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Everyday Challenges in Estate Planning & Administration

Indiana Continuing Legal Education Forum (ICLEF)

Everyday Challenges in Estate Planning & Administration
October 22, 2021
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INDIANA CONTINUING LEGAL EDUCATION FORUM

Everyday Challenges in Estate Planning & Administration

Agenda

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

8:55 A.M. Welcome and Introduction to the Program
Corbin K. King, Program Chair

9:00 A.M. Creating an Inventory of all Property and Fair Market Value
Amber K. Boyd

9:30 A.M. Medicaid Questions in Estate Planning
Jane E. Null

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

10:45 A.M. Proving Validity of the Will
Amber K. Boyd

11:15 A.M. Supervised v. Unsupervised Administration
Jessica L. Merkel

12:15 P.M. **Adjourn**

October 22, 2021

Everyday Challenges in
Estate Planning & Administration

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Indiana probate lawyer *Corbin King* takes a practical and personal approach to client service in estate planning, probate and elder law issues. With more than two decades of experience, he provides clarity, guidance and counsel to people as they deal with trust and estate matters, probate administration and the unique issues faced by the elderly.

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Indiana University School of Law, Indianapolis, Indiana, J.D. (1989)
McGeorge School of Law, University of the Pacific, Sacramento, California
Indiana University, Bloomington, B.A. (1986)

Amber K. Boyd
Amber Boyd Attorney At Law, Indianapolis

Amber K. Boyd is a versatile professional with strong experience in managing complex litigation matters. She founded Amber K. Boyd Attorney at Law in 2013, where she is the sole practitioner. Ms. Boyd practices in the areas of employment law with a focus on discrimination cases as well as estate planning and probate law.

Ms. Boyd always keeps her eye on winning at trial. She has established a track record of securing large settlements for her clients that often exceed what the defendant or employer had offered. Ms. Boyd clearly explains complex legal issues to her clients and ensures witnesses are well-prepared to testify. She has years of experience litigating in federal and state court, and she has mediated cases through the Equal Employment Opportunity Commission.

Before founding her law firm, Ms. Boyd served as a compliance officer at a national mortgage company in Indianapolis, where she managed 19 law firms nationwide. She evaluated attorney compliance with policies, procedures, service level agreements, and state and federal requirements. Ms. Boyd also provided litigation support to executive management and internal and external counsel, and she completed a root cause analysis of foreclosure issues to identify process improvements.

Ms. Boyd is a member of the Marion County Bar Association, the Indianapolis Bar Association, and the American Bar Association Labor and Employment Division. She is also a board member of the Mapleton-Fall Creek Neighborhood Development Corporation as well as a member of the Delta Sigma Theta Sorority, Inc.Ms. Boyd's practice focuses on employment law, small business law and estate planning.

In 2015, Ms. Boyd was one of 25 attorneys selected to participate in the Indiana State Bar Association's Leadership Development Academy.
Ms. Boyd earned her J.D. from Washington and Lee University School of Law in 2012, where she was an Equal Justice America Legal Services Fellow, President of the Black Law Student Association (BLSA) and member of the BLSA Mock Trial Team. While a member of the BLSA Mock Trial Team, Ms. Boyd led her team to a second place finish at the Mid-Atlantic Thurgood Marshall Mock Trial Competition and quarterfinals at the National Thurgood Marshall Competition.

Ms. Boyd earned her B.A. in Political Science from Dillard University, magna cum laude, in 2009. At Dillard University Ms. Boyd became a member of the Pi Gamma Mu honor society and Delta Sigma Theta Sorority, Inc. and was named 2009 Best All-Around Student for the Division of Social Science.

Ms. Boyd is admitted to practice law in the state of Indiana and the U.S. District Court for the Southern District of Indiana.

Jessica L. Merkel

Jessica is the managing partner at Bunger & Robertson. Her practice includes estate planning; trust and probate administration; trust, estate and guardianship litigation; guardianship administration, and family law including collaborative family law. Jessica was selected as a Rising Star by Super Lawyers in 2009, and 2017-2019 in the areas of Estate Planning and Probate. She is also a registered Domestic Relations and Civil Mediator.

Jessica earned her undergraduate degree, cum laude, from Gettysburg College in Gettysburg, Pennsylvania, and went on to pursue her J.D. at the Indiana University Maurer School of Law. Jessica served on the Sherman Minton Moot Court Board. Jessica received her degree in 2006 and went on to practice at another Bloomington law firm before joining Bunger & Robertson in 2008.

Jessica, a Bloomington native, stays involved in her community by serving as a board member of Monroe County United Ministries, and a Co-Chair for the Thrive by Five Campaign to support the early learning initiatives of The Community Foundation of Bloomington and Monroe County. And just as Jessica helps her clients in planning for and transitioning their families, she has grown and nurtured her own. She and her husband, Clint, are busy and proud parents of three (very active) young children.

Jane Langdon Null
The Law Office of Jane Langdon Null
Of Counsel, Fechtman Law Office
Indianapolis, Indiana

JANE LANGDON NULL has limited her practice to the area of Elder Law for the majority of her legal career. She currently has her own law practice on the northside of Indianapolis in addition to being "Of Counsel" with Fechtman Law Office. Her practice focuses on elder law issues, including guardianship, advance directives, Medicaid planning and application, wills and trusts, probate estate administration and nursing home residents' rights. In addition to advising seniors on many legal issues, she also provides assistance with determining and locating the most appropriate type of care for her clients, ensuring quality care, and coordinating service providers.

Jane received her undergraduate degree from Indiana University and her law degree from DePaul University College of Law in Chicago, Illinois. She was admitted to the Indiana Bar in 1993 and the Michigan Bar in 1999. She is a member of the Probate, Trust and Property, Elder Law and Social Security Sections of the Indiana State Bar Association. She is serving on the Board of the Indiana Chapter of the National Academy of Elder Law Attorneys (IN-NAELA).

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Amber K. Boyd
Attorney at Law
Indianapolis, Indiana

Section One

Creating an Inventory……………………………………….. Amber K. Boyd

PowerPoint Presentation

Creating an Inventory

Amber K. Boyd Moorman

Amber K. Boyd Attorney at Law

Marshalling Assets

- Personal Representative’s Statutory Authority
- Initial Steps
- Financial Accounts
- IRA’s, Annuities, Life Insurance
- Obtaining Tax ID Number
- Safe Deposit Boxes
- Real Estate

Personal Representative's Statutory Authority

Indiana Code Title 29. Probate § 29-1-13-1

- 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.

Initial Steps

- Forward all mail;
- Review decedent's tax returns; and
- Determine if decedent has a safe deposit box.

Financial Accounts

- Contact financial institution;
- Determine the account balance; and
- Liquidate accounts.

IRA’s, Annuities, Life Insurance

- Typically, a beneficiary is designated;
- What happens when there is no beneficiary listed.

Obtaining Tax ID Number

- www.irs.gov

Safe Deposit Boxes

- Sec. 1.5 . (a) Upon the death of an individual, a financial institution shall grant access in the following order of priority to a safe deposit box leased by the individual at the time of the individual's death:
- (1) A surviving joint lessee of the safe deposit box, upon the presentation of proof of the individual's status as a joint lessee.
- (2) The personal representative of the individual's estate, upon the presentation of letters testamentary or letters of administration.
- (3) The personal representative named in the individual's will, upon the presentation of an affidavit meeting the requirements of subsection (c) if a probate estate has not been opened.
- (4) The trustee of a trust created by the individual that was revocable during the individual's life, upon the presentation of an affidavit meeting the requirements of subsection (c) if a probate estate has not been opened.
- (5) Any other individual, upon the presentation of a court order directing access to the safe deposit box.

Real Estate

- Determine ownership of real estate, and
- Marion County Assessors Office.

Drafting the Inventory

Inventory

- Real property, with plat or survey description, and if a homestead, designated as such;
- Furniture and household goods;
- Emblements and annual crops raised by labor;
- Corporate stocks including the class, the par value or that it has no par value, if preferred stock the dividend rate;
- Mortgages, bonds, notes or other written evidences of debt or of ownership described by name of debtor, recording data, and other identification;
- Bank accounts, money, and insurance policies if payable to the estate of the decedent or to his personal representative;
- All other personal property accurately identified, including the decedent's proportionate share in any partnership, but no inventory of the partnership property shall be required.

Appraisals

- Real Property
- Personal Property

Vehicles

- Kelly Blue Book Value

Section Two

Medicaid Issues in Estate Planning

Jane E. Null
The Law Office of Jane Langdon Null
Indianapolis, Indiana

Section Two

Medicaid Issues in Estate Planning………………………... Jane E. Null

MEDICAID ISSUES IN ESTATE PLANNING

There are many instances in which you may encounter "Medicaid Issues" in your estate planning practice. Half of the battle is knowing what questions to ask in order to spot current or potential Medicaid issues. Usually, it’s not as simple as dealing with a client who is currently disabled- that's an easy one. One must consider the possibility that the client may have a disabled spouse, child, or grandchild, now or in the future, and how that could impact the client's estate plan. Then one must also consider if the client has a likelihood of becoming disabled in the future (possibly due to a pre-existing medical condition) and if so, does the client have the means to private pay for long term care in the face of a medical crisis. All of these scenarios bring about unique challenges that cannot be solved with a simple will or basic revocable living trust.

