

Members

Sen. Joseph Zakas, Chairperson  
Sen. Randall Head  
Sen. John Broden  
Rep. Ed DeLaney, Vice-Chairperson  
Rep. Ryan Dvorak  
Rep. Ralph Foley  
Chris Colpaert  
Joseph H. Davis  
Kris Fruehwald  
Thomas Hardin  
Judge Thomas Lowe  
James Martin  
David Pendergast  
Dan Reeves  
Timothy Sendak  
Jerry Withered



## PROBATE CODE STUDY COMMISSION

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Authority: IC 2-5-16-2

### MEETING MINUTES<sup>1</sup>

Meeting Date: September 7, 2010  
Meeting Time: 10:30 A.M.  
Meeting Place: State House, 200 W. Washington St., Room 431  
Meeting City: Indianapolis, Indiana  
Meeting Number: 1

**Members Present:** Sen. Joseph Zakas, Chairperson; Sen. John Broden; Rep. Ralph Foley; Joseph H. Davis; Kris Fruehwald; Judge Thomas Lowe; James Martin; David Pendergast; Dan Reeves; Timothy Sendak; Jerry Withered.

**Members Absent:** Sen. Randall Head; Rep. Ed DeLaney, Vice-Chairperson; Rep. Ryan Dvorak; Chris Colpaert; Thomas Hardin.

Sen. Zakas called the meeting to order at 10:30 a.m.

Attorney Jeff Kolb presented the annual policy proposals of the Probate Trust and Real Property Section of the Indiana State Bar Association (Exhibit A). The Section has recommended the following legislative changes:

- (1) Authorize asset protection trusts.
- (2) Require clerk of the circuit court to spread an order of record entered

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<sup>1</sup> These minutes, exhibits, and other materials referenced in the minutes can be viewed electronically at <http://www.in.gov/legislative>. Hard copies can be obtained in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for hard copies may be mailed to the Legislative Information Center, Legislative Services Agency, West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for hard copies.

with respect to a nonresident decedent's estate only upon the request of an interested person rather than as a matter of course.

(3) Coordinate the priority of a Medicaid claim in Title 12 with the priority of claims set forth in the Probate Code.

(4) Provide an exception to the three year window to probate a will when estate proceedings have not been commenced for the decedent and an asset remains titled or registered in the decedent's name.

(5) Clarify that a domiciliary foreign personal representatives has the powers of an unsupervised personal representative rather than the powers of a supervised personal representative.

(6) Clarify notice requirements with respect to the appointment of a temporary guardian.

(7) Provide for the appointment of a "stand by guardian" using a power of attorney that is effective upon the death or incapacity of the appointing individual and valid for ninety days unless the "stand by guardian" petitions the court for a guardianship.

(8) Revise various provisions within recent legislation concerning:

- (A) the Transfer on Death Act;
- (B) matrimonial trusts; and
- (C) discretionary interests.

Mr. Kolb answered the Commission's questions concerning the proposals.

Following Mr. Kolb's presentation, the Commission resumed discussing guardianships. Mr. Martin reported that the Section had discussed an Illinois statute concerning short-term guardianships (Exhibit B) in which the guardian may be appointed without appearing in court, using a notarized statutory form. Mr. Martin explained that the Section opted not to recommend adopting a statute to mirror the Illinois law because the powers granted to the Illinois short-term guardian are substantially similar to the parental powers that may be delegated in Indiana under IC 29-3-9-1. The Indiana delegation of parental powers is also similar to the Illinois short-term guardianship in that it may be established without appearing in court, using a power of attorney.

Sen. Zakas asked the members of the Commission to comment on whether or not courts should be authorized by statute to waive the bonds normally required from nonresident personal representatives. Mr. Martin noted that concerns about the expense of the bond are understandable when the personal representative is the only beneficiary of the estate, but he would be hesitant waive the requirement when there are multiple beneficiaries. Ms. Fruehwald added that regardless of the number of beneficiaries, the bonding requirement also exists to protect creditors' interests.

The Commission discussed no-contest clauses in wills and trusts which are unenforceable by statute in Indiana and Florida. Exhibit C summarizes the degree to which the clauses are enforceable in other states.

Sen. Zakas adjourned the meeting at approximately 12:30 p.m.

**REPORT FROM**  
**PROBATE TRUST AND REAL PROPERTY SECTION**  
**OF THE**  
**INDIANA STATE BAR ASSOCIATION**  
**TO THE**  
**PROBATE CODE STUDY COMMISSION**  
**AUGUST 31, 2010**

**REPORT FROM  
PROBATE TRUST AND REAL PROPERTY SECTION  
OF THE  
INDIANA STATE BAR ASSOCIATION  
TO THE  
PROBATE CODE STUDY COMMISSION  
AUGUST 31, 2010**

The Probate Trust and Real Property Section of the Indiana State Bar Association (Section) provides the following legislative changes for the 2011 legislative session. It appreciates the willingness of the Probate Code Study Commission (PCSC) to work with the Section on improving Indiana laws.

1. **ASSET PROTECTION TRUST.** This issue was first presented to the PCSC in 2008. Under current Indiana law, a person cannot create a trust where trust assets will be protected from claims of the persons creditors. As of this date, twelve (12) states adopted statutes which allow the creation of a self settled asset protection trust under certain conditions. A review of those twelve asset protection states is contained under **Tab A**. One of the leading states in this area is Delaware. Its language was codified by Tennessee. Attached as **Tab B** is language adapted from Delaware and Tennessee for enactment in Indiana. An asset protection trust cannot be set up to defraud creditors and the rights of spouses and child support are protected. The statute also provides that the rule against perpetuities does not apply to an asset protection trust. This allows Indiana estate planners to create a trust for future generations known as a dynasty trust.
  
2. **INDIANA INHERITANCE TAX – NONRESIDENT ORDER.** I.C. 6-4.1-5-15 requires the clerk of the circuit court in which real property is located to spread a copy of the nonresident inheritance tax order of record. This is the requirement that is often not necessary. The amendment to the statute would only require the clerk of the circuit court to spread the order of record upon the request of any interested person. This change is attached as **Tab C**.
  
3. **MEDICAID CLAIM – COORDINATION WITH PROBATE CODE.** Under I.C. 12-14-21-3, Medicaid is given a high priority claim for reimbursement against estates of decedents who received Medicaid. However, the statute is not coordinated with the claim statute under the probate code found at I.C. 29-1-14-9. This amendment makes it clear that the Medicaid claim does not have priority over prior recorded encumbrances, taxes, reasonable costs of administration and reasonable funeral expenses. This relieves a specific problem that arises when taxes

are owed to federal or state agencies. There is personal liability for the fiduciary if the taxes are not paid before any other distribution is made. **Tab D** contains these changes.

4. **PROBATE OF WILL – TIME LIMIT.** Under I.C. 29-1-7-15.1, current Indiana law requires that a will be probated within three (3) years of the date of death or the decedent will have died intestate. Indiana appears to be unique in this application of a time limit for probate of a will. The amendment to the statute contained at **Tab E** would allow for the will to be probated if an asset is titled or registered in the name of the decedent. It effectively removes the three (3) year time limit under those circumstances. \*

5. **FOREIGN PERSONAL REPRESENTATIVE – POWERS.** I.C. 29-2-1-6 taken from the Uniform Probate Code gives a domiciliary foreign personal representative all powers of a local personal representative. While the statute is silent, the comments to the Uniform Probate Code clearly state that these are unsupervised powers of a personal representative. The amendment attached as **Tab F** makes it clear that the powers are those of an unsupervised personal representative.

6. **EMERGENCY GUARDIANSHIP – NOTICE.** I.C. 29-3-3-4 deals with the notice to be given in guardianship proceedings. However, it is silent when the petition is for the appointment of an emergency or temporary guardian. The amendment attached as **Tab G** clarifies the notice is to be given before the petition is filed or if the petition is filed and an order entered, immediately after the order is entered. I.C. 29-3-6-1 also contains a small coordinating amendment.

7. **STANDBY GUARDIAN.** The Section studied provisions from other states regarding standby guardians. Some of these provisions are very lengthy and complicated. The Section decided the best approach was to allow a parent or guardian to delegate powers based on the contingency of the death or incapacity of the parent or guardian. This would allow a standby guardian to be in place until a full petition for guardianship can be filed. Attached as **Tab H** are the amendments to I.C. 29-3-9-1.

8. **TECHNICAL CHANGES.** In addition to the substantive changes set out above, some technical changes are proposed.

8.1. **TRANSFER ON DEATH – MOTOR VEHICLES AND WATER CRAFT.** In the recent Transfer on Death Act, it came to the attention of the Section that, under the motor vehicle and water craft statute, only an individual could create a

TOD transfer. This is clearly not the intent of the TOD Act. As a result, the word “individual” was removed and “owner or owners” was substituted to convey a broader class of transferors. Attached as **Tab I** are amendments to I.C. 9-17-3-9 and 9-31-2-30.

**8.2. DISCRETIONARY INTEREST – DEFINITION.** Last year, some very important sections were added to the Indiana Trust Code dealing with discretionary interests and the protection of those interests from creditors. Omitted from the material was the definition of a “discretionary interest.” Attached as **Tab J** is an amendment to I.C. 30-4-2.1-14 providing that definition along with examples.

**8.3. MATRIMONIAL TRUST – TENANCY BY THE ENTIRETIES.** Last year, an important addition to the Trust Code dealt with matrimonial trust property and the transfer of real property from a husband and wife to either a joint or separate trust. The intent of the statute was to continue the tenancy by the entireties protection from creditors for matrimonial property. Attached as **Tab K** are clarifications to the statute regarding those protections. I.C. 30-4-3-5 is amended.

**8.4. TRANSFER ON DEATH – IRA’S AND RETIREMENT PLANS.** The recent Transfer on Death Act could be interpreted as applying its provisions to IRA’s and retirement plans created under federal law. To avoid that confusion, **Tab L** contains amendments to various provisions to make it clear that it does not apply to those types of investments.

**8.5. TRANSFER ON DEATH – RIGHTS OF SURVIVING SPOUSES AND CHILDREN.** The Transfer on Death Act stated that an election under I.C. 29-1-3-1 does not apply to a valid transfer on death transfer. The Section believes that there could be circumstances on which the election does apply especially if the transfer on death transfer is done as a fraud against the marriage. **Tab M** contains an amendment to I.C. 30-2-17-14-25 removing the prohibition of an election under I.C. 29-1-3-1.

**8.6. TRANSFER ON DEATH – RECORDING REQUIREMENTS.** The State Board of Accounts is requiring an auditor’s endorsement before recording a transfer on death deed. These deeds are revocable and the transfer on the auditor’s tax records could cause confusion. I.C. 32-17-14-11 is amended to exempt transfer on death deeds from the endorsement requirement. I.C. 32-17-14-26(a)(20) is amended to require the endorsement on the filing of the affidavit. See **Tab N**.

# Comparison of the Twelve Domestic Asset Protection Statutes

Updated Through November, 2008

by David G. Shaftel  
Anchorage, Alaska\*

*Editors' Synopsis: This recently updated chart provides a summary and comparison of the characteristics and attributes of domestic asset protection trusts in those states which have enacted such legislation.*

## INTRODUCTION

A domestic asset protection trust (hereinafter referred to as a "DAPT") is generally, an irrevocable trust with an independent trustee who has absolute discretion to make distributions to a class of beneficiaries which includes the settlor. The primary goals of DAPTs are asset protection and, if so designed, transfer tax minimization.

Prior to 1997, several states had statutory provisions which appear to support the formation of DAPTs. In 1997, Alaska was the first state to enact a usable DAPT statute. In the ten years since, other states have followed suit. There are now eleven (arguably 12, if Colorado is included) states that allow for the formation of DAPTs.

Legislatures have taken different approaches. The original statutes are terse and only indicate a public policy (Missouri and Colorado). Some of the new statutes amend existing statutes, and others enact new "Acts." Interest groups within the various states have influenced the extent of the asset protection provided by the statutes.

If implemented correctly, the DAPT approach may be used successfully by residents of states with

DAPT statutes. An interesting issue remains whether non-residents of DAPT states may form a DAPT under one of the DAPT state's laws and obtain the desired asset protection and tax benefits. The analysis of this issue involves the conflict of laws. The most likely test is whether the non-resident's domiciliary state has a "strong public policy" against DAPT asset protection. The fact that twelve states now have DAPT statutes moves this approach from the eccentric anomaly category to an accepted asset protection and transfer tax minimization planning technique. As more and more states enact DAPT statutes, the conclusion that a non-DAPT state has a "strong public policy" against a DAPT trust seems less likely.

The DAPT chart below is designed to give the reader an easy and quick comparison of the various DAPT statutes. A chart, by its very nature, is an oversimplification. The reader is urged to carefully analyze the provisions of a statute before implementing a DAPT.

The following ACTEC Fellows generously reviewed and edited their state's summaries for accuracy: Marc A. Chorney (Colorado); Richard G. Bacon (Delaware); Larry P. Katzenstein (Missouri); Layne Rushforth (Nevada); William Zorn (New Hampshire); Richard B. Kells (Oklahoma); Mary Louise Kennedy (Rhode Island); John H. Raforth (South Dakota); Bryan Howard (Tennessee); Thomas Christensen, Jr. (Utah); and Robert H. Leonard (Wyoming).

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SUBJECT	ALASKA	COLORADO**	DELAWARE	MISSOURI
	Citation: Alaska Stat. § 34.40.110	Citation: Colo. Rev. Stat. §§ 38-10-111	Citation: Del. Code Ann. tit. 12, §§ 3570-3576	Citation: Mo. Rev. Stat. §§ 456.5-505
	Effective Date: April 2, 1997	Effective Date: 1861	Effective Date: July 1, 1997	Effective Date: 1989
	URL: <a href="http://www.legis.state.ak.us">http://www.legis.state.ak.us</a>	URL: <a href="http://www.state.co.us">http://www.state.co.us</a>	URL: <a href="http://www.delcode.state.de.us">http://www.delcode.state.de.us</a>	URL: <a href="http://www.moga.mo.gov">http://www.moga.mo.gov</a>
<b>1. What requirements must trust meet to come within protection of statute?</b>	Trust instrument must: (1) be irrevocable; (2) expressly state AK law governs validity, construction, and administration of trust (unless trust is being transferred to AK trustee from non-AK trustee); (3) contain spendthrift clause.	In trust, limited to future creditors.	Trust instrument must: (1) be irrevocable; (2) expressly state that DE law governs validity, construction, and administration of trust (unless trust is being transferred to DE trustee from non-DE trustee); (3) contain spendthrift clause.	Trust instrument must: (1) be irrevocable; (2) contain a spendthrift clause; (3) have more than the settlor as a beneficiary; (4) settlor's interest must be discretionary.
<b>2. May a revocable trust be used for asset protection?</b>	No.	No.	No.	No.
<b>3. Has the state legislature consistently supported DAPT's and related estate planning by continued amendments?</b>	Yes, amendments enacted in: 2006, 2004, 2003, 2001, 2000, and 1998.	No amendments.	Yes, amendments enacted in: 2008, 2007, 2006, 2005, 2003, 2002, 2001, 2000, and 1998.	Amendments enacted in 2004.
<b>4. What contacts with state are suggested or required to establish situs?</b>	Suggested: (1) some or all of trust assets deposited in state; (2) AK trustee whose powers include (a) maintaining records (can be non-exclusive), (b) preparing or arranging for the preparation of income tax returns (can be non-exclusive); (3) part or all of the administration occurs in state, including maintenance of records.	Not addressed by statute.	Required: (1) some or all of trust assets deposited in state; (2) DE trustee whose powers include (a) maintaining records (can be non-exclusive), (b) preparing or arranging for the preparation of income tax returns; (3) or, otherwise materially participates in the administration of the trust.	Principal place of business or residence of trustee in designated jurisdiction, or presence of all or part of the administration in designated jurisdiction; statute includes procedure for transfer of principal place of business. RSMo § 456.11-1108

\*\* It is unclear whether Colorado's statute qualifies as a DAPT statute. Compare *In Re Baum*, 22 F.3d 1014, 1017 (10th Cir. 1994), with *In the Matter of Cohen*, 8 P.3d 429 (Colo. 1999). See also Howard D. Rosen and Gideon Rothschild, 810 2nd T.M., ASSET PROTECTION PLANNING, A-96 (2008) (contending that the Colorado statute qualifies as a DAPT statute as to future creditors).

