Protecting Americans from Tax Hikes Act of 2015, Section 2501(a) was amended to specifically exclude from federal gift tax "transfers of money or other property to an organization described in paragraph (4), (5), or (6) of section 501(c) and exempt from tax under section 501(a), for the use of such organization." This exclusion from federal gift tax is applicable to lifetime gifts to section 501(c)(4), (5), and (6) organizations, but does not apply to transfers at death. Accordingly testamentary transfers to section 501(c)(4), (5), and (6) organizations still would be taxable for estate tax purposes. Moreover, lifetime transfers to these organizations also could be subject to IRC § 2036. No private inurement is permitted for a section 501(c)(4) organization. Effective July 19, 2019, are final regulations under section 506 dealing with the requirement that an organization notify the IRS within 60 days of its intent to operate under section 501(c)(4). TD 9873.

Section 501(c)(4) Organizations include "civic leagues" and "social welfare organizations," which must be nonprofit and organized for the promotion of the common good and general welfare of the community as a whole, and "local associations of employees," in which membership is limited to employees of a particular person or particular person in a designated locality, and the earnings of which must be used for charitable, educational or recreational activities. Specific examples of section 501(c)(4) organizations would be homeowners associations, veterans groups, community centers and community programs, volunteer fire departments, parks associations, public recreational facilities, and service organizations.

A section 501(c)(4) organization does not appear to fit within the definition of "disqualified person," because it is:

- Not a substantial contributor or foundation manager;
- Not an individual
- Not a "35 percent" corporation, partnership, trust or estate; and
- Not a private foundation.

No cases or rulings appear to establish that a section 501(c)(4) organization would be a disqualified person. This may create a useful opportunity to use section 501(c)(4) organizations to avoid excess business holdings and self-dealing issues that could arise from transfers of closely-held business interests to a private foundation.

Section 4943 would preclude a private foundation from long-term ownership of more than 20 percent of the voting stock of a corporation or other business enterprise in combination with all disqualified persons. However, if a section 501(c)(4) organization is not a disqualified person, it could own a "business enterprise" with one or more private foundations in a manner that would avoid violating the prohibition against excess business holdings under section 4943. If an owner transferred interests in a closely-owned business to a private foundation in conjunction with a transfer to a section 501(c)(4) organization, it may be possible to avoid excess business holdings.

To illustrate,

- Donor could recapitalize her closely-held business enterprise from 1 million shares of common stock to 100,000 shares of voting stock and 900,000 shares of nonvoting stock.

- Donor then could contribute 80,000 shares of voting stock to a new section 501(c)(4) organization that Donor's family controls, without incurring gift tax.

- At death, Donor could contribute 20 percent of voting stock and all nonvoting stock to a private foundation, and the section 501(c)(4) organization would own 80 percent of the voting stock.

If a section 501(c)(4) organization is not a disqualified person (even if it is controlled by one or more disqualified persons) it would be permissible for a private foundation and the section 501(c)(4) organization to enter into transactions that ordinarily would be treated as self-dealing. For example a section 501(c)(4) organization could:

- Purchase or borrow assets from a related private foundation.
- Lease real estate to a related private foundation.

- Co-own and co-invest with a related private foundation.

3. Estate Income Tax Deduction. Where a decedent lacks a taxable estate, but wants to make a charitable bequest, consideration should be given to providing that the first dollars of income of the estate go to charity in an amount equal to the amount of the bequest. The estate will receive an income tax deduction if the estate has sufficient income.

4. Conservation Easement Controversy. In addition to the cases noted in these materials, the Tax Court has handed down more than two-dozen mostly government victories along the same grounds. On June 25, 2020, in IR-2020-130 the IRS announced a "time-limited settlement offer" to taxpayers with cases pending in Tax Court. The IRS position is that it will not negotiate syndicated easements so promoters pay full penalties (40%) but taxpayers may make themselves eligible for a 10% - 20% penalty if they settle cooperatively, but the benefits of the deduction will be lost (a taxpayer may deduct acquisition cost of the land). Taxpayers who are not in syndicates but whose easements are defective on technical grounds are in a bit of a no-man's land. By way of background, the IRS has been very grumpy with syndicated easements for several years. Notice 2017-10 states:

> The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) are aware that some promoters are syndicating conservation easement transactions that purport to give investors the opportunity to obtain charitable contribution deductions in amounts that significantly exceed the amount invested. This notice alerts taxpayers and their representatives that the transaction described in section 2 of this notice is a tax avoidance transaction and identifies this transaction, and substantially similar transactions, as listed transactions for purposes of §1.6011-4(b)(2) of the Income Tax Regulations (Regulations) and §§6111 and 6112 of the Internal Revenue Code (Code).

The specific transaction covered by the Notice is described as follows:

> An investor receives promotional materials that offer prospective investors in a pass-through entity the possibility of a charitable contribution deduction that equals or exceeds an amount that is two and one-half times the amount of the investor's investment. The promotional materials may be oral or written. For purposes of this notice, promotional materials include, but are not limited to, documents described in §301.6112-1(b)(3)(iii)(B) of the Regulations. The investor purchases an interest, directly or indirectly (through one or more tiers of pass-through entities), in the pass-through entity that holds real property. The pass-through entity that holds the real property contributes a conservation easement encumbering the property to a tax-exempt entity and allocates, directly or through one or more tiers of pass-through entities, a charitable contribution deduction to the investor. Following that contribution, the investor reports on his or her federal income tax return a charitable contribution deduction with respect to the conservation easement.

The effect of the Notice is retroactive:

> Transactions entered into on or after January 1, 2010, that are the same as, or substantially similar to, the transaction described in section 2 of this notice are identified as "listed transactions" for purposes of §1.6011-4(b)(2) and §§6111 and 6112 effective December 23, 2016. Persons entering into these transactions on or

> after January 1, 2010, [emphasis added] must disclose the transactions as described in §1.6011-4 for each taxable year in which the taxpayer participated in the transactions, provided that the period of limitations for assessment of tax has not ended on or before December 23, 2016.
>
> Material advisors, including appraisers, who make a tax statement on or after January 1, 2010, with respect to transactions entered into on or after January 1, 2010, have disclosure and list maintenance obligations under §§6111 and 6112. See §§301.61113, 301.6112-1.
>
> For rules regarding the time for providing disclosure of a transaction described in this notice, see §§1.6011-4(e) and 301.6111-3(e). However, if, under §1.6011-4(e)(1), a taxpayer is required to file a disclosure statement with respect to a transaction described in this notice after December 23, 2016, and prior to May 1, 2017, that disclosure statement will be considered to be timely filed if the taxpayer alternatively files the disclosure with the Office of Tax Shelter Analysis by May 1 (because April 30 is a Sunday). In addition, for purposes of disclosure of transactions described in this notice, the 90-day period provided in §1.6011-4(e)(2)(i) is extended to 180 days. Further, if under §301.6111-3(e), a material advisor is required to file a disclosure statement with respect to the listed transaction described in this notice by January 31, 2017, that disclosure statement will be considered to be timely filed if the taxpayer files the disclosure with the Office of Tax Shelter Analysis by May 1, 2017 (because April 30 is a Sunday).

On June 27, 2019, the Congressional Research Service issued a white paper titled Charitable Conservation Contributions Potential for Abuse? Easements declined in 2009–13 but substantially increased in 2014-15.

Independently, a committee of the American Bar Association has issued a report, the ABA RPTE Conservation Easement Task Force: Recommendations Regarding Conservation Easements and Federal Tax Law. (Available via SSRN at https://ssrn.com/abstract=3385453 or 53 Real Property, Trust and Estate Law Journal, Fall 2018/Winter 2019).

In a July 31, 2019 letter to a taxpayer who had written to Senators Isakson and Perdue, Chief Counsel Michael Desmond stated:

> Your letter accurately notes that the IRS believes that significant abuse of the conservation easement deduction continues to exist, particularly overvaluation of easements. Overvaluations pose a vexing and persistent problem, which the IRS addresses in Treasury Regulation section 1.170A-17 and in the syndicated conservation easement listing notice, Notice 2017-10.
>
> The IRS has made overvalued easements an enforcement priority. IRS examiners are trained to look for overvaluation indicators, which are nearly always the primary reason for commencing a conservation easement deduction audit.
>
> Easement donors who rely on appraisers with extensive professional qualifications and experience may in good faith believe that the appraisals they prepare contain correct conclusions of value and comport with statutory and regulatory requirements. At times, however, the reliance is misplaced. When appraisals look too good to be true, taxpayers who rely on them are taking a risk.

There are four general issues to keep in mind, two general ones for all charitable transfers and two specific to easements. The general issues are defective appraisals – those that don't meet the requirements – and the failure to give income tax basis information to the IRS as required. The specific issues are the "granted in perpetuity" requirement and the "protected in perpetuity" requirement. From the perspective of policy, the IRS appears to lack confidence in appraisers, which affects its willingness to accept valuations, and in some, perhaps many, easement holders, which affects its willingness to accept a broad interpretation of the regulatory limits. Most recently, the validity of portions of the easement regulations have been questioned on procedural grounds.

5. Granted In Perpetuity and Protected In Perpetuity Requirements. In Pine Mountain Preserve LLLP et al. v. Commissioner, 151 T.C. No. 14 (2018), the primary issue was whether the ability to construct residences in various building areas invalidated a conservation easement. The taxpayer (Pine Mountain Preserve LLLP) conveyed to the North American Land Trust (NALT) in 2005, 2006, and 2007, easements covering relatively small portions of land in Alabama. Each easement defined a conservation area that was to be restricted in perpetuity from commercial and residential development, with a carve-out in the 2005 and 2006 easements for 16 reserved "building areas," within each of which the taxpayer could construct a single-family residence. The 2006 easement did not specify the location of the building areas, and the 2005 easement permitted the taxpayer, with the consent of the land trust, to move the building areas from their initially designated locations to any other location within the conservation area.

The opinion states:

> We begin with the 2006 easement because it presents a somewhat novel pattern. The 2006 easement permits Pine Mountain to establish within the 2006 Conservation Area six Building Areas, each as large as one acre. Each Building Area may include a single-family dwelling plus "a shed, garage, gazebo, and pool," and the owner of each Building Area may construct a 5,000-square-foot barn within 1,000 feet of its perimeter. However, the 2006 easement does not specify, either in the deed itself or in an attached plat, the locations of the six Building Areas. And it places no limitations on where within the 2006 Conservation Area such Building Areas may be located, except to say that these locations must be "approved in advance" by NALT.
>
> It seems clear to us that the 2006 easement does not embody "a restriction (granted in perpetuity) on the use which may be made of the real property." See sec. 170(h)(2)(C). Although the restriction placed by the easement is perpetual, "the restriction on 'the real property' is not." Belk III, 774 F.3d at 226 (quoting section 170(h)(2)(C)). Pine Mountain remained free to build a six-acre residential development within the 2006 Conservation Area, thus converting to commercial use land that was supposed to be protected in perpetuity from development. Indeed, it was impossible to define, when the 2006 easement was granted, what "real property" would actually be restricted from development, because the residential lots could literally be placed anywhere within the 2006 Conservation Area. As a result, the perpetual use restriction did not attach at the outset "to a defined parcel of real property" or to "a single, immutable parcel" of land. Id. at 225, 227.
>
> NALT had to approve the precise location of the six residences within the 2006 Conservation Area. By so doing, NALT might minimize the derogation of

conservation values that the subdivision caused and perhaps ensure that “the conservation purpose [wa]s protected in perpetuity.” Sec. 170(h)(5)(A). But this does not change the fact that the easement, when granted, did not create a perpetual use restriction on a defined parcel of land, as required by section 170(h)(2)(C). Because the 2006 easement does not constitute a “qualified real property interest,” Pine Mountain could not claim for the donation of this interest a charitable contribution deduction under section 170(f)(3)(B)(iii) and (h)(1).

2. 2005 Easement

Most of the 2005 Conservation Area consists of ridgelines and higher elevation land in the northwest portion of Parcel 2. The balance consists of lower lying land around a man-made lake near the center of Parcel 2. Overall the easement covers about 47% of the acreage of Parcel 2.

Apart from the acreages involved, the 2005 easement is substantially similar to the easements involved in Bosque Canyon. It reserves to Pine Mountain or individual homeowners the rights to construct one single-family dwelling and appurtenant structures within each of ten “Building Areas” inside the 2005 Conservation Area. Although the deed itself does not limit the size or location of these ten Building Areas, an attached plat shows each Building Area as a one-acre lot situated around the man-made lake.

Article 3.16, however, provides that the “boundaries of the Building Areas may be modified by mutual agreement” of Pine Mountain and NALT. Such modification is subject to the proviso that “the areas of a Building Area shall not be increased” and that the boundary modifications shall not, in NALT's “reasonable judgment,” adversely affect conservation purposes. Article 3.16 thus permits the Building Areas to be relocated (with NALT's consent) to higher elevation zones or to other locations within the 2005 Conservation Area.

Besides permitting the relocation of homesites, the easement permits Pine Mountain to build within the 2005 Conservation Area other structures and facilities appurtenant to the residential development. These include:

- at least ten barns, each of which may include “an apartment for occupancy by a caretaker and such caretaker's family”;

- two scenic overlooks, one of which “may include a guest bedroom,” occupying up to six acres in the aggregate;

- at least one riding stable and indoor riding ring, occupying up to ten acres in the aggregate;

- up to 14 piers and boat launches, which may include four “common boat launch facilit[ies] with associated boat storage building[s]”;

- up to five ponds, occupying up to 25 acres in the aggregate, which may apparently be encumbered by piers and boat launch facilities; and

- a reasonable (but otherwise unlimited) number of wildlife hunting stands or blinds to facilitate hunting and shooting by homeowners and their guests.

The easement does not specify the location of any of these facilities, and their location could change if the location of the Building Areas changed. Although

> NALT's approval is generally required, its approval for certain facilities (such as the man-made ponds) "shall not be unreasonably withheld." For other facilities, such as the piers, boat launches, boat storage buildings, and hunting blinds, no approval or prior review by NALT is needed.
>
> We conclude that the rights reserved to Pine Mountain, considered in their entirety, prevent the 2005 easement from constituting a "qualified real property interest." See sec. 170(h)(2). As in Bosque Canyon, the easement deed allows all ten residences to be moved from the man-made lake to other, possibly more desirable, locations within the 2005 Conservation Area. And as in Bosque Canyon, the easement places no limits on how many homesites can be moved, how often this can be done, or how far into the future such relocations can occur.
>
> The 2005 easement also permits Pine Mountain to construct, anywhere within the 2005 Conservation Area, a variety of other buildings. At least 11 of these buildings may include additional living quarters. All of these facilities are intended for the recreational use of the homeowners and their guests. Collectively, they have the effect of expanding the residential development well beyond the ten acres consumed by the Building Areas alone.

A dissent would have been less restrictive but attracted only one vote.

The Eleventh Circuit reversed in part, affirmed in part, and remanded in part, upon appeal; Pine Mountain Preserve, LLLP v. Commissioner, 978 F.3d 1200 (11th Cir. 2020). The court first held that the easements satisfy the granted-in-perpetuity requirement of section 170(h)(2)(C). The court concluded the Tax Court misunderstood the statute. The opinion states:

> On its face, § 170(b)(2)(C) doesn't require much—only that a grant embody "a restriction (granted in perpetuity) on the uses which may be made of the real property." It seems to us clear that a conservation easement of the sort at issue here qualifies. It constitutes "a restriction" on "the use . . . of the real property" because it burdens what would otherwise be the landowner's fee-simple enjoyment of—and absolute discretion over—the use of its property. And it does so "in perpetuity" because nothing in the grant envisions a reversion of the easement interest to the landowner, its heirs, or assigns. A broad limitation on the use of the property that applies to the parcel as a whole satisfies the statutory test, even if within that parcel there exist certain narrow exceptions to that limitation. I.R.C. § 170(h)(2)(C).
>
> The Commissioner contends, by contrast, that an aggregate restriction on the use of the land isn't enough; rather, he asserts, every inch of land must be subject to the restriction in perpetuity—such that, his argument goes, even a limited reservation of development rights violates the granted-in-perpetuity requirement. "[T]he whole point of § 170(h)(2)(C)," the Commissioner argues, "is to ensure that a conservation easement's restriction on the use that may be made of the real property is *perpetual*, meaning that the restriction cannot be subsequently removed, weakened, or diminished . . . ." Br. of Appellee at 45–46 (emphasis original). But the Commissioner misunderstands both the plain language of the statute and the common-law provenance of the term "perpetuity." As for the language, the word that precedes the term "restriction" is "a," and it seems to us indisputable that the 2005 and 2006 easements impose "a restriction"—singular—on the uses to which the subject parcels may be put because they broadly restrict Pine Mountain's preexisting development rights. And they impose that restriction

> "in perpetuity," as that term is understood in the common law, because Pine Mountain, its heirs, or assigns remain indefinitely subject to the restriction and because nothing in the grants will cause the easements, either automatically or upon the happening of some event, to revert back to the Pine Mountain or its successors.
>
> * * *
>
> The Tax Court constructed a "Swiss cheese" analogy—the entire conservation area serving as the slice and the development zones the holes. As the Tax Court saw it, § 170(h)(2)(C) demands that the entire slice (the conservation area) be protected from development in perpetuity, such that the landowner cannot under any circumstances relocate any of the holes (reserved rights).
>
> But whether exceptions to restrictions in a conservation easement poke holes in the slice runs, we think, to whether the easement adequately *protects* the conservation purposes, which is a question to be answered by reference to § 170(h)(5)(A), not § 170(h)(2)(C). Using the Tax Court's own cheese metaphor, all that § 170(h)(2)(C)'s granted-in-perpetuity condition requires is that the landowner grant a slice (*i.e.*, a restrictive easement) in the first place, which here Pine Mountain plainly did. We agree with Pine Mountain that the better cheese analogy is to Pepper Jack. Here, the reserved rights don't introduce holes into the conservation-easement slice, because the entire slice remains subject to "a restriction"—*i.e.*, the conservation easement. Instead, the reserved rights are embedded pepper flakes, and, so long as they don't alter the actual boundaries of the easement, § 170(h)(2)(C) is satisfied.

Importantly, the opinion distinguished the easements here from those considered by the Fourth Circuit in Belk:

> In rejecting the deductions for the 2005 and 2006 easements, the Tax Court relied heavily on a series of its own previous decisions that the Fourth Circuit subsequently affirmed in *Belk v. C.I.R.*, 774 F.3d 221 (4th Cir. 2014). *Belk* concerned a conservation easement in which the landowner had reserved a right, subject to the donee organization's approval, to "substitute an area of land . . . contiguous to the Conservation Area for an equal or lesser area of land comprising a portion of the Conservation Area." *Belk v. C.I.R.*, 140 T.C. 1, 3 (2013), *aff'd*, 774 F.3d 221 (4th Cir. 2014). The reviewing courts held that this provision disqualified the property interest under § 170(h)(2)(C) "because the real property contributed to the Trust is not subject to a use restriction in perpetuity." *Belk*, 774 F.3d at 226. As the Fourth Circuit interpreted that provision, "[t]he placement of the article 'the' before 'real property' makes clear that a perpetual use restriction must attach to a defined parcel of real property rather than simply *some* or *any* (or interchangeable parcels of) real property." *Id*. at 225 (emphasis in original). It held that if the grant permits land from outside the easement to be swapped for easement land—thus freeing the easement land from the attendant restrictions—then "the restriction on 'the real property' is not" perpetual because the boundaries of the restricted property have shifted. *Id*. at 226.
>
> The 2005 and 2006 easements here bear no resemblance to the one at issue in the *Belk* litigation. The easements that Pine Mountain granted only allow building areas to be moved around *within the fixed boundaries of the easement*— they don't permit outside-territory swapping. Pine Mountain's easements more closely resemble those in *BC Ranch II v. C.I.R.*, 867 F.3d 547 (5th Cir. 2017). In that case, landowners had deeded perpetual conservation easements to a land trust but

> reserved rights to build homesites on select five-acre plots, subject to the trust's consent. The Fifth Circuit held that the easements satisfied § 170(h)(2)(C)'s granted-in-perpetuity requirement because "[o]nly discrete five-acre residential parcels, entirely within the exterior boundaries of the easement property," could be moved within the conservation area. *Id.* at 553. In so holding, the court distinguished *Belk* on grounds that apply equally here. The Fifth Circuit explained that the problem in *Belk* arose "because the donor of the easement could develop the same land that it had promised to protect, simply by lifting the easement and moving it elsewhere," even to "tracts of land entirely different and remote from the property originally covered by that easement"—*that*, the court recognized, is what violated the granted-in-perpetuity requirement. *Id*. at 553. The Fifth Circuit also observed that parcel-swapping would complicate valuations because an appraiser would have to value a moving target. *Id*.
>
> By contrast, there are no such dangers where, as in *BC Ranch*—and here— an easement only permits the relocation of building areas within the conservation area without changings the easement's boundaries. *Id.* at 552. First, such an arrangement can't be used to release the real property from the easement in a wholesale manner. And second, so long as "the unencumbered homesite parcels have roughly the same per-acre value as the rest of the" easement territory, then appraisal is feasible because "changing the boundaries of some of the homesite parcels would not return any value to the easement donors." *Id*. at 553.

Then the court turned to the protected-in-perpetuity requirement, which the Tax Court had upheld. The court agreed with the Tax Court:

> Each easement's amendment clause "recognize[s] that circumstances could arise which would justify the modification of certain restrictions" in the grant. The clause thus states that NALT, as the "Holder," and Pine Mountain, as the "legal owner," "shall mutually have the right, in their sole discretion, to agree to amendments to this Conservation Easement, which are not inconsistent with the Conservation Purposes." The Commissioner asserts that the amendment provision gives so much discretion to the parties that it causes the 2007 easement—and again, by extension the others as well—to violate the "double-perpetuity requirement" of § 170(h)(2)(C) and § 170(h)(5)(A). We disagree. For starters, to the extent that the Commissioner's position equates "perpetuity" with inalienability, unreleasability, or unamendability, we reject it. As we have explained, "perpetuity"—as used in connection with conservation easements—draws on the term's common-law meaning and denotes only that the granted property won't automatically revert to the grantor, his heirs, or assigns. *See supra* at 12–13.
>
> Separately, it seems to us that the Commissioner's position proves entirely too much. Parties to a bilateral contract—which is all a conservation easement is—can *always* agree after the fact to amend their agreement, whether or not they expressly reserve that right to themselves in writing. If the possibility of amendment were a deal-killer, then there could be no such thing as a tax deductible conservation easement.
>
> As the Tax Court correctly observed, the easements at issue here are conveyances with respect to which Pine Mountain and NALT contracted. It is (literally) hornbook contract law that contracting parties are free to amend their agreements after the fact. *See* 28 Williston on Contracts § 70:154 (4th ed.) ("A promise modifying a duty under an executory contract is binding if the modification is fair and equitable in view of circumstances not anticipated by the parties when the

> contract was made."); *see also* Restatement (Second) of Contracts § 89 (1981) (similar). More particularly, traditional servitude doctrine has long allowed for the amendment of easements. *See* Restatement (Third) of Property (Servitudes) § 7.1 (2000) (observing that a property servitude "may be modified or terminated by agreement of the parties, pursuant to its terms"). 5 And indeed, even the Uniform Conservation Easement Act—the act that enabled landowners to grant perpetual easements to conservation trusts—provides for the possibility of bilateral amendments. *See* UCEA § 2(a) ("Except as otherwise provided . . . , a conservation easement may be created, conveyed, recorded, assigned, released, *modified*, terminated, or otherwise *altered* or affected in the same manner as other easements." (emphasis added)).

The essence of the Eleventh Circuit's policy determination – if court's make policy determinations – is in footnote 4, to which the careful listener can almost hear the IRS replying "no, no, no, are you crazy?"

> 4 Lest anyone worry that our interpretation of § 170(h)(2)(C) gives the Pine Mountains of the world a free pass, we make two observations in closing our discussion of the 2005 and 2006 easements. First, we have dealt only with § 170(h)(2)(C). Even after passing through the granted-in-perpetuity gateway, a conservation easement must still satisfy § 170(h)(5)(A)'s protected-in-perpetuity requirement; that, it seems to us, is likely where Congress envisioned the heavy lifting—the more rigorous analysis of the degree to which the grant protects conservation purposes—should occur. Second, recall that NALT has extensive advance-approval rights under these easement contracts. NALT is a sophisticated land-conservation organization, and we have little doubt that when it comes to negotiating conservation easements, it is well positioned and equipped to look after conservation interests.

Finally, the court remanded for a "better" determination of value from the Tax Court. The court thought the original decision just "split the baby" which was inappropriate.

6. **Protected In Perpetuity; Validity of Regulation**. In Oakbrook Land Holdings v. Commissioner, 154 T.C. No. 10 (2020), the Tax Court upheld the "protected in perpetuity" regulatory requirement. In 1983 the IRS issued a proposed regulation with a "perpetuity" requirement, and received more than 700 pages of comments. With respect to the procedural aspects of the regulation, the opinion states:

> The two aspects of the "judicial extinguishment" rule to which petitioner objects are the requirement that the donee receive a proportional share of the proceeds and the fact that the "proportionate share" formula does not account for the possibility of donor improvements. Treasury clearly considered the comments it received on the first point because it substantially revised the text of section 1.170A-14(g)(6)(ii), Income Tax Regs., in response to those comments. See supra pp. 14-15.
>
> Only one of the 90 commenters mentioned donor improvements, and it devoted exactly one paragraph to this subject. That commenter, NYLC, was concerned about facade easements on historic structures, as opposed to "perpetual open space easements," with which Treasury was chiefly concerned. See 48 Fed. Reg. at 22940. And NYLC mentioned this point to support its belief that donors of facade easements "are likely to be discouraged from making a donation," a supposition that Treasury may reasonably have discounted.

> In any event, "[t]he administrative record reflects that no substantive alternatives to the final rules were presented for Treasury's consideration." SIH Partners, 150 T.C. at 44; see dissenting op. p. 102 ("A comment is * * * more likely to be significant if the commenter suggests a remedy for the purported problem it identifies."). NYLC offered no suggestion about how the subject of donor improvements might be handled; it simply recommended "deletion of the entire extinguishment provision." Only one other commenter of the 13 mentioning judicial extinguishment voiced that recommendation.

Footnote 3, relevant to the dissent, states:

> Our dissenting colleague errs in relying on United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977), to support his position. See dissenting op. pp. 110-113. That case involved a Food and Drug Administration (FDA) regulation establishing minimum "time, temperature, and salinity" requirements for processing fish. The Second Circuit invalidated the regulation as applied to one category of fish product, "non-vacuum-packed hot-smoked white-fish." Nova Scotia Food Prods. Corp., 568 F.2d at 253. The court first held that the FDA had "failed to disclose to interested parties the scientific data and the methodology upon which it relied." Id. at 250. "When the basis for a proposed rule is a scientific decision, the scientific material which is believed to support the rule should be exposed to the view of interested parties for their comment." Id. at 252. The court also held that the agency had failed to consider: (1) evidence that heating "certain types of fish to high temperatures will completely destroy the product," (2) the suggestion that using "nitrite and salt as additives could safely lower the high temperature otherwise required," and (3) the suggestion that different processing requirements should be established for different species of fish. Id. at 245. Here, the basis for the proposed regulation was not "a scientific decision"; Treasury relied on no undisclosed data when proposing its regulation; the two commenters who opposed the judicial extinguishment rule offered no concrete alternative suggestions; and the concerns they expressed lacked the significance of concerns about destroying the commercial viability of a product, which the Second Circuit aptly described as "vital questions" in Nova Scotia Food Prods. Corp., 568 F.2d at 252.
>
> ***
>
> The broad statements of purpose contained in the preambles to the final and proposed regulations, coupled with obvious inferences drawn from the regulations themselves, are more than adequate to enable us to perform judicial review. We find that Treasury's rationale for the judicial extinguishment rule "can reasonably be discerned and * * * coincides with the agency's authority and obligations under the relevant statute." SIH Partners, 150 T.C. at 47. We accordingly hold that Treasury satisfied all applicable APA requirements when promulgating this rule.

The court then turned to the substance, analyzed under Chevron as explained by the court:

> Having concluded that the regulation was properly promulgated, we turn to petitioner's contention that the regulation is substantively invalid. When considering a challenge to the substantive validity of a regulation, we generally employ the two-part test established by Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). The first prong of that test asks "whether Congress has directly spoken to the precise question at issue." Id. at 842. "If the intent of Congress is clear, that is the end of the matter." Ibid.

> Section 170(h)(5)(A) sets forth a general requirement that the conservation purpose be "protected in perpetuity." Congress does not appear to have considered the possibility that an easement might be judicially extinguished, and the statute does not address how that possibility would affect a taxpayer's ability to satisfy the "perpetuity" requirement. Congress therefore did not speak directly to the question at issue.
>
> We accordingly proceed to Chevron step two, which requires us to consider whether the regulation "is based on a permissible construction of the statute." Chevron, 467 U.S. at 843. If the statute is silent, we must give deference to the interpretation embodied in the agency's regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute." Id. at 844; see United States v. MeadCorp., 533 U.S. 218, 227 (2001). In other words we must sustain the regulation so long as it represents a "reasonable interpretation" of the law Congress enacted. Chevron, 467 U.S. at 844; see SIH Partners, 150 T.C. at 50.

The court determined that the regulation was valid under Chevron:

> We cannot say that the regulation's "proportionate value" approach is "arbitrary, capricious, or manifestly contrary to the statute." Chevron, 467 U.S. at 844. Under the regulation the donee acquires "a property right, immediately vested in the donee organization," in a share of any future proceeds. Sec. 1.170A-14(g)(6)(ii), Income Tax Regs. Needless to say, the easement might be extinguished many years after it was granted, and considerable inflation in property values might occur in the interim. If the donee's share were limited to the easement's historical FMV, its property right could be eviscerated in real dollar terms. This would allow the donor or its successors to "reap[ ] a windfall if the property is destroyed or condemned." Carroll, 146 T.C. at 214 (quoting Kaufman, 687 F.3d at 26). That outcome would be at odds with the regulation's central purpose: to ensure satisfaction of the statute's "protected in perpetuity" requirement by supplying the donee with an asset that replaces, in real terms, the easement that has been lost.
>
> ***
>
> Second, petitioner contends that the regulation is invalid because it does not permit the donee's share of the proceeds to be reduced by the value of improvements (if any) made by the donor. The regulation as proposed did not address donor improvements, and only one of 90 commenters mentioned the point. See supra pp. 21-22. Once again, we cannot say that the absence of a provision addressing donor improvements renders the regulation "arbitrary, capricious, or manifestly contrary to the statute." Chevron, 467 U.S. at 844.
>
> Treasury's goal in prescribing this regulation was to ensure satisfaction of the statute's "protected in perpetuity" requirement. In effect this requirement is deemed satisfied because the sale proceeds replace the easement as an asset deployed by the donee "exclusively for conservation purposes." Sec. 170(h)(5)(A). In certain factual scenarios, reducing the donee's proceeds on account of donor improvements could frustrate this goal, especially if local land values should decline.
>
> For example, assume that a taxpayer donates an easement valued at $1 million on property valued at $2 million without the easement. The taxpayer thereafter spends $1 million improving the property. Many years later, there is an economic downturn, the easement is extinguished, and the property is sold for $2 million. Under the regulation the donee would be entitled to $1 million (half of the

> proceeds) and the conservation purpose would be deemed "protected in perpetuity." Sec. 170(h)(5)(A). But if improvements were carved out, the donee's share would be reduced to $500,000 or zero, depending on whether the carve-out was applied to the entire proceeds or to the donee's 50% share.
>
> NYLC, the only commenter to mention donor improvements, notably did not suggest any text to address this problem. And addressing it would have raised a host of questions: Would the donee's proceeds be reduced by improvements the donor had made before granting the easement, after granting it, or both? Would the donor get credit for improvements to the land itself (such as grading) or only for erecting structures? Would the donee's proceeds be reduced by the donor's cost for the improvements or by their FMV at the time the easement was extinguished? And how would the problem mentioned in the previous paragraph be solved, to prevent the donee's share from being severely reduced or even eliminated? It is conceivable that Treasury could have drafted a regulation that addressed the possibility of donor improvements, dealing with these ancillary questions in some rational way. But that was a policy decision for Treasury, not this Court, to make.

The court thought it significant that the regulation was finalized long ago in 1986:

> The regulation petitioner challenges was promulgated in January 1986. It has never been amended. In the past 34 years Congress has amended section 170 more than 30 times, but these amendments have never suggested any disagreement with the construction of the statute that Treasury adopted in section 1.170A-14(g)(6), Income Tax Regs. This "strongly suggests that * * * [Congress] did not view Treasury's construction * * * as unreasonable or contrary to the law's purpose." SIH Partners, 150 T.C. at 53-54 (sustaining under Chevron step two a regulation that had persisted substantially unchanged for nearly 50 years).
>
> [footnote omitted]

Twelve judges signed on to the majority opinion. There was a concurrence and a dissent. The concurrence in result only by Judge Toro would have flunked the regulation under Chevron but disallowed the deduction because the charity did not receive all the state law property rights in the land. That opinion states:

> Oakbrook maintains that the requirement of section 170(h)(5)(A) is met so long as the donee, upon a sale or other disposition after extinguishment by judicial proceeding, would obtain an amount equal to the fair market value of the easement at the time the easement was established, subject to reduction for subsequent improvements funded exclusively by the donor. But Oakbrook's position ignores the fact that, to be eligible for a deduction under section 170(h) in the first place, a donor must grant to a donee an "interest[ ] in real property." Sec. 170(h)(2). One of the rights inherent in a real property interest (and presumably required to be transferred to the donee in order to satisfy section 170(h)(2)(C)) is the property holder's right to be compensated at fair market value upon a subsequent transfer or taking.
>
> ***
>
> The formula set out in the Deed exposes the fundamental problem for Oakbrook-under the terms of the Deed, the donee never received the type of "interest[ ] in real property" contemplated by section 170(h)(2)(C) and further protected by section 170(h)(5)(A). Put another way, by failing to convey to the donee the

> unrestricted right to be compensated at fair market value upon a future transfer or taking, the Deed so restricted the donee's interest as to cause it to fall outside the purview of section 170(h)(2)(C).
>
> The shortcoming inherent in the Deed also affects Oakbrook's compliance with section 170(h)(5)(A). The payment of a predetermined fixed amount would be insufficient as compensation for a right "protected in perpetuity" if the fair market value of the property had appreciated since the date the easement was granted. When a transfer of money to the donee is intended to satisfy the "perpetuity of purpose" requirement of section 170(h)(5)(A), no reasonable reading of the statute would bless the donee receiving an amount that is less than the fair market value of its "interest[ ] in real property" as of the time of the conversion of its interest into cash.

On the other hand, Judge Toro would have invalidated the donor improvement portion of the regulation:

> I begin at the same starting place--the statutory text. The statute provides a deduction for a contribution to a qualified organization of a "qualified real property interest" made "exclusively for conservation purposes." Although the statute makes clear that there can be no deduction unless the conservation purposes are "protected in perpetuity," one cannot lose track of the fact that the deduction is predicated on a "qualified real property interest" being contributed to a qualified organization. Thus, the most that a qualified organization can be entitled to receive if its "qualified real property interest" is extinguished in the future is the full value of that interest. Whatever the purpose of a contribution, that purpose may not be invoked to require the donor to give the donee, as a precondition to receiving a deduction for his contribution, a right to receive compensation properly attributed to the real property interest that the Code permits the donor to retain. A regulation interpreted to require otherwise cannot be a permissible interpretation of the statutory text before us. Under that text, the interest the donee organization must obtain in connection with a contribution is the "qualified real property interest" transferred to it. Requiring the donor to promise to turn over to the donee proceeds in excess of the fair market value of that interest is inconsistent with the statutory framework, and nothing in the "statutory purposes" compels a different conclusion. Goldstein, 451 F.3d at 881 (quoting Abbott Labs., 920 F.2d at 988).
>
> The opinion of the Court admits that "[i]t is conceivable that Treasury could have drafted a regulation that addressed the possibility of donor improvements, dealing with [the types of questions noted above] in some rational way." See op. Ct. p. 30. But the opinion of the Court overlooks the lack of a "rational" solution to those problems, by noting that "that was a policy decision for Treasury, not this Court, to make." See id. In the Court's view, "Treasury's overarching goal [in prescribing the regulation] was to guarantee that the donee, upon judicial extinguishment of the easement, would receive the full share of proceeds to which it was entitled. * * * Treasury exercised reasoned judgment by adhering to a simple rule that splits sale proceeds in a direct proportional manner." See id. p. 31.
>
> I agree with the opinion of the Court that the donee should "receive the full share of proceeds to which it was entitled." See id.(emphasis added). But a rule interpreted to require the deed to allocate to the donee not only the proceeds attributable to its own real property interest but also a share of the proceeds attributable to the interest the Code permits the donor to retain does not " ' "fit" ' with the statutory language" and is unreasonable. Good Fortune Shipping SA v.

> Commissioner, 897 F.3d at 262 (quoting Goldstein, 451 F.3d at 881). Calling it a "policy decision" does not change the fact that the rule, as interpreted by the Commissioner, yields in certain circumstances a result that is entirely unreasonable and without any basis in the statute. Under Chevron, Treasury is entitled to draw lines on the page provided by Congress; Chevron does not give Treasury legislative authority to substitute a different page for the one Congress enacted into law.

Judge Toro also found the procedural part of the rulemaking defective:

> In response to the notice, Treasury received more than 700 pages of comments during the extended comment period and at least another 130 pages after the comment period had closed. A hearing on the proposed regulation was requested and was held on September 15, 1983. Thirty-seven members of the public were originally scheduled to speak at the hearing, and 30 actually spoke. The hearing lasted more than five hours, and the transcript exceeds 200 pages.
>
> A Treasury Decision adopting final regulations was published in the Federal Register on January 14, 1986. See T.D. 8069, 1986-1 C.B. 89, 51 Fed. Reg. 1496 (Jan. 14, 1986). The Treasury Decision spanned roughly 12 pages, of which approximately 10 contained the actual text of the regulations. That left just over two pages for Treasury's responses to comments and other administrative matters (for example, the Paperwork Reduction Act notice and drafting information). Put another way, Treasury used six columns of the Federal Register to address more than 700 pages of timely comments and more than 200 pages of public testimony. Those six columns were intended to cover comments on a "regulation project consisting of 10 paragraphs, 23 subparagraphs, 30 subdivisions, and 21 examples." See op. Ct. p. 24.
>
> One might wonder how an agency familiar with the D.C. Circuit's decision in Home Box Office, which by 1986 had been on the books for more than eight years, could have thought that six columns in the Federal Register sufficed to "respond[ ] to significant points raised by the public" in more than 700 pages, or how that response constituted a "dialogue" between the agency and the public contemplated by the APA as interpreted by Home Box Office and the authorities on which it relied. Home Box Office, 567 F.2d at 35-36 (fn. ref. omitted); see also PPG Indus., 630 F.2d at 466 (reiterating that the APA requires agencies "to give reasoned responses to all significant comments in a rulemaking proceeding"). Even for an agency determined to be exceedingly "concise," six columns in the Federal Register would be a tight amount of space to show "what major issues of policy were ventilated ... and why the agency reacted to them as it did." Carlson, 938 F.3d at 344 (alteration in original) (quoting Del. Dep't of Nat. Res. & Envtl. Control v. EPA, 785 F.3d 1, 17 (D.C. Cir. 2015)).
>
> But, in my view, Treasury did not think it confronted such a Herculean task. It is more likely that Treasury was simply following its historical position that the APA's procedural requirements did not apply to these types of regulations.[15] As the Treasury Decision explains, Treasury took the view that "[a]lthough a notice of proposed rulemaking which solicited public comments was issued, the * * * [IRS] concluded when the notice was issued that the regulations are interpretative and that the notice and public comment procedure requirement of 5 U.S.C. 553 did not apply." T.D. 8069, 1986-1 C.B. at 92. When an agency engaged in a particular rulemaking exercise believes the APA does not require it to provide notice and receive comments at all, it is not difficult to see why that agency might

> think that a rather brief explanation, offered as it were out of its own generosity, should be good enough.[17]
>
> The problem with this position, however, is that Treasury's conclusion that the regulation at issue here did not require notice and comment was mistaken, as the opinion of the Court correctly makes clear
>
> ***
>
> The NYLC Comment Letter in effect countered that the proposed rule on future donor improvements was contrary to those policy decisions, would lead to inequitable results that were inconsistent with the statute, and would deter future contributions. In short, the NYLC Comment Letter offered comments that, "if adopted, would require a change in an agency's proposed rule." Home Box Office, 567 F.2d at 35 n.58. Those comments were both "relevant and significant," requiring a response. Grand Canyon, 154 F.3d at 468; accord Carlson, 938 F.3d at 343-344.
>
> Unfortunately, however, the Treasury Decision finalizing the regulations contains no such response. The Treasury Decision changed the sentence on which the Commissioner relies with respect to donor improvements as follows (with the relevant change underscored):
>
>> (1) Proposed Regulation: "For purposes of this paragraph (g)(5)(ii), that original minimum proportionate value of the donee's property rights shall remain constant." 48 Fed. Reg. 22946.
>>
>> (2) Final Regulation: "For purposes of this paragraph (g)(6)(ii), that proportionate value of the donee's property rights shall remain constant." T.D. 8069, 1986-1 C.B. at 99.
>
> But Treasury gave no explanation as to how the change addressed the concerns expressed in the NYLC Comment Letter. In short, Treasury's actions did not provide "an explanation [that] is clear enough that its 'path may reasonably be discerned.' " Encino Motorcars, 579 U.S. at ___, 136 S. Ct. at 2125 (quoting Bowman Transp., 419 U.S. at 286).[18] Nor does Treasury's action provide any insight on "what major issues of policy were ventilated ... and why the agency reacted to them as it did" on this point. Carlson, 938 F.3d at 344 (quoting Del. Dep't of Nat. Res. & Envtl. Control, 785 F.3d at 17).

Three judges agreed with portions of Judge Toro's opinion.

The dissent reviewed multiple comments to Treasury's proposed regulation and then turned to Treasury's response:

> What we hear is the chirping of crickets.
>
> The Final Rule's statement of basis and purpose shows absolutely no mention of the extinguishment-proceeds clause at all, much less any mention of the proportionate-share or improvements problems--and no reasoned response to any of the public's comments on those provisions.[9] The majority doesn't deny this, see op. Ct. pp. 23-25, and we aren't even the first court to notice: In Kaufman v. Shulman, 687 F.3d 21, 26 (1st Cir. 2012), the First Circuit was forced to guess at

> the apparent purpose of the section 1.170A-14(g)(6)(ii), Income Tax Regs., after noting that it “was unexplained when first promulgated.”
>
> This makes the defining characteristic of section 1.170A-14(g)(6)(ii), Income Tax Regs., its utter lack of any contemporaneous explanation of its key choices--to require that donees get a fraction, rather than an absolute amount, of extinguishment proceeds and to require that they get a share of any proceeds from a donor’s improvements to the property. There is no prefiguring of these choices in the legislative history or the notice of proposed rulemaking, and no explanation of them in the Final Rule. Had Treasury responded in any meaningful way to the comments that it received, such as those from the NYLC, neither donors and donees, nor courts, see, e.g., Oakbrook, T.C. Memo. 2020-54, at *20-*28 (highlighting the confusing nature of section 1.170A-14(g)(6), Income Tax Regs., and attempting to discern its meaning), nor the IRS, compare Priv. Ltr. Rul. 200836014 (Sept. 5, 2008) (stating that the regulation isn’t violated by a conservation easement in which a donee receives only proceeds less any amount attributable to an improvement), with Oakbrook, T.C. Memo. 2020-54, at *36 (addressing the IRS’s argument that a conservation easement in which a donee receives only proceeds less any amount attributable to an improvement is a violation of the regulation), would have to grapple with whether “proportionate value” establishes a fraction or a fixed value, or whether a donee is entitled to any extinguishment proceeds attributable to the value of improvements or rising land values. Such widespread industry confusion is precisely what APA section 553 is intended to avoid. So while we don’t demand a perfect explanation for Treasury’s decision making, see Bowman Transp., 419 U.S. at 286, we should demand some, see Encino Motorcars, 579 U.S. at __, 136 S. Ct. at 2125. And here, there wasn’t any.

With respect to the substance, the dissent notes that Chevron can be applied in different ways and that Treasury now justifies the regulation on grounds different from what it did when it issued the regulation. As to this point, the dissent states:

> These seem like perfectly plausible reasons. But they are not the ones that Treasury itself offered at the time it issued the regulation. This raises another problem for the Commissioner in his defense--the Chenery rule. The Chenery rule prevents an agency from relying on *post hoc* rationalizations to defend its decision making. SEC v. Chenery Corp., 318 U.S. 80, 87 (1943) (“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”); see also State Farm, 463 U.S. at 50 (courts may not accept post hoc rationalizations). And Chevron step 2 is limited by Chenery. Bank of Am., N.A. v. FDIC, 244 F.3d 1309, 1319 (11th Cir. 2001) (stating that Chenery must be considered at step 2 of Chevron); see also Council for Urological Interests v. Burwell, 790 F.3d 212, 222 (D.C. Cir. 2015); America’s Cmty. Bankers v. FDIC, 200 F.3d 822, 835 (D.C. Cir. 2000). We shouldn’t be coming up with our own *post hoc* justifications for the reasonableness of the rule if the Commissioner’s lawyers wouldn’t be able to.
>
> The same problem affects our analysis of the substantive validity of this regulation under State Farm. The Sixth Circuit has warned agencies that its arguments in favor of a regulation not being “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” is likewise limited by the Chenery rule. See Atrium, 766 F.3d at 567-68 (“[T]he ground upon which an administrative order must be judged are those upon which the record discloses that its action was based.” (quoting Chenery, 318 U.S. at 87)).

> The majority today comes up with as good a set of arguments as possible to justify the reasonableness of the regulatory choices that Treasury made when it was drafting this regulation. But Treasury didn't make them. Or at least it didn't make them in the administrative record of this regulation.

The Eleventh Circuit delivered the taxpayer a significant victory in Hewitt v. Commissioner, 21 F.4th 1336 (11th Cir. 2021) holding that the Treasury interpretation in Treas. Reg. § 1.170A-14(g)(6)(ii) is arbitrary and capricious. The court introduces the case as follows:

> David and Tammy Hewitt seek review of the Tax Court's order determining that they were not entitled to carryover a charitable contribution deduction for the donation of a conservation easement (the "Easement"). The Tax Court concluded that the Easement did not satisfy the "protected-in-perpetuity" requirement, see I.R.C. § 170(h)(5), because the Easement deed violated the judicial extinguishment proceeds formula set forth in Treas. Reg. § 1.170A-14(g)(6)(ii). Specifically, in the event of judicial extinguishment, the Easement deed subtracts the value of post-donation improvements to the property from the extinguishment proceeds before determining the donee's share of the proceeds, which the Commissioner asserts violated § 1.170A-14(g)(6)(ii) and, thus, § 170(h)(5)'s protected-in-perpetuity requirement.
>
> On appeal, the Hewitts make several arguments as to why the Tax Court erred. They contend that the Commissioner's interpretation of § 1.170A-14(g)(6)(ii) is incorrect, as subtraction of the value of post-donation improvements from the proceeds allocated to the donee is the "better reading" of the regulation. As to this interpretation argument, we recently determined, in *TOT Property Holdings, LLC v. Commissioner*, that § 1.170A-14(g)(6)(ii) "does not indicate that any amount, including that attributable to improvements, may be subtracted out." 1 F.4th 1354, 1363 (11th Cir. 2021) (quoting *PBBM-Rose Hill, Ltd. v. Comm'r*, 900 F.3d 193, 208 (5th Cir. 2018)).
>
> But, based on the taxpayers' concession in *TOT*, *id*. at 1362 & n.13, we did not address whether § 1.170A-14(g)(6)(ii) was procedurally valid under the Administrative Procedures Act ("APA") or substantively valid under the framework in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Unlike the taxpayers in *TOT*, the Hewitts challenge the regulation's validity on appeal. Specifically, the Hewitts argue that the Commissioner's interpretation of § 1.170A-14(g)(6)(ii)—prohibiting the subtraction of the value of post-donation improvements to the property on which a conservation easement exists from the proceeds in the event of judicial extinguishment—is arbitrary and capricious for violating the procedural requirements of the APA, see 5 U.S.C. § 706, because the U.S. Treasury Department failed to respond to significant comments as to the improvements issue in promulgating the regulation. The Hewitts further argue that the regulation is substantively invalid under *Chevron* as an unreasonable interpretation of the statute.
>
> After careful review, and for the reasons explained below, we conclude that the Commissioner's interpretation of § 1.170A14(g)(6)(ii) is arbitrary and capricious and violates the APA's procedural requirements. And because we find the Commissioner's interpretation of § 1.170A-14(g)(6)(ii) to be invalid under the APA, the Easement deed's subtraction of the value of post-donation improvements from the extinguishment proceeds allocated to the donee does not violate § 170(h)(5)'s protected-in-perpetuity requirement. Accordingly, we

> reverse the Tax Court's order disallowing the Hewitts' carryover deduction for the conservation easement and remand for further proceedings.

The court noted that Tot didn't raise this issue:

> Unlike *TOT*, the Hewitts assert that Treasury failed to comply with the procedural requirements of the APA in promulgating Treas. Reg. § 1.170A-14(g)(6)(ii). Specifically, the Hewitts contend that the administrative record demonstrates that comments raising concerns with § 1.170A-14(g)(6)(ii) were filed during the rulemaking process, that those comments were "significant" such that they required a response from Treasury, and that Treasury failed to adequately respond to those significant comments in the final regulation's "basis and purpose" statement, in violation of the APA's procedural requirements. As such, the Hewitts contend that § 1.170A-14(g)(6)(ii), as interpreted by the Commissioner to prohibit the subtraction of the value of post-donation improvements to the easement property in the proceeds allocated to the donee in the event of judicial extinguishment, is arbitrary and capricious under the APA.

With respect to the procedure leading up to the issuance of the regulations, the opinion states:

> After a public hearing, Treasury adopted the proposed regulations with revisions. 51 Fed. Reg. at 1496. In the preamble to the final rulemaking, Treasury stated that "[t]hese regulations provide necessary guidance to the public for compliance with the law and affect donors and donees of qualified conservation contributions" and that it had "consider[ed] . . . all comments regarding the proposed amendments." *Id*. In the subsequent "Summary of Comments" section, however, Treasury did not discuss or respond to the comments made by NYLC or the other six commenters concerning the extinguishment proceeds regulation. *See id*. at 1497–98; *Oakbrook*, 154 T.C. at 188 ("The 'judicial extinguishment' provision is not among the amendments specifically addressed in the 'Summary of Comments.'"). And Treasury stated that "[a]lthough a notice of proposed rulemaking which solicited public comments was issued, the Internal Revenue Service concluded when the notice was issued that the regulations are interpretative and that the notice and public comment procedure requirement of 5 U.S.C. [§] 553 [of the APA] did not apply." 51 Fed. Reg. at 1498.
>
> The Hewitts assert that these seven comments—in particular, NYLC's comment—were significant such that they warranted a response from Treasury in promulgating the final extinguishment proceeds regulation. In response, the Commissioner asserts that none of the thirteen comments were significant to require a response from Treasury because they did not raise any point casting doubt on the regulation's reasonableness.

The dissents in Oakbrook were important

> The *Oakbrook* decision was not unanimous. Judge Toro, in a concurring in result opinion, found that, if the proceeds regulation was read in the way proposed by the Commissioner, i.e., to bar subtraction of the value of post-donation improvements from the extinguishment proceeds, it failed to comply with the APA's procedural requirements. *See id*. at 216 (Toro, J., concurring).

***

> In his dissenting opinion, Judge Holmes reached a similar conclusion to Judge Toro on the regulation's procedural invalidity under the APA. He concluded that comments from NYLC and other organizations "were significant and [were] entitled to an agency response." *See id*. at 245 (Holmes, J., dissenting). Judge Holmes explained that Treasury's statement that it considered "all comments" was not sufficient under the APA, noting that the Federal Circuit, in *Dominion Resources, Inc. v. United States*, 681 F.3d 1313, 1319 (Fed. Cir. 2012), found a Treasury regulation procedurally invalid even though Treasury explicitly stated that "it rejected the commentators' recommendation and brief explanation in general terms of how one of the provisions worked." *Oakbrook*, 154 T.C. at 245–46 (Holmes, J., dissenting). He further explained that the final regulations at issue provided even less explanation than those in *Dominion Resources*, as Treasury failed to "even acknowledge the relevant comments or expressly state its disagreement with them" such that there was not even "a minimal level of analysis." *Id*. at 248 (quoting *Encino Motorcars*, 579 U.S. at 2120).

The court concluded:

> After careful consideration of the agency record before us, the several opinions in *Oakbrook* and precedent from the Supreme Court, and this Court's interpretation of procedural validity under the APA, we conclude that § 1.170A-14(g)(6)(ii)—as read by the Commissioner to prohibit subtracting the value of post-donation improvements to the easement property from the proceeds allocated to the donor and donee in the event of judicial extinguishment—is arbitrary and capricious under the APA for failing to comply with the APA's procedural requirements and is thus invalid. See §§ 553(c), 706(2)(A).
>
> Our decision in *Lloyd Noland* is instructive. In that case, the plaintiffs challenged a malpractice insurance rule related to Medicare reimbursements that was promulgated by the Secretary of Health and Human Services. 762 F.2d at 1563. In addressing the plaintiffs' challenge, we concluded that the malpractice insurance rule was procedurally inadequate under the APA; specifically, it violated § 553(c), which we explained requires an agency "to incorporate into a new rule a concise general statement of its basis and purpose." *Id*. at 1566. The Secretary had failed to respond to comments that a study the agency relied on, which contained limited data that the authors cautioned against generalizing, was unreliable. *Id*. While the Secretary asserted that the objections were irrelevant, we concluded otherwise, such that those comments formed the basis of our holding that the malpractice insurance rule was arbitrary. *Id*. at 1566, 1568. We also rejected the Secretary's argument that she addressed certain hospitals' comments based on the rule's preamble, stating that "[w]e are aware that insurance companies generally do not determine insurance rates for malpractice insurance based upon the financial status of the patients," and that "premiums are 'incurred primarily for the benefit of the total overall patient population and for the protection of facility assets.'" *Id*. at 1566. While the Secretary suggested "that drawing a conclusion contrary to the comments does not mean they were not considered," we explained that "[b]asis and purpose statements must enable the reviewing court to see the objections and why the agency reacted to them as it did" and that agencies should rebut relevant comments. *Id*. at 1566–67. Because the Secretary's response to the rule's comments were inadequate, we affirmed the district courts' invalidation of the rule. *Id*. at 1567, 1569; *cf. Encino Motorcars*, 579 U.S. at 2126–27 ("The [agency] said that, in reaching its decision, it had 'carefully considered all of the comments, analyses, and arguments made for and against the proposed changes.' . . . But when it came to explaining the 'good reasons for the new policy,' the [agency] said almost nothing. . . . [T]he [agency's]

> conclusory statements do not suffice to explain its decision." (first quoting 76 Fed. Reg. 18,832, 18,832 (Apr. 5, 2011), then quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009))).
>
> The Commissioner argues that *Lloyd Noland* should be distinguished because, in that case, we reviewed "a factual, evidence based rule," while the extinguishment proceeds regulation is based on Treasury's interpretation of § 170(h)(5)'s statutory protected-inperpetuity requirement. But, in *Lloyd Noland*, we did not hold that the requirement that "[b]asis and purpose statements must enable the reviewing court to see the objections and why the agency reacted to them as it did"—including responding to significant comments—only applies when there is "erroneous data or fact finding" underlying the proposed regulation, as the Commissioner suggests, and we decline to do so here.
>
> As in *Lloyd Noland*, in promulgating the final extinguishment proceeds regulation, Treasury failed to respond to the relevant and significant comment from NYLC as to the post-donation improvements issue. In the proposed regulations' preamble, Treasury stated that the "regulations reflect the major policy decisions made by the Congress and expressed in the[] committee reports" to the Tax Treatment Extension Act of 1980. 48 Fed. Reg. at 22,940. One of the policy decisions reflected in those "committee reports," expressly referenced by Treasury, provided that "the preservation of our country's natural resources and cultural heritage is important," that "conservation easements now play an important role in preservation efforts," and that "provisions allowing deductions for conservation easements should be directed at the preservation of unique or otherwise significant land areas or structures." S. Rep. No. 96-1007, at 9 (1980). NYLC's comment recognized as much, stating that "[t]he statute was enacted by Congress to encourage the protection of our significant natural and built environment through the donation of conservation restrictions."

Of special importance was whether the comments from the New York Landmarks Conservancy were "significant." The court said they were:

> While we agree with the Commissioner that Treasury was only required to respond to *significant* comments to comply with the APA's procedural requirements, we disagree with the Commissioner's argument that NYLC's comment was not significant. The Commissioner's claim that the "primary (if not exclusive)" purpose in crafting the proceeds regulation was *only* to interpret § 170(h)(5)'s "protected-in-perpetuity" requirement is inconsistent with the committee reports Treasury purportedly relied on. As identified by NYLC, one of the purported purposes set forth in the committee reports, was to allow deductions for the donation of conservation easements to encourage donation for such easements. *See* S. Rep. No. 96-1007, at 9. And NYLC raised the postdonation improvements issue, as to extinguishment proceeds, and warned that its exclusion in the regulatory scheme would discourage prospective donors from donating conservation easements. In other words, NYLC's comment was specific to, and casted doubt on, the reasonableness of the proceeds regulation in light of one of Congress's committee reports which, according to Treasury, was "reflected" in the final regulations. 48 Fed. Reg. at 22,940 ("The regulations reflect the major policy decisions made by the Congress and expressed in the[] committee reports."). Furthermore, the final regulations did not limit the purpose of the proceeds regulation in the way the Commissioner suggests. We thus decline to classify NYLC's comment as insignificant based on the Commissioner's interpretation of Treasury's primary purpose in crafting the proceeds regulation.6 *See State Farm*, 463 U.S. at 43, 50 ("'[W]e may not supply a reasoned basis for

> the agency's action that the agency itself has not given.' . . . [C]ourts may not accept appellate counsel's post hoc rationalizations for agency action." (quoting *Chenery*, 332 U.S. at 196)). The Commissioner additionally asserts that Treasury's revisions to the proposed proceeds regulation in the final regulation support Treasury's representation that it considered "all comments" in the final regulations' preamble. But, as the Commissioner concedes, the revisions were simply "clarifications" in response to other comments "expressing uncertainty" about the regulation's meaning "rather than substantive changes." Indeed, the proceeds regulation was revised from vesting the donee with a property right having a fair market value "that is a minimum ascertainable proportion of the fair market value to the entire property" to a fair market value "that is at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift, bears to the value of the property as a whole at that time." *See Oakbrook*, 154 T.C. at 188 (comparing the proposed and final proceeds regulations). But this revision does not provide any indication that Treasury was responding to NYLC's significant comment about the post-donation improvements issue. *See Lloyd Noland*, 762 F.2d at 1567; *Hussion*, 950 F.2d at 1554. We therefore reject this argument.

The Sixth Circuit went the other way from Hewitt and upheld the Tax Court in Oakbrook Land Holdings, LLC v. Commissioner, 28 F.4th 700 (6th Cir. 2022). The opinion summarizes the situation:

> Under § 170(h) of the Internal Revenue Code, taxpayers who donate an easement in land to a conservation organization may be eligible to claim a charitable deduction on their Federal income tax returns. Crucially, the easement's conservation purpose must be guaranteed to extend in perpetuity to qualify for the deduction. See 26 U.S.C. (I.R.C.) § 170(h)(5)(A). Unexpected developments, however, may make this impossible long after the donor has deeded the easement away. How, then, can an easement satisfy the perpetuity requirement?
>
> Contemplating such scenarios, the Department of Treasury has promulgated a rule, 26 C.F.R. (Treas. Reg.) § 1.170A-14(g)(6). This regulation addresses situations in which unforeseen changes to the surrounding land make it "impossible or impractical" for an easement to fulfill its conservation purpose. Treas. Reg. § 1.170A-14(g)(6)(i). In these events, the conservation purpose may still be protected in perpetuity "if the restrictions are extinguished by judicial proceeding and all of the donee's proceeds . . . from a subsequent sale or exchange of the property are used by the donee" to further the original conservation purpose. *Id*. Proceeds are calculated by a formula in § 1.170A-14(g)(6)(ii), a provision to which we refer as the "proceeds regulation."
>
> On this appeal from the United States Tax Court, the petitioners, Oakbrook Land Holdings, LLC (Oakbrook) and William Duane Horton, challenge the validity of the proceeds regulation. The petitioners contend that, in promulgating this rule, Treasury violated the notice-and-comment requirements of the Administrative Procedure Act (APA). The petitioners also argue that Treasury's interpretation of § 170(h)—the statute that the rule implements—is unreasonable. Finally, the petitioners argue that the proceeds regulation is arbitrary or capricious. The full Tax Court considered these arguments and found them to be unpersuasive. *See Oakbrook Land Holdings v. Comm'*r, 154 T.C. 180, 181 (T.C. 2020). We agree with the Tax Court and AFFIRM.

With respect to the procedural adequacy of Treas. reg. § 1.170A-14 (g)(6)(ii) the court held:

> Under the APA, whenever agencies promulgate "a rule that 'intends to create new law, rights or duties'" such as this regulation does, they must engage in a process known as notice-and-comment rulemaking. *Tennessee Hosp. Ass'n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018) (quoting *Michigan v. Thomas*, 805 F.2d 176, 182–83 (6th Cir. 1986)). *See also* 5 U.S.C. § 553(b). There are three steps involved in this process. First, the agency must publish a "notice of proposed rule making" in the Federal Register. 5 U.S.C. § 553(b). Next, the agency must afford "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." § 553(c). Finally, "[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." *Id*
>
> The petitioners contend that the agency deviated from the APA's notice and comment requirements in two ways. First, the petitioners argue that Treasury inadequately explained the rationale for the proceeds regulation in its concise general statement of basis and purpose. Second, the petitioners argue that the agency failed to respond to certain comments about the regulation, which, according to the petitioners, raised significant issues. We consider each argument in turn.
>
> ***
>
> 1. Adequacy of Treasury's Concise Statement of Basis and Purpose
>
> After the comment period closed, Treasury issued a concise statement of basis and purpose for Treas. Reg. § 1.170A-14 that explained the regulations' goals and addressed various comments made about the rules. *See* 51 Fed. Reg. at 1497–98. This statement lacked an explanation for the policy rationale behind Treas. Reg. § 1.170A-14(g)(6)(ii) specifically. Instead, Treasury explained that the regulations contained in Treas. Reg. § 1.170A-14 "provide necessary guidance to the public for compliance with the law and affect donors and donees of qualified conservation contributions." 51 Fed. Reg. at 1496. To the petitioners, this explanation is far too succinct to provide adequate insight into the proceeds regulation's rationale. Placing this explanation within the context of the rulemaking leads us to the opposite conclusion.
>
> What an agency must include in a concise general statement of basis and purpose is dictated by competing considerations. Courts, on the one hand, must be able "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." Simms, 45 F.3d at 1005 (quoting *Auto. Parts & Accessories Ass'n, Inc. v Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968)). Judicial scrutiny does not "contemplate that the court itself will, by a laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution." *Auto. Parts & Accessories Ass'n, Inc.*, 407 F.2d at 338. Agencies, on the other hand, operate with scarce time and limited resources. *See Vermont Yankee Nuclear Power Corp. v. Nat. Res. Defense Council, Inc.*, 435 U.S. 519, 551 (1978). These limitations mean that an agency cannot "discuss every item of fact or opinion included in the submissions made to it in informal rule making." *Simms*, 45 F.3d at 1005 (quoting *Auto. Parts & Accessories Ass'n, Inc.*, 407 F.2d at 338).
>
> Balancing these considerations, the APA's concise-general-statement requirement "is not meant to be particularly onerous." *Nat'l Mining Ass'n v. Mine*

> *Safety & Health Admin*. 512 F.3d 696, 700 (D.C. Cir. 2008). Absent an ideal statement, courts may still conduct judicial review and uphold a regulation "where the basis and purpose [are] considered obvious." *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 14 F.3d 429, 443 (9th Cir. 1993); *see also Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 303 (2d Cir. 2006); *Citizens to Save Spencer Cnty. v. U.S. EPA*, 600 F.2d 844, 884 (D.C. Cir. 1979). If a statement is truly concise, then "[a] careful reading of the agency's published notices, from its original grant of the petition for rulemaking to its final rule, [may still] disclose[] a 'reasoned path'" that the agency followed to reach its ultimate rule. *Simms*, 45 F.3d at 1006 (quoting *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 639 (D.C. Cir. 1984)).
>
> Juxtaposing the final version of Treas. Reg. § 1.170A-14(g)(6)(ii) with the notice of proposed rulemaking reveals that the basis and purpose of the rule are apparent. In the background section of the proposed version of the proceeds regulation, Treasury provided a brief history of how the Code had treated the charitable deductions of conservation easements. 48 Fed. Reg. at 22940. This history traced how contributions of partial interests went from being disfavored under the Tax Reform Act of 1969, to being allowed under the Tax Reduction and Simplification Act of 1977. *Id*. This allowance came with a caveat: conservation easements had to "be perpetual in order to qualify for a deduction under section 170." *Id*. After Congress again amended the Code with the Tax Treatment Extension Act of 1980, Treasury proposed the proceeds regulation to implement I.R.C. § 170(h). 48 Fed. Reg. at 22940. Notably, although I.R.C. § 170(h)(5)(A) required that easements' conservation purposes be protected in perpetuity, the provision was silent about how to guarantee this requirement in the event of extinguishment. Facing this lacuna, it was obvious that Treasury would need to craft a regulation that spoke to the issue of protecting an easement's conservation purpose should unforeseen circumstances stymie this end.
>
> ***
>
> Taken together, then, the statutory text and the legislative history that Treasury contemplated in promulgating Treas. Reg. § 1.170A-14(g)(6)(ii) illuminate the regulation's basis and purpose: to provide an administrable mechanism that would ensure that an easement's conservation purpose as per I.R.C. § 170(h)(5)(A) continued to be protected should the interest be extinguished. That the regulation allots proceeds in a manner more favorable to donees than to donors merely demonstrates Treasury's acute awareness of Congress's decision to concern itself with the welfare of one entity over the other once the donation was made. Because we can discern this from the information that Treasury provided during the rulemaking, its concise statement suffices.

The court was lenient in the requirement that Treasury respond to comments:

> In the concise general statement of basis and purpose that accompanied the final rule, Treasury also did not address any comments that touched on Treas. Reg. § 1.170A-14(g)(6)(ii). For the petitioners, this oversight is the main procedural deficiency with the rule. To this end, they list a series of comments that mentioned the proceeds regulation, argue that at least some of these required Treasury's attention, and conclude that the agency's failure to do so is fatal to the regulations. Having thoroughly examined these comments, we disagree.
>
> The APA's requirement of soliciting comments serves several ends. "In addition to increasing the quality of rules, the required public participation helps 'ensure

> fair treatment for persons to be affected by' regulation." *United States v. Cain*, 583 F.3d 408, 420 (6th Cir. 2009) (quoting *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 678 (6th Cir. 2005)). From these principles follows an agency's duty to respond to "significant points raised by the public." *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977)). After all, if an agency could ignore every comment regardless of its content, then the process of soliciting public input would be pointless. *See id*.
>
> Yet the inverse is true, too. Requiring an agency to respond to every comment regardless of its content would transform rulemaking into
>
>> a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented."
>
> *Vermont Yankee*, 435 U.S. at 553–54. Recognizing that notice-and-comment rulemaking is not an administrative sport, we have repeatedly concluded that an agency must "give reasoned responses to all significant comments in a rulemaking proceeding," not that an agency must respond to all comments. *United States v. Utesch*, 596 F.3d 302, 310 (6th Cir. 2010) (quoting P*PG Indus., Inc. v. Costle*, 630 F.2d 462, 466 (6th Cir. 1980)) (emphasis added); *see also Navistar Int'l Transp. Corp. v. U.S. EPA*, 941 F.2d 1339, 1359 (6th Cir. 1991).
>
> Significance is difficult to measure in the abstract. The petitioners catalog cases that they argue use different "tests" for determining whether a comment requires an agency's response. *See, e.g., Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 852 (D.C. Cir. 1987); *Home Box Office, Inc.*, 567 F.2d at 35 n.58; *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 253 (2d Cir. 1977). Rather than provide discrete tests, however, these cases demonstrate that assessing significance is context dependent and requires reading the comment in light of both the rulemaking of which it was part and the statutory ends that the proposed rule is meant to serve.
>
> "Accordingly, an agency must respond to comments 'that can be thought to challenge a fundamental premise' underlying the proposed agency decision." *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (quoting *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000)). A comment must provide enough facts and reasoning to show the agency what the issue is and how it is relevant to the agency's aims. *See Vermont Yankee*, 435 U.S. at 553; *Home Box Office, Inc*., 567 F.2d at 35 n.58. Comments that do so are "significant enough to step over a threshold requirement of materiality" needed for an agency to address them. *Vermont Yankee*, 435 U.S. at 553 (quoting *Portland Cement Ass'n v. Ruckelshau*s, 486 F.2d 375, 394 (D.C. Cir. 1973)).

The court also commented on the Hewitt case:

> The petitioners also direct us to a recent decision by the Eleventh Circuit that held the proceeds regulation to be procedurally invalid under the APA. See *Hewitt v. Comm'r*, 21 F.4th 1336, 1339 (11th Cir. 2021). Unlike the concurrence, we find that decision's reasoning to be unpersuasive. In concluding that the New York Landmarks Conservancy's comment raised significant concerns about possible deterrent effects that the proceeds regulation could have on donations, the

> Eleventh Circuit stressed that one of I.R.C. § 170's aims is "to allow deductions for the donation of conservation easements to encourage donation for such easements." *Id*. at 1352. Although encouraging the donation of conservation easements is undeniably a goal of the statute, highlighting this point overlooks a crucial condition that Congress demanded be met by donors seeking deductions: an easement's conservation purpose must be "protected in perpetuity."7 I.R.C. § 170(h)(5)(A).
>
> That the proceeds regulation interprets I.R.C. § 170(h)(5)(A) and is meant to enforce Congress's goal of limiting deductions to those instances in which the perpetuity requirement can be satisfied is evident from the regulations. Not only does the plain language of the proceeds regulation address this end, see Treas. Reg. § 1.170A-14(g)(6)(i) ("the conservation purpose can nonetheless be treated as protected in perpetuity" if the proceeds regulation is followed upon judicial extinguishment), but the rule is also part of a section in the regulations titled "Enforceable in perpetuity," Treas. Reg. § 1.170A-14(g), that contemplates various scenarios in which the perpetuity requirement of I.R.C. § 170(h)(5)(A) would not be met, *see*, *e.g.*, Treas. Reg. § 1.170A-14(g)(2), id. § 1.170A-14(g)(4). Other than missing § 1.170A-14(g)(2), which regulates how mortgages impact the perpetuity requirement and was added in response to other comments, the proposed rule contained the same relevant language. *See* 48 Fed. Reg. at 22945–47. Put differently, I.R.C. § 170(h)(5)(A) embodies a particular policy that restricts deductions to where an easement's conservation purpose can be protected forever, and Treas. Reg. § 1.170A-14(g)(6)(ii) interprets how to implement that policy. The Eleventh Circuit's decision thus does not alter our conclusion that Oakbrook has failed to cite comments that raised valid concerns about how the regulation served this policy.
>
> At this point, the concurrence interjects to accuse us of treating the perpetuity requirement of I.R.C. § 170(h)(5)(A) as a trump card. But we did not decide that perpetuity should play a vital role in the statutory scheme. Congress did. Even aside from the legislative history on which Treasury expressly relied in crafting the proceeds regulation, the statute's text makes it apparent that what Congress sought to encourage is not simply the donation of conservation easements as the concurrence believes. Rather, Congress intended to incentivize the donations of only those easements that met a highly circumscribed set of prerequisites. These easements must be "of a qualified real property interest," which includes the requirement that the interest contain a perpetual restriction on its use. I.R.C. § 170(h)(1)(A), (2)(C). Donations must be "to a qualified organization." I.R.C. § 170(h)(1)(B). And, of course, they must be "exclusively for conservation purposes"—purposes that must be ensured to endure forever. I.R.C. § 170(h)(1)(C), (5)(A). *Cf. Carlson*, 938 F.3d at 342, 345–46 (noting that "simplicity of structure" was one of the "fourteen [statutory] factors" that Congress explicitly deemed it necessary for the Postal Service to contemplate in rulemaking).

The majority found the regulation was a reasonable interpretation of the statute and thus entitled to a Chevron deference holding of validity.

A concurrence in judgment concluded that the "proceeds regulation" should be invalidated but thought the Oakbrook deed violated the "perpetuity" requirement. Judge Guy's opinion is educational:

> The Department of the Treasury must play by the same rules as other federal agencies. The Supreme Court made that clear when it refused to "carve out an

approach to administrative review good for tax law only" and "expressly 'recognized the importance of maintaining a uniform approach to judicial review of administrative action.'" *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 55 (2011) (cleaned up) (quoting *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999)). But it seems the majority opinion has done the opposite for Treasury's proceeds regulation (Treas. Reg. § 1.170A-14(g)(6)(ii)). In my view, the regulation is procedurally invalid under the Administrative Procedure Act (APA) for substantially the same reasons stated by the Eleventh Circuit in *Hewitt v. Commissioner of IRS*, 21 F.4th 1336 (11th Cir. 2021), and by the concurring and dissenting opinions in *Oakbrook Land Holdings, LLC v. Commissioner of IRS*, 154 T.C. 180, 200-30 (2020) (Torro, J., concurring in the judgment, joined in full by Urda, J., and joined in part by Gustafson and Jones, JJ.); *id*. at 230-259 (Holmes, J., dissenting). But I would conclude that the Commissioner's statutory argument is not forfeited and affirm on that basis.

***

As the Eleventh Circuit held, NYLC's comment "was significant and required a response by Treasury to satisfy the APA's procedural requirements." *Hewitt*, 21 F.4th at 1351. Because Treasury "failed to respond to NYLC's significant comment concerning the post-donation improvements issue as to proceeds, it violated the APA's procedural requirements." *Id*. at 1353.

The majority opinion makes NYLC's four-page comment seem insignificant by condensing it to one sentence and omitting the most important part. *Compare* (Maj. Op. 16), *with Hewitt*, 21 F.4th at 1345 (quoting extensively from NYLC's comment). In part, NYLC's comment made the following points:

> 1. Most importantly, NYLC stated that the proceeds regulation "contemplates that a ratio of value of the conservation restriction to value of the fee will be fixed at the time of the donation and will remain in effect forever thereafter. *This formula fails to take into account that improvements may be made thereafter by the owner which should properly alter the ratio*." J.A. 671 (emphasis added). NYLC drove the point home with a specific example. Suppose the owner of property worth $100,000 grants a "scenic easement" worth 10% of the value of the entire parcel, guaranteeing that the owner of Parkacre and his successors will never build high-rise buildings in order to ensure Parkacre is a place to enjoy nature and sunlight. *See* J.A. 670-71; *see also* 48 Fed. Reg. 22940, 22944-55 (May 23, 1983). The parcel owner then spends $2 million to build rental housing units on the parcel. *Id*. If the easement is later extinguished in eminent domain proceedings for the parcel, "the donee organization would be entitled . . . to 10% of the sale price of the entire parcel including the improvements," i.e., 10% of $2.1 million. J.A. 671. "*This would obviously be undesirable to the prospective donor and would constitute a windfall to the donee organization*." *Id*. (emphasis added).
>
> 2. NYLC thus contended that the proceeds regulation "contain[s] problems *of policy and practical application* so pervasive as to cause [NYLC] to recommend strongly the deletion of these provisions. *The statute was enacted by Congress to encourage the protection of our significant natural and built environment through the donation of conservation restrictions and yet, the proposed provisions would thwart the purpose of the statute by deterring prospective donors*." J.A. 670 (emphasis added)

> 3. NYLC spoke from first-hand experience, recounting that "it is our experience that prospective donors frequently raise the question that 'perpetuity' is a long time and may impose unforeseeably heavy burdens on themselves or future owners under unforeseeable future circumstances. We find ordinarily that these concerns are mollified upon the donor's recognition that common law permits extinguishment of restrictions . . . . Obviously, the prospect of extinguishment would no longer mollify these fears if a split of proceeds under unknown circumstances would be required." J.A. 670-71.
>
> 4. NYLC—a donee organization—emphasized that "[t]he value of a conservation restriction to the donee organization is not a monetary value but a philanthropic value as a device for achieving the charitable objectives of the organization," such that "the extinguishment of a conservation restriction cannot be compensated by the payment of money." J.A. 671. To that end, NYLC stated that it "would prefer to eliminate" the proceeds regulation rather than "trade on the prospect of future windfalls when restrictions are extinguished." *Id*.
>
> 5. "In light of the potential inequities described," NYLC concluded by "*recommend[ing] that the proposed proceeds formula be revised to prevent such inequities," but "strongly recommend[ed] deletion of the entire extinguishment provision.*" J.A. 672 (emphasis added).

NYLC's comment was "significant": It "show[ed] why [a] mistake was of possible significance in the results." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978) (quoting P*ortland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973)). The comment is significant for two principal reasons.

First, NYLC's comment is significant because it showed that the regulation "would thwart" one of "the purpose[s] of the statute by deterring prospective donors." J.A. 670; *accord Hewitt*, 21 F.4th at 1351. That is, "[o]ne of the policy decisions reflected in th[e] 'committee reports,' expressly referenced by Treasury," *Hewitt*, 21 F.4th at 1351 (quoting 48 Fed. Reg. at 22940), "provided that 'the preservation of our country's natural resources and cultural heritage is important,' that 'conservation easements now play an important role in preservation efforts,' and that 'provisions allowing deductions for conservation easements should be directed at the preservation of unique or otherwise significant land areas or structures.'" *Id*. (quoting S. REP. NO. 96-1007, at 9 (1980)); *see also BC Ranch II, L.P. v. Comm'r of IRS*, 867 F.3d 547, 553-54 (5th Cir. 2017).

Second, NYLC cast doubt on the reasonableness of the regulation's formula and further showed that it would "obviously" deter donors because "the regulation's proceeds formula: (1) 'contemplates that a ratio of value of the conservation restriction to value of the fee will be fixed at the time of the donation and will remain in effect forever thereafter'; and (2) 'fail[ed] to take into account that improvements may be made thereafter by the owner which should properly alter the ratio.'" *Hewitt*, 21 F.4th at 1351 (quoting NYLC's comment); see J.A. 670-71. The majority opinion does not grapple with this second aspect of the reasoning in *Hewitt*. If it was a significant comment to suggest that an agency's uniform cook temperature for all fish should be altered to each species of fish so that the product is not destroyed, *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 243, 252-53 (2d Cir. 1977); (Maj. Op. 15-16), then NYLC's comment was likewise significant because it argued that a donor's postdonation improvements "should properly alter the ratio" so that Congress's tax incentive for prospective donors is not destroyed. J.A. 671.

Treasury might have explained that post-donation improvements might cause a slight indirect increase in the value of an easement and that the donee should reap the total value *of the easement*. But Treasury did not. More importantly, Treasury left everyone to wonder: Why would the easement holder be entitled to receive a proportional percentage of the *actual value of* the donor's post-donation improvements, i.e., rental housing units or a country club and golf course? Why would the statutory tax deduction incentivize any donor to grant a conservation easement if it means the donor (and any successors) must agree to give the donee the easement proceeds *and* a proportional ratio of *any* future improvements in the event of judicial extinguishment? Or why would Treasury require that the value of separate property rights (the easement and the property burdened) always maintain a proportional value relationship when "there is commonly little, if any, relation." RESTATEMENT (FIRST) OF PROPERTY § 508 cmt. b (Am. Law. Inst. 1944). This court should not "sanction silence in the face of such vital questions." *Nova Scotia Food Prods.*, 568 F.2d at 253.

The bottom line is there is no doubt that NYLC's comment "'can be thought to challenge [two] fundamental premise[s]' underlying the proposed agency decision" and Treasury failed to respond. *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (quoting *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000)); *see Hewitt*, 21 F.4th at 1351-52. (*Contra* Maj. Op. 15-16 (stating the same test but a contrary conclusion). In other words, Treasury's decision is arbitrary and capricious because it "entirely failed to consider [these] important aspect[s] of the problem." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

***

The reasoning in *Carlson v. Postal Regulatory Commission*, 938 F.3d 337 (D.C. Cir. 2019), explains why NYLC's comment required a response. Carlson considered an agency's decision to increase the cost of letter stamps by five cents. 938 F.3d at 341. The Postal Service's proposal noted that "keeping the price of stamps 'at round numbers divisible by five'" would help achieve one of the statutory goals, "simplicity of structure." *Id*. at 342. Carlson, a "postal customer and watchdog," chimed in during notice-and-comment, arguing: (1) that "keeping the price of a stamp divisible by five did not promote the value of 'simplicity of structure'"; (2); that "raising the price of stamps by five cents was inconsistent with the statutory objective of 'establish[ing] and maintain[ing] a just and reasonable schedule for rates'" (similar to NYLC's argument that the fixed-ratio formula is flawed and would "thwart" the statutory goal of encouraging conservation easements); and (3) that "the detrimental 'effect of rate increases upon the general public' weighed against the Postal Service's proposal" (analogous to NYLC's statement that "problems of policy and practical application" and "inequities" weighed in favor of revising the regulation or deleting it altogether). *Id*. at 342, 345-47 (alterations in original). The agency did not respond to Carlson's comments, but it did more than Treasury here; it at least "referenced, but did not resolve, Carlson's" first point. *Id*. at 342. The court held that all of Carlson's comments were significant and "warranted [a] response" because they concerned "several relevant statutory objectives and factors." *Id*. at 345. "By failing to consider relevant statutory objectives and factors and declining to respond to significant public comments, the Commission violated the APA when it approved the stamp price hike." *Id*. at 351. The same is true here.

The majority opinion acknowledges that "encouraging the donation of conservation easements is undeniably a goal of the statute." (Maj. Op. 19). Yet it treats one other statutory goal—perpetuity—as a trump card, such that Treasury was free to ignore any comment unless the comment showed that the regulation "fail[ed] to satisfy" the "perpetuity requirement." (Maj. Op. 18; *see id*. 16-21, 23-24).

On the contrary, "[e]ven when an agency has significant discretion in deciding how much weight to accord each statutory factor, that does not mean it is free to ignore any individual factor entirely." *Carlson*, 938 F.3d at 344 (cleaned up) (quoting T*ex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 934 (5th Cir. 1998)); *see also Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 818 (D.C. Cir. 1983) (holding that the agency "must explain why a particular proposal is inconsistent with the balance between regulation and competition" (citation omitted)); *Nova Scotia Food Prods*., 568 F.2d at 253 ("[T]he administrative process should disclose, at least, whether the proposed regulation is considered to be commercially feasible, or whether other considerations prevail even if commercial infeasibility is acknowledged."). As in *Carlson*, Treasury "also failed to evaluate how other statutory objectives and factors," such as encouraging the donation of conservation easements, "might bear on the proposed [proceeds regulation] or outweigh [Treasury's purported] reliance on" the perpetuity requirement. *Id*. at 347.

Treasury was required to *explain to the public*, why post-donation improvements are not taken into account and why it balanced the competing statutory interests in favor of adopting a fixed-ratio formula. "[A]n agency may justify its policy choice by explaining why [its] policy 'is more consistent with statutory language' than alternative policies," but Treasury is not permitted to remain silent and leave it for a court to "supply a reasoned basis for the agency's decision." *Encino Motorcars*, 579 U.S. at 223 (citation omitted). (*Contra* Maj. Op. 13, 19-20, 22, 25).

***

Treasury's decision to remain silent has consequences: We cannot rely on *post hoc* explanations; nor can a court offer the reasons that might have supported Treasury's decision. The majority explains why the proceeds regulation is needed to implement the statute's protected-in-perpetuity requirement and why, as a matter of policy, the division of extinguishment proceeds should be "more favorable to donees than to donors," such that the easement holder should receive a fixed ratio of the actual value of the *donor's* post-donation improvements. (Maj. Op. 13, 19-20, 22, 25). The problem is that Treasury did not provide these reasons at the time it promulgated the proceeds regulation.

"It is a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Dep't of Homeland Sec.*, 140 S. Ct. at 1907 (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)). "It is not the role of the courts to speculate on reasons that might have supported an agency's decision. '[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given.'" *Encino Motorcars*, 579 U.S. at 224 (quoting *State Farm*, 463 U.S. at 43). That also means "courts may not accept . . . counsel's *post hoc* rationalizations for agency action." *State Farm*, 463 U.S. at 50. This "rule serves important values": It promotes "agency accountability"; instills "confidence that the reasons given are not simply 'convenient litigating position[s]'"; and preserves "the orderly functioning of the process of review." *Dep't of Homeland Sec.*, 140 S. Ct. at 1909 (citations omitted).

The Commissioner's brief and the majority opinion offer a similar rationale and cite the same law review article published in 2021. (Appellee Br. 61-63; Maj. Op. 13, 22). But "[t]he functional reasons for requiring contemporaneous explanations apply with equal force regardless whether *post hoc* justifications are raised in court by those appearing on behalf of the agency or by agency officials themselves." *Dep't of Homeland Sec.*, 140 S. Ct. at 1909.

***

But this does not mean Oakbrook should prevail outright. Because Oakbrook's deed calls for the donee to receive a *fixed amount* in the event of a judicial extinguishment, the deed violates the plain language of Congress's requirement that the conservation easement must be granted in perpetuity under I.R.C. § 170(h)(2)(C). (Appellee Br. 32-35, 37); *see Oakbrook*, 154 T.C. at 204-07 (Toro, J., concurring in the judgment, joined by Gustafson, Urda, and Jones, JJ.).

***

With that understanding, the statute only requires a donor to give a qualified organization one right from the bundle—the right to forever prevent uses of the property in a way inconsistent with the qualified conservation purpose. *See, e.g.*, *Hoffman Props*., 956 F.3d at 835; *Pine Mt. Pres. v. Comm'r of IRS*, 978 F.3d 1200, 1206 (11th Cir. 2020); *BC Ranch II*, 867 F.3d at 551-54. Oakbrook's deed does that. *See* J.A. 112-19. Oakbrook holds all the remaining rights.

From there, the statute requires that the easement be "granted in perpetuity," I.R.C. § 170(h)(2)(C), meaning the donee must "*hold* [that] property interest in perpetuity[.]" *Glass v. Comm'r of IRS*, 471 F.3d 698, 713 (6th Cir. 2006) (cleaned up; emphasis added). When that provision was enacted, the blackletter law of property dictated that "[u]pon the extinguishment of an easement by eminent domain, the owner of the easement is entitled to compensation *measured by the value of the easement*." RESTATEMENT (FIRST) OF PROPERTY § 508 (emphasis added); *see also id*. § 508 cmt. b ("Fair value for purposes of the award is the loss to the owner of the easement[.]"); *id*. § 566 cmt. b. Indeed, the Supreme Court "repeatedly held that just compensation normally is to be measured by 'the market value of the property *at the time of the taking* contemporaneously paid in money.'" *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (emphasis added) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)); *accord Horne v. Dep't of Agric.*, 576 U.S. 351, 368-69 (2015). Today, Tennessee follows the same rules.

Oakbrook's deed, however, limits the donee's proceeds to a fixed amount determined *at the time of the grant*. J.A. 121-22. Oakbrook admits that "'perpetuity'—as used in connection with conservation easements—draws on the term's common-law meaning and denotes only that the granted property won't automatically revert to the grantor, his heirs, or assigns." *Pine Mt. Pres.*, 978 F.3d at 1209; (Reply Br. 6). But Oakbrook's deed does not treat the donee as the holder of the easement right at the time of judicial extinguishment because the donee's easement rights are not appraised at the time of judicial extinguishment. Rather, the announcement of a judicial extinguishment effectively means the easement right reverts to Oakbrook because the donee receives a fixed amount set at the time of the grant. Accordingly, Oakbrook did not gift an easement interest "granted in perpetuity." *See* I.R.C. § 170(h)(2)(C).

In that regard, Oakbrook's deed makes this case different from *Hewitt.* There, the deed provided that, upon judicial extinguishment, the donee will receive "a fair

> market value determined by": (1) finding the current "fair market value of the Property unencumbered by the Easement (*minus any increase in value after the date of th[e] grant attributable to improvements*)"; and (2) multiplying that amount "by the ratio of the value of the Easement at the time of this grant to the value of the Property." *Hewitt*, 21 F.4th at 1340 (emphasis in original). While Oakbrook's deed similarly subtracts post-donation improvements, it differs because it fixes the fair market value "as of the date of th[e] Conservation Easement" grant. J.A. 121.
>
> The only problem is that, although the Commissioner presses this statutory argument now, the Commissioner did not raise the argument before the tax court. It appears four of the tax court judges decided to raise the argument sua sponte. *See Oakbrook*, 154 T.C. at 204-07 (Toro, J., concurring in the judgment, joined by Gustafson, Urda, and Jones, JJ.). The only statutory argument the Commissioner raised was that Oakbrook's easement deed "violates I.R.C. § 170(h)(2)(C) and (h)(5)(A) because the area covered by the conservation easement is not clearly defined." J.A. 34, 39-40, 47-49. The same provisions are the basis of the Commissioner's current statutory argument.
>
> ***
>
> In terms of fairness to the tax court, *see Sheet Metal*, 21 F.4th at 356, there is a significant difference between considering an argument to reverse a trial court and considering an argument to affirm. After all, we "may affirm a decision of the district court for any reason supported by the record, including on grounds different from those on which the district court relied." *Thomas v. City of Columbus*, 854 F.3d 361, 364-65 (6th Cir. 2017) (citation omitted); *accord U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 330 F.3d 747, 750 (6th Cir. 2003).
>
> Setting aside any exception to the forfeiture rule, our court and the Supreme Court "recognize a distinction between failing to properly raise a claim before the district court and failing to make an argument in support of that claim." *United States v. Reed*, 993 F.3d 441, 453 (6th Cir. 2021) (citation omitted); *see also Citizens United v. FEC*, 558 U.S. 310, 330-31 (2010) (concluding that the argument that a case "should be overruled is 'not a new claim,'" but instead, "it is—at most—'a new argument to support what has been a consistent claim: that the FEC did not accord Citizens United the rights it was obliged to provide by the First Amendment" (cleaned up)). The Commissioners' "arguments" that Oakbrook's deed violates § 170(h)(2)(C) and (h)(5)(A) "in two different ways, by [failing to sufficiently define the conservation area] and by [failing to satisfy the perpetuity requirements], are not separate *claims*. They are, rather, separate arguments in support of a single claim—that the [deed] effects [a violation of the statute]." *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992). "Having raised a [statutory violation] claim in the [tax] courts, therefore, [Oakbrook] could have formulated any argument [it] liked in support of that claim here." *Id*. at 535.

The Tax Court denied summary judgment to the government in Corning Place Ohio, LLC v. Commissioner, T. C. Memo. 2022-12, appealable to the Sixth Circuit but before the Oakbrook appellate decision was handed down. The issue was perpetuity protection. In addition, to the issue of regulation's validity, the construction of the clause itself was at issue:

> The regulations set forth detailed rules for determining whether this "protected in perpetuity" requirement is met. Key to our analysis here are the rules governing

the mandatory division of proceeds in the event the property is sold following a judicial extinguishment of the easement. *See* Treas. Reg. § 1.170A-14(g)(6).

2These regulations recognize that "a subsequent unexpected change in the conditions surrounding the property ... can make impossible or impractical the continued use of the property for conservation purposes." *Id.* subdiv. (i). Despite that possibility, "the conservation purpose can nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding" and the easement deed ensures that the charitable donee, following the sale of the property, will receive a proportionate share of the proceeds and use those proceeds consistently with the conservation purposes underlying the original gift. *Ibid.* This requirement is strictly construed; if a donee is not absolutely entitled to a proportionate share of extinguishment proceeds, then the conservation purpose of the contribution is not protected in perpetuity. *Carroll v. Commissioner*, 146 T.C. 196, 212 (2016).

* * *

Upon initial inspection the easement deed at issue seems to track the regulation precisely. It provides that "Grantee's percentage interest shall be determined as the fair market value of this Easement as of the Recording Date divided by the fair market value of the Property as a whole as of the Recording Date." But respondent views as problematic the sentence that appears two lines later: "The values upon the Recording Date of this Deed shall be those values used to calculate the deduction for [F]ederal income tax purposes allowable by reason of this grant pursuant to Section 170(h) of the Code."

In elaborating his argument respondent relies principally on *Carroll*. The deed there provided that the numerator of the apportionment fraction—i.e., the value of the donee's property right—was "the deduction for federal income tax purposes allowable by reason of this grant, pursuant to Section 170(h) of the Code." *Carroll*, 146 T.C. at 215 (emphasis omitted). We held that this formula violated the regulation, noting that, if the IRS denied the deduction for reasons other than valuation—in which case no deduction would be "allowable"—the numerator of the apportionment fraction "will be zero." *Id.* at 217. In the event of extinguishment the taxpayers could argue that they "never received a tax deduction" and hence that the donee was entitled to no share, rather than to a proportionate share, of the sale proceeds. *Id.* at 218. Such an argument, we found, would be "supported by the literal terms of the easement, and there is no evidence of a different intent." *Ibid.*

* * *

The extinguishment provision in Carroll was drafted quite differently from the one here, and we think respondent errs in equating them. The deed in *Carroll* defined the numerator as "the deduction ... allowable" for Federal income tax purposes, and we construed this phrase (consistently with its context) to mean the deduction allowable to the taxpayer in that case. The deduction allowable to the taxpayer, in other words, was itself the numerator, and that deduction could be zero.

Here, the deed defines the numerator as "the fair market value of this easement as of the Recording Date." It then says that this value (and the value appearing in the denominator) "shall be those values used to calculate the deduction ... allowable ... pursuant to Section 170(h)." Grammatically speaking, the "allowable" phrase here does not define the numerator. It simply specifies the deduction in question—

> namely, the deduction that is allowable to taxpayers generally under section 170(h).
>
> * * *
>
> Three other features of the instant deed distinguish this case from *Carroll*. The first is the phrase "values used to calculate," which does not appear in the *Carroll* deed. As often happens with the passive voice, one is forced to ask, "Used by whom?" Respondent appears to contend that the phrase means "the values used by the IRS or a court to calculate the deduction ultimately allowed to the taxpayer." On this reading, the provision would resemble that in *Carroll*. But this phrase could also mean "the values used by the taxpayer to calculate the deduction claimed on its return." On that reading the numerator would be very large and consistent with the regulation.
>
> We find the latter interpretation more plausible because of a second feature of the Corning Place deed, namely, its repeated references to "the recording date." As noted earlier, the deed initially says that the "Grantee's percentage interest shall be determined as the fair market value of this Easement as of the Recording Date divided by the fair market value of the Property as a whole as of the Recording Date." This phrase appears again in the sentence respondent views as problematic: "The values upon the Recording Date of this Deed shall be those values used to calculate the deduction ... allowable ... pursuant to Section 170(h)." The only values known "as of the Recording Date" would be the values that Corning Place intended to use in preparing its tax return, which would appear on the face of the appraisal.
>
> A third feature of the instant deed distinguishes this case even more sharply from *Carroll*. The deed in *Carroll* initially defined the numerator as the deduction allowable for Federal income tax purposes. It then stated that "[t]he parties shall include the ratio of those values [i.e., the numerator and the denominator] with the Baseline Documentation and shall amend such values, if necessary, to reflect any final determination thereof by the Internal Revenue Service or a court of competent jurisdiction." *Carroll*, 146 T.C. at 215 (emphasis omitted). This final clause made it absolutely clear that the parties intended the numerator to be the deduction ultimately allowed to the taxpayer granting the easement. No such clause appears in the Corning Place deed.

7. **Savings Clause In Easement Ineffective**. The Eleventh Circuit in Tot Property Holdings, LLC v. Commissioner, 2021 WL 2559088 (11th Cir. 2021) upheld the Tax Court's determination that a savings clause in the easement deed could not save the deduction. The opinion states:

> Section 9 of the deed governs extinguishment and condemnation of the easement. Section 9.1, the extinguishment section, states:
>
>> If circumstances arise in the future that render the purpose of this Easement impossible to accomplish, the Easement can only be terminated or extinguished, whether in whole or in part, by judicial proceedings in a court of competent jurisdiction. The amount of the proceeds to which Grantee shall be entitled from any sale, exchange, or involuntary conversion of all or any portion of the Property subsequent to such termination or extinguishment, shall be the stipulated fair market value of this Easement, or proportionate part thereof, as determined in accordance with Section 9.2 or 26 C.F.R. Section 1.170A-14, if different.

Section 9.2 of the deed is entitled “Valuation.” The easement is a real property interest immediately vested in Foothills. According to Sections 9.1 and 9.2, the stipulated fair market value of the easement at the time of such future extinguishment (which will determine the “amount of the proceeds to which Grantee shall be entitled”) shall be determined by (as stated in Section 9.2):

> multiplying (a) the fair market value of the Property unencumbered by this Easement (minus any increase in value after the date of this grant attributable to improvements) by (b) a fraction, the numerator of which is the value of this Easement at the time of the grant and the denominator of which is the value of the Property without deduction of the value of this Easement at the time of this grant.

In other words, this Section 9.2 formula provides that, upon any such future extinguishment (e.g. condemnation), the proceeds (e.g. proceeds of the condemnation) shall be reduced by “any increase in value after the date of this grant attributable to improvements,” and then the charitable donee's share would be determined by multiplying that reduced amount times the defined fraction. And the numerator and denominator of the fraction are the value, respectively, of the easement and unencumbered property at the time of the grant. Section 9.2 then concludes as follows: “It is intended that this Section 9.2 be interpreted to adhere to and be consistent with 26 C.F.R. Section 1.170A-14(g)(6)(ii).”

* * *

The dispositive question for whether the taxpayer may claim a deduction in this case is whether the Treasury Regulation Override provisions in Section 9 of the easement deed are impermissible savings clauses that are triggered by a condition subsequent, on the one hand, or valid interpretive provisions, on the other. If the former, the deed is not in compliance with 26 C.F.R. § 1.170A-14, no deduction can be claimed, and we must affirm the Tax Court on this issue. If the latter, it is at least arguable that the deed complies.

* * *

Appellants attempt to circumvent the problem of inconsistency of Section 9.2 with the requirements of the regulation, and the resulting disallowance of their deduction, by relying on the Treasury Regulation Override provisions of Sections 9.1 and 9.2. They argue that, pursuant to those provisions, the amount of the proceeds to which Foothills is entitled shall be “determined in accordance with Section 9.2 or 26 C.F.R Section 1.170A-14, if different,” and “[i]t is intended that this Section 9.2 be interpreted to adhere to and be consistent with 26 C.F.R. Section 1.170A-14(g)(6)(ii).” Appellants' argument is that these provisions are interpretive tools that operate to require proceeds to be distributed in compliance with 26 C.F.R § 1.170A-14. Because the formula in Section 9.2—the preferred alternative to applying § 1.170A-14, according to the deed—is, in fact, “different” from the regulatory formula and the deed requires the regulations to always control, TOT argues that we must interpret the deed to comply with the regulation.

TOT argues that the Tax Court erred in holding that the Treasury Regulation Override provisions were not interpretive and contained a “condition subsequent savings clause.” Whether the donation of the conservation easement is deductible, thus, turns on whether the Override provisions in the easement deed are unenforceable savings clauses, rather than valid interpretive provisions. We turn next to discuss the distinction between a condition subsequent savings clause, on the one hand, and a merely interpretive clause on the other hand.

The court concluded the clause in question is a condition-subsequent savings clause:

> First, the formula in Section 9.2 of the easement deed is unambiguous. It plainly and unambiguously provides that the required fraction, or proportionate share, shall be applied to the sales proceeds “minus any increase in value after the date of th[e] grant attributable to improvements.” Juxtaposed against the deed's alternative formula—that in 26 C.F.R. § 1.170A-14(g)(6)(ii)—Section 9.2's subtraction of the value of property improvements is stark. As in Belk, therefore, “[t]here is no open interpretive question for the savings clause to ‘help’ clarify.” 774 F.3d at 230. Rather, Section 9.2 unambiguously provides that the value attributable to improvements will be subtracted from condemnation proceeds before the required fraction is applied.
>
> Second, the operation of the Treasury Regulation Override provisions in this case means that the preferred formula—expressly described in the easement deed in Section 9.2—is simply nullified. Again, Section 9.1 defines the fair market value of Foothills's proceeds “as determined in accordance with Section 9.2 or 26 C.F.R Section 1.170A-14, if different.” Thus, Section 9.1 clearly states that Section 9.2's formula applies; it is first in the provision and has no condition attached to it. Then, the provision continues to contemplate the regulation's application, but its application is conditional. That is, the application of the regulation is conditioned on whether it is “different” from the plain text of the express formula in the easement deed in Section 9.2. If it is “different,” the Override operates to simply rewrite the easement deed to eliminate the Section 9.2 formula, leaving operative only the regulatory formula. If enforced, then, the Override would then impermissibly “countermand the plain text of the [e]asement [d]eed.” Coal Prop., 153 T.C. at 141; e.g., Belk, 774 F.3d at 230 (“Thus, the Belks ask us to employ their savings clause not to aid in determining [their] intent, but to rewrite their Easement in response to our holding. This we will not do.” (internal quotation marks omitted) (citation omitted)).
>
> Third, for the Override to be triggered and for the regulation to apply as the proper formula over Section 9.2's formula, a future event must occur, i.e. a determination that the proper interpretation of the regulation is “different” from the formula set forth in Section 9.2. And, in this sense, Foothills's property right to proceeds “equal to the [regulatory] proportionate value” is not “immediately vested,” 26 C.F.R. § 1.170A-14(g)(6)(ii), as the regulation requires, since the defined right to proceeds—without improvements subtracted out—is conditioned on a subsequent IRS or court determination.

8. **Government Language for Extinguishment Clause**. An IRS Chief Counsel’s Memorandum released July 30, 2021, CCA 202130014, sets forth the government position and offers satisfactory language for easements to adopt on the extinguishment issue. The CCA states:

> ISSUE
>
> Does a conservation easement fail to satisfy the requirements of section 170(h) of the Code if the deed contains language subtracting from the donee’s extinguishment proceeds the value of post-donation improvements or the post-donation increase in value of the property attributable to improvements?

> CONCLUSION
>
> Yes. Decreasing the portion of the proceeds that is required to be allocated to the donee upon extinguishment under Treas. Reg. § 1.170A-14(g)(6)(ii) causes the easement to fail to satisfy the requirements of section 170(h) unless, as provided in Treas. Reg. § 1.170A-14(g)(6)(ii), state law provides that the donor is entitled to the full proceeds from the conversion.

The CCA goes on to set forth appropriate language:

> Donor agrees that the donation of the perpetual conservation restriction described in this deed gives rise to a property right, immediately vested in the donee organization, with a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction, at the time of the gift, bears to the fair market value of the property as a whole at that time. For purposes of this paragraph, the proportionate value of the donee organization's property rights shall remain constant.
>
> On a subsequent sale, exchange, or involuntary conversion of the subject property, the donee organization will be entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction.
>
> All of the donee organization's proceeds from a subsequent sale or exchange of the property must be used by the donee organization in a manner consistent with the conservation purposes of the original contribution.

In Sells v. Commissioner, T.C. Memo. 2021-12, the court concluded the taxpayer had reasonable cause when using a "defective" extinguishment clause because of PLR 200836014 which had approved a similar clause and because the court found similar clauses were in widespread use, including by the easement holder.

9. **Pre-Arranged Sales**. Under the anticipatory assignment of income doctrine, a taxpayer who earns or otherwise creates a right to receive income will be taxed on any gain realized from that right if, based on the realities and substance of events, the receipt of income is practically certain to occur, even if the taxpayer transfers the right before receiving the income (see Lucas v. Earl, 281 U.S. 111 (1930)). The related step transaction doctrine similarly prevents a taxpayer from escaping taxation by collapsing a series of substantially linked steps into a single overall transaction (see Penrod v. Commissioner, 88 T.C. 1415, 1428 (1987)).

In Palmer v. Commissioner (62 T.C. 684 (1974), aff'd on other grounds, 523 F.2d 1308 (8th Cir. 1975), acq, 1978-1 C.B. 2), the Tax Court held that a taxpayer's gift of stock in a closely-held corporation to a private foundation, followed by a redemption, would not be characterized as a sale or redemption between the taxpayer and the corporation followed by a gift of the redemption proceeds to the foundation, because the foundation was not legally obligated to redeem the stock at the time it received the shares. In Revenue Ruling 78-197 (1978-1 C.B. 83), the Service announced that it would treat the proceeds of a stock redemption under facts similar to those in the Palmer case as income to the donor only if the donee is legally bound or can be compelled by the corporation to surrender the shares for redemption. The "bright line" test of Palmer and Revenue Ruling 78-197 is not haze free.

In Blake v. Commissioner, 42 T.C.M. 1336 (1981), aff'd, 697 F.2d 473 (2d. Cir. 1982), the donor contributed stock to a charity with the understanding that the charity would permit the corporation to redeem the stock and the charity would then use the proceeds to buy the donor's yacht at an inflated price. The yacht was sold shortly thereafter by the charity for less than 50 percent of the price it had paid the donor. The Second Circuit Court of Appeals found the "understanding" enough to re-characterize the transaction as a sale of stock by the donor, followed by a contribution of the yacht to charity. Note that, unlike in other situations, there was a quid pro quo required by the donor in order for the donor to make the stock gift.

In Ferguson v. Commissioner, 108 T.C. 244, (1997), aff'd, 174 F.3d 997 (9th Cir. 1999), there was a gift of stock followed by a redemption pursuant to the terms of a merger agreement. The donors were directors and minority shareholders of Company A. On day 1, Company A entered into an agreement and plan of merger with Company B. Company A's board of directors (the donors abstaining) approved the merger and recommended it to the shareholders. On day 6, Company B made its tender offer. By day 34, more than 50 percent of the shareholders had tendered their shares. On day 43, the donors donated some of their Company A stock to a charity, which in turn immediately tendered the stock to Company B. On day 46, Company B announced its acceptance of all the tendered shares and purchased all of the shares on day 47. The Tax Court found that the donors were taxable on the gain from the stock transferred to charity because by the date of the gift the donors' interest had been converted from an interest in a viable corporation to a fixed right to receive cash. The Ninth Circuit Court of Appeals affirmed, holding that the transaction had "ripened" into a right to receive sale proceeds once 50 percent shareholder approval for the merger had been reached.

The application of Revenue Ruling 78-197 again arose in Gerald A. Rauenhorst, et al. v. Commissioner, 119 T.C. No. 9 (2002). In that case, Arbeit (a partnership) owned warrants enabling it to purchase NMG stock. On September 28, 1993, WCP (a corporation) offered to purchase all NMG stock. On November 9, 1993 the partnership assigned some warrants to four charities. On November 19 Arbeit sold its remaining warrant to WCP, and the charities sold their warrants to WCP. On November 22, 1993, WCP and NMG agreed on a sale of all the NMG stock. The government argued that the bright-line test of Revenue Ruling 78-197 was not controlling. The court held that, based on the facts of the case and the "no legal obligation" test of Palmer and Revenue Ruling 78-197, there was no prearranged sale, and in the process took a very dim view of the government's urging to ignore the ruling:

> While this Court may not be bound by the Commissioner's revenue rulings, and in the appropriate case we could disregard a ruling or rulings as inconsistent with our interpretation of the law, see Stark v. Commissioner, 86 T.C. 243, 251 (1986), in this case it is respondent who argues against the principles stated in his ruling and in favor of our previous pronouncements on this issue. The Commissioner's revenue ruling has been in existence for nearly 25 years, and it has not been revoked or modified. No doubt taxpayers have referred to that ruling in planning their charitable contributions, and, indeed, petitioners submit that they relied upon that ruling in planning the charitable contributions at issue. Under the circumstances of this case, we treat the Commissioner's position in Rev. Rul. 78-197, 1978-1 C.B. 83, as a concession. Accordingly, our decision is limited to the question whether the charitable donees were legally obligated or could be compelled to sell the stock warrants at the time of the assignments.

A footnote to the opinion states as follows:

> The record indicates that no agreement was entered into by the donees before Nov. 19, 1993, the date they signed the warrant purchase and sale agreement. On Nov. 16, 1993, NMG's legal counsel sent letters to each of the donees enclosing a warrant purchase and sale agreement. Those letters state that pursuant to the warrant purchase and sale agreement, the donees would agree to sell their reissued warrants to WCP and "to abstain from either exercising its Warrant or selling or otherwise transferring it to any other party through Dec. 31, 1993." Certainly, the formality of having the donees enter into the warrant purchase and sale agreements suggests that they had not entered into any binding agreements before Nov. 19, 1993.

Subsequent to Rauenhorst, the government reiterated its intention, generally, to follow its own rulings in litigation. In PLR 200230004, a husband and wife proposed to transfer 495 of 500 shares of a C corporation to a charitable remainder unitrust and asked whether the redemption would be treated as an assignment of income. The ruling first describes Palmer and Revenue Ruling 78-197 and then states as follows:

> In the present case, at the time X shares are transferred to Trust, X will be under no legal obligation to redeem the contributed stock. There is no agreement among the parties under which X would be obligated to redeem, or Trust would be obligated to surrender for redemption, the stock. Trust is not legally obligated to accept any offer of redemption made by X. Accordingly, any redemption by X of the stock contributed by Grantors to Trust will be respected.
>
> Based on the representations submitted and information described above, we conclude that a purchase by X of the stock transferred by Grantors to Trust will be treated as a redemption of the stock from Trust, and will not be treated as a redemption of stock from Grantors or a distribution by X to Grantors. Therefore, the sale or redemption by Trust of its X stock will not result in the capital gain in such sale or the redemption price being attributed for tax purposes to Grantors.

In PLR 200321010, a retired officer of a corporation intended to give shares of the corporation to a charitable remainder unitrust. The transfer would trigger an option under a shareholder agreement, giving the company the right to purchase the stock for a formula price. The ruling described the "bright-line" test of Palmer, cited Rauenhorst, and concluded as follows:

> Consequently, the test for purposes of this ruling request, is whether the CRUT will be legally bound or can be compelled by Company to surrender the stock for redemption at the time of the donation. Here, X proposes to transfer the Company stock to the CRUT. Under the restrictions contained in each year's stock restriction agreement, the CRUT must first offer the stock to Company at a set formula price should the CRUT propose to dispose of the shares. This provision amounts to a right of first refusal. However, it does not mean that the CRUT is legally bound or can be compelled by Company to surrender the stock to Company at the time of the donation. The information submitted contains no indication that the CRUT will be legally bound, or could be compelled by Company, to redeem or sell the gifted stock. That all or a portion of the gifted stock was subject to restrictions upon transfer to a third party by X, and thus by the CRUT following the transfer, does not give Company the ability to compel its

> redemption or sale from the CRUT. The CRUT is free to retain title to and ownership of the stock indefinitely.
>
> Because the CRUT is not legally bound and cannot be compelled by Company to redeem or sell the stock, we conclude that the transfer of the Company stock by X to the CRUT, followed by any subsequent redemption of the stock by Company, will not be recharacterized for federal income tax purposes as a redemption of the stock by Company from X followed by a contribution of the redemption proceeds to the CRUT. See Palmer v. Commissioner, supra, and Rev. Rul. 78-197, supra. The same principles apply if the stock is sold by the CRUT rather than redeemed by Company. Thus, provided there is no prearranged sale contract whereby the CRUT is legally bound to sell the stock upon the contribution, we conclude that any subsequent sale will not be recharacterized for federal income tax purposes as a sale of the stock by X, followed by a contribution of the sale proceeds to the CRUT. Accordingly, any redemption proceeds or sales proceeds received by the CRUT for the stock will not be treated as taxable income received by X.

See also PLR 200821024 to the same effect.

In Dickinson v. Commissioner, T.C. Memo. 2020-128, Judge Greaves reached the right result but the litigation itself is disturbing. The CFO of a private company donated shares to a donor advised fund (DAF) when allowed to transfer shares by the board, on three occasions. The board was comfortable allowing the transfers because the DAF had a policy of trying to sell closely-held shares quickly which meant, as a practical matter, offering the shares back to the company. In fact, after each donation the company redeemed the shares.

The IRS treated the donation and redemption as an integrated whole to claim the taxpayers in effect sold the stock and contributed the proceeds. Why is puzzling. One would have thought that Rev. Rul. 78-197 would have been dispositive for the taxpayers but apparently not. The opinion discusses that ruling as follows:

> The parties point us to Rev. Rul. 78-197, 1978-1 C.B. 83, a "bright-line" rule the IRS applies in cases like Palmer, which focuses on the donee's control over the disposition of the appreciated property. See Rauenhorst v. Commissioner, 119 T.C. at 165. This Court has not adopted Rev. Rul. 78-197, supra, as the test for resolving anticipatory assignment of income issues, see Rauenhorst v. Commissioner, 119 T.C. at 166, and does not do so today. The ultimate question, as noted in Palmer, is whether the redemption and the shareholder's corresponding right to income had already crystallized at the time of the gift. See Palmer v. Commissioner, 62 T.C. at 694-695. Regardless of whether the donee's obligation to redeem the stock may suggest the donor had a fixed right to redemption income at the time of donation, See Rauenhorst v. Commissioner, 119 T.C. at 166-167, respondent does not allege that petitioner husband had any such right in this case. Accordingly, respondent's resort to Rev. Rul. 78-197, supra, is unavailing.

The opinion relies on a two-prong approach set forth in Humacid Co. v. Commissioner, 42 T.C. 894 (1964), which respected the form of the transaction if the taxpayer (1) gives the property away absolutely and parts with title thereto (2) before the property gives rise to income by way of a sale.

The court determined both prongs were easily met. Even a "preexisting understanding among the parties that the donee would redeem donated stock does not convert a postdonation redemption into a predonation redemption."

The opinion notes:

> Furthermore, neither a pattern of stock donations followed by donee redemptions, a stock donation closely followed by a donee redemption, nor selection of a donee on the basis of the donee's internal policy of redeeming donated stock suggests that the donor failed to transfer all his rights in the donated stock. See, e.g., Grove v. Commissioner, 490 F.2d at 242–245 (respecting form of transaction where donee needed to fundraise to support its operations, and over a decade consistently redeemed annual donations of stock for which donor remained entitled to dividends); Carrington v. Commissioner, 476 F.2d at 705–706 (respecting form of transaction where donee redeemed stock eight days after it was donated); Palmer v. Commissioner, 62 T.C. 684, 692–693 (1974), (respecting form of transaction where, pursuant to a single plan, the taxpayer donated stock to a foundation and then caused the corporation to redeem the stock from the foundation the day after the donation), aff'd, 523 F.2d 1308 (8th Cir. 1975). Petitioners' contemporaneous documentary evidence of an absolute gift, and respondent's failure to assert facts indicating any genuine controversy on this point, lead us to conclude that petitioner husband's donations satisfy the first Humacid requirement.

With respect to second prong, the court follows a "practically certain" analysis which is squishier that the bright-line test of Rev. Rul. 78-197:

> Where a donee redeems shares shortly after a donation, the assignment of income doctrine applies only if the redemption was practically certain to occur at the time of the gift, and would have occurred whether the shareholder made the gift or not. See Palmer v. Commissioner, 62 T.C. at 694–695; see also Ferguson v. Commissioner, 174 F.3d 997, 1003–1004 (9th Cir. 1999) (finding that the shareholder recognizes income from a stock sale where acquisition is "practically certain to occur", rather than the subject of "a mere anticipation or expectation", before the shareholder donates stock), aff'g 108 T.C. 244 (1997). In Hudspeth v. United States, 471 F.2d 275, 276 (8th Cir. 1972), for example, the court recast a stock donation as a taxable stock sale and donation of the sale proceeds where the taxpayer donated stock after the issuing corporation's directors and shareholders had adopted a plan of complete liquidation. See also Jones v. United States, 531 F.2d 1343, 1343–1344 (6th Cir. 1976); Allen v. Commissioner, 66 T.C. 340, 347 (1976).2 By contrast, there was no assignment of income in Palmer v. Commissioner, 62 T.C. at 687–688, 695, even though all parties were related and anticipated the redemption before the donation, because "no vote for the redemption had yet been taken" when the shareholder donated the stock. As in Palmer, the redemption in this case was not a fait accompli at the time of the gift.

10. **Notes Owned By A Private Foundation**. Many individuals sell assets during lifetime to family trusts in exchange for notes. A foundation or entity like a CLT that is similarly subject to the self-dealing rules of section 4941 may not hold those notes, because the obligor trust will be a disqualified person with respect to the CLT. The solution to this problem is to drop the note into an LLC and transfer non-voting interests to the CLT. Such was allowed in PLR 202037009 which states:

CLT proposes that Revocable Trust form LLC and contribute cash and the Note to LLC in exchange for 100% of LLC's ownership interests, 99% of which are nonvoting interests and 1% of which are voting interests. Revocable Trust will satisfy its distribution obligations by distributing to CLT an amount of nonvoting interests in LLC with a value equal to CLT's full distribution entitlement. The remaining undistributed nonvoting interests and all voting interests in LLC will be distributed to the other Revocable Trust beneficiaries, A, B, and C in their individual capacities, and not as trustees of CLT.

Pursuant to the LLC operating agreement, LLC will be managed by a single manager (Manager) who is selected and may be removed by a vote of the members holding a majority of the voting interests. The holders of the nonvoting interests will possess no management rights or rights to vote on the appointment or removal of Manager. An amendment to the LLC operating agreement or dissolution of the LLC requires the approval of all members, whether holding voting or nonvoting interests.

LLC will hold and administer the Note and receive payments of interest and principal on the Note. Aside from the cash initially contributed to LLC by Revocable Trust, LLC's PLR-133620-18 3 sole asset and source of income will be the Note. CLT will engage only in passive investment activities, and not in the operation of any business enterprise. At least 95% of CLT's gross income will be from passive investments including interest and dividends.

* * *

CLT will not "control" LLC within the meaning of Treas. Reg. § 53.4941(d)-1(b)(5) due to a lack of voting power. As holder of the nonvoting interests, CLT will have no management rights or right to vote on the manager of LLC. The other beneficiaries of Revocable Trust will own all of the voting interests, giving them the right to select and remove the manager LLC. As a holder of nonvoting interests, CLT will have a right to receive distributions only if LLC dissolves or chooses to make current distributions, but the timing and amount of such distributions will be uncertain and cannot be compelled by CLT. Only the other beneficiaries of Revocable Trust, as the holders of the voting interests, may elect or remove the Manager, who will have the sole power to manage the affairs of LLC and determine the timing and amount of distributions. Thus, CLT and CLT's trustees (acting only in such capacity) will not have sufficient votes or positions of authority to cause LLC to engage in a transaction.

Additionally, CLT will not have the power to compel dissolution of LLC since LLC may only be dissolved with written approval of all members, including the holders of the voting interests. The power associated with the nonvoting interests of LLC as a necessary party to vote on the liquidation of LLC is not considered equivalent to a "veto power" within the meaning of Treas. Reg. § 53.4941(d)-1(b)(5) because the power cannot be exercised over an action relevant to any potential act of self-dealing. Consequently, CLT will not "control" LLC within the meaning of Treas. Reg. § 53.4941(d)-1(b)(5)

Accordingly, CLT's receipt of nonvoting interests in LLC from Revocable Trust will not constitute a loan or extension of credit between a "private foundation" and a "disqualified person" within the meaning of section 4941(d)(1)(B) and Treas. Reg. §53.4941(d)-2(c) because CLT will not acquire an interest in the promissory note; instead, CLT will acquire nonvoting interests in LLC, with respect to which it will not have any management rights or control over distributions.

> Thus, CLT's receipt and continued ownership of nonvoting interests in LLC will not constitute an act of self-dealing described in section 4941.
>
> * * *
>
> Under Treas. Reg. § 53.4941(d)-1(b)(4), a transaction between a private foundation and an organization does not result in an act of self-dealing where the organization is neither controlled by the foundation nor does it have a disqualified person owning at least a 35% beneficial interest in the organization. Here, as explained above, CLT does not control LLC because CLT only holds nonvoting interests, with the only voting interests in LLC held by the other Revocable Trust beneficiaries. Although the other Revocable Trust beneficiaries may be trustees of CLT and thus disqualified persons, they own the voting interests in LLC in their individual capacities and not as foundation managers of CLT. Further, the other Revocable Trust beneficiaries only own an approximately 1% beneficial interest in LLC, below the 35% threshold.
>
> * * *
>
> LLC's sole asset will be the Note, which will generate passive income in the form of interest, as described in sections 4943(d)(3) and 512(b)(1). As such, LLC will not be considered a "business enterprise" for purposes of section 4943(d)(3) because at least 95 percent of its gross income will derive from passive sources. See also Treas. Reg. § 53.4943-10(c)(1). Because LLC will not be considered a "business enterprise," the restrictions on excess business holdings under section 4943 will not apply. Thus, CLT's receipt and continued ownership of nonvoting interests in LLC will not result in excess business holdings under section 4943.

See also PLR 202101002, involving the sale during lifetime to a joint revocable trust followed by approval of the note contribution via an LLC. However, in Rev. Proc. 2021-40 the IRS stated that after September 3, 2021, it will not "issue rulings on whether an act of self-dealing occurs when a private foundation (or other entity subject to section 4941) owns or receives an interest in a limited liability company or other entity that owns a promissory note issued by a disqualified person." A transaction completed as part of the probate exception would be much safer than one done in a lifetime gift transaction.

11. Disqualified Person for Section 4958 Purposes. The case of Fumo v. Commissioner, T.C. Memo. 2021-61, is a good reminder that section 4958 applies to individuals who can exercise "substantial influence" over a charity making them a disqualified person subject to excise taxes even if not officially an officer, director, or employee. The opinion summarizes the situation as follows:

> Petitioner was convicted in 2009 on Federal criminal charges, including mail and wire fraud. One victim of his fraud was Citizens Alliance for Better Neighborhoods (Citizens Alliance), an organization exempt **[*2]** from Federal income tax under section 501(a) and (c)(3).[1] In May 2013 the Internal Revenue Service (IRS or respondent) determined that petitioner was liable for excise taxes under section 4958(a)(1). That section imposes, in the case of any "excess benefit transaction" involving a charity, a tax equal to 25% of the excess benefit, and provides that such tax "shall be paid by any disqualified person * * * with respect to such transaction."

> A “disqualified person” is defined to include anyone who was, during a five-year look-back period, “in a position to exercise substantial influence over the affairs of the organization.” Sec. 4958(f)(1)(A). Respondent has filed a motion for partial summary judgment contending that petitioner was a “disqualified person” with respect to Citizens Alliance during 2002-2004. Although he was not an officer, director, or employee of the organization, we agree with respondent that he was “in a position to exercise substantial influence over * * * [its] affairs.” Ibid.

The larger background is more colorful:

> Petitioner himself was never employed as an officer, director, trustee, or employee of Citizens Alliance. However, he used his power and influence as the chairman of a senate appropriations committee to obtain funding for the organization from a variety of public and private sources. During 1991-2004 he was instrumental in securing at least $15 million in public grants for Citizens Alliance and a comparable volume of funding from private sources. This included a $17 million grant from a public utility, which Citizens Alliance received after petitioner agreed to drop a lawsuit against the utility.
>
> In February 2007 a grand jury charged petitioner with 139 counts of criminal activity. Thirty-four of these counts, on which Ms. Arnao was charged as a codefendant, related to a scheme to defraud Citizens Alliance. The indictment alleged that petitioner and Ms. Arnao conspired to use Citizens Alliance's funds to purchase vehicles, farm equipment, tools, and consumer goods for petitioner's use and make other expenditures on his behalf (e.g., for foreign travel, the services of a private investigator, and cell phone service for his chauffeurs and daughter).
>
> In March 2009, following a six-month trial, petitioner was convicted on all 34 counts related to the scheme to defraud Citizens Alliance. After several appeals related to sentencing, petitioner was ultimately required to pay Citizens Alliance restitution of $1,165,317. That was the amount of loss petitioner caused to the organization, as determined by the trial court.
>
> Petitioner testified during his criminal trial. He testified that he considered Citizens Alliance a “constituent service” of his senate office and expected to derive political benefits from the work it performed in his district. Although Ms. Arnao exercised day-to-day control over the organization's affairs, petitioner approved most significant projects and directed many major expenditures (including purchase of the office building that housed his first district office).
>
> Petitioner testified that he received over the years many “perks and gifts” from Citizens Alliance. He owned several residences, including a farm near Harrisburg, and he was apparently something of a tool aficionado. He admitted at trial that, between 1998 and 2003, he received $43,000 in tools paid for by Citizens Alliance. When he wanted the organization to purchase tools for him, he testified that he would email Ms. Arnao or another senate staff member, who would order the tools using Citizens Alliance's credit card.
>
> Petitioner routinely enjoyed the use of trucks, minivans, and other vehicles owned or leased by Citizens Alliance. He admitted at trial that, in 2003, the organization paid for a bulldozer that was used exclusively on his farm. When the bulldozer broke down in December of that year, Citizens Alliance paid $16,000 to repair it.
>
> Petitioner admitted at trial that he “did have a significant role” in Citizens Alliance. While he “did not make all the decisions,” he “did make a lot of

> decisions on important topics." As he explained: "I don't have a title or a job. Do I have influence? Yes." When asked by his defense attorney to describe his relationship with Citizens Alliance, he stated: "I viewed it as my non-profit. I viewed it as my entity, my baby. Gave it birth and nursed it along, got involved more with strategy and ideas. You know, that's how we viewed it. And we ran it out of our office." On cross-examination he testified similarly: "I created it. I helped it. I guided it. I gave it strategy. I gave it my time and effort. I raised money for it. If it weren't for me, it wouldn't exist."

12. **Donor Challenge to Charity's Promise**. Malcolm and Emily Fairbairn gave a significant amount of Energous stock to charity in December, 2017. They believed the charity had promised to liquidate the stock in a particular way, did not, and reduced the benefit to their fund and the amount of their income tax deduction. Before the court in Fairbairn v. Fidelity Investments Charitable Gift Fund, 2021 WL 754534 (N.D.Ca. 2021) was whether the donors could recover damages. The court held no. More specifically, the donors made these claims:

> The Fairbains allege that Fidelity Charitable representative Justin Kunz made four separate promises on December 27 or December 28, 2017 to entice them to donate 1.93 million-WATT shares to their Fidelity Charitable DAF:
>
> • Fidelity Charitable would not trade more than 10% of the daily trading volume of Energous shares,
>
> • Fidelity Charitable would employ sophisticated, state-of-the art methods for liquidating large blocks of stock,
>
> • Fidelity Charitable would allow the Fairbairns to advise on a price limit (i.e., a point below which Fidelity would not sell shares without first consulting the Fairbairns), and
>
> • Fidelity would not liquidate any of the donated Energous shares until the new year.
>
> (Dkt. No. 1 at ¶ 65.) The Fairbairns contend that Fidelity Charitable did not do as Kunz promised and therefore Fidelity Charitable is liable for common law misrepresentation, breach of contract, promissory estoppel and violating California's unfair competition law.

The court held that Fidelity never sold more than 10% in a day. The other promises the court found Fidelity simply did not make:

> The Fairbairns' conduct after they learned that the shares had all been sold on December 29 also weighs against a finding that the promises were made. When Malcolm learned on January 5, 2018 about the December 29 sale of the WATT shares, he did not confront Kunz by email or telephone about the alleged broken promises. Indeed, it was not until January 15, 2018 that the Fairbairns even mentioned to Fidelity Charitable that the liquidation had violated promises made to them. Malcolm's testimony that he was too angry and needed to cool off would make sense for a few hours, or maybe a few days, but 10 days of silence is hard to understand.
>
> Further, in January 2018, when the Fairbairns were communicating with Kunz about the liquidation, they never asserted that Kunz had made those promises.

> Instead, in their communications with Kunz they stated they "were told," or "the DAF people" had told them, without suggesting that Kunz was the DAF person who told them. Emily's testimony that she said "the DAF people" rather than "You" because she did not want to accuse Kunz of wrongdoing while he was trying to rectify the situation within Fidelity Charitable is not persuasive. In the very same communications Emily also tells Kunz: "I do want you to know how much I respect your *integrity* and efforts." (Ex. 174 (emphasis added).) It is one thing to not directly accuse the person who lied to you; it is another to gratuitously tell that person you respect their integrity.
>
> As to the alleged promise to allow the Fairbairns to advise on a sale price limit, even the email Malcolm wrote on January 15, 2018 in which he states for the first time that he was told certain things, represents only that he was told (by some unidentified person) that the Fairbairns could advise on a price limit "if necessary." (Ex. 128.) The email is consistent with Malcolm's trial testimony: "if we run into a problem, or if there is something that's coming up, and if we're having any sort of difficulty in selling the stock, that, you know, I would be called, advised, I would be able to advise." (Dkt. No. 242 at 371.) Even accepting Malcolm's testimony, the ability to advise on a price was only if Fidelity Charitable was having difficulty in selling the stock, as a trader might encounter with a thinly-traded stock. Fidelity Charitable was having no trouble trading WATT on December 29, 2017 when it was trading at nearly historically high volume and price.

All charities, including community foundations, need to be careful about statements to donors. Statements may be characterized as promises and promises may give rise to contracts with state law effects.

In Pinkert v. Schwab Charitable Fund, 2021 WL 2476869 (N. D. Ca. 2021), the claim was that Schwab operates investment pools that are more expensive than other similar investment pools which is a breach of Schwab's fiduciary duty, as the opinion describes:

> The plaintiff alleges that there are cheaper alternatives available for the index funds and the money-market fund. (For example, Vanguard has a cheaper money-market fund.) Also, investment funds have classes of shares that are more expensive for smaller investors with less bargaining power (akin to a retail price) and less expensive for institutional investors (a wholesale price). Schwab Charitable allegedly selected the retail shares of some funds when it could have qualified for the wholesale shares. In a similar vein, Schwab Charitable could have used its market power to negotiate better rates for the custodial and brokerage services that Charles Schwab provides it. The idea is that Schwab Charitable has benefited Charles Schwab to the detriment of the fund, leaving fewer dollars in donor accounts, including the plaintiff's account, that can be donated to charitable organizations. (footnotes omitted)

The court denied standing because there was no allegation that Schwab promised certain investments which were not made, and the donor gave away the contribution to Schwab and was not a beneficiary of the charitable fund in any way that would create standing. The plaintiff also argued that the fees reduced the amount available to be given away which did reputational damage to the plaintiff, an argument the court rejected stating:

> Third, the plaintiff contends that the defendants injured his "reputational and expressive interests" in his account. He uses the account to advance his

> philanthropic goals, support charities that are meaningful to his family, and cultivate the family value of charitable giving. The excess fees reduce his ability to advance those interests. He cites no analogous case to support this argument. Instead, he cites *Friends of the Earth* and *Spokeo*. The interests that establish standing in an environmental case (recreational, aesthetic, and economic) or a data-privacy case (harm to reputation) are not analogous. For one, standing is contextual, and the harm to a plaintiff-donor's advisory or reputational interest is not injury in fact commensurate with the industrial pollution reducing recreational opportunities in *Friends of the Earth* or the inaccurate information in a consumer report that was injury in *Spokeo*. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181–84 (2000); *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1112 (9th Cir. 2017).

The case is on appeal to the 9th Circuit.

13. **LLC May Qualify As A Section 501(c)(3) Organization**. In Notice 2021-56 the IRS provided that under certain circumstances an entity organized as an LLC under state law could qualify for tax-exempt treatment under section 501(c)(3). The requirements set forth are as follows:

> .02 Required provisions of LLC articles of organization and operating agreement
>
> Except as set forth in section 3.04 of this notice, the IRS will issue a determination letter recognizing an LLC as exempt from tax and described in section 501(c)(3) only if both the LLC's articles of organization and its operating agreement each include:
>
> > (1) Provisions requiring that each member of the LLC be either (i) an organization described in section 501(c)(3) and exempt from taxation under section 501(a) or (ii) a governmental unit described in section 170(c)(1) (or wholly-owned instrumentality of such a governmental unit).
> >
> > (2) Express charitable purposes and charitable dissolution provisions in compliance with § 1.501(c)(3)-1(b)(1) and (4).
> >
> > (3) The express chapter 42 compliance provisions described in section 508(e) (1), if the LLC is a private foundation.
> >
> > (4) An acceptable contingency plan (such as suspension of its membership rights until a member regains recognition of its section 501(c)(3) status) in the event that one or more members cease to be section 501(c)(3) organizations or governmental units (or wholly-owned instrumentalities thereof).
>
> .03 Representation on enforceability
>
> The LLC must represent that all provisions in its articles of organization and operating agreement are consistent with applicable state LLC law and are legally enforceable.
>
> .04 States with limitations on articles provisions
>
> If an LLC is formed under a state LLC law that prohibits the addition of provisions to articles of organization other than certain specific provisions required by the

> state LLC law, the requirements of section 3.02 of this notice will be deemed satisfied if the LLC's operating agreement includes the provisions set forth in section 3.02 of this notice and if the articles of organization and operating agreement do not include any inconsistent provisions.

14. **Basis of Assets of Former Public Charities for Section 4940 Purposes**. IRS Memorandum UILC 4940.02-00 issued November 18, 2021 provides there is no basis step-up when a public charity becomes a private foundation. The Memorandum states:

> Generally, then, under section 4940, for purposes of determining gain or loss from the sale or other disposition of property, the usual income tax rules of Part II of Subchapter O of Chapter 1 apply in determining basis, subject to the special rules of section 4940(c)(3)(B) and disregarding section 362(c). We find no provision in the law for the basis of an organization's assets to be increased to fair market value on the date the organization becomes classified as a private foundation and thus subject to section 4940(a), except as provided in section 4940(c)(4)(B), which provides for a one-time step-up in basis of property held by private foundations when section 4940 went into effect.2 Section 4940(c)(4)(B) is not applicable with respect to property that was not held by or considered held by a private foundation as of December 31, 1969. See *Friedman Foundation, Inc. v. Commissioner*. See also Rev. Rul. 76-424, which applied section 4940(c)(4)(B) to stock distributed to a private foundation in 1971 in satisfaction of a bequest under the will of an individual who died in 1967 on the grounds that the private foundation was considered to hold that property on December 31, 1969.
>
> Consequently, for purposes of determining capital gain net income under section 4940, the basis of property of a tax-exempt organization described in section 501(c)(3) that ceases to qualify as a public charity under section 509(a)(1), (2), or (3), and becomes a private foundation is generally determined under the rules of Part II of Subchapter O of Chapter 1 of the Code.

There is a contrary private letter ruling that the IRS now believes is wrong as noted in footnote 2:

> We are aware a private letter ruling, PLR 9852023, held that, in the case of an organization which ceased to qualify as a public charity described in section 509(a)(3) and became a private foundation, the adjusted basis of property for purposes of determining the capital gain (if any) subject to the excise tax imposed under section 4940(a) should be the fair market value of such property on the date the organization ceases to be a public charity and is classified as a private foundation. We believe PLR 9852023 is incorrect.

15. **No Contemporaneous Written Acknowledgement Inferred From Gift Documents**. At issue in Albrecht v. Commissioner, T.C. Memo. 2022-53, was whether the taxpayer received anything from a charitable done stating that no goods or services were received. The opinion recites the facts:

> Petitioner and her late husband acquired a large collection of Native American jewelry and artifacts during their marriage. On or around December 19, 2014, petitioner donated approximately 120 items from this collection (donation) to the Wheelwright Museum of the American Indian (Wheelwright Museum). In connection with the donation the Wheelwright Museum and petitioner executed a "Deed of Gift" (deed) dated December 19, 2014, that consisted of five pages. The first page stated that petitioner "hereby donates the material described below to

> the Wheelwright Museum of the American Indian under the terms stated in the Conditions Governing Gifts to the Wheelwright Museum of the American Indian.” Immediately under this clause was the heading “Description of Material: See Attached List.” The first page also included the museum's logo, petitioner's address, and her donor identification number, as well as the signatures of petitioner and a museum official.
>
> The second page of the deed was titled “Conditions Governing Gifts to the Wheelwright Museum of the American Indian” and specified conditions governing gifts to the museum. One of these conditions stipulated in relevant part that “the donation is unconditional and irrevocable; that all rights, titles and interests held by the donor in the property are included in the donation, unless otherwise stated in the Gift Agreement.” The final three pages of the deed listed items of donated property. Despite “the Gift Agreement” reference on the second page of the deed, no such agreement was included with the deed, and the Wheelwright Museum did not provide petitioner with any further written documentation concerning the donation.

Because there was no gift agreement actually executed, the taxpayers argued no rights were retained, and thus no benefits should be inferred from the deed alone. The Tax Court disagreed:

> Although the deed in this case provides that the donation was “unconditional and irrevocable,” it continues that “all rights, titles and interests held by the donor in the property are included in the donation, *unless otherwise stated in the Gift Agreement.*” (Emphasis added.) Thus, the terms of the deed were subject to a separate agreement, but the Wheelwright Museum did not provide petitioner with this document before the return was filed.4
>
> Petitioner contends that the Gift Agreement is irrelevant to the issue of whether the Wheelwright Museum provided goods or services in exchange for the donation because the sole purpose of the Gift Agreement was to describe the extent to which petitioner retained certain rights, titles, or interests in the donation. Petitioner also insists that the Wheelwright Museum's failure to provide her with a Gift Agreement “indicates the presumption that all [of] [p]etitioner's right[s], title[s] and interest[s] in the donated property [are] included in the donation.” We do not find these arguments persuasive when construing the plain text of the deed. By referencing another document that superseded the terms of the deed with respect to the donor's rights in the donation, the deed provided the donor with the ability to retain an interest in the donation, including under a potential quid pro quo arrangement.
>
> Petitioner cited no authority for the proposition that a separate agreement referenced in a deed but unattached thereto creates a presumption that the deed alone satisfies section 170(f)(8). We are unwilling to create such a rule, especially when the deed did not indicate it constituted the entire agreement of the parties or that any prior discussions, negotiations, or understandings between them were merged into the deed. When looking exclusively at the deed and considering it as a whole, it leaves open a significant question about whether the parties had entered into a side agreement that included additional, superseding terms. *See French*, T.C. Memo. 2016-53, at *10–12 (refusing to uphold as a CWA a deed that, when analyzed as a whole, did not represent the entire agreement between the donee and donor).

C. SECTION 408 — IRAs AND RETIREMENT PLANS

1. SECURE Act Changes. Sections 114 and 401 of the Setting Every Community Up for Retirement Enhancement ("SECURE") Act of 2019 contain a number of provisions important to estate planners primarily in connection with distributions from defined contribution plans ("plans") and individual retirement accounts. Proposed Regulations were issued on February 24, 2022, that largely update or rewrite regulations across the field. REG-105954-20.

a. Required Beginning Date Change

The term required beginning date ("RBD") refers to the date when the plan participant or IRA owner (the "employee") begins receiving required minimum distributions ("RMDs") from the plan or IRA. Before the SECURE Act, the RBD was April 1 of the year following the year in which the employee reached age 70½ or, if not a 5% owner, retired, whichever was later. Section 114 of the SECURE Act, amending sections 401(a)(9)(B) & (C) and 408(b), changes the RBD for employees who reach age 70½ after December 31, 2019 to April 1 of the year following the year in which the employee reaches age 72 or, if not a 5% owner, retires, whichever is later. One result of this change is that no one will have an RBD in 2021.

This is a small positive development for taxpayers because, while there is no prohibition against or penalty for starting to receive distributions a year or two earlier than one's RBD, those who can afford to defer starting to receive distributions until the new RBD may have as much as an extra year of tax-deferred earnings on the amount of their initial RMD.

b. Introduction of "Eligible Designated Beneficiary" Concept

Section 401 of the SECURE Act, amending section 401(a)(9)(E), introduces the term "eligible designated beneficiary" ("EDB"). An EDB includes an employee's surviving spouse, an employee's child who has not reached majority (an employee's child who has not completed a "specified course of education" is a minor but what such a course is, is uncertain; similarly, a child who has not attained age 26 appears to be a minor for these purposes), a "disabled" individual (generally, if, as of the date of the employee's death, the minor has a medically determinable physical or mental impairment that results in marked and severe functional limitations that can be expected to result in death or be of long-term and indefinite duration), a chronically ill individual (within the meaning of section 7702B(c)(2)) and an individual not more than ten years younger than the employee. An employee's child who has reached majority is no longer an EDB. The age of majority is defined by the proposed regulations as age 21. Of course that means when a minor child is a beneficiary the account balance must be paid to the child by age 31. EDB status is determined as of the employee's date of death. If any beneficiary is not an eligible designated beneficiary then none will be.

c. Minimum Required Distribution Rules Under SECURE Act

Before the SECURE Act, if the beneficiary of a defined contribution plan or IRA was a designated beneficiary ("DB") (very simply, an individual who is designated as a beneficiary under the plan (or IRA)), RMDs could generally be made to the DB over his or her life expectancy. The opportunity to spread RMDs over a beneficiary's life expectancy was (and is) generally considered to be a positive attribute because it usually enables accumulation and compounding of tax-deferred earnings within the plan or IRA for a relatively long period.

The SECURE Act left the defined contribution plan and IRA distribution options pertaining to a surviving spouse largely unchanged. As before, a surviving spouse may elect to treat a predeceased spouse's IRA as her or his own, implement a spousal rollover or take plan or IRA distributions over her or his life expectancy as annually recalculated. A surviving spouse may delay the start of distributions until the predeceased spouse would have reached age 72.

Also left undisturbed by the SECURE Act are the RMD rules applicable when there is no DB. In that case, if the employee dies before reaching his or her RBD, all plan or IRA proceeds must be distributed by the end of the fifth year after the year of the employee's death, and, if the employee dies on or after reaching his or her RBD, all plan or IRA proceeds must be distributed over the employee's then remaining life expectancy without annual recalculation. However, the proposed regulations add that beneficiaries, other than the spouse, must take annual distributions during the 10 year period based on the designated beneficiary's life expectancy in the year following the owner's death, reduced by one each year, if the owner dies on or after the owner's required beginning date. This "at least as rapidly" rule is controversial.

However, under the SECURE Act, if and only if a plan or IRA beneficiary is an EDB, he or she may receive plan or IRA proceeds over his or her life expectancy (but, unless such beneficiary is the employee's surviving spouse, without annual recalculation). If a plan or IRA beneficiary is a DB but not an EDB, that DB must take all plan or IRA proceeds by the end of the tenth year after the year of the employee's death. These provisions are effective with respect to plans and IRAs where the employee died or dies after December 31, 2019.

d. Summary of Trust Planning Under SECURE Act

A so-called "conduit trust" is a trust whose terms mandate that any and all distributions the trust receives from a plan or IRA pursuant to the applicable beneficiary designation shall be immediately paid over to the current beneficiary. A conduit trust is the ultimate "see-through trust" because, when determining the amounts of RMDs distributable from a plan or IRA to the trust, one simply looks to the identity and age of the current beneficiary.

If plan or IRA benefits are payable to a conduit trust for the benefit of the employee's surviving spouse, those benefits may be paid over the annually recalculated life expectancy of the surviving spouse. Following the death of the surviving spouse, any remaining benefits will have to be paid no later than the end of the tenth year after the year of death of the surviving spouse.

If plan or IRA benefits are payable to a conduit trust for the benefit of a non-spousal EDB, those benefits may be paid over the life expectancy of the EDB without recalculation. Following the death of the non-spousal EDB, any remaining benefits will have to be paid no later than the end of the tenth year after the year of such death. The major exception to these rules, however, is that, if the non-spousal EDB is a minor child of the employee, the plan or IRA benefits payable to the conduit trust can no longer be paid over the EDB's life expectancy (without recalculation) from and after the point when that child has reached majority. From and after that time, any remaining benefits will have to be paid no later than the end of the tenth year after the year in which the child reached majority. If plan or IRA benefits are payable to a conduit trust for the benefit of a DB who is not an EDB, those benefits will have to be paid no later than the end of the tenth year after the year of the employee's death.

A so-called "accumulation trust" is a "see-through trust" whose terms do not require that any and all distributions the trust receives from a plan or IRA pursuant to the applicable beneficiary designation shall be paid over to any trust beneficiary at any particular time. A see-through trust is one that is valid under state law, irrevocable, has identifiable, human beneficiaries and as to which certain documentation is provided to the plan or IRA custodian or trustee by October 31 of the year after the employee's death. Certain beneficiaries, like a beneficiary whose interest is contingent on the death of a prior, residual beneficiary, can be disregarded (income to child for life, then remainder to grandchild, but if neither survive, to charity; charity may be ignored). Further, beneficiaries via a power of appointment exercised by September 30 of the year after the account owner's death will be designated, and likewise may be removed. Even if state law allows trust modification or decanting the identifiable requirement can be met. See Treas. Reg. Section 1.401(a)(9)-4, A-5(b) of the proposed regulations.

In general, if plan or IRA benefits are payable to an accumulation trust, those benefits will have to be paid no later than the end of the tenth year after the year of the employee's death. The exceptions to this general rule are as follows:

- If the accumulation trust is for the benefit of a disabled individual or a chronically ill individual, (two categories of EDB as defined in amended section 401(a)(9)(E)) and has multiple beneficiaries, it is an "applicable multi-beneficiary trust" ("AMBT"). Plan or IRA benefits payable to an AMBT may be paid using the life expectancy method, but it is not entirely clear whether the measuring life is that of the disabled or chronically ill individual or another beneficiary.

- If one or more beneficiaries of the accumulation trust are non-DBs:

  - If the employee dies before his or her RBD, plan or IRA benefits will have to be paid no later than the end of the fifth year after the year of the employee's death.

  - If the employee dies on or after his or her RBD, plan or IRA benefits may be paid over the employee's then remaining life expectancy without recalculation.

2. **Waiver of 2020 Required Minimum Distributions.** The CARES Act (the "Coronavirus Aid, Relief and Economic Security Act"), signed by the President on March 27, 2020, includes a provision (Section 2203, amending sections 401(a)(9) & 402(c)(4)) granting a waiver of any and all defined contribution plan and IRA RMDs that, in the absence of the waiver, would have been required in 2020. Thus, amounts that would have been mandated RMDs for 2020 (even for those who reached age 70½ in 2019 and so would have been required to take two RMDs in 2020) were permitted instead to remain inside the plan or IRA in 2020 and continue to generate tax-deferred investment return.

On June 23, 2020, the IRS issued Notice 2020-51. Notice 2020-51 explicitly allows a recipient of a RMD in 2020 to roll it over – essentially reversing the transaction and its otherwise applicable tax consequences.

The timing of enactment of the CARES Act in relation to the 2020 RMD waiver it granted, however, created a dilemma for those employees who wanted to take advantage of the waiver but at the time of enactment or shortly thereafter had already taken their 2020 RMD and allowed sixty days to pass. To alleviate this problem, Notice 2020-51 also expanded the usual sixty-day rollover period so that any RMD received in 2020, regardless of when received in 2020, could be rolled over until August 31, 2020, at the earliest.

Other important provisions of the CARES Act include Section 2202, amending section 72, which allowed the following:

- A "qualified individual" could receive in-service "coronavirus-related distributions" from a plan or IRA of up to $100,000.00 from January 1, 2020 through December 30, 2020 without being subject to the 10% early distribution penalty if the recipient was under age 59½ and with the options to elect ratable income taxation of the amount distributed over a three-year period or to repay to the plan or IRA within three years the amount distributed as if the repayment were validly rolled-over in a trustee-to-trustee transfer within sixty days of the distribution. Qualified individuals are those who is diagnosed with SARS-CoV-2 or COVID-19, whose spouse or a dependent diagnosed with SARS-CoV-2 or COVID-19 or who experiences adverse financial consequences from being quarantined, furloughed or laid off, having work hours reduced, being unable to work due to lack of child care or closing or reducing the hours of a business owned or operated by such individual. This was an expansive group.

- A qualified individual could receive loans from a qualified plan of up to $100,000.00 or the employee's nonforfeitable, accrued benefit (an increase in the loan limit from $50,000 or one-half of the employee's nonforfeitable, accrued benefit) through September 22, 2020. See IRS Notice 2020-50. A plan sponsor may delay a qualified individual's loan repayment obligation for one year. Subsequent repayments with respect to any such loan are required to be adjusted to reflect that delay and any interest accruing during that delay.

3. **Transfer to Inherited IRA Denied**. A taxpayer ended up in a bad situation in PLR 202125007. The facts were straightforward:

> You represent that in Year 1, within months after Decedent A's death, the custodian of IRA X advised Trust T's trustees that they could not trade stocks in IRA X and that the assets of IRA X would have to be transferred to another account in order to trade stocks. Following the custodian's advice, Trust T's trustees transferred substantially all of IRA X's assets to a non-IRA account held by the custodian for the benefit of Trust T.
>
> Several months have passed since the transfer of IRA X's assets to the non-IRA account. You request that the transfer be permitted to be reversed, so that the

> assets in the nonIRA account may be transferred to an inherited IRA account for the benefit of Trust T.

The IRS said no. The ruling states:

> Assets in an inherited IRA for the benefit of a trust are not permitted to be rolled over under section 408(d)(3). The only permitted method of transferring assets from an inherited IRA to another inherited IRA is via a trustee-to-trustee transfer, which requires a direct transfer from one IRA to another IRA. Therefore, once the assets have been distributed from an inherited IRA, there is no permitted method of transferring them back into an IRA. In this case, the assets of IRA X were transferred to a non-IRA account. Accordingly, the assets may not now be transferred to an IRA account.
>
> With regard to your second ruling request, section 408(d) provides that, except with respect to investment in the contract, assets distributed out of an inherited IRA are included in gross income. Accordingly, Trust T will be required to include in gross income for Year 1, the year in which the distribution from IRA X occurred, any portion of the amounts transferred from IRA X that is not investment in the contract.
>
> With regard to your third ruling request, as also set forth in the first ruling, Trust T may not transfer IRA X's assets currently held in the non-IRA account into any IRA account.

D. SECTIONS 671-678 -- GRANTOR TRUST RULES

1. Section 678 and a Presently Exercisable General Power of Appointment As A Planning Device.

Section 678 provides:

> (a) General Rule. —A person other than the grantor shall be treated as the owner of any portion of a trust with respect to which:
>
> > (1) such person has a power exercisable solely by himself to vest the corpus or the income therefrom in himself, or
> >
> > (2) such person has previously partially released or otherwise modified such a power and after the release or modification retains such control as would, within the principles of sections 671 to 677, inclusive, subject a grantor of a trust to treatment as the owner thereof.
>
> (b) Exception Where Grantor Is Taxable. Subsection (a) shall not apply with respect to a power over income, as originally granted or thereafter modified, if the grantor of the trust or a transferor (to whom section 679 applies) is otherwise treated as the owner under the provisions of this subpart other than this section.
>
> [emphasis added]

Section 678(a)(2) has long been the basis for estate tax planning: a parent contributes $5000 to a trust that gives the child a 30 day withdrawal right and gives the child other powers that would have made the trust a grantor trust if the child had contributed the $5000 to the trust. The child would appear to be the owner of the entire trust (assuming that parent has no rights in the trust that would make the parent the grantor) and thus Rev. Rul. 85-13 would treat the child and the trust as the same taxpayer. Such trusts are often referred to as BDITs – Beneficiary Deemed Inheritor's Trusts – and have been the subject of wide discussion and controversy. See, e.g., Jerome M. Hesch, Lawrence Brody, Richard A. Oshins & Susan P. Rounds, *A Gift From Above: Estate Planning on a Higher Plane — The Unique Design of a BDIT Minimizes — Even Eliminates — Many Tax and Non-Tax Problems*, 150 Tr. & Est. 17 (Nov. 2011); but also Areas In Which Rulings Or Determination Letters Will Not Ordinarily Be Issued, in Rev. Proc. 2022-3, Section 4 (42) which provides:

> (42) Section 678.—Person Other than Grantor Treated as Substantial Owner.— Whether a person will be treated as the owner of any portion of a trust over which that person has a power to withdraw the trust property (or had such power prior to a release or modification, but retains other powers which would cause that person to be the owner of the trust under § 671 if the person were the grantor), other than a power which would constitute a general power of appointment within the meaning of § 2041. if the trust purchases the property from that person with a note and the value of the assets with which the trust was funded by the grantor is nominal compared to the value of the property purchased.

Section 678(a)(1) has given rise to a different kind of planning. Suppose a beneficiary may withdraw an amount equal to all of the trust's taxable income in any given year (from all of the trust assets) but not the entire trust assets. Ed Morrow refers to this as the BDOT; IRC 678(a)(1) the "*Beneficiary Deemed Owner Trust*" (BDOT), LEIMBERG ESTATE PLANNING NEWSLETTER #2516 (Sept. 5, 2017). The BDOT appears clearly effective for income shifting, but it is not quite as clear whether it makes the person with the right to withdraw the owner of the entire trust for Rev. Rul. 85-13 purposes.

The regulations governing the grantor trust rules (sections 671-679) clearly provide that the reference to "income "unless specifically limited, refers to income determined for tax purposes and not to income for trust accounting purposes. Treas. Reg. §1.671-2(b). In order for the beneficiary to be treated as the owner of the entire trust for income tax purposes under section 678(a)(1), the withdrawal power must apply to all net taxable income during the year, including capital gains. If a beneficiary may withdraw "income" then under applicable state law the concern would be that the trust means income determined for trust accounting purposes which would not typically include extraordinary dividends or capital gains.

To cause the taxable income attributable to the corpus portion of the trust also to be treated as owned by the beneficiary, the withdrawal power must apply with respect to an amount equal to all of the net taxable income. Having the corpus portion of the trust being treated as owned by the beneficiary for income tax purposes is extremely important if the beneficiary wishes to sell assets to the trust and have the transfer treated as a non-recognition event under the reasoning of Rev. Rul. 85-13. In Campbell v. Commissioner, T.C. Memo 1979-495, beneficiaries had the power to cause the trustee to distribute capital gains; beneficiaries did not request and the trustee did not distribute the capital gains income to the beneficiaries, but they were deemed to be the owners of the capital gains income under section 678(a)(1). PLR 201633021 also supports this result.

Income is taxable to a powerholder under section 678(a)(1) whether or not the amount is actually withdrawn. If it is withdrawn, such withdrawal is generally a non-taxable event because it is not a distribution that is reported under the distribution rules for non-grantor trusts. Rev. Rul. 67-241. For instance, section 678(a)(1) applies if the powerholder is a minor for whom a guardian who could exercise the power has not been appointed. Rev. Rul. 81-6 (child could withdraw all income until age 25; minority status irrelevant); Trust No. 3 v. Commissioner, 285 F.2d 102 (7th Cir. 1960)(minor beneficiaries could terminate a trust; that no guardians had been appointed was irrelevant).

What happens if the power is not exercised, as will often be the case? The trust agreement may provide that failure to withdraw the taxable income amount in a particular year would lapse and could not be exercised in a later year. If so, and if the lapsed power exceeds the greater of "(A) $5,000, or (B) 5 percent of the aggregate value, at the time of such lapse, of the assets out of which, or the proceeds of which, the exercise of the lapsed powers could have been satisfied," the power holder will be treated as having made a gift of the excess amount (unless it is an incomplete gift because of retained powers over the trust), which will mean the property will be included in the powerholder's estate. Note that if the person with the withdrawal right is not an individual the "5 x 5 exception" may not apply; section 2514(e), which creates the exception, applies by its term to an "individual."

Generally, the net taxable income of a trust will be less than 5% of the trust value. To use the full trust value to measure the 5% amount, the beneficiary ought to be able to withdraw the net taxable income amount from all of the trust assets. In Rev. Rul. 66-87 the beneficiary had the power to withdraw accounting income and the 5% element was calculated based just on the accounting income, not all trust assets. Fish v. U.S., 432 F.2d 1278 (9th Cir. 1970), held that the 5% amount, when applied to a power to withdraw "all or part of the net income of the trust for that year" was only 5% of the income, not 5% of the trust assets. The taxpayer argued that because the income payable to the decedent would have been payable either from corpus or income, the entire trust represents "assets out of which, or the proceeds out of which, the exercise of lapsed powers could be satisfied." The court disagreed because for federal tax purposes the distribution would have been a distribution of income.

The IRS cited Fish in Rev. Rul. 85-88 to hold that where a power of appointment is limited to annual trust income the 5 percent test is based on annual trust income, not the amount of trust corpus. Neither Fish nor the Ruling considered the result if the withdrawal right could be from any trust assets. Prudence suggests that a beneficiary should be authorized to withdraw the greater of the net taxable income or 5% of the trust corpus from any of the income or out of the entire corpus of the trust. The right to withdraw may also hang.

Other issues to consider are the rights of creditors of the powerholder and the presence of a true grantor under sections 671-677 which trump section 678.

If the Fish problem can be solved, almost any trust may be taxed to a designated person, for example a person in a state without an income tax. That may not mean the trust is a wholly grantor trust with the benefits of Rev. Rul. 85-13. Does the grantor have rights over corpus? Treas. Reg. § 1.671-3(a)(1) indicates one person can own "income" but not own corpus. Put another way, what does the term "portion" mean in section 678? It could mean the "income" portion as opposed to the "corpus" portion or it could mean the undivided interest portion of the trust that a person with a right of withdrawal could withdraw, whether income or corpus. Treas. Reg. § 1.671-3 provides as follows:

> **(a)** When a grantor or another person is treated under subpart E (section 671 and following) as the owner of any portion of a trust, there are included in computing his tax liability those items of income, deduction, and credit against tax attributable to or included in that portion. For example:
>
> > **(1)** If a grantor or another person is treated as the owner of an entire trust (corpus as well as ordinary income), he takes into account in computing his income tax liability all items of income, deduction, and credit (including capital gains and losses) to which he would have been entitled had the trust not been in existence during the period he is treated as owner.
> >
> > **(2)** If the portion treated as owned consists of specific trust property and its income, all items directly related to that property are attributable to the portion. Items directly related to trust property not included in the portion treated as owned by the grantor or other person are governed by the provisions of subparts A through D (section 641 and following), part I, subchapter J, chapter 1 of the Code. Items that relate both to the portion treated as owned by the grantor and to the balance of the trust must be apportioned in a manner that is reasonable in the light of all the circumstances of each case, including the terms of the governing instrument, local law, and the practice of the trustee if it is reasonable and consistent.
> >
> > **(3)** If the portion of a trust treated as owned by a grantor or another person consists of an undivided fractional interest in the trust, or of an interest represented by a dollar amount, a pro rata share of each item of income, deduction, and credit is normally allocated to the portion. Thus, where the portion owned consists of an interest in or a right to an amount of corpus only, a fraction of each item (including items allocated to corpus, such as capital gains) is attributed to the portion. The numerator of this fraction is the amount which is subject to the control of the grantor or other person and the denominator is normally the fair market value of the trust corpus at the beginning of the taxable year in question. The share not treated as owned by the grantor or other person is governed by the provisions of subparts A through D. See the last three sentences of paragraph (c) of this section for the principles applicable if the portion treated as owned consists of an interest in part of the ordinary income in contrast to an interest in corpus alone.
>
> **(b)** If a grantor or another person is treated as the owner of a portion of a trust, that portion may or may not include both ordinary income and other income allocable to corpus. For example:
>
> > **(1)** Only ordinary income is included by reason of an interest in or a power over ordinary income alone. Thus, if a grantor is treated under section 673 as an owner by reason of a reversionary interest in ordinary income only, items of income allocable to corpus will not be included in the portion he is treated as owning. Similarly, if a grantor or another person is treated under sections 674-678 as an owner of a portion by reason of a power over ordinary income only, items of income allocable to corpus are not included in that portion. (See paragraph (c) of this

section to determine the treatment of deductions and credits when only ordinary income is included in the portion.)

(2) Only income allocable to corpus is included by reason of an interest in or a power over corpus alone, if satisfaction of the interest or an exercise of the power will not result in an interest in or the exercise of a power over ordinary income which would itself cause that income to be included. For example, if a grantor has a reversionary interest in a trust which is not such as to require that he be treated as an owner under section 673, he may nevertheless be treated as an owner under section 677(a)(2) since any income allocable to corpus is accumulated for future distribution to him, but items of income included in determining ordinary income are not included in the portion he is treated as owning. Similarly, he may have a power over corpus which is such that he is treated as an owner under section 674 or 676 (a), but ordinary income will not be included in the portion he owns, if his power can only affect income received after a period of time such that he would not be treated as an owner of the income if the power were a reversionary interest. (See paragraph (c) of this section to determine the treatment of deductions and credits when only income allocated to corpus is included in the portion.)

(3) Both ordinary income and other income allocable to corpus are included by reason of an interest in or a power over both ordinary income and corpus, or an interest in or a power over corpus alone which does not come within the provisions of subparagraph (2) of this paragraph. For example, if a grantor is treated under section 673 as the owner of a portion of a trust by reason of a reversionary interest in corpus, both ordinary income and other income allocable to corpus are included in the portion. Further, a grantor includes both ordinary income and other income allocable to corpus in the portion he is treated as owning if he is treated under section 674 or 676 as an owner because of a power over corpus which can affect income received within a period such that he would be treated as an owner under section 673 if the power were a reversionary interest. Similarly, a grantor or another person includes both ordinary income and other income allocable to corpus in the portion he is treated as owning if he is treated as an owner under section 675 or 678 because of a power over corpus.

(c) If only income allocable to corpus is included in computing a grantor's tax liability, he will take into account in that computation only those items of income, deductions, and credit which would not be included under subparts A through D in the computation of the tax liability of the current income beneficiaries if all distributable net income had actually been distributed to those beneficiaries. On the other hand, if the grantor or another person is treated as an owner solely because of his interest in or power over ordinary income alone, he will take into account in computing his tax liability those items which would be included in computing the tax liability of a current income beneficiary, including expenses allocable to corpus which enter into the computation of distributable net income. If the grantor or other person is treated as an owner because of his power over or right to a dollar amount of ordinary income, he will first take into account a portion of those items of income and expense entering into the computation of ordinary income under the trust instrument or local law sufficient to produce income of the dollar amount required. There will then be attributable to him a pro rata portion of other items entering into the computation of distributable net income under subparts A through D, such as expenses allocable to corpus, and a

> pro rata portion of credits of the trust. For examples of computations under this paragraph, see paragraph (g) of § 1.677(a)-1.

Where one trust can withdraw all of the assets of the other trust, the trust with the withdrawal right seems clearly the owner of the whole trust for income tax purposes. But with a more limited withdrawal right the result is uncertain. An example of a power to vest "the income therefrom" is described in Private Letter Ruling 201633021. The ruling involved Trust 1 and Trust 2 which were non-grantor trusts because the grantor had died. The assets of Trust 1 and Trust 2 are held for the benefit of the same beneficiaries. The governing document of Trust 2 provides that Trust 1 retains the power, solely exercisable by Trust 1, to revest the net income of Trust 2 in Trust 1; provided, however, that such power shall lapse on the last day of such calendar year. Trust 2 further provides that income includes (i) any dividends, interest, fees and other amounts characterized as income under section 643(b) of the Code, (ii) any net capital gains realized with respect to assets held less than twelve months, and (iii) any net capital gains realized with respect to assets held longer than twelve months. The ruling provides that the trustee "proposes to transfer funds from Trust 1 to Trust 2."

The IRS concluded:

> Trust 1 will be treated as the owner of the portion of Trust 2 over which they have the power to withdraw under § 678(a). Accordingly, Trust 1 will take into account in computing their tax liability those items which would be included in computing the tax liability of a current income beneficiary, including expenses allocable to which enter into the computation of distributable net income. Additionally, Trust 1 will also take into account the net capital gains of Trust 2." The ruling unfortunately does not provide any insight on what the income tax consequences would be when Trust 1 "transfers funds" to Trust 2. The language of the ruling implies the Trust 1 will be treated as a beneficiary of Trust 2 but also "as the owner of the portion of Trust 2 over which they have the power to withdraw under § 678(a).

The language doesn't necessarily (but it could) mean that Trust 1 is the deemed owner entirely of Trust 2 and all of its assets. If Trust 1 is treated as the owner entirely of Trust 2, then theoretically Trust 1 could engage in a sale of the assets of Trust 1 to Trust 2 in exchange for an installment note, and the transaction would be disregarded for income tax purposes under Revenue Ruling 85-13. This would be the result if Trust one could withdraw all the assets of Trust 2 at any time.

If, however, Trust 1 is merely an entity that must report the income, capital gain, expenses, and other items used to compute DNI, then such a transaction could, in part, be considered a taxable event. Even if the latter interpretation is correct, if Trust 1 is a non-GST exempt trust and Trust 2 is a GST exempt trust, the tax liability borne by Trust 1 from all of Trust 2's income and capital gain could significantly increase Trust 2's trust assets over time and decrease the assets in Trust 1.

PLR 202022002, the trust agreement of a Trust 1 prohibited the distribution of Shares (perhaps of a closely-held company) to the beneficiaries, but allowed for the distribution of the proceeds from the sale of Shares. Trust 1 contributed all of its Shares to LLC, a newly formed entity classified as partnership for Federal tax purposes, in exchange for membership interest in LLC. The same restrictions on the Shares were placed on the membership interests of LLC. Trust 1 then transferred a portion of its LLC interest to a Subtrust for the sole benefit of A. After A reached the age of 40, A exercised a withdrawal right to take all of the Subtrust's assets, except the LLC interests. The Subtrust agreed to sell a portion of its LLC interests to Trust 2 in exchange for cash and a promissory note. Trust 2 is a grantor trust with respect to A. A also had the authority to withdraw the cash and promissory note from Subtrust after the sale. The IRS concluded, "because A has a power exercisable by herself to vest the proceeds of Subtrust's LLC interest in herself and that those proceeds are Subtrust's only asset, A will be treated as the owner of Subtrust under § 678. Consequently, the transfer of the LLC interests to Trust 2 is not recognized as a sale for federal income tax purposes because Trust 2 and Subtrust are both wholly owned by A."

When doing trust to trust transactions, if the trusts are not grantor trusts, it would be best to have one trust have a withdrawal right over all assets of the other trust.

2. **Grantor Trusts and Spouses**. PLR 201927003 is helpful. Each spouse created a grantor trust. Then spouse one sold a partnership interest to spouse two's trust, and Trust One sold interests to Trust Two. The ruling provides:

> Section 1041(a)(1) of the Code provides that no gain or loss shall be recognized on a transfer of property from an individual to a spouse. Section 1041(b) of the Code provides that, in the case of any transfer described in subsection (a), (1) the property shall be treated as acquired by the transferee by gift, and (2) the basis of the transferee in the property shall be the adjusted basis of the transferor. Because Trust 1 is a grantor trust, assets sold by Trust 1 will be treated for federal tax purposes as sold by Spouse 1. In addition, because Trust 2 is a grantor trust, assets purchased from Taxpayer and Trust 1 will be treated for federal tax purposes as purchased by Spouse 2. Accordingly, based on the information submitted, we rule as follows: (1) Spouse 1 will recognize no gain or loss on the sale by Spouse 1 of a x percent limited partnership interest in Partnership to Trust 2 (§ 1041(a)(1) and Rev. Rul. 85-13). (2) Spouse 1 will recognize no gain or loss on the sale by Trust 1 of a x percent limited partnership interest in Partnership to Trust 2 (§ 1041(a)(1) and Rev. Rul. 85-13). (3) The basis of property acquired from Spouse 1 by Trust 2 will be the same as the adjusted basis in the property in the hands of Spouse 1 (§ 1041(b)(2)). (4) The basis of property acquired from Trust 1 by Trust 2 will be the same as the adjusted basis in the property in the hands of Trust 1 (§ 1041(b)(2)).

3. **DING Trusts**. State income tax may be avoided if assets may be transferred into a non-grantor trust in such a way as to avoid the transferor making a gift. The typical acronym for such trusts is a DING Trust, for Delaware Incomplete Non-Grantor Trusts, but there is nothing magical about Delaware as the state in which the trust ought be created.

Typically, the grantor of the trust wants to be a beneficiary. Thus, in order to avoid grantor trust status the grantor may receive distributions only at the direction of adverse parties. Generally, some of the grantor's descendants are beneficiaries of the trust and are thus thought to be adverse for income tax purposes, and thus are empowered to make distributions to the grantor.

The grantor also wants the transfer to be incomplete for gift tax purposes. In a string of rulings beginning in 2001 the IRS determined that a testamentary power of appointment in the grantor made the gift incomplete. See e.g. 200148028, 200715005, and others in between. In CCA 201208026 the IRS reversed that position, concluding that the testamentary power of appointment would only affect the remainder interest not the income or present interest. So, the trick is to give the grantor some power that will make the gift incomplete but that will not cause the trust to be a grantor trust for income tax purposes.

One such power is the grantor's power to make distributions in a non-fiduciary capacity pursuant to a fixed and ascertainable standard under Reg. §2511-2 so long as retention of such power does not cause the assets of the trust to be subject to the grantor's creditors (because that would cause the trust to be a grantor trust for income tax purposes, per Rev. Rul. 54-516). Delaware, Ohio, Nevada and Wyoming protect trusts where the donor retains this power.

Another potential power would be to require the grantor's consent before distributions were made to others. This power would pass muster in many of the asset protection states, including Delaware.

In IR-2007-127 (July 9, 2007) the IRS announced it was reconsidering its position on the gift tax consequences to the beneficiaries on the distribution committees. The IRS was likely spooked by comments from a professional group about the tax consequences of DINGs and the government's arguably incoherent ruling position. However, without comment on what learning has been achieved, the IRS began issuing rulings in this area, in March 2013.

New York has enacted legislation providing that DINGs are subject to New York income tax if created by a New York domiciliary even if not a grantor trust for federal income tax purposes. Other states may adopt similar legislation.

PLR 201832008 is typical of current ING trust creation. The distribution of authority is carefully divided and distributed:

> Grantor is the only donor and all property contributed to Trust will be Grantor's separate property under State 1 law. The trustee, Trustee, is a trust company with its headquarter in State 2. Trust is governed by the laws of State 2. Currently, Grantor and Spouse have two minor children, Child 1 and Child 2.
>
> During Grantor's lifetime, at any time or times, Trustee, pursuant to an appointment of the Committee or Grantor, while the Committee is in existence, shall distribute to the Beneficiaries such amounts of net income or principal of Trust as the Committee or Grantor determines. Any appointment, determination, or action by the Committee requires either (i) The unanimous written consent of the then serving members of the Committee, other than Grantor (Unanimous Member Power), or (ii) The written consent of Grantor and a majority of the other then serving members of the Committee (Grantor's Consent Power). In addition, Grantor, in a non-fiduciary capacity, may appoint such amounts of principal to one or more persons in the group consisting of Grantor's descendants, Father, Mother, and Individual, as Grantor deems advisable to provide for such person's health, support, and education. (Grantor's Sole Power). Such power may not be

> exercised to discharge or satisfy Grantor's legal obligations. Any net income not distributed shall be accumulated and added to the principal of Trust.
>
> If at any time a Committee member fails or ceases to serve then the position of such Committee member shall remain vacant; subject to exception for the appointment of representatives with legal authority to act on behalf of another Committee member.
>
> The Trust agreement provides that if there is no Committee, the trustee (other than a beneficiary-trustee) may pay any one or more of the beneficiaries such amount or amounts of the net income and principal for any purpose, even to the extent of all or none, at any time and from time to time, as the trustee determines in his discretion and only with Grantor's written consent, and in making such determinations, the trustee may consider or ignore, in the trustee's discretion, the beneficiaries' other financial resources of any kind.
>
> Initially, Committee consists of Grantor, Representative 1, Representative 2, Father, and Mother. Representatives 1 and 2 act on behalf of Child 1 and Child 2, respectively, until each child reaches majority age. As each of the minor children, Child 1 and Child 2, reaches majority age, that child will become a member of the Committee, replacing his representative. Trust provides that, at any time, members of the Committee, may by unanimous vote add one or more members to the Committee (other than Spouse) provided that such members are beneficiaries of Trust. The Trust agreement, as amended, states that Committee shall be deemed not to exist at any time there are fewer than two members other than Grantor. The Committee shall also be dissolved and cease to exist upon Grantor's death.
>
> Upon Grantor's death, the trustee shall distribute such amounts of trust property as Grantor appoint to or in favor of any one person or more persons or entities, other than Grantor, Grantor's estate, the creditors of Grantor, or the creditors of Grantor's estate, as Grantor may appoint by will (Grantor's Testamentary Power). Such power may not be exercised to discharge or satisfy Grantor's legal obligations.
>
> Upon Grantor's death, the trustee shall divide the then remaining trust property into as many separate shares of equal value as necessary to dispose of the property. Any balance which is not distributed pursuant to Grantor's Testamentary Power shall be distributed as follows: (1) one such equal share to Father, if he is then living; (2) one such equal share to Mother, if she is then living; (3) one such equal share to Individual, if he is then living, and (4) seven such equal shares to Grantor's then living descendants, by right of representation, to be held in further trust for such descendants. If none of the remainder beneficiaries is living upon Grantor's death, any balance which is not distributed pursuant to Grantor's Testamentary Power shall be distributed in equal shares in further trust for the benefit of individuals named in Trust.

The grantor’s contribution to the trust was an incomplete gift:

> In this case, Grantor retained the Grantor's Consent Power over the net income and principal of Trust. Under § 25.2511-2(e), a donor is considered as himself having a power if it is exercisable by him in conjunction with any person not having a substantial adverse interest in the disposition of the transferred property or the income therefrom. The Committee members are not takers in default for purposes of § 25.2514-3(b)(2). They are merely co-holders of the power. Under § 25.2514-3(b)(2), a co-holder of a power is only considered as having an adverse

interest where he may possess the power after the possessor's death and may exercise it at that time in favor of himself, his estate, his creditors, or the creditors of his estate. In this case, the Committee ceases to exist upon the death of Grantor. Accordingly, the Committee members do not have interests adverse to Grantor under § 25.2514-3(b)(2) and for purposes of § 25.2511-2(e). Therefore, Grantor is considered as possessing the power to distribute net income and principal to any beneficiary himself because he retained the Grantor's Consent Power.

If the Committee ceases to exist, the Trustee has the power to distribute net income to a beneficiary. However, the Trustee's power is not a condition precedent to each Grantor's Consent Power. Each Grantor's Consent Power over income is presently exercisable and not subject to a condition precedent. Thus, the Trustee's power to distribute net income does not cause the transfer of property to be complete with respect to the income interest in Trust for federal gift tax purposes. Therefore, each Grantor is considered as possessing the power to distribute income to any beneficiary himself or herself because he or she retained the Grantor's Consent Power.

Grantor also retained the Grantor's Sole Power over the principal of Trust. Under § 25.2511-2(c), a gift is incomplete if and to the extent that a reserved power gives the donor the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves unless the power is a fiduciary power limited by a fixed or ascertainable standard. In this case, the Grantor's Sole Power gives Grantor the power to change the interests of the beneficiaries. Even though Grantor's power is limited by an ascertainable standard, i.e., health, education, and support, Grantor's power is not a fiduciary power. Accordingly, the retention of the Grantor's Consent Power and the Grantor's Sole Power causes the transfer of property to Trust to be incomplete for federal gift tax purposes.

If the Committee ceases to exist, the Trustee, in its fiduciary capacity, also has the power to distribute principal to one or more beneficiaries. The powers of the Trustee are not conditions precedent to the Grantor's powers. Grantor's Sole Power over principal is presently exercisable and not subject to a condition precedent. Accordingly, Grantor retains dominion and control over the principal of Trust until the Trustee exercises his or her power to appoint principal. *See Goldstein v. Commissioner*, 37 T.C. 897 (1962). Thus, the Trustee's powers to distribute principal do not cause the transfer of property to be complete with respect to the remainder in Trust for federal gift tax purposes. Accordingly, the retention of Grantor's Consent Power and Grantor's Sole Power causes the transfer of property to Trust to be wholly incomplete for federal gift tax purposes.

Further, Grantor retained the Grantor's Testamentary Power to appoint the property in Trust to any persons, other than to the Grantor's estate, Grantor's creditors, or the creditors of Grantor's estate. Under § 25.2511-2(b), the retention of a testamentary power to appoint the remainder of a trust is considered a retention of dominion and control over the remainder. Accordingly, the retention of this power causes the transfer of property to Trust to be incomplete with respect to the remainder for federal tax purposes.

Finally, the Committee members possess the Unanimous Member Power over net income and principal. This power is not a condition precedent to Grantor's powers. Grantor's powers over the net income and principal are presently exercisable and not subject to a condition precedent. Grantor retains dominion and control over the net income and principal of Trust until the Committee members exercise their Unanimous Member Power. Accordingly, the Unanimous Member Power does not cause the transfer of property to be complete with respect to the income

> interest for federal gift tax purposes. *See Goldstein v. Commissioner*, 37 T.C. 897 (1962); *Estate of Goelet v. Commissioner*, 51 T.C. 352 (1968).

Nonetheless the grantor's powers did not make the trust taxable to the grantor for income tax purposes.

A distribution from the trust to other than the grantor would be a gift by the grantor. See also PLR 202006002, dealing with community property (one of a series), and PLR 202014001, also part of a series. See also PLR 202017018.

