

H H E P C

Hoosier Hills Estate Planning Council



Vol. IX, No. 3

Spring 2010

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Vice-President's Message

Welcome Back. The HHEPC Board has been working to bring you some exciting programs. There is obviously a lot to learn and talk about in the estate planning area right now and the Board will have several excellent opportunities for you to get together with other professionals to discuss the major changes in our industry.

The next program will be held on April 26, 2010 at Salt Creek Golf Resort in Nashville, Indiana. The program features Dan Dalton, Dean Emeritus and the Harold A. Poling Chair of Strategic Management of the Kelley School of Business at Indiana University Bloomington. Dean Dalton, an engaging and entertaining speaker, will speak about ethics and enterprise. Ethical lapses are no longer limited to Wall Street--Indiana has its own homegrown example of an ethical train wreck in the case of financial planner Marcus Schrenker who allegedly stole money from his clients and then faked his death in an attempted cover-up.

Also at the April meeting, Donald R. Hopper has agreed to attend and will be available to informally answer a few questions about the Indiana Inheritance Tax. Mr. Hopper is the new Indiana Inheritance Tax Commissioner who replaced Kristen Kemp. We encourage all of our members who deal with the Indiana Department of Revenue Inheritance Tax Division to come to the April meeting to meet Mr. Hopper.

In addition to the April meeting, the Board is working on a social gathering for Council members this summer. The Board has also undertaken the initial planning for the 2011 Estate Planning Day. If you are interested in being a speaker or working on a committee for the 2011 Estate Planning Day program, contact any Board member.

I look forward to seeing each of you at Salt Creek Golf Course April 26th.

Best regards,
James Bohrer, Vice- President

Table of Contents

Vice-President's Message.....	page 1
April 26th Seminar Outline	page 2
Speaker Biography	page 2
Drafting under the Indiana Transfer of Death	page 3

Estate Planning Seminar Program

April 26, 2010

Salt Creek Golf Retreat, Nashville, Indiana
rsvp: kmccconahay@yahoo.com by April 12, 2010

Ethics and Enterprise

Dan R. Dalton

Founding Director of the Institute for Corporate Governance, Dean Emeritus, and the Harold A. Poling Chair of Strategic Management in the Kelley School of Business, Indiana University, Bloomington, Indiana

An Exercise in Introspection: Introduction to Perhaps the Most Challenging of Ethical Dilemmas

- Lessons from Frodo's Ring in the "Hobbit"
- Lessons from the "Ring of Gyges"
- Mini-Case # 1

The Material Difference between Cows and Bears in Matters of Ethics on the High Ground

- Agency Theory
- 300 Year Old Rule of Equity
- Fiduciaries and Positions of Trust
- A Fiduciary May Not Personally Profit from the Position of Trust, Except by Charging a Reasonable Fee for Services
- Mini-Case # 2

Simplicity and "Commanders Intent" – Setting the Tone and the Culture

- Military "Few Plans Survive Contact with the Opposing Force"
- Athletics "Everyone Has a Plan, Until They Get Hit"
- While There Can Be Five "Most Important Goals," There *Can't* Be the Five Most Important Commanders' Intents
- "Commanders Intent" -- Best Practice?
- A Good Example
- A Bad Example of Same Initiative in Corp-Speak

Potential Bridges to Unethical Behavior

- Rewarding Inappropriate Behavior
- Punishing Appropriate Behavior
- Is It Easier to Get Forgiveness than Permission?
- Conflicts of Interest/Related Party Transactions

Potential Bridges to Ethical Behavior

- High Level Personnel "On Board"
- The View from the Top "The High Ground Revisited"
- When in Doubt, Count Yourself Out
- Hate Surprises ("Boss's Disease," Selective Information/Information Quarantine)
- Disclosure (Good Start, No Always Enough)
- The Three "Cs" (Calm, Cool, & Collected)
- Wits & Grapes
- Light and Warehouses

In a Crisis, or an Embarrassment

- The Three "Ts" "Tell the Truth; Tell It Now; Tell It Yourself"
- Leadership Endures in Many Forms, None Better than by Example
- The "Perfect" Apology
- Acknowledges the Mistake or Wrongdoing
- Accepts Responsibility
- Expresses Regret
- Provides Assurance that the Misstep Will Not Be Repeated
- All in a Timely Manner

