## Introduction

This publication is intended to serve as a supplement to training in estate planning basics. While it may serve as an independent reference, a key purpose is to add information for estate and financial planning programs.

Several topics not discussed at length in this booklet belong in a basic estate and financial planning program, including: life insurance alternatives, trust alternatives, advance healthcare directives, long-term care insurance, gift and estate taxes, and income taxes.

Information is essential for making estate planning decisions. This information includes personal financial facts and knowledge about the property and tax law implications of planning alternatives. For example, having no will may be of little concern for a person with many "will substitutes" such as right of survivorship arrangements for a residence and most personal property. Table 2 identifies typical will substitutes or probate avoidance arrangements and shows the federal estate and Indiana inheritance 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 ever-popular 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 estate administration.

Unsupervised administration may satisfy some concerns about unnecessary steps and processes in traditional 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 a living trust may exceed a lawyer's probate fee.

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 planning alternatives. Just as many planning alternatives are possible for the living; many options usually remain for an informed personal representative to exercise in a decedent's estate. Legal and tax counsel may be essential for postmortem estate planning.

Personal understanding of 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 in Indiana

A decedent with assets subject to probate and without a will that directs his or her probate estate property distribution leaves the Indiana intestacy law to decide who gets the decedent's probate property. Intestacy law represents how an "average person" would want his or her probate estate to be distributed as reflected by the Indiana legislature. Table 1 is a display of Indiana intestacy laws. It should be emphasized that Table 1 shows to whom a decedent's property interests pass if not transferred by a will or will substitutes. Distribution by intestacy law may not be what a deceased person would have preferred nor be appropriate for the heirs.

It is a fact that "will substitutes," such as joint tenancy, tenancy-by-the-entirety, both retirement plans, and life insurance policies with individuals designated as beneficiaries, keep a large part of what many individuals leave out of probate. Many married couples and individuals rely almost exclusively on will substitute arrangements with or without a will.

## Examples of When There Is No Will

Keep in mind that the examples that follow refer to property distribution for assets and interests that are part of a decedent's probate estate. If there is no will providing for the disposition of a decedent's property, then the law of intestacy governs, but only for interests not covered by other provisions for distribution. "Will substitutes" take precedence over the law of intestacy.

1. John and his wife, Mary, have one child, Eric. One-half of John's probate estate passes 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. (However, a trusteeship might be substituted for the guardianship to avoid annual accountings.)

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 an equal (one-third) share of the remaining 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 the other quarter. If Loren has no surviving parents and no children of a prior marriage, all of his probate property will pass to Kathy.

4. Gregory is a widower with two children. His probate property passes 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. Where 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. Jerry is married to Mary Ann. He has two children from his prior marriage. Jerry's childless widow has a right to one-half of the personal property in Jerry's estate and 25% of the “value” of in what was Jerry's real estate. The children would receive one-half of the personal property and a two-thirds life estate interest in the real estate as well as the remainder interest in the real estate. The one-third life estate may leave an awkward or unmanageable situation, and a public sale or an intra-family buyout may be necessary.

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 will take one-half because half-bloods are treated the same as full-bloods in Indiana.

7. Jackie and Robert adopted David. Jackie's widower shares with David just as if he were a natural born child.

While the above results may be acceptable in many situations, generally a will greatly eases estate administration. For some individuals or couples and families, the will can incorporate tax-saving features. Another planning alternative is to transfer property into a living trust and provide for distribution with the trust. Where family business capital is 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.

## Table 1. Indiana Intestacy Law.[a]

| Survivors | Who Receives What |
| --- | --- |
| Spouse, one or more children | 1/2 estate to spouse[b]<br>1/2 estate to child or children |
| Spouse, no children<br>Parents of the deceased person | 3/4 estate to spouse<br>1/4 estate to parent(s) |
| Spouse, no children or parents | All to spouse |
| Second or subsequent childless spouse<br>Children of first marriage | Spouse: 1/2 of personal property, 25% of the fair market value of real estate, and<br>1/2 personal property and title to real estate to child, children, or issue of deceased children |
| Children, no spouse or parents | All to children |
| No spouse or children | Equal sharing by parents and siblings, with parents getting at least 1/4 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//>.
**Consult a lawyer for assistance.**

b A surviving spouse is entitled to this amount as a minimum 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 and other lineal descendants and ancestors have no such statutory right. That is, a decedent may avoid all family in a will with or without mentioning 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.

c If a child has predeceased a parent, then the issue of that child takes by representation (i.e., the children of a child divide their parent's share equally).

## Will Substitutes

Will substitutes offer many ways to avoid probate, such as right-of-survivorship properties (joint ownership) and contractual arrangements (e.g., life insurance and retirement benefits). The right-of-survivorship arrangements are themselves legal arrangements that control or establish ownership after death whether or not there is a will. Life insurance is an example of a contract that normally provides for one or more persons (or an entity, such as a trust) as beneficiaries. The beneficiary designation takes care of who gets the life insurance proceeds. Likewise, where a decedent had joint property with right of survivorship, the surviving joint tenant(s) will, by law, own the property at the death of one of the joint tenants. A retirement plan usually provides who gets benefits after the primary beneficiary dies. Estate planning requires examination of all will substitute arrangements.

Typical 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. "No" says that the interest is not a probate asset, but instead is transferred by a will substitute. Many people use joint ownership with survivorship rights, life insurance and legal life estates (retained life income, remainder to designated parties), and living trusts to avoid probate.

With extensive use of will substitutes, the will may apply to very little property. However, a will is important even if many assets are not subject to probate. Table 2 shows there are "three estates" to deal with in the analysis of a decedent's estate. Property interests may be in the "federal estate tax estate" and the "Indiana inheritance tax estate" whether or not these interests are part of the "probate estate." Individuals and couples with modest wealth (say, more than $750,000) should examine the federal estate tax law.(1) They should analyze their estate with respect to the tax and probate issues. Avoiding probate may be no more important than strategies to reduce taxes. Will substitutes (probate avoidance) may provide relatively more cost savings for those with modest estates (less than $1,000,000, the "applicable exemption amount" added in 2001 tax law changes).