PLR 201908008 is a recent incomplete gift, non-grantor trust ruling, with a charitable feature. The facts presented were otherwise typical:

> On Date, Settlor created Trust, an irrevocable trust, for the benefit of Individual A, Individual B, and Foundation (Eligible Beneficiaries). Trust has an Independent Trustee and an Administrative Trustee. The situs of Trust is State.
>
> Article I(1) of Trust provides that during the life of Settlor, the trustees shall pay so much, if any, of the net income from such trust to or for the benefit of any one or more of the Eligible Beneficiaries, in such equal or unequal shares and to the exclusion of any one or more of the other Eligible Beneficiaries, as the Distribution Committee shall, at any time or from time to time by written instrument delivered to the trustees, direct; provided, however, that the trustees shall not distribute any amount to any of the Eligible Beneficiaries pursuant to any direction of the Distribution Committee unless and until Settlor shall, acting individually and solely in a nonfiduciary capacity, first consent in writing to such direction (Settlor's Consent Power).
>
> Article I(2) provides that the trustees shall be authorized to distribute all or any part of the net income not so paid pursuant to Article I(1) to any one or more of the Eligible Beneficiaries, in such equal or unequal shares and to the exclusion of any one or more of the other Eligible Beneficiaries, as the Independent Trustee shall, at any time or from time to time in the absolute discretion of the Independent Trustee, determine for any purpose.
>
> Article I(3) provides that the trustees shall pay so much, if any, of the principal of such trust to or for the benefit of any one or more charitable organizations, and in such equal or unequal shares, as Settlor shall, at any time or from time to time by written instrument, direct and appoint; provided, however, that this power of appointment shall be a limited power, which shall not be exercisable to any extent in favor of Settlor, Settlor's estate, the creditors of Settlor, or the creditors of Settlor's estate (Settlor's Inter Vivos Limited Power of Appointment).
>
> Any net income not so paid pursuant to Article I shall be accumulated and added to principal.
>
> Article II provides that following Settlor's death, the trustees shall distribute the trust estate to one or more charitable organizations, and in such equal or unequal shares, as Settlor shall direct and appoint; provided, however, that this power of appointment shall be a limited power, which shall not be exercisable to any extent in favor of Settlor, Settlor's estate, creditors of Settlor, or creditors of Settlor's estate (Settlor's Testamentary Limited Power of Appointment). To the extent Trust property is not effectively appointed, the trustees shall distribute such whole

> or part to such one or more charitable organizations, and in such equal or unequal shares, as the Independent Trustee shall determine in the absolute discretion of the Independent Trustee.
>
> Article III(A) provides that during the life of Settlor, the Distribution Committee shall have the power to direct the trustees as provided in Article I. Following Settlor's death, the PLR-113144-18 3 Distribution Committee shall cease to exist and the person or persons who shall, immediately prior to the death of Settlor, be in office as members of the Distribution Committee shall cease to have any authority, either individually or collectively, to direct the trustees or to exercise any other right or power under Trust.
>
> Under Article III(B), the initial members of the Distribution Committee are Independent Trustee, Individual A and Individual B. Article III(C) provides that Settlor, or if Settlor at any time is not able to act, the members of the Distribution Committee may appoint successor members to the committee. The Independent Trust also has the power under Article III(D) to appoint members to the committee.
>
> Article III(F) provides that (i) there shall be at least one member of the Distribution Committee in office at all times during Settlor's life and (ii) a majority of the members of the committee shall, at all times during Settlor's life, consist of Eligible Beneficiaries.
>
> Article III(G) provides that if and so long as there shall be more than one member on the Distribution Committee, the committee shall act by majority vote of such members.
>
> Article V(G) provides that there shall not be more than three individuals, or more than two individuals and one corporation in office as trustees of Trust, and none of Settlor, Settlor's husband, and any individual or corporation who is related or subordinate to Settlor or Settlor's husband (within the meaning of § 672(c)) is eligible to serve as trustee of Trust.
>
> Article XII(B)(6) defines the term "charitable organization" to mean and include only an organization (a) that is described in §§ 170(c), 2055(a), and 2522(a); and (b) that shall not, by any action or course of conduct, have so disqualified itself that any charitable deduction that would otherwise be available for federal income, estate or gift tax purposes, in respect of property passing to such organization, would be disallowed.
>
> Settlor has made the following representations. Settlor has not claimed nor will she claim an income tax or gift tax charitable deduction under § 170(c) or 2522(a) for any property transferred by Settlor to Trust at any time, unless and until Trust makes a payment to one or more charitable organizations. No person (including any corporation or trust) other than Settlor is presently expected to make any transfer of property to Trust at any time, so no other charitable deduction will be claimed or available for contributions of property to Trust. Trust will not set aside any amounts for charitable purposes and claim a deduction under § 642(c)(2).

The charitable provisions are not typical. The ruling states that the trust may receive a section 643(c) deduction and that the settlor will not be a disqualified person with respect to the trust because no income tax deduction was claimed. With respect to this point, the ruling states:

> The basic purpose of § 4947 is to prevent these trusts from being used to avoid the requirements and restrictions applicable to private foundations. For purposes of this section, a trust shall be presumed (in the absence of proof to the contrary) to have amounts in trust for which a charitable deduction was allowed if a deduction would have been allowable under one of these sections.
>
> Section 53.4947-1(c)(1)(i) provides that a trust is one which has amounts in trust for which a deduction was allowed under § 642(c) within the meaning of § 4947(a)(2) once a deduction is allowed under § 642(c) to the trust for any amount permanently set aside.
>
> In *Virginian Hotel Corp. v. Helvering*, 319 U.S. 523 (1943), the Supreme Court held that "allowed" meant that the taxpayer had taken the deduction and the Commissioner had not challenged it. Id. at 527. Noting that there was "no machinery for formal allowances of deductions from gross income," a deduction being claimed and going unchallenged is the only way in which a deduction could be "allowed."
>
> Trust has both charitable and non-charitable beneficiaries and is not exempt from tax under § 501(a). One of the requirements to qualify as a split-interest trust described in § 4947(a)(2) is that the trust has amounts in trust for which a charitable deduction was allowed to some person (including the trust itself for a charitable set-aside). Settlor has represented that, for the duration of Trust, Trust will not hold any amounts for which a person claimed a charitable deduction for a transfer to Trust, or for which Trust claimed a charitable deduction under § 642(c)(2) for a set-aside. Thus, for Settlor's life, Trust will not qualify as a split-interest trust under § 4947(a)(2). The fact that Settlor may claim a gift tax deduction under § 2522 (or that Trust may claim an income tax deduction under § 642(c)(1) when a charitable distribution from Trust is made is not material, because such amount is not held in Trust when the charitable deduction arises.
>
> Based upon the facts submitted and representations made, we conclude that Settlor will not be a disqualified person with respect to Trust because Trust will not be treated as a split-interest trust within the meaning of §§ 4947(a)(2) and 53.4947-1(c)(1)(i) and, accordingly, the provisions of §§ 507, 508(e), 4941, 4943, 4944, and 4945 shall not apply to Trust during Settlor's life.

In PLR 202017018 – the only ING ruling issued in 2020 – a settlor established an irrevocable trust to benefit himself, his spouse, his descendants, his parents and his parents' descendants (in addition to himself and his own descendants). A corporate fiduciary was the sole Trustee and there was a distribution committee consisting of at least two individuals other than the settlor and the settlor's spouse but could also include the settlor. The distribution committee was initially the settlor, the settlor's parents and the settlor's sister. An elaborate mechanism was set forth in the trust instrument to ensure that, throughout the settlor's life, the distribution committee remained intact. At the settlor's death, the distribution committee was to cease operations, and all powers previously held by the distribution committee were thereafter to be held and exercised by the Trustee. Distributions from the trust could be made as follows:

- Income or principal could be distributed to or for any beneficiary (other than the settlor's spouse) as determined by a majority of the distribution committee, other than the settlor or the settlor's spouse, acting in a non-fiduciary capacity, with the written consent of the settlor;

- Income or principal could be distributed to or for any beneficiary as determined unanimously by the distribution committee, other than the settlor or the settlor's spouse, acting in a non-fiduciary capacity; and
- Principal could be distributed to or for any beneficiary (other than the settlor or the settlor's spouse) as determined by the settlor, acting in a non-fiduciary capacity, for the health, education or support of any one or more of such beneficiaries.

Consistent with the above rules, distributions could be made in equal or unequal amounts among concurrent beneficiaries. During the settlor's life, the Trustee was not permitted to make any distributions except as directed in accordance with the above rules. In addition, the settlor held a testamentary power of appointment that could be exercised in favor the settlors' parents' descendants (except the settlor, his estate, his creditors or his estate's creditors), the settlor's spouse or any one or more charitable organizations.

The IRS ruled as follows:

- Neither the settlor nor any member of the distribution committee will be considered the grantor or owner of the trust for income tax purposes;
- The settlor's transfer of property to the trust will be considered not to be a completed gift for gift tax purposes;
- Discretionary distributions won't be considered gifts for gift tax purposes by any distribution committee member; and
- A distribution committee member's gross estate for estate tax purposes won't include the value of any trust property.

Last year, the IRS indicated it wouldn't issue ING trust rulings with respect to ING trusts with somewhat narrow characteristics in Revenue Procedure 2020-3. Even more recently, the IRS completely put the brakes on all ING trust rulings in Rev. Proc. 2021-3 (Section 5.01(9) & (17)). Quite obviously, for an ING trust to be effective the state in which the trust is resident must either not have an income tax or must have an income tax rate much lower than the rate being avoided.

Incomplete gift trusts may have other uses. Suppose a client funds LLC-1 with $9 million and LLC-2 with $1 million. Suppose further that client gives LLC-1 to an ING trust. Next client gives LLC-2 to the same trust, except client does not retain the powers required to make the gift incomplete over LLC-2 (e.g., no power of appointment over LLC-2). Without regard to grantor trust status, assets may be sold for a note from LLC-1 to LLC-2 such that growth above the interest rate will accumulate in LLC-2.

E. SECTION 1361 – S CORPORATIONS

F. SECTIONS 2031 and 2512 – VALUATION

1. Valuation of LLCs Holding Leased Property For Gift, Estate, and Charitable Purposes. Judge Buch has decided for the Tax Court a straightforward valuation case in Estate of Warne v. Commissioner, T.C. Memo. 2021-17. There were five LLCs at issue with various percentages owned by a family trust included in the decedent's estate.

The easiest issue for the court to deal with was the estate tax charitable deduction. At the decedent's death she left 75% of Royal Gardens, LLC to the family foundation and 25% to St. John's Lutheran Church. The estate argued that 100% went to charity but the IRS argued Ahmanson Foundation v. United States, (9th Cir. 1981) and the Tax Court agreed with the IRS. An estate receives a charitable deduction only for what charities receive, which the court held was a 4% discount for the 75% and a 27.385% discount for the 25% (each stipulated by the parties). The discounts could have been avoided by leaving 100% to the Foundation and having it distribute 25% to the church.

The family trust held fractions of the other LLCs as follows:

> At the time of Miriam Warne's death, the LLCs had the following ownership structure: WRW was held 78% by the Family Trust and 22% by William Warne; VJK was held 86.3% by the Family Trust, 0.5% by Tom Warne, and 4.4% by each of the three granddaughters; Warne Ranch was held 72.5% by the Family Trust, 26% by Tom Warne, and 0.5% by each granddaughter; Warne Investments was held 87.432% by the Family Trust and 12.568% by Trust "H"; and Royal Gardens was held 100% by the Family Trust. William Warne and Tom Warne were cotrustees of the Family Trust. They are also coexecutors of Miriam Warne's estate.

The experts valued the leased real estate using a sales comparison approach to value the land. With respect to the effect of discounts at the entity level, the opinion states:

> The discount for lack of control for the majority interests held by the Family Trust should be low. The LLCs' operating agreements grant significant power to the majority interest holder, such as the ability to unilaterally dissolve the LLCs and appoint and remove managers. The Family Trust held the majority interest in every LLC at issue. When a majority interest holder exerts control similar to that which the Family Trust can exercise in the LLCs, we have held that no discount for lack of control applies.31 Because the parties agree to a discount for lack of control, we will find one; however, given the control retained by the Family Trust, the discount should be slight.

The IRS's expert argued for a 2% lack of control discount based on closed-end mutual funds, which the court rejected. The taxpayer's expert argued based on data from minority interest sales for a 5% - 8% discount. However the taxpayer's expert also assumed that if the majority tried to liquidate the minority would sue which the court concluded was an unwarranted assumption. So the court applied a 4% lack of control discount. The court much preferred the taxpayer's expert on lack of marketability, stating:

> The parties' experts used the same general method to calculate their discounts for lack of marketability. Both experts calculated the LLCs' restricted stock equivalent discounts and adjusted that calculation to account for the LLCs' characteristics to reach the final discount for lack of marketability. However, Mr. Schwab's analysis was more credible. His report considered additional metrics and provided a more thorough explanation of his process. In calculating the restricted stock equivalent discount, he determined the most important factors--such as the market-to-book ratio and market risk volatility--and he gave them more significant weight in his analysis. Mr. Schwab concluded a 10% to 12% restricted stock equivalent discount and decreased it by 25% as a holding period

> adjustment. He opined that a 5% to 10% discount for lack of marketability should apply.
>
> In contrast, Mr. Robak concluded a 2% discount for lack of marketability, providing little information to support this conclusion. In calculating the restricted stock equivalent discount, Mr. Robak weighted every factor equally and reached a 14.5% restricted stock equivalent discount. He then calculated a 2% discount for lack of marketability without justifying the substantial decrease in the discount. When an expert does not provide enough evidence to support his opinion, we decline to adopt that opinion. Without justification for his conclusion, it appears Mr. Robak made a visceral reduction of the discount rate data instead of a statistical one. We therefore decline to adopt the Commissioner's discount for lack of marketability analysis.
>
> We adopt Mr. Schwab's lack of marketability discount but believe it should remain at the lower end of the 5% to 10% range. Therefore, the discount for lack of marketability for the LLCs is 5%.

Each of the parties used different experts to value the underlying properties then the entities.

The taxpayers had not filed a timely gift tax return and the court upheld a penalty because the estate presented no evidence of reasonable cause.

2. **Valuation of Image and Likeness**. The Tax Court was presented with valuing the decedent's image and likeness, as well as certain business assets, in Estate of Michael Jackson, T. C. Memo. 2021-48. Judge Holmes wrote a lengthy opinion (breezy, for a Tax Court judge) which reviews much of Jackson's business and musical career (omitting discussion of personal matters almost entirely) and also outlines the current business strategies of the music industry. With respect to valuation itself the most broadly applicable points are that the court refused to tax effect streams of earnings and refused to apply a penalty to the estate. Regarding the tax effecting issue, the opinion states:

> Fishman, Wallis, and Dahl in their respective DCF analyses concluded that the appropriate hypothetical buyer for each asset would be a C corporation, and therefore, each of them reduced cashflows by the income-tax liability that would be paid by a hypothetical C corporation buyer. To make things even more complicated, each also computed a discount rate that included the effects of a C corporation's tax rate. They all stated that this was appropriate because it used both after-tax cashflows and after-tax discount rates. Each of the Estate's experts, however, used a different tax rate to do his computation:
>
> • Fishman applied a 35% rate based on the federal rate,
>
> • Wallis applied a 39.615% rate based on a combined federal and New York State rate, and
>
> • Dahl applied a 39.8% rate based on a combined federal and undisclosed state rate.
>
> When we've faced this issue in the past, we've shied away from tax affecting because of these difficult practical problems. See Estate of Gallagher, 101 T.C.M.

(CCH) at 1710; Estate of Giustina, 101 T.C.M. (CCH) at 1679; Dallas v. Commissioner, 92 T.C.M. (CCH) 313, 317-18 (2006) (tax affecting not appropriate when the taxpayer presumed that an S corporation would lose its S corporation status after a sale); Gross, 78 T.C.M. (CCH) at 207. For example, in Wall v. Commissioner, 81 T.C.M. (CCH) 1425, 1432-33 n.19 (2001), we noted that

> [t]he argument in favor of tax-effecting stresses that many potential buyers of S corporations are C corporations. Because a C corporation would be unable to maintain a target company's S corporation status following an acquisition, the C corporation would tax-effect the S corporation's income (at C corporation rates) in deciding how much it would pay for the S corporation. See Trugman, Understanding Business Valuation: A Practical Guide to Valuing Small to Medium-Sized Businesses, at 198-199 (1998). By contrast, the argument against tax-effecting stresses that although an S corporation's stockholders are subject to tax on the corporation's income, they are generally not subject to a second level of tax when that income is distributed to them. This could make an S corporation at least somewhat more valuable than an equivalent C corporation. However, tax-effecting an S corporation's income, and then determining the value of that income by reference to the rates of return on taxable investments, means that an appraisal will give no value to S corporation status.

There has, it seems, been only one case where we allowed tax affecting in a valuation. See Estate of Jones v. Commissioner, T.C. Memo. 2019-101, at *41-*42. In Estate of Jones, both experts agreed that a hypothetical buyer and seller would take into account the form of business entity in determining the fair market value of a limited-partnership interest. Id. at *39. The parties just disagreed on how to account for this effect. Id. The Commissioner's expert argued against tax affecting because the company at issue was a natural-resource holding company--not because it would pay no entity-level tax. Id.

The experts here strongly disagree on the appropriateness of tax affecting. We view this disagreement just as we have in the past, as one that is a dispute about fact. And we find, as we have done consistently in the past apart from Estate of Jones, that by a preponderance of the evidence tax affecting is not appropriate here because the Estate has failed to persuade us that a C corporation would be the hypothetical buyer of any of the three contested assets. The Estate's experts did not even discuss in a persuasive way their reasons for assuming that a C corporation would be the only or even likely buyer for these assets.

* * *

Our finding reflects these facts: The Estate's own experts used inconsistent tax rates. They failed to explain persuasively the assumption that a C corporation would be the buyer of the assets at issue. They failed to persuasively explain why many of the new pass-through entities that have arisen recently wouldn't be suitable purchasers. And they were met with expert testimony from the Commissioner's side that was, at least on this very particular point, persuasive in light of our precedent. This all leads us to find that tax affecting is inappropriate on the specific facts of this case. We distinguish Estate of Jones as an instance where the experts agreed to take into account the form of the business entity and agreed on the entity type. The Commissioner argued there, as he does here, that we shouldn't tax affect, but his own experts didn't seem to be on board. As we observed, “[t]hey do not offer any defense of respondent's proposed zero tax rate.

> Thus, we do not have a fight between valuation experts but a fight between lawyers." Estate of Jones, at *39.
>
> We do not hold that tax affecting is never called for. But our cases show how difficult a factual issue it is to demonstrate even a reasonable approximation of what that effect would be. In Estate of Jones, there was expert evidence on only one side of the question, and that made a difference.
>
> That was not the case here.

The IRS and estate values were significantly far apart on values as noted in the Conclusion to the opinion:

Asset	Estate	Commissioner	Tax Court
Jackson's image and likeness	$3,078,000	$161,307,045	$4,153,912
NHT II	-0-	206,295,934	-0-
NHT III	2,267,316	114,263,615	107,313,561

But no penalties were imposed:

> The Estate valued Jackson's image and likeness at roughly $2,000 on its return. This was based on an appraisal by Moss Adams--an accounting firm that we specifically find is reputable and credible. See supra pp. 49, 100-01. Moss Adams based its valuation on the last 10 years of Jackson's life, and concluded to the surprise of the Estate that Jackson's image and likeness was not worth very much. The Commissioner argues that this valuation was clearly wrong--and the Estate should have known not to rely on it.
>
> But the facts show that this low valuation wasn't that farfetched. Jackson made almost no money attributable to his name and likeness in the last decade of his life, especially after the 2003 trial. And in 2009, even as Jackson rapidly sold out multiple concerts, exploitation of his name and likeness earned him only $24. Moss Adams followed standard appraisal procedure in this area--it focused on the last 10 years of Jackson's life. Though Fishman and Roesler--who we find credible--eventually expanded their dataset, they both stated in their reports that they typically only look at the 10 most recent years of income. While we disagree with Moss Adams's appraisal, we do find that it was reasonable. And we find that the Estate reasonably relied on it in good faith once it discovered how little revenue Jackson had been earning from use of his name and likeness. No penalties here.
>
> We find much the same for the valuation of NHT III. Our own opinion shows how complicated valuing Mijac and NHT III is. The Estate again used Moss Adams to help them estimate this value. We also disagree with this appraisal value, but we again find that it was reasonable given all the facts and circumstances. And we again find it was reasonable for the Estate to rely on it and that it did so in good faith. No penalties here either.

The estate had multiple experts, whereas the IRS only had one. The court was not thrilled with the IRS expert:

> As the Commissioner's only expert witness, Anson's credibility was an especially important part of the case. And it suffered greatly at trial. His problems began when he was asked about the effect on himself and his firm if the Commissioner

> prevailed in the case. He responded: "I have no idea. I've never worked for the Internal Revenue Service before." Later when asked whether he or his firm had previously been retained by the Commissioner to write an intellectual-property valuation report in Whitney Houston's estate-tax case, Anson replied: "No. Absolutely not." That was a lie. Approximately two years before he testified, the Commissioner had retained Anson to write a valuation report titled, "Analysis of the Fair Market Value of the Intangible Property Rights Held by the Estate of Whitney E. Houston as of February 11, 2012 For Estate Tax Purposes." It was only after a recess and advice from the Commissioner's counsel that Anson admitted to this.
>
> Anson also testified that neither he nor his firm ever advertised to promote business. This was also a lie. In the midst of trial, Anson's firm touted his testimony in the following email blast:
>
>> What has been described as the "tax trial of the century" by the Hollywood Reporter, the case between the Internal Revenue Service and the Estate of Michael Jackson began in Tax Court this week. CONSOR Chairman Weston Anson is the expert of the century and will be testifying on behalf of the IRS.
>>
>> The big discrepancy in the value of the Jackson estate will be sure to bring testimony tailor made for a Hollywood blockbuster. While CONSOR valued the intellectual property assets of the Jackson estate at a total close to $1 billion, the estate initially valued the assets at time of death at a mere $2,105.
>
> And in a lecture given before trial Anson referred to his valuation in this case, stating, "I'm sitting today * * * in a deposition in what's known as the 'Billion Dollar Tax Case.' * * * [W]e've just spent the last year valuing the estate of Michael Jackson." When asked at trial whether he had in fact referred to this case as a billion-dollar case, Anson replied with his own question: "Would you like to be called the lawyer of the century?"
>
> The Estate moved to strike all of Anson's testimony, including his expert reports, as tainted by perjury. We denied the Estate's motion finding it "too severe." We instead stated that "[a] more proportionate remedy would be to discount the credibility and weight we give to [Anson's] opinions." There is nothing wrong about marketing one's services or taking on another case for the IRS while working on this one. But Anson did undermine his own credibility in being so parsimonious with the truth about these things he didn't even benefit **[*61]** from being untruthful about, as well as in not answering questions directly throughout his testimony.
>
> This affects our factfinding throughout.

3. Validity of Buy-Sell Agreement and Effect of Life Insurance Paid to Company On The Value. Connelly v. United States, 2021 WL 4281288 (E.D. Mo. 2021), dealt with the valuation of Crown C Supply, Inc. in the estate of Michael Connelly. The parties stipulated the value was $3.1 million excluding $3.5 million of life insurance paid to the company at Michael's death, and ignoring a buy-sell agreement. The court first concluded that the buy-sell agreement did not satisfy the requirements of section 2703. The opinion states:

The parties here have stipulated that the Connelly brothers entered the Stock Agreement for the purpose of ensuring continued family ownership over Crown C. Doc. 47 at ¶¶ 1-3. The IRS does not provide any support for its contention that the Estate's actions taken after Michael's death alter the purpose of the Stock Agreement, making it no longer a bona fide business arrangement. Doc. 61 at p. 12. Based on the parties' stipulation, the Court deems the Stock Agreement a bona fide business arrangement for purposes of summary judgment.

***

For a buy-sell agreement to control the value of property for estate-tax purposes, it must not be a substitute for a testamentary disposition, ensuring that transactions between family members reflect full-and-adequate consideration. *See* 26 C.F.R. § 25.2703-1(b)(4) (price must be comparable to what an unrelated third party would pay, taking into account fair market value); *Estate of Lauder*, 1992 WL 386276, *21 (plaintiff must demonstrate full-and-adequate consideration in money or money's worth). The existence of a bona fide business purpose does not exclude the possibility that a buy-sell agreement is a testamentary device. 26 C.F.R. § 25.2703-1(b)(2); *see also St. Louis County Bank*, 674 F.2d at 1210. Further, "intrafamily agreements restricting the transfer of stock in a closely held corporation must be subjected to greater scrutiny than that afforded similar agreements between unrelated parties." *Estate of Lauder*, 1992 WL 386276, *20 (citing *Dorn v. United States*, 828 F.2d 177, 182 (3d Cir. 1987)); *see also Hoffman v. Comm r*, 2 T.C. 1160, 1178-1179 (T.C. 1943), *affd. sub nom. Giannini v. Comm'r*, 148 F.2d 285 (9th Cir. 1945) ("[T]he fact that the option is given to one who is the natural object of the bounty of the [decedent] requires substantial proof to show that it rested upon full-and-adequate consideration.").

Despite the legitimate business purpose of the Stock Agreement, the Estate bears the burden of proving that the Stock Agreement was not also a device to pass Crown C shares to members of the Connelly family for less than full-and-adequate consideration. *See Estate of Lauder*, 1992 WL 386276, *21. The Estate asserts that the Stock Agreement was not a testamentary device because (1) Crown C redeemed Michael's shares for fair market value, as established by the parties' stipulation to the value of Michael's shares, (2) the Stock Agreement was binding, because Crown C redeemed Michael's shares, and (3) the Connelly brothers were in good health when they executed the Stock Agreement. Doc. 65 at p. 7.

The Estate failed to show that the Stock Agreement was not a device to transfer wealth to Michael's family members for less than full-and-adequate consideration. First, the $3 million redemption price was not full-and-adequate consideration. The parties' stipulation explicitly left aside the life-insurance issue when it otherwise agreed to the $3.1 million fair market value of Michael's Crown C shares. Doc. 48. Therefore, the stipulation only aids the Estate if the Court finds that the fair market value excludes the $3 million in life-insurance proceeds used to redeem Michael's shares. In other words, the $3 million redemption price is only equivalent to the fair market value of the shares *if* the Court were to find that the $3 million in life-insurance proceeds are not included in Crown C's value. As discussed in section III.B.1 below, the Court follows the reasoning from the Tax Court in *Estate of Blount*, so the life-insurance proceeds are included in Crown C's fair market value. *Estate of Blount v. Comm'r*, 2004 WL 1059517, at *26 (T.C. 2004), a*ff'd in part, rev'd in part on other grounds*, 428 F.3d 1338 (11th Cir. 2005).

***

Additionally, the Stock Agreement's lack of a minority discount for Thomas's shares and corresponding lack of a control premium for Michael's shares substantially overvalues Thomas's shares and undervalues Michael's shares. The Stock Agreement required that in determining the appraised value of the shareholders' shares in Crown C, “[t]he appraisers shall not take into consideration premiums or minority discounts[.]” Doc. 53-4, Art. VII., Sec. C. The Stock Agreement's lack of a control premium for Michael's majority interest indicates that the price was not full-and-adequate consideration. *See* 26 C.F.R. § 20.2031-2(f)(2) (fair market value for a corporation's stock is determined by “the company's net worth, prospective earning power and dividend-paying capacity, and other relevant factors” including “the degree of control of the business represented by the block of stock to be valued . . .”); *Bright's Estate v. U.S.*, 658 F.2d 999, 1006-7 (5th Cir. 1981) (a willing buyer would account for a controlling interest or a minority interest in a closely-held corporation); *Estate of True v. Comm'r*, 2001 WL 761280, at *100 (T.C. 2001) (“[Plaintiff's] 58.16-percent interest represented a majority of the shares entitled to vote; therefore, [Plaintiff] owned a controlling interest in Black Hills Trucking at his death. Accordingly, [the expert] should have added a control premium to compute entity value . . .”); *see also Zaiger's Estate v. Comm'r*, 64 T.C. 927, 945-46 (T.C. 1975) (“Petitioner's experts applied discounts to their valuations to reflect the minority interest involved and to compensate for the fact that voting control would not be in the hands of the purchaser. Such considerations were proper and discounts were appropriate.”).

***

The Estate does not show that the Stock Agreement is comparable to similar agreements negotiated at arms' length. Courts treat a contractual restriction as comparable to similar agreements if it “could have been obtained in a fair bargain among unrelated parties in the same business dealing with each other at arm's length.” 26 C.F.R. § 25.2703-1(b)(4) (this determination considers factors such as “the expected term of the agreement, the current fair market value of the property, anticipated changes in value during the term of the arrangement, and the adequacy of any consideration given in exchange for the rights granted.”). The question is whether, “[a]t the time the right or restriction is created, the terms of the right or restriction are comparable to similar arrangements entered into by persons in an arm's length transaction.” 26 C.F.R. § 25.2703-1(b)(1)(iii); *Holman v. Comm r*, 130 T.C. 170, 197 (T.C. 2008), *affd*, 601 F.3d 763 (8th Cir. 2010) (“Comparability is determined at the time the restriction is created.”).

In *Blount*, the Tax Court held that to show comparability, the estate had to produce evidence “that the terms of an agreement providing for the acquisition or sale of property for less than fair market value are similar to those found in similar agreements entered into by unrelated parties at arm's length in similar businesses.” *Estate of Blount*, 2004 WL 1059517, at *17 (T.C. 2004), *aff'd in part, rev'd in part on other grounds*, 428 F.3d 1338 (11th Cir. 2005); *see also Holman*, 130 T.C. at 198-99. The Tax Court relied on the text of 26 U.S.C. § 2703(b)(3), legislative history, and the text of the applicable regulations, 26 C.F.R. § 25.2703-1(b)(4).

The Court agrees with this analysis. The statutory text of 26 U.S.C. § 2703(b)(3) uses terms that require a comparison of the agreement at issue to others (“comparable to similar arrangements”) and that those other agreements must be the product of “arm's length transaction(s).” In the face of this plain text, legislative history need not be consulted, but even so, the Senate committee report supports this textual analysis. *See* 136 Cong. Rec. 15683 (Oct. 18, 1990)

> (discussing consideration of various factors, including "the demonstration of general practice(s) of unrelated parties, " and expert testimony). The regulations also track the "general practice(s) of unrelated parties" language of the Senate committee report, and further require the showing of comparables from similar businesses. 26 C.F.R. 25.2703-(1)(b)(4).

A related problem for the estate was that the parties didn't actually follow the process in the buy-sell agreement for setting value. The parties could have agreed annually or, if not, engaged appraisers after death, but did neither as discussed by the court:

> The Stock Agreement required shareholders Michael and Thomas to agree on and sign "Certificates of Agreed Value" every year to establish the price-per-share; but in the 12 years the agreement was in place before Michael's death, they never agreed on the value, or created or signed such certificates. Doc. 61 at p. 5; Doc. 53-4, Art. VII., Sec. A-B. Under the Stock Agreement, the failure of the shareholders to do so triggered the obligation to obtain the Appraised Value Per Share through a very specific process involving multiple professional appraisers. Doc. 53-4, Art. VII., Sec. C. But Thomas and the Estate never followed that specific process and never determined the Appraised Value Per Share; instead, they chose to come up with their own *ad hoc* valuation of $3 million. Doc. 58 at ¶¶ 23-38; Doc. 51 at p. 4.
>
> The Court finds that Crown C's share price was not "fixed and determinable" from the 2001 Stock Agreement. *See Estate of Lauder*, 1992 WL 386276, *18 ("Several requirements have evolved for testing whether the *formula price set forth in such restrictive agreements* is binding for purposes of the Federal estate tax. It is axiomatic that *the offering price* must be fixed and determinable under the agreement." (emphasis added)); *see also* 26 C.F.R. § 20.2031 2(h) ("The effect, if any, that is given to the option or contract price in determining the value of the securities for estate-tax purposes depends upon the circumstances of the particular case.").
>
> The $3 million redemption price that Thomas and the Estate set forth in the Sale Agreement did not come from any formula or other provisions in the Stock Agreement, rendering the Estate's proposed share price, for estate-tax-valuation purposes, neither fixed nor determinable from the Stock Agreement. Doc. 58 at ¶¶ 23-38. The parties did not rely on a Certificate of Agreed Value or follow the detailed appraisal mechanism of the Stock Agreement to determine the price-per-share; instead, they completely disregarded the Stock Agreement and negotiated their own value, which not surprisingly was less than the value of the life-insurance proceeds. *Id.* at ¶¶ 23-38, 64-65; *see also* 26 C.F.R. § 20.2031-2(h).

Because the brothers didn't sign a certificate during life or follow the valuation procedure after death, the court concluded the agreement wasn't binding on the parties as required by section 2703.

Next the court turned to the valuation of the company given the life insurance and redemption obligation. The court agreed with the Tax Court in Blount but specifically rejected the Eleventh Circuit's reversal in that case as being "demonstrably erroneous." The opinion states:

> The parties agree that the facts of this case present the same fair-market-value issue as *Estate of Blount*, 2004 WL 1059517, at *26 (T.C. 2004), a*ff'd in part, rev'd in part*, 428 F.3d 1338 (11th Cir. 2005). Doc. 52 at 12; Doc. 46 at 6-7.

In *Estate of Blount*, a closely-held family company entered into a stock purchase agreement with its shareholders, intending that the company would use life-insurance proceeds to redeem a key shareholder's shares upon his death. 428 F.3d at 1340. When one of the shareholders died, his estate argued that the life-insurance proceeds should not be included in the value of the company, for purposes of determining fair market value of the redeemed shares, because of the company's offsetting contractual obligation to redeem those shares from the estate. *Id.* at 1345.

The Tax Court in *Estate of Blount* included the life-insurance proceeds in the value of the company and the shareholders' shares, determining that the redemption obligation was not like an ordinary liability because the redemption involved the very same shares being valued. 2004 WL 1059517, at *26. The Eleventh Circuit reversed on this issue, holding that the fair market value of the closely-held corporation did not include life-insurance proceeds used to redeem the shares of the deceased shareholder under a stock purchase agreement. *Estate of Blount*, 428 F.3d at 1346. The Eleventh Circuit reasoned that the stock-purchase agreement created a contractual liability for the company, offsetting the life-insurance proceeds. *Id.* at 1345-46. The Eleventh Circuit concluded that the insurance proceeds were "not the kind of ordinary nonoperating asset that should be included in the value of [the company] under the treasury regulations" because they were "offset dollar-for-dollar by [the company's] obligation to satisfy its contract with the decedent's estate." *Id.* at 1346 (citing 26 C.F.R. § 20.2031-2(f)(2)).

The IRS urges the Court to reject the Eleventh Circuit's holding in *Estate of Blount* and apply the Tax Court's reasoning. Doc. 52 at 12-14. The IRS contends that the Eleventh Circuit's approach violates customary valuation principles, resulting in a below-market valuation for Crown C and a windfall for Thomas at the expense of Michael's estate. *Id.* According to the IRS, a willing buyer and seller would value Crown C at approximately $6.86 million, rather than $3.86 million, because on the date of Michael's death, Crown C possessed the $3 million in life insurance proceeds that were later used to redeem Michael's shares. *Id.* at 19. This, in turn, would make Michael's 77.18% interest in Crown C worth about $5.3 million. *Id.* The Estate disagrees, somewhat reflexively arguing that under the Eleventh Circuit's holding in *Estate of Blount*, the Court should not include the $3 million in life-insurance proceeds in the valuation of Crown C because of the redemption obligation in the Stock Agreement. Doc. 46 at p. 6. But other than citing the Eleventh Circuit's holding and its own expert opinions (which essentially say that holding controls), the Estate does not really explain *why* it believes the Eleventh Circuit's holding is correct. *Id.*

***

Consider what a hypothetical "willing buyer" would pay for a company subject to a redemption obligation. *See* 26 C.F.R. § 20.2031-1(b). The willing buyer would not factor the company's redemption obligation into the value of the company, because with the purchase of the entire company, the buyer would thereby acquire all of the shares that would be redeemed under the redemption obligation; in other words the buyer would pay all of the shareholders the fair market value for all of their shares. The company, under the buyer's new ownership, would then be obligated to redeem shares *that the buyer now holds*. Since the buyer would receive the payment from the stock redemption, the buyer would not consider the obligation *to himself* as a liability that lowers the value of the company *to him*. *See Estate of Blount*, 2004 WL 1059517, at *25 (T.C. 2004) ("To treat the corporation's obligation to redeem the very shares that are being valued as a liability that reduces the value of the corporate entity thus distorts the nature of the ownership interest represented by those shares.”).

A willing buyer purchasing Crown C on the date of Michael's death would not demand a reduced purchase price because of the redemption obligation in the Stock Agreement, as Crown C's fair market value would remain the same regardless. The willing buyer would buy all 500 of Crown C's outstanding shares (from Michael's Estate and Thomas) for $6.86 million, acquiring Crown C's $3.86 million in estimated value plus the $3 million in life-insurance proceeds at issue. If Crown C had no redemption obligation, the willing buyer would then own 100% of a company worth $6.86 million.

But even with a redemption obligation, Crown C's fair market value remains the same. Once the buyer owned Crown C outright, the buyer could either: 1) cancel the redemption obligation to himself and own 100% of a company worth $6.86 million, or 2) let Crown C redeem Michael's former shares-the buyer (and not Michael's Estate) would receive roughly $5.3 million in cash and then own 100% of a company worth the remaining value of about $1.56 million, leaving the buyer with a total of $6.86 million in assets. Therefore, with or without the redemption obligation, the fair market value of Crown C on the date of Michael's death was $6.86 million.

The Estate urges the Court to follow the Eleventh Circuit's reasoning in *Estate of Blount*, which declared that “nonoperating assets should not be included in the fair market valuation of a company where, as here, there is an enforceable contractual obligation that offsets such assets.” 428 F.3d at 1346 (quotation marks omitted). But as the IRS points out, the Court must determine the fair market value of Crown C on the date of Michael's death, not the value in its postredemption configuration. *See* 26 U.S.C. § 2031. Excluding the insurance proceeds from Crown C's value impermissibly treats Michael's shares as both outstanding and redeemed at the same time, reducing Crown C's value by the redemption price of the very shares whose value is at issue. This approach ignores the ownership interest represented by Michael's shares; construing a redemption obligation as a corporate liability only values Crown C post redemption (i.e., excluding Michael's shares), not the value of Crown C on the date of death (i.e. including Michael's shares).

***

The Eleventh Circuit's opinion in *Estate of Blount* relied heavily on *Estate of Cartwright*, 183 F.3d 1034, 1037 (9th Cir. 1999), which excluded insurance proceeds from the fair market value of a company when the proceeds were offset by an obligation to pay those proceeds to a shareholder's estate. *Estate of Blount*, 428 F.3d at 1345. But *Estate of Cartwright* is distinguishable. As the Tax Court in *Estate of Blount* explained about *Estate of Cartwright*:

> The lion's share of the corporate liabilities in that case which were found to offset the insurance proceeds were *not obligations of the corporation to redeem its own stock*. Rather, we determined that approximately $4 million of the $5 million liability of the corporation was to compensate the decedent shareholder for services; i.e., for his interest in work in progress. Thus, a substantial portion of the liability was no different from any third-party liability of the corporation that would be netted against assets, including insurance proceeds, to ascertain net assets.

> 2004 WL 1059517, at *27 (emphasis added). Unlike in *Estate of Cartwright*, Crown C's redemption obligation simply bought Michael's shares. *See id.* The redemption did not compensate Michael for his past work, so it was not an ordinary corporate liability. *See Estate of Blount*, 2004 WL 1059517, at *27 (T.C. 2004). While some of the life-insurance proceeds in *Estate of Cartwright* were used for a stock redemption, *Estate of Cartwright* mainly discussed how the insurance proceeds compensated the shareholder for past work, not for his shares in the company. *See Estate of Cartwright*, 1996 WL 337301, at *7-8 (T.C. 1996), *aff'd in part, rev'd in part by*, 183 F.3d 1034, 1037-38 (9th Cir. 1999). And to the extent that *Estate of Cartwright* excluded some of the life-insurance proceeds from the company's fair market value because of an offsetting redemption obligation, the opinion contains the same analytical flaw as *Estate of Blount*, 183 F.3d at 1037, i.e. considering a redemption obligation to be a corporate liability that depresses a company's value by ignoring the ownership interest represented by the redeemed shares.
>
> The Court finds the Tax Court's reasoning in *Estate of Blount* persuasive. *Estate of Blount*, 2004 WL 1059517, at *24-27; *see also* Adam S. Chodorow, *Valuing Corporations for Estate Tax Purposes: A Blount Reappraisal*, 3 Hastings Business Law Journal 1, 25 (2006) ("Taking redemption obligations into account leads the court to value the wrong property . . . redemption obligations are different from other types of corporate obligations in that a redemption obligation both shrinks the corporate assets and changes its ownership structure."). A redemption obligation is not an ordinary corporate liability--a stock redemption involves a change in the ownership structure of the company, where the company buys a shareholder's interest--so a redemption obligation does not change the value of the company as a whole *before the shares are redeemed*. Nor can a redemption obligation diminish the value of the same shares being redeemed; the shareholder is essentially "cashing out" his share of ownership in the company and its assets. Moreover, a stock redemption results in the company (and more specifically its remaining shareholder(s)) getting something of equal value for the cash spent, i.e. the decedent's share of ownership in the company; the exchange increases the ownership interest for each of the company's outstanding shares, i.e. the surviving shareholders' shares.
>
> For these reasons, the Court respectfully finds that the Eleventh Circuit's opinion in *Estate of Blount* is "demonstrably erroneous" and there are "cogent reasons for rejecting [it]." *Keasler v. United States*, 766 F.2d 1227, 1233 (8th Cir. 1985) ("[T]he tax decisions of other circuits should be followed unless they are demonstrably erroneous or there appear cogent reasons for rejecting them." (internal quotation marks and citation omitted)). Accordingly, the Court holds that the $3 million in life-insurance proceeds used to redeem Michael's shares must be included in the fair market value of Crown C and of Michael's shares.

Connelly is on appeal to the Eighth Circuit.

G. SECTION 2032 — ALTERNATE VALUATION AND SECTION 2032A — SPECIAL USE VALUATION

1. **New Proposed Alternate Valuation Regulations**. [WAITING ON FINAL REGULATIONS.] An estate may elect alternate valuation and value its assets as of six months after death for estate tax purposes. If the alternate valuation date is elected, property disposed of before six months after death is valued on the date of the disposition. §2032 was originally enacted in 1935, after the stock market crash of 1929. On April 25, 2008, Treasury

issued proposed Regulations to restrict the application of section 2032 by preventing post-death events other than market conditions from being taken into account when valuing the property. REG-112196-07. Those Proposed Regulations defined market conditions as events outside the control of the decedent, the decedent's executor or trustee, or any other person whose property being valued affected the fair market value of the property. The government's defeat in Kohler v. Commissioner, T.C. Memo. 2006-152, inspired the Proposed Regulations. The Tax Court ruled in Kohler that stock received by an estate in a post-death reorganization should be the property valued on the alternate valuation date and that the restrictions placed on the stock should be taken into account. In its action on decision stating non-acquiescence, the IRS took the view that the court incorrectly applied the regulations by allowing a post-death change in the character of the property to be taken into account when determining the property's value. The IRS thought that the court misapplied Treas. Reg. § 20.2032-1(c)(1), which provides that a tax-free reorganization is not a disposition under section 2032.

H. SECTION 2033 – GROSS ESTATE

I. SECTIONS 2035-2038 – RETAINED INTERESTS

1. **Tax Court Strikes A Blow Against Discount Planning**. Estate of Powell v. Commissioner of Internal Revenue, 148 T.C. No. 18 (2017) is a reviewed opinion with eight judges on the majority opinion, two concurring in result only, and seven joining a concurring opinion. What's going on here? The case involved three elements – state law and the actions of an attorney in fact; section 2043; and section 2036(a)(2). The latter is the most significant aspect of the opinion. The opinion reads as if the Tax Court, despairing of Congress or the IRS "doing anything about" discount planning, decided to strike a blow on its own.

The facts were simple. On August 6, 2008, Mrs. Powell's son, as attorney in fact, created a Delaware partnership, NHP Enterprises. On August 8, 2008, again as attorney in fact, the son contributed $10,000,752 to NHP in exchange for a 99% limited partnership interest. Son, as general partner had full control of the partnership which could be dissolved with written consent of all partners. Immediately thereafter, the son assigned the 99% to a CLAT using his power of attorney. By all accounts, Mrs. Powell was incapacitated all this time, and she died on August 15, 2008.

The Court ignored the application of section 2036(a)(1) using the "implied agreement" argument advanced by the IRS. Instead the Court looked to apply section 2036(a)(2).

The taxpayer conceded that funding NHP was not a "bona fide sale for adequate and full consideration." Section 2036(a) states:

> (a) General Rule.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), * * * under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

> (1) the possession or enjoyment of, or the right to the income from, the property, or
>
> (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

May the decedent have the right at death for section 2036 to apply? The Court says no. That the decedent had the power as a limited partner to dissolve the partnership with someone else – the general partner – for a moment prior to the transfer to the CLAT was sufficient to invoke section 2036(a)(2). The transfer would have needed to be more than three years before death to be effective given section 2035.

The Court was worried about 2036(a)(2) workarounds. Footnote 4 to the opinion states:

> Because we express no view on whether the transfer of decedent's cash and securities to NHP was subject to a right described in sec. 2036(a)(1) (or whether enjoyment of those assets was subject to change on the date of decedent's death through the exercise of a power described in sec. 2038(a)), it does not follow that, had NHP's limited partnership agreement been drafted in a way that prevented the application of sec. 2036(a)(2), decedent's gross estate would have been reduced by any discount applicable in valuing the limited partner interest issued in exchange for those assets.

The Court also determined that the transfer to the CLAT was invalid under applicable state law – California – because the power of attorney did not specifically authorize gifts (beyond the annual exclusion) which is required in California to confer a broad gift power. Thus the NHP units were also included in the decedent's estate.

Concurring that there was no double inclusion led the majority to expound upon section 2043 with the minority writing that the court should have applied a simple "recycling of value" theory. The concurring opinion states:

> The Court correctly concludes that section 2036(a)(2) applies here. See op. Ct. pp. 14–21 (relying on Estate of Strangi v. Commissioner, T.C. Memo. 2003–145, 85 T.C.M. (CCH) 1331, aff'd on other grounds, 417 F.3d 468 (5th Cir. 2005)). The decedent clearly "made a transfer" of the $10 million in cash and securities. And she clearly retained the proverbial "string" that pulls these assets back into her estate.
>
> But the Court concludes, see op. Ct. p. 22, that section 2036(a) does not require "the inclusion in the value of decedent's gross estate of the full date-of-death value of the cash and securities," while admitting that the statute, "read in isolation, would require that result." See Estate of Thompson v. Commissioner, T.C. Memo. 2002–246, 84 T.C.M. (CCH) 374, 386 ("Section 2036(a) effectively includes in the gross estate the full fair market value * * * of all property transferred in which the decedent had retained an interest." (Emphasis added.)). Instead, the Court holds that section 2036(a)(2) brings into the gross estate a much smaller sum: the value of the cash and securities ($10 million) minus the value of the limited partnership interest that the decedent got in exchange. Otherwise, the Court says, the $10 million would be included in her estate twice: first via section 2036(a)(2) and again via her partnership interest, which would be separately includible as property of the estate under section 2033.

> This is where I part company with the Court, because I do not see any “double inclusion” problem. The decedent's supposed partnership interest obviously had no value apart from the cash and securities that she allegedly contributed to the partnership. The partnership was an empty box into which the $10 million was notionally placed. Once that $10 million is included in her gross estate under section 2036(a)(2), it seems perfectly reasonable to regard the partnership interest as having no distinct value because it was an alter ego for the $10 million of cash and securities.
>
> This is the approach that we have previously taken to this problem. See Estate of Thompson, 84 T.C.M. (CCH) at 391 (concluding that the decedent's interest in the partnership had no value apart from the assets he contributed to the partnership); Estate of Harper v. Commissioner, T.C. Memo. 2002–121, 83 T.C.M. (CCH) 1641, 1654; cf. Estate of Gregory v. Commissioner, 39 T.C. 1012, 1020 (1963) (holding that a decedent's retained interest in her own property cannot constitute consideration under section 2043(a)). And this is the approach that I would take here. There is no double-counting problem if we read section 2036(a)(2), as it always has been read, to disregard a “transfer with a string” and include in the decedent's estate what she held before the purported transfer—the $10 million in cash and securities.
>
> Rather than take this straightforward path to the correct result, the Court ad-opts as the linchpin of its analysis section 2043(a). Neither party in this case advanced any argument based on section 2043(a); indeed, that section is not cited in either party's briefs. And as the Court recognizes, see op. Ct. p. 28, we have not previously applied section 2043(a), as the Court does here, to limit the amount includible in a decedent's gross estate under section 2036(a). See, e.g., Estate of Harper, 83 T.C.M. (CCH) at 1654 (ruling that section 2043(a) “is inapplicable where, as here, there has been only a recycling of value and not a transfer for consideration”).
>
> Invoking section 2043(a), the Court divides the $10 million into a “doughnut” and a “doughnut hole.” The “doughnut” consists of the limited partnership interest allegedly received by the decedent; on the Court's theory, this is pulled back into the gross estate via section 2035 or 2038, and its value then included under section 2033. As a result, section 2036(a), paired with section 2043(a), has the much-reduced function of bringing back into the gross estate, not the full value of the $10 million as that section by its terms requires, but only “the amount of any discounts (that is, the doughnut holes) allowed in valuing the partnership interest.” See op. Ct. pp. 26–27. This theory seemingly validates the estate's claimed discount for lack of marketability, which seems highly suspect on the facts presented.
>
> The Court's exploration of section 2043(a) seems to me a solution in search of a problem. It is not necessary; the parties did not think it was necessary; and our prior cases show that it is unnecessary. And even if the section 2043(a) issue were properly presented, I am not sure that the Court's application of that provision is correct. It is far from clear to me that the decedent's partnership interest—a consequence of the now-disregarded transfer—can constitute “consideration in money or money's worth” within the meaning of section 2043(a).

If there is no persuasive non-tax reason for the entity, and ownership is surrendered within three years of death, then avoiding section 2036(a)(2) is difficult. One approach is to limit the decedent’s rights over the entity in the first place. For example, the client could add assets to a trust that lacks any current beneficiaries. The client would retain a testamentary power of appointment thus making the gift incomplete but the assets would be includable in the client's estate. The trustee would engage in the discount planning, presumably under specific authority in the trust. The decedent would never have had any liquidation right or other section 2036(a)(2) right unless such were somehow imputed through the trust to the grantor.

Another approach is to sell the decedent's interest in the entity. The issue there is whether if the sale is for less than would be included in the decedent/seller's estate did the decedent/seller receive full consideration. In United States v. Allen, 293 F.2d 916 (10th Cir. 1961) the decedent created a trust reserving 3/5ths of the income for life; many years later she sold the income interest for far less than the value of 3/5ths of the trust. The court held that was an inappropriate loophole because – under the 1939 Code – a taxpayer could keep income for most of the taxpayer's life and then sell close to death for a fraction of what otherwise would be included.

In trying to understand the implications of Powell, the case of Estate of Frank D. Streightoff, T.C. Memo. 2018-178, should be considered. Ultimately an 18% lack of marketability discount was allowed, and the section 2036 issue which might have been dispositive was not. The argument by the estate was that the transfer was an assignee interest, which was rejected. The opinion states:

> The parties disagree as to the type of interest that must be valued and included in the value of decedent's gross estate. [footnote omitted]
>
> The estate contends that the agreement created an assignee interest in decedent's limited partnership interest under Texas State law and the partnership agreement. It contends that it valued and reported decedent's interest in the revocable trust correctly as an assignee interest on Schedule G of its tax return. Respondent contends that the agreement did not create an assignee interest held by the revocable trust. Respondent argues that decedent transferred his 88.99% limited partnership interest to the revocable trust and the value to be included in the value of the gross estate should be that of a limited partnership interest.
>
> We need to determine whether the interest decedent transferred to the revocable trust was a limited partnership interest or an assignee interest. Generally, State law determines the property interest that has been transferred for Federal estate tax purposes. See McCord v. Commissioner, 120 T.C. 358, 370 (2003), rev'd and remanded on other grounds, 461 F.3d 614 (5th Cir. 2006). TRLPA (as in effect for the relevant period) provides that a partnership interest is personal property and is assignable, in whole or in part, unless the partnership agreement provides otherwise. Tex. Rev. Civ. Stat. Ann. art. 6132a-1, secs. 7.01 and 7.02(a)(1) (West). An assignee of a partnership interest is entitled to receive, to the extent assigned, allocations of income, gain, loss, deduction, credit, or similar items, and to receive distributions to which the assignor is entitled, but an assignment does not entitle the assignee "to become, or to exercise rights or powers of, a partner". Id. sec. 7.02(a)(2) and (3). The assignee may become a limited partner, with all rights and powers of a limited partner under a partnership agreement, in the manner that the partnership agreement provides or if all partners consent. Id. sec. 7.04(a) and (b).
>
> Although we consult State law to determine what property interests were transferred, our inquiry may not end there. See McCord v. Commissioner, 120 T.C. at 371. The Federal tax effect of a particular transaction is governed by the

substance of the transaction rather than its form. Frank Lyon Co. v. United States, 435 U.S. 561, 573 (1978). The doctrine that the substance of a transaction will prevail over its form has been applied in Federal estate and gift tax cases. See Heyen v. United States, 945 F.2d 359, 363 (10th Cir. 1991); Estate of Murphy v. Commissioner, T.C. Memo. 1990-472. In particular, we have indicated a willingness to look beyond the formalities of intrafamily partnership transfers to determine what, in substance, was transferred. See Kerr v. Commissioner, 113 T.C. 449, 464-468 (1999), aff'd, 292 F.3d 490 (5th Cir. 2002). We will consider both the form and the substance of decedent's transfer to the revocable trust to determine whether the property interest transferred was an assignee interest or a limited partnership interest.

***

We conclude that the form of the agreement establishes that decedent transferred to the revocable trust a limited partnership interest and not an assignee interest. The economic realities underlying the transfer of decedent's interest also support our conclusion that the transferred interest should be treated as a limited partnership interest for Federal estate tax purposes. This is because we conclude that regardless of whether an assignee or a limited partnership interest had been transferred, there would have been no substantial difference before and after the transfer to the revocable trust. See Kerr v. Commissioner, 113 T.C. at 467-468. Pursuant to Streightoff Investments' partnership agreement only the general partner had the right to direct the partnership's business; neither limited partners

nor assignees had managerial rights. The partnership agreement provided that assignees had no rights to any information regarding the business of the partnership or to inspection of the books or records of the partnership. However, this distinction made no difference in this case because Ms. Streightoff was both a partner entitled to information regarding Streightoff Investments and the trustee of the revocable trust.

The partnership agreement provided that an "unadmitted assignee" did not have the right to vote as a limited partner. In Kerr v. Commissioner, 113 T.C. at 467, we determined that the only real difference between the rights of a limited partner and those of an assignee was the right to vote on partnership matters, and we concluded that this difference was not significant. We held that under such circumstances the transferred interest should be valued as a limited partnership interest rather than as an assignee interest. Id. Here, we conclude similarly that whether the revocable trust held the voting rights associated with a limited partnership interest would have been of no practical significance. There were no votes by limited partners following the execution of the agreement. Additionally, during his life decedent held the power to revoke the transfer to the revocable trust. If he had revoked the transfer, he would have held all the rights of a limited partner in Streightoff Investments, including the right to vote on partnership matters. Also, Streightoff Management as the general partner could have treated the holder of an assignee interest as a substitute limited partner. Under the facts and circumstances of this case, there was no difference in substance between the transfer of a limited partnership interest in Streightoff Investments and the transfer of an assignee interest in that limited partnership interest. See id.; Astleford v. Commissioner, T.C. Memo. 2008-128, slip op. at 16. Accordingly, as a matter of both form and substance, the interest to be valued for estate tax purposes is an 88.99% limited partnership interest in Streightoff Investments.

The Fifth Circuit affirmed, noting that even if an assignee interest had been transferred the valuation would have been the same. Streighthoff v. Commissioner, 954 F.3d 713 (5th Cir. 2020). The Fifth Circuit held:

> *Economic Substance*. From an economic reality standpoint, we also agree with the tax court's alternative substance over form rationale. Estate of Streightoff, 2018 WL 5305054, at *7 ("[R]egardless of whether an assignee or a limited partnership interest had been transferred, there would have been no substantial difference before and after the transfer to the revocable trust."). Assuming we were to accept the Estate's argument that the Assignment conveyed an unadmitted assignee interest as a matter of form, the substance of the transaction will nonetheless prevail. The substance over form doctrine permits a court to determine a transaction's characterization according to its "underlying substance of the transaction rather than its legal form." Southgate Master Fund, 659 F.3d at 480. Here, looking beyond the formalities of this intrafamily transfer, the Assignment lacks economic substance outside of tax avoidance. Griffin v. United States, 42 F. Supp. 2d 700, 703 (W.D. Tex. 1998) ("[E]ven if a transaction falls within the literal requirements of the tax statute, the transaction will be disregarded . . . if it has no business purpose or economic effect other than the creation of tax deductions, or if its only purpose is tax avoidance."). While SILP limited partners appear to enjoy several managerial and oversight powers that unadmitted assignees do not6, there were no practical differences after the Assignment was executed. Other than Elizabeth, there is no record of SILP's limited partners, the decedent's children, exercising their partnership rights or responsibilities. For example, this partnership held no meetings or votes, nor was there any attempt to remove Streightoff Management as SILP's general partner. Without genuine nontax circumstances present, the Assignment is the functional equivalent of a transfer of limited partnership interest. See Kerr, 113 T.C. at 467 (Under similar facts, the court held that "[t]he objective economic realities underlying the transfers" support that "there were no significant differences . . . between the rights of limited partners and assignees."); see also Streightoff, 2018 WL 5305054, at *7.

2. **Application of Section 2043 to Defective FLP Transfer**. The 30,000 foot view of Moore v. Commissioner, T.C. Memo. 2020-40, is set out by Judge Holmes of the Tax Court as follows:

> Howard Moore was born into rural poverty but over a long life built a thriving and very lucrative farm in Arizona. In September 2004 he began negotiating its sale, but his health went bad. He was released from the hospital and entered hospice care by the end of that year.
>
> Then he began to plan his estate.
>
> What his lawyer came up with was quite complex--a combination of five trusts and a partnership--and it required him to contribute most of his farm to the partnership. His stated reason was to protect the farm from various business risks and bring his sometimes fractious family together to learn to manage the business without him. But five days after the partnership received part ownership of the farm, Moore sold it. And even after the sale, Moore stayed on the farm and directed its operations until he died.
>
> The key question we have to answer is whether Moore's plan works to reduce the size of his taxable estate. We also have to figure out whether Moore's efforts to reduce the size of his taxable estate resulted in taxable gifts.

In a nutshell, the court concluded that the taxpayer retained control of the farm, and had no bona fide, non-tax reasons for the FLP or transfer, and included the farm in his estate. But then the court went on to discuss section 2043 in the most detailed way yet by the Tax Court. That discussion is worth consideration for planning purposes:

> a. The Problem of Section 2043(a)
>
> The root of this problem is that section 2043 prohibits the Commissioner from just adding the proceeds from the sale of Moore's farm to his gross estate. It requires instead a more complicated set of calculations when there are transactions--like the transfer of four-fifths of the farm from the Living Trust to the FLP--that fall within section 2036. Section 2043(a) says (with the key word italicized)
>
>> If any one of the transfers * * * described in sections 2035 to 2038, inclusive, and section 2041 is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate *only* the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.
>
> The number that needs to be included in the gross estate can be expressed in an equation: $V_{included} = C_d + FMV_d - C_t$, where
>
> $V_{included}$ = value that must be added to the gross estate;
>
> C_d = date-of-death value of the consideration received by the decedent from the transaction that remains in his estate, see sec. 2033;
>
> FMV_d = fair market value at date of death of property transferred by the decedent whose value is included in the gross estate under section 2036; and
>
> C_t = consideration received by the decedent at the time of the transfer, which has to be subtracted under section 2043(a).
>
> To see how this works, let's look at a few examples. We'll start with the simplest and work toward one that echoes what we have here.
>
> *Example 1: Constant Values.* Imagine a parcel of land worth $1000. Its aging owner transfers its ownership to a FLP in which his partnership interest is worth $500, but he keeps a life estate. What's included in his gross estate is $1000, computed as the partnership interest valued at $500 when he died (and thus included in his estate under section 2033), plus $1000 (the value of the land as of the date of death), minus $500 (the value of the partnership interest when he received it). If the decedent hadn't done the transaction the $1000 parcel would be in his estate; the Code essentially nullifies the bargain sale's effect on the value of the gross estate.
>
> This was more or less the situation in Estate of Powell. The result seems sensible. As we pointed out in that case, however, problems can arise when the value of the transferred asset fluctuates between the time of transfer and the time of death. Estate of Powell v. Commissioner, 148 T.C. at 408 n.7.

Let's turn to those.

Example 2: Inflating Values. Now consider the same facts as in the first example, but the value of the land and the FLP share doubles between the time of transfer and the date of death. The now $1000 FLP interest stays in the estate under section 2033; but one must add another $2000 to the estate because the fair market value of the land is also measured as of the date of death. The result is the inclusion of $2500 in the estate: $1000 + $2000 - $500. This might be thought to be less sensible: If the decedent had kept the land, only $2000 would be in his gross estate.

Example 3: Declining Values. Again, the same facts but the land and the FLP share halve in value. The FLP interest is worth only $250 at the date of death and the land is worth only $500. What's included in the gross estate? $250 + $500 - $500 = $250, instead of $500. This makes the decedent who does the transaction better off than one who doesn't.

And now we can introduce discounted FLP interests.

Example 4: Discounted Interest, But Simple. This example will have slightly different facts. There is still a piece of land worth $1,000 and the aging owner transfers it to a FLP. However, this time, the aging owner's son contributes a peppercorn to the FLP as well. Under the partnership agreement the son is the general partner and the aging land owner is the limited partner. Father and son agree that this triggers a 25% discount for lack of control, and the value of the father's partnership interest sinks to $750. Under the formula, the estate would include $750 for the FLP interest (under section 2033), $1000 for the transferred land (under section 2036), but with $750 subtracted (under section 2043).

Example 5: Discounted Interest, But Not Simple. Now assume the same facts as example 4 except this time the FLP sells the land for $1000. Then, the FLP makes a distribution of $400 back to the aging father. Under the formula this produces a strange result. Included in the estate is $400 cash (section 2033), $450 for the FLP interest (section 2033), $1000 for the transferred land (section 2036), less $750 (section 2043)--in all the estate now has a value of $1100. Had the aging man just sold the land he would have only $1000 in his estate.

Some of these examples thus lead to what may seem odd results, but we must nevertheless apply the Code as it is written and interpreted in a Division Opinion. See Sec. State Bank v. Commissioner, 111 T.C. 210, 213 (1998), aff'd, 214 F.3d 1254 (10th Cir. 2000); Hesselink v. Commissioner, 97 T.C. 94, 99-100 (1991); Nihiser v. Commissioner, T.C. Memo 2008-135, 95 T.C.M. (CCH) 1531, 1534 (2008).

And there's one last thing to note--the variable C_d is not limited by tracing rules. This means that whatever is left of the original consideration in an estate is included, but so are any proceeds from its later sale because section 2033 includes all property that a decedent owns in his gross estate. This also means that any property that leaves an estate after a transfer governed by section 2036 but before a decedent's death is *not* generally included in the gross estate.

ii. Application of Section 2043(a)

We can now begin to customize the equation to fit these cases. (We'll do this with verbal descriptions and leave the actual math to the parties under Rule 155.)

> *FMV_d*. The fair market value of the farm was established by the sale to the Mellons. This was an arms-length sale to a third party, and neither the estate nor the Commissioner disputes that it sets the fair market value of the farm on both the date the price was agreed to and the date of sale. The transfer of four-fifths of the farm from the Living Trust to the FLP occurred at very nearly the same time as this sale. Moore then died less than two months later. We find it more likely than not that the fair market value of the farm did not change in so short a time. See, e.g., Cave Buttes, L.L.C. v. Commissioner, 147 T.C. 338, 355 (2016); Dunlap v. Commissioner, T.C. Memo 2012-126, 103 T.C.M. (CCH) 1689, 1709 (2012).
>
> *C_t*. Section 2043 tells us to subtract from this value of the farm the value of the consideration that Moore received. We value this consideration on the date it was received. One-fifth of the value of the farm went directly to the Living Trust and is a matter of multiplication. But what of the remaining four-fifths? This is the portion that went from the Living Trust to the FLP in exchange for an interest in the FLP. Here the parties' estimations diverge. The estate says that Moore got an interest in the FLP worth about $5.3 million; the Commissioner argues that it was worth about $8.5 million. Because of the brief time between the challenged transfer and Moore's death, we find it more likely than not that this value--whether it was $5.3 million or $8.5 million--did not change between the time Moore received it and the time he died. On the facts of these cases, then, we don't think this dispute matters because we would add back either figure after subtracting it.
>
> With the value of the consideration that Moore received measured at the time he received it equal to the value of the consideration that remained in his estate at the time of his death, the equation thus far is:
>
> (Either $5.3 million or $8.5 million + (.2 * value of farm at date of death)) + ((value of farm at date of death) - ((either $5.3 million or $8.5 million) + (.2 * value of farm at date of death))).
>
> *$C_{d.}$* This variable, however, is not simply the value of the consideration from the challenged transaction. Section 2033 tells us to include only the value of that consideration that remains in the estate as of the date of Moore's death. To get to this number we have to look for any money that left that estate after the farm's sale and before that date. There were three of these adjustments to the C_d variable that the parties identified and argued about:
>
> - unpaid attorney's fees,
>
> - transfers to Moore's children, and
>
> - $2 million dollar purported loan.

The court concluded the transfers and loans were gifts.

The upshot of the section 2043 analysis is that taxpayers need to avoid section 2036 if at all possible. Disposition of all interests in entities three years prior to death is helpful, as could be use of an incomplete gift trust to facilitate the gift or sale of non-voting units. If assets appreciate between the time of transfer and the time of inclusion there may be double inclusion. Alternatively, before death the transaction needs to be unwound with some assets "in" and others "out" of the soon-to-be decedent's estate.

The decedent's revocable trust had a charitable allocation clause to a CLAT that stated:

> [T]he smallest amount which, when transferred to the Howard V. Moore Charitable Lead Annuity Trust as provided in Section 2 of the Article will result in the least possible federal estate tax being payable as a result of my death after allowing for the applicable exclusion amount (after taking into account adjusted taxable gifts, if any) as finally determined for federal estate tax purposes, and the credit for state death taxes (but only to the extent that the use of this credit does not require an increase in the state death taxes paid).
>
> The denominator is the value of the Living Trust as determined for federal estate-tax purposes.

The court whiffed on its interpretation of that clause. First it found that it did not apply to zero-out the estate tax because the farm was not included in the trust so the clause could not direct it to charity. That is partially correct. Then it stated:

> There is also a second, much more general problem here. Charitable deductions are allowed only for the value of property in a decedent's gross estate if transferred to a charitable donee "by the decedent during his lifetime or by will." Sec. 20.2055-1(a), Estate Tax Regs. We have repeatedly denied charitable deductions where the donation turned upon the actions of the decedent's beneficiary or an estate's executor or administrator. See, e.g., Estate of Engelman v. Commissioner, 121 T.C. 54, 70-71 (2003); Estate of Marine v. Commissioner, 97 T.C. 368, 378-79 (1991), aff'd, 990 F.2d 136 (4th Cir. 1993).
>
> Charitable deductions must be ascertainable at a decedent's date of death. Ithaca Tr. Co. v. United States, 279 U.S. 151, 154 (1929)(transfers to a charity must be "fixed in fact and capable of being stated in definite terms of money"); Estate of Marine, 97 T.C. at 375. Section 20.2055-2(b)(1), Estate Tax Regs., states:
>
> If, as of the date of a decedent's death, a transfer for charitable purposes is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that the charitable transfer will not become effective is so remote as to be negligible.
>
> Whether the Living Trust would get additional funds from the Irrevocable Trust to transfer to the Charitable Trust was not ascertainable at Moore's death but only after an audit by the Commissioner, followed by a determination that additional property should be included in Moore's estate, followed by either the successful defense of that position or the estate's acquiescence to his determinations. For the exception to apply, it would have to have been almost certain that the Commissioner would not only challenge, but also successfully challenge the value of the estate. We do not think that's a reasonable conclusion.
>
> The estate likens its facts to those of Estate of Christiansen v. Commissioner, 586 F.3d 1061 (8th Cir. 2009), aff'g 130 T.C. 1 (2008), and Estate of Petter v. Commissioner, 653 F.3d 1012 (9th Cir. 2011), aff'g T.C. Memo. 2009-280. In Estate of Christiansen v. Commissioner, 586 F.3d at 1062-63, even though the amount of the property to be transferred was subject to change based on a formula clause, we allowed a charitable deduction because the transfer itself was not contingent on the happening of some event.

> In Estate of Petter, a FLP was to distribute LLC units to the trusts that Ms. Petter had set up for each of her children. The trusts were to receive a specific number of units up to a set dollar amount, with any units over that set value going to charity. Estate of Petter, 653 F.3d at 1020. Since the value of these units was unknown (because it was based on the FMV of stock held by the FLP), id., if a subsequent audit by the Commissioner led to a revaluation of the units then some of those units that had already been transferred to trusts had to be retransferred to the charitable donee in accordance with the trust provisions, id. at 1019. As in Estate of Christiansen, value was at issue, but not whether there would be a transfer to the donee at all. Estate of Petter, 653 F.3d at 1018.
>
> Article 5, section 2 of Moore's Irrevocable Trust does not say that the Living Trust will receive a transfer of assets of unknown value. It says that whether the Living Trust will even receive a transfer of assets is unknown-contingent on an examination by the Commissioner. This is unlike Estate of Christiansen, where we *knew* the charity would get a transfer of assets, just not the value, or Estate of Petter, where we *knew* the charity would get some transfer of value, just not how much. Here, we *don't know* if the charity would get any additional assets at all.

The analysis is puzzling. The allocation of assets between, say, a marital deduction and bypass trust works the same way as this clause. Judge Holmes also authored Christiansen and Petter; why the different readings is unclear. Nonetheless, the Ninth Circuit upheld the denial of the charitable deduction. The opinion states:

> On appeal, the Estate does not challenge the inclusion of the proceeds from the sale of the Farm in the taxable estate, arguing only that it is entitled to charitable deductions. We affirm.
>
> A deduction can be taken for "the value of property included in the decedent's gross estate and transferred by the decedent during his lifetime or by will" or trust upon his death to a charitable entity. 26 C.F.R. § 20.2055-1(a). The issue for decision is whether donations to the Charitable Trust were required by the Moore trust documents. Answering this question requires analysis of the express language of those documents. *See State ex rel. Goddard v. Coerver,* 412 P.2d 259, 262 (Ariz. 1966).
>
> The Estate relies upon Article 5, Section 2 of the Irrevocable Trust, which required the Trustee to make distributions on Moore's death to minimize federal estate tax liability. But this provision is triggered only by a determination that "any asset of this trust" is also an asset of the gross estate. The proceeds of the Farm sale were not assets of the Irrevocable Trust, or for that matter any Moore Trust, notwithstanding that the Irrevocable Trust owned 98% of the Partnership at the time of Moore's death. Rather, the proceeds were the asset of the *Partnership*, and Article II, Section 1, Paragraph "u" of the Partnership Agreement expressly provided that "no Partner shall have any interest in any of the assets of the Partnership."
>
> The Estate argues in the alternative that "asset of this trust" is ambiguous, and that we should therefore construe it to encompass the assets of the Partnership to effectuate the purposes of Moore's estate plan. We disagree; the relevant language of both the Irrevocable Trust and Limited Partnership documents is unambiguous: the Irrevocable Trust, as a limited partner, had no "interest in any of the assets of the Partnership."

> The Trustee of the Irrevocable Trust was therefore not required to transfer the Farm's proceeds to the Living Trust and eventually to the Charitable Trust upon Moore's death and the Commissioner therefore correctly denied the Estate's claimed charitable deductions.

The Ninth Circuit concluded that if the farm (or proceeds from its sale) was what the estate included, there could be no charitable deduction for a partnership interest if the trust only allocated to charity assets owned by the trust. The decision points up the need to draft charitable allocation clauses carefully.

J. SECTIONS 2041 AND 2514 — GENERAL POWERS OF APPOINTMENT

K. SECTIONS 61, 83, 409A, 2042 AND 7872 - LIFE INSURANCE

1. Analysis of Split Dollar Plan.

1. Analysis of Split Dollar Plan. Estate of Clara M. Morrissette v. Commissioner, 146 T.C. No. 11 (2016) confronts directly the gift tax consequences of split-dollar life insurance plans. Before turning to the specific arrangement before the court, it is instructive to read the court's understanding of split-dollar insurance and the 2003 final regulations. The opinion states:

> The IRS issued final regulations in September 2003 that govern all split-dollar life insurance arrangements entered into or materially modified after September 17, 2003 (final regulations). The final regulations define a split-dollar life insurance arrangement as an arrangement between an owner and a nonowner of a life insurance contract in which: (i) either party to the arrangement pays, directly or indirectly, all or a portion of the premiums on the life insurance contract; and (ii) the party paying for the premiums is entitled to recover all or any portion of those premiums, and such recovery is to be made from, or is secured by, the proceeds of the life insurance contract. Id. para. (b)(1).
>
> ***
>
> The final regulations provide two mutually exclusive regimes for taxing split-dollar life insurance arrangements entered into (or materially modified) after September 17, 2003, either the economic benefit regime or the loan regime. Id. subpara. (3)(i); see Our Country Home Enters., Inc. v. Commissioner, 145 T.C. __, __ (slip op. at 29) (July 13, 2015).
>
> The determination of which regime applies to a split-dollar life insurance arrangement depends on which party owns, or is deemed to own, the life insurance policy subject to the arrangement. Generally, the person named as the owner in the insurance contract is treated as the owner of the contract. Sec. 1.61-22(c)(1), Income Tax Regs. A nonowner is any person other than the owner who has any direct or indirect interest in the contract. Id. subpara. (2).
>
> ***
>
> As an exception to the general rule, the final regulations include a special ownership rule that provides that if the only economic benefit provided under the split-dollar life insurance arrangement to the donee is current life insurance protection, then the donor will be the deemed owner of the life insurance contract, irrespective of actual policy ownership, and the economic benefit regime will apply. Id. subpara. (1)(ii)(A)(2). If, on the other hand, the donee receives any

> additional economic benefit, other than current life insurance protection, then the donee will be considered the owner and the loan regime will apply. Id.
>
> ***
>
> For a split-dollar life insurance arrangement to be taxed under the economic benefit regime, the owner or deemed owner will be treated as providing an annual benefit to the nonowner in an amount equal to the value of the economic benefits provided under the arrangement, reduced by any consideration the nonowner pays for the benefits. Sec. 1.61-22(d)(1), Income Tax Regs. The value of the economic benefits provided to the nonowner for a taxable year under the arrangement is equal to the sum of (i) the cost of current life insurance protection, (ii) the amount of cash value to which the nonowner has current access during the year, and (iii) any economic benefits not otherwise described that are provided to the nonowner. Id. subpara. (2).
>
> The cost of the current life insurance protection takes into account the life insurance premium factors that the Commissioner publishes for this purpose. See id. subpara. (3)(ii). The amount of the current life insurance protection is the death benefit of the life insurance contract (including paid-up additions) reduced by the sum of the amount payable to the owner plus the portion of the cash value taxable to (or paid for by) the nonowner. See id. subdiv. (i). The amount of the insurance policy cash value is determined disregarding surrender charges or other similar charges or reductions and including insurance policy cash value attributable to paid-up additions. See id. subpara. (4)(i).
>
> ***
>
> The final regulations provide that the nonowner has current access to any portion of the policy cash value to which the nonowner (i) has a current or future right and (ii) that currently is directly or indirectly accessible by the nonowner, inaccessible to the owner, or inaccessible to the owner's general creditors. Id. subdiv. (ii).

Here, Clara M. Morrissette established a revocable trust, the Clara M. Morrissette Trust (CM Trust), and contributed her shares in the Interstate Group (a family corporation) to the trust. In 2006 the CMM Trust entered split-dollar insurance arrangements with three Dynasty Trusts established, one for each of her three sons. The CMM Trust contributed $29.9 million to the three trusts to purchase universal life insurance policies for the sons.

> To provide the Dynasty Trusts with the resources to purchase the Interstate Group stock held by or on behalf of a decedent, each Dynasty Trust purchased two universal life insurance policies, one on the life of each other brother. On October 4, 2006, (i) the Arthur Dynasty Trust purchased two universal life insurance policies, one on the life of Donald and one on the life of Kenneth; (ii) the Donald Dynasty Trust purchased two universal life insurance policies, one on the life of Arthur and one on the life of Kenneth; and (iii) the Kenneth Dynasty Trust purchased two universal life insurance policies, one on the life of Arthur and one on the life of Donald.

The opinion described the split-dollar terms as follows:

> To fund the purchase of the policies, each Dynasty Trust and the CMM Trust entered into two split-dollar life insurance arrangements (each a split-dollar life

> insurance arrangement, and collectively, split-dollar life insurance arrangements) on October 31, 2006, to set forth the rights of the respective parties with respect to the policies. The CMM Trust contributed (i) $9.96 million to the Arthur Dynasty Trust, (ii) $9.98 million to the Donald Dynasty Trust, and (iii) $9.96 million to the Kenneth Dynasty Trust. The Dynasty Trusts then used that money to pay a lump-sum premium on each policy to maintain that policy for the insured's projected life expectancy.
>
> Under the split-dollar life insurance arrangements, upon the death of the insured the CMM Trust would receive a portion of the death benefit from the respective policy insuring the life of the deceased equal to the greater of (i) the cash surrender value (CSV) of that policy, or (ii) the aggregate premium payments on that policy (each a receivable, and collectively, receivables). Each Dynasty Trust would receive the balance of the death benefit under the policy it owns on the life of the deceased, which would be available to fund the purchase of the stock owned by or for the benefit of the deceased. If a split-dollar life insurance arrangement terminates for any reason during the lifetime of the insured, the CMM Trust would have the unqualified right to receive the greater of (i) the total amount of the premiums paid or (ii) the CSV of the policy, and the Dynasty Trust would not receive anything from the policy.
>
> Each split-dollar life insurance arrangement includes the following recital: "WHEREAS, the parties intend that this Agreement be taxed under the economic benefit regime of the Split-Dollar Final Regulations, and that the only economic benefit provided to the [Dynasty] Trust[s] under this arrangement is current life insurance protection."
>
> Additionally, the Dynasty Trusts executed collateral assignments of the policies to the CMM Trust to secure payment of the amounts owed to the CMM Trust. Neither the Dynasty Trusts nor the CMM Trust retained the right to borrow against a policy.

The court noted that the Preamble to the final regulations contained an example like this transaction:

> As a threshold matter, the preamble to the final regulations includes an example that is structured identically to the split-dollar life insurance arrangements at issue. The preamble distinguishes between a donor, or the donor's estate, who is entitled to receive an amount equal to the greater of the aggregate premiums paid by the donor or the CSV of the contract and a donor, or the donor's estate, who is entitled to receive the lesser of those two values. T.D. 9092, sec. 5, Gift Tax Treatment of Split-Dollar Life Insurance Arrangements, 2003-2 C.B. 1055, 1062. In the former situation, the donor makes a gift to the donee equal to the cost of the current life insurance protection provided less any premium amount paid by the donee. Id. In the latter situation, the value of the donor's gift of economic benefits equals the cost of current life insurance protection provided, the amount of policy cash value to which the trust has current access, and the value of any other economic benefits, less the amount of premiums paid by the donee. Id. Thus, it follows that where a donor is to receive the greater of the aggregate premiums paid or the CSV of the contract, the possibility of the donee receiving an additional economic benefit is foreclosed.
>
> We are aware that the Court has previously been unpersuaded by a preamble to regulations. See Allen v. Commissioner, 118 T.C. 1, 17 n.12 (2002) ("In addition to the obvious fact that these documents also are not items of legislative history, these documents are afforded little weight in this Court." (citing Dobin v.

> Commissioner, 73 T.C. 1121, 1127 n.9 (1980))). We are not bound by the preamble, but because it is an agency's interpretation of its statute, we apply the standard enunciated by the Supreme Court in Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Therefore, the Commissioner is entitled to at least the lowest level of deference in interpreting his own regulations and their statutes. See United States v. Mead Corp., 533 U.S. 218, 221 (2001); ADVO, Inc. v. Commissioner, 141 T.C. 298, 322 (2013); Armco, Inc. v. Commissioner, 87 T.C. 865, 868 (1986) (explaining how a preamble is drafted and that it is a statement of intent that represents the institutional viewpoint). Here, however, the preamble is consistent with the estate's interpretation of the statute and contrary to respondent's position. While we find the logic of the preamble sound, to be thorough we will articulate why, under the final regulations, the economic benefit regime applies.

Here, the court found the special ownership rule would apply because the Dynasty Trusts had no access to cash value:

> For the Dynasty Trusts to have current access under the final regulations, the Dynasty Trusts must first have a current or future right to any portion of the policy cash value. The split-dollar life insurance arrangements are structured so that upon the termination of a split-dollar life insurance arrangement during the lifetime of the insured, 100% of the CSV (including CSV attributable to premiums paid by the Dynasty Trusts) would be paid to the CMM Trust. Additionally, if a split-dollar life insurance arrangement were to terminate as a result of the death of the insured, the Dynasty Trusts would be entitled to receive only that portion of the death benefit of the policy in excess of the receivable payable to the CMM Trust. Accordingly, under the split-dollar life insurance arrangements the Dynasty Trusts had no current or future right to any portion of the policy cash value, and thus, no current access under the regulations.
>
> Respondent argues that the Dynasty Trusts had a direct or indirect right in the cash values of the insurance policies by virtue of the terms of the 2006 Amendment to the CMM Trust. Under that amendment, the CMM Trust's interest in the cash values of the policies would pass to the Dynasty Trusts or directly to Mrs. Morrissette's sons or their heirs upon her death. However, because the CMM Trust was a revocable trust with respect to Mrs. Morrissette, she retained an absolute right to alter the CMM Trust throughout her lifetime. Accordingly, the Dynasty Trusts did not have a legally enforceable right to the cash values of the policies during the lifetime of the grantor. Furthermore, the split-dollar life insurance arrangements did not require the CMM Trust to distribute the receivables to the Dynasty Trusts. Rather, Mrs. Morrissette retained the right to receipt of the receivables.

The IRS also argued this plan was analogous to reverse-split dollar plans:

> Respondent argues that the circumstances referenced in Notice 2002-59, 2002-2 C.B. 481, apply to the split-dollar life insurance arrangements at issue prohibiting the use of the economic benefit regime. Notice 2002-59, sec. 3.01, 2002-2 C.B. at 482, states:
>
> > Treasury and the Service understand that, under certain split-dollar life insurance arrangements (some of which are referred to as "reverse" split-dollar), one party holding a right to current life insurance protection uses inappropriately high current term insurance rates, prepayment of premiums, or other techniques to confer policy benefits other than

> current life insurance protection on another party. The use of such techniques by any party to understate the value of these other policy benefits distorts the income, employment, or gift tax consequences of the arrangement and does not conform to, and is not permitted by, any published guidance.
>
> Notice 2002-59, supra, is mainly focused on reverse split-dollar life insurance arrangements. Under a typical reverse split-dollar life insurance arrangement, an irrevocable life insurance trust (ILIT) purchases a large life insurance policy, and the insured and the ILIT enters into a split-dollar life insurance arrangement. Under this arrangement, the insured is entitled to the policy's death benefit and in return pays the ILIT the greater of the actual cost of one-year term insurance or the P.S. 58 rate.[6] This arrangement is the opposite of the typical split-dollar life insurance arrangement and thus is referred to as "reverse split-dollar". Because life insurance costs have decreased substantially since the P.S. 58 rates were set by the IRS, the insured's payment of economic benefits using the P.S. 58 rates would be substantially greater than the actual mortality charges incurred by the ILIT. With a large policy, the insured could transfer significant sums to the ILIT and, on the basis of older IRS rulings, incur little or no gift tax costs. In the most abusive cases, the insured would prepay the P.S. 58 economic benefit amounts for several years. After a few years, the parties usually terminate the arrangement. The ILIT, flush with cash from the excess payments from the insured, either maintains the policy or cashes it out.
>
> ***
>
> The split-dollar life insurance arrangements between the CMM Trust and the Dynasty Trusts bear no resemblance to the transactions Notice 2002-59, supra, is prohibiting. Mrs. Morrissette, who was 94 at the time she set into motion these arrangements, wanted the Interstate Group to remain in her family. To that end, she caused the CMM Trust to pay a lump-sum premium, through the Dynasty Trusts, on the life insurance policies held on the lives of her sons, the proceeds of which would be employed to purchase the stock held by each of her sons upon his death. Unlike the reverse split-dollar life insurance arrangements described in the notice, the receivables the CMM Trust obtained in exchange for its advances provided the CMM Trust sole access to the CSV of the policies.
>
> Additionally, respondent argues that the "prepaid premiums" pay not only for current insurance protection, but also for future protection, which is a benefit other than current life insurance protection and requires that the arrangement be taxed under the loan regime. This position relies on Notice 2002-59, supra, for the proposition that prepayment of future premiums (by paying a single premium) confers policy benefits other than current life insurance protection. This assertion, however, assumes that the Dynasty Trusts would otherwise be required to pay the premiums. Under the split-dollar life insurance arrangements, the Dynasty Trusts are not required, but are permitted, to pay any portion of the policies' premiums. The split-dollar life insurance arrangements were structured such that the CMM Trust was obligated to pay all the premiums. Thus, under the split-dollar life insurance arrangements, regardless of how the CMM Trust elected to pay the premiums (whether in one lump sum or over any number of installments), the CMM Trust would not relieve the Dynasty Trusts of any obligation to pay premiums because the Dynasty Trusts were not required to pay any premiums.

The risk to the taxpayer in these transactions is that the IRS will succeed on a claim that the prepaid premiums are a gift. The risk may be mitigated if a net gift is made.

The Tax Court denied the taxpayer's motions for summary judgement on the application of section 2036, 2038, and 2703 to split-dollar policies in Cahill v. Commissioner, T.C. Memo. 2018-84. The court reviewed its understanding of the facts as follows:

> In exchange for decedent's payment of $10 million as premiums on the policies for MB Trust's benefit, decedent[5] received (and continued to own until he died) the right to terminate the split-dollar agreements in conjunction with the trustee of MB Trust. Each split-dollar agreement states that, upon termination, one of two things could happen: (1) MB Trust could opt to retain the policy, in which case decedent would immediately receive the greater of premiums paid or cash surrender value with respect to the related policy, or (2) MB Trust could decline its option to retain the policy, in which case the policy would be transferred to Northern Trust, N.A., in full or partial satisfaction of decedent's liability to Northern Trust, N.A. (We will refer to these as the termination rights.)
>
> Additionally, each split-dollar agreement states that upon the death of the insured, decedent would receive the greatest of the remaining loan balance, premiums paid, or cash surrender value. (We will refer to these as decedent's death benefit rights.) MB Trust would receive any excess of the death benefits over the amount required to be paid to decedent. (We will refer to these as MB Trust's death benefit rights.)
>
> On its estate tax return, the estate claimed that the aggregate value of all the rights decedent held under the split-dollar agreements, including the termination rights, was $183,700. The estate contends that (1) because decedent's right to terminate the split-dollar agreements was held in conjunction with the trustee of MB Trust and (2) because it would allegedly never make economic sense for MB Trust to allow termination of the split-dollar agreements, termination was so unlikely that the termination rights had no value as of decedent's date of death. On this basis, the estate contends that the value of decedent's interests in the split-dollar agreements is limited to the value of decedent's death benefit rights. The estate further contends that on decedent's date of death these rights were worth only $183,700, because Patrick and Shannon Cahill, the insured persons, were then projected to live for many years, with the result that decedent's rights had only a relatively small present value.
>
> In the notice of deficiency respondent adjusted the total value of decedent's rights in the split-dollar agreements from $183,700 to $9,611,624; i.e., to the aggregate cash surrender value of the policies as of decedent's date of death. In support of this adjustment, respondent presents alternative theories applying sections 2036(a)(2), 2038(a)(1), and 2703(a)(1) and (2). The estate seeks summary judgment that sections 2036, 2038, and 2703 are inapplicable; it looks for support for its position in section 1.61–22, Income Tax Regs.

The court concluded that those may, or may not, have been a bona find sale for full and adequate consideration:

> There are many unresolved factual questions with respect to whether this transfer had a legitimate business purpose. For instance: (1) Were these arrangements actually intended to provide liquidity decades from now, or were they intended merely to eliminate the cash surrender value from decedent's estate? (2) The guaranteed return (3%) on the investment in the policies appears to be lower than the interest rate on the loan decedent used to purchase the policies (one month

> LIBOR plus 1.14%); taking into account all of the economic facts and circumstances, would this arrangement actually be capable of providing liquidity decades from now? How much liquidity, in present valued terms (i.e. valued to the date of execution)? At what cost, in present valued terms? And (3) why was an arrangement intended to provide liquidity potentially decades from now funded with a loan that required a balloon payment of the entire principal amount after only five years? That is, if decedent was acting as a prudent business person, why did he fund a long-term obligation with a short-term loan? Because such questions remain, summary judgment is inappropriate with respect to whether decedent's transfer of $10 million was part of a bona fide sale.
>
> ***
>
> According to the estate, at decedent's date of death MB Trust's ability to veto decedent's termination of the agreements rendered the termination rights valueless. Additionally, the estate alleges that decedent's death benefit rights are worth less than 2% of the cash surrender value (i.e., $183,700 ÷> $9,611,624 < 2%). But MB Trust's veto power existed from the moment decedent entered into these split-dollar agreements, and nothing in the undisputed facts presently before us suggests that the terms of the split-dollar agreements were altered between execution of the agreements and decedent's date of death; consequently, this alleged 98% discount must have been present from the execution of these agreements. Therefore, according to the estate's valuation theory, the initial transfer of $10 million in value cannot have been in exchange for property worth that amount; i.e., under the estate's argument, what decedent received was necessarily worth at least 98% less than what he transferred (even without taking into account the amounts used to pay commissions and fees to the insurance company). Consequently, at least according to the estate's valuation theory, the value of what decedent received (allegedly, something close to $183,700) was not even roughly equal to the $10 million decedent paid.

The court believes that section 2703 may apply on a simple reading of the statute:

> On the basis of the undisputed facts, we conclude that under section 2703(a)(1) the split-dollar agreements, and specifically the provisions that prevent decedent from immediately withdrawing his investment, are agreements to acquire or use property at a price less than fair market value. The estate claims that decedent paid $10 million to the insurance companies for the benefit of MB Trust and in return received certain rights, namely, the termination rights (which the estate claims are worthless) and decedent's death benefit rights (which, according to the estate's valuation theory, are worth less than 2% of the cash surrender value). MB Trust, meanwhile, paid nothing into this arrangement and received MB Trust's death benefit rights. As best we understand the estate's valuation theory, MB Trust's death benefit rights are allegedly worth at least the cash surrender value minus the value of decedent's death benefit rights (i.e., $9,611,624—(allegedly) $183,700 = $9,427,924). Nothing in the parties' filings suggests that MB Trust ever paid, or was obligated to pay, any interest or other amount to compensate decedent for MB Trust's acquisition and use of this amount.

The court rejected an analogy of a split-dollar agreement to notes or partnership and held that 2703 may apply:

> We note that most of the estate's arguments with respect to section 2703(a) are generally to the effect that, if section 2703(a) applies in this case, it would also apply to all sorts of other options, agreements, rights, and restrictions. For example, the estate argues that “almost every two-party agreement has a restriction that one party cannot just unilaterally terminate the agreement.” The estate's implicit claim would appear to be that its hypothetical restriction is so obviously legitimate that Congress could not have meant for section 2703(a) to apply. But section 2703(b) provides the exceptions to application of section 2703(a); in particular, section 2703(b)(3) specifically provides for comparison of the terms of the option, agreement, right, or restriction to “similar arrangements entered into by persons in an arms' length transaction.” The estate's vague and general arguments by way of comparison are therefore more appropriate as part of a section 2703(b)(3) analysis. And because the parties have yet to address whether section 2703(b) applies in this case, we decline to consider it.

The case of Machacek v. Commissioner of the Internal Revenue, 906 F.3d 429 (6th Cir. 2018), dealt with an interesting split-dollar income tax question. The opinion summarizes the issue as follows:

> Petitioners-appellants John J. Machacek, Jr. (John Machacek) and Marianne Machacek (together, the Machaceks), a married couple, were the sole shareholders of John J. Machacek, Jr., Inc. (Machacek, Inc.), a corporation organized under Subchapter S of the Internal Revenue Code (an S corporation). John Machacek was also an employee of Machacek, Inc. The Machaceks appeal the Tax Court’s ruling requiring them to treat as income the economic benefits resulting from Machacek, Inc.’s payment of a premium on John Machacek’s life insurance policy under a compensatory split-dollar arrangement. Relying on the compensatory nature of the arrangement, the Tax Court rejected the Machaceks’ argument that the economic benefits should be treated as a shareholder distribution.
>
> Because the Tax Court did not consider the impact of a provision of the tax regulations specifically requiring that such economic benefits be treated as shareholder distributions, we reverse the Tax Court’s decision and remand for further proceedings consistent with this opinion.
>
> **I. Background**
>
> In 2002, Machacek, Inc. adopted the Sterling Benefit Plan in order to provide certain benefits to its employees. Pursuant to the plan, Machacek, Inc. provided John Machacek with a life insurance policy and paid the $100,000 annual premium in the 2005 tax year; both Machacek, Inc. and the Machaceks filed timely tax returns for that year. Because Machacek, Inc. is an S corporation, its income, losses, deductions, and credits are “passed through” to shareholders for tax purposes. Machacek Inc. deducted the $100,000 premium, and that amount was thus not included in the Machaceks’ individual income. The Machaceks also did not include as individual income the economic benefits flowing from the increase in value of the life insurance policy.
>
> The Tax Court determined that Machacek, Inc. was not entitled to deduct the $100,000 premium payment. Because the $100,000 premium payment was not deductible, Machacek, Inc. underreported its income for that year and, due to the

> pass-through nature of S corporations, the increased income was passed through to the Machaceks, who were then required to pay income tax on that amount. The non-deductibility of the premium payment is not disputed, and the Machaceks concede that they must report the amount of the premium payment as pass-through income.
>
> The dispute here concerns the tax treatment of the economic benefits flowing to John Machacek as a result of Machacek, Inc.'s payment of the premium. The parties dispute whether the Machaceks are required to report as taxable income—in addition to the pass-through amount of the premium—the economic benefits flowing from the increase in value of the life insurance policy caused by the payment of the premium.[1]

The opinion is fascinating because the Court ultimately relied on a regulation uncited by either party. The taxpayer argued for a four step analysis:

> At the first step, the Machaceks argue that notwithstanding that the economic benefits here flowed from a compensatory split-dollar arrangement, the regulations require that the economic benefits "be treated as a 'distribution of property' from the corporate-owner (Machacek, Inc.) to the non-owner (Mr. Machacek)." (Appellants' Br. at 17.) This step of the argument relies on 26 C.F.R. § 1.301-1(q)(1)(i), which states that the provision of economic benefits "by a corporation to its shareholder pursuant to a split-dollar life insurance arrangement ... is treated as a distribution of property." Neither the Machaceks nor the Commissioner addressed this regulation before the Tax Court, and the Tax Court made no mention of this regulation.
>
> At the second step, the Machaceks point to the fact that "distributions of property" to a shareholder are ordinarily governed by 26 U.S.C. § 301(c). *See* 26 U.S.C. § 301(a) ("[A] distribution of property ... made by a corporation to a shareholder with respect to its stock shall be treated in the manner provided in [§ 301(c)].").
>
> At the third step, the Machaceks argue that Subchapter S—rather than § 301(c)—governs the treatment of the distribution here because Machacek, Inc. is an S corporation. *See* 26 U.S.C. § 1368(a) ("distribution of property made by an S corporation with respect to its stock to which (but for this subsection) section 301(c) would apply shall be treated in the manner provided" by Subchapter S).
>
> At the fourth step, the Machaceks argue that Subchapter S mandates that any shareholder distribution "taxable under the Subchapter S provisions ... would escape taxation under the split-dollar regulations." (Appellants' Br. at 17.)

The IRS thought that the mere fact that the arrangement was a compensatory split-dollar arrangement was determinative:

> The Commissioner correctly notes that such treatment would be uncontroversial if the recipient of the economic benefits were an ordinary employee, rather than an S corporation's shareholder-employee. The distinction between John Machacek's different roles—employee and shareholder—is therefore key to the Commissioner's position.
>
> In response to the Machaceks' reliance on § 1.301-1(q)(1)(i), the Commissioner points only to the distinction between compensatory and shareholder

> arrangements. The Commissioner recognizes that § 1.301-1(q)(1)(i) applies to both compensatory and shareholder arrangements but concludes that it "does not mean that in any situation where a compensatory arrangement covers a shareholder, the taxpayer's status as a shareholder trumps his status as an employee, causing the economic benefit to be treated as a distribution to a shareholder," because "[s]uch an interpretation of the regulation would make no sense, as it would defeat the reason for distinguishing between a compensatory arrangement and a shareholder arrangement." (Appellee's Br. at 37.)
>
> ***
>
> Finally, the Commissioner notes that "Machacek, Inc. will be entitled to a deduction in a future tax year," pursuant to 26 C.F.R. § 1.83-6(a)(5), "when it actually transfers ownership of the policy to John Machacek." (Appellee's Br. at 41; *see also id.* at 26.) The Commissioner appears to rely on a possible future deduction as a way to counter the Tax Court's acknowledgement that the result below "may seem aberrational." The Commissioner argues that "it is [the Machaceks], not the Commissioner, who are arguing for an inequitable result under which they would escape taxation on the accumulation value of the policy, and realize an additional tax advantage when their corporation deducts the cost of the policy in the future." (Appellee's Br. at 41.) However, the Machaceks will also have personal tax consequences when the policy is transferred.

Finally, the Court reaches what it concludes is the dispositive regulation:

> In finding for the Commissioner, the Tax Court did not address 26 C.F.R. § 1.301-1(q)(1)(i). Neither party cited or relied on this regulation below, and we are aware of no case discussing the regulation in any context. But given its importance in this scenario, we cannot simply ignore it. If the economic benefits to John Machacek are properly treated as a distribution of property to a shareholder—rather than as compensation to an employee—then the Tax Court erred.
>
> Section 1.301-1(q)(1)(i) is dispositive and renders irrelevant whether John Machacek received the economic benefits through a compensatory or shareholder split-dollar arrangement. Section 1.301-1(q)(1)(i) treats economic benefits provided to a shareholder pursuant to *any* split-dollar arrangement as a distribution of property within the ambit of § 301. And, although another sub-section of that regulation, 26 C.F.R. § 1.301-1(c), states that the regulation as a whole "is not applicable to an amount paid by a corporation to a shareholder unless the amount is paid to the shareholder in his capacity as such," the explicit inclusion in § 1.301-1(q)(1)(i) of all arrangements described in § 1.61-22(b)(2)—which includes compensatory arrangements—makes clear that when a shareholder-employee receives economic benefits pursuant to a compensatory split-dollar arrangement, those benefits are treated as a distribution of property and are thus deemed to have been paid to the shareholder in his capacity as a shareholder. The Commissioner offers no alternative interpretation that gives meaning to the inclusion of compensatory arrangements in § 1.301-1(q)(1)(i). Our interpretation is further supported by the fact that § 1.61-22(d) states that the tax treatment of the economic benefits depends on the "relationship between the owner and the non-owner." The Commissioner argues that this language shows that the tax treatment depends on the nature of the split-dollar arrangement—compensatory or shareholder—but if that were the controlling factor, the regulation could have said so. It does not.

The Tax Court issued another opinion dealing with various issues in Morrisette on May 13, 2021. Estate of Morrissette v. Comm'r, T. C. Memo. 2021-60 (hereinafter referred to as Morrissette II). In general the opinion was favorable to the taxpayer. The court held that sections 2036 and 2038 did not pull the policy proceeds into the grantor's estate because the arrangement was based on a sale for full and adequate consideration, that section 2703 did not apply which would have included the underlying cash surrender value of the policies in the decedent's estate, and that the fair market value could be calculated using discounted cash-flow. The court found that discount rates of half, or less, of that used by the taxpayer were appropriate, and, more importantly, only assumed that the arrangement would continue until the estate tax statute of limitations would expire. The estate won on technique but lost on the numbers. The court found the 40% gross valuation misstatement penalty (section 6662(h) was appropriate.

Levine v. Commissioner, 158 T.C. No. 2 (2022), authored by Judge Holmes, is the latest inter-generational split-dollar life insurance case. The case is a win for the taxpayer with broader ramifications, especially in view of Morrissette. The key facts of the arrangement were set forth in the opinion as follows:

> The deceased entered into split-dollar life-insurance agreement which required her revocable trust to pay premiums for life-insurance policies taken out on the lives of her daughter and son-in-law. When the insurance arrangement terminates – by death or "cancellation" – the revocable trust will receive the greater of the premiums paid or the cash surrender value of the policies. An irrevocable life-insurance trust owned the policies, and the decedent's children and grandchildren were the beneficiaries of the irrevocable trust. The sole member of the investment committee in the irrevocable trust was Bob Larson, a family friend and advisor, and he along with the decedent's children, Nancy and Robert, were successor trustees of the revocable trust and the decedent's attorneys-in-fact. A third party corporate fiduciary was trustee of the irrevocable trust but was the sole member of the irrevocable trust's investment committee, only Larson could prematurely terminate the life-insurance policies.
>
> ***
>
> Between June and July 2008, Nancy, Robert, and Larson—in their capacities as Levine's attorneys-in-fact and as trustees of her Revocable Trust—executed several documents to put the split-dollar arrangement into effect. We summarize the most important parts of the deal:
>
> • The Insurance Trust agreed to buy insurance policies on the lives of Nancy and Larry;
>
> • The Revocable Trust agreed to pay the premiums on these policies;
>
> • The Insurance Trust agreed to assign the insurance policies to the Revocable Trust as collateral;
>
> • The Insurance Trust agreed to pay the Revocable Trust the greater of (i) the total amount of the premiums paid for these policies—$6.5 million—and (ii) either (a) the current cash-surrender values of the policies upon the death of the last surviving insured or (b) or the cash-surrender values of the policies on the date that they were terminated, if they were terminated before both insureds died.

> It was very important, if this deal was to work, that the Insurance Trust and not the Revocable Trust own the policies. The recitals in the arrangements state that the parties do *not* intend to convey to Levine or the Revocable Trust any "right, power or duty that is an incident in ownership ... as such is defined under Section[s] 2035 and 2042" in the life-insurance policies at the time of Levine's death. They also state that neither the Insurance Trust, nor its beneficiaries, nor the insureds—Nancy and Larry—would have access to any current or future interest in the cash value of the insurance policies.
>
> We also specifically find that *only* the Insurance Trust—and that means Larson—had the right to terminate the arrangements. There were two split-dollar arrangements, one for each insurance company. Paragraph 6 from both arrangements controlled the right to terminate the arrangements:
>
>> The Insurance Trust shall have the sole right to surrender or cancel the Policy during the lifetime of either insured. In addition the Insurance Trust may terminate this Agreement in a writing delivered to the other party, effective upon the date set forth in such writing.
>
> If the Insurance Trust did terminate the Agreement, however, it would get nothing:
>
>> The Revocable Trust shall have the unqualified right to receive the total amount payable upon such surrender or cancellation of this Policy, or upon termination by notice from the Insurance Trust, and the Insurance Trust shall not have access to, or any current or future interest in, the Cash Value. Upon such payment of said funds to, and receipt of said funds by, the Revocable Trust, this Agreement shall terminate.
>
> ***
>
> With the split-dollar deal done, Swanson had finished hammering into place the paper armor he had designed to protect as many of Levine's assets from tax as he legally could. He was just in time; within months, Levine's physical and mental health began to deteriorate more rapidly. She became more forgetful and began to not recognize her family and friends. At the start of 2009, she became bedridden. On January 22 she died.

The issue was how large was the decedent's gift:

> Everyone involved knew that Levine, through her Revocable Trust, had given away some of her property to the Insurance Trust and its beneficiaries—they knew, in other words, that the value of the money the Revocable Trust would get years later wasn't equal to the $6.5 million it had given to the Insurance Trust for it to buy the insurance policies on Nancy and her husband. They knew that this was a taxable gift. Swanson prepared gift-tax returns for 2008 and 2009. Larson and Nancy signed these returns in their capacities as Levine's attorneys-in-fact. Each Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, reported the value of the gift as the economic benefit transferred from the Revocable Trust to the Insurance Trust. Gifts of valuable property for which the donor receives less valuable property in return are called "bargain sales." *See Estate of Bullard v. Commissioner*, 87 T.C. 261, 265 (1986). And the value of gifts made in bargain sales is usually measured as the difference between the fair market value of what is given and what is received. *Id.* at 270–71. Not so here. The Secretary, for whatever reason, has issued regulations that provide a

> different measure of value when split-dollar life insurance is involved. *See* Treas. Reg. § 1.61-22(d)(2). The number Larson and Nancy came up with after applying the valuation rules in the regulations was $2,644. *See* Treas. Reg. § 25.2512-1.
>
> Everyone involved also knew that the promise of the Insurance Trust to pay the Revocable Trust some amount sometime in the future was also valuable. It had to be reported on the Levine's estate-tax return. And on Levine's Schedule G, Transfers During Decedent's Life, of the Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, the value of the split-dollar receivable, as owned by the Revocable Trust on the alternate valuation date, was reported as an asset worth about $2 million.
>
> ***
>
> This shift of money from the Revocable Trust for the purchase of the life-insurance policies that benefited the Insurance Trust caught the IRS's attention. The Commissioner issued his challenge, and the joust between the IRS and the Estate began. The Commissioner noticed two things in particular. The first was the small amount—only $2,644—that Levine reported as the gift that her Revocable Trust had made to the Insurance Trust. The second was that the Insurance Trust had promised to pay the Revocable Trust the *greater* of $6.5 million or the policies' cash surrender value at *either* the death of both Nancy and her husband *or* upon termination of the policies. At the time of Levine's death, this value was close to $6.2 million, and the Commissioner suspected there was no insurmountable hurdle to the Insurance Trust's terminating the policies well before Nancy and her husband both died. This would mean that the Insurance Trust and Levine's descendants, as beneficiaries of the Revocable Trust, had ready access to $6.2 million, not just the $2.1 million + $2,644 that was reported on the estate and gift-tax returns.

The court first held the arrangement was covered by the split-dollar regulations:

> Over the years, the IRS provided limited guidance on the taxation of split-dollar life-insurance arrangements, mostly in the form of notices and revenue rulings. That all changed when the Treasury Department issued final regulations in 2003. These govern all split-dollar arrangements entered into or materially modified after September 17, 2003. Treas. Reg. § 1.61-22. The final regulations broadly define a split-dollar life-insurance arrangement between an owner and a nonowner of a life-insurance contract in which:
>
> • either party to the arrangement pays, directly or indirectly, all or a portion of the premiums;
>
> • the party making the premium payments is entitled to recover all or a portion of those premium payments, and repayment is to be made from or secured by the insurance proceeds; and
>
> • the arrangement is not part of a group-term life insurance plan (other than one providing permanent benefits).
>
> *Id.* para. (b)(1)
>
> The split-dollar arrangement in this case meets these specific requirements. After defining what a split-dollar arrangement is, the final regulations create two different and mutually exclusive regulatory regimes—called the "economic

> benefit regime” and the “loan regime”—that govern the income- and gift-tax consequences of split-dollar arrangements. Which regime a particular arrangement falls under depends on who “owns” the life-insurance policy at issue. *Id.* subpara. (3)(i). The general rule is that the person named as the owner is the owner. *Id.* para. (c)(1). Nonowners are any person other than the owner who has a direct or indirect interest in the contract. *Id.* subpara. (2). Under this general rule, the Insurance Trust would be the owner of the policies here, and the loan-regime rules would apply.
>
> But there is an exception to this general rule. If the only right or economic benefit provided to the donee under a split-dollar life-insurance arrangement is an interest in current life-insurance protection, then the regulations tell us to ignore the formal ownership designation and treat the donor as the owner of the contract. This is the economic-benefit regime. *Id.* subpara. (1)(ii)(A)(2). So there's at least a threshold question here about whether the Insurance Trust received any economic benefit in addition to current life-insurance protection.
>
> On this we have precedent. In *Morrissette I*, we held that a split-dollar arrangement much like this one fell under the economic-benefit regime for gift-tax purposes. But we also noted in *Morrissette I*, 146 T.C. at 172 n.2, that “we [were] not deciding whether the estate's valuation of the receivables ... in the gross estate [was] correct.” And section 1.61-22(a)(1) seems not to cover the estate-tax consequences of split-dollar arrangements at all.21 The final regulations do make one reference to estate tax in their preamble, which states “[f]or estate tax purposes, regardless of who is treated as the owner of a life insurance contract under the final regulations, the inclusion of the policy proceeds in a decedent's gross estate will continue to be determined under section 2042.” T.D. 9092, § 5, 2003-2 C.B. 1055, 1063. But the express terms of section 2042 limit its applicability to life-insurance policies on a decedent's own life, not split-dollar arrangements where policies are taken out on the lives of others. *See* § 2042(1); Treas. Reg. § 20.2042-1(a)(2) (“[S]ection 2042 has no application to the inclusion in the gross estate of the value of rights in an insurance policy on the life of a person other than the decedent”). From this we conclude that neither the regulation nor section 2042 governs our valuation of the split-dollar arrangement we have to analyze.

The IRS argued that because the loan arrangement could be terminated the regulations did not apply and sections 2036 and 2038 did apply:

> In the Commissioner's view, this entire transaction was merely a scheme to reduce Levine's potential estate-tax liability and, if it was a sale, it was not *bona fide* because it lacked any legitimate business purpose. He argues that the Estate should have reported on its return the cash-surrender values of the life-insurance policies, not the value of the receivable. He reasons that:
>
> • under section 2036 Levine retained the right to income—or the right to designate who would possess the income—from the split-dollar arrangement, and
>
> • under section 2038 she maintained the power to alter, amend, revoke, or terminate the enjoyment of aspects of the split-dollar arrangement,
>
> • even if the full values of the life-insurance policies are not includible in Levine's estate under section 2036 or 2038, the restrictions in the split-dollar arrangement should be disregarded under the special valuation rules provided in section 2703,

> which would force the Estate to include in its taxable value the full cash-surrender values of the policies.

The court said no. Section 2036 does not apply because no rights beyond default state law were retained. The opinion states:

> Section 2036’s regulations tell us that “[a]n interest or right is treated as having been retained or reserved if at the time of the transfer there was an understanding, express or implied, that the interest or right would later be conferred.” Treas. Reg. § 20.2036-1(c)(1)(i). The use, possession, enjoyment, right to income, or other enjoyment of property is considered having been retained or reserved “to the extent that the use, possession, right to the income, or other enjoyment is to be applied towards the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.” *Id.* para. (b)(2).
>
> If we are right that the only property that Levine transferred was cash, then our analysis under section 2036 would seem to be easy—she retained no “interest” in that *cash.* But she did get something in return—the split-dollar receivable created and defined by the split-dollar arrangements. The receivable gave her the right to the greater of $6.5 million or the cash-surrender values of the policies. Under the terms of the split-dollar arrangements, however, Levine did not have an immediate right to this cash-surrender value. She (or her estate) had to wait until the deaths of both Nancy and Larry, or the termination of the policies according to their terms. Here we find what could be a very important difference between the split-dollar arrangements here and those analyzed in *Estate of Cahill* and *Morrissette II*. In Levine's case, the split-dollar arrangements between the Revocable Trust and the Insurance Trust expressly stated that *only* the Insurance Trust had the right to terminate the arrangement.
>
> The split-dollar arrangements we analyzed in *Morrissette II* and *Estate of Cahill* were different. Look at the language in those arrangements. In *Morrissette II*:
>
> The Donor and the Trust may *mutually* agree to terminate this agreement by providing written notice to the Insurer, but in no event shall either the Donor or the Trust possess the unilateral right to terminate this Agreement.
>
> And in *Estate of Cahill*:
>
> This Agreement may be terminated during the Insured's lifetime *only* by written agreement of the Donor *and* the Donee acting unanimously. Such termination shall be effective as of the date set forth in such termination agreement.
>
> This difference matters. Unlike what we saw in *Morrissette II* and *Estate of Cahill*, we see here a carefully drafted arrangement that expressly gives the power to terminate *only* to the Insurance Trust. It gave Levine herself no unilateral power to terminate the policies and no language like that in the arrangement at issue in *Estate of Cahill* or *Morrissette II* that gave her that right acting in conjunction with the Insurance Trust. *See supra* pp. 16–17. By requiring *both* parties’ approval, the arrangements that we analyzed in *Morrissette II* and *Estate of Cahill* necessarily *required* each decedent's approval to terminate the arrangement. The opposite is true here, where only the Insurance Trust could terminate the arrangement. Without any contractual right to terminate the policies, we can't say that Levine had any sort of possession or rights to their cash-surrender values. If the contest between the Estate and the Commissioner were confined to

the tiltyard defined by the transactional documents, we would have to conclude that sections 2036(a) and 2038 do not tell us to include the polices' cash surrender values in the Estate's gross value.

The Commissioner, however, tries to unhorse the Estate's argument with the pointed assertion that we should look at the transaction as a whole to get a clear picture of where each party stands and its role in the transaction. And that is exactly what we will do. We'll do it in two ways. We will question whether our review of the rights that any decedent might keep in a split-dollar arrangement really should be defined by the documents alone. Then we will look carefully to the particular circumstances of this transaction to see whether, as a practical matter on the facts of this case, Levine kept a right to the cash-surrender values of the policies bought by the Insurance Trust.

First to the law—should it make a difference whether the transactional documents in a split-dollar arrangement put the unilateral right to unwind the transaction onto the donee rather than split it between the donor and donee? First-year law students almost all learn that a black-letter rule of contract law is that the parties to a contract are free to modify it. *See* Joseph M. Perillo, Contracts (7th ed. 2014). The Commissioner would surely have a strong argument that this implicit power of parties to a contract is a "right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom." § 2036(a)(2).

The Commissioner's first pass at the Estate in this part of their joust would thus be something like this: The Estate is a party to the split-dollar arrangement with the Insurance Trust. The insurance policies belong to the Insurance Trust. But the policies' cash-surrender values are a form of income from that property. The right to the cash-surrender values belongs to the Revocable Trust (and thus the Estate) if the split-dollar arrangements are terminated. The arrangement may say that only the Insurance Trust has the power to terminate the deal and hand over that income to the Estate, but general principles of contract law allow the Estate to modify any term of the arrangements in conjunction with the Insurance Trust.

The language of section 2036(a)(2) *is* broad—it uses the word "right" without a modifier like "contract" or "instrument creating the." So why shouldn't we construe that word to include background rights like the right to modify a contract? And, if so, wouldn't the cash-surrender values of the insurance policies be either a "right to the income" from that property, § 2036(a)(1), or a right that could be exercised in "conjunction with" another to the income from that property, §§ 2036(a)(2), 2038(a)(1)?

The problem for the Commissioner is *Helvering v. Helmholz*, 296 U.S. 93 (1935), a case about revocable transfers. Helmholz was a widower, whose wife had named him her sole heir. *Id.* at 96. While she was alive, she settled valuable stock in a privately held corporation into a trust. *Id.* at 94. Her brothers and sisters and her parents were the other shareholders, and the trust corpus was destined for later descendants or, if her family line died out, to charity. *Id.*

But her will left everything she owned at death to her husband. *Id.* at 96. The Commissioner argued that settlors of a trust may, with the consent of its beneficiaries, terminate the trust and restore the contributed property to the settlors. *Id.* at 97. Is this not, the Commissioner argued (and here the quote is from the slightly different language of the Code's equivalent of section 2038 back then) "a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke" a transfer of property? *Id.* at 96.

> A persnickety textualist might quickly respond that it was. But the Supreme Court looked at the text of the trust agreement itself. That language had express provisions for the trust's termination—the death of the last surviving grandchild in the family, the written agreement of all the beneficiaries, a resolution by the directors of the family's corporation, or the corporation's liquidation. *Id.* at 97. The Court characterized these express provisions for the termination of the trust as typical of "every welldrawn instrument." *Id.* at 96. The Court acknowledged that it was true that "a writing might have been executed by Mrs. Helmholz and her cobeneficiaries while she was alive, with the effect of revesting in her the shares which she had delivered into the trust." *Id.* at 97. But it held that
>
> [t]his argument overlooks the essential difference between a power to revoke, alter or amend, and a *condition* which the law imposes. The general rule is that all parties in interest may terminate the trust. The clause in question added nothing to the rights which the law conferred. Congress cannot tax as a transfer intended to take effect in possession or enjoyment at the death of the settlor a trust created in a state whose law permits all the beneficiaries to terminate the trust.
>
> *Id.* (emphasis added) (footnote omitted).

This holding is extremely important. Where authority is the same as under default state law, the taxpayer didn't retain a power. The opinion goes on:

> A more recent case that addresses the same problem is *Estate of Tully v. United States*, 528 F.2d 1401 (Ct. Cl. 1976). Tully owned half the stock in a private corporation. *Id*. at 1402. He and his partner reached an agreement long before his death that their company would pay a large death benefit to each of their widows. *Id*. Tully died, and the government argued that the death benefit owed his widow from the corporation had to be included in his estate. *Id*. There was nothing in the instrument that created the benefit that gave Tully himself any interest in it at the date of death, but the government noted that he continued to own half his company till the day he died. *Id*. at 1403. It reasoned that this meant that he had the power, acting with his partner, to do anything he wanted with corporate assets, and maybe he could have persuaded his partner to change the death benefit at any time. *Id*.
>
> Nice try, held the Court of Claims. A power to "alter, amend, revoke or terminate" would trigger inclusion in an estate, but that kind of power "does not extend to *powers of persuasion*." *Id*. at 1404. To be included within the Code's sweep, a power has to be in the instrument itself, not a speculative possibility allowed by general principles of law. A broader reading—that a power to amend an instrument in conjunction with others includes all speculative possibilities—"would sweep all employee death benefit plans into the gross estates of employees." *Id*. at 1405.
>
> We encountered a somewhat similar argument in conservation-easement cases. Congress enacted a Code section to allow a deduction for such easements if done properly. One requirement of a proper easement is that it preserve land in perpetuity. But remember that the parties to a contract can modify its terms, and easements are a kind of contract. We rejected the Commissioner's argument that a power to amend means that the parties *might* amend it so as to destroy perpetuity, which means that the easement wasn't perpetual. We disagreed: "Generally speaking, the parties to a contract are free to amend it, whether or not they explicitly reserve the right to do so.... Respondent's argument would apparently prevent the donor of any easement from qualifying for a charitable

> contribution deduction under section 170(h) if the easement permitted amendments." *Pine Mountain Pres. LLLP v. Commissioner,* 151 T.C. 247, 282 (2018), *rev'd in part, aff'd in part, vacated and remanded,* 978 F.3d 1200 (11th Cir. 2020).

The IRS is not finished. Couldn't Larson just take advantage of the situation and terminate the policy? The court found that Larson has fiduciary duties to all the trust beneficiaries and thus is unlikely to do that:

> We therefore conclude that the Commissioner doesn't win as a matter of law here.
>
> But we do think he's correct that we also must avoid being so blinded by any formal gleam from the Estate's armor that we overlook some practical chinks that deals like this may have: Can the Commissioner dismount from purely legal or theoretical arguments and start wielding shorter, sharper weapons forged from the particular facts of particular cases?
>
> The Commissioner thinks he can, and would have us focus on our holdings in *Estate of Strangi*, 85 T.C.M. (CCH) 1331, and *Estate of Powell v. Commissioner*, 148 T.C. 392 (2017), cases in which we concluded that section 2036(a)(2) clawed value back into a decedent's taxable estate despite the drafting skills of talented estate lawyers. In both *Estate of Strangi* and *Estate of Powell* we distinguished the Supreme Court's opinion in *United States v. Byrum*, 408 U.S. 125 (1972), in which an estate won, so we can begin by summarizing that case.
>
> In *Byrum*, the Supreme Court held that a decedent's right to vote shares of stock in three corporations that he had transferred to a trust for the benefit of his children did not cause those shares to be included in his estate under section 2036(a)(2). The Court noted that any powers the decedent might have had were subject to a number of different "economic and legal constraints" that prevented those powers from being equivalent to the right to designate a person to enjoy trust income. *Id.* at 144. One of these constraints was that the decedent, as the controlling shareholder of each corporation whose stock was transferred into the trust, owed fiduciary duties to minority shareholders that limited his influence over the corporations' dividend policies. *Id.* at 142–43. The Supreme Court also noted that an independent corporate trustee alone had the right under the trust agreement to pay out or withhold income, *id.* at 137, so the decedent had no way of compelling the trustee to pay out or accumulate that income, *id.* at 144. That the decedent had fiduciary duties to these minority shareholders—duties that were legally enforceable—was important to the Supreme Court's analysis. *Id.* at 141–42.
>
> We have been careful to distinguish *Byrum* in later cases when we see something behind a transaction's facade that suggests appearance doesn't match reality. *Estate of Strangi*, 85 T.C.M. (CCH) at 1333–34, featured a decedent who could act with others to dissolve a family limited partnership to which he had transferred property in exchange for a 99% limited-partner interest. The decedent in *Estate of Strangi*—through his son-in-law—also had the right to determine the amount and timing of partnership distributions. *Id.* at 1337. This led us to distinguish *Byrum*, because in *Byrum* the son-in-law had fiduciary duties to other members of the family limited partnership; in *Estate of Strangi*, the son-in-law's potential fiduciary duties—as the decedent's attorney-in-fact and 99% owner of the family limited partnership—were duties he owed "essentially to himself." *Id.* at 1343.

We decided *Estate of Powell* on essentially the same grounds as *Estate of Strangi*. In *Estate of Powell*, 148 T.C. at 394–95, a fiduciary also owed duties to the decedent both as his attorney-in-fact and as partner in a family limited partnership. We found that there was nothing in the record of that case to suggest that as a fiduciary he "would have exercised his responsibility as a general partner of [the family limited partnership] in ways that would have prejudiced decedent's interests." *Id.* at 404. And we again determined that whatever duties were owed were duties that "he owed almost exclusively to decedent herself." *Id.*

Here's where the Commissioner makes his thrust. He contends that Levine—through her attorneys-in-fact—stood on both sides of these transactions and therefore could unwind the split-dollar transactions at will. This meant that she—again through the attorneys-in-fact—had the power to surrender the policies at any time for their cash-surrender values. (Remember that, under the terms of the split-dollar arrangements, if the Insurance Trust surrendered the policies before the deaths of both Nancy and her husband, it would immediately owe the Revocable Trust the full cash-surrender values of the policies.) The Commissioner argues that these powers constitute the right to possession and enjoyment of, or the right to income from, the split-dollar receivable under section 2036(a)(1). If he's right, we would have to value the receivable at the policies' cash-surrender values.

We agree that Robert, Nancy, and Larson—as Levine's attorneys-in-fact—stood in the shoes of Levine for this split-dollar arrangement. That is the point of giving someone a power of attorney. The Revocable Trust is the entity that paid the $6.5 million, and its cotrustees are Nancy, Larry, and Larson. The Insurance Trust, however, owns the life-insurance policies, and its trustee is South Dakota Trust. South Dakota Trust is directed by the investment committee, and the investment committee's only member is Larson. This, however, means that the only person that stood on both sides of the transaction is Larson—in his role as the investment committee and as one of Levine's attorneys-in-fact.

We therefore must look at each of Larson's roles in this transaction to consider how to apply sections 2036(a) and 2038. Under the 1996 power of attorney and Minnesota law, all actions taken by Larson as an attorney-in-fact are considered to be actions of Levine. *See* Minn. Stat. § 523.12 (2008).[25] The Insurance Trust's instrument, however, states that the Insurance Trust is irrevocable. We have no reason to doubt that this means what it says. And the consequence is that Levine irrevocably surrendered her interest in the Insurance Trust and had no right to change, modify, amend, or revoke its terms. Once it was created, Levine had no legal power over its assets. Levine did not have the power to surrender the policies by herself. Since Larson—in his role as an attorney-in-fact—could not take any action which Levine could not take herself, we find that he could not surrender the policies in his capacity as attorney-in-fact. This means that even if we treat the Insurance Trust, the policies, or *that* Trust's rights under the split-dollar deal as the "property transferred" (and thus the property whose value we look for) under section 2036, Levine did not retain any right to possession or enjoyment of the property transferred.

To get around these problems, the Commissioner has to argue that Larson has the right to designate who shall possess or enjoy the cash-surrender value of the policies, either by surrendering them or by terminating the entire arrangement. *See Estate of Cahill*, 115 T.C.M. (CCH) at 1467. For example, in *Estate of Cahill*, we found that section 2036(a)(2) applied when the decedent jointly held the right to terminate the split-dollar life-insurance policy with the irrevocable trust that held the policies. *Id.* We think that's the only way the

Commissioner can include the combined cash-surrender values of the life-insurance policies in Levine's estate under section 2036(a)(2) or section 2038.

But we also think that this argument fails to consider the fiduciary obligations Larson owes to the beneficiaries of the Insurance Trust—obligations that would prevent him from surrendering the policies. The Commissioner first questions the validity and existence of these duties. He notes that "Larson was not compensated for his role as the sole member of the Investment Committee despite the fact that petitioner has taken the position that he assumed significant fiduciary responsibilities under this role." But we don't think that matters. There is no requirement under either South Dakota law[26] or general trust law[27] that a trustee or trust adviser be compensated to have fiduciary obligations. The terms of the Insurance Trust expressly state that Larson—in his role as the single-member investment committee—shall be considered to be acting in a fiduciary capacity. Therefore we do find that Larson was under fiduciary obligations in his role as the sole member of the investment committee.

Larson's duties in his role for the Insurance Trust required him, however, to look out for the interests of *that* Trust's beneficiaries. And here is where the Commissioner makes a different and subtler argument. He contends that, since Nancy and Robert are beneficiaries of the Insurance Trust, they stand to benefit under the split-dollar arrangement regardless of whether the life-insurance policies remain in place or are surrendered during their lifetime. This means, he says, that Larson would not violate his fiduciary duties to the beneficiaries of the Insurance Trust if he either surrendered, or didn't surrender, the policies because Nancy and Robert would benefit no matter what. If Larson immediately terminated the split-dollar arrangement, surrendered the policies, and sent the money out of the Insurance Trust to the Estate and then to Levine's children, he'd just be benefiting the children in a different capacity.

To this subtle thrust, the Estate has a blunt parry: Levine's children are not the only beneficiaries under the Insurance Trust. Her grandchildren are also beneficiaries, and Larson has fiduciary obligations to them as well. According to the terms of the Insurance Trust, Levine's grandchildren would receive nothing if the life-insurance policies were surrendered. Left unmentioned is the final step in this argument—that Larson has no right to violate his fiduciary obligations by looting the Insurance Trust for the benefit of only some of its beneficiaries.

The Commissioner counters by arguing that the Insurance Trust itself allows Nancy and Robert to extinguish their children's interests in it. This means, he says, that Nancy and Robert are the only real beneficiaries, and stand to benefit regardless of whether the life-insurance policies stay in effect.

This misinterprets the way that "extinguishment" works under the provisions of the Insurance Trust, however. The Trust plainly states that "the special testamentary power of appointment hereby granted to said Beneficiary shall not be exercisable in favor of or for the benefit of the Beneficiary ..."—i.e. they can't extinguish another beneficiary's interest in favor of themselves. The Insurance Trust also states that extinguishment of a beneficiary's interest can occur only by will and cannot take place until the death of the beneficiary doing the extinguishing (which in this case would be Nancy or Robert). So if Nancy and Larry hoped to extinguish the interests of their own children, they couldn't do so until they themselves directly named some other beneficiary to take their place. This means that during the lives of Nancy and Robert, their children will remain beneficiaries of the Insurance Trust, and a decision by Larson to surrender the

> policies would mean the grandchildren would receive nothing. This would breach his fiduciary duties to them.
>
> ***
>
> We stress that the fiduciary duties that Larson owed to the beneficiaries of the Insurance Trust do not conflict with the fiduciary duties that he owed Levine as one of her attorneys-in-fact. In both *Estate of Strangi* and *Estate of Powell* we held that the fiduciary's role as the attorney-in-fact would potentially require him to go against his duties as a trustee. *Estate of Strangi*, 85 T.C.M. (CCH) at 1343; *Estate of Powell*, 148 T.C. at 404. This is not the case here: Under Minnesota law, whenever Larson and the other attorneys-in-fact exercise their powers, they are to do so "in the same manner as an ordinarily prudent person of discretion and intelligence would exercise in the management of the person's own affairs and shall have the interests of the principal utmost in mind." Minn. Stat. § 523.21 (1992). And Larson, Nancy, and Robert all credibly testified that one of the reasons for this split-dollar arrangement was that Levine wished to provide for her grandchildren and keep this arrangement in effect until the insureds died. So not only did Larson's role as an attorney-in-fact not require him to go against his duties as a trustee, the two roles reinforced each other and pushed him to fulfill Levine's stated purpose in her estate planning. They made it more likely that he would not want to cancel the life-insurance policies.
>
> ***22** We therefore find it more likely than not that the fiduciary duties that limit Larson's ability to cancel the life-insurance policies were not "illusory". It also persuades us that we cannot characterize his ability to unload the policies and realize their cash-surrender values as a right retained by Levine, either alone or in conjunction with Larson, to designate who shall possess or enjoy the property transferred or the income from it.

For the same reason, The court rejected the application of section 2038. The last try by the IRS was section 2703:

> The Commissioner argues that when Levine—through her attorneys-in-fact—entered into the split-dollar arrangement, she placed a restriction on her right to control the $6.5 million in cash and the life-insurance policies. And the restriction on Levine's right to unilaterally access the funds transferred to the insurance companies for the benefit of the Insurance Trust is what should be disregarded when determining the value of the property under section 2703(a)(2).
>
> ***
>
> We disagree. Section 2703 does refer to "any property." But the "any property" it refers to is property of an estate, not some other entity's property. Our caselaw confirms the plain meaning of the Code, and tells us to confine section 2703's valuation rule to property held by a decedent at the time of her death. *See, e.g., Estate of Strangi v. Commissioner*, 115 T.C. 478 (2000), *aff'd in part, rev'd in part*, 293 F.3d 279 (5th Cir. 2002). The district court in *Church v. United States*, 85 A.F.T.R.2d 2000-804 (W.D. Tex. 2000), *aff'd without published opinion*, 268 F.3d 1063 (5th Cir. 2001), rejected precisely this argument when it held that "property" in section 2703 consideration does not include assets that a decedent contributed to a partnership before her death, but only the partnership interest she got in exchange. *See also Estate of Strangi*, 115 T.C. at 488 ("Congress 'wanted to value property interests more accurately when they transferred, instead of

> including previously transferred property in the transferor's gross estate.' " (citing *Kerr v. Commissioner,* 113 T.C. 449 (1999), *aff'd,* 292 F.3d 490 (5th Cir. 2002))).
>
> The property we have to value here is the property in Levine's estate, which is the split-dollar receivable she held at the time of her death. There were no restrictions on *that* property. She could do with the receivable what she wanted. She was free to sell it or transfer it as she wished. One needs to remember that what the Estate valued on its return was the receivable owned by Levine in her Revocable Trust. Section 2703 is not relevant to the valuation of the receivable because Levine had unrestricted control of it. Section 2703 therefore does not apply.

The Estate of Arthur Cinader v. Commissioner, Tax Court docket 5245-22, deals with the deductibility of a note in a reverse split-dollar plan. The amount involved exceeds $41 million.

L. SECTION 2053 and 2054 - DEBTS AND ADMINISTRATION EXPENSES

M. SECTIONS 2056, 2056A AND 2519- MARITAL DEDUCTION

1. Termination of QTIP Trust Creates Double Gifts. CCA 202118008 involved simple facts and a most unfortunate result. Surviving spouse was the beneficiary of a QTIP trust, received all the income of course, could receive principal for health, maintenance, and support in the spouse's accustomed standard of living if the income were insufficient, and had a testamentary power of appointment among descendants. Apparently for planning purposes, the spouse and descendants decided to terminate the trust and give all of the trust assets back to the spouse who then disposed of the assets in what appear to be sales and perhaps other estate planning transactions. The National Office determined that spouse made a gift of the value of the QTIP assets when the trust was terminated, and that the descendants made a gift of the value of their remainder interests. There was no offset for the respective gifts, and the transaction was not treated as a sale. The termination was done via a commutation agreement that the CCA describes this way:

> On Date 3, Spouse, as the current beneficiary and as the trustee of Trust 1, and Child 1 and Child 2, as remainder beneficiaries and virtual representatives of the contingent and unborn beneficiaries of Trust 1, entered into Agreement. Under the terms of Agreement, Trust 1 was commuted1 and all of its property was distributed to Spouse. Recital H of Agreement provides that Spouse and Children agree that "Trust assets could be more effectively utilized if [Spouse] held such assets outright and free of trust." In Recital F of Agreement, the parties acknowledge that Spouse's testamentary limited power of appointment is "not operative." Paragraph 3 of Agreement provides:
>
>> By signing this Agreement and by virtue of the QTIP election for the Trust, the commutation of the Trust results in a deemed gift, for federal gift tax purposes, of the remainder interest in the Trust assets from [Spouse] to [Children] under Section 2519 of the Code. By virtue of the distribution of all of the Trust assets to [Spouse], the commutation of the Trust does not result in a deemed gift of [Spouse's] income interest in the Trust under Section 2511 of the Code. Additionally, by signing this Agreement and by virtue of the distribution of all of the Trust asset [sic] to [Spouse], the commutation of the Trust results in a gift, for federal gift tax purposes, of the remainder interest in the Trust from [Children] to

> [Spouse]. The deemed gift of the remainder interest from [Spouse] to [Children] and the gift from [Children] to [Spouse] results in a reciprocal gift transfer.

First up to be considered were the tax consequences to the spouse. The CCA states:

> In this case, Spouse, as personal representative of Decedent's estate, made an election under § 2056(b)(7) to treat Trust 1 as QTIP and claimed a marital deduction on Decedent's Form 706 for the value of Trust 1. Years later, on Date 3, Spouse and Children entered into Agreement. By its terms, Agreement effected the commutation of Trust 1.
>
> In a commutation, the trustee makes terminating distributions to the holders of the beneficial interests in the trust equal to the actuarial value of the interests. Each beneficiary gives up his or her respective beneficial interest in exchange for a lumpsum payment, in what is essentially a sale transaction. The commutation terminates any relationship between the beneficiary and the trust, and if all interests are commuted, the trust terminates.
>
> Based on the above, the commutation of Trust 1 effected by Agreement constitutes a disposition by Spouse of Spouse's qualifying income interest within the meaning of § 2519(a). Section 25.2519-1(a) and (f); *Estate of Novotny*. Accordingly, for gift tax purposes, Spouse is treated as transferring by gift all interests in Trust 1 other than the qualifying income interest.3

Footnote 3 states:

> Note that the commutation does not constitute a gift of Spouse's qualifying income interest under § 2511 because Spouse received adequate and full consideration for Spouse's qualifying income interest based on the distribution of all trust property to Spouse. *See* § 25.2519-1(g), *Example 2*.

The CCA summarized the Estate of Novotny, 93 T.C. 12 (1989) like this: the surviving spouse and remainderman divided the sale proceeds of QTIP proportionately on the basis of the respective values of their interests; the court indicated that the commutation constituted a disposition by the spouse of the income interest for purposes of § 2519 and was thus subject to gift tax.

So, the QTIP was terminated, the spouse received all the QTIP assets, and the spouse made a gift of the value of those assets to the descendants. Now let's look at the what the descendants did. Before the termination they would have received the assets when the spouse died. The CCA provides as follows:

> In this case, Child 1, Child 2, and Spouse entered into Agreement, which legally bound all persons interested in Trust 1. The effect of Agreement was to extinguish Spouse's testamentary limited power of appointment, commute Trust 1, and terminate Trust 1. As a result, Agreement vested a valuable property interest (the value of the remainder) in Children, the then remaindermen. Rather than accept a terminating distribution of the value of their beneficial interest, Child 1 and Child 2 agreed that the trust property "could be more effectively utilized" by Spouse holding the property outright. The outright distribution of all trust property to Spouse pursuant to the terms of Agreement constitutes a transfer of the value of Children's remainder interests without receipt of adequate and full

> consideration.4 Accordingly, Child 1 and Child 2 each made a gift under § 2511 of the value of their respective remainder interest in Trust 1 to Spouse. Section 2512(b).

Footnote 4 is omitted and deals with spouses' subsequent transfers.

The children argued that there had to be some offset here, otherwise the property was being taxed twice. The National Office rejected that position stating:

> In *Commissioner v. Wemyss*, 324 U.S. 303 (1945) and its companion case *Merrill v. Fahs*, 324 U.S. 308 (1945), the Supreme Court considered the gift tax meaning of the term "adequate and full consideration in money or money's worth" in the context of antenuptial contracts.
>
> In *Wemyss*, the donor transferred assets to his fiancé to compensate her for the loss of an income interest that would terminate upon her marriage to him. There was no dispute that both a promise of marriage and detriment to a contracting party constituted valuable consideration for purposes of the law of contracts. The Tax Court had held that if the promise of marriage was the consideration, it was not one reducible to a money value and, if the fiancé's loss of the income interest was the consideration, it did not constitute consideration in the hands of the donor. The Supreme Court stated:
>
> If we are to isolate as an independently reviewable question of law the view of the Tax Court that money consideration must benefit the donor to relieve a transfer by him from being a gift, we think the Tax Court was correct. . . . The section taxing as gifts transfers that are not made for "adequate and full (money) consideration" aims to reach those transfers which are withdrawn from the donor's estate.
>
> *Wemyss*, 324 U.S. at 307-08. In other words, valuable contractual consideration in the hands of the donor is not sufficient; adequate and full consideration is that which replenishes, or augments, the donor's taxable estate.
>
> In *Merrill*, the donor transferred property to donor's then spouse in exchange for spouse's relinquishment of marital rights in donor's remaining property. The Court held that spouse's relinquishment of the marital rights did not constitute adequate and full consideration for donor's transfer because the assets subject to the marital rights were already includible in donor's gross estate. *Id*. at 312-13.
>
> Rev. Rul. 69-505, 1969-2 C.B. 179, involves a transfer to a trust of joint-tenancy property that is treated as a reciprocal exchange for consideration in money or money's worth. A and B owned the property as joint tenants and could each unilaterally sever the joint tenancy, and if not severed, the property would pass to the survivor upon the death of the other joint tenant. A and B transferred the property to a trust, reserving the right to receive one-half of the income therefrom for their joint lives and all to the survivor for life with remainder to C. Citing § 25.2511-1(e) and *U.S. v. Estate of Grace*, 395 U.S. 316 (1969), the revenue ruling holds that the transfers between A and B are treated as a reciprocal exchange for consideration in money or money's worth. Thus, neither A nor B made a gift to the other to the extent that the transfers were of equal value. The revenue ruling concludes that since the value of the gift by B is less than the value of the gift by A, A is deemed to have made a gift to B of the difference in value of A's and B's transfer.

***

Agreement characterized the transaction as a commutation of Trust 1 followed by a distribution of all trust property to Spouse. Thus, Spouse agrees to the extinguishment of Spouse's lifetime interest in Trust 1 and Children agree to the extinguishment of their remainder interest in Trust 1 in exchange for receipt of their respective proportionate share of trust property. Also pursuant to Agreement, Children transfer their proportionate share of trust property received in the commutation to Spouse and receive no consideration from Spouse in exchange for the transfer. Absent entering into Agreement, Spouse had no right to the remainder under the terms of Trust 1 or otherwise. Therefore, from an economic perspective, the transaction resulted in a one-sided gift transfer from Children to Spouse.

It is the deemed gift transfer arising by application of § 2519(a) that is the crux of Spouse and Children's position, as stated in Agreement, that the transfers are reciprocal gift transfers. However, unlike in Rev. Rul. 69-505, Spouse's deemed transfer under § 2519(a) and Children's transfers of their remainder interests under § 2511 do not constitute offsetting exchanges of consideration. Spouse received no consideration for the deemed transfer to Children under § 2519(a). That is, because the entire value of Trust 1 was subject to inclusion in Spouse's gross estate under § 2044, the transfer of the remainder by Children to Spouse does not augment Spouse's estate and, thus, cannot constitute the receipt of adequate and full consideration for gift tax purposes. *See Commissioner v. Wemyss; Merrill v. Fahs.*

The fact that Spouse can receive no consideration for the deemed transfer resulting from the application of § 2519(a) does not nullify Children's transfers of their remainder interests in Trust 1. When Trust 1 was commuted, the remainder interest vested outright, equally in Children, the then remaindermen. Children then transferred their valuable property interest to Spouse and received nothing in exchange. Under § 2512(b) and *Wemyss*, these transfers by Children for no consideration constitute a gift. If Children were to transfer their remainder interests to a third party other than Spouse, the transfers would clearly be a gift. The result is the same if the donee is the surviving spouse beneficiary of a QTIP trust.5 Thus, the transaction cannot be considered involving offsetting transfers for consideration within the meaning of Rev. Rul. 69-505.

***

In Rev. Rul. 98-8, 1998-1 C.B. 541, the surviving spouse purchased from the trust remainderman the remainder interest in a QTIP trust by issuing a promissory note equal to the actuarial value of the remainder interest to the remainderman. As a result of the purchase, the trust terminated under its terms and the entire corpus was transferred to the surviving spouse. The surviving spouse then used the proceeds to pay the remainderman the value of the remainder interest. The revenue ruling concludes that the purchase of the remainder interest, which is analogous to a commutation of the QTIP trust, is treated as a taxable disposition by the surviving spouse of the qualifying income interest, resulting in a gift of the value of the remainder interest under § 2519. Citing to *Wemyss*, the revenue ruling explains that the receipt of the remainder interest cannot increase the donor's taxable estate because it is already subject to inclusion in the surviving spouse's taxable estate under § 2044. Accordingly, the surviving spouse's receipt of the remainder interest cannot constitute adequate and full consideration under § 2512 for the promissory note transferred. The revenue ruling notes that any other result would subvert the legislative intent and statutory scheme underlying § 2056(b)(7).

In *Estate of Kite v. Commissioner*, T.C. Memo. 2013-43, the surviving spouse was the beneficiary of two QTIP trusts. According to a prearranged plan, the QTIP trusts were terminated and all assets were distributed to the surviving spouse. Two days later, the surviving spouse sold the assets to her three children in exchange for three deferred private annuity agreements under which payments would commence ten years thereafter. In the event that the surviving spouse died within the ten-year period, her annuity interest would terminate and nothing would be payable to her estate. Based on the facts and circumstances, the court found the sale of the assets of the QTIP trusts to the children in exchange for deferred annuities constituted a bona fide sale for adequate and full consideration and treated the annuity transaction as a single integrated transaction for purposes of § 2519. Moreover, the sale of the assets of the QTIP trusts, followed by the payment to the surviving spouse of the proceeds equal to the value of her income interest, was a disposition of her qualifying income interest for purposes of § 2519. In response to petitioner's post-opinion argument that there was no gift tax deficiency for the § 2519 disposition of the surviving spouse's qualifying income interest based on the receipt of full and adequate consideration, the court stated,

> [S]ection 2519(a) treats the disposition of a qualifying income interest as a deemed transfer of the remainder interest. In other words, "the donee spouse is treated as making a gift under section 2519 of the entire trust less the qualifying income interest" (emphasis added). Sec. 25.2519-1(a), Gift Tax Regs. The term "gift" is not an accident. The remainder interest is a future interest held by the remainderman and not the donee spouse. Accordingly, the donee spouse cannot receive full and adequate consideration, or indeed any consideration, in exchange for the remainder interest. This result is supported by the intent of the marital deduction and the QTIP regime.

Estate of Kite v. Commissioner, No. 6772-08 (T.C. Oct. 25, 2013) (order and decision under Tax Court Rule 155). The court ruled that the decedent owed gift tax on the value of the deemed § 2519 gift. *Id*.

Here, the QTIP statutory scheme and legislative history support the view that Rev. Rul. 69-505 has no application and the separate transfers by Spouse and Children cannot be offset by consideration for gift tax purposes. Decedent's estate received the benefit of deferral of the estate tax liability allocable to the property of Trust 1 as a result of electing QTIP for such property under § 2056(b)(7). Because the commutation effected by Agreement constitutes a taxable disposition by Spouse within the meaning of § 2519(a) (see Issue 1), it marks the end of the deferral of the tax.

Rev. Rul. 98-8 and *Estate of Kite* illustrate that a disposition under § 2519(a) has significant tax consequences, which are appropriate in view of the QTIP statutory scheme and legislative history. Here, because the commutation of Trust 1 results in a disposition of Spouse's qualifying income interest within the meaning of § 2519(a), Spouse is treated as effectively transferring the remainder interest even though under state property law precepts the remainder interest is held by Children, not Spouse. The taxable transfer by Spouse resulting from the application of § 2519 marks the end of the deferral of estate tax on the Trust 1 property that passed untaxed from Decedent's estate, and is no longer subject to inclusion in Spouse's gross estate under § 2044(b)(2). Eliminating the taxable transfer by Spouse based on a deemed reciprocal gift transfer by the remaindermen would allow the value of the remainder of Trust 1 to escape transfer tax under both §§ 2519 and 2044, which would be contrary to the QTIP statutory scheme and legislative history.

Finally, the National Office got around to valuing the two gifts. The spouse's gift – recall that the spouse received all the property – was valued by subtracting the spouse's income interest from the full value of the trust property. The children's gifts were valued based on standard actuarial methods. The CCA states:

> Section 25.2519-1(c)(4) provides that the amount treated as a transfer under § 25.2519-1(c)(1) is further reduced by the amount the surviving spouse is entitled to recover under § 2207A(b) (relating to the right to recover gift tax attributable to the remainder interest). Under § 25.2519-1(c)(4), if the donee spouse is entitled to recover gift tax under § 2207A(b), the amount of the gift tax recoverable and the value of the interest treated as transferred under § 2519 are determined by using the same interrelated computation applicable for other transfers in which the transferee assumes the gift tax liability. The gift tax consequences of failing to exercise the right of recovery are determined separately under § 25.2207A-1(b).
>
> Under § 2207A(b) and § 25.2207A-1(a), a surviving spouse treated as transferring an interest in property by reason of § 2519 is entitled to recover from the "person receiving the property" the amount of gift tax attributable to that property. The right of recovery arises at the time the gift tax is actually paid by the surviving spouse subject to § 2519.
>
> In this case, the amount of Spouse's gift under § 2519 is determined by subtracting the value of Spouse's qualifying income interest from the fair market value of the trust property as of Date 3, the date of Agreement. Section 2519(a); § 25.2519-1(a). Discretionary principal distributions and the testamentary limited power of appointment are not taken into account. A standard § 7520 income factor can be used to value the qualifying income interest, and thus, the value of Spouse's qualifying income interest is determined by multiplying the value of the trust property by the income factor of
>
> 0.09172.6 Section 25.2512-5(d)(2)(iii); § 25.7520-1. Based on a value of the trust property of $b, the value of Spouse's qualifying income interest is $e. The amount of Spouse's gift under § 2519, therefore, is $f (i.e., $b – $e = $f).
>
> To the extent Spouse is entitled to recover gift tax attributable to the remainder interest under § 2207A(b), this amount is reduced, using an interrelated calculation. Note that, under § 25.2207A-1(b), if Spouse waives or otherwise fails to exercise Spouse's right of recovery, Spouse will be treated as making an additional gift in the amount of the unrecovered tax.7
>
> ***
>
> Based on the available facts, it is appropriate to value each of Children's interests as one-half of the actuarial present value of the remainder interest, adjusting as necessary for the restrictions on the beneficial interests. The determination takes into account that the possibility of principal invasion was so remote as to be negligible, given that the combined value of the property held by Trust 1 was $b at the time of commutation and, thus, annual income of Trust 1 would have been substantial and likely sufficient for Spouse's health, maintenance, and support, even if Spouse's accustomed manner of living were extravagant.8 Further, the determination takes into account, based on all the facts and circumstances, that the testamentary limited power of appointment would be appropriately treated as having no measurable effect on the values of these interests.

> Accordingly, based on the available facts, we conclude that the actuarial value of Children's proportionate shares of the remainder interest is properly determined under § 7520, using a standard remainder factor. Thus, the value of each child's remainder interest under § 7520 is determined by multiplying the value of the trust property by the remainder factor of 0.908289 then dividing the product by 2. Section 25.2512-5(d)(2)(ii); § 25.7520-1. Based on a value of the trust property of $b, the fair market value of each child's gift, therefore, is $g (i.e., ($b x 0.90828) ÷ 2 = $g).

Footnote 8 notes that the spouse must not have needed principal distributions because the spouse sold most of the assets received "immediately after Spouse received it in exchange for promissory notes that did not provide for the payment of principal until a date after Spouse's probable life expectancy."

In PLR 202116001 a QTIP ("Qualified Trust") was divided and the spouse released an income right over part of the trust. The ruling describes what happened as follows:

> On Date 1, Trustee divided Qualified Trust into two trusts, Qualified Trust-A and Continuing Qualified Trust, both with terms and provisions identical to those set forth in Qualified Trust. Trustee placed $x in cash and marketable securities into Qualified Trust-A and retained all other assets in Continuing Qualified Trust. The assets retained in Continuing Trust are income producing such that Spouse retains the enjoyment of the assets. On Date 2, Trustee and the beneficiaries of Qualified Trust-A petitioned Court for entry of an order with respect to Qualified Trust-A. On Date 3, finding that a continuation of Qualified Trust-A unchanged would defeat or substantially impair its purposes, Court entered Order. Order modifies the terms and provisions of Qualified Trust-A.
>
> Article V of Qualified Trust-A, as modified by Order, provides that Qualified Trust-A shall terminate upon the death of the last surviving income beneficiary. However, at any time, including prior to Spouse's death, Qualified Trust-A may be terminated as to a beneficiary's interest and any part of the trust property representing her interest may be distributed to that beneficiary if the trustee considers such distribution to be in the best interests of the beneficiary, considering the demonstrated ability of the beneficiary to handle money and property wisely, her judgment, prudence and discretion, and any other factors the trustee may consider relevant. The trustee may exercise the power of termination even if the beneficiary is restrained from alienating her interest.
>
> Article III, section 3.1, as modified by Order, provides that the original and principal beneficiaries of Qualified Trust-A shall become the income beneficiaries in proportion to their interests in the principal. Section 7.2, allowing the trustee to make distributions to Spouse for her health, education, maintenance and support, is deleted in its entirety. Order further provides that, the terms and conditions of Qualified Trust-A shall be interpreted and applied as if Spouse had died on the date Order is entered, and that Trustees shall continue to be the trustee of Qualified Trust-A and Continuing Qualified Trust. Although Order is effective on Date 3, it is expressly conditioned on receipt of favorable rulings from the Internal Revenue Service prior to Date 4.

Because the trust continued even after the income interest was given up, there was no gift form the remainder beneficiaries. However, the gift by the spouse was described like this:

> In the present case, following the division of Qualified Trust on Date 1, the trusts resulting from the division, Qualified Trust-A and Continuing Qualified Trust, had terms and provisions identical to those set forth in Qualified Trust. Thus, the division of Qualified Trust did not change the beneficial interests of Spouse, Daughter 1 or Daughter 2 in the property originally held in Qualified Trust. Accordingly, based on the facts submitted and representations made, we rule that the division of Qualified Trust on Date 1 did not cause the assets remaining in Qualified Trust after the division (referred to as Continuing Qualified Trust) to be subject to the United States Gift Tax pursuant to § 2519 or 2511.
>
> Order, however, modifies the terms of Qualified Trust-A to change the beneficial interests of Spouse, Daughter 1, and Daughter 2 in the property of Qualified Trust-A. Article V of Qualified Trust-A, which continues to provide that Qualified Trust-A shall terminate upon the death of the last surviving income beneficiary, is modified to provide that at any time, including prior to Spouse's death, Qualified Trust-A may be terminated as to a beneficiary's interest. In other words, Order terminates Spouse's income interest as of Date 3. The term "disposition" as used in § 2519, applies broadly to circumstances in which the surviving spouse's right to receive the income is relinquished or otherwise terminated, by whatever means. See H. Rep. No. 97-201, at 161 (1981). The property in Qualified Trust-A is a portion of the property originally held by Qualified Trust with respect to which Decedent's estate was allowed a deduction under § 2056(b)(7). Thus, for purposes of § 2519, the entry of Order on Date 3 resulted in a disposition of a qualifying income interest for life in Qualified Trust-A.
>
> Accordingly, based on the facts submitted and representations made, we rule that Spouse is deemed to have made a transfer of all of the property in Qualified Trust-A under § 2519, other than the value of her qualifying income interest, and Spouse is deemed to have made a transfer of her qualifying income interest in Qualified Trust-A under § 2511, on Date 3 upon entry of Order approving modifications by which the income interest of Spouse in Qualified Trust-A is terminated and distributions from Qualified Trust-A are permitted to be made prior to death of Spouse.

A QTIP election is at root a "deal" between the surviving spouse and the government. The government allows a marital deduction and the surviving spouse agrees that all of the enjoyment and value of the property as to which the election is made will flow through the hands of the surviving spouse. The "deal" is necessary because a QTIP trust often is designed without any other power in the surviving spouse which would cause estate tax inclusion. Accordingly, if the surviving spouse gives up any of the income interest in QTIP property, the surviving spouse is deemed by section 2519 to have made a gift of the entire value of that QTIP property (that would not have had to be the rule; the surviving spouse could have been deemed to have made a gift of that portion of the income, but such a determination is complicated and uncertain, thus a strict "penalty" rule was imposed by statute). However, concluding that a "transfer" of a remainder by the children has occurred and is a gift creates double-taxation of the same QTIP property. Had there been no QTIP election the government's approach would have been more sensible: the spouse had an income interest, the children a remainder interest, the children allowed all the trust property to be distributed to the spouse which could have been a gift of the remainder interest.

N. SECTIONS 2501 TO 2524 – GIFTS

1. **Unusual Assignment Clause Produced A Gift**. Nelson v. Commissioner, T.C. Memo. 2020-81, involved the transfer of units in a limited partnership, Longspar, to a trust in 2008. One transfer was a gift, the other a sale for a note. The transfers were by assignment as follows:

> Mrs. Nelson made two transfers of limited partner interests in Longspar to the Trust. The first transfer was a gift on December 31, 2008. The Memorandum of Gift and Assignment of Limited Partner Interest (memorandum of gift) provides:
>
> > [Mrs. Nelson] desires to make a gift and to assign to * * * [the Trust] her right, title, and interest in a limited partner interest having a fair market value of TWO MILLION NINETY-SIX THOUSAND AND NO/100THS DOLLARS ($2,096,000.00) as of December 31, 2008 * * *, as determined by a qualified appraiser within ninety (90) days of the effective date of this Assignment.
>
> Petitioners structured the second transfer, on January 2, 2009, as a sale. The Memorandum of Sale and Assignment of Limited Partner Interest (memorandum of sale) provides:
>
> > [Mrs. Nelson] desires to sell and assign to * * * [the Trust] her right, title, and interest in a limited partner interest having a fair market value of TWENTY MILLION AND NO/100THS DOLLARS ($20,000,000.00) as of January 2, 2009 * * *, as determined by a qualified appraiser within one hundred eighty (180) days of the effective date of this Assignment * * *.
>
> Neither the memorandum of gift nor the memorandum of sale (collectively transfer instruments) contains clauses defining fair market value or subjecting the limited partner interests to reallocation after the valuation date. In connection with the second transfer, the Trust executed a promissory note for $20 million (note). Mr. Nelson, as trustee, signed the note on behalf of the Trust. The note provides for 2.06% interest on unpaid principal and 10% interest on matured, unpaid amounts, compounded annually, and is secured by the limited partner interest that was sold. Annual interest payments on the note were due to Mrs. Nelson through the end of 2017.

Appraisals were completed and 6.14% and 58.65% of the Longspar units were transferred. Upon audit, the IRS increased the values of the units transferred. The question for the court was what was transferred:

> The parties agree that the transfers were complete once Mrs. Nelson executed the transfer instruments parting with dominion and control over the interests. See Burnet v. Guggenheim, 288 U.S. 280, 286 (1933); Carrington v. Commissioner, 476 F.2d 704 (5th Cir. 1973), aff'g T.C. Memo. 1971-222; Estate of Metzger v. Commissioner, 100 T.C. 204, 208 (1993), aff'd, 38 F.3d 118 (4th Cir. 1994); sec. 25.2511-2(b), Gift Tax Regs. But they disagree over whether Mrs. Nelson transferred Longspar limited partner interests of $2,096,000 and $20 million, as petitioners contend, or percentage interests of 6.14% and 58.65%, as respondent contends.
>
> We look to the transfer documents rather than subsequent events to decide the amount of property given away by a taxpayer in a completed gift. See Estate of

Petter v. Commissioner, T.C. Memo. 2009-280, 2009 WL 4598137, at *12 (citing Succession of McCord v. Commissioner, 461 F.3d 614, 627 (5th Cir. 2006), rev'g and remanding 120 T.C. 358 (2003)), aff'd, 653 F.3d 1012 (9th Cir. 2011); see also Commissioner v. Procter, 142 F.2d 824 (4th Cir. 1944) (disregarding the subsequent reallocation of property to the donor via a saving clause as contrary to public policy), rev'g and remanding a Memorandum Opinion of this Court. Petitioners argue that the transfer instruments show that Mrs. Nelson transferred specific dollar amounts, not fixed percentages, citing a series of cases that have respected formula clauses as transferring fixed dollar amounts of ownership interests. In each of those cases we respected the terms of the formula, even though the percentage amount was not known until fair market value was subsequently determined, because the dollar amount was known. Wandry v. Commissioner, T.C. Memo. 2012-88, 2012 WL 998483, at *4; Hendrix v. Commissioner, T.C. Memo. 2011-133, 2011 WL 2457401, at *5-*9; Estate of Petter v. Commissioner, 2009 WL 4598137, at *11-*16.

Saving clauses have been treated differently. As we explained in Estate of Petter and Wandry, courts have rejected saving clauses because they relied on conditions subsequent to adjust the gifts or transfers so the size of the transfer (as measured either in dollar amount or percentage) could not be known. Thus, for example, in Commissioner v. Procter, 142 F.2d at 827, the Court of Appeals for the Fourth Circuit rejected a clause adjusting part of a gift to "automatically be deemed not to be included in the conveyance in trust hereunder and shall remain the sole property of * * * [the taxpayer]" because the adjustment would be triggered only by a "final judgment or order of a competent federal court of last resort that any part of the transfer * * * is subject to gift tax."

In Succession of McCord v. Commissioner, 461 F.3d at 618, the Court of Appeals for the Fifth Circuit upheld a gift of an interest in a partnership expressed as "a dollar amount of fair market value in interest" reduced by a transfer tax obligation rather than a percentage interest that was determined in agreements subsequent to the gift. It held that "a gift is valued as of the date that it is complete; the flip side of that maxim is that subsequent occurrences are off limits." Id. at 626. The formula clause in the initial transfer document did not include qualifying language that fair market value was to be "as finally determined for [Federal gift] tax purposes," but the court did not find that omission fatal because the value of the gift was ascertainable as of the date it was complete. Id. at 627.

Petitioners argue that we should construe the transfer clauses here as more akin to the formula clauses that were upheld in Succession of McCord, Estate of Petter, and Wandry, that is, read them as transferring dollar amounts rather than percentages. However, as part of their argument, they cite evidence of their intent, which includes their settlement discussions with IRS Appeals and subsequent adjustments to reflect changes in valuation to reflect those discussions. Of course, as in Succession of McCord, we look to the terms of the transfer instruments and not to the parties' later actions except to the extent that we conclude the terms are ambiguous and their actions reveal their understanding of those terms. Id. at 627-628.

Therefore, to decide whether the transfers were of fixed dollar amounts or fixed percentages, we start with the clauses themselves, rather than the parties' subsequent actions. The gift is expressed in the memorandum of gift as a "limited partner interest having a fair market value of TWO MILLION NINETY-SIX THOUSAND AND NO/100THS DOLLARS ($2,096,000.00) as of December 31, 2008 * * *, as determined by a qualified appraiser within ninety (90) days of the effective date of this Assignment." Similarly, the sale is expressed in the

> memorandum of sale as a "limited partner interest having a fair market value of TWENTY MILLION AND NO/100THS DOLLARS ($20,000,000.00) as of January 2, 2009 * * *, as determined by a qualified appraiser within one hundred eighty (180) days of the effective date of this Assignment."
>
> The transferred interests thus are expressed in the transfer instruments as an interest having a fair market value of a specified amount as determined by an appraiser within a fixed period. The clauses hang on the determination by an appraiser within a fixed period; value is not qualified further, for example, as that determined for Federal estate tax purposes. See, e.g., Estate of Christiansen v. Commissioner, 130 T.C. 1, 14-18 (2008) (upholding gift clause providing fair market value "as such value is finally determined for federal estate tax purposes"), aff'd, 586 F.3d 1061 (8th Cir. 2009); Estate of Petter v. Commissioner, 2009 WL 4598137, at *11-*16 (upholding gift clause transferring the number of units of a limited liability company "that equals one-half the minimum * * * dollar amount that can pass free of federal gift tax by reason of Transferor's applicable exclusion amount" along with a clause providing for an adjustment to the number of units if the value "is finally determined for federal gift tax purposes to exceed the amount described" in the first clause).
>
> Unlike the clause in Succession of McCord, "fair market value" here already is expressly qualified. By urging us to interpret the operative terms in the transfer instruments as transferring dollar values of the limited partner interests on the bases of fair market value as later determined for Federal gift and estate tax purposes, petitioners ask us, in effect, to ignore "qualified appraiser * * * [here, Mr. Shrode] within * * * [a fixed period]" and replace it with "for federal gift and estate tax purposes." While they may have intended this, they did not write this. They are bound by what they wrote at the time. As the texts of the clauses required the determination of an appraiser within a fixed period to ascertain the interests being transferred, we conclude that Mrs. Nelson transferred 6.14% and 58.35% of limited partner interests in Longspar to the Trust as was determined by Mr. Shrode within a fixed period.

Longspar itself owned interests in a closely-held company, "Stacked" discounts were allowed, summarized by the court as follows:

> First, Mrs. Nelson transferred 6.14% and 58.65% Longspar limited partner interests to the Trust. Next, discounts of 15% for lack of control and 30% for lack of marketability should apply to the valuation of WEC common stock, resulting in a fair market value of $912 per share. Therefore, the controlling, marketable value of Longspar is $60,729,361. Discounts of 5% for lack of control and 28% for lack of marketability should apply to calculate the fair market value of a Longspar limited partnership interest. As a result, a 1% Longspar limited partner interest has a fair market value of $411,235 and the 6.14% and 58.65% Longspar limited partner interests Mrs. Nelson transferred to the Trust have fair market values of $2,524,983 and $24,118,933, respectively.

The Fifth Circuit upheld the Tax Court in Nelson v. Commissioner, 17 F.4th 556 (5th Cir. 2021). The opinion states:

> As the government well-analogized, if a farmer agrees to sell the number of cows worth $1,000 as determined by an appraiser, and the appraiser determines that five cows equals that stated value, then the sale is for five cows. If a later appraisal determined that each cow was worth more, and that two extra cows had been

> included in the sale, nothing in the agreement would allow the farmer to take the cows back. The parties would be held to what they agreed—a transfer of the number of cows determined by the appraiser to equal $1,000. So too here. No language in the transfer agreements allows the Nelsons to reopen their previously closed transaction and reallocate the limited partner interests based on a change in valuation.
>
> While the formula-clause cases might give the appearance of reopening a transaction in just such a fashion, that is not the case. A gift is considered complete, and thus subject to the gift tax, when "the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or the benefit of another." 26 C.F.R. § 25.2511-2(b) (2021). For tax purposes, the "value ... at the date of the gift shall be considered the amount of the gift." 26 U.S.C § 2512(a). With a formula clause, the transaction is still closed even if a reallocation occurs. That reallocation simply works to ensure that a specified recipient "receive[s] those units [he or she was] already entitled to receive." *Est. of Petter*, 653 F.3d at 1019. Similarly, the value of the gift existed and could be determined at the time of the transfer. "The number of ... units" transferred is "capable of mathematical determination from the outset, once the fair market value [is] known." *Id.* The reallocation clauses thus allow for the proper number of units to be transferred based on the final, correct determination of valuation.
>
> The Nelsons did not include such a clause. Instead, the trust has already received everything it was entitled to—the number of units matching the stated value as determined by a qualified appraiser. Both parties agree with the Tax Court's conclusion that the gift was complete, and that Mary Pat parted with dominion and control, on the date listed in each transfer agreement. On those dates, Mary Pat irrevocably transferred the number of units the appraiser determined equaled the stated values. No clause in the transfer documents calls for a reallocation to ensure the trust received a different amount of interests if the final, proper valuation was different than the appraiser's valuation. The percentage of interests was transferred on the listed dates, even if those percentages were indefinite until the appraisal was completed. *Cf. Robinette v. Helvering*, 318 U.S. 184, 187, 63 S.Ct. 540, 87 L.Ed. 700 (1943) (holding that a gift was complete even in the face of "indefiniteness of the eventual recipient"). The gift tax is assessed as of the date of the transfer and on the value of those percentages, whatever that value may be. Simply put, while the Nelsons may have been attempting to draft a formula clause, they did not do so.

Interestingly, neither the IRS nor the courts seemed bothered by the condition that the appraisal occur within 90 days after the transfer – that it need not occur previously or simultaneously with the transfer. That attitude is encouraging.

2. **Step-Transaction**. Smaldino v. Commissioner, T.C. Memo. 2021-127, is a cautionary tale, albeit one with bad facts. From a 30,000 foot view, Mrs. Smaldino needed assets to give to a trust, to use her own applicable exclusion. Mr. Smaldino gave her the assets which she promptly gave to the trust, and the IRS said she was just his agent so he really made the gift. The Tax Court agreed. The opinion states:

> Petitioner owned and operated numerous rental properties in southern California. He placed 10 of these properties in Smaldino Investments, LLC (LLC), which he owned through a revocable trust. In 2013 he transferred about 8% of the LLC

> class B member interests to the Smaldino 2012 Dynasty Trust (Dynasty Trust), an irrevocable trust that he had created a few months earlier for the benefit of his children and grandchildren. Around the same time, petitioner purportedly transferred about 41% of the LLC class B member interests to his wife, Agustina Smaldino, who purportedly retransferred them to the Dynasty Trust the next day.
>
> On petitioner's 2013 gift tax return, he reported as a taxable gift only the approximately 8% of the LLC class B membership interests he had transferred directly to the Dynasty Trust. Respondent determined that petitioner had made a taxable gift to the Dynasty Trust of 49% of the class B membership interests, including the approximately 41% interest that assertedly had passed from petitioner to the Dynasty Trust indirectly through Mrs. Smaldino. After revaluing the LLC interests, respondent determined that petitioner had a $1,154,000 gift tax deficiency for 2013.
>
> ***
>
> Petitioner has been married to Mrs. Smaldino since 2006. She has a master's degree in economics and since about 1995 has worked almost continuously in petitioner's businesses--first in his liquor-store business and, after a three-year interval, in his property-management business.
>
> Petitioner has 6 children from a prior marriage and 10 grandchildren. Two of the children work in petitioner's property-management business.
>
> In 2012, when he was 69, a health scare motivated petitioner to get his estate planning in order. He and Mrs. Smaldino agreed that she should have security in her own assets; they did not want her assets and his children's assets commingled as part of the estate plan. Petitioner wanted to pass his business to his children and grandchildren and to give many of his remaining assets to Mrs. Smaldino. Similarly, she wanted petitioner's progeny to have the property-management business.
>
> Petitioner and Mrs. Smaldino developed a plan to provide his progeny a bundle of assets comprising certain properties in the property-management company and to provide her a separate group of assets that would far exceed any share that the children received. As explained below, this plan involved placing certain of petitioner's business properties in the LLC and then transferring interests in the LLC to a trust for the benefit of his children and grandchildren. Petitioner resolved to transfer up to 50% of the LLC interests, the maximum he could transfer without triggering reassessment of property taxes on the LLC's assets.

The government argument was simply that the transfers to Mrs. Smaldino were indirectly made by Mr. Smaldino, analogizing to various annual exclusion and similar cases.

> Respondent contends that the doctrine of substance over form demands that we disregard petitioner's purported transfer of the LLC member interests to Mrs. Smaldino and her purported retransfer of these same interests to the Dynasty Trust a day later because these actions were “part of a prearranged plan between all parties involved to effectuate the transfer of the ownership of the LLC” from petitioner to the Dynasty Trust. Respondent urges us to treat the two purported transfers, in accordance with their asserted substance, as an indirect gift from petitioner to the Dynasty Trust.

> In support of his position, respondent relies on a line of cases in which the courts have employed substance over form principles to recharacterize multistep property transfers among related parties as indirect gifts between the persons who were determined to be, in substance, the actual donors and donees. See, e.g., Heyen v. United States, 945 F.2d 359 (10th Cir. 1991) (treating the decedent's inter vivos transfers of stock shares to multiple nonfamily members, who immediately reconveyed the shares to members of the decedent's family, as indirect transfers from the decedent to the ultimate donees); Estate of Bies v. Commissioner, T.C. Memo. 2000-338 (treating the decedent's inter vivos transfers of closely held corporation stock to her daughters-in-law and granddaughter-in-law, each of whom immediately transferred the stock to her husband, as indirect transfers from the decedent to those husbands); Estate of Cidulka v. Commissioner, T.C. Memo. 1996-149 (treating the decedent's inter vivos transfers of stock to his daughter-in-law, who immediately transferred the stock to her husband, as gifts of minority stock interests to the decedent's son for purposes of valuing blocks of shares).

One of the problems the taxpayers had was that the various transfer documents had only “effective as of” dates as the court states:

> The following documents were executed as part of petitioner's family estate plan.
>
> 1. Petitioner, as trustee of the Smaldino Family Trust, executed a document captioned “ASSIGNMENT SEPARATE FROM CERTIFICATE”, which states that he “assigns and transfers” to Mrs. Smaldino a “sufficient number” of nonvoting units in the LLC “so that the fair market value of such nonvoting units as determined for federal gift tax purposes shall be Five Million Two Hundred Forty Nine Thousand One Hundred Eighteen and 42/100ths Dollars ($5,249,118.42)”. Petitioner and Mrs. Smaldino decided upon this amount on the basis of her then-available Federal estate and gift tax exemption. This document, which is signed by both petitioner and Mrs. Smaldino, states that it is “Effective: April 14, 2013” but does not indicate the date it was executed.
>
> 2. Mrs. Smaldino executed an “ASSIGNMENT SEPARATE FROM CERTIFICATE”, which states that she “assigns and transfers” to Allen Douglass Smaldino, as trustee of the Dynasty Trust, nonvoting shares of the LLC that are described identically as in the certificate whereby petitioner had purportedly assigned these same LLC interests to her. This document, which is signed by both Mrs. Smaldino and Allen Douglass Smaldino, states that it is “Effective: April 15, 2013” but does not indicate the date it was executed.
>
> 3. Petitioner, as trustee of the Smaldino Family Trust, executed a document captioned “ASSIGNMENT SEPARATE FROM CERTIFICATE”, which states that he “assigns and transfers” to Allen Douglass Smaldino, as trustee of the [*9] Dynasty Trust, a “sufficient number” of nonvoting units in the LLC “so that the fair market value of such nonvoting units as determined for federal gift tax purposes shall be One Million Thirty One Thousand Eight Hundred Eighty One and 58/100ths Dollars ($1,031,881.58).” This document, which is signed by both petitioner and Allen Douglass Smaldino, states that it is “Effective: April 15, 2013” but does not indicate the date it was executed.
>
> When the dust settled, the Dynasty Trust wound up with 49% of the LLC class B member interests that previously had belonged to petitioner.3 Petitioner hired James A. Biedenbender to value a 49% ownership interest in the LLC class B units. In a report dated August 22, 2013, Mr. Biedenbender opined that “a 49%

> Class B units nonvoting member's interest in the Company [the LLC] as [of] April 15, 2013 for certain tax reporting requirements on Form 709, US Gift Tax Return" was $6,281,000.
>
> In exchange for the use of Mrs. Smaldino's available Federal estate and gift tax exemption, on June 10, 2013, petitioner amended the Smaldino Family Trust to provide her additional moneys and properties. The LLC's operating agreement was never amended to account for any transfer of units to Mrs. Smaldino. However, exhibit A of the operating agreement was amended "as of April 15, 2013" to show the Dynasty Trust as holding a 49% ownership interest in the LLC (consisting of two blocks of class B nonvoting units--one of 409.5 units and the other of 80.5 units, representing 40.95% and 8.05%, respectively, of the 1,000 aggregated voting and nonvoting units) and to show petitioner, as trustee of the Smaldino Family Trust, as holding the remaining 51% ownership interest (consisting of 500 class B nonvoting units as well as the 10 class A voting units). This amendment is signed by petitioner as the LLC's manager but does not indicate the date on which it was executed.

Among the other problems for the taxpayers were that Mrs. Smaldino was never admitted as a member of the LLC, the operating agreement never reflected the transfers (no updating of the ownership records), no income tax return ever reflected her ownership, and Mr. Smaldino did not report the gift to Mrs. Smaldino on his gift tax return.

The Smaldinos did not help themselves in their trial testimony:

> He does not expressly dispute, however, that the transactions in question were part of a prearranged plan to transfer ownership of 49% of the LLC class B member interests to the Dynasty Trust while using Mrs. Smaldino's estate and gift tax exemption. Indeed, petitioner testified that he intended for the properties in the LLC to be divided among five of his children, as beneficiaries of the Dynasty Trust, while Mrs. Smaldino would receive a larger share of assets that were "outside the LLC". Mrs. Smaldino testified that before the purported transfer in question she had already made "a commitment, promise" to her husband and family that she would transfer the LLC units to the Dynasty Trust. When asked on direct examination whether she could have changed her mind if she had wanted to, she responded: "No, because I believe in fairness."

The valuation was favorable to the Smaldinos with a 36% discount.

There is no magic "safe" time between two gifts that enables avoidance of a step-transaction argument. Suppose Mr. Smaldino had sold the LLC interest to Mrs. Smaldino for a note, or had swapped assets with her.

O. SECTION 2518 – DISCLAIMERS

P. SECTIONS 2601-2654 - GENERATION-SKIPPING TRANSFER TAX

1. Trust Amendment Approved. PLR 202206008 involved interesting facts. A Trust B was created at the death of the grantor before September 25, 1985. The provisions of Trust B were these:

> Under Clause 5., Trust B is established for the benefit of Grantor's sole surviving child, Child. Under Clause 5., Paragraph (1), Trustee must distribute all of the net income from Trust B to Child during Child's life. Clause 5., Paragraph (5)

> provides that Trustee has the authority in the exercise of its sole and absolute discretion to withdraw from the corpus of the trust, such sum or sums as it may deem necessary for the maintenance, education, welfare and comfort of any beneficiary or beneficiaries, and such exercise of discretion by Trustee shall be final and not subject to question by any person or persons. Under Clause 5., Paragraph (2), upon Child's death, Trust B terminates and is to be distributed, *per stirpes*, to Child's surviving descendants, if any, and if none, to the heirs at law of Grantor's wife, Spouse.

Trustee wanted to give a power of appointment to Child which resulted in litigation that was ultimately settled. The IRS described that process as follows:

> A controversy arose regarding the administration of Trust B and Trustee's desire to exercise its discretion to provide Child with a power of appointment over certain assets of Trust B. Trustee asserts that the exercise of this discretionary authority is to carry out the intent of Grantor to keep trust assets in the hands of Grantor's descendants upon Child's death and to minimize transfer taxation upon Trust B assets. However, according to Trustee, due to family dynamics, including separation and divorce, as well as changing tax laws, Grantor's intent may not be carried out.
>
> Child and the other beneficiaries of Trust B have been in negotiations regarding Trustee's proposed exercise of its discretionary authority for approximately several months. During this time, Beneficiary 1 and Beneficiary 2 (individually and as representative of his minor children) opposed the proposed exercise of Trustee's discretionary authority. Litigation was commenced, but after further negotiations, the parties were able to reach a settlement agreement. Court has approved, after a hearing on the matter, the settlement agreement in an order, dated Date 3 (Settlement Agreement), subject to a favorable private letter ruling by the Internal Revenue Service.
>
> Settlement Agreement provides that Trust B, Clause 5., Paragraph (2) is modified to grant Child a testamentary general power of appointment to appoint a "Defined Portion" of Trust B principal to Child's estate. The term "Defined Portion" means the largest portion of Trust B that could be included in Child's federal estate without increasing the total amount of the "Transfer Taxes" actually payable at Child's death over and above the amount that would have been actually payable in the absence of this provision. The term "Transfer Taxes" means all inheritance, estate, and other death taxes, plus all federal and state GST taxes, actually payable by reason of Child's death. In the event Child fails to exercise this power, and to the extent the trust property is not subject to this power, upon Child's death, Trustee shall distribute such property, *per stirpes*, to Child's then living descendants, if any, and if none, to the heirs at law of Spouse.

The IRS issued two favorable rulings. First:

> In this case, pursuant to the proposed modification to Trust B, the trust will be modified to grant Child a testamentary general power of appointment under § 2041(a)(2) to appoint a "Defined Portion" of Trust B principal to Child's estate. In the event Child fails to exercise this power, and to the extent Trust property is not subject to this power, upon Child's death, Trustee shall distribute such property, *per stirpes*, to Child's then living descendants, if any, and if none, to the heirs at law of Spouse.

