



Legal Affairs

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## Understanding Your Estate in Indiana

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DISCLAIMER: This publication is not intended to serve as answer to personal estate and financial planning or estate settlement problems. Legal and other appropriate counsel is advised or may be required by law for dealing with the planning, maintenance, and transfer of an estate.

**Introduction**

This publication may serve as an independent reference. However, a key purpose is to add information for estate and family business transfer planning programs.

Several topics not discussed at length in this publication belong in an estate and business transfer planning program, including: life insurance, trusts, advance healthcare directives, long-term care insurance (especially Indiana’s partnership program), federal gift and estate taxes, income taxes and numerous estate planning options. The author has materials and a seminar that discuss additional topics.

Individual and business ownership information is essential, as is knowledge of basic estate planning tools, for making estate planning decisions. The necessary information includes personal financial facts, knowledge about property and tax law and implications of planning alternatives. For example, going by the law of descent (Table 1) and not having a will may be of little concern for a person who is well informed and satisfied with “will substitutes,” such as right of survivorship arrangements for a residence and personal property, and with other assets transferred by contractual arrangements, such as life insurance and retirement funds.

Table 2 identifies typical will substitutes or probate avoidance arrangements and shows the federal estate tax implications of each arrangement. Considerations in making a will and selected elements of estate planning are outlined. Also discussed is the relationship of a will to the revocable living trust. Basic choices for estate administration (probate) in Indiana are discussed. Individuals should not choose the living trust alternative without having an understanding of the options available for an estate administration.

Unsupervised administration may satisfy some concerns about unnecessary steps and processes in a supervised estate probate. Having an unsupervised administration will not eliminate, and may not greatly reduce, a lawyer’s probate fee. However, it is possible that fees for modern estate planning, including planning for and drafting a living trust, may exceed a lawyer’s fee for his or her assistance to a personal representative. This fact may not be of a concern as long as the trust and other measures, such as buy-sell restrictions, accomplish an individual’s comprehensive estate and business transfer planning.

**Contents**

**Introduction**..... 1  
 Death Without a Will ..... 2  
 Examples of Death Without a Will ..... 2  
**Indiana Intestacy Law (Table 1)** ..... 2  
**Will Substitutes**..... 3  
**Considerations in Will Making** ..... 3  
**Carl’s Estate for Probate and Taxation**  
     **with Julie, His Surviving Spouse.\* (Table 2)**..... 4  
**Self-Proving Will Certificate (Figure 1)**..... 5  
**Types of Real Estate Ownership** ..... 7  
 Tenants-in-Common ..... 7  
 A Planning Tool – A Restricted Transfer Arrangement..... 7  
 Ordinary Joint Tenancy ..... 8  
 Tenancy-by-the-Entirety..... 8  
 Rules and Planning Implications ..... 8  
 Life Estates..... 9  
**Jointly Held Personal Property** ..... 9  
 Special Statutes..... 9  
 Multiple-Party Bank Accounts..... 9  
 Alternatives to Survivorship Accounts ..... 10  
**Elections, Allowances, and Options** ..... 11  
 Spouse’s Elections ..... 11  
 Trusts as a Limitation ..... 11  
 Family Allowance..... 11  
 Prenuptial Agreement..... 12  
 Renunciation or Disclaimers..... 12  
**Estate Administration**..... 12  
 Presentation of a Will..... 12  
**Estate Administration Flow Chart (Figure 2)** ..... 13  
 Appointment of the Personal Representative ..... 14  
 Notice to Creditors..... 14  
 Collection and Management of Assets ..... 14  
 Preparation and Filing of an Inventory..... 14  
 Determining Estate Tax ..... 14  
 The Final Account..... 15  
 Supplemental Report and Discharge..... 15  
 Delay in Closing an Estate ..... 15  
**Special Administration Procedures** ..... 15  
 Unsupervised Administration ..... 15  
 Dispensing with Administration ..... 15  
 Summary Administrative Procedure ..... 16  
 Endnotes ..... 16

The best approach to negotiating a lawyer’s probate fee, as counsel to the personal representative (executor), is to be knowledgeable about both the nature of the decedent’s estate and the relevant post-death alternatives. Just as many planning alternatives are possible for the living, many options may remain for an informed personal representative to exercise in a decedent’s estate. Legal and tax counsel are essential for postmortem estate planning. Understanding the alternatives is important. Individuals should be well informed and take as much responsibility for personal financial and estate planning decisions as possible.

**Death Without a Will**

Table 1 displays Indiana intestacy law showing to whom a decedent’s property interests pass if interests are not transferred by a will nor by will substitutes. Intestacy law represents how an “average person” might want his or her probate estate to be distributed. Distribution by intestacy law may not be what a deceased person would have preferred nor be appropriate for his or her spouse and/or heirs.

Will substitutes, such as joint tenancy, tenancy-by-the-entirety, retirement accounts, life insurance, and annuities with individuals designated as beneficiaries, keep a large part of what many individuals own out of probate. Married couples and individuals typically have will substitute arrangements with or without a will. Will substitutes or beneficiary designations may be appropriate for a given individual’s situation. However, this may not be true for selected assets; as circumstances change, there may be a need for adjusting asset distribution arrangements. **Will substitutes, including provisions for assets in a trust, take precedence over both the law of intestacy and provisions in a decedent’s will. Avoiding probate of a decedent’s assets does not mean that taxes (estate and income) will be avoided.**

In 2009 Indiana expanded transfer on death (TOD) provisions in the law. See IC 32-17-14. TOD provisions now permit TOD of real estate just as other assets may be transferred — another way to avoid probate. For real estate, this means a deed can be of record that places title in the grantee(s) once the grantor(s) dies, and the fact of a TOD grantor’s death is added to the appropriate courthouse record, i.e., chain of title. Check with your lawyer on the advisability of TOD arrangements. It is illegal for anyone other than a licensed Indiana lawyer to set up a transfer on death deed for real estate in Indiana.

**Examples of Death Without a Will**

Examples that follow refer to property distribution for assets and interests that are part of a decedent’s probate estate. Without a will, the law of intestacy governs, but only for interests not covered by other legal provisions for distribution.

1. John and his wife, Mary, had one child, Eric. One-half of John’s probate estate would pass to Mary and one-half to Eric. Because John Jr. is a minor, Mary, as his guardian, may be required to make annual accountings to a court concerning her son’s share. (A trusteeship might be substituted for the guardianship to avoid annual accountings.)

**Table 1. Indiana Intestacy Law<sup>a</sup>**

Survivors	Who Receive
Spouse, one or more children	½ estate to spouse <sup>b</sup> ½ estate to child or children
Spouse, no children Parents of the deceased person	¾ estate to spouse ¼ estate to parent(s)
Spouse, no children or parents	All to spouse
Second or subsequent childless spouse and children of prior marriage(s)	Spouse: ½ of personal property, 25% of the fair market value of real estate; and to child, children, or issue of deceased children ½ personal property and title to real estate
Children, no spouse or parents	All to children
No spouse or children	Equal sharing by parents and siblings, with parents getting at least ¼ each
No issue of deceased brothers and sisters, no parent	Equal sharing by surviving grandparents
No grandparents	Equal sharing by brothers and sisters (uncles and aunts) of decedent’s parents or by issue of uncles and aunts by representation
None of the above	State of Indiana

- a. These rules are found in the Indiana Code at 29-1-2. Indiana Code is online at: <http://www.in.gov/legislative/ic/code/>.
- b. IC 29-1-4-1 entitles a surviving spouse to receive \$25,000 before calculating and completing any other distributions. Additionally, a surviving spouse is entitled to an “elective share,” a minimum amount, even if the deceased spouse had a will that left the surviving spouse a lesser share. IC 29-1-3-1 sets the surviving spouse’s elective share at one-half (1/2) if a first spouse or a spouse with children by the deceased spouse. The second or subsequent childless spouse’s elective share remains at one-third (1/3) of the testator’s personal property and 25% of the value of real estate.  
  
