

## **INTRODUCTION**

Why is estate planning important? It is your final expression to your family and loved ones. A good estate plan can be of great benefit to your survivors. No estate plan or improper estate planning can cause numerous problems such as disputes among your family members and destruction of family relationships, unwanted or unexpected distributions of your property, and unnecessary costs and death taxes.

Why is disability planning important? Disability and incompetency can happen suddenly and without warning. You should sign a living will, appointment of health care representative, HIPAA release authority, and power of attorney while you are healthy and competent. You can decide issues relating to life support and who should make your health care decisions. You can decide who will have authority over your finances and property.

Use caution in accepting estate and disability planning recommendations. Many people give advice who are not properly trained and who do not have sufficient experience. You should always have a competent attorney involved in formulating your estate and disability plan and in preparing all of the legal documents. Please remember that it is illegal to practice law in Indiana without a license, and only attorneys can legally prepare legal documents and give legal advice. Be wary of receiving legal advice from others, as it is often wrong.

This article is written to provide you with general educational information. This article is not a substitute for legal advice concerning your particular situation and your estate and disability plan.

## **LIVING WILL**

Indiana law allows you to sign a living will that will control whether your life is to be artificially prolonged if your attending physician certifies in writing that you have an incurable injury, disease, or illness, that your death will occur within a short period of time, and that the use of life prolonging procedures would serve only to

artificially prolong the dying process. A living will requires procedures or medication necessary to provide you with comfort care or to alleviate pain.

If you signed a living will before July 1, 1994, you should consider signing a new living will, because a new law took effect that allows you to choose whether or not you want to be given artificially supplied nutrition and hydration under certain circumstances or you can elect to leave those decisions up to your health care representative. Living wills signed before July 1, 1994, require artificially supplied nutrition and hydration.

Although Indiana law requires certain provisions in a living will, these provisions may include additional specific directions. Most of our clients want the consent of their health care representative incorporated into their living wills, because they don't want the life and death decision left solely to their attending physician. Standard living will forms do not have provisions that require the consent of your health care representative.

### **APPOINTMENT OF HEALTH CARE REPRESENTATIVE**

If you become incapable of consenting to health care, then Indiana law allows the following persons to consent to your health care: your spouse, your parent, any of your adult children, and any of your adult siblings. The Indiana statute does not set out any priority among these persons, meaning that any of them can authorize your health care.

Indiana law also allows you to decide who has the authority to make your health care decisions by appointing your health care representative. Even though you appoint someone as your health care representative you will still be in control of all of your own health care decisions as long as your physician determines that you are capable of consenting. After your attending physician determines that you are no longer capable of consenting to your health care, your health care decisions would be made by the person or persons who you have appointed as your health care representative.

Your health care representative could be your spouse, child, family member, or friend. You should choose someone who would make health care decisions consistent with how you would want them to be made. You can designate your first, second, and third choices.

Your health care representative can be given the power to do the following:

1. Have access to your medical records,
2. Disclose your medical information to others,
3. Hire and discharge your doctors and health care providers,
4. Consent or refuse to consent to medical care and to delegate this authority to anyone else,
5. Consent to psychiatric care and to voluntarily commit you to a psychiatric care facility,
6. Provide you with appropriate relief from pain,
7. Arrange for your care in a hospital, nursing home, or hospice,
8. Make anatomical gifts on your behalf,
9. Request an autopsy of your remains, and
10. Determine the disposition of your body after your death.

Your health care representative can be authorized to make decisions in your best interest concerning withdrawal or withholding of health care even if death may result. This requires that certain language be included in your appointment that conforms with the requirements of Indiana law.

You should sign your appointment while you are in good health. Once you are in need of having a health care representative you may not have sufficient mental capacity to legally appoint one. Your failure to appoint a health care representative could also result in the necessity of a guardianship proceeding through a court.

You should make sure your health care representative has a copy of your appointment, and you should have a discussion with your health care representative about your desires. I have written a publication entitled "My Wishes" that can be

used as a format to communicate your desires to your health care representative relating to donation of your body parts, your funeral and burial, and your obituary. This publication is available from my office.

### **HIPAA RELEASE AUTHORITY**

The Health Insurance Portability and Accountability Act (HIPAA) became effective in 2003. This act makes it unlawful for your doctor or health care provider to make certain disclosures or releases of your health care information or records. You should sign a HIPAA Release Authority that will authorize your doctors and health care providers to disclose and release your health care information and records to those persons who you appoint as your health care representative.

### **POWER OF ATTORNEY**

A power of attorney is a written document giving someone else the power to act on your behalf. This person is called an attorney-in-fact. A general power of attorney can give your designated agent or agents the power to do almost anything with your property, and a limited power of attorney gives authority for only certain transactions such as selling a house. Your power of attorney can be durable which means that it can remain in effect even though you later become incompetent. You should never give a power of attorney to someone who is not absolutely and completely trustworthy.