Personal Ethics 101 – The Most Basic Guidelines

- In the Sunday Supplement "Or, the Front Page"
- A Child on Your Shoulder; Or, Your Child on Your Shoulder True? Reasonably Fair? Compromises Rapport?
- The Ethic of Reciprocity "The Golden Rule"
- Confusing Legality with Ethicality?
- Adherence to Legal/Regulatory Guidelines or Beyond that Standard?
- Mini-Case # 3

Some Things Are a Bit Easier In Principle Than They Are In Practice

- Mini-Case # 4, Versions I, II, III
- Mini-Case # 5

Speaker Biography

Dan R. Dalton is the founding Director of the Institute for Corporate Governance, Dean Emeritus, and the Harold A. Poling Chair of Strategic Management in the Kelley School of Business, Indiana University. Formerly with General Telephone & Electronics (GT&E), he received his Ph.D. from the University of California, Irvine. A Fellow of the Academy of Management, Professor Dalton is widely published, with over 325 articles in corporate governance, business strategy, law, and ethics. Additionally, his work has been frequently featured in the business and financial press including *The Wall Street Journal*, *Business Week*, *Fortune*, *The Economist*, *Financial Times*, *The Boston Globe*, *Chicago Tribune*, *Los Angeles Times*, *Washington Post*, and *The New York Times*. Recognized by *Business Week* as a "Governance Guru," Professor Dalton has served on seven boards of directors and regularly addresses public, corporate, and industry groups on corporate governance, corporate social responsibility, and ethics issues. He is also a Fellow of the Tobias Center for Leadership Excellence and a member of the Indiana University Alliance of Distinguished and Titled Professors.

Drafting under the Indiana Transfer on Death Property Act

By Jeffrey B. Kolb

Mr. Kolb is a partner in the law firm of Emison Doolittle Kolb & Roellgen LLP in Vincennes, and is active in the Probate, Trust and Real Property Section of the Indiana State Bar Association.

INTRODUCTION

Effective July 1, 2009, Indiana adopted a comprehensive Transfer on Death Property Act (IC 32-17-14). This replaced the POD concept for accounts and the Uniform Transfer on Death Act for Securities. Also, it deals with the transfer on death of vehicles and watercrafts and added a new concept in Indiana which is a Transfer on Death Deed.

Any new comprehensive act such as the Transfer on Death Property Act, creates questions concerning the drafting of documents. This is particularly true with the new Transfer on Death Deed concept. This article will provide some drafting suggestions under the new Act.

In any drafting situation, there are goals that need to be addressed. These goals can be summarized as follows: 1) meet the statutory requirements; 2) make sure that the document is understandable to your client and third parties; and 3) carry out the client's intent. This article will focus on requirements and making the document understandable.

DEFINITIONS

The statutory requirements under the Indiana Transfer on Death Property Act are many and depend upon the situation. Some of these requirements are in the definitions. IC 32-17-14-3(2) defines a "beneficiary designation" as a written instrument. "Ownership in Beneficiary Form" means holding property under registration in beneficiary form or other written instrument that names the owner of the property; directs ownership of the property to be transferred on death of the owner to the designated beneficiary; and designates the beneficiary (IC 32-17-14-3(6)). "Registration in Beneficiary Form" means titling of an account record, certificate or other written instrument that provides evidence of ownership of the properties; directs ownership to be transferred on the death of the owner to the designated beneficiary and designates the beneficiary (IC 32-17-14-3(10)). A "transferring entity" means a person who owes a debt or is obligated to pay money or benefits; renders contract performance; delivers or conveys property; or changes the record of ownership of property on the books, records and accounts of an enterprise or on a certificate or document of title that evidences property rights. This definition of a "transferring entity" is important because many

registered forms of ownership such as stocks, bonds and accounts will be handled by transferring entities, using the forms that they require.

GENERAL REQUIREMENTS

The general statutory requirements are under IC 32-17-14-4(b). A beneficiary designation must designate the beneficiary of a Transfer on Death Transfer; make the transfer effective upon the death of the owner; and comply with the Transfer on Death to Property Act or any other applicable law, and the conditions of any governing instrument. The conditions of any governing instrument will be normally those required by the transferring entity and will vary greatly. Check with the transferring entity for forms and requirements before drafting. In drafting, it is not necessary to designate a beneficiary a primary beneficiary; however, it is necessary to designate a beneficiary as "contingent beneficiary" in order to highlight that beneficiary's conditional interest (IC 32-17-14-26).