I. MEDICAID

Medicaid is a joint program involving both federal and state governments. In order to qualify for services, a person must meet specific asset, income, and personal criteria. In addition to promulgated Federal and State regulations, the Indiana Family and Social Services, Division of Family Resources has a manual used by its caseworkers to implement the program. The manual can be accessed online at https://www.in.gov/fssa/ompp/forms-documents-and-tools2/medicaid-eligibility-policy-manual/. There are about 37 different categories of Medicaid but this paper focuses primarily on Medicaid for the aged and disabled.

II. MEDICAID RELATED ESTATE PLANNING ISSUES FACING THE CLIENT WHO IS CURRENTLY DISABLED

A. Social Security Disability Income (SSDI) vs. Social Security Supplemental Security Income (SSI)

Several federal benefits programs provide financial assistance to seniors and persons living with disabilities. Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI) are two of the most common programs from the Social Security Administration (SSA). SSI provides minimum basic financial assistance to older adults and persons with disabilities (regardless of age) with very limited income and resources. Federal SSI benefits from the Social Security Administration are often supplemented by state programs. In Indiana, SSI recipients are automatically eligible for Medicaid benefits. SSDI supports individuals who are disabled and have a qualifying work history, either through their own employment or a family member (spouse/parent). SSDI is not a means-tested benefit; therefore, most of the estate planning tools discussed in this paper are not necessary for the client who is receiving SSDI. A person with SSDI will automatically qualify for Medicare after 24 months of receiving disability payments (individuals with amyotrophic lateral sclerosis [ALS] are eligible for Medicare immediately). It is possible that if an individual has both limited income/resources and a work history, he or she can qualify for both benefits.

Social Security uses a strict definition of disability that relates to an individual's ability to perform work and the projected length of the disability. Federal law defines "disability" as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be **expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months**. It requires that the applicant submit extensive medical records to support the application. A short-term or partial disability does not qualify for SSI or SSDI.

B. The Client Who is Receiving Supplemental Security Income (SSI)

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

[1] 42 U.S.C. §1396p(d)(4).

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

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

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

1. The recipient of public benefits who will be the trust beneficiary **must be less than sixty-five (65) years** old at the time the trust is established.

2. The special needs trust must be established by the recipient of public benefits him or herself, by a parent, grandparent, or guardian of the recipient of public benefits, or by a court.

3. The special needs trust must be irrevocable.

4. The trust must include a provision that states that any funds remaining in the trust at the death of the trust beneficiary (the recipient of public benefits) are available to reimburse the State for its Medicaid costs on behalf of that trust beneficiary.

a. The "Two Ten Buck Rule"

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

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

Second, the SSA thinks that Indiana's statutory version of the Doctrine of Worthier Title indicates that a trust that purports to be irrevocable is actually revocable, if there is only one beneficiary of the trust. The SSA does not consider the state to be a trust beneficiary by way of the "pay-back" clause, and the SSA does not accept a general category of persons (such as "heirs at law") to be a trust beneficiary, so it is important to make certain in these cases that there are at least two specific named beneficiaries of the trust. Otherwise, the SSA will determine that the trust is revocable, which would obviously disqualify the trust beneficiary from SSI

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

b. Legal Authority to Establish a (d)(4)(A)

When the Omnibus Budget Reconciliation Act of 1993 (OBRA '93) was passed, there was apparently a mistake in the wording of the statute as it relates to special needs trusts, because the individual him or herself was not included in the list of individuals and entities eligible to establish a special needs trust. Considering the fact that OBRA '93 was passed more than 25 years ago, a fix for this mistake has been a long time coming!

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

In addition, a (d)(4)(A) trust may be established by a parent, a grandparent, a guardian, or a court. However, it is important to note that the Social Security Administration requires a parent or grandparent to have some sort of legal authority to establish the trust. So, in the case of a minor or an incapacitated adult, a parent or grandparent must get that legal authority from a court, through a guardianship or a protective order.

2. The Pooled Income Trust

Another form of a self-settled special needs trust is a pooled income special needs trust, authorized under 42 USC 1396p(d)(4)(C). Like all special needs trusts, a pooled special needs trust allows an individual access to financial resources to enhance their life while safeguarding public benefits that provide access to vital services. Administered by a non-profit, a pooled trust combines the assets of many individuals for investment purposes while maintaining individual accounts for each beneficiary. At the death of the trust beneficiary, the trust is allowed to retain a portion of any remaining funds for the benefit of other beneficiaries of the pooled trust, prior to the reimbursement to the State.

The pooled trust also can accommodate a smaller trust estate that cannot afford higher bank trustee administration fees. The pooled trust can be the answer to concerns regarding the administration of the trust. The administration of the trust is provided by the pooled trust, which relieves the burden from the family members or other caregivers.

The Federal law allows pooled trusts to be used for disabled persons and does NOT contain the additional language that the disabled person must be under age 65. Thus, a person over age 65 can enroll in a pooled trust and those funds will not be a countable resource in determining Medicaid eligibility. There has been concern in Indiana that FSSA could impose a penalty on assets placed in a pooled trust as the State law is a little unclear on this issue, but to date this has been their position.

In Indiana The Arc Master Trust is the most prominent pooled income trust. The Arc offers families and people of all disabilities an experienced, professional option for special needs trust administration at an affordable price, allowing resources to be saved and easily used for qualified disability and personal expenses. They offer first party and third-party special needs trust options. The Arc Trust retains one-half (1/2) of any funds remaining at the death of the trust beneficiary in the case of a first party pooled income trust. See https://www.thearctrust.org/pooled-trust.

3. Establishing and Funding an ABLE Account

In 2014, the Achieving a Better Life Experience (ABLE) Act was signed into law. The ABLE Act allows people with disabilities to create tax-advantaged savings accounts called ABLE accounts. The money in ABLE accounts can be used for qualified disability-related expenses, such as education, housing and transportation. Most importantly, ABLE accounts allow people with disabilities to save money without losing their eligibility for federally funded benefits such as Medicaid or Supplemental Security Income (SSI). This transformative law aims to ease financial strains faced by individuals with disabilities by making tax-free savings accounts available for qualified disability expenses. The most important specifications are as follows:

a. Funds contributed into these accounts will not adversely affect eligibility for most means-tested benefits.

b. ABLE accounts are meant to supplement, not supplant, benefits provided through private insurance, Medicaid, Supplemental Security Income (SSI) benefits, employment and other sources.

c. Typically, an ABLE account may not receive annual contributions in excess of the annual gift tax exemption under 26 U.S.C. §2503(b); however, account owners who earn income may contribute beyond this limit.

d. There are eligibility requirements related to opening an ABLE account. Currently, an individual must have a **<u>disability which began before age 26.</u>**

e. Funds in the account may be used for "qualified disability expenses." Examples include, but are not limited to, education, housing, transportation, employment training and support, assistive technology, personal support services, health, prevention and wellness, financial management and administrative services, legal fees, funeral and burial expenses.

f. Assets in and distributions for qualified disability expenses will be disregarded or given special treatment when determining eligibility for most federal means-tested benefits (including SSI benefits and Medicaid).

g. Contributions to an individual's ABLE account may be made by any "person." A person is defined as an individual, trust, estate, partnership, association, company or corporation.

h. The funds remaining in an ABLE account upon the death of the designated beneficiary must be paid back to the state (to reimburse the state for funds expended on behalf of the beneficiary since the inception of the account), even if the funds were contributed by a third party.

III. MEDICAID RELATED ESTATE PLANNING ISSUES FACING THE CLIENT WITH A DISABLED HEIR

A. Third-Party Special Needs Trusts.

When the special needs trust holds assets that originally belonged to someone other than the disabled individual (a parent or grandparent, for example) the trust **does not** need to include a provision that states that any funds remaining in the trust at the death of the trust beneficiary (the recipient of public benefits) are available to reimburse the State for its Medicaid costs on behalf of that trust beneficiary since the time that the trust was established.

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

B. Third - Party Pooled Special Needs Trust

Another form of a third-party special needs trust is a pooled income special needs trust. Like other third-party trusts, this trust allows parents or other relatives to include the disabled loved one in their estate planning, while protecting the loved ones means tested public benefits. And, in the case of a pooled special needs trust, such as The Arc of Indiana Master Trust, the trust does not necessarily retain a portion of any remaining funds for the benefit of other beneficiaries of the pooled trust. In fact, The Arc retains none of the funds remaining at the death of the trust beneficiary, unless the individual who funded the trust wishes to leave any of the remaining funds for the benefit of other beneficiaries of The Arc. When a family member wishes to fund a pooled income trust, the Joinder Agreement is completed with the non-profit trust (typically the Arc Master Trust in Indiana) and the language referencing the Trust is incorporated into the estate plan to provide for the funding of the trust.

C. A Testamentary Special Needs Trust for a Surviving Spouse Who is Receiving Medicaid Benefits

Testamentary trusts are trusts created under a will. The Medicaid rules provide a special "safe harbor" for testamentary trusts created by a deceased spouse for the benefit of a surviving spouse. The assets of these trusts are treated as available to the Medicaid applicant only to the extent that the trustee has an obligation to pay for the applicant's support. If payments are solely at the trustee's discretion, they are considered unavailable. Therefore, these testamentary trusts can provide a strategic path for community spouses to leave funds for their surviving institutionalized husband or wife that can be used to pay for services that are not covered by Medicaid. These may include extra therapy, special equipment, evaluation by medical specialists or others, legal fees, additional home health care, or transfers to another nursing home if that became necessary.