A general power of attorney can be immediately effective, or it can become effective after your doctor certifies that you are unable to manage your financial affairs. If your attorney-in-fact is completely trustworthy, then you should not be concerned about giving a power of attorney that is immediately effective. This type is easier to use as the attorney-in-fact does not have to produce a current written opinion from your doctor that you are unable to manage your financial affairs.

If you become incompetent and unable to manage your financial affairs and have not given someone a power of attorney, then it may be necessary for your family to hire an attorney and file a petition with a court to have someone appointed

guardian over your property. The guardian would have the legal authority to manage your personal finances and property under the supervision of a court. The guardian must have a bond that can be costly. An inventory and appraisal of all your property must be filed with the court. Guardians must obtain court approval for a number of matters, including the sale of property and periodic accountings. Guardianships can be cumbersome, costly, and time-consuming. A guardianship can usually be avoided by giving someone a durable power of attorney while you are in good health.

### **MEDICAID**

It is quite common for elderly persons to need long term care in a nursing home. Medicare benefits usually cover only 20 days of nursing home expenses and may cover a portion of the expenses after that time not to exceed a total of 100 days. Most people do not have long term care or other insurance that will pay the nursing home and medication expenses.

The average monthly nursing home expense in Indiana is \$3,898.00, and the prescription medication expenses can easily be several hundred dollars per month. You and your family should be aware that certain actions can be taken with your assets even after you enter the nursing home that may allow your nursing home and prescription medication expenses to be paid by Medicaid and at the same time preserve and protect your property so that it can pass to your family. Many families do not get professional help and guidance, and instead spend all of the assets to pay nursing home and medication expenses, leaving the person destitute and relying on the politicians and government to provide adequate care. This is unwise.

Medicaid benefits may also be available to pay for in-home health care services and assisting living expenses.

In order to allow your family to be in a position to perform transactions that will qualify you for Medicaid and at the same time protect as much of your property as possible, you need special provisions in your power of attorney. These provisions could include authority to gift your assets in unlimited amounts to your

spouse and authority to pay for caregiving and other services performed by your attorney-in-fact, members of your family, and others.

If you have an accident or develop a disease or illness that may require future home health care services, assisted living, or nursing home care, then you or your representative should immediately consult with an elder law attorney who is well-versed in Medicaid law.

The Deficit Reduction Act signed into law by President Bush on February 8, 2006 imposes penalties that will disqualify a person from receiving Medicaid benefits who has made gifts to persons (other than a spouse), churches, and/or charities on or after February 8, 2006 within 5 years prior to applying for Medicaid benefits. As a consequence, a person should not gift any property or money to anyone other than a spouse if it is possible that the person may need to apply to Medicaid benefits within 5 years. An elder law attorney should be consulted before any gift is made so that the consequences of making a gift can be fully understood.

Medicaid planning is a highly technical and specialized discipline, and you should choose your advisor very carefully. We have found that many families have received bad advice.

You should get Medicaid advice from a qualified elder law attorney immediately upon knowing that there may be a need for in-home health care services, assisted living, or nursing home care.

### **"PROBATE" AND WHO RECEIVES WHAT**

In order to understand how your property would be distributed after your death, it is important to understand what property would pass outside of your

"estate" and what property would be included as part of your "estate." Your Last Will and Testament will only distribute your property that is a part of your "estate".

Examples of property distributions that are not included as a part of your estate are as follows:

1. Absent a clear contrary intention expressed in a written instrument, all household goods in possession of both husband and wife acquired during their marriage become the property of the surviving spouse.

2. A surviving joint tenant with rights of survivorship usually receives ownership of the property held in joint tenancy at the death of a joint tenant. Unless there is clear and convincing evidence of a different intention at the time an account is created, money on deposit at the death of a party to a joint account goes to the surviving party or parties.

3. Accounts that are payable on death (P.O.D. accounts) or that are transfer on death (T.O.D. accounts) are distributed to the designated beneficiaries.

4. Title to real estate deeded to a husband and wife during their marriage passes to the surviving spouse.

5. Life insurance, annuities, individual retirement accounts, and retirement savings plans are distributed to the designated beneficiaries.

6. Property owned by the trustee of a trust will be distributed as provided by the terms of the trust.

Probate is the legal procedure for a court to determine that a person's will is valid under state law. In Indiana, a will must be in writing and must be signed in the presence of two (2) disinterested witnesses who also sign the will in the presence of each other. Wills that do not comply with the legal requirements will not be probated by the court and will not control how the estate would be distributed.