> Under these circumstances, we conclude that the modification of Trust B pursuant to Court order will not shift any beneficial interest in Trust B to any beneficiary who occupies a lower generation (as defined in § 2651) than the person or persons who held the beneficial interest prior to the modification and the modification will not extend the time for vesting of any beneficial interest in Trust B beyond the period provided for in Trust B. Accordingly, based on the facts submitted and the representations made, we conclude that the modifications of Trust B pursuant to the Date 3 Court order will not cause Trust B to lose its exempt status from the GST tax or otherwise become subject to the GST tax.

Then a ruling on the effect of the general power to Child:

> In this case, the modification of Trust B to grant Child a testamentary general power of appointment pursuant to the Court-approved Settlement Agreement will not cause Trust B property to be includible in Child's gross estate. However, the exercise by Child of Child's testamentary general power of appointment will result in the appointed property being includible in Child's gross estate under § 2041(a)(2). Accordingly, based on the facts submitted and the representations made, we conclude that the exercise by Trustee of its discretionary authority over Trust B principal upon the terms of the Settlement Agreement will result in only the trust property subject to Child's testamentary general power of appointment to be included in Child's gross estate under § 2041(a)(2).

The conclusion seems to be missing a phrase. Presumably the point is that the property subject to the power is included in Child’s estate. However, perhaps the IRS construes the power to be a pre-1942 addition. The ruling describes the difference before reaching this conclusion:

> Section 2041(a)(2) provides that to the extent of any property with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942, or with respect to which the decedent has at any time exercised or released such a power of appointment by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under §§ 2035 to 2038, inclusive. For purposes of this paragraph (2), the power of appointment shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised.

Q. **SECTIONS 2701-2704 - SPECIAL VALUATION RULES**

1. **How Might The Doctrine Of Merger Be Used With A GRAT?** Because a trust is created by separating legal and equitable title to property, merging legal and equitable title to property in one person will, in general, cause the trust to terminate. The doctrine of merger is incorporated in section 402(a)(5) of the UTC, the comment to which states:

> Subsection (a)(5) addresses the doctrine of merger, which, as traditionally stated, provides that a trust is not created if the settlor is the sole trustee and sole beneficiary of all beneficial interests. The doctrine of merger has been inappropriately applied by the courts in some jurisdictions to invalidate self-declarations of trust in which the settlor is the sole life beneficiary but other

> persons are designated as beneficiaries of the remainder. The doctrine of merger is properly applicable only if all beneficial interests, both life interests and remainders, are vested in the same person, whether in the settlor or someone else. An example of a trust to which the doctrine of merger would apply is a trust of which the settlor is sole trustee, sole beneficiary for life, and with the remainder payable to the settlor's probate estate.

The Restatement (Third) of Trusts § 69, Comment b, states that "[i]f, by operation of law, the legal title to the trust property passes to the beneficiary who has the entire beneficial interest, merger occurs, the trust terminates, and the beneficiary holds the property free of trust. Where the life interest and remainder interest is held by two beneficiaries who are also the only co-trustees, whether merger occurs in favor of the two beneficiaries is uncertain. See Scott and Ascher on Trusts § 11.2.5.

Suppose the grantor and the remainder beneficiaries contribute their respective interests to an LLC in exchange for membership interests that are proportionate to the interests of each such that the grantor receives an interest equal in value to the amount that would be included in the grantor estate if she died at that moment. The LLC would have all the beneficial interests in the GRAT property. If the LLC could become trustee of the GRAT then the doctrine of merger ought to apply. May an LLC serve as trustee? Under the UTC, for example, there is no definition of trustee but there are broad references to "persons" serving as trustee and the definition of person includes entities like an LLC. Some states may impose other limitations. In PLR 201928005, dealing with merger in the context of a GRAT, the IRS notes a state law requirement that a trustee may terminate a CLAT where the annuity and remainder are held by one beneficiary (and concludes the trustee doing so will not cause gain or loss recognition).

Where an LLC cannot serve as trustee, if the LLC managers serve as trustees is that sufficient? The answer is uncertain. The LLC managers are not the LLC.

Would a merger into an LLC be a taxable event for income tax purposes? The answer would seem to be no. Similarly, because the grantor receives an LLC interest having a value equal to what would be in the grantor's estate if the grantor died at that moment concerns like those raised in CCA 201745012 arguably are avoided.

2. GRAT Inclusion. Treas. Reg. §20.2036-1(c)(2)(i) applies section 2036 to a GRAT. When the grantor dies during the GRAT term, an amount of the GRAT is included in the grantor's estate which is sufficient to produce the annuity using the section 720 rate then in effect (with special rules for annuities, that change during the term). As a practical matter, absent a substantial increase in the section 7520 rate between the date of the GRAT and the grantor's death, an extraordinary appreciation, all of a GRAT is included in the Grantor's estate at death. An exception is for GRATs with long terms, perhaps as long as 99 years, because the annuity required to zero out over such a long-term is very low, as discussed below.

In Badgley v. United States, 121 A.F.T.R.2d 2018-1816 (N.D. Ca. 2018) the taxpayer challenged the regulation where the GRAT term was 15 years. The taxpayer lost. The opinion states:

> Plaintiff contends that the Court should disregard the Regulation as an unreasonable interpretation of section 2036 as applied to Patricia's GRAT. *See* Pl. Mot. at 24 (citing *Prof'l Equities v. Commissioner*, 89 T.C. 165 (1987)). Defendant argues that the Regulation is a reasonable interpretation of section 2036 and valid under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Plaintiff does not expressly dispute that *Chevron* applies; instead, Plaintiff claims that the Regulation is interpretive and thus given less deference as compared to a legislative rule. See Pl. Opp. at 19.
>
> The Court applies *Chevron*'s two-step framework. *See Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 52 (2011). At *Chevron* step one, the Court asks "whether Congress has directly addressed the precise question at issue." *Id*. (quotation omitted). The parties agree that section 2036 does not expressly address whether annuity payments constitute some possession, enjoyment, or right to income from the transferred property. Def. Mot. at 14; Pl. Mot. at 19. So the Court proceeds to step two. At that step, the Court "may not disturb an agency rule unless it is arbitrary or capricious in substance, or manifestly contrary to the statute." *Mayo Found. for Med. Educ.*, 562 U.S.at 53 (quotation omitted).
>
> The Court concludes that the Regulation is reasonable, and valid under *Chevron*. In drafting the Regulation, the IRS and Treasury Department relied principally on the above discussed binding authorities, including *Church's, Hallock, and Spiegel's*. *See* Grantor Retained Interest Trusts—Application of Sections 2036 and 2039, T.D. 9414, 73 Fed. Reg. 40173-01 (July 14, 2008) at 40174. Those cases support Defendant's view of section 2036, which parallels the Regulation's interpretation of that section. The IRS and Treasury Department also drew on section 2036's legislative history to devise the Regulation, observing that Congress amended section 811(c) to include interests retained for a term of years. *Id*. (citing H.R. Rep. no. 81-1412 at 9 (1949)). Though Plaintiff cites legislative history for the opposite conclusion, Plaintiff does not explain why that history supports the Regulation. *See* Pl. Opp. at 20.

Overturning a final regulation is difficult. Here the regulation was designed to be anti-taxpayer. Inclusion with one payment to go is calculated the same as on day 2 of the GRAT. The taxpayer appealed arguing that an annuity is not a retained right to income or use, and the valuation approach of the regulations should be thrown out, but the appeal was denied by the Ninth Circuit. Badgley v. United States, 957 F.3d 969 (9th Cir. 2020). The opinion states:

> The fact that § 2036(a)(1) does not include the term "annuity" does not exclude annuities from its ambit. This is consistent with the decisions of the Supreme Court and our sibling circuits, which have concluded that interests such as reversionary interests, the power of appointment, and rent— also not expressly listed in § 2036(a)—nevertheless fall into one of the three categories. *See, e.g., Estate of Spiegel v. Comm'r*, 335 U.S. 701, 705 (1949) (potential reversionary interest in property is possession or enjoyment); *Fid.-Phila. Tr. Co. v. Rothensies*, 324 U.S. 108, 111 (1945) (beneficiaries' estates "took effect in enjoyment" only at transferor's death because she held power of appointment); *Estate of McNichol*, 265 F.2d at 671 (rent from property is enjoyment). As far back as the 1940s, the Supreme Court rejected the proposition that taxpayers could "escape the force of this section by hiding behind the legal niceties contained in devices and forms created by conveyances." *Church's Estate*, 335 U.S. at 646 (quotation omitted); *see also Fid.- Phila.*, 324 U.S. at 111 ("The application of this tax does not depend

> upon elusive and subtle casuistries." (quotation omitted)). We reject Badgley's argument that because § 2036(a)(1) does not expressly mention annuities, the full value of Decedent's GRAT cannot be included in the gross estate.
>
> ***
>
> In *Commissioner v. Clise*, 122 F.2d 998 (9th Cir. 1941), involving annuity contracts outside of the trust context, we concluded that when a grantor retained the "economic benefit" of annuity payments, she retained enjoyment of the property. *Id.* at 999, 1003–04. Because the annuities went to Clise for her lifetime and to a designated second annuitant upon her death, "[t]he practical effect of the annuity contracts was to reserve to [her] the enjoyment of the property transferred and to postpone the fruition of the economic benefits thereof to the second annuitants until her death." *Id.* at 1004; *see also Forster v. Sauber*, 249 F.2d 379, 380 (7th Cir. 1957) (holding retained annuity includable in gross estate because "grantor has retained the economic enjoyment of the contracts for life"); *Mearkle's Estate v. Comm'r*, 129 F.2d 386, 388 (3d Cir. 1942) (holding annuity contracts includable because their practical effect was "to reserve to the annuitant the enjoyment of the property transferred and to postpone the fruition of the economic benefits to the second annuitant until after the death of the first"). We conclude that when a grantor derives substantial present economic benefit from property, she retains the enjoyment of the property for purposes of § 2036(a)(1).[5] As in *Clise*, Decedent's annuity was a "substantial present economic benefit," requiring inclusion of the GRAT's date of death value in her estate. She received $302,259 per year for fifteen years through the annuity. Moreover, because the partnership was the only property placed in the GRAT, the annuity stemmed from that property interest. As "something of value enjoyed by her," *Bayliss v. United States*, 326 F.2d 458, 461 (4th Cir. 1964), the annuity reserved to Decedent the enjoyment of the partnership interest during her lifetime. And because Decedent died before the termination of the GRAT, the property was not transferred to its beneficiaries before her death—and remained tied to her by the string she created.
>
> ***
>
> Badgley also challenges 26 C.F.R. § 20.2036-1(c)(2), which includes the formula the IRS uses to calculate the portion of the property includable under § 2036(a). The regulation interprets § 2036(a) to provide that GRATs are includable in a grantor's gross estate because they are sufficiently tied to the grantor.[7] Badgley's argument regarding the formula is limited to two sentences and two footnotes, without a single citation to legal authority. As we have previously held, arguments presented in such a cursory manner are waived. Federal Rule of Appellate Procedure 28(a)(8)(A) requires an appellant's opening brief to contain the "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." *Id.* "Arguments made in passing and not supported by citations to the record or to case authority are generally deemed waived." *United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010).

Suppose the grantor of the GRAT is unlikely to survive the term. A remainder interest purchase strategy was tried in CCA 201745012 which the IRS described as follows:

> ISSUES
>
> (1) Whether the remainder interest in transferred property in which the donor has retained an annuity replenishes the donor's taxable estate so as to constitute adequate and full consideration in money or money's worth for gift tax purposes where the purchase of the remainder occurs on the donor's deathbed during the term of the annuity.
>
> (2) Whether a note given in exchange for property that does not constitute adequate and full consideration in money or money's worth for gift tax purposes is deductible as a claim against the estate.
>
> CONCLUSIONS
>
> (1) Where the purchase of the remainder occurs on the donor's deathbed during the term of the annuity, the remainder does not replenish the donor's taxable estate. Accordingly, the remainder does not constitute adequate and full consideration in money or money's worth for gift tax purposes. Merrill v. Fahs, 324 U.S. 308 (1945).
>
> (2) A note given in exchange for property that does not constitute adequate and full consideration in money or money's worth for gift tax purposes is not deductible as a claim against the estate.

The purchase occurred the day before the grantor died. The essence of the replenishment argument was outlined by the IRS:

> In Commissioner v. Wemyss, 324 U.S. 303 (1945), the Supreme Court considered the meaning of the term "adequate and full consideration in money or money's worth" for gift tax purposes. There, the donor transferred assets to his fiancé to compensate her for the loss of an income interest that would terminate upon her marriage to him. There was no dispute that both a promise of marriage and detriment to a contracting party constituted valuable consideration for purposes of the law of contracts. The Tax Court had held that if the promise of marriage was the consideration, it was not one reducible to a money value and if the fiancé's loss of the income interest was the consideration, it did not constitute consideration in the hands of the donor.
>
>> If we are to isolate as an independently reviewable question of law the view of the Tax Court that money consideration must benefit the donor to relieve a transfer by him from being a gift, we think the Tax Court was correct. . . . The section taxing as gifts transfers that are not made for 'adequate and full (money) consideration' aims to reach those transfers which are withdrawn from the donor's estate. To allow detriment to the donee to satisfy the requirement of 'adequate and full consideration' would violate the purpose of the statute and open wide the door for evasion of the gift tax.
>
> Wemyss, 324 U.S. at 307-08. In other words, valuable contractual consideration in the hands of the donor is not sufficient; adequate and full consideration is that which replenishes, or augments, the donor's taxable estate.
>
> Wemyss had a companion case, Merrill v. Fahs, 324 U.S. 308 (1945), which was also a gift tax case. Merrill and its predecessors likewise involved situations where A transferred property to B, A's fiancé or spouse, in exchange for B's

> relinquishment of marital rights in A's remaining property. Both Wemyss and Merrill have come to stand for the general proposition that "adequate and full consideration in money or money's worth" for gift tax purposes is that which replenishes, or augments, the donor's taxable estate. See Steinberg v. Commissioner, 141 T.C. 258, 266 (2013) (noting that under the estate depletion theory, a donor receives consideration in money or money's worth only to the extent that the donor's estate has been replenished), citing Wemyss, at 307-08, and Randolph E. Paul, Federal Estate and Gift Taxation, para. 16.14, at 1114-15 (1942).[1] See also I.R.C. § 2043(b)(1) ("Transfers for Insufficient Consideration"). Thus, B's relinquishment of marital rights in A's property will have no effect on the includible value of that property in A's gross estate. Accordingly, the relinquishment of marital rights cannot replenish a donor's gross estate for estate tax purposes, and thus cannot constitute adequate and full consideration for gift tax purposes. See also Commissioner v. Bristol, 121 F.2d 129, 136 (1st Cir. 1941).
>
> It is important to keep in mind that in each of the above cases, the relinquishment of the marital rights in the donor's remaining assets did constitute valuable contractual consideration in the hands of the donor, and did benefit the donor. It enabled the donor to dispose of that property free of the spousal claims of the second marriage. See Merrill v. Fahs, 324 U.S. at 309. For instance, Bristol involved the waiver of spousal claims against a family business that the donor wished to bequeath to the children of his first marriage. Bristol, 121 F.2d at 131. Indeed, in each of these cases, it was the prospective husband's desire to dispose of his property as he chose that was the basis of the ante-nuptial agreement. This freedom did not constitute adequate and full consideration, however, because it did not augment the husband's taxable estate.
>
> Here, it cannot be disputed that Donor's liability on the promissory notes depleted Donor's taxable estate. However, in the context of a deathbed purchase of a remainder interest in transferred property in which a donor has retained a § 2036 "string," the receipt of the remainder does not increase the value of the donor's taxable estate, because the value of the entire property, including that of the remainder, will be includible in the donor's gross estate pursuant to § 2036(a)(1). Thus, Donor's receipt of the remainder interests cannot constitute adequate and full consideration within the meaning of § 2512(b). Commissioner v. Wemyss, 324 U.S., at 307-08. Cf. Rev. Rul. 98-8, 1998-1 C.B. 541 (reaching a similar conclusion for gift tax purposes in the context of §§ 2519 and 2044.) Accordingly, Donor has made a completed gift to the beneficiaries of Trust 1 in the amount of the value of the promissory notes transferred to Trust 1.

The CCA repeatedly notes the "deathbed" nature of the transaction. It is unclear if an earlier purchase would have mattered, if at such time the entire GRAT would have been included in the grantor's estate.

When the section 7520 rate is extremely low, a very long-term GRAT will require extremely low annuity payments to zero-out. For example, a 99 year term GRAT when the 7520 rate is 0.6% requires an annuity of 1.342568% to zero-out. If the 7520 rate thereafter increases to 3.6% (the June 2022 rate) only 37.294% of the GRAT assets would be included in the grantor/annuitant's estate. Suppose a GRAT were terminated at such time by the doctrine of merger; the "replenishment" standard suggested by Wemyss would seem to be satisfied.

3. **GRAT Invalidated**. CCA 202152018 is an unusual ruling. IRS determined that a grantor never intended to receive a qualified annuity and thus made a gift of the full value of the assets contributed to the GRAT despite the apparent adequacy of the GRAT language.

Taxypayer owned a closely-held company and marketed it for sale. Three days after the bids came in (from five potential buyers) taxpayer created a two-year GRAT. A few weeks later taxpayer contributed shares in the same company to a charitable remainder trust. The appraisals used for the two gifts were quite different. The CRT shares were appraised by a "qualified appraiser" as required to receive a charitable deduction. The GRAT annuity was based on an older appraisal:

> The value of the shares of Company was determined based on an appraisal of Company on December 31, Year 1, a date approximately seven months prior to the transfer to Trust. The appraisal, which was obtained in order to satisfy the reporting requirements for nonqualified deferred compensation plans under § 409A of the Code, valued the shares of Company at $w per share.

During the GRAT term the appraisal process and sale of the company proceeded – described by the IRS as follows:

> Additional time was granted to the Corporations to submit final offers. The last offer was received on Date 3, almost three months after the initial offers. Corporations A through D raised their offers, while Corporation E withdrew from the bidding, expressing no further interest.
>
> ***
>
> Three months after the new offers were received and several weeks after the transfer to his charitable remainder trust, Donor accepted Corporation A's offer, which represented a 10 percent increase over its initial offer. Per the final offer, an initial cash tender offer was made of $x per share, an amount that was nearly three times greater than $w (the value determined as of December 31, Year 1). During the tender period, Donor tendered b shares, while Donor's charitable remainder trust also took advantage of the tender offer.
>
> On December 31, Year 2, Donor again had Company appraised for purposes of § 409A and the new appraised value was $y per share, which was almost twice the previous year's value of $w per share.2 These steps were repeated for a December 31, Year 3 appraisal with similar results. The December 31, Year 2 and Year 3 appraisals both included the following language: "[a]ccording to management, there have been no other recent offers or closed transactions in Company shares as of the Valuation Date." There was no such declaration in the December 31, Year 1 appraisal.
>
> In Year 4, approximately six months after the end of Trust's two-year GRAT term, Corporation A purchased the balance of the Company shares for $z per share, a price almost double the value of $y.

The IRS summarized the record about the appraisal discrepancy:

> The record as compiled to date supports the proposition that, as of Date 1, the hypothetical willing buyer of the Company stock could have reasonably foreseen the merger and anticipated that the price of Company stock would trade at a substantial premium over $w per share. When asked to explain the use of the outdated appraisal (as of December 31, Year 1) to value the transfer to the GRAT, as well as the use of a new appraisal to value the transfers to charity, the company that conducted the appraisal stated only that "[t]he appraisal used for the GRAT transfer was only six months old, and business operations had not materially changed during the 6-month period . . . For the charitable gifts, under the rules for Form 8283, in order to substantiate a charitable deduction greater than $5,000, a qualified appraisal must be completed. Because of this requirement an appraisal was completed for the donations of [Company] stock to various charities on [Date 4]."

The IRS had no difficulty concluding that the valuation of the shares in the GRAT was too low. However, instead of simply adjusting the annuity amount, which might have been the expected result, the IRS found the taxpayer didn't retain a qualified annuity at all:

> Section 25.2702-3(d)(1) provides that to be a qualified annuity interest, an interest must be a qualified annuity interest in every respect. Further, to be a qualified interest, the interest must meet the definition of and function exclusively as a qualified interest from the creation of the trust.
>
> In *Atkinson v. Commissioner*, 115 T.C. 26, 32 (2000), aff'd, 309 F.3d 1290 (11th Cir. 2002), a donor created a charitable remainder annuity trust (CRAT) but no payments were actually made from the trust to the donor during the two-year period between the creation of the trust and the donor's death. The Commissioner argued that the trust was not a valid CRAT under § 664(d)(1) and the corresponding regulations because the required annual annuity amount was never paid. The Tax Court agreed, concluding that although the terms of the trust met the letter of the statutory requirement providing for five percent annual distributions, the trust did not operate in accordance with those terms. Specifically, the Tax Court determined that the trust did not meet the express five percent requirement of the statute and could not qualify for treatment as a charitable remainder trust. On appeal, the estate argued that the deduction was being denied because of a "foot fault," or a minor mistake. The Court of Appeals disagreed, however, and affirmed the Tax Court, holding that the trust failed to comply with the rules governing CRATs throughout its existence. Because these rules in § 664(d)(1) and the corresponding regulations were not scrupulously followed throughout the life of the trust, a charitable deduction was not appropriate. *Atkinson*, 309 F.3d at 1295.
>
> ***
>
> In addition, although the governing instrument of Trust appears to meet the requirements in § 2702 and the corresponding regulations, intentionally basing the fixed amount required by § 2702(b)(1) and § 25.2702-3(b)(1)(i) on an undervalued appraisal causes the retained interest to fail to function exclusively as a qualified interest from the creation of the trust. The trustee's failure to satisfy the "fixed amount" requirement under § 2702 and § 25.2702-3(b)(1)(ii)(B) is an operational failure because the trustee paid an amount that had no relation to the initial fair market value of the property transferred to the trust; instead, the amount was based on an outdated and misleading appraisal of Company, at a time when Company had received offers in the multi-billion dollar range. When asked about

> the use of the outdated appraisal, the company that conducted the appraisal stated only that business operations had not materially changed during the 6-month period. In contrast, in valuing the transfer to the charitable trust, the company that conducted the appraisal focused only on the tender offer, and accordingly gave little weight to the business operations for valuation purposes.
>
> The operational effect of deliberately using an undervalued appraisal is to artificially depress the required annual annuity. Thus, in the present case, the artificial annuity to be paid was less than 34 cents on the dollar instead of the required amount, allowing the trustee to hold back tens of millions of dollars. The cascading effect produced a windfall to the remaindermen. Accordingly, because of this operational failure, Donor did not retain a qualified annuity interest under § 2702. *See Atkinson*.

The obvious learning from the ruling is not to use outdated appraisals. What else may be done? A GRAT may be funded with a defined value clause; suppose there are questions about value, and/or an appraisal, then the taxpayer could give assets with a defined value to the GRAT. Further, a GRAT term that runs through the gift tax audit period adds validity to the argument that the trustee must and will adjust the annuity payment. The valuation argument by the IRS is not outrageous although it seems contrary to section 2702 and the applicable regulations.

4. **Valuation of Publicly Traded Stock**. CCA 201929002 is pernicious. The co-founder and Chairman of a publicly-traded company funded a GRAT. Subsequently the company announced a merger and its stock appreciated. The ruling states:

> The Internal Revenue Service has reviewed the underlying transaction documents from the year preceding the merger. Such documents include the Corporation A and Corporation B exclusivity agreement, correspondence between Corporation A and Corporation B, and Board meeting minutes. The record as compiled to date supports the position that, as of Date 1, the hypothetical willing buyer of the stock could have reasonably foreseen the merger and anticipated that the price of Corporation A stock would trade at a premium.

The IRS concluded that the gift valuation could be adjusted notwithstanding that the stock was publicly traded. The ruling relies on Silverman – a case involving closely-held stock not yet publicly traded – and Ferguson – an assignment of income case:

> In Silverman v. Commissioner, T.C. Memo. 1974-285, aff'd, 538 F.2d 927 (2d Cir. 1976), cert. denied, 431 U.S. 938 (1977), the petitioners gifted shares of preferred stock while in the process of reorganizing with the intent to go public. The Tax Court rejected the expert testimony presented by the petitioners because the expert failed to take into account the circumstances of the future public sale.
>
> In Ferguson v. Commissioner, 174 F.3d 997 (9th Cir. 1999), aff'g 108 T.C. 244 (1997), the appellate court considered the issue of whether the Tax Court correctly held that taxpayers were liable for gain in appreciated stock under the anticipatory assignment of income doctrine. In Ferguson, taxpayers owned 18 percent of AHC and served as officers and on the board of directors. In late 1987 and early 1988, the AHC board of directors contacted and eventually authorized Goldman, Sachs & Co. to find a purchaser of AHC and to assist in the negotiations. By July 1988, Goldman, Sachs had found four prospective purchasers. Shortly thereafter, AHC

> entered into a merger agreement with DCI Holdings, Inc. With the taxpayers abstaining from the vote, the AHC board unanimously approved the merger agreement. On August 3, 1988, the tender offer was started. On August 15, taxpayers with the help of their broker executed a donation-in-kind record with respect to their intention to donate stock to a charity and two foundations. On September 9, 1988, the charity and the foundations tendered their stock. On September 12, 1988, the final shares were tendered and on October 14, 1988, the merger was completed. The court concluded that the transfers to charity and the foundations occurred after the shares in AHC had ripened from an interest in a viable corporation into a fixed right to receive cash and the merger was "practically certain" to go through. In particular, the court noted that "[t]he Tax Court really only needed to ascertain that as of [the valuation] date, the surrounding circumstances were sufficient to indicate that the tender offer and the merger were practically certain to proceed by the time of their actual deadlines — several days in the future." Ferguson, 174 F.3d at 1004. Consequently, the assignment of income doctrine applied and the taxpayers realized gain when the shares were disposed of by charity and the foundations.
>
> The current case shares many factual similarities with Ferguson, including the targeted search by the Board of Directors of Corporation A to find merger candidates, the exclusive negotiations with Corporation B immediately before the final agreement, the generous terms of the merger, and an agreement that was "practically certain" to go through. While the Ferguson opinion deals exclusively with the assignment of income doctrine, it also relies upon the proposition that the facts and circumstances surrounding a transaction are relevant to the determination that a merger is likely to go through. See Bank One and Kollsman, supra. The current case presents an analogous issue, that is, whether the fair market value of the stock should take into consideration the likelihood of the merger as of the Date 1 transfer of Shares to Trust. The Ferguson and Silverman opinions, as considered by the Tax Court and the Second and Ninth Circuit Courts of Appeal, support the conclusion that the value of stock in Corporation A must take into consideration the pending merger. Accordingly, a value determined on the basis of the selling price as provided under § 25.2512-2(b) does not represent the fair market value of Shares as of the valuation date; pursuant to § 25.2512-2(e), other relevant facts and elements of value must be considered in determining fair market value. Under the fair market value standard as articulated in § 25.2512-1, the hypothetical willing buyer and willing seller, as of Date 1, would be reasonably informed during the course of negotiations over the purchase and sale of Shares and would have knowledge of all relevant facts, including the pending merger. Indeed, to ignore the facts and circumstances of the pending merger would undermine the basic tenets of fair market value and yield a baseless valuation.
>
> [Emphasis added.]

The underlined statement will often be false. Many conditions pay prevent the shareholder from discussing a merger, such as confidentiality agreements, securities law provisions. Further, suppose identical facts except that the shareholder was not an officer or director of the company and was not aware of the impending merger. Would that taxpayer's stock have been valued at the traded value, and, if so, why? Suppose the Chairman's spouse had funded a GRAT on the same date and the evidence was that the spouse never participated in or learned about business matters. Different valuation?

The ruling summarizes Treas. Reg. § 25.2512-2(e) as follows:

> Section 25.2512-2(e) provides, in relevant part, that in cases in which it is established that the value per bond or share of any security determined on the basis of the selling or bid and asked prices as provided under § 25.2512-2(b) does not represent the fair market value thereof, then some reasonable modification of the value determined on that basis or other relevant facts and elements of value shall be considered in determining fair market value.

The full subsection reads as follows:

> **(e)** ***Where selling prices or bid and asked prices do not represent fair market value.*** In cases in which it is established that the value per bond or share of any security determined on the basis of the selling or bid and asked prices as provided under paragraphs (b), (c), and (d) of this section does not represent the fair market value thereof, then some reasonable modification of the value determined on that basis or other relevant facts and elements of value shall be considered in determining fair market value. Where sales at or near the date of the gift are few or of a sporadic nature, such sales alone may not indicate fair market value. In certain exceptional cases, the size of the block of securities made the subject of each separate gift in relation to the number of shares changing hands in sales may be relevant in determining whether selling prices reflect the fair market value of the block of stock to be valued. If the donor can show that the block of stock to be valued, with reference to each separate gift, is so large in relation to the actual sales on the existing market that it could not be liquidated in a reasonable time without depressing the market, the price at which the block could be sold as such outside the usual market, as through an underwriter, may be a more accurate indication of value than market quotations. Complete data in support of any allowance claimed due to the size of the block of stock being valued should be submitted with the return. On the other hand, if the block of stock to be valued represents a controlling interest, either actual or effective, in a going business, the price at which other lots change hands may have little relation to its true value.

The taxpayer has petitioned the Tax Court for relief, in Baty v. Commissioner, filed June 23, 2021 (Docket No. 12216-21). The Company involved was Emeritus Senior Care. The Petition reviewed the history of the negotiations to sell the company:

> e. During the first half of 2013, Emeritus consulted with Wells Fargo Securities as its financial advisor with an eye toward engaging with potential strategic partners regarding long-term opportunities. In late June of 2013, Emeritus received a formal proposal to acquire its real estate assets from a third party. Over the next six months, Emeritus received serious business combination proposals from three additional companies, including Brookdale Senior Living ("Brookdale"), a direct competitor.
>
> f. After consideration of the various proposals, in November of 2013, Emeritus determined to continue discussions with two of the four suitors, one of which was Brookdale. In an effort to maximize shareholder value, Emeritus attempted to create a bidding war between Brookdale and the other potential merger candidate. In late December of 2013, at Emeritus' request, both Brookdale and the other suitor submitted "best and final" offers. Both offers required Emeritus to commit to exclusive negotiations with the offeror with respect to apossible future corporate combination.

> g. Emeritus chose to negotiate with Brookdale (whose offer was solely to exchange Emeritus shares for Brookdale shares in a 1:1 ratio i.e., shareholders in Emeritus receiving one share of Brookdale for each share of Emeritus held) because of the potential synergies between the companies and the relative stability of Brookdale's share price. The Board of Directors thereupon authorized management to negotiate with Brookdale exclusively through January 23, 2014. Thereafter, Emeritus and Brookdale worked towards an agreement, with Emeritus agreeing to extend the exclusivity period on at least two more occasions.
>
> h. Petitioner was chairman of the Board of Directors of Emeritus and was aware of (and participated in) the ongoing merger negotiations with Brookdale, though he was not part of the team tasked with day-to-day negotiations.

The taxpayer and GRAT were subject to the trading limits of Rule 144.

> 1. Under SEC Rule 144, because of his role as Chairman of the Board, Petitioner was considered an "affiliate" of Emeritus, which placed certain limitations on the Emeritus stock held by Petitioner, including:
>
> (1) If an affiliate sells shares in a private transaction (off market), the purchaser inherits the affiliate taint with respect to such shares and is unable to resell the shares within six months.
>
> (2) Even with respect to sales in the market, an affiliate (or a person who acquires stock in an off-market transaction from an affiliate) is subject to volume limitations: in each quarter, no more than the greater of (1) one percent of the total outstanding shares of the security; or (2) the average weekly trading volume of the security during the preceding four weeks, can be sold in the market.
>
> (3) As the GRAT contribution was in excess of the Rule 144 volume limitations (it was both in excess of 1% of the outstanding shares of Emeritus and also in excess of the average weekly share transactions during the prior four weeks), a significant portion of the 1,657,504 GRAT shares could not have been sold by Petitioner or any transferee on January 14, 2014.
>
> (4) Of the 1,657,504 shares contributed to the GRAT: 20,000 were from stock options exercised by Petitioner on August 23, 2013, and 440,000 were from stock options exercised on January 2, 2014. These shares were "restricted securities" under SEC Rule 144 and could not be publicly sold for six months after acquisition. Thus, as of January 14, 2014, 460,000 of the 1,657,504 shares could not be sold.
>
> (5) The SEC requires "affiliates" like Petitioner to file a notice with the SEC on Form 144 with respect to any sale involving more than 5,000 shares or in excess of $50,000 in any three-month period.

As it turned out, the price of the stock on the GRAT funding date was $22.05 a share. The price did not change much until the merger was announced:

> m. At the time that the Baty 2014 GRAT was established, whether a merger between Emeritus and Brookdale would ultimately be concluded was far from certain, and material terms with respect to the potential corporate combination were not finalized.

> n. On February 4, 2014 (21 days after Petitioner transferred the Emeritus stock to the GRAT), Brookdale had insisted on a significant (and unfavorable) change in the stock exchange ratio. Rather than the original offer of a 1:1 exchange, Brookdale revised its offer downward to a 1:0.95 share exchange ratio i.e., each Emeritus shareholder would receive 0.95 shares in Brookdale for each share of Emeritus exchanged. This effectively reduced the offer by 5%. Due to this change in price, Emeritus seriously considered abandoning the proposed Brookdale transaction and re-engaging with the other suitor.
>
> o. Ultimately, on February 17, 2014, Emeritus determined to go forward with Brookdale, even at the reduced price. While the parties ultimately reached a deal, significant revisions—including the downward price adjustment were made between January 14, 2014, and the date that the deal was finalized. The negotiated deal received preliminarily approval by the respective boards of Emeritus and Brookdale in mid-February and was publicly announced after the close of trading on February 20, 2014. The Emeritus stock price at market close on February 20, 2014, (the date the terms of the merger were disclosed to the public) was $21.46. The following day (February 21, 2014), after the announced merger had been digested by the market, the share price for Emeritus opened at $29.35 and closed at $29.01.
>
> p. While the Agreement and Plan of Merger was announced on February 20, 2014, the proposed merger was subject to several contingencies, including shareholder approval by both companies, various regulatory approvals (federal and state), and the need to obtain various third-party consents (lenders, landlords, etc.). Moreover, there was the possibility of disruptive shareholder lawsuits. Emeritus and Brookdale worked for five months to overcome these challenges and finally completed the merger on July 31, 2014.
>
> q. The IRS Notice of Deficiency bases its assertion of the fair market value of the January 14, 2014, contribution of Emeritus shares to the Baty 2014 GRAT on the value of the post-merger Brookdale stock ($55,012,557) held by the GRAT on July 31, 2014.
>
> r. For purposes of the gift tax, the fair market value of the Emeritus shares contributed to the GRAT was no greater than the price (the average high/low) of the shares on the NYSE on the date of the contribution. Given the various restrictions on transfer described above, the actual fair market value of the contributed Emeritus shares was significantly lower than the NYSE price.

Interestingly, the taxpayer makes much of a subsequent decline in the value of the stock. Whether this is helpful is questionable:

> s. In the July 31, 2014, merger, the Baty 2014 GRAT's 1,657,504 shares of Emeritus were exchanged for 1,574,628 shares of Brookdale. On January 14, 2015, the trustees made the first annuity payment required by the terms of the Baty 2014 GRAT by transferring 526,411 shares of Brookdale stock—valued at the January 14, 2015, closing price of $35.88 per share, or $18,887,626.68—to Petitioner. This left the Baty 2014 GRAT with 1,048,217 Brookdale shares.
>
> t. On March 6, 2015, Petitioner—via a power to substitute assets provided in the GRAT trust agreement substituted 72,115 shares of Washington Trust Bank for 376,115 shares of Brookdale, each having a value of $13,701,850. This left the GRAT with 672,102 Brookdale shares and 72,115 Washington Trust Bank shares.

u. One month later, the Baty 2014 GRAT entered into a collar with respect to 672,100 of the Brookdale shares, selling a call option and purchasing a put option through the public options market.

v. By October 9, 2015, the share price of Brookdale had dropped to $23.22/share, which—on an exchange adjusted basis was lower than the Emeritus share price on the date of the GRAT contribution (January 14, 2014).

w. On January 11, 2016, 672,100 shares of Brookdale were liquidated in a taxable event—i.e., the GRAT exercised the put option that had been purchased in 2015 as part of the collar. This left the GRAT with two remaining shares of Brookdale, 72,115 shares of Washington Trust Bank stock, and cash.

x. On January 14, 2016, the trustees made the second and final annuity payment by transferring 72,115 shares of Washington Trust Bank stock (valued at $13,422,404 or $186.125/share using the high / low method), two shares of Brookdale stock (valued at $30 or $14.975 per share using high / low method), and $5,465,183 of cash to Petitioner. The remaining assets, valued at $17,247,588, were split evenly between the two remaindermen, with the GRAT paying $8,623,794 to each beneficiary. The Baty 2014 GRAT then terminated.

y. If the GRAT had never engaged in the Washington Trust Bank substitution of assets transaction and the collar transaction, it would have continued to hold 1,048,217 shares of Brookdale on January 14, 2016. At the $14.975/share price on January 14, 2016, the remaining assets of the GRAT would have been worth $15,697,050, an amount insufficient to pay the second annuity payment obligation of $18,887,616.99. Thus, but for the substitution of assets and the collar, the Baty 2014 GRAT would not have succeeded in transferring any value to the remaindermen and there is little chance this controversy would have ever been brought by the IRS.

R. SECTION 6166 — EXTENSION OF TIME TO PAY TAX

S. TAX ADMINISTRATION

1. **Priority Guidance Plan**. 2021-2022 (September 9, 2021).

EMPLOYEE BENEFITS

A. Retirement Benefits

2. Regulations and other guidance under §72(t) relating to the 10 percent additional tax on early distributions.

3. Update to IRA regulations under §§219, 408, 408A, and 4973 for statutory changes and additional issues.

* * *

6. Regulations relating to SECURE Act modifications to §401(a)(9) and addressing other issues under §401(a)(9).

7. Regulations relating to SECURE Act modifications to certain rules governing §401(k) plans.

8. Guidance on student loan payments and qualified retirement plans and §403(b) plans.

EXEMPT ORGANIZATIONS

2. Guidance on circumstances under which an LLC can qualify for recognition under §501(c)(3).

3. Final regulations on §509(a)(3) supporting organizations. Proposed regulations were published on February 19, 2016.

* * *

5. Guidance under §4941 regarding a private foundation's investment in a partnership in which disqualified persons are also partners.

6. Regulations regarding the excise taxes on donor advised funds and fund management.

GENERAL TAX ISSUES

23. Guidance concerning virtual currency.

GIFTS AND ESTATES AND TRUSTS

1. Final regulations establishing a user fee for estate tax closing letters. Proposed regulations were published on December 31, 2020.

2. Final regulations under §§1014(f) and 6035 regarding basis consistency between estate and person acquiring property from decedent. Proposed and temporary regulations were published on March 4, 2016.

3. Regulations under §2010 addressing whether gifts that are includible in the gross estate should be excepted from the special rule of § 20.2010-1(c).

4. Regulations under §2032(a) regarding imposition of restrictions on estate assets during the six-month alternate valuation period. Proposed regulations were published on November 18, 2011.

5. Regulations under §2053 regarding personal guarantees and the application of present value concepts in determining the deductible amount of expenses and claims against the estate.

6. Regulations under §2632 providing guidance governing the allocation of generation-skipping transfer (GST) exemption in the event the IRS grants relief under §2642(g), as well as addressing the definition of a

GST trust under §2632(c), and providing ordering rules when GST exemption is allocated in excess of the transferor's remaining exemption.

7. Final regulations under §2642(g) describing the circumstances and procedures under which an extension of time will be granted to allocate GST exemption.

8. Final regulations under §2801 regarding the tax imposed on U.S. citizens and residents who receive gifts or bequests from certain expatriates. Proposed regulations were published on September 10, 2015.

9. Regulations under §7520 regarding the use of actuarial tables in valuing annuities, interests for life or terms of years, and remainder or reversionary interests.

NOTE: REG -122770-18, issued May 5, 2022, updates the actuarial factors for section 7520. The factors were to have been updated by May, 2019. The transition rule states:

> Transitional Rules The regulations provide certain rules to facilitate the transition to the new actuarial tables. For gift tax purposes, if the date of a transfer is on or after January 1, 2021, and before the applicability date of the Treasury decision adopting these regulations as final regulations, the donor may choose to determine the value of the gift (and/or any applicable charitable deduction) under tables based on either Table 2000CM or Table 2010CM. Similarly, for estate tax purposes, if the decedent dies on or after January 1, 2021, and before the applicability date of the Treasury decision adopting these regulations as final regulations, the value of any interest (and/or any applicable charitable deduction) may be determined in the discretion of the decedent's executor under tables based on either Table 2000CM or Table 2010CM, provided that the decedent's executor must use the same mortality table to value all interests in the same property. However, the section 7520 interest rate to be utilized is the appropriate rate for the month in which the valuation date occurs, subject to the following special rule for certain charitable transfers. Specifically, in accordance with this transitional rule and the rules contained in §§1.7520-2(a)(2), 20.7520-2(a)(2), and 25.7520-2(a)(2), in cases involving a charitable deduction, if the valuation date occurs on or after January 1, 2021, but before the applicability date of the Treasury decision adopting these regulations as final regulations, and the executor or donor elects under section 7520(a) to use the section 7520 interest rate for a month that is prior to January 1, 2021, then the mortality experience contained in Table 2000CM must be used. If the executor or donor uses the section 7520 interest rate for a month that is on or after January 1, 2021, but before the applicability date of the Treasury decision adopting these regulations as final regulations, then the tables based on either Table 2000CM or Table 2010CM may be used. However, if the valuation date occurs on or after the applicability date of the Treasury decision adopting these regulations as final regulations, the executor or donor must use the new mortality experience contained in Table 2010CM even if the use of a prior month's interest rate is elected under section 7520(a). In addition, the regulations no longer will provide that the estate of a decedent who was under a mental disability that prevented a change in the disposition of the decedent's property may elect to value the property interest included in the gross estate either under the mortality table and interest rate in effect at the time the decedent first became subject to the mental disability or under the mortality table and interest rate in effect on the decedent's date of death. The taxpayer decedent, during life and before the advent of the mental disability, would not know, beforehand, what the

> market interest rate would be at his or her future date of death, but can reasonably be expected to have understood that the property interest would be valued at the then-applicable market rate, whatever it might be. Becoming incapacitated should not alter the effect of that understanding. Therefore, a special rule permitting an election to use the interest rate in effect at the time the decedent first became subject to the mental disability is not necessary. The same is true with respect to mortality rates. Accordingly, estates of decedents with a mental disability who die after the applicability date of the Treasury decision adopting these regulations as final regulations will be required to use the mortality table and interest rate in effect on the decedent's date of death or the alternate valuation date under section 2032, if elected.

2. **No Ruling Positions**. In Rev. Proc. 2022-3 the IRS provided issues on which it will not rule in Section 3. Among those are:

> (18) Section 101. —Certain Death Benefits.—Whether there has been a transfer for value for purposes of § 101(a) in situations involving a grantor and a trust when (i) substantially all of the trust corpus consists or will consist of insurance policies on the life of the grantor or the grantor's spouse, (ii) the trustee or any other person has a power to apply the trust's income or corpus to the payment of premiums on policies of insurance on the life of the grantor or the grantor's spouse, (iii) the trustee or any other person has a power to use the trust's assets to make loans to the grantor's estate or to purchase assets from the grantor's estate, and (iv) there is a right or power in any person that would cause the grantor to be treated as the owner of all or a portion of the trust under §§ 673 to 677.
>
> (39) Section 170.—Charitable. Etc., Contributions and Gifts.—Whether a charitable contribution deduction under § 170 is allowed for a transfer of an interest in a limited partnership or a limited liability company taxed as a partnership to an organization described in § 170(c).
>
> (40) Section 170.—Charitable, Etc., Contributions and Gifts.—Whether a taxpayer who advances funds to a charitable organization and receives therefor a promissory note may deduct as contributions, in one taxable year or in each of several years, amounts forgiven by the taxpayer in each of several years by endorsement on the note.
>
> (82) Sections 507, 664, 4941, and 4945.—Termination of Private Foundation Status; Charitable Remainder Trusts; Taxes on Self-Dealing; Taxes on Taxable Expenditures.—Issues pertaining to the tax consequences of the termination of a charitable remainder trust (as defined in § 664) before the end of the trust term as defined in the trust's governing instrument in a transaction in which the trust beneficiaries receive their actuarial shares of the value of the trust assets.
>
> (88) Section 641. —Imposition of Tax. —Whether the period of administration or settlement of an estate or a trust (other than a trust described in §664) is reasonable or unduly prolonged.
>
> (89) Section 642(c). —Deduction for Amounts Paid or Permanently Set Aside for a Charitable Purpose. —Allowance of an unlimited deduction for amounts set aside by a trust or estate for charitable purposes when there is a possibility that the corpus of the trust or estate may be invaded.
>
> (90) Section 643(f).—Treatment of multiple trusts.—Whether two or more trusts shall be treated as one trust for purposes of subchapter J of chapter 1.

(91) Section 664. —Charitable Remainder Trusts. —Whether the settlement of a charitable remainder trust upon the termination of the noncharitable interest is made within a reasonable period of time.

(93) Section 671.—Trust Income, Deductions, and Credits Attributable to Grantors and Others as Substantial Owners.—Whether the grantor will be considered the owner of any portion of a trust when (i) substantially all of the trust corpus consists or will consist of insurance policies on the life of the grantor or the grantor's spouse, (ii) the trustee or any other person has a power to apply the trust's income or corpus to the payment of premiums on policies of insurance on the life of the grantor or the grantor's spouse, (iii) the trustee or any other person has a power to use the trust's assets to make loans to the grantor's estate or to purchase assets from the grantor's estate, and (iv) there is a right or power in any person that would cause the grantor to be treated as the owner of all or a portion of the trust under §§ 673 to 677.

(98) Section 1001.—Determination of Amount of and Recognition of Gain or Loss.—Whether the termination of a charitable remainder trust before the end of the trust term as defined in the trust's governing instrument, in a transaction in which the trust beneficiaries receive their actuarial shares of the value of the trust assets, is treated as a sale or other disposition by the beneficiaries of their interests in the trust.

(112) Section 2055.—Transfers for Public, Charitable, and Religious Uses.—Whether a charitable contribution deduction under § 2055 is allowed for the transfer of an interest in a limited partnership or a limited liability company taxed as a partnership to an organization described in § 2055(a).

(114) Section 2522.—Charitable and Similar Gifts.—Whether a charitable contribution deduction under § 2522 is allowable for a transfer of an interest in a limited partnership or a limited liability company taxed as a partnership to an organization described in § 2522(a).

(115) Section 2601.—Tax Imposed.— Whether a trust exempt from generation-skipping transfer (GST) tax under § 26.260l — l(b)(1), (2), or (3) of the Generation-Skipping Transfer Tax Regulations will retain its GST exempt status when there is a modification of a trust, change in the administration of a trust, or a distribution from a trust in a factual scenario that is similar to a factual scenario set forth in one or more of the examples contained in § 26.2601-1 (b)(4)(i)(E).

(126) Section 4941.—Taxes on Self- Dealing.—Whether transactions during the administration of an estate or trust meet the requirements of the exception to § 4941 set forth in § 53.4941(d)-1(b)(3) of the Private Foundation Excise Tax Regulations, in cases in which a disqualified person issues a promissory note in exchange for property of an estate or trust.

(127) Section 4941.—Taxes on Self-Dealing.—Whether an act of self-dealing occurs when a private foundation (or other entity subject to § 4941) owns or receives an interest in a limited liability company or other entity that owns a promissory note issued by a disqualified person.

(131) Section 4958.—Taxes on Excess Benefit Transactions.—Whether a compensation or property transaction satisfies the rebuttable presumption that the transaction is not an excess benefit transaction as described in § 53.4958-6 of the Excess Benefit Transactions Excise Tax Regulations.

In addition, rulings will "not ordinarily" be issued on the issues below. "Not ordinarily" means that unique and compelling reasons must be demonstrated in order for a ruling to be issued.

> (18) Section 170.—Charitable, Etc., Contributions and Gifts.—Whether a taxpayer who transfers property to a charitable organization and thereafter leases back all or a portion of the transferred property may deduct the fair market value of the property transferred and leased back as a charitable contribution.
>
> (39) Section 664.—Charitable Remainder Trusts.—Whether a trust that will calculate the unitrust amount under § 664(d)(3) qualifies as a § 664 charitable remainder trust when a grantor, a trustee, a beneficiary, or a person related or subordinate to a grantor, a trustee, or a beneficiary can control the timing of the trust's receipt of trust income from a partnership or a deferred annuity contract to take advantage of the difference between trust income under § 643(b) and income for Federal income tax purposes for the benefit of the unitrust recipient.
>
> (42) Section 678.—Person Other than Grantor Treated as Substantial Owner.—Whether a person will be treated as the owner of any portion of a trust over which that person has a power to withdraw the trust property (or had such power prior to a release or modification, but retains other powers which would cause that person to be the owner of the trust under § 671 if the person were the grantor), other than a power which would constitute a general power of appointment within the meaning of § 2041. if the trust purchases the property from that person with a note and the value of the assets with which the trust was funded by the grantor is nominal compared to the value of the property purchased.
>
> (49) Sections 2035, 2036, 2037, 2038, and 2042.—Adjustments for Certain Gifts Made Within Three Years of Decedent's Death; Transfers with Retained Life Estate; Transfers Taking Effect at Death; Revocable Transfers; Proceeds of Life Insurance.—Whether trust assets are includible in a trust beneficiary's gross estate under § 2035, 2036. 2037, 2038, or 2042 if the beneficiary sells property (including insurance policies) to the trust or dies within 3 years of selling such property to the trust, and (i) the beneficiary has a power to withdraw the trust property (or had such power prior to a release or modification, but retains other powers which would cause that person to be the owner if the person were the grantor), other than a power which would constitute a general power of appointment within the meaning of § 2041, (ii) the trust purchases the property with a note, and (iii) the value of the assets with which the trust was funded by the grantor is nominal compared to the value of the property purchased.
>
> (52) Section 2501.—Imposition of Tax.—Whether the sale of property (including insurance policies) to a trust by a trust beneficiary will be treated as a gift for purposes of § 2501 if (i) the beneficiary has a power to withdraw the trust property (or had such power prior to a release or modification, but retains other powers which would cause that person to be the owner if the person were the grantor), other than a power which would constitute a general power of appointment within the meaning of § 2041, (ii) the trust purchases the property with a note, and (iii) the value of the assets with which the trust was funded by the grantor is nominal compared to the value of the property purchased.
>
> (53) Section 2503.—Taxable Gifts.— Whether the transfer of property to a trust will be a gift of a present interest in property when (i) the trust corpus consists or will consist substantially of insurance policies on the life of the grantor or the grantor's spouse, (ii) the trustee or any other person has a power to apply the trust's income or corpus to the payment of premiums on policies of insurance on the life

> of the grantor or the grantor's spouse, (iii) the trustee or any other person has a power to use the trust's assets to make loans to the grantor's estate or to purchase assets from the grantor's estate, (iv) the trust beneficiaries have the power to withdraw, on demand, any additional transfers made to the trust, and (v) there is a right or power in any person that would cause the grantor to be treated as the owner of all or a portion of the trust under §§ 673 to 677.
>
> (54) Section 2514.—Powers of Appointment.—If the beneficiaries of a trust permit a power of withdrawal to lapse, whether § 2514(e) will be applicable to each beneficiary in regard to the power when (i) the trust corpus consists or will consist substantially of insurance policies on the life of the grantor or the grantor's spouse, (ii) the trustee or any other person has a power to apply the trust's income or corpus to the payment of premiums on policies of insurance on the life of the grantor or the grantor's spouse, (iii) the trustee or any other person has a power to use the trust's assets to make loans to the grantor's estate or to purchase assets from the grantor's estate, (iv) the trust beneficiaries have the power to withdraw, on demand, any additional transfers made to the trust, and (v) there is a right or power in any person that would cause the grantor to be treated as the owner of all or a portion of the trust under §§ 673 to 677.
>
> (57) Section 2601.—Tax Imposed.— Whether a trust that is exempt from the application of the generation-skipping transfer tax because it was irrevocable on September 25, 1985, will lose its exempt status if the situs of the trust is changed from the United States to a situs outside of the United States.
>
> (58) Section 2702.—Special Valuation Rules in Case of Transfers of Interests in Trusts.—Whether annuity interests are qualified annuity interests under § 2702 if the amount of the annuity payable annually is more than 50 percent of the initial net fair market value of the property transferred to the trust, or if the value of the remainder interest is less than 10 percent of the initial net fair market value of the property transferred to the trust. For purposes of the 10 percent test, the value of the remainder interest is the present value determined under § 7520 of the right to receive the trust corpus at the expiration of the term of the trust. The possibility that the grantor may die prior to the expiration of the specified term is not taken into account, nor is the value of any reversion retained by the grantor or the grantor's estate.
>
> (59) Section 2702.—Special Valuation Rules in Case of Transfers of Interests in Trusts.—Whether a trust with one term holder satisfies the requirements of § 2702(a)(3)(A) and § 25.2702-5(c) to be a qualified personal residence trust.
>
> (60) Section 2702.—Special Valuation Rules in Case of Transfers of Interests in Trusts.—Whether the sale of property (including insurance policies) to a trust by a trust beneficiary is subject to § 2702 if (i) the beneficiary has a power to withdraw the trust property (or had such power prior to a release or modification, but retains other powers which would cause that person to be the owner if the person were the grantor), other than a power which would constitute a general power of appointment within the meaning of § 2041, (ii) the trust purchases the property with a note, and (iii) the value of the assets with which the trust was funded by the grantor is nominal compared to the value of the property purchased.

Finally, rulings related to private trust companies, decanting, or the basis adjustment, if any, of assets owned by a grantor trust, will not be issued until the IRS resolves the issue through publication of a revenue ruling, revenue procedure, or regulations. In addition, ING trusts continue in the “to be resolved” list not the “no ruling” list; INGs are described like this:

> (9) Section 671.—Trust Income, Deductions, and Credits Attributable to Grantors and Others as Substantial Owners.—Whether the grantor will be considered the owner of any portion of a transfer in trust under §§ 673 to 677 that is purported to be an incomplete gift under § 2511, specifically including, but not limited to, a transfer to a trust providing for distributions at the direction of a committee to the donor and the committee members either by unanimous consent of the committee members or a majority of the committee members with the consent of the donor.
>
> (10) Section 678.—Person other than Grantor Treated as Substantial Owner. —Whether the beneficiaries of a trust will be considered the owners of any portion of such trust when two or more of such beneficiaries have the power to distribute income or principal to themselves by unanimous consent.
>
> * * *
>
> (18) Section 2511.—Transfers in General.—Whether a transfer in trust that is purported not to be considered owned by the grantor under § 671 is an incomplete gift, specifically including, but not limited to, a transfer to a trust providing for distributions at the direction of a committee to the donor and the committee members either by unanimous consent of the committee members or a majority of the committee members with the consent of the donor.

3. **Meaning of Tax Reimbursement Clause**. At issue in Karimipour v. Karimipour (In re Davidson Magnifying Glass Non-Exempt Trust, 2021 WL 137262 (Mich. Ct. App. 2021), was whether the tax reimbursement clause in a trust required the trustee to pay out the amount of the “unified credits” used. The opinion states:

> Under Article IV(4)(e) of the trust agreements, if Marla or Ethan “exercises a power of appointment and Transfer Taxes are imposed” as a result of the transfer of trust property, the trustees are required to pay those “Transfer Taxes as provided in the Paragraph entitled Payment of Taxes.” In relevant part, Article X of the trust agreements provides the following:
>
>> 1. Payment of Taxes. Following any transfer of Trust Property which results in any Transfer Taxes to the beneficiary of any trust created under this trust instrument, the Trustee shall reimburse such beneficiary or distribute trust property to such beneficiary in accordance with the following:
>>
>> a. If so directed by the beneficiary or the Personal Representative of the beneficiary's estate, the Trustee shall pay from the remaining property held in a trust for the beneficiary, directly to the appropriate governmental authority, to the beneficiary or to the Personal Representative of the beneficiary's estate, as the Trustee deems advisable, without seeking reimbursement or recovery from any Person, the amount by which the Transfer Taxes payable in any jurisdiction by reason of the transfer are increased.
>>
>> * * *
>
> "Transfer Taxes" are defined in Article XVI of the trust agreements to "mean[] . . . any gift taxes, including taxes arising pursuant to , and any gift, transfer or other

> similar succession taxes imposed by any state resulting from a transfer subject to federal gift tax[.]" Although the definition of "Transfer Taxes" includes "any gift taxes," under Article X, paragraph (1)(a) of the trust agreements, the taxes must also be "payable."

Does gift taxes "payable" mean the total gift tax or the net, after the application of the donor's unified credit? The court held that payable means the amounts actually paid:

> The sums of money that were required to be paid—and that were actually paid—to the Internal Revenue Service ("IRS") by Marla and Ethan were their respective gift taxes, which were calculated after the application of the unified credits. Marla and Ethan did not actually pay a sum of money with respect to the unified credits because a unified credit is not a tax that must be paid to the IRS. See e.g., 26 USC 2505. Rather, as evidenced by the facts of this case, a unified credit is used to calculate the gift taxes that must be paid to the IRS, and the credits function to decrease the amount of money owed to the IRS. Accordingly, under the terms of the trust agreements, the amount of gift taxes payable means the amount of gift taxes calculated after the application of the unified credits. Consequently, because the use of the unified credits does not constitute payment of a gift tax, the trustees were not required to reimburse Marla and Ethan for the value of the unified credits.

Although unusual, the case is a good illustration generally of the importance of carefully drafted tax clauses. Who ought to benefit from unified credits/exemption/applicable exclusion is not obvious in every case.

4. CBO Publication, Understanding Federal Estate and Gift Taxes. The Congressional Budget Office has published Understanding Federal Estate and Gift Taxes (June 2021) which contains interesting data, including:

> Who Pays Estate and Gift Taxes?
>
> Relatively few people pay estate and gift taxes. Among the 2.7 million decedents in 2016, about 13,000 estates were required to file a return—and of those, 5,500 estates owed taxes. CBO projects that the number of taxable estates will drop to 2,800 among 2021 decedents because of the higher exemption allowed by the 2017 tax act. In terms of gift taxes, about 236,000 gift tax returns were filed in 2018, but only 2,000 of those owed the tax. People who do not pay estate taxes may still be affected by them; that group includes heirs and people who engage in estate planning (the process of managing and allocating assets while a person is still alive) to avoid or lessen the tax.
>
> People Who Pay Estate and Gift Taxes
>
> Widowed decedents and people age 80 or older accounted for the majority of taxable returns filed and estate taxes paid among decedents in 2016.[9] Most estates that filed an estate tax return in that year belonged to widowed decedents who were 80 or older.
>
> - About 64 percent of taxable returns were filed by the estates of widowed decedents, and those returns accounted for 54 percent of estate tax revenues.

- About 78 percent of taxable returns were filed by the estates of decedents age 80 or older, and those returns accounted for 80 percent of estate tax revenues.

In addition, most taxable returns were filed by relatively small estates, even though most estate tax revenues came from the largest estates.

- In 2016, estates with a gross value of $10 million or less accounted for 57 percent of taxable returns but only 11 percent of estate tax revenues.

- Estates with a gross value of $50 million or more filed 5 percent of taxable returns but accounted for 46 percent of estate tax revenues.

In 2018, 22 percent of taxable gifts were at least $1 million, and they accounted for 86 percent of gift tax revenues. Typically, filers must apply their estate tax exemption to the gift tax, which reduces their gift tax liability. The estate tax exemption available when those filers die, however, will be reduced by the amounts previously applied to the gift tax while they were alive.

Other Affected People

The estate tax affects people who do not pay it directly, such as heirs. Some people engage in estate planning to avoid paying the tax (or to reduce the amount that they owe), which may result in ownership arrangements for their assets that they would otherwise not choose. For example, people might transfer assets through a trust to their heirs earlier than they had intended so as to remove those assets from their estate.[10] Although the decedent's estate is responsible for paying estate taxes, the tax reduces the amount that heirs may receive.

Heirs tend to have relatively high income. Families that received an inheritance in 2019—about 3 percent of all families according to the 2019 Survey of Consumer Finances—typically had a higher median income than other families ($92,000 compared with $58,000).[12] About half of the heirs were between the ages of 55 and 75, and most received inheritances from their parents. Those inheritances did not necessarily come from a taxable estate. The median inheritance was $50,000, and the average inheritance was $186,000 (because of a relatively small number of large inheritances).

Do Estate and Gift Taxes Affect Saving?

Because the estate tax is imposed on the transfer of assets, it in effect taxes people's savings. The amount of estate tax that people pay varies—even among people with similar resources—depending on what they choose to do with their money. For instance, the tax on an estate left by someone who saves more will be higher than the tax on an estate left by someone who spends more. As a result, the estate tax could encourage people to save and invest less by making it more expensive for them to leave money to their heirs. Overall, however, the empirical evidence on the effect of the estate tax on saving is inconclusive.[13]

The lack of consensus about the overall effect of the estate tax on saving stems from several factors. The smaller inheritances left to heirs because of the estate tax might induce people, or their heirs, to save more. Alternatively, estate taxes would have little effect on the saving behavior of people who do not intend to leave an inheritance. Another consideration is the way capital gains taxes apply to the value of inherited assets (see Box 1). Because of the step up in basis—upon

> inheritance, the cost basis of an asset is increased to its fair-market value—any appreciation in value while the decedent held the asset is not subject to capital gains taxes, which could motivate people to save more.

5. **No Penalties Quite Yet**. Leighton v. The United States, 155 Fed.Cl. 543 (Cl. Ct. 2021), involved the Estate of David Leighton, with son Frank as executor, another brother, David, Jr., lawyer Richard Allen, consultants known as Freshwater Consultants, and family office providers known as JDJ Family Office Services. The decedent died in January 2017, David, Jr. declined to serve as co-executor, and son Frank served, hiring Allen, Freshwater, and JDJ to help. Collectively they concluded that the decedent's estate was well below the $5,490,000 required before an estate tax return would be due. The opinion recites certain developments during estate administration:

> Throughout the above-recited process, David Leighton, Jr. had not been involved in the estate preparation and administration—for example, he had declined to serve as a co-executor. (*Id*.). On February 26, 2019, almost two years after his father's death, David Leighton, Jr., indicated that the Decedent "might have" established and funded various trusts during his lifetime, and an estate tax return may have been necessary. (*Id*. at 5). Mr. Allen inquired about those trusts with Freshwater, to which Freshwater responded with a copy of the Decedent's 2012 gift tax form confirming the existence of lifetime gifts. (*Id*.). This was new information to the Executor, Mr. Allen, and JDJ Services. That form illuminated leeward gifts totaling $5,094,000—an amount that would put the value of the estate over the threshold for an estate tax return. (*Id*.). Under 26 U.S.C. § 6075(a), that return was due within nine months of the Decedent's death, i.e., not later than October 6, 2017—a deadline long passed.
>
> On April 9, 2019, after coordinating with JDJ Services, Freshwater, and the Executor, Mr. Allen prepared and filed the Decedent's belated estate tax return. (Am. Compl. at 5). The estate paid $1,626,928.00, an amount representing tax and estimated penalties and interest at that time. (*Id*.). After processing the return, the IRS assessed the following obligations: estate tax liability of $1,145,387.00, a late-filing penalty of $257,712.07, a late-payment penalty of $85,904.02, and interest totaling $87,858.88. (Def.'s Mot., App. 2). The IRS refunded the resulting overpayment of $50,066.03 on May 21, 2019. (Def.'s Mot., App. 3).
>
> The Executor subsequently filed a refund claim with the IRS, insisting that it was improper to impose penalties resulting from the untimely filing of the estate tax return because he reasonably relied on Mr. Allen's advice and that all parties were unaware of the Decedent's lifetime gifts. (Am. Compl. at 3). After more than six months passed without the IRS acting on his refund claim, it was deemed denied on November 27, 2020. (*Id*. at 6; *see also* IRC §6532(a)). The Executor initiated this action on February 2, 2021, (Compl., ECF No. 1), arguing that his failure to timely file the estate tax return was "due to reasonable cause and not due to willful neglect," thereby entitling him to a refund. (*Id*. at 5–6). The United States moved to dismiss the Executor's original Complaint for purported failure to state a claim on April 5, 2021. (ECF No. 8).

The court denied the government's motion to dismiss:

> The Court must now decide if the Executor's pleading, when taken as true, could plausibly establish reasonable cause for the estate's belated tax filing. The United States argues that this belated filing was unreasonable at every turn—Mr. Allen's

advice was unreasonable, Executor's reliance on the advice was unreasonable, and the unavailability of the tax information itself was unreasonable. (*See generally* Def.'s Mot.). Each of those arguments is based on the finding that someone, somewhere should have known about the 2012 gift tax form. As explained below, the Court is not able to make that decision at this nascent stage of litigation.

When evaluating whether reasonable cause exists, the Federal Circuit focuses its analysis of whether the advice was that of a competent and independent professional advisor on several factors. Those factors include: (1) whether "the advice was based on all pertinent facts and circumstances and the law as it relates to those facts and circumstances"; (2) whether the advice was based on any "unreasonable factual or legal assumptions," or "unreasonably [relied] on the representations, statements, findings, or agreements of the taxpayer or any other person"; and (3) whether the taxpayer's reliance on the advice was "objectively reasonable." *Stobie Creek Invs. LLC v. United States*, 608 F.3d 1366, 1381 (Fed. Cir. 2010). Whether these factors are present in each situation is a question of fact, but what elements must be present to constitute reasonable cause is a question of law. *Estate of Liftin*, 111 Fed. Cl. at 13 (citing 26 U.S.C.A. § 6651(a)(1)). Generally, a taxpayer may establish reasonable cause for failing to file a timely return to avoid penalty by establishing reasonable reliance on the advice of an accountant or attorney, even if it is later established that such advice was erroneous or mistaken. *Thomas v. Comm'r*, 82 T.C.M. (CCH) 449 (T.C. 2001), 2001 WL 919858 (citing 26 U.S.C. § 6651(a)(1)).

The United States argues that the advice that Executor received pertaining to whether he needed to file an estate tax return was objectively unreasonable. (Def.'s Mot. at 10). First, the United States asserts that Mr. Allen's advice was not "based on all the pertinent facts and circumstances" because that advice did not account for the 2012 gifts made by the Decedent. (*Id*. at 11). This circular argument is unavailing. A finding for the United States on this point would also mean that missing information could never constitute reasonable cause because advice would necessarily not be based on all pertinent facts and circumstances. As such, this argument is not a valid reason for dismissal.

The United States goes on to argue that Mr. Allen's tax advice was unreasonable because his "blind faith in JDJ Services regarding the Decedent's lifetime gifts" does not constitute due diligence. (*Id*. at 11, 12). The Federal Circuit has found that a failure to perform due diligence amounts to unreasonable reliance on the statements of others. *Russian Recovery Fund Limited v. United States*, 851 F.3d 1253 (Fed. Cir. 2017). *Russian Recovery Fund* involved a situation where the plaintiff's outside accounting firm "did no independent investigation into the factual accuracy of the information that [a related individual] supplied." 851 F.3d at 1269. The facts differ from this case because, in *Russian Recovery Fund*, the taxpayer provided its tax preparation firm with a "self-interested" version of the relevant facts "orchestrated by [the taxpayer] to achieve a desired result and were not critically evaluated by [the tax preparer]." *Id*. (quoting *Russian Recovery Fund Ltd. v. United States*, 122 Fed. Cl. 600, 622 (2015)). In this situation, the Amended Complaint enumerates various steps taken in coordinating the estate, including an exchange of a questionnaire about the valuation of the estate. (Am. Compl. at 3–4). At this stage, the Court must accept as true that the steps outlined in the pleadings were taken to their most reasonable extent. Requiring a more detailed recount of those events runs counter to this Court's well-established pleading standards. Tax advisors cannot reasonably give advice on unavailable information. While the Court accepts as true that Mr. Allen's investigation did not

> reveal the existence of the 2012 trusts, without more evidence, the Court is unable to discern whether that factual investigation constituted reasonable due diligence.
>
> The United States goes on to argue that, because Executor is the sole party responsible for the belated filings, he therefore cannot demonstrate reasonable reliance on the advice of his agent. (Def.'s Mot. at 14–15). Taxpayers are free to hire an agent of their choosing in the preparation of their taxes, but that does not relieve the taxpayer of its legal obligations under the tax code, and any carelessness, reckless indifference, or intentional failure by the taxpayer's agent or employee is attributable to the taxpayer. *See Boyle*, 469 U.S. at 250. Further, reliance on advisors is generally an insufficient excuse for relief from the late-filing and late-payment penalties because filing and payment deadlines are unambiguous. *Id*. at 249. The *Boyle* Court recognized other scenarios which could establish reasonable cause. For instance, the Supreme Court held that taxpayers may reasonably rely on advice concerning whether—but not when—a return must be filed. 469 U.S. at 250–51, *see also Carmean v. United States*, 4 Cl. Ct. 181, 185 (1983) ("[W]hen there is no question that a return must be filed, the taxpayer has a personal, non-delegable duty to file the return when due."). In the scenarios contemplated by *Boyle*, the Supreme Court does not address misapprehensions of fact or the responsibility of taxpayers in tendering relevant information to their tax advisors. The question that is left open is whether reasonable cause can be established when, as in this case, the taxpayer and its agents act on incorrect information.
>
> ***
>
> The United States' arguments fail because each of them presupposes that one or more of the parties *should have known* that the estate's valuation went beyond the threshold for filing an estate tax form. The marrow of the Executor's case cannot be summarily described as "bad tax advice," but instead as advice without all pertinent information and based on a misapprehension of fact. Therefore, the United States' arguments can be affirmed or negated by answering a single question: should the Executor or his tax advisors have known about the Decedent's funded trusts prior to their unveiling in 2019? There is simply not enough information to answer that question. At the pleading stage, the Court must take the Executor's allegations as true and view them in the light most favorable to him. To the extent the United States dispute these allegations, that is a factual inquiry not suitable for resolution on a motion to dismiss.

6. **Notices Creating "Listed Transactions" Require Notice and Comment**. Litigation over the procedural requirements of Treasury and IRS promulgations is widespread in the conservation easement area, but not only there. In Mann Construction, Inc. v. United States, 21 F.4th 1138 (6th Cir. 2022), the court held that IRS Notices setting forth a listed transaction must have a notice and comment period. At issue was Notice 2007-83 dealing with cash value life insurance products:

> In 2007, the IRS issued Notice 2007-83, entitled "Abusive Trust Arrangements Utilizing CashValue Life Insurance Policies Purportedly to Provide Welfare Benefits." 2007-2 C.B. 960. The Notice designates certain employee-benefit plans featuring cash-value life insurance policies as listed transactions. A cash-value life insurance policy combines life insurance coverage with a cash-value investment account. As the IRS saw it, these transactions run the risk of allowing small business owners to receive cash and other property from the business "on a tax-favored basis." *Id*.

> Brook Wood and Lee Coughlin collectively own Mann Construction, which is based in Michigan. The company provides general contracting, construction management, and similar services.
>
> From 2013 to 2017, Mann Construction established an employee-benefit trust that paid the premiums on a cash-value life insurance policy benefitting Wood and Coughlin. The company deducted these expenses, while Wood and Coughlin reported as income part of the insurance policy's value. Neither the individuals nor the company reported this arrangement to the IRS as a listed transaction.
>
> In 2019, the IRS concluded that this structure fit the description identified in Notice 2007-83. The agency imposed penalties on the company ($10,000) and both of its shareholders ($8,642 and $7,794) for failing to disclose their participation in the trust. All three paid the penalties for the 2013 tax year and sought administrative refunds, claiming the IRS lacked authority to penalize them. When the administrative process for challenging the penalties left the taxpayers empty-handed, they turned to federal court.

The IRS agreed it did not provide a notice and comment period before issuing Notice 2007-83. Did it have to? The opinion states:

> The IRS offers two explanations for declining to follow the notice-and-comment process:(1) It says that Notice 2007-83 is merely an interpretive rule (which does not require notice and comment) as opposed to a legislative rule (which does require notice and comment); and (2) it says that, even if the Notice amounts to a legislative rule, Congress exempted the IRS from the APA's requirements with respect to these disclosure rules. Each defense deserves a turn.
>
> ***
>
> Legislative rules have the "force and effect of law"; interpretive rules do not. *Perez*, 575 U.S. at 96–97 (quoting *Shalala v. Guernsey Mem'l Hosp*., 514 U.S. 87, 99 (1995)). Legislative rules impose new rights or duties and change the legal status of regulated parties; interpretive rules articulate what an agency thinks a statute means or remind parties of pre-existing duties. *Tenn. Hosp. Ass'n*, 908 F.3d at 1042.When rulemaking carries out an express delegation of authority from Congress to an agency, it usually leads to legislative rules; interpretive rules merely clarify the requirements that Congress has already put in place. *Id*. at 1043.
>
> Measured by these metes and bounds, Notice 2007-83 amounts to a legislative rule. The Notice has the force and effect of law. It defines a set of transactions that taxpayers must report, and that duty did not arise from a statute or a notice-and-comment rule. It springs from the IRS's own Notice. Taxpayers like Mann Construction had no obligation to provide information regarding listed transactions like this one to the IRS before the Notice. They have such a duty after the Notice. Obeying these new duties can "involve significant time and expense," and failure to comply comes with the risk of penalties and criminal sanctions, all characteristics of legislative rules. *CIC Servs., LLC v. IRS*, 141 S. Ct. 1582, 1591 (2021); *see also id*. at 1592; Kristin E. Hickman, *Unpacking the Force of Law*, 66 Vand. L. Rev. 465, 524 (2013) (characterizing penalties as a leading indicator that a regulation is legislative rather than interpretive).

> The Notice also stems from an express and binding delegation of rulemaking power. Congress tasked the IRS with determining "by regulations" how taxpayers must "make a return or statement" and the information they must provide to the IRS when doing so. 26 U.S.C. §6011(a). Under the penalty provision for failing to report certain types of transactions, the statute delegates to the Secretary of the Treasury authority to "determine[]" which transactions have "a potential for tax avoidance or evasion" or are "the same as, or substantially similar to, a transaction" deemed "a tax avoidance transaction." *Id.*§6707A(c)(1)–(2). The long and the short of it is that Congress "delegates to the Secretary of the Treasury, acting through the IRS, the task of identifying particular transactions with the requisite risk of tax abuse." *CIC Servs.*, 141 S. Ct. at 1587. In identifying a new type of transaction purportedly satisfying these demands, Notice 2007-83 purports to carry out this congressional delegation. In every relevant way, the Notice has the stripes and colors of a legislative rule subject to the notice-and-comment process.
>
> Attempting to fend off this conclusion, the government argues that Notice 2007-83 merely interprets the term "tax avoidance transaction" in §6707A. But, as shown, the substance of the Notice is legislative. It creates new substantive duties, the violations of which prompt exposure to financial penalties and criminal sanctions. Those are hallmarks of a legislative, not an interpretive, rule. The government's argument also overlooks the reality that the relevant statutory terms are not self-defining, which explains why Congress delegated to the IRS authority to "determine[]" and "identif[y]" which transactions need to be reported. 26 U.S.C. §6707A(c)(1)–(2); *see CIC Servs.*,141 S. Ct. at 1587. That feature of the Notice, once again, represents a quality of a quintessential legislative rule. *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 169–70 (7th Cir. 1996) (deeming a binding rule promulgated pursuant to a delegation of legislative authority "the clearest possible example of a legislative rule").

Did Congress exempt notices of listed transactions? No, said the court:

> The baseline assumption for agency action that will have the force and effect of law is that it must go through notice and comment. 5U.S.C. §553. But Congress may exempt an agency from the process. It has done so before. *See, e.g., Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (immigration).
>
> Did it do so here? Before an agency may regulate without the protections of the notice-and-comment process, it must show that Congress "expressly" carved out the exception. 5U.S.C. §559. "Exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed." *Marcello*, 349 U.S. at 310; *see also Dickinson v. Zurko*, 527 U.S. 150, 155 (1999) (recognizing consistent processes as a goal of the APA and requiring a clear indication in the relevant statute to deviate from that norm).
>
> ***
>
> As the concrete tends to inform the abstract, let us offer some examples. Start with cases in which the court accepted an express congressional deviation from the conventional notice-and-comment requirements. In one case, the U.S. Supreme Court accepted Congress's clear rejection of the APA's baseline approach based on Congress's "laborious adaptation of the" APA to deportation proceedings and the "specific points at which deviations" were made from APA procedures. *Marcello*, 349 U.S. at 310 (Immigration and Nationality Act of 1952). In another case, our court highlighted an example of how Congress could

unequivocally modify the APA's procedures with statutory text: "Except as otherwise provided in this chapter, the provisions of sections 551 to 559 and sections 701 to 706 of [the APA] shall not apply to the making of any order, notice, or decision made pursuant to this chapter, or to any proceeding for the review thereof." *Reich v. Youghiogheny & Ohio Coal Co.*, 66 F.3d 111, 114 n.2 (6th Cir. 1995) (quoting 30 U.S.C. §956). In still another case, the D.C. Circuit identified a clear rejection of the APA's baseline approach based on Congress's creation of "specific procedures" that "differ from those of the APA." *Asiana Airlines v. F.A.A.*, 134 F.3d 393, 398 (D.C. Cir. 1998) (Federal Aviation Reauthorization Act).

Contrast these cases to those that failed to meet the clarity imperative. In one case, "minor variations" from the APA in which the "variations deal[t] primarily with subjects not contained in the APA" did not suffice to modify the presumption of the APA's applicability. *Lane v. U.S. Dep't of Agric.*, 120 F.3d 106, 109–10 (8th Cir. 1997) (National Appeals Division statutes). In another case, a statutory scheme that remained "compatible with the APA"—but with extensive and exclusive procedural components—did not satisfy the stiff requirements for displacing the APA. *Citizens for Resp. & Ethics in Wash. v. F.E.C.*, 993 F.3d 880, 890–92 (D.C. Cir. 2021) (Federal Election Campaign Act). In another case, the court held that statutory procedures requiring "public notice" and "public hearings" did not abrogate the APA's notice-and-comment requirements. *Lake Carriers' Ass'n v. E.P.A.*, 652 F.3d 1, 6 (D.C. Cir. 2011) (per curiam) (Clean Water Act). Whether faced with statutes potentially on one side of the line or the other, we remain vigilant that "the import of the §559 instruction is that Congress's intent to make a substantive change be clear." *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of Fed. Rsrv. Sys.*, 745 F.2d 677, 686 (D.C. Cir. 1984).

***

Note to begin the absence of any express variation of the APA's notice-and-comment procedures. The statutes do not say anything, expressly or otherwise, that modifies the baseline procedure for rulemaking established by the APA. *Id*. §§6011, 6707A. Nor did Congress expressly displace those requirements by creating a new procedure for these regulations. The statutes do not provide any "express direction to the" agency "regarding its procedure" for identifying reportable and listed transactions, let alone procedures "that cannot be reconciled with" notice-and-comment requirements or any other indication within the statutory text that "plainly expresses a congressional intent to depart from" the normal APA procedures. *Asiana Airlines*, 134 F.3d at 398. The statutes merely establish a disclosure and penalty regime for the IRS to administer. As to the statutory text, Congress did not change the background procedural requirements of the APA or otherwise indicate an exemption from those requirements in a "clear" or "plain" way that would make the APA's procedures inapplicable to the IRS. *See Lockhart*, 546 U.S. at 145–46.

Not true, the government pushes back. It starts by pointing to the cross-reference language in the reportable transaction definition, which describes such transactions as those "determined under regulations prescribed under section6011." 26 U.S.C. §6707A(c)(1). It then adds that, at the time Congress enacted §6707A, one such regulation provided that the IRS could identify reportable and listed transactions by "notice, regulation, or other form of published guidance." 26 C.F.R.§1.6011-4(b)(1)–(2) (2003). Because a "notice" is the type of IRS action at issue, it claims that the statute contains an express exception from the APA's notice-and-comment process.

***

> The driving inquiry is whether Congress "clearly" departed from the APA's baseline rule. *Lockhart*, 546 U.S. at 145; *see also Ass'n of Data Processing*,745 F.2d at 685–86. Potential inferences layered on top of conjectural implications do not suffice. The government, notably, has not identified any case in which Congress exempted an agency from the APA's requirements via such a winding and elaborate route. Accepting the government's approach "would require us to create §559 precedent that itself could prove disruptive by too readily permitting other agencies to depart from uniform APA requirements." *Dickinson*, 527 U.S. at 162.

Mann Construction, if applied broadly, would substantially change IRS procedures.

In GBX Associates LLC v. United States, Case No. 1:22-CV-00401-PAB (N.D. Ohio), in an answer filed to the Complaint of Petitioner, the government noted:

> 6. In light of the recent decision of the United States Court of Appeals for the Sixth Circuit in *Mann Construction, Inc. v. United States*, No. 21-1500 (Mar. 3, 2022), Plaintiff's likelihood of success in challenging the lawfulness of Notice 2017-10 is high.
>
> **Answer: Admits on the ground that *Mann Construction* is now controlling law within the Sixth Circuit and that the analysis in that decision regarding IRS Notice 2007-83 appears to apply with equal force in IRS Notice 2017-10. The United States reserves the right to challenge the correctness of the *Mann Construction* decision, and to assert the validity of Notice 2017-10, in cases outside the Sixth Circuit.**

At 2022 WL 1012618, the court noted GBX may be the same as Mann but may not be because the Notice in question is different.

See also CIC Services, LLC. v. IRS where a federal district court in Tennessee invalidated Notice 2016-66 (designates certain micro-captive transactions as transactions of interest). In Liberty Global, Inc. v. United States, 27 F.4th 1138 (D. Colo. 2022), temporary regulations implementing retroactive application of section 245A (foreign source dividends received deduction) were invalidated.

T. MISCELLANEOUS

PART 4 – STATE DEVELOPMENTS

U. STATE DEVELOPMENTS

1. Failure to Discuss Basis Planning.

Stevenson v. Stanyer, 2019 WL 2895378 (Wa. Ct. App., Div.3)(unreported).

Income tax basis planning is increasingly a part of estate planning and became the subject of a malpractice claim in Spokane, Washington. Many years ago, Dr. and Mrs. Richard Stevenson transferred a lake house in Idaho into a trust to avoid estate tax on the property. Dr. Stevenson died in 1989 and the trust worked as intended with the property remaining in the trust for Mrs. Stevenson's benefit until her death in 2016. Mrs. Stevenson's children decided to sell the lake house and learned they would owe capital gains taxes whereupon Mrs. Stevenson's son, as executor, sued the lawyer who had updated Mrs. Stevenson's will, power of attorney, and health care directive some six months before she died. The opinion states that the "essence of the complaint" was that the lawyer should have advised Mrs. Stevenson to have entered into an agreement with the trust beneficiaries to dissolve the trust, take the lake house into her personal name, and receive increased basis, none of which would cause any estate tax to be owed because of the increased estate exemption. The damages were $159,000 in capital gains taxes.

The lawyer defended on the grounds that he was not asked to do any tax work on behalf of the beneficiaries. The decedent's son remembered his mother's "clear intention" that her death not result in a taxable event to her estate or her beneficiaries but the court found that there was no evidence such intent was ever expressed to the lawyer. The opinion notes that "[t]here is simply no indication that her desire to avoid tax consequences for the children was ever communicated to Mr. Stanyer. Similarly, the e-mail communications between Stanyer and Stevenson, offered into the record by both parties, do not mention the issue of tax advice." The court concluded that it "is difficult to see how any general duty to provide tax advice for her estate would encompass tax advice for the beneficiaries of the trust she controlled."

Many lawyers make more expansive claims for the sort of advice we are providing to a client, and in many instances actually represent both the parents and children or at least some of the children. Arguably the successful defense made by the lawyer here would be more difficult in such instances.

A complaint styled Raia v. Lowenstein Sandler was filed in the Superior Court of New Jersey Law Division: Civil Part, Bergen County (BER-L-000921-19). The essence of the action is the supposed failure of counsel to advise clients that assets given to dynasty trusts retain carryover basis and potential particular problems that could result from depreciation recapture upon the trusts ceasing to be grantor trusts when the grantor died. Regardless of the merits – if any – of the action, it is a reminder for estate planners. The engagement letter contained an arbitration clause which was enforced. Raia v. Cohn Reznick, LLP, 2020 WL 3408732.

2. Trust Protector As Fiduciary With A Duty To Whom? Ron v. Ron, 2020 WL 1426392 (S.D. Tx. 2020), deals with the alleged dissipation of assets in connection with a divorce. Directly pertinent to estate planners is a question addressed by the court regarding a trust protector in a children's trust, the recipient of some of the alleged dissipation. The relevant language of the children's trust was:

> The Trust states: "The purpose of a Trust Protector is to direct my Trustee in certain matters concerning the trust, and to assist, if needed, in achieving my objectives as expressed by the other provisions of my estate plan hereunder." Id. at 17. The Trust explicitly empowers the Trust Protector to carry out several duties. Relevant here, the Trust provides:
>
> > The Trust Protector may add as a beneficiary of any trust established hereunder (i) any descendant of my husband's parents; (ii) any spouse or surviving spouse of any such descendant (other than me); and (iii) any

> charity, subject to any limitations the Trust Protector determine appropriate. The Trust Protector may also remove any beneficiary who was added under this subsection.

The wife was upset because the trust protector added husband as a beneficiary of a trust she had created (to which husband had transferred assets). Wife, Suzanne, claimed the trust protector, Stein, had a fiduciary duty to her. The court held that neither the trust nor Texas law created such a fiduciary relationship:

> In my view, nothing in Section 4.01 of the Trust creates a fiduciary relationship between Stein and Suzanne. If anything, the provision strongly suggests that the fiduciary relationship is between Stein and the Trustee—who Stein is to "direct" and "assist"—or perhaps, between Stein and the Trust—which contains Suzanne's memorialized objectives. *Id*. The mere fact that Section 4.01 references Suzanne's objectives means nothing when the Trust explicitly states that "[a]ll provisions of this agreement are to be construed to accomplish these objectives." *Id*. at 10. Given this reality, literally every provision in the Trust is expressly intended to achieve Suzanne's objectives. Surely, this does not mean that every individual implicated by a given provision has entered a fiduciary relationship with Suzanne.
>
> ***
>
> Though not argued by the parties, I also considered the provision of the Texas Trust Code that mentions trust protectors and their fiduciary duty. Section 114.0031(a)(1) of the Texas Trust Code states: "'Advisor' includes protector." TEX. PROP. CODE § 114.0031(a)(1). Section 114.0031(e) then provides:
>
> If the terms of a trust give a person the authority to direct, consent to, or disapprove a trustee's actual or proposed investment decisions, distribution decisions, or other decisions, the person is an advisor. An advisor is a fiduciary regardless of trust terms to the contrary except that the trust terms may provide that an advisor acts in a nonfiduciary capacity if:
>
> > (1) the advisor's only power is to remove and appoint trustees, advisors, trust committee members, or other protectors; and
> >
> > (2) the advisor does not exercise that power to appoint the advisor's self to a position described by Subdivision.
>
> *See* TEX. PROP. CODE § 114.0031(e). This seems to be the only provision in the Texas Trust Code that discusses the fiduciary duty owed by a trust protector. Notably, the section discusses the trust protector in his role as advisor to the trustee. This suggests that the fiduciary relationship is between Stein (Trust Protector) and Avi (Trustee)— again, or perhaps, between Stein (Trust Protector) and the Trust itself. In other words, Texas law does not create a formal fiduciary relationship between Stein and Suzanne.

3. **Declaratory Judgment Action Does Not Trigger No Contest Clause**. At issue in Hunter v. Hunter, 838 S.E.2d 721 (Va. 2020), was whether Chip, a beneficiary of a trust known as Theresa's Trust, triggered a no contest clause by filing an action questioning the inform and report provisions of the trust. Eleanor, the trustee, argued yes. The complaint that Chip filed had two counts the court described as follows:

> Chip filed this declaratory judgment action, seeking a favorable interpretation of the trust that would require Eleanor to provide Chip with information and documents related to the trust. Aware of the no-contest provision in the Theresa Trust, Chip divided his declaratory judgment complaint into two carefully worded counts. Count II acknowledged the ultimate goal of the litigation by asserting that Chip sought the "determination of the rights of Chip and Eleanor" under the terms of the Theresa Trust to require the trustee to inform and report under Code § 64.2-775, other various provisions of the Virginia Uniform Trust Code, or stand-alone principles of common law and equity jurisprudence. The rationale behind Count II, as Chip explained to the circuit court in a subsequent brief, was that he interpreted the language of the inform-and-report waiver provision to only apply to the duty to inform and report under former Code § 55-548.13 and to have no effect on what he interpreted as freestanding inform-and-report duties arising under other sources of law. *See* R. at 177-85. Based upon prior communications with Eleanor's counsel, Chip understood Eleanor's position to be that the waiver provision relieved her of any and all inform-and-report duties.
>
> The complaint expressly sought to create a firewall protecting Count I from any uninvited, premature consideration of Count II. Prior to the complaint's allusion to the competing interpretations of the inform-and-report waiver provision, Count I requested that the circuit court "initially determine" whether determining Chip's and Eleanor's rights and duties under the trust "would constitute a 'contest' " under the no-contest provision, thereby triggering the forfeiture of Chip's beneficial interest in the trust. J.A. at 3. Count I stated that the court should consider the request in Count II "if, and only if," the court interpreted the no-contest provision to be inapplicable. *Id.* Relying on our decision in *Virginia Foundation of Independent Colleges v. Goodrich*, 246 Va. 435, 436 S.E.2d 418 (1993), the complaint insisted that it sought "no further relief than that which has been held by the Virginia Supreme Court ... to permit a beneficiary to file a declaratory judgment action seeking an interpretation ... without such conduct being held to fall within the scope of a no contest clause and/or actuating a no contest clause." J.A. at 3. In Count I, Chip contended that he "merely [sought] an interpretation of the language of the Trusts with respect to the rights and duties of Chip and Eleanor," and thus, Count II did not trigger the application of the no-contest clause. *Id.* at 11.

The no contest clause and the reasoning of the lower court, the opinion summarized this way:

> The circuit court held that Count II of the complaint had triggered the no-contest provision and, on this basis, ordered the forfeiture of Chip's interest in the Theresa Trust. Even if it were true that Count II had violated the no-contest provision, the court erred by disregarding the if-and-only-if proviso of Count I and ordering a forfeiture based upon Count II. Instead, in such a scenario, the circuit court should have entered judgment on Count I in Eleanor's favor and dismissed Count II as moot.
>
> That said, we do not accept the first premise of the circuit court's reasoning that Count II violated the no-contest provision. Whether such a violation has occurred "depends upon the wording of the 'no contest' provision and the facts and circumstances of each particular case." *Womble*, 198 Va. at 529, 95 S.E.2d 213; *see also Goodrich*, 246 Va. at 439, 436 S.E.2d 418. In the first paragraph of the self-styled "IN TERROREM PROVISION" of the trust, Theresa provided background context explaining her intent:

> I have from time to time made gifts and provided financial support to each of my children and to my grandchild as I wished, and as my husband and I determined to be necessary to their circumstances. Except as otherwise expressly set forth in this document, the share for any beneficiary hereunder shall not be affected by any gifts or loans to any beneficiary hereunder.
>
> J.A. at 254. The next paragraph of the no-contest provision begins: "I desire that my children and grandchild not expend resources *disputing loans, gifts or bequests that I have made*." *Id.* (emphasis added). Theresa then sought to enforce that desire by declaring:
>
> > Therefore, if any beneficiary under this Trust Agreement takes any one or more actions described in this paragraph, then the interest of such beneficiary under this Trust Agreement shall be revoked, and such beneficiary shall be deemed to have predeceased me without surviving descendants for all purposes under this Trust Agreement, effective as of the date such action is taken.
>
> *Id.* One of the "actions" triggering the forfeiture was "[c]ontest[ing] any provision of this Trust Agreement." *Id.*
>
> The no-contest provision provided a specific definition for a prohibited "contest" of the trust: "For purposes of this Article, a person shall be deemed to contest an instrument or action, if he or she takes any action seeking to invalidate, nullify, set aside, render unenforceable, or otherwise avoid the effect of such instrument, action or transaction." *Id.* at 255. A caveat, however, followed this definition:
>
> > The preceding paragraph shall take effect regardless of whether such contest is made in good faith or is ultimately successful, provided, however that a petition made in good faith and not objected to by my Trustee hereunder, seeking an interpretation of this or any other instrument, shall not be considered a contest of such instrument.
>
> *Id.*
>
> Focusing on the sentence defining "contest," Chip asserts that Count II never sought to "invalidate, nullify, set aside, render unenforceable, or otherwise avoid" any provision of the Theresa Trust. *Id.* Nor did he violate his mother's "desire" that no beneficiary should "expend resources disputing loans, gifts or bequests" that she had previously made. *Id.* at 254. Instead, when properly construed, Count II merely sought an interpretation of the trustee's inform-and-report duties under other sources of law that would be wholly unaffected by the waiver provision. The circuit court disagreed with Chip and ordered the forfeiture of his interest in the trust. We believe the court erred in doing so.

Eleanor, the trustee, argued that the no contest cause was triggered because she did not agree to the petition. The court flatly rejected that argument stating:

> Eleanor acknowledges this general rule but argues that the no-contest provision in the Theresa Trust required forfeiture even if Chip sought only a judicial interpretation of its provisions. Skipping over the sentence defining "contest," Eleanor lays emphasis on the proviso that follows. That proviso, broken out below for clarity, purports to recognize an exception to the no-contest provision:

- *provided*, however that a petition
    - made in *good faith* and
    - *not objected to by my Trustee* hereunder,
    - seeking an *interpretation* of this or any other instrument,
- shall not be considered a contest of such instrument.

See J.A. at 255 (emphases added). Eleanor argues that this proviso extends the no-contest provision to a beneficiary's good faith petition for a judicial interpretation of the trust if she, as trustee, objects to the request. To her, the meaning of the provision is quite clear: A request for a judicial interpretation of the trust constitutes a contest triggering forfeiture so long as she says so. We have several concerns about this argument.

To begin, we have never addressed (much less approved) a no-contest provision seeking to seal the courthouse doors to a litigant seeking an interpretation (rather than an invalidation) of a trust or will provision. Several courts have criticized such an effort as an impermissible overreach inconsistent with the traditional boundaries of no-contest provisions. Leading commentators have taken a similar view.[11] We need not resolve that question in this case, however, because the proviso Eleanor relies upon merely implies, but does not expressly state, that her mother intended to include a request for judicial interpretation within the definition of a contest, thus warranting a forfeiture. In this area of legal draftsmanship, mere implications will not suffice.

As we noted earlier, forfeiture provisions are "strictly construed," *Rafalko*, 290 Va. at 395, 777 S.E.2d 870, because "equity abhors forfeitures," *Jones*, 101 U.S. at 628, and because "provisions that require forfeiture are not favored in the law and will not be enforced except according to their clear terms," *Rafalko*, 290 Va. at 402, 777 S.E.2d 870. To be effective, the provision must "precisely express" an intent to cause a forfeiture. *Keener*, 278 Va. at 443, 682 S.E.2d 545. "The instrument must give the right of forfeiture in terms so clear and explicit as to leave no room for any other construction." *Davis*, 205 Va. at 169, 135 S.E.2d 812. These canons of construction have great weight in the context of a no-contest provision in a trust instrument since a trust's very identity as a creature of equity presupposes the possibility of oversight of the trustee by a chancellor jealous of safeguarding the rights of all parties with an interest in the trust.

Strictly construed, the proviso in the no-contest provision of the Theresa Trust does not equate a request for an *interpretation* of the trust's provisions with a *contest* of the trust. Instead, the no-contest provision enumerates the actions constituting a "contest" as "any action seeking to invalidate, nullify, set aside, render unenforceable, or otherwise avoid the effect of such instrument, action or transaction." J.A. at 255. These verbs — invalidate, nullify, set aside, render unenforceable, and avoid the effect of — are not synonyms for interpret.

The proviso purports to remove an action (a request for judicial interpretation) from a list in which the action never appeared in the first place. The proviso states that Eleanor, as trustee, can agree that a request for an interpretation is not a contest. The proviso thus assumes that a request for an interpretation has already been defined as a "contest" by the no-contest clause — thus creating the need for a proviso that excises "interpretation" from that definition in certain

> circumstances. By doing so, the proviso makes a tautological assertion "in which the point to be proved is implicitly taken for granted," Black's Law Dictionary 189 (11th ed. 2019), a classic example of begging the question. One does not need an exception to a rule to do something the rule does not prohibit.
>
> For these reasons, the principles of strict construction dictate that neither the definition of "contest" nor the proviso's attempted exception from that definition clearly and unmistakably states that either count of Chip's declaratory judgment action violates the no-contest provision by seeking an interpretation of the trust and, based thereon, a declaration of the trustee's duties. The circuit court erred in concluding otherwise.

4. **No-Contest Clause Applied**. Missouri has a statute allowing a "test" lawsuit over a no-contest clause. In Knopik v. Shelby Investments, LLC, 597 S.W.3d 189 (Mo. 2020), the beneficiary ignored that statute and just filed a lawsuit alleging a breach by the trustee. The court applied the no-contest clause:

> Gift L.L.C. ("Settlor") created the Knopik Irrevocable Trust ("Trust") in late December 2016. The provisions of the Trust established Shelby Investments, L.L.C. ("Trustee") as the sole trustee and Samuel Knopik ("Beneficiary") as the sole beneficiary of the Trust. The Trust was to provide the Beneficiary with a $100-per-month distribution, beginning in December 2016 and ending in December 2020. Provision 12 of the Trust, denominated "No Contest," provided:
>
> > In case any beneficiary shall (i) contest the validity of this trust, or any provisions hereof, in whole or in part; (ii) make a claim against a trustee for maladministration or breach of trust; or (iii) attempt to remove a trustee for any reason, with or without cause; then such contest or claim and such attempt shall cancel and terminate all provisions for or in favor of the beneficiary making or inciting such contest or claim, without regard to whether such contest or claim shall succeed or not; and all and any provisions or provision herein in favor of the beneficiary so making such contest or claim, or attempting or inciting the same, to be revoked and of no force and effect; and the entire trust estate shall revert to the Settlor and be distributed to the Settlor.
>
> The Trustee made a single distribution to the Beneficiary in February 2017 but made no further distributions pursuant to the terms of the Trust. In August 2017, the Beneficiary filed a petition against the Trustee for breach of trust and to remove the Trustee. The Trustee admitted it made the single payment pursuant to the Trust, despite additional distributions being required. The Trustee further admitted it had indicated to the Beneficiary that it did not intend to make any future payments pursuant to the Trust. The Trustee also raised a counterclaim for declaratory judgment, asking the circuit court to determine that, due to the violation of the "No Contest" provision of the Trust, all provisions of the Trust in favor of the Beneficiary were cancelled and terminated. The Beneficiary and the Trustee each filed motions for summary judgment. The circuit court entered summary judgment in favor of the Trustee on its counterclaim after finding that the Beneficiary's filing of his petition for breach of trust and removal violated the Trust's no-contest clause. The Beneficiary appeals.
>
> ***
>
> There is no doubt that the language of the Trust indicated the Settlor's clear intent to impose the result of forfeiture when the Beneficiary filed his petition. Provision

> 12 of the Trust purported to require forfeiture if the Beneficiary were to contest the validity of the Trust, make a claim against the Trustee for maladministration or breach of trust, or attempt to remove the Trustee for any reason. The petition the Beneficiary filed in the circuit court contained two counts. Count I was titled "Breach of Trust." Count II – "Removal" – sought removal of the Trustee and proposed a replacement trustee. When the Beneficiary filed his petition, violation of the plain language of Provision 12 was evident. The circuit court found the filing of the petition, as pleaded, to be in violation of the Trust's no-contest provision, and the circuit court ordered that all provisions of the Trust in favor of the Beneficiary be cancelled and terminated. The Beneficiary asks for relief by having this Court rule that no-contest clauses are inapplicable when the action is for breach of trust or removal of a trustee.
>
> However, if the Beneficiary wished to challenge the enforceability and applicability of the no-contest clause to the claims in his petition, he should have done so in a proceeding under section 456.4-420. Section 456.4-420, enacted by the Missouri legislature in 2014, addresses a procedure by which an interested person can seek to avoid the effect of no-contest clauses in trusts. The statute provides "for an interlocutory determination whether a particular ... petition ... by the interested person would trigger application of the no-contest clause or would otherwise trigger a forfeiture that is enforceable under applicable law and public policy." Section 456.4-420.1. Upon consideration of the language of the clause, the relationship of the clause to the trust instrument, and the facts of the petition, the circuit court makes a determination that "result[s] in the no-contest clause being enforceable to the extent of the court's ruling." Section 456.4-420.4. This determination is subject to appeal. Section 456.4-420.3.
>
> Section 456.4-420 provided a "safe harbor" in which the Beneficiary should have invoked a challenge to the enforceability and applicability of the no-contest clause to his claims for breach of trust and removal. But the Beneficiary chose to file his petition asserting the exact claims the Trust unambiguously stated would result in forfeiture. Because of the Beneficiary's failure to utilize section 456.4-420, this Court need not reach the issue of either delineating specific exceptions to the application of no-contest clauses or deciding whether a good faith or probable cause exception should be introduced in Missouri.

The court seems to base this tough result for the beneficiary on the beneficiary's failure to start with a different statute, but suppose the beneficiary had asked the clause would apply and the court had said yes? The beneficiary would have been without a remedy. Why Missouri would enforce a trust with so few – maybe no – limits on a trustee is uncertain. A concurrence hints of a backstory that reflects poorly on the court and litigants:

> It has been suggested that the present case is fictitious or collusive. *See* Kimberly E. Cohen, et al. *Advanced Estate Planning Practice Update: Summer 2019* (American Law Institute June 12, 2019) (quoted portion authored by Kathleen R. Sherby) (setting forth the circumstances surrounding this case and concluding: "Based on the circumstantial evidence gathered thus far, *Knopik* appears to be a 'contrived' case, put together by the two disappointed lawyers in [a prior matter]."). The author of this suggestion makes a compelling case but uses facts and inferences both within and outside the record now before this Court. This Court, on the other hand, has authority to dismiss an appeal on the ground that the case is fictitious or collusive only if the record before the Court demonstrates this is so. *State ex rel. Chandler v. McQuillin*, 229 Mo. 523, 130 S.W. 9, 12 (Mo. 1910); *Hahn*, 36 S.W. at 665-66. Here, the record falls short of

> that standard, and the Court declines to inquire of the parties and their counsel further on this issue.
>
> It is devoutly to be hoped, however, that this case – and the ramifications and remedies that will flow from the pursuit of a fictitious or collusive suit, though they were not invoked here – come to mind the next time counsel or their clients consider feigning a dispute (or the appearance of one) merely for the purpose of securing an advisory opinion.

5. **In Terrorem Clause In An Undue Influence Situation**. Giller v. Slosberg, 2021 WL 1624641 (Ga. App. 2021), involved undue influence claims regarding a trust and beneficiary designations. The trust contained an in terrorem clause, which the court found applicable despite the apparent validity of the claim. The opinion states:

> This case does not involve a will. Rather, it concerns three documents which purported to distribute much of the assets of the father, David K. Slosberg: the David K. Slosberg Asset Protection Trust II, dated January 17, 2014 (Trust #2), a beneficiary form designating Giller and Seidner as beneficiaries of their father's IRA Account with First National Bank & Trust ("FNBT") (the "IRA Account"), and a beneficiary form designating Giller, Seidner, and Slosberg as beneficiaries of their father's Agency Account with FNBT (the "Agency Account"), with Giller and Seidner each receiving forty percent of the assets and Slosberg receiving twenty percent. Slosberg believed that Giller and Seidner exerted undue influence over their father and caused their father to execute these three documents, drastically reducing his right to their father's assets.
>
> Approximately one year before their father died, Slosberg filed suit against Giller and Seidner. After their father's death, Slosberg filed his third amended complaint, which is the operative pleading for this appeal. The amended complaint included a number of claims, including claims for undue influence, fraud, conversion, and trover against Giller and Seidner based on allegations that their father's actions were the result of diminished mental capacity and undue influence. The complaint sought, among other relief, the imposition of a constructive trust to the extent Giller and Seidner had absconded with assets to which Slosberg was entitled, and injunctive relief to prohibit Giller and Seidner from transferring or receiving any assets of their father, including, inter alia, Trust #2, the IRA Account, and the Agency Account until the court determined whether the execution of these document was the result of undue influence. Giller and Seidner answered and asserted counterclaims against Slosberg for defamation and tortious interference, seeking both a declaratory judgment and equitable relief.
>
> Following a two and one-half week trial, the jury found in favor of Slosberg on his claims for undue influence as to all three documents: Trust #2, the IRA Account, and the Agency Account. The superior court entered final judgment on the jury's verdict, ruling "that the challenged documents pertaining to the Accounts are void and are hereby set aside, as are any transfers made pursuant to those documents." The superior court further noted that the evidence produced at trial demonstrated that the total amount contained in the accounts at the time of the father's death was $2,372,000.01, and that all assets contained in these three accounts "had been distributed by FNBT, either to [Giller and Seidner] or into the registry of the Court, apart from $140,413.67 held in the IRA account as of December 31, 2018." The superior court, therefore, imposed a constructive trust in favor of Slosberg for $1,056,482.31, which the court determined was Slosberg's one-third share of the accounts, plus prejudgment interest, post judgment interest, and costs.

* * *

> We first note that Giller and Seidner do not claim that the evidence was insufficient to support the jury's findings or in any way challenge the jury's findings that they wrongfully procured the three documents and their assets through the exercise of undue influence over their father. Rather, they attack the superior court's final judgment, arguing that (1) the in terrorem clause contained in Trust #2 precluded Slosberg from receiving any assets from that trust, (2) the superior court's imposition of a constructive trust in Slosberg's favor usurps the probate court's jurisdiction, and (3) the final judgment awarded damages above those to which Slosberg was entitled.[3] These issues appear to raise mixed questions of fact and law. With mixed questions of fact and law, this Court accepts the trial court's findings on disputed facts and witness credibility unless clearly erroneous, but independently applies the legal principles to the facts. *Garden Club of Ga. v. Shackelford*, 274 Ga. 653, 655 (1), 560 S.E.2d 522 (2002); *Suggs v. State*, 272 Ga. 85, 88 (4), 526 S.E.2d 347 (2000).
>
> 1. Giller and Seidner assert that the superior court erred in allowing Slosberg to “enjoy the benefits he forfeited by initiating actions disallowed by the no-contest clause” in their father's trust. Specifically, they argue that the superior court's final judgment is inconsistent with the valid and enforceable in terrorem clause[4] contained in Trust #2, which provides that benefits revoked under the clause become a part of the remainder of the Trust Estate. They further assert that not only was Slosberg not entitled to benefits under Trust #2 because of the in terrorem clause, but they were entitled to judgment in their favor on the undue influence claim as to the trust.[5] We conclude that Slosberg forfeited any benefits under Trust #2 by violating the trust's in terrorem clause, and the superior court erred in not only awarding a constructive trust based on any benefits he would have received under the trust, but also in permitting the claim to proceed to the jury. We note that neither the IRA Account nor the Agency Account contained in terrorem clauses, and our decision in this division, therefore, is limited to Trust #2.

In terrorem enforcement in Georgia is strong:

> Although Slosberg attempts to distinguish *Duncan v. Rawls*, 345 Ga. App. 345, 812 S.E.2d 647 (2018), that case is directly on point and leads us to the inescapable conclusion that the in terrorem clause in Trust #2 bars any claim attacking the trust, including a claim that the trust was executed as the result of undue influence. *Duncan* concerned “whether and under what circumstances Georgia public policy prohibits enforcement of an in terrorem, or no contest, provision of a trust.” Id. at 345, 812 S.E.2d 647. The case involved beneficiaries of a trust, allegedly in good faith and upon probable cause, challenging the legal validity of the trust based on a claim of undue influence. Id. “We conclude[d] that because the legislature, not this Court, determines Georgia public policy, the trial court did not err by enforcing the in terrorem clause against a claim of undue influence and therefore granting partial summary judgment to the trustees on that claim.” Id. Specifically, this Court held as follows:
>
> > Under Georgia law, a trust may be attacked where the trust results from undue influence. But ... in terrorem clauses protecting against such a challenge are allowed under Georgia law with only one codified limitation, that being the alternative disposition provision discussed above. The parties have not cited any other statutory limitation on such

> clauses, and we find none, let alone a good faith/probable cause exception to enforcement of an in terrorem clause.

Id. at 348 (1) (b), 812 S.E.2d 647 (citation omitted).

Howell v. Bates, 350 Ga. App. 708, 715 (3), 830 S.E.2d 250 (2019), where this Court affirmed the trial court's ruling that the petitioner had violated an in terrorem clause and forfeited her distribution under a trust. The trust in that case provided that

> if a person contested or initiated legal proceedings either to challenge the validity of the Trust, the Will, or of any provision in either document, or to prevent any provision in either document from being carried out in accordance with its terms (whether or not in good faith and with probable cause), then all benefits provided for such person under the Trust and the Will would be revoked and annulled.

Id. at 714 (3), 830 S.E.2d 250 (punctuation and footnote omitted). This Court specifically held that by filing actions challenging the validity of a will with an in terrorem clause, including one in which the petitioner claimed the will was invalid due to alleged undue influence, the petitioner "clearly violated the plain language of the 'no contest' clause in the Trust." Id. at 715 (3) (b), 830 S.E.2d 250.

While we sympathize with Slosberg, and we agree that it is poor public policy to permit individuals exerting undue influence over the creation of trusts to immunize their actions by including in terrorem clauses in the trusts, we must exercise judicial restraint because "[t]he legislature, and not the courts, is empowered by the Constitution to decide public policy, and to implement that policy by enacting laws." *Duncan*, 345 Ga. App. at 350 (1) (b), 812 S.E.2d 647 (punctuation omitted). To that end, this Court repeatedly has stated that

> [s]tatutes should be read according to the natural and most obvious import of the language, without resorting to subtle and forced constructions, for the purpose of either limiting or extending their operation. In reviewing a statute, we presume that the legislature enacts all statutes with knowledge of the existing laws.

Howell, 350 Ga. App. at 712 (2), 830 S.E.2d 250.

A review of OCGA § 53-12-22, which addresses in terrorem clauses in trusts, and OCGA § 53-4-68, which addresses in terrorem clauses in wills, indicates that *Duncan*, supra, was correctly decided. After our decision in *Duncan*, a full court opinion that included a special concurrence and two dissents, the legislature amended both OCGA §§ 53-12-22 and 53-4-68, adding three identical circumstances under which in terrorem clauses shall not be enforceable in trusts or wills. OCGA §§ 53-12-22 (c), 53-4-68 (c). The legislature did *not*, however, choose to add or amend the trust statute to void in terrorem clauses in trusts that are impossible, illegal, or against public policy, as they are in wills. See OCGA § 53-4-68 (a) ("Conditions in a will that are impossible, illegal, or against public policy shall be void."). Instead, the legislature retained OCGA § 53-12-22 (a), which merely states, "[a] trust may be created for any lawful purpose." "Because the legislature is presumed to act with full knowledge of the existing state of the law, it follows that the legislature chose not to adopt a good faith/probable cause exception to enforcement of no contest clauses in trusts." *Duncan*, 345 Ga. App. at 349-350 (1) (b), 812 S.E.2d 647. Strictly construing the in terrorem clause, which we are obligated to do, *Callaway*, 321 Ga. App. at 353 (1), 739 S.E.2d 533,

> and presuming the legislature enacted and amended OCGA § 53-12-22 with knowledge of the existing laws, which we are obligated to do, *Howell*, 350 Ga. App. at 712 (2), 830 S.E.2d 250, we conclude that the superior court erred in failing to find that the in terrorem clause in Trust #2 resulted in Slosberg's forfeiture of benefits under Trust #2.

A dissent would have held that the trust was invalid altogether:

> Under fundamental and settled law, the verdict and judgment that the trust before us was procured by undue influence entailed a determination that the grantor had been without capacity to execute it and therefore that it was void at its inception. The in terrorem clause falls along with the rest of the instrument. There is nothing to the contrary in *Duncan v. Rawls*, 345 Ga. App. 345, 812 S.E.2d 647 (2018). Adopting a rule to the contrary entails disapproving decisions of our Supreme Court. So I respectfully dissent.
>
> "A person has capacity to create an inter vivos trust to the extent that such person has legal capacity to transfer title to property inter vivos. A person has capacity to create a testamentary trust to the extent that such person has legal capacity to devise or bequeath property by will." OCGA § 53-12-23.
>
> Here the verdict is an authoritative determination that the grantor lacked the capacity to create a trust. "For undue influence to be sufficient to invalidate a trust, it must amount to deception or force and coercion so that the grantor is deprived of free agency and the will of another is substituted for that of the grantor." *Lewis v. Van Anda*, 282 Ga. 763, 766 (4), 653 S.E.2d 708 (2007) (citation and punctuation omitted). See also *Mullis v. Welch*, 346 Ga.App. 795, 799 (2) (b), 815 S.E.2d 282 (2018) ("[The standard required for invalidation of a trust] is the same standard required for the invalidation of a will or a deed as the result of undue influence over a testator/testatrix or grantor.")
>
> Wills and trusts executed by one without the legal capacity to do so are void from the inception. They are stillborn. Their terms are, and always were, entirely without effect. See *JR Const./Elec. v. Ordner Const. Co.*, 294 Ga. App. 453, 455, 669 S.E.2d 224 (2008); cf. *Smith v. Morris, Manning & Martin*, 264 Ga. App. 24, 26, 589 S.E.2d 840 (2003) (physical precedent only). Including in terrorem clauses.

6. Effect of No Contest Clause. Matter of Phyllis V. McDill Revocable Trust, 506 P.3d 753 (Wy. 2022), involved a sophisticated no contest clause set forth by the opinion as follows:

> **Effect of Attempted Contest.** In the event that any person (1) directly or indirectly contests or attacks this [trust] or any trust or beneficial interest created hereunder ... or (2) conspires with or voluntarily assists anyone associated with any such contest or attack, singly or in conjunction with any other person(s), then the Settlor specifically disinherits such person and such person's descendants; all interests and properties given to or created for the benefit of such person and such person's descendants, directly or in trust, under this [trust], shall be forfeited, and such property shall be disposed [of] as if such person and their descendants had predeceased the Settlor.

> The trust outlined "the acts" constituting a "contest" for purposes of the no-contest provision. Those "acts" included a "[d]irect or [i]ndirect contest" in which a

> "person unsuccessfully contests or, in any manner, attacks or seeks to impair or invalidate any provision of [the trust] ... on any grounds whatsoever." The trust also required the trustee to provide notice of his intent to enforce the no-contest provision and give the person contesting the trust an opportunity to dismiss or withdraw the contest to avoid disinheritance:
>
>> **Withdrawal of Contest**. Notwithstanding the foregoing, the [no-contest] provision[ ] ... shall not apply unless and until the [t]rustee has given written notice of such fiduciary's intent to enforce the foregoing provision[ ] against a particular person to such person ... and give[s] such person the opportunity to voluntarily dismiss or withdraw any petition or action that such fiduciary deems to constitute a contest or to otherwise cooperate in defending or terminating a contest. If such person dismisses or withdraws such petition, contest or other claim or takes other actions requested by such fiduciary within thirty (30) business days after receipt of such notice, then th[e] [no-contest provision] shall not apply with respect to such petition or contest or other claim; provided that such fiduciary shall have the broadest permissible discretion in terms of insisting on a particular form or scope of dismissal or withdrawal in order to ensure that the petition, contest or other claim will not reoccur.

The case involved a beneficiary, Thomas, who brought a lawsuit against the trustee, Michael, in Texas, which was not withdrawn in time to meet the requirements of the clause, and then was dismissed for lack of personal jurisdiction. The opinion states:

> Michael provided copies of: (1) the trust and its amendments, including the fourth amendment which contained the no-contest provision; (2) Thomas's petition in the Texas Lawsuit which sought to invalidate the third and fourth amendments to the trust; (3) Michael's notice of intent to enforce the trust's no-contest provision; and (4) the tracking confirmation demonstrating the notice of intent to enforce the no-contest provision was delivered by certified mail to Thomas's Texas address on July 23, 2018. Michael also requested the district court take judicial notice that the Texas Lawsuit was dismissed and provided a copy of the dismissal order. These documents established a *prima facie* case that Thomas had violated the trust's no-contest provision by filing the Texas Lawsuit seeking to invalidate the third and fourth amendments to the trust and failing to dismiss or withdraw it within 30 days of receiving notice of Michael's intent to enforce the no-contest provision.
>
> The burden then shifted to Thomas to present specific evidence demonstrating a genuine dispute of material fact as to the validity of the no-contest provision or his violation of it. He failed to meet his burden because he did not timely respond to the summary judgment motion. As a result, the district court properly granted summary judgment to Michael and ruled Thomas had forfeited his interest as a trust beneficiary by violating the no-contest provision. *See Magin v. Solitude Homeowner's Inc.*, 2011 WY 102, ¶ 39, 255 P.3d 920, 932 (Wyo. 2011) (the district court properly granted summary judgment to plaintiff because defendant did not file a response to plaintiff's summary judgment motion and therefore failed to raise any genuine issue of material fact for trial).
>
> Despite his failure to meet his summary judgment burden, Thomas nevertheless argues the district court erred in interpreting the no-contest provision. According to him, the provision requires a "contest" to be "unsuccessful," which means it must be decided on the merits such that it would be given res judicata effect.

> Thomas argues the dismissal of his Texas Lawsuit on jurisdictional grounds is not a dismissal on the merits and not subject to res judicata. Indeed, he points out he alleged the same claims raised in the Texas Lawsuit as counterclaims in this lawsuit.
>
> There are two problems with Thomas's argument. First, he failed to raise it in the district court. " 'Issues raised for the first time on appeal generally will not be considered by this court unless they are jurisdictional or issues of such a fundamental nature that they must be considered.' " *Gjertsen v. Haar*, 2015 WY 56, ¶ 15, 347 P.3d 1117, 1123 (Wyo. 2015) (quoting *Byrd v. Mahaffey*, 2003 WY 137, ¶ 10, 78 P.3d 671, 674 (Wyo. 2003)). Thomas's argument is neither jurisdictional nor fundamental. Second, his argument lacks merit.
>
> "No-contest ... clauses are valid in Wyoming." *Gowdy*, ¶ 39, 455 P.3d at 1210 (citing *EGW v. First Fed. Savings Bank of Sheridan*, 2018 WY 25, ¶ 18, 413 P.3d 106, 110 (Wyo. 2018), and *Dainton v. Watson*, 658 P.2d 79, 81 (Wyo. 1983)). "The intent of the settlor regarding contests to the trust is controlling." Id. (citing *EWG*, ¶ 19, 413 P.3d at 111). We determine that intent from "the plain language contained in the four corners of the [trust]. Where there is no ambiguity and the language is clear and susceptible of only one construction, then the plain provisions of the trust instrument must be given effect." *In re Est. of George*, 2011 WY 157, ¶ 65, 265 P.3d 222, 235 (Wyo. 2011) (citing *Rock Springs Land & Timber, Inc. v. Lore*, 2003 WY 100, 75 P.3d 614, 619-20 (Wyo. 2003)).
>
> The no-contest provision of the trust disinherits any person who "directly or indirectly contests or attacks [the trust] or any trust or beneficial interest created hereunder[.]" The trust states a "contest" occurs when, among other things, a person "unsuccessfully contests or, in any manner, attacks or seeks to impair or invalidate any provision of this [trust] ... on any grounds whatsoever." Thomas does not dispute the Texas Lawsuit contested, attacked, or sought to impair or invalidate the trust. He argues only that the Texas Lawsuit was not technically "unsuccessful" because it was dismissed on jurisdictional grounds rather than on the merits.
>
> The plain meaning of "unsuccessful" is "not successful: not meeting with or producing success." Merriam-Webster Dictionary, https://www.merriamwebster.com/dictionary/unsuccessful (last visited Feb. 28, 2022). "Success" means "favorable or desired outcome." *Id.*, https://www.merriamwebster.com/dictionary/success (last visited Feb. 28, 2022). Thomas's Texas Lawsuit was "unsuccessful" because it did not produce a favorable or desired outcome. It was dismissed.
>
> The district court did not err in granting summary judgment to Michael on his claim Thomas forfeited his beneficiary status and was disinherited from taking under the trust because he violated its no-contest provision.

7. Georgia Allows Beneficiaries To Amend Trust To Give Themselves The Power To Remove And Replace Trustees. In Trust Under Agreement of Taylor, 164 A.3d 1147 (Pa. 2017), the Pennsylvania Supreme Court held that an otherwise valid amendment to a trust under the uniform act would not be valid if the purpose of the amendment was to allow beneficiaries to remove and replace the trustee. The court reasoned that the uniform act had specific provisions dealing with trustee removal.

Georgia has not adopted the Uniform Trust Code but has several provisions that are similar. The Beneficiaries of a trust may modify the trust if they all agree, the trustee receives notice, and a court finds no violation of a material purpose, and, if the settlor is dead. OCGA § 53-12-61(c)(1). There is also a trustee removal provision, OCGA § 53-12-221(a), that allows removal per the terms of the trust instrument, or upon petition to a court showing "good cause."

In Glass v. Faircloth, 840 S.E.2d 724 (Ga. App. 2020), the beneficiaries wanted to change trustees in a fee dispute. Interestingly, the court noted that because the beneficiaries could amend the trust under Georgia law, it did not have to grapple with whether the fees were in fact excessive. The court held that the two cited provisions were easily reconcilable:

> First, the Modification Statute operates, as here, only after the settlor's death (whereas the Removal Statute contains no such restriction), when concerns could arise that the settlor did not anticipate and can do nothing to resolve. Second, the Removal Statute, which operates at any time, allows initiation by "any interested person" and does not require consent of any of the beneficiaries. Thus, these two provisions address different scenarios and are not inherently inconsistent, and there is no ambiguity or practical effect that frustrates the purpose of either provision.
>
> ***
>
> Further, "[a]ll statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it... [W]hen a statute is amended, from the addition of words it may be presumed that the legislature intended some change in the existing law." In light of this, when the legislature amended the Modification Statute in 2018 to allow trust modification after the death of the settlor (under the conditions enumerated in the statute), the legislature could have limited that authority with respect to removal of trustees. It did not. The Modification Statute instead contains broad authority to modify trusts after the death of the settlor so long as the court determines that the notice provisions are met, all beneficiaries consent, and the purpose of the trust is preserved. This is not an absurd or impracticable result, and it is not inconsistent with the ability to remove a trustee (without the consent of the beneficiaries) at any time due to misconduct or for other good cause. The Modification Statute, unlike the Removal Statute, does not contain a burden to show good cause and encompasses scenarios that do not involve trustee misconduct. In light of the plain statutory language requiring the court to approve a modification under the terms in the Modification Statute, we will not read into the Code a limitation that is absent.

Footnote 17 states:

> The 2018 amendment to the Modification Statute was part of a raft of Trust Code changes adopted in the same bill. See Ga. L. 2018, p. 262. Notably, the Removal Statute does not say a "trustee may *only* be removed" for good cause. Compare with OCGA § 53-12-501 (b) (2) ("This article shall not apply to ... [a] power to appoint or remove a trustee or trust director."). To the contrary, the legislature did not change the language in OCGA § 53-12-221 that affords the authority to remove a trustee in accordance with the terms of the trust, even as it granted authority to modify trust terms under OCGA § 53-12-61.

8. **Attorney Insurance Policy Does Not Cover Attorney Acting as Trustee**. Philip Farthing, an attorney, was liable to the Higgerson beneficiaries of various family trusts of which he was trustee on account of his negligent investment of trust assets. Did his professional liability policy cover him? That was at issue in ALPS Property & Casualty Insurance Company v. Higgerson, 805 Fed.Appx. 193 (E.D. Va. 2020)(unpublished). The policy covered acting as a trustee but excluded negligent supervision of funds. The opinion states:

> Applying those standards, the court concluded that the policy exclusion for the "negligent supervision" of funds or property clearly and unambiguously applied, foreclosing coverage.[3] *Id.* at *6. Under that ***196** exclusion, the policy does not apply to any claim arising from or in connection with:
>
>> Any conversion, misappropriation, improper commingling or negligent supervision by any person of client or trust account funds or property, or funds or property of any other person held or controlled by an Insured in any capacity or under any authority, including any loss or reduction in value of such funds or property.
>
> J.A. 61–62. By its "clear and express terms," the district court found, that provision "facially applies" to stocks "held or controlled" by Farthing in "any capacity," including his capacity as trustee of the Higgerson family trusts. *ALPS*, 2018 WL 4927366, at *6.
>
> The district court acknowledged, as the Higgerson Defendants argued, that the phrase "negligent supervision" typically connotes "the supervision of other people," not funds or property. *Id.* at *7 n.10. But here, the court held, the context provided by the full provision – with its express reference to the "negligent supervision ... of client or trust account funds or property, or funds or property of any other person," J.A. 62 – "leaves no doubt that it excludes claims arising from the negligent supervision *of funds or property* held or controlled by the insured." *ALPS*, 2018 WL 4927366, at *7 n.10. Moreover, the district court reasoned, case law shows that "supervision" is commonly used to describe the management not only of people but also of investments, including stock portfolios. *Id.* at *7 (quoting, *e.g.*, *Migdal v. Rowe Price-Fleming Int'l, Inc.*, 248 F.3d 321, 324 (4th Cir. 2001) (noting that "[m]ost funds are externally managed – each fund contracts with an investment adviser to recommend *and supervise* the fund's investments") (emphasis added)). And all of that, the district court concluded, is consistent with the definition of "supervision" in Black's Law Dictionary – "[t]he series of acts involved in managing, directing, or overseeing persons or projects," *Supervision*, Black's Law Dictionary (10th ed. 2014) – on which Virginia courts have relied for the proposition that "supervision" may refer to the management or oversight of things (such as property) as well as people. *See ALPS*, 2018 WL 4927366, at *8 (citing *Hutton v. Commonwealth*, 66 Va.App. 714, 791 S.E.2d 750, 753 (2016)).
>
> It was equally clear, the district court held, that Farthing's conduct qualified as "negligent" within the meaning of the exclusion. There was no need to consider in this case the "precise contours of the ordinary meaning of the word 'negligence,' " the district court explained, because Farthing's investment activities were "expressly determined to be 'reckless' breaches of his fiduciary duties during the underlying state court lawsuit." *Id.* at *7. An insurer's duty to indemnify is governed by the plain terms of the policy and the "litigated facts" in the underlying state action, *id.* (quoting *CACI Int'1, Inc. v. St. Paul Fire & Marine Ins. Co.*, 566 F.3d 150, 155 (4th Cir. 2009)), and here, the prior finding of

> recklessness “establishes, as a matter of law, a lack of care that rises to, and exceeds, ordinary negligence,” *id.*

9. **Trusts Reformed to Avoid Reciprocity**. In Matter of Jill Petrie St. Clair Trust Reformation**,** 464 P.3d 326 (Kan. 2020), spouses created trusts that were not intended to be reciprocal but the drafter omitted the relevant different provisions as the opinion notes:

> In September 2003, Jill executed a trust agreement establishing the Jill Petrie St. Clair Trust. She named William J. Wallisch the trustee. The trust made her husband, William Paxson St. Clair, a life beneficiary of the trust's income. Upon William's death, the trust's income would then be distributed to Jill and William's children and grandchildren living at the time the trust was created, and the principal would eventually be distributed to the grandchildren or their estates.
>
> In December 2002, before Jill created her trust, William established his own trust with an identical distribution scheme but naming Jill a life beneficiary of the trust's income. Both Jill and William funded their trusts in identical amounts when Jill executed her trust agreement.
>
> M. Wayne Davidson was the attorney who prepared the trusts for Jill and William. One of the purposes of William's trust was to make sure the assets in his trust were not included in his or Jill's taxable estates. Davidson proposed to Jill that she create her own trust to obtain gift tax benefits and to similarly assure that the assets in her trust were not included in William's taxable estate. Davidson drafted Jill's trust with those objectives in mind. To that end, Jill's trust agreement provided that “no part of this Trust shall be included in the Grantor's gross estate for death tax purposes.” At the time Jill executed the trust agreement, she believed it contained the necessary provisions for the trust assets to be excluded from her and William's taxable estates, and for the transfers to the trust to be considered completed gifts.
>
> But because of a drafting error, Davidson failed to include two provisions necessary to differentiate the benefits provided to William under Jill's trust from the benefits provided to Jill under William's trust. These provisions were necessary to avoid the two trust being considered reciprocal, resulting in the assets of Jill's trust being included in William's estate upon his demise and vice versa. One of the provisions that was erroneously omitted from Jill's trust agreement would have enabled William to annually receive $5,000 or 5% of the assets in Jill's trust. The other provision would have given William a lifetime special power of appointment over the trust assets in Jill's trust that would have enabled him to appoint all or any portion of the assets in Jill's estate to any person other than himself, his creditors, his estate, or the creditors of his estate. These provisions are commonly used by attorneys drafting trusts to avoid creating reciprocal trusts.

The trial court found that the scrivener had committed an error which the Kansas Supreme Court affirmed.

10. **No “Adoption Out” Under Indiana Trust**. Mildred had a son, Charles, who married Ann. Mildred created an irrevocable trust paying income to Charles, then Ann, then Charles’ descendants, per stirpes, and another similar testamentary trust. Charles and Ann had David, who married Joan, and they had three children, Brittany, Matthew, and Molly. David and Joan divorced, Joan married Thomas, who adopted Brittany, Matthew and

Molly. The question in Walters v. Corder, 146 N.E.3d 365 (In. App. 2020), was whether the three adopted children remained beneficiaries of Mildred's trusts. The court held that in Indiana the answer is yes:

> We begin with the language that created the trust. Upon David's death, his share of the trust is to be divided among his living children. The term "children" is not defined in the terms of the trust, and the term is not qualified or restricted in any way (other than requiring the children to be "living"). Further, the trust language is silent as to adopted children—whether adopted in or out of the family. At the time Mildred included in her will the Testamentary Trust in 1991, the Indiana Trust Code did not define the term "children."1 Further, caselaw indicates that the ordinary, popular, and legal sense of the word "children" embraces the first generation of offspring. *Casper v. Helvie*, 83 Ind. App. 166, 146 N.E. 123, 127 (1925). All four of David's offspring were living at the time of his death.
>
> We now turn to the circumstances existing at the time Mildred executed her will establishing the Testamentary Trust in 1991. David was married to his first wife, Joan, and they had only one child, Brittany. During the course of their marriage, and while Mildred was alive, David and Joan had their second child, Matthew, in 1992. When Mildred died in 1994, David and Joan were still married, and Joan was pregnant with their third child, Molly. Moreover, the unrefuted designated evidence shows that, prior to her death, Mildred knew that Joan was pregnant with a third child, and that Mildred had a close relationship with both Brittany and Matthew during her lifetime. Mildred never knew that David and Joan got divorced or that David consented to the adoption of Brittany, Matthew, and Molly; these events all occurred after Mildred's death.
>
> As we did with her Testamentary Trust, we examine Mildred's intent with regard to the Irrevocable Trust. The term "issue" is not defined by the terms of the trust, and, other than requiring the issue to be twenty-one, the language of this provision does not restrict or limit the term or create a separate class for adopted children. The document is silent with regard to issue that may be adopted in or out of the family. The term "issue" is not defined in the trust code, but it has been defined in caselaw as meaning "descendants." *Allen v. Craft*, 109 Ind. 476, 9 N.E. 919, 922 (1887); *see also* Black's Law Dictionary (11th ed. 2019) (defining "issue" as lineal descendants; offspring). Here, David was a descendant of Charles, and Brittany, Matthew, Molly, and Raquel are all descendants or offspring of David.
>
> As to the facts and circumstances existing at the time Mildred established this trust in 1968, we have little information. David was only eight years old so Mildred had no knowledge of whether he would marry and/or have children. Beyond that information, there is no evidence that Mildred intended to exclude any of her descendants from this class of beneficiaries.
>
> * * *
>
> The courts of our state have made it abundantly clear that the settlor's intent is the sovereign guide in the interpretation of the terms of a trust. *See, e.g.*, *Doll v. Post*, 132 N.E.3d 34, 38 (Ind. Ct. App. 2019) (primary purpose in construing trust is to ascertain and give effect to settlor's intention), *trans. denied* (2020). We have before us no evidence of an intent on the part of Mildred to exclude her three eldest grandchildren from membership in the classes of beneficiaries of these two trusts merely because her grandson gave his consent to their adoption by their stepfather after Mildred's death. Therefore, we determine that, despite the fact that the O'Brien Children were adopted out of the Walters family, they retain their

> status as beneficiaries in the two trusts as the “children” of David and the “issue” of David's father.

David’s daughter, by his second marriage, Raquel, was the objecting party. Her argument was that Indiana adoption and probate law required a different result:

> The purpose of Section 31-19-15-1 “ ‘is to shield the adoptive family from unnecessary instability and uncertainty arising from unwanted intrusions by the child's biological family.’ ” *In re Adoption of J.T.A.*, 988 N.E.2d 1250, 1253 (Ind. Ct. App. 2013) (quoting *In re Adoption of K.S.P.*, 804 N.E.2d 1253, 1257 (Ind. Ct. App. 2004)), *trans. denied*. Here, the O'Brien Children are all adults, and the biological family is not trying to interfere with any aspect of the relationship between them and their adoptive family. Rather, their biological great grandmother, with whom two of the three O'Brien Children2 had contact and a relationship from their birth until her death, included them as beneficiaries of her trusts. Although Raquel claims that a determination that the O'Brien Children are beneficiaries under the terms of Mildred's trusts would “undermine the purpose of the adoption statutes,” we disagree. Appellant's Br. p. 20. The objective of Section 31-19-15-1 is not advanced by depriving the O'Brien Children of their status as beneficiaries merely because their biological father consented for them to be adopted after the death of the settlor of the trusts. The statute was designed as a shield to protect new adoptive families, not as a sword to prohibit adopted children from receiving a trust distribution, per the settlor's wishes, from a member of the family from which the children have been adopted out. Indeed, allowing this statute to be used in such a manner would contravene one of the cardinal principles of trust law: the settlor has the right to arrange for the distribution of her estate as she sees fit. *Paloutzian v. Taggart*, 931 N.E.2d 921, 925 (Ind. Ct. App. 2010) (citing Jay M. Zitter, Annotation, *Adopted Child as Within Class Named Deed or Inter Vivos Instrument*, 37 A.L.R.5th 237, § 2(a) (1996)).
>
> * * *
>
> In addition, Raquel contends that to conclude that the O'Brien Children are beneficiaries conflicts with both Indiana Code section 29-1-2-8 (1987) of the probate code and Section 6-4.1-1-3 (2012) of the tax code. Section 29-1-2-8 provides that, for purposes of intestate succession, an adopted child will be treated as a natural child of the child's adopting parents and will cease to be treated as a child of the natural parents. Section 6-4.1-1-3 states that, for purposes of inheritance taxes, a legally adopted child is to be treated as if the child were the natural child of the child's adopting parent if the adoption occurred before the individual was totally emancipated. These statutes apply only to intestate distributions and inheritance taxes, respectively, and do not constitute rules of trust construction. For that reason, they are of no significance in ascertaining the intention of a settlor in designating his or her intended beneficiaries when the children were adopted out of the family after the death of the settlor. Stated another way, the question we are presented with is not whether the O'Brien Children would take as heirs if Mildred had died intestate or what class of transferee they are in for purposes of calculating inheritance tax due. Rather, the question is whether Mildred intended to include the O'Brien Children in the classes of beneficiaries when she used the term “children” in her Testamentary Trust and when she used the term “issue per stirpes” in her Irrevocable Trust.

11. **The Ethics of Lawyers Working Remotely**. The ethics pronouncements of the American Bar Association are not binding on attorneys or state regulatory authorities. Nonetheless, in the absence of other authority, they can be helpful. On December 16, 2020, the ABA issued Formal Opinion 495 which reaches a common-sense conclusion:

> The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible as a lawyer to a local jurisdiction where the lawyer is physically located, but not licensed. The Committee's opinion is that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

Of course, the out-of-state lawyer must not represent to clients or the public that the lawyer is admitted to practice in the remote jurisdiction. That would be prohibited by Model Rule 5.5(b)(2).

The Florida Supreme Court has issued an opinion (2021 WL 2006584) stating that an attorney not licensed in Florida may reside in Florida and do legal work for the lawyer's non-Florida clients. The facts dealt with were these:

> He is licensed to practice law in New Jersey, New York, and before the United States Patent and Trademark Office (hereinafter "USPTO"). He is not licensed to practice law in Florida. He recently retired from his position as chief IP counsel for a major U.S. Corporation. That position was in New Jersey. He moved from New Jersey to Florida. He started working as an attorney with a New Jersey law firm specializing in federal IP law. The firm has no offices in Florida and has no plans to expand its business to Florida. His professional office will be located at the firm's business address in New Jersey, although he will do most of his work from his Florida home using a personal computer securely connected to the firm's computer network. In the conduct of his employment with the firm, he will not represent any Florida persons or entities and will not solicit any Florida clients. While working remotely from his Florida home, he will have no public presence or profile as an attorney in Florida. Neither he nor his firm will represent to anyone that he is a Florida attorney. Neither he nor his firm will advertise or otherwise inform the public of his remote work presence in Florida. The firm's letterhead and website, and his business cards will list no physical address for him other than the firm's business address in New Jersey and will identify him as "Of Counsel – Licensed only in NY, NJ and the USPTO." The letterhead, website, and business cards will show that he can be contacted by phone or fax only at the firm's New Jersey phone and fax number. His professional email address will be the firm's domain. His work at the firm will be limited to advice and counsel on federal IP rights issues in which no Florida law is implicated, such as questions of patent infringement and patent invalidity. He will not work on any issues that involve Florida courts or Florida property, and he will not give advice on Florida law.

12. **Decanting**. In Hodges v. Johnson, 177 A.3d. 86 (N.H. 2017), two irrevocable trusts were established in 2004 for the benefit of the grantor's wife, children, step-children and other descendants. The Trustees had a discretionary power to "distribute all or any portion of the net income and principal of the trust to any one or more of the group consisting of [the beneficiaries] and distributee trusts, in such amounts and at such times as the Trustee, in the Trustee's discretion, may determine." "Distributee trusts" were defined as any trust under the trust instruments or any other trust established by the grantor. A distributee trust could be for the benefit of one or more, "but not necessarily all," of the beneficiaries.

The Trustees of the two irrevocable trusts decanted trust assets into new trusts and eliminated the grantor's two step-children and one of his biological children from the definition of "descendants" in the new trust instruments, effectively stripping their interests in the trusts. The trust assets were not transferred to the new trusts. The decanting documents provided for the transfer of trust assets upon the settlor's death. Because the parties never made arguments regarding the failure to transfer the assets, both the trial court and the Supreme Court of New Hampshire treated the decantings as if they had occurred when decanting documents were executed and that the failure to transfer assets did not render the decantings invalid.

Under New Hampshire's decanting statute, if a Trustee has the power to make discretionary distributions of principal to one or more beneficiaries, the Trustee may decant the assets to a new trust that eliminates one of those beneficiaries as a beneficiary of the new trust. The statute further provides that "[i]n exercising the power to decant, a trustee has a duty to exercise the power in a manner that is consistent with the settlor's intent as expressed in the terms of the trust, and the trustee shall act in accordance with the trustee's duties under this chapter and the terms of the first trust." RSA 564-B:4-418.

The trial court set aside the decantings and removed the Trustees. On appeal to the Supreme Court of New Hampshire, the court stated that even though New Hampshire's decanting statute allowed the Trustees to eliminate beneficiaries, and even though the Trustees had the discretion to distribute income and principal in the Trustees' discretion, the Trustees were still subject to the duty of impartiality in carrying out the decanting. The court stated that "a trustee, who makes unequal distributions among beneficiaries and/or eliminates a beneficiary's non-vested interest in an irrevocable trust through decanting, violates the statutory duty of impartiality only when the trustee fails to treat the beneficiaries 'equitably in light of the purposes and terms of the trust.'" (quoting Uniform Trust Code § 803 Cmt.).

The court agreed with the trial court that the decantings were improper and void because the decantings violated the Trustees' duty of impartiality by failing to consider the interests of all of the beneficiaries, both present and remainder. It is difficult to understand why a trustee would think it could decant under such circumstances.

The removed, former trustees asked to be reimbursed from the 2004 trusts for post-trial fees and costs they personally incurred defending the decantings, and asked not to be required to reimburse those trusts for the fees and costs the trusts incurred. The trial court found that the former trustees had committed a serious breach of trust and should not be granted the relief they sought. The Supreme Court of New Hampshire affirmed at Hodges v. Johnson, 244 A.3d 245 (N.H. 2020). The opinion states:

> The Former Co-Trustees assert that the trial court "inappropriately relied" upon the fact that they did not file a petition for instruction. They argue that the trial court's reliance was improper because: (1)the court "failed to establish a valid foundation or set out any criteria to support its assertion that [they] should have filed a petition";(2) there "was no established law" suggesting that "their decision-making . . . was subject to doubt or conflicting claims";(3) they needed to act expeditiously to prevent the plaintiffs and Joanne from acting detrimentally to the 2004 Trusts; (4) bringing a petition for instruction would have resulted in "hotly contested" and "expensive" litigation;(5) "[t]he decanting decision concerned contingencies that are not appropriate for a petition for instruction"; and(6) even after Hodges, "we do not know how the Former Co-Trustees should have exercised their duty of impartiality."(Emphases omitted.)
>
> However, it is precisely when there is "uncertainty as to the proper application of the law to the facts" that a petition for instruction is warranted. Rock Springs Land and Timber, Inc. v. Lore, 75 P.3d 614, 623 (Wyo. 2003) (quotation omitted).Section 71 of the Restatement (Third) of Trusts provides: "A trustee . . . may apply to an appropriate court for instructions regarding the administration or distribution of the trust if there is reasonable doubt about the powers or duties of the trusteeship or about the proper interpretation of the trust provisions." Restatement (Third) of Trusts, § 71 (2007). "A trustee commits a breach of trust not only by violating a duty as a result of negligence or misconduct but also, ordinarily, by violating a duty because of a mistake concerning the nature or extent of the trustee's powers and duties under the terms of the trust or applicable law." Id. cmt. a at 9 (citation omitted).Accordingly, "[t]o avoid undue risk of liability when reasonable doubt exists in these matters, a trustee may seek protection by applying for instructions from an appropriate court." Id. Contrary to the Former Co-Trustees' assertions,
>
>> a trustee need not act at his or her peril in administering a trust. Nor need a trustee act first and discover later whether a particular act was in breach of trust. Instead, a trustee is entitled to judicial instructions whenever there is reasonable doubt about the powers or duties of the trusteeship or about the proper interpretation of the trust provisions. Indeed, a trustee can properly pay the costs of seeking instructions out of the trust estate, unless seeking them was plainly unwarranted, because there was no reasonable uncertainty about the matter in question.
>
> Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, Scott and Ascher on Trusts, § 16.8, at 1070-71(5th ed. 2007)(quotation omitted).
>
> To the extent that the trial court concluded that the circumstances in this case should have caused the Former Co-Trustees to have reasonable doubt as to whether the decantings at issue were proper, we agree. Here, the decanting to exclude beneficiaries of irrevocable trusts were to be accomplished under circumstances suggesting that the settlor directed them so as to disinherit disfavored family members. Those circumstances should have caused the Former Co-Trustees to have reasonable doubt as to the propriety of the decantings.
>
> Thus, we find no error in the trial court's suggestion that, before participating in the decantings, the Former Co-Trustees could have filed a petition for instruction or obtained an independent legal opinion, instead of relying exclusively upon

> McDonald's [settlor's attorney] advice under circumstances suggesting that he was doing the settlor's bidding to disinherit beneficiaries with whom the settlor was unhappy.

In the Matter of: The Niki and Darren Irrevocable Trust, 2020 WL 8421676 (Del. Ch. unreported), dealt with a decanting by co-trustees, consented to by the beneficiaries. Approximately five years later the co-trustees asked the Delaware Chancery Court to determine the decanting was invalid. The opinion states:

> This case was briefed around one central issue: whether the assets of the Original Trust were validly decanted into the Second Trust. Both trusts were settled by the same person, Ildiko, who is also a beneficiary of both trusts, and who was the initial sole trustee of the Original Trust. Ildiko—with Petitioner Comerica, who is a trustee of *both* the Original Trust and the Second Trust—now, *four years later*, seeks to have the purported decanting declared void as noncompliant with the Decanting Statute—a decanting that Ildiko and Comerica executed *themselves*, as the trustees of the Original Trust. In effect, Ildiko is asking this Court to declare void an action that she took over six years ago, an action which now appears to be to her detriment and to another beneficiary's benefit, in what I may categorize as an attack of late-onset settlor's remorse.
>
> To be clear, as the settlor and creator of the Second Trust, Ildiko, for reasons of her own, determined to create a trust that had certain benefits for Darren, compared with the Original Trust. It also purported to benefit Ildiko herself: the Second Trust, unlike the Original Trust, allows the trustee to invade the principal on Ildiko's behalf. As the trustee of the Original Trust, Ildiko decided to place its corpus into that Second Trust. Ildiko then enjoyed the benefits of being a beneficiary of the Second Trust, including, presumably, distributions from the Second Trust, for several years. Only when conditions made her regret her prior decanting decision did she and Comerica decide to attack the legitimacy of their own actions in funding the Second Trust. To invoke equity as a remedy for those actions is, I find, itself offensive to equity. Having previously acted in a fiduciary capacity to settle and fund a trust through what she now asserts were illegal means, Ildiko cannot invoke equity for relief from that action, in her own self-interest—relief, I note, that would be to the detriment of Darren, toward whom she owes fiduciary duties. In other words, Ildiko cannot rely on past unlawful conduct as a fiduciary as the key that turns the lock to release her from the results of such conduct.
>
> It is worth noting, I think, that unclean hands is not available where the result of applying the doctrine would itself be inequitable. So, in *Portnoy v. Cryo-Cell*, then-Vice Chancellor Strine refused to apply the doctrine where it would affect innocent equity-holders. The analog to those equity-holders here, perhaps, is Niki. Nothing, I note, prevents Niki from pursuing Ildiko or Comerica for breach of trust with respect to the decanting of the Original Trust, if she finds it appropriate to do so. Further, there is no allegation that this Court's application of unclean hands will work an inequity because of some wrongful action on Darren's part—no such action is alleged.
>
> I have principally discussed unclean hands with respect to Ildiko. The fact that her co-trustee, Comerica, is sponsoring the Verified Petition does not impede me from applying the doctrine here. Comerica was a co-trustee of the Original Trust and thus had a duty to ensure that the assets were not decanted from the Original Trust in violation of the Decanting Statute. Having failed in that duty, it cannot now, four years later, invoke equity to correct its mistake in such a way that would

> benefit one of its beneficiaries to the detriment of another, in light of the benefiting beneficiary's actions discussed above. Accordingly, the doctrine of unclean hands bars me from hearing the merits of the Verified Petition and the Petitioner's Motion for Judgment on the Pleadings is denied.

The trustee - beneficiaries referred to as childlike - was apparently upset because the decanting created a new trust that reduced her interest, in favor of her son-in-law, if her daughter and son-in-law divorced, which they did.

13. **Entity Transparency**. The National Defense Authorization Act, passed by Congress at the end of 2020 and beginning of 2021, contains the Corporate Transparency Act. Of particular interest to estate planners is that entities created by a filing with a state Secretary of State (or similar state office) will need to begin filing beneficial ownership statements with the Financial Crimes Enforcement Network, two years after Treasury issues regulations on the matter. A company with more than 20 full-time employees that files a US federal income tax return showing $5 million or more in gross receipts or sales, and that has a physical presence in the US, need not file, nor will charities and various other regulated businesses (banks, insurance companies, and the like) be required to file. Although business trusts likely do have reporting requirements, thus far private trusts have no reporting obligations but those may be imposed at a future point. Presumably general partnerships need not report because they are common law entities generally not required to make a filing under applicable state law.

Suppose a state wanted to assist entities that preferred not to make reports. If in such a state general partnerships lacked filing requirements then making general partnerships more attractive would seem to be desirable. The problem with general partnerships, from an estate planning point of view, is that they do not restrict management and liquidation rights as is required to obtain discounts, and, more generally, that they do not provide any party with limited liability. Traditionally limited liability and restricted management and liquidation could only be obtained via entities that require state "incorporation" or a similar step. In the case of limited liability the commonly stated reason is that the public ought to know, or be charged with knowing, of limited liability.

Suppose a state substituted a naming requirement for a filing requirement. For example, the state might provide that a general partnership, created without a filing, would be a traditional general partnership with unlimited liability unless it contained in its name, say, "Limited Liability." A general partnership that contained "Limited Liability" in the name would have the limited liability of a limited liability corporation and would in all respects function as if were an LLC with all "general partners" as managers. For those clients who desired LLC benefits without the requirement of reporting, such an arrangement would be attractive. Quite obviously many other naming conventions could be adopted, for instance a "Special General Partnership" such that a traditional general partnership called Smith & Jones, SGP means it is formed as a general partnership, without formalities, but has adopted the LLC form of operation and liability.

14. **Exercise of Power of Appointment**. The effect of an attempted exercise of a power of appointment was in question in Wilmington Trust Company as Trustee of the A. Felix Du Pont Trust v. James Paul Mills Jr. et. al, 2021 WL 2620585 (Del. Ch. unreported). A 1934 trust gave Alice Du Pont this power of appointment:

> > Upon the death of Trustor's said daughter, Alice F. du Pont, Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto the widower of said Alice F. du Pont, and/or unto the lawful issue of said Alice F. du Pont, in such manner and amounts and upon such trusts, terms and conditions as said Alice F. du Pont shall have appointed by the last instrument in writing which she shall have executed and delivered during her lifetime to Trustee, or failing such instrument in her last Will and Testament, or in default of any such appointment then unto her living issue, if any per stripes not per capita. ...
>
> Pet. Ex. A § 1 (the "Original Limited Power").

Alice had three children, Phyllis, James, and Mary. Phyllis was in an accident and was unlikely to have children; Alice exercised her power several times, in 1986 for the last time, which the court described as follows:

> Alice exercised the Original Limited Power for the final time in an instrument dated July 25, 1986. Pet. Ex. B (the "1986 Exercise"). In that instrument, Alice continued to treat Phyllis differently than James and Mary.
>
> Like the prior exercises, the 1986 Exercise provided that upon Alice's death, the Trustee would divide Trust No. 2108 into equal shares, one for each of Alice's surviving children, and hold each share as a separate trust. The 1986 Exercise also retained the basic framework of the Second Limited Power, framed in terms substantively identical to the 1983 Exercise. The 1986 Exercise also retained the Adopted Child Proviso.
>
> Like the 1983 Exercise, the 1986 Exercise supplemented the Second Limited Power with a proviso that purported to empower Phyllis to designate a charity as the recipient of her share of Trust No. 2108. The 1986 Exercise, however, added the phrase "to the extent permissible" to the text. The language now read:
>
> > [P]rovided, however, that *to the extent permissible* Grantor's daughter PHYLLIS may exercise any power conferred upon her under this subparagraph in favor of any organization or organizations to which deductible contributions may be made for purposes of federal income or estate tax laws, as well as in favor of her issue, but subject to the limitations contained in Paragraph (d) of this Article SECOND.
>
> *Id.* art. SECOND, ¶ (a)(1)(D) (the "Second Charitable Proviso") (emphasis added).
>
> Like the earlier instruments, the 1986 Exercise contained a Default Provision. Unlike the earlier instruments, and consistent with the addition of the phrase "to the extent permissible" to the Second Charitable Proviso, the 1986 Exercise added language to address a failure to exercise the Second Limited Power fully and effectively. The Default Provision in the 1986 Exercise reads as follows:
>
> > *To the extent a child of Grantor does not fully and effectively appoint*, the trust property, *to the extent not fully and effectively appointed,* shall be distributed to the issue, per stirpes, of such deceased child, subject to the provisions of Article FOURTH; provided, however, that any share of such property passing to any child of such deceased child of Grantor shall be held in further trust. ... *To the extent a child of Grantor does not fully*

> > *and effectively appoint* and is not survived by issue, such property *to the extent not effectively appointed* shall be distributed to the then surviving issue of Grantor, per stirpes, subject to the provisions of Article FOURTH....
>
> *Id.* art. SECOND, ¶ (a)(1)(D) (the "Final Default Provision").
>
> Like the earlier exercises, the 1986 Exercise contained a Perpetuities Provision. The terms of the Perpetuities Provision in the 1986 Exercise were substantively identical to the corresponding provision in the 1983 Exercise.
>
> The Trustee executed the 1986 Exercise in its capacity as trustee, thereby acknowledging its existence. The Trustee also agreed to "act in accordance with its terms." Mills Reply Br. Ex. B at 18.

Alice died in 2002 and in 2006 Phyllis attempted to exercise the power of appointment she had been given by Alice. This exercise the court described like this:

> The 2006 Exercise recognized the limited scope of the Original Limited Power. In a WHEREAS clause, it described that power of appointment accurately as follows:
>
> > [M]y grandfather conferred upon my mother a limited power to appoint the principal and undistributed income of Trust No 002108 as of the date of her death to and among her widower and/or her lawful issue in such manner and amounts and upon such trusts, terms and conditions as she appointed by the last instrument in writing that she executed and delivered during her lifetime to Trustee, or failing any such instrument, then by her Last Will and Testament....
>
> Pet. Ex. C at 1. The 2006 Exercise thus recognized that the scope of the Original Limited Power extended only to Alice's widower and lawful issue; it did not contain a grant of authority comparable to the Second Charitable Proviso.
>
> The 2006 Exercise also recognized that the source of the Second Charitable Proviso was the 1986 Exercise. Another WHEREAS clause described the power of appointment granted by that instrument as follows:
>
> > [I]n Article SECOND (a)(1)(D)) of the instrument dated July 28, 1986, my mother conferred upon me a limited power to appoint the principal and undistributed income of my one-third share of Trust No 002108 held for my benefit in favor of my issue, or in favor of any organization or organizations to which deductible contributions may be made for purposes of federal income or estate tax laws, as I shall have appointed effectively by the last instrument in writing which I shall have executed and delivered to Trustee during my lifetime, or failing any such instrument, then by my Last Will and Testament.
>
> *Id.* at 1-2. The 2006 Exercise thus captured the conflict between the Original Limited Power and the Second Charitable Proviso.
>
> In the 2006 Exercise, Phyllis provided that the corpus of the Phyllis Trust would pass on her death, free from trust, to The Wyeth Foundation (the "Foundation"), as long as the Foundation was "then in existence and qualified ... as a charitable

> organization to which contributions are deductible." *Id.* at 2. She further stated that if the Foundation "is not then in existence and so qualified, I direct the Trustee under said trust agreement to distribute the trust fund, free from trust, to such organization or organizations with comparable purposes then in existence and so qualified as the Trustee shall select." *Id.*
>
> The Trustee acknowledged 2006 Exercise. Counsel for the Trustee reviewed the instrument and regarded it as a valid exercise of the Second Limited Power as expanded by the Second Charitable Proviso.
>
> Phyllis died on January 14, 2019. She had no children. Her will appointed her husband, James B. Wyeth, as the executor of her estate (the "Estate"). To avoid confusion between James Mills and James Wyeth, this decision refers to the latter as the "Executor."

Subsequent to Phyllis's death, her brother James thinks to inquire whether her exercise to leave the trust assets (her one-third) was valid. The court held that at common law the answer was no. Further, a statute adopted after Phyllis had died in 2019 could not expand the power. The opinion states:

> The parties dispute whether Phyllis could rely on the Second Charitable Proviso to exercise the Second Limited Power for the benefit of the Foundation. As a matter of law, she could not.
>
> Under the common law rule, the holder of a power of appointment (the "first generation" or "original" power of appointment) can use that power to create a further power of appointment (the "second generation" or "derivative" power of appointment). As a matter of law, the holder of the first generation power of appointment cannot create a second generation power of appointment that confers greater authority than the first generation power of appointment. If the first generation power of appointment is a limited power, then those limitations apply to the second generation power of appointment and to any additional derivative powers of appointment that the second generation holder or subsequent holders may create. Each power holder can create a derivative power of appointment with lesser powers by imposing additional restrictions or limitations on the derivative power, but a power holder cannot create a derivative power of appointment that expands the power beyond the grant of authority that the power holder received.[5]
>
> Under the common law rule, if the settlor of a trust creates a first generation power of appointment and stated that the power only could be used to appoint the corpus of the trust in favor of a limited class of persons (the "appointees" or "objects" of the power), then the holder of that power can use it to create a second generation power of appointment in favor of any permissible appointee of the first generation power. However, the holder cannot expand the scope of the second generation power beyond the first by adding additional objects. *See Foulke*, 40 A.2d at 716; Simes and Smith, *supra*, § 977.
>
> The same rule applies to the holder of the second generation power of appointment. The holder of that power can use it to create a third generation power of appointment in favor of any of the permissible appointees of the second generation power, but the holder cannot expand the scope of the third generation power beyond the scope of the second (or the first) by adding additional objects.
>
> The common law rule applied in Delaware when Felix created the Original Limited Power, when Alice executed the four instruments that exercised the

Original Limited Power (including the operative 1986 Exercise), and when Phyllis executed the 2006 Exercise. Under the common law rule, Phyllis could not exercise a power of appointment in favor of the Foundation. The Trust Agreement only authorized the holder of the Original Limited Power to exercise the power in favor of Alice's widower or her lawful issue. Alice could and did exercise her authority under the Original Limited Power to create the Second Limited Power, but she could not expand the class of appointees who could be objects of the Second Limited Power. When Phyllis attempted to exercise the Second Limited Power in favor of the Foundation, she exercised it in favor of an appointee that was not contemplated by the Original Limited Power. The attempted appointment therefore failed.

1. The Trust Agreement Did Not Authorize A Power Holder To Add Appointees

The common law rule against permitting a power holder to add appointees is a default rule. A settlor can deviate from the common law rule by including express language in the first generation power of appointment that permits the power holder to add appointees. The common law authorities framed the rule as a presumption against the power to add appointees, which the power holder could overcome by pointing to language in the instrument that supported the existence of that power. *See* Restatement (Third) § 19.14.

The Foundation claims that the Trust Agreement contained language sufficient to overcome the presumption, but that view rests on a motivated reading of the Trust Agreement. According to the Foundation, the Original Limited Power empowered Alice to add appointees because it provided that the trust fund would be conveyed "in such manner and amounts and upon such trusts, terms and conditions as [Alice] shall have appointed." Pet. Ex. A § 1. The Foundation contends that this language included the power to add appointees.

In making this argument, the Foundation fails to distinguish between the object of a power, i.e. the permissible appointees, and the form of property interest that the object of a power can receive, i.e. property free from trust, in trust, or subject to other terms, conditions, and limitations. *See Equitable Tr. Co. v. James*, 47 A.2d 303, 306 (Del. Ch. 1946). The two concepts are distinct. The first refers to the recipient of the property. The second refers to the extent of the property interest that the recipient receives, traditionally described as the quantum of the estate. *See id.*; *Wilmington Tr. Co. v. Wilmington Tr. Co.*, 180 A. 597, 602 (Del. Ch. 1935), *modified on other grounds*, 186 A. 903 (Del. Ch. 1936). A grantor can create a power of appointment that is general as to its objects but limited as to the quantum of estate that the holder can confer. Or a grantor can create a power of appointment that is limited as to its objects, but unlimited as to the quantum of estate that the holder can confer. *See Foulke*, 40 A.2d at 717.

Through the Original Limited Power, the Trust Agreement conferred on Alice a power of appointment that was limited as to its objects (her widow or lawful issue) but unlimited as to the quantum of estate that she could confer on those objects ("in such manner and amounts and upon such trusts, terms and conditions as [Alice] shall have appointed"). The language that the Foundation cites only addressed the quantum of estate. It did not address the permissible objects. The language therefore did not authorize Alice to create additional objects, as she attempted to do through the Second Charitable Proviso.

* * *

> Consistent with the common law rule, the 2014 version of Section 505(a) continued only to permit the holder a limited power of appointment—now termed a nongeneral power of appointment— "to appoint such assets among objects all of whom are objects of the original power." The power holder remained unable to expand the scope of the power of appointment by adding new objects.
>
> Effective June 19, 2019, after Phyllis died and this dispute arose, the General Assembly amended Section 505(a) again, this time to add the Appointee Expansion Statute. As a result of the amendment, Section 505(a) currently states:
>
>> Unless the instrument creating a nongeneral power of appointment expressly manifests a contrary intent of the donor, the donee of such a power, in addition to exercising the power in any other manner permitted by law and the instrument creating the power, may effectively appoint all or a portion of the assets subject to such power to a trustee or trustees for the benefit of 1 or more objects of the power and may, in addition, create in an object of the power a general or nongeneral power of appointment, exercisable during life or at death, over assets subject to the original power o*r may create in a person who is not an object of the power* a nongeneral power of appointment, exercisable during life or at death, to appoint such assets among objects all of whom are objects of the original power.
>
> 25 *Del. C.* § 505(a) (2019). The Appointee Expansion Statute changed the law so that future power holders in Alice's and Phyllis's positions would be able to use a limited power of appointment to create a power of appointment "in a person who is not an object of the power."
>
> The enactment of the Appointee Expansion Statute does not change the result in this case. The history of Section 505 shows that in 2003, the General Assembly initially codified the common law rule, reinforcing the conclusion that when Phyllis executed the 2006 Exercise, she could not appoint her trust to an appointee outside the scope of the Original Limited Power. The attempt to appoint the Foundation as the recipient of the trust corpus was therefore invalid.
>
> The enactment of the Appointee Expansion Statute demonstrates instead that it required a change in the law to authorize what Phyllis attempted to do. A statute was not necessary; a court ruling could have altered the common law rule. Some change in the law, however, was needed.[7]

15. **Trust Termination Would Violate Material Purpose (Nebraska)**. The court in In re McGregor, 308 Neb. 405 (Ne. 2021), concluded terminating a spendthrift trust would violate a material purpose.

Husband (Clifford) died, and the relevant trust was for Evelyn (wife/mother)'s benefit and then for their children. The court describes the trust as follows:

> Evelyn retained all net income generated from the real estate owned by the Family Trust and paid all real estate expenses, such as real estate taxes and income taxes.
>
> The Family Trust creates separate "carve-out" trusts for Clifford and Evelyn's two children, Allen and Debra L. Schardt (Debra). Upon Evelyn's death, the rest and residue of the Family Trust is to be equally distributed to the separate carve-out trusts, which are named the "Allen Eugene McGregor Family Trust" and the

> "Debra Louise Schardt Family Trust." The Family Trust states that it is Clifford's intent, to the extent possible, to treat the children equally. If the Family Trust contains sufficient funds, the value of the distributions to the separate carve-out trusts will be equalized. However, if there are insufficient funds, the distributions will not be equalized.
>
> Allen and Debra are to become the trustee of his or her respective trust. The trust instrument states that the assets of the carve-out trusts "shall remain in trust" and that the trusts "shall be irrevocable and shall not be revoked or amended in whole or in part by the trustee, beneficiary or any other person." In the event of the death, resignation, or inability of a trustee of a carve-out trust, the Family Trust contains provisions to select a successor trustee, which could include a survivor of Allen and Debra, or a designated corporation or bank.
>
> Until the death of Allen or Debra, the trustee of his or her respective trust shall from time to time, in his or her discretion, pay for the health, education, support, or maintenance of his or her children or grandchildren. In distributing trust income, the trustee must give first priority to Allen or Debra and secondary priority to Allen's or Debra's respective children. The trust instrument states that it is Clifford's intent that each carve-out trust be construed as "a non-support discretionary spendthrift trust that may not be reached by the beneficiaries['] creditors for any reason." Upon the death of Allen or Debra, pursuant to a limited power of appointment, the trustee of the deceased's carve-out trust may transfer the remainder of the separate trust for the benefit of a person, corporation, or other entity, but it shall not be exercised in favor of Allen or Debra, his or her estate, or creditors of his or her estate.
>
> In May 2011, Evelyn, Allen, and Debra entered into a trust settlement agreement, which, upon Evelyn's death, provides for the distribution of the Family Trust's assets directly to Allen and Debra, free of trust. Per the agreement, Allen would receive an additional tract of real estate not distributed under the Family Trust. Further, the agreement requires an equalization payment between Allen and Debra. In May 2017, Evelyn emailed Allen, purporting to revoke the agreement.

The court concluded the agreement was unenforceable because the spendthrift provisions were a material purpose of the trust. Of course, as a practical matter, had Evelyn not wanted to rescind the agreement it would been carried out in all likelihood.

16. **Conflicts of Law – Will**. The case of In Re Estate of Marie G. Dow, 2021 WL 199619 (N.H. 2021), involves the pretermitted heirs statute of both New Hampshire and Massachusetts. The decedent died in New Hampshire but her Will provided for Massachusetts law to govern. The court recites these facts:

> Marie G. Dow executed her last will and testament on June 30, 2014. At that time, she was living in Massachusetts. She passed away on November 20, 2018, having moved to an assisted living facility in New Hampshire approximately a year earlier. Just prior to her death, she sold her real property in Massachusetts, and there is no dispute that her estate consists of only personal property. In addition to her son Christopher Dow and ex-daughter-in-law Leslie Dow, Marie G. Dow is survived by another son and her granddaughter. Her will provides, in pertinent part,
>
>> [ARTICLE] SECOND: All the rest, residue and remainder of my estate, real, personal and mixed, of which I may die, seized and possess, or to

> which I may be entitled at the time of my demise, wheresoever the same may be found (hereinafter called my "residuary estate"), I give, devise and bequeath to my daughter-in-law, LESLIE DOW ....
>
> > If LESLIE DOW fails to survive me, then I hereby give, devise and bequeath my estate to my granddaughter ....
>
> ....
>
> [ARTICLE] EIGHTH: I have intentionally omitted to mention, or to devise or bequeath or give anything of which I may die seized and possessed, or to which I may be in any way entitled at the time of my decease, to any person or persons other than those mentioned in this my last Will and Testament.
>
> [ARTICLE] NINTH: My estate is to be administered and enforced according to the laws of the Commonwealth of Massachusetts.

The first issue was which state's law applied? The court determined it would apply New Hampshire law:

> We first address whether the New Hampshire probate division erred in applying Massachusetts' pretermitted heir statute, rather than New Hampshire's RSA 551:10, to the testator's will. On appeal, the petitioner argues that, despite the language of Article Ninth in his mother's will, RSA 551:10 applies because his mother was domiciled in New Hampshire at the time of her death and her estate consists of only personal property. The respondent argues that "[t]he intent of Marie G. Dow is clear," (bolding and capitalization omitted), pursuant to Article Ninth of her will, that Massachusetts law should apply and asserts that New Hampshire "give[s] effect" to choice-of-law provisions in wills. We agree with the petitioner.
>
> * * *
>
> We note that our prior case law, contemplating the applicability of New Hampshire's pretermitted heir statute where the facts implicated more than one jurisdiction, has not expressly dealt with a provision like that of Article Ninth in Marie G. Dow's will, expressing her intent to have her estate "administered and enforced according to the laws" of another state — the Commonwealth of Massachusetts. See, e.g., In re Estate of Rubert, 139 N.H. at 276, 651 A.2d 937 (applying Virginia law to determine whether the plaintiff was a pretermitted heir entitled to an intestate share of the testator's personal property where the testator was domiciled in Virginia); Royce, 117 N.H. at 895, 897, 379 A.2d 1256; cf. In re Farnsworth's Estate, 109 N.H. at 15-19, 241 A.2d 204. While it is true that we attempt to give maximum effect to a testator's intent, see In the Matter of Jackson, 117 N.H. 898, 903, 379 A.2d 832 (1977), our law does not support the application here of another state's pretermitted heir statute independent of the governing law of the testator's domicile at death with respect to dispositions of personal property, see In re Estate of Rubert, 139 N.H. at 276, 651 A.2d 937; see also Restatement (Second) Conflicts of Laws, supra § 263(1), at 121. But see Royce, 117 N.H. at 896-97, 379 A.2d 1256 (creating an exception that was limited to the facts of that case).
>
> Section 264 of the Restatement (Second) Conflicts of Laws supports a testator's ability, in bequeathing interests in personal property, to select the rules of construction of another state for use in construing the language of her

> will. See Restatement (Second) Conflicts of Laws, supra § 264(1), at 125 ("A will insofar as it bequeaths an interest in movables is construed in accordance with the local law of the state designated for this purpose in the will."); id. § 264 cmt. e at 126-27 ("The forum will give effect to a provision in the will that it should be construed in accordance with the rules of construction of a particular state.").[4] We have not expressly adopted this section of the Restatement, and we need not consider doing so here because even assuming without deciding that Article Ninth designated Massachusetts' rules of construction for application to the will, neither Massachusetts' nor New Hampshire's pretermitted heir statute constitutes a rule of construction. See In re Craig Living Trust, 171 N.H. 281, 284-85, 194 A.3d 967 (2018) (explaining RSA 551:10 is not a rule of construction). Compare Mass. Gen. Laws Ann. ch. 190B, § 2-302 (pretermitted heir statute), with Mass. Gen. Laws Ann. ch. 190B, §§ 2-601 to 2-610 (West 2012 & Supp. 2020) (encompassing the rules of construction applicable to wills), and Mass. Gen. Laws Ann. ch. 190B, §§ 2-701 to 2-711 (West 2012 & Supp. 2020) (encompassing the rules of construction applicable to donative dispositions in wills and other governing instruments). As will be discussed in section III, not only is RSA 551:10 not a rule of construction, it is a conclusive rule of law. See In re Craig Living Trust, 171 N.H. at 284-85, 194 A.3d 967.
>
> We, therefore, hold that New Hampshire's pretermitted heir statute applies to Marie G. Dow's will because she was a domiciliary of New Hampshire at the time of her death and her will disposes of only personal property. Accordingly, the probate division erred in applying Massachusetts law to determine that the petitioner is not a pretermitted heir.

17. **Accepting Will Benefits Precludes Will Contest.** Suppose you might secure one-third of an estate valued a $1,427,209.94 if you won a contest to throw the Will out. The executor distributes to you $43,229.15 in specific bequests which you accept. You decide to challenge the Will arguing that what you accepted is less than what you would have received. Do you win? Well in Texas you could win at the appellate level before losing before the Texas Supreme Court, which is what happened in Estate of Johnson:

> Similarly unavailing is MacNerland's claim, accepted by the court of appeals, that she is not estopped because she did not accept all that the will entitles her to receive. A beneficiary may enforce the will according to its terms; such an action does not ask to set the will aside. Estoppel by acceptance of benefits also does not preclude the beneficiary from challenging the executor's conduct or seeking the executor's removal. In such instances, the beneficiary is seeking to enforce the terms of the will, not to invalidate them. Because they similarly seek enforcement, MacNerland's analogies to cases involving contract disputes and divorce settlements are inapt. When a party receives partial payment under a contract or judgment and sues to recover more, the positions are not inconsistent; the party seeks to enforce the contract or order, not to invalidate it. In a will contest, however, the beneficiary does not seek to enforce the terms of the will; she charges that the will is invalid. A beneficiary must firmly plant herself on the side of the will's validity or invalidity and accept the consequences of that election.
>
> * * *
>
> MacNerland argues that an opportunistic executor could offensively deny a would-be will contestant's claim by partially distributing the estate to an unwitting beneficiary to avoid a will contest. The doctrine sufficiently accounts for this

> concern, however, by requiring that a beneficiary voluntarily accept the benefit. If a beneficiary or devisee lacks knowledge of some material fact at the time of acceptance, she may take steps to reject the benefit. MacNerland did not attempt to return the mutual fund account to the estate or assert in this case that her acceptance of the account was involuntary.

18. **Common-Law Same Sex Marriage Before Same Sex Marriage Allowed**. LaFleur v. Pyfer, 479 P.3d 869 (Colo. 2021), involves a fascinating issue. The dissent states the issue most clearly:

> Is it possible for a same-sex couple in Colorado to have *mutually intended and agreed* to enter into a *legal* marital relationship when both parties were aware that Colorado law prohibited same-sex marriage at the time? The answer is clearly no. When Pyfer and LaFleur participated in their wedding ceremony in November 2003, they both understood that same-sex couples could not lawfully marry in Colorado because Colorado considered same-sex marriage unlawful, unenforceable, and invalid. Thus, Pyfer and LaFleur could not possibly have *intended or agreed* to enter into the *legal* relationship of marriage. And, because common law marriage in Colorado requires *mutual intent and agreement* to enter into the *legal* relationship of marriage, *In re Marriage of Hogsett & Neale*, 2021 CO 1, ¶ 49, 478 P.3d 713, 723–24, Pyfer and LaFleur cannot be deemed to have entered into a common law marriage.
>
> Only after the Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), rendered our state's ban on same-sex marriage unconstitutional could Pyfer and LaFleur have mutually intended and agreed to enter into a common law marriage. But *Obergefell* wasn't announced until June 2015—more than a decade after Pyfer and LaFleur had their wedding ceremony

The majority interprets the requirements of common law marriage differently, focusing on the intent to have a long-term marital relationship, rather than a specific legal relationship:

> **C. Application of the Updated Common Law Marriage Framework**
>
> Having concluded that Pyfer and LaFleur were not, as a matter of law, barred from entering into a common law marriage, we next determine whether a common law marriage was established under the refined test we announce in *Hogsett*. “A determination of whether a common law marriage exists turns on issues of fact and credibility, which are properly within the trial court's discretion.” *Lucero*, 747 P.2d at 665. Accordingly, we review the court's factual findings for clear error and its common law marriage finding for an abuse of discretion.
>
> LaFleur argues that the parties did not, as a factual matter, have the intent to enter into a common law marriage. We disagree and conclude that the record supports the district court's conclusion that Pyfer and LaFleur manifested a mutual intent to enter into a marital relationship.
>
> “[A] common law marriage may be established by the mutual consent or agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement.” *Hogsett*, ¶ 49. “In assessing whether a common law marriage has been established, courts should give weight to evidence reflecting a couple's express agreement to marry.” *Id.* In the absence of such evidence, courts may infer such an agreement from the parties’ conduct. *Id.*

As we explain in *Hogsett*, the factors identified in *Lucero*, 747 P.2d at 665, can still be relevant to this inquiry. Courts should therefore consider factors such as

> cohabitation[;] reputation in the community as spouses[;] maintenance of joint banking and credit accounts[;] purchase and joint ownership of property[;] filing of joint tax returns[;] ... the use of one spouse's surname by the other or by children raised by the parties[;] ... evidence of shared financial responsibility, such as leases in both partners' names, joint bills, or other payment records; evidence of joint estate planning, including wills, powers of attorney, beneficiary and emergency contact designations; ... symbols of commitment, such as ceremonies, anniversaries, cards, gifts, and the couple's references to or labels for one another[;] ... [and] the parties' sincerely held beliefs regarding the institution of marriage.

Hogsett, ¶¶ 55–56. These factors must be assessed in context, however, and "the inferences to be drawn from the parties' conduct may vary depending on the circumstances." *Id.* at ¶ 49.

As in *Hogsett*, "[w]e begin by reviewing evidence of an express agreement to marry." ¶ 62. Here, Pyfer proposed marriage to LaFleur, and LaFleur accepted. The parties then participated in a ceremony that, as the district court explained, "certainly appear[ed] to be a wedding." For instance, Pyfer and LaFleur exchanged vows during the ceremony, which was officiated by a reverend and was attended by friends and family. They exchanged rings and wore tuxedos. A toast was given. And Pyfer and LaFleur signed a document titled "Certificate of Holy Union"—much like a couple would sign a marriage license. This evidence suggests, as the district court found, that the parties expressly agreed to enter into a common law marriage as of November 30, 2003, the date of the ceremony.

That said, given the range of meanings that a same-sex couple might ascribe to such a ceremony before *Obergefell*, it is important to examine the other circumstances of the relationship to discern the parties' intent. *Hogsett*, ¶ 54 n.9. Here, the parties' conduct was such that, in addition to the ceremony, a mutual agreement to enter into a marital relationship may be inferred. Of course, some of the evidence does not point in either direction. While it would have been significant had one of the parties used the other's surname, for example, the fact that they did not do so does not necessarily suggest that the parties did not intend to be married. *See Hogsett*, ¶ 45 ("[T]here may be any number of reasons, including cultural ones, that spouses and children do not take one partner's name at marriage."). Similarly, the parties' failure to file joint tax returns reveals little, especially given that for the majority of their relationship, this was not a possibility under federal law. *See Hogsett*, ¶ 66.

Other factors, by contrast, are more instructive. Although the parties did not share joint bank accounts or own property together, they cohabitated, and LaFleur financially supported Pyfer, both in his day-to-day life and in his pursuit of a career. And Pyfer listed LaFleur as his spouse on several forms over the years.