SUBJECT	ALASKA	COLORADO**	DELAWARE	MISSOURI
<b>5. What interests in principal and income may settlor retain?</b>	Settlor may retain interests in: (1) CRT; (2) total-return trust; (3) GRAT or GRUT; (4) QPRT; (5) IRA.	Not addressed by statute.	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to 5% interest in total-return trust; (4) GRAT or GRUT; (5) QPRT; (6) qualified annuity interest; (7) ability to be reimbursed for income taxes attributable to trust; and (8) the ability to have debts, expenses and taxes of the settlor's estate paid from the trust.	Settlor may be one of a class of beneficiaries of a trust discretionary as to income or principal. RSMo § 456.5-505.3
<b>6. What is trustee's distribution authority?</b>	Absolute discretion.	Not addressed by statute.	(1) Discretion; or (2) pursuant to a standard.	Not directly addressed by statute.
<b>7. What powers may settlor retain?</b>	Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; and (3) right to appoint trust protector of trustee advisor.	Not addressed by statute.	Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; and (3) power to replace trustee/advisor.	None.
<b>8. Who must serve as trustee to come within protection of statute?</b>	Alaska trustee not required, but suggested to establish situs. Resident individual or trust company or bank that possesses trust powers and has principal place of business in Alaska.	Not addressed by statute.	Resident individual or corporation whose activities are subject to supervision by Delaware Bank Commissioner, FDIC, Comptroller of Currency, or Office of Thrift Supervision.	Not addressed by statute.
<b>9. May non-qualified trustees serve?</b>	Yes.	Not addressed by statute.	Yes, as a co-trustee.	Not addressed by statute.
<b>10. May trust have distribution advisor, investment advisor, or trust protector?</b>	Yes. Trust may have trust protector (who must be disinterested third party) and trustee advisor. Settlor may be advisor if does not have trustee power over discretionary distributions.	Not addressed by statute.	Yes. Trust may have one or more advisors (other than trustor) who may remove and appoint qualified trustees or trust advisors or who have authority to direct, consent to, or	Not addressed by statute.

\*\* It is unclear whether Colorado's statute qualifies as a DAPT statute. Compare *In Re Baum*, 22 F.3d 1014, 1017 (10th Cir. 1994), with *In the Matter of Cohen*, 8 P.3d 429 (Colo. 1999). See also Howard D. Rosen and Gideon Rothschild, 810 2nd T.M., *ASSET PROTECTION PLANNING*, A-96 (2008) (contending that the Colorado statute qualifies as a DAPT statute as to future creditors).

SUBJECT	ALASKA	COLORADO**	DELAWARE	MISSOURI
10. (Continued)			disapprove distributions from trust. Trust may have investment advisor, including trustor. The term "advisor" includes a protector.	
11. Are fraudulent transfers excepted from coverage?	Yes. Alaska has not adopted Uniform Fraudulent Transfer Act. Alaska statute sets aside transfers made with intent to defraud.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with actual intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent. However, future creditors may set aside transfer only if transfer made with intent to defraud.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent. RSMo § 456.5-505.
12. Fraudulent transfer action: burden of proof and statute of limitations.	Burden not addressed by statute. <u>Existing creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered, but future creditor must establish claim within four years after transfer. <u>Future creditors:</u> Four years after transfer.	Clear and convincing evidence. <u>Existing creditors and future creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.	Clear and convincing evidence. <u>Existing creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud. <u>Future creditors:</u> Four years after transfer.	Clear and convincing evidence. <u>Existing creditors and future creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.
13. Does statute provide an exception (no asset protection) for a child support claim?	Yes, if settlor was 30 days or more in default of making payment at time of transfer of assets to trust.	No.	Yes.	Yes. RSMo § 456.5-503.2
14. Does the statute provide an exception (no asset protection) for alimony?	No.	No.	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust.	Yes. RSMo § 456.5-503.2

\*\* It is unclear whether Colorado's statute qualifies as a DAPT statute. Compare *In Re Baum*, 22 F.3d 1014, 1017 (10th Cir. 1994), with *In the Matter of Cohen*, 8 P.3d 429 (Colo. 1999). See also Howard D. Rosen and Gideon Rothschild, 810 2nd T.M., ASSET PROTECTION PLANNING, A-96 (2008) (contending that the Colorado statute qualifies as a DAPT statute as to future creditors).

SUBJECT	ALASKA	COLORADO**	DELAWARE	MISSOURI
15. Does statute provide an exception (no asset protection) for property division upon divorce?	Yes, if assets were transferred to trust during or less than 30 days prior to marriage. Otherwise, assets are protected.	No.	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.	No.
16. Does statute provide an exception (no asset protection) for tort claims?	No.	No.	Yes, for claims that arise as a result of death, personal injury, or property damage occurring before or on the date of transfer.	No.
17. Does statute provide other express exceptions (no asset protection)?	No.	No.	No.	Yes if another governing law supercedes.
18. Does statute prohibit any claim for forced heirship, legitime or elective share?	No.	No.	Yes.	No.
19. Are there provisions for moving trust to state and making it subject to statute?	Yes.	No.	Yes.	No.
20. Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	Yes.	No.	Yes.	No.
21. Does statute provide that trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply?	No.	No.	Yes.	No.

\*\* It is unclear whether Colorado's statute qualifies as a DAPT statute. Compare *In Re Baum*, 22 F.3d 1014, 1017 (10th Cir. 1994), with *In the Matter of Cohen*, 8 P.3d 429 (Colo. 1999). See also Howard D. Rosen and Gideon Rothschild, 810 2nd T.M., *ASSET PROTECTION PLANNING*, A-96 (2008) (contending that the Colorado statute qualifies as a DAPT statute as to future creditors).

SUBJECT	ALASKA	COLORADO**	DELAWARE	MISSOURI
22. Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	Yes.	No.	Yes.	No.
23. Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	Yes, and also provides protection for funding limited partnerships and LLCs.	No.	Yes.	No.
24. Does statute authorize a beneficiary to use or occupy real property or intangible personal property owned by trust, if in accordance with trustee's discretion?	Yes.	No.	No, except for QPRT residence.	No.
25. Is a non-settlor beneficiary's interest protected from property division at divorce?	Yes, and may not be considered in property division.	Increases in the value of and income from separate property after marriage are marital property.	Yes, but may be considered in property division.	Yes, but may be considered in property division.
26. Are due diligence procedures required by statute?	Yes; affidavit required.	No.	No.	No.
27. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	Yes.	No.	Yes.	Yes. RSMo § 456.7-709.

\*\* It is unclear whether Colorado's statute qualifies as a DAPT statute. Compare *In Re Baum*, 22 F.3d 1014, 1017 (10th Cir. 1994), with *In the Matter of Cohen*, 8 P.3d 429 (Colo. 1999). See also Howard D. Rosen and Gideon Rothschild, 810 2nd T.M., *ASSET PROTECTION PLANNING*, A-96 (2008) (contending that the Colorado statute qualifies as a DAPT statute as to future creditors).

SUBJECT	ALASKA	COLORADO**	DELAWARE	MISSOURI
28. Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	Yes.	No.	Yes.	No.
29. Is the trustee given "decanting" authority to modify the trust?	Yes.	No.	Yes.	No.
30. What is allowable duration of trusts?	Up to 1,000 years.	Up to 1,000 years.	Abolished rule against perpetuities for personal property (which includes LLC and LP interests). 110 years for real property.	Abolished rule against perpetuities when trustee has power of sale; generally effective for trusts created only on or after August 28, 2001. RSMo § 456.025.1
31. Does state assert income tax against DAPTs formed by non-resident settlors?	No.	Yes.	No. However, does impose its income tax upon trusts that accumulate income for Delaware residents.	Yes, if from sources within Missouri. Probably no if from marketable securities.
32. Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	Yes, charging order is only remedy.	Yes, charging order is only remedy.	Yes, charging order is only remedy.	Yes, charging order is only remedy.
33. What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	(1) Trustee petition and court discharge; or (2) six months after trustee provides report that adequately discloses claims.	Six months after receipt of a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary.	Trustee filing and court discharge. Discharge occurs two years after delivery of statement that discloses the facts giving rise to the claim. (Accountings do not have <i>res judicata</i> effect in Delaware except as to matters actually contested in the accounting proceeding.)	One year after trustee provides report that adequately discloses claims. RSMo § 456.10-1005.

\*\* It is unclear whether Colorado's statute qualifies as a DAPT statute. Compare *In Re Baum*, 22 F.3d 1014, 1017 (10th Cir. 1994), with *In the Matter of Cohen*, 8 P.3d 429 (Colo. 1999). See also Howard D. Rosen and Gideon Rothschild, 810 2nd T.M., ASSET PROTECTION PLANNING, A-96 (2008) (contending that the Colorado statute qualifies as a DAPT statute as to future creditors).

SUBJECT	NEVADA	NEW HAMPSHIRE	OKLAHOMA	RHODE ISLAND
	Citation: Nev. Rev. Stat. §§ 166.010-166.170	Citation: N.H. Rev. Stat. Ann. § 564-D: 1 -18	Citation: Okla. Stat. tit. 31 § 11, et seq.	Citation: R.I. Gen Laws §§ 18-9.2-1 - 18-9.2-7
	Effective Date: Oct. 1, 1999	Effective Date: Jan. 2, 2009	Effective Date: June 9, 2004	Effective Date: July 1, 1999
	URL: <a href="http://www.leg.state.nv.us">http://www.leg.state.nv.us</a>	URL: <a href="http://www.gencourt.state.nh.us">http://www.gencourt.state.nh.us</a>	URL: <a href="http://www.lsb.state.ok.us">http://www.lsb.state.ok.us</a>	URL: <a href="http://www.rilin.state.ri.us">http://www.rilin.state.ri.us</a>
<b>1. What requirements must trust meet to come within protection of statute?</b>	Trust instrument must: (1) be irrevocable; (2) all or part of corpus of trust must be located in Nevada, domicile of settlor must be in Nevada, or trust instrument must appoint Nevada trustee; and (3) distributions to settlor must be approved by someone other than the settlor.	Trust instrument must: (1) be irrevocable; (2) expressly state that NH law governs validity, construction, and administration of trust (unless trust is being transferred to NH trustee from non-NH trustee); (3) contain spendthrift clause.	Trust instrument may be revocable or irrevocable. Trust instrument must: (1) expressly state Oklahoma law governs; (2) have qualified beneficiaries (ancestors or descendants of grantor, spouse of the grantor, charities, or trusts for such beneficiaries); (3) recite that income subject to income tax laws of Oklahoma; (4) limited to \$1,000,000 of assets plus growth.	Trust instrument must: (1) be irrevocable; (2) expressly state R.I. Law governs validity, construction, and administration of trust; (3) contain spendthrift clause.
<b>2. May a revocable trust be used for asset protection?</b>	No.	No.	Yes. Settlor may revoke or amend trust and take back assets. No court or other judicial body may compel such revocation or amendment.	No.
<b>3. Has the state legislature consistently supported DAPT's and related estate planning by continued amendments?</b>	Yes. The 2007 legislature approved minor amendments.	No amendments. Statute first enacted in 2008.	Yes, amendment enacted in 2005.	Yes, amendment enacted in 2007.
<b>4. What contacts with state are suggested or required to establish situs?</b>	Required: (1) all or part of assets are in state; (2) Nevada trustee whose powers include: (a) maintaining records, (b) preparing income tax returns; (3) all or part	Required: (1) some or all of trust assets deposited in state; (2) NH trustee whose powers include (a) maintaining records (can be nonexclusive), (b) preparing or	Required: (1) Oklahoma trustee; (2) majority of value of assets comprised of Oklahoma assets.	Required: (1) some or all of trust assets deposited in state; (2) R.I. trustee whose powers include: (a) maintaining records (can be non-exclusive), (b) preparing or

SUBJECT	NEVADA	NEW HAMPSHIRE	OKLAHOMA	RHODE ISLAND
4. (Continued)	of administration in state.	arranging for the preparation of income tax returns; (3) or, otherwise materially participates in the administration of the trust.		arranging for the preparation of income tax returns; (3) or, otherwise materially participates in the administration of the trust.
5. What interests in principal and income may settlor retain?	Not addressed by statute.	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to five percent interest in total return trust; (4) QPRT; (5) GRAT or GRUT; (6) the ability to have debts, expenses and taxes of the settlor's estate paid from the trust; (7) ability to be reimbursed for income taxes attributable to trust.	Irrevocable trusts: not addressed by statute. Revocable trusts: see Item 7.	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to five percent interest in total return trust; QPRT; ability to be reimbursed for income taxes attributable to trust.
6. What is trustee's distribution authority?	Absolute discretion.	(1) Discretion; or (2) pursuant to an ascertainable standard.	Irrevocable trusts: not addressed by statute. Revocable trusts: see Item 7.	Discretion, or pursuant to a standard.
7. What powers may settlor retain?	Settlor may retain: (1) power to veto distributions; and (2) special testamentary power of appointment or other similar power.	Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; and (3) power to replace trustee/advisor with nonrelated/nonsubordinate party.	Irrevocable trusts: not addressed by statute. Revocable trusts: settlor may revoke or amend.	Settlor may retain: (1) power to veto distributions; and (2) special testamentary power of appointment.
8. Who must serve as trustee to come within protection of statute?	Resident individual or trust company or bank that maintains office in Nevada.	Resident individual or a state or federally chartered bank or trust company having a place of business in New Hampshire.	Oklahoma based bank or credit union insured by FDIC or NCUA or Oklahoma based trust company chartered under Oklahoma law or nationally chartered, and has place of business in Oklahoma.	Resident individual (other than the transferor) or corporation whose activities are subject to supervision by R.I. Dept. of Business Regulation, FDIC, Comptroller of Currency, or Office of Thrift Supervision.

SUBJECT	NEVADA	NEW HAMPSHIRE	OKLAHOMA	RHODE ISLAND
9. May non-qualified trustees serve?	Yes.	Yes.	Yes.	Yes.
10. May trust have distribution advisor, investment advisor, or trust protector?	Not addressed by statute.	Yes. Trust may have one or more trust advisors who may remove and appoint qualified trustees or trust advisors or who have authority to direct, consent to, or disapprove distributions from trust. "Trust advisor" includes a trust protector or any other person who holds one or more trust powers.	Not addressed by statute.	Yes. Trust may have one or more advisors (other than trustor) who may remove and appoint qualified trustees or trust advisors or who have authority to direct, consent to, or disapprove distributions from trust. Trust may have investment advisor, including trustor. The term "advisor" includes a protector.
11. Are fraudulent transfers excepted from coverage?	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.
12. Fraudulent transfer action: burden of proof and statute of limitations.	Clear and convincing evidence. <u>Future creditors:</u> Two years after transfer. <u>Existing creditors:</u> Two years after transfer, or, if longer, six months after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud (rather than constructive fraud). 2007 amendment (effective 10/1/2007) provides that transfer is deemed discovered when reflected in a public record.	<u>Case law:</u> Actual fraud must be proved by clear and convincing evidence; constructive fraud by a preponderance of the evidence. <u>Existing creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud. <u>Future creditors:</u> Four years after transfer.	Clear and convincing evidence. <u>Existing creditors and future creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.	Clear and convincing evidence. <u>Existing creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud. <u>Future creditors:</u> Four years after transfer.

