

**Members**

Rep. Jud McMillin, Chairperson  
Rep. Ralph Foley  
Rep. Ed DeLaney  
Sen. Joseph Zakas, Vice-Chairperson  
Sen. Susan Glick  
Sen. John Broden  
Joseph H. Davis  
Kris Fruehwald  
Thomas Hardin  
Judge Thomas Lowe  
James Martin  
David Pendergast  
Dan Reeves  
Timothy Sendak  
Jerry Withered



## PROBATE CODE STUDY COMMISSION

Legislative Services Agency  
200 West Washington Street, Suite 301  
Indianapolis, Indiana 46204-2789  
Tel: (317) 233-0696 Fax: (317) 232-2554

**LSA Staff:**

Ross Hooten, Attorney for the Commission  
Anne Haley, Attorney for the Commission  
Jessica Harmon, Fiscal Analyst for the Commission

**Authority:** IC 2-5-16-2

### MEETING MINUTES<sup>1</sup>

**Meeting Date:** October 2, 2012  
**Meeting Time:** 1:30 P.M.  
**Meeting Place:** State House, 200 W. Washington St., Room 404  
**Meeting City:** Indianapolis, Indiana  
**Meeting Number:** 1

**Members Present:** Rep. Jud McMillin, Chairperson; Rep. Ralph Foley; Rep. Ed DeLaney; Sen. Joseph Zakas, Vice-Chairperson; Joseph H. Davis; Kris Fruehwald; Thomas Hardin; James Martin; David Pendergast; Dan Reeves; Timothy Sendak; Jerry Withered.

**Members Absent:** Sen. Susan Glick; Sen. John Broden; Judge Thomas Lowe.

Rep. McMillin called the meeting to order at 1:40 p.m..

Attorney Jeff Kolb presented the annual policy proposals of the Probate Trust and Real Property Section of the Indiana State Bar Association (ISBA) (Exhibit A).

#### (1) Authorize asset protection trusts.

Mr. Kolb said that the purpose of an asset protection trust or "dynasty trust" is to

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<sup>1</sup> These minutes, exhibits, and other materials referenced in the minutes can be viewed electronically at <http://www.in.gov/legislative>. Hard copies can be obtained in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for hard copies may be mailed to the Legislative Information Center, Legislative Services Agency, West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for hard copies.

permit settlors to grow their "nest eggs" through successive generations, by protecting their assets from creditors. Mr. Sendak pointed out that these trusts undermine the purpose of the rule against perpetuities which is to prevent the accumulation of wealth over the course of generations. The Commission discussed Indiana's loss of business and assets to other states that have asset protection trusts.

## **(2) Homestead exemptions.**

Mr. Kolb said that the purpose of the proposal is not to expand the number of exemptions for one entity but to allow more entities to claim the exemption. The Commission questioned whether the language of the proposal accomplishes this purpose. Rep. McMillin asked LSA to draft language that restricts an entity to one exemption and to provide a fiscal impact statement consistent with the language.

## **(3) Medicaid eligibility**

Rep. McMillin said that the Commission would not address this proposal because it is outside of the Commission's statutory authority.

## **(4) Estate lawyer duties**

Rep. Kolb said that the proposal is a response to *Estate of Lee v. Colussi* N.E.2d (Ind. Ct. App 2011) involving the estate's legal malpractice claim against Colussi, the estate's attorney. The lower court granted Colussi's motion for summary judgment, concluding that he did not have a duty to monitor the personal representative's control over the estate bank account. The appellate court reversed, finding that Colussi had a duty to the estate and remanded the case for trial on whether his failure to monitor the estate bank account constituted a breach of that duty. Mr. Kolb said that the ISBA's proposed legislation is consistent with the case law of most states that hold that an estate lawyer's only duty is to the personal representative and not to the beneficiaries.

## **(5) Inventory assets**

Mr. Kolb said that this proposal clarifies that the personal representative must prepare an inventory of the decedent's probate estate.

## **(6) Penalties for failure to comply with fiduciary requests**

Rep. McMillin suggested that, due to the complexity of the proposal, the Commission postpone its discussion until after members have reviewed LSA's draft of the proposal. Commission members suggested the following changes to the proposal for discussion at the next meeting:

- Add penalties for failure to comply with requests of trustees and attorneys in fact.
- Provide that an enforcement action is not subject to arbitration or mediation.
- Add a set minimum monetary penalty in addition to treble damages, in an amount that is sufficient enough to induce financial institutions to comply.
- Reduce the amount of time (the proposal provides for ten business days) that a party has after receiving a small estate affidavit to confirm that they will comply with the affidavit.

**(7) Costs and expenses of administration--fees of surrogate attorneys**

Mr. Kolb said that this proposal resolves a conflict with an Indiana Supreme Court Rule, by removing a statutory provision that includes a surrogate attorney's fee in the costs and expenses of administration.

**(8) Purchase of real estate assets by personal representative**

Mr. Kolb said that this proposal would allow a personal representative to purchase real estate assets from the estate if the court issues an order after notice to all interested parties.

**(9) Guardianship notice**

Mr. Kolb said that this proposal provides additional protection for a protected person when a guardian files an account by: (1) adding persons who receive notice of the hearing on the account when the court waives notice to the protected person; and (2) providing for the appointment of a guardian ad litem to review an accounting in certain circumstances.

**(10) Revocable trusts: powers of settlors, duties of trustees and rights of beneficiaries**

Mr. Kolb said that this proposal is the result of a court case from another state in which the settlor-trustee of a revocable trust tried to sell property of the trust and was found to have breached the trustee's fiduciary duty to a beneficiary. Mr. Kolb said the ISBA's proposal makes it clear that the beneficiaries' rights are subject to the control of the settlor and the duties of the trustee are owed exclusively to the settlor.

**(11) Matrimonial trusts**

Mr. Kolb said that this proposal clarifies that a matrimonial trust provides the same protections that the settlors would have if the property was held in a tenancy by the entireties. He said the proposal specifies factors to consider to determine whether creditors will have access to a surviving settlor's interest in the trust.

**Additional proposal**

Mr. Kolb presented an additional policy proposal (Exhibit B) that addresses the holding of *State ex. rel. Family and Social Services Administration v. Estate of Phillip Roy*, 963 N.E. 2d 78 (Ind. Ct. App. 2012) which found that a trial court could order the sale of an estate's real property to pay the decedent's Medicaid debt. Mr. Kolb said that IC 29-1-7-15.1 authorizes the personal representative to sell the estate's real property to satisfy a decedent's debts only if, and this did not happen in *Roy*, an estate is opened within five months after the decedent's death. Mr. Kolb discussed how the five month restriction serves the important purpose of clearing the title to real property. Mr. Kolb said that the proposal clarifies the personal representative's authority to administer the estate.

Rep. McMillin said that preliminary drafts of proposals prepared by LSA would be distributed to members before the next meeting of the Commission on October 9. He adjourned the meeting at 3:08 p.m..

**REPORT FROM**  
**PROBATE TRUST AND REAL PROPERTY SECTION**  
**OF THE**  
**INDIANA STATE BAR ASSOCIATION**  
**TO THE**  
**PROBATE CODE STUDY COMMISSION**  
**AUGUST 14, 2012**

October 2, 2012  
Probate Code Study Commission  
Exhibit A

**REPORT FROM  
PROBATE TRUST AND REAL PROPERTY SECTION  
OF THE INDIANA STATE BAR ASSOCIATION  
TO THE  
PROBATE CODE STUDY COMMISSION  
AUGUST 14, 2012**

The Probate Trust and Real property Section of the Indiana State Bar Association (Section) provides the following legislative changes for the 2013 legislative session. It appreciates the willingness of the Probate Code Study Commission (PCSC) to work with the Section on improving Indiana laws.

