Estate Planning Council of Indianapolis

2023 FEDERAL AND INDIANA DEVELOPMENTS FOR ESTATE PLANNERS

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Jeff Dible has used his best efforts to include accurate and up-to-date information in this paper. Citations and URL links to new or amended Indiana statutes are to the latest versions available on the Indiana General Assembly's web site as of April 13, 2023.

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Jeffrey S. Dible

Jeffrey S. "Jeff D" Dible has been practicing law since October 1979 and, for more than 36 years, has concentrated his practice in the areas of trust and estate administration, estate planning, related litigation, taxation, and business succession planning. He is a Fellow of the American College of Trust and Estate Counsel (ACTEC) and served as ACTEC's Indiana State Chair from March 2015 through January of 2020. Jeff Dible has frequently represented and advised the individual or corporate trustees of trusts. He often works as an expert witness or consultant with other lawyers and law firms in Indiana and other jurisdictions with respect to Indiana trust and estate law or federal gift and estate tax matters.

Jeff has frequently testified before legislative committees of the Indiana General Assembly regarding trust and estate law reform legislation and (in 2011 and 2012) inheritance tax repeal. He is the current chairperson of the ISBA's Probate Review Committee. In 2017 and early 2018, he was the chairperson of an ISBA Task Force that drafted the "electronic wills, trusts and POAs" legislation, which the General Assembly enacted in 2018 as P.L. 40-2018 (House Enrolled Act 1303). He also participated extensively in the drafting of 2021 Indiana legislation enacted to update signing and witnessing requirements for wills (House Enrolled Act 1255) and to overhaul Indiana's health care advance directive statutes (Senate Enrolled Act 204), and he testified in favor of both bills before their passage.

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FOR ESTATE PLANNERS

(1) Federal REMINDER # 1: Current and future (post-2025) lifetime estate and gift tax exclusion amounts.

The **Appendix** on pages 25 and 26 below contains this writer's tables summarizing the lifetime exclusion amounts (under Code § 2010), applicable credit amounts, top marginal estate and gift tax rates, and annual gift exclusion amounts from 2017 through 2023, plus "historical" amounts and rates on the second page for various years from 1998 through 2016.

The 2023 maximum lifetime exclusion amount of $12,920,000 consists of the "doubled" base exclusion amount of $10 million plus inflation indexing after 2011. Under the late 2017 Tax Cut and Jobs Act, the "doubled" exclusion amount will sunset for decedents dying and gifts made after December 31, 2025, and will revert to the old $5 million amount plus inflation indexing starting on January 1, 2026. This will happen automatically unless the next Congress and the President enact legislation to extend the "doubled" lifetime exclusion amount into post-2025 years.

For decedents dying or transfers made in 2026, the basic exclusion amount (based on $5 million but with inflation indexing added) is estimated by this writer to be about $6.8 million.

For high-net-worth individuals who have a realistic expectation of dying *after* 2025, their exposure to the federal estate tax will increase. Those individuals can take advantage of the November 2019 anti-clawback regulations[1] and make taxable gifts *before* 2026 in amounts that increase their cumulative lifetime taxable gifts to a total that *exceeds* the post 2025 lifetime exclusion amount. If an individual who makes such large taxable gifts before 2026 dies after 2025, the larger lifetime exclusion amount that was actually used can be applied in the federal estate tax calculation *instead of* the smaller lifetime exclusion amount

(2) Federal REMINDER # 2: Late portability election relief.

Remember that when a married individual dies after 2010 and when his or her spouse survives, any unused federal estate lifetime exclusion amount (the DSUE amount) can be "transferred" to the surviving spouse only by filing a timely federal estate tax return (Form 706) for the deceased spouse.

When the first-to-die spouse's federal gross estate plus lifetime taxable gifts are in a total amount too small to *require* a federal estate tax return to be filed, and when zero net federal estate tax would be owed on a Form 706 return, the surviving spouse or

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[1] *Amended* 26 C.F.R. § 20.2010-1(c) through (f); TD 9884, 84 Fed.Reg. 63995-01, 2019 WL 6309937 (F.R.), effective November 26, 2019.

executor for the deceased spouse has more time to file a "late" Form 706 return and make the portability election, but only if a timely Form 706 return was not previously filed for that deceased spouse.

Revenue Procedure 2017-34 (2017-26 I.R.B. 1282, June 9, 2017) allowed the executor of a married U.S. citizen or resident decedent to file a zero-tax-due Form 706 return (and make the portability election) on or before the second anniversary of the deceased spouse's death. This simplified filing method made it unnecessary to use the expensive private letter ruling (PLR) procedure under 26 C.F.R. § 301.9100-3 to request "late election" relief from the IRS.

After Rev. Proc. 2017-34 was issued, the IRS continued to receive large numbers of PLR requests for late-filing relief, filed by advisors for surviving spouses who had not thought about a portability election even within the longer 2-year period following the deceased spouse's death.

On July 8, 2022, the IRS issued Rev. Proc. 2022-32 (2022-30 I.R.B. 101, 2022 WL 2821866), which superseded Rev. Proc. 2017-34 and extended the deadline for the simplified filing procedure to the fifth anniversary of the death of the first-to-die spouse. The eligibility criteria are the same. If the surviving spouse and executor miss that 5-year deadline, the only remaining option is to submit a PLR request for late filing relief under Part 9100-3.

Keep in mind that if the first-to-die spouse dies after 2010 and before 2026, the surviving spouse and the executor for the deceased spouse have an added incentive to file the Form 706 return and make the portability election, because the DSUE amount that is "transferred" to the surviving spouse will be based on the "doubled" lifetime exclusion amount that is in effect in the year of death and will not decrease even if the surviving spouse dies after 2025, when the surviving spouse's own basic exclusion amount will not be "doubled."

(3) Proposed regulations under Code § 2053 add "present value" concepts to limit some deductions claimable on a Form 706 estate tax return.

Proposed regulations under Code § 2053 [REG 130975-08, 87 FR 338331-01, 2022 WL 2304651, published June 28, 2022] introduce present value concepts and other restrictions on the deductions that can be claimed on Schedules J or K of a federal estate tax return.

(a) The public comments period closed on September 26, 2022, and Treasury held a public hearing on October 7, 2022.

(b) The regulations will be effective for the estates of decedents dying on or after the publication date for the final version of the regulations.

(c) These proposed regulations "inject" present value concepts into the calculation of the deductible portion (under IRC § 2053) of various administration expenses that are not paid on or before the third anniversary of the decedent's death.

(d) If an otherwise deductible expense or debt will be paid only after the 3-year period, the proposed Regs contain detailed rules for calculating the discounted present value of the future payment.

(e) The unpaid *principal* balance of a mortgage or of another debt of the decedent that is deductible under Reg. § 20.2053-7 need not be reduced to a present value amount.

(f) The proposed Regs eliminate the need to support the calculation of the claimed deduction with a *qualified* appraisal.

(g) The proposed Regs (§20.2053-3(d)(2)) list 11 facts or circumstances that must be considered in determining whether interest paid by the estate on loans after the 3-year period will be deductible on a present-value basis or not deductible at all.

(h) Depending on the analysis and application of the 11 factors, so-called **Graegin** loans (*see* T.C. Memo 1988-477 and **Black**, 133 T.C. 340 [2009]) that feature a fixed rate of interest and which are not prepayable may not support any interest expense deduction at all (if the loan is from a family member or related party) or may support only a deduction for the discounted present value of the interest to be paid in the future.

(4) Proposed regulations under the late 2019 SECURE Act.