The estate of a decedent who does not have a probated will is distributed as provided by the state intestacy law. For example, a decedent who dies a resident of Indiana and leaves a spouse, one (1) child, and a deceased child who has a child surviving would have his estate distributed as follows: a \$25,000.00 widow's allowance to his spouse, and the remaining balance of his net estate as follows: one-half (1/2) to his spouse, one-fourth (1/4) to his surviving child, and one-fourth (1/4) to the children of his deceased child. If the surviving spouse is a second or other subsequent spouse, then the spouse receives a \$25,000.00 widow's allowance, one-half (1/2) of the personal property, and one-fourth (1/4) of the fair market value of the real estate.

Your will or the intestacy law (if you have no will) will determine the distribution of property that is part of your estate.

A good estate plan must include proper ownership and titling of property and proper beneficiary designations of life insurance, annuities, and retirement accounts.

### **RIGHTS OF SURVIVING SPOUSE**

Your estate plan must consider the rights of your surviving spouse as these rights relate to distributions you want to make to your children from a previous marriage or to others.

In Indiana, surviving spouses have the following rights, among others:

1. Absent a clear contrary intention expressed in a written instrument, all household goods in possession of both a husband and wife and acquired during their marriage become the property of the surviving spouse.

2. The surviving spouse is entitled to an allowance of \$25,000.00 in personal property from the deceased spouse's estate, and if the personal property is not sufficient the balance will be satisfied from real estate constituting a part of the

estate. This allowance is not chargeable against the share that is otherwise to be distributed to the surviving spouse.

3. The surviving spouse generally has the right to receive certain qualified retirement plan benefits belonging to the deceased spouse (unless this right was properly waived by the surviving spouse).

4. The surviving spouse can file an election to take against the deceased spouse's will so that the deceased spouse gets one-half (1/2) of the net estate. However, if the surviving spouse is a second or subsequent spouse who did not have a child by the decedent, and if the decedent left a surviving child or descendant of a child, then if the surviving spouse elects to take against the Last Will and Testament, then the election entitles the surviving spouse to take one-third (1/3) of the net personal property in the estate and one-fourth (1/4) of the fair market value of the real estate in the estate.

These rights can be waived or limited by a valid enforceable written agreement between the spouses (either a pre-nuptial or possibly a post-nuptial agreement supported by sufficient consideration). A person's estate plan can be destroyed by a surviving spouse or the surviving spouse's attorney-in-fact claiming the spousal rights after death when the estate plan did not include a valid enforceable pre-nuptial or post-nuptial agreement. It is difficult to have an enforceable post-nuptial agreement (signed after the marriage), as it must be supported by sufficient consideration.

### **TRUSTS FOR CHILDREN AND OTHERS**

If any person who could potentially receive any of your property or life insurance after your death is a child or a young adult you should consider whether to have this property or money distributed to a trustee of a trust for the benefit of this person. Without making provisions for a trust in your estate plan any distribution to a minor child must usually be managed by a guardian appointed by a court until the

child is eighteen (18) years old at which time the child is entitled to have all of the property or money to spend as he or she desires.

It is usually better to postpone distributions to a more mature age when wiser and more mature decisions are more likely to be made about the use or investment of the inheritance. Also, giving property outright to a young adult too early in life may cause the person to lose motivation in working or in educational pursuits.

You should consider an estate plan that provides for distributions to the trustee of a trust to be established for the benefit of your heir if that person is not at least a certain age at your death. You can direct how the trustee is to use the money. Many trusts provide that the trustee has discretion in using the trust income and principal to provide or help provide for the person's support, maintenance, health and educational needs. The trust can also provide for outright distributions of the remaining property at more mature ages. For example, the provisions of the trust could provide that the trustee distribute the property to the beneficiary at age 30, or 1/2 at age 30 and 1/2 at age 35, or 1/3 at age 30, 1/3 at age 35, and 1/3 at age 40, or whatever other ages and proportions that you think would be appropriate.

Trusts can also be established for persons who have a disability or who have alcohol or drug dependency.

### **SPECIAL NEEDS TRUSTS**

If your spouse enters a nursing home and if there is not sufficient medical or long term care insurance to cover the health care expenses, then you should immediately seek competent advice concerning Medicaid qualification planning and asset protection. It is usually advisable for the spouse at home to either disinherit the spouse in the nursing home or establish a special needs trust for the benefit of the surviving spouse. If the spouse at home dies first and leaves all of the assets to the spouse in the nursing home, then these assets can cause a disqualification for Medicaid benefits until these assets are "spent down" for care.

One of the best approaches is for the spouse at home to leave the assets to the trustee of a special needs trust. If this trust is drafted properly then the assets in the trust will not cause the spouse in the nursing home to be disqualified from receiving Medicaid benefits; however, the assets can be used to provide certain extras that are not paid for by Medicaid. After the spouse in the nursing home dies, then the assets in the special needs trust can pass to the children or other family members, free from any Medicaid reimbursement claim.

