TRUST ISSUES AND GUIDELINES FOR INDIANA COUNTY AUDITORS, ASSESSORS, AND RECORDERS

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1. **Preface**.

This brief outline identifies the kinds of trusts that county officials will most likely encounter in real estate transfers and common issues pertaining to trusts. The various kinds of trusts include almost infinitely diverse details, but only a few details are relevant to the process of real property assessment, real estate transfer records, and instrument recordation. Therefore, this outline provides the relevant common issues and best practices to help county officials fulfill their respective responsibilities with respect to real estate title instruments offered for recordation when the instruments refer to trusts.

2. **What is a Trust**?

A trust is a relationship between the transferor of an asset and a transferee (the "trustee"), who accepts the asset as a caretaker under terms and conditions that direct how the trustee must manage the assets and to whom the trustee should distribute the asset at some future date. Generally, a trust is established through a last will and testament, trust agreement, declaration of trust, or other written document.

3. **Types of Trusts**.

Three basic types of trusts exist among the countless varieties of trusts. A person can create two kinds of trusts during the person's lifetime (both kinds of trusts known by lawyers as "inter vivos" trusts), namely, revocable trusts (sometimes called "living trusts") and irrevocable trusts. The third kind of trust, known as a "testamentary" trust, is a kind of trust that a person (often known as the "testator") makes by including trust provisions included in the testator's last will and testament, and the trust takes effect as an irrevocable trust after the testator's death.

3.1. **Revocable Trusts**.

A revocable trust is made by a trust agreement signed by the trust creator, sometimes called the "settlor" or "trustor," and one or more trustees. Usually, the settlor reserves the right to revoke (cancel) or amend (change) the trust, but the settlor can give that right to others. A revocable trust is an estate planning device that gives the settlor the ability to regulate asset management during the settlor's lifetime, even if the settlor becomes disabled. A revocable trust also provides a plan to transfer asset ownership to trust beneficiaries after the settlor's death. The most common reason for someone to make a revocable trust is to avoid the necessity of someone petitioning a county probate court for administration of the settlor's estate (some people refer to this as avoiding "probate"). The settlor can also be the trustee.

3.2. **Irrevocable Trusts**.

An inter vivos irrevocable trust (that is, a trust created and funded by a settlor during his or her lifetime) is very similar to a revocable trust, but the settlor usually gives up the right to revoke or amend the trust. The primary reason for a settlor to create an irrevocable trust is to transfer ownership of assets so the assets cannot be treated as belonging to the settlor, while also providing a system to regulate asset management for as long as the trust retains ownership of the assets. Wealthy settlors use irrevocable trusts to remove assets from their federally taxable estates and thereby minimize federal estate taxes. There are several other reasons for settlors to transfer assets to irrevocable trusts, but the reasons usually involve a settlor's desire to prevent the settlor from being treated as the legal owner of the irrevocable trust's assets. The settlor can also be the trustee and the settlor may reserve certain limited rights over the trust, including, for an example of the many kinds of potential rights, the power to receive income from the trust or modify the beneficiaries through the settlor's last will and testament.

3.3. **Testamentary Trusts**.

A testator makes a testamentary trust by including language in his or her last will and testament that specifies that a trustee will retain assets in trust until some distribution date in the future instead of distributing the assets soon after the testator's death. A testamentary trust only takes effect after the following steps conclude:

a) The testator dies;

b) Someone presents the will to the probate court with a petition for the will to be admitted to probate;

c) The court orders the clerk to enter the will into the will record (also known as "admitting the will to probate"); and

d) The clerk complies with the order to enter the will into the will record (sometimes called “probating” the will or “spreading the will of record”).

Naturally, the testator cannot be a trustee because the trust administration does not begin until after the testator’s death.

Is not necessary for the court to appoint a personal representative (also known as some circumstances as the “executor,” and in other circumstances as the “administrator”) in order for a testamentary trust to effectively receive ownership of real estate that passes to the trustee under the testator’s will.Indiana Code § 29-1-7-23 provides that all real property that is part of a deceased person’s probate estate passes automatically at death and by operation of law to the legatees (if there is a will) or to the heirs (if the decedent had no will). If a personal representative is appointed for the estate, he or she can sign a personal representative’s deed identifying the trustee of the testamentary trust as the new owner of the real estate, but that deed merely “clears” and updates the record title to the real estate; the actual transfer of ownership to the trustee of the testamentary trust occurred earlier, at the moment of death.

Testamentary trusts may be some of the earliest kinds of trusts in world history. Although most people are more familiar with revocable trusts, revocable trusts have only been prevalent in the United States for about fifty years.

3.4. “Grantor Trusts.”

“Grantor trust” is a label commonly used to refer to either an irrevocable or revocable trust that is treated, for federal income tax purposes, as the alter ego of the settlor who created the trust, or in some situations as the alter ego of the sole current beneficiary of the trust. Usually, “grantor trust” status is created intentionally, as a result of the settlor’s retention of the right to amend or revoke the trust, or the settlor’s entitlement to receive all of the trust income, or the settlor’s possession of certain powers to withdraw and substitute trust assets or to add beneficiaries.