However, children, or other lineal descendants, ancestors and other relatives have no such statutory elective share. That is, a decedent may avoid all family in a will with or without mentioning their heirs and ancestors, except a surviving spouse, unless the spouse does not object or is bound by a contractual agreement. See IC 29-1-3-8 for an exception relating to children born or adopted after the making of the last will.
- c. If a child has predeceased a parent, then the issue of that child takes by representation (i.e., the children of that deceased child divide their parent’s share equally).

2. Joseph is married with three children. If Joseph dies without a will, his widow receives one-half, and the children will each be entitled to a one-third share of the other half.
3. Loren and Kathy are childless. Kathy may not receive all of his probate property if Loren dies without a will. Kathy receives three-quarters, and Loren’s parent(s) receive a quarter. If Loren has no surviving parents and no children of a prior marriage, all of Loren’s property passes to Kathy.
4. Gregory was a widower with two children. His probate property passed to the children equally at his death. If, instead, he had no spouse, no children, and no parents surviving, his brothers and sisters would share equally. If Gregory’s brothers or sisters predecease him, his nieces and nephews would take by representation (i.e., the children of a brother or sister divide their parent’s share equally).

5. John is married to Mary. John has two children from his prior marriage. If he died, Mary, childless, would have a right to one-half of the personal property in John's estate and 25% of the "net value" of what was John's real estate. The children would receive one-half of the personal property and title to the real estate.
6. Joan is single and has no children. Joan's parents predeceased her. She has a sister, Marie, and a half brother, Jeffrey. Marie and Jeff each get one-half of Joan's estate. Half-bloods are treated the same as full bloods in Indiana.
7. Jackie and Robert adopted David. Jackie's widower would share with David just as if he were a natural-born child.

While the above results may be acceptable in many situations, a will, trust or other transfer tools may ease estate administration and, for some situations, incorporate tax-saving features. Where family business assets are involved, thoughtful estate planning techniques are important in preventing family disputes. "Buy-sell" agreements (restricted transfer arrangements), which are imposed on survivors' shares, may be important for limiting transfer alternatives. However, if the law of descent prevails, interests by this law may be disclaimed to shift property interests to what may be a more appropriate distribution.

### Will Substitutes

There are many ways to avoid probate with "will substitutes," such as by right-of-survivorship (joint) ownership and contractual arrangements, e.g., life insurance and retirement funds. The right-of-survivorship arrangements are themselves legal arrangements that establish ownership after death of a joint tenant. The surviving joint tenant(s), will own the property at the death of one of the joint tenants. The beneficiary designation takes care of who gets the life insurance proceeds. A retirement plan usually provides for who gets the remaining benefits after the primary beneficiary dies. Typically, a funded, lifetime trust is another example of a will substitute. Estate planning should include examination of all will substitute arrangements.

Typical property-holding arrangements provide many will substitutes. Table 2 serves as a reminder that for several items in a decedent's (Carl's) estate, there may be numerous "No" entries in the "Probate" column. If "No", the interest is not a probate asset as probate is often defined, but instead is transferred by a will substitute. Joint ownership with survivorship rights, life insurance, annuities, life estates (a retained or granted life income, remainder to designated parties), and living trusts all avoid probate. With extensive use of will substitutes, typically a decedent's will applies to very little property. However, a will is important even if many of a decedent's assets are not subject to probate. For example, often trusts are in place but important assets of a decedent may not have been transferred to his or her trust. Income and death taxes are separate issues in handling a decedent's estate, and both provide planning opportunities.

Table 2 shows there are "two estates" (formerly three, before the repeal of the Indiana inheritance tax) to deal with in the analysis of a decedent's estate. A decedent's property interests may be in the "federal estate tax estate" whether or not these interests are part of the "probate estate." Individuals and couples with wealth of \$5 million or more should examine the potential impact of the federal estate tax. They should analyze their estate with respect to the tax and probate issues. Avoiding probate may be no more important than strategies to reduce death taxes. Probate avoidance may provide more cost savings for those with estates of more than \$5 million.

Surviving joint tenants, other than a surviving spouse, must show contribution to the ownership of the underlying assets; otherwise the deceased joint tenant is assumed to have been the sole contributor to the original ownership interest. The decedent's solely owned property and tenants-in-common interests may pass to the surviving spouse, depending on the decedent's will or lack of a will. The ultimate distribution of assets subject to probate is not decided in the illustrations in Table 2 below.

Life insurance proceeds payable to an individual (i.e., not payable to a decedent's estate) were exempt from Indiana inheritance tax. One-half of jointly owned and tenants-by-the-entireties property held by married couples is automatically included in the federal estate tax estate. This is true for joint tenancies entered into after 1981. A 1992 case (Gallenstein, Sixth Circuit Court of Appeals) and cases since then have held that the "consideration furnished" rule, between spouses, still applies to joint interest created before 1977.

"Consideration furnished" means the surviving joint tenant must show a contribution to the equity in the asset; otherwise the full value of the asset at a deceased joint tenant's death is included in his or her estate tax estate. For a surviving spouse, there is a 100% deduction (as of January 1, 1982). Capital asset values (the value accepted for federal estate tax purposes) included in a decedent's estate become the income tax basis of the asset — typically the asset's fair market value on the decedent's date of death.

### Considerations in Will Making <sup>(2)</sup>

A will is a written document that may control the disposition of a decedent's "probate" property. Each state has laws that should be followed in making a will. In Indiana, legal requirements are:

- The maker of a will must be of sound mind and be at least 18 years old.
- The will must be signed by the maker (testator) and be witnessed by at least two witnesses in a special manner provided by law. Generally, persons who are beneficiaries under the will should not serve as witnesses.
- The will must be in writing. <sup>(3)</sup>

After death, the will is presented to the probate court, generally a Circuit Court in Indiana. A will may be made self-proving by

**Table 2. Carl’s Estate for Probate and Taxation with Julie, His Surviving Spouse\***

Decedent’s Estate	Probate	Federal Estate Tax	Indiana Inheritance Tax
<b>Real Estate:</b>			Repealed 1/1/2013
1. Carl and Julie, TBE <sup>a</sup>	No	½ <sup>b</sup>	
2. Carl (sole owner or tenant-in-common)	Yes	Yes? <sup>c</sup>	
3. Carl and Richard, JTWROS <sup>d</sup>	No	Yes?	
4. Transfer on Death (TOD)	No	Yes?	
<b>Personal Property:</b>			
5. Carl and Julie, JTWROS	No	½	
6. Carl, sole owner	Yes	Yes?	
7. Carl and Richard, JTWROS	No	Yes?	
<b>Insurance:</b>			
8. On Life of Carl (Carl, owner)	No	Yes	
9. On Life of Julie (Carl, owner)	Yes	Yes?	
10. On Life of Carl (Julie, owner) Note: Not Carl’s Asset.	No	No	
<b>Other:</b>			
11. Qualified Pension Plan	No	Yes? <sup>f</sup>	
12. Stock Option Rights	Yes	Yes?	
13. Trust Assets (Carl, owner)	No	Yes?	
14. A Granted Life Interest <sup>g</sup>	No	No	
15. Revocable (Living Trust) or Retained Life Estate <sup>h</sup>	No	Yes?	
16. Social Security Benefits	No	No	
17. Partnership Interest	Yes	Yes?	
18. An Annuity (Carl, owner)	No	Yes?	
19. Land Installment Contract (seller)	Yes & No <sup>i</sup>	Yes?	

\* This table follows the guide of a similar demonstration by the late Carl W. Kloepfer, who was an attorney in Lafayette, Indiana. It is an illustration of many property interests and ownership arrangements that avoid probate, but these interests may be subject to the federal estate tax.