If you desire to leave an inheritance to a child or other person who is disabled and who receives Medicaid, certain Social Security benefits, or certain other governmental benefits, then you should not leave the property outright to that person, as this distribution could cause the person to lose their governmental benefits. Instead, you should consider establishing a special needs trust for that person.

### **PARENTS WHO HAVE A COURT-ORDERED SUPPORT OBLIGATION**

A person's obligations to pay child support do not terminate upon death. However, if the parent obligated to pay child support dies, then the amount of support may be modified or revoked by the court "to the extent just and appropriate under the circumstances" on petition of the personal representative of the parent's estate. It is usually appropriate to reduce the child support obligation if Social Security survivor's benefits are paid.

This future child support obligation can result in a claim against the estate that is difficult to resolve. Having provisions in an estate plan for a trustee of a trust to fulfill these obligations as they become due and owing from life insurance or other money distributed to the trust after the parent's death can be very helpful in resolving this claim.

### **FEDERAL ESTATE TAX**

Property potentially subject to federal estate tax would include all of your real estate and personal property, individual retirement accounts, qualified retirement

savings plans, annuities, your interest in any joint property, your P.O.D. and T.O.D. accounts, the amount of life insurance (owned by you) on your life that is payable by reason of your death, and certain gifts that you made within three (3) years prior to your death. The total value of all of this property and perhaps other property at death constitutes your "gross estate" for federal estate tax purposes. Assuming that you have the total unified federal estate tax credit available at your death (the credit can be reduced or eliminated by taxable gifts during your lifetime), then there would be no requirement to file a federal estate tax return if the total value of your "gross estate" is less than the following unified credit equivalent amounts:

\$2,000,000.00 if you die in 2006, 2007, or 2008

\$3,500,000.00 if you die in 2009

No estate tax if you die in 2010.

\$1,000,000.00 if you die in 2011 or after

(unless this is changed by a new law).

However, if you made any gifts of "future interests" or any gifts of "present interests" in property during your lifetime that exceeded the exempt amounts (total value not to exceed \$3,000 per donee each calendar year prior to 1982, not to exceed \$10,000 per donee each calendar year after 1981 through 2001, and not to exceed \$11,000.00 per donee per calendar year during and after 2002, and \$12,000 per donee per calendar year during and after 2005, and as the amount may be adjusted in later years), then the excess gifts will reduce the amount of the unified credit available to your estate. The 2006 gift tax annual exclusion amount of \$12,000 per donee per calendar year will be adjusted for inflation by the I.R.S. at various times in the future. There is a lifetime gift tax exemption of \$1,000,000.00 from 2002 through 2010.

Once an estate is subjected to federal estate tax, the tax rates are extremely high. The federal estate tax return and the estate tax is due nine (9) months after the date of death. If the full unified credit is available at death, then the portion of the estate being subjected to estate tax starts being taxed at 37% with the rates getting steadily higher on larger portions of the estate up to certain maximums depending on the year of death, ranging from 46% in 2006 to 45% in 2009. There is an unlimited marital deduction meaning that to the extent property is transferred to a

surviving spouse who is a U.S. citizen (that meets the requirements for the marital deduction), this property would not be subject to federal estate tax.

There are several estate planning methods that should be considered to eliminate or reduce federal estate taxes. These include: a credit shelter trust for the surviving spouse (also referred to as a bypass trust), a QTIP (qualified terminal interest property) trust, an irrevocable life insurance trust, charitable trusts and bequests, and lifetime gifts to reduce the size of the estate.

A credit shelter trust could be used by a married person. Upon the death of the first spouse a sum not exceeding to the available unified credit equivalent amount would be distributed to a credit shelter trust with the balance of the estate being distributed outright or in a marital deduction trust for the benefit of the surviving spouse. The surviving spouse could have benefits from the credit shelter trust which could include: (1) the right to receive net income for life, (2) the right to receive \$5,000.00 or 5% of the value of the trust, whichever is greater, each calendar year, and (3) the right to receive distributions of principal from the trust in order to provide for the surviving spouse's support, maintenance, health, and educational needs. If the trust is set up properly, the amount of the property and investments in the credit shelter trust would not be included in the surviving spouse's estate for federal estate tax purposes. As a consequence, by utilizing this device, \$3,000,000.00 can be passed on to the children free of federal estate tax if both spouses die in 2005 (the amount is higher if the deaths occur in later years). Using the credit shelter trust can save significant sums in federal estate tax.

Life insurance trusts are another way to save federal estate taxes. An irrevocable trust is set-up whereby the trustee purchases and owns a life insurance policy. The use of a joint and survivor life insurance policy insuring the joint lives of a husband and wife should be considered. The policy would pay death benefits on the second to die, which would go into the trust. The person establishing the trust would gift the amount of insurance premiums to the trustee of the trust each year. There needs to be a notice to the beneficiaries of the trust of the right to withdraw these gifts in order to qualify the gifts for the annual gift tax exclusion. After death occurs the insurance proceeds are paid to the trust and are distributed to

the trust beneficiaries (i.e., the children) as provided by the terms of the trust. The insurance proceeds are not subjected to federal estate tax.