The "?" notation following certain property interests in the estate and inheritance tax columns of Table 2 signals the fact that a surviving joint tenant may be able to keep some or all of the value of the asset out of the decedent's federal estate tax and Indiana inheritance tax estates. Surviving joint tenants, other than a surviving spouse, must show contribution to the ownership of the underlying asset, otherwise the deceased joint tenant is assumed to have been the sole contributor. Property passing to a surviving spouse may be 100% deductible in the calculation of the federal estate tax. Also, transfers to the surviving spouse may be 100% exempt from the Indiana inheritance tax.

Life insurance proceeds payable to an individual (i.e., not payable to a decedent's estate) are 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 usually true for joint tenancies entered into after 1981. A 1992 court case (Gallenstein, Sixth Circuit Court of Appeals), and cases since then hold that the "consideration furnished" rule, as 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 the deceased joint tenant's death is included in the estate tax estate. For a surviving spouse, whatever is included, however, is 100% deductible because of the federal estate tax marital deduction rule as of January 1, 1982. The included value (the value accepted for federal estate tax purposes) becomes the income tax basis that is the property's fair market value on the decedent's date of death. Normally, there is a step-up in the income tax basis which may reduce future income tax liability. A "step-up" results because the basis just before death is usually less than the asset's fair market value.

**Table 2. Carl's Estate for: Probate, Federal Estate Tax, and Indiana Inheritance Tax with Julie, His Surviving Spouse.** *

| Decedent's Estate | Probate | Federal Estate Tax | Indiana Inheritance Tax |
|---|---|---|---|
| **Real Estate:** | | | |
| 1. Carl and Julie, TBEWROS[a] | No | 1/2[b] | No[b] |
| 2. Carl (sole owner or tenant-in-common) | Yes | Yes?[c] | Yes?[c] |
| 3. Carl and Richard, JTWROS[d] | No | Yes? | Yes? |
| **Personal Property:** | | | |
| 4. Carl and Julie, JTWROS | No | ½ | No |
| 5. Carl sole owner. | Yes | Yes? | Yes? |
| 6. Carl and Richard, JTWROS | No | Yes? | Yes? |
| **Insurance:** | | | |
| 7. On Life of Carl (Carl, owner) | No | Yes? | No[e] |
| 8. On Life of Julie (Carl, owner) | Yes | Yes? | Yes? |
| 9. On Life of Carl (Julie, owner) | No | No | No |
| **Other:** | | | |
| 10. Qualified Pension Plan | No | Yes?[f] | Yes[f] |
| 11. Stock Option Rights | Yes | Yes? | Yes? |
| 12. Trust Assets (Carl, owner) | No | Yes? | Yes? |
| 13. A Granted Life Interest[g] | No | No | No |
| 14. Revocable (Living Trust) or Retained Life Estate[h] | No | Yes? | Yes? |
| 15. Social Security Benefits | No | No | No |
| 16. Partnership Interest | Yes | Yes? | Yes? |
| 17. An annuity (Carl only) | No | Yes? | Yes? |
| 18. Land Installment Contract (seller) | No?[i] | Yes ? | Yes? |

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

a. Tenants-by-the-entireties with rights of survivorship.

b. Beginning Jan. 1, 1982, the federal estate tax law requires one-half 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%. Also, all transfers from a decedent spouse to a surviving spouse are 100% exempt from Indiana inheritance tax.

c. There is a question mark (?) because if the assets go to the surviving spouse, there is 100% avoidance of estate or inheritance taxes. 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 the contribution would be excluded form both federal estate and Indian inheritance tax.

d. Joint tenants with rights of survivorship.

e. Life insurance benefits are exempt from Indiana inheritance tax if not payable to the insured decedent's estate.

f. Prior to 1985, there was a $100,000 exclusion. 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 gift to him.

h. A retained life interest (retained by the decedent) and assets in 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 nor Indiana inheritance taxes 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 are the surviving spouse's free of inheritance tax and without probate; otherwise there may be probate and inheritance taxes. 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.

## Considerations in Will Making [2]

A will is a written document which controls the disposition of a decedent's "probate" property. Each state has laws that should be followed in making a will. In Indiana:

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 and be witnessed by at least two witnesses in a special manner provided by law. Persons who are beneficiaries under the will should not serve as witnesses.

The will must be in writing. [3]

After death, the will is presented to the probate court, generally a Circuit Court in Indiana. A will may be made self-proving by the acknowledgment of the will by the testator (party whose will it is) and the verification of the witnesses in the form of a 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 testimony of a witness. Avoiding the need to locate witnesses or for witnesses to come forward saves administration expense and may avoid delay. A self-proving certificate may be a valuable addition to a will that otherwise needs no changes.

Wills may be revoked or changed by the maker 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 frequently made by an addition to the will called a "codicil." (It is possible to make a will that cannot be changed.)

Indiana does not have a statute to allow for a holographic will—one in handwriting, signed but and not witnessed. **Indiana law does allow for a list (referred to in a will but outside the will) of tangible personal (not used in a trade or business) property to be distributed to specified individuals. IC 29-1-6-1(m).**

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

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

(1) that the testator executed the instrument as his or her will;
(2) that, in the presence of both witnesses, he or she signed or acknowledged his or her signature already made or directed another to sign for him/her in his/her presence.
(3) that he or she executed the will as his or hers free and voluntary act for the purposes expressed in it;
(4) that each of the witnesses, in the presence of the testator and of each other, signed the will as witnesses;
(5) that the testator was of sound mind when the will was executed;
(6) that to the best knowledge of each of the witnesses, the testator was at the time the will was executed eighteen (18) or more years of age, or was a member of the armed forces or of the merchant marine of the United States or its allies.

