2024

RECENT DEVELOPMENTS

LEGISLATION.

The 2024 Indiana legislative session was historic. I chaired the Probate Review Committee for over twenty-five years reviewing and developing most of the probate, trust and death tax legislation in Indiana. During those twenty-five years, there were two issues which the Probate Trust and Real Property Section has not had much success in changing.

The first issue is the Rule Against Perpetuities. Over forty years ago, I testified before the House and Senate Judiciary Committee regarding the advantages of either repealing or increasing the time limit of the Rule Against Perpetuities. Any changes to the Rule Against Perpetuities were squashed in the House or Senate Judiciary Committees.

In addition, the Section attempted for many years to impose some type of time limit on governmental claims, especially claims by the State for Medicaid reimbursement. Those efforts were also rebuffed.

In 2024, effective July 1 of 2024, we will have significant changes in both the Rule Against Perpetuities and a time limit for claims for Medicaid reimbursement by the State of Indiana.
This article will take a look at the following legislative changes:

1. RULE AGAINST PERPETUITIES – WAIT AND SEE – 360 YEARS;

2. MEDICAID REIMBURSEMENT – CLAIMS – TIME LIMITATION;
3. DISSOLUTION OF MARRIAGE – SUBSEQUENT REMARRIAGE – EFFECT ON ESTATE PLAN;
4. LIMITED LIABILITY COMPANY – DEATH OF SOLE MEMBER;
5. PERSONAL REPRESENTATIVE – CONVICTED FELON;
6. TRANSFER ON DEATH – INSURANCE – COVERAGE;
7. TRANSFER ON DEATH – AUDITOR ENDORSEMENT;
8. TRANSFER ON DEATH – DEED;
9. POWER OF ATTORNEY – EXECUTION;
10. ESTATE OR TRUST – DISTRIBUTION – BASIS;
11. POWER OF ATTORNEY – RECORDING; 12. TRUST – LITIGATION – NO DOCKETING

1. RULE AGAINST PERPETUITIES – WAIT AND SEE – 360 YEARS. The origins of the Rule Against Perpetuities are traced back to the Duke of Norfolk's case, 3Ch. Cas 1, 22 Eng. Rep. 931(1682). In 1886, American legal scholar John Chipman Gray is credited with the modern statement of the rule; "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest." As the rule developed, there also developed legal fictions to help in the enforcement of the rule including but not limited to the fertile-octogenarian and the unborn widow.

When Indiana became a state in 1816, it adopted the English common law as of that time which included the Rule Against Perpetuities.

In 1986 the Commission on Uniform Laws adopted the Uniform Statutory Rule Against Perpetuities Act. Indiana was one of the 29 states which adopted this uniform act. The act created a wait and see period which stated that if the interest vested within 90 years of the date of the creation of the interest, it did not violate the Rule Against Perpetuities.

In another area of the law, Federal Estate Taxes, there developed the generation skipping tax. The generation skipping tax allowed the creation of a trust which had a zero inclusion for both now and in the future on Federal Estate Taxes. As the exemptions increased, the use and benefit of these types of zero inclusion trusts became obvious.

To take benefit of these zero inclusion trusts, many states began amending their Rule Against Perpetuities. About 8 states totally repealed the Rule Against Perpetuities or narrowed it to the point where it does not apply. Only 3 U.S. jurisdictions still have the common law Rule Against Perpetuities. Many of the states amended the Uniform Statutory Rule Against Perpetuities to replace the 90 years with a longer period of time. For example, Florida, for many years increased the 90 years to 360 years and just recently increased it to 1,000 years along with Utah.

Bordering Indiana is a good example of the different attitudes towards the Rule Against Perpetuities.

Illinois allows a trust document to opt out of the Rule if the trust document does not limit the trustees power to sell trust assets for a period beyond the Rule Against Perpetuities. In Illinois, these are known as perpetual trusts.

Kentucky repealed its Rule Against Perpetuities for all interests in real or personal property, but a future interest is void if the power to sell or alienate is suspended for a period longer than 21 years after the death of some person alive when the interest was created.

Michigan's Rule Against Perpetuities statute does not apply to personal property held in trust and the trust can indefinitely suspend the vesting of the future interest, absolute ownership or power of alienation.