- a. Tenants-by-the-entireties with rights of survivorship.
- b. Beginning Jan. 1, 1982, the federal estate tax law requires one-half of the value for marital, joint property to be “subject to tax.” This means the income-tax basis is stepped-up on this one-half of the value. A 1992 case (Gallenstein from the Sixth Circuit Court of Appeals) held that the “consideration furnished” rule applies to joint interests created before 1977 where the decedent died after 1981. Thus, if a surviving spouse cannot show consideration furnished for joint interests created before 1977, the entire value is in the decedent spouse’s estate tax estate and the income tax basis is set at that included value. Since 1981, the federal estate tax marital deduction is 100%.
- c. There is a question mark (?) because if the assets go to the surviving spouse, there is, generally, total avoidance of the federal estate tax. Items 3 and 6 have a question mark since it is possible that Richard can show contribution to the jointly owned interest. If he could, the percentage of the fair market value related to his contribution would be excluded from federal estate.
- d. Joint tenants with rights of survivorship.
- e. Life insurance payable to an individual was exempt from the Indiana Inheritance Tax. The tax was repealed.
- f. Prior to 1985, there was an exclusion of \$100,000. After 1984, the total benefits are part of the estate tax estate.
- g. Carl K. did not previously own the property from which the life interest arose, i.e., the life interest was a lifetime gift or inheritance.
- h. A life interest retained by the decedent and assets in what was a revocable trust both are subject to estate tax just as if the decedent had retained sole ownership of his or her assets. The living trust is one of many ways to avoid probate, but the living trust does not avoid federal estate tax and the annual trust income is taxable to the grantor.
- i. If the installment sale was of tenants-by-the-entirety interests, without other intent specified, the proceeds belong to the surviving spouse and without probate; otherwise there may be probate of this asset. The amount subject to federal estate tax in Carl’s return depends upon Julie’s interest in the contract. Generally, the fair market value of an installment contract is the discounted value of the stream of principal and interest payments. The stream of payments must be discounted in order to reflect delay in time to collect the payments.

the acknowledgment of the will by the testator (party whose will it is) and the verification of the witnesses in the form of a signed certificate (Figure 1).

The self-proving certificate contains the legal requirements for a valid will. Its effect is to allow the will to be admitted to probate without the testimony of a witness. Avoiding the need to locate witnesses, or for witnesses to come forward, may save administration expense and may avoid delay.

Wills may be revoked or changed anytime before death if the testator has “will-making capacity.” All changes must be made in strict compliance with the law. Changes in wills are made by an addition to the will called a “codicil.” (It is possible to make a will that cannot be changed.)

Indiana law does not allow for a holographic will — a signed handwriting, but not witnessed. Indiana law allows for a list (referred to in the will but outside the will) of tangible, personal property (not used in a trade or business) to be distributed to specified individuals. It is typical for individuals to make promises of specific assets to family and friends. A properly maintained and documented list introduced with the will after death allows these bequests to be carried out. See IC 29-1-6-1(m).

Deathbed wills might be challenged. A will should be prepared while a person is in good mental health. Hastily prepared wills may not accurately carry out the maker’s wishes. Furthermore, such a will may invite a will contest — a lawsuit brought to have the will or parts of it declared invalid. Will contests can arise over changes made: when a person is ill; while under the influence of medication; or when it is believed there was “undue” influence of another individual.

The process of making or revising a will should be viewed in the light of one’s vision and goals, and other provisions for estate planning. Keep in mind, there are several typical will substitutes (e.g., joint



property, life insurance, retirement plans, living trusts, life estates and transfer or payable-upon-death arrangements). Individuals and couples should review these matters with legal counsel. However, spouses and other individuals should consider (and may be advised to get) separate legal counsel when estate planning.

Will-making, self directives and estate-planning considerations:

- If there is no will, assets not covered by a will substitute transfer by the law of descent (See Table 1).
- Who should receive your property?
- Who should be named as personal representative of your estate?
- Who should be named as guardian(s) for minor children, if any may exist?
- Should there be special provisions for minors and for individuals who are legally or financially incompetent?
- Should there be a special needs trust or another type of trust for the above situation?

**Figure 1. Self-Proving Will Certificate**

UNDER THE PENALTIES FOR PERJURY, We (Will-Maker/Testator), (Witness #1) and (Witness #2), the testator and the witnesses, respectively, whose names are signed to the attached declare:

- (1) the testator signified that the instrument is the testator’s will;
- (2) in the presence of at least two (2) witnesses, the testator signed the instrument or acknowledged the testator’s signature already made or directed another to sign for the testator in the testator’s presence;
- (3) the testator executed the instrument freely and voluntarily for the purposes expressed in it;
- (4) each of the witnesses, in the testator’s presence and in the presence of all other witnesses, is executing the instrument as a witness;
- (5) the testator was of sound mind when the will was executed; and
- (6) the testator is, to the best of the knowledge of each of the witnesses, either: at least eighteen (18) years of age; or a member of the armed forces or the merchant marine of the United States or its allies.

Date \_\_\_\_\_ Testator \_\_\_\_\_

Witness #1 \_\_\_\_\_ Witness #2 \_\_\_\_\_



- Should there be a trust arrangement to manage property for surviving children and another family member or other individual(s) to raise the children (guardian of the person)?
- Is there a durable power of attorney in place and a designated health care representative?
- Is there a living will?
- Given existing wealth and a planning vision, should complex arrangements, such as reorganization of business assets, be considered?
- Transferring property interests (both personal and real property) may benefit from a buy-sell rule (a restricted transfer agreement).
- Should there be more life insurance and long-term care insurance?
- If you have a charitable organization in mind, consider lifetime gifts, especially if you can save income tax.
- Gifting a conservation easement may be one way for landowners to save on income tax and avoid additional development of their land.
- Where should the will be kept? Indiana law provides for filing a will with the circuit court clerk as a safe place. (See IC 29-1-7-3.1 — Will depository.)

Typically, a personal representative is a knowledgeable family member of the decedent (often a surviving spouse or an adult child). The designated party will employ legal counsel for assistance with estate administration. However, for some estates it may be advisable to request that a professional personal representative be appointed. Both the personal representative and his or her legal counsel are entitled to a fee. In certain estates, the payment of fees outside the family for estate administration may be a wise investment. Estate representation should be studied carefully. A great deal of concern (including litigation) may arise over how to and at what cost for the administration of an estate.

Should a trust(s) be created: for a spouse, for children, or grandchildren? A legal life estate may adequately serve a family situation. However, a trust with useful provisions, such as a buy-sell agreement, is a better choice than the ordinary life estate. Knowing the income and estate tax effects of an estate-planning tool is important. There are many types of trust arrangements. In the case of a living trust, an individual, his or her spouse, or other family members may serve as trustee(s). What is best may require legal and tax analysis. A lifetime (living) trust may be the best choice along with a “pour-over” will. For assets not already in a living trust, a pour-over will provides for the transfer of probate assets into what was the decedent’s living trust. Just as with a will, buy-sell or restricted-transfer arrangements may be important.

The use of a trust for management of life insurance proceeds may be one of the most important uses of a trust — especially for young families. A properly drafted irrevocable trust may also keep insurance proceeds exempt from federal estate tax. For federal estate tax, ownership of the insurance policy is the issue.

For those who die with small or modest estates, equity in a home and or farmland, automobiles, a savings account, life insurance benefits, and retirement benefits are likely to be left to a surviving spouse. Life insurance in a trust may be an efficient way for managing life insurance proceeds. For surviving children, a life insurance trust can control the use of insurance proceeds to satisfy specific goals and objectives that are important to a deceased parent.

Individuals and married couples typically plan to avoid federal estate taxes. Married individuals who each have estates approaching or above the federal estate tax “applicable exclusion amount” [AEA] may use typical tax-avoidance approaches for the estate of the surviving spouse. Typically, the plan isolates at least the AEA from the estate of the surviving spouse in a “credit shelter” trust. Income from a credit shelter trust may or may not be provided for a surviving spouse. However, given the specifics of the federal estate tax law (not detailed in this presentation) various options may exist for handling a transfer from a decedent to a surviving spouse and to other heirs ( devisees and legatees).