Date _________ Testator__________________________

Witness __________________________

Witness __________________________

"Deathbed" wills might be challenged. A will should be prepared while a person is in good health and in a position to carefully consider its provisions. 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 while under the influence of medication or the "undue" influence of another individual. The process of making or revising a will should be viewed in the light of one's total objectives and other provisions for estate planning. Keep in mind, there are several typical will substitutes (e.g., joint property, life insurance, retirement plans, trusts, and life estates). Complex-will arrangements may accomplish nothing if all the significant interests go to a surviving spouse by rights of survivorship. Individuals and couples should review these matters with legal counsel. However, spouses should consider separate counsel when doing their respective estate planning.

Following is a list of will-making and estate-planning considerations.

- Who should receive your property? Your instructions are important despite the use of will substitutes.
- Many situations may benefit from a buy-sell agreement in a will for important business assets such as land.
- If there is no will, assets not covered by a will substitute are transferred by the law of descent (Table 1).
- If you have a charitable organization in mind, consider lifetime gifts, especially if you can save income tax.
- Who should be named as guardian(s) of children under 18 years of age?
- You may want a trust to manage property left to the children and a family member or other individuals to raise the children (guardian of the person).
- This is important for parents of minors or for individuals who are responsible for anyone who is legally or financially incompetent.
- Who should be named as personal representative of your estate?
- Where should the current will be kept?
- Indiana law has a provision for filing a will with the County Clerk as a safe, neutral place.

Typically, a personal representative is a knowledgeable family member (often a surviving spouse or the oldest child). The designated party will then seek legal counsel for assistance with estate administration. However, for some estates it is advisable to request a professional personal representative to be appointed. Both the personal representative and his legal counsel are entitled to a fee. In certain estates, the payment of fees outside the family for estate administration may be a sound investment. This issue should be studied carefully because a great deal of concern may arise over how and at what cost the estate is administered!

Should a trust be created for oneself, for a spouse, for children, or grandchildren? Sometimes, 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, legal life estate. Knowing the income, estate, and inheritance tax effects of an estate-planning tool is important. Many types of trust arrangements are possible. In the case of a living trust, an individual, his or her spouse, or other family members can serve as trustee(s). What is best for your situation may require legal and tax analysis with professional assistance. 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.

Generally, life insurance should not be payable to an estate to be distributed according to a will. Should life insurance proceeds be payable to a trustee? 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. Life insurance payable to an individual rather than to an estate is exempt from the Indiana inheritance tax.

For those who die while their children are still dependents, life insurance proceeds may be a way the decedent can aid in the development of his or her children. (For those who die with small or modest estates; equity in a home, an automobile, a savings accounts, life insurance benefits, and retirement benefits are likely to be left to a surviving spouse.) Life insurance in a trust is an efficient way for managing life insurance proceeds. For minor children, a life insurance trust can control the use of insurance proceeds to satisfy specific goals and objectives that are important to a parent who may die prematurely.

Individuals and married couples typically plan to avoid federal estate taxes. Married individuals who each have estates approaching or above $1.5 million (or the "applicable exclusion amount" [AEA] as it increases to $3.5 million by 2009) may use the typical tax-avoidance approaches for the estate of the surviving spouse. Typically, the plan is to isolate at least the AEA from the estate of the surviving spouse in a "credit shelter" trust with income from the trust to the surviving spouse.

Several options exist. This fundamental estate tax planning may be accomplished with either a living trust or by traditional will provisions. Restricting the rights of a surviving spouse with a prenuptial agreement (contracts) may be important --especially where mature individuals are contemplating marriage with children and property from a prior marriage. 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 *statutory (elective) share*. This election may be prevented by a proper ante-nuptial or postnuptial agreement.
Has the size or makeup of the estate changed significantly?
Has any intended beneficiary of an estate had changes in circumstances?
Have the probate and/or death tax laws changed since the last will?

Are there provisions for control of business assets? Where a family business is involved, its control and transfer are critical areas of planning. Many tools are available to help with control and transfer of a business including land. Rules for buying and selling assets between co-owners of property are important. Buy-sell rules can be used inside a will and in trusts, partnerships, corporations and other asset holding arrangements.

Are there items of personal property intended for specific individuals? If so, consider lifetime gifts. Otherwise, list them in your will with a proper description or identification. Lifetime transfer with retained use might be suitable. Verbal commitments with or without tags or labels may lead to disputes. Seek legal advice on a retained life-interest strategy, especially if the assets have significant value.

Are there charitable intentions that could be provided for in a will? Remember that gifts to tax-exempt organizations are exempt from federal gift and estate tax, and inheritance 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 gifts.

Under the law, a person is free to give his or her property by will according to personal desires if public policy is not violated. However, a surviving spouse has a statutory right to one-half share of a decedent spouse's estate, unless the surviving spouse has waived that right with a legally binding contract such as an ante-nuptial or postnuptial agreement. A second or subsequent childless surviving spouse has an elective right to one-third of personal property and one-third life estate in real estate.

The drafting of a will is an important legal matter involving many decisions that require professional judgment that can be rendered only with training and experience. A lawyer familiar with estate planning, probate practice, and the drafting of wills, trusts, and business arrangements--with other professional assistance as needed--can avoid many pitfalls. Finding an adequately trained lawyer for your estate planning and will-drafting is a problem for many individuals. In many estate-planning and will-making situations, federal income and estate tax expertise is needed. Judgments similar to those required for obtaining professional counsel for other purposes will be needed. The individual's best protection from inadequate service is knowledge of his or her facts and of planning alternatives and their implications.

# 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 means each party has a percentage interest in the property. Each owns a part of the whole. The part owned may be any fraction (e.g., one-fourth, one-third, one-eighth) of the whole.

Upon death, one's tenant-in-common interest is part of his or her probate estate and passes by the law of descent or according to his or her will. One right of a tenant-in-common is that of partition (a legal remedy for physical division or sale of the property). When a physical partition of the property is not possible, typically there is a sale of the real estate with net proceeds divided according to percentage interests.