On February 24, 2022, the Treasury Department published proposed regulations under the SECURE Act's amendments to Code section 401(a)(9) and related sections [REG-105954-20, 87 FR 10504-01, 2022 WL 540917].

(a) The proposed Regs formally adopt labels and definitions (*e.g.*, "see-through trust," "conduit trust," "accumulation trust") that planners and tax professionals have been using for at least a decade.

(b) Recall that under the original SECURE Act, unless a designated beneficiary is in one of five categories of "eligible designated beneficiary" (EDB), that designated beneficiary must take taxable withdrawals of all assets from his or her portion of the retirement account by the end of the calendar year containing the 10th anniversary of the account owner's death. This is the "10-year payout" rule, and it also applies to trusts that are entitled to "see-through" treatment.

(c) Recall also that the five categories of EDBs who are not subject to the 10-year payout rule include the surviving spouse of the deceased account owner, a child of the account owner who has not "reached majority," or an individual who fits a detailed definition of "disabled" or 'chronically ill."

(d) The proposed Regs arguably go beyond the text of the SECURE Act's 2020 changes to IRC § 401(a)(9)(B) and (H) by providing that if the employee under a defined contribution plan dies after his or her RBD and if there is a designated beneficiary subject to the 10-year payout rule, then *during* the 10-year payout period, the DB must take *annual* RMD withdrawals based on the longer of the designated beneficiary's life expectancy or the deceased account owner's life expectancy [*Preamble ¶s 3a and 3c; Prop. Reg. § 1.401(a)(9)-5(d) and (e)(2)*].

(e) Regarding the above change made in the proposed Regs (which also applies to IRAs), *see also* IRS Notice 2022-53, 2022-45 IRB 437, 2022 WL 6732591.

(f) The proposed Regs confirm that for a child of the employee or IRA owner and to determine EDB (eligible designated beneficiary) status, the age of "majority" is age 21.

(5) Proposed "anti-abuse" clawback regulations applicable to some pre-2026 taxable gifts by decedents who die after 2025.

Proposed "anti-abuse" clawback regulations were published on published April 27, 2022 [REG 118913-21, 87 FR 24918-01, 2022 WL 1224712]. The final version of these regulations will limit the ability of a post-2025 decedent's estate to claim and use the pre-2026 lifetime exclusion amount in the federal estate tax calculation, depending on what kinds of large pre-2026 taxable gifts were made.

(a) These proposed Regs run only 11 pages and are sufficiently vague to allow the IRS to do significant mischief if the large pre-2026 taxable gifts by a post-2025 decedent are anything other than "outright" gifts.

(b) Recall that under 26 C.F.R. § 20.2010-1(c) [as added by TD 9884, 84 FR 64999 on November 26, 2019], a "special rule" allows a decedent who dies after December 31, 2025 to use, in the federal estate tax calculation, the *larger* lifetime exclusion amount that the decedent *actually used* in making taxable gifts before the end of the pre-2026 period, instead of using the smaller basic exclusion amount that will be in effect in the year of death (approximately $6.8 million in 2026).

(c) Under these proposed anti-abuse regulations, the estate of the post-2025 decedent won't be able to use the larger exclusion amount that was used with pre-2026 lifetime gifting, to the extent that any of the following conditions applied to a pre-2026 gift:

(i) The gift transfer is brought back into the decedent's federal gross estate under IRC § 2035 (transfer made within 3 years of death).

(ii) The transfer was made with a retailed life estate or a retained power to control possession, enjoyment or the right to income (IRC § 2036).

(iii) The transfer takes effect at death by the donee's survival of the donor (IRC § 2037) or the transfer was subject to the donor's retained power to revoke (IRC § 2038).

(iv) The transfer consists of proceeds from a policy of life insurance on the decedent's life, where the policy was NOT held in a properly-structured ILIT (IRC § 2042).

(v) The transfer results from an enforceable promise to make a gift or a gifted promissory note (see Rev. Rul. 84-25) that remained unsatisfied at the time of death and which is satisfied with assets from the gross estate.

(vi) The transfer is of an interest in a FLP or family LLC where the decedent retained a preferred interest, as described in Regs. §§ 25.2701-5(a)(4) and 25.2702-6(a)(1).

(vii) The transfer consists of a relinquishment of a retained interest or power within 18 months before death OR payoff of an enforceable promise within 18 months before death [*One workaround is to be sure to pay off the obligation more than 18 months before death*].

(d) A notable exception to the above rules, which would allow the decedent to use the larger pre-2026 exclusion amount, would apply to a GRAT where the taxable value of the original transfer (*i.e.,* the gift of the remainder interest) was 5 percent or less of the total value of the assets originally transferred to the GRAT; when this "5 percent or less" criterion is satisfied, the estate of the settlor/donor can use —in the estate tax calculation — the part of the larger pre-2025 exclusion amount that applied to the gift element for the remainder interest.

(e) A final exception to the above anti-abuse rules will apply, and will allow the decedent's estate to use the larger "actually-used" pre-2026 exclusion amount, to the extent that the decedent's retained interest terminated under a durational period stated in the original transfer instrument (*e.g.*, a GRAT or a QPRT) as a result of the passage of time or the death of any person.

(6) "SECURE 2.0 Act of 2022" provisions enacted on December 29, 2022.

The "SECURE 2.0 Act" is the unofficial name for about 132 pages of provisions that were included as Division T of the massive Consolidated Appropriations Act for the fiscal year ending September 30, 2023 (H.R. 2617, Pub. L. 117-328), as signed by Pres. Biden on December 29, 2022. The last 6 pages of Division T are retirement benefit rules that apply only to U. S. Tax Court judges.

Only a few of the SECURE 2.0 provisions (primarily of interest to individuals) are summarized below. Italicized citations below are to top-level sections of the Act in Division T.

(a) Some changes are effective after 12-31-***2023***; a few provisions were effective upon enactment; and other provisions are effective for plan years or tax years beginning after 12-31-***2024.***

(b) Effective on January 1, 2023, for individuals who were born after 1950 and before 1960 and who will reach age 72 <u>*after*</u> December 31, 2022 and who will reach age 73 before January 1, 2033, the required beginning date (RBD) for taking required minimum distributions is age 73 [*Act section 107, amending IRC § 401(a)(9)(C)(v)*].

(c) Effective on January 1, 2023, for individuals who were born in 1960 or later and who will reach age 72 <u>*after*</u> December 31, 2022 and who will reach age 73 after 2033, the RBD is age 75[*Id.*].

(d) Effective for tax years beginning after December 31, 2024 and for individuals who are 60 to 63 years of age, the inflation-indexed limits on catch-up contributions to 401(k), 403(b), governmental 457(b) plans and SIMPLE plans will be increased [*Act section 109*].

(e) Effective for tax years beginning after December 31, 2023, unless the employee's annual wages don't exceed $145,000, all catch-up contributions to a 401(k), 403(b), or governmental 457(b) plan will have to be Roth (after tax) contributions [*Act section 603*].

(f) Effective for tax years beginning after December 31, 2023, the annual RMD requirements that used to apply to Roth 401(k) plans will no longer apply [*Act section 325, adding new subdivision (5) to IRC § 402A*].

(g) Effective after December 31, ***2023*** and subject to some limitations, an individual who has maintained a section 529 account for a designated beneficiary for at least 15 continuous years may do a tax-free rollover of assets from the 529 account and to a Roth IRA account for that designated beneficiary, via a trustee-to-trustee transfer [*Act section 126*].