Ohio's Rule Against Perpetuities statute does not apply to two categories of post 1999 trusts. The first category is a trust that says the rule does not apply and gives the trustee unlimited power to sell the assets. The second category must be a trust instrument with Ohio law governing, or a substantial part of the trust assets have an Ohio situs, or the trust is administered in Ohio, or at least one trustee is domiciled in Ohio, or the trust instrument was executed in Ohio.

Over forty years ago, testimony was given to the Indiana Legislature asking for the Rule Against Perpetuities to be suspended or extended. There then followed multiple attempts to somehow change the Rule Against Perpetuities to take advantage of the zero inclusion trust. The most recent effort came in 2019 with the adoption of the Indiana Legacy Trust. As originally written, the Legacy Trust provided that the Rule Against Perpetuities did not apply so long as the trustee had the power to alienate. That provision was removed when the Legacy Trust was enacted.

In 2024, there was no organized effort by the Section to pursue changes to the Rule Against Perpetuities. However, the Section monitors proposed legislation including House Bill 1209 which was sponsored by Representative Heine. That bill replaced the 90 years in the Uniform Statutory Rule Against Perpetuities with a 360 year period.

Contact was made with Representative Heine and there then ensued a joint effort by Heine, other sponsors and the Section to get the Rule Against Perpetuities changes. The Section provided language which allowed a change in the Rule Against Perpetuities vesting period time if the trustee had full unrestricted power to alienate trust property and the trust expressly stated that the exception applied.

As passed, House Enrolled Act 1209 does have a lack of coordination. It first adds to the Trust Code a new IC 30-4-5-26 which uses the Section language requiring that the trustee have full unrestricted power of alienation and that the trust expressly state that the Rule Against Perpetuities does not apply. In that circumstance, it says that the 90 years in the Statutory Rule Against Perpetuities is extended to 360 years.

However, House Enrolled Act 1209 goes on to then amend the Uniform Statutory Rule Against Perpetuities, IC 32-17-8-3 and 3.5, by replacing the 90 year period time with 360 years.

This raises the question of application of the changes to existing trusts which may have tried to use a savings clause in case the period of vesting under the Uniform Statutory Rule was extended. If you just read IC 30-4-5-26, the savings clause would not work because the trust does not

expressly state that the exception applies. However, if the savings clause is worded properly, the changes to the Uniform Statutory Rule Against Perpetuities should, in this author's opinion, apply because the 90 years is replaced by 360 years.

In drafting a new trust, the belts and suspenders approach requires the drafter to make sure the trustee had full unrestricted power of alienation and expressly refer to the exception in IC 30-4-5-26.

In House Enrolled Act 1209, there is language referring to a power of appointment ("first power") and the use of that first power to create another power of appointment ("second power"). This is what is known as the Delaware Tax Trap though in current modern usage, it is not much of a tax trap. Originally, it was used in a Delaware situation to make the assets of the trust subject to the power of appointment taxable by the user of the first power of appointment. However, in modern usage and careful drafting, it can be used to give to the holder of the first power, the option to decide whether or not to create a taxable estate and receive the stepped up basis at death.

The language in the Hose Enrolled Act 1209 makes it clear that the period of time under the Uniform Statutory Rule Against Perpetuities begins to run when the first power is exercised. This means that a carefully drafted trust will allow that when the 360 years begins to run out, the power can be exercised creating another 360 years.

2. MEDICAID REIMBURSEMENT – CLAIMS – TIME LIMITATION. Medicaid statutes entitles the State to reimbursement in two different ways. The State can place a lien for

reimbursement against real property owned by the recipient or it can file a claim against the recipient's estate. In Indiana, liens against real estate are not used. This limits the State of Indiana to claims against the estate.

Under the current probate code, there is no time limitation for the State of Indiana to file its claim for reimbursement. The procedure for claims against non-probate transfers does suggest offer some time limitations if the claim is against a non-probate transfer.

Current law requires that State agency charged with Medicaid reimbursement, known in the statutes as the Unit, be notified of the death of all decedents 55 years of age or older.

Recently, the small estate affidavit amount increased to $100,000.00. Testimony was given by the Attorney General's Office in front of the Probate Code Study Commission requesting that a notice also be given to the Unit for a small estate affidavit used as a result of the death of a decedent 55 years of age or older.

In response, the suggestion was made that notice was appropriate in that situation but that in both an estate administration and a notice of a small estate affidavit, there should be a time limitation for the Unit to file its claim for reimbursement. Originally, the Section drafted language to allowed a notice of a small estate affidavit for decedents 55 years of age or older but also included a limitation stating that the Unit had so many days from the receipt of the notice of the small estate affidavit or the administration to file the claim.

