

2025 INDIANA LONG-TERM CARE ASSET PROTECTION PLANNING

HOOSIER HILLS ESTATE PLANNING COUNCIL

October 30, 2025

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Contents

PART 1 Cautionary Notes and Introduction.....	1
1.1. DON'T DABBLE IN LONG-TERM CARE ASSET PROTECTION PLANNING!.....	1
1.1.1. Turbulent Indiana Medicaid Eligibility Requirements	1
1.1.2. Long-term Care Assets Protection Planning and Medicaid Eligibility Representation Impacts Real People Intimately and Dramatically.....	1
1.1.3. No Room for Part-Timers – Be “All-In” or Get Out!	2
1.2. Introduction.....	2
1.3. Indiana Medicaid Overview.....	3
1.3.1. Federal and State Statutory and Regulatory Authority	3
1.3.2. Indiana Statutory and Regulatory Authority	3
1.3.3. Indiana Medicaid Programs	4
1.3.4. Single Applicant Eligibility Requirements	7
1.3.5. Married Applicants	10
PART 2 Asset Protection Planning.....	12
2.1. Long-Term Care Insurance	12
2.1.1. Indiana’s Long Term Care Insurance Program (ILTCIP) History.....	12
2.1.2. ILTCIP Insurance Policy Features.....	12
2.1.3. Indiana Long Term Care Insurance Market Turbulence.....	13
2.2. Powers of Attorney with Expanded Gift Powers	14
2.2.1. Multimillionaire Federal Estate Tax Problem with Unlimited Powers of Attorney ...	14
2.2.2. Indiana’s Statutory Power of Attorney Gift Restriction	14
2.2.3. Overriding Unnecessary Statutory Gift Restriction	15
2.3. Asset Protection Planning for Individuals	15
2.3.1. Fundamental Long-Term Care Asset Protection Concepts	15
2.3.2. Asset Transfer Planning Opportunities	16
2.3.3. Asset Transfer Planning Transferee Selection Pitfalls.....	17
2.3.4. Asset Transfer Planning Look-Back Period Pitfalls	18
2.3.5. Asset Transfers to Irrevocable Trusts – Essential Elements.....	18
2.3.6. Irrevocable Trust Flexibility	20
2.3.7. Life Insurance Transfers and Beneficiary Designations	22
2.3.8. Trust Protectors	22

2.3.9. Beware of Small Trust Liquidation Provisions!	23
2.3.10. DO NOT PLAN A DESIGNATION OF AN IRREVOCABLE TRUST AS A RETIREMENT ASSETS DESIGNATED BENEFICIARY!!!	23
2.4. Testamentary Trust for the Surviving Spouse	24
2.4.1. Federal Testamentary Trust Protection	24
2.4.2. Designating the Testamentary Trust as Account and Policy Beneficiary.....	24
2.5. Protecting Individual Family Trustees Against Fiduciary Liability	25
2.5.1. Authorizing Self-Interested Trustee Transactions	25
2.5.2. Prudent Investor Act	28
2.6. Crisis Asset Protection Planning with Gifts and Annuities	29
2.6.1. Gifts and the Transfer Penalty Commencement Trap.....	29
2.6.2. Reducing Resources with Medicaid-Compliant Promissory Notes and Annuities	29
2.6.3. Medicaid-Compliant Promissory Notes.....	29
2.6.4. Medicaid-Compliant Annuities.....	30
2.6.5. Annuities Versus Promissory Notes	30
2.6.6. Purchasing a Medicaid-Compliant Annuity.....	31
2.7. Married Couples.....	32
2.7.1. Applicability of Asset Protection to Planning for Individuals to Couples.....	32
2.7.2. Married Couples' Look-Back Period Timing Issues	32
2.7.3. A Married Couple's Snapshot Date Timing Issue	33
2.7.4. A Married Couple's Mortgage Loan Snapshot Date Timing Opportunity	35
2.7.5. Spending Down Excess Resources With Exempt Asset Purchases.....	37
2.7.6. Spending Down Excess Resources With Immediate Annuities	38
2.7.7. 2024 Rule Change Counting Community Spouse IRAs.....	39
2.7.8. Conversion of a Regular IRA to a Roth IRA.....	39
2.7.9. Institutional Spouse's IRA Annuity and the "Name on the Check Rule"	40
2.7.10. Transferring IRAs Under Court-Approved Property Settlements	41
PART 3 Irrevocable Trust Administration	41
3.1. Settlor as Trustee.....	41
3.2. Taxpayer Identification Number.....	42
3.3. Administration After Settlor's Death.....	42
PART 4 Testamentary Trust Administration.....	42
PART 5 Probate Estate Administration	43

5.1. Threshold Questions About a Decedent’s Assets	43
5.2. Probate Terminology Matters – What is a Decedent’s “Estate?”	43
5.3. Decedents’ Probate Property Title Passage	44
5.3.1. Immediate Title Passage	44
5.3.2. Title Passage to Distributees	45
5.3.3. Testate Estate Title Passage Questions Concerning the Probate Estate’s Suspended Existence	45
5.3.4. Wills Must Be Admitted to Probate.....	45
5.3.5. Race to the Courthouse to Resolve the Probate Estate’s Suspended Existence	46
5.4. Personal Representative’s Power of Possession	47
5.4.1. Personal Representative’s Interception of Title Passage	47
5.4.2. Personal Representative’s Distribution Deed Distractions	49
5.5. Refocusing on Intestate and Testate Title Passage	50
5.5.1. “Probate Estate” Definition.....	50
5.5.2. Intestate Title Passage – a Family Thing	50
5.5.3. Testate Title Passage – Decedent’s Will Admitted to Probate	50
5.6. Personal Representative’s Administration of a Decedent’s Probate Estate.....	51
5.6.1. Personal Representative’s Appointment	51
5.6.2. Personal Representative’s Fiduciary Duty to Distributees and Creditors.....	51
5.6.3. Personal Representative’s Management of a Decedent’s Probate Estate	52
PART 6 Medicaid Estate Recovery and Other Creditors’ Claims.....	52
6.1. Creditors’ Claims Against a Decedent’s Probate Estate.....	52
6.1.1. Governmental Claims (Other Than FSSA’s Estate Recovery Unit).....	52
6.1.2. Family and Social Services Administration’s Estate Recovery Against a Deceased Medicaid Recipient’s Probate Estate	53
6.1.3. Nongovernmental Claims Against a Decedent’s Probate Estate	55
6.2. Secured Claims Against a Decedent’s Encumbered Property	55
6.3. Requirements for a Claim Against a Decedent’s Probate Estate	56
6.4. Claim Collection Priorities for a Decedent’s Probate Estate	57
6.5. Creditors’ Claims Against a Decedent’s Probate Real Property.	59
6.5.1. Brief History Lesson on Personalty Versus Realty.....	59
6.5.2. Creditors’ Interception of Probate Real Property Title passage	59
6.5.3. Overview of Procedural Functions of Ind. Code § 29-1-7-15.1	59

6.5.4. The 5-Month & 7-Month Rules Governing a Personal Representative's Sale of a Decedent's Real Property Under Ind. Code § 29-1-7-15.1(b)	61
6.6. Procedural Strategies for Distributees' Protection of Probate Assets Against Claims	63
6.6.1. Strategy 1: Skip Probate Administration	63
6.6.2. Strategy 2: Petition for Administration More Than 5 Months After Decedent's Death – No Claims Filed	63
6.6.3. Strategy 3: Petition for Administration More Than 5 Months After Decedent's Death – Late Claims Filed	64
6.6.4. Strategy 4: Pursue Real Property Under Ind. Code § 29-1-7-23(b)-(d) and (Temporarily) Abandon Low-Value Personal Property	65
6.6.5. Strategy 5: Seek appointment of a Personal Representative to Scrutinize Claim Merits	67
6.7. Medicaid Reimbursement Claims Against Nonprobate Transferees	69
6.7.1. Procedural Policy for Claims Against Nonprobate Transferees	69
6.7.2. Nonprobate Transfer Definitions	70
6.7.3. Party Definitions and Liability of Nonprobate Transferees	71
6.7.4. Apportionment of Nonprobate Transferees' Liability to the Probate Estate	72
6.7.5. Abatement of Beneficiaries' Trust Interests by Nonprobate Transfer Claims	72
6.7.6. Instrument's Apportionment Provisions Concerning Nonprobate Transferees' Liability	73
6.7.7. Forum of Proceedings to Enforce Claims Against Nonprobate Transferees	73
6.7.8. Claims Concerning Deceased Transferors Dying Before July 1, 2018	73
6.7.9. <i>Very Limited</i> Medicaid Estate Recovery Claim Deadline Exemption	74
6.7.10. Medicaid Estate Recovery Exemptions of Nonprobate Transfers Established Before April 30, 2002, and Assets Determined by FSSA to be Exempt or Unavailable Before April 30, 2002	74
6.7.11. Claims Concerning Assets Transferred Through Nonprobate Transfers Concerning Deceased Transferors Dying After June 30, 2018	75
6.8. Counter-Punching as an Asset Protection Strategy Against Nonprobate Claims	82
6.8.1. Avoid Filing a Petition for Administration Within 5 Months After the Deceased Transferor's Death	82
6.8.2. Seeking Appointment as Personal Representative	83
6.8.3. Personal Representative's Duty to Scrutinize Claim Merits	83
6.8.4. Personal Representative's Role as the Claim Procedures Enforcer	83
6.8.5. Claim Settlement Negotiations	84
6.8.6. Pursue Asset Values in Claim Enforcement Sales	84

PART 7 CONCLUSION.....	85
APPENDICES	86

2025 INDIANA LONG-TERM CARE ASSET PROTECTION PLANNING

PART 1

CAUTIONARY NOTES AND INTRODUCTION

1.1. DON'T DABBLE IN LONG-TERM CARE ASSET PROTECTION PLANNING!

1.1.1. Turbulent Indiana Medicaid Eligibility Requirements

Indiana Medicaid laws, policies, and procedures sometimes shift as suddenly and violently as the weather in America's tornado alley. For example, the following is a sample of the changes Indiana's Family and Social Services Administration (FSSA) has implemented in 2024:

- reassignment of administrative responsibility for Medicaid home and community-based services (HCBS) waivers for applicants 60 years of age and older from the Division of Aging to the Office of Medicaid Policy and Planning;
- reassignment of administrative responsibility for HCBS waivers for applicants younger than 60 years of age from the Division of Aging to the Division of Disability and Rehabilitative Services;
- establishment of a multi-year waiting list for applicants to begin receiving Medicaid benefits under HCBS waivers;
- curtailment of a program that paid family members with caregiving certifications to provide caregiving services under HCBS waivers; and
- inclusion of previously exempt community spouse IRAs.

1.1.2. Long-term Care Assets Protection Planning and Medicaid Eligibility Representation Impacts Real People Intimately and Dramatically

Long-term care assets protection planning and Medicaid eligibility representation impact clients very intimately and dramatically. Seemingly inconsequential errors can cost clients tens or hundreds of thousands of dollars.

1.1.3. No Room for Part-Timers – Be “All-In” or Get Out!

Therefore, long-term care assets protection planning and Medicaid eligibility representation cannot be a sideline law practice subject.

A lawyer interested in this law practice subject must commit to the following minimum competency standards:

- join the Probate, Trust & Real Property Section and Elder Law Section of the Indiana State Bar Association and engage in conversations on their respective InbarConnect Communities;
- join the Indiana Chapter of the National Academy of Elder Law Attorneys and engage in conversations on its online discussion community;
- attend the annual Advanced Elder Law conference of the Indiana Continuing Legal Education Forum (ICLEF); and
- attend ICLEF’s annual Elder Law Institute.

1.2. Introduction

This article describes the laws governing the Indiana Medicaid system, advance planning strategies to protect assets from future long-term care costs, and strategies for the administration of estates and trusts to protect assets from estate recovery actions. Initially, we will review the underlying state and federal laws governing Medicaid and some of the specific Medicaid eligibility requirements for individual and married applicants. Next, we will explore the most effective long-term care asset protection planning strategies for individuals and married couples. Then, we will examine the administrative processes for irrevocable trusts, testamentary trusts, and probate estates following a client’s death. Finally, we will discuss alternatives for responding to Medicaid estate recovery actions against probate estates of deceased public assistance benefits recipients and their nonprobate asset transferees.

1.3. Indiana Medicaid Overview

1.3.1. Federal and State Statutory and Regulatory Authority

Congress established the Medicare and Medicaid system in the Medicare and Medicaid Act of 1965,¹ which amended the Social Security Act of 1935.²

Congress delegated rule-making authority to the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services to implement the Medicare and Medicaid Act of 1965.³

The Secretary of Health and Human Services promulgates rules on the administration of the Medicare and Medicaid programs⁴ through the Centers for Medicare & Medicaid Services (CMS), formerly the Health Care Financing Administration (HCFA).

CMS administers the Medicare and Medicaid programs and regulates the states' administration of Medicaid. CMS also publishes a State Medicaid Manual⁵ as a guide for the states' establishment of their own policy manuals.

1.3.2. Indiana Statutory and Regulatory Authority

The Indiana General Assembly codified the statutory authority governing Indiana's Medicaid programs in Ind. Code Article 12-15. That article appoints the FSSA to administer Indiana's Medicaid programs,⁶ and authorizes the FSSA to

(1) take actions;

(2) give directions; and

(3) adopt procedures and rules under IC 4-22-2;

¹ P.L. 89-97 (79 Stat. 286), enacted July 30, 1965, generally codified at 42 U.S.C. §§ 301 – 1397mm.

² P.L. 74-271 (49 Stat. 620), enacted August 14, 1935, codified at 42 U.S.C. §§ 301 – 1397mm.

³ 42 U.S.C. §1302.

⁴ 42 CFR 400 – 699.

⁵ <https://www.cms.gov/regulations-and-guidance/guidance/manuals/paper-based-manuals-items/cms021927>, last visited for this article on September 13, 2025.

⁶ Ind. Code § 12-15-1-1.

*necessary to carry out the Medicaid program and the federal Social Security Act to provide Medicaid and ensure uniform equitable treatment of applicants for and recipients of Medicaid.*⁷

The FSSA has promulgated rules governing its administration of Indiana's Medicaid programs in Title 405 of the Indiana Administrative Code.⁸

The FSSA's Indiana Health Coverage Program Policy Manual is an integrated eligibility manual that contains information about health coverage under Medicaid, Hoosier Healthwise, Hoosier Care Connect, and the Healthy Indiana Plan (IHCPPM).⁹ Although it is not a source of law enacted by the legislature or promulgated as a set of rules by the FSSA under the Indiana Administrative Orders and Procedures Act,¹⁰ the IHCPPM provides a helpful summary of Medicaid eligibility requirements that the FSSA uses to guide its employees and contractors in the administration of Indiana's Medicaid programs and other public assistance benefit programs. Therefore, this article refers extensively to the provisions of the IHCPPM.

1.3.3. Indiana Medicaid Programs

1.3.3.1. Indiana's Medicaid Budget Deficit

The Associated Press reported on December 20, 2023, that Indiana's April 2023 budget forecast underestimated the state's Medicaid expenditures by \$984 million.¹¹ In the scramble to plug its budget gap, the FSSA radically reorganized most of its Medicaid benefits systems through privatization and internal reassignment of Medicaid eligibility oversight among FSSA's offices and divisions.

⁷ Ind. Code § 12-15-1-10.

⁸ The FSSA's promulgated rules governing Medicaid eligibility and estate recovery appear in 405 IAC 2 (<https://iar.iga.in.gov/code/2026/405/2>, last visited for this article on September 13, 2025).

⁹ <https://www.in.gov/fssa/ompp/forms-documents-and-tools2/medicaid-eligibility-policy-manual/>, last visited for this article on September 13, 2025.

¹⁰ Ind. Code Chapter 4-22-2.

¹¹ Isabella Volmert, *Indiana underestimated Medicaid cost by nearly \$1 billion, new report says*, ASSOCIATED PRESS, December 20, 2023, <https://apnews.com/article/indiana-medicaid-billion-dollar-shortfall-forecast-a8dd99fadd7f6e7d9b63a5e7dbedfd12>, last visited for this article on September 13, 2025.

1.3.3.2. Indiana PathWays for Aging Managed Care Program

Throughout the last half of 2023 and the spring of 2024, FSSA reorganized its Medicaid system into a managed care system that it branded and marketed as the “Indiana PathWays for Aging Managed Care Program.”¹² FSSA expanded its contractual relationship with MAXIMUS Health Services Inc. to delegate more Medicaid application processing responsibilities to MAXIMUS as the state’s Medicaid enrollment broker¹³ and delegated its Medicaid benefits management responsibilities to three Managed Care Entities (MCEs), Anthem Blue Cross and Blue Shield (Anthem), Humana Healthy Horizons®, and United HealthCare Services, Inc.¹⁴

FSSA’s Medicaid reorganization included an overhaul that splits its Medicaid Home and Community-Based Services (HCBS) system, formerly known as the Aged and Disabled Waiver, into two new waiver systems described in FSSA’s application to the Centers for Medicare & Medicaid Services (CMS)¹⁵ that explains the change as follows:

The Family and Social Services Administration (FSSA) proposes to amend this Aged and Disabled (A&D) Waiver to create two separate waivers in the provision of Home and Community-Based Services (HCBS) services to eligible participants who, but for the provision of such services, would require nursing facility level of care. FSSA is proposing to change the name of this waiver from the Aged & Disabled Waiver to the Health & Wellness Waiver for eligible waiver participants 59 years of age or younger.

As described in Attachment #1 Transition Plan, eligible waiver participants 60 years of age and over will be transitioned to a new FSSA waiver titled the PathWays Waiver.

¹² <https://www.in.gov/pathways/>, last visited for this article on September 13, 2025.

¹³ <https://www.in.gov/medicaid/partners/medicaid-partners/maximus/>, last visited for this article on September 13, 2025.

¹⁴ <https://www.advancingstates.org/mcehcbs-provider-roundtable-events>, last visited for this article on September 13, 2025.

¹⁵ <https://www.in.gov/fssa/files/HW-waiver-MS.PDF>, last visited for this article on September 13, 2025.

1.3.3.3. PathWays Waiver

FSSA re-branded the new HCBS waiver for participants 60 years of age and older as the “PathWays Waiver,” the name of which is confusingly similar to the name of FSSA’s all-encompassing managed care system.¹⁶

FSSA reassigned oversight responsibility for the PathWays Waiver from its Division of Aging to the Office of Medicaid Policy and Planning (OMPP).

Despite FSSA’s glossy marketing of the waiver on television and other multimedia outlets as a progressive part of the Indiana PathWays for Aging system, the OMPP initially established a waiver eligibility waiting list with a huge backlog.¹⁷ Thus, many families must make the difficult choice of caring for loved ones at home without Medicaid financial support or admitting them to nursing homes, where Medicaid eligibility is readily available.

1.3.3.4. Health and Wellness Waiver

FSSA also reassigned oversight responsibility for its new Health & Wellness Waiver for participants under 60 from the FSSA’s Division of Aging to its Division of Disability and Rehabilitative Services.¹⁸ Like the PathWays Waiver, applicants for the Health & Wellness Waiver must register and wait for months for a spot on the Health & Wellness Waiver waiting list.¹⁹

¹⁶ <https://www.in.gov/fssa/da/medicaid-hcbs/>, last visited for this article on September 13, 2025.

¹⁷ <https://www.in.gov/fssa/ddrs/information-for-individuals-and-families/hcbs-waiver-waiting-list-information/>, last visited for this article on September 13, 2025.

¹⁸ *Id.*

¹⁹ *Id.*

1.3.4. Single Applicant Eligibility Requirements

1.3.4.1. Resources

IHCPPM Chapter 2600²⁰ describes the Indiana Medicaid resource (generally speaking, assets) eligibility rules, and Section 3005.00 of Chapter 3000²¹ specifies the dollar value limits of allowable resources for Medicaid eligibility. Section 3005.10 of Chapter 3000²² provides that the resource limit for a single applicant or an applicant whose spouse qualifies as a “community spouse” is \$2,000.

Generally, most individually owned assets are included in the category of countable resources. The accumulating cash surrender value of whole life insurance policies and comparable life insurance policies is an often-overlooked resource that this article will discuss in the discussion of Asset Protection Planning in Section PART 2.

Some assets are exempt from consideration as resources, such as a vehicle²³ or income-producing farmland.²⁴ However, as this article will explain later, an asset’s exemption from consideration as a resource does not necessarily mean that it is protected from exposure to a Medicaid “member’s” long-term care costs.

1.3.4.2. Income

IHCPPM Chapter 2800²⁵ describes how Indiana Medicaid determines and verifies a Medicaid applicant’s income during the eligibility process and in the post-eligibility administration of a Medicaid member’s benefits. With a few notable exceptions, a single Medicaid member may retain a personal needs allowance of \$52 per month, the health insurance premium amount required to maintain a health insurance policy, and

²⁰ Published online at https://www.in.gov/fssa/ompp/files/Medicaid_PM_2600.pdf, last visited for this article on September 13, 2025.

²¹ Published online at https://www.in.gov/fssa/ompp/files/Medicaid_PM_3000.pdf, last visited for this article on September 13, 2025.

²² *Id.*

²³ *Id.* at Section 2615.60.20.05.

²⁴ *Id.* at Section 2620.15.20.

²⁵ https://www.in.gov/fssa/ompp/files/Medicaid_PM_2800.pdf, last visited for this article on September 13, 2025.

a few other items, but the Medicaid member must apply the remaining net income to the member's cost of care.²⁶

Generally, a Medicaid member's income cannot exceed an inflation-adjusted value known as the Special Income Level (SIL).²⁷ However, Section 1613(e) of the Social Security Act²⁸ codified an exception established by a United States District Court for a Medicaid member named Jeanette Miller, whose income was between the long-term care facility rate and the SIL.²⁹ In those cases, a Medicaid member may transfer the excess income to an irrevocable trust commonly known as a "Miller Trust" and a "Qualified Income Trust" and deduct the transferred income from the member's budgeted income to keep the income below the SIL amount.³⁰ Transfers to a Miller Trust do not trigger Medicaid transfer penalties and the trust's accumulated funds do not count as part of the member's resources.³¹

1.3.4.3. Transfer Penalties

When people learn about the Medicaid eligibility rules, they often consider transferring assets to family members to reduce their resource value and qualify for Medicaid. However, Congress enacted a transfer penalty system to limit Medicaid expenditures for people who transfer their assets to qualify for Medicaid.³² Indiana adopted the Federal transfer penalty system, which temporarily disqualifies a person who applies

²⁶ Section 3455.15.10 of IHCPPM Chapter 3400 published online at https://www.in.gov/fssa/ompp/files/Medicaid_PM_3400.pdf, last visited for this article on September 13, 2025.

²⁷ \$2,901 as of January 1, 2025, as published in Section 3010.20.15 of IHCPPM Chapter 3000 published online at https://www.in.gov/fssa/ompp/files/Medicaid_PM_3000.pdf, and explained in Section 3455.14.00 of IHCPPM Chapter 3400 published online at https://www.in.gov/fssa/ompp/files/Medicaid_PM_3400.pdf, last visited for this article on September 13, 2025.

²⁸ 42 U.S.C. §1382b(e)(1), incorporating 42 U.S.C. §1396p(d)(4)(B) by reference.

²⁹ *Miller v. Ibarra*, 746 F. Supp. 19 (D. Colo. 1990).

³⁰ 405 IAC 2-3-29.

³¹ *Id.*

³² 42 U.S.C. §1396p(c).

for Medicaid within 5 years (the “look-back period”) after transferring assets or assigning income for less than the comparable fair market value.³³

1.3.4.4. Transfer Penalty Commencement Trap

Indiana’s transfer penalty begins on the **LATER** date of:

1. the first day of the month in which assets have been transferred for less than fair market value, or
2. the date on which the individual is otherwise eligible for Medicaid benefits.³⁴

If an individual or a married couple transfers assets and requires Medicaid assistance within the look-back period, the transfer penalty will not begin until the applicable resource value drops below the Medicaid resource allowance. Stated more bluntly, the transfer penalty does not begin until the applicant’s medical condition requires nursing home care and the applicant lacks sufficient resources to pay for the care.

HERE’S THE TRAP: If the transfer penalty begins after an applicant’s nursing home costs have consumed all the resources remaining after a gift, how can the applicant continue paying the nursing home costs during the transfer penalty?

This article’s Subsection 2.6.2 describes a strategy to overcome the transfer penalty commencement trap. However, the transfer penalty commencement trap is one of the problems that make long-term care asset protection planning a professionally dangerous enterprise.

1.3.4.5. Indiana Transfer Penalty Calculation

Generally, an Indiana transfer penalty lasts for a number of months calculated by dividing the cumulative uncompensated value of assets transferred within the look-

³³ Ind. Code § 12-15-2-23 and Ind. Code § 12-15-2-23.5.

³⁴ 405 IAC 2-3-1.1(c).

back period by the average monthly cost³⁵ to a private patient of an Indiana nursing facility at the time of application, without rounding down any fractional portion of a month.³⁶ To account for the variable number of days in a month throughout the calendar, FSSA multiplies the decimal portion of the transfer penalty by 30.42. So, for example, if the division results in a penalty of 2.1967555, FSSA rounds up to 2.20, multiplies the decimal by 30.42, and rounds the resulting 6.084 up to 7 to establish a transfer penalty of 2 months and 7 days.³⁷

A penalty-triggering transfer is any uncompensated or under-compensated conveyance or assignment of a person's assets or income to someone else without retaining the ability to use the assets or income to pay the transferor's health care expenses. For example, although adding a party to a checking account does not diminish the original party's unlimited access to the account or trigger a transfer penalty, conveying a real estate interest to another person is a penalty-triggering transfer.

1.3.5. Married Applicants

1.3.5.1. Resources

If both spouses in a married couple need Medicaid benefits, their total allowable resource value is \$3,000.³⁸

Most people who work regularly with long-term care Medicaid refer to a Medicaid application when only one spouse needs Medicaid benefits as a "spousal case." The \$2,000 individual resource allowance applies to the one spouse needing Medicaid

³⁵ \$7,651 as of July 1, 2025, as published and updated as of July 1 each year in Section 3006.00.00 of IHCPPM Chapter 3000 published online at https://www.in.gov/fssa/ompp/files/Medicaid_PM_3000.pdf, last visited for this article on September 13, 2025.

³⁶ 405 IAC 2-3-1.1(g).

³⁷ Section 2640.10.35.05 of IHCPPM Chapter 2600 published online at https://www.in.gov/fssa/ompp/files/Medicaid_PM_2600.pdf, last visited for this article on September 13, 2025.

³⁸ Section 3005.10.00 of IHCPPM Chapter 3000 published online at https://www.in.gov/fssa/ompp/files/Medicaid_PM_3000.pdf, last visited for this article on September 13, 2025.

benefits (the “Institutional Spouse”).³⁹ However, the resource allowance of the other spouse (the “Community Spouse”) is the **lesser amount** of:

50% of the couple’s countable resources (the “Spousal Share”)⁴⁰ as of the “snapshot Date;” or

the maximum inflation-adjusted Community Spouse Resource Allowance (the “CSRA”) applicable in the year of the Medicaid application.⁴¹

The “Snapshot Date” is the beginning (date of admission) of the Institutional Spouse’s first continuous period of institutionalization for 30 consecutive days, which began on or after September 30, 1989.⁴² If the Snapshot Date falls on a weekend or holiday, FSSA uses the asset values as of the preceding business day.

Exempt assets for a married couple include the same assets that are exempt for a single Medicaid applicant, plus any real estate owned by a Community Spouse.⁴³

Until the summer of 2024, FSSA excluded a Community Spouse’s IRA or other similar retirement account from the calculation of the Spousal Share. FSSA began counting the Community Spouse’s retirement accounts in July 2024 under its revision of 405 IAC 2-3-26 published in the Indiana Register on June 26, 2024.⁴⁴

³⁹ *Id.*

⁴⁰ Section 2635.10.10.05 of IHCPPM Chapter 2600 published online at https://www.in.gov/fssa/ompp/files/Medicaid_PM_2600.pdf, last visited for this article on September 13, 2025.

⁴¹ \$157,920 as of January 1, 2025, according to Section 3005.10.00 of IHCPPM Chapter 3000 published online at https://www.in.gov/fssa/ompp/files/Medicaid_PM_3000.pdf, last visited for this article on September 13, 2025.