For federal income tax purposes, a grantor trust and its assets are not treated as separate from the person (settlor or current beneficiary) who is the “grantor” or “owner,” even though the trust is a separate “person” for state property law purposes, and (if the trust is irrevocable) as a separate person for estate and gift tax purposes. An irrevocable trust may be structured as a grantor trust for estate and gift tax planning reasons, so that the trust’s income is directly taxable to the “grantor,” even if the “grantor” does not own the trust assets for any other purpose.

The fact that a particular trust is a "grantor trust" does not have any special implications with respect to real or personal property transferred to or acquired by the trust or its trustee(s). A grantor trust is not required to have (and usually does not have) a separate federal tax I.D. number (TIN or EIN); instead, the trust uses the social security number of the individual who is the "grantor" and owner of the trust for income tax purposes.

3.5. "Land Trusts."

Land trusts are specifically permitted under the laws of States such as Illinois and Indiana (*see* Indiana Code § 30-4-2-13. A land trust is a trust that owns real property, and that is structured so that the beneficiary or beneficiaries of the trust have the power to directly manage the trust assets, and/or the power to direct the trustee to sell the trust assets or how to manage the trust assets. The trustee of a land trust has the power to sell trust assets only in response to a written direction from the beneficiary or beneficiaries or, if there is no written direction made, after the passage of a time period specified in the written trust document. A trust may be a "land trust" even if the words "Land Trust" do not appear in the trust's name.

A land trust is a "vehicle" that is often used to prevent the identities of the trust beneficiaries — who have the real power to control and to sell trust-owned real estate — from being publicly known. The trustee and the income tax authorities will know who the beneficiaries are, and lenders who make mortgage loans to such a land trust will know, but the beneficiaries' identities can otherwise be kept secret.

3.6. "Special Needs Trusts" and "Supplemental Needs Trusts."

Trusts of this type are often abbreviated as "SNTs and are used in long-term-care planning. A SNT is an irrevocable trust that is typically created for the benefit of an individual who is physically or mentally disabled. Usually, a SNT is structured as a discretionary spendthrift trust, where the timing, amounts, and purposes of all distributions and expenditures are left up to the discretion of the trustee, and where neither the disabled beneficiary, nor the beneficiary's creditors, nor any other person has the power to compel the trustee to make any particular distribution or expenditure during the beneficiary's lifetime. The trustee uses this discretion skillfully and selectively by spending trust assets and income in ways that will not interrupt or end the beneficiary's entitlement or eligibility for public benefits based on need, such as Supplemental Security Income (SSI) or Medicaid.

A SNT may be "self-settled" (funded with assets that were previously owned by the disabled individual) and subject to numerous requirements under federal and State Medicaid rules. Or a SNT may be "non-self-settled" or "third-party" (funded with assets that are gifted by third parties directly to the trustee, either during the third party's lifetime or at death), so that the disabled individual never owned or owns a direct interest in the assets.

Unless the written terms of the SNT restrict the trustee's powers, a SNT can purchase or otherwise acquire and own real and personal property in the same way as any other irrevocable or testamentary trust.

3.7. Qualified Personal Residence Trust (QPRT).

A "qualified personal residence trust" or QPRT is an irrevocable trust that is created for gift and estate planning purposes during the lifetime(s) of an individual or married couple, in order to eventually move the value of personal residential real estate out of the "estates" of the individual or couple for estate tax purposes, and to protect the future growth in value of that residential real estate from the estate tax.

The settlor(s) of a QPRT fund it by transferring ownership of the residential real estate to the trustee. At the end of a fixed term of years (5, 10, 15 years, etc.), the QPRT's terms direct the trustee to transfer ownership of the real estate to or for the benefit of remainder beneficiaries (such as children or grandchildren) who are not the settlor(s) of the QPRT. During that fixed term of years, the settlor(s) have the right to continue to use and occupy the residential real estate rent-free. After the end of the fixed term of years, if the settlor(s) are still alive, they can continue to use and occupy the residential real estate only by paying a market rate of rent to the trustee or to the remainder beneficiaries.

During the fixed term of years, the living settlor(s) of a QPRT qualify as "owners" of the residential real estate for property tax purposes, including for purposes of the homestead deduction and credit.

3.8. **Matrimonial Trust**.

A "matrimonial trust" is a trust created by a married individual to be the record owner of real property that might otherwise be titled in the names of the married couple as husband and wife (tenants by the entireties). A single parcel of real estate can be owned by one matrimonial trust that is jointly created by both spouses, or each spouse could create a separate trust, and each of the two matrimonial trusts could own an undivided fractional interest in the same real estate. When real estate is owned by a matrimonial trust and has been properly established as "matrimonial property," the real estate will have much of the same protection from the individual creditors of each spouse that would apply to real estate owned co-owned directly by the spouses as husband and wife.

Real estate owned by one “joint matrimonial trust” or by two separate “matrimonial trusts” will not have the desired creditor protection, and will not be “matrimonial property,” unless the two spouses make a written election that is either (a) stated in the body of the deed that transfers the real estate to the trust(s) or (b) stated in a separate election that is recorded with the county recorder and indexed to the deed(s) that transferred the real estate to the trust(s). *See* I.C. § 30-4-3-35.

