2025 INDIANA LONG-TERM CARE
ASSET PROTECTION PLANNING

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PART 1 – INTRODUCTION

- LTC Asset Protection Planning Practice Competence
- Indiana Medicaid Overview
  - Indiana Medicaid Turmoil
  - Basic Medicaid Eligibility Requirements
  - Transfer Penalty Trap

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Indiana Medicaid Turmoil

- $984 Million 2023 Indiana Medicaid Budget Deficit
- Indiana PathWays for Aging Managed Care Program
  - Application processing by MAXIMUS Health Services Inc.
  - Managed Care Entities (MCEs): Anthem Blue Cross and Blue Shield (Anthem), Humana Healthy Horizons®, and United HealthCare Services, Inc

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Indiana Medicaid Turmoil

- HCBS waiver for "members" 60 and over re-branded as PathWays Waiver
  - FSSA reassignment of PathWays Waiver from Division of Aging to the Office of Medicaid Policy and Planning (OMPP)
  - PathWays Waiver waiting list with multi-year backlog

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Indiana Medicaid Turmoil

- HCBS waiver for "members" under 60 re-branded as Health & Wellness Waiver
  - FSSA reassignment of Health & Wellness Waiver from Division of Aging to Division of Disability and Rehabilitative Services
  - Health & Wellness Waiver waiting list with multi-year backlog

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Basic Medicaid Eligibility Requirements

$2,000 single applicant resource limit

Resource limit for both spouses in NH is $3,000

Resource limit for a "spousal case" is $2,000 plus the <u>lesser</u> of:

- 50% of the couple's countable resources (the "Spousal Share") on the "snapshot date" OR
- maximum applicable inflation-adjusted Community Spouse Resource Allowance (the "CSRA" - $157,920 in 2025)

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WARNING!
CRITIAL 2024 SPOUSAL CASE RULE CHANGE!

Community Spouse IRAs are now COUNTABLE Resources!

FSSA's amended 405 IAC 2-3-26 became effective in July 2024

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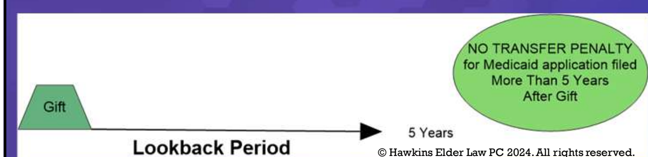
Transfer Penalties

5-Year "Look Back"



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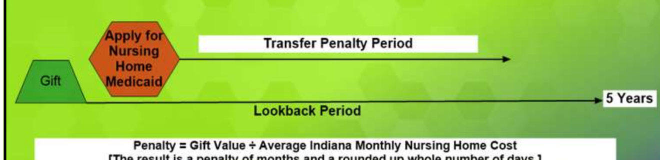
Transfer Penalties

Penalty on Transfers During 5-Year "Look Back"



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Single Applicant Eligibility Requirements

TRANSFER PENALTY TRAP!

Transfer penalty begins on the *LATER* date of the:

- 1st day of the asset transfer month, or
- date when the Applicant is otherwise eligible for Medicaid benefits

Translation: Medicaid nursing home (NH) coverage ineligibility starts when the applicant is in NH and Broke

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PART 2 – ASSET PROTECTION PLANNING

1. Fundamental LTC Asset Protection Concepts
2. Long-Term Care (LTC) Insurance
3. Powers of Attorney with Expanded Gift Powers
4. Asset Transfer Planning
5. Spousal Testamentary Trusts
6. Protecting Individual Trustees and Trust Protectors
7. Crisis Asset Protection Planning

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Fundamental LTC Asset Protection Concepts

- The potential risk of future LTC costs is a function of:
  1. whether an individual will need LTC;
  2. the duration of the required care; and
  3. the cost of the care.
- LTC asset protection requires the isolation of protected assets from principal access by the person needing LTC

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Fundamental LTC Asset Protection Concepts

- Some assets are easier and more cost-effective to isolate than others
- Asset isolation planning variables:
  - Protection vs. control continuum comfort level
  - Transfer penalty income and liquidity needs
  - Asset transfer tax consequences
  - Family dynamics

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LTC Insurance

- Indiana's Long Term Care Insurance Program (ILTCIP)
  - "Dollar-for-Dollar" benefit
  - "Total Asset Disregard" benefit
- LTC Insurance Market Turbulence
  - Fewer insurance underwriters
  - Limited coverage
  - Increased premiums

