1-1-2023

Estate Planning Strategies, Tools, Techniques & More!

Indiana Continuing Legal Education Forum (ICLEF)

Estate Planning Strategies, Tools, Techniques and More!
March 9, 2023

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Feature Release 4.1
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Indiana Continuing Legal Education Forum (ICLEF)
230 East Ohio Street, Suite 300
Indianapolis, Indiana 46204
Ph: 317-637-9102 // Fax: 317-633-8780 // email: iclef@iclef.org
URL: https://iclef.org

ESTATE PLANNING STRATEGIES, TOOLS, TECHNIQUES AND MORE!

March 9, 2023

www.ICLEF.org

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

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ESTATE PLANNING STRATEGIES, TOOLS, TECHNIQUES AND MORE!

Agenda

8:30 A.M. Registration and Coffee

8:55 A.M. Welcome and Introduction
John B. Bishop, Program Chair

9:00 A.M. Basic Estate Planning Strategies and Tools; Small Estate Affidavits; Do's and Don'ts
Jessica L. Merkel

10:00 P.M. Document Specifics (Topic Begins)
Micah J. Nichols
- Revocable Trusts - Irrevocable Trusts - Wills

10:30 A.M. Break

10:45 A.M. Document Specifics (Topic Completes)
Micah J. Nichols

11:15 A.M. TOD / POD and other Beneficiary Designations
James W. Martin

12:15 P.M. Lunch Break

1:15 P.M. Taxes!
Jeffrey S. Dible
- Techniques to Minimize the Eventual Federal Gross Estate for Estate Tax Purposes and Tax Aspects of Non-Probate Transfers

2:00 P.M. Probate and Estate Litigation Generally; Resulting Litigation from Poor or Less Than Desirable Drafting of Documents
Christopher J. Mueller

2:45 P.M. Refreshment Break

3:00 P.M. Elder Law Considerations and Special Needs Planning in Estates
Tamara L. Rogers

3:45 P.M. Gifting in Estate Planning
DeAnn L. Farthing

4:30 P.M. Adjourn

March 9, 2023

ESTATE PLANNING STRATEGIES, TOOLS, TECHNIQUES AND MORE!

Faculty

Mr. John B. Bishop - Chair
Cohen Garelick & Glazier
8888 Keystone Crossing Blvd., Suite 800
Indianapolis, IN 46240
ph: (317) 573-8888
e-mail: jbishop@cgglawfirm.com

Mr. Jeffrey S. Dible
Frost Brown Todd LLC
201 North Illinois Street, Suite 1900
Indianapolis, IN 46204
ph: (317) 237-3811
e-mail: jdible@fbtlaw.com

Ms. DeAnn L. Farthing
Robinson & Farthing LLC
8500 Keystone Crossing, Suite 470
Indianapolis, IN 46240
ph: (317) 587-7820
e-mail: dlf@yourindyattorneys.com

Mr. James W. Martin
Martin & Martin
8585 Broadway, Suite 660
Merrillville, IN 46410
ph: (219) 769-3760
e-mail: jwm@netnitco.net

Ms. Jessica L. Merkel
Bunger & Robertson
211 South College Avenue
P.O. Box 910
Bloomington, IN 47402-0910
ph: (812) 332-9295
e-mail: jmerkel@lawbr.com

Mr. Christopher J. Mueller
Lewis Wagner, LLP
1411 Roosevelt Avenue, Suite 102
Indianapolis, IN 46201
ph: (317) 922-2850
e-mail: cmueller@lewiswagner.com

Mr. Micah J. Nichols
Krieg DeVault LLP
12800 North Meridian Street, Suite 300
Carmel, IN 46032
ph: (317) 283-6375
e-mail: mnichols@kdlegal.com

Ms. Tamara L. Rogers
Rogers Law Firm, LLC
6437 Rucker Road, Suite E
Indianapolis, IN 46220
ph: (317) 343-9406
e-mail: tamara@trogerslaw.com

March 9, 2023

John B. Bishop, Cohen Garelick & Glazier, P.C., Indianapolis

John Bishop concentrates his practice in the areas of Estate and Wealth Transfer Planning, including estate and trust planning and administration, as well as probate, estate and trust litigation and intellectual property rights and enforcement. He works closely with businesses and entrepreneurs to assist with registration and enforcement of trademarks, copyrights and trade secrets. Before joining Cohen Garelick & Glazier, John clerked for the Chief Judge of the Indiana Court of Appeals and focused on the protection and enforcement of the rights of publicity of numerous high profile clients.

Jeffrey S. Dible, Frost Brown Todd LLC, Indianapolis

Jeff Dible concentrates his practice in estate planning, taxation and general business law. He prepares wills and trusts, supervises the administration of estates and trusts, represents various parties in guardianships and contested will or trust litigation, and provides gift tax and estate planning advice to professionals and business owners in the larger context of business succession. Jeff regularly lectures to attorneys and other estate planning professionals on a variety of estate planning and tax topics.

Jeff has frequently testified before committees of the Indiana General Assembly in favor of or against various bills to amend Indiana's trust, estate and guardianship laws, including the 2012-13 repeal of the Indiana inheritance tax, the 2018 electronic wills statute, and the 2019-2021 changes to the Indiana Probate Code and Trust Code. He is a Fellow of the American College of Trust and Estate Counsel and has been certified as an Indiana Trust and Estate Lawyer by the Indiana Trust and Estate Specialty Board (TESB).

DeAnn L. Farthing, Robinson & Farthing LLC, Indianapolis

DeAnn L. Farthing, a life-long Indiana resident, is a partner of Robinson & Farthing LLC. After graduating with two Bachelor of Arts degrees from Indiana University at Indianapolis, Ms. Farthing pursued her passion for law earning her Juris Doctorate from the McKinney School of Law at Indiana University – Indianapolis.

Ms. Farthing focuses her practice on meeting the legal needs of both businesses and individuals. She has represented clients all over the State of Indiana in more than half of all Indiana county courts. Having served as legal counsel for more than 50 business clients in the Indianapolis and surrounding areas, she keeps abreast of changes in the law that may affect business operations. She strives to provide small and medium businesses with economic and efficient solutions to all their legal needs.

In addition to serving business owners, Ms. Farthing works to educate individuals in all stages of life on the importance of estate planning. She daily provides information to interested clients that answer "what if" questions. Further, her experience enables her to guide individuals through the probate process after the death of a loved one. Her goal is to make the emotionally charged process as easy and economical as possible.

She focuses her practice in the areas of estate planning, probate, trust administration, corporate formation and general business litigation and operation. She is a member of the Indiana State Bar Association, the Indianapolis Bar Association, Estate Planning Council, Inc. of Indianapolis, Business Networking International - Keystone Lunch Chapter, a speaker for the Indiana Continuing Legal Education Forum (ICLEF) and a volunteer for the annual Low Asset Wills Workshop. Ms. Farthing has been selected as a "Rising Star" for Estate Planning & Probate by Indiana Super Lawyers for the years 2017, 2018, 2019, 2020, and 2021. Only 2.5% of Indiana attorneys are selected for this honor using a comprehensive research, peer nomination and peer review process.

Ms. Farthing currently lives in Fishers with her husband and three children. She enjoys spending time with her family and attending Pennington Park Church in Fishers.

JAMES W. MARTIN

Owner, Martin and Martin, Merrillville, Indiana. Admitted to bar, 1986, Indiana. Education: Indiana University-Bloomington, B.S. in Accounting, 1983; Valparaiso University School of Law, J.D., 1986.

Presenter at the following Lake County Bar Association (LCBA) seminars: (1) Probate and Estate Administration – December 1, 2000; (2) Claims Against Nonprobate Property – October 29, 2004; (3) Comparing Transfer on Death (TOD) With Trusts – November 20, 2013; (4) Wills vs. Trusts vs. TOD – November 4, 2016; (5) Numerous Legislative Updates.

Presenter at the following Indiana Continuing Legal Education (ICLEF) seminars: (1) Living Trusts vs. Wills – May 16, 1996; (2) Planning Your First … Estate Under $600,000 – June 27, 1996; (3) The Long and Winding Road to the Probate Court – November 5, 1997; (4) Estate Planning – December 17 & 18, 1997; (5) Trusts & Estate Planning: Concepts & Techniques – November 5, 1998; (6) Estate Planning CLE Seminar (Quebec, Canada) – July 10-17, 1999; (7) Disclaimers and Post Mortem Planning – September 22, 1999; (8) The Long and Winding Road to the Probate Court – November 10, 1999; (9) The Process of Probate Practice – October 12, 2001; (10) Hot Tips in Estate Planning – December 6, 2001; (11) Advanced Estate Planning, April 26-27, 2002; (12) Recent Statutory Developments in Probate and Estate Matters, August 28, 2002; (13) Disclaimers and Post Mortem Planning – February 28, 2003; (14) 30th Midwest Estate Tax & Business Planning Institute – June 4-6, 2003; (15) Basic Will and Trust Drafting – February 12, 2004; (16) Wills vs. Living Trusts – November 11, 2004; (17) "Untrustworthy" Non-Probate Transfers – May 20, 2005; (18) Making the Choice: Wills or Revocable Trusts – September 16, 2005; (19) Guardianships A to Z Revisited – August 11, 2006; (20) Estate Planning and Administration Potpourri – December 18, 2007; (21) Land Trusts 2008 – Still A Good Choice For Certain Clients – May 21, 2008; (22) The Full Spectrum of Estate Planning, Administration and Litigation – October 14, 2009; (23) Wills vs. Trusts and the New TOD Property Act – November 11, 2009; (24) The New TOD Law: What It Means for Your Estate Planning Practice – February 10, 2010; (25) 120 Hot Tips in Estate Practice – December 21, 2010; (26) 120 Hot Tips in Estate Practice – December 21, 2011; (27) A Comparison of Transfers – August 23, 2013; (28) Unique Issues in Estate Planning – November 20, 2015; (29) Estate Planning Trilema: Trusts vs. Wills vs. TOD Property – February 18, 2016; (30) Federal Estate/Indiana Inheritance Tax Primer – October 6, 2017; (31) 6th Annual REALITY – May 10-11, 2018; (32) Estate Planning Trilema: Wills vs. Trusts vs. TOD Accounts – October 15, 2019; (33) Midwest Estate, Tax and Business Planning Institute – June 4-5, 2020.

Chairman of the following ICLEF seminars: (1) Cutting Edge Tax Issues in Estate Planning – November 28, 2000; (2) Basic Will and Trust Drafting – February 12, 2004.

Presenter at the Trust and Estate Specialty Board (TESB) Course Reviews. Topic: Transfer on Death Property Act – November 2, 2012; Transfer on Death Property Act – November 3, 2016.

Memberships:

- Lake County Bar Association - Probate and Trust Committee
- Porter County Bar Association - Probate and Trust Committee
- Indiana State Bar Association - Probate, Trust and Real Property Section
  - Probate Review Committee (1991 – Present)
  - Chair of Membership, Communications and Needs Committee (1991 – 2010)
  - First District Representative (1997 – Present)
- Indiana Probate Code Study Commission (1995 – 2013 and 2019 to present).
- Board Certified Indiana Trust and Estate Lawyer (By TESB), 2007 – Present
- Trust and Estate Specialty Board (TESB), 2008 – April 30, 2012
  - Test Committee (2008 to 2016)
- Fellow of the American College of Trust and Estate Counsel (2007 to Present).

Jessica L. Merkel

Jessica is a 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. She is also a registered Domestic Relations and Civil Mediator and serves as a Guardian ad Litem for adults and minors.

Jessica earned her undergraduate degree, cum laude, from Gettysburg College in Gettysburg, Pennsylvania. In 2006 she earned her J.D. from the Indiana University Maurer School of Law. Jessica has been practicing with Bunger & Robertson since 2008.

Jessica, a Bloomington native, stays involved in her community by serving as a board member of Monroe County United Ministries, the President of the Governing Board of First United Methodist Church, and a board member of the Hoosier Hills Estate Planning Council. She is a passionate member of a Community Support Team for newly arrived refugees to the Bloomington Area. 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 and a small menagerie of pets. Her hobbies include Powerlifting and fiber arts, albeit not simultaneously.

LEWIS WAGNER
ATTORNEYS

Christopher J. Mueller

Partner

1411 Roosevelt Ave., Suite 102
Indianapolis, Indiana, 46201
Tel: 317.237.0500 | cmueller@lewiswagner.com

Legal Assistant: Brenda Clarkson
Tel: 317.237.0500 | bclarkson@lewiswagner.com

Education

Indiana University Robert H. McKinney School of Law
J.D., 2015
cum laude

Valparaiso University
B.S. Chemistry and B.A. Music, 2010
magna cum laude

University of Wisconsin-Milwaukee
Graduate Certificate - Public Health, 2011

Bar Admissions

Indiana, 2015

U.S. District Court Northern District of Indiana, 2015

U.S. District Court Southern District of Indiana, 2015

Chris brings an innate curiosity to every case he tackles. He has earned multiple degrees in a range of focus areas, including chemistry and music. With a dual perspective of the rigorous scientific process and artistic creativity, he finds hidden connections and creative solutions to solve multifaceted problems in unique ways.

Chris spends his day representing clients in legal matters related to trusts and estates, real estate, business, tax planning, and general civil litigation. He represents clients in complex litigation and helps businesses and individuals plan wisely for the future. As a registered civil mediator, Chris relishes the opportunity to settle cases to the satisfaction of everyone involved.

Chris is a native of Cedarburg, Wisconsin. He moved to Indianapolis after meeting his wife, Laura. Along with their three young children, they enjoy cooking, hiking, and spending time with extended family. Chris and his wife are enthusiastic and passionate supporters of the Indianapolis Symphony Orchestra, the Indianapolis Symphonic Choir, and The Indianapolis Children's Choir.

Practice Areas

- Alternative Dispute Resolution
- Business Services
- Real Estate

Publications

- "5 Tips on Estate and Trust Settlement Agreements," Indiana Continuing Legal Education Forum: 90 Hot Tips in Estate, Trust, and Probate Practice, 2022.
- "Ethical Considerations in Drafting Trusts for Clients with Diminished Capacity," Indiana Continuing Legal Education Forum: Trust Planning Beyond the Acronyms, 2022.
- Indiana Continuing Legal Education Forum: Reality CLE, Mediation Panel, 2021.
- "Continued Covid Craziness! What Does it Look Like and How Are You Staying Well?," Indiana State Bar Association, 2021.
- "How to Avoid Probate – But Should You?," Indiana Continuing Legal Education Forum, 2019.
- "Estate Administration Procedures: Why Each Step is Important," National Business Institute, 2019.
- "Estate and Trust Contests, Disputes, Challenges," National Business Institute, 2018.
- "Handling Debts and Claims Against the Estate," National Business Institute, 2018
- "The Fiduciary Detective: Asset Marshalling Challenges," Indiana State Bar Association, 2018.
- "Legal Ethics in Estate Administration," National Business Institute, 2017.
- "Handling Debts and Claims Against the Estate," National Business Institute, 2017.
- "Locating Companies for Due Diligence and Background Information," National Business Institute, 2015.
- "Locating Persons and Finding Background Information," National Business Institute, 2015.

Representative Cases

- Moriarty v. Moriarty, 150 N.E.3d 616 (Ind. Ct. App. 2020).
- ShermansTravel Media, LLC v. Gen3Ventures, LLC, 152 N.E.3d 616 (Ind. Ct. App. 2020).
- In re Estate of Melvin Simon, Cause No. 29D03-0910-ES-000141 (Hamilton Co. Ind. Sup. Ct. 3).
- In re the Christel DeHaan 2012 Irrevocable Investment Trust dated March 7, 2012, Cause No. 49D01-1703-TR-012560 (Marion Co. Ind. Sup. Ct. 1), and In re the Irrevocable Trust Agreement for Kirsten Andrea DeHaan dated April 15, 1997, Cause No. 49D01-1611-TR-042212 (Marion Co. Ind. Sup. Ct. 1).
- The National Bank of Indianapolis v. Ripley Entertainment, Inc., No. 6:18-cv-03394-MDH (West. Dist. of Missouri May 18, 2021).

Micah J. Nichols, Krieg DeVault LLP, Carmel

Micah Nichols is a Board Certified Indiana Trust and Estate Lawyer, as certified by the Trust and Estate Specialty Board, and concentrates his practice in the areas of estate planning, estate and trust administration, asset preservation, elder law, guardianships, trust and estate litigation, and general business.

Mr. Nichols has worked with families with nominal estates to those that have taxable estates (+$25,000,000 in net worth) and has developed sophisticated estate plans to minimize gift and estate taxes, to fulfill charitable goals, and safeguard assets for future generations. Mr. Nichols enjoys working with all families, from young professionals just beginning their careers and starting their families to seniors contemplating retirement and leaving a legacy. He particularly enjoys helping his clients navigate through complicated family dynamics, assisting business owners with transition and/or succession plans, and working with his clients' team of financial advisors and accountants in developing a wholistic and complete financial and asset management plan.

Originally from northeast Indiana, Mr. Nichols has been in private practice since 2012 and is married to his college sweetheart and has two children. While Micah primarily serves clients in the Indianapolis and central Indiana region, he currently has clients all over the state of Indiana.

Tamara L. Rogers, Rogers Law Firm, LLC, Indianapolis

Tamara Rogers was born in Chicago, Illinois. She went to Southern Illinois University-Carbondale after graduating from Morgan Park High School. After working as a social worker for four years, she decided to attend law school at DePaul University College of Law in Chicago, Illinois. Tamara was a Juvenile Magistrate for five years in Marion Circuit Court, where she heard paternity cases that were post-judgment, establishing, enforcing or modifying support, custody and parenting time orders, and other various related family law matters.? She also spent many years practicing in general litigation and family law. She handled all stages of the litigation practice from drafting motions, representing her clients in court, and participating in mediation and arbitration. Tamara decided to start her law firm to assist people through difficult family situations or help them with estate planning assistance.

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Section One

Do's and Don'ts

Basic Estate Planning Strategies and Tools

Jessica L. Merkel
Bunger & Robertson
Bloomington, Indiana

Section One

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DO'S and DON'TS

Basic Estate Planning Strategies & Tools

(oh yeah, and Small Estate Affidavits too)

Jessica L. Merkel
Bunger & Robertson
Bloomington, IN
812-332-9295
www.lawbr.com
jmerkel@lawbr.com

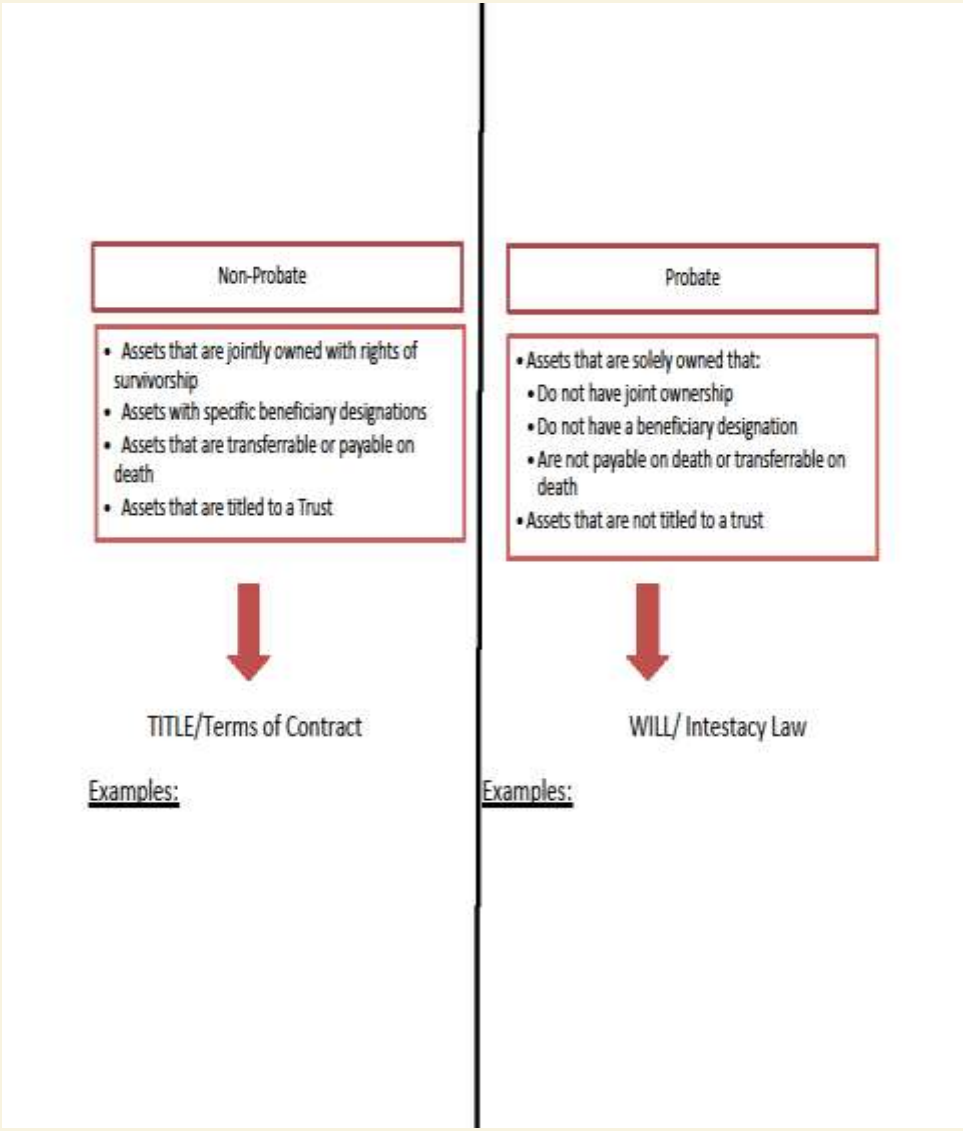
The “Do’s” of Estate Planning

1) Know who is your client and confirm the scope of your representation in writing.

2) Approach the Estate Planning process from a wholistic viewpoint: It is SO much more than just churning out documents.

3) Connect the dots between the written documents and the assets.

4) Know what is a probate asset, a non-probate asset and how they ***do*** or ***do not*** work together.



The “Do’s” of Estate Planning

4) **Be a Flexible Thinker:** *One size does not fit all.* Clients aren’t the same so our solutions should not be the same either. Discuss the pros and cons of:

- Will
- Revocable Trusts
- POD/TOD and other Non-Probate transfers
- Irrev. Trusts

5) Gather as much information from your client as possible ahead of your meeting:

- Contact information, proper names and dates of birth
- Asset information re:
  - Ownership
  - Beneficiary / POD/TOD designations
  - Approx. Value
- Other Contracts or Financial Obligations
  - Pre/Post Nuptial Agreement
  - Mortgage/Promissory Note/Lease
  - Child Support/PSE Obligation/Marital Equalization/ Duty to carry Life Insurance under Divorce Decree

TRUST but VERIFY

6) Ask about the client's goals and concerns

Some Frequent Fliers:

- Pie Lady/Pool Boy influencing widower/widow
- The significant others of children/grandchildren
- Beneficiaries' Physical/Mental Health Challenges
- DINKS/SINKS

7) Keep up to date with changes in the IN Probate Code and applicable Federal Tax Law

Example: New Changes to Small Estates

For deaths after June 30, 2022, an estate with gross probate value of up to **$100,000** can use a Small Estate Affidavit to transfer ownership.

*Prior to June 30, 2022, the limit was only **$50,000***

8) When can a Small Estate Affidavit be used?

- The value of the gross probate estate, wherever located (less liens, encumbrances, and reasonable funeral expenses) does not exceed:
  - $50,000 for the estate of an individual who dies after June 30, 2006, and before July 1, 2022; and
  - $100,000 for the estate of an individual who dies after June 30, 2022
- 45 days have elapsed since date of death
  - *except for Motor vehicles or watercraft --only 5 days*

https://www.usatoday.com/story/news/nation/2023/02/02/iowa-woman-declared-dead-alive-funeral-home/11172947002/

- No application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction
- Lists the name and address of each distributee that is entitled to a share of the property and the part of the property to which each distributee is entitled.
- Affiant has notified each distributee identified in the Affidavit of the affiant's intention to present an affidavit under this section
- The Affiant is entitled to payment or delivery of the property on behalf of each distributee named in the affidavit.

9) Assets sought to be transferred via Affidavit are:

- Personal property
- An instrument evidencing a debt
- An obligation
- A Chose in Action
- A life insurance policy
- Other intangible property such as annuities, mutual funds, cash, money market accounts or stock

BUT NOT: Real property or the contents of a safe deposit box IC 29-1-8-1.5(a)(b)

10) What if you don't know if the Estate is "Small" or not?

- Enter: the Small Estate ***Discovery*** Affidavit
- This is used to determine whether the estate can be administered under the summary procedures set forth in IC 29-1-8-1
- See IC 29-1-8-1.5 (c) and the example provided in your materials for the required contents.
- A person presented with a Small Estate Affidavit ***must*** provide the requested information within 3 business days. If they fail to do so they are liable to the estate.
  - See IC 29-1-8-1.5(f)


now back to our
regularly scheduled
programming

The “Do’s” of Estate Planning

11) <u>Get comfortable being uncomfortable-</u>

Ask Awkward Questions

- How do they want to treat stepchildren/step grandchildren?
- Did the “adoption” actually occur?
- In-laws as out-laws
- Physical and mental health/stability of beneficiaries
- What happens if someone dies before them?

12) <u>Think in the alternative regarding:</u>

- Fiduciary appointments
- Predeceased spouse/children/no descendants

ASK….

13) Communicate clearly and effectively

- Lower barriers to entry
- Meet clients where they are comfortable
  - Zoom v. In-Person
  - In Community vs. In-Office
- Substance over form when it comes to information gathering
- Be upfront about timing of deliverable and cost
- Hold yourself accountable to the above

- Set reminders to follow up about missing information/lagging review.
- Set check in reminders after signing (2-5 years)
- Save and secure PDFs of signed documents

14) Be A Translator

- Educate without overwhelming your client

- Discern their learning style (Visual, Auditory, Read/Write, Kinesthetic), and adjust your style accordingly.

15) Be a Team player

- Work with the client's other advisors, check your ego at the door, stay in your lane

The “DON’TS” of Estate Planning

- Talk down or over your clients
- Let your clients sign documents they don’t understand
- Assume your clients know what they own, how the assets are titled and/or designated
- Have a one size fits all approach to Estate Planning
- Let your paralegal or assistant engage in all the client contact
- Draft documents without analyzing the client’s assets, and how they work together (or not)
- Fail to edit
- Treat clients like numbers

16) Allow clients to give into “analysis paralysis”. Discuss:

- Boundaries not shackles
- Building the Good Bones of a plan
- 5-year scope
- The documents <u>are not</u> the 10 Commandments

The “DON’TS” of Estate Planning

- Let clients put POD/TOD designations on all their assets without understanding how they work and understand the tradeoffs/consequences of such tools

17) Don’t go **MIA** After Drafting

- Estate planning is about relationship building, after all.
- Set a diary entry to reach out to them at least every 2-5 years

ATTORNEYS AT LAW

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AFFIDAVIT FOR TRANSFER OF CERTIFICATE OF TITLE FOR A VEHICLE / WATERCRAFT WITHOUT ADMINISTRATION

State Form 18733 (R9 / 7-22)
INDIANA BUREAU OF MOTOR VEHICLES

INSTRUCTIONS:
1. *Complete in blue or black ink or print form.*
2. *Complete this form to request a transfer of vehicle ownership for an estate, wherever located, less liens or encumbrances, whose gross value does not exceed $100,000.*
3. *A copy of the death certificate is required in addition to this affidavit.*

SECTION 1 - CLAIMANT / DISTRIBUTEE OF THE ESTATE

Name *(last, first, middle initial)*			
Legal Address *(number and street)*	City	State	ZIP Code

SECTION 2 - DECEDENT INFORMATION

Name *(last, first, middle initial)*	Date Deceased *(mm/dd/yyyy)*

SECTION 3 - VEHICLE / WATERCRAFT INFORMATION

Identification Number																

Year	Make	Model	Title Number

SECTION 4 - AFFIRMATION OF FACTS

Pursuant to Indiana Code §29-1-8-1(b), the transfer of the certificate of title to the motor vehicle shall not be prohibited if five (5) days have elapsed since the death of the decedent and no appointment of a personal representative is contemplated. A transfer of vehicle or watercraft ownership shall be made by the Bureau of Motor Vehicles upon receipt of this affidavit. The affidavit must be duly executed by the distributees of the estate.

I, the above named claimant, hereby swear or affirm, under penalty of perjury:

- The value of the gross probate estate of the above named decedent, less liens and encumbrances, does not exceed one hundred thousand dollars ($100,000).
- Five (5) days have elapsed since the death of the decedent.
- No application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction.
- I am entitled to ownership of the vehicle / watercraft.
- I certify that the vehicle / watercraft is not subject to any liens that are the responsibility of the claimant.

I swear or affirm that the information I have entered on this form is correct. I understand that making a false statement may constitute the crime of perjury.

Signature of Claimant	Printed Name	Date Signed *(mm/dd/yyyy)*

DRAFT

FINANCIAL INSTITUTION
ADDRESS

Re: Estate of DECEDENT

Dear CONTACT:

Enclosed please find a Small Estate Discovery Affidavit pursuant to I.C. §29-1-8-1.5 which requires a response within ***three (3) business days of its receipt***, and a Letter of Authorization signed by AFFIANT, a beneficiary under the decedent's Last Will and Testament/ heir in estate, authorizing your company to release the requested information directly to my office.

If you have any questions, please contact me. I appreciate your timely cooperation in this matter.

Sincerely,

Jessica L. Merkel
jmerkel@lawbr.com
Direct Dial: (812) 245-6022

BUNGER & ROBERTSON
ATTORNEYS AT LAW

PERSONAL ASSETS AND LIABILITIES – ESTATE PLANNING

Name: **Date:**

ASSETS

Indicate in Ownership column all joint ownership or ownership by anyone other than you.

1. **Cash/Cash Equivalents** (savings, checking, money funds, CDs, etc.)

Institution	Type	Amount	Ownership

Total Value $ 0.00

2. **Investments** (Corporate Stock, Bonds, Annuities, etc. but **not IRAs, 401Ks, or other retirement accounts.** List each broker/investment account as single item. For investments not held in an account, group types of investments, e.g., municipal bonds, equity stocks. Or attach a summary of investments with information requested below.)

Company/Broker/Account	Type	Current Value	Ownership

Total Value $ 0.00

3. **IRAs, Qualified Employee Plan Benefits, other retirement savings accounts** (401K, Keough, SEP, 403(b), PERF, TIAA-CREF, etc.)

Company	Type	Current Value	Ownership	1st Beneficiary	2nd Cont. Beneficiary

Total Value $ 0.00

4. **Real Estate**

Real Estate	Parcel #1	Parcel #2
Address		
Type of property (residence, commercial, farm, etc.)		
Owner(s) (Alone, Joint, Tenants in common, etc.)		
Date acquired		
Cost basis		
Present fair market value		

Total Value $ 0.00

5. **Mortgage Obligations**

Real Estate	Parcel #1	Parcel #2
Original mortgages		
Current number of mortgages		

Total Mortgages $ 0.00

Total Net Real Estate Value _____

6. **Life Insurance**

Life Insurance	Policy #1	Policy #2	Policy #3	Policy #4
Owner				
Insured				
Beneficiary				
Contingent				
Company				
Type of Policy				
Cash Value				
Death Benefit				

Total Death Benefit $ 0.00

7. **Accounts Receivable, Notes and Mortgages** ($ owed to you)

Debtor	Security	Payee	Present Balance Due

Total Value $ 0.00

8. **Tangible Personal Property**

Description	Value	Ownership
Household Contents		
Automobile		
Automobile		
Other (_____)		
Other (_____)		

Total Value $ 0.00

9. **Other Property** (contract rights, licenses, royalties, corporate stock, closely held business stock, partnership interests, powers of appointment, etc.)

Description	Value	Ownership

Total Value $ 0.00

10. **Other Liabilities** (excluding real estate mortgages)

Type	Amount	Description

Total Above Liabilities $ 0.00

Plus, Real Estate Mortgages $ 0.00

Total Liabilities $ 0.00

SUMMARY OF ASSETS AND LIABILITIES

Please complete this form using the values from the foregoing sections.

Assets

1. Cash/Cash Equivalents	$ 0.00
2. Investments	$ 0.00
3. Qualified Employee Plan Benefits, IRAs	$ 0.00
4. Real Estate	$ 0.00
5. Life Insurance	$ 0.00
6. Accounts Receivable, Notes and Mortgages	$ 0.00
7. Personal Property	$ 0.00
8. Other Property	$ 0.00
Total Assets:	$ 0.00

Liabilities

Mortgage Obligations	$ 0.00
Other Liabilities	$ 0.00
Total Liabilities:	$ 0.00

NET WORTH (*Total Assets minus Total Liabilities*): $ 0.00

BUNGER & ROBERTSON
ATTORNEYS AT LAW

FAMILY INFORMATION FORM – ESTATE PLANNING

CLIENT INFORMATION

DATE:

PHONE NUMBER (HOME):

MAILING ADDRESS:

CLIENT 1

Name (*as it should appear in your Will*):	Employer Name/Address:
Birth Date:	
Age:	Occupation:
SSN *(last four digits only)*:	Cell Number:
Cell Number:	Preferred Email:

CLIENT 2 ***(leave blank if not applicable)***

Name (*as it should appear in your Will*):	Employer Name/Address:
Birth Date:	
Age:	Occupation:
SSN *(last four digits only)*:	Cell Number:
Cell Number:	Preferred Email:

INFORMATION REGARDING YOUR CHILDREN AND/OR OTHER BENEFICIARIES

INFORMATION FOR BENEFICIARY 1

Name (*Full Name)*:	Mailing Address:
Cell Number:	
Birth Date:	Age:
SSN *(last four digits only)*:	Relationship to you:
Primary Email:	
If there are descendants, provide their names, dates of birth and addresses:	

INFORMATION FOR BENEFICIARY 2

Name (*Full Name)*:	Mailing Address:
Cell Number:	
Birth Date:	Age:
SSN *(last four digits only)*:	Relationship to you:
Primary Email:	
If there are descendants, provide their names, dates of birth and addresses:	

INFORMATION FOR BENEFICIARY 3

Name (*Full Name)*:	Mailing Address:
Cell Number:	
Birth Date:	Age:
SSN *(last four digits only)*:	Relationship to you:
Primary Email:	
If there are descendants, provide their names, dates of birth and addresses:	

INFORMATION FOR BENEFICIARY 4

Name (*Full Name)*:	Mailing Address:
Cell Number:	
Birth Date:	Age:
SSN *(last four digits only)*:	Relationship to you:
Primary Email:	
If there are descendants, provide their names, dates of birth and addresses:	

INFORMATION FOR ADDITIONAL BENEFICIARIES LIST ON PAGE 8

ADDITIONAL INFORMATION

If you answer "YES" to any of the following questions, please provide details on page 8 of the form.