A third way to reduce estate taxes is to leave part of the estate to a qualified charity or church or to a charitable trust. A gift can be made to a charitable remainder trust. The gift could be of highly appreciated property, and the trustee could sell the property and pay no capital gains tax. The donor receives a specified amount of income from the trust for life or a term of years, and upon the donor's death or after the term of years the remaining trust property goes to the charity. The amount in the trust is not taxed for federal estate tax purposes, and the donor gets a charitable income tax deduction when the property is transferred to the trust.

Another estate planning device is making gifts during lifetime. Under present law, a person can make total gifts of \$12,000.00 per person each calendar year. In the case of married persons who jointly make these gifts (which may require the filing of a gift tax return to "split the gift"), the sum is increased to \$24,000.00 per person each calendar year. These amounts will increase at various times in the future due to inflation adjustments. To the extent gifts do not exceed these annual exclusion amounts, it is not necessary to file a gift tax return nor do these gifts reduce the amount of the available unified credit for federal estate tax purposes. Gifts that do not exceed the annual exclusion amounts within three (3) years of death will not be subjected to estate tax as "gifts in contemplation of death."

### **INDIANA INHERITANCE TAX**

Indiana inheritance tax would tax all of your real estate and personal property, individual retirement accounts, retirement savings plans, annuities, your interest in any joint property, your P.O.D. and T.O.D. accounts, certain gifts that you made within one (1) year prior to your death (there is no annual exclusion amount), and perhaps other property. Indiana inheritance tax does not apply to transfers of property to a surviving spouse nor does it generally apply to life insurance proceeds payable to a beneficiary other than the estate.

Indiana inheritance tax is computed on the share of property received by each beneficiary. The exemption amounts and rates of taxation vary depending upon

who the beneficiary is. For example, the first \$100,000.00 received by a parent, child, stepchild, grandchild or great-grandchild is not subject to inheritance tax, and, after certain deductions, the next \$25,000.00 is subject to a 1% inheritance tax, the next \$25,000.00 is subject to a 2% inheritance tax, and the next \$150,000.00 is subject to a 3% inheritance tax, and the next \$100,000.00 is subject to a 4% inheritance tax, and so on, with the maximum rate of taxation being 10% on amounts over \$1,500,000.00. However, if the person who inherits is a brother, sister, niece, nephew, or a spouse of a child, the exempt amount is \$500.00 with the first \$100,000.00 being taxed at 7%, and the next \$400,000.00 being taxed at 10%, etcetera, with the maximum rate being 15% on the amount over \$1,500,000.00. For others, there is only a \$100.00 exemption with the rate starting at 10% on the amount up to \$100,000.00, 15% on the amount over \$100,000.00 and 20% for the amount over \$1,000,000.00.

There is a 5% discount from the total amount of tax that is available if the tax is paid within nine (9) months after date of death. The tax must be paid within twelve (12) months after date of death.

### **LIVING TRUSTS vs. "PROBATE"**

Living trusts can be very useful and appropriate estate planning devices; however, they are not the best estate plan for everyone. Living trusts are being "sold" by some insurance agents, attorneys, and others by making false or deceptive representations. The mass-marketed living trusts are typically prepared with little or no individualized drafting. Prices being charged for mass-marketed living trusts may be much higher than what a competent attorney would charge to prepare a living trust and to help properly implement the transfer of property to the trustee of this trust.

There are generally two (2) types of trusts. A testamentary trust is established by a Last Will and Testament, and a living trust is established by a written agreement between the person establishing the trust (the "settlor") and the trustee of the trust. A trust must have a trustee who owns, administers, and distributes the trust property for the benefit of a beneficiary or beneficiaries in accordance with the terms of the trust agreement.

Trusts are very useful estate planning devices, because they can control the management, use, and disposition of someone's property after death. For example, without using a trust, there could be an outright distribution of property to your child if your child is at least eighteen (18) years old. By using a testamentary trust, this distribution can be delayed until older ages when the child is more mature and able to wisely conserve and use the inheritance.

The typical "revocable living trust" would involve the person signing a trust agreement appointing himself, as trustee. He would then transfer ownership of his house, furniture and household goods, pets, automobiles, investments, accounts, and all of his other property to himself as trustee of the living trust. The trust agreement would provide that he could use this property in any way he saw fit during his lifetime, and he could amend or revoke the trust at any time during his lifetime. Upon his death, the trust agreement would designate a successor trustee, such as a surviving spouse or child. The trust agreement would allow the successor trustee to pay the funeral expenses, debts, and death taxes, and would require the trustee to distribute the balance of the property as provided by the trust agreement (for example, to the surviving children).