(h) Effective for tax years beginning after December 31, ***2025***, the maximum age criterion for an ABLE account beneficiary under IRC § 529A(e)(1)(A) will be age 46 instead of age 26, so that if a determination of the individual's "blind" or "disabled" status is made before the 46th birthday, "blind" or "disabled" status need not be separately certified to the IRS [*Act section 124*].

(i) Effective for plan years beginning ***in 2023***, an employee who wants to take a hardship distribution from a 401(k), 403(b), or 457(b) plan on the basis of a "safe harbor" event that establishes an immediate and heavy financial need, the employee will be able to self-certify that a safe harbor event exists or has occurred; no substantiation requirements [*Act section 312*].

(j) Starting after December 31, ***2023***, an employee who is a domestic abuse victim may take a penalty-free withdrawal (the lesser of $10,000 or 50% of the employee's account balance) from his or her 401(k), 403(b), or 457(b) plan; the 10% early withdrawal additional tax will still apply [*Act section 314*].

(k) Starting after December 29, ***2025***, an employee may take a penalty-free withdrawal of $2,500 per year from a 401(k), 403(b), or 457(b) plan to pay long-term care insurance premiums; the 10% early withdrawal additional tax will still apply [*Act section 334*].

(l) For distributions taken from a 401(k), 403(b), or 457(b) plan after December 29, ***2022***, the 10% additional tax on early withdrawal distributions will <u>*not*</u> apply if the participating employee is terminally ill [*Act section 326, adding new sub¶ (L)) to Code § 722(t)(2)*].

(m) For tax years beginning **after *2022***, amends the definition and the rules under Code § 401(a)(9)(H) for an "applicable multi-beneficiary trust" that has at least one disabled beneficiary, to include "pooled" special needs trusts that have a nonprofit organization (such as ARC of Indiana Master Trust) as a beneficiary [*Act section 337*].

(n) Consistent with the IRS's recent efforts to crack down on abusive schemes for promoting conservation easement deductions through syndicated partnerships (*see* IRS Announcement 2022-28, 20222-52 IRB 659), and for contributions made after December 29, ***2022***, adds complex limits on the income tax deduction that can be claimed under Code § 170(h) by a partner in a pass-through entity when the pass-through entity made the qualified conservation contribution [*Act section 605*].

(7) "Beneficial ownership reporting" requirements under the Corporate Transparency Act, effective January 1, 2024 for newly formed domestic business entities that don't fit any of 23 exceptions.

"Beneficial ownership information" [BOI] reporting requirements under the Corporate Transparency Act will become effective on January 1, 2024 for "domestic reporting companies" (S or C corporations, LLCs, or LLPs) that are newly created on or after January 1, 2024. BOI reporting requirements will be effective January 1, 2025 for all domestic reporting companies formed *before* 2024:

(a) The final regulations appear at 31 C.F.R. § 1010.380 and were published on September 30, 2022 [87 FR 59498-01, 2022 WL 4547920].

(b) The purpose of the regulations is to bring the United States into compliance with the FATF's global standards for combatting money laundering and the financing of terrorism, by allowing financial regulators to "look through" business entities and to confirm who the beneficial owners are.

(c) FinCEN at Treasury is still in the process of designing the Beneficial Ownership Secure System (BOSS) that will receive and store the BOI information.

(d) For new domestic reporting companies formed on or after January 1, 2024, BOI about the company's beneficial owners must be reported to FinCEN within 30 calendar days after legal formation.

(e) Under these final Regulations, a "beneficial owner" is an individual who either —

(i) Directly or indirectly owns or controls 25 percent or more of the ownership interests in a covered domestic reporting company, *OR*

(ii) Directly or indirectly exerts "substantial control" over the company by serving as a senior officer, ***or*** having authority to appoint or remove a senior officer or a majority of board members, ***or*** having authority to direct or substantially influence important business decisions by the company.

(f) The BOI that must be reported for each beneficial owner of a covered domestic reporting company includes the owner's full name, date of birth, current address, unique identifying number from a government-issued ID (driver's license, passport, etc.), plus an image of that photo ID.

(g) For domestic reporting companies newly formed on or after January 1, 2024, the same identifying information must be submitted for each "company applicant" (lawyer, paralegal, etc.) who was involved in or who directed the filing of the document(s) that legally formed the reporting company.

(h) Generally, a "domestic reporting company" is any business entity that is required to make a filing with the Secretary of State or similar state official in order to legally form or register the entity under state law.

(i) Note that under the final Regulations, a limited partnership or a general partnership cannot be a "domestic reporting company."

(j) If a "domestic reporting company" does not satisfy any of 23 exceptions, the company must securely report information (BOI) about its beneficial owners to FinCEN at Treasury.

(k) Some of the 23 exceptions apply to "large" reporting companies[2] that are already subject to significant governmental disclosure requirements under state of federal law.

(l) A true trust that is not a statutory business entity cannot be a "domestic reporting company," and generally, only BOI about the trustee will need to be reported if a trust holds a 25% or larger interest in the company or if the trustee exerts "substantial control" (explained above).

(m) However, in the following situations where a trust is a beneficial owner, BOI about a trust beneficiary or the settlor must be disclosed [31 C.F.R. § 1010.380(d)(2)(ii)(C)]:

(i) One beneficiary is the sole permissible recipient of income and principal distributions from the trust;

(ii) One beneficiary has the right to demand or withdraw substantially all the assets from the trust; or

(iii) The settlor has the power to revoke the trust or to withdraw all of the trust's assets.

(8) Suggested best practices when using <u>Wandry</u>-style defined value clauses in installment sales to irrevocable grantor trusts.

Properly worded "defined value" clauses continue to be valuable elements when drafting assignments, promissory notes and other documents for the sale of an interest in a closely-held business entity to an irrevocable grantor trust. *See* **Wandry v. Commissioner**, T.C. Memo 2012-88.

(a) When a defined value clause is used, the total <u>*value*</u> of shares or units sold or given away is defined as the value *as finally determined for federal gift tax purposes*, and the <u>*number*</u> of shares or units transferred is to be determined and confirmed later. This can make the professional appraisal of the fair market value of the shares or units "audit proof': If the IRS later claims

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[2] For example, under 31 C.F.R. § 1010.380(c)(2)(xxi), an exempt "large reporting company" is a domestic entity that operates at a physical office in the United States, has more than 20 full-time employees in the U.S., and filed a U. S. income tax return that reported more than $5 million in gross receipts for the previous year.

that the per-unit market value is higher, the defined value clause keeps the total *value* of the sold shares or units constant and adjusts downward the *number* of shares or units sold.

(b) Follow the tip from Steve Akers of Bessemer Trust Co. and add specific references in the assignment documents, stock powers, and transfer ledger for shares or units, in which the transferor and transferee confirm that the *number* of shares or units actually transferred is subject to later adjustment and determination, even though the *value* of the shares or units transferred is fixed and definite.

(c) The case of **Sorenson v. Commissioner** (Tax Court Docket Nos. 24797-18, 24798-18, 20284-19, and 20285-19) was settled in August 2022 by a stipulated decision and illustrates that sometimes the use of a *Wandry*-type defined value clause can work *too well*.

(d) In late 2014, the two brothers who founded Firehouse Subs each made gifts of non-voting stock to irrevocable grantor trusts; the number of shares gifted was left variable but with a value (per trust) of $5 million as finally determined for federal gift tax purposes.

(e) In early 2015, each brother also sold voting stock to his respective trust for a fixed price per share. Each brother kept the rest of his stock.

(f) The December 2014 appraised value for the gifted non-voting shares was $532.79 per share, and that value was also used as the price per share for each brother's sale of voting stock in early 2015.