1. **ASSET PROTECTION TRUST.** This creates a new chapter in the Trust Code: IC 30-4-8. This issue was first presented to the PCSC in 2008. It always received a majority vote in favor but has never had enough votes to be referred to the legislature. Under current Indiana law, a person cannot create a trust where trust assets will be protected from claims of the person's creditors. As of this date, thirteen (13) states have statutes which allow the creation of a self settled asset protection trust under certain conditions. One of the leading states in this area is Delaware. Its language was codified by Tennessee. Attached as **Tab A** is language adapted from Delaware and Tennessee for enactment in Indiana. An asset protection trust cannot be set up to defraud creditors and the rights of spouses and child support are protected. The statute also provides that the rule against perpetuities does not apply to an asset protection trust. This allows Indiana estate planners to create a trust for future generations known as a dynasty trust.

2. **PROPERTY TAX – HOMESTEAD EXEMPTION – ENTITY.** This proposed change to I.C. 6-1.1-1-9 expands the definition of owner for the homestead exemption to include entities, such as partnerships, limited partnerships, corporations and limited liability companies. A mark up of the statute with these changes can be found under **Tab B**.

3. **MEDICAID – ELIGIBILITY – INSTITUTIONALIZATION OF COMMUNITY SPOUSE.** This change amends I.C. 12-15-3-1 to provide that when the community spouse also becomes institutionalized, the eligibility of the already institutionalized spouse is established and will not be dependent upon the assets of the community spouse now entering the nursing home until that spouse applies for Medicaid. **Tab C** contains these changes.

4. **ESTATE LAWYER – DUTIES.** A new I.C. 29-1-10-20 specifies that the attorney performing services for an estate represents the personal representative and is not liable to any interested person for any loss suffered by the estate unless the action of the attorney caused the loss. It specifically states that the attorney representing the personal representative owes no duty to interested persons to protect, possess, maintain, monitor or account for estate assets. The language is contained under **Tab D**. This legislation is in response to the *Colussi* case.

5. **INVENTORY – PROBATE ASSETS.** I.C. 29-1-12-1 is amended to make it clear that the only duty to inventory is the duty to prepare an inventory of probate assets which are

defined to be those assets transferred at the death of decedent either under the decedent's will or absent a will under the laws of intestacy. Those changes can be found at **Tab E**.

6. FIDUCIARY REQUESTS – PENALTIES. **Tab F** includes a series of changes, both new provisions and amendments to existing provisions to provide penalties for failure to comply with the statutes in the Probate Code, Guardianship Code, and Power of Attorney Act. Generally speaking, the damages are three (3) times the amount of actual damages plus costs of collection and attorney fees.

7. CLASSIFICATION OF CLAIMS AND ALLOWANCES. In 2012, changes were made to I.C. 29-1-14-9 including a provision related to the fees of an attorney surrogate. It appears that these issues will be addressed by Supreme Court rule. As a result, subsection (c) of Section 9 should be repealed. These changes are contained under **Tab G**.

8. PERSONAL REPRESENTATIVE – PURCHASE OF ESTATE ASSETS. This change amends I.C. 29-1-15-16.5. to allow the sale of estate assets to a personal representative upon the order of a court issued after notice of the hearing to all interested persons, ensuring adequate consideration is received by the estate for the interest acquired. Changes are contained at **Tab H**.

9. GUARDIANSHIP – NOTICE. I.C. 29-3-9-6 is amended to provide for notice to alternative individuals for the protected person when the court waives notice to the protected person. This material can be found under **Tab I**.

10. REVOCABLE TRUST – GRANTOR – TRUSTEE. This new I.C. 30-4-3-1.3 provides that a revocable trust with the settlor as trustee does not require any duties of the trustee to the beneficiaries. This change addresses cases where the settlor as trustee has been charged with breach of fiduciary duty despite the fact that it is a revocable trust. These changes can be found Under **Tab J**.

11. MATRIMONIAL TRUSTS – CREDITOR RIGHTS. Amendments to I.C. 30-4-3-35 provide that the protection provided to matrimonial property is to be the same as that provided by real property owned as tenants by the entirety. Changes can be found under **Tab K**.

**IC 30-4-8 INDIANA ASSET PROTECTION TRUST**

**30-4-8-1 APPLICABLE DATE.** This chapter shall apply to Qualified Dispositions to Asset Protection Trusts and Dispositions by Transferors who are trustees made on or after June 30, 2013.

**30-4-8-2 DEFINITIONS.** Unless the context otherwise requires, the following definitions apply in this chapter.

(1) "Asset Protection Trust" means a trust that:

(A) Appoints at least one or more Qualified Trustees for the Property that is the subject of a Qualified Disposition;

(B) Expressly incorporates the law of Indiana to govern the validity, construction and administration of the trust;

(C) Is irrevocable; and

(D) Provides that the interest of the Transferor or beneficiary in the trust Property or the income therefrom may not be transferred, assigned, pledged or mortgaged, whether voluntarily or involuntarily, before the a trustee actually distributes the Property or income to the beneficiary.

(2) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.

(3) "Creditor" means, with respect to a Transferor, a Person who has a Claim.

(4) "Debt" means liability on a Claim.

(5) "Disposition" means a transfer, conveyance or assignment of Property including a change in the legal ownership of Property occurring upon the substitution of one (1) trustee for another or the addition of one (1) or more new trustees. "Disposition" also includes the exercise of a power so as to cause a transfer of Property to a trustee or trustees, but shall not include the release or relinquishment of an interest in Property that until the release or relinquishment was the subject of a Qualified Disposition.

(6) "Investment Decision" means the retention, purchase, sale, exchange, tender or other transaction affecting the ownership of or rights in investments.

(7) "Person" means an individual at least eighteen (18) years of age, a corporation, trust, limited partnership, limited liability company or partnership, partnership, governmental entity or political subdivision.

(8) "Property" includes real property, personal property, and interests in real or personal property.

(9) "Qualified Affidavit" means a sworn affidavit signed by the Transferor before a Disposition of Property to an Asset Protection Trust that meets the requirements of IC 30-4-8-3(a). In the event of a Disposition by a Transferor who is a trustee, the Qualified Affidavit shall be signed by the Transferor who made the original Disposition to the trustee, or a predecessor trustee, in a form that meets the requirements of IC 30-4-8-2(1)(C) and (D) and shall state facts as of the time of the original Disposition.

(10) "Qualified Disposition" means a Disposition by or from a Transferor with or without consideration, to an Asset Protection Trust after the Transferor executes a Qualified Affidavit. A Disposition by a trustee that is not a Qualified Trustee to a trustee that is a Qualified Trustee shall not be treated as other than a Qualified Disposition solely because the trust instrument fails to meet the requirements of IC 30-4-8-2(1)(B). In the case of a disposition to more than one (1) trustee, a Disposition that is otherwise a Qualified Disposition shall not be treated as other than a Qualified Disposition solely because not all of the recipient trustees are Qualified Trustees.

(11) "Qualified Trustee" means a person who:

(A) In the case of an individual at least eighteen (18) years of age, is a resident of Indiana, or, for all other Persons, is authorized by the law of Indiana to act as a trustee and whose activities are subject to supervision by the State of Indiana, the federal deposit insurance corporation, the comptroller of the currency, or the office of thrift supervision or any successor thereto;

(B) Maintains or arranges for custody in Indiana some or all of the Property that is the subject of the Qualified Disposition, maintains records for the Asset Protection Trust on an exclusive or nonexclusive basis, prepares or arranges for the preparation of required income tax returns for the Asset Protection Trust, or otherwise materially participates in the administration of the Asset Protection Trust; and

(C) Is not the Transferor.