**A Planning Tool:** Brothers and sisters typically hold real estate as tenants-in-common. If a parent dies with real estate and without a will, leaving a spouse and children, they will take as tenants-in-common. One should plan for the possibility that they cannot agree on how to manage the property. If a tenant-in-common or his/her guardian or trustee or judgment creditor wants cash, a public auction may be the result. Restricting the in-common ownership arrangements is often wise so one interest holder cannot impose a public sale of the property upon the others--for example, a first option to buy, held by all sisters and brothers or held by specific members of a family. Therefore, a **restrictive transfer arrangement** (a buy-sell agreement) is good planning.

## Ordinary Joint Tenancy

Ordinary joint tenancy is similar to tenants-in-common in some respects. A severance of the interests can be carried out by one party to the tenancy, or one party can encumber his or her interest independently. When a joint tenant in real estate transfers an interest, the transferee becomes a tenant-in-common with the other joint tenant(s). A major distinction is that joint tenants enjoy rights of survivorship. If one joint tenant dies, the surviving joint tenant(s) owns the entire interest. Thus, the decedent's joint tenancy interest is not subject to probate but instead passes by law to the surviving joint tenant(s).

Married couples typically use joint tenancy as a method for owning personal property. Occasionally, parents own realty and personal property with 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 have satisfactory results in many situations, it use is cautioned as it can lead to a number of problems.

For federal estate tax purposes, a decedent joint tenant is assumed to have contributed the entire value of the jointly-held property unless the surviving joint tenant can prove otherwise. An important exception to this rule applies for a deceased spouse; in that case, for arrangements since 1981, one-half the asset value is included in the estate of the deceased spouse for federal estate tax purposes.

## Indiana Tenancy-by-the-Entirety

Tenancy-by-the-entirety is a form of joint tenancy with rights of survivorship reserved for married couples owning real estate. Further, entirety interests cannot be independently encumbered by one spouse. This explains why lenders require both husband and wife to sign when real estate they hold by the entireties is mortgaged. It also suggests an important reason for both spouses to avoid signing documents that would expose their entireties' realty to significant liability, such as a financial liability agreement for a teenager's driver's license.

### Special 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 language makes it clear that such is not intended. For example, "John and Mary Smith as tenants-in-common" would avoid right of survivorship. In Indiana, without other words to the contrary, the wording "John and Mary Smith" 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, real estate wealth often switch to tenants-in-common for estate-planning purposes as well as engage in other more sophisticated planning.

An estate plan based solely on the ownership of property in joint tenancy or in tenancy-by-the-entirety is frequently ill-advised. Legal counsel is always desirable before determining whether and to what extent a joint tenancy or tenancy-by-the-entirety plan should be used as a will substitute.

A joint tenancy plan may be undesirable from the point of view of minimizing estate and inheritance taxes as property passes to the children or grandchildren. Further, the surviving spouse may not use the property for the benefit of the decedent tenant's children in the intended way. In fact, the children may never receive an inheritance that must pass through the estate of a parent who was a joint tenant with the first parent to die. 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) who are entitled to a survivor's allowance of $25,000. See IC 29-1-4-1.

Joint ownership with survivorship rights creates a federal estate tax problem when passing valuable capital, such as farmland. If major appreciating assets are left to a surviving spouse, a widow or widower may become wealthy only with the passage of time due to appreciation in asset values. The more prematurely a spouse dies with a significant jointly-held estate, the more important this problem. A young widow or widower may experience substantial appreciation in farmland values. The children may find the property subject to substantial federal estate and Indiana inheritance tax and estate administration costs in the estate of a widow or widower.

Each individual may have an estate tax base (net estate, including **adjusted taxable gifts** since 1976) of up to the applicable exemption amount, $2 million in 2008, and avoid federal estate tax. If a taxable estate base value is above the applicable exemption amount the estate tax may be a very significant expense. For example, in 2008, with a federal estate tax base of $3 million, the "estate tax," after subtracting $780,800, the 2008 applicable credit amount, is $450,000. See Tables 4 and 5 in the Appendix.

Married individuals, who have modest estates, including the wealth from life insurance, should study the alternatives to joint property with rights of survivorship. Good results can be achieved by using trusts and wills.

### Life Estates

Farmers and others often use the retained life estate as a probate-avoidance device. Their heirs may become disgruntled with the results. An initial issue is the federal estate and Indiana inheritance tax laws require the fair market value (measured at date of death) be subject to tax at the death of the party who retained a life interest.

The **retained life estate** may be in writing in a deed, or the 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 continues to flow to the original owner after an ownership transfer on paper, the IRS demands full value of the property in the estate tax estate of the original owner. This arrangement is described as a retained life estate. A retained life estate arrangement will avoid probate of the real estate. 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 rules discussed here are the same whether an interest is retained via a legal life estate or a revocable, lifetime (living) trust.

On the other hand, a **life estate granted to a person** is not a part of the decedent grantee's estate for federal estate or Indiana inheritance tax purposes. A granted compared to a retained life estate is a valuable estate-tax-planning tool. One who devises a life estate to another may keep the value of the realty out of the devisee's estate at his/her death. Farmers have favored the legal life estate because it keeps the management within the family. However, a trust may be preferable in most cases. A family member(s) could be the trustee(s), where adequate management skills exist in the family. The trust approach invites provisions for a buy-sell plan and for management assistance for the life beneficiary.

## Jointly Held Personal Property

Married individuals, parents, and their children commonly set up arrangements by which personal property is jointly held with rights of survivorship. This is done regularly with autos, checking and savings accounts, certificates of deposit, bonds, and other assets. For married individuals, the wording designating the ownership often does not declare "joint tenancy with rights of survivorship," so that a dispute could arise as to whether there are rights of survivorship in the spouse.

### Special Statutes

A statute provides the intent where the "right-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 law presumes tenants-in-common.