⁴² Section 2635.10.10 and Section 2635.10.10.05 of IHCPPM Chapter 2600 published online at https://www.in.gov/fssa/ompp/files/Medicaid_PM_2600.pdf, last visited for this article on September 13, 2025.

⁴³ Section 2620.15.30 of IHCPPM Chapter 2600 published online at https://www.in.gov/fssa/ompp/files/Medicaid_PM_2600.pdf, last visited for this article on September 13, 2025.

⁴⁴ 20240724-IR-405230819FRA, published online at <https://iar.iga.in.gov/register/20240724-IR-405230819FRA>, last visited for this article on September 13, 2025.

1.3.5.2. Income

Generally, the FSSA excludes the Community Spouse's income from the Institutional Spouse's monthly income budget. However, if the Community Spouse's income is less than the Spousal Income Standard plus certain other allowances,⁴⁵ the Community Spouse may retain enough of the Institutional Spouse's income to supplement the Community Spouse's income up to the amount of the Spousal Income Standard.⁴⁶

PART 2

ASSET PROTECTION PLANNING

2.1. Long-Term Care Insurance

2.1.1. Indiana's Long Term Care Insurance Program (ILTCIP) History

Insurance is an investment product that someone purchases to shift risk to the issuing insurance company. Long-term care insurance shifts the risk of a person's potential incurrence of long-term health care costs to the insurer.

Indiana was one of the leading states in the 1990s that offered Medicaid eligibility incentives to induce Hoosiers to purchase long-term care insurance from participating insurance carriers. Indiana's Long Term Care Insurance Program (ILTCIP) is a "partnership" between the Indiana Department of Insurance, FSSA, the participating insurance underwriters, and the people who purchase long-term care insurance policies from the insurance underwriters.

2.1.2. ILTCIP Insurance Policy Features

Under the basic plan, an insured person's Medicaid resource allowance increases by \$1 for each \$1 of qualified long-term care insurance coverage.

⁴⁵ Section 3010.20.10 of IHCPPM Chapter 3000 at https://www.in.gov/fssa/ompp/files/Medicaid_PM_3000.pdf, last visited for this article on September 13, 2025.

⁴⁶ Section 3455.15.10.10 of IHCPPM Chapter 3400 published online at https://www.in.gov/fssa/ompp/files/Medicaid_PM_3400.pdf, last visited for this article on September 13, 2025. It is possible in rare cases to increase the CSRA amount if the total value of the couple's monthly income is less than the Community Spouse's Income Allowance.

One of the key principles of the qualified long-term care insurance coverage is that a policy must include an inflation writer that increases the dollar value of coverage by 5% annually (the “Dollar-for-Dollar” benefit).

If the insured person purchases a specified inflation-adjusted minimum coverage amount,⁴⁷ the insured person’s Medicaid resource allowance will be unlimited, and the person will qualify for long-term care Medicaid coverage regardless of the person’s wealth if the person needs a level of long-term care equivalent to nursing home care (the “Total Asset Disregard” benefit).

2.1.3. Indiana Long Term Care Insurance Market Turbulence

A perfect storm of economic factors has repelled insurance carriers from the long-term care insurance market over the past 25 years. First, the average cost of Indiana long-term care has increased consistently in most years at an inflation rate close to 5%.⁴⁸ Second, as the large Baby Boomer population aged, the number of people needing long-term care increased.⁴⁹ Third, although nursing home residents have not necessarily experienced an increased quality of life, health care advances have extended their longevity.⁵⁰

Today, the only participating insurance underwriters listed on the ILTCIP website are Bankers Life and Casualty Co. and Thrivent Financial for Lutherans.⁵¹ Anecdotally, multiple clients have consulted with this author over the past 5 years about long-term care

⁴⁷\$522,686 in 2025 according to data published online by the ILTCIP at <https://www.in.gov/iltcp/files/Important-Message-11-2023.pdf>, last visited for this article on September 13, 2025.

⁴⁸ See the historic average Indiana nursing home rates from 1998 to the present published online by FSSA in Section 3006.00.00 in Chapter 3000 of IHCPPM Chapter 3000 published online at https://www.in.gov/fssa/ompp/files/Medicaid_PM_3000.pdf, last visited for this article on September 13, 2025.

⁴⁹ Mark Mather, Linda A. Jacobsen, and Kelvin Pollard, *Aging Baby Boomers to Face Caregiving, Obesity, Inequality Challenges*, Population Reference Bureau, Population Bulletin, vol. 70, no. 2, January 13, 2016, published online at <https://www.prb.org/resources/aging-baby-boomers-to-face-caregiving-obesity-inequality-challenges/#:~:text=The%20aging%20of%20the%20baby%20boom%20generation%20could,Reference%20Bureau%20%28PRB%29%20projects%20in%20a%20new%20report.> Last visited for this article on September 13, 2025.

⁵⁰ Jamie Wells, M.D., *Does Access to Health Care Promote Longevity?*, The American Council on Science and Health, May 22, 2019, published online at <https://www.acsh.org/news/2019/05/22/does-access-health-care-promote-longevity-14044>, last visited for this article on September 13, 2025.

⁵¹ Insurance Companies list published online at <https://www.in.gov/iltcp/consumer-information/insurance-companies/>, last visited for this article on September 13, 2025.

insurance companies' proposals to maintain coverage for larger premium amounts, maintain premium amounts with reduced coverage, or purchase a termination of coverage from the insureds.

Multiple insurance companies offered long-term care insurance before the ILTCIP, and some have continued offering coverage independently from the ILTCIP for decades. However, this author's individual inquiries about long-term care insurance coverage have revealed that the cost of long-term care insurance has increased substantially while the insurance carriers have reduced the maximum dollar value of coverage per premium dollar. In this author's opinion, the increased long-term care insurance premium costs and reduced coverage make long-term care insurance unfeasible for most potential long-term care insurance customers.

2.2. Powers of Attorney with Expanded Gift Powers

2.2.1. Multimillionaire Federal Estate Tax Problem with Unlimited Powers of Attorney

A bizarre estate tax nightmare can occur when an attorney in fact dies holding an unlimited power of attorney if the combined wealth of the principal and the attorney-in-fact exceeds the applicable federal estate tax exemption.⁵² The unlimited power of attorney would constitute a general power of appointment that would cause the principal's wealth to be included in the taxable gross estate of the attorney in fact.⁵³

2.2.2. Indiana's Statutory Power of Attorney Gift Restriction

To protect Indiana residents from that scenario, the gift power of the Indiana Power of Attorney Act includes the following gift power restriction:

The attorney in fact or a person that the attorney in fact has a legal obligation to support may not be the recipient of gifts in one (1) year that total more than the

⁵² \$13.99 million in 2025 under 26 U.S.C. §2010, increasing to \$15 million for decedents dying after December 31, 2025, under Section 70106 of H.R.1 - One Big Beautiful Bill Act, enacted as Public Law No: 119-21 on July 4, 2025 (<https://www.congress.gov/bill/1/th-congress/house-bill/1/text>, last visited for this article on September 13, 2025).

⁵³ 26 U.S.C. §2041.

*amount allowed as an exclusion from gifts under Section 2503 of the Internal Revenue Code.*⁵⁴

While that restriction may be essential to protect multimillionaires, it unnecessarily deprives less financially endowed families of essential long-term care asset protection gift planning opportunities.

2.2.3. Overriding Unnecessary Statutory Gift Restriction

Fortunately for people with more modest wealth than multimillionaires, the Indiana Power of Attorney Act includes the following express authority to remedy the statutory gift limitation problem:

*A power of attorney may in writing delete from, add to, or modify in any manner a power incorporated by reference, including the power to make gifts under section 9 of this chapter.*⁵⁵

Therefore, except for clients who want to keep the restriction, estate planning attorneys should include language like the following example in a general durable power of attorney for all clients whose multigenerational wealth does not exceed the federal estate tax exemption:⁵⁶

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.

2.3. Asset Protection Planning for Individuals

2.3.1. Fundamental Long-Term Care Asset Protection Concepts

The potential risk of future long-term care costs is a function of:

1. whether an individual will need long-term care;
2. the duration of the required care; and

⁵⁴ Ind. Code § 30-5-5-9(a)(2).

⁵⁵ Ind. Code § 30-5-5-1(d).

⁵⁶ \$13.99 million in 2025 under 26 U.S.C. §2010, increasing to \$15 million for decedents dying after December 31, 2025, under Section 70106 of H.R.1 - One Big Beautiful Bill Act, enacted as Public Law No: 119-21 on July 4, 2025 (<https://www.congress.gov/bill/119/congress/house-bill/1/text>, last visited for this article on September 13, 2025).

3. the cost of the care.

Because the risk relates directly to the individual's future long-term health care needs, the only way to protect the individual's assets is to irrevocably separate the individual from key asset ownership elements of the assets.

Some individuals can protect relatively permanent asset holdings like life insurance policies and real estate by transferring them to other people or to irrevocable trusts. However, the long-term care asset protection separation requirement makes it much more difficult to protect more liquid assets like bank accounts, investments, and retirement plan assets. Retirement assets amplify the asset protection problem because the required ownership transfer triggers the deferred taxes of regular IRAs and other tax-deferred accounts, and destroys the tax benefits of Roth IRAs. So, an individual's long-term care asset protection plan usually focuses on protecting real estate and life insurance policies.

2.3.2. Asset Transfer Planning Opportunities

An individual's transfer of assets without considering the effects of Medicaid transfer penalties risks turning a future health care crisis into an insolvency crisis. However, a skillful elder law attorney can guide a client through planned asset transfers to protect some assets while retaining sufficient reserves to pay long-term care costs during the look-back period.

Two elements of a planned real estate remainder interest transfer amplify the plan's asset protection results more than most other asset protection strategies.

1. While the basis of the transfer penalty for the remainder interest transfer value is a fraction of the total real estate value,⁵⁷ the retained life estate terminates automatically

⁵⁷ For FSSA's explanation of the value calculation on the transfer of a remainder interest, see Section 2605.25.10.05 of IHCPPM Chapter 2600 published online at https://www.in.gov/fssa/ompp/files/Medicaid_PM_2600.pdf, last visited for this article on September 13, 2025. Note that the explanation incorrectly states that a remainder interest holder cannot sell the remainder interest unless the deed permits it. In truth, a remainder interest holder can sell the remainder interest unless the deed restricts or prohibits the sale.

upon the life tenant's death, thereby permanently protecting the entire real estate value for the remainder interest holder.

2. FSSA uses the property tax assessed value to determine the property's fair market value,⁵⁸ which usually understates property values in stable and rising real estate markets.⁵⁹

Therefore, a planned real estate remainder interest transfer can usually protect 100% of the property's value while triggering a transfer penalty based on a much smaller percentage of the real estate's fair market value.

Some life insurance transfers also offer important asset protection opportunities. If a policy's cash surrender value is significantly less than the death benefit value, an irrevocable transfer of the policy will protect the death benefit while triggering a relatively small transfer penalty based on the cash surrender value.

2.3.3. Asset Transfer Planning Transferee Selection Pitfalls

As previously stated at the beginning of Subsection 2.3.2 of this article, poor asset transfer planning can create dreadful financial hardships. While it is important to consider transfer penalties in an asset transfer plan, transferee selection is also essential.

The real estate remainder interest transfer strategy endows the transferee with a permanent future interest in the real estate. If the transferee is an individual, the transferee's potential personal drama, like the transferee's death, disability, or financial distress may jeopardize the stability of the asset a client is trying to protect. So, an estate planning attorney must

⁵⁸The IHCPPM indicates that the real estate's fair market value should be calculated by dividing the tax assessment value by an obscure assessment trending statistic used by county assessors to update property tax assessments based on recent trends in comparable property sale values referred to as the "assessment ratio" in Section 2605.25.10 of IHCPPM Chapter 2600 published online at https://www.in.gov/fssa/ompp/files/Medicaid_PM_2600.pdf, last visited for this article on September 13, 2025. However, the assessment ratio is not readily available for evaluation in most counties, and, anecdotally, Medicaid eligibility officials still follow a long-standing pattern of only relying on the tax assessment value, itself.

⁵⁹ However, Indiana's property tax assessed value system usually lags behind market trends and overstates fair market values in falling markets like the housing crisis in the "Great Recession" between 2007 and 2009. For information about housing prices during the Great Recession, see John Weinberg, *The Great Recession and Its Aftermath*, November 22, 2013, Federal Reserve History, published online at <https://www.federalreservehistory.org/essays/great-recession-and-its-aftermath>, last visited for this article on September 13, 2025.

consider and advise the client about the inherent risks of transferring a remainder interest to one or more individuals.

Many people buy life insurance because they think they need it to pay funeral costs. Also, there is no shortage of uninformed people who may advise a life insurance policyholder to transfer life insurance to a funeral home to protect the policy from long-term care costs. A life insurance policy transfer to a funeral home may protect a small life insurance policy medically under Indiana's life insurance resource exemption.⁶⁰ However, the life insurance exemption's requirement that the State of Indiana be designated to receive any remaining policy benefits after the payment of funeral costs ruins the strategy's benefits if the policy's death benefit value substantially exceeds the funeral costs.⁶¹

2.3.4. Asset Transfer Planning Look-Back Period Pitfalls

Many people mistakenly believe that a transfer penalty cannot last longer than the look-back period. Once someone files a Medicaid application, a transfer that occurred within the look-back period must run to its full duration, regardless of whether it extends beyond the end of the look-back period.

An estate planning lawyer must conspicuously warn an asset transfer planning client about the look-back period. The warning should emphasize that the family should never let a nursing home file a Medicaid application without consulting the lawyer about transfer penalties.

A lawyer who files Medicaid applications for clients must also establish a foolproof process to avoid prematurely filing a Medicaid application near the end of a look-back period if the applicant has an applicable transfer penalty.

2.3.5. Asset Transfers to Irrevocable Trusts – Essential Elements

An asset transfer plan featuring a well-designed irrevocable trust can eliminate the Asset Transfer Planning Pitfalls previously described in Subsection 2.3.3 of this article. However,

⁶⁰ Section 2615.25.05.15 of IHCPPM Chapter 2600 published online at https://www.in.gov/fssa/ompp/files/Medicaid_PM_2600.pdf, last visited for this article on September 13, 2025.

⁶¹ *Id.*

the irrevocable trust agreement's design must satisfy state⁶² and federal⁶³ Medicaid laws governing the availability of a trust's assets as a Medicaid member's resources, while remaining flexible enough to avoid the hardships of unintended consequences.

If the client or any trustee of the client's irrevocable trust has any real or theoretical discretion to distribute any part of the trust's principal to the client or the client's spouse, federal law includes that portion of the trust's principal as an available resource to the client or the client's spouse.⁶⁴

So, the irrevocable trust agreement cannot give the client or the client's spouse the discretionary authority to revoke or amend the trust agreement, nor can it authorize the trustee to distribute any part of the trust's principal to the client or the client's spouse for any reason, including the HEMS⁶⁵ standard provisions that appear in many estate tax credit shelter trusts for surviving spouses and third-party special needs trusts.

⁶² The FSSA defines "assets" in 405 IAC 2-3-1.1(a)(1) for purposes of counting resources for eligibility and imposing transfer penalties for asset transfers as follows:

(1) "Assets" includes the income and resources of an applicant or a member, and an applicant's or a member's spouse, including income or resources the applicant or member, or the applicant's or member's spouse, is entitled to receive but does not receive because of action by:

(A) the applicant or member, or the applicant's or member's spouse;

(B) a person, including a court or an administrative body with legal authority to act in place of or on behalf of the applicant or member, or the applicant's or member's spouse; or

(C) a person, including a court or an administrative body acting at the direction or on the request of the applicant or member, or the applicant's or member's spouse.

The term includes assets an individual is entitled to receive but does not receive because of failure to take action subject to subsection (j).

⁶³ 42 U.S.C. §1396p(d).

⁶⁴ 42 U.S.C. §1396p(d)(3)(B) provides:

(B) In the case of an irrevocable trust-

(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income-

(I) to or for the benefit of the individual, shall be considered income of the individual, and

(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c); and

(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c), and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

⁶⁵ "HEMS" stands for health, education, maintenance, and support.

2.3.6. Irrevocable Trust Flexibility

While the client and the client's spouse must not have or retain the discretionary authority to revoke or amend the trust agreement, tax issues and the "rule of unintended consequences" make it essential to include subtle flexibility in the irrevocable trust agreement.

The irrevocable trust does not have to be wholly inflexible. The following sample language authorizes the trust's settlor (also known as the "grantor" for "trustor") to modify the trust agreement's language indirectly through a retained testamentary power of appointment:

ARTICLE 4

IRREVOCABILITY AND POWERS OF APPOINTMENT

4.1. Irrevocable Trust.

The trusts we are making by this Agreement are irrevocable during our lifetimes.⁶⁶

4.2. Testamentary Power of Appointment.

4.2.1. We reserve the testamentary power to appoint, remove, and replace beneficiaries and restate all other terms and conditions of this Agreement to take effect after our deaths.

4.2.2. Either of us may use the testamentary power of appointment by making a Last Will and Testament that refers to this article and any provisions of this Trust Agreement to be revised or replaced and states the Trust's new or revised provisions.

4.2.3. The power of appointment provisions in our most recently executed Last Will and Testament will govern the exercise of the powers of appointment under this article.

If the client's real estate transfers to the irrevocable trust include the client's residence, the client may need to sell the residence to downsize to a more manageable home or to reduce home maintenance costs after the client moves to assisted living or nursing home. If the client does not retain sufficient rights concerning the irrevocable trust to qualify for the exclusion of gain from the sale of the client's parental residence under section 121 of the

⁶⁶ This and other simple provisions in this article include language for married couples to illustrate how to design joint irrevocable trusts, but the editing process to convert the language for an individual settlor's irrevocable trust agreement is relatively easy.

Internal Revenue Code (the “IRC”),⁶⁷ the client’s lack of ownership of the entire sale proceeds will make the trust’s portion of the sale proceeds taxable.

IRC section 671 attributes a trust’s income to its grantor if the grantor retains certain rights over the trust described in sections referenced by section 671.⁶⁸ So, the following sample provisions will qualify the trust’s real estate sale proceeds to be attributable to the settlor and be excluded as the sale of the Settlor’s principal residence under IRC section 121:

ARTICLE 5

ADMINISTRATION DURING OUR LIVES

5.1. Distribution of Net Income.

During each of our lives, the Trustee will pay to us, or the survivor of us, or use for our benefit, or the survivor of us, all the Net Income, but none of the principal.

5.2. Reserved Grantor Trust Powers.

5.2.1. We retain and reserve the power to substitute assets for trust property of comparable value.

5.2.2. We retain and reserve the power to borrow money from the Trust on terms including the accrual of interest on sums borrowed at the Applicable Federal Rate established and published by the Internal Revenue Service.

5.2.3. We retain and reserve the following powers of administration described in 26 USC § 675(4):

5.2.3.1. a power to vote or direct the voting of stock or other securities of a corporation in which my holdings and the Trust’s holdings are significant from the viewpoint of voting control;

5.2.3.2. a power to control the investment of the Trust Estate either by directing investments or reinvestments or by vetoing proposed investments or reinvestments, to the extent that the trust funds consist of stocks or securities of corporations in which our holdings and the Trust’s holdings are significant from the viewpoint of voting control; or

5.2.3.3. a power to exchange and substitute our property for trust property of an equivalent value.

5.2.3.4. We retain and reserve the direct power to appoint individual beneficiaries of the Trust’s income or principal during our lifetimes,

⁶⁷ 26 U.S.C. § 121.

⁶⁸ 26 U.S.C. §671, with a reference to 26 USC §§671-679, which compose Subpart E of Title 26, Subtitle A, Chapter 1, Subchapter J, Part II.

provided that we retain and reserve no power to make a beneficiary appointment described in 26 USC § 674(b), (c), or (d) as amended, and the Treasury Regulations promulgated thereunder.

5.2.4. Our attorneys-in-fact may exercise the powers listed in this Section on our behalf during our lifetimes.

5.2.5. Notwithstanding any provision of this article to the contrary, we do not retain or reserve any power to demand and receive any portion of the trust property in any transaction other than as a loan by the Trustee as our creditor to either of us as the borrower or as an exchange of our property for comparably valued trust property.

5.2.6. Notwithstanding any provision of this article to the contrary, we expressly prohibit the Trustee from distributing any portion of the trust property to us other than as a loan by the Trustee as our creditor to either of us as the borrower or as an exchange of trust property for our comparably valued property.

Note that the retained grantor trust powers do not include any powers or rights to receive distributions of the trust's principal. In fact, the last two provisions of the sample language double down on emphasizing that point.

2.3.7. Life Insurance Transfers and Beneficiary Designations

If a client transfers a life insurance policy to an irrevocable trust, the client should also designate the trust as the policy's beneficiary to ensure that the trust receives the death benefit.

2.3.8. Trust Protectors

Although the settlor's retained testamentary powers of appointment add essential flexibility to an irrevocable trust agreement, they are useless if the settlor is incapacitated. So, a settlor may want to appoint an independent person to serve as a trust protector with the authority to modify the trust under circumstances that undermine the settlor's objectives. However, just as the trust agreement must not authorize any distributions of principal to the settlor or the settlor's spouse, the trust protector's powers must not include the authority to direct or authorize the distribution of the trust's principal to the settlor or the settlor's spouse.⁶⁹

⁶⁹ Although not intended to be a masterful template for emulation, consider using language to appoint and authorize a trust protector like the sample that appears as **APPENDIX 1** of this article.

2.3.9. Beware of Small Trust Liquidation Provisions!

It is essential to read the entire trust agreement thoroughly to avoid provisions that may authorize the distribution of principal to the settlor. Many trusts include common-sense provisions for liquidating trusts with low asset values, but those provisions can sink the ship of an asset protection plan if the provisions allow the trustee to distribute principal to the settlor. The following sample language authorizes a small trust liquidation but includes a restriction that cross-references the provisions for administering the trust during the settlor's lifetime:

11.4. Liquidation of Small Trusts.

11.4.1. If a trust's total asset value is not more than \$100,000, the Trustee may use discretion to end the Trust and distribute its property to the beneficiary or beneficiaries then entitled to receive the Trust's current income.

11.4.2. If there is more than one beneficiary of the Trust, the Trustee will distribute the trust property among the beneficiaries proportionately to their shares of the Trust's income.

11.4.3. Regardless of the other provisions of this Section, the Trustee may not distribute more trust property to us than ARTICLE 5 authorizes the Trustee to distribute to us.

2.3.10. DO NOT PLAN A DESIGNATION OF AN IRREVOCABLE TRUST AS A RETIREMENT ASSETS DESIGNATED BENEFICIARY!!!

It may be appropriate to establish pay on death and transfer on death arrangements to consolidate personal property in an irrevocable trust. However, an inter vivos trust that is irrevocable during the settlor's lifetime is **NEVER** an appropriate beneficiary of a 401(k), simple IRA, Roth IRA, or any other comparable retirement plan asset because it is too inflexible for non-spouse beneficiaries and its prohibition against principal withdrawals will prevent a spouse beneficiary from taking required mineral distributions.

A trust will not qualify as a beneficiary unless:

(i) The trust is a valid trust under State law or would be but for the fact that there is no corpus.

(ii) The trust is irrevocable or will, by its terms, become irrevocable upon the death of the employee.

(iii) The beneficiaries of the trust who are beneficiaries with respect to the trust's interest in the employee's interest in the plan are identifiable (within the meaning of paragraph (f)(5) of this section [42 CFR § 1.401(a)(9)-2(f)(5)]) from the trust instrument.

(iv) The documentation requirements in paragraph (h) of this section [42 CFR § 1.401(a)(9)-2(h)] have been satisfied.⁷⁰

2.4. Testamentary Trust for the Surviving Spouse

2.4.1. Federal Testamentary Trust Protection

Subsection 2.3.5 of this article stated that a Medicaid applicant's resources include the assets of an inter vivos irrevocable trust if the trust was funded by the assets of the applicant or the applicant's spouse.⁷¹ However, a testamentary trust established under a deceased spouse's last will and testament for the surviving spouse's benefit avoids the resource inclusion problem.⁷² So, while an irrevocable trust must restrict a surviving spouse's access to principal, the deceased spouse's testamentary trust can give the surviving spouse unlimited access to principal without causing the principal to be included as a surviving spouse's resources.⁷³

2.4.2. Designating the Testamentary Trust as Account and Policy Beneficiary

⁷⁰ 42 CFR § 1.401(a)(9)-2, as most recently amended by T.D. 10001, [89 FR 58907](#), July 19, 2024.

⁷¹ 42 U.S.C. § 1396p(d)(3)(B).

⁷² 42 U.S.C. § 1396p(d)(2)(A) provides (with emphasis added): For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust **other than by will**:

(i) The individual.

(ii) The individual's spouse.

(iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.

(iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

Ind. Code § 29-1-8-10 defines IRA beneficiary designations and other direct funding arrangements as "direct transfers" and expressly provides that a "direct postmortem transfer is a transfer of an asset or property to a trust established in a will for all purposes of the Social Security Act (42 U.S.C. 301 et seq.)."

⁷³ A sample article of a will establishing a testamentary trust for the testator's spouse appears in **APPENDIX 2** of this article.

The following are examples of provisions in client letters of direction to financial institutions requesting assistance with designating testamentary trust as beneficiaries:

2.4.2.1. IRA Designation of Testamentary Trust as Beneficiary

Please help me designate the [Testamentary Trust Name] as the beneficiary of my IRA Account Number _____. For information about the trustees and their powers, please see the enclosed certification of trust made under Ind. Code § 30-4-4-5.

2.4.2.2. Bank Account Designation of Testamentary Trust as Beneficiary

Please help me designate the [Testamentary Trust Name] as the POD beneficiary of my checking Account Number _____. For information about the trustees and their powers, please see the enclosed certification of trust made under Ind. Code § 30-4-4-5.

2.4.2.3. Investment Account Designation of Testamentary Trust as Beneficiary

Please help me designate the [Testamentary Trust Name] as the TOD beneficiary of my investment Account Number _____. For information about the trustees and their powers, please see the enclosed certification of trust made under Ind. Code § 30-4-4-5.

2.5. Protecting Individual Family Trustees Against Fiduciary Liability

2.5.1. Authorizing Self-Interested Trustee Transactions

2.5.1.1. Self-Interested Trustee Transactions Introduction

The Indiana Trust Code prohibits a trustee from engaging in self-interest transactions that involve the trustee in the trustee's fiduciary capacity.⁷⁴ While the restriction justifiably addresses a corrupt trustee's self-dealing, it is a blunt instrument that does not allow a trustee/beneficiary to self-deal in transactions that are not prejudicial to the other beneficiaries. So, this Subsection outlines the issues and suggests a drafting solution to protect a trustee/beneficiary from an inequitable restriction that penalizes the trustee for accepting fiduciary responsibility.

2.5.1.2. Trust Code Self-Dealing Prohibition

The Indiana Trust Code's self-dealing provisions in Ind. Code § 30-4-3-7 state:

⁷⁴ Ind. Code § 30-4-3-7.

IC 30-4-3-7 Self-dealing; transactions between trusts

Sec. 7. (a) Unless the terms of the trust provide otherwise or the transaction is authorized under section 7.5 of this chapter, IC 28-1-12-8, or IC 28-6.1-6-26, the trustee has a duty:

(1) not to loan funds to the trustee or an affiliate;

(2) not to purchase or participate in the purchase of trust property from the trust for the trustee's own or an affiliate's account;

(3) not to sell or participate in the sale of the trustee's own or an affiliate's property to the trust; or

(4) if a corporate trustee, not to purchase for or retain in the trust its own or a parent or subsidiary corporation's stock, bonds, or other capital securities. However, the trustee may retain such securities already held in trusts created prior to September 2, 1971.

(b) Unless the terms of the trust provide otherwise, a corporate trustee may invest in, purchase for, or retain in the trust its own or an affiliate's obligations, including savings accounts and certificates of deposit, without the investment, purchase, or retention constituting a conflict of interest under section 5 of this chapter.

(c) Unless the terms of the trust provide otherwise, a corporate trustee does not violate subsection (a) by investing in, purchasing for, or retaining in the trust its own or an affiliate's obligations, including savings accounts and certificates of deposit, if the payment of each obligation is fully insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or any insurer approved by the department of financial institutions under IC 28-7-1-31.5.