(12) "Transferor" means a Person who, as an owner of Property, as a holder of a power of appointment which authorizes the holder to appoint in favor of the holder, the holder's Creditors, the holder's estate or the Creditors of the holder's estate, or as a trustee, directly or indirectly makes a Disposition or causes a Disposition to be made.

(13) "Trust Advisor" means a Person given authority by the terms of an Asset Protection Trust to direct, consent to or disapprove actual or proposed Investment Decisions, distribution decisions or other decisions related to Property in an Asset Protection Trust.

### **30-4-8-3 QUALIFIED AFFIDAVIT.**

(a) A Qualified Affidavit shall identify the Property to be transferred to the Asset Protection Trust and state that:

(1) The Transferor has full right, title, and authority to transfer the Property to the Asset Protection Trust;

(2) The transfer of the Property to the Asset Protection Trust will not render the Transferor insolvent;

(3) The Transferor does not intend to defraud a Creditor by transferring the Property to the Asset Protection Trust,

(4) The Transferor does not have any pending or threatened court actions against the Transferor, except for those court actions identified by the Transferor on an attachment to the Qualified Affidavit;

(5) The Transferor is not involved in any administrative proceedings except for those administrative proceedings identified on an attachment to the Qualified Affidavit;

(6) The Transferor does not contemplate filing for relief under the provisions of the federal bankruptcy code; and

(7) The Property being transferred to the Asset Protection Trust is not derived from unlawful activities.

(b) If Transferor is an individual and is married at the time the Qualified Affidavit is signed, a copy of this Qualified Affidavit shall be given to the Transferor's spouse.

### **30-4-8-4 PROTECTION FROM CREDITORS.**

(a) Except as provided in IC 30-4-8-5 and notwithstanding any provision of law to the contrary, no action of any kind, including, without limitation, an action to enforce a judgment entered by a court or other body having adjudicative authority, shall be brought at law or in equity for an attachment or other provisional remedy against Property that is the subject of a Qualified Disposition to an Asset Protection Trust or for the avoidance of a Qualified Disposition to an Asset Protection Trust.

(b) If, in any action brought against an Asset Protection Trust, a court takes any action where the court declines to apply the law of Indiana in determining the effect of a

spendthrift provision in the Asset Protection Trust, the trustee of the Asset Protection Trust shall immediately upon such court's action and without the further order of any court, cease in all respect to be trustee of the Asset Protection Trust and a successor trustee shall thereupon succeed as trustee in accordance with the terms of the trust or, if the trust does not provide for a successor trustee and the trust would otherwise be without a trustee, a court of this state, upon the application of any beneficiary of Asset Protection Trust, shall appoint a successor trustee upon such terms and conditions as it determines to be consistent with the purposes of the trust and this Act. Upon the trustee's ceasing to be trustee, that trustee shall have no power or authority other than to convey the trust Property to the successor trustee named in the trust in accordance with this section.

(c) An Asset Protection Trust and its Property shall be protected under this section whether or not the Transferor retains any or all of the powers and rights described in IC 30-4-8-10 or serves as a Trust Advisor pursuant to IC 30-4-8-9.

#### **IC 30-4-8-5 CREDITOR EXCEPTIONS.**

(a) The only Claims that are exceptions to IC 30-4-8-4 are:

(1) Actions brought in this state pursuant to the provisions of the Uniform Fraudulent Transfer Act, IC 32-18-2, where the requirements for recovery under the Uniform Fraudulent Transfer Act are met by clear and convincing evidence;

(2) Payments, both past and future, due under a court judgment or order for child support against the Transferor in existence at the time of the Qualified Disposition to the Asset Protection Trust; or

(3) A court judgment or order of division of property in a dissolution of marriage or legal separation of the Transferor if the Qualified Disposition to the Asset Protection Trust was:

(A) After the date of the Transferor's marriage that is being dissolved or separated; or

(B) Within thirty (30) days before the date of the Transferor's marriage that is being dissolved or separated unless Transferor gives written notice to the other party to the marriage three (3) days before the Qualified Disposition

(b) A Creditor's Claim under subsection (a)(1) of this section shall be extinguished unless:

(1) The Creditor's Claim arose before the Qualified Disposition to an Asset Protection Trust was made, and the action is brought within the later of:

(A) Two (2) years after the Transfer was made; or

(B) Six (6) months after the Transfer was recorded or made a public record or, if not recorded or made a public record, was or could have reasonably be discovered by the Creditor.

(2) Notwithstanding the provisions of IC 32-18-2-19, the Creditor's Claim arose concurrent with or subsequent to the Qualified Disposition and the action is brought within four (4) years after the Qualified Disposition is made.

*2 per email*  
(c) For purpose of this chapter, a Qualified Disposition that is made by means of a Disposition by a Transferor who is a trustee shall be deemed to have been made as of the time, whether before, on or after July 1, 2013, the Property that is the subject of the Qualified Disposition was originally transferred to the Transferor acting in the capacity of trustee, or any predecessor trustee, in a form that meets the requirements of IC 30-4-8-2(1)(C) and (D).

(d) In circumstances where more than one (1) Qualified Disposition is made by means of the same Asset Protection Trust, then:

(1) The making of a subsequent Qualified Disposition shall be disregarded in determining whether a Creditor's Claim with respect to a prior Qualified Disposition is extinguished as provided in subsection (b); and

(2) Any distribution to a beneficiary shall be deemed to have been made from the latest Qualified Disposition.

#### **IC 30-4-8-6                      LIMITATIONS ON CREDITOR'S CLAIM.**

(a) If a Creditor's Claim is allowed under IC 30-4-8-5 (a), the Qualified Disposition to an Asset Protection Trust shall be subject to that Claim only to the extent necessary to satisfy the Transferor's Debt to the Creditor whose Claim was allowed.

(b) In the event any Creditor's Claim is allowed as provided in subsection (a), then:

(1) If the court is satisfied that a Qualified Trustee has not acted in bad faith in accepting or administering the Property that is the subject of the Qualified Disposition:

(A) The Qualified Trustee shall have a first and paramount lien against the Property that is the subject of the Qualified Disposition in an amount equal to the entire cost, including attorneys' fees, properly incurred by the Qualified Trustee in the defense of the action or proceedings filed by the Creditor;

(B) The Creditor's Claim shall be allowed subject to the proper fees, costs, preexisting rights, claims and interests of the Qualified Trustee and of any predecessor Qualified Trustee that has not acted in bad faith;

(C) For the purposes of this subdivision, it shall be presumed that the Qualified Trustee did not act in bad faith merely by accepting the Property; and

(D) If the court is satisfied that a beneficiary of an Asset Protection Trust has not acted in bad faith, the Creditor's Claim shall be subject to the right of the beneficiary to retain any distribution made upon the exercise of a trust power or discretion vested in the Qualified Trustee or Qualified Trustees of the Asset Protection Trust, which power or discretion was properly exercised prior to the Creditor's commencement of an action. For purposes of this subdivision, it shall be presumed that the beneficiary, including a beneficiary who is also a Transferor of the trust, did not act in bad faith merely by creating the trust or by accepting a distribution made in accordance with the terms of the Asset Protection Trust.

**IC 30-4-8-7 BANKRUPTCY PROVISION.** A spendthrift provision as described in IC 30-4-8-2(1)(D) shall be deemed to be a restriction on the transfer of the Transferor's beneficial interest in the trust that is enforceable under applicable nonbankruptcy law within the meaning of § 541(c)(2) of the Bankruptcy Code (11 U.S.C. § 541(c)(2)) or any successor provision thereto.