LaFleur did not tell his coworkers that he was married. But there was testimony that LaFleur worked in an environment that was not welcoming of same-sex couples; thus, viewed in context, his failure to publicize his relationship with Pyfer does not necessarily reflect a lack of mutual agreement to be married. *See Hogsett*, ¶ 51 ("There may be cases where, particularly for same-sex partners, a couple's choice not to broadly publicize the nature of their relationship may be explained by reasons other than their lack of mutual agreement to be

> married.”). Pyfer, by contrast, “held himself out as married to family and friends” with LaFleur's knowledge.
>
> True, there was evidence, toward the end of their relationship, that Pyfer was involved in an extramarital affair and that Pyfer and LaFleur ceased sharing a bedroom and instead lived separately in the same house. However, the parties’ actions as their relationship deteriorated cannot be used to override their earlier agreement to be married. *See Hogsett*, ¶ 57 (“[C]onduct inconsistent with marriage that occurs as a relationship is breaking down should not negate a finding of common law marriage where there is evidence of the parties’ earlier mutual agreement to be married. In other words, infidelity, physical separation, or other conduct arising as the relationship is ending does not invalidate a couple's prior mutual agreement to enter a common law marriage.”).
>
> In short, viewing the record as a whole and considering the totality of the circumstances, the district court's conclusion that the parties mutually agreed to be married and “intended to be joined with [each other] for the rest of [their] li[ves]” is supported by the record. Accordingly, we affirm the court's conclusion that Pyfer and LaFleur entered into a common law marriage.

A concurrence and dissent argued that the parties were married because they had a wedding and that factors were confusing and unnecessary in the analysis.

See also Swicegood v. Thompson, 431 S.C. 130 (Ct. App. SC 2020), affirmed in part, vacated in part, by Swicegood v. Thompson, 435 S.C. 63 (S.C. 2022). The common law marriage was not allowed because the couple did not have the requisite intent and mutual agreement to enter a legally binding common law marriage because they knew they could not marry (they ended their relationship before Obergerfell was decided). Whether that approach is really consistent with Obergerfell may be argued.

Olga Kucerak v. USA, 5:22-CV-00007, in the U.S. District Court for the Western District of Texas, is an estate tax case in which the estate administrator is arguing for the marital deduction. The petition states:

> To avoid making the Texas “common-law marriage” statute and the Estate Tax marital deduction statute unconstitutional “as applied” to the Estate, the words and actions of being “life partners” and a “committed couple” by Ms. Wood and Ms. Saum must be accepted as the equivalent of a traditional couples representation that they are “married”.

19. **Non-Participants In Mediation Beware**. Breslin v. Breslin, 62 Cal.App.5th 801 (Cal. Ct. App. (2d) 2021), reaches an important, if succinct, conclusion:

> The trustee of a decedent's trust petitioned the probate court to determine the trust beneficiaries. The potential trust beneficiaries received notice of the petition. The probate court ordered the matter to mediation. The same potential beneficiaries received notice of the mediation, but some did not participate. The participating parties reached a settlement that excluded the nonparticipating parties as beneficiaries. The probate court approved the settlement. The nonparticipating parties Pacific Legal Foundation et al. (collectively “the Pacific parties”) appeal. We affirm. A party receiving notice under the circumstances here, who fails to participate in court-ordered mediation, is bound by the result.

20. **Court In One State Applying The Law of Another Is Problematic**. Sirgutz v. Sirgutz, 2021 WL 1657568 (Fl. App. (4th) 2021), dealt with an antenuptial provision that provided for a lump sum payment to the former wife. The agreement was subject to New York law, leaving the Florida court to sort out what it thought New York law is. The majority and dissent disagreed about New York law as is seen in the excerpts from the opinion:

MAJORITY

> The former wife argues the trial court erred in ruling the Antenuptial Agreement's lump sum alimony obligation did not survive the former husband's death because the clear intent of the agreement was to provide her with survivorship benefits after a dissolution of their marriage. The former husband's estate responds the former husband's obligations terminated upon his passing because the Antenuptial Agreement did not explicitly provide for, nor expressed an intent for survivorship benefits following a marriage dissolution.
>
> * * *
>
> This issue is governed by New York law because the Antenuptial Agreement was executed in New York and includes a provision mandating its interpretation under New York law. *See Lamb v. Lamb*, 154 So. 3d 465, 467 (Fla. 5th DCA 2015) ("Generally, Florida courts enforce contractual choice-of-law provisions unless enforcing the chosen forum's law would contravene strong Florida public policy.").
>
> Under New York law, it is a "well-accepted proposition that a husband's obligation to support his wife terminates with the husband's death." *Cohen v. Cronin*, 39 N.Y.2d 42, 45, 382 N.Y.S.2d 724, 346 N.E.2d 524 (1976). "However, the husband might, by agreement, impose upon his estate a duty to make alimony or support payments after his death." *Id.* "[T]o bind the estate, a separation agreement **must either specifically provide for the continuation of payments or evince, from the terms of the agreement read as a whole, a clear intention that support payments continue**, notwithstanding the husband's death." *Id.* (emphasis added).
>
> The former wife concedes the Antenuptial Agreement does not expressly provide that the lump sum alimony provision survive the former husband's death, but argues that, taken as a whole, its provisions evince an intent to provide as such. She relies on *Cohen* and *Matter of Riconda*, 90 N.Y.2d 733, 665 N.Y.S.2d 392, 688 N.E.2d 248 (1997), in support.
>
> In *Cohen*, the New York Court of Appeals concluded the husband's estate was required to make support payments under the terms of the parties' separation agreement. 39 N.Y.2d at 47, 382 N.Y.S.2d 724, 346 N.E.2d 524. There, the agreement provided that payments would terminate where the wife remarried, or the obligation expired. *Id.* at 46, 382 N.Y.S.2d 724, 346 N.E.2d 524. It did not include language suggesting payments were to be made during the joint lives of the parties or terminate upon death of either party. *Id.* The court reasoned that "in consideration for the release of her other marital rights, the wife acquired the security of having periodic payments made for her support during her lifetime, or, at least, until a remarriage." *Id.* at 46–47, 382 N.Y.S.2d 724, 346 N.E.2d 524.
>
> *Cohen* is inapplicable here, however, because the Antenuptial Agreement includes other support for the former spouse.

In *Riconda*, the Court of Appeals of New York declined to apply *Cohen*. 90 N.Y.2d at 739, 665 N.Y.S.2d 392, 688 N.E.2d 248. "The judicial search is **for specific, relevant contractual intent of the *parties***...." *Id.* (emphasis added). Because the agreement in *Riconda* "simply provide[d] for maintenance payments until [the wife's] death or remarriage" and was "silent as to the eventuality and consequence of his predeceasing her," the court remanded the case to the lower court for a determination of the parties' intent in drafting and executing their agreement. *Id.* at 739–40, 665 N.Y.S.2d 392, 688 N.E.2d 248.

Here, the parties' Antenuptial Agreement provided that "the husband shall pay to the wife, for her support and maintenance, $75,000 per year (in twelve equal monthly installments) for a period of two years after the date of entry of such judgment or until the wife's earlier death or remarriage." The Antenuptial Agreement did not speak to the effect of the former husband's death. It expressly provided the former wife had an independent source of income. Under New York law, this was sufficient to establish the presumption that the obligation did not survive the former husband's death. *See id.* at 738, 665 N.Y.S.2d 392, 688 N.E.2d 248 ("When the four corners of the agreement contain no unequivocal direction to pay after death, and when discernible manifestations of intent reflect that support for the recipient spouse after the death of the payor spouse is otherwise provided for, the statutory and precedential preference that maintenance obligations terminate upon the death of the payor should ordinarily prevail.").

The Antenuptial Agreement expressly provided for the former wife's financial support in the event of the former husband's death, "if the parties are still married to each other and residing together at the time of the Husband's death." It provided:

> Notwithstanding the provisions of Article 4, [the waiver provision], **if the parties are still married to each other and residing together at the time of the [h]usband's death**, the [h]usband desires to make a fair and reasonable provision for the [w]ife in lieu of the rights that, after the Marriage, she might or could have had as a Wife or widow absent this Antenuptial Agreement. The parties therefore agree to the following:
>
> The [h]usband shall, upon the marriage, provide in his last will and testament for a trust fund to take effect upon his death, wherein $200,000 will be placed in trust, the income from said trust to be paid to the wife until the wife's death or remarriage.

It did not include similar language in the lump sum alimony provision.

DISSENT

I dissent. Because our duty is to apply New York law, the case of *Gardner v. Zammit*, ––– A.D.3d ––––, 128 N.Y.S.3d 383 (2020), is most closely on point, and governs this proceeding. I would reverse the final summary judgment.

In *Gardner*, the parties were divorced and entered into a settlement agreement with terms that the wife would pay maintenance to the husband which would terminate only upon his death. The agreement also had a provision making it binding upon "the parties, their heirs, executors, legal representatives, administrators and assigns." After the former wife died, her estate refused to make further payments to the former husband; he in turn sued the estate for the payments. *Id*.

> The court determined that the estate was liable for the maintenance payments. It reasoned:
>
> A settlement agreement is a contract subject to principles of contract interpretation, and the court “should interpret the contract in accordance with its plain and ordinary meaning” (*Matter of Wilson*, 138 A.D.3d 1441, 1442 [31 N.Y.S.3d 331 (4th Dept. 2016)] [internal quotation marks omitted]). In addition, “[t]he intent to vary the statutory and precedential preference of an end to maintenance payments upon death of the payor must be expressed clearly” (*Matter of Riconda*, 90 N.Y.2d 733 [665 N.Y.S.2d 392, 688 N.E.2d 248]). Here, neither party contends that the settlement agreement is ambiguous. We agree with plaintiff that the clause at issue unequivocally permits the termination of the maintenance obligation on the happening of one event only: the death of plaintiff. Further, the settlement agreement makes all provisions of the agreement binding on “the parties, their heirs, executors, legal representatives, administrators and assigns.” Thus, plaintiff met his initial burden on the motion of establishing that the maintenance payments were intended to survive decedent's death and become an obligation of her estate ....
>
> *Id.* at 384–85 (citations omitted).
>
> Similarly, in this case, Article 6(iv)(g) provides that the two years of alimony payments shall terminate only upon the happening of one of two events: death of the former wife or her remarriage. Further, just as in *Gardner*, the contract stated that it was binding on the parties’ executors and administrators. Therefore, the alimony provision is binding on the estate. I conclude that *Gardner* is controlling.
>
> That Article 7 provides for support if the parties were still married at the husband's death does not prove that the parties did not intend the limited alimony upon divorce to continue in case of the former husband's death. Moreover, I believe the majority is mistaken in its reliance on the statement in the agreement that the wife has income ($20,000 per year in 1986, the date of the agreement) as creating a presumption that alimony payments should not continue after death. While New York cases discuss an independent source of support from the paying spouse as evidence that the contract does not contemplate post-death continuation of maintenance payments, a spouse's own income is not the “independent provision” for the wife's support envisioned by the New York courts. *Matter of Riconda*, 90 N.Y.2d 733, 665 N.Y.S.2d 392, 688 N.E.2d 248, explains the type of independent source of support necessary to conclude that the alimony provision does not survive the payor's death:
>
> Independent sources of support, from which an intent not to allow post-death continuance of maintenance payments may include the designation of a former spouse as irrevocable beneficiary on a life insurance policy and other distributions accruing upon the death of the payor spouse, or a lump-sum transfer in discharge of claims against the estate.
>
> *Id.* at 739, 665 N.Y.S.2d 392, 688 N.E.2d 248 (citations omitted). In this case, there was no provision for the former wife in the estate, or by way of insurance, or any other distribution for her benefit.

The litigants may have been more satisfied, and certainly we who are third-party observers would have been, had a New York court been applying its own law.

21. **Trust Protector Subject To Indirect Undue Influence**. Where a beneficiary unduly influences the settlor of a trust, who in turn influences the trust protector, the undue influence may render ineffective the actions of the trust protector. Such was the holding of In the Matter of ABB Trust, 2021 WL 1884054 (Az. App. 2021). The facts are simple and sad:

> In February 2016, Austin petitioned to divorce Kay, his wife of 57 years. He was 78 years old and in declining health. He was also romantically involved with Lindi, his caretaker. Austin's divorce from Kay was finished in December 2016. He then married Lindi.
>
> Shortly before the divorce became final, Austin hired his estate planning attorney, Paul Deloughery of Magellan Law, to create an irrevocable trust. At the time, Austin "feared the women in his life" would exert "too much pressure on him to change his estate plan" and wanted "to free himself from the threat of exploitation and the pressures of undue influence."
>
> And so, on November 1, 2016, Austin transferred his assets into the ABB Trust ("Trust"), which generally directed that "[a]ll" of its provisions were to "be interpreted to accomplish [Austin's] objectives." Austin created the Trust "with the intent that assets transferred to the trust be held for my benefit while I am living, and for the benefit of my beneficiaries after my death," all under the Trust's "terms and conditions." Austin "had a close relationship with his three daughters and wanted to ensure their beneficial interest in the Trust would be preserved upon his death." As originally created, therefore, the Trust directed the Trustee, upon Austin's death, to distribute 45% of the Trust corpus to his former wife Kay, 45% to his three adult daughters (collectively, "Daughters"), and 10% to Lindi. The Daughters also would receive all "tangible personal property not disposed of by a written memorandum."
>
> Austin selected a professional trustee, Managed Protective Services, Inc. ("Trustee"), to manage the Trust's assets. He also designated a "Trust Protector" to "direct" and "assist" the Trustee "in achieving [Austin's] objectives" under the estate plan. *See generally* A.R.S. § 14-10818. Austin picked his attorney Deloughery to serve as the Trust Protector.
>
> *Authority to Amend the Trust*
>
> The Trust provided that Austin could not "alter, amend, revoke or terminate [its terms] in any way." And yet, Austin authorized the Trust Protector to amend or modify the Trust: "Any amendment made by the Trust Protector will be binding and conclusive on all persons interested in the trust, unless the amendment is shown by clear and convincing evidence to have been made in bad faith by the Trust Protector."
>
> But the Trust limited the Trust Protector's powers. It explained, for instance, how the Trust Protector should interpret the Trust:
>
>> In exercising and considering whether to exercise any power granted to a Trust Protector under the agreement, the Trust Protector should make reasonable inquiry into any matter or seek any information that reasonably bear upon the Trust Protector's decision to exercise the power.

> > The Trust Protector may settle any disputes concerning the interpretation of any provision contained in [the Trust] that arise as a result of any perceived ambiguity. In doing so, the role of the Trust Protector is to ensure that [the Trust] is construed in a manner consistent with [Austin's] estate planning objectives.
>
> *Two Amendments and the Fallout*
>
> The Trust Protector twice amended the Trust in the first six months after its creation. In March 2017, he added an *in terrorem* clause that would invalidate the interest of any beneficiary who (a) "contests by a claim of undue influence" or "objects" to "any [Trust] amendments" or (b) "seeks to obtain adjudication in any court proceedings that [the Trust] or any of its provisions is void." Petitioners do not contest the validity of this amendment.
>
> At issue here is the second amendment ("Second Amendment"), which the Trust Protector adopted in May 2017. This amendment eliminated Kay as a beneficiary, made Lindi the sole income beneficiary of the Trust at Austin's death, and authorized the Trustee to distribute the Trust's assets to Lindi as "advisable for any purpose." The Second Amendment also reduced the Daughters to remainder beneficiaries upon Lindi's death and added Lindi's sons from a prior marriage as remainder beneficiaries.

The evidence of undue influence was compelling as recited by the court:

> Petitioners attached over 150 pages of exhibits to their Verified Petition and First Amended Verified Petition, including the Trust document, the First Amendment and the Resignation of Trust Protector.
>
> Among the attachments were an unsigned affidavit of Trust Protector Deloughery that described Lindi's role in securing the Second Amendment, and an October 2018 email from Deloughery explaining: "I think the affidavit is generally correct. However, since you want it under oath, I would need to give some thought to the wording to ensure it is correct." Drafted for Deloughery in the first person, the affidavit read:
>
> > Shortly before May 6, 2017, I received a communication from Lindi saying that Austin wanted changes to the Trust. At the time Lindi was living with Mr. Bates full time as [sic] considered herself his caregiver and mistress.
> >
> > Lindi brought Austin to my office. Initially, Lindi did all the talking. She demand[ed] changes to the Trust that would be in her favor. Austin sat there next to her but said nothing. I later asked to interview Austin without Lindi. Privately Austin informed me that he wanted to provide for Lindi but did not want to give her an outright distribution.
>
> Further, according to Petitioners, though Austin had appointed Managed Protective Services to serve as Trustee, Lindi in fact managed the assets of the Trust—collecting rents from tenants, demanding they pay higher rent and trying to refinance Trust assets. Even so, Lindi grew frustrated with the Trustee and scheduled a meeting with Austin and the Trustee's representatives in January 2018. The Trustee's representatives later described that meeting under oath, expressing their collective "shock[ ] at [Austin's] obvious incapacity." The representatives explained that (1) Austin "was unable to speak at all due to a

> permanently emplaced tracheostomy tube; he was unable to open his eyes; he was sitting propped up in a chair; he made no hand gestures," (2) Austin "was unable to speak or eat, and did not appear to be fully conscious," (3) Lindi "answered all questions put to [Austin], stating that she understood him perfectly," (4) Lindi became "visibly irritated" when told she would not receive the Trust's assets "outright" at Austin's death but would instead be an income Trust beneficiary for her lifetime, and (5) Lindi "demanded that [the Trustee] resign and stated that the terms of the Trust needed to be changed."
>
> Lindi then contacted the Trust Protector and again demanded he amend the Trust in her favor. This time, however, the Trust Protector resigned rather than accede to Lindi's demands.
>
> In April 2018, Lindi filed paperwork to remove Managed Protective Services as trustee and appointed her daughter's friend as the replacement trustee, even though the friend "lack[ed] any experience or education to serve as a trustee." Austin authorized the change with his thumbprint rather than his signature. He died five months later.

Lindi argued there was no claim she influenced the trust protector, an argument the court concluded was irrelevant:

> Lindi contends that Petitioners' claim is defective because it does not allege she exercised undue influence directly over the Trust Protector. But, as explained above, that argument is not supported by the statute's plain language, and this court ordinarily resists reading words or requirements into a statute. *Cf. Midtown Med. Group, Inc. v. State Farm Mut. Auto. Ins. Co.*, 220 Ariz. 341, 347, ¶ 22, 206 P.3d 790, 796 (App. 2008) (courts do not "seek to create conflicting provisions with the result that the judiciary adds elements the legislature could have easily required but did not").
>
> Moreover, Lindi's argument overlooks the Trust's terms, the relationship between settlor and trust protector and the likelihood of real-world misconduct. To be sure, the Trust gave the Trust Protector the sole power to amend the Trust. But it also directed the Trust Protector to look to Austin's preferences and desires in managing the Trust.
>
> The Trust specifically required the Trust Protector to "assist in achieving [Austin's] objectives" and mandated that "the role of the Trust Protector is to ensure that [the Trust] is construed in a manner consistent with [Austin's] estate planning objectives." Therefore, even though the Trust Protector had final authority to approve or reject an amendment, Austin's input remained relevant, if not dispositive, under the Trust's terms. To that end, one commentator has described the role of a trust protector as "an agent [who has] been chosen by the settlor to have some level of power to guide the trustee's actions." Philip J. Ruce, *The Trustee and the Trust Protector: A Question of Fiduciary Power*, 59 Drake L. Rev. 67, 68 (2010).
>
> Further, the Trust's express "Limitation[s] on Trust Protector Powers" required the Trust Protector to conduct a reasonable inquiry before exercising his powers and to gather all information that reasonably bore on the decision to exercise his power. If Lindi exercised undue influence over Austin in a way that limited or tainted the Trust Protector's inquiry, which caused the Trust Protector to adopt her proposed Second Amendment, she accomplished precisely what § 14-10406 prohibits—exercising undue influence to induce the creation of the

> amendment. If Lindi is immune from an undue influence claim here, then any defendant may avoid liability under the Arizona Trust Code by simply pressuring, threatening and exploiting a vulnerable person to do their dirty work. At minimum, Petitioners should have been allowed to conduct discovery into why the Trust Protector decided to approve the Second Amendment.

A dissent would have gone the other way and held that the undue influence must have been directly of the trust protector.

22. **Attorney-Client Privilege After Client's Death**. The facts in In re Estate of Rabin, 474 P.3d 1211 (Colo. 2020), were simple. Husband died leaving all to his widow. Former wife then appeared making a claim on two promissory notes executed while the decedent was married to his eventual widow. The widow was also the personal representative. The court notes what happened next:

> Wanting more information, Claudine [widow] asked Louis's longtime attorney, Mark Freirich, for all of Louis's legal files, most of which had nothing to do with the notes. He refused, citing confidentiality concerns. She then subpoenaed the files, placing two time-honored legal principles on a collision course: client-lawyer confidentiality (given practical effect by the attorney-client privilege and Colorado Rule of Professional Conduct 1.6) and a personal representative's duty to settle a decedent's estate.
>
> We hold that (1) Colorado's Probate Code doesn't grant a personal representative a general right to take possession of all of a decedent's legal files as "property" of the estate; (2) a decedent's lawyer is ordinarily prohibited from disclosing a decedent's legal files, even to the personal representative; but (3) a decedent's lawyer may provide the personal representative with otherwise privileged or confidential documents if such disclosure is necessary to settle the decedent's estate.
>
> * * *
>
> Freirich moved to quash the subpoena, arguing that producing Louis's full set of files (which, according to Freirich, encompasses about forty-five individual files) would cause undue burden and expense and the "attorney-client privilege has not been waived." Fischer then contacted Freirich, clarifying that he was "seeking the paperwork in [Freirich's] files that may have been generated around [the date of the notes] to understand the consideration" for them.
>
> Freirich eventually provided the documents he had regarding the promissory notes, which included copies of the notes and two pages of Freirich's handwritten notes. He did so after concluding that Suyue's [former wife] presence during his discussions with Louis had vitiated any privilege that would otherwise exist.
>
> Still, Claudine sought production of the rest of the files. Freirich responded that he didn't have "any additional information regarding the underlying debt reflected in the Promissory Note[s]"; his duty of confidentiality under Colorado Rule of Professional Conduct 1.6 prevented him from revealing more; and his refusal to comply with the subpoena was "consistent with what [he] believe[d] to be [Louis's] wishes." Claudine countered that Freirich had to produce the files because they were Louis's property, and section 15-12-709, C.R.S. (2020), grants a personal representative the right to take possession of a decedent's property; Louis waived his attorney-client privilege by nominating her as his personal

> representative, and the privilege now belongs to Louis's estate; and Freirich's duty of confidentiality didn't otherwise prevent remittance of Louis's files to her, since Louis also waived his right to confidentiality by nominating her as the personal representative.

Are client files “property” of an estate? The court held they are not:

> Although Rule 1.16(d) required Freirich to provide Louis with “papers and property to which the client is entitled” upon termination of the attorney-client relationship, that duty is grounded in ethics, not property law. *Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus,* 824 S.W.2d 92, 97 (Mo. Ct. App. 1992) (“ ‘Surrendering papers and property to which the client is entitled’ is one example of a step an attorney must take to protect [a former client's] interest. But, this duty ... need not be supported or justified by any property concepts.” (quoting Mo. Sup. Ct. R. 4-1.16)); Colo. Bar Ass'n Ethics Comm., Formal Op. 104, at 2 (revised Sept. 2018) (“[A] client's entitlement [under Rule 1.16(d)] is not completely defined by traditional concepts of property and ownership. Rather, the entitlement is based on the client's right to access the file related to the representation so as to enable continued protection of the client's interests.”). Moreover, Rule 1.16(d)’s reference to “papers and property” suggests that a client's property is distinguishable from “[a] client's files ... relating to a matter that the lawyer would usually maintain in the ordinary course of practice.” Colo. RPC 1.16A cmt. 1 (“A lawyer's obligations with respect to client ‘property’ are distinct [from obligations with respect to a client's files].”).
>
> In keeping with the Colorado Rules of Professional Conduct's distinction between a lawyer's papers and a client's property, we conclude that a personal representative does not acquire a right to take possession of a decedent's legal files under section 15-12-709 except for “documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, and wills.” Colo. RPC 1.16A cmt. 1. Those items are the client's property. *See* Restatement (Third) of the Law Governing Lawyers § 46 cmt. a (Am. Law Inst. 2000) (differentiating between client files and “writings that qualify as property ... because of their value, for example cash, negotiable instruments, stock certificates and other writings constituting presumptive proof of title, and collectors’ items such as literary manuscripts”). For the purposes of section 15-12-709, the rest of the files are the lawyer's property.
>
> Further, the personal representative does not take possession or control of some intangible right to access the deceased client's files. Rule 1.16(d) requires lawyers to surrender certain papers to the client when the representation ends, but that responsibility is an ethical duty owed to the client, not something the client legally *owns*. *See Own*, Black's Law Dictionary (11th ed. 2019) (“[T]o have legal title to.”). Thus, a lawyer's ethical duty to surrender papers to former clients does not pass to the personal representative under the Probate Code's definition of “property.” *See* § 15-10-201(42) (“ ‘Property’ means both real and personal property or any interest therein and anything that may be the subject of ownership.”).

However, the court also concludes that a testator impliedly waives the attorney-client privilege by appointing a personal representative, at least in part:

> We analyze the possibility of implied waiver in light of the role of the personal representative under Colorado law. A personal representative undertakes certain

statutory duties with respect to estate administration. *E.g.*, § 15-12-703(1), C.R.S. (2020) ("A personal representative has a duty to settle and distribute the estate of the decedent ...."); § 15-12-703(4) ("[A] personal representative ... has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his decedent had immediately prior to death."). A decedent nominates a personal representative precisely because the decedent wants that individual to administer the decedent's estate.

To effectively carry out those duties (as well as any other duties specified in the will), a personal representative may need access to material otherwise protected by the attorney-client privilege. Thus, by nominating a personal representative, a client impliedly waives any claim of attorney-client privilege with respect to communications necessary for estate administration, unless the client expressly manifested the intent to maintain the privilege. *See Wesp*, 33 P.3d at 198 ("To prove an implied waiver, there must be evidence showing that the privilege holder, 'by words or conduct, has impliedly forsaken his claim of confidentiality with respect to the communication in question.' " (quoting *Miller v. Dist. Ct.*, 737 P.2d 834, 838 (Colo. 1987))). A decedent's former attorney may therefore provide a personal representative with privileged information necessary for the personal representative to settle the estate.[8]

Accordingly, the division erred in concluding that Claudine, as the personal representative, became the attorney-client-privilege holder after Louis's death. But Louis did impliedly waive the privilege with respect to communications necessary to administer his estate by appointing her as his personal representative. The attorney-client privilege couldn't shield any otherwise privileged communications necessary to settle Suyue's claim, although we recognize that Freirich already provided Claudine with the file regarding the promissory notes.

* * *

"[A] lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation." Colo. RPC 1.6 cmt. 5. Therefore, release is appropriate if "the attorney has reasonable grounds for concluding that release of the information is impliedly authorized in furthering the former client's interests in settling [the] estate." D.C. Bar, Ethics Op. 324, at 2 (2004). So a decedent's former attorney may provide the personal representative with confidential information necessary to settle the estate unless the decedent has expressly indicated otherwise. But the attorney cannot provide a decedent's complete legal files to the personal representative *unless* the decedent gave informed consent for such broad disclosure in the will or elsewhere.

To hold otherwise would drastically undermine a lawyer's duty of confidentiality to a deceased client. It would grant the personal representative authority to request, from every one of a decedent's former attorneys, the decedent's entire legal history, regardless of subject matter and the needs of the estate.

There is no evidence that all of Louis's legal files were necessary to administer the estate. Thus, Freirich had a professional duty of confidentiality under Rule 1.6 to withhold all unnecessary information related to his representation of Louis. And when Claudine subpoenaed files that she did not need for estate administration, the duty of confidentiality obligated Freirich to make all non-frivolous objections (including the assertion of attorney-client privilege for any confidential communications made for the purpose of obtaining legal advice).

23. **Place of Celebration Controls Existence of Marriage**. Estate of Grossman v. Commissioner, T.C. Memo. 2021-65, involved fascinating facts. Semone Grossman married in New York in 1955. In 1965 he obtained a "unilateral divorce" in Mexico and in 1967 he married again, in New Jersey. In 1974 his relationship with his second wife was over, and his first wife sued saying she was still married to Mr. Grossman because they had never divorced. She won. In 1986, Mr. Grossman obtained a Jewish religious divorce in New York and married in 1987 his third wife in Israel. The court summarized the next 27 years as follows:

> After their marriage in Israel, H and W3 returned to N.Y. and lived there as husband and wife for 27 years, until H's death in 2014. They had two children, filed joint Federal income tax returns, and shared a home and finances. During this time, W1 also lived in N.Y., saw H and W3 socially, and never challenged their marriage. W1 filed Federal income tax returns as single and made no statutory claim against H's estate after his death.
>
> When H died in 2014, he left the bulk of his estate to W3, and the estate claimed a corresponding marital deduction under I.R.C. sec. 2056(a). R denied the deduction and argues in a motion for partial summary judgment that H's religious divorce from W1 was invalid under N.Y. law. Relying on N.Y. law, R argues that W1, rather than W3, was H's surviving spouse when he died.

So, the question could be was Mr. Grossman properly divorced from his first wife, Hilda, on the theory that without such divorce he couldn't have married his third wife. However, that is not how the Tax Court approached the case at all:

> First, the Commissioner begins his analysis by asking whether Semone and Hilda were validly divorced and relies exclusively on New York law to determine the answer. But that is the wrong starting question, and the Commissioner looks to the wrong jurisdiction for the governing law. Under section 2056(a)--the provision at issue in this case--the Court must determine whether Ziona was Semone's "surviving spouse" for Federal estate tax purposes. Accordingly, the proper starting question is whether Semone and Ziona were validly married. To answer that question, given the parties' positions on this score, we assume (without deciding) that we should look to New York law. And New York law in turn requires us to consider the rules of the place of the celebration of the marriage, here Israel.
>
> It is well established that capacity to marry is a prerequisite for marriage and that the prerequisites for marriage are also determined by the place of celebration. As the New York Court of Appeals in Van Voorhis, 86 N.Y. at 25 (quoting Connelly, 2 Eng. L. & Eq. 570), put it: "We all know * * * that in questions of marriage contract, the lex loci contractus [the law of the place of the contract] is that which is to determine the status of the parties." This includes whether a person seeking to remarry has been validly divorced. The Restatement (Second) of Conflict of Laws, on which the Commissioner relies, highlights the same point. Restatement, Conflict of Laws 2d, sec. 283 cmt. h (1971) ("[A] marriage will usually be valid everywhere if it complies with the requirements of the state where it was contracted as to such matters as * * * the capacity of either party to marry[.]"). Caselaw and other Federal agencies agree on this principle. See, e.g., Jahed v. Acri, 468 F.3d 230, 235 (4th Cir. 2006) ("Ordinarily, in the immigration context, the validity of a prior divorce is addressed to determine whether a subsequent marriage is lawful. See, e.g., Matter of Hosseinian, 19 I. & N. Dec. 453 (BIA

> 1987). In such situations, the * * * [Board of Immigration Appeals] ‘look[s] to the law of the state where the subsequent marriage was celebrated to determine whether or not that state would recognize the validity of the divorce.’ Id. at 455.”).
>
> Here, there is no dispute that Israel--the place of Ziona's marriage celebration--viewed Semone and Hilda as validly divorced and Semone as capable of remarrying. This was demonstrated by Israel's acceptance of the letter from the *Beth Din* of America, the issuance of a *ketubah* to Semone and Ziona, and the later issuance of a marriage certificate. Under Israeli law, religious divorces (i.e., *gets*) are fully recognized. Indeed, they are the only way for people of Jewish faith who have been married before to make themselves eligible to remarry another Jewish person in Israel. See supra Part II. Since New York law requires us to look to the law of the place of the marriage celebration to determine the parties’ capacity to marry, New York law also requires us to defer to the place of celebration and its determination on whether one of those parties was validly divorced and therefore capable to remarry. See, e.g., Matter of May, 305 N.Y. at 491, 114 N.E.2d 4. Applying this standard, we would expect the New York Court of Appeals to accept Israel's determination that Semone and Hilda's marriage had ended, leaving Semone free to marry Ziona.

In short, Israel accepted the religious divorce, Israel allowed the happy couple to marry, and New York law holds that if you are married somewhere else you are married in New York (with narrow exceptions):

> More generally, the Commissioner fails to recognize that the public policy exception to the place of celebration rule is narrow. The New York Court of Appeals has held that the exception applies when a marriage falls “within the inhibitions of natural law” because it is “offensive to the public sense of morality to a degree regarded generally with abhorrence.” See Matter of May, 305 N.Y. at 493, 114 N.E.2d 4. We cannot agree that Semone and Ziona's marriage falls under this standard. This is not a case in which one spouse sought to cohabit with two or more other “spouses” at the same time. Semone was a serial monogamist who sought to end his marriage to Hilda before his marriage to Ziona began. All the parties most intimately involved in both marriages appear to have understood that Semone and Hilda were divorced and that Semone and Ziona were married.
>
> Despite the Commissioner's efforts to show otherwise, we do not see how New York's policy interest in preventing marriages involving incest, polygamy, and the like would be implicated here.

24. Power to Appoint to Charity Does Not Create Countable Assets for Medicaid Purposes. At issue in Fournier v. Secretary of Executive Office of Health and Human Services, 170 N.E.3d 1159- (Ma. 2021) was whether assets in a self-settled trust where the only reservation of rights by the settlor was the power to appoint to charity – a charity over which the settlor has no control – would be countable assets for Medicaid purposes. The Massachusetts Supreme Court held that the they are not. The opinion states:

> 1. Four years ago, in Daley v. Secretary of the Exec. Office of Health & Human Servs., 477 Mass. 188, 203, 74N.E.3d 1269 (2017), we raised -- but did not answer – the question whether a trust settlor's reservation of a limited power of appointment to appoint trust principal to a nonprofit or charitable entity over which the settlor has no control, contained within an irrevocable trust established by the settlor, could render the assets held in the trust “countable” for purposes of determining the settlor-applicant's eligibility for Medicaid long-term care

> benefits. Specifically, we instructed MassHealth to consider, in the first instance, whether there were "any circumstances," see 42 U.S.C. § 1396p(d)(3)(B)(i), in which the settlor-applicant could use his limited power of appointment to appoint the trust principal to a nonprofit or charitable nursing home for the purpose of paying for his care. Daley, supra.
>
> This case picks up where Daley left off. While both were living, the plaintiff, Emily Misiaszek, and her husband created an irrevocable trust, the corpus of which includes their home. The terms of the trust grant Misiaszek, during her lifetime, a limited power of appointment to appoint all or any portion of the trust principal to a nonprofit or charitable organization over which she has no controlling interest. After Misiaszek applied for and was denied MassHealth long-term care benefits, the Massachusetts Office of Medicaid's board of hearings (board) affirmed MassHealth's determination that the home was a countable asset, concluding that Misiaszek ostensibly could use her limited power of appointment to appoint portions of the home's equity, included as part of the trust principal, to the nonprofit nursing home where she resided as payment for her care. Misiaszek then sought judicial review of the board's decision, and a Superior Court judge reversed the board's ineligibility determination.
>
> 2 We conclude that under the terms of her trust, Misiaszek's limited power of appointment does not allow her, in any circumstance, to appoint the trust principal for her benefit, and thus the trust principal is not "countable" for purposes of determining her eligibility for MassHealth benefits. Accordingly, we affirm the judgment of the Superior Court and remand the case for further proceedings consistent with this opinion.

25. **Amount of Wrongful Death Proceeds Included in An Estate**. In Morley v. Director, Division of Taxation, 32 N.J.Tax 366 (NJ Tax Court 2021), the decedent died in 2014 when utility workers created a natural gas explosion in front of the decedent's house. In 2017 the case settled for $20,000,000, which became $13,418,462.15 after counsel fees and expenses. That amount was divided, per New Jersey law, half to the survivors and half to the estate. So the estate received $6,709,213.08. An appraiser had valued the estate's claim at $2,690,600. The parties agreed that the wrongful death claim proceeds paid to the survivors were not subject to New Jersey estate tax, leaving the determination of value of the estate claim. The opinion states:

> Here, the transfer inheritance tax laws dictate what is included in the estate ("any sum recovered as compensation for death of a person caused by a wrongful act, neglect or default, whether by award of damages or settlement of compromise"), and when (date of recovery of the "award or settlement"). N.J.S.A. 54:35-1; N.J.A.C. 18:26-5.3(a). The regulations also indicate what is not taxable, and therefore, what is not includible in an estate. N.J.A.C. 18:26-5.3; 18:26-6.6. Therefore, construing the statutes in pari materia, the court finds that the legislative intent was to include in the decedent's estate, the sums recovered pursuant to the survival claim action, whether the recovery resulted from a trial or a settlement.
>
> Thus, the sums actually recovered by the decedent's estate in the survival claim action represents the value of that claim, which here is $6,709,231.08. Although received or recovered later, this amount is deemed to be the value of the survival action claim as of the decedent's date of death. The legislative changes implemented by L. 1978, c. 172, while noting that it was as to the "date on which certain property is includible in the estate of a decedent for transfer inheritance

> tax purposes," sought to address the inequity as to timing of the payment of the tax so that "taxes shall become due and payable on the date of the award of damages or settlement of compromise, rather than the date of death of the decedent." Even if some ambiguity exists whether this law addresses the timing of the tax payment or the date on which an asset is to be valued, it is resolved by the unambiguous intent that (1) the "property" to be included in the decedent's estate are the "sums recovered under the Death By Wrongful Act Statute," and (2) the date such "property" is includible in the estate (and therefore subject to tax) is "the date of the award of damages or settlement" and not the date of death. Sen. Rev. Fin. and Approp. Comm. Statement to Senate, No. 348.
>
> It would be counterintuitive to maintain that the same asset (survival claim action) is to be included in the same estate (decedent's) but argue that the tax base, i.e., amount subject to tax, should be different for each type of tax: for the estate tax, it should be an amount based on an appraiser's value conclusion (what is the asset's alleged market value as of the date of death), but for transfer inheritance tax purposes it is the amount recovered under N.J.A.C. 18:26-5.3. Construing the Estate Tax and Transfer Inheritance Tax statutes in pari materia will avoid this absurdity. The court's conclusion does not sidestep the ruling in Estate of Warshaw because there the asset at issue was not a survival action claim and the case did not involve applicability of the Transfer Inheritance Tax laws.

26. **Oregon Grabs Out of State QTIP for Estate Tax**. Don Gillam died in 2012, a Montana resident. His wife, Helene Evans, had shortly before his death moved to Oregon where she lived until her own death in 2015. Mr. Gilman created a testamentary trust for Mrs. Evans that did not qualify for QTIP but that the trustee, a Montana resident, had it reformed so it would achieve the Federal marital deduction. At issue in Estate of Evans v. Department of Revenue, 368 Or. 430 (Or. 2021), was whether Oregon could tax the QTIP as part of Mrs. Evans' estate. The court concluded it could stating:

> We agree with the department that the cited cases do not establish that a state may impose an estate tax on the assets of an out-of-state trust only if the deceased beneficiary had the ability to control how the assets of that out-of-state trust were managed, invested, or distributed. Instead, based on the rule announced in *Kaestner*, ––– U.S. ––––, 139 S Ct at 2222, we conclude that the demands of due process also could be satisfied by a showing that a resident decedent had some degree of possession or enjoyment of, or right to receive, the trust property. *See Kaestner*, ––– U.S. ––––, 139 S Ct at 2223-24 (demonstrating that court looks at whether beneficiaries had some enjoyment or future right to receive trust property, not just at whether they had right to control trust property, when considering "minimum connection" question).
>
> APPLICATION
>
> Applying that standard to this case, we conclude that Evans had sufficient "enjoyment" of the trust principal (in addition to the enjoyment of the income generated thereby) to satisfy *Kaestner*'s requirement of "some degree of possession, control, or enjoyment" of the trust assets and thus to permit Oregon to include those trust assets in Evans's taxable estate. While, under her husband's modified will, Evans could not claim a right to the whole of the trust principal or any particular portion thereof, she had a potential right to receive distributions of principal, to the extent that trust income was insufficient to satisfy her needs. No other person could receive any part of the principal during Evans's lifetime. And while the remainder beneficiaries had a right to whatever was left of the

principal after Evans's death, they could not prevent her from receiving distributions of principal that would reduce or even eliminate their own ultimate shares in the remainder.

Even under the settlement in which Evans ceded her rights with respect to the trust principal under her husband's will and Montana law, she received a substantial one-time payment that consisted of part of the principal. And she retained a potential right to distributions from principal, to the extent that the trust principal failed to generate income sufficient to cover the agreed-upon fixed monthly distribution. In all of those ways, Evans could and did access the trust principal for her own use and benefit in a way that no other person could during her lifetime. We conclude that Evans thereby had a substantial measure of enjoyment of the trust principal. And therefore, under the rule set out in *Kaestner*, Oregon could rely on Evans's status as an Oregon resident to impose its taxes on that trust principal without violating the Due Process Clause.

We caution, however, that our focus on Evans's enjoyment of the trust assets should not be taken as a conclusion that the circumstances here could not be considered sufficient control of the trust assets. Plaintiff has insisted that Evans never had control of the trust assets in the required sense ("some ability to decide or control how the trust principal will be invested, managed, or distributed") because the management and distribution of the assets was completely in the hands of the trustee. But plaintiff's description of Evans's rights—or lack thereof—is not entirely accurate. The modified will that controlled the trust clearly contemplated that Evans would receive distributions from the trust assets as "necessary for [her] health, education, maintenance or support in [her] accustomed manner of living." The fact that it directed that those distributions be in "such amounts from the principal *as the trustee determines* to be necessary" for that purpose did not foreclose the possibility that Evans could judicially compel distributions of principal to herself, if her needs were not being met. Furthermore, under Montana law, Evans could force the trustee to take certain actions with respect to the trust property if the amount of trust income that he distributed to her was "insufficient to provide [her] with the beneficial enjoyment required to obtain the marital deduction." MCA § 72-34-445. Evans did ultimately agree to give up those potential claims in exchange for a lump sum payment from principal and a right to a monthly distribution set at a specified amount. But we leave for another day the question of whether such a settlement rendered irrelevant any potential control of the trust principal that beneficiary might have had for purposes of the *Kaestner* rule or whether the ability to enter into a settlement regarding distribution of the trust assets was itself a demonstration of control. We need not resolve those questions because we conclude that Evans otherwise satisfied *Kaestner*'s requirement that she have sufficient "possession, control, or enjoyment" of the trust assets to permit Oregon to include the assets in Evans's taxable estate.

Plaintiff, nevertheless, insists that satisfying the *Kaestner* test is not enough, that due process requires more in this case. Seemingly appealing to a more generic understanding of what the Due Process Clause requires, plaintiff contends that it is confiscatory and unfair to allow Oregon to tax the assets of a Montana trust based solely on the facts that the trust assets were designated as QTIP for purposes of federal estate taxes and that the trust's income beneficiary happened to be living in Oregon when she died. Plaintiff's points in that regard appear to be twofold. First, plaintiff suggests that it is unfair for Oregon to rely on the *federal* tax QTIP election of Gillam's executor as a statutory basis for including the trust assets in Evans's *Oregon* estate, when the quid pro quo rationale that justifies the QTIP mechanism—inclusion of the value of trust property in the estate of a surviving spouse in exchange for the earlier deduction of the value of that property from the estate of the original decedent—is not relevant to Evans's Oregon estate (because there had been no earlier deduction from Gillam's estate either in Oregon or Montana). And second, plaintiff suggests that including the trust property in Evans's Oregon estate would be unexpected and arbitrary. According to plaintiff, neither Gillam, in creating the trust with the federal marital deduction in mind, nor his executor, in electing to designate the trust property as QTIP, could have foreseen that the trust assets would thereby become subject to taxation in Oregon, based on the mere happenstance that Evans, the income beneficiary, moved to and died here.

Plaintiff's first argument misapprehends the kind of fairness that the Due Process Clause requires. As explained above, a QTIP election permits a married couple to defer certain taxes that otherwise would be imposed on the estate of the first to die until the death of the survivor. It does so by allowing a deduction of QTIP-designated trust property from the original decedent's estate *in exchange* for the subsequent inclusion of the same trust property in the estate of the survivor. In the many states that, like Oregon, tie the value of a decedent's estate for state tax purposes to the value of his or her federal estate, a federal QTIP election generally will result in application of the same bargain or exchange to the state taxes that pertain to the affected individuals: Property in a QTIP trust will not be subject to either federal or state estate taxes when the first spouse dies, but will later be subject to both the federal and state taxation as part of the surviving spouse's estate.

We recognize that differences in state tax laws mean that a federal QTIP election will not always produce a corresponding benefit with respect to the original decedent's state-level estate—as here because Montana does not tax estates—yet another state in which the surviving spouse dies includes the trust property in that surviving spouse's taxable estate. That difference in outcome is simply the result of permissible differences in the tax laws of the states that are involved, not a violation of the Due Process Clause.

Plaintiff also suggests that Oregon's inclusion of the trust assets in Evans's Oregon estate is unfair in the sense of being caused by an unforeseen and arbitrary event—plaintiff's relocation to and death in Oregon, a state that has an estate tax and that bases that estate tax on the value of the decedent's *federal* taxable estate. But, as the department points out, the possibility of incurring additional tax liability depending on where Evans chose to reside was inherent in the election to designate the assets of the Gillam Trust as QTIP and a risk that Gillam's executor knowingly took when he made that election. Evidence of that fact is in Article Fifth of Gillam's modified will, which, in conjunction with authorizing the QTIP election, directs that, upon Evans's death, the trustee of the Gillam Trust shall pay over to the legal representative of her estate such amounts as the trustee shall determine for the payment of “federal and state death taxes *** imposed *by any jurisdiction* by reason of [Evans's] death and with respect to any property included in this trust.” (Emphasis added.) Moreover, Evans's move to Oregon was quite the opposite of unforeseen: She moved to Oregon a month before Gillam died, and many months before Gillam's executor even began the process of modifying Gillam's will to allow the QTIP election.

We are persuaded, in fact, that Oregon's inclusion of the assets of the Gillam Trust in Evans's Oregon estate should be considered fair precisely because of the choice by Gillam's executor to designate those assets as QTIP. Our conclusion that Evans's interests in the assets of the trust were such that Oregon's imposition of its estate tax on those assets does not offend due process draws on the specific

> context of ORS 118.005(7), which bases Oregon's estate tax on the value of a decedent's federal estate; a QTIP election that resulted in a reduction to Gillam's federal estate in exchange for a subsequent increase in Evans's federal estate; and an agreement that the trust—not Evans's heirs—would be liable for any resulting increase in Evans's federal and state estate taxes.

Much of the argument was over the application of the Kaestner income tax case, and three 80 year old cases dealing with state taxation of trusts. The discussion is interesting:

> *Kaestner* is only a starting point, however. Although it sets out a general rule requiring that an in-state trust beneficiary "have some degree of possession, control or enjoyment of the trust property or a right to receive that property" before the state can tax that property, it does not explore what might qualify as "some degree." The parties point to much earlier Supreme Court cases as sources of additional guidance regarding what it means for a resident of a state to have had "some degree of possession, control or enjoyment" of intangible trust assets such that, upon their death, those trust assets may be taxed as part of their estate. The parties focus their arguments on three estate tax cases, all decided within a two-year period some eighty years ago—*Curry*, 307 U.S. 357, 59 S.Ct. 900, 83 L.Ed. 1339, *Graves v. Elliott*, 307 U.S. 383, 59 S Ct 913, 83 L Ed 1356 (1939), and *Whitney*, 309 U.S. 530, 60 S.Ct. 635, 84 L.Ed. 909.
>
> In the first case, *Curry*, a resident of Tennessee had created a trust, funded by stocks and other intangibles, designating herself as the income beneficiary for life and reserving to herself certain powers, including the powers to direct the sale of the trust property and to dispose of the trust property by will. An Alabama corporation was designated as the trustee, and the trust was administered in Alabama and under the laws of that state. 307 U.S. at 360-61, 59 S.Ct. 900. In her will, the trustor bequeathed the trust property to the trustee in trust for the benefit of her husband and children. *Id.* at 361, 59 S Ct 900.
>
> Upon the trustor's death, Alabama and Tennessee both sought to impose an estate tax on the trust property, and the trustor's executors in Tennessee sought a declaratory judgment in the Tennessee courts as to the two states' authority in that regard. *Id.* at 361-62, 59 S Ct 900. On appeal from a Tennessee Supreme Court decision holding that only Tennessee could impose its tax, the United States Supreme Court reversed, holding that both states could impose their transfer taxes consistently with due process. The Court reasoned that Alabama could do so by virtue of the fact that an Alabama trustee had legal ownership of the intangible property, the beneficial interest in which was transferred upon the trustor's death, *id.* at 370, 59 S Ct 900, while Tennessee could do so because of the in-state residency of a decedent who, in life, had had a right to control the trust property, including by directing its disposition upon her death, *id.* at 370-71, 59 S Ct 900. With respect to the latter point, the Court explained:
>
> "The decedent's power to dispose of the intangibles was a potential source of wealth which was property in her hands from which she was under the highest obligation in common with her fellow citizens of Tennessee, to contribute to the support of the government whose protection she enjoyed. Exercise of that power, which was in her complete and exclusive control in Tennessee, was made a taxable event by the statutes of the state."
>
> *Id.* The Court noted, too, that "[f]or purposes of taxation, a general power of appointment *** has hitherto been regarded by this Court as equivalent to ownership of the property subject to the power." *Id.* at 371, 59 S Ct 900.

In *Graves*, the Court reinforced its holding in *Curry* and clarified that the significance of the power to dispose of intangible property was not limited to an *exercise* of that power but extended also to a relinquishment of such power at death, through a failure to exercise it in life. The trust at issue in *Graves* was created by a New York resident who, during her lifetime, had transferred certain intangible property to a bank in Colorado to be held in trust. 307 U.S. at 384-85, 59 S.Ct. 913. The trust agreement provided that the trustee was to pay the income from the trust to the decedent's daughter for life and, thereafter, to the daughter's children until they reached a certain age, at which point the children were to receive a proportionate share of the trust principal. The decedent had reserved to herself the right to remove the trustee, change the trust beneficiaries, or revoke the trust and revest title to the property in herself at any point during her lifetime. *Id.*

When the decedent died—without exercising any of those reserved rights—New York tax authorities included the intangible property held in the Colorado trust in its assessment of decedent's New York estate, but the New York Court of Appeals held that inclusion of that property infringed due process. *Id*. at 385-86, 59 S Ct 913. The Supreme Court reversed, emphasizing as it had in *Curry* that “the power of disposition of property is the equivalent of ownership. It is a potential source of wealth and its exercise in the case of intangibles is the appropriate subject of taxation at the place of the domicile of the owner of the power.” *Id.* at 386, 59 S Ct 913. As a result, “[t]he relinquishment at death, in consequence of the non-exercise in life, of a power to revoke a trust created by a decedent is likewise an appropriate subject of taxation.” *Id.* Relying on its reasoning in *Curry*, the Court concluded:

> “[W]e cannot say that the legal interest of decedent in the intangibles held in trust in Colorado was so dissociated from her person as to be beyond the taxing jurisdiction of the state of her domicile more than her other rights in intangibles. Her right to revoke the trust and to demand the transmission to her of the intangibles by the trustee and the delivery to her of their physical evidences was a potential source of wealth, having the attributes of property. As in the case of any other intangibles which she possessed, control over her person and estate at the place of her domicile and her duty to contribute to the support of government there afford adequate constitutional bases for imposition of a tax measured by the value of the intangibles transmitted or relinquished by her at death.”

Id. at 386-87, 59 S.Ct. 913.

The final case that we consider, *Whitney*, differs from *Curry* and *Graves* in that the due process question had nothing to do with *where* intangible property held in trust may be taxed constitutionally and therefore did not include any discussion that might clarify the due process “minimum connection” requirement. The trust at issue in *Whitney* was established and funded in New York by the will of Cornelius Vanderbilt. It provided for an annual income to Vanderbilt's wife and also gave Mrs. Vanderbilt the power to dispose of the trust principal among the couple's four children in her will, in such proportions as she might choose. The trust further provided that, if Mrs. Vanderbilt did not exercise that “special power of appointment” in her will, then the trust property would be divided equally among the four children upon her death. 309 U.S. at 534-35, 60 S.Ct. 635. Mrs. Vanderbilt *did* exercise the power of appointment in her will and, upon her death, the taxing authorities of New York (where the trust was administered and Mrs. Vanderbilt had at all times resided) included the value of the trust principal in Mrs. Vanderbilt's gross estate for purposes of calculating the state's estate tax. Mrs. Vanderbilt's beneficiaries and executors challenged New York's inclusion of

> the trust principal in her estate, arguing that doing so violated the Due Process Clause, given that Mrs. Vanderbilt had not been the "beneficial owner" of the trust corpus—by which the challengers meant that she could not use the corpus of the trust herself, could not appoint it to her own estate, and could not direct it to her creditors. *Id.* at 535-38, 60 S Ct 635.
>
> The Supreme Court rejected the due process challenge. The Court explained that, to the extent that New York's estate tax statute was aimed at diverting to the community a portion of the total wealth released by a death, the state was
>
> "not confined to that kind of wealth which was, in colloquial language, 'owned' by a decedent before death, nor even to that over which he had an unrestricted power of testamentary disposition."
>
> *Id.* at 538, 60 S.Ct. 635. Instead,
>
> "[i]t is enough that one person acquires economic interests in property through the death of another person, even though such acquisition is in part the automatic consequence of death or related to the decedent merely because of his power to designate to whom and in what proportions among a restricted class the benefits shall fall."
>
> *Id.* at 538-39, 60 S.Ct. 635. After pointing to various other circumstances in which property not "beneficially owned" by a decedent may nevertheless be included in his or her estate, the Court made an even more expansive statement:
>
> "A person may by his death bring into being greater interests in property than he himself has ever enjoyed, and the state may turn advantages thus realized into a source of revenue[.] * * * *[I]f death may be made the occasion for taxing property in which the decedent had no 'beneficial interest,' then the measurement of that tax by the decedent's total wealth-disposing power is merely an exercise of legislative discretion in determining what the state shall take in return for allowing the transfer*."
>
> *Id.* at 539-40, 60 S.Ct. 635 (emphasis added).

27. **Valuation of Two Simultaneous Fractional Gifts**. The facts in Buck v. United States, 2021 WL 4391091 (Dist. Ct. Conn. 2021), were straightforward:

> Between 2009 and 2013, plaintiff Peter Buck purchased $82,853,050 in tracts of timberland in upstate Maine and Vermont. From 2010 to 2013, he gifted interests in these tracts to his two sons, Christopher Buck and William Buck. Each son received a 48% interest in each tract, while the plaintiff retained a 4% interest for himself.
>
> Each year from 2010 to 2013, the plaintiff reported and paid gift tax on these transfers as two separate gifts to his sons, each representing the gifted 48% interest in given tracts. The plaintiff valued the gifts using discounts meant to account for the possibility that the interests were less valuable to hypothetical buyers than they might be otherwise. While the combined purchase price of the properties was $82,853,050, the plaintiff declared the discounted value of each 48% fractional interest to be $18,496,249, a total of $36,992,498 for the two sons. This represented a 55% discount from the total purchase price.

> The Internal Revenue Service ultimately challenged the plaintiff's valuations and assessed deficiencies in the plaintiff's gift tax returns. The plaintiff paid this amount in full and filed claims for refunds before bringing this action. The government now moves for partial summary judgment on a question of law.

The first question that might be reasonably asked is why the IRS ignored Revenue Ruling 93-12 which states:

> Rev. Rul. 81-253, 1981-1 C.B. 187, holds that, ordinarily, no minority shareholder discount is allowed with respect to transfers of shares of stock between family members if, based upon a composite of the family members' interests at the time of the transfer, control (either majority voting control or de facto control through family relationships) of the corporation exists in the family unit. The ruling also states that the Service will not follow the decision of the Fifth Circuit in Estate of Bright v. United States, 658 F.2d 999 (5th Cir. 1981).
>
> In Bright, the decedent's undivided community property interest in shares of stock, together with the corresponding undivided community property interest of the decedent's surviving spouse, constituted a control block of 55 percent of the shares of a corporation. The court held that, because the community-held shares were subject to a right of partition, the decedent's own interest was equivalent to 27.5 percent of the outstanding shares and, therefore, should be valued as a minority interest, even though the shares were to be held by the decedent's surviving spouse as trustee of a testamentary trust. See also, Propstra v. United States, 680 F.2d 1248 (9th Cir. 1982). In addition, Estate of Andrews v. Commissioner, 79 T.C. 938 (1982), and Estate of Lee v. Commissioner, 69 T.C. 860 (1978), nonacq., 1980-2 C.B. 2, held that the corporation shares owned by other family members cannot be attributed to an individual family member for determining whether the individual family member's shares should be valued as the controlling interest of the corporation.
>
> After further consideration of the position taken in Rev. Rul. 81-253, and in light of the cases noted above, the Service has concluded that, in the case of a corporation with a single class of stock, notwithstanding the family relationship of the donor, the donee, and other shareholders, the shares of other family members will not be aggregated with the transferred shares to determine whether the transferred shares should be valued as part of a controlling interest.
>
> ***
>
> If a donor transfers shares in a corporation to each of the donor's children, the factor of corporate control in the family is not considered in valuing each transferred interest for purposes of section 2512 of the Code. For estate and gift tax valuation purposes, the Service will follow Bright, Propstra, Andrews, and Lee in not assuming that all voting power held by family members may be aggregated for purposes of determining whether the transferred shares should be valued as part of a controlling interest. Consequently, a minority discount will not be disallowed solely because a transferred interest, when aggregated with interests held by family members, would be a part of a controlling interest. This would be the case whether the donor held 100 percent or some lesser percentage of the stock immediately before the gift.

But no, here the court summarizes the government’s argument as follows:

> The government moves for partial summary judgment on a legal issue. It asks the court to “conclude as a matter of law that no discount should be available for a

> gift of a fractional interest unless the taxpayer held such interest in fractional form before the gift, rather than viewing several simultaneously gifted portions of the property as fractional interests in the hands of the donor for purpose of valuing the gift." Def. Mem. at 13-14. The government maintains that gift tax law categorically prohibits such a discount because it is contrary to one of the primary purposes of the gift tax. It contends that "the value of the property [here] to which the gift tax applies is the fair market value of the Properties transferred to CLWH, minus the portion of each that served to enhance Dr. Buck's 4-percent interest in CLWH"; that "it is not appropriate to apply fractional interest discounts in valuing a gift of land to more than one individual"; and "that the value of each donee's interest is simply the value of the whole times the percent ownership." Id. at 29.
>
> ***
>
> The government emphasizes that "the value of a gift for federal gift tax purposes is the value to the donor, not the donee." Def. Mem. at 2. The government then argues that the value of the properties gifted here should "reflect[ ] the economic reality that Dr. Buck transferred what to him equaled the value of a 96% interest in each of the Properties." Id. at 13; see also id. at 19-20 ("[T]he value *to Dr. Buck* of what he parted with was 96% of the total value of the property prior to the transfer."). The government maintains that disallowing fractional discounts where there was no fractional interest beforehand ensures that "the value of the gift made by the donor, not the measure of enrichment to the donee, ... is determinative." Id. at 18. In other words, even if the property is now worth less because of the creation of fractional interests, the property was worth more in the donor's hands before the fractional interests were created, and it is that value, not the new value, that should be the basis for calculating the gift tax.

Fortunately the court understood the government's position was 180 degrees wrong:

> The gift tax statute, the regulations, and relevant case law require the court to look at the value of each gift at the time it passes from the donor to the donee. The gift tax statute pertaining to valuation of gifts provides: "If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift." 26 U.S.C. § 2512(a). By way of contrast, the estate tax statute expressly looks at "the value of all property to the extent of the interest therein of the decedent at the time of his death." Id. § 2033 (emphasis added). The regulations reflect such a distinction. The gift tax regulations provide that "if a gift is made in property, its value at the date of the gift shall be considered the amount of the gift." 26 C.F.R. § 25.2512-1 (emphasis added).[1] The regulations state that "the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, [and] is measured by the value of the property passing from the donor ...." Id. § 25.2511-2. The estate tax regulations provide that "the value of the gross estate of a decedent ... is the total value of the interests described" by statute. Id. § 25.2031-1(a).
>
> Moreover, the regulations require that gifts be valued using "an objective test using hypothetical buyers and sellers in the marketplace," not one "which envisions a particular buyer and seller." LeFrak v. Comm'r, T.C. Memo. 1993-526, 1993 WL 470956, at *3 (1993) (citing Estate of Andrews v. Comm'r, 79 T.C. 938, 956 (1982); Kolom v. Comm'r, 71 T.C. 235, 244 (1978)). This is consistent with the fact that the gift tax applies to a donor's gift even where no donee is yet ascertained. See Robinette v. Helvering, 318 U.S. 184, 186-87, 63 S.Ct. 540, 87 L.Ed. 700 (1943) (upholding gift tax where "the identity of the donee may not then be known or ascertainable").

The government's position on this point is also inconsistent with LeFrak and Shepherd v. Commissioner, 115 T.C. 376 (2000). LeFrak directly addresses the question at issue here.2 In LeFrak, one of the petitioners transferred "20 buildings, formerly held solely by petitioner," to "new partnerships created simultaneously with the conveyances" and gave 30% "interests in the respective partnerships to the donees," 1993 WL 470956, at *4, all of whom were the petitioner's "children or their trustees," id. at *1. While the petitioners claimed that the transfers were of partnership interests, the Tax Court held that the donor actually transferred "his interest in the buildings"--that is, in real estate. Id. at *5-6. The Commissioner "valued the gift on the basis that fractional interests in property were transferred." Id. at *6. The Tax Court endorsed the Commissioner's approach:

> For gift tax purposes, the value of the fractional interest in the property transferred, and not the value of the property as a whole, must ultimately be decided..... The fair market value of a fractional interest in real property cannot as a general rule be derived by simply applying the percentage of the interest in the whole to the value of the entire property.

Id. at *15. The Tax Court proceeded to apply a combined minority discount and discount for lack of marketability "from the full value of each gift to each donee." Id. at *18. See also Zable v. Comm'r, T.C. Memo. 1990-55, 1990 WL 8598 (1990) (holding that, for gift tax purposes, "[i]t is the fair market value of these fractional interests, and not the fair market value of the property as a whole, which must ultimately be determined").

In Shepherd, the Tax Court applied fractional interest discounts in analogous circumstances. There the petitioner joined with his two sons to form a partnership in which the petitioner held a 50% interest and each son held a 25% interest. The petitioner transferred to the partnerships shares of his majority interests in three banks, as well as leased land in which the petitioner "owned the entire interest," subject to the lease. 115 T.C. at 378. The petitioner claimed a minority discount of 15% for the bank shares and reported the value of the leased land as a whole at $400,000. Because "the gift tax computed" fell below "his claimed maximum unified credit," the petitioner "reported no gift tax due on these transfers." Id. The Commissioner assessed a gift tax deficiency on the basis that the "fair market value of the 50-percent interest in the leased land that petitioner gifted to his sons was $639,300," far greater than the $200,000 value that the petitioner had claimed, but the Commissioner accepted the minority discount for the shares as reported. Id.

The Tax Court observed that "the parties disagree[d] as to what valuation discounts should apply to petitioner's transfer of the leased land and bank stock" and, specifically, about "whether petitioner's transfers to the partnership should reflect minority and marketability discounts attributable to the sons' minority-interest status in the partnership." Id. at 383. The Tax Court determined that the gifts were indirect gifts of undivided interests in the land and stocks, and it declined to "aggregate the separate, indirect gifts to his sons," applying settled precedent to hold that these "must be valued separately." Id. at 389-90 (citing Estate of Bosca v. Comm'r, T.C. Memo. 1998-251, 1998 WL 376348 (1998)). The Tax Court rejected the Commissioner's argument that "no valuation discount for fractional interests is warranted with respect to the leased land" "as failing to give adequate weight to other reasons for discounting a fractional interest in the leased land, such as lack of control in managing and disposing of the property." Id. at 401-02. The Tax Court then proceeded to use a discount of 15% for both the leased land and the bank stocks.

> The results in LeFrak and Shepherd are consistent with the well-established principle that gifts should be valued at the time of the gift, not before or after they are made. See also Goodman v. Commissioner, 156 F.2d 218, 219 (2d Cir. 1946) (holding that the gift's value was its value "at the moment it [wa]s made" and rejecting the petitioner's argument that the gift should be valued "at a moment of time antecedent to the time when the gift became complete").
>
> LeFrak and Shepherd are also consistent with the principle that each separate gift must be valued separately. In Estate of Bosca v. Commissioner, for example, the Tax Court reiterated its past holdings "reject[ing] attempts by taxpayers to aggregate separate gifts of stock made on the same day in order to claim a blockage discount," as well as its holding "reject[ing] an attempt by the Commissioner to aggregate separate gifts of stock on the same day" in an effort "to value the gifts as 'control stock.' " 1998 WL 376348, at *11. In both cases, the Tax Court made clear that "each separate gift must be valued separately." Id. Under applicable law, the gifts here are not a single 96% interest but two 48% interests given to two different donees, and the gifts must be valued separately at the time of transfer.

So, a taxpayer win but in a case scary that it was brought at all.

28. Effect of Entity Governing Instrument On Testamentary Dispositions. In Finlaw v. Finlaw, 320 So.3d 844 (Fla.App. [2d] 2021), a partnership agreement allowed a partnership interest be bequeathed only to lineal descendants who were children of the partners, therefore a partner could not devise her partnership interest to her grandson in her will. Ohio law governed the partnership agreement (but, said the court, in this regard Florida and Ohio law were substantially similar). The opinion states:

> Under both Ohio and Florida law, where contracting parties expressly agree on the disposition of property upon death, that agreement generally controls over a testamentary disposition of the property. See Barnecut v. Barnecut, 3 Ohio App.2d 132, 209 N.E.2d 609, 612-13 (1964) (holding that where a partnership agreement called for the settlement of a partnership interest, the interest did not become a part of the decedent's estate); Blechman v. Est. of Blechman, 160 So. 3d 152, 159 (Fla. 4th DCA 2015) (observing "the general principle that express language in a contractual agreement 'specifically addressing the disposition of [property] upon death' will defeat a testamentary disposition of said property") (alteration in original) (quoting Murray Van & Storage, Inc. v. Murray, 364 So. 2d 68, 68 (Fla. 4th DCA 1978))); see also Swanda v. Paramount Com. Real Est. Invs., No. C-030425, 2004 WL 1124587, at *2 (Ohio Ct. App. May 21, 2004) (holding partner's attempt to transfer partnership share by will ineffective where transfer was contrary to partnership agreement).
>
> Thus, having agreed in the partnership agreement to devise the partnership interest only to her children who are lineal descendants, the decedent's subsequent devise to her grandson instead was contrary to the terms of the agreement. The trial court did not err in so concluding.

The grandson then attempted to have the partnership dissolved relying on another partnership provision:

> In the alternative, the grandson argues that if he was not entitled to inherit the decedent's interest in the partnership, then the trial court was required to dissolve

> the partnership. As the basis for this argument, the grandson relies upon the following sentence from the provision quoted fully *supra*:
>
>> Should any partner neglect or fail to execute such last will and testament, so as to ultimately cause his or her partnership interest to pass to and vest in an individual, who is not a spouse or lineal descendant of these partners, then upon such event, the Partnership shall be liquidated and dissolved forthwith.
>
> (Emphasis added.)
>
> Under this plain language, dissolution is required only where the partnership interest passes to and vests in someone who is *not* a spouse or lineal descendant of the partners. It is undisputed that the decedent's grandson is her lineal descendant. Thus, this provision was not triggered.
>
> Moreover, the stated intent for the restrictions imposed under section XIX was to "protect and preserve the family character of" the partnership. Considering the section as a whole, it is clear the partners agreed that transfers that violate the restrictions—but which were still within the family, such as to the grandson here—would simply be ineffective by operation of controlling Ohio law, as set forth above. By contrast, transfers to individuals outside of the family would destroy the family character and thereby call for the drastic remedy of dissolution. Thus, because the decedent's attempted transfer to the grandson kept the interest within the family, the trial court correctly concluded that the dissolution provision was never triggered and properly declined to dissolve the partnership.

Tita v. Tita, 334 So.3d 646 (Fl. App. [4th] 2022), dealt with an LLC, with a provision the court distinguished from the one in Finlaw. Utah law was involved which the court found was substantially similar to Florida. The opinion states:

> "[O]perating agreements for limited liability companies are construed applying principles of contract interpretation." *Blechman v. Est. of Blechman*, 160 So. 3d 152, 156 (Fla. 4th DCA 2015). "Accordingly, since there is no disagreement regarding this case's historical facts, the trial court's interpretation of the Agreement—and its effect on the Decedent's probate estate—is a legal matter, subject to *de novo* review." *Id.* "A trial court's interpretation of the text of a last will and testament or trust instrument is reviewed de novo." *Reno v. Hurchalla*, 283 So. 3d 367, 369 (Fla. 3d DCA 2019).
>
> Relying on *Blechman*, as well as *Murray Van & Storage, Inc. v. Murray*, 364 So. 2d 68, 69 (Fla. 4th DCA 1978), and *Finlaw v. Finlaw*, 320 So. 3d 844, 848 (Fla. 2d DCA 2021), the wife argues that because the Company's Operating Agreement specifically addresses the disposition of a membership interest upon death, that provision "defeat[s]" a testamentary disposition of the same property. We reject this argument, concluding that the Operating Agreement lacks the specific language that would override the decedent's disposition of the membership interest in his will.
>
> ***
>
> The Operating Agreement does not specify to whom the decedent's interest should be passed, nor does it provide that such interest shall vest in another immediately upon a member's death. Rather, the Operating Agreement indicates that the

> Company should give written notice **to the estate of the deceased member** within 180 days if the Company decides to exercise the "Death Buy Out" provision. The Operating Agreement anticipates that the membership interest of a deceased member would be part of that member's probate estate, and provides that the Company should handle the death buyout matter with the estate to "purchase, acquire, and **redeem** the interest of the deceased member." The language about giving notice to the estate regarding the exercise of the "Death Buy Out" option would be nonsensical if the Operating Agreement itself controlled a transfer of an interest triggered by the death of a member. Also, the Operating Agreement's recognition that the Company could deal with an estate for a buyout is in line with the notion that the personal representative would distribute the proceeds of the buyout according to the directions in a will.
>
> Another provision of the Operating Agreement acknowledges that transfer of a member's interest would not be controlled by the Operating Agreement. Section 8.4 recognizes that a "successor in interest to the Member" could be "an estate, bankruptcy trustee, or otherwise," opening the door to any number of potential transfers.
>
> The decedent's bequest to appellees of his interest in the Company vested upon his death. *See* § 732.514, Fla. Stat. (2018). Once vested, the Operating Agreement controlled the nature of appellees' interest and the terms of a buyout.
>
> ***
>
> Here, the decedent was in possession of a membership interest in the Company when he died. Nothing in the Operating Agreement operated to trump the will and effect a transfer of the membership interest outside of the will. The membership interest devised to appellees was a specific legacy that became part of the probate estate. *See Babcock v. Est. of Babcock*, 995 So. 2d 1044, 1046 (Fla. 4th DCA 2008) ("A specific legacy is a gift by will of property which is particularly designated and which is to be satisfied only by the receipt of the particular property described." (quoting *In re Est. of Udell*, 482 So. 2d 458, 460 (Fla. 4th DCA 1986))). Because the Company elected to exercise its right to purchase the decedent's membership interest from the estate, appellees are entitled to receive the proceeds of the sale under the will.

29. **Even A Small Interest In A Trust Confers Jurisdiction On A Beneficiary**. In Trust Under Will of August T. Ashton, 260 A.3d 81 (Pa. 2021), Elizabeth Reed, a beneficiary, received a $2,400 annuity from a trust established in 1951, as did two others with the total annual distributions being $1,400. In 2017, the trust assets were worth $72.3 million. In 2018, PNC Bank, the trustee, asked for two changes to the trust:

> Among other matters, the Petition set forth two requests for adjudication. In the first request, PNC sought approval to divide the **Trust** into two: the first to be funded with $5 million and dedicated to the named beneficiaries' annuity payments, and the second to be funded with the balance of the **Trust's** present assets and dedicated to providing scholarships for students at the University as a purely charitable **trust**. *See generally* 20 Pa.C.S. § 7740.7(b) (relating to the division of **trusts** with court approval). The theory was that the latter **trust** could take advantage of tax benefits available to purely charitable **trusts**. *See* Petition for Adjudication, Rider to Item 14, at 1.
>
> In its second request, the Petition sought authorization for certain changes to PNC's fees as the sole remaining trustee. PNC asked for a one-time retroactive

> commission of approximately $730,000, representing one percent of the market value of the **Trust** as of the previous month. *See id*. at 2. As well, PNC sought to increase its compensation going forward.[1] In particular, it asked for approval to begin charging fees in accordance with its institutional fee schedule, albeit discounted by 20%. *See id*. at 2-3. This would give PNC the ability to charge fees as a percentage of the "account" value rather than a percentage of the income.

Ms. Reed objected. The trustee argued that she could not possibly be harmed. The court disagreed:

> Still, PNC posits that recognizing standing in favor of persons in Appellant's position may be socially undesirable. Most notably, PNC expresses that individuals with only a small benefit may begin lodging challenges solely to extract a settlement. *See* Brief for PNC at 25 (raising the specter of "troll-like litigation" by "improper plaintiffs" with a motive to "strong-arm settlements and otherwise gain leverage over the actual stakeholders"). The Attorney General adds that if Appellant is allowed to litigate her objections, the litigation expenses **will**, in effect, be paid using monies that would otherwise have gone to scholarships at the University, thereby harming the public interest. *See* Brief for Attorney General at 30.
>
> While these may be valid concerns, limiting standing in the manner advanced by Appellees could also lead to unintended consequences. For example, in a **trust** similar to the one presently at issue – albeit absent the charitable remainder supervised by the Attorney General – the trustee could divert substantial monies to its own benefit through deliberate self-dealing. This conduct could then be insulated from challenge by any of the named beneficiaries due to a threshold requirement that, in order to litigate, the beneficiary must establish personal monetary harm in addition to harm to the **trust**. Notably, these are the types of competing social policy considerations the Legislature is better positioned than this Court to evaluate and balance. *See Williams v. City of Phila.*, 647 Pa. 126, 151 & n.21, 188 A.3d 421, 436 & n.21 (2018) (highlighting the "superior resources available to the General Assembly in assessing matters of social policy"). If that body ultimately concludes that these factors should be resolved in a manner that denies equitable relief absent a certain predicate showing of injury, it has the power to enact legislative changes which embody such a determination.
>
> [12]We conclude, then, that a violation by the trustee of a trustee's duty constitutes a breach of **trust** which affects the beneficiaries' equitable interest in the **trust** res and makes relief available that is equitable in nature, even where the beneficiary cannot demonstrate that she suffered, or **will** suffer, a monetary loss. *See* 20 Pa.C.S. § 7781.[13] Equitable remedies are designed to compel the trustee to redress the breach or otherwise to perform its duties as trustee. *See id*. § 7781(b); *see also* RESTATEMENT (SECOND) OF **TRUSTS** § 199; *cf*. RESTATEMENT (THIRD) OF **TRUSTS** § 100 (relating to a trustee's liability for a breach of **trust**). Further, while Appellees are correct that the Attorney General has standing to object under its *parens patriae* authority, conferring standing to one entity does not automatically dispossess another person of her right to object to aspects of the **Trust's** administration. Thus, by raising objections to the Fourth Account, Appellant did not usurp the role of the Attorney General but asserted her own rights as a beneficiary.
>
> We therefore hold that Appellant, as beneficiary under the **Trust**, had an interest which was harmed if the transactions of PNC as documented in the Fourth Account were improper as is alleged, and that her interest was substantial, direct,

> and immediate. It was substantial because any duties Appellant claims were breached were not owed to the general public, but to the beneficiaries. Furthermore, any harm to Appellant's interest in the **trust** res was caused by the allegedly improper transactions, and that harm ensued immediately upon the alleged breach of **trust** – it was not remote or speculative. In terms of the UTA, we therefore hold that Appellant is a beneficiary "affected" by PNC's alleged conduct. *See* 20 Pa.C.S. § 7782(a) (making trustees liable to "the beneficiaries affected" by a breach of **trust**). *See generally id*. § 7781, Uniform Law Comment ("Beneficiaries and cotrustees have standing to bring a petition to remedy a breach of **trust**.").

Specifically, with regard to the trustee's proposed compensation charge, the court held:

> In her objections, Appellant sought to challenge the income disbursed to PNC in the amount of approximately $2.3 million as reflected in the Fourth Account, as well as the retroactive commission requested by PNC in the amount of about $730,000, and the proposed change in fees going forward to conform with PNC's institutional fee schedule – which, as noted, sets compensation as a percentage of the **trust** account rather than **trust** income, and charges miscellaneous additional fees. *See supra* note 2.
>
> Insofar as the $2.3 million in past fees is concerned, Appellant currently explains that her objection to this item relates to the 1969 letter sent by the University to PNC's predecessor, approving an increase from five to seven percent of gross income collected. *See supra* note 1; Brief for Appellant at 37. For the reasons explained, because the increased compensation necessarily affected the **Trust** principal, Appellant had standing to challenge it retroactively.
>
> We also note that, under the UTA, where, as here, a settlor issues a written fee agreement, and the trustee later seeks to enlarge those fees, it can only do so with the court's approval, *see* 20 Pa.C.S. § 7768(b), or by settlement agreement entered into by all beneficiaries, regardless of the size of their benefit. *See id*. § 7710.1(b), (d)(4). Although the UTA was not in force when, in January 1969, PNC's predecessor enhanced its commission from five to seven percent of the **Trust's** gross income, we see no reason why a beneficiary who did not agree to the increase should be barred, on grounds of standing, from questioning it in a later judicial proceeding. *See* RESTATEMENT (SECOND) OF **TRUSTS** § 242, comment *i* (indicating that if there are multiple beneficiaries, one beneficiary's authorization to an increase in the trustee's compensation is not binding on the other beneficiaries); *cf.* 20 Pa.C.S. § 7768, Uniform Law Comment (noting the UTA grants the trustee authorization to fix its own compensation without court approval, but that authorization is "subject to the right of a beneficiary to object to the compensation in a later judicial proceeding").
>
> 14The same applies with equal force to a present request, in a judicial setting, to a retroactive increase in compensation, as well as to increases which are proposed for the future. Whether or not such fees are ultimately deemed proper by the court, they **will** effectuate a transfer to PNC of monies that would otherwise remain within the **Trust**. Appellant's equitable interest in the entire **Trust** res is therefore sufficient to give her standing to challenge such fees. Additionally, as to these types of requests, the UTA applies and, as noted, it generally predicates such enhancements upon either judicial approval or private settlement agreed to by all beneficiaries. We thus decline to adopt a test for standing whereby a retroactive or future enlargement in trustee compensation can only be challenged by a

> beneficiary who is able to demonstrate, preliminarily, that her benefit **will** be affected by the increase.

30. **Letter From 1954 Remains A Fee Agreement**. In Trust Under Deed Of Wallace F. Ott, 271 A.3d 409 (Superior Ct. Pa. 2021), the court allowed a one-time principal commission equal to half of a corporate trustee's regular schedule but otherwise enforced a 1954 letter as a fee agreement. The opinion states:

> PNC Bank, N.A. ("Accountant" or "PNC"), appeals from the Order overruling in part and sustaining in part the objections filed by co-trustees/beneficiaries Robert W. Prigge, Jr., and James E. Shryock ("Objectors") to the Third Account of the Wallace Ott *Inter Vivos* Trust ("Trust"). PNC challenges the orphans' court's limiting of PNC's trust administration fee to five percent of income and its granting a one-time principal fee of $145,000 as compensation for services rendered during the third accounting period covering November 8, 2004, to May 15, 2017. PNC also challenges the orphans' court's denial of its request for the Trust to pay its attorney's fees. After careful review, we affirm.
>
> We glean the following relevant facts from the orphans' court's July 20, 2020 Adjudication and the reproduced record. On June 10, 1954, Wallace Ott ("Settlor") executed a Deed of Trust for the benefit of his four grandchildren and their issue, appointing Tradesmens Land Title Bank and Trust Company ("Tradesmens") as trust administrator. Settlor appointed Tradesmens and himself as co-trustees. The Trust instrument does not contain any provisions addressing trustee compensation. However, also on June 10, 1954, Tradesmens' assistant vice president, who had signed the Trust instrument on behalf of Tradesmens, sent a letter addressed to Settlor ("the 1954 Letter") containing the following paragraph regarding its fee for administering the Trust:
>
>> This letter is to advise you that our fee for administering the trust which you established yesterday for the benefit of your grandchildren will be the same as that which we are currently charging in Mrs. Ott's Deed of Trust and in your personal Deed of Trust; namely [5%] of income collected.
>
> Letter from Sidney B. Dexter to Settlor, dated June 10, 1954.
>
> ***
>
> "An agreement is a valid and binding contract if: the parties have manifested an intent to be bound by the agreement's terms; the terms are sufficiently definite; and there was consideration." *In re Estate of Hall*, 731 A.2d 617, 621 (Pa. Super. 1999). In *In re Estate of Breyer*, 475 Pa. 108, 379 A.2d 1305 (1977), the Pennsylvania Supreme Court found that a letter from a corporate trustee stating that it would charge a two percent income commission was a fee agreement because the letter was definite and unambiguous. *Id*. at 1309-10. "In ascertaining the intent of the parties to a contract, it is their outward and objective manifestations of assent, as opposed to their undisclosed and subjective intentions, that matter." *Ingrassia Constr. Co., Inc. v. Walsh*, 337 Pa.Super. 58, 486 A.2d 478, 483 (1984).
>
> The Uniform Trust Act provides that "[i]f a trust instrument or written fee agreement signed by the settlor or anyone who is authorized by the trust instrument to do so specifies a trustee's compensation, the trustee is entitled to the specified compensation." 20 Pa.C.S. § 7768(b).

The trial court here found that, as in *Breyer*, *supra*, the 1954 Letter contained terms that are definite and unequivocal, and Settlor and Trademens manifested an intent to be bound by them. The court stated:

> [The 1954 Letter], like the letter in *Breyer*, unequivocally states the amount, source, and timing of Tradesmens' compensation: "five percent of the income collected." The [1954 L]etter is clear and unambiguous as it relates to trustee compensation from income. Also, valuable consideration exchanged hands as Tradesmens received a five percent of income fee for promising the Settlor it would administer the Trust for the beneficiaries.
>
> * * *
>
> [ ] [T]he court finds the Settlor and Tradesmens manifested a intent to be bound by the terms of [the 1954 Letter]. Tradesmens drafted the letter the same day as the Trust's execution, the letter explicitly mentions Tradesmens' compensation, and the letter drew no protest from the Settlor. Under these facts, a reasonable person would assume the Settlor and Tradesmens discussed the matter of compensation and there was a meeting of the minds on that issue. The letter itself suffices to prove this, but the parties' later conduct lends added support. In the wake of the letter, the Settlor transferred the Trust corpus to Tradesmens, and Tradesmens proceeded to administer the Trust. For years, Tradesmens calculated its fee for services rendered exactly as prescribed by the letter. ... Whatever the parties' hidden aims with respect to the Tradesmens' letter, the record manifests the parties' intent to perform according to its terms.

Adjudication, 7/20/2020, at 15-19.

***

Courts must give effect to a fee agreement's terms. *Estate of Schwenk*, 507 Pa. 409, 490 A.2d 428, 432 (1985). Thus, where a valid agreement between a settlor and trustee fix the terms of the trustee's compensation, "courts must ordinarily enforce the terms of the agreement without making an independent determination of whether the terms are reasonable." *In re Trust of Duncan* 480 Pa. 608, 391 A.2d 1051, 1055 (1978).

However, pursuant to Section 7768(b) of the Uniform Trust Act, a court may consider a request for an additional income fee. Section 7768(b) provides:

(b) If specified; adjustment.--If a trust instrument or written fee agreement signed by the settlor or anyone who is authorized by the trust instrument to do so specifies a trustee's compensation, the trustee is entitled to the specified compensation. The court may allow reasonable compensation that is more or less than that specified if:

(1) the duties of the trustee have become substantially different from those contemplated when the trust was created or when the fee agreement was executed;

(2) the compensation specified in the trust instrument or fee agreement would be unreasonable; or

(3) the trustee performed extraordinary services, and the trust instrument or fee agreement does not specify the trustee's compensation for those services.

20 Pa.C.S. § 7768(b). *See also In re Trust of Duncan*, *supra*, at 1055 (recognizing "an exception to the general rule in circumstances where the trustee has performed extraordinary services beyond those contemplated by the parties or where the compensation fixed by the agreement is so low that the unwillingness of a competent trustee to continue or undertake to administer the trust would defeat or substantially impair its purposes[.]").

7The party seeking the deviation from the fee agreement has the burden of proving that the services it rendered establish that the amount claimed is "reasonable compensation." *In re Smith,* 874 A.2d 131, 138 (Pa. Super. 2005) (*en banc*).

8Here, the orphans' court found that PNC had not provided specific evidence from which it could "properly appraise Accountant's alleged substantially different duties and adjust its specified compensation accordingly." Adjudication at 24. First, in rejecting PNC's contention that five percent was unreasonable, the court concluded:

Here, the [c]ourt does not find a [five percent] income fee agreement to be unreasonably low. For starters, Accountant intends to continue serving as the corporate fiduciary of the Trust.[2] This without more obviates Accountant's claim the specified compensation is too low. *See* [*Duncan*, *supra*, at 1055] (stating adjustment of specified compensation [is] allowed "where the compensation fixed by the agreement is so low that the unwillingness of a competent trustee to continue or undertake to administer the trust would defeat or substantially impair its purposes"); *In re Estate of Smith* [*supra*, at 137] ("When the question is whether the trustee compensation is so low as to thwart the purpose of the trust, ... the proper inquiry is whether a competent trustee would service the trust at the designated rate of compensation."). If the [five percent] agreement were too low, why does Accountant persist in administering the Trust? ... One might expect an unreasonably low fee to produce unwillingness on Accountant's part to continue as the corporate fiduciary, but Accountant displays no unwillingness and has not expressed any intention of resigning its office.

[2] The [c]ourt concludes this based on the fact the petition for adjudication asks the [c]ourt [to] award the Trust principal to Accountant for continued administration.

Adjudication at 20-21.

The Orphans' court also concluded that PNC had "not present[ed] clear and convincing evidence of how its duties are so substantially different as to warrant an adjustment of its specified compensation." ***Id***. at 21. The court recognized that trust administration generally has changed since 1954, as PNC witness Linda Manfredonia testified, but concluded that because PNC did not present any evidence "linking changes in trust administration overall to concrete changes in Accountant's duties vis-à-vis this Trust," it could not find PNC's duties to be "substantially different." ***Id***. at 22. "If anything, Mr. Payne's testimony shows administration of the Trust is a 'matter of math, not discretion,' and his statements about the run-of-the-mill nature of the Trust's administration undermines Accountant's claim of substantially different duties." ***Id***.

***

Pursuant to Section 7768 of the Uniform Trust Act, "[n]either a compensation provision in a trust instrument nor a fee agreement governs compensation payable from trust principal unless it explicitly so provides." 20 Pa.C.S. 7768(a). Thus, where a trust instrument or a separate fee agreement is silent on the issue of principal compensation, a trustee is not barred from requesting such a fee. ***In re Kennedy's Trust***, 364 Pa. 310, 72 A.2d 124, 126 (1950). ***See, e.g., Schwenk***, 490 A.2d at 432 (holding that a trustee was not entitled to a terminal principal commission where the trust instrument *explicitly limited* trustee compensation to income).

"A fiduciary's compensation depends upon the extent and character of the labor and the responsibility involved. Supervision of the amount of compensation is peculiarly within the discretion of the orphans' court. Unless such discretion is clearly abused the judgment will not be disturbed on appeal." ***Breyer***, 379 A.2d at 1311 (citation omitted).

The Uniform Trust Act provides:

> **(d) Court authority.--**In determining reasonable compensation, the court may consider, among other facts, the market value of the trust and may determine compensation as a fixed or graduated percentage of the trust's market value. The court may allow compensation from principal, income or both and determine the frequency with which compensation may be collected. Compensation at levels that arise in a competitive market shall be presumed to be reasonable in the absence of compelling evidence to the contrary.

20 Pa.C.S. § 7768(d).

In considering whether requested interim principal compensation is reasonable, courts consider "the character of the services rendered, the responsibility incurred, and the zeal and fidelity with which the trust of the accountants was carried." ***In re Estate of Taylor***, 281 Pa. 440, 126 A. 809, 810 (1924).

Here, the court concluded that, in light of the increase of over $600,000 of the Trust's fair market value between 2004 and 2017, and the significant increase in the distributions of Trust income made to the beneficiaries during this time period, "Accountant is entitled to an interim principal commission of $145,000 which is reasonable given the Trust's outstanding performance over the third accounting period." ***Id***. at 30. The orphans' court also concluded that the Objectors presented compelling evidence showing that PNC's request for $216,000 was unreasonable, stating:

> Accountant stated in the email it would seek a principal commission of $145,000, later describing the sum as a "gesture of good faith" and a way to "engender goodwill with the family." This gesture was not part of settlement negotiations or the like as the email predates this litigation by seven months.
>
> Accountant's magnanimity pleases the [c]ourt as it rarely sees such acts of *nobless oblige*. If Accountant believed $145,000 was a reasonable principal commission, why then the [c]ourt agrees. To hold otherwise means Accountant can seek cover behind Section 7768's presumption of reasonableness despite the fact it was prepared to accept a principal commission considerably lower than what its fee schedules would require of the Trust. The [c]ourt will not condone this tactic and finds

> Accountant's email compelling evidence of the unreasonableness of its requested principal commission.
>
> Adjudication at 29.
>
> We discern no abuse of the court's discretion in ordering an interim principal commission of $145,000, which is approximately 8.7% of the adjusted principal balance. In addition to the PNC email, the performance of the Trust, and the benefit that inured to the beneficiaries, the court also considered evidence, as noted above, that the administration of the Trust's income was "a matter of math" and that PNC is not required to provide extraordinary services in its administration of the Trust. ***See*** N.T. at 25, 38-39 (Testimony of Mikal Payne as on cross). We decline to reweigh the evidence. In light of the above, we conclude that the orphans' court properly exercised its discretion in granting an interim principal commission of $145,000.

31. **Receiver Appointed And LLC Assets Liquidated – 10th Circuit**. EarthGrains Baking Companies, Inc., v. Sycamore, 2022 WL 433486 (10th Cir. 2022), is the story of courts finally losing patience with the failure of an LLC to pay out distributions subject to a charging order. The background facts are important:

> Leland Sycamore created Grandma Sycamore's Home-Maid Bread ("Grandma Sycamore's"), a popular line of baked goods which he sold to Metz Baking Company ("Metz") in 1998 for around $9.5 million. The sale encompassed all marks, goodwill, and trade secrets associated with Grandma Sycamore's, but Leland retained a limited license to sell the bread in several states—not including Utah. Later, Metz merged into the Sara Lee Corporation ("Sara Lee") and all rights under the agreement transferred to Sara Lee.
>
> Leland put the money from the Grandma Sycamore's deal into his newly formed Sycamore Family LLC. The LLC's founding members were Leland, his wife Jeri, and their four children: Tyler, Nichole, Kristina, and Kami. Leland and Jeri held 48% membership interests while the children initially received 1% interests.[1] The LLC's business operations were limited to holding and managing the family's assets, including a multimillion-dollar mansion in Provo, Utah, known as the Sheffield Property. A decade later, Leland returned to the bread game.
>
> In 2008, Leland bought a bakery, which became the Sycamore Family Bakery, by obtaining a $2,112,500 line of credit from Wells Fargo Bank. The LLC (not Leland) secured the line of credit by pledging the Sheffield Property as collateral. In exchange, Leland gave the LLC a promissory note for $2,112,500 and allegedly signed a document purporting to transfer all but 2% of his membership position in the LLC to his wife Jeri. The latter transfer was ruled invalid in a separate lawsuit for failing to comply with the LLC's operating agreement, so Leland retains his 48% interest. *See Sycamore Family LLC v. EarthGrains Baking Cos. Inc.*, No. 2:13–CV–00639–DN, 2014 WL 7261769, at *5 (D. Utah Dec. 18, 2014).
>
> Leland's new business soon breached the Sara Lee license by selling homemade bread products under the Sycamore name in Utah. Several cease-and-desist letters followed, but Leland and the Sycamore Family Bakery were undeterred. In 2009, Sara Lee sued Leland and the Sycamore Family Bakery in the District of Utah for trademark infringement, unfair competition, cybersquatting, and breach of contract. At that point, EarthGrains acquired the relevant interests from Sara Lee and replaced Sara Lee as the plaintiff. In 2012, a jury awarded EarthGrains $2,333,129 in damages, $2,324,429 of which was attributed to Leland. The district

> court doubled the award against Leland. The district court also tripled the remaining damages attributed to the Sycamore Family Bakery—bringing the total damages award to $4,674,958, plus interest—and awarded EarthGrains $1,091,336.40 in attorney's fees. We affirmed the district court's damages award enhancement. *See EarthGrains Baking Cos. Inc. v. Sycamore Family Bakery, Inc.*, 573 F. App'x 676, 682 (10th Cir. 2014) (unpublished).
>
> Two years passed and EarthGrains's judgment "remain[ed] completely unsatisfied." Aple. App'x Vol. I at 78. That was because all Leland's assets were housed in the family's LLC, beyond his creditors' reach. As the district court explained, "Leland and his family have worked together to make Leland appear to be judgment proof even though he is a multimillionaire" by "rearrang[ing] ... finances to make it appear that Leland has no possessions and no income." Aplt. App'x Vol. IV at 1065. EarthGrains sought a charging order against Leland's 48% interest in the LLC. In 2014, a magistrate judge entered the charging order against the LLC, including the following instruction:
>
> Sycamore Family LLC ... is ordered to pay directly to [EarthGrains] all assets, profits, proceeds, distributions, advances, draws, and any other remuneration due to [Leland] Sycamore as a result of his ownership interest in Sycamore Family LLC, including without limitation any transfers characterized or designated as payment for [Leland's] tax liabilities, salary, wages, reimbursements, or loans, until the [judgment against Leland] is satisfied in full.
>
> Aplt. App'x Vol. I at 56. More than three months after it was served with the order, the LLC objected. The district court denied the objection as untimely.
>
> By late 2018, "the LLC ha[d] not paid a penny" to EarthGrains, despite the charging order, and EarthGrains had not recovered anything on its judgment by other means. Aplt. App'x Vol. IV at 1072–73. EarthGrains had first complained about the LLC's noncompliance and moved for contempt sanctions in late 2014. The LLC opposed. After a hearing in which the LLC participated, the district court denied the motion without prejudice to permit further discovery. *See id.* at 1058 (noting that the district court "did not deny the [2014] motion ... because of a failure to demonstrate contempt" and that "the information presented to the court" at the time "demonstrated a violation of the [c]harging [o]rder").

By 2018 the district court had lost patience:

> EarthGrains renewed its motion for contempt sanctions in July 2018, seeking the appointment of a receiver to account for and transfer to EarthGrains any wrongly withheld distributions, as well as to foreclose on Leland's membership interest in the LLC to the extent necessary to satisfy EarthGrains's judgment. The LLC again filed a brief in opposition and participated in the hearing on the motion. In November 2018, the district court granted EarthGrains's motion. The district court found by "clear and convincing evidence that Leland Sycamore, Jeri Sycamore, and the Sycamore Family LLC [we]re in willful contempt of the court's [c]harging [o]rder." *Id.* at 1066. For instance, the LLC's "operating agreement requires all LLC distributions to be distributed to the owners based on their percentage ownership." *Id.* at 1058. Yet the "LLC ha[d] made substantial distributions"—"run[ning] into the hundreds of thousands" of dollars—"to Jeri Sycamore without making the requisite payments to EarthGrains in proportion to Leland Sycamore's membership interests in the LLC." *Id.* at 1060. The LLC also "g[ave] family

> members de facto distributions" by "allowing [them] to live rent free in LLC homes and condominiums." *Id.* at 1060–61.
>
> But the district court stated that "the exact amount of the contempt [wa]s unknown" because the LLC "fail[ed] to comply with the [c]harging [o]rder's requirements to turn over relevant financial information" and because of its "disregard for corporate structures or recordkeeping." *Id.* at 1066. Accordingly, the district court granted EarthGrains's request for a receiver—denying the LLC's competing request for a less powerful special master—and entered a separate order appointing Wayne Klein as the LLC's receiver and outlining his powers and responsibilities.

The receiver investigated and in July 2019 issued recommendations:

> In total, the receiver allocated $3,859,898.96 to Leland, $963,339.62 to Jeri, $175,319.31 to Kristina, $50,664.72 to Tyler, and $25,798.92 to Nichole. Filtering these numbers through each Sycamore's membership percentage, the receiver extrapolated the total distributions the LLC should be viewed as having made since the charging order's entry. Focusing on the largest of these sums, the receiver presented the district court with two potential amounts of distributions that could be imputed to Leland's 48% membership interest and therefore owed immediately to EarthGrains. If Kristina's distributions—almost entirely consisting of her loan—were the touchstone, the LLC would owe EarthGrains $6,313,073.43 ("Kristina amount"). Alternatively, the receiver noted that if the district court "determine[d] not to treat the loan to Kristina Sycamore as a distribution, the highest assumed distributions" would come from Leland, so the LLC would owe EarthGrains his $3,859,898.96 ("Leland amount"). *Id.* at 1174. Without explaining why, the receiver recommended against "imputing the loan to Kristina Sycamore as a distribution" and instead proposed adopting the Leland amount. Aplt. App'x Vol. V at 1184.
>
> The LLC had approximately $1,100,000 in cash, which the receiver recommended paying to EarthGrains immediately. Of course, that would not be enough to cover even the lower Leland amount. Because of the insufficient amount of cash, the inadequacy of anticipated future cash, the LLC's unwillingness to make required payments, the LLC's decision to own most of its assets in real estate, and the likelihood that foreclosing on Leland's interest in the LLC would be impractical and ineffective, the receiver asked to liquidate some of the LLC's real estate. The receiver asserted that "[t]his result is no different in substance than the existing authority granted to [him] ... to use available cash of the LLC to pay to [EarthGrains] the equivalent of Leland Sycamore's distributions." Aplt. App'x Vol. IV at 1177. The receiver catalogued Jeri's involvement in the LLC's misconduct and proposed treating distributions imputed to Leland as distributions for her benefit, which would reduce distributions owed to Jeri and avoid exhausting the LLC's assets. If the court disagreed and decided to protect Jeri's interest, the receiver sketched out several options for doing so.

The court allowed certain assets of the LLC to be liquidated and transferred to the creditors, although not agreeing entirely with the receiver’s calculations.

32. Where Inheritance Taxes Are To Be Paid From An Insufficient Residue, The Excess Is Apportioned To The Recipients of Assets – Nebraska. In Svoboda v. Larson, 311 Neb. 352 (Neb. 2022), the Supreme Court of Nebraska was confronted, apparently for the first time, with a not uncommon fact pattern – the insufficient residue. The court set forth the situation:

> The first issue for determination is whether inheritance taxes may be charged to the estate, where the will directs that inheritance taxes be charged to the residue, but the residue lacks sufficient assets. This is a novel issue under Nebraska law.
>
> Chapter 77, article 20, of the Nebraska Revised Statutes imposes inheritance taxes on a beneficiary's distribution based on the beneficiary's relationship to the decedent.7 The inheritance tax is a tax on the beneficiary, not the decedent.8 The burden of inheritance taxes will be imposed upon the individual beneficiaries of the decedent in accordance with the statutory pattern unless there is a clear and unambiguous direction to the contrary in the will or other governing instrument.9 Generally, the fiduciary charged with distributing a decedent's property deducts the inheritance taxes from any property distributed or collects the tax from the legatee or the person entitled to such property.
>
> A testator who wants to shift the burden of the inheritance tax may employ any word or combination of words that the testator desires, and a few simple words might be enough to show his or her intent. But the direction in the will must be clear and unambiguous in order to supplant the statutory pattern. Any ambiguities are resolved in favor of the statutory pattern.
>
> Recall the relevant language found in Blain's will: "My Personal Representative shall pay *from the residue of my estate* all my debts, funeral expenses, administration expenses and all estate, inheritance, succession and transfer taxes ... which shall become payable by reason of my death." (Emphasis supplied.)
>
> Here, the parties do not dispute that Blain's will displaced the default statutory rule which places the inheritance tax burden on the individual receiving the bequest. Because the issue of Blain's intent as shown by his will is not contested, the next task is to determine the consequences of the fact that the residue lacked sufficient assets to carry out Blain's intent.

The court held:

> Where a will directs that taxes be paid out of the residuary estate but there is no residuary estate—that is, nothing is left over and above preresiduary legacies and devises after paying debts and funeral and administration expenses—the ordinary result is that the direction must fail; and the burden of the taxes falls where the law places such burden in the absence of a tax clause, unless the testator has made provision for such a contingency. Thus, each legacy or devise bears its own inheritance tax, and the administrative expenses and estate taxes are apportioned under the apportionment statutes.

33. Attorney Has No Duty To Non-Client Prospective Beneficiaries. In Alberts v. Turnbull Conway, P.C., 641 S.W.3d 370 (Mo. App. 2022), Howard Walz died before certain trust amendments were drafted and signed. Those who allegedly would have benefitted sued. The opinion states:

> In June 2018, Walz engaged Stephen Conway, a Missouri lawyer and employee of Turnbull Conway, P.C., to provide estate planning services to accomplish and effect changes to Walz's estate plan and existing estate planning documents. Specifically, Walz instructed Defendants to draft amendments to Walz's existing trust agreement to provide for specific distributions to Plaintiffs, and Defendants agreed to do so.
>
> After Walz hired Defendants, but before Defendants accomplished the amendments to Walz's trust agreement as instructed, Walz's health deteriorated, and he was hospitalized on more than one occasion. Defendants were advised of Walz's hospitalizations and of the importance of promptly attending to Walz's estate planning instructions, including the drafting of the amendments of his trust to include specific distributions to Plaintiffs.
>
> Walz died on September 11, 2018. His trust agreement was not amended before his death.
>
> On January 23, 2020, Plaintiffs filed their petition against Defendants for legal malpractice. They alleged Defendants were negligent in one or more of the following respects:
>
> a. failing to act with reasonable diligence and promptness in performing the services they agreed to perform on behalf of Walz;
>
> b. failing to timely draft amendments to the Walz trust agreement;
>
> c. failing to timely secure execution of amendments to the Walz trust;
>
> d. failing to effectuate the amendments to the Walz trust providing and resulting in specific distributions to Plaintiffs;
>
> e. failing to timely refer Walz to other counsel to draft amendments to the Walz trust and/or effectuate the amendments to the Walz trust.
>
> Plaintiffs alleged that, as a direct and proximate result of Defendants' negligence, Walz's trust was not amended and Plaintiffs did not receive the specific distributions from the trust estate as intended by Walz and were damaged as a result. Plaintiffs further asserted that they were the intended beneficiaries of the amendments to Walz's trust agreement that Defendants were hired and instructed to effectuate and that if Defendants failed to effectuate the trust amendments, it was foreseeable and certain that they would be damaged. They also asserted that they had standing to bring the claims under *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624 (Mo. banc 1995).

Under Missouri law, beneficiaries may sue under certain circumstances:

> In *Donahue*, the Missouri Supreme Court created an exception to the traditional rule requiring privity in the form of the existence of an attorney-client relationship, and allowed non-client, intended beneficiaries of executed (but

failed) testamentary transfers to sue the donor's attorney for legal malpractice. 900 S.W.2d at 628-29; *Meyer*, 614 S.W.3d at 625; *Johnson v. Sandler, Balkin, Hellman, & Weinstein, P.C.*, 958 S.W.2d 42, 48 (Mo. App. W.D. 1997). In *Donahue*, Gerald Stockton sent his attorney checks drawn on his living trust payable to Mary Donahue and Sundy McClung, who were not beneficiaries under the trust, and directed the attorney to ensure that Donahue and McClung received the proceeds of the checks when Stockton died. 900 S.W.2d at 625. In addition, Stockton directed his attorney to prepare a deed, which Stockton executed, transferring a fifty-percent interest in his home to Donahue, effective on Stockton's death. *Id.* Stockton subsequently gave his attorney another check drawn on the trust payable to Donahue upon his death. *Id.* After Stockton's death, the testamentary transfers were challenged in a declaratory judgment action and found invalid. *Id.* Donahue and McClung sued the attorney and his law firm for legal malpractice. *Id.* at 626.

***

The *Donahue* court applied the six factors and found, as a matter of law, that they weighed in favor of imposing a legal duty on attorneys to the non-client beneficiaries of Stockton's executed (but failed) testamentary transfers. *Id.*; *Johnson*, 958 S.W.2d at 49. It explained:

> Applying these six factors here, the pleadings state that Stockton's primary purpose in writing the checks and preparing and signing the deed was to benefit the plaintiffs and, aside from Stockton's desire that his property be distributed according to his directions after his death, no benefit to him is apparent. It is clear that plaintiffs cannot be characterized as incidental or indirect beneficiaries. Negligent advice or preparation of testamentary documents was almost certain to cause plaintiffs injury. The conduct of [the attorney] and the law firm was directly connected to the injury. Future harm may only be prevented by allowing intended beneficiaries of failed testamentary transfers some avenue of recovery in malpractice claims, particularly where the estate has interests inconsistent with those of the intended beneficiaries. The legal profession will not be unduly burdened by being required to act competently toward identifiable persons that a client specifically intends to benefit when such persons have no other viable remedy and where such persons are not in an adversarial relationship to the client. The Court concludes that the facts as pleaded here are sufficient to assert a breach of a legal duty and to state a cause of action in a lawyer malpractice action.

Donahue, 900 S.W.2d at 629.

***

This court decided *Johnson v. Sandler, Balkin, Hellman, & Weinstein, P.C.*, 958 S.W.2d 42, 48 (Mo. App. W.D. 1997), two years later. In *Johnson*, Harry Adreme's attorney drafted, and Adreme executed, trust amendments that left half of his trust to his daughters, Gail Johnson and Sandra Butler, and his granddaughter, Lori Baca, and the other half held in a qualified terminable interest property ("QTIP") trust with the income payable to his (second) wife during her life, and the remainder passing to Johnson, Butler, and Baca. *Id.* at 45. After Adreme's death, his wife elected to take her spousal share against the trust, thus depriving Johnson, Butler, and Baca of the QTIP trust remainder and defeating Adreme's expressed intent to benefit them as residual beneficiaries. *Id.* at 45-46.

> Johnson, Butler, and Baca sued the attorney and his law firm for legal malpractice. *Id.* at 46.
>
> Following *Donahue*, in *Johnson*, this court reversed the trial court's summary judgment in favor of the attorney and law firm, finding that the evidence created a genuine issue of material fact as to whether Adreme intended the services performed by the attorney and law firm to benefit plaintiffs Johnson, Butler, and Baca so that the attorneys owed a duty to the non-client plaintiffs. *Id.* at 52. In analyzing whether the services the attorney and the law firm performed on Adreme's behalf were intended by him to benefit Johnson, Butler, and Baca, the *Johnson* court found that the non-client plaintiffs were specifically-named beneficiaries of the executed trust amendments, including the QTIP trust, which the attorney and the law firm prepared. *Id.* at 50. It explained that to satisfy *Donahue*'s first requirement (that the attorney had been retained to benefit the non-client beneficiaries) it is not necessary that the client advise the attorney drafting the testamentary document that he or she "intends to benefit" the beneficiaries. *Id.* It reasoned that because "[t]he main purpose of retaining an attorney to prepare a testamentary trust is to ensure the future transfer of the settlor's estate to the [named] beneficiaries designated by the settlor[,] ... an intent to benefit is inherent in designating persons as beneficiaries of a trust or will." *Id.* In short, *Johnson* determined that there need not be direct statements from the client in order to infer his intent to retain an attorney to benefit named beneficiaries, as that intent could be inferred from their inclusion as beneficiaries in the executed documents. *Id.* In *Johnson*, the intent to benefit the non-clients hinged upon Johnson's execution of the testamentary instrument that included them as beneficiaries. *Id.*

Prospective beneficiaries were, the court found, a bridge too far:

> Plaintiffs ask this court to extend the exception to the general rule requiring privity, to impose on attorneys a duty to prospective beneficiaries of undrafted, unexecuted testamentary documents. Plaintiffs, however, do not direct us to any cases imposing such a duty in this state or any other jurisdiction, and we have independently found none. Because the lack of an executed testamentary document introduces rampant speculation into the analysis, we decline Plaintiffs' request to extend the exception and find persuasive the reasoning of courts in several jurisdictions that have similarly declined to impose a duty of care to prospective beneficiaries where the alleged negligence concerns the failure to promptly draft and secure execution of testamentary documents. *See Strong v. Fitzpatrick*, 204 Vt. 452, 169 A.3d 783 (2017); *Rydde v. Morris*, 381 S.C. 643, 675 S.E.2d 431 (2009); *Sisson v. Jankowski*, 148 N.H. 503, 809 A.2d 1265 (2002); *Miller v. Mooney*, 431 Mass. 57, 725 N.E.2d 545 (2000); *Krawczyk v. Stingle*, 208 Conn. 239, 543 A.2d 733 (1988); *Parks v. Fink*, 173 Wash.App. 366, 293 P.3d 1275 (2013); *Babcock v. Malone*, 760 So.2d 1056 (Fla. Dist. Ct. App. 2000); *Radovich v. Locke-Paddon*, 35 Cal.App.4th 946, 41 Cal.Rptr.2d 573 (1995). Those courts have reasoned that "imposing on attorneys a duty to prospective beneficiaries of undrafted, unexecuted wills would undermine the duty of loyalty that an attorney owes to his or her client and invite claims premised on speculation regarding the testator's intent." *Strong*, 169 A.3d at 789.
>
> Imposing a duty to prospective beneficiaries of undrafted, unexecuted testamentary instruments would not comport with an attorney's duty of undivided loyalty to the client and would create a potential conflict of interest to the testator and the prospective beneficiaries. In *Krawczyk*, the Connecticut Supreme Court explained,

> A central dimension of the attorney-client relationship is the attorney's duty of entire devotion to the interest of the client. This obligation would be undermined were an attorney to be held liable to third parties if, due to the attorney's delay, the testator did not have an opportunity to execute estate planning documents prior to death. Imposition of liability would create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily. Fear of liability to potential third party beneficiaries would contravene the attorney's primary responsibility to ensure that the proposed estate plan effectuates the client's ***377** wishes and that the client understands the available options and the legal and practical implications of whatever course of action is ultimately chosen. These potential conflicts of interest are especially significant in the context of the final disposition of a client's estate, where the testator's testamentary capacity and the absence of undue influence are often central issues.

Krawczyk, 543 A.2d at 736 (internal quotes and citations omitted).

Additionally, imposing a duty to *prospective* beneficiaries of undrafted, unexecuted testamentary instruments would invite claims premised on improper speculation regarding the testator's intent. *Strong*, 169 A.3d at 789. As the Vermont Supreme Court explained in *Strong*, "This risk is particularly high in the estate-planning context because the primary witness who could speak to testamentary intent is deceased when a claim is made." *Id.* In the absence of an executed testamentary document manifesting the testator's intent, "the risk of misinterpreting the testator's intent increases dramatically" and "the tendency to manufacture false evidence that cannot be rebutted due to the unavailability of the testator" is heightened. *Babcock*, 760 So.2d at 1057 (internal quotes and citation omitted). "Moreover, even if a testator had made note of his or her intent through declarations to relatives, friends, neighbors and the like ... that intent may change over time during the estate-planning process." *Strong*, 169 A.3d at 789. "[C]ommon experience teaches that potential testators may change their minds more than once after the first meeting [with their attorney]." *Radovich*, 41 Cal.Rptr.2d at 582. The Massachusetts Supreme Judicial Court recognized:

> A client who engages an attorney to prepare a will may seem set on a particular plan for the distribution of her estate.... It is not uncommon, however, for a client to have a change of heart after reviewing a draft will. Confronting a last will and testament can produce complex psychological demands on a client that may require considerable periods of reflection. An attorney frequently prepares multiple drafts of a will before the client is reconciled to the result. The most simple distributive provisions may be the most difficult for the client to accept. Considerable patience and compassion can be required of attorneys drafting wills, especially where the client seeks guidance through very private and sensitive matters. If a duty arose as to every prospective beneficiary mentioned by the client, the attorney-client relationship would become unduly burdened. Attorneys could find themselves in a quandary whenever the client had a change of mind, and the results would hasten to absurdity.

Miller, 725 N.E.2d at 550-51.

34. Remote Signing Procedures During The Pandemic Not Followed – New York. In Will of Holmgren, 74 Misc. 3d 917 (Sur. Ct. 2022), the court addressed remote signings for the first time. The court noted this background:

> While written opinions are generally not warranted in uncontested matters, the within instrument presents the court with its first opportunity to formally address what may likely be a recurrent scenario regarding the adequacy of affidavits submitted with instruments executed under the auspices of Executive Order (A. Cuomo) No. 202.14 (9 NYCRR 8.202.14 [the Order]), which, for the brief period of April 7, 2020, to June 25, 2021, permitted the remote execution of wills.
>
> The Order, occasioned by the extraordinary circumstances surrounding the then-emerging COVID-19 pandemic, did not, as many wrongfully assume, replace the formal execution requirements of EPTL 3-2.1. Rather, it solely authorized the use of audiovisual technology to satisfy the "presence" requirements contained in the statute.
>
> The long established formalities governing the proper execution of a will are set forth in EPTL 3-2.1. Briefly, this statute requires the testator to sign the will in the presence of at least two attesting witnesses (or acknowledge testator's signature to each attesting witness); the testator to declare to the attesting witnesses that the instrument signed is testator's last will and testament (the so-called "publication" requirement); that the witnesses, within 30 days, both attest the testator's signature was affixed or acknowledged "in their presence"; and that the witnesses, at the request of the testator, sign their names and affix their addresses at the end of the will (*see* EPTL 3-2.1 [a] [2]-[4]).
>
> In the pre-pandemic world the above requirements, which contemplated physical presence and in-person interaction, were not considered onerous, much less potentially hazardous to one's health. Indeed will execution ceremonies of the not so distant past were routinely carried out in law office conference rooms, cramped offices, small kitchens, and even hospital wards without the slightest thought given to the proximity of the participants or the potential exposure to viral disease. Any mention of the adequacy of the air filtration system, of the availability of masks or hand sanitizer, or of a concern regarding a participant's sneeze or cough potentially exposing others present to microbes would have—at a minimum—raised eyebrows. No longer.
>
> With the public's aversion to personal interaction increasing in tandem with its demand for estate planning, the remote witnessing provision provided a welcomed respite to in-person execution ceremonies, permitting New York residents to engage in increasingly relevant end-of-life planning in a manner consistent with social distancing guidelines. Good intentions aside, however, virtual witnessing is not without its own inconveniences.
>
> According to the Order, the "presence" requirements incident to the act of witnessing can only be "virtually" satisfied provided the following conditions are met: (1) the testator has to be either personally known to the attesting witnesses *or* must present valid photo identification to the witnesses during the video conference; (2) the video conference must allow for direct interaction between the testator, witnesses, and, if applicable, the supervising attorney (no prerecorded videos); and (3) the witnesses must receive a legible copy of the signature page(s) the same day the papers are signed.

> In addition to the foregoing conditions, the Order includes provisions whereby the attesting witnesses *may* sign the transmitted copy of the signature page(s) and transmit them back to the testator and further provides that the witnesses *may* repeat the witnessing of the original signature page(s) as of the date of execution provided they are presented with the original signature pages *and* the electronically witnessed copies within 30 days of the remote execution ceremony.
>
> While not required at the time of execution by statute or by the Order, best practice considerations plainly include the execution and annexation to the instrument of a contemporaneous "self-proving affidavit" whereby the attesting witnesses swear to "such facts as would if uncontradicted establish the genuineness of the will, the validity of its execution and that the testator at the time of execution was in all respects competent to make a will and not under any restraint" (SCPA 1406 [1]).

The court found the procedures were not followed.

> Although the instrument before the court appears to contain such a contemporaneous affidavit from the attesting witnesses, the court finds that the affidavit fails to establish all of the facts necessary to prove the validity of the will's execution pursuant to the Order under which it was authorized.
>
> Initially, the affidavit is deficient in that it states that the attesting witnesses were "acquainted" with the testator. In the past, such language has proved adequate for traditional in-person executions (which oftentimes utilize institutional witnesses who have just met the testator, such as law firm employees). Yet the Order specifically requires either that the testator be personally known to the witnesses, or that the testator display valid photo identification to the witnesses during the ceremony.
>
> Since the term "personally known" obviates the need for the testator to produce any proof of identification to the witnesses whatsoever, it implies a quantum of familiarity between the attesting witnesses and the testator that goes beyond that of "acquaintance." A mere introduction to a law firm paralegal or so-called "friend of a friend" does not satisfy a standard that allows for ****3** the dispensation of confirmatory photo identification. Therefore as the affidavit annexed to the instrument only recites that the witnesses were "acquainted" with the testator and is otherwise silent regarding whether the testator produced valid photo identification during the execution ceremony, it is insufficient to demonstrate compliance with the Order.
>
> In addition, the affidavit is deficient in that it does not state that the audiovisual technology referenced was in working order and allowed for direct interaction between the testator and the witnesses in real time.

35. **A Trust Is Not A Contract For Arbitration Purposes**. The Virginia Supreme Court stated the issue in Boyle v. Anderson, 871 S.E. 2d 226 (Va. 2022), as follows:

> This appeal calls upon us to decide the narrow question of whether the Virginia Uniform Arbitration Act, Code §§ 8.01-581.01 to -.016) ("VUAA") or the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA") compels enforcement of an arbitration clause in a trust. Both statutes require arbitration for contracts. The VUAA also compels arbitration for written agreements to submit a dispute to arbitration. We conclude that a trust is not a contract and, therefore, the VUAA and the FAA do not require arbitration on that basis. We further conclude that a

> beneficiary of a trust is not a party to an agreement to arbitrate and, therefore, the provision of the VUAA compelling arbitration when there exists a written agreement to arbitrate likewise does not apply. Accordingly, we will affirm the judgment of the circuit court.

The trust contained an arbitration provision that the trustee sought to enforce against a beneficiary:

> Before he passed away, Strother R. Anderson created an *inter vivos* irrevocable trust that was to be divided into three shares: one for his daughter Sarah Boyle, one for his son John, and one for the children of his third child Jerry. Upon Strother Anderson's death, Boyle became the trustee as well as a beneficiary of the trust. The trust contains an unambiguous arbitration clause. It provides that "[a]ny dispute that is not amicably resolved, by mediation or otherwise, shall be resolved by arbitration ...."
>
> Linda D. Anderson ("Linda"), the widow of John Anderson, and the ancillary administrator of his estate, filed a complaint against Boyle, alleging that Boyle breached her duties as trustee. The complaint seeks, among other things, Boyle's removal or, in the alternative, an order that she comply with the terms of the trust. In response, Boyle filed a motion to compel arbitration. Linda opposed arbitration, contending that the trust was not a contract and that she had not agreed to resolve the dispute by arbitration. The circuit court denied the motion to compel arbitration. Boyle filed an interlocutory appeal under Code § 8.01-581.016, which authorizes an appeal from an order "denying an application to compel arbitration made under § 8.01-581.02."

The court determined that a trust lacks the key indices of a contract:

> A. A trust is not a "contract."
>
> "[A] contract is defined as '[a]n agreement between two or more persons which creates an obligation to do or not to do a particular thing.' " *Buchanan v. Doe*, 246 Va. 67, 72, 431 S.E.2d 289 (1993) (quoting Black's Law Dictionary 322 (6th ed. 1990)).
>
> One treatise posits that "[t]he trust originated in medieval England, apparently from a desire to make gifts to medieval church orders in England which were prohibited by their vows from owning property." William M. McGovern, Sheldon F. Kurtz & David M. English, Principles of Wills, Trusts, & Estates 409 (2d ed. 2011). To circumvent this obstacle, "[a] legal gift was ... made to certain responsible persons, who were mandated to hold the property to the use of the friars." *Id.* Over the centuries, it evolved into a flexible tool to make dispositions of property. *See Collins v. Lyon, Inc.*, 181 Va. 230, 247, 24 S.E.2d 572 (1943) ("A trust can be created for any purpose which is not illegal [and] which is not against public policy .... The purposes for which trusts can be created are as unlimited as the imagination of lawyers.") (citation omitted).
>
> We conclude that a trust does not qualify as a contract or agreement. Trusts are generally conceived as donative instruments. The Second Restatement of Trusts, carrying forward the language of the first Restatement of 1935, states that "[t]he creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract." Restatement (Second) of Trusts § 197 cmt. B (1959). The Second Restatement defines a trust as "a fiduciary relationship with respect to property." *Id.* § 2.

> Beyond this longstanding conception of trusts, contracts and trusts differ in how they are formed. “The existence of the contract depends on actual acceptance of an offer. It is founded on mutual assent. A trust is in the nature of a conveyance of an equitable interest, and its formation is not dependent on the beneficiary's knowledge or acquiescence.” Amy Morris Hess, et al., Bogert's Law of Trusts and Trustees § 17 (2021). Additionally, trusts differ from contracts in that “[n]o consideration is required for the creation of a trust.... In fact, most trusts are created by gratuitous transfer.” Restatement (Third) of Trusts, Introductory Note 1 (2003). Beneficiaries of a trust generally do not provide any consideration to the settlor of the trust.
>
> Additionally, the duties owed by contracting parties also differ from the fiduciary duties a trustee owes to the beneficiaries of the trust. *See Rowland v. Kable*, 174 Va. 343, 367, 6 S.E.2d 633 (1940) (noting the fiduciary nature of a trustee's duties); *see also* Restatement (Third) of Trusts § 2 (2003) (“A trust ... is a fiduciary relationship with respect to property.”). As Judge Cardozo famously wrote,
>
>> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.
>
> *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 546 (1928) (citation omitted); *see also* Bogert's Law of Trusts and Trustees § 17 (in contrast to the fiduciary duties owed by a trustee, “[n]o rule prevents parties to a contract from acting freely for their own interests during the execution of the contract. They have no duty of loyal representation of the opposing party in the relationship”). A beneficiary's action against a trustee is properly brought as a claim for breach of fiduciary duty rather than as a breach of contract.
>
> Third, ownership of property in a trust differs from ownership of property in a contract. “One of the major distinguishing characteristics of a trust is divided ownership of property, the trustee usually having legal title and the beneficiary having equitable title.” *Id.* This stands in contrast to the law of contracts, where “this element of division of property interest is entirely lacking.” *Id.* Additionally, “[t]he rights and duties of parties to a contract generally may be freely transferred. A trustee, on the other hand, cannot assign the trusteeship or delegate the performance of fiduciary duties except as permitted by statute.” *Id.*

The VUAA applied “to both a “written agreement to submit any existing controversy to arbitration” and to “a provision in a written contract to submit” a controversy to arbitration. *Id.*”. So it doesn’t apply to the trust. The FAA doesn’t either:

> Boyle also relies on the FAA. The Act's core provision, section 2, provides as follows:

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, ... or an agreement in writing to submit to arbitration an existing controversy ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> 9 U.S.C. § 2. Section 2 makes arbitration clauses enforceable as a matter of federal law if three conditions are met. First, there must be a "contract." Second, within this "contract" must be an arbitration clause ("[a] written provision ... to settle by arbitration a controversy") that does not violate contract law ("grounds ... for the revocation of any contract"). Third, the arbitration clause must be part of "a transaction involving commerce."
>
> The United States Supreme Court has not addressed the question before us, i.e., whether an arbitration clause in a trust is enforceable under the FAA. We perceive nothing in that Court's precedent–and we acknowledge that the Court has given the FAA a very broad reading–that compels us to depart from the statute's plain language to reach a conclusion that the FAA applies to an arbitration clause in a trust. The FAA by its plain terms applies to contracts. A trust is not a contract. In the absence of contrary binding precedent, and under a straightforward textual interpretation of this statute, we conclude that the FAA does not apply to the arbitration clause at issue here.

36. Action Against An Attorney-In-Fact May Not Require Production Of The Principal's Will. The Georgia Power of Attorney statute regarding an estate plan was described by the court in Bethune v. Bethune, 870 S.E.2d 827 (Ga. App. 2022), as follows:

> The Georgia Power of Attorney Act required the agent to "[a]ttempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving such plan is consistent with the principal's best interest based on all relevant factors[.]" OCGA § 10-6B-14 (b) (6).

In an action by one brother against the attorney-in-fact brother, the petitioner brother sought many financial records but was denied a copy of the principal's Will:

> The attorney-client privilege belongs to the principal, as the client, see *Spence v. Hamm*, 226 Ga. App. 357, 358 (1), 487 S.E.2d 9 (1997) (physical precedent) (citing *Moclaire v. State*, 215 Ga. App. 360, 363 (5), 451 S.E.2d 68 (1994)), and the petitioner argues that the agent cannot invoke it. We are not persuaded by this argument for two reasons.
>
> First, the record shows that the attorney who drafted the will also invoked the privilege on her behalf. That attorney, who also represents the agent, stated in a letter to the petitioner's attorney that he was "not at liberty to discuss [the will's] contents ... without [the principal's] written authority." The attorney-client privilege may be invoked on the client's behalf by the attorney. See *Moclaire*, 215 Ga. App. at 363 (5), 451 S.E.2d 68 (noting that the attorney-client privilege "was properly invoked by [an] attorney" on behalf of a client to prevent the attorney from being compelled to give testimony that would impeach the client, who was testifying as a state witness in a criminal trial).
>
> Second, an agent with authority to exercise the principal's legal rights may invoke the attorney-client privilege on the principal's behalf. See *Schaffer*, 303 Ga. App.

> at 587 (2), 693 S.E.2d 852 (an executor stands in the place of a deceased testator and may, in that capacity, invoke the attorney-client privilege to prevent testimony from the deceased's attorney regarding the preparation of wills). See also John D. Hadden, Green's Georgia Law of Evidence § 5:18 (2019-2020 ed.) ("fiduciaries acting in the client's interest qualify to claim the privilege"). We recognize that the agent in this case, as the respondent to the petition, personally benefits from invoking the attorney-client privilege. And if he were *only* acting in his personal capacity — in essence, as a stranger to the attorney-client relationship — he could not invoke the privilege. See *Schaffer*, 303 Ga. App. at 587 (2), 693 S.E.2d 852. But the circumstances of this case do not compel a conclusion that the agent is acting only in his personal capacity. The power of attorney expressly gave the agent authority to exercise the principal's legal rights on her behalf. Nothing in the record suggests that the principal authorized the disclosure of her privileged communications regarding the terms of her will or that she, or her agent on her behalf, had disclosed that information to a stranger to the relationship or taken any other action that would deprive her of the right to invoke the attorney-client privilege as to that information. Under these circumstances, we discern no clear abuse of discretion in the trial court's ruling that the attorney-client privilege applies and bars the discovery.
>
> We are not persuaded by the petitioner's argument that the Georgia Power of Attorney Act provides an exception to the attorney-client privilege in these circumstances. The petitioner points to the statutory provision, mentioned above, requiring an agent to "[a]ttempt to preserve the principal's estate plan[.]" OCGA § 10-6B-14 (b) (6). But nothing in the plain language of that provision purports to create an exception to the attorney-client privilege set forth in OCGA § 24-5-501 (a) (2). We decline to read the Georgia Power of Attorney Act to require disclosure of the terms of a principal's will where, as here, those terms are otherwise privileged and persons authorized to invoke that privilege on behalf of the principal have done so. As our Supreme Court has held,
>
> if the purpose of [a] privilege is to be served, the participants in the confidential conversation must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.
>
> *Cooksey v. Landry*, 295 Ga. 430, 436 (3), 761 S.E.2d 61 (2014) (citations and punctuation omitted).
>
> For these reasons, we find that the trial court did not clearly abuse his discretion in concluding that the principal's will was privileged, and therefore granting the agent's motion for an order protecting it from production.

37. **Not Simultaneous Deaths**. In The Matter Of The Estate Of Leslie B. Cates, 2021 WL 7368163 (Ok. App. 2021), involved sad facts, a murder-suicide – described by the court this way:

> Mr. Cates shot and killed Mrs. Cates during the early morning hours of January 25, 2018. Mrs. Cates sustained multiple gunshot wounds, including one to the head. Mr. Cates subsequently committed suicide by shooting himself in the head. Prior to doing so, Mr. Cates telephoned Mr. Pilz, a longtime friend of Mrs. Cates, and informed him that he had shot and killed Mrs. Cates, that he "may do the same" to himself, and that Mr. Pilz should call 911.

> The phone call to Mr. Pilz was made at 6:24 a.m., and the police arrived at Mr. and Mrs. Cates' residence at approximately 6:35 a.m. However, no entry was made into the residence until a special-operations team forcefully entered at 9:29 a.m., at which time Mr. and Mrs. Cates were found dead in their bedroom. No shots were fired after the police arrived, and it is undisputed Mr. Cates shot himself sometime after his phone call to Mr. Pilz and before the time the police arrived.
>
> Austin Bond and Lindsey Bond are Mrs. Cates' children from a previous marriage. This probate proceeding was initiated when Mr. Bond filed a petition seeking appointment as interim and special administrator. Mr. Bond further asserted he and Ms. Bond are the only heirs of Mrs. Cates.

Mrs. Cates had executed a Will naming a Mr. Pilz as beneficiary if she and her husband died simultaneously, which was defined by the Will as "if there is no sufficient evidence to establish that we died other than simultaneously". At trial, the court found the deaths were not simultaneous and Mr. Pilz asked for a new trial which was denied:

> Following the trial, the court set forth in its Decree, as stated above, that by a preponderance of the evidence Mr. and Mrs. Cates did not die simultaneously, and that Mr. Pilz was therefore not a beneficiary of Mrs. Cates' estate.
>
> Mr. Pilz subsequently filed a motion for new trial in which he asserted it was Mrs. Cates' "intent, as expressed in the residuary article of the Will, that her estate go to [Mr. Pilz] if there is no sufficient evidence that she and Mr. Cates died other than simultaneously." He further asserted the definition of simultaneous death in the Will is consistent with the definition of simultaneous death as set forth in the Uniform Simultaneous Death Act, 58 O.S. 2011 §§ 1001-1008, and, thus, cases interpreting the Act are applicable to the present case. Mr. Pilz asserted, in effect, that at least pursuant to some cases applying the Act, the deaths of Mrs. Cates and Mr. Cates could not be found to have occurred other than simultaneously because no one directly witnessed and reported the earlier cessation of Mrs. Cates' "[heartbeat and] breathing, or all functions of her entire brain, including the brain stem[.]" That is, Mr. Pilz asserted:
>
>> In order for Mr. Cates to survive Mrs. Cates, there must be evidence that her heart had ceased beating and she ceased breathing, or all functions of her entire brain, including the brain stem had ceased along with evidence that [at that same moment] Mr. Cates' heart was still beating and he was still breathing or his entire brain, including the brain stem, was still functioning.
>
> Mr. Pilz further asserted that although the medical examiner assigned to the case opined it is more probable than not that Mrs. Cates died before Mr. Cates, according to Mr. Pilz "anything is probable." Mr. Pilz asserted that the medical examiner's "interrogatory answers make it clear that there is no sufficient evidence of when the Cates 'exactly' died, therefore they died simultaneously based on the [time they were found]."
>
> Mr. Pilz' motion for new trial was denied by the trial court in its Order filed in October 2019. The trial court stated in its Order as follows:

> At least the following evidence established to the satisfaction of this court by a preponderance that Mr. and Mrs. Cates 'died other than simultaneously' ...:
>
> 1. Mr. Cates declared he shot and killed his wife in a phone call to [Mr.] Pilz. This fact alone distinguishes this case from any cited by defendant. Mr. Cates reported not just the shooting, but the fact of the death of his wife, at a time when he obviously was very much alive.
>
> 2. While he did not determine the times of death of Mr. and Mrs. Cates, Dr. Miller, the M.D. pathologist who oversaw a complete autopsy of Mrs. Cates and an external exam only of Mr. Cates, testified by interrogatory: "It is more probable than not that [Mrs. Cates] would have died before [Mr. Cates]."
>
> 3. Dr. Sibley, the plaintiff's retained expert and past medical examiner at the Tulsa Office of the Chief Medical Examiner clearly testified and supported his opinion that the probability of Mrs. Cates dying before Mrs. Cates was 90 percent. His opinion was supported by physical facts which were not controverted.

The Court of Appeals agreed:

> Returning to the above-described telephone call, Mr. Pilz testified at trial that during that call Mr. Cates stated to him, "I just shot [Mrs. Cates]. I shot her in the head. She's dead." Mr. Pilz testified that Mr. Cates further stated: "She stole $7,000 of my money and bought [her daughter] a car. When I objected, she laughed at me. I put an end to that. I may do the same. Call 911." Moreover, as Mr. Pilz acknowledges in his appellate brief, a neighbor of Mr. and Mrs. Cates told the police that she heard a loud bang only a few minutes before the officers arrived. No further shots were heard. Thus, according to the undisputed timeline of events, Mr. Cates, who fired the shot into Mrs. Cates' head at some point in time prior to the 6:24 a.m. phone call, shot himself only a few minutes prior to 6:35 a.m. Although some evidence was introduced that it was within the realm of the "possible" that Mrs. Cates could have survived for "more than three to four minutes" after she was shot in the head, no evidence was presented that Mrs. Cates could have survived her injuries until a few minutes before 6:35 a.m., even assuming the shot to her head occurred immediately before the 6:24 a.m. phone call. Moreover, even assuming *arguendo* that such a possibility is supported by some evidence, the trial court's contrary determination that Mr. and Mrs. Cates died otherwise than simultaneously is supported by the preponderance of the evidence presented at trial.
>
> Thus, based on our review of the record, we conclude the trial court's determination that sufficient evidence was presented that Mr. and Mrs. Cates did not die simultaneously — i.e., that they died otherwise than simultaneously by a preponderance of the evidence — is not clearly contrary to the weight of the evidence.

38. **Interpretation of Situs Clause In Trust**. At issue in Silver v. Horneck, 2021 Il. App. (1st) 201044 (Il. App. (1st) 2021), was a suit among siblings:

> Seeking an accounting and to enforce certain provisions of two trusts established by her now-deceased parents, the plaintiff in this case, a resident of Florida, sued

> her brother and co-beneficiary, a resident of Washington, and her cousin, who serves as trustee of the trusts and resides in Colorado. The circuit court concluded that it lacked personal jurisdiction over these nonresident defendants and dismissed the complaint with prejudice pursuant to section 2-301 of the Code of Civil Procedure (Code) (735 ILCS 5/2-301 (West 2018)). Maintaining that the court had both general and specific jurisdiction over the defendants, the plaintiff now asks us to reverse that ruling and remand the case for further proceedings. For the reasons that follow, we affirm.

The trustee did not live or act in Illinois, nonetheless perhaps the trust was sitused in Illinois:

> Elizabeth asserted in her complaint that the circuit court had jurisdiction over this case "because it involve[d] trusts governed by Illinois law with *situs* in Illinois." As support for her assertion that the trust *situs* was Illinois, Elizabeth relied on the following language included at article VIII, paragraph (c) of Robert's Trust and article VII, paragraph (c) of Corrinne's Trust (referred to hereinafter as Paragraph (c)):
>
> "Illinois Law Governs; *Situs* and Administration of Trusts; Substitute Trustees. The validity and effect of each trust created hereunder is governed by Illinois law. The *situs* of any trust created hereunder may, however, be transferred at any time or times to such place or places as the Trustees deem to be for the best interests of such trust."
>
> Defendants disagreed with Elizabeth's reading of this provision. In their motions to dismiss her complaint for a lack of personal jurisdiction under section 2-301 of the Code (735 ILCS 5/2-301(a) (West 2018)), they argued that the above language provided only that Illinois law would apply for purposes of interpreting the trust instruments and that the *situs* of the Trusts could be changed. It did not, in their view, designate a particular place where the Trusts were to be administered. Citing Illinois law holding that a trust's *situs* is the place where the trustee actively performs his or her trust administration duties, defendants asserted that the Trusts' *situs* had been Illinois when it was administered by Corrinne in Illinois but changed when it was then administered by Corrinne in Florida and changed again when it was administered by Mr. Horneck in Colorado.

The court agreed with defendants that the situs changed when the trustee changed:

> Defendants do not dispute that Illinois was the Trusts' original place of administration. But as they correctly note, the administration of a trust is generally understood to occur where the individual charged with that administration—the trustee—is located. See *Campbell v. Albers*, 313 Ill. App. 152, 160, 39 N.E.2d 672 (1942) ("[t]he location of the administration of a trust, or the *situs* of a trust, means the place of the performance of the active duties of the trustee" (internal quotation marks omitted)); see also Restatement (Third) of Trusts § 76, cmt. b(2) (2007) (noting that "the principal place of administration ordinarily will be the place where the trustee is located" (internal quotation marks omitted)). Here, Mr. Horneck was never the one to change the Trusts' place of administration. It was Corrinne who, while serving as the acting trustee, relocated from Illinois to Florida. And she set in motion a second change to the place of administration when she named Mr. Horneck, a Colorado resident, as her successor trustee. Elizabeth has not alleged that Corrinne failed to provide her with proper notice—or indeed that Elizabeth did not have actual notice—of either of these changes.

> The language of the trust instruments also dispels the notion that any formal action was required to accomplish a transfer of the Trusts' *situs.* Immediately after stating that "[t]he *situs* of any trust created hereunder may *** be transferred at any time or times to such place or places as the Trustees deem to be for the best interests of such trust," paragraph (c) notes that "[i]n so doing, the Trustees may resign and appoint a substitute Trustee." That is precisely what Corrinne did when she named Mr. Horneck as her successor. Article IX, section (j) of Robert's Trust and Article V, section (i) of Corrinne's Trust, titled "Powers of Continuing and Successor Trustees," further provide that "[u]pon any change in any trusteeship," a successor trustee "shall have all of the powers, authorities, rights, discretions, immunities, estates, titles, duties and obligations of the original Trustee, *without the necessity of any conveyance or the taking of any action whatsoever.*" (Emphasis added.) As Mr. Horneck's counsel noted at oral argument, the *situs* of these Trusts was not fixed by designation but rather *by operation* of the trust instruments.
>
> In sum, we must reject Elizabeth's argument that a lack of formal action by either Corrinne or Mr. Horneck somehow resulted in the Trusts' principal place of administration remaining in Illinois after the relocation of the original trustee and the later appointment of an out-of-state successor trustee.

The court also rejected a finding of common law situs in Illinois, in what may be the most important aspect of the case:

> Elizabeth's final argument is that the common law factors generally considered by courts support a finding that the Trusts are administered in Illinois. Those factors are "(1) the provisions of the trust instrument, (2) the residence of the trustees, (3) the residence of the beneficiaries, (4) the location of the trust assets, and (5) the location where the business of the trust is to be conducted." *Burgauer v. Burgauer*, 2019 IL App (3d) 170545, ¶ 44, 431 Ill.Dec. 408, 127 N.E.3d 941. Elizabeth's assertion that the first factor weighs in her favor is based on her argument, which we have already rejected, that the trust instruments designate Illinois as the *situs* of the Trusts. Elizabeth also contends that the last two of the factors support a finding of personal jurisdiction. She notes that, at the time her causes of action arose, trust assets included shares in an Illinois corporation and membership units in a Delaware limited liability company with offices in Illinois. And she points to Mr. Horneck's retention of Mr. Saunders and Mr. Crowe, legal and accounting professionals in Illinois.
>
> At best, we view the location of trust assets as a neutral factor in this case. Of the two trusts, only Richard's Trust ever held shares in the companies Elizabeth now focuses on. And while those assets were held during a period of time in which Elizabeth claims Mr. Horneck breached his fiduciary duties to her, they were also fully distributed over eight months before Elizabeth initiated this action.
>
> Nor do we believe that the services rendered by Mr. Saunders and Mr. Crowe, whom it seems were hired primarily because of their history with the family and not based on their particular location, should be considered the equivalent of the trust "doing business" in Illinois. Mr. Saunders advised Mr. Horneck on legal matters relating to both the Trusts and to Corrinne's estate and communicated with Elizabeth and her counsel regarding such matters. Mr. Crowe provided some limited tax advice and prepared Illinois tax returns identifying the Trusts as nonresident trusts. The *business* of investing trust assets, monitoring those assets, making payments required by the trust instruments, and making decisions

> regarding when and how to fulfil the terms of those documents was accomplished by Mr. Horneck in Colorado.

39. **Power of Appointment Exercised To Unfunded Trust Was Valid**. Benjamin v. Corasaniti, 267 A.3d 108 (Conn. 2021), deals with simple facts:

> On appeal, it is undisputed that Peter expressed a clear and unequivocal intent to exercise his nongeneral testamentary powers of appointment in favor of Peter's Yellow Submarine Trust. The parties dispute, however, whether Peter's exercise of these powers was valid and effective given that Peter's Yellow Submarine Trust was not funded during Peter's lifetime. The plaintiffs contend that Peter's Yellow Submarine Trust was not a permissible appointee under both Connecticut and Illinois law because, in the absence of trust property, it was not a legal entity to which property could be appointed in Peter's will. The defendants respond that a trust need not be funded at the time of its creation but may be funded at a later date by the transfer of property to the trust, including by the exercise of a testamentary power of appointment. They contend that Peter's unequivocal exercise of his nongeneral testamentary powers of appointment in accordance with the limits set forth in the 2002 Trust, the 2005 Trust C, and the 2011 Trust funded Peter's Yellow Submarine Trust at the time of Peter's death, thereby creating a valid and enforceable charitable trust. We agree with the defendants.

Peter's powers were over several trusts, each governed by either Illinois or Connecticut law. The court held that the law of both states allowed a trust to come into existence through the exercise of a power of appointment:

> Peter's Yellow Submarine Trust was unfunded prior to Peter's death and, therefore, was not a valid and enforceable charitable trust during Peter's lifetime. Nonetheless, it became a valid and enforceable charitable trust after Peter's death through the exercise of his nongeneral testamentary powers of appointment in his will to fund Peter's Yellow Submarine Trust with the proceeds of the sale of the HIHC stock in his 2002 Trust, 2005 Trust C, and 2011 Trust. Indeed, under the common law, a trust need not exist prior to the exercise of a power of appointment. Instead, "a trust may be created by ... an exercise of a power of appointment by appointing property to a person as trustee for one or more persons who are objects of the power ...."9 Id., § 10 (d), p. 145; see *In re Breault's Estate*, 29 Ill. 2d 165, 178, 193 N.E.2d 824 (1963) (implicitly recognizing that trust may be created by exercise of testamentary power of appointment if will reflects donee's clear intent to exercise power of appointment); see also *Garfield* v. *State Street Trust Co.*, 320 Mass. 646, 657, 70 N.E.2d 705 (1947) (donee validly exercised general testamentary power of appointment to create valid trust); *Shriners Hospital for Crippled Children* v. *Citizens National Bank, Covington, Virginia*, 198 Va. 130, 136–37, 92 S.E.2d 503 (1956) (same). Peter exercised his nongeneral testamentary powers of appointment by directing in his will "that all of the [HIHC] [s]hares be sold in accordance with the [s]hareholder's [a]greement and the net proceeds of such sale shall be distributed to ... Peter's Yellow Submarine Trust, to be added to principal and applied for such organization's charitable purposes," and fulfilled the formal requirements necessary to complete the creation of Peter's Yellow Submarine Trust as a valid and enforceable charitable trust.
>
> Section 401 (3) of the Uniform Trust Code, which recently was adopted in Connecticut and Illinois, codifies this common-law rule. See Unif. Trust Code § 401 (3) (2000), 7D U.L.A. 134 (2018). Under both Connecticut and Illinois law, "[a] trust may be created by ... exercise of a power of appointment ... in favor of

> a trustee ....” General Statutes § 45a-499v (3); accord 760 Ill. Comp. Stat. Ann. 3/401 (3) (West Cum. Supp. 2020). The official commentary accompanying the Uniform Trust Code confirms that an inter vivos trust that was not funded during the donee's lifetime may be completed by the testamentary exercise of a power of appointment. See *Yale University* v. *Blumenthal*, 225 Conn. 32, 38, 621 A.2d 1304 (1993) (“[a] court can properly consider the official comments as well as the published comments of the drafters as a source for determining the meaning of an ambiguous provision [of a uniform act]”) (internal quotation marks omitted); see also *Zaabel* v. *Konetski*, 209 Ill. 2d 127, 134–35, 282 Ill.Dec. 748, 807 N.E.2d 372 (2004) (considering official comment to uniform act to clarify statutory ambiguity). According to the commentary accompanying § 401 of the Uniform Trust Code, “a trust is not created until it receives property,” but trust property “need not be transferred contemporaneously with the signing of the trust instrument. A trust instrument signed during the settlor's lifetime is not rendered invalid simply because the trust was not created until property was transferred to the trustee at a much later date, including by contract after the settlor's death.” Unif. Trust Code § 401, comment, supra, 7D U.L.A. 134. Accordingly, it is clear that, pursuant to § 45a-499v (3) and 760 Ill. Comp. Stat. Ann. 3/ 401 (3), Peter created a valid and enforceable charitable trust, Peter's Yellow Submarine Trust, through the exercise of his nongeneral testamentary powers of appointment.

There was another technical argument dismissed by the court, that the appointment was to a trust rather than a trustee.

Interestingly, the court concluded that the testamentary additions to trust acts of both Illinois and Connecticut failed to cover this situation. Footnote 9 states:

> Because Peter funded Peter's Yellow Submarine Trust through the exercise of a nongeneral testamentary power of appointment, rather than a bequest or devise, we conclude that the Uniform Testamentary Additions to Trusts Acts of Connecticut and Illinois are inapplicable to the present case. See General Statutes § 45a-260 (a) (2) (“[a] will may validly *devise* or *bequeath* property to the trustee or trustees of a trust ... regardless of the existence, size, or character of the corpus of the trust” (emphasis added)); 755 Ill. Comp. Stat. Ann. 5/4-4 (West 2007) (“[t]he existence, size or character of the corpus of the trust is immaterial to the validity of the *bequest*” (emphasis added)). Instead, we focus our analysis on the law governing the creation of a trust via a donee's exercise of a power of appointment.

40. **No Distribution Outright Where Beneficiary Is Married – Upheld (Indiana)**. The opening paragraph of the Indiana Supreme Court opinion in Rotert v. Stiles, 174 N.E. 3d 1067 (Ind. 2021) states:

> When Marcille Borcherding died, she left her estate in trust for her children. One trust provision says that her son’s interest will be distributed to him directly if he is unmarried at the time of her death; but if he is married when she dies, his interest will be held in trust. At issue is whether this provision is an unlawful restraint against marriage. We hold it is not. The statutory prohibition against restraints on marriage applies only to a devise to a spouse by will and not to other dispositions. We thus decline to apply the restraint-against-marriage prohibition to Borcherding’s trust provision. We hold further that her son’s ancillary due-process claim fails.

In In re Estate of Robertson, 859 N.E.2d 772 (Ind. Ct. App. 2007), the Court of Appeals had gone the other way. The Supreme Court commented on the applicable statutes this way:

> First, the Indiana Probate Code says that "[a] devise to a spouse with a condition in restraint of marriage shall stand, but the condition shall be void." Ind. Code § 29-1-6-3. Thus, our probate code prohibits restraints against marriage only if the restraint is in a "devise to a spouse". Subsection 29-1-1-3(a) sets out the definitions that "apply throughout this article", referring to the probate code. When used as a noun in the probate code, "devise" means "a testamentary disposition of either real or personal property or both." *Id*. § 29-1-1-3(a)(6). And a "testamentary disposition", though not defined by subsection 29-1-1-3(a), is something our Court has long considered the distinguishing feature of a will. *See, e.g., Castor v. Jones*, 86 Ind. 289, 290–91 (1882) (finding that an instrument, regardless of its form, was a will because its author intended to make a "testamentary disposition"). In other words, "the essence of a testamentary disposition" is "that it be purely posthumous in operation". *Heaston v. Kreig*, 167 Ind. 101, 111, 77 N.E. 805, 807 (1906). We therefore consider wills as "tak[ing] effect after . . . death", *ibid*., while recognizing that revocable trusts "are popular substitutes for wills" that allow settlors "to retain control and use of their assets during their lifetimes", *Fulp v. Gilliland*, 998 N.E.2d 204, 205 (Ind. 2013). Thus, the legislature's use of "devise" as a noun under subsection 29-1-1-3(a)(6) is consistent with its use as a verb under subsection 29-1-1-3(a)(7): "'devise' . . . means to dispose of either real or personal property or both by will."
>
> Hence, under section 29-1-6-3's plain language, its prohibition applies only to devises, i.e., gifts made by will. And the statute applies only to devises "to a spouse". Here, we have neither a testamentary devise nor a devise to a spouse but a disposition by a revocable trust to a child. The statutory prohibition under our probate code does not apply.
>
> Second, neither does the Indiana Trust Code prohibit the challenged provision. In fact, the trust code does not prohibit conditions in restraint of marriage at all. What it prohibits is ignoring the settlor's intent (and where relevant, the trust's purpose) as manifested in the trust's plain terms. According to the statute: "The rules of law contained in this article"—referring to the trust code—"shall be interpreted and applied to the terms of the trust so as to implement the intent of the settlor and the purposes of the trust." *Id*. § 30-4-1-3. As a result, the section continues, "[i]f the rules of law and the terms of the trust conflict, the terms of the trust shall control unless the rules of law clearly prohibit or restrict the article which the terms of the trust purport to authorize." *Ibid*. Thus, a court must implement the settlor's manifested intent unless doing so would clearly violate the "rules of law contained in [the trust code]". *Ibid*.; accord *Fulp*, 998 N.E.2d at 207 (explaining a court's "primary purpose in construing a trust instrument is to ascertain and give effect to the settlor's intention" as long as applying the trust's terms does not violate the trust code) (cleaned up). Here, Rotert points to nothing in the trust code that "clearly prohibit[s] or restrict[s]" the challenged provision, and we know of none. Given this section's mandate to honor Borcherding's intent, we decline to invalidate the challenged provision or to restrict what the legislature does not forbid.

A concurrence in result only concluded that because the status of a beneficiary's marriage was determined at the moment of the decedent's death, the provision did not encourage divorce. For instance, the concurring Justices would have reached a different result if a trust had provided a beneficiary would receive income only while unmarried.

Suppose a long-term irrevocable trust for a child provided that upon the child's death the assets would be distributed to the child's then unmarried descendants, per stirpes. Where a child's descendant is of legal age such a provision could influence the descendant, relevant?

APPENDIX A

Biden Administration Greenbook

Spring 2022

Turney P. Berry
Louisville, Kentucky

Copyright Turney P. Berry 2022

TABLE OF CONTENTS

1. Biden Tax Proposals. Language below taken from the Treasury Green Book. 1

A. Increase the Top Marginal Income Tax Rate for High Earners. 1

B. Reform the Taxation of Capital Income 1

C. Treat transfers of appreciated property by gift or on death as realization events 3

D. Impose a Minimum Income Tax on the Wealthiest Taxpayers (Billionaire's Tax) 5

E. Modify Income, Estate and Gift Tax Rules for Certain Grantor Trusts. 7

F. Require Consistent Valuation of Promissory Notes 9

G. Improve Tax Administration For Trusts and Decedents' Estates 11

H. Limit Duration of Generation-Skipping Transfer Tax Exemption 14

1. Biden Tax Proposals. Language below taken from the Treasury Green Book.

A. Increase the Top Marginal Income Tax Rate for High Earners.

Current Law

For taxable years beginning after December 31, 2017, and before January 1, 2026, the top marginal tax rate in the tax rate tables is 37 percent. For taxable years beginning after December 31, 2025, the top marginal tax rate for individual income tax is 39.6 percent.

For taxable years beginning after December 31, 2021, and before January 1, 2023, the top marginal tax rate applies to taxable income over $647,850 for married individuals filing a joint return and surviving spouses, $539,900 for unmarried individuals (other than surviving spouses) and head of household filers, and $323,925 for married individuals filing a separate return. The tax bracket thresholds are indexed for inflation.

Reasons for Change

The proposal would raise tax rates for the highest income taxpayers. It would raise revenue while increasing the progressivity of the tax system.

Proposal

The proposal would increase the top marginal tax rate to 39.6 percent. The top marginal tax rate would apply to taxable income over $450,000 for married individuals filing a joint return, $400,000 for unmarried individuals (other than surviving spouses), $425,000 for head of household filers, and $225,000 for married individuals filing a separate return. After 2023, the thresholds would be indexed for inflation using the C-CPI-U, which is used for all current thresholds in the tax rate tables.

The proposal would be effective for taxable years beginning after December 31, 2022.

B. Reform the Taxation of Capital Income

Current Law

Most realized long-term capital gains and qualified dividends are taxed at graduated rates based on the taxpayer's taxable income, with 20 percent generally being the highest rate (23.8 percent including the net investment income tax, if applicable based on the taxpayer's modified adjusted gross income). Moreover, capital gains are taxable only upon the sale or other disposition of an appreciated asset. When a donor gives an appreciated asset to a donee during the donor's life, the donee's basis in the asset is the basis of the donor; the basis is “carried over” from the donor to the donee. There is no realization of capital gain by the donor at the time of the gift, and there is no recognition of capital gain by the donee until the donee later disposes of that asset. When an appreciated asset is held by a decedent at death, the basis of the asset for the decedent's heir is adjusted (usually “stepped up”) to the fair market value of the asset at the date of the decedent's death. As a result, the appreciation accruing during the decedent's life on assets that are still held by the decedent at death avoids Federal income tax.

Reasons for Change

Preferential tax rates on long-term capital gains and qualified dividends disproportionately benefit high-income taxpayers and provide many high-income taxpayers with a lower tax rate than many low- and middle-income taxpayers. The rate disparity between taxes on capital gains and qualified dividends on the one hand, and taxes on labor income on the other, also encourages economically wasteful efforts to convert labor income into capital income as a tax avoidance strategy.

Under current law, because a person who inherits an appreciated asset receives a basis in that asset equal to the asset's fair market value at the time of the decedent's death, appreciation that had accrued during the decedent's life is never subjected to income tax. In contrast, less-wealthy individuals who must spend down their assets during retirement pay income tax on their realized capital gains. This dynamic increases the inequity of the tax treatment of capital gains. In addition, the preferential treatment for assets held until death produces an incentive for taxpayers to inefficiently lock in portfolios of assets and hold them primarily for the purpose of avoiding capital gains tax on the appreciation, rather than reinvesting the capital in more economically productive investments.

Moreover, the distribution of wealth among Americans has grown increasingly unequal, concentrating economic resources in a steadily shrinking percentage of individuals. Coinciding with this period of growing inequality, the long-term fiscal shortfall of the United States has significantly increased. Reforms to the taxation of capital gains and qualified dividends will reduce economic disparities among Americans and raise needed revenue.

Proposal

Tax capital income for high-income earners at ordinary rates

Long-term capital gains and qualified dividends of taxpayers with taxable income of more than $1 million would be taxed at ordinary rates, with 37 percent generally being the highest rate (40.8 percent including the net investment income tax).[11]The proposal would only apply to the extent that the taxpayer's taxable income exceeds $1 million ($500,000 for married filing separately), indexed for inflation after 2023.[12]

The proposal would be effective for gain required to be recognized and for dividends received on or after the date of enactment.

C. Treat transfers of appreciated property by gift or on death as realization events

Under the proposal, the donor or deceased owner of an appreciated asset would realize a capital gain at the time of the transfer. The amount of the gain realized would be the excess of the asset's fair market value on the date of the gift or on decedent's date of death over the decedent's basis in that asset. That gain would be taxable income to the decedent on the Federal gift or estate tax return or on a separate capital gains return. The use of capital losses and carry-forwards from transfers at death would be allowed against capital gains and up to $3,000 of ordinary income on the decedent's final income tax return, and the tax imposed on gains deemed realized at death would be deductible on the estate tax return of the decedent's estate (if any).

Gain on unrealized appreciation also would be recognized by a trust, partnership, or other non-corporate entity that is the owner of property if that property has not been the subject of a recognition event within the prior 90 years. This provision would apply to property not subject to a recognition event since December 31, 1939, so that the first recognition event would be deemed to occur on December 31, 2030.

A transfer would be defined under the gift and estate tax provisions and would be valued at the value used for gift or estate tax purposes. However, for purposes of the imposition of this capital gains tax, the following would apply. First, a transferred partial interest generally would be valued at its proportional share of the fair market value of the entire property, provided that this rule would not apply to an interest in a trade or business to the extent its assets are actively used in the conduct of that trade or business. Second, transfers of property into, and distributions in kind from a trust, other than a grantor trust that is deemed to be wholly owned and revocable by the donor, would be recognition events, as would transfers of property to, and by, a partnership or other non-corporate entity, if the transfers have the effect of a gift to the transferee. The deemed owner of such a revocable grantor trust would recognize gain on the unrealized appreciation in any asset distributed from the trust to any person other than the deemed owner or the U.S. spouse of the deemed owner, not including distributions made in discharge of an obligation of the deemed owner. All of the unrealized appreciation on assets of such a revocable grantor trust would be realized at the deemed owner's death or at any other time when the trust becomes irrevocable.

Certain exclusions would apply. Transfers to a U.S. spouse or to charity would carry over the basis of the donor or decedent. Capital gain would not be realized until the surviving spouse disposes of the asset or dies, and appreciated property transferred to charity would be exempt from capital gains tax. The transfer of appreciated assets to a split-interest trust would be subject to this capital gains tax, with an exclusion from that tax allowed for the charity's share of the gain based on the charity's share of the value transferred as determined for gift or estate tax purposes.

The proposal would exclude from recognition any gain on all tangible personal property such as household furnishings and personal effects (excluding collectibles). The $250,000 per-person exclusion under current law for capital gain on a principal residence would apply to all residences and would be portable to the decedent's surviving spouse, making the exclusion effectively

$500,000 per couple. Finally, the exclusion under current law for capital gain on certain small business stock would also apply.

In addition to the above exclusions, the proposal would allow a $5 million per-donor exclusion from recognition of other unrealized capital gains on property transferred by gift during life. This exclusion would apply only to unrealized appreciation on gifts to the extent that the donor's cumulative total of lifetime gifts exceeds the basic exclusion amount in effect at the time of the gift. In addition, the proposal would allow any remaining portion of the $5 million exclusion that has not been used during life as an exclusion from recognition of other unrealized capital gains on property transferred by reason of death. This exclusion would be portable to the decedent's surviving spouse under the same rules that apply to portability for estate and gift tax purposes (resulting in a married couple having an aggregate $10 million exclusion) and would be indexed for inflation after 2022. The recipient's basis in property, whether received by gift or by reason of the decedent's death, would be the property's fair market value at the time of the gift or the decedent's death.

The proposal also includes several deferral elections. Taxpayers could elect not to recognize unrealized appreciation of certain family-owned and operated businesses until the interest in the business is sold or the business ceases to be family-owned and operated. Furthermore, the proposal would allow a 15-year fixed-rate payment plan for the tax on appreciated assets transferred at death, other than liquid assets such as publicly traded financial assets and other than businesses for which the deferral election is made. The IRS would be authorized to require security at any time when IRS perceives a reasonable need for security to continue this deferral. That security could be provided from any person, and in any form, deemed acceptable by the IRS.

Additionally, the proposal would include other legislative changes designed to facilitate and implement this proposal, including without limitation: the allowance of a deduction for the full cost of appraisals of appreciated assets; the imposition of liens; the waiver of penalty for underpayment of estimated tax to the extent that underpayment is attributable to unrealized gains at death; the grant of a right of recovery of the tax on unrealized gains; rules to determine who has the right to select the return filed; the achievement of consistency in valuation for transfer and income tax purposes; coordinating changes to reflect that the recipient would have a basis in the property equal to the value on which the capital gains tax is computed; and a broad grant of regulatory authority to provide implementing rules.

To facilitate the transition to taxing gains at gift, death and other events under this proposal, the Secretary and her delegates would be granted authority to issue any regulations or other guidance necessary or appropriate to implement the proposal, including rules and safe harbors for determining the basis of assets in cases where complete records are unavailable, reporting requirements for all transfers of appreciated property including value and basis information, and rules where reporting could be permitted on the decedent's final income tax return instead.

The proposal would be effective for gains on property transferred by gift, and on property owned at death by decedents dying, after December 31, 2022, and on certain property owned by trusts, partnerships, and other non-corporate entities on January 1, 2023.

D. Impose a Minimum Income Tax on the Wealthiest Taxpayers (Billionaire's Tax)

Current Law

Most realized long-term capital gains and qualified dividends are taxed at graduated rates under the individual income tax, with 20 percent generally being the highest rate (23.8 percent including the net investment income tax, if applicable, based on the taxpayer's modified adjusted gross income). Moreover, capital gains are taxable only upon a realization event, such as the sale or other disposition of an appreciated asset. As a result, the Federal income taxation of the appreciation of an asset that accrues during the asset's holding period is deferred. In the case of unrealized appreciation at death, the basis adjustment (usually, a step-up) for a decedent's assets may cause Federal income taxation of that gain to be eliminated entirely.

Reasons for Change

Preferential treatment for unrealized gains disproportionately benefits high-wealth taxpayers and provides many high-wealth taxpayers with a lower effective tax rate than many low- and middle-income taxpayers.

Under current law, the preferential treatment for unrealized gains produces an incentive for taxpayers to inefficiently lock in portfolios of assets and hold them primarily for the purpose of avoiding capital gains tax on the appreciation, rather than reinvesting the capital in more economically productive investments.

Reforms to the taxation of capital gains will reduce economic disparities among Americans and raise needed revenue.

Proposal

The proposal would impose a minimum tax of 20 percent on total income, generally inclusive of unrealized capital gains, for all taxpayers with wealth (that is, the difference obtained by subtracting liabilities from assets) of an amount greater than $100 million.

Under this proposal, taxpayers could choose to pay the first year of minimum tax liability in nine equal, annual installments. For subsequent years, taxpayers could choose to pay the minimum tax imposed for those years (not including installment payments due in that year) in five equal, annual installments.

A taxpayer's minimum tax liability would equal the minimum tax rate (that is, 20 percent) times the sum of taxable income and unrealized gains (including on ordinary assets) of the taxpayer, less the sum of the taxpayer's unrefunded, uncredited prepayments and regular tax. Payments of the minimum tax would be treated as a prepayment available to be credited against subsequent taxes on realized capital gains to avoid taxing the same amount of gain more than once. The amount of a taxpayer's "uncredited prepayments" would equal the cumulative minimum tax liability assessed (including installment payments not yet due) for prior years, less any amount credited against realized capital gains in prior years.

Uncredited prepayments would be available to be credited against capital gains taxes due upon realization of gains, to the extent that the amount of uncredited prepayments, reduced by the cumulative amount of unpaid installments of the minimum tax (net uncredited prepayments), exceeds 20 percent of unrealized gains. Refunds would be provided to the extent that net uncredited prepayments exceed the long-term capital gains rate (inclusive of applicable surtaxes) times the taxpayer's unrealized gains — such as after unrealized loss or charitable gift. However, refunds would first offset any remaining installment payments of minimum tax before being refundable in cash.

Minimum tax liability would be reduced to the extent that the sum of minimum tax liability and uncredited prepayments exceeds two times the minimum tax rate times the amount by which the taxpayer's wealth exceeds $100 million. As a result, the minimum tax would be fully phased in for all taxpayers with wealth greater than $200 million.

For single decedents, net uncredited prepayments in excess of tax liability from gains at death would be refunded to the decedent's estate and would be included in the decedent's gross estate for Federal estate tax purposes. For married decedents, net uncredited prepayments that are unused would be transferred to the spouse or as otherwise provided by the Secretary or her delegates through regulations or other guidance.

Taxpayers with wealth greater than the threshold would be required to report to the IRS on an annual basis, separately by asset class, the total basis and total estimated value (as of December 31 of the taxable year) of their assets in each specified asset class, and the total amount of their liabilities. Tradable assets (for example, publicly traded stock) would be valued using end-of-year market prices. Taxpayers would not have to obtain annual, market valuations of non-tradable assets. Instead, non-tradable assets would be valued using the greater of the original or adjusted cost basis, the last valuation event from investment, borrowing, or financial statements, or other methods approved by the Secretary or her delegates (Secretary). Valuations of non-tradable assets would not be required annually and would instead increase by a conservative floating annual return (the five-year Treasury rate plus two percentage points) in between valuations. The IRS may offer avenues for taxpayers to appeal valuations, such as through appraisal.

This reporting also would be used to determine if the taxpayer is eligible to be treated as "illiquid." Taxpayers would be treated as illiquid if tradeable assets held directly or indirectly by the taxpayer make up less than 20 percent of the taxpayer's wealth. Taxpayers who are treated as illiquid may elect to include only unrealized gain in tradeable assets in the calculation of their minimum tax liability. However, taxpayers making this election would be subject to a deferral charge upon, and to the extent of, the realization of gains on any non-tradeable assets. The deferral charge would not exceed ten percent of unrealized gains.

Estimated tax payments would not be required for minimum tax liability. The minimum tax payment amount would be excluded from the prior year's tax liability for purposes of computing estimated tax required to be paid to avoid the penalty for the underpayment of estimated taxes. The proposal would provide the Secretary with the authority to prescribe such regulations or other guidance determined to be necessary or appropriate to carry out the purposes of the proposal, including rules to prevent taxpayers from inappropriately converting tradeable assets to non-tradeable assets.

The proposal would be effective for taxable years beginning after December 31, 2022.

E. Modify Income, Estate and Gift Tax Rules for Certain Grantor Trusts.

Current Law

If the grantor who creates a revocable trust, or in certain cases an irrevocable trust, retains certain powers with regard to the trust or its assets (such as the power to control or direct the trust's income or assets), the trust is a grantor trust and the grantor is considered the deemed owner of the trust. The assets of a grantor trust are treated, solely for income tax purposes, as the assets of the deemed owner of the trust, even if the deemed owner is not a beneficiary of the trust. In addition to causing transactions between the grantor trust and its deemed owner to be disregarded for income tax purposes, this feature also generally results in the income tax liability generated by grantor trust assets to be the obligation of the deemed owner, rather than the obligation of the trust or its beneficiaries. No amount paid by the deemed owner of a grantor trust to satisfy this income tax liability is treated as a gift by the deemed owner to the trust or its beneficiaries for Federal gift tax purposes.

Individuals who own assets expected to appreciate in value use two common techniques for reducing estate taxes that exploit the gift and income tax features of grantor trusts to remove value from their gross estates.

The first technique is the funding of a Grantor Retained Annuity Trust (GRAT) with assets that are expected to appreciate in value. A GRAT is an irrevocable grantor trust in which the grantor retains an annuity interest for a term of years that the grantor expects to survive. At the end of that term, the assets then remaining in the trust are transferred to (or held in further trust for) the beneficiaries. At the creation of the GRAT, the gift tax rules determine the value of the grantor's gift of the remainder interest in the GRAT by deducting the then-present value of the grantor's retained annuity interest from the fair market value of the property funding the GRAT. The present value of the grantor's retained annuity interest is the value of the expected payments to the grantor during the GRAT term determined using a discount rate or rate of return based in part on the applicable Federal rate in effect for the month in which the GRAT is funded.

The second technique is the sale of an appreciating asset to a grantor trust by the deemed owner of the trust. Generally, a transaction between a grantor trust and its deemed owner is an event that is disregarded for income tax purposes. Thus, when a taxpayer sells an appreciating asset to a grantor trust of which the taxpayer is the deemed owner for income tax purposes, the taxpayer does not recognize capital gain or loss on the sale and the trust's basis in the asset is the same as the taxpayer's basis before the transaction. In most cases, the taxpayer receives the sales price for the appreciating asset in the form of a note issued by the trust to be paid from the future income or return from the asset sold to the trust.

Reasons for Change

GRATs and grantor trusts allow taxpayers to substantially reduce their combined Federal income, gift, and estate tax obligations through tax planning. A taxpayer can use a GRAT or sell assets to the taxpayer's grantor trust to remove significant value from the taxpayer's gross estate for Federal estate tax purposes without Federal income or gift tax consequences. Reform is necessary to close the relevant loopholes and ensure the effective operation of the Federal income, gift, and estate taxes. To be effective, any change in the law would have to address both techniques; otherwise, taxpayers will simply shift their planning from one technique to the other.

GRATs are also often funded with assets expected to appreciate rapidly in value. To the extent that the value of a GRAT's assets appreciate at a rate that exceeds the relatively low statutory interest rate used to value the grantor's retained annuity interest, that appreciation will have been transferred to the remainder beneficiary or beneficiaries of the GRAT with little or no gift tax. However, if the grantor dies during the GRAT term, almost the entire value of the GRAT assets generally is included in the grantor's gross estate for Federal estate tax purposes. In that event, even though little or no gift tax was incurred, the transfer tax benefits of the GRAT will not have been achieved. To mitigate this risk, the GRAT term is selected to be a number of years that the grantor is expected to survive. To mitigate the tax cost, the GRAT is structured to have a remainder interest with only a very small value. As a result, even if the GRAT is unsuccessful, there has been little to no cost or downside risk for the grantor.

The planning effect of a taxpayer's sale of an appreciating asset to his or her grantor trust is to remove the future appreciation from the taxpayer's gross estate without the payment of gift or estate tax and without the recognition of any capital gain on the sale. In addition, the deemed owner's payment of the income tax on the trust's taxable income and gains each year is considered the owner's payment of his or her own tax liability and therefore not a gift. This allows the property in the trust to grow free of income tax, without any gift tax cost.

Another tax avoidance strategy facilitated by grantor trusts involves a taxpayer who, at some time before the taxpayer's death, repurchases (in another transaction disregarded for income tax purposes) the then-appreciated asset from the grantor trust for the asset's then-fair market value. When the taxpayer dies, the appreciated asset in the grantor's gross estate will have its basis adjusted to its fair market value on the taxpayer's date of death, so any unrealized appreciation is not subjected to capital gains tax. The trust then will have the same value as before the repurchase but without the future capital gains tax liability for the unrealized gain on that asset.

Proposal

The proposal would require that the remainder interest in a GRAT at the time the interest is created have a minimum value for gift tax purposes equal to the greater of 25 percent of the value of the assets transferred to the GRAT or $500,000 (but not more than the value of the assets transferred). In addition, the proposal would prohibit any decrease in the annuity during the GRAT term and would prohibit the grantor from acquiring in an exchange an asset held in the trust without recognizing gain or loss for income tax purposes. Finally, the proposal would require that a GRAT have a minimum term of ten years and a maximum term of the life expectancy of the annuitant plus ten years. These provisions would impose some downside risk on the use of GRATs so they are less likely to be used purely for tax avoidance purposes.

For trusts that are not fully revocable by the deemed owner, the proposal would treat the transfer of an asset for consideration between a grantor trust and its deemed owner or any other person as one that is regarded for income tax purposes, which would result in the seller recognizing gain on any appreciation in the transferred asset and the basis of the transferred asset in the hands of the buyer being the value of the asset at the time of the transfer. Such regarded transfers would include sales as well as the satisfaction of an obligation (such as an annuity or unitrust payment) with appreciated property. However, securitization transactions would not be subject to this new provision.

The proposal also would provide that the payment of the income tax on the income of a grantor trust is a gift. That gift occurs on December 31 of the year in which the income tax is paid (or, if earlier, immediately before the owner's death, or on the owner's renunciation of any reimbursement right for that year) unless the deemed owner is reimbursed by the trust during that same year. The amount of the gift is the unreimbursed amount of the income tax paid.

The GRAT portion of the proposal would apply to all trusts created on or after the date of enactment. The portion of the proposal characterizing the grantor's payment of income taxes as a gift also would apply to all trusts created on or after the date of enactment. The gain recognition portion of the proposal would apply to all transactions between a grantor trust and its deemed owner occurring on or after the date of enactment. It is expected that the legislative language providing for such an immediate effective date would appropriately detail the particular types of transactions to which the new rule does not apply.

F. Require Consistent Valuation of Promissory Notes

Current Law

Generally, an individual who lends money at a below-market rate of interest to another individual is treated as making a gift for gift tax purposes and the lender is imputed a commensurate amount of income for income tax purposes. The Internal Revenue Code requires minimum rates of interest based on the duration of a note or other loan (its term); the IRS issues monthly rates for each term. These rates effectively create a safe harbor: if the interest rate on a loan is at least equal to the minimum rate of interest specified by the IRS for a loan of the same term, the loan avoids being a “below-market loan” (the forgone interest on which is subject to income tax) and the loan is not treated as a gift for gift tax purposes.

Reasons for Change

The rules for below-market loans allow a taxpayer to take inconsistent positions regarding the valuation of a loan and thereby achieve a tax savings. Typically, a taxpayer sells a valuable asset intra-family for a promissory note carrying the minimum interest rate required to ensure that the loan is not taxed as a “below-market loan” for income tax purposes. The taxpayer claims that the minimum interest rate is sufficient to avoid both the treatment of any foregone interest on the loan as imputed income to the lender and the treatment of any part of the transaction as a gift. However, in subsequently valuing that unpaid note for Federal estate tax purposes after the death of the taxpayer, the estate takes the position that the fair market value of the note should be discounted because the interest rate is well below the market rate at the time of the taxpayer's death. In other words, the taxpayer relies on the statutory rules to assert that the loan is not below market for gift tax purposes at the time of the transaction and relies on the underlying economic characteristics to assert the loan is below market for estate tax purposes later. Because the prescribed minimum interest rates for promissory notes have been so low for at least the past decade, the use of these notes has become a popular tax planning technique to reduce gift and estate taxes.

Alternatively, the term of a promissory note may be very lengthy, and at death, the holder's estate may claim a significant discount on the value of the unpaid note based on the amount of time before the note will be paid in full.

Proposal

The proposal would impose a consistency requirement by providing that, if a taxpayer treats any promissory note as having a sufficient rate of interest to avoid the treatment of any foregone interest on the loan as income or any part of the transaction as a gift, that note subsequently must be valued for Federal gift and estate tax purposes by limiting the discount rate to the greater of the actual rate of interest of the note, or the applicable minimum interest rate for the remaining term of the note on the date of death. The Secretary and her delegates (Secretary) would be granted regulatory authority to establish exceptions to account for any difference between the applicable minimum interest rate at the issuance of the note and actual interest rate of the note. In addition, the term of the note would be treated as being short term regardless of the due date, or term loans would be valued as demand loans in which the lender can require immediate payment in full, if there is a reasonable likelihood that the note will be satisfied sooner than the specified payment date and in other situations as determined by the Secretary.

The proposal would apply to valuations as of a valuation date on or after the date of introduction.

G. Improve Tax Administration For Trusts and Decedents' Estates

Current Law

Definition of executor

Section 2203 of the Internal Revenue Code (Code) defines "executor" for purposes of the estate tax to be the person who is appointed, qualified, and acting within the United States as executor or administrator of the decedent's estate or, if none, then "any person in actual or constructive possession of any property of the decedent" who is considered a "statutory" executor. A "statutory" executor is a person who is not appointed by a court but has an obligation to file an estate tax return because they possess assets of the decedent. A statutory executor could include, for example, the trustee of the decedent's revocable trust, a beneficiary of an Individual Retirement Account (IRA) or life insurance policy, or a surviving joint tenant of jointly owned property.

Limit on the reduction in value of special use property

Generally, the fair market value of real property for estate tax purposes is based on the property's value at its "highest and best use." For example, an undeveloped parcel of land might be valued as property that could be developed for residential or commercial purposes. However, the estates of owners of certain real property used in a family-owned trade or business may reduce the value of that property for Federal estate tax purposes below its value at its highest and best use to help preserve its current use. The maximum reduction in value is limited to $750,000, as adjusted for inflation since 1997; in 2022, the reduction in value is capped at $1.23 million.

Ten-year period for certain estate and gift tax liens

Current law provides an automatic lien on all gifts made by a donor and generally on all property in a decedent's estate to enforce the collection of gift and estate tax liabilities from the donor or the decedent's estate, as applicable. The lien remains in effect for 10 years from the date of the gift for gift tax, or the date of the decedent's death for estate tax, unless the tax is sooner paid in full.

Reporting of estimated total value of trust assets

Although most domestic trusts are required to file an annual income tax return, there is no requirement to report the nature or value of assets held by a domestic trust. As a result, the IRS has no statistical data on the magnitude of wealth held in domestic trusts. Other agencies collect data on the amount of wealth held in some, but not other, types of domestic trusts. In contrast, private foundations are required to report both the basis and fair market value of their assets on their annual tax return. While some of that asset information is required to compute the foundation's excise tax liability and distribution requirements, that information also provides statistical data to the IRS that can be used for various tax administration purposes and in developing tax policies.

Reasons for Change

Expand definition of executor

Because the statutory definition of executor currently applies only for estate tax purposes, a statutory executor (including a surviving spouse who filed a joint income tax return) has no authority to represent the decedent or the estate with regard to the decedent's final income tax liabilities, failures to report foreign assets, or other tax liabilities and obligations that arose prior to the decedent's death. Similarly, no one has the authority to extend a limitations statute, claim a refund, agree to a compromise or assessment, or pursue judicial relief with regard to a tax liability of the decedent. Problems associated with this absence of any representative authority have started to arise more frequently, as reporting obligations (particularly regarding an interest in a foreign asset or account) have increased.

Additionally, in the absence of an appointed executor, multiple different persons may meet the definition of executor and, on occasion, more than one of them has each filed a separate estate tax return for the decedent's estate or they have made conflicting tax elections.

Increase the limit on the reduction in value of special use property

The inflation adjustments since 1997 have not kept up with the increases in the value of real property over that same time period, causing this special use valuation provision to be of diminishing benefit to decedents' estates.

Extend 10-year period for certain estate and gift tax liens

Under current law, this 10-year lien cannot be extended, including in cases where the taxpayer enters into an agreement with the IRS to defer tax payments or to pay taxes in installments that extend beyond 10 years. Thus, for unpaid amounts due to be paid after the 10-year period, this special lien has no effect.