In order to "avoid probate" (having an estate), the person must have transferred ownership of all of his property to the trustee of the trust by the time of his death, and if any property is not transferred to the trustee, then this property could be the subject of an estate administration proceeding through the Court. Many people have living trusts, but they have failed to transfer ownership of all of their property to the trustee so when they die they will have some transfers being made via the trust provisions and other transfers being made according to a Last Will and Testament or intestacy laws through an estate administration proceeding.

A person who has established a trust should also have a "pourover will" that would distribute any property that would be owned by such person (and not owned by the trust) to the trustee of the trust to be distributed according to the trust provisions. It may not be necessary to have an estate administration proceeding if the total value of the estate (less liens and encumbrances) is \$25,000 or less.

There are many considerations in determining whether a person should have a living trust. Some of the considerations are as follows:

1. Cost of a Living Trust. It is usually much more expensive to establish a living trust and to transfer ownership of all of your property to the trustee than it is to continue to own your property in your own name and provide for the distribution of your estate by a Last Will and Testament. Prices quoted by out of town attorneys who have conducted living trust seminars in Columbus, Indiana range from \$1,500 to \$2,000 for a living trust for a single person and \$2,500 to \$3,500 for a married couple. These costs are usually significantly higher than what our office generally charges for living trusts. The extra costs of a living trust estate plan plus the reasonable rate of return on the extra costs to the date of death may exceed the costs of an estate administration proceeding. Wills usually cost much less than living trusts and the fees associated with transferring all of the property to a living trust.

2. Funding of the Trust. In order to cause the distribution of all a person's property from a living trust, it is necessary that all of the person's property be owned by the trustee of the trust so that they have no "estate" when they die. As a consequence, all of a person's property should be transferred to the trustee of the living trust at its inception, and any additional property acquired in the future must also be transferred to the trustee of the living trust. With a Last Will and Testament, the person continues to own property in his or her own name.

3. Property Management After Disability. Living trust salespersons usually represent that a living trust can provide for the management of your property in the event you (the trustee and the beneficiary of the trust) become disabled. The trust agreement designates a successor trustee to serve in the event you, as the trustee, become disabled or incompetent. The successor trustee takes over management of the trust property and payment of your bills and expenses from the trust income and property. On the other hand, even without a living trust you should have a general power of attorney designating your spouse, your child or children, or some other trusted person or bank to be your attorney-in-fact to manage your property and pay your bills and expenses if you become incompetent or disabled. You do not need a living trust to accomplish this if you have a power of attorney.

4. Medicaid. Revocable living trusts do not offer advantages for Medicaid qualification purposes, as the property owned by the trustee is counted as an "available resource". We have reviewed some joint revocable living trusts established by a husband and wife that have provisions that prevent Medicaid qualification without spending one-half (1/2) of the trust assets on nursing home and medical care. A trust agreement should have special provisions that permit the trustee to perform certain transactions with the property in the trust so that the person who established the trust can qualify for Medicaid. For gifts made prior to February 8, 2006, Indiana has a "lookback period" of 3 years from the date of the Medicaid application for gifts that are made by an individual; however, the lookback period is 5 years for any gift from a trust. For gifts made on or after February 8, 2006, the lookback period is 5 years for gifts made by an individual or from a trust. Gifts made to anyone other than a spouse within the lookback period will cause a period of disqualification from receiving Medicaid benefits.

5. Income Taxes. Current rules do not require a separate income tax return and federal identification number for a trust when the person who establishes the trust is also the trustee. However, once a successor trustee takes over a federal identification number must be obtained, and state and federal fiduciary income tax returns must be prepared and filed for the trust each year. Similarly, the personal representative of an estate must obtain a federal identification number and file fiduciary income tax returns for an estate.

6. Will Contest and Trust Contest. Both wills and trusts can be contested. A will contest must be filed with the court within three (3) months after the will is probated, but the period to contest a trust is much longer. Certain mental competency is required to establish a valid will and to establish a valid trust.

7. Privacy. It is not necessary for a living trust to be "probated", and as a consequence the trust agreement is not routinely filed with the court. On the other hand, if any dispute or issue needs to be determined by a court, then the trust will need to be filed with the court. Although a Last Will and Testament becomes a public record after it is admitted to probate, the nature and amount of the property of the estate can remain private. Although the personal representative of an estate must prepare an inventory of the estate assets within two (2) months after being

appointed, there is no requirement that this inventory be filed with the court. Most estates are administered in Indiana using the "unsupervised administration" procedures that do not require the filing of a final accounting or any financial information with the court. Also, although the Indiana inheritance tax return is filed with the court (even when there is a living trust being settled), the courts must keep the inheritance tax returns confidential.