Due to a change in the federal estate tax law, we now have portability — the carryover of an unused estate tax credit to a surviving spouse. This is a huge change in the federal estate tax law for married parties. However, issues and complications enter with portability of a deceased spouse’s unused credit. One important requirement to obtain portability of a credit is the filing of a federal estate tax return within nine months of a first spouse’s death. It is possible in 2015 for a deceased spouse to use none of the credit and leave a surviving spouse with the ability to have an enhanced credit to shelter the federal estate of over a \$10 million estate. For married couples with sufficient wealth to benefit from portability, experienced trust and estate legal counsel is essential.

Estate tax planning may be accomplished with sophisticated provisions in a living trust, or traditional will provisions.

Restricting the rights of a surviving spouse with a prenuptial agreement may be important, especially for an individual with a substantial estate who is contemplating remarriage and who has children from a prior marriage who may expect to inherit from this individual (his or her parent). Though a spouse “agrees” in advance to an estate plan, he or she may elect to take against a will that leaves him or her less than a surviving spouse’s spousal allowance and *statutory (elective) share*. This election may be prevented by a prenuptial or postnuptial agreement. To avoid a surviving spouse’s spousal allowance and elective share, before contemplating remarriage it may be wise to isolate, in an irrevocable trust, assets that children expect as inheritance or lifetime gifts.

Estate planning is a continuing process. Has the size or makeup of the estate changed significantly? Has any intended beneficiary of an estate had changes in circumstances? Have estate tax laws changed since the last will or trust arrangement?

Are there provisions for control of the transfer of business assets? When family business interests are involved, control and transfer are critical areas of planning. Planning tools are available to help with control and transfer of a business interest, including land. Rules for buying and selling assets between co-owners of property are important. Buy-sell rules can be used in a: will, trust, partnership, corporation, limited liability company, life estate, and transfer on death document.

Are there items of personal property intended for specific individuals? If so, consider lifetime gifts. Otherwise, list them in your will or trust (or personal property list outside the will) with an adequate identification. Lifetime transfer with retained use might be suitable. Verbal commitments with or without tags or labels may lead to disputes and in fact are legally invalid.

Are there charitable intentions that could be provided for in a will or trust? Gifts to tax-exempt organizations [exempt under IRC Sec. 501(c) (3)] are exempt from federal gift and estate tax. Indiana has no gift tax. Lifetime gifts to tax-exempt organizations may also bring a reduction in federal and state income taxes. If you can manage without the gifted assets, the income tax savings favor lifetime, charitable gifts. However, since 1977, adjusted taxable gifts to individuals (not to a charity) are added back into a decedent’s federal estate tax calculation.

The drafting of a will is an important legal matter involving many decisions requiring professional judgment that can be rendered only by a lawyer with training and experience. Generally, a lawyer familiar with estate planning, probate practice, and the drafting of wills, trusts, and business arrangements — with other professional assistance as needed — can help individuals and families avoid many pitfalls. In many estate-planning and will-making situations, federal income and estate tax expertise is needed. An individual’s best protection from inadequate service

is knowledge of his or her facts and implications of planning alternatives.

An important consideration in estate planning is the purchase of long-term care insurance. Long-term care insurance is especially important for those individuals who wish to protect assets from being consumed by extended periods of in home and/or nursing home care.

### Types of Real Estate Ownership

Three types of multi-party (co-tenancy) arrangements are typical alternatives to sole ownership of real estate in Indiana. They are tenants-in-common, joint tenancy, and tenants-by-the-entirety.

#### Tenants-in-Common

To own as tenants-in-common (TIC) means each party has a percentage interest in the property. Each owns a part of the whole. The part owned can be any fraction (e.g., one-fourth, one-third, one-eighth) of the whole. Upon death, one’s TIC interest is part of his or her probate estate and passes by the law of descent or according to his or her will, trust or possibly by a transfer on death (TOD) stipulation. A legal right of a tenant-in-common is that of a partition suit (a legal remedy for physical division or sale of a TIC interest). Typically, physical partition of the property is not possible, and there is a sale of the real estate with net proceeds divided according to individual, percentage interests.

**A planning tool — A Restricted Transfer Agreement:** Brothers and sisters typically hold real estate as TIC. If a parent dies with real estate and without a will, leaving a spouse with children, they are TIC. Wills may leave property to heirs as tenants-in-common. One may plan for the possibility that siblings and other heirs cannot agree on how to manage property. If a tenant-in-common or his/her guardian or trustee or judgment creditor wants cash for an interest held TIC, a public auction (via a partition proceedings) may be the result. Imposing a restrictive transfer arrangement on in-common ownership may be wise so that one interest holder may not impose a public sale of the property upon the other owner(s). For example, the right of a first option to buy an interest that may be for sale might be held by all co-owners or held by specific members of a family. Generally, a **restricted transfer agreement** (a buy-sell agreement) is good planning.



### **Ordinary Joint Tenancy**

Ordinary joint tenancy is similar to tenants-in-common in some respects. A major distinction is that a joint tenant has a right of survivorship. The decedent's joint tenancy interest is not subject to probate but passes by law to the surviving joint tenant(s).

As with a tenancy in common, a severance of the interests can be carried out by one party to the tenancy, or one party can encumber his or her interest. When a joint tenant in real estate transfers an interest, the transferee becomes a tenant-in-common with the other joint tenant(s). If one joint tenant dies, the surviving joint tenant(s) owns the entire interest. Married couples typically use joint tenancy as a method for owning personal property. Occasionally, a parent owns realty and/or personal property with a child as joint tenants with rights of survivorship as a caretaking arrangement and perhaps as a probate avoidance arrangement. This type of parent-child (or with any other relative) planning and management may achieve satisfactory results. However, use of joint ownership should be cautioned. A joint tenant's interest is subject to creditor claims. A creditor with a legal judgment against a joint tenant may force a sale of the jointly held property.

For federal estate tax purposes, a deceased joint tenant is assumed to have contributed the entire value of the jointly held property unless the surviving joint tenant(s) can prove contribution to an ownership interest. An important exception to this rule applies for a deceased spouse; in that case, for spousal, joint property arrangements after 1981, one-half of the asset value is included in the estate of the deceased spouse for federal estate tax but fully is deductible by the marital deduction in favor of the surviving spouse.

**However, good estate planning may include a “buy-sell agreement” to be imposed on right-of survivorship ownership for both real estate and personal property.**

### **Tenancy-by-the-Entirety**

Tenancy-by-the-entirety (TBTE) is a form of joint tenancy with rights of survivorship reserved for married couples owning real estate in Indiana. Normally, entirety interests cannot be independently encumbered by one spouse. Thus, entireties ownership offers protection from creditors of one spouse for a family residence or other real estate. This explains why lenders require both husband and wife to sign (legally committed for repayment) when real estate held by the entireties is mortgaged. It is an important reason for both spouses to avoid signing documents that would expose their entireties real estate to liability, such as a financial liability agreement for a teenager's driver's license, or for a business venture when security represented by a couple's TBTE property should not be required.

Estate planning lawyers can use special techniques to extend TBTE property protection to revocable living trusts, called matrimonial trusts. The matrimonial trust planning strategy is somewhat controversial, and it requires an extra level of legal sophistication.

### **Rules and Planning Implications**

An Indiana statute provides that words on a deed conveying realty to a married couple will be deemed to create a tenancy-by-the-entirety unless the wording on the deed makes it clear that TBTE is not intended. For example, “John and Mary Smith as tenants-in-common” would avoid right of survivorship. In Indiana, without words to the contrary, the wording “John and Mary Smith” (a married couple) creates a tenancy-by-the-entirety in real estate. In the case of unmarried parties, such wording as “John Smith and Mary Smith” creates a tenancy-in-common. Married couples with significant wealth in real estate may switch to tenants-in-common for estate-planning purposes as well as engage in other more sophisticated estate planning.

An estate plan based solely on the ownership of property in joint tenancy or in tenancy-by-the-entirety may be ill-advised. Legal counsel is desirable before selecting joint tenancy or tenancy-by-the-entirety ownership.