This morphed into Senate Enrolled Act 18 and the new subsection (g) under IC 29-14-1 under Section 9, page 11. Subsection (g) makes no reference to notice to the Unit but instead creates a fixed deadline of 120 days after the date of the death of the decedent for the Unit to file a claim in court or to open an estate and file a claim in court. As a result, there is no requirement for notice with a small estate affidavit, though the notice in an estate administration still remains but is not tied to this time limitation.

This change will be hotly disputed by the State of Indiana. We can expect efforts to either repeal or revise this time limitation in future legislation. In the meantime, subsection (g) becomes effective July 1, 2024.

This raises the question of the application of the change to existing claims. Indiana case law indicates that all changes are prospective only. However, in the *Estate of Robinson by Robinson v. C & I Leasing*, 691 N.E. 2nd 474 (Ind. App. 1998), a procedural change was applied to a claim that arose before the effective date of the change. This suggests that claims already filed by the Unit are not affected by this statute, but if the claim has not yet been filed, even though it may have arisen before the effective date of the statute, it would be barred if it does not meet the time limitation. It will be interesting to see how this plays out.

3. DISSOLUTION OF MARRIAGE – REMARRIAGE – ESTATE PLANNING. Senate Enrolled Act 18 in Sections 7 and 13, pages 7, 8 and 16 were meant to be a technical correction to existing Indiana law. Under the existing Indiana law, if the testator was divorced, all will and trust

provisions in favor of the former spouse were revoked. This clear statement left unanswered what effect, if any, remarriage of the two spouses would have on the prior estate plan.

The Section Probate Review Committee formed a subcommittee which recommended that remarriage did not reinstate the former provisions. This was considered to be a very easy solution to the problem because any reinstatement carried with it other issues as we are about to discuss.

The legislature, for whatever reason, took the provision by the Section and said that remarriage reinstated will and trust provisions for the former spouse. The issue this raises is the following timeline: An estate plan for the spouse, dissolution of the marriage, new estate plan, remarriage. Under this timeline, does the remarriage reinstate the old provisions for the spouse or does the new estate plan take precedence? A technical correction can be expected to try and make it clear that the new estate plan will prevail.

4. LIMITED LIABILITY COMPANY – DEATH OF SOLE MEMBER. Senate Enrolled Act 18, Sections 1 to 6, pages 1 to 7 deal with the death of a sole member of a limited liability company. In fact, it is narrowly written to only apply if there is no written operating agreement that specifies what happens on the death of a sole member or there is no transfer on death beneficiary designation.

Currently under Indiana law (IC 23-18), when the sole member of a single member LLC is an individual who dies and there is no written operating agreement, the sole member's death triggers

a dissolution of the LLC. This is true even if the wishes and expectations of the deceased sole member was otherwise and could cause adverse tax consequences.

Senate Enrolled Act 18 amends the limited liability statute to state that the deceased member's interest in the LLC passes to the deceased member's heir if there is no will or legatees if there is a will probated. The sole members and heirs are substituted as successor members. Of course, the sole member can change this result by an operating agreement with a different result or a beneficiary designation under transfer on death.

5. PERSONAL REPRESENTATIVE – CONVICTED FELON. Under IC 29-1-10-1(b), a convicted felon is unable to serve as a personal representative in Indiana.

Senate Enrolled Act 18, Section 8, page 10 provides an exception to this rule giving the court discretion to appoint a convicted felon upon Court's consideration of the following:

1. The amount of time that has lapsed since the person was convicted of a felony;
2. The nature of the felony conviction;
3. Whether the felony conviction is no longer a felony charge under current law;
4. Whether the felony conviction has been expunged;
5. Whether the person's felony conviction was acknowledged in the testator's will or in a consent signed by the distibutees.

These are not weighted factors nor are any of them disqualifications. Perhaps the most important factor is subsection (5), which is the acknowledgement in the will or a consent signed by the distributees of the felony conviction.

6. TRANSFER ON DEATH – INSURANCE COVERAGE. The transfer on death beneficiary designation is allowed on real and personal property. Often, this property is insured by the owner. However, on the owner's death, the insurance, be it casualty or liability, will cease. This produces a gap where the designated beneficiary must scramble to get coverage if so desired.