8. Trustee Fees. Living trust salespersons often represent that living trusts save executor (personal representative) fees. The successor trustee is also entitled to be paid a fee.

9. Creditor Claims. A revocable living trust will not protect the person who establishes the trust from creditor claims against the trust property during the person's lifetime. When an estate administration proceeding is commenced, the personal representative of the estate is required to send notice to all known creditors of the decedent, and if these creditors fail to file written claims against the estate within three (3) months, then these claims are barred. However, if property is distributed from a living trust, then the three (3) month claim period would not apply, and a nine (9) month claim period may apply. Indiana has a state statute that makes assets in a revocable living trust subject to creditor claims and to the statutory allowances to the decedent's spouse and children if the decedent's probate estate is insufficient to satisfy those claims. The claim period is nine (9) months from the date of death.

10. Settlement of Estates and Trusts, Attorney's Fees, and Death Taxes. Those who sell living trusts typically represent that by "avoiding probate" with a living trust, there is a huge saving of attorney's fees and court costs. Our office usually charges between 2%-4% of the value of the probate estate as attorney's fees for a probate estate settlement administration. The estate assets are invested during administration, and the income generated from the investments will pay or help pay the attorney's fees, expenses, and court costs. Additionally, the amount of the attorney's fees is deductible on the Indiana inheritance tax return and federal estate tax return or on the estate income tax returns. Where the income from estate assets do not equal or exceed the amount of the attorney fee deduction on the estate income tax returns, a deduction for the excess attorney fee amount can be distributed

to the beneficiaries of the residuary estate to take on their own individual tax returns. As a consequence, the ability to deduct attorney's fees can reduce the actual cost to the estate and beneficiaries. Court costs are minimal. In order to probate a will and open an estate administration proceeding, the court costs are currently \$150.00.

It is necessary to "settle" a living trust similar to an estate. Those who sell living trusts typically represent that living trusts eliminate delays caused by "probate" in the distribution of property after death. However, a successor trustee should never distribute the trust property to the beneficiaries without making sure that all of the legal claims of creditors of the decedent are paid (creditors have 9 months from date of death to make a claim) and all of the income and death taxes are paid. The trustee is personally liable to the creditors and taxing authorities if any legal claims and taxes are not paid from the trust.

A revocable living trust will not save any death taxes. It is illegal for the trustee of a living trust to distribute any of the trust property that is subject to Indiana inheritance tax (unless the beneficiary is the decedent's surviving spouse) without the written consent of the Indiana Department Revenue or the County Assessor, unless the transferee signs a sworn affidavit that the transfer is not subject to Indiana inheritance or estate tax and the reasons why and this form is filed with the Indiana Department of Revenue.

Indiana inheritance tax returns must be filed within nine (9) months of date of death. After the Indiana inheritance tax return is filed, it may take several months to get an acceptance from the Indiana Department of Revenue, even if there is no audit. It takes several months to get the closing letter from the Internal Revenue Service after the federal estate tax return is filed. A successor trustee should not distribute all of the property to the beneficiaries, unless the trustee knows that the tax returns have been filed, approved, and accepted and that the taxes are paid in full. The trustee is personally liable for the payment of the inheritance taxes and the Federal estate taxes. As a consequence, distributions from living trusts should not take place until the death tax returns have been approved and the taxes have been paid in full.

The successor trustee should always hire an attorney to advise and assist the successor trustee in settling the living trust and to prepare and file the required death tax returns. The successor trustee is also required to obtain a federal tax identification number and to file the required income tax returns for the trust. As a consequence, proper settlement of a living trust also involves delay and costs for

attorney's fees. Settlement of an estate and settlement of a living trust both take similar amounts of time and work.

11. Delay in the Distribution of Property After Your Death. Living trust salespersons typically represent that "probate" causes extreme delay in the distribution of your property, and this delay can be eliminated through the use of a living trust. This is not true. A personal representative of an estate being administered as an "unsupervised estate" can make partial distributions of property immediately after being appointed by the court. A personal representative of a "supervised estate" may also be able to make partial distributions before the estate is settled under certain circumstances. Although most probate estate administrations typically take approximately one (1) year or less, property can be distributed throughout the course of the administration as partial distributions to the extent it is not needed for the payment of claims, expenses, and taxes. As was mentioned earlier, a successor trustee should not distribute all of the trust property immediately after death, but should pay the inheritance tax and estate taxes from the trust property and should wait until the appropriate death tax clearances have been obtained and all of the debts, claims, and income taxes paid before the property in the trust is finally distributed to the beneficiaries of the trust.