While joint ownership and transfers on death arrangements are common practice, such a plan may be undesirable from the point of view of minimizing federal estate tax as property passes to the children or grandchildren. Further, a surviving spouse may not use a deceased spouse's property in the intended way for the benefit of the children of his or her deceased spouse. In fact, children may never receive an inheritance. Generally, children have no legal right to share in the estate of their parents, except minors under eighteen (18) years of age at the time of a parent's death; they are entitled to a survivor's allowance of \$25,000. (See IC 29-1-4-1.)

All or most assets to a surviving spouse may create a death tax burden when there is significant wealth. If major appreciating assets are left to a surviving spouse, a widow or widower may become wealthy with the passage of time due to appreciation in asset values. The more prematurely a spouse dies with significant wealth, the more important this problem may be. Children of a deceased parent may find their inheritance subject to substantial federal estate tax and estate administration costs.

A decedent's estate with a federal estate tax base (net estate, including the taxable portion of lifetime gifts since 1976) of up to the applicable exemption amount of over \$5 million in 2015 avoids federal estate tax. If a taxable estate base value is above the applicable exemption amount, the federal estate tax may be a significant issue.

Married individuals who have estates of substantial value, including life insurance, should study planning alternatives. Good results may be achieved by using trusts and/or wills. However, neither trusts nor wills alone may be the path to avoiding death taxes. Trusts and wills are tools that are combined with other planning tools. For example, a lifetime gift-making program is a way to reduce an individual's estate.

### Life Estates

Farmers and others may use a retained life estate or a revocable living trust as a probate-avoidance device. A retained life interest is subject to federal estate tax at the fair market value at date of death for the entire property interest. A retained life estate or retained income from a trust will let the property interest avoid probate. That fact alone may save administration expense and eliminate uncertainty. Most counselors would advise a trust arrangement in lieu of the legal life estate. However, the tax rule is the same whether a life interest is retained via a legal life estate or via a revocable living trust. Retention of life income may be oral with a deed in fee simple to the children. If the IRS discovers that the income from property continued to flow to the original owner after an ownership transfer on paper, the IRS requires the fair market value of the property interest in the federal estate tax estate of a decedent owner. This arrangement is described as a “retained life estate.”

On the other hand, a **life estate granted to a person** is not a part of the grantee’s estate for federal estate tax purposes. A life estate granted to someone, compared to an individual retaining a life estate, is a valuable estate tax avoidance tool. One who devises (designated in a will or trust) a life estate to another may keep the value of the property out of the devisee’s estate at his or her death. Some individuals may favor the legal life estate because it keeps the management within the family. In most cases, a trust owning the property may be preferable to a common law life estate. A family member(s) could be the trustee(s), if adequate management skills exist in the family. A trust approach invites provisions for buy-sell restrictions and consideration for management assistance for the lifetime beneficiary.

Due to a recent change in the law in Indiana, real estate and other assets may be title as transfer on death (TOD).

The TOD approach should be more efficient than a living trust or a retained life estate. However, the TOD arrangement still leaves the property in the decedent’s federal estate tax estate at market value at the date of the owner’s death. Again, selection of alternatives should be done with the advice of an estate planning lawyer with full knowledge of the planner’s wealth and intentions.

### Jointly Held Personal Property

Married individuals, parents, and their children commonly own personal property with rights of survivorship. This is done routinely for cars and trucks, checking and savings accounts, certificates of deposit, bonds, and other assets. For married individuals, the wording designating the ownership often does not explicitly state “joint tenancy with rights of survivorship.” But for Indiana law, a dispute could arise as to whether there are rights of survivorship in a surviving spouse.

### Special Statutes

An Indiana statute provides the intent if the “rights-of-survivorship” words are missing for personal property held in the names of both husband and wife. Survivorship rights exist unless it is clearly stated that the item is not to be considered as held with the rights of survivorship. Because of this law in Indiana, spouses must say “without rights of survivorship” on the ownership document if tenancy-in-common and not joint tenancy is desired. For unmarried individuals, “with rights of survivorship” must be indicated where co-ownership (two or more names) appears, or else the Indiana law presumes tenants-in-common. The statute states:

#### Sec. 29.

- (a) This section does not apply to an account.
- (b) Except as provided in subsection (c), personal property that is owned by two (2) or more persons is owned by them as tenants in common unless expressed otherwise in a written instrument.
- (c) Upon the death of either husband or wife:
  - (1) household goods:
    - (A) acquired during marriage; and
    - (B) in possession of both husband and wife; and
  - (2) any:
    - (A) promissory note;
    - (B) bond;
    - (C) certificate of title to a motor vehicle; or
    - (D) other written or printed instrument; evidencing an interest in tangible or intangible personal property in the name of both husband and wife; becomes the sole property of the surviving spouse unless a clear contrary intention is expressed in a written instrument. See IC 32-17-12

### Multiple-Party Bank Accounts

Multiple-party bank accounts (checking, savings, certificates of deposit, and other like accounts) are excluded from the above statement of the law since they are under a special section of the law on “non-probate” transfers. Married couples and those in other family relationships often use survivorship bank accounts, including payable on death (P.O.D.) or trust accounts, for lifetime convenience and to avoid probate. Indiana law provides that at the death of a party to a joint account, unless there is clear and convincing evidence at the time the account was created, the entire account belongs to the surviving party(s) whose name is on the account. See IC 32-17-13 for Indiana law regarding non-probate transfers and the liability of such transfers to the probate estate.

In effect, rights of survivorship are presumed by the law where the signature card or contract with the bank mentions two or more names but does not make survivorship rights clear. Note that this presumption deals only with intangibles at financial

institutions and not personal property in general. For other personal property, the presumption when doubt exists over a co-ownership arrangement is tenants-in-common, unless the parties were married.

Non-probate transfer rules concerning multiple-party accounts also stipulate the following:

1. The account belongs to the parties in proportion to their contributions. If the decedent was the only contributor, then the parties (if two or more survive) share equally in the account.
2. Multiple-party accounts cannot be used to avoid the decedent's debts, taxes, and expenses of administration to the extent that the decedent had contributed to the account. For example, if a parent-depositor owns an account with survivorship rights in a son and the son predeceases the parent, the parent could show proof of contribution, avoid the deceased son's creditors, and prevent having any part of the account subject to federal estate tax in the son's estate.

A person who has received funds that were the decedent party's contribution to a bank account must report the amount to the decedent's personal representative.

3. A right of survivorship that arises for a multiple-party account defined above cannot be changed by statements about the account in the deceased depositor's will. If the depositor wants to clear up the transfer intent concerning a multiple-party account, it can be done by appropriate documentation with the financial institution holding the account. It is an Indiana law that controls, not a will or a living trust. See IC 32-17-11-18.

Individuals who have managed money with joint bank accounts but do not intend to personally keep the decedent's remaining balance may take appropriate action. Because the law says the survivor owns the account, a timely disclaimer may get a jointly owned account back into the decedent's estate for distribution to other heirs according to a will or by the law of descent.

4. In Indiana, since 2008, the owner(s) of a vehicle or watercraft may create an interest in the vehicle that is transferrable on the death of the owner or owners by obtaining a certificate of title conveying the interest in the vehicle to one or more named individuals as **transfer on death beneficiaries**. An interest in a vehicle transferred under this section vests upon the death of the owner or owners. See IC 9-17-3-9.
5. Following the above, another new addition to Indiana law is a "transfer on death deed" which conveys an interest in real property to a grantee by beneficiary designation. Transfer on death refers to a transfer of property that takes effect upon the death of the owner. See IC 32-17-14-3(13). Besides real estate interests, basically, any personal property maybe transferred on death (TOD) by the appropriate prior documentation.

### ***Alternatives to Survivorship Accounts***

Problems may arise over survivorship accounts. Often a son or daughter can draw on the account for the parent-depositor, but the parent may not have intended the balance to go to an individual child. Special-purpose accounts should be designated as such, and durable powers of attorney can describe powers granted to handle another's affairs.

A living trust may be a better approach than joint accounts for asset management. An adult child could be a co-trustee or a contingent trustee. The trust should describe the distribution of a decedent's trust assets to the beneficiaries.