Do you have a premarital agreement? *(Provide copy if YES)* ☐ YES ☐ NO

Do either of you have any children by a previous marriage or out of wedlock?

Client 1: ☐ YES ☐ NO

Client 2: ☐ YES ☐ NO

Do you have a Will? *(Provide copy if YES)* ☐ YES ☐ NO

Do you have any Trusts? *(Provide copy if YES)* ☐ YES ☐ NO

Do you own property in Alaska, Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington, Wisconsin or Puerto Rico while married to each other *(leave blank if not applicable*)?

☐ YES ☐ NO

Is anyone in your family or among your intended beneficiaries not a citizen of the United States? *(Provide details page 8 if YES)*

☐ YES ☐ NO

Have either of you made gifts in excess of the annual Gift Tax exclusion amount?

Client 1: ☐ YES ☐ NO

Client 2: ☐ YES ☐ NO

Have you filed a gift tax return? *(Provide copy if YES)*

☐ YES ☐ NO

Are there special circumstances (disabled child, second marriage concerns) which need to be addressed in your will or trust? Please explain:

INFORMATION REGARDING YOUR PROFESSIONAL ADVISORS

Attorney (*Full Name)*:	Business Number:
	Business Email:
Business Name and Mailing Address:	

Accountant (*Full Name)*:	Business Number:
	Business Email:
Business Name and Mailing Address:	

Stock Broker or Investment Advisor: (*Full Name)*:	Business Number:
	Business Email:
Business Name and Mailing Address:	

Banker (*Full Name)*:	Business Number:
	Business Email:
Business Name and Mailing Address:	

FIDUCIARIES

In your estate planning documents you will need to name several "fiduciaries" – the individual(s) and/or institutions who will act for you and your family's benefit in handling your estate as executor, any trust you create as trustee, or your financial or health care affairs while incapacitated. Please list your choices below. Naming one appointee to act at a time is recommended, but you may name two to act together (We will discuss in depth when we meet).

Guardians(s): (*list only if you have minor children*)

_____

Successor(s): _____

_____

Personal Representative:

_____

Successor(s): _____

_____

Trustee:

_____

Successor(s): _____

_____

Power of Attorney:

_____

Successor(s): _____

_____

Health Care Representative:

_____

Successor(s): _____

_____

FIDUCIARIES CONTACT INFORMATION

Name (*Full Name)*:	Phone Number(s):
Relationship to you:	Primary Email:
Mail Address:	

Name (*Full Name)*:	Phone Number(s):
Relationship to you:	Primary Email:
Mail Address:	

Name (*Full Name)*:	Phone Number(s):
Relationship to you:	Primary Email:
Mail Address:	

Name (*Full Name)*:	Phone Number(s):
Relationship to you:	Primary Email:
Mail Address:	

Name (*Full Name)*:	Phone Number(s):
Relationship to you:	Primary Email:
Mail Address:	

Name (*Full Name)*:	Phone Number(s):
Relationship to you:	Primary Email:
Mail Address:	

ADDITIONAL INFORMATION FOR ATTORNEY

Change as needed for intestate

STATE OF INDIANA)
) SS:
COUNTY OF MONROE)

AFFIDAVIT FOR TRANSFER OF ASSETS WITHOUT ADMINISTRATION

TO: INSTITUTION
ADDRESS

On behalf of the claimants listed below, the undersigned, upon personal knowledge and belief, makes these statements:

1. The Affiant, NAME , is the _____ of the Decedent.

2. DECEDENT, deceased, died testate on DATE, while a resident of Monroe County, Indiana.

3. No petition for the appointment of a personal representative for the decedent has been granted and none is contemplated.

4. More than forty-five days have elapsed since the death of the decedent.

5. The value of the gross probate estate, wherever located, less liens and encumbrances and reasonable funeral expenses, does not exceed $100,000.

6. The following named persons are the only legatees of the decedent and are entitled to the share of the decedent's property set forth next to the name of each legatee:

NAMES, RELATIONSHIP ADDRESSES — PERCENTAGE (%)

All of these individuals have been notified of this affidavit by the affiant.

6. The following is a full description of all the personal property belonging to the decedent, together with an estimated value as of the date of decedent's death according to the best knowledge and information of the affiant:

Personal clothing and other tangible personal property — Negligible
INSTITUTIONS AND ACCOUNT NUMBERS _____

7. By reason of the above-stated matters, the affiant requests that the above-enumerated personal property of the decedent, DECEDENT, be transferred to him in accordance with

the decedent's Last Will and Testament and in accordance with the provisions of Indiana Code (IC) § 29-1-8-1 and § 29-1-8-2.

8. The affiant is entitled to the payment or delivery of the property and requests immediate distribution to him, pursuant to the provisions of IC § 29-1-8-3 on behalf of each person listed in item 5.

9. Pursuant to the terms of IC § 29-1-8-2, the person paying or delivering the property to the affiant is released from any liability.

WHEREFORE, the affiant herein hereby requests that INSTITUTION presently in possession of the above-enumerated personal property, namely PROPERTY account nos. _____, transfer the same to said affiant pursuant to the Indiana Code and that distribution of said property to the affiant herein shall release INSTITUTION from any liability with regard to the proper application and disbursement of said personal property; and that the affiant herein, AFFIANT, hereby charges himself with the responsibility of proper disbursement of the funds according to the provisions of the Indiana Code and hereby agrees to hold harmless said INSTITUTION from any liability with regard to the transfer of said personal property.

Affirmed under penalties for perjury this _____ day of _____, 20__, that the foregoing representations are true.

_____
AFFIANT
ADDRESS

STATE OF _____)
)
COUNTY OF _____)

Before me, a Notary Public in and for said County and State, personally appeared AFFIANT, who after being duly sworn, acknowledged the execution of the foregoing document.

WITNESS my hand and notarial seal this ____ day of _____, 20__.

_____
Notary Public

Non-Probate

- Assets that are jointly owned with rights of survivorship
- Assets with specific beneficiary designations
- Assets that are transferrable or payable on death
- Assets that are titled to a Trust

TITLE/Terms of Contract

Examples:

Probate

- Assets that are solely owned that:
  - Do not have joint ownership
  - Do not have a beneficiary designation
  - Are not payable on death or transferrable on death
- Assets that are not titled to a trust

WILL/ Intestacy Law

Examples:

STATE OF INDIANA)
) SS:
COUNTY OF GREENE)

SMALL ESTATE DISCOVERY AFFIDAVIT

TO: FINANCIAL INSTITUTION
ADDRESS

Comes now the undersigned affiant, upon his personal knowledge and belief, and makes the following statements:

1. DECEDENT, deceased, SSN, died on DATE OF DEATH, while residing at DECEDENT'S ADDRESS INCLUDING ZIP.

2. The Affiant, AFFIANT'S NAME, whose address is AFFIANT'S ADDRESS INCLUDING ZIP, and is the decedent's RELATION TO DECEDENT.

3. That affiant has reason to believe the following described personal property is in the possession of FINANCIAL INSTITUTION:

   Checking, savings or money market account(s)

4. That the affiant requests FINANCIAL INSTITUTION provide him with:

   (a) the date of death value of the property, and

   (b) the names of all known beneficiaries of such property

   (c) for the purpose of determining whether the decedent's estate may be administered under the summary procedures of Indiana Code (IC)§29-1-8-1.

5. That pursuant to the provisions of IC§29-1-8-1.5, the affiant is entitled to delivery of this information ***within three (3) business days*** following the presentation of this affidavit.

6. That, the person who acts in good faith reliance on this Affidavit is released from any liability relating to the disclosure of the requested information, pursuant to the terms of IC §29-1-8-1.5(e).

WHEREFORE, the affiant herein hereby requests that FINANCIAL INSTITUTION allegedly in possession of the above-enumerated personal property, namely checking, savings or money market account(s) held at the institution, release the date of death value and the names of all known beneficiaries of such property within three (3) business days following the presentation of this affidavit pursuant to the Indiana Code, and that provision of the requested information to the affiant within the time frame allotted shall release FINANCIAL INSTITUTION from any liability

with regard to the disclosures of the requested information; and that the affiant herein hereby charges himself with the responsibility of proper reporting of this information to the decedent=s personal representative, if any, or any other person having a superior right to said personal property.

Affirmed under penalties for perjury that the foregoing representations are true.

_____
AFFIANT
ADDRESS

STATE OF INDIANA)
) SS:
COUNTY OF GREENE)

Before me, a Notary Public in and for said County and State, personally appeared AFFIANT, who after being duly sworn, acknowledged the execution of the foregoing document.

WITNESS my hand and notarial seal this ____ day of _____, 2012.

_____
Notary Public
Name Printed:_____

My Commission Expires:

_____
My County of Residence is:

_____

IC 29-1-8-1.5 Affidavit to obtain date of death values for personal property, accounts, and intangible property belonging to a decedent; form of affidavit; duty to furnish information to the affiant

Sec. 1.5. (a) This section does not apply to the following:

(1) Real property owned by a decedent.

(2) The contents of a safe deposit box rented by a decedent from a financial institution organized or reorganized under the law of any state (as defined in IC 28-2-17-19) or the United States.

(b) After the death of a decedent, a person:

(1) indebted to the decedent; or

(2) having possession of:

(A) personal property;

(B) an instrument evidencing a debt;

(C) an obligation;

(D) a chose in action;

(E) a life insurance policy;

(F) a bank account; or

(G) intangible property, including annuities, fixed income investments, mutual funds, cash, money market accounts, or stocks;

belonging to the decedent;

shall furnish the date of death value of the indebtedness or property and the names of the known beneficiaries of property described in this subsection to a person who presents an affidavit containing the information required by subsection (c).

(c) An affidavit presented under subsection (b) must state:

(1) the name, address, Social Security number, and date of death of the decedent;

(2) the name and address of the affiant, and the relationship of the affiant to the decedent;

(3) that the disclosure of the date of death value is necessary to determine whether the decedent's estate can be administered under the summary procedures set forth in this chapter; and

(4) that the affiant is answerable and accountable for the information received to the decedent's personal representative,

if any, or to any other person having a superior right to the property or indebtedness.

(d) A person presented with an affidavit under subsection (b) must provide the requested information within three (3) business days after being presented with the affidavit.

(e) A person who acts in good faith reliance on an affidavit presented under subsection (b) is immune from liability for the disclosure of the requested information.

(f) A person who:

(1) is presented with an affidavit under subsection (b); and

(2) refuses to provide the requested information within three (3) business days after being presented with the affidavit;

is liable to the estate of the decedent.

(g) A plaintiff who prevails in an action to compel a person presented with an affidavit under subsection (b) to accept the authority of the affiant or in an action for damages arising from a person's refusal to provide the information requested in an affidavit presented under subsection (b) shall recover the following:

(1) Three (3) times the amount of the actual damages.

(2) Attorney's fees and court costs.

(3) Prejudgment interest on the actual damages from the date the affidavit was presented to the person.

Section Two

A BRIEF PRIMER ON ESTATE PLANNING DOCUMENT SPECIFICS

Micah J. Nichols, Esq.
KRIEG DEVAULT LLP
12800 North Meridian Street,
Suite 300
Carmel, IN 46032-5407
T. 317-566-1110
F. 317-636-1507

mnichols@kdlegal.com

www.kriegdevault.com

Section Two

A Brief Primer on Estate Planning Document Specifics.....Micah J. Nichols

BIOGRAPHY

Micah Nichols is a partner at Krieg DeVault LLP and a Board Certified Indiana Trust and Estate Lawyer, as certified by the Trust and Estate Specialty Board, and concentrates his practice in the areas of estate planning, estate and trust administration, asset preservation, elder law, guardianships, trust and estate litigation, and general business.

Mr. Nichols has worked with families with nominal estates to those that have taxable estates (+$25,000,000 in net worth) and has developed sophisticated estate plans to minimize gift and estate taxes, to fulfill charitable goals, and safeguard assets for future generations. Mr. Nichols enjoys working with all families, from young professionals just beginning their careers and starting their families to seniors contemplating retirement and leaving a legacy. He particularly enjoys helping his clients navigate through complicated family dynamics, assisting business owners with transition and/or succession plans, and working with his clients' team of financial advisors and accountants in developing a wholistic and complete financial and asset management plan.

Originally from northeast Indiana, Mr. Nichols has been in private practice since 2012 and is married to his college sweetheart and has two children. While Micah primarily serves clients in the Indianapolis and central Indiana region, he currently has clients all over the state of Indiana.

I. LAST WILLS AND TESTAMENTS

A. Basic Requirements.

To create a last will and testament ("Will") in Indiana, a person must be either (i) at least 18 years old or (ii) a member of the armed forces or merchant marine. *See* I.C. § 29-1-5-1.

The person must also have testamentary capacity, i.e. a "sound mind." A "sound mind" is the mental capacity sufficient to (i) know the extent and value of the testator's property; (ii) know the number and names of the persons who are the natural objects of the testator's bounty; and (iii) retain the facts necessary to direct the making of a will. *See Ramseyer v. Dennis*, 116 N.E. 417, 418 (Ind. 1917); *In re. Rhoades*, 993 N.E.2d 291, 299 (Ind. Ct. App. 2013).

For a Will to be valid, the testator must signify to at least two witnesses that the instrument is the testator's Will and either: (i) sign the Will; (ii) direct another person to sign the testator's name in the testator's presence; or (iii) acknowledge the testator's signature to the witnesses. *See* I.C. § 29-1-5-3(b)(1). Typically, a self-proving clause is also attached to a Will, but this is not required to make a Will valid. However, a Will that is self-proved is admitted to probate without having to submit additional proof that the Will was properly executed. *See* I.C. § 29-1-5-3.1.

1. Witness Requirements

For a valid Will, the witnesses must be competent when the will is executed and both: (i) witness the testator's signature to the will; witness the signature of someone who signs the will at the testator's direction; or have the testator acknowledge the testator's signature to the witnesses if the testator previously signed the will; and (ii) execute the will or a self-proving-clause attached to the will in the testator's and each other's presence. *See* I.C. § 29-1-5-2 and -3. *See also Scampmorte v. Scampmorte*, 179 N.E.2d 302, 306-10 (Ind. Ct. App. 1960).

As a result of the COVID-19 pandemic, legislation was created that allows the witnesses and a testator to use real-time, two-way technology and still be considered in one another's "presence" if the testator and witnesses cannot be in the same physical space.

A beneficiary under a Will should not serve as a witness. If a beneficiary serves as a witness and the Will cannot be proved without that beneficiary's testimony or signature, the Will is generally void as to that beneficiary and persons claiming under that beneficiary. However, if the beneficiary would be entitled to a distributive share of the testator's estate except for the Will, the beneficiary can claim the lesser of the share they would be entitled to except for the Will or under the Will. The best practice is to ensure that the witnesses are disinterested and independent.

A Will or self-providing affidavit is not required to be notarized. However, certain electronic Wills or Wills executed in counterpart may require an affidavit of compliance from an attorney or a directed paralegal supervising the execution, which must be notarized.

2. Attestation Clause

It is common for a Will to have an attestation clause, a sample of which follows: "Signed, sealed, published and declared by [TESTATOR NAME] the testator above named, as and for [his/her] last will and testament, in our presence, and we, in [his/her] presence, and the presence of each other, have hereunto subscribed our names as witnesses on [DATE]."

Witnesses typically sign the Will under the attestation clause, and occasionally, addresses of the witnesses are also provided, although there is no requirement to provide addresses. It may be helpful to include addresses in case witnesses need to be reached years from now when a Will is probated.

3. Self-Proving Affidavit

The form of a self-proving affidavit is codified in I.C. § 29-1-5-3.1, which is typically included at the end of a Will. The self-proving affidavit is typically signed during the signing of the Will. The self-providing affidavit under I.C. § 29-1-5-3.1 is as follows:

> We, the undersigned testator and the undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument declare:
>
> (1) that the testator executed the instrument as the testator's will;
>
> (2) that, in the presence of both witnesses, the testator signed or acknowledged the signature already made or directed another to sign for the testator in the testator's presence;
>
> (3) that the testator executed the will as a free and voluntary act for the purposes expressed in it;
>
> (4) that each of the witnesses, in the presence of the testator and of each other, signed the will as a witness;
>
> (5) that the testator was of sound mind when the will was executed; and
>
> (6) that to the best knowledge of each of the witnesses the testator was, at the time the will was executed, at least eighteen (18) years of age or was a member of the armed forces or of the merchant marine of the United States or its allies.

The Will and self-proving affidavit do not each require separate testator and witness signatures. A single signature of each of the two witnesses in each other's presence and in the signing testator's presence accomplishes the witnessing and self-proving of the Will. *See* I.C. § 29-1-5-3.1(a). *See also Estate of Dellinger v. 1st Source Bank*, 793 N.E.2d 1041, 1043-45 (Ind. 2003).

Note that if a testator executes the will and the witnesses execute it with only an attestation clause and no self-proving affidavit, the Will may later be made self-proving by attaching a self-

proving clause signed by the testator and the witnesses that meets the requirement of I.C. § 29-1-5-3.1.

B. Types of Wills.

1. Oral (Nuncupative) Wills

An oral or nuncupative Will is permitted in Indiana only if the testator (i) is in imminent peril of death; (ii) dies because of that impending peril; and (iii) declares the Will before two disinterested witnesses; and the Will is (i) reduced in writing by or under the direction of one of the witnesses within 30 days after the declaration and (ii) submitted for probate within 6 months after the testator's death. *See* I.C. § 29-1-5-4(a).

Moreover, an oral Will may only dispose of personal property not exceeding an aggregate value of $1,000. If the testator is an active miliary member in a time of war, that aggregate value is increased to $10,000. *See* I.C. § 29-1-5-4(b).

If a testator who makes an oral Will already has an existing Will, the oral Will acts only as a codicil, and the provisions of the oral Will only change the existing Will to the extent necessary to give effect to the gifts made under the oral Will. *See* I.C. § 29-1-5-4(c).

2. Handwritten or Holographic Wills

Holographic Wills are generally not valid in Indiana. A holographic Will is a Will that is handwritten by the testator in its entirety and signed but not witnessed. In Indiana, a valid handwritten Will must be witnessed and follow all formalities required for a valid Will in Indiana. *See* I.C. § 29-1-5-1 through 29-1-5-9.

3. Contractual Wills

A testator's contractual agreement to make a testamentary disposition may be valid in Indiana. This could be done in a blended family situation. The enforcement of this type of contract

is typically done through the filing and prosecution of a claim in the testator's estate. *See Markey v. Estate of Markey*, 38 N.E. 3d 1003, 1007-08 (Ind. 2015).

4. Statutory Wills

Some states provide statutory Wills where a form is provided by the State and the testator just needs to complete certain blanks and check boxes related to certain Will provisions. However, Indiana does not have a statutory Will.

5. Counterpart Wills

Wills can be executed in counterpart. When a Will is signed in counterparts, there are multiple identical copies of the Will, one signed by the testator and one or more additional counterparts signed by the witnesses. A counterpart Will must be in tangible, readable form and be created under the supervision of an attorney or directed paralegal. *See* I.C. § 29-1-5-3(c).

Once executed, the testator or another individual at the testator's direction, must assemble the counterparts of the Will and signatures of the testator and witnesses within 5 business days. If the testator has directed another to assemble the separate portions into a single document, the 5-day period does not start until the individual receives all the separately signed counterparts. If the testator dies after executing the will, but before compiling the composite document, the validity of the will is not affected. Scanned copies or photocopies of the composite document containing all the signatures may be validly presented for filing. *See* § I.C. 29-1-5-3(c).

The supervising attorney or directed paralegal must also complete an affidavit of compliance certifying that the statutory formalities have been met, which affidavit must include the following:

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

(ii) the name and residential or business address of each witness;

(iii) the address, city, and state where the testator was physically located when they signed a counterpart;

(iv) the city and state where each attesting witness was physically located when they signed a counterpart;

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

(vi) a description of the audiovisual or other method used by the testator, witnesses, and supervising attorney or directed paralegal to interact with each other in real time during the signing process;

(vii) description of the method used by the testator and witnesses to identify each page break in the will and verify that the separate counterparts were identical in content;

(viii) general description of how and when the attorney or directed paralegal combined the counterparts into a single document;

(ix) the name, telephone number, and business or residential address of the supervising attorney or directed paralegal who supervised the execution and witnessing; and

(x) other information the attorney or directed paralegal considers relevant to determining the testator's capacity and the testator's and witnesses' compliance with the execution formalities.

See I.C. § 29-1-5-3(d).

Similar to electronic Wills, this affidavit of compliance should be filed with the petition to probate a counterpart Will. If not submitted, the counterpart Will is voidable at the discretion of the court, on an objection to probate under I.C. § 29-1-7-16, or on a timely will contest under I.C. § 29-1-7-17. *See* I.C. § 29-1-21-4(d). *See* I.C. § 29-1-5-3(e).

A self-proving clause must be attached to a counterpart Will, which should be in the following statutory form:

> We, the undersigned testator and undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument, declare the following:
>
> (1) That the undersigned testator and witnesses interacted with each other in real time through the use of technology, and each witness was able to observe the testator and other witnesses throughout the signing process.
>
> (2) That the testator executed a complete counterpart of the instrument, in a readable form on paper, as the testator's will.
>
> (3) That, in the presence of both witnesses, the testator:
>
> (A) signed the paper counterpart of the will;
> (B) acknowledged the testator's signature already made; or
> (C) directed another individual to sign the paper counterpart of the will for the testator in the testator's presence.
>
> (4) That the testator executed the will as a free and voluntary act for the purpose expressed in the will.
>
> (5) That each of the witnesses, in the presence of the testator and of each other, signed one (1) or more other complete paper counterparts of the will as a witness.
>
> (6) That each paper counterpart of the will that was signed by the witness was complete, in readable form, and with content identical to the paper counterpart signed by the testator.
>
> (7) That the testator was of sound mind when the will was executed.
>
> (8) That, to the best knowledge of each witness, the testator was at least eighteen (18) years of age at the time the will was executed or was a member of the armed forces or of the merchant marine of the United States or its allies.

See I.C. § 29-1-5-3.1(e).

6. Electronic Will Execution and Self-Proving Requirements

An electronic Will must include either (i) the testator's electronic signature or (ii) the electronic signature of another adult individual, who is not an attesting witness, made at the testator's direction and be attested to by the electronic signatures of at least two witnesses, who may be remote witnesses. *See* I.C. § 29-1-21-4(a).

Additionally, the testator must state, in the presence of the attesting witnesses, that the instrument to be electronically signed is the testator's Will. *See* I.C. § 29-1-21-4(a)(3). The testator, or another adult individual at the testator's direction and not an attesting witness, must electronically sign the electronic Will in the attesting witness' presence. The attesting witnesses must electronically sign the electronic Will in the testator's and each other's presence. *See* I.C. 29-1-21-4(a)(1), (4), and (5). However, if the testator and witnesses cannot be in the same physical space, Indiana law allows them to use real-time, two-way technology and still be considered in one another's presence. *See* I.C. § 29-1-1-3(15), (16).

An electronic signature is both (i) an electronic sound, symbol, or process attached to or logically associated with an electronic record and (ii) executed or adopted by a person with the intent to sign the electronic record. *See* I.C. § 29-1-21-3(9) and 26-2-8-102(10).

The testator and witnesses must comply with both (i) the prompts issued by the software used to perform the electronic signing and (ii) the instructions given by any person responsible for supervising the execution of the electronic Will. *See* I.C. § 29-1-21-4(a)(2).

The testator or other adult individual who is not an attesting witness and acts for the testator must command the software application or user interface to finalize the electronically signed

electronic Will as an electronic record, which may include any identity verification evidence to the testator or document integrity evidence for the electronic Will.

Whenever an electronic Will is executed remotely, the execution must be supervised by an attorney or directed paralegal.[1] *See* I.C. § 29-1-21-4(b). Within a reasonable amount of time after the attorney or directed paralegal witnesses a remotely executed electronic Will, they must complete an "affidavit of compliance," certifying that the electronic Will was executed in compliance with Indiana's required formalities, which affidavit must include the following:

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

(ii) the name and residential or business address of each witness;

(iii) the address, city, and state where the testator was physically located at execution;

(iv) the city and state where each witness was physically located at execution;

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

(vi) a description of the method used by the testator, witnesses, and supervising attorney or directed paralegal to interact with each other during the signing process;

(vii) a description of the electronic method used to record the signature of the testator and witnesses;

(viii) the name, telephone number, and business or residential address of the attorney or directed paralegal supervising the process; and

[1] A directed paralegal is a non-lawyer assistant who is employed or retained by a licensed attorney and whose work that attorney directly supervises. *See* I.C. § 29-1-1-3(a)(9).

(ix) Other information the attorney or directed paralegal considers relevant to determining the testator's capacity and the testator's and witnesses' compliance with the execution formalities.

See I.C. § 29-1-21-4.

This affidavit of compliance should be filed with the petition to probate an electronic Will. If not submitted, the electronic Will is voidable at the discretion of the court, on an objection to probate under I.C. § 29-1-7-16, or on a timely will contest under I.C. § 29-1-7-17. *See* I.C. § 29-1-21-4(d).

A testator may self-prove an electronic Will both at signing and before the Will is electronically filed, although it does not need to be self-proved. A self-proving clause is attached to an electronic Will and follows the following format:

> We, the undersigned testator and the undersigned witnesses, whose names are signed to the attached or foregoing instrument, declare:
>
> (1) That the testator executed the instrument as the testator's will.
>
> (2) That, in the presence of both witnesses, the testator signed the will or directed another individual who is not one of the witnesses to sign for the testator in the testator's presence and in the witnesses' presence;
>
> (3) That the testator executed the will as a free and voluntary act for the purposes expressed in it;
>
> (4) That each of the witnesses, in the presence of the testator and each other, signed the will as a witness;
>
> (5) That the testator was of sound mind when the will was executed; and
>
> (6) That, to the best knowledge of each attesting witness, the testator was, at the time the will was executed, at least eighteen (18) years of age or was a member of the armed forces or of the merchant marine of the United States or its allies.

See I.C. § 29-1-21-4(f).

Similar to written Wills, the testator and attesting witnesses may each provide a single signature for any electronic Will that includes a self-proving clause and do not need to separately sign the electronic Will and the self-proving clause. *See* I.C. § 29-1-21-4(f).

C. Document Specific Provisions.

A Will can encompass a variety of provisions if executed correctly as stated above. This Section discusses the most common provisions found in a Will.

1. Family Information

A section on a testator's family is generally included, which not only lists the spouse and children, if any, but can also address blended family situations. A testator can also use this section to disinherit family members or include additional family members (like stepchildren) that are not biologically related to the testator.

2. Payment of Last Debts and Expenses

This section addresses the personal representative's obligation to pay last debts and expenses of the testator, as well as taxes.

3. Tangible Personal Property

Indiana law allows for a Will to incorporate by reference a written statement or list disposing of items of tangible personal property, other than property used in trade or business, not otherwise specifically disposed of by the Will. This writing must (i) be referred to in the Will; (ii) be signed by the testator; and (iii) refer to the items and beneficiaries with reasonable certainty. *See* I.C. § 29-1-6-1(m). Such writing may be prepared on or after the execution of the Will and may be changed by the testator after the writing is prepared. *See* I.C. § 29-1-6-1(m).

If no tangible personal property memorandum is prepared, it is wise to include a general gift of tangible personal property.

Practitioners should make sure they define "tangible personal property." Under Indiana law, a written memorandum allows a testator to dispose of vehicles, furniture, furnishings, clothing, jewelry, household items, and the like. It does not allow a testator to dispose of property primarily held for investment purposes nor does it include property held for use in a trade or business, ordinary currency, and cash or bullion. Practitioners can also decide whether to include art, antiques, stamp and coin collections and other collections in the definition of "tangible personal property." Oftentimes, these items are excluded due to their value compared to clothing and household items.

Finally, some practitioners will include insurance proceeds related to such property and direct that those proceeds covering an item of tangible personal property pass to the individual or individuals listed and might also specifically state that expenses of packing, shipping, insuring, and delivering tangible personal property to beneficiaries will be an expense of the estate.

4. Residue

The most important provision in a Will is determining where the residuary of a testator's probate assets will pass upon a testator's death. A testator can incorporate by reference his or her revocable trust (i.e. a "pour over will") or can leave assets to beneficiaries outright or in a testamentary trust.

a. Incorporating a Trust (i.e. Pour-Over Will)

In order to incorporate a trust instrument in a Will, the Will must (i) refer to the writing, (ii) the writing must be clearly identified, and (iii) the writing must be in existence at the will's execution and the decedent's death. *See* I.C. § 29-1-6-1(h). *See also Bircher v. Wasson*, 44

180 N.E.2d 118, 126 (Ind. Ct. App. 1962). For a pour-over will, practitioners generally incorporate the revocable trust by reference to become part of the Will if the trust becomes invalid as a result of some irregularity. Since the terms of the trust are incorporated by reference into the Will, the personal representative can follow the terms of the trust.

The trust must exist before the Will may validity incorporate it, so when executing a revocable trust and pour-over will, the settlor should sign the trust before the will to comply with the law for incorporation by reference. *See* I.C. § 29-1-6-1(h).

b. Testamentary Trusts

Testamentary trusts are created under a decedent's Will and go into effect after a decedent's death and once the Will is probated, which is different from a revocable living trust, which is valid and effective once signed. Various testamentary trusts can be created under a Will, including separate trusts or single trusts, which will hold the probate assets in trust for the benefit of an individual or individuals, such as a spouse, children, or grandchildren. Testamentary trusts can provide the same type of tax planning and asset protection for beneficiaries that revocable trusts do and allow assets to be held in trust for the lifetime of a beneficiary or at certain ages, although such administration is subject to the probate process, which may require additional court filings or court approvals.

(1) Differences Between Testamentary Trusts and Revocable Trusts

Testamentary Trusts cannot be funded until the death of the testator, which is different from a revocable trust, which can be funded while the settlor is living or at death (if there is a pour-over Will). Testamentary trusts offer no benefit while the testator is living.

A testamentary trust is also irrevocable, so the only way the terms of the trust can be changed is by executing a new Will, which is different from a revocable trust, which can be amended without having to execute a new Will.

A testamentary trust is subject to the probate process and is under court supervision, so in order to be established, the Will must be probated, and the trust becomes a matter of public record. Compare these trusts to revocable trusts, which are contracts between private individuals and which do not require court supervision and never become part of the public record.

Assets transferred to a revocable trust during a settlor's life pass outside the probate process, so these are used to avoid the probate process. Testamentary trusts are not a "probate avoidance strategy" since the Will must be probated to create the trust.

There is generally no incapacity or disability language in a testamentary trust for the testator since the trust is not created until the testator dies. A revocable trust can be privately managed without any court involvement if the settlor becomes incapacitated or disabled. Generally, revocable trusts have successor trustee provisions to manage the trust if the settlor becomes incapacitated.

Based on these differences and challenges associated with testamentary trusts, it is common for practitioners to use revocable trusts, rather than testamentary trusts, although testamentary trusts might make sense for a client with simple assets who wants to include trusts terminating at certain ages, especially if a probate estate will be created anyways. There is not a "one size fits all" for estate planning clients.

5. Personal Representative Appointments

The Personal Representative is one that will administer the estate of a decedent. A person is disqualified to act as a personal representative if the person is under the age of 18 years old,

incapacitated, a convicted felon, a resident corporation not authorized to act as a fiduciary in Indiana, or any individual the court finds unsuitable. *See* I.C. § 29-1-10-1(b). A non-resident individual or corporate fiduciary may qualify and serve as a joint personal representative with an Indiana resident by both posting a bond and otherwise being qualified to act as personal representative. *See* § 29-1-10-1(c). A nonresident individual may qualify only by filing with the court a written notice that the individual accepts the appointment, a notice of appointment of a resident agent in Indiana, and a bond of sufficient value. *See* I.C. § 29-1-10-1(d).

It is generally common and best practice to include a compensation clause in a personal representative appointment, although this is not required since I.C. 29-1-10-13 allows a personal representative to receive reasonable compensation. Moreover, any corporate personal representative may not serve if there is no specific compensation clause provided for in the Will. There is no statutory limitation or fee schedule. Compensation generally is determined based on (i) the nature of the estate; (ii) the nature of the service provided; (iii) any peculiar qualifications for the duties being performed and the advantage to the estate of these qualifications; (iv) the difficulties encountered in the estate administration; and (v) all other factors in a consideration of compensation fair to the estate and reasonable for the personal representative. *See In re Est. of Kingseed*, 413 N.E.2d 917, 932 (Ind. Ct. App. 1980).

A drafting attorney of a Will can generally serve as the named personal representative. *See* Indiana Rules of Professional Conduct, Rule 1.8, cmt. 8. An attorney named as personal representative in the will may receive compensation in addition to the attorney's fees for personal representative services as attorney and for other services not required of a personal representative. These fees must be just, reasonable, and fully disclosed in writing to the client in an understandable way. *See* I.C. § 29-1-10-13; Indiana Rules of Professional Conduct Rules 1.7 and 1.8. The attorney

must also be careful to abide by the Rules of Professional Conduct in this arrangement and should advise the client about (i) The nature and extent of the lawyer's financial interest in the appointment; and (ii) The availability of alternative candidates for the position. *See* Indiana Rules of Professional Conduct Rule 1.8, cmt. 8. The attorney may also wish to, among other things: (i) advise the testator in writing to seek independent legal counsel and (ii) obtain from the testator written and signed informed consent.