**IC 30-4-8-8 TRANSFEROR'S LIMITATIONS.** Except as permitted by the provisions of the Asset Protection Trust and by IC 30-4-8-9 and 10, the Transferor shall have no rights or authority with respect to the principal or income of the Asset Protection Trust and any agreement or understanding purporting to grant or permit the retention of any greater rights or authority shall be void.

**IC 30-4-8-9 TRANSFEROR AS ADVISOR.** A Person may serve as a Trust Advisor even if that Person is the Transferor of the Qualified Disposition, but that Person may not serve as advisor to a trust that is a Qualified Disposition except with respect to the retention of the veto right permitted by IC 30-4-8-10(1).

**IC 30-4-8-10 TRANSFEROR RETAINED POWERS.** An Asset Protection Trust shall not be deemed revocable on account of its inclusion of one (1) or more of the following:

- (1) A Transferor's power to veto a distribution from the trust;
- (2) A power of appointment (other than a power to appoint to the Transferor, the Transferor's Creditors, the Transferor's estate or the Creditors of the Transferor's estate) exercisable by will or other written instrument of the Transferor effective only upon the Transferor's death;
- (3) The Transferor's potential or actual receipt of income or principal, including rights to income retained in the trust;

(4) The Transferor's potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust as such terms are defined in § 664 of the Internal Revenue Code of 1986 (26 U.S.C. § 664) and any successor provision thereto;

(5) The Transferor's potential or actual receipt of income or principal from a grantor retained annuity trust or grantor retained unitrust that is allowed under 26 U.S.C. 2702 of the Internal Revenue Code as that section exists on the date this Act is effective and as amended;

(6) The Transferor's potential or actual receipt or use of principal if such potential or actual receipt or use of principal would be the result of a Qualified Trustee or Qualified Trustees acting:

(A) In the Qualified Trustee's or Qualified Trustees' discretion. For purposes of this section, a Qualified Trustee is presumed to have discretion with respect to the distribution of principal unless such discretion is expressly denied to the Qualified Trustee by the terms of the trust;

(B) Pursuant to a standard that governs the distribution of principal and does not confer upon the Transferor a power to consume, invade or appropriate property for the benefit of the Transferor, unless such power of the Transferor is limited by an ascertainable standard relating to the health, education, support, or maintenance within the meaning of § 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986, as in effect on July 1, 2007, or as later amended; or

(C) At the direction of an advisor described in IC 30-4-8-11 acting:

(i) In such advisor's discretion; or

(ii) Pursuant to a standard that governs the distribution of principal and does not confer upon the Transferor a power to consume, invade, or appropriate Property for the benefit of the Transferor, unless such power of the Transferor is limited by an ascertainable standard relating to the health, education, support, or maintenance within the meaning of § 2041(b)(1)(A) or 2414(c)(1) of the Internal Revenue Code of 1986, as in effect on July 1, 2007, or as later amended.

(7) The Transferor's right to remove a trustee or advisor and to appoint a new trustee or advisor; provided, however, that such right shall not include the appointment of a Person who is a related or subordinate party with respect to the Transferor within the meaning of § 672(c) of the Internal Revenue Code of 1986 (26 U.S.C. § 672(c)) and any successor provision thereto;

(8) The Transferor's potential or actual use of real property held under a qualified personal residence trust within the meaning of such term as described in § 2702(c)

of the Internal Revenue Code of 1986 (26 U.S.C. § 2702(c)) and any successor provision thereto.

#### **IC 30-4-8-11           ADVISORS**

(a) For purposes of this chapter, neither the Transferor nor any other individual who is a nonresident of this state nor an entity that is not authorized by the law of Indiana to act as a trustee or whose activities are not subject to supervision as provided in IC 30-4-8-2 (11)(A) shall be considered a Qualified Trustee; however, nothing in this chapter shall preclude a Transferor from appointing one (1) or more advisors, including but not limited to:

(1) Advisors who have authority under the terms of the trust instrument to remove and appoint Qualified Trustees or Trust Advisors;

(2) Advisors who have authority under the terms of the trust instrument to direct, consent to or disapprove distributions from the trust; and

(3) Advisors who do not meet the requirements imposed by IC 30-4-8-2 (11).

(b) For purposes of this subsection, the term “advisor” includes a trust “protector” or any other person who, in addition to a Qualified Trustee, holds one (1) or more trust powers.

**IC 30-4-8-12           QUALIFIED TRUSTEE VACANCY.** In the event that a Qualified Trustee of an Asset Protection Trust ceases to meet the requirements of IC 30-4-8-2 (11)(A), and there remains no trustee that meets such requirements, that Qualified Trustee shall be deemed to have resigned as of the time of cessation, and the successor Qualified trustee provided for in the Asset Protection Trust shall become a Qualified Trustee of the Asset Protection Trust or in the absence of any successor Qualified Trustee provided for in the Asset Protection Trust, then a court of this state shall, upon application of any interested party, appoint a successor Qualified Trustee.

#### **IC 30-4-8-13           IMMUNITY**

(a) Notwithstanding any provision of law to the contrary, a Creditor, including a Creditor whose Claim arose before or after a Qualified Disposition, or any other Person shall have only those rights with respect to a Qualified Disposition as are provided in this chapter, and that Creditor or any other Person shall not have any Claim or cause of action against the trustee, or an advisor of an Asset Protection Trust, or against any person involved in the counseling, drafting, preparation, execution or funding of an Asset Protection Trust. For purposes of this section, counseling, drafting, preparation, execution or funding of an Asset Protection Trust includes the counseling, drafting, preparation, execution and funding of a limited partnership or a limited liability company if interests in the limited partnership or limited liability company are subsequently transferred to the Asset Protection Trust.

(b) Notwithstanding any provision of law to the contrary, no action of any kind, including, without limitation, an action to enforce a judgment entered by a court or other body having adjudicative authority, shall be brought at law or in equity against a trustee or an advisor of an Asset Protection Trust, or against any Person involved in the counseling, drafting, preparation, execution or funding of an Asset Protection Trust, if, as of the date such action is brought, an action by a Creditor with respect to such Asset Protection Trust would be barred under this section.

**IC 30-4-8-14**            **RULE AGAINST PERPETUITIES EXCLUSION.** The common law rule against perpetuities and the Uniform Statutory Rule Against Perpetuities, IC 32-17-8, shall not apply to Property or Property interests in an Asset Protection Trust or the terms and provisions of an Asset Protection Trust.

**AMENDED**

**IC 6-1.1-1-9. Owner**

(a) For purposes of this article, the "owner" of tangible property shall be determined by using the rules contained in this section.

(b) For purposes of this article, "entity" refers to a partnership, limited partnership, limited liability partnership, association, corporation, limited liability company, trust, or similar entity.

(cb) Except as otherwise provided in this section, the holder of the legal title to personal property, or the legal title in fee to real property, is the owner of that property.

(de) When title to tangible property passes on the assessment date of any year, only the person obtaining title is the owner of that property on the assessment date.

(ed) When the mortgagee of real property is in possession of the mortgaged premises, the mortgagee is the owner of that property.

(fe) When personal property is security for a debt and the debtor is in possession of the property, the debtor is the owner of that property.

(gf) When a life tenant of real property is in possession of the real property, the life tenant is the owner of that property.

(g) When the grantor or individual with a beneficial (whether discretionary or not) or ownership interest in an entity of a ~~qualified personal residence trust created under United States Treasury Regulation 25.2702-5(e)(2)~~ is:

(1) in possession of the real property transferred to the ~~entity~~trust; and

(2) entitled to occupy the real property ~~rent-free~~ under the terms of an agreement or other provision that binds the trustentity;

the grantor or individual with a beneficial (whether discretionary or not) or ownership interest in the entity is the owner of that real property.