Require reporting of estimated total value of trust assets

Because of the lack of statistical data on the nature and value of assets held in trusts in the United States, it is difficult to develop the administrative and legal structures capable of effectively implementing appropriate tax policies and evaluating compliance with applicable statutes and regulations. Because so much wealth currently is held in domestic trusts, the lack of this data hampers efforts to design tax policies intended to increase the equity and progressivity of the tax system.

Proposal

Expand definition of executor

To empower an authorized party to act on behalf of the decedent in such matters, the proposal would move the existing definition of executor from section 2203 to section 7701 of the Code, expressly making it applicable for all tax purposes, and would authorize such an executor to do anything on behalf of the decedent in connection with the decedent's pre-death tax liabilities or other tax obligations that the decedent could have done if still living. Because this definition frequently results in multiple parties being an executor, the proposal also would grant regulatory authority to the Secretary and her delegate (Secretary) to adopt rules to resolve conflicts among multiple executors authorized by that provision.

The proposal would apply upon enactment, regardless of a decedent's date of death.

Increase the limit on the reduction in value of special use property

The proposal would increase the cap on the maximum valuation decrease for “qualified real property” elected to be treated as special use property to $11.7 million. Such property generally would include the real estate used in family farms, ranches, timberland, and similar enterprises.

The proposal would apply to the estates of decedents dying on or after the date of enactment.

Extend 10-year period for certain estate and gift tax liens

The proposal would extend the duration of the automatic lien beyond the current 10-year period to continue during any deferral or installment period for unpaid estate and gift taxes.

The proposal would apply to 10-year liens already in effect on the date of enactment, as well as to the automatic lien on gifts made and the estates of decedents dying on or after the date of enactment.

Require reporting of estimated total value of trust assets

The proposal would require certain trusts administered in the United States, whether domestic or foreign (other than a trust subject to the reporting requirements of section 6048(b) of the Code), to report certain information to the IRS on an annual basis to facilitate the appropriate analysis of tax data, the development of appropriate tax policies, and the administration of the tax system. That reporting could be done on the annual income tax return or otherwise, as determined by the Secretary, and would include the name, address, and TIN of each trustee and grantor of the trust, and general information with regard to the nature and estimated total value of the trust's assets as the Secretary may prescribe. Such reporting on asset information might be satisfied by identifying an applicable range of estimated total value on the trust's income tax return. This reporting requirement for a taxable year would apply to each trust whose estimated total value on the last day of the taxable year exceeds $300,000 or whose gross income for the taxable year exceeds $10,000.

The proposal would apply for taxable years ending after the date of enactment.

H. Limit Duration of Generation-Skipping Transfer Tax Exemption

Current Law

The generation-skipping transfer (GST) tax is imposed on gifts and bequests by an individual transferor to transferees who are two or more generations younger than the transferor. Each individual has a lifetime GST tax exemption ($12.06 million in 2022) that can be allocated to transfers made, whether directly or in trust, by that individual to a grandchild or other "skip person." The allocation of GST exemption to a transfer or to a trust excludes from the GST tax not only the amount of assets to which GST exemption is allocated, but also all subsequent appreciation and income on that amount during the existence of the trust.

The portion of the transferred property or of a trust not shielded from tax by the allocated GST exemption, and thus the portion of the property to which GST tax will apply, is determined by multiplying the value of the property or trust by a factor referred to as the inclusion ratio. The allocation of GST exemption changes the inclusion ratio (which can range from one to zero) applicable to the transferred property or trust.

Reasons for Change

While property remains in a trust, no estate tax is imposed at the death of any trust beneficiary because the beneficiary typically has no rights to the trust property that would cause the property to be includable in the deceased beneficiary's gross estate for Federal estate tax purposes. At the termination of the trust, however, the trust assets are required to vest in one or more persons, thus becoming the property of those persons and reentering the gift and estate tax base.

At the time of the enactment of the GST provisions, the law of most States included the common law Rule Against Perpetuities (RAP) or some statutory version of it requiring that every trust terminate no later than 21 years after the death of a person who was alive at the time the trust was created. Today, many States either have limited the application of their RAP statutes (permitting trusts to continue for several hundred or up to 1,000 years), or entirely repealed their RAP statute. In those States, as a practical matter, trusts are permitted to continue in perpetuity, so the property in those trusts have been permanently removed from the estate and gift tax base.

Proposal

The proposal would provide that the GST exemption would apply only to: (a) direct skips and taxable distributions to beneficiaries no more than two generations below the transferor, and to younger generation beneficiaries who were alive at the creation of the trust; and (b) taxable terminations occurring while any person described in (a) is a beneficiary of the trust.[14] However, section 2653 of the Internal Revenue Code (Code) would not apply for these purposes.[15] In addition, solely for purposes of determining the duration of the exemption, a pre-enactment trust would be deemed to have been created on the date of enactment. The result of these proposals is that the benefit of the GST exemption that shields property from the GST tax would not last as long as the trust. Instead, it would shield the trust assets from GST tax only as long as the life of any trust beneficiary who either is no younger than the transferor's grandchild or is a member of a younger generation but who was alive at the creation of the trust.

Specifically, this limit on the duration of the GST exemption would be achieved at the appropriate time by increasing the inclusion ratio of the trust to one, thereby rendering no part of the trust exempt from GST tax. Because contributions to a trust from different grantors are deemed to be held in separate trusts under section 2654(b) of the Code, each such separate trust would be subject to the same rule for the duration of the exemption, measured from the date of the first contribution by the grantor of that separate trust. The special rule for pour-over trusts under section 2653(b)(2) would continue to apply to pour-over trusts and to trusts created under a decanting authority, and for purposes of this rule, such trusts would be deemed to have the same date of creation as the initial trust.[16] The other rules of section 2653 would continue to apply and would be relevant in determining when a taxable distribution or taxable termination occurs. An express grant of regulatory authority to the Secretary and her delegates would be included to facilitate the implementation and administration of this provision.

The proposal would apply on and after the date of enactment to all trusts subject to the generation-skipping transfer tax, regardless of the trust's inclusion ratio on the date of enactment.

Section Two

ETHICAL CONSIDERATIONS

Jeffrey B. Kolb

Kolb Roellgen & Traylor LLP

Vincennes, Indiana

2022

Section Two

Ethical Considerations....................Jeffrey B. Kolb

A. INTRODUCTION 1
B. BACKGROUND....................1
C. CONTEXT 1
D. TYPE....................2
E. ROLE....................3
F. OTHER SOURCES OF ETHICS 3
G. TEN RULES 4

1. IDENTIFY THE CLIENT 4

1.1. PROBLEMS 5

1.1.1. REFERRALS 5
1.1.2. FAMILY 6

1.1.2.1. OPINION 2 OF 2001 6

1.1.3. FIDUCIARY....................6

1.1.3.1. OPINION 4 OF 1997 6

1.2. SOLUTIONS 7

2. MONITOR CLIENT'S CAPACITY 8

2.1. RULE 8
2.2. PROBLEM....................9
2.3. SOLUTIONS 12

3. CHECK FOR CONFLICTS 14

3.1. RULE 14
3.2. PROBLEMS 14

3.2.1. PRIOR CLIENT....................14
3.2.2. NON-CLIENT PAYS 15
3.2.3. REFERRALS....................16
3.2.4. MULTIPLE CLIENTS 17
3.2.5. FIDUCIARY....................18
3.2.6. LAWYER'S INTEREST 19
3.2.7. LAWYER AS FIDUCIARY....................20
3.2.8. OTHER 22

3.2.9. REPRESENTING CLIENT AS FIDUCIARY AND BENEFICIARY 22

3.3. SOLUTIONS 23

4. LIMITED REPRESENTATION 24

4.1. RULE 24
4.2. PROBLEMS 24
4.3. SOLUTIONS 25

5. DETERMINE FEE 26

5.1. RULE 27
5.2. PROBLEMS 27
5.3. SOLUTIONS 29

6. PRESERVE CLIENT'S CONFIDENTIAL INFORMATION 29

6.1. RULE 29
6.2. PROBLEMS 31

6.2.1. REFERRALS 31
6.2.2. MULTIPLE CLIENTS 31
6.2.3. DECEDENT'S FILE 31

6.3. SOLUTIONS 32

7. COMMUNICATE WITH CLIENT 32

7.1. RULE 32
7.2. PROBLEMS 32
7.3. SOLUTIONS 33

8. BE DILIGENT 33

8.1. RULE 33
8.2. PROBLEMS 33
8.3. SOLUTIONS 37

9. DO NOT LIE 37

9.1. RULE 37
9.2. PROBLEMS 37

9.2.1. MEDICAID – OPINION 2 FOR 2003 39

9.3. SOLUTIONS 39

10. SAFEGUARD CLIENT'S PROPERTY 39

10.1. RULE 39
10.2. PROBLEMS 40
10.3. SOLUTION...41

11. MISCELLANEOUS ISSUES...41

11.1. ADVERTISING...41
11.2. FEE SPLITTING 42
11.3. CONTEMPT 42
11.4. PARALEGAL..43
11.5. SEX 44
11.6. SUBSTANCE ABUSE 44
11.7. RESPECT 45
11.8. CONTACT WITH AN ADVERSE PARTY 46

12. CONCLUSION...47

A. INTRODUCTION. Whether you like it or not, you, as a lawyer, are an ethical being governed by specific standards in the conduct of your profession. The standards are rules with which you, the lawyer, must comply or else seek a new profession.

B. BACKGROUND. In 1908, the American Bar Association (ABA) adopted the Canons of Professional Ethics. These "Canons" were mostly admonitions to lawyers to "do good and avoid evil."[1] By their very nature they were broad and nonspecific.

In 1969, the ABA adopted the Code of Professional Responsibility now known as the Model Code of Professional Responsibility which was eventually adopted by every state. The Model Code reduced the number of canons to nine (9) but added Ethical Consideration (EC's) and Disciplinary Rules (DR's). The DR's mandated certain conduct by lawyers.[2]

In 1983, the ABA adopted the Model Rules of Professional Conduct (Model Rules). These Model Rules were the product of the Kutak Commission. Effective January 1, 1987, the Indiana Supreme Court adopted the Model Rules with some variations as "Rules of Professional Conduct" (Rules).[3] Effective January 1, 2005, the Indiana Supreme Court adopted many amendments based on ABA and Indiana State Bar Association recommendations.

The Model Rules abandoned the Model Code format of Canons, EC's and DR's because it proved unworkable and also because some courts used EC's to find mandatory duties. The Model Rules are based on the premise that professional conduct should be a matter of law and not morality.[4]

C. CONTEXT.

The Model Rules are normally used in three different contexts:

1. Disciplinary proceedings.
2. Malpractice litigation.
3. Hearing on motion to disqualify a lawyer because of a conflict.[5]

A disciplinary proceeding is normally based on a rule violation. Rules of Professional Conduct lack the force and effect of statutes or of case law but serve as a proper standard for the legal profession and specifically operate as rules of law in disciplinary

[1] Allee, "Representing Older Persons: Ethical Dilemma," Probate and Property, January and February 1988, p. 37 (hereinafter "Allee").

[2] Allee, supra.

[3] Rules of Professional Conduct. (This article will refer to Model Rules or Rules).

[4] "Developments Regarding the Professional Responsibility of the Estate Planning Lawyer: The effect of the Model Rules of Professional Conduct: Real Property, Probate and Trust Journal, Vol. 22, Spring, 1987, p.1 (hereinafter "Report of Committee").

[5] Tate, "Handling Conflicts of Interest That May Occur in an Estate Planning Practice," Estate Planning, January/February 1989 p 32 (hereinafter "Tate"); see Bethlehem Steel Corp. v. Sercon Corp., 654 NE 2d 1163 (Ind. App. 1995). [removal of lawyer]

proceedings before the Supreme Court.[6] Violation of a rule is misconduct even if the client is satisfied with the performance.[7] Violation of a rule must be proven by clear and convincing evidence.[7.1] It is in this context of discipline that the rules are most often used.

A rules violation may also lead to a liability problem. There are no cases indicating that an ethical violation is a prime facie or per se case of malpractice of tort.[8] Conversely, the fact that the lawyer's conduct does not violate a rule does not insulate the lawyer's conduct from an action for liability.[9]

In a legal malpractice claim, the Indiana Supreme Court defines four elements:

1. Employment of an attorney which creates a duty,
2. The failure of the attorney to exercise ordinary skill and knowledge (the breach of the duty),
3. The breach was a proximate cause of damages; and
4. Damages were suffered.[10]

To the extent that ethical rules articulate a standard of care or duty owed to the client under the circumstances of the representation, the Rules will be relevant to the legal malpractice claim.[11] Even "aspirational standards" can cause duties the breach of which can cause liability.[11.1]

Conflicts of interest, as defined in the Rules, also lead to motions to disqualify a lawyer or law firm or to avoid payment of attorney fees.[12]

This article focuses mainly on the disciplinary proceedings aspect of rules violations though other cases will be discussed.

D. TYPE. There are three types of rules under the Rules which also effect their application.

1. Mandatory.
2. Guidelines.
3. Permissive.

[6] Trotter v Nelson, 657 NE 2d 426 (Ind. 1995).

[7] Matter of Stanton, 492 NE 2d 1056, clarified 504 NE 2d 1 (Ind. 1986).

[7.1] Admission R 23(14)(g)

[8] Bruce, "Ethics in Estate Planning and Estate Administration," 15 Probate Notes 118 (1989) (hereinafter "Bruce"); see also Comments to Rules of Professional Conduct, Preamble (hereinafter "Comments").

[9] Ross, "Legal Malpractice in Estate Planning and Administration, "ACTEC notes, Vol 18, No. 4; p 266 (hereinafter "Ross"); citing Maritrans GP Inc. v Pepper, Hamilton & Sheety, 602 A2d 1277 (Pa. 1992).

[10] Rice & Strunk, 670 NE 2d 1281 (Ind. 1996).

[11] See Lazy 7 Coals Sales, Inc. v Stone & Hinds, P.C., 813 SW 2d 400 (Tenn. 1991); and Day v Rosenthal, 170 Cal. App. 3rd 1125 (1985) cert. denied, 106 S. Ct. 1267 (1986).

[11.1] Pennell, "An Estate Planner's Perspective of the NAELA Aspirational Standards," NAELA Journal, Volume 2, page 95, 2006.

[12] Ross, p 248, 266; also Dolatowski v Estate of Rondinelli, 692 NE 2d 915 (Ind. App. 1998) and Reed v. Hoosier Health Systems, Inc., 825 NE 2d 408 (Ind. App. 2005).

"Mandatory rules are imperatives and use the words "shall" or "shall not."[13] Violation will lead to discipline.[14] The "mandatory" rules correspond to the old DR's under the Model Code. The comments to the Rules provide guidelines to the Rules. They do not create obligations but rather explain how the "mandatory" rules apply.[15] They correspond to the old EC's under the Model Code.

"Permissive" rules use the word "may" and create no obligation as the lawyer has discretion in complying with the rule.[16]

E. ROLE. In addition to knowing the context in which the rule is used and the type of rule, the Rules create distinctions based on the role the lawyer has undertaken. The old Model Code viewed a lawyer as a representative. The Rules expanded the Model Code to recognize that the lawyer also functions as:

1. An advisor (see Rule 2.1.).
2. A negotiator.
3. An intermediary. (see Rule 2.2.).
4. An evaluator. (see Rule 2.3.).
5. A third party neutral (see Rule 2.4.).

The Rules attempt to provide ethical standards according to the role assumed.[17]

F. OTHER SOURCES OF ETHICS. The Rules expressly recognize that it is not the only source of ethical consideration.[18] The Indiana State Bar Association issues ethical opinions which can be found at inbar.org. The American College of Trust & Estate Council adopted Standards and Guidelines[19] and Commentaries on the Model Rules.[20] The American Law Institute released a Restatement on the Law Governing Lawyers (Third).[21] The ABA Real Property, Probate and Trust Section issued The Lawyer's Duties in Representing the Husband and Wife and Counseling the Fiduciary.[22] The ABA Commission on the Mentally Disabled and Commission on Legal Problems of the Elderly issued a joint call for rules of professional conduct in the guardianship area.[23] The National Academy of Elder Law Attorneys (NAELA) Task Force on Multidisciplinary Practices and Ancillary Services issued "Aspirational Standards for the Practice of Elder Law with

[13] Comments

[14] Id.

[15] Id.

[16] Id.

[17] Report of Committee, p. 3.

[18] Comments Preamble.

[19] ACPC, "Standard and Guidelines" (1989).

[20] Commentaries on the Model Rules of Professional Conduct, Fourth Edition (hereinafter "Commentaries"), 2006.

[21] American Law Institute, 1999 (hereinafter "Restatement").

[22] Roth, "Current Ethical Problems in Advising Clients" ACTEC Notes, Vol 20, p 224, 226 (1994) (hereinafter "Roth")

[23] Guardianship, An Agenda for Reform, p. 26.

Commentaries. (hereinafter "Aspirational Standards")".[24] Finally, any rule of law, whether civil or criminal, governing a lawyer's conduct is a source of ethical guidelines as a violation of a rule of law is unethical.[25]

G. TEN RULES. This presentation is designed as a checklist of ten major ethical considerations. Under each checklist item is a listed problem area. Each item concludes with possible solutions.

The first two issues, Identity of Client and Capacity of Client, are fundamental issues which effect the application of all Rules. The remaining eight issues deal with specific Model Rules.

1. **IDENTIFY THE CLIENT.** The first question all lawyers should ask and answer is "who is the client?" The application of the Rules depends upon the answer to this question.[26] In maintaining confidential information, determining conflicts of interest, and communicating with the client, it is the key issue. The Rules provide little guidance on "who is a client?"

The Comment Preamble states,

> "Whether a client-lawyer relationship exists for any specific purposes can depend on the circumstances and may be a question of fact."[27]

Normally, a lawyer-client relationship is contractual.[28] Creation of an attorney-client relationship is not dependent upon the formal signing of an employment agreement or upon the payment of attorney fees.[29] An attorney-client relationship may be implied by the conduct of the parties.[30] The existence of an attorney-client relationship is in no way dependent on the ultimate viability of the potential causes of action discussed by the parties; its existence is dependent only on the nature of the interaction between the parties and their consent, express or implied, to such a relationship.[31] An attorney-client relationship is consensual, existing only after both attorney and client have consented to its formation.[32] Mere provision of nominal legal advice is not automatically dispositive where the existence of an attorney-client relationship is disputed.[33] An important factor to determine whether an

[24] Aspirational Standards for the Practice of Elder Law with Commentaries, NAELA Journal, Vol. 2, No. 1, 2006 .

[25] Model Rule 8.4.

[26] Report of Committee, p. 14. Rabb, 763 NE 2d (Ind. 2002) [Lawyer as fiduciary failed to carry out duties prescribed by statute – 180 day suspension.] Graddick, 769 NE 2d (Ind. 2002) [failed to pay back loan when fee received.]

[27] Comments

[28] Price, "Professional Responsibility in Estate Planning: Progress or Paralysis." 1987 Miami Institute on Estate Planning. p. 18-4 (hereinafter "Price").

[29] Matter of Anonymous, 655 NE 2d 67 (Ind. App. 1995).

[30] Matter of Kinney, 670 NE 2d 1294 (Ind. App. 1996).

[31] Matter of Anonymous, 655 NE 2d 67 (Ind. App. 1995).

[32] Matter of Kinney, 670 NE 2d 1294 (Ind. App. 1996).

[33] Matter of Kinney, 670 NE 2d 1294 (Ind. App. 1996).

attorney-client relationship exists is the putative client's subjective belief that he is consulting a lawyer in his professional capacity and on his intent to seek professional advice.[34] Courts have given heavy weight to the beliefs and expectations of the putative client.[35]

In Hacker v Holland,[35.1] the Indiana Court of Appeals concluded that a buyer's attorney's preparation of closing documents and presiding over a closing standing alone were insufficient to create a relationship or to render the attorney liable to the seller for any negligent acts associated with the transaction.

In Douglas v Monroe,[35.2] the Indiana Court of Appeals found no attorney-client relationship where the attorney was stopped by the mother's brother in a bank lobby to inquire about time limitations on the mother's wrongful death claim arising from her son's drowning in a college swimming pool. This case was a malpractice claim against the lawyer when the mother's subsequent claim was dismissed as time barred. Important in both cases appeared to be the fact that there was no prior continuous attorney-client relationship and that the attorney had never agreed to act on behalf of the client.

Conversely putative client expectations can result in no representation. In Matter of Bender,[36] the lawyer undertook a representation without proper consent. The lawyer represented a Chicago bank as trustee that owned real property in Indiana. One of the beneficiaries of the trust contracted to purchase the rental property but discovered that the property was damaged. The trust retained the attorney to sue the tenants for the damage. Without obtaining the consent of the purchasing beneficiary, the lawyer filed a lawsuit naming the beneficiary as one of the plaintiffs. When the beneficiary found out about the lawsuit, the beneficiary retained a different lawyer. The newly retained lawyer advised the first lawyer of the objections to the lawsuit and the failure to obtain consent. Finally, the lawyer and trustee withdrew as a party plaintiff in the case. Nevertheless, the lawyer's neglect in filing the lawsuit and failure to obtain consent resulted in a public reprimand.

Effective January 1, 2005, the Indiana Supreme Court adopted Rule 1.18 which deals with "prospective clients." Under this rule, if information is received from a person seeking legal representation, it is subject to the confidentiality rules. Moreover, the lawyer cannot represent adverse interests unless there is consent by all parties in writing and other exceptions are met.

1.1. **PROBLEMS.** Problems with identifying the client arise in numerous circumstances.

1.1.1. **REFERRALS.** Clients are often referred to a lawyer's office. There are a multitude of organizations which provide services to the client, private organizations

[34] Matter of Anonymous, 655 NE 2d 67 (Ind. App. 1995).

[35] Price, p. 18-4.

[35.1] 570 NE 2d 951 (Ind. App. 1991).

[35.2] 743 NE 2d 1181 (Ind. App. 2001).

[36] 704 NE 2d 115 (Ind. 1998).

and governmental agencies, who may provide referrals. In addition, the elderly are often "brought" to the lawyer's office by relatives, accountants, insurance agents or concerned friends.

The one time referral does not present as much of an ethical concern as situations where referrals occur on a periodic basis. Without intending to create a lawyer-client relationship, the lawyer by accepting periodic referrals may create an expectation by the referring agency or individual of a relationship. As a result, the lawyer would be subject to all the Rules with respect to the lawyer's relationship with the referring agency. Unintended conflicts also arise between the intended client and the referrer.

1.1.2. **FAMILY**. The problem of multiple clients most frequently occurs in the estate planning context. The most common circumstance involves a husband and wife coming to a lawyer for estate planning. An even more complicated situation may involve intergenerational planning where the whole family arrives in the lawyer's office to not only plan the parents' estate but insure the continuation of a family business or family investments.

1.1.2.1. **OPINION 2 OF 2001**. Opinion 2 of 2001 is a potpourri of "who is the client" questions. The lengthy facts are condensed here for brevity. Grandfather was a longtime client of Jones. Granddaughter wanted Jones to undertake a course of action with which Jones disagreed. Granddaughter hired attorney Smith. Smith prepared a power of attorney which grandfather signed. Before deciding questions related to the use of paralegals, confidentiality and conflict of interest, the opinion discussed three different answers to who is Smith's client. It first talks about whether the granddaughter is Smith's client. It next talks about whether the grandfather is Smith's client. (Despite the fact that Smith sent grandfather a letter that said "I am not your lawyer.") Finally, it discusses whether or not the grandfather and granddaughter together are Smith's clients. The bad news for Smith is that in all three situations he was found to have violated one or more ethical rules by his conduct in preparing the power of attorney. Because of its wide ranging discussion on this issue and issues related to the capacity of the client, a full copy of the opinion is attached to this article as **Appendix F**.

1.1.3. **FIDUCIARY**. Estate planning will involve the appointment of fiduciaries including: attorney-in-fact, personal representative, trustee or a guardian. Because the lawyer drafts the documents appointing the fiduciary, the lawyer is often called on by the fiduciary to help carry out the intent of the document. Institutional fiduciaries routinely call on the drafter of the document to help administer the document. Representing or counseling a fiduciary has raised much discussion with respect to who is the client.[37]

1.1.3.1. **OPINION 4 OF 1997.** In Opinion 4 of 1997, the Legal Ethics Committee of the Indiana State Bar Association dealt with the issue of who

[37] Report of the Special Study Committee on Professional Responsibility, "Counseling the Fiduciary," 28 Real Property Probate and Trust Journal, Winter, 1994, p. 825; and Pennell, "Representations Involving Fiduciary Entities: Who Is the Client?," Fordham Law Review, March, 1994, p. 1319.

did a lawyer represent: the daughter as personal representative, the estate or other interests such as heirs, creditors and taxing authorities? The opinion notes two leading models of fiduciary representation which operate as default rules in the absence of a specific agreement.

The first model comes from the American Bar Association, ABA 94-380, which states that the fiduciary is the lawyer's only client and the lawyer owes the client's beneficiary only the obligations owed to third parties.

The second model treats the fiduciary and the beneficiary as joint clients of the lawyer extending the lawyer's duties of care to include the client's beneficiaries.

Opinion 4 quotes extensively from Robert W. Tuttle's article entitled "The Fiduciary's Fiduciary: Legal Ethics and Fiduciary Representation" in the 1994 University of Illinois Law Review on page 889. In that article, Tuttle offers an alternative theory which would impose a legal duty on lawyers not to advise or assist fiduciary clients to breach fiduciary obligations and in addition would impose a moral duty to protect the beneficiary from harm. Tuttle would amend Rule 1.2 to prohibit counseling a client to breach a fiduciary duty and Rule 1.6 to allow disclosure of a breach of fiduciary duty.

Opinion 4 also points out that Florida changed its Rule 1.7 to expressly provide that the personal representative is the client and not the estate or the beneficiary.

As a result of all this, Opinion 4 answers the question "Who is the client?" with the answer "Probably the personal representative as fiduciary." A copy of Opinion 4 is attached as **Appendix D**.

Effective July 1, 2013, IC 29-1-10-20 clarifies that the only duty owed by an estate lawyer is to the personal representative unless there is a written agreement with an interested party.

1.2. **SOLUTIONS**. The issue of "who is the client?" should be addressed in writing in each situation. Under Rule 1.5., to be discussed later, a fee agreement, preferably in writing, must be reached with each new client. A written fee agreement can be used to designate the "client." A sample representation agreement is attached as **Appendix A**. A new representation agreement is recommended upon undertaking any new legal work for the client.

But there is more to the issue of "who is the client?" than a written representation agreement. In the referral, family and fiduciary situations listed above it is more important to establish "who is not the client." At the outset, the referring agency or individual should be made aware of the attorney's duties under the Rules to the client which for the most part exclude the referring agency or individual from either output or input. This can be done in the letter thanking the referring agency or individual for referring the elderly client and emphasizing the rules apply to confidentiality, conflicts and communications.

In the family situation, the lawyer must be aware of false expectations on the part of the family. The lawyer should clearly designate who is the client and exclude in the appropriate situations those who are not the client.

Finally, in the situation involving a fiduciary, the lawyer should take pains to pick a client and clearly spell out his duties to that client and to the fiduciary involved. If the fiduciary is to be represented as an individual, the lawyer should go to great lengths to emphasize not only the limited nature of the representation but also to exclude the beneficiaries from any fiduciary duties and advise them to seek separate counsel.

Sometimes exclusion of the referrer or family is not the best result for the client. Many elderly clients require a coordinated approach that is interdisciplinary. As will be discussed under later rules, it is possible for the client to consent to representation where there are conflicts, and to share confidential information, and communications with referring agencies or individuals, family, or fiduciaries. Nevertheless, the lawyer at the outset should firmly establish the ground rules with full disclosure to the client of the conflicts or else the situation could easily spin out of control.

2. MONITOR CLIENT'S CAPACITY.

2.1. **RULE.** Once the client's identity is established, the lawyer must, under Rule 1.14, monitor the client's capacity. This monitoring must be done at the outset and throughout the relationship.

The normal attorney-client relationship is contractual and based on the agency concept. An incapacitated individual may be incapable of becoming a client or continuing in a client-lawyer relationship.[38] If the client becomes incapacitated during the relationship, the lawyer has no contractual authority to act for the client and may be subjected to personal liability if the lawyer continues in the representation.[39] Both the Rules and Model Code place the burden of determining the capacity of the client on the lawyer. Unlike the Model Code, Rule 1.14 specifically deals with the situation:

> "(a) When a client's capacity to make adequately considered decisions in connection with the 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.
>
> (b) When the lawyer reasonably believes 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 interests, 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, seek the appointment of a guardian ad litem, conservator or guardian.

[38] Allee, p. 38.

[39] Id.; see also In Matter of Bender, 704 NE 2d 115 (Ind. 1998) [lawyer reprimanded for representing an individual without consent].

> (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.

2.2. **PROBLEM.** The comment to Rule 1.14 points out the dilemma created by the responsibilities given to the lawyer under this Rule:

> "The normal client-lawyer relationship is based upon the assumption that the client, once properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects."

The comment to Rule 1.14 makes it clear that this is never a black and white decision:

> "So, also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions."

As indicated in Rule 1.14(b), the lawyer may have to take action seeking appointment of a guardian ad litem, conservator or guardian. This creates an abnormal lawyer-client relationship, because it requires the lawyer to make decisions on behalf of the client that are in the client's "best interest." While the new rule does expressly recognize the lawyer's ability to convey confidential information, it gives very clear warnings to the lawyer about the information to be disclosed:

> "At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client."

This leads the comment to Rule 1.14 to conclude:

> "The lawyer's position in such cases is unavoidably a difficult one."

Opinion 2 of 2001 contains a detailed discussion of the lawyer's duty under old Rule 1.14. To briefly recap the facts, attorney Smith wrote a power of attorney for grandfather at the granddaughter's request and sent a paralegal to have the document executed. Attorney Smith never met with or saw the grandfather. This was found to be a violation of Rule 1.14 because he assumed that the grandfather was able to communicate and make decisions without ever seeing or talking to the grandfather. The opinion found that if Smith had gone to see the grandfather he would have known that the grandfather needed a representative to act on his behalf; either someone appointed under a properly executed power of attorney or a guardianship. It found that it would have been Smith's duty in that case to obtain the proper representation for the grandfather. A copy of Opinion 2 is attached as **Appendix F.**

It is the lawyer's duty under the rules to make the determination of the client's capacity. This determination will involve an analysis of the type of legal work involved and the client's ability to handle that legal work. As a commentator noted:

> "Determining competency is difficult for medical and behavioral experts much less than for lawyers..."[40]

The comment to Rule 1.14 has additional language which sets forth considerations the lawyer should take into account in determining the client's diminished capacity:

> "In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision: the substantive fairness of a decision; and the consistency of a decision with the known long term commitments and values of the client."

These factors often raise more questions than answers particularly when the lawyer attempts to decide the substantive fairness of a decision made by a client and ability to appreciate consequences of a decision.

It is possible that lawyers may resort to models of behavior derived from the requirement that a patient give informed consent for medical treatment which behavior includes the following factors:

1. The patient is capable of making and expressing life choices;
2. The decision is based on rational factors;
3. The decision is in fact rational; and
4. The patient understands the actual consequences of the decision.[41]

The issue of client capacity and the attorney's duty to monitor that capacity has produced significant literature.[42] The most comprehensive treatment of this issue is

[40] Alle, p. 39.

[41] Id.

[42] Margulies, "Access, Connection, and Voice: A Conceptual Approach for Representing Senior Citizens of Question of Capacity," Fordham Law Review, Vol. 62, No. 5, p. 1073; and Roca, "Determining Decisional

contained in a 2005 joint publication of the American Bar Association and American Psychological Association entitled: "Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers," a copy of which is attached as **Appendix H.** It and its companion, A Handbook for Psychologists go to great lengths to explore the duties placed on lawyers when clients have diminished capacity and offer some guidelines on how to proceed. Of particular note is its emphasis that lawyers should not try to administer tests to measure capacity as specific training is needed to interpret the results. Lawyers practicing in this area should review the handbook and be aware of its guidelines.

In 2015, the North Dakota Supreme Court in *Runge v Disciplinary Bd of N.D. Supreme Court*, 2015 ND 32, dealt specifically with the issue of whether Rule 1.14 was violated. The North Dakota rule and burden of proof is similar to Indiana and may offer some solace to lawyers facing these issues. In 2009, Franz appointed his daughter as his attorney-in-fact. In 2012, Franz had a heart attack and began living in a Lutheran care center. Upon his arrival, his evaluation said he was incapable of making medical decisions. In 2013, Franz's friend, Ida, contacted lawyer Runge who determined there was no guardianship and suggested revoking the power of attorney. Runge spoke with Franz over the phone and later met with Franz to discuss revoking the power of attorney. Runge concluded that Franz had capacity to revoke the power of attorney and prepared a revocation which Franz signed. Franz then left the care center and moved in with Ida.

The daughter filed a disciplinary complaint. The Disciplinary Board determined Runge violated Rule 1.14 and issued an admonition to Runge. Runge filed for review by the North Dakota Supreme Court.

The North Dakota Supreme Court held that there was no clear and convincing proof that Runge violated Rule 1.14. The Disciplinary Board believed Runge should have consulted first with the daughter as Franz's representative. The Supreme Court relied on outside authority that the judgment of capacity is left to the discretion of the lawyer on the scene.[42.1.1.] The cited source goes on to say a lawyer cannot be disciplined for action based on reasonable deliberation, plausible professional basis and best interest of the client.[42.2.] Under this standard, Runge's evaluation was within his professional judgment. Because there was no guardianship it was not necessary for Runge to consult with anyone.

There is generally recognized four different instances where client capacity is measured.

1. Contractual.
2. Donative.
3. Testamentary.

Capacity: A Medical Perspective," Fordham Law Review, Vol. 62, No. 5, p. 1177; ABA Committee on Law & Aging and American Psychological Association, "Assessment of Older Adults with Diminished Capacity; A Handbook for Lawyers (2005); Streisand and Spar, "A Lawyer's Guide to Diminishing Capacity and Effective Use of Medical Experts in Contemporaneous and Retrospective Evaluations,"ACTEC Journal (2008) p. 180; Peck, "Ethical Issues in Representing Elderly Clients with Diminished Capacity," Illinois Bar Journal, 2011, Vol. 99, page 512.

[42.1.1.] Geoffery C. Hazard, Jr., W. William Hodes & Peter R. Jarus, The Law of Lawyering, §19.04 (4th Ed. 2015).

[42.2.] *Id.*

4. Ability to care for one's self and manage one's affairs.[43]

In an ICLEF article, William Holswager provides a very good review of Indiana's case law on these four issues.[44] Generally, the determination of capacity has shifted from conclusory determinations such as insanity to a more transactional approach where the courts take a look at the individual's ability to understand the transaction being discussed. As a result, capacity to enter into contracts or make gifts are blending into common concepts. This blending continues as the capacity to make a revocable lifetime trust is now the same as a will.[44.1]

In Hunter v Klimowicz,[45] the Court of Appeals applied the standard under IC 30-4-2-10(c) for irrevocable trusts, which is "be of sound mind and have a reasonable understanding of the nature and effect of the terms of the trust," to revoke a trust the settler did not understand. On rehearing,[45.1] the Court acknowledged that this 2005 change should not be applied to a 2000 trust. Using the old testamentary standard it still invalidated the trust.

Indiana has, of course adopted some new standards in determining an individual's capacity with regard to the creation of a guardianship.[46] With the advent of the "Elder Lawyer," some very fine articles have been written educating lawyers with regard to methods of assessing capacity.[47] The education of the lawyers in these areas involve familiarity with a wide range of capacity tests that are beyond the scope of this article.

2.3. **SOLUTIONS**. There are a multitude of proposed approaches in dealing with the issue of client capacity.[48] At the outset of the client-lawyer relationship, the lawyer should have in mind problems regarding the client's capacity. In the initial interview of the client, the lawyer should undertake some type of factual determination of the client's past medical history, current medical treatment and current medication.

In the Fordham Law Review there are recommendations for guidelines with regard to questioning the client. These guidelines include:

1. Client's ability to articulate reasoning behind a decision.
2. The variability of the client's state of mind.
3. The client's ability to appreciate the consequences of a decision.
4. The irreversibility of any decision.

[43] Spar, "Attorney's Guide to Competency and Undue Influence," NAELA Quarterly, Summer, 2000, p. 7 [describes general rule regarding these issues with emphasis on California] (hereinafter "Spar").

[44] Holwager, "Capacity, The Legal Standards and Ethical Considerations," ICLEF.

[44.1] See IC 30-4-2-10(b).

[45] 867 NE2d 626 (Ind. App. 2007).

[45.1] 872 NE2d 1109 (Ind. App. 2007)

[46] See IC 29-3-1-7.5.

[47] Kapp, "Measuring Client Capacity: Not So Easy, Not So Fast" NAELA Quarterly, Summer, 2000, p. 3; and Boyer "Representing the Client with Marginal Capacity: Challenges for the Elder Law Attorney-A-Resource Guide," NAELA Quarterly, Spring, 1999, p. 3.

[48]Boyer, supra, p. 8; Fordham Law Review

5. The substantive fairness of a decision.
6. The consistency of a decision with lifetime commitments of the client.[49]

These issues should be addressed by speaking with the client alone.

If it appears that the client may be suffering from some type of incapacity, the lawyer should seek the help of the client's physician. This should only be undertaken with the client's full knowledge and consent, preferably in writing. A determination that the client is incapacitated and unable to undertake the legal work anticipated, should put all legal matters on hold as the client is unable to enter into a lawyer-client relationship. At this stage, the lawyer should seek a relative or concerned individual or agency which will come forth to obtain the necessary legal representation for the client through the appointment of a guardian.

If the determination is that the client is capable of entering into legal decisions, the attorney should plan for the possibility of future incapacity by having the client execute a general or specific power of attorney. The Fordham Law Review cites with approval the American College of Trust and Estate Council Commentaries on the Model Rules which states:

> "As a matter of routine, the lawyer who represents a competent adult in estate planning matters should provide the client with the information regarding the devices the client could employ to protect his or her interest in the event of disability, including ways the client could avoid the necessity of a guardianship or similar proceeding. Thus, as a service to the client, the lawyer should inform the client in a general way regarding the cost, advantages and disadvantages of durable powers of attorney, directors to physicians or living wills, health care proxies, and revocable trusts."

The comment to Rule 1.14 also specifically recognizes the utility of a "durable power of attorney" as well as other surrogate decision making tools.

Appendix B is a specific power of attorney whereby the individual appoints another individual as an attorney-in-fact to take care of all legal matters and consents to any release of information necessary for the attorney in the representation. This creates a surrogate decision maker for the client and allows the lawyer, in the lawyer's discretion, to consult with the attorney-in-fact in place of the client. This document is designed to remove any questions with regard to confidentiality, conflicts of interest, or communication with the client. It is designed to be effective immediately but, under the Indiana Power of Attorney statute, can be contingent upon later events and specifically designed for the elderly client's needs. In the fee agreement, the client should authorize release of confidential information to the attorney-in-fact. A sample release is shown in **Appendix A.**

With the attorney-in-fact in place, the lawyer can continue to let the client make decisions on the client's own behalf until such time as the lawyer determines that a decision

[49] Fordham Law Review, p. 991.

is needed from the attorney-in-fact. This places the duty on the lawyer to make that determination but does not hold the lawyer liable if the decision is improperly made as the lawyer can consult with the attorney-in-fact at any time during the litigation.

This procedure is consistent with the typical elderly client pattern in that they are either referred or brought to the lawyer's office by concerned individuals or agencies. Of course, the elderly client needs to be fully advised of the nature and extent of the general or specific durable power of attorney. In addition, the power of attorney should not be executed unless the record clearly documents the elderly person's ability to understand the nature and extent of the document.

3. CHECK FOR CONFLICTS.

3.1. **RULE.** Rules 1.7, 1.8 and 1.9 set out the rules with regard to conflicts of interest. The relevant sections of the rules will be referred to under the various problems noted below.

Effective January 1, 2005, the Indiana Supreme Court adopted Rule 1.18 which deals with "prospective clients." Under this rule, if information is received from a person seeking legal representation, the lawyer cannot represent adverse interests unless there is consent by all parties in writing and other exceptions are met.

3.2. PROBLEMS.

3.2.1. **PRIOR CLIENT**. Rule 1.9. provides:

> "(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests on the former client unless the former client consents after consultation.
>
> (b) A lawyer shall not willingly represent a person in the same or substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
>
> (1) Whose interest are materially adverse to that person; and
> (2) About whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless a former client gives informed consent confirmed in writing.

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) Use information related to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) Review information relating to the representation except as these rules would permit or require with respect to a client."

Effective January 1, 2005, the client's consent must be in writing.

In Matter of Roback,[50] the attorney was publicly reprimanded and admonished for representing the husband's estate when the wife whom he formerly represented instituted a claim against the estate for her spousal share. The court found a violation of Rule 1.9.

In Matter of Good,[51] the attorney represented Tucker, an individual being investigated by adult protection services agencies. The court then appointed the attorney to represent the woman who was the alleged victim. While the elderly lady was in the psychiatric ward, the lawyer had a Power of Attorney executed and a will that left almost her entire estate to Tucker, the individual formerly accused of abuse. The individual's farm was later sold and money was used by the attorney for improper purposes. The attorney claimed that the money was owed to him for legal service and because the will left everything to Tucker, Tucker could do with it what he wished. The court disagreed and disbarred the attorney.

3.2.2. **NON-CLIENT PAYS.** Rule 1.8(f) states:

> "The lawyer shall not accept compensation for representation of a client from anyone other than the client unless (1) the client gives informed consent; (2) there is no interference with the lawyer's independence or professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6."

One commentator has gone so far as to recommend that in the preparation of estate planning documents for a husband and wife, the husband and wife each be consulted separately with respect to the payment of the fee and that the fee be billed separately and paid separately.[52]

[50] 654 NE 2d 731 (Ind. 1995).

[51] 632 NE 2d 719 (Ind. 1994).

[52] Wade, "When Can a Lawyer Represent Both Husband and Wife in Estate Planning," Probate and Property, March/April 1987 (hereinafter "Wade").

3.2.3. **REFERRALS**. Rule 1.7. provides:

> "(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:
>
> (1) The representation of one client will be directly adverse to another client; or
>
> (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibility to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflictive interest under paragraph (a), a lawyer may represent a client if:
>
> (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) The representation is not prohibited by the law;
>
> (3) 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
>
> (4) Each affected client gives informed consent confirmed in writing."

Effective January 1, 2005, the client's consent must be informed and confirmed in writing.

The comment to the Rule specifically refers to conflicts arising in estate planning and administration. The comment recognizes that the identity of a client in an estate administration may be unclear and that under one view the client is the fiduciary while under another view the client is the estate or trust including its beneficiaries. Effective July 1, 2013, IC 29-1-10-20 states the estate lawyer only owes a duty to the personal representative unless there is a written agreement with an interested person.

In connection with referrals, one commentator listed the following referrals which raise questions under the rule:

> "1. By a trust company with the understanding that a trust will be created using said company as trustee;

2. By an insurance agent with the understanding that the estate plan will include a large life insurance purchase;

3. By a charity with the understanding that the estate plan will include large bequest or split interest trust for each charity;

4. By a financial plan or a stockbroker with the understanding that the estate plan will include investments that have been recommended;

5. By a business owner with the understanding that the estate plan will include buy/sell agreements for the new client, a co-owner of the business."[53]

Opinion 1 for 2001 discusses an attorney who had a relationship with a financial planning firm. The attorney was one of the owners of the firm. The other owners and employees were nonlawyers. The financial planning firm made referrals to the attorney and the attorney made referrals to the financial planning firm. Opinion 1 found a violation of Rule 7.3 which prohibits a lawyer from recommending employment as a private practitioner of himself to a nonlawyer who has not sought his advice. Because attorney A was part owner of the financial planning firm the recommending personnel would be his employees and would be deemed acting on his behalf and therefore violating this rule. A copy of Opinion 1 is attached as **Appendix E**.

In Opinion 1 of 2004, an unwaivable conflict was found in a referral program set up by a bank.

All referrals contain the same potential problems as those listed above. Specifically, referrals on a periodic basis from the same source create an implied understanding which may be difficult for the lawyer to rebut without written evidence to the contrary.

3.2.4. **MULTIPLE CLIENTS.** Rule 1.7 quoted above also relates to the circumstance of multiple clients. Multiple clients normally involve the husband and wife estate planning situation or the family estate planning situation. The husband and wife estate planning situation has particularly attracted a lot of literature.[54]

The problem with multiple clients differs with the type of work to be done. Prenuptial contracts may provide the clearest potential for a conflict of interest.[55] The preparation of a will may involve the following relevant factors:

[53] Bruce, p. 121.

[54] Report of the Special Study Committee on Professional Responsibility Comments and Recommendation on the Lawyer's Duties in Representing Husband and Wife, Real Property, Probate and Trust Journal, Winter, 1994, p. 765; and Pearce, "Family Values of Legal Ethics: Competing Approaches to Conflicts in Represents Spouses," Fordham Law Review, Vol. 62, No. 65, p. 1253.

[55] Wade, p. 14.

1. The lawyer's prior relationship with one but not the other spouse.
2. The relative size of the spouse's separate estate.
3. The existence of children by a prior marriage.
4. The level of sophistication and experience in dealing with lawyers.
5. The stability of the marriage.[56]

In Haynes v First National State Bank,[57] a daughter directed her lawyer to prepare a will for her aged mother leaving the estate to the daughter and cutting out the children of the deceased brother who lives with the brother's widow and her second husband. The Court of Appeals found undue influence existed because of the daughter's prior relationship with the attorney and bringing the mother to the daughter's attorney.

In Re Estate of Koch,[58] each opposing party had two respected commentators on ethics testify. The court upheld a will that was drafted for the testator by a lawyer who also represented the testator and two of her sons in litigation involving a charitable foundation. Her will, which left the bulk of her estate to her four sons, included a no contest clause and a provision that conditioned the gifts on the dismissal by a beneficiary of any litigation that was pending against her within sixty days following her death. The lawyer did not discuss the will with the sons including the two sons who were clients of the firm in the litigation. The court distinguished the case from Haynes v National State Bank discussed above.[59]

In Matter of Shirley,[59.1] the lawyer collected substantial fees from a corporation and then advised one of six siblings on obtaining control of the corporation. At one point the lawyer sought to have the corporation held in contempt. This conflict received a 30 day suspension.

Where one of the multiple clients has been a long term client, one commentator recommends that the second client be sent to a different lawyer as a painful solution but one that may avoid the ultimate loss of probate work for even the first client.[60]

Opinion 2 of 2001 contains a lengthy discussion of the conflicts of interest that arise if both the grandfather and the granddaughter are clients. Opinion 2 points out that if they are both clients, the lawyer failed to disclose to both parties the conflict of interest that arises from the joint representation under Rule 1.7. A copy of Opinion 2 is attached as **Appendix F**.

3.2.5. **FIDUCIARY.** Planning often involves the appointment of a fiduciary. The lawyer preparing the documents often ends up representing the fiduciary. Conflicts can be found in the lawyer's prior representation of the fiduciary or later

[56] Id.
[57] 432 Atl. 2d 890 (1981).
[58] 849 P. 2d 977 (Kan. App. 1993).
[59] For additional cases on this issue see Commentaries.
[59.1] 930 NE 2d 1135 (Ind. 2010).
[60] Bruce, p. 121.

representation of the fiduciary if the lawyer acquires an interest adverse to the client and does so without consultation and consent of the client.[61]

Similarly, the lawyer for a protected person may be in a conflict situation if the lawyer undertakes an advisory role for the guardian or person acting for the protected person.

3.2.6. **LAWYER'S INTEREST**. Perhaps the most critical situations occur when the lawyer takes a position for the lawyer's own interests which may be adverse to that of the client. Examples include the lawyer as a beneficiary of documents drafted by the lawyer. Rule 1.8 (c) states:

> "A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For the purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship."

The American College of Trust and Estate Council proposed that the gift be limited to only the lawyer's intestate share.[62] Obviously, any lawyer drafting documents in which the lawyer is a beneficiary would want to take great pains to comply with rule.

Obviously some do not.

In Matter of Bales,[63] public reprimand was given to a lawyer who represented a client with respect to a will which results in substantial personal benefits to the lawyer.

In Matter of Taylor,[64] the lawyer's representation of his stepmother in estate planning with the advice that she execute a waiver of her right to take against a will of his father thereby increasing his benefits warranted the lawyer a 120 day suspension. (The lawyer had previously been disciplined twice.)

In Matter of Herbert,[65] the lawyer drafted a will naming himself as personal representative and a beneficiary. The lawyer had advised the client to get disinterested advice when she indicated a desire to leave the lawyer something in the will. The lawyer went ahead when the client insisted she did not want another lawyer involved. The lawyer got a public reprimand for not adequately disclosing the conflicts to the client.

[61] Pennell, "Representations Involving Fiduciary Entities; Who is the Client?, Fordham Law Review, Vol. 62, No. 5, p. 1319; and Report of the Special Study Committee on Professional Responsibility, "Counseling the Fiduciary" 28 Real Property Probate and Trust Journal, Winter, 1994, p. 825.

[62] Bruce, p. 123.

[63] 608 NE 2d 987 (Ind. 1993).

[64] 693 NE 2d 526 (Ind. 1998).

[65] 553 NE 2d 130 (Ind. 1990).

In the Matter of Levy,[65.1] the lawyer drafted a will for a close friend leaving valuable property to the lawyer and his wife and making the lawyer the personal representative. When the nephew challenged, the gifts were voided. The lawyer who had 41 years of experience and was a judge for 7 years was suspended for 60 days.

In Matter of Goebel,[65.2] the lawyer received a sixty day suspension for writing a will for a business partner that named the lawyer's son and daughter-in-law specific beneficiaries and himself as residuary beneficiary.

In Matter of Watson,[65.3] the lawyer drafted a will for an owner of shares in a closely held Indiana telephone company that was also owned by the lawyer's mother. The lawyer also owned one share and served in a variety of corporate positions. In the second codicil, the lawyer drafted an option for the corporation to buy the shares at "book value." The client died and the shares were purchased for $9,500.00 per share. Two years later they sold again for $21,000.00 a share. The lawyer was suspended for 60 days.

In Matter of Haynes,[65.4] the lawyer borrowed $30,000.00 from an estate he was handling. The personal representative eventually had to sue to get the money back. The lawyer was suspended for 30 days.

In Matter of Moores,[65.5] the client paid the lawyer $4,000.00 to defend a foreclosure. In addition, the lawyer negotiated an 8 year listing agreement. The lawyer's delaying tactics led to a summary judgment against his clients. The lawyer's conflict led to a 60 day suspension.

In Matter of Colman,[65.6] and in the Matter of Watts,[65.7] Colman met with a ninety-five year old client in a hospital. The client stated he wanted to give Colman all his estate at death. Colman contacted Watts. Watts never met with the client, instead relying on Colman and his paralegal to draft the will. Colman was suspended for 3 years and Watts was suspended for 120 days.

Opinion 1 for 2002 discusses a lawyer who establishes a financial planning firm and asks if he can sell financial products to his clients. The Ethics Committee recommends full disclosure to the clients with written waivers of conflicts.

3.2.7. **LAWYER AS FIDUCIARY.** Not as obvious is the role of a lawyer

[65.1] 867 NE 2d 581 (Ind. 2007).
[65.2] 733 NE 2d 1178 (Ind. 2000).
[65.3] 733 NE 2d 934 (Ind. 2000).
[65.4] 744 NE 2d 430 (Ind. 2000)
[65.5] 854 NE 2d 350 (Ind. 2006).
[65.6] 885 NE 2d 1238 (Ind. 2008).
[65.7] 918 NE 2d 330 (Ind. 2009).

as a fiduciary. For the most part, the Rules do not directly address when a lawyer may be a fiduciary.[66] The old Model Code in EC 5-6 states:

> "A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where the client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety."

The Rules do not address the issue directly. In the American Law Institute's restatement of the Law Governing Lawyers (Third) comments and notes to §216 provide:

> "Unless the affected client consents to the representation under the limitations and conditions provided in §202 [client consent to a conflict of interest], a lawyer may not represent a client in any matter with respect to which the lawyer has a fiduciary or other legal obligation to another person if there is a substantial risk that the obligation would materially and adversely affect the lawyer's representation of the client."

The ACTEC commentaries cited favorably in the Fordham Law Review, states:

> "An individual is generally free to select or appoint a member he or she wishes to a fiduciary office (e.g., trustee, executor, attorney-in-fact). None of the provisions of the model rules deals explicitly with the propriety of a lawyer preparing for a client a will or other document that appoints the lawyer to a fiduciary office. As a general proposition, lawyers should be permitted to assist adequately informed clients who wish to appoint their lawyers as fiduciaries."
>
> > "Accordingly, lawyers should be free to prepare a document for a client that appoints the lawyer to a fiduciary office so long as the client is properly informed, consents in writing, the appointment does not violate the conflict of interest rules of Rule 1.7 (conflict of interest: general rule), and the appointment is not the product of undue influence or improper solicitation by the lawyer."

In The Matter of Merriel L. Smith and Gregory B. Smith,[67] father and son lawyers received two year and ninety day suspensions respectively for preparing documents allowing the attorneys to take care of the affairs of a wealthy widow. In the process, the lawyers bought word processing equipment, set up an interest free loan with a relatively small monthly payment, and failed to repay the loan on the widow's death. The lawyers also gave secretaries a bonus from the widow's money and one was executor of the estate

[66] Spurgeon and Ciccarello, "The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations," Fordham Law Review, Vol. 62, No. 5, p. 1357; and Report of the Special Study Committee on Professional Responsibility Preparation of Wills and Trusts That Name Drafting Lawyer as Fiduciary, 28 Real Property Probate and Trust Journal, Winter, 1994, p. 803.

[67] 572 NE 2d 1280 (Ind. 1991).

when the widow died. When a beneficiary challenged the high fees, the fees were substantially reduced.

In The Matter of Bales,[68] the lawyer received a public reprimand for advancing fees out of the estate to pay herself as executor and attorney. The court found that she engaged in a conflict of interest when she undertook to represent a client when that representation was materially limited by her own interest.

Related to this issue of lawyers as fiduciaries is a prohibition in Model Rule 1.8(h) which states:

> "A lawyer shall not make an agreement perspectively limiting the lawyer's liability to a client for malpractice unless permitted by law and a client is independently represented in making the agreement or settle a claim for such liability with an unrepresented client or former client without first advising the person in writing that independent representation is appropriate in connection therewith.

Many wills, trusts or other fiduciary documents are drafted with exculpatory language in it protecting the fiduciary. If the lawyer drafts such language with the lawyer as fiduciary, it would be a clear violation of this rule.[69]

3.2.8. **OTHER**. There are many other actions of a lawyer which could create a conflict situation. These include:

- Donation of legal services to charity auction. See Opinion 4 of 2008;
- Naming the lawyer's charity as beneficiary;
- Naming the lawyer's corporate client as fiduciary;
- Naming the lawyer as counsel for the fiduciary;
- Failing to use self-proving wills;
- Safekeeping clients' wills; and
- Safekeeping clients' powers of attorney.[70]

This is not meant to be an exclusive list but only examples of conflict situations which can arise in the representation of any client but particularly the elderly client.

3.2.9. **REPRESENTING CLIENT AS FIDUCIARY AND BENEFICIARY.** Often the lawyer represents a client who may be a fiduciary and a beneficiary. The ethical question is whether the lawyer can represent the client in both capacities.

[68] 608 NE 2d 987 (Ind. 1993).

[69] Matter of Burns, 516 NE 2d 35 (1987)

[70] Report of Committee, pp. 28-30.

Illinois Professional Conduct Advisory Opinion 21-01 dealt with the specific facts of a widower being representative for the deceased wife's estate and also making and election as a beneficiary to elect against the will. The opinion finds a conflict if the lawyer represents client on both issues but finds the conflict is waivable if:

> (1) the lawyer reasonably believes she will be able to provide competent and diligent representation to each affected client, including the surviving spouse, individually and in a fiduciary capacity;
> (2) the lawyer makes clear her relationship to the parties involved; and
> (3) each affected party, including the spouse individually, the beneficiaries or, if applicable, the natural or court-appointed guardian of minor beneficiaries, or a guardian ad litem appointed to protect their interest, gives informed constent.

3.3. **SOLUTIONS.** The client's legal matter must be checked against an index of all prior client matters. With a properly maintained client index, this is not too difficult.

Difficulty can arise where the client approaches you for estate planning and requests your advice about an appropriate institutional fiduciary where you represented the institutional fiduciary as a client in other matters. A similar problem can arise where you undertake estate planning for a beneficiary of the client.[71]

One commentator suggests the following checklist to comply with Rule 1.9 as it applies to prior clients:

1. Is it a substantially related matter?
2. Are there materially adverse interests?
3. Has there been consent after consultation?
4. Is the use of the information to the disadvantage of the former client?
5. Is the information confidential?
6. Is the information generally known?[72]

The proposed solution to most conflicts is best set forth in the Comment to Rule 1.7. under the heading "Informed Consent" and "Confirmed in Writing." The Comment makes clear that a client may consent to representation notwithstanding a conflict. Obviously, the question of conflict must be resolved as to each client if there are multiple clients. The consultation should involve a detailed disclosure of the client or possible conflict as seen by the lawyer and the client's consent to the lawyer's continued representation. The consent should be in writing.

In Van Kirk v Miller,[72.1] a malpractice claim was based on a conflict of interest where the seller and buyer of a business were represented by the same lawyer. A written waiver saved the lawyer.

[71] Tate, p. 34.

[72] Tate, p. 35.

[72.1] 869 NE 2d 534 (Ind. App. 2007).

It is not recommended that any particular form be used for this disclosure and consent. Rather, a letter should be written to the client detailing the specifics of the current representation and the possible conflicts involved. The letter should then ask the client to sign acknowledging the enclosed discussion of the conflict and consenting to the continued representation. A letter confirming the client's oral consent is an alternative.

4. **LIMITED REPRESENTATION.**

4.1. **RULE.** Rule 1.1 requires:

> "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
>
> Rule 1.2 adds:
>
> "(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decision concerning the objectives or representation and as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter."

In Rule 1.1 the lawyer has a mandate to do his best on behalf of the client and in Rule 1.2 the lawyer has a mandate to do only what the client requests.

It is to the advantage of both the lawyer and the client that the exact matters to be handled by the lawyer be detailed as soon as possible. If not, the application of the Rules is left to whatever implied understanding the courts of disciplinary commissions may find in the lawyer-client relationship.

4.2. **PROBLEMS.** The client has no idea what legal services should be rendered. The elderly client is more likely to misunderstand the exact type of legal services to be rendered. As discussed in Section 2, the lawyer has the duty to determine the elderly client's abilities to understand and adjust his explanation accordingly.

The current state of elder law also makes it more likely that the elderly client will present the lawyer with problems and that the lawyer has neither the staff, equipment, or education to handle. Matters such as Medicaid and Medicare can be very complex and specialized areas of the law meant only for a few practitioners. Also, the staff and equipment necessary to handle some problems brought in by the elderly could be beyond the reach of some lawyers.

In Indianapolis Podiatry, P.C. v Efroymson,[73] the Indiana Court of Appeals dealt with an attempt to limit the scope of an attorney's representation. It found that the limitation would not be valid without full disclosure to the client similar to that which is required when the attorney has a conflict of interest. Such limitation may not materially impair the client's rights. Now the disclosure must be in writing.

Problems also arise in closing the case. In The Matter of Quinn,[74] the attorney violated rules of professional conduct when he ceased working on a case based on the belief that the client obtained a new lawyer but did not formally withdraw from representation or insure that the client's case was sufficiently handled.

In Flatow v Ingalls,[74.1] a legal malpractice claim was filed against a law firm for failure to respond to a motion for summary judgment. The law firm was employed under a written agreement to represent the client in a defamation action against IPL. The written representation agreement specifically limited the scope of duties to this defamation claim. The defendant requested summary judgment on claims other than defamation. The law firm notified the client but did not respond. The client sued. The law firm asked for summary judgment. The trial court denied. The Court of Appeals reversed and remanded with instructions to enter summary judgment for the law firm based on its limited representation agreement.

In Finnerty v Colussi,[74.2] the lawyer was not so lucky. Dora Grace Lee died leaving a will designating her sister and her granddaughter, Mason, as co-personal representatives. The co-personal representatives chose Colussi to serve as the estate lawyer. Colussi obtained letters of office and mailed them to the co-personal representatives along with instructions to immediately open an estate account and pay all expenses and deposit all income in that account. Previously, the co-personal representatives agreed that Mason would retain the estate check book with either co-personal representative having the power to deposit or withdraw money. The estate assets were liquidated and approximately $236,000.00 went into the account. Unknown to the co-personal representative and Colussi, Mason began writing checks for her personal use and the use of relatives. The majority of the estate funds were depleted within nine (9) months of the decedent's death. The lawyer and the co-personal representative reported the embezzlement to the police. The co-personal representatives each resigned along with Colussi. Finnerty was appointed successor personal representative. Finnerty, on behalf of the estate, filed a complaint against Colussi alleging he committed legal malpractice by failing "to inform himself as to the status of the estate assets or monitor their use." Colussi filed an answer along with a counterclaim to recover unpaid attorneys fees. He then filed a motion for summary judgment alleging that he had no duty to monitor the estate bank account, that he was entitled to receive attorneys fees for his representation of the estate. The estate in opposition, designated the deposition testimony of an estate lawyer who opined that Colussi breached the applicable standard of care by failing to control or monitor the estate checking

[73] 720 NE 2d 376 (Ind. App. 1999).
[74] 696 NE 2d 863 (Ind. App. 1998).
[74.1] 932 NE 2d 726 (Ind. App. 2010).
[74.2] 954 NE 2d 1042 (Ind. App. 2011).

account. The trial court granted Colussi's motion for summary judgment, noting the expert testimony was more testimony of one lawyer's practice and not necessarily a duty on behalf of all lawyers to monitor the estate account.

The Court of Appeals reversed and remanded. Instead of focusing on whether or not there was a duty to control or monitor the estate account, the Court of Appeals stated that it was a given that the lawyer owes a duty to the estate to "use the degree of care and skill that a reasonably careful, skillful and prudent attorney would use under the same or similar circumstances." By phrasing the case in this manner, the Court of Appeals found the case to be a question of breach (in other words a question of fact) rather than whether or not a duty exists. Accordingly, the Court of Appeals found that a genuine issue of material fact existed as to whether the lawyer breached a duty owed to the estate. The Court of Appeals went on to also reverse the summary judgment on Colussi's fees finding that a genuine issue of material fact exists as to whether he was entitled to receive the full amount dependent on the determination of whether or not he breached the standard of care. A written limited scope of services may have prevented this issue.

In response to the Colussi case, the Indiana legislature effective July 1, 2013, added IC 29-1-10-20 which states in subsection (b) that:

> (b) Except as otherwise provided in a written agreement between the estate lawyer and an interested person, an estate lawyer:
>
> (1) represents and owes a duty only to the personal representative;
> (2) does not have a duty to collect, possess, manage, maintain, monitor, or account for estate assets unless otherwise required by a specific order of the court; and
> (3) is not liable for any loss suffered by the estate, except to the extent the loss was caused by the estate lawyer's breach of a duty owed to the personal representative.

Related to these issues would be problems that may involve foreign jurisdictions where the lawyer is not qualified to practice.

4.3. **SOLUTIONS**. The exact scope of representation should be discussed and agreed on between the lawyer and the client. Preferably, this agreement should be set forth in writing in a document similar to that attached as **Appendix A**. The lawyer in many cases may want to take pains to exclude from the scope of representation certain items that the lawyer necessarily does not wish to undertake such as Medicaid qualification, a foreign jurisdiction problem, or a complex federal estate tax determination.[74.3]

Finally, a closing letter should be sent when the matter is complete notifying the client that no more work is anticipated.

5. DETERMINE FEE.

[74.3] See ACTEC, "Engagement Letters: A Guide for Practitioner," 1999.

5.1. **RULE.** Rule 1.5 sets forth the specific factors to be considered in determining the reasonableness of a fee and in the case of a new matter requires that an agreement be reached with the client, preferably in writing, before any representation is commenced.

5.2. **PROBLEMS.** For many clients, fees are going to be a number one concern and fear. Many are on fixed incomes or a very limited budget and will want to know the cost of the legal services and how those legal services are paid.

In the Matter of Woolbert,[74.4] the lawyer handling a supervised estate withdrew without court permission $35,000.00 in fees. Later, the lawyer asked for approval and the court reduced the fees to $14,500.00. The lawyer argued fees could be paid at any time. The Supreme Court cited IC 29-1-10-13 as requiring court approval. For prior violations and this violation, the lawyer was suspended for 1 year.

In Estate of Grimm,[74.5] the will limited the lawyer's fee to $50,000.00. The lawyer accepted this limitation. The lawyer ended up hiring two more law firms to assist. Neither entered an appearance. The probate court granted fees in excess of $50,000.00. The Court of Appeals reversed because none of the lawyers submitted itemized bills. It also found the total amount of fees could not exceed the $50,000.00 and that the two law firms hired by lawyer should look to the lawyer for payment after itemizing their bill.

In Matter of Miller,[74.6] the lawyer had fee problems with several estates. In one he withdrew over $148,000.00 in fees as lawyer and personal representative when he could only justify $80,000.00. In a different supervised estate, he withdrew fees without court approval then repaid it with interest. The Supreme Court determined that was wrongful conversion. The lawyer was suspended for 1 year.

The Estate of Inlow,[74.7] involved an intestate estate of over $180,000,000.00. The children opened an estate with one child as personal representative. The widow (a second spouse) asked for a different personal representative. The probate court appointed co-personal representatives. Later the court removed the child as personal representative. The remaining personal representative's lawyers asked for fees in an amount equal to the maximum under the local probate rule, $1,520,000.00. After hearing, the probate court reduced the fee to $750,000.00. The Court of Appeals reversed and remanded because no evidence under the RPC 1.5 factors was used.

In Matter of Hefron,[74.8] the lawyer entered into an hourly agreement to recover estate assets. After learning the assets had significant value, the lawyer insisted on a contingency agreement despite knowing a settlement was basically reached. The Supreme Court stated that the contingency fee was unreasonable and should be renegotiated.

[74.4] 672 NE 2d 412 (Ind. 1996).
[74.5] 705 NE 2d 483 (Ind. 1999).
[74.6] 720 NE 2d 171 (Ind. 2000).
[74.7] 735 NE 2d 240 (Ind. App. 2000).
[74.8] 771 NE 2d 1157 (Ind. 2000).

In the Matter of Welke,[74.9]the lawyer charged a $1,500.00 "nonrefundable" retainer. When client terminated the representation he failed to refund the unearned portion of the retainer for some eight months. In a separate count he charged a client a $3,000.00 "nonrefundable" minimum fee and failed to refund that fee on termination of his representation. Basically, there is no such thing as a "nonrefundable" retainer. A thirty day suspension was imposed. However, in Robert L. Canada[79.9.1.] the Indiana Supreme Court did uphold a nonrefundable fee payment in a criminal case where the fee agreement clearly stated the fee was nonrefundable and it was reasonable. In Matter of Chaxis,[79.9.2.] the result, once again, was no such thing as a "nonrefundable retainer."

In the Matter of Beckner,[74.10] the Supreme Court among other ethical issues dealt with an attorney who in the course of handling the estate entered into a contract to be paid $28,000.00. The attorney later wrote a letter requesting an additional $11,000.00 fee. The estate was actually handled in Virginia by a Virginia lawyer and there was little showing of any reason for the additional fee. In addition to the fee, the lawyer submitted invoices to the beneficiary for legal expenses he claimed to have incurred in connection with the estate. As a result of this misconduct and others, the lawyer was disbarred.

In Matter of Stochel,[74.11] a contingency fee agreement gave the lawyer 40% of a $180,000.00 recovery in an estate. The recovery was paid in annual payments with the first payment of $60,000.00. The lawyer kept $50,000.00 of the first payment. The Supreme Court covered the rules on fee splitting (writing necessary and must be related to work done) and contingent fees (in writing). The lawyer was given a public reprimand, but a warning was given that similar cases will face greater sanctions.

In Estate of Mary L. Daniels,[74.12] estate litigation involved a $180,000.00 claim for services against a $100,000.00 estate. The first estate lawyer got paid and got out. The second estate lawyer asked for $16,000.00 in fees up front which were approved. After discovery, the second lawyer asked for another $26,000.00. The probate court rejected these fees. The claim for services was allowed out of the estate left. The Court of Appeals affirmed based mainly on the fact that if the second request for fees was granted the fees would exceed over 50% of the estate.

In Matter of Powell,[74.13] the lawyer was employed to remove the trustee of a special needs trust knowing the trustee was willing to resign. The trust held proceeds from a personal injury recovery and was established by the victim because of drug and alcohol dependency. The lawyer took the case on a contingency fee. The Supreme Court found the fee to be exploitive given the client's condition. The lawyer was suspended for 120 days.

[74.9] 772 NE 2d 992 (Ind. 2002).
[79.9.1.] 986 NE 2d 254 (Ind. 2013).
[79.9.2.] 2020 Ind. LEXIS 472
[74.10] 778 NE 2d 806 (Ind. 2002).
[74.11] 792 NE 2d 874 (Ind. 2003).
[74.12] 856 NE 2d 763 (Ind. App. 2006).
[74.13] 953 NE 2d 1060 (Ind. 2011).

In Matter of Newman,[74.14] the lawyer was employed at an hourly rate and contingency rate based on estate distribution to remove the personal representative, reinstate client as personal representative, and remove the estate lawyer. The lawyer successfully got a new judge but was fired 3 weeks later. Despite requests from the former client, it took the lawyer six weeks to withdraw, 18 months to produce time sheets and 3 years to summarize the work. The lawyer was suspended for 18 months for waging war on his client.

In Matter of Williams,[74.15] an elderly woman asked the lawyer to administer her estate and gave the lawyer a power of attorney. When nursing home bills were not paid, a niece got involved. The client revoked the power of attorney. The new lawyer asked for an accounting which the original lawyer resisted. The trial court found that the lawyer had billed for 546 hours of work for total fees of $93,500.00 from an estate of about $300,000.00. The lawyer defended claiming the money was for him to write books including "American Folk Gospel." The lawyer was suspended for 2 years with the notation that the lawyer was not actually practicing law currently. Two justices thought disbarment appropriate.

5.3. **SOLUTIONS.** A written fee agreement is recommended in all circumstances similar to that set forth as Appendix A. Monthly payments may be preferable to clients on a budget.

6. PRESERVE CLIENT'S CONFIDENTIAL INFORMATION.

6.1. **RULE.** Rule 1.6 provides:

> "(a) A lawyer shall not reveal information relating to representation of a client unless a client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) To prevent reasonably certain death or substantial bodily harm;
>
> (2) To prevent the client from committing a crime or committing fraud that is reasonably certain to result in substantial injury to the financial interest or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) To prevent, mitigate or rectify substantial injury to the financial interest or property of another that is reasonably certain to result or has resulted from the client's commission

[74.14] 958 NE 2d 792 (Ind. 2011).

[74.15] 971 NE 2d 92 (Ind. 2012).

> of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (4) To secure legal advice about the lawyer's compliance with these rules;
>
> (5) To establish a claim or defense on behalf of the lawyer and a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
>
> (6) To comply with other law or a court order.
>
> (c) In the event a lawyer's physical or mental disability where the appointment of a guardian or conservator of an attorney's client's files, disclosure of a client's name in files is authorized to the extent necessary to carry out the duties of the person managing the lawyer's files."

The confidentiality rule applies not merely to matters communicating confidences by the client but also to all information relating to the representation, whatever its source. Moreover, rules regarding confidentiality apply even if a lawyer-client relationship is only considered and after the relationship has been terminated.

Effective January 1, 2005, the Indiana Supreme Court adopted Rule 1.18 which deals with "prospective clients." Under this rule, if information is received from a person seeking legal representation, it is subject to the confidentiality rules.

Technology and its impact on confidential communications is an emerging area of law. Electronic communications are not always secure.[74.16] Standards exist to protect client information.[74.17]

In The Matter of Mullins,[75] a lawyer received a public reprimand for breach of confidentiality. The lawyer created a not-for-profit as guardian over Sue Ann Lawrence, an incapacitated adult whose parents were seeking the removal of nutrition and hydration. A corporation was appointed as temporary limited guardian with authority to seek a stay or other relief. While guardian, the corporation sent out Sue Ann Lawrence's medical records to news agencies. The lawyer was charged with breaching the confidentiality of the client's medical records, improper use of the medical records in an effort to embarrass the parents and improperly interfering in the matter where they had no interest.

In Opinion 4 of 1997, one of the issues dealt with the lawyer's ability to disclose a daughter's plan to have her brother execute a disclaimer of his interest in an estate where the

[74.16] ISGA Legal Ethics Committee, Legal Ethics Involved in Online Social Media and Networking; An Overview, Res Gestae, March , 2011, p. 29.

[74.17] International Legal Technical Standards Organization, "2011 Guidelines for Legal Professionals," www.iltso.org., 2011.

[75] 649 NE 2d 1024 (Ind. 1995).

brother had a very low IQ and lived in a group home on account of developmental disabilities. The question asked by the lawyer was whether he could disclose to the court his concerns about the daughter's plans or the son's capacity. Under old Rule 1.6, the answer was yes based on four different aspects of the rule. First, under the facts it was believed that the son's incapacity was generally known. Second, it was felt that the disclosure was impliedly authorized to carry out the lawyer's representation. Third, the disclosure was authorized in order to prevent the sister's crime. Fourth, the disclosure was necessary to avoid assisting the daughter in committing a fraud on a tribunal. A copy of Opinion 4 is attached as **Appendix D**.

In Matter of Lehman[75.1.] among many rule violations was the lawyer's disposal of confidential information in a trash bin where a reporter found the information. The result was a two year suspension without automatic reinstatement.

In Matter of Smith[75.2] a lawyer's tell all book about his intimate relationship with a famous client resulted in disbarment.

6.2. PROBLEMS.

6.2.1. **REFERRALS.** The mere fact a client was referred to the lawyer indicates that there is an agency or individual concerned about the client. Often that concern takes the form of follow up questions to the lawyer as to the status, nature or services provided to the elderly client.

6.2.2. **MULTIPLE CLIENTS.** The client is often involved in situations where multiple clients are undertaken by the lawyer. Specifically, a husband and wife situation is often encountered. In addition, it is not unusual for the entire family to undertake some type of family estate plan.

6.2.3. **DECEDENT'S FILE.** The lawyer's file on a decedent may still have confidential information. The question is often what can be released and under what circumstances.

Illinois Professional Conduct Advisory Opinion 21-02 addresses these issues. The opinion concludes that "the Illinois Rules of Professional Conduct allow a lawyer to provide the executor and trustee named in a deceased client's estate planning documents with the final executed copies of those documents and whatever portions of the estate planning file may be helpful to the named fiduciary to carry out the deceased client's intent expressed in those documents. The lawyer may give other family members limited information about the deceased client's estate planning documents and file if providing that limited information will allow a beneficiary to enforce her rights or if the disclosure might prevent litigation. If a lawyer receives a subpoena issued in a will or trust contest for a deceased client's estate planning file, the lawyer should contest the subpoena and not comply until a court has ordered the lawyer to comply.

[75.1.] 3 NE 3rd 536 (Ind. 2014).

[75.2] 991 NE 2d 106 (Ind. 2013).

6.3. **SOLUTIONS.** At the outset of the lawyer-client relationship, the lawyer should notify the referring agency or individual of the duties owed to the client particularly with regard to the confidentiality of information. Information should only be released to the referring agency or individual if the client has knowingly executed a release of information similar to the release of information required by medical providers. A sample release of legal information is provided in **Appendix C.**

In the representation of multiple clients, disclosure and consent is again the key. It should be made clear to each multiple client that any information received by the lawyer is to be shared with all clients and that there is to be no confidential information kept from any of the clients. The lawyer should reserve the right to withdraw from representation of a client if the lawyer determines a conflict of interest is involved. If electronic communication is desired, obtain client's consent in writing. See **Appendix A** for a sample form.

7. COMMUNICATE WITH CLIENT.

7.1. **RULE.** Rule 1.4 states:

"(a) A lawyer shall:

> (1) Promptly inform the client of any decision or circumstances with respect to which the client's informed consent, as defined in Rule 1.4(e) is required by these rules;
> (2) Reasonably consult with the client about the means by which the client's objectives are to be accomplished;
> (3) Keep the client reasonably informed about the status of the matter;
> (4) Promptly comply with reasonable requests for information; and
> (5) Consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the rules of professional conduct or other law or assistance limited under Rule 1.2(c).

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

7.2. **PROBLEMS.** Communication with a client can often be difficult. As discussed in Section 2, it is a lawyer's duty to determine the capacity of the client and what the client can and cannot understand. With the client's consent, the lawyer can rely on the client's physician to aid in this matter.

In The Matter of Ranlin,[76] the lawyer violated the professional rules of conduct by failure to explain matters to the extent reasonably necessary to permit the client to make informed decisions regarding representations.

In Re Cable,[77] the lawyer failed to respond to the client's request for information or to consult with the client in such a way as to allow the client to make informed decisions. This coupled with the lawyer's failure to cooperate with the disciplinary commission, return the fee, or to act with reasonable diligence led to the attorney being disciplined.

A factual situation similar to Cable as set out in the Matter of Kelley,[78] led to a suspension from the practice of law for a period of not less than eighteen months.[79]

7.3. **SOLUTIONS.** As proposed under Section 2, it would be to the lawyer's advantage if the client through a general power of attorney or a specific power of attorney as set forth in **Appendix B** appoints an attorney-in-fact with whom the lawyer may communicate as a surrogate decision maker.

8. BE DILIGENT.

8.1. **RULE.** Rule 1.3 states:

"A lawyer shall act with reasonable diligence and promptness representing a client." This is probably the number one client complaint about lawyers.

8.2. **PROBLEMS.** Diligence and promptness is probably more of a concern with the elderly client than the normal client. It can statistically be shown that the elderly client has less time to live. If that were not enough, the elderly client often in the initial conference, discloses various medical treatments and conditions which could become serious suddenly. The death of the elderly client could terminate the legal representation and, worse, create a malpractice situation if certain documents have not been prepared and executed before the elderly client's demise.

There are a multitude of Indiana cases on lack of diligence.

In Matter of Henry,[80] the lawyer received the nine month suspension for failing to take necessary steps to close estates opened over a course of eight years.

In Matter of Dils,[81] a lawyer received a public reprimand for failure to comply with various court orders regarding filing of accounts and closing of the estate. In a second estate, he failed to respond to various claims and elections taken against the will.

[76] 697 NE 2d 44 (Ind. 1998).

[77] 715 NE 2d 396 (Ind. 1999).

[78] 655 NE 2d 1220 (Ind. 1995).

[79] Communication with the client was also a factor in attorney discipline in the Matter of Beardsley, 658 NE 2d 591 (Ind. 1995); In Re Snyder, 706 NE 2d 1080 (Ind. 1999); and the Matter of Trueblood, 633 NE 2d 249 (Ind. 1994).

[80] 599 NE 2d 602 (Ind. 1992) reinstatement granted 615 NE 2d 1085.

In Matter of Thornburg,[82] a suspension from the practice of law for a period of not less than three years came from a variety of different cases including failing to close the estate within the statutory period of time, failing to file inventory of estate assets, failing to pay debts of the estate, and using estate assets for personal expenses.

In Matter of Wirt,[83] the lawyer was suspended from the practice of law for a period of three years for neglecting for almost three years to admit a will to probate or to clear title to real property and diverting estate funds to his personal use.

In Re Snyder,[84] the lawyer was suspended for six months for neglecting two estates and failure to keep his clients informed as to the status.

In Matter of Noel,[85] the lawyer received a one year suspension subject to conditional reinstatement for failure to secure the closing of an estate, failure to file a final accounting and not complying with reasonable requests from the executor of beneficiary to keep them advised of the status of the estate.

In Matter of Clifford D. Shaul,[86] the lawyer was suspended from the practice of law for a period of not less than one year for lying to the beneficiaries, not settling the estate for years, failing to pay debts of the estate, filing false affidavits, and general neglect of the estate.

In Matter of Martin H. Kinney,[87] the lawyer was suspended from the practice of law for a period of 120 days for not concluding the estate within a period of twelve years and waiting more than six years to file the first lawsuit which was ultimately dismissed. While the hearing officer found no misconduct, the Supreme Court found that there was sufficient neglect.

In Matter of Thomas W. Fox,[88] the lawyer was suspended for three years for neglecting an estate and depositing estate funds into his interest trust account.

In Matter of Beardsley,[89] the lawyer received a public reprimand. The will was probated in 1978. Ultimately, a final account was filed in 1995. While there was no harm to the client and the attorney waived unpaid attorney fees, the court found neglect.

In Matter of Antcliff,[90] the lawyer received a sixty-day suspension for neglect in an estate and as legal guardian.

[81] 646 NE 2d 667 (Ind. 1995).
[82] 381 NE 2d 855 (Ind. 1978).
[83] 482 NE 2d 721 (Ind. 1985).
[84] 706 NE 2d 1080 (Ind. 1999).
[85] 622 NE 2d 154 (Ind. 1993).
[86] 592 NE 2d 687 (Ind. 1992).
[87] 605 NE 2d 172 (Ind. 1993).
[88] 547 NE 2d 850 (Ind. 1989).
[89] 658 NE 2d 591 (Ind. 1995).

In Re Razo,[91] the lawyer was suspended from the practice of law. The lawyer was hired to update a will and draft a power of attorney for the fee of $150.00. When the client tried to reach the lawyer, he failed to respond or acknowledge attempts. On one occasion, the client parked in front of the lawyer's office and waited for him. He assured the client that the documents were ready but the next day called to say that the computer ate them. For this neglect and for other reasons, he was suspended.

In Re Deets,[92] the lawyer was publicly reprimanded for taking fees without court approval but also for failure to insure that the death taxes were paid. The estate took more than eleven years after it was opened to close.

In Matter of Watson,[93] the lawyer was suspended from practice for sixty days with reinstatement conditioned upon substance abuse counseling. The lawyer wrote a will naming himself as executor. Personal property was sold without the daughter's knowledge and the house was rented and subjected to abuse. A late inheritance tax return was filed which was backdated. When a hearing was held to remove the lawyer as executor, a telephone call from the local hospital was received stating that the lawyer was in no condition to appear because of a consumption of alcohol.

In Matter of Clifford,[94] the lawyer was suspended for thirty days. The lawyer opened an estate in 1989. Information was required from the personal representative that was late in being received nevertheless it took until 1993 for the lawyer to draft an Indiana inheritance tax return.

In Matter of Kehoe,[95] the lawyer received a ninety-day suspension for neglect in mishandling two estates.

In Matter of Miller,[96] the lawyer neglected an estate prompting the court to issue a contempt citation for failure to close the estate. She abandoned a representation without notifying the decedent's husband. To add insult to injury, the lawyer charged a fee of almost $5,000.00 for the representation. This produced a series of ethical violations leading to a suspension not fewer than one hundred and twenty days.

In Matter of Watson,[97] the lawyer served as attorney and/or fiduciary on several estates, guardianships and conservatorships. The lawyer consistently failed to file inventories, accountings, reports, and other required pleadings. Again, to add insult to injury, the lawyer took a fee of $3,100.00 without court approval. This resulted in a suspension from the practice of law not fewer than six months.

[90] 629 NE 2d 848 (Ind. 1994).

[91] 720 NE 2d 719 (Ind. 1999).

[92] 716 NE 2d 367 (Ind. 1999).

[93] 630 NE 2d 1354 (Ind. 1994).

[94] 665 NE 2d 90 (Ind. 1996).

[95] 678 NE 2d 394 (Ind. 1997).

[96] 764 NE 2d 212 (Ind. 2002).

[97] 757 NE 2d 1002 (Ind. 2001).

In Matter of Tudor,[98] violation was found from the lawyer's neglect of an unsupervised estate and failure to respond to the commission's demand for response. This led to a suspension of sixty days.

In Matter of Williams,[98.1] a lawyer who had been suspended twice before for neglect was disbarred for what the court referred to as "serial neglect." This is true even though the hearing officer only recommended a suspension of 180 days. The complaint against the lawyer involved five separate circumstances of neglect and also involved the lawyer's failure to appear at two of three scheduled pretrial disciplinary hearings.

In Matter of Rabb, [98.2]the lawyer served as personal representative and lawyer to an estate. The lawyer failed to pay bequests, pay inheritance tax, file accounting (despite 7 requests from court) and appear in court (despite 3 orders). The lawyer received a 180 day suspension.

In Matter of Ghoulson,[98.3] the lawyer was hired to handle an estate and did nothing for 2 years. The lawyer was suspended for 90 days.

In Matter of Reed,[98.4] the lawyer opened an estate about 10 years ago. It took him one year to file an inventory. Three heirs died during the estate administration. The lawyer opened two of those estates which remained open for over 4 years. The lawyer was given a public reprimand.

In Matter of Kilburn,[98.5] the lawyer opened 22 estates between 1988 and 1996. In 2004, all were still open. The lawyer was suspended for 30 days but if he did not close the estates within 60 days, the suspension would be 2 years. Also the lawyer could not open an estate or be an estate lawyer for 2 years.

In Matter of Peters,[98.6] the lawyer was co-personal representative. Inheritance tax was paid but no order obtained for two years. The federal estate tax was late causing penalties and interest. The other co-personal representative could not get the lawyer to respond so a new lawyer was hired. The lawyer was suspended for 30 days.

In Matter of Coody,[98.7] the lawyer for an estate failed to file tax returns. After a grievance was filed, the lawyer refunded the fee and finished the estate. The lawyer got a public reprimand.

[98] 760 NE 2d 154 (Ind. 2001)
[98.1] 764 NE 2d 613
[98.2] 763 NE 2d 959 (Ind. 2000).
[98.3] 803 NE 2d 1125 (Ind. 2004).
[98.4] 815 NE 2d 505 (Ind. 2004).
[98.5] 809 NE 2d 331 (Ind. 2004).
[98.6] 854 NE 2d 1026 (Ind. 2006).
[98.7] 945 NE 2d 148 (Ind. 2011).

In Matter of Roger,[98.8] the lawyer opened an estate in 2002. In 2007, beneficiaries filed a contempt action in court. Roger withdrew. While Roger had prior disciplinary issues, the court noted the personal representative knew his duties and would not respond to Roger's requests. The lawyer got a public reprimand.

8.3. **SOLUTIONS.** All clients demand priority. To put client's work in the normal course of business and turn to their matters whenever other work is done can prove a severe embarrassment and a source of potential liability.

9. **DO NOT LIE.**

9.1. **RULE.** Rule 4.1 states:

"In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of a material fact of law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client unless disclosure is prohibited by Rule 1.6."

Model Rule 3.3 states:

"(a) The lawyer shall not knowingly:

(1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
(2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclose by opposing counsel; or
(3) Offer evidence that the lawyer knows to be false."

9.2. **PROBLEMS.** The client's request often includes the transfer of assets to avoid taxes or qualify for welfare programs. The client is under tremendous monetary temptation to make the transfers without adequately reporting them.

In many cases, lawyers are contacted to complete the transfers with knowledge that the client is not going to reveal the transfers to the appropriate government agency. This can place the lawyer in a severe quandary.

In Matter of Richards,[99] disbarment was the appropriate sanction for an attorney who filed false affidavits with the trial court and testified falsely before a federal court and

[98.8] 961 NE 2d 991 (Ind. 2011).
[99] 755 NE 2d 601 (Ind. 2001).

submitted into evidence a falsified document about his health and ability to work in order to obtain extensions of time.

In Matter of Scahill,[100] admonishment was given to an attorney who represented a husband in a divorce proceeding and failed to disclose material facts to the tribunal when disclosure was necessary to avoid assisting fraudulent acts against the tribunal by the client.

In the Matter of Drook,[101] the lawyer signed his secretary's name as notary and witness to various documents and wills. He was suspended for 60 days.

In Matter of Kertis,[101.1] the lawyer as personal representative stole about $159,000.00 from an estate where he inherited $65,000.00 and was paid fees of $25,000.00. The lawyer then filed a false account. The lawyer was disbarred.

In Matter of Manns,[101.2] the lawyer practiced with her lawyer husband. The husband discussed investment with a client in platinum. The client was to invest $20,000.00. The $20,000.00 was spent by the lawyer and her husband. The lawyer was suspended 3 years.

In Matter of Gofourth,[101.3] an intestate decedent left his parents and brother as equal heirs. The lawyer prepared a will for the decedent leaving most of the estate to the father. The father forged the will and forgave a $1,000.00 debt owed by the lawyer. Another lawyer probated the will not knowing it was a forgery. The drafting lawyer originally insisted the will was valid but later confessed pleading guilty to a felony. The lawyer was suspended for 3 years.

In Matter of Graham,[101.4] the lawyer was to be paid 3% of the value of the estate. After 2 years, the lawyer filed a final account even though assets were not distributed and taxes not paid. The account inflated the value of the estate and erroneously listed non-estate assets. The lawyer was suspended 90 days.

In Matter of Denimure,[101.5] the lawyer prepared an affidavit to transfer property from an estate. The client obtained his siblings signatures but the signatures were not notarized. The lawyer notarized the document. There is no allegation the signatures were forgeries. However, the lawyer received a public reprimand.

In Matter of Robison,[101.6] the lawyer prepared documents for co-personal representatives to sign. The lawyer sent the documents to the first co-personal representative who sent the documents back with one document unsigned. The lawyer forged the co-personal

[100] 767 NE 2d 976 (Ind. 2002).
[101] 855 NE 2d 989 (Ind. 2006).
[101.1] 769 NE 2d 588 (Ind. 2002).
[101.2] 684 NE 2d 1071 (Ind. 1997).
[101.3] 839 NE 2d 690 (Ind. 2005).
[101.4] 891 NE 2d 987 (Ind. 2008).
[101.5] 908 NE 2d 609 (Ind. 2009).
[101.6] 985 NE 2d 336

representative's signature and sent the documents to the other co-personal representative who immediately saw the forgery. The lawyer was fired and a complaint filed with the disciplinary commission. The lawyer received a public reprimand as agreed discipline. Justice Dickson and Justice Rush, noting the importance of the integrity of signature, dissented believing a lengthy suspension was required.

In Matter of Stout, the attorney was suspended for 30 days with reinstatement for threatening to use intimate photos to get a woman to dismiss a request for a protective order.[101.7]

9.2.1. **MEDICAID - OPINION 2 FOR 2003.** Opinion 2 for 2003 centers on the ethical duties of an estate lawyer where there is a claim for reimbursement by Medicaid. In the first and second scenarios the lawyer does not know there is a Medicaid claim. As a result no duty is owed to Medicaid. In the third scenario, the lawyer is instructed not to give notice to Medicaid. The discussion then centered on whether the personal representative was committing a crime (not clear) which would be an exception to the confidentiality rules. The Ethics Committee agreed the lawyer should at the least resign. Under the fourth scenario, the lawyer resigned. The issue still remains whether the lawyer should report confidential information under the crime exception. The fifth scenario involved a small estate affidavit with no duty to notify creditors. Even if the lawyer knows of the Medicaid claim no duty to notify was found. A copy of Opinion 2 is at **Appendix G.**

9.3 **SOLUTIONS.** The lawyer should be leery of doing specific transfer work without understanding the underlying reason for the work. For example, preparation of a deed may be a simple procedure but nevertheless may be part of a fraudulent scheme on the clients behalf. The lawyer should inquire as to why the transfer is being made. Upon obtaining indications that the client may be walking a fine line between proper and improper conduct, the lawyer should immediately communicate in writing with the client the lawyer's position as to the proper course for the client to take. Should the client choose an improper course of action that is known to the lawyer, the lawyer is required by the rules to take action to remedy that false situation.

10. **SAFEGUARD CLIENT'S PROPERTY.**

10.1. **RULE.** Rule 1.15 provides:

> (a) A lawyer shall hold property of client's and third persons that is in a lawyer's possession in connection with the representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

[101.7] 2022 Ind. LEXIS 92

Sadly, the number of cases involving misuse of the client's money is way too many.[102]

10.2. **PROBLEMS.** Hopefully, all lawyers are aware of the need to keep client funds separate from their own and the proper maintenance and use of the trust account. What seems to be a problem that has not yet caused disciplinary action, but a serious one nonetheless, is the treatment of the client's tangible property often times the business records, deeds, and other legal papers provided in connection with the estate planning representations. Many of these legal documents are irreplaceable and vitally important to the client or their beneficiaries at a later date.

In Matter of Ivanovich,[103] a newly admitted lawyer waited over a year to set up a trust account. She then failed to institute any safeguards and commingled funds. She was placed on probation for 18 months and given a list of things to do.

In Matter of Small,[103.1] the lawyer was given a 6 month suspension for overdrawing trust account and maintaining inadequate records. The lawyer was given 2 years suspension stayed on condition the lawyer attended classes and pay for periodic audits.

Results similar to Matter of Small can be found in:

In Matter of Cuellar[103.2]

In Matter of Doyle[103.3]

In Matter of Ulrich[103.4]

In Matter of Goldberg [103.5]

In Matter of Davis[103.6]

In Matter of Moores[103.7]

[102] In the Matter of Reed, 657 NE 2d 103 (Ind. 1995); In the Matter of Thornburg, 381 NE 2d 855 (Ind. 1978); In the Matter of Wirt, 482 NE 2d 721 (Ind. 1985); In the Matter of Huebner, 561 NE 2d 492 (Ind. 1990); In Re Hagedorn, 725 NE 2d 397 (Ind. 2000); In the Matter of Frosch, 643 NE 2d 902 (Ind. 1994); In the Clanin, 619 NE 2d 269 (Ind. 1993); In Re Neswick, 719 NE 2d 389 (Ind. 1999); In the Matter of Hill, 655 NE 2d 343 (Ind. 1995); In the Matter of John A. Cauley, 602 NE 2d 795 (Ind. 1994); In the Matter of Rybolt, 769 NE 2d 590 (Ind. 2002); and In the Matter of Lossemore, 771 NE 2d 1154 (Ind. 2002) [unfortunately these are only the reported cases. Most of these types of cases involve the resignation of the lawyer.].

[103] 858 NE 2d 102 (Ind. 2006).

[103.1] 818 NE 2d 466 (Ind. 2004).

[103.2] 880 NE 2d 1209 (Ind. 2008).

[103.3] 891 NE 2d 558 (Ind. 2008).

[103.4] 918 NE 2d 332 (Ind. 2009).

[103.5] 952 NE 2d 200 (Ind. 2011).

[103.6] 2021 Ind. LEXIS 687

[103.7] 2021 Ind. LEXIS 180

10.3. **SOLUTION**. The lawyer should have a system in place in the lawyer's office with the lawyer's employees in dealing with the client's property. If copies can be made and returned on the same day in which they were delivered to the client, there should be no problem. If the material is to be retained, it should be placed separate from the lawyer's property and inventoried. If at all possible, when property is returned to the client, the lawyer should have a receipt ready to show the return of the property. One example receipt is to simply copy the property and note on the copy the return to the client.

If there is a dispute over payment, the lawyer should think twice before trying to assert a lien on the file. Don Lundberg has an excellent discussion of the ethical issues in "File, File – Who's Got the File?"[104]

Rules for Admission and Discipline, Rule 23, Section 27, requires a lawyer to have in place a plan for files to be maintained if the lawyer dies or is incapacitated. The rule requires a surrogate lawyer be named for lawyers who do not practice in a firm.

11. MISCELLANEOUS ISSUES.

11.1. ADVERTISING.

In Matter of Scozen,[105] the lawyer received a public reprimand. The lawyer anticipated being named attorney for an estate. When another lawyer was hired, the lawyer sent the letter to a charitable residuary beneficiary telling them that the estate would require close monitoring and that if they wish to discuss it with him he would be happy to do so. The Disciplinary Commission of the Supreme Court found the lawyer violated Rule 7.3(c) which dealt with advertising material because his letter did not indicate that it was advertising material. The lawyer was reprimanded. One justice felt that the punishment was insufficient.

In Matter of Foster,[106] the lawyer was also a licensed insurance agent. The advertisement in the paper contained the words "Estate Specialist since 1979." Rule 7.4(a)(2) prohibits any attorney holding himself out as a specialist. The lawyer, also in his role as insurance agent, contacted current insureds to request information about a policy surrender form. Because of the client's company, the lawyer was found to have violated Rule 8.4 which prohibits an attorney engaging in conduct involving dishonesty and deceit. A public reprimand was given to the lawyer.

In Matter of Wilkinson,[107] an ad was run in the yellow pages describing the lawyer as a "bankruptcy and debt specialist." This provoked a public reprimand for the lawyer for violating Rule 7.1(b).

[104] Res Gestae, Spt. 2007, p. 29.

[105] 660 NE 2d 377 Ind. 1996).

[106] 630 NE 2d 562 (Ind. 1994).

[107] 770 NE 2d 825 (Ind. 2002).

In Matter of Allen,[108] the lawyer sent out a letter soliciting a deceased's survivor for a wrongful death action. The letter did not contain the words "advertising material" and had not been filed with the commission. The lawyer received a public reprimand for these violations.

In Re Anonymous,[108.1] two lawyers advertised in a small privately-owned directory as "Elder Law Specialists." They were not certified. Each received a private reprimand.

In Re Anonymous,[108.2] the American Association of Motorcycle Injury Lawyers, Inc. offers to lawyers franchise opportunities. In this case, "Law Tigers" included referrals, a website and various logos. The web site linked to the lawyer's web site and contained representations prohibited under Indiana's rule. The Indiana lawyer was held responsible for these impermissible statements and received a public reprimand.

11.2. **FEE SPLITTING.**

In Gillaspy,[109] the lawyer was suspended from the practice of law for a period of ninety days for affiliating with two nonlawyers who assisted individuals in the preparation of living trust, wills and bankruptcy petitions. All the necessary paper work was prepared and filed by the nonlawyers and the lawyer simply collected a flat fee.

In Matter of Hear, [110]the lawyer was suspended for 100 days for using a nonlawyer to solicit clients for debt collection business and sharing fees with the nonlawyer.

In Matter of John,[111] the lawyer received a public reprimand by entering into written agreements with a nonlawyer where the nonlawyer agreed to act as attorney-in-fact for a plaintiffs group in a civil suit against an insurance company. The nonlawyer was to receive twenty percent of any gross award.

In Matter of Dilk,[111.1.] the lawyer received about 2,675 referrals from Foreclosure Solutions, LLC over a 3 year period of time. In most cases the lawyer never met with the client but filed appearances to stall foreclosure. The lawyer received a flat $150.00 or about $600,000.00 over the period of time. This was only a fraction of the amount paid to the referring company. The lawyer was suspended for six months.

In Matter of Joyce,[111.2.] a lawyer was suspended 180 days for estate planning work referred by United Financial Systems, Corp.

11.3. **CONTEMPT.**

[108] 783 NE 2d 1118 (Ind. 2002).
[108.1] 783 NE 2d 1130 (Ind. 2003).
[108.2] 6 NE 3rd 903 (Ind. 2014).
[109] 640 NE 2d 1054 (Ind. 1994).
[110] 755 NE 2d 579 (Ind. 2001).
[111] 758 NE 2d 929 (Ind. 2001).
[111.1.] 2 NE 3d 1263 (Ind. 2014).
[111.2.] 9 NE 3d 142 (Ind. 2014).

In Matter of Contempt of Mittower,[112] the lawyer had given up his license to practice law. He nevertheless continued to provide legal services to a company reviewing legal documents and contracts. Among those documents were estate planning documents. Because of his contempt, the lawyer was fined a sum of $500.00 and ordered to never identify himself in any way as a licensed attorney.

In Matter of Love,[112.1.] lawyers failure to timely comply with request for information from hearing officer got a public reprimand.

In Matter of Reeman,[112.2.] a suspended lawyer was fined $3,000.00, ordered to disgorge all fees paid to him while suspended and sentenced to 10 days in prison.

In Matter of Shalk,[112.3.] a suspended lawyer handled two guardianship matters. He was fined $500.00.

In Matter of Greene,[112.4.] an Illinois lawyer contracted with 11 Indiana hospitals offering to help patients recover insurance money to pay the hospital bills. He was enjoined from anymore practice in Indiana.

In Matter of Haigh,[112.5.] a suspended patent lawyer continued to provide legal services. The lawyer argued that under federal regulations he could continue like a paralegal. The Supreme Court disagreed and fined him $1,000.00 and disbarred him.

11.4. **PARALEGAL**. Opinion Number 3 of 2000 deals with a contract paralegal who is not a full or part time employee of the attorney. The opinion approves of the use of a contract paralegal as long as proper supervision and control over the paralegal's work is maintained and guidelines in Rule 9 are followed.

Opinion Number 2 of 2001 involves the improper use of the paralegal. In this case, violations were found under Rule 5.3 for failure to properly supervise the paralegal who was sent out to have the power of attorney executed without the lawyer even meeting the principal.

In Matter of Schuyler,[112.1] the paralegal stole $34,000.00 from an estate. Even after being informed of the theft, the lawyer continued to employ the paralegal until she pled guilty. The lawyer reimbursed the money and cooperated but received a public reprimand for failure to supervise the paralegal.

[112] 693 NE 2d 555 (Ind. 1998).
[112.1.] 19 N.E. 3d 251 (Ind. 2014).
[112.2.] 999 NE 2d 844 (Ind. 2013).
[112.3.] 2 NE 3d 679 (Ind. 2014).
[112.4.] 6 NE 3d 947 (Ind. 2014).
[112.5.] 7 NE 3d 980 (Ind. 2014).
[112.1] 894 NE 2d 543 (Ind. 2008).

11.5. **SEX.** RPC 1.8 (j) is effective January 1, 2005 and specifically prohibits sex with a client unless the consensual relationship existed before employment.

In Matter of Tosoutsouris,[113] the attorney was suspended for thirty days for engaging in sexual relation with a client while representing her. Interestingly, the case points out the fact that there was no ethical rule at that time prohibiting consensual sex. However, the Supreme Court found sufficient precedent and reasons in the conflict of interest rules to support the suspension.

In Matter of Pacior,[114] the lawyer received a public reprimand for expressing romantic interests in a client by sending her various notes and cards. Three times he hugged and kissed the client during the pendency of the dissolution and bankruptcy.

In Matter of Pugliese,[114.1] the lawyer in a dissolution matter had sex with the client and was suspended 30 days.

In Matter of Usher,[114.2.] a lawyer desired an intimate relationship with a law student who interned with his firm. She did not. The lawyer began a smear campaign to harm the student's career. Lawyer was suspended 3 years with no automatic reinstatement.

In Matter of Hollander,[114.3] the lawyer was a public defender. Using his position, he identified H.S. as someone arrested for prostitution. He texted H.S.'s cell phone offering help in exchange for sex. The police had the cell phone and received the text. The lawyer met with an undercover policewoman and again offered help for sex. The lawyer was suspended one year.

In Matter of Ruiz,[114.4] the attorney was publicly reprimanded for unwanted sexual advances.

In Matter of Thomas,[114.5] the attorney was suspended 30 days with automatic reinstatement for sexually explicit text messages.

11.6. **SUBSTANCE ABUSE.**

In Matter of Clayton,[115] addiction to alcohol and drugs resulted in a six month suspension with reinstatement conditioned on treatment.

In Matter of Followell,[115.1] the lawyer was on probation with JLAP requirements, when an alcohol related violation occurred in Florida. The lawyer was suspended 150 days with extended JLAP requirements.

[113] 748 NE 2d 856 (Ind. 2001).
[114] 770 NE 2d 273 (Ind. 2002.
[114.1] 941 NE 2d 1044 (Ind. 2011).
[114.2.] 987 NE 2d 1080 (Ind. 2013).
[114.3] 27 NE 3d 278 (Ind. 2015).
[114.4] 2021 Ind. LEXIS 523
[114.5] 2021 Ind. LEXIS 270
[115] 778 NE 2d 404 (Ind. 2002).

In Matter of McCall III,[115.2] the lawyer self-reported a public intoxication conviction and got a 90 day suspension plus JLAP conditions.

In Matter of Potthast,[115.3.] the lawyer was a deputy prosecutor who pled guilty to DUI. She got 30 days suspension and JLAP conditions.

In Matter of McConnell,[115.4.] the lawyer was found guilty of OWI and did not report to the Commission. He was suspended 180 days with JLAP conditions.

11.7. **RESPECT.**

In Matter of McClellan,[116] the lawyer received a public reprimand when in his Petition for Rehearing in the Court of Appeals he stated: "When is it okay for a lawyer to lie? When his lips are moving to an insurance adjuster."

In Reed Sign Services, Inc. v Reid,[117] the Court of Appeals granted rehearing mainly to admonish the lawyer for a display of disrespect to the court. One subheading in the Petition for Rehearing was entitled "Misstatements of the Record and Facts by the Court of Appeals." The lawyer also stated that the Court of Appeals ignored the obvious answer, ignored binding case precedence, misconstrued the real facts and misstated the record. If that were not enough, the lawyer went into a lengthy analogy comparing the trial court's ruling to an imagined ruling regarding an appeals court justice who is retained under the election retention voting. The imagined trial court judge is described as a fool and the ruling is called ridiculous. The Court of Appeals noted that the particular lawyer had previously been admonished by the Court of Appeals in a separate opinion. Appellate fees were granted to the responding party.

In The Matter of Thomsen,[118] the lawyer received a public reprimand when in a petition for custody the lawyer stated:

> "The wife continues to associate herself around town in the presence of a black male, and such association is causing and placing the children in harm's way, as husband has been advised by neighbors of the wife and child. Said black male has resided at the home of the wife and children, for lengthy periods of time, while 'fixing the computer.' The behavior of placing the children in harm's way should be stopped immediately."

[115.1] 992 NE 2d 685 (Ind. 2013).
[115.2] 996 NE 2d 783 (Ind. 2013).
[115.3.] 8 NE 3d 197 (Ind. 2014).
[115.4.] 11 NE 3d 902 (Ind. 2014)
[116] 754 NE 2d 500 (Ind. 2001).
[117] 760 NE 2d 1002 (Ind. App. 2001).
[118] 837 NE 2d 1011 (Ind. 2005).

If that were not enough, the lawyer at trial referred to the gentleman as "the black guy" and "the black man."

In the Matter of Dempsey,[118.1] the lawyer purchased a multi-unit residential property. When the Seller later foreclosed, the lawyer filed Chapter 13 bankruptcy. In the foreclosure, the lawyer initiated three appeals. In the bankruptcy, the lawyer filed a consolidated appeal. During the appeals, the lawyer was admonished not to argue issues already decided. The lawyer was found to continue to argue res judicata issues, misstate facts and make baseless claims (alleged mental disabilities on part of Sellers and Sellers' daughters). In 2009, in downtown Indianapolis, the lawyer handed out leaflets referring to Sellers as "slumlords" and Seller's lawyers as "skylocks" and part of a Jewish cabal. The leaflet then went on about Jews including accusation of involvement in the 9/11 attacks. The lawyer was suspended for no less than three years without automatic reinstatement. Justice David voted to disbar.

In Matter of Barker,[118.2.] the lawyer represented a father in a dissolution action. The lawyer sent a letter to opposing counsel with s copy to the court accusing the mother of being an illegal alien. The lawyer argued the letter was legitimate advocacy but was suspended 30 days anyway.

In Matter of Ogden,[118.3] the lawyer opened an estate with Judge Coleman as special judge. Judge Coleman was later replaced. Nevertheless, the lawyer corresponded with his client and Judge Coleman in a manner highly critical of the Judge. In addition, after the Supreme Court issued an opinion on distribution of civil forfeiture funds, the lawyer sent letters to the judge in Marion County asking that ruling be followed. The lawyer was suspended 30 days.

In Matter of Schlesinger,[118.4] public defender was reprimanded for at least four appellate briefs using the wrong sentencing standard.

11.8. CONTACT WITH AN ADVERSE PARTY.

In Matter of Baker, III,[119] the attorney received a public reprimand for sending letters to the opposing party without consent from the opposing parties' counsel. In this case, the lawyer wrote a letter to the opposing lawyer claiming the opposing lawyer should be disqualified because of a conflict of interest. Without that consent of the opposing lawyer, a copy of the letter was forwarded to the bonding company, the lawyer's client.

[118.1] 2013 Ind. LEXIS 342 (Ind. 2013).

[118.2.] 993 NE 2d 1138 (Ind. 2013).

[118.3] 10 NE 3d 499 (Ind. 2014).

[118.4] 2016 Ind. LEXIS 212 (Ind. 2016).

[119] 758 NE 2d 56 (Ind. 2001).

In Matter of Uttermohlen,[120] the lawyer received a public reprimand for sending a letter to the opposing party represented by another lawyer stating that a request for change of venue was wasteful. A copy of the letter was sent to the opposing lawyer.

12. **CONCLUSION.**

The Rules provide a thicket of rules and regulations with which the lawyer must comply. The current trend appears to be to draft rules which deal with specific situations. Unfortunately, the end result appears to be more confusion. It is impossible to draft a rule for each specific situation.

Each lawyer, to remain a lawyer, must adopt a consistent approach to all clients which incorporate into the lawyer's practice these ethical considerations.

[120] 768 NE 2d 449 (Ind. 2002).

APPENDIX A

ESTATE PLANNING
LEGAL FEE AND EXPENSE AGREEMENT

I, Kolb Roellgen & Traylor LLP, and you, Client, make this agreement regarding legal services.

1. SERVICES. I am employed by you to provide you with legal advice and representation. You authorize and direct me to do any lawful act on your behalf which I deem advisable. I agree to notify you of all significant developments and to consult with you in advance as to important decisions related to those developments. The scope of representation is limited to:____

____

1.1. LIMITED REPRESENTATION. This Agreement is limited to the legal services described above and does not include nor does it engage me to represent you in any matter not described above.

2. FEES. The fee you pay me shall be determined by his action.

2.1. FIXED FEE – SPECIFIC DOCUMENTS: One hour of legal advice and counsel will be provided and the following documents will be prepared for fixed fees as designated:

Will or Codicil with Trust	$________(Each Will)
Will or Codicil without Trust	$________(Each Will)
Power of Attorney (POA)	$________(Each POA)
Health Care Representative Appointment (HCRA)	$________(Each HCRA)
Living Will	$________(Each Living Will)
Revocable Trust	$________(Each Trust)

2.2. HOURLY. For the preparation of all documents other than listed above in 2.1 and for legal advice and counsel in excess of one hour, the fee shall be based on an hourly rate times the amount of time spent on your matter.

Lawyer's rate	$________
Legal Assistant's rate	$________
Clerical rate	$________

The hourly rate may, at any time, be increased on written notice from me to you. The increase shall be effective as of the date the notice is mailed. A statement showing a new billing rate will be considered notice.

3. PAYMENT OF FEES. Upon receipt of a statement from me, you agree to pay the amount shown on the statement to me within thirty (30) days after the date of the statement.

4. EXPENSES. You authorize me to incur expenses on your behalf including but not limited to the expenses listed below and shall reimburse me as shown below:

Computer legal research	-actual cost
Travel in my car	-IRS rate of reimbursement
Other travel costs and meals	-actual cost
Special postage or delivery charges	-actual cost
Filing or recording fees	-actual cost
Court costs	-actual cost
Witness fees	-actual cost
All other costs	-actual cost

Expenses will be billed monthly to you for payment within thirty (30) days after the date of the statement.

5. MULTIPLE CLIENTS. If more than once client has employed me, you acknowledge that you could now or in the future employ separate lawyers to pursue your sole interest and protect your confidential information. Nevertheless, you now wish to jointly employ me. Each of you agree that all relevant communications received by me from any of you in this matter may be fully, disclosed to all of you. I retain the right to withdraw from representing any one or more of you without explanation if, in your sole discretion, a conflict of interest arises.

6. POWER OF ATTORNEY. If you appoint an attorney-in-fact under a durable power of attorney and either grant the attorney-in-fact the specific power to handle your legal matters or the general power to do anything lawful for you, I may communicate directly with the attorney-in-fact on all of your legal matters including the disclosure of confidential information and may accept the attorney-in-fact's decision as though made by you without communicating with you.

7. TAX DEDUCTION. To the extent that my services constitute tax counsel or planning or involve tax research, the fees are deductible for income tax purposes if you itemize your deductions. At your request, we will identify that part of our fee which is deductible.

8. FILE DESTRUCTION. You authorize me to destroy your file more than six (6) years after the file is closed.

9. ELECTRONIC COMMUNICATIONS. You authorize me to communicate with you by electronic communication even though it may not be secure.

10. ADJUSTMENT. You shall notify me in writing of any changes, deletions, additions, corrections or other adjustments to billing statements within thirty (30) days after the date of the statement. You agree to waive any and all objections to my statement not noticed in writing to me within thirty (30) days after the date of the statement.

11. COLLECTION AND LATE CHARGES. Late payments shall bear interest at the rate of 12% per annum from the first day payment is due. You shall also pay to me an amount equal to the reasonable cost of collection incurred in collecting the late payments, recognizing that I will collect the late payment and that I am entitled to charge as collection costs my time and expenses expended in collecting the payment as normally charged to you on an hourly basis. In the event an action is commenced, Client hereby submits to the jurisdiction and venue of the Courts of Knox County in the State of Indiana.

12. SUCCESSORS. This agreement shall be binding on the heirs, beneficiaries, legal representatives, assigns and successors in interest to you and me and shall not be affected by my subsequent change in identity, organization, or personnel.

DATED THIS ___ DAY OF ______________, 2022.

KOLB ROELLGEN & TRAYLOR LLP

By____

CLIENT

______________________________	______________________________
(Signature)	(Signature)
______________________________	______________________________
Printed Name	Printed Name
______________________________	______________________________
Address	Address
______________________________	______________________________
Phone Number(s) (Home and Cell)	Phone Number(s) (Home and Cell)
______________________________	______________________________
E-Mail	E-Mail

_____(Initial) I authorize emails concerning my case including invoices.

APPENDIX B

SPECIAL
POWER OF ATTORNEY
OF ____________________

BY THIS POWER OF ATTORNEY, I name an attorney-in-fact with power to act on my behalf pursuant to IC 30-5, as it exists now and is amended in the future.

1. SINGLE ATTORNEY-IN-FACT. As my attorney-in-fact, I name
____________________________, whose address and telephone number are
____
____.

1.1. SUCCESSOR. If my original attorney-in-fact fails or ceases to serve as my attorney-in-fact, I name as my successor attorney-in-fact ______________________________ whose address and telephone number are ____.

1.1.1. FOR MULTIPLE ATTORNEYS-IN-FACT. My successor shall replace any attorney-in-fact who fails or ceases to serve.

1.2. LIABILITY LIMITED. My attorney-in-fact shall only be liable for actions undertaken in bad faith except if my attorney-in-fact is involved in self-dealing.

1.3. NO FEE. My attorney-in-fact shall not be entitled to a fee for services provided as my attorney-in-fact.

2. EFFECTIVE IMMEDIATELY. This power of attorney shall be effective as of the date it is signed.

3. POWERS. I give to my attorney-in-fact or any successor attorney-in-fact the powers specified in this section to be used on my behalf, **PROVIDED** that my attorney-in-fact shall not have any power which would cause my attorney-in-fact to be treated as the owner of any interest in my property.

3.1. CLAIMS AND LITIGATION. Authority with respect to claims and lititgation pursuant to IC 30-5-5-11.

4. ALL PRIOR POWERS OF ATTORNEY REVOKED. All powers of attorney executed by me prior to the date of this power of attorney are revoked.

5. GUARDIAN. If protective proceedings are instituted on my behalf or a guardian is requested to act on my behalf, I name my attorney-in-fact to act on my behalf or as my guardian.

6. TERMINATION ON DEATH. Without regard to my mental or physical condition, this power of attorney shall continue in effect until revoked or until my death whichever occurs first.

I have executed this instrument on ____________________, 20__.

____

STATE OF ________________, COUNTY OF ______________, SS:

The undersigned, a notary public in and for the above county and state residing in _______________ County, _____________________, certifies and witnesses that the above-signed, personally known to me to be the same person whose name is subscribed to this instrument, appeared before me in person and acknowledged the signature and delivered the instrument as a free and voluntary act, for the uses and purposes named in the instrument.

Witness my hand and Notary Seal this ___ day of _____________________, 20__.

____
Notary Public

My Commission Expires:

_________________________________ _________________________________
(printed name of notary)

THIS INSTRUMENT WAS PREPARED BY ________________________________, LAWYER, KOLB ROELLGEN & TRAYLOR LLP, P.O. BOX 215, VINCENNES, INDIANA 47591.

APPENDIX C

RELEASE OF LEGAL INFORMATION

I, client, acknowledge that you, Kolb Roellgen & Traylor possesses confidential information in the form of documents and verbal communications received by you during the course of your handling my legal work and related matters.

I hereby consent to you releasing any or all of this confidential information without limitation with regard to time or type of information to ______________________________

DATED________________________.

____
(Typed Name)

STATE OF INDIANA, COUNTY OF KNOX, SS:

The undersigned, a notary public in and for the above county and state, residing in ________ County, Indiana, certifies and witnesses that the above signed, personally known to me to be the same person whose name is subscribed to this instrument, appeared before me in person and acknowledged the signature and delivered the instrument as a free and voluntary act, for the uses and purposes named in the instrument.

Dated:________________________, _______.

____
Notary Public

My Commission Expires:

____
(printed name of notary)

____

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE
OPINION NO. 4 OF 1997

The Legal Ethics Committee of the Indiana State Bar Association (the "Committee") has been requested to provide an advisory opinion with respect to the following facts and issues:

FACTS

Daughter is administrator of Father's intestate estate. The only other heir is Son, who, although an adult, has an I.Q. of 70 and lives in a group home on account of his developmental disabilities. Further, Son has very little education and may not be able to read or write.

Daughter tells Lawyer that Son doesn't want any part of the estate, and asks Lawyer to "prepare some paper" which Daughter will take to Son to have him sign. Lawyer advises Daughter that Son may not have the capacity to disclaim or make a gift of his interest. Daughter says if Lawyer isn't going to "do things her way," she'll hire another lawyer.

Daughter does retain new counsel. When Daughter comes to Lawyer's office to pick up the file, Daughter tells Lawyer that her new counsel has a plan to "get around things."

ISSUES

1. Who did Lawyer represent, Daughter as personal representative, "the estate," or other interests, such as heirs, creditors and taxing authorities? (In effect, does Lawyer have any duty to protect Son's interests?)

2. May or must Lawyer disclose to the court the concerns Lawyer has about Daughter's plan or about Son's capacity?

ANALYSIS

Issue One

A. Applicable Rules

R.P.C. Rule 1.7(b) provides that a lawyer shall not represent a client if the representation may be materially limited by the lawyer's responsibilities to another client, a third person, or the lawyer's own interests, absent the lawyer's reasonable belief that the representation will not be adversely affected and consent of the client. The Comment highlights the issue:

> Conflict questions may also arise in estate planning and estate administration. . . . In estate administration the identity of the client may be unclear under the law of a

> particular jurisdiction. Under one view, the client is the fiduciary, under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

R.P.C. Rule 1.2(d) provides that a lawyer shall not counsel a client to engage, or assist a client in engaging in criminal or fraudulent conduct, but a lawyer may discuss the legal consequences of proposed conduct and counsel or assist a client in making a good faith effort to determine the validity, scope, meaning or application of the law. The Comment to Rule 1.2 contains the following:

> Where the client is a fiduciary, the lawyer may be charged with special obligations in dealing with a beneficiary.

R.P.C. Rule 1.14 governs a lawyer's representation of a client under a disability, and subsection (b) provides that a lawyer may take protective action or seek the appointment of a guardian of a client only where the lawyer reasonably believes the client cannot act adequately in the client's own interest. The Comment to Rule 1.14 states:

> If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

R.P.C. Rule 1.16(a) provides that a lawyer shall withdraw from representation if, among other grounds, the representation will result in violation of the Rules of Professional Conduct. Subsection (b) provides that a lawyer may withdraw from representation if withdrawal can be accomplished without material adverse effect upon the client's interest or if, among other grounds, the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.

B. Discussion

Indiana case law provides scant authority on who is the client. In Vollmer by Vollmer v. Rupright, 517 N.E.2d 1240 (Ind.App. 1988), guardians of a minor child sought to challenge the attorney fee agreement between the personal representative of the child's mother's wrongful death estate and the attorney. The Court of Appeals affirmed the trial court's denial of the petition to vacate the award of attorney fees. In the course of assessing the fairness of the contingent fee agreement, the Court of Appeals observed that a wrongful death estate personal representative is a trustee for the benefit of distributees, and does not act in his individual capacity or for his own benefit in hiring counsel. Further, given the extraordinary fiduciary nature of such a personal representative's responsibility, his activities and those of his attorney must be totally above reproach. The Court of Appeals held that any proposed contingent fee contract should be submitted for court approval prior to execution, but upheld the agreement at issue even though it was not submitted to the trial court for approval.

In Walker v. Lawson, 526 N.E.2d 968 (Ind. 1988), the Indiana Supreme Court held that an action will lie by will beneficiaries against the attorney who drafted the will on the basis that the beneficiaries are known third parties. A terminally ill woman asked her lawyer for advice on how to convey her estate to her two sons and not to her second childless spouse. The lawyer prepared a will disinheriting the husband and devising her entire estate in trust to the two sons. After her death, the spouse filed an election to take against the will. Sons sued lawyer, alleging he should have employed some other device to protect the estate against husband. While affirming the existence of a legal duty owed by lawyer to known third parties such as sons who would be will beneficiaries, the Supreme Court held that there was no mechanism available to lawyer to carry out wife's intent, so lawyer's failure to do so was not malpractice.

Hermann v. Frey, 537 N.E.2d 529 (Ind.App. 1989) was another malpractice case involving whether an attorney is subject to suit by a known third party who is not his client. The trial court granted summary judgment in favor of attorney, reasoning that attorney represented the administrator of the wrongful death estate, not surviving spouse individually. The Court of Appeals reversed, finding privity was not a requirement in a suit against attorneys by known third party beneficiaries. Spouse was permitted to proceed with her suit against attorney, which alleged that attorney was negligent in not naming one particular physician as a defendant in a medical malpractice action.

Two excellent law review articles examine in depth the issue of who is the client: "The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation," by Robert W. Tuttle, 1994 Univ. of Illinois Law Review 889 (1994) and "Representations Involving Fiduciary Entities: Who Is the Client?" by Jeffrey N. Pennell, 62 Fordham Law Review 1319 (1994). Tuttle in particular does a thorough job of examining the problem through a process known as casuistry.

Tuttle finds fault with the two leading models of fiduciary representation, which would operate as default rules in the absence of a specific agreement. The two models are the American Bar Association Committee on Ethics and Professional Responsibility Formal Opinion 94-380, and the model of Professor Geoffrey Hazard set out in "Triangular Lawyer Relationships: An

Exploratory Analysis," 1 Geo.J. Legal Ethics 15 (1987). ABA 94-380 states that the fiduciary is the lawyer's only client, and a lawyer owes the client's beneficiaries only the obligations owed to third parties. Hazard would treat the fiduciary and the beneficiary as joint clients of the lawyer, extending the lawyer's duties of loyalty and care to include the client's beneficiaries. Tuttle finds that ABA 94-380 ignores the peculiar nature of a fiduciary's role and the fiduciary's relationship to beneficiaries, and that the Hazard approach does not deal with all contexts in which lawyers represent fiduciaries, discounts the potential for conflict of interest, and exposes lawyers to increased malpractice liability.

Tuttle offers an alternative theory by which a lawyer representing a fiduciary assumes a relationship with the beneficiary that, while not an attorney-client relationship, is also not the same as the usual relationship between an attorney and a non-client. At a minimum, Tuttle would impose a legal duty on lawyers not to advise or assist fiduciary clients to breach fiduciary obligations, and in addition would impose a moral duty to protect the beneficiary from harm. Tuttle attempts to strike a balance between the two harms a lawyer might do a beneficiary through 1) not protecting the beneficiary against a fiduciary's breach, and 2) turning the lawyer into a "fiduciary watchdog" which would duplicate the oversight by courts or others and greatly increase costs, which tend to fall on beneficiaries.

Tuttle concludes that changes need to be made in the Rules of Professional Conduct. The first, a change to Rule 1.2(d), would prohibit a lawyer from counselling a client to engage, or assist a client, in conduct the lawyer knows is criminal, fraudulent, or a breach of fiduciary duties. The second is a change to Rule 1.6, so that a lawyer would have the discretion to disclose a fiduciary's breach of duty, without liability either to the fiduciary for disclosing or the beneficiary for failing to disclose. (Washington's version of Rule 1.6 authorizes an attorney to disclose a breach of fiduciary duty to a court which appointed the fiduciary, which would solve the problem involving a personal representative but would not address defalcations of a trustee, which is not court-appointed.) One other possible rule change bears consideration: Florida's Rule 1.7 expressly provides that the personal representative is the client and not the estate or the beneficiaries, and Pennell finds that this is a viable approach for other states in addressing the problem of who is the client, as it would minimize conflicts of interest and help clarify parties' expectations.

It bears mentioning that the lawyer and client may enter into an agreement affecting the scope or terms of representation. Some probate lawyers make it clear in an engagement letter that the lawyer has the right to disclose the client's breach of fiduciary duties. Some even go so far as to send a "non-engagement letter" to estate beneficiaries making it clear the lawyer does not represent them. Finally, the Marion County Probate Court recently added the following language to the advisory of duties which each personal representative and guardian must sign:

> I authorize my attorney to disclose to the court any information relating to his or her representation of me as personal representative even if such information would otherwise be confidential.

Such waivers eliminate any problem with the lawyer advising the court of client wrongdoing.

Absent rule changes, the law in Indiana would seem still to be unclear, though Tuttle's argument that a lawyer has legal duties running only to a fiduciary client is compelling. Having answered the question "who is the client?" with the answer "probably the personal representative as a fiduciary," the analysis of conflict of interest and confidentiality issues becomes somewhat more straightforward.

Issue Two

A. Applicable Rules

R.P.C. Rule 1.9(b) provides that a lawyer who formerly represented a client in a matter shall not thereafter use confidential information to the disadvantage of the former client except as Rules 1.6 or 3.3 would permit or require, or when the information has become generally known.

R.P.C. Rule 1.6(a) provides that a lawyer shall not reveal information relating to a client's representation without consent after consultation, except for disclosures impliedly authorized in order to carry out the representation or except as provided in subsection (b). R.P.C. Rule 1.6(b) provides that a lawyer may reveal confidential information to the extent the lawyer reasonably believes disclosure is necessary to prevent the client from committing a criminal act or where the lawyer's representation of the client has been called into question (in such contexts as a civil action against the lawyer, a criminal charge against the lawyer, or a disciplinary action against the lawyer).

R.P.C. Rule 3.3(a)(2) prohibits a lawyer from making a false statement of material fact to a tribunal and from failing to disclose a material fact to a tribunal which is necessary to avoid assisting a client's criminal or fraudulent act against the tribunal.

R.P.C. definition of "fraud" or "fraudulent" is conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

R.P.C. definition of "knowingly" is actual knowledge of the fact in question, which may be inferred from circumstances.

B. Discussion

Under the facts as set out, and under the assumption that Daughter as personal representative is Lawyer's client, four theories would support Lawyer's disclosure of Son's possible incapacity: 1) The information of Son's possible incapacity has become generally known, 2) disclosure is impliedly authorized to carry out Lawyer's representation, 3) disclosure is authorized because necessary to prevent Daughter's crime, and 4) disclosure is required in order not to assist Daughter in committing a fraud on a tribunal.

Under the first theory, lawyer would be permitted pursuant to Rule 1.9(b) to disclose Son's possible incapacity if such information has become generally known. (Note that information about Daughter's scheme to coerce Son into giving her his share of the inheritance is different, in that this information is almost certainly not generally known.) The director of Son's group home is aware of Son's condition, and if Son were placed there by any social service agency or after some agency study or report or a physician's diagnosis, it begins to look as though Son's condition is generally known. Any special education or testing by or through a school would also contribute to an inference that son's condition is generally known. Lawyer's belief that Son's condition is generally known would probably be reasonable if Lawyer learns of some of the circumstances such as the above. If the fact is generally known, Rule 1.9(b) authorizes Lawyer to disclose the fact to the court.

The analysis of the second theory begins with viewing Lawyer's role as assisting Daughter as personal representative in complying with her duties under the law. Among these are, in supervised administration, a duty to file an accounting with the court; in unsupervised administration, a duty to furnish an accounting to interested distributees and file a verified closing statement with the court; and in every estate, a duty to make distribution only to the persons entitled thereto. Note also I.C. 29-1-1-20(b), which provides that in a probate proceeding where an interested person is incapacitated, a court may appoint a guardian ad litem to represent such person if the court determines that representation of the interests otherwise would be inadequate, and which further provides that the court shall set out its reasons for appointing a guardian ad litem. Note also that under I.C. 29-3-3-2, if an incapacitated person's property does not exceed $3500, the court may authorize a suitable person to receive and manage the property instead of appointing a guardian. Where the property exceeds $3500, the implication is that only a guardian may receive it. Thus, a personal representative may never distribute property to an incapacitated heir or devisee, but must distribute to a court-appointed suitable person where the amount is $3500 or less, or otherwise, to a guardian. I.C. 29-1-1-20(b) and I.C. 29-3-3-2 may be seen as imposing additional duties on a personal representative where a distributee is incapacitated. These duties of Daughter as personal representative make the fact of Son's questionable capacity information the fiduciary must report to the court prior to making distribution. Since Lawyer was retained to assist Daughter in carrying out her duties, Lawyer is impliedly authorized to disclose the fact to the court in order to carry out the representation, pursuant to Rule 1.6(a). Under this theory, then, Lawyer may disclose the fact of Son's questionable capacity to the court. There is some doubt, however, whether disclosures can be impliedly authorized by a representation after the representation has terminated, though such a result would seem to follow because Rule 1.9 (which applies to former clients) incorporates Rule 1.6 (which applies during a representation).

The third theory is that Lawyer may disclose the fact to the court in order to prevent Daughter from committing a criminal act, as authorized by Rule 1.6(b). If Son indeed lacks capacity or is subject to undue influence and Daughter knows it, Daughter's having him sign over his inheritance to her may well constitute all of the elements of criminal fraud or conversion. This potential crime can be prevented by Lawyer disclosing Son's questionable capacity to the court and the court's appointment of a guardian ad litem in two ways: First, the court will make a determination that Son is incapacitated, so that no subsequent attempt by Son to alienate his property will be valid. Second, Son will have an ally in the person of the guardian ad litem, who can help Son resist undue influence and otherwise protect Son's interests.

Fourth, it can be argued that Lawyer is required to disclose the fact to the court in order not to assist Daughter in committing a fraud on the court, pursuant to Rule 3.3(a)(2). Daughter's failure to apprise the court of the relevant information that Son may be an incapacitated person interested in the estate may constitute fraud on the tribunal under the R.P.C. definition of fraud. The failure to disclose relevant information, coupled with a personal representative's duty not to distribute to an incapacitated person, may raise Daughter's silence to the level of conduct having a purpose to deceive, in this case to deceive the court. Lawyer shall not then knowingly fail to disclose the information, because such conduct would assist Daughter's fraud on the tribunal. Lawyer need not "know" that Son actually lacks capacity; Lawyer need only know that Son's condition is such that the court ought to consider whether Son's interests require the appointment of a guardian ad litem, and Lawyer certainly knows this.

In sum, Lawyer may disclose to the court the fact that Son may be incapacitated either because the fact is generally known, because the disclosure is impliedly authorized by the representation, or because disclosure is necessary to prevent Daughter from committing a criminal act. Alternatively, Lawyer must disclose the fact of Son's questionable capacity to the court in order not to assist Daughter in committing a fraud on the tribunal. Disclosure of Daughter's scheme itself (clearly something Daughter expects to be covered by lawyer-client confidentiality) would not be necessary if disclosure of Son's questionable capacity results in the court appointing a guardian ad litem for him.

While these good-faith arguments in favor of disclosure are available to Lawyer under the current state of Indiana law, the result is by no means clear-cut. Daughter would need to be audacious indeed to sue Lawyer in malpractice for breaching her confidence and defeating her scheme by disclosure, but a suit by Son's later-appointed guardian (suing Lawyer in malpractice because Son is a known third party) would be a real possibility if Lawyer does not disclose. Where, however, a personal representative client is merely negligent instead of greedy and corrupt and an estate beneficiary is not incapacitated, a more difficult balancing-of-interests problem is presented. Each fact situation is, of course, different, but one or more of the theories justifying Lawyer's disclosure here may apply in other circumstances.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 1 FOR 2001

An attorney, referred to as "Attorney A" for purposes of this opinion, has submitted an inquiry to the Committee regarding his relationship with a financial planning firm (the "FP firm"). The description of the business arrangement presented in Attorney A's letter is referred to herein as the "Submitted Facts."

In the Committee's opinion, the proposed business arrangement, as described in the Submitted Facts, violates Rule 7.3 of the Indiana Rules of Professional Conduct, may violate Rules 5.4 and 5.5(b), and possibly conflicts with several other rules.

The Submitted Facts

Attorney A is licensed and in good standing to practice law in the State of Indiana. His continuing education activities are focused largely on tax and estate planning issues. Attorney A is also stated to be ". . . licensed and in good standing as a Certified Financial Planner" (although Indiana law contains no explicit provisions for the licensing or certification of financial planners).

Attorney A is one of the owners of the FP firm, whose other owners and employees are non-lawyers. In delivering financial planning services, non-attorney personnel of the FP firm may decide that a customer also needs estate planning services. In such cases the representative of the FP firm may recommend that the customer retain Attorney A to perform these legal services.

The next step calls for Attorney A to prepare an "engagement letter," which would include statements that "none of the legal fees will be shared with non-lawyers," and that the FP firm's financial planning fees "do not change if the legal documents are prepared by client's long-standing attorney elsewhere." Upon engagement, Attorney A prepares the legal estate-planning documents and charges the client for those services separately from the financial planning services performed by the FP firm's other personnel.

Attorney A also accepts referrals from an outside financial planning firm, for "stand-alone estate-planning services," and charges the same document-drafting fees to such "outside" clients as to FP firm clients.

The FP firm does not advertise legal document drafting services and does not solicit document drafting engagements by its non-attorney representatives.

Submitted Questions

The primary question submitted is, "Does [Attorney A's] conduct in this scenario comply with the Indiana Rules of Professional Conduct?"

The inquiring party has also submitted three subsidiary questions, each of which follows from the primary question. Because the response to these subsidiary questions depends on the same analysis as the primary question, they are addressed individually below in the "Conclusions" section of this Opinion.

Analysis

The scenario outlined under the Submitted Facts raises issues concerning "multi-disciplinary practice" ("MDP") -- that is, whether and to what extent attorneys may ethically practice law as part of a business venture that is partially owned by non-lawyers, including members of other disciplines such as accountancy or financial planning.

The Committee recognizes that MDP is the subject of intense interest and discussion within the legal profession and has been addressed recently by, among other things, proposed amendments to the Model Rules recommended by the American Bar Association's Commission on Multidisciplinary Practice, which were rejected by the ABA House of Delegates on July 11, 2000. See e.g., William J. Harvey, The gathering storm: MDP versus the legal profession, legal ethics and the Indiana lawyer, Res Gestae, Sept. 2000, at 24; Caryn Langbaum, Will attorneys vote themselves out of the competition?, Res Gestae, Oct. 2000, at 12; The Future of the Profession: A Symposium on Multidisciplinary Practice, 84 Minn. L. Rev. 1269 (2000); Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership, 13 Geo. J. Legal Ethics 217 (2000). In Indiana these issues have also been studied by the ISBA's Indiana MDP Task Force.

Nevertheless, the Committee also recognizes that its role is to respond to specific inquiries raised by attorneys and to interpret the Rules as they exist today. Therefore, the present opinion is limited to addressing the particular circumstances set forth in the Submitted Facts; it is intended to express no broader opinion about the future or ethics of MDP.

The Committee's opinion is that the proposed arrangement outlined by Attorney A violates Rule 7.3(a), and may conflict with Rules 5.4 and 5.5(b), for the reasons discussed below.

A. Rule 7.3 -- Rule 7.3(a) provides, "A Lawyer shall not seek or recommend by in-person contact (either in the physical presence of, or by telephone) the employment, as a private practitioner, of himself . . . to a nonlawyer who has not sought his advice regarding employment of a lawyer, or assist another person in so doing."

Under the Submitted Facts, staff of the FP firm may, and for reasons discussed below are likely to be, recommending Attorney A's services to their non-lawyers clients. This practice may violate Rule 7.3(a) in two ways. First, because Attorney A is a part owner of the FP, at least some of the recommending personnel would be his employees, who could be deemed to be acting on Attorney A's own behalf in making an in-person recommendation of his services. Second, even if such personnel were not acting as his agents, Attorney A would be participating in this arrangement by "assisting another person in" recommending Attorney A's employment to a non-lawyer, in violation of the last clause of the Rule. See e.g., State Bar of Mich., Comm. on Professional and Judicial Ethics, Informal Op. CI-1058 (1985) (advising that lawyer may not enter into arrangement with debt consolidation corporation that interviews clients, evaluates their needs for legal services, and refers those requesting legal services to lawyer); N.Y. State Bar Ass'n, Comm. on Professional Ethics, Op.565 (1988) (advising that lawyer may not hire public relations and marketing firm to solicit potential clients in person, and may not compensate firm on basis of legal business so generated).

Although the Submitted Facts do not suggest that employees of the FP firm will be directly compensated based on their referrals to Attorney A, these employees can be expected to know that Attorney A is a part owner of the FP firm. [Thus, they may feel impelled by economic pressure, or induced by hope of financial reward, to recommend that a client retain Attorney A, regardless of whether retaining Attorney A -- or hiring any lawyer -- is in that client's best interests.]

Furthermore, the prospect that employees or the other, non-attorney owners of the FP will be rewarded -- even indirectly -- for referring clients to Attorney A creates the potential for violation of Rule 7.3(f). Under that Rule, a lawyer may not "compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client . . ."

Such rules reflect the principle that the selection of an attorney must "'result from a free and informed choice by the client'"and the concern that "when a nonlawyer has a monetary interest in referring cases to an attorney, then it is the referrer's and not the client's best interests that are being considered." Trotter v. Nelson, 684 N.E.2d 1150 (Ind. 1997) (holding that alleged contract between attorney and non-attorney for referral of clients was unenforceable as against public policy embodied by. Rule 7.3(f)) (citations omitted).

It should also be noted that under some circumstances, the "engagement letters" sent by Attorney A to prospective clients he has never met should be treated as solicitation letters governed by Rule 7.3(c). If one of Attorney A's co-owners or employees at the FP firm (or someone at the "outside" FP firm) simply gives a customer's name to Attorney A, without making a prior recommendation to the customer, or a recommendation is made without the customer having a "family or prior professional relationship with Attorney A and does not indicate a willingness to be contacted," then an ensuing written communication from Attorney A would appear to be within the reach of Rule 7.3(c). That Rule provides in relevant part, "Every written communication from a lawyer soliciting professional employment from a prospective client potentially in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words 'Advertising Material. . .'" In an analogous case, Matter of Anonymous, 630 N.E.2d 212 (Ind. 1994), unsolicited letters soliciting employment with respect to a need to avoid mortgage foreclosures were held to be subject to Rule 7.3(c)'s "Advertising Material" requirements.

B. Rules 5.4 and 5.5 -- This Committee has considered in the past the ethical issues raised by attorneys who offer legal services as part of non-legal businesses, and we have noted that such arrangements may violate a range of Rules in addition to 7.3. See, e.g., Opinion No. 4

of 1992 (concluding that attorney's relationship with financial services organization that referred prospective investors to attorney did not appear to violate Rule 5.4 or 5.5 so long as attorney prepared all forms and made independent assessment of client's legal needs, but that such arrangements created great potential for violation of Rules, and might implicate prohibitions on fee-splitting and referral services); Opinion No. 5 of 1991 (concluding that, notwithstanding fact that attorney labeled his business a real-estate management firm, and that certain tasks were a hybrid of lawyer and lay functions, arrangement would constitute practice of law, but attorney could advertise himself as offering property management services so long as he complied with Rules 7.1, 7.3, and 7.4).[1]

In the instant case, the Submitted Facts do not contain sufficient detail for the Committee to determine with certainty whether the proposed scenario would violate these other Rules. Moreover, there is often no clear line between the limits of financial-planning tasks that are merely "law-related services" and thus properly provided by non-attorneys, and other tasks so closely related to estate planning law that they constitute "the practice of law" and are foreclosed to non-attorneys. As the Indiana Supreme Court noted in State ex rel. Indiana State Bar Ass'n v. Indiana Real Estate Assoc., 244 Ind. 214, 191 N.E.2d 711, 714-15 (1963):

> Although the practice of law is one of the oldest and most honored professions, the law itself is by no means an exact science, the practice of which can be accurately and unequivocally defined . . . There is a twilight zone between the area of law which is clearly permitted to the layman, and that which is denied him. Thus, the

[1] Other states' bars have grappled with these issues as well; see Utah State Bar Ethics Advisory Opinion Committee, Opinion No. 97-09 (considering whether lawyer's plan to provide legal services in conjunction with non-lawyer estate-planning professionals violated Rules 1.1, 1.2(b), 1.6(a), 1.7(b), 5.3, and 5.5(b)); Report of the Illinois Bar Ass'n's Corporate Law Section to the Illinois State Bar Ass'n (www.illinoisbar.org/mdppro.html); report of the Boston Bar Ass'n's Ethics Committee (at www.bostonbar.org/pw/ethics/1999b.html).

> question which this court must determine is where, within this 'twilight zone,' it is proper to draw the line between those acts which are and are not permissible to people who are not lawyers.

Notwithstanding this zone of uncertainty, the Submitted Facts present a danger that the activities of the FP firm and its non-attorney representatives, by providing services in conjunction with Attorney A, could cross over the line into the practice of law. If so, Attorney A's actions could be considered as assisting those persons in violation of Rule 5.5(b), which provides that lawyer shall not "assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

For example, after non-attorney financial planners gave advice to the customer, only the final drafting of the recommended documents might be left to Attorney A. (In an extreme case: "Here are some standard forms that you can use, but you will have to get an attorney to look them over and re-type them before you sign them.")

Rule 5.4(c), which prohibits an attorney from allowing a person who "recommends the attorney's employment from influencing the attorney's professional judgment," might also be violated by these arrangements. For example, in Matter of Thrasher, 661 N.E.2d 546 (Ind. 1996), where an attorney regularly accepted referral of bankruptcy matters from a business management company specializing in financial and tax planning. The attorney signed and filed papers prepared by non-attorneys without having actually met or consulted with the client in question. The Court found that such a practice violated Rule 5.4(c) as well as Rules 1.1, 1.4(b), 1.8(f), 3.3(a)(1), 5.5(b), and 8.4(c).

Even if Attorney A took care to consult with the client and prepare documents personally, and thus avoid the specific practice disapproved of in Thrasher, the danger of compromising Attorney A's professional judgment could arise when non-attorney personnel of the firm advised their customers that they need particular types of estate planning documents, and then referred them to Attorney A for the drafting of such documents. If Attorney A finds that the suggested documents are in fact not the best answers to the clients' needs, he might nevertheless feel constrained against making alternative suggestions. Such suggestions would tend to discredit the expertise of his employees and thereby reduce the FP firm's reputation and the value of his ownership interest.

In addition to constraining the exercise of independent legal judgment as prohibited by Rule 5.4(c) , these circumstances could also present Attorney A with a material conflict between his own interests and those of his client, in violation of Rule 1.7(b). That Rule provides, "A lawyer should not represent a client if the representation of that client may be materially limited by . . . the lawyer's own interests." If the non-attorneys in the FP firm sell the client on the idea of buying certain items (e.g. annuities, stocks) there may be commission income involved which would at least indirectly benefit Attorney A. This would conflict with Attorney A's duty to independently evaluate the client's estate plan.

There is also a danger, depending on the details of the FP firm's structure and operations, that the scenario outlined by Attorney A would violate Rules 5.4(a) (prohibiting fee-sharing with non-attorneys) and 5.4(b) (prohibiting partnerships with non-attorneys "if any of the activities . . . consist of the practice of law").

Conclusion

For the reasons above, the Committee's opinion in response to the primary question posed by Attorney A is that the proposed arrangement violates Rule 7.3(a), and presents serious risk of conflict with Rules 5.4 (a)-(c) and 5.5(b), as well as the other Rules noted in the past cases cited above. The structure of this business arrangement seems inherently conducive of violations of several parts of the Rules of Professional Conduct and therefore may not be permitted.

The Committee's response to the three subsidiary questions set out below, all of which are presumed to be also governed by the Submitted Facts, follows the same analysis.

The first subsidiary question is as follows "Assuming arguendo that [Attorney A] can ethically provide legal services in this scenario, what is the extent to which [Attorney A's] financial planning co-workers can recommend [Attorney A] and/or other attorneys (who are not associated with the financial planning firm) for their clients' legal document drafting needs?"

For the reasons given above, the Committee believes that any referral by employees or co-owners of the FP firm to Attorney A would violate Rule 7.3(a). Rule 7.3(a) uses the term "shall not," and thus does not permit an "extent" or "degree" of recommendation or solicitation.

The second subsidiary question is, "Would the Committee's answer change if [Attorney A] kept an office or location separate from financial planning firm's office? . . . In other words, does [Attorney A's] physical proximity to the financial planning firm have an impact on the attorney's compliance with [the Rules]? [Is there a] "minimum physical proximity" [or] "minimum contacts" test in this regard?"

The answer to this question, and each of its three sub-parts, is no; the Committee does not believe that the physical configuration of Attorney A and FP firm personnel has any bearing on the policies behind or interests protected by Rule 7.3 or 5.4 and 5.5. Rather, it is the economic relationship between Attorney A and the FP firm, and the ability of the client to receive independent, competent legal advice, that governs the permissibility of these practices.

The third subsidiary question is, "Is [Attorney A] within the Rules of Professional Conduct if he/she works part-time in the financial planning firm and part-time as a solo legal practitioner?"

To the extent that this question refers to Attorney A's practice under the scenario contained in the Submitted Facts, the Committee believes that such practice is not within the Rules, for the reasons stated above.

To the extent that this question asks whether it is a violation under *any* circumstances for an attorney to practice part-time within a financial planning firm and part-time as a solo legal practitioner, the Committee believes that there is no *per se* prohibition on such dual employment, but that the circumstances of an attorney's particular practice must be evaluated with respect to the Rules cited above. The Committee's present Opinion must therefore be limited to the particular Submitted Facts presented by the inquiry, and not broadly applied to every situation in which an attorney maintains business interests or relationship beyond his law practice.

LEGAL ETHICS COMMITTEE
INDIANA STATE BAR ASSOCIATION

Opinion No. 2 for 2001

Editor's Note: The opinions of the Legal Ethics Committee of the Indiana State Bar Association are issued solely for the education of those requesting opinions and the general public. The Committee's opinions are based solely upon hypothetical facts related to the Committee. The opinions are advisory only. The opinions have no force of law.

Facts[1]

Grandfather is a wealthy 88-year-old widower whose only child is deceased but who has a granddaughter and a grandson. For five years, Grandfather has used Attorney Jones to draw up and implement an estate plan, including a trust, a will, a health-care power of attorney and a financial power of attorney. Jones has also helped Grandfather transfer real estate into the trust, sell real estate and make gifts.

The financial power of attorney provided that it would not be effective except upon Grandfather's incapacity, as certified in writing by a physician. The trust had a similar mechanism whereby Grandfather was trustee, but upon his incapacity as certified, successors would assume the administration of the trust. The power of attorney provided that Granddaughter and Bank were to serve jointly once Grandfather could not; the trust provided that Granddaughter, another individual and Bank would serve as successor co-trustees in the same event. Grandfather told Jones that while he loved Granddaughter and appreciated her care and attention, he did not want her to serve alone as attorney-in-fact or as successor trustee because of Granddaughter's financial problems and because he did not care for her husband. Grandfather had loaned Granddaughter considerable sums over the years, which Granddaughter had not repaid, and Granddaughter owed a large amount of unpaid taxes from a failed business venture. Granddaughter had also made demands upon Jones to make Grandfather follow through on a promise Grandfather made that he would make a gift to Granddaughter of a life estate in certain real estate he owned which Granddaughter wanted to develop. Further, on several occasions Granddaughter had brought Grandfather to Jones' office to change Grandfather's will and trust to leave Granddaughter her shares under the will and the trust outright and not for life, but on each occasion Grandfather told Jones he was still thinking about it and did not want to make the changes.

Grandfather's health deteriorated, and because of chronic pain Grandfather went into a depression, no longer wanted to get out of bed or get dressed, and was not bathing or eating regularly. Jones became concerned and arranged for a physician visit and a home health aide, though Granddaughter complained that Jones was "interfering." Grandfather was also not paying quarterly estimated tax payments, and utility bills went unpaid.

Granddaughter came to Jones' office and demanded that she be made sole attorney-in-fact. Jones explained that a physician needed to certify that Grandfather could no longer handle his own affairs, which would trigger the power of attorney with co-attorneys-in-fact and trigger the need for successor co-trustees, and Jones said he would begin that process.

Granddaughter, unsatisfied with Jones' approach, then consulted Attorney Smith, telling Smith that Grandfather wanted a new power of attorney making Granddaughter sole attorney-in-fact. (It is not clear whether Granddaughter told Smith that Jones had been approached on the matter of a new power of attorney and that Jones declined to draw up a new power of attorney; for purposes of this Opinion, the author will assume she did not.) Smith prepared the new power of attorney. Smith sent a paralegal who was a notary to Grandfather to secure Grandfather's signature, but Smith never saw or consulted with Grandfather, and considered Granddaughter to be Smith's client. The paralegal brought a letter from Smith to Grandfather and read it to him; the letter stated Granddaughter was Smith's client, and that if Grandfather had any questions or reservations about the power of attorney, Grandfather should contact his own attorney. In the presence of the paralegal and the home health aide, Grandfather indicated he understood the document and wanted to sign it, and he did.

Jones did contact Grandfather's physician, who certified in writing that Grandfather was incapacitated. The letter from the physician was dated one week before Grandfather executed the new power of attorney which Smith prepared.

Granddaughter as purported sole attorney-in-fact is now beginning to take action. She has fired Jones as Grandfather's attorney and hired Smith to be Grandfather's new attorney to do a new estate plan for Grandfather, and she is demanding that Jones turn over all files relating to Grandfather and the trust. When Jones received a letter from Grandfather instructing Jones to turn over his documents to Granddaughter, Jones went to visit Grandfather to seek clarification. Grandfather told Jones he remembers signing the letter and the power of attorney because Granddaughter wanted him to, but that he didn't understand them.

Issues

Smith wants to know whether his client Granddaughter as attorney-in-fact and successor trustee is entitled to Grandfather's files and the trust records from Jones (and whether Jones is committing an ethical violation by refusing to provide the information), and Jones wants to know whether he can resist the demand for the files and otherwise take steps to protect Grandfather's interests. Certain other ethics issues which neither Smith nor Jones have raised are implicated by the facts and merit discussion. A statement of the issues is as follows:

1. Who is Smith's client in the preparation of the power of attorney, Granddaughter or Grandfather?

2. Is Grandfather a continuing client of Jones as to estate-planning and incapacity-planning matters? If so, was Smith obligated to contact Jones as Grandfather's attorney and not to contact Grandfather directly? If not, has Smith provided advice to an unrepresented person?

3. May Jones take any protective actions regarding Grandfather?

4. Did Smith properly supervise his paralegal in delegating any obligation to ascertain Grandfather's capacity and freedom from undue influence?

Discussion

Issue 1 – Who is Smith's client?

A. Granddaughter as Smith's client

It may be that Granddaughter is Smith's client, as Smith asserts. In other cases where a lawyer represents a fiduciary (a personal representative or a guardian), the lawyer represents the fiduciary as such and not the beneficiary, though there are special considerations short of a lawyer-client relationship which run from the lawyer to interested persons.[2] Some agency relationships are really contractual arrangements for professional services, such as a property manager or a bank or trust company agent for managing a portfolio. With these, the agent's lawyer may well have prepared the agreement. The agent expects compensation, being in business to render the services sought, but the agency is ultimately for the benefit of the principal.

A power of attorney with a layperson agent, especially a family member helping a frail older person, is distinguishable from such a professional-services agency contract. A layperson agent is not in the business of being an agent, the arrangement is not negotiated at arms length, the principal may already have some dependence on the proposed agent (perhaps even approaching undue influence), and often the agent is expected to serve without compensation, though an attorney-in-fact by statute is entitled to a reasonable fee for services rendered.[3] With a frail-principal-type power of attorney, it is at least a stretch to reason that a lawyer may serve a client's objective to become an agent and a fiduciary for another person, but it may be possible.

Smith may have violated Rule 1.2 with Granddaughter's initial consultation by failing to make further inquiry into her true objectives. A lawyer should not undertake a representation without making further inquiry if the facts presented by a prospective client suggest that the representation might aid the client in perpetrating a fraud or otherwise committing a crime.[4] The fact that a proposed client in drafting a power of attorney was the agent and not a frail principal should have suggested to Smith the possibility that the client's real objective might be fraud. Smith then had an ethical responsibility to find out whether the proposal was above-board before performing the services. By failing to make further inquiry, Smith violated Rule 1.2.

If Smith reasonably concluded that Granddaughter was the client, Smith did indeed need to advise Grandfather that Smith did not represent Grandfather. The problem with the advisory, however, is that Smith under these circumstances had a due diligence requirement to ascertain whether Grandfather had the mental ability to appreciate the advisory, in addition to ascertaining whether he had the ability to execute the document, and Smith did neither.[5] Paragraph 8 of the Comments to Rule 1.2 states that where the lawyer's client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary. The special obligation is clearly meant to put a lawyer on heightened alert as to a beneficiary's capacity and circumstances where the client is a fiduciary, because of the existence of a confidential relationship between the client and the beneficiary. Smith's failure to ascertain either Grandfather's capacity to appreciate the advisory or his capacity to execute the document is a violation of this Rule 1.2 special obligation, notwithstanding the fact that Granddaughter is the client.

Smith also violated R.P.C. Rule 4.2, which prohibits a lawyer from communicating with a person the lawyer knows to be represented by another lawyer in the matter.[6] While it may sometimes be difficult to identify the outer bounds of the same matter for Rule 4.2 purposes,[7] the preparation of a new power of attorney is clearly the same matter as Grandfather's existing estate plan and incapacity plan, which for five years were handled for Grandfather by Jones. Smith certainly knew that there was an existing power of attorney, because Granddaughter said Grandfather wanted a "new" one. Further, the circumstances strongly suggest that Grandfather either actually had or might well have had a lawyer for an estate plan and an incapacity plan, because Grandfather was wealthy, had complicated property affairs, and had only recently fallen into ill health. Prudent persons of means almost invariably avail themselves of the assistance of many professionals including lawyers to organize and manage their affairs. It would not be reasonable here for Smith to claim he did not know Grandfather had a lawyer already; a lawyer may not avoid Rule 4.2 by simply closing his eyes to the obvious.[8] Smith further could not reasonably claim that Grandfather had discharged Jones, even if Granddaughter had said so; Smith should have taken steps to confirm any representation that prior counsel had effectively been discharged,[9] at the very least by inquiring of Grandfather and probably by attempting to contact the discharged lawyer as well.

If, however, Grandfather could be said not to have a lawyer on the matter of the new power of attorney, it may be that Smith's submission of the proposed new power of attorney to Grandfather constituted the giving of legal advice to a person not represented by counsel, in violation of Rule 4.3.[10] The advice Smith was impliedly giving Grandfather by tendering the power of attorney was at the very least the advice that in Smith's opinion Grandfather had the capacity to execute the power of attorney, and perhaps also the advice that the arrangement was suitable and appropriate and not a fraud on Grandfather. Here, Smith's letter of non-representation fell well short of a notice clarifying Smith's limited interests and dispelling the implied advice, which would constitute a violation of Rule 4.3.

With Granddaughter as a client, Smith soon might have a further Rule 1.2 problem. Once Granddaughter begins to use the new power of attorney, any transaction she enters into with

Grandfather is presumptively invalid as the product of undue influence.[11] Further, if the transaction benefits Granddaughter personally, the transaction is presumed fraudulent.[12] Smith could then be assisting Granddaughter in such fraudulent conduct in violation of Rule 1.2(d).[13] If Smith in good faith believed Granddaughter's initial conduct was proper but later discovers that Granddaughter is bent on fraud, Smith would be required to withdraw from the representation.[14] There are red flags galore raised by Granddaughter's conduct; Granddaughter has already tried to convince Jones to help complete a gift to her which Grandfather proposed, and has tried to persuade Grandfather to change the estate plan arrangement from Granddaughter receiving a life estate in certain property to Granddaughter receiving the fee interest. After rendering the initial service to Granddaughter of drafting a new power of attorney, if Granddaughter asks Smith to do anything else, Smith would have a duty to make further inquiry into Granddaughter's objectives to avoid assisting a client with a fraud.

B. Grandfather as Smith's client

A power of attorney is "[a]n instrument authorizing another to act as one's agent."[15] The agent is a fiduciary, with a relationship to the principal of trust and confidence analogous to that of a trustee, having a duty to act primarily for the principal's benefit with scrupulous good faith and candor,[16] and having "the punctilio of an honor the most sensitive [as] the standard of behavior."[17] Granddaughter came to Smith, purportedly at the request of Grandfather, to draft a new power of attorney. The person whose objective is carried out by the attorney-client representation would seem to be Grandfather rather than Granddaughter on two grounds: First, Granddaughter was asking for Smith's assistance in accomplishing what Grandfather had requested of her (in effect, Granddaughter in consulting Smith is acting as an informal agent, enlisting Smith's help in carrying out Grandfather's objective of having a new power of attorney). Second, the objective of the representation was the appointment of an agent whose duty will be to act for the exclusive benefit of a principal. Grandfather may be Smith's real client with the preparation of the power of attorney, Smith's characterization notwithstanding.[18]

If Grandfather is Smith's client, Smith has violated R.P.C. Rule 1.2 requiring a lawyer to abide by a client's decisions regarding the objectives of the attorney-client representation. Smith in fact never found out Grandfather's objectives directly from Grandfather, but instead relied on Granddaughter's representations as to Grandfather's objectives (and Granddaughter at that time was not purporting to act as authorized attorney-in-fact under the old power of attorney). Had the estate-planning document been a will, no prudent lawyer would have permitted the will to be executed without confirming the testator's wishes where the initial communication of those wishes was with someone other than the testator. Further, while a trust may be executed by an agent on behalf of a settlor,[19] no prudent lawyer would permit an agent to specify the terms of a trust instrument and then to execute it as settlor's attorney-in-fact without independently ascertaining the settlor's wishes. A power of attorney is executed with less formality than a will but more formality than a trust, but still represents an agency arrangement for the sole benefit of a principal. A lawyer who drafts a power of attorney for a frail principal to execute may be doing so at the implied instance of the principal, so that the client is the principal and not the attorney-in-fact.

The facts also suggest that if Grandfather is the client, Smith may have violated Rule 1.14 in another way. The rule requires a lawyer to maintain a normal lawyer-client relationship with a client whose ability to make considered decisions is impaired, but authorizes the lawyer to take protective action where the client cannot adequately act in the client's own interest. The Comments to Rule 1.14 direct a lawyer to see to the appointment of a legal representative where there is not one and where it would serve the client's best interests. Further, the Comments expressly mention that the lawyer should maintain communication. Here, if Smith had exercised reasonable diligence to ascertain the physical and mental condition of Grandfather, Smith would have known of a clear need for the appointment of a suitable representative for Grandfather. There were mechanisms already in place for appropriate representatives to be appointed, namely, secure the physician certification that Grandfather could not handle his own affairs, which would trigger two things: first, the springing of the existing power of attorney so that the named co-attorneys-in-fact could assist with individually owned property, and second, the right of successor co-trustees to assume management of trust property. There would also be a substantial question whether Grandfather had the capacity to put in place any other mechanism for the appointment of a representative, such as a new power of attorney with different terms. Rule 1.14 imposed upon Smith an obligation to consider whether an impaired client had the capacity to enter into various protective mechanisms such as a new power of attorney or a new revocable trust.[20] Under these circumstances, if Grandfather is Smith's client, Smith violated Rule 1.14 by assuming without seeing or talking to Grandfather that Grandfather had the capacity to make a new power of attorney.[21]

C. Granddaughter and Grandfather as Smith's joint clients

Joint representation of both Granddaughter and Grandfather would be another possibility with Smith's preparation of a new power of attorney (and Granddaughter as attorney-in-fact has attempted to arrange Smith's joint representation for all matters since by purportedly firing Jones and hiring Smith as Grandfather's lawyer.) Under R.P.C. Rule 1.7, a lawyer shall not represent a client if the representation may be materially limited by the lawyer's responsibilities to another client unless the lawyer believes the representation will not be adversely affected and the client consents after consultation. Representation of multiple clients in a single matter is possible, but only where the consent after consultation is given, and the consultation must include an explanation of the implications of common representation and the advantages and risks.

Here, Smith did not consult Grandfather at all on the preparation of the new power of attorney, and Smith did not obtain his consent. As discussed above, had Smith met Grandfather face-to-face, the issue of Grandfather's capacity would have been apparent, so as to make the effectiveness of any consultation regarding joint representation suspect, and to make the validity of any consent to joint representation questionable. Certainly, Smith provided Grandfather no explanation of the implications of joint representation or the advantages and risks. If Granddaughter and Grandfather are Smith's joint clients on the new power of attorney, Smith has violated Rule 1.7.[22]

Issue 2 – Is Grandfather a continuing client of Jones?

If Grandfather is a continuing client of Jones on estate-planning and incapacity-planning matters, then Smith violated R.P.C. Rule 4.2 by contacting Grandfather in seeking Grandfather's signature on the new power of attorney. An estate plan or incapacity plan is typically an ongoing process, with changes necessary as the law changes or as the circumstances or wishes of a client change. Whether a lawyer's representation of a client on such matters has terminated would depend on whether the client has expressly discharged the lawyer or upon the passage of considerable time where no legal services had been rendered. Where

Grandfather has not expressly discharged Jones, and only days or weeks (and not months or years) have passed since Jones's last legal services for Grandfather, Jones is still Grandfather's lawyer for estate planning and incapacity planning.

As discussed above, Smith knew or should have known that Grandfather had employed Jones as his lawyer on estate planning and incapacity planning in the near-past. If Smith had any question about whether Jones represented Grandfather, Smith had a duty to find out, either by asking Grandfather or Jones or both, and Smith failed to do so. Smith's contact with Grandfather thus violated R.P.C. Rule 4.2. Also as discussed above, if Grandfather were not a continuing client of Jones but a former client, Smith's tender of the new power of attorney to Grandfather for signature might constitute the impermissible giving of advice to an unrepresented person in violation of R.P.C. Rule 4.3.

Issue 3 – May Jones take any protective action?

R.P.C. Rule 1.14 provides that a lawyer may take protective action for a client where the client's ability to make adequately considered decisions is impaired. A lawyer should take the protective action that is least restrictive under the circumstances.[23] Here, Jones has considerable reason to believe that the new power of attorney is invalid, in light of the physician's certification that Grandfather was incapacitated on a date prior to execution of the new power of attorney. Jones might well also have grounds to believe Grandfather is subject to Granddaughter's undue influence under the circumstances, knowing how Granddaughter has made attempts to influence Grandfather in the past. Jones is authorized by Rule 1.14 to take action to protect incapacitated client Grandfather under these circumstances, with the particular steps taken the only issue.

One step which Jones could take and has taken is to resist Granddaughter's demand as purported attorney-in-fact for Grandfather's file. This is the least restrictive protective action that Jones could take, and is clearly authorized by the rules under the circumstances, at least until it is established judicially that the power of attorney is valid. One further action which Jones might contemplate to protect Grandfather would to bring a declaratory judgment action to determine the validity of the new power of attorney. If such an action is brought, Jones should request that a guardian ad litem be appointed for Grandfather in the action.[24] Jones might also consider requesting injunctive relief pending a hearing on the merits if that were felt to be in Grandfather's best interests.

Issue 4 – Has Smith properly supervised the paralegal?

Under R.P.C. Rule 5.3, a lawyer having supervisory authority over a nonlawyer shall make an effort to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer. Smith here sent a paralegal who was a notary to obtain Grandfather's signature on the new power of attorney, but far more than notarizing a signature was done by the paralegal. The paralegal read Smith's letter to Grandfather. The paralegal further tendered the new power of attorney for Grandfather's signature and notarized the signature. The paralegal necessarily made a determination that Grandfather understood the notice of non-representation sent by Smith, that he knowingly and intelligently waived his right to consult counsel, that he had the capacity to execute the power of attorney, and that he was free from the undue influence of Granddaughter or anyone else.[25] Assuming arguendo that Smith's client was Granddaughter, Smith had the "special obligation" under R.P.C. Rule 1.2 which a lawyer owes the beneficiary of a fiduciary-client. Under these circumstances this special obligation would require Smith to verify that this 88-year-old person in ill and declining health had capacity and was free from undue influence.[26] Smith may not delegate this obligation to a paralegal.[27] Accordingly, Smith violated R.P.C. Rule 5.3 by failing properly to supervise the paralegal sent to obtain Grandfather's signature.

Conclusion

The facts are highly suggestive that Granddaughter is seeking to alter all of her Grandfather's estate planning and incapacity planning to Granddaughter's own individual benefit now that Grandfather has grown too weak to resist her influence. Moreover, Granddaughter has found a lawyer to assist her in her enterprise and not look too closely at it. Even accepting Smith's position that Granddaughter was the client, Smith here violated Rule 1.2 by failing to make further inquiry into Granddaughter's real objectives and the Rule 1.2 "special obligation" owed a beneficiary. Smith further violated the Rule 4.2 prohibition against contacting a person represented by an attorney, and may have violated the Rule 5.3 obligation properly to supervise nonlawyers.[28] With Granddaughter's very first transaction under the new power of attorney which benefits herself personally, Smith will violate Rule 1.2 for assisting a client in committing a fraud unless Smith withdraws from representing Granddaughter. If, however, Grandfather is Smith's real client, then Smith has violated Rule 1.2 for failure to determine and follow a client's objectives, Rule 1.14 for failure to evaluate the capacity of a client and protect a client's interest, and Rule 5.3 for sending a paralegal to do what Smith was required to do. Jones, pursuant to Rule 1.14, is authorized to take the least restrictive steps to protect Grandfather's interests, certainly including resisting surrendering confidential client information to a purported attorney-in-fact acting under a questionable power of attorney, and perhaps also including seeking a judicial determination of the validity of the power of attorney and injunctive relief pending that determination.

[1] The two lawyers who requested an ethics opinion each submitted detailed statements of the facts. Other than changes made to make the lawyers and the parties unidentifiable, the facts presented here are drawn from the lawyers' statements. No facts known to be in dispute are presented. The opinion is, however, based only upon the facts as set out. The Committee cannot investigate, nor can the Committee resolve disputes of fact. This opinion should not be read to suggest that some lawyers should be referred for discipline, but is published to educate the bar on potential ethical pitfalls and to stimulate discussion on ethics issues.

[2] *See* Opinion No. 4, 1997, Legal Ethics Committee, Indiana State Bar Association.

[3] I.C. 30-5-4-5.

[4] ABA Comm. on Ethics and Professional Responsibility, Informal Opinion 1470 (1981).

[5] While there is a presumption that persons possess the capacity to act (*Graham v. Plotner,* 87 Ind.App. 462, 151 N.E. 735 (1926); *Achey v. Stephens,* 8 Ind. 411, 414-15 (1856)), the presumption here is overcome by Grandfather's appearance and physical and mental condition (which Smith's paralegal saw), even if Granddaughter failed to inform Smith that a week ago a physician had certified that Grandfather was unable to manage his own affairs. *See* also the discussion *infra* at footnote 27 regarding Smith's non-delegable duty to determine Grandfather's capacity.

[6] For purposes of the instant R.P.C. 4.2 analysis, the author assumed that Granddaughter did not tell Smith either of two things: one, that she knew Grandfather's physician had rendered an opinion that Grandfather did not have capacity; and two, that Grandfather had recently and continuously used Jones as his attorney on estate-planning and incapacity-planning matters. (In effect, Granddaughter's knowledge is not imputed to Smith.) Had Granddaughter told Smith these things, Smith would clearly have violated Rule 4.2 by not contacting Jones prior to tendering the new power of attorney for Grandfather's execution.

[7] *Smith v. Johnston,* 711 N.E.2d 1259, 1263 (Ind. 1999) at footnote 4.

[8] *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995).

[9] *Id.*

10. "Whether a lawyer may submit papers to an unrepresented party for signature is a difficult question, apparently dependent upon whether the lawyer's actions are categorized as the rendition of legal advice, or mere communication. The distinction is difficult to discern in many cases. . . . Professor Wolfram suggests that the lawyer in the 'precarious' position of presenting documents to an unrepresented person might find it advisable to give written notice to the unrepresented party clarifying the lawyer's limited interests." (Center for Professional Responsibility, American Bar Association, *Annotated Model Rules of Professional Conduct, 4th ed.*, pp. 421-422).

11. The relationship between attorney-in-fact and principal is a confidential relationship, and undue influence is presumed in any transaction which benefits the attorney-in-fact. (*Hunter v. Milhous,* 159 Ind.App. 105, 305 N.E.2d 448, 460 (1973); *Matter of Good,* 632 N.E.2d 719, 721 (Ind. 1994)).

12. Fraud is presumed in a transaction benefiting an attorney-in-fact. *Villanella v. Godbey,* 632 N.E.2d 786, 790 (Ind.App. 1994). Note, however, that where an attorney-in-fact acts with due care for the benefit of a principal, the presumption is overcome, so the attorney-in-fact is not liable for such acts even though the attorney-in-fact also benefits. (I.C. 30-5-9-2)

13. Note, however, that Granddaughter's arranging to be sole attorney-in-fact rather than co-attorney-in-fact probably does not confer a benefit to Granddaughter, so that fraud would not be presumed by that change alone. By analogy, I.C. 29-1-5-2 provides that if a person named in a will to receive an interest also witnesses the will, the gift is forfeited. The interest must be a beneficial interest, and the statute expressly provides that being named in the will as executor, trustee, guardian or counsel for any of those is not a beneficial interest. As with a will, being named a fiduciary probably does not confer a benefit, so fraud would not be presumed with the initial service Granddaughter requested of Smith, which was to make her sole attorney-in-fact instead of co-attorney-in-fact.

14. R.P.C. Rule 1.2, Comment 7.

15. *Black's Law Dictionary, Abridged 5th Ed.*, West Publishing Co., St. Paul, Minn., 1983.

16. *Id.*

17. *Malachowski v. Bank One, Indianapolis, N.A.*, 667 N.E.2d 780, 782 (Ind.App. 1996), J. Riley, dissenting (citing *Meinhard v. Salmon,* 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (J. Cardozo)).

18. Weighing against that conclusion, though, is the possibility that Grandfather may not have had the capacity to engage Smith; the existence of a lawyer-client relationship depends upon an express and comprehensive authorization from the client, and under Rule 1.14 a lawyer representing a disabled client must evaluate the degree of incapacity and medical reports to determine whether the client can make informed decisions. Pa. Bar Assn. Comm. on Legal Ethics and Professional Responsibility, Op. 97-51 (1997). If Grandfather should be considered Smith's real client, Smith has violated Rule 1.14 by failing to evaluate Grandfather's ability to hire Smith in the first place. Note also that Smith may not delegate to a paralegal the duty to evaluate Grandfather's capacity or the responsibility to establish an attorney-client relationship; *see infra* at footnotes 24-27.

19. I.C. 30-4-2-1(a).

20. ABA Ethics Committee Opinion 96-404 (1996).

21. Again, note that Smith's duty to determine Grandfather's capacity was not delegable to a paralegal; *see infra* at footnote 27.

22. Best for both Granddaughter and Grandfather might have been for each to be represented by separate counsel. Smith could have avoided all of the issues regarding a due diligence obligation to ascertain Grandfather's capacity if Jones had continued to represent Grandfather. Whenever a lawyer is asked by a family member (or a close friend or caregiver) to perform services purportedly at the instance of another, the lawyer might be well advised to see that the other is represented by counsel. If the other is not already represented, the lawyer might consider referring the other to a capable colleague not in the lawyer's same firm, especially if there is any question of diminished capacity, so that the new counsel could fully investigate the issue and take whatever steps are necessary to protect the other. *See In re Estate of Meyer*, 747 N.E.2d 1159, 1168 (Ind.App. 2001) at footnote 7, where the Court of Appeals approved a lawyer's referring a prospective client to separate counsel where the prospective client indicated he wanted to create a trust which would benefit the lawyer or the lawyer's family.

23. ABA Ethics Committee Opinion 96-404 (1996).

24. *See* Indiana Rules of Trial Procedure, Rule 17(B).

25. If Grandfather is Smith's client, note that R.P.C. Guideline 9.3(a) prohibits a lawyer's delegating responsibility for establishing an attorney-client relationship to a paralegal, and note further that Guideline 9.3(c) prohibits delegating to a paralegal the responsibility for a legal opinion (such as whether a person has capacity or whether a proposed arrangement is suitable and not a fraud).

26. Note that the fact Granddaughter was not present during the execution of the power of attorney is not determinative on the issue of undue influence; such fact is only one in the entire set of circumstances, other facts being Grandfather's health and its effect on body and mind, Grandfather's dependence upon and subjection to Granddaughter's influence, and Granddaughter's opportunity to wield influence. *O'Dell v. Youngblood*, 422 N.E.2d 381, 383 (Ind.App. 1981).

27. Some paralegals, especially ones employed by elder-law attorneys, may have special training or experience in assessing capacity. There is no indication here that Smith's paralegal had any such special training or experience. If the paralegal had, the proper procedure would not be for the paralegal to assess capacity and render an opinion, but to report to the lawyer the results of the assessment and let the lawyer render the non-delegable opinion. The facts as presented by the lawyers do not rule out the possibility that Smith's paralegal had special training or experience and that the paralegal discussed the assessment of capacity with Smith, letting Smith make the determination of whether Grandfather had the capacity to execute the power of attorney. Finally, note that the paralegal's observations of Grandfather's physical and mental condition are and should be imputed to Smith, who has the responsibility to supervise the paralegal.

28. Without knowing whether the paralegal had special training or experience and whether Smith and not the paralegal rendered the opinion that Grandfather had capacity to execute the power of attorney, it is not possible to conclude that Smith violated Rule 5.3. It may even be, however, that Smith deliberately sent the paralegal in order to distance himself from the document execution, so that he would not be called as a witness if any litigation ensued and would be able to represent a litigating party. That kind of sharp practice calculated to steal a millionaire client from another lawyer would certainly seem to violate a lawyer's obligation to deal honestly with others. (R.P.C. Preamble)

Opinion No. 2 of 2003

Editor's Note: The opinions of the Legal Ethics Committee of the Indiana State Bar Association are issued solely for the education of those requesting opinions and the general public. The Committee's opinions are based solely upon hypothetical facts related to the Committee. The opinions are advisory only. The opinions have no force of law.

The Legal Ethics Committee of the Indiana State Bar Association ("Committee") has been requested to provide an advisory opinion with respect to issues raised by the following hypothetical facts:

Facts

Mother is an 80-year-old widow who has resided in a nursing home since shortly after the death of her husband eight years ago. She became eligible for Medicaid after spending down her assets, which happened two years ago. Since that time, Medicaid has provided about $25,000 in benefits to her. Mother's brother just passed away, though, and she inherited $110,000 from his estate, rendering her ineligible for further Medicaid until her assets are again spent down. She opened two bank accounts with her inheritance, one which she owned individually and a savings account which she opened with her son, an adult and her only child, as joint tenants with right of survivorship. Each account began with $55,000. One year later, Mother died. At that time, the individually owned account balance was $40,000, and the joint account, which had remained untouched, had grown to $58,000. Mother had no other property.

Son, as Mother's sole heir, retained Lawyer to open an intestate estate with Son as personal representative. Lawyer did so and arranged to have notice of administration published in the newspaper, also asking Son to give him a list of Mother's creditors so he could arrange for notice by mail to them. Son made the list, and Lawyer had the clerk send notice to all of the creditors on the list.

Lawyer further helped Son fill out an Application for Consent to Transfer for the joint account, and submitted the application to the assessor's office. The assessor, noting that the property transfers to Son would not exceed his $100,000 inheritance tax exemption, consented to the transfer of the joint account to Son.

Since Son had helped Mother with her finances following the death of her husband, he knew that Mother had been on Medicaid prior to receiving the inheritance. Lawyer, on the other hand, had no actual notice that Mother had ever been on Medicaid. Under Scenario 1, Son inadvertently left off the list of Mother's creditors given to Lawyer the Office of Family & Children ("OFC"), the state agency responsible for Medicaid. Under Scenario 2, Son knew OFC should be on the list, but deliberately left it off, knowing his inheritance from the estate would be larger if OFC did not get notice and file a claim. Under Scenario 3, Son told Lawyer that OFC was a creditor, but instructed Lawyer not to give OFC notice. Under Scenario 4, Son instructed Lawyer not to give OFC notice, and Lawyer thereafter terminated his representation of Son. Under Scenario 5, Mother lived long enough that there was only $20,000 left in her individually titled bank account at the time of her death; in effect, Mother left only a small estate capable of being transferred without opening an estate administration through the court. Assume for Scenario 5 that Son tells Lawyer that Mother at one time received Medicaid.