The statute states: *Personal property, other than an account, which is owned by two (2) or more persons is owned by them as tenants-in-common, unless expressed otherwise in a written instrument. However, household goods acquired during coverture (marriage) and in possession of both husband and wife, and any promissory note, bond, certificate of title to a motor vehicle, or any other written or printed instrument evidencing an interest in tangible or intangible personal property, other than an account, in the name of both husband and wife, shall upon the death of either become the sole property of the surviving spouse unless a clear contrary intention is expressed in a written instrument.*
Upon the death of either husband or wife: *household goods acquired during marriage; and in possession of both husband and wife; and any: promissory note; bond; certificate of title to a motor vehicle; or 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 32-17-11-29.

### 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. During the 1970's, litigation developed over whether a person who was designated as having rights of survivorship on a bank account with a decedent should get the account balance, though the survivor was unaware his/her name was on the account. The personal representative and heirs of the decedent account depositor argued that the decedent's intent was not to allow an individual to receive the entire account balance. They reasoned that it was only a convenience to the depositor to have someone who could draw money for the disabled depositor's needs. Since 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, a "non-probate transfer" statute was enacted in Indiana. The statute 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 (ies) to the account.

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 or Indiana inheritance taxes 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.

### Alternatives to Survivorship Accounts

Problems can 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 to beneficiaries of a decedent's trust assets.

In second or subsequent marriages, disputes could 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. A parent may want to transfer certain assets into an irrevocable trust with children of a prior marriage as the ultimate beneficiaries. This arrangement could be established for 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 from 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. The general rule is that one's (donor's) personal contribution into a joint tenant account is excludable from what otherwise might be declared a gift or counted for federal estate-tax purposes at the death of the donee joint tenant. 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. At least 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. Transfers to spouses are 100% exempt from Indiana inheritance tax.

It may be a good idea for each spouse to have money in a private account. It would be 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 or Indiana inheritance 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 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. But many people rely on joint accounts because they feel more comfortable with these seemingly uncomplicated arrangements. Further, they may be unwilling to make lifetime gifts and may feel more in control of their liquid assets than with other arrangements such as trusts. Also, individuals may feel joint ownership is a sufficient probate-avoidance technique.

## 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 wife or husband sign away his or her marital interest. According to Indiana law, this should no longer be necessary. 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 the property.

However, a surviving spouse who is a first spouse of the deceased spouse, or one who has children by the deceased spouse, can elect to take one-half of the net estate (real estate and personal property) instead of taking what the will provides if the will provision is 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 personal property and an amount equal to 25% of the decedent spouse's net real estate interest. See IC 29-1-3-1. For decedent, spouse situations prior to July 1. 2003, the second or subsequent spouse, childless by the deceased spouse, could elect **a 1/3 life estate in real estate of the deceased spouse** along with one-third of the personal property that may be part of the deceased's probate estate.

**Example:** A deceased husband's will provides $100,000 to a surviving spouse (a surviving spouse without children by the deceased spouse) and the remaining $500,000 to the children of his prior marriage. Concerned that she would not have enough money to sustain her through her retirement years, she can elect to take her 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.

## Trusts as a Limitation

Generally, only the property owned by the deceased spouse is subject to the election. 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. A trust, established during a spouse's lifetime, can serve as a vehicle for limiting a surviving spouse's rights in property that may otherwise be in an estate. However, 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.

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 intestacy. The $25,000 allowance is classified as a debt against the estate. There is an advantage to classifying the allowance as a debt. 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 $2,000 and other debts of $20,000. Administration expenses of the estate are $1,500. 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) $1,500 administration expense<br>
(2) $5,000 funeral expense<br>
(3) **$25,000 family allowance**<br>
(4) $2,000 federal taxes<br>
(5) $5,000 medical expenses<br>
(6) $500 state taxes<br>
(7) $11,000 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 signs 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 agreement binding 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 also be wise to consider a prenuptial agreement.

## 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 designate in a will specifically who takes, in case the first-intended party 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 directly 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. Also, if a child disclaims in favor of a surviving spouse, the 100% marital deduction could provide an estate tax savings and an Indiana inheritance tax savings.

## Indiana Inheritance Tax

The Indiana inheritance tax is not a tax on the property itself, but on the transferee's (heir's) right to receive or succeed to property. The tax is imposed at progressive rates with exemptions decreasing and the rates rising the more distant the relationship of the decedent to the recipient of the property (Table 3, Indiana Inheritance Tax Schedule).[4] Inheritance taxes are determined by the probate court for resident decedents and by the Indiana Department of Revenue, Inheritance Tax Division, for nonresident decedents who have assets in Indiana.

The inheritance tax applies to real estate and tangible personal property in Indiana that belonged to a deceased resident. It also applies to the decedent's intangible personal property despite where it is located. It also applies to property interests of a nonresident decedent, for real and tangible personal property within the jurisdiction of Indiana.

Real estate outside Indiana in a living trust does not become subject to the Indiana inheritance tax.

All death transfers from one spouse to another are 100% exempt from the Indiana inheritance tax. Life insurance proceeds, Social Security benefits, and certain retirement funds are exempt from Indiana inheritance tax for all individual beneficiaries. An important benefit of the 100% inheritance tax exemption to surviving spouses is that now a husband and wife may avoid joint ownership, knowing that a property interest left: in a trust, by will, or by the law of descent to a surviving spouse is exempt from the inheritance tax. Elimination of joint tenancy may be necessary for satisfying other estate planning goals such as minimization of federal estate tax.[5]