405 IAC 2-3-1.1 includes language regarding a Medicaid transfer penalty that will be implemented if the Medicaid applicant or recipient failed to take action to receive assets which they were entitled to receive by law. This aspect of the rule will impact a nursing home spouse, if the community spouse happens to be the first to die, and he or she does not leave enough to the nursing home spouse to satisfy the spousal allowance specified by Ind. Code §1-4-1 and/or the statutory

right of election specified by Ind. Code §1-3-1. The rule will invoke a Medicaid transfer penalty, even if the surviving, nursing home spouse simply fails to elect to take against the Will of the deceased community spouse. However, the rule also provides knowledgeable counsel with a very effective solution to the potential problem of the Medicaid transfer penalty. Under 405 IAC 2-3-1.1(i)(4), the rule states:

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

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

A testamentary special needs trust will not cause a problem with the ongoing Medicaid eligibility of the nursing home spouse, because the special needs language leaves all of the discretion regarding distributions to the trustee, and the trust assets are not "available" to the Medicaid recipient. Counsel should be sure to fund the special needs trust with enough of the community spouse's assets to satisfy the spousal allowance and the statutory right of election relevant to the particular case. The author has recently been using the following language for this purpose:

> "In the event my *husband/wife, *, survives me by thirty (30) days, then I devise and bequeath to *, as Trustee, in trust for the benefit of *(spouse), an amount sufficient to prevent any period of ineligibility for Medicaid for *(spouse) based on the statutory

rights of a spouse to elect to Take Against the Will of a deceased spouse as set forth in Ind. Code §29-1-3, or any successor section, and also based on the Surviving Spouse Allowance as set forth in Ind. Code §29-1-4, or any successor section."

IV. MEDICAID RELATED ESTATE PLANNING ISSUES FOR THE CLIENT LOOKING TO PRESERVE ASSETS PRIOR TO FACING A LONG TERM CARE CRISIS

A. Medicaid Planning Done Five Years Prior to a Medicaid Application

For all transfers made via outright gift or by means of an irrevocable trust the look-back period will be five (5) years. Any transfers made five years prior to an application for Medicaid are off the table and do not need to be disclosed at the time of application.

One of the biggest tools used in this situation is the irrevocable trust with or without a preservation of income. The general concept of trusts in the Medicaid planning world is that the assets placed in a trust are either considered as an available resource, in the case of a revocable inter vivos trust, or are considered to have been transferred subject to penalty, in the case of most irrevocable trusts.

1. The Use of an Irrevocable Trust

Benefits of a Medicaid protection trust to a person seeking Medicaid assistance include asset exemption for themselves or a spouse (after the five year look-back period or Medicaid penalty period). Such trusts can provide income to his or her spouse while protecting the principal placed in the trust. In addition to being irrevocable, the trust corpus must not be made available to the grantor under any circumstances. If the Grantor can benefit from the income, then the income is countable but the corpus remains unavailable. At the death of the grantor, the principal is paid to the grantor's heirs. To avoid Medicaid's "look-back period," the trust must be funded at least five years before applying for Medicaid benefits. The actual period of ineligibility depends on the amount transferred to the trust.

One should be aware of the drawbacks to such an arrangement. It is very rigid, so the grantor cannot gain access to the trust funds even if needed for some other purpose. For this reason, one should always leave an ample cushion of ready funds outside the trust. Often the trust beneficiaries, typically the Grantor's children, will use the trust principal to benefit the grantor, but there cannot be a legal requirement that they do so.

One tax advantage of these trusts is that if they contain property that has increased in value, such as real estate or stock, the Grantor can retain a "special testamentary power of appointment" so that the beneficiaries receive the property with a step-up in basis at your death. This will also prevent the need to file a gift tax return upon the funding of the trust.

B. Outright Gifting to Family Members

If a person makes an outright gift instead of using a Medicaid protection trust the preservation of the gifted money faces many dangers: the person receiving the funds could die, in which case the assets would pass through his or her estate, the person may need public benefits in the future, may lose the money to his or her own creditors or in a divorce or bankruptcy, or have a falling out with the donor. With that being said, the use of gifts remain a large part of an elder law attorney's Medicaid planning practice when planning within five years of a Medicaid application.

C. Medicaid Planning Within Five Years of a Medicaid Application

Most Medicaid planning done within five years of a Medicaid application will involve a Medicaid penalty period, with some exceptions discussed below. Indiana defines an asset as any income or resource to which the applicant or spouse is entitled.

1. **The Definition of a Transfer in the Medicaid Planning World**

A "transfer" of an asset is an event in which any asset is transferred, sold, given away, or otherwise disposed of as follows:

(1) Transfers include any total or partial divestiture of control or access, including, but not limited to, any of the following:

- (a) Converting an asset from individual to joint ownership if the transferor is giving up some control or access to the property.
- (b) Disposing of a portion or partial interest in the asset while retaining an interest.
- (c) Disclaiming an interest in an estate or failing to elect against a spouse's will and claim the spousal allowance.

2. How the Penalty Period is Determined

There is no correlation between the annual Federal gift tax exemption under 26 U.S.C. §2503(b) and the Medicaid gifting regulations. A Medicaid applicant is allowed to make a gift or gifts of up to **$1,200 total** per year to a family member or members or a non-profit organization without penalty. Beyond this, the possible result of a transfer *for less than adequate consideration* is the imposition of a period of Medicaid ineligibility, or a "penalty period", which is determined based on the amount of the transfer, the date of the transfer, and whether or not adequate consideration was received.

A penalty period is only imposed if the applicant is residing in a nursing home or hospital or receiving Home and Community-Based services under specified waivers; however, a penalty period is not imposed for applicants residing at home and receiving traditional Medicaid. IHCPPM Manual 2640.10.05.

3. How the Penalty Period Start Date is Determined

a. For transfers of property occurring on and after November 1, 2009, the penalty period will begin on the later of:

(i) The date on which the individual would be otherwise eligible for long term care services under Medicaid based on an approved application were it not for the imposition of the penalty period; or

(ii) The first day of the month during which assets have been transferred for less than fair market value; and

(iii) The penalty does not occur during any other transfer of property penalty.

The penalty will continue to run even if the applicant is no longer receiving long term care services.

4. How the Penalty Period is Calculated

(a) All transfers for less than adequate consideration are lumped together and one penalty period is established. Penalty periods are no longer rounded down so partial month penalty periods will be established. The total amount of the transfer is divided by the average monthly cost of nursing home care. This figure changes annually and is currently set at $6,681.00.

5. Transfers Not Subject to Penalty

Some transfers are not subject to the imposition of a penalty period, even if the transfer is for less than adequate consideration within five years of a Medicaid application. Some exempt transfers include:

a. Any transfers between spouses.

b. Any transfers between a parent and a disabled child.

c. Any transfers to a trust for the sole benefit of a spouse or a disabled child, as long as the child meets the definition for disabled under the SSI guidelines. 42 U.S.C. Sec.1396p(c)(2)(B).

d. Any Transfer to a trust established for the sole benefit of a disabled person under age sixty-five. Sec. 1396p(c)(2)(B)(iv).

e. The transfer of the home to a child under age twenty-one, a child who was residing in the home for at least two years before the person becomes institutionalized and who provided care which allowed the person to live at home rather than in an institution, OR to a sibling with an equity interest in the home who resided in the home for at least one year before the person becomes institutionalized. IHCPPM Manual 2640.10.15.05.

f. Any transfers made exclusively for reasons not related to Medicaid eligibility, estate recovery or a lien. IHCPPM Manual 2640.10.30

g. If the transferred assets that created the penalty period are returned, no penalty period is imposed.

h. If the imposition of a transfer penalty would impose an undue hardship on the applicant.

V. MEDICAID RELATED ESTATE PLANNING ISSUES FACING THE INCAPACITATED CLIENT WHO IS IN IMMEDIATE NEED OF ESTATE OR MEDICAID PLANNING

A. The Use of the Client's Durable Power of Attorney

Although an attorney-in-fact cannot execute a Last Will and Testament for the principal. one can use many other estate planning techniques with a properly drafted durable power of attorney.

1. Create and Fund a Revocable Living Trust pursuant to I.C 30-5-5-15. The general language under this section only confers the power to an agent to establish a revocable trust. I suggest adding additional language to most power of attorney documents conferring additional power to create and fund an irrevocable trust, and more particularly a Qualified Income Trust or "Miller" trust for the purpose of qualifying the principal for Medicaid benefits.
2. Review the gifting provisions of the client's power of attorney. When drafting power of attorney documents for clients who may need Medicaid or Estate planning in the future consider adding language which allows for gifting to the agent of an amount in excess of the annual gift tax exclusion amount.