Real estate that is owned by one or two matrimonial trusts ***could be*** owner-occupied residential real estate, but it is also possible for non-residential real estate to be owned by a matrimonial trust(s). There is no limit on the number of parcels of real estate that an Indiana married couple may own “through” or via a matrimonial trust(s). If either or both spouses have the right to use and occupy the real estate as a principal residence and in fact occupy the real estate as their principal residence, the real estate will qualify for the homestead deduction and credit. After the death of one spouse, the surviving spouse may or may not be able to continue to claim the homestead deduction and credit for the real estate; it will depend on the nature and extent of the interest (including any right to use or occupy the real estate) that the trust agreement(s) give to the surviving spouse.

4. **Transfers to Trusts**.

Numerous methods exist to transfer assets to trusts. A settlor can transfer assets or cause assets to be transferred to his or her revocable trust or irrevocable trust during the settlor’s lifetime, or after the settlor’s death. A testamentary trust can only receive transfers after the testator’s death because a testamentary trust cannot begin its existence during the testator’s lifetime. It would difficult to list all of the various ways that assets transferred to trusts, but this part of the outline attempts to list the most common ways for real estate to transfer to trusts.

4.1. **Deeds Other Than Transfer on Death Deeds**.

4.1.1. **Anyone can Transfer**.

Any person, including the trustee of a trust that owns real estate, can transfer real estate to an inter vivos trust by deed.

4.1.2. **Testamentary Trust Cannot Receive Inter Vivos Transfers**.

It is not possible to transfer real estate to a testamentary trust during the testator's lifetime.

4.1.3. **Anyone Can Transfer to a Testamentary Trust after the Will Is Probated**.

Anyone, including the trustee of another trust, can transfer real estate to a testamentary trust after the testator has died and the testator's last will and testament has been probated.

4.2. **Transfer on Death Deeds**.

4.2.1. **Indiana Transfer on Death Property Act**.

The Indiana Transfer on Death Property Act (Indiana Code Chapter 32-17-14) permits a property owner to designate beneficiaries of the owner's real estate in a transfer on death deed (referred to hereafter as a "TOD deed").

4.2.2. **TOD Is Not Inter Vivos**.

The beneficiaries of a TOD deed receive ownership of the real estate after the owner's death.

4.2.3. **Trusts Can Be TOD Beneficiaries**.

A real estate owner can designate any kind of trust as the beneficiary of a TOD deed.

4.2.4. **Owners Can Change TOD Beneficiaries**.

The owner can change the beneficiary of a TOD deed at any time during the owner's lifetime, or the owner can cancel the TOD deed and simply retain ownership of the real estate without having any TOD beneficiaries.

4.2.5. **TOD Transfer After Owner's Death**.

Real estate ownership only passes to the beneficiary of a TOD deed after the owner's death, so a deed may designate a trust as the TOD beneficiary, but the actual transfer of the real estate to the will not take effect until after the owner's death.

4.2.6. **<u>TOD Provisions Are Permissible in Warranty Deeds and Other Kinds of Deeds</u>**.

Some county officials believe mistakenly that warranty deeds and other deeds that actually transfer real estate ownership cannot have TOD provisions, but Indiana Code § 32-17-14-13 provides specifically that:

> (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.
>
> (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.
>
> (c) A direct transfer of property to a transferee to hold as owner in beneficiary form is effective when the written instrument perfecting the transfer becomes effective to make the transferee the owner.

<u>Therefore, no county official should require a real estate transferee that wants to designate TOD beneficiaries to first take title to the real estate without TOD provisions, and then to make and record a separate TOD deed</u>.

4.3. **Transfer by Last Will and Testament**.

A last will and testament can transfer ownership of real estate owned by the testator, alone, up to the time of the testator's death. The last will and testament can provide for the real estate to pass into a testamentary trust established within the last will and testament. It is common for a testator to make a special will commonly referred to as a "pour over" will that complements the testator's revocable trust by directing in the terms of the will that any assets that the testator owns individually up to the time of the testator's death will transfer to the revocable trust. Sometimes, testators make pour over wills that distribute assets, upon death, to inter vivos irrevocable trusts.

5. Transfer to Trust Issues (and Commonly Misunderstood Non-Issues).

5.1. Real Estate Ownership.

5.1.1. General Rule.

It is important for a county assessor or county auditor to know whether an instrument transfers ownership at the time that someone presents it for recordation. The simple test for this issue is whether the grantor’s name is different from the transferee’s name.

5.1.2. Nature of a trustee's estate.

A person's individual ownership of real estate is entirely different from the person's fiduciary ownership of real estate as trustee of an irrevocable trust. Indiana Code § 30-4-2-6(b) provides that, "The extent of the trustee's estate in the trust property is limited to that which is necessary to enable him to perform the trust."