(g) The stock in Firehouse Subs continued to grow substantially in value, and in 2021, the entire corporation was sold for about $1 billion, with each brother's trust receiving $153 million.

(h) One of the issues in the IRS gift tax audit in **Sorenson** was whether the 2014 gift tax valuation of the non-voting stock (under the **Wandry** formula) should be respected.

(i) As part of the Tax Court settlement with the IRS, the brothers stipulated to a December 2014 value of $1,640 per share for the stock (higher than the $532.79 appraised value per share but less than the value that the IRS had contended).

(j) The higher stipulated value per share allowed the brothers to *sell* more shares to the outside buyer, and to receive more sales proceeds, than if they had been treated as selling or giving away more stock in 2014-15 at a lower value of $532.79 per share; The *additional* consideration received by each brother from the 2021 sale was about $66 million, compared to what they would have received if the $532.79-per-share appraised value had been upheld.

(9) Inter-generational split-dollar life insurance arrangement in the Levine case.

An intergenerational split-dollar insurance arrangement was sustained by the Tax Court in **Estate of Levine v. Commissioner**, 158 T.C. No. 2, 2022 WL 59190 (February 28, 2022).

(a) An intergenerational split-dollar arrangement typically involves a "premium-paying trust" (a revocable trust created by an older senior family member) and a "policy-owning trust," which is an irrevocable trust that will own a life insurance policy on the life of a younger family member.

(b) The senior family member's trust agrees to pay the premiums on the policy that insures the younger family member.

(c) The irrevocable policy-owning trust agrees that upon the death of the insured, the irrevocable trust will pay to the premium-paying trust an amount equal to the *greater* of the total premiums paid or the cash surrender value of the policy immediately before the insured's death.

(d) When the settlor of the premium-paying trust dies and that trust becomes irrevocable, the estate tax value of the "receivable" owed by the policy-owning trust (as of the date of the settlor's death) will be a discounted value because the death of the insured younger family member will occur at a [distant] future time.

(e) In the **Levine** case, the mother's revocable trust (the premium-paying trust) paid or committed to pay a total of about $6.5 million to fund premium payments on a pair of second-to-die life insurance policies purchased by an ILIT and with the daughter and son as the insureds. Most of the amounts advanced by the mother were in exchange for the ILIT's promise to make repayment after the later of the daughter's and the son's deaths, of the "greater of" amount described in ¶ (c) above. The mother's gift tax return followed the guidance in the split-dollar insurance regulations and reported a net taxable gift of $2,644.

(f) In **Levine,** the mother died about a year later. Her estate and the IRS stipulated that the total premium payments made by the mother's trust was about $2.82 million. However, the IRS argued that for federal estate tax purposes, the larger *current* cash surrender value of the policies — about $6.15 million — was included in the mother's gross estate, instead of the discounted present value of the receivable,, which would be collectible only after the future death of the last-to-die child. The IRS based its argument on Code sections 2036(a) and 2038, and claimed that

Mrs. Levine had retained the power to terminate the split dollar arrangement early, during her lifetime.

(g) The Tax Court judge rejected the IRS's arguments that the larger ($6.15 million) cash surrender value was included in the deceased settlor's gross estate under Code sections 2036, 2038, or 2703, because Mrs. Levine did not retain any right to unilaterally terminate the split-dollar arrangement.

(h) One practical lesson from **Levine** is that in such split-dollar arrangements, the premium-paying trust or its settlor should not retain any right to trigger or participate in an early termination of the arrangement.

2023 INDIANA LEGISLATION OF INTEREST

(10) Senate Enrolled Act 287 (P.L. ___-2023): various estate, trust and guardianship law changes.

Text: http://www.iga.in.gov/legislative/2023/bills/senate/287#document-0b9ed031

Senate Enrolled Act 287 was the Indiana State Bar Association's omnibus probate and trust update and technical corrections bill. By April 18th, this legislation had been signed by the Speaker of the House and Senate President and was awaiting Governor Holcomb's signature. All provisions are effective for decedents dying or for decisions made or actions taken on or after July 1, 2023.

(A) Pre-mortem validation of Wills and trust instruments while the testator or settlor is still alive.

For both wills and revocable trusts, SEA 287 creates a new optional pre-mortem validation procedure that the living testator (for a Will) or a living settlor (for a revocable or irrevocable trust) can use to bar the filing of a will contest or trust contest after death [*sections 3 and 18 of the Act, adding new I.C. § 29-1-7-16.5 and amending I.C. § 30-4-6-14*].

For clients who want to bar after-death challenges to their estate plans, these optional procedures are less onerous than the currently available remedy: a declaratory judgment action filed by the testator or settlor against the beneficiaries and against potential challengers. The first pre-mortem validation statute was enacted in North Dakota in 1977, followed by Ohio in 1978, Arkansas in 1979, and (after 2009) by Alaska, New Hampshire, Delaware, and North Dakota.

Here is the procedure that a living testator or settlor will use if he or she chooses to do pre-mortem validation:

(i) The testator or settlor sends a complete copy of the Will or trust instrument *AND* a notice with specified content to each beneficiary or disinherited person whose later claims (after death) need to be barred.

(ii) If the living testator uses the new statute to protect his or her Will against a future contest, the statutory 90-day notice *also* must be sent to each person who would be an intestate heir of the testator if he or she died without a valid Will on the date the notice is sent.

(iii) The notice must inform each recipient that he or she has 90 days in which to file an action to challenge the validity of the Will or trust on the grounds of lack of capacity, undue influence, etc.

(iv) If a recipient of the notice does not commence an action within the 90-day period, a contest action by that recipient after the settlor's or testator's death is barred.

(v) If the settlor or testator signs a new trust instrument or Will *after* using this new statute, he or she must start the notice process all over again in order to bar an after-death contest to challenge the new Will or trust.

(B) New guardianship procedure to obtain a medical report or records on incapacity via a "confidential health disclosure order."

In proceedings to establish adult guardianships, the local probate court rules in several of Indiana's most populous counties (including Marion, Hamilton, Tippecanoe, and Vanderburgh) require the filing of a "physician's report" or other written medical evidence of the adult's incapacity *either* at the time the guardianship petition is filed *or* at the time of the initial hearing (Marion County requires the filing of a physician's report when the initial petition is filed).

Although it is currently quite common for capacity or incapacity determinations to be made by clinical psychologists, neuropsychologists, or even physician assistants or nurse practitioners, all of the above-mentioned local probate rules require the written report to be signed by a licensed "doctor" or "physician," and this can create a practical obstacle to establishing even a limited guardianship for an incapacitated adult who does need a guardianship.

If the alleged incapacitated adult (AIA) is not able or willing to sign a HIPAA authorization to allow the petitioner and his or her lawyer to obtain the relevant medical records or report and if there is no other "personal representative" who has been given record-release authority under the HIPAA Privacy Rule (45 C.F.R. Part 160), this can create a "chicken-or-egg" problem that prevents the filing of or a hearing on a guardianship petition. Obviously, unless there is demonstrable and immediate emergency threat to the AIA's health or safety, health care providers are generally terrified of violating HIPAA rules and will refuse to disclose any medical records or reports without a valid HIPAA authorization or court order (Bare subpoenas are not sufficient unless the issuer complies with additional requirements in the HIPAA regulations.

A similar medical-record-access problem exists for adult individuals who are _currently_ under guardianship. The guardianship might have been hastily or improvidently established; the scope of the guardianship might be broader than was necessary or currently necessary; or the protected adult's health and condition may have improved to the point where it would be in his or her best interests to terminate or limit the guardianship. But the protected adult may bind that he or she cannot induce a health care provider to produce relevant medical records or an updated report, because health care providers may regard the court-appointed guardian as the _only_ person authorized to release the medical records or personal health information (PHI) of the protected adult.