ASSIGNMENT REQUIREMENTS

There are specific statutory rules for specific types of transfers. IC 32-17-14-10 deals specifically with the written assignment of a contractual right. This could be a transfer on death written into the contract itself or could be a separate document. Because it covers such a wide range of contractual rights, a predrafted form would be very difficult. One notable difference from other specific transfer requirements is that there does not need to be a notary.

TANGIBLE PERSONAL PROPERTY REQUIREMENTS

Specific statutory rules are contained in IC 32-17-14-12 for the transfer of tangible of personal property. Unlike other property which is in possession of a transferring entity or subject to written contractual rights, there is usually no third party involved in the transfer of tangible personal property. To prevent fraud, the transfer on death of tangible personal property must include a notary.

TRANSFER ON DEATH DEED REQUIREMENTS

The transfer on death deed is by far the most interesting document under the new Act. Difficulty arises here because of the use of the recording system to memorialize transfers that will not take place until the death of the owner. Deeds are typically irrevocable transfers. Transfer on death deeds are revocable transfers of specific pieces of property. The actual transfer would not occur until the death of the owner. This confusion raises concerns regarding sales disclosure forms and transfers on record books.

IC 32-17-14-11 contains specific requirements for transfer on death deeds. If real property is owned tenancy by the entireties, the beneficiary designation is void unless both spouses sign (IC 32-17-14-11(e)(1)). If the real property is owned as joint tenants by rights of survivorship, any one of the joint tenants can make a beneficiary designation by a transfer on death deed, however the transfer on death deed severs the joint tenancy and the co-tenants become tenants in common with regard to the severed interest (IC 32-17-14-11(e)(2)). However, if the joint tenants with rights of survivorship go together to create a beneficiary designation, a conveyance of any joint owner's interest has no effect on the original beneficiary designation for the nonsevering joint tenant (IC 32-17-14-11(e)(3)). The owner of a life estate in real estate cannot create a beneficiary designation (IC 32-17-14-11(e)(5)). Terms and conditions of any conveyance established in the interest of the owner prevail over any transfer on death beneficiary designation made by the owner (IC 32-17-14-11(e)(6)). The transfer on death transfer can be transfers to multiple beneficiaries with rights of survivorship; transfers to remaindermen on termination of a life tenancy; or tenancy in common. Unless designated otherwise, tenancy in common would be the default designation.

DEFAULT RULES

Throughout the Indiana Transfer on Death Property Act, there are default rules that can be avoided by careful drafting. Probably the most interesting default rule deals with transfers on death to descendants of the owner and the anti-lapse rule. IC 32-17-14-22 states that if the beneficiary of a transfer on death transfer is a descendant of the owner and predeceases the owner then the gift does not lapse, but passes to the descendants of the predeceased beneficiary per stirpes. The Act allows the use of an acronym "LDPS" to designate lineal descendants per stirpes.

If the drafter does not wish the anti-lapse rule to apply, then the beneficiaries of the descendants of the owners would carry the designation "no LDPS." Accordingly, if the beneficiary is not a descendant, yet the drafter does intend that the anti-lapse rule apply, then the beneficiary's name should be followed by "LDPS" indicating it will go to lineal descendants per stirpes if the beneficiary predeceased the owner.

If the beneficiary predeceases the owner, there are three (3) options. The first option is that the gift will lapse. In layman terms, the transfer does not occur. The second option is that the gift will pass to the beneficiary's lineal descendants per stirpes or LDPS. The third option is to select a contingent beneficiary in the document and designate that beneficiary as a "contingent beneficiary." Of course if a primary and contingent beneficiary predeceases the owner, then the same three options arise again.

Another default rule is that dissolution or annulment of a marriage will revoke any designation of the spouse under a transfer on death designation. If the drafter wishes contrary result, it should be drafted in the document. Also, if the beneficiary is a class gift to "my children" any afterborn child will share equally. Again, drafting can reverse that result.

COMMENTS TO FORMS

To illustrate the application of the above rules, some sample forms are provided on the Council's website at www.hhepc.org. As indicated above, no sample form is included for an assignment of a contractual right because of the variety of the interest that can be assigned, nor is any included for registered property. Exhibit A which deals with tangible personal property could readily be adapted to their property interests.