Issues

May or must Lawyer give notice to OFC that Mother is deceased or that an estate has been opened for Mother? May or must Lawyer inform a tribunal that OFC is a creditor or that Son has failed to give OFC proper notice?

Applicable statutes, regulations

I.C. 6-4.1-8-8 provides that without a consent to transfer, property held jointly may not be transferred to the survivor, except where the survivor is a spouse or the property is a joint checking account.

145 IAC 4.1-8-3 provides that except for transfers to a spouse or transfers of a checking account, a consent to transfer must be obtained before property held jointly by a resident decedent and another may be transferred to the survivor, and further provides that to ensure that the transfer will not jeopardize the collection of inheritance tax, the consent shall not exceed 80 percent of the property until the inheritance tax is paid.

I.C. 12-15-9-1 provides that upon the death of a Medicaid recipient, the amount of Medicaid paid after the recipient became age 55 must be allowed as a preferred claim in the recipient's estate, that the affidavit of a person designated by the Indiana Secretary of Human Services is evidence of the amount of the claim, and that the claim is payable in accordance with I.C. 29-1-14-9 after funeral expenses for the recipient and the recipient's spouse, expenses of last illness of the recipient and the recipient's spouse, and the expenses of administration of the estate, including attorney fees.

I.C. 29-1-7-7 provides in pertinent part that notice of the issuance of letters upon the opening of an estate shall be published, that notice shall be served by mail on all heirs, devisees and known creditors, and that the personal representative shall serve notice on creditors who are known or reasonably ascertainable within one month of first publication or as soon as possible after one month. It further provides that if the personal representative fails to give notice to a known or reasonably ascertainable creditor within the one month period, the creditor may submit a claim within an additional two months after the date notice is given, though a claim will be barred if not filed within nine months of death.

I.C. 29-1-8-1 provides in pertinent part that a small estate affidavit may be used to claim property of a decedent without a court order or proceeding where the property consists of personal property not exceeding $25,000.

I.C. 29-1-14-1 provides in pertinent part that except as provided in I.C. 29-1-7-7, claims against a decedent's estate, other than claims for costs of administration and claims of the United States or the state or any subdivision are forever barred unless filed within three months of the date of first published notice, and further provides that all claims barrable after the three-month time-bar are forever barred if not filed within nine months after death.

I.C. 29-1-14-9 provides that claims shall be classified and paid in the following order: 1) costs of administration; 2) funeral expenses; 3) survivor's allowance under I.C. 29-1-4-1; 4) debts and taxes of the United States; 5) medical expenses of the last illness; 6) debts and taxes of the state of Indiana; and 7) all other claims.

I.C. 32-4-1.5-7 provides that multi-party accounts are liable for claims, taxes and expenses of administration including survivor's allowance if estate assets are insufficient; provides that a written demand to assert the liability must be made upon a personal representative; and provides that sums recovered by the personal representative under the statute shall be administered as a part of the decedent's estate.

Applicable Rules of Professional Conduct

R.P.C. Rule 1.2 provides in pertinent part that a lawyer shall abide by a client's decision concerning the objectives of representation, although a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. Further, when a lawyer knows the client expects assistance not permitted to the lawyer, the lawyer shall consult with the client regarding the limitations on the lawyer's conduct.

R.P.C. Rule 1.6 provides in pertinent part that a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, though a lawyer may reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing any criminal act.

R.P.C. Rule 1.9 provides in pertinent part that a lawyer who has formerly represented a client in a matter shall not thereafter use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require or when the information has become generally known.

R.P.C. Rule 1.16 provides in pertinent part that a lawyer shall withdraw from representing a client where the representation will result in a violation of the rules of professional conduct or other law, and that a lawyer may withdraw if it can be accomplished without material adverse effect on the client's interests where the client persists in a course of conduct the lawyer believes is criminal or fraudulent or where the client insists upon pursuing an objective the lawyer considers imprudent.

R.P.C. Rule 3.3 provides in pertinent part that a lawyer shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid a client's criminal or fraudulent act, and further provides that this duty applies even if disclosure is of information otherwise protected by Rule 1.6.

R.P.C. Rule 4.1 provides in pertinent part that a lawyer shall not knowingly fail to disclose that which the law requires to be revealed.

Analysis

Who is the client under all scenarios

Who is the client in an estate administration was addressed in ISBA Legal Ethics Committee Opinion No. 4 of 1997. There, it was concluded that a lawyer represents not "the estate" or interested persons such as creditors, taxing authorities and distributees, but represents instead the personal representative in his fiduciary capacity. Lawyer's ethical obligations to a client runs to Son and not to OFC, though Lawyer has ethical obligations to OFC as a third party, as discussed hereinbelow.

The Comment to Rule 1.2 raises a concern. It states that "[w]here the client is a fiduciary, a lawyer may be charged with special obligations in dealing with a beneficiary." The term beneficiary is not defined in the Rules of Professional Conduct, but *Black's Law Dictionary, Abridged Fifth Edition,* defines "beneficiary" as "one who benefits from act of another," and also mentions the context of a trust, where a beneficiary is "a person who has any present or future interest, vested or contingent . ... Person for whose benefit property is held in trust." With a trust, a trust creditor would not be within the meaning of the term beneficiary, so a lawyer representing a trustee would not owe a trust creditor any Rule 1.2 special obligation. With an estate, the Probate Code speaks in terms not of beneficiaries but of interested persons: "'Interested persons' means heirs, devisees, spouses, creditors, or any others having a property right in or claim against the estate of a decedent being administered. This meaning may vary at different stages and in different parts of a proceeding and must be determined according to the particular purpose and matter involved." (I.C. 29-1-1-3) Although it is potentially problematic that a beneficiary owed the special obligations by a lawyer representing a fiduciary under the R.P.C. might be equivalent to an interested person for Probate Code purposes including a creditor, the distinction does not alter the analysis under any of the scenarios analyzed. It can be assumed arguendo that the R.P.C.'s "beneficiary" and the Probate Code's "interested person" are equivalent for present purposes, though such equivalence is by no means clear.

Consent to transfer under all scenarios

The purpose of the statutes and regulations regarding the Consent to Transfer mechanism is to ensure payment of Indiana Inheritance Tax, which is imposed upon property transfers which take place because of death. While the Multi-Party Account law at I.C. 32-4-1.5-7 provides that resort may be made to multi-party account funds where a decedent's probate estate is insufficient to pay claims, it also provides that written demand to assert the liability must be made upon a personal representative, and that anything recovered by the personal representative from a multi-party account shall be administered as a part of the decedent's estate. A decedent's estate must be opened for a personal representative to be appointed, so the legislature intended for creditor claims of a decedent to be resolved through a probate estate, whether the funds to pay claims come from the probate estate or nonprobate property such as a multi-party account.

There is no duty of notice on the part of an applicant filing an Application for Consent to Transfer apart from the duties imposed upon personal representatives to notify creditors. Since Son has no duty to notify OFC upon filing an Application for Consent to Transfer, Lawyer would not have an obligation under Rule 4.1(b) to make a disclosure required by law. There would also not be a fraud involved in the sense of "[a] false representation of a matter of fact ... which deceives and is intended to deceive another so that he shall act upon it to his legal injury." (*Black's Law Dictionary, supra*) Without a crime or fraud in Son's Application for Consent to Transfer, Lawyer's assistance to Son with the Application does not run afoul of the Rule 1.2(d) proscription from assisting a client in conduct a lawyer knows is criminal or fraudulent. Neither is there any tribunal under Rule 3.3(a)(2) to which Lawyer owes a duty of candor.

Whether Lawyer knows or does not know of Son's plans not to notify OFC is not significant. Where Son has no duty to notify OFC upon his filing an Application for Consent to Transfer, and filing the Application without giving notice is not a fraud, Lawyer does not violate any ethical obligation by failing to notify OFC of the filing or by assisting Son in preparing and filing the Application.

Scenario 1

Pursuant to I.C. 29-1-7-7, Son "shall" serve notice of administration on all known or reasonably ascertainable creditors. Under the facts, OFC is a known creditor, but even if Son were not actually aware the Medicaid benefits were provided to Mother, OFC is likely a reasonably ascertainable creditor, since any investigation of Mother's circumstances would reveal that she received Medicaid benefits for two years. Son thus has a duty to provide actual notice of administration to OFC.

Under I.C. 29-1-7-7, the consequence of failing to provide notice to a known or reasonably ascertainable creditor is that a claim filed more than three months from the date of first publication of notice will not be untimely. An OFC claim for Medicaid, however, is not subject to the three months' bar, as OFC is an agency of the state, not subject to the three month's time-bar pursuant to I.C. 29-1-14-1. OFC's claim would be timely whenever filed, even more than nine months from date of death.

In the event the estate is fully administered and closed without OFC having filed a claim, there are Probate Code provisions which would enable OFC to re-open the estate even after closing (*see, e.g.*, I.C. 29-1-7.5-6, where fraud, misrepresentation or inadequate disclosure related to settlement of an unsupervised estate are alleged, and I.C. 29-1-17-13, where mistake, fraud or willful misconduct are alleged in a supervised estate). Further, there may be remedies against the estate distributees (*see* I.C. 29-1-7.5-5, where undischarged claims not barred may be prosecuted against unsupervised estate distributees). It is also worthy of note that OFC has the same ability to learn of deaths and pending estate administrations as claimants who are not known and not reasonably ascertainable, namely, it can watch for obituaries of persons against whom OFC may have a claim and for published legal notices of the opening of an estate.

While Son clearly has the duty to give OFC actual notice of administration, Lawyer under the facts does not know OFC is a creditor. While Rule 4.1(b) prohibits a lawyer from knowingly failing to disclose that which is required by the law to be revealed, disclosure would only be required where Lawyer knows OFC is a creditor. Lawyer further would not know client's conduct is criminal or fraudulent (if it is), which otherwise would have prevented Lawyer from assisting Son under Rule 1.2(d). In addition, without knowing OFC is a creditor, Lawyer is bound by the Rule 1.6 obligation not to reveal information relating to Son's representation, although giving notice to estate creditors including OFC might be said to have been impliedly authorized under the Probate Code notice provisions. Finally, while a tribunal is involved once an estate is opened, Lawyer's obligation to disclose facts to the tribunal necessary to avoid assisting in any fraud or crime by Son is again dependent on Lawyer's knowledge, which is absent in Scenario 1. Lawyer thus commits no violation of the Rules of Professional Conduct under Scenario 1.

Scenario 2

The analysis of Lawyer's ethical obligations where an estate has been opened is not different from that under Scenario 1. Whether a Rule 4.1(b) duty to disclose that which by law ought to be disclosed, or a Rule 1.2(d) obligation not to counsel Son to engage in or assist Son in the commission of a fraud or crime, or a Rule 3.3(a)(2) obligation to disclose a fact to the tribunal necessary to avoid assisting Son in a crime or fraud, Lawyer's lack of knowledge that OFC is a creditor means that Lawyer commits no violation of the Rules of Professional Conduct when Lawyer represents Son as personal representative in the estate administration. Further, while Lawyer might be justified by Rule 1.6(a) in breaching a client confidence on the grounds that notifying known and reasonably ascertainable creditors is required in an estate administration and thus impliedly authorized in order to represent Son as personal representative, the concept of "information relating to the representation" in Rule 1.6(a) necessarily implies knowledge of the information; if Lawyer does not know, Lawyer cannot disclose it even if Rule 1.6(a) permits him to disclose it. Under Scenario 2, Lawyer commits no violation of the Rules of Professional Conduct.

Scenario 3

Lawyer's knowledge that Son intends not to notify OFC of Mother's estate changes Lawyer's obligation to OFC and to the tribunal. Son has a clear duty to provide the notice, and Lawyer, while bound by Rule 1.2(a) to abide by Son's decision, is required by Rule 1.2(e) to counsel Son that Lawyer cannot assist in conduct which is criminal or fraudulent.

It may be that Son's conduct in failing to give notice to OFC, while a breach of duty, is not a crime or fraud. Under I.C. 29-1-14-1, the remedy for failure to give a creditor notice is that the creditor's otherwise untimely filed claim will not be untimely. Since OFC is exempt from the filing deadlines altogether, and the constructive notice of publication in a newspaper is adequate for other categories of creditors, OFC is not without some notice, and is not at all without a remedy from the legal consequences of Son's failure to give notice. If Son's conduct is not a crime or fraud, Lawyer may continue to represent Son in the estate administration and honor Son's demand that OFC not receive notice without violating Rule 3.3(a)(2). It should be noted, however, that Lawyer is permitted by Rule 1.16(b)(3) to withdraw from representing Son, conditioned only upon there not being a material adverse effect on Son's interests, if Lawyer finds that Son's disregarding of Lawyer's advice to give OFC notice is imprudent.

If Lawyer continues representing Son, Lawyer must take care that Lawyer does not assist Son in making a false representation to the court that all known or reasonably ascertainable creditors have received notice. A personal representative of an unsupervised estate is required in a closing statement pursuant to I.C. 29-1-7.5-4 to state that he has provided notice to creditors as required under I.C. 29-1-7-7(c) and (d). In a supervised estate, I.C. 29-1-16-5 requires the personal representative in a petition to settle and allow an account to specify to the court the persons to whom distribution is to be made and the amounts to which each is entitled. If Lawyer were to prepare either a closing statement containing a false statement that creditors were given proper notice or a petition to settle and allow by proposing distribution of a net estate to heirs or devisees without honoring OFC's priority under I.C. 29-1-14-9, Lawyer would be knowingly making a false statement of material fact to a tribunal prohibited by Rule 3.3(a)(1). At the point where the personal representative is required to make a statement that creditors have received proper notice, Lawyer cannot assist Son without violating Rule 3.3(a)(1).

Even if Lawyer would be permitted to continue in the representation, Lawyer's knowing assistance to Son in securing a larger inheritance through failing to give OFC notice is fraught with peril, as Son's conduct might be seen by some to constitute fraud or a crime. Under Rule 1.2(d), a lawyer shall not assist a client in engaging in conduct which is criminal or fraudulent. Further, under Rule 1.16(a)(1), a lawyer shall withdraw from a representation where the lawyer will be called upon to violate the Rules of Professional Conduct or some other law. Finally, under Rule 3.3(a)(2), a lawyer shall not knowingly fail to disclose a fact to a tribunal necessary to avoid a client's crime or fraud. Lawyer first must counsel Son that Lawyer cannot assist (Rule 1.2(e)) and give Son the opportunity to provide OFC the notice required by law. If Son insists that OFC not receive notice, and such conduct constitutes a fraud or crime, Lawyer shall withdraw. The withdrawal can be "quiet," not communicating any red flag to the court about the reason for the withdrawal, or "noisy," where Lawyer indicates that his withdrawal is mandated by the Rules of Professional Conduct, allowing the court to infer that there is a problem with the client's conduct. In either event, Lawyer's withdrawal permits Lawyer to maintain Son's confidentiality but honors Lawyer's duty to the tribunal under Rule 3.3 and to OFC under Rule 4.1, since after withdrawal, Lawyer no longer has those duties. (*See*, however, Scenario 4, where Son is a former client of Lawyer rather than a current client.)

Although Lawyer has a duty not to reveal a client's confidences under Rule 1.6, there are a number of possible bases under which Lawyer would be permitted to reveal to the Court that OFC is a creditor or to OFC that an administration is pending. One of these is found in Rule 1.6(a) itself, where a lawyer is permitted to make disclosures impliedly authorized to carry out the representation. Another is contained in Rule 1.6(b), where a lawyer may reveal information reasonably necessary to prevent a client's criminal act (although it may be that notice to OFC is not reasonably necessary to prevent Son from committing a crime, either because what Son is doing is not a crime or because other circumstances make disclosure not reasonably necessary to prevent a crime). One final basis is the Rule 4.1(b) requirement that in order to be truthful to a non-client, a lawyer must disclose what is required by law to be revealed, here that an estate administration has been opened, which gives rise to a duty under the Probate Code to provide notice to creditors. Lawyer's subverting of Son's instructions and revealing Son's confidential information is problematic. While arguably authorized, it resolves the conflict between Rules 1.6 and 1.2 on the one hand, and making a disclosure required by law on the other, in favor of disregarding the duty of confidentiality and overriding a client's directions as to the objectives of the representation. Such a resolution offers no ethical safe harbor to attorneys who may instead safely choose to quietly withdraw.

Rule 1.6(a) expressly permits a lawyer to make disclosures impliedly authorized to carry out the representation. It could be argued that because the notice provisions of the Probate Code require Son to give notice to known creditors, Lawyer could add OFC's name to the list of creditors to receive notice, Son's direction notwithstanding, because giving OFC notice is impliedly authorized for Lawyer to represent Son in carrying out his duties as personal representative. Lawyer would arguably not be in violation of Rule 1.2 or Rule 1.6 by adding OFC's name to the list. (Lawyer would also be honoring the "special obligation" Lawyer may have to OFC as a possible beneficiary of Lawyer's client Son as a fiduciary under the Comment to Rule 1.2.) Doing so, however, would mean that Lawyer is disclosing something Son expressly told him not to disclose, and Lawyer may well decide that withdrawal is a better option.

Rule 1.6(b)(1) authorizes a lawyer to reveal a client's information which would otherwise be confidential where disclosure is reasonably necessary to prevent the client from committing a criminal act. While it is beyond the scope of this opinion to analyze whether Son's conduct might constitute some crime, for this purpose it will be assumed arguendo that a crime might be implicated. The inquiry then is whether Lawyer's disclosure is reasonably necessary to prevent Son's crime. It may be that the failure to give actual notice to an agency of the state as a creditor is not reasonably necessary, since the remedy for failing to give notice is an extension of time to file a claim, and the state already has no bar to the time within which it must file a claim. If so, Lawyer is required by Rule 1.6 to maintain Son's confidential information and not give OFC notice. If not, Lawyer would be permitted by Rule 1.6(b)(1) to reveal the information, although, as discussed above, many lawyers would choose to withdraw from the representation rather than breach the client's confidence and disregard the client's objective.

Rule 4.1(b) further requires Lawyer to disclose what is required by law to be revealed. Since the notice provisions of the Probate Code require notice be given to known creditors, Lawyer's duty of truthfulness to third parties means that Lawyer shall give OFC notice where Lawyer knows OFC is a creditor. Once Lawyer has terminated his representation, however, he would no longer have a Rule 4.1(b) duty to disclose.

Although there are rationales for revealing Son's confidential information that OFC is a creditor, many lawyers again would terminate the representation rather than to reveal the confidential information and disregard Son's objectives. Further, while it may be possible for Lawyer to continue to represent Son up to the point where Son will be making a false statement to the court, it might be prudent for Lawyer to terminate the representation at the earliest opportunity rather than to continue the representation, reveal the confidential information, and seek to justify the breach of the confidence.

Scenario 4

Where Son is a former client of Lawyer's, Rule 1.9 is implicated. While Lawyer shall not use information relating to representing Son to Son's disadvantage, Rule 1.9(b) expressly cross-references Rule 1.6 or Rule 3.3. As discussed with Scenario 3, Rule 1.6(b)(1) would permit Lawyer to reveal information he reasonably believed necessary to prevent Son from committing a crime. If Son's conduct does not constitute a crime, Lawyer is bound by Rule 1.6 not to reveal a client's confidential information, and by Rule 1.9 not to reveal a former client's confidential information, so Lawyer may not reveal to OFC that an estate administration has been opened without violating the Rules of Professional Conduct. If Son's conduct is a crime, Lawyer may reveal to OFC that an estate administration has been opened and not be in violation of the Rules of Professional Conduct.

Similarly, Rule 3.3 by the terms of Rule 1.9(b) applies to a former client as it does to a current client. Lawyer would be required to disclose to the court the fact that OFC is an estate creditor if Son's conduct constitutes a fraud or a crime and disclosure is reasonably necessary to prevent a fraud or crime. If Son's conduct is not a fraud or crime, or if disclosure is not necessary to prevent a fraud or crime, Lawyer is bound by Rule 1.6 not to reveal a client's confidential information, and by Rule 1.9 not to reveal a former client's confidential information. Therefore, Lawyer may not inform the tribunal that OFC is a creditor without violating the Rules of Professional Conduct. If, however, Son's conduct is a fraud or crime and Lawyer's revealing to the court that OFC is a creditor is reasonably necessary to prevent Son's fraud or crime, Lawyer is required by Rule 3.3(a)(2) and Rule 1.9 to disclose to the court that OFC is a creditor, and Lawyer commits no Rule 1.6 violation by doing so.

Scenario 5

As is the case with a Consent to Transfer, the law does not require notice to creditors where an estate administration is not opened, so Son breaches no duty by failing to give notice to OFC. Mother's funds are, however, subject to the claims of Mother's creditors, limited to nine months from date of death for non-governmental creditors and not limited in the case of governmental creditors. In the event that OFC some day causes Mother's estate to be opened and files its claim, Son will be required to return the funds from Mother's bank account to the estate.

Whether Lawyer violates the Code of Professional Responsibility in assisting Son with a small estate affidavit turns upon whether not opening an estate administration and not notifying known and reasonably ascertainable creditors such as OFC is a fraud or crime. If so, Rule 1.2(d) prohibits Lawyer from preparing the small estate affidavit, and Rule 1.16(a) would require Lawyer to withdraw from the representation. Rule 3.3 is not implicated, as no tribunal is involved, and Rule 4.1 is not implicated, as no law requires notice to creditors where no estate is opened. If Son's conduct does not constitute a fraud or crime, Lawyer is not prohibited from assisting Son with the small estate affidavit and commits no violation of the Code of Professional Responsibility by failing to disclose anything to OFC or to a tribunal.

There is no statutory duty to open an estate regardless of the value of a decedent's assets at death. Unless the estate is a small estate, however, such assets will not be able to be transferred. It also follows that where no estate is opened, there is no duty to give notice to potential estate claimants. Absent a duty to open an estate or a duty to notify creditors where no estate is opened, Son commits no fraud or crime by transferring Mother's bank account funds through the use of a small estate affidavit. Son as "person acting on behalf of the distributes" under a small estate affidavit (I.C. 29-1-8-3) would be a fiduciary with duties to persons entitled to a distribution from the estate property, including OFC. If Son having obtained possession of assets fails to make distribution to OFC, Son commits a breach of this fiduciary duty. If, however, Son commits no crime or fraud thereby, Lawyer violates no Rule of Professional Conduct in assisting Son by preparing a small estate affidavit and instructing Son on its use.

ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITIES

2nd Edition

ABA
AMERICAN BAR ASSOCIATION
Commission on Law and Aging

AMERICAN PSYCHOLOGICAL ASSOCIATION

HANDBOOK FOR LAWYERS

ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITIES

2nd Edition

American Bar Association Commission on Law and Aging
American Psychological Association

AMERICANBARASSOCIATION
Commission on
Law and Aging

AMERICAN
PSYCHOLOGICAL
ASSOCIATION

Table of Contents

Acknowledgements iv

Executive Summary v

I. Importance of Lawyer Assessment of Client Capacity 1

A. Capacity Judgments and Legal Practice 1

B. Increasing Prevalence of Capacity Questions 1

C. Model Rule 1.14 2

D. Legal Malpractice 2

E. Lawyer Assessment of Capacity 3

II. Legal Standards of Diminished Capacity 5

A. Standards of Capacity for Specific Legal Transactions 5

B. Diminished Capacity in State Guardianship Law 7

C. Ethical Guidelines for Assessing Capacity 8

III. Clinical Models of Capacity 9

A. General Clinical Model of Capacity 9

B. Specific Domain Models of Capacity 11

IV. Lawyer Assessment of Capacity 13

A. Observing Signs of Possible Diminished Capacity 13

B. Evaluating a Client's Understanding in Relation to Legal Elements of Capacity. 17

C. Considering Factors from Ethical Rules 18

D. Performing the Legal Analysis and Categorizing the Legal Judgment 19

E. Documenting the Capacity Judgment 19

F. Taking Actions Following Informal Capacity Assessment 20

G. Caution Against Lawyer Use of Psychological Instruments 21

Capacity Worksheet for Lawyers 23

V. Techniques Lawyers Can Use to Enhance Client Capacity 27

A. Engendering Client Trust and Confidence 27

B. Accommodating Sensory Changes 28

C. Accommodating Cognitive Impairments 28

D. Strengthening Client Engagement in the Decision-Making Process 29

VI. Referrals for Consultation or Formal Assessment 31

A. Basic Considerations in Seeking Consultation or Referral 31

B. Selecting a Clinician 32

C. Elements of a Lawyer's Referral to a Clinician 33

VII. Understanding and Using the Capacity Assessment Report 37

A. Understanding the Elements of the Capacity Report 37

B. Clinical Capacity Opinions Versus Legal Capacity Outcomes 39

C. Using the Capacity Report 39

Appendix 1: Capacity Assessment Algorithm for Lawyers 42

Appendix 2: Case Examples 43

Appendix 3: Brief Guide to Psychological and Neuropsychological Instruments 59

Appendix 4: Dementia Overview 67

End Notes 71

Acknowledgements

This handbook represents a collaborative effort of members of the American Bar Association (ABA) and the American Psychological Association (APA). Formal collaborative efforts between the ABA and the APA began in 1995 with the establishment of the interdisciplinary Task Force on Facilitating APA/ABA Relations. Since that time, the task force has identified, developed, and pursued productive interdisciplinary projects and relationships. Interactions between the APA and the ABA have resulted in collaboration on a number of activities and facilitated useful forums for the exchange of views about critical issues and concerns affecting psychology and the law.

Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers represents the first work product of the ABA/APA Assessment of Capacity in Older Adults Project Working Group, established in 2003 under the auspices of the Task Force on Facilitating APA/ABA Relations.

In June 2003, a two-day meeting, *Legal and Psychological Perspectives on Assessment of Capacity in Older Adults: An ABA-APA Dialogue*, brought together a group of attorneys, psychologists, and a probate judge to discuss professional needs. Among the issues identified was a need for a handbook for attorneys on working with older adults with diminished capacity with a focus on attorney assessment. Subsequent to the meeting, the ABA/APA Assessment of Capacity in Older Adults Project Working Group was formed. The group met again in December 2003. At that meeting an outline for the handbook was developed and chapter authors were identified.

Members of the ABA/APA Working Group are: Nancy Coleman, M.S.W, M.A.; Deborah DiGilio, M.P.H.; Barry Edelstein, Ph.D.; Gregory Hinrichsen, Ph.D.; Daniel Marson, J.D., Ph.D.; Jennifer Moye, Ph.D.; Leonard Poon, Ph.D.; David Powers, Ph.D.; Charles Sabatino, J.D.; and Erica Wood, J.D. Daniel Marson and Jennifer Moye contributed case examples. Jennifer Moye was the editor of this handbook.

The working group acknowledges the input of Betsy Abramson, J.D.; Donna Beavers, B.S.; Edwin Boyer, J.D.; Baird Brown, J.D.; Hon. John Kirkendall; and John Laster, J.D. The draft handbook was also reviewed by the APA Committee on Aging, the APA Ad Hoc Committee on Legal Issues, APA Division 12, Section II - Clinical Geropsychology, APA Division 20 - Adult Development and Aging, APA Division 40 - Clinical Neuropsychology, and a focus group of elder law attorneys. A special thanks goes to Katie Maslow, M.S.W., of the Alzheimer's Association, for her contribution in preparing the appendix on dementia. We are grateful to these groups and a host of other professionals for their helpful comments and suggestions on earlier drafts of this handbook. The working group also expresses its special thanks to Jamie Philpotts for her superb editorial assistance.

Finally, we wish to acknowledge for their financial support in the printing and distribution of this handbook the Borchard Foundation Center on Law and Aging, the Gerontology Center at the University of Georgia, Camilla O. McRory, attorney at law, and B. Hudnall Stamm, Ph.D., Institute of Rural Health, Idaho State University (under the institute's grant # 1 D1B TM 00042-01 from the Department of Health and Human Services (DHHS) Health Resources and Services Administration, Office for the Advancement of Telehealth). The contents are the sole responsibility of the authors and do not necessarily represent the official views of DHHS.

Executive Summary

With the coming demographic avalanche of Boomers reaching their 60s and the over-80 population swelling, lawyers face a growing challenge: older clients with problems in decision-making capacity. While most older adults will not have impaired capacity, some will. Clear and relatively obvious dementias will impair capacity, and the prevalence of such dementias increases with age. But what about older adults with an early stage of dementia or with mild central nervous system damage? Such clients may have subtle decisional problems and questionable judgments troubling to a lawyer. This handbook offers a conceptual framework and practice tips for addressing problems of client capacity, in some cases with help from a clinician.

Some might argue that without training in mental disorders of aging and methods of formal capacity evaluation, lawyers should not be making determinations about capacity. Yet lawyers necessarily are faced with an assessment or at least a screening of capacity in a rising number of cases involving specific legal transactions and, in some instances, guardianship. Even the belief that "something about a client has changed" or a decision to refer a client for a formal professional capacity evaluation represents a preliminary assessment of capacity.

The 2002 revision of the ABA's Model Rules of Professional Conduct, Rule 1.14, concerning the client with diminished capacity, recognizes the bind in which this places the attorney, and provides some guidance. The rule triggers protective action when an attorney reasonably believes that a client has diminished capacity, that there is a potential for harm to the client, and that the client cannot act in his or her own interest. However, the critical question is: how does the lawyer reach a reasonable belief that the client has diminished capacity? This handbook seeks to respond.

The handbook represents a unique collaboration of lawyers and psychologists. While it is a joint project of the ABA Commission on Law and Aging and the APA, its applicability is broad. It can be of use to elder law attorneys, trusts and estates lawyers, family lawyers, and general practitioners. It introduces lawyers to a wide spectrum of mental health professionals, including, but extending beyond, licensed psychologists. Interdisciplinary partnerships between lawyers and clinicians promise more informed approaches for helping older clients meet their legal needs.

The handbook is not a practice standard meant to outline compulsory actions. Instead, it offers ideas for effective practices and makes suggestions for attorneys who wish to balance the competing goals of autonomy and protection as they confront the challenges of working with older adults with diminished capacity. The handbook includes helpful discussion of the following 16 key questions.

1. What are legal standards of diminished capacity? (Ch. II, pp. 5 – 8). In everyday legal practice, lawyers need to be familiar with three facets of legal thinking about diminished capacity–standards of capacity for specific legal transactions under statutory and case law; standards of diminished capacity in state guardianship law; and ethical guidelines for assessing capacity, as set out in Model Rule 1.14 and the comments to the rule.

2. What are clinical models of capacity? (Ch. III, pp. 9 – 12). While psychologists and other health professionals may use different terms than lawyers, conceptually the clinical model of capacity has striking similarities to the legal model.

3. What signs of diminished capacity should a lawyer be observing? (Ch. IV, pp. 13 – 16). There is no single marker of diminished capacity, but there are "red flags" that may indicate problems. Attorneys should be alert to cognitive, emotional, or behavioral signs such as memory loss, communication problems, lack of mental flexibility, calculation problems, disorientation and more, as described.

Capacity Worksheet for Lawyers (pp. 23 - 26)

This capacity worksheet helps you identify and organize:

- ○ **Observational signs of diminished capacity.**
- ○ **Mitigating factors affecting capacity.**
- ○ **Transaction-specific elements of legal capacity.**
- ○ **Task-specific factors in evaluating capacity.**
- ○ **Preliminary conclusions about client capacity.**

4. What mitigating factors should a lawyer take into account? (Ch. IV, pp. 16 – 17). Factors such as stress, grief, depression, reversible medical conditions, hearing or vision loss, or educational, socio-economic, or cultural background can influence a determination or can call for alternative action–such as a referral to a physician or an adjusted approach to communication.

5. What legal elements should a lawyer consider? (Ch. IV, pp. 17 - 18). A lawyer can compare the client's understanding with each of the elements of capacity set out in statute or case law for the specific transaction or situation at hand. For instance, state law may require that for making gifts, a person must have an understanding of the property dispositions made and the persons and objects of his or her bounty.

6. What factors from ethical rules should a lawyer consider? (Ch. IV, pp. 18 – 19). A lawyer must take into account key questions specific to the task at hand (many of which are set out in the Comment to Rule 1.14) concerning the nature of the decision (consistency with long-term values, fairness, irreversibility) and the functioning of the individual (ability to articulate reasoning, variability of state of mind, and appreciation of consequences). The more serious the concerns about the decision and the risk involved, the higher the functioning needed.

7. How might a lawyer categorize judgments about client capacity? (Ch. IV, pp. 19 - 20). There is no simple score that will help the lawyer easily to come to a conclusion about client capacity. Rather, it is a professional judgment integrating all of the factors above. It might be helpful to categorize the results in the schema on page vii.

8. Should a lawyer use formal clinical assessment instruments? (Ch. IV, pp. 21 - 22). It is generally *not appropriate for lawyers to use formal clinical assessment instruments* such as the Mini-Mental Status Examination (MMSE), as they are not trained in using and interpreting these tests, the information yielded is limited, and the results may be misleading.

9. What techniques can lawyers use to enhance client capacity? (Ch. V, pp. 27 – 30). Lawyers can use practical approaches to accommodate sensory and cognitive changes that become more prevalent with age, and to build trust and confidence. Lawyers must be sensitive to age-related changes without losing sight of the individuality of each older client, and must not assume impairments in older clients but be prepared to address these issues when they arise. It is a fine line to walk. The handbook lists many tips to engender trust and bolster decision-making ability, and to accommodate hearing, vision, and cognitive loss. It also describes an approach to strengthen client engagement in the decision-making process.

10. What are the pros and cons of seeking an opinion of a clinician? (Ch. VI, pp. 31 - 32). If there are "more than mild problems" a lawyer may find it helpful to seek the independent judgment of a physician or other clinician. Moreover, in cases of ongoing or anticipated family or other conflict a lawyer may seek a formal assessment to preempt future litigation such as a will contest. A referral to a clinician requires client consent, and can be quite traumatic for the client, as well as unsettling for the lawyer-client relationship. Also, it is expensive. However, a formal assessment generally is very valuable in clarifying specific areas of diminished capacity, eliciting advice on strategies to enhance capacity, identifying the need for protective action, justifying concerns to family members, and providing evidence in subsequent depositions or court hearings. The handbook offers ideas for ways to suggest an assessment to clients.

11. What if the client's ability to consent to a referral is unclear? (Ch. VI, pp. 34 – 36). The lawyer could wait until the client is stabilized or has a lucid interval to seek consent–or at least "assent." Under one possible interpretation of the Model Rules, the

- ○ **Intact. No or very minimal evidence of diminished capacity.**
- ○ **Mild problems. Some evidence of diminished capacity, but insufficient to preclude representation or proposed transaction.**
- ○ **More than mild problems. Substantial evidence of diminished capacity, Warrants consultation with or referral to mental health professional.**
- ○ **Severe problems. Client lacks capacity to proceed with the transaction and the representation.**

lawyer might make a very limited disclosure of otherwise confidential information to seek assistance from a clinician, since this is a "protective action." The lawyer needs to use good judgment and limit information revealed to what is absolutely necessary. The lawyer should seek a clinical consultation without identifying the client whenever possible.

12. What are the benefits for the lawyer of a private consultation with a clinician? (Ch. VI, p. 31). Sometimes a lawyer may seek a consultation with a clinician to discuss and clarify capacity issues before proceeding with representation or with a formal mental health assessment. This approach is private, and does not involve the client or require client consent, as the client is not identified. The consultation is simply professional advice to the lawyer, paid for by the lawyer. It often can save considerable time, money, and angst.

13. How can a lawyer identify an appropriate clinician to make a capacity assessment? (Ch. VI, pp. 32 - 33). The most important question in identifying an appropriate clinician is *how much experience the professional has with the assessment of capacity of older adults.* Types of professionals most likely to have such a background include: physicians, geriatricians, geriatric psychiatrists, forensic psychologists and psychiatrists, gero- and neuropsychologists, neurologists, and geriatric assessment teams. Lawyers with a large geriatric clientele may already have–or should develop–such contacts. Lawyers can investigate mental health resources through the local Area Agency on Aging, through local affiliates of the American Psychiatric Association and American Psychological Association, or through state or local medical societies or university medical centers.

14. What information should a lawyer provide to a clinician in making a referral? (Ch. VI, pp. 33 - 36). The care with which the lawyer crafts the referral request will bear directly on the usefulness of the results. A referral letter should clearly set out: client background; reason client contacted the lawyer; whether a new or old client; the purpose of the referral (the legal task to be performed); the relevant legal standard for capacity to perform the task at hand; any known medical and functional information about the client; the living situation and any environmental/social factors that may affect capacity; and client values and preferences. The lawyer should request that the *evaluator contact him/her by telephone before proceeding with any written report,* to determine whether such a report would be useful. A written report might not be advisable if litigation is possible and the assessment provides potential adverse evidence.

15. What information should the lawyer look for in an assessment report? (Ch. VII, pp. 37 - 39). While capacity reports differ among clinicians, common elements include: demographic information; legal background and referral questions; history of present illness and any psychosocial history; a statement of informed consent to the evaluation; behavioral observations; tests administered and extent to which the test results are considered valid; a summary of test results with scores and performance ranges; a diagnosis or opinion on the question of capacity for the legal task(s) at hand; and any recommendations for clinical actions to treat symptoms.

16. How does a clinical capacity evaluation relate to the lawyer's judgment of capacity? (Ch. VII, pp. 39 - 41). The ultimate question of capacity is a legal–and in some cases a judicial–determination, not a clinical finding. A clinical assessment stands as strong evidence to which the lawyer must apply judgment taking into account all of the factors in the case at hand.

I. Importance of Lawyer Assessment of Client Capacity

A. Capacity Judgments and Legal Practice

Although lawyers seldom receive formal training in capacity assessment, they make capacity judgments on a regular basis whether they realize it or not. In the context of litigation, capacity may be the sole issue in controversy–such as in a guardianship action or a challenge to a will, trust, or donative transfer based on an allegation of legal incapacity. In this context, the lawyer's role is fairly straightforward–to advocate fairly but zealously for the conclusion that represents the interests of the party he or she represents.

In non-adversarial situations, such as estate planning or the handling of specific transactions, issues of capacity are confronted more informally in the daily practice setting. In this setting, legal practitioners by necessity make implicit determinations of clients' capacity at at least two points. First, the lawyer must determine whether or not a prospective client has sufficient legal capacity to enter into a contract for the lawyer's services. Failing this, representation cannot proceed.

Second, the lawyer must evaluate the client's legal capacity to carry out the specific legal transactions desired as part of the representation (e.g., making a will, buying real estate, executing a trust, making a gift, etc.). Fortunately, for the typical adult client, the presence of adequate capacity is obvious. Moreover, as a legal and ethical matter, capacity is presumed. It is only when signs of questionable capacity present themselves that a capacity determination becomes a conscious mental process–either one deliberately undertaken or haphazardly muddled through.

Such a practice reality may seem foreign and perhaps a bit alarming to the legal professional not readily familiar with mental health concepts. Lacking training in capacity assessment or other aspects of mental health, the average practitioner may argue that lawyers do not and should not perform capacity assessments. Instead, lawyers should refer any cases of questionable capacity to mental health professionals for assessment. The assertion is true as far as it goes–but it only goes so far. To decide whether a formal assessment is needed, the lawyer is *already exercising judgment* about the client's capacity on an informal or preliminary level. The exercise of judgment, even if it is merely the incipient awareness that "something is not right," is itself an assessment. It is better to have a sound conceptual foundation and consistent procedure for making this preliminary assessment than to rely solely on *ad hoc* conjecture or intuition.

Unavoidable capacity determinations:

1. **Does the client have the capacity to contract for my services?**
2. **Does the client have the capacity to complete the legal transaction?**

Lawyers need a conceptually sound and consistent process for answering these questions.

B. Increasing Prevalence of Capacity Questions

The incidence of cases in which capacity is an issue will increase substantially in the coming years because of the aging demographic bulge and because of the greater incidence of dementia that accompanies the aging process. The label *dementia* implies no specific cause, nor does it represent an inevitable part of normal aging. However, the prevalence of dementia is estimated to double every five years in the elderly, growing from a disorder that affects 1 percent of persons 60 years old to a condition afflicting approximately 30 percent to 45 percent of persons 85 years old.[1] A wide range of diseases affecting the brain cause dementia, some entirely reversible.[2] Alzheimer's disease is the most common cause, accounting for 60 percent to 70 percent of dementia cases.[3] New drug therapies are emerging to slow the progress of Alzheimer's, but it remains incurable and irreversible. For more information on dementia, see Appendix 4.

C. Model Rule 1.14

The ABA's Model Rules of Professional Conduct (MRPC), as revised in 2002, acknowledge the lawyers' assessment functions, and indeed, suggest a duty to make informal capacity judgments in certain cases. For the first time, the revised rule attempts to give some guidance to lawyers faced with that task. Rule 1.14: Clients with Diminished Capacity, recognizes: first, the goal of maintaining a normal client-lawyer relationship; second, the discretion to take protective action in the face of diminished capacity; and third, the discretion to reveal confidential information to the extent necessary to protect the client's interests.

As set forth above, the trigger for taking protective action in part (b) of the rule is threefold, requiring: the existence of diminished capacity; a risk of substantial harm; and an inability to act adequately in one's own interest. Lawyers are familiar with assessing risk and identifying what is in one's interest, but usually they are neither familiar with nor trained in evaluating diminished capacity. Even though taking protective action is permissive ("may") and not mandatory, inaction due to uncertainty puts the lawyer uncomfortably between an ethical rock and a hard place.

2002 Revision of MRPC 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.

(b) When the lawyer reasonably 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.

(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.

D. Legal Malpractice

Legal malpractice is another risk factor that points to the need for a more deliberate attention to capacity issues. The failure to assess a client's capacity has been asserted as grounds for legal malpractice by would-be beneficiaries of a client's largess. For example, a disinherited child may allege in a will contest that a lawyer did not exercise proper care in that he or she failed to determine the testator's capacity to execute a will.

Traditionally, the courts have been reluctant to find lawyers liable for malpractice in these circumstances for two reasons: one, the lack of "privity of contract" between the lawyer and the disinherited third party (i.e., the lack of a legal relationship under which a duty arises); and two, the fact that lawyers' conduct is judged by a standard of care established by the knowledge, skill, and ability ordinarily possessed and exercised by other members of the bar in similar circumstances.[4] Historically, most lawyers did not attempt to assess capacity, so consequently, the standard of practice was quite minimal.

However, the principle of privity has been eroded significantly over the years in case law, and standards of practice continue to evolve as the prevalence of incapacity rises and as a greater awareness of the need to address capacity issues has emerged. Legal malpractice for failure to address capacity questions in appropriate cases is no longer a remote possibility.

This is not to say that every client should be referred out for clinical evaluation. Indeed, there are potentially serious negative consequences to such referrals, including increased costs and time delays and increased mental and emotional stress for the client. However, if there are any signs of diminished capacity, the lawyer is far better off consistently documenting the process of determining that the client does or does not have capacity to engage in the transaction.

E. Lawyer Assessment of Capacity

How do lawyers properly address capacity issues? The Comment to new Rule 1.14 for the first time gives some guidance in assessing capacity, although the rule itself does not define capacity:

> **Comment 6 to Rule 1.14**
>
> **In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.**

These factors blend quite naturally with the normal client interview and the counseling conversation. Yet the factors appear in the Comment without any conceptual, clinical, or practical explanation.[5]

The purpose of this handbook is to fill in the conceptual background and to offer systematic steps in making assessments of capacity. The process does not plunge lawyers into the task of clinical assessment. Indeed, these guidelines recommend against conducting clinical psychological screenings, such as the Mini-Mental Status Exam (MMSE), unless one is professionally trained in such testing. Clinical screening tests such as the MMSE are often given too much weight. They do not in themselves provide sufficient evaluation of capacity.

This handbook recommends instead a systematic role for lawyers in capacity screening at three levels. The first level is that of "preliminary screening" of capacity, the goal of which is merely to identify capacity "red flags."

The process leads in most cases to one of four conclusions:

1. There is no or very minimal evidence of diminished capacity; representation can proceed.
2. There are some mild capacity concerns, but they are not substantial; representation can proceed.
3. Capacity concerns are more than mild or substantial and professional consultation or formal assessment may be merited.
4. Capacity to proceed with the requested representation is lacking.

The second level of involvement, if needed, involves the use of professional consultation or referral for formal assessment. Such consultation or referral is best accomplished after the lawyer has fine-tuned the referral questions.

The third level of involvement requires making the legal judgment that the level of capacity is either sufficient or insufficient to proceed with representation as requested. Regardless of whether a clinical assessment is utilized, the final responsibility rests on the shoulders of the attorney to decide whether representation can proceed as requested or not, or whether in appropriate cases, protective action under MRPC Rule 1.14(b) is merited.

> **The lawyer's assessment of capacity is a "legal" assessment. It involves:**
>
> 1. **An initial assessment component and, if necessary,**
> 2. **Use of a clinical consultation or formal evaluation by a clinician, and**
> 3. **A final legal judgment about capacity by the lawyer.**

II. Legal Standards of Diminished Capacity

This chapter describes legal approaches to defining diminished capacity and incapacity. Read in tandem with the next chapter on the clinical models of capacity, the explanation highlights the similarities and contrasts between the two approaches to capacity.

Historically, the law's approach to incapacity reflects a long-standing paradox. On the one hand, our legal system has always recognized situation-specific standards of capacity, depending on the particular event or transaction–such as capacity to make a will, marry, enter into a contract, vote, drive a car, stand trial in a criminal prosecution, and so on.[6] A finding of incapacity in any of these matters could nullify or prevent a given legal act. On the other hand, at least until very recently, determinations of incapacity in the context of guardianship proceedings were routinely quite global, absolute determinations of one's ability to manage property and personal affairs. A finding of incapacity under guardianship law traditionally justified intrusive curtailments of personal autonomy and resulted in a virtually complete loss of civil rights.[7]

Lawyers need to be familiar with three facets of diminished capacity:

- ○ **Standards of capacity for specific legal transactions.**
- ○ **Approaches to capacity in state guardianship and conservatorship laws.**
- ○ **Ethical guidelines for assessing client capacity.**

A. Standards of Capacity for Specific Legal Transactions

The law generally presumes that adults possess the capacity to undertake any legal task unless they have been adjudicated as incapacitated in the context of guardianship or conservatorship, or the party challenging their capacity puts forward sufficient evidence of incapacity to meet a requisite burden of proof. The definition of "diminished capacity" in everyday legal practice depends largely on the type of transaction or decision under consideration.[8] Depending on the specific transaction or decision at issue, as well as the jurisdiction in which one is located, legal capacity has multiple definitions, set out in either state statutory and/or case law. Lawyers must be familiar with the specific state-based standards.

Consider state legal standards for the specific transaction at hand: The definition of "diminished capacity" in everyday legal practice depends largely on the type of transaction or decision under consideration.

As described in Chapter III, the evaluation of capacity by clinicians parallels this legal transaction-specific analysis, but instead of "transactions," clinicians categorize functions into "domains."

Examples of common transaction-specific legal standards include the following:

Testamentary Capacity

Typically, the testator at the time of executing a will must have capacity to know the natural objects of his or her bounty, to understand the nature and extent of his or her property, and to interrelate these elements sufficiently to make a disposition of property according to a rational plan.[9] The terminology that the testator must be of "sound mind" is still commonly used. The test for testamentary capacity does not require that the person be capable of managing all of his or her affairs or making day-to-day business transactions. Nor must the testator have capacity consistently over time. Capacity is required at the time the will was executed. Thus, a testator may lack testamentary capacity before and/or after executing a will, but if it is made during a "lucid interval," the will remains valid.[10] Finally, even a testator who generally possesses the elements of testamentary capacity may have that capacity negated by an "insane delusion" (i.e., irrational perceptions of particular persons or events") if the delusion materially affects the will.[11]

Donative Capacity

Capacity to make a gift has been defined by courts to require an understanding of the nature and purpose of the gift, an understanding of the nature and extent of property to be given, a knowledge of the natural objects of the donor's bounty, and an understanding of the nature and effect of the gift. Some states use a higher standard for donative capacity than for testamentary capacity, requiring that the donor knows the gift to be irrevocable and that it would result in a reduction in the donor's assets or estate.[12]

Contractual Capacity

In determining an individual's capacity to execute a contract, courts generally assess the party's ability to understand the nature and effect of the act and the business being transacted.[13] Accordingly, if the act or business being transacted is highly complicated, a higher level of understanding may be needed to comprehend its nature and effect, in contrast to a very simple contractual arrangement.

Capacity to Convey Real Property

To execute a deed, a grantor typically must be able to understand the nature and effect of the act at the time the conveyance is made.[14]

Capacity to Execute a Durable Power of Attorney

The standard of capacity for creating a power of attorney has traditionally been based on the capacity to contract. However, some courts have also held that the standard is similar to that for making a will.[15]

Decisional Capacity in Health Care

Capacity to make a health care decision is defined by statute in most states under their advance directives laws. Typical of these legal definitions is the following from the Uniform Health Care Decisions Act:

> "Capacity" means an individual's ability to understand the significant benefits, risks, and alternatives to proposed health care and to make and communicate a health-care decision.[16]

Decisional capacity in health care is rooted in the concept of *informed consent.*[17] The concept is based on the principle that a patient has the right to prevent unauthorized contact with his or her person, and a clinician has a duty to disclose relevant information so the patient can make an informed decision. The lack of informed consent is often an issue in medical malpractice claims. Informed consent requires that one's consent to treatment be competent, voluntary, and informed. Capacity is only one element of the test of informed consent. A person may have capacity to make a treatment decision, but the treatment decision will lack informed consent if it was either involuntary or unknowing.

While it is up to clinicians to evaluate a patient's capacity for medical treatment, lawyers need to be knowledgeable about this as well. For example, a lawyer may need to determine a client's capacity to execute an advance directive for health care or to establish in court a client's capacity to make a particular health care decision. The test of capacity to execute a health care directive is generally parallel to that of capacity to contract. However, because the capacity to contract is such a malleable test, depending upon the nature, complexity, and consequences of the act at issue, lawyers and judges have few road signs in seeking an answer to the question of capacity for many of these transactions. Accordingly, the clinical models of capacity discussed in Chapter III help to supplement legal notions with scientifically grounded indicators.

Capacity to Mediate

In referring a client to mediation or representing a client in a mediation, a lawyer should be familiar with the capacity to mediate. The *ADA Mediation Guidelines* name several factors to be considered by mediators:

> The mediator should ascertain that a party understands the nature of the mediation process, who the parties are, the role of the mediator, the parties' relationship to the mediator, and the issues at hand. The mediator should determine whether the party can assess options and make and keep an agreement.[18]

Other Legal Capacities

A host of other legal acts have specific definitions of capacity articulated and honed by statutes and courts in different jurisdictions. For instance, lawyers may wrestle with client capacity to drive, to marry, to stand trial, to sue and be sued, or to vote.

B. Diminished Capacity in State Guardianship Law

State guardianship and conservatorship laws rely on broader and more encompassing definitions of incapacity, a finding of which permits the state to override an individual's right to make decisions and to appoint someone (a guardian or conservator) to act as the person's surrogate decision-maker for some or all of the person's affairs.[19] The criteria for a finding of incapacity differ among the states, but in all states, the law starts with the presumption of capacity. The burden of proof is on the party bringing the petition to establish sufficient diminished capacity to justify the appointment of a guardian or conservator.

The law of guardianship has evolved extensively from its English roots. Originally, the law required a finding that the alleged incapacitated person's status was that of an "idiot," "lunatic," "person of unsound mind," or "spendthrift." Present day notions of incapacity instead use a combination of more finely-tuned medical and functional criteria. Since the 1960s, a common paradigm for the definition of incapacity under guardianship laws has been a two-pronged test that required: (1) a finding of a disabling condition, such as "mental illness," "mental disability," "mental retardation," "mental condition," "mental infirmity," or "mental deficiency"; and (2) a finding that such condition causes an inability to adequately manage one's personal or financial affairs.[20]

Historically the disabling condition prong of the test was quite broad. Many states included "physical illness" or "physical disability" as a sufficient disabling condition, and some opened a very wide door by including "advanced age" and the catch-all "or other cause." Such amorphous and discriminatory labels invited overly subjective and arbitrary judicial determinations. Over time, states sought to refine both prongs of this test to make the determination of incapacity less label-driven, more specific, and more focused on how an individual functions in society.[21] For example, only a few states still include the pejorative term "advanced age" in their definition.[22] Likewise, the second prong of the test–inability to manage one's affairs–has been honed by many states to focus only on the ability to provide for one's "essential needs" such as "inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety."[23]

In more recent years "cognitive functioning" tests have emerged in many states to supplement or replace one or both prongs of the traditional test. For example, in the 1997 Uniform Guardianship and Protective Proceedings Act, a cognitive functioning test replaces the disabling condition language in the definition of incapacity:

> "Incapacitated person" means an individual who, for reasons other than being a minor, is *unable to receive and evaluate information or make or communicate decisions to such an extent* that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.[24]

These three tests—disabling condition, functional behavior, and cognitive functioning—have been used by states in a variety of ways.[25] Some combine all three.[26] Most states have added threshold requirements for guardianship intervention–most commonly a finding that the guardianship is "necessary" to provide for the essential needs of the individual (i.e., there are no other feasible options) or that the imposition of a guardianship is "the least restrictive alternative."[27]

Four varying tests of incapacity under state guardianship law:

○ **Disabling condition.**

○ **Functional behavior as to essential needs.**

○ **Cognitive functioning.**

○ **Finding that guardianship is necessary and is "least restrictive alternative."**

State guardianship laws today *permit or prefer limited forms* of guardianship rather than plenary guardianship.

In addition to defining the elements of diminished capacity for purposes of guardianship, most state laws have finally recognized that capacity is not always an all or nothing phenomenon, and have enacted language allowing for "limited guardianship" in which the guardian is assigned only those duties and powers that the individual is incapable of exercising. Thus, judges, as well as lawyers who draft proposed court orders, need to understand and identify those specific areas in which the person cannot function and requires assistance. Under the principle of the least restrictive alternative, the objective is to leave as much in the hands of the individual as possible.

C. Ethical Guidelines for Assessing Capacity

The first chapter of this handbook noted the importance of Rule 1.14 of the Model Rules of Professional Conduct, revised in 2002, which describes the special ethical responsibility of lawyers in representing clients with diminished capacity. It also noted that, although the Model Rules do not define capacity, the Comment to Rule 1.14 identifies the following factors that the lawyer should "consider and balance" in determining the extent of a client's diminished capacity:

Comment 6 to Rule 1.14—Capacity Factors

- ○ **The client's ability to articulate reasoning leading to a decision.**
- ○ **Variability of state of mind.**
- ○ **Ability to appreciate consequences of a decision.**
- ○ **The substantive fairness of a decision.**
- ○ **The consistency of a decision with the known long-term commitments and values of the client.**

These factors are explored further in Chapter IV. The task of the lawyer will be to integrate these factors, along with the state's specific standards for the legal transaction at hand or the specific criteria for a determination of incapacity under state guardianship law—into a process of preliminary capacity assessment. This challenging task is explored in Chapter IV, after the summary of the clinical model of capacity.

III. Clinical Models of Capacity

Why consider the clinical perspective on capacity?

In most situations, the lawyer will determine that the client has legal capacity and will proceed with the transaction without the need for an assessment by a clinical health professional. For clients who do require a clinical assessment, later chapters of this handbook will discuss how to work with clinicians and interpret clinical reports.

This section summarizes models of capacity from the clinical perspective. A comparison of legal and clinical models of capacity reveals many similarities. A basic understanding of a clinical perspective on capacity may help the attorney to make decisions about a client's legal capacity.

Which clinical health professionals evaluate capacity?

Most often, when a lawyer seeks clinical consultation, the clinician will be a physician, although psychiatrists, psychologists, and other mental health professionals also may evaluate capacity. Clinicians use models of capacity that combine clinical practice standards with law and clinical research. The remainder of this section summarizes key elements of these models, including a general conceptual model for capacity and specific "domain" models of capacity.

A. General Clinical Model of Capacity

Regardless of the capacity that is being evaluated, clinicians must address four questions: What is the diagnosis that is causing the problem? What are the client's cognitive strengths and weaknesses? What are the client's behavioral strengths and weaknesses? Who is the client and what is the life situation with which they are contending? A widely cited model of capacity ("the Grisso model") that is often used by psychologists labels these key components of capacity as causal, functional (cognitive and behavioral), and interactive.[28] These components are similar to those found in legal guardianship standards.

Key Points

- ○ **In most cases, it will not be necessary to consult with a clinician.**
- ○ **Knowledge of clinical models of capacity can be useful.**
- ○ **Many legal and clinical concepts of capacity are similar.**
- ○ **There is an emerging consensus on clinical models of capacity.**

A Comparison of Guardianship Standards and Clinical Models of Capacity

Legal Model		Clinical Model
Disabling Condition	↔	**Causal Component**
Cognitive Functioning	↔	**Cognitive Functioning**
Behavioral Functioning	↔	**Behavioral Functioning**
Necessity Component– What risk of harm? Least restrictive alternative?	↔	**Interactive Component**

1. Causal Component

- *Definition of Causal Component*

The causal component is the diagnosis that is the cause of the incapacity—for example, Alzheimer's disease or schizophrenia.

- *Relationship to Legal Standard*

The causal component corresponds to the disabling condition test in guardianship law (Chapter II, B). Information about the likely cause of incapacity is very important information for the attorney. Once the diagnosis is established, it usually indicates the prognosis and likely patterns of symptoms. Usually the most important question is: "will this person get better, stay the same, or get worse?" The diagnosis might also suggest to the attorney why a given client is frequently changing his or her mind. An answer to this latter question is especially relevant to the Comment to Model Rule 1.14, which asks for consideration of the client's variability of state of mind.

For example, an individual comes into a lawyer's office to change a will but seems confused. Knowledge of the cause of the confusion could help to guide the lawyer's actions. A diagnosis of delirium (a condition in which an individual has marked difficulties focusing, usually caused by a medical problem) indicates that confusion is likely temporary and should clear up with appropriate medical treatment. A diagnosis of depression could suggest that a change of mind may be due to feelings of hopelessness or distorted thinking that should also improve with appropriate treatment. Thus, information on the diagnosis not only names the cause of any impairment, but indicates whether the impairment is temporary or permanent, will get better, worse, stay the same, or will improve with treatment.

Knowing the diagnosis helps answer:

- ○ **What is causing the problem?**
- ○ **Is it temporary or permanent?**
- ○ **Will it get better or worse?**
- ○ **Could it improve with treatment?**
- ○ **What treatment could help?**
- ○ **Is there is no clinical impairment or illness?**

- *Assessment of Causal Component*

The diagnosis will almost always be one found in the *Diagnostic and Statistical Manual of Mental Disorders – IV (DSM-IV)*,[29] which lists and describes currently recognized psychiatric disorders. A psychiatric diagnosis is made after reviewing current and past problems and medical information (e.g., labs, brain scans). Of course, a clinician may determine that there is no diagnosable illness and that the person's current decisions (even if they represent a change from past decisions) reflect an appropriate, considered choice that is consistent with the individual's values.

2. *Cognitive Functioning*

- *Common Cognitive Problems*

An individual may have cognitive problems with attention, memory, understanding or expressing information, reasoning, organizing, planning, or other areas. These problems could be caused by a cognitive disorder, such as dementia, or a psychiatric disorder such as schizophrenia.

- *Relationship to Legal Standard*

This cognitive element of capacity is found in guardianship law, particularly based on the 1982 or 1997 Uniform Guardianship and Protective Proceedings Act, which emphasize an individual's ability to "receive and evaluate information or make or communicate decisions" or "sufficient understanding or capacity to make/communicate decisions."

- *Assessment of Cognition*

Cognitive symptoms are assessed by clinicians through clinical interview and/or formal testing.

3. *Functional Behavior*

- *Importance of Functional Behavior*

Many traditional clinical assessments end once the person's diagnosis and cognition are assessed (e.g., a typical neuropsychological or neurological assessment). But, when legal capacity is questioned, it is important to have specific, direct information about the individual's abilities for the capacity in question, be it making a will, making a medical decision, living at home, driving, or any other task.

Information about cognitive and functional performance together explains the person's capacity for the transaction in question. For example, in evaluating the capacity to manage finances, information about both memory and abilities to pay bills may be relevant. It is important to consider both pieces of information. Sometimes an individual can demonstrate how to do something during clinical examination but poor memory makes it impossible to remember the task at home. Conversely, a person may have trouble on a standard memory test (e.g., remembering a list of words), but is quite able consistently to name a health care proxy despite the memory problem.

- *Relationship to Legal Standard*

This functional element of capacity is found in guardianship law in clauses that describe the need to adequately manage one's person or property. The element is also found in all types of transaction-specific legal standards that characterize the specific skills or abilities necessary for the transaction at hand.

- *Assessment of Functional Behavior*

Functional behavior is assessed through the reports of family members, direct observation, and/or performance-based testing. More and more clinicians turn to functional instruments–also called capacity instruments–to do such assessments. Capacity instruments are described in Appendix 3.

4. *Interactive Component*

- *Definition of Interactive Component*

Some lawyers may object to the clinical model thus far, arguing: "But I have known my client for years, and what is being requested is consistent with his values even though he may look a little confused," or "But in this situation, naming a reliable and conscientious adult child as an agent under a durable power of attorney is such a low risk that it doesn't matter if my client cannot pass your tests."

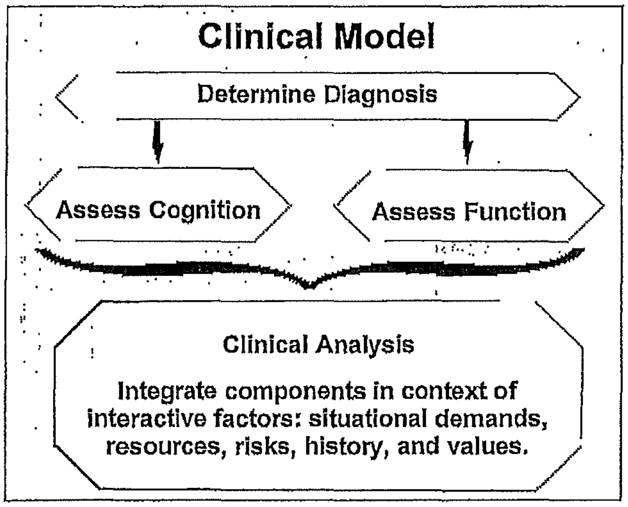
These contextual factors (e.g., the history, the risk in the situation) are also part of a clinical model of capacity and a good clinical evaluation of capacity. The so-called *interactive* component of capacity takes into account personal, physical, psychosocial, and situational demands placed on the individual. The interactive component also incorporates the resources available to the individual, risks of the specific situation, and the person's values and preferences. The outcome of a clinical evaluation of capacity is never merely a diagnostic statement or report of test results, but an integration of these with the particulars of the client's life and situation.

- *Relationship to Legal Standard*

The interactive component is clearly recognized in legal concepts of capacity, particularly in statutory pre-conditions for guardianship that require a finding that guardianship is the least restrictive alternative given the person's circumstances.

- *Assessment of Interactive Factors*

The interactive component is assessed through direct questioning (of the client and, if appropriate, family) about the situation, the person's resources, history, values, preferences, and knowledge of the services and clinical interventions tried (e.g., bill paying services or treatment for depression). The clinician may need to speak to the lawyer and other sources to gather information about interactive factors.


Clinical Model
Determine Diagnosis
Assess Cognition
Assess Function
Clinical Analysis
Integrate components in context of interactive factors: situational demands, resources, risks, history, and values.

B. Specific Domain Models of Capacity

Just as the law has transaction-specific models of legal capacities, clinicians also recognize "domain"-specific models of capacities. The word "domain" is used to connote a cohesive area of cognitive or functional behavior.

Consent Capacity

A widely accepted taxonomy of the functional abilities needed for medical decision-making capacity is: Understanding, Appreciation, Reasoning, and Expression of Choice.[30]

Understanding is the ability of the individual to comprehend diagnostic and treatment-related information.

Appreciation refers to the ability to relate the treatment information to one's own situation. In usual clinical practice, appreciation translates into the client's belief that a well-considered medical diagnosis is valid and that treatment may be beneficial.

Reasoning is the ability to evaluate treatment alternatives by comparing risks and benefits in light of one's own life. Sometimes reasoning is defined by the ability of the client to provide "rational reasons" behind a treatment choice.

Expressing a choice is the ability to communicate a consistent decision about treatment.

Financial Capacity

An often-used model of the functional abilities important for financial capacity examines knowledge, skills, and judgment.[31]

Knowledge for finances involves the ability to describe facts, concepts, and events related to financial activities such as knowledge of currency, bank statements, investments, and other personal financial data.

Skills involve the ability to demonstrate practical procedures and routines important for financial management such as making change and writing checks.

Judgment involves the ability to make reasonably sound financial decisions in novel or ambiguous social situations, such as being sensitive to fraud, invulnerable to coercion, and prudent in making investments.

Independent Living

For many older adults with dementia, a critical assessment concerns whether the individual is safe to live independently. A model for assessing the abilities important for independent living focuses on a range of key skills and judgment.

Skills important to demonstrate for independent living have been described as "instrumental activities of daily living" (IADL). IADLs involve the ability to manage the home, health, money, transportation, meals, and communication.

Judgment relates to insight and decision-making essential to independent living, such as ability to handle emergencies, compensate for areas of incapacitation, exhibit motivation for daily life, and minimize risk to self and others.[32]

These domain models have been especially important in guiding researchers in their development of tests that assess specific functional behaviors and guide actual clinical assessments.

IV. Lawyer Assessment of Capacity

Lawyers must make capacity judgments in their everyday practice. There are at least two aspects to such assessments. First, the attorney must determine whether the prospective client has sufficient legal capacity to enter into a contract for the attorney's services. Second, the attorney must evaluate the client's legal capacity to carry out the specific legal transaction(s) under consideration. In either instance, the attorney must conduct an analysis of the legal elements of the capacity at issue in relation to the client's presenting cognitive and emotional abilities.

This chapter describes each of the following steps that the lawyer should take in a thorough analysis of client capacity:

A. Observe and interpret signs of diminished capacity;

B. Evaluate understanding in relation to the specific legal elements of capacity for the transaction at hand;

C. Consider the degree of risk to the client and the ethical factors set out in the Comment to Rule 1.14;

D. Complete the legal analysis;

E. Document capacity observations; and

F. Take appropriate actions in response.

This chapter outlines the lawyer's task of observation, legal analysis, and capacity judgment. For many, if not most clients, these will be the only necessary steps, because clinical consultation or assessment will not be needed to reach a firm conclusion about capacity. The next chapter directly supplements this discussion by ensuring that clients are judged under circumstances that support and enhance their capacity. The remaining chapters describe the process of obtaining and using an informal clinical consultation or a formal clinical assessment, should the lawyer believe that step is necessary prior to forming a final conclusion about legal capacity.

The process described below focuses on key signs and factors to consider in a legal assessment of capacity. The process outlined is meant to structure and record observations leading to a legal judgment that is sufficiently comprehensive in scope, systematic in process, accountable if challenged, and documented.

Furthermore, the process is geared to blend in naturally to the case interview process, rather than adding a whole new costly element. When used with the worksheet at the end of this chapter, the process systematizes and documents what the lawyer already does implicitly. The worksheet is designed to be used by the lawyer either during the client interview as a note-taking device, or immediately afterwards as an analytic tool.

A. Observing Signs of Possible Diminished Capacity

There is no single indicator that provides a consistent, clear signal that an older adult is functioning with diminished capacity. However, there are markers that, when considered together, may reflect diminished capacity. These signs should not be taken in and of themselves to be proof of diminished capacity. Instead, they may indicate a need for further evaluation of capacity by an independent professional if the signs are present in sufficient number and/or severity.

In noting potential signs of incapacity, it is important to keep in mind that the focus is on decisional abilities rather than on cooperativeness or affability. It may be challenging to disentangle one's reactions to a client's interpersonal style from observations of the client's cognitive, emotional, or behavioral problems.

Observe with the following in mind:

- ○ **Focus on decisional abilities, not cooperativeness or affability.**
- ○ **Pay attention to changes over time; history is important.**
- ○ **Beware of ageist stereotypes.**
- ○ **Consider whether mitigating factors could explain the behavior.**

It can also be difficult to determine the meaning of cognitive, emotional, or behavioral anomalies in a new client. However, if a client is a returning one, it is critical to consider the history of interactions and pay attention to changes in functioning. A baseline of what is typical for any particular person is extremely helpful in assessing current decisional abilities. Be sensitive to gradual or sudden changes in functioning among returning clients.

Finally, it is useful to be sensitive to societal stereotypes about aging, commonly termed "ageism." Aging stereotypes may be positive, idealizing old age; or negative, perhaps including the assumption that aging and diminished capacity are synonymous. Such beliefs could influence an appraisal of capacity. Hopefully, awareness of the possible signs of incapacity will help the lawyer to be more objective.

During the course of an interview, the attorney should be aware of specific cognitive, emotional, or behavioral anomalies that serve as "red flags." These may indicate possible neurological or psychiatric illness that could diminish capacity. Most of the red flags will be observed during the interview or reported by third parties such as family members. It will not be necessary (and in most cases not appropriate) to use psychological screening instruments during preliminary capacity assessments.

During and immediately after a client interview, the attorney can document the signs observed, and also make notations about the nature and severity of these signs on the worksheet following this chapter.

PART A OF WORKSHEET

Observational signs of diminished capacity:

○ **Cognitive signs**

○ **Emotional signs**

○ **Behavioral signs**

Mitigating factors may alter weight of observations.

Possible Cognitive Signs of Incapacity

1. Short-term Memory Loss

A client quickly may forget information discussed in the interview, repeating the same statements or asking the same question multiple times, with no indication that she or he has done so more than once. Also, while the client can discuss events from 10 years to 20 years ago, there may be more difficulty describing events of the past few days or weeks. For example, the client may be able to engage in brief casual conversation, such as a five-minute conversation about the weather or sports, but have trouble going beyond that in detail and begin to repeat questions already asked or forget your name or the purpose of the visit. The ability to engage in such small talk can lead family who live out of town to say that an impaired older adult "sounds just fine on the phone."

2. Communication Problems

A great deal can be learned by observing how the client uses language and communicates ideas. For example, a client may have repeated difficulty finding a particular word or naming common items even if they can talk about the item. For example, she may say "I brought my thing with the papers in it" instead of "I brought my notebook." A common "cover" tactic for older adults with memory or communication problems is to defer to others excessively when asked direct questions, perhaps saying "My wife handles all the appointments, you'd have to ask her if we went," or "I hardly ever call my own phone number; my son would remember because he uses it."

Clients who are asked direct questions may have trouble staying on the topic, frequently shifting to discussion of unrelated issues, or moving erratically or nonsensically between topics. Such problems can indicate trouble organizing thoughts such as is found in frontal dementia or in thought disorder (e.g., psychotic thinking). Repeated difficulty finding words and vague or disorganized language may indicate an inability to communicate a clear decision or to comprehend important or relevant information.

3. Comprehension Problems

It is important to explore the client's comprehension of information with other than yes/no questions. For example, difficulty repeating back or paraphrasing simple concepts is indicative of problems in comprehension. Repeated questioning could indicate poor memory or it could indicate poor comprehension. Many people with poor memory can paraphrase information immediately, while individuals with poor comprehension will have trouble even with this.

4. Lack of Mental Flexibility

A client may lack the capacity to understand or even acknowledge multiple alternatives or viewpoints other than her or his own, or have difficulty comprehending and adjusting to changes. This is different from simply being stubborn in that someone who is stubborn can typically acknowledge that other perspectives exist, and can provide reasons for not choosing them. For example, a stubborn person may not want to change a will for particular reasons, whereas an older adult lacking in mental flexibility may exhibit a general fear of making any changes for very vague reasons.

5. Calculation Problems

A client may have very basic difficulties with simple math problems that are far worse than expected given the level of education. An example of this is someone with a college degree who makes an error in adding dollar amounts together, or lines up columns of numbers incorrectly while adding or subtracting. The client may also present signs suggesting impairment in financial management abilities more broadly, e.g., lack of awareness of current financial assets or debts.

6. Disorientation

Disorientation can occur relative to space, time, or location. For example, a long-time client may have difficulty navigating through the attorney's office building spatially or may get lost driving to the office even if he or she has been there several times over many years (spatial orientation). Once there, the client may not be able to identify where he or she is (orientation to place). The client may also not be aware of what time it is or what year it is, perhaps making references to events from several years ago as if the events were current (orientation to time).

Possible Emotional Signs of Incapacity

1. Significant Emotional Distress

A client may be persistently emotionally distressed during an interview or across interviews, beyond typical emotions expected given the circumstances, such that the individual's emotional state makes it very difficult to address the relevant legal questions. For example, the client may appear extremely anxious, tearful, or seem depressed and appear to have no energy and respond very slowly to questions.

2. Emotional Lability/Inappropriateness

Rather than a steady emotional state, a client may also either show an extremely wide range of emotions during an interview (perhaps moving quickly from laughter to tears). Alternatively, a client may express feelings that seem highly inconsistent with what he or she is discussing (laughter when discussing death of a spouse, tears of distress while professing to be happy).

Possible Behavioral Signs of Incapacity

1. Delusions

Delusions are beliefs that are unlikely to be true, such as a belief that neighbors or the government are spying on oneself. Delusional thinking may be manifest more generally in expressions of feeling frightened or unsafe. Presence of delusions may call into question the extent to which decisions are founded on sound reasoning. For example, some delusional nursing home residents occasionally stop eating because of beliefs that their food is being poisoned. However, apparent delusions that seem more reality-based may warrant further exploration. Older adults commonly have concerns about relatives or facility staff stealing money or possessions from them, which unfortunately may be more reality based.

2. Hallucinations

Hallucinations are sensory experiences in the absence of physical stimuli that could be responsible for such experiences, such as hearing voices that no one else can hear. They are often auditory or visual, but can involve the other senses: smell, touch, and/or taste. An example is an older adult who seems to be having a conversation with another person who is not there. As with delusions, hallucinations may call into question the extent to which a decision is reality-based. However, it should be noted that high functioning older adults who are recently widowed and grieving sometimes report hearing a deceased spouse call their name or briefly seeing their image. Also, significant hearing or vision problems can place an older adult at risk for sensory misperceptions. When combined with isolation and anxiety, such misperceptions may appear hallucinatory or delusional in quality.

3. *Poor Grooming/Hygiene*

Individuals who are experiencing cognitive difficulties or serious emotional problems may not brush their hair, shave, or shower regularly, or have other grooming issues. For example, along with irregular bathing or shaving, a relatively common behavior among older adults with dementia is to wear multiple layers of clothing, perhaps several shirts or multiple pairs of pants. Attention to the appearance, clothing, and smell of a client gives clues to possible mental status changes.

Functioning Beyond the Office

Observations in the office setting are obviously quite limited. If the lawyer has the ability to interview clients in their home setting, there is a definite advantage in being able to see some of their functioning in their natural and familiar environment. The lawyer may in the natural course of contact with clients—and family members with whom your client has permitted communication—learn other information about the client's level of functioning at home, particularly with respect to "activities of daily living," (ADLs) and "instrumental activities of daily living" (IADLs).

Such information may or may not be relevant to capacity. For example, an inability to write checks to pay the bills may be merely a physical deficit (and thus have nothing to do with decisional capacity), or it may be a result of failing to remember payment obligations or how to understand a bill (and thus be quite relevant to capacity for certain legal tasks). In any case, any additional information regarding client functioning in the home and community rounds out the total picture of the client's abilities and deficits. The worksheet on page 23 provides a space for recording any such information about the client's functioning beyond the office setting.

ADLS	IADLS
Dressing	Grocery shopping & meal preparation
Bathing	Driving
Toileting	Housework
Eating	Managing money
Walking	Managing medication
Transferring between bed/chair	Using telephone & mail

Undue Influence

Capacity assessment focuses on the fit between the individual's cognitive, functional, and decisional abilities and the complexity and risk of the legal transaction at hand. On the other hand, undue influence refers to a dynamic between an individual and another person. It is certainly more challenging to assess such a dynamic, but there are certain factors to assess with the elderly client to gauge whether undue influence is at work. Lawyers might attend to whether the elderly client appears fearful, isolated, overly dependent or vulnerable, or seems overwhelmed by or unaware of financial information.[33] It is also useful to determine the history of the relationship between the elderly client and any person who appears to be in a position of power: is it a long-term trustworthy relationship or is it a family member, caregiver, or acquaintance who has more recently become a "new best friend."

Mitigating/Qualifying Factors in Assessing Signs of Diminished Capacity

In addition to noting potential signs of incapacity, there are a number of mitigating or qualifying factors that may influence observed signs. In most cases, the attorney will need to ask some follow-up questions to determine whether these mitigating factors are playing a role. If found, these factors indicate a need for alternative action, be it a referral to a physician, adjusting the approach to communication, or waiting until another time when the client is functioning better.

1. *Stress; Grief; Depression; Recent Stressful Events*

A client may at times seem confused, unable to pay attention to instructions, or unable to make decisions. It is important to ascertain stresses in the client's life that could cause anxiety, depression, or inability to act. These potential signs of diminished capacity could go away when the transient stresses are alleviated.

Consider these mitigating factors that may be addressed to enhance capacity:

- ○ **Stress, grief, depression, recent events**
- ○ **Reversible medical factors**
- ○ **Normal fluctuations in mental ability and fatigue**
- ○ **Hearing and vision loss**
- ○ **Education**
- ○ **Socio-economic background**
- ○ **Cultural and ethnic traditions**

2. *Reversible Medical Factors*

Signs of disorientation and confusion could be due to a host of medical conditions and medication factors that are reversible. Some common causes are related to medications: adverse medication reaction, interactions among too many medications (polypharmacy), and taking medications incorrectly. Also, older adults can be extremely sensitive to dietary insufficiency–inadequate nutrition, hydration, and deficiency in certain vitamins in the diet can lead to temporary cognitive changes. Further, persistent pain may impact cognition. A referral to a physician or geriatrician (physician specializing in older adults) prior to further action may be indicated.

Indeed, if the client has not had a complete physical in the past year, referral is always worthwhile.

3. *Normal Fluctuations in Mental Ability in Older Adults*

Normal mental status varies over the time of day depending on the situational stresses and available energy for the older client. Clinicians have learned to test older clients in mid-morning when the client is most alert, since fatigue could cause lower performances.

4. *Hearing and Vision Loss*

Losses in hearing and vision are normal in aging. Diminished functioning in the senses should not be generalized to mental incapacity. The amount of peripheral loss varies from person to person. Older adults learn ways to compensate for these losses. However, problems in hearing and vision could sometime present a picture that the older client cannot attend, focus, or provide appropriate responses to questions. Suggestions for accommodating sensory changes are provided in the next chapter.

5. *Individual Differences and Variability Considerations*

Mental abilities can be influenced by a person's education, life and job-related experiences, and sometimes socio-economic background. The styles and strategies used in mental performances can be further influenced by the client's gender, personality, lifestyle choices, value system, and eccentricities. In addition, cultural and ethnic traditions in approaching personal, family, and medical issues may vary. From this perspective, the range of cognitive functions that is considered normal among older adults is large. These individual differences are important and need to be taken into account in evaluating potential mental capacity of older clients.

B. Evaluating a Client's Understanding in Relation to Legal Elements of Capacity

Observation of signs of diminished capacity is only an initial step for the attorney evaluating a client's capacity. The next and more substantive step is to evaluate the client's legal capacity for the proposed transaction or situation at issue. This requires a direct comparison of the client's understanding with each of the functional elements of capacity set out in statute or case law for the transaction or situation at hand.

PART B OF WORKSHEET

- ○ **Note the legal elements of capacity for the particular task at hand—e.g., testamentary capacity, contractual capacity, and donative capacity.**
- ○ **Compare client's understanding, appreciation, and functioning with the relevant legal elements.**

Testamentary capacity, again, can serve as the illustrative case example. Although a client may demonstrate signs of diminished capacity in introductory remarks and discussion, the real heart of the capacity issue involves the attorney's judgment as to whether the client can satisfy the legal elements (usually four) constituent to making a will:

- Can the client describe what a will is?
- Does the client know the "objects of his/her bounty"—i.e., his/her natural heirs?
- Does the client know the nature and extent of his/her assets?
- Can the client describe a basic plan for distributing these assets to his/her heirs?

The client's decisional process will be implicit and intuitive, as well as explicit and conscious. The attorney's role is to present information, answer and ask questions, gently probe and query, and weigh client responses and thought processes. In addition, with client consent or in accordance with the rules of ethics, the attorney could solicit information from family members and other collateral sources, including fellow professionals. The decisional process may occur over the course of one or several meetings with the client. Ultimately, the attorney must form a judgment about the client's understanding of the respective legal elements of the transaction at issue, and regarding the client's capacity overall to undertake the transaction(s) at issue (in this example, to execute a will), or the client's capacity to care for self or property under the elements set out in the state guardianship law.

C. Considering Factors from Ethical Rules

Not only must the lawyer assess the client's understanding of the legal transaction, but also take into consideration the factors set out in the Comment to Rule 1.14 of the MRPC. The new rule and comment have not been adopted everywhere, yet they merit consideration because of their authoritative source.

The factors addressed in the comment derive from recommendations of a 1993 National Conference on Ethical Issues in Representing Older Clients[34] and, in particular, from an article on representing clients with questionable capacity prepared for the conference by Peter Margulies.[35] Margulies describes six factors–five of which Comment 6 to Rule 1.14 expressly refers to.

PART C OF WORKSHEET

The Margulies/Fordham criteria:

1. **Ability to articulate reasoning behind the decision.**
2. **Variability of state of mind.**
3. **Appreciation of consequences.**
4. **Substantive fairness of decision.**
5. **Consistency with lifetime values.**
6. **Irreversibility of the decisions.**

1. *The client's ability to articulate reasoning leading to a decision.* The client should be able to state the basis for his or her decision. The stated reasons for the decision should be consistent with the client's overall stated goals and objectives.

2. *Variability of state of mind.* Margulies defines this factor as the extent to which the individual's cognitive functioning fluctuates.

3. *Ability to appreciate consequences of a decision.* For example, does a client recognize that without a given medical decision, he or she may physically decline or even die–or without a legal challenge to an eviction, he or she may be without a place to live.

4. *The substantive fairness of the decision.* Margulies maintains that while lawyers normally defer to client decisions, a lawyer nonetheless cannot simply look the other way if an older individual or someone else is being taken advantage of in a blatantly unfair transaction. To do so could defeat the very dignity and autonomy the lawyer seeks to enhance, and thus fairness is one element to balance. Of course, judging fairness risks the interjection of one's own beliefs and values, so caution is required.

   Yet, the reality is that when the desired legal plan conforms to conventional notions of fairness–e.g., equitable distribution of assets among all children–or the plan is consistent with the lawyer's long-standing knowledge of the client and family, then capacity concerns wane proportionately. Capacity may be diminished but adequate for a legal transaction deemed to be very low risk in the context of conventional fairness.

5. *The consistency of a decision with the known long-term commitments and values of the client.* The decision normally should reflect the client's lifelong or long-term perspective. This will be easier to determine if the lawyer-client relationship is long-standing. At the same time, individuals can change their values framework as they age. The distinction is important.

6. *Irreversibility of the decision.* This factor is listed in the Margulies article but not in the Comment to Rule 1.14. Margulies notes that "the law historically has attached importance to protecting parties from irreversible events," and that "doing something that cannot be adjusted later calls for caution on the part of the attorney."[36]

Of these six factors, the first three are "functional" in the sense that they reflect the cognitive functioning of the individual. These may be supported by observation of the signs of diminished capacity described previously. The latter three are "substantive" in that they look at the content and nature of the decision itself. Under the Margulies approach, the latter three factors may be thought of as substantive "levers" that modulate a kind of sliding scale of capacity. The greater the concerns under the latter three substantive variables (fairness, consistency with commitments, irreversibility), the greater the level of functioning demanded under the first three variables (ability to articulate reasoning, variability of state of mind, and appreciation of consequences).[37] In other words, the higher the risk (as measured by the client's own values, the finality, and fairness), the more one must probe to ensure decisional capacity.

The Margulies paradigm has no direct evidence-based validation in the psychological or medical literature, although the paradigm is consistent with the psychological models previously described in Chapter III, emphasizing functional and interactive (i.e., substantive) aspects of capacity. The paradigm rests upon Margulies' ethical analysis of the threshold for protective action, enhanced by an appreciation of the realities of legal counseling. A key strength is that the factors Margulies enumerates blend quite seamlessly with the kind of issues that lawyers would typically discuss in counseling clients. In that respect, the factors are very user-friendly for lawyers and amenable to easy documentation in the lawyer's notes. A careful weighing and balancing of these factors along with the specific elements of legal capacity for the transaction at hand will assist the lawyer to make a preliminary judgment of capacity.

D. Performing the Legal Analysis and Categorizing the Legal Judgment

In making a capacity judgment at this stage (without resorting to clinical consultation or formal assessment), an attorney will need to weigh all the data obtained up to this point as a whole. The completed worksheet summarizes the lawyer's observations regarding cognitive, emotional, and behavioral functioning; the presence of any mitigating factors affecting the observations; the client's decisional functioning in comparison to the applicable legal tests; and task-specific factors recommended under the Margulies/Fordham approach.

With these data, the lawyer should make a categorical assignment of the fit between the client's abilities and the legal capacity at issue. Unfortunately, there is no simple score that will help the attorney easily to arrive at a conclusion. The conclusion is ultimately a professional judgment that is aided by the systematic consideration of signs of incapacity, the client's understanding of the legal transaction, and the factors laid out in the Model Rule. In integrating these sources of data to form a conclusion, the attorney may consider the capacity classification schema in the box on the next page.

If the attorney feels uncertain as to whether the observed problems represent "mild" versus "more than mild" issues, this would be an indication to consult with a clinician as described in Chapter VI.

E. Documenting the Capacity Judgment

As in other client matters, the attorney should document his or her observations and assessment regarding client capacity. The worksheet provides that

PART D OF WORKSHEET

Capacity Conclusions

□ **Intact**

No or very minimal evidence of diminished capacity.

□ **Mild problems**

Some evidence of diminished capacity, but insufficient in attorney's judgment to preclude representation or proposed transaction.

□ **More than mild problems**

Substantial evidence of diminished capacity sufficient to warrant attorney consultation with mental health professional, or referral of client for a formal professional assessment of capacity.

□ **Severe problems**

Client lacks the capacity to proceed with the transaction and the representation.

documentation, although it may be advisable to further summarize key observations, conclusions, and reasonings in a case note, either in the space provided at the end of the worksheet or elsewhere in a case summary. In cases where the additional steps of consultation with a mental health professional or referral for formal assessment are necessary, the worksheet provides a first level of assessment. Once additional steps are taken (as described in Chapters VI and VII), the lawyer should document further analysis, judgment, and final disposition in the case file.

Videotaping As Documentation?

The question is often asked whether videotaping of the client completing a legal transaction, such as a will signing or being questioned just before the transaction, is a good idea. Experienced practitioners have come to different conclusions on this question. In selected cases, videotape evidence of a client explaining his or her reasons behind a particular dispositive provision can provide a deterrence to a contest. But, there are several arguments against videotaping the client's execution of a document:

- Videotaping may, in fact, exaggerate the client's deficits in decisional capacity.
- Unless the attorney videotapes all clients, the fact of videotaping may itself be used to raise doubts of capacity.
- The videotape cannot be edited to remove portions for any reason without risking ethical or legal violation of evidence tampering prohibitions.

F. Taking Actions Following Informal Capacity Assessment

Following a preliminary capacity assessment, an attorney may need to weigh different courses of action. In the majority of cases, presumably there will be no issues of diminished capacity and the attorney can proceed with the legal representation without further concern. In the case of "mild problems" with capacity, the attorney may want to consider referring the client for a *geriatric medical evaluation* to ensure there are no medical problems which may be transiently affecting capacity and for which resolution could remove any lingering concerns.

In cases involving "more than mild problems" with capacity, the attorney also should consider a general geriatric work-up. However, in such cases it is likely that capacity issues will persist and will require either a formal referral to a *clinician* for capacity assessment or at least attorney consultation with a clinician for guidance and clarification. After taking such external steps, the attorney then can decide the best course of action concerning the representation.

In situations where "severe problems" with capacity exist, further representation by the attorney may be problematic. Withdrawal from direct representation, taking all reasonable steps to protect the client's interests, or seeking to advance the client's interests through representation of another party (e.g., a family member), may be indicated. If a client-lawyer relationship already exists before capacity becomes an issue, then protective action may be ethically appropriate under Model Rule 1.14(b).

A formal evaluation of capacity by a clinician will be useful in supporting these actions. Communication with the client about the capacity issues, as well as with family members and significant others where

Possible Action Steps Following Preliminary Assessment

Intact Capacity

○ **Proceed normally**

Mild problems

○ **Proceed normally**

○ **Consider medical referral or**

○ **Informal mental health consultation or**

○ **Formal capacity assessment**

More than mild problems

○ **Proceed with great caution**

○ **Consider medical referral or**

○ **Informal mental health consultation or**

○ **Formal capacity assessment**

Severe problems

○ **Formal capacity assessment**

○ **Decline representation or withdraw**

○ **Protective action if appropriate**

appropriate, may be warranted in most of these cases to protect the client's legal interests and to reduce the risk of exploitation.

G. Caution Against Lawyer Use of Psychological Instruments

Cognitive screening instruments have enjoyed wide acceptance and use in clinical settings, mainly because of their brevity and simplicity in administering, scoring, and interpreting. Several brief mental status questionnaires have been developed, the most popular of which is the 30-item Mini-Mental Status Examination (MMSE), although others are widely used, too. See the Cognitive Screening tests in Appendix 3.

The MMSE provides a quick but blunt assessment of overall cognitive mental status. It assesses orientation, attention, registration and immediate recall, language, and the ability to follow simple verbal and written commands. It provides a total score that places the individual on a 30-point scale of cognitive function. In clinical settings, the MMSE has been used to detect impairment, follow the course of an illness, monitor response to treatment, screen for cognitive disorders in epidemiological studies, and follow cognitive changes in clinical trials.

While this handbook argues that lawyers regularly engage in the legal assessment of capacity and should do so in a systematic manner, for a variety of reasons addressed below, it is generally not appropriate for attorneys to use more formal clinical assessment instruments, such as the MMSE.

Lack of Training

Lawyers generally do not have the education and training needed to administer these tests. Many factors must be taken into consideration when administering and interpreting psychological tests. A few examples include: limits to the validity and reliability of tests; impact of mental status, education level, environmental variables (e.g., lighting, noise), fatigue, sleep deprivation, and sensory deficits on test results; and impact of social and cultural issues on performance.

Limited Yield

For an attorney, the information yield of psychological screening instruments is very limited, compared with other sources of relevant information. At best, screening test scores will indicate that further psychological evaluation is needed, which could often be better determined on the basis of careful observation and a thorough interview.

Over-Reliance

There is a danger of over-reliance on single test scores. Single test scores can unfortunately appear to be objectively and numerically precise. A multidimensional approach to clinical assessment is considered the gold standard for formal assessment. Decisions should not be made on the basis of a single test score.

False Negatives and False Positives

Screening exams such as the MMSE pose a risk of producing both false positives and false negatives in conclusions about mental deficits related to relevant tasks. For example, a client with mobility problems (e.g., arthritis) may have a reduced MMSE score related to difficulty drawing pentagons or folding a paper. This deficit has little relevance to the ability to prepare an advance directive. Such a conclusion would be a "false positive." On the other hand, an individual who demonstrates excellent performance on the MMSE (knows the date, has good memory) but has a specific focused and unfounded delusion about a family member, which represents an acute psychosis, may lack testamentary capacity despite the high score. This is a "false negative."

Practice Effects

When cognitive screening tests are used more than once, familiarity with the test can improve performance, even though one's cognitive functioning has not improved.

Lack of Specificity to Legal Incapacity

In a number of studies, cognitive screening alone has been found lacking sensitivity or specificity to many decisional tasks, such as medical decision-making.[38] It is likely to be much more relevant to evaluate the client's understanding of the specific legal elements of capacity for the transaction at hand and consider the factors laid out in this chapter. Such an approach is much more consistent with a normal attorney-client interview and will likely be more defensible in the event of a malpractice claim.

Capacity Worksheet for Lawyers

Source: *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, by the ABA Commission on Law and Aging and the American Psychological Association (2005). Please read and review the handbook prior to using the worksheet.

Client Name: ______________________ **Date of Interview:** ________________

Attorney: ______________________ **Place of Interview:** ________________

A. Observational Signs

◆ Cognitive Functioning	Examples
Short-term Memory Problems	Repeats questions frequently Forgets what is discussed within 15-30 min. Cannot remember events of past few days
Language/Communication Problems	Difficulty finding words frequently Vague language Trouble staying on topic Disorganized Bizarre statements or reasoning
Comprehension Problems	Difficulty repeating simple concepts Repeated questioning
Lack of Mental Flexibility	Difficulty comparing alternatives Difficulty adjusting to changes
Calculation/Financial Management Problems	Addition or subtraction that previously would have been easy for the client Bill paying difficulty
Disorientation	Trouble navigating office Gets lost coming to office Confused about day/time/year/season
◆ Emotional Functioning	**Examples**
Emotional Distress	Anxious Tearful/distressed Excited/pressured/manic
Emotional Lability	Moves quickly between laughter and tears Feelings inconsistent with topic

◆ Behavioral Functioning	Examples
Delusions	Feels others out "to get" him/her, spying or organized against him/her Fearful, feels unsafe
Hallucinations	Appears to hear or talk to things not there Appears to see things not there Misperceives things
Poor Grooming/Hygiene	Unusually unclean/unkempt in appearance Inappropriately dressed

Other Observations/Notes of Functional Behavior

Other Observations/Notes on Potential Undue Influence

Mitigating/Qualifying Factors Affecting Observations	Ways to Address/Accommodate
Stress, Grief, Depression, Recent Events affecting stability of client	Ask about recent events, losses Allow some time Refer to a mental health professional
Medical Factors	Ask about nutrition, medications, hydration Refer to a physician
Time of Day Variability	Ask if certain times of the day are best Try mid-morning appointment
Hearing and Vision Loss	Assess ability to read/repeat simple information Adjust seating, lighting Use visual and hearing aids Refer for hearing and vision evaluation
Educational/Cultural/Ethnic Barriers	Be aware of race and ethnicity, education, long-held values and traditions

B. Relevant Legal Elements - The legal elements of capacity vary somewhat among states and should be modified as needed for your particular state.

General Legal Elements of Capacity for Common Tasks	Notes on Client's Understanding/ Appreciation/Functioning Under Elements
Testamentary Capacity - Ability to appreciate the following elements in relation to each other: 1. Understand the nature of the act of making a will. 2. Has general understanding of the nature and extent of his/her property. 3. Has general recognition of those persons who are the natural objects of his/her bounty. 4. Has/understands a distribution scheme.	
Contractual Capacity The ability to understand the nature and effect of the particular agreement and the business being transacted.	
Donative Capacity An intelligent perception and understanding of the dispositions made of property and the persons and objects one desires shall be the recipients of one's bounty.	
Other Legal Tasks Being Evaluated & Capacity Elements:	

C. Task-Specific Factors in Preliminary Evaluation of Capacity

The more serious the concerns about the following factors...	The higher the function needed in the following abilities...
Is decision consistent with client's known long-term values or commitments?	Can client articulate reasoning leading to this decision?
Is the decision objectively fair? Will anyone be hurt by the decision?	Is client's decision consistent over time? Are primary values client articulates consistent over time?
Is the decision irreversible?	Can client appreciate consequences of his/her decision?

D. PRELIMINARY CONCLUSIONS ABOUT CLIENT CAPACITY - After evaluating A, B, and C above:

□ **Intact** - No or very minimal evidence of diminished capacity	*Action*: Proceed with representation and transaction
□ **Mild problems** - Some evidence of diminished capacity	*Action*: (1) Proceed with representation/transaction, or (2) Consider medical referral if medical oversight lacking, or (3) Consider consultation with mental health professional, or (4) Consider referral for formal clinical assessment to substantiate conclusion, with client consent
□ **More than mild problems** - Substantial evidence of diminished capacity	*Action*: (1) Proceed with representation/transaction with great caution, or (2) Medical referral if medical oversight lacking, or (3) Consultation with mental health professional, or (4) Refer for formal clinical assessment, with client consent
□ **Severe problems** - Client lacks capacity to proceed with representation and transaction	*Action*: (1) Referral to mental health professional to confirm conclusion (2) Do not proceed with case; or withdraw, after careful consideration of how to protect client's interests (3) If an existing client, consider protective action consistent with MRPC 1.14(b)

CASE NOTES: Summarize key observations, application of relevant legal criteria for capacity, conclusions, and actions to be taken:

V. Techniques Lawyers Can Use to Enhance Client Capacity

Clients with evidence of diminished capacity may still be able to make or participate in making a legal decision. The Comment to Model Rule 1.14 notes that "a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being."[39] How can a lawyer maximize the capacity of an older client who may be limited by one or more of the cognitive, emotional, behavioral, or mitigating factors described in Chapter IV?

This chapter highlights practical techniques that lawyers can use to accommodate sensory and cognitive changes that become more prevalent with age, and to engender the trust and confidence of older clients with diminished capacity.

This chapter describes an approach of "gradual counseling" by which the attorney may help the client to understand and make choices through a process of clarification, reflection, and feedback that is respectful of client values.

A key message of this chapter is that attorneys must be sensitive to age-related changes without losing sight of the individuality of each older person.[40] Although functional limitations do increase with age, most older adults do not have physical, sensory, or cognitive impairments. Therefore, one must not assume impairments in older clients, but one must be prepared to address these issues when they arise. Moreover, attorneys should examine their own attitudes toward aging to ensure that "ageism" does not inadvertently influence their judgments about client capacity. Lawyers also should be alert to ethnic and cultural factors that might be a barrier to communication, subliminally affecting perceptions of client abilities and behavior.

Finally, attorneys should do everything possible to make their office and their counseling approach "elder friendly" and accessible to individuals with a range of disabilities. Under the Americans with Disabilities Act (ADA), law offices as "public accommodations" are required to make reasonable modifications to their policies, practices, and procedures to make services available to people with disabilities.[41] Beyond this, many older clients whose impairments do not reach the level covered under the ADA will be aided by the kinds of techniques listed below to optimize their functioning.

A. Engendering Client Trust and Confidence

Attorneys can take steps to build the trust of older clients, allowing them to be at their best during the interview process and bolstering their decision-making ability.

- Upon introduction, take time to **"break the ice"** and, if appropriate, make a few brief remarks about areas of common interest such as weather, sports, or mutual connections.
- **Interview the client alone** to ensure confidentiality and to build trust. However, consider the important role support persons can play. If the client is more at ease with a friend or family member in the room, **consider including the support person for a portion** of the interview or at least during an introductory phase. Be sure to talk *to the client rather than past the client* to the others.
- Stress the **confidentiality** of the relationship. Some older adults may be fearful of losing control of their affairs if they divulge information. Assure the client that information will not be shared with others, including family members, without prior consent.
- Encourage maximum **client participation** to increase a sense of investment in the process.
- Respond directly to the client's feelings and words, making the client **feel respected and valued**, which enhances trust.
- Use **encouragement** and verbal reinforcement liberally.

- Take **more time** with older clients so they are comfortable with the setting and the decision-making process to be undertaken.
- Conduct business over **multiple sessions** to increase familiarity and opportunities for trust building.

B. Accommodating Sensory Changes

While not all older adults have hearing and vision loss, these deficits are common for a substantial proportion of Americans over the age of 65. Sensory problems, particularly in hearing, sometimes result in older individuals pretending that they know what is under discussion, becoming socially withdrawn, and in some instances, depressed. As stated in Chapter IV, lawyers should not mistake sensory loss for mental confusion. Rather, sensory changes and the older adults' response to them are mitigating factors that should be taken into consideration when assessing signs of diminished capacity.

To address hearing loss

- Minimize **background noise** (e.g., close the office door, forward incoming calls) as individuals with hearing loss have difficulty discriminating between sounds in the environment.
- **Look at the client** when speaking. Many individuals with hearing loss read lips to compensate for hearing loss.
- **Speak slowly and distinctly**. Older adults may process information more slowly than younger adults.
- **Do not** over-articulate or **shout** as this can distort speech and facial gestures.
- Use a **lower pitch** of voice because the ability to hear high frequency tones is the first and most severe impairment experienced by many older adults with compromised hearing.
- Arrange seating to be conducive to conversation. **Sit close** to the client, face-to-face, at a table rather than on the far side of a desk.
- Focus more on written communication to compensate for problems in oral communication. Provide **written summaries** and follow-up material.
- Have auditory **amplifiers** available.

To address vision loss

- Increase **lighting**.
- **Reduce** the impact of **glare** from windows and lighting as older adults have increased sensitivity to glare. Have clients face away from a bright window.
- **Do not** use **glossy** print materials, as they are particularly vulnerable to glare.
- Format documents in **large print** (e.g., 14- or 16-point font) and double-spaced as presbyopia (blurred vision at normal reading distance) becomes more prevalent with age.
- Give clients **additional time** to read documents, as reading speed is often slower.
- Give the client adequate **time to refocus** his or her gaze when shifting between reading and viewing objects at a distance, as visual accommodation can be slowed.
- Be mindful of **narrowing field of vision.** A client may not be aware of your presence in the room until you are directly in front of him or her.
- Have **reading glasses** and magnifying glasses available on conference tables.
- Arrange furnishings so **pathways** are **clear** for those with visual or physical limitations.

To accommodate hearing/vision loss, address:

❑ **Background noise**
❑ **Seating position**
❑ **Lighting**
❑ **Large print materials**
❑ **Hearing and vision aids**
❑ **Speaking style and pace**

C. Accommodating Cognitive Impairments

For clients with some evidence of cognitive impairment who may be in the murky gray area of "questionable capacity," the practical steps suggested below may offer significant support:

- Begin the interview with **simple questions** requiring brief responses to assess client understanding and optimal pace, as reaction time is often slower among older adults, particularly for more complex tasks.
- Conduct business at a **slower pace** to allow the client to process and digest information, as information-processing speed declines with age.
- Allow **extra time for responses** to questions, as "word-finding" can decline with age.
- **Break information** into smaller, manageable segments.
- Discuss **one issue at a time**, as divided attention between two simultaneous tasks, as well as the ability to shift attention rapidly, shows age-related decline.
- **Provide cues** to assist recall rather than expecting spontaneous retrieval of information.
- **Repeat, paraphrase, summarize**, and check periodically for accuracy of communication and comprehension. The importance of repeated testing for comprehension has been documented in research of informed consent procedures showing that comprehension is sometimes incomplete even when individuals state that they understand. This inconsistency is more pronounced among older adults, particularly those with low vocabulary and education levels.[42]
- If information is not understood, incompletely understood, or misunderstood, **provide corrected feedback** and check again for comprehension.
- **Provide summary notes** and information sheets to facilitate later recall. Include key points, decisions to be made, and documents to bring to next meeting.
- Schedule appointments **for times of the day** when the client is at peak performance. Peak performance periods change with age and for many older adults **mornings** are often best.
- Provide time for **rest** and bathroom breaks.
- Schedule **multiple, shorter appointments** rather than one lengthy appointment, as older adults may tire more easily than younger adults. Multiple testing sessions can also assist in identifying the client's performance rhythms and cycles.
- Whenever possible, conduct business in the **client's residence**. This often makes the client more relaxed, optimizes decision-making, and provides the attorney with clues about "real-world" functioning.

D. Strengthening Client Engagement in the Decision-Making Process

Linda F. Smith, in her seminal article "Elderlaw: Representing the Elderly Client and Addressing the Question of Competence," describes a technique of *gradual counseling* that is useful in compensating for age-related differences in memory and problem-solving ability, and when there are questions about capacity. It provides a method for inquiring into and understanding the client's decision-making process, and may assist such clients in thinking through their underlying concerns, goals and values, and choosing a consistent course of action.

> The attorney for the limited client should engage the client in a process of gradual decision-making, which will involve clarification, reflection, feedback, and further investigation....Gradual counseling requires the attorney to repeatedly refer to the client's goals and values in assessing each alternative and in discussing the pros and cons of an alternative. This will involve a great deal of clarifying and reflecting of the clients' thoughts and feelings....The attorney should proceed to explain each relevant option and elicit the client's reactions.[43]

Smith outlines steps in the process of "gradual counseling" and maintains that if attorneys are vigilant in pursuing these steps with a client of questionable capacity, it may assist a limited client in reaching an informed decision:[44]

Gradual counseling:

□ **Identify goals**

□ **State problem**

□ **Ascertain values**

□ **Compare options to goals**

□ **Give feedback**

- Confirm or reconfirm the client's basic **goal** or problem to be solved.
- **Get feedback** from the client to ensure he or she agrees with the lawyer's statement of the problem. Listen for important client **values**.
- Ascertain **the most important** values the client expresses. Restate these values and confirm with the client. Recognize that the values of an older client may differ from those of the attorney.

> For example, a young attorney may begin to doubt the competence of her elderly client who does not wish to contest a right to income or benefits or does not wish to take a relatively simple legal action to preserve his assets. However, if the particular client has a limited life expectancy, minimal need for assets, or an emotional focus upon internal or spiritual things, that client's decision may be quite reasonable. Because the underlying values are so important, throughout the counseling process the attorney should continue to reflect the feelings and thoughts that the client expresses . . . to understand the client's values as fully as possible.[45]

- Describe the **best option** for attaining the client's goal. Ask for the client's feeling about that option.
- **Explain each relevant option**, and get the client's reaction. This will enable the attorney to see whether the client understands the information and how the client responds. It will also check for consistency of values. The attorney may need to "present fewer choices and only the most salient features for or against each alternative." This "weeding out" may allow a client of questionable capacity to reach a reasoned judgment.
- Give the client **feedback** that might be helpful. For example, if the client appears inconsistent in goals or decisions over time, pointing this out may help the client to remember and focus. If a client chooses a course that seems harmful, the attorney could express worry and concern, and get the client's reactions to this.
- Even when there is no clearly enunciated choice by the client, the lawyer still may be able to find capacity for the limited decision at hand from the **client's reactions** during the course of the session.

Such a "gradual counseling" approach is respectful of the client's autonomy. Moreover, an attorney taking these steps will be assured that he or she has made a thorough attempt to find client capacity before taking any more precipitous action. However, if despite all of these techniques and accommodations, the client's capacity for the decision or transaction is still questionable, the attorney may need assistance from a clinician.

VI. Referrals for Consultation or Formal Assessment

This chapter describes four key matters every lawyer needs to know: (A) the basic considerations relevant to seeking consultation or referral to a clinician for formal assessment; (B) how to select a clinician; (C) the elements or steps of any referral; and (D) how to communicate with the clinician doing the assessment.

Consultation: A lawyer's conversation with a clinician to discuss concerns about the client's presentation. Usually client is not identified and consultation does not require client consent.

Referral: A formal referral to a clinician for evaluation, which may or may not result in a written report. Requires client consent.

A. Basic Considerations in Seeking Consultation or Referral

In transactional legal representations, two common scenarios can lead to the decision to seek professional consultation or to make a formal referral for assessment.

First, the attorney may have sufficiently strong concerns about the capacity of the client that it is important to seek clinical expertise and input on the issue before proceeding further or taking protective action as allowed in Rule 1.14(b). Second, in cases of ongoing or anticipated family or other conflict, the foresighted attorney may seek to preempt a future litigation (e.g., a will contest) by having the client undergo a capacity assessment prior to execution of the legal transaction (e.g., the will).[46]

Under the classification schema presented in Chapter IV for distinguishing clients with (1) intact capacity, (2) mild problems, (3) more than mild problems, and (4) severe problems, an attorney may find it helpful to contact a suitable clinician in situations where the client demonstrates *more than mild problems* with diminished capacity. For clients with only *mild problems*, further evaluation generally is not necessary, unless the attorney concludes that interested third persons may challenge the legal transactions at some point, based upon allegations of mental incapacity. In these situations, the attorney may want to recommend formal evaluation of the client as a defensive measure.

Reasons for consultation or referral in transactional legal representation:

- ❑ **Concern about client capacity.**
- ❑ **Concern about preempting future litigation.**

Sometimes an attorney will seek a private consultation with a clinician to discuss and clarify specific capacity issues before proceeding further with representation. Disclosure of the attorney's concerns is private, at least at this stage of the process, and does not involve the client. The Comment to Rule 1.14(b) provides explicit recognition of such external consultations, indicating that it is proper for attorneys to seek guidance from an "appropriate diagnostician" in cases where clients demonstrate diminished capacity.[47]

In other cases, an attorney may feel compelled by capacity concerns, litigation strategy, or other case circumstances to seek an independent formal capacity evaluation by a clinician. Such a decision is significant because it necessarily involves disclosure to the client of an attorney's concerns or litigation strategy, and requires a client's consent to be evaluated. It represents a significant step by the attorney that can impact the attorney-client relationship in both positive and negative ways.

Decisions of this type, thus, will sometimes necessitate lengthy and forthright discussions with clients and family members.

This being said, such capacity evaluations and written reports are usually quite valuable because when conducted properly, they furnish objective cognitive and behavioral data and professional expertise to the attorney and the case. The opinions of a clinician can serve as evidence or be advisory in a number of important functions, outlined in the box, next page.

At the same time, a formal assessment is not without danger, for there is always the potential adverse use of such an evaluation against the lawyer's client. Though the report may be protected under physician-

Potential uses of clinical opinion regarding client capacity:

- □ **Expert testimony in a subsequent deposition or courtroom hearing.**
- □ **Clarification of the areas of diminished capacity and of retained strengths.**
- □ **Affirmation of the client's capacity.**
- □ **Justification of the attorney's capacity concerns to disbelieving clients and family members.**
- □ **Expert advice on strategies to compensate for identified mental deficits.**
- □ **Indication of the need for protective action.**
- □ **Recommendation for follow-up testing (anticipated restoration of capacity).**

patient privilege and attorney-client privilege when the client refuses to consent to disclosure, these privileges are variable under state law and subject to a host of exceptions and interpretations. Their protection from discovery in civil litigation is not absolute.[48]

On this point it should be emphasized that the clinical evaluation *need not result in a formal written report.* The lawyer may instruct the clinician to do the evaluation, and then to call the lawyer with preliminary, unwritten conclusions, after which the lawyer can state whether or not the clinician should commit the clinical opinion to writing.

B. Selecting a Clinician

Although the Comment to Rule 1.14(b) permits the lawyer to find an "appropriate diagnostician" it does not specify who is "appropriate." Of note, although the Model Rule refers to "diagnostician," a better term is clinician, as the process of capacity assessment involves more than a diagnosis, especially with the move away from merely making a diagnosis to describing cognitive and functional abilities.

Ideally, the most appropriate clinician would be a medical or mental health professional who is knowledgeable about the problems of late life, familiar with assessment approaches and instruments relevant to capacity issues, and has considerable experience conducting capacity assessments.

Who is an appropriate clinician?

The most important criterion is the clinician's experience and knowledge in the assessment of older adults.

Types of professionals who are most likely to have such background include those listed in the box on the following page. In major metropolitan areas lawyers are more likely to be able to identify internists, psychiatrists, and psychologists with relevant background. The reality is, however, that the number of professionals with ideal credentials is small.

Lawyers in rural or smaller communities may find it difficult to locate a psychiatrist or psychologist within reasonable driving distance. In this case, the lawyer may need to rely on local professional resources even if they are not ideal. A respected medical internist with a geriatric clientele may be appropriate.

A critical step in making a referral is to articulate clearly the area of referral expertise needed. Consider whether the client's impairment may stem from mental retardation or developmental disability, mental illness, Alzheimer's or other type of dementia, or other possible medical cause. The expertise for examining these different etiologies can be quite different. For example, a neurologist may have expertise in problems associated with Alzheimer's disease (a cognitive illness) while a psychiatrist is likely to have more expertise in schizophrenia (a psychiatric illness). The more closely the expertise is matched to the underlying impairment, the more likely the diagnostician can accurately assess the client and provide needed answers.

When considering a referral, the lawyer should ascertain the qualifications of the assessor. Most medical professionals are "boarded" or have "added qualifications" in one or several specialty areas. Being boarded or having added qualifications means that the individual has obtained required training and education and passed an exam. Relevant medical boarded specialties include geriatric medicine, psychiatry, neurology, geriatric psychiatry, and forensic psychiatry.

In psychology, there is increasing specialization although the boarding process has not been as important as in medicine. A small number of psychologists are boarded by the American Board of Professional Psychology (relevant boarded areas include neuropsy-

Key Professionals for Capacity Consultation or Referral

Physician	Any MD
Geriatrician	MD specialist in aging
Geriatric Psychiatrist or Gero-psychologist	Mental health specialists in aging
Forensic Psychologist or Psychiatrist	Mental health specialists in law
Neurologist	MD specialist in the brain function
Neuro-psychologist	Psychologist specialist in cognitive testing
Geriatric Assessment Team	Multidisciplinary teams in aging

chology and forensics), although most individuals who do geriatric assessments are not boarded.

Perhaps the most critical question is to *ascertain how much experience the professional has in the assessment of capacity of older adults*, or of clients with the type of presenting problem at hand.

When approaching the client's regular physician to request an evaluation, it is also useful to ask how long the physician has known the client. Armed with this information the lawyer will not only be in a better position to make a judgment about whether the individual is an "appropriate diagnostician," but also to convey in advance to the client what to expect as part of the evaluation.

Ideally, lawyers who have a large geriatric clientele will be able to recommend clinicians with whom they have had positive prior experience. Lawyers lacking those prior connections may wish to investigate resources through the local aging network. A good starting point is the local Area Agency on Aging for the county, city, or multi-county area in which the lawyer is located. Under the Older Americans Act, Area Agencies on Aging are responsible for planning and funding a wide range of services for older persons. They typically provide extensive information and referral services and may be able to identify health professionals with expertise in capacity assessment.

Asking about qualifications of clinicians:

- ❑ How long have you conducted such assessments?
- ❑ How many older adults have you assessed?
- ❑ What assessment approach and tools do you generally use?
- ❑ How many visits are usually required and of what duration?
- ❑ What is the likely cost of the assessment?

To find your local Area Agency on Aging and other resources, call the Eldercare Locator toll-free line at 1-800-677-1116, or go online to www.eldercare.gov.

The American Psychiatric Association and American Psychological Association each have state and local affiliates. Sometimes these affiliates have referral lists based on area of expertise. State or local medical societies may be able to provide referral to geriatric medicine specialists or to physicians who identify themselves as having experience with older adults. University medical centers also may have geriatric or long-term care divisions with multi-disciplinary geriatric assessment teams.

For lawyers who see an increasing number of older adults in legal practice, it makes sense to develop referral resources in advance. In areas where there is a dearth of those with relevant specialty background, it might be possible to partner with a local health or mental health professional who is interested in gaining experience in this area.

C. Elements of a Lawyer's Referral to a Clinician

Once a lawyer has identified good local clinical resources, the lawyer must consider the elements of an effective case referral. These elements are addressed below. The task of interpreting the assessment report is addressed in Chapter VII. Appendix 2 sets out a model letter requesting a client assessment.

In making a referral, it is important for the lawyer to recognize his or her own continuing role. Ultimately, the judgment about the client's capacity for the legal transaction at hand is the lawyer's to make. While the results of a clinical assessment gen-

Referral issues to consider:

1. **Use of consultation preliminary to referral;**
2. **Client consent for formal assessment; and**
3. **Lawyer communication with the assessor.**

The lawyer makes the final determination of capacity for the legal transaction.

erally will be a determining factor, client capacity is a *legal decision* and an inherent part of the lawyer-client relationship. Thus, the lawyer can use the assessment report as valuable—ideally conclusive—evidence, but still needs to "look behind" the report and make an independent judgment taking all factors into account.

Informal Consultation

A lawyer may consult a clinician either preliminary to or instead of making a client referral for a formal assessment. In such a consultation, the lawyer can outline client communications and reactions, as well as the legal transaction for which capacity is required. The lawyer can seek an informal opinion on the question of capacity—and on the question of whether a formal assessment is necessary. The clinician can raise questions the lawyer might have overlooked, allay or reframe the lawyer's concerns, and suggest strategies for enhancing client capacity.

A preliminary up-front consultation on capacity can bring a lot of "bang for the buck"–in some cases saving the lawyer and the client a great deal of time, money, and angst if it avoids an unnecessary formal assessment. Or it may provide reassurance that a formal assessment is indeed the right step, as well as an indication about what kind of assessment might be optimal.

As discussed further below, communication of capacity concerns to clients and families can sometimes be a difficult and unsettling process, which occasionally may lead abruptly to termination of the representation. Thus, an attorney needs to be well-prepared before taking such a formal step, and a private consultation may be one of the preparatory steps.

Possible questions in an informal consult:

□ **What should I look for?**

□ **What else might I ask?**

□ **What could I do to enhance capacity?**

□ **What am I overlooking?**

□ **What does it seem like to you?**

□ **Is a formal assessment indicated?**

Client Consent for Informal Consultation

Does such a preliminary consultation require client consent? If the lawyer identifies the client in the consultation, the lawyer would breach Model Rule 1.6 mandating confidentiality by failing to seek consent. Moreover, the lawyer should aim to involve the client to the greatest extent possible in all aspects of the representation. However, the Comment to Model Rule 1.14 on clients with diminished capacity provides that "in appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician" in determining client capacity.[49] The comment does not address the question of consent for seeking such guidance. And on the question of disclosure of otherwise confidential information, the new Model Rule 1.14(c) provides that if the elements of Model Rule 1.14(b) are met (i.e., the lawyer reasonably believes the client has diminished capacity, is at risk of substantial harm, and unable to act adequately in his or her own interest), then the lawyer may "reveal information about the client, but only to the extent reasonably necessary to protect the client's interest." The obvious dilemma here is that the consultation may be needed prior to, and specifically, in order to determine whether the elements of Rule 1.14(b) are met—not after the lawyer has already come to that conclusion.

One possible interpretation of the rule and comment is that, since consultation with an appropriate clinician is a very minimal protective action, the threshold for meeting the trigger criteria in Rule 1.14(b) is correspondingly low, thereby justifying very limited disclosure of otherwise confidential information. Unfortunately, authoritative resolution of the question is lacking. The lawyer needs to use good judgment and limit information revealed to what is absolutely necessary to assist with a determination of capacity. Whenever possible, the lawyer should seek to consult the assessor informally without identifying the client. In that case, the question of consent does not arise. The consultation is simply professional advice to the lawyer.

Payment for Informal Consultation

What about payment? If the client is identified in the consultation and has given consent, the lawyer then can bill the client for the consultation, as well as for the time spent by the lawyer in speaking with the assessor. The lawyer should establish in advance the assessor fee for such consultations. However, if the client is not identified, the consultation is really a service for the lawyer, paid for by the lawyer.

Uses of informal consultation:

- □ **Clinical interpretation of problem.**
- □ **Informal clinical opinion on capacity.**
- □ **Suggestions for enhancing capacity.**
- □ **Additional questions to ask client.**

If client is not identified . . .
no consent necessary and lawyer pays fee.

Client Consent for Formal Assessment

Client consent for referral for a formal assessment involves some of the same ethical considerations as client consent for an informal consultation, outlined above. On the one hand, the lawyer must not breach the confidentiality that is the hallmark of the client-lawyer relationship, and on the other hand, the lawyer knows that an assessment of capacity is necessary to assure the validity of documents or to proceed with the task at hand. If the client seems unable to give consent, the lawyer could wait until the client is stabilized, and then explain the need for referral and seek consent, or at least the "assent" of the client.

Once the client has made contact with the clinical assessor, the assessor will need to ensure there is sufficient informed consent to conduct the evaluation.[50] Finally, the clinician must get the client's consent to provide the test results to the lawyer under the requirements of the Health Insurance Portability and Accountability Act (HIPAA).[51] But beyond the ethical dictates, as a practical matter, there can be no referral unless the client at some level agrees to have an appointment with a clinician and to participate in the interview and the selected assessment tests.

How, then, does the lawyer broach the topic of a formal assessment with the client? Suggesting an assessment seems like an ultimate judgment by the lawyer–an authority figure in whom the client has placed trust. The client may interpret it as "My lawyer thinks I'm crazy... can't do things for myself ... have dementia ... am just an old woman." Indeed, "merely raising the issue of someone's competency [capacity] can be hurtful or damaging to them."[52] Moreover, the client may be intimidated by the very idea of a psychologist asking questions or of having to take a test.

Key points in discussing with clients possible referral for evaluation include:

- □ **My job as a lawyer is to do everything possible to ensure that your action (e.g., writing a will, executing this contract) cannot successfully be challenged now or at a later time.**
- □ **This kind of action can be legally challenged in the future on the grounds of legal incapacity.**
- □ **The likelihood of a challenge is higher when a family member (or other interested party) is cut out of a will (or contract) or given a significantly lesser benefit than that which they might have expected.**
- □ **A key preventative step is to have an assessment of capacity as close as possible to the time the legal transaction is completed.**

The referral is indeed trickier when the lawyer is not acting only to avoid later challenge, but because of genuine concern regarding the client's decision-making abilities, particularly in the context of undue influence. It is important to alert the client to the benefits as well as the risks of a capacity assessment. The clinician is duty bound to the same disclosure.

The best approach in such situations is a compassionate but honest and direct explanation such as:

> *Mrs. Jones, I am concerned about how you are doing. I am a little worried about your memory. To be sure that everything is okay for us to make this change to your will, and to make sure no one would contest it later, I would like you to meet with a clinician to do some formal assessment of your thinking. Hopefully, the testing will show us that everything is okay. If not, hopefully the testing will show us how to help you to meet your goals. The testing could come out either way, but I*

> *think it is a good idea to be sure. Is it okay if I set up an appointment for a specialist to talk with you and conduct the tests?*

Payment for Formal Assessment

Payment will also be a primary concern in making a referral for assessment by a clinician. If the assessment is related to a diagnosis of the client's condition or can be directly tied to his or her medical care, then the assessment may be billable under medical insurance or Medicare. However, when the assessment is strictly for a legal purpose and the client has given consent, the lawyer will need to disclose the likely cost of such assessment and confirm the client's payment obligation or other payment arrangement before proceeding.

Communicating with the Clinician

The care with which the lawyer crafts the referral request will bear on the usefulness of the results. Setting out the full information, the legal standard, and questions up front will be more likely to yield a well-tailored assessment report. Conversely, a poorly crafted referral without a clear statement of the purpose may get results that are simply not meaningful, not understandable, or just not on target.

The referral letter will be of greatest use if it clearly sets out the reason for the request, sufficient information about the client and the circumstances, and any legal standard of capacity involved. See an example of a referral letter in Appendix 2. As noted in the U.S. Veterans Administration's *Practice Guidelines for Psychologists*:

> There is always a specific reason why the psychologist is being consulted, and it is often not clearly stated. The psychologist must also understand the circumstances under which the person is allegedly unable to function under legal standards for competency. What specific areas of skill and function are at issue? In what circumstances and places? What other resources does the patient have to assist him/her in this matter? Why is the question being asked now? Was there a critical incident? Are there any major changes (e.g., surgery, relocation) which have had or might have a significant impact on this individual's ability to make decisions?[53]

It is important for the lawyer to communicate with the clinician orally, as well as in writing, to make sure the assessor understands the purpose for the referral and the elements outlined in the referral letter, as noted in the checklist on this page. The aim is to ensure a complete and well-targeted assessment that is worth the money spent. Having to fill in gaps or ambiguities afterwards is both costly and an inefficient use of everyone's time.

Checklist of Lawyer Referral Letter Elements:

1. **Client background: name, age, gender, residence, ethnicity, and primary language if not English.**
2. **Reason client contacted lawyer; date of contact; whether new or old client.**
3. **Purpose of referral: assessment of capacity to do what? Nature of the legal task to be performed, broken down as much as possible into its elemental components.**
4. **Relevant legal standard for capacity to perform the task in question.**
5. **Medical and functional information known: medical history, treating physicians, current known disabilities; any mental health factors involved; lawyer's observations of client functioning, need for accommodations.**
6. **Living situation; family make-up and contacts; social network.**
7. **Environmental/social factors that the lawyer believes may affect capacity.**
8. **Client's values and preference to the extent known; client's perception of problem.**
9. **Whether a phone consultation is wanted prior to the written report.**

VII. Understanding and Using the Capacity Assessment Report

As the number of capacity assessments increases significantly over the next decades due to demographic changes, lawyers will become increasingly familiar with interpreting and using clinical assessments. Along with this, clinicians are developing practice standards and guidelines for such reports. This chapter aims to guide attorneys in the basic features and uses of a capacity assessment report.

The following description of a capacity assessment is drawn from a typical psychological or neuropsychological report, although the length of the report and elements included vary from practitioner to practitioner.

The term "patient" is used in this chapter since the capacity evaluation with a clinical examiner is a clinically-oriented application despite its ultimate application in a legal setting. Examples of capacity evaluation reports are provided in Appendix 2.

A. Understanding the Elements of the Capacity Report

1. *Demographic Information*

The report should provide basic information concerning the age, race, gender, education, marital status, and vocational status of the patient. Such basic information provides a general context for the report's findings and conclusions.

Note: Reports of capacity assessment naturally differ somewhat depending on the professional discipline and to some extent the style of the clinician.

2. *Legal Background and Referral*

A brief description of the legal matter or issues underlying the capacity issue should be referenced early in the report. This normally would include the referral source, the specific referral question(s) presented, and the elements of capacity at issue.

3. *History of Present Illness*

Frequently there are issues of medical and specifically neurologic and psychiatric illness that may be associated with the alleged diminished capacity of an individual. This medical history needs to be presented early in the report. Interview information obtained from the patient and collateral sources is an important part of this section.

Common Elements of a Clinical Evaluation Report

Element	Summary
1. Demographic Information	Age, race, gender, education, etc.
2. Legal Background and Referral	Legal issue at hand, referral question
3. History of Present Illness	Medical history, current symptoms, etc.
4. Psychosocial History	Occupation, current living situation, family history of psychiatric and medical illness, etc.
5. Informed Consent	Statement of client's consent to the evaluation
6. Behavioral Observations	Appearance, speech, mood, etc.
7. Tests Administered	List of tests given
8. Validity Statement	Opinion of extent to which test results are valid
9. Summary of Testing Results	Test scores, standard scores, performance ranges as compared to age-matched normative data
10. Impression	Diagnosis; Clinical interpretation of test results; Clinical interpretation of psycholegal capacities
11. Recommendations	If appropriate, statements of recommended clinical action (e.g., treatment to help symptoms)

4. *Psychosocial History*

The report also concisely should reference relevant aspects of the patient's psychosocial history: family history; personal and family medical history; personal and family psychiatric history; social history; and work history.

5. *Informed Consent*

This section will document how the examiner described the purpose of the evaluation, and the patient's understanding of the evaluation and its risk and benefits, as well as the patient's consent to participate in the evaluation.

6. *Behavioral Observations*

Behaviors demonstrated by the patient during the course of the evaluation are often important pieces of capacity evidence and need to be set forth in the report. These can include the patient's appearance and presentation, speech and communication abilities, mood and range of emotional expression, insight and judgment, sense of humor, and test taking approach. Indications of neurologic or psychiatric illness should be noted, such as short-term memory loss (in interview); inability to follow task directions; confusion; perseverative behaviors or answering (i.e., excess repetition of a particular response, such as a word, phrase, or gesture); paranoid or delusional thinking; hallucinatory events; or the flat affect and morbid ideation characteristic of depression.

7. *Tests Administered*

A listing of the full range of tests administered should be included in the report. This would include tests that the patient discontinued or was unable to complete. There are many different psychological tests available that can be incorporated into a capacity evaluation. These are summarized in Appendix 3. However, in general, tests should cover the following general areas: (1) cognitive abilities; (2) personality and emotional functioning; and (3) relevant functional abilities. The functional category takes on particular significance in a capacity evaluation, as it will include (if available) measures of the specific capacities at issue in the legal case (e.g., medical decision-making capacity, financial capacity). However, as discussed further below, all three areas of testing are needed to comprise a comprehensive evaluation of the patient's capacity status.

When are objective tests indicated? The use of objective or performance-based instruments will vary according to the discipline of the assessor and the impairment of the client. As a rule, psychologists are more prone to use objective tests and to use more of them than physicians. Overall, the more mild, subtle, and complex a client's presentation, the more useful objective tests are likely to be. In contrast, a client with clear and obvious incapacity, such as in late stage Alzheimer's disease, is unlikely to need or even to be able to complete most objective tests for the purposes of a capacity evaluation. Further, the more likely it is that the findings of the report will be disputed, the more important it will be to use standardized tests as these are more defensible as representing objective findings versus subjective opinion.

8. *Validity Statement*

An essential part of any report is a brief statement by the examiner concerning the validity of both the cognitive and emotional/personality test findings. For example, "the patient gave appropriate effort during the testing, and test results are judged to be a reliable and valid indicator of the patient's level of functioning." The validity of test results can be altered by factors such as low effort, frank attempts to exaggerate deficits, or unstable medical status. In most cases of unstable medical status the examiner should wait until the patient is medically stable, but this is not always possible when an immediate result is needed. The validity measures will assist in this formulation, but other test-taking behaviors and factors also need to be considered. Exaggerated test-taking performance and sometimes outright malingering can emerge in a capacity evaluation, although most older adults will be motivated to perform at their best when the purpose is to confirm capacity for legal transactions they have initiated, as compared to personal injury and workmen's compensation settings. The validity statement focuses on effort and motivation as it influences test performance. The impact of other variables such as education, socio-economic background, and ethnicity is considered in the interpretation in the impression section.

9. Summary of Testing Results

A summary of the test results should be presented as part of the report, either in text or tabular form. Although textual description of test data is probably most common, a tabular format can be very effective as it can efficiently present the full range of data obtained (raw scores, subscale scores, percentile ranks), organized by cognitive, personality, and functional sections.

10. Diagnostic and Clinical Interpretation

This section of the report integrates all of the evaluation information into a set of clinical and capacity findings. This is a significant undertaking, as multiple sources and levels of information (from the medical record, the clinical interviews, behavioral observations, and the multiple types of tests administered) must be considered, weighed, and then translated into diagnostic findings and, separately, into clinical interpretation. For example, the clinician may state that the test results are consistent with dementia, and the patient is capable of making simple medical decisions but lacks the capacity to make complex medical and financial decisions. It is at this juncture that the value of retaining a clinician with experience in capacity evaluations will be underscored. An effective approach is to report the diagnostic impressions, cognitive, and personality impressions first, in a separate section, as prelude to clinical interpretation of the psycholegal capacities. The diagnostic statement may appear in "five axis" format, with the first item being the primary psychiatric diagnoses, the second, the personality diagnosis (if any), the third, the medical conditions affecting axes I and II, the fourth, a description of psychosocial and environmental problems, and the fifth, a "global assessment of functioning" number from 0-100.

The next section can detail the clinician's opinion of the client's psycholegal capacities. This opinion reflects not merely a scoring and reporting of test results, but a process of clinical inquiry and interpretation. It is important to keep in mind that the cognitive and emotional/personality findings and diagnostic assignments will not be determinative, by themselves, of the capacity outcomes in a particular matter. The capacity outcomes depend primarily on the fit, as judged by the examiner, between the individual patient's current functional abilities and the demands of the capacity in question within the patient's life context. Thus, as an example, a patient diagnosed with mild Alzheimer's disease and mild to moderate memory impairment may still be quite capable of consenting to medical treatment, if he or she demonstrates sufficient treatment consent abilities such as appreciation, reasoning, and understanding in discussing a medical intervention with a physician.

B. Clinical Capacity Opinions Versus Legal Capacity Outcomes

Capacity opinions in a report often are presented in terms of the patient being capable, marginally capable, or incapable with respect to the particular capacity in question (e.g., testamentary capacity). These capacity findings are clinical opinions, which although highly relevant to the legal capacity question at issue, are also distinct. It is at this point that the distinction between "clinical capacity" and "legal capacity" is most apparent and relevant.

The lawyer (or sometimes the judge) makes the final determination of legal capacity.

Capacity evaluations should not (but in some cases may) present capacity opinions as actual findings of legal capacity. Clinical findings are evidence which must then be adduced by the attorney to support, along with other evidentiary sources, his or her judgment concerning the legal capacity issue at hand, such as the ability to change a will. In guardianship, judges use capacity evaluations as one form of evidence (albeit highly relevant and probative) in arriving at their determination of the need for guardianship or conservatorship.

C. Using the Capacity Report

A capacity report, like other expert sources of evidence, is subject to multiple uses.

Follow-up with Examiner

Upon receiving a capacity evaluation, an attorney should allocate time to read and digest the report as thoroughly as possible. This will permit an informed follow-up with the examiner to identify, for example, other issues needing attention or, on occasion, factual inaccuracies needing correction. Also, the attorney may need to clarify the meaning of technical language or abbreviations used in the report.

Use of the Report As Evidence

The attorney may treat the report as informational and advisory, or as a formal assessment that could be used as evidence in a judicial setting. If the examiner is not to be designated as an expert witness in a hearing or trial, the report will in most instances not be subject to discovery, and can remain advisory in nature, as part of the attorney's client case file.

However, the application of client-lawyer privilege and doctor-patient privilege varies among the states and may not protect the report from discovery. In some cases, the attorney has sought a capacity evaluation and report specifically for purposes of inclusion in the record to substantiate or refute the client's ability concerning a legal transaction, and, in the case of guardianship, for presentation as evidence at the hearing.

Limited Guardianship and the Least Restrictive Alternative

In general, during a guardianship or conservatorship proceeding, the findings of a capacity report should be used to support an outcome consistent with the least restrictive alternative. Thus, where possible, the findings should be used to frame judicial orders of limited guardianship or conservatorship, reserving to the client rights and powers in all areas in which he or she still retains decisional abilities. Thus, with respect to a conservatorship order, if the capacity evaluation suggests preserved abilities regarding handling small amounts of money and a small checking account, these activities (cash transactions, limited checkbook management) should be retained by the client as part of the overall order. The report also may substantiate the client's capacity to execute a durable power of attorney or a health care directive that may preclude the need for guardianship.

Protective Actions Under Model Rule 1.14

In some instances, the findings of the capacity evaluation may compel the attorney to take protective action with respect to an already existing client and his or her assets. Model Rule 1.14 requires that in situations of diminished capacity, the attorney take "reasonably necessary protective action." The presence of a sound capacity evaluation and report will likely make the attorney more comfortable in taking such actions, if indicated.

The Comment to Model Rule 1.14 provides the following examples of protective action and guiding principles:

> Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney, or consulting with support groups, professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities, and respecting the client's family and social connections.

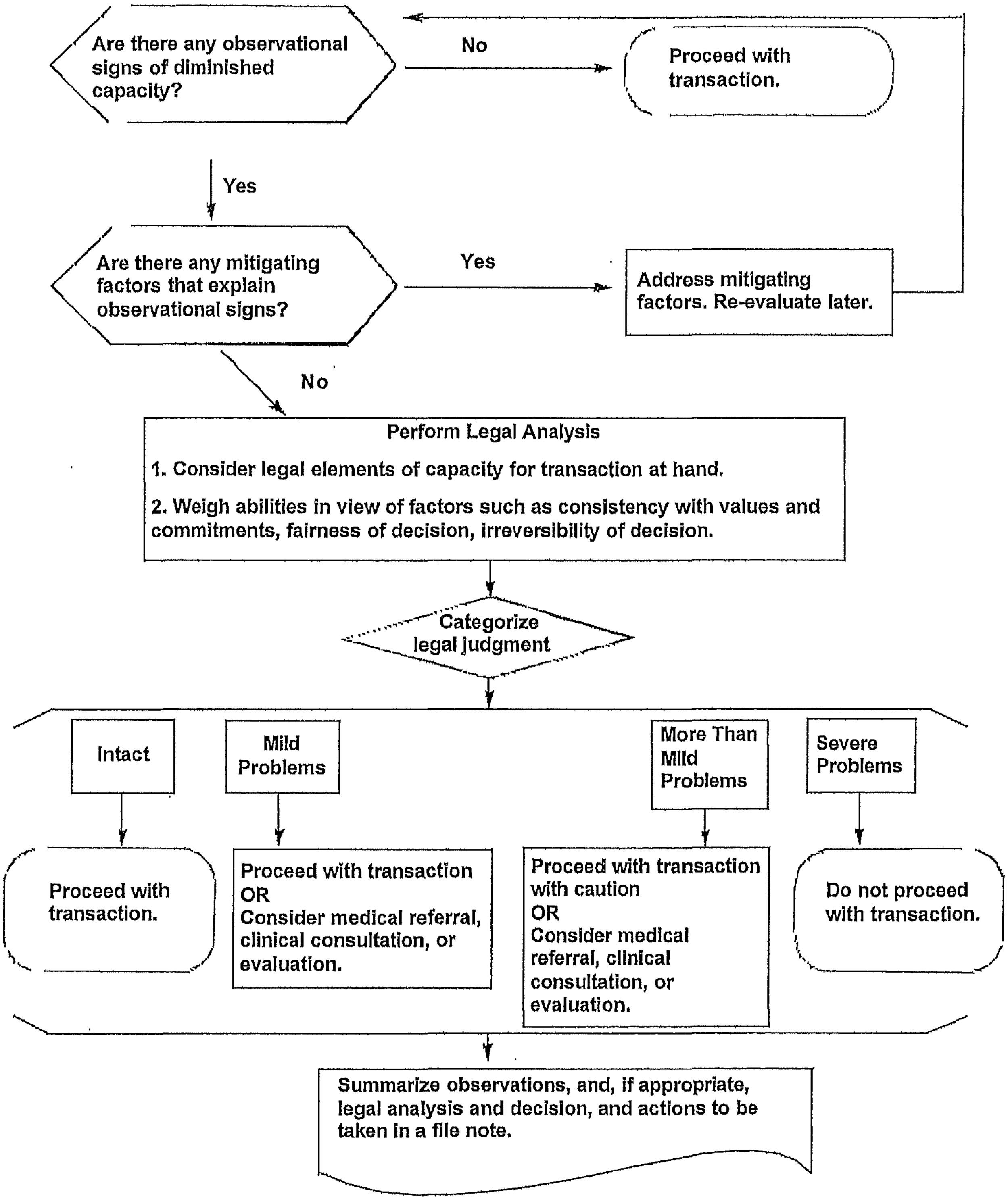
Clinical Interventions

There are many situations that are not adversarial, in which the attorney, client, and family are all seeking to serve the client's interests and to maximize capacity and autonomy. One important result of a capacity assessment may be specific recommendations for clinical interventions that may be recommended by the lawyer and pursued by the client and family to improve or stabilize the client's functioning. For example, in the case of the older client who has become delusional in the context of a hearing impairment, isolation, and anxiety, clinical interventions to address all three (hearing aids, more social contact, anti-anxiety medication) may very well reduce or eliminate delusions and restore the individual's capacity. In other situations, more frequent oversight and assistance with nutrition and medication may increase the client's lucidity. Afterwards, the legal transaction may be appropriately pursued.

Re-Evaluation Over Time

Capacity status can fluctuate over time and in some instances a capacity that was initially lost (e.g., as a result of a head injury, transient acute psychosis, severe depression that later remits with treatment) will be recovered. In situations of intermittent or evolving capacity status, the value or need for a subsequent capacity evaluation should be considered. For example, a client assessed as lacking capacity due to psychotic thinking that is secondary to severe depression may be re-evaluated for capacity after treatment for the depression. Similarly, a client assessed as lacking capacity due to confusion secondary to a urinary track infection may similarly be re-evaluated.

Appendix 1: Capacity Assessment Algorithm for Lawyers


Are there any observational signs of diminished capacity?
No
Proceed with transaction.
Yes
Are there any mitigating factors that explain observational signs?
Yes
Address mitigating factors. Re-evaluate later.
No
Perform Legal Analysis
1. Consider legal elements of capacity for transaction at hand.
2. Weigh abilities in view of factors such as consistency with values and commitments, fairness of decision, irreversibility of decision.
Categorize legal judgment
Intact
Mild Problems
More Than Mild Problems
Severe Problems
Proceed with transaction.
Proceed with transaction OR Consider medical referral, clinical consultation, or evaluation.
Proceed with transaction with caution OR Consider medical referral, clinical consultation, or evaluation.
Do not proceed with transaction.
Summarize observations, and, if appropriate, legal analysis and decision, and actions to be taken in a file note.

Appendix 2: Case Examples

Introduction to Case Examples

In writing this handbook, the working group considered four possible types of case examples: (a) a case of an older adult with intact cognition and judgment, with no evidence of incapacity, who is asking for assistance with a legal transaction; (b) a case of an older adult with mild problems with capacity but where the attorney proceeds with the transaction either because the risk and complexity of the transaction are low, or after informal consultation and clarification with a clinician; (c) a case of an older adult with more than mild problems with capacity and where the lawyer seeks formal assessment; (d) a case of an older adult where the capacity problems are severe and rather obvious and the lawyer cannot proceed even to representation.

The first type of case, with intact capacity, would represent the majority of a lawyer's older adult caseload. We decided that it would likely be most helpful to include examples of cases with more than mild problems, and where the lawyer does seek formal assessment, in order to illustrate the type of case where this might occur, provide examples of good quality assessment reports, and describe how the lawyer used such reports to guide follow-up action. In contrast, we presumed that lawyers would not find it necessary to review case examples where capacity or incapacity were obvious. As such, the following two examples illustrate situations with more than mild capacity problems and where an attorney sought formal assessment. In the following case examples, the formal assessments were written by psychologists. As noted in the handbook, the style of the report received will vary depending on the discipline of the assessor. These reports are more typical of what a lawyer would receive from a psychologist rather than a physician or psychiatrist.

CASE EXAMPLE #1: Contract, Will, and Finances

A. Example of Attorney Model Referral Letter

RE: Referral of Mr. Patient for Mental Health Assessment

Dear _________:

As we discussed by telephone, I am writing to make a referral of Mr. Patient for a neuropsychological assessment, with emphasis on his capacity: (1) to contract, (2) to make a will, and (3) to manage his business and financial affairs, as well as (4) his vulnerability to undue influence.

Background

I represented Mr. Patient and his now deceased wife several years ago in preparing their estate plan. Recently, Mr. Patient requested that I redraft a will for him and also prepare a buy/sell agreement for him with respect to his company Happy Valley Construction, which he owns with his brother James. Mr. Patient is 76 years old, was born and raised in Columbus, Georgia, and lives alone in his home of 34 years, although he receives home care services every day. His wife of 40 years died in 1990. He has two married daughters and one disabled single son. His daughter, Mrs. Daughter, is the only one who lives close by. She regularly helps him with shopping, paying bills, cooking, and light housekeeping. She is also named as his agent on his general durable power of attorney for financial affairs. However, she has not yet assumed the role of acting as his agent or attorney-in-fact.

As a result of my preliminary information gathering of his business and personal financial circumstances, as well as direct observations of Mr. Patient, I recommended to him that he undergo this formal evaluation. He consented to undergo the assessment, to have the results of the assessment released to me (release attached), and to pay the cost of the assessment. He should be billed directly by you. He has also consented to your contacting his daughter for additional background information.

Triggering Issue

Mr. Patient's daughter, Mrs. Daughter, called my office to make an appointment for her father to review a contract (a buy-sell agreement) that Mr. Patient's brother asked him to sign. She also said that her father wanted to discuss rewriting his will.

I met with Mr. Patient on x/xx/xx for part of the time in private and for part of the time with his daughter present. While he appeared well-groomed and dressed appropriately and was able to describe the purpose of his visit, he showed considerable difficulty understanding the contents of the contract his brother asked him to sign. The buy-sell contract would give his brother a first option to acquire his interest in their closely-held family company (Happy Valley Construction) on very favorable terms. But it also goes a significant step further in vesting the entire company in his brother upon Mr. Patient's death and forgiving several unspecified loans made by Mr. Patient to the company. The daughter expressed concern that her uncle is taking advantage of her father's diminished health in urging him to sign such a one-sided agreement.

As to his will, he urgently wants to redo it, now that his wife has died (although her death is now several years passed). I had prepared his current will when his wife was still alive. Under his current will, his disabled son would receive half the estate in trust, while the two daughters would each get one-quarter of the estate. He states that he now wants everything to go equally to his three children, but he appears to be confused about the nature and extent of property in his estate and about the terms of his present will.

His daughter also reports high levels of forgetfulness, confusion, and poor judgments, especially around financial transactions. She is concerned that he is unable to handle neither his business nor personal financial affairs, and she currently does most of his personal bill paying for him.

Relevant Legal Standards

Contractual capacity. In this state, the test of whether party has sufficient mental capacity to execute a valid contract is whether he is possessed of sufficient mind and reason for a full and clear understanding of the nature and consequences of making the contract. A more complicated contract calls for a higher level of capacity than a simple one. While a buy-sell agreement is not unusually complex, the proposed agreement in this case goes well beyond the usual buy-sell terms, and would in effect be a will substitute for a major part of his estate, as well as forgiving several loans (the number or amount of which I have not yet verified).

Testamentary capacity. In this state, the capacity to make a will is defined as requiring: (1) an understanding that a will is a disposition of property to take effect after death, (2) a general understanding of the property subject to the will, (3) a knowledge of the persons related to him by ties of blood and of affection who would be the usual beneficiaries of a will, and (4) an ability to conceive and express by words, written or spoken, or by signs, or by both, any intelligible scheme of disposition. It is possible for one to have testamentary capacity but not contractual capacity.

Legal incapacity to manage one's property. This is the standard used to determine the need for a court-appointed guardian in this state: a court may appoint a guardian for a person who is: (1) incapacitated by reason of mental illness, mental retardation, mental disability, physical illness or disability, chronic use of drugs or alcohol, detention by a foreign power, disappearance, or other cause; and (2) as a result of such condition, incapable of managing his or her estate, and (3) the appointment is necessary either because the property will be wasted or dissipated unless proper management is provided or because the property is needed for the support, care, or well-being of such person or those entitled to be supported by such person.

Undue influence. "Undue influence" is influence that amounts either to deception or to force and coercion which destroys free agency. It is recognized that lesser amount of influence may be necessary to dominate a mind that is impaired by age or disease. However, honest persuasion or argument does not constitute undue influence in the absence of fraud or duress when the individual in question has the mental capacity to choose between his original intention and the wishes of the other person

Medical/Social/Functional Information

Mr. Patient reports that he is on medication for diabetes and heart problems. His daughter reports that he had bypass surgery in 1989 or 1990 and that he had surgery on his lungs in 2000. His personal physician is Dr. Medical, at (address and phone). My contacts with Mr. Patient go back 15 years, and he was always quite knowledgeable in business affairs, very caring of his family, and active. My own observations are that he is now clearly quite frail and variable in his level of understanding, alertness, and confusion. Only his daughter appears to have regular contact with him. She is very concerned about his welfare and very distrustful of her uncle. The uncle essentially runs the business alone now, but maintains contact with Mr. Patient. Mr. Patient appears to have great trust in his brother.

In summary, I request an evaluation for the purposes described above. Please include the following in your assessment report if possible:

- Mental health diagnosis
- Tests conducted
- Analysis of test results
- Applicability to situation at hand
- Specific assessment of the ability of Mr. Patient to:
    - execute a contract (the buy-sell agreement described above)
    - make a will
    - manage his business and financial affairs
- Assessment of his vulnerability to undue influence
- Suggestions for improving his capacity or accommodating his deficiencies, if any.

I understand that the evaluation and report can be completed by x/xx/xx. If that time frame changes, please let me know. Please send your report to me at my Columbus office address. I appreciate your help with the case and look forward to working with you in the future.

Sincerely,

B. Example of Psychological Assessment Report

Name: Mr. Patient
Sex: Male
Race: Caucasian
Age: 76
DOB: x/xx/29
MRN: xxxxxxx

Education: 6
Occupation: Real estate/construction business owner
Marital Status: Widowed
Handedness: Right
Date Seen: x/xx/xx
Date of Report: x/xx/xx

I. BACKGROUND INFORMATION Mr. Patient was referred as an outpatient to the Neuropsychology Clinic by his attorney, Mr. Legal, Esq., for evaluation of the patient's cognitive and emotional status, and capacities to contract (execute a buy/sell agreement), manage his overall business and financial affairs, and make a will.

History of Present Illness: Mr. Patient reportedly has a 3- to 5-year history of memory problems, which reportedly developed insidiously and have gotten progressively worse over time. He reportedly has not been previously evaluated for these problems.

In interview, Mr. Patient stated that he does not have any problems with his memory. He also generally denied any other cognitive or functional problems. He stated that he does not have any help at home, but that his daughter comes by sometimes to help him pay bills or to bring him groceries. He denied problems with his driving. Regarding mood or personality changes, he reported that he is "doing fine" and denied any symptoms of depression or anxiety. Upon inquiry by the examiner, he expressed only a vague knowledge of a buy-sell agreement regarding his business that has reportedly been prepared by his brother..

Mr. Patient's daughter, Ms. Daughter, described a much more serious situation. Ms. Daughter said that her father has had memory problems for at least 5 years, and that his memory has become noticeably worse over the past 3 years. She said that she first noticed something was different when she left her accounting job in the family business in 1998 over some disagreements with her uncle James, who co-owns the business with her father. She said that her father did not seem to be taking up for her, which was uncharacteristic of him. She said that she later realized that her father was forgetting about these disagreements and his role in resolving them. Ms. Daughter reported that he currently asks the same question repeatedly, forgets conversations, and constantly misplaces items. She said that he has more trouble remembering people's names. She said that he has comprehension problems, but pretends to understand people when they talk to him. She reported that when they go to restaurants, he gets lost on his way back from the restroom. She reported that he has not driven since July 2000 when he had lung surgery. She said that just prior to that, he complained to her about getting lost while driving in a familiar area.

Regarding functional changes, Ms. Daughter reported that her father has no meaningful activities around the home. He has had full-time caregivers since July 2000. She noted that he still cannot remember their names. She reported that prior to these home health care arrangements, her father was not bathing and was wearing the same clothes every day. She reported that she has handled all of her father's bill paying since October 2000. She said that she also tries to supervise his business transactions. Ms. Daughter reported that her father co-owns an excavation business Happy Valley Construction, with his brother James. The business is located in Columbus, Georgia.

Mr. Patient reportedly has a separate business where he also buys, develops, and sells real estate. Ms. Daughter stated that her father has agreed on several occasions to consult her before signing any business documents, but then forgets to do this.

Ms. Daughter reported several poor business decisions her father has made recently. She said that in the past year he sold a piece of real estate for $10,000 that was worth $100,000. She also reported that he has made almost $500,000 in loans to the family business over the past 2 years, and that these loans have not been repaid. She reported that her father initially loaned $200,000 to Happy Valley in 1998, $90,000 of which went to his nephew, who also works for the company. She stated that there does not appear to be a note for the loan to his nephew. She reported that the remaining $300,000 was loaned out in October 2000.

Ms. Daughter also expressed concern about a proposed buy-sell agreement that was presented to her father by his brother while she was out of town. This agreement reportedly presents terms that are very favorable to the brother. It apparently states that if her father dies, the company will go to her uncle James and the money owed by the company to her father will be forgiven. She noted that in this buy/sell agreement, some property that belongs to her father is listed instead as company property. Upon learning of this agreement, Ms. Daughter encouraged her father to contact his attorney Mr. Legal to discuss this.

Finally, Ms. Daughter expressed concern about whether her father may have recently signed a new will. Although he has no recollection of signing a new will, she indicated that he had stated that his brother had recently mentioned the "need" for a new will.

Regarding mood or personality changes, Ms. Daughter reported that her father is more laid back and even indifferent. She said that he used to be very focused on and concerned about his business affairs, but now seems often indifferent to them. She denied symptoms of anxiety or depression, but noted that he naps a lot during the day. She also stated that he always wants to eat because he forgets that he has already eaten.

Social/Academic/Occupational History: Mr. Patient reportedly was born and raised in Columbus, Georgia. He reported that he had 4 brothers and sisters. The patient's father was a farmer and iron smith. The patient was reportedly married for 40 years when his wife died in 1990. He reported that he has two daughters and one son with a disability. He currently lives alone.

Mr. Patient reportedly completed 6 years of education. He reportedly buys and sells real estate and co-owns an excavation business called Happy Valley Construction Company, Inc. Mr. Patient reportedly started the excavation business and then brought his brothers into the business at a later time.

Prior Medical History: Mr. Patient's medical history reportedly is significant for diabetes and history of blood clots. Surgical history reportedly includes four-way coronary artery bypass graft (1989) and partial lung resection (2000). The patient reportedly does not drink alcohol and does not smoke. There is reportedly no history of alcohol or other substance abuse.

Family medical history is reportedly positive for myocardial infarction in his brother, stomach cancer in his sister, skin cancer in his sister, and possible AD in his mother.

Psychiatric History: Mr. Patient reportedly has no history of mental health treatment. As noted above, he reportedly has had no prior evaluations for his memory problems.

Medications: Coumadin, Exelon, Prevacid, Tenormin, ginkgo biloba, Ambien, Detrol, Claritin.

II. BEHAVIORAL OBSERVATIONS Mr. Patient presented as a well-groomed, nicely dressed 76 year-old Caucasian man. He was accompanied to the evaluation by his daughter, Ms. Daughter.

In interview, the patient's speech was fluent and reasonably goal-directed but lacked spontaneity. Responses were terse and impoverished. Comprehension appeared generally intact. Affect was mildly constricted, and mood was pleasant but irritable. Insight was judged to be very poor. There was no indication or report of formal hallucinations or delusions, or of a thought or perceptual disorder. There was no indication or report of suicidal ideation, plan, or intent.

During testing, Mr. Patient was alert and pleasant but would quickly become irritable and uncooperative with testing. He exhibited mild performance anxiety. He displayed task frustration by abandoning or avoiding tasks. He showed no response to encouragement from the psychometric technician. He displayed inability to complete some tasks due to comprehension problems. He made a few perseverative and intrusion errors. He required constant redirection to task. He showed a complete lack of test-taking strategies.

At one point, he refused to continue testing and started to leave, but was persuaded by his daughter to continue. Because of his reluctance to participate, and the examiner's concern that he would prematurely terminate the testing, only an abbreviated test battery could be administered. Nevertheless, sufficient information was obtained to respond fully to the referral questions. Overall, the patient appeared to put forth variable but acceptable effort during the testing. Much of his reluctance to participate related to tasks that he appeared unable to perform. Overall, the current test results are an accurate representation of Mr. Patient's current levels of cognitive and emotional functioning, and of his current financial abilities.

III. TESTS ADMINISTERED

California Verbal Learning Test - II (CVLT-II)
Clinical Interview
Cognitive Competency
Executive Clock Drawing Task (CLOX)
Financial Capacity Instrument (FCI)[54]
Geriatric Depression Scale (GDS)

Mattis Dementia Rating Scale (DRS)
Token Test
Trails A and B
WAB Auditory Comprehension
Wide Range Achievement Test-3 (reading subtest)

IV. SUMMARY OF RESULTS

Please see attachment.

V. IMPRESSIONS AND SUMMARY

Neuropsychological Findings:

1. Probable dementia, currently moderate (DRS=89/144, CDR= 2.0).

The neuropsychological test results were consistent with probable moderate dementia. Evidence for this impression included severe impairment on a dementia screening instrument and impairments in high-load verbal learning, recall, and recognition memory (severe to profound), simple short-term verbal recall (severe), orientation to time (severe), orientation to place (severe), simple auditory comprehension (severe), reading abilities (moderate), visuospatial construction of a clock drawing (mild), simple visuomotor tracking (mild), propositional auditory comprehension (moderate), and spontaneous construction of a clock drawing (severe). The patient was unable to complete a measure of visuomotor tracking/set flexibility. In addition, the patient's daughter reported that he has had progressive memory and other cognitive problems for as long as five years.

Functional testing and interview data were also consistent with moderate dementia. Mr. Patient was severely impaired on a cognitive measure of everyday problem solving abilities. On a functional measure of financial capacity, the patient showed intact performance only on simple tasks of naming coins/currency, coin/currency relationships, and single and multi-item grocery purchases. He demonstrated significant impairment on tests of counting coins/currency, understanding financial concepts, making change for a vending machine, tipping, conceptual understanding of a checkbook/register, pragmatic use of a checkbook/register, conceptual understanding of a bank statement, use of a bank statement, detection of telephone fraud, conceptual understanding of bills, identifying and prioritizing bills, and knowledge of his personal financial assets and activities. In addition, the patient's daughter indicated that he has home health care aides around the clock. She reported that prior to these arrangements, the patient was not bathing and wore the same clothes every day. She said that he currently has no meaningful activities around the home.

As discussed above, due to the patient's reluctance to participate fully in the testing, only an abbreviated test battery was administered. Some cognitive domains were not assessed (e.g., expressive language, general intellectual abilities), and other domains were not assessed as comprehensively as they normally would be.

2. Possible Alzheimer's disease.

Mr. Patient's neurocognitive profile was consistent with possible AD. High-load verbal learning, recall, and recognition memory were moderately to severely impaired and he was unable to benefit from semantic or recognition cueing. He showed 0% recall after a short delay, which is consistent with the rapid decay of information over delay seen in AD. In addition, he had 0% short-term recall of verbal items from the memory subtest of the DRS. Mr. Patient demonstrated characteristic impairments on measures of executive function (simple visuomotor tracking, propositional auditory comprehension, and spontaneous construction of a clock drawing) and inability to complete a measure of visuomotor tracking/set flexibility.

Clinical course was consistent with AD. Mr. Patient's cognitive difficulties reportedly have been slowly progressive over the past 5 years. He also has a family history of possible AD.

In the examiner's judgment, it is highly probable that Mr. Patient has AD. However, he needs a neurological work-up for dementia before the clinical diagnosis can be established conclusively.

Capacity Findings:

1. Probable current incapacity to enter into contracts. This incapacity would include loan agreements, real estate contracts, and corporate buy/sell agreements.

The history, interview information, and test data indicated that Mr. Patient is probably incapable currently of entering into contracts such as the proposed buy-sell agreement. Ms. Daughter reported that her father has recently sold some real estate at a fraction of what it is worth. She said that he has also made several large loans to his business recently, but seems generally unaware of these loans and the fact that they are not being repaid. He had very little specific knowledge regarding the proposed buy-sell agreement and seemed confused about its purpose.

Contractual capacity is a higher order legal competency which draws upon a variety of cognitive abilities, including memory, conceptual knowledge, reading ability, mental flexibility/executive function, and judgment. As discussed above, Mr. Patient is suffering from a moderate progressive dementia, probably of the Alzheimer's type, and he currently demonstrates significant deficits in all cognitive domains tested, including attention, memory, comprehension, and executive function. Screening for reading abilities revealed that Mr. Patient currently reads at the 2nd grade level (2%ile for age), which reflects a decline from estimated premorbid levels.

In the examiner's opinion, Mr. Patient no longer possesses the abilities to read and comprehend contractual documents, to recall essential information and details about contractual matters, to have the mental flexibility and judgment to negotiate effectively, or to make such business decisions in his best interest. In summary, he is no longer capable of entering into contracts, and it is likely that he has lacked this capacity for several years.

2. Probable current incapacity to make a new will.

Interview and test data indicated that Mr. Patient is probably incapable currently of making a new will. Mr. Patient was unable to provide an adequate description of a will, stating only "It's where you put stuff in different people's names." He was also unable to set forth the nature and extent of his property to be listed within a will, describing his assets initially only as "farmland." When specifically prompted about items of property including his business, home, bank accounts, and stocks, he stated that he wanted these things to go to his children. When asked about debts owed to him, he stated that no one owed him any money. When reminded that he had loaned money to his business, and that repayment of these loans could be made to his estate after his death, he acknowledged that these debts were still outstanding. However, he could not recall the exact amount of the loans. Mr. Patient's lack of knowledge of assets/property to be passed in his will was also reflected in his poor performance on Domain 8 of the FCI, which tests general knowledge of personal assets and estate arrangements.

Mr. Patient did know the objects of his bounty and did indicate a general plan of distribution, stating that he would want his property to pass to his children equally. However, on testing Mr. Patient indicated that he had not yet made a will, whereas his daughter reported that he has a current will.

It is the examiner's judgment that Mr. Patient currently lacks testamentary capacity.

3. Probable current incapacity to manage business-related and everyday financial affairs.

History, interview, and test data indicated that Mr. Patient is also currently incapable of managing his overall financial affairs and making business-related decisions. In interview, Mr. Patient demonstrated inaccurate knowledge of his financial and business affairs. For example, the patient indicated that he goes into work at his excavation business every day, even occasionally running construction equipment, whereas the patient's daughter reported that he is retired and that his brother operates and manages the business on his own. She reported that her father continues to manage his own finances, but makes poor business decisions (e.g., recently sold some property for 10% of what it was worth). She reported that her father has agreed several times not to sign anything without letting her review it first, but then forgets to consult her.

Functional testing of financial abilities revealed overall severe impairment in financial capacity. On testing, Mr. Patient demonstrated intact performance on tasks of naming coins/currency, coin/currency relationships, and single and multi-item cash purchases. However, he was impaired on tests of counting coins/currency, understanding financial concepts, making change for a vending machine, tipping, conceptual understanding of a checkbook, use of a checkbook, conceptual understanding of a bank statement, use of a bank statement, detection of telephone fraud, conceptual understanding of bills, identifying and prioritizing bills, and knowledge of personal financial activities. Taken together, these findings indicate that he is no longer capable of managing any aspect of his business and financial affairs.

4. Probable vulnerability to undue influence.

In addition to his capacity impairment, it is very likely that Mr. Patient is currently vulnerable to undue influence in his business and other activities. Early on in their disease course, as their short-term memory and comprehension abilities erode, patients with AD become increasingly vulnerable to the influence of others. It is likely that Mr. Patient's reported recent poor business decisions may reflect such a vulnerability. For example, during testing Mr. Patient failed to detect a telephone credit card scam situation and agreed to provide his credit card number over the phone to an unknown caller.

VI. RECOMMENDATIONS

1. We recommend that Mr. Patient be referred to the UAB Memory Disorders Clinic for a full neurological and dementia evaluation.

2. Continued pharmacotherapy with cholinesterase inhibitors appears to be appropriate.

3. Mr. Patient and his family should consider legally securing his business, financial, and personal affairs as soon as possible. Mr. Patient could potentially benefit from formal guardianship and conservatorship.

4. Mr. Patient's cognitive and emotional status should continue to be closely monitored. This evaluation would provide a useful baseline if follow-up testing were indicated.

The results of this evaluation are confidential.

C. Note on Post-Assessment Action by the Attorney

Based on this assessment, Mr. Patient's attorney concluded that she should not proceed in doing Mr. Patient's will, nor with execution of the buy-sell agreement. The attorney informed Mr. Patient of the assessment results and provided a copy to Mr. Patient and, with his permission, to his daughter. (However, if Mr. Patient had not given permission, the attorney would have to determine whether disclosure might be a necessary action to protect the legal interests of his client under Model Rule 1.14.)

The attorney advised Mr. Patient and his daughter that it is time for his daughter to handle his financial affairs as his legal agent. The attorney provided the daughter with a background brochure explaining the responsibilities and tips for carrying out the responsibilities of a fiduciary under a durable power of attorney. Finally, the attorney reinforced the assessor's recommendation for referral to the UAB Memory Disorders Clinic.

Attachment—Test Scores

Domain	Test	Raw Score	Scaled/Index	%ile
Dementia Severity	DRS Total*	89	▨	▨
Attention	DRS Attention*	29	▨	▨
Receptive Language	WAB Auditory Comp.*	57	▨	<1
Memory	DRS Memory*	9	▨	▨
	CVLT-II Recall Trials 1-5*	16	25	▨
	Short Delay Free Recall*	0	-3	▨
	Short Delay Cued Recall*	0	-3.5	▨
	Long Delay Free Recall*	0	-2.5	▨
	Long Delay Cued Recall*	0	-3.5	▨
	Perseverations*	0	-1	▨
	Cued Recall Intrusions*	0	-1	▨
	Discriminability*	0.3	-3	▨
	False Positives*	10	1.5	▨
Visuospatial	DRS Construction*	6	▨	▨
	CLOX 2*	11	▨	▨
Abstraction/Judgment	DRS Conceptualization*	24	▨	▨
	Cognitive Competency*	10	▨	▨
Executive Function	DRS Initialization/Perseveration*	21	▨	▨
	Trails A seconds (errors)*	161 (5)	▨	4
	Trails B seconds (errors)*	2000	▨	
	CLOX 1*	8	▨	▨
	Tokens*	8	▨	▨
Mood/Personality	Geriatric Depression Scale*	0	▨	▨
Achievement	WRAT-3 Reading	27	SS:4, Grade:2	2
Additional Tests	FCI Domain 1Total	43	-0.73	23
	FCI Domain 2 Total	10/23		
	FCI Domain 3 Total	17	-2.53	<1
	FCI Domain 4 Total	19	-30.20	<1
	FCI Domain 5 Total	2	-5.84	<1
	FCI Domain 6 Task 6C	0	-9.54	<1
	FCI Domain 7 Total	11/19		
	FCI Domain 8 Total	12	-3.04	<1

CASE EXAMPLE #2: Guardianship

A. Example of Attorney Model Referral Letter

RE: Referral of Mr. Doe for Mental Health Assessment

Dear ________:

As we discussed by telephone, I am writing to make a referral of Mr. Doe for a mental health assessment, with primary emphasis on financial management abilities and, to a lesser extent, health care decision-making capacity. I am representing Mr. Conservator, who is the court-appointed conservator for Mr. Doe. Mr. Doe has consented to the assessment and either he or Mr. Conservator will contact you to arrange an appointment. Mr. Doe also has consented to release of the assessment results to Mr. Conservator, as well as to me as counsel for Mr. Conservator (see attached release). Mr. Doe has consented to your contacting his son for additional information. Mr. Conservator has agreed to payment for the proposed assessment from the funds of Mr. Doe, but will need a statement of the procedure's cost in advance. Below is background information that may be of help in conducting the assessment and preparing the report.

Background: According to Mr. Conservator, Mr. Doe is a Korean War veteran, age 72, a widower with four adult children. He has multiple chronic medical conditions as detailed in his records (attached), as well as a history of alcohol problems, various mental problems, and possibly some degree of dementia. Mr. Conservator reports that Mr. Doe shows some degree of confusion, yet still seems to have some understanding of his financial situation. Mr. Conservator was appointed by the County Probate Court to serve as conservator in 1995. In that capacity, he manages all of the income of Mr. Doe (military benefits, Social Security, small pension). Mr. Doe has no substantial assets and lives with his son. Mr. Conservator provides Mr. Doe with a stipend of $600 per month for food, gas, and other spending. Mr. Conservator reports that he was selected as conservator due to evidence of quarrels among Mr. Doe's children. Mr. Doe has expressed confidence in his son. However, the son has medical and neurological problems of his own due to an auto accident.

Triggering Issue: Recently, Mr. Doe has had specific needs for larger amounts of cash, and has expressed frustration to Mr. Conservator that he lacks control of his income and must make requests in order to use it. Mr. Doe states that he has the capacity to manage his own funds, but that if he cannot do so, he would like his son to be the conservator. Mr. Conservator as court-appointed fiduciary understands that he is under a duty to seek the least restrictive alternative and maximize the autonomy of the conservatee. He needs professional advice on evaluating the specific abilities of Mr. Doe to manage money and avoid undue influence before taking any action before the court.

In addition, Mr. Conservator noted that Mr. Doe has discussed the importance of making his own health care decisions, and Mr. Conservator inquired about the possibility of having Mr. Doe execute an advance directive. Please include in the assessment an evaluation of Mr. Doe's capacity to make health care decisions and to appoint a health care agent.

Relevant State Law Provisions: In this state, a court may appoint a conservator if an individual is "incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to manage property or financial affairs or provide for his or her support or for the support of his legal dependents without the assistance of a conservator. A finding that the individual displays poor judgment, alone, shall not be considered sufficient evidence that the individual needs a conservator." [citation] A conservator has broad financial powers, unless limited by the court (in an order appointing a "limited conservator"), including the power to make gifts, convey property, engage in estate planning or create a trust, but must make decisions based on the values and preferences, as well as the best interests of the protected individual.

In this state, capacity to make health care decisions is based on the ability of an individual to "understand the significant benefits, risks, and alternatives to proposed health care" [citation]. Capacity to appoint a health care agent is based on a person's ability to "understand the nature and effect" of such an appointment [citation]. The level of capacity needed to appoint an agent is generally lower than that needed to make complex health care decisions or to give instructions about such decisions in advance.

Specific Assessment Request: Mr. Conservator requests that the following information be included in your assessment report:

- Mental health diagnosis
- Tests conducted
- Analysis of test results
- Applicability of results to situation at hand
- Specific assessment of the ability of Mr. Doe to –
  - Understand basic financial concepts
  - Understand the sources and amounts of his income
  - Make financial judgments
  - Pay bills
  - Make monetary calculations, including making change on a transaction
  - Contract for goods or services
  - Avoid exploitation or undue influence
- Assessment of Mr. Doe's capacity to execute an advance directive for health care.

Please send your report and invoice to Mr. Conservator at [address], with a copy of the report to me at this office, and a copy to Mr. Doe at [address]. I appreciate your help with this case and look forward to working with you in the future.

B. Example of Psychological Report

REASON FOR REQUEST:

Mr. Doe was referred from Mr. ——, representing Mr. Doe's conservator, for neuropsychological and functional testing. Mr. Doe is expressing dissatisfaction in his current conservator (known to Mr. Doe as his "guardian" and referenced as guardian in this report) and a question as to whether he still needs to have a guardian. Given his current cognitive status, there is also a question regarding his capacity to complete an advance directive and capacity to make treatment decisions.

INFORMED CONSENT:

Prior to the interview and testing, the nature and purpose of this evaluation was explained. The patient was told that the findings would be provided in a written report to the referring attorney as requested by his guardian; that testing would evaluate his thinking, memory, and problem-solving related to his need for a guardian; that the results of the testing could support his desire not to have a guardian (benefit from his perspective), or the testing could indicate that he does need a guardian (risk from his perspective). Mr. Doe appeared to understand the nature, purpose, risks and benefits of the evaluation. Mr. Doe stated that he understood the testing was to re-evaluate his cognition, and to compare to previous test performance, with a focus on financial decision-making and, to a lessor extent, medical decision-making. He consented to the interview and testing.

PRESENTING PROBLEM AND HISTORY:

Mr. Doe is a 72-year-old male. He worked as a truck driver, tile worker, and mason. He currently lives with a son who is disabled from a car accident (reportedly with memory problems and gait problems). He has another son and two daughters.

Mr. Doe is a Korean war veteran (served 1950-1954) who receives a 100% service-connected disability for "psychosis," and 10% for superficial scars and ear infection.

Psychiatric history includes alcohol abuse (6-8 beers per night plus valium), sober 15 years. History of schizophrenia is unclear; more recent diagnoses for Mr. Doe are dementia due to multiple etiologies (alcohol abuse, head injury) and mood disorder secondary to general medical condition, with psychotic features. He has had four psychiatric hospitalizations beginning in 1956.

Medical history is taken from medical records provided by Mr. ——. Medical history includes recurrent cancer (lung, throat). Mr. Doe is still smoking and is followed privately for medical problems. He is also noted to be s/p gun shot wound to head (no information but apparently superficial), history of GI problems, and history of seizures.

Mr. Doe was appointed a guardian for finances while living in Louisiana, for money management problems related reportedly to alcohol abuse. He was appointed a guardian for finances (conservator) in this state after he moved back here in 1995. He has expressed recent frustration that he is only paid $600 per month (from which he buys food, gas, and for spending money for himself and his son). He desires more control over his finances. For example, he was upset that his lawyer requested receipts prior to releasing money for his daughter's wedding. He expresses a desire for control over his money and states his son at home could help with paying bills. He would like to have $2,000 to take a vacation trip through ME and NH. He cannot identify any benefits to himself with having a guardian.

MEDICATIONS include Codeine 30mg, Acetaminophen 300mg T1 every 6 hours prn, Phenobarbital 30mg t1 qhd, Oxybutynin 5mg t1 bid, Phenytoin 100mg t1 tid, Citalopram 40mg t 1/2 qd, Paroxetine 20mg t1 qd, Olanzapine 7.5mg t1 qhs, Thioridazine 100mg t1 bid, Trazodone 50mg t2 qhs.

NEUROPSYCHOLOGICAL TESTING has been done in the past in 1996 and 1998, as well as 1970 and 1972. Recent testing found significant deficits in memory and planning/organization, moderate deficits in verbal skills, relative strengths (low average performance) for visual skills. Early testing found low average IQ.

CT SCAN OF HEAD completed 7/30/99 found no lesions, but moderate dilation of lateral ventricles raising a suspicion for early normal pressure hydrocephalus.

COLLATERAL INTERVIEW:

With the guardian's and the patient's consent, the patient's son, with whom he lives, was contacted. His son said that he has lived with his father since his father's return in 1995. He said that his father (the patient) has had problems "thinking straight" for most of his life. He noted that he feels these problems have gotten worse in the past two years. He said that he helps his father to take care of the house and to make meals. The son acknowledged that his father has been a poor manager of money in the past, particularly when drinking. He said that earlier in his life, when his father drank more actively, the family had to struggle to pay for meals and bills. He said that he is reluctant to help his father manage his money as money has been a source of conflict between them in the past. He also acknowledges that he (the son) is having some difficulties organizing his affairs since his car accident; and confirmed some ongoing differences with his siblings, including differences in matters concerning his father.

DATA:

Medical Record Review
Clinical interview + Financial & Health care interview
Wechsler Adult Intelligence Scale III (WAIS)—subtests
Wechsler Memory Scale III (WMS)—subtests

Controlled Oral Word Association Test "FAS"
Boston Naming Test (BNT)
Geriatric Depression Scale (GDS)
Independent Living Scales—Money Management and Health and Safety scales

MENTAL STATUS:
Mr. Doe missed his first scheduled appointment, having confused it with another canceled appointment, but, with a reminder call, arrived 20 minutes early for his next appointment. He was neatly groomed, thin, elderly male. He presented as mildly anxious, eager to please, and concerned about his test performance. There was no evidence of active depression or psychosis, but he complained of fears and concerns about mental breakdown and suicidality (although he was not actively suicidal at the time of the interview). He was oriented to person, place, and near time (thought it was 8/30 rather than 8/31).

TESTING:

ATTENTION as measured by digits forward was in the average range for his age (5 digits forward), while CONCENTRATION as measured by digits backward was in the low average range for his age (3 digits backward). He also evidenced problems with sustained attention during testing, having trouble focusing on instructions and problems for an extended period of time.

VERBAL AND VISUAL MEMORY were severely impaired, consistent with previous test performance. Immediate recall of stories was in the borderline-defective range (a decline from 96, 98 testing) and 30-minute delayed recall of stories was in the borderline-defective range (about the same as before) with 32% of the material remembered at delay from the initial presentation. Immediate recall of designs was in the borderline range, while delayed recall of designs was in the borderline-defective range (both about the same as before) with 6% of the material remembered at delay from the initial presentation.

VERBAL SKILLS on the WAIS-III were in the borderline to borderline-defective range. Word knowledge (Vocabulary) was borderline-defective (a decline from previous testing). Abstract reasoning (Similarities) was in the borderline-defective range (about the same as before) and Everyday reasoning (Comprehension) was in the borderline range (a decline from before). Confrontation naming (BNT) was in the defective range with anomia evidenced during testing.

VISUAL SPATIAL SKILLS on the WAIS III were in the low average to defective range. Attention to visual detail (Picture Completion) was in the defective range. Visual-problem solving (Matrix Reasoning) was in the low average range.

EXECUTIVE FUNCTION on the FAS was in the low average to borderline range. Also, test performance was consistently impulsive (didn't wait to hear instructions before answering), gave up easily—for this reason on many of the tests he was given additional instruction and many opportunities to expand on his first answer or to think about it more/again to maximize his performance. Also, he was slightly disinhibited.

DEPRESSION screening with the GDS indicated mild depression (14/30), but in fact most of the responses seemed related to his intrusive thoughts and concerns about his thinking, rather than depression.

FINANCIAL DECISION-MAKING on the ILS was in the low/dependent range. He knew some basic financial concepts (Social Security, home insurance, health insurance) but could not say when income tax was due. His procedural skills were quite limited. He counted out some basic change, but could not calculate change due from a $5 bill or co-payment due on a bill. Also, he was unable to write checks to pay bills. His financial judgment was marginal. He has some sensitivity to reasons it was important to pay bills and ways to avoid getting cheated out of his money, but could not give well elaborated reasons on this. In interview he was unable to estimate the sources of his income, the size of his savings account. He noted he likes to give gifts but tries to avoid giving gifts to friends.

HEALTH CARE MANAGEMENT on the ILS was in the low/dependent range, although a bit better than his financial management skills. He was able to give accurate responses for a number of emergency medical and safety situations although some of his explanations about his current health situation were vague—he had trouble describing his current state of health, the importance of bathing (although noted he showers every day), a plan for managing his medications. In interview he had some definite ideas about managing his health care. He very much wants to make his own decisions regarding his health care. If he was unable to make decisions he'd like his son (who lives with him) to do so. He feels knowing his children and granddaughter is what "makes life worth living" for him and that he values continued living highly, i.e., states he would like to continue to live even with disabilities in walking, talking, and thinking. These views are informed in part by his religious beliefs.

SUMMARY AND CONCLUSIONS:
Mr. Doe is a 72-year-old male with a current diagnosis of dementia due to multiple etiologies and mood disorder secondary to general medical condition. He has a guardian for finances and is expressing displeasure at the controls (wants more money per month, wants to be able to have larger sums for trips and presents). There is also a question of medical decision-making and capacity to name a health care proxy.

Results of Cognitive Testing:
Neuropsychological testing finds intact simple attention, relative strengths in visual problem solving and verbal fluency. Otherwise, there are severe deficits in concentration and working memory, delayed memory, verbal problem solving. He was very pleasant and cooperative during testing, but was consistently impulsive in his test responses. Results and history are consistent with the following diagnoses.

