Estate Planning Council of Indianapolis

2022 INDIANA ESTATE & TRUST LEGISLATION
(Enacted During the 2022 Session)

by Jeffrey S. Dible
Frost Brown Todd LLC
jdible@fbtlaw.com

Woodland Country Club
Carmel, Indiana

April 21, 2022

DISCLAIMER

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 16, 2022.

TABLE OF CONTENTS

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 on a consulting basis for 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. 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.

Jeffrey S. Dible
(317) 237-3811
jdible@fbtlaw.com

2022 INDIANA ESTATE AND TRUST LEGISLATION

(1) House Enrolled Act 1208 (P.L. 162-2022): A wide-ranging array of updating provisions and technical corrections in titles 16, 29 and 30

Text: http://iga.in.gov/legislative/2022/bills/house/1208#document-5b7ed4b1

House Enrolled Act 1208 was the Indiana State Bar Association's omnibus probate and trust update and technical corrections bill. Governor Holcomb signed this legislation on March 18, 2022. All provisions are effective for decedents dying or for decisions made or actions taken on or after July 1, 2022.

(A) Fixing inconsistencies about who mails required notices.

During the 2016-2021 period, when e-filing was introduced and spread among Indiana's 92 counties, there was a growing "divergence" between (a) what the probate and guardianship statutes *say* about how required notices must be served and (b) the actual practice of attorneys under Trial Rules 5(B)(3), 86 and 87, which govern e-filing and e-service using the Indiana Electronic Filing System (IEFS). Keep in mind that with respect to matters of procedure, the Trial Rules and other rules promulgated by the Supreme Court control over contrary provisions in Indiana statutes.

HEA 1208 fixes these inconsistencies by amending the following sections or subsections in the Probate Code and guardianship statute:

29-1-1-12 [*delete (c); P R sends notice*]

29-1-1-13 [*Clerk does not initiate notice by publication; delete "and by mail"*]

29-1-1-16 [*replace "clerk or other official" with "an official"*]

29-1-3-3 [*after spousal election is filed, Clerk notifies P R and P R's attorney by e-service and unrepresented parties by first class mail*]

29-1-7-7(a) [*passive voice for publication of notice of administration; Clerk does not initiate publication*]

29-1-7-7(c) [*delete sentence requiring the P R to furnish copies of the notice and envelopes to the Clerk; the P R serves the notice of administration through e-service or by mail on the distributees and listed creditors*]

29-3-6-1 [*In a guardianship proceeding, the petitioner or attorney, not the clerk, serves the statutory notice by e-service or first class mail*]

29-1-17-15.1 [*in proceedings to determine heirs if no estate has been opened within 5 months after death; passive voice verbiage for service through e-filing or first class mail*]

The introduced bill for HEA 1208 contained three other similar corrections (to I.C. §§ 29-1-7-15.1(c), 29-1-7.5-1, and 29-1-7.5-1.5, to clarify that the personal representative or the P R's attorney, and not the Clerk, is responsible for sending the notices, and that e-service and first class mail can be used. For unknown reasons, those provisions were stripped from the final version of the Bill but can be re-introduced in 2023.

Under HEA 1208, the clerk of the probate court still "issues" the required statutory notices, by filling in the date, adding the clerk's signature "stamp," posting the issued notice to the CCS, and distributing the completed notices electronically through e-notification to the registered users (attorneys) who have filed appearances in the proceeding. The attorneys then serve the notices by first class mail.

PRACTICE POINTER: In many Indiana counties (especially Marion County), the probate court staff personnel and deputy clerks rely heavily on e-mail to distribute administrative notices (such as notices of hearings). If a creditor or other party is participating *pro se* in an estate or trust proceeding, that party may not have an e-mail address on file in the case, and the court staff may not be aware of the mailing address for the party.

The attorneys of record for *represented* parties should confirm that the court staff has a mailing address for each *unrepresented* party who does not have an e-mail address on file, and should ensure that the clerk's office sends copies of administrative notices by mail to those unrepresented parties. The attorneys of record should also serve copies of pleadings and motions, etc. by mail on those unrepresented parties who don't have e-mail addresses, and should modify the wording of certificates of service to refer to the service that is made by mail, as well as to electronic service through IEFS.

(B) Removing the timing contradictions in the "summary administration" provisions (I.C. §§ 29-1-8-3 and -4).

I.C. §§ 29-1-8-3 and 29-1-8-4 apply in situations where (a) a guardianship of the property has terminated with the death of the protected person and the value of the remaining guardianship assets doesn't exceed a specified ceiling amount ***or*** (b) an unsupervised estate has been opened but the total probate estate assets, minus liens and encumbrances, reasonable funeral expenses, and reasonable administration expenses does not exceed the same specified ceiling amount.

The ceiling amount is $50,000 for decedents dying between July 1, 2006 and June 30, 2022 and is increased to $100,000 for decedents dying after June 30, 2022 (This change was made by Senate Enrolled Act 67, explained below).

The contradiction pertained to the order in which the fiduciary (P R or guardian) must make the summary distribution of the remaining assets and file a closing statement. I.C. § 29-1-8-3(b) had required the fiduciary to file a closing statement first and then distribute the assets. I.C. § 29-1-8-4(b) and (c) contained ambiguous wording and appeared to require distributions first and closing statement second. HEA 1208 removed the contradiction by amending both sections 3 and 4 to permit distributions first, followed by the filing of a closing statement.

(C) Clarifying the "special administrator" provisions in IC 29-1-10 and adding due process details.

Indiana's long-standing Probate Code section on the appointment of special [estate] administrators was seriously out of date, did not address issues of notice and the need for a hearing, and frequently resulted in a race to the courthouse between competing parties. In addition, there was no specific section that applied to the appointment of a special administrator to bring a wrongful death action as a result of the death of an Indiana-*resident* decedent.

Estate of Lewis, 123 NE 3d 670 (Ind. 2019), involved a race to the courthouse and the appointment (by 2 different courts) of 2 different relatives of the decedent as special administrator, and the rescinding of one appointment. In **Lewis,** the Supreme Court held that if a probate court is asked to make or rescind an appointment of a special administrator, the court should give notice and hold a hearing, even though the current statutes did not require this.

HEA 1208 amended I.C. § 29-1-10-15 to add two additional grounds that the probate court can rely on in deciding to appoint a special administrator, including to facilitate a wrongful death action. HEA 1208 also added new subsections (c) and (d) to section 15 and enacted a new section 29-1-10-15.5 to govern proceedings to appoint a special administrator to assert a wrongful death claim arising from the death of a resident decedent. These provisions specify the notice and hearing procedures to comply with the Supreme Court's holding in **Lewis**. New § 29-1-10-15.5 specifies the content of a petition, the content of the notice to be mailed to interested persons, and the deadline for filing of objections (14 days in advance of the hearing date).

(D) Clarifying the time for filing objections to an accounting in a supervised estate.

I.C. §§ 29-1-16-6 and 29-1-16-7 apply when the personal representative of a supervised estate files an intermediate or final accounting and petitions the probate court to set a hearing date and to approve the accounting. Sections 6 and 7 contained unclear wording about *when* interested persons must file objections: at least 14 days before the hearing date [in section 6(b)] *or* at any time or before the hearing date [in section 7].

HEA 1208 removes the ambiguous language from I.C. § 29-1-16-7 and clarifies the wording in I.C. § 29-1-16-6, to require that notice of the accounting hearing be served at least 30 days before the hearing date, and to require that objections to the accounting be filed in writing at least 14 days before the hearing date. The 14-day deadline must be specified in the notice of hearing that is sent to interested persons.

(E) Revising and expanding the "slayer rule" in I.C. § 29-1-2-12.1.

The purpose of a "slayer rule" is to prevent a murderer from profiting from the crime by inheriting assets from the deceased victim. Indiana's main "slayer rule" statute

is I.C. § 29-1-2-12.1, which was last previously amended in 2005. The old version referred to assets that pass through an estate or under a trust to the killer or perpetrator, but did not specifically refer to life insurance proceeds or other non-probate assets. The old statute also did not explicitly provide a rule for a situation in which the perpetrator kills the victim and then commits suicide.

In 2021, the ISBA Probate Trust & Real Property Section proposed any extensive rewrite of I.C. § 29-1-2-12.1 which, among other things, would have replaced the constructive trust remedy with a forfeiture of the perpetrator's interest in the victim's assets. This proposal did not end up in an introduced bill during the 2022 Session.

However, Senator Aaron Freeman introduced a separate bill, SB 132, to revise I.C. § 29-1-2-12.1 and to enact a new rule to deal with life insurance proceeds in a murder-suicide situation. The ISBA, this writer, and other stakeholders worked with Sen. Freeman to revise SB 132. After the Senate passed SB 132, the bill's text was added in an amendment to House Bill 1208.

As enacted in HEA 1208, the changes in and additions to I.C. § 29-1-2-12.1 make it similar to the ISBA's proposed rewrite. The main innovations in revised section 12.1 are the following defined terms:

- "Unlawful death" means death resulting from murder, voluntary manslaughter, or causing suicide (but not assisting suicide).
- "Decedent" means the person who is the victim of the unlawful death.
- "Culpable person" means a person who caused the unlawful death, as established by (a) guilty plea or conviction in a criminal case or (b) a civil action establishing "knowing and intentional" killing by a preponderance of the evidence. "Culpable person" also includes the estate of a person who knowingly and intentionally causes the unlawful death and who later dies (This makes the "slayer rule" apply in a murder-suicide situation).

The definitions of "culpable person" and "unlawful death" will prevent the slayer rule from applying to a person who commits *negligent* or *reckless* homicide that results in the death of a family member or other person.