It is generally common and best practice to include successor personal representative provisions. If no successor personal representative is appointed, the following persons may serve in the following order of priority: (i) the surviving spouse who is a devisee in the Will that is admitted to probate; (ii) a devisee in the Will that is admitted to probate; (iii) the surviving spouse or other person nominated by the surviving spouse; (iv) an heir or other person nominated by the heir; and (v) any other qualified person. *See* I.C. § 29-1-10-1(a).

If there are two or more personal representatives appointed, generally any one of the personal representatives may act alone unless the Will provides otherwise. However, the following actions must be exercised, if at all, by all the personal representatives: (i) instituting a suit on behalf of the estate; (ii) employing an attorney; (iii) carrying out the business of the deceased; (iv) voting corporate shares held by the estate; (v) exercising those powers under the Will which by the terms of the Will are only to be exercised by all the personal representatives. *See* I.C. § 29-1-10-10.

When more than two personal representatives possess powers that must be exercised by them jointly, the decision of a majority of the personal representatives appointed controls. When there are two personal representatives, they must act unanimously, unless the Will provides otherwise. If the personal representatives or majority cannot agree or are equally divided on a

matter, they must petition the court and exercise the power according to the direction from the court after a hearing. *See* I.C. § 29-1-10-11(a).

6. Guardianship Appointments

For clients with minor children, it is common to appoint guardians in a Will. Such guardians appointed under a Will take some priority under I.C. § 29-3-5-5(a). Usually, the person named as guardian in the Will files a petition for appointment to serve as guardian for a minor. However, any person can file the petition. *See* I.C. §§ 29-3-5-4 and 29-3-5-5. In appointing a guardian, the court acts in the best interest of the minor. *See* I.C. § 29-3-5-5(b). The court considers many factors, including: (i) the request made for a minor by a parent of the minor or the minor's de facto custodian; (ii) any request in a will or other written instrument; (iii) an existing designation of standby guardian; (iv) any request made by a prospective ward who is at least 14 years old; (v) the relationship of the proposed guardian to the prospective ward; (vi) the best interest of the prospective ward and the ward's property.

A person nominated in the will of a deceased parent (or in a power of attorney of a living parent) generally has priority to consideration for appointment as guardian over anyone other than a standby guardian designated by the parent's written declaration. However, the court has discretion to appoint a person with lower statutory priority (or of the same priority) who the court considers to be best qualified to serve. *See* I.C. §§ 29-3-3-7 and 29-3-5-5.

Individuals may not serve as guardian if they have been adjudged to be sexually violent predators, were convicted of child molesting or sexual misconduct with a minor against a child less than 16 years old after reaching 18 years old, or were convicted of other specified felonies. *See* I.C. 29-3-7-7.

Although not specifically stated, it is presumed that the guardian must also be over the age of 18 and of sound mind. If the nominated guardian is a person with a disability as defined in the Americans with Disabilities Act, a court must, when considering the person's suitability as guardian: (i) not discriminate against the individual and (ii) take into consideration any reasonable accommodations that can be provided. *See* I.C. § 29-3-5-4.1.

This appointment of a guardian in a Will or in a stand-by guardian document under I.C. § 29-3-3-7, is merely *persuasive*, not a guarantee. The Court considers guardianship nominations using specified factors and order of priority set out in I.C. §§ 29-3-5-4 and 29-3-5-5.

Care and planning should also be made if a client is appointing a married couple to serve as co-guardians, especially if such married couple later gets divorced in the future given current divorce rates. Will the client prefer one individual over another from that relationship if the couple is not married or appoint a different individual entirely? These questions should all be asked and considered when appointing co-guardians who are married.

7. No Contest Clauses

A no-contest clause, also known as an *in terrorem* clause, is an optional provision that a testator can include in a Will, especially if there is an issue of conflict among beneficiaries of the Will. The main goal of a no-contest clause is to discourage beneficiaries from challenging the Will or any of its provisions.

As of July 1, 2018, no contest clauses are valid and enforceable in Indiana under the express terms of the clause. However, a no-contest clause does not apply to any of the following:

(i) Action brought by a beneficiary if good cause is found by a court.

(ii) Action brought by an executor or other fiduciary of a will that incorporates a no-contest clause, unless the executor or other fiduciary is a beneficiary against whom the no-contest clause is otherwise enforceable.

(iii) Agreement, including a non-judicial settlement agreement, among beneficiaries and any other interested persons to settle or resolve any other matter relating to a will or an estate.

(iv) Action to determine whether a proposed or pending motion or proceeding constitutes a contest.

(v) Action brought by or on behalf of a beneficiary to seek a ruling on the construction or interpretation of a will.

(vi) Action or objection brought by a beneficiary, an executor, or other fiduciary that seeks a ruling on: proposed distributions; fiduciary fees; or any other matter where a court has discretion.

(vii) Action brought by the attorney general, if good cause is shown to do so, that seeks a ruling regarding the construction or interpretation of either: a will with a charitable trust or bequest; or a no-contest clause provision contained in a will or trust that purports to penalize a charity or charitable interest.

(viii) Action brought by the attorney general that institutes any other proceedings relating to an estate or trust if good cause is shown to do so.

See I.C. § 29-1-6-2(b).

As one can see, there are several exceptions to the no-contest clause, which makes such clause less powerful in the grander scheme. Moreover, a beneficiary is likely to contest the Will anyways if they have been disinherited because they have nothing to lose. Therefore, if a client desires to use a no contest clause, best practice is to leave such beneficiary with some inheritance,

so the beneficiary has to strongly consider whether to pursue tying the Will up in litigation for several years.

II. REVOCABLE TRUSTS

A. Basic Requirements.

In Indiana, there are no statutory minimum age requirements for a settlor of a trust. *See* I.C. §§ 30-4-2-1 and 30-4-2-1.5. However, since only those 18 years of age or older may contract and make a will, it is generally accepted that only individuals 18 years of age or older can formally create a trust. *See* I.C. §§ 29-1-5-1 and 30-4-2-10(b).

In Indiana, the settlor's mental capacity required to create a revocable trust is the same as required to create a will. *See* I.C. § 30-4-2-10(b). A person making a will must be of sound mind. *See* I.C. § 29-1-5-1. Recall that the standard for testamentary capacity requires the testator to have the mental capacity sufficient to (i) know the extent and value of the testator's property; (ii) know the persons who are the natural objects of the testator's bounty; and (iii) retain the facts necessary to direct the making of a will. *See Ramseyer v. Dennis*, 116 N.E. 417, 418 (Ind. 1917); *In re Rhoades*, 993 N.E.2d 291, 299 (Ind. Ct. App. 2013).

In Indiana, a trust of real or personal property is enforceable only if there is written evidence of the trust terms, signed by either (i) the settlor, (ii) the settlor's agent, or (iii) an eligible adult signing at the settlor's direction and in the settlor's physical presence. *See* I.C. § 30-4-2-1(a). If an individual signs the trust at the direction of the settlor, the trust instrument must (i) identify the person signing for the settlor; (ii) state that the person is signing at the direction of the settlor and in the settlor's direct physical presence; and (iii) state that the person is not a relative of the settlor, a trustee named in the trust, or entitled to a beneficial interest in, or power of appointment over, the trust property. *See* I.C. § 30-4-2-1(a).

The terms of the trust must identify with reasonable certainty: (i) trust property, which can be either actual property or an expectancy interest; (ii) the trustee's identity; (iii) the nature of the trustee's interest, such as powers related to the property; (iv) the beneficiary's identity, except in certain narrow cases; (v) the nature of the beneficiary's interest; and (vi) the purpose of the trust. *See* I.C. § 30-4-2-1(c).

In Indiana, trusts are enforceable only if there is written evidence of the trust terms bearing the signature of the settlor or the settlor's authorized agent. *See* I.C. § 30-4-2-1(a). However, implied trusts, equitable trusts, and constructive trusts are recognized in limited circumstances, such as when legal title is acquired through wrongful means. *See* I.C. § 29-1-2-12.1; *Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, 973 N.E.2d 1099, 1109 (Ind. 2012). Revocable trusts generally include the trustee's signature as well. The trustee must accept the trust. The signature of the person named as trustee on the trust instrument or in a separate written acceptance is conclusive evidence that the named person accepted the trust. *See* I.C. § 30-4-2-2(b). However, a trustee's signature is not required for a valid revocable trust, as there are additional ways that the trustee may accept the trust. There are no requirements that a revocable trust be witnessed in order for it to be valid nor are there requirements that a revocable trust be notarized. *See* I.C. §§ 29-1-5-9; 30-4-2-1(a); 30-4-2-1.5(b). While some trusts are notarized for a variety reasons, such as required proof of validity of recording, these issues can be resolved by submitting a notarized certification of trust, rather than submitting the entire trust instrument for recording.

B. Document Specifics.

1. Provisions During a Settlor's Life.

It is recommended that distributions be as liberal to the settlor as possible. The settlor should be able to withdraw principal and income of the trust at any time and for any reason as long

as the settlor is alive and has the capacity. Some even include liberal distributions to a settlor's spouse, depending on the structure of the trust and relationship between the settlor and the settlor's spouse.

It is common to include a provision to hold the settlor's primary residence in trust for the benefit of the settlor and the settlor's spouse, even if the primary residence will be an unproductive asset. This can even be expanded to include the settlor's children or grandchildren if applicable. If a primary residence clause is included, practitioners should include "carrying charges" related to the settlor's primary residence, such as utilities, homeowner's insurance, and property taxes.

If a settlor has a taxable estate, it may also be wise to include provisions related to gifting if the settlor is incapacitated—such as gifts to spouse, children, and charities.

2. Payment of Last Debts and Expenses and Taxes

Revocable trusts in Indiana do not generally prevent the settlor's creditors from reaching trust assets during the settlor's lifetime. *See* I.C. § 30-4-3-2(b). If a settlor wishes to shield assets from creditors, a settlor would need to consider establishing a legacy trust under I.C. § 30-4-8-1 *et seq.* Transfers of revocable trust property after the settlor's death are non-probate transfers in Indiana and are liable to a decedent's probate estate for both claims against the probate estate and statutory allowances to the decedent's spouse and children (but not including the elective share, except in limited circumstances). *See* I.C. 32-17-13-1 and -2.

Due to the treatment of revocable trust assets in a decedent's estate, there are generally provisions placed in a revocable trust that allows the trustee to work with the personal representative to pay any claims filed in the estate from the trust assets if estate assets are insufficient, although there is no requirement to do so. Furthermore, if a client has a taxable estate,

it is generally recommended to add to the revocable trust how gift and estate and generation skipping taxes will be paid, if any.

3. Tangible Personal Property

Just like a Will, a settlor may use a written statement or list that complies with the statute and is referred to in the settlor's revocable trust, if that property is not used in a trade or business or otherwise specifically disposed of by the trust. *See* I.C. § 30-4-2.1-11(a).

The writing must be (i) signed by the settlor; (ii) must describe the property and the beneficiaries with reasonable certainty; (iii) may be prepared before or after the settlor executes the trust instrument; (iv) may be subsequently altered; and (v) may have no significance apart from the writing's effect on the dispositions made by the trust. *See* I.C. § 30-4-2.1-11(b).

4. Formula/Specific Gifts

After payment of last debts and expenses and distribution of tangible personal property, common practice is to include any formula or specific gifts. Formula gifts refer to any gifts that need to be made for tax purposes, such as a gift to a marital QTIP trust, a reverse QTIP marital trust for unused generation-skipping tax exemption, or a credit shelter trust for any remaining gift and estate tax exemption.

Other common specific gifts might include a gift of real estate, or pets and pet paraphernalia, vacation homes, business interests, etc.

A marital QTIP trust is a type of trust that can be used to transfer assets in trust to a spouse free of tax during life, or more commonly, at death. When a trust is drafted to meet the requirements delineated in the tax law, it qualifies as a marital QTIP trust and receives the same marital deduction treatment as if the property was given outright. In order to qualify as a marital QTIP trust, (i) the marital QTIP trust must grant the beneficiary spouse a "qualifying income interest for

life" (Either all the trust's net income must be paid at least annually to the beneficiary spouse, or the beneficiary spouse must have the right to annually withdraw all the trust's net income. This right to income cannot be subject to any contingencies. For example, the right to income cannot terminate upon the surviving spouse's remarriage); (ii) only the beneficiary spouse can have the power to appoint the trust property; (iii) the beneficiary spouse must have the right to demand that the trustee convert non–income producing assets into income-producing assets; and (iv) the QTIP must be irrevocable. *See* I.R.C. 2056(b). A client may wish to give the beneficiary spouse the right to trust principal as well (either discretionary or according to certain standards), but the spouse should be the only beneficiary of the marital QTIP trust during the beneficiary spouse's lifetime.

A credit shelter trust is a type of trust that can be used to take advantage of a settlor's gift and estate tax exemption. Assets placed in the credit shelter trust are generally held apart from the estate of the surviving spouse, so they may pass tax-free to the remaining beneficiaries at the death of the surviving spouse. The assets held in the credit shelter trust can benefit the surviving spouse during his or her lifetime and also descendants. Since assets transferred to the credit shelter trust, as well as any appreciation, are tax free and are not included in the surviving spouse's taxable estate, practitioners generally make distributions from the credit shelter trust, fully discretionary or subject to an ascertainable standard. Mandatory distributions from a credit shelter trust are generally not common.

5. Residue

After payment of last debts and expenses, the distribution of tangible personal property and formula or specific gifts, if any, then a settlor needs to address what will happen with the rest, residue, and remainder of the trust assets.

The most common plan consists of a gift to the spouse, either outright or in trust, but if the spouse does not survive the settlor, then to the settlor's descendants, either outright or in trust. If there is a potential for a taxable estate, consider giving the spouse a disclaimer right to disclaim assets to a disclaimer trust rather than having to elect portability. Disclaimer planning is essentially "wait and see" planning and provides great flexibility – the surviving spouse can wait until the first spouse's death to decide if utilizing the disclaimer trust makes sense from a gift and estate tax planning perspective.

If a client wants to leave assets to descendants in trust, consider the use of a single trust until the youngest descendant obtains a certain age and then dividing the assets into separate trusts. A single trust or sometimes called a "pot trust" lists multiple beneficiaries such as children within a single common fund. A single trust makes sense when descendants might be different ages or might have different means or needs (example: some children have made it through college while others have not). Separate trusts are created from a trust, which typically has one descendant as a beneficiary of the trust. In both types of trusts, a client can set distribution standards (example: health, education, maintenance, or support or any purpose); a client can address when the trusts terminate (example: at certain ages, or at certain events, or for a beneficiary's lifetime); a client can give a beneficiary a power of appointment (limited or general); a client can also provide trustee guidelines to a trustee on making distributions (examples: distributions for weddings, first home purchase, or automobile; distributions for education (how much); distributions for business or adoption/fertility treatments; prenuptial agreement requirements; substance abuse provisions; and distributions for travel; etc.).

6. Trustee Appointments

In Indiana, for a natural person to qualify as a trustee, that person must (i) have the capacity to take, hold, and deal with the property; (ii) be at least 18 years of age; and (iii) be of sound mind and good moral character. *See* I.C. § 30-4-2-11(a). If the trustee is a corporation, it must have the power to act under Indiana law as a trustee. A beneficiary is not disqualified for serving as trustee just by being a beneficiary of the trust if the beneficiary is otherwise qualified. *See* I.C. § 30-4-2-11. A trustee is not required to be an Indiana resident to serve as trustee. *See Donahue v. Watson*, 411 N.E. 2d 741, 747 (Ind. Ct. App. 1980). However, an out-of-state trustee might affect either (i) the situs of the trust or (ii) the principal place of administration.

The trust terms generally determine successor trustee appointment, subject to the statutory trustee requirements and the court's general equitable powers. The court only acts to fill a vacancy in the trusteeship if the trustee or trustees appointed cannot or will not act. *See Dykeman v. Jenkines*, 101 N.E. 1013, 1016-18 (Ind. 1913).

When a trustee vacancy occurs, the statute provides the order for successor trustee appointment. A trustee vacancy of a noncharitable trust is filled according to the following priority: (i) the trust's designated successor trustee (if the trust has at least two co-trustees and at least one co-trustee remains in office, the co-trustee vacancy is not required to be filled); and (ii) If no trustee is acting as trustee, the role of trustee is filled by person appointed by a majority of the qualified beneficiaries as defined in I.C. § 30-4-1-2(19)[2]; or a person appointed by the court. *See* I.C. § 30-4-3-33(c).

[2] A qualified beneficiary is a beneficiary who, on the date the beneficiary's qualification is determined either: (i) is a distributee or permissible distributee of trust income or principal; (ii) would be a distributee or permissible distributee of trust income or principal if the interest of the distributee above terminated on that date; (iii) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date; (iv) is a charitable organization expressly designated to receive distributions under the terms of a charitable trust; (v) Is a person

The trustee must accept the trust in Indiana. The signature of the person named as trustee, either on a trust agreement or a separate written acceptance as trustee is conclusive that the named person accepted the trust. *See* I.C. § 30-4-2-2(b). The named trustee is presumed to have accepted the trust as trustee if the trustee exercises the powers or duties under the trust. *See* I.C. § 30-4-2-2(c). However, if there is immediate risk of damage to the trust estate, the named person may act to preserve the trust estate without being presumed to have accepted the trust. Indiana does not deem the named person to accept the trust, as trustee, if the person, within a reasonable time, delivers a written rejection to the settlor, or if the settlor is dead, to the beneficiary or the court. *See* I.C. § 30-4-2-2(e).

In Indiana, the person named as trustee may reject the trust in writing without liability for the trust property. A person is presumed to have rejected the trust if, after being informed of the trusteeship, the named trustee does not either: (i) accept the trust; (ii) exercise trust powers; or (iii) perform duties under the trust within a reasonable time. *See* I.C. § 30-4-2-2(d).

Much like personal representatives in an estate, a trustee has the right to reasonable compensation unless the terms of the trust provide otherwise. *See* I.C. § 30-4-5-16(a). If the trust terms specify specific trustee compensation, the trustee is entitled to the compensation as specified. Most corporate trustees charge fees based on their published fee schedule for both service as trustee and separate standard fees for accounting costs, investment expenses, and other fees resulting from their service as trustee. Before they agree to serve as trustee, many corporate trustees require that their fee schedules be incorporated as part of the trust agreement. The court may increase or

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appointed to enforce a trust for the care of an animal under I.C. § 30-4-2-18; (vi) or is a person appointed to enforce a trust for a noncharitable purpose under I.C. § 30-4-2-19. *See* I.C. § 30-4-2(19)(A). The Indiana attorney general is also a qualified beneficiary of a charitable trust if its principal place of administration is in Indiana. *See* I.C. § 30-4-1-2(19)(B).

decrease trustee compensation if either the trustee's duties are substantially different from those contemplated or the specified compensation is unreasonably low or high. *See* I.C. § 30-4-5-16(b). A trustee is also entitled to be reimbursed for reasonable trust administration expenses. *See* I.C. § 30-4-5-16(c).

If multiple trustees are serving, unless the trust terms state otherwise, any power vested in two trustees must be exercised by both together and any power vested in three or more trustees must be exercised by a majority. *See* I.C. § 30-4-3-4(a). If there are multiple trustees who cannot act either unanimously or by majority, as required, any trustee may (i) act and then petition the court for approval if irreparable damage to trust property may result from not acting; or (ii) petition the court for permission to act before acting if there is no risk of immediate damage to trust property. *See* I.C. § 30-4-3-4(b).

In Indiana, a trustee may be removed by either the court or any person authorized to remove the trustee under the trust terms. *See* I.C. § 30-4-3-29(a). For trusts executed after June 30, 1996, unless the terms of the trust provide otherwise, a beneficiary of the trust may petition the court to have a corporate trustee removed if there has been a change in control of the corporate trustee after the trust was executed. *See* I.C. § 30-4-3-29(a), (d).

In Indiana, unless the trust terms require a different time, the trustee may resign either: (i) by giving 30 days' notice to the qualified beneficiaries, the settlor, if living, and all co-trustees, if any, or (ii) with the court's approval. *See* I.C. § 30-4-3-29(b).

Documents in Indiana generally grant the trustee all the powers and authorities under the Indiana Trust Code subject to any provision of the trust which may conflict with the Indiana trust law (Ind. Code Ann. § 30-4-3-3). This broad language gives the trustee the statutory powers. Trust agreements typically list the more common powers in the trust instrument itself to give the settlor,

the trustee, and financial institutions and other third parties dealing with the trustee some guidance about what trust powers the trustee has, without having to reference the Indiana Trust Code.

7. Directed Trusts

In Indiana, under the Uniform Directed Trust Act effective July 1, 2019, a trust instrument may grant an individual or entity other than the trustee (referred to as a trust director) a power of direction. A power of direction allows the settlor to indicate certain decisions or actions over which the director, rather than the trustee, has discretion. *See* I.C. §§ 30-4-9-2 and 30-4-9-6.

A power of direction is a power over a trust granted to a person by the trust's terms to the extent the power is exercisable while the person is not serving as a trustee. It includes a power over the investment, management, or distribution of trust property or other matters of trust administration. Some specific examples include an investment director or a closely-held business director. A power of direction does not include the following: (i) a power of appointment (a power enabling a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over trust property); (ii) the power to appoint or remove a trustee or trust director; (iii) power of a settlor over a trust to the extent the settlor has a power to revoke the trust; (iv) power of a beneficiary over a trust to the extent the exercise or nonexercise of the beneficiary or another beneficiary represented by the beneficiary with respect to the exercise or nonexercise of the power; (v) power over a trust if The trust's terms provide the power is held in a nonfiduciary capacity; and the power must be held in a nonfiduciary capacity to achieve the settlor's tax objectives under the Internal Revenue Code. *See* I.C. §§ 30-4-9-2 and 30-4-9-5.

A trust director also has any further powers appropriate to the exercise or non-exercise of the powers of direction, except as otherwise provided in the trust instrument and under statute. *See* I.C. § 30-4-9-6. For example, a settlor can make the trust director's power of direction or the

termination of a power of direction contingent on the occurrence of certain events. The trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power as a sole trustee in a similar position and under similar circumstances. If there are multiple trust directors, the trust director has the same fiduciary duty and liability as if there were multiple trustees. *See* I.C. § 30-4-9-8(a). The terms of the trust may impose additional duties or liabilities on the trust director. *See* I.C. § 30-4-9-8(c). Unless the terms of a trust provide otherwise, the rules applicable to a trustee apply to a trust director regarding (i) acceptance (I.C. § 30-4-2-2); (ii) giving of bond to secure performance (I.C. § 30-4-6-8); (iii) reasonable compensation (I.C. § 30-4-5-16); (iv) resignation and removal (I.C. § 30-4-3-29); (v) vacancy and appointment of successor (I.C. § 30-4-3-33). *See* I.C. § 30-4-9-16.

A trustee subject to a trust director's power of direction is referred to as a directed trustee. *See* I.C. § 30-4-9-2(3). A directed trustee must take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction and related powers. The trustee is not liable for the action. However, a directed trustee must not comply with a trust director's powers to the extent that by doing so the trustee would engage in willful misconduct. *See* I.C. § 30-4-9-9. Willful misconduct is intentional wrongdoing (malicious conduct or conduct designed to defraud or to seek an unconscionable advantage) and not mere negligence, gross negligence, or recklessness. *See* I.C. § 30-4-9-2(11), (12). The trust can impose additional duties on the directed trustee. *See* I.C. § 30-4-9-9(e). A directed trustee that has reasonable doubt about the directed trustee's duty may petition the court for instructions. *See* I.C. § 30-4-9-9(d).

Unless the trust provides otherwise, a trustee does not have a duty to monitor the trust director or inform or give advice to a settlor, beneficiary, trustee, or trust director where the trustee might have acted differently than the director. Similarly, a trust director does not have a duty to

monitor a trustee or another trust director or inform or give advice to a settlor, beneficiary, trustee, or another trust director where the director might have acted differently than a trustee or another trust director. *See* I.C. § 30-4-9-11. The trustee or trust director does not assume the duties above by taking a related action. *See* I.C. § 30-4-9-11. However, a directed trustee must provide information to a trust director to the extent the information is reasonably related both to the powers or duties of the trustee and the powers or duties of the director. A trust director must provide the same information to a trustee or another trust director. *See* I.C. § 30-4-9-10. To the extent that a directed trustee or a trust director acts in reliance on the information received, the directed trustee or trust director are not liable for breach of trust to the extent the breach resulted from the reliance, unless by so acting, they engage in willful misconduct.

8. Silent Trusts

A silent (or quiet) trust is a trust that is unknown to a beneficiary. A settlor may expand, restrict, eliminate, or otherwise vary the right of a beneficiary to be informed of a beneficiary's interest in a trust for a period of time related to (i) the beneficiary's age; (ii) the settlor's lifetime; (iii) the lifetime of the settlor's spouse; (iv) a term of years; (v) a period of time ending on a specific date or a specific event that is certain to occur. *See* I.C. § 30-4-3-6(c).

During the term of the silent trust, a designated representative for the beneficiary must be appointed in the trust instrument. The designated representative (i) represents the beneficiary; (ii) binds the beneficiary's interests for the purposes of a court proceeding or nonjudicial settlement matter involving the trust, unless the court finds that a conflict of interest exists between the beneficiary and the designated representative; (iii) may begin, or defend and participate in, any proceeding relating to the trust; (iv) must not disclose information provided by the trustee to the

beneficiary, unless a court orders otherwise, or the settlor agrees to the disclosure. *See* I.C. 30-4-3-6(d).

9. Spendthrift Provisions

Most, if not all, revocable trusts contain spendthrift provisions, which protect trust beneficiaries from their creditors. This language also prevents a beneficiary from assigning or transferring a beneficiary's future interest in the trust assets. A beneficiary's creditors cannot attach to the assets of the trust before distribution to the beneficiary.

10. Rules Against Perpetuities

Most revocable trusts contain a provision discussing when the trust will terminate pursuant to the rules again perpetuities. Under this rule, a non-vested property interest in a trust is valid only if the interest when created is certain to vest or terminate not later than either: (i) 21 years after the death of an individual then alive whose life is used for measuring or (ii) within 90 years after the interest is created. *See* I.C. § 32-17-8-3. Any interest of a beneficiary in a revocable trust is not vested until the date of the settlor's death or the trust otherwise becomes irrevocable. *See* I.C. § 30-4-3-1.5. Therefore, the rule against perpetuities measuring period begins on that date of death.

III. IRREVOCABLE TRUSTS

A. Differences Between Irrevocable vs. Revocable Trusts

1. Power to Amend

There are several key differences and some similarities between irrevocable and revocable trusts. The biggest difference is the ability to change the document during the settlor's lifetime. Revocable trusts are the most flexible type of trust. The instrument can be changed at any time and for any reason as long as the settlor is competent and living. An irrevocable trust cannot be changed by the settlor except in limited circumstances. In order for an irrevocable trust to be modified, it

can only be done through court approval or beneficiary and trustee approval or both via a court process or nonjudicial settlement agreement. *See* I.C. § 30-4-5-25.

2. Treatment for Gift and Estate Tax Purposes, i.e. Ownership of Trust Assets

Assets transferred to a revocable trust are still under the "control" of the settlor since the trust can be amended and/or revoked, and generally, a settlor has full access to income and principal from the trust and can withdraw assets from a revocable trust for any purpose. "Control" is essentially equal to outright ownership, ability to name/change beneficiaries, revoke/amend, and utilize income and principal. Unless an individual gives an asset free and clear to someone, it is still under that individual's "control" and is therefore, part of an individual's gross taxable estate. Therefore, assets transferred to a revocable trust are still considered part of a settlor's gross taxable estate. When assets are transferred to an irrevocable trust, a settlor generally gives up "control" of the assets, which removes those assets, and any income and appreciation, outside a settlor's gross taxable estate. Therefore, assets transferred to an irrevocable trust are generally not considered part of a settlor's gross taxable estate.

Since assets transferred to a revocable trust are still considered owned or controlled by the individual settlor, the Internal Revenue Service ("Service") treats those assets as still being owned by the individual settlor and any income accrued in the revocable trust is reported on an individual's personal income tax return and the revocable trust's tax identification number is the individual's social security number. The Service treats irrevocable trusts as separate taxable entities, which have their own social security numbers. However, an irrevocable trust can be drafted as intentionally defective for income tax purposes, wherein any income is reported on an individual settlor's personal social security number.

3. Creditor Protection

Revocable trusts do not provide adequate creditor protection for a settlor. Any creditor can place a claim on assets in a revocable trust when a settlor dies and request that his/her/its debt be satisfied through trust assets. Creditors must still go through a non-probate transferor process under I.C. 32-17-13 *et seq*. Irrevocable trusts generally provide creditor protection for a settlor since assets transferred to an irrevocable trust are not considered available to the settlor, especially if a settlor creates an Indiana legacy trust under I.C. § 30-4-8-1 *et seq.*

Section Three

TOD/POD and Other Beneficiary Designations

James W. Martin
Martin & Martin
Merrillville, Indiana

Section Three

TOD/POD and Other Beneficiary Designations…… James W. Martin

TOD/POD and OTHER BENEFICIARY DESIGNATIONS

BY

JAMES W. MARTIN
8585 BROADWAY, SUITE 660
MERRILLVILLE, INDIANA 46410
(219) 769-3760; jwm@netnitco.net

I. HISTORY

A. Multiple Party Accounts Statutes (IC 32-17-11)
Effective July 1, 1976

B. Uniform Act on Transfer on Death Securities (IC 32-17-9)
Effective July 1, 1997

C. Transfer on Death Vehicles (IC 9-17-3-9 & IC 9-31-2-30)
Effective July 1, 2008

D. Senate Bill 81 (2008) - Originally included TOD Deeds
TOD Deeds removed at the request of the PTRP Section

E. PTRP Section decides on a comprehensive law covering most types of property with uniform rules

F. House Bill 1287 (2009) – Public Law 143 (2009)

II. UNIFORMITY WITH PROBATE CODE AND TRUST CODE

A. Anti-Lapse – Probate IC 29-1-6-1(g); Trust IC 30-4-2.1-7
TOD Property Act IC 32-17-22

B. Omitted Child – Probate IC 29-1-3-8; Trust IC 30-4-2.1-4
TOD Property Act IC 32-17-25(c)

C. Divorce – Probate IC 29-1-5-8; Trust IC 30-4-2-15
TOD Property Act IC 32-17-23

D. Slayer Rule – Probate IC 29-1-2-12.1; Trust IC 30-4-1-13
TOD Property Act IC 32-17-24(b)

III. STATUTES NOT INCORPORATED

A. DISCLAIMERS – 32-17.5-3-1

A person may disclaim, in whole or part, ***any interest in*** or power over ***property***, including a power of appointment.

B. 2016 Amendment/Addition to UDPIA

A new subsection was added to the Uniform Disclaimer of Property Interests Act [32-17.5-4-1(6)] which clarifies what happens to a disclaimed TOD transfer.

1. Individual: passes as if the disclaimant died immediately before the owner.
2. Not an Individual: passes as if the disclaimant did not exist before the death of the owner.

IV. WHAT HAS BEEN REPEALED?

A. All POD provisions included in the Multiple Party Accounts Statutes (IC 32-17-11) – Repealed effective July 1, 2009

B. Uniform Act on Transfer on Death Securities (IC 32-17-9)
Entire Act repealed effective July 1, 2009

V. APPLICATION OF THE ACT – IC 32-17-14-2

A. Applies to all TOD securities, TOD accounts and POD accounts created before July 1, 2009, unless application

1. adversely affects a right given to an owner or beneficiary;

2. gives a right to any owner or beneficiary that the owner or beneficiary was not intended to have when the account was created;

3. imposes a duty or liability on any person that was not intended to be imposed when account was created; or

4. relieves any person from any duty or liability imposed:

a. by the terms of the account; or

b. under prior law

5. **LDPS applies to all TOD/POD transfers created before 7/1/09**.

B. Applies to a TOD transfer if when the owner designates the beneficiary:

1. the owner was a resident of Indiana;

2. the property subject to the beneficiary designation was situated in Indiana;

3. the obligation to pay or deliver arose in Indiana;

4. the transferring entity was a resident of Indiana or had a place of business in Indiana; or

5. the transferring entity's obligation to make the transfer was accepted in Indiana.

C. Applies to motor vehicles and watercraft

See: IC 9-17-3-9

NOTE: The statute allowing TOD beneficiaries on watercraft, IC 9-31-2-30, was repealed effective July 1, 2016, along with the entire Chapter regarding certificates of title. Watercraft statutes formerly under IC 9-31-2 were incorporated into Article 17 of Title 9. For purposes of IC 9-17, the definition of "vehicle" under IC 9-13-2-196 now includes watercraft.

VI. DEFINITIONS – IC 32-17-14-3

A. **"Governing instrument"** refers to a written instrument agreed to by an owner that establishes the terms and conditions of an ownership in beneficiary form.

B. **"LDPS"** means an abbreviation of lineal descendants per stirpes, which may be used in a beneficiary designation to designate a substitute beneficiary as provided in section 22 of this chapter

C. **"Property"** means any present or future interest in real property, intangible personal property, or tangible personal property

"Property" includes:

1. a right to direct or receive payment of a debt;

2. a right to direct or receive payment of money or other benefits due under a contract, account agreement, deposit agreement, employment contract, compensation plan, or trust or by operation of law;

3. a right to receive performance remaining due under a contract;

4. a right to receive payment under a promissory note or a debt maintained in a written account record;

5. rights under a certificated or uncertificated security;

6. rights under an instrument evidencing ownership of property issued by a governmental agency; and

7. rights under a document of title (as defined in IC 26-1-1-201)

NOTE: An addition was made (effective July 1, 2013) to the Limited Liability Companies Act which allows any member interest in a limited liability company to be the subject of a TOD transfer. IC 23-18-6-2.5.