If the trustee’s fiduciary title would be attributable to the individual that serves as trustee, it would conflict with the idea that the trustee must manage trust property and deliver it to or for the benefit of the trust beneficiaries upon termination of the trust.

This concept is similar to an individual having a mortgage deduction on his home and an LLC, of which the individual is a member, having a mortgage deduction on the LLC’s business property.

5.1.3. Grantee Name in Transfer to Trust.

It does not matter whether a deed to trust or a TOD deed with a trust as a beneficiary identifies the transferee or TOD beneficiary by the name of the trustee or the name of the trust. Indiana Code § 30-4-1-2(21) provides this flexible rule as follows:

> (21) "Trust property" means property either placed in trust or purchased or otherwise acquired by the trustee for the trust regardless of whether the trust property is titled in the name of the trustee or the name of the trust.

A trust instrument or trust document should identify the names of a trust and the trustee, but a trust does not have to have a name under the law. As a practical matter, the name of a trust may be more descriptive and easier to identify in official County records than the name of the trustee. For example, if a deed says “Jane Jones warrants and conveys to Jane

Jones-Smith, as trustee of the Jane Jones-Smith Trust," it is much more descriptive to record the transferee as the "Jane Jones-Smith Trust," than "Jane Jones-Smith, Trustee." However, if the instrument only identifies the transferee as something like "Jane Jones-Smith, as trustee of the trust established under agreement dated August 18, 2016," the only practical way to identify the grantee is some variation of "Jane Jones-Smith, Trustee."

If a trust has a name in the format "John Doe Irrev Trust FBO Jane Smith U/A/D 1-31-2009," that name would normally mean that John Doe was the settlor of the trust, Jane Smith is the initial primary beneficiary ["FBO" means 'for benefit of"], and the trust instrument or trust document was dated January 31, 2009 ["U/A" or "U/A/D" means "under agreement dated"].

When the trust that has owned or receives ownership of real property is a revocable trust, or where that trust *was* a revocable trust before the death of the settlor, the trust instrument or trust document may have been amended several times, or "restated" (where the original or previous version of the trust document is completely replaced by a new trust document). It is a common convention for a currently revocable trust or a formerly revocable trust to be referred to by a "name of the trust" that contains the date of the last amendment to or restatement of the trust document.

A trust's official name, or the name that the trustee uses for a trust, may contain words such as "Family," Marital," "Spousal, "Real,' "Pure," or "Common Law," but the use of any of these words does not compel or justify any particular conclusion about whether the trust is revocable or irrevocable or about who the beneficiaries are. The presence of "Living" or "Loving" in the name of a trust usually indicates that the trust was revocable at one time, but it may no longer be revocable at the time that a deed or other real estate document is presented for recording.

The identities of the beneficiaries of a trust are irrelevant to a county assessor or county auditor, except for the purpose of determining whether a trust beneficiary is an "owner" of trust-owned real property under Indiana Code § 6-1.1-1-9 or whether Ind. Code § 6-1.1-12-17.9 entitles the trust to claim a property tax deduction such as the homestead deduction.

5.1.4. **Transfer to Owner, TOD to Trust**.

As stated earlier in this outline, it is entirely appropriate under Indiana Code § 32-17-14-13 for an actual transfer of real estate ownership to include a TOD provision such as, "Jane Jones warrants and conveys to Jane Jones-Smith, TOD Jane Jones-Smith Trust." This language in a warranty deed, quitclaim deed or other instrument of real estate transfer actually transfers real estate title from a person named "Jane Jones" to another person named "Jane Jones-Smith." The TOD provision simply adds a TOD beneficiary as a secondary feature of the deed.

5.1.5. **Transfer Trust by Last Will and Testament or by a TOD Deed to a Testamentary Trust**.

5.1.5.1. **Transfer upon Probate of Will**.

If a last will and testament provides for asset transfers to a trust, the transfers take place when the county clerk enters the last will and testament into the will record if the testator owned real estate without TOD provisions or anyone having survivorship rights.

5.1.5.2. **Final Decree in Supervised Estate Administration**.

In supervised estate administration, the personal representative usually presents the probate court's final decree to the auditor and recorder for recordation.

5.1.5.3. **Other records of title transfer**.

If the estate is administered with unsupervised administration, or if the will is probated without administration, the probate process leaves no record of the title transfer in the offices of the assessor, auditor, or recorder. Sometimes, a personal representative in unsupervised administration will issue and record a personal representative's deed to document the statutory transfer of real estate title to the decedent's heirs-at-law (if the decedent died without a will) or devisees (the beneficiaries of a will). Otherwise, it is necessary for someone to make a record of the ownership transfer in those offices in order to for the auditor to update the auditor's transfer records. That record can either be in the form of an affidavit or a memorandum in a deed that indicates when the owner died and recites the probate information, including the date of the will's admission to probate and a citation to the will record in which the will is admitted to probate. Preferably, the affidavit or memorandum will also give the date of the court's order and the cause number of the case in which the petition for probate of the will was filed.

5.1.5.4. **Title Transfer Records Concerning TOD Deeds**.