New subsection 12.1(c) contains a non-exhaustive list of property interests which the culpable person would otherwise inherit and to which the slayer rule applies, including trust assets, TOD assets, the decedent's (victim's) interest in joint tenancy assets, and (in subdivision (c)(6) "property passing under a contractual agreement" upon death.

As revised by HEA 1208, I.C. § 29-1-2-12.1 still imposes a constructive trust (equitable remedy) upon the property that the culpable person inherits or receives as a result of the unlawful death of the decedent. The statute does <u>*not*</u> cause a forfeiture of the culpable person's inherited property interest. The culpable person holds the

inherited property as constructive trustee for the innocent persons (other trust or estate beneficiaries, other designated beneficiaries, etc.) who would be legally entitled to receive the property if the culpable person had died immediately before the decedent and victim (subsection (f)).

I.C. § 29-1-2-12.1 imposes a constructive trust upon the inherited property in the culpable person's hands. As amended, I.C. §29-1-2-12.1 does not change the status of the culpable person as an estate or trust beneficiary, TOD designated beneficiary, or surviving joint tenant who is entitled "on paper" to inherit the asset. The "constructive trust" remedy means that the innocent next of kin or other beneficiaries of the deceased victim may need to engage in further litigation against the culpable person to enforce the constructive trust.

Subdivision (c)(6) ["property passing under a contractual agreement upon the decedent's [victim's death"] could apply to proceeds from an IRA, pension or other retirement account. However, I.C. § 29-1-2-12.1 cannot prevent the custodian or plan administrator from paying the proceeds to the culpable person as a designated beneficiary.

A special rule in subsection 12.1(d) applies to life insurance proceeds and codifies existing case law (*see* **Estate of Troxal v. S.P.T.**, 851 N.E.2d 345 (Ind. Ct. App. 2006), *transfer denied* 860 N.E.2d 598; **Estate of Foleno ex rel. Thomas v. Estate of Foleno**, 772 N.E.2d 490 (Ind. Ct. App. 2002), *transfer denied* 783 N.E.2d 702). If the life policy insured the victim OR if the life policy insured the killer (murder followed by suicide), the insurance company can pay out the proceeds to the contingent beneficiaries as if the killer predeceased the victim, so long as the contingent beneficiaries are blameless with respect to the insured's death.

HEA 1208 also amended one of the two "wrongful death" statutes, I.C. § 34-23-1-2, which applies when the victim is not survived by any children or dependents. The definition of "adult person" (as the victim of a wrongful death) is expanded to include a married individual who has no dependents and whose death was caused by the that married individual's spouse.

(F) Eliminating "docketing of a trust" as a specifically named procedure.

Dating back to the original 1971 enactment of the Indiana Trust Code, the filing or registration of a trust instrument with a court has never been required, and court supervision of a trust's administration has never been required, unless the trust instrument explicitly requires probate court supervision or other involvement. *See* I.C. § 30-4-6-2. Further, the mere filing of a copy of a trust instrument with a probate court does not give the court continuing power over the administration of the trust. I.C. § 30-4-6-7(b).

The concept of "docketing" was introduced in I.C. § 30-4-6-7(a) to address a practical problem: How to give a probate court knowledge of the contents of a trust

instrument in a proceeding to interpret or modify the trust's terms or to resolve some litigated dispute. In trust litigation, it has been a common practice for the petitioner to file two simultaneous petitions: a petition to "docket" the trust instrument and a separate petition that asks for the "real" relief under chapters 3, 5, or 7 of the Trust Code, etc.

"Trust docketing" is nothing more than the filing of a copy of the trust instrument as a case record, with the court's permission. But the purpose and significance of "docketing" are widely misunderstood, which has led to anomalous litigation situations in which (a) one party files a copy of the trust instrument, (b) the parties litigate a dispute about that trust for one or more years, and (c) the court never enters an order permitting the "docketing" of the trust.

The solution in HEA 1208 is to eliminate "docketing" of a trust as a separate concept and procedure, and to allow any person to file a copy of the trust instrument in the course of a proceeding, without obtaining the advance permission of the probate court. As amended effective July 1, 2022, I.C. §§ 30-4-6-4 and 30-4-6-7 read as follows:

I.C. 30–4–6–4

Sec. 4. Except as provided in section 7 of this chapter and IC 30–4–7, unless the terms of the trust expressly direct that the court is to have continuing jurisdiction over the administration of the trust:

(1) a trustee need not ~~docket a trust in the~~ **file a copy of the trust instrument as a part of the court's** records; ~~of the court~~

(2) ~~nor may~~ the court **may not** require a ~~trust to be docketed;~~ **copy of the trust instrument to be filed as a part of the court's records;** and

~~(2)~~ **(3)** ~~with respect to a decedent's estate docketed for the purpose of probate or administration, which either establishes a trust or makes a devise to another trust,~~ **if:**

(A) a decedent's will establishes a trust or contains a devise to a trust; and

(B) the will is probated under IC 29–1–7 with or without the appointment of a personal representative for the decedent's estate;

the court shall have no continuing jurisdiction over the administration of the trust after **the will is probated or after** any distribution from the **decedent's** estate is paid or delivered to the trustee.

I.C. 30–4–6–7

Sec. 7. ~~(Docketing~~ **(Filing Copy of Trust Instrument** as Part of Proceeding) (a) ~~If it is necessary to the determination of any issue of law~~

~~or fact in a proceeding, the court may direct that a copy of the trust instrument, if any, be kept in its records.~~ **In any proceeding under IC 30–2–14, IC 30–2–15, or this article, any petitioner or other interested person, including but not limited to a trustee or beneficiary, may file a copy of the trust instrument for the trust with the court, to make the trust's terms a part of the court's records. If there is a dispute about whether the trust has been amended or restated or about which version of a trust instrument is a valid version, two (2) or more parties may file copies of different trust instruments or amendments so that the court is aware of their contents.**

(b) Permissible methods for filing a copy of the trust instrument with the court under subsection (a) include filing the copy as an exhibit or attachment to a petition for substantive relief under this article. A separate petition to "docket" the trust or to permit the filing of a copy of the trust instrument is not required.

(c) Upon the filing of a copy of the trust instrument with the court, a presumption arises that the trust's terms have been properly presented to the court. The presumption may be rebutted on a showing that:

(1) the court lacks subject matter jurisdiction over the trust; or

(2) the proceeding has not been filed in the proper venue under section 3 of this chapter.

The filing of a copy of a trust instrument under this section does not preclude any interested person from asserting claims or defenses regarding the validity, interpretation, or administration of the trust or from cross-petitioning for relief under this title.

(d) If:

(1) a trustee, beneficiary, or other interested person files a proceeding under IC 30–2–14, IC 30–2–15, or this article with respect to a trust; and

(2) a copy of the trust instrument is not filed with the court under subsection (a);

the court may order any party to file a copy of the trust instrument as a condition to entertaining or hearing a petition for substantive relief with respect to the trust.

~~(b)~~ **(e)** The filing of the trust instrument under subsection (a) ~~of this section~~ shall not result in continuing supervisory jurisdiction by the court. Upon conclusion of the proceeding, **unless otherwise ordered by the court, the clerk shall remove** the trust instrument ~~shall be removed~~ from the court's records.

Please note that after a party files a copy of a trust instrument in a proceeding under the Trust Code or IC 30-2-14 or 30-2-15, subsection (c) provides only two grounds on which the filing of the copy can be challenged: improper venue or the absence of subject matter jurisdiction for the proceeding.

(G) Miscellaneous technical corrections in titles 16, 29 and 30.

House Enrolled Act 1208 makes the following technical corrections to existing statutes, all of which were enacted or amended within the last four years:

- In I.C. § 16-36-7-19 (part of the 2021 health care advance directive statute), replace one instance of the word "testator" with "declarant" in the definition of "present" and "presence."
- In I.C. § 29-1-21-16(c) (regarding the filing of an electronic will for probate), replace the cross-reference to old Administrative Rule 9(G) with a reference to Rule 5 of the Rules on Access to Court Records.
- In I.C. § 29-1-22-1 (regarding the authorized but not-yet-established electronic estate planning document registry), correct the definition of an electronic POA to refer to the 2021 definition in title 30, which allows an electronic POA to be signed with two disinterested witnesses instead of notarization.
- In I.C. § 29-3-3-3 (the general provision which authorizes biological parents to sign various waivers and consents on behalf of their minor children), add a cross-reference to new I.C. § 29-1-10-15.5 (proceedings to appoint a special administrator).
- In I.C. § 30-5-4-1.9 (added to the POA statute in 2021), replace the phrase "probate of a power of attorney" with "the validity and enforceability of a power of attorney."
- Amend the definition of "electronic power of attorney" in I.C. § 30-5-11-3(8) to refer to the use of two disinterested witnesses as well as notarization, as permitted under House Enrolled Act 1255 of 2021.

(2) Senate Enrolled Act 66 (P.L. 150-2022): Permitting "late" distributions of known probate assets from closed supervised estates

Text: http://iga.in.gov/legislative/2022/bills/senate/66#document-91fb5169

Senate Enrolled Act was signed by Governor Holcomb on March 18, 2022 and is effective for the estates of decedents dying on or after July 1, 2022.

This Bill was an initiative by Senator Michael Young to deal with a problem that is rare and which should be non-existent: A *supervised* estate administration in which the personal representative is discharged but where some *known* estate asset(s) remain undistributed. When a previously *unknown* estate asset is discovered after the personal representative is discharged, an existing section, I.C. § 29-1-17-14, allows the personal

representative to be reappointed. But section 14 doesn't apply to an estate asset that was and is known and which the personal representative forgot or neglected to distribute before being discharged.