SUBJECT	NEVADA	NEW HAMPSHIRE	OKLAHOMA	RHODE ISLAND
13. Does statute provide an exception (no asset protection) for a child support claim?	No.	Yes.	Yes.	Yes, if at the time of transfer a court order for child support existed.
14. Does the statute provide an exception (no asset protection) for alimony?	No.	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust.	No.	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust.
15. Does statute provide an exception (no asset protection) for property division upon divorce?	No.	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.	No.	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.
16. Does statute provide an exception (no asset protection) for tort claims?	No.	Yes, for claims that arise as a result of death, personal injury, or property damage occurring before or on the date of transfer.	No.	Yes, for claims that arise as a result of death, personal injury, or property damage occurring before or on the date of transfer.
17. Does statute provide other express exceptions (no asset protection)?	No.	No.	Yes, statute does not protect excess over \$1,000,000 of contributed property.	No.
18. Does statute prohibit any claim for forced heirship, legitime or elective share?	No.	Yes, unless the transferor made the qualified disposition for the purpose of defeating the surviving spouse's elective share rights.	No.	No.
19. Are there provisions for moving trust to state and making it subject to statute?	No.	No.	No.	No.
20. Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	No.	Yes.	Yes.	Yes.

SUBJECT	NEVADA	NEW HAMPSHIRE	OKLAHOMA	RHODE ISLAND
21. Does statute provide that trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply?	No.	No.	No.	Yes.
22. Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	No.	Yes.	No.	Yes.
23. Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	No.	Yes.	No.	Yes.
24. Does statute authorize a beneficiary to use or occupy real property or intangible personal property owned by trust, if in accordance with trustee's discretion?	No.	No, except for QPRT residence.	No.	No, except for QPRT residence.
25. Is a non-settlor beneficiary's interest protected from property division at divorce?	Yes, if property is retained in a spendthrift trust for the beneficiary. Even if not retained in trust, property received by gift or inheritance is the beneficiary's separate property; however, trust income and assets can be considered a resource for purposes of determining alimony and child support.	No, however case law establishes that only vested and defined trust interests are included in the valuation of marital estates.	Yes, if property is retained in a spendthrift trust for the beneficiary. Even if not retained in trust, property received by gift or inheritance is the beneficiary's separate property; however, trust income and assets can be considered a resource for purposes of determining alimony and child support.	Yes, but may be considered in property division.

SUBJECT	NEVADA	NEW HAMPSHIRE	OKLAHOMA	RHODE ISLAND
26. Are due diligence procedures required by statute?	No.	No.	No.	No.
27. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	No.	Yes.	No.	Yes.
28. Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	No.	No.	No.	No.
29. Is the trustee given "decanting" authority to modify the trust?	No.	Yes. N.H. Rev. Stat. Ann. § 564-B: 4-418.	No.	No.
30. What is allowable duration of trusts?	Up to 365 years.	Abolished rule against perpetuities if the trust instrument expressly exempts the instrument from the rule against perpetuities and a trustee has the power to sell.	Rule against perpetuities.	Abolished rule against perpetuities.
31. Does state assert income tax against DAPTs formed by non-resident settlors?	No. Nevada has no state income tax.	Yes	Yes	No
32. Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	Yes, charging order is only remedy.	Yes, charging order is only remedy.	Yes, charging order is only remedy.	Yes, charging order is only remedy.
33. What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	Trustee petition and court discharge.	One year after trustee provides report that adequately discloses claims. N.H. Rev. Stat. Ann. § 564-B: 10-1005.	Two years after trustee provides report that adequately discloses claims.	Trustee application and court discharge.

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	WYOMING
	Citation: S.D. Codified Laws §§ 55-16-1 - 55-16-17	Citation: Tenn. Code Ann. § 35-16-101	Citation: Utah Code Ann. § 25-6-14	Citation: Wyo. Stat. §§ 4-1-505 and 4-10-510 - 523
	Effective Date: March 2, 2005	Effective Date: July 1, 2007	Effective Date: December 31, 2003	Effective Date: July 1, 2007
	URL: <a href="http://www.legis.state.sd.us">http://www.legis.state.sd.us</a>	URL: <a href="http://www.legislature.state.tn.us">http://www.legislature.state.tn.us</a>	URL: <a href="http://www.le.utah.gov">http://www.le.utah.gov</a>	URL: <a href="http://legisweb.state.wy.us">http://legisweb.state.wy.us</a>
<b>1. What requirements must trust meet to come within protection of statute?</b>	Trust instrument must: (1) be irrevocable; (2) expressly state that S.D. law governs validity, construction, and administration of trust (unless trust is being transferred to S.D. trustee from non-S.D. trustee); (3) contain spendthrift clause; specifically refer to S.D. Act.	Trust instrument must: (1) be irrevocable; (2) expressly state TN law governs validity, construction and administration of the trust; (3) contain a spendthrift clause.	Trust instrument must: (1) be irrevocable; (2) contain spendthrift clause.	Trust instrument must: (1) state that trust is a "qualified spendthrift trust" under § 4-10-510 of Wyoming statutes; (2) be irrevocable; (3) expressly state Wyoming law governs validity, construction and administration of the trust; (4) contain a spendthrift clause; (5) settlor must have personal liability insurance equal to lesser of \$1,000,000 or value of trust assets.
<b>2. May a revocable trust be used for asset protection?</b>	No.	No.	No.	No.
<b>3. Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?</b>	No amendments.	Yes. Amendments enacted in 2008. Public Chapter No. 1010.	No amendments.	No amendments to DAPT statute which was enacted in 2007. However, Legislature has annually supported estate and trust legislation.
<b>4. What contacts with state are suggested or required to establish situs?</b>	Suggested: (1) some or all of trust assets deposited in state; (2) S.D. trustee whose powers include (a) maintaining records (can be non-exclusive), (b) preparing or arranging for the preparation of income tax returns; (3) or otherwise materially participates in the administration of the trust.	Required: (1) some or all of trust assets deposited in state; (2) Tennessee trustee whose powers include (a) maintaining records (can be non-exclusive), (b) preparing or arranging for the preparation of income tax returns; (3) or, otherwise materially participates in the administration of the trust.	Required: (1) Utah trust company; (2) some or all of the assets held in certain types of accounts in state.	Required: Wyoming trustee who: (a) maintains custody of some or all of trust assets in state; (b) maintains records (can be non-exclusive); (c) prepares or arranges for the preparation of income tax returns; (d) or, otherwise materially participates in the administration of the trust.

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	WYOMING
<b>5. What interests in principal and income may settlor retain?</b>	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to 5% interest in total-return trust; (4) GRAT or GRUT; (5) QPRT.	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to 5% interest in total-return trust; (4) QPRT.	Settlor may retain interest in CRT.	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to 5% interest in total-return trust; (4) QPRT.
<b>6. What is trustee's distribution authority?</b>	(1) Absolute discretion; (2) pursuant to an ascertainable standard.	(1) Absolute discretion; (2) pursuant to a standard.	(1) Absolute discretion; (2) pursuant to an ascertainable standard.	(1) Absolute discretion; (2) pursuant to a standard.
<b>7. What powers may settlor retain?</b>	Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; and (3) power to replace trustee/advisor with nonrelated/nonsubordinate party.	Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; (3) power to replace trustee/advisor with nonrelated/nonsubordinate party; and (4) serve as an investment advisor.	Settlor may retain: (1) power to veto distributions; (2) testamentary special power of appointment; and (3) power to appoint nonsubordinate advisors/protectors.	Settlor may retain: (1) power to veto distributions; (2) inter vivos or testamentary general or limited power of appointment; (3) power to add or remove a trustee, trust protector, or trust advisor; (4) serve as an investment advisor.
<b>8. Who must serve as trustee to come within protection of statute?</b>	Resident individual or corporation whose activities are subject to supervision by S.D. Division of Banking, FDIC, Comptroller of Currency, or Office of Thrift Supervision. S.D. trustee automatically ceases to serve if it fails to meet these requirements.	Resident individual, or is authorized by Tennessee law to act as a trustee and whose activities are subject to supervision by the Tennessee Dept. of Financial Institutions, the FDIC, the Comptroller of the Currency, or the Office of Thrift Supervision, or any successor thereto.	Institution authorized to engage in trust business in Utah, including Utah depository institutions, non-Utah depository institutions authorized to do business in Utah, and certain other institutions.	Resident individual or a person authorized by Wyoming law to act as trustee or a regulated financial institution.
<b>9. May non-qualified trustees serve?</b>	Yes	Yes	Yes. Individual co-trustees may serve.	Yes
<b>10. May trust have distribution advisor, investment advisor, or trust protector?</b>	Yes. Trust may have one or more advisors (other than trustor) who may remove and appoint qualified trustees or trust advisors or who have authority to direct, consent to, or disapprove distributions from trust. Trust may have investment advisor, including trustor.	Yes. Trust may have: (1) advisors who have authority to remove and appoint qualified trustees or trust advisors; (2) advisors who have authority to direct, consent to or disapprove distributions from the trust; and (3) investment advisors. The term "advisor" includes a trust protector.	Yes. Trust may have non-subordinate advisors/protectors who can remove or appoint trustees; direct, consent to, or disapprove distributions; or serve as investment directors. Settlor may be investment director.	Yes. Trust may have trust protector who can remove or appoint trustees; direct, consent to, or disapprove distributions; change governing law; change beneficiary's interests; and grant or terminate powers of appointment. Trust may have advisors. Settlor may be an advisor.

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	WYOMING
<b>11. Are fraudulent transfers excepted from coverage?</b>	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.
<b>12. Fraudulent transfer action: burden of proof and statute of limitations.</b>	Clear and convincing evidence. <u>Existing creditors and future creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.	Burden not addressed by statute. <u>Existing creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud. <u>Future creditors:</u> Four years after transfer.	Clear and convincing evidence. <u>Existing creditors and future creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.	Burden not addressed by statute. <u>Existing creditors and future creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.
<b>13. Does statute provide an exception (no asset protection) for a child support claim?</b>	Yes.	Yes.	Yes.	Yes.
<b>14. Does the statute provide an exception (no asset protection) for alimony?</b>	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust.	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust.	Yes.	No.
<b>15. Does statute provide an exception (no asset protection) for property division upon divorce?</b>	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.	Yes.	No.
<b>16. Does statute provide an exception (no asset protection) for tort claims?</b>	Yes, for claims that arise as a result of death, personal injury, or property damage occurring before or on the date of transfer.	No.	Yes, see Item 17, below.	No.

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	WYOMING
<p><b>17. Does statute provide other express exceptions (no asset protection)?</b></p>	No.	No.	<p>Yes: (1) claim is decision or ruling resulting from judicial, arbitration, mediation, or administrative proceeding commenced prior to or within three years after trust created; (2) public assistance; (3) taxes; (4) violation of certain written representations or agreements; (5) fraud.</p>	<p>Yes. (1) Qualified trust property that is listed upon an application or financial statement used to obtain or maintain credit other than for the benefit of the qualified spendthrift trust; (2) property of a qualified spendthrift trust that was transferred to the trust by a settlor who received the property by a fraudulent transfer.</p>
<p><b>18. Does statute prohibit any claim for forced heirship, legitime or elective share?</b></p>	No.	No.	No.	No.
<p><b>19. Are there provisions for moving trust to state and making it subject to statute?</b></p>	Yes.	<p>Implied, based on a trustee's power to make contributions to a DAPT.</p>	Yes.	<p>Yes, permits transfer of trust property from trust created in another jurisdiction with similar creditor protection for settlor with creditor protection relating back to date of funding of trust created in other jurisdiction. Irrevocable trusts from other states may also elect to become qualified spendthrift trusts if they incorporate law of Wyoming, obtain qualified trustee, and have spendthrift clause.</p>
<p><b>20. Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?</b></p>	Yes.	Yes.	Yes.	Yes.

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	WYOMING
21. Does statute provide that trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply?	No.	Yes.	No.	Yes.
22. Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	Yes.	Yes.	No.	No.
23. Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	Yes.	Yes.	Yes.	Yes.
24. Does statute authorize a beneficiary to use or occupy real property or intangible personal property owned by trust, if in accordance with trustee's discretion?	Yes.	Yes.	No.	No, except for QPRT residence.
25. Is a non-settlor beneficiary's interest protected from property division at divorce?	No.	Yes, but may be considered in property division.	No.	Yes, but may be considered in property division.
26. Are due diligence procedures required by statute?	No.	Yes; affidavit required.	No.	Yes; affidavit required.

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	WYOMING
27. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	Yes.	Yes.	Yes.	Yes.
28. Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	No.	No.	No.	No.
29. Is the trustee given "decanting" authority to modify the trust?	Yes.	Yes.	No.	No, but trust protector may have a similar power.
30. What is allowable duration of trusts?	Abolished rule against perpetuities.	Up to 360 years.	Up to 1,000 years.	Up to 1,000 years, except for real property.
31. Does state assert income tax against DAPTs formed by non-resident settlors?	No.	No, if the beneficiaries are nonresidents. If the beneficiaries are residents, a tax is levied on dividends and interest.	No, except for Utah source income, such as rental income from Utah real property.	No.
32. Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	Yes; charging order is only remedy.	Yes for LLCs; charging order is only remedy.  No for LPs.	Yes, charging order is only remedy.	Yes; charging order is exclusive remedy.
33. What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	180 days after trustee provides accounting, or by order of court for supervised trusts.	One year after trustee provides report that adequately discloses claims.	Six months after trustee provides report that adequately discloses claims.	Two years after trustee provides report that adequately discloses claims.

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Volume 34, No. 4, Spring 2009

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The *ACTEC Journal* (ISSN 1544-4945) is published quarterly for the Fellows of The American College of Trust and Estate Counsel as a professional service.

Members of the College receive a subscription to *ACTEC Journal* without charge. Non-members may subscribe to *ACTEC Journal* for \$60 per year. Price for single issue, if available, is \$15 per issue.

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**IC 30-4-8 INDIANA ASSET PROTECTION TRUST**

**30-4-8-1 APPLICABLE DATE.** This chapter shall apply to Qualified Dispositions to Asset Protection Trusts and Dispositions by Transferors who are trustees made on or after June 30, 2011.

**30-4-8-2 DEFINITIONS.** Unless the context otherwise requires, the following definitions apply in this chapter.

(1) “Asset Protection Trust” means a trust that:

(A) Appoints at least one or more Qualified Trustees for the Property that is the subject of a Qualified Disposition;

(B) Expressly incorporates the law of Indiana to govern the validity, construction and administration of the trust;

(C) Is irrevocable; and

(D) Provides that the interest of the Transferor or beneficiary in the trust Property or the income therefrom may not be transferred, assigned, pledged or mortgaged, whether voluntarily or involuntarily, before the Qualified Trustee or Qualified Trustees actually distribute the Property or income to the beneficiary.

(2) “Claim” means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.

(3) “Creditor” means, with respect to a Transferor, a Person who has a Claim.

(4) “Debt” means liability on a Claim.

(5) “Disposition” means a transfer, conveyance or assignment of Property including a change in the legal ownership of Property occurring upon the substitution of one (1) trustee for another or the addition of one (1) or more new trustees. “Disposition” also includes the exercise of a power so as to cause a transfer of Property to a trustee or trustees, but shall not include the release or relinquishment of an interest in Property that until the release or relinquishment was the subject of a Qualified Disposition.

(6) “Investment Decision” means the retention, purchase, sale, exchange, tender or other transaction affecting the ownership of or rights in investments.

(7) “Person” means an individual at least eighteen (18) years of age, a corporation, trust, limited liability company or partnership, partnership, governmental entity or political subdivision.

(8) “Property” includes real property, personal property, and interests in real or personal property.

(9) “Qualified Affidavit” means a sworn affidavit signed by the Transferor before a Disposition of Property to an Asset Protection Trust that meets the requirements of IC 30-4-8-3(a). In the event of a Disposition by a Transferor who is a trustee, the Qualified Affidavit shall be signed by the Transferor who made the original Disposition to the trustee, or a predecessor trustee, in a form that meets the requirements of IC 30-4-8-2(1)(C) and (D) and shall state facts as of the time of the original Disposition.

(10) “Qualified Disposition” means a Disposition by or from a Transferor with or without consideration, to an Asset Protection Trust after the Transferor executes a Qualified Affidavit. A Disposition by a trustee that is not a Qualified Trustee to a trustee that is a Qualified Trustee shall not be treated as other than a Qualified Disposition solely because the trust instrument fails to meet the requirements of IC 30-4-8-2(1)(B). In the case of a disposition to more than one (1) trustee, a Disposition that is otherwise a Qualified Disposition shall not be treated as other than a Qualified Disposition solely because not all of the recipient trustees are Qualified Trustees.