A testamentary trust can be is a TOD deed beneficiary because Indiana Code § 32-17-14-21(d) provides, "(d) For purposes of this section, 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." A similar notice issue exists for county assessors and auditors in such cases as in the cases of probated wills that transfer real estate to trusts about making a record of the transfer to the trust after the owner's death. Fortunately, a lawyer can resolve the issue with the same kind of affidavit or deed memorandum about the probate of the owner's last will and testament as in the case of a probated will that transfers real estate to a trust.

5.1.6. **Transfers Involving Disclaimers**.

There are times when an estate plan will provide a benefit to a beneficiary that create problems for the beneficiary to receive the benefit. For example, if a beneficiary is wealthy, inheritance may increase the amount of wealth that would be exposed to federal estate tax upon the beneficiary's death, so it may be desirable for the distribution to bypass the beneficiary. Unfortunately, it is not always possible to know whether an estate plan distribution will be helpful or disruptive until after the person establishing the estate plan dies.

An estate planning device exists to remedy such situations by allowing the beneficiary to "disclaim" an estate plan distribution and be treated as if the beneficiary had died before the deceased estate plan owner. This is particularly true in some estate planning strategies between married couples, in which a spouse may want to disclaim assets so that they can pass into a specially designed trust that minimizes estate taxes but provides limited benefits to the surviving spouse.

You almost have to flowchart the way a disclaimer plan functions after the decedent's death. An example may help illustrate how to break down the way the plan works in sequential steps.

Consider a wealthy married couple named Mr. and Mrs. Smith that owns real estate as husband and wife, which constitutes a form of real estate ownership known as “tenancy by the entireties.” If Mr. Smith dies first, Mrs. Smith will have a right of survivorship that will entitle her to full ownership of real estate. However, if Mr. Smith has established a last will and testament or a related revocable trust estate plan that includes estate tax minimization provisions, it may be desirable for Mrs. Smith to disclaim her share of the real estate so that the real estate will pass through Mr. Smith’s estate plan.

1. The disclaimer causes Mrs. Smith to be treated as if she predeceased Mr. Smith, so that the real estate became part of his "probate estate" and passed under the control of his last will and testament, instead of passing to her as the surviving cotenant under their cotenancy that previously provided survivorship rights to her.

2. Mr. Smith's will a revocable trust may state a general rule that everything passes to the surviving spouse with no strings attached, so long as such assets exceed the value of the federal estate tax credit (commonly thought of as the federal estate tax exemption, the value of which is $5.49 million in 2017). However, the exception in the next point frequently swallows the general rule.

3. Mr. Smith will or trust may provide for the real estate and other assets pass into a trust, commonly known as a “credit shelter” trust, for the benefit of Mrs. Smith. A common credit shelter trust funding formula because the credit shelter trust to receive assets worth up to the value that is effectively exempted from the federal estate tax by the estate tax credit. Some older credit shelter trusts were established before the federal estate tax credit was increased to its current level, but the applicable assets often have not increased as much as the estate tax credit has increased, so the credit shelter trust often consumes all of the deceased spouse’s assets.

4. A credit shelter trust, by its nature, provides a life estate for the benefit of the surviving spouse. The highlighted language of the testamentary trust specifically provides that Mrs. Smith will have the use of, or rent from, any real estate held in the trust.

5. The life estate that the testamentary trust provides for Mrs. Smith is a separate, indirect interest in the real estate to which she becomes entitled under the trust without respect to her original cotenancy with Mr. Smith. The disclaimer does its job by terminating the original cotenancy, but it cannot terminate the life estate because the life estate in the real estate only exists as a result of the disclaimer. It is important to distinguish that Mrs. Smith uses the disclaimer to disclaim direct ownership of real estate, but she did not acquire direct ownership of real estate through the testamentary trust. She only holds an interest in the testamentary trust, which provides an indirect

life estate in the real estate. Therefore, she does not receive the real estate through the trust, but only an interest in the trust that provides life estate rights in the real estate under the terms of the trust. If she actually received a direct interest in the real estate, then she would be able to transfer that interest to someone else, but the clause that appears under the second set of highlighted text specifically provides that her real estate rights may not be assigned, attached, or subject to claim without the trustee's prior consent.

6. Mrs. Smith's life estate under the testamentary trust is an interest in the trust, which, combined with her occupation of the real estate as their residence, entitles the trust to claim the homestead deduction under Indiana Code § 6-1.1-12-37, which refers to the qualifications for a trust to claim deductions under Indiana Code § 6-1.1-12-17.9, and the supplemental homestead deduction under Indiana Code § 6-1.1-12-37.5, which incorporates eligibility for the homestead deduction under Indiana Code § 6-1.1-12-37 by direct reference, and consequently, also incorporates the qualifications for a trust to claim deductions under Indiana Code § 6-1.1-12-17.9 by indirect reference.

5.2. **Trustee Power**.

5.2.1. **Issue of Trustee Power**.

The trustee power issue is a question of whether the trustee has enough power to do something that an instrument signed by the trustee purports to do. Generally, a person cannot transfer ownership or a lesser interest in real estate unless the person actually owns the real estate and has authority to transfer the ownership or lesser interest.