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Powers of Attorney with Expanded Gift Powers

- Power of Attorney incorporation of statutory powers by reference
- General power of appointment circuit breaker in Ind. Code §30-5-5-9(a)(2) presently prohibits AIF self-interested gifts over $19,000
- LTC crisis planning often requires large self-interested gifts

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Powers of Attorney with Expanded Gift Powers

- Ind. Code §30-5-5-1(d) allows the override of unnecessary statutory gift restriction for ALL modest wealth clients
- Simple restriction override language:

  I give my attorney in fact the general authority to act concerning gift transactions under the terms of Ind. Code §30-5-5-9 without regard to any restrictions on the aggregate yearly value of a gift to an individual or entity otherwise specified in Ind. Code §30-5-5-9.

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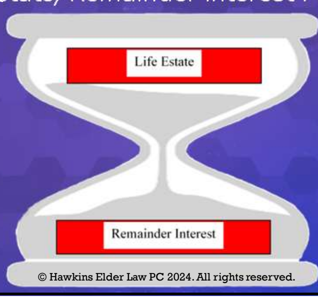
Asset Transfer Planning Opportunities

Life Estate/Remainder Interest Planning



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Asset Transfer Planning Opportunities

Life Estate/Remainder Interest Planning

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Asset Transferee Selection Pitfalls

REMAINDER INTEREST TRANSFER PITFALL

Generation 1 ⟶ Generation 2 remainder transfer exposes the property to risks of Generation 2's:

- Premature death
- Disability
- Financial crisis
- Divorce
- Uncooperativeness

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Asset Transferee Selection Pitfalls

LIFE INSURANCE TRANSFER PITFALL

- Whole life insurance policy cash surrender values count as resources like checking accounts
- Funeral plans funded by life insurance assignment must designate the State of Indiana as the beneficiary of funds remaining after paying funeral costs

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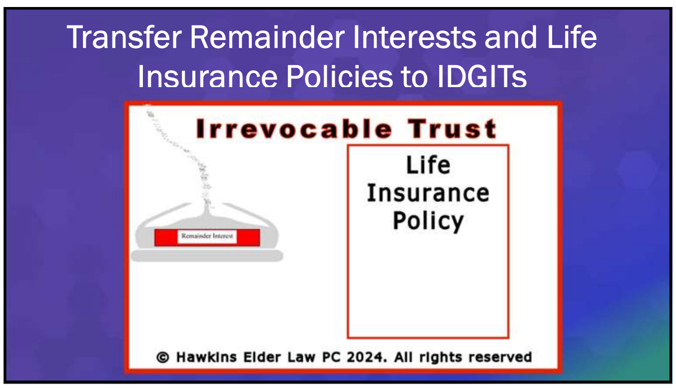

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DRAFTING FLEXIBLE IRREVOCABLE TRUSTS

Flexible Drafting Goals

1. Reserve indirect trust revision powers without causing trust property inclusion as resources under 42 U.S.C. §1396p(d)(3)(B);
2. Qualify the trust as a "grantor trust" for attribution of settlors' personal income tax benefits to the trust under 26 U.S.C. §671.

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DRAFTING FLEXIBLE IRREVOCABLE TRUSTS

- Testamentary power of appointment
- Income distributable to settlors
- IRS attribution of trust's tax attributes to settlors with retained grantor trust powers
- Clarifications to avoid Medicaid inclusion of trust property as settlors' resources
- Trust protector empowered to "call audibles"

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DRAFTING FLEXIBLE IRREVOCABLE TRUSTS

Trust Protectors

- Trustee appointment, removal, and replacement powers
- Dispute resolution powers
- Transactional approval and ratification powers
- Distribution modification and approval powers
- Beneficiary removal and replacement powers

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SPOUSAL TESTAMENTARY TRUSTS

Federal Inter Vivos Trust Resource Inclusion

- 42 U.S.C. §1396p(d)(3)(B) provides that a Medicaid applicant's resources include inter vivos trust property funded by the assets of the applicant or the applicant's living or deceased spouse to the extent a trustee could distribute the assets to the applicant or the applicant's spouse.

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SPOUSAL TESTAMENTARY TRUSTS

Federal Testamentary Trust Protection

- 42 U.S.C. §1396p(d)(2)(A) provides that the resource inclusion under (d)(3)(B) applies to a trust that the applicant or the applicant's spouse establishes ***other than by will***.