Table 3. **Indiana Inheritance Tax Schedule.**

| Beneficiary Class[b] | Exemptions | Inheritance Tax Brackets (thousands of dollars)[a] | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | 0 to 25 | 25 to 50 | 50 to 100 | 100 to 200 | 200 to 300 | 300 to 500 | 500 to 700 | 700 to 1000 | 1000 to 1500 | over 1500 |
| | | Rates | | | | | | | | | |
| *Class A*: Natural , adopted & step children, all other descendants, including those of adopted & step children Parent(s) & lineal ancestors. | $100,000 | 1% | 2% | 3% | 3% | 4% | 5% | 6% | 7% | 8% | 10% |
| *Class B*: Brothers, sisters, descendants of brothers & sisters, & a child's spouse widow or widower. | $500 | 7% | 7% | 7% | 10% | 10% | 10% | 12% | 12% | 15% | 15% |
| *Class C*: All others, except a surviving spouse. | $100 | 10% | 10% | 10% | 15% | 15% | 15% | 15% | 15% | 20% | 20% |

a Each bracket starts **after** the top number and goes through the bottom number. For example, the second bracket, "25 to 50", is over $25,000 and through $50,000.
b Transfers to the decedent's surviving spouse, with sufficient rights, are exempt from the Indiana Inheritance tax. Life insurance not payable to the decedent's estate is exempt from the Indiana Inheritance tax.

### "Pick-up" Tax Ended in 2004

Indiana has a "pick-up" tax as part of its inheritance tax structure. For Indiana resident decedents, the pick-up tax is equal to the **federal estate death-tax credit** minus the calculated Indiana inheritance tax for all heirs taking from a given estate. The state death tax credit is calculated from Table 6 in the Appendix after subtracting $60,000 from the federal estate tax taxable estate. If the federal death tax credit is less than the calculated Indiana inheritance tax, there is no pick-up tax. The pick-up tax is also referred to as the Indiana **"estate tax."**(6) Legislation in 2001 includes an amended IRC, Section 2058. The state death tax credit is reduced 25% in 2002, 50% in 2003, and 75% in 2004. In 2005, and after, a deduction from the gross estate will be allowed only for the amount of a state imposed death taxes. Under current Indiana law is the Indiana Inheritance tax.

The pick-up tax arose when there was a federal estate tax after subtracting the federal estate tax applicable credit amount (ACA).

**Federal Estate Tax**: For 2006-08, the ACA is $780,800, which is the estate tax on the applicable exclusion amount (AEA) of $2 million. The AEA increases by specified amounts shown in Table 5 of the Appendix until it reaches $3,500,000 in 2009. Most decedents do not have a federal estate tax liability, and therefore will not have an Indiana pick-up tax.

In 2006-08, a deceased spouse could leave a taxable estate of $4,000,000, and if the surviving spouse received at least $2 million of this net estate, there would be no federal estate tax due to the applicable credit amount of $780,800. Assets left to a surviving spouse with certain minimum rights (at least the right to annual income) may be 100% deductible from the federal estate tax base. The federal estate tax on the balance of $2 million ($4,000,000 - $2,000,000) is $780,800, which is the applicable credit amount in 200-08. (See the Appendix for federal estate tax tables.)

Before July of 1997, there often was an inheritance tax without a federal estate tax liability. A child (Class A beneficiary) had only a small exemption from the Indiana inheritance tax. For example, if an adult child received $150,000, after subtracting the old $5,000 exemption, the inheritance tax on $145,000 was $3,600 (Table 3, "Class A beneficiary").

As of July 1, 1997, the Class A beneficiary exemption is $100,000. In the above example, this would leave $50,000 exposed to the inheritance tax, with a tax of $750. Indiana has recently added step children and their children to the list of Class A beneficiaries.

The more children or grandchildren inheriting, the more value covered by the individual $100,000 exemptions (per Class A beneficiary) and the lower the inheritance tax for a given total inheritance. However, the exemptions did not change for "Class B" and "Class C" beneficiaries, the more distant relatives of a decedent who might inherit property.

## Estate Administration
## (See Flow Chart on page 18)

Estate administration (probate) can take one of several forms, depending upon the situation and options under the law. Generally, probate assures that the deceased person's property goes to the proper persons after paying valid claims including taxes.

Normally, the probate court (Circuit Court in most Indiana counties) may be involved throughout an estate administration. Usually, a lawyer provides counsel to the personal representative and assumes responsibility for many decisions and prepares necessary legal documents. Typical events are discussed below.

## Transfer of Joint Accounts and Other Personal Property

A jointly held account bank may not be transferred to the surviving joint tenant without the written consent of the Indiana Department of Revenue or the county assessor. Since there is no inheritance tax on transfers to a surviving spouse, the written consent requirement does not apply for accounts between spouses.

The same consent provisions apply for other personal property of an Indiana resident decedent, except proceeds payable under a life insurance policy. Again, there is an exception to the consent requirement for a surviving spouse since 1980. While they waive the consent requirement for a surviving spouse, they require notice of a transfer to the assessor or Department of Revenue. The justification for a consent before being allowed to transfer an account is to allow the county assessor or Indiana Department of Revenue to identify taxable inheritance and to insure the inheritance tax is paid. Consent should be given by the appropriate official if the transfer will not jeopardize the collection of inheritance tax. Usually, obtaining consent to transfer is not a difficult process. This requirement may be awkward and an annoyance for widows and widowers.

In many situations, a surviving spouse may feel an urgent need for money from what was a jointly held account. He or she may hurry the process of opening up the estate in order to obtain assistance with the consent to transfer. Thus, the waiver of the requirement for a surviving spouse to obtain consent to transfer may encourage deliberation before starting the estate administration process.

Another specific concern in the early steps of estate administration is the "freeze" on the decedent's safety deposit box, which is often jointly owned with a surviving spouse. In the past the decedent's safety deposit box could not be opened until a court order was obtained. The county assessor was notified and present to inventory the contents.

After a 1979 amendment, which made a surviving spouse's transfer from a decedent spouse 100% exempt from inheritance tax, arguably the Indiana Department of Revenue no longer had an interest in the contents. However, the Department of Revenue objected and maintained the requirement for the county assessor to inventory the safe deposit box contents, because someone other than the surviving (joint-owner) spouse might be entitled to the contents.