5.2.2. **People Affected by the Trustee Power Issue**.

Real estate buyers and banks that give take mortgages on real estate as loan collateral cannot acquire the real estate interests that they seek if the transferors lack ownership or power to convey the interest. Therefore, responsible buyers and bankers hire title companies and lawyers to verify transferors' ownership and conveyance powers.

5.2.3. **People Not Affected by the Trustee Power Issue**.

The trustee power issue should not concern anyone other than real estate buyers and banks. If an instrument indicates that an owner of record is transferring ownership or a lesser interest, the only concern of the county assessor, auditor, or recorder should be whether the transferor's name matches the owner's name in the county records. For example, a county official should not be concerned about the powers of a transferor identified as “Jeff Hawkins as trustee of the Jeff Hawkins Trust” if the owner’s name in the county records is the “Jeff Hawkins Trust,” but a transferor identified as “Jeffrey Hawkins as trustee of the Jeffrey Hawkins Trust” is an ownership problem if the owner’s name in the county records is the “Jeff Hawkins Trust.”

5.2.4. Use and Recording of “Trust Certifications.”

Indiana Code § 30-4-4-5 permits the trustee of any trust to provide a third party (such as a title insurance company, mortgage lender, or purchaser) with a “Certification of Trust,” instead of giving that third party a complete copy of the trust instrument or trust document. Such a third party who receives a certification of trust may rely on its contents and is protected from any liability resulting from its reliance, unless the third party has actual knowledge that information in the Certification is incorrect.

The trustee of a trust has an incentive and a duty to maintain the privacy and the non-public nature of the trust’s terms, including the identities of the beneficiaries and the nature of their interests, because third parties such as mortgage lenders and purchasers have no independent legal right to receive such information. Signing and providing a Certification of Trust is one easy way for the trustee to provide third parties with the information and assurance that they *do* need, while preserving the confidentiality of most of the trust’s provisions.

Sometimes, the trustee of a trust that owns real property will record a certification of trust with the county recorder, to confirm in the public record who the current trustee(s) are, whether the trust is revocable, and what relevant powers are held and exercisable by the trustee(s).

A Certification of Trust must be signed by at least one trustee (any current trustee) and must contain the following information:

- That the trust exists and the date the trust instrument was executed.
- The identity of the settlor.
- The identity and address of the currently acting trustee.
- A description of the powers of the trustee.

- The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust.

- The authority of co-trustees (if more than one) to sign or otherwise authenticate and whether all or less than all the co-trustees are required in order to exercise the powers of the trustee.

- The manner by which the trustee takes title to trust property.

- A statement that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

A third party that receives a Certification of Trust may require the trustee to provide copies of pages from the trust document or trust instrument that identify the current trustee *and* which confirm the trustee's power to act that is relevant to the particular transaction (for example, the power to purchase, sell, mortgage, lease, or subdivide real estate). Typically, the trustee will provide copies of those relevant pages from the trust document or trust instrument, plus the first and last pages and signature page, along with the Certification of Trust.

5.3. Property Tax Issues.

5.3.1. Sales Disclosure.

Indiana Code Chapter 6-1.1-5.5 requires parties to a "conveyance" to complete, sign, and file a sales disclosure with the County assessor before recording a "conveyance document." Indiana Code § 6-1.1-5.5-1 says that for purposes of Indiana Code Chapter 6-1.1-5.5, "conveyance" means any transfer of a real property interest for valuable consideration.

Generally speaking, people make trusts and transfer assets to trusts for estate planning purposes without exchanging money or other valuable consideration. Similarly, trustees generally transfer assets to trust beneficiaries in compliance with trust provisions without exchanging money or other valuable consideration. In such cases, the transactions do not constitute "conveyances," under Indiana Code § 6-1.1-5.5-1, so it is not necessary for the parties to complete, sign, and file sales disclosures for such transactions.

5.3.2. Property Tax Assessed Value Deductions.

Some of the purposes and objectives for estate planning with trusts described in this document become difficult to achieve if such trusts must pay property taxes without credit for deductions for which their settlors or beneficiaries would qualify if the settlors or beneficiaries owned the real estate individually. Indiana Code § 6-1.1-12-17.9 protects certain trusts from such disruption with these provisions (with clarification added by the authors of this guide in square brackets):

> **A trust is entitled to a deduction under section 9** [*deduction for persons 65 or older*]**, 11** [*deduction for blind or disabled person*]**, 13** [*deduction for veteran with partial disability*]**, 14** [*deduction for totally disabled veteran or veteran age 62 and partially disabled*]**, 16** [*deduction for surviving spouse of veteran*]**, or 17.4 (before its expiration** [*this deduction for World War I veterans expired on December 31, 2015*]**) of this chapter for real property owned by the trust and occupied by an individual if the county auditor determines that the individual:**
>
> **(1) upon verification in the body of the deed or otherwise, has either:**
>
> **(A) a beneficial interest in the trust; or**
>
> **(B) the right to occupy the real property rent free under the terms of a qualified personal residence trust created by the individual under United States Treasury Regulation 25.2702-5(c)(2); and**
>
> **(2) otherwise qualifies for the deduction.**

The "homestead" definition in Indiana Code § 6-1.1-12-37(a)(2) extends to a residence described in Indiana Code § 6-1.1-12-17.9 that is owned by a trust if the occupying individual is an individual that is also described in Indiana Code § 6-1.1-12-17.9. Therefore, a trust and certain other entities described in Indiana Code § 6-1.1-12-37 can also qualify for the homestead deduction under that section.