(11) “Qualified Trustee” means a person who:

(A) In the case of a natural Person, is a resident of Indiana, or, in all other cases, is authorized by the law of Indiana to act as a trustee and whose activities are subject to supervision by the State of Indiana, the federal deposit insurance corporation, the comptroller of the currency, or the office of thrift supervision or any successor thereto;

(B) Maintains or arranges for custody in Indiana some or all of the Property that is the subject of the Qualified Disposition, maintains records for the Asset Protection Trust on an exclusive or nonexclusive basis, prepares or arranges for the preparation of required income tax returns for the Asset Protection Trust, or otherwise materially participates in the administration of the Asset Protection Trust; and

(C) Is not the Transferor.

(12) “Transferor” means a Person who, as an owner of Property, is a holder of a power of appointment which authorizes the holder to appoint in favor of the holder, the holder’s Creditors, the holder’s estate or the Creditors of the holder’s estate, or as a trustee, directly or indirectly makes a Disposition or causes a Disposition to be made.

(13) “Trust Advisor” means a Person given authority by the terms of an Asset Protection Trust to direct, consent to or disapprove actual or proposed Investment Decisions, distribution decisions or other decisions related to Property in an Asset Protection Trust.

**30-4-8-3 QUALIFIED AFFIDAVIT.**

(a) A Qualified Affidavit shall identify the Property to be transferred to the Asset Protection Trust and state that:

(1) The Transferor has full right, title, and authority to transfer the Property to the Asset Protection Trust;

(2) The transfer of the Property to the Asset Protection Trust will not render the Transferor insolvent;

(3) The Transferor does not intend to defraud a Creditor by transferring the Property to the Asset Protection Trust,

(4) The Transferor does not have any pending or threatened court actions against the Transferor, except for those court actions identified by the Transferor on an attachment to the Qualified Affidavit;

(5) The Transferor is not involved in any administrative proceedings except for those administrative proceedings identified on an attachment to the Qualified Affidavit;

(6) The Transferor does not contemplate filing for relief under the provisions of the federal bankruptcy code; and

(7) The Property being transferred to the Asset Protection Trust is not derived from unlawful activities.

(b) If Transferor is an individual and is married at the time the Qualified Affidavit is signed, a copy of this Qualified Affidavit shall be given to the Transferor's spouse.

**30-4-8-4 PROTECTION FROM CREDITORS.**

(a) Except as provided in IC 30-4-8-5 and notwithstanding any provision of law to the contrary, no action of any kind, including, without limitation, an action to enforce a judgment entered by a court or other body having adjudicative authority, shall be brought at law or in equity for an attachment or other provisional remedy against Property that is the subject of a Qualified Disposition to an Asset Protection Trust or for the avoidance of a Qualified Disposition to an Asset Protection Trust.

(b) If, in any action brought against an Asset Protection Trust, a court takes any action whereby the court declines to apply the law of Indiana in determining the effect of a spendthrift provision in the Asset Protection Trust, the trustee of the Asset Protection Trust shall immediately upon such court's action and without the further order of any court, cease in all respect to be trustee of the Asset Protection Trust and a successor trustee shall

thereupon succeed as trustee in accordance with the terms of the trust or, if the trust does not provide for a successor trustee and the trust would otherwise be without a trustee, a court of this state, upon the application of any beneficiary of Asset Protection Trust, shall appoint a successor trustee upon such terms and conditions as it determines to be consistent with the purposes of the trust and this Act. Upon the trustee's ceasing to be trustee, that trustee shall have no power or authority other than to convey the trust Property to the successor trustee named in the trust in accordance with this section.

(c) An Asset Protection Trust and its Property shall be protected under this section whether or not the Transferor retains any or all of the powers and rights described in IC 30-4-8-10 or serves as a Trust Advisor pursuant to IC 30-4-8-9.

### **IC 30-4-8-5 CREDITOR EXCEPTIONS.**

(a) The only Claims that are exceptions to IC 30-4-8-4 are:

(1) Actions brought in this state pursuant to the provisions of the Uniform Fraudulent Transfer Act, IC 32-18-2, where the requirements for recovery under the Uniform Fraudulent Transfer Act are met by clear and convincing evidence;

(2) Payments, both past and future, due under a court judgment or order for child support against the Transferor in existence at the time of the Qualified Disposition to the Asset Protection Trust; or

(3) A court judgment or order of division of property in a dissolution of marriage or legal separation of the Transferor if the Qualified Disposition to the Asset Protection Trust was:

(A) After the date of the Transferor's marriage that is being dissolved or separated; or

(B) Within thirty (30) days before the date of the Transferor's marriage that is being dissolved or separated unless Transferor gives written notice to the other party to the marriage three (3) days before the Qualified Disposition

(b) A Creditor's Claim under subsection (a)(1) of this section shall be extinguished unless:

(1) The Creditor's Claim arose before the Qualified Disposition to an Asset Protection Trust was made, and the action is brought within the limitations of IC 32-18-2-19 in effect on the date of the Qualified Disposition; or

(2) Notwithstanding the provisions of IC 32-18-2-19, the Creditor's Claim arose concurrent with or subsequent to the Qualified Disposition and the action is brought within four (4) years after the Qualified Disposition is made.

(c) For purpose of this chapter, a Qualified Disposition that is made by means of a Disposition by a Transferor who is a trustee shall be deemed to have been made as of the time, whether before, on or after July 1, 2011, the Property that is the subject of the Qualified Disposition was originally transferred to the Transferor acting in the capacity of trustee, or any predecessor trustee, in a form that meets the requirements of IC 30-4-8-2(1)(C) and (D).

(d) In circumstances where more than one (1) Qualified Disposition is made by means of the same Asset Protection Trust, then:

(1) The making of a subsequent Qualified Disposition shall be disregarded in determining whether a Creditor's Claim with respect to a prior Qualified Disposition is extinguished as provided in subsection (b); and

(2) Any distribution to a beneficiary shall be deemed to have been made from the latest Qualified Disposition.

#### **IC 30-4-8-6                    LIMITATIONS ON CREDITOR'S CLAIM.**

(a) If a Creditor's Claim is allowed under IC 30-4-8-5 (a), the Qualified Disposition to an Asset Protection Trust shall be subject to that Claim only to the extent necessary to satisfy the Transferor's Debt to the Creditor whose Claim was allowed.

(b) In the event any Creditor's Claim is allowed as provided in subsection (a), then:

(1) If the court is satisfied that a Qualified Trustee has not acted in bad faith in accepting or administering the Property that is the subject of the Qualified Disposition:

(A) The Qualified Trustee shall have a first and paramount lien against the Property that is the subject of the Qualified Disposition in an amount equal to the entire cost, including attorneys' fees, properly incurred by the Qualified Trustee in the defense of the action or proceedings filed by the Creditor;

(B) The Creditor's Claim shall be allowed subject to the proper fees, costs, preexisting rights, claims and interests of the Qualified Trustee and of any predecessor Qualified Trustee that has not acted in bad faith; and

(C) For the purposes of this subdivision, it shall be presumed that the Qualified Trustee did not act in bad faith merely by accepting the Property; and

(D) If the court is satisfied that a beneficiary of an Asset Protection Trust has not acted in bad faith, the Creditor's Claim shall be subject to the right of the beneficiary to retain any distribution made upon the exercise of a trust power or discretion vested in the Qualified Trustee or Qualified Trustees of the Asset Protection Trust, which power or discretion was properly exercised prior to the Creditor's commencement of an action. For purposes of this subdivision, it shall be presumed that the beneficiary, including a

beneficiary who is also a Transferor of the trust, did not act in bad faith merely by creating the trust or by accepting a distribution made in accordance with the terms of the Asset Protection Trust.

**IC 30-4-8-7 BANKRUPTCY PROVISION.** A spendthrift provision as described in IC 30-4-8-2(1)(D) shall be deemed to be a restriction on the transfer of the Transferor's beneficial interest in the trust that is enforceable under applicable nonbankruptcy law within the meaning of § 541(c)(2) of the Bankruptcy Code (11 U.S.C. § 541(c)(2)) or any successor provision thereto.

**IC 30-4-8-8 TRANSFEROR'S LIMITATIONS.** Except as permitted by the provisions of the Asset Protection Trust and by IC 30-4-8-9 and 10, the Transferor shall have no rights or authority with respect to the principal or income of the Asset Protection Trust and any agreement or understanding purporting to grant or permit the retention of any greater rights or authority shall be void.

**IC 30-4-8-9 TRANSFEROR AS ADVISOR.** A Person may serve as a Trust Advisor notwithstanding that Person is the Transferor of the Qualified Disposition, but that Person may not serve as advisor to a trust that is a Qualified Disposition except with respect to the retention of the veto right permitted by IC 30-4-8-10(1).

**IC 30-4-8-10 TRANSFEROR RETAINED POWERS.** An Asset Protection Trust shall not be deemed revocable on account of its inclusion of one (1) or more of the following:

- (1) A Transferor's power to veto a distribution from the trust;
- (2) A power of appointment (other than a power to appoint to the Transferor, the Transferor's Creditors, the Transferor's estate or the Creditors of the Transferor's estate) exercisable by will or other written instrument of the Transferor effective only upon the Transferor's death;
- (3) The Transferor's potential or actual receipt of income or principal, including rights to income retained in the trust;
- (4) The Transferor's potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust as such terms are defined in § 664 of the Internal Revenue Code of 1986 (26 U.S.C. § 664) and any successor provision thereto;
- (5) The Transferor's potential or actual receipt of income or principal from a grantor retained annuity trust or grantor retained unitrust that is allowed under 26 U.S.C. 2702 of the Internal Revenue Code as that section exists on the date this Act is effective and as amended;

(6) The Transferor's potential or actual receipt or use of principal if such potential or actual receipt or use of principal would be the result of a Qualified Trustee's or Qualified Trustees' acting:

(A) In the Qualified Trustee's or Qualified Trustees' discretion. For purposes of this section, a Qualified Trustee is presumed to have discretion with respect to the distribution of principal unless such discretion is expressly denied to the Qualified Trustee by the terms of the trust;

(B) Pursuant to a standard that governs the distribution of principal and does not confer upon the Transferor a power to consume, invade or appropriate property for the benefit of the Transferor, unless such power of the Transferor is limited by an ascertainable standard relating to the health, education, support, or maintenance within the meaning of § 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986, as in effect on July 1, 2007, or as later amended; or

(C) At the direction of an advisor described in IC 30-4-8-11 acting:

(i) In such advisor's discretion; or

(ii) Pursuant to a standard that governs the distribution of principal and does not confer upon the Transferor a power to consume, invade, or appropriate Property for the benefit of the Transferor, unless such power of the Transferor is limited by an ascertainable standard relating to the health, education, support, or maintenance within the meaning of § 2041(b)(1)(A) or 2414(c)(1) of the Internal Revenue Code of 1986, as in effect on July 1, 2007, or as later amended.

(7) The Transferor's right to remove a trustee or advisor and to appoint a new trustee or advisor; provided, however, that such right shall not include the appointment of a Person who is a related or subordinate party with respect to the Transferor within the meaning of § 672(c) of the Internal Revenue Code of 1986 (26 U.S.C. § 672(c)) and any successor provision thereto;

(8) The Transferor's potential or actual use of real property held under a qualified personal residence trust within the meaning of such term as described in § 2702(c) of the Internal Revenue Code of 1986 (26 U.S.C. § 2702(c)) and any successor provision thereto.

#### **IC 30-4-8-11            ADVISORS**

(a) For purposes of this chapter, neither the Transferor nor any other natural Person who is a nonresident of this state nor an entity that is not authorized by the law of Indiana to act as a trustee or whose activities are not subject to supervision as provided in IC 30-4-8-2

(11)(A) shall be considered a Qualified Trustee; however, nothing in this chapter shall preclude a Transferor from appointing one (1) or more advisors, including but not limited to:

(1) Advisors who have authority under the terms of the trust instrument to remove and appoint Qualified Trustees or Trust Advisors;

(2) Advisors who have authority under the terms of the trust instrument to direct, consent to or disapprove distributions from the trust; and

(3) Trust Advisors, whether or not such advisors would meet the requirements imposed by IC 30-4-8-2 (11).

(b) For purposes of this subsection, the term “advisor” includes a trust “protector” or any other person who, in addition to a Qualified Trustee, holds one (1) or more trust powers.

**IC 30-4-8-12 QUALIFIED TRUSTEE VACANCY.** In the event that a Qualified Trustee of an Asset Protection Trust ceases to meet the requirements of IC 30-4-8-2 (11)(A), and there remains no trustee that meets such requirements, that Qualified Trustee shall be deemed to have resigned as of the time of cessation, and the successor Qualified trustee provided for in the Asset Protection Trust shall become a Qualified Trustee of the Asset Protection Trust or in the absence of any successor Qualified Trustee provided for in the Asset Protection Trust, then a court of this state shall, upon application of any interested party, appoint a successor Qualified Trustee.

**IC 30-4-8-13 IMMUNITY**

(a) Notwithstanding any provision of law to the contrary, a Creditor, including a Creditor whose Claim arose before or after a Qualified Disposition, or any other Person shall have only those rights with respect to a Qualified Disposition as are provided in this chapter, and that Creditor or any other Person shall not have any Claim or cause of action against the trustee, or an advisor of an Asset Protection Trust, or against any person involved in the counseling, drafting, preparation, execution or funding of an Asset Protection Trust. For purposes of this section, counseling, drafting, preparation, execution or funding of an Asset Protection Trust includes the counseling, drafting, preparation, execution and funding of a limited partnership or a limited liability company if interests in the limited partnership or limited liability company are subsequently transferred to the Asset Protection Trust.

(b) Notwithstanding any provision of law to the contrary, no action of any kind, including, without limitation, an action to enforce a judgment entered by a court or other body having adjudicative authority, shall be brought at law or in equity against a trustee or an advisor of an Asset Protection Trust, or against any Person involved in the counseling, drafting, preparation, execution or funding of an Asset Protection Trust, if, as of the date such action is brought, an action by a Creditor with respect to such Asset Protection Trust would be barred under this section.

**IC 30-4-8-14**            **RULE AGAINST PERPETUITIES EXCLUSION.** The common law rule against perpetuities and the Uniform Statutory Rule Against Perpetuities, IC 32-17-8, shall not apply to Property or Property interests in an Asset Protection Trust or the terms and provisions of an Asset Protection Trust.

## Exhibit D

### 12-14-21-3. Priority of lien. AMENDED

Notwithstanding any other law, a claim filed for recovery of aged assistance has priority in order of payment from the estate over all other claims, except the following:

- (1) Prior recorded encumbrances.
- (2) Taxes.
- (3) Reasonable costs of administration.
- (4) Reasonable funeral expenses in an amount not to exceed five hundred fifty dollars (\$550). The court may consider the amount of funds established~~However, this amount is zero (0) if the decedent has for prepaid funeral expenses that were excluded as a resource for Medicaid eligibility under IC 12-15-2 to determine reasonability of funeral expenses under this section.~~

### IC 12-15-9-0.5 "Estate" and "nonprobate transfer" defined AMENDED

Sec. 0.5.

(a) As used in this chapter, "estate" includes:

~~(1) all real and personal property and other assets included within an individual's probate estate~~ assets described in IC 29-1-1-3(a)(9);

(2) any interest in real property owned by the individual at the time of death that was conveyed to the individual's survivor through joint tenancy with right of survivorship, if the joint tenancy was created after June 30, 2002;

(3) any real or personal property conveyed through a nonprobate transfer; and

(4) any sum due after June 30, 2005, to a person after the death of a Medicaid recipient that is under the terms of an annuity contract purchased after May 1, 2005, with the assets of:

~~(A) the Medicaid recipient; or~~

~~(B) the Medicaid recipient's spouse.~~

(b) As used in this chapter, "nonprobate transfer" means a valid transfer, effective at death, by a transferor:

(1) whose last domicile was in Indiana; and

(2) who immediately before death had the power, acting alone, to prevent transfer of the property by revocation or withdrawal and:

(A) use the property for the benefit of the transferor; or

(B) apply the property to discharge claims against the transferor's probate estate.