B. Request Permission to Conduct Estate or Medicaid Planning via a Court Order in a Guardianship Proceeding

A guardian can conduct estate or Medicaid planning for a protected individual who lacks testamentary capacity. Being under a guardianship in Indiana does not necessarily eliminate the possibility that an individual can create a Last Will and Testament as the standard for testamentary capacity is different than the standard of “incompetency or incapacity” as defined in the guardianship code. If there are any concerns that the individual’s will may come under scrutiny by any heirs then the fact that the testator had been deemed “incapacitated” prior to drafting the document may be of concern. The basic tenets of testamentary capacity are that at the time of the making of a will, the testator must have sufficient strength of mind and memory to know the extent and value of his property, to know the number and names of those who are the natural objects of his bounty and their deserts with reference to their conduct towards and treatment of him, and the ability to retain the aforementioned fact in mind long enough to have his Will prepared and executed. See *Love v. Harris, 127 Ind. App. 505, 143 N.E. 2d. 450 (1957).*

Pursuant to I.C. 29-3-9-4.5 a guardian can conduct estate or Medicaid planning after notice to interested persons and upon authorization of the court, if the protected person has been found by the court to lack testamentary capacity. Under this statute the court may authorize the guardian to do any of the following:

(1) Make gifts.

(2) Exercise any power with respect to transfer on death or payable on death transfers that is described in IC 30-5-5-7.5.

(3) Convey, release, or disclaim contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entireties.

(4) Exercise or release a power of appointment.

(5) Create a revocable or irrevocable trust of all or part of the property of the estate, including a trust that extends beyond the duration of the guardianship.

(6) Revoke or amend a trust that is revocable by the protected person.

(7) Exercise rights to elect options and change beneficiaries under insurance policies, retirement plans, and annuities.

(8) Surrender an insurance policy or annuity for its cash value.

(9) Exercise any right to an elective share in the estate of the protected person's deceased spouse.

(10) Renounce or disclaim any interest by testate or intestate succession or by transfer inter vivos.

Before approving a guardian's exercise of a power listed above, the court shall consider primarily the decision that the protected person would have made, to the extent that the decision of the protected person can be ascertained. If the protected person has a will, the protected person's distribution of assets under the will is prima facie evidence of the protected person's intent. The court shall also consider:

(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.

(c) A guardian may examine and receive, at the expense of the guardian, copies of the following documents of the protected person:

(1) A will.

(2) A trust.

(3) A power of attorney.

(4) A health care appointment.

(5) An advance directive.

(6) Any other estate planning document.

VI. BASIC MEDICAID ELIGIBILITY RULES FOR THE AGED AND DISABLED

A. <u>Income Rules</u> for Individuals Receiving Home and Community Based Waiver Services or Long-Term Care Services

A procedure called the Special Income Level (SIL), went into effect July

2006 for Home and Community Based Waiver Services and in June 2014 for institutionalized Medicaid recipients. This budget calculation allows the applicant/recipient to have up to three (3) times the SSI maximum. This amount as of January 2021 is $2,382 per month. If the applicant/recipient's income is above this level, the person may qualify for Medicaid but they will need to establish a Qualified Income Trust, or "Miller Trust".

1. Miller Trusts

If an applicant's income is over the SIL they cannot qualify for Medicaid unless they use a "Miller Trust" into which all of that person's income, or the amount of the income exceeding the Special Income Level, is placed into the trust. Essentially, once the trust is complete, the amount by which the gross income exceeds the Special Income Level is set as the spend down amount for a waiver recipient and a spend down liability amount for an institutionalized recipient. The trust can be used to pay the spend down amount, the monthly nursing home liability, the spousal allowance, if any, or any other deduction allowed by Medicaid. Any income retained in the trust is paid to the State at the death of the recipient to help pay back the Medicaid assistance received.

B. Basic Medicaid Eligibility <u>Resource</u> Rules

Eligibility for a month is based on the amount of countable resources owned on the first moment of the first day of the month, with a few exceptions. IHCPPM Manual 2605.20.10. Income does not count as a resource in the month that it is received, but income that remains until the following month becomes a resource.

In order to obtain Medicaid benefits, a single person is limited to $2,000 in countable resources and a married couple is limited to $3,000 if both parties are applying for Medicaid. The resources of both spouses are counted toward the resource limit when the applicant is married. If the applicant lives at home, the assets of everyone in the household may be considered. IHCPPM Manual 3005.15.00.

1. Countable Resources

In order to be counted towards the applicant's resource limit, the resource must be available. The resource is considered to be available if the individual has the unrestricted right, authority, or ability to liquidate the property or his share of the property. The following resources will be counted towards the Medicaid recipients and his or her spouse's resource limit:

a. Cash- except income in month of receipt is not counted as a resource.

b. Bank Accounts / CD / certain types of annuities

c. Stocks and Bonds

d. Revocable burial accounts

e. Cash surrender value of life insurance if the spouse or applicant is the owner of the policy.

f. Real estate that does not meet one of the exempt categories outlined below.

g. A negotiable mortgage, loan or promissory note payable to the applicant or spouse.

h. A down payment received on a land sale contract.

8. Trusts- Eligibility rules as discussed in prior Articles of this paper.

2. Exempt Resources

The following resources are not counted as part of applicant's total allowable assets:

a. Life insurance policies irrevocably assigned to a funeral home.

b An irrevocable funeral trust set up under I.C. 30-2-10.

c. Burial plot.

d. One Motor vehicle of any value using the wholesale value.

e. Business accounts- when funds in a bank account are titled as a business account, such funds are exempt.

f. Income producing personal property, such as farm machinery, livestock, tools, equipment, business inventory, furnishings and appliances in rental property and a vehicle used in a business. This does not include income- producing investments, such as CD's and stocks.

g. Certain trust as previously discussed in this paper.

h. Household goods and personal effects.

i. Certain types of real estate

i. The home if it is the principal resident of the applicant or his spouse, minor children, adult disabled child, or blind child and the equity value does not exceed $603,000.

-remains exempt if one of the persons listed above <u>intends</u> to return to the home (may need verification from doctor)

ii. Income producing real estate if the income is greater than the expenses of ownership.

iii. Real property offered for sale or rent at fair market value.

iv. Real property that is used to produce food for home consumption.

v. Real estate owned jointly with rights of survivorship so long as the joint owner is not financially responsible for the applicant and the joint owner refuses to sell the property.

VII. THE SPOUSAL IMPOVERISHMENT RULES (SIR)

The Medicare Catastrophic Coverage Act of 1988 changed the Medicaid program in order to allow one spouse to obtain Medicaid benefits without impoverishing the other spouse. However, these rules only apply when one spouse is residing in a nursing home and the other spouse remains in the community or if both spouses are residing in the community and one spouse is applying for assistance under a Home and community Based Waiver. The Institutionalized Spouse's eligibility is determined based on resource and income limits.

A. VALUATION OF RESOURCES UNDER THE SIR

All countable assets are valued on the first day of the first period of continuous institutionalization, in a hospital or nursing facility, of at least 30 consecutive days. Assets are valued on this day even if the applicant is not applying for Medicaid at this time. This date is known as the "Resource Assessment Date" or "Snapshot Date" and determines the amount used to calculate the Spousal Resource Allowance. The Spousal Resource Allowance does not increase even if the resources increase after this date. Resources of both spouses are counted based on the same rules as outlined above, with the following additional exceptions:

(1) Up to $2,000 for each spouse of separately identifiable funds or assets which have been set aside for burial.

(2) Real property owned solely by the Community Spouse or held jointly by the Community Spouse with persons other than the Institutionalized Spouse.

(3) Retirement accounts owned by the community spouse.

B. COMPUTING THE COMMUNITY SPOUSAL RESOURCE ALLOWANCE

The Community Spousal Resource Allowance is one-half of the total countable assets on the Resource Assessment date, with a minimum of $26,076 and a maximum of $130,380. These amounts are adjusted on January 1st of each calendar year based on inflation. A court order or a fair hearing can increase this amount under certain circumstances. The Institutional Spouse's countable resources must be placed in the sole name of the Community Spouse within ninety

(90) days of a determination of Medicaid eligibility. Any new resources that the Community Spouse gains after the Institutionalized Spouse is on Medicaid are not counted and will not affect the Institutionalized Spouse's eligibility or the Community Spouse's resource allowance. The Institutionalized Spouse is allowed $2,000.00, the same number of countable resources as a single person residing in a nursing home.

VIII. CONCLUSION

Medicaid issues can directly or indirectly impact an estate planning client's course of action. The best practice of an estate planning attorney is to thoroughly analyze the family dynamics of the client in order to parse out any potential Medicaid pitfalls presently facing the client, or ones looming in the future.

To practice in the area of "Medicaid Planning" requires a thorough knowledge of the Federal and State Medicaid eligibility rules, as well as an understanding of the case processing system. Most elderly or disabled Medicaid applicants and their families are very frustrated, overwhelmed, and intimidated by the eligibility and application process. The assistance of an attorney who is knowledgeable in this area can be invaluable resource for an applicant.

Medicaid Issues in Estate Planning

Presented by:

Jane Langdon Null,

Attorney at Law,

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- Half of the battle is knowing what questions to ask.

- Consider the possibility that the client may have a disabled spouse, child, or grandchild, now or in the future, and how that could impact the client's estate plan.

- Consider if the client has a likelihood of becoming disabled in the future (possibly due to a pre-existing medical condition), or has the means to private pay for long term care in the face of a medical crisis.

WHAT IS MEDICAID ANYWAY?????