Keep in mind that if the personal representative of a solvent, supervised estate and the P R's attorney comply with existing Probate Code sections, no known asset should remain undistributed, because of multiple opportunities to distribute all assets.

- Before the personal representative (P R) can petition for a discharge and to close the estate, the P R must obtain a decree of final distribution (which is usually combined with an order approving the final accounting) under I.C. § 29-1-17-2. The common practice is to list the remaining assets to be distributed in either the final accounting or the decree of final distribution.
- *After* the P R completes the final distributions, the P R must file a supplemental report of distribution under I.C. § 29-1-17-13, "together with receipts or other evidence satisfactory to the court that distribution has been made as ordered in the final decree." This gives the P R ample opportunity to ensure that all known residuary assets are distributed *before* filing the supplemental report.

With respect to real property that is a probate estate asset, the decree of final distribution itself, like a probated Will, is a "title transaction" document under I.C. § 32-20-2-7(4). If the decree of final distribution describes a parcel of or interest in real property in sufficient detail, a copy of the distribution decree itself could be recorded to prove that the real property has passed to the correct legatee, even if the personal representative neglects to execute and deliver a personal representative's deed before obtaining a discharge order under I.C. § 29-1-7-13.

The ISBA worked with Senator Mike Young to revise his introduced bill (SB 66) and to create a solution that would not create other problems. The solution in Senate Enrolled Act 66 is new section 29-1-17-13.5, which applies only to closed supervised estates and which can be used for both real property and personal property that the personal representative forgot or neglected to distribute before being discharged.

I.C. 9-1-17-13.5

Sec. 13.5. (a) This section applies to a solvent supervised estate if:

(1) a decree of final distribution has been entered by the court under section 2 of this chapter;

(2) the personal representative has filed a supplemental report of distribution and the court has entered an order of discharge under section 13 of this chapter; and

(3) one (1) or more than one (1) estate assets shown on hand in the personal representative's final account remain undistributed after the entry of the order of discharge.

(b) If the undistributed assets of the estate are specifically described in the decree of final distribution, distribution of any of the assets may be accomplished or documented by:

(1) the distributee who is entitled to receive the asset filing or recording of an affidavit under subsection (c); or

(2) the personal representative's execution and recording or filing of a personal representative's deed or other transfer document under subsection (e).

(c) If the decree of final distribution under section 2 of this chapter identifies one (1) or more distributees who are entitled to receive distribution of an asset that remains undistributed, any distributee may sign and file with the court an affidavit that:

(1) states the cause number and the caption for the estate;

(2) states the date on which the decree of final distribution was entered by the court;

(3) identifies the undistributed asset described in the decree and to which the distributee is entitled;

(4) states the interest in the asset that has passed to the distributee who signs the affidavit and to each other distributee who has an interest in that asset; and

(5) states that the undistributed asset has passed by operation of law under IC 29–1–7–23(a) to the distributee who signs the affidavit, as a result of the decedent's death and the entry of the decree of final distribution.

(d) If an undistributed asset consists of an interest in real property, the distributee must record a copy of the affidavit and a copy of the decree of final distribution with the county recorder of the county in which the real property is situated. If the decree of final distribution does not include the full legal description of the real property, the distributee who signs the affidavit must include in the affidavit the legal description of the real property and the property tax parcel identification number for the real property.

(e) Notwithstanding the filing of a supplemental report of distribution and the court's entry of an order of discharge under section 13 of this chapter, the personal representative's powers to complete distribution and delivery of all undistributed estate assets continue for a period of ninety (90) days beginning on the day after the date of entry of the order of discharge in the chronological case summary. During that ninety (90) day period:

(1) the personal representative may proceed, without any further court order, to sign and deliver any assignment or transfer document to complete the distribution of personal property and may sign and record a personal representative's deed to complete the distribution of real property of the estate; and

(2) any distributee who has an interest in an undistributed estate asset may petition the court for an order compelling the personal representative to sign and deliver or to sign and record a personal representative's deed or other assignment or transfer document to complete the distribution of that estate asset.

If a petition under subdivision (2) is filed before the ninety (90) day period ends and if the court issues an order, the order will be effective without notice to any persons other than the personal representative and the distributee who filed the petition, even if the order is issued after the ninety (90) day period ends.

Please note the following in new section 13.5:

- Following the entry of an order discharging the P R and closing the estate, the 90-day period for completion of omitted distributions is similar in duration to the 3-month period that follows the filing of a closing statement under I.C. § 29-1-7.5-4 in an unsupervised estate.
- Under subsections (b)(2) and (e)(1), if the P R is cooperative and wants to complete the distributions that were forgotten or overlooked, the P R can make those distributions during the 90-day period without obtaining any further court order.
- If the P R is uncooperative or refuses or declines to act, any distributee who is entitled to an asset (which should have been but wasn't distributed) can petition the probate court under subsection (e)(1) and during the 90-day period for a new order compelling the P R to make the distribution.
- If the decree of final distribution identifies a specific item of real or personal property and identifies the distributee who was supposed to receive it, subsections (b)(1) and (c) or (d) permit that distributee to file an affidavit with the court (for personal property) or to record an affidavit (with the county recorder, for real property), to document that ownership of the asset has transferred to that distributee under I.C. § 29-1-7-23.
- If the undistributed asset is personal property and if the distributee who is entitled to the asset chooses to file an affidavit under subsection (c), the affidavit will be filed under the estate's cause number and it can simply refer to the decree of final distribution.

- If the undistributed asset is an interest in real property and if the distributee who is entitled to it chooses to record an affidavit under subsection (d), a copy of the decree of final distribution must be recorded with the affidavit, and the affidavit must include the legal description and property tax parcel I.D. number for the pertinent real estate if the distribution decree does not contain this information.
- New section 13.5 does not explicitly require the discharged personal representative to file any follow-up report with the probate court if the P R acts under subsection (e)(1) to sign and deliver a P R's deed or asset assignment during the 90-day period, but it would be a good idea to do so.

(3) Senate Enrolled Act 67 (P.L. 151-2022): Increasing the probate estate "ceiling" amount in the small estate affidavit statutes from $50,000 to $100,000

Text: http://iga.in.gov/legislative/2022/bills/senate/67#document-319e88d8

Senate Enrolled Act was signed by Governor Holcomb on March 18, 2022 and is effective for the estates and assets of decedents dying on or after July 1, 2022.

Before 2022, the last increase in the "small estate affidavit ceiling amount" under chapter 8 of the Probate Code (I.C. 29-1-8) was in 2006, for decedents dying after June 30, 2006. The ceiling amount had remained at $50,000 for 16 years. The ceiling amount is applied as follows to determine and control whether small estate affidavits can be used to collect or re-title *personal* property of an Indiana resident decedent without getting a personal representative appointed, if the personal property is owned solely by the decedent and would pass under the decedent's Will if there is one:

- *STEP 1*: Determine the total value of the decedent's gross probate estate (real and personal property).[1]
- *STEP 2*: Subtract the liens and encumbrances (mortgages, other perfected secured debt, unpaid property taxes that are a lien, and recorded judgments and tax liens).
- *STEP 3*: Subtract "reasonable funeral expenses" of the decedent, whether already paid or not.
- *STEP 4*: Compare the remaining dollar value from Step 3 to the ceiling amount in I.C. § 29-1-8-1(b)(1).

If the remaining dollar value is less than or equal to the ceiling amount ($50,000, for decedents dying before July 1, 2022), then small estate affidavits can be used but are not required to be used. If the remaining dollar value in Step 4 exceeds the ceiling amount,

---

[1] Under I.C. § 29-1-1-3(a)(32), "'Probate estate' denotes the property transferred at the death of a decedent under the decedent's will or under IC 29-1-2, in the case of a decedent dying intestate."

then a personal representative must be appointed (an estate must be opened) to re-title or collect the decedent's *personal* property. However, if the decedent's probate estate assets consist *solely* of real property of *any* value, a passage of title affidavit under I.C. § 29-1-7-23 can be recorded to document how and to whom the real property has passed as a result of the decedent's death, without getting a personal representative appointed.

Before and during the 2021 hearings of the Probate Code Study Commission, the ISBA's PTRP Section pushed for an increase in the ceiling amount from $50,000 to $100,000. There was support among Commission members to increase the ceiling amount to some level between $75,000 and $100,000. Senator Tim Lanane introduced Senate Bill 67 to increase the ceiling amount from $50,000 to $100,000 in I.C. §§ 29-1-8-1, 29-1-8-3, and 29-1-8-4.

The Senate passed SB 67 by a vote of 43 to 4. In the Indiana House, the original House sponsor was Rep. John Young, who preferred to limit the increased ceiling amount to $75,000 and who believed that a ceiling of $100,000 would invite abuse of the small estate affidavit procedure by one or more dishonest heirs within a decedent's family. However, Rep. Young either caused or allowed himself to be removed as a sponsor from the Bill, and SB 67 was passed by the House without any amendments, by a vote of 83 to 1. The one "nay" vote was from Rep. John Young, and some of the 15 House members who were excused and did not vote had earlier voiced opposition to an increase all the way up to $100,000.

The increase from $50,000 to $100,000, as enacted in Senate Enrolled Act 67, reads as follows in three sections in I.C. 29-1-8:

In I.C. § 29-1-8-1(b) [*required content of the small estate affidavit*]:

> (b) The affidavit required by subsection (a) must be an affidavit made by or on behalf of the distributee and must state the following:
>
> > (1) That the value of the gross probate estate, wherever located, (less liens, encumbrances, and reasonable funeral expenses) does not exceed:
> >
> > > (A) twenty-five thousand dollars ($25,000), for the estate of an individual who dies before July 1, 2006; ~~and~~
> >
> > > (B) fifty thousand dollars ($50,000), for the estate of an individual who dies after June 30, 2006, **and before July 1, 2022; and**
> >
> > > **(C) one hundred thousand dollars ($100,000), for the estate of an individual who dies after June 30, 2022**.