The term does not include transfer of a survivorship interest in a tenancy by the entireties real estate or payment of the death proceeds of a life insurance policy.

### **IC 12-15-9-1 Amount of claim; preference AMENDED**

#### Sec. 1.

(a) Subject to subsection (b), upon the death of a Medicaid recipient ~~or upon the death of a deceased Medicaid recipient's spouse~~, the total amount of Medicaid paid on behalf of the recipient after the recipient became fifty-five (55) years of age must be allowed as a preferred claim against the estate of the recipient ~~or the recipient's spouse~~ in favor of the state. The affidavit of a person designated by the secretary to administer this section is evidence of the amount of the claim and is payable after the payment of the following in accordance with IC 29-1-14-9:

(1) ~~Funeral expenses for the recipient and the recipient's spouse, not to exceed in each individual case three hundred fifty dollars (\$350).~~ The expenses of administering the estate, including without limitation attorney fees and personal representative fees approved by the court; and all taxes, interest, and penalties imposed by federal, state, county, and local government.

(2) ~~The expenses of the last illness of the recipient and the recipient's spouse that are authorized or paid by the office.~~ Reasonable funeral expenses for the recipient.

(3) ~~The expenses of administering the estate, including the attorney's fees approved by the court.~~ The expenses of the last illness of the recipient that are authorized or paid by the office.

(b) ~~If a recipient's spouse remarries, the part of the estate of the recipient's spouse that is attributable to the subsequent spouse is not subject to a claim for Medicaid paid on behalf of the recipient.~~

### **IC 29-1-14-9 Classification of claims; preferences AMENDED**

#### Sec. 9.

(a) All claims shall be classified in one (1) of the following classes. If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

(1) Costs and expenses of administration.

(2) Reasonable funeral expenses. However, in any estate in which the decedent was a recipient of public assistance under IC 12-1-1 through IC 12-1-12 (before its repeal) or any of the following, subject to the provisions of IC 12-15-9-1, the amount of funeral expenses having priority over any claim for the recovery of public assistance shall not exceed the limitations provided for under IC 12-14-6, IC 12-14-17, and IC 12-14-21:

TANF assistance.

TANF burials.

TANF PACT/J.O.B.S.

Temporary assistance to Other Needy Families (TAONF) assistance.

ARCH.

Blind relief.

Child care.

Child welfare adoption assistance.

Child welfare adoption opportunities.

Child welfare assistance.

Child welfare child care improvement.

Child welfare child abuse.

Child welfare child abuse and neglect prevention.

Child welfare children's victim advocacy program.

Child welfare foster care assistance.

Child welfare independent living.

Child welfare medical assistance to wards.

Child welfare program review action group (PRAG).

Child welfare special needs adoption.

Food Stamp administration.

Health care for indigent (HCI).

ICES.

IMPACT (food stamps).

Title IV-D (ICETS).

Title IV-D child support administration.

Title IV-D child support enforcement (parent locator).

Medicaid assistance.

Medical services for inmates and patients (590).

Room and board assistance (RBA).

Refugee social service.

Refugee resettlement.

Repatriated citizens.

SSI burials and disabled examinations.

Title XIX certification.

(3) Allowances made under IC 29-1-4-1.

(4) All debts and taxes having preference under the laws of the United States.

(5) Reasonable and necessary medical expenses of the last sickness of the decedent, including compensation of persons attending him.

(6) All debts and taxes having preference under the laws of this state; but no personal representative shall be required to pay any taxes on any property of the decedent unless such taxes are due and payable before possession thereof is delivered by the personal representative pursuant to the provisions of IC 29-1.

(7) All other claims allowed.

(b) No preference shall be given in the payment of any claim over any other claim of the same class, nor shall a claim due and payable be entitled to a preference over claims not due.

(c) Costs and expenses of administration referred to in subsection (a)(1) include without limitation the fee of an attorney surrogate that has been approved by a court under the rules of the Indiana Supreme Court governing attorney surrogates and filed as a claim in the estate of a deceased attorney.

**IC 29-1-7-15.1 Determination of intestacy; presentation of will for probate; time limits; sale of property AMENDED**

Sec. 15.1.

(a) When it has been determined that a decedent died intestate and letters of administration have been issued upon the decedent's estate, no will shall be probated unless it is presented for probate before the court decrees final distribution of the estate or before a closing statement has been filed in an unsupervised estate.

(b) No real estate situate in Indiana of which any person may die seized shall be sold by the executor or administrator of the deceased person's estate to pay any debt or obligation of the deceased person, which is not a lien of record in the county in which the real estate is situate, or to pay any costs of administration of any decedent's estate, unless letters testamentary or of administration upon the decedent's estate are taken out within five (5) months after the decedent's death.

(c) The title of any real estate or interest therein purchased in good faith and for a valuable consideration from the heirs of any person who died seized of the real estate shall not be affected or impaired by any devise made by the person of the real estate so purchased, unless:

(1) the will containing the devise has been probated and recorded in the office of the clerk of the court having jurisdiction within five (5) months after the death of the testator; or

(2) an action to contest the will's validity is commenced within the time provided by law and, as a result, the will is ultimately probated.

~~(d) The will of the decedent shall not be admitted to probate unless the will is presented for probate before the latest of the following dates:—~~

~~(1) Three (3) years after the individual's death.——~~

~~(2) Sixty (60) days after the entry of an order denying the probate of a will of the decedent previously offered for probate and objected to under section 16 of this chapter.——~~

~~(3) Sixty (60) days after entry of an order revoking probate of a will of the decedent previously admitted to probate and contested under section 17 of this chapter. However, in the case of an individual presumed dead under IC 29-2-5-1, the three (3) year period commences with the date the individual's death has been established by appropriate legal action.~~

(d) If no estate proceedings have been commenced for the decedent and if an asset of the decedent's remains titled or registered in the name of the decedent, the will of the decedent may

be presented to the court for probate and admitted to probate subject to all rules governing the admission of wills to probate.

**Exhibit F**

**IC 29-2-1-6 Domiciliary foreign personal representative; powers - AMENDED**

Sec. 6. A domiciliary foreign personal representative who has complied with section 5 may exercise as to assets in this state all powers of a local unsupervised personal representative and may maintain actions and proceedings in this state subject to any conditions imposed upon non-resident parties generally.

**Exhibit G**

**IC 29-3-3-4 Emergencies; appointment of temporary guardian; suspension of guardian; exemptions AMENDED**

Sec. 4.

(a) If:

- (1) a guardian has not been appointed for an incapacitated person or minor;
- (2) an emergency exists;
- (3) the welfare of the incapacitated person or minor requires immediate action; and

(4) no other person appears to have authority to act in the circumstances; the court, on petition by any person or on its own motion, may appoint a temporary guardian for the incapacitated person or minor for a specified period not to exceed sixty (60) days. No such appointment shall be made except after notice and hearing unless it is alleged and found by the court that immediate and irreparable injury to the person or injury, loss, or damage to the property of the alleged incapacitated person or minor may result before the alleged incapacitated person or minor can be heard in response to the petition. If a temporary guardian is appointed without advance notice and the alleged incapacitated person or minor files a petition that the guardianship be terminated or the court order modified, the court shall hear and determine the petition at the earliest possible time.

(b) If:

(1) A petition is filed under this section for appointment of a temporary guardian: and

(2) On or before the time the court considers and acts on the petition, each person required to receive notice under IC 29-3-6-1(a) has not either:

(A) received a complete copy of the petition and the notice required by IC 29-3-6-2,  
or

(B) received actual notice of the filing of the petition and specifically waived in writing the necessity for service of the notice required by IC 29-3-6-2,

then immediately after the court enters an order scheduling a hearing on the petition or appointing a temporary guardian, the petitioner shall serve complete copies of the petition, the court's order, and the notice required by IC 29-3-6-2 on every person entitled to notice under IC 29-3-6-1(a) and on every other person to whom the court directs that notice be given. The requirements of this subsection are in addition to the petitioner's obligations, under Rule 65 of the Indiana Rules of Trial Procedure, to make a specific showing of his or her efforts to provide

advance notice to all interested persons or of the reasons why such advance notice cannot or should not be given.

~~(b)~~(c) If the court finds that a previously appointed guardian is not effectively performing fiduciary duties and that the welfare of the protected person requires immediate action, the court may suspend the authority of the previously appointed guardian and appoint a temporary guardian for the protected person for any period fixed by the court. The authority of the previously appointed guardian is suspended as long as a temporary guardian appointed under this subsection has authority to act.

~~(d)~~ A temporary guardian appointed under this section has only the responsibilities and powers that are ordered by the court. The court shall order only the powers that are necessary to prevent immediate and substantial injury or loss to the person or property of the alleged incapacitated person or minor in an appointment made under this section.

~~(e)~~ Proceedings under this section are not subject to the provisions of IC 29-3-4.

~~(f)~~ A proceeding under this section may be joined with a proceeding under IC 29-3-4 or IC 29-3-5.

**IC 29-3-6-1 Notice of petition and hearing; persons to whom notice must be given; waiver of notice AMENDED**

Sec. 1.

(a) When a petition for appointment of a guardian or for the issuance of a protective order is filed with the court, notice of the petition and the hearing on the petition shall be given by first class postage prepaid mail as follows:

(1) If the petition is for the appointment of a successor guardian, notice shall be given unless the court, for good cause shown, orders that notice is not necessary.

(2) If the petition is for the appointment of a temporary guardian, notice shall be given as required by IC 29-3-3-4(a) and (b).

(3) If the subject of the petition is a minor, notice of the petition and the hearing on the petition shall be given to the following persons whose whereabouts can be determined upon reasonable inquiry:

(A) The minor, if at least fourteen (14) years of age, unless the minor has signed the petition.

(B) Any living parent of the minor, unless parental rights have been terminated by a court order.

(C) Any person alleged to have had the principal care and custody of the minor during the sixty (60) days preceding the filing of the petition.

(D) Any other person that the court directs.

(4) If it is alleged that the person is an incapacitated person, notice of the petition and the hearing on the petition shall be given to the following persons whose whereabouts can be determined upon reasonable inquiry:

(A) The alleged incapacitated person, the alleged incapacitated person's spouse, and the alleged incapacitated person's adult children, or if none, the alleged incapacitated person's parents.

(B) Any person who is serving as a guardian for, or who has the care and custody of, the alleged incapacitated person.

(C) In case no person other than the incapacitated person is notified under clause (A), at least one (1) of the persons most closely related by blood or marriage to the alleged incapacitated person.

(D) Any person known to the petitioner to be serving as the alleged incapacitated person's attorney-in-fact under a durable power of attorney.

(E) Any other person that the court directs. Notice is not required under this subdivision if the person to be notified waives notice or appears at the hearing on the petition.

(b) Whenever a petition (other than one for the appointment of a guardian or for the issuance of a protective order) is filed with the court, notice of the petition and the hearing on the petition shall be given to the following persons, unless they appear or waive notice:

(1) The guardian.

(2) Any other persons that the court directs, including the following:

(A) Any department, bureau, agency, or political subdivision of the United States or of this state that makes or awards compensation, pension, insurance, or other allowance for the benefit of an alleged incapacitated person.

(B) Any department, bureau, agency, or political subdivision of this state that may be charged with the supervision, control, or custody of an alleged incapacitated person.

**Exhibit H**

**IC 29-3-9-1 Delegation of powers; exercise of powers under power of attorney AMENDED**

Sec. 1.

(a) By a properly executed power of attorney, a parent of a minor or a guardian (other than a temporary guardian) of a protected person may delegate to another person for:

(1) any period during which the care and custody of the minor or protected person is entrusted to an institution furnishing care, custody, education, or training; or

(2) except as provided in subsection (b), a period not exceeding twelve (12) months; any powers regarding support, custody, or property of the minor or protected person, except the power to consent to the marriage or adoption of a protected person who is a minor.

(b) Unless otherwise stated in the power of attorney executed under subsection (a), the delegation shall be effective immediately. However, a parent of a minor or a guardian (other than a temporary guardian) of a protected person may specifically provide in the power of attorney that the delegation becomes effective upon the death or incapacity (as defined in IC 29-3-1-7.5) of the parent or guardian. A delegation which is effective by reason of death or incapacity of the parent or guardian shall terminate ninety (90) days after it becomes effective unless, within the ninety (90) day period, the person to whom the delegation is given files a petition for a guardianship of the minor or protected person, in which case the delegation shall continue until the court rules on the petition.

~~(c)~~ (b) A person having a power of attorney executed under subsection (a) has and shall exercise, for the period during which the power is effective, all other authority of the parent or guardian respecting the support, custody, or property of the minor or protected person except any authority expressly excluded in the written instrument delegating the power. However, the parent or guardian remains responsible for any act or omission of the person having the power of attorney with respect to the affairs, property, and person of the minor or protected person as though the power of attorney had never been executed.

~~(d)~~ (e) Except as otherwise stated in the power of attorney delegating powers under this section, a delegation of powers under this section may be revoked by a written instrument of revocation that:

(1) identifies the power of attorney revoked; and

(2) is signed by the:

(A) parent of a minor; or

(B) guardian of a protected person;

who executed the power of attorney.

**Exhibit I**

**IC 9-17-3-9 Transfer on death conveyance; requirements AMENDED**

Sec. 9.

(a) ~~An individual owner or owners of a~~ whose certificate of title for a vehicle indicates that the individual is the sole owner of the vehicle may create an interest in the vehicle that is transferrable on the death of the individual owner or owners by obtaining a certificate of title conveying the interest in the vehicle to one (1) or more named individuals as transfer on death beneficiaries.

(b) Subject to subsection (e), an interest in a vehicle transferred under this section vests upon the death of the ~~transferor~~owner or owners.

(c) A certificate of title that is:

(1) worded in substance as "A.B. transfers on death to C.D." or "A.B. and C.D. transfer on death to E.F."; and

(2) signed by the ~~transferor~~owner or owners; is a good and sufficient conveyance on the death of the ~~transferor~~owner or owners to the transferee or transferees.

(d) A certificate of title obtained under this section is not required to be:

(1) supported by consideration; or

(2) delivered to the named transfer on death beneficiary or beneficiaries; to be effective.

(e) Upon the death of an ~~individual~~owner or owners conveying an interest in a vehicle in a certificate of title obtained under this section, the interest in the vehicle is transferred to each beneficiary who is described by either of the following:

(1) The beneficiary:

(A) is named in the certificate; and

(B) survives the transferor.

(2) The beneficiary:

(A) survives the transferor; and

(B) is entitled to an interest in the vehicle under IC 32-17-14-22 following the death of a beneficiary who:

(i) is named in the certificate; and

(ii) did not survive the transferor.

(f) A transfer of an interest in a vehicle under this section is subject to IC 6-4.1.

(g) A certificate of title designating a transfer on death beneficiary is not testamentary.

(h) In general, IC 32-17-14 applies to a certificate of title designating a transfer on death beneficiary. However, a particular provision of IC 32-17-14 does not apply if it is inconsistent with the requirements of this section or IC 9-17-2-2(b).

### **IC 9-31-2-30 Transfer on death conveyance; requirements AMENDED**

Sec. 30.

(a) ~~An individual owner or owners of a whose certificate of title for a watercraft indicates that the individual is the sole owner of the watercraft~~ may create an interest in the watercraft that is transferrable on the death of the individual owner or owners by obtaining a certificate of title conveying the interest in the watercraft to one (1) or more named individuals as transfer on death beneficiaries.

(b) Subject to subsection (e), an interest in a watercraft transferred under this section vests upon the death of the ~~transferor~~ owner or owners.

(c) A certificate of title that is:

(1) worded in substance as "A.B. transfers on death to C.D." or "A.B. and C.D. transfer on death to E.F."; and

(2) signed by the ~~transferor~~ owner or owners; is a good and sufficient conveyance on the death of the ~~transferor~~ owner or owners to the transferee or transferees.

(d) A certificate of title obtained under this section is not required to be:

(1) supported by consideration; or

(2) delivered to the named transfer on death beneficiary or beneficiaries; to be effective.