Sections 9 through 15 of SEA 287 address these problems by creating a new statutory procedure for petitioning for a "confidential health disclosure order," which in turn allows the petitioner to obtain relevant medical records or an existing or new medical or psychological report on the capacity or incapacity of the alleged incapacitated adult (AIA). SEA 287 adds new I.C. § 29-3-4-1.5 and amends I.C. §§ 29-3-8-8, 29-3-12-1, and 29-3-12-5.

(i) The new procedures are based on a procedure already available under a hard-to-find provision of the federal HIPAA privacy regulation [45 C.F.R. § 164.512(e)].

(ii) Any interested person can petition the probate court for an order to obtain either existing medical records about the AIA or a new medical report on that adult's capacity.

(iii) The probate court must appoint a guardian ad litem for the AIA unless he or she already has an attorney of record.

(iv) The probate court must schedule and hold a hearing on the petition and the relevant health care provider(s) and all other interested persons must receive notice and an opportunity to attend the hearing and file objections.

(v) If the court issues an order for a health care provider to disclose existing medical records or a new report on capacity, the records and report must be filed first and only with the court.

(vi) The court shares the medical records or report with the AIA and his or her GAL or counsel, and the court decides whether the records or report contain sufficient evidence of incapacity to warrant sharing the medical records or report with the other parties.

(vii) All medical records or reports produced and disclosed in the proceeding can be used only in guardianship or related proceedings involving the AIA and will remain confidential case records.

(viii) An adult who is subject to an existing guardianship and who believes that the guardianship is no longer necessary or should be made limited has the right to petition for a confidential health disclosure order to obtain his or her own records.

(C) Clarifying the probate court's discretion to reduce or waive the bond requirement for a non-resident personal representative of an unsupervised estate.

Currently, I.C. § 29-1-10-1 appears to impose strict minimum requirements for the amount of a surety bond that a non-resident personal representative must post as a condition to being appointed. Solely for unsupervised estates, I.C. § 29-1-7.5-2.5 says that the probate court has discretion to "adjust" the bond that a non-resident P R must post, but that authority has not been consistently applied throughout Indiana.

Sections 7 and 8 of SEA 287 amends both of those Probate Code sections to confirm that if an estate will be unsupervised, the probate court has the discretion to reduce a non-resident P R's "required" bond amount to zero (*i.e.*, to waive the bond requirement).

(D) Distribution of undistributed assets of a revoked revocable trust after death of settlor.

Section 16 of SEA 287 amends I.C. § 30-4-3-1.5 to clarify what should happen to the assets of a revocable trust if the settlor revokes the trust but if the settlor dies before the trustee (who may also be the settlor) distributes or delivers the assets of the revoked trust. If the trust instrument itself is silent on this issue, the new "default rule" is that the revoked trust's assets become assets of the deceased settlor's estate.

(E) Confirming the discretionary power of a trustee to pay reimbursements to the settlor or other deemed owner of a grantor trust for part or all of trust income taxes that the deemed owner personally pays.

For estate and gift tax planning purposes, a high-net-worth individual may create an irrevocable grantor trust — a trust to which completed gifts can be made, so that the assets of the trust are not included in the settlor's or any donor's "estate" for estate tax purposes, but where the trust is treated as the alter ego of the settlor or another deemed owner solely for *income tax* purposes. All of the trust's income will be taxable to the settlor or other deemed owner, and when the deemed owner uses personal funds to pay those trust income taxes, that is the equivalent of making additional non-taxable gifts to the trust's beneficiaries. Irrevocable grantor trusts are often created to receive taxable gifts or installment sales of appreciating assets.

Under current federal law (Revenue Ruling 2004-64, 2004-27 I.R.B. 7), if an independent trustee or independent trust director has the discretionary power but not the obligation to reimburse the grantor trust's deemed owner for income taxes that he or she pays from personal funds, neither the existence nor the exercise of that reimbursement power will cause the trust assets to be included in the deemed owner's "estate" for estate tax purposes.

Section 17 of SEA 287 adds to the Trust Code a new section 30-4-3-38, which provides that unless the trust instrument provides otherwise, the trustee of each grantor trust has an explicit statutory power, but not an obligation, to use trust principal or income to make discretionary reimbursements to the grantor trust's deemed owner for income taxes that the deemed owner used personal funds to pay on the grantor trust's income.

(F) Authority to apply for means-tested public benefits; resolving potential conflict between authority of Agent under POA and health care representative under an Advance Directive.

Under any "advance directive for health care" that is signed during or after 2021, each named health care representative (HCR) is presumed to have the authority to apply for means-tested public benefits (Medicaid, CHOICE, SSI, etc.) on behalf of the declarant unless the advance directive's text specifically says otherwise (*see* I.C. §§ 16-36-7-10(2) and 16-36-7-36(a)(6)).

But some individuals who sign new advance directives may have previously signed — and forgotten about — durable powers of attorney that contain health care powers, that name different persons as the Agents or attorneys in fact, and which also expressly or impliedly grant authority to apply for means tested public benefits. Because the signing of a new advance directive does not automatically supersede the earlier, broader POA,[3] two or more different people could have the authority to prepare and submit a Medicaid application on behalf of the same individual.

Section 19 of SEA 287 resolves this potential conflict by adding two new subsections to I.C. § 30-5-5-16 (the "health care powers" section in the POA statute), which provide that if authority to apply for public benefits is held by both a HCR and a different Agent under a durable POA, the Agent's authority under the POA supersedes the authority of the HCR under the advance directive, unless the advance directive explicitly says otherwise.

(G) Making pre- and post-marital agreements for estate tax "portability elections" explicitly enforceable.

Since the unused lifetime estate tax exclusion amount (DSUE amount) became "portable" and "transferable" between a deceased spouse and a surviving spouse after 2010, it has become increasingly common for couples to negotiate and add to their

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[3] A later signed advance directive supersedes and revokes an earlier signed advance directive by the same declarant, unless the later signed AD explicitly states that the earlier AD is to remain in effect. I.C. § 16-36-7-34(4). This rule does not apply to powers of attorney that contain non-health-care powers.

prenuptial agreements a provision that requires the deceased spouse's executor to make a portability election if the marriage ends by the death of one spouse instead of by divorce. However, current Indiana law does not address what consideration would be adequate for a portability election provision included in a *prenuptial* agreement. Current Indiana law also says nothing about what consideration would be adequate for a portability election provision in a *post-marital* agreement.

Sections 20 and 21 of SEA 287 add two new sections (I.C. §§ 31-11-3-5.5 and 31-11-7-5) to title 31, to add a definition of "portability agreement" and to make "portability agreements" within prenuptial agreements and post-marital agreements enforceable without separate or additional consideration. Further, and because the making of a portability election allows the IRS to hold the statute of limitations open with respect to the correct calculation of the deceased spouse's DSUE amount, a portability agreement can require the successors in interest of each spouse to cooperate and communicate with the others in later years, as necessary to respond to IRS inquiries.

(H) Technical corrections to statutory notice provisions in the Probate Code.

Sections 2, 5 and 6 of SEA 287 make additional technical corrections to conform the Probate Code (I.C. §§ 29-1-7.5-1 and 29-1-7.5-1.5) to current estate administration practice, where the probate court clerk electronically signs and issues statutory notices, but the personal representative or her or his attorney serves the notices by mail and then e-files a certification of mailing. These corrections were accidentally stripped out of 2022 House Enrolled Act 1208 before it was passed.