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SPOUSAL TESTAMENTARY TRUSTS

Federal Testamentary Trust Protection

- So, a surviving spouse can receive both principal and income from a testamentary trust, like the example in Appendix 2, without including its assets among the surviving spouse's resources.

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TRUSTEE & TRUST PROTECTOR EXONERATION

- Self-interested conduct by beneficiary/trustee that does not disadvantage other beneficiaries
- Limited individual trustee duty under the Indiana Uniform Prudent Investor Act
- No liability for individual trust protector omissions
- No liability for good faith individual trust protector actions

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LTC Crisis Asset Protection Planning with Gifts, Loans and Annuities

Medicaid-Compliant Promissory Notes

A Medicaid-compliant promissory note must:

1. have a repayment term actuarially sound under the actuarial publications of the Social Security Administration;

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LTC Crisis Asset Protection Planning with Gifts, Loans and Annuities

Medicaid-Compliant Promissory Notes

2. provide for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and

3. prohibit canceling the balance upon the death of the lender.

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LTC Crisis Asset Protection Planning with Gifts, Loans and Annuities

Medicaid-Compliant Annuities

A Medicaid-compliant annuity must:

1. be irrevocable and nonassignable;

2. be actuarially sound (payable within the life expectancy of the community spouse or institutional spouse);

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LTC Crisis Asset Protection Planning with Gifts, Loans and Annuities

Medicaid-Compliant Annuities

3. provide for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made; and

4. Either provide that:

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LTC Crisis Asset Protection Planning with Gifts, Loans and Annuities

Medicaid-Compliant Annuities

A. the state is the remainder beneficiary in the first position for at least the total amount of Medicaid paid on behalf of the applicant for Medicaid; or

B. the state is a beneficiary in the second position after the community spouse or a minor or disabled child.

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PART 3
CREDITORS' CLAIMS IN "PROBATE ESTATES"

Probate Code Terminology

What is a decedent's "Estate?"

- The set of a decedent's former economic rights and interests remaining after the decedent's death,
- *NOT* the court case opened to administer the Estate.

(Source: Jeff Hawkins, *NOT* a Nobel Laureate Economist)

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IC 29-1-1-3(a)(32): "Probate Estate" denotes

WHAT: the property transferred

WHEN: at the death of a decedent

HOW & HOW:

- under the decedent's will OR
- under IC 29-1-2 [*Intestate distribution rules*], in the case of a decedent dying intestate.

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WHEN, WHAT, WHO & HOW - IC 29-1-7-23(a):

WHEN A PERSON DIES, the person's REAL *AND* PERSONAL PROPERTY passes to persons TO WHOM IT IS DEVISED BY THE PERSON'S LAST WILL *OR*, in the absence of such disposition, TO the persons who succeed to the person's estate as THE PERSON'S HEIRS; *BUT* it shall be *subject* to the possession of the personal representative *AND* to the election of the surviving spouse *AND* shall be *chargeable* with the expenses of administering the estate, the payment of other claims *AND* the allowances under IC 29-1-4-1, *EXCEPT* as otherwise provided in IC 29-1.

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CREDITOR TITLE PASSAGE INTERCEPTIONS

IC 29-1-7-23 (a) When a person dies, the person's real and personal property passes ...; ***BUT*** it shall be ***subject to the possession of the personal representative*** ***AND*** to the ***election of the surviving spouse*** ***AND*** ***shall be chargeable*** with the ***expenses of administering*** the estate, the ***payment of other claims*** ***AND*** the ***allowances under IC 29-1-4-1***, except as otherwise provided in IC 29-1.

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CLAIMS UNDER IND. CODE CHAPTER 29-1-14

- Claim = *in rem* civil complaint versus probate estate
- Ind. Code §29-1-14-1 sets claim deadlines
- Ordinary creditor claim deadline is the LATER of:

1. 3 months after first published notice to creditors;
2. 3 months after the court has revoked probate of a will, in accordance with IC 29-1-7-21, if the claimant was named as a beneficiary in that revoked will; or
3. 9 months after decedent's death if no notice is given

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CLAIMS UNDER IND. CODE CHAPTER 29-1-14

- Claims without deadlines under Ind. Code §29-1-14-1(a):
  - "expenses of administration" and
  - "claims of the United States, the state, or a subdivision of the state."
- ***BUT*, New in 2024**: Ind. Code §29-1-14-1(g) requires FSSA's Estate Recovery *Unit* to file a claim in an open estate within 120 days after the decedent's death

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Personal Representative's Authority to Sell Decedent's Real Property under IC 29-1- 7-15.1 (b)-(c)

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Strategies to Protect Property for Distributees:

1. Skip probate administration and claim real property by real property title passage affidavit under IC 29-1- 7-23(b) if:
   - the probate estate only comprises real property,
   - the distributees are mutually cooperative, and
   - none of the distributees has judgment liens or other legal or financial vulnerabilities.