(e) Upon the death of an ~~individual~~ owner or owners conveying an interest in a watercraft in a certificate of title obtained under this section, the interest in the watercraft is transferred to each beneficiary who is described by either of the following:

(1) The beneficiary:

(A) is named in the certificate; and

(B) survives the transferor.

(2) The beneficiary:

(A) survives the transferor; and

(B) is entitled to an interest in the watercraft under IC 32-17-14-22 following the death of a beneficiary who:

(i) is named in the certificate; and

(ii) did not survive the transferor.

(f) A transfer of an interest in a watercraft under this section is subject to IC 6-4.1.

(g) A certificate of title designating a transfer on death beneficiary is not testamentary.

(h) In general, IC 32-17-14 applies to a certificate of title designating a transfer on death beneficiary. However, a particular provision of IC 32-17-14 does not apply if it is inconsistent with the requirements of this section or IC 9-31-2-16.

IC 30-4-2.1-14 Rules of interpretation concerning discretionary interests AMENDED

Sec. 14.

(a) A discretionary interest is any interest over which the trustee has any discretion to make or withhold a distribution. A discretionary interest may be evidenced by permissive language such as "may make distributions" or may be evidenced by mandatory distribution language that is negated by the discretionary languages of the trust such as "the trustee shall make distributions in the trustee's sole and absolute discretion." An interest that includes distribution language such as "shall" but is subsequently qualified by discretionary distribution language shall be classified as a discretionary interest. Examples of discretionary interests include, but are not limited to, the following:

(1) "The trustee, may, in the trustee's sole and absolute discretion, make distributions for health, education, maintenance and support":

(2) "The trustee, in the trustee's sole and absolute discretion, shall make distributions for health, education, maintenance and support":

(3) "The trustee may make distributions for health, education, maintenance and support":

(4) "The trustee shall make distributions for health, education, maintenance and support. The trustee may exclude any of the beneficiaries or make unequal distribution among them":

(5) "The trustee may make distributions for health, education, maintenance, support, comfort and general welfare."

(ab) The following rules apply only to discretionary interests:

(1) A discretionary interest is a mere expectancy that is neither a property interest nor an enforceable right.

(2) A creditor may not:

(A) require a trustee to exercise the trustee's discretion to make a distribution;  
or

(B) cause a court to foreclose a discretionary interest.

(3) A court may review a trustee's distribution discretion only if the trustee acts dishonestly or with an improper motive.

- | (~~bc~~) Words such as sole, absolute, uncontrolled, or unfettered discretion dispense with the trustee acting reasonably.
- | (~~ed~~) Absent express language to the contrary, if the distribution language in a discretionary interest permits unequal distributions between beneficiaries or distributions to the exclusion of other beneficiaries, a trustee may, in the trustee's discretion, distribute all of the accumulated, accrued, or undistributed income and principal to one (1) beneficiary to the exclusion of the other beneficiaries.
- | (~~de~~) Regardless of whether a beneficiary has any outstanding creditors, a trustee of a discretionary interest may directly pay any expense on behalf of the beneficiary and may exhaust the income and principal of the trust for the benefit of the beneficiary. A trustee is not liable to a creditor for paying the expenses of a beneficiary who holds a discretionary interest.

**IC 30-4-3-35 Matrimonial trusts; election; effect of the death of a spouse or the dissolution of the marriage; revocation. AMENDED**

Sec. 35. (a) This section is intended to ensure that if real property is transferred to one or more revocable trusts created by a husband and wife for estate planning purposes, the husband and wife will enjoy the real estate ownership protections that they would otherwise enjoy if they owned that real property in an estate by the entireties, such as an estate by the entireties created under IC 32-17-3-1.

(b) As used in this section, "joint matrimonial trust" means a single inter vivos trust established under this section by settlors who are related as husband and wife.

(bc) As used in this section, "matrimonial property" means real property that:

- (1) is subject to a written election to treat the property as matrimonial property under this section; and
- (2) is owned by a matrimonial trust.

(ed) As used in this section, "matrimonial trust" means a trust established under this section to own matrimonial property.

(de) As used in this section, "separate matrimonial trust" means a separate trust that is also a matrimonial trust.

(ef) As used in this section, "separate trust" means a trust established by one (1) individual.

(fg) A matrimonial trust may be established:

- (1) jointly by a husband and wife; or
- (2) in two (2) or more separate trusts.

(gh) A husband and wife may elect to treat real property as matrimonial property with a written statement of the election:

- (1) in an instrument or instruments conveying the real property to a matrimonial trust or trusts; or
- (2) in a separate writing that must be recorded in the county where the real property is situated and indexed in the records of the county recorder's office to the instrument or instruments that convey the real property to a matrimonial trust or trusts.

(hi) A guardian of a husband and wife may make an election under this section:

- (1) without the approval of the court if the guardian has unlimited powers under IC 29-3-8-4; and
- (2) with the approval of the court in all other cases.

(ij) An attorney in fact of a husband ~~and~~ or wife may ~~make~~ join in the making of an election under this section under the powers conferred upon the attorney in fact by IC 30-5-5-2 if

the power of attorney is recorded in the county where the real property is situated and indexed in the records of the county recorder's office to the instrument or instruments that convey the real property to a matrimonial trust or trusts.

(jk) The terms of a separate matrimonial trust or a joint matrimonial trust may (but are not required to) restrict the sale or transfer of the matrimonial property for the lifetime of the settlor who dies first, for the lifetime of the surviving settlor, or for some other defined time period.

(l) An interest in matrimonial property is not severable during the marriage of the husband and wife unless:

- (1) both the husband and wife join in the severance in writing; or
- (2) a third party owns and forecloses a mortgage or other lien against the interests of both the husband and wife in the matrimonial property.

(km) Notwithstanding any other provision of this section, the legal rights of a lienholder that exist at the time of an election to treat the real property subject to the lien as matrimonial property may not be subject to a severance described in subsection (jl) without the lienholder's written consent.

(l) ~~A matrimonial trust established by an individual continues to be)~~ To the extent that a matrimonial trust continues to be a matrimonial trust after the death of thea settlor (as provided in subsections (o) and (p) below):

- (1) Real property held or owned in a separate trust, and for which an earlier election was made under this section, continues to be matrimonial property; and
- (2) An unsecured creditor or judgment lien creditor who has a claim only against the deceased settlor but not against the surviving settlor cannot enforce that claim against the deceased settlor's interest or the surviving settlor's interest in the matrimonial property.

(o) Matrimonial property held in a separate matrimonial trust or in a joint matrimonial trust continues to be matrimonial property after the death of one settlor if the settlors reserved a life estate in the matrimonial property for each settlor when they conveyed the matrimonial property to the matrimonial trust(s), or if the deceased settlor's separate trust or the joint trust instrument provides to the surviving spousesettlor:

- (1) a life estate;
- (2) an interest that qualifies for a deduction from the gross estate of the decedent under Section 2056 of the Internal Revenue Code regardless of whether an election is made to qualify the interest for the deduction; or
- (3) in some respect the current right to occupy or receive rent, royalties, or other kinds of income with respect to the matrimonial property.

(mp) A separate matrimonial trust established by a deceased settlor ceases to be a matrimonial trust upon the termination of payments to the surviving spousesettlor as a result of the surviving spouse'settlor's death or as a result of the surviving spouse'settlor's valid disclaimer of all interests in the separate-matrimonial property held in the deceased settlor's trust.~~(n)~~ A jointseparate matrimonial trust ceasesestablished by a settlor who remains

alive continues to be a matrimonial trust ~~upon the death of one (1) of the settlors~~during that settlor's remaining lifetime, so long as he or she retains the right to use, occupy or enjoy the matrimonial property held in his or her separate trust.

(eg) A matrimonial trust ceases to be a matrimonial trust upon the dissolution of the marriage of the settlors.

(pr) A husband and wife may revoke a matrimonial trust by together executing a writing expressing the revocation.

**IC 32-17-14-2 Applicability AMENDED**

Sec. 2.

(a) Except as provided elsewhere in this chapter, this chapter applies to a transfer on death security, transfer on death securities account, and pay on death account created before July 1, 2009, unless the application of this chapter would:

(1) adversely affect a right given to an owner or beneficiary;

(2) give a right to any owner or beneficiary that the owner or beneficiary was not intended to have when the transfer on death security, transfer on death securities account, or pay on death account was created;

(3) impose a duty or liability on any person that was not intended to be imposed when the transfer on death security, transfer on death securities account, or pay on death account was created; or

(4) relieve any person from any duty or liability imposed:

(A) by the terms of the transfer on death security, transfer on death securities account, or pay on death account; or

(B) under prior law.

(b) Subject to section 32 of this chapter, this chapter applies to a transfer on death transfer if at the time the owner designated the beneficiary:

(1) the owner was a resident of Indiana;

(2) the property subject to the beneficiary designation was situated in Indiana;

(3) the obligation to pay or deliver arose in Indiana;

(4) the transferring entity was a resident of Indiana or had a place of business in Indiana;

or

(5) the transferring entity's obligation to make the transfer was accepted in Indiana.

(c) This chapter does not apply to property, money, or benefits paid or transferred at death under a life or accidental death insurance policy, annuity, contract, plan, or other product sold or issued by a life insurance company unless the provisions of this chapter are incorporated into the policy or beneficiary designation in whole or in part by express reference.

(d) This chapter does not apply to property, money, or benefits paid or transferred at death under an employee benefit plan governed by the Employee Retirement Income Security Act of 1974, or under an individual retirement account or similar account or plan intended to qualify for tax exemption or deferral under the Internal Revenue Code, unless the provisions of this chapter are incorporated into the governing instrument or beneficiary designation in whole or in part by express reference.

(de) This chapter does not apply to a transfer on death transfer if the beneficiary designation or an applicable law expressly provides that this chapter does not apply to the transfer.

(ef) Subject to IC 9-17-3-9(h) and IC 9-31-2-30(h), this chapter applies to a beneficiary designation for the transfer on death of a motor vehicle or a watercraft.

(fg) The provisions of:

(1) section 22 of this chapter; and

(2) section 26(b)(9) of this chapter; relating to distributions to lineal descendants per stirpes apply to a transfer on death or payable on death transfer created before July 1, 2009.

### **IC 32-17-14-3 Definitions    AMENDED**

Sec. 3.

The following definitions apply throughout this chapter:

(1) "Beneficiary" means a person designated or entitled to receive property because of another person's death under a transfer on death transfer.

(2) "Beneficiary designation" means a written instrument other than a will or trust that designates the beneficiary of a transfer on death transfer.

(3) "Governing instrument" refers to a written instrument agreed to by an owner that establishes the terms and conditions of an ownership in beneficiary form.

(4) "Joint owners" refers to persons who hold property as joint tenants with a right of survivorship. However, the term does not include a husband and wife who hold property as tenants by the entirety.

(5) "LDPS" means an abbreviation of lineal descendants per stirpes, which may be used in a beneficiary designation to designate a substitute beneficiary as provided in section 22 of this chapter.

(6) "Owner" refers to a person or persons who have a right to designate the beneficiary of a transfer on death transfer.

(7) "Ownership in beneficiary form" means holding property under a registration in beneficiary form or other written instrument that:

(A) names the owner of the property;

(B) directs ownership of the property to be transferred upon the death of the owner to the designated beneficiary; and

(C) designates the beneficiary.

(8) "Person" means an individual, a sole proprietorship, a partnership, an association, a fiduciary, a trustee, a corporation, a limited liability company, or any other business entity.

(9) "Proof of death" means a death certificate or a record or report that is prima facie proof or evidence of an individual's death.

(10) "Property" means any present or future interest in real property, intangible personal property (as defined in IC 6-4.1-1-5), or tangible personal property (as defined in IC 6-4.1-1-13). The term includes:

(A) a right to direct or receive payment of a debt;

(B) a right to direct or receive payment of money or other benefits due under a contract, account agreement, deposit agreement, employment contract, ~~compensation plan, pension plan, individual retirement plan, employee benefit plan,~~ or trust or by operation of law;

(C) a right to receive performance remaining due under a contract;

(D) a right to receive payment under a promissory note or a debt maintained in a written account record;

(E) rights under a certificated or uncertificated security;

(F) rights under an instrument evidencing ownership of property issued by a governmental agency; and

(G) rights under a document of title (as defined in IC 26-1-1-201).

(11) "Registration in beneficiary form" means titling of an account record, certificate, or other written instrument that:

(A) provides evidence of ownership of property in the name of the owner;

(B) directs ownership of the property to be transferred upon the death of the owner to the designated beneficiary; and

(C) designates the beneficiary.

(12) "Security" means a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer. The term includes a certificated security, an uncertificated security, and a security account.

(13) "Transfer on death deed" means a deed that conveys an interest in real property to a grantee by beneficiary designation.

(14) "Transfer on death transfer" refers to a transfer of property that takes effect upon the death of the owner under a beneficiary designation made under this chapter.

(15) "Transferring entity" means a person who:

(A) owes a debt or is obligated to pay money or benefits;

(B) renders contract performance;

(C) delivers or conveys property; or

(D) changes the record of ownership of property on the books, records, and accounts of an enterprise or on a certificate or document of title that evidences property rights. The term includes a governmental agency, business entity, or transfer agent that issues certificates of ownership or title to property and a person acting as a custodial agent for an owner's property. However, the term does not include a governmental office charged with endorsing, entering, or recording the transfer of real property in the public records.

## **IC 32-17-14-23 Effect of divorce or annulment AMENDED**

### **Sec. 23.**

(a) If, after an owner makes a beneficiary designation, the owner's marriage is dissolved or annulled, any provision of the beneficiary designation in favor of the owner's former spouse is revoked on the date the marriage is dissolved or annulled. Revocation under this subsection is effective regardless of whether the beneficiary designation refers to the owner's marital status. The beneficiary designation is given effect as if the former spouse had not survived the owner.

(b) Subsection (a) does not apply to a provision of a beneficiary designation that:

(1) has been made irrevocable, or revocable only with the spouse's consent;

(2) is made after the marriage is dissolved or annulled; or

(3) expressly states that the dissolution or annulment of the marriage does not affect the designation of a spouse or a relative of the spouse as a beneficiary.

(c) A provision of a beneficiary designation that is revoked solely by subsection (a) is revived by the owner's remarriage to the former spouse or by a nullification of the dissolution or annulment of the marriage.

~~(d) This section does not apply to any employee benefit plan governed by the Employee Retirement Income Security Act of 1974.~~

### **IC 32-17-13-1 "Nonprobate transfer" defined AMENDED**

#### **Sec. 1.**

(a) As used in this chapter, "nonprobate transfer" means a valid transfer, effective at death, by a transferor:

(1) whose last domicile was in Indiana; and

(2) who immediately before death had the power, acting alone, to prevent transfer of the property by revocation or withdrawal and:

(A) use the property for the benefit of the transferor; or

(B) apply the property to discharge claims against the transferor's probate estate.

The term does not include a transfer at death (other than a transfer to or from the decedent's probate estate) of

(i) a survivorship interest in a tenancy by the entireties real estate,

(ii) an individual retirement account or similar account or plan,

(iii) benefits under an employee benefit plan,

(iv) transfer of a life insurance policy or annuity, or

(v) payment of the death proceeds of a life insurance policy or annuity.

(b) With respect to a nonprobate transfer involving a multiple party account, a nonprobate transfer occurs if the last domicile of the depositor whose interest is transferred under IC 32-17-11 was in Indiana.

(c) With respect to a motor vehicle or a watercraft, a nonprobate transfer occurs if the transferee obtains a certificate of title in Indiana for:

(1) the motor vehicle under IC 9-17-2-2(b); or

(2) the watercraft as required by IC 9-31-2-16(a)(1)(C).

(d) A transfer on death transfer completed under IC 32-17-14 is a nonprobate transfer.

**IC 32-17-14-25 Rights of surviving spouses and children AMENDED**

Sec. 25.

(a) ~~An election under IC 29-1-3-1 does not apply to a valid transfer on death transfer.~~ In accordance with IC 32-17-13, a transfer on death transfer may be subject to the payment of the surviving spouse and family allowances under IC 29-1-4-1.

(b) A beneficiary designation designating the children of the owner or children of any other person as a class and not by name includes all children of the person regardless of whether the child is born or adopted before or after the beneficiary designation is made.