In I.C. § 29-1-8-3 [*procedure for summary distribution and closure of a "small" unsupervised estate*]:

> (b) Except as otherwise provided in this section, if the value of a decedent's gross probate estate, less liens and encumbrances, does not exceed the sum of:
>
> (1) an amount equal to:
>
> (A) twenty-five thousand dollars ($25,000), for the estate of an individual who dies before July 1, 2006; ~~and~~
>
> (B) fifty thousand dollars ($50,000), for the estate of an individual who dies after June 30, 2006, **and before July 1, 2022; and**
>
> **(C) one hundred thousand dollars ($100,000), for the estate of an individual who dies after June 30, 2022;**
>
> (2) the costs and expenses of administration; and
>
> (3) reasonable funeral expenses; [2]
>
> the fiduciary, without giving notice to creditors, may . . . .
>
> . . . .
>
> (c) If an estate described in subsection (a) (b) includes real property, an affidavit may be recorded in the office of the recorder in the county in which the real property is located. The affidavit must contain the following:
>
> (1) The legal description of the real property.

---

[2] Note that in § 29-1-8-3, the relationship between the dollar ceiling amount (now $100,000) and reasonable funeral expenses is defined differently than in I.C. § 29-1-8-1(b). Under section 3, the reasonable funeral expenses should be *added* to the ceiling amount, and then that sum is compared to the value of the probate estate reduced by liens and encumbrances, but operationally, this reaches the result as the four steps under § 29-1-8-1, explained on page 12 above. The real difference between the ceiling calculations under section 1 and section 3 is that when an unsupervised estate is open and when the P R is thinking about using the summary distribute-and-close procedure under section 3, the "costs and expenses of administration" can effectively be subtracted from the value of the gross probate estate minus the liens and encumbrances. In contrast, when no estate has been opened and when small estate affidavits will be used, only "reasonable funeral expenses" (and not administration expenses) can be subtracted. This is a long-standing rule and has not changed.

(2) The following statements:

(A) If the individual dies after June 30, 2006, **and before July 1, 2022,** the following statement: "It appears that the decedent's gross probate estate, less liens and encumbrances, does not exceed the sum of the following: fifty thousand dollars ($50,000), the costs and expenses of administration, and reasonable funeral expenses.".

(B) If the individual dies before July 1, 2006, the following statement: "It appears that the decedent's gross probate estate, less liens and encumbrances, does not exceed the sum of the following: twenty-five thousand dollars ($25,000), the costs and expenses of administration, and reasonable funeral expenses.".

(C) If the individual dies after June 30, 2022, the following statement: "It appears that the decedent's gross probate estate, less liens and encumbrances, does not exceed the sum of the following: one hundred thousand dollars ($100,000), the costs and expenses of administration, and reasonable funeral expenses.".

In I.C. § 29-1-8-4(b)(1)(A) [*required content of closing statement to be filed after summary distribution*]:

(b) Unless prohibited by order of the court and except for estates being administered by supervised personal representatives, a fiduciary may close an estate administered under the summary procedures of section 3 of this chapter by disbursing and distributing the estate assets to the distributees and other persons entitled to those assets, and by filing with the court, at any time after disbursement and distribution of the estate, a verified statement stating that:

(1) to the best knowledge of the fiduciary, the value of the gross probate estate, less liens and encumbrances, did not exceed the sum of:

(A) twenty-five thousand dollars ($25,000), for the estate of an individual who dies before July 1, 2006, ~~and~~ fifty thousand dollars ($50,000), for the estate of an individual who dies after June 30, 2006, **and before July 1, 2022, and one hundred thousand dollars ($100,000), for the estate of an individual who dies after June 30, 2022**;

(B) the costs and expenses of administration; and

(C) reasonable funeral expenses;

. . . .

PRACTICE POINTERS: For a decedent dying on or after July 1, 2022, when the value of the gross probate estate (net of liens and encumbrances and reduced by reasonable funeral expenses) doesn't exceed the $100,000 ceiling, the use of small estate affidavit(s) to collect or retitle personal property is *optional* and *permissive*, not mandatory. Keep the following principles and issues in mind:

- There could be fact situations in which small estate affidavits *could* be used but in which it would be safer and more efficient to open an estate and appoint a personal representative. Relevant facts and circumstances could include these:
    - One or more of the distributees are untrustworthy or financially irresponsible and may be unable toto hold collected estate assets or funds for proper application and division (to pay administration expenses and debts first).
    - There are significant known creditor claims.
    - Two or more distributees don't get along and won't be able to agree upon or consent to division and distribution of the net collected assets according to the probated Will (if there is one) or I.C. § 29-1-2-1.
- I.C. § 29-1-8-1(b)(4) still requires the affiant to accurately list, in each small estate affidavit, the name and address of each distributee who is entitled to a share of the pertinent asset and the share to which each distributee is entitled.
- I.C. § 29-1-8-1(b)(4) still requires the affiant to state in the affidavit, under the penalties for perjury, that the affiant has notified each other listed distributee of the intention to present and use the small estate affidavit.
- Nothing in I.C. § 29-1-8-1 wipes out creditor claims or absolves an affidavit from the responsibility to properly apply the collected assets to (a) pay reasonable administration and funeral expenses, (b) pay the decedent's federal and state tax liabilities, and (c) hold back appropriate amounts of money for creditor claims until after the 9-month bar date under I.C. § 29-1-14-1(d) has passed.
- If one of several distributees approaches a lawyer about drafting a small estate affidavit(s), that lawyer should perform some due diligence about the decedent's family structure, the apparent solvency of the "estate," the existence or absence of felony convictions for distributees and the ability and inclination of the potential client to follow instructions and comply with the Probate Code.
- If the lawyer's potential client is one of several distributees who will be signing and using small estate affidavits, the lawyer should have a written engagement letter with that client which states the scope of the work, and the lawyer should strongly consider sending "I am not your lawyer" letters to the *other* distributees.

(4) Senate Enrolled Act 357 (P.L. 26-2022): After 2023, prohibiting county auditors and assessors from refusing to endorse, accept or process recordable documents and sales disclosure forms in electronic format.

Text: http://iga.in.gov/legislative/2022/bills/senate/357#document-f4d3d8d6

In 2021, House Enrolled Act 1255 (P.L. 185-2021) made numerous clarifications and other overdue changes to the real estate, notarial and recording statutes in titles 32 and 33, and many of these changes were effective on passage (April 29, 2021). In particular:

- With respect to "instruments concerning real property" that are eligible to be recorded, I.C. § 32-21-2-15 placed documents in native electronic format on an equal footing with documents on paper.
- I.C. § 32-21-2.5-8 essentially set a deadline of "on or before July 1, 2022," after which each county recorder is required to accept and process electronic documents for recording if they have the required content, and to index recorded electronic documents in the same index as the corresponding documents submitted in paper form.
- New I.C. § 32-21-2.5-12 has been labeled the "papering out" statute. It permits a tangible paper copy to be printed from a native electronic real estate document (deed, affidavit, etc.) and to be certified as accurate, and requires a county recorder to record such a paper copy if it otherwise satisfies requirements.

These 2021 changes were supported by the Indiana County Recorders Association, but the county auditors and county assessors, collectively as "stakeholder" groups, were not on board or in agreement.

For 2022, the Indiana Land Title Association and other real estate industry stakeholders did further work with the county auditors and county assessors and convinced them to support Senate Bill 357, which was signed by Governor Holcomb on March 7, 2022 and is generally effective on after July 1st.

Under Senate Enrolled Act 357, and after December 31, 2023:

- County assessors cannot refuse to accept and process sales disclosure forms that are submitted in electronic document form.
- County auditors cannot refuse to endorse deeds, transfer affidavits (such as under I.C. § 29-1-7-23 or the TOD Property Act), and other real estate instruments that are submitted in electronic document form.

Finally, SEA 357 amends I.C. § 32-21-2.5-8 so that on and after July 1, 2022, a county recorder cannot be compelled to record a plat of real property, a survey of real property or a military discharge that is submitted to the recorder in electronic form.

(5) House Enrolled Act 1205 (P.L. 161-2022): One new provision in I.C. 30-4-3 *and* enactment of the Uniform Trust Decanting Act

Text: http://iga.in.gov/legislative/2022/bills/house/1205#document-286078ce

This legislation was signed by the Governor on March 18, 2022. HEA 1205 comprises two parts, and both are additions to the Indiana Trust Code, effective on and after July 1, 2022.

The **first part** is a single new section, § 30-4-3-29.3, which is added to the Trust Code to make it easier to change the trustee structure of an existing irrevocable trust, by replacing a single trustee with 2 or more trustees, with a division of labor established between those trustees, so that the multiple trustees have non-overlapping duties, powers, and potential liabilities.

New I.C. § 30-4-3-29.3 is fairly short, is based on a Delaware Trust Code provision, and will apply whenever some person has the power to fill a vacancy in a trustee position, whether the power to appoint a successor trustee exists under a provision in the trust instrument or under I.C. § 30-4-3-33:

> Sec. 29.3. (a) The power to appoint a successor trustee under a governing instrument or under section 33 of this chapter includes:
>
> (1) the power to appoint multiple successor trustees; and
>
> (2) the power to allocate trustee powers to one (1) or more trustees.
>
> (b) A trustee to whom powers:
>
> (1) have been exclusively allocated under subsection (a) must be a fiduciary only with respect to the powers allocated; and
>
> (2) have not been allocated under subsection (a) is not liable for the actions of a trustee to whom the powers, duties, and responsibilities are allocated.
>
> (c) The rules governing the rights, powers, duties, and liabilities of a governing instrument under this chapter apply to a trustee appointed under this section unless expressly limited by the terms of a governing instrument.