In second or subsequent marriages, disputes may arise over household and other items that children know were not acquired during the final marriage of a decedent parent. Children may have gifted or lent certain items to a parent, and the parent would like for them to receive the item back after his or her death. Special provisions in a will or trust may be the best way to accomplish the desired disposition.

Another method for disposition that is recognized in Indiana is a proper listing of specific personal items in a list that may be maintained outside a will. The list must be mentioned in the list-maker's will. A parent may want to transfer certain assets into an irrevocable trust with children of a prior marriage as his or her ultimate beneficiaries. This trust arrangement should be done before a second or subsequent marriage. Indiana has case law regarding attempts to limit the rights of a second spouse after a second marriage that have failed. Legal counsel is advised prior to a second or subsequent marriage.

Under federal gift tax rules, one party (child) can hold a joint account or deposit with another party (parent) making the total or a more-than-proportionate contribution, yet the act of establishing the account is not a taxable gift. Federal tax regulations permit no taxable gift for a jointly held bank account until a donee joint tenant withdraws funds that the donee uses for purposes other than a legal obligation of the donor. The reason no gift exists until withdrawal is that the donor joint tenant may withdraw the deposit, and the other joint tenant may never benefit from the account. If a lifetime gift is intended, the donor may gift outright or set up a separate account for the donee.

As a rule, a person's contribution into a joint tenant account is excludable from what otherwise might be declared a lifetime gift. However, the donor may have to prove his or her contribution to the account should the donee predecease the donor in order to keep the value of the account from being taxed in the estate of the donee. Federal estate tax rules require that one-half of the value of spousal-survivorship property be included in the federal estate tax estate of a deceased spouse. This is true for joint tenants and tenants by the entireties property interests acquired since 1976. This is an arbitrary rule despite contribution. Yet this one-half is 100% deductible for federal estate-tax purposes.

It may be a good idea for each spouse to have money in a private account. The private account would be readily available to a surviving spouse for expenses after death of a spouse. This strategy may prevent apprehension following the death of a spouse about gaining access to joint accounts. However, since there is no federal estate tax on a spouse's survivorship account, there should be little effort involved in getting these accounts cleared or freed up (consent to transfer) at a bank or other financial institution.

The above discussion is not intended to suggest that multiple-party accounts or transfer on death documents are necessarily preferred estate-planning tools. Where considerable value is involved, the use of a well-drafted living trust and/or a durable power of attorney may be preferable. If gifts are intended, gifts to separate accounts may be better than the joint-account approach. Often, people rely on joint accounts and may feel more comfortable with these seemingly uncomplicated arrangements. Also, individuals may feel joint ownership is a desirable probate-avoidance tool. Further, they may be unwilling to make lifetime gifts and may feel more in control of their assets than with a trust.

## Elections, Allowances, and Options

### *Spouse's Elections*

In the past, if a husband or wife owned real estate in his or her own name and wished to convey it to someone else, he or she was required to have his or her spouse sign away his or her marital interest. According to Indiana law, a spouse does not have a legal interest in the property owned by his or her spouse. Either should be able to transfer his or her separate property without consent of the other spouse. Avoiding the loss of this freedom and flexibility may be a reason why many individuals in Indiana have resisted efforts to adopt community property law. In the case of tenancies-by-the-entirety ownership, neither spouse can independently convey an interest, even though one spouse may have provided the funds to acquire the property or have inherited or been gifted the property.

However, a surviving spouse who is a first spouse of the deceased spouse, or one who has children by the deceased spouse, may elect to take one-half of the net estate (real estate and personal property) instead of taking what a will provides if will provisions are less than the one-half statutory guarantee. When the surviving spouse is a second or subsequent childless spouse and the deceased person had children from a prior marriage, he or she has an elective right to one-third of the net value of personal property and an amount equal to 25% of the decedent spouse's net real estate interest. See IC 29-1-3-1.

**Example:** A deceased spouse has a net estate of \$600,000 in personal property. The deceased spouse's will provides \$100,000 to the surviving spouse without children by the deceased spouse and the remaining \$500,000 of personal property to the children of the deceased spouse's prior marriage. Concerned that that the

surviving spouse would not have enough money for retirement years, the surviving spouse elects to take the legal marital share of \$200,000 (one-third of the net estate of \$600,000).

When the value of the property given the surviving spouse under the will is less than the amount the surviving spouse would receive by electing to take against the will, the surviving spouse may elect to retain any or all specific bequests or devises given to the surviving spouse in the will at their fair market value as of the time of the decedent's death and receive the balance due in cash or property. See IC 29-1-3-1(b).

### *Trusts as a Limitation*

Generally, only the property owned by the deceased spouse is subject to a surviving spouse's elective share. If a husband transferred two-thirds of his property before death, he could reduce his wife's legal right in the property that he originally owned. An irrevocable trust established before a marriage or remarriage may limit a surviving spouse's rights in property that may otherwise be in a deceased spouse's estate. Indiana case law may void a trust arrangement, if it is found to be solely intended to defeat the elective share of a spouse.

### *Family Allowance*

Another provision intended to protect the family of a deceased spouse or parent is the family allowance. This provision gives \$25,000 to the surviving spouse or to dependent children (under age 18), if there is no surviving spouse. The \$25,000 comes from the personal property of the estate. But if there is less than \$25,000 in personal property in the estate, the balance may come from any real estate in an estate. As such, the balance is a lien on the real estate. See IC 29-1-4.

An allowance under this section is not chargeable against the intestate shares of a surviving spouse or children (Table 1). Thus, the \$25,000 is provided plus the amount provided for by will or by intestacy. The \$25,000 allowance is classified as a debt against the estate. If the estate is not large enough to meet all claims, the \$25,000 is payable before all claims, except the costs of administration and the funeral expenses.

**Example:** A person dies with funeral expenses of \$5,000; medical expenses of \$5,000; federal taxes of \$2,000; state taxes of \$500; and other debts of \$20,000. Administration expenses of the estate are \$2,500. The estate consists of assets worth \$50,000. Since the family allowance is given priority over many other claims on or debts of the estate, the total estate of \$50,000 is distributed in the following order:

- (1) \$2,500 ..... administration expense
- (2) \$5,000 ..... funeral expense
- (3) \$25,000 ..... family allowance**
- (4) \$5,000 ..... medical expenses
- (5) \$500 ..... state taxes
- (6) \$10,000 ..... left to pay toward the \$20,000 of other debts.

### **Prenuptial Agreement**

Previously married individuals may have property in their own names that they wish to pass to their children of the prior marriage(s). Before marrying, each may sign a prenuptial contract agreeing to waive what he or she would otherwise be entitled to by law after the death of the other. The promise of marriage is sufficient consideration to make the prenuptial agreement binding in Indiana in contract law. For a postnuptial agreement, each must receive something tangible in return for a waiver of rights to make a binding contract. Previously unmarried individuals who have amassed wealth may be wise to consider a prenuptial agreement. A postnuptial agreement may not be attainable. Consult an Indiana lawyer for assistance in these matters.



### **Renunciation or Disclaimers**

Indiana law provides that property to be received by right of survivorship, by a will, or by the law of intestacy can be renounced (disclaimed) in whole or in part by filing a written instrument to that effect within nine months after the death of the decedent. A person renouncing need not receive anything in return to be legally bound. The property then passes as if the disclaiming party predeceased the decedent. The disclaimant is not permitted to renounce in favor of anyone. The owner of property may indicate in his or her will who takes in case a designated person renounces.

Disclaimers may permit the disclaimant to avoid creditors, income tax, and Indiana inheritance tax. Federal estate tax can be reduced ultimately in the disclaimant's estate. A federal tax law permits an individual devisee to disclaim, yet there is no federal gift tax liability for the disclaimed value.

Federal tax law places several requirements for a disclaimer to be effective, including the following:

1. The disclaimant must make an irrevocable and unqualified refusal to accept an interest in the property.
2. The disclaimer must be in writing.
3. The disclaimant must not have accepted the interest disclaimed or any of its benefits.
4. The disclaimer document must be delivered to the transferor or title holder not later than nine (9) months after the day of the transfer to the disclaimant.