- Medicaid is a joint program involving both federal and state governments.
- In order to qualify for services, a person must meet specific asset, income, and personal criteria (usually some form of a disability).
- There are approx. 37 different categories of Medicaid but this presentation focuses primarily on Medicaid for the aged and disabled.

MEDICAID RELATED ESTATE PLANNING ISSUES FACING THE CLIENT WHO IS CURRENTLY DISABLED

- Client who is receiving Social Security Disability Income (SSDI) vs. Social Security Supplemental Security Income (SSI)

- Know the difference!!!!!!

- Federal law defines “disability” as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be **expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.** This applies to both programs**.**

- SSI provides minimum basic financial assistance to older adults and persons with disabilities (regardless of age) with very limited income and resources. In Indiana, SSI recipients are automatically eligible for Medicaid benefits.

- SSDI supports individuals who are disabled and have a qualifying work history, either through their own employment or a family member (spouse/parent). Not a means-tested benefit so no need for special planning usually.

The Client Who is Receiving Supplemental Security Income (SSI) can benefit from a Self-Settled or "First Party" Special Needs Trust

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

- The trustee of the special needs trust must have sole and absolute discretion over the use of the trust funds for the sole benefit of the recipient of public benefits.

Criteria for A Self- Settled Special Needs Trust:

1. The recipient of public benefits **must be less than sixty-five (65) years** old at the time the trust is established.

2. The special needs trust must be established by the recipient of public benefits him or herself (if legally competent) by a parent, grandparent, or guardian, or by a court. A parent or grandparent must establish through a guardianship or protective order.

3. The special needs trust must be irrevocable.

4. The trust must include a PAYBACK CLAUSE which is a provision that states that any funds remaining in the trust at the death of the trust beneficiary (the recipient of public benefits) are available to reimburse the State for its Medicaid costs on behalf of that trust beneficiary.

The “Two Ten Buck Rule”

Have the parent or grandparent who establishes the trust put $10 of his or her own money into the trust before the trust beneficiary adds his or her own funds to the trust. Then, specify that, when the trust beneficiary dies, someone else gets $10, after the pay-back to the state but before the heirs at law get the balance, if any.

Another option for a Self-Settled SNT: Pooled Income Trust

- Administered by a non-profit, a pooled trust combines the assets of many individuals for investment purposes while maintaining individual accounts for each beneficiary. At the death of the trust beneficiary, the trust is allowed to retain a portion of any remaining funds for the benefit of other beneficiaries of the pooled trust, prior to the reimbursement to the State.

- The Arc of Indiana is the most prominent pooled income trust in Indiana. They retain one-half (1/2) of any funds remaining at the death of the trust beneficiary.

<u>Advantages of a Pooled Income Trust:</u>

- The pooled trust also can accommodate a smaller trust estate that cannot afford higher bank trustee administration fees.
- The administration of the trust is provided by the pooled trust, which relieves the burden from the family members or other caregivers.
- A person <u>over age 65</u> can enroll in a pooled trust and those funds will not be a countable resource in determining Medicaid eligibility.

Disabled Clients May Consider Establishing and Funding an ABLE Account

- ✓ The ABLE Act allows people with disabilities to create tax-advantaged savings accounts called ABLE accounts.
- ✓ The money in ABLE accounts can be used for qualified disability-related expenses, such as education, housing and transportation. Most importantly, ABLE accounts allow people with disabilities to save a certain amount of money without losing their eligibility for federally funded benefits such as Medicaid or Supplemental Security Income (SSI).

ABLE ACCOUNTS CONTINUED:

- Typically, an ABLE account may not receive annual contributions in excess of the annual gift tax exemption under 26 U.S.C. §2503(b); however, account owners who earn income may contribute beyond this limit.

- There are eligibility requirements related to opening an ABLE account. Currently, an individual must have a **disability which began before age 26.**

ABLE ACCOUNTS CONTINUED:

- Funds in the account may be used for "qualified disability expenses" as outlined in the paper.

- Contributions may be made by any "person." A person is defined as an individual, trust, estate, partnership, association, company or corporation.

- The funds remaining in an ABLE account upon the death of the designated beneficiary must be paid back to the state since the inception of the account), even if the funds were contributed by a third party.

THE CLIENT WITH A DISABLED HEIR

- <u>Third Party SNT</u>
- Same principles apply as in the first party trust in that the assets are not counted in a Medicaid eligibility determination.
- The trust holds assets from another party and NO payback clause is required.

- <u>Pooled Income SNT</u>
- The Joinder Agreement is completed with the non-profit trust (typically the Arc Master Trust in Indiana) and the language referencing the Trust is incorporated into the estate plan to provide for the funding of the trust.

Estate Planning Tip for the Client Whose Spouse is Receiving Medicaid Benefits:

- **A <u>Testamentary</u> Special Needs Trust is essential for a Client whose spouse is receiving Medicaid benefits.**

- The Medicaid rules provide a special "safe harbor" for testamentary trusts created by a deceased spouse for the benefit of a surviving spouse. The assets of these trusts are treated as unavailable to the Medicaid applicant if the trustee has “sole discretion”.

Can We Just Disinherit the Spouse on Medicaid?

Under 405 IAC 2-3-1.1(i)(4), the rule states:

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

- ❑ Must fund the special needs trust with enough of the community spouse’s assets to satisfy the spousal allowance and the statutory right of election in order

MEDICAID RELATED ESTATE PLANNING ISSUES FOR THE CLIENT LOOKING TO PRESERVE ASSETS PRIOR TO FACING A LONG TERM CARE CRISIS

I. Medicaid Planning Done Five Years Prior to a Medicaid Application

- Any transfers made five years prior to an application for Medicaid are off the table and do not need to be disclosed at the time of application.

- Planning CAN be done within five years of an application but in those cases a period of ineligibility or penalty period will apply.

- Consider the use of an irrevocable trust or outright gifting.

Medicaid Planning Done Five Years Prior to a Medicaid Application Cont'd:

➢ **Basics of a Medicaid Protection Trust:**

1. The principal is protected after five years with no payback provision.

2. Grantor can receive income but cannot have any access to principal. Income may be lost if Grantor needs Medicaid long term care benefits.

3. Must be irrevocable

4. Con: The Grantor no longer has any access to these funds.

OUTRIGHT GIFTING TO FAMILY:

If a client makes an outright gift instead of using a Medicaid protection trust the preservation of the gifted money faces many dangers:

1. The person receiving the funds could die, in which case the assets would pass through his or her estate,

2. The person may need public benefits in the future,

3. The person may lose the money to his or her own creditors or in a divorce or bankruptcy,

4. Client could have a or have a falling out with the donee

Medicaid Planning Done <u>Within Five Years</u> of a Medicaid Application

- Most Medicaid planning done within five years of a Medicaid application will involve a Medicaid penalty period, with some exceptions.

- There is no correlation between the annual Federal gift tax exemption under 26 U.S.C. §2503(b) and the Medicaid gifting regulations.

- A Medicaid applicant is allowed to make a gift or gifts of up to **<u>$1,200 total</u>** per year to a family member or members without penalty

THE MEDICAID ASSET TRANSFER PENALTY PERIOD

- ✓ The total amount of the asset(s) transferred within the five years prior to an application is divided by the average monthly cost of nursing home care. This figure changes annually and is currently set at $6,681.00.

- ✓ In most cases, the penalty starts on the day that a person would be "Medicaid eligible but for the penalty period". Meaning that the applicant must meet the Medicaid income and resource criteria and then file an application to get the penalty period started. This process is subject to legal pitfalls!

TRANSFERS NOT SUBJECT TO PENALTY:

- Any transfers between spouses.
- Any transfers between a parent and a disabled child or a trust for the disabled child.
- The transfer of the home to a child under age twenty-one OR a child who was residing in the home for at least two years before the person becomes institutionalized and who provided care which allowed the person to live at home rather than in an institution. IHCPPM Manual 2640.10.15.05.

TRANSFERS NOT SUBJECT TO PENALTY cont'd:

- Any transfers made exclusively for reasons not related to Medicaid eligibility, estate recovery or a lien.

- If the transferred assets that created the penalty period are returned, no penalty period is imposed.

- If the imposition of a transfer penalty would impose an undue hardship on the applicant.

ASSISTING THE INCAPACITATED CLIENT IN IMMEDIATE NEED OF ESTATE OR MEDICAID PLANNING

A. The Use of the Client's Durable Power of Attorney to do the following:

1. Create and Fund a revocable or irrevocable trust

2. Make gifts to family members or charities

3. Change the beneficiary on a life insurance policy

4. Add pay on death designations to bank accounts

Request Permission to Conduct Estate or Medicaid Planning via a Court Order in a Guardianship Proceeding

- If the incapacitated client does not already have a power of attorney, then estate or Medicaid planning through a guardianship is an option.

- Must first establish guardianship and show that the protected person lacks testamentary capacity.

- I.C. 29-3-9-4.5 outlines the proper steps and things that can be accomplished.

BASIC MEDICAID INCOME ELIGIBILITY RULES FOR THE AGED AND DISABLED

- If an applicant’s income is over the SPECIAL INCOME LIMIT (currently $2,382.00) then they cannot qualify for Medicaid unless they use a Qualified Income trust or “Miller Trust”.
- The amount of the gross income exceeding the Special Income Level MUST be placed into the trust every month.