(I) Allowing living will declarations be signed with one notarized acknowledgement.

Finally, and for those Hoosiers who (against all logic and reason) want to sign a living will declaration but cannot easily arrange to sign in the presence of two disinterested witnesses), on and after July 1, 2023, section 1 of SEA 287 amends I.C. § 16-36-4-8 to allow the declarant to sign and acknowledge a living will declaration in the presence of a notary public instead of with the signatures of two witnesses.

(11) House Enrolled Act 1458 (P.L. ____-2023): Fixing inconsistencies in the out-of-hospital DNR and POST statutes.

Text: http://www.iga.in.gov/legislative/2023/bills/house/1458#document-6c8394d0

House Enrolled Act 1458 will be effective on and after July 1, 2023. As of April 17th, it had been signed by the Speaker and Senate President and was awaiting the Governor's signature.

When an individual suffers cardiac or pulmonary arrest at home, or somewhere out in public, or while traveling between health care facilities, if someone called 911 or if EMS personnel are otherwise on the scene, EMS personnel must attempt CPR unless they see a medical order telling them not to resuscitate.

Indiana has two statutes which permit individual patients and their doctors to put in place medical orders that can apply *outside* hospitals and nursing facilities, and which can direct EMS personnel and other providers to NOT do CPR. One is the "out of hospital DNR declaration and order" under IC 16-36-5, which has been available for decades, and the other is the Physician Orders for Scope of Treatment or POST form, which has been available since July 2013 and which can contain a DNR or "code status" order in case of cardiac or pulmonary arrest.

Only a small subset of adult patients are eligible to have and to sign an out-of-hospital DNR order or a POST. Essentially, these are patients who have underlying chronic or terminal health problems that are so serious that if such a patient suffered cardiac or pulmonary arrest and if CPR was done or attempted, then in the words of both statutes, "resuscitation would be unsuccessful or within a short period the person would experience repeated cardiac or pulmonary failure resulting in death." I.C. §§ 16-36-5-10(2) and 16-36-6-5(4). The POST statute adds other qualifying criteria: advanced chronic progressive illness or advanced chronic progressive frailty.

For example, most patients with metastatic cancer, COPD, or congestive heart failure would qualify to sign an out of hospital DNR declaration and order or a POST, and to have it approved by their doctor.

Since 1987, Indiana's health care consent laws have allowed certain individuals *standing in particular relationships* to a patient to sign consents to health care (or to consent to the refusal or stopping of health care) on behalf of that patient *IF* that patient lacks the capacity to consent *AND IF* there is no health care representative who has been appointed in writing by that patient and who is able and available to consent. In 2018, these individuals (spouse, adult children, parents, adult siblings, etc.) got listed in a hierarchy or priority order in I.C. § 16-36-1-5, and the same hierarchy and rules also appear in I.C. § 16-36-7-42, within the "advance directives" chapter that was added in 2021. These individuals are now called "proxies."

When any patient is being treated inside a hospital or a nursing facility and if that patient does not have a health care representative who was appointed in writing (such as under a POA) and who is able and available to act, a proxy of the patient who has priority under the statutory hierarchy can sign a "do not resuscitate" (DNR) or "allow natural death" order. Such an order will apply if the patient suffers cardiac or pulmonary arrest while inside the hospital or nursing facility.

However, if that same patient were to be transported to his or her home or out of the hospital and to some other facility (such as a hospice) current law would not authorize the proxy to sign a DNR order that could be effective while the patient is at home or en route between treatment facilities. Most doctors and other clinicians do not understand this distinction.

House Enrolled Act 1458 amends multiple sections in I.C. 16-36-5 and in I.C. 16-36-6 so that if a patient is qualified to sign an out of hospital DNR declaration or a POST *but* if the patient lacks capacity and has no appointed representative who is able and available to act, a proxy who is listed in I.C. § 16-36-7-42 and who has priority to act can take any action regarding either type of order (signing, revocation, replacement, etc.) that the patient or an appointed representative could take. A proxy who acts with respect to an out-of-hospital DNR declaration or a POST has an obligation to act in accordance with the patient's known wishes and intentions, and to act according to the patient's best interests if his or her wises and intentions are not known. *See* I.C. § 16-36-7-42(d) and (e).

(12) Senate Enrolled Act 2 (P.L. 1-2023): Allowing any pass-through entity to file a "PTET election" to pay Indiana adjusted gross income tax at the entity level and to pass reduced taxable K-1 income to the equity owners.

Text: http://www.iga.in.gov/legislative/2023/bills/senate/2#document-a4ec56a7

For taxable years beginning after 2017 and before 2026, federal law places a maximum cap of $10,000 per year on the state and local taxes of all kinds that can be deducted by any individual or married couple (26 U.S.C. § 164(b)(6)(B)). Indiana is the 31st state to enact a workaround state tax statute, which can be used by any pass-thru entity (S corporation, partnership, or LLC taxed as a partnership or S corporation).

Senate Enrolled Act 2, which is Indiana's pass-thru entity tax (PTET) statute, was signed by Governor Holcomb on February 22, 2023, with a retroactive effective date of January 1, 2022. SEA 2 amends parts of the subtractions in I.C. § 6-3-1-3.5's long definition of Indiana "adjusted gross income"; adds a definition of the Indiana AGI of a pass-thru entity; and adds a new chapter 2.1 (IC 6-3-2.1) to state the rules and procedures for the PTE tax. Indiana's PTET statute applies only to state income taxes and not county income taxes. The PTET election and the refundable state credit are not available to disregarded single-member LLCs or qualified subchapter S subsidiaries.

Indiana's PTET statute, like the other state statues, allows a pass-thru entity to make an election, and under which the entity pays a state net income tax (PTE tax) *at the entity leve*l, at the individual AGI tax rate (in Indiana, currently 3.23 percent). The electing entity claims a *federal* income tax deduction for the state PTE tax paid, and passes through the state PTE tax paid on a pro rata basis to its equity owners. For federal income tax purposes, the K-1 income passing through to the equity owners is reduced because of the PTE tax that the entity level has paid to Indiana, and Indiana's statute allows each equity owner to claim a refundable state income tax credit for the owner's pro-rata portion of the PTE tax paid (new I.C. § 6-3-2.1-5(b)).

If an equity owner of an electing pass-thru entity is an estate or trust, the election causes the beneficiaries of the estate or trust to receive their pro-rata portions of the PTE tax payment, and the beneficiaries can claim the refundable credit on their own Indiana IT-40 returns.

The Indiana Department of Revenue has issued an Answers to FAQs document (https://www.in.gov/dor/tax-forms/ptet/faq); a 14-page instructions document issued on March 31, 2023 (https://www.in.gov/dor/files/ptet-instructions.pdf) and a one-page form (IN-PTET, S.F. 57223) that an eligible pass thru entity can file each year to make the election (https://forms.in.gov/Download.aspx?id=15526). The PTE tax is calculated and shown on an add-on schedule to the regular adjusted gross income tax return (*e.g.*, IT-20S or IT-65) that the entity files.

The PTET election must be made by the entity on a stand-alone basis each year, by the pass thru entity's authorized officer(s), partner(s) or managers. The election is binding on all of the equity owners of the entity. For the 2022 tax year, the election may be made after March 31, 2023 and before August 31, 2024. If an eligible entity has already filed its Indiana AGI return for 2022 on or before April 18, 2023, that entity can amend its return and make the election. For 2024, an eligible pass-thru entity may file the PTET election at any time during 2024 or on its timely-filed (including extensions) Indiana return for 2024.