Note that new section 29.3 says nothing about *how many people* may hold the power to appoint a successor trustee. If the trust instrument is silent and if I.C. § 30-4-3-33 applies, the power to appoint a successor trustee may be held collectively by the qualified beneficiaries of the trust, who would have to act by majority vote to exercise the power. It may not be easy for multiple individuals to accomplish a successful majority vote that appoints 2 or 3 successor trustees and which establishes a division of powers and duties among the trustees.

Note also that new section 29.3 says nothing about establishing positions, powers and duties of non-trustee fiduciaries ("trust directors" under I.C. 30-4-9) *in addition to* multiple trustees. The ISBA may be able to get section 29.3 amended in a future year to allow trust director positions to be added at the same time as the appointment of one or more successor trustees.

The **second part** of HEA 1205 consists of the rest of the 24-page Enrolled Act ad enacted Indiana's version of the Uniform Trust Decanting Act, which is added to the Indiana Trust Code as new chapter 10 (I.C. 30-4-10). Indiana is the 13th State to enact the UTDA.

The Indiana UTDA is effective on July 1, 2022, and our prior (2010) trust decanting statute (I.C. § 30-4-3-36) is repealed, also for decisions made or actions taken on or after July 1, 2022.

(A) Trusts that are subject to the new Indiana trust decanting Act

Unless the trust has *only* charitable beneficiaries and is held or administered *solely* for charitable purposes (*see* I.C. § 30-4-10-1(c)(1)), or unless the trust's terms specifically prohibit the exercise of a statutory decanting power, the new Indiana Act will apply to every newly-created or existing *irrevocable* trust that has <u>either</u> a principal place of administration in Indiana <u>or</u> an Indiana governing law provision that applies to the administration or construction of the trust.

(B) Gaps in and shortcomings of old section 30-4-3-36

Indiana's previous trust decanting statute was based on Florida's statute, was first enacted in 2010, and consists of just 574 words. For highly experienced trust lawyers and for trustees that are not risk-averse, our old statute has offered a lot of freedom in designing the structure of the "second trust" that would receive assets decanted or poured from a first trust.

However, old I.C. § 30-4-3-36 was always short on detail, contained no internal definitions, and was silent on numerous issues:

- Old § 36 did not use the term "decanting" and based the trustee's power to decant on the old conceptual model of a trustee's discretionary power to distribute principal in further trust for at least one beneficiary or the first or current trust.
- Old § 36 did not address fact patterns in which *someone else* (e.g., a trust director such as a distribution committee or trust protector) has the *discretion* to direct the trustee to distribute principal.
- Old § 36 did not say who should be treated as the "settlor" of the second trust that receives a decanting distribution.

- Old § 36 did not address the potential loss of tax benefits for the second trust or for the settlor, *other than* the loss of a marital or charitable transfer tax deduction or the loss of a § 2503 annual exclusion.
- Old § 36 contained no provisions for protecting charitable beneficiaries' interests in a first trust, other than prohibiting changes that would destroy an estate or gift tax charitable deduction.
- Other than a single sentence in subsection (c) [which prohibited postponing the time for vesting for Rule Against Perpetuities purposes], old § 36 did not address GST tax issues.
- Old § 36 did not prohibit changes through decanting that could eliminate important rights or powers (such as a power to remove or replace a trustee) in the terms of the second trust.
- Old § 36 was silent on the issue of whether the terms of a second trust could grant or confer a power of appointment that could be exercised in favor of persons who are not beneficiaries of the first trust.
- Old § 36 was silent about whether a trustee could decant assets to a second trust that would increase the trustee's compensation or reduce the trustee's standard of liability or conduct.
- Old § 36 did not mention beneficiaries with disabilities and did not allow decanting to replace an "outright" distributive share or a mandatory income interest with a discretionary interest, to enable a disabled beneficiary to successfully apply for means-tested public benefits.

In practical terms, the above shortcomings and gaps in our old decanting statute created two types of problems: *First*, some worthwhile objectives could not be accomplished through decanting at all in Indiana. And *second*, a trustee who received substandard or incomplete legal advice could commit some costly mistakes by decanting trust assets to a second-trust with ill-conceived provisions.

All of the above-listed deficiencies are addressed in I.C. 30-4-10, Indiana's version of the Uniform Trust Decanting Act.

Especially for existing trusts that limit the trustee's discretionary distribution powers by an ascertainable standard such as HEMS, there will be changes that *could be made* under old I.C. § 30-4-3-36, but which will be prohibited under the new Act on or after July 1, 2022. For trustees in such situations, it will be crucial to complete decanting under the old statute before the July 1, 2022 effective date for its repeal and replacement. Arguably, if a trustee wants to decant under the old statute, the 60-day pre-decanting statute should be sent out not later than June 30, 2022, and preferably sooner.

(C) New specifically defined terms in the new Decanting Act

New I.C. 30-4-10 includes 47 specifically defined terms. Seven (7) of those definitions are borrowed from elsewhere in the Indiana Trust Code or from other Indiana statutes, but the rest of the defined terms in the Act are new. Here are some of the more important new definitions:

- "Decanting power" (§ 30-4-10-12): The power of an "authorized fiduciary" (*see below*) to distribute property of a first trust to one or more second trusts OR "to modify the terms of the first trust." ***Comment***: *This definition is significant because it allows a trustee or other authorized fiduciary to modify the first trust's terms without actually transferring assets to a second trust.*

- "Authorized fiduciary" (§ 30-4-10-4): A trustee, trust director, or other fiduciary (but not a settlor) that has discretion to distribute or to direct the distribution of principal of the first trust to 1 or more current beneficiaries. ***Comment:*** *This definition recognizes that a trust director may be the person who has the discretion to direct principal distributions, and therefore will be the "authorized fiduciary" who can use the decanting procedures under the new Act.*

- "Settlor" (§§ 30-4-10-28 and 30-4-10-55): The definition incorporates the regular Indiana Trust Code definition of "settlor" (a person who creates a trust) but with these additions:

    - With respect to assets that are decanted from the first trust to a second trust, the settlor of the first trust is "deemed" to be a settlor of the second trust (§ 55(a)).

    - If more than 1 person creates or contributes property to a trust, each person is a "settlor" with respect to the portion of the trust that is attributable to his or her contribution except to the extent that another person has a power to revoke or withdraw that portion (§ 24(b)).

    - In determining a "settlor's" intent with respect to a second trust, evidence of the intent of the authorized fiduciary (who exercises the decanting power) or of the intent of the settlor of the first trust may also be considered (§ 55(b)).

- "Current beneficiary" (§ 30-4-10-11): "A beneficiary who, on the date that the beneficiary's qualification is determined, is a distributee or permissible distributee of trust income or principal" (also includes the holder of a presently exercisable *general* power of appointment).

- "Successor beneficiary" (§ 30-4-10-41(c)): A beneficiary that is not a qualified beneficiary (under I.C. § 30-4-1-2(19)) on the date the beneficiary's qualification is determined. ***Comment***: *This concept is used to regulate what powers of appointment can be created within the second trust and what beneficiaries can be given stronger or more definite interests under the second trust.*

- "Presumptive remainder beneficiary" (§ 30-4-10-41(b)): A qualified beneficiary who is not a current beneficiary.

- "Beneficiary with a disability" (§ 30-4-10-6): This is a broad and detailed definition that does not appear in the national, original Uniform Act. It is similar to the definition of "incapacitated person" in the guardianship statute (I.C. § 29-3-1-7.5), but here, "disability" also includes susceptibility to financial exploitation *and* progressive diseases or conditions that may impair a beneficiary's ability to provide self-care or to manage assets *currently or in the future*.

- "Noncontingent right" (§ 30-4-10-41(a)): A right that is *not* subject to the exercise of discretion or subject to the occurrence of a specified event that is not certain to occur.

- "Vested interest" (§ 30-4-10-41(d)): This is an important multi-part definition:

    - A "right to a mandatory distribution that is a noncontingent right as of the date of the exercise of the decanting power";

    - A "current and noncontingent right, annually or more frequently, to a mandatory distribution of income, a specified dollar amount, or a percentage of value of some or all of the trust property";

    - A "current and noncontingent right, annually or more frequently, to withdraw income, a specified dollar amount, or a percentage of value of some or all of the trust property";

    - A "presently exercisable general power of appointment";[3] or

    - A "right to receive an ascertainable part of the trust property on the trust's termination that is not subject to the exercise of discretion or to the occurrence of a specified event that is not certain to occur."

  Unless a beneficiary of the first trust is disabled and unless new section 43 can be used to create a special needs trust as the second trust, the exercise of the decanting power cannot "reduce or eliminate a vested interest" under the first trust (§ 30-4-10-41(f)(3).

- "Ascertainable standard" (§ 30-4-10-3) and "reasonably definite standard" (§ 30-4-10-24): The Act borrows the federal tax law definitions of these terms from Code sections 674(b)(5)(A), 2041(b)(1)(A), and 2514(c)(1) and also refer to the "applicable regulations."

---

[3] New I.C. § 30-4-10-17, -20, -21, and -22 contain common-sense and helpful definitions of "powerholder," "power of appointment," general power of appointment," and "presently exercisable power of appointment."