**AMENDED**

**IC 12-15-3-1. Medical assistance to aged, blind, or disabled; total cash value of money, stock, bonds, and life insurance owned by applicant or applicant and spouse; limitations.**

Section 1.

(a) Except as provided in subsections (b) and (c) and section 7 of this chapter, an applicant for or recipient of Medicaid is ineligible for assistance if the total cash value of money, stock, bonds, and life insurance owned by:

(1) the applicant or recipient is more than one thousand five hundred dollars (\$1,500) for assistance to the aged, blind, or disabled; or

(2) the applicant or recipient and the applicant's or recipient's spouse is more than two thousand two hundred fifty dollars (\$2,250) for medical assistance to the aged, blind, or disabled.

(b) In the case of an applicant who is an eligible individual, a Holocaust victim's settlement payment received by the applicant or the applicant's spouse may not be considered when calculating the total cash value of money, stock, bonds, and life insurance owned by the applicant or the applicant's spouse.

(c) In the case of an individual who:

(1) resides in a nursing facility or another medical institution; and

(2) has a spouse who does not reside in a nursing facility or another medical institution; the total cash value of money, stock, bonds, and life insurance that may be owned by the couple to be eligible for the program is determined under IC 12-15-2-24.

(d) In the case of an individual described in subsection (c), the individual's Medicaid eligibility, once achieved under IC 12-15-2-24, shall continue without regard to the assets belonging to a spouse (even if such spouse subsequently enters a nursing facility or another medical institution) until such spouse applies for Medicaid assistance.

NEW IC 29-1-10-20

ESTATE LAWYER; DUTIES

(a) For purposes of this section, "estate lawyer" refers to an attorney performing services for the estate at the request of the personal representative.

(b) Unless otherwise agreed in writing between the estate lawyer and an interested person, the estate lawyer:

- (1) represents and owes a duty only to the personal representative;
- (2) shall not have any duty to collect, possess, manage, maintain, monitor or account for estate assets, unless otherwise required by a specific order of the court; and
- (3) shall not be liable for any loss suffered by the estate except to the extent the loss was caused by the estate lawyer's breach of a duty owed to the personal representative.

(c) To the extent that a court's local probate rule conflicts with this section, this section controls.

29-1-75132

Exhibit E

**AMENDED**

**IC 29-1-12-1. Inventory and appraisal – Copies – Exception**

(a) Within two (2) months after his appointment, unless a longer time shall be granted by the court, every personal representative shall prepare a verified inventory in one (1) or more written instruments, indicating the fair market value of each item of property of the decedent that is transferred at the death of decedent either under the decedent's will or, absent a will, under the laws of intestary which shall come to his possession or knowledge, including a statement of all known, liens and other charges on any item. Such property shall be classified therein as follows:

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

(b) The personal representative may employ a disinterested appraiser to assist him in ascertaining the fair market value as of the date of the decedent's death of any asset the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of assets included in the estate. The names and addresses of any appraiser shall be indicated on the inventory with the item or items he appraised.

(c) The personal representative shall furnish a copy of the inventory, or any supplement or amendment to it, to interested persons who request it, unless he has filed the original of the inventory, or any supplement or amendment to it, with the court.

AHD (1981) = The right of a tenant farmer to the crops or products of land he has cultivated

**NEW**

**IC 29-1-13-10.5. Remedies for Third Parties' Non-Compliance with Personal Representative or Other Fiduciary; Immunity for Third Parties**

Section 10.5

(a) This section applies to transactions or dealings between third parties (as defined in subsection (b)(4) below) and:

- (1) an affiant, claimant or other person who signs and issues or presents a small estate affidavit under IC 29-1-8-1, 29-1-8-1.5, or 29-1-8-3;
- (2) a personal representative holding domiciliary letters testamentary, or letters of general administration issued to that personal representative under IC 29-1-10;
- (3) a domiciliary foreign personal representative who has complied with IC 29-2-1-5, if no proceedings for appointment of a local personal representative (as defined in IC 29-2-1-1(2)) are pending and if no local personal representative has been appointed; and
- (4) a guardian appointed and holding letters of guardianship under IC 29-3 with respect to the property of a minor or an incapacitated adult.

This section does not apply to claims, demands, or requests for distributions from trusts. If a trust beneficiary or the representative of a deceased or incapacitated trust beneficiary contends that a trustee has failed or refused to make a required distribution, the beneficiary's available procedures and remedies are governed by the terms of the trust and by the applicable provisions of IC 30-2, IC 30-4, and the common law.

(b) As used in this section:

- (1) "Property owner" means:
  - (A) an Indiana resident decedent for whom a supervised or unsupervised estate has been opened under IC 29-1 or a non-resident decedent who owns property located in Indiana and for whom a domiciliary foreign personal representative has complied with IC 29-2-1-5;
  - (B) an Indiana resident decedent for whom an affiant or claimant is entitled to use a small estate affidavit under IC 29-1-8-1, 29-1-8-1.5, or 29-1-8-3; or

(C) a minor or incapacitated adult for whom letters of guardianship over his or her property have been issued to a guardian appointed under IC 29-3.

(2) “Requesting party” means a claimant, affiant, personal representative, or guardian who signs a fiduciary’s instruction (as defined below) and who issues or presents that fiduciary’s instruction to a third party (as defined below).

(3) “Third party” means an individual, a bank, a regulated investment company, a trust company, a life insurance company, a securities transfer agent, a stock registrar, a retirement plan administrator, an IRA custodian, another financial institution, or another person who is indebted to a property owner or who has possession of tangible or intangible personal property or choses in action belonging to that property owner.

(5) “Fiduciary’s instruction” means a small estate affidavit, letter, instruction, or other written request that —

(A) is delivered to a third party;

(B) is signed by a requesting party with respect to money, securities, choses in action, or other property titled in the name of or otherwise owned by a property owner, including debts owed to the property owner;

(C) asks or instructs the third party to deliver, transfer ownership of, or release such money, securities, choses in action, or other property titled in the name of or otherwise owned by a property owner;

(D) purports to be within the scope of the authority of the requesting party who signed the small estate affidavit, letter, instruction, or other written request; and

(E) is accompanied (as applicable) by a small estate affidavit in proper form under IC 29-1-8-1, 29-1-8-1.5, or 29-1-8-3, or by a true copy of the letters testamentary, letters of administration, or letters of guardianship issued to the requesting party, bearing a certificate of the clerk of the issuing court that is less than sixty (60) days old.

(6) “Non-compliance” and “fails to comply” means:

(A) A third party’s failure or refusal (including silence or inaction) to confirm to a requesting party, within ten (10) business days after the third party’s receipt of a fiduciary’s instruction from that requesting party, that the third party will comply with that fiduciary’s instruction.

(B) A third party's imposition or charging of a research fee or processing fee (other than a standard fee or commission that is charged to all living and deceased customers for re-titling or transferring record ownership) as a condition to complying with a fiduciary's instruction.

If requesting party has not already complied with the third party's commercially reasonable conditions (as permitted under subsection (c)) at the time of the third party's receipt of a fiduciary's instruction from that requesting party, the ten-business-day period under subparagraph (A) of this subdivision (6) begins running on the first business day after the day on which the third party receives information or documents complying with the all of the commercially reasonable conditions.