D. **"Transferring Entity"** means a person who:

1. owes a debt or is obligated to pay money or benefits;
2. renders contract performance;
3. delivers or conveys property; or
4. changes the record of ownership of property on the books, records, and accounts of an enterprise or on a certificate or document of title that evidences property rights

"Transferring Entity" includes a governmental agency, business entity, or transfer agent that **issues** certificates of ownership or title to property and a person acting as a custodial agent for an owner's property. *However, the term **does not include** a governmental office charged with endorsing, entering, or **recording the transfer of real property in the public records.***

VII. EXCLUDED TRANSFERS – IC 32-17-14-4(a)

A. Transfers by rights of survivorship in property held as joint tenants or tenants by the entirety

B. A transfer to a remainderman on the termination of a life tenancy

C. An inter vivos or a testamentary transfer under a trust established by an individual

D. A transfer made under the exercise or nonexercise of a power of appointment

E. A transfer made on the death of a person who did not have the right to designate the person's estate as the beneficiary of the transfer

F. Specific Exclusions:

1. **Except in instances of fraud, duress, undue influence, or mistake or because the owner lacked capacity the Act <u>does</u> <u>NOT</u> <u>apply</u> <u>to</u>:** life or accidental death insurance policies, annuities, or other products sold or issued by a life insurance company, <u>unless</u> the provisions of this chapter are incorporated into the policy or beneficiary designation in whole or in part by express reference. **IC 32-17-14-2(c)**.

<u>NOTE</u>: IC 32-17-14-2(c) indicates that life insurance and annuity products <u>are</u> susceptible to challenge in instances of fraud, duress, undue influence, or mistake or because the owner lacked capacity.

2. A TOD transfer if the beneficiary designation or an applicable law expressly provides that this chapter does not apply to the transfer. **IC 32-17-14-2(c)**.

3. Retirement plans, <u>unless</u> the provisions of this chapter are incorporated into the governing instrument or beneficiary designation in whole or in part by express reference. **IC 32-17-14-2.5**.

VIII. REQUIREMENTS

A. A beneficiary designation made under this chapter must do the following: IC 32-17-14-4(b)

1. Designate the beneficiary of a transfer on death transfer

2. Make the transfer effective upon the death of the owner of the property being transferred

3. Comply with this chapter, the conditions of any governing instrument, and any other applicable law

B. A transfer on death direction is accomplished in a form substantially similar to the following: IC 32-17-14-4(d)

1. Insert Name of the Owner or Owners

2. Insert "Transfer on death to" or "TOD" or "Pay on death to" or "POD"

3. Insert the Name of the Beneficiary or Beneficiaries

C. Delivery Requirement IC 32-17-14-9(b), 10(b) and 14(d)
A beneficiary designation is effective if it is:

1. executed; and

2. **delivered to** the transferring entity or contract obligor **before the death of the owner**

D. Exceptions to Delivery Requirement
No delivery requirement exists for TOD transfers of real estate (IC 32-17-14-11) or tangible personal property (IC 32-17-14-12). However, a TOD deed must be recorded before the death of the owner [IC 32-17-14-11(a)(2)].

IX. GENERAL RULES

A. "TOD" and "POD" Are Interchangeable
The terms, "Transfer on Death", "TOD", "Pay on Death", and "POD" are interchangeable in this Act
IC 32-17-14-4(d), IC 32-17-14-11(g) and IC 32-17-14-14(b)

B. A transfer on death transfer: IC 32-17-14-5

1. is effective with or without consideration;

2. is not considered testamentary;

3. is not subject to the requirements for a will or for probating a will under IC 29-1; and

4. may be subject to an agreement between the owner and a transferring entity to carry out the owner's intent to transfer the property under this chapter

C. Joint Owners & Tenants by the Entireties

1. The death of the last surviving owner of property held by joint owners is considered the death of the owner. **IC 32-17-14-4(c)**

2. On the death of one (1) of two (2) or more joint owners, property with respect to which a beneficiary designation has been made belongs to the surviving joint owner or owners. **IC 32-17-14-15(b)**

3. If at least two (2) joint owners survive, the right of survivorship continues as between the surviving owners. **IC 32-17-14-15(b)**

4. On the death of a tenant by the entireties, property with respect to which a beneficiary designation has been made belongs to the surviving tenant. **IC 32-17-14-15(c)**

D. Trusts May be Beneficiaries IC 32-17-14-21

1. A trustee of a trust may be a designated beneficiary regardless of whether the trust is amendable, revocable, irrevocable, funded, unfunded, or amended after the designation is made.

2. Unless a beneficiary designation provides otherwise, a trust that is revoked or terminated before the death of the owner is considered nonexistent at the owner's death.

3. Unless a beneficiary designation provides otherwise, a legal entity or trust that does not:

a. exist; or

b. come into existence effective as of the owner's death;

is considered nonexistent at the owner's death.

4. An owner's testamentary trust is considered to have come into existence as of the owner's death if the owner's last will and testament is admitted to probate.

5. Owners of vehicles (the definition of which includes watercraft) may designate a trust as a TOD beneficiary. (IC 9-17-3-9(a), effective July 1, 2015). **NOTE:** IC 9-31-2-30(a) was repealed effective July 1, 2016, and watercraft was added to the definition of vehicle under IC 9-13-2-196.

E. Effect of Proper Execution IC 32-17-14-9(a)

An effective beneficiary designation [See IC 32-17-14-9(b)]:

1. authorizes a transfer of property under this chapter;

2. **i**s effective on the death of the owner of the property; and

3. transfers the right to receive the property to the designated beneficiary who survives the death of the owner

F. Delivery to Beneficiary Not Required

Delivery of a copy of a beneficiary designation to the beneficiary is **not** required by the Act. **IC 32-17-14-10(c), 11(c) and 12(b)**

G. Beneficiary Rights Before Death of Owner – NONE IC 32-17-14-15(a)

1. Before the death of the owner, **a beneficiary has no rights in the property** because of the beneficiary designation.

2. The signature or agreement of the beneficiary is not required for any transaction relating to property transferred under this chapter.

3. If a lienholder takes action to enforce a lien, by foreclosure or otherwise through a court proceeding, it is not necessary to join the beneficiary as a party defendant in the action **unless** the beneficiary has another interest in the real property that has vested.

H. Retroactive Acceptance IC 32-17-14-7(c)

If a beneficiary designation, revocation, or change is subject to acceptance by a transferring entity, the transferring entity's acceptance of the beneficiary designation, revocation, or change relates back to and is effective as of the time the request was received by the transferring entity.

I. Revocation

1. An owner may revoke or change a beneficiary designation at any time before the owner's death. **IC 32-17-14-4(e)**

2. An agreement between the transferring entity and the owner is subject to the owner's power to revoke or change a beneficiary designation before the owner's death. **IC 32-17-14-8(b)**

3. A beneficiary designation may be revoked or changed during the lifetime of the owner. **IC 32-17-14-16(a)**

J. Interest Passes at Death IC 32-17-14-15(d)

On the death of the owner, property with respect to which a beneficiary designation has been made passes by operation of law to the beneficiary.

K. Authority of Transferring Entity IC 32-17-14-6

The authority of a transferring entity acting as agent for an owner of property subject to a transfer on death transfer does not cease at the death of the owner. The transferring entity shall transfer the property to the designated beneficiary in accordance with the beneficiary designation and this chapter.

L. Beneficiaries & Survivorship

1. If two (2) or more beneficiaries survive, there is no right of survivorship among the beneficiaries when the death of a beneficiary occurs after the death of the owner **unless** the beneficiary designation expressly provides for survivorship among the beneficiaries. **IC 32-17-14-15(e)**

2. Except as expressly provided otherwise, the surviving beneficiaries hold their separate interest in the property as tenants in common. **IC 32-17-14-15(e)**

3. The share of any beneficiary who dies after the owner dies belongs to the deceased beneficiary's estate. **IC 32-17-14-15(e)**

4. If no beneficiary survives the owner, the property belongs to the estate of the owner **unless** the beneficiary designation directs the transfer to a substitute beneficiary in the manner required by section 22 (LDPS) of this chapter. **IC 32-17-14-15(f)**

M. Beneficiary Survivorship Required IC 32-17-14-20

An individual who is a beneficiary of a transfer on death transfer is **not** entitled to a transfer **unless** the individual:

1. Survives the owner; and

2. Survives the owner by the time, if any, required by the terms of the beneficiary designation.

N. Beneficiary Compliance IC 32-17-14-8(c)

A transferring entity's **duties** under an agreement between the transferring entity and the owner are **subject to** the following:

1. Receiving proof of the owner's death

2. Complying with the transferring entity's requirements for proof that the beneficiary is entitled to receive the property

O. Transferring Entity Transfer Requirement IC 32-17-14-9(c)

A transferring entity shall make a transfer to the designated beneficiary who survives the death of the owner **unless** there is clear and convincing evidence of the owner's different intention at the time the beneficiary designation was created.

P. Contract Rights Are Subject to TOD Act IC 32-17-14-10

Contract rights may be assigned to an assignee effective as of the death of the owner, with or without consideration, if the assignment is:

1. executed; and

2. delivered to the contract obligor before the death of the owner

Q. Lost, Destroyed, Damaged, or Involuntarily Converted TOD Property IC 32-17-14-18

1. If property subject to a beneficiary designation is lost, destroyed, damaged, or involuntarily converted during the owner's lifetime, the beneficiary succeeds to any right with respect to the loss, destruction, damage, or involuntary conversion that the owner would have had if the owner had survived.

2. The beneficiary has no interest in any payment or substitute property received by the owner during the owner's lifetime.

R. Beneficiary Takes TOD Property Subject to Owner's Commitments IC 32-17-14-19

1. Beneficiary takes the owner's interest in the property at the death of the owner **subject to** all conveyances, assignments, contracts, set offs, licenses, easements, liens, and security interests made by the owner or to which the owner was subject during the owner's lifetime.

2. Beneficiary **of an account** with a bank, savings and loan association, credit union, broker, or mutual fund takes the owner's interest in the property at the death of the owner **subject to** all requests for

payment of money issued by the owner before the owner's death, whether paid by the transferring entity before or after the owner's death, or unpaid.

3. Beneficiary is liable to the payee of an unsatisfied request for payment to the extent that the request represents an obligation that was enforceable against the owner during the owner's lifetime.

4. Each beneficiary's liability with respect to an unsatisfied request for payment is limited to the same proportionate share of the request for payment as the beneficiary's proportionate share of the account under the beneficiary designation.

5. Each beneficiary has the right of contribution from the other beneficiaries with respect to a request for payment that is satisfied after the owner's death, to the extent that the request for payment would have been enforceable by the payee during the owner's lifetime.

S. Divorce or Annulment IC 32-17-14-23

1. If after an owner makes a beneficiary designation, any beneficiary designation in favor of the owner's former spouse is **revoked** on the date the marriage is dissolved or annulled.

2. Revocation is effective regardless of whether the beneficiary designation refers to the owner's marital status.

3. The beneficiary designation is given effect as if the former spouse had not survived the owner.

4. Revived by the owner's remarriage to the former spouse **or** by a nullification of the dissolution or annulment of the marriage.

5. The divorce or annulment provision **does not apply** to a provision of a beneficiary designation that:

a. has been made irrevocable, or revocable only with the spouse's consent;

b. is made after the marriage is dissolved or annulled; **or**

c. expressly states that the dissolution or annulment of the marriage does not affect the designation of a spouse or a relative of the spouse as a beneficiary.

6. The divorce or annulment provision **does not apply** to any employee benefit plan governed by the Employee Retirement Income Security Act of 1974 **(ERISA)**.

T. Void Transactions IC 32-17-14-24(a)

A beneficiary designation or a revocation of a beneficiary designation that is procured by fraud, duress, undue influence, or mistake or because the owner lacked capacity is **void**.

U. Slayer Rule Applies IC 32-17-14-24(b)

A beneficiary designation made under this chapter is subject to **IC 29-1-2-12.1.**

V. Rights of Surviving Spouses and Children IC 32-17-14-25

1. The Act is silent on whether TOD transfers are subject to a surviving spouse's election to take against the will under IC 29-1-3-1.

2. TOD transfers may be subject to the payment of the surviving spouse and family allowances under IC 29-1-4-1.

3. A beneficiary designation designating the children of the owner or children of any other person **as a class** and not by name **includes** all children of the person regardless of whether the child is **born or adopted before or after** the beneficiary designation is made.

4. A child of the owner born or adopted **after** the owner makes a beneficiary designation that names another child of the owner as the beneficiary is entitled to receive a fractional share of the property that would otherwise be transferred to the named beneficiary.

5. The share to which each child of the owner is entitled to receive is expressed as a fraction in which the numerator is one (1) and the denominator is the total number of the owner's children.

6. An owner may opt out of the "child born or adopted after" rule.

7. A transferring entity **is not obligated** to apply the "child born or adopted after" rule to property registered in beneficiary form.

8. If a child is **not** named as a beneficiary, the "child born or adopted after" rule **does not apply**.

W. Creditors of an Owner IC 32-17-14-29

1. This chapter does not limit the rights of an owner's creditors against beneficiaries and other transferees that may be available under any other applicable Indiana law.

2. The liability of a beneficiary for creditor claims and statutory allowances is determined under **IC 32-17-13** (Claims Against Nonprobate Transferees).

X. Changes That Remain Subject to the Act IC 32-17-14-30

Except as otherwise provided by law, TOD transfers subject to the Act remain subject to the Act notwithstanding a change in the:

1. beneficiary designation;
2. residency of the owner;
3. residency or place of business of the transferring entity; or
4. location of the property.

Y. Probate Court Jurisdiction IC 32-17-14-31

1. The probate court shall hear and determine questions and issue appropriate orders concerning the determination of the beneficiary who is entitled to receive a TOD transfer and the proper share of each beneficiary.

2. The probate court shall hear and determine questions and issue appropriate orders concerning any action to:

a. obtain the distribution of any property from a transferring entity; or

b. for improperly distributed property, obtain the return of:

(1) any property and income earned on the property; or

(2) an amount equal to the value of the property plus income and gain realized from the property.

Z. Out-of-State Beneficiary Designations IC 32-17-14-32

1. Except for TOD deeds, a beneficiary designation that purports to have been made and is valid under:

a. the Uniform Probate Code as enacted by another state;

b. the Uniform TOD Security Registration Law as enacted by another state; or

c. a similar law of another state;

is governed by the law of that state.

2. A TOD transfer subject to a law of another state may be executed and enforced in Indiana.

3. Except for TOD deeds, the meaning and legal effect of a TOD transfer is determined by the law of the state selected in a governing instrument or beneficiary designation.

X. TOD DEEDS – IC 32-17-14-11

A. Requirements To Be Effective

To transfer the interest provided to the beneficiary, a TOD deed must be:

1. executed by the owner or the owner's legal representative, and

2. **recorded** with the recorder of deeds in the county in which the real property is situated **before the death of the owner** **IC 32-17-14-11(a)**

B. TOD deeds not recorded by the death of the owner are void IC 32-17-14-11(b)

C. No consideration or delivery to the beneficiary is necessary IC 32-17-14-11(c)

D. TOD deeds can be used to transfer an interest in real estate to either a revocable or irrevocable trust IC 32-17-14-11(d)

E. The effect of a TOD deed is determined as follows under IC 32-17-14-11(e):

1. If the owner's interest in the real property is as a **tenant by the entirety**, the conveyance is inoperable and **void unless the other spouse joins in the conveyance**

2. If the owner's interest in the real property is as a **joint** tenant with **rights of survivorship**, the conveyance **severs** the joint tenancy and the cotenancy becomes a tenancy in common

3. If the owner's interest in the real property is as a **joint** tenant with **rights of survivorship** and the property is subject to a beneficiary designation, a conveyance of any joint owner's interest **has no effect on the original beneficiary designation for the nonsevering joint tenant**

4. If the owner's interest is as a **tenant in common**, the owner's interest passes to the beneficiary as a transfer on death transfer

5. If the owner's interest is a **life estate** determined by the owner's life, the conveyance is inoperable and **void**

6. If the owner's interest is **any other interest**, the interest passes in accordance with this chapter and the terms and conditions of the conveyance establishing the interest. If a conflict exists between the conveyance establishing the interest and this chapter, the terms and conditions of the conveyance establishing the interest prevail.

F. Wording of the beneficiary designation IC 32-17-14-11(f)

The following example is not intended to be exhaustive: "(insert owner's name) conveys and warrants (or quitclaims) to (insert owner's name), TOD to (insert beneficiary's name)".

G. "POD" does not require liquidation IC 32-17-14-11(g)

Since "POD" or "Pay on Death" may be used in a beneficiary designation [IC 32-17-14-4(d)], clarification was made that using that terminology does **not** require the liquidation of the real estate being transferred.

H. Auditor's Endorsement Unnecessary IC 32-17-14-11(i)

The endorsement of the auditor under IC 36-2-11-14 is not necessary to record a transfer on death deed. **However**, if the deed includes a **direct transfer** under Section 13, the Auditor's endorsement would be necessary.

XI. TANGIBLE PERSONAL PROPERTY – IC 32-17-14-12

A. Requirements To Be Effective

To transfer an interest in tangible personal property, a deed of gift, bill of sale, or other writing must:

1. expressly create ownership in beneficiary form;
2. be sufficient to transfer the type of property involved; and
3. executed by the owner and acknowledged before a **notary public** or other person authorized to administer oaths.

B. No consideration or delivery to the beneficiary is necessary

XII. DIRECT TRANSFERS – IC 32-17-14-13 (1 Deed vs. 2 Deeds)

A. A direct transfer may be made to another person with a TOD beneficiary designation to another person

IC 32-17-14-13(a): A transferor of property, with or without consideration, may execute a written instrument **directly** transferring the property to a **transferee** to hold as **owner in beneficiary form**.

IC 32-17-14-13(b): A **transferee** under an instrument described in subsection (a) is considered the **owner** of the property for all purposes and has all the rights to the property provided by law to the owner of the property, including the right to revoke or change the beneficiary designation.

XIII. REGISTRATION IN BENEFICIARY FORM – IC 32-17-14-14

A. Property may be held or registered in beneficiary form

How? IC 32-17-14-14(a)

By including in the name in which the property is held or registered a direction to transfer the property on the death of the owner to a beneficiary designated by the owner

How, Again? IC 32-17-14-14(b)

By showing on the account record, security certificate, or instrument evidencing ownership of the property:

1. the name of the owner and, if applicable, the estate by which two (2) or more joint owners hold the property; and

2. an instruction **substantially similar in form** to "transfer on death to (insert name of beneficiary)".

NOTE: "pay on death to (insert name of the beneficiary)" and the use of the abbreviations "TOD" and "POD" are also permitted by this section.

B. Only a transferring entity may place a transfer on death direction on an asset IC 32-17-14-14(c)

C. A transfer on death direction is effective on the death of the owner and transfers the owner's interest in the property to the designated beneficiary if: IC 32-17-14-14(d)

1. the property is **registered** in beneficiary form before the death of the owner; **or**

2. the transfer on death direction is **delivered** to the transferring entity before the owner's death

D. Property registered in beneficiary form is conclusive evidence, in the absence of fraud, duress, undue influence, lack of capacity, or mistake (See IC 32-17-14-24), that the direction was: IC 32-17-14-14(e)

1. regularly made by the owner;

2. accepted by the transferring entity; and

3. not revoked or changed before the owner's death.

XIV. REVOCATION OR CHANGE RULES – IC 32-17-14-16

A. Time Limit

Must be made during the lifetime of the owner. IC 32-17-14-16(a).

B. Tenants by the Entireties Property

1. Must be made with the agreement of **both tenants** for so long as both tenants are **alive**.

2. A surviving spouse may revoke or change the beneficiary designation.

C. Other Restricted Property

For property owned in a form of ownership (other than as tenants by the entirety) that restricts conveyance of the interest unless another person joins in the conveyance, must be made with the agreement of each living owner required to join in a conveyance.

D. Joint Owners With Right of Survivorship

Must be made with the agreement of each living owner.

E. Subsequent Beneficiary Designation

Revokes a prior beneficiary designation **unless** the subsequent beneficiary designation expressly provides otherwise.

F. Compliance

Must comply with the terms of any governing instrument, this chapter, and any other applicable law.

G. By Will or Trust? NO!

A beneficiary designation may not be revoked or changed by a will or trust **unless** the beneficiary designation expressly grants the owner the right to revoke or change the beneficiary designation by a will.

H. Transfer of TOD Property During Life

With or without consideration, terminates the beneficiary designation with respect to the property transferred. IC 32-17-14-16(h) and (j).

I. Effective Date of Revocation or Change

Determined in the same manner as the effective date of a beneficiary designation.

J. TOD Real Estate

By executing and recording either:

1. A subsequent deed of conveyance revoking, omitting, or changing the beneficiary designation;
2. an affidavit acknowledged or proved under IC 32-21-2-3 that revokes or changes the beneficiary designation; or
3. the subsequent deed or affidavit must be recorded before the death of the owner. IC 32-17-14-16(j).

NOTE: Warranty deed and quit-claim deed statutes were amended, effective July 1, 2019, to require that if the real estate being transferred was "TOD" real estate, the deed of conveyance must be recorded before the death of the owner to be an effective revocation of the previous TOD deed. See IC 32-17-1-2(c), IC 32-21-1-13(b) and IC 32-21-1-15(b).

K. TOD Real Estate – Ways Beneficiary Designation Cannot be Revoked

1. A physical act, such as a written modification on or the destruction of a transfer on death deed after the transfer on death deed has been recorded, has no effect on the beneficiary designation
2. A transfer on death deed may not be revoked or modified by will or trust.

XV. ACTIONS OF LEGAL REPRESENTATIVES – IC 32-17-14-17

A. Beneficiary Designations

An attorney in fact, guardian, conservator, or other agent acting on the behalf of the owner of property **may make, revoke,** or **change** a beneficiary designation if:

1. the action complies with the terms of this chapter and any other applicable law; and

2. the action is not expressly forbidden by the document establishing the agent's right to act on behalf of the owner.

B. Alienation of TOD Property

An attorney in fact, guardian, conservator, or other agent **may withdraw, sell, pledge,** or **otherwise transfer** property that is subject to a beneficiary designation notwithstanding the fact that the effect of the transaction may be to extinguish a beneficiary's right to receive a transfer of the property at the death of the owner.

C. Beneficiary's Rights

The rights of a beneficiary to any part of property that is subject to a beneficiary designation after the death of the owner are determined under IC 29-3-8-6.5 (election against estate of owner) if:

1. A guardian or conservator takes possession of the property;

2. The guardian sells, transfers, encumbers, or consumes the property during the protected person's lifetime; and

3. The owner subsequently dies.

XVI. LDPS (ANTI-LAPSE) – IC 32-17-14-22 (DEFAULT RULE)

A. Lineal Descendant of Owner IC 32-17-14-22(b)

If a designated beneficiary who is a lineal descendant of the owner:

1. is deceased at the time the beneficiary designation is made;

2. does not survive the owner; **or**

3. is treated as not surviving the owner;

the beneficiary's right to a transfer on death transfer belongs to the beneficiary's lineal descendants per stirpes who survive the owner **unless** the owner provides LDPS does not apply.

B. Not a Lineal Descendant of Owner IC 32-17-14-22(d)

An owner may apply LDPS to a beneficiary who is not a lineal descendant of the owner by adding either of the following after the beneficiary's name:

1. The words "and lineal descendants per stirpes", **or**

2. The notation "LDPS".

C. No LDPS (Opt Out) IC 32-17-14-22(c)

An owner may indicate no LDPS by:

1. making the notation "No LDPS" after a beneficiary's name; or

2. including other words negating an intention to direct the transfer to the lineal descendant substitutes of the nonsurviving beneficiary.

D. Shares of Substitute Beneficiaries IC 32-17-14-22(e)

1. When two (2) or more individuals are substitute beneficiaries, the individuals are entitled to equal shares of the property if they are of the same degree of kinship to the nonsurviving beneficiary.

2. If the substitute beneficiaries are of unequal degrees of kinship, an individual of a more remote degree is entitled by representation to the share that would otherwise belong to the individual's parent.

E. If No Lineal Descendant Survives IC 32-17-14-22(f)

1. If LDPS applies by default or is applied by the owner and no lineal descendant of the beneficiary survives the owner, the TOD property belongs to the other surviving beneficiaries.

2. If no other beneficiary survives the owner, the TOD property belongs to the owner's estate.

XVII. GENERAL RULES APPLYING TO BENEFICIARY DESIGNATIONS – IC 32-17-14-26

A. Transferring Entity May Not Adopt Inconsistent Rules

A transferring entity may not adopt rules for the making, execution, acceptance, and revocation of a beneficiary designation that are inconsistent with this chapter.

B. Beneficiary Designation Rules

1. Must be made in writing, signed by the owner, dated, and, in the case of a transfer on death deed, compliant with all requirements for the recording of deeds.

2. A security that is not registered in the name of the owner may be registered in beneficiary form on instructions given by a broker or person delivering the security.

3. A beneficiary designation may designate one (1) or more **primary** beneficiaries and one (1) or more **contingent** beneficiaries.

4. A **primary** beneficiary is the person shown immediately following the transfer on death direction.

5. Words indicating that the person is a primary beneficiary are **not** required.

6. The name of a **contingent** beneficiary in the registration **must** have the words **"contingent beneficiary"** or words of similar meaning to indicate the contingent nature of the interest being transferred.

7. Multiple surviving beneficiaries share equally **unless** a different percentage or fractional share is stated for each beneficiary.

8. If a percentage or fractional share is designated, the surviving beneficiaries share in the proportion that their designated shares bear to each other.

9. A transfer of unequal shares may be expressed in numerical form following the name of the beneficiary in the registration.

10. A TOD transfer also transfers any interest, rent, royalties, earnings, dividends, or credits earned or declared on the property but not paid or credited before the owner's death.

11. If a distribution results in fractional shares in a security that is **not divisible**, the transferring entity may (a) distribute in the name of all beneficiaries as tenants in common, (b) distribute as the beneficiaries may direct, or (c) may sell the property that is not divisible and distribute the proceeds to the beneficiaries in the proportions to which they are entitled.

12. On the death of the owner, the property, **minus** all amounts by the owner, belongs to the surviving beneficiaries as follows (if a deceased beneficiary does **not** have an LDPS substitute):

> **a.** If there are multiple **primary** beneficiaries and a primary beneficiary does not survive the owner, the share of the nonsurviving beneficiary is allocated among the surviving beneficiaries in the proportion that their shares bear to each other.

b. If there are no surviving primary beneficiaries, the property belongs to the surviving contingent beneficiaries in equal shares or according to the percentages or fractional shares stated in the registration.

c. If there are multiple contingent beneficiaries and a contingent beneficiary does not survive the owner, the share of the nonsurviving contingent beneficiary is allocated among the surviving contingent beneficiaries in the proportion that their shares bear to each other.

13. If a trustee designated as a beneficiary:

a. does not survive the owner;

b. resigns; or

c. is unable or unwilling to execute the trust as trustee and no successor trustee is appointed in the twelve (12) months following the owner's death;

the transferring entity may make the distribution as if the trust did not survive the owner.

14. If a trustee is designated as a beneficiary and no affidavit of certification of trust or probated will creating an express trust is presented to the transferring entity within twelve (12) months after the owner's death, the transferring entity may make the distribution as if the trust did not survive the owner.

15. If the transferring entity is not presented evidence during the twelve (12) months after the owner's death that there are lineal descendants of a nonsurviving beneficiary for whom LDPS distribution applies who survived the owner, the transferring entity may make the transfer as if the nonsurviving beneficiary's descendants also failed to survive the owner.

16. If a beneficiary cannot be located, the transferring entity shall hold the missing beneficiary's share.

17. If a missing beneficiary's share is not claimed during the twelve (12) months after the owner's death, the transferring entity shall transfer the share as if the beneficiary did not survive the owner.

18. A transferring entity has **no obligation** to attempt to locate a missing beneficiary, to pay interest on the share held for a missing beneficiary, or to invest the share in any different property.

19. Cash, interest, rent, royalties, earnings, or dividends payable to a missing beneficiary may be held by the transferring entity at interest or

reinvested by the transferring entity in the account or in a dividend reinvestment account.

20. If a beneficiary is a minor or an incapacitated adult, the transfer may be made under the Indiana Uniform Transfers to Minors Act, the Indiana Uniform Custodial Trust Act, or a similar law of another state.

21. A written request for a TOD transfer may be made by any beneficiary, a beneficiary's legal representative or attorney in fact, or the owner's personal representative.

22. A transfer under a TOD deed occurs automatically upon the owner's death and does not require a request for transfer.

23. A written request for a TOD transfer **must** be accompanied by the following:

a. A certificate or instrument evidencing ownership of the contract, account, security, or property.

b. Proof of the deaths of the owner and any nonsurviving beneficiary.

c. An inheritance tax waiver from states that require it.

d. A copy of the instrument creating the legal authority or a certified copy of the court order appointing the legal representative.

e. Any other proof of the person's entitlement that the transferring entity may require.

24. For a **TOD real estate transfer**, the beneficiary shall file an **affidavit** in the office of the recorder of the county in which the real property is located. The affidavit must be endorsed by the county auditor under IC 36-2-11-14 in order to be recorded. The affidavit **must** contain the following:

a. The legal description of the property.

b. The date of death of the owner (Not a death certificate, effective July 1, 2014).

c. The name and address of each beneficiary who survives the owner or is in existence on the date of the owner's death.

d. The name of each beneficiary who has not survived the owner's death or is not in existence on the date of the owner's death.

e. A cross-reference to the recorded TOD deed.

25. A beneficiary designation is **presumed** to be valid.

26. A party may rely on the presumption of validity **unless** the party has **actual knowledge** that the beneficiary designation was not validly executed.

27. A person who acts in good faith reliance on a TOD deed is immune from liability to the same extent as if the person had dealt directly with the named owner and the named owner had been competent and not incapacitated.

XVIII. TRANSFERRING ENTITY POWERS AND DUTIES – IC 32-17-14-27

1. A transferring entity may execute a TOD transfer with or without a written request for execution.

2. A transferring entity may rely and act on:

a. a certified or authenticated copy of a death certificate issued by an official or an agency of the place where the death occurred as showing the fact, place, date, and time of death and the identity of the decedent; and

b. a certified or authenticated copy of a report or record of any governmental agency that a person is missing, detained, dead, or alive, and the dates, circumstances, and places disclosed by the record or report.

3. A transferring entity has no duty to verify the information contained within a beneficiary designation.

4. The transferring entity may rely and act on a request made by a beneficiary or a beneficiary's attorney in fact, guardian, conservator, or other agent.

5. A transferring entity **has no duty to**: **IC 32-17-14-27(e)**

a. give notice to any person of the date, manner, and persons to whom a transfer will be made under beneficiary designation, **unless** it has notice of an adverse claim;

b. attempt to locate any beneficiary or lineal descendant substitute;

c. determine whether a nonsurviving beneficiary or descendant had a lineal descendant who survived the owner;

d. locate a trustee or custodian;

e. obtain the appointment of a successor trustee or custodian;

f. discover the existence of a trust instrument or will that creates an express trust; or

g. determine any fact or law that would:

(1) cause the beneficiary designation to be revoked in whole or in part as to any person because of a change in marital status or other reason; or

(2) cause a variation in the distribution provided in the beneficiary designation.

6. A transferring entity **has no duty to withhold making a transfer** based on knowledge of any fact or claim adverse to the transfer to be made **unless before making the transfer** the transferring entity receives a written notice that: [**IC 32-17-14-27(f)]**

a. in manner, place, and time affords a reasonable opportunity to act on the notice before making the transfer; and

b. does the following:

(1) Asserts a claim of beneficial interest in the transfer adverse to the transfer to be made.

(2) Gives the name of the claimant and an address for communications directed to the claimant.

(3) Identifies the deceased owner.

(4) States the nature of the claim as it affects the transfer.

7. If a transferring entity receives a timely notice of an adverse claim, the transferring entity may discharge any duty to the claimant by **sending a notice by certified mail** to the claimant. **IC 32-17-14-27(g)**

8. The notice **must** advise the claimant that a transfer will be made at least forty-five (45) days after the date of the mailing **unless** the transfer is restrained by a court order. **IC 32-17-14-27(g)**

9. The transferring entity shall withhold making the transfer for at least forty-five (45) days after the date of the mailing. **IC 32-17-14-27(g)**

10. Unless the transfer is restrained by court order, the transferring entity may make the transfer at least forty-five (45) days after the date of the mailing. **IC 32-17-14-27(g)**

11. A transferring entity is not responsible for the application or use of property transferred to a fiduciary entitled to receive the property.

12. A transferring entity may require parties engaged in a dispute over the propriety of a transfer to:

a. adjudicate their respective rights; or

b. furnish an indemnity bond protecting the transferring entity.

13. A transfer made in good faith and reliance on information the transferring entity reasonably believes to be accurate discharges the transferring entity from all claims for the amounts paid and the property transferred.

14. All protections provided by the Act to a transferring entity are in addition to the protections provided by any other applicable Indiana law.

XVIX. EFFECT OF IMPROPER DISTRIBUTIONS – IC 32-17-14-28

1. Unless the transfer can no longer be challenged because of adjudication, estoppel, or limitations, **a transferee** of property that was improperly distributed or paid **is liable for**:

a. the return of the property, including income earned on the money or property, to the transferring entity; or

b. the delivery of the property, including income earned on the money or property, to the rightful transferee.

c. attorney's fees and costs incurred by the rightful transferee.

2. If an improper transferee does not have the property, the transferee is liable for an amount equal to the sum of:

a. the value of the property as of the date of the disposition; and

b. the income and gain that the transferee received from the property and its proceeds.

c. attorney's fees and costs incurred by the rightful transferee.