This writer presumes that an eligible pass-thru entity which makes the PTET election will claim a *federal* income tax deduction on its Form 1120S or 1065 return for the state PTE tax paid to the Indiana Department of Revenue. Although the text of SEA 2 is not very clear on this issue, this writer believes that new subsection (g)(3) of I.C. § 6-3-1-3.5 requires an electing pass-thru entity to add back the federal income tax deduction for the Indiana PTE tax paid in order to calculate Indiana "adjusted gross income," because this is what an individual taxpayer would have to do.

Because the PTET election must be made by the entity at the entity level and is binding on all its equity owners, and because the entity's payment of the entity-level PTE tax is somewhat likely to *reduce* the *actual distributions* that the entity makes to the owners (with reductions potentially larger than the passed through refundable state credit), some equity owners may "feel" or "experience" less benefit from the PTET election than other equity owners, unless all the owners have comparable wealth and income.

The ISBA's Probate, Trust & Real Property Section is studying whether the Indiana Probate Code and/or Trust Code should be amended to (a) give a fiduciary a specific power to cause a pass-thru entity to make the PTET election if the fiduciary has voting control of the entity *and* (b) create some procedure to protect the fiduciary from later complaints or objections from beneficiaries of the estate or trust, if some beneficiaries don't like the effects of the PTET election. Arguably, the personal representative of an estate or the trustee of a trust will have a real exposure to liability (for making the "wrong" decision about a PTET election) only if the estate or trust holds a controlling voting interest in an eligible pass-thru entity *OR* if the estate or trust holds a voting interest that is large enough so that the fiduciary could cast a deciding vote to have the entity make or refrain from making the PTET election.

(13) Senate Enrolled Act 296 (P.L. 7-2023): Amending real property tax sale statute to preserve rights of landowners under recorded ground leases.

Text: http://www.iga.in.gov/legislative/2023/bills/senate/296#document-ca73afbc

In **Elda Corp. v. Holliday LLC**, 171 N.E.3d 124 (Ind. Ct. App. 2021), the improvements on a parcel of land were owned by a separate entity which had a ground lease with the owner of the land. The improvements were assessed and taxed under a separate parcel I.D. number. After the owner of the improvements parcel failed to pay property taxes for several years, the improvements parcel was sold at a tax sale. The owner of the land (Elda) did not object to or attempt to prevent the tax sale at any point, and after the redemption period expired, the tax sale purchaser of the improvements (Holliday) received a tax deed granting it fee simple title to the improvements, free of all liens and encumbrances. In affirming the trial court's summary judgment in favor of Holliday, the Court of Appeals construed the relevant provisions in I.C. § 6-1.1-25-4 and held that the tax deed eradicated Elda's ground lease so far as Holliday was concerned and did not preserve any right by Elda to demand rent or to eject Holliday from the land.

Senate Enrolled Act 296, which was signed by Governor Holcomb on April 5th and which is effective July 1, 2023, prevents a recurrence of the result in **Elda v. Holliday** by adding a definition of a separately-taxed "severed interest" in new I.C. § 6-1.1-23.9-2.5, and by amending I.C. § 6-1.1-25-4(f), to add in new subdivision (4) that the fee simple estate conferred by tax deed for a "severed interest" is "'subject to . . . leases shown by public record if the tax deed executed under this chapter conveys only a severed interest located in, on, under, or above the land." The amendment also states, "The rights that an owner of land has in, on, under, or above the land, in a lease described in subdivision (4), or in a memorandum of a lease described in subdivision (4) are not limited or abrogated by a tax deed conveying an interest in one (1) or more severed interests described in subdivision (4)."

(14) Senate Enrolled Act 166 (P.L. ___-2023): Use of a legal survey in a boundary dispute to cut off an adverse possession claim.

Text: http://www.iga.in.gov/legislative/2023/bills/senate/166#document-7970c140

On April 13, the Indiana Senate voted 47 to 0 to approve the House's amendments to SB 166, and the Senate President signed on April 17th. Assuming that the Governor signs, this legislation will be effective July 1, 2023.

The legal survey statute, I.C. § 36-2-12-10, is amended to add subsection (b), which specifies additional information that must be included in the certified mail notice that a professional surveyor sends to adjoining landowners after filing a legal survey with the county surveyor. The additional required content in the notice includes a statement that any affected landowner who has a claim of title under adverse possession must file an appeal with the circuit court in the county within 180 days after the notice of the filing of the legal survey. The 10-year statute of limitations for the recovery of possession of real estate, in I.C. § 34-11-2-11, is amended to insert the same 180-day limitations period for commencing an adverse possession action, if the claim of adverse possession accrued before the legal survey located and established the boundary lines *and* if the claim for recovery of possession "involves or is affected by" a boundary line established by the professional surveyor in the legal survey.

(15) Senate Bill 325 (P.L. ___-2023): Clarifying the definition of "homestead" for property tax homestead deduction purposes.

Text: http://www.iga.in.gov/legislative/2023/bills/senate/325#document-a4913294

The original introduced version of this bill was badly drafted, was criticized by the ISBA real property legislation subcommittee, but was passed by the Senate, 41 to 8 on February 28, 2023.

The modest good news is that the House Ways and Means Committee rewrote and improved Senate Bill 325 and recommended passage by a 21-to-zero vote on April 6th. Two April 11 committee amendments and one April 13th floor amendment (after second re-reading) followed. On April 17, the House voted 97 to 1 to approve SB 325 with the House's amendments and returned the bill to the Senate on the 18th. If SB 325 is enacted, it will be effective for property tax assessment dates beginning with January 1, 2024.

Under the long and complex section (6-1.1-12-37) that governs the "homestead" deduction" for property tax purposes, real property can qualify as a "homestead," receive a homestead deduction, and also qualify for the 1-percent-of-assessed value statutory "circuit breaker" cap in I.C. § 6-1.1-20.6-7.5, ***IF*** the real estate consists of a "dwelling" and immediately surrounding land not exceeding one acre in area. "Dwelling" is separately defined in I.C. § 6-1.1-12-37(a)(1)(A) as "[r]esidential real property improvements [*plural*] that an individual uses as the individual's residence, including a house or garage."

In a 2022 Indiana Tax Court case, the Indianapolis property owner had a 2.56-acre lot on which the improvements were a house and attached garage, a *detached* carriage house, and a *detached* 2-car garage. There was no dispute that the carriage house and the detached garage were used by the property owner as extensions of the house and were not used for any commercial or non-residential purpose. The Marion County Assessor refused to treat the carriage house and detached garage as part of the "dwelling" for homestead deduction and property tax cap purposes The Indiana Board of Tax Review found in favor of the Assessor, and the Indiana Tax Court reversed and held for the property owner, based on the plain wording of the definition of "dwelling" as cited above. **Schiffler v. Marion County Assessor**, 184 N.E.3d 726 (Ind. Tax Ct. 2022).

On October 7, 2022 (about 7 months after the Tax Court's decision in **Schiffler)**, the DLGF issued a modified guidance memo [https://www.in.gov/dlgf/files/2022-memos/67cc5db7356f742c2cc7c4da93de532418df53b8.pdf] to county assessors, stating that separate detached improvements that are inside the 1-acre boundary and which have a residential use should be treated as part of the homestead for purposes of the 1-percent property tax cap.

One or more county assessors were unhappy with the Tax Court's decision and/or the revised DLGF guidance, and one result was the introduced version of Senate Bill 325. This bill would have added other (poorly worded) elements to the already-complex definition of "homestead" and to the required contents of the "certified statement" that must be filed with the county auditor, under I.C. § 6-1.1-12-37(e) to claim the homestead deduction.