Exhibit A is a transfer on death of tangible personal property. There can be more than one owner. There can also be more than one primary beneficiary. While it is not necessary to designate any beneficiary as a "primary beneficiary" it is recommended because of the statute's requirement that "contingent beneficiaries" be so designated. If there is more than one primary beneficiary, then their interest in the property on the death of the owner should be specifically detailed.

As discussed above, if a primary beneficiary predeceases, there are default options set out in the Act. However, those default options are usually not known to the owner, the beneficiaries or any other third parties. As a result, the document becomes much more understandable if it describes specifically what happens if the primary beneficiary predeceases. In this case, the form allows the selection of one of the three options which are lapse, payment to the lineal descendants per stirpes, or payment to a contingent beneficiary. The forms "LDPS" which will not be understood by the client without explanation. Unfortunately the client will probably not understand the phrase "lineal descendants per stirpes" either and there is no short explanation. Hopefully "LDPS" will become understood over time. Also as discussed above, if the contingent beneficiary and the primary beneficiary both predecease the owner, the same three options occur.

While any creation of a transfer on death designation revokes any prior transfer on death designations, it would be helpful to the beneficiaries and third parties if any prior transfers on death are designated in the document and specifically revoked.

The statute specifically requires a notary on the transfer of tangible personal property. In Exhibit A the notary is followed by a preparation statement. Though this statement is not required, it is good practice so that everyone understands the circumstances under which the designation was created.

Exhibit B is a transfer on death deed. To assist courthouse employees, the title should clearly indicate the transfer on death aspect of the deed. The form mirrors the transfer on death of tangible personal property in that it discusses multiple owners

and multiple beneficiaries. One notable difference is the inclusion of the language for "NO CONSIDERATION" in the initial transfer. This is important to avoid the need for a sales disclosure form. Typical conveyance language such as "warrant," "quitclaim" or "convey" are not used in the deed itself. Initial feedback from auditors and recorders suggests that language is confusing in determining the intent of the deed. The transfer on death deed must be recorded before the owner dies. In order to be transferred and recorded, the deed must contain information found in all deeds, such as a notary, a social security redaction statement, mailing addresses, and a preparation statement.

Exhibit C is very important document in the ultimate transfer of the real property under a transfer on death deed. This is an affidavit whose requirements are set out in the statute. After the death of the owner, this affidavit must be recorded in order to complete the transfer.

Exhibit D is a revocation of a transfer on death deed. In order to be recorded it must contain aspects similar to a deed such as a notary, a redaction statement, addresses and a preparation statement. This revocation must be recorded before the owner's death.

CONCLUSION

The Transfer on Death Property Act provides the estate planner important new tools creating revocable transfers on death for specific property interests. However, the drafter must be careful in order to carry out the client's intent.

Go Deeper: To view Forms discussed in this article, please go to www.hhepc.org (Document Library)

Meet Donald R. Hopper who recently replaced Kristen Kemp as Indiana's Inheritance Tax Commissioner. The HHEPC is pleased to welcome Mr. Hopper to his new position. Mr. Hopper will be available to answer a few questions from HHEPC members about Indiana's tax procedures or policies concerning the inheritance tax prior to the start of the regular CE program.

Estate Planning Seminar

Featuring **Dan R. Dalton**, Founding Director of the Institute for Corporate Governance, Dean Emeritus, and the Harold A. Poling Chair of Strategic Management in the Kelley School of Business, Indiana University, Bloomington, Indiana

Date: Monday, April 26, 2010
Time: 12:00 p.m. . 3:00 p.m.
Place: Salt Creek Golf Retreat
2359 State Road 46 East, Nashville, Indiana 47448

To register for the seminar, mail your check to Paul Bullock, Wachovia Securities Financial Network, 3925 Hagan St., Ste 300, Bloomington, Indiana 47401 or you may e-mail Kathleen McConahay at kmconahay@yahoo.com.

Registration Fee: **free** for Members and Guests -- **\$60.00** for Non-Members

Please register by April 12, 2010

REGISTRATION INFORMATION

Please register me for the seminar on April 26, 2010.

Enclosed is a check in the amount of \$_____ payable to Hoosier Hills Estate Planning Council.

Name _____

Address _____

Phone _____ e-mail _____



Hoosier Hills Estate Planning Council
c/o Paul Bullock
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Bloomington, Indiana 47401

Estate Planning Seminar

Dan R. Dalton
April 26, 2010

Salt Creek Golf Retreat
Nashville, Indiana

Take advantage of our website
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