(c) A third party may impose other commercially reasonable conditions on its compliance with a fiduciary's instruction, including but not limited to requirements that (as applicable) the requesting party provide any or all of the following for a property owner who is deceased:

- (1) an affidavit of domicile;
- (2) a death certificate;
- (3) a copy of the deceased property owner's probated will, if the will is relevant for the purpose of determining the persons who are ultimately entitled to the property whose delivery, release, or transfer is sought in the fiduciary's instruction; or
- (4) a consent to transfer approved by the county assessor or by the Indiana Department of State Revenue for the property referred to in the fiduciary's instruction, if IC 6-4.1-8-4 applies to the deceased property owner's property whose release or delivery is sought.

A third party's decision to refer a fiduciary's instruction to the third party's in-house or external legal counsel for review does not extend the third party's time for compliance with the fiduciary's instruction, and the issuance of an opinion or advice by the third party's in-house or external legal counsel does not excuse the third party's non-compliance. To the extent that a third party's compliance with a fiduciary's instruction would involve disclosure of non-public personal information (as defined in 16 C.F.R. § 313.3(n)) about the property or debts of a deceased or incapacitated individual who is the property owner (as defined in this section), this section is a State law authorizing the third party to make disclosure for purposes of the Gramm-Leach-Bliley Financial Modernization Act (P.L. 106-102, 15 U.S.C. § 6801), consistent with 16 C.F.R. § 313.15(a)(7)(i).

(d) If a third party fails to confirm, within the ten-business-day period under subsection (c)(6), that it will comply with a fiduciary's instruction delivered to that third party, or if the third party thereafter refuses to comply with the fiduciary's instruction or to cooperate with the

requesting party, the requesting party may bring an enforcement proceeding by a verified petition against that third party in the probate court —

- (1) that issued letters testamentary, letters of administration or letters of guardianship to the requesting party, or
- (2) in the county in which the requesting party complied with IC 29-2-1-5 with respect to deceased property owner who was not an Indiana resident, or
- (3) in the county in which venue would be proper for petitioning for letters of administration, if the property owner is deceased and if no letters have been issued and if the fiduciary's instruction is a small estate affidavit under IC 29-1-8.

The court shall schedule a hearing on the petition and shall direct the service of notice of the filing of the petition and notice of a hearing upon the third party, under IC 29-1-1-12 and 29-1-1-15. The third party may serve and file a responsive pleading on or before the hearing date, but a responsive pleading is not required. A change of venue from the judge or a change of venue from the county is not available for enforcement proceedings under this section. In an enforcement proceeding, the petitioner has the burden of proving the third party's non-compliance and the actual damages and expenses of the requesting party by a preponderance of the evidence.

(e) In an enforcement proceeding brought under subsection (d) of this section, and following the hearing or the non-appearance or default by the third party on the hearing date:

- (1) The court may issue an order requiring the third party to comply with the fiduciary's instruction, with or without supplementation or modification in the court's order; with continued non-compliance by the third party punishable as contempt of court; and
- (2) If the requesting party (as petitioner) prevails in the proceeding, the third party shall pay the following to the requesting party:
  - (A) Three times the actual damages sustained by the requesting party as a result of the third party's non-compliance;
  - (B) To the extent not already included in and reimbursed as part of the requesting party's actual damages, the actual travel expenses incurred by the requesting party in attending the hearing;
  - (C) The requesting party's reasonable attorney fees and disbursements, in an amount determined by the court; and
  - (D) The costs of the proceeding.

If a personal representative is appointed for a decedent's estate under IC 29-1-7 after a requesting party commences an enforcement proceeding under subsection (d) because of a third-party's non-compliance with a small estate affidavit, the personal representative shall be

substituted as the petitioner in the action and will be entitled to recover, on behalf of the estate and all the distributees, the relief described in paragraphs (1) and (2) of this subsection.

(f) A third party who:

- (1) receives a fiduciary's instruction (as defined in this section) from a requesting party with respect to property of a property owner; and
- (2) acts in good faith and without actual knowledge of a lack of authority of the requesting party; and
- (3) complies with that fiduciary's instruction,

is immune from civil or criminal liability that might otherwise result from the third party's actions in reliance on the fiduciary's instruction.

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**IC 29-1-13-10. Petitions; concealment; embezzlement; conversion; adverse interest; attachment Remedies for concealment, embezzlement, conversion, or third-party non-compliance.**

*[Existing subsections (a) and (b) unchanged]*

(c) If a person fails to comply with the written demand or instruction of the personal representative regarding property of the decedent, the personal representative may bring an enforcement proceeding and pursue available remedies under IC 29-1-13-10.5.

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***NEW***

**IC 29-3-9-12. Guardian's remedies for third-party non-compliance**

Section 12

- (a) This section applies only to a guardianship of the property of a minor or an incapacitated adult.
  - (b) If a third party fails to comply with the guardian's written demand or instruction issued by the guardian within the scope of his or her authority, the guardian may bring an enforcement proceeding and pursue available remedies under IC 29-1-13-10.5.
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**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**

Section 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~~ **ten (10) 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) **If a person:** A person who:

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

(2) fails or refuses to provide the requested information within ~~three (3) business~~ **ten (10) business days** after being presented with the affidavit;

is liable to the estate of the decedent. **the presenter of the affidavit may bring an enforcement proceeding against that person and may pursue available remedies under IC 29-1-13-10.5.**

~~(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.~~

## **IC 29-1-8-2. Personal property; payments; delivery; transfer; release**

### Section 2.

**(a)** The person paying, delivering, transferring, or issuing personal property or the evidence thereof pursuant to affidavit is discharged and released to the same extent as if he dealt with a personal representative of the decedent. He is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit.

**(b)** If any person to whom an affidavit is delivered **fails or** refuses to pay, deliver, transfer, or issue any personal property or evidence thereof, it may be recovered or its payment, delivery, transfer, or issuance compelled upon proof of their right in a proceeding brought for the purpose by or on behalf of the persons entitled thereto. **Proceedings and orders under this subsection are in addition to the remedies available in an enforcement proceeding under IC 29-1-13-10.5.**

(c) Any person to whom payment, delivery, transfer or issuance is made is answerable and accountable therefor to any personal representative of the estate or to any other person having a superior right.

#### IC 30-5-8-7. Reliance on power of attorney; immunity

##### Section 7.

(a) A person who acts in good faith reliance on a power of attorney is immune from liability to the same extent as if the person had dealt directly with the named principal and the named principal had been competent and not incapacitated.

(b) The named attorney in fact **or a person holding authority delegated by a named attorney-in-fact** may furnish an affidavit **or certification** to a person that states, to the best knowledge of the attorney in fact:

- (1) that the instrument relied on by the person is a true copy of the power of attorney;
- (2) that the named principal is alive;
- (3) that the power of attorney was validly granted and executed;
- (4) that the relevant powers granted to the attorney in fact have not been altered or terminated;
- (5) in the case of a successor attorney in fact, that the original attorney in fact has failed or ceased to serve and the successor attorney in fact is empowered to act on behalf of the principal;
- (6) **in the case of an affidavit or certification signed by a person holding delegated authority, that the authority was validly delegated and has not been revoked;** and
- (7) if the effective date of the power of attorney begins upon the occurrence of a certain event, that the event has occurred and the attorney in fact is authorized to act under the power of attorney.

**An affidavit or certification given under this subsection must be acknowledged by the signer in the presence of a notary public, or must state that the signer swears or affirms, under the penalties for perjury, to the statements in the affidavit or certification. As a condition to complying with instructions by an attorney in fact or a person holding delegated authority, a person receiving an affidavit or certification may require the affidavit or certification to be dated and signed within sixty (60) days before the person's**

receipt of instructions. However, a person receiving an affidavit or certification may not refuse to comply with an instruction on the grounds that the power of attorney itself is more than sixty (60) days old.