(d) If the terms of the trust permit the trustee to deal with a beneficiary for the trustee's own account, the trustee has a duty to deal fairly with and to disclose to the beneficiary all material facts related to the transaction which the trustee knows or should know.

(e) Unless the terms of the trust provide otherwise, the trustee may sell, exchange, or participate in the sale or exchange of trust property from one (1) trust to the trustee as trustee of another trust, provided the sale or exchange is fair and reasonable with respect to the beneficiaries of both trusts and the trustee discloses to the beneficiaries of both trusts all material facts related to the sale or exchange which the trustee knows or should know.

(f) This section does not prohibit a trustee from enforcing or fulfilling any enforceable contract or agreement:

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

(2) between the settlor and the trustee in the trustee's individual capacity.

2.5.1.3. Authority to Allow Self-Interested Trustee Transactions

Ind. Code § 30-4-3-7(a) begins by limiting the statute's application to trusts that do not authorize a trustee to engage in self-interested transactions. So, a trust agreement and testamentary trust provisions of a will can expressly authorize a trustee to engage in self-interested transactions.

2.5.1.4. Express Authorization of Self-Interested Trustee Transactions

This author suggests authorizing an individual trustee who is also a beneficiary of the trust to engage in self-interested transactions that are not prejudicial to the interests of the other beneficiaries. The following sample language strives to balance the interests of the trustee's need to participate with other beneficiaries in transactions that benefit the beneficiaries while preventing the trustee from abusing that authority:

12.1. Trustee Powers

12.1.1. Self-Interested Conduct

12.1.1.1. "Self-Interested Conduct" is any action or conduct by a Trustee in a matter or transaction in which the Trustee may have any kind of personal interest other than the Trustee's fulfillment of fiduciary responsibility.

12.1.1.2. An individual Trustee may engage in Self-Interested Conduct if:

12.1.1.2.1. The Trustee is a beneficiary of a trust under this Agreement;

12.1.1.2.2. The Self-Interested Conduct would be reasonable under the circumstances for any person other than the Trustee; and

12.1.1.2.3. The Trustee's Self-Interested Conduct will not cause the Trustee to receive a larger percentage share of the value of distributions compared to the other beneficiaries' shares than the Trustee would otherwise receive if all the beneficiaries otherwise received the distributions in the ordinary course of the administration of the trust under this Agreement.

2.5.2. Prudent Investor Act

2.5.2.1. Prudent Investor Act Introduction

The Indiana Uniform Prudent Investor Act⁷⁵ establishes minimum standards of fiduciary conduct governing the administration of a trust or estate. Most people would expect a professional fiduciary to satisfy those standards. However, most estate planning clients don't want to expose their trusted family members acting as amateur fiduciaries to liability for their unintentional failure to perform on the level of a professional fiduciary.

2.5.2.2. Sample Prudent Investor Act Exoneration Provisions

The following sample shows how a will or trust agreement may protect an amateur individual fiduciary from liability under the Prudent Investor Act:

12.7. Limited Duty Under Prudent Investor Rule.

12.7.1. No common law or statutory "prudent person" rule, "prudent investor" rule, or similar rule will apply to an individual Trustee's administration of a Trust under this Agreement.

12.7.2. I intend that each Trustee exercise discretion in the acquisition and retention of trust property without regard to prudent investments.

12.7.3. Specifically, an individual Trustee will have no duty to:

12.7.3.1. Make the trust property productive;

12.7.3.2. Preserve the trust property;

12.7.3.3. Diversify the investment of trust property;

12.7.3.4. Manage the trust property in the interest of the beneficiary;

12.7.3.5. Review trust property and develop an investment plan;

12.7.3.6. Verify facts relevant to investments;

12.7.3.7. Use special skills in making investments;

12.7.3.8. Consider any factors in investment, including without limitation:

12.7.3.8.1. General economic conditions;

12.7.3.8.2. The possible effect of inflation or deflation;

⁷⁵ Ind. Code ch. 30-4-3.5.

12.7.3.8.3. The expected tax consequences of investment decisions or strategies;

12.7.3.8.4. The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real estate;

12.7.3.8.5. The expected total return from income and the appreciation of capital;

12.7.3.8.6. Other resources of the beneficiaries;

12.7.3.8.7. Needs for liquidity, regularity of income, and preservation or appreciation of capital; or

12.7.3.8.8. An asset's special relationship or special value, if any, to the purposes of the Trust or a beneficiary.

2.6. Crisis Asset Protection Planning with Gifts and Annuities

2.6.1. Gifts and the Transfer Penalty Commencement Trap

If an unmarried person needs long-term care immediately, there is no time to structure an estate plan based on the 5-year look-back period. However, as this article explains in Subpart 1.3.4.4, a transfer penalty does not begin until a Medicaid applicant needs nursing home care and the applicant's countable resource value drops below the applicable resource allowance. Therefore, a gift plan will succumb to the transfer penalty commencement trap if the applicant retains countable resources worth more than the resource allowance. This is why most elder law attorneys guide nursing home residents' families through an asset salvage plan involving a combination of gifts and custom-designed annuities.

2.6.2. Reducing Resources with Medicaid-Compliant Promissory Notes and Annuities

A Medicaid-compliant promissory note or annuity can help overcome the transfer penalty commencement trap by reducing the applicant's resources to the resource allowance level.

2.6.3. 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;

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.

2.6.4. Medicaid-Compliant Annuities

A Medicaid-compliant annuity is an annuity contract that:

1. is irrevocable and nonassignable;
2. is actuarially sound (payable within the life expectancy of the community spouse or institutional spouse);
3. provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made; and
4. either:
 - A. the state is named as 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 named as a beneficiary in the second position after the community spouse or a minor or disabled child.⁷⁶

2.6.5. Annuities Versus Promissory Notes

The following comparison shows the cost-benefit analysis required to choose whether to use an annuity or promissory note to salvage assets in a crisis asset protection gift strategy:

An annuity must designate the state as a primary or secondary beneficiary.	A promissory note must prohibit debt cancellation.
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⁷⁶ 405 IAC 2-3-1.2(c)(2) and 405 IAC 2-3-1.2(d).

An annuity creates a stable cash flow that does not require action by any individual.	A promissory note depends on the payor making the monthly payments promptly.
An annuity plan is not dependent on a responsible individual payor.	A promissory note plan will fail if the payor is irresponsible.
An annuity purchase may take more than a week to conclude and document the transaction.	A family can implement a promissory note strategy in less than a week.
The cost of an annuity purchase includes the additional expense of the annuity broker's commission.	A promissory note requires the elder law attorney to render detailed and costly services to document the transaction.
A skilled annuity broker can help calculate and confirm essential gift/annuity transaction details.	A promissory note strategy depends wholly on the elder law attorney to calculate and confirm the gift/loan transaction details.

Although we have used promissory notes in many cases, this author's firm prefers the simplicity and reliability of the gift/annuity strategy – especially when a client's family members are not sufficiently sophisticated or reliable to make promissory note payments faithfully.

2.6.6. Purchasing a Medicaid-Compliant Annuity

Although almost any insurance underwriter can issue an immediate annuity that satisfies the Medicaid annuity rule,⁷⁷ mainstream underwriters generally do not issue annuities with payout terms shorter than 60 months.

⁷⁷ *Id.*

However, most crisis Medicaid plans create transfer penalties that are shorter than 60 months.

Therefore, most elder law attorneys coordinate with annuity brokers, like Krause Financial, to help community spouses purchase custom-designed annuities with extremely short payouts to replenish their asset portfolios on accelerated timetables.

2.7. Married Couples

2.7.1. Applicability of Asset Protection to Planning for Individuals to Couples

Most planning concepts described in Section 2.2 of this article concerning Asset Protection Planning for Individuals also apply to married couples. However, married couples require a detailed analysis of timing issues, opportunities created by Medicaid rules pertaining exclusively to married couples, and special health circumstances.

2.7.2. Married Couples' Look-Back Period Timing Issues

Timing issues can determine a married couple's asset protection planning efficacy. The most critical timing issues concern the 5-year look-back period and the snapshot date.

Medicaid imposes a transfer penalty if an applicant **OR** the applicant's spouse makes a transfer within the look-back period.⁷⁸ So, if either spouse makes a transfer and one or both need Medicaid assistance during the look-back period, the couple will have to pay the long-term care costs without Medicaid assistance. An estate planner must advise a married couple of this risk before recommending an asset protection gift plan and verify that the couple has sufficient liquid resources to pay the long-term care costs if a health crisis occurs within the look-back period.

Although the look-back period timing issue was previously mentioned in Subsection 2.3.4, the issue is sufficiently important to emphasize here as well. Always consider and document all transfers that occurred within an unexpired look-back period and ensure that no one files a Medicaid application before the end of the look-back period without a clear strategy for paying long-term care costs during an applicable transfer penalty.

⁷⁸ 405 IAC 2-3-1.1(c).

2.7.3. A Married Couple's Snapshot Date Timing Issue

As previously stated in Subpart 1.3.5.1 of this article, the Community Spouse's resource allowance in a spousal case is the smaller value of the applicable CSRA⁷⁹ or 50% of the couple's total resource value as of the snapshot date. The snapshot date creates a critical timing issue for couples with less than 200% of the CSRA because any reduction of the total resource value before the snapshot date reduces the Community Spouse's resource allowance.

To illustrate the snapshot date timing issue, consider Bill and Sue Smith. Bill has early-onset dementia, and he has not had a snapshot date. The Smiths have the following assets and liabilities:

Ownership/Responsibility	Asset/Liability	Value
Joint	Checking Account	\$150,000.00
Bill	IRA	\$50,000.00
Sue	IRA	\$50,000.00
Joint	Investment Account	\$100,000.00
Tenants by the Entirety	Real Estate	\$300,000.00
Joint	Mortgage Loan	-\$100,000.00
Joint	Vehicle	\$75,000.00
Joint	Vehicle Loan	-\$50,000.00
Total Net Asset Value		\$575,000.00

The Smiths' countable resource value calculation appears in the following table:

Ownership/Responsibility	Asset/Liability	Value
Joint	Checking Account	\$150,000.00
Bill	IRA	\$50,000.00
Sue	IRA	\$50,000.00
Joint	Investment Account	\$100,000.00
Countable Resource Value		\$350,000.00

If Sue paid off the mortgage and vehicle loans before admitting Bill to a nursing home, the payoff would modify the Smiths' assets and liabilities as follows:

Ownership/Responsibility	Asset/Liability	Value
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⁷⁹ \$157,920 as of January 1, 2025, according to Section 3005.10.00 of IHCPPM Chapter 3000 published online at https://www.in.gov/fssa/ompp/files/Medicaid_PM_3000.pdf, last visited for this article on September 13, 2025.

Joint	Checking Account	\$100,000.00
Bill	IRA	\$50,000.00
Sue	IRA	\$50,000.00
Tenants by the Entirety	Real Estate	\$300,000.00
Joint	Vehicle	\$75,000.00
Total Net Asset Value		\$575,000.00

The payoff will also modify the Smiths' countable resource value calculation as follows:

Ownership/Responsibility	Asset/Liability	Value
Joint	Checking Account	\$100,000.00
Bill	IRA	\$50,000.00
Sue	IRA	\$50,000.00
Countable Resource Value		\$200,000.00

If Sue had not paid off the mortgage loan and vehicle loan until after Bill's nursing home admission, their allowable resource calculation would have been as follows:

Spouse	Resource Allowance
Sue	\$157,920.00
Bill	\$2,000.00
Total Resources Allowance	\$159,920.00
Total Resources	\$350,000.00
Total Resources Allowance	-\$159,920.00
Excess Resources	\$190,080.00

Then, Sue could have spent down the excess resources and qualified Bill for Medicaid by paying off the loans and reorganizing one of the IRAs⁸⁰ post-snapshot date.

Sadly, the premature loan payoffs reduced the Smiths' allowable resources as follows:

Spouse	Resource Allowance
Sue	\$100,000.00
Bill	\$2,000.00
Total Resources Allowance	\$102,000.00

⁸⁰ See more details about spousal case IRA planning below Subsections 2.7.7 - 2.7.10 of this article.

2.7.4. A Married Couple's Mortgage Loan Snapshot Date Timing Opportunity

Debt can be a blessing and a curse in long-term care asset protection planning. As the examples illustrated in Subsection 2.7.3 of this article, a couple's premature debt payoff can reduce the community spouse's resource allowance. However, the opposite effect is possible for a couple with a strong credit rating and substantial real estate equity.

Let's revisit Bill and Sue to examine the mortgage loan snapshot date timing opportunity and assume the same original facts, but their assets and liabilities are as follows:

Ownership/Responsibility	Asset/Liability	Value
Joint	Checking Account	\$150,000.00
Bill	IRA	\$10,000.00
Sue	IRA	\$10,000.00
Joint	Investment Account	\$10,000.00
Tenants by the Entirety	Real Estate	\$300,000.00
Joint	Vehicle	\$15,000.00
Total Net Asset Value		\$555,000.00

The Smiths' countable resource value calculation appears in the following table:

Ownership/Responsibility	Asset/Liability	Value
Joint	Checking Account	\$150,000.00
Bill	IRA	\$10,000.00
Sue	IRA	\$10,000.00
Joint	Investment Account	\$10,000.00
Countable Resource Value		\$180,000.00

While the Smiths are not paupers, the following resource allowance calculation leaves them with a small allowance and an unnecessarily large value of excess resources for a snapshot valuation:

Spouse	Resource Allowance
Sue	\$90,000.00
Bill	\$2,000.00
Total Resource Allowance	\$92,000.00

Note that the real estate does not count as a resource because Sue is the community spouse residing at home. If Sue borrowed \$128,000 through a home equity loan and deposited the

loan proceeds in her checking account before the snapshot date, the asset and liability numbers would change as follows:

Ownership/Responsibility	Asset/Liability	Value
Joint	Checking Account	\$278,000.00
Bill	IRA	\$10,000.00
Sue	IRA	\$10,000.00
Joint	Investment Account	\$10,000.00
Tenants by the Entirety	Real Estate	\$300,000.00
Joint	Mortgage Loan	-\$128,000.00
Joint	Vehicle	\$15,000.00
Total Net Asset Value		\$495,000.00

The loan obligation would not reduce the Smiths' countable resource value, and the loan proceeds deposited in the checking account would increase the countable resources as follows:

Ownership/Responsibility	Asset/Liability	Value
Joint	Checking Account	\$278,000.00
Bill	IRA	\$10,000.00
Sue	IRA	\$10,000.00
Joint	Investment Account	\$10,000.00
Countable Resource Value		\$308,000.00

The increased countable resource value elevates Smiths' resource allowance as follows:

Spouse	Resource Allowance
Sue	\$157,920.00
Bill	\$2,000.00
Total Resource Allowance	\$159,920.00

So, the mortgage loan strategy would artificially increase the Smiths' resource allowance from \$92,000 to \$156,000.

The following table shows the asset value effect of Sue paying off the loan immediately after the snapshot date:

Ownership/Responsibility	Asset/Liability	Value
Joint	Checking Account	\$150,000.00

Ownership/Responsibility	Asset/Liability	Value
Bill	IRA	\$10,000.00
Sue	IRA	\$10,000.00
Joint	Investment Account	\$10,000.00
Tenants by the Entirety	Real Estate	\$300,000.00
Joint	Vehicle	\$15,000.00
Total Net Asset Value		\$495,000.00

Now look at the loan payoff's effect on the Smiths' countable resource value and excess resource value:

Ownership/Responsibility	Asset/Liability	Value
Joint	Checking Account	\$150,000.00
Bill	IRA	\$10,000.00
Sue	IRA	\$10,000.00
Joint	Investment Account	\$10,000.00
Countable Resource Value		\$180,000.00
	Spouse	Resource Allowance
	Sue	\$157,920.00
	Bill	\$2,000.00
Total Resource Allowance		\$159,920.00
Total Resources		\$180,000.00
Total Resource Allowance		-\$159,920.00
Excess Resources		\$20,080.00

2.7.5. Spending Down Excess Resources With Exempt Asset Purchases

Spending down excess resources by purchasing exempt assets is a bread-and-butter strategy in most spousal cases. Common exempt expenditures include home improvements like roof repairs, kitchen appliance replacements, and vehicle trades.

Suppose Forrest and Jenny Grump had the following assets, and Forrest needed nursing home care:

Ownership/Responsibility	Asset/Liability	Value
Joint	Checking Account	\$150,000.00
Forrest	IRA	\$10,000.00
Jenny	IRA	\$10,000.00
Joint	Investment Account	\$10,000.00

Tenants by the Entirety	Real Estate	\$300,000.00
Joint	Vehicle	\$15,000.00
Total Net Asset Value		\$555,000.00

The Grumps' resource assessment would include the following assets:

Ownership/Responsibility	Asset/Liability	Value
Joint	Checking Account	\$150,000.00
Forrest	IRA	\$10,000.00
Jenny	IRA	\$10,000.00
Joint	Investment Account	\$10,000.00
Countable Resource Value		\$180,000.00
	Spouse	Resource Allowance
	Forrest	\$90,000.00
	Jenny	\$2,000.00
Total Resource Allowance		\$92,000.00
Total Resources		\$180,000.00
Total Resource Allowance		-\$92,000.00
Excess Resources		\$88,000.00

If Jenny was tired of driving their old jalopy vehicle and mowing the lawn with an old-fashioned tractor-type lawnmower, she might spend down the excess resources by replacing the jalopy with a new luxury SUV and the old lawnmower with an air-conditioned, turbo-diesel, zero-turning radius lawnmower.

2.7.6. Spending Down Excess Resources With Immediate Annuities

Sometimes, the best plan is a simple excess resource spend-down solution. A community spouse can spend down excess resources by purchasing a Medicaid-compliant immediate annuity.

As previously stated in Subsection 2.6.2 of this article, mainstream underwriters generally do not issue annuities with payout terms shorter than 60 months. The Medicaid requirement that the state must be designated as a secondary beneficiary⁸¹ creates a significant risk that

⁸¹ *Id.*

the family will lose the benefit of the annuity if the community spouse dies before receiving the final annuity payment. Therefore, most elder law attorneys coordinate with annuity brokers, like Krause Financial, to help community spouses purchase custom-designed annuities with extremely short payouts to replenish their asset portfolios on accelerated timetables.

2.7.7. 2024 Rule Change Counting Community Spouse IRAs

The FSSA complicated spousal case IRA planning in its 2024 rule change making community spouse IRAs countable in a married couple's snapshot date resource assessment. However, we still have useful tools to preserve a couple's retirement assets.

2.7.8. Conversion of a Regular IRA to a Roth IRA

Suppose Betty Jones is transferring from a hospital to a nursing home after her stroke, and the resource assessment on the snapshot date includes the following resources owned by Betty and her husband, Joe:

Ownership/Responsibility	Asset/Liability	Value
Joint	Checking Account	\$175,000.00
Joe	IRA	\$150,000.00
Total Resources		\$325,000.00

The Jones resource allowance and excess resource calculations are as follows:

	Spouse	Resource Allowance
	Joe	\$157,920.00
	Betty	\$2,000.00
Total Resource Allowance		\$159,920.00
Total Resources		\$325,000.00
Total Resource Allowance		-\$159,920.00
Excess Resources		\$165,080.00

Now assume that Joe's pension and required minimum distributions from his IRA place the Joneses near the bottom edge of the 22% marginal tax bracket, and their adult children's high incomes are pushing them near the top of the 32% marginal tax bracket.

If Joe converts his regular IRA to a Roth IRA, his taxable income will rise by \$150,000, increasing his income tax liability by \$33,000. If he uses the checking account to pay the \$33,000 as an estimated tax installment to the IRS and rolls part of the Roth into a short-term Medicaid-compliant annuity, he can spend down the excess resources as follows:

Excess Resources	\$165,080.00
Estimated Tax Installment	-\$33,000.00
Immediate Annuity	-\$132,080.00
Remaining Excess Resources	\$0.00

The combined Roth IRA conversion and immediate annuity strategy qualifies Betty for Medicaid, preserves an optimal value in the Roth IRA that will continue to grow without required minimum distributions, and eliminates the additional tax burden the Jones' children would face if they inherited the regular IRA.

2.7.9. Institutional Spouse's IRA Annuity and the "Name on the Check Rule"

The FSSA states its policy on the "ownership" of income, known as the "name on the check rule," as follows:

The individual who has title to the proceeds of a payment or property is the individual who "owns" the income.

If the income is received by an individual's legal representative or guardian, the individual still owns the income. When a legal representative receives the income, ownership through one of the following documents must be verified:

- *The designation on the payment, check, award letter, or other document*
- *The title to the property.*⁸²

If an institutional spouse converts an IRA to a Medicaid-compliant IRA annuity, the annuity payments will become part of the income budget to pay the long-term care costs. However, the institutional spouse's attorney-in-fact can use the name on the check rule to purchase a customized Medicaid-compliant IRA annuity with payments taxable to the institutional spouse, but payable to the community spouse.

⁸² Section 2805.15.00 of IHCPPM Chapter 2800 published online at https://www.in.gov/fssa/ompp/files/Medicaid_PM_2800.pdf, last visited for this article on October 17, 2024.

This strategy has the same risk associated with the community spouse's death during the annuity's payment term described in this article's Subsection 2.7.6, so the strategy must strike a balance between spreading the payments thinly enough to minimize the resulting income tax burden and accelerating the payments to complete the distribution during the community spouse's life.

2.7.10. Transferring IRAs Under Court-Approved Property Settlements

Generally, any transfer of assets out of an IRA triggers taxation of the transferred amount in the year of the transfer.⁸³ However, if a property settlement order directs the transfer of one spouse's IRA for the support of the other spouse in a divorce or legal separation proceeding, the transfer is not taxable.⁸⁴ So, a Community Spouse can petition for legal separation and seek a property settlement and support order to transfer the institutional spouse's IRA tax-free to the community spouse.

Before the state changed the rule to count a community spouse's IRA, the community spouse's tax savings and flexibility usually justified the cost of the proceeding. Now, however, an estate plan attorney must consider whether the strategy's benefits justify the time and expense required to secure a property settlement and support order in a legal separation proceeding.

PART 3

IRREVOCABLE TRUST ADMINISTRATION

3.1. Settlor as Trustee

This article's Subsection 2.3.5 outlines the state and federal Medicaid laws that include the assets of a settlor's irrevocable trust as part of the settlor's countable resources in determining the eligibility of the settlor or the settlor's spouse for Medicaid benefits. While some elder law practitioners discourage settlors from serving as trustees of their irrevocable trusts, this author approaches the subject more flexibly. Most clients prefer serving as trustees for convenience and to preserve some of their asset management autonomy. Thorough education about the trust

⁸³ 26 USC §408(d)(1).

⁸⁴ 26 USC §408(d)(6).

agreement's self-dealing restrictions usually equips a client adequately to manage the trust without jeopardizing its asset protection function.

3.2. Taxpayer Identification Number

This article's Subsection 2.3.6 explains why an irrevocable trust that qualifies as a grantor trust under 26 U.S.C. § 671 is taxable under the settlor's Social Security number. If the spouse whose Social Security number a joint irrevocable trust uses as the trust's taxpayer identification number dies, the trust can use the surviving spouse's Social Security number for that purpose. However, the successor trustee must apply to the IRS for the assignment of an employer notification number to the trust when the surviving spouse dies.

3.3. Administration After Settlor's Death

There is no generally applicable reason for the process of administering an irrevocable trust after the settlor's death to differ from the administration of a deceased settlor's formerly revocable trust. What applies to one kind of trust should apply equally to the other.

PART 4

TESTAMENTARY TRUST ADMINISTRATION

The administration of a testamentary trust begins after the testator's death. A petitioner must submit the testator's will to the probate court of the county in which the testator resided and secure an order admitting the will to probate.⁸⁵ Although it is permissible, the court does not need to appoint a personal representative or for the clerk to issue letters testamentary to complete the probate process. After the court admits the will to probate, the trustee must apply to the IRS for the assignment of an Employer Identification Number to the trust.

⁸⁵ Ind. Code § 29-1-7-4.

PART 5

PROBATE ESTATE ADMINISTRATION

5.1. Threshold Questions About a Decedent's Assets

A January 1951 Saturday Evening Post story by reporter Robert M. Yoder featured this description of the reporter's interview with bank robber Willie Sutton:⁸⁶

Someone once asked Slick Willie Sutton, the bank robber, why he robbed banks. The question might have uncovered a tale of injustice and lifelong revenge. Maybe a banker foreclosed on the old homestead, maybe a banker's daughter spurned Sutton for another.

Sutton looked a little surprised, as if he had been asked "Why does a smoker light a cigarette?"

"I rob banks because that's where the money is," he said, obviously meaning "in the most compact form." That eye for the simple essential may be the secret of a singular success.

Whether a lawyer is pursuing or defending a decedent's assets in claims proceedings, success requires a procedural awareness of how, when, and where assets flow from the decedent's cold grasp.

5.2. Probate Terminology Matters – What is a Decedent's "Estate?"

Ind. Code § 29-1-14-2 says a claimant must "... file a succinct definite statement thereof in the office of the clerk of the court in which the letters were issued." Although it is a subtle distinction, a decedent's "estate" is not the same thing as the forum in which a claimant files a claim against a decedent's estate. So, the first fundamental question to evaluate the vulnerability of a decedent's property to claim enforcement is: "What is the decedent's estate?"

Ind. Code Chapter 29-1-14's claim enforcement procedures distinguish between the estate administration proceeding in probate court and the statutorily defined concept of a "decedent's estate." The first sentence of Ind. Code § 29-1-14-2 restricts the enforcement of most claims against a decedent or the decedent's estate unless the claim holder files a "succinct definite statement" of the claim *"in the office of the clerk of the court in which the letters were issued."*

⁸⁶ 1951 January 20, The Saturday Evening Post, Volume 223, Issue 30, Someday They'll Get Slick Willie Sutton by Robert M. Yoder, P. 17

Notice that the above-quoted text of the first sentence of Ind. Code § 29-1-14-2 does not say that the claimant must file the claim in the “estate.” The distinction between the decedent’s “estate” and the forum in which a personal representative administers the estate is a fundamental Probate Code concept. The Probate Code’s “estate” definition appears in Ind. Code § 29-1-1-3(a)(11), which says:

“Estate” denotes the real and personal property of the decedent or protected person, as from time to time changed in form by sale, reinvestment, or otherwise, and augmented by any accretions and additions thereto and substitutions therefor and diminished by any decreases and distributions therefrom.

The Probate Code refines the estate concept further with this general rule definition of a decedent’s “probate estate” in Ind. Code § 29-1-1-3(a)(32) (with emphasis added):

“Probate Estate” denotes the property transferred at the death of a decedent under the decedent’s will or under IC 29-1-2, in the case of a decedent dying intestate.

So, what assets does the probate estate exclude? Perhaps that question’s best answer focuses on the general rule’s exceptions. Essentially, all a decedent’s assets are part of the decedent’s probate estate (often called “probate property”) unless state or federal law causes assets to pass outside the probate estate (often called “nonprobate property”).

5.3. Decedents’ Probate Property Title Passage

5.3.1. Immediate Title Passage

Ind. Code § 29-1-7-23(a) states that title to a decedent’s real **AND** personal probate property passes as follows (with emphasis added):

*(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.***

Similarly, the text of Ind. Code § 29-1-1-3(a)(32) quoted in Section 5.2 of this article states that title to a decedent’s probate property (real and personal) passes “at the death of” the decedent. So, if it decedent’s probate property passes **at the moment** of the decedent’s

death, the title passage occurs automatically and instantaneously. The next question is: to whom does a decedent's probate property pass upon the decedent's death?

5.3.2. Title Passage to Distributees

It is too much of a mouthful to say "heirs of an intestate decedent or beneficiaries of a testate decedent's will" in this discussion. Thankfully, Ind. Code § 29-1-1-3(a)(9) furnishes "distributees" as a defined term to encompass "those persons who are entitled to the real and personal property of a decedent under a will, under the statutes of intestate succession, or under Ind. Code § 29-1-4-1."