**Example:** A person with children who inherits from a parent could exercise a disclaimer and allow children who are alternative heirs to benefit from the inheritance. This may not change the grandparent's federal estate tax. It is possible that estate tax could be saved in the estate from which the disclaimed interest arises, for example, if the alternative taker is a tax-exempt organization.

### **Estate Administration**

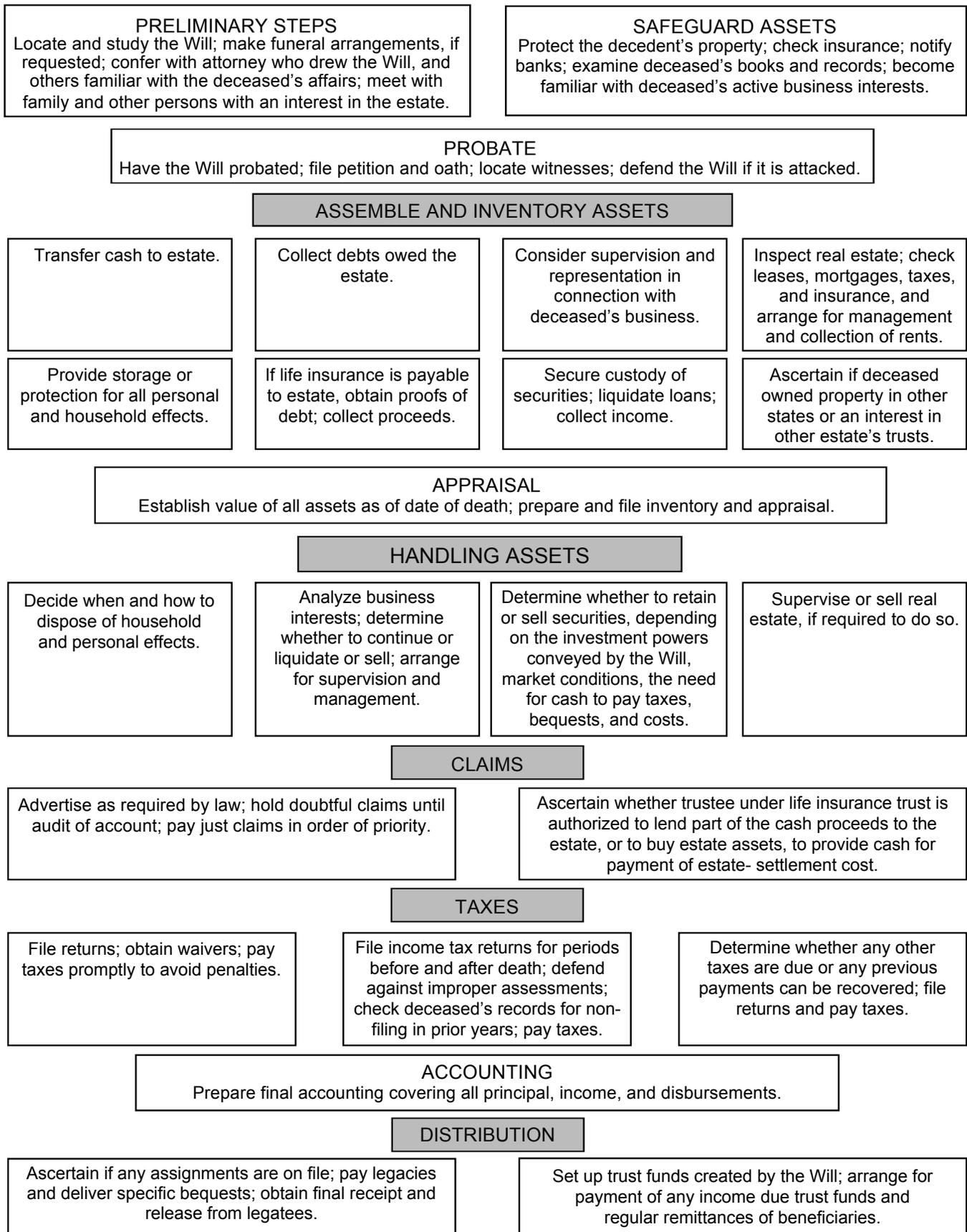
Estate administration (typically referred to as "probate") assures that the deceased person's property is properly distributed after paying valid claims, including taxes. The probate court (the Circuit Court in most Indiana counties) may be involved throughout a supervised administration. An Indiana lawyer provides counsel to the personal representative and may assume responsibility for many decisions and prepare necessary legal documents. Typical events are discussed below. However, Figure 2 (Page 13) is more inclusive of all possible activities than this discussion.

### **Presentation of a Will**

A person in possession of a decedent's will has the duty to present it to the probate court. A will is not effective unless it is admitted to probate. Generally, a will is not honored if presented more than three years after death or anytime after the court decrees a final distribution of estate assets. Once a will is accepted for probate, it is the guide to the testator's wishes.

Besides the will, an affidavit of death is filed with the court. This affidavit is essential to demonstrate that there is a decedent's estate to administer. If there is no will, this fact is documented with the court, and an order is issued to install a personal representative.

Figure 2. Estate Administration Flow Chart



### ***Appointment of the Personal Representative***

“Personal representative” is the term provided in the law for what is commonly called an “executor” or an “administrator” if there is no will. A personal representative is the individual or corporation (e.g. a bank trust department) appointed by the probate court to take charge of the decedent’s property during the probate/estate administration process.

The personal representative must identify and assume control over all of the decedent’s probate estate. The personal representative must pay all lawful claims against the decedent’s estate, including the decedent’s debts, income and estate taxes, and all expenses of administering his estate. The personal representative normally employs a lawyer for legal assistance and other professionals — typically, an accountant and appraisers.

A personal representative (PR) must be at least 18 years of age, of sound mind, and a resident or a nonresident who serves as co-personal representative with a resident PR. Neither may serve if a convicted felon. A nonresident of Indiana may serve as a sole PR, but he or she must have a resident agent. PRs are recognized in the following order.

1. The individual(s) designated in the will.
2. If there is no will or no PR designated in the will or the PR designated in a will cannot or will not serve, the PR is the surviving spouse or his or her nominee.
3. If there is no surviving spouse, the next of kin or his or her nominee may be the PR. A person or institution named as PR in a will must be issued “letters testamentary.” In effect, a PR must be accepted by the court. If the decedent died without a will, the court will issue “letters of administration” instead — according to the rules stated above.

If no petition for letters is filed within 30 days after the date of death, any other “qualified person” may file for appointment as PR. A non-relative who has an interest in the estate, such as a creditor or a former business partner of the decedent, could be a person qualified to be a PR.

It is important for a PR to recognize that his or her lawyer for administration of the estate is employed by and responsible to the PR. Generally, the lawyer should be of the PR’s choosing. A lawyer or law firm that holds the decedent’s will or drafted the will or one mentioned in the will to serve as the estate’s counsel need not be the one chosen.

Traditionally, the PR posted a bond to secure his or her handling of the estate. Today, a bond will not be required unless the will requests it or the probate court decides one is necessary.

### ***Notice to Creditors***

Publication of the letters testamentary or letters of administration in a newspaper is public (legal) notice of the opening of an estate and the appointment of a personal representative. Indiana law

allows five months from date of public notice to permit creditors to file claims against the estate. However, law requires the estate to give actual or direct notice to those known to have a claim against the estate.

### ***Collection and Management of Assets***

The PR must act as if he or she were the decedent doing what the original owner would do or be required to do if he or she still held the property. The PR has the duty to take possession of the decedent’s assets, pay taxes, collect any income and protect the property, communicate with the court, and distribute assets to the proper individuals.

### ***Preparation and Filing of an Inventory***

Within two months following appointment, the PR must prepare and file an inventory of the decedent’s property. The inventory lists assets and their appraised value less liens, mortgages, and other debts of the estate. Not all property owned by the decedent is subject to the probate procedure. Joint property, property held in trust, and life insurance proceeds are examples of some types of property that largely escape the probate process. However, while there may be many non-probate assets in an estate, these non-probate asset values may be subject to federal estate.