House Enrolled Act 1034, as amended by House Enrolled Act 1359, addresses this gap by requiring any insurance company to cover the property subject to the transfer on death for sixty (60) days after the death of the insured. This sixty day period is thought to be long enough for the beneficiary to then obtain insurance.

7. TRANSFER ON DEATH – DEED ENDORSEMENT. Currently, IC 32-17-14-11(i) exempts all TOD deeds from any requirement that the County Auditor endorse the TOD deed as a condition to recording. The County Auditor's endorsement is only required on the filing of the affidavit once the owner is dead.

What caused confusion among county officials is that a TOD deed can be in two forms. The first form is a straight beneficiary designation which under the statute is revocable. The second form is a deed to another individual and then TOD to a third person. This is an outright transfer to the first grantee who then has the ability to revoke the TOD designation. Because of the second deed,

some counties refused to endorse the TOD deed for recording because it does make a change in the current record ownership.

Senate Enrolled Act 18, Sections 19 and 23 on pages 28 and 30, provides some clarification regarding the second type of deed but more importantly requires the County Auditor's endorsement on all types of TOD's before they are recorded. This is a major change in the recording of these deeds.

8. POWER OF ATTORNEY – RECORDING. During the recent COVID epidemic, the power of attorney statute was changed in 2020 to allow the principle to sign it in the presence of two disinterested witnesses if the principle cannot find and interact with a notary public. However, the power of attorney must be recorded if the attorney-in-fact uses the power of attorney to convey real property. The issue became recording the power of attorney that was witnessed by two disinterested witnesses.

Senate Enrolled Act 18, Section 17, page 25, makes it clear that a power of attorney with two disinterested witnesses can be recorded if proof, as defined in IC 32-21-2-1.7, is attached to the original power of attorney. That proof is basically a certificate of one of the attesting witnesses which is then notarized.

9. POWER OF ATTORNEY – EXECUTION. Confusion has arisen, especially among certain banks, regarding the proper execution of a power of attorney. This has lead those banks to not give credence to powers of attorney whose execution it questions.

The Section believed that some type of safe harbor on the execution would be necessary. Senate Enrolled Act 18, Section 18, pages 25 and 26, sets out such a safe harbor.

10. DISTRIBUTION – BASIS. IC 29-1-17-11(b) and IC 30-4-3-3(d) require the fiduciary in either an estate or a trust, to make non-pro rata in kind distributions of non-cash assets in order to fund the gifts. The fiduciary is required to make a "fair and equitable allocation of the total potential built in gain or loss among all the beneficiaries who receive the distribution." It appears that Indiana is the only jurisdiction in the United States requiring this fair and equitable allocation, thereby complicating distributions from estates and trusts.

The Section recommended that these presumptions be reversed by repealing that requirement.

Senate Enrolled Act 18, Sections 10 and 14 on pages 12 and 21, carry out that intent with the revocation of the fair and equitable requirement and a specific statement that the fiduciary is not required to allocate and distribute particular assets based on the potential gain or loss that the beneficiary would realize if the assets were sold.

11. TRUST – NO DOCKETING. Current Indiana law requires the docketing of a trust before the court has jurisdiction over it.

Senate Enrolled Act 18 Section 16 page 24, strikes the requirement of docketing and simply requires a copy of the trust instrument to be filed along with any court documents.

RECENT REPORTED CASES

JURISDICTION. *Tingley v. First Financial Bank*, 2024 Ind. App. LEXIS 84. An Illinois land trust was created in 2002. At its creation, First National Bank of Marshall, Illinois was the trustee. By acquisition and merger, the trustee became First Financial Bank with its headquarters in Terre Haute, Indiana. A complaint was filed in Indiana asking the trustee to carry out the terms of the trust which would be the public auction of the almost 600 acres of real estate. The Defendant's filed a Motion to Dismiss for lack of subject matter jurisdiction which the trial court granted.
The Court of Appeals reversed and remanded. The Defendants relied mostly on *In Re Alford*, 897 N.E. 2nd 946, which involved an Indiana trust which was exclusively administered in Virginia by a Virginia resident who maintained all the trust records there. In Alfort, the Court of Appeals affirmed the trial court's dismissal. Judge Brown dissented, finding there was both subject matter and personal jurisdiction. In Tingley, the Court of Appeals agreed mostly with Judge Brown's dissent, finding that the trial court did have subject matter and personal jurisdiction. The Alford case was not expressly overruled but clearly distinguished.