Basic Medicaid Eligibility Resource Rules

- **Asset limit of $2,000 in countable assets for a single applicant and $3,000 for a couple if both are applying for Medicaid.**

- **Assets of both spouses are considered in the eligibility determination based on their total countable assets of the "snapshot date".**

- **Assets are categorized as "exempt" or "countable"**

The Spousal Impoverishment Rules

- **There are separate rules for a couple if <u>only one spouse</u> is applying for Medicaid. These rules are much more generous!**

- All countable assets are valued on the first day of the first period of continuous institutionalization, in a hospital or nursing facility, of at least 30 consecutive days (this applies to the spouse applying for Medicaid)

COMPUTING THE COMMUNITY SPOUSAL

RESOURCE ALLOWANCE

The Community Spousal Resource Allowance is one-half of the total countable assets on the Snap Shot date, with a minimum of $26,076 and a maximum of $130,380.

The couple must “spend down” to half before the sick spouse can qualify for Medicaid. There are many Medicaid planning techniques to facilitate this spend down process.

IN CONCLUSION……………………….

- Medicaid issues can directly or indirectly impact an estate planning client's course of action. The best practice of an estate planning attorney is to thoroughly analyze the family dynamics of the client in order to parse out any potential Medicaid pitfalls presently facing the client, or ones looming in the future.

- To practice in the area of "Medicaid Planning" requires a thorough knowledge of the Federal and State Medicaid eligibility rules, as well as an understanding of the Indiana case processing system.

Section Three

Proving Validity of the Will

Amber K. Boyd
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Indianapolis, Indiana

Section Three

Proving Validity of the Will

Presented by: Amber K. Boyd

Amber K. Boyd Attorney at Law

Requirements for a Will

- Sec. 3.1 . (a) This section applies to a will executed before, on, or after July 1, 2003. When a will is executed, the will may be:
- (1) attested; and
- (2) made self-proving;
- by incorporating into or attaching to the will a self-proving clause that meets the requirements of subsection (c) or (d). If the testator and witnesses sign a self-proving clause that meets the requirements of subsection (c) or (d) at the time the will is executed, no other signatures of the testator and witnesses are required for the will to be validly executed and self-proved.
- (b) If a will is executed by the signatures of the testator and witnesses on an attestation clause under section 3(b) of this chapter, the will may be made self-proving at a later date by attaching to the will a self-proving clause signed by the testator and witnesses that meets the requirements of subsection (c) or (d).

Self-Proving Clause

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

Self-Proving Clause

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

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

(2) that, in the presence of both witnesses, the testator signed or acknowledged the signature already made or directed another to sign for the testator in the testator's presence;

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

(4) that each of the witnesses, in the presence of the testator and of each other, signed the will as a witness;

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

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

____

Testator

__________ ______________________________

Date Witness

____

Witness

Attested and Self-Proved

A will is attested and self-proved if the will includes or has attached a clause signed by the testator and the witnesses that indicates in substance that:

- (1) the testator signified that the instrument is the testator's will;
- (2) in the presence of at least two (2) witnesses, the testator signed the instrument or acknowledged the testator's signature already made or directed another to sign for the testator in the testator's presence;
- (3) the testator executed the instrument freely and voluntarily for the purposes expressed in it;
- (4) each of the witnesses, in the testator's presence and in the presence of all other witnesses, is executing the instrument as a witness;
- (5) the testator was of sound mind when the will was executed; and
- (6) the testator is, to the best of the knowledge of each of the witnesses, either:
- (A) at least eighteen (18) years of age; or
- (B) a member of the armed forces or the merchant marine of the United States or its allies.
- (e) This section shall be construed in favor of effectuating the testator's intent to make a valid will.

Proving Validity

- Handwriting sample
- Affidavits of Witnesses

Will Contest

- The decedent was of unsound mind at the time of the execution of the purported Will;
- The purported Will was unduly executed;
- The purported Will was executed under duress;
- The purported Will was obtained under undue influence; and
- The purported Will and its probate are invalid for any other valid objection to its validity or its probate.

Section Four

Supervised v. Unsupervised Administration

Pros, Cons and Pitfalls of Each Path

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Section Four

Supervised v. Unsupervised Administration…………Jessica L. Merkel

I. Introduction

In order to determine what, if any estate administration is required, an attorney must make a series of initial inquiries. The establishment and use of initial client intake forms, such as those provided by Ms. Hamilton in her presentation, are key to gathering the information necessary for the attorney to make a thoughtful and accurate decision.

The intake forms should reveal the decedent's domicile at his or her time of death in order to accurately determine which Indiana county is the correct venue, or if ancillary administration is required to manage real estate located in another state. The forms should also reveal the decedent's testate or intestate status, heirs and beneficiaries, and the nature, value, ownership, location and designated beneficiary of any asset and liability in which the decedent had an interest at death.

It is best if the client is provided these forms prior to the initial meeting. Then the attorney can review the forms and discuss their contents with the client, in order to flesh out the details and obtain a better understanding of the interpersonal dynamics of the beneficiaries and the executor which is often as large a factor in determining what type of administration is best suited to the specific case at hand as the type and size of the decedent's assets.

II. Initial Steps in Opening the Estate

A. Early Considerations

Before putting pen to paper (or fingers to the keypads) the attorney must determine whether *any* type of court administration is necessary at all. IC 29-1-8-1 permits parties to forgo any formal court proceeding if the total value of the decedent's probate assets (i.e. those assets which are solely owned by the decedent, without a joint owner, designated beneficiary or transfer on death beneficiary) less liens and encumbrances, is no more than Fifty Thousand Dollars ($50,000.00). If the size and the location of the assets are known, they may be gathered and distributed through the use of a Small Estate Affidavit and Consent to Transfer. If the client is unsure of the value, ownership or beneficiary status of an asset, a Small Estate Discovery Affidavit, drafted in compliance with IC 29-1-8-1.5, may prove helpful. However, be advised that many out of state financial institutions do not understand the legal impact of this document and often will not respond, even under threat of litigation. Most importantly, a Small Estate Proceeding is not suggested in situations where there are creditors or contentious heirs due to the lack of transparency in the process.

After it is determined that formal court administration is required, the attorney should analyze what type of court administration is appropriate: supervised or unsupervised. Supervised administration is governed exclusively by the relevant Indiana statues and local court rules. The personal representative has no independent authority and must first request approval from the court prior to taking any administrative action in the estate. As a result the legal fees associated with representing this type of estate can be higher, and the time it takes to fully administer the estate will be longer. On the other hand, the over sight of the court offers significant transparency for the beneficiaries and creditors, which in turn protects both the personal representative and the attorney.

Unsupervised administration involves significant less oversight by the Court and consequently, can prove a more efficient and less costly choice if applied to the appropriate matter. However, this freedom can become cumbersome if the attorney is not well versed in this area of law, the personal representative is not cognizant of his fiduciary obligations and responsibilities, or there is a potential for conflict among the parties of interest.

With an unsupervised estate, the Court is essentially only involved in three distinct phases of administration: at the beginning to ensure that the estate is properly opened and all the required notices are given; in the middle to ensure that an inventory was prepared; and at the end to facilitate the distribution of the estate's assets. Otherwise, the personal representative has the independent authority to administer the estate's assets, pay claims and expenses, and distribute the proceeds of the estate.

An attorney should not automatically default to one type of administration over the other. Rather, a case by case inquiry should be made in order to capitalize on the strength, and minimize the weaknesses, of each administrative option. Some questions to ask before choosing the form of administration are as follows:

1) Is there a Last Will and Testament? If so, what does the Will say in regards to the form of administration?
2) What do the local court rules require for unsupervised administration in county of venue?
3) Is the estate solvent (i.e. more assets than liabilities)?
4) What types of assets are in the estate? How "toxic" or complicated are they to sell or transfer?
5) What skeletons may be in the decedent's closet?
    a. Are there any outstanding Judgements?
    b. Is there a potential for any tort claims to be brought against the decedent?
6) Who are the heirs/legatees/distributees?
    a. What is their relationship to each other?
    b. What is their relationship to the personal representative(s)?

7) Who is (who are) the personal representative(s)?

   a. If there are multiple personal representatives, what is their relationship to each other?

   b. How responsible and responsive are the appointed personal representatives?

   c. What is their financial acumen?

   d. How stable is their personal financial situation? Is there a risk of self help due to feelings of "entitlement" or outright need?

8) What is the potential for discord among the parties of interest?

If the answers to these questions reveal an atmosphere ripe for litigation or even increased adversity, you would be wise to elect for more court oversight rather than less, by way of supervised administration. Also remember that under IC 29-1-7.5-2(c), the administration can always be changed by way of a court order or at the request an interested party if it is later determined the original choice of court supervision is no longer beneficial to the estate.

B. <u>Preliminary Requirements</u>

1. Unsupervised Administration

To open an unsupervised probate proceeding before an Indiana Court, IC 29-1-7.5-2(a)(2) mandates that the following requirements must be met:

1) The estate must be solvent;
2) The personal representative must be qualified to serve without court supervision;
3) All heirs, legatees or devisee must consent to unsupervised administration; and,
4) The Will does not specifically request supervised administration.

Unsupervised administration is available to both testate and intestates estates.