- "Expanded distributive discretion" (§ 30-4-10-14): "A discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard."
- "Limited distributive discretion" (§ 30-4-10-42(a)): "A discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard."

As explained further in **Part (F)** below, one of the most important top-level changes in Indiana law under the Act is that the *kinds* of changes that can be made (through decanting) in the second trust will be *broad* if the trustee or other authorized fiduciary has "expanded distributive discretion" (no ascertainable standard or reasonably definite standard as a limitation), but the *kinds* of changes that can be made will be *narrow* if the trustee or other authorized fiduciary has only "limited distributive discretion."

(D) Decanting requirements, rules and procedures under old § 30-4-3-36 that are continued (but usually in more detail) under the new Act

Practical Issue, Rule or Requirement	Provision in Old § 30-4-3-36	Provision in New Act (IC 30-4-10)	Comment
The written terms of the "first trust" can prohibit or restrict decanting	Opening lines of § 36(a)	§ 1(d) and § 45(a)	If the first trust's terms do not prohibit or restrict decanting, § 33(d) says the first trust's terms are deemed to include the decanting power
Any "first trust" can include a specific decanting power that is broader than the statutory power	§ 36(g)	§ 1(c)(4)	A specific decanting provision included in the written terms of a trust controls over a contrary rule in the Act
Not a breach of fiduciary duty or actionable misconduct if a trustee declines to decant	§ 36(f)	33(c)	The trustee of a first trust also has no duty to inform the beneficiaries about the availability of decanting

Practical Issue, Rule or Requirement	Provision in Old § 30-4-3-36	Provision in New Act (IC 30-4-10)	Comment
A spendthrift clause or a general prohibition of amendment or revocation does not restrict or prohibit the trustee's power to decant	§ 36(e)	§ 45(c)	The Act adds that decanting is not prevented by a general provision that prohibits assignment of a beneficiary's interest in the first trust
Decanting does not require the probate court's approval or the consent of any beneficiaries	Inferred from the silence of section 36 about court approval or consent	§ 33(a)	To prevent the IRS arguing that any beneficiary has made a taxable gift to any other beneficiary as a result of a change accomplished through decanting to a second trust, it is crucial that the beneficiaries remain passive and to not consent
A trustee with the power to decant can petition the probate court for instructions about whether to decant and with what changes	Inferred from I.C. § 30-4-3-18(a)	§ 39(a)	Section 39 in the Act is more detailed about the kinds of guidance that a trustee or other authorized fiduciary can request from the probate court
Requirement for a pre-decanting notice to qualified beneficiaries at least 60 days in advance of proposed decanting	§ 36(d), first sentence	§§ 35 through 38	The Act's requirements are broader and more detailed; *see* **Part (E)** below
Requirement for a written "record of exercise" of the decanting power	§ 36	§ 40	The Act's § 40 is more detailed about the required content of the record of exercise; *see* **Part (E)** below

Practical Issue, Rule or Requirement	Provision in Old § 30-4-3-36	Provision in New Act (IC 30-4-10)	Comment
A beneficiary can petition the probate court for an order preventing decanting *OR* to allege that the decanting is a breach of duty or has violated beneficiary rights	§ 36(d), last sentence	§ 37(a) § 39(a)(4) and (a)(7)	Even after expiration of the 60-day notice period or after a waiver of notice, a beneficiary or other person can file a petition for a determination that a proposed or completed decanting violated the act or is a breach of fiduciary duty
For Rule Against Perpetuities (RAP) purposes, preventing the postponement of vesting or termination under the second trust	§ 36(c), last sentence	§ 50(b)	The terms of the second trust *can* extend the duration or postpone the vesting in enjoyment of various beneficial interests, but not beyond the end of the RAP period

What is the legal effect of a change that is made through decanting in the second trust but which violates a rule or restriction in the new Act? A handy provision (new I.C. § 30-4-10-52) provides the answers:

- **The "read out" rule**: If the second-trust instrument contains a changed or new provision that is prohibited under the Act, that provision is *void* "to the extent necessary to comply with this chapter [IC 30-4-10]."
- **The "read in" rule** If the second-trust instrument should have kept some provision from the first trust that the Act required to be preserved, that provision is "deemed to be included in the instrument to the extent necessary to comply with this chapter."
- If a trustee or other fiduciary determines that either of the above rules applies as a result of a prior exercise of the decanting power, the trustee or other fiduciary "shall take corrective action consistent with the fiduciary's duties." I.C. § 30-4-10-52(c).

(E) Requirements for the "pre-decanting notice" and the "record of exercise" of the decanting power under the Indiana Act

As stated in the above table, these two requirements were also in the repealed section 30-4-3-36 and were carried over into the Act (in part because they are extremely common elements of the trust decanting statutes in most States).

Old I.C. § 30-4-3-36(d) required the trustee to provide the 60-day pre-decanting notice to all qualified beneficiaries (as defined in I.C. § 30-4-1-2(19)) of the first trust but did not specify the content of the pre-decanting notice, except for this sentence: "A copy of the proposed instrument exercising the power satisfies the trustee's notice obligation under this subsection."[4]

In the new Act, the person who must give the pre-decanting notice is the "authorized fiduciary" (which may be either a trustee or a trust director) who possesses and intends to exercise the decanting power. New I.C. § 30-4-10-36 lists the minimum required content for the 60-day pre-decanting notice, which must:

> "(1) specify the manner in which the authorized fiduciary intends to exercise the decanting power;
>
> (2) specify the proposed effective date for the exercise of the decanting power;
>
> (3) include a copy of the first-trust instrument; and
>
> (4) include a copy of the second-trust instrument."

Section 35(a) in the new Act expands the class of persons who must be served with the 60-day pre-decanting notice, to include not just the qualified beneficiaries of the first trust but also —

- each settlor of the first trust who is still alive or in existence,
- each fiduciary of the first trust,
- each fiduciary of the second trust,
- each person that currently has the right to remove or replace the authorized fiduciary who is giving the notice,
- each person who holds a presently exercisable power of appointment under the first trust, and
- the attorney general of the state, if the first trust contains a charitable interest.

---

[4] Because the required content for the written record of exercise was not specified in detail in subsection 36(c) of the repealed statute, this writer had to design his own "notice" and "record of exercise" forms to include, at a minimum, the details of the terms of the first trust that were being changed in the second trust.

If an individual is listed above and is supposed to receive a pre-decanting notice, but if that individual is a minor or unborn or incapacitated or cannot be located, the authorized fiduciary can serve the notice on a virtual representative for that individual, including a "designated representative," under I.C.§ § 30-4-6-10.5. *See* new I.C.§ 30-4-10-35(a)(2), -35(c), and 38.

New § 30-4-10-35(b) says that the 60-day pre-decanting notice period begins on the day when the notice is given and expires 59 days later. Subsection 35(d) provides that the 60-day lead time may be waived only if <u>*all*</u> the persons who are entitled to receive the notice sign written waivers.

Under repealed I.C. § 30-4-3-36(c), the written record of exercise of the decanting power must be "signed and acknowledged by the trustee; and . . . filed with the records of the first trust." The old statute says nothing about the required *content* of the "record of exercise. In this writer's opinion, the best practice under this old Indiana statute is to include in the record of exercise, at a minimum, all of the written terms of the second trust and confirmation of what changes were made, compared to the first trust's terms.

New I.C. § 30-4-10-40 helpfully specifies the required content of the "record of exercise" that the authorized fiduciary must sign and keep. The signed record of exercise must:

> "(1) directly or indirectly reference the notice required by section 35 of this chapter;
>
> (2) identify the first trust and the second trust;
>
> (3) identify and state the property of the first trust being distributed to each second trust; and
>
> (4) identify the property that remains in the first trust."

The written terms (*i.e.*, the trust instrument) of the second trust are not required to be included in the record of exercise *because they are part of the required content of the 60-day pre-decanting notice*.

(F) Differences between "second trust" modifications that are possible with "expanded distributive discretion" vs. "limited distributive discretion"

Indiana's version of the Act, like the national version, contains *two separate* statements of the power and authority of an "authorized fiduciary to decant:

- Section 30-4-10-41(e) states, "an authorized fiduciary that has **expanded distributive discretion** over the principal of a first trust for the benefit of one (1) or more current beneficiaries may exercise the decanting power over the principal of the first trust." *The stated exceptions to this general rule are in subsection 41(f) [explained below] and in subsection 44 for trusts with charitable interests.*

- Section 30-4-10-42(b) states, "an authorized fiduciary that has limited distributive discretion over the principal of the first trust for the benefit of one (1) or more current beneficiaries may exercise the decanting power over the principal of the first trust," subject to important restrictions in subsections (c) and (d) [explained below].

If a trustee or other authorized fiduciary has a discretionary distribution power (decanting power) that applies to fewer than all the principal assets of the first trust (*e.g.,* only with respect to "Family Fund A"), then the authorized fiduciary can exercise the decanting power only with respect to that subset of the first trust's principal. *See* I.C. §§ 30-4-10-41(i) and 30-4-10-42(e).

The following table summarizes the kinds of changes that can or cannot be made in the terms of the second trust, according to whether the trustee or other authorized fiduciary has "expanded distributive discretion" or only "limited distributive discretion." These rules are found in sections 41 and 42 of the new Indiana Act.