3. If an improper transferee encumbers the property, the transferee shall satisfy the debt incurred in an amount sufficient to release any security interest, lien, or other encumbrance on the property.

4. A purchaser for value of property or a lender who acquires a security interest in the property from a TOD beneficiary:

a. in good faith; or

b. without actual knowledge that:

(1) the transfer was improper; or

(2) information in an affidavit recorded after the death of the owner of TOD real estate was not true;

takes the property free of any claims of or liability to the owner's estate, creditors of the owner's estate, persons claiming rights as beneficiaries of the transfer on death transfer, or heirs of the owner's estate.

5. A purchaser or lender for value has no duty to verify sworn information relating to the TOD transfer.

6. The protection provided to a purchaser or lender for value applies to information that relates to the beneficiary's ownership interest in the property and the beneficiary's right to sell, encumber, and transfer good title to a purchaser or lender but does not relieve a purchaser or lender from the notice provided by instruments of record with respect to the property.

7. The remedy of a rightful transferee must be obtained in an action against the improper transferee.

REMEMBER: IC 32-17-14-31 states that the probate court shall hear and determine questions and issue appropriate orders concerning the determination of the beneficiary who is entitled to receive a TOD transfer and the proper share of each beneficiary and shall hear and determine questions and issue appropriate orders concerning any action to obtain the return of improperly distributed property.

EXHIBIT A

SUMMARY OF TOD LAWS

	COMPREHENSIVE TOD LAW	TOD REAL ESTATE	POD/TOD ACCOUNTS/ SECURITIES	TOD VEHICLES
ALABAMA			5-24 8-6-140	
ALASKA		13.48	13.33.101 13.33.201	
ARIZONA		33.405	14.6203 14.6303	28-2055
ARKANSAS		18-12-608	28-10-201 28-14-101	27-14-727
CALIFORNIA		Prob 5600	Prob 5100 Prob 5500	Veh 4150.7
COLORADO		15-15-404	15-15-203 15-15-203	42-6-110.5
CONNECTICUT		Introduced 2020 HB 5209	36a-296 45a-468	14-16(b)
DELAWARE			5-924 12-801	21-2302
FLORIDA			655.82 711.50	
GEORGIA			7-1-810 53-5-60	
HAWAII		527-1	560:6-101 539-1	
IDAHO			15-6-101 15-6-301	
ILLINOIS		755 ILCS 27	205 ILCS 625 815 ILCS 10	625 ILCS 5/3-104(a-5)
INDIANA	32-14-17	32-17-14-11		9-17-3-9
IOWA		Introduced 2020 SF 2030	524.805 633D	
KANSAS		59-3501	9-1215 17-49a	59-3508
KENTUCKY			391.340 292.6501	
LOUISIANA			766.1 No TOD Secs	
MAINE		18-C 6-401	18-C 6-201 18-C 6-301	

	COMPREHENSIVE TOD LAW	TOD REAL ESTATE	POD/TOD ACCOUNTS/ SECURITIES	TOD VEHICLES
MARYLAND			Fin Inst 1-204 Est Tr 16-101	Transp 13-115
MASSACHUSETTS			Part II, Title II, 190B 6-101 Part II, Title II, 201E 101	
MICHIGAN			490.81 700.6301	
MINNESOTA		507.071	524.6-214 524.6-301	
MISSISSIPPI		Introduced 2020 SB 2851	81-5-62 91-21-1	
MISSOURI	461.003	461.025	362.471	301.681
MONTANA		72-6-401	72-6-201 72-6-301	
NEBRASKA		76-3405	30-2716 30-2734	30-2715.01
NEVADA	111.700 to 781	111.655	111.783	482.247
NEW HAMPSHIRE			383-B:4-404 563-C:1	
NEW JERSEY			17:16I-1 3B:30-1	
NEW MEXICO		45-6-401	45-6-201 45-6-301	
NEW YORK			19-9-14.1 13-4.1	
NORTH CAROLINA			53C-6-7 41-40	
NORTH DAKOTA		30.1-32.1-01	30.1-31-01 30.1-31-21	
OHIO		5302.22	2131.10 1709.01	2131.13
OKLAHOMA		58-1251	6-2025 71-901	47-1107.5
OREGON		93.948	708A.455 59-535	
PENNSYLVANIA			20-6301 20-6401	
RHODE ISLAND		Introduced 2020 HB 7729	19-9-14.1 7-11.1	
SOUTH CAROLINA			62-6-101 35-6-10	

	COMPREHENSIVE TOD LAW	TOD REAL ESTATE	POD/TOD ACCOUNTS/ SECURITIES	TOD VEHICLES
SOUTH DAKOTA		29A-6-401	29A-6-101 29A-6-301	
TENNESSEE			45-2-704 35-12-101	
TEXAS		2-C-114.001	2-C-133.001 No TOD Secs	2-C-115.001
UTAH		75-6-401	75-6-101 75-6-301	
VERMONT			8-14205 9-4351	23-2023
VIRGINIA		64.2-621	6.2-604 64.2-612	46.2-633.2
WASHINGTON		64.80	30A.22.50 21.35	
WEST VIRGINIA		36-12-1	31A-4-33A 36-1-1	
WISCONSIN		705.15	705.01 705.21	
WYOMING		2-18-101	2-1-203 2-16-101	
WASHINGTON DC		19-604.01	19-602.01 19-603.01	

EXHIBIT B

POD/TOD Deposit Account Beneficiary Designation

New Account ☐
Revision ☐
Account Owner Name _____

Account Owner Name _____

Account Owner Name _____

Account Owner Name _____

Account Number _____ ☐ Checking ☐ Savings ☐ CD

- No LDPS – In the case of multiple beneficiaries, if one or more of the beneficiaries does not survive the account owner(s), the deceased beneficiary's share of the account will be divided among the remaining beneficiaries upon the death of the last surviving account owner. If all beneficiaries predecease the owner(s), the account becomes property of the owner's estate.

- LDPS (Lineal Descendants Per Stirpes) – In the event that a designated beneficiary dies prior to the death of all account owners, his share will pass to his lineal descendants. If a deceased beneficiary has no lineal descendants, his share is treated as No LDPS.

Beneficiaries for this account are listed below:

Beneficiary Name	Date of Birth	Relationship to account owner(s)	LDPS?
			☐ No LDPS ☐ LDPS
			☐ No LDPS ☐ LDPS
			☐ No LDPS ☐ LDPS
			☐ No LDPS ☐ LDPS
			☐ No LDPS ☐ LDPS

_____ _____
Account Owner Signature Date

_____ _____
Account Owner Signature Date

_____ _____
Account Owner Signature Date

_____ _____
Account Owner Signature Date

All account owners must sign the beneficiary form on new & revised accounts.
If revision, a **new signature card** is needed.

EXHIBIT C

Mail Tax Bills To:
Y
Street
City, State, Zip

Return To:
Y
Street
City, State, Zip

TRANSFER ON DEATH DEED

This Indenture Witnesseth that **X**, of Lake County, Indiana, as a gift and for no consideration, conveys and warrants to **X**, **Grantee Address** Lake County, Indiana, **Transfer on Death** to **Y** any interest **X** owns in the following described real estate in Lake County, Indiana:

LEGAL DESCRIPTION
Parcel Number:
Common Address:

If **Y** does not survive **X** or is not in existence when **X** dies, then (his/her/their) share of this Transfer on Death transfer shall:

(a) lapse.
(b) be distributed to the **Y's** lineal descendants, per stirpes;.
(c) be distributed to _____.

This Transfer on Death revokes, modifies and supersedes **X's** Transfer on Death Deed signed by **X** on _____ and recorded on _____ in the Office of the Recorder of Lake County, Indiana, as document number _____.

In Witness Whereof, **X** has executed this instrument this _____ day of MONTH, 2023.

_____
X

STATE OF INDIANA)
COUNTY OF LAKE)

Before me, the undersigned, a Notary Public in and for said County and State, this _____ day of MONTH, 2023, personally appeared **X**, and acknowledged his/her execution of the foregoing Transfer on Death Deed as his/her voluntary act and deed.

WITNESS MY HAND AND SEAL.
My Commission Expires:
_____

_____
Notary Public
Resident of Lake County, Indiana

I affirm, under the penalties for perjury, that I have taken reasonable care to redact each Social Security number in this document, unless required by law.

_____

This Instrument Prepared By: James W. Martin, Attorney at Law, 8585 Broadway, Suite 660, Merrillville, Indiana 46410, (219) 769-3760, at the specific request of the owner or the owner's representatives and is based solely on information supplied by one or more of those parties and without examination for accuracy. This preparer assumes no liability for any errors, inaccuracy or omissions in this instrument resulting from the information provided. The parties accept this disclaimer by the owner's execution of this document.

EXHIBIT D

Mail Tax Bills To:
X
Street
City, State, Zip

Return To:
X
Street
City, State, Zip

TRANSFER ON DEATH DEED

This Indenture Witnesseth that **X and Y, husband and wife**, of Lake County, Indiana, as a gift and for no consideration, convey and warrant to **X and Y, husband and wife**, **Grantee Address** Lake County, Indiana, **Transfer on Death** to **Z** any interest they own in the following described real estate in Lake County, Indiana:

LEGAL DESCRIPTION
Parcel Number:
Common Address:

If **Z** does not survive the survivor of **X and Y**, then (his/her/their) share of this Transfer on Death transfer shall:

(a) lapse.
(b) be distributed to the **Z's** lineal descendants, per stirpes.
(c) be distributed to _____.

This Transfer on Death Deed revokes, modifies and supersedes **X's and Y's** Transfer on Death Deed signed by **X and Y** on _____ and recorded on _____ in the Office of the Recorder of Lake County, Indiana, as document number _____.

In Witness Whereof, **X and Y** have executed this instrument this _____ day of MONTH, 2023.

_____ _____
X **Y**

STATE OF INDIANA)
)
COUNTY OF LAKE)

Before me, the undersigned, a Notary Public in and for said County and State, this _____ day of MONTH, 2023, personally appeared **X and Y**, and acknowledged their execution of the foregoing Transfer on Death Deed as their voluntary act and deed.

WITNESS MY HAND AND SEAL.

My Commission Expires: _____

Notary Public
Resident of Lake County, Indiana

I affirm, under the penalties for perjury, that I have taken reasonable care to redact each Social Security number in this document, unless required by law.

_____

This Instrument Prepared By: James W. Martin, Attorney at Law, 8585 Broadway, Suite 660, Merrillville, Indiana 46410, (219) 769-3760, at the specific request of the owner or the owner's representatives and is based solely on information supplied by one or more of those parties and without examination for accuracy. This preparer assumes no liability for any errors, inaccuracy or omissions in this instrument resulting from the information provided. The parties accept this disclaimer by the owner's execution of this document.

EXHIBIT E

TRANSFER ON DEATH
OF
TANGIBLE PERSONAL PROPERTY

X TRANSFERS to **X**, Transfer on Death to **Y**, **X's** interest at death in the following described unregistered tangible personal property:

All non-business tangible personal property normally kept at the **X's** residence at [ADDRESS], or at any other residence or building that is currently owned or occupied or which may be acquired or occupied after this date, as well as all such property acquired hereafter, or which may be located elsewhere, including, but not limited to, furniture, furnishings, dishes and china, tableware, sporting goods, boats, trailers, guns, books, paintings, other art objects, jewelry, and collections of personal property, lawn furniture, tools, machinery and maintenance equipment, and items attached to the residence but not considered real estate; all insurance policies on the non-business tangible personal property and the proceeds from said policies resulting from claims therefrom.

If **Y** does not survive **X** or is not in existence when **X** dies, then the interest in the above described property on **X's** death shall:

(a) lapse.
(b) be distributed to the **Y's** lineal descendants, per stirpes;.
(c) be distributed to _____.

This Transfer on Death revokes, modifies and supersedes a Transfer on Death to the extent it applies to the same property signed by **X** on [date signed].

IN WITNESS WHEREOF, I have signed this Transfer on Death of Tangible Personal Property this _____ day of MONTH, 2023.

_____
X

STATE OF INDIANA)
COUNTY OF LAKE)

The undersigned, a Notary Public in and for said County and State, does hereby certify that **X**, personally known to me to be the same person whose name is subscribed to the foregoing Transfer on Death of Tangible Personal Property, appeared before me this _____ day of MONTH, 2023, and acknowledged HE/SHE signed, sealed and delivered the said instrument as HIS/HER free and voluntary act, for the use and purposes set forth in it.

Notarial Seal:

_____
Notary Public
Resident of Lake County, Indiana

THIS INSTRUMENT PREPARED BY: James W. Martin, Attorney at Law, 8585 Broadway, Suite 660, Merrillville, Indiana 46410.

EXHIBIT F

Mail Tax Bills To:
Y
Street
City, State, Zip

Return To:
Y
Street
City, State, Zip

TRANSFER ON DEATH DEED REVOCATION

X (Owner) REVOKES a Transfer on Death Deed signed by Owner on [Date Signed] and recorded [Date Recorded] in the office of the Recorder of Lake County, Indiana as Document No. _____, which Transfer on Death Deed transferred Owner's interest in the following described real estate:

LEGAL DESCRIPTION
Parcel Number:
Common Address:

In Witness Whereof, **X** has executed this instrument this _____ day of MONTH, 2023.

_____
X

STATE OF INDIANA)
)
COUNTY OF LAKE)

Before me, the undersigned, a Notary Public in and for said County and State, this _____ day of MONTH, 2023, personally appeared **X**, and acknowledged his/her execution of the foregoing Transfer on Death Deed as his/her voluntary act and deed.

WITNESS MY HAND AND SEAL.

My Commission Expires:
_____

_____
Notary Public
Resident of Lake County, Indiana

I affirm, under the penalties for perjury, that I have taken reasonable care to redact each Social Security number in this document, unless required by law.

_____

EXHIBIT G

TRANSFER ON DEATH OF PROMISSORY NOTE

We are the owners of a Promissory Note from **DEBTOR** dated _____ in the face amount of **_____ Thousand and 00/100 Dollars ($__,000.00)** (the "Promissory Note").

X and **Y** TRANSFER to **X** and **Y**, as joint tenants with rights of survivorship, Transfer on Death to **Z**, their interest at death in the Promissory Note.

If **Z** does not survive the survivor of **X** and **Y**, then her interest in the above described Promissory Note on the death of the survivor of **X** and **Y** shall be distributed to his/her lineal descendants, per stirpes.

IN WITNESS WHEREOF, we have signed this Transfer on Death of Promissory Note this _____ day of MONTH, 2023.

_____ _____

H **Y**

STATE OF INDIANA)
)
COUNTY OF LAKE)

The undersigned, a Notary Public in and for said County and State, does hereby certify that **X** and **Y**, personally known to me to be the same persons whose names are subscribed to the foregoing Transfer on Death of Promissory Note, appeared before me this _____ day of MONTH, 2023, and acknowledged they signed, sealed and delivered the said instrument as their free and voluntary act, for the use and purposes set forth in it.

Notarial Seal:

_____
Notary Public
Resident of Lake County, Indiana

THIS INSTRUMENT PREPARED BY: James W. Martin, Attorney at Law, 8585 Broadway, Suite 660, Merrillville, Indiana 46410.

EXHIBIT H

DECLARATION OF TRANSFER ON DEATH OWNERSHIP OF INTERESST IN LLC

I, **X**, am currently the owner of **_____% (___ units)** of **NAME OF LLC, an Indiana Limited Liability Company**.

X TRANSFERS to **X**, Transfer on Death to **Y (as primary beneficiary)**, **X's** interest at death of **NAME OF LLC**, an Indiana Limited Liability Company.

If **Y** does not survive **X**, then his/her interest in the above described property on **X's** death shall be distributed to **Z1** and **Z2**.

If either **Z1 or Z2** does not survive **X**, then his or her interest in the above described property on **X's** death shall be distributed to his or her lineal descendants, per stirpes.

It is my intention to transfer on my death my entire interest in **NAME OF LLC**. Therefore, if I own more or less than the interest stated above, this Declaration of Transfer on Death Ownership shall include whatever interest in **NAME OF LLC** I own at the time of my death.

IN WITNESS WHEREOF, I have signed this Declaration of Transfer on Death Ownership this _____ day of MONTH, 2023.

_____
X

STATE OF INDIANA)
)
COUNTY OF LAKE)

The undersigned, a Notary Public in and for said County and State, does hereby certify that **X** personally known to me to be the same person whose name is subscribed to the foregoing Declaration of Transfer on Death Ownership, appeared before me this _____ day of MONTH, 2023, and acknowledged he signed, sealed and delivered the said instrument as his free and voluntary act, for the use and purposes set forth in it.

Notarial Seal:

_____
Notary Public
Resident of Lake County, Indiana

ACKNOWLEDGEMENT

The undersigned, on behalf of **NAME OF LLC**, acknowledges the foregoing Declaration of Transfer on Death Ownership.

Dated this _____ day of _____, 2023.

NAME OF LLC

By: _____
Title: _____

THIS INSTRUMENT PREPARED BY: James W. Martin, Attorney at Law, 8585 Broadway, Suite 660, Merrillville, Indiana 46410.

EXHIBIT I

TRANSFER ON DEATH
OF
INTEREST IN ESTATE

X TRANSFERS to **X**, Transfer on Death to **BENEFICIARY(IES)**, **X's** interest at death in **THE ESTATE OF _____,** being administered in the _____ County Superior/Circuit Court under Cause No. _____.

If **BENEFICIARY** does not survive **X**, then the interest in the above described Estate on **X's** death shall be distributed to **BENEFICIARY's** lineal descendants, per stirpes.

IN WITNESS WHEREOF, I have signed this Transfer on Death of Interest in Estate this _____ day of MONTH, 2023.

_____
X

STATE OF INDIANA)
)
COUNTY OF LAKE)

The undersigned, a Notary Public in and for said County and State, does hereby certify that **X**, personally known to me to be the same person whose name is subscribed to the foregoing Transfer on Death of Interest in Estate, appeared before me this _____ day of MONTH, 2023, and acknowledged he/she signed, sealed and delivered the said instrument as his/her free and voluntary act, for the use and purposes set forth in it.

Notarial Seal: _____
Notary Public
Resident of _____ County, Indiana

ACKNOWLEDGEMENT

The undersigned, Personal Representative of the Estate of _____, acknowledges the foregoing Transfer on Death of Interest in Estate.

Dated this _____ day of _____, 2023.

_____
____, Personal Representative of the Estate
of _____, deceased

THIS INSTRUMENT PREPARED BY: James W. Martin, Attorney at Law, 8585 Broadway, Suite 660, Merrillville, Indiana 46410.

EXHIBIT J

Mail Tax Bills To:
Y
Street
City, State, Zip

Return To: Y
Street
City, State, Zip

TRANSFER ON DEATH AFFIDAVIT

[Name of Beneficiary], upon personal knowledge and belief, makes these statement's:

1. **X** died _____, 20__, owning an interest in the following described real estate in Lake County, Indiana:

LEGAL DESCRIPTION
Parcel Number: __-___-__
Common Address:

2. On __/__/__, **X** signed a Transfer on Death Deed transferring, on HIS/HER death, HIS/HER interest in the real estate described above which document was recorded on _____ in the Office of the Recorder of Lake County, Indiana, as document number _____

3. The designated beneficiary or beneficiaries in the Transfer on Death Deed and their addresses who did not survive Owner or were not in existence when Owner died are:

[Name of predeceased beneficiary and address]

4. The designated beneficiary or beneficiaries in the Transfer on Death Deed and their addresses who survive the Owner or are in existence at Owner's death are:

[Name of surviving beneficiary and address]

5. The purpose of this Affidavit is to comply with the requirements of IC 32-17-14-26(b)(20) to transfer on death Owner's interest in the real estate described above to the Transfer on Death Deed beneficiary(ies).

In Witness Whereof, **Y** has executed this instrument this _____ day of MONTH, 2023.

_____
Y

STATE OF INDIANA)
)
COUNTY OF LAKE)

Before me, the undersigned, a Notary Public in and for said County and State, this _____ day of MONTH, 2023, personally appeared **Y**, and acknowledged his/her execution of the foregoing Transfer on Death Deed as his/her voluntary act and deed.

WITNESS MY HAND AND SEAL.

My Commission Expires:
_____

_____
Notary Public
Resident of Lake County, Indiana

I affirm, under the penalties for perjury, that I have taken reasonable care to redact each Social Security number in this document, unless required by law.

_____

This Instrument Prepared By: James W. Martin, Attorney at Law, 8585 Broadway, Suite 660, Merrillville, Indiana 46410, (219) 769-3760, at the specific request of the owner or the owner's representatives and is based solely on information supplied by one or more of those parties and without examination for accuracy. This preparer assumes no liability for any errors, inaccuracy or omissions in this instrument resulting from the information provided. The parties accept this disclaimer by the owner's execution of this document.

TRANSFER ON DEATH (TOD) VS. TRUSTS

FACTOR	TRANSFER ON DEATH (TOD)	REVOCABLE LIVING TRUST
1. DRAFTING FEES	A TOD plan can be relatively inexpensive or can be just as expensive as a trust plan, depending on the time spent and the complexity of the situation.	Revocable living trust plans can cost several hundred dollars or thousands of dollars, depending on the time spent and the complexity of the situation.
2. IMPLEMEN-TATION, OWNERSHIP OF ASSETS	To complete a TOD plan, all assets must be given beneficiary designations. The beneficiaries of life insurance, annuities and retirement plans must be coordinated with the TOD plan. Assets can remain jointly owned by husband and wife.	To be administered in a trust, assets must be titled in the name of the trustee. The beneficiaries of life insurance, annuities and retirement plans must be coordinated with the trust plan. Joint ownership, POD accounts and TOD property defeat a living trust plan.
3. MAKING CHANGES TO THE PLAN	To change a TOD plan, changes to ALL beneficiary designations are necessary. Doing so may be cumbersome.	To change a trust plan, amending or restating the trust will address the assets owned by the trust. However, appropriate changes to the beneficiaries of life insurance, annuities and retirement plans must be coordinated with the changes to the trust plan.
4. COMPLEX DISTRIBU-TIONS	TOD plans are best suited for simple, direct distributions to beneficiaries. However, with proper drafting and beneficiary designations, TOD plans may distribute to testamentary trusts for beneficiaries.	Trusts are ideal for complex distributions and alternative distributions, including trusts for minors, incapacitated adults, spendthrift children, special needs trusts, etc.

Prepared By: James W. Martin, 8585 Broadway, Suite 660, Merrillville, IN 46410. (219) 769-3760

5.	PRIVACY (AFTER DEATH)	A will, when probated, becomes a public document. A will may be "spread of record" in the administration of a TOD estate to transfer probate assets, if any, using small estate administration.	A "pour-over" will may be "spread of record" to transfer probate assets, if any, to the trust. A living trust is not filed in court, unless litigation commences or clarification is necessary.
6.	CENTRALIZED MANAGEMENT (AFTER DEATH)	A TOD plan has no centralized management system. The executor has no authority over TOD transfers. Therefore, no one person is responsible (or liable) for paying bills. **NOTE:** This problem may be overcome by the beneficiaries opening a joint checking account to pay bills. Cooperation is required.	The successor trustee is the "manager" of the assets owned by or payable to the trust. The successor trustee will aggregate the assets, pay the bills and distribute the net assets when the administration is finished.
7.	DISTRIBUTION AFTER DEATH	Distribution can be accomplished in as few as one to two months. A TOD affidavit is filed for real estate. A death certificate can be used to close bank accounts and to transfer or liquidate investments. Other documents (claim forms, new account applications, etc.) may need to be signed to facilitate the process.	Distribution is available immediately after death, however, distribution should be withheld during any trust contest. Sufficient funds should be reserved to pay expenses of administration, debts, final income taxes, and Federal Estate Tax, if applicable. Tax year matters.
8.	TAX RETURNS AND ACCOUNTINGS	No "fiduciary" income tax returns or accountings are necessary, or required, when administering a TOD estate plan after death.	A successor trustee must obtain a new tax ID number and file fiduciary tax returns. An accounting of the trust administration is required by most trusts and Indiana law.
9.	ATTORNEY FEES (AFTER DEATH)	The beneficiaries and the attorney agree upon fees, which are not subject to court approval. However, the services rendered are greatly reduced, resulting in less attorney fees than for assisting with a trust administration.	The trustee and the attorney agree upon fees, which are not subject to court approval. Usually, services are performed on an hourly basis. Generally, more legal work is necessary to administer trust assets than TOD assets.

Prepared By: James W. Martin, 8585 Broadway, Suite 660, Merrillville, IN 46410. (219) 769-3760

TOD/POD and OTHER BENEFICIARY DESIGNATIONS

BY

JAMES W. MARTIN
8585 BROADWAY, SUITE 660
MERRILLVILLE, INDIANA 46410
(219) 769-3760; jwm@netnitco.net

Comprehensive Law

- Any present or future interest in real property, intangible personal property, or tangible personal property [IC 32-17-14-3(11)]
- Most other states: limited application

See Exhibit A

Excluded Property

- JTWROS/Tenants by Entirety
- Life Estate/Remainder
- Trusts
- Powers of Appointment
- Life Insurance/Annuities*
- Retirement Plans*

*Unless the provisions of the Act were incorporated in the agreement

Piecemeal Approach Can Have Inconsistent Results

- Multi-Party Account Statutes
- Transfer on Death Securities Acts
- Beneficiary Deed Statutes
- Uniform Real Property Transfer on Death Act
- TOD Vehicle Statutes
- Probate and Trust Codes

Anti-Lapse vs. Surviving Beneficiaries.

Lack of Uniformity with Probate/Trust Codes

UNIFORMITY WITH PROBATE CODE AND TRUST CODE

1. Anti-Lapse
2. Omitted Child
3. Divorce
4. Slayer Rule

Disclaimers

- A person may disclaim, in whole or part, ***any interest in*** or power over ***property***, including a power of appointment. IC 32-17.5-3-1
- IC 32-17.5-4-1(6) was added to UDPIA in 2016
  - Individual: Disclaimant died immediately before the death of the owner
  - Non-Individual: Disclaimant did not exist before the death of the owner

Vehicles

- Separate place in the Indiana Code outside the Transfer on Death Property Act
- Cars and boats are now covered by the same section (IC 9-17-3-9)
- Same rules as in the Act (Subsections e and g)

Application

1. Owner was a resident of Indiana
2. Property subject to the beneficiary designation was situated in Indiana
3. Obligation to pay or deliver arose in Indiana
4. Transferring entity was a resident of Indiana or had a place of business in Indiana
5. Transferring entity's obligation to make the transfer was accepted in Indiana

Interest in LLC

- IC 23-18-6-2.5(a)(1) – Added in 2013
- Unless otherwise limited or prohibited in a written operating agreement, any member interest in a limited liability company may be designated as a transfer on death property under IC 32-17-14.

Transferring Entity

<u>Person who</u>: IC 32-17-14-3(18)

- Owes a debt or is obligated to pay money or benefits
- Renders contract performance
- Delivers or conveys property
- Changes the record of ownership of property on the books, records, and accounts of an enterprise or on a certificate or document of title that evidences property rights

Transferring Entity (Cont'd)

- **Includes** a governmental agency, business entity, or transfer agent that **issues** certificates of ownership or title to property and a person acting as a custodial agent for an owner's property. (BMV)
- **Does not include** *a governmental office charged with endorsing, entering, or recording* ***the transfer of real property in the public records.*** *(Auditor/Recorder)*

Requirements

- Designate a beneficiary
- Make the transfer effective upon the death of the owner
- Comply with the Act, the governing instrument, and other applicable law

Form (General)

Substantially similar to:

- Insert Name of the Owner or Owners
- Insert "Transfer on death to" or "TOD" or "Pay on death to" or "POD“

  NOTE: “TOD” and “POD” are interchangeable
- Insert the Name of the Beneficiary or Beneficiaries

See Exhibit B

Form (Deeds)

Substantially similar to:

- "(insert owner's name) conveys and warrants (or quitclaims) to (insert owner's name), TOD to (insert beneficiary's name)“

NOTE: Words indicating that the person is a primary beneficiary are not required [IC 32-17-14-26(b)(4)]

See Exhibits C and D

Form (TPP)

- Creates ownership in beneficiary form
- Sufficient to transfer the type of property involved (No titles)
- **Must be notarized**

See Exhibit E

Forms (Others)

- Promissory Note (Exhibit G)
- Interest in LLC (Exhibit H)
- Interest in Estate (Exhibit I)

  (Use for interests in trusts too)
- Assignment of Contract Rights IC 32-17-14-10

Delivery

- To be effective, beneficiary designations must be delivered to the transferring entity **before the death of the owner** [IC 32-17-14-9(b), 10(b) and 14(d)]

- Exceptions: TOD TPP & TOD Deeds

Recording

- To be effective, a TOD deed must be recorded **before the death of the owner** IC 32-17-14-11(a)(2)

Amendment/Revocation

- A beneficiary designation must be revoked or changed during the lifetime of the owner
  - Remember the delivery requirement

  [Advantage over other non-probate transfers]
- Revocation of JTWROS property requires all owners
- A subsequent beneficiary designation revokes a prior beneficiary designation
- Transfer of the property during life terminates the beneficiary designation
- Cannot be revoked by Will or Trust

Revocation (Real Property 1)

- An instrument (i.e. subsequent TOD deed) amending or revoking a TOD beneficiary on real property must be recorded **during the life of the owner** (See Exhibit F)
- Transfer of the real property during the life of the owner terminates the beneficiary designation, but only if the deed is recorded **during the life of the owner**
- Revocation of tenants by entirety property must be signed by both spouses

Revocation (Real Property 2)

- Cannot be revoked by will or trust
- A physical act of deed destruction has no effect
- **<u>Beware</u>:** IC 32-17-1-2(c), IC 32-21-1-13(b) and IC 32-21-1-15(b) (Effective July 1, 2019) [Home Sale; QC Deed]
- Negates *Robinson v. Robinson*, 125 N.E.3d 1 (Ind. App. 2019) Decided May 13, 2019

Rules (General 1)

- TOD transfers are:
  - effective with or without consideration
  - not testamentary
  - Not subject to the requirements for probating a will

Rules (General 2)

- Beneficiary designations do not take effect until the last surviving owner dies
- Rights of survivorship survive
- Trusts of all kinds may be beneficiaries
- A testamentary trust is considered to have come into existence at the owner's death if the will is admitted to probate

Rules (General 3)

- Beneficiaries' interest during the life of the owner: **NONE**
- No need to deliver a copy to a beneficiary
- Signature or agreement of beneficiary is not necessary
- Lienholder action against an owner need not include a beneficiary

Rules (General 4)

- A beneficiary designation, revocation or amendment relates back to the date it was received by the transferring entity
- A beneficiary must survive the owner to be entitled to a share of the property
- No right of survivorship among beneficiaries unless expressly provided, tenants in common instead
- The share of any beneficiary who dies after the owner dies belongs to the deceased beneficiary's estate

Rules (General 5)

- If no beneficiary survives the owner, the property belongs to the estate of the owner, **unless** section 22 (LDPS) applies
- A transferring entity shall make a transfer to the designated beneficiary **unless** there is clear and convincing evidence of the owner's different intention at the time the beneficiary designation was created
- Currently no “hammer” clause

Rules (General 6)

- Beneficiary takes the property subject to the owner's commitments:
  - assignments, contracts, set offs, licenses, easements, liens, and security interests
- Beneficiaries' liability is proportionate and they have a right of contribution from other beneficiaries
- Beneficiary designation procured by fraud, duress, undue influence, or mistake or because the owner lacked capacity is **void**

Rules (Deeds 1)

- TOD deeds not recorded before the death of the owner are **void**
- Amendments/revocations not recorded before the death of the owner are **void**
- No consideration is necessary
- POD/Pay on Death does not mean the real property must be liquidated
- Auditor's endorsement is unnecessary

Rules (Deeds 2)

- If ownership is tenants by entirety, the conveyance is void unless both spouses sign
- If ownership is JTWROS, a conveyance by one joint owner severs the joint tenancy and creates tenants in common
- If ownership is JTWROS, a conveyance by one joint owner has no effect on the non-severing owner

Rules (Deeds 3)

- If ownership is tenants by entirety or JTWROS, the transfer does not occur until the death of the last owner
- If ownership is as a tenant in common, the owner's interest transfers at the owner's death
- TOD transfer of a life estate is inoperable and void

Direct Transfers (1 Deed vs. 2 Deeds)

- IC 32-17-14-13 authorizes direct transfers
  - A transferor of property may execute a written instrument **directly** transferring the property to a **transferee** to hold as **owner in beneficiary form**
  - A **transferee** is considered the **owner** of the property for all purposes and has all the rights to the property provided by law to the owner of the property, including the right to revoke or change the beneficiary designation

Actions of Legal Representatives

- An attorney in fact, guardian, conservator, or other agent acting on the behalf of the owner of property may make, revoke, or change a beneficiary designation
- Legal representatives may withdraw, sell or transfer TOD property extinguishing the beneficiaries' right to receive it
- After death of owner, beneficiaries may elect to receive from the owner's estate the amount determined under IC 29-3-8-6.5

TOD Plan Documents

- TOD plan should include:
  - "Safety Net" Will
  - Financial POA
  - Health Care POA/HCRA
  - HIPAA Release
  - Living Will/Life Prolonging Procedures Declaration

Planning Pros & Cons

- Pros:
  - Possibly lower fees
- Cons:
  - All assets must have beneficiary designations
  - More difficult/time consuming to make changes vs. changing the terms of a Will or Trust
- **Note:** Special language for trusts designated as beneficiaries

Administration Pros & Cons

- Pros:
  - Lower fees: TOD Affidavit; Spread Will?
  - More privacy than probate administration
  - Reduced administration/distribution time
  - No accountings or fiduciary tax returns
- Cons:
  - Less privacy than trust administration (Spread Will)
  - Lack of “centralized management”