5.3.3. Testate Estate Title Passage Questions Concerning the Probate Estate's Suspended Existence

Three important questions concern the potential title passage of probate property under the decedent's will:

- (1) If the decedent's probate property passes to distributees automatically under the will upon the decedent's death, how does that happen?
- (2) What are the time limits, if any, for the distributees to present the decedent's will and claim the probate property title passage?
- (3) What can the distributees of an intestate decedent do to resolve the question of whether the decedent died intestate?

5.3.4. Wills Must Be Admitted to Probate

Ind. Code § 29-1-7-24 answers the first question of Subsection 5.3.3 of this article with the following requirement for the perfection of the distributees' entitlement to claim a testate decedent's probate property under a will:

Except as provided in IC 29-1-13-2, no will is effective for the purpose of proving title to, or the right to the possession of, any real or personal property disposed of by the will, until it has been admitted to probate.

Ind. Code § 29-1-7-4 provides an à la carte menu of petition options, including a petition to probate a will without petitioning for appointment of a personal representative or issuance of letters testamentary.⁸⁷

Ind. Code § 29-1-7-15.1 answers the second and third questions of Subsection 5.3.3 of this article with rules that limit:

- the admission of a decedent's will to probate (Ind. Code § 29-1-7-15.1(a), (g), and (h)); and
- a personal representative's power to "possess" the decedent's real and personal property (Ind. Code § 29-1-7-15.1 (b)-(e)).

5.3.5. Race to the Courthouse to Resolve the Probate Estate's Suspended Existence

The following language of Ind. Code § 29-1-7-15.1(a) creates a potential race to the courthouse between proponents of a decedent's will and people otherwise entitled to receive probate property as the decedent's intestate distributees under Ind. Code § 29-1-2-1 (with emphasis added):

⁸⁷ Ind. Code § 29-1-7-4 Petitions; hearing

(a) Any interested person or a personal representative named in the will may petition the court having jurisdiction of the administration of the decedent's estate:

- (1) to have the will of such decedent, whether the same is written or is unwritten, is in his possession or not, is lost, destroyed, or without the state, probated;
- (2) for the issuance of letters testamentary to the executor named in said will for the administration of said estate;
- (3) for the appointment of an administrator with the will annexed if no executor is designated in said will or if the person so designated is not qualified, dead, or refuses to serve; or
- (4) for the appointment of an administrator for the estate of any person dying intestate.

(b) A petition for probate may be combined with a petition for the issuance of letters testamentary, or as administrator with the will annexed, and a person interested in the probate of a will and in the administration of the estate may petition for both.

(c) No notice that a will is to be offered for probate or that it has been probated shall be required.

(d) No notice of the filing of, and hearing on, the petition described in this section shall be given to or served upon any person. If the petition described herein is filed in term time, it shall be heard forthwith by the court, and if filed in vacation, it shall be heard by the judge of said court if present, or in his absence by the clerk of the said court.

(e) If:

- (1) an interested person petitions for the appointment of an administrator for the estate of a person dying intestate; and
- (2) a petition to dissolve the marriage of the decedent and the decedent's spouse is pending in an Indiana court or the court of another state at the time of the decedent's death;

the court may not appoint the decedent's spouse to be the administrator of the decedent's estate.

(f) Subsection (e) does not apply to a petition for appointment of an administrator for the estate of a person dying intestate if the application of subsection (e) is waived in an agreement signed by each person, except a person who is incapacitated or a minor, who is eligible for a distribution from the decedent's net estate under IC 29-1-2-1. A waiver may be submitted to the court at any time before the appointment of an administrator.

(a) When it has been determined that a decedent died intestate and letters of administration have been issued upon the decedent's estate, no will shall be probated unless it is presented for probate:

*(1) **before** the court decrees final distribution of the estate;⁸⁸ **or***

*(2) in an unsupervised estate, **before** a closing statement has been filed.⁸⁹*

So, a decedent's estate (not estate administration) remains in a kind of suspended existence until a court admits a decedent's will to probate or the limit to probating a will applies under Ind. Code § 29-1-7-15.1(a).

It may surprise people other than probate lawyers that distributees sometimes delay probating decedents' wills for many years or decades. Although Ind. Code § 29-1-7-15.1(g) appears to place time limits on probating a decedent's will, an exception to those time limits under Ind. Code § 29-1-7-15.1(h) permits a will to be probated if:

(1) no estate proceedings have been commenced for a decedent; and

(2) an asset of the decedent remains titled or registered in the name of the decedent.

The admission of a decedent's will to probate under Ind. Code § 29-1-7-13(a) (with or without the appointment of a personal representative to administer the probate estate) perfects title passage to the will's beneficiaries, but it does not **cause** the title to pass. Instead, the title of a decedent's assets passes immediately, automatically, and without human intervention under Ind. Code § 29-1-7-23(a).

5.4. Personal Representative's Power of Possession

5.4.1. Personal Representative's Interception of Title Passage

A personal representative can disrupt the title passage under Ind. Code § 29-1-7-23(a) because the title passage is "subject to the possession of the personal representative..."⁹⁰ However, Ind. Code § 29-1-7-15.1(b)-(e) balances the equities of the personal

⁸⁸ Ind. Code § 29-1-17-2.

⁸⁹ Ind. Code § 29-1-7.5-4.

⁹⁰ Ind. Code § 29-1-7-23(a).

representative's power to possess the probate property against the distributees' entitlement to receive the probate property.⁹¹

⁹¹ (b) No real property located in Indiana of which any person may die seized shall be sold by the executor or administrator of the deceased person's estate to pay any debt or obligation of the deceased person, which is not a lien of record in the county in which the real property is located or to pay any costs of administration of any decedent's estate, unless a petition for administration is filed in court under section 5 of this chapter not later than five (5) months after the decedent's death and the clerk issues letters testamentary or letters of administration not later than seven (7) months after the decedent's death.

(c) If:

- (1) a petitioner files a petition for administration filed in an estate to which subsection (b) may apply; and
- (2) the clerk of the court does not issue letters testamentary or of administration and publish notice of the estate administration under subsection (a) not later than thirty (30) days after the petition for administration has been filed;

the petitioner shall serve the following notice on each creditor in the manner provided under section 7(d) of this chapter not later than forty-five (45) days after the petition for administration has been filed:

NOTICE OF PETITION FOR ADMINISTRATION

In the _____ Court of _____ County, Indiana.

Notice is hereby given that a petition for administration was filed on the ____ day of ____, 20____, in cause number _____, concerning the estate of _____, deceased, who died on the ____ day of _____, 20____, but the clerk of the court has not issued letters testamentary or of administration.

The estate includes real property that may be subject to sale restrictions under IC 29-1-7-15.1.

All persons who have claims against this estate, whether or not now due, must file their claims in the office of the clerk of this court not later than seventy-five (75) days after the date on which the petition for administration was filed, or not later than thirty (30) days after the date on which the petitioner serves this notice, to prevent the application of real property sale restrictions to the claims, whichever is later.

Dated at _____, Indiana this ____ day of _____, 20____.

as the Petitioner.

(d) The limitation described in subsection (b) on the sale of real property does not apply to a claim if:

- (1) a petition for administration is filed in court under section 5 of this chapter not later than five (5) months after the decedent's death;
- (2) the claimant files the claim in the office of the clerk of the court not later than:
 - (A) seventy-five (75) days after the date on which the petition for administration was filed; or
 - (B) thirty (30) days after the date on which the petitioner serves the notice required in subsection (c);whichever is later; and
- (3) the failure of the clerk to issue letters testamentary or letters of administration not later than seven (7) months after the decedent's death is not the result of the petitioner's failure to comply with the requirements of:
 - (A) this article;
 - (B) the Indiana Rules of Trial Procedure; or
 - (C) the local rules of the court.

(e) The court shall order the limitation described in subsection (b) inapplicable to a claimant's claim concerning the sale of real property if any interested person files a motion for findings under this subsection and the court finds that the following conditions apply:

- (1) A petition for administration was filed in court under section 5 of this chapter not later than five (5) months after the decedent's death.
- (2) More than thirty (30) days have elapsed since the petition was filed.
- (3) The claimant is a reasonably ascertainable creditor under section 7 of this chapter.
- (4) The claimant filed a claim in the estate not later than seventy-five (75) days after the date on which the petition for administration was filed, or not later than thirty (30) days after the date on which the petitioner serves the notice required in subsection (c), whichever is later.

5.4.2. Personal Representative's Distribution Deed Distractions

Illusionists and pickpockets apply their trades by distracting their target audiences from what is really happening. Likewise, Ind. Code § 29-1-7.5-3.4 distracts and deludes many Indiana lawyers into a mistaken belief that a personal representative transfers title to the distributees in an unsupervised estate administration by delivering a deed of distribution to distributees.⁹²

However, notwithstanding the statute's use of "distribution" and "distribute," a personal representative's deed of distribution to the decedent's distributees under that section does not really "distribute" anything. Why? Because, again, the title passage only occurs under Ind. Code § 29-1-7-23(a), "subject to the possession of the personal representative."

Ind. Code § 29-1-7.5-3.4 merely provides a mechanism for the personal representative in an unsupervised estate to waive and release to the distributees the personal representative's perfected power to possess and divest title.

The corresponding provision in a supervised estate to Ind. Code § 29-1-7.5-3.4 is a court's entry of a decree of final distribution under Ind. Code § 29-1-17-2,⁹³ which (with emphasis added):

*"shall operate as the **final adjudication of the transfer** of the right, title, and interest of the decedent to the distributees therein designated; but no transfer before or after the decedent's death by an heir or devisee shall affect the decree, nor shall the decree affect any rights so acquired by grantees from the heirs or devisees."*⁹⁴

(5) The petitioner has not satisfied the provisions of subsection (c).

⁹² Ind. Code § 29-1-7.5-3.4 Distribution of real property

Sec. 3.4. (a) This section applies to the distribution of real property by a personal representative to a devisee or heir under this chapter.

(b) The conveyance subscribed by the personal representative under this section is sufficient to distribute all title in the real property to the devisee or heir if the conveyance includes substantially the following language:

"A.B. is the personal representative of the estate of C.D., deceased. This estate is pending as Cause Number _____ in _____ County, Indiana. The personal representative, by virtue of the power given a personal representative under Indiana law, hereby distributes to E.F. the following described real estate: (insert description)."

As added by P.L.130-1992, SEC.4.

⁹³ See especially subsections (f)-(g).

⁹⁴ Ind. Code § 29-1-17-2(f).

Note that the italicized portion of the above-quoted Ind. Code § 29-1-17-2 text says the decree of final distribution is an adjudication of transfer – not the transfer, itself. Why? Because, again, the title passage only occurs under Ind. Code § 29-1-7-23(a), “subject to the possession of the personal representative.”

5.5. Refocusing on Intestate and Testate Title Passage

5.5.1. “Probate Estate” Definition

To refocus attention on intestate and testate title passage, let’s review Ind. Code § 29-1-1-3(a)(32), which says:

“Probate Estate” denotes the property transferred at the death of a decedent under the decedent’s will or under IC 29-1-2, in the case of a decedent dying intestate. (emphasis added).

5.5.2. Intestate Title Passage – a Family Thing

Ind. Code Chapter 29-1-2 governs title passage of an intestate decedent’s estate. It is easy to identify an intestate decedent’s heirs if you know the family tree. the title passage depends on the decedent’s pre-death marital status and the decedent’s proximity of genealogical relationship to the decedent’s descendant, ancestors, or more remotely related family members.

5.5.3. Testate Title Passage – Decedent’s Will Admitted to Probate

As Subsection 5.3.3 of this article has previously stated, a testate decedent’s estate (not estate administration) remains in a kind of suspended state of existence until someone resolves the uncertainty.

Subsection 5.3.4 of this article has stated that Ind. Code § 29-1-7-24 requires a will to be admitted to probate before it can cause title to pass to the will’s beneficiaries and Ind. Code § 29-1-7-24 authorizes a petitioner to petition to probate a will with or without full estate administration.

As previously stated in Subsection 5.3.5 of this article, Ind. Code § 29-1-7-15.1(a) explains how to resolve the uncertainty concerning an unprobated will and Ind. Code § 29-1-7-15.1(g) and (h) frame the time limits and exceptions to time limits for that determination.

5.6. Personal Representative's Administration of a Decedent's Probate Estate

5.6.1. Personal Representative's Appointment

Ind. Code § 29-1-10-1(a) provides the following sequence of priorities for the appointment of a personal representative:

- (1) To the executor or executors designated in a will that has been admitted to probate.*
- (2) To a surviving spouse who is a devisee in a will that has been admitted to probate.*
- (3) To a devisee in a will that has been admitted to probate.*
- (4) To the surviving spouse, or to the person or persons nominated by the surviving spouse or to the surviving spouse and the person or persons nominated by the surviving spouse.*
- (5) To:*
 - (A) an heir;*
 - (B) the person or persons nominated by an heir; or*
 - (C) an heir and the person or persons nominated by an heir.*
- (6) If there is not a person listed in subdivisions (1) through (5), then to any other qualified person.*

5.6.2. Personal Representative's Fiduciary Duty to Distributees and Creditors

The Indiana Court of Appeals has issued the following guidance concerning a personal representative's responsibility to distributees and creditors:

*A personal representative has a fiduciary obligation to administer a decedent's probate estate impartially "for the benefit of and the protection of creditors and distributees."*⁹⁵

*...a personal representative owes a duty to all interested parties, including the Tax Department, to administer the estate impartially. Such personal representative is regarded as an officer of the court and he must look to the court or the law for his authority in dealing with estate assets.*⁹⁶

⁹⁵ *Fall v. Miller*, 462 N.E.2d 1059, 1061 (Ind. App. 1984).

⁹⁶ *Indiana Dept. of State Revenue, Inheritance Tax Div. v. Cohen's Estate*, 436 N.E.2d 832 (Ind. App. 1982) (citing *State ex rel. Department of Financial Institutions v. Kaufman*, 218 Ind. 74, 30 N.E.2d 978 (Ind. 1941)).

*Furthermore, the personal representative is charged with the responsibility of preserving the estate; and, he shall not interfere with the estate entrusted to him.*⁹⁷

*The personal representative has a duty to care for and conserve the assets of a decedent's estate so that such assets are not wasted or mismanaged.*⁹⁸

*Ind. Code § 29-1-16-1 provides in relevant part that a personal representative shall be liable for any loss to the estate arising from his neglect or wrongful acts or omissions or for any other negligent or willful act or nonfeasance in his administration of the estate by which loss to the estate arises. Likewise, Indiana courts have held that a personal representative who fails to use due diligence in collecting a claim due the estate becomes personally liable for any loss caused thereby.*⁹⁹

5.6.3. Personal Representative's Management of a Decedent's Probate Estate

Subsection 5.4.1 of this article has already stated that the title passage under Ind. Code § 29-1-7-23(a) is "subject to the possession of the personal representative." Subsection 5.4.1 of this article also stated that a personal representative's power to possess the decedent's probate property is subject to limitations under Ind. Code § 29-1-7-15.1(b)-(e). So, the personal representative must exercise the fiduciary responsibility to evaluate creditors' claims filed under Ind. Code Chapter 29-1-14 and enforce valid claims against the decedent's probate assets.

PART 6

MEDICAID ESTATE RECOVERY AND OTHER CREDITORS' CLAIMS

6.1. Creditors' Claims Against a Decedent's Probate Estate

6.1.1. Governmental Claims (Other Than FSSA's Estate Recovery Unit)

Ind. Code § 29-1-14-1 establishes the deadlines for creditors to file claims against a decedent's probate estate. However, subsection (a) exempts the following government claims from the deadlines:

"expenses of administration" and

"claims of the United States, the state, or a subdivision of the state."

⁹⁷ *Id.*, (citing Ind.Code 29-1-13-2).

⁹⁸ *Id.*, (citing *Alerding v. Allison*, 170 Ind. 252, 83 N.E. 1006 (Ind.1908) and *Beardsley, Executor v. Marsteller*, 120 Ind. 319, 22 N.E. 315 (Ind.1889)).

⁹⁹ *Id.*, (citing *Condit, Executor v. Winslow*, 106 Ind. 142, 5 N.E. 751 (Ind.1886)).

Therefore, most governmental creditors have no deadlines to file claims against a decedent's probate estate. However, there is a big difference between filing a claim and enforcing it.

This Article will feature circumstances when even governmental creditors must walk away empty-handed.

6.1.2. Family and Social Services Administration's Estate Recovery Against a Deceased Medicaid Recipient's Probate Estate

6.1.2.1. Basis of FSSA's Estate Recovery Authority

Ind. Code § 12-15-9-1 authorizes the Indiana Family and Social Services Administration (the "FSSA") to file a claim for reimbursement from a decedent's estate if FSSA's Medicaid program paid Medicaid benefits on the decedent's behalf after the decedent became 55 years of age.¹⁰⁰

Ind. Code § 12-15-9-2 prohibits FSSA from enforcing claims against:

(1) Real estate of a recipient while it is necessary for the support, maintenance, or comfort of the surviving spouse, a dependent child less than twenty-one (21) years of age, or a dependent who is nonsupporting because of blindness or other disability.

(2) Personal property necessary for the support, maintenance, or comfort of the surviving spouse, a dependent child less than twenty-one (21) years of age, or a dependent who is nonsupporting because of blindness or other disability.

(3) Personal effects, ornaments, or keepsakes of the deceased.

¹⁰⁰ **Ind. Code § 12-15-9-1 Amount of claim; preference**

Sec. 1. Upon the death of a Medicaid recipient, the total amount of Medicaid paid on behalf of the recipient after the recipient became fifty-five (55) years of age must be allowed as a preferred claim against the estate of the recipient in favor of the state. The affidavit of a person designated by the secretary to administer this section is evidence of the amount of the claim and is payable after the payment of the following in accordance with IC 29-1-14-9:

- (1) Funeral expenses for the recipient, not to exceed three hundred fifty dollars (\$350).
- (2) The expenses of the last illness of the recipient that are authorized or paid by the office.
- (3) The expenses of administering the estate, including the attorney's fees approved by the court.

Ind. Code § 12-15-9-0.5 establishes a broad definition of “estate” that includes a decedent’s probate estate and a decedent’s nonprobate property.¹⁰¹

6.1.2.2. Surprising 2024 Claim Limit on FSSA’s Estate Recovery Unit

A surprising 2024 amendment to the claimant’s deadline provisions of Ind. Code § 29-1-14-1 added a new Subsection (g) imposing the following deadline for probate estate claims by the FSSA’s Estate Recovery Unit:¹⁰²

(g) A claim by the unit against a decedent’s estate is forever barred unless:

(1) the unit files a claim in the court in which the decedent’s estate is being administered; or

(2) the unit opens an estate for the decedent and files a claim against the decedent in the estate;

*not later than one hundred twenty (120) days after the date of death of the decedent.*¹⁰³

So, regardless of any time limit described in this article requiring an action concerning a decedent’s estate or claims against transferees of a decedent’s nonprobate transfers, a claim filed by the FSSA’s Estate Recovery Unit later than 120 days after the decedent’s death is **unenforceable for decedents who died AFTER July 1, 2024.**

¹⁰¹ Ind. Code § 12-15-9-0.5 “Estate” and “nonprobate transfer”

Sec. 0.5. (a) As used in this chapter, “estate” includes:

- (1) all real and personal property and other assets included within an individual’s probate estate;
- (2) any interest in real property owned by the individual at the time of death that was conveyed to the individual’s survivor through joint tenancy with right of survivorship, if the joint tenancy was created after June 30, 2002;
- (3) any real or personal property conveyed through a nonprobate transfer; and
- (4) any sum due after June 30, 2005, to a person after the death of a Medicaid recipient that is under the terms of an annuity contract purchased after May 1, 2005, with the assets of the Medicaid recipient.

(b) As used in this chapter, “nonprobate transfer” has the meaning set forth in IC 32-17-13-1.

¹⁰² Ind. Code § 29-1-1-3(a)(36) defines the “Unit” as follows: (36) “Unit” means the estate recovery unit of the office of Medicaid policy and planning established under IC 12-8-6.5-1.

¹⁰³ P.L.99-2024, SEC.9; 2024 SEA 18, SEC.9.

6.1.3. Nongovernmental Claims Against a Decedent's Probate Estate

The only deadlines for **nongovernmental creditors** to collect a debt against a decedent's probate personal property appear in Ind. Code § 29-1-14-1. Subsection (a) provides that a creditor must file a claim:

with the court in which such estate is being administered within:

- (1) three (3) months after the date of the first published notice to creditors; or*
- (2) three (3) months after the court has revoked probate of a will, in accordance with Ind. Code § 29-1-7-21, if the claimant was named as a beneficiary in that revoked will;*

whichever is later.

Subsection (b) says:

No claim shall be allowed which was barred by any statute of limitations at the time of decedent's death.

Subsection (c) counterbalances Subsection (b) as follows:

No claim shall be barred by the statute of limitations which was not barred at the time of the decedent's death, if the claim shall be filed within:

- (1) three (3) months after the date of the first published notice to creditors; or*
- (2) three (3) months after the court has revoked probate of a will, in accordance with Ind. Code § 29-1-7-21, if the claimant was named as a beneficiary in that revoked will;*

whichever is later.

Finally, Subsection (d) since this ultimate deadline for nongovernmental creditors to file claims against a decedent's estate if the claim is not otherwise barred by the preceding subsections:

All claims barrable under subsection (a) shall be barred if not filed within nine (9) months after the death of the decedent.

6.2. Secured Claims Against a Decedent's Encumbered Property

Ind. Code § 29-1-14-1 requires a secured creditor to file a claim against a deceased debtor's probate estate just like the requirement for an unsecured creditor to file a claim. However, Ind. Code § 29-1-14-2 also requires a secured creditor to include a reference in the written statement

of claim to the location of the creditor's recorded lien. Ind. Code § 29-1-14-6 incorporates the "Uniform Act Governing Secured Creditors Dividends in Liquidation Proceedings" by reference for the next steps in a creditor's enforcement of a secured claim under Ind. Code Chapter 30-2-7.

Generally, a secured creditor may expect to collect against the decedent's probate estate assets that the creditor's lien encumbers. The amount of the recovery, however, may depend on whether the encumbered property value is sufficient to satisfy the unpaid debt. To the extent the debt exceeds the value of the collateral, the excess portion of the creditor's claim will be unsecured and subject to the claims proceedings under Ind. Code Chapter 29-1-4.

6.3. Requirements for a Claim Against a Decedent's Probate Estate

Ind. Code § 29-1-14-2 is an unusually dense Probate Code section that does not separate its provisions into subsections.¹⁰⁴ The section requires a creditor to file a "succinct definite statement" of the creditor's claim against the decedent's estate, regardless of whether the claim is presently due or contingent.¹⁰⁵ The section also sets out the elements of that a claimant must satisfy to enforce a claim.

¹⁰⁴ **Ind. Code § 29-1-14-2 Actions; definite statement; personal representative actions; deductions from claims**
Sec. 2. No action shall be brought by complaint and summons against the personal representative of an estate for the recovery of any claim against the decedent or the decedent's estate, except in the enforcement of claims for injury to person or damage to property arising out of negligence as provided in section 1 of this chapter, but the holder thereof, whether such claim be due or not, shall file a succinct definite statement thereof in the office of the clerk of the court in which the letters were issued. The clerk shall send by United States mail or by personal service an exact copy of such statement to the personal representative of the estate. Any claims of the personal representative against the decedent shall be made out and filed in the office of the clerk of the court in which the letters were issued. If any claim against the decedent is founded upon any written instrument, alleged to have been executed by the decedent, the original or a complete copy thereof, shall be filed with the statement, unless it is lost or destroyed, in which case its loss or destruction must be stated in the claim. The statement shall set forth all credits and deductions to which the estate is entitled and shall be accompanied by the affidavit of the claimant or the claimant's agent or attorney, that the claim, after deducting all credits, set-offs, and deductions to which the estate is entitled, is justly due and wholly unpaid, or if not yet due, when it will or may become due, and no claim shall be received unless accompanied by such affidavit. If the claim is secured by a lien on any real or personal property, such lien shall be particularly set forth in such statement, and a reference given to where the lien, if of record, will be found. If the claim is contingent, the nature of the contingency shall also be stated. No statement of claim need be filed as provided in this section as to those claims which are paid by the personal representative within three (3) months after the date of the first published notice to creditors or the period allowed under IC 29-1-7-7. However, in instances where a cause of action was properly filed and commenced against a decedent prior to the decedent's death, the same shall be continued against the personal representative or successors in interest of the deceased, who shall be substituted as the party or parties defendant in such action, and in such instance it shall not be necessary for the claimant to file a claim as herein provided. In any action thus continued the recovery, if any, shall be limited as otherwise provided by law.

¹⁰⁵ A sample claim appears as **APPENDIX 3** of this article.

6.4. Claim Collection Priorities for a Decedent's Probate Estate

Unsecured creditors with timely filed claims have few worries about a decedent's solvent probate estate. However, Ind. Code § 29-1-14-9 establishes the following priorities for satisfaction of creditors' unsecured claims against a decedent's insolvent probate estate:

(1) Costs and expenses of administration, except funeral expenses, expenses of a tombstone, and expenses incurred in the disposition of the decedent's body.

(2) Reasonable funeral expenses, expenses of a tombstone, and expenses incurred in the disposition of the decedent's body. 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 12-14-21:

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 (ISETS or a successor statewide automated support enforcement system).

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.

All is not lost for an industrious unsecured creditor whose claim remains unsatisfied because the decedent's probate estate was insolvent. Later sections of this article will describe the alternative collection procedures to pursue property that the decedent transferred through nonprobate transfers.

6.5. Creditors' Claims Against a Decedent's Probate Real Property.

6.5.1. Brief History Lesson on Personalty Versus Realty

Indiana's former probate laws required a decedent's personal representative to satisfy claims from the decedent's personal property before liquidating the real property. The law corresponded to this statement of an English rule of equity:

*For lands are in equity a favoured fund, insomuch that the heir at law, or devisee of a mortgagor, may demand to have the estate mortgaged by such deviser himself, cleared out of the personalty.*¹⁰⁶

Although the Indiana General Assembly removed most of the real versus personal property distinctions in claim satisfaction, real property's persistent priority remains embedded in Ind. Code § 29-1-7-15.1(b).

6.5.2. Creditors' Interception of Probate Real Property Title passage

The personal representative's perfected power to possess and divest title under Ind. Code § 29-1-7-23(a) disrupts the automatic and immediate passage of title to the distributees.

A creditor may perfect the personal representative's power to possess and divest title under Ind. Code § 29-1-7-23(a) by filing a Petition for Administration within five months after the decedent's death and securing the clerk's issuance of letters testamentary or letters of administration to the personal representative within seven months after the decedent's death in satisfaction of those requirements under Ind. Code § 29-1-7-15.1 (b)-(e).

Subsection 6.5.4 of this article will address the procedural prerequisites for a personal representative's sale of a decedent's real property under Ind. Code § 29-1-7-15.1 (b)-(e) after the overview of Ind. Code § 29-1-7-15.1 in Subsection 6.5.3.

6.5.3. Overview of Procedural Functions of Ind. Code § 29-1-7-15.1

Ind. Code § 29-1-7-15.1 confuses many lawyers. To resolve the confusion, it is important to remember the context that Ind. Code § 29-1-7-15.1 governs:

¹⁰⁶ Blackstone, William, Commentaries on the Laws of England, Vol. 2, Page 333, Clarendon Press, Oxford, 1778 (Paraphrasing the English High Court of Chancery in *Bartholomew v. May*, 1 Atk. 487, 26 Eng.Rep. 309 (Ch. 1737)).

▪ Ind. Code § 29-1-7-15.1(a) governs when the conclusion of the formal administration of a decedent's estate as a supervised estate or unsupervised estate cuts off the eligibility of a will for admission to probate (with or without formal probate estate administration).

▪ Ind. Code § 29-1-7-15.1(b)-(e) regulates the authority of a court-appointed personal representative to sell a decedent's real property.

▪ Ind. Code § 29-1-7-15.1(f) protects a BFP who purchases a decedent's real property if a will is not admitted to probate within five months after the decedent's death or a will contest has not commenced the statutory deadlines for filing a will contest.

▪ Ind. Code § 29-1-7-15.1(g) provides some limiting rules for admitting Will to probate that would rarely actually prohibit the probate of a will.¹⁰⁷

▪ Ind. Code § 29-1-7-15.1(h) provides that there is no deadline to probate of will whatsoever if:

- there has been no formal estate administration following a Petition for Administration,
- an asset remains titled or registered in the name of the decedent, and
- nothing has happened to prevent the admission of a will to probate under Ind. Code § 29-1-7-15.1(g).