Unsupervised status may still be achieved without the consent of the beneficiaries if:

1) The estate is solvent;

2) The personal representative is qualified to serve without court supervision; and,

3) The Will specifically authorizes unsupervised administration. IC 29-1-7.5-2(b)

However, it is strongly suggested to check the local court rules regarding the requirements for unsupervised administration before proceeding without the consent of the heirs as some courts, including but not limited to, Monroe County, will *only* permit the opening of an unsupervised estate if notice is given, regardless of what the Will requests. See Monroe County Local Court Rules—Probate Rule 0810.

The personal representative is qualified to serve so long as he is over the age of eighteen, not mentally incapacitated, not a convicted felon or any other person whom the court finds unsuitable. A nonresident individual, who otherwise meets the requirements stated above, may qualify as an in-state personal representative only by filing:

1) a written notice of his acceptance of the appointment,

2) notice of the appointment of a resident agent to accept service of process; and

3) a surety bond in the amount required by IC 29-1-10-1(d).

Once letters of appointment are issued to the personal representative, Notice of Unsupervised Administration, in the form set out by IC 29-1-7.5-1.5(b), must be mailed by the clerk to all heirs, devises and legatees. This Notice is non-waivable by the heirs, legatees and devisees, and is separate and distinct from the Notice of Administration that is required to be published in a newspaper of general circulation and mailed to all known or reasonably known creditors. See IC 29-1-7-7.

2. Supervised Administration

There are no preliminary requirements for opening a supervised estate. The requirement to provide notice to creditors under IC 29-1-7-7 is the same for both supervised and unsupervised estates. This same notice must be served by mail upon each heir, devisee and legatee whose names and addresses appear in the Petition for Probate.

3. A Note on Bonds

Under both IC 29-1-7.5-2.5 and IC 29-1-11-1, no surety bond is required to be filed on behalf of a personal representative of either an unsupervised or supervised estate unless the Will otherwise requires, or the Court determine that a bond is necessary to protect the interests of creditors and other beneficiaries. In practice, however, most local court rules require the posting of at least a minimum bond in all estates. See Monroe County Local Court Rules—Probate Rule 0803. *Make sure to review the county's local court rules before opening an estate.*

III. Collection and Administration of Estate Property

A. <u>Inventories</u>

In both unsupervised and supervised estates, an inventory of the probate assets must be prepared within sixty (60) days of the letters being issued. For an unsupervised estate, the inventory must be given to any distributee (as defined by IC 29-1-1-3(a)(8)) who requests a copy. The personal representative may certify to the Court that an inventory has been prepared and is available, but the Court may not require the personal representative to file the same in open court. See IC 29-1-7.5-3.2. The personal representative of a supervised estate is required to provide a copy of the inventory to any interested persons (as defined by IC 29-1-1-3(a)(13)) who request it, unless the Inventory has already been filed with the Court. See IC 29-1-12-1.

B. Authority of Personal Representative in the Administration of the Assets

The largest distinction between supervised and unsupervised estates is the relative autonomy the personal representative has to administer the estate's assets.

1. Unsupervised Administration

A personal representative in an unsupervised estate has the independent authority to collect and manage the assets of the estate. Specifically, the personal representative, under IC 29-1-7.5-3 et seq., can perform the following actions without prior approval of the Court:

1) Retain the decedent's assets;
2) Receive decedent's assets;
3) Perform, compromise or refuse to perform on decedent's contracts, including executing and delivering deeds of conveyance on real property or delivering a deed in escrow;
4) Satisfy written binding charitable pledges of the decedent;
5) Deposit and invest liquid assets;
6) Acquire or dispose of an asset for cash or credit;
7) Make repairs to buildings or other structures;
8) Subdivide, develop or dedicate land to public use;
9) Enter for any purpose into a lease as lessor or lessee;
10) Abandon property;
11) Enter into a mineral lease;
12) Vote stock;
13) Pay calls or assessments on securities;
14) Hold securities in the name of a nominee;
15) Insure estate assets;
16) Borrow money and advance money for the protection of the estate;

17) Compromise a fair and reasonable settlement of any debt or renew, extend or modify the terms of obligations owed to the estate;
18) Pay taxes, assessment and compensation of personal representative and other expenses of administration;
19) Sell or exercise stock subscription or conversion rights
20) Allocate income and expense items to estate income or principal;
21) Employ advisors (e.g. lawyers and certified public accountants) to assist in the performance of the personal representative's duties;
22) Prosecute and defend claims;
23) Sell, mortgage or lease real or personal property;
24) Continue any unincorporated business of decedent;
25) Incorporate decedent's business;
26) Satisfy and settle claims;
27) Inspect and investigate property of the decedent for the purpose of determining the application of environmental law to the property;
28) Distribute assets; and
29) Perform any other act necessary or appropriate to administering the estate.

2. Supervised Administration

In contrast, the personal representative of a supervised estate has very little independent authority to administer the estate's assets without prior approval of the court. The actions of a personal representative in a supervised estate are controlled by a myriad of code provisions.

IC 29-1-13 et seq. contains rules and guidance for the collection and management of decedent's assets. Unless the personal representative is given the power to sell, mortgage lease, or exchange property without court authority under the terms of the Will, the personal representative of a supervised estate must petition the Court for such authority.

The provisions for the sale, mortgage or lease of real property are found at IC 29-1-15-11. The personal representative may file a petition to sell, mortgage or lease real property, for which the Court will require a hearing. Notice of the hearing must be provided to all heirs and lienholders, unless otherwise waived. If all the heirs and lienholders waive notice, the Court may issue the Order permitting the sale immediately. The Court's order for sale shall describe the property, direct whether the sale shall be public or private, direct that the sale shall be for fair market value if at private sale or no less than two-thirds of the market value if at a public sale. The order should outline the financial terms of the transaction. It is wise for the personal representative to file a verified report of their actions to the Court after the sale has been completed.

The provisions for the sale, mortgage or lease of personal property are found at IC 29-1-15-8. With a limited exception, the personal representative of a supervised estate must petition the court for such authority. The petition is typically heard without notice after which an order is issued. The Court may issue an order for either a public or private sale. IC 29-1-15-9 grants an exception to this rule by permitting the personal representative to sell personal property without notice if:

(a) The property is perishable in nature;

(b) The property will depreciate in value rapidly;

(c) The estate will incur a loss or expense in maintaining the property;

(d) If the proceeds of such sale are needed to fund the survivor's allowance.

The personal representative will remain responsible for the actual value of the property unless he reports the sale to the court which thereafter approves said sale. IC 29-1-15-21 permits the court to authorize payment of fees and expenses related to the sale, and IC 29-1-15-22 permits the court to approve platting of the land to help dispose of the real estate.

C. <u>Partial Distributions</u>

1. Unsupervised Administration

A personal representative of an unsupervised estate has full authority under IC 29-1-7.5-3-(28) to distribute the assets of the estate. Consequently, partial distributions may be made prior to the final closure of the estate, provided however, that there are adequate assets remaining to pay debts and expenses of administration. The consent of the heirs, legatees and devisees is not required nor must the Court issue prior approval of such distribution.

2. Supervised Administration

With some limited exceptions under IC 29-1-17-1, a personal representative of a supervised estate is not permitted to make any distribution to heirs, devisees and legatees until entry of the final decrees of distribution issued upon the filing of the Final Account.

Pursuant to IC 29-1-17-1 (a) and (b), the personal representative may petition for a partial distribution during the administration if the property is perishable in nature, would materially depreciate if distribution were delayed, or if estate funds would be required to store the asset. The disributee must consent to accepting the property and agree to return its value if the court later determines that the property is needed to pay claims and expenses. The court can also require the distributee to provide security for the distribution.

IC 29-1-17-1(c) also permits for a Decree of Partial distribution after the expiration of the time limit for filing claims, but before the Final Account is filed or approved. The Court may issue such Decree with notice to interested persons. The Decree is conclusive as a decree of final distribution. The distributee may also be required to post security.

IV. Closing the Estate

An estate, whether unsupervised or supervised, must be promptly closed. Unless good cause is shown for a delay, a supervised estate must be closed within one year of the personal representative's appointment. See IC 29-1-16-2. If an unsupervised estate is not closed within one year of the personal representative's appointment, the personal representative <u>must</u> file a statement with the court explaining why the estate has not yet been closed. IC 29-1-7.5-3.8.

A. <u>Accounting and Final Distribution</u>

1. Unsupervised Administration

The personal representative may close an unsupervised estate after the three (3) month claim period has expired by filing a Verified Closing Statement which states the following:

1) Notice was published to creditors and more than three (3) months have passed since the first publication;
2) Notice was mailed as provided in IC 29-1-7-7(c) to creditors, heirs, devisees and legatees and provided to known creditors pursuant to IC 29-1-7-7(d);
3) The estate has been fully administered by resolving and/or paying all claims, expenses of administration, estate, inheritance and other death taxes;
4) Any deed for real estate owned by the decedent has been executed and recorded;
5) All assets of the estate have been distributed to the parties entitled to receive them;
6) A copy of the closing statement has been sent to all distributees and creditors (whose claims have not been paid or barred) *and the distributees have been provided with a full account in writing of the personal representative's administratio*n; and

7) The names and addresses of all distributees, creditors or claimants to whom the personal representative has sent a copy of the closing statement and account. See IC 29-1-7.5-4.