Administrative Process

- Real Estate: Record TOD Affidavit
- Bank Accounts: Deliver death certificate and request funds
- Stock/Brokerage Accounts: Deliver death certificate, open new account and request transfer of assets/funds
- Vehicles: Deliver death certificate to BMV and apply for new title
- TPP, Entities, Retirement Plans, Life Insurance

TOD Affidavit

- Must contain [IC 32-17-14-26(b)(20)]:
  - Legal description
  - Date of owner's death
  - Name and address of each beneficiary who survived the owner
  - Name and address of each beneficiary who did not survive the owner
  - Cross reference to the recorded TOD deed

See Exhibit J

Disqualifiers (Red Flags)

- Too many beneficiaries
- Dysfunctional beneficiaries
- Complex distributions (numerous specific gifts - ademption)

Rights of Spouses

- The Act is silent on whether TOD transfers are subject to a surviving spouse's election to take against the will under IC 29-1-3-1
- TOD transfers are subject to the surviving spouse's allowance under IC 29-1-4-1 pursuant to IC 32-17-13 (Claims Against Non-Probate Transferees)

Rights of Children

- TOD transfers are subject to the family (children) allowance under IC 29-1-4-1 pursuant to IC 32-17-13 (Claims Against Non-Probate Transferees)
- Designation of “children” includes those born or adopted before or after the designation is made
- When children are specifically named, an omitted child (born after the designation) receives a fractional shares based on the number of children
- An owner may opt out of the omitted child rule
- The omitted child rule does not apply if no children are designated as beneficiaries

Anti-Lapse (LDPS)

- IC 32-17-14-22
- Default rule if a beneficiary is a descendant
- May be applied to any beneficiary
- An owner may opt out (“No LDPS”)
- Substitute beneficiaries take by representation
- If no substitute beneficiaries, the other primary beneficiaries take the share of the deceased beneficiary

Slayer Rule

- A beneficiary designation is subject to the Slayer Rule under IC 29-1-2-12.1

Divorce

- Any beneficiary designation in favor of the owner's former spouse is **revoked** on the date the marriage is dissolved or annulled
- Revocation is effective even if the beneficiary designation does not refer to the owner’s marital status
- Treated as if the former spouse did not survive the owner
- Revived by the owner’s remarriage to the former spouse **or** by a nullification of the dissolution or annulment of the marriage

Divorce(Cont'd)

- Rule **does not apply** to a beneficiary designation that:
  - has been made irrevocable, or revocable only with the spouse's consent
  - is made after the marriage is dissolved or annulled; or
  - expressly states that the dissolution or annulment of the marriage does not affect the designation of a spouse
- Rule **does not apply** to any ERISA plans

Creditors

- The liability of a beneficiary for creditor claims is determined under IC 32-17-13 (Claims Against Non-Probate Transferees)

TOD Affidavit

- Must contain [IC 32-17-14-26(b)(20)]:
  - Legal description
  - Date of owner's death
  - Name and address of each beneficiary who survived the owner
  - Name and address of each beneficiary who did not survive the owner
  - Cross reference to the recorded TOD deed

See Exhibit J

Transferring Entity Reliance

- May rely or act on a certified death certificate
- May rely or act on a certified record of a governmental agency that a person is missing, dead or alive
- May rely or act on a request from a beneficiary's legal representative
- However, a transferring entity may make a TOD transfer with or without a written request [IC 32-17-14-27(b)]

Transferring Entity Has No Duty To: 1

- Verify information in the beneficiary designation
- Give notice of making a transfer (unless it has received notice of an adverse claim)
- Attempt to locate a missing beneficiary
- Pay interest on or invest the share of a missing beneficiary (does not include interest/dividend-earning assets)
- Determine whether a predeceased beneficiary had a surviving lineal descendant
- Apply the omitted child rule

Transferring Entity Has No Duty To: 2

- Locate a trustee or custodian
- Pursue appointment of a trustee or custodian
- Discover the existence of a trust
- Determine whether a beneficiary designation is revoked because of change in marital status
- Determine whether a variation in the distribution under the beneficiary designation should be made

Twelve (12) Months After Owner's Death

- If a trust is a beneficiary and no trustee is appointed, transferring entity may distribute as if no trust survived
- If a trust is a beneficiary and no affidavit of certification of trust is received, transferring entity may distribute as if no trust survived
- Evidence of a surviving descendant of a nonsurviving beneficiary is not received, transferring entity may distribute as if no descendant of a nonsurviving beneficiary survived the owner
- If a missing beneficiary's share is not claimed, transferring entity may distribute as if that beneficiary did not survive the owner

Notice of Adverse Claim 1

- Must be received by the transferring entity before the TOD transfer is made
- Affords a reasonable opportunity to act on the notice before making the transfer
- Requirements of Notice:
  - Asserts a claim of beneficial interest adverse to the transfer to be made
  - Name and address of claimant
  - Identifies the owner
  - States the nature of the claim

Notice of Adverse Claim 2

- Transferring entity can discharge its duty by sending a notice to the claimant
- Notice must be sent by certified mail
- Must advise claimant that the transfer will be made at least forty-five (45) days after the date of mailing, unless a court order is received
- Transferring entity may require parties to adjudicate their rights or post a bond

Improper Distributions

- Rightful transferee must seek remedy in an action against the improper transferee
- Improper transferee is liable for:
  - Return of the property (including income earned) to the transferring entity or the rightful transferee
  - Value of property, if it was sold, as of the date sold (including income and gain)
  - Satisfaction of any debt incurred against the property
  - Attorney fees and costs of rightful transferee

Circumstantial Changes

- A beneficiary designation effective under the Act remains effective despite a change in the:
  - Beneficiary designation
  - Residency of the owner
  - Residency or place of business of the transferring entity; or
  - Location of the property

Jurisdiction

- The **probate court** shall hear and determine questions and issue appropriate orders concerning any action to:
  - Obtain the property from a transferring entity
  - Determine the beneficiary who is entitled to receive a TOD transfer
  - Determine the proper share of each beneficiary
  - Obtain the return of improperly distributed property (plus income/gain)

Section Four

Indiana Continuing Legal Education Forum

Estate Planning Strategies, Tools, Techniques & More!

TECHNIQUES TO MINIMIZE THE EVENTUAL FEDERAL GROSS ESTATE FOR ESTATE TAX PURPOSES
AND
TAX ASPECTS OF NON-PROBATE TRANSFERS

March 9, 2023
Indianapolis, Indiana

Jeffrey S. Dible
Frost Brown Todd LLP
jdible@fbtlaw.com

Section Four

Techniques to Minimize the Eventual Federal Gross Estate for Estate Tax Purposes and Tax Aspects of Non-Probate Transfers.....Jeffery S. Dible

Jeffrey S. Dible

Jeffrey S. “Jeff D” Dible has been practicing law since October 1979 and, for more than 37 years, has concentrated his practice in the areas of trust and estate administration, estate planning, related litigation, taxation, and business succession planning. He is a Fellow of the American College of Trust and Estate Counsel (ACTEC) and served as ACTEC’s Indiana State Chair from March 2015 through January of 2020. Jeff Dible has frequently represented and advised the individual or corporate trustees of trusts. He often works on a consulting basis for lawyers and law firms in Indiana and other jurisdictions with respect to Indiana trust and estate law or Indiana taxation matters.

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

I TECHNIQUES FOR MINIMIZING THE "FEDERAL GROSS ESTATE" FOR ESTATE TAX PURPOSES

A. A "Refresher" on the Federal Estate Tax Calculation

It's worth remembering how the federal estate tax is calculated after a decedent's death (Line numbers in the left column below are the line numbers on page 1 of the Form706, and the dollar amounts in the third column are merely examples):

Line #	Description of Line Item or Operation	Amount	Comment
1	Total federal gross estate (sum of all assets reportable on Schedules A thru I *minus* any exclusion on Sch. U)	$ 14,000,000	
2	Tentative allowable deductions from Schedules J thru L and Schedules M [marital] and O [charitable]	75,000	Schedules J thru L claim deductions for administrative & funeral expenses, debts, & liens
3a	Tentative taxable estate [*Line 1 minus Line 2*]	13,925,000	
3b	State death deduction [*zero for any Indiana resident decedent dying after 2012*] [1]	0	
3c	Taxable estate (*Line 3a minus Line 3c*]	13,925,000	
4	Adjusted taxable gifts [*Follow Form 706 instructions*]	4,613,000	Adds the decedent's post-1976 ***taxable*** gifts to the taxable estate; *see* Code § 2001(b)(1)(B)
5	Grossed up total "transfer tax base" [*Line 3c plus Line 4*]	18,538,000	*See* Code § 2001(b)(1)
6	Tentative estate tax on the grossed-up Line 5 amount, using "Table A"	7,361,000	

[1] If an Indiana resident decedent's gross estate includes real property or tangible personal property located physically in other state that has a state-level death tax, that other state's death tax could be claimed on Line 3b

Line #	Description of Line Item or Operation	Amount	Comment
6	Tentative estate tax on the grossed-up Line 5 amount, using "Table A" [*repeated from previous page*]	$ 7,361,000	40% of 17,538,000 *plus* $345,800
7	*Minus* gift tax paid or payable (at date of death rates) on adjusted taxable gifts	0	Requires complex & careful computations using the Line 7 worksheet and Worksheet TG in the Form 706 instructions [2]
8	Gross estate tax (before credits) on the taxable estate assets [*Line 6 minus Line 7*]	$ 7,361,000	
9d	Applicable lifetime exclusion amount	12,920,000	Full exclusion amount under Code § 2010 for a 2023 decedent
9e, 11	Applicable credit amount [*equals the estate tax calculated on Line 9d*]	5,113,800	"Credit equivalent" for 2023 decedents [*see* the **Appendix ___** table starting on page 22]
12	Net estate tax after subtracting credit amount [*Line 8 minus Line 11*]	$ 2,247,200	

The "cumulative" nature of the estate tax calculation (adding post-1976 taxable gifts to the taxable estate) effectively pushes the decedent's estate into the highest possible marginal estate tax bracket. This meant more, in practical terms, in the years before 2002 when there were many more estate tax brackets and when the top marginal rate could be as high as 55 percent.

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[2] If the decedent made large taxable gifts in a year when the top marginal gift tax rate was ***higher*** than the top estate tax rate (currently 40 %), the Line 7 calculation will give the decedent's estate ***less*** "credit" for the gift tax actually paid for that prior year. Conversely, if the decedent made large taxable gifts in a year (such as 2010—2012) when the top marginal gift tax rate was ***lower*** than the top estate tax rate in the year of death, the Line 7 calculation may produce a "gift tax paid or payable" amount that is larger than zero, even though the decedent actually owed no gift tax and paid no gift tax.

Nowadays, one important implication of this *cumulative* estate tax calculation is that when a client makes ***taxable*** gifts, the estate tax that is actually saved after death is not the estate tax on the value of the gifted asset as of the time of the gift. Instead, the donor saves the estate tax on —

- The *future growth* in the value of the gifted asset after the date of the gift; and
- The *future income* generated by the gifted asset after the date of the gift; and
- The gift tax, if any, that the donor ***actually paid*** on taxable gifts made more than 3 years before death by the donor or the donor's spouse (*see* Code § 2035(b).

B. Techniques that are Outside the Scope of this Topic

The following tools or techniques can reduce the amount of the client's federal *taxable* estate after death, by adding or increasing ***deductions***, but they do not reduce the federal *gross* estate:

- Allocating and distributing gross estate assets to an outright marital share or to a marital trust that qualifies for the estate tax charitable deduction (claimable on Schedule M of Form 706).
- Making a bequest or distribution after death out of gross estate assets and "outright" to a 501(c)(3) charitable organization and claiming an estate tax charitable deduction on Schedule O of Form706.
- Making a bequest or distribution after death and out of gross estate assets to a charitable remainder annuity trust (CRAT) or charitable remainder unitrust (CRUT) and claiming an estate tax charitable deduction for the discounted present value (calculated under Code §§ 2031 and 7520) of the charitable beneficiary's remainder interest.
- Making a bequest or distribution after death and out of gross estate assets to a charitable lead trust (CLAT or CLUT) which pays a stream of annuity or unitrust payments to a charitable organization for a specified term of years, and claiming an estate tax charitable deduction for the discounted present value (calculated under Code §§ 2031 and 7520) of the stream of payments to the charitable lead beneficiary.
- Having the decedent direct (in the Will or a trust instrument) that a qualified conservation easement (satisfying Code § 170(h)) be placed on real property ***after*** the decedent's death, and claiming an estate tax charitable deduction on Schedule O under Code § 2055(f).

C. Transfer Techniques that Exclude Assets from the Donor's Federal Gross Estate

Each of the techniques listed in this section involves the making of a completed gift that removes the gifted asset from the potential federal gross estate of the donor.

The techniques in paragraphs (8), (9), (12), and (13) all involve the use of the IRS's published section 7520 rate (sometimes called the "IRS discount rate" or "hurdle rate"). The Treasury Department publishes the section 7520 rate on a monthly basis in the same Revenue Ruling that lists the Applicable Federal Rates (AFRs) for the next month. https://www.irs.gov/applicable-federal-rates. The section 7520 rate was 4.60 percent for February 2023 and is 4.40 percent for March 2023. By comparison, the section 7520 rate ranged from a low of 0.40 percent to a high of 1.00 percent during the period from May 2020 through April 2021, and the last time that the section 7520 rate was 4.60 percent or higher was in December 2007.

(1) ***Annual exclusion gifts outright or in trust*** under Code § 2503(b) or (c). When your client, as the donor, makes a gift to any person who can use or enjoy the gifted money or other asset immediately in the present and without restrictions, that gift is a "gift of a present interest in property," and it automatically qualifies for the per-donee "annual exclusion" from taxable gifts under Code § 2503(b). The annual exclusion has been indexed for inflation since 2002, is $17,000 per donee for 2023 gifts, and is likely to be $18,000 per donee for gifts made in 2023.

Annual exclusion gifts (and outright gifts to charitable organizations described in Paragraph (3) below) are the most "efficient" way to save estate tax after the donor's later death because gifts qualifying for the annual exclusion are excluded from taxable gifts and will never be counted in the after-death estate tax calculation explained in Part A on pages 1 and 2 above.

It is possible to structure a gift to an irrevocable trust so that a $17,000 annual exclusion will apply to a beneficiary (or to each of several beneficiaries) of that trust when a gift is made to the trust. The most familiar example of this technique is to include "Crummey withdrawal powers" in the trust, so that a beneficiary's current right to withdraw money or property is or can be triggered by a gift to the Trust. Complex rules and options apply to such withdrawal powers.

When a beneficiary of an irrevocable trust is under 21 years of age, Code § 2503(c) allows the settlor to carefully structure that non-adult beneficiary's interest in the trust so that each gift to the trust will qualify for the $17,000 annual exclusion for that beneficiary and for that year. Such trusts are commonly called "section 2503(c) minor's trusts," and the

$17,000 annual exclusion applies these trusts for the same reason that the annual exclusion is also available for gifts to UTMA custodial accounts, for gifts to section 529 educational savings accounts, and for gifts to ABLE accounts under Code § 529A(c)(2).

High-net worth individuals and couples frequently want to create and fund trusts for the benefit of grandchildren or other "skip persons" who are members of generations 2 or more levels below. One tax-driven motive for such planning is to avoid the imposition of estate tax upon the deaths of their *children* with respect to the assets that are gifted for the benefit of *grandchildren*. The federal generation skipping transfer (GST) tax exists to replace the estate tax revenue that would be lost, and each individual currently has a lifetime GST tax exemption whose maximum amount ($12,920,000) is the same as the maximum lifetime estate and gift tax exclusion amount under Code § 2010. When an individual makes a taxable gift to or for the benefit of a grandchild or other skip person, that gift uses up, dollar for dollar, part of the donor's lifetime estate and gift tax exclusion *and also* part of the donor's lifetime GST exemption.

The GST tax chapter of the Internal Revenue Code allows any individual to structure a gift (outright or in trust) to or for a grandchild or other skip person so that the gift will qualify for the $17,000 annual exclusion from taxable gifts *and also* qualify as a "non-taxable gift" for GST tax purposes under Code § 2642(c)(3). When both requirements are satisfied, the first $17,000 of the gift to or for the benefit of the grandchild or other skip person will not use up any of the donor's lifetime estate and gift tax exclusion *or* any of the donor's lifetime GST exemption. Such non-taxable annual exclusion gifts produce "pure" estate tax savings because they won't be counted in the after-death estate tax calculation.

One final example of a structure for annual exclusion gifts is the piecemeal annual forgiveness of installment payments owed by the donee "borrower" to a donor "lender" on an intra-family loan. When this technique is used, the donor lender structures a bona fide loan (not a demand loan) that requires the donee borrower to repay the principal plus adequate stated interest. The donee borrower should have a plausible ability to repay the loan; the donor lender should not leave any paper trail or other circumstances suggesting that there is no intention to collect repayment; and it's a "plus" if the loan is secured. *See* **Estate of Musgrove v. United States**, 33 Fed.Cl. 657, 664 (1995); **Elizabeth Miller v. Commissioner**, T.C. Memo 1996-3..The donor lender can either collect actual repayments and refund them or inform the donee borrower by letter that specified installment payments are forgiven. The amount of forgiven or foregone principal and interest payments, up to

$17,000 per year per borrower, will be an annual exclusion gift under Code § 2503(b). *See* Reg. § 25.2511–1(g)(1); **Haygood v. Commissioner**, 42 T.C. 936 (1964).

(2) ***Direct payments of medical expenses or school tuition*** to the health care provider or to the school under Code § 2503(e). There is another category of gifts that are excluded from the donor's taxable gifts, even if the donee has already received a full $17,000 of annual exclusion gifts in the pertinent year. The donor can directly pay school tuition to an educational institution[3] on behalf of the donee, or the donor can directly pay "medical expenses" (as broadly defined in Code § 213(d)) to the medical provider on behalf of the donee, and the entire amount will be excluded from the donor's taxable gifts.

(3) ***"Outright" gifts to 501(c)(3) charitable organizations***. A "straight" or "outright" gift of money or other property to a charitable organization and exclusively for non-profit purposes is covered by two exclusions from the donor's taxable gifts: The section 2503(b) annual exclusion for the first $17,000 of the donation, and the gift tax charitable deduction for the rest of the donation. The gift tax charitable deduction is claimed on Schedule A, Part 4, line 7 of the Form 709 return.

(4) ***Gift(s) to an inter vivos marital trust***. A married donor can give money or other assets in any amount to an *inter vivos* marital trust with the donor's spouse as the sole initial beneficiary, and if the marital trust is structured to automatically qualify for the marital deduction (for example, the spouse beneficiary has a freely exercisable general power of appointment over the marital trust assets) or to the extent that a QTIP election is made, the gift to the marital trust will qualify for the gift tax marital deduction.

Such a gift to an *inter vivos* marital trust will remove assets and asset value from the donor spouse's potential gross estate, but if the gift tax marital deduction is claimed, the estate tax on the marital trust assets is merely postponed, because upon the spouse beneficiary's later death, the marital trust assets will be included in the spouse beneficiary's federal gross estate under Code §§ 2041 or 2044 and will be eligible for a new cost basis equal to date-of-death market value.

(5) ***Gift(s) to an irrevocable trust (SLAT or SLANT) that has the donor's spouse as a beneficiary***. A SLAT [***S***pousal ***L***imited ***A***ccess ***T***rust) or a SLANT (***S***pousal ***L***imited

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[3] The school that receives the tuition payment must be a public school or a non-profit educational organization described in Code § 170(b)(1)(A)(ii), such as a non-profit private school or state college or university. Note that only tuition payments, and not other kinds of school expenses, qualify for this exclusion from taxable gifts.

Access ***N***on-grantor ***T***rust) is simply an irrevocable trust that has the spouse of the donor as the sole initial beneficiary or as one of the beneficiaries, where the trust cannot qualify for the gift tax marital deduction or where a QTIP election (if available) is intentionally ***not*** made. Therefore, the funding of the SLAT or SLANT uses up part of the donor spouse's lifetime estate and gift tax exclusion, and the trust assets (plus future appreciation and income) are removed from the donor spouse's potential federal gross estate. Further, so long as the donee spouse does not have a general power of appointment over the SLAT or SLANT assets, those assets will not be included in the donee spouse's gross estate at the time of her death.

Many variations in the design and structure of a SLAT or SLANT are possible. The trust can be structured as a domestic asset protection trust (DAPT) such as an Indiana legacy trust under IC 30-4-8. With some careful design, and drafting the donor spouse could be eligible to become a successor beneficiary of the trust if the donee spouse dies first., but the prospect of the donor spouse having a successor beneficial interest may weaken the estate tax savings if the donor spouse receives distributions (after the donee spouse's death) that the donor spouse does not spend before the second death.

SLATs and SLANTs have been attractive to couples with stable marriages because they allow assets to be removed from the gross estates of both spouses, while also permitting some cash flow (in the form of distributions) to come back to the donee spouse and to be available to the marital household.

When such a trust is structured as a grantor trust (SLAT), the donor spouse typically retains an asset substitution or swap power under Code § 675(4); the entire SLAT is treated as owned by the donor spouse for income tax purposes; and the donor spouse is responsible for paying all income taxes on the SLAT's income. The grantor trust structure permits the donor spouse to engage in asset sale transactions with the SLAT without realizing any gain or loss. If the donor spouse does not want the trust to be a grantor trust for income tax purposes, then more elaborate drafting is necessary to make the trust a non-grantor trust (SLANT).

(6) ***Gifts to an irrevocable trust with non-spouse, non-charitable beneficiaries***.

This is a huge category of trusts, for which an almost infinite variety of designs and structures are available. Just within the subset of trusts that have descendants of the donor as the main beneficiaries, these structures are possible:

- A separate share trust for each descendant beneficiary in a particular generation, with either mandatory net income and discretionary principal distributions or with all distributions discretionary.
- A single "pot trust" structure with multiple children or multiple descendants in multiple generations as the beneficiaries eligible to receive or benefit from discretionary "sprinkle-spray" distributions of net income and/or principal.
- Adding or foregoing withdrawal powers and other features to allow the section 2503(c) annual exclusion to apply to the first $17,000 (per beneficiary) of gifts to the trust each year.
- Adding or not adding general or limited testamentary powers of appointment that can be exercised by some or all of the descendant beneficiaries.
- Including "incentive trust" or "special needs trust" provisions along with the discretionary distribution standards.
- Including detailed provisions to limit the risk that the trust assets will be misspent, wasted, fought over in a divorce, or diverted by creditors as a result of the future personal behavior problems, financial problems, or marital problems of a beneficiary.
- Including specific directions for the division of each beneficiary's separate trust into a GST-exempt trust and non-GST-exempt trust, so that the exempt trust will always have an inclusion ratio of zero for GST tax purposes.

All of these potential designs or structures for descendants' trusts can achieve the parent or grandparent donor's objective of removing asset value from his or her potential federal gross estate for estate tax purposes.. Further, with the right design, even an Indiana descendants' trust can be administered for 2 generations without exposing the trust assets to estate tax, until the trust "bumps up against" the Indiana statutory rule against perpetuities.

(7) ***Transferring a life insurance policy on the client's life so that each beneficiary is an owner of the policy***. If Carla Client directly owns a $10 million life insurance policy on her own life and dies while holding "incidents of ownership" in that policy, the $10 million death benefit will be included and taxable as part of Carla's gross estate under Code § 2042. Suppose that Carla's 4 adult children are named as the equal beneficiaries on the policy. If Carla made a completed gift assignment of ownership of the policy to the 4 children and lived at least 3 years after completing the assignment, then the

death benefit or policy proceeds will be excluded from Carla's estate for estate tax purposes, even if Carla continued to directly pay the premiums herself.

The well-known technique of creating an irrevocable life insurance trust (ILIT) to receive an assignment of ownership of an existing policy, or to apply for and own a newly-issued policy on the settlor's life, is just a special-case example of this technique. With an ILIT as the owner of the policy and with a responsible fiduciary in control of the LIT, the insured settlor can reduce or eliminate the risks that the policy would lapse for non-payment of premiums or that inappropriate changes would be made to the beneficiary designations.

When an individual *who is not the insured* owns all or a fractional part of an insurance policy on the life of the insured, and when that individual owner dies *before* the insured, the amount included in the gross estate of the deceases policy owner is the replacement cost of the policy (for a term policy, a fractional part of the last premium payment, and for a whole life policy the interpolated terminal reserve, roughly equal to the cash surrender value).

(8) ***Gift(s) to one or more Grantor Retained Annuity Trusts (GRATs)***. When a client owns an appreciating asset (such as a portfolio of marketable securities or a single publicly-traded stock) that is easily divisible and relatively easy to re-value, a gift to a GRAT remains an attractive technique. The settlor will transfer the asset(s) to the GRAT and will retain the right to receive annuity payments for a period of 2 or more years, where the annuity is expressed as a fixed percentage of the date-of-gift fair market value of the assets given to the GRAT. The taxable gift element of the GRAT is the value of the remainder interest that flows to another person(s) after the end of the term. The value of that remainder interest is determined by subtracting the discounted present value of the annuity payment stream (calculated with the section 7520 rate) from the date-of-gift market value of the GRAT assets.

Current law allows the settlor of a GRAT to set the annuity payout percentage sufficiently high so that the discounted present value of the annuity payment stream is nearly equal to the date-of-gift market value of the GRAT assets, which means that the value of the remainder interest gift could be $1.00 or less. When a GRAT is "zeroed out" in this manner, the estate tax savings will be significant or larger, to the extent that the financial or economic performance (growth in market value plus reinvested income) is at an annual rate that "beats" the section 7520 rate for the month in which the GRAT was

funded. The estate tax savings from any successful GRAT is the estate tax that is avoided on the growth in value of the GRAT assets that is not paid back to the settlor.

The potential estate tax savings from a GRAT will disappear if the settlor dies during the term of the GRAT. In addition, if the GRAT is zeroed out, the annuity payout percentage will be set so high (possibly 28 to 39 percent per year) that the trustee of the GRAT will have to assign parts of the GRAT assets back to the settlor, in addition to paying all the net income to the settlor.

When the section 7520 rate is relatively high (as in early 2023), a GRAT is a less-attractive technique for two reasons: *First*, a higher section 7520 rate means a lower discounted value for the retained annuity interest and a higher value for the taxable gift of the remainder interest. *Second*, when the section 7520 rate is higher, it is probably more difficult for the assets inside the GRAT to "perform" or grow financially at an average rate that exceeds the section 7520 rate.

(9) ***Gift of a personal residence to a Qualified Personal Residence Trust (QPRT)***.

The settlor who creates and funds a QPRT retains the right to use and occupy the personal residence for a specific term of years beginning on the date when the residence is transferred to the trustee of the QPRT. If the settlor dies during the term, the QPRT's assets are included in the settlor's gross estate under Code § 2036(a), and no estate tax is saved. For gift tax purposes, the remainder interest in a QPRT is determined by subtracting the discounted present value of the settlor's retained interest (for the term of years) from the total value of the residential real estate on the date of the gift transfer to the QPRT.

In an economic environment that includes fairly high interest rates, a QPRT is an attractive technique, because a higher section 7520 rate will cause the discounted present value of the settlor's retained interest to be higher, and this means that the value of the remainder interest gift will be lower.

Perhaps the biggest drawback to the use of QPRTs, and the most negative selling point, is that if the settlor who created and funded the QPRT outlives the term of years, he or she will have to pay a market rate of rent to the remainder beneficiaries, in order to have a continuing right to use or occupy the residential real estate.

(10) ***Making currently-owned assets less liquid and less valuable by creating an FLP or family LLC.*** This suite of strategies is decades old. Although chapter 14 of the Internal Revenue Code (especially Code § 2701) has made some techniques illegal or unworkable, it is still possible for your high-net-worth clients to contribute appreciating

assets (such as marketable securities or shares in an existing operating business) to a new family limited partnership (FLP) or family LLC (This writer prefers to use LLCs).

The FLP or LLC is intentionally structured so that no partner or member has the unilateral right to force the dissolution or liquidation of the entity, to force the entity to make distributions, or to force the entity to redeem the partner's or member's interest for cash. These restrictions allow a business valuation professional to apply discounts for lack of marketability and for lack of control when appraising the market value of a number of partner or member units that represent a non-controlling interest. The valuation discounts may result in a total reduction of 25 to 40 percent in the value of a one-percent interest in the partnership or LLC, compared to the "inside asset value" of the assets held *inside* the entity.

This writer prefers to structure a family LLC so that its capital structure consists of Class A voting member units and Class B non-voting member units in a ratio of about 1 to 9 or even 2 to 98; so that the voting and non-voting units have identical economic rights on a per-unit basis to receive distributions; and so that only the Class A members elect and re-elect the LLC's managers. This structure ensures that most of the value of the LLC is "bound up in" the Class B non-voting units. The family LLC still must have a business purpose other than to claim valuation discounts and save future estate tax, and the LLC should operate, hold meetings, make investment decisions, and keep records as a real family business.

Creating and using this kind of structure for a family LLC does not save any future estate tax so long as the wealthy client and founding member keeps all of the Class A and Class B units. The wealthy client needs to gift or sell Class B units (perhaps even all of the Class B units) to other family members or to irrevocable trusts for their benefit. Those gifts can be valued for gift tax purposes with valuation discounts determined by professional appraisal, so that the donor's lifetime estate and gift tax exclusion can be "stretched" or "leveraged."

This kind of planning is only for clients who have patience, a tolerance for complexity, and a tolerance for the risk that in a future gift tax or estate tax audit, the IRS will closely scrutinize the FLP or LLC and all transfers of interests in the entity.

(11) ***"Estate freeze" techniques such as an installment sale to an irrevocable grantor trust.*** The essence of an "estate freeze is that a wealthy donor / client transfers away an asset that is growing or likely to grow in value, and that donor / client keeps or receives in exchange a different asset whose value is likely to grow more slowly nor not at

all between the present and the donor / client's later death. A properly-executed "estate freeze" transaction saves future estate tax by substituting a static or slowly-growing asset for an appreciating asset.

One example of an estate freeze transaction that has been popular for at least a decade is an installment sale of an asset to an irrevocable grantor trust in exchange for a long-term promissory note that requires the purchaser and borrower to pay interest on the unpaid balance of the purchase price at a fixed rate of interest that is just slightly higher than the applicable federal rate (AFR) for a loan of that duration or tenor, according to the Treasury Department's published AFRs for the month in which the sale occurs and the loan is made.

This sort of transaction is sometimes called an "installment sale to an intentionally defective grantor trust (IDGT)," but there is nothing "defective" about the trust that purchases the appreciating asset(s) from the client who is the settlor of the trust. The trust is carefully structured so that it is an irrevocable trust for gift and estate tax purposes but is a grantor trust (and therefore the alter ego of the settlor) for income tax purposes. The grantor trust feature means that the settlor can sell an appreciated asset (with a low basis relative to market value) to the trust in a bona fide sale transaction for a full market-value price, without realizing any gain or loss. The grantor trust feature also means that the settlor must pay all income taxes on the trust's income, but the trust's terms can give an independent trustee the discretion (but not the obligation) to reimburse the settlor for some or all of the income taxes paid. The settlor's unreimbursed payment of the trust's income taxes is the equivalent of making additional gift-tax-free gifts to the trust's beneficiaries.

This type of installment sale transaction saves future estate taxes after the client settlor / seller's death to the extent that (a) the future growth in value and income generated by or for the sold assets exceeds (b) the installment payments that the settlor / seller collects under the promissory note but does not spend during his or her lifetime.

It is possible (and optional) to structure the promissory note to the settlor lender so that the note is a SCIN (self-cancelling installment note), and so that if the settlor / lender dies before the note is fully paid off, the unpaid principal balance is automatically canceled (discharged and wiped out) and will not be a countable asset of the deceased settlor's federal gross estate for estate tax purposes. However in order for the promissory note to actually ***work*** as a SCIN, the stated interest rate must be set higher than the AFR and must include a "mortality risk premium" that takes into account the possibility that the settlor / lender may die during the term of the note. *See* **Moss v. Commissioner**, 74 T.C. 1239 (1980). The ideal candidate for the lender on a SCIN is someone who is not at imminent

risk of death but who is in poorer-than-average health or is likely to die before reaching his or her actuarial life expectancy. Planning with SCINs is not for the faint-hearted.

(12) ***Gift(s) to a charitable remainder annuity trust (CRAT) or charitable remainder unitrust (CRUT)***. The settlor who creates and funds a properly structured CRAT or CRUT can claim an income tax charitable deduction and a gift tax charitable deduction for the discounted present value of the charitable remainder interest. When the trust is a CRAT, the charitable deductions will be available only if the CRAT satisfies an IRS "exhaustion test" and if the calculated present value of the charitable remainder is at least 10 percent of the date-of-gift market value of the assets transferred to the CRAT.

If the settlor of a CRAT or CRUT is not a lead beneficiary (the settlor names another person(s) as the non-charitable lead beneficiary or beneficiaries), then the full value of the assets given to the CRAT or CRUT are removed from the settlor's potential gross estate, because the settlor is making a taxable gift to the non-charitable lead beneficiary.

In a high-interest rate environment, a higher section 7520 rate will result in a higher calculated present value of the charitable remainder interest in the CRAT or CRUT, and therefore a higher charitable deduction. However, a CRAT that is structured to make annuity payments to one or more lead beneficiaries for their lives is sensitively dependent on the ages and life expectancies of the lead beneficiaries, and even at a section 7520 rate of 4.60 percent, the CRAT might fail to satisfy the requirements for a charitable deduction.

(13) ***Gifts to an inter vivos charitable lead annuity trust (CLAT)***. A client can create a charitable lead trust, make a gift transfer of assets to the trustee, and provide in the trust agreement that the trustee must pay an annuity to one or more 501(c)(3) charitable organizations for a specific term of years. The annuity is defined a fixed percentage of the date-of-gift market value of the assets used to fund the CLAT. After the lead term ends, the trust terminates, and the trustee must distribute the remaining trust assets to one or more remainder beneficiaries, who can consist of individuals, other trusts for individuals, and (optionally) one or more charities.