12. Out of State Real Estate. Real estate located out of state can be transferred to the trustee of a living trust. This real estate can usually be distributed as provided in the trust agreement without the necessity of an ancillary probate estate administration proceeding in the state where the real estate is located. However, there can be complications in some states. For example, Florida has a homestead exemption law that may require an estate administration proceeding to clear title to real estate that is distributed by the successor trustee of a living trust. Florida also has a law that requires the filing of a "notice of trust" with the court after the death of a person who establishes a revocable living trust so that creditors can file claims against trust assets. One should also consider the inheritance tax treatment of the state in which the real estate is located.

13. Joint Revocable Living Trusts. A joint revocable living trust is one (1) trust agreement that is signed by a husband and wife. These types of living trusts are widely promoted. They can result in difficulties relating to the determination of the basis of property for capital gains purposes after the death of the first spouse to die, and many experts recommend that they never be used if a credit shelter trust is to be created after the death of the first spouse to die.

14. Summary of Living Trusts vs. Probate.

	<u>Advantage</u>	<u>Disadvantage</u>	<u>No Advantage</u>
A. Costs to Implement and Maintain		X	
B. Time and Effort to Establish and Maintain		X	
C. Management of Property after Disability *If person has given power of attorney			X*
D. Medicaid Planning		X	
E. Income Tax Returns if the Person who Establishes Trust is not the Trustee		X	
F. Will Contest vs. Trust Contest		X	
G. Privacy as to Who is Distributed Your Property After Your Death	X		
H. Privacy as to the Amount and Value of Your Property Distributed After Your Death *If the estate is "unsupervised administration"			X
I. Fees for Trustee vs. Fees for Personal Representative of Estate			X
J. Creditor Claims		X	
K. Costs to Settle Living Trusts	X		
L. Death Tax Savings			X
M. Delay in Distribution of Property After Death			X
N. Distribution of Out of State Real Estate	X		

In conclusion, living trusts are not the best estate plan for everyone. I tend to recommend living trusts when most or all of the following circumstances exist: (1) my client is elderly, (2) my client is single or is a widow or widower, (3) my client can understand and be comfortable with establishing, funding, and administering the trust, (4) my client is likely to transfer all property acquired in the future to the living trust, (5) my client's family has a good relationship and the disposition of property does not "disinherit" a family member, (6) my client is establishing and transferring property to the trustee of a trust that will fund a credit shelter trust if there is a surviving spouse (7) my client owns real estate located outside of Indiana, and (8) the potential estate is substantial.

### **YOUR ESTATE AND DISABILITY PLANNING DOCUMENTS**

Make sure that you safeguard your original Will, as the original Will may need to be probated by the Court after your death. A safety deposit box at a financial institution is the safest place. You should make sure that someone else is also authorized to have access to your safety deposit box.

Make sure that the person(s) who is/are designated as personal representative(s) of your estate know where to find your original Will. You should tell them to immediately seek legal advice after your death before taking any action regarding your estate.

You should also make sure the person(s) designated as your attorney-in-fact and health care representative have the signed power of attorney, living will, and appointment of health care representative or have immediate access to the appropriate documents. They should contact an attorney to get legal advice if it becomes necessary to act on your behalf. You should also give copies of your living will and appointment of health care representative to all of your physicians and to each hospital or other health care facility upon your admission.

### **CHANGE OF RESIDENCY**

If you change your residency from Indiana to another state you should have your living will, appointment of health care representative, general power of attorney, will, and trust agreement reviewed by an attorney in that state and possibly changed. Laws differ substantially from state to state.

### **REVIEW OF YOUR ESTATE AND DISABILITY PLAN**

You should have a competent attorney review your estate and disability plan under the following circumstances: (1) If your financial condition changes significantly (such as receiving an inheritance or purchasing additional life

insurance), or (2) If you or your spouse have a health problem that may lead to care in a nursing home or death, or (3) If you have marital problems that may lead to a dissolution of marriage, or (4) If your spouse dies, or (5) If you plan to remarry, or (6) If you learn of a change in federal estate tax law, or (7) If any member of your family becomes disabled or has serious financial problems, or (8) Every 5 years (or at least every 3 years if you have an estate plan designed to reduce or eliminate Federal estate taxes), or (9) Whenever you feel it is appropriate.

### **ABOUT THE AUTHOR**

James K. Voelz was born and raised in Columbus, Indiana. He has an undergraduate degree from Hanover College and a Doctor of Jurisprudence degree from Indiana University at Indianapolis. Mr. Voelz has practiced law in Columbus since 1975. His law practice primarily involves wills, trusts, estate and disability planning, estate and trust settlement, elder law, Medicaid qualification planning, and real estate matters. He is a member of Hoosier Hills Estate Planning Council, National Academy of Elder Law Attorneys, and the Indiana State Bar Association, its Elder Law Section, and its Probate, Trust, and Real Property Section. He has also recently served as President of the Bartholomew County Bar Association, Inc. and its Board of Directors. Mr. Voelz has been appointed by the Supreme Court of Indiana to its Committee on Character and Fitness.

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