(c) A person who:

- (1) relies on an affidavit or certification described in subsection (b); and
- (2) acts in good faith;

is immune from liability that might otherwise arise from the person's action in reliance on the power of attorney that is the subject of the affidavit or certification.

### IC 30-5-9-9. Persons refusing to accept authority of attorney in fact

Section 9.

(a) Except as provided in subsection (b), a person who, not more than ~~three (3)~~ business ten (10) business days after receiving:

- (1) an original of a power of attorney, or
- (2) a true copy of a power of attorney and an affidavit or certification under IC 30-5-8-7(b),

refuses to accept the authority of an attorney in fact or a person with delegated authority to exercise a power granted under a power of attorney is liable to the principal and to the principal's heirs, assigns, and the personal representative of the estate of the principal in the same manner as the person would be liable had the person refused to accept the authority of the principal to act on the principal's own behalf. After receiving the documents specified in subdivision (1) or (2) of this subsection and an instruction from an attorney in fact or a person with delegated authority, if the person chooses to refer the power of attorney and any affidavit or certification to the person's in-house legal department or outside legal counsel for review, that referral does not extend the person's ten-business day period for acceptance of the authority of the attorney in fact or the person holding delegated authority. In any action brought in court to either force the acceptance of the authority of the attorney in fact or pursue damages as a result of the person's refusal to accept the authority of an attorney in fact, the person found liable for refusing to accept the authority of an attorney in fact shall pay the following:

- (1) Three (3) times the amount of the actual damages.
- (2) The attorney's fees of the person bringing the action to court.

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(3) Prejudgment interest on the actual damages from the date the person refused to accept the authority of the attorney in fact.

**(4) To the extent not included and reimbursed as part of the actual damages, the actual travel expenses incurred by the person bringing the action to court.**

**(5) The costs of the action.**

(b) A person refusing to accept the authority of an attorney in fact to exercise a power granted under a power of attorney is not liable under subsection (a) if:

- (1) the person has actual notice of the revocation of the power of attorney before the exercise of the power;
- (2) the duration of the power of attorney specified in the power of attorney has expired;
- (3) the person has actual knowledge of the death of the principal;
- (4) the person reasonably believes that the power of attorney is not valid under Indiana law and provides the attorney in fact with a written statement not more than ten (10) business days after the refusal, describing the reason that the power of attorney is not valid under Indiana law; or
- (5) the person reasonably believes that the power of attorney does not grant the attorney in fact with authority to perform the transaction requested and provides the attorney in fact with a written statement not more than ten (10) business days after the refusal, describing the reason the person believes the power of attorney is deficient under Indiana law.

(c) This section does not negate the liability a person would have to the principal or the attorney in fact under another form of power of attorney, under the common law, or otherwise.

**AMENDED**

**IC 29-1-14-9. Classification of claims; preferences**

Section 9.

(a) All claims shall be classified in one (1) of the following classes. If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

(1) Costs and expenses of administration.

(2) Reasonable funeral expenses. However, in any estate in which the decedent was a recipient of public assistance under IC 12-1-1 through IC 12-1-12 (before its repeal) or any of the following, the amount of funeral expenses having priority over any claim for the recovery of public assistance shall not exceed the limitations provided for under IC 12-14-6, IC 12-14-17, and IC 12-14-2:

TANF assistance.

TANF burials.

TANF IMPACT/J.O.B.S.

Temporary assistance to Other Needy Families (TAONF) assistance.

ARCH.

Blind relief.

Child care.

Child welfare adoption assistance.

Child welfare adoption opportunities.

Child welfare assistance.

Child welfare child care improvement.

Child welfare child abuse.

Child welfare child abuse and neglect prevention.

Child welfare children's victim advocacy program.

Child welfare foster care assistance.

Child welfare independent living.

Child welfare medical assistance to wards.

Child welfare program review action group (PRAG).

Child welfare special needs adoption.

Food Stamp administration.

Health care for indigent (HCI).

ICES.

IMPACT (food stamps).

Title IV-D (ICETS).

Title IV-D child support administration.

Title IV-D child support enforcement (parent locator).

Medicaid assistance.

Medical services for inmates and patients (590).  
Room and board assistance (RBA).  
Refugee social service.  
Refugee resettlement.  
Repatriated citizens.  
SSI burials and disabled examinations.  
Title XIX certification.

(3) Allowances made under IC 29-1-4-1.

(4) All debts and taxes having preference under the laws of the United States.

(5) Reasonable and necessary medical expenses of the last sickness of the decedent, including compensation of persons attending the decedent.

(6) All debts and taxes having preference under the laws of this state; but no personal representative shall be required to pay any taxes on any property of the decedent unless such taxes are due and payable before possession thereof is delivered by the personal representative pursuant to the provisions of IC 29-1.

(7) All other claims allowed.

(b) No preference shall be given in the payment of any claim over any other claim of the same class, nor shall a claim due and payable be entitled to a preference over claims not due.

~~(c) For purposes of subsection (a), costs and expenses of administration include the fee of a surrogate attorney that has been: —~~

~~(1) approved by a court under the rules of the Indiana Supreme Court governing surrogate attorneys; and —~~

~~(2) filed as a claim in the estate of a deceased attorney.~~

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**AMENDED**

**IC 29-1-15-16.5 Acquisition of beneficial interest in real property of estate by personal representative**

Section 16.5.

(a) This section applies to a supervised or an unsupervised estate.

(b) Unless authorized by:

(1) a will;

(2) a trust;

(3) the consent of all heirs, legatees, or beneficiaries; or

(4) an adjudicated compromise agreement approved by the court under IC 29-1-9; any sale (including an auction sale), encumbrance, lease, or rental of real property that is an asset of the estate is void if the sale, encumbrance, lease, or rental of the real property causes the personal representative to directly or indirectly acquire a beneficial interest in the real property, or

(5) an order of the court issued after notice and hearing to all interested persons, assuring adequate consideration is received by the estate for the interest acquired.—

(c) This section does not prohibit a personal representative from enforcing or fulfilling any enforceable contract or agreement:

(1) executed during the decedent's lifetime; and

(2) between the decedent and the personal representative in the personal representative's individual capacity.

**AMENDED**

**IC 29-3-9-6. Account of administration; filing with court; notice of hearing on account; order of discharge; limitation of actions against sureties**

Section 6.

(a) Unless otherwise directed by the court, a guardian (other than a temporary guardian) shall file with the court:

(1) at least biennially, not more than thirty (30) days after the anniversary date of the guardian's appointment; and

(2) not more than thirty (30) days after the termination of the appointment; a written verified account of the guardian's administration.

(b) A temporary guardian shall file with the court, within thirty (30) days after the termination of the temporary guardian's appointment, and otherwise as ordered by the court, a written verified account of the temporary guardian's administration.

(c) A written verified account required under this section must include the incapacitated person's or minor's current residence and a description of the condition and circumstances of the incapacitated person or minor.

(d) Upon the filing of an accounting in a guardianship, hearing and notice thereof shall be had as set forth in this section.

(1) The Court shall give notice as set forth under this provision advising the person entitled to receive notice that an accounting has been filed and will be acted upon by the Court on the date set unless written objections are presented to the court on or before that date.

~~(d)~~ (2) Notice of the hearing of each account of a guardianship shall be given, unless waived, to the following:

(1a) The protected person unless waived by the court. If notice to the protected person is waived, notice shall be given to a relative, not serving as guardian in the following priority:.

- (1) The protected person's spouse;
- (2) One of the protected person's adult children; or
- (3) One of the protected person's parents.

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(4) If the incapacitated person does not have a spouse, adult child, or parent, the Court may appoint a Guardian Ad Litem to receive a copy of the guardian's account to review the same on behalf of the incapacitated person.