A 1993 law removes the requirement for the bank or other institution that rents a joint, safe deposit box to a married couple to freeze the box (and report to the assessor) upon the death of a joint-owner spouse. Further, there is no longer a requirement or right in the Indiana Department of Revenue or the county assessor's office to examine and inventory the contents of a safe deposit box in this limited situation.

An alternative for those who may wish to hold a safe deposit box, but are not married, e.g., a parent and child, is to have two boxes. Each individual might want to be listed as a deputy for the other's deposit box. Items such as wills could be in the other person's box. Then, upon death of one individual, the other individual could get the decedent's will from the survivor's box.

The practice of the Indiana Inheritance Tax Division is to allow for a "Permit to Examine Safety Deposit Box." This permit must be signed by the judge of the probate court. This permit allows only the removal of a will. The permit can be obtained without having chosen a lawyer for the estate.

## 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.

## 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 (bank trust department) appointed by the probate court to take charge of the decedent's property during the probate 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, estate and inheritance taxes, and all expenses of administering his estate. The personal representative normally employs a lawyer and utilizes other professionals (accountants and appraisers typically).

A personal representative (PR) must be at least 18 years of age, of sound mind, a resident or a nonresident who serves as co-personal representative with a resident, and cannot be 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 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 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 and/or Indiana inheritance tax.

### Determining Estate and Inheritance Taxes

For estates with modest or greater asset values, important among the PR's duties is complying with the federal estate tax and Indiana inheritance tax laws. The federal estate tax return (Form 706) and associated documents, if required, are filed nine months following death. Generally, a gross estate of more than $650,000 (the current applicable exclusion amount) is needed before a federal estate tax return must be filed.

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. Farmland in some estates may be eligible for valuation at less than fair market value.

Other papers and publications concerning the special valuation of farmland for estate tax purposes are available from the author.[5]
If a federal estate tax return is required, a copy of the final determination of the federal estate tax must be filed with the Inheritance Tax Division of the Indiana Department of Revenue.

While the Indiana inheritance tax is a tax on transfers to specific individuals, the PR is viewed as an agent of the state in the collection of this tax. He or she is personally responsible for the collection of both the inheritance and federal estate taxes.

Once the estate tax is determined, the net to be distributed can be calculated. After each heir's share is calculated, he receives that share minus the applicable inheritance tax.

Inheritance tax arising from an estate of a resident decedent is paid to the county treasurer. If paid within nine months (when it is due) of the decedent's death, there is a 5% discount. Interest is charged if the inheritance tax is not paid by after one year of death at 10% per annum from the date of death.

## The Final Account

When all administration activity is completed, formal closing action can begin. Basically, this occurs when all property is collected and bills (including estate and inheritance taxes) paid. The first step in the closing of the estate is the preparation of a detailed 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 Indiana inheritance and federal estate taxes are 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 heirs 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. The administration of the estate is done with direct 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 and inheritance taxes will depend upon the valuation figures settled upon with the IRS. Thus, both the federal estate tax and Indiana inheritance tax may be the only unsettled issues. If an estate tax return is not required, a closing may be possible within a year after 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 proper tax. Thus, the PR should be sure that assets are readily available to pay the ultimate tax.

Many other factors, including PR and lawyer procrastination, can add to the normal and necessary delays preventing the closing of an estate. When an estate tax return is necessary, the delay in the closing of the estate is not the fault of the probate 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. But, an unsupervised administration can occur only if all persons with an interest in the estate and the probate court 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 does not shorten the five-month notice period for creditors to come forward with claims. It should not suggest that the administration may be "casual" or sloppy. Prudent conduct is required, and the beneficiaries are entitled to a detailed accounting of the 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, interests 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 distributes, 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 neither five months, normally required for all claims to be presented, nor 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

[1] A $2 million applicable exclusion amount (AEA) for 2006-08 arises from the federal estate tax applicable credit amount (ACA) of $780,800 also for 2006--08. The AEA is the taxable amount in federal estate tax that has a tentative estate tax equal to the ACA. The AEA was increased to $2 million in 2006-08. Federal tax law also provided a "family-owned business interest deduction" (FOBID) for a decedent's estate that holds a "qualified" business interest. However, the FOBID and the AEA are capped at $1.3 million. FOBID was repealed at the end of 2003. See Appendix Table 5.

Also, "Special Use Valuation" (SUV) (Internal Revenue Code Sec. 2032A) may benefit a decedent's estate that consists of significant farmland. Sec. 2032A permits reductions in an estate tax value of up to $960,000 in 2008where 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 an estate value of $2,960,000 ($2 million + $960,000) in 2008 yet have no federal estate tax. The SUV reduction limit has been "indexed" by 1997 legislation, allowing increases in this sum to reflect inflation. FOBID was dropped from the law in 2004 when the AEA reached $1.5 million.

[2]This section benefits from a public service publication of the Indiana State Bar Association, *Estates: Property Ownership and Death Taxes*. It and other pamphlets are available from the Indiana State Bar Association, 230 East Ohio Street, Indianapolis, IN 46204.

[3]Indiana law does permit 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.

[4]If there is a question about the Indiana inheritance tax, information may be available from: Inheritance Tax Division, Indiana Department of Revenue, P O Box 71, 100 North Senate Avenue, Indianapolis, IN 46206-0017; Phone 317-232-2154.

[5]For details on the federal estate and gift tax see IRS Publ. 950. You may obtain federal tax forms and instructions at the Web site www.irs.ustreas.gov/prod/forms_pubs/forms.html. You may contact the author: Gerald A. Harrison, by mail, Dept. of Ag. Economics, Purdue University, 1145 Krannert, West Lafayette, IN 47907-1145; Phone: 765-494-4216; or toll free: 1-888-398-4636; E-mail: harrisog@purdue.edu.

[6]The Indiana inheritance tax law also includes a generation-skipping tax which is beyond the scope of this publication.