When the client / settlor creates and funds a CLAT, he or she is treated as making two completed gifts: The gift of the charitable lead interest, whose value is calculated using the section 7520 rate and based on the length of the term; ***and*** the gift of the non-charitable remainder interest (whose gift tax value equal the total date-of-gift market value of the CLAT assets *minus* the calculated present value of the charitable lead interest. A CLAT can be "zeroed out," producing a nearly-zero gift tax value for the remainder interest, by increasing the annuity percentage enough so that the present value of the lead interest is

equal or nearly equal to the total value of the gifted assets that funded the CLAT. After the end of the lead term, a zeroed-out CLAT may still contain some assets for distribution to the remainder beneficiaries *IF* the financial and economic performance of the assets inside the CLAT is, on average, better than the section 7520 rate that was used to calculate the present value of the lead annuity interest.

When an *inter vivos* CLAT is properly structured, the settlor can claim a gift tax charitable deduction for the value of the lead annuity interest, and the assets given to the CLAT will be removed from the settlor's gross estate. If the settlor structures the CLAT as a ***grantor trust***, the settlor can also claim an *income tax* charitable deduction for the discounted value of the charitable lead interest, but the settlor also must pay the income taxes on all of the CLAT's income for the full duration of the lead term.

In a high interest rate environment when the section 7520 rate is also fairly high, CLATs are less advantageous, because a higher section 7520 rate will produce a lower calculated present value for the charitable lead interest and a larger value for the taxable gift of the remainder interest.

CLATs can also be created to be funded after the client's death, when the discounted present value of the charitable lead interest will qualify for the estate tax charitable deduction.

D. Techniques that Reduce the Value of Assets Included in the Gross Estate

This section summarizes two (2) provisions in the estate tax chapter (chapter 11) of the Internal Revenue Code which do not exclude *assets themselves* from the decedent's gross estate, but which reduce the *value* that gets included in the gross estate for a particular asset.

(1) ***The alternate use valuation election under Code § 2032A***. When a decedent dies owning real property that has been used in farming or in conducting some other trade or business, a professional appraisal of that real property's fair market value, for estate tax purposes, may reflect the real property's market value *in its highest and best use* (including the potential for commercial development), instead of its market value ***in use*** (such as use in farming). Code section 2032A allows the decedent's estate to make an election, on the estate tax return, to value the real property at a lower value, according to its continued use in farming or in the previous and current trade or business. Although section 2032A is worded more broadly, section 2032A elections are most often made for real property used in farming.

If a section 2032A election can be made and is made, the maximum amount that the reported value of qualifying real property can be reduced on the federal estate tax return is a reduction in appraised value that cannot exceed an inflation-adjusted amount based on $750,000. For decedents dying in 2023, that maximum is $1,310,000.

Subsection (e)(7) of § 2032A specifies the method that must be used to determine the [lower] market value in use of qualifying real property used in farming, and subsection (e)(8) specifies the method that must be used to determine the [lower] market value in use of qualifying real property that was used and will continue to be used in farming or some other trade or business.

Section 2032A is one of the most complex sections in the entire Internal Revenue Code; it runs 9 pages, comprises nine lettered subsections, contains about 15 specific definitions, and imposes detailed and onerous requirements on the "qualified heirs" who inherit the real property and who must actively participate in the real property's continued use in the previous trade or business (such as farming) for a 10-year period, or else suffer the imposition of an additional estate tax (recapture tax). An estate that makes a section 2032A election must obtain a regular professional appraisal of the date-of-death fair market value of the qualifying real property, so that the amount of the reduction in value can be confirmed.

(2) ***Exclusion of value from the gross estate for land subject to a qualified conservation easement.***

Code section 170(h) contains complex *income tax* rules and requirements for the creation of qualified conservation easements on land, and which permit the owner of the land to claim an income tax charitable deduction. Subsection (c) of Code § 2031 allows a decedent's estate to reduce the value of land that is reported as part of the gross estate, within stated limits, if a qualified conservation easement exists on the land as of the date of death or if the conservation easement is placed on the land (*e.g.*, in compliance with a direction in the decedent's Will) after death but before the due date (with extensions) for filing the federal estate tax return.

Under Code § 2031(c), the maximum amount of "value reduction" that can be achieved (excluded from the decedent's federal gross estate) is the lesser of (1) $500,000 or (2) a defined percentage [which cannot be more than 40 percent] of the fair market value of the land that is subject to the conservation easement, minus any estate tax charitable deduction that is claimed under Code § 2055(f) if the easement is created after the decedent's death.

The ability of a decedent's estate to claim this value reduction on an estate tax return is subject to numerous detailed requirements.

It is always necessary to obtain two professional appraisals when the owner of land wants to place a conservation easement on the land and claim either an income tax deduction or an estate tax benefit after death: One appraisal to determine the market value of the land without the "burden" of the conservation easement, and a second appraisal to determine the reduction in value. During the last decade, the opportunities for tax savings from conservation easements have driven the evolution of an impressive industry in which promoters purchase land, place conservation easements on the land, and then sell syndicated fractional interests in the land to investors, bolstered by exaggerated appraisals about how much the easements have reduced the market value of the land. The IRS has identified such syndicated conservation easements as "listed [potentially abusive] transactions." *See* https://www.irs.gov/charities-non-profits/conservation-easements and https://www.irs.gov/newsroom/irs-provides-details-about-settlements-in-syndicated-conservation-easement-transaction-initiative. On December 6, 2022, the Treasury Department published proposed regulations which again identified syndicated conservation easements as listed transactions. *See* IRS Announcement 2022-28, 2022-52 I.R.B. 659, 2022 WL 17491928; REG-106134-22, 87 Fed. Reg. 75185.

If you have a client who has died and who owns land that is already subject to an existing conservation easement, that easement may be legitimate and may provide the basis for an exclusion from (reduction in) the land's reportable value on the estate tax return. However, you and the deceased client's other advisors should carefully study the circumstances under which the conservation easement was placed on the land and should scrutinize all past appraisals that the deceased client obtained or relied on.

II FEDERAL TAX ASPECTS AND EFFECTS OF NON-PROBATE TRANSFERS

A. Scope of this Part of the Paper (What's a "non-probate transfer"?)

The table in Part B below lists several types of non-probate transfers that transform the pertinent asset into a "non-probate asset" that passes by operation of law to a surviving joint owner, to remainderman or remaindermen, or to a designated beneficiary or beneficiaries, instead of passing under the Will of the deceased owner or under the intestate distribution statute if the owner dies without a valid Will.

One obvious and intentional omission from the table below is property held in (owned by) a revocable "living" trust and passing under the terms of that trust upon the settlor's later

death. The income, estate and gift tax consequences of asset transfers ***into*** a revocable trust and asset transfers ***out*** ***of*** the trust after the settlor's death are well known:

- No gift tax consequences from an assignment or transfer of any money or property by the settlor to the revocable trust so long as the trust remains revocable, because of the settlor's retained power to amend and revoke the trust, to withdraw any or all contributed assets, and to change the ultimate after-death disposition (*See* 26 C.F.R. § 25.2511-2(b)).
- No change in the cost basis of any asset assigned or transferred to a trust that remains revocable by the transferor or donor (Code § 1015(a)).
- Upon and after the settlor's death, which terminates the settlor's power to revoke the trust or change the disposition of the trust assets, inclusion of the trust's assets in the settlor's federal gross estate (Code §§ 2036(a) and 2038).
- Upon the death of the settlor, a new cost basis for nearly all assets that were held or owned by the revocable trust, equal to the date-of-death fair market value of each trust asset (Code § 1014(b)(3) and (b)(9)).

B. The Summary Table for Tax Consequences of Common Non-Probate Transfers

In the table below, ***A*** stands for the person who owns the property but re-titles, assigns, or transfers it into non-probate form, and ***B*** stands for a beneficiary, surviving joint owner, or other transferee who receives the property after the death of **A** or after the death of some intermediate owner.

Description of Transfer	Gift Tax Consequences	Estate Tax Effect after Death	Effect on Cost Basis of Asset	Authority for Federal Tax Treatment
Re-titling a bank account or C.D. in "joint or survivor" form with A and non-spouse individual B as the joint owners	No immediate taxable gift by A to B because B cannot withdraw more than B's net contribution to the account	Account is included in gross estate of first joint owner to die (but only half of value if A and B are married)	Irrelevant for money in a bank account or other bank deposit	I.C. § 32-17-11-6 and -17; Reg. § 25.2511-1(h)(4) For estate tax treatment, Code §§ 2040(a) [non-spouse] and 2040(b) [spouse]
Re-titling property other than a bank account or deposit in joint tenancy (JTWROS) form with A as one owner and with a non-spouse B as the other new joint owner	Immediate gift by A of an equal fractional interest in the property to B, because B has a right to seek partition or to unilaterally sever the joint tenancy	If the joint tenancy remains in effect at A's death, A's gross estate includes the value of the property to the full extent of A's contribution	For B's fractional interest, basis equals A's cost basis; upon A's death, B receives stepped-up basis (FMV) for the portion included in A's gross estate	I.C. § 32-17-2-1, **Clausen v. Warner**, 78 N.E.2d 551, 118 Ind.App. 340 (1948) Reg. § 25.2511-1(c) and (h)(5); Code §§ 1014(b)(9), 1015 and 2040(a)
Before 1977, re-titling property in joint tenancy or tenancy by the entireties form with A and A's spouse B as the owners	Immediate gift by A of an equal fractional interest in the property to B because A cannot act alone to convey	At A's death, A's gross estate includes the proportionate part of the property value based on A's contribution	For surviving spouse B, basis step-up to date-of-death FMV to the extent that property is included in A's gross estate	Reg. §§ 25.251101(h)(5) and 25.2523(d)-1; Code § 2040(a) [applying to joint tenancies created before 1977 and deaths before 1977]
After 1976, re-titling property in joint tenancy or tenancy by the entireties form with A and A's spouse B as the owners	Immediate gift by A of an equal fractional interest in the property to B because A cannot act alone to convey	At the "first death," deceased spouse's gross estate includes one-half of the value of the property	Basis step-up on death of first spouse to die just to the extent of half of the property's date-of-death value	Reg. §§ 25.251101(h)(5) and 25.2523(d)-1; Code § 2040(b) ["one-half" rule for "qualified joint interests" owned by a married couple]

Description of Transfer	Gift Tax Consequences	Estate Tax Effect after Death	Effect on Cost Basis of Asset	Authority for Federal Tax Treatment
Re-titling a motor vehicle in name of A and another individual B as the co-owners	Immediate gift of ½ of the vehicle's value to B because both A and B must act together to sell or transfer the vehicle; Indiana state law does not treat A and B as co-owning vehicle with survivorship unless A and B are married	If A or B dies after 1976 and are married, one half of vehicle value is included in deceased owner's estate; otherwise, deceased owner's gross estate includes part of value proportionate to contribution	Upon death of A or B, vehicle receives a new cost basis (FMV on date of death) to the extent of the proportionate part included in deceased owner's gross estate (but one half if married co-owner dies after 1976)	I.C. § 9-17-3-0.6 and -17; I.C. § 322-17-11-29(c) Reg. § 25.2511-1(c) & (h) Code §§ 1014(b)(9), 1015, and 2040
Gift by A of a remainder interest to B with A reserving a life estate in the transferred property	Immediate gift by A to B in an amount equal to the actuarial present value of remainder (Use IRS mortality tables and § 7520 rate)	Entire value of the property is included in A's gross estate	Upon A's death, the property receives a "full" basis step-up or step-down to date-of-death FMV	Reg. § 25.2511-1(e) Code § 1014(b)(9) Code §§ 2036(a)
Sale by A of a remainder interest in property, with A reserving a life estate	No gift if A sells the remainder for full actuarial value	Value of the property is not included in A's gross estate at death if remainder interest was sold for full value	No basis step-up upon the death of A if the remainder interest sale was for full value	Code § 2036(a); **Wheeler v. U.S.**, 116 F.3d 749 (5th Cir. 1997)
A's designation of B as a beneficiary on a traditional IRA or retirement account	No immediate gift by A if A retains the right to change beneficiaries	No estate tax consequence until after A's death	No change in cost basis, even after A's death (IRD rule below)	Reg. § 25.2511-2(b), second sentence [incomplete gift doctrine]
Death of A as the owner of a traditional IRA or retirement account, with account assets passing to B	Treated as an at-death transfer, not a gift	Retirement account is included in A's gross estate	No basis-step up for B because the account is right to "income in respect of a decedent"	Code §§ 2036(a) and 2038 Code § 1014(c)

Description of Transfer	Gift Tax Consequences	Estate Tax Effect after Death	Effect on Cost Basis of Asset	Authority for Federal Tax Treatment
Death of A as the insured and owner of a life insurance policy with B as the designated beneficiary	No gift tax consequence; treated as an at-death transfer (Unless there was a "transfer for value" of the policy before death, proceeds are income-tax free)	Entire policy proceeds or death benefit included in A's gross estate because of A's ownership (possession of incidents of ownership) in the policy	Irrelevant, because the death benefit or policy proceeds consist of cash	Code §§ 1014(b)(9) and 2042 Code § 101(a)(2) ["transfer for value" income tax rule and exceptions]
A's designation of an after-death beneficiary B under an annuity contract owned by A	No gift tax consequence if A retains the right to change the beneficiary designation	No estate tax consequence until after A's death	No change in cost basis, even after A's death	Reg. § 25.2511-2(b), second sentence [incomplete gift doctrine]
A's death as the annuitant or measuring life under an annuity contract owned by A	No gift tax consequence; treated as an at-death transfer	Included in A's gross estate, to the extent of the part of the date-of-death value that is proportionate to A's premium payments and contributions ***and*** contributions of A's employer	A's death does not change cost basis, because of exclusion of annuities from the basis-step-up rules in Code § 1014(b)	Code § 2039 [inclusion in gross estate] Code § 1014(b)(9)(A) [annuities excluded from basis step-up]
A transfers real or personal property to A as the sole "Owner" with added designation of B as the TOD beneficiary	No gift because A, as the "Owner," retains the power to remove or change the TOD beneficiary and to sell or transfer the property, unless A explicitly made the transfer irrevocable	Entire value of the property is included in A's gross estate	Entire property passing to B (or to the last-named TOD beneficiary) receives a new cost basis equal to FMV on the date of A's death	Reg. § 25.2511-2(b), second sentence [incomplete gift doctrine] Code §§ 1014(b)(9), 2036(a), and 2038

Description of Transfer	Gift Tax Consequences	Estate Tax Effect after Death	Effect on Cost Basis of Asset	Authority for Federal Tax Treatment
A transfers real or personal property to A and ***another*** individual O as the "Owners" with added designation of B as the TOD beneficiary after the later of A's and O's deaths	A has made an immediate gift to O of a fractional interest in the property because of O's ability to separately transfer O's interest, *UNLESS* the nature of the property prohibits O from unilaterally withdrawing more than O's contribution	If A and O are not married and hold the property as joint tenants, then at death of A or O, deceased owner's gross estate includes part of property's date-of-death FMV proportionate to deceased owner's contribution If A and O are not married and hold the property as T in C, only the deceased owner's fractional interest is included in gross estate If A and O are married, then at the first death, half of the value is included in the gross estate	Upon the death of 1 of the 2 owners, the property receives a new stepped-up cost basis (date-of-death FMV) only to the extent of the value included in the deceased owner's gross estate If the final transfer to TOD beneficiary B occurs upon the death of the last owner to die, then B receives a cost basis equal to the FMV on the date of the death of the last owner to die	I.C. §§ 32-17-14-11(e) and 32-17-14-15(b) and (c) Reg.§ 25.2511-1(e) and (h)(4) & (5) [gift tax treatment] Code § 2040(a) and (b) [extent of inclusion in gross estate] Code § 1014(b)(9) [basis step-up at death]
A transfers real or personal property to another individual O as the ***sole*** "Owner" with added designation of B as the TOD beneficiary after O's later death	A has made an immediate gift transfer of the entire property to O	Assuming that O received the presumptive statutory right to change the TOD beneficiaries, entire value of the property is included in O's gross estate	Upon O's death, entire property receives a new cost basis equal to date-of-death FMV	I.C. §§ 32-17-14-9, 32-17-14-9, and 32-17-14-16 Regs. §§ 25.2511-1 and 25.2511-2 Code §§ 1014(b)(9), 2038 and 2041

Appendix 1
Estate, Gift, and GST Tax Rates and Exclusion Amounts for 2017 through 2023

For decedents dying in, or gifts made in	**2017**	**2018** [4]	**2019**	**2020**	**2021**	**2022**	**2023**
Maximum lifetime exclusion amount (use for lifetime gifts or at death), inflation-indexed	$ 5,490,000	$ 11,180,000	$ 11,400,000	$ 11,580,000	$ 11,700,000	$ 12,060,000	$ 12,920,000
Top marginal tax rate (estate tax *and* gift tax)	40 percent	40 percent	40 percent	40 percent	40 percent	40 percent	40 percent
Tax credit equivalent of maximum lifetime exclusion ("unified credit")	$ 2,141,800	$ 4,417,800	$ 4,505,800	$ 4,577,800	$4,625,800	$ 4,769,800	$ 5,113,800
Lifetime generation-skipping transfer (GST) exemption, inflation-indexed	$ 5,490,000	$ 11,180,000	$ 11,400,000	$ 11,580,000	$ 11,700,000	$ 12,060,000	$ 12,920,000
Flat GST tax rate	40 percent	40 percent	40 percent	40 percent	40 percent	40 percent	40 percent
Per-donee annual exclusion from taxable gifts under Code § 2503(b) for "gifts of a present interest in property"	$ 14,000	$ 15,000	$ 15,000	$ 15,000	$ 15,000	$ 16,000	$ 17,000
Exclusion from taxable gifts under § 2503(e) for school tuition or medical expenses paid ***directly*** by the donor	unlimited	unlimited	unlimited	unlimited	unlimited	unlimited	unlimited

[4] Inflation adjustments using chained CPI continue after 2023. Basic exclusion amount (before inflation adjustments) will decrease to $5 million on January 1, 2026 unless Congress and the President act to extend or scale back the current tax relief.

APPENDIX 1: Pre-2017 Estate, Gift Tax, and GST Tax Exclusions and Tax Rates

Year	Estate Tax Applicable Exclusion Amount	Applicable Credit Amount	Lifetime Gift Tax Exemption (if *different* from estate tax)	Starting Marginal Est. or Gift Tax Rate (above exclusion)	Lifetime GST Exemption	Years (for Gift Tax Annual Exclusion)	§ 2503 Annual Gift Tax Exclusion (indexed)
1998	$ 625,000	$ 202,050	675,000	37 %	$ 1,000,000	1932 – 1938	$ 5,000
1999	650,000	211,300	675,000	37 %	1,010,000	1939 – 1942	4,000
2000	675,000	220,550		37 %	1,030,000	1943 – 1981	3,000
2001	675,000	220,550		37 %	1,060,000	1982 – 2001	10,000
2002	1,000,000	345,800		41 %	1,100,000	2002	11,000
2003	1,000,000	345,800		41 %	1,120,000	2003	11,000
2004	1,500,000	555,800	1,000,000	45 %	1,500,000	2004	11,000
2005	1,500,000	555,800	1,000,000	45 %	1,500,000	2005	11,000
2006	2,000,000	780,800	1,000,000	46 %	2,000,000	2006	12,000
2007	2,000,000	780,800	1,000,000	45 %	2,000,000	2007	12,000
2008	2,000,000	780,800	1,000,000	45 %	2,000,000	2008	12,000
2009	3,500,000	1,455,800	1,000,000	45 %	3,500,000	2009	13,000
2010	5,000,000	1,730,800		35 %	5,000,000	2010	13,000
2011	5,000,000	1,730,800		35 %	5,000,000	2011	13,000
2012	5,120,000	1,772,800		35 %	5,120,000	2012	13,000
2013	5,250,000	2,045,800		40 %	5,250,000	2013	14,000
2014	5,340,000	2,081,800		40 %	5,340,000	2014	14,000
2015	5,430,000	2,117,800		40 %	5,430,000	2015	14,000
2016	5,450,000	2,125,800		40 %	5,450,000	2016	14,000

WHAT GIFTS AM I (OR WAS I) SUPPOSED TO REPORT ON A GIFT TAX RETURN? (IRS Form 709)

By Jeffrey S. Dible

Gifts that DO NOT Need to be Reported on a Form 709 Return	Gifts That DO Need to be Reported on a Form 709 Return
• Basic support provided by a parent to a minor or unemancipated child (a *legal obligation*, not a *gift*)	• A gift ***in any amount*** to a person who cannot currently use and enjoy the gifted money or property without delays or restrictions (*that is*, a gift of a "future interest in property"; *See* Note 3 on Page 26)
• Charitable donations of money or property (in any amounts) that the charity can use without restriction	
• Gifts in any amounts ***to the donor's spouse***, if the spouse can use the gifted money or property without restrictions or delays (*See* Note 2 on Page 25)	• One or more gifts of a "present interest in property" to a person in one year in a total amount **exceeding** the annual exclusion (*See* Note 1 below) for that person for that year Gifts in this category include — o Gifts on birthdays, holidays or special occasions o Buying property or creating an investment account in the name of the recipient o Adding the recipient's name as an owner on a joint account or other asset titled in "joint tenants" form o Gifts of the rent-free use of property or forgiveness of debts . . . ***IF*** the total of that gift plus other gifts exceeds the annual exclusion amount for that recipient for that year
• Adding the name of the recipient as a "pay on death" or "transfer on death" (TOD) beneficiary on any kind of property (*This is revocable or reversible and is a transfer occurring at death, not a gift during the donor's lifetime*)	
• One or more gifts of a "present interest in property" to anyone in a total amount that does not exceed the annual exclusion amount for that year (*See* Note 1 below)	
• Payments of **medical expenses** and most kinds of health insurance premiums made *directly to the health care provider* on behalf of the recipient, *in any amounts* • Payments of **school tuition** made *directly to the school* on behalf of the student, *in any amounts* (Does *not* apply to gift payments of room and board or other educational expenses)	

Notes

1. When a donor (giver) makes one or more gifts *of a "present interest in property"* to the same individual, or to certain kinds of trusts for the benefit of that individual (the donee or recipient), the amount of those gifts that does not exceed the *annual exclusion* for that

individual and for that year are tax-free**. They do not need to be reported on a Form 709 return**, **but they can be**. A "gift of a present interest in property" is a gift of money or other property that the recipient can use or enjoy or benefit from immediately, without restrictions or delays.

The annual per-recipient exclusion amounts were and are as follows (under section 2503(b) of the Internal Revenue Code, and automatically indexed for inflation after 2001):

Year(s) When Gifts Were Made	Exclusion Amount per Recipient
1943 – 1981	$ 3,000
1982 – 2001	$ 10,000
2002 – 2005	$ 11,000
2006 – 2008	$ 12,000
2009 - 2012	$ 13,000
2013 – 2017	$ 14,000
2018 – 2021	$ 15,000
2022	$ 16,000
2023	$ 17,000

Gifts that qualify for the annual exclusion include gifts made to custodians on behalf of a child under age 21 where the gifted money or property is titled and held under the Uniform Transfers to Minors Act (UTMA) or in some states, the Uniform Gifts to Minors Act (UGMA). Gifts to a "minor's trust" described in section 2503(c) of the Internal Revenue Code also qualify for the annual exclusion, because such a trust, like a UTMA account, gives the child the unrestricted right to withdraw, keep and control the assets upon reaching age 21.

Finally, if the terms of an irrevocable trust give a beneficiary a "withdrawal power" (sometimes called a Crummey power) to withdraw and keep money or property that is added to the trust, that withdrawal power causes gifts to the trust to qualify for the annual exclusion for that beneficiary.

If one or more "gifts of a present interest in property" are given to one individual in one year in a total amount that ***exceeds*** the annual exclusion amount for that individual for that year, the better practice is to report *all* of those gifts on a Form 709 return, and to claim the exclusion amount (for the first $17,000 of each qualifying gift made in 2023).

2. Gifts that are made "outright" and free of restrictions to the donor's or giver's spouse are always 100 percent exempt from the federal gift tax, because of the unlimited gift tax marital deduction. Technically, all gifts to a spouse, no matter how small in amount, are supposed to be reported on a Form 709 gift tax return, so that the marital deduction can be claimed. It is a good practice to report *large* gifts to a spouse on a Form 709 return,

because if the spouse who receives the gift sells the property later, the copy of the filed Form 709 return may provide useful information about the spouse's basis in the property, for the purpose of calculating gain or loss.

3. If a gift of $17,000 or less is made in 2023 to an irrevocable trust for the benefit of one or more individuals, or for the benefit of one or more individuals plus one or more charitable organizations, the gift is potentially taxable for gift tax purposes and must be reported on a Form 709 gift tax return *unless the trust clearly gives every beneficiary a present interest in the money or property given to the trust.*

   All trusts that have both individuals and charitable organizations as beneficiaries (charitable lead trusts such as CLATs or CLUTs, charitable remainder trusts such as CRATs or CRUTs) are structured so that gifts to these trusts do NOT qualify for the annual exclusion explained in Note 1.

   Other specialized types of trusts, including GRATs (grantor retained annuity trusts), SLATs (spousal limited access trusts), and QPRTs (qualified personal residence trusts) also do not qualify for the annual exclusion, because they contain or give "remainder interests" (future interests in the trust assets that are not currently enjoyable) to one or more beneficiaries.

4. When a person makes both annual exclusion gifts and reportable, potentially taxable gifts in the same year, the best practice (which is also required under the law) is to report both the annual exclusion gifts and the potentially taxable gifts on the Form 709 return for that year.

5. If one member of a married couple uses *only* his or her funds to make gifts to one donee that exceeds the annual exclusion amount (*e.g.*, $17,000 in 2023), that spouse can "borrow" and use the annual exclusion of his or her spouse by filing a timely gift tax return and by making a "gift-splitting" election. The other spouse consents to the election by signing the front of the gift tax return. A gift-splitting election can ***only*** be made on a timely-filed gift tax return, and the election requires the consenting spouse to be treated as making one-half of *every gift* made by the donor spouse in that year.

6. Under the federal gift tax rules in the Code and regulations, "***taxable gifts***" are gifts that exceed the available annual exclusions (as described in Note 1 above) and the available marital and charitable deductions.

7. When and to the extent that a person makes *taxable gifts* in any year, those taxable gifts trigger a federal gift tax, and a part of the person's ***lifetime exclusion amount*** is automatically used in order to reduce that federal gift tax to zero. This occurs whether or not the person files a Form 709 return as he or she should. A donor is ***not*** able to choose to write a check for gift tax to the IRS and to refrain from using his or her lifetime exclusion amount.

8. The *lifetime exclusion amount* has been set (and changed) by Congress under Code section 2001. For every dollar of the lifetime exclusion amount that is used to "shelter" taxable gifts from the gift tax, one dollar less of that lifetime exclusion amount will be available for use after the donor's death to shelter assets from the federal estate tax. The part of the lifetime exclusion amount that could be used to shelter taxable gifts from the gift tax was $1 million from 2002 through 2010. It increased to $5 million in 2011 and to $5,120,000

(indexed for inflation) in 2012. Continued inflation-indexing caused this maximum lifetime exclusion amount to increase to $5,250,000 in 2013, to $5,340,000 in 2014, to $5,430,000 in 2015, to $5,450,000 in 2016, and to $5,490,000 in 2017. The December 2017 "tax cut and jobs act" increased the maximum lifetime exclusion to $11.18 million for persons dying and gifts made in 2018, to $11.70 million for persons dying and gifts made in 2021, $12,060,000 for persons dying and gifts made in 2022, and $12,920,000 for persons dying and gifts made in 2023. The lifetime exclusion will continue at that level, with further inflation indexing, through 2025. Unless Congress acts to extend the higher lifetime exclusion amount, it will return to $5 million-plus-inflation-indexing on January 1, 2026, for persons dying and gifts made in 2026 and later years.

9. The federal gift tax calculation is *cumulative* in every year: The Form 709 return adds the most recent (reported) year's gifts to all taxable gifts (net of deductions and the annual exclusions) that were or should have been reported for all previous years after 1976, calculates the gift tax on the total using current gift tax rates, and then subtracts the gift tax computed on all *prior years*' gifts. This is done to push the donor into the highest possible marginal gift tax bracket (for 2010-2012, 35 percent, and 40 percent in 2013 and later years).

10. Once an individual donor has entirely used up his or her *lifetime exclusion amount* (for gift tax purposes) in order to automatically shelter taxable gifts from the gift tax, every later gift that does not qualify for or that exceeds the annual exclusion, or that does not qualify for the marital or charitable deduction, will trigger a federal gift tax. When a net federal gift tax is owed, the due date for payment is the normal filing deadline for the Form 709 return (April 15th, the same as the normal filing deadline for Form 1040 income tax returns).

11. Even when a particular gift is completely "covered" by the annual exclusion or an available marital or charitable deduction and even when the filing of a Form 709 is not required, **the best practice is still to report all gifts, every year**, on a Form 709 return, at least in every year when a gift of more than $17,000 (or $16,000 per donee for gifts in 2022) is given to or for any individual recipient. This is preferable for five reasons:

    (a) Years later, and especially after the donor's death, having copies of those gift tax returns will make it much easier to confirm how much of the donor's lifetime gift and estate tax exclusion amount and lifetime GST exemption were used up or allocated with respect to lifetime transfers in each year.

    (b) If a particular gift was required to be reported on a gift tax return but if the gifts was not reported, **the IRS's ability to later assess gift tax on that unreported gift never expires**, unless the gift is disclosed in a later Form 709 return, or in an attachment to a Form 709, and disclosed "in a manner adequate to apprise the Secretary [of the Treasury] of the nature of such item." *See* Code § 6501(c)(9).

    (c) Treasury Reg. § 301.6501(c)-1(e) and (f) go into much more detail about what constitutes "adequate disclosure" of gift transfers**. If "adequate disclosure" is made in the Form 709 gift tax return** that reports a particular gift, **the IRS has only 3 years from the filing of the gift tax return** or the filing deadline for that year's gift tax return, whichever is later, **within which to assess additional gift tax** on that gift.

(d) If a gift is accurately reported and adequately disclosed on a gift tax return, and if the IRS does not assess additional gift tax on that gift within the 3-year limitations period, then Code sections 2001(f) and 2504(c) prohibit the IRS from later revisiting, reopening or revaluing that gift, even for the purpose of determining the deceased donor's post-1976 taxable gifts for estate tax purposes.

(e) Form 709 includes space for reporting the donor's cost basis in each non-cash asset that is gifted (The donee must use that "transferred" cost basis to calculate the gain or loss if the donee later sells the gifted asset).

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Section Five

Probate and Estate Litigation Generally; Resulting Litigation From Poor or Less Than Desirable Drafting of Documents

Christopher J. Mueller
Lewis Wagner, LLP
Indianapolis, Indiana

Section Five

Probate and Estate Litigation Generally;
Resulting Litigation From Poor or Less
Than Desirable Drafting of Documents……...… Christopher J. Mueller

PowerPoint Presentation

Probate and Estate Litigation Generally; Resulting Litigation from Poor or Less Than Desirable Drafting of Documents

March 9, 2023

Christopher J. Mueller
Lewis Wagner, LLP
1411 Roosevelt Avenue, Suite 102
Indianapolis, IN 46201
317-922-2822
cmueller@lewiswagner.com

Probate and Estate Litigation

A. Will Contest & Objections to Probate

- Ind. Code § 29-1-7-17:
- Any interested person may contest the validity of any will in the court having jurisdiction over the probate of the will within three (3) months after the date of the order admitting the will to probate by filing in the same court, in a separate cause of action, the person's allegations in writing verified by affidavit, setting forth:
  - (1) the unsoundness of mind of the testator;
  - (2) the undue execution of the will;
  - (3) that the will was executed under duress or was obtained by fraud; or
  - (4) any other valid objection to the will's validity or the probate of the will.
- The executor and all other persons beneficially interested in the will shall be made defendants to the action.

Probate and Estate Litigation

A. Will Contest & Objections to Probate

- Ind. Code § 29-1-7-19:
- At the time of filing a verified complaint under section 17 of this chapter, the plaintiff in the action, or some other person on the plaintiff's behalf, shall file a bond with sufficient sureties in an amount approved by the court, conditioned for the due prosecution of the proceedings and for the payment of all costs if in the proceedings judgment is rendered against the plaintiff.

Probate and Estate Litigation

A. Will Contest & Objections to Probate

- Ind. Code § 29-1-7-16:
  - Prior to the admission of a will to probate, written objections to its probate alleging that such objections are not made for vexation or delay may be filed in the court having jurisdiction over the probate of the will by any interested person. No notice of the filing of such objection need be given. The clerk shall note such filing of an objection in the estate docket and copy such objections in the will record. If such will is thereafter offered for probate, it shall be impounded by the clerk, copied in the will record, and its probate continued for thirty (30) days. If an action to resist the probate of such will is not commenced within thirty (30) days, such will may be admitted to probate without notice.

Probate and Estate Litigation

A. Will Contest & Objections to Probate

- Appointing a Special Administrator
  - Ind. Code § 29-1-10-15(a): “A special administrator may be appointed by the court if . . . (3) any person shall have died testate and objections to the probate of the person’s will shall have been filed as provided by law.”

Probate and Estate Litigation

A. Will Contest & Objections to Probate

- Unsoundness of Mind
  - Every person is presumed to be of sound mind to execute a will until the contrary is shown. *Hays v. Harmon*, 809 N.E.2d 460, 464 (Ind. Ct. App. 2004), *trans. denied*.
  - To rebut this presumption, a party must show that the testator lacks mental capacity at the time of executing his will to know: (1) the extent and value of his property; (2) those who are the natural objects of his bounty; (3) their deserts, with respect to their treatment of and conduct toward him, and (4) to retain such facts in mind long enough to have a will prepared and executed. *Gast v. Hall*, 858 N.E.2d 154, 165 (Ind. Ct. App. 2006)

Probate and Estate Litigation

A. Will Contest & Objections to Probate

- Unsoundness of Mind
  - While it is the testator's soundness of mind at the time of executing the will that is controlling, evidence of the testator's mental condition prior to the date of execution is admissible, as it relates to the testator's mental state when executing his will. *Gast*, 858 N.E.2d at 165.
  - A testator must possess all essential elements of testamentary capacity; if one essential element is lacking, the will of the testator is not valid. *Lowe v. Talbert*, 177 N.E. 339, 339-40 (Ind. Ct. App. 1931) (en banc).