I. Clinical Disorders and Other Conditions that may be a focus of clinical attention:
  Dementia due to multiple etiologies
  Mood disorder related to General Medical Condition
  Alcohol Dependence in sustained full remission
II. Personality Disorders and Mental Retardation:
  None
III. General Medical Conditions:
  History of cancer; history of gun shot wound to head; question of NPH
IV. Psychosocial and Environmental Problems: Problems related to guardian, family conflict
V. Global Assessment of Functioning: 38 (current)

Results of Functional Testing/Capacity Findings:
1. Understanding of basic financial concepts:
Mr. Doe has very limited knowledge of his own finances or important financial concepts.

2. Understanding of sources and amount of income:
Mr. Doe was not able to state the sources and amount of his current income.

3. Making financial judgments:
Results of both the cognitive and functional testing indicate that his ability to make financial judgments is poor.

4. Paying bills:
During testing, Mr. Doe was unable to understand a bill statement or appropriately write checks in response to the statement.

5. Making monetary calculations, including making change on a transaction:
Mr. Doe has good social skills and is able to count some change, however, he was unable to determine the amount owed to him as a result of a financial transaction.

6. Contracting for goods or services:
Results of both the cognitive and functional testing indicate that Mr. Doe lacks the ability to contract for goods or services.

7. Avoiding exploitation or undue influence:
Due to Mr. Doe's problems with reasoning and executive functioning, he is at high risk for exploitation and undue influence. Whether his son could fill the role of conservator is uncertain without more formal assessment of the son–but it appears that there is a history of family conflict about finances and this would not be the optimal situation even if the son was more able to manage money himself. For now I would recommend working with Mr. Doe to keep the conservator in place.

8. Making medical decisions and appointing a health care proxy:
In terms of medical decision-making, testing and interview suggests he holds strong values and beliefs about his health and care decisions, and can understand basic aspects of his health and health care. This combined with results of neuropsychological testing suggests that he would be capable of completing an advance directive although may need extra attention and careful explanation in educating about the process and options. He can likely make simple medical decisions but as the decision in question is more difficult, this may tax his ability to remember basic information about the risks and benefits of treatments, and thus he may for those decisions utilize the input of a health care proxy or concerned family member.

Clinical Interventions Recommended:

Mr. Doe's clinical status may be improved with the following interventions.

1. Medication review by a primary care doctor, geriatrician, or neurologist to consider whether it is possible that any of his current medications may be contributing to decreased ability to process information and concentrate.

2. Referral to neurology to follow up on possible Normal Pressure Hydrocephalus (NPH) given CT findings and evidence of probable decline in cognition.

3. If significant medication changes are made to reduce their potential impact on cognition, and/or if Mr. Doe is diagnosed with and treated for NPH, it would be important to re-assess his cognition to determine if his functioning has improved.

4. Given Mr. Doe's strong desire for more autonomy, it might be worth working with Mr. Doe to improve avenues for his autonomy, and increased financial freedom in context of conservatorship. For example, can he be given a sum of money for a trip or a present as a trial (with request to return receipts later).

Thank you for this referral.

C. Note on Post-Assessment Action by Attorney

Based on this assessment, the attorney advised that the conservatorship should remain in place at the present time, but that Mr. Conservator should make efforts to expand Mr. Doe's financial decision-making authority. The attorney recommended that Mr. Doe be allowed a specified amount of funds in addition to his regular allowance, with the understanding that Mr. Doe would report back to the conservator on expenditures and provide receipts. The attorney also supported the recommendation in the assessment report for a medication review and a referral to a neurologist concerning NPH diagnosis and treatment. If changes in medication and/or NPH treatment result in cognitive improvements, and if Mr. Doe appears able to manage the extra funds provided him, some modification of the scope of the conservatorship might be discussed in the future. The attorney also advised that Mr. Conservator appears to be the most appropriate fiduciary, even though Mr. Doe may want his son to fill this role, due to uncertainty about the son's financial management capabilities and the son's conflicts with his siblings. However, with Mr. Doe's permission, Mr. Conservator should increase his contacts with the son and with Mr. Doe's other children.

The attorney advised the conservator that Mr. Doe appears to have the capacity to appoint a health care agent, and to indicate basic health care preferences in an advance directive. Further investigation might be necessary to determine whether the son could serve as the agent. Mr. Doe should seek counsel for the preparation of an advance directive. The attorney noted that the local legal services program has a lawyer who specializes in aging issues including advance directives, and that Mr. Doe appears to qualify for such assistance. The attorney gave Mr. Conservator a brochure about health care decision-making for discussion with Mr. Doe.

Appendix 3: Brief Guide to Psychological and Neuropsychological Instruments

For the purposes of this fact sheet, psychological tests are described in four categories: (1) tests used to evaluate and document symptoms of cognitive impairment; (2) tests used to rate the type and severity of emotional or personality disorder; (3) tests used to detect unusual response styles, or the validity of test taking; and (4) tests used to evaluate specific functional capacities or abilities. A brief guide to cognitive screening instruments is provided at the end of this appendix.

This listing is not meant as an exhaustive or definitive list, but provides an overview of some of the more commonly assessed domains and tests. The number of tests can be somewhat overwhelming; added to this is that evaluators may refer to tests by shortened names or abbreviations. For more information on specific tests, please refer to the reference books noted at the end of this chapter.

A. Tests for Evaluating Cognitive Impairment

A comprehensive psychological or neuropsychological evaluation would typically assess the domains of appearance and motor activity, mood, level of consciousness, attention, memory, language, visual-spatial or constructional ability, reasoning, fund of information, and calculations. Some of these areas are assessed through observation of the client's presentation and communication during a clinical interview. Other areas can be assessed through standardized, norm-referenced tests.

1. Appearance, Orientation, and Motor Activity

Definition: Although typically assessed through observation, not testing, an important part of a comprehensive evaluation is examination of appearance, grooming, weight, motor activity (active, agitated, slowed), and orientation to person, place, time, and current events.

2. Level of consciousness

Definition: Although also typically assessed through observation, not testing, the evaluator will also observe the degree of alertness and general mental confusion, rating as alert, lethargic, or stupor. Additional assessment with basic measure of attention may be necessary.

3. Attention

Definition: Attention concerns the basic ability to attend to a stimulus; also the ability to sustain attention over time, as well as freedom from distractibility.

Tests:

- Digit Span Forward/Digit Span Backward
  from the Wechsler Adult Intelligence Scale–III (WAIS-III) or the Wechsler Memory Scale–III (WMS-III)
- Working Memory (from the WMS-III)
- Paced Auditory Serial Attention Test (PASAT)
- Visual Search and Attention Test (VSAT)
- Visual Attention (from the Dementia Rating Scale (DRS))
- Trails A of the Trail Making Test

4. Memory and Learning

Definition: Memory assessment involves evaluation of the system by which individuals register, store, retain, and retrieve information in verbal and visual domains.

Tests

- Memory Assessment Batteries (from the WMS-III or the Memory Assessment Scales (MAS))

- Auditory Verbal Learning Test
- Recall and Recognition (from the DRS)
- Fuld Object Memory Evaluation
- California Verbal Learning Test (CVLT)
- Hopkins Verbal Learning Test (HVLT)

5. *Language*

Definition: Language includes a number of abilities such as spontaneous speech, the fluency of speech, repetition of speech, naming or word finding, reading, writing, comprehension. The presence of aphasia (difficulty receiving or expressing speech) and thought disordered speech is also noted.

Tests:

- Boston Naming Test (BNT)
- Controlled Oral Word Association Test (commonly called the "FAS")
- Boston Diagnostic Aphasia Examination (BDAE)
- Token Test

6. *Executive Function*

Definition: The assessment of executive functions concern planning, judgment, purposeful and effective action, concept formation, and volition. This area is often an extremely important aspect of capacity.

Tests:

- Similarities (from the WAIS-III)
- Trails B of the Trail Making Test (TMT)
- Wisconsin Card Sorting Test
- Stroop Color Word Test
- Delis-Kaplan Executive Function System (DKEFS)
- Malloy
- Mazes

7. *Visual-Spatial and Visuo-Constructional Reasoning and Abilities*

Definition: Visual spatial assessment involves evaluation of visual-spatial perception, problem solving, reasoning, and construction or motor performance involving visual-spatial skills.

Tests:

- Performance subtests from WAIS-III, such as Block Design, Object Assembly, Matrix Reasoning
- Hooper Visual Organization Test
- Visual Form Discrimination Test
- Clock Drawing
- Rey-Osterrieth Complex Figure
- Line Bisection

8. *Verbal Reasoning and Abilities*

Definition: The assessment of verbal reasoning involves evaluation of logical thinking, practical judgments, and comprehension of relationships. Related abilities are fund of knowledge, which is the extent of information known and retained, and calculation concerning arithmetic skills.

Tests:

- Verbal subtests from the WAIS-III, such as Similarities, Comprehension, Information, Arithmetic
- Proverbs

9. Motor Functions

Definition: Tests of motor function provide basic ability about praxis or motor skills in each hand, which are important for distinguishing observed deficits on tasks involving motor performance from primary (motor) or secondary (central nervous system) deficits.

Tests:

- Finger Tapping
- Grooved Pegboard

B. Tests for Emotional and Personality Functioning

Tests of emotional and personality functioning can provide a more objective means to assess the range and severity of emotional or personal dysfunction.

1. Mood and Symptoms of Depression, Anxiety, and Psychoses

Definition: These scales assess the individual's degree of depressed or anxious mood, and associated symptoms such as insomnia, fatigue, low energy, low appetite, loss of interest or pleasure, irritability, feelings of helplessness, worthlessness, hopelessness, or suicidal ideation. Some scales will also assess the degree of hallucinations, delusions, suspicious or hostile thought processes.

Tests:

- Geriatric Depression Scale (GDS)
- Cornell Scale for Depression in Dementia
- Dementia Mood Assessment Scale (DMAS)
- Beck Depression Inventory (BDI)
- Beck Anxiety Inventory (BAI)
- Brief Symptom Inventory (BSI)

2. Personality

Definition: Personality inventories are occasionally used in capacity assessment to explore unusual ways of interacting with others and looking at reality that may be impacting sound decision-making. Projective personality tests are relatively less structured and allow the patient open-ended responses. Objective tests in contrast typically provide a question and ask the patient to choose one answer (e.g., "yes" or "no").

Tests:

- Rorschach
- Minnesota Multiphasic Personality Inventory–2 (MMPI)
- Profile of Mood States (POMS)

C. Tests of Effort, Motivation, or Response Style

These measures, also referred to as validity tests, are structured in such a way to detect inconsistent or unlikely response patterns indicative of attempts to exaggerate cognitive problems. They serve as one type of evidence permitting the clinician to judge the validity of the overall cognitive testing. Generally they detect test-taking response patterns that deviate from chance responding or from norms for established cognitively impaired clinical populations like AD. If the tests are positive, they suggest an intentional (or in some cases subconscious) test-taking approach to exaggerate deficits. It remains a clinical judgment as to how to interpret the clinical meaning of the test-taking bias/exaggeration. In some cases, they may reflect malingering for monetary secondary gain, whereas in others they may indicate a factitious disorder or sometimes a somatoform disorder. Tests of validity may be used when the examiner is concerned that the individual has a reason to gain from "faking bad" on the test, such as in disability claims. Older adults who are receiving capacity evaluation are most likely to be giving maximal effort to perform at their highest level, in which case formal tests of validity are probably not indicated.

1. Validity

Definition: Validity tests are structured in such a way to detect inconsistent or unlikely response patterns indicative of attempts to exaggerate cognitive dysfunction.

Tests:

- Test of Memory Malingering (TOMM)
- 21 Item Test
- 15 Item Test
- CVLT-II Forced Choice

D. Tests for Evaluating Specific Capacities or Abilities

When capacity or competency is specifically in question, a comprehensive evaluation would include direct assessment of the area in question. We include here instruments designed for clinical (not research) use. As these tests are more recently developed, we include a more detailed description of the instruments. Specific information on reliability and validity relevant to the Daubert standard of scientific admissibility can be found in the test manuals and is also summarized in several chapters.[55]

1. Adult Functional Adaptive Behavior Scale (AFABS)

Primary Reference: P.S. Pierce, *Adult Functional Adaptive Behavior Scale: Manual of Directions* (1989).

Area Assessed: Functional Abilities for Independent Living

Description: The Adult Functional Adaptive Behavior Scale (AFABS) was developed to assist in the assessment of ADL and IADL functions in the elderly to evaluate their capacity for personal responsibility and the matching of a client to a placement setting. The AFABS consists of 14 items. Six items rate ADLs: eating, ambulation, toileting, dressing, grooming, and managing (keeping clean) personal area. Two items tap IADLs: managing money and managing health needs. Six items tap cognitive and social functioning: socialization, environmental orientation (ranging from able to locate room up through able to travel independently in the community), reality orientation (aware of person, place, time, and current events), receptive speech communication, expressive communication, and memory. Items are rated on four levels: 0.0 representing a lack of the capacity, 0.5 representing some capacity with assistance, 1.0 representing some capacity without assistance, and 1.5 representing independent functioning in that area. Individual scores are summed to receive a total score in adaptive functioning. The AFABS assesses adaptive functioning through interviewing an informant well-acquainted with the functioning of the individual in question. The informant data is combined with the examiner's observation of and interaction with the client to arrive at final ratings. The AFABS is designed for relatively easy and brief administration (approximately 15 minutes). The author recommends it be administered only by professionals experienced in psychological and functional assessment, specifically a psychologist, occupational therapist, or psychometrician, although research with the AFABS has also utilized psychiatric nurses and social workers trained in its administration.

2. Aid to Capacity Evaluation (ACE)

Primary Reference: Edward Etchells et al., *Assessment of Patients Capacity to Consent to Treatment*, 14 J. Gen. Internal Med. 27-34 (1990).

Area Assessed: Medical Decision-Making

Description: The ACE is a semi-structured assessment interview that addresses seven facets of capacity for an actual medical decision (not a standardized vignette): the ability to understand (1) the medical problem, (2) the treatment, (3) the alternatives to treatment, and (4) the option of refusing treatment (5); the ability to perceive consequences of (6a) accepting treatment and (6b) refusing treatment; and (7) the ability to make a decision not substantially based on hallucinations, delusions, or depression. These reflect legal standards in Ontario, Canada but also correspond to U.S. legal standards.

3. Capacity Assessment Tool (CAT)

Primary Reference: M.T. Carney et al., *The Development and Piloting of a Capacity Assessment Tool*, 12 J. Clinical Ethics 17-23 (2001).

Area Assessed: Medical Decision-Making

Description: The CAT proposes to evaluate capacity based on six abilities: communication, understanding choices, comprehension of risks and benefits, insight, decision/choice process, and judgment. It uses a structured interview format to assess capacity to choose between two options in an actual treatment situation; as such, it does not use a hypothetical vignette.

4. Capacity to Consent to Treatment Interview (CCTI)

Primary Reference: Daniel C. Marson et al., *Assessing the Competency of Patients with Alzheimer's Disease Under Different Legal Standards*, 52 Arch. Neurol. 949-954 (1995).

Area Assessed: Medical Decision-Making

Description: The CCTI is based on two clinical vignettes; a neoplasm condition and a cardiac condition. Information about each condition and related treatment alternatives is presented at a fifth to sixth grade reading level with low syntactic complexity. Vignettes are presented orally and in writing; participants are then presented questions to assess their decisional abilities in terms of understanding, appreciation, reasoning, and expression of choice.

5. Competency Interview Schedule (CIS)

Primary Reference: G. Bean et al., *The Assessment of Competence to Make a Treatment Decision: An Empirical Approach*, 41 Can. J. Psych. 85-92 (1996).

Area Assessed: Medical Decision-Making

Description: The CIS is a 15-item interview designed to assess consent capacity for electro-convulsive therapy (ECT). Patients referred for ECT receive information about their diagnosis and treatment alternatives by the treating clinician, and the CIS then assesses decisional abilities based on responses to the 15 items

6. Decision Assessment Measure

Primary Reference: J.G. Wong et al., *The Capacity of People with a "Mental Disability" to Make a Health Care Decision*, 30 Psych. Med. 295-306 (2000).

Area Assessed: Medical Decision-Making

Description: Wong et al., working in England, developed a measure that references incapacity criteria in England and Wales (understanding, reasoning, and communicating a choice), based on methodology by Thomas Grisso et al. (*The MacArthur Treatment Competence Study: II. Measures of Abilities Related to Competence to Consent to Treatment*, 19(2) L. & Human Behavior 127-148 (1995)). Their instrument also assesses the ability to retain material because it is one of the legal standards for capacity in England and Wales (though not in the United States). A standardized vignette regarding blood drawing is used to assess paraphrased recall, recognition, and non-verbal demonstration of understanding (pointing to the correct information on a sheet with both correct information and distracter/incorrect information).

7. Decision-Making Instrument for Guardianship (DIG)

Primary Reference: S.J. Anderer, *Developing An Instrument to Evaluate the Capacity of Elderly Persons to Make Personal Care and Financial Decisions* (1997) (Unpubl. doctoral dissertation, Allegheny Univ. of Health Sciences).

Area Assessed: Self Care, Home Care, Financial, (Guardianship)

Description: The Decision-Making Instrument for Guardianship (DIG) was developed to evaluate the abilities of individuals to make decisions in everyday situations often the subject of guardianship proceedings. The instrument consists of eight vignettes describing situations involving problems in eight areas: hygiene, nutrition, health care, residence, property acquisition, routine money management in property acquisition, major expenses in property acquisition, and property disposition. Examinees are read a brief vignette describing these situations in the second person. Detailed scoring criteria are used to assign points for aspects of problem solving including defining the problem, generating alternatives, consequential thinking, and complex/comparative thinking. The DIG is carefully standardized. Standard instructions, vignettes, questions, and prompts are provided in the manual. In addition, detailed scoring criteria are provided. Sheets with simplified lists of salient points of each vignette, provided in large type, help to standardize vignette administration and emphasize the assessment of problem solving and not reading comprehension or memory. Vignettes are kept simple, easy to understand, and are brief.

8. *Direct Assessment of Functional Status (DAFS)*

Primary Reference: David A. Loewenstein et al., *A New Scale for the Assessment of Functional Status in Alzheimer's Disease and Related Disorders*, 44 J. Gerontology: Psych. Sci. 114-121 (1989).

Area Assessed: Functional Abilities for Independent Living

Description: The Direct Assessment of Functional Status (DAFS) was designed to assess functional abilities in individuals with dementing illnesses. The scale assesses seven areas: time orientation (16 points), communication abilities (including telephone and mail; 17 points), transportation (requiring reading of road signs; 13 points), financial skills (including identifying and counting currency, writing a check and balancing a checkbook; 21 points), shopping skills (involving grocery shopping; 16 points), eating skills (10 points), dressing and grooming skills (13 points). The composite functional score has a maximum of 93 points, exclusive of the driving subscale, which is considered optional. The DAFS requires that the patient attempt to actually perform each item (e.g., is given a telephone and asked to dial the operator). The entire assessment is estimated to require 30-35 minutes to complete. Any psychometrically trained administrator can administer the scale. The DAFS has been used for staging functional impairment in dementia, from one to three, in a group of 205 individuals with probable Alzheimer's disease.

9. *Financial Capacity Instrument (FCI)*

Primary Reference: Daniel C. Marson et al., *Assessment of Financial Capacity in Patients with Alzheimer's Disease: A Prototype Instrument*, 57 Arch. Neurol. 877-884 (2000).

Area Assessed: Financial

Description: The Financial Capacity Instrument (FCI) was designed to assess everyday financial activities and abilities. The instrument assesses six domains of financial activity: basic monetary skills, financial conceptual knowledge, cash transactions, checkbook management, bank statement management, and financial judgment. The FCI is reported to require between 30-50 minutes to administer, depending on the cognitive level of the examinee. The FCI uses an explicit protocol for administration and scoring.

10. *Hopemont Capacity Assessment Interview (HCAI)*

Primary Reference: Barry Edelstein et al., *Assessment of Capacity to Make Financial and Medical Decisions* (1993) (Paper presented at Toronto meeting of the American Psychological Association, August 1993).

Area Assesssed: Financial, Medical Decision-Making

Description: The Hopemont Capacity Assessment Interview (HCAI) is a semi-structured interview in two sections. The first section is for assessing capacity to make medical decisions. The second section is for assessing capacity to make financial decisions and will be discussed here. In the interview the examinee is first presented with concepts of choice, cost, and benefits and these concepts are reviewed with the examinee through questions and answers. The examinee is then presented medical or financial scenarios. For each scenario the individual is asked basic questions about what he or she has heard, and then asked to explain costs and benefits, to make a choice, and to explain the reasoning behind that choice. The HCAI uses a semi-structured format. General instructions are provided. Specific standardized introductions, scenarios, and follow-up questions are on the rating form.

11. Independent Living Scales (ILS)

Primary Reference: Patricia A. Loeb, *Independent Living Scales* (1996).

Areas Assessed: Care of Home, Health Care, Financial (Guardianship)

Description: The Independent Living Scales (ILS) is an individually administered instrument developed to assess abilities of the elderly associated with caring for oneself and/or for one's property. The early version of the ILS was called the Community Competence Scale (CCS). The CCS was constructed specifically to be consistent with legal definitions, objectives, and uses, in order to enhance its value for expert testimony about capacities of the elderly in legal guardianship cases. The ILS consists of 70 items in five subscales: Memory/Orientation, Managing Money, Managing Home and Transportation, Health and Safety, and Social Adjustment. The five subscales may be summed to obtain an overall score, which is meant to reflect the individual's capacity to function independently overall. Two factors may be derived from items across the five subscales: Problem Solving and Performance/Information. The ILS has extensive information on norms, reliability, and validity.

12. MacArthur Competence Assessment Tool - Treatment (MACCAT-T)

Primary Reference: Thomas Grisso & Paul S. Applebaum, *Assessing Competence to Consent to Treatment* (1998).

Area Assessed: Medical Decision-Making

Description: The MacCAT-T utilizes a semi-structured interview to guide the clinician through an assessment of the capacity to make an actual treatment decision. It does not use a standardized vignette. Patients receive information about their condition, including the name of the disorder, its features and course, then are asked to "Please describe to me your understanding of what I just said." Incorrect or omitted information is cued with a prompt (e.g., "What is the condition called?"), and if still incorrect or omitted, presented again. A similar disclosure occurs for the treatments, including the risks and benefits of each treatment alternative. Next, patients are asked if they have any reason to doubt the information and to describe that. They are then asked to express a choice and to answer several questions that explicate their reasoning process, including comparative and consequential reasoning and logical consistency.

13. Multidimensional Functional Assessment Questionnaire (MFAQ)

Primary Reference: Center for the Study of Aging and Human Development, *Multidimensional Functional Assessment: The OARS Methodology* (1978).

Area Assessed: Functional Abilities for Independent Living

Description: The Multidimensional Functional Assessment Questionnaire (MFAQ) was developed to provide a reliable and valid method for characterizing elderly individuals and for describing elderly populations. The MFAQ supersedes the nearly identical Community Survey Questionnaire (CSQ, a predecessor which also was developed by the Duke Center). Both instruments frequently have been called the "OARS," in reference to the program that developed the instrument throughout the 1970s. The MFAQ or the CSQ was already in use by well over 50 service centers, researchers, or practitioners nationally when the MFAQ was published (1978). Part A provides information in five areas of functioning, including activities of daily living. The Activities of Daily Living (ADL) dimension assesses 14 functions including both instrumental and physical ADLs. *Instrumental ADLs are*: use telephone, use transportation, shopping, prepare meals, do housework, take medicine, handle money. *Physical ADLs are*: eat, dress oneself, care for own appearance, walk, get in/out of bed, bath, getting to bathroom, continence. Part B of the MFAQ assesses the individual's utilization of services, that is, whether and to what extent the examinee has received assistance from various community programs, agencies, relatives, or friends, especially within the latest six months. Questioning also includes the examinee's perceived need for the various services.

14. Philadelphia Geriatric Center Multilevel Assessment Inventory (MAI)

Primary Reference: M. Powell Lawton & Miriam Moss, *Philadelphia Geriatric Center Multilevel Assessment Instrument: Manual for Full-length MAI* (undated).

Area Assessed: Functional Abilities for Independent Living

Description: The Philadelphia Geriatric Center Multilevel Assessment Inventory (MAI) was designed to assess characteristics of the elderly relevant for determining their needs for services and placement in residential settings. The MAI is a structured interview procedure that obtains descriptive information about an elderly respondent related to seven domains. Each of the domains (except one) is sampled by interview questions in two or more subclasses, which the authors call sub-indexes. The full-length MAI consists of 165 items; the middle length MAI has 38 items, and the short-form has 24 items. The domains assessed are physical health, cognitive, activities of daily living, time use, personal adjustment, social interaction, and perceived environment. The MAI manual provides considerable structure for the process of the interview, sequence and content of questions, and scoring. It describes criteria for 1 to 5 rating of each of the domains, but these criteria are not tied specifically to item scores. The manual discusses general considerations for interviewing elderly individuals and dealing with special problems of test administration with this population (e.g., dealing with limited hearing or vision).

E. Cognitive Screening Tests

Cognitive screening tests are useful for giving a general level of overall cognitive impairment, but they are notoriously insensitive to deficits in single domains. They may be used as an overall screening to determine whether additional testing is needed. They may also be used for individuals with more severe levels of impairment who cannot complete other tests.

1. Blessed Information-Memory-Concentration Test (BIMC): The BIMC is a 33-point scale with subtests of orientation, personal information, current events, recall, and concentration. There is a short version with six items. It has adequate test-retest reliability and correlation with other measures of cognitive impairment.

2. Mental Status Questionnaire (MSQ): The MSQ is a 10-item, 10-point scale assessing orientation to place, time, person, and current events. It has low to modest sensitivity for detecting neurological illness.

3. Mini Mental State Examination (MMSE): The MMSE is a 30-point screening instrument that assesses orientation, immediate registration of three words, attention and calculation, short-term recall of three words, language, and visual construction. The MMSE is widely used and has adequate reliability and validity. Positive findings require more in-depth evaluation. Limitations of the MMSE, discussed in Chapter IV, include the potential for false positives or false negatives, and the association of MMSE scores with age, education, and ethnicity. Longer versions and telephone versions of the MMSE are available.

4. The Seven Minute Screen (7MS): This screening instrument consists of four subtests: recall, verbal fluency, orientation, and clock drawing. It has adequate test-retest reliability and inter-rater reliability.

5. Short Portable Mental Status Questionnaire (SPMSQ): The SPMSQ is scored as a sum of errors on subtests of orientation, location, personal information, current events, and counting backwards. Race and age corrections to scores are available.

F. Key Test Reference Books

Thomas Grisso et al., *Evaluating Competencies: Forensic Assessments and Instruments* (2d ed. 2002).

Asenath LaRue, *Aging and Neuropsychological Assessment* (1992).

Muriel D. Lezak, *Neuropsychological Assessment* (3d ed. 1995).

Peter A. Lichetenberg ed., *Handbook of Assessment in Clinical Gerontology* (1999).

Otfried Spreen & Esther Strauss, *A Compendium of Neuropsychological Tests: Administration, Norms, and Commentary* (2d ed. 1998).

Appendix 4: Dementia Overview[1]

What is dementia?

Dementia is a syndrome characterized by decline in memory in association with either decline in other cognitive abilities, e.g., judgment and abstract thinking, or personality change. The resulting impairment must be severe enough to interfere with work or usual social activities or relationships.[2] The requirement for decline distinguishes dementia from life-long mental retardation, although a person with mental retardation can develop dementia if his or her cognitive abilities decline from a previous level. The requirement also means that a person with high previous intelligence can have dementia if his or her cognitive abilities decline to average levels, and this decline interferes with work or usual social activities or relationships.

Outdated terms: terms that were used in the past, such as *senility*, *chronic brain syndrome*, and *hardening of the arteries*, are rarely used now because they are imprecise and inaccurate.

What causes dementia?

Dementia can be caused by more than 70 diseases and conditions. The most common cause is Alzheimer's disease, which is present in 60 percent to 75 percent of dementia cases in the United States. The second most common cause is vascular or multi-infarct disease, which is present in 10 percent to 20 percent of cases. Alzheimer's disease and multi-infarct disease often coexist in a condition referred to as *mixed dementia*. Other diseases and conditions that can cause dementia include Lewy body disease, fronto-temporal disease (including Pick's disease), Creutzfeld-Jacob disease, Parkinson's disease, Huntington's disease, amyotrophic lateral sclerosis (Lou Gehrig's disease), and AIDS.[3]

Reversible dementia. In a small minority of people with dementia, the condition may be partially or completely reversible with treatment of underlying causes, such as chronic infections, thyroid disease, and normal-pressure hydrocephalus.[2,4] Unfortunately, these situations are rare.

How common is dementia?

The total number of people with dementia in the United States is not known. That is because most people with dementia do not have a diagnosis, and no study with a nationally representative sample and procedures for diagnosing dementia has been completed.

Estimates of the number of people with Alzheimer's disease come from studies of smaller community samples. Results of two widely cited studies indicate that 2 percent of people age 65 to 74 have Alzheimer's disease, with the proportion increasing to 8 percent to 19 percent of people age 75 to 84, and 29 percent to 42 percent of people age 85 and over.[5,6] Combining these proportions and U.S. Census data indicates that 2.6 million to 4.5 million people age 65 and over (7 percent to 13 percent of all people age 65 and over) had Alzheimer's disease in 2000. Since prevalence rises rapidly with age, the total number of people with Alzheimer's disease will increase greatly as the age groups 75 to 84 and 85+ grow in coming decades. Alzheimer's disease occurs in a small proportion (probably less than one percent) of people under age 65. That proportion may increase in the future as the disease is recognized earlier.

Assuming that Alzheimer's disease is present in 60 percent to 75 percent of all cases of dementia in the U.S. and that it affected 2.6 to 4.5 million people age 65 and over in 2000, one could estimate that 3.4 to 7.5 million people age 65 and over had dementia in 2000. Preliminary data from the Health and Retirement Survey indicate that there may be 400,000 people under age 65 with dementia, for a total of 3.9 to 8 million people with dementia in all age groups in 2000

What are the symptoms of dementia?

As noted above, dementia is characterized by decline in memory associated with decline in other cognitive abilities or personality change. Many descriptions of the symptoms of dementia focus primarily on symptoms of Alzheimer's disease. Symptoms of other dementing diseases and conditions are often described

[1] Prepared by Katie Maslow, M.S.W., of the Alzheimer's Association, Washington, D.C.

[2] American Psych. Ass'n, *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)* (4th ed. 1994).

[3] Paul T. Costa et al., *Recognition and Initial Assessment of Alzheimer's Disease and Related Dementias*, 19 Clinical Practice Guideline (1996).

[4] Charles Cefalu and George T. Grossberg, *Diagnosis and Management of Dementia*, 2 Am. Fam. Physician Monograph (2001).

[5] Ron Brookmeyer et al., *Projections of Alzheimer's Disease in the United States and Public Health Impact of Delaying Disease Onset*, 88 Am. J. Pub. Health 1337-1342 (1998).

[6] Liesi E. Hebert et al., *Alzheimer's Disease in the U.S. Population: Prevalence Estimates Using the 2000 Census*, 60 Arch. Neurol. 1119-1122 (2003).

only as they differ from the symptoms of Alzheimer's disease.

Alzheimer's disease generally begins gradually. Its causes are not known, but much has been learned in recent years about the risk factors, biology, and course of the disease (see *Unraveling the Mystery*[7]). The earliest symptoms of Alzheimer's disease are usually memory problems, especially problems with learning and recall of new information. Other early symptoms include difficulty with language (e.g., word-finding) and disturbances in visuospatial skills that can result in getting lost in a familiar setting. Deficits in executive functions (e.g., planning, organization, and judgment) are also common. These cognitive changes limit the person's ability to work and carry out activities that are needed for independent living, e.g., driving, shopping, cooking, and managing finances. The person may or may not be aware of, and be disturbed by, these changes.[3,8,9]

Alzheimer's disease is progressive. Over time, the person's cognitive deficits worsen, and other kinds of symptoms appear. Many people with Alzheimer's disease are depressed. Some become withdrawn, apathetic, and/or irritable. Agitation is common, and some people with Alzheimer's disease develop psychiatric and behavioral symptoms, e.g., delusions, aggression, wandering, and inappropriate sexual behaviors. Most people with the disease require 24-hour supervision at least in the middle stage of their illness. Eventually, they become unable to bathe, dress, toilet, and feed themselves. Gait and swallowing difficulties are also common in the late stage of the disease.[3,7] Death usually occurs sooner than would be predicted on the basis of population data.[10]

Vascular or multi-infarct dementia differs from Alzheimer's dementia in that it generally begins more abruptly and exhibits a step-wise progression of symptoms. This is because the condition is usually caused by a stroke, multiple small strokes, or changes in blood supply to the brain that result in specific brain lesions. A person's cognitive and other symptoms depend on the type, location, and extent of these lesions; thus, symptoms vary greatly from one person to another.[3,11]

Lewy body disease differs from Alzheimer's disease in that it usually progresses more rapidly. Visual hallucinations, fluctuating cognitive abilities, changing attention and alertness, and motor signs of parkinsonism are also more common.[8,12]

Fronto-temporal disease (including Pick's disease) differs from Alzheimer's disease in that learning ability and visuospatial skills are often less affected, and noncognitive symptoms are more common. Patients frequently exhibit profound apathy, distractability, and impulsivity.[3,8]

Can stages of dementia be identified?

Various staging systems have been developed for dementia. These systems are useful because they provide a conceptual framework that often helps families, care providers, and others understand where their relative or client is in the course of his or her illness, and therefore, think about and plan for the person's current and future care. Some relatively simple staging systems identify only 3 stages (mild, moderate, and severe) and define the stages in very general terms. Other staging systems are more complex and precise. An example of the latter type is the Global Deterioration Scale, a 7-stage system based on the severity of a person's cognitive and self-care deficits and psychiatric and behavioral symptoms.[13] Despite the usefulness of this and other staging systems, it is important to remember that the progression of dementing diseases and conditions and the timing of particular symptoms vary greatly from one person to another. Thus few patients progress through the stages exactly as they are defined in any system.

How can cognitive changes that are common in normal aging be distinguished from dementia?

It is often very difficult to distinguish memory problems and other cognitive changes that are common in normal aging from the early symptoms of dementia, in part because cognitive changes in normal aging are not well understood.[2,3,14] In its dementia guideline, the American Medical Association points out that a person with dementia will eventually become unable to maintain independent functioning, whereas independent function-

[7] Nat'l Inst. Health, U.S. Dep't of Health and Hum. Servs, *Alzheimer's Disease: Unraveling the Mystery* (NIH Pub. No. 02-3782) (2002).

[8] Jeffrey L. Cummings & Greg Cole, *Alzheimer's Disease*, 287 JAMA 2335-2338 (2000).

[9] Claudia H. Kawas, *Early Alzheimer's Disease*, 349 New Eng. J. Med. 1056-1063 (2003).

[10] Eric B. Larson et al., *Survival After Initial Diagnosis of Alzheimer's Disease*, 140 Annals of Internal Med. 501-509 (2004).

[11] David L. Nyenhuis & Philip B. Gorelick, *Vascular Dementia: A Contemporary Review of Epidemiology, Diagnosis, Prevention, and Treatment*, 46 J. Am. Geriatrics Soc'y 1437-1448 (1998).

[12] Estrella Gomez-Tortosa et al., *Dementia with Lewy Bodies*, 46 J. Am. Geriatrics Soc'y 1449-1458 (1998).

[13] Barry Reisburg et al., *The Global Deterioration Scale for Assessment of Primary Degenerative Dementia*, 139 Am. J. Psyc. 1136 (1982).

[14] Ronlad C. Peterson et al., *Current Concepts in Mild Cognitive Impairment* 58 Arch. Neurol. 1985-1992 (2001).

ing is preserved in normal aging. To distinguish dementia and normal aging without waiting to see whether the person's functioning worsens, the guideline suggests several comparisons: for example, in dementia, the person's family is likely to be more concerned about his or her forgetfulness, whereas in normal aging, the person may be more concerned; similarly, in dementia, there is likely to be notable decline in memory for recent events and ability to converse, whereas in normal aging, the person remembers important events and maintains the ability to converse.[15] These and other comparisons are helpful but not definitive in distinguishing the two conditions.

Mild Cognitive Impairment is a condition that is receiving increasing attention as researchers attempt to understand the causes of Alzheimer's disease and find ways to prevent and treat it. For research purposes, it is efficient to study people who are at high risk for the disease, and many elderly people are now enrolled as subjects in observational studies and clinical trials where they are diagnosed as having mild cognitive impairment. An unknown number of elderly people are also being diagnosed with mild cognitive impairment outside of research settings. Many researchers and clinicians believe that all people with mild cognitive impairment will eventually transition to Alzheimer's disease.[16] Reported rates of transition range from 6 percent to 25 percent per year in individuals age 66 to 81 at the start of the study.[17] Some clinicians and advocates question the wisdom of diagnosing mild cognitive impairment in people who are quite old at time of diagnosis, may be upset by the diagnosis, may not transition for four or more years, and may be denied insurance and/or admission to certain residential care facilities if the diagnosis is known.

Why is it important to diagnose dementia and the underlying cause of the dementia?

Some physicians are reluctant to diagnose dementia or its underlying cause because they think the conditions are hopeless and are hesitant to call attention to them unless asked by the family.[18] Over the past decade, dementia and its causes are being diagnosed more often, primarily because of the availability of medications for Alzheimer's disease and greater general awareness of Alzheimer's and dementia. Still many people with dementia have not been diagnosed.[19] Physicians may be aware of a patient's cognitive deficits even if they have not conducted a formal evaluation, but even when a formal diagnosis is made, the patient and family may not be told, and the diagnosis may not be entered into his or her medical record.[20]

Diagnosis of dementia is important because it allows the person, and perhaps more so his or her family, to understand what is happening to the person and increases the likelihood that they will access available information and supportive services. It also increases the likelihood that physicians will initiate treatments and be alert to limitations in the person's ability to report symptoms accurately, manage medications safely, and understand and comply with other recommendations. Early diagnosis is important because it gives the person and family time to make financial, legal, and medical decisions while the person is capable.

How can dementia be diagnosed?

Dementia and Alzheimer's disease can be diagnosed with high accuracy (90 percent or higher) when standardized diagnostic criteria are used.[21] Diagnosis of vascular or multi-infarct disease, Lewy body disease, and fronto-temporal disease is often more difficult because many people with these conditions have atypical or nonspecific symptoms.[20] The first steps in diagnosis are a focused history and physical, mental status testing, and discussions with the family, if any. Laboratory tests are often used, primarily to rule out reversible or partially reversible causes of dementia. There is disagreement about the value of neuroimaging procedures, but virtually all experts agree that these procedures are useful for younger patients and patients with unusual symptoms.

[15] American Med. Ass'n, *Diagnosis, Management, and Treatment of Dementia: A Practical Guide for Primary Care Physicians* (1999).

[16] John C. Morris et al., *Mild Cognitive Impairment Represents Early-Stage Alzheimer's Disease*, 58 Arch. Neurol. 397-405 (2001).

[17] Ronald C. Peterson et al., *Practice Parameter: Early Detection of Dementia: Mild Cognitive Impairment (An Evidence-Based Review)*, 56 Neurol. 1133-1142 (2001).

[18] Linda Boise et al., *Diagnosing Dementia: Perspectives of Primary Care Physicians*, 39(4) Gerontologist 457-464 (1999).

[19] Linda Boise et al., *Dementia Assessment in Primary Care: Results from a Study in Three Managed Care Systems*, 59A J. Gerontology: Med. Sciences 621-626 (2004).

[20] James Chodosh et al., *Physician Recognition of Cognitive Impairment; Evaluating the Need for Improvement*, 52 J. Am. Geriatrics Soc'y 1051-1059 (2004).

[21] David S. Knopman et al., *Practice Parameter: Diagnosis of Dementia (An Evidence-Based Review): Report of the Quality Standards Subcommittee of the American Academy of Neurology*, 56 Neurol. 1143-1153 (2001).

Delirium and depression can present with symptoms similar to dementia. Recognition and differential diagnosis of these three conditions is important. Delirium is an acute condition that can and should be treated quickly. Depression is also treatable in older people. In addition, however, people with dementia are at increased risk of developing delirium, and many people with dementia also have depression; thus, the three conditions often coexist. Effective treatment of coexisting delirium and/or depression may improve cognitive functioning in a person with dementia, although research suggests that treatment for depression often does not have as much effect as expected on the person's cognitive functioning.

Treatment of dementia

Many medical associations and other groups have developed guidelines and consensus statements about treatment of dementia.[22] These documents differ in length, primary focus, and intended audience, but their recommendations are similar. While acknowledging that the effects of available medications for Alzheimer's disease are often modest, the documents generally recommend an initial trial of the medications. Aggressive treatment of cardiovascular conditions is recommended since these conditions can cause vascular dementia and hasten onset of symptom development in people with Alzheimer's disease. The guidelines and consensus statements recommend careful evaluation of mood and behavioral symptoms and efforts to manage these symptoms nonpharmacologically, if possible. They also recommend treatment of depression, attention to safety issues (e.g., driving, wandering, and firearms), referrals to community services, and involvement and support of family caregivers.[3,7,8,14,23,24,25]

Coexisting medical conditions in people with dementia

Many people with dementia also have other serious medical conditions. Medicare fee-for-service claims for 1999 show, for example, that 30 percent of beneficiaries with dementia also had coronary heart disease, 28 percent also had congestive heart failure, 21 percent also had diabetes, and 16 percent also had thyroid disease.[26] These medical conditions and the medications and other procedures that are used to treat the conditions can worsen cognitive and other symptoms in a person with dementia. At the same time, dementia clearly complicates the treatment of the other conditions. Families and other informal and paid caregivers of people with dementia and co-existing medical conditions are often coping with extremely difficult care situations.

Where do people with dementia live?

No precise information is available about where people with dementia live, but available data suggest that at any one time, about 20 percent of all people with dementia are in nursing homes; about 10 percent are in assisted living or other residential care facilities; and the remaining 70 percent are at home alone or with a family member or other informal caregiver.

People with dementia who live alone: Studies indicate that about 20 percent of people with dementia live alone.[27,28] About half of these people have a relative or friend who functions as a caregiver, but the other half have no one. Some of these individuals have mild dementia, but many have moderate to severe dementia. They may come to the attention of attorneys when a landlord, neighbor, or law enforcement official realizes they are unable to care for themselves and may create safety problems for others. Lack of an available surrogate decisionmaker may make them difficult clients.

[22] Katie Maslow et al., *Guidelines and Care Management Issues for People with Alzheimer's Disease and Other Dementias*, 10 Disease Mgmt. Health Outcomes 693-706 (2002).

[23] George T. Grossberg & Abhilash K. Desai, *Management of Alzheimer's Disease*, 58A J. Gerontology Med. Sciences 331-353 (2003).

[24] Gary W. Small et al., *Diagnosis and Treatment of Alzheimer's Disease and Related Disorders: Consensus Statement of the American Association for Geriatric Psychiatry, the Alzheimer's Association, and the American Geriatric Society*, 278 JAMA 1363-1371 (1997).

[25] Rachelle S. Doody et al., *Practice Parameter: Management of Dementia (An Evidence-Based Review): Report of the Quality Standards Subcommittee of the American Academy of Neurology*, 56 Neurol. 1154-1166 (2001).

[26] Julie P.W. Bynum et al., *The Relationship Between a Dementia Diagnosis, Chronic Illness, Medicare Expenditures, and Hospital Use*, 52 J. Am. Geriatrics Soc'y 187-194 (2004).

[27] Krista L. Prescop et al., *Elders with Dementia Living in the Community With and Without Caregivers: An Epidemiological Study*, 11 Int'l Psychogeriatrics 235-250 (1999).

[28] Pamela Arnsberger Webber et al., *Living Alone with Alzheimer's Disease: Effects on Health and Social Service Utilization Patterns*, 34 Gerontologist 8-14 (1994).

End Notes

1. University Health Sys. Consortium & U.S. Dep't of Veterans Affairs, *Dementia Identification and Assessment: Guidelines for Primary Care Practitioners* (1997); David S. Geldmacher & Peter J. Whitehouse, *Evaluation of Dementia*, 335 New Eng. J. Med. 330 (1996); Peter V. Rabins et al., *Practical Dementia Care* (1999).
2. *Id.*
3. *Id. See also* Nat'l Inst. on Aging, Nat'l Inst. of Health, U.S. Dep't of Health & Human Servs., *Progress Report on Alzheimer's Disease* (NIH Pub. No. 99-4664) (1999).
4. *See* Arthur C. Walsh et al., *Mental Capacity* (2d ed. 1994) for a discussion of the case law concerning the lawyer's malpractice liability for knowingly allowing an incapacitated person to execute legal documents.
5. The factors contained in this Comment to Rule 1.14 actually derive from a recommendation at the National Conference on Ethical Issues in Representing Older Clients, 62 Fordham L. Rev. (1994), and, in particular, from an article prepared for the conference by Peter Margulies entitled *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 Fordham L. Rev. 1073 (1994).
6. John Parry, *Decision-Making Rights Over Persons and Property*, in *The Mentally Disabled and the Law* (Samuel J. Brakel et al. eds., 3d ed. 1985).
7. Larry Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23(2) Ariz. L. Rev. 599-660 (1981); Peter Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 Mo. L. Rev. 215-236 (1975).
8. Walsh et al., *supra* note 4, at §2.02; *see also*, John Parry & F. Phillips Gilliam, *Handbook on Mental Disability Law* (2002).
9. Walsh et al., *supra* note 4 at §2.02; Parry & Gilliam, *supra* note 8, at 147. *See also* Louis A. Mezzullo & Mark Woolpert, *Advising the Elderly Client* (2004).
10. Parry & Gilliam, *supra* note 8, at 147-148.
11. *Id.*
12. Walsh et al., *supra* note 4, at §2.09; Mezzullo & Woolpert *supra* note 9, at §32:11.
13. Walsh et al., *supra* note 4, at §2.10; Mezzullo & Woolpert *supra* note 9, at §32:12.
14. Mezzullo & Woolpert, *supra* note 9, at §32:14.
15. John J. Regan et al., *Tax, Estate & Financial Planning for the Elderly* (2003).
16. Uniform Health-Care Decisions Act § 1(3) (1993), http://www.law.upenn.edu/bll/ulc/fnact99 /1990s/ uhcda93.pdf.
17. Alan Meisel, *The Right to Die* (2d ed. 1999); Barry R. Furrow et al., *Health Law* § 6-9 (1995).
18. Benjamin N. Cardozo School of Law, *ADA Mediation Guidelines* (2000). *Also see* Erica Wood, *Dispute Resolution and Dementia: Seeking Solutions*, 35 Georgia Law Review 2, 785 (2001); and http://www.mediate.com/adamediation/.
19. States use differing terms for state intervention in the financial affairs or personal affairs of incapacitated persons. The term "guardianship" is used here to refer to the judicial process for appointing a decision-maker over the personal and/or financial affairs of an incapacitated person, regardless of the particular term or terms used in any specific jurisdiction.
20. Charles P. Sabatino & Susanna L. Basinger, *Competency: Reforming Our Legal Fictions*, 6 J. of Mental Health & Aging 119 (2000).
21. American Bar Ass'n Comm'n on the Mentally Disabled & Comm'n on Legal Problems of the Elderly, *Guardianship: An Agenda for Reform* (1989); Stephen Anderer, *Determining Competency in Guardianship Proceedings* (1990).
22. Sally Hurme & Erica Wood, *Now and Then: Factoids on Adult Guardianship Statutory Reform* (2001) (unpublished paper available through the Am. Bar Ass'n Comm'n on Law and Aging).
23. *See, e.g.*, Idaho Code § 15-5-101(a)(1) (1999); Minn. Stat. Ann. § 525.54, subd. 2 (West 1998); N.H. Rev. Stat. Ann. § 464-A:2(XI) (1999).
24. Uniform Guardianship and Protective Proceedings Act § 102(5) (1997), http://www.law.upenn.edu/bll/ulc/ fnact99/1990s/ugppa97.htm.
25. Sabatino & Basinger, *supra* note 20.
26. For elements of each state's definition, see chart on *Initiation of Guardianship Proceedings*, Sally Hurme & Erica Wood, American Bar Association Commission on Law and Aging, http://www.abanet.org/aging/guardian2.pdf.
27. Sabatino & Basinger, *supra* note 20.
28. Thomas Grisso, *Evaluating Competencies* (2d ed. 2003).
29. American Psych. Ass'n, *Diagnostic and Statistical Manual of Mental Disorders—IV* (4th ed. 1994).
30. Thomas Grisso & Paul S. Appelbaum, *MacArthur Competency Assessment Tool for Treatment (MacCAT-T)* (1998).
31. Daniel C. Marson & Laurie Zebley, *The Other Side of the Retirement Years: Cognitive Decline, Dementia and Loss of Financial Capacity*, J. Retirement Planning 30-38 (2001); Sherry L. Willis & K. Warner Schaie, *Everyday Cognition: Taxonomic and Methodological Considerations*, in *Mechanisms of Everyday Cognition* (J.M. Puckett & H. W. Reese eds., 1993).
32. Patricia Anderten, *The Elderly, Incompetency, and Guardianship* (1979) (unpublished Masters thesis, St. Louis University, St Louis, Mo.).
33. Irving Hellman, *Elder Abuse Consultations: Financial Capacity Evaluations for Cases of Fiduciary Abuse and Undue Influence*, 18 Psych. in Long-Term Care 5-8 (2004).
34. 62 Fordham L. Rev. 5 (March 1994).
35. *Id.* at 1073.
36. *Id.* at 1087.
37. *Id.* at 1089.
38. Scott Y. H. Kim et al., *Current State of Research on Decision-Making Competency of Cognitively Impaired Elderly Persons*, 10 Am. J. of Geriatric Psych. 151-165 (2002).
39. American Bar Ass'n Ctr. for Professional Responsibility, *Client-Lawyer Relationship: Rule 1.14 Client with Diminished Capacity*, in *Model Rules of Professional Conduct*, http://www.abanet.org/cpr/mrpc/rule_1_14.html.
40. American Bar Ass'n Comm'n on Legal Problems of the Elderly (currently Comm'n on Law and Aging) & Legal Counsel for the Elderly, Inc. of AARP, *Effective Counseling of Older Clients: The Attorney-Client Relationship* (1995).
41. 42 U.S.C. §§ 12181-12189 (2004).
42. H. A. Taub & Marilyn T. Baker, *The Effect of Repeated Testing Upon Comprehension of Informed Consent Materials by Elderly Volunteers*, 9(3) Experimental Aging Research 135-138 (1983).
43. Linda F. Smith, *Representing the Elderly Client and Addressing the Question of Competence*, 14 J. of Contemporary L. 61 at 90 & 92 (1988).
44. *Id.* at 92-96.
45. *Id.* at 91 & 93.
46. Daniel C. Marson et al., *Testamentary Capacity and Undue Influence in the Elderly: A Jurisprudent Therapy Perspective*, 28 L. & Psych. Rev. 71-96 (2004).
47. American Bar Ass'n Ctr. for Professional Responsibility, *supra* note 39, at Comment [6].
48. *See* Bumele V. Powell & Ronald C. Link, *The Sense of a Client: Confidentiality Issues in Representing the Elderly*, 62 Fordham L. Rev. 1197, 1234–1238 (1994); T. P. Ludington, *Reports of Treating Physician Delivered to Litigant's Own Attorney As Subject of Pretrial or Other Disclosure, Production, or Inspection*, 82 A.L.R.2d 1162 (1962).

49. American Bar Ass'n Ctr. for Professional Responsibility, *supra* note 39, at Comment [6].
50. National Ctr. for Cost Containment, U.S. Dep't of Veterans Affairs, *Clinical Assessment for Competency Determination: A Practice Guideline for Psychologists* (1997).
51. Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 stat. 1936.
52. Michel Silberfeld & Arthur Fish, *When the Mind Fails: A Guide to Dealing with Incompetency* (1994).
53. National Ctr. for Cost Containment, U.S. Dep't of Veterans Affairs, *supra* note 50, at 7-9.
54. The Financial Capacity Instrument (FCI) is a capacity test developed by Marson and colleagues that directly assesses a patient's financial management skills across 18 abilities (task level), 9 activities (domain level), and overall (global level). Other capacity measures that include financial test items include the Independent Living Scales (ILS), the Direct Assessment of Functional Skills (DAFS), and the Structured Assessment of Independent Living Skills (SAILS). A description of these tests and their references in the literature may be found in Appendix 3.
55. Barry Reisberg, *Senile Dementia*, in II *The Encyclopedia of Aging* 907-915 (G. Maddox et al., eds. 2001).

Section Three

CREDITORS' CLAIM ENFORCEMENT AGAINST DECEDENTS' PROPERTY

49th Annual Midwest Estate Tax & Business Planning Institute

Indiana Continuing Legal Education Forum

Indianapolis, Indiana

June 9, 2022

Jeff R. Hawkins
Hawkins Elder Law
999 North Section Street
Post Office Box 382
Sullivan, Indiana 47882-0382
Tel: 812-268-8777
Fax: 812-268-8838
Email: jeff@hawkinselderlaw.com
Web: www.HawkinsElderLaw.com

© Copyright Hawkins Elder Law 2022 All Rights Reserved

Section Three

Creditors' Claim Enforcement Against Decedents' Property..Jeff R. Hawkins

Part 1. Introduction 1

1.1. Purpose 1

1.2. Threshold Questions About a Decedent's Assets 1

1.3. Two Major Channels Passing Decedents' Assets 2

Part 2. Creditors' Claims in Decedents' "Probate Estates" 2

2.1. Probate Terminology Matters – What is a Decedent's "Estate?" 2

2.2. Decedents' Probate Property Title Passage 3

2.2.1. Immediate Title Passage 3

2.2.2. Title Passage to Distributees 4

2.2.3. Testate Estate Title Passage Questions Concerning the Probate Estate's Suspended Existence 4

2.2.4. Wills Must Be Admitted to Probate 4

2.2.5. Race to the Courthouse to Resolve the Probate Estate's Suspended Existence 6

2.3. Personal Representative's Power of Possession 7

2.3.1. Personal Representative's Interception of Title Passage 7

2.3.2. Personal Representative's Distribution Deed Distractions 8

2.3.3. Refocusing on Intestate and Testate Title Passage 9

2.3.4. Intestate Title Passage – a Family Thing 9

2.3.5. Testate Title Passage – Decedent's Will Admitted to Probate 9

2.4. Personal Representative's Administration of a Decedent's Probate Estate 10

2.4.1. Personal Representative's Appointment 10

2.4.2. Personal Representative's Fiduciary Duty to Distributees and Creditors 10

2.4.3. Personal Representative's Management of a Decedent's Probate Estate 11

2.5. Creditors' Claims Against a Decedent's Probate Estate 12

2.5.1. Governmental Claims 12

2.5.2. Family and Social Services Administration's Estate Recovery Against a Deceased Medicaid Recipient's Probate Estate 12

2.5.3. Nongovernmental Claims Against a Decedent's Probate Estate 13

2.6. Secured Claims Against a Decedent's Encumbered Property 14

2.7. Requirements for a Claim Against a Decedent's Probate Estate 14

2.8. Claim Collection Priorities for a Decedent's Probate Estate 15

2.9. Creditors' Claims Against a Decedent's Probate Real Property. 17

2.9.1. Brief History Lesson on Personalty Versus Realty 17

2.9.2. Creditors' Interception of Probate Real Property Title passage 17

2.9.3. Overview of Procedural Functions of IC 29-1-7-15.1 17

2.9.4. The 5-Month & 7-Month Rules Governing a Personal Representative's Sale of a Decedent's Real Property Under IC 29-1-7-15.1(b) 18

2.10. Procedural Strategies for Distributees' Protection of Probate Assets Against Claims 20

2.10.1. Strategy 1: Skip Probate Administration 20

2.10.2. Strategy 2: Petition for Administration More Than 5 Months After Decedent's Death – No Claims Filed 21

2.10.3. Strategy 3: Petition for Administration More Than 5 Months After Decedent's Death – Late Claims Filed 21

2.10.4. Strategy 4: Pursue Real Property Under IC 29-1- 7-23(b)-(d) and (Temporarily) Abandon Low-Value Personal Property 22

2.10.5. Strategy 5: Seek appointment of a Personal Representative to Scrutinize Claim Merits 24

Part 3. Claims Against Nonprobate Transferees 26

3.1. Procedural Policy for Claims Against Nonprobate Transferees 26

3.2. Nonprobate Transfer Definitions 27

3.3. Party Definitions and Liability of Nonprobate Transferees 28

3.4. Apportionment of Nonprobate Transferees' Liability to the Probate Estate 29

3.5. Abatement of Beneficiaries' Trust Interests by Nonprobate Transfer Claims 29

3.6. Instrument's Apportionment Provisions Concerning Nonprobate Transferees' Liability. 29

3.7. Forum of Proceedings to Enforce Claims Against Nonprobate Transferees 30

3.8. Claims Concerning Deceased Transferors Dying Before July 1, 2018 30

3.9. Medicaid Estate Recovery Claim Deadline Exemption 30

3.10. Medicaid Estate Recovery Exemptions of Nonprobate Transfers Established Before April 30, 2002, and Assets Determined by FSSA to be Exempt or Unavailable Before April 30, 2002 31

3.11. Claims Concerning Assets Transferred Through Nonprobate Transfers Concerning Deceased Transferors Dying After June 30, 2018 32

3.11.1. Deadline to File and Serve a Claim Against a Deceased Transferor's Probate Estate 32

3.11.2. Deadline to File and Serve a Written Demand 32

3.11.3. Written Demand Contents 33

3.11.4. Requirement of a Claimant's Diligent Probate Estate Claim Prosecution 34

3.11.5. Direct Claimant Action If Personal Representative Declines or Fails to Act........... 35

3.11.6. Statutory Exoneration for a Personal Representative's Declination or Failure to Act 35

3.11.7. Protection of Secured Creditors' Interests 36

3.11.8. Deadline for Filing and Serving the Written Demand 36

3.11.9. Deadline for Commencement of Proceedings Against Nonprobate Transferees Concerning Deceased Transferors Dying That June 30, 2018 36

3.11.10. Statutory Exoneration of Obligors and Trustees for Transfers to Non probate Transferees 37

3.11.11. Obligations, Rights, and Priorities of Successful Personal Representatives and Claimants 37

3.12. Counter-Punching as an Asset Protection Strategy Against Nonprobate Claims............ 38

3.12.1. Avoid Filing a Petition for Administration Within 5 Months After the Deceased Transferor's Death 38

3.12.2. Seeking Appointment as Personal Representative.. 39

3.12.3. Personal Representative's Duty to Scrutinize Claim Merits.................................... 39

3.12.4. Personal Representative's Role as the Claim Procedures Enforcer......................... 39

3.12.5. Claim Settlement Negotiations 40

3.12.6. Pursue Asset Values in Claim Enforcement Sales.. 40

Part 4. CONCLUSION 41

CREDITORS’ CLAIM ENFORCEMENT AGAINST DECEDENTS’ PROPERTY

PART 1. INTRODUCTION

1.1. Purpose

This outline has three informational objectives to help readers understand the relative rights a deceased debtor’s creditors versus the people entitled to receive the deceased debtor’s assets:

(1) the two principal doctrines governing how ownership of the decedent’s assets passes after the decedent’s death;

(2) the procedural requirements for a creditor to assert collection claims against the deceased debtor’s assets; and

(3) some of the strategies that probate lawyers may use to defend the decedent’s beneficiaries against claims of the decedent’s creditors.

The author intends this outline to present a balance between plaintiffs’ and defendants’ perspectives. However, the pursuit of that balance required the author to philosophically extend beyond a principally defendant-centric outlook from three decades of helping people transfer wealth to their families and helping the families receive and protect the wealth transfers. Although a few plaintiffs’ cases have influenced the author’s perspectives, those influences are admittedly nominal.

1.2. Threshold Questions About a Decedent’s Assets

A January 1951 Saturday Evening Post story by reporter Robert M. Yoder featured this description of the reporter’s interview with bank robber Willie Sutton:[1]

> Someone once asked Slick Willie Sutton, the bank robber, why he robbed banks. The question might have uncovered a tale of injustice and lifelong revenge. Maybe a banker foreclosed on the old homestead, maybe a banker’s daughter spurned Sutton for another.

[1] 1951 January 20, The Saturday Evening Post, Volume 223, Issue 30, Someday They’ll Get Slick Willie Sutton by Robert M. Yoder, P. 17

> Sutton looked a little surprised, as if he had been asked "Why does a smoker light a cigarette?"
>
> "I rob banks because that's where the money is," he said, obviously meaning "in the most compact form." That eye for the simple essential may be the secret of a singular success.

Whether a lawyer is pursuing or defending a decedent's assets in claims proceedings, success requires a procedural awareness of how, when, and where assets flow from the decedent's cold grasp.

1.3. Two Major Channels Passing Decedents' Assets

A decedent's assets generally flow through two channels to the people legally entitled to receive the assets after the decedent's death:

(1) the decedent's "probate estate;" and

(2) title transfer systems that bypass the decedent's "probate estate."

Part 2 of this outline describes the first channel and Part 3 describes the second channel.

PART 2. CREDITORS' CLAIMS IN DECEDENTS' "PROBATE ESTATES"

2.1. Probate Terminology Matters – What is a Decedent's "Estate?"

IC 29-1-14-2[2] says a claimant must "… file a succinct definite statement thereof in the office of the clerk of the court in which the letters were issued." Although is it a subtle distinction, a decedent's "estate" is not the same thing as the forum in which a claimant files a claim against a decedent's estate. So, the first fundamental question to evaluate the vulnerability of a decedent's property to claim enforcement is: "what is the decedent's estate?"

The Probate Code's claim enforcement procedures in IC Chapter 29-1-14 distinguish between the estate administration proceeding in probate court and the statutorily defined concept of a "decedent's estate." The first sentence of IC 29-1-14-2 restricts the enforcement of most claims

[2] Please note that the PDF version of this outline contains hyperlinks to online resources that are currently relevant and publicly available without subscriptions in spring 2022. Hyperlinks to statutes link to the 2021 Indiana Code published on the Indiana General Assembly website at http://iga.in.gov/. Although this outline's author has attempted to indicate any statutory additions, amendments, or repeals in the General Assembly's 2022 session, hyperlinks in this outline will not automatically update or account for any statutory additions, amendments, or repeals by the General Assembly after 2022. Also, hyperlinks to other Indiana government resources may become similarly stale after this outline's publication in spring 2022.

against a decedent or the decedent's estate unless the claim holder files a "succinct definite statement" of the claim "*in the office of the clerk of the court in which the letters were issued*."

Notice that the above-quoted text of the first sentence of IC 29-1-14-2 does not say that the claimant must file the claim in the "estate." The distinction between the decedent's "estate" and the forum in which a personal representative administers the estate is a fundamental Probate Code concept. The Probate Code's "estate" definition appears in IC 29-1-1-3(a)(11), which says:

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

The Probate Code refines the estate concept further with this general rule definition of a decedent's "probate estate" in IC 29-1-1-3(a)(32) (with emphasis added):

> "Probate Estate" denotes the **property transferred at the death of a decedent** under the **decedent's will *or*** under **IC 29-1-2, in the case of a decedent dying intestate**.

So, what assets does the probate estate exclude? Perhaps that question's best answer focuses on the general rule's exceptions. Essentially, all a decedent's assets are part of the decedent's probate estate (often called "probate property") unless state or federal law causes assets to pass outside the probate estate (often called "nonprobate property").

This outline describes nonprobate property in Part 3. The rest of Part 2 describes probate property and the procedural issues concerning creditors' claims against probate property.

2.2. Decedents' Probate Property Title Passage

2.2.1. Immediate Title Passage

IC 29-1-7-23(a) states that title to a decedent's probate property passes as follows (with emphasis added):

> (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**.

Similarly, the text of IC 29-1-1-3(a)(32) quoted in Section 2.1 of this outline states that title to a decedent's probate property (real and personal) passes “at the death of” the decedent. So, if it decedent’s probate property passes at the moment of the decedent’s death, the title passage occurs automatically and instantaneously. The next question is: to whom does a decedent’s probate property pass upon the decedent’s death?

2.2.2. Title Passage to Distributees

It is too much of a mouthful to say “heirs of an intestate decedent or beneficiaries of a testate decedent's will” in this discussion. Thankfully, IC 29-1-1-3(a)(9) furnishes “distributees” as a defined term to encompass “those persons who are entitled to the real and personal property of a decedent under a will, under the statutes of intestate succession, or under IC 29-1-4-1.”

2.2.3. Testate Estate Title Passage Questions Concerning the Probate Estate’s Suspended Existence

Three important questions concern the potential title passage of probate property under the decedent’s will:

(1) If the decedent’s probate property passes to distributees automatically under the will upon the decedent’s death, how does that happen?

(2) What are the time limits, if any, for the distributees to present the decedent’s will and claim the probate property title passage?

(3) What can the distributees of an intestate decedent do to resolve the question of whether the decedent died intestate?

2.2.4. Wills Must Be Admitted to Probate

IC 29-1-7-24 answers the first question of Subsection 2.2.3 with the following requirement for the perfection of distributees entitlement to claimant a testate decedent’s probate property under a will:

> Except as provided in IC 29-1-13-2, no will is effective for the purpose of proving title to, or the right to the possession of, any real or personal property disposed of by the will, until it has been admitted to probate.

IC 29-1-7-4 provides an à la carte menu of petition options that include a petition to probate a will without petitioning for appointment of a personal representative or issuance of letters testamentary.[3]

IC 29-1-7-15.1 answers the second and third questions of Subsection 2.2.3 with rules that limit:

- the admission of a decedent's will to probate (IC 29-1-7-15.1(a), (g), and (h)); and
- a personal representative's power to "possess" the decedent's real and personal property (IC 29-1-7-15.1 (b)-(e)).

[3] IC 29-1-7-4Petitions; hearing

(a) Any interested person or a personal representative named in the will may petition the court having jurisdiction of the administration of the decedent's estate:

(1) to have the will of such decedent, whether the same is written or is unwritten, is in his possession or not, is lost, destroyed, or without the state, probated;

(2) for the issuance of letters testamentary to the executor named in said will for the administration of said estate;

(3) for the appointment of an administrator with the will annexed if no executor is designated in said will or if the person so designated is not qualified, dead, or refuses to serve; or

(4) for the appointment of an administrator for the estate of any person dying intestate.

(b) A petition for probate may be combined with a petition for the issuance of letters testamentary, or as administrator with the will annexed, and a person interested in the probate of a will and in the administration of the estate may petition for both.

(c) No notice that a will is to be offered for probate or that it has been probated shall be required.

(d) No notice of the filing of, and hearing on, the petition described in this section shall be given to or served upon any person. If the petition described herein is filed in term time, it shall be heard forthwith by the court, and if filed in vacation, it shall be heard by the judge of said court if present, or in his absence by the clerk of the said court.

(e) If:

(1) an interested person petitions for the appointment of an administrator for the estate of a person dying intestate; and

(2) a petition to dissolve the marriage of the decedent and the decedent's spouse is pending in an Indiana court or the court of another state at the time of the decedent's death;

the court may not appoint the decedent's spouse to be the administrator of the decedent's estate.

(f) Subsection (e) does not apply to a petition for appointment of an administrator for the estate of a person dying intestate if the application of subsection (e) is waived in an agreement signed by each person, except a person who is incapacitated or a minor, who is eligible for a distribution from the decedent's net estate under IC 29-1-2-1. A waiver may be submitted to the court at any time before the appointment of an administrator.

2.2.5. Race to the Courthouse to Resolve the Probate Estate's Suspended Existence

The following language of IC 29-1-7-15.1(a) creates a potential race to the courthouse between proponents of a decedent's will and people otherwise entitled to receive probate property as the decedent's intestate distributees under IC 29-1-2-1 (with emphasis added):

> (a) When it has been determined that a decedent died intestate and letters of administration have been issued upon the decedent's estate, *no will shall be probated unless it is presented for probate*:
>
> (1) **before** the court decrees final distribution of the estate;[4] **or**
>
> (2) *in an unsupervised estate*, **before** a closing statement has been filed.[5]

So, a decedent's estate (not estate administration) remains in a kind of suspended existence until a court admits a decedent's will to probate or the limit to probating a will applies under IC 29-1-7-15.1(a).

It may surprise people other than probate lawyers that distributees sometimes delay probating decedents' wills for many years or decades. Although IC 29-1-7-15.1(g) appears to place time limits on probating a decedent's will, an exception to those time limits under IC 29-1-7-15.1(h) permits a will to be probated if:

> (1) no estate proceedings have been commenced for a decedent; and
>
> (2) an asset of the decedent remains titled or registered in the name of the decedent.

The admission of a decedent's will to probate under IC 29-1-7-13(a) (with or without the appointment of a personal representative to administer the probate estate) perfects title passage to the will's beneficiaries, but it does not ***cause*** the title to pass. Instead, the title of a decedent's assets passes immediately, automatically, and without human intervention under IC 29-1-7-23(a).

[4] IC 29-1-17-2

[5] IC 29-1-7.5-4

2.3. Personal Representative's Power of Possession

2.3.1. Personal Representative's Interception of Title Passage

A personal representative can disrupt the title passage under IC 29-1-7-23(a) because the title passage is "subject to the possession of the personal representative…"[6] However, IC 29-1-7-15.1(b)-(e) balances the equities of the personal representative's power to possess the probate property against the distributees' entitlement to receive the probate property[7] as follows:

[6] IC 29-1-7-23(a).

[7] (b) No real property located in Indiana of which any person may die seized shall be sold by the executor or administrator of the deceased person's estate to pay any debt or obligation of the deceased person, 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 any decedent's estate, unless a petition for administration is filed in court under section 5 of this chapter not later than five (5) months after the decedent's death and the clerk issues letters testamentary or letters of administration not later than seven (7) months after the decedent's death.

(c) If:

(1) a petitioner files a petition for administration filed in an estate to which subsection (b) may apply; and

(2) the clerk of the court does not issue letters testamentary or of administration and publish notice of the estate administration under subsection (a) not later than thirty (30) days after the petition for administration has been filed;

the petitioner shall serve the following notice on each creditor in the manner provided under section 7(d) of this chapter not later than forty-five (45) days after the petition for administration has been filed:

NOTICE OF PETITION FOR ADMINISTRATION

In the _______ Court of __________ County, Indiana.

Notice is hereby given that a petition for administration was filed on the ___ day of ____, 20___, in cause number _________________, concerning the estate of ___________, deceased, who died on the _____ day of _______, 20___, but the clerk of the court has not issued letters testamentary or of administration.

The estate includes real property that may be subject to sale restrictions under IC 29-1-7-15.1.

All persons who have claims against this estate, whether or not now due, must file their claims in the office of the clerk of this court not later than seventy-five (75) days after the date on which the petition for administration was filed, or not later than thirty (30) days after the date on which the petitioner serves this notice, to prevent the application of real property sale restrictions to the claims, whichever is later.

Dated at __________, Indiana this ____ day of _____________, 20___.

____as the Petitioner.

(d) The limitation described in subsection (b) on the sale of real property does not apply to a claim if:

(1) a petition for administration is filed in court under section 5 of this chapter not later than five (5) months after the decedent's death;

(2) the claimant files the claim in the office of the clerk of the court not later than:

(A) seventy-five (75) days after the date on which the petition for administration was filed; or

(B) thirty (30) days after the date on which the petitioner serves the notice required in subsection (c);

whichever is later; and

2.3.2. Personal Representative’s Distribution Deed Distractions

Illusionists and pickpockets apply their trades by distracting their target audiences from what is really happening. Likewise, IC 29-1-7.5-3.4 distracts and deludes many Indiana lawyers into a mistaken belief that a personal representative transfers title to the distributees in an unsupervised estate administration by delivering a deed of distribution to distributees.[8] However, notwithstanding statute’s use of “distribution” and “distribute,” a personal representative’s deed of distribution to the decedent’s distributees under that section does not really “distribute” anything. Why? Because, again, the title passage only occurs under IC 29-1-7-23(a), “subject to the possession of the personal representative.”

IC 29-1-7.5-3.4 merely provides a mechanism for the personal representative in an unsupervised estate to waive and release to the distributees the personal representative’s perfected power to possess and divest title.

(3) the failure of the clerk to issue letters testamentary or letters of administration not later than seven (7) months after the decedent's death is not the result of the petitioner's failure to comply with the requirements of:

(A) this article;

(B) the Indiana Rules of Trial Procedure; or

(C) the local rules of the court.

(e) The court shall order the limitation described in subsection (b) inapplicable to a claimant's claim concerning the sale of real property if any interested person files a motion for findings under this subsection and the court finds that the following conditions apply:

(1) A petition for administration was filed in court under section 5 of this chapter not later than five (5) months after the decedent's death.

(2) More than thirty (30) days have elapsed since the petition was filed.

(3) The claimant is a reasonably ascertainable creditor under section 7 of this chapter.

(4) The claimant filed a claim in the estate not later than seventy-five (75) days after the date on which the petition for administration was filed, or not later than thirty (30) days after the date on which the petitioner serves the notice required in subsection (c), whichever is later.

(5) The petitioner has not satisfied the provisions of subsection (c).

[8] **IC 29-1-7.5-3.4 Distribution of real property**

Sec. 3.4. (a) This section applies to the distribution of real property by a personal representative to a devisee or heir under this chapter.

(b) The conveyance subscribed by the personal representative under this section is sufficient to distribute all title in the real property to the devisee or heir if the conveyance includes substantially the following language:

"A.B. is the personal representative of the estate of C.D., deceased. This estate is pending as Cause Number ___________ in __________ County, Indiana. The personal representative, by virtue of the power given a personal representative under Indiana law, hereby distributes to E.F. the following described real estate: (insert description)."

As added by P.L.130-1992, SEC.4.

The corresponding provision in a supervised estate to IC 29-1-7.5-3.4 is a court's entry of a decree of final distribution under IC 29-1-17-2,[9] which (with emphasis added):

> "shall operate as the *final adjudication of the transfer* of the right, title, and interest of the decedent to the distributees therein designated; but no transfer before or after the decedent's death by an heir or devisee shall affect the decree, nor shall the decree affect any rights so acquired by grantees from the heirs or devisees."[10]

Note that the italicized portion of the above-quoted IC 29-1-17-2 text says the decree of final distribution is an adjudication of transfer – not the transfer, itself. Why? Because, again, the title passage only occurs under IC 29-1-7-23(a), "subject to the possession of the personal representative."

2.3.3. Refocusing on Intestate and Testate Title Passage

To refocus attention to intestate and testate title passage, let's review IC 29-1-1-3(a)(32), which says:

> "Probate Estate" denotes the property transferred at the death of a decedent **under the decedent's will** or **under IC 29-1-2**, in the case of a decedent dying intestate. (emphasis added).

2.3.4. Intestate Title Passage – a Family Thing

IC Chapter 29-1-2 governs title passage of an intestate decedent's estate. It is easy to identify an intestate decedent's heirs if you know the family tree. the title passage depends on the decedent's pre-death marital status and the decedent's proximity of genealogical relationship to the decedent's descendant, ancestors, or more remotely related family members.

2.3.5. Testate Title Passage – Decedent's Will Admitted to Probate

As Subsection 2.2.3 of this outline has previously stated, a testate decedent's estate (not estate administration) remains in a kind of suspended state of existence until someone resolves the uncertainty. Subsection 2.2.4 of this outline has stated that IC 29-1-7-24 requires a will to be admitted to probate before it can cause title to pass to the will's beneficiaries and IC 29-1-7-24 authorizes a petitioner to petition to probate a will without or without full estate

[9] *See especially subsections (f)-(g).*

[10] IC 29-1-17-2(f).

administration. As also previously stated in Subsection 2.2.5 of this outline, IC 29-1-7-15.1(a) explains how to resolve the uncertainty concerning an unprobated will and IC 29-1-7-15.1(g) and (h) frame the time limits and exceptions to time limits for that determination.

2.4. Personal Representative's Administration of a Decedent's Probate Estate

2.4.1. Personal Representative's Appointment

IC 29-1-10-1(a) provides the following sequence of priorities for the appointment of a personal representative:

> (1) To the executor or executors designated in a will that has been admitted to probate.
>
> (2) To a surviving spouse who is a devisee in a will that has been admitted to probate.
>
> (3) To a devisee in a will that has been admitted to probate.
>
> (4) To the surviving spouse, or to the person or persons nominated by the surviving spouse or to the surviving spouse and the person or persons nominated by the surviving spouse.
>
> (5) To:
>
> > (A) an heir;
> >
> > (B) the person or persons nominated by an heir; or
> >
> > (C) an heir and the person or persons nominated by an heir.
>
> (6) If there is not a person listed in subdivisions (1) through (5), then to any other qualified person.

2.4.2. Personal Representative's Fiduciary Duty to Distributees and Creditors

The Indiana Court of Appeals has issued the following guidance concerning a personal representative's responsibility to distributees and creditors:

- A personal representative has a fiduciary obligation to administer a decedent's probate estate impartially "for the benefit of and the protection of creditors and distributees."[11]

- …a personal representative owes a duty to all interested parties, including the Tax Department, to administer the estate impartially. Such personal representative is

[11] *Fall v. Miller*, 462 N.E.2d 1059, 1061 (Ind. App. 1984).

regarded as an officer of the court and he must look to the court or the law for his authority in dealing with estate assets.[12]

- Furthermore, the personal representative is charged with the responsibility of preserving the estate; and, he shall not interfere with the estate entrusted to him.[13]

- The personal representative has a duty to care for and conserve the assets of a decedent's estate so that such assets are not wasted or mismanaged.[14]

- Ind. Code § 29-1-16-1 provides in relevant part that a personal representative shall be liable for any loss to the estate arising from his neglect or wrongful acts or omissions or for any other negligent or willful act or nonfeasance in his administration of the estate by which loss to the estate arises. Likewise, Indiana courts have held that a personal representative who fails to use due diligence in collecting a claim due the estate becomes personally liable for any loss caused thereby.[15]

2.4.3. Personal Representative's Management of a Decedent's Probate Estate

Subsection 2.3.1 of this outline has already stated that title passage under IC 29-1-7-23(a) is "subject to the possession of the personal representative." Subsection 2.3.1 also stated that a personal representative's power to possess the decedent's probate property is subject to limitations under IC 29-1-7-15.1(b)-(e). So, the personal representative must exercise the fiduciary responsibility to evaluate creditors' claims filed under IC Chapter 29-1-14 and enforce valid claims against the decedent's probate assets.

[12] *Indiana Dept. of State Revenue, Inheritance Tax Div. v. Cohen's Estate*, 436 N.E.2d 832 (Ind. App. 1982) (*citing State ex rel. Department of Financial Institutions v. Kaufman*, 218 Ind. 74, 30 N.E.2d 978 (Ind.1941)).

[13] *Id*, (*citing* Ind.Code 29-1-13-2).

[14] *Id*, (*citing Alerding v. Allison,* 170 Ind. 252, 83 N.E. 1006 (Ind.1908) and *Beardsley, Executor v. Marsteller,* 120 Ind. 319, 22 N.E. 315 (Ind.1889)).

[15] *Id*, (*citing Condit, Executor v. Winslow,* 106 Ind. 142, 5 N.E. 751 (Ind.1886)).

2.5. Creditors' Claims Against a Decedent's Probate Estate

2.5.1. Governmental Claims

IC 29-1-4-1 establishes the deadlines for creditors to file claims against a decedent's probate estate. However, Subsection (a) excludes from the deadlines:

- "expenses of administration" and
- "claims of the United States, the state, or a subdivision of the state."

Therefore, governmental creditors have no deadlines to file claims against a decedent's probate estate. However, there is a big difference between filing a claim and enforcing it. This outline will feature circumstances when even governmental creditors must walk away empty-handed.

2.5.2. Family and Social Services Administration's Estate Recovery Against a Deceased Medicaid Recipient's Probate Estate

IC 12-15-9-1 authorizes the Indiana Family and Social Services Administration (the "FSSA") to file a claim for reimbursement from a decedent's estate if FSSA's Medicaid program paid Medicaid benefits on the decedent's behalf after the decedent became 55 years of age.[16]

IC 12-15-9-2 prohibits FSSA from enforcing claims against:

> (1) Real estate of a recipient while it is necessary for the support, maintenance, or comfort of the surviving spouse, a dependent child less than twenty-one (21) years of age, or a dependent who is nonsupporting because of blindness or other disability.
>
> (2) Personal property necessary for the support, maintenance, or comfort of the surviving spouse, a dependent child less than twenty-one (21) years of age, or a dependent who is nonsupporting because of blindness or other disability.
>
> (3) Personal effects, ornaments, or keepsakes of the deceased.

[16] IC 12-15-9-1 Amount of claim; preference

Sec. 1. Upon the death of a Medicaid recipient, the total amount of Medicaid paid on behalf of the recipient after the recipient became fifty-five (55) years of age must be allowed as a preferred claim against the estate of the recipient in favor of the state. The affidavit of a person designated by the secretary to administer this section is evidence of the amount of the claim and is payable after the payment of the following in accordance with IC 29-1-14-9:

(1) Funeral expenses for the recipient, not to exceed three hundred fifty dollars ($350).

(2) The expenses of the last illness of the recipient that are authorized or paid by the office.

(3) The expenses of administering the estate, including the attorney's fees approved by the court.

IC 12-15-9-0.5 establishes a broad definition of "estate" that includes a decedent's probate estate and a decedent's nonprobate property.[17]

2.5.3. Nongovernmental Claims Against a Decedent's Probate Estate

The only deadlines for **nongovernmental creditors** to collect a debt against a decedent's probate personal property appear in IC 29-1-4-1. Subsection (a) provides that a creditor must file a claim:

> with the court in which such estate is being administered within:
>
> (1) three (3) months after the date of the first published notice to creditors; or
>
> (2) three (3) months after the court has revoked probate of a will, in accordance with IC 29-1-7-21, if the claimant was named as a beneficiary in that revoked will;
>
> whichever is later.

Subsection (b) says:

> No claim shall be allowed which was barred by any statute of limitations at the time of decedent's death.

Subsection (c) counterbalances Subsection (b) as follows:

> No claim shall be barred by the statute of limitations which was not barred at the time of the decedent's death, if the claim shall be filed within:
>
> (1) three (3) months after the date of the first published notice to creditors; or
>
> (2) three (3) months after the court has revoked probate of a will, in accordance with IC 29-1-7-21, if the claimant was named as a beneficiary in that revoked will;
>
> whichever is later.

[17] **IC 12-15-9-0.5"Estate" and "nonprobate transfer"**
Sec. 0.5. (a) As used in this chapter, "estate" includes:
(1) all real and personal property and other assets included within an individual's probate estate;
(2) any interest in real property owned by the individual at the time of death that was conveyed to the individual's survivor through joint tenancy with right of survivorship, if the joint tenancy was created after June 30, 2002;
(3) any real or personal property conveyed through a nonprobate transfer; and
(4) any sum due after June 30, 2005, to a person after the death of a Medicaid recipient that is under the terms of an annuity contract purchased after May 1, 2005, with the assets of the Medicaid recipient.
(b) As used in this chapter, "nonprobate transfer" has the meaning set forth in IC 32-17-13-1.

Finally, Subsection (d) since this ultimate deadline for nongovernmental creditors to file claims against a decedent's estate if the claim is not otherwise barred by the preceding subsections:

> All claims barrable under subsection (a) shall be barred if not filed within nine (9) months after the death of the decedent.

2.6. Secured Claims Against a Decedent's Encumbered Property

IC 29-1-14-1 requires a secured creditor to file a claim against a deceased debtor's probate estate just like the requirement for an unsecured creditor to file a claim. However, IC 29-1-14-2 also requires a secured creditor to include a reference in the written statement of claim to the location of the creditor's recorded lien. IC 29-1-14-6 incorporates the "Uniform Act Governing Secured Creditors Dividends in Liquidation Proceedings" by reference for the next steps in a creditor's enforcement of a secured claim under IC Chapter 30-2-7.

Generally, a secured creditor may expect to collect against the decedent's probate estate assets that the creditor's lien encumbers. The amount of the recovery, however, may depend on whether the encumbered property value is sufficient to satisfy the unpaid debt. To the extent the debt exceeds the value of the collateral, the excess portion of creditor's claim will be unsecured and subject to the claims proceedings under IC Chapter 29-1-4.

2.7. Requirements for a Claim Against a Decedent's Probate Estate

IC 29-1-14-2 is an unusually dense Probate Code section that does not separate its provisions into subsections.[18] The section requires a creditor to file a "succinct definite statement" of the creditor's

[18] IC 29-1-14-2 Actions; definite statement; personal representative actions; deductions from claims

> Sec. 2. No action shall be brought by complaint and summons against the personal representative of an estate for the recovery of any claim against the decedent or the decedent's estate, except in the enforcement of claims for injury to person or damage to property arising out of negligence as provided in section 1 of this chapter, but the holder thereof, whether such claim be due or not, shall file a succinct definite statement thereof in the office of the clerk of the court in which the letters were issued. The clerk shall send by United States mail or by personal service an exact copy of such statement to the personal representative of the estate. Any claims of the personal representative against the decedent shall be made out and filed in the office of the clerk of the court in which the letters were issued. If any claim against the decedent is founded upon any written instrument, alleged to have been executed by the decedent, the original or a complete copy thereof, shall be filed with the statement, unless it is lost or destroyed, in which case its loss or destruction must be stated in the claim. The statement shall set forth all credits and deductions to which the estate is entitled and shall be accompanied by the affidavit of the claimant or the claimant's agent or attorney, that the claim, after deducting all credits, set-offs, and deductions to which the estate is entitled, is justly due and wholly unpaid, or if not yet due, when it will or may become due, and no claim shall be received unless accompanied by such affidavit. If the claim is secured by a lien on any real or personal property, such lien shall be particularly set forth in such statement, and a reference given to where the lien, if of record, will be found. If the claim is contingent, the nature of the contingency shall also be stated. No

claim against the decedent's estate, regardless of whether the claim is presently due or contingent.[19] The section also sets out the elements of that a claimant must satisfy to enforce a claim.

2.8. Claim Collection Priorities for a Decedent's Probate Estate

Unsecured creditors with timely filed claims have few worries about a decedent's solvent probate estate. However, IC 29-1-14-9 establishes the following priorities for satisfaction of creditors unsecured claims against a decedent's insolvent probate estate:

> (1) Costs and expenses of administration, except funeral expenses, expenses of a tombstone, and expenses incurred in the disposition of the decedent's body.
>
> (2) Reasonable funeral expenses, expenses of a tombstone, and expenses incurred in the disposition of the decedent's body. However, in any estate in which the decedent was a recipient of public assistance under IC 12-1-1 through IC 12-1-12 (before its repeal) or any of the following, the amount of funeral expenses having priority over any claim for the recovery of public assistance shall not exceed the limitations provided for under IC 12-14-6, IC 12-14-17, and IC 12-14-21:
>
> TANF assistance.
>
> TANF burials.
>
> TANF IMPACT/J.O.B.S.
>
> Temporary Assistance to Other Needy Families (TAONF) assistance.
>
> ARCH.
>
> Blind relief.
>
> Child care.
>
> Child welfare adoption assistance.
>
> Child welfare adoption opportunities.
>
> Child welfare assistance.
>
> Child welfare child care improvement.
>
> Child welfare child abuse.

statement of claim need be filed as provided in this section as to those claims which are paid by the personal representative within three (3) months after the date of the first published notice to creditors or the period allowed under IC 29-1-7-7. However, in instances where a cause of action was properly filed and commenced against a decedent prior to the decedent's death, the same shall be continued against the personal representative or successors in interest of the deceased, who shall be substituted as the party or parties defendant in such action, and in such instance it shall not be necessary for the claimant to file a claim as herein provided. In any action thus continued the recovery, if any, shall be limited as otherwise provided by law.

[19] A sample claim appears as Appendix 1 of this Outline.

Child welfare child abuse and neglect prevention.

Child welfare children's victim advocacy program.

Child welfare foster care assistance.

Child welfare independent living.

Child welfare medical assistance to wards.

Child welfare program review action group (PRAG).

Child welfare special needs adoption.

Food Stamp administration.

Health care for indigent (HCI).

ICES.

IMPACT (food stamps).

Title IV-D (ISETS or a successor statewide automated support enforcement system).

Title IV-D child support administration.

Title IV-D child support enforcement (parent locator).

Medicaid assistance.

Medical services for inmates and patients (590).

Room and board assistance (RBA).

Refugee social service.

Refugee resettlement.

Repatriated citizens.

SSI burials and disabled examinations.

Title XIX certification.

(3) Allowances made under IC 29-1-4-1.

(4) All debts and taxes having preference under the laws of the United States.

(5) Reasonable and necessary medical expenses of the last sickness of the decedent, including compensation of persons attending the decedent.

(6) All debts and taxes having preference under the laws of this state; but no personal representative shall be required to pay any taxes on any property of the decedent unless such taxes are due and payable before possession thereof is delivered by the personal representative pursuant to the provisions of IC 29-1.

(7) All other claims allowed.

All is not lost for an industrious unsecured creditor whose claim remains unsatisfied because the decedent's probate estate was insolvent. Later sections of this outline will describe the alternative collection procedures to pursue property that the decedent transferred through nonprobate transfers.

2.9. Creditors' Claims Against a Decedent's Probate Real Property.

2.9.1. Brief History Lesson on Personalty Versus Realty

Indiana's former probate laws required a decedent's personal representative to satisfy claims from the decedent's personal property before liquidating the real property. The law corresponded to this statement of an English rule of equity:

> For lands are in equity a favoured fund, insomuch that the heir at law, or devisee of a mortgagor, may demand to have the estate mortgaged by such devisor himself, cleared out of the personalty.[20]

Although the Indiana General Assembly removed most of the real versus personal property distinctions in claim satisfaction, real property's persistent priority remains embedded in IC 29-1- 7-15.1(b).

2.9.2. Creditors' Interception of Probate Real Property Title passage

The personal representative's perfected power to possess and divest title under IC 29-1-7-23(a) disrupts the automatic and immediate passage of title to the distributees. A creditor may perfect the personal representative's power to possess and divest title under IC 29-1-7-23(a) by filing a Petition for Administration within five months after the decedent's death and securing the clerk's issuance of letters testamentary or letters of administration to the personal representative within seven months after the decedent's death in satisfaction of those requirements under IC 29-1-7-15.1 (b)-(e). Subsection 2.9.4 of this outline will address the procedural prerequisites for a personal representative's sale of a decedent's real property under IC 29-1-7-15.1 (b)-(e) after Subsection the overview of IC 29-1-7-15.1 in

2.9.3. Overview of Procedural Functions of IC 29-1-7-15.1

IC 29-1-7-15.1 seems to confuse many lawyers. To resolve the confusion, it is important to remember the contexts that IC 29-1-7-15.1 governs:

[20] Blackstone, William, Commentaries on the Laws of England, Vol. 2, Page 333, Clarendon Press, Oxford, 1778 (Paraphrasing the English High Court of Chancery in *Bartholomew v. May*, 1 Atk. 487, 26 Eng.Rep. 309 (Ch. 1737)).

▪ IC 29-1-7-15.1(a) governs when the conclusion of the formal administration of a decedent's estate as a supervised estate or unsupervised estate cuts off the eligibility of a will for admission to probate (with or without formal probate estate administration).

▪ IC 29-1-7-15.1(b)-(e) regulates the authority of a court-appointed personal representative to sell a decedent's real property.

▪ IC 29-1-7-15.1(f) protects a BFP who purchases a decedent's real property if a will is not admitted to probate within five months after the decedent's death or a will contest has not commenced the statutory deadlines for filing a will contest.

▪ IC 29-1-7-15.1(g) provides some limiting rules for admitting Will to probate that would rarely actually prohibit the probate of a will.[21]

▪ IC 29-1-7-15.1(h) provides that there is no deadline to probate of will whatsoever if:

- there has been no formal estate administration following a Petition for Administration,
- an asset remains titled or registered in the name of the decedent, and
- nothing has happened to prevent the admission of a will to probate under IC 29-1-7-15.1(g).

2.9.4. The 5-Month & 7-Month Rules Governing a Personal Representative's Sale of a Decedent's Real Property Under IC 29-1-7-15.1(b)[22]

IC 29-1-7-15.1(b) has had a contentious history over the past decade. Until the General Assembly's 2018 amendments,[23] IC 29-1-7-15.1(b)'s text read as follows:

> (b) No real estate situate in Indiana of which any person may die seized shall be sold by the executor or administrator of the deceased person's estate to pay any debt or obligation of the deceased person, which is not a lien of record in the county in which the real estate

[21] Don't be distracted by the three-year deadline of subpart (1) because the rule applies to the later of the three subparts, and subparts (2) and (3) require some action in probate court before their timelines begin running.

[22] A procedural diagram for the "5-Month & 7-Month Rules" appears in Appendix 2 of this outline.

[23] 2018 SEA 247, SEC. 6; 2018 P. L. 163, SEC. 6.

> is situate, or to pay any costs of administration of any decedent's estate, unless letters testamentary or of administration upon the decedent's estate are taken out within five (5) months after the decedent's death.

In 2012, an Indiana Court of Appeals opinion interpreting subsection (b) held:

> …we find that Indiana Code section 29-1-7-15.1(b) is not a limitation on the trial court's authority to issue an order for the sale of real estate under Indiana Code section 29-1-15-3.[24]

In 2013, the Indiana General Assembly effectively overrode and superseded the Court of Appeals opinion in *Estate of Roy* by clarifying that a court cannot authorize a personal representative to take an action that the Probate Code otherwise prohibits when the General Assembly enacted IC 29-1-10-21, which read as follows until the General Assembly revised the statute in 2021:[25]

> Sec. 21. (a) All authority to act with respect to an estate administered under IC 29-1-7 and IC 29-1-7.5 is vested exclusively in the personal representative.
>
> (b) If this article prohibits an action by the personal representative, the prohibition restricts the personal representative, regardless of court order, unless:
>
>> (1) a majority in interest of the distributees expressly consent to the proposed action; or
>>
>> (2) the statute imposing the restriction expressly permits a court to approve the prohibited action.

Representatives of the Indiana State Bar Association, FSSA, and the Attorney General of Indiana negotiated a series of legislative amendments in 2018, 2019, and 2021 that led to the current version of IC 29-1- 7-15.1.

The current version of IC 29-1- 7-15.1 keys on whether someone ***files*** a **petition for administration** (as defined in IC 29-1-1-3(a)(31)) **within 5 months after the decedent's death**. If there is no petition for administration within that 5-month deadline, IC 29-1- 7-15.1(b) prohibits the sale of real property composing part of the probate estate (as defined in

[24] *State ex rel. Family and Social Services Admin. v. Estate of Roy*, 963 N.E.2d 78, 84-85 (Ind.App. 2012) (*Transfer denied*).

[25] 2021 SEA 184, SEC.4; P.L.184-2021, SEC.4.

IC 29-1-1-3(a)(32)) to pay **creditors' claims** without distributee consent under IC 29-1-10-21(b).

Even if someone files a petition for administration within 5 months after the decedent's death, the prohibition under IC 29-1- 7-15.1(b) on a sale to satisfy creditors' claims still applies if the Clerk does not issue letters testamentary or letters of administration within 7 months after the decedent's death unless the Court enters an order with findings under IC 29-1- 7-15.1(e).

IC 29-1-7-15.2 provides that the anti-sale protection of real property under IC 29-1- 7-15.1(b) extends to the proceeds of sale if a majority in interest of the distributees consent to a sale under IC 29-1-10-21.[26]

2.10. Procedural Strategies for Distributees' Protection of Probate Assets Against Claims

2.10.1. Strategy 1: Skip Probate Administration

The title passage affidavit provisions of IC 29-1- 7-23(b)-(d) offer a cost-effective and strategically advantageous alternative to probate administration if:

- the probate estate only comprises real property,
- the distributees are mutually cooperative, and
- none of the distributees has judgment liens or other legal or financial vulnerabilities.[27]

[26] **IC 29-1-7-15.2 Sale of real property; permitted use of proceeds**

Sec. 15.2. (a) This section applies to real property subject to section 15.1(b) of this chapter, if the personal representative sells the real property to:

(1) satisfy a lien of record in the county in which the real property is located;

(2) pay costs of administration; or

(3) use the sale proceeds for any other payment or distribution approved by the written consent of a majority in interest of the distributees under IC 29-1-10-21.

(b) The proceeds of the sale of real property described in subsection (a) will retain the same protection that section 15.1(b) of this chapter provides to real property with respect to payment of any debt or obligation of the deceased person not described in subsection (a).

[27] See Appendices 3-5 for examples of title passage affidavits.

In that case, consider documenting the automatic transfer of legal title to the real property under IC 29-1- 7-23(b)-(d) instead of filing a petition for administration and administering the real property through formal probate administration.

2.10.2. Strategy 2: Petition for Administration More Than 5 Months After Decedent's Death – No Claims Filed

If the probate estate only comprises real property and the distributees are either uncooperative or financially vulnerable, consider filing a petition for administration **later than 5 months after the decedent's death**, selling the real property, and distributing the sale proceeds with the same asset protection under IC 29-1-7-15.2 that would apply under IC 29-1- 7-15.1(b) to the distribution of the real property in-kind under IC 29-1- 7-23(b)-(d).

2.10.3. Strategy 3: Petition for Administration More Than 5 Months After Decedent's Death – Late Claims Filed

If, after filing a petition for administration more than 5 months after the decedent's death under the preceding recommendation, a creditor files a claim in the estate, consider these steps:

- unless the estate has an affirmative defense on the merits (*e.g.* mistaken identity, accord and satisfaction, claim value miscalculation, etc.), affirmatively allow the claim with a qualifying statement that:[28]
  - explains the applicability of IC 29-1- 7-15.1(b) to the distribution of the real property in-kind under IC 29-1- 7-23(b)-(d);
  - states that the probate estate lacks sufficient personal property to satisfy the claim; and
  - states that the personal representative will file a closing statement showing the claim as allowed with insufficient personal property to satisfy the claim and stating that the personal representative will

[28] This outline does not furnish a sample claim allowance statement because

    - make and record a personal representative's deed to the distributees under IC 29-1-7.5-3.4[29] or

    - sell the real property and distributed to the distributees free of creditors claims under IC 29-1-7-15.2.

- *DO NOT DENY A GOVERNMENT CLAIM AS UNTIMELY FILED* – government claims are exempt from the claims deadline under IC 29-1-14-1(a), so all government claims are timely filed and the denial will bog down the estate administration in unnecessary and unpredictable litigation; and

- File a closing statement documenting the applicability of IC 29-1-7-15.1(b) to the distribution of the real property in-kind under IC 29-1- 7-23(b)-(d), or the sale of the real property for permissible reasons under IC 29-1-7-15.1(b) or with distributee consent under IC 29-1-10-21(b) and distribution of the sale proceeds to the distributees free of creditors claims under IC 29-1-7-15.2.

2.10.4. Strategy 4: Pursue Real Property Under IC 29-1- 7-23(b)-(d) and (Temporarily) Abandon Low-Value Personal Property

This strategy may be ideal for some families if:

- the probate estate comprises real property and accounts or other intangible personal property held by financial institutions or other third parties worth a total probate estate value (real and personal) exceeding the $50,000 limit for effectuating the transfer of personal property with a small estate affidavit under IC 29-1-8-1;[30]

- the distributees are mutually cooperative; and

- none of the distributees is financially vulnerable.

If all those conditions exist, consider the following steps:

[29] As stated previously, a personal representative's deed of distribution is not really a transfer of title, but a release of the personal representative's power of divestiture described in IC 29-1- 7-23(a).

[30] 2022 HEA 1208, SEC. 1., P.L. 151-2022, SEC. 1., increases the limit to $100,000 on July 1, 2022.

- document the automatic transfer of legal title to the real property under IC 29-1- 7-23(b)-(d);

- abandon the personal property by refraining from filing a petition for administration to claim the personal property; and

- help the distributees claim the abandoned personal property under Indiana's Revised Unclaimed Property Act[31] through the Indiana Attorney General's Unclaimed Property website.

Note that IC 32-34-1.5-50 provides for enforcement of debts against unclaimed property[32] and 10 IAC 1.5-4-8 provides a creditor's proof of claim procedure,[33] so the personal property

[31] IC Chapter 32-34-1.5.

[32] IC 32-34-1.5-50 Delivery of property to owner; payment of enforceable debt

Sec. 50. (a) Not later than thirty (30) days after a claim is allowed under section 49(b) of this chapter, the attorney general shall pay or deliver to the owner the property or pay to the owner the net proceeds of a sale of the property, together with income or gain to which the owner is entitled under section 33 of this chapter.

(b) Property held under this chapter by the attorney general is subject to a claim for the payment of an enforceable debt the owner owes in this state for:

(1) child support arrearages, including child support collection costs and child support arrearages that are combined with maintenance;

(2) a civil or criminal fine or penalty, court costs, surcharge, or restitution imposed by a final order of an administrative agency or a final court judgment; or

(3) state or local taxes, penalties, and interest that have been determined to be delinquent or as to which notice has been recorded with the local taxing authority.

(c) Before delivery or payment to an owner under subsection (a) of property or payment to the owner of net proceeds of a sale of the property, the attorney general first shall apply the property or net proceeds to a debt under subsection (b) the attorney general determines is owed by the owner. The attorney general shall pay the amount to the appropriate state or local agency.

(d) The attorney general may make periodic inquiries of state and local agencies in the absence of a claim filed under section 48 of this chapter to determine whether an apparent owner included in the unclaimed property records of this state has enforceable debts described in subsection (b). The attorney general first shall apply the property or net proceeds of a sale of property held by the attorney general to a debt under subsection (b) of an apparent owner which appears in the records of the attorney general and deliver the amount to the appropriate state or local agency.

[33] 10 IAC 1.5-4-8 Creditors; proof of claim

Authority: IC 32-34-1.5-87

Affected: IC 32-34-1.5

Sec. 8. Any creditor of an apparent owner claiming an interest in unclaimed property in the custody of the attorney general shall file the following with the attorney general:

(1) A certified copy of a final judgment establishing the debt owed by the apparent owner.

abandonment strategy offers no assurance that the family may recover free of debts through the unclaimed property system. However, it may be more likely that a creditor would monitor and file a claim against a decedent's probate estate than that the creditor would monitor and file a claim against the decedent's the unclaimed property.

2.10.5. Strategy 5: Seek appointment of a Personal Representative to Scrutinize Claim Merits

If a claim seems inevitable, a decedent's distributees may want to seek appointment of a personal representative to scrutinize and challenge claims on their merits.

IC 29-1-14-11 imposes the following mandate on the personal representative scrutinize claims (with emphasis added):

> IC 29-1-14-11 Inquiry into correctness; liability on bond
>
> Sec. 11. Before allowing or paying claims against the estate he represents, **it shall be the duty of every personal representative** to **inquire into the correctness of all claims** against the estate and **make all available defenses thereto**, and **if he fails so to do, he shall be liable on his bond**, at the suit of any person interested in the estate, **for all damages sustained by the estate in consequence of such neglect**.

So, a personal representative should not hastily approve a claim just to satisfy the applicable deadlines for claim allowance or disallowance of IC 29-1-14-10(a) and (b).[34] Instead, a prudent

(2) Proof that the judgment is first in time within the apparent owner's county of residence.

(3) Proof by affidavit or otherwise that the debt has not been extinguished by the statute of limitations and has not been satisfied in whole or in part.

(Office of Attorney General for the State; 10 IAC 1.5-4-8; filed Jul 1, 1997, 4:15 p.m.: 20 IR 3002; readopted filed Aug 14, 2003, 1:15 p.m.: 27 IR 946; readopted filed Oct 6, 2009, 9:03 a.m.: 20091104-IR-010090575RFA; readopted filed Oct 26, 2015, 1:48 p.m.: 20151125-IR-010150149RFA; readopted filed Nov 10, 2021, 4:13 p.m.: 20211208-IR-010210426RFA)

[34] IC 29-1-14-10 Allowance; disallowance; expenses of administration

> Sec. 10. (a) On or before three (3) months and fifteen (15) days after the date of the first published notice to creditors, the personal representative shall allow or disallow each claim filed not later than three (3) months after the date of the first published notice to creditors, and as to any claim filed not later than nine (9) months after the decedent's death by a claimant (other than the United States, the state, or a subdivision of the state) who did not receive notice of administration under IC 29-1-7-7, the personal representative shall allow or disallow the claim not later than fifteen (15) days after the date of filing of the claim.
>
> (b) The personal representative shall allow or disallow each claim filed by the United States, the state, or a subdivision of the state on or before the later of:
>
> (1) three (3) months and fifteen (15) days after the first published notice to creditors; or

personal representative should disallow a claim if the personal representative believes the personal representative needs evidence of the claim's merits. IC 29-1-14-10(c) and (d) indicate that the method of a personal representative's allowance or disallowance of a claim depends on the status of rules for that action issued by the Indiana Supreme Court, if any, or local rules if the Supreme Court has not yet given guidance on the subject.[35] If the personal representative disallows the claim or takes no action within the deadlines for claim allowance or disallowance, any party may petition the court to set the claim for trial under IC 29-1-14-10(e).[36]

A few disputes emerged in the past couple of years about evidentiary requirements for claims filed against decedents' estates by the Estate Recovery Unit of the Indiana Family and Social Services Administration (the "FSSA"). In those cases, FSSA argued that an FSSA employee's affidavit in support of an FSSA claim under IC 12-15-9-1[37] required no copies of supporting

(2) fifteen (15) days after the date on which the United States, the state, or a subdivision of the state filed the claim.

[35] (c) The personal representative shall make appropriate notations on the margin of the claim and allowance docket showing the action taken as to the claim, or, in a jurisdiction that has implemented electronic filing, by making appropriate notations of the action taken as to the claim according to rules established by the Indiana supreme court, or if the Indiana supreme court adopts no rule regarding the notations, then by local rules established by the court where the claim is filed.

(d) If a personal representative determines that the personal representative should not allow a claim in full, the claim shall be noted "disallowed". The clerk of the court shall give written notice to a creditor if a claim has been disallowed in full or in part. In a jurisdiction that has implemented electronic filing, written notice to a creditor concerning a disallowed claim, in full or in part, shall be given according to rules established by:

(1) the Indiana supreme court; or

(2) local rules established by the local court where the claim is filed if rules from the Indiana supreme court have not yet been promulgated.

NOTE: This outline does not furnish a form for the Personal Representative's allowance or disallowance of a claim because of the methodological variances that may exist in local rules until the Supreme Court's issues rules to standardize the process.

[36] See the explanation in Subsection 3.11.4 of this outline concerning a claimant's obligation under IC 32-17-13-7(f) to petition to set a claim for trial as a prerequisite for enforcing the claim against nonprobate transferees.

[37] **IC 12-15-9-1Amount of claim; preference**

Sec. 1. Upon the death of a Medicaid recipient, the total amount of Medicaid paid on behalf of the recipient after the recipient became fifty-five (55) years of age must be allowed as a preferred claim against the estate of the recipient in favor of the state. The affidavit of a person designated by the secretary to administer this section is evidence of the amount of the claim and is payable after the payment of the following in accordance with IC 29-1-14-9:

(1) Funeral expenses for the recipient, not to exceed three hundred fifty dollars ($350).

(2) The expenses of the last illness of the recipient that are authorized or paid by the office.

(3) The expenses of administering the estate, including the attorney's fees approved by the court.

records or other admissible evidence to shift the burden of proof to the personal representative.[38]

Although the trial courts' allowance of FSSA's claims over the personal representatives' objections struck this author as unconstitutional takings of property without due process of law,[39] the personal representatives and distributees elected not to appeal the decisions. When this author spoke to the Deputy Attorney General responsible for supervising all FSSA claims in 2021, the Deputy Attorney General said FSSA had already initiated an informal practice of sharing supporting claim records with personal representatives' counsel to avoid unnecessary evidentiary arguments. Still, the statutory ambiguities under which the courts allowed the FSSA claims remain unresolved by legislation or an appellate court's opinion.

Some claims may expire under statutes of repose and statutes of limitations. For example, most federal tax liens expire under the 10-year statute of limitations for collection established in 26 U.S.C. § 6502 unless circumstances exist that extend or suspend the10-year limitations period.[40] So, a diligent person representative should investigate whether a claimant has expired under an applicable statute of limitation or statute of repose.

PART 3. CLAIMS AGAINST NONPROBATE TRANSFEREES

3.1. Procedural Policy for Claims Against Nonprobate Transferees

IC Chapter 32-17-13 presents a densely intricate procedural gauntlet that a deceased transferor's claimants must navigate flawlessly to collect their claims against the deceased transferor's nonprobate transferees.[41]

The chapter's principal policy protects the nonprobate transferees' due process rights because:

[38] See copies of trial court orders overruling the personal representatives' evidentiary objections in two 2020 cases included in the addenda of this outline.

[39] U.S. Const. amend. XIV, §1.

[40] See the Internal Revenue Manuals Part 5, Subsection 5.17.2.2.2, published online at https://www.irs.gov/irm/part5/irm_05-017-002 (last visited by the author on April 4, 2022).

[41] Procedural diagrams for claims against nonprobate transferees appear in Appendices 6-8 of this Outline.

- the private nature of nonprobate transfers tends to isolate nonprobate transferees from notice about probate estate proceedings; and

- nonprobate transferees would have no reason to anticipate probate estate proceedings if a deceased transferor's estate plan passed 100% of the deceased transferor's assets through nonprobate transfer instruments.

3.2. Nonprobate Transfer Definitions

IC 32-17-13-1(a) provides a general rule defining a "nonprobate transfer" as follows:

> (a) As used in this chapter, "nonprobate transfer" means a valid transfer, effective at death, by a transferor:
>
> (1) whose last domicile was in Indiana; and
>
> (2) who immediately before death had the power, acting alone, to prevent transfer of the property by revocation or withdrawal and:
>
> (A) use the property for the benefit of the transferor; or
>
> (B) apply the property to discharge claims against the transferor's probate estate.

IC 32-17-13-1(b) excludes the following transfers from the nonprobate transfer definition:

> (b) The term does not include a transfer at death (other than a transfer to or from the deceased transferor's probate estate) of:
>
> (1) a survivorship interest in a tenancy by the entireties real estate;
>
> (2) a life insurance policy or annuity;
>
> (3) the death proceeds of a life insurance policy or annuity;
>
> (4) an individual retirement account or a similar account or plan; or
>
> (5) benefits under an employee benefit plan.

IC 32-17-13-1(c) provides that a nonprobate transfer on a multiparty account of the deceased transferor if the deceased transferor's last domicile was in Indiana.[42]

[42] (c) With respect to a nonprobate transfer involving a multiple party account, a nonprobate transfer occurs if the last domicile of the depositor whose interest is transferred under IC 32-17-11 was in Indiana. IC 32-17-13-1(c)

IC 32-17-13-1(d) provides that a nonprobate transfer of a motor vehicle or watercraft occurs if the **transferee obtains a certificate of title in Indiana** under IC 9-17.[43]

IC 32-17-13-1(e) provides that "a transfer on death transfer completed under IC 32-17-14 is a nonprobate transfer."[44]

3.3. Party Definitions and Liability of Nonprobate Transferees

IC 32-17-13-2(a) identifies the persons entitled to enforce claims filed against deceased transferors' probate estates as follows:

> (a) As used in this chapter, "claimant" means the surviving spouse[45] or a surviving child, to the extent that statutory allowances are affected, or a person who has filed a timely claim in a deceased transferor's probate estate under IC 29-1-14, and is entitled to enforce the claim against a transferee of a nonprobate transfer.

IC 32-17-13-2(b) identifies the recipient of a nonprobate transfer as follows:

> (b) As used in this chapter, "nonprobate transferee" means a person who acquires an interest in property by a nonprobate transfer.

IC 32-17-13-2(c) establishes a nonprobate transferee's liability to a claimant as follows:

> (c) Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to a deceased transferor's probate estate for:
>
> (1) allowed claims against the deceased transferor's probate estate; and

[43] (d) With respect to a motor vehicle or a watercraft, a nonprobate transfer occurs if the transferee obtains a certificate of title in Indiana under IC 9-17. IC 32-17-13-1(d)

[44] IC 32-17-14 is the Indiana Transfer on Death Property Act (the "TOD Act"), which authorizes a transferor to make pay on death (POD) transfers of bank accounts and transfer on death (TOD) transfers of almost conceivable kind of asset. However, IC 32-17-14-2.5 provides the following TOD Act exclusions:

> This chapter does not apply to property, money, or benefits paid or transferred at death under:
> (1) an employee benefit plan governed by the Employees Retirement Income Security Act of 1974;
> (2) an individual retirement account; or
> (3) a similar account or plan intended to qualify for a tax exemption or deferral under the Internal Revenue Code;
> unless the provisions of this chapter are incorporated into the governing instrument or beneficiary designation in whole or in part by express reference.

[45] See *Sarkar v. Naugle (In re Sarkar)*, 145 N.E.3d 802 (Ind. App. 2020), and the cases cited in *Sarkar* concerning the effectiveness of a married person's estate planning objective to disinherit the person's surviving spouse through a revocable trust or other nonprobate transfer system.

> (2) statutory allowances to the decedent's spouse and children;
>
> to the extent the decedent's probate estate is insufficient to satisfy those claims and allowances.

IC 32-17-13-2(d) provides that a nonprobate transferee's liability "may not exceed the value of nonprobate transfers received or controlled by the nonprobate transferee."

If a nonprobate transferee has contributed to the nonprobate transferee's acquisition of the property that nonprobate transferee received from the deceased transferor, IC 32-17-13-2(e) provides that "the liability of the nonprobate transferee does not include the net contributions of the nonprobate transferee."

3.4. Apportionment of Nonprobate Transferees' Liability to the Probate Estate

IC 32-17-13-3 apportions multiple nonprobate transferees' liability to the probate estate as follows:

> IC 32-17-13-3 Priority of liability to probate estate
>
> Sec. 3. Nonprobate transferees are liable for the insufficiency described in section 2 of this chapter in the following order:
>
> (1) As provided in the deceased transferor's will or other governing instrument.
>
> (2) To the extent of the value of the nonprobate transfer received or controlled by the trustee of trusts that can be amended, modified, or revoked by the decedent during the deceased transferor's lifetime. If there is more than one (1) such trust, in proportion to the relative value of the trusts.
>
> (3) Other nonprobate transferees in proportion to the values received.

3.5. Abatement of Beneficiaries' Trust Interests by Nonprobate Transfer Claims

If a claimant enforces an allowed claim to recover the claim deficiency against a trust, IC 32-17-13-4 provides the following abatement rule:

> IC 32-17-13-4 Beneficiary interests in trusts
>
> Sec. 4. Unless otherwise provided by the trust instrument, interest of beneficiaries in all trusts incurring liabilities under this chapter shall abate as necessary to satisfy the liability as if all of the trust instruments were a single trust.

3.6. Instrument's Apportionment Provisions Concerning Nonprobate Transferees' Liability

If an instrument establishing a nonprobate transfer apportions liability among multiple nonprobate transferees, IC 32-17-13-5 applies the apportionment as follows:

> IC 32-17-13-5 Apportionment of liability by instrument
>
> Sec. 5. (a) A provision made in an instrument may direct the apportionment of the liability among the nonprobate transferees taking under that or any other governing instrument.
>
> (b) If a provision in an instrument conflicts with a provision in another instrument, the later provision prevails.

3.7. Forum of Proceedings to Enforce Claims Against Nonprobate Transferees

IC 32-17-13-6(a) provides the following rule concerning the jurisdictional location of proceedings to enforce claims against nonprobate transferees:

> (a) Upon due notice to a nonprobate transferee, the liability imposed by this chapter is enforceable in proceedings in Indiana in the county where:
>
> (1) the transfer occurred;
>
> (2) the transferee is located; or
>
> (3) the probate action is pending.

IC 32-17-13-6(b) establishes the nature of a proceeding against nonprobate transferees as a separate court case as follows:

> (b) A proceeding under this chapter may be commenced as a separate cause from a cause in which a probate action is pending with respect to a deceased transferor of a nonprobate transfer by filing a complaint against a nonprobate transferee as a defendant and serving a summons and a complete copy of the complaint to each defendant under the Indiana Rules of Trial Procedure.

3.8. Claims Concerning Deceased Transferors Dying Before July 1, 2018

Most claims against nonprobate transferees concerning decedents dying before July 1, 2018, are time-barred under IC 32-17-13-7(a)-(c) or IC 32-17-13-8(a) in spring 2022. For those claims to be enforceable, personal representatives or claimants had to commence collection lawsuits against nonprobate transferees under IC 32-17-13-7(a)-(c) or IC 32-17-13-8(a) before January 1, 2020. Although the Indiana Supreme Court's pandemic emergency orders could have tolled some cases long enough to remain pending, those cases must be increasingly rare in spring 2022.

3.9. Medicaid Estate Recovery Claim Deadline Exemption

IC 12-15-9-0.6(d) provides a limited exemption from deadlines in IC Chapter 32-17-13 concerning claims of the Estate Recovery Unit of the Indiana Family and Social Services Administration (the

FSSA) against a deceased transferor's nonprobate transferees. The exemption under IC 12-15-9-0.6(d) applies a deceased transferor who received Medicaid benefits failed to disclose the deceased transferor's assets to disclose to the county office of the FSSA's Division of Family Resources.

A strict construction would limit the exemption to assets that a deceased transferor failed to disclose under the express language of the statute. The exemption should not apply if the deceased transferor disclosed assets as part of the deceased transferor's compliance with Medicaid eligibility requirements, and then established nonprobate transfers after the disclosure.

3.10. Medicaid Estate Recovery Exemptions of Nonprobate Transfers Established Before April 30, 2002, and Assets Determined by FSSA to be Exempt or Unavailable Before April 30, 2002

IC 12-15-9-0.8 excludes from FSSA's estate recovery authority a decedent's nonprobate property that:

(1) the office determined were exempt or unavailable assets; or

(2) were transferred out of the probate estate;

before May 1, 2002.

FSSA's exemption from deadlines for claims against nonprobate transferees under IC 12-15-9-0.6(d) may have mixed effects on nonprobate transfers described in IC 12-15-9-0.8. Although IC 12-15-9-0.8(1) excludes nonprobate assets that FSSA determined were exempt or unavailable before May 1, 2002, FSSA could not have determined that nonprobate assets were exempt or unavailable without the deceased Medicaid recipient's disclosure of those assets in the Medicaid application process. However, the exclusion in IC 12-15-9-0.8(2) makes no express or implied disclosure requirement, and the deadline exemption under IC 12-15-9-0.6(d) only exempts from FSSA's claims against nonprobate transferees from **deadlines** under IC Chapter 32-17-13 concerning undisclosed assets. So, it appears that if a decedent received Medicaid benefits after age 55 and established a nonprobate transfer of assets before May 1, 2002, FSSA could not enforce a claim against the decedent's nonprobate transferees, regardless of whether the decedent disclosed the assets to FSSA.[46]

[46] The interplay of IC 12-15-9-0.6(d) and IC 12-15-9-0.8 are not purely academic considerations. Suppose a person disabled by illness or injury received Medicaid benefits before and after reaching 55 years of age in the 1990s, and

3.11. Claims Concerning Assets Transferred Through Nonprobate Transfers Concerning Deceased Transferors Dying After June 30, 2018

3.11.1. Deadline to File and Serve a Claim Against a Deceased Transferor's Probate Estate

IC 32-17-13-7(d)(1) requires a deceased transferor's claimant to complete the following actions within 5 months after the deceased transferor's death:

- file a claim against the deceased transferor's probate estate; and
- deliver a copy of the claim to each nonprobate transferee known by the claimant.

Although government creditors' claims are exempt from the claims deadline underIC 29-1-4-1, even a government creditor must comply with the requirement to file a claim against the deceased transferor's probate estate under IC 32-17-13-7(d)(1).

The procedural requirement of filing a claim in the deceased transferor's probate estate within 5 months after the deceased transferor's death necessitates the following action sequence within the 5-month deadline:

- someone must file a petition for administration (defined in IC 29-1-1-3(a)(31));
- the court must enter an order granting the petition and appointing a personal representative for the deceased transferor's estate; and
- the claimant must file the claim in the deceased transferor's open estate.

3.11.2. Deadline to File and Serve a Written Demand

Generally, IC 32-17-13-7(d)(2) requires a claimant to:

then acquired sufficient wealth by earnings, inheritance, or marriage to no longer qualify for Medicaid. In that case, the person could have simply withdrawn from Medicaid without disclosing the new wealth. Although FSSA would have estate recovery rights for those old Medicaid benefits, IC 12-15-9-0.8(2) would prohibit FSSA from claiming against the deceased former Medicaid recipient's nonprobate transferees if the decedent had established and funded a revocable trust, pay on death or transfer on death beneficiary designation, or another nonprobate transfer device before April 30, 2002.

- file a written demand in the deceased transferor's probate estate for the personal representative to commence proceedings against nonprobate transferees under IC Chapter 32-17-13;

- serve a copy of the written demand on the personal representative; and

- serve copies of the written demand on each known nonprobate transferee.[47]

IC 32-17-13-7(d)(3) subjects the written demand delivery requirements of IC 32-17-13-7(d)(2) to IC 32-17-13-7(j), which this outline will discuss further momentarily.

3.11.3. Written Demand Contents

IC 32-17-13-7(e) specifies the following requirements for the written demand's contents:

> (1) The cause number of the deceased transferor's estate.
>
> (2) A statement of the claimant's interest in the deceased transferor's estate and nonprobate transfers, including the date on which the claimant filed a claim in the deceased transferor's estate.
>
> (3) A copy of the claim attached as an exhibit to the written demand.
>
> (4) A description of the nonprobate transfer, including:
>
>> (A) a description of the transferred asset, as the asset would be described under IC 29-1-12-1, regardless of whether the asset is part of the decedent's probate estate, subject to the redaction requirements of the Indiana administrative rules, established by the Indiana supreme court;
>>
>> (B) a description or copy of the instrument by which the deceased transferor established the nonprobate transfer, subject to the redaction requirements of the Indiana administrative rules, established by the Indiana supreme court; and
>>
>> (C) the name and mailing address of each nonprobate transferee known by the claimant.

[47] A sample written demand appears in Appendix 9 of this Outline.

3.11.4. Requirement of a Claimant's Diligent Probate Estate Claim Prosecution

One of the deadlines under IC 32-17-13-7(f) depends on when the claimant's claim is finally allowed in the deceased transferor's probate estate. So, IC 32-17-13-7(f) requires claimants to pursue their claims aggressively against the deceased transferor's probate estate.

IC 32-17-13-7(f) creates a time bar for claimants to pursue probate estate claim proceedings under IC 29-1-14-10 that does not exist in the Probate Code concerning claims in solvent estates that require no additional collection proceedings against nonprobate transferees.

The Probate Code's deadline for the personal representative allow or disallow a ***non-governmental claim*** filed in the deceased transferor's probate estate under IC 29-1-14-10(a) requires the personal representative to allow or disallow a claim:

- on or before 3 months and 15 days after the date of the first published notice to creditors if the claim was filed not later than 3 months after the date of the first published notice to creditors; and

- not later than 15 days after the date of filing of a claim filed not later than 9 months after the decedent's death by a claimant (other than the United States, the state, or a subdivision of the state) who did not receive notice of administration under IC 29-1-7-7.

The Probate Code's deadline to for the personal representative allow or disallow a ***governmental claim*** filed in the deceased transferor's probate estate under IC 29-1-14-10(b) requires the personal representative to allow or disallow a claim filed by the United States, the state, or a subdivision of the state on or before the later of:

- 3 months and 15 days after the first published notice to creditors; or

- 15 days after the date on which the United States, the state, or a subdivision of the state filed the claim.

IC 32-17-13-7(f) bars the commencement of the proceeding against nonprobate transferees unless the claimant presses the claim in the deceased transferor's probate estate aggressively and petitions to set the claim for trial in the probate court under IC 29-1-14-10(e) within 30 days after the personal representative's applicable deadline has expired under IC 29-1-14-10(a) or IC 29-1-14-10(b) to allow or disallow the claim.[48]

3.11.5. Direct Claimant Action If Personal Representative Declines or Fails to Act

IC 32-17-13-7(g) contemplates that a personal representative may affirmatively decline to pursue claims against nonprobate transferees or simply fail to pursue the claims. If a personal representative affirmatively declines or fails to pursue a claim within 30 days after receiving a claimant's written demand, the claimant may commence a proceeding against nonprobate transferees directly in the name of the decedent's estate. In that case, the claimant must commence the proceeding at the claimant's expense.

3.11.6. Statutory Exoneration for a Personal Representative's Declination or Failure to Act

IC 32-17-13-7(h) protects a personal representative from liability for declining or failing to pursue a claim against nonprobate transferees. This statutory exoneration contrasts with the personal representative's statutory duties to possess and preserve it decedent's estate under IC 29-1-13-1.[49]

The statutory exoneration can be a significant factor in one or more of the asset protection strategies described in Section 0 of this outline.

[48] A sample petition to set claim for trial appears in Appendix 10 of this Outline.

[49] IC 29-1-13-1 Possession of property; duties of personal representative

Sec. 1. Every personal representative shall have a right to take, and shall take, possession of all the real and personal property of the decedent. The personal representative:

(1) shall pay the taxes and collect the rents and earnings thereon until the estate is settled or until delivered by order of the court to the distributees;

(2) shall keep in tenantable repair the buildings and fixtures under the personal representative's control;

(3) may protect the buildings and fixtures under the personal representative's control by insurance; and

(4) may maintain an action:

(A) for the possession of real property; or

(B) to determine the title to real property.

3.11.7. Protection of Secured Creditors' Interests

IC 32-17-13-7(i) affirmatively protects a creditor's right to enforce "a valid and otherwise enforceable lien, warrant, mortgage, pledge, security interest, or other comparable interest against property included in a nonprobate transfer." However, a secured creditor must satisfy the elements of IC Chapter 32-17-13 to recover a deficiency judgment against it decedent's nonprobate transferees if a mortgage foreclosure or comparable sale of the decedent's encumbered assets does not satisfy the decedent's debt.

3.11.8. Deadline for Filing and Serving the Written Demand

IC 32-17-13-7(j) requires the claimant to complete the written demand filing and delivery by **the later of**:

- 7 months after the deceased transferor's death; or
- 30 days after the final allowance of the claimant's claim in the deceased transferor's probate estate.

Subsection (j) accommodates protracted claim adjudication in the administration of the decedent's probate estate. If a claimant satisfies all the requirements of the preceding subsections, the claimant does not necessarily have to make and deliver the written demand under IC 32-17-13-7(d) earlier than 30 days after the claim adjudication ends by judgment or agreement.

To illustrate this delayed timing, imagine a personal injury plaintiff winning a jury verdict couple of years after punctually filing and vigilantly prosecuting a personal injury claim against a decedent's probate estate. In that case plaintiff could enforce the jury verdict against the decedent's nonprobate transferees by making and delivering the written demand under IC 32-17-13-7(d) within 30 days after the jury verdict's entry.

3.11.9. Deadline for Commencement of Proceedings Against Nonprobate Transferees Concerning Deceased Transferors Dying That June 30, 2018

IC 32-17-13-8(b) establishes the filing deadlines for lawsuits against decedents' nonprobate transferees. The subsection considers that a personal representative may:

- file a written notice in the administration of the deceased transferor's probate estate stating that the personal representative does not intend to commence a proceeding against the nonprobate transferees;[50] or

- decline or fail to commence a proceeding against the nonprobate transferees.[51]

If the personal representative files a written notice of intent not to commence a proceeding, the claimant who has satisfied the written demand requirements of IC 32-17-13-7(d) or IC 32-17-13-7(j), IC 32-17-13-8(b)(1) requires the claimant to file a lawsuit against the nonprobate transferees within 30 days after the personal representative's filing of the notice.

If the personal representative simply declines or fails to commence a proceeding against the nonprobate transferees, the claimant must file the lawsuit against the nonprobate transferees within 90 days after the final allowance of the claim in the administration of the deceased transferor's probate estate.[52]

3.11.10. Statutory Exoneration of Obligors and Trustees for Transfers to Non probate Transferees

IC 32-17-13-9 exonerates debtors or third-party holders of a deceased transferor's assets from transferring the assets in a nonprobate transfer to the no transferees. This exoneration contrasts with the general rule that a fiduciary must act impartially toward a decedent's creditors and beneficiaries.

3.11.11. Obligations, Rights, and Priorities of Successful Personal Representatives and Claimants

IC 32-17-13-10 governs a successful claimant's rights and responsibilities toward other claimants and the nonprobate transferees.

Subsection (a) requirements a personal representative to include the personal representative's recovery against nonprobate transferees in the personal representative's inventory of the deceased transferor's probate estate and distribute the recovered assets as the personal

[50] IC 32-17-13-8(b)(1).

[51] IC 32-17-13-8(b)(2).

[52] A sample Complaint Against Nonprobate Transferees appears in Appendix 11 of this Outline.

representative would distribute or pay any other assets of the deceased transferor's probate estate.

In Subsection (b), the maxim "to the victor belong the spoils" describes a claimant's right to apply a successful assets recovery directly to the decedent's debt to the claimant, without requiring the claimant to remit the recovery to the personal representative.

If multiple claimants pursue claims successfully against nonprobate transferees, Subsection (c) allocates the recovery proceeds among the claimants according to the claimant priorities in the administration of a decedent's probate estate.[53]

Subsection (d) requires a successful claimant to file a full or partial satisfaction of the claimant's claim in the administration of the deceased transferor's probate estate, depending on whether the claimant recovers a full or partial payment of the claimant.

3.12. Counter-Punching as an Asset Protection Strategy Against Nonprobate Claims

3.12.1. Avoid Filing a Petition for Administration Within 5 Months After the Deceased Transferor's Death

A deceased transferor's transferees have a strong incentive to discourage the filing a petition for administration of the deceased transferor's probate estate within 5 months after the deceased transferor's date of death.

The 5-month deadline to file a claim against the deceased transferor's probate estate under IC 32-17-13-7(d)(1) creates an unusual stumbling block for creditors accustomed to the normal deadline for claims against a decedent's probate estate. While a creditor generally has up to 3 months after the first publication of notice of administration to file a claim against a decedent's probate estate, IC 32-17-13-7(d)(1) since that time limit at 5 months after the date of the decedent's death.

If no one files a petition for administration of a deceased transferor's probate estate, there is no estate in which a creditor may file a claim to satisfy IC 32-17-13-7(d)(1). A creditor's claim

[53] IC 29-1-14-9.

will be time-barred if the creditor does not take the initiative to open the estate and filed a claim within that deadline.

3.12.2. Seeking Appointment as Personal Representative

A personal representative nominated in a testate decedent's will may petition for appointment to administer and solvent decedent's estate. An intestate decedent's distributee or nonprobate transferee may also want to petition for appointment as the decedent's personal representative to maintain a stabilizing influence on the estate administration and any corresponding proceedings against nonprobate transferees.

The personal representative and the personal representative's counsel are entitled to recover their fees and costs as administrative claims having greater priority than all other creditors' claims.[54] If the personal representative is also a distributee or a nonprobate transferee, a personal representative's fee may be the only benefit the personal representative may receive from the decedent's assets.

3.12.3. Personal Representative's Duty to Scrutinize Claim Merits

As stated in Subsection 2.10.5 of this Outline, a personal representative's scrutiny of claims under IC 29-1-14-11 may expose the claims vulnerabilities on the merits. So, the strategy in Subsection 2.10.5 of this Outline for seeking appointment of a person representative and scrutinizing claims may serve nonprobate transferees equally well if the probate estate is insolvent as it protects distributees in a solvent estate.

3.12.4. Personal Representative's Role as the Claim Procedures Enforcer

The demanding procedural requirements of IC Chapter 32-17-13 should embolden lawyers to defend nonprobate transferees against creditors' claims through diligent attention to the chapter's procedural details in the same way that a skillful criminal defense lawyer requires a

[54] IC 29-1-14-9 Classification of claims; preferences

Sec. 9. (a) All claims shall be classified in one (1) of the following classes. If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

(1) **Costs and expenses of administration**, except funeral expenses, expenses of a tombstone, and expenses incurred in the disposition of the decedent's body.

* * * * *

prosecutor to satisfy procedural requirements and prove the defendant's guilt on each statutory element of each alleged crime. Although the chapter should not deter diligent creditors, details-attentive counsel can use the chapter's demanding procedural requirements to:

- enforce the requirements relentlessly in litigation; or
- negotiate for nonprobate transferees-friendly settlements.

3.12.5. Claim Settlement Negotiations

Some creditors appreciate the concept that a "bird in the hand is worth two in the bush." Those creditors' priorities may make them amenable to negotiating the values of their claims in exchange for immediate cash payments. Nonprobate transferees may use the statutory procedural requirements for claim enforcement as incentives for claimants to compromise their claims and eliminate the costly time commitments required to satisfy all the procedural deadlines. Although claimants may assert contractual rights to recover attorney fees, costs, and prejudgment interest, many claimants are willing to waive or reduce those amounts in negotiated settlements.

3.12.6. Pursue Asset Values in Claim Enforcement Sales

A decedent's person representative, distributees, and nonprobate transferees did not despair over a claimant's successful claim enforcement if underlying asset values may exceed the claim amount.

A decedent's person representative and the nonprobate transferees may have opportunities to promote an asset sale or otherwise enhance an asset's marketability enough to sell the asset or a value exceeding the claim value.

Even if a claim's value exceeds the values of assets that are subject to the claim, market forces may create opportunities for the nonprobate transferees to acquire the assets for bargain prices in poorly-attended sales. Unlike banks and other holders of real property mortgages, some creditors lack the required sophistication to recover assets full values in judgment execution sales. In those cases, nonprobate transferees may be able to purchase the assets for amounts far below the assets' fair market values.

PART 4. CONCLUSION

Lawyers may find this outline and its appendices useful for representing plaintiffs or defendants. The power of knowledge may help a lawyer wielding superior scholarship and case preparation overcome factual and strategic disadvantages and overwhelm a less diligent counterpart. However, humility and empathy distinguish a masterful lawyer from a technically proficient lawyer characterized by self-righteous hubris. The latter lawyer may win cases, but a masterful lawyer wins the admiration and respect of the court, counsel, and parties, regardless of a case’s outcome.

Appendix 1

STATE OF INDIANA	)	IN THE SCHMO CIRCUIT COURT
COUNTY OF SCHMO	)	
	)	CAUSE NO. 00C01-2204-ES-000001
IN THE MATTER OF THE	)	
SUPERVISED ADMINISTRATION	)	
OF THE ESTATE OF	)	
JOBY SCHMO,	)	
Deceased	)	
	)	

ESTATE CLAIM

The Claimant, Snuffy Smith, now files a claim against the above-captioned estate as follows:

Claimant's Name: Snuffy Smith

Claimant's Address: 555 Smith Lane, Schmoville, IN 47000

Claimant's Telephone Number: 555-555-5555

Description of Claimant's Claim: Grain consumed in the Claimant's field by Boss, the decedent's grand champion hog.

Amount of Claimant's Claim: $10,000.00

I, Snuffy Smith, solemnly swear or affirm under penalty for perjury that this claim, after deducting all credits, setoffs, and deductions to which the estate is entitled, is justly due and wholly unpaid to the best of my knowledge and belief.

____
Snuffy Smith, as the Claimant

STATE OF INDIANA, COUNTY OF SCHMO

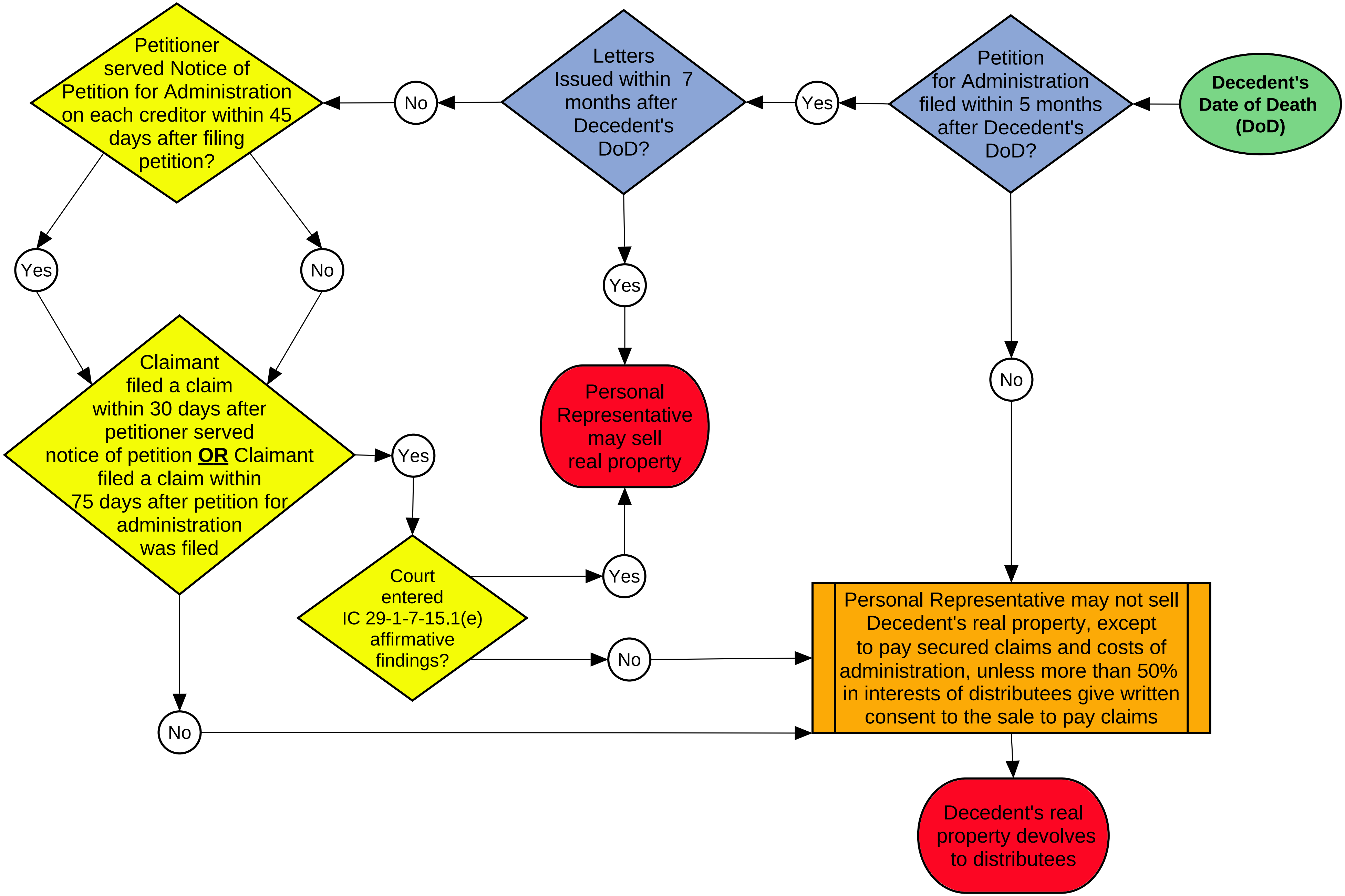
Subscribed and sworn to me before me, a Notary Public in and for said County and State, this day, April ___, 2022

____
Notary Public
Printed Name: _________________________
County of Residence: ___________________

Commission Number: _________________________
Commission Expiration: ______________________

Appendix2

Personal Representative's Authority to Sell Decedent's Real Property Under IC 29-1- 7-15.1 (b)-(e)


Decedent's Date of Death (DoD)
Petition for Administration filed within 5 months after Decedent's DoD?
Yes
No
Letters Issued within 7 months after Decedent's DoD?
Yes
No
Personal Representative may sell real property
Petitioner served Notice of Petition for Administration on each creditor within 45 days after filing petition?
Yes
No
Claimant filed a claim within 30 days after petitioner served notice of petition OR Claimant filed a claim within 75 days after petition for administration was filed
Yes
No
Court entered IC 29-1-7-15.1(e) affirmative findings?
Yes
No
Personal Representative may not sell Decedent's real property, except to pay secured claims and costs of administration, unless more than 50% in interests of distributees give written consent to the sale to pay claims
Decedent's real property devolves to distributees

Appendix 3

Sample Real Property Title passage Affidavit – Multiple Fact Patterns

STATE OF INDIANA)
)
COUNTY OF SCHMOE)

AFFIDAVIT OF TITLE PASSAGE

The Affiant, Joe Bill Schmoe (referred to hereafter as the "Affiant" and "Joe"), being first duly sworn, under oath deposes and says as follows:

1. Instrument Indexes: The Affiant requests that the Recorder of Schmoe County, Indiana, record and index this Affidavit according to IC 36-to-7-10(l) with a cross-referencing notation on the Recorder's records to the following instruments:
   a. Tract 1
      i. Instrument Title: Warranty Deed (to which this Affidavit refers as the "MAS & MAS Deed").
      ii. Instrument Citation: Schmoe County Deed Record 1, page 1.
      iii. Instrument Date: February 29, 1995.
      iv. Instrument Recording Date: February 29, 1995.
      v. Instrument Grantors: Methuselah Alfonso Schmoe and Myti Aphrodite Schmoe, a husband-and-wife.
   b. Tract 2
      i. Instrument Title: Transfer on Death Deed (to which this Affidavit refers as the "HES Deed").
      ii. Instrument Citation: Schmoe County Instrument No. 2010000023.
      iii. Instrument Date: February 29, 2010.
      iv. Instrument Recording Date: February 30, 2010.
      v. Instrument Grantor: Henrietta Earnestine Schmoe, deceased (to whom this Affidavit refers hereafter as "Henrietta").

2. Real Property Descriptions:

   a. The legal description of the real property conveyed by the MAS & MAS Deed (to which this Affidavit refers hereafter as "Schmoe Hemp Farm Tract 1") is as follows:

      Beginning at the railroad rail embedded at the center line of Schmoe Street as a monument marking the Northeast Corner of the Northwest Quarter of Section 0, Township 0 North, Range 0 West, in the City of Schmoesburg, Township of Schmoe, County of Schmoe, State of Indiana; and running thence South 0 degrees, 0 minutes, 0 seconds West 20 chains, 3 rods, and 9 links to a steel driveshaft embedded as a monument way down yonder in the paw-paw patch; thence North 90 degrees, 0 minutes, 0 seconds West 10 chains, 1 rod, and 5 links to another steel driveshaft embedded as a monument; thence North 0 degrees, 0 minutes, 0 seconds West 20 chains, 3 rods, and 9 links to another railroad rail embedded at the center line of Schmoe Street as a monument; thence South 90 degrees, 0 minutes, 0 seconds East 10 chains, 1 rod, and 5 links to the point of beginning, containing 21.4652 acres, more or less.

   b. HES Deed Real Property Description (to which this Affidavit refers hereafter as the "Schmoe Hemp Farm Tract 2"):

      Beginning at the railroad rail embedded at the center line of Schmoe Street as a monument marking the Northeast Corner of the Northwest Quarter of Section 0, Township 0 North, Range 0 West, in the City of Schmoesburg, Township of Schmoe, County of Schmoe, and State of Indiana; and running thence South 0 degrees, 0 minutes, 0 seconds West 20 chains, 3 perches, and 9 links to a steel driveshaft embedded as a monument way down yonder in the paw-paw patch; thence North 90 degrees, 0 minutes, 0 seconds West 10 chains, 1 perch, and 5 links to another steel driveshaft embedded as a monument; thence South 0 degrees, 0 minutes, 0 seconds West 3 chains to another steel driveshaft embedded as a monument; thence South 90 degrees, 0 minutes, 0 seconds East 13 chains, 1 perch, and 5 links to another steel driveshaft embedded as a monument; thence North 0 degrees, 0 minutes, 0 seconds West 23 chains, 3 perches, and 9 links to another railroad rail embedded at the center line of Schmoe Street as a monument; thence North 90 degrees, 0 minutes, 0 seconds West 3 chains to the point of beginning, containing 10.1037 acres, more or less.

3. The Affiant is one of the surviving adult children of Rufus Xavier Sarsaparilla Schmoe, deceased (to whom this Affidavit refers hereafter as, “Rufus”), and Henrietta Earnestine Schmoe, deceased (to whom this Affidavit refers hereafter, “Henrietta”), and the Affiant makes this Affidavit upon his personal knowledge.

4. Rufus and Henrietta were husband and wife when they acquired title by the MAS & MAS Deed to the Schmoe Hemp Farm Tract 1, to which the records in the office of the Auditor of Schmoe County refer as follows:

    a. County and State of Real Property Location: Schmoe County, Indiana.

    b. Tax Parcel Number: 00-02-34-000-030.000-003.

    c. Property Address: 0001 Schmoe St., Schmoesburg, IN 47000

    d. Real Property Description: Pt NW 0-0-0 21.4652 A.

5. Henrietta designated the HES Trust established under her Last Will and Testament as the transfer on death beneficiary of the Schmoe Hemp Farm Tract 2 in HES Deed according to IC §32-17-14-11, and the records of the office of the Auditor of Schmoe County refer to the Schmoe Hemp Farm Tract 2 as follows:

   a. County and State of Real Property Location: Schmoe County, Indiana.

   b. Tax Parcel Number: 00-02-34-000-030.000-004.

   c. Property Address: 0002 Schmoe St., Schmoesburg, IN 47000

   d. Real Property Description: Pt NW 0-0-0 10.1037 A.

6. Henrietta died testate on June 31, 2016.

7. No one filed a petition for administration of Henrietta's estate and, therefore, no court decree of final distribution of her estate was entered, nor was a closing statement filed, so there was no prohibition against the presentation of Henrietta's will for probate under IC §29-1-7-15.1(a).

8. Henrietta established the HES Trust in Article 4 of her Last Will and Testament and appointed Commerce to administer the HES Trust as Trustee for the benefit of Geraldine II, who was disabled in a tragic vehicle/rhinoceros collision that killed Geraldine II's father as they were driving past the home of Albert Andreas Armadillo, the next-door neighbor of Rufus and Henrietta.

9. Henrietta's Last Will and Testament was admitted to probate without administration in Schmoe County Will Record 43, page 60, under Cause Number 00C01-1906-EM-0001 by order of the Schmoe Circuit Court entered June 3, 2019, less than 3 years after Henrietta's death, which was within the time limitation under IC §29-1-7-15.1(g) to admit her will to probate, and consequently, title to the Schmoe Hemp Farm Tract 2 became vested automatically by operation of law upon Henrietta's death, according to IC §32-17-14-15(d) and IC §32-17-14-21(d), in Milburn Drysdale as Senior Trust Officer of Commerce Bank of Beverly Hills, as Trustee of the HES Trust.

10. Rufus survived as Henrietta's surviving spouse after Henrietta's death on June 31, 2016. Rufus and Henrietta were never at any time divorced subsequent to their acquisition of the Schmoe Hemp Farm Tract 1 as tenants by the entirety; and consequently, by operation of

the law, title to the Schmoe Hemp Farm Tract 1 was immediately vested in Rufus upon Henrietta's death.

11. Rufus, was the father of four children, namely, Rafaella Gabriela Sarsaparilla Schmoe (hereafter, "Rafaella"), Henrietta Earnestine Schmoe II (hereafter, "Henrietta II"), Rufus Xavier Sarsaparilla Schmoe II (hereafter, "Rufus II"), and the Affiant herein as his only heirs-at-law (hereinafter, the heirs-at-law are referred to as the "Heirs").

12. A train struck the automobile that Rufus II was driving through Conjunction Junction with his wife, Geraldine Amarilla Schmoe (hereinafter, "Geraldine"), and Rufus on June 31, 2020, killing Geraldine and Rufus instantly, and inflicting fatal injuries from which Rufus II later died on September 31, 2021.

13. Rufus died intestate.

14. More than 5 months passed after Rufus's death and no one petitioned for administration of his estate within that period, so title to Schmoe Hemp Farm Tract 1 passed indefeasibly upon Rufus's death to the Heirs as follows:

Name	Relationship	Address	Percentage
Joe	Son	0002 Schmoe St. Schmoesburg, IN 47000	25%
Raffaella	Daughter	0003 Schmoe St. Schmoesburg, IN 47000	25%
Henrietta II	Daughter	0004 Schmoe St. Schmoesburg, IN 47000	25%
Rufus II	Son	0005 Schmoe St. Schmoesburg, IN 47000	25%
		Total of Percentages	100.00%

15. Rufus Xavier Sarsaparilla Schmoe III (hereinafter, "Rufus III"), is the only child of the marriage of Rufus II and Geraldine.

16. Geraldine Amarilla Balderdash II (hereinafter, “Geraldine II”) was Geraldine’s only other child, who was born by Geraldine’s previous marriage to Geraldo Reginald Balderdash, deceased.

17. Rufus III petitioned for appointment as personal representative of Rufus II’s estate on January 1, 2022, under Cause Number 00C01-2101-EU-0001.

18. The Schmoe Circuit Court granted the petition and admitted Rufus II’s Last Will and Testament to probate on February 29, 2022, but Schmoe Circuit Court Clerk Schloer Dan Moelassass did not issue letters testamentary to Rufus III until April 31, 2022.

19. Rufus III did not file a Notice of Petition for Administration, and no one filed a claim within 75 days after Rufus III filed a petition for appointment as personal representative, so the power of the personal representative to divest title lapsed under the provisions of IC §29-1-7-15.1(b)-(d).

20. Article 3 of Rufus II’s Last Will and Testament provides for distribution of 50% of Rufus II’s estate to Rufus III and the remaining 50% of Rufus II’s estate to Milburn Drysdale, President and Senior Trust Officer of Commerce Bank of Beverly Hills (hereafter, “Commerce”), as Trustee of the RXSSIII Trust established under Article 5 of Rufus II’s Will for Geraldine II’s benefit.

21. Because the power of a personal representative to divest Rufus II’s share of title to the Schmoe Hemp Farm Tract 1 under the requirements of IC §29-1-7-15.1(b) lapsed, and title to Rufus II’s share of title to the Schmoe Hemp Farm Tract 1 passed automatically, immediately, and indefeasibly from Rufus II to Rufus II’s devisees, Rufus III and the RXSSIII Trust under Rufus II’s Will as a matter of law under IC §29-1-7-23(a).

22. The passage of title in the Schmoe Hemp Farm Tract 1 upon the deaths of Rufus and Rufus II has resulted in the vestiture of title among the respective distributees of Rufus and Rufus II as follows:

Name	Relationship	Address	Percentage
Joe	Rufus’ Son	0002 Schmoe St. Schmoesburg, IN 47000	25%

Raffaella	Rufus' Daughter	0003 Schmoe St. Schmoesburg, IN 47000	25%
Henrietta II	Rufus' Daughter	0004 Schmoe St. Schmoesburg, IN 47000	25%
Rufus III	Rufus II's Son	0005 Schmoe St. Schmoesburg, IN 47000	12.5%
HES Trust	Rufus II's Testamentary Trust	1 N. Rodeo Dr. Beverly Hills, CA 90210	12.5%
Total of Percentages			100.00%

23. Joe, Raffaella, Henrietta II, and Rufus III have appointed Commerce Bank of Beverly Hills[1] to serve as their agent to administer rental receipts from the cash rent of Schmoe Hemp Farm Tract 1 and Schmoe Hemp Farm Tract 2, and to administer payment of expenses disbursements of net income among the owners of Schmoe Hemp Farm Tract 1 and Schmoe Hemp Farm Tract 2, so all property tax statements should be mailed with respect to Schmoe Hemp Farm Tract 1 and Schmoe Hemp Farm Tract 2 to Commerce Bank of Beverly Hills as follows:

Schmoe Hemp Farm Account Manager
Commerce Bank of Beverly Hills
1 N. Rodeo Dr.
Beverly Hills, CA 90210

24. Rufus, Henrietta, and Rufus II are the decedents with respect to whom the Affiant is making this Affidavit according to the provisions of IC §29-1-7-23(b)-(f).

25. This affidavit is made for the purpose of establishing the facts herein contained, to induce the Schmoe County Auditor to transfer the Real Property to the distributees of Rufus, Henrietta, and Rufus II upon the Schmoe County Auditor's real property transfer records, and to induce the Schmoe County Recorder to record this Affidavit and index it to the MAS & MAS Deed and the HES Deed.

[1] Where all the gold in California is in someone else's name according to the Gatlin Brothers.

IN WITNESS WHEREOF, the Affiant has affixed his hand and seal this day, September 31, 2022.

____
Joe Bill Schmoe

STATE OF INDIANA, COUNTY OF SCHMOE) SS:

Before me, a Notary Public in and for said County and State, this day, September 31, 2022, personally appeared Joe Bill Schmoe, who affirmed under oath the truth of the representations contained herein and acknowledged the execution of the above and foregoing Real Property Title Passage Affidavit and Affidavit for Transfer of Real Property to be his free and voluntary act and deed.

____
Notary Public
Printed Name: ________________________
County of Residence: __________________

My Commission Expires:
____
Commission Number: ________________________

I affirm, under the penalties for perjury, that I have taken reasonable care to redact each Social Security number in this document, unless required by law.

Signature: _______________________________
Printed Name: _______________________________

This Real Property Title Passage Affidavit was prepared by A. Lolly Lawyer, of Lolly, Lolly, & Lolly PC., whose address is 1.75 N. Court St., Post Office Box 000, Schmoesburg, Indiana 47000, whose telephone number is 812-000-000, whose fax number is 812-000-0001, and whose website is www.LollyLollyLolly.com.

Appendix 4

Sample Real Property Title Passage Affidavit - Basic Template

STATE OF INDIANA)
)
COUNTY OF SCHMOE)

TITLE PASSAGE AFFIDAVIT

The Affiant, Joe Bill Schmoe, being first duly sworn, upon an oath deposes and says as follows:

1. The Affiant is one of the surviving adult children of Rufus Xavier Sarsaparilla Schmoe, deceased (hereafter, “Rufus”), and Henrietta Earnestine Schmoe, deceased (hereafter, “Henrietta”).

2. Rufus and Henrietta were husband and wife when they acquired title to the following described real property situated in Schmoe County, Indiana, to-wit:

40 acres down by the paw-paw patch.

[Tax Parcel Number: 00-02-34-000-030.000-003]

[Property Address: 0001 Schmoe St., Schmoesburg, IN 47000]

(referred to hereinafter, the “Real Property,” but the tax parcel number and property address are provided for informational purposes only and are not part of the description of the Real Property) by a Warranty Deed from Albert Andreas Armadillo, an adult, to Rufus and Henrietta, a husband-and-wife, dated February 29, 1995, and recorded February 29, 1995, in Deed Record 000, page 1 (the “Warranty Deed”).

3. The Warranty Deed is the most recent instrument recorded in the Office of the Recorder of Schmoe County, Indiana (hereafter, the “Recorder”), and the Affiant requests that the Recorder index this Affidavit to the Warranty Deed with respect to the Real Property, and it is the most recent instrument responsible for conveying title to the Real Property.

4. Henrietta died on November 31, 1999, leaving Rufus as her surviving spouse. Rufus and Henrietta were never at any time divorced subsequent to their acquisition of the real property as tenants by the entirety; and consequently, by operation of the law, title to the Real Property was immediately vested in Rufus upon Henrietta’s death.

5. [Sample language for a testate Rufus:] Rufus died testate on the June 31, 2017, leaving a Last and Testament dated April 31, 2001, that was admitted to probate under Cause Number 00C01-1809-EM-0001 by order of the the Schmoe Circuit Court entered September 31, 2018.

6. [Sample language for an intestate Rufus:] Rufus was the father of four children, namely, Raffaella Gabriela sarsaparilla Schmoe (hereinafter, "Raffaella"), Henrietta Earnestine Schmoe II (hereinafter, "Henrietta II"), Rufus Xavier Sarsaparilla Schmoe II (hereinafter, "Rufus II"), and the Affiant herein. Rufus II and his wife, died simultaneously and intestate on November 31, 1999, leaving their son and only descendant, Rufus Xavier Sarsaparilla Schmoe III (hereinafter, "Rufus III"), as their sole heir-at-law. Rufus died intestate on the June 31, 2017, leaving Raffaella, Henrietta II, Rufus III, and the Affiant herein as his only heirs-at-law (hereinafter, the heirs-at-law are referred to as the "Heirs").

7. Title to the Real Property was immediately vested in the [use one of these defined terms and delete the other term: Legatees or Heirs] as tenants in common immediately upon Rufus's death by operation of the law under IC 29-1-7-23, subject to the power of a personal representative to divest title under the requirements of IC 29-1-7-15.1.

8. No petition was filed for probate of a will and for issuance of letters testamentary, for appointment of an administrator with the will annexed, or for the appointment of an administrator under IC 29-1-7-5 within 5 months after Rufus's death, nor did the Clerk issue letters testamentary or letters of administration within seven months after Rufus's death, so the power of a personal representative to divest title expired automatically as a matter of law under IC 29-1-7-15.1(b), and title is now invested indefeasibly in the [use one of these defined terms and delete the other term: Legatees or Heirs] as follows:

Name	Relationship	Address	Percentage
Joe Bill Schmoe	Rufus's Son	0002 Schmoe St. Schmoesburg, IN 47000	25%
Raffaella Gabriela Sarsaparilla Schmoe	Rufus's Daughter	0003 Schmoe St. Schmoesburg, IN 47000	25%
Henrietta Earnestine Schmoe II	Rufus's Daughter	0004 Schmoe St. Schmoesburg, IN 47000	25%

Rufus Xavier Sarsaparilla Schmoe III	Rufus's Grandson	0005 Schmoe St. Schmoesburg, IN 47000	25%

9. This affidavit is made for the purpose of establishing the facts herein contained and to induce the Schmoe County Auditor to transfer the Real Property to the names of Joe Bill Schmoe and Betty Jo Schmoe upon the Schmoe County Auditor's real property transfer records.

IN WITNESS WHEREOF, the Affiant has affixed his hand and seal this day, September 31, 2022.

____
Joe Bill Schmoe

STATE OF INDIANA, COUNTY OF SCHMOE) SS:

Before me, a Notary Public in and for said County and State, this day, September 31, 2022, personally appeared Joe Bill Schmoe, who swore to the truth of the representations contained herein and acknowledged the execution of the above and foregoing Affidavit of Death and Affidavit for Transfer of Real Property to be his free and voluntary act and deed.

____
My Commission Expires: Notary Public
____________________________ Printed Name: ____________________
Commission Number: ____________________ County of Residence: ________________

I affirm, under the penalties for perjury, that I have taken reasonable care to redact each Social Security number in this document, unless required by law.

Signature: ____________________________
Printed Name: ____________________________

This Real Property Title Passage Affidavit was prepared by A. Lolly Lawyer, of Lolly, Lolly, & Lolly PC., whose address is 1.75 N. Court St., Post Office Box 000, Schmoesburg, Indiana 47000, whose telephone number is 812-000-000, whose fax number is 812-000-0001, and whose website is www.LollyLollyLolly.com.

Appendix 5

AFFIDAVIT OF TITLE PASSAGE

The undersigned, ___________________________________ (the "Affiant"), being duly sworn on oath, states that:

1. The Affiant is ___________________________________ of ___________________________________ (the "Decedent"), who died on ___________________________________, 20____, while domiciled in _____________________ County, ________________________.

2. The Decedent acquired a ___________________________________ interest (the "Decedent's Title Interest") in the real estate described in this Affidavit (the "Real Estate") by the ___________________________________ dated ___________________________________ 20____, and [filed / recorded] on ________________________, 20____, in ________________________________ [as Instrument Number ___________________________________ in the office of the [Clerk / Recorder,] of ___________________________________ County, Indiana.

3. The last instrument recorded in the office of the Recorder of ___________________________________ County, Indiana, was the ___________________________________ dated ___________________________________ 20____, and recorded on ___________________________________ 20____, in Deed Record ___________________________________ page ___________________________________ as Instrument No. ___________________________________ (the "Latest Recorded Instrument").

4. The marital relationship between the Decedent and ___________________________________ remained unbroken from the time they acquired the Decedent's Title Interest in the Real Estate until the death of ___________________________________ on ___________________________________ 20____, at which time the Decedent's Title Interest acquired the title interest of the Decedent's spouse in the Real Estate as the surviving tenant by the entireties.

5. The Real Estate is located in ___________________________________ County, Indiana, and described by property tax parcel number, property location, and legal description as follows, to-wit:

Commented [JH1]: Affiant's relationship to the decedent

Commented [JRH2]: This is space for the the decedent's name as required under IC 29-1-7-23(b)(1)

Commented [JRH3]: The decedent's date of death and County of domicile are required under IC 29-1-7-23(b)(2).

Commented [JH4]: Decedent's ownership interest in the real estate, such as fractional, mineral, fee simple, etc.

Commented [JRH5]: This whole paragraph addresses IC 29-1-7-23(b)(4), which describes a muniment of title by which the decedent acquired the decedent's interest in the real estate. The muniment could be a deed, a quiet title judgment, a final decree in a supervised estate, or other means of title transfer as contemplated under the Uniform Marketable Title Act, which appears in IC 32-20. If the decedent acquired the interest with another person, especially if the decedent acquired the real estate with rights of survivorship, such as in a joint tenancy, tenancy by the entireties, or as a remainder beneficiary in a deed by which a grantor retained a life estate, indicate that information here, and elaborate about the death of any cotenant or other party that triggered the transfer to the decedent by survivorship such as with the fourth enumerated allegation that is provided is a sample.

Commented [JH6]: This recital identifies the local county government office in which the particular muniment of title appears, such as a will and a clerk's office or a deed in a recorder's office.

Commented [JRH7]: The variables here include the document location citations required under IC 29-1-7-23(b)(6).

Commented [JRH8]: This paragraph addresses IC 29-1-7-23(b)(3) if the instrument described in the third enumerated allegation was a muniment of title that was not recorded in the recorder's office.

Commented [JH9]: Note that the affidavit recites recorded instruments on the first page in conformity with the requirements of IC 36-2-7-10(l)

Commented [JRH10]: This is a sample of an explanation of how the decedent acquired title from a spouse if they acquired title together as tenants by the entireties. Alternative language should be used if the decedent acquired the interest with someone as joint tenants with rights of survivorship, or if the decedent acquired a remainder interest that was subject to a granted or retained life estate.

[Property Tax Parcel No.: ___________________________________]

[Property Location: ___________________________________]

{Add real estate description here}.

Commented [JRH11]: This allegation provides the real estate description and other information required under IC 29-1-7-23(b)(5)

6. The Decedent died testate, and the Decedent's Last Will and Testament, which was admitted to probate by order of the ___________________________________ Court entered in Cause No. ___________________________________ on ___________________________________ 20____, provided for the Decedent's Title Interest to be distributed to the Decedent's legatees (the "Legatees") by percentages or fractions as follows:

6.1. ___________________________________ % to ___________________________________ whose address is ___________________________________, ___________________________________;

6.2. ___________________________________ % to ___________________________________ whose address is ___________________________________, ___________________________________;

6.3. ___________________________________ % to ___________________________________ whose address is ___________________________________, ___________________________________;and

6.4. ___________________________________ % to ___________________________________ whose address is ___________________________________, ___________________________________.

OR

7. The Decedent died intestate, leaving as the decedent's heirs-at-law (the "Heirs at Law") the following persons by percentages or fractions:

7.1. ___________________________________ % to ___________________________________ whose address is ___________________________________, ___________________________________;

7.2. ___________________________________ % to ___________________________________ whose address is ___________________________________, ___________________________________;

7.3. ___________________________________ % to ___________________________________ whose address is ___________________________________, ___________________________________;and

7.4. ___________________________________ % to ___________________________________ whose address is ___________________________________, ___________________________________.

Commented [JRH12]: Alternative enumerated sections 5 and 6 are examples of how to describe the devolution to the distributees is required in IC 29-1-7-23(b)(7), (9), and (10). The applicable explanation should remain and the inapplicable explanation should be deleted when preparing an affidavit with this template.

8. The Decedent's Title Interests devolved to the Legatees ___________________________________ Heirs at Law immediately and automatically as a matter of law under IC 29-1-7-23 upon the Decedent's death.

Commented [JRH13]: This is a continuation of the explanation of devolution under IC 29-1-7-23(b)(7). The distributees are either legatees or heirs at law, and the inapplicable designation should be deleted, leaving either legatees or heirs at law in this enumerated allegation, but not both.

Commented [JRH14]: This allegation summarizes the effect of devolution under the cited statute. The allegation is not mandatory, but it is a useful way to connect the dots for people who are not familiar with title devolution.

9. The Decedent owed no obligations to creditors that are enforceable against the Real Estate and there is no federal estate tax due and owing as a consequence of the Decedent's death.

Commented [JRH15]: There is no requirement for this allegation, but is a nice touch to provide clarification about whether a federal estate tax lien applies to the real estate. If the decedent owed creditors, this allegation should be modified to either identify the creditors or it should simply omit any reference to the creditors. The existence of creditors does not have anything to do with whether someone can use this affidavit as evidence of the devolution of real estate title.

10. As of this date:

10.1. at least 7 months have elapsed since the Decedent's death;

10.2. no letters testamentary or letters of administration have been issued to a court-appointed personal representative for the Decedent within the time limits specified under IC 29-1-7-15.1(d);

10.3. a probate court has not issued findings and an accompanying order preventing the limitations in IC 29-1-7-15.1(b) from applying to the Real Estate;

10.4. a majority in interests of the Decedent's distributees have not consented to the Decedent's personal representative's sale of the Decedent's Title Interest to pay any debt or obligation of the Decedent, which is not a lien of record in ____________________________________ County, Indiana, or to pay any costs of administration of any Decedent's estate under IC 29-1-10-21; and

10.5. consequently, it is not possible for the Decedent's personal representative to sell the Decedent's Title Interest to pay any debt or obligation of the Decedent, which is not a lien of record in ____________________________________ County, Indiana, or to pay any costs of administration of any Decedent's estate.

11. The purpose of this Affidavit is to induce the Auditor of ____________________________________ County, Indiana, to endorse this Affidavit and record it as a title transfer in the Auditor's real estate ownership records as an instrument that is exempt from the requirements to file a sales disclosure under IC 29-1-7-23(c), and to direct the Recorder of ____________________________________ County, Indiana, to record the Affidavit and index it to the Latest Recorded Instrument in the Recorder's index records.

12. The Affiant affirmed the truth of the representations in this Affidavit under penalty for perjury and authorizes any person to rely upon this Affidavit as evidence of an effective transfer of title of record (as defined in IC 32-20-3-1) as stated in IC 29-1-7-23(e).

Commented [JRH16]: This allegation is not necessary to establish the fact of the passage of the decedent's title under IC 29-1-7-23(a).

The allegation satisfies the safe harbor requirement of IC 29-1-7-23(b)(8) and connects the dots for the conclusion that the Decedent's distributees may convey title free and clear of claims by the decedent's creditors.

If a proposed transaction depends upon use of this affidavit within 5 months after the decedent's death, a title company may want to escrow funds to determine whether anyone has filed a petition for administration under an "EU" or "ES" probate cause number. NOTE, a petition for administration cannot be filed under an "EM" cause number. If no petition for administration is filed at or within 5 months after the decedent's death, a creditor cannot force the real estate to be sold and any escrowed funds should be distributed to the distributees identified in the affidavit.

If a petition for administration is filed at or within 5 months after the decedent's death, the title company should monitor the case to determine whether letters of administration or letters testamentary have been issued at or within 7 months after the decedent's death, and whether a creditor has satisfied the requirements under IC 29-1-7-23(c)-(e). Obviously, a case with this circumstance will require the title company to consult with legal counsel.

The allegation also ties into the exception to the "5-month" rule of IC 29-1-7-15.1(b) under IC 29-1-10-21.

NOTE, however, that 2020 Indiana Senate Bill 50 will modify the statute for clarification purposes, and this allegation will change significantly after June 30, 2020.

Commented [JRH17]: This allegation should help the auditor and recorder understand their respective responsibilities concerning transfer of ownership information on the tax duplicates, exemption from sales disclosure form filing requirements, and duties to effectuate the recordation and indexing of the affidavit under IC 29-1-7-23(c).

Commented [JRH18]: This is a restatement of IC 29-1-7-23(e), which should help title companies and lenders feel comfortable relying upon the affidavit.

I affirm under the penalties for perjury that the foregoing statements are true.

____
____

Commented [JH19]: Affiant's name

STATE OF INDIANA, COUNTY OF ________________________) SS:

Before me a Notary Public in and for said County and State, personally appeared ___________________________________ who being first duly sworn, affirmed the trust of the foregoing representations and acknowledged the execution of the foregoing Affidavit of Title Passage on this day, ___________________________________ 20 ____.

Commented [JH20]: Affiant's name

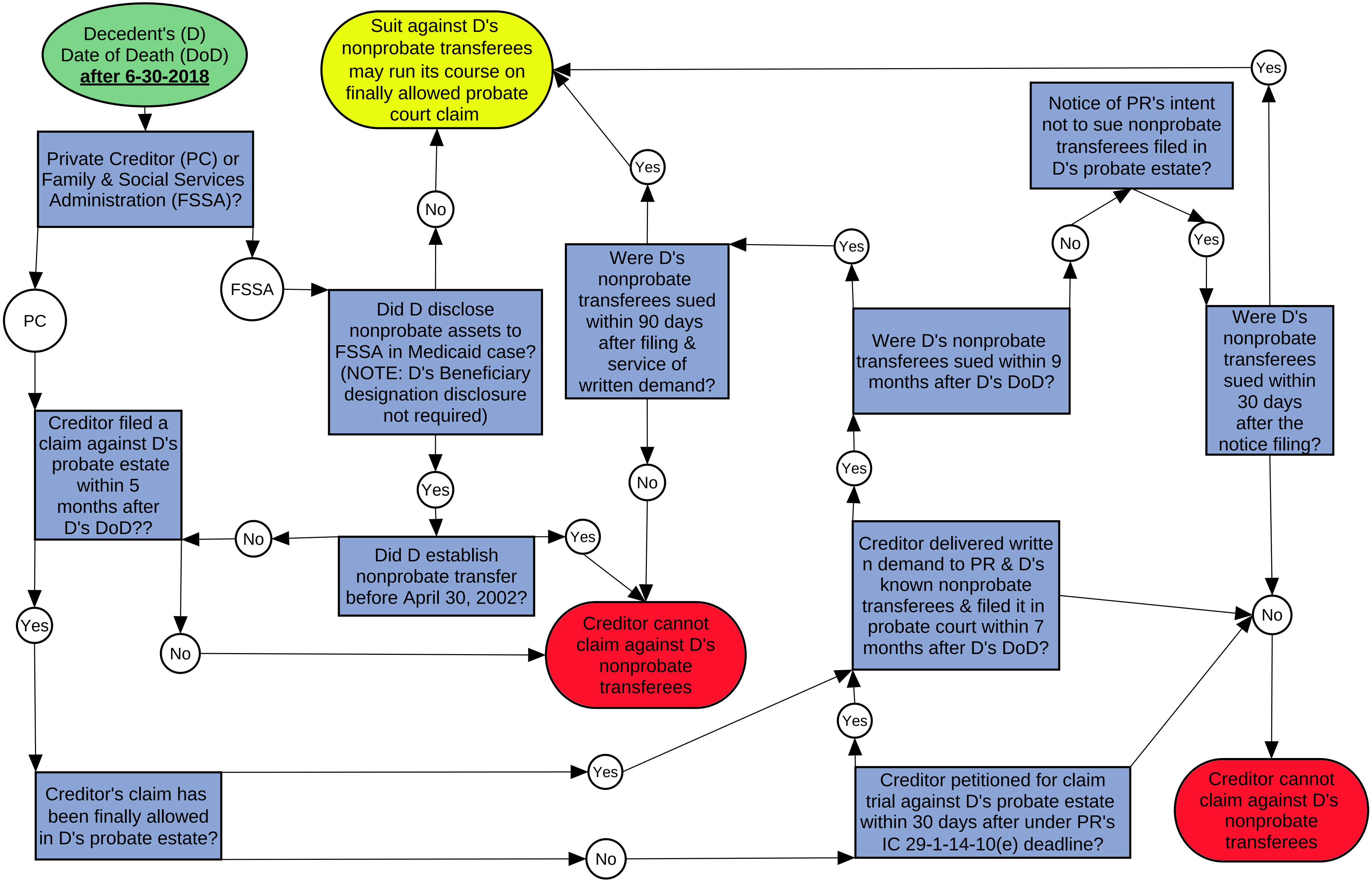
Commission Expiration: __________________ Signature: ______________________________
Commission Number: ____________________ Notary Public
County of Residence: ____________________ Printed Name: ___________________________

I affirm, under penalties for perjury, that I have taken reasonable care to redact each Social Security number in this document, unless required by law. ___________________________________

This Affidavit Title Passage was prepared by ___________________________________ of _______________________, the address of which is ______________________, _____________, ___________ __________-_____; whose phone number is __________________; whose fax number is _____________________; and whose Internet URL is https://www.________________.

Appendix 6

FSSA & Other Creditors' Claims Against Nonprobate Transferees of Decedents Dying After June 30, 2018



Decedent's (D) Date of Death (DoD) **after 6-30-2018**

Private Creditor (PC) or Family & Social Services Administration (FSSA)?

Suit against D's nonprobate transferees may run its course on finally allowed probate court claim

Did D disclose nonprobate assets to FSSA in Medicaid case? (NOTE: D's Beneficiary designation disclosure not required)

Were D's nonprobate transferees sued within 90 days after filing & service of written demand?

Notice of PR's intent not to sue nonprobate transferees filed in D's probate estate?

Were D's nonprobate transferees sued within 9 months after D's DoD?

Were D's nonprobate transferees sued within 30 days after the notice filing?

Creditor filed a claim against D's probate estate within 5 months after D's DoD??

Did D establish nonprobate transfer before April 30, 2002?

Creditor cannot claim against D's nonprobate transferees

Creditor delivered writte n demand to PR & D's known nonprobate transferees & filed it in probate court within 7 months after D's DoD?

Creditor's claim has been finally allowed in D's probate estate?

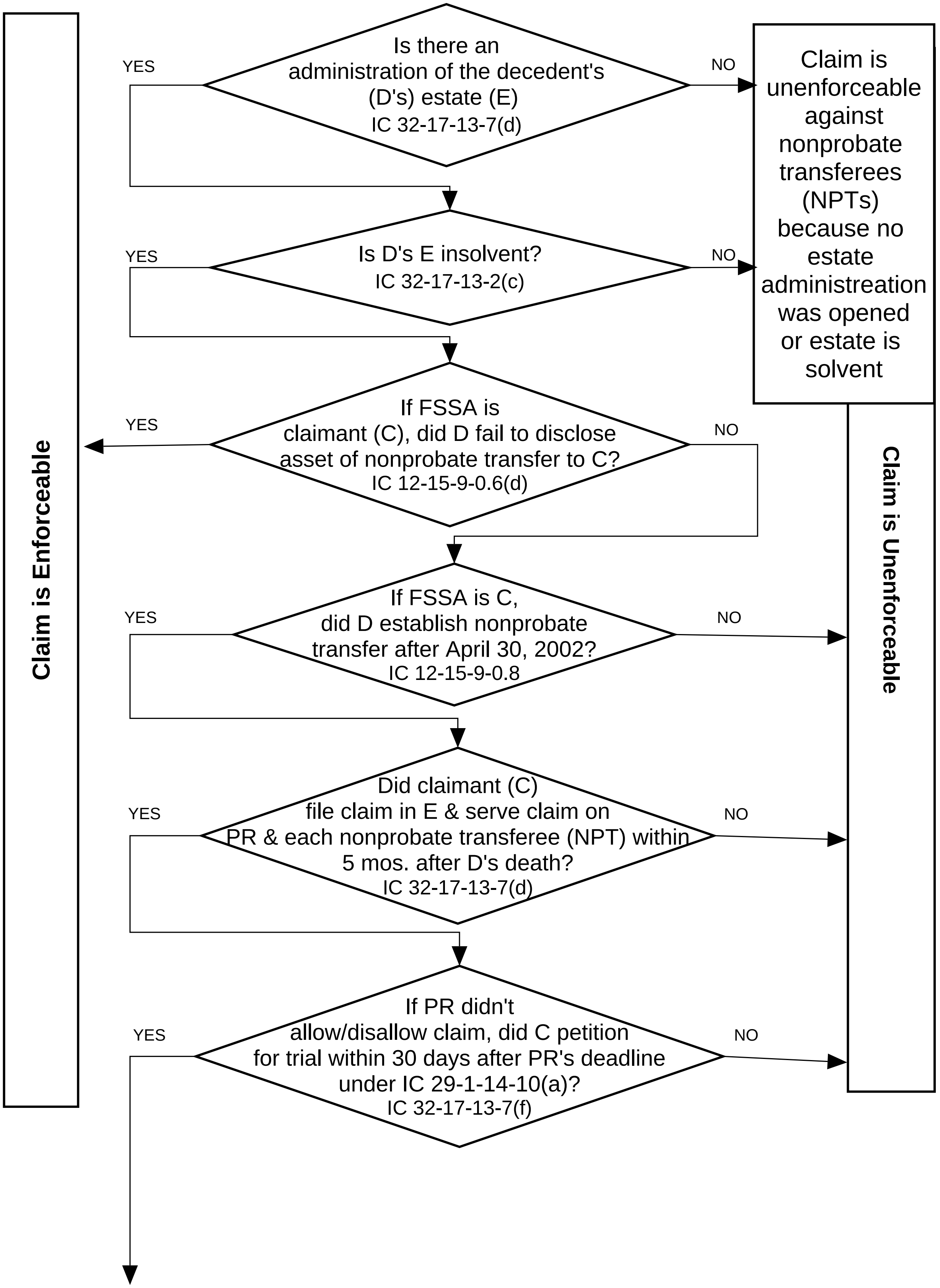
Creditor petitioned for claim trial against D's probate estate within 30 days after under PR's IC 29-1-14-10(e) deadline?