¹⁰⁷ Don't be distracted by the 3-year deadline of subpart (1) because the rule applies to the later of the three subparts, and subparts (2) and (3) require some action in probate court before their timelines begin running.

6.5.4. The 5-Month & 7-Month Rules Governing a Personal Representative's Sale of a Decedent's Real Property Under Ind. Code § 29-1-7-15.1(b)¹⁰⁸

Ind. Code § 29-1-7-15.1(b) has had a contentious history over the past decade. Until the General Assembly's 2018 amendments,¹⁰⁹ Ind. Code § 29-1-7-15.1(b)'s text read as follows:

(b) No real estate situate in Indiana of which any person may die seized shall be sold by the executor or administrator of the deceased person's estate to pay any debt or obligation of the deceased person, which is not a lien of record in the county in which the real estate is situate, or to pay any costs of administration of any decedent's estate, unless letters testamentary or of administration upon the decedent's estate are taken out within five (5) months after the decedent's death.

In 2012, an Indiana Court of Appeals opinion interpreting subsection (b) held:

...we find that Indiana Code section 29-1-7-15.1(b) is not a limitation on the trial court's authority to issue an order for the sale of real estate under Indiana Code section 29-1-15-3.¹¹⁰

In 2013, the Indiana General Assembly effectively overrode and superseded the Court of Appeals opinion in *Estate of Roy* by clarifying that a court cannot authorize a personal representative to take an action that the Probate Code otherwise prohibits when the General Assembly enacted this author's legislative proposal for Ind. Code § 29-1-10-21, which read as follows until the General Assembly revised the statute in 2021:¹¹¹

Sec. 21. (a) All authority to act with respect to an estate administered under IC 29-1-7 and IC 29-1-7.5 is vested exclusively in the personal representative.

(b) If this article prohibits an action by the personal representative, the prohibition restricts the personal representative, regardless of court order, unless:

(1) a majority in interest of the distributees expressly consent to the proposed action; or

¹⁰⁸ A procedural diagram for the Personal Representative (PR) Authority to Sell Decedent's Real Property (RP) Under IC 29-1-7-15.1(b)-(e) appears in **APPENDIX 4** of this article.

¹⁰⁹ 2018 SEA 247, SEC. 6; 2018 P. L. 163, SEC. 6.

¹¹⁰ *State ex rel. Family and Social Services Admin. v. Estate of Roy*, 963 N.E.2d 78, 84-85 (Ind.App. 2012) (*Transfer denied*).

¹¹¹ 2021 SEA 184, Sec. 4; P.L.184-2021, Sec. 4.

(2) the statute imposing the restriction expressly permits a court to approve the prohibited action.

This author and other representatives of the Indiana State Bar Association negotiated with the FSSA and the Attorney General of Indiana to draft a series of legislative amendments in 2018, 2019, and 2021 that clarified Ind. Code §§ 29-1-7-15.1,¹¹² 29-1-7-15.2,¹¹³ and 29-1-10-21.¹¹⁴

The current version of Ind. Code § 29-1-7-15.1¹¹⁵ allows a personal representative to sell the decedent's real property to satisfy secured creditors' liens and pay the costs of administration while prohibiting real property sales for any other purpose if no one files a petition for administration (as defined in Ind. Code § 29-1-1-3(a)(31)) within 5 months after the decedent's death.¹¹⁶ If there is no petition for administration within that 5-month deadline, Ind. Code § 29-1-7-15.1(b) prohibits the sale of real property composing part of the probate estate (as defined in Ind. Code § 29-1-1-3(a)(32)) to pay creditors' claims without distributee consent under Ind. Code § 29-1-10-21(b).

Even if someone files a petition for administration within 5 months after the decedent's death, the prohibition under Ind. Code § 29-1-7-15.1(b) on a sale to satisfy creditors' claims still applies if the Clerk does not issue letters testamentary or letters of administration within 7 months after the decedent's death unless the Court enters an order with findings under Ind. Code § 29-1-7-15.1(e).

¹¹² Formerly: Acts 1973, P.L.289, SEC.1; Acts 1975, P.L.288, SEC.8. As amended by P.L.263-1989, SEC.1; P.L.238-2005, SEC.11; P.L.95-2007, SEC.5; P.L.36-2011, SEC.4; P.L.163-2018, SEC.6; P.L.231-2019, SEC.8; P.L.184-2021, SEC.1; P.L.38-2023, SEC.2.

¹¹³ As added by P.L.163-2018, SEC.7. Amended by P.L.184-2021, SEC.2.

¹¹⁴ As added by P.L.99-2013, SEC.4. Amended by P.L.184-2021, SEC.4.

¹¹⁵ (b) No real property located in Indiana of which any person may die seized shall be sold by the executor or administrator of the deceased person's estate to pay any debt or obligation of the deceased person, which is not a lien of record in the county in which the real property is located or to pay any costs of administration of any decedent's estate, unless a petition for administration is filed in court under section 5 of this chapter not later than five (5) months after the decedent's death and the clerk issues letters testamentary or letters of administration not later than seven (7) months after the decedent's death. As amended by 2021 HEA 1252 Sec. 8., P.L.184-2021, Sec. 8,

¹¹⁶ Note that if the FSSA's Unit does not ensure the issuance of letters testamentary or letters of administration and file a claim in a decedent's estate within 120 days after the decedent's death, the Unit's claim will be unenforceable under Ind. Code § 29-1-14-1(g).

Ind. Code § 29-1-7-15.2 provides that the anti-sale protection of real property under Ind. Code § 29-1-7-15.1(b) extends to the proceeds of sale if a majority in interest of the distributees consent to a sale under Ind. Code § 29-1-10-21.¹¹⁷

6.6. Procedural Strategies for Distributees' Protection of Probate Assets Against Claims

6.6.1. Strategy 1: Skip Probate Administration

The title passage affidavit provisions of Ind. Code § 29-1-7-23(b)-(d) offer a cost-effective and strategically advantageous alternative to probate administration 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.¹¹⁸

In that case, consider documenting the automatic transfer of legal title to the real property under Ind. Code § 29-1-7-23(b)-(d) instead of filing a petition for administration and administering the real property through formal probate administration.

6.6.2. Strategy 2: Petition for Administration More Than 5 Months After Decedent's Death – No Claims Filed

If the probate estate only comprises real property and the distributees are either uncooperative or financially vulnerable, consider filing a petition for administration **later than 5 months after the decedent's death**, selling the real property, and distributing the sale proceeds with the same asset protection under Ind. Code § 29-1-7-15.2 that would

¹¹⁷ **Ind. Code § 29-1-7-15.2 Sale of real property; permitted use of proceeds**

Sec. 15.2. (a) This section applies to real property subject to section 15.1(b) of this chapter, if the personal representative sells the real property to:

(1) satisfy a lien of record in the county in which the real property is located;
(2) pay costs of administration; or
(3) use the sale proceeds for any other payment or distribution approved by the written consent of a majority in interest of the distributees under IC 29-1-10-21.

(b) The proceeds of the sale of real property described in subsection (a) will retain the same protection that section 15.1(b) of this chapter provides to real property with respect to payment of any debt or obligation of the deceased person not described in subsection (a).

¹¹⁸ See **APPENDICES 5-7** for examples of title passage affidavits.

apply under Ind. Code § 29-1-7-15.1(b) to the distribution of the real property in-kind under Ind. Code § 29-1-7-23(b)-(d).

6.6.3. Strategy 3: Petition for Administration More Than 5 Months After Decedent's Death – Late Claims Filed

If, after filing a petition for administration more than 5 months after the decedent's death under the preceding recommendation, a creditor files a claim in the estate, consider these steps:

- unless the estate has an affirmative defense on the merits (*e.g.* FSSA's Estate Recovery Unit filed the claim more than 120 days after the decedent's death, mistaken identity, accord and satisfaction, claim value miscalculation, etc.), affirmatively allow the claim with a qualifying statement that:¹¹⁹
 - explains the applicability of Ind. Code § 29-1-7-15.1(b) to the distribution of the real property in-kind under Ind. Code § 29-1-7-23(b)-(d);
 - states that the probate estate lacks sufficient personal property to satisfy the claim; and
 - states that the personal representative will file a closing statement showing the claim as allowed with insufficient personal property to satisfy the claim and stating that the personal representative will:
 - make and record a personal representative's deed to the distributees under Ind. Code § 29-1-7.5-3.4¹²⁰ or
 - sell the real property and distribute it to the distributees free of creditors' claims under Ind. Code § 29-1-7-15.2;

¹¹⁹ A sample Limited Allowance of Claim appears in **APPENDIX 8** of this article.

¹²⁰ As stated previously, a personal representative's deed of distribution is not really a transfer of title, but a release of the personal representative's power of divestiture described in Ind. Code § 29-1-7-23(a).

- Don't deny claims filed by state and federal government entities other than the FSSA's Estate Recovery Unit because they are exempt from the claim deadline under Ind. Code § 29-1-14-1(a), and a denial will bog down the estate administration in unnecessary and unpredictable litigation; and
- File a closing statement documenting the applicability of Ind. Code § 29-1-7-15.1(b) to the distribution of the real property in-kind under Ind. Code § 29-1-7-23(b)-(d), or the sale of the real property for permissible reasons under Ind. Code § 29-1-7-15.1(b) or with distributee consent under Ind. Code § 29-1-10-21(b) and distribution of the sale proceeds to the distributees free of creditors' claims under Ind. Code § 29-1-7-15.2.

6.6.4. Strategy 4: Pursue Real Property Under Ind. Code § 29-1-7-23(b)-(d) and (Temporarily) Abandon Low-Value Personal Property

This strategy may be ideal for some families if:

- the probate estate comprises real property and accounts or other intangible personal property held by financial institutions or other third parties worth a total probate estate value (real and personal) exceeding the \$50,000 limit for effectuating the transfer of personal property with a small estate affidavit under Ind. Code § 29-1-8-1;¹²¹
- the distributees are mutually cooperative; and
- none of the distributees is financially vulnerable.

If all those conditions exist, consider the following steps:

- document the automatic transfer of legal title to the real property under Ind. Code § 29-1-7-23(b)-(d);
- abandon the personal property by refraining from filing a petition for administration to claim the personal property; and

¹²¹ 2022 HEA 1208, SEC. 1., P.L. 151-2022, SEC. 1., increased the limit to \$100,000 on July 1, 2022.

- help the distributees claim the abandoned personal property under Indiana's Revised Unclaimed Property Act¹²² through the Indiana Attorney General's [Unclaimed Property website](#).

Note that Ind. Code § 32-34-1.5-50 provides for the enforcement of debts against unclaimed property,¹²³ and 10 IAC 1.5-4-8 provides a creditor's proof of claim procedure,¹²⁴ so the personal property abandonment strategy offers no assurance that the family may recover free of debts through the unclaimed property system. However, it may be more likely that a creditor would monitor and file a claim against a decedent's probate

¹²² Ind. Code Chapter 32-34-1.5.

¹²³ **Ind. Code § 32-34-1.5-50 Delivery of property to owner; payment of enforceable debt**

Sec. 50. (a) Not later than thirty (30) days after a claim is allowed under section 49(b) of this chapter, the attorney general shall pay or deliver to the owner the property or pay to the owner the net proceeds of a sale of the property, together with income or gain to which the owner is entitled under section 33 of this chapter.

(b) Property held under this chapter by the attorney general is subject to a claim for the payment of an enforceable debt the owner owes in this state for:

- (1) child support arrearages, including child support collection costs and child support arrearages that are combined with maintenance;
- (2) a civil or criminal fine or penalty, court costs, surcharge, or restitution imposed by a final order of an administrative agency or a final court judgment; or
- (3) state or local taxes, penalties, and interest that have been determined to be delinquent or as to which notice has been recorded with the local taxing authority.

(c) Before delivery or payment to an owner under subsection (a) of property or payment to the owner of net proceeds of a sale of the property, the attorney general first shall apply the property or net proceeds to a debt under subsection (b) the attorney general determines is owed by the owner. The attorney general shall pay the amount to the appropriate state or local agency.

(d) The attorney general may make periodic inquiries of state and local agencies in the absence of a claim filed under section 48 of this chapter to determine whether an apparent owner included in the unclaimed property records of this state has enforceable debts described in subsection (b). The attorney general first shall apply the property or net proceeds of a sale of property held by the attorney general to a debt under subsection (b) of an apparent owner which appears in the records of the attorney general and deliver the amount to the appropriate state or local agency.

¹²⁴ **10 IAC 1.5-4-8 Creditors; proof of claim**

Authority: Ind. Code § 32-34-1.5-87

Affected: Ind. Code § 32-34-1.5

Sec. 8. Any creditor of an apparent owner claiming an interest in unclaimed property in the custody of the attorney general shall file the following with the attorney general:

- (1) A certified copy of a final judgment establishing the debt owed by the apparent owner.
- (2) Proof that the judgment is first in time within the apparent owner's county of residence.
- (3) Proof by affidavit or otherwise that the debt has not been extinguished by the statute of limitations and has not been satisfied in whole or in part.

(Office of Attorney General for the State; 10 IAC 1.5-4-8; filed Jul 1, 1997, 4:15 p.m.: 20 IR 3002; readopted filed Aug 14, 2003, 1:15 p.m.: 27 IR 946; readopted filed Oct 6, 2009, 9:03 a.m.: 20091104-IR-010090575RFA; readopted filed Oct 26, 2015, 1:48 p.m.: 20151125-IR-010150149RFA; readopted filed Nov 10, 2021, 4:13 p.m.: 20211208-IR-010210426RFA)

estate than that the creditor would monitor and file a claim against the decedent's unclaimed property.

6.6.5. Strategy 5: Seek appointment of a Personal Representative to Scrutinize Claim Merits

If a claim seems inevitable, a decedent's distributees may want to seek the appointment of a personal representative to scrutinize and challenge claims on their merits.

Ind. Code § 29-1-14-11 imposes the following mandate on the personal representative to scrutinize claims (with emphasis added):

Ind. Code § 29-1-14-11 Inquiry into correctness; liability on bond

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 make all available defenses thereto, and 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.

So, a personal representative should not hastily approve a claim just to satisfy the applicable deadlines for claim allowance or disallowance of Ind. Code § 29-1-14-10(a) and (b).¹²⁵

Instead, a prudent personal representative should disallow a claim if the personal representative believes the personal representative needs evidence of the claim's merits. Ind. Code § 29-1-14-10(c) and (d) indicate that the method of a personal representative's allowance or disallowance of a claim depends on the status of rules for that action issued

¹²⁵ **Ind. Code § 29-1-14-10 Allowance; disallowance; expenses of administration**

Sec. 10. (a) On or before three (3) months and fifteen (15) days after the date of the first published notice to creditors, the personal representative shall allow or disallow each claim filed not later than three (3) months after the date of the first published notice to creditors, and as to any claim filed not later than nine (9) months after the decedent's death by a claimant (other than the United States, the state, or a subdivision of the state) who did not receive notice of administration under IC 29-1-7-7, the personal representative shall allow or disallow the claim not later than fifteen (15) days after the date of filing of the claim.

(b) The personal representative shall allow or disallow each claim filed by the United States, the state, or a subdivision of the state on or before the later of:

(1) three (3) months and fifteen (15) days after the first published notice to creditors; or

(2) fifteen (15) days after the date on which the United States, the state, or a subdivision of the state filed the claim.

by the Indiana Supreme Court, if any, or local rules if the Supreme Court has not yet given guidance on the subject.¹²⁶

If the personal representative disallows the claim or takes no action within the deadlines for claim allowance or disallowance, any party may petition the court to set the claim for trial under Ind. Code § 29-1-14-10(e).¹²⁷

A few disputes emerged in the past couple of years about evidentiary requirements for claims filed against decedents' estates by the Estate Recovery Unit of the FSSA. In those cases, FSSA argued that an FSSA employee's affidavit in support of an FSSA claim under Ind. Code § 12-15-9-1¹²⁸ required no copies of supporting records or other admissible evidence to shift the burden of proof to the personal representative.

¹²⁶ (c) The personal representative shall make appropriate notations on the margin of the claim and allowance docket showing the action taken as to the claim, or, in a jurisdiction that has implemented electronic filing, by making appropriate notations of the action taken as to the claim according to rules established by the Indiana supreme court, or if the Indiana supreme court adopts no rule regarding the notations, then by local rules established by the court where the claim is filed.

(d) If a personal representative determines that the personal representative should not allow a claim in full, the claim shall be noted "disallowed". The clerk of the court shall give written notice to a creditor if a claim has been disallowed in full or in part. In a jurisdiction that has implemented electronic filing, written notice to a creditor concerning a disallowed claim, in full or in part, shall be given according to rules established by:

- (1) the Indiana supreme court; or
- (2) local rules established by the local court where the claim is filed if rules from the Indiana supreme court have not yet been promulgated.

A sample Limited Allowance of Claim appears in **APPENDIX 8** of this article.

¹²⁷ See the explanation in Subsection **6.7.11.4** of this article concerning a claimant's obligation under Ind. Code § 32-17-13-7(f) to petition to set a claim for trial as a prerequisite for enforcing the claim against nonprobate transferees.

¹²⁸ **Ind. Code § 12-15-9-1 Amount of claim; preference**

Sec. 1. Upon the death of a Medicaid recipient, the total amount of Medicaid paid on behalf of the recipient after the recipient became fifty-five (55) years of age must be allowed as a preferred claim against the estate of the recipient in favor of the state. The affidavit of a person designated by the secretary to administer this section is evidence of the amount of the claim and is payable after the payment of the following in accordance with IC 29-1-14-9:

- (1) Funeral expenses for the recipient, not to exceed three hundred fifty dollars (\$350).
- (2) The expenses of the last illness of the recipient that are authorized or paid by the office.
- (3) The expenses of administering the estate, including the attorney's fees approved by the court.

Although the trial courts' allowance of FSSA's claims over the personal representatives' objections struck this author as unconstitutional takings of property without due process of law,¹²⁹ the personal representatives and distributees elected not to appeal the decisions.

When this author spoke to the Deputy Attorney General responsible for supervising all FSSA claims in 2021, the Deputy Attorney General said FSSA had already initiated an informal practice of sharing supporting claim records with personal representatives' counsel to avoid unnecessary evidentiary arguments. Still, the statutory ambiguities under which the courts allowed the FSSA claims remain unresolved by legislation or an appellate court's opinion.

Some claims may expire under statutes of repose and statutes of limitations. For example, most federal tax liens expire under the 10-year statute of limitations for collection established in 26 U.S.C. § 6502 unless circumstances exist that extend or suspend the 10-year limitations period.¹³⁰ So, a diligent person representative should investigate whether a claimant has expired under an applicable statute of limitations or statute of repose.

6.7. Medicaid Reimbursement Claims Against Nonprobate Transferees

6.7.1. Procedural Policy for Claims Against Nonprobate Transferees

Ind. Code Chapter 32-17-13 presents a densely intricate procedural gauntlet that a deceased transferor's claimants must navigate flawlessly to collect their claims against the deceased transferor's nonprobate transferees.¹³¹

The chapter's principal policy protects the nonprobate transferees' due process rights because:

- the private nature of nonprobate transfers tends to isolate nonprobate transferees from notice about probate estate proceedings; and

¹²⁹ U.S. Const. amend. XIV, §1.

¹³⁰ See the Internal Revenue Manuals Part 5, Subsection 5.17.2.2.2, published online at https://www.irs.gov/irm/part5/irm_05-017-002 (last visited by the author on April 4, 2022).

¹³¹ A procedural diagram for claims against nonprobate transferees appears in **APPENDIX 9** of this article.

- nonprobate transferees would have no reason to anticipate probate estate proceedings if a deceased transferor's estate plan passed 100% of the deceased transferor's assets through nonprobate transfer instruments.

6.7.2. Nonprobate Transfer Definitions

Ind. Code § 32-17-13-1(a) provides a general rule defining a “nonprobate transfer” as follows:

(a) As used in this chapter, “nonprobate transfer” means a valid transfer, effective at death, by a transferor:

(1) whose last domicile was in Indiana; and

(2) who immediately before death had the power, acting alone, to prevent transfer of the property by revocation or withdrawal and:

(A) use the property for the benefit of the transferor; or

(B) apply the property to discharge claims against the transferor's probate estate.

Ind. Code § 32-17-13-1(b) excludes the following transfers from the nonprobate transfer definition:

(b) The term does not include a transfer at death (other than a transfer to or from the deceased transferor's probate estate) of:

(1) a survivorship interest in a tenancy by the entireties real estate;

(2) a life insurance policy or annuity;

(3) the death proceeds of a life insurance policy or annuity;

(4) an individual retirement account or a similar account or plan; or

(5) benefits under an employee benefit plan.

Ind. Code § 32-17-13-1(c) provides that a nonprobate transfer occurs on a multiparty account of the deceased transferor if the deceased transferor's last domicile was in Indiana.¹³²

¹³² (c) With respect to a nonprobate transfer involving a multiple party account, a nonprobate transfer occurs if the last domicile of the depositor whose interest is transferred under IC 32-17-11 was in Indiana. Ind. Code § 32-17-13-1(c)

Ind. Code § 32-17-13-1(d) provides that a nonprobate transfer of a motor vehicle or watercraft occurs if the **transferee obtains a certificate of title in Indiana** under Ind. Code Article 9-17.¹³³

Ind. Code § 32-17-13-1(e) provides that “a transfer on death transfer completed under Ind. Code Chapter 32-17-14 is a nonprobate transfer.”¹³⁴

6.7.3. Party Definitions and Liability of Nonprobate Transferees

Ind. Code § 32-17-13-2(a) identifies the persons entitled to enforce claims filed against deceased transferors’ probate estates as follows:

(a) As used in this chapter, “claimant” means the surviving spouse¹³⁵ or a surviving child, to the extent that statutory allowances are affected, or a person who has filed a timely claim in a deceased transferor’s probate estate under IC 29-1-14, and is entitled to enforce the claim against a transferee of a nonprobate transfer.

Ind. Code § 32-17-13-2(b) identifies the recipient of a nonprobate transfer as follows:

(b) As used in this chapter, “nonprobate transferee” means a person who acquires an interest in property by a nonprobate transfer.

Ind. Code § 32-17-13-2(c) establishes a nonprobate transferee’s liability to a claimant as follows:

(c) Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to a deceased transferor’s probate estate for:

¹³³ (d) With respect to a motor vehicle or a watercraft, a nonprobate transfer occurs if the transferee obtains a certificate of title in Indiana under IC 9-17. Ind. Code § 32-17-13-1(d)

¹³⁴ Ind. Code Chapter 32-17-14 is the Indiana Transfer on Death Property Act (the “TOD Act”), which authorizes a transferor to make pay on death (POD) transfers of bank accounts and transfer on death (TOD) transfers of almost conceivable kind of asset. However, Ind. Code § 32-17-14-2.5 provides the following TOD Act exclusions:

This chapter does not apply to property, money, or benefits paid or transferred at death under:

- (1) an employee benefit plan governed by the Employees Retirement Income Security Act of 1974;
- (2) an individual retirement account; or
- (3) a similar account or plan intended to qualify for a tax exemption or deferral under the Internal Revenue Code;

unless the provisions of this chapter are incorporated into the governing instrument or beneficiary designation in whole or in part by express reference.

¹³⁵ See *Sarkar v. Naugle (In re Sarkar)*, 145 N.E.3d 802 (Ind. App. 2020), and the cases cited in *Sarkar* concerning the effectiveness of a married person’s estate planning objective to disinherit the person’s surviving spouse through a revocable trust or other nonprobate transfer system.

(1) allowed claims against the deceased transferor's probate estate; and
(2) statutory allowances to the decedent's spouse and children;
to the extent the decedent's probate estate is insufficient to satisfy those claims and allowances.

Ind. Code § 32-17-13-2(d) provides that a nonprobate transferee's liability "may not exceed the value of nonprobate transfers received or controlled by the nonprobate transferee."

If a nonprobate transferee has contributed to the nonprobate transferee's acquisition of the property that the nonprobate transferee received from the deceased transferor, Ind. Code § 32-17-13-2(e) provides that "the liability of the nonprobate transferee does not include the net contributions of the nonprobate transferee."

6.7.4. Apportionment of Nonprobate Transferees' Liability to the Probate Estate

Ind. Code § 32-17-13-3 apportions multiple nonprobate transferees' liability to the probate estate as follows:

Ind. Code § 32-17-13-3 Priority of liability to probate estate

Sec. 3. Nonprobate transferees are liable for the insufficiency described in section 2 of this chapter in the following order:

- (1) As provided in the deceased transferor's will or other governing instrument.*
- (2) To the extent of the value of the nonprobate transfer received or controlled by the trustee of trusts that can be amended, modified, or revoked by the decedent during the deceased transferor's lifetime. If there is more than one (1) such trust, in proportion to the relative value of the trusts.*
- (3) Other nonprobate transferees in proportion to the values received.*

6.7.5. Abatement of Beneficiaries' Trust Interests by Nonprobate Transfer Claims

If a claimant enforces an allowed claim to recover the claim deficiency against a trust, Ind. Code § 32-17-13-4 provides the following abatement rule:

Ind. Code § 32-17-13-4 Beneficiary interests in trusts

Sec. 4. Unless otherwise provided by the trust instrument, interest of beneficiaries in all trusts incurring liabilities under this chapter shall abate as necessary to satisfy the liability as if all of the trust instruments were a single trust.

6.7.6. Instrument's Apportionment Provisions Concerning Nonprobate Transferees' Liability

If an instrument establishing a nonprobate transfer apportions liability among multiple nonprobate transferees, Ind. Code § 32-17-13-5 applies the apportionment as follows:

Ind. Code § 32-17-13-5 Apportionment of liability by instrument

Sec. 5. (a) A provision made in an instrument may direct the apportionment of the liability among the nonprobate transferees taking under that or any other governing instrument.

(b) If a provision in an instrument conflicts with a provision in another instrument, the later provision prevails.

6.7.7. Forum of Proceedings to Enforce Claims Against Nonprobate Transferees

Ind. Code § 32-17-13-6(a) provides the following rule concerning the jurisdictional location of proceedings to enforce claims against nonprobate transferees:

(a) Upon due notice to a nonprobate transferee, the liability imposed by this chapter is enforceable in proceedings in Indiana in the county where:

- (1) the transfer occurred;*
- (2) the transferee is located; or*
- (3) the probate action is pending.*

Ind. Code § 32-17-13-6(b) establishes the nature of a proceeding against nonprobate transferees as a separate court case as follows:

(b) A proceeding under this chapter may be commenced as a separate cause from a cause in which a probate action is pending with respect to a deceased transferor of a nonprobate transfer by filing a complaint against a nonprobate transferee as a defendant and serving a summons and a complete copy of the complaint to each defendant under the Indiana Rules of Trial Procedure.

6.7.8. Claims Concerning Deceased Transferors Dying Before July 1, 2018

Most claims against nonprobate transferees concerning decedents dying before July 1, 2018, are time-barred under Ind. Code § 32-17-13-7(a)-(c) or Ind. Code § 32-17-13-8(a) in spring 2022. For those claims to be enforceable, personal representatives or claimants had to commence collection lawsuits against nonprobate transferees under Ind. Code § 32-17-13-7(a)-(c) or Ind. Code § 32-17-13-8(a) before January 1, 2020.

6.7.9. Very Limited Medicaid Estate Recovery Claim Deadline Exemption

Ind. Code § 12-15-9-0.6(d) provides a limited exemption from deadlines in Ind. Code Chapter 32-17-13 concerning claims of the FSSA's Estate Recovery Unit against a deceased transferor's nonprobate transferees. The exemption under Ind. Code § 12-15-9-0.6(d) applies to a deceased transferor who received Medicaid benefits and failed to disclose the deceased transferor's assets to the county office of the FSSA's Division of Family Resources.

A strict construction would limit the exemption to assets that a deceased transferor failed to disclose under the express language of the statute. The exemption should not apply if the deceased transferor disclosed assets as part of the deceased transferor's compliance with Medicaid eligibility requirements and then established nonprobate transfers after the disclosure.