In the Indiana House of Representatives, the Senate-passed version of SB 325 was amended three times (successively) to revise and expand the definition of "dwelling" (in I.C. § 6-1.1-12-37(a)(1)) <u>*and*</u> also to revise and expand one portion of the multi-part definition of "homestead" (in I.C. § 6-1.1-12-37(2)(C)), which has "dwelling" as one of its elements [*new or deleted wording is shown in a* **bold** *or* ~~strikethrough~~ *font below*]:

- For residential real property other than mobile homes or manufactured homes, "dwelling means "residential real property improvements that an individual uses as the individual's residence, ~~including a house or garage~~, **limited to a single house and a single garage, regardless of whether the single garage is attached to the single house or detached from the single house**."
- Homestead" which aways includes but is not limited to a "dwelling," still means "an individual's principal place of residence" that "consists of a dwelling, ~~and the real estate, not exceeding~~ **and includes up to** one (1) acre ~~that immediately surrounds~~ **of land immediately surrounding** that dwelling, **and any of the following improvements:**

  (i) Any number of decks, patios, gazebos or pools.

  (ii) One (1) additional building that is not part of the dwelling if the building is predominantly used for a residential purpose and is not used as an investment property or as a rental property.

  (iii) One (1) additional residential yard structure other than a deck, patio, gazebo, or pool."

The House-passed version of SB 325 eliminated any change to the required content of the DLGF-designed "statement" that a residential property owner must file at least once under I.C. § 6-1.1-12-37(e) to "apply" for the homestead deduction. For example, there is no explicit requirement that the home owner submit a drawing showing the perimeter of the area of "up to one (1) acre" within which the house and other homestead-eligible improvements are situated.

In this writer's opinion, the practical impact of the changed definitions of "dwelling" and "homestead" is that a homeowner can claim the homestead deduction for all of the following improvements if they will fit within a one-acre area:

- a house;
- one attached or detached garage;
- one other building of any kind used for a predominantly residential purpose and not held or operated as a rental or investment property (*E.g.,* a guest house within the one acre will not qualify as part of the homestead if it is operated as an AirBnB property).
- any number of "decks, patios, gazebos or pools" [*"pool" is not defined*]; and
- one additional "residential yard structure" [*not defined*] which is not a deck, patio, gazebo or pool.

On the other hand, if the homeowner has a second garage ***and*** a guest house, third garage, greenhouse or tool shed in addition to the main house and garage, the homestead deduction can be claimed for one of the additional buildings and for one of the "additional residential yard structures" but not all of them.

For purposes of the "circuit breaker" caps on annual property taxes under I.C. 6-1.1-20.6 (expressed as a percentage of grossed assessed value), the House-passed version of SB 325 also amends the definition of "nonresidential real property" in I.C. § 6-1.1-20.6-2.5 and the definition of "residential property" in I.C. § 6-1.1-20.6-4. The practical impact of these changes is that if a person's principal residence includes an *extra* building (a *second* additional garage, guest house, etc.) and/or more than one additional "residential yard structure" that is outside the revised of a "homestead," then the value of those extra improvements will not qualify for the 1-percent-of-assessed-value cap for "homesteads," but will qualify for the 2-percent-of-assessed-value cap for "residential property" under I.C. § 6-1.1-20.6-7.5(a)(2).

Based on its content as of April 13, 2023, Senate Bill 325 still provides ample opportunities for mischief by homeowners, DLGF, and county assessors. Property owners and their advisors should wait for additional guidance from DLGF later in 2023 if a homestead contains multiple improvements such as a *third* garage or equipment shed.

Appendix

Estate, Gift, and GST Tax Rates and Exclusion Amounts for 2017 through 2023

For decedents dying in, or gifts made in	2017	2018 [4]	2019	2020	2021	2022	2023
Maximum lifetime exclusion amount (use for lifetime gifts or at death), inflation-indexed	$ 5,490,000	$ 11,180,000	$ 11,400,000	$ 11,580,000	$ 11,700,000	$ 12,060,000	$ 12,920,000
Top marginal tax rate (estate tax *and* gift tax)	40 percent	40 percent	40 percent	40 percent	40 percent	40 percent	40 percent
Tax credit equivalent of maximum lifetime exclusion ("unified credit")	$ 2,141,800	$ 4,417,800	$ 4,505,800	$ 4,577,800	$4,625,800	$ 4,769,800	$ 5,113,800
Lifetime generation-skipping transfer (GST) exemption, inflation-indexed	$ 5,490,000	$ 11,180,000	$ 11,400,000	$ 11,580,000	$ 11,700,000	$ 12,060,000	$ 12,920,000
Flat GST tax rate	40 percent	40 percent	40 percent	40 percent	40 percent	40 percent	40 percent
Per-donee annual exclusion from taxable gifts under Code § 2503(b) for "gifts of a present interest in property"	$ 14,000	$ 15,000	$ 15,000	$ 15,000	$ 15,000	$ 16,000	$ 17,000
Exclusion from taxable gifts under § 2503(e) for school tuition or medical expenses paid *directly* by the donor	unlimited	unlimited	unlimited	unlimited	unlimited	unlimited	unlimited

[4] Inflation adjustments using chained CPI continue after 2023. Basic exclusion amount (before inflation adjustments) will decrease to $5 million on January 1, 2026 unless Congress and the President act to extend or scale back the current tax relief.

APPENDIX: Pre-2017 Estate, Gift Tax, and GST Tax Exclusions and Tax Rates

Year	Estate Tax Applicable Exclusion Amount	Applicable Credit Amount	Lifetime Gift Tax Exemption (if *different* from estate tax)	Starting Marginal Est. or Gift Tax Rate (above exclusion)	Lifetime GST Exemption	Years (for Gift Tax Annual Exclusion)	§ 2503 Annual Gift Tax Exclusion (indexed)
1998	$ 625,000	$ 202,050	675,000	37 %	$ 1,000,000	1932 – 1938	$ 5,000
1999	650,000	211,300	675,000	37 %	1,010,000	1939 – 1942	4,000
2000	675,000	220,550		37 %	1,030,000	1943 – 1981	3,000
2001	675,000	220,550		37 %	1,060,000	1982 – 2001	10,000
2002	1,000,000	345,800		41 %	1,100,000	2002	11,000
2003	1,000,000	345,800		41 %	1,120,000	2003	11,000
2004	1,500,000	555,800	1,000,000	45 %	1,500,000	2004	11,000
2005	1,500,000	555,800	1,000,000	45 %	1,500,000	2005	11,000
2006	2,000,000	780,800	1,000,000	46 %	2,000,000	2006	12,000
2007	2,000,000	780,800	1,000,000	45 %	2,000,000	2007	12,000
2008	2,000,000	780,800	1,000,000	45 %	2,000,000	2008	12,000
2009	3,500,000	1,455,800	1,000,000	45 %	3,500,000	2009	13,000
2010	5,000,000	1,730,800		35 %	5,000,000	2010	13,000
2011	5,000,000	1,730,800		35 %	5,000,000	2011	13,000
2012	5,120,000	1,772,800		35 %	5,120,000	2012	13,000
2013	5,250,000	2,045,800		40 %	5,250,000	2013	14,000
2014	5,340,000	2,081,800		40 %	5,340,000	2014	14,000
2015	5,430,000	2,117,800		40 %	5,430,000	2015	14,000
2016	5,450,000	2,125,800		40 %	5,450,000	2016	14,000