Please note that **in an unsupervised estate** a final accounting *must still be prepared* and presented to the distributees, even though it does not have to be filed with and approved by the Court.

2. Supervised Administration

The personal representative may close a supervised estate after the claims period has expired and all claims have been paid, settled or disallowed, by filing his Final Account and petitioning the Court for a Decree of Final Distribution. See IC 29-1-17-2. Notice of Final Account shall be given to all interested persons. The accounting shall include at least three schedules. The first schedule shall show all property under the care of the personal representative. The second schedule shall show payments, charges, losses and prior distributions. The third schedule shall show the balance and identify of the remaining assets. All receipts for disbursements (e.g. cancelled checks) shall be filed with the account. If the accounting is a final account, a fourth schedule shall be attached showing the proposed distribution of the assets remaining in the estate. At the time of filing the final account, the personal representative shall petition the Court to settle and allow his account and request an order authorizing the proposed distribution. See IC 29-1-16-4.

The personal representative may file interim accountings prior to the filing of the final account. Many court's local rules require the filing of an interim account if the estate has not been closed within one year of the personal representative's appointment. If the accounting is an interim account, the personal representative can petition the Court to finalize all matters reported in the account, provided however, that the provisions for notice and hearing are followed the same as for a final account.

A hearing will be set upon the filing of the accounting and notice must be given by the clerk to all persons entitled to share in the final account. However, heirs may waive notice to any accounting, permitting the Court to act immediately. If the accounting is a Final Account, IC 29-1-16-6(a) requires that the Clerk set a date for written objection to the Final Account be filed. Such date shall be at least fourteen days prior to the date set for the hearing on the Final Account.

Pursuant to IC 29-1-17-13, a Supplemental Report must be filed showing compliance with the terms of the Decree of Final Distribution. Receipts should accompany this report. Once the Supplemental Report is filed the court will enter an Order of Discharge releasing the personal representative from his duties.

B. <u>Fees</u>

1. Unsupervised Administration

The personal representative has the authority to determine, contract and pay professional fees (including the attorney's fees) and the personal representative's own fees without an order from the Court, or notice to or consent from the parties at interest. Professional fees which include the attorney's fees are considered a matter of private contract.

2. Supervised Administration

IC 29-1-10-13 deals with compensation of the personal representative and lawyer for the estate in a supervised administration. Fees for the personal representative and the attorney <u>must</u> be determined just and reasonable and ordered paid by the Court. The attorney *and* the personal representative should keep accurate and thorough time and expense records in order to justify their requested fees. Compensation is allowed when the final account has been filed and approved. However, the personal representative and the attorney may petition for an award of partial fees during the administration. Review the local Court rules as to the issue of partial fees prior to making such a request. Also, note that some local rules include a guideline fees schedule setting out what fee will be presumed reasonable based on the gross value of the estate assets.

C. Claims against Distributees

1. Unsupervised Administration

If a claim remains undischarged and is not time-barred, the claimant may prosecute the claim against one or more distributeee of the estate under IC 29-1-7.5-5. The distributee is potentially liable only to the extent of his distribution, and the cost shall be satisfied as if the claim had been paid by the estate. Distributees are entitled to contribution from the other distributees, provided however that they notify the other distributees of any demands for payment made by a claimant, providing the other distributees with sufficient time to join in any proceeding and assert his rights.

Any undischarged claim, as well as any distributee's right to recovery property improperly distributed, shall be forever barred at the later of three (3) years after the decedent's death or one (1) year after the closing statement is filed. IC 29-17.5-7

2. Supervised Administration

Pursuant to IC 29-1-14-8, a claimant can bring an action on a contingent claim against a distributee's share within three (3) months of when the claim becomes absolute. The distributees are jointly and severally liable, but no distributee shall be liable in an amount in excess of their distributive share. If, however, one distributee is unable to pay their proportionate share of the liability, the remaining distributees shall be liable for the defaulting distributee's share of the claim.

D. Liability of Personal Representative

1. Unsupervised Administration

Pursuant to IC 29-1-7.5-4(b), if no proceeding is brought against the personal representative within three (3) months after the Closing Statement is filed, the appointment of a Personal Representative terminates and the estate is closed by operation of law. All claims against the personal representative are barred unless commenced within said three (3) months, unless the claim is based on fraud, misrepresentation or inadequate disclosure (IC 29-1-7.5-6).

2. Supervised Administration

Pursuant to IC 29-1-17-13, upon the filing of a Supplemental Report, the Court will enter an order discharging the personal representative. This discharge releases the personal representative from their duties and operates as a bar to any suit which is not commenced within one (1) year from the date of discharge, even if based solely upon mistake, fraud, or willful misconduct on the part of the personal representative.

V. Conclusion

Due to the relative advantages and disadvantages, tricks and traps of each path of administration, make careful inquires and provide a thoughtful analysis in deciding which form of administration to select for each estate that you advise. It is also prudent to review on a regular basis the local court rules of the county before which the estate will be opened, and also the entire Indiana Probate Code.

SUPERVISED v. UNSUPERVISED ADMINISTRATION

Quick Reference

Supervised	**Unsupervised**
IC 29-1- 7 (and more)	IC 29-1-7.5 et seq
No Bond (or minimum Bond per local rules)	No Bond (or minimum Bond per local rules)
Substantial Court Supervision	Limited statutory authority for Court to order PR to act
Inventory given to interested parties who request if not already filed with the Court	Inventory must be prepared and given to those who request a copy
No sales without Court approval	Sales when appropriate and necessary as determined by PR
No distributions without Court approval	Distributions anytime if funds available to pay debts, claims, and taxes
Final Accounting must be filed with Court	No Final Account to be filed with Court
More demanding of legal time (and higher fees)	Typically less legal time
No Attorney or PR fees without Court approval	Fees are a matter of contract and payable when agreed to.

SUPERVISED V. UNSUPERVISED ADMINISTRATION

PROS, CONS AND PITFALLS OF EACH PATH

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Synopsis of Supervised Estate Administration

- IC 29-1-7 et seq.
  - No Bond (but check local court rules)
  - Substantial Court Supervision
  - Inventory must be filed w/court or given to beneficiaries who request
  - No sales w/o Court approval

Synopsis of ES Admin. Cont'd

- No distributions w/o Court approval
- Final Accounting must be filed with the Court for approval
- More demanding of Attorney's time
- No Attorney or PR fees without Court approval

Synopsis of Unsupervised Estate Administration

- IC 29-1-7.5 et seq.
  - No bond (or a minimum bond per local court rules)
  - limited statutory authority for Court to order PR's actions
  - Inventory must be prepared and given to beneficiaries who request a copy

Synopsis of EU Admin Cont'd

- Sales when appropriate and necessary in PR's discretion
- Distributions anytime if funds are available to pay debts, claim and taxes
- No Final Account to be filed with Court
- Typically less legal time required
- Fees are a matter of contract, and payable when agreed to.

Thoughts to Consider

- Is there a Will? If so, what type of administration does it permit?
- What does the local court require for unsupervised administration
- Is the estate solvent?
- What types of assets are in the Estate?
- What skeletons are in the Decedent's closet?
  - Judgements? Potential Tort claims?

- Who are the heirs/devisees?
  - What is their relationship to each other?
  - What is their relationship to the PR?
- Who is the PR?
  - If there are multiple PRs, what is the nature of their relationship to/with each other?
  - How responsible and responsive are the PRs?
  - What is the PRs financial acumen?
  - How financially stable are the PRs?
    - Is there a risk of "entitlement creep" or self help?
- What is the potential for discord among the parties of interest?

Hypothetical 1: The Insolvent Estate

- Assets: Bank Account, House, Car and Retirement Account (Non-probate bc of designated beny)
- Heir: 1 Child, early 20s, unemployed, lives in decedent's house
- Gross Probate Est: $160K
- Total Liabilities (Mortg. & Med. & CC): $171 K
- Costs of Admin: $6K

Hypothetical 2: Surviving Subsequent Spouse

- Testate, but Will provides $0 for SSS
- Entire estate passes to children of decedent
- **No prenup**
- Assets:
  - House + acreage
  - Bank Accounts
  - Life Insurance –payable to SS
  - TPP
  - Brokerage Accounts

Hypothetical 3: Intestate Estate

- No will
- Surviving Spouse (One and only) + 2 adult children
- No known liabilities
- Assets:
  - House, other Real Estate, Stocks, Bonds, Retirement Accounts

Hypothetical 4: The Warring Siblings

- Siblings from different marriages
- Oldest child appointed PR
- Youngest child sole residuary beneficiary
- Assets are LLCs and Sub-S Corporations
- There are encumbrances on the companies' assets.

Hypothetical 5: The Charitable Estate

- Testate
- Will appoints Co-PRs: friend of decedent, and attorney of decedent
- Will divides assets among 4 charitable beneficiaries
- Attorney not particularly well versed in Estate law.

Hypothetical 6: Intestate“SINK”

- Intestate
- Retirement account pays to “Estate”
- No spouse, sibling, descendant of Sibling, ancestor, child, descendant of child
- Only cousins (or desc.) to inherit

And remember…

“When a festive occasion our spirit unbends

We should never forget the profession’s best friends.

So we’ll pass ‘round the wine

And a light bumper fill

To the jolly testator who makes his own will.”

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