NOTE, HOWEVER, that if the FSSA's Estate Recovery Unit files a probate estate claim more than 120 days after the death of a decedent who died after June 30, 2024, the claim is unenforceable under Ind. Code § 29-1-14-1(g), so the nonprobate transferees should move to dismiss any proceedings that the Estate Recovery Unit may commence on the claim under Ind. Code Chapter 32-17-13.¹³⁶

6.7.10. Medicaid Estate Recovery Exemptions of Nonprobate Transfers Established Before April 30, 2002, and Assets Determined by FSSA to be Exempt or Unavailable Before April 30, 2002

Ind. Code § 12-15-9-0.8 excludes from FSSA's estate recovery authority a decedent's nonprobate property that:

(1) the office determined were exempt or unavailable assets; or

(2) were transferred out of the probate estate;

before May 1, 2002.

FSSA's exemption from deadlines for claims against nonprobate transferees under Ind. Code § 12-15-9-0.6(d) may have mixed effects on nonprobate transfers described in

¹³⁶ This Article will repeat this note as a footnote to other references to a creditor's filing deadlines under Ind. Code Chapter 32-17-13.

Ind. Code § 12-15-9-0.8. Although Ind. Code § 12-15-9-0.8(1) excludes nonprobate assets that FSSA determined were exempt or unavailable before May 1, 2002, FSSA could not have determined that nonprobate assets were exempt or unavailable without the deceased Medicaid recipient's disclosure of those assets in the Medicaid application process.

However, the exclusion in Ind. Code § 12-15-9-0.8(2) makes no express or implied disclosure requirement, and the deadline exemption under Ind. Code § 12-15-9-0.6(d) only exempts from FSSA's claims against nonprobate transferees from **deadlines** under Ind. Code Chapter 32-17-13 concerning undisclosed assets.

So, it appears that if a decedent received Medicaid benefits after age 55 and established a nonprobate transfer of assets before May 1, 2002, FSSA could not enforce a claim against the decedent's nonprobate transferees, regardless of whether the decedent disclosed the assets to FSSA.¹³⁷

6.7.11. Claims Concerning Assets Transferred Through Nonprobate Transfers Concerning Deceased Transferors Dying After June 30, 2018

6.7.11.1. Deadline to File and Serve a Claim Against a Deceased Transferor's Probate Estate

Ind. Code § 32-17-13-7(d)(1) requires a deceased transferor's claimant to complete the following actions within 5 months after the deceased transferor's death:

- file a claim against the deceased transferor's probate estate;¹³⁸ and

¹³⁷ The interplay of Ind. Code § 12-15-9-0.6(d) and Ind. Code § 12-15-9-0.8 are not purely academic considerations. Suppose a person disabled by illness or injury received Medicaid benefits before and after reaching 55 years of age in the 1990s, and then acquired sufficient wealth by earnings, inheritance, or marriage to no longer qualify for Medicaid. In that case, the person could have simply withdrawn from Medicaid without disclosing the new wealth. Although FSSA would have estate recovery rights for those old Medicaid benefits, Ind. Code § 12-15-9-0.8(2) would prohibit FSSA from claiming against the deceased former Medicaid recipient's nonprobate transferees if the decedent had established and funded a revocable trust, pay on death or transfer on death beneficiary designation, or another nonprobate transfer device before April 30, 2002.

¹³⁸ NOTE, HOWEVER, that if the FSSA's Estate Recovery Unit files a probate estate claim more than 120 days after the death of a decedent who died after June 30, 2024, the claim is unenforceable under Ind. Code § 29-1-14-1(g), so the nonprobate transferees should move to dismiss any proceedings that the Estate Recovery Unit may commence on the claim under Ind. Code Chapter 32-17-13.

- deliver a copy of the claim to each nonprobate transferee known by the claimant.

Although claims of government creditors other than the FSSA's Estate Recovery Unit¹³⁹ are exempt from the claims deadline under Ind. Code § 29-1-4-1, even a government creditor must comply with the requirement to file a claim against the deceased transferor's probate estate under Ind. Code § 32-17-13-7(d)(1).

The procedural requirement of filing a claim in the deceased transferor's probate estate within 5 months after the deceased transferor's death necessitates the following action sequence within the 5-month deadline:

- someone must file a petition for administration (defined in Ind. Code § 29-1-1-3(a)(31));
- the court must enter an order granting the petition and appointing a personal representative for the deceased transferor's estate; and
- the claimant must file the claim in the deceased transferor's open estate.¹⁴⁰

6.7.11.2. Deadline to File and Serve a Written Demand

Generally, Ind. Code § 32-17-13-7(d)(2) requires a claimant to:

- file a written demand in the deceased transferor's probate estate for the personal representative to commence proceedings against nonprobate transferees under Ind. Code Chapter 32-17-13;
- serve a copy of the written demand on the personal representative; and
- serve copies of the written demand on each known nonprobate transferee.¹⁴¹

¹³⁹ If the FSSA's Estate Recovery Unit files a probate estate claim more than 120 days after the death of a decedent who died after June 30, 2024, the claim is unenforceable under Ind. Code § 29-1-14-1(g).

¹⁴⁰ *Id.*

¹⁴¹ A sample written demand appears in **APPENDIX 10** of this article.

Ind. Code § 32-17-13-7(d)(3) applies the written demand delivery requirements of Ind. Code § 32-17-13-7(d)(2) to Ind. Code § 32-17-13-7(j), which this article will discuss momentarily.

6.7.11.3. Written Demand Contents

Ind. Code § 32-17-13-7(e) specifies the following requirements for the written demand's contents:

- (1) The cause number of the deceased transferor's estate.*
- (2) A statement of the claimant's interest in the deceased transferor's estate and nonprobate transfers, including the date on which the claimant filed a claim in the deceased transferor's estate.*
- (3) A copy of the claim attached as an exhibit to the written demand.*
- (4) A description of the nonprobate transfer, including:*
 - (A) a description of the transferred asset, as the asset would be described under IC 29-1-12-1, regardless of whether the asset is part of the decedent's probate estate, subject to the redaction requirements of the Indiana administrative rules, established by the Indiana supreme court;*
 - (B) a description or copy of the instrument by which the deceased transferor established the nonprobate transfer, subject to the redaction requirements of the Indiana administrative rules, established by the Indiana supreme court; and*
 - (C) the name and mailing address of each nonprobate transferee known by the claimant.*

6.7.11.4. Requirement of a Claimant's Diligent Probate Estate Claim Prosecution

One of the deadlines under Ind. Code § 32-17-13-7(f) depends on when the claimant's claim is finally allowed in the deceased transferor's probate estate. So, Ind. Code § 32-17-13-7(f) requires claimants to pursue their claims aggressively against the deceased transferor's probate estate.

Ind. Code § 32-17-13-7(f) creates a time bar for claimants to pursue probate estate claim proceedings under IC 29-1-14-10 that does not exist in the Probate Code concerning claims in solvent estates that require no additional collection proceedings against nonprobate transferees.

The Probate Code's deadline for the personal representative to allow or disallow a ***non-governmental claim*** filed in the deceased transferor's probate estate under IC 29-1-14-10(a) requires the personal representative to allow or disallow a claim:

- on or before 3 months and 15 days after the date of the first published notice to creditors if the claim was filed not later than 3 months after the date of the first published notice to creditors; and
- not later than 15 days after the date of filing of a claim filed not later than 9 months after the decedent's death by a claimant (other than the United States, the state, or a subdivision of the state) who did not receive notice of administration under IC 29-1-7-7.

The Probate Code's deadline for the personal representative to allow or disallow a ***governmental claim*** filed in the deceased transferor's probate estate under IC 29-1-14-10(b) requires the personal representative to allow or disallow a claim filed by the United States, the state, or a subdivision of the state on or before the later of:

- 3 months and 15 days after the first published notice to creditors; or
- 15 days after the date on which the United States, the state, or a subdivision of the state filed the claim.

Ind. Code § 32-17-13-7(f) bars the commencement of the proceeding against nonprobate transferees unless the claimant presses the claim in the deceased transferor's probate estate aggressively and petitions to set the claim for trial in the probate court under IC 29-1-14-10(e) within 30 days after the personal representative's applicable deadline has expired under IC 29-1-14-10(a) or IC 29-1-14-10(b) to allow or disallow the claim.¹⁴²

¹⁴² A sample petition to set claim for trial appears in **APPENDIX 11** of this article.

6.7.11.5. Direct Claimant Action If Personal Representative Declines or Fails to Act

Ind. Code § 32-17-13-7(g) contemplates that a personal representative may affirmatively decline to pursue claims against nonprobate transferees or simply fail to pursue the claims. If a personal representative affirmatively declines or fails to pursue a claim within 30 days after receiving a claimant's written demand, the claimant may commence a proceeding against nonprobate transferees directly in the name of the decedent's estate. In that case, the claimant must commence the proceeding at the claimant's expense.

6.7.11.6. Statutory Exoneration for a Personal Representative's Declination or Failure to Act

Ind. Code § 32-17-13-7(h) protects a personal representative from liability for declining or failing to pursue a claim against nonprobate transferees. This statutory exoneration contrasts with the personal representative's statutory duties to possess and preserve the decedent's estate under IC 29-1-13-1.¹⁴³

Statutory exoneration can be a significant factor in one or more of the asset protection strategies described in Section 6.8 of this article.

6.7.11.7. Protection of Secured Creditors' Interests

Ind. Code § 32-17-13-7(i) affirmatively protects a creditor's right to enforce "a valid and otherwise enforceable lien, warrant, mortgage, pledge, security interest, or other comparable interest against property included in a nonprobate transfer." However, a secured creditor must satisfy the elements of Ind. Code Chapter 32-17-13 to recover a

¹⁴³ IC 29-1-13-1 Possession of property; duties of personal representative

Sec. 1. Every personal representative shall have a right to take, and shall take, possession of all the real and personal property of the decedent. The personal representative:

- (1) shall pay the taxes and collect the rents and earnings thereon until the estate is settled or until delivered by order of the court to the distributees;
- (2) shall keep in tenable repair the buildings and fixtures under the personal representative's control;
- (3) may protect the buildings and fixtures under the personal representative's control by insurance; and
- (4) may maintain an action:
 - (A) for the possession of real property; or
 - (B) to determine the title to real property.

deficiency judgment against a decedent's nonprobate transferees if a mortgage foreclosure or comparable sale of the decedent's encumbered assets does not satisfy the decedent's debt.

6.7.11.8. Deadline for Filing and Serving the Written Demand

Ind. Code § 32-17-13-7(j) requires the claimant to complete the written demand filing and delivery by **the later of**:

- 7 months after the deceased transferor's death; or
- 30 days after the final allowance of the claimant's claim in the deceased transferor's probate estate.

Ind. Code § 32-17-13-7(j) accommodates protracted claim adjudication in the administration of the decedent's probate estate. If a claimant satisfies all the requirements of the preceding subsections, the claimant does not necessarily have to make and deliver the written demand under Ind. Code § 32-17-13-7(d) earlier than 30 days after the claim adjudication ends by judgment or agreement.

To illustrate this delayed timing, imagine a personal injury plaintiff winning a jury verdict a couple of years after punctually filing and vigilantly prosecuting a personal injury claim against a decedent's probate estate. In that case, the plaintiff could enforce the jury verdict against the decedent's nonprobate transferees by making and delivering the written demand under Ind. Code § 32-17-13-7(d) within 30 days after the jury verdict's entry.

6.7.11.9. Deadline for Commencement of Proceedings Against Nonprobate Transferees Concerning Deceased Transferors Dying After June 30, 2018

Ind. Code § 32-17-13-8(b) establishes the filing deadlines for lawsuits against decedents' nonprobate transferees. The subsection considers that a personal representative may:

- *file a written notice in the administration of the deceased transferor's probate estate stating that the personal representative does not intend to commence a proceeding against the nonprobate transferees;*¹⁴⁴ or
- *decline or fail to commence a proceeding against the nonprobate transferees.*¹⁴⁵

If the personal representative files a written notice of intent not to commence a proceeding, the claimant who has satisfied the written demand requirements of Ind. Code § 32-17-13-7(d) or Ind. Code § 32-17-13-7(j), Ind. Code § 32-17-13-8(b)(1) requires the claimant to file a lawsuit against the nonprobate transferees within 30 days after the personal representative's filing of the notice.

If the personal representative simply declines or fails to commence a proceeding against the nonprobate transferees, the claimant must file the lawsuit against the nonprobate transferees within 90 days after the final allowance of the claim in the administration of the deceased transferor's probate estate.¹⁴⁶

6.7.11.10. Statutory Exoneration of Obligors and Trustees for Transfers to Nonprobate Transferees

Ind. Code § 32-17-13-9 exonerates debtors or third-party holders of a deceased transferor's assets from transferring the assets in a nonprobate transfer to the nonprobate transferees. This exoneration contrasts with the general rule that a fiduciary must act impartially toward a decedent's creditors and beneficiaries.

6.7.11.11. Obligations, Rights, and Priorities of Successful Personal Representatives and Claimants

Ind. Code § 32-17-13-10 governs a successful claimant's rights and responsibilities toward other claimants and the nonprobate transferees.

Subsection (a) requires a personal representative to include the personal representative's recovery against nonprobate transferees in the personal

¹⁴⁴ Ind. Code § 32-17-13-8(b)(1).

¹⁴⁵ Ind. Code § 32-17-13-8(b)(2).

¹⁴⁶ A sample Complaint Against Nonprobate Transferees appears in **APPENDIX 12** of this article.

representative's inventory of the deceased transferor's probate estate and distribute the recovered assets as the personal representative would distribute or pay any other assets of the deceased transferor's probate estate.

In Subsection (b), the maxim "to the victor belong the spoils" describes a claimant's right to apply a successful assets recovery directly to the decedent's debt to the claimant, without requiring the claimant to remit the recovery to the personal representative.

If multiple claimants pursue claims successfully against nonprobate transferees, Subsection (c) allocates the recovery proceeds among the claimants according to the claimant priorities in the administration of a decedent's probate estate.¹⁴⁷

Subsection (d) requires a successful claimant to file a full or partial satisfaction of the claimant's claim in the administration of the deceased transferor's probate estate, depending on whether the claimant recovers a full or partial payment of the claimant.

6.8. Counter-Punching as an Asset Protection Strategy Against Nonprobate Claims

6.8.1. Avoid Filing a Petition for Administration Within 5 Months After the Deceased Transferor's Death

A deceased transferor's transferees have a strong incentive to discourage the filing a petition for administration of the deceased transferor's probate estate within 5 months after the deceased transferor's date of death.

The 5-month deadline to file a claim against the deceased transferor's probate estate under Ind. Code § 32-17-13-7(d)(1) creates an unusual stumbling block for creditors accustomed to the normal deadline for claims against a decedent's probate estate. While a creditor generally has up to 3 months after the first publication of notice of administration to file a claim against a decedent's probate estate, Ind. Code § 32-17-13-7(d)(1) since that time limit at 5 months after the date of the decedent's death.

¹⁴⁷ Ind. Code § 29-1-14-9.

If no one files a petition for administration of a deceased transferor's probate estate, there is no estate in which a creditor may file a claim to satisfy Ind. Code § 32-17-13-7(d)(1). So, a creditor's claim will be time-barred if the creditor does not take the initiative to open the estate and file a claim within that deadline.

6.8.2. Seeking Appointment as Personal Representative

A personal representative nominated in a testate decedent's will may petition for appointment to administer an insolvent decedent's estate. An intestate decedent's distributee or nonprobate transferee may also want to petition for appointment as the decedent's personal representative to maintain a stabilizing influence on the estate administration and any corresponding proceedings against nonprobate transferees.

The personal representative and the personal representative's counsel are entitled to recover their fees and costs as administrative claims having greater priority than all other creditors' claims.¹⁴⁸ If the personal representative is also a distributee or a nonprobate transferee, a personal representative's fee may be the only benefit the personal representative may receive from the decedent's assets.

6.8.3. Personal Representative's Duty to Scrutinize Claim Merits

As stated in Subsection 6.6.5 of this article, a personal representative's scrutiny of claims under IC 29-1-14-11 may expose the claims' vulnerabilities on the merits. So, the strategy in Subsection 6.6.5 of this article for seeking appointment of a person representative and scrutinizing claims may serve nonprobate transferees equally well if the probate estate is insolvent, as it protects distributees in a solvent estate.

6.8.4. Personal Representative's Role as the Claim Procedures Enforcer

The demanding procedural requirements of Ind. Code Chapter 32-17-13 should embolden lawyers to defend nonprobate transferees against creditors' claims through diligent attention to the chapter's procedural details in the same way that a skillful criminal defense

¹⁴⁸ IC 29-1-14-9 Classification of claims; preferences

Sec. 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**, except funeral expenses, expenses of a tombstone, and expenses incurred in the disposition of the decedent's body.

lawyer requires a prosecutor to satisfy procedural requirements and prove the defendant's guilt on each statutory element of each alleged crime. Although the chapter should not deter diligent creditors, details-attentive counsel can use the chapter's demanding procedural requirements to:

- enforce the requirements relentlessly in litigation; or
- negotiate for nonprobate transferees-friendly settlements.

6.8.5. Claim Settlement Negotiations

Some creditors appreciate the concept that a “bird in the hand is worth two in the bush.” Those creditors' priorities may make them amenable to negotiating the values of their claims in exchange for immediate cash payments. Nonprobate transferees may use the statutory procedural requirements for claim enforcement as incentives for claimants to compromise their claims and eliminate the costly time commitments required to satisfy all the procedural deadlines. Although claimants may assert contractual rights to recover attorney fees, costs, and prejudgment interest, many claimants are willing to waive or reduce those amounts in negotiated settlements.

6.8.6. Pursue Asset Values in Claim Enforcement Sales

A decedent's personal representative, distributees, and nonprobate transferees did not despair over a claimant's successful claim enforcement if underlying asset values may exceed the claim amount.

A decedent's personal representative and the nonprobate transferees may have opportunities to promote an asset sale or otherwise enhance an asset's marketability enough to sell the asset or a value exceeding the claim value.

Even if a claim's value exceeds the values of assets that are subject to the claim, market forces may create opportunities for the nonprobate transferees to acquire the assets for bargain prices in poorly-attended sales. Unlike banks and other holders of real property mortgages, some creditors lack the required sophistication to recover assets' full values in

judgment execution sales. In those cases, nonprobate transferees may be able to purchase the assets for amounts far below the assets' fair market values.

PART 7

CONCLUSION

Lawyers may find this article and its appendices useful for representing plaintiffs or defendants. The power of knowledge may help a lawyer wielding superior scholarship and case preparation overcome factual and strategic disadvantages and overwhelm a less diligent counterpart. However, humility and empathy distinguish a masterful lawyer from a technically proficient lawyer characterized by self-righteous hubris. The latter lawyer may win cases, but a masterful lawyer wins the admiration and respect of the court, counsel, and parties, regardless of a case's outcome.

APPENDICES

2025 Indiana Long-Term Care Asset Protection Planning

Appendices

Appendix 1: Sample Trust Protector Language

Appendix 2: Sample Spousal Testamentary Trust Provisions

Appendix 3: Sample Claim Form

Appendix 4: Procedural Diagram for the “5-Month & 7-Month Rules”

Appendix 5: Sample Title Passage Affidavit

Appendix 6: Sample Title Passage Affidavit

Appendix 7: Sample Title Passage Affidavit

Appendix 8: Sample Limited Allowance of Claim

Appendix 9: Procedural Diagram for Probate Claims Against Nonprobate Transferees

Appendix 10: Sample Written Demand

Appendix 11: Sample Petition to Set Claim for Trial

Appendix 12: Sample Complaint Against Nonprobate Transferees

ARTICLE 9
TRUST PROTECTOR

9.1. Settlor's Intent for Trust Protector Service.

We intend that a Trust Protector appointed under this Agreement should exercise the Trust Protector's powers under this article to ensure that:

- 9.1.1. the Trustee fulfills the Trustee's duties under this Agreement wisely;
- 9.1.2. the Trustee's exercise of authority under this Agreement is consistent with the Trust Protector's understanding of our Beneficial intent for the beneficiaries of each Trust under this Agreement;
- 9.1.3. the Trustee's fees and expenses are reasonable; and
- 9.1.4. the Trustee communicates responsively and appropriately with the Trust Protector and the beneficiaries of Trusts under this Agreement.

9.2. Trust Protector Qualifications.

- 9.2.1. A Trust Protector may be one or more individuals, corporations, or other entities.
- 9.2.2. A Trust Protector should have sufficient time, experience, and prudence to fulfill our intent for the Trust Protector's service.

9.3 Appointment of Trust Protector.

We appoint _____ to serve as the Trust Protector.

9.4. Appointment of Successor Trust Protectors.

The Trust Protector may appoint other individuals or institutional fiduciaries to serve as successor Trust Protectors.

9.5. Appointment of Trust Protector by Beneficiaries.

- 9.5.1. If an original Trust Protector dies or becomes unwilling or unable to serve as Trust Protector for any reason without appointing a successor Trust Protector, the beneficiaries of more than one-half of the Trust's current income at that time may appoint a Trust Protector by a written Trust Protector appointment instrument (the "beneficiaries' Trust Protector Appointment") signed by the beneficiaries.
- 9.5.2. The beneficiaries' appointment of a successor Trust Protector will become effective upon their delivery of a copy of the beneficiaries' Trust Protector Appointment to the new Trust Protector.
- 9.5.3. The beneficiaries will also deliver a copy of the beneficiaries' Trust Protector Appointment to the person serving as Trustee at that time, and the Trustee's responsibilities to inform and coordinate with a Trust Protector appointed under this Section will begin upon the Trustee's receipt of a copy of the beneficiaries' Trust Protector Appointment.

9.6. Trust Protector Resignation.

Anyone serving as Trust Protector may resign by acknowledged instrument delivered to the Trustee then acting under this Agreement.

9.7. Discretionary Distributions to Trust Protectors Prohibited.

The Trustee may not make an unrequired distribution that would discharge or substitute for a legal obligation of any person serving as Trust Protector, even if this Agreement would otherwise authorize the distribution.

9.8. Discretionary Principal Distributions to Settlers Prohibited.

Notwithstanding any other provision of this article, the Trust Protector may not in any way cause, authorize, or direct any distributions of principal to us.

9.9. Trust Protector Has No Fiduciary Duty.

To the extent not prohibited by applicable law, no construction of this Agreement will treat an individual Trust Protector as acting under a fiduciary duty, but, in all events, the Trust Protector must act in good faith.

9.10. Trust Protector Duty to Monitor the Trustee.

9.10.1. The Trust Protector will consider and review periodically all relevant circumstances, including the Trustee's performance considering the Trust Protector's understanding of the Trust's purposes and the beneficiaries' needs, and will use the Trust Protector's best judgment in maintaining a qualified, suitable individual or entity to serve as Trustee.

9.10.2. Notwithstanding the preceding provisions of this Section, an individual Trust Protector will have no liability for not supervising or monitoring the Trustee's performance under this Agreement.

9.11. Restrictions on Trust Protector Appointment of Interested Persons.

9.11.1. No Trust Protector, Trustee, or beneficiary may appoint a successor Trust protector or successor Trustee that is related or subordinate to the Trust Protector as a "related or subordinate party" within the meaning of IRC Section 672(c) when the Trust Protector is an "adverse party" within the meaning of IRC Section 672(a) or would be an adverse party if the Trust Protector were serving as Trustee unless that individual or entity would also be an adverse party.

9.11.2. If more than one person is serving as Trust Protector under this Agreement, this Section will prohibit the appointment of any Trustee that could not be appointed by each Trust Protector if serving alone as Trust Protector.

9.12. Notice of Appointment and Acceptance of Appointment as Trust Protector.

9.12.1. The Trust Protector or Trustee will advise each person appointed as a Trust Protector under this Agreement of the appointment.

9.12.2. Each person appointed as Trust Protector will accept the appointment by an acknowledged instrument delivered to the Trustee then serving within 60 days after the notification.

9.12.3. If a person appointed as Trust Protector fails to deliver the acceptance to the Trustee within the time required under this Section, the person will be treated as having renounced the appointment as Trust Protector, and the Trustee will, by an acknowledged instrument, appoint as Trust Protector one or more individuals or entities other than a Trustee appointed under this Agreement or any individual or entity that is related or subordinate (within the meaning of IRC

APPENDIX 1

Section 672(c) and the Regulations thereunder) to any the Trustee or beneficiary under this Agreement.

9.13. Compensation of Trust Protectors.

9.13.1. The Trustee will pay reasonable compensation to the Trust Protector on the Trust Protector's demand for compensation as Trust Protector under this Agreement.

9.13.2. A Trust Protector's compensation is reasonable if, under the circumstances, the compensation is comparable to fees that a corporate Trustee or accounting firm would charge to render comparable services.

9.13.3. A Trust Protector shall be entitled to indemnification and reimbursement for all reasonable expenses that the Trust Protector incurs and performance of the Trust Protector's service under this Agreement.

9.14. Trust Protector Powers.

9.14.1. The Trust Protector shall have the powers in this article concerning any Trust under this Agreement.

9.14.2. The Trust Protector may exercise the powers under this Section if the Trust Protector believes that the Trust Protector's action is appropriate.

9.14.3. The Trust Protector may also exercise the powers under this Section upon written request by a beneficiary or Trustee, or upon the Trust Protector's initiative.

9.14.4. The Trust Protector may appoint one or more individuals or entities to serve as successor Trust Protector after the Trust Protector ceases service as Trust Protector.

9.14.5. The Trust Protector then serving may remove a successor Trust Protector or change the terms of a successor Trust Protector's service before the successor Trust Protector's term of service begins.

9.14.6. The Trust Protector may remove the Trustee then serving, or any successor Trustee before the successor Trustee's term of service begins.

9.14.7. The Trust Protector may overrule any decision made by the Trustee, including without limitation decisions about distributions from the Trust; investments of trust property; or any other decision that the Trustee has made or refrained from making.

9.14.8. The Trust Protector may appoint an individual or entity with fiduciary powers to replace any removed Trustee or successor Trust Protector.

9.14.9. The Trust Protector may change the situs of a Trust under this Agreement.

9.14.10. The Trust Protector may change the governing state law applicable to the administration of a Trust under this Agreement regardless of the then Trust's existing situs.

9.14.11. The Trust Protector may change the construction of a Trust under this Agreement from the governing law of the prior situs to the governing law of the new situs.

9.14.12. The Trust Protector may amend a Trust under this Agreement in response to changes in the Internal Revenue Code that would otherwise increase taxation of the principal or income of a Trust under this Agreement.

APPENDIX 1

9.14.13. The Trust Protector may amend a Trust under this Agreement if the Trust Protector believes:

9.14.13.1. the amendment is necessary to achieve our intended purposes of this Agreement; and

9.14.13.2. the amendment does not cause us to have or receive any interest that this Agreement prohibits the Trustee to distribute to us or that we have renounced in this Agreement.

9.14.14. The Trust Protector may end a Trust under this Agreement.

9.15. Trust Protector Removal of Trustees.

9.15.1. The Trust Protector will have the power to remove any currently serving or future Trustee of a Trust under this Agreement for any reason or no reason at all.

9.15.2. If a Trust Protector's removal of a Trustee also removes a Successor Trustee appointed by the removed Trustee.

9.15.3. A Trust Protector will notify a Trustee of the Trustee's removal under this Section by a signed, acknowledged instrument, a copy of which the Trust Protector will deliver to the removed Trustee, any remaining Trustee then serving, and any individual or entity appointed by us or Trust Protector to replace the removed Trustee.

9.15.4. A Trust Protector may release the power to remove any Trustee, and the Trust Protector may limit the effectiveness of the release to that Trust Protector or make the release binding upon all successor Trust Protectors.

9.15.5. Notwithstanding any contrary provision of this Agreement, a Trust Protector may not receive compensation or reimbursement of expenses incurred in the Trust Protector's exercise of the power to remove one or more Trustees more than once within any period of 12 consecutive months.

9.16. Conflicts With Trustee.

A Trust Protector's decision will replace a Trustee's conflicting decision.

9.17. Limited Liability.

An individual Trust Protector will be free of all liability, damage, cost, and expense for any mistake in judgment, fact, or law in the performance of the Trust Protector's duties unless the Trust Protector disregards our intent for the Trust Protector's service with willful and malicious intent toward a current or contingent beneficiary of a Trust under this Agreement.