Additionally, Indiana Code § 6-1.1-1-10 defines a "Person" as a sole proprietorship, partnership, association, corporation, limited liability company, fiduciary (a term that includes guardians, personal representatives of the decedent's estates, and trustees of trusts), or individual. Therefore, any current or future deduction for which a "person" may be entitled to apply will also apply to a trust. An example of a current deduction that would extend to a trust through the person definition is the deduction for property financed by a mortgage, installment loan, or home equity loan under Indiana Code § 6-1.1-12-1.

Indiana Code § 6-1.1-12-17.8 deals with real estate that already qualifies for one of these deductions. Existing deductions carry over to a trust smoothly under if the trust acquires the real estate with the deed that satisfies the statutory requirements. The county auditor should look for a memorandum in the deed of conveyance identifying an individual occupant of the real estate as a person having a beneficial interest in the trust or the right to occupy the real property rent free under the terms of a qualified personal residence trust.

Consider a fictional person named Bob Homeowner for an example of how pre-existing exemptions carryover to trust. Bob owns and occupies his residence that he designated for his homestead on the sales disclosure form when he purchased his home. If Bob transfers his residence to his trust and continues to reside in the residence, the deduction carries over to his trust under Indiana Code § 6-1.1-12-17.8.

A trust may qualify for property tax deductions for real estate that did not previously qualify for the deductions if:

1. the trust acquires the real estate:

    a. with a deed that includes the memorandum required in Indiana Code § 6-1.1-12-17.9 about the individual occupying the real estate, or

    b. someone presents an affidavit or other document containing a verification that satisfies the requirements of Indiana Code § 6-1.1-12-17.9 after a trust has already acquired the real estate; and

2. the trustee of the trust or the individual occupant of the real estate with the beneficial interest in the trust that qualifies for the deduction files the applicable application for the deduction.

Consider another fictional character, Vinny Vet. Vinny is a disabled veteran who has been leasing his residence. Vinny wants to plan his estate with a revocable trust and acquire the residence in the name of his trust with a VA loan. In Vinny's case, there is no pre-existing homestead or disabled veteran's deduction to carry over to the trust because the former rental property did not previously qualify for any deductions. Therefore, Vinny must apply for the deductions upon acquiring the real estate in the trust.

The statutes do not speak directly about who should file the application for deduction. Generally, a trustee of a trust is a person authorized to sign documents on behalf of the trust. However, it also makes sense for the individual occupant of the real estate with the beneficial interest in the trust that qualifies for the deduction to apply for the deduction because that individual will be the person having personal knowledge of his or her eligibility to apply for the deduction. It is also possible that the individual may be too disabled to apply for the deduction, so the individual's legal representative would need to apply for the deduction on behalf of the disabled individual. Regardless of whether a trustee, the individual real estate occupant, or the individual's legal representative applies for the deduction, the person who signs the application should have sufficient personal knowledge of the facts that qualify the real estate for deduction.

The point of assessed valuation deduction statutes for trusts is not to trick and trap people with technical rule violations, but to ensure that people retain or receive legitimate deductions, while denying inapplicable or abusive deduction applications.

The essential questions about a trust are:

- Is there a verification in the body of a deed or other document that the real estate occupant has:
    - A beneficial interest in the trust or
    - A QPRT occupancy right?
- With the real estate qualify for deduction if everything was the same and the document actually owned the real estate instead of the trust?

A beneficial interest is a very simple standard. If the trust gives the real estate occupant something that the occupant would not have outside of the trust, the occupant has a beneficial interest. The benefit can be ridiculously small; even negligible.

The analysis is essentially the same for the mortgage or contract debt deduction (Indiana Code § 6-1.1-12-1), the over-age-65 deduction (Indiana Code § 6-1.1-12-9), the deduction for blind individuals (Indiana Code § 6-1.1-12-11), for disabled veterans

(Indiana Code § 6-1.1-12-13, -14, and 14.5), and for veterans' surviving spouses (Indiana Code § 6-1.1-12-16)

This is because Indiana Code § 6-1.1-1-10 includes "fiduciary" within the definition of "Person" as follows:

> "Person" includes a sole proprietorship, partnership, association, corporation, limited liability company, fiduciary, or individual.