### ***Determining Estate Tax***

For estates with substantial asset values, important among the PR’s duties is complying with the federal estate tax. Currently, in 2015, the estate tax credit negates the tax on over \$5 million in net estate tax taxable assets. The federal estate tax return (Form 706) and associated documents, if required, are due nine months following death. Generally, professional assistance is needed to determine if a federal estate tax return must be filed. Even when no estate tax is due, there may be a requirement to file with the IRS to make portable the unused estate tax credit of a deceased spouse.

Numerous complicated options exist in the federal estate tax rules, generally requiring the assistance of a tax lawyer or a skilled tax practitioner for interpretation and application. For example, two alternative asset valuation rules exist (besides fair market values) for federal estate tax purposes. For example, a decedent’s farmland may be eligible for valuation (IRC Sec. 2032A) at less than fair market value for federal estate tax purposes. Currently, over \$1 million in land value may be removed from the gross, federal estate tax estate for decedents who qualify for Ag use valuation of farm and range land. Conditions apply to be eligible for Ag use valuation; use conditions apply once the land is in the decedent’s estate. More information is available from the author.

A PR is viewed as an agent and is personally responsible for the collection of the federal estate tax.

Once the estate tax (if any) is determined, the net estate to be distributed can be calculated. After each heir's share is calculated, he or she receives his or her share. Shares may be in cash for interests in noncash property — personal and real.

### ***The Final Account***

When all administration activity is completed, formal closing can begin. Basically, this occurs when all property is collected and bills (including estate tax) paid. The first step in the closing of an estate is the preparation of a final account. The accounting is divided into three schedules:

1. Property inventory, including income generated during estate administration,
2. All claims and losses charged against the estate, and
3. The balance of the property remaining in the estate and available for distribution.

Once the final account is completed, the PR can petition the court to approve it and request the authority to make final distribution to the heirs. Notice of the hearing is given to all interested persons.

If the court is fully satisfied, it will grant a decree of final distribution. The court must:

1. Approve the PR's and attorney's fees,
2. Find that the final account is completed,
3. Find that federal estate tax, if any, is paid,
4. Find that all creditors are paid, and
5. Find that the proposed distribution to each heir is equitable and reasonable.

### ***Supplemental Report and Discharge***

At this point, the PR is not done. Distribution of the assets to the appropriate recipients may still be incomplete.

A supplemental report is filed to inform the court of these activities. If the court approves, the PR requests a discharge from any further responsibility. Once discharged, the estate is officially closed.

### ***Delay in Closing an Estate***

Normally, estate administration (probate) involves a lawyer representing a PR before the probate court. Generally, the administration of an estate is done with court supervision at all steps in the process. For practical purposes, the estate may be open for one to three years or until a federal estate tax clearance is received from the IRS. Estates may remain open because of the delay due to auditing the estate tax return. The final estate tax (if any) will depend upon the valuation figures settled upon with the IRS. The federal estate tax may be the only unsettled issue. If a federal estate tax return is not required, a closing may be possible within a year or less after a date of death.

If the estate tax is a significant amount, and a dispute with the IRS is likely, distributions of assets to the heirs may be totally or partially delayed. The PR is liable to both the federal and state governments for the ultimate tax liability. Thus, the PR should be sure that assets are readily available to pay the federal estate tax.

Many other factors, including PR and lawyer procrastination, can add to the normal and necessary delays that prevent the closing of an estate. Generally, when a federal estate tax return is necessary, the delay in the closing of the estate is not the fault of the administration process.

### ***Special Administration Procedures***

As a technical matter, "probate" means proving the will in a probate court. Will disputes are infrequent because there is usually no legal basis to question the will. To reduce the cost of routine estate administration, state law may permit a less formal procedure than that described above — a procedure that reduces court involvement in the estate administration process.

### ***Unsupervised Administration***

Unsupervised administration is an alternative method. "Unsupervised" means an administration without court supervision (once the estate is "open") at each step. An unsupervised administration can occur only if the probate court and all persons with an interest in the estate concur. The interested parties that must agree to permit an unsupervised administration are those who stand to take from the estate by will or by the law of descent.

Further, unsupervised administration is not available unless the estate is solvent, the PR is willing and qualified to act independently, and the will is free of a request to the contrary. Beneficiaries are given direct notice of the request for an unsupervised administration. They are advised by this notice that they may object to an unsupervised administration.

Unsupervised administration may simplify and speed the administration activities and reduce the PR's fees and lawyer's fees. Unsupervised administration neither shortens the five-month notice period for creditors to come forward with claims nor suggests that the administration may be casual or sloppy. Prudent conduct is required, and the beneficiaries are entitled to a detailed accounting of estate assets.

### ***Dispensing with Administration***

"No administration" is a third kind of administration that is essentially an avoidance of administration. It may be an option when the value of the probate assets, less liens and encumbrances, does not exceed \$50,000. In this case, no PR need be appointed. An affidavit procedure can be carried out 45 days after death of the decedent to document a lawful distribution of assets. See IC 29-1-8-1, et seq.

No administration procedures may be considered when the decedent's actual wealth is far greater than \$50,000 after subtracting estate debts. Many assets, such as joint property, life insurance proceeds, property held in a living trust, retirement benefits, and other contractual arrangements are not probate assets. Joint accounts and other non-probate assets can be used to pay valid claims if these claims cannot be paid with other assets.

### Summary Administrative Procedure

In addition, a summary administrative procedure is available if it appears that the value of a decedent's gross probate estate, less liens and encumbrances, does not exceed the sum of:

- (1) Fifty thousand dollars (\$50,000);
- (2) The costs and expenses of administration; and
- (3) Reasonable funeral expenses;

the personal representative or a person acting on behalf of the distributees, without giving notice to creditors, may immediately disburse and distribute the estate to the persons entitled to it and file a closing statement. This procedure is "summary" in that there can be an accounting and an estate "closing" without waiting for the five months, normally required for all claims to be presented, or the 45 days referred to above.

Where this situation presents itself, the PR, or a person acting in that capacity, may be allowed to make distribution of assets to those who are entitled to them by law. The law provides a priority for who gets paid first when assets do not equal debts, allowances and estate expenses. See IC-29-1-8-3.

### Endnotes

<sup>1</sup> There is an over \$5 million applicable exclusion amount (AEA) for 2015 for the federal estate tax. This means the estate tax credit will cover the federal estate tax on a net estate of over \$5 million. And the AEA is indexed, i.e., increases with inflation.

Also, "Special Use Valuation" (SUV) (Internal Revenue Code Sec. 2032A) may benefit a decedent's estate that consists of significant farmland values. Sec. 2032A permits reductions in an estate tax value (indexed) to over \$1 million in 2015 where certain conditions are satisfied before death and the "qualified heirs" continue to meet conditions after a qualified decedent's death for at least 10 years. A decedent who leaves a family-owned business with farmland that may qualify for SUV could have a net estate value of over \$6 million (\$5 million + \$1 million) in 2015 yet have no federal estate tax.

<sup>2</sup> This section benefits from a public service publication of the Indiana State Bar Association, *Estates: Property Ownership and Death Taxes*. Other pamphlets are available by mail from the Indiana State Bar Association, 211 N. Pennsylvania, Indianapolis, IN 46204. Online at: <<http://www.inbar.org/publications2>>.

<sup>3</sup> Indiana law permits a "nuncupative" (oral) will, but only for transfers of personal property of \$1,000 or less (unless in the military in time of war, when the limit is \$10,000) when a person is in imminent peril of death and the person dies of the impending peril. To be upheld, the nuncupative must have been declared before two disinterested witnesses. The nuncupative will does not revoke an existing will; it only brings an adjustment up to the satisfaction of the maximum \$1,000 (or \$10,000) limit. See IC 29-1-5-4.

<sup>4</sup> You may obtain federal tax forms at the Web site <<http://www.irs.ustreas.gov/formspubs/index.html>>.

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