ARTICLE 4

JOE SCHMOE TESTAMENTARY TRUST

4.1. Joe Schmoe Testamentary Trust Establishment.

This Article establishes and governs the administration of a testamentary trust to be known as the Joe Schmoe Testamentary Trust.

4.2. Intent to Provide In Lieu of Allowance Under Ind. Code §29-1-4-1.

I intend for my spouse to receive distributions under this Article in lieu of an allowance under Ind. Code §29-1-4-1.

4.3. My Designations of the Joe Schmoe Testamentary Trust as Beneficiary of My Assets.

Any designation of a beneficiary of a will, trust, deed, agreement, pay on death or transfer on death beneficiary designation, life insurance policy, annuity contract, retirement plan containing retirement assets, or other instrument that identifies or designates as a beneficiary the Joe Schmoe Testamentary Trust or refers to a trust established under the Last Will and Testament of Joe Schmoe, or to the Joe Schmoe Testamentary Trust's Trustees or Successor Trustees will be effective in distributing income or property to the Joe Schmoe Testamentary Trust, and the income or property will become part of the Joe Schmoe Testamentary Trust's trust estate.

4.4. Estate Distribution to the Joe Schmoe Testamentary Trust.

After the Personal Representative has satisfied the requirements of the preceding provisions, the Personal Representative will distribute all the real or personal property of my estate, regardless of the location of my estate's real and personal property, to the Joe Schmoe Testamentary Trust to be administered under this Article.

4.5. Beneficiary and Trustees.

4.5.1. Betty Schmoe is the Joe Schmoe Testamentary Trust's beneficiary, and I appoint Betty Schmoe to serve with Susie Schmoe as Trustees of the Joe Schmoe Testamentary Trust.

4.5.2. While Betty Schmoe serves as Trustee, she and Susie Schmoe will serve as Co-Trustees, acting unanimously.

4.5.3. If Betty Schmoe is unable or unwilling to serve because of death, disability, or resignation, Susie Schmoe will serve as the Trustee.

4.6. Successor Trustee.

While Betty Schmoe serves as Trustee, if Susie Schmoe is unable or unwilling to serve because of death, disability, resignation, or unwillingness to accept the role of Trustee, Joetta Schmoe will serve as the Trustee.

4.7. Trustee Defined.

Any person appointed as Trustee or Successor Trustee is hereafter referred to as the "Trustee," regardless of the number of people appointed for that role.

4.8. Trust Property Investment.

The Trustee will invest and reinvest the Joe Schmoe Testamentary Trust's property and collect the income that the invested trust property produces.

7.2. Ensuring Qualified Distributions.

7.2.1. The Trustee will ascertain whether my estate or the trust estate of a trust established under this Last Will and Testament includes a retirement asset and whether a distribution will be a "qualified distribution" as that term is defined in IRC §408A.

7.2.2. The Trustee will make reasonable efforts to cause all distributions to be qualified distributions.

7.2.3. Notwithstanding any other provision of this Last Will and Testament to the contrary, the Trustee will make reasonable efforts to satisfy any requirements under IRC §401(a)(9), as amended, and the regulations promulgated thereunder, to make required minimum distributions.

7.3. Notification of Plan Administrator.

The Trustee will deliver a copy of this Last Will and Testament, as amended, to the plan administrator of any plan that designates one or more trusts established under this Last Will and Testament as beneficiaries and provide to the plan administrator any information or documents required under IRC §401(a)(9), as amended, and the regulations promulgated thereunder.

7.4. Trust Qualification as Beneficiary of Retirement Assets.

7.4.1. I intend that all retirement assets received by the trust will be paid to qualified beneficiaries as that term is used in the regulations under IRC § 401(a)(9).

7.4.2. No benefit from retirement assets will be used by this trust for the payment of taxes, debts, administration expenses, or other non-qualifying distributions at a time when the use would result in the trust not being a qualified beneficiary.

7.4.3. Notwithstanding any other provisions of this Last Will and Testament, if my spouse survives me and I have designated a trust established under this Last Will and Testament as the beneficiary of retirement assets, the Trustee will ensure that the trust satisfies the requirements for my spouse to withdraw the required minimum distributions over the term of my spouse's life expectancy that the Internal Revenue Service has stated in Private Letter Rulings (the "PLRs") including without limitation PLRs 1999-18065, 2001-36030, 2003-14029, 2009-34046, 2009-35045, and 2009-50053.

7.4.4. The Trustee is authorized and directed to consult with the Trustee's legal counsel and income tax advisor and exercise the Trustee's discretion to take any action or make any election required to qualify a protected beneficiary's share of distributions for distribution over the protected beneficiary's life expectancy.

7.4.5. No benefit will be paid to a charity or any other person or entity that would not be a qualified beneficiary for purposes of determining required distributions under the provisions of IRC § 401(a)(9) except that the payment may be made before the beneficiaries of the trust

APPENDIX 2

must be determined, if, as a result of the payment, the non-qualifying beneficiary is eliminated as a beneficiary of the trust.

7.4.6. This Section will not apply to any specific bequest to a charity or for a nonqualified person or entity that is funded by retirement assets under express language in this Last Will and Testament.

7.4.7. If an entity other than an individual human being becomes a beneficiary, the Trustee will take whatever action is necessary to ensure that every beneficiary is an individual human being, including, without limitation, making a liquidating distribution to a beneficiary that is not an individual human being in compliance with the regulations.

4.9. Real Estate Expenses of Other Trusts.

The Trustee of the Joe Schmoe Testamentary Trust will pay property taxes, property owner's insurance premiums, and maintenance costs concerning any real estate owned by any other trust established by either or both of Betty Schmoe and me.

4.10. Net Income Distribution.

The Trustee will distribute all the net income of the Joe Schmoe Testamentary Trust to Betty Schmoe at least in every calendar quarter in which the trust has net income.

4.11. Principal Distribution.

4.11.1. If the Trustee determines in the Trustee's discretion that Betty Schmoe is insecure, the Trustee may use the amount of the Joe Schmoe Testamentary Trust's principal as the Trustee determines in the Trustee's discretion to be required to make Betty Schmoe secure.

4.11.2. Regardless of the preceding Subsection, the Trustee will not use principal to purchase goods or services for Betty Schmoe if the purchase would disqualify Betty Schmoe for any kind of assistance or would diminish assistance benefits that Betty Schmoe would be otherwise entitled to receive.

4.12. Final Distribution of the Joe Schmoe Testamentary Trust.

After the death of Betty Schmoe, or if Betty Schmoe predeceases me, the Trustee will distribute the remaining Joe Schmoe Testamentary Trust property under the final trust distribution provisions of ARTICLE 5.

APPENDIX 3

STATE OF INDIANA	)	IN THE SCHMO CIRCUIT COURT
COUNTY OF SCHMO	)	
	)	CAUSE NO. 00C01-2111-ES-000011
IN THE MATTER OF THE	)	
SUPERVISED ADMINISTRATION	)	
OF THE ESTATE OF	)	
JOBY SCHMO,	)	
Deceased	)	
	)	

ESTATE CLAIM

The Claimant, Snuffy Smith, now files a claim against the above-captioned estate as follows:

Claimant's Name: Snuffy Smith

Claimant's Address: 555 Smith Lane, Schmerville, IN 47000

Claimant's Telephone Number: 555-555-5555

Description of Claimant's Claim: Grain consumed in the Claimant's field by Boss, the Decedent's grand champion hog.

Amount of Claimant's Claim: \$10,000.00

I, Snuffy Smith, solemnly swear or affirm under penalty for perjury that this claim, after deducting all credits, setoffs, and deductions to which the estate is entitled, is justly due and wholly unpaid to the best of my knowledge and belief.

Snuffy Smith, as the Claimant

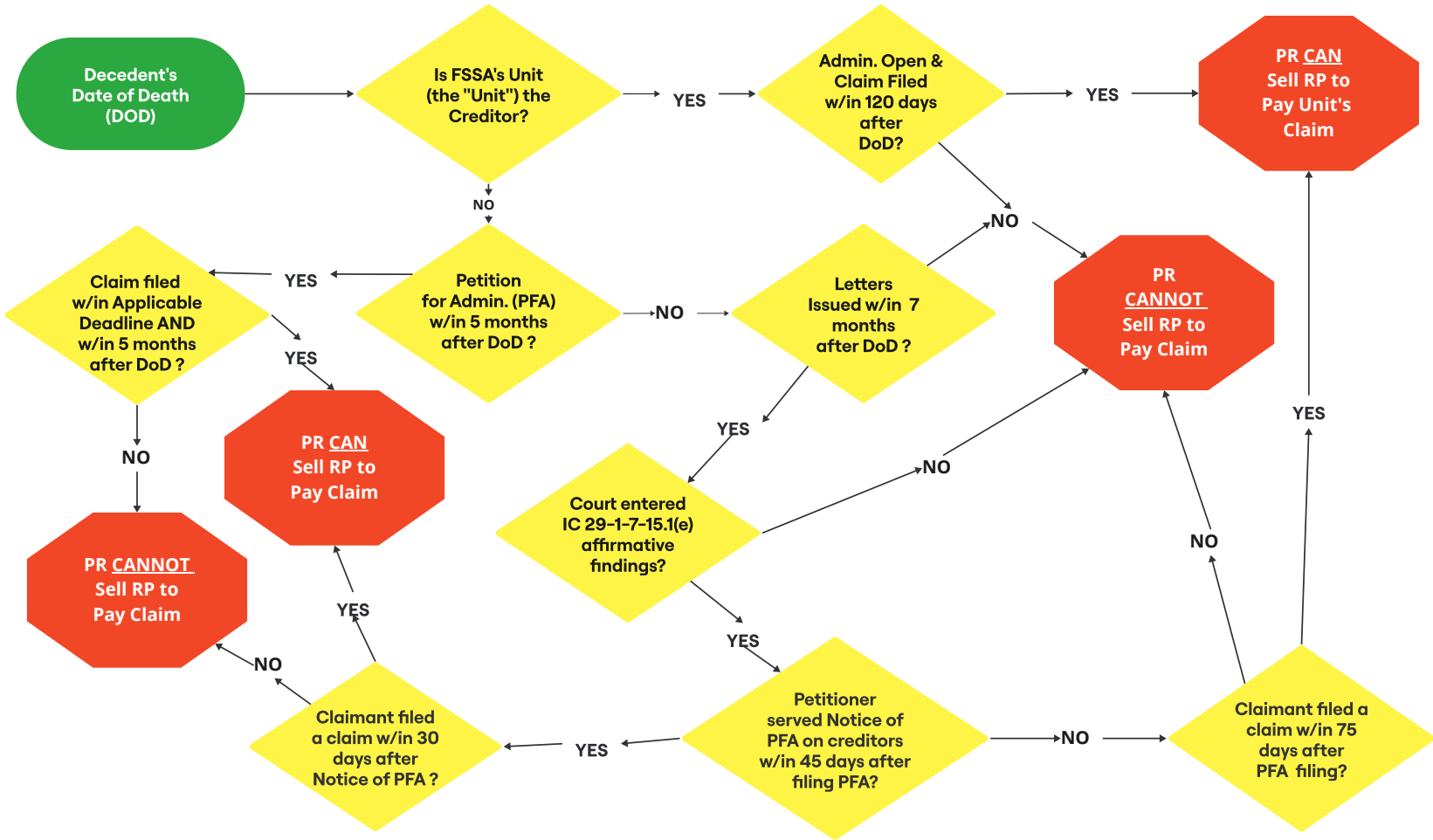
STATE OF INDIANA, COUNTY OF SCHMO

Subscribed and sworn to me before me, a Notary Public in and for said County and State, this day, April 4, 2022

Commission Number: 1111111110
Commission Expiration: April 31, 2022

Notary Public
Printed Name: Newt Notarious
County of Residence: Schmo

Personal Representative (PR) Authority to Sell Decedent's Real Property (RP) Under IC 29-1-7-15.1 (b)-(e)



APPENDIX 5
Sample Real Property Title Passage Affidavit - Basic Template

STATE OF INDIANA)
)
COUNTY OF SCHMOE)

TITLE PASSAGE AFFIDAVIT

The Affiant, Joe Bill Schmoe, being first duly sworn, upon an oath deposes and says as follows:

1. The Affiant is one of the surviving adult children of Rufus Xavier Sarsaparilla Schmoe, deceased (hereafter, “Rufus”), and Henrietta Earnestine Schmoe, deceased (hereafter, “Henrietta”).

2. Rufus and Henrietta were husband and wife when they acquired title to the following described real property situated in Schmoe County, Indiana, to-wit:

40 acres down by the paw-paw patch.

[Tax Parcel Number: 00-02-34-000-030.000-003]

[Property Address: 0001 Schmoe St., Schmoesburg, IN 47000]

(referred to hereinafter, the “Real Property,” but the tax parcel number and property address are provided for informational purposes only and are not part of the description of the Real Property) by a Warranty Deed from Albert Andreas Armadillo, an adult, to Rufus and Henrietta, a husband-and-wife, dated February 29, 1995, and recorded February 29, 1995, in Deed Record 000, page 1 (the “Warranty Deed”).

3. The Warranty Deed is the most recent instrument recorded in the Office of the Recorder of Schmoe County, Indiana (hereafter, the “Recorder”), and the Affiant requests that the Recorder index this Affidavit to the Warranty Deed with respect to the Real Property, and it is the most recent instrument responsible for conveying title to the Real Property.

4. Henrietta died on November 31, 1999, leaving Rufus as her surviving spouse. Rufus and Henrietta were never at any time divorced subsequent to their acquisition of the real property as tenants by the entirety; and consequently, by operation of the law, title to the Real Property was immediately vested in Rufus upon Henrietta’s death.

APPENDIX 5
Sample Real Property Title Passage Affidavit - Basic Template

5. [Sample language for a testate Rufus:] Rufus died testate on the June 31, 2017, leaving a Last and Testament dated April 31, 2001, that was admitted to probate under Cause Number 00C01-1809-EM-0001 by order of the the Schmoe Circuit Court entered September 31, 2018.

6. [Sample language for an intestate Rufus:] Rufus was the father of four children, namely, Raffaella Gabriela sarsaparilla Schmoe (hereinafter, “Raffaella”), Henrietta Earnestine Schmoe II (hereinafter, “Henrietta II”), Rufus Xavier Sarsaparilla Schmoe II (hereinafter, “Rufus II”), and the Affiant herein. Rufus II and his wife, died simultaneously and intestate on November 31, 1999, leaving their son and only descendant, Rufus Xavier Sarsaparilla Schmoe III (hereinafter, “Rufus III”), as their sole heir-at-law. Rufus died intestate on the June 31, 2017, leaving Raffaella, Henrietta II, Rufus III, and the Affiant herein as his only heirs-at-law (hereinafter, the heirs-at-law are referred to as the “Heirs”).

7. Title to the Real Property was immediately vested in the [use one of these defined terms and delete the other term: Legatees or Heirs] as tenants in common immediately upon Rufus’s death by operation of the law under IC 29-1-7-23, subject to the power of a personal representative to divest title under the requirements of IC 29-1-7-15.1.

8. No petition was filed for probate of a will and for issuance of letters testamentary, for appointment of an administrator with the will annexed, or for the appointment of an administrator under IC 29-1-7-5 within 5 months after Rufus’s death, nor did the Clerk issue letters testamentary or letters of administration within seven months after Rufus’s death, so the power of a personal representative to divest title expired automatically as a matter of law under IC 29-1-7-15.1(b), and title is now invested indefeasibly in the [use one of these defined terms and delete the other term: Legatees or Heirs] as follows:

Name	Relationship	Address	Percentage
Joe Bill Schmoe	Rufus’s Son	0002 Schmoe St. Schmoesburg, IN 47000	25%
Raffaella Gabriela Sarsaparilla Schmoe	Rufus’s Daughter	0003 Schmoe St. Schmoesburg, IN 47000	25%
Henrietta Earnestine Schmoe II	Rufus’s Daughter	0004 Schmoe St. Schmoesburg, IN 47000	25%

APPENDIX 5
Sample Real Property Title Passage Affidavit - Basic Template

Rufus Xavier Sarsaparilla Schmoe III	Rufus's Grandson	0005 Schmoe St. Schmoesburg, IN 47000	25%
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9. This affidavit is made for the purpose of establishing the facts herein contained and to induce the Schmoe County Auditor to transfer the Real Property to the names of Joe Bill Schmoe and Betty Jo Schmoe upon the Schmoe County Auditor's real property transfer records.

IN WITNESS WHEREOF, the Affiant has affixed his hand and seal this day, September 31, 2022.

Joe Bill Schmoe

STATE OF INDIANA, COUNTY OF SCHMOE) SS:

Before me, a Notary Public in and for said County and State, this day, September 31, 2022, personally appeared Joe Bill Schmoe, who swore to the truth of the representations contained herein and acknowledged the execution of the above and foregoing Affidavit of Death and Affidavit for Transfer of Real Property to be his free and voluntary act and deed.

My Commission Expires: _____

Commission Number: _____

Notary Public

Printed Name: _____

County of Residence: _____

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

Signature: _____

Printed Name: _____

This Real Property Title Passage Affidavit was prepared by A. Lolly Lawyer, of Lolly, Lolly, & Lolly PC., whose address is 1.75 N. Court St., Post Office Box 000, Schmoesburg, Indiana 47000, whose telephone number is 812-000-000, whose fax number is 812-000-0001, and whose website is www.LollyLollyLolly.com.

APPENDIX 6
Sample Title Passage Affidavit – Multiple Fact Patterns

STATE OF INDIANA)
)
COUNTY OF SCHMOE)

AFFIDAVIT OF TITLE PASSAGE

The Affiant, Joe Bill Schmoe (referred to hereafter as the “Affiant” and “Joe”), being first duly sworn, under oath deposes and says as follows:

1. Instrument Indexes: The Affiant requests that the Recorder of Schmoe County, Indiana, record and index this Affidavit according to IC 36-to-7-10(l) with a cross-referencing notation on the Recorder’s records to the following instruments:
 - a. Tract 1
 - i. Instrument Title: Warranty Deed (to which this Affidavit refers as the “MAS & MAS Deed”).
 - ii. Instrument Citation: Schmoe County Deed Record 1, page 1.
 - iii. Instrument Date: February 29, 1995.
 - iv. Instrument Recording Date: February 29, 1995.
 - v. Instrument Grantors: Methuselah Alfonso Schmoe and Myti Aphrodite Schmoe, a husband-and-wife.
 - b. Tract 2
 - i. Instrument Title: Transfer on Death Deed (to which this Affidavit refers as the “HES Deed”).
 - ii. Instrument Citation: Schmoe County Instrument No. 2010000023.
 - iii. Instrument Date: February 29, 2010.
 - iv. Instrument Recording Date: February 30, 2010.
 - v. Instrument Grantor: Henrietta Earnestine Schmoe, deceased (to whom this Affidavit refers hereafter as “Henrietta”).

APPENDIX 6
Sample Title Passage Affidavit – Multiple Fact Patterns

2. Real Property Descriptions:

- a. The legal description of the real property conveyed by the MAS & MAS Deed (to which this Affidavit refers hereafter as “Schmoe Hemp Farm Tract 1”) is as follows:

Beginning at the railroad rail embedded at the center line of Schmoe Street as a monument marking the Northeast Corner of the Northwest Quarter of Section 0, Township 0 North, Range 0 West, in the City of Schmoesburg, Township of Schmoe, County of Schmoe, State of Indiana; and running thence South 0 degrees, 0 minutes, 0 seconds West 20 chains, 3 rods, and 9 links to a steel driveshaft embedded as a monument way down yonder in the paw-paw patch; thence North 90 degrees, 0 minutes, 0 seconds West 10 chains, 1 rod, and 5 links to another steel driveshaft embedded as a monument; thence North 0 degrees, 0 minutes, 0 seconds West 20 chains, 3 rods, and 9 links to another railroad rail embedded at the center line of Schmoe Street as a monument; thence South 90 degrees, 0 minutes, 0 seconds East 10 chains, 1 rod, and 5 links to the point of beginning, containing 21.4652 acres, more or less.

- b. HES Deed Real Property Description (to which this Affidavit refers hereafter as the “Schmoe Hemp Farm Tract 2”):

Beginning at the railroad rail embedded at the center line of Schmoe Street as a monument marking the Northeast Corner of the Northwest Quarter of Section 0, Township 0 North, Range 0 West, in the City of Schmoesburg, Township of Schmoe, County of Schmoe, and State of Indiana; and running thence South 0 degrees, 0 minutes, 0 seconds West 20 chains, 3 perches, and 9 links to a steel driveshaft embedded as a monument way down yonder in the paw-paw patch; thence North 90 degrees, 0 minutes, 0 seconds West 10 chains, 1 perch, and 5 links to another steel driveshaft embedded as a monument; thence South 0 degrees, 0 minutes, 0 seconds West 3 chains to another steel driveshaft embedded as a monument; thence South 90 degrees, 0 minutes, 0 seconds East 13 chains, 1 perch, and 5 links to another steel driveshaft embedded as a monument; thence North 0 degrees, 0 minutes, 0 seconds West 23 chains, 3 perches, and 9 links to another railroad rail embedded at the center line of Schmoe Street as a monument; thence North 90 degrees, 0 minutes, 0 seconds West 3 chains to the point of beginning, containing 10.1037 acres, more or less.

APPENDIX 6
Sample Title Passage Affidavit – Multiple Fact Patterns

3. The Affiant is one of the surviving adult children of Rufus Xavier Sarsaparilla Schmoe, deceased (to whom this Affidavit refers hereafter as, “Rufus”), and Henrietta Earnestine Schmoe, deceased (to whom this Affidavit refers hereafter, “Henrietta”), and the Affiant makes this Affidavit upon his personal knowledge.
4. Rufus and Henrietta were husband and wife when they acquired title by the MAS & MAS Deed to the Schmoe Hemp Farm Tract 1, to which the records in the office of the Auditor of Schmoe County refer as follows:
 - a. County and State of Real Property Location: Schmoe County, Indiana.
 - b. Tax Parcel Number: 00-02-34-000-030.000-003.
 - c. Property Address: 0001 Schmoe St., Schmoesburg, IN 47000
 - d. Real Property Description: Pt NW 0-0-0 21.4652 A.

APPENDIX 6
Sample Title Passage Affidavit – Multiple Fact Patterns

5. Henrietta designated the HES Trust established under her Last Will and Testament as the transfer on death beneficiary of the Schmoe Hemp Farm Tract 2 in HES Deed according to IC §32-17-14-11, and the records of the office of the Auditor of Schmoe County refer to the Schmoe Hemp Farm Tract 2 as follows:
 - a. County and State of Real Property Location: Schmoe County, Indiana.
 - b. Tax Parcel Number: 00-02-34-000-030.000-004.
 - c. Property Address: 0002 Schmoe St., Schmoesburg, IN 47000
 - d. Real Property Description: Pt NW 0-0-0 10.1037 A.
6. Henrietta died testate on June 31, 2016.
7. No one filed a petition for administration of Henrietta's estate and, therefore, no court decree of final distribution of her estate was entered, nor was a closing statement filed, so there was no prohibition against the presentation of Henrietta's will for probate under IC §29-1-7-15.1(a).
8. Henrietta established the HES Trust in Article 4 of her Last Will and Testament and appointed Commerce to administer the HES Trust as Trustee for the benefit of Geraldine II, who was disabled in a tragic vehicle/rhinoceros collision that killed Geraldine II's father as they were driving past the home of Albert Andreas Armadillo, the next-door neighbor of Rufus and Henrietta.
9. Henrietta's Last Will and Testament was admitted to probate without administration in Schmoe County Will Record 43, page 60, under Cause Number 00C01-1906-EM-0001 by order of the Schmoe Circuit Court entered June 3, 2019, less than 3 years after Henrietta's death, which was within the time limitation under IC §29-1-7-15.1(g) to admit her will to probate, and consequently, title to the Schmoe Hemp Farm Tract 2 became vested automatically by operation of law upon Henrietta's death, according to IC §32-17-14-15(d) and IC §32-17-14-21(d), in Milburn Drysdale as Senior Trust Officer of Commerce Bank of Beverly Hills, as Trustee of the HES Trust.
10. Rufus survived as Henrietta's surviving spouse after Henrietta's death on June 31, 2016. Rufus and Henrietta were never at any time divorced subsequent to their acquisition of the Schmoe Hemp Farm Tract 1 as tenants by the entirety; and consequently, by operation of

APPENDIX 6
Sample Title Passage Affidavit – Multiple Fact Patterns

the law, title to the Schmoe Hemp Farm Tract 1 was immediately vested in Rufus upon Henrietta's death.

11. Rufus, was the father of four children, namely, Rafaella Gabriela Sarsaparilla Schmoe (hereafter, "Rafaella"), Henrietta Earnestine Schmoe II (hereafter, "Henrietta II"), Rufus Xavier Sarsaparilla Schmoe II (hereafter, "Rufus II"), and the Affiant herein as his only heirs-at-law (hereinafter, the heirs-at-law are referred to as the "Heirs").
12. A train struck the automobile that Rufus II was driving through Conjunction Junction with his wife, Geraldine Amarilla Schmoe (hereinafter, "Geraldine"), and Rufus on June 31, 2020, killing Geraldine and Rufus instantly, and inflicting fatal injuries from which Rufus II later died on September 31, 2021.
13. Rufus died intestate.
14. More than 5 months passed after Rufus's death and no one petitioned for administration of his estate within that period, so title to Schmoe Hemp Farm Tract 1 passed indefeasibly upon Rufus's death to the Heirs as follows:

Name	Relationship	Address	Percentage
Joe	Son	0002 Schmoe St. Schmoesburg, IN 47000	25%
Raffaella	Daughter	0003 Schmoe St. Schmoesburg, IN 47000	25%
Henrietta II	Daughter	0004 Schmoe St. Schmoesburg, IN 47000	25%
Rufus II	Son	0005 Schmoe St. Schmoesburg, IN 47000	25%
Total of Percentages			100.00%

15. Rufus Xavier Sarsaparilla Schmoe III (hereinafter, "Rufus III"), is the only child of the marriage of Rufus II and Geraldine.

APPENDIX 6
Sample Title Passage Affidavit – Multiple Fact Patterns

16. Geraldine Amarilla Balderdash II (hereinafter, “Geraldine II”) was Geraldine’s only other child, who was born by Geraldine’s previous marriage to Geraldo Reginald Balderdash, deceased.
17. Rufus III petitioned for appointment as personal representative of Rufus II’s estate on January 1, 2022, under Cause Number 00C01-2101-EU-0001.
18. The Schmoe Circuit Court granted the petition and admitted Rufus II’s Last Will and Testament to probate on February 29, 2022, but Schmoe Circuit Court Clerk Schloer Dan Moelassass did not issue letters testamentary to Rufus III until April 31, 2022.
19. Rufus III did not file a Notice of Petition for Administration, and no one filed a claim within 75 days after Rufus III filed a petition for appointment as personal representative, so the power of the personal representative to divest title lapsed under the provisions of IC §29-1-7-15.1(b)-(d).
20. Article 3 of Rufus II’s Last Will and Testament provides for distribution of 50% of Rufus II’s estate to Rufus III and the remaining 50% of Rufus II’s estate to Milburn Drysdale, President and Senior Trust Officer of Commerce Bank of Beverly Hills (hereafter, “Commerce”), as Trustee of the RXSSIII Trust established under Article 5 of Rufus II’s Will for Geraldine II’s benefit.
21. Because the power of a personal representative to divest Rufus II’s share of title to the Schmoe Hemp Farm Tract 1 under the requirements of IC §29-1-7-15.1(b) lapsed, and title to Rufus II’s share of title to the Schmoe Hemp Farm Tract 1 passed automatically, immediately, and indefeasibly from Rufus II to Rufus II’s devisees, Rufus III and the RXSSIII Trust under Rufus II’s Will as a matter of law under IC §29-1-7-23(a).
22. The passage of title in the Schmoe Hemp Farm Tract 1 upon the deaths of Rufus and Rufus II has resulted in the vestiture of title among the respective distributees of Rufus and Rufus II as follows:

Name	Relationship	Address	Percentage
Joe	Rufus’ Son	0002 Schmoe St. Schmoesburg, IN 47000	25%

APPENDIX 6
Sample Title Passage Affidavit – Multiple Fact Patterns

Raffaella	Rufus' Daughter	0003 Schmoe St. Schmoesburg, IN 47000	25%
Henrietta II	Rufus' Daughter	0004 Schmoe St. Schmoesburg, IN 47000	25%
Rufus III	Rufus II's Son	0005 Schmoe St. Schmoesburg, IN 47000	12.5%
HES Trust	Rufus II's Testamentary Trust	1 N. Rodeo Dr. Beverly Hills, CA 90210	12.5%
Total of Percentages			100.00%

23. Joe, Raffaella, Henrietta II, and Rufus III have appointed Commerce Bank of Beverly Hills¹ to serve as their agent to administer rental receipts from the cash rent of Schmoe Hemp Farm Tract 1 and Schmoe Hemp Farm Tract 2, and to administer payment of expenses disbursements of net income among the owners of Schmoe Hemp Farm Tract 1 and Schmoe Hemp Farm Tract 2, so all property tax statements should be mailed with respect to Schmoe Hemp Farm Tract 1 and Schmoe Hemp Farm Tract 2 to Commerce Bank of Beverly Hills as follows:

Schmoe Hemp Farm Account Manager
Commerce Bank of Beverly Hills
1 N. Rodeo Dr.
Beverly Hills, CA 90210

24. Rufus, Henrietta, and Rufus II are the decedents with respect to whom the Affiant is making this Affidavit according to the provisions of IC §29-1-7-23(b)-(f).
25. This affidavit is made for the purpose of establishing the facts herein contained, to induce the Schmoe County Auditor to transfer the Real Property to the distributees of Rufus, Henrietta, and Rufus II upon the Schmoe County Auditor's real property transfer records, and to induce the Schmoe County Recorder to record this Affidavit and index it to the MAS & MAS Deed and the HES Deed.