If the authorized fiduciary has "expanded distributive discretion" —	**If the authorized fiduciary has only "limited distributive discretion" —**
The terms of the second trust *CAN* make these changes (compared to first trust):	The terms of the second trust *CAN* make these changes (compared to first trust):
• *CAN* postpone or accelerate the vesting in enjoyment of a beneficiary's interest that is not a (currently) "vested interest"	• *CAN* make any changes in administrative provisions not explicitly prohibited in the rest of the Act
• *CAN* make a successor beneficiary a presumptive remainder beneficiary	• *CAN* change the governing law under the second trust to a different jurisdiction
• *CAN* change the distribution standards for any beneficiary's *discretionary* interest in the first trust	• If the first trust requires a distribution to be made *directly to* a beneficiary, *CAN* provide that the distribution can be paid or applied "for the benefit" of that beneficiary (so long as the "substantially similar beneficial interest" requirement is satisfied
• *CAN* delete an appointment power that is NOT a presently exercisable general power of appointment	
• *CAN* create or modify a power of appointment for a current beneficiary who is eligible to benefit from principal distributed under expanded distributive discretion	The terms of the second trust *CANNOT* make these changes (except with respect to a beneficiary with a disability (Sec. 43):

If the authorized fiduciary has "expanded distributive discretion" —	If the authorized fiduciary has only "limited distributive discretion" —
• *CAN* create or modify an appointment power for a successor beneficiary or presumptive remainder beneficiary of the first trust, but ONLY if the power will be exercisable after the power holder becomes a current beneficiary • *CAN* include a new or modified appointment power exercisable in favor of appointees who are not beneficiaries of the first trust • Change the governing law under the second trust to a different jurisdiction • *CAN* make any changes in administrative provisions not explicitly prohibited in the rest of the Act	The terms of the second trust *CANNOT* make these changes (except with respect to a beneficiary with a disability (Sec. 43): • *CANNOT* reduce or eliminate a vested right such as a mandatory right to receive distributions or a currently exercisable withdrawal power • *CANNOT* add a current beneficiary who is not a current beneficiary of the first trust • *CANNOT* add as a presumptive remainder beneficiary or successor beneficiary a person who isn't a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust
The terms of the second trust *CANNOT* make these changes (except with respect to a beneficiary with a disability (Sec. 43): • *CANNOT* reduce or eliminate a vested right such as a mandatory right to receive distributions or a currently exercisable withdrawal power • *CANNOT* add a current beneficiary who is not a current beneficiary of the first trust • *CANNOT* add as a presumptive remainder beneficiary or successor beneficiary a person who isn't a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust	

(G) Changes (compared to the first trust) that are possible under the Act with respect to the interest of a "beneficiary with a disability"

One of the innovations in the Uniform Act is a detailed section (in Indiana's version, I.C. § 30-4-10-43) which permits decanting to change the interest of a trust beneficiary who has a disability, even if that disabled beneficiary's interest is a mandatory income, annuity or unitrust interest and or even if that disabled beneficiary has a currently-exercisable right to withdraw assets from the first trust. In contrast, Indiana's old decanting statute (*see* I.C. § 30-4-3-36(a)(2) prohibited decanting to reduce or eliminate a mandatory income, annuity or unitrust interest of a beneficiary, whether disabled or not.

Because the new Act defines the "decanting power" as consisting of the power to distribute assets to a second trust *and* the power to modify the terms of the first trust, and because sections 6 and 43 of the new Act broadly define "beneficiary with a disability" and provide more flexible decanting rules for the interests of disabled beneficiaries,[5] the new ACT will permit changes that will benefit the interests of a beneficiary with a disability by (for example) making it possible for the disabled beneficiary to continue to receive or to qualify for means-tested government benefits.

New section 43 contains specific definitions of "government benefits" and "special needs trust" [a trust that the trustee reasonably believes would not be considered as a resource for the purpose of determining whether a beneficiary with a disability is eligible for government benefits]. Section 43 also contains an explicit and broad definition of "special needs fiduciary" [a trustee or other fiduciary who is not a settlor and who can exercise the decanting power to benefit a beneficiary with a disability]. This specific definition of "special needs fiduciary" is required because in some situations, the trustee who administers a first trust which has a disabled beneficiary may not have *any* discretionary power to distribute income or principal to the disabled beneficiary or to any other current beneficiary. That trustee will nevertheless fit the definition of "special needs fiduciary" if the trustee is required to distribute part or all of the first trust's income or principal to at least one current beneficiary, one of whom has a disability. *See* I.C. § 30-4-10-43(c)(3).

When a first trust has a beneficiary with a disability, the Act imposes two primary constraints on the exercise of the decanting power:

- The second trust (which could be a modification of the first trust or an actual separate trust) must be a "special needs trust" that benefits the beneficiary with a disability [I.C. § 30-4-10-43(e)(1)].

---

[5] Ind. Code § 30-4-10-43(f)(3) confirms that if a first trust has a beneficiary with a disability *and also* one or more beneficiaries who are *not* disabled, the second trust(s) must grant to the non-disabled beneficiaries substantially the same beneficial interests as they have under the first trust.

- The trustee or other "special needs fiduciary" who decants to the second trust must determine that the exercise of the decanting power "will further the purposes of the first trust" [I.C. § 30-4-10-43(e)(2)].

There is a third potential constraint under section 49 of the new Act if the decanting power were exercised to modify the disabled beneficiary's interest in a way that would destroy a past tax benefit that was claimed for assets of the first trust. If section 43 permits extensive change to the interest of the disabled beneficiary but if that change would violate section 49 of the Act and cause a loss of a tax benefit, does section 49 trump or control over section 43, or does section 43 (and the special circumstances and needs of the disabled beneficiary) cause section 43 to control?

Neither the national Uniform Act, nor the official comments, nor Indiana's version of the Act answers this question, and national estate planning commentators and appellate courts have (so far) not answered it either.

The opening sentence of I.C. § 30-4-10-49(e)(3) is worded almost identically to the corresponding text of the national Uniform Act and reads as follows [italics added]:

> (3) If the first trust contains property that qualified, *or would have qualified but for provisions of this chapter other than this section*, for the exclusion from the gift tax described in 26 U.S.C. 2503(b), as amended and in effect on July 1, 2022, the second-trust instrument must not include or omit a term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. 2503(b), as amended and in effect on July 1, 2022.

Here is the simplest, most straightforward interpretation of the section 49 restrictions: If the beneficiary with a disability has an interest in the first trust that was funded with or traceable to an asset transfer that qualified for the estate or gift tax marital deduction or which qualified as an annual exclusion gift or "non-taxable gift" for federal gift tax or GST tax purposes, then section 49 prohibits a decanting which would change the disabled beneficiary's interest under the second trust in a way that would have caused the original funding transfer to the first trust to fail to qualify for the tax benefit.

In the sentence from I.C. § 30-4-10-52(e)(3) quoted above, the reason for including the italicized phrase "but for provisions of this chapter other than this section" is not clear. Section 43 is a "provision of this chapter [IC 30-4-10] other than this section." *Does this mean that section 43 controls if section 43 permits an exercise of the decanting power to make a change that section 49 (tax restrictions) would have prohibited?* The answer is not obvious.

If the straightforward interpretation of section 49 is the correct one, and if preserving or losing a marital deduction, an annual gift exclusion, or a zero inclusion ratio for a

past GST gift is at stake, then it may be impossible for a trustee or other special needs fiduciary to use the decanting power to make the necessary changes to the disabled beneficiary's interest, in order to permit the disabled beneficiary to become or remain qualified to receive government benefits. Another trust modification method may have to be used.

When a beneficiary of the first trust has a disability and when new section 43 gives a "special needs fiduciary" (such as a qualifying trustee) broader and more flexible powers to decant or modify with respect to the disabled beneficiary's interest, subsection 43(f)(2) states that subsection 41(f)(3) does not apply. If the tax limitations in section 49 of the new Act do not apply, and if the disabled beneficiary has a "vested interest" in the first trust (*e.g.*, a mandatory income, annuity or unitrust interest, or a currently exercisable withdrawal power, or the right to receive direct distribution of an "outright" share of the assets of a terminating trust), the special needs fiduciary can eliminate that vested interest and replace it with an entirely discretionary spendthrift interest under the second trust.

If a special needs fiduciary uses new section 43 to create and fund a second trust which gives the disabled beneficiary an entirely discretionary spendthrift interest, that second trust cannot add remainder beneficiaries who are not either current beneficiaries or successor beneficiaries of the first trust. *See* I.C. § 30-4-10-43(f)(1), cross-referencing § 30-4-10-41(f)(2). However, unless the loss of a federal tax benefit is an issue, the possibilities for structuring the second trust as a "special needs" trust are otherwise wide open.

I.C. § 30-4-10-43(f)(1)(A) and (B) specifically permit the disabled beneficiary's interest in the second trust to be structured as a "(d)(4)(A) trust" under 42 U.S.C. § 1396p(d)(4)(A), or as a "(d)(4)(C) pooled trust" under 42 U.S.C. § 1396p(d)(4)(C). Both of those types of trusts are "self-settled trusts," treated as created by the beneficiary with the disability.

- If the beneficiary with a disability is *currently* entitled to receive one or more mandatory distributions of income or principal from the first trust or if that disabled beneficiary has a currently exercisable and unconditional power to withdraw assets from the first trust, this writer believes that the second trust (special needs trust) which receives the decanting distribution arguably should be treated as a self-settled trust for government benefit eligibility purposes. This means that unless it is a (d)(4)(C) pooled trust, it should contain a payback provision.
- In contrast, if the beneficiary with a disability has some *future* right to receive mandatory distributions starting at a later date or if that disabled beneficiary will have a withdrawal power that won't become exercisable until some date that is at least a year in the future, *and* if that disabled beneficiary either has no current right to receive distributions or has only a current discretionary interest, this

writer believes that the second trust (special needs trust) can eliminate the future interest and can be structured as a third-party discretionary trust, without any payback provision.