Probate and Estate Litigation

A. Will Contest & Objections to Probate

- Undue Execution
  - The execution of a will must meet several requirements under Ind. Code § 29-1-5-3 or § 29-1-5-3.1. Failure to comply with such execution requirements are grounds for challenging the validity of the will.

Probate and Estate Litigation

A. Will Contest & Objections to Probate

- Undue Influence
  - Undue influence is defined as “the exercise of sufficient control over the person, the validity of whose act is brought into question, to destroy his free agency and constrain him to do what he would not have done if such control had not been exercised.” *In re Estate of Wade*, 768 N.E.2d 957, 962 (Ind. Ct. App. 2002), *trans. denied.*

Probate and Estate Litigation

A. Will Contest & Objections to Probate

- Undue Influence
  - It is an intangible thing that only in the rarest instances is susceptible of what may be termed direct or positive proof. *McCartney v. Rex*, 145 N.E.2d 400, 402 (Ind. Ct. App. 1957)
    - "The difficulty is also enhanced by the fact universally recognized that he who seeks to use undue influence does so in privacy.")
  - Proof of undue influence depends largely upon circumstantial evidence.
  - The only positive and direct proof required is of facts and circumstances from which undue influence may reasonably be inferred.

Probate and Estate Litigation

A. Will Contest & Objections to Probate

- Undue Influence
  - As circumstances tending in a slight degree to furnish ground for the inference of fraud or undue influence, it is proper to consider the character of the proponents and beneficiaries, and interest or motive on their part to unduly influence the testator, and facts and surroundings giving them an opportunity to exercise such influence.
  - Undue influence can best be seen by its results, and the presence of undue influence is fundamentally a question of fact.

Probate and Estate Litigation

A. Will Contest & Objections to Probate

- Ind. Code § 29-1-7-17.5
- (a) The court, in its discretion and upon application of any party instituting an action under section 16 or 17 of this chapter, may permit the contest of two (2) or more wills if there is prima facie evidence that:
  - (1) the decedent suffered from an irreversible medical or psychiatric condition that predated the earliest will to be challenged; or
  - (2) a party beneficially interested in one (1) or more challenged wills had a direct and active nexus with the preparation or execution process for each will to be challenged on the basis of undue influence.

Probate and Estate Litigation

A. Will Contest & Objections to Probate

- Ind. Code § 29-1-7-17.5 (continued)
- The prima facie preliminary evidentiary showing under subdivision (1) shall be made by an affidavit of the decedent's treating physician or through the records of a health care provider obtained during discovery and tendered to the court under Rule 803(6) of the Indiana Rules of Evidence.

Probate and Estate Litigation

B. Trust Contests

Ind. Code § 30-4-6-14(a):

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

Probate and Estate Litigation

B. Trust Contests

- Capacity: Ind. Code § 30-4-2-10
  - (a) If a trust is created by a will, the settlor's capacity that is required to create the trust is determined by the applicable probate law.
  - (b) The capacity of a settlor that is required to create, amend, revoke, or add property to a revocable trust is the same as the capacity of a testator that is required to make a will.
  - (c) To create or add property to an irrevocable trust, the settlor or transferor must be of sound mind and have a reasonable understanding of the nature and effect of the act and the terms of the trust.

Probate and Estate Litigation

B. Trust Contests

- Indiana law applicable to challenging the validity of a trust on the basis of undue influence and unsoundness of mind are consistent with will contests.

Probate and Estate Litigation

C. Nonprobate Assets

- If you're challenging the validity of a will (or a trust), don't forget to investigate (other) nonprobate assets:
  - Real estate (TOD or other JWROS titles)
  - Joint accounts
  - Beneficiary designations (on retirement accounts, e.g.)

Probate and Estate Litigation

C. Nonprobate Assets

- Alternate options for pursuing these as part of your will or trust contest:
- Tortious Interference with Inheritance
  - Rarely pleaded
  - Only available if traditional remedy (i.e. will contest) is insufficient
  - Nature of the action is tort, so punitive damages may be available
- Declaratory judgment action seeking a declaration that a particular transfer was invalid. *See* Ind. Code § 34-14-1-1 *et seq.*

Probate and Estate Litigation

C. Nonprobate Assets

- Joint Accounts
  - An account that is jointly owned carries a presumption of ownership with it upon the death of one of the joint owners.
  - To rebut presumption, the party challenging the survivor's right to the proceeds presents clear and convincing evidence that when the account was created, the decedent did not intend for the joint owner to receive the proceeds.
  - Or, present clear and convincing evidence that the decedent had a contrary intent at the time of the account’s creation or that the intent of the decedent changed before death and the decedent by written order informed the financial institution of this change.

Probate and Estate Litigation

D. Power of Attorney Abuses

- We've all seen this, and we all know how challenging they can be to address after the abuse occurred.
- First step is to demand an accounting under Ind. Code § 30-5-6-4.
- An attorney in fact is required to deliver an accounting to :
  - (1) the principal;
  - (2) a guardian appointed for the principal;
  - (3) the personal representative of the principal's estate;
  - (4) an heir of the principal after the death of the principal;
  - (5) a legatee of the principal after the death of the principal; or
  - (6) a child of the principal.
- Or, as ordered by the Court.

Probate and Estate Litigation

E. Attorney Fees

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

Probate and Estate Litigation

E. Attorney Fees

- Will Contests: Ind. Code § 29-1-7-17.5 (continued):
  - (b) If the court exercises its discretion to permit the challenge to two (2) or more wills in one (1) proceeding, a challenger is eligible to request attorney's fees under IC 29-1-10-14 if the challenger stands to directly benefit from a successful suit. The court shall review the attorney's fee claims at the conclusion of the will contest. The award and allocation of attorney's fees paid from the estate shall be solely at the discretion of the court.

Probate and Estate Litigation

E. Attorney Fees

- Trust Matters:
  - No corresponding fee statute for trusts contests.
  - Fiduciaries who have a duty to defend the trust will be compensated out of the trust property.
  - But, Beneficiaries may be entitled to attorney fees, if successful,
    - to compel the trustee to perform his duties;
    - to enjoin the trustee from committing an act which may be a breach of trust;
    - to compel the trustee to redress a breach of trust; or
    - to remove a trustee for cause and to appoint a successor trustee
    - Wrongfully holdings funds outside of trust
    - commingling funds
    - *See* Ind. Code § 30-4-3-22(e).

Probate and Estate Litigation

E. Attorney Fees

- Trust Matters:
  - Trustee may also be required to disgorge profits, fiduciary fees and, attorneys fees if beneficiary is successful in litigation. Ind. Code § 30-4-3-11.

Resulting Litigation from Poor or Less Than Desirable Drafting of Documents

F. Miscellaneous Procedures

- Ind. Code § 29-1-6-5
  - The court in which a will is probated shall have jurisdiction to construe it. Such construction may be made on a petition of the personal representative or of any other person interested in the will; or, if a construction of the will is necessary to the determination of an issue properly before the court, the court may construe the will in connection with the determination of such issue. When a petition for the construction of a will is filed during administration of the estate, notice of the hearing thereon shall be given to interested persons. If the estate has been closed prior to the filing of such petition, notice shall be given as in civil actions.

Resulting Litigation from Poor or Less Than Desirable Drafting of Documents

F. Miscellaneous Procedures

- Ind. Code § 30-4-3-18
  - (a) If there is reasonable doubt with respect to any matter relating to the administration of the trust, the trustee is entitled to be instructed by the court.

Resulting Litigation from Poor or Less Than Desirable Drafting of Documents

F. Miscellaneous Procedures

- Ind. Code § 30-4-3-24.4
  - (a) The court may modify the administrative or dispositive terms of a trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

Resulting Litigation from Poor or Less Than Desirable Drafting of Documents

F. Miscellaneous Procedures

- Ind. Code § 30-4-3-24.4 (continued)
  - (b) The court may modify the administrative terms of a trust or terminate the trust if:
    - (1) the purpose of the trust has been fulfilled; or
    - (2) continuation of the trust on the trust's existing terms would:
      - (A) be illegal, impossible, impracticable, or wasteful; or
      - (B) impair the trust's administration.

Resulting Litigation from Poor or Less Than Desirable Drafting of Documents

F. Miscellaneous Procedures

- Ind. Code § 30-4-3-24.4 (continued)
  - (c) If the trust terminates under this section, the court shall direct the trustee to distribute the trust property in a manner consistent with the purposes of the trust.
  - (d) The court may modify the terms of a trust to give the settlor the power to revoke and modify the trust if the:
    - (1) settlor intended to reserve the power;
    - (2) settlor believed the power was reserved; and
    - (3) power was omitted from the terms of the trust by mistake.

Resulting Litigation from Poor or Less Than Desirable Drafting of Documents

F. Miscellaneous Procedures

- Ind. Code § 30-4-3-24.5
- (d) The court may:
  - (1) modify or terminate a trust; or
  - (2) remove the trustee and appoint a different trustee;
- if the court determines that the value of the trust property is insufficient to justify the cost of administration. If a trust terminates under this subsection, the court shall direct the trustee to distribute the trust property in a manner consistent with the purposes of the trust.

Resulting Litigation from Poor or Less Than Desirable Drafting of Documents

F. Miscellaneous Procedures

- Ind. Code § 30-4-3-25
  - Upon petition by an interested party, the court may rescind or reform a trust according to the same general rules applying to rescission or reformation of non-trust transfers of property.

Resulting Litigation from Poor or Less Than Desirable Drafting of Documents

F. Miscellaneous Procedures

- Ind. Code § 30-4-3-26
  - (a) Upon petition by the trustee or a beneficiary, the court shall direct or permit the trustee to deviate from a term of the trust if, owing to circumstances not known to the settlor and not anticipated by him, compliance would defeat or substantially impair the accomplishment of the purposes of the trust. In that case, if necessary to carry out the purposes of the trust, the court may direct or permit the trustee to do acts which are not authorized or are forbidden by the terms of the trust, or may prohibit the trustee from performing acts required by the terms of the trust.

Probate and Estate Litigation

- Questions?

Section Six

Elder Law Considerations and Special Needs Planning

Tamara L. Rogers
Rogers Law Firm, LLC
Indianapolis, Indiana

Section Six

Elder Law Considerations and Special Needs Planning…….. Tamara L. Rogers

PowerPoint Presentation

ELDER LAW CONSIDERATIONS AND SPECIAL NEEDS PLANNING

ROGERS LAW FIRM, LLC

ICLEF

March 9, 2023

Presenter: Tamara L. Rogers, Esq.

Elder Law Considerations

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Elder Law Considerations

Three different living arrangements and costs

- Home
- Assisted Living Facility
- Skilled Nursing Facility (SNF)

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Elder Law Considerations

Engagement Letter

Medicaid /Preplanning Strategy

Payment Schedule

Communication Expectations

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Elder Law Considerations

Plan of Action

- Prepare and Present a Plan for Qualification
- Assist with Steps to Qualify
- Prepare and Submit Application
- Coordinate with Client and Agency
- Formulate a Plan to Minimize Estate Recovery

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Elder Law Considerations
General Qualifications

Residency

Citizen/Qualified Alien

SSN

Third Party Recovery

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Medical Requirements

Aged, Blind, or Disabled

Over 65

Requiring Nursing Home Level of Care

Elder Law Considerations

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Elder Law Considerations
Financial Requirements

Income Limit

QIT/Miller Trust

Resource Limit

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Elder Law Considerations
Family Assets

Income

Institutional Spouse

Community Spouse

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Elder Law Considerations – Family Assets

Exempt Resources - Examples

A. The Home

B. One Vehicle

C. Household Furnishings, Personal Effects, Etc.

Elder Law Considerations

Countable Resources - Examples

- Bank Accounts
- Cash Value Insurance Policies
- Cash on Hand
- Additional Vehicles
- Other Real Property
- Other Liquid Resources

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Elder Law Considerations

Spend-Down Assets

- Trusts
- Gifting
- Pay Off Mortgage
- Pay off Debt
- New Vehicle
- Home Improvements
- Enhanced Medical Care

- Promissory Notes
- Annuities
- Special Needs Trusts
- Burial Plans
- Other State-Specific Tools

Elder Law Considerations

Spending Down Assets

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Elder Law Considerations

Gifts

A) Calculation of Penalty

B) Curing Gifts

Special Needs Planning

1st Party Special Needs Trust

Preserve need-based public assistance or planning to qualify for assistance such as:

- Medicaid
- Supplemental Security Income
  - What threatens eligibility?
    - ❖ Received settlements
    - ❖ Awarded verdicts

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Special Needs Planning

1st Party Special Needs Trust

Disabled individual's own money

- Must be an irrevocable trust
- Settled by a parent, grandparent, guardian, or court
- Or pooled special needs trust (Arc of Indiana)

Government Repayment Provision

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Special Needs Planning

3rd Party Special Needs Trust

Holds a third party's money

Benefits the disabled individual

- Trust may be either revocable, irrevocable, or testamentary
- Settled by anyone other than the disabled person
- No government repayment provision is required

Can not hold the disabled person's assets

Special Needs Planning
1st Party or 3rd Party Trust?

EXAMPLE ONE:

- Peter, age 11, is receiving SSI and Medicaid.
- Peter is eligible for SSI because of his financial need and disability.
- He is eligible for Medicaid because, in Indiana, an individual who receives SSI is eligible for Medicaid

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Special Needs Planning

EXAMPLE ONE

Peter's grandmother left Peter a $100,000.00 inheritance → Direct Money to Peter → Government benefits threatened/ removed → How to shelter the inheritance?

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Special Needs Planning

1st Party or 3rd Party Trust?

EXAMPLE ONE:

If Peter wants to shelter the inheritance, he will have to do “First Party” special needs planning because the money is now his

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Special Needs Planning

1st Party or 3rd Party Trust?

EXAMPLE TWO:

- Peter, age 11, is receiving SSI and Medicaid
- Peter is eligible for SSI because of his financial need and disability
- Peter's grandmother is in your office and wants to leave Peter a $100,000.00 inheritance
- What planning options do you have?

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Special Needs Planning
Example Two

Common Planning Options	
Testamentary Trust - Include a special needs provision in her Last Will and Testament	3rd Party Special Needs Trust

Questions?
Thank you! Tamara Rogers, Esq.

ICLEF

March 9, 2023

tamara@trogerslaw.com

(317) 343-9406 (Office Telephone)

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Section Seven

Indiana Continuing Legal Education Forum

Estate Planning Strategies, Tools, Techniques & More!

OUTRIGHT GIFTING STRATEGIES IN ESTATE PLANNING

March 9, 2023

Indianapolis. Indiana

RF | ROBINSON FARTHING

DeAnn L. Farthing
8500 Keystone Crossing, Suite 470
Indianapolis, Indiana 46240
317.587.7820
dlf@yourindyattorneys.com

Section Seven

Outright Gifting Strategies in Estate Planning…….DeAnn L. Farthing

DeAnn L. Farthing

DeAnn L. Farthing, a life-long Indiana resident, is a partner of Robinson & Farthing LLC. After graduating with two Bachelor of Arts degrees from Indiana University at Indianapolis, Ms. Farthing pursued her passion for law earning her Juris Doctorate from the McKinney School of Law at Indiana University – Indianapolis.

Ms. Farthing focuses her practice on meeting the legal needs of both businesses and individuals. She has represented clients all over the State of Indiana in more than half of all Indiana county courts. Having served as legal counsel for more than 100 business clients in the Indianapolis and surrounding areas, she keeps abreast of changes in the law that may affect business operations. She strives to provide small and medium businesses with economic and efficient solutions to all their legal needs.

In addition to serving business owners, Ms. Farthing works to educate individuals in all stages of life on the importance of estate planning. She daily provides information to interested clients that answer "what if" questions. Further, her experience enables her to guide individuals through the probate or trust administration process after the death of a loved one. Her goal is to make the emotionally charged process as easy and economical as possible.

She focuses her practice in the areas of estate planning, probate, trust administration, corporate formation and general business operations. She is a member of the Indiana State Bar Association, the Indianapolis Bar Association, Estate Planning Council, Inc. of Indianapolis. Ms. Farthing has been selected as a "Rising Star" for Estate Planning & Probate by Indiana Super Lawyers for the years 2017, 2018, 2019, 2020, 2021, and 2022 and a “Super Lawyer” for the year 2023.

Ms. Farthing currently lives in Fishers with her husband and three children. She enjoys spending time outside with her family and attending Pennington Park Church in Fishers.

Outright Gifting Strategies in Estate Planning

A. Starting the Conversation: When should discussing outright lifetime gifting strategies be part of the conversation?

Gifting is not for every client in every situation. Prior to discussing any gifting strategy, we, as advisors, should have a clear picture of the following for our clients:

- **Assets**
  - Values?
  - Overall net worth?
  - Types of assets?
  - How are assets owned?
- **Liabilities**
  - Debts?
  - Mortgages?
  - Liens or other security interests?
  - Ongoing financial commitments?
- **Income v. Spending Habits**
  - What is the client's annual income?
  - How much does the client typically spend annually?
  - Will the client's annual spending change?
  - Projections from the client's financial advisor? CPA?
    - How much growth is anticipated?
- **Age**
  - Gifting strategies for a forty (40) year old look different than for an eighty (80) year old.
- **Health**
  - Gifting strategies for someone in great health look different that for a client in poor health.
- **Desire**
  - Does the client want to make lifetime gifts?

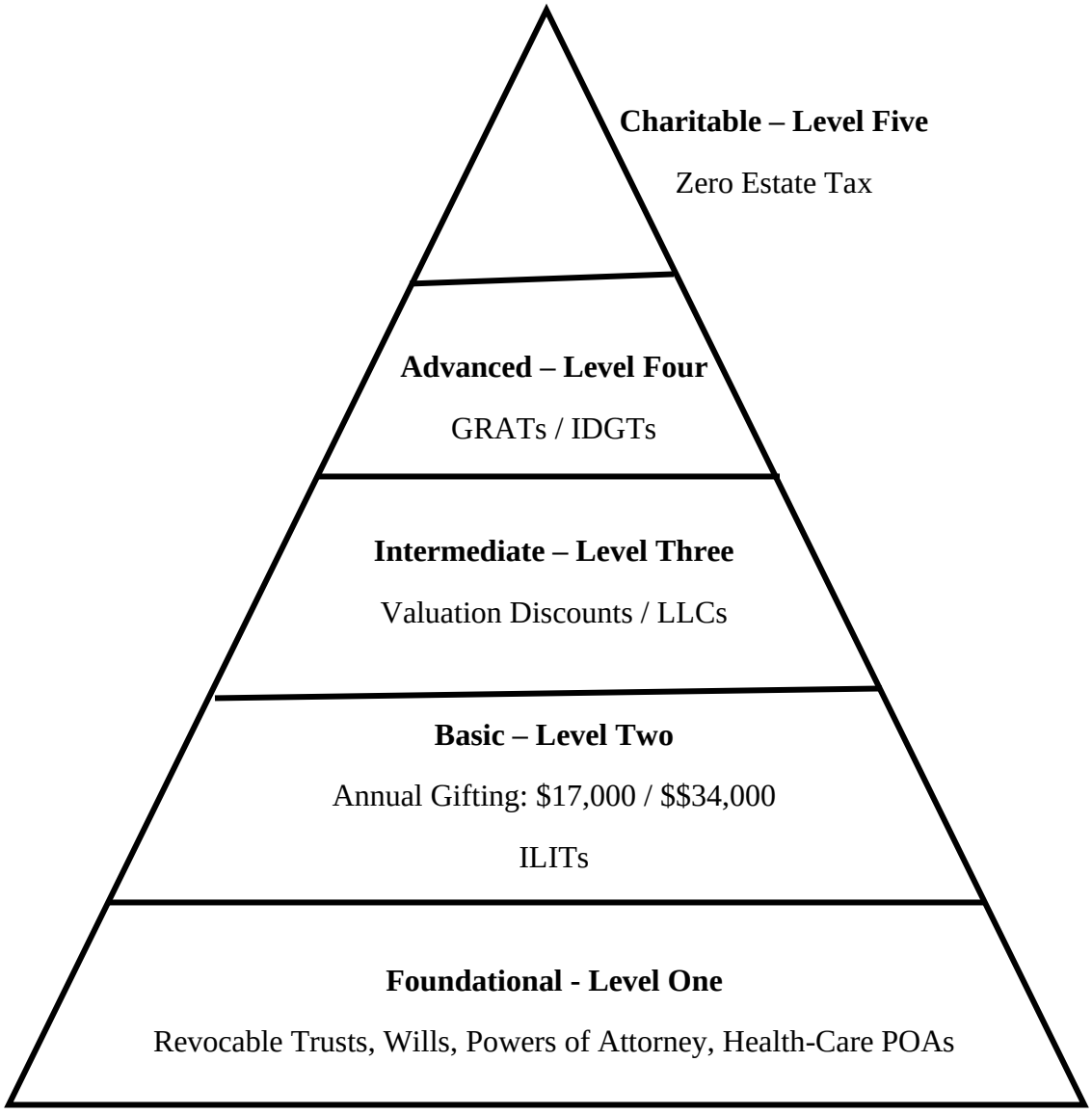
GOLDEN RULE IN GIFTING: Does the client have what they need to meet their desires and standard of living for the remainder of their life/lives?

General Parameters when a Gifting Strategy should be discussed with the client:

- The client has a desire to gift.
- The client has a taxable estate (exceeds $12,920,000 for individuals)

- An individual client with a net worth at or exceeding $10M or less depending on income/spending.
- A married couple with a net worth at or exceeding $15M or less depending on income/spending.
- An individual or couple whose net worth is increasing dramatically.
- An individual or couple that spend disproportionately less than they earn in income year over year.
- Clients with substantial business or real estate interests that are constantly appreciating.

B. Lifetime Gifting Strategies: Estate Planning Complexity Pyramid. Note: DeAnn Farthing did not create this pyramid but the original author is unknown.



For purposes of this paper, we will focus on those gifting strategies at the Basic – Level Two and Intermediate – Level Three Levels of the Estate Planning Complexity Pyramid. Both of these strategies can be implemented to reduce the client's federal taxable estate at death (or at the death of the survivor for married couples).

- **Annual Gifting / Bleed Off Strategy.**

What is it? The annual gifting / bleed off strategy is a strategy recommended and used during a clients life to gift value to another person and thus reduce the value of the clients taxable estate over time. This is accomplished using the client's annual exclusion amount. See IRS Code § 2503(b). Each individual currently has an annual exclusion amount $17,000 in value per donee, which is $34,000 in value per married couple, per donee. This means that each individual can give away $17,000 in value to another person *EACH YEAR* and no reporting is necessary. As you can imagine, this is a long-term strategy that over a period of time can make a tremendous impact in an individual's overall estate.

HYPO: Imagine a married couple, each 55 years old with 3 adult children. If the married couple implemented an annual gifting / bleed off strategy this year the impact would be as follows:

Year 1 - $102,000 gifted in non-reportable gifts;

Year 2 - $204,000 gifted in non-reportable gifts;

Year 10 - $1,020,000 gifted in non-reportable gifts;

Year 20 - $2,040,000 gifted in non-reportable gifts;

Year 30 - $3,060,000 gifted in non-reportable gifts.

These are the raw gift amounts not considering that the annual exclusion amount has increased each year since inception due to inflation. In addition, the numbers listed above don't contemplate compounding interest or the increase in value of the gifts over time, which vale would have been added to the parents estates and is now added to the estates of their children.

How is it implemented? Gifting is completed anytime an individual gives money or another asset with value to another person with no restrictions. Meaning, the donee has the present right and ability to use the gift. It is important to remember that this strategy does not need to be achieved with a cash gift. Many clients choose to implement this strategy utilizing membership interest in a limited liability company (LLC), stock in a corporation, gold, silver or other precious metals, real estate interests, creation of a 529 account, and via other assets of value. Annual gifting can also be accomplished by loaning money to a donee and forgiving the note over time to the extent of the annual exclusion. While this strategy is beyond this paper, it should be considered when larger gifts are needed in a given calendar year.

When should it be implemented? If this gifting strategy makes sense for the clients it can be implemented at any time. It can also be implemented and then stopped if the clients situation changes, thus the risk of this strategy is almost non-existent. However, as seen in the

hypothetical above, this strategy is most effective when implemented sooner as the biggest benefit of this strategy is the benefit of time.

What type of client is a good candidate for this strategy? This strategy can be used for almost any client due to its flexibility in being able to start gifting and then stop at any time. Essentially, anytime a client is wanting to make any type of gift to a donee, they should consider this strategy and create the gift to fit within the parameters of the annual gifting / bleed off strategy.

By way of example, if a grandparent wants to gift a child a vehicle this year (2023) or the money to purchase a vehicle and the value of the vehicle is $25,000 then strategically the grandparent should either gift the child $17,000 in this calendar year and $8,000 in next calendar year OR the grandparent could give the grandchild $17,000 in this calendar year and the grandchild could obtain a loan for the remaining, which loan the grandparent could pay off in the following calendar year. Note, the grandparent could also be the lender.

- **Use It All (or potential lost it) Strategy.**

What is it? In our practice we have seen more of the use it or potentially lose it gifting strategy in recent years. In this strategy, a client will gift their entire lifetime exclusion amount in a short period of time, either in one year or over the course of a few years. For individuals gifting in 2023, the current exclusion or unified credit is $12,920,000 per person. This means that each individual can give away during their life or at their passing $12,920,000 without any estate or gift tax being owed. Of course, historically this amount has gone up annually with inflation. Just like with the annual gifting / bleed off strategy, the benefit is in gifting the whole unified credit now and allowing the value to appreciate in another's estate in lieu of the clients.

How is it implemented? This strategy is implemented carefully with thoughtful and collaborative communication between the client, attorney, financial advisors and CPA. Just like with the annual gifting / bleed off strategy, either cash or other assets can be utilized, and the clients need to think strategically about what assets it makes the most sense to gift. What this paper does not consider but which should be considered prior to implementing this strategy is that while the client is making the completed gift and giving away value they are also giving the asset away during life and not at death. Thus, they are also giving away the step-up in tax basis of the asset as well. A difference between this and the annual gifting / bleed off strategy is that once this gift is complete (or each year if it is completed over a few years) a gift tax return must be filed. We would recommend filing the gift tax return with support documentation showing how the value was determined.

What type of client is a good candidate for this strategy?

- High net worth clients capable of giving away large amounts of value
- Business owners

- Farmers
- Clients with non-income producing or income producing high-valued assets (i.e. real estate)

Why "or potentially lose it"? The current unified credit of $12,920,000 per person is inflated. The basic exclusion amount (no inflation) is set to decrease and go back to the prior 2017 level of $5,000,000 per person on January 1, 2026. This WILL happen unless Congress take action to increase, change or extend the current level. As such, any clients wishing to give beyond $5,000,000 should consider this strategy prior to such date as once the level is reduced the option to give this amount will be gone…at least until Congress acts.

Additional Considerations for this Strategy:

- Do assets need to be shifted between spouses to accomplish the gifting?
- Which spouse should do the gifting?
- Forgoing the Step-Up in Tax Basis (How this impacts stock / membership interest)

C. What isn't a Gift?

Each of the strategies listed above are ways in which clients can reduce their potential estate tax liability. However, outright gifts aren't the only ways in which clients can accomplish this goal. Certain categories of gifts are excluded from a client's taxable gifts and can be done over and above the clients annual exclusion amount in Code § 2503. These excluded gifts are as follows:

- **Medical Expenses:** As long as the client pays the medical expenses for another individual *DIRECTLY* to the medical provider, such payments are excluded from the client's taxable gifts.

  "Medical Expenses" is broadly defined under Code § 213(d) to include the amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease or for the purpose of affecting any structure or function of the body. And can include medicine that is prescribed or insulin. See attached Appendix A for a listing from Compliance Dashboard LLC - https://complianceadministrators.com/medical-expenses-under-irs-section-213d/ of certain medical expenses included and excluded. ***Disclaimer*** – The attached exhibit and website is for illustration purposes only and has not been independently verified.

- **School Expenses:** As long as the client pays for the school expenses of another individual (eligible student) DIRECTLY to the educational institution, such payments are excluded from the client's taxable gifts.

  Qualified expenses are amounts paid for tuition, fees and other related expenses for an eligible student that are required for enrollment or attendance

at an eligible educational institution. Eligible expenses also include student activity fees that are required to enroll.

Expenses that do not qualify include:

- Room and board
- Insurance
- Medical expenses (including student health fees)
- Transportation
- Similar personal, living or family expenses

D. Don't Forget Discounts on both the Bleed Off and Use It All Strategies. Both the annual gifting / bleed off and use it all strategies are effective ways to strategically assist your clients in reducing their taxable estate at death. However, advisors assisting clients to implement either of these gifting strategies should also consider potential discounts available to their clients. The thought should always occur to the advisor: Can this gift be made in a more tax efficient manner?

- **Considerations:**
  - Should you utilize an entity structure (LLC, Inc.) with both voting and non-voting membership interest / stock in which to make gifts?
  - Should you create an entity structure before making gifts?
  - How do you value an entity?

Appendix A

https://complianceadministrators.com/medical-expenses-under-irs-section-213d/

Section 213 of the Internal Revenue Code (IRC) allows a deduction for expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, spouse, or dependent, to the extent the expenses exceed 7.5% of adjusted gross income. Under section 213(d), medical care includes amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.

Deductible Medical Expenses

- Abortion
- Acupuncture
- Alcoholism
- Ambulance
- Annual Physical Examination
- Artificial Limb
- Bandages
- Birth Control Pills (by prescription)
- Blood tests
- Blood transfusions
- Body scan
- Braille Books and Magazines
- Breast Pumps and Supplies
- Breast Reconstruction Surgery
- Capital Expenses for special equipment installed in your home if their main purpose is medical care (i.e., constructing entrance or exist ranges for your home,
- Car (cost of special hand controls and other special equipment installed in car for the use of a person with a disability)
- Chiropractor
- Christian Science Practitioner
- Contact Lenses
- Crutches
- Dental Treatment (i.e., teeth cleaning, braces, dentures, etc.)
- Diagnostic Devices (ex: blog sugar test kit)
- Disabled Dependent Care Expenses
- Drug Addiction
- Drugs (prescription)
- Elastic hosiery (prescription)
- Eye Exam
- Eyeglasses
- Eye Surgery
- Fees paid to health institute prescribed by a doctor
- Fertility Enhancement

- Guide Dog (or other service animal)
- Gum Treatment
- Gynecologist
- Healing Services
- Health Coverage Tax Credit (HCTC)
- Health Maintenance Organization (HMO)
- Hearing Aids
- Home Care
- Hospital Services
- Hydrotherapy
- Insulin treatment
- Insurance Premiums
- Laboratory Fees
- Lactation Expenses
- Lead-Based Paint Removal
- Learning Disability
- Legal Fees (paid that are necessary to authorize treatment for mental illness)
- Lifetime Care—Advance Payments
- Lodging
- Long-Term Care
- Meals (cost of meals at hospital or similar institution if a principal purpose for being there is to get medical care)
- Medical Conferences
- Medical Information Plan
- Medicare A
- Medicare B
- Medicare D
- Medicines
- Metabolism Tests
- Nursing Home
- Nursing Services
- Operations (non-cosmetic surgeries)
- Optometrist
- Oral Surgery
- Organ Transplant (including donor's expenses)
- Orthopedic shoes
- Osteopath
- Oxygen
- Pediatrician
- Physical Examination
- Physiotherapist
- Podiatrist
- Postnatal treatments
- Prenatal Care
- Psychiatrist
- Psychoanalyst

- Psychologist
- Psychotherapy
- Radium Therapy
- Special school costs for the handicapped
- Spinal fluid test
- Splints
- Sterilization
- Telephone or TV equipment to assist the hard-of-hearing
- Therapy equipment
- Transportation expenses (relative to health care)
- Vaccines
- Vasectomy
- Vision Correction Surgery
- Vitamins (if prescribed)
- Weight-Loss Program (for medical reason)
- Wheelchair
- Wig
- X-Rays

Non-Deductible Medical Expenses

- Advancement payment for services to be rendered next year
- Athletic Club membership
- Baby Sitting, Childcare, and Nursing Services for non-impaired child
- Boarding school fees
- Bottled Water
- Controlled Substances
- Cosmetic Surgery
- Dancing and Swimming Lessons (even if recommended by doctor)
- Diaper Server
- Electrolysis or Hair Removal
- Flexible Spending Arrangement (FSA)
- Funeral Expenses
- Future Medical Care
- Hair Transplant
- Health Savings Accounts (HSAs)
- Household Help
- Illegal Operations and treatments
- Maternity Clothes
- Medical Savings Account (MSA)
- Medicines and Drugs from other countries
- Nonprescription Drugs and Medicines
- Nutritional Supplements
- Personal Use Items
- Scientology counseling
- Social activities
- Stop-smoking programs

- Teeth Whitening
- Veterinary Fees

Over-the-Counter Drugs – Eligible for Deduction

- Allergy Medications
- Antibiotic ointments
- Anti-diarrhea medicine
- Cold Medicine
- Cough drops and throat lozenges
- First aid creams
- Motion sickness medicine
- Pain relievers
- Pedialyte
- Sinus Medications and Nasal Sprays
- Sleep aids

Over-the-Counter Drugs—Ineligible for Deduction

- Acne Treatments
- Cosmetics
- Chapstick
- Dietary Supplements
- Face Cream
- Fiber Supplements
- Medicated Shampoo/Soaps
- Moisturizers
- One-A-Day Vitamins
- Suntan Lotion
- Toiletries
- Toothbrush
- Toothpaste
- Topical Creams