¹ Where all the gold in California is in someone else's name according to the Gatlin Brothers.

APPENDIX 6
Sample Title Passage Affidavit – Multiple Fact Patterns

IN WITNESS WHEREOF, the Affiant has affixed his hand and seal this day, September 31, 2022.

Joe Bill Schmoe

STATE OF INDIANA, COUNTY OF SCHMOE) SS:

Before me, a Notary Public in and for said County and State, this day, September 31, 2022, personally appeared Joe Bill Schmoe, who affirmed under oath the truth of the representations contained herein and acknowledged the execution of the above and foregoing Real Property Title Passage Affidavit and Affidavit for Transfer of Real Property to be his free and voluntary act and deed.

My Commission Expires: _____

Notary Public

Printed Name: _____

Commission Number: _____

County of Residence: _____

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

Signature: _____

Printed Name: _____

This Real Property Title Passage Affidavit was prepared by A. Lolly Lawyer, of Lolly, Lolly, & Lolly PC., whose address is 1.75 N. Court St., Post Office Box 000, Schmoesburg, Indiana 47000, whose telephone number is 812-000-000, whose fax number is 812-000-0001, and whose website is www.LollyLollyLolly.com.

APPENDIX 7
Annotated Sample Title Passage Affidavit Template

AFFIDAVIT OF TITLE PASSAGE

The undersigned, _____ (the “Affiant”), being duly sworn on oath, states that:

1. The Affiant is _____ of _____ (the “Decedent”), who died on _____, 20____, while domiciled in _____ County, _____.

2. The Decedent acquired a _____ interest (the “Decedent’s Title Interest”) in the real estate described in this Affidavit (the “Real Estate”) by the _____ dated _____, 20____, and [filed / recorded] on _____, 20____, in _____ [as Instrument Number _____ in the office of the [Clerk / Recorder,] of _____ County, Indiana, _____.

3. The last instrument recorded in the office of the Recorder of _____ County, Indiana, was the _____ dated _____, 20____, and recorded on _____, 20____, in Deed Record _____ page _____ as Instrument No. _____ (the “Latest Recorded Instrument”).

4. The marital relationship between the Decedent and _____ remained unbroken from the time they acquired the Decedent’s Title Interest in the Real Estate until the death of _____ on _____, 20____, at which time the Decedent’s Title Interest acquired the title interest of the Decedent’s spouse in the Real Estate as the surviving tenant by the entireties.

5. The Real Estate is located in _____ County, Indiana, and described by property tax parcel number, property location, and legal description as follows, to-wit:

Commented [JH1]: Affiant's relationship to the decedent

Commented [JRH2]: This is space for the the decedent's name as required under [IC 29-1-7-23\(b\)\(1\)](#)

Commented [JRH3]: The decedent's date of death and County of domicile are required under [IC 29-1-7-23\(b\)\(2\)](#).

Commented [JH4]: Decedent's ownership interest in the real estate, such as fractional, mineral, fee simple, etc.

Commented [JRH5]: This whole paragraph addresses [IC 29-1-7-23\(b\)\(4\)](#), which describes a muniment of title by which the decedent acquired the decedent's interest in the real estate. The muniment could be a deed, a quiet title judgment, a final decree in a supervised estate, or other means of title transfer as contemplated under the Uniform Marketable Title Act, which appears in [IC 32-20](#). If the decedent acquired the interest with another person, especially if the decedent acquired the real estate with rights of survivorship, such as in a joint tenancy, tenancy by the entireties, or as a remainder beneficiary in a deed by which a grantor retained a life estate, indicate that information here, and elaborate about the death of any cotenant or other party that triggered the transfer to the decedent by survivorship such as with the fourth enumerated allegation that is provided is a sample.

Commented [JH6]: This recital identifies the local county government office in which the particular muniment of title appears, such as a will and a clerk's office or a deed in a recorder's office.

Commented [JRH7]: The variables here include the document location citations required under [IC 29-1-7-23\(b\)\(6\)](#).

Commented [JRH8]: This paragraph addresses [IC 29-1-7-23\(b\)\(3\)](#) if the instrument described in the third enumerated allegation was a muniment of title that was not recorded in the recorder's office.

Commented [JH9]: Note that the affidavit recites recorded instruments on the first page in conformity with the requirements of [IC 36-2-7-10\(l\)](#)

Commented [JRH10]: This is a sample of an explanation of how the decedent acquired title from a spouse if they acquired title together as tenants by the entireties. Alternative language should be used if the decedent acquired the interest with someone as joint tenants with rights of survivorship, or if the decedent acquired a remainder interest that was subject to a granted or retained life estate.

APPENDIX 7
Annotated Sample Title Passage Affidavit Template

[Property Tax Parcel No.: _____]

[Property Location: _____]

{Add real estate description here}. _____

Commented [JRH11]: This allegation provides the real estate description and other information required under [IC 29-1-7-23\(b\)\(5\)](#)

6. The Decedent died testate, and the Decedent's Last Will and Testament, which was admitted to probate by order of the _____ Court entered in Cause _____ No. _____ on _____ 20____, provided for the Decedent's Title Interest to be distributed to the Decedent's legatees (the "Legatees") by percentages or fractions as follows:

6.1. _____ % to
_____ whose address is
_____, _____;

6.2. _____ % to
_____ whose address is
_____, _____;

6.3. _____ % to
_____ whose address is
_____, _____;and

6.4. _____ % to
_____ whose address is
_____, _____.

OR

7. The Decedent died intestate, leaving as the decedent's heirs-at-law (the "Heirs at Law") the following persons by percentages or fractions:

APPENDIX 7
Annotated Sample Title Passage Affidavit Template

7.1. _____ % to
_____ whose address is
_____, _____;

7.2. _____ % to
_____ whose address is
_____, _____;

7.3. _____ % to
_____ whose address is
_____, _____;and

7.4. _____ % to
_____ whose address is
_____, _____.

8. The Decedent's Title Interests devolved to the Legatees
_____ Heirs at Law immediately and automatically
as a matter of law under IC 29-1-7-23 upon the Decedent's death.

9. The Decedent owed no obligations to creditors that are enforceable against the Real
Estate and there is no federal estate tax due and owing as a consequence of the Decedent's
death.

10. As of this date:

10.1. at least 7 months have elapsed since the Decedent's death;

Commented [JRH12]: Alternative enumerated sections 5 and 6 are examples of how to describe the devolution to the distributees is required in [IC 29-1-7-23](#)(b)(7), (9), and (10). The applicable explanation should remain and the inapplicable explanation should be deleted when preparing an affidavit with this template.

Commented [JRH13]: This is a continuation of the explanation of devolution under [IC 29-1-7-23](#)(b)(7). The distributees are either legatees or heirs at law, and the inapplicable designation should be deleted, leaving either legatees or heirs at law in this enumerated allegation, but not both.

Commented [JRH14]: This allegation summarizes the effect of devolution under the cited statute. The allegation is not mandatory, but it is a useful way to connect the dots for people who are not familiar with title devolution.

Commented [JRH15]: There is no requirement for this allegation, but is a nice touch to provide clarification about whether a federal estate tax lien applies to the real estate. If the decedent owed creditors, this allegation should be modified to either identify the creditors or it should simply omit any reference to the creditors. The existence of creditors does not have anything to do with whether someone can use this affidavit as evidence of the devolution of real estate title.

APPENDIX 7

Annotated Sample Title Passage Affidavit Template

10.2. no letters testamentary or letters of administration have been issued to a court-appointed personal representative for the Decedent within the time limits specified under IC 29-1-7-15.1(d);

10.3. a probate court has not issued findings and an accompanying order preventing the limitations in IC 29-1-7-15.1(b) from applying to the Real Estate;

10.4. a majority in interests of the Decedent's distributees have not consented to the Decedent's personal representative's sale of the Decedent's Title Interest to pay any debt or obligation of the Decedent, which is not a lien of record in _____ County, Indiana, or to pay any costs of administration of any Decedent's estate under IC 29-1-10-21; and

10.5. consequently, it is not possible for the Decedent's personal representative to sell the Decedent's Title Interest to pay any debt or obligation of the Decedent, which is not a lien of record in _____ County, Indiana, or to pay any costs of administration of any Decedent's estate.

11. The purpose of this Affidavit is to induce the Auditor of _____ County, Indiana, to endorse this Affidavit and record it as a title transfer in the Auditor's real estate ownership records as an instrument that is exempt from the requirements to file a sales disclosure under IC 29-1-7-23(c), and to direct the Recorder of _____ County, Indiana, to record the Affidavit and index it to the Latest Recorded Instrument in the Recorder's index records.

12. The Affiant affirmed the truth of the representations in this Affidavit under penalty for perjury and authorizes any person to rely upon this Affidavit as evidence of an effective transfer of title of record (as defined in IC 32-20-3-1) as stated in IC 29-1-7-23(e).

Commented [JRH16]: This allegation is not necessary to establish the fact of the passage of the decedent's title under [IC 29-1-7-23\(a\)](#).

The allegation satisfies the safe harbor requirement of [IC 29-1-7-23\(b\)\(8\)](#) and connects the dots for the conclusion that the Decedent's distributees may convey title free and clear of claims by the decedent's creditors.

If a proposed transaction depends upon use of this affidavit within 5 months after the decedent's death, a title company may want to escrow funds to determine whether anyone has filed a petition for administration under an "EU" or "ES" probate cause number. NOTE, a petition for administration cannot be filed under an "EM" cause number. If no petition for administration is filed at or within 5 months after the decedent's death, a creditor cannot force the real estate to be sold and any escrowed funds should be distributed to the distributees identified in the affidavit.

If a petition for administration is filed at or within 5 months after the decedent's death, the title company should monitor the case to determine whether letters of administration or letters testamentary have been issued at or within 7 months after the decedent's death, and whether a creditor has satisfied the requirements under [IC 29-1-7-23\(c\)-\(e\)](#). Obviously, a case with this circumstance will require the title company to consult with legal counsel.

The allegation also ties into the exception to the "5-month" rule of [IC 29-1-7-15.1\(b\)](#) under [IC 29-1-10-21](#).

NOTE, however, that [2020 Indiana Senate Bill 50](#) will modify the statute for clarification purposes, and this allegation will change significantly after June 30, 2020.

Commented [JRH17]: This allegation should help the auditor and recorder understand their respective responsibilities concerning transfer of ownership information on the tax duplicates, exemption from sales disclosure form filing requirements, and duties to effectuate the recordation and indexing of the affidavit under [IC 29-1-7-23\(e\)](#).

Commented [JRH18]: This is a restatement of [IC 29-1-7-23\(e\)](#), which should help title companies and lenders feel comfortable relying upon the affidavit.

APPENDIX 7
Annotated Sample Title Passage Affidavit Template

I affirm under the penalties for perjury that the foregoing statements are true.

Commented [JH19]: Affiant's name

STATE OF INDIANA, COUNTY OF _____) SS:

Before me a Notary Public in and for said County and State, personally appeared _____ who being first duly sworn, affirmed the trust of the foregoing representations and acknowledged the execution of the foregoing Affidavit of Title Passage on this day, _____ 20 ____.

Commented [JH20]: Affiant's name

Commission Expiration: _____ Signature: _____
Commission Number: _____ Notary Public
County of Residence: _____ Printed Name: _____

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

This Affidavit Title Passage was prepared by _____ of _____, the address of which is _____, _____, _____ - ____; whose phone number is _____; whose fax number is _____; and whose Internet URL is https://www._____.

APPENDIX 8

STATE OF INDIANA	)	IN THE SCHMO CIRCUIT COURT
	)	
COUNTY OF SCHMO	)	CAUSE NO. 00C01-2410-ES-000099
	)	
IN THE MATTER OF THE	)	
SUPERVISED ADMINISTRATION	)	
OF THE ESTATE OF	)	
JOBY SCHMO,	)	
Deceased	)	

PERSONAL REPRESENTATIVE’S ESTATE CLAIM ALLOWANCE

The Personal Representative, Billy Bob Schmo, now allows the claim against the above-captioned estate filed by Snuffy Smith (the “Claimant”) on October 15, 2024 (the “Claim”), subject to the following factual representations:

1. The Decedent, Joby Schmo, died on January 31, 2024;
2. No petition for administration was filed under Ind. Code §29-1-7-5 concerning the Decedent’s estate until the Personal Representative filed his petition for administration on September 15, 2024;
3. Ind. Code §29-1-7-15.1(b) prohibits the Personal Representative from selling the Decedent’s real property to pay any of the Decedent’s debts or obligations, which are not liens of record in the county where the real property is located or to pay any costs of administration of the Decedent’s estate, unless a petition for administration is filed in court under Ind. Code §29-1-7-5 within five after the Decedent’s death and the clerk issued letters testamentary or letters of administration not later than seven months after the Decedent’s death.
4. More than five months elapsed between the Decedent’s death and the Personal Representative’s filing of his petition for administration on September 15, 2024;
5. The Decedent’s estate has no assets other than real property, from which the Personal Representative may satisfy the Claim;
6. Although a majority in interest of the distributees of the Decedent’s estate have consented in writing to the Personal Representative’s sale of the decedent’s real property to pay the costs of administration of the Decedent’s estate, none of the distributees of the Decedent’s estate consented in writing to the Personal Representative’s use of the real property sale proceeds to satisfy the Claim;

APPENDIX 8

7. Ind. Code §29-1-7-15.1(b) provides that the proceeds of the sale of the Decedent's real property will retain the same protection that Ind. Code §29-1-7-15.1(b) provides to real property with respect to payment of the Claim;

8. The Personal Representative expects to file a final account with a petition to:

8.1. settle the Decedent's estate as insolvent,

8.2. pay the costs of administration of the Decedent's estate, and

8.3. distribute the remaining net proceeds of the sale of the Decedent's real property to the distributees of the Decedent's estate; and

9. The Personal Representative does not expect the Decedent's estate to receive any additional assets, from which the Personal Representative may satisfy the Claim.

NOW, THEREFORE, Billy Bob Schmo, as the Decedent's Personal Representative, now allows the Claim as stated above, with no expectation that the Claimant will receive any payment in full or partial satisfaction of the Claim.

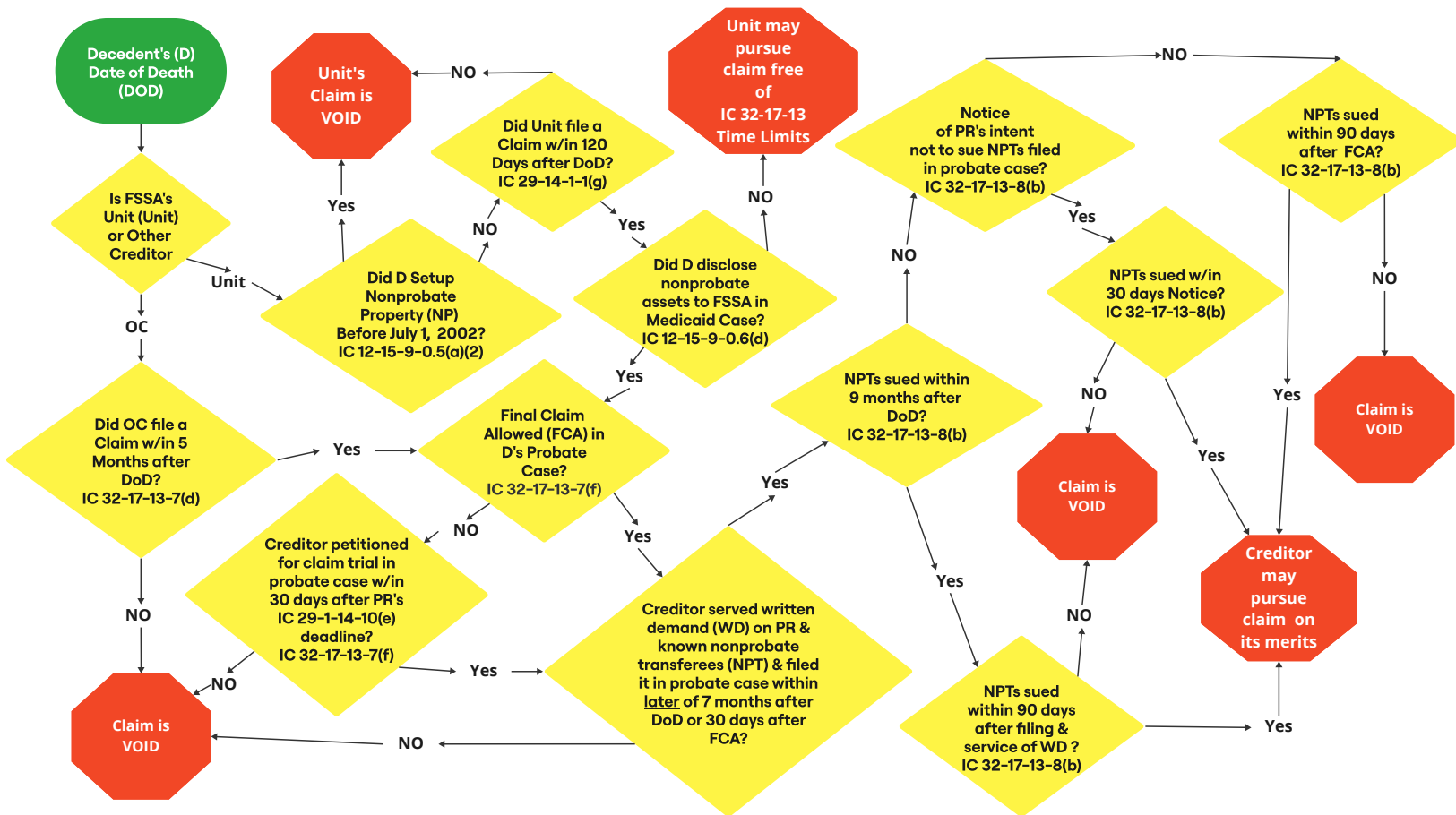
Billy Bob Schmo as the Personal Representative

I, Billy Bob Schmo, affirm under penalty for perjury that the foregoing representations are true.

Billy Bob Schmo as the Personal Representative

Lawyer Sally I. Sioux, Personal Representative's Counsel
Sioux, Anny & Awl
1 Awl St.
Sioux City, IN 46000
Ph. 444-444-4440

Claims Against Nonprobate Transferees Under IC 32-17-13



APPENDIX 10

STATE OF INDIANA	)	IN THE SCHMO CIRCUIT COURT
	)	
COUNTY OF SCHMO	)	CAUSE NO. 00C01-2111-ES-000011
	)	
IN THE MATTER OF THE	)	
SUPERVISED ADMINISTRATION	)	
OF THE ESTATE OF	)	
JOBY SCHMO,	)	
Deceased	)	

WRITTEN DEMAND FOR PROCEEDINGS AGAINST NONPROBATE TRANSFEREES

The Claimant, Snuffy Smith, makes this Written Demand for Proceedings Against Nonprobate Transferees under Ind. Code § 32-17-13-7 and says as follows:

1. Joby Schmo (the “Decedent”) died intestate on November 31, 2021.
2. The Court appointed Billy Bob Schmo to serve as the Decedent’s Personal Representative and the Clerk issued Letters of Administration to the Personal Representative on November 31, 2021.
3. The Publisher’s Affidavit of the Schmo County Gazette states that it published the first notice to creditors on December 17, 2021.
4. The Claimant filed his claim against the Decedent’s estate on February 29, 2022 (the “Claim”).
5. More than three months and 15 days have elapsed since the first publication of notice to creditors and the Personal Representative has neither allowed nor disallowed the Claim within the deadline specified in Ind. Code § 29-1-14-10(a).
6. The Claimant filed a Petition to Set Claim for Trial in the Schmo Circuit Court on April 4, 2022, a date that was less than 30 days after the expiration of the Personal Representative’s deadline to allow or disallow the Claim under Ind. Code § 29-1-14-10(a).

NOW, THEREFORE, the Claimant demands that the Personal Representative commence proceedings against the following transferees of nonprobate transfers by the Decedent:

Nonprobate Transfer	Transferee Name	Transferee Address
Transfer on Death Transfer of a 25% interest in Boss, the Decedent's grand champion hog	Billy Bob Schmo	90 N. Schmo Ave. Schmoville, IN 47000

APPENDIX 10

Nonprobate Transfer	Transferee Name	Transferee Address
Transfer on Death Transfer of a 25% interest in Boss, the Decedent's grand champion hog	Cindy Lou Who-Schmo	90 N. Schmo Ave. Schmerville, IN 47000
Transfer on Death Transfer of a 25% interest in Boss, the Decedent's grand champion hog	Ernest T. Schmo	90 N. Schmo Ave. Schmerville, IN 47000
Transfer on Death Transfer of a 25% interest in Boss, the Decedent's grand champion hog	Jimmy Joe Schmo	90 N. Schmo Ave. Schmerville, IN 47000

Snuffy Smith, as the Claimant

I, Snuffy Smith, affirm under penalty for perjury that the foregoing representations are true.

Snuffy Smith

Lawyer Lolly,Jr., Claimant's Counsel
Lolly, Lolly & Lolly
1 Schmo St.
Schmerville, IN 47000
Ph. 555-555-5550

APPENDIX 11

STATE OF INDIANA	)	IN THE SCHMO CIRCUIT COURT
	)	
COUNTY OF SCHMO	)	CAUSE NO. 00C01-2111-ES-000011
	)	
IN THE MATTER OF THE	)	
SUPERVISED ADMINISTRATION	)	
OF THE ESTATE OF	)	
JOBY SCHMO,	)	
Deceased	)	

PETITION TO SET CLAIM FOR TRIAL

The Claimant, Snuffy Smith, petitions the Court to set the Claimant's claim for trial under Ind. Code § 29-1-14-10(e) and says as follows in support of the petition:

1. Joby Schmo (the "Decedent") died intestate on November 31, 2021.
2. The Court appointed Billy Bob Schmo to serve as the Decedent's Personal Representative and the Clerk issued Letters of Administration to the Personal Representative on November 31, 2021.
3. The Publisher's Affidavit of the Schmo County Gazette states that it published the first notice to creditors on December 17, 2021.
4. The Claimant filed his claim against the Decedent's estate on February 29, 2022 (the "Claim").
5. More than three months and 15 days have elapsed since the first publication of notice to creditors and the Personal Representative has neither allowed nor disallowed the Claim within the deadline specified in Ind. Code § 29-1-14-10(a).
6. The Claimant is filing this petition on April 4, 2022, a date that is less than 30 days after the expiration of the Personal Representative's deadline to allow or disallow the Claim under Ind. Code § 29-1-14-10(a).

NOW, THEREFORE, the Claimant prays the Court to enter an order setting the Claim for trial.

Snuffy Smith, as the Claimant

I, Snuffy Smith, affirm under penalty for perjury that the foregoing representations are true.

Snuffy Smith

Lawyer Lolly, Jr., Claimant's Counsel
Lolly, Lolly & Lolly
1 Schmo St.
Schmoville, IN 47000
Ph. 555-555-5550

APPENDIX 12

STATE OF INDIANA	)	IN THE SCHMO CIRCUIT COURT
	)	
COUNTY OF SCHMO	)	CAUSE NO. 00C01-2301-CC-000011
	)	
SNUFFY SMITH, EX REL. ESTATE OF	)	
JOE SCHMO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
BILLY BOB SCHMO, CINDY LOU	)	
WHO-SCHMO, ERNEST T. SCHMO,	)	
AND JIMMY JOE SCHMO,	)	
	)	
Defendants.	)	

VERIFIED COMPLAINT AGAINST NONPROBATE TRANSFEREES

Plaintiff Snuffy Smith complains in the name of the Estate of Joe Schmo against the Defendants, Billy Bob Schmo, Cindy Lou Who-Schmo, Ernest T. Schmo, And Jimmy Joe Schmo, and says as follows:

1. Boss, the grand champion hog owned by Joby Schmo (the “Deceased Transferor”), entered the Plaintiff’s field and consumed \$10,000 worth of corn on September 31, 2021.
2. The Deceased Transferor died intestate on November 31, 2021.
3. The Schmo Circuit Court appointed Billy Bob Schmo to serve as the Decedent’s Personal Representative and the Clerk issued Letters of Administration to the Personal Representative or administration of the Deceased Transferor’s estate under Cause Number 00C01-2111-ES-000011 (the “Estate”) on November 31, 2021.
4. The Publisher’s Affidavit of the Schmo County Gazette states that it published the first notice to creditors on December 17, 2021.
5. Plaintiff filed his claim to recover \$10,000 in damages against the Decedent’s estate (the “Claim”) on February 29, 2022.
6. More than three months and 15 days have elapsed since the first publication of notice to creditors and the Personal Representative has neither allowed nor disallowed the Claim within the deadline specified in Ind. Code § 29-1-14-10(a).

APPENDIX 12

7. Plaintiff filed a Petition to Set Claim for Trial in the Schmo Circuit Court on April 4, 2022, a date that was less than 30 days after the expiration of the Personal Representative's deadline to allow or disallow the Claim under Ind. Code § 29-1-14-10(a).

8. Plaintiff delivered a Written Demand for Proceedings Against Nonprobate Transferees under Ind. Code § 32-17-13-7 to each of the Personal Representative and the Defendants and filed a copy of the Written Demand for Proceedings Against Nonprobate Transferees in the Estate on April 31, 2022.

9. The Schmo Circuit Court entered a judgment allowing the Claim on November 31, 2022 (the "Claim Allowance Judgment") and finding that the Deceased Transferor's probate estate was insolvent.

10. The Personal Representative has failed to commence proceedings against the Defendants, so Plaintiff is entitled to commence proceedings in the name of the Estate under Ind. Code § 32-17-13-7(g).

11. Plaintiff holds an allowed claim by the Claim Allowance Judgment in the amount of \$10,000.00, and Plaintiff is entitled to judgment against the Defendants to enforce the Claim Allowance Judgment in the amount of \$10,000.00 and the costs of this proceeding under Ind. Code § 32-17-13-6.

NOW, THEREFORE, Plaintiff prays the Court for entry of judgment for \$10,000.00 and the costs of this proceeding in favor of Plaintiff and against the Defendants to be apportioned among the defendants as follows:

1. Against Defendant Billy Bob Schmo, 25%;
2. Against Defendant Cindy Lou Who-Schmo, 25%;
3. Against Defendant Ernest T. Schmo, 25%; and
4. Against Defendant Jimmy Joe Schmo, 25%.

Snuffy Smith, as the Plaintiff ex rel. the Estate
of Joe Schmo

APPENDIX 12

I, Snuffy Smith, affirm under penalty for perjury that the foregoing representations are true.

Snuffy Smith

Lawyer Lolly,Jr., Claimant's Counsel
Lolly, Lolly & Lolly
1 Schmo St.
Schmoville, IN 47000
Ph. 555-555-5550