(c) Except as provided in subsection (d), a child of the owner born or adopted after the owner makes a beneficiary designation that names another child of the owner as the beneficiary is entitled to receive a fractional share of the property that would otherwise be transferred to the named beneficiary. The share of the property to which each child of the owner is entitled to receive is expressed as a fraction in which the numerator is one (1) and the denominator is the total number of the owner's children.

(d) A beneficiary designation or a governing instrument may provide that subsection (c) does not apply to an owner's beneficiary designation. In addition, a transferring entity is not obligated to apply subsection (c) to property registered in beneficiary form.

(e) If a beneficiary designation does not name any child of the owner as the designated beneficiary with respect to a particular property interest, a child of the owner born or adopted after the owner makes the beneficiary designation is not entitled to any share of the property interest subject to the designation.

**IC 32-17-14-11 AMENDED**

(a) A transfer on death deed transfers the interest provided to the beneficiary if the transfer on death deed is:

(1) executed by the owner or owner's legal representative; and

(2) recorded with the recorder of deeds in the county in which the real property is situated before the death of the owner.

(b) A transfer on death deed is void if it is not recorded with the recorder of deeds in the county in which the real property is situated before the death of the owner.

(c) A transfer on death deed is not required to be supported by consideration or delivered to the grantee beneficiary.

(d) A transfer on death deed may be used to transfer an interest in real property to either a revocable or an irrevocable trust.

(e) If the owner records a transfer on death deed, the effect of the recording the transfer on death deed is determined as follows:

(1) If the owner's interest in the real property is as a tenant by the entirety, the conveyance is inoperable and void unless the other spouse joins in the conveyance.

(2) If the owner's interest in the real property is as a joint tenant with rights of survivorship, the conveyance severs the joint tenancy and the cotenancy becomes a tenancy in common.

(3) If the owner's interest in the real property is as a joint tenant with rights of survivorship and the property is subject to a beneficiary designation, a conveyance of any joint owner's interest has no effect on the original beneficiary designation for the nonsevering joint tenant.

(4) If the owner's interest is as a tenant in common, the owner's interest passes to the beneficiary as a transfer on death transfer.

(5) If the owner's interest is a life estate determined by the owner's life, the conveyance is inoperable and void.

(6) If the owner's interest is any other interest, the interest passes in accordance with this chapter and the terms and conditions of the conveyance establishing the interest. If a conflict exists between the conveyance establishing the interest and this chapter, the terms and conditions of the conveyance establishing the interest prevail.

(f) A beneficiary designation in a transfer on death deed may be worded in substance as "(insert owner's name) conveys and warrants (or quitclaims) to (insert owner's name), TOD to (insert beneficiary's name)". This example is not intended to be exhaustive.

(g) A transfer on death deed using the phrase "pay on death to" or the abbreviation "POD" may not be construed to require the liquidation of the real property being transferred.

(h) This section does not preclude other methods of conveying real property that are permitted by law and have the effect of postponing enjoyment of an interest in real property until after the death of the owner. This section applies only to transfer on death deeds and does not invalidate any deed that is otherwise effective by law to convey title to the interest and estates provided in the deed.

(i) The endorsement of the auditor under IC 36-2-11-14 is not necessary to record a transfer on death deed.

### **IC 32-17-14-26 General rules applying to a beneficiary designation AMENDED**

(a) If an agreement between the owner and a transferring entity is required to carry out a transfer on death transfer as described in section 7 of this chapter, a transferring entity may not adopt rules for the making, execution, acceptance, and revocation of a beneficiary designation that are inconsistent with this chapter. A transferring entity may adopt the rules imposed by subsection (b) in whole or in part by incorporation by reference.

(b) Except as otherwise provided in a beneficiary designation, a governing instrument, or any other applicable law, the following rules apply to a beneficiary designation:

(1) A beneficiary designation or a request for registration of property in beneficiary form must be made in writing, signed by the owner, dated, and, in the case of a transfer on death deed, compliant with all requirements for the recording of deeds.

(2) A security that is not registered in the name of the owner may be registered in beneficiary form on instructions given by a broker or person delivering the security.

(3) A beneficiary designation may designate one (1) or more primary beneficiaries and one (1) or more contingent beneficiaries.

(4) On property registered in beneficiary form, a primary beneficiary is the person shown immediately following the transfer on death direction. Words indicating that the person is a primary beneficiary are not required. The name of a contingent beneficiary in the registration must have the words "contingent beneficiary" or words of similar meaning to indicate the contingent nature of the interest being transferred.

(5) Multiple surviving beneficiaries share equally in the property being transferred unless a different percentage or fractional share is stated for each beneficiary. If a percentage or fractional share is designated for multiple beneficiaries, the surviving beneficiaries share in the proportion that their designated shares bear to each other.

(6) A transfer of unequal shares to multiple beneficiaries for property registered in beneficiary form may be expressed in numerical form following the name of the beneficiary in the registration.

(7) A transfer on death transfer of property also transfers any interest, rent, royalties, earnings, dividends, or credits earned or declared on the property but not paid or credited before the owner's death.

(8) If a distribution by a transferring entity under a transfer on death transfer results in fractional shares in a security or other property that is not divisible, the transferring entity may distribute the fractional shares in the name of all beneficiaries as tenants in common or as the beneficiaries may direct, or the transferring entity may sell the property that is not divisible and distribute the proceeds to the beneficiaries in the proportions to which they are entitled.

(9) On the death of the owner, the property, minus all amounts and charges owed by the owner to the transferring entity, belongs to the surviving beneficiaries and, in the case of substitute beneficiaries permitted under section 22 of this chapter, the lineal descendants of designated beneficiaries who did not survive the owner are entitled to the property as follows:

(A) If there are multiple primary beneficiaries and a primary beneficiary does not survive the owner and does not have a substitute under section 22 of this chapter, the share of the nonsurviving beneficiary is allocated among the surviving beneficiaries in the proportion that their shares bear to each other.

(B) If there are no surviving primary beneficiaries and there are no substitutes for the nonsurviving primary beneficiaries under section 22 of this chapter, the property belongs to the surviving contingent beneficiaries in equal shares or according to the percentages or fractional shares stated in the registration.

(C) If there are multiple contingent beneficiaries and a contingent beneficiary does not survive the owner and does not have a substitute under section 22 of this chapter, the share of the nonsurviving contingent beneficiary is allocated among the surviving contingent beneficiaries in the proportion that their shares bear to each other.

(10) If a trustee designated as a beneficiary: (A) does not survive the owner; (B) resigns; or (C) is unable or unwilling to execute the trust as trustee and no successor trustee is appointed in the twelve (12) months following the owner's death; the transferring entity may make the distribution as if the trust did not survive the owner.

(11) If a trustee is designated as a beneficiary and no affidavit of certification of trust or probated will creating an express trust is presented to the transferring entity within the twelve (12) months after the owner's death, the transferring entity may make the distribution as if the trust did not survive the owner.

(12) If the transferring entity is not presented evidence during the twelve (12) months after the owner's death that there are lineal descendants of a nonsurviving beneficiary for whom LDPS distribution applies who survived the owner, the transferring entity may make the transfer as if the nonsurviving beneficiary's descendants also failed to survive the owner.

(13) If a beneficiary cannot be located at the time the transfer is made to located beneficiaries, the transferring entity shall hold the missing beneficiary's share. If the missing beneficiary's share is not claimed by the beneficiary or by the beneficiary's personal representative or successor during the twelve (12) months after the owner's death, the transferring entity shall transfer the share as if the beneficiary did not survive the owner.

(14) A transferring entity has no obligation to attempt to locate a missing beneficiary, to pay interest on the share held for a missing beneficiary, or to invest the share in any different property.

(15) Cash, interest, rent, royalties, earnings, or dividends payable to a missing beneficiary may be held by the transferring entity at interest or reinvested by the transferring entity in the account or in a dividend reinvestment account associated with a security held for the missing beneficiary.

(16) If a transferring entity is required to make a transfer on death transfer to a minor or an incapacitated adult, the transfer may be made under the Indiana Uniform Transfers to Minors Act, the Indiana Uniform Custodial Trust Act, or a similar law of another state.

(17) A written request for the execution of a transfer on death transfer may be made by any beneficiary, a beneficiary's legal representative or attorney in fact, or the owner's personal representative.

(18) A transfer under a transfer on death deed occurs automatically upon the owner's death subject to the requirements of subdivision (20) and does not require a request for the execution of the transfer.

(19) A written request for the execution of a transfer on death transfer must be accompanied by the following:

(A) A certificate or instrument evidencing ownership of the contract, account, security, or property.

(B) Proof of the deaths of the owner and any nonsurviving beneficiary.

(C) An inheritance tax waiver from states that require it.

(D) In the case of a request by a legal representative, a copy of the instrument creating the legal authority or a certified copy of the court order appointing the legal representative.

(E) Any other proof of the person's entitlement that the transferring entity may require.

(20) On the death of an owner whose transfer on death deed has been recorded, the beneficiary shall file an affidavit in the office of the recorder of the county in which the real property is located. The affidavit must be endorsed by the auditor under IC 36-2-11-14 in order to be recorded. The affidavit must contain the following:

(A) The legal description of the property.

(B) A certified copy of the death certificate certifying the owner's death.

(C) The name and address of each designated beneficiary who survives the owner or is in existence on the date of the owner's death.

(D) The name of each designated beneficiary who has not survived the owner's death or is not in existence on the date of the owner's death.

(E) A cross-reference to the recorded transfer on death deed.

(c) A beneficiary designation is presumed to be valid. A party may rely on the presumption of validity unless the party has actual knowledge that the beneficiary designation was not validly executed. A person who acts in good faith reliance on a transfer on death deed is immune from liability to the same extent as if the person had dealt directly with the named owner and the named owner had been competent and not incapacitated.

(755 ILCS 5/11-5.4)

Sec. 11-5.4. Short-term guardian.

(a) A parent, adoptive parent, or adjudicated parent whose parental rights have not been terminated, or the guardian of the person of a minor may appoint in writing, without court approval, a short-term guardian of an unmarried minor or a child likely to be born. The written instrument appointing a short-term guardian shall be dated and shall identify the appointing parent or guardian, the minor, and the person appointed to be the short-term guardian. The written instrument shall be signed by, or at the direction of, the appointing parent in the presence of at least 2 credible witnesses at least 18 years of age, neither of whom is the person appointed as the short-term guardian. The person appointed as the short-term guardian shall also sign the written instrument, but need not sign at the same time as the appointing parent.

(b) A parent or guardian shall not appoint a short-term guardian of a minor if the minor has another living parent, adoptive parent or adjudicated parent, whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to make and carry out day-to-day child care decisions concerning the minor, unless the nonappointing parent consents to the appointment by signing the written instrument of appointment.

(c) The appointment of the short-term guardian is effective immediately upon the date the written instrument is executed, unless the written instrument provides for the appointment to become effective upon a later specified date or event. The short-term guardian shall have authority to act as guardian of the minor as provided in Section 11-13.2 for a period of 365 days from the date the appointment is effective, unless the written instrument provides for the appointment to terminate upon an earlier specified date or event. Only one written instrument appointing a short-term guardian may be in force at any given time.

(d) Every appointment of a short-term guardian may be amended or revoked by the appointing parent or by the appointing guardian of the person of the minor at any time and in any manner communicated to the short-term guardian or to any other person. Any person other than the short-term guardian to whom a revocation or amendment is communicated or delivered shall make all reasonable efforts to inform the short-term guardian of that fact as promptly as possible.

(e) The appointment of a short-term guardian or successor short-term guardian does not affect the rights of the other parent in the minor.

(f) The written instrument appointing a short-term guardian may, but need not, be in the following form:

APPOINTMENT OF SHORT-TERM GUARDIAN

[IT IS IMPORTANT TO READ THE FOLLOWING INSTRUCTIONS:

By properly completing this form, a parent or the guardian of the person of the child is appointing a guardian of a child of the parent (or a minor ward of the guardian, as the case may be) for a period of up to 365 days. A separate form should be completed for each child. The person appointed as the guardian must sign the form, but need not do so at the same time as the parent or parents or guardian.

This form may not be used to appoint a guardian if there is a guardian already appointed for the child, except that if a guardian of the person of the child has been appointed, that guardian may use this form to appoint a short-term guardian. Both living parents of a child may together appoint a guardian of the child, or the guardian of the person of the child may appoint a guardian of the child, for a period of up to 365 days through the use of this form. If the short-term guardian is appointed by both living parents of the child, the parents need not sign the form at the same time.]

1. Parent (or guardian) and Child. I, (insert name of appointing parent or guardian), currently residing at (insert address of appointing parent or guardian), am a parent (or the guardian of the person) of the following child (or of a child likely to be born): (insert name and date of birth of child, or insert the words "not yet born" to appoint a short-term guardian for a child likely to be born and the child's expected date of birth).

2. Guardian. I hereby appoint the following person as the short-term guardian for the child: (insert name and address of appointed person).

3. Effective date. This appointment becomes effective: (check one if you wish it to be applicable)

- On the date that I state in writing that I am no longer either willing or able to make and carry out day-to-day child care decisions concerning the child.
- On the date that a physician familiar with my condition certifies in writing that I am no longer willing or able to make and carry out day-to-day child care decisions concerning the child.
- On the date that I am admitted as an in-patient to a hospital or other health care institution.
- On the following date: (insert date).
- Other: (insert other).

[NOTE: If this item is not completed, the appointment is effective immediately upon the date the form is signed and dated below.]

4. Termination. This appointment shall terminate 365 days after the effective date, unless it terminates sooner as determined by the event or date I have indicated below: (check one if you wish it to be applicable)

- On the date that I state in writing that I am willing and able to make and carry out day-to-day child care decisions concerning the child.
- On the date that a physician familiar with my condition certifies in writing that I am willing and able to make and carry out day-to-day child care decisions concerning the child.
- On the date that I am discharged from the hospital or other health care institution where I was admitted as an in-patient, which established the effective date.
- On the date which is (state a number of days, but no more than 365 days) days after the effective date.
- Other: (insert other).

[NOTE: If this item is not completed, the appointment will be effective for a period of 365 days, beginning on the effective date.]

5. Date and signature of appointing parent or guardian. This appointment is made this (insert day) day of (insert month and year).

Signed: (appointing parent)

6. Witnesses. I saw the parent (or the guardian of the person of the child) sign this instrument or I saw the parent (or the guardian of the person of the child) direct someone to sign this instrument for the parent (or the guardian). Then I signed this instrument as a witness in the presence of the parent (or the guardian). I am not appointed in this instrument to act as the short-term guardian for the child. (Insert space for names, addresses, and signatures of 2 witnesses)

7. Acceptance of short-term guardian. I accept this appointment as short-term guardian on this (insert day) day of (insert month and year).

Signed: (short-term guardian)

8. Consent of child's other parent. I, (insert name of the child's other living parent), currently residing at (insert address of child's

other living parent), hereby consent to this appointment on this (insert day) day of (insert month and year).

Signed: (consenting parent)

[NOTE: The signature of a consenting parent is not necessary if one of the following applies: (i) the child's other parent has died; or (ii) the whereabouts of the child's other parent are not known; or (iii) the child's other parent is not willing or able to make and carry out day-to-day child care decisions concerning the child; or (iv) the child's parents were never married and no court has issued an order establishing parentage.]

(Source: P.A. 95-568, eff. 6-1-08.)

Westlaw.

755 ILCS 5/11-13.2

Page 1

**C****Effective: June 1, 2008**

West's Smith-Hurd Illinois Compiled Statutes Annotated Currentness

Chapter 755. Estates

▣ Act 5. Probate Act of 1975 (Refs &amp; Annos)

▣ Article XI. Minors (Refs &amp; Annos)

→ 5/11-13.2. Duties of short-term guardian of a minor

§ 11-13.2. Duties of short-term guardian of a minor.

(a) Immediately upon the effective date of the appointment of a short-term guardian, the short-term guardian shall assume all duties as short-term guardian of the minor as provided in this Section. The short-term guardian of the person shall have authority to act as short-term guardian, without direction of court, for the duration of the appointment, which in no case shall exceed a period of 365 days. The authority of the short-term guardian may be limited or terminated by a court of competent jurisdiction.