(b2) In the case of a protected person who has died, the personal representative of the estate of the protected person, if any. If the guardian and the personal representative are the same individual, then the Court may appoint a Guardian Ad Litem to review the same on behalf of the deceased incapacitated person.

(c3) Any other persons that the court directs.

(ed) When an account other than an account in final settlement is filed, the court may approve the same ex parte, but the account may be reviewed by the court at any subsequent time and does not become final until an account in final settlement is approved by the court after notice and hearing.

(ef) When notice of hearing has been given under this section, the order of the court approving the intermediate account or the final account is binding upon all persons.

(fg) When a guardian files with the court proper receipts or other evidence satisfactory to the court showing that the guardian has delivered to the appropriate persons all the property for which the guardian is accountable as guardian, the court shall enter an order of discharge. The order of discharge operates as a release from the duties of the guardian's office that have not yet terminated and operates as a bar to any suit against the guardian and the guardian's sureties, unless the suit is commenced within one (1) year from the date of the discharge.

**NEW**  
**30-4-3-1.3**

(a) While a trust is revocable and the settlor has the capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

(b) A settlor is presumed to have capacity for the purposes of subsection (a) of this section until the trustee has received the written certification of at least one licensed physician that the settlor lacks the capacity to revoke the trust.

(c) If a revocable trust has more than one settlor, the duties of the trustee are owed to all of the settlors having capacity to revoke the trust.

(d) During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

(e) If a trustee reasonably believes that a settlor of a revocable trust lacks capacity to revoke the trust, the trustee shall be authorized to provide information to the settlor's designated agent (even if the designated agent is one of two or more trustees), or to any beneficiary who, if the settlor were deceased, would be entitled to distributions from the trust.

(f) A person who becomes a successor trustee of a revocable trust upon the death, resignation or incapacity of a trustee who was also a settlor shall not be liable for any act or failure to act by the settlor while the settlor was trustee.

(g) Where the predecessor trustee was also a settlor, a successor trustee of a revocable trust shall have no duty to investigate any act or failure to act by the predecessor trustee, no duty to review any accounting of the predecessor trustee, and no duty to take action on account of any breach of trust by the predecessor trustee.

**AMENDED  
IC 30-4-3-35**

**Matrimonial trusts; election; effect of the death of a spouse or the dissolution of the marriage; revocation**

Section 35.

(a) This section is intended to ensure that if real property is transferred to one (1) or more revocable trusts created by a husband and wife for estate planning purposes, the husband and wife will enjoy/maintain the real estate ownership protections that/equivalent to those they would have otherwise enjoy if they owned that real property in an estate by the entirety including an estate by the entirety created under IC 32-17-3-1.

(b) As used in this section, "joint matrimonial trust" means a single inter vivos trust established under this section by settlors who are ~~related as~~ husband and wife.

(c) As used in this section, "matrimonial property" means real property that:

(1) is subject to a written election to treat the property as matrimonial property under this section; and

(2) is owned by a matrimonial trust.

(d) As used in this section, "matrimonial trust" means a trust established under this section to own matrimonial property.

(e) As used in this section, "separate matrimonial trust" means a separate trust that is also a matrimonial trust.

(f) As used in this section, "separate trust" means a trust established by one (1) individual.

(g) A matrimonial trust may be established:

(1) jointly by a husband and wife; or

(2) in two (2) or more separate trusts.

(h) A husband and wife may elect to treat real property as matrimonial property with a written statement of the election:

(1) in an instrument or instruments conveying the real property to a matrimonial trust or trusts; or

(2) in a separate writing that must be recorded in the county where the real property is situated and indexed in the records of the county recorder's office to the instrument or instruments that convey the real property to a matrimonial trust or trusts.

(i) A guardian of a husband or wife may make an election under this section:

(1) without the approval of the court if the guardian has unlimited powers under IC 29-3-8-4; and

(2) with the approval of the court in all other cases;

(j) An attorney in fact of a husband and wife may join in the making of an election under this section under the powers conferred upon the attorney in fact by IC 30-5-5-2 if the power of attorney is recorded in the county where the real property is situated and indexed in the records of the county recorder's office to the instrument or instruments that convey the real property to a matrimonial trust or trusts.

(k) The terms of a separate matrimonial trust or a joint matrimonial trust may (but are not required to) restrict the sale or transfer of the matrimonial property for:

(1) the lifetime of the settlor who dies first;

(2) the lifetime of the surviving settlor; or

(3) another defined time period.

(l) An interest in matrimonial property is not severable during the marriage of the husband and wife unless:

(1) both the husband and wife join in the severance in writing; or

(2) a third party owns and forecloses a mortgage or other lien against the interests of both the husband and wife in the matrimonial property.

(m) Notwithstanding any other provision of this section, the legal rights of a lienholder that exist at the time of an election to treat the real property subject to the lien as matrimonial property may not be subject to a severance described in subsection (l) without the lienholder's written consent.

(n) To the extent that a matrimonial trust continues to be a matrimonial trust after the death of a settlor (as provided by subsections (o) and (q)):

(1) real property held or owned in a separate trust and for which an earlier election was made under this section, continues to be matrimonial property; and

(2) an unsecured creditor or judgment lien creditor who has a claim only against the deceased settlor but not against the surviving settlor cannot enforce that claim against the deceased settlor's interest or the surviving settlor's interest in the matrimonial property.

(o) After the death of a settlor of a matrimonial trust (whether separate or joint), the issue of whether the surviving settlor's interest in the matrimonial property will be exposed to the claims of the surviving settlor's existing creditors or new creditors must be determined according to:

(1) The nature and extent of the surviving settlor's interest in the matrimonial property under the terms of the deceased settlor's separate trust or the joint trust;

(2) All the other relevant facts and circumstances; and

(3) Pertinent principals of non-trust law outside this article.

(pe) Matrimonial property held in a separate matrimonial trust or in a joint matrimonial trust continues to be matrimonial property after the death of one (1) settlor:

(1) if the settlors reserved a life estate in the matrimonial property for each settlor when they conveyed the matrimonial property to the matrimonial trust or trusts; or

(2) if the deceased settlor's trust (whether it is a joint or a separate trust) provides to the surviving settlor:

(A) a life estate;

(B) an interest that qualifies for a deduction from the gross estate of the decedent under Section 2056 of the Internal Revenue Code regardless of whether an election is made to qualify the interest for the deduction; or

(C) in some respect the current right to occupy or receive rent, royalties, or other kinds of income with respect to the matrimonial property.

(qp) A separate matrimonial trust established by a deceased settlor ceases to be a matrimonial trust upon the termination of payments to the surviving settlor as a result of the surviving settlor's death or as a result of the surviving settlor's valid disclaimer of all interests in the matrimonial property held in the deceased settlor's trust.

(rq) A separate matrimonial trust established by a settlor who remains alive continues to be a matrimonial trust during that settlor's remaining lifetime, so long as the settlor retains the right to use or occupy matrimonial property held in the settlor's separate trust.

(sf) A matrimonial trust ceases to be a matrimonial trust upon the dissolution of the marriage of the settlors.

| (ts) A husband and wife may revoke a matrimonial trust by together executing a writing expressing the revocation

(NEW) 29-1-10-20 Effect of restrictions on authority of personal representatives and courts in administration.

(a) All authority to act with respect to an estate administered under chapters 7 and 7.5 of this article is vested exclusively in the personal representative.

(b) If a section in this article prohibits an action by the personal representative, the prohibition will restrict the personal representative, regardless of court order, unless a majority of the distributees expressly consent to the action or the section imposing the restriction expressly permits a court to approve the prohibited action.

15.1(b)

October 2, 2012  
Probate Code Study Commission  
Exhibit B