TRUST – CONTEST. *Bosworth v. Bosworth*, 2024 Ind. App. LEXIS 65 and *Bosworth v. Bosworth*, 2024 Ind. App. LEXIS 64. These two cases are actually separate opinions. One case involves the trust of H. Louise Bosworth, while the other case involves the trust of Neil L. Bosworth. Two sisters docketed both trusts and provided a copy to their brother. Within ninety (90) days of receiving the docketed trusts and certification, the brother then docketed the trust and four amendments, increasing his share of the farm real estate. The sisters argued that the brother did not comply with IC 30-4-6-14 because he did not commence a "judicial proceeding". They cited the will contest case of *Blackman v. Gholson*, 46 N.E. 3rd 975 (Ind. App. 2015) where

separate judicial action had not been filed. The trial court denied the sister's Motion for Summary Judgment.

One interlocutory appeal, the Court of Appeals affirmed the trial court in both cases. It distinguished the will contest statute from the trust contest statute in that the will contest statute specifically requires a separate cause of action. However, the trust contest statute only required a judicial proceeding which the brother met by docketing the trust and four amendments.

WILL CONTEST – SUMMARY JUDGMENT. *Hummer v. Donathan*, 2024 Ind. App. LEXIS 78. Norma Donathan died testate in 2020 survived by four children. The will executed in 2016 and amended in 2018 disinherited Cathy. Cathy filed a will contest. On Cathy's death, her children became plaintiffs. The trial court granted summary judgment to the estate on the issues of unsound mind and undue influence.

The Court of Appeals affirmed reviewing the extensive evidence submitted on the unsound mind issue. It found significant evidence showing that Norma had twice disinherited Cathy over a period of time. On the undue influence, they found Norma was not subject to undue influence.

FINAL ACCOUNTING – OBJECTION – VEXATIOUS. *Smith v. Ropp* 2024 Ind. App. LEXIS 79. Robin Ropp died testate on November 5, 2018, survived by her husband Jay and her mother, Smith. Jay, Smith, and Rhonda McClure were named co-personal representatives. Throughout the course of the administration, Smith consistently challenged Jay on a variety of different issues, many which the trial court found to be without merit. When Jay filed a final accounting, the trial court held that Smith did not have standing to challenge it.

The Court of Appeals affirmed. While it states numerous times that Smith did have standing to object to the final accounting, her vexatious and repetitive challenges deprived her grandchildren

of the inheritance. The trial court had the authority to impose restrictions on any litigant who persists with meritless claims.

SENIOR CONSUMER PROTECTION ACT. *McIntosh v. McIntosh*, 222 N.E. 3rd 998. IC 24-4.6-6 contains the Senior Consumer Protection Act (SCPA). The act contains many definitions but generally prohibits the financial exploitation of a senior consumer. The burden of proof is a preponderance of the evidence and among the remedies is recovery of attorney's fees. Reberta McIntosh was 92 years of age. She had been diagnosed with dementia though the reports said she was sharp at times and other times not. Reberta fell and was given to the care of her eldest son, Jimmy, and his wife Sheryl. Jimmy and Sheryl moved into Reberta's home. Jimmy attempted to draft a warranty deed conveying the ownership of the home to Jimmy and his wife. Reberta signed this deed, but it was unrecordable because it lacked a complete legal description. About two and one-half years later, Jimmy went to an attorney. Another sibling informed Jimmy that Reberta did not want to sign the deed. Jimmy apparently stood over Reberta as she sat in the chair yelling "some pretty harsh things to her." Some time later, Jimmy and Sheryl took Reberta to the attorney's office where the deed was signed. Later, Reberta executed another deed keeping a life estate on her home and splitting the remainder equally among her children. Later, Reberta and another sibling filed a Petition to Quite Title alleging that Jimmy and Sheryl violated the SCPA. Following a bench trial, the trial court entered specific findings that they did violate the SCPA and voided the deed to Jimmy and Sheryl and ordered them to pay Reberta's attorney's fees totaling $8,050.00.

The Court of Appeals affirmed. Jimmy and Sheryl were successful in convincing the Court of Appeals it should not apply any of the burden shifting paradigms in undue influence cases because the SCPA was a specific statutory remedy. The Court of Appeals reviewed the Act and found more

than sufficient evidence under SCPA to support the trial court's decision even though it had used the wrong standard. The Court of Appeals also handled a small procedural glitch in the subsequent Reberta deed to all four children with retaining a life estate. It found the issues were not substantial enough to void the deed.