(b) Unless further specifically limited by the instrument appointing the short-term guardian, a short-term guardian shall have the authority to act as a guardian of the person of a minor as prescribed in Section 11-13, but shall not have any authority to act as guardian of the estate of a minor, except that a short-term guardian shall have the authority to apply for and receive on behalf of the minor benefits to which the child may be entitled from or under federal, State, or local organizations or programs.

CREDIT(S)

P.A. 79-328, § 11-13.2, added by P.A. 88-529, § 5, eff. Jan. 14, 1994. Amended by P.A. 95-568, § 10, eff. June 1, 2008.

HISTORICAL AND STATUTORY NOTES

P.A. 95-568, § 5, in subsec. (a), changed "60 days" to "365 days".

LAW REVIEW AND JOURNAL COMMENTARIES

Grandparents raising grandchildren in Illinois--Establishing the right to a continuing relationship through visitation, custody, and guardianship in 2007: Where we've been, where we are, and where we need to go. Rebecca J. O'Neill, 38 Loy.U.Chi.L.J. 733 (Summer 2007).

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Exhibit C Probate Code Study Commission  
Meeting 1 September 7, 2010

States in which No Contest Clauses are Enforceable under the Common Law	Statutes on Wills	Statutes on Wills and Trusts	UPC States (Enforceable unless the contestant has probable cause to bring the action)	Absolutely Unenforceable States
Alabama	Alaska	California	Alaska	Florida
Arkansas	Arizona	Florida	Arizona	Indiana
Connecticut*	Colorado	Hawaii	Colorado	
Iowa*	Georgia	Indiana	Hawaii	
Kansas*	Idaho	Michigan	Idaho	
Kentucky	Maine	Nevada	Maine	
Massachusetts	Minnesota	New Mexico	Michigan	
Illinois	Montana	Oregon	Minnesota	
Missouri	Nebraska	Pennsylvania	Montana	
New Hampshire*	New Jersey	Texas	Nebraska	
New York*	North Dakota		New Jersey	
North Carolina*	South Carolina		New Mexico	
Ohio	South Dakota		North Dakota	
Oklahoma	Utah		Pennsylvania	
Rhode Island			South Carolina	
Tennessee*			South Dakota	
Virginia			Utah	
Washington*				
West Virginia*			*11 States that Judicially Adopted the rule of the UPC	
Wisconsin*				

**29-1-6-2**

Sec. 2. If, in any will admitted to probate in any of the courts of this state, there is a provision or provisions providing that if any beneficiary thereunder shall take any proceeding to contest such will or to prevent the admission thereof to probate, or provisions to that effect, such beneficiary shall thereby forfeit any benefit which said will made for said beneficiary, such provision or provisions shall be void and of no force or effect.

(Formerly: Acts 1953, c.112, s.602.)

**30-4-2.1-3**

Sec. 3. A provision in a trust that provides, or has the effect of providing, that a beneficiary forfeits a benefit from the trust if the beneficiary contests the trust is void.

As added by P.L.4-2003, SEC.7.

#### COMMENT

In addition to a registrar or clerk, a person authorized to accept delivery of a will from a custodian may be a universal successor or other person authorized under the law of another nation to carry out the terms of a will.

#### Section 2-517. Penalty Clause for Contest.

A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

#### COMMENT

This section replicates Section 3-905.

### PART 6

#### RULES OF CONSTRUCTION APPLICABLE ONLY TO WILLS

##### GENERAL COMMENT

Parts 6 and 7 address a variety of construction problems that commonly occur in wills, trusts, and other types of governing instruments. All of the "rules" set forth in these parts yield to a finding of a contrary intention and are therefore rebuttable presumptions.

The rules of construction set forth in Part 6 apply only to wills. The rules of construction set forth in Part 7 apply to wills and other governing instruments.

The sections in Part 6 deal with such problems as death before the testator (lapse), the inclusiveness of the will as to property of the testator, effect of failure of a gift in the will, change in form of securities specifically devised, ademption by reason of fire, sale and the like, exoneration, and exercise of a power of appointment by general language in the will.

#### Section 2-601. Scope.

In the absence of a finding of a contrary intention, the rules of construction in this Part control the construction of a will.

#### COMMENT

**Purpose and Scope of Revisions.** Common-law rules of construction yield to a finding of a contrary intention. The pre-1990 version of this section provided that the rules of construction in Part 6 yielded only to a "contrary intention indicated by the will." To align the statutory rules of construction in Part 6 with those established at common law, this section is revised so that the rules

General pecuniary devises bear interest at the legal rate beginning one year after the first appointment of a personal representative until payment, unless a contrary intent is indicated by the will.

#### COMMENT

Unlike the common law, this section provides that a general pecuniary devisee's right to interest begins one year from the time when administration was commenced, rather than one year from death. The rule provided here is similar to the common law rule in that the right to interest for delayed payment does not depend on whether the estate in fact realized income during the period of delay. The section is consistent with Section 5(b) of the Revised Uniform Principal and Income Act which allocates realized net income of an estate between various categories of successors.

#### Section 3-905. Penalty Clause for Contest.

A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

#### Section 3-906. Distribution in Kind; Valuation; Method.

(a) Unless a contrary intention is indicated by the will, the distributable assets of a decedent's estate shall be distributed in kind to the extent possible through application of the following provisions:

(1) A specific devisee is entitled to distribution of the thing devised to him, and a spouse or child who has selected particular assets of an estate as provided in Section 2-403 shall receive the items selected.

(2) Any homestead or family allowance or devise of a stated sum of money may be satisfied in kind provided

(i) the person entitled to the payment has not demanded payment in cash;

(ii) the property distributed in kind is valued at fair market value as of the date of its distribution, and

(iii) no residuary devisee has requested that the asset in question remain a part of the residue of the estate.

(3) For the purpose of valuation under paragraph (2) securities regularly traded on recognized exchanges, if distributed in kind, are valued at the price for the last sale of like securities traded on the business day prior to distribution, or



**Effective: January 1, 2010**

West's Annotated California Codes Currentness

Probate Code (Refs & Annos)

▣ Division 11. Construction of Wills, Trusts, and Other Instruments (Refs & Annos)

▣ Part 3. No Contest Clause (Refs & Annos)

→ § 21310. Definitions

As used in this part:

(a) "Contest" means a pleading filed with the court by a beneficiary that would result in a penalty under a no contest clause, if the no contest clause is enforced.

(b) "Direct contest" means a contest that alleges the invalidity of a protected instrument or one or more of its terms, based on one or more of the following grounds:

(1) Forgery.

(2) Lack of due execution.

(3) Lack of capacity.

(4) Menace, duress, fraud, or undue influence.

(5) Revocation of a will pursuant to Section 6120, revocation of a trust pursuant to Section 15401, or revocation of an instrument other than a will or trust pursuant to the procedure for revocation that is provided by statute or by the instrument.

(6) Disqualification of a beneficiary under Section 6112 or 21350.

(c) "No contest clause" means a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary for filing a pleading in any court.

(d) "Pleading" means a petition, complaint, cross-complaint, objection, answer, response, or claim.

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(e) "Protected instrument" means all of the following instruments:

(1) The instrument that contains the no contest clause.

(2) An instrument that is in existence on the date that the instrument containing the no contest clause is executed and is expressly identified in the no contest clause, either individually or as part of an identifiable class of instruments, as being governed by the no contest clause.

#### CREDIT(S)

(Added by Stats.2008, c. 174 (S.B.1264), § 2, operative Jan. 1, 2010.)

#### LAW REVISION COMMISSION COMMENTS

##### 2008 Addition

Section 21310 is new. Subdivision (a) continues part of the substance of former Section 21300(b).

Subdivision (b)(1)-(5) continues the substance of former Section 21300(b), except that mistake and misrepresentation are no longer included as separate grounds for a direct contest.

Subdivision (b)(6) is consistent with former Sections 21306(a)(3) and 21307(c).

Subdivision (c) continues the substance of former Section 21300(d).

Subdivision (d) restates the substance of former Section 21305(f).

Subdivision (e) is new. Subdivision (e)(1) provides that a protected instrument includes an instrument that contains a no contest clause. That may include an instrument that expressly incorporates or republishes a no contest clause in another instrument. Subdivision (e)(2) is similar to former Section 21305(a)(3). [38 Cal.L.Rev.Comm. Reports apx 5 (2008)].

#### HISTORICAL AND STATUTORY NOTES

##### 2010 Electronic Update

##### 2008 Legislation

Section 3 of Stats.2008, c. 174 (S.B.1264), provides:

"This act shall become operative on January 1, 2010."

##### Derivation

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C

Effective: January 1, 2010

West's Annotated California Codes Currentness

Probate Code (Refs &amp; Annos)

↳ Division 11. Construction of Wills, Trusts, and Other Instruments (Refs &amp; Annos)

↳ Part 3. No Contest Clause (Refs &amp; Annos)

→ § 21311. Enforcement of clause

(a) A no contest clause shall only be enforced against the following types of contests:

(1) A direct contest that is brought without probable cause.

(2) A pleading to challenge a transfer of property on the grounds that it was not the transferor's property at the time of the transfer. A no contest clause shall only be enforced under this paragraph if the no contest clause expressly provides for that application.

(3) The filing of a creditor's claim or prosecution of an action based on it. A no contest clause shall only be enforced under this paragraph if the no contest clause expressly provides for that application.

(b) For the purposes of this section, probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery.

CREDIT(S)

(Added by Stats.2008, c. 174 (S.B.1264), § 2, operative Jan. 1, 2010.)

Current with all 2009 Reg.Sess. laws; all 2009-2010 1st through 5th, 7th, and 8th Ex.Sess. laws; urgency legislation through Ch. 186 of the 2010 Reg.Sess.; and propositions on the 6/8/2010 ballot.

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West's Nevada Revised Statutes Annotated Currentness  
 Title 12. Wills and Estates of Deceased Persons (Chapters 132-156)  
 Chapter 137. Contests of Wills (Refs & Annos)  
 General Provisions  
 → **137.005. Enforcement of no-contest clauses; exceptions**

1. Except as otherwise provided in subsections 3 and 4, a no-contest clause in a will must be enforced by the court.
  
2. A no-contest clause must be construed to carry out the testator's intent. Except to the extent the will is vague or ambiguous, extrinsic evidence is not admissible to establish the testator's intent concerning the no-contest clause. The provisions of this subsection do not prohibit such evidence from being admitted for any other purpose authorized by law.
  
3. Notwithstanding any provision to the contrary in the will, a devisee's share must not be reduced or eliminated if the devisee seeks only to:
  - (a) Enforce the terms of the will;
  
  - (b) Enforce the devisee's legal rights in the probate proceeding; or
  
  - (c) Obtain a court ruling with respect to the construction or legal effect of the will.
  
4. Notwithstanding any provision to the contrary in the will, a devisee's share must not be reduced or eliminated under a no-contest clause because the devisee institutes legal action seeking to invalidate a will if the legal action is instituted in good faith and based on probable cause that would have led a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the will was invalid.
  
5. As used in this section, "no-contest clause" means one or more provisions in a will that express a directive to reduce or eliminate the share allocated to a devisee or to reduce or eliminate the distributions to be made to a devisee if the devisee takes action to frustrate or defeat the testator's intent as expressed in the will.

CREDIT(S)

Added by Laws 2009, c. 358, § 8.

West's Nevada Revised Statutes Annotated Currentness  
Title 13. Guardianships; Conservatorships; Trusts (Chapters 159-167)  
    ▣ Chapter 163. Trusts (Refs & Annos)  
        ▣ General Provisions  
            → **163.00195. Enforcement of no-contest clauses; exceptions**

1. Except as otherwise provided in subsections 3 and 4, a no-contest clause in a trust must be enforced by the court.
  
2. A no-contest clause must be construed to carry out the settlor's intent. Except to the extent the no-contest clause in the trust is vague or ambiguous, extrinsic evidence is not admissible to establish the settlor's intent concerning the no-contest clause. The provisions of this subsection do not prohibit such evidence from being admitted for any other purpose authorized by law.
  
3. Notwithstanding any provision to the contrary in the trust, a beneficiary's share must not be reduced or eliminated if the beneficiary seeks only to:
  - (a) Enforce the terms of the trust or any other trust-related instrument;
  
  - (b) Enforce the beneficiary's legal rights related to the trust or any trust-related instrument; or
  
  - (c) Obtain a court ruling with respect to the construction or legal effect of the trust or any other trust-related instrument.
  
4. Notwithstanding any provision to the contrary in the trust, a beneficiary's share must not be reduced or eliminated under a no-contest clause in a trust because the beneficiary institutes legal action seeking to invalidate a trust or any other trust-related instrument if the legal action is instituted in good faith and based on probable cause that would have led a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the trust or other trust-related instrument was invalid.
  
5. As used in this section:
  - (a) "No-contest clause" means one or more provisions in a trust that express a directive to reduce or eliminate the share allocated to a beneficiary or to reduce or eliminate the distributions to be made to a beneficiary if the beneficiary takes action to frustrate or defeat the settlor's intent as expressed in the trust or in a trust-related instrument.

(b) "Trust" means the original trust instrument and each amendment made pursuant to the terms of the original trust instrument.

(c) "Trust-related instrument" means any document purporting to transfer property to or from the trust or any document made pursuant to the terms of the trust purporting to direct the distribution of trust assets or to affect the management of trust assets, including, without limitation, documents that attempt to exercise a power of appointment.

CREDIT(S)

Added by Laws 2009, c. 358, § 35.

Current through the 2009 75th Regular Session of the Nevada Legislature and technical corrections received from the Legislative Counsel Bureau (2009).

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West's Oregon Revised Statutes Annotated Currentness

Title 13. Protective Proceedings; Powers of Attorney; Trusts

▣ Chapter 130. Uniform Trust Code (Refs &amp; Annos)

▣ Creation, Validity, Modification and Termination of Trust

→ 130.235. In terrorem clause

(1) Except as provided in this section, an in terrorem clause in a trust is valid and enforceable. If a beneficiary challenges a trust that contains an in terrorem clause that applies to the beneficiary, the court shall enforce the clause against the beneficiary even though the beneficiary establishes that there was probable cause for the challenge.

(2) The court shall not enforce an in terrorem clause if the beneficiary challenging the trust establishes that the beneficiary has probable cause to believe that the trust is a forgery or that the trust has been revoked.

(3) The court shall not enforce an in terrorem clause if the challenge is brought by a fiduciary acting on behalf of a protected person under the provisions of ORS chapter 125, a guardian ad litem appointed for a minor or a guardian ad litem appointed for an incapacitated or financially incapable person.

(4) For the purposes of this section, "in terrorem clause" means a provision in a trust that reduces or eliminates the interest of a beneficiary under the trust if the beneficiary challenges the validity of part or all of the trust.

## CREDIT(S)

Current through 2010 Special Session Laws. Revisions to Acts made by the Oregon Reviser were unavailable at the time of publication.

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**C**

West's Oregon Revised Statutes Annotated Currentness

Title 12. Probate Law (Refs &amp; Annos)

▣ Chapter 112. Intestate Succession and Wills (Refs &amp; Annos)

▣ Wills

→ **112.272. In terrorem clauses**

(1) Except as provided in this section, an in terrorem clause in a will is valid and enforceable. If a devisee contests a will that contains an in terrorem clause that applies to the devisee, the court shall enforce the clause against the devisee even though the devisee establishes that there was probable cause for the contest.

(2) The court shall not enforce an in terrorem clause if the devisee contesting the will establishes that the devisee has probable cause to believe that the will is a forgery or that the will has been revoked.

(3) The court shall not enforce an in terrorem clause if the contest is brought by a fiduciary acting on behalf of a protected person under the provisions of ORS chapter 125, a guardian ad litem appointed for a minor, or a guardian ad litem appointed for an incapacitated or financially incapable person.

(4) For the purposes of this section, "in terrorem clause" means a provision in a will that reduces or eliminates a devise to a devisee if the devisee contests the will.

## CREDIT(S)

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