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Strategies to Protect Property for Distributees:

2. Petition for administration **<u>more than</u>** 5 months after decedent's death if:

- probate estate only comprises real property and
- distributees are either uncooperative or financially vulnerable.

IC 29-1- 7-15.2 protects sale proceeds like IC 29-1- 7-15.1(b) protects real property from sale to pay claims.

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Strategies to Protect Property for Distributees:

3. If a claim is filed and the petition for administration of a <u>real property-only estate</u> was filed **<u>more than</u>** 5 months after the decedent's death:

- **<u>ALLOW THE CLAIM</u>**, unless the PR has an affirmative claim defense; and
- **Include a claim allowance statement stating**:
  - Applicability of IC 29-1- 7-15.1(b);

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Strategies to Protect Property for Distributees:

- Probate estate lacks personal property to satisfy the claim; and
- PR will file an insolvent estate closing statement and distribute or sell real property.

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Strategies to Protect Property for Distributees:

4. Pursue real property under IC 29-1- 7-23(b)-(d) and temporarily abandon low-value personal property if:

- Probate estate comprises real property and intangible personal property held by banks or other third parties worth a total probate estate value (real and personal) exceeding the $50,000 limit ($100,000 for the decedents dying after June 30, 2022);

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Strategies to Protect Property for Distributees:

- Distributees are mutually cooperative; and
- Distributees are financially sound.

Distributees can claim personal property Indiana’s Revised Unclaimed Property Act.

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Strategies to Protect Property for Distributees:

5. Seek PR appointment to scrutinize merits of an inevitable, timely-filed claim as mandated by IC 29-1-14-11:

   Sec. 11. Before allowing or paying claims against the estate he represents, ***it shall be the duty of every personal representative to inquire into the correctness of all claims*** against the estate and ***<u>make all available defenses thereto</u>***, and

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Strategies to Protect Property for Distributees:

if he fails so to do, he shall be liable on his bond, at the suit of any person interested in the estate, for all damages sustained by the estate in consequence of such neglect.

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CLAIMS AGAINST NONPROBATE TRANSFEREES UNDER IND. CODE CHAPTER 32-17-13

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Counter-Punching as an Asset Protection Strategy Against Nonprobate Claims

1. Avoid filing a petition for administration within 5 months after the deceased transferor's death because the claimant must file a claim against the decedent's probate estate Within 5 months after the deceased transferor's death before pursuing claims against nonprobate transferees.

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Counter-Punching as an Asset Protection Strategy Against Nonprobate Claims

- A claimant cannot file a claim within 5 months if there is no estate administration in which to file the claim.
- A claimant can file a petition for administration, but some creditors are unfamiliar with probate estate administration procedures.

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Counter-Punching as an Asset Protection Strategy Against Nonprobate Claims

2. Seek appointment of a personal representative.
   - The personal representative sets the pace and can require the claimant to follow the rules.
   - The person representative can challenge the claim against the probate estate on the merits, whereas a nonprobate transferee has no control over those proceedings.

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Counter-Punching as an Asset Protection Strategy Against Nonprobate Claims

- Even if the creditor satisfies procedural requirements with a claim that consumes all nonprobate property, the personal representative and personal representative's counsel are entitled to fees and reimbursement of expenses.

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Counter-Punching as an Asset Protection Strategy Against Nonprobate Claims

3. Negotiate a Claim Settlement because the procedures for claims against nonprobate transferees are a daunting gauntlet that creditors may prefer to avoid with claim compromises.

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Counter-Punching as an Asset Protection Strategy Against Nonprobate Claims

3. Pursue asset values in claim enforcement sales.
   - Family members may be able to purchase assets at bargain prices.
   - Alternatively, asset sales may yield dividends after satisfying claims.

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CONCLUSION

1. Prepare factual and statutory analysis thoroughly.
2. Remember, all details maybe essential!
3. Humility and empathy go a long way.

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