Creditor cannot claim against D's nonprobate transferees

Appendix 7

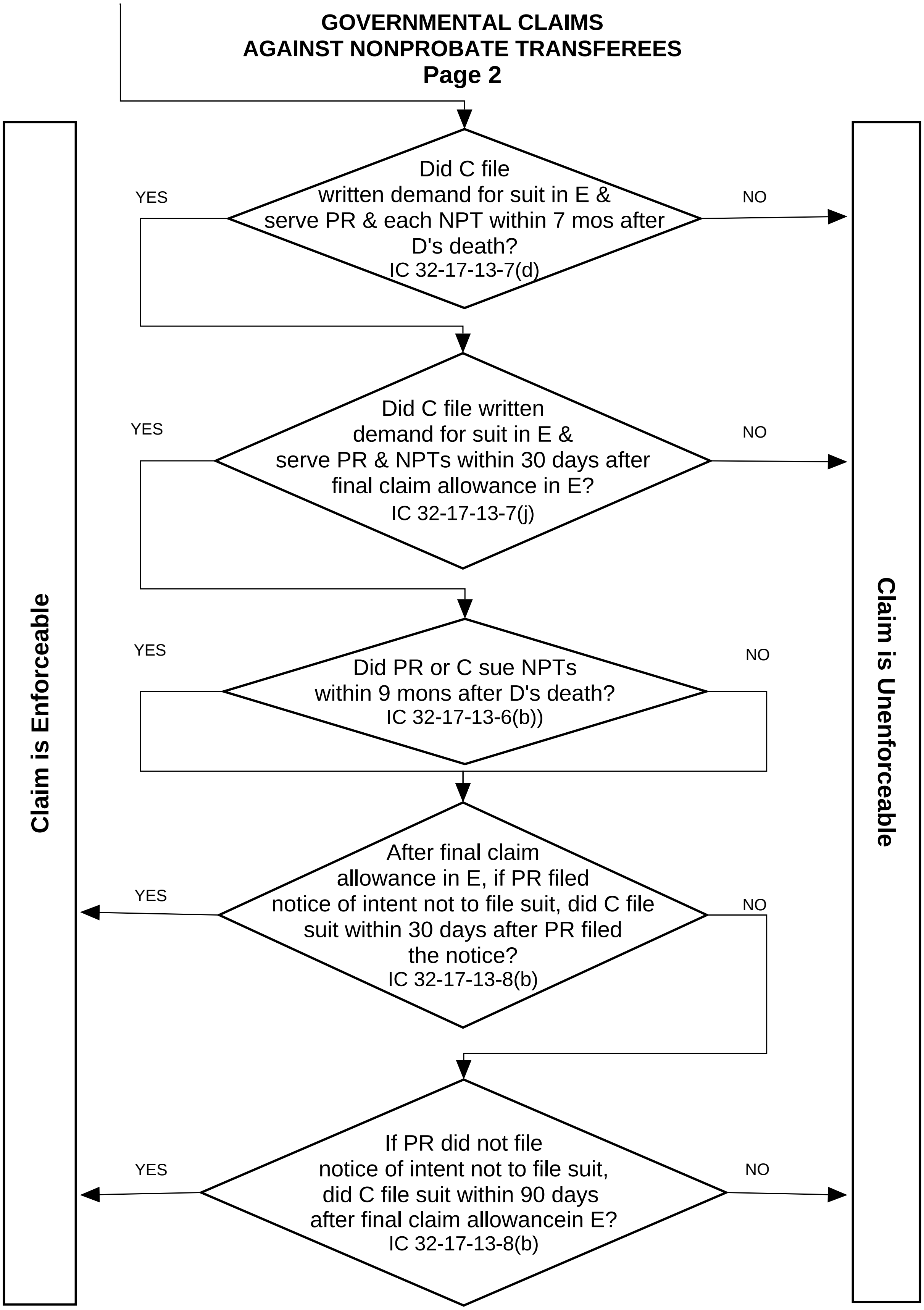
GOVERNMENTAL CLAIMS AGAINST NONPROBATE TRANSFEREES

[IC 32-17-13 for Decedent's dying after June 30, 2018]


Is there an administration of the decedent's (D's) estate (E)
IC 32-17-13-7(d)
YES
NO
Claim is unenforceable against nonprobate transferees (NPTs) because no estate administreation was opened or estate is solvent
Is D's E insolvent?
IC 32-17-13-2(c)
YES
NO
If FSSA is claimant (C), did D fail to disclose asset of nonprobate transfer to C?
IC 12-15-9-0.6(d)
YES
NO
Claim is Enforceable
Claim is Unenforceable
If FSSA is C, did D establish nonprobate transfer after April 30, 2002?
IC 12-15-9-0.8
YES
NO
Did claimant (C) file claim in E & serve claim on PR & each nonprobate transferee (NPT) within 5 mos. after D's death?
IC 32-17-13-7(d)
YES
NO
If PR didn't allow/disallow claim, did C petition for trial within 30 days after PR's deadline under IC 29-1-14-10(a)?
IC 32-17-13-7(f)
YES
NO

Appendix 7

GOVERNMENTAL CLAIMS AGAINST NONPROBATE TRANSFEREES Page 2

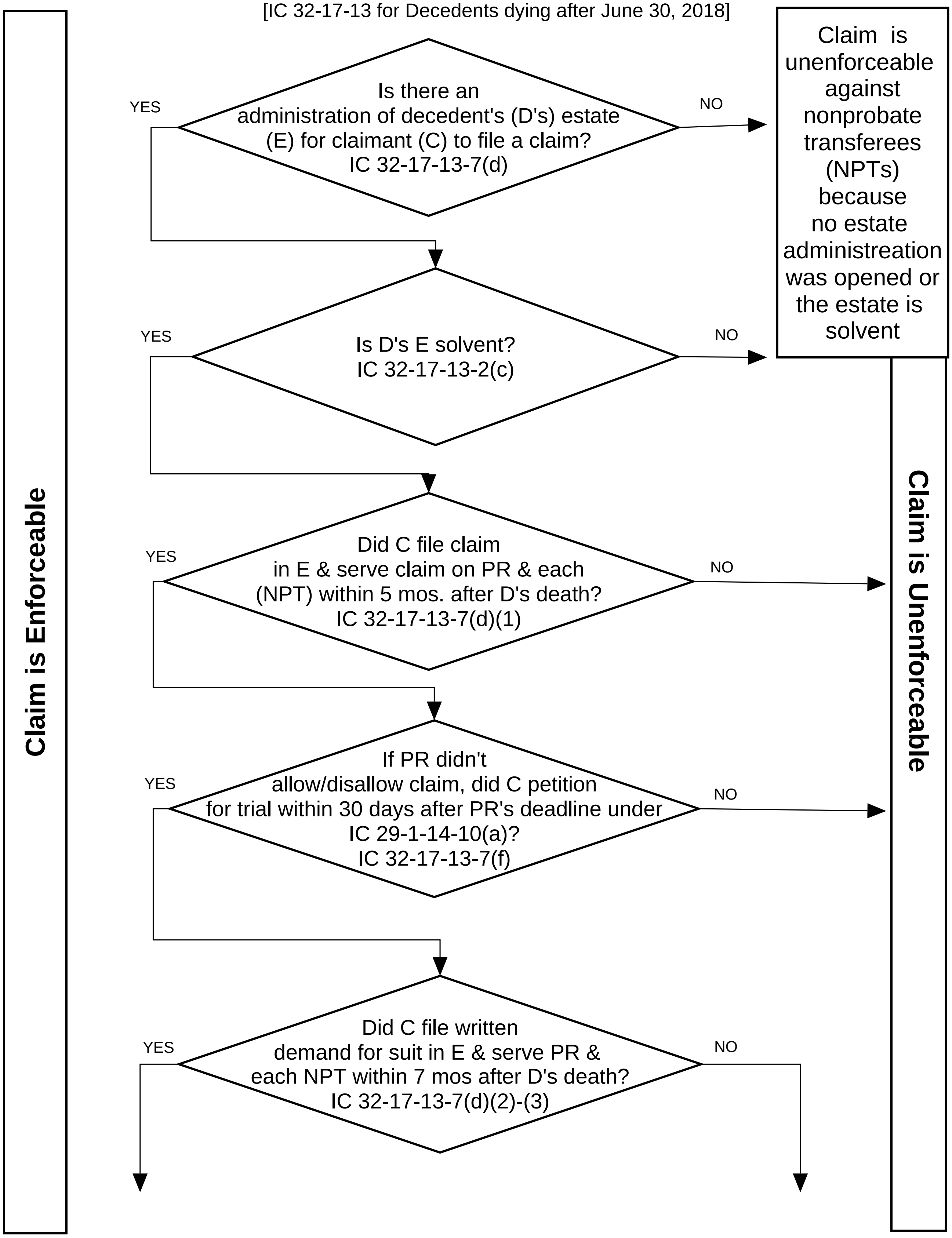

Did C file written demand for suit in E & serve PR & each NPT within 7 mos after D's death? IC 32-17-13-7(d)
YES
NO
Did C file written demand for suit in E & serve PR & NPTs within 30 days after final claim allowance in E? IC 32-17-13-7(j)
YES
NO
Did PR or C sue NPTs within 9 mons after D's death? IC 32-17-13-6(b))
YES
NO
After final claim allowance in E, if PR filed notice of intent not to file suit, did C file suit within 30 days after PR filed the notice? IC 32-17-13-8(b)
YES
NO
If PR did not file notice of intent not to file suit, did C file suit within 90 days after final claim allowancein E? IC 32-17-13-8(b)
YES
NO
Claim is Enforceable
Claim is Unenforceable

Thanks to Jeffrey B. Kolb, of Vincennes, for permission to reproduce and update this diagram.

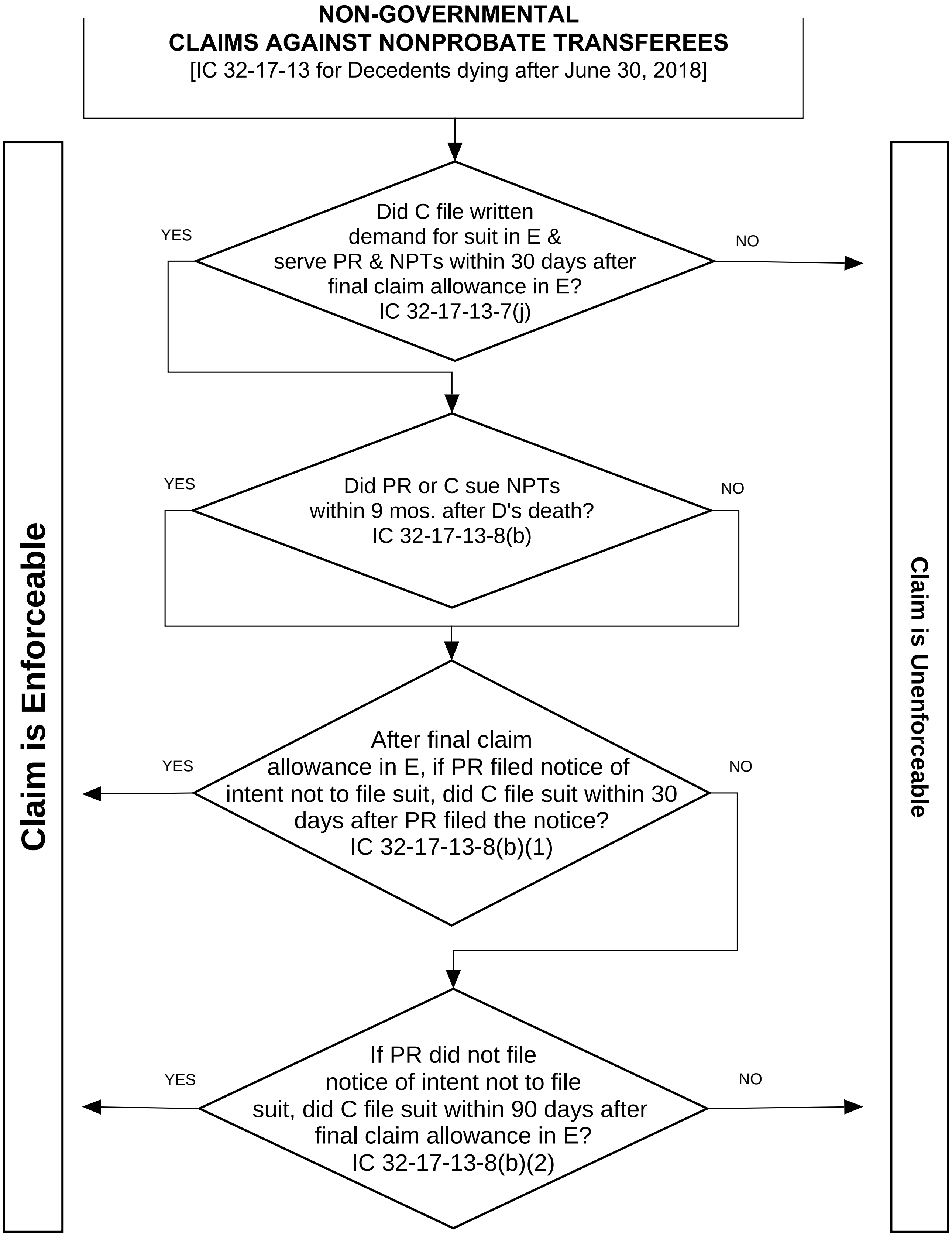
Appendix 8

NON-GOVERNMENTAL
CLAIMS AGAINST NONPROBATE TRANSFEREES

[IC 32-17-13 for Decedents dying after June 30, 2018]


Is there an administration of decedent's (D's) estate (E) for claimant (C) to file a claim? IC 32-17-13-7(d)
YES
NO
Claim is unenforceable against nonprobate transferees (NPTs) because no estate administreation was opened or the estate is solvent
Is D's E solvent? IC 32-17-13-2(c)
YES
NO
Did C file claim in E & serve claim on PR & each (NPT) within 5 mos. after D's death? IC 32-17-13-7(d)(1)
YES
NO
If PR didn't allow/disallow claim, did C petition for trial within 30 days after PR's deadline under IC 29-1-14-10(a)? IC 32-17-13-7(f)
YES
NO
Did C file written demand for suit in E & serve PR & each NPT within 7 mos after D's death? IC 32-17-13-7(d)(2)-(3)
YES
NO
Claim is Enforceable
Claim is Unenforceable

APPENDIX 8


NON-GOVERNMENTAL
CLAIMS AGAINST NONPROBATE TRANSFEREES
[IC 32-17-13 for Decedents dying after June 30, 2018]
Did C file written demand for suit in E & serve PR & NPTs within 30 days after final claim allowance in E? IC 32-17-13-7(j)
YES
NO
Did PR or C sue NPTs within 9 mos. after D's death? IC 32-17-13-8(b)
YES
NO
After final claim allowance in E, if PR filed notice of intent not to file suit, did C file suit within 30 days after PR filed the notice? IC 32-17-13-8(b)(1)
YES
NO
If PR did not file notice of intent not to file suit, did C file suit within 90 days after final claim allowance in E? IC 32-17-13-8(b)(2)
YES
NO
Claim is Enforceable
Claim is Unenforceable

Thanks to Jeffrey B. Kolb, of Vincennes, for permission to reproduce and update this diagram.

Appendix 9

STATE OF INDIANA) IN THE SCHMO CIRCUIT COURT
)
COUNTY OF SCHMO) CAUSE NO. 00C01-2111-ES-000011
)
IN THE MATTER OF THE)
SUPERVISED ADMINISTRATION)
OF THE ESTATE OF)
JOBY SCHMO,)
Deceased)

WRITTEN DEMAND FOR PROCEEDINGS AGAINST NONPROBATE TRANSFEREES

The Claimant, Snuffy Smith, makes this Written Demand for Proceedings Against Nonprobate Transferees under Ind. Code § 32-17-13-7 and says as follows:

1. Joby Schmo (the "Decedent") died intestate on November 31, 2021.

2. The Court appointed Billy Bob Schmo to serve as the Decedent's Personal Representative and the Clerk issued Letters of Administration to the Personal Representative on November 31, 2021.

3. The Publisher's Affidavit of the Schmo County Gazette states that it published the first notice to creditors on December 17, 2021.

4. The Claimant filed his claim against the Decedent's estate on February 29, 2022 (the "Claim").

5. More than three months and 15 days have elapsed since the first publication of notice to creditors and the Personal Representative has neither allowed nor disallowed the Claim within the deadline specified in Ind. Code § 29-1-14-10(a).

6. The Claimant filed a Petition to Set Claim for Trial in the Schmo Circuit Court on April 4, 2022, a date that was less than 30 days after the expiration of the Personal Representative's deadline to allow or disallow the Claim under Ind. Code § 29-1-14-10(a).

NOW, THEREFORE, the Claimant demands that the Personal Representative commence proceedings against the following transferees of nonprobate transfers by the Decedent:

Nonprobate Transfer	**Transferee Name**	**Transferee Address**
Transfer on Death Transfer of a 25% interest in Boss, the Decedent's grand champion hog	Billy Bob Schmo	90 N. Schmo Ave. Schmoville, IN 47000

Appendix 9

Nonprobate Transfer	Transferee Name	Transferee Address
Transfer on Death Transfer of a 25% interest in Boss, the Decedent's grand champion hog	Cindy Lou Who-Schmo	90 N. Schmo Ave. Schmoville, IN 47000
Transfer on Death Transfer of a 25% interest in Boss, the Decedent's grand champion hog	Ernest T. Schmo	90 N. Schmo Ave. Schmoville, IN 47000
Transfer on Death Transfer of a 25% interest in Boss, the Decedent's grand champion hog	Jimmy Joe Schmo	90 N. Schmo Ave. Schmoville, IN 47000

____
Snuffy Smith, as the Claimant

I, Snuffy Smith, affirm under penalty for perjury that the foregoing representations are true.

____
Snuffy Smith

____
Lawyer Lolly,Jr., Claimant’s Counsel
Lolly, Lolly & Lolly
1 Schmo St.
Schmoville, IN 47000
Ph. 555-555-5550

Appendix 10

STATE OF INDIANA	)	IN THE SCHMO CIRCUIT COURT
	)	
COUNTY OF SCHMO	)	CAUSE NO. 00C01-2111-ES-000011
	)	
IN THE MATTER OF THE	)	
SUPERVISED ADMINISTRATION	)	
OF THE ESTATE OF	)	
JOBY SCHMO,	)	
Deceased	)	

PETITION TO SET CLAIM FOR TRIAL

The Claimant, Snuffy Smith, petitions the Court to set the Claimant's claim for trial under Ind. Code § 29-1-14-10(e) and says as follows in support of the petition:

1. Joby Schmo (the "Decedent") died intestate on November 31, 2021.

2. The Court appointed Billy Bob Schmo to serve as the Decedent's Personal Representative and the Clerk issued Letters of Administration to the Personal Representative on November 31, 2021.

3. The Publisher's Affidavit of the Schmo County Gazette states that it published the first notice to creditors on December 17, 2021.

4. The Claimant filed his claim against the Decedent's estate on February 29, 2022 (the "Claim").

5. More than three months and 15 days have elapsed since the first publication of notice to creditors and the Personal Representative has neither allowed nor disallowed the Claim within the deadline specified in Ind. Code § 29-1-14-10(a).

6. The Claimant is filing this petition on April 4, 2022, a date that is less than 30 days after the expiration of the Personal Representative's deadline to allow or disallow the Claim under Ind. Code § 29-1-14-10(a).

NOW, THEREFORE, the Claimant prays the Court to enter an order setting the Claim for trial.

____
Snuffy Smith, as the Claimant

I, Snuffy Smith, affirm under penalty for perjury that the foregoing representations are true.

Appendix 10

____
Snuffy Smith

____
Lawyer Lolly,Jr., Claimant's Counsel
Lolly, Lolly & Lolly
1 Schmo St.
Schmoville, IN 47000
Ph. 555-555-5550

Appendix 11

STATE OF INDIANA	)	IN THE SCHMO CIRCUIT COURT
	)	
COUNTY OF SCHMO	)	CAUSE NO. 00C01-2301-CC-000011
	)	
SNUFFY SMITH, EX REL. ESTATE OF JOE SCHMO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
BILLY BOB SCHMO, CINDY LOU WHO-SCHMO, ERNEST T. SCHMO, AND JIMMY JOE SCHMO,	)	
	)	
Defendants.	)	

VERIFIED COMPLAINT AGAINST NONPROBATE TRANSFEREES

Plaintiff Snuffy Smith complains in the name of the Estate of Joe Schmo against the Defendants, Billy Bob Schmo, Cindy Lou Who-Schmo, Ernest T. Schmo, And Jimmy Joe Schmo, and says as follows:

1. Boss, the grand champion hog owned by Joby Schmo (the "Deceased Transferor"), entered the Plaintiff's field and consumed $10,000 worth of corn on September 31, 2021.

2. The Deceased Transferor died intestate on November 31, 2021.

3. The Schmo Circuit Court appointed Billy Bob Schmo to serve as the Decedent's Personal Representative and the Clerk issued Letters of Administration to the Personal Representative or administration of the Deceased Transferor's estate under Cause Number 00C01-2111-ES-000011 (the "Estate") on November 31, 2021.

4. The Publisher's Affidavit of the Schmo County Gazette states that it published the first notice to creditors on December 17, 2021.

5. Plaintiff filed his claim to recover $10,000 in damages against the Decedent's estate (the "Claim") on February 29, 2022.

6. More than three months and 15 days have elapsed since the first publication of notice to creditors and the Personal Representative has neither allowed nor disallowed the Claim within the deadline specified in Ind. Code § 29-1-14-10(a).

7. Plaintiff filed a Petition to Set Claim for Trial in the Schmo Circuit Court on April 4, 2022, a date that was less than 30 days after the expiration of the Personal Representative's deadline to allow or disallow the Claim under Ind. Code § 29-1-14-10(a).

8. Plaintiff delivered a Written Demand for Proceedings Against Nonprobate Transferees under Ind. Code § 32-17-13-7 to each of the Personal Representative and the Defendants and filed a copy of the Written Demand for Proceedings Against Nonprobate Transferees in the Estate on April 31, 2022.

9. The Schmo Circuit Court entered a judgment allowing the Claim on November 31, 2022 (the "Claim Allowance Judgment") and finding that the Deceased Transferor's probate estate was insolvent.

10. The Personal Representative has failed to commence proceedings against the Defendants, so Plaintiff is entitled to commence proceedings in the name of the Estate under Ind. Code § 32-17-13-7(g).

11. Plaintiff holds an allowed claim by the Claim Allowance Judgment in the amount of $10,000.00, and Plaintiff is entitled to judgment against the Defendants to enforce the Claim Allowance Judgment in the amount of $10,000.00 and the costs of this proceeding under Ind. Code § 32-17-13-6.

NOW, THEREFORE, Plaintiff prays the Court for entry of judgment for $10,000.00 and the costs of this proceeding in favor of Plaintiff and against the Defendants to be apportioned among the defendants as follows:

1. Against Defendant Billy Bob Schmo, 25%;
2. Against Defendant Cindy Lou Who-Schmo, 25%;
3. Against Defendant Ernest T. Schmo, 25%; and
4. Against Defendant Jimmy Joe Schmo, 25%.

____
Snuffy Smith, as the Plaintiff ex rel. the Estate
of Joe Schmo

Appendix 11

I, Snuffy Smith, affirm under penalty for perjury that the foregoing representations are true.

____
Snuffy Smith

____
Lawyer Lolly,Jr., Claimant's Counsel
Lolly, Lolly & Lolly
1 Schmo St.
Schmoville, IN 47000
Ph. 555-555-5550

INDIANA REAL AND PERSONAL PROPERTY TITLE PASSAGE AND CREDITORS' RIGHTS

Jeff R. Hawkins

Hawkins Elder Law

PART 1. INTRODUCTION

Purpose:

1. Two Main Asset Channels From Decedent to Beneficiaries

2. Creditors’ Procedural Requirements in Each Channel

3. Beneficiaries’ Asset Protection Strategies in Each Channel

TWO ASSET CHANNELS:

1. Decedent’s Probate Estate

2. Title Transfer Systems that Bypass the Probate Estate

Key Questions:

1. WHAT transfers?

2. WHEN does it transfer?

3. HOW does it transfer?

4. WHERE does it go?

PART 2
CREDITORS’ CLAIMS IN “PROBATE ESTATES”

Probate Code Terminology

What is a decedent’s “**Estate**?”

- The set of a decedent’s former economic rights and interests remaining after the decedent’s death,
- ***NOT*** the court case opened to administer the Estate.

(Source: Jeff Hawkins, *NOT* a Nobel Laureate Economist)

IC 29-1-1-3(a)(32): "Probate Estate" denotes

WHAT: the property transferred

WHEN: **at the death** of a decedent

HOW & WHERE:

- **under the decedent's will** OR
- **under** IC 29-1-2 [*Intestate distribution rules*], in the case of a decedent dying intestate.

WHEN, WHAT, WHERE & HOW - IC 29-1-7-23(a):

(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.

TO WHOM?

- IC 29-1-1-3(a)(6): "Devise" or "legacy" = Transfer under a Decedent’s Will of either real or personal property or both.
- IC 29-1-1-3(a)(8): "Devisee" and "legatee" = Beneficiary of the devise or legacy under a Decedent’s Will
- IC 29-1-1-3(a)(14): "Heirs" = people entitled to a Decedent’s real and personal property under the statutes of intestate succession
- IC 29-1-1-3(a)(9): Devisees & Heirs = Distributees

More Probate Property Transfer Questions

- How does a decedent’s probate property pass to distributees automatically under the will upon the decedent’s death?

- Are there time limits for the distributees to present the decedent’s will and claim probate property?

- How can the distributees of an intestate decedent determine whether the decedent died intestate?

- How can a creditor intercept a deceased debtor’s probate property from title passage at death?

How does a decedent’s probate property pass to distributees automatically under the will upon the decedent’s death?

- It’s a kind of suspended animation.
- A testate decedent’s title transfers immediately and automatically under IC 29-1- 7-23(a), but:
- IC 29-1-7-24:

  Except as provided in IC 29-1-13-2, **no will is effective** for the purpose of proving title to, or the right to the possession of, any real or personal property disposed of by the will, until it has been admitted to probate.

IC 29-1-7-4 Petitions; hearing

(a) Any interested person or a personal representative named in the will may petition the court having jurisdiction of the administration of the decedent's estate:

(1) to have the will of such decedent, whether the same is written or is unwritten, is in his possession or not, is lost, destroyed, or without the state, probated;

* * * *

(b) A petition for probate may be combined with a petition for the issuance of letters testamentary, or as administrator with the will annexed, and a person interested in the probate of a will and in the administration of the estate may petition for both.

IC 29-1-7-4 Petitions; hearing (Continued)

(c) No notice that a will is to be offered for probate or that it has been probated shall be required.

(d) No notice of the filing of, and hearing on, the petition described in this section shall be given to or served upon any person. If the petition described herein is filed in term time, it shall be heard forthwith by the court, and if filed in vacation, it shall be heard by the judge of said court if present, or in his absence by the clerk of the said court.

Are there time limits for distributees to present a decedent’s will and claim probate property?

YES – It could be a courthouse race under IC 29-1-7-15.1(a):

(a) When it has been determined that a decedent died intestate and letters of administration have been issued upon the decedent's estate, no will shall be probated *unless* it is presented for probate:

(1) *before* the court decrees final distribution of the estate; *or*

(2) in an unsupervised estate, *before* a closing statement has been filed.

How can a creditor intercept a deceased debtor’s probate property from title passage at death?

IC 29-1-7-23 (a) When a person dies, the person's real and personal property passes to persons …; ***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.

Personal Representative’s Probate Title Interception

- Who can be appointed personal representative?
- What are the personal representative’s duties?

Who can be appointed personal representative?

IC 29-1-10-1(a):

1. Executor designated in a probated will
2. Surviving spouse included as a devisee in a probated will
3. Another devisee in a probated will
4. Surviving spouse or surviving spouse's nominee
5. An heir or heir's nominee
6. Anyone else, including a creditor's nominee

What are the personal representative’s duties?

Fall v. Miller, 462 N.E.2d 1059, 1061 (Ind. App. 1984)

- Fiduciary obligation to administer a decedent’s probate estate *impartially* for the benefit and protection of creditors AND distributees;”
- Preserve & conserve assets against waste & mismanagement;
- Liable for any loss to the estate arising from his neglect or wrongful acts or omissions or for any other negligent or willful act or nonfeasance; and
- Liable for any loss in failure to collect a claim diligently.

Claim = *In Rem* Civil Complaint Against Probate Estate

IC Chapter 29-1-14 governs claims.

IC 29-1-14-1 sets claim deadlines.

- Claims without deadlines under IC 29-1-14-1(a):
  - "expenses of administration" and
  - "claims of the United States, the state, or a subdivision of the state."

Nongovernmental Claims Under IC 29-1-14-1(a):

(a) A creditor must file a claim with the court in which such estate is being administered within:

- 3 months after the date of the first published notice to creditors; or
- 3 months after the court has revoked probate of a will, in accordance with IC 29-1-7-21, if the claimant was named as a beneficiary in that revoked will;

whichever is later.

Nongovernmental Claims Under IC 29-1-14-1(b) & (c):

(b) No claim if SOL barred it at the time of decedent's death.

(c) If not barred by SOL at the time of the decedent's death, claim must be filed within:

- 3 months after first published notice to creditors; or
- 3 months after the court has revoked probate of a will, under IC 29-1-7-21, if the claimant was named as a beneficiary in that revoked will;

whichever is later.

Nongovernmental Claims Under IC 29-1-14-1(d)-(f) :

d) All claims barrable under subsection (a) are barred if not filed within 9 months after the decedent’s death.

e) Creditors can enforce mortgages, pledges, and other liens without finding a claim, but they must file timely claims to collect collateral sale deficiencies.

f) A tort claim not barred by an SOL may proceed within the SOL, but must be filed within subsection (a)’s deadlines to collect against the probate estate assets.

Succinct Claim Statement Under IC 29-1-4-2:

Written claim is filed in the Clerk’s office, then the Clerk sends the claim to the personal representative.

Written claim based on an instrument signed by the decedent must include the instrument.

Written claim must account for all credits, set-offs, and deductions.

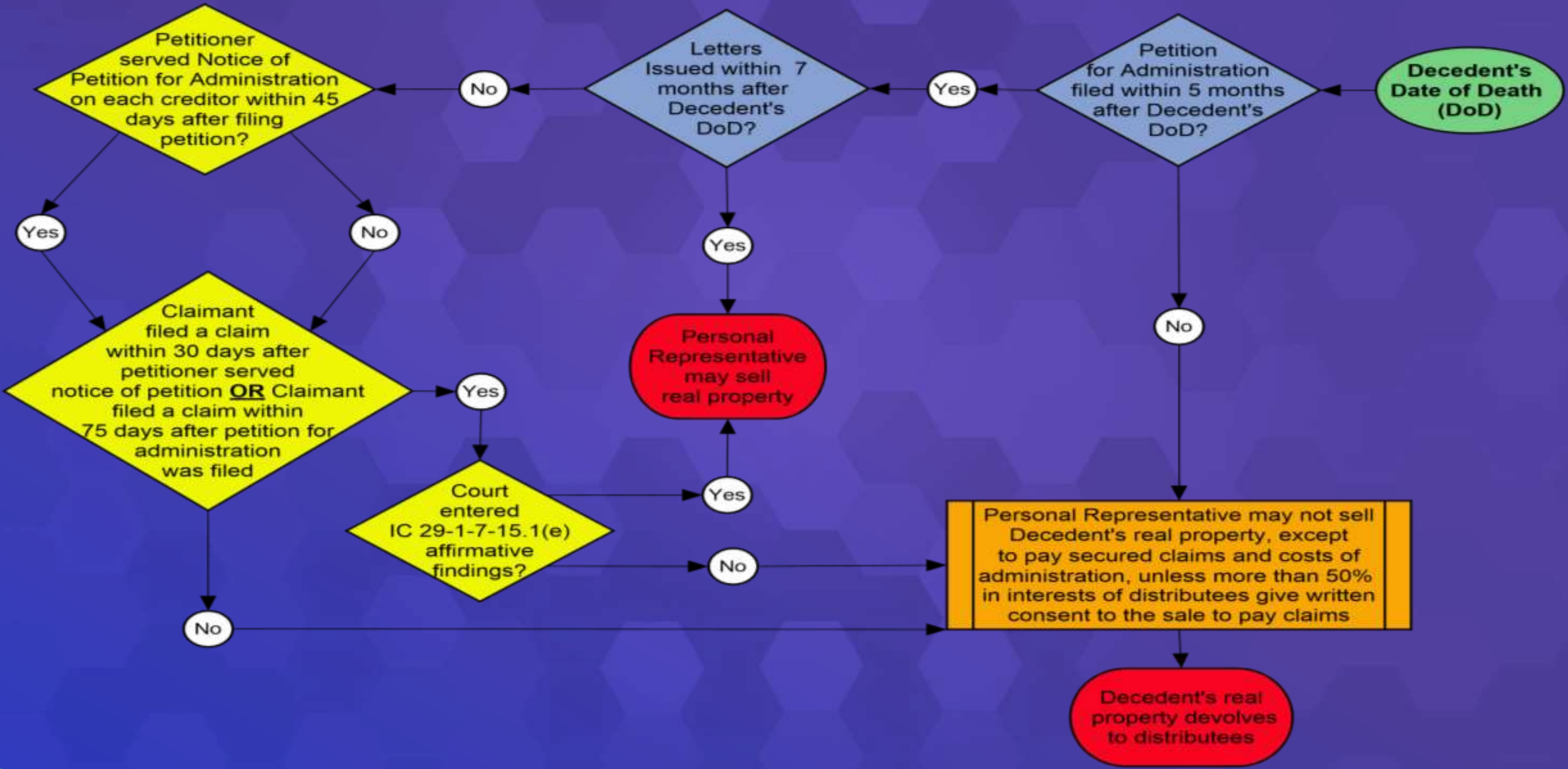
Written contingent claim must describe the contingencies.

Claim Priorities Under IC 29-1-4-9:

1. Costs and expenses of administration (including PR & lawyer fees).
2. Reasonable funeral expenses and related expenses subject to caps for deceased public assistance recipients.
3. Surviving spouse and child allowances under IC 29-1- 4-1.
4. Debts and taxes having preference under United States laws.
5. Medical expenses of decedent’s last illness.
6. Debts and taxes having preference under Indiana law (2022).
7. All other claims.

APPENDIX 2

Real Property Sale to Pay Claims Under IC 29-1-7-15.1(b)-(e)



Decedent's Date of Death (DoD)

Petition for Administration filed within 5 months after Decedent's DoD?

Yes

No

Letters Issued within 7 months after Decedent's DoD?

Yes

No

Personal Representative may sell real property

Petitioner served Notice of Petition for Administration on each creditor within 45 days after filing petition?

Yes

No

Claimant filed a claim within 30 days after petitioner served notice of petition **OR** Claimant filed a claim within 75 days after petition for administration was filed

Yes

No

Court entered IC 29-1-7-15.1(e) affirmative findings?

Yes

No

Personal Representative may not sell Decedent's real property, except to pay secured claims and costs of administration, unless more than 50% in interests of distributees give written consent to the sale to pay claims

Decedent's real property devolves to distributees

Strategies to Protect Property for Distributees:

1. Skip probate administration and claim real property by real property title passage affidavit under IC 29-1- 7-23(b) if:
   - the probate estate only comprises real property,
   - the distributees are mutually cooperative, and
   - none of the distributees has judgment liens or other legal or financial vulnerabilities.

Strategies to Protect Property for Distributees:

2. Petition for administration **more than** 5 months after decedent’s death if:

- probate estate only comprises real property and
- distributees are either uncooperative or financially vulnerable.

IC 29-1- 7-15.2 protects sale proceeds like IC 29-1- 7-15.1(b) protects real property from sale to pay claims.

Strategies to Protect Property for Distributees:

3. If a claim is filed and the petition for administration of a real property-only estate was filed **more than** 5 months after the decedent's death:

- **ALLOW THE CLAIM**, unless the PR has an affirmative claim defense; and
- **Include a claim allowance statement stating**:
  - ○ Applicability of IC 29-1- 7-15.1(b);
  - ○ Probate estate lacks personal property to satisfy the claim; and
  - ○ PR will file an insolvent estate closing statement and distribute or sell real property.

Strategies to Protect Property for Distributees:

4. Pursue real property under IC 29-1- 7-23(b)-(d) and temporarily abandon low-value personal property if:

- Probate estate comprises real property and intangible personal property held by banks or other third parties worth a total probate estate value (real and personal) exceeding the $50,000 limit ($100,000 for the decedents dying after June 30, 2022);
- Distributees are mutually cooperative; and
- Distributees are financially sound.

Distributees can claim personal property Indiana's Revised Unclaimed Property Act.

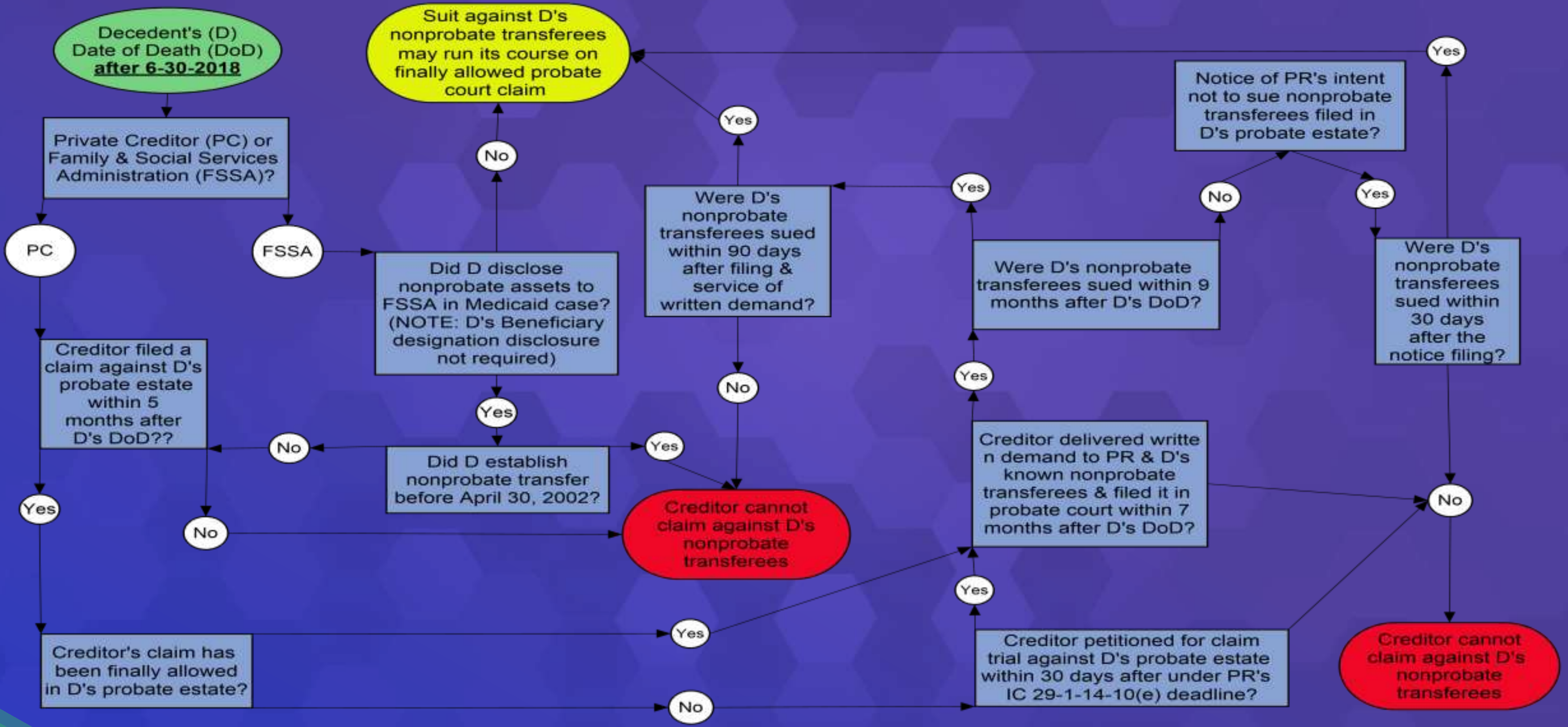
Strategies to Protect Property for Distributees:

5. Seek PR appointment to scrutinize merits of an inevitable, timely-filed claim as mandated by IC 29-1-14-11:

> Sec. 11. Before allowing or paying claims against the estate he represents, ***it shall be the duty of every personal representative to inquire into the correctness of all claims*** against the estate and ***make all available defenses thereto***, and ***if he fails so to do, he shall be liable on his bond***, at the suit of any person interested in the estate, for all damages sustained by the estate in consequence of such neglect.

PART 3 – CLAIMS AGAINST NONPROBATE TRANSFEREES

APPENDIX 6: FSSA & Other Creditors' Claims Against Nonprobate Transferees of Decedents Dying After June 30, 2018



Decedent's (D) Date of Death (DoD) **after 6-30-2018**

Private Creditor (PC) or Family & Social Services Administration (FSSA)?

PC

FSSA

Creditor filed a claim against D's probate estate within 5 months after D's DoD??

Yes

No

Creditor's claim has been finally allowed in D's probate estate?

Yes

No

Did D disclose nonprobate assets to FSSA in Medicaid case? (NOTE: D's Beneficiary designation disclosure not required)

No

Yes

Did D establish nonprobate transfer before April 30, 2002?

No

Yes

Suit against D's nonprobate transferees may run its course on finally allowed probate court claim

Creditor cannot claim against D's nonprobate transferees

Were D's nonprobate transferees sued within 90 days after filing & service of written demand?

Yes

No

Creditor delivered writte n demand to PR & D's known nonprobate transferees & filed it in probate court within 7 months after D's DoD?

Yes

No

Creditor petitioned for claim trial against D's probate estate within 30 days after under PR's IC 29-1-14-10(e) deadline?

Yes

No

Were D's nonprobate transferees sued within 9 months after D's DoD?

Yes

No

Notice of PR's intent not to sue nonprobate transferees filed in D's probate estate?

Yes

No

Were D's nonprobate transferees sued within 30 days after the notice filing?

Yes

No

Creditor cannot claim against D's nonprobate transferees

Counter-Punching as an Asset Protection Strategy Against Nonprobate Claims

1. Avoid filing a petition for administration within 5 months after the deceased transferor's death because the claimant must file a claim against the decedent's probate estate Within 5 months after the deceased transferor's death before pursuing claims against nonprobate transferees.

   - A claimant cannot file a claim within 5 months if there is no estate administration in which to file the claim.
   - A claimant can file a petition for administration, but some creditors are unfamiliar with probate estate administration procedures.

Counter-Punching as an Asset Protection Strategy Against Nonprobate Claims

2. Seek appointment of a personal representative.

    - The personal representative sets the pace and can require the claimant to follow the rules.
    - The person representative can challenge the claim against the probate estate on the merits, whereas a nonprobate transferee has no control over those proceedings.
    - Even if the creditor satisfies procedural requirements with a claim that consumes all nonprobate property, the personal representative and personal representative's counsel are entitled to fees and reimbursement of expenses.

Counter-Punching as an Asset Protection Strategy Against Nonprobate Claims

3. Negotiate a Claim Settlement because the procedures for claims against nonprobate transferees are a daunting gauntlet that creditors may prefer to avoid with claim compromises.
4. Pursue asset values in claim enforcement sales.
   - Family members may be able to purchase assets at bargain prices.
   - Alternatively, asset sales may yield dividends after satisfying claims.

CONCLUSION

1. Prepare factual and statutory analysis thoroughly.

2. Remember, all details maybe essential!

3. Humility and empathy go a long way.

Jeff R. Hawkins
Hawkins Elder Law
999 North Section Street
Post Office Box 382
Sullivan, Indiana 47882-0382
Tel: 812-268-8777
Fax: 812-268-8838
Email: jeff@hawkinselderlaw.com
Web: www.HawkinsElderLaw.com

Section Four

Elder Law for the Estate Planner

Stinson
LawFirm
Providing peace of mind
with care and compassion.

Jeffery D. Stinson
STINSON LAW FIRM, LLC
1980 East 116th Street, Suite 125
Carmel, Indiana 46032
(317) 622-8181
jstinson@stinsonelderlaw.com

Section Four

Elder Law for the Estate Planner..................................Jeffery D. Stinson

What is Elder Law 1

Most Common Public Benefits Programs...2

Medicaid 2

VA Pension Benefits..23

Medicare 34

Supplemental Security Income 34

Temporary Assistance for Needy Families ("TANF") 35

Federal Assisted Housing 35

SNAP Benefits 35

Appendix A (Qualified Income Trust-State Template)...36

Appendix B (Qualified Income Trust) 39

Appendix C (Public Benefits Planning Authority for Power of Attorney).................46

Appendix D (Public Benefits Planning Authority for Trustee) 53

Appendix E (Medicaid Authorized Representative form) 57

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 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.

The practice of elder law requires competency in a number of practice areas with high importance on frequent updates to his or her knowledge base to remain competent. Joining associations of elder law attorneys, such as the Elder Law Section of the Indiana State Bar Association and the National Academy of Elder Law Attorneys and its local Chapter are essential to keeping the attorney abreast with upcoming law changes and having colleagues to “group think” problems. Co-counseling should be explored in the infancy of an attorneys elder law practice, especially if the client’s issue does not fall under the attorney’s current expertise.

I. What is Elder Law?

Although it is difficult to formulate a concrete definition of elder law, most attorneys agree it can be best defined by the demographics the elder law attorney serves-the elderly and the disabled. The elder law attorney’s practice, then, can consist of a number of practice areas that can intersect one another and at times conflict with one another creating a need to help identify what is in the best interests of the client (e.g. planning for VA pension benefits versus Medicaid benefits). Common practice areas include:

- Medicaid planning
- Veteran’s pension planning
- Special needs planning
- Guardianship
- Estate administration
- Trust administration
- Tax
- Estate planning
- Elder abuse, nursing home negligence, and Medicaid litigation

- Social Security Disability
- Supplemental Security Income planning preservation
- Planning for and advocating for SNAP benefits, public housing, and other less common public benefits programs.

The diversity of practices areas under the “elder law umbrella” have gave rise to many practitioners focusing on a few of these areas only. For example, one may encounter an elder law attorney working in special needs planning only. However, a working knowledge of all these programs is essential to a successful elder law practice.

II. Most Common Public Benefits Programs

The number of public benefits programs are numerous, each with its own set of extensive laws, rules, and guidelines. Programs such as Medicare and Social Security Disability Insurance ("SSDI") benefits are not affected by the financial status of the recipient. Most programs, though, are needs-based, such as Medicaid, VA pension benefits, Supplemental Security Income ("SSI"), Temporary Assistance for Needy Families ("TANF"), federal assisted housing, and SNAP benefits.

A. Medicaid

Medicaid is a joint program involving both the federal government and state governments. In order to qualify for services, a person must meet specific asset, income, and personal criteria. Sources of Medicaid law may be found in the United States Code (Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.*), Code of Federal Regulations (42 CFR Parts 430 through 456), Indiana Code (I.C. 12-15), and Indiana Administrative Code (405 IAC). In addition to promulgated regulations, the Indiana Family and Social Services Administration has a manual used by its caseworkers to implement the program (*Indiana Health Coverage Program Policy Manual*, commonly referred to as IHCPPM Manual). On June 1, 2014, Indiana substantially reworked its Medicaid system converting its system to one that aligns with the Supplemental Security Income (SSI) program. As a result, the SSI portion of Social Security's *Program Operations Manual* (aka POMS Manual) can be a source of information for Medicaid and Social Security statute and regulation interpretation as well. There are 38 different categories of Medicaid listed in the IHCPPM Manual and 2 more not listed in the Manual. However, the Medicaid categories most often encountered by the elder law attorney are the Medicaid disability and Medicaid aged categories.

1. Income Eligibility Rules.

Although the Qualified Income Trust, a/k/a the Miller Trust, became a federally created safe harbor in 1993, Indiana Medicaid recipients and Indiana elder law practitioners had little reason to know about their use for close to the first two decades of their existence. As a "209(b) State", Indiana's Medicaid plan made little use of Special Income Levels or "income caps." This changed first with the introduction by the Indiana Family and Social Services Administration of a Special Income Level for Medicaid covered home and community based services. Then, in 2014, Indiana elected to become an "SSI state," scrapping its "209(b)" status and becoming part of the majority of states that provide Medicaid to recipients receiving Supplemental Security Income. After this conversion, the long elusive Miller Trust became a necessary eligibility component for many Medicaid recipients bringing with it the confusion and misunderstanding of the use of such tool which continues to persist today.

A Medicaid applicant who desires assistance for institutionalized care or alternative home and community based services (i.e. Medicaid "waiver" services), must have countable income less than or equal to the Special Income Level (SIL) for such services. Fortunately, the SIL for these services is much higher than the income standard for applicants for Medicaid in the community. The Indiana Family & Social Services Administration has elected to implement a coverage option that allows the SIL for Medicaid long term care services to be 300% of the supplemental security income benefit rate[1]. Consequently, any applicant who is in a medical institution for a period of thirty consecutive days or longer or has been approved for Medicaid waiver services will benefit from the higher SIL[2]. In 2022, the SIL is $2,523 per month.

Unfortunately, even the higher SIL still creates a monthly income cap that disqualifies many applicants. If an individual's income exceeds the SIL by even $1, he or she will not qualify. Fortunately, the Miller Trust provides a statutorily defined solution to this problem. If the applicant creates *and* funds the Miller Trust with at least the amount of income in excess of the SIL, he or she will pass the income eligibility test. In other words, deposits to the Miller Trust are no longer considered a part of the applicant's countable income for eligibility purposes.

i. Why the Miller Trust.

a. The Story of Lottie Ham

Lottie Ham lived in a nursing home for eight and a half years. She suffered from Parkinson's disease and other health ailments which led her to be completely paralyzed except for eye movements.

When Lottie's husband died and she received a survivor's pension, her income became too great and she was no longer eligible to receive Medicaid benefits. Having no other source of funding for her care, her daughter, and guardian, L. Jeanette Miller,

[1] 42 U.S.C. § 1396b(f)(4)(C)
[2] 42 U.S.C. § 1396a(a)(10)(A)(ii)(V)

spent over $40,000 of her own money to pay for the care Lottie required until she could no longer afford to pay for Lottie's care.

Ms. Miller sought relief from the Medicaid "income cap" by asking a Court to order Lottie's income be placed in a trust that appointed Ms. Miller as trustee. Some of the money would be allowed to pay for Lottie's care but there were still specifications on how the money could be used. After the trust was created, Miller applied for Medicaid on behalf of her mother but was subsequently denied. Lottie and three other similarly situated individuals appealed. The Judge ruled that Lottie and her co-plaintiffs could establish such Trusts without a Medicaid penalty[3].

b. Codification of the Miller Trust

The Omnibus Budget Reconciliation Act of 1993 (OBRA-93) brought sweeping changes to federal Medical laws. Among them were prohibitions against using trusts to qualify for Medicaid benefits except in three specified instances. One of those exceptions codified the use of the type of Trust created by Lottie Ham. Congress officially recognized the so-called Qualified Income Trust (also often referred to as the Miller Trust in honor of the parental lineage of the trust concept) under 42 USC §1396p(d)(4)(B). This statutorily created safe harbor allows Medicaid recipients to create their own Miller Trust and assign income to the Trust. Income assigned to the Trust is not considered countable income when an individual needs to pass the income eligibility budget[4] and thereby avoids the harsh result of having income over the Special Income Level, but less than the cost of needed care.

[3] Miller v. Ibarra, 746 F. Supp. 19 (D. Col. 1990).

[4] IHCPPM §3325.05.00

Appendix A includes the State of Indiana form Qualified Income Trust template. A more customized Qualified Income Trust Template is included as Appendix B.

2. Resource Eligibility Rules for Single Individuals and Married Couples.

Medicaid places limits on the amount of assets (resources in Medicaid nomenclature) a recipient may own. The limit of non-exempt resources for a single individual is $2,000 and $3,000 for a married couple where both spouses live in the community, both spouses are in a nursing home, or both spouses receive waivered services.

Not all resources count toward an individual's resource limit. Property which is not "available" to the recipient is not counted.[5] In addition, the following resources are not countable:

- A life insurance policy with cash value whose face value is $1,500 or less.[6]
- A properly created irrevocable funeral trust.[7]
- Burial plots.
- One motor vehicle of any value if it is used for transportation of the applicant or a member of the applicant's household[8].
- Household goods and personal effects.[9]

[5] See 405 IAC 2-3-14 and 2-3-15 and IHCPPM 2615 et. seq (MED and MED 1 provisions) for on countable and non-countable resources. IHCPPM 2635.10.10.05 et. seq explains special rules for institutionalized spouses with community spouses. Property is available if an individual has, "the right, authority or ability to liquidate the property, or his share of the property." For this reason certain property is not-countable, such as real estate held as joint tenants with rights of survivorship or as a life estate where other owners refuse to sell; retirement accounts that prohibit withdrawals before a certain age; and certain annuities, promissory notes, loans, mortgages, and trusts. However, these arrangements must be evaluated to determine whether they are "deemed" available by Medicaid rules, as is the case with certain trusts, or violate the transfer of assets rules, as discussed below.

[6] IHCPPM 2615.25.05.15; 20 CFR 416.1230(a).

[7] I.C. 12-15-2-17.

[8] IHCPPM 2615.60.20.05.

[9] Note though that this exemption may not apply to an individual's valuable collection or unused property.

- The home if it is the principal residence of the recipient, his or her spouse, minor child, adult disabled or blind child, or parent (if recipient is a minor). The home remains exempt if one of the individuals listed above is not currently living in the home (for example for medical treatment), but intends to return to live there.
- Rental real estate. Real estate is exempt if it produces income greater than the expenses of ownership. However, the recipient must charge the tenant fair market rent or the agency could apply a transfer of assets penalty to the recipient for the difference between fair market rent and what the recipient charges.
- Real estate which is used to produce food for home consumption.
- Income producing personal property.
- Property disregarded due to the purchase of the recipient of a Indiana Partnership Long-term Care Insurance policy.
- Certain trusts.

In addition, when there is an institutionalized spouse and a community spouse, one car is exempt regardless of value and real estate owned solely by the community spouse is not a countable asset. See generally IHCPPM 2635.10.10.05. The retirement accounts of the community spouse are also not countable[10].

Resources are valued on the first day of the month.[11] Therefore, a recipient's countable resources may exceed the limit in the middle of the month (such as when monthly income is

[10] IHCPPM 2615.15.00, 20 CFR 416.1202(a)(1).

[11] 405 IAC 2-3-15(a). Some exceptions are applicable to the "first of the month rule." For example, if a benefit check, such as Social Security, for the proceeding month is deposited at the end of the prior month, that check will not be counted as a resource. In addition, checks written, but not cleared prior to the first of the month, will be counted as a resource.

deposited), but his or her eligibility will not be effected as long as countable resources are spent down to the countable resource limit by the beginning of the next month.[12]

3. Special Resource Eligibility Rules Where One Spouse is Institutionalized or Receiving Waiver Services and the Other Lives at Home.

The eligibility rules when one spouse is institutionalized or needs waivered services and the other lives at home are significantly different. The Medicare Catastrophic Coverage Act of 1988 (MCCA)[13] sought to protect a spouse living at home from being impoverished before the spouse in a nursing home could receive Medicaid (spousal impoverishment rules). Thus, Medicaid law protects certain types of assets and certain amounts of income and assets for a "community spouse" of a Medicaid beneficiary in a nursing home or receiving waivered services.

The spouse in the nursing home or receiving institutionalized services is referred to as the institutionalized spouse and the spouse at home is the community spouse. The spousal impoverishment rules apply when the institutionalized spouse begins a continuous period of institutionalization on or after September 30, 1989 for thirty or more consecutive days. Resources are then counted at the beginning of the continuous period of institutionalization (snapshot date).[14] This is true whether the institutionalized spouse is applying for Medicaid or not. Resources in the name of either or both spouses are considered when determining resource eligibility. Certain assets are exempt from the eligibility determination. For example, real estate owned by the community spouse,

[12] Timing on spend down is extremely important. The individual's resources will be determined as of the stroke of midnight at the beginning of the month. Payments made during the day of the first month will not be deducted from the individual's resources. Therefore, it is often more advisable to counsel clients to think of being below the resource limit as of the "end of the month" rather than the beginning of the month.

[13] 42 U.S.C. §1396r-5.

[14] 42 U.S.C. §1396r-5(c)(1)(A); IHCPPM §3320.05.00. For Medicaid waiver applicants who have no prior institutionalization, the snapshot date is the date of the application or the date the waiver Service Plan is approved, whichever is later.

retirement accounts of the community spouse, and one vehicle of any value is exempt in the spousal situation.

Once the value of countable resources is determined as of the snapshot date, the spousal share is then calculated. The spousal share is one-half of the total countable resources, with a minimum of $27,480 and a maximum of $137,400. These amounts can be increased by a court order or by a fair hearing.

Eligibility for institutionalized spouse is established when the couple's countable assets are spent down to the community spouse's share plus $2,000 for the institutionalized spouse.

Once Medicaid eligibility is established for the institutionalized spouse, no resources of the community spouse are considered available to the institutionalized spouse.

4. Planning for Future Medicaid Eligibility, When and If Needed.

Many people believe that transfers of assets, irrevocable trusts, and annuities are the primary tools for Medicaid planning. Some approach the topic as if the only consideration is protecting the inheritance. Prior to expanded estate recovery and more stringent transfer rules, these options tended to unduly favor inheritance preservation at the expense of protection for the elder, since other options, such as investment in income-producing real estate and non-probate transfers, protected both interests in better balance.

This section begins with the subject of transfers because that is what the current rules highlight. Exempt planning should always be a primary target when an applicant has a community spouse as most marital assets can be sheltered in exempt resources in the name of the community spouse. Exempt asset planning is still a primary strategy to consider for a single individual, but may not be as effective to preserve inheritance because of estate recovery laws. As we will see, exempt asset planning may also be essential in conjunction with transfer planning to permit the client to start running a penalty period and still have something of value to apply to the care costs during the penalty period.

i. Preserving Assets Through Transfers.

One method to preserve assets through early planning is to make transfers. If the client is willing to give up ownership and control over an asset, transfers serve two asset preservation goals. First, they decrease the amount of assets the client has when determining that client's Medicaid eligibility. Second, any asset that is transferred is no longer subject to Medicaid estate recovery. Depending on the plan, and the circumstances and intentions of the donees, the assets may voluntarily be made available to help the elder with future needs. However, most transfers are subject to the Medicaid transfer of assets penalty.

There are several types of transactions that may be considered transfers. Many clients will have already done something that may be considered a transfer by Medicaid before seeing you. Each prior and proposed transfer must be carefully evaluated if there is any chance the client will need Medicaid within the five (5) years following these types of transactions:

- Any outright sale, assignment or gift of an asset for less than fair market value
- Giving someone else a partial right in an asset, such as joint ownership
- Forgoing a right to receive property or income, such as a disclaimer of inheritance or failure of a spouse to elect a statutory share
- Assignment or relinquishment of a right to income
- Purchase of certain annuities

- Placing assets in an irrevocable trust with someone else as beneficiary

- Certain loans to others

ii. Analyzing Transfers:

There are several elements to review for any transaction that might be considered a transfer:

1. Determine the applicable look-back period for each transfer. Transfers are subject to a 5-year look-back. Might the client apply for Medicaid within the "look-back" period?

2. If so, is the transaction a "transfer of assets" that may result in a penalty?

3. If so, is the particular transfer exempt from penalty, because it fits within a specific statutory exception based on the person to whom it was transferred? Examples: transfers to spouse, transfer to trust for disabled person under 65, transfer of home to live-in caregiver child, or the purchase of life estate in child's home and living there 1 year or more.

4. If not, is the particular transfer exempt from penalty because of the nature of the property interest? Examples: certain household goods or vehicles, or certain property used in a "trade or business."

5. If not, can the client prove that the transfer was exclusively for a purpose other than to qualify for Medicaid? 42 U.S.C. §1396p(c)(2)(C)(ii). Cf. 405 IAC 2-3-1.1(k)(7).

6. If not, how much "uncompensated value" was involved in the transfer?

7. Calculate the penalty period.[15] If the penalty period is greater than the remainder of the applicable look-back period, advise the client "**Do not apply for Medicaid until the transfer is no longer within the look-back period**." Calculated penalties for large transfers, particularly those of where the uncompensated value transferred within the look-back period is greater than $412,000, can be much greater than five years. However, the longer penalty cannot be applied to large transfers unless the client applies within the applicable look-back period.

8. If the calculated penalty is less than the expiration of the applicable look-back period, determine how the client can meet requirements to be otherwise eligible for Medicaid for long term care services, to get the penalty clock running.

9. Determine how the client's needs can be met during that period.

It is easy to understand that the look-back date is 5 years on all transfers, but it is somewhat less transparent how the start date of the penalty period for transfers occurs within the look-back period.

The Look Back Date

42 U.S.C. 1396p(c)(1)(B)(i)

The look-back date specified in this subparagraph is a date that is 36 months (or, in the case of payments from a trust or portions of a trust that are treated as assets disposed of

[15] All transfers made within the look-back period are lumped together. The penalty period is calculated by dividing the uncompensated value of all transfers by the State's average monthly cost of nursing home care to first determine the months of ineligibility. Partial month penalties are then calculated converting a fractional month to days. See 405 IAC 2-3-1.1; IHCPPM 2640 et. seq.

by the individual pursuant to paragraph (3)(A)(iii) or (3)(B)(ii) of subsection (d) of this section or *in the case of any other disposal of assets made on or after February 8, 2006, 60 months*) before the date specified in clause (ii). (*emphasis added*).

405 IAC 2-3-1.1(b)

A look back date is sixty (60) months before the first date as of which the individual both:

(1) is an institutionalized individual; and

(2) has applied for medical assistance.

Beginning Date of Transfer Penalty

42 U.S.C. 1396p(c)(1)(D)(ii)

In the case of a transfer of asset made on or after February 8, 2006, the date specified in this subparagraph is the first day of a month during or after which assets have been transferred for less than fair market value, or **the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care described in subparagraph (C) based on an approved application for such care but for the application of the penalty period**, whichever is later, and which does not occur during any other period of ineligibility under this subsection. [Emphasis added]

405 IAC 2-3-1.1(c) incorporates this provision for transfers occurring after November 1, 2009:

. . .

The penalty period is equal to the number of months specified in subsection (g) of this section and shall begin on the later of the first day of the month in which assets have been transferred for less than fair market value, or the date on which the individual would be eligible for services described in subjection (e) of this section, based on an approved application for such assistance without regard to any penalty periods, whichever is later, and which does not occur during any other period of ineligibility.

The federal law makes it clear that the person has to be at the point of qualification for Medicaid and in need of institutional level of service before the penalty clock starts ticking.

Indiana has interpreted the law to require that the person has to actually apply for Medicaid, be approved on all other ways, but be denied payment for nursing home or equivalent services because of the transfer penalty.

What if the person is approved under the foregoing but later improves to the point that he/she no longer needs nursing home level of care? Does the penalty then stop running? Fortunately, the Federal agency charged with administering the Medicaid program instructed states that once the penalty clock starts to run, it should not be halted by subsequent events and Indiana agrees with this position.

iii. Transfers that are Not Subject to Penalty.

Any plan involving transfers should begin with an analysis of whether the client can make a transfer that does not result in a penalty. The list of specifically authorized transfers that do not create a penalty follow.

Certain Transfers of the Client's Home

42 U.S.C. 1396p(c)(2)(A) (substantially similar provisions found at 405 IAC 2-3-1.1(k)(1))

> An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that—
>
> (A) the assets transferred were a home and title to the home was transferred to—
>
> (i) the spouse of such individual;
>
> (ii) a child of such individual who (I) is under age 21, or (II) (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title;

> (iii) a sibling of such individual who has an equity interest in such home and who was residing in such individual's home for a period of at least one year immediately before the date the individual becomes an institutionalized individual; or
>
> (iv) a son or daughter of such individual (other than a child described in clause (ii)) who was residing in such individual's home for a period of at least two years immediately before the date the individual becomes an institutionalized individual, and who (as determined by the State) provided care to such individual which permitted such individual to reside at home rather than in such an institution or facility.

Transfers of the individual's home to a child under the age of twenty-one (21) years or that is blind or disabled is a transfer not subject to penalty. If a transfer is made to a blind or disabled child, the attorney should obtain documentation of the child's disability. If the child receives Social Security Disability Insurance payments or Supplemental Security Income payments, then the award letter the child received for those programs is sufficient documentation.

Transfers to a sibling who has an equity interest in the home and has lived with the individual for at least one year is a transfer not subject to penalty.

Finally, transfers to a child who lived in the individual's home and provided care to the individual that kept the individual out of an institution for a period of two years is not subject to penalty. The attorney should gather sufficient documentation to prove the need and length of care. Often a letter from the individual's physician indicating the child's care has permitted the individual to remain at home for the two year period is sufficient.

No Penalty for Transfers to Disabled or Blind Child, Trust for Disabled or Blind Child, or a Trust for other disabled person, under age 65.

> **42 U.S.C. 1396p(c)(2)(B) (substantially similar provisions found at 405 IAC 2-3-1.1(k)(4))**
>
> An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that—
>
> . . .
>
> (B) the assets—
>
> . . .
>
> (iii) were transferred to, or to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of, the individual's child described in subparagraph (A)(ii)(II), or
>
> (iv) were transferred to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1382c(a)(3) of this title);
>
> . . .

Often a disabled family member is also receiving Medicaid, SSI and or Food Stamps. In such a case, the transfers should be made to a special needs trust for the person rather than outright, so that the assets do not disqualify the person from those benefits.

Other forms of exempt transfers are discussed later. But let's return to struggling with that look-back and penalty period issue for non-exempt transfers through some examples.

iv. Purchase a life estate: A transfer with a more limited "look-back."

A client can purchase a life estate in the home of a child (or other person) for the fair market value of the life estate purchase. If the client lives in the home for a period of one (1) year after purchasing the life estate, there is not penalty for the purchase. The Federal law regarding this exemption is as follows:

> **42 U.S.C. 1396p(c)(1)(J)**
>
> For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes the purchase of a life estate interest in another individual's home unless the purchaser resides in the home for a period of at least 1 year after the date of the purchase.

The State law regarding this exemption is as follows:

> **405 IAC 2-3-1.1(d)(1)(H)**
>
> Transfer includes any total or partial divestiture of control or access, including, but not limited to, any of the following:
>
> . . .
>
> (H) For the purchase of a life estate interest in another individual's home unless the purchaser resides in the home for a period of at least one (1) year beginning immediately after the date of purchase.

As an example, suppose a 75 year old client purchased a life estate in her child's home worth $200,000.00. HCFA Transmittal 64 §3258-9 values the life estate as $104,298.00 ($200,000.00 value X .52149 life interest factor for a 75 year old = $104,298.00). If the client moves into the child's home and lives there for a period of one year, the $104,298.00 can be transferred to the child free of penalty.

v. Examples of Transfer Penalty Calculations.

Charlie Norris is a single man of modest means who lives independently but is becoming increasingly frail. His assets are as follows:

Checking and savings account	$70,000.00
House	$100,000.00
CD	$10,000

Charlie receive a monthly Social Security payment of $2,000 and a monthly pension payment of $1,000.

Charlie wants to give his son $50,000 to help his son start a martial arts academy. Although his motives may be pure, these facts alone make it unlikely that he will be able to prove to the satisfaction of the Medicaid agency that his transfer was exclusively for purposes other than to qualify for Medicaid. The transfer will be subject to transfer review for five years.

The penalty would be calculated as follows: $50,000÷$6,873[16]=7.27. There is no rounding down and the penalty does not begin to run until after he has applied for Medicaid, requires nursing home level of care and is otherwise eligible (under the income standard and resource limit). In this case, he would be denied long term care coverage for 7.27 months after he needs the care and is otherwise down to Medicaid financial eligibility levels. This penalty applies any time he has a nursing home or equivalent care need within the five years following the transfer.

A very real, very significant danger occurs if Charlie needs long term care within the 5-year look-back period. Because of the $50,000 transfer, he must at least be able to private pay through his penalty period, if he requires care within 5 years.

One year after the transfer, Charlie requires nursing home care at a cost of $7,000 per month. Charlie would have to wait 48 more month to be outside the look-back period. It will take at least $4,000 from his assets for each month of nursing home need. Even if he sells his house, he will have only $130,000 to meet his shortfall. This is fair less than the $192,000 he

[16] This is the 2022 average cost of nursing home care published by FSSA, the penalty period divisor.

needs to private pay through the remaining look-back period. Unfortunately, the martial arts academy did not fare as well as his son anticipated. So, his son can be of no help to remedy the penalty.

Charlie's best option is to get the 7.27 month penalty running. He almost has enough cash assets to meet his private pay shortfall of $32,000 during this penalty period. He needs to get the penalty period running, though. The problem is that he cannot become eligible for Medicaid if he still has $32,000 in the bank and the penalty period does not run until after he otherwise qualifies. What can Charlie do?

First he must shelter his $32,000 into an asset that is exempt under the Medicaid program that also has enough liquidity to return it to him as he needs it. Suppose he purchases an annuity that will give him $4,000 per month over the next 8 months that meets all Medicaid annuity requirements. He now has his Social Security and pension of $3,000 to go with the $4,000 monthly annuity payment to meet his $7,000 per month care cost. Can he apply now to get the penalty running?

Not yet. He has one other barrier to eligibility-his income. Because his monthly income of $7,000 (the entire annuity payment is considered "income" for Medicaid purposes) is well over the income standard of $2,523, he will not qualify until he has created and properly funded a Qualified Income Trust (aka Miller Trust). Charlie proceeds with creating such a Trust and funds it with his $7,000 monthly income. Now he is well below the income standard.

Charlie applies for Medicaid. He is approved, subject to the 7.27 month penalty. After 8 months, the penalty has transpired and the annuity has paid its last payment having funded Charlie's shortfall during the penalty period. On month 9, Medicaid coverage begins.

Now Charlie has another problem. The doctor indicates he will probably never be able to leave the nursing facility. He owns a home that he is no longer residing and has no disposable income to maintain the expenses on the home. He can rent the home for fair market rent as Medicaid has an asset exemption for income producing real estate. However, neither Charlie nor his son want to be landlords and the house will be subject to Medicaid's priority estate claim at Charlie's death. He can sell it, but then he will have converted an exempt resource to a countable resource. With $100,000 in cash from the sale proceeds, he will lose Medicaid eligibility. What can Charlie do?

This situation gives rise to what this author has coined a ½ and ½ plan. Such a strategy uses Medicaid transfer rules to protect some of the sale proceeds without the entire amount being lost to care costs. Here is how it works. We know that Charlie needs an additional $4,000 over his monthly income to meet his monthly care costs. We also know that the Medicaid transfer of assets penalty in year 2022 is $6,873. So, his "burn rate" is about 9 months ($100,000 / $10,873). Consequently, Charlie can transfer about $65,000 to his family while use the remaining $35,000 to pay through the penalty period. A $65,000 transfer results in a 9.45 month penalty ($65,000/$6,873). To get under the resource limit so that he remains "otherwise eligible" for Medicaid, Charlie loans the other $35,000 to his daughter over a 9 month term. At the end of 9 months, Charlie has protected $65,000 from the sale of his home and now has full Medicaid coverage for his care again. The promissory note accomplished its purpose of covering Charlie's care cost shortage over the 9 month period.

The Remainder Interest Transfer, Protecting More with Less Penalty

Suppose that rather than gifting cash to his son, Charlie wanted to protect his home for his son. A gift of a $100,000 home would create a 14.54 month penalty. He would still have $80,000 to use toward his care and other needs. If he prepays his funeral, he could then use some of the remaining cash to purchase a Medicaid qualified annuity with payments of $4,000 per month for 15 months.

Suppose Charlie wants to protect the home for his son and give him some cash, too. His lawyer suggests he transfer only the remainder interest in his home to his son, retaining a life estate for himself, and he gives his son $30,000 of his $80,000 cash. Charlie is 75 when he makes the transfer. This transaction actually creates a shorter penalty period, because he has transferred only 47.851%, or $47,851, of the value of the home according to the life-estate tables that Medicaid uses. Yet he has protected the full value of the home plus $30,000 cash while invoking a penalty period of approximately 12 months. He has $50,000 to purchase an annuity to get a monthly income for a term that will see him through the penalty period. He may have to offer his life estate for sale or rent, to qualify, however.

One result of the transfer of a remainder interest in real estate is that the value of the interest subject to penalty is fixed in time. Thus, even though the remainder interest increases and the life estate decreases as the client ages, the penalized interest is only the value of the remainder based upon the age of the transferor at the time of transfer. Also, as the client ages, the gift increases and if the property is held by the client at death, the entire value of his or her property will have been transferred, but he or she will only have been penalized on the value of the remainder interest when it was transferred.

Any gifting plan that results in a penalty requires a careful analysis and diligent oversight. First, determining the “reserve” required for care during the private pay period can be difficult to predict. Increases in nursing home costs tend to outpace the rate of inflation, so an accurate prediction of nursing home costs over a period of five years is problematic. Furthermore, the client's needs may change and he or she may have additional expenses over the five year period that he or she does not currently have. Thus, the attorney will want to include disclaimers in any transfer plan letter that attempts to predict exact results and plan to review the plan with the client under a periodic schedule such as annually, and whenever there is a significant change in circumstances, such as increased health risk or change in care setting and costs. This permits review of assumed amounts and calculations that have been used in the planning.

Remember, in order to trigger the running of the transfer of assets penalty within the look-back period, the client must become eligible for Medicaid. This means application for Medicaid must be made, but if the application is made without full awareness of the facts, agency practices, and law that is current at the time of application, the result could cause the whole plan to fall apart. Filing the application for Medicaid benefits at an inappropriate time could result in failure to trigger the running of the transfer of assets penalty or worse, cause the penalty to last longer than the look-back period. So, it is important to stress that the client or the client's agent review the plan with the attorney at critical junctures, such as when the client's health status declines.

5. Planning for Immediate Medicaid Eligibility Using Exempt Assets.

Medicaid planning for the client in immediate need of services, most often involves sheltering countable resources in exempt form. For example, countable resources such as a bank account, a CD, or a brokerage account can be liquidated and invested in income-producing real estate, promissory note, or an annuity. These assets may be exposed to estate recovery or liens, but the client will have the advantage of continuing to have some net worth while on Medicaid and Medicaid's recovery is generally less than the cost of care at private-pay levels. In the situation of an applicant with a community spouse, lien and estate recovery issues are of little concern as the non-recipient community spouse will own all assets at the conclusion of the Medicaid plan.

B. VA Pension Benefits

The Veteran's Administration (VA) offers numerous benefit programs to veterans and their families. These programs vary in type. Below is a list of some of the benefits available to qualifying veterans or family members of qualifying veterans:

- Compensation and pension for disabled veterans, certain family members of veterans, and veterans in need.
- Health care.
- Educational assistance.
- Home loan assistance.
- Life insurance.
- Burial assistance.
- Survivor benefits.

Of particular importance to the elder law practitioner is the VA pension program. The legal authority for VA benefits can be found in the United State Code at 38 USC §101 *et. seq.* and Chapter 38 of the Code of Federal Regulations.

The VA pension program is quickly becoming a popular middle-class benefit to meet an individual's long term care costs. With over a decade's focus on tightening Medicaid eligibility criteria and the program's continuing institutional bias, the VA pension program has provided a necessary alternative to those who can and desire to seek long term care assistance outside a nursing home.

Despite the misnomer of labeling the program pension, seemingly indicating that the benefit is for career military personnel, the benefit is actually provided to those veterans (and their surviving spouses) who have suffered a *non-service connected disability*. The pension benefit consists of two different levels which is awarded to the recipient based upon the level of his or her disability. The Service Pension is the base level of pension benefit. The Special Monthly Pension is a larger benefit award and is further broken down into two categories-housebound benefit and aid and attendance benefit. A surviving spouse of a veteran will qualify for similar categories of pension under what is known as the Death Pension.

1. The Three Elements of VA Pension Eligibility.

A. Basic Eligibility Test.

The basic test for VA pension eligibility is that that claimant[17] be a "a person who served in the active military, naval, or air service, and who was discharged or released

[17] For the purpose of these materials, the "claimant" is either the veteran or the surviving spouse of the veteran.

therefrom under conditions, other than dishonorable"[18] or is the surviving spouse of a person meeting this criteria.

The military has five types of discharge:[19]

- Honorable Discharge
- Discharge under Honorable Conditions (General Discharge)
- Discharge under Other than Honorable Conditions (Undesireable Discharge)
- Bad Conduct Discharge
- Dishonorable Discharge

A veteran will automatically meet the criteria for discharge without further inquiry if he or she received either the Honorable Discharge or Discharge under Honorable Conditions/General Discharge. The VA will hold a hearing for any veteran who received a Discharge under Other than Honorable Conditions/Undesireable Discharge or Bad Conduct Discharge to determine the veteran's "character of service."[20] A veteran who received a Dishonorable Discharge will never meet the basic eligibility test.

In addition to being discharged for reasons other than dishonorable, the veteran must also have served during active duty wartime service. First, the veteran must have been active for a specified period of time in which at least one day was during a period of war.[21] The length of active duty depends upon the period in which the veteran served. For veterans who served prior to 1980, 90 days of continuous service is required.[22] For veterans who served after

[18] 38 USC §101(2); 38 CFR §3.1(d)
[19] 38 CFR §3.12
[20] 38 CFR §3.12
[21] 38 USC §1521(j)
[22] 38 USC §1521(j).

September 8, 1980, 24 months or a full period of duty is required.[23] Fortunately, the definition of "wartime" if fairly broad under the VA and most veteran's service time falls within one of the "periods of war." This is especially true for veterans who served during or before Vietnam, with only a few years between 1941 and 1975 that do not qualify as a period of war. The following chart lists periods of war for veterans serving prior to 1980. A detailed listing of all periods of war can be found at 38 CFR §3.2.[24]

War	Start Date	End Date
World War II	12/7/1941	12/31/1946
Korea	6/27/1950	1/31/1955
Vietnam	11/1/1955[25]	5/7/1975

B. Disability Test.

The next test that the claimant must meet is the disability test; that is, the claimant must be permanently and totally disabled. On its face, this test is easy to meet considering the VA presumes that an individual of the age of 65 or older is permanently and totally disabled.[26] If the claimant is 65 or older, he or she meets the disability test and will receive the Basic Pension (as long as all other tests have been met). However, the *level of disability* will ultimately determine the amount of the claimant's benefit; so, detailed documentation of the claimant's disability is a necessity for a Special Monthly Pension.

To qualify for the Housebound Special Monthly Pension, the claimant must be "substantially confined to the home or immediate premises due to a disability which is

[23] 38 USC §1521(j); §5303A(b); 38 CFR §3.12a(a)(1)
[24] See http://www.vba.va.gov/bln/21/pension/wartime.htm
[25] Veterans had to serve IN the Republic of Vietnam from 11/1/1955-8/4/1965 to qualify.
[26] 38 USC §1502(a); 38 CFR §3.3(a)(3)(iv)(A)

reasonably certain to remain throughout their lifetime."[27] The claimant will also meet the definition of housebound if he or she has a permanent 100% rating for one disability plus a rating of 60% or higher for a second disability.[28]

To qualify for the Aid and Attendance Special Monthly Pension, the claimant must be helpless or so nearly helpless as to require the aid and attendance of another person[29]. This standard is met if the applicant can show one of the following criteria:

- The claimant must be in a nursing home.[30]
- The claimant must be blind or nearly so.[31]
- The claimant requires custodial care; that is, the claimant needs assistance with at least 2 of the following activities of daily living[32]:
  - Dressing/undressing
  - Keeping oneself clean & presentable (hygiene/bathing)
  - Frequent prosthetic adjustment
  - Feeding due to loss of coordination or strength of upper extremities
  - Attending to the wants of nature (incontinence)
- The claimant needs to be in a protective environment; that is, he or she has a physical or mental incapacity requiring protection from the hazards or dangers of his or her daily environment[33].

[27] 38 USC §1502(c); 38 CFR §3.351(d)
[28] 38 USC §1521(e)
[29] 38 CFR§3.351(b).
[30] 38 USC §1502(b)(1); 38 CFR§3.351(c).
[31] 38 USC §1502(b)(2); 38 CFR§3.351(c).
[32] 38 CFR§3.352(a).
[33] *Id*.

- The claimant must be bedridden, in that his or her disability or disabilities require that he or she remain in bed apart from any prescribed course of convalescence or treatment.

C. Financial Need Test.

The VA reviews both the claimant's income and assets in determining whether he or she meets the financial need criteria for pension.

1. Income Eligibility Rules.

In order to meet the income test, the claimant's income for veteran's administration purposes (IVAP) must be less than the Maximum Annual Pension Rate (MAPR) for the type of pension in which the claimant seeks assistance. The annual MAPR for year 2022 for each category of pension for veterans and surviving spouses of veterans is listed below.

	MAPR Veteran	**MAPR Surviving Spouse of Veteran**
Basic Pension	$14,760	$9,888
Housebound Special Pension	$18,024	$12,084
Aid & Attendance Special Pension	$24,600	$15,804
w/ Dependent	$29,160 ($2,430/month)	

IVAP is determined by adding the gross income of the veteran and his or her household, or the veteran's surviving spouse and his or her household in the case of a death pension, and then subtracting exclusions from income. Income is defined as "payments of any kind from any source."[34] The following are examples of income: earnings, disability and retirement payments, interest and dividends, and net income from a farm or business. Once income is determined, the claimant's exclusions are deducted from income. The most important exclusion is for unreimbursed medical expenses.[35] Typically the claimant is already paying significant long term care costs because of his or her needs. These costs, which could include payment to a home health care provider or assisted living facility, are deducted from income to determine the claimant's IVAP. In most circumstances, the unreimbursed medical expenses are significant enough to reduce the claimant's IVAP to $0. Other exclusions from income can be found at 38 USC §1503(a).

2. Asset Eligibility Rules.

In addition to having an IVAP less than the MAPR to qualify for the pension, the claimant must also not have excessive net worth. The VA pension countable net worth limit is $138,489 (year 2022). Net worth includes the sum of the claimant's assets as well as his or her countable annual income (his IVAP)[36]. Not all assets count toward the countable net. The following assets are not are not countable:

- Primary residence (single family unit)[37], including residential lot area of 2 acres or less unless the additional acreage is unmarketable[38].
- Personal effects (including vehicles)[39].
- Assets excluded by statute[40].

[34] 38 USC §1503(a); 38 CFR §3.271(a)
[35] 38 USC §1503(a)(8); 38 CFR §3.278(c)
[36] 38 CFR §3.274(b)(1)
[37] 38 CFR §3.275(b)(1)
[38] 38 CFR §3.275(a)(3)
[39] 38 CFR §3.275(b)(3)
[40] *Id* (*see* 38 CFR §3.279)

3. Transfer Rules.

Like Medicaid, VA regulations discourage individuals from certain transfers of assets to meet the maximum net worth limit. A claimant makes a transfer for less than fair market value when he or she gives away an asset, sells it for less than it is worth, or transfers assets to a trust or purchases an annuity that reduces net worth[41]. The VA penalizes a claimant when a "covered asset" is transferred. A covered asset is an asset that was part of the claimant's net worth, was transferred for less than fair market value, and if not transferred would have caused or partially caused the claimant's net worth to exceed the net worth limit[42].

The regulation provides for a 36 month transfer review period[43]. The VA reviews all transfers made during the review period to determine the "covered asset amount" that will be subject to penalty. The covered asset amount is the amount by which the claimant's net worth would have exceed the net worth limit if the transfer(s) had not occurred[44]. Remember that net worth for the purpose of calculating the penalty not only includes the claimant's assets, but any positive IVAP as well[45]. The penalty period is a period of non-entitlement due to transfer of a covered asset[46]. It is calculated by divided the value of the covered asset by the monthly Maximum Annual Pension Rate for a married veteran in need of aid and attendance ($2,431 in year 2022)[47]. The penalty period begins on the first day of the month following the transfer[48]. However, if there are multiple transfers in the review period, the penalty period begins on the

[41] 38 CFR §3.276(a)(5)
[42] 38 CFR §3.276(a)(2)
[43] 38 CFR §3.276(a)(7)
[44] 38 CFR §3.276(a)(5)
[45] 38 CFR §3.274(b)(1)
[46] 38 CFR §3.276(e)(8)
[47] 38 CFR §3.276(e)(1)
[48] 38 CFR §3.276(e)(2)

first day of the month following the last transfer[49]. Consequently, many claimant's may get caught in a wary trap of a delayed penalty period start date on a significant size gift because of a subsequent nominal charitable, holiday, or birthday gift later in the review period. This is because the VA's only exceptions to the transfer rules are those made to a trust for the benefit of a child of the veteran who is rated as incapable of self-support and there is no way trust assets can return to the claimant or the claimant's spouse[50] or transfers due to fraud or unfair business practice[51]. Fortunately, the VA does apply a maximum penalty period of 5 years[52].

Not all transactions that one would consider a transfer meet the definition of transfer for VA pension purposes. Typically, any reservation of control over an asset by the claimant results in the VA determining no transfer occurred and the asset will still be counted as part of his or her net worth. For this reason, transfers to an individual living with the claimant, transfers of real property reserving a life estate, and transfers to income only trust or intentionally defective grantor trust should be avoided.

i. Example of Transfer Penalty Calculation.

Chris T. Veteran is a single veteran of the Korean conflict. He lives in an assisted living facility paying, $3,500 per month for his care. He receives $4,500 in monthly income between his Social Security payment and pension. His assets are as follows:

Checking and savings account	$168,489.00
House	$100,000.00

[49] 38 CFR §3.276(e)(2)
[50] 38 CFR §3.276(d)
[51] 38 CFR §3.276(c)
[52] 38 CFR §3.276(e)

Chris gave $42,000 to his daughter one year ago for her wedding. He intends to apply for VA pension. If he applies for VA pension in the 36 month review period, what will be his transfer penalty?

First, we must determine the amount of Chris' covered assets which is the amount by which Chris' net worth would have exceeded the net worth limit if the transfer had not occurred. If the transfer had not occurred, Chris would have had $168,489 in total assets. However, we must also add to this amount Chris' countable annual income which is $12,000 in his case (($4,500 monthly income - $3,500 monthly medical expenses = $1,000 IVAP)*12). Chris' house is exempt. So, his covered asset amount is $168,489 + $12,000, or $180,489. The net worth limit for 2022 is $138,489. So, Chris' covered asset amount is $42,000. His penalty will be $42,000 / $2,431, or 18 months. The penalty started one month after the penalty occurred, or 11 months ago. So, Chris still must wait another 7 months before his VA pension benefits will start.

D. Determining the Amount of Benefit.

Once the claimant has met the test for VA pension eligibility, the VA will determine the amount of the claimant's benefit. The claimant's benefit is determined by deducting the claimant's IVAP from the MAPR of the level of pension in which he or she qualifies. For example, if the claimant qualifies for the basic pension and he is a veteran whose annual IVAP is $1,000.00, then his annual benefit will be $13,760 ($14,760-$1,000).

E. Planning for VA Benefits.

For those claimants who have an IVAP in excess of the MAPR for the pension level in which he or she seeks or has excessive net worth, a legal plan can eliminate these barriers.

Often when an individual's IVAP is in excess of the MAPR, he or she has care needs but has not yet arranged for that care to begin. Once the care begins, then the claimant will have enough unreimbursed medical expenses to deduct from his or her income to bring his or her IVAP below the MAPR. In addition, the claimant can enter into a written care agreement to compensate family caregivers for care they are delivering to the claimant. If so ordered by a physician, an individual's rent in independent living can also be considered a medical expenses if he or she needs custodial care by a third party (including family) in that apartment.

If the claimant has excess net worth, then he or she will either need to spend assets, convert countable assets into exempt assets, or transfer assets and wait the lookback or transfer period. The claimant is permitted to spend money on goods and services the claimant or a member of his or her household needs[53]. This could include new household goods or paying debts. The claimant could also purchase a new vehicle or prepaid funerals for the claimant and the members of the claimant's household. The claimant could also upgrade exempt assets like improvements to the home. Examples of services the claimant could spend funds are delayed medical work (i.e. dental or vision care), legal fees, or a lump caregiver agreement[54]. Transfers can occur as well. Typically, this author will recommend that transfers are made to an irrevocable family trust; that is, an irrevocable, non-grantor trust where the client's family members are beneficiaries. If the covered asset amount transfered is more than $87,000, then the claimant should not file an application for benefits until after the 36 month transfer review

[53] 38 CFR §3.274(f)(1)

[54] Remember, however, that one must be cognizant of the need for Medicaid when counseling a client for VA benefits. Many times the rules of the programs are incongruent and planning strategies for one could negatively affect eligibility for another.

period has transpired. The applicant can apply if the amount of covered assets transferred is less than this amount[55].

C. Medicare

Medicare provides health insurance and prescription drug coverage to those over the age of 65 or those who have been receiving Social Security Disability for 24 months. Medicare is not a source for long term care coverage, except in very limited circumstances. Medicare covers a maximum of 100 days in a Skilled Nursing Facility. To be eligible for Medicare payments, the patient must first be in the hospital for a period of at least 3 days covered by Medicare and then subsequently enter a Medicare-certified Skilled Nursing Facility within 30 days after being discharged from the hospital. Coverage continues only while the patient requires "skilled care." Medicare will pay the first 20 days in full. For days 21 through 100, there is a co-payment required from the patient of $194.50 per day for calendar year 2022. Most Medicare Supplement policies pay this co-payment. After day 100, Medicare coverage ends and so does the coverage from most Medicare supplement policies.

D. Supplemental Security Income (SSI)

SSI is a federally-funded needs-based disability program for adults and children which provides for a monthly cash benefit for the recipient's food and shelter. The law is found at Title XVI of the Social Security Act, 42 U.S.C. §1381, et seq. and 20 C.F.R. §416. The SSI program is administered by the Social Security Administration. The program has an asset limit and income limit for qualification in addition to requiring that the individual be blind or disabled.

[55] Remember, though, that a penalty will not run if multiple transfers occur within the review period. The client should be cautioned not to make additional transfers after the first transfer.

E. Temporary Assistance for Needy Families ("TANF")

TANF is a program that provides cash assistance and supportive services to families with children under the age of 18. TANF beneficiaries have a countable asset limit. Their assistance group is also prohibited from exceeding an income standard. Medicaid assistance is available for TANF recipients if requested.

F. Federal Assisted Housing

The principal federal housing program that provides assistance to persons with disabilities is Section 8[56]. Typical assistance is provided in the form of rental assistance. The program has an income threshold that the recipient cannot exceed.

G. SNAP Benefits

SNAP Benefits (f/k/a Food Stamps) provide needy individuals with assistance to purchase nutritious food. The food stamp program has both an asset limit and income limit.

[56] 12 U.S.C. §1701.

Appendix A

________________________QUALIFIED INCOME TRUST (MILLER TRUST)
[Name of Beneficiary]

__________________________[name of settlor] hereby creates a trust, to be known as __________________________[name of primary beneficiary] Qualified Income Trust and to be governed by the terms set out below:

The primary beneficiary of the trust is_________________________________[name of primary beneficiary]. The purpose of this trust is to assure eligibility of the primary beneficiary for medical assistance program benefits.

The property to be placed in the trust is the income received by the primary beneficiary from the following source(s):

1. ____
2. ____
3. ____

No property other than the primary beneficiary’s income may be placed in the trust. The trust may receive any or all of the primary beneficiary’s income, but the entire amount of the income allocated to the trust from each income source shall be deposited directly in the trust account or deposited in the trust account in the same month the income is received by the primary beneficiary.

The Trustee shall make distributions from the trust in amounts and for the purposes necessary to maintain eligibility of the primary beneficiary for medical assistance program benefits, notwithstanding any other provisions of this document. Among the requirements of the medical assistance program at the time of establishment of this trust, which the Trustee shall meet as long as and to the extent required, is the requirement that the trustee make payments from the trust in the following priority, no later than the last day of the month after the income is received by the trust:

1. A monthly personal needs allowance for the primary beneficiary, if the primary beneficiary

is depositing his/her entire income into the trust;

2. A sum to the spouse of the primary beneficiary, if any, sufficient to provide but not exceed the minimum monthly maintenance needs allowance for the spouse as provided by Title XIX of the Social Security Act;
3. Incurred medical expenses of the primary beneficiary as defined by the Medicaid program;
4. The cost of medical assistance provided to the primary beneficiary;
5. Payments to or on behalf of the primary beneficiary that will not result in the loss or reduction of benefits available to the beneficiary from the medical assistance program.

_____________________________________(name of initial trustee) shall serve as Trustee of this trust. In the event the Trustee resigns, becomes legally incapacitated or dies while holding office,_______(name of successor trustee) shall serve as successor trustee. Any Trustee may, while serving as Trustee, appoint one or more successor trustees. If there is no named trustee eligible or willing to serve as Trustee, any interested person may apply to the primary beneficiary of the trust in order to be appointed Trustee. No bond shall be required for any Trustee. The Trustee shall have all powers given to a trustee by the Indiana Trust Code, Ind. Code § 30-4.

The Trust’s assets, income and distributions shall not be subject to anticipation, assignment, pledge, sale or transfer in any manner, nor shall the primary beneficiary have the power to anticipate or encumber such interest nor shall such interest, while in the possession of the Trustee, be liable for, or subject to the debts, contracts, obligations, liabilities or torts of the primary beneficiary.

This trust is irrevocable. This trust shall terminate upon the death of the primary beneficiary. Upon the death of the primary beneficiary, the Trustee shall distribute to the Indiana Family and
Social Services Administration or its successor agency any remaining trust property up to an amount equal to the total medical assistance paid on behalf of the primary beneficiary by the State of Indiana. The Trustee shall distribute any remaining trust property to
____[name(s) of distributee(s)].

Appendix A

Signed the____________________day of___________________________20____.

Settlor ________________________________ Initial Trustee _____________________________________

Appendix B

QUALIFIED INCOME TRUST
FOR
«Client Full Name:LIKE THIS»

THIS TRUST AGREEMENT is made this «Client Document Execution Date:' ',>0,"______ day of ______________________, _________":3rd day of June, 1990», between «Client Full Name», «IF By Representative = "Through a Representative"» , by «Client Gender:his/her» attorney-in-fact, «Representative Full Name»«END IF», as the **SETTLOR** and «Miller Trust Trustee Full Name 1» as the **TRUSTEE**.

ARTICLE ONE
NAME OF TRUST

THIS TRUST shall for convenience be known as the **«Client Full Name:LIKE THIS» QUALIFIED INCOME TRUST** and it shall be sufficient that it be referred to as such in any instrument of transfer, deed, assignment, bequest or devise.

ARTICLE TWO
PURPOSE OF THIS TRUST

The **SETTLOR**'s intention in maintaining this Trust is to create a trust described under 42 U.S.C. Section 1396p(d)(4)(B) to enable the **SETTLOR** to seek and obtain Medicaid benefits despite having available income in excess of the Special Income Level (hereinafter referred to as the SIL) ($2,349 in 2020) established by the Indiana Family & Social Services Administration (hereinafter referred to as the FSSA). This Trust will be composed only of pension, Social Security, and any other income to the Settlor, as provided by Article 4, together with any accumulated income in this Trust.

ARTICLE THREE
IRREVOCABLE TRUST

This Trust is irrevocable except that:

A. Settlor may amend this Agreement to name new, successor or additional trustees.

B. Any Trustee may amend this Agreement to name one or more replacement or successor trustees to himself or herself.

C. The Settlor or the Trustee may amend this Agreement in accordance with requests of FSSA or to comply with rules, regulations and/or law as may be existing from time to time.

Appendix B

ARTICLE FOUR
ADDITIONS TO PRINCIPAL

For any month during which the **SETTLOR** receives Medicaid benefits that are subject to the SIL, **SETTLOR** hereby covenants and agrees to deliver or cause to be delivered to the **TRUSTEE** at a minimum the **SETTLOR**'s monthly income which exceeds the SIL ($2,250.00 in 2018). No property other than the **SETTLOR's** income (and the earnings thereon) shall be used to fund this Trust.

ARTICLE FIVE
APPOINTMENT OF TRUSTEE

5.01. APPOINTMENT. The **SETTLOR** hereby nominates and appoints «Miller Trust Trustee Full Name 1» as **TRUSTEE** of this Trust.

5.02. RESIGNATION. Any **TRUSTEE** hereunder (whether originally designated herein or appointed as successor) shall have the right to resign at any time by giving thirty (30) days notice to that effect to the current income beneficiary of the Trust and the Successor Trustee named in 5.03 below.

5.03. APPOINTMENT OF SUCCESSOR. A. Upon the death, resignation or incapacity of «Miller Trust Trustee Full Name 1», «Miller Trust Trustee Full Name 2» shall serve as the Successor **TRUSTEE**. Upon the death, resignation or incapacity of «Miller Trust Trustee Full Name 2» to serve as **TRUSTEE**, then the **SETTLOR** or the **SETTLOR**'s legal representative, including the **SETTLOR**'s guardian or attorney in fact, shall appoint a Successor **TRUSTEE** and shall notify such trustee of such appointment. Such Successor **TRUSTEE** must be an individual or a trust company or bank able to act as such.

B. Any Successor **TRUSTEE** hereunder shall possess and exercise all powers and authority herein conferred on the original **TRUSTEE**. If Co-Trustees are named, either Co-Trustee may act independent of the other Co-Trustee. No Successor **TRUSTEE** shall be personally liable for any act or omission of any predecessor. With the approval of the **SETTLOR**, if living and competent to act, otherwise a Court of competent jurisdiction, a Successor **TRUSTEE** may accept the account rendered and the property received as a full and complete discharge to a predecessor **TRUSTEE** without incurring any liability for so doing.

5.04. BOND. To the extent that any such requirement can be legally waived, no **TRUSTEE** shall ever be required to give bond, or to qualify or make accountings to any court or courts under the provision of any existing or future statutes of Indiana or any other state or territory, or to obtain the order or approval of any court in the exercise of any power or discretion herein given.

5.05. MERGER OF CORPORATE TRUSTEE. If a Corporate **TRUSTEE** shall, subsequent to its commencing to serve hereunder, merge or consolidate with any other entity authorized to serve as a Corporate **TRUSTEE**, then the successor corporation created pursuant to said merger or consolidation shall act as **TRUSTEE** and shall possess all of the rights, powers, duties and discretions conferred or imposed on the **TRUSTEE** originally named herein.

5.06. COMPENSATION. Every **TRUSTEE** shall be entitled to receive compensation for services rendered hereunder commensurate with the time and expertise required; provided, however,
that in the event a bank or trust company becomes a **TRUSTEE** hereunder, such bank or trust company shall be entitled to reasonable compensation based upon its then standard charge for other trusts of similar size. Further, every **TRUSTEE** shall be reimbursed for all reasonable expenses incurred in the management and protection of the Trust Estate.

5.07. ACCOUNTING AND REPORTING.

A. The **TRUSTEE** shall render to the **SETTLOR** statements of account or receipts and disbursements as **TRUSTEE** upon request of the **SETTLOR**.

B. Periodic reports to any court shall not be made unless required by court order or the regulations of the FSSA. The trust records shall be open at all reasonable times to inspection by the beneficiaries of the trust and their accredited representatives.

C. To the extent the **TRUSTEE** receives any governmental benefits which are, under the regulations or law applicable to such program, prohibited to be commingled with other assets of the Trust, the **TRUSTEE** shall segregate such receipts as a separate share of this Trust and administer same independently of the balance of the Trust estate.

5.08. DETERMINATION OF INCAPACITY. For the purpose of this Trust, an individual shall be deemed to be incapable of managing his or her own affairs upon being adjudicated incapacitated by a Court of competent jurisdiction, or upon the receipt by the **TRUSTEE** or Successor **TRUSTEE** of a certificate signed by a licensed physician that such individual is mentally incapable of attending to his or her business affairs. Such status of incapacity for purposes of this Trust shall continue until receipt by the **TRUSTEE** of a certified copy of a Court Order restoring such individual's competency, or until receipt by the Successor **TRUSTEE** of a certificate signed by a licensed physician stating that in the opinion of such physicians such individual is mentally capable of attending to his or her business affairs. Until the Successor **TRUSTEE** receives such a certified copy of a Court Order or physicians' statements, it shall be fully protected in assuming that such individual's capacity has not changed. An attorney in fact for any individual named in this Trust may serve on behalf of that individual in any capacity contemplated under the terms of this trust.

ARTICLE SIX
TRUST ADMINISTRATION DURING SETTLOR'S LIFETIME

The **TRUSTEE** shall make distributions from the trust in amounts and for the purposes necessary to maintain eligibility of the **SETTLOR** for Medicaid benefits. The **TRUSTEE** shall not make any distribution which jeopardizes the **SETTLOR**'s eligibility for Medicaid benefits. The **TRUSTEE** may pay the following items from the trust:

Appendix B

1. Amounts needed to pay the **SETTLOR**'s share of the costs (currently described as income spend down or liability) for any services covered by Medicaid, to the extent those costs are not covered by Medicaid or by other sources.

2. Spousal and family allocation, if any.

3. The amount of any exemptions or deductions which are allowed by Medicaid in Post Eligibility budgeting, including but not limited to health insurance premiums, medical expenses not subject to payment by a third party and not covered by Medicaid, and court-ordered guardianship fees.

4. Incurred medical expenses of the primary beneficiary as defined by the Medicaid program.

5. Amounts reasonably necessary to establish and maintain the existence of this Trust, including but not limited to bank fees, Trustee fees and commissions, and reasonable attorneys' fees.

6. Payments to or on behalf of the **SETTLOR** that will not result in the loss or reduction of benefits available to the **SETTLOR** from the medical assistance program.

7. A monthly personal needs allowance for the **SETTLOR**, if all the **SETTLOR's** income, or more than the amount by which the **SETTLOR**'s total income exceeds the personal needs allowance, is deposited into the Trust.

Any excess income may be distributed to or on behalf of the **SETTLOR** (or the **SETTLOR**'S spouse, if married) only to the extent allowed under the Indiana Administrative Rules, the Indiana Program Policy Manual, other state law or policy, federal law, or the CMS State Medicaid Manual governing Medicaid assistance and Qualified Income Trusts. In no event shall the amounts distributed exceed such amount determined by the state of Indiana as required or allowed to be disbursed and not cause the **SETTLOR**'s Medicaid qualification to thereby be jeopardized.

If the **SETTLOR** delivers income to the **TRUSTEE** for a month for which the **SETTLOR** is not approved for and does not receive Medicaid services subject to the SIL, then the **TRUSTEE** shall pay such income directly to the **SETTLOR** or the **SETTLOR's** representative.

If any money remains after the monthly distributions and deductions from the Trust, such funds shall be retained and be added to the principal of the Trust.

No part of the principal or undistributed income of the Trust shall be considered available to nor be distributed to the **SETTLOR** except as provided above.

Appendix B

ARTICLE SEVEN
TERMINATION OF TRUST

7.01. DISTRIBUTION UPON DEATH OF SETTLOR. This Trust shall terminate upon the death of the **SETTLOR** and any portion of the Trust estate remaining after payment of the amounts described in Section 7.02 below shall be distributed to beneficiaries designated by the **SETTLOR** by will, trust, or other document. If no such designation has been made, then any remaining portion shall be distributed to **SETTLOR's** heirs under Indiana's law of intestate succession. In disposing of any Trust property subject to a designation by a will, the **TRUSTEE** may rely upon an instrument admitted to probate in any jurisdiction as the will of the **SETTLOR** or may assume that the **SETTLOR** died intestate without making any designation if the **TRUSTEE** has no notice of a will or other document making a designation within three months after «Client Gender:his/her» death.

7.02. REPAYMENT TO THE STATE FOR MEDICAID PROVIDED. Upon the death of the **SETTLOR**, the **TRUSTEE** shall distribute and deliver to the state of Indiana, and/or to any other state in which Medicaid benefits are received, all amounts remaining in the Trust up to an amount as certified by its appropriate agency equal to the total medical assistance paid on behalf of the **SETTLOR** under Medicaid.

ARTICLE EIGHT
TRUST ADMINISTRATION

8.01. PROTECTION FROM CLAIMS OF CREDITORS. A. The **TRUSTEE** is herein vested with full and complete title to all property and the estate embraced within the Trust hereof, both as to principal and income therefrom, subject only to the execution of the Trust herein.

B. The **SETTLOR** shall not have the power to sell, assign, transfer, encumber or in any other manner anticipate or dispose of «Client Gender:his/her» interest in the Trust Estate or the income produced thereby. No disposition, charge or encumbrance of either the income or principal of any of the Trust or any part thereof by the **SETTLOR** shall be of any validity or legal effect or be in any wise regarded by the **TRUSTEE**.

C. If any creditor of the **SETTLOR** asserts a claim against the **SETTLOR's** interest in the trust estate, the **TRUSTEE** shall object to such claim and shall notify FSSA of the assertion of any such claim.

D. This provision shall not bar any remedy sought by either the state of Indiana, or any other state or county, for the purpose of obtaining amounts payable thereto in accordance with this Trust Agreement.

8.02. INCAPACITY. Whenever income or principal is distributable, at the discretion of the **TRUSTEE**, to or for the benefit of any person who is incapacitated or who is not adjudicated incapacitated but who by reason of illness or mental or physical disability, is in the opinion of the **TRUSTEE** unable to properly administer such amounts, then the **TRUSTEE**, in its sole and absolute discretion, as donee of a power, may distribute all or any part of such property (a) to or for the benefit of such person even though such distribution may result in an incidental benefit to the person with whom such person resides or such person's guardian; (b) to such person's legal representative; or, (c) to the person with whom such person is residing for such person's benefit without the requirement of a bond or security.

ARTICLE NINE
TRUSTEE POWERS

9.1. POWERS OF TRUSTEE. The **TRUSTEE** shall have all the powers with respect to the **SETTLOR's** trust estate given a trustee with respect to trust property under Ind. Code 30-4-3-3 or its successor section and given to all unsupervised personal representatives with respect to estate property under Ind. Code 29-1-7.5-3 or its successor section. Where these powers are similar to each other, the broadest of these powers or discretions shall control.

9.2. CONTRACT PROTECTION. The **TRUSTEE** shall have the power to protect the **TRUSTEE** from personal liability in any contract entered into on behalf of the trust.

9.3. CHANGE LOCATION OF TRUST. The **TRUSTEE** shall have the power to transfer the situs or location of the trust to any place.

9.4. PROTECTING SETTLOR'S ELIGIBILITY FOR PUBLIC BENEFITS. The **TRUSTEE** is authorized, as it may in its discretion deem appropriate, to take whatever administrative or judicial steps which may be necessary to continue the **SETTLOR**'s eligibility for any public assistance programs, including obtaining instructions from a court of competent jurisdiction and obtaining a ruling that the Trust principal is not available to the **SETTLOR** for such eligibility purposes. All costs incurred by the **TRUSTEE** in relation to these matters, including reasonable attorney's fees, shall be a proper charge to the Trust unless payment of such costs or fees would result in rendering the **SETTLOR** ineligible for any public benefits to which «Client Gender» would otherwise be entitled.

ARTICLE TEN
MISCELLANEOUS

10.1. The masculine, feminine or neuter gender, wherever used herein shall be deemed to include the masculine, feminine and neuter. Whenever Trustee or Trustees is used herein, the same shall be deemed to include any singular Trustee or Successor Trustee or Trustees. Any reference in this Trust to the FSSA shall include any successor public agency or program which becomes vested with the responsibility for providing publicly supported nursing home care or equivalent home and community based services to eligible Indiana residents or the residents of the State in which the **SETTLOR** resides.

10.2. To the same effect as if it were the original, anyone may rely upon a copy of this instrument certified by the **TRUSTEE** to be a true and accurate copy of the original.

10.3. No one dealing with the **TRUSTEE** need inquire concerning the validity of anything it purports to do nor need see to the application of the monies paid or any property transferred by it upon the order of the Trustee.

10.4. This Agreement and the Trusts hereby created shall be governed by and construed in all respects in accordance with the laws of the state of Indiana, except that if the **SETTLOR** moves to another state to reside there on a continuing basis, then it shall be governed by the laws of the new state of residence.

IN WITNESS WHEREOF, the **SETTLOR** and **TRUSTEE** have signed this Trust Agreement this «Client Document Execution Date:' ',>0,"______ day of ______________________, _________":3rd day of June, 1990».

SETTLOR: **TRUSTEE:**

_________________________________ _________________________________

«Client Full Name» «Miller Trust Trustee Full Name 1»

«IF By Representative = "Through a Representative"»

, by «Client Gender:his/her» attorney-in-fact, «Representative Full Name»«END IF»

THIS INSTRUMENT PREPARED BY: «Attorney», Atty. «Attorney:23760 49», the «MY COMPANY:LIKE THIS», «MY ADDRESS1», «MY ADDRESS2», «MY CITY», «MY STATE» «MY ZIP CODE». Telephone «MY PHONE».

Appendix C

ADDENDUM TO GENERAL DURABLE POWER OF ATTORNEY

«IF Addendum Agent Options = "single agent"»

I, «Client Full Name», of «Client Street Address», «Client City», «Client State» «Client ZIP Code», on the «Client Document Execution Date:' ',>0,"______ day of ______________________, _________":3rd day of June, 1990», executed a General Durable Power of Attorney naming «Power of Attorney Name 1», whose present address is «Power of Attorney Street Address 1», «Power of Attorney City 1», «Power of Attorney State 1» «Power of Attorney ZIP Code 1», as my true and lawful attorney-in-fact, or agent. In furtherance of the power of and authority conferred under that instrument, I now execute this Addendum to said General Durable Power of Attorney, and with its execution now grant to «Power of Attorney Name 1», my attorney-in-fact or agent, the following additional powers.

None of these powers shall be executed without my attorney-in-fact first consulting with counsel knowledgeable about public and private benefits that may be available to me and the impact that the exercise of these powers may have on my eligibility for such benefits. My attorney-in-fact may take any action then necessary to effectuate the foregoing, including to qualify me for Social Security Benefits, Supplement Security Income, Department of Veteran's Affairs benefits, Medicaid or any other government benefit program.

Thereby, I grant my attorney-in-fact the following additional powers:«ELSE IF Addendum Agent Options = "multiple agents in order of priority"»

I, «Client Full Name», of «Client Street Address», «Client City», «Client State» «Client ZIP Code», on the «Client Document Execution Date:' ',>0,"______ day of ______________________, _________":3rd day of June, 1990», executed a General Durable Power of Attorney naming the following individuals, in the following order of priority, as my true and lawful attorneys-in-fact, or agents:

1. «Power of Attorney Name 1», whose present address is «Power of Attorney Street Address 1», «Power of Attorney City 1», «Power of Attorney State 1» «Power of Attorney ZIP Code 1».
2. «Power of Attorney Name 2», whose present address is «Power of Attorney Street Address 2», «Power of Attorney City 2», «Power of Attorney State 2» «Power of Attorney ZIP Code 2».
3. «IF ANSWERED (Power of Attorney 3 Information)»«Power of Attorney Name 3», whose present address is «Power of Attorney Street Address 3», «Power of Attorney City 3», «Power of Attorney State 3» «Power of Attorney ZIP Code 3».«END IF»
4. «IF ANSWERED (Power of Attorney 4 Information)»«Power of Attorney Name 4», whose present address is «Power of Attorney Street Address 4», «Power of Attorney City 4», «Power of Attorney State 4» «Power of Attorney ZIP Code 4».«END IF»

In furtherance of the power of and authority conferred under that instrument, I now execute this Addendum to said General Durable Power of Attorney, and with its execution I hereby grant to my attorneys-in-fact, **in the same order of priority**, the additional authority listed below.

Appendix C

If one of my attorneys-in-fact is unable to act, then in cases where my remaining attorney-in-fact may act, such remaining attorney-in-fact may execute and deliver an affidavit that my other attorney-in-fact is unable to serve or to continue to serve, and such affidavit shall be conclusive evidence insofar as third parties are concerned of the facts set forth therein, and in such event any person acting in reliance upon such affidavit shall incur no liability to my estate because of such reliance.

None of these powers shall be executed without my attorneys-in-fact first consulting with counsel knowledgeable about public and private benefits that may be available to me and the impact that the exercise of these powers may have on my eligibility for such benefits. My attorneys-in-fact may take any action then necessary to effectuate the foregoing, including to qualify me for Social Security Benefits, Supplement Security Income, Veterans Benefits, Medicaid or any other government benefit program.

Thereby, I grant my attorneys-in-fact the following additional powers:
«ELSE IF Addendum Agent Options = "joint agents"»

I, «Client Full Name», of «Client Street Address», «Client City», «Client State» «Client ZIP Code», on the «Client Document Execution Date:' ',>0,"______ day of ______________________, _________":3rd day of June, 1990», executed a General Durable Power of Attorney naming the following individuals as my true and lawful attorneys-in-fact, or agents:

- «Power of Attorney Name 1», whose present address is «Power of Attorney Street Address 1», «Power of Attorney City 1», «Power of Attorney State 1» «Power of Attorney ZIP Code 1».
- «Power of Attorney Name 2», whose present address is «Power of Attorney Street Address 2», «Power of Attorney City 2», «Power of Attorney State 2» «Power of Attorney ZIP Code 2».
- «IF ANSWERED (Power of Attorney 3 Information)»«Power of Attorney Name 3», whose present address is «Power of Attorney Street Address 3», «Power of Attorney City 3», «Power of Attorney State 3» «Power of Attorney ZIP Code 3».«END IF»
- «IF ANSWERED (Power of Attorney 4 Information)»«Power of Attorney Name 4», whose present address is «Power of Attorney Street Address 4», «Power of Attorney City 4», «Power of Attorney State 4» «Power of Attorney ZIP Code 4».«END IF»

In furtherance of the power of and authority conferred under that instrument, I now execute this Addendum to said General Durable Power of Attorney, and with its execution I hereby grant to my attorneys-in-fact the additional authority listed below, to be exercised by them jointly in certain specified circumstances.

The specific powers in this Addendum shall be exercised by my attorneys-in-fact jointly, and not individually, unless only one of my attorneys-in-fact is able to act as the result of death, incapacity or prolonged absence of the other attorneys-in-fact, in which case the sole remaining attorney-in-fact may act individually.

«IF ANSWERED(Power of Attorney 3 Information)»
If one or more of my attorneys-in-fact are unable to act, then in cases where my remaining attorney-in-fact, or attorneys, may act, they may execute and deliver an affidavit that my other attorney-in-fact, or attorneys, are unable to serve or to continue to serve, and such affidavit shall be conclusive evidence insofar as third parties are concerned of the facts set forth therein, and in such event any person acting in reliance upon such affidavit shall incur no liability to my estate because of such reliance.
«ELSE»If one of my attorneys-in-fact is unable to act, then in cases where my remaining attorney-in-fact may act, such remaining attorney-in-fact may execute and deliver an affidavit that my other attorney-in-fact is unable to serve or to continue to serve, and such affidavit shall be conclusive evidence insofar as third parties are concerned of the facts set forth therein, and in such event any person acting in reliance upon such affidavit shall incur no liability to my estate because of such reliance.
«END IF»

None of these powers shall be executed without my attorneys-in-fact first consulting with counsel knowledgeable about public and private benefits that may be available to me and the impact that the exercise of these powers may have on my eligibility for such benefits. My attorneys-in-fact may take any action then necessary to effectuate the foregoing, including to qualify me for Social Security Benefits, Supplement Security Income, Veterans Benefits, Medicaid or any other government benefit program.

Thereby, I grant my attorneys-in-fact the following additional powers:
«ELSE IF Addendum Agent Options = "single agent, followed by joint agents (spouse, then children)"»
I, «Client Full Name», of «Client Street Address», «Client City», «Client State» «Client ZIP Code», on the «Client Document Execution Date:' ',>0,"______ day of _______________________, __________":3rd day of June, 1990», executed a General Durable Power of Attorney naming «Power of Attorney Name 1», whose present address is «Power of Attorney Street Address 1», «Power of Attorney City 1», «Power of Attorney State 1» «Power of Attorney ZIP Code 1», as my true and lawful attorney-in-fact, or agent. In furtherance of the power of and authority conferred under that instrument, I now execute this Addendum to said General Durable Power of Attorney, and with its execution now grant to «Power of Attorney Name 1», my attorney-in-fact or agent, the following additional powers.

In the General Durable Power of Attorney I executed on the «Client Document Execution Date:' ',>0,"______ day of _______________________, __________":3rd day of June, 1990», I also named the following individuals as my true and lawful attorneys-in-fact, or agents:

- «Power of Attorney Name 2», whose present address is «Power of Attorney Street Address 2», «Power of Attorney City 2», «Power of Attorney State 2» «Power of Attorney ZIP Code 2».

- «IF ANSWERED (Power of Attorney 3 Information)»«Power of Attorney Name 3», whose present address is «Power of Attorney Street Address 3», «Power of Attorney City 3», «Power of Attorney State 3» «Power of Attorney ZIP Code 3».«END IF»
- «IF ANSWERED (Power of Attorney 4 Information)»«Power of Attorney Name 4», whose present address is «Power of Attorney Street Address 4», «Power of Attorney City 4», «Power of Attorney State 4» «Power of Attorney ZIP Code 4».«END IF»

In the event that «Power of Attorney Name 1», is unavailable or unable to serve as my agent, I hereby grant to «Power of Attorney Name 2»«IF ANSWERED(Power of Attorney Name 4)», «Power of Attorney Name 3» and «Power of Attorney Name 4»«END IF»«ELSE» and «Power of Attorney Name 3»«END IF» the additional authority listed below, to be exercised by them jointly in certain specified circumstances.

«IF ANSWERED(Power of Attorney 3 Information)»
If one or more of my attorneys-in-fact are unable to act, then in cases where my remaining attorney-in-fact, or attorneys, may act, they may execute and deliver an affidavit that my other attorney-in-fact, or attorneys, are unable to serve or to continue to serve, and such affidavit shall be conclusive evidence insofar as third parties are concerned of the facts set forth therein, and in such event any person acting in reliance upon such affidavit shall incur no liability to my estate because of such reliance.
«ELSE»If one of my attorneys-in-fact is unable to act, then in cases where my remaining attorney-in-fact may act, such remaining attorney-in-fact may execute and deliver an affidavit that my other attorney-in-fact is unable to serve or to continue to serve, and such affidavit shall be conclusive evidence insofar as third parties are concerned of the facts set forth therein, and in such event any person acting in reliance upon such affidavit shall incur no liability to my estate because of such reliance.
«END IF»

None of these powers shall be executed without my attorneys-in-fact first consulting with counsel knowledgeable about public and private benefits that may be available to me and the impact that the exercise of these powers may have on my eligibility for such benefits. My attorneys-in-fact may take any action then necessary to effectuate the foregoing, including to qualify me for Social Security Benefits, Supplement Security Income, Veterans Benefits, Medicaid or any other government benefit program. Thereby, I grant my attorneys-in-fact the following additional powers:

1. To conduct financial and estate planning on my behalf, considering factors related both to my disability and/or my demise, and in furtherance of the exercise of this power, I specifically confer upon my agent or attorney-in-fact by way of example and not by way of limitation, authority to engage in the following acts:

   A. To receive funds from my Trustee, and to make distribution of said funds pursuant to the powers granted herein. My attorney-in-fact is also authorized to direct my Trustee to make a distribution pursuant to my powers to amend, revoke, or withdraw from my Trust.

B. To make a gift or gifts at any time or times of any or all of my assets, cash, property or interests in property to any person or entity, including one of my attorneys-in-fact, and including any right to change the beneficiary on any bank and investment accounts, insurance policies, annuities, qualified or nonqualified retirement plans, and real property interests I may own, and without regard to any restrictions on aggregate yearly value of a gift to an individual as set forth in I.C. 30-5-5-9.

C. To create, revoke, or amend any trust or trusts. Specifically, and without limiting the authority granted to my attorneys-in-fact, my attorneys-in-fact may:

i. create and fund a self-settled special needs trust in accordance with United States Code, Title 42, Section 1396p(d)(4)(A);

ii. create and fund a qualified income trust in accordance with United States Code, title 42, Section 1396p(d)(4)(B) if such a trust should be deemed necessary to qualify me for Medicaid benefits, and make arrangements for the diversion of my income to such a trust as necessary to comply with applicable Medicaid rules and regulations; and

iii. sign all necessary documents to allow me to join any trust qualifying under United States Code, Title 42, Section 1396p(d)(4)(C) and transfer any portion of my assets to such trust.

D. To disclaim any property or interest in property or powers to which for any reason and by any means I may become entitled, whether by gift, estate or intestate succession; to release or abandon any property or powers which I may now or hereafter own, including any interests in or rights over trusts (including the right to alter, amend, revoke, or terminate). In exercising such discretion, my attorney-in-fact may take into account such matters as shall include, but shall not be limited to, any reduction in estate or inheritance taxes on my estate, the effect on my public benefits to which I may be or may become entitled, and the effect of such renunciation or disclaimer upon persons who receive the renounced or disclaimed property.

E. To use any financial and estate planning devices I, myself, might use were I personally present, competent and acting in my own behalf. This authority shall include the right to add joint owners to any bank account I may own or to open new bank accounts on my behalf in joint name with other individuals.

2. To enter into, execute, modify, alter or amend any contract or agreement (for example, a Caregiver Agreement or Personal Services Contract) pertaining to my medical, personal, or general care that I may require at my residence, assisted living facility, nursing facility, or in another’s residence on my behalf. I expressly authorize my Attorney-in-Fact to also serve as a caregiver under any such agreement and to be paid in accordance with the terms and conditions of such agreement, provided, however, that such services are compensated at fair market value.

3. To purchase and hold any type of property that is considered to be an exempt resource under 405 IAC 2-3-15; and

4. To purchase, from a reputable insurance company, a non-assignable, non-cancelable single premium, irrevocable commercial annuity and to name beneficiaries thereon.

The estate and financial planning powers herein conferred are for the purpose of providing for «IF Client Married»my spouse and«END IF» the beneficiaries of my estate plan, reducing tax liability, or preserving assets for use by «IF Client Married»my spouse and«END IF» the beneficiaries of my estate plan in the event I require long-term health care.

In carrying out the powers granted in this paragraph, my attorney-in-fact shall be guided by the standard that the estate planning powers are designed, in part, for the preservation of my assets and my attorney-in-fact shall exercise such powers in such a way as to provide for my best interests and the best interests of the beneficiaries of my estate plan.

My attorney-in-fact may exercise any estate planning power without any prohibition against self-dealing. My attorney-in-fact shall have the authority to make unlimited gifts to my attorney-in-fact.

To the extent that the terms and provisions of this Addendum to General Durable Power of Attorney are inconsistent with the terms and provisions of my General Durable Power of Attorney, then the terms and provisions of the General Durable Power of Attorney shall be deemed to be superseded by the terms and provisions of this Addendum which shall control. To the extent that the terms and provisions of the initial General Durable Power of Attorney are not inconsistent with the terms and provisions of this Addendum, said powers are now ratified and shall remain in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this «Client Document Execution Date:' ',>0,"______ day of ______________________, _________":3rd day of June, 1990».

____
«Client Full Name»

Appendix C

STATE OF «Client State:LIKE THIS»)
) SS:
COUNTY OF «Notary County:Marion/Hamilton/_____________________:LIKE THIS»)

Before me, the undersigned, a Notary Public in and for said County and State, personally appeared «Client Full Name», who acknowledged the execution of the foregoing Addendum to General Durable Power of Attorney.

WITNESS my hand and Notarial seal, this «Client Document Execution Date:' ',>0,"______ day of _____________________, _________":3rd day of June, 1990».

____
Notary Public Signature

This instrument prepared by «Attorney», Atty. #«Attorney:23760 49», the «MY COMPANY:LIKE THIS», «MY ADDRESS1», «MY ADDRESS2», «MY CITY», «MY STATE» «MY ZIP CODE». Telephone «MY PHONE».

Appendix D

The Trustee is given discretion to manage the trust estate in the best interests of the Grantor, and the preservation of the estate for those persons designated as remainder beneficiaries in Article ___ pursuant to the following guidelines:

Section 4.1. Consultation with the Grantor. As long as the Grantor is capable of participating in decisions regarding investments, distribution of income and distributions of principal, the Trustee's actions shall be taken after consultation with the Grantor.

Section 4.2. Payments of Income and Principal. The Trustee shall pay to the Grantor that portion of the net income and principal of the Trust Property as the Grantor from time to time directs. However, during any period in the Grantor's life in which the Grantor is deemed mentally and/or physically incapacitated pursuant to a medical statement obtained from the Grantor's personal family physician, wherein said physician is of the medical opinion that the Grantor is unable to handle the Grantor's financial affairs or make financial decisions, then the Trustee may use so much of the net income and principal of the Trust Property as the Trustee, in the Trustee's sole discretion, believes proper for the support, comfort and welfare of the Grantor.

In the event that the Grantor does not have a personal family physician, then the Trustee shall obtain a written opinion as to the Grantor's mental and physical capacity from two licensed physicians. Upon receiving medical verification that the Grantor is unable to handle financial matters, then the Trustee shall proceed with administration of this trust and shall, use so much of the net income and principal of the Trust Property as the Trustee, in the Trustee's sole discretion, believes proper for the support, comfort and welfare of the Grantor.

Any net income not so distributed shall be added to the principal of the trust.

Disbursement of those amounts may be made by the Trustee in any one or more of the following ways as the Trustee shall deem most desirable:

1. to the Grantor;
2. to the court appointed guardian, conservator or other legal representative of the Grantor;
3. to some relative or friend who has care or custody of the Grantor; or
4. by the Trustee using funds directly for the benefit of the Grantor.

The receipt of that party shall release the Trustee from any liability for the expenditure. The Trustee shall not be liable to see to the proper application of the amounts so paid.

Section 4.3. Principles for the Exercise of Trustee Discretion. The Trustee's actions shall be guided by the following principles:

1. An independent lifestyle for the Grantor should be maintained to the extent medically and economically feasible. Home and community based care is preferred to nursing facility care, where the needs of the Grantor can be met in such a setting.
2. The assets of the Grantor should be preserved by application for appropriate public and private benefits to which the Grantor may be entitled and the Trust should be administered in such a way as to maximize such benefits, including the purchase of any asset that would be considered an exempt asset under the Medicaid program.
3. Preservation of Trust assets shall be for the primary benefit of the Grantor to meet the contingencies of the Grantor's life and future needs for care, support and maintenance in a manner as close as possible to the lifestyle to which the Grantor has been accustomed.

Appendix D

Subject to the foregoing, the Grantor also wishes to preserve assets as an inheritance for the designated beneficiaries pursuant to Article ___, if possible, without jeopardizing the care, support and maintenance of the Grantor.

Section 4.4. Specific Directions in Particular Circumstances. Based on the foregoing principles, the Grantor directs the Trustee to take certain actions with trust assets in certain circumstances:

- In the event that the Grantor becomes incapacitated and is determined by *her treating physician to require long term care in a nursing facility or in the community, then the Trustee is authorized to consult with Grantor's counsel about the advisability of taking actions to preserve trust assets, the legal effect of such actions, and as to whether these actions would create an undue risk that the Grantor's need for care would go unmet by causing disqualification from public benefits.
- If the Trustee elects to take asset-preserving actions, the Grantor contemplates that the preservation of some or all of the trust estate for the beneficiaries of the Grantor's estate plan would be an appropriate choice by the Trustee. However, this power given to the Trustee to preserve assets creates no reciprocal right or legally enforceable expectancy in any such beneficiary or heir. It is in the Trustee's sole discretion to use this power, and the Trustee may elect against such asset preservation and instead liberally spend any and all of the trust estate for the care of the Grantor if for instance, in the Trustee's opinion, the comfort or contentment of the Grantor would be jeopardized by placement in a facility chosen solely because it was certified to receive public benefits. Some of the estate-preserving actions the Trustee may consider include:

Appendix D

a. The purchase of income-producing real estate or any other asset that is an exempt resource under the Medicaid program.

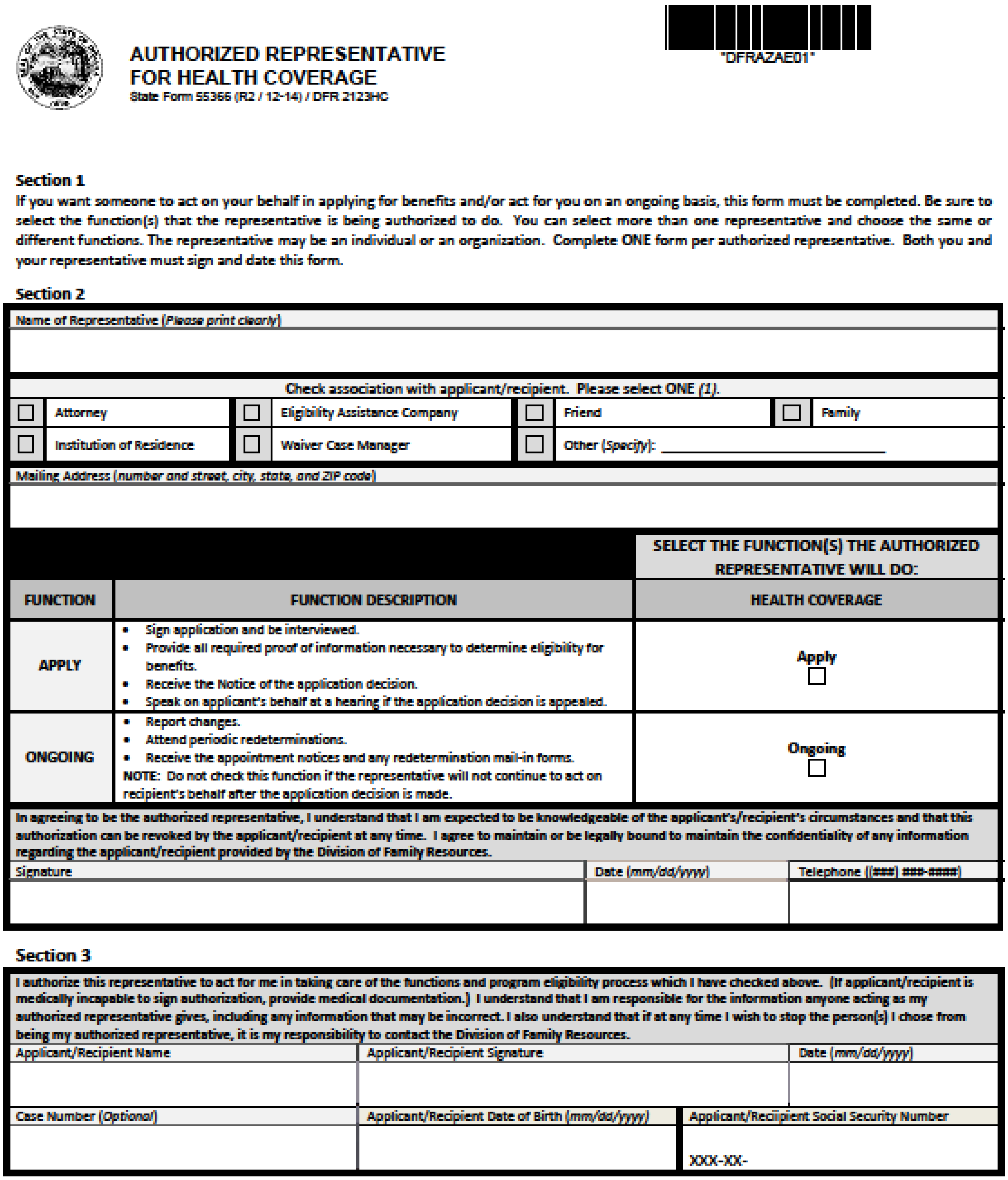
b. The conveyance to the Grantor by the Trustee of any interest in any Trust asset which will cause the asset to qualify as an exempt asset for Medicaid purposes or permit the Grantor (directly or through the Grantor’s agent) to direct the disposition of such asset.

c. The conveyance of a joint tenancy or remainder interest in income-producing real estate or other asset to the remainder beneficiaries of this Trust, outright or in trust, and under such terms as the Trustee determines after consultation with knowledgeable counsel will serve to protect the asset without placing the security of the Grantors in jeopardy.

d. The purchase by the Trustee of a commercial annuity for the life of the Grantor or such shorter period as the Trustee, in the Trustee’s sole discretion, deems advisable, from a reputable insurance company which would provide monthly installment payments to the Grantor. The Trustee may purchase an annuity contract that provides that if annuitant dies before a certain period of time, then any remaining balance would be distributed pursuant to the terms of Article ___ subject to any law, regulation, or policy required by a State Medicaid program, which are applicable when the Grantor is deceased.

e. The distribution of assets to the remainder beneficiaries of this Trust, outright or in trust, and under such terms as the Trustee determines after consultation with knowledgeable counsel.

Appendix E



"DFRAZAE01"

AUTHORIZED REPRESENTATIVE FOR HEALTH COVERAGE

State Form 55366 (R2 / 12-14) / DFR 2123HC

Section 1

If you want someone to act on your behalf in applying for benefits and/or act for you on an ongoing basis, this form must be completed. Be sure to select the function(s) that the representative is being authorized to do. You can select more than one representative and choose the same or different functions. The representative may be an individual or an organization. Complete ONE form per authorized representative. Both you and your representative must sign and date this form.

Section 2

Name of Representative (*Please print clearly*)

Check association with applicant/recipient. Please select ONE *(1)*.

□	Attorney	□	Eligibility Assistance Company	□	Friend	□	Family
□	Institution of Residence	□	Waiver Case Manager	□	Other (*Specify*): ______________________		

Mailing Address (*number and street, city, state, and ZIP code*)

FUNCTION	FUNCTION DESCRIPTION	SELECT THE FUNCTION(S) THE AUTHORIZED REPRESENTATIVE WILL DO: HEALTH COVERAGE
APPLY	• Sign application and be interviewed. • Provide all required proof of information necessary to determine eligibility for benefits. • Receive the Notice of the application decision. • Speak on applicant's behalf at a hearing if the application decision is appealed.	Apply □
ONGOING	• Report changes. • Attend periodic redeterminations. • Receive the appointment notices and any redetermination mail-in forms. NOTE: Do not check this function if the representative will not continue to act on recipient's behalf after the application decision is made.	Ongoing □

In agreeing to be the authorized representative, I understand that I am expected to be knowledgeable of the applicant's/recipient's circumstances and that this authorization can be revoked by the applicant/recipient at any time. I agree to maintain or be legally bound to maintain the confidentiality of any information regarding the applicant/recipient provided by the Division of Family Resources.

Signature	Date (*mm/dd/yyyy*)	Telephone ((###) ###-####)

Section 3

I authorize this representative to act for me in taking care of the functions and program eligibility process which I have checked above. (If applicant/recipient is medically incapable to sign authorization, provide medical documentation.) I understand that I am responsible for the information anyone acting as my authorized representative gives, including any information that may be incorrect. I also understand that if at any time I wish to stop the person(s) I chose from being my authorized representative, it is my responsibility to contact the Division of Family Resources.

Applicant/Recipient Name	Applicant/Recipient Signature	Date (*mm/dd/yyyy*)

Case Number (*Optional*)	Applicant/Recipient Date of Birth (*mm/dd/yyyy*)	Applicant/Recipient Social Security Number
		XXX-XX-

DFRAZAE01

EVERYTHING AN ESTATE PLANNER NEEDS TO KNOW ABOUT ELDER LAW IN 60 MINUTES

StinsonLawFirm

Providing peace of mind with care and compassion.

JEFFERY D. STINSON, CELA*

*CERTIFIED AS AN ELDER LAW ATTORNEY BY THE NATIONAL ELDER LAW FOUNDATION

Jeff has been actively working in the area of elder law since 1998. When he passed the bar in 2002, he concentrated his own practice in elder law, estate planning, long-term care planning, Medicaid planning, Veterans Affairs benefits planning, special needs planning, guardianships, and estate administration.

He has maintained that focus throughout his career and carried these services to his own law firm in 2013.

STINSON LAW FIRM

So many of us have gone through the painful process of seeing our parents, spouse, or loved one fail in health. When he or she is no longer able to care for themselves, there are questions that need to be answered and decisions that must be made.

Attorney Jeffery Stinson has been on both sides of the situation.

His experiences have shaped Stinson Law Firm, where we combine superior legal services with compassionate customer care.

The Medicaid Act is actually a morass of interconnecting legislation. It contains provisions which are circuitous and, at best, difficult to harmonize. The Act has ben called "an aggravated assault on the English language, resistant to attempts to understand it." See Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981). The Medicaid Act has been characterized as one of the "most completely impenetrable texts within human experience" and "dense reading of the most tortuous kind." Rehabilitation *Ass'n* of Va. V. Kozlowski, 42 F.3d 1444, 1450 (4th Cir. 1994). The court has nothing but sympathy for officials who must interpret or administer the Act.

Indiana FSSA v. Patterson, 119 N.E.3d (Ind Ct. App. 2019), transfer denied 127 N.E.2d 229 (Ind.2019), cert. denied Dec. 16, 2019

AGENDA

Identify Needs-based Public Benefits

Impoverishment Not Required-
A Brief Review of Planning Options

Avoid Future Transfer Issues

Avoid Potential Transfer Problems with Loans and Land Sale Contracts

Avoid Potential Transfer Problems with Annuities

Understand the Purpose of a "Miller Trust"

Know about Medicaid Estate Recovery and What Expenses the State can Recover

The Importance of Special Needs Trusts

Fiduciary Authority to Plan for Public Benefits Eligibility

Preparing Your Client for Future Medicaid Eligibility

NOT AFFECTED BY FINANCIAL STATUS

- Social Security Disability Insurance (SSDI)
- Medicare
- Social Security retirement benefits, dependent benefits, and survivor benefits.
- VA Compensation

NEEDS-BASED PUBLIC BENEFITS

- Medicaid
- VA Pension
- Supplemental Security Income (SSI)
- Temporary Assistance to Needy Families
- Federal Housing Assistance
- SNAP benefits

MEDICAID

HEALTH BENEFITS

PRESCRIPTION DRUGS

LONG TERM CARE BENEFITS

Nursing Facility Coverage

Home and Community Based Alternatives

- Home Care
- Assisted Living
- Adult Day Care
- Adult Family Care

MEDICAID

- 38 (40?) categories in Indiana
- All categories have different eligibility criteria.
  - Income based
  - Asset based
  - Income and asset based
- Sometimes necessary to get category from FSSA.

Authorized Representative for Health Coverage form:

https://forms.in.gov/Download.aspx?id=11310

MEDICAID

Elder law attorneys encounter

- Medicaid disability,
- Medicaid SSI, and
- Medicaid Aged

most often.

Aged, blind, or disabled

Income less than income standard

"Countable" Resources less than resource standard.

No volatile transfers in review period.

VA PENSION

VFW
10046
PAST PO

- Cash benefit for veterans and surviving spouses of veterans.
- For 2022, the maximum benefit for a married veteran in need of aid and attendance is $2,430 and for $1,317 for a surviving spouse.
- Ideal for individuals in need of assisted living, home care, or adult day care.

VA PENSION ELIGIBILITY CRITERIA

Service Requirement

Disability Requirement

Financial Need

SUPPLEMENTAL SECURITY INCOME (SSI)

- Federal program administered by Social Security Administration
- Provides monthly cash benefit for recipient's food and shelter.
- Asset and income limit.
- Recipient must be blind or disabled.

SOCIAL SECURITY
100
THIS NOTE IS LEGAL TENDER FOR ALL DEBTS, PUBLIC AND PRIVATE
UNITED STATES OF AMERICA
ONE HUNDRED DOLLARS
JULY 4, 1776
FEDERAL RESERVE NOTE

OTHER NEEDS-BASED PUBLIC BENEFITS PROGRAMS

TEMPORARY AID FOR NEEDY FAMILIES ("TANF")

- Provides cash assistance and supportive services to families with children under the age of 18.
- Resource and income limit.

FEDERAL ASSISTED HOUSING

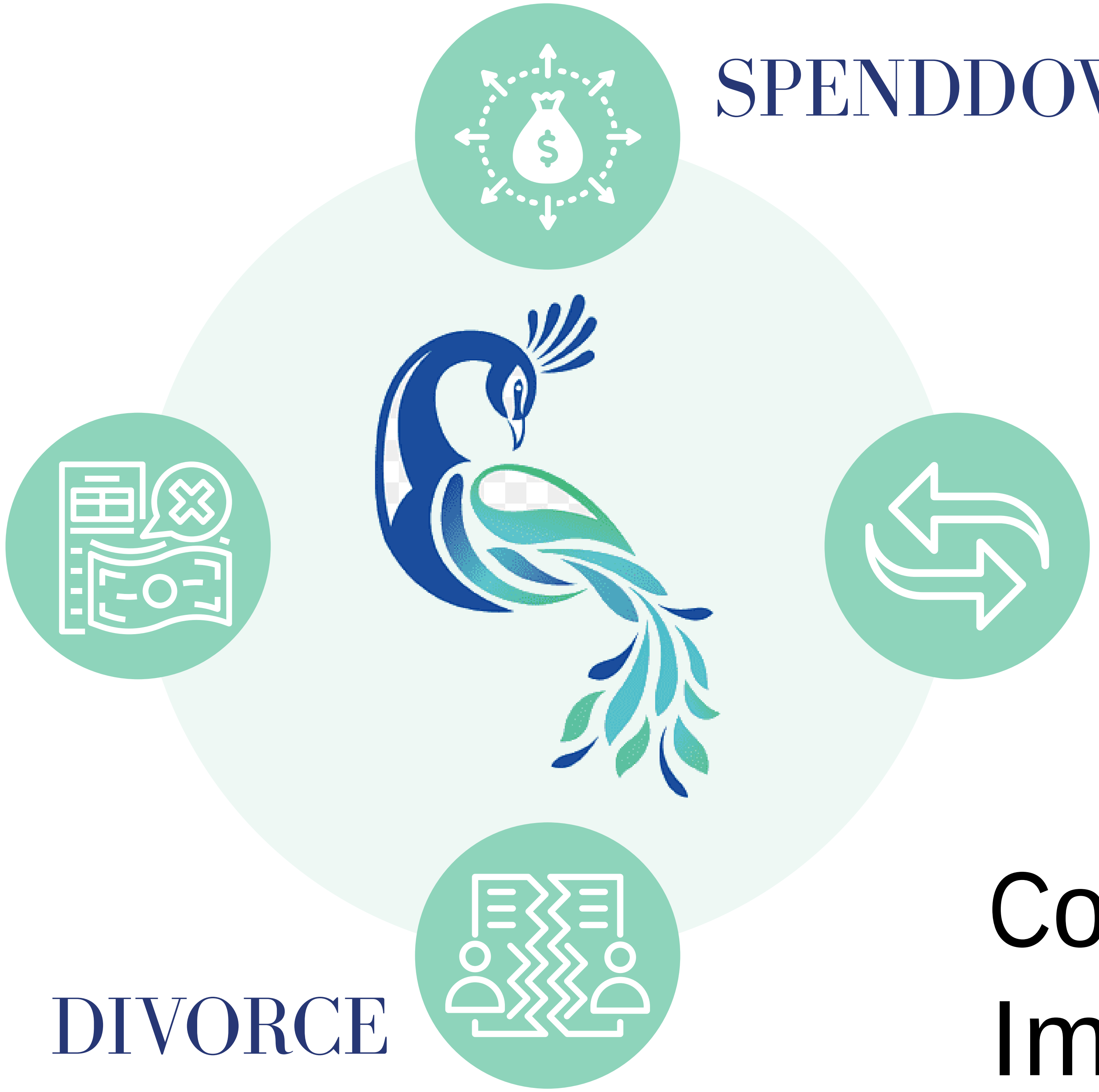
- Provides assistance to persons with disabilities.
- Usually rental assistance.
- Income limit.

OTHER NEEDS-BASED PUBLIC BENEFITS PROGRAMS

SNAP BENEFITS (AKA FOOD STAMPS)

- Provides needy individuals with assistance to purchase nutritious food.
- Asset and income limit.

PLANNING OPTIONS



SPENDDOWN

EXEMPT PLANNING

TRANSFER PLANNING

DIVORCE RARELY NECESSARY

Complete Impoverishment Not Required

EXEMPT PLANNING EXAMPLE

HOWARD AND MARION CUNNINGHAM

Asset	Current Value
House $125K Value, Less $20K mortgage	$105,000
Joint bank accounts	$10,000
Marion's CD	$40,000
Joint brokerage account	$255,000
2016 Toyota Camry	$15,000
Howard term life insurance	$0
TOTAL:	$425,000

HOWARD AND MARION CUNNINGHAM

Asset	Current Value
House $125K Value, Less $20K mortgage	$105,000
Joint bank accounts	$10,000
Marion's CD	$40,000
Joint brokerage account	$255,000
2016 Toyota Camry	$15,000
Howard term life insurance	$0
TOTAL:	$425,000

HOWARD AND MARION CUNNINGHAM

Spousal Share

$ 137,400

Asset Shelter

	Count assets	$ 305,000
−	Spousal share	$ 137,400

$ 167,600

HOWARD AND MARION CUNNINGHAM

ASSET SHELTER ($174,620)

Pay mortgage	$ 20,000
Purchase income annuity	$ 154,620
	$ 174,620

HOWARD AND MARION CUNNINGHAM

Net Worth Before Plan

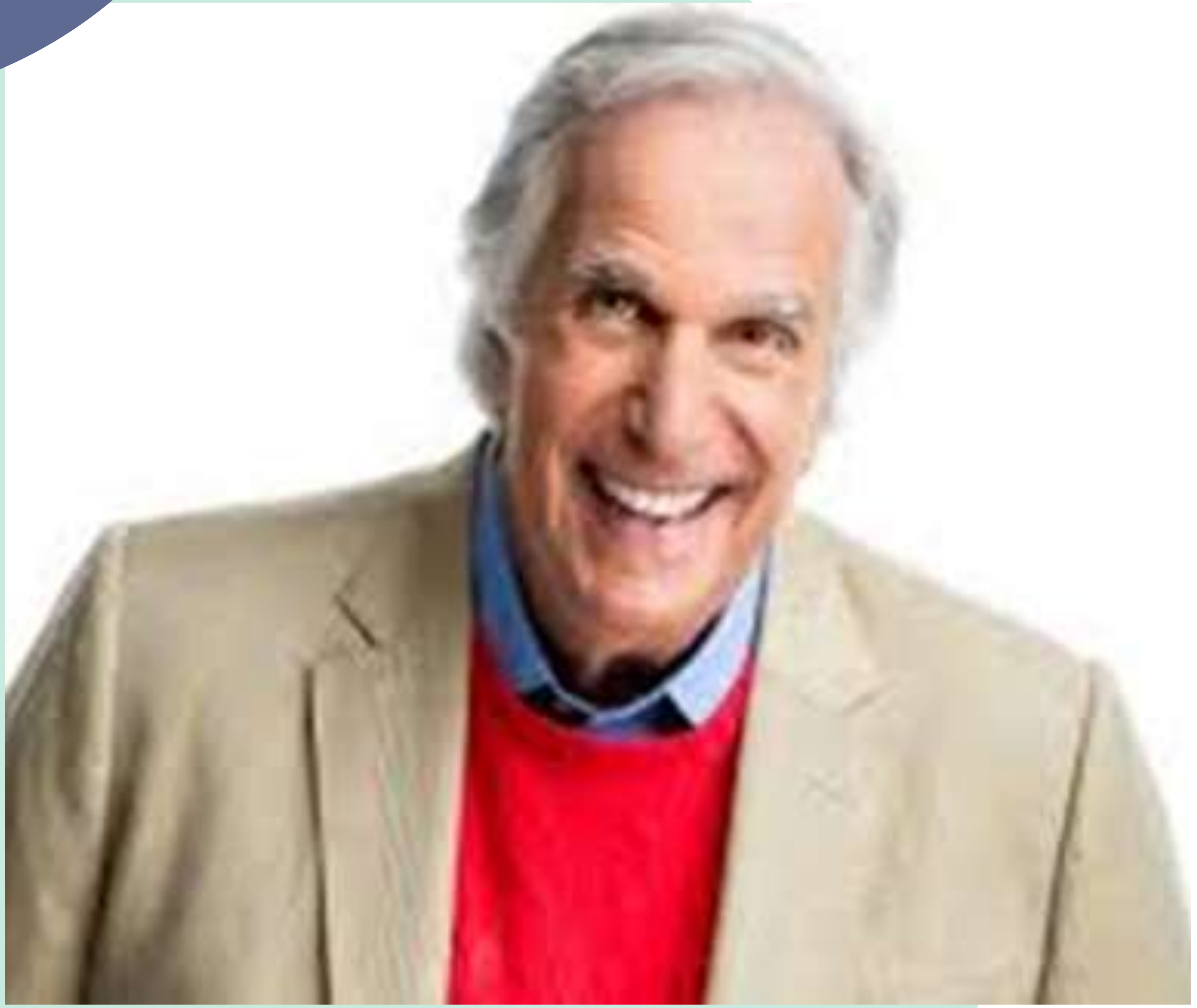
Asset	Current Value
House $125K Value, Less $20K mortgage	$105,000
Joint bank accounts	$10,000
Marion's CD	$40,000
Joint brokerage account	$255,000
2016 Toyota Camry	$15,000
Howard Term Life	$0
TOTAL:	$425,000

Net Worth After Plan

Asset	Current Value
House	$125,000
Joint bank accounts	$10,000
Marion's CD	$40,000
Joint brokerage account	$86,600
Income annuity	$147,6000
2016 Toyota Camry	$15,000
Howard Term Life	$0
TOTAL:	$425,000

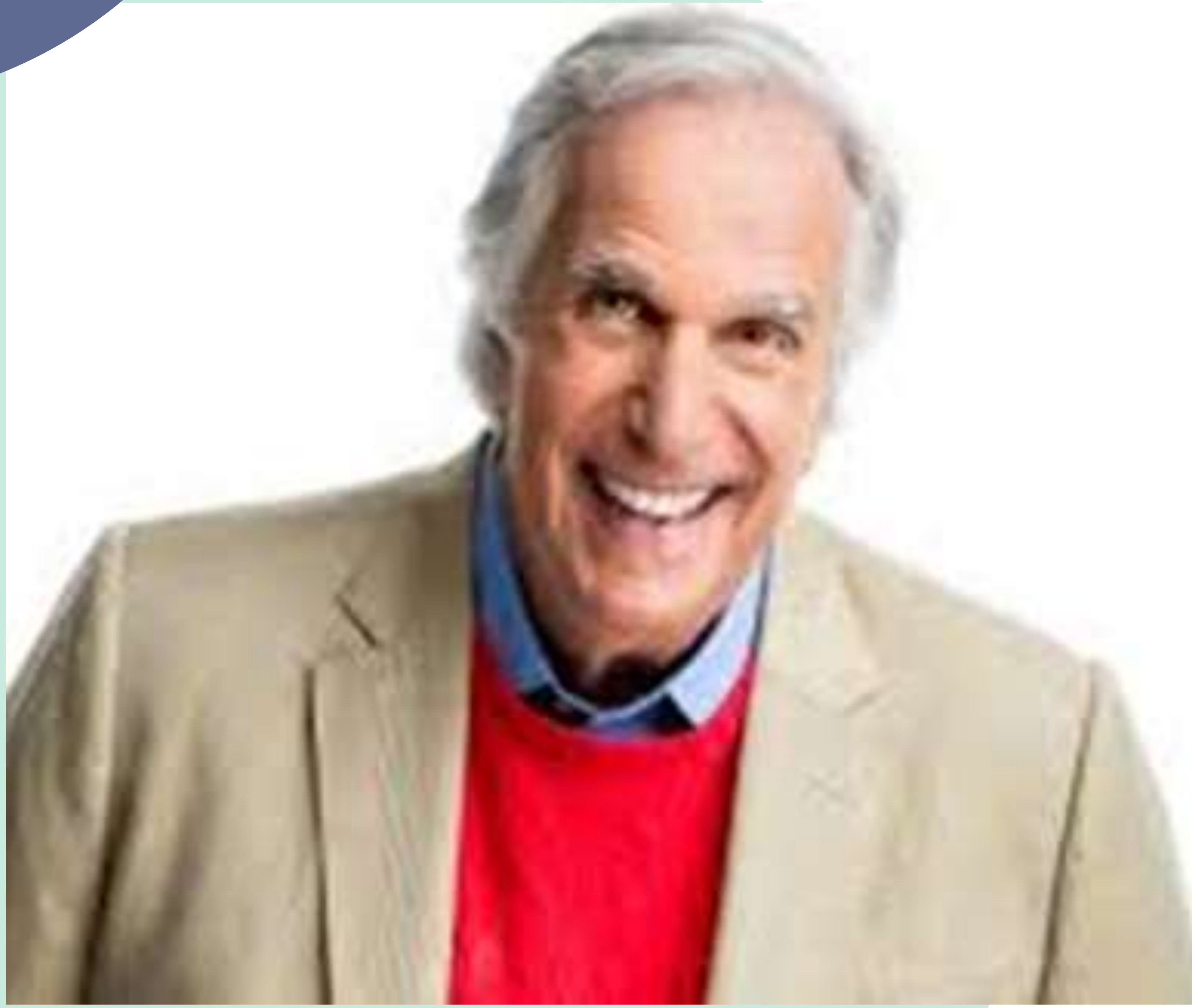
TRANSFER PLANNING EXAMPLE

ARTHUR FONZARELLI



- $150,000 in total assets
- $5,500 in monthly care costs
- $2,000 in monthly income

ARTHUR FONZARELLI



Arthur's monthly shortfall is $3,500 per month

Arthur will spend his life savings in 42 months and have protected $0

ARTHUR FONZARELLI

THE HALF AND HALF PLAN

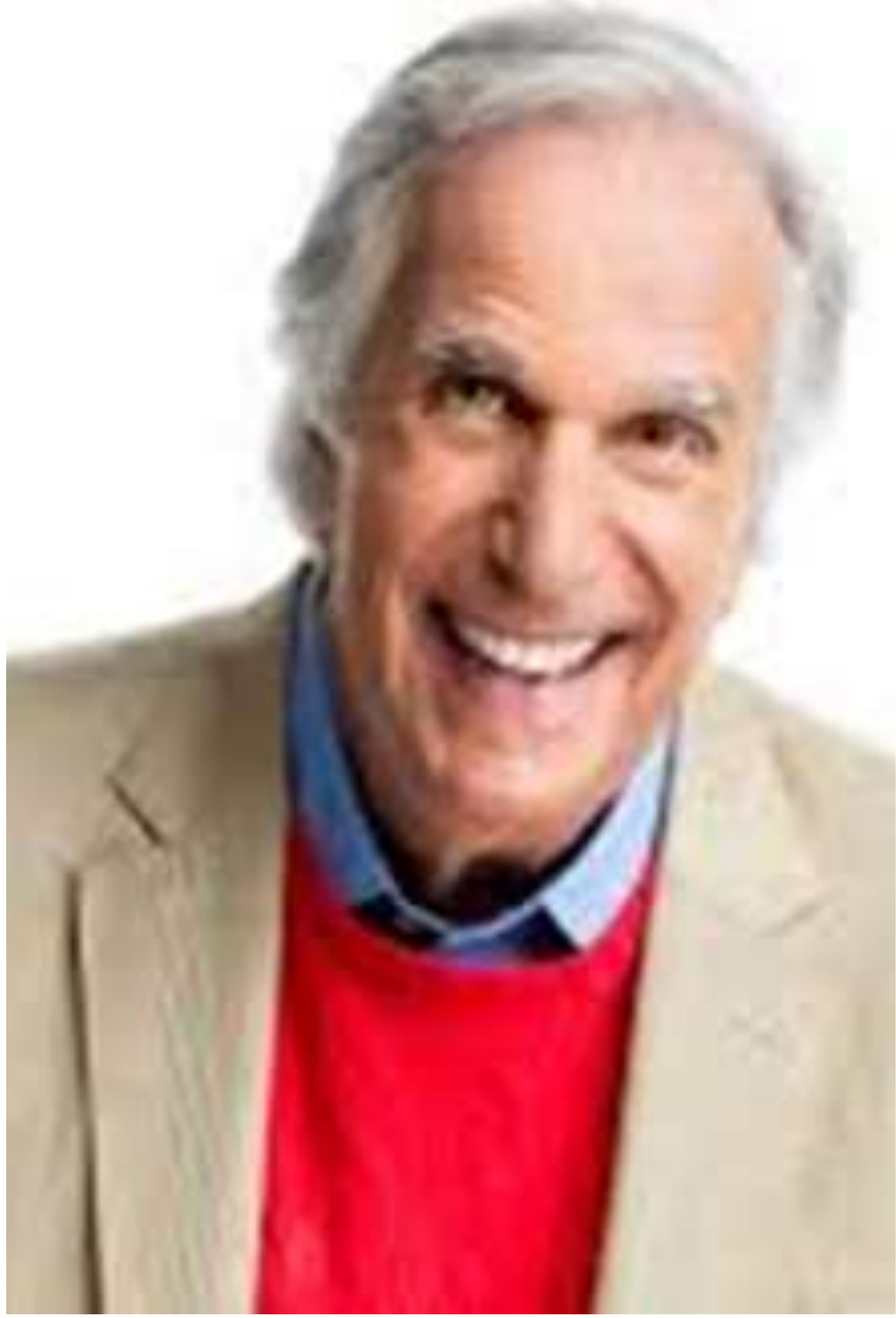
- **Accelerates Medicaid eligibility** (establishes eligibility before all assets are exhausted on care.)
- Protects portion of assets.

ARTHUR FONZARELLI

Family Share

$96,000 allocated to trust for family.

- Funds pooled during life time of Arthur.
- Trustee can make distribution to family members.
- Funds split among family at Arthur's death.

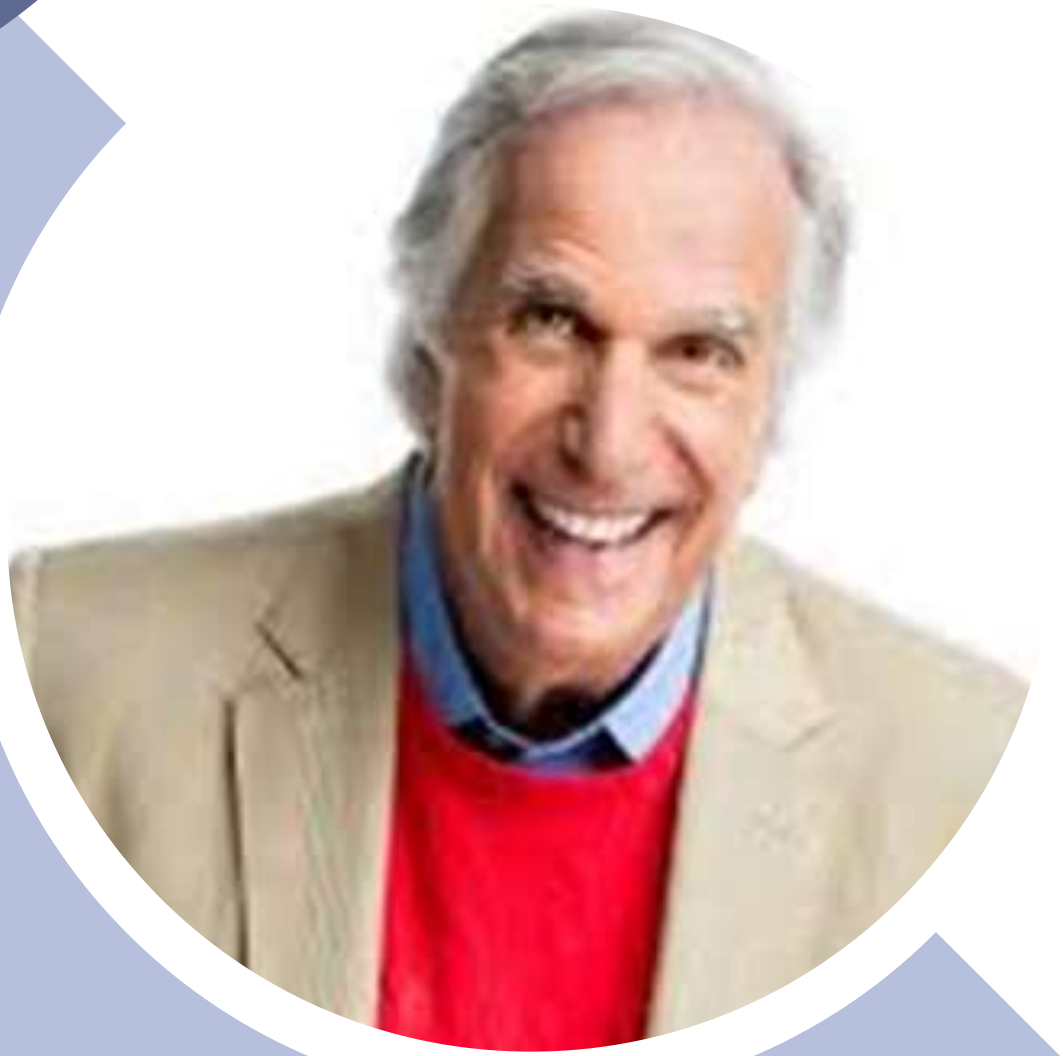


Care Share

$54,000 allocated to pay for care during penalty period.

- Medicaid assesses 15 month penalty.
- $54,000 converted to stream of income for 15 months.
- Income payments are $3,500.

ARTHUR FONZARELLI



The half and half plan
allows Arthur to protect
$96,000 and receive long
term care coverage from
Medicaid after 15 months.

Instead of protecting $0
and receiving long term
care coverage in 42
months…

MEDICAID DISCOUNT EXAMPLE

AL DELVECCHIO

- $250,000 in total assets
- $8,000 in monthly care costs
- $2,000 in monthly income

AL DELVECCHIO

Al's monthly shortfall is $6,000 per month

Al will spend his life savings in 42 months and have protected $0 assets.

A half and half plan requires Al to private pay for 20 months.

AL DELVECCHIO

MEDICAID ELIGIBILITY

Al loans $250,000 to his daughter.

Al immediate qualifies for Medicaid. He now pays $2,000 per month, instead of $8,000.

Medicaid's negotiated rate with the facility is $6,000 per month.

AL DELVECCHIO

AFTER AL'S DEATH

Al dies 12 months later.

Medicaid submits a claim for $48,000

(($6,000-$2,000)*12)

AL DELVECCHIO

With the Medicaid discount plan, Al pays $72,000 per year for his care rather than $96,000.

Al saved $24,000 with the Medicaid discount plan.

AL DELVECCHIO

Medicaid Discount Plan

- Immediate Medicaid eligibility.
- Countable assets convertible to exempt safe harbors under Medicaid rules.
- State of Indiana may have claim on remaining assets at death, but recipient receives the benefit of Medicaid's lower reimbursement rate vs. private pay rate.

VA PENSION EXAMPLE

HOWARD CUNNINGHAM

$2,000 SOCIAL SECURITY

$2,500 HOME CARE

Asset	Current Value
House $125K Value Less $20K mortgage	$125,000
Bank accounts	$10,000
CD	$40,000
Brokerage account	$125,000
2016 Toyota Camry	$15,000
Howard Term Life	$0
TOTAL:	$315,000

HOWARD CUNNINGHAM

INCOME ELIGIBILITY

Income ($2,000) – Medical Expenses ($2,500)
= -$500

EXEMPT ASSETS

House

Car

HOWARD CUNNINGHAM

EXCESS ASSETS

$44,227

Purchase prepaid funeral $10,000

Improves house $20,000

Gives $13,227 to Family Trust

6 month penalty

Asset	Current Value
Bank accounts	$10,000
CD	$40,000
Brokerage account	$125,000
Howard term life insurance	$0
TOTAL:	$175,000

HELP YOUR CLIENT AVOID FUTURE TRANSFER ISSUES

Penalty is a period of "no help" from the programs.

TRANSFERS

- Gifts
- Sales for less than market value
- Forgoing right to receive property or income.
- Certain financial transactions that fail to meet Medicaid or VA criteria

MEDICAID TRANSFER LENS

1. Is transaction a transfer of assets that might result in penalty?
2. Is the transfer exempt from penalty because it meets a statutory safe harbor?
3. Can the individual prove that the transfer was exclusively for a purpose other than to qualify for Medicaid?
4. What is the uncompensated value?
5. What is the penalty period? (Uncompensated value/$6873 (2022)

60 MONTH LOOKBACK PERIOD (REVIEW PERIOD)

The penalty starts the month the individual is otherwise eligible for Medicaid
(or the month after the transfer for an current Medicaid recipient)

In May 2020, Barney gives his son Bam Bam $30,000 so that Bam Bam and his new wife, Pebbles, have funds for a down payment for a home.

PENALTY PERIOD:

$30,000/$6,873=4.36.

.36*30.42=10.95

4 months, 11 days

Starts when Barney meets all other Medicaid eligibility criteria

VA TRANSFER RULES

36 MONTH REVIEW PERIOD

1. Determine amount of "covered assets"
   - The amount by which the claimant's net worth exceeded the net worth limit if the transfer had not occurred.
   - Transfers do not include persons outside claimant's household.
   - No partial interest.
2. Calculate Penalty
   - Covered assets / Monthly MAPR for Veteran in need of aid and attendance with dependent)

Penalty starts month after transfer occurred.
If multiple transfers, the penalty period begins on the first day of the month following the last transfer.
Max period of 5 years.

In May 2020, Barney gives his son Bam Bam $30,000 so that Bam Bam and his new wife, Pebbles, has funds for a down payment for a home.

PENALTY PERIOD:

Covered assets: $30,000 ($168,489-$30,000).

Penalty period: $30,000/$2431= 12.34

Penalty 13 months and starts June 2020

POTENTIAL TRANSFER PROBLEMS WITH PROMISSORY NOTES

- The repayment term is actuarially sound in accordance with the Period Life Table;

- The agreement provides for payments to be made in equal amounts during the term of the loan, with no deferral of payments and no balloon payments; and

- The promissory note, loan, or mortgage prohibits the cancellation of the balance upon the death of the lender.

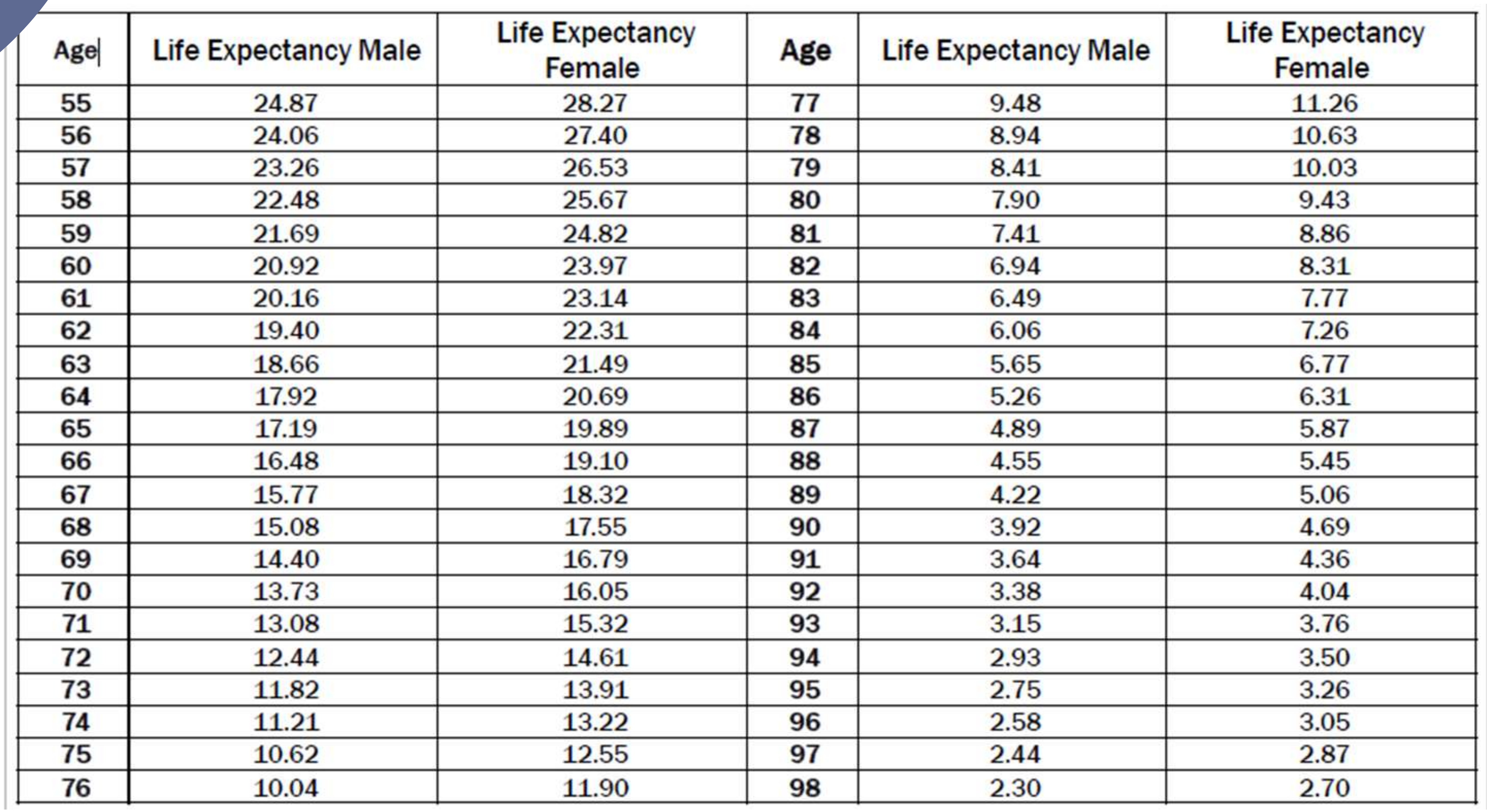
POTENTIAL TRANSFER PROBLEMS WITH LAND SALE CONTRACTS

IHCPPM 2615.55.15 applies promissory note requirements to Land Sale Contracts

Legal?

Potential solution: Novation and substitution

POTENTIAL TRANSFER PROBLEMS



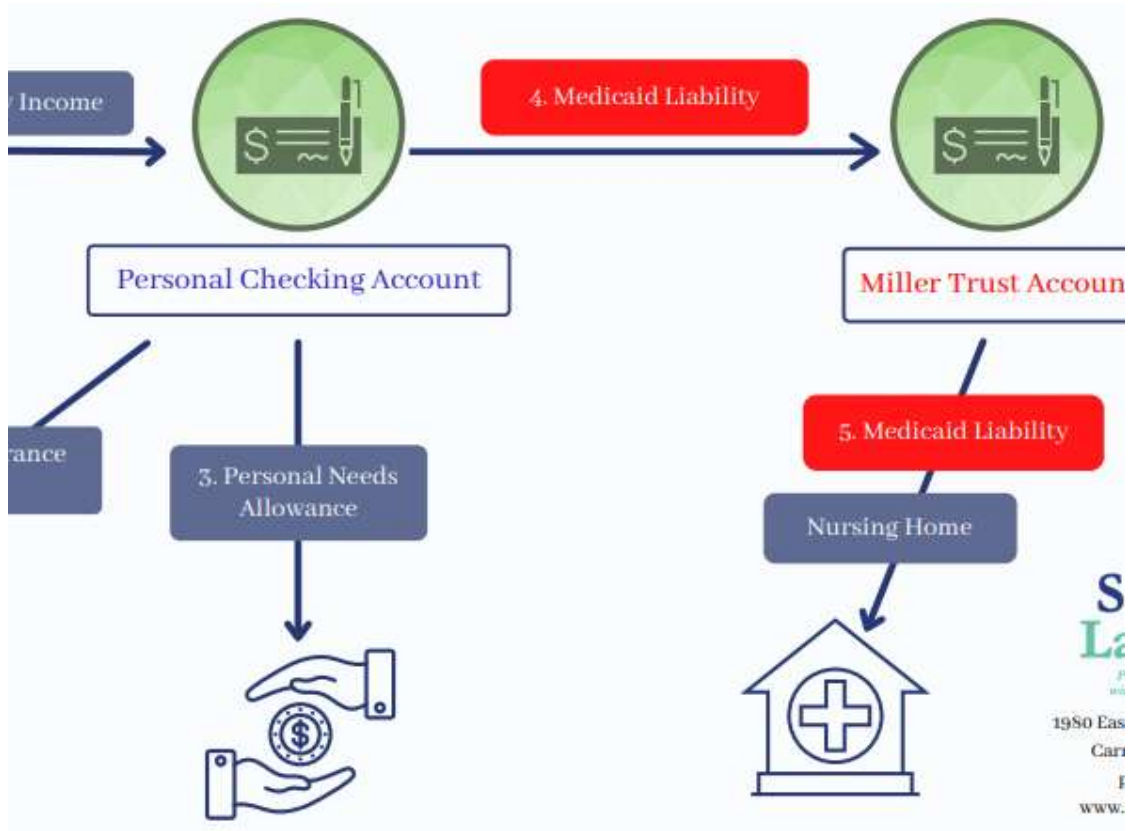
Age	Life Expectancy Male	Life Expectancy Female	Age	Life Expectancy Male	Life Expectancy Female
55	24.87	28.27	77	9.48	11.26
56	24.06	27.40	78	8.94	10.63
57	23.26	26.53	79	8.41	10.03
58	22.48	25.67	80	7.90	9.43
59	21.69	24.82	81	7.41	8.86
60	20.92	23.97	82	6.94	8.31
61	20.16	23.14	83	6.49	7.77
62	19.40	22.31	84	6.06	7.26
63	18.66	21.49	85	5.65	6.77
64	17.92	20.69	86	5.26	6.31
65	17.19	19.89	87	4.89	5.87
66	16.48	19.10	88	4.55	5.45
67	15.77	18.32	89	4.22	5.06
68	15.08	17.55	90	3.92	4.69
69	14.40	16.79	91	3.64	4.36
70	13.73	16.05	92	3.38	4.04
71	13.08	15.32	93	3.15	3.76
72	12.44	14.61	94	2.93	3.50
73	11.82	13.91	95	2.75	3.26
74	11.21	13.22	96	2.58	3.05
75	10.62	12.55	97	2.44	2.87
76	10.04	11.90	98	2.30	2.70

POTENTIAL TRANSFER PROBLEMS WITH ANNUITIES

For any annuity the does not conform to precise Medicaid criteria, the entire purchase price of the annuity is a transfer.

KNOW WHAT A MILLER TRUST IS AND WHAT IT DOES AND DOES NOT DO

QUALIFIED INCOME TRUST (AKA MILLER TRUST) IS SAFE HARBOR VEHICLE FOR APPLICANTS TO USE WHO HAVE INCOME IN EXCESS OF THE INCOME CAP.


Income
4. Medicaid Liability
Personal Checking Account
Miller Trust Accoun
ance
3. Personal Needs Allowance
5. Medicaid Liability
Nursing Home
S
La
1980 Eas
Car
www.

State Template:
www.in.gov/fssa/files/Qualified_Income_Trust_Miller_Trust_template.pdf

KNOW WHAT ABOUT MEDICAID ESTATE RECOVERY AND THOSE EXPENSES INCLUDED

Medical coverage paid under Medicaid after recipient reached age 55.

- Including HIP 2.0
  - Caption rate FSSA pays the medical plan.
    - State must provide notices of potential recovery in advance of enrollment.

KNOW THE IMPORTANCE OF SPECIAL NEEDS TRUSTS IN ESTATE PLANING

Special (supplemental) needs trusts keep assets and income from being considered available for need-based public benefits programs.

First Party

- “Safe harbor” created by statute
- Allows a disabled individual to place his or her own funds in to special needs trust.
- Must pay back State first at recipient’s death up to amount of services provided.

Third Party

- Create by someone other than the beneficiary and fund with assets that did not originally belong to the beneficiary.

Spousal Supplemental Needs

Must be testamentary

- Medicaid trust provisions (42 §USC 1396p(d)) only apply to inter vivos trusts.

ENSURE YOUR CLIENT'S ESTATE PLAN HAS WHAT IT NEEDS FOR PUBLIC BENEFITS PLANNING

- Expanded Gifting Authority.

- Self-dealing permitted.

ING TRUST
&
PLANNING

- Create Irrevocable Trusts.

GUARDIANSHIP AUTHORITY

- Ind. Code § 29-3-9-4.5 This code specifically allows for estate planning which would otherwise not generally be allowed so long as the court considers:

- (1) the financial needs of the protected person and the needs of individuals who are dependent on the protected person for support;
- (2) the interests of creditors;
- (3) the possible reduction of income taxes, estate taxes, inheritance taxes, or other federal, state, or local tax liabilities;
- (4) the eligibility of the protected person for governmental assistance;
- (5) the protected person's previous pattern of giving or level of support;
- (6) the protected person's existing estate plan, if any;
- (7) the protected person's life expectancy and the probability that the guardianship will terminate before the protected person's death; and
- (8) any other factor the court considers relevant

HELP YOUR CLIENT PREPARE FOR FUTURE MEDICAID ELIGIBILITY

- Identify Snapshot Dates and Advise Clients to Gather Data
- **More “aggressive” withdrawals** from IRA

Key Takeaways

Key Takeaways

THANK YOU

StinsonLawFirm

Providing peace of mind with care and compassion.

1980 East 116th Street, Suite 125
Carmel, Indiana 46032

Section Five

Charitable Giving for High-Net Worth Clients

Gina M. Giacone
Ice Miller LLP
Indianapolis, Indiana

Section Five

**Charitable Giving for
High-Net Worth Clients……………………………………….. Gina M. Giacone**