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# Appendix

## Federal Unified Estate and Gift Tax Tables

**Table 4. Unified Federal Gift and Tentative Estate Tax Schedule.***

| Transfer Tax Base | | Tax on Amount in Column 1 | Tax Rate on Excess of Amount in Column 1 |
|---|---|---|---|
| (1) | (2) | (3) | (4) |
| $ 0 | $10,000 | $ 0 | 18% |
| 10,000 | 20,000 | 1,800 | 20% |
| 20,000 | 40,000 | 3,800 | 22% |
| 40,000 | 60,000 | 8,200 | 24% |
| 60,000 | 80,000 | 13,000 | 26% |
| 80,000 | 100,000 | 18,200 | 28% |
| 100,000 | 150,000 | 23,800 | 30% |
| 150,000 | 250,000 | 38,800 | 32% |
| 250,000 | 500,000 | 70,800 | 34% |
| 500,000 | 750,000 | 155,800 | 37% |
| 750,000 | 1,000,000 | 248,300 | 39% |
| 1,000,000 | 1,250,000 | 345,800 | 41% |
| 1,250,000 | 1,500,000 | 448,300 | 43% |
| 1,500,000 | 2,000,000 | 555,800 | 45% |
| 2,000,000 | ***** | 780,800 | 45% *** |

* Tentative, means before the credit for gift taxes paid the applicable credit amount in Table 5 and before the state death-tax credit from Table 7 and, when applicable, before a credit for tax on prior transfers in a given estate. The federal estate and gift tax is unified--there is only one set of rates. Adjusted taxable lifetime gifts (amounts above the annual exclusion per individual donee) are added to the donor's estate tax base.

** There is an additional 5% surcharge on estate tax bases above $10 million to eliminate the benefit of the "applicable credit amount" and the graduated rates. The marginal rate during the surcharge is 60 percent.

*** This maximum rate is reduced by 2001 legislation to 50% for 2002, and then reduced by 1% point each year, to 45% in 2007. In 2010 the estate tax is repealed while the highest rate for lifetime gifts is 35%. In 2011, the estate tax returns with a 55% maximum rate and an AEA of $1 million.

**Table 5. Federal Estate-Tax Applicable Exclusion and Applicable Credit Amounts, and Family-**

**Owned Business Interest Deduction**

| Year of Death | Applicable Exclusion &Credit Amounts for Estate Tax | Family-Owned Business Interest Deduction | Total Potential Exclusion & Deduction |
|---|---|---|---|
| 2002-2003 | $1,000,000/345,800 | $300,000 ?** | $1,300,000 |
| 2004-2005 | 1,500,000/555,800* | FOBID was repealed, effective, Jan. 1, 2004 | NA |
| 2006-2008 | 2,000,000/780,800 | | |
| 2009 | 3,500,000/1,455,800 | | |
| 2010 | Estate Tax Repealed 1,000,000/ 345,800 | | |
| 2011 | Estate Tax Reinstated | | |

* The applicable exclusion amount is $1 million for lifetime gifts from 2002 forward. Note the highest tax rate drops to 50% in 2002 and then reduces in annual steps to 45% in 2009.
** FOBID was a maximum of $675,000. FOBID was more favorable than the AEA since the latter is an estate tax credit while FOBID was a deduction from the gross estate.

**Table 6. Federal Estate Death-Tax Credit Schedule.***

| Adjusted Taxable Estate (Taxable Estate Less $60,000) From | To | Credit on Estate Tax on Amt. In Col. 1 | Tax Rate on Excess of Amt. In Col. 1 |
|---|---|---|---|
| $0 | $40,000 | $0 | 0% |
| 40,000 | 90,000 | 0 | .8% |
| 90,000 | 140,000 | 400 | 1.6% |
| 140,000 | 240,000 | 1,200 | 2.4% |
| 240,000 | 440,000 | 3,600 | 3.2% |
| 440,000 | 640,000 | 10,000 | 4.0% |
| 640,000 | 840,000 | 18,000 | 4.8% |
| 840,000 | 1,040,000 | 27,600 | 5.6% |
| 1,040,000 | 1,540,000 | 38,800 | 6.4% |
| 1,540,000 | 2,040,000 | 70,800 | 7.2% |
| 2,040,000 | 2,540,000 | 106,000 | 8.0% |
| 2,540,000 | 3,040,000 | 146,800 | 8.8% |

* This credit is a holdover from pre-1977 tax law. TRA-1976 unified the federal gift and estate tax rates, but calculation of this credit did not change. Before 2005, a "state death tax credit" gave rise to the Indiana "estate tax" (referred to as the pick-up tax). Several states had no inheritance tax, but they still had “a tax” that collected what was allowed by the "state death tax" credit.
Legislation in 2001 includes an amended IRC, Section 2058. The state death tax credit was reduced 25% in 2002, 50% in 2003, and 75% in 2004. In 2005, and after, a deduction from the gross estate will be allowed only for state imposed death taxes which under Indiana law will be the Indiana Inheritance tax.

I. EC-519

# Understanding Your Estate in Indiana

**Gerald A. Harrison**
**Department of Agricultural Economics**

**Legal Affairs**

# Understanding Your Estate in Indiana

**Gerald A. Harrison*** **EC-519**

**Department of Agricultural Economics**

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* Gerry Harrison is a Professor and Extension Economist at Purdue University and a member of the Indiana Bar. Attorney Susan M. Vance, now a teacher at St. Mary's College, Notre Dame, IN, was a major contributor to first edition of this publication in 1981. Thanks to Alan Miller, George Patrick and Lee Schrader, all of Purdue's Department of Agricultural Economics, and Jeff Washburn, attorney, Columbus, IN for their reviews and helpful suggestions. My wife, Mary Ann, has made many suggestions to improve this publication. A special thanks to Laura Hoelscher, Agricultural Communications Service for her professional, editorial assistance. You may contact the author by phone, 765-494-4216, or toll free, 1-888-398-4636, ask for Ext. 44216 or by E-mail: <harrisog@purdue.edu>. Revised: Dec. 2008 A-1.4.2

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