The mortgage deduction under Indiana Code § 6-1.1-12-1 entitles a "person" to the deduction with the following language:

> (a) Each year a ***person*** who is a resident of this state may receive a deduction from the assessed value of:
>
> > (1) mortgaged real property, an installment loan financed mobile home that is not assessed as real property, or an installment loan financed manufactured home that is not assessed as real property, with the mortgage or installment loan instrument recorded with the county recorder's office, that the person owns;
> >
> > (2) real property, a mobile home that is not assessed as real property, or a manufactured home that is not assessed as real property that the person is buying under a contract, with the contract or a memorandum of the contract recorded in the county recorder's office, which provides that the person is to pay the property taxes on the real property, mobile home, or manufactured home; or
> >
> > (3) real property, a mobile home that is not assessed as real property, or a manufactured home that the person owns or is buying on a contract described in subdivision (2) on which the person has a home equity line of credit that is recorded in the county recorder's office.
>
> (b) Except as provided in section 40.5 of this chapter, the total amount of the deduction which the person may receive under this section for a particular year is:
>
> > (1) the balance of the mortgage or contract indebtedness (including a home equity line of credit) on the assessment date of that year;
> >
> > (2) one-half (1/2) of the assessed value of the real property, mobile home, or manufactured home; or
> >
> > (3) three thousand dollars ($3,000);

whichever is least.

(c) A person who has sold real property, a mobile home not assessed as real property, or a manufactured home not assessed as real property to another person under a contract which provides that the contract buyer is to pay the property taxes on the real property, mobile home, or manufactured home may not claim the deduction provided under this section with respect to that real property, mobile home, or manufactured home.

(d) The person must:

(1) own the real property, mobile home, or manufactured home; or

(2) be buying the real property, mobile home, or manufactured home under contract;

on the date the statement is filed under section 2 of this chapter.

The “owner” appears in Indiana Code § 6-1.1-1-9, as follows:

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

(b) 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.

(c) 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.

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

(e) 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.

(f) 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 of a qualified personal residence trust created under United States Treasury Regulation 25.2702-5(c)(2) is:

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

(2) entitled to occupy the real property rent free under the terms of the trust;

the grantor is the owner of that real property.

Indiana Code § 6-1.1-12-17.8 contains specific cross-references to sections 1, 9, 11, 13, 14, 16 and 37 and applies the same deduction eligibility and application rules when a trust is the record owner of the real property.

Indiana Code §6-1.1-12-17.9, the main section defining when a trust is entitled to a deduction, also refers to sections 9, 11, 13, 14, and 16.

6. **Best Practices**.

6.1. **Seek Policy and Procedure Input from Reputable Lawyers**.

Many parts of the Indiana Code rely on other parts of the Indiana Code to express the complete body of law. It is easy to misunderstand part of the law if someone who does not make a career of understanding the law tries to interpret it without expert guidance. Misinformation and misunderstanding of law creates many conflicts and frustrations in Indiana courthouses. It is in the best interests of all users of records affecting real estate title for all offices that manage those records to establish reasonable policies and procedures, and to administer them fairly and consistently. Lawyers and title companies have particular interest in consistent administration of reasonable policies and procedures, and they usually welcome the opportunity to comment about proposed new policies and procedures so that they can help public officials ensure consistent administration of reasonable policies and procedures. Therefore, it is wise to publicize new policies and procedures among the most reputable lawyers and title companies that engage in county real estate transactions and seek input about whether a proposal conforms with law and the practical needs of real estate transaction parties.

6.2. **Check Names Against Recorded Instruments**.

The ownership issue revolves around whether a transferor has sufficient ownership to transfer the interest that a new instrument purports to convey. The previously recorded instrument in the chain of title is the only source of information that counts in the determination of the ownership issue. All records other than the previously recorded instrument in the chain of title are unofficial and should not be considered reliable if an ownership discrepancy appears between a new instrument and those records. Therefore, an assessor or auditor should examine the previously recorded instrument in the recorder's office to determine whether the discrepancy is in the new instrument or the records that the assessor or auditor is responsible to maintain.

6.3. **Courtesy Calls Save Time and Money**.

Lawyers make mistakes like everyone else, and county officials need to return erroneous instruments to the lawyers for corrections sometimes. However, except in the case of a clear ownership issue as described in this outline, there are few reasons to return an instrument. The unnecessary return of an instrument can delay the effectiveness of the transaction and expose transaction parties to unintended problems that can cost hundreds, thousands, or millions of dollars to fix. Therefore, if a lawyer is thoughtful enough to provide a telephone number in the body of an instrument, the lawyer will always appreciate receiving a courtesy call about the instrument instead of receiving it with an instrument rejection form. In some cases, a phone call can clarify an issue so that the official will not have to process the same instrument more than once.

6.4. **The Indiana State Bar Association Wants to Help**.

The Indiana State Bar Association (ISBA) is the largest professional organization for lawyers, judges, law professors, paralegals, court and law firm administrators, and law librarians, with more than 12,000 members. The ISBA's Probate, Trust & Real Property Section has groups of expert members that constantly evaluate laws concerning estates, trusts, guardianships, and real estate to find and resolve problems through legislative and administrative solutions and education of lawyers and the public. Any government official that would like to have input from the ISBA about a new or persistent problem should feel free to contact the ISBA and request an audience with representatives of the Probate, Trust & Real Property Section. The ISBA office is accessible toll-free by telephone at 1-800-266-2581 or on the Internet at www.inbar.org.