(H) Protecting "charitable interests" under the first trust when the decanting power is exercised

Section 44 of the new Indiana Act (I.C. § 30-4-10-44) goes into more detail than our old, repealed decanting statute and contains safeguards to prevent most charitable interests in the first trust from being diminished or significantly altered. The restrictions in new section 44 operate as additional constraints on the decanting power even when the trustee of first trust has "expanded distributive discretion."

The rules in new section 44 should be read in light of the definitions of "charitable organization," "charitable purpose," and "charitable interest" in sections 7, 8 and 9 of the new Indiana Act. The main restrictions in new section 44 are in subsection (d) and state that if the first trust contains a charitable interest,

> . . . the second trust must not:
>
> (1) diminish the charitable interest [*for example, reduce a dollar amount or percentage or fractional interest*]:
>
> (2) diminish the interest of an identified charitable organization that holds the charitable interest [*for example, replace one charitable beneficiary with a different one*];
>
> (3) alter any charitable purpose stated in the first-trust instrument; or
>
> (4) alter any condition or restriction related to the charitable interest.

Subsection 44(a) includes an additional defined term, "determinable charitable interest," which could include a charitable organization's lead interest under a CLAT or CLUT, a charitable organization's remainder interest under a CRAT or CRUT, or any other unconditional right that a charitable organization has or will later have to receive a distribution for charitable purposes, either currently or on the occurrence of a specified event.

If a charitable organization has a "determinable charitable interest" in the first trust, then two additional rules apply:

- The Attorney General of Indiana has the rights of a qualified beneficiary of the first trust and may represent and bind the charitable interest (new I.C. § 30-4-10-44(c)).[6]

---

[6] Based on this writer's experience, it is unlikely that the Indiana Attorney General would take any position for or against any change that an authorized fiduciary might try to change through decanting.

- The terms of the second trust cannot change the governing law for the administration of the charitable interest to the law of some non-Indiana jurisdiction, unless the probate court approves the change, or *unless* the attorney general consents in writing to the change in governing law, or *unless* the attorney general fails to timely object within the 60-day notice period that is triggered by the pre-decanting notice (new I.C. § 30-4-10-44(f).

(I) Tax-driven restrictions on decanting under section 49 of the new Act

The longest section in the new Act is section 49 (§ 30-4-10-49), which is designed and intended to prevent the loss of significant tax benefits for the first trust as a result of ill-conceived or mistaken exercises of the decanting power.

The Uniform Trust Decanting Act was deliberately designed to include these long and detailed tax provisions to induce the Treasury Department and IRS to issue guidance on the federal tax consequences of trust decanting when decanting makes a change to the beneficial interests in a trust. On December 27, 2011, the Treasury Department posed questions, invited comments, and announced that it was "considering approaches" to be put into published guidance. *See* Notice 2011-101 (2011-52 IRB 932). However, After 2013, Treasury dropped "tax decanting" guidance from its topic list in its Priority Guidance Plan and has not restored it in any later Priority Guidance Plan. Beginning with Rev. Proc. 2011-3, 2011-1 IRB 111 (issued in January 2011), the IRS announced that the federal tax consequences of trust decanting was an "area under study" and that the IRS would not issue private letter rulings in this area until after the Treasury Department publishes regulations or other guidance.

Among estate planning professionals, the consensus was and is that the Treasury Department and IRS would become willing to issue official guidance on the federal tax consequences of trust decanting after state law acquired some uniformity. The Uniform Trust Decanting Act, and the section on tax benefits in particular, is an attempt to create that uniformity.

Subsection (e) of new section 49 consists of ten (10) specific tax-driven rules or restrictions, which are "limitations" on "the exercise of the decanting power." These restrictions work because under I.C. § 30-4-10-52(a)(1) and (a)(2), if an exercise of the decanting power results in a provision in the second trust that violates the Act, an offending provision is *void* to the extent necessary to comply with the new Act, and a provision that is missing is deemed to be included in the second-trust instrument. The rules and restrictions in subsection 49(e) are in subdivisions (1) through (10) and are summarized as follows:

(1) Don't terminate or jeopardize an estate or gift tax **marital deduction** that was claimed for assets of or a transfer to the first trust.

(2) Don't terminate or jeopardize an estate or gift tax **charitable deduction** that was claimed for assets of or a transfer to the first trust.

(3) Don't disqualify an interest in or assets of the first trust from an annual exclusion from taxable gifts under Code section 2503(b) or (c). [7]

(4) If the first trust holds S corporation stock, maintain provisions in the second trust which permit it to continue as a qualified subchapter S trust (QSST).

(5) If the first trust contained assets that qualified for a zero inclusion ratio for GST tax purposes because the assets were transferred to the first trust in the form of a non-taxable gift under Code § 2642(c). [8]

(6) If the first trust holds or is entitled to receive assets of any retirement plan or account that is subject to Code § 401(a)(9) and the corresponding regulations, the provisions of the second trust cannot make a change that would increase the required minimum distributions (RMDs) or [arguably] replace a 10-year payout requirement under the SECURE Act with a 5-year payout requirement.

(7) If the first trust has a grantor who is not a U. S. citizen or resident and if the first trust relies on Code § 672(f)(2)(A) to qualify as a grantor trust for income tax purposes, the authorized fiduciary cannot decant to a second trust that fails to also satisfy the requirements of Code § 672(f)(2)(A) to maintain grantor trust status.

(8) Subdivision (e)(8) is a catch-all provision that applies to any federal or state tax deduction, exemption, exclusion, or other tax benefit if the first-trust instrument either is clearly designed to qualify for that tax benefit *or* expressly indicates an intent to qualify for the tax benefit. When either condition is satisfied, decanting cannot be used to structure the second trust in a way that would have lost the tax benefit if the change(s) had been made originally in the first-trust instrument.

(9) [*and also* (10)] If the first trust is a grantor trust with a U. S. person as the grantor, the second trust may "switch off" grantor trust status and function as a non-grantor trust. If the first trust is a non-grantor trust, the second trust may be a grantor trust, but during the 60-day notice period, the living settlor can block the switch from non-grantor to grantor trust status by delivering a signed

---

[7] Three types of gifts to a "first trust" would have qualified as annual exclusion gifts under Code § 2503 and subsection 49(e)(3) of the Act: "Outright" gifts of a present interest in property, up to the per-donee annual maximum ($16,000 in 2022); gifts with Crummey-type withdrawal powers; and gifts to section 2503(c) minor's trusts.

[8] Under § 2642(c), a gift to a trust for a skip person is a "non-taxable gift" if it satisfies Code § 2503(b) or (c) *and* if the trust has that skip person as its sole beneficiary during his or her lifetime *and* if the trust assets will be included in the skip person beneficiary's federal gross estate if he or she dies before the trust terminates.

written objection to the trustee or other authorized fiduciary who proposed to decant. Finally, if the first trust is a grantor trust but authorizes the settlor or other person to take some action that will terminate grantor trust status, the second trust must grant an equivalent power to the settlor or another person to terminate grantor trust status.

(J) A potpourri of miscellaneous rules in the Indiana UTDA

The new Indiana Act, like the national Uniform Act, contains some additional rules, procedures and safeguards.

- New I.C. § 30-4-10-39 is analogous to the "petition for instructions" provision in I.C. § 30-4-3-18(a) but is broader. Section 39 permits an authorized fiduciary, a beneficiary, a person entitled to notice under section 35, or (with respect to a charitable interest) the Indiana attorney general to file a petition with the probate court to seek any of seven (7) listed types of relief, including:
    - Providing instructions to an authorized fiduciary about whether a proposed exercise of the decanting power is permitted under the Act and is consistent with fiduciary duties.
    - Approving a proposed or completed exercise of the decanting power.
    - If an authorized fiduciary is unwilling to directly exercise the decanting power, appointing another person as "special fiduciary," who can be authorized to decide whether to decant and to proceed with decanting.
    - To determine in advance that a proposed or attempted exercise of the decanting power is invalid or ineffective under the Act, in light of I.C. § 30-4-10-52.
    - To provide instructions to the trustee and/or evaluate a past exercise of the decanting power about whether the "read out" or "read in" rules in section 52 apply.
- New I.C. § 30-4-10-46 prohibits an exercise of the decanting power to increase the compensation that an authorized fiduciary can collect from the second trust, unless the probate court approves the increase or all qualified beneficiaries of he second trust sign written consents to the increased compensation.
- Under new I.C. § 30-4-10-47(a), the terms of the second trust cannot absolve or relieve an authorized fiduciary from liability for breach of trust to a greater extent than the first trust (for example, by substituting a "lower" standard of conduct or liability for that authorized fiduciary.
- If the terms of the first trust provide for or permit indemnification of an authorized fiduciary, then subsection 47(b) permits the second-trust instrument to contain a provision for payment of indemnification to an authorized fiduciary.

- Subsection (c) of new I.C. § 30-4-10-47 prohibits the second-trust instrument from "reducing fiduciary liability in the aggregate."
- So long as the change in the administrative structure of a second trust would not "reduce fiduciary liability [of all fiduciaries] in the aggregate, subsection 47(d) allows an exercise of the decanting power to "divide and reallocate fiduciary powers among fiduciaries, including one (1) or more trustees and [trust directors]," and to relieve a fiduciary from liability for an act or omission of another fiduciary, as permitted by other state law (including the Indiana Directed Trust Act, IC 30-4-9).
- Under new I.C. § 30-4-10-48, if the terms of the first trust give some person a power to remove or replace an authorized fiduciary, that authorized fiduciary cannot exercise the decanting power to modify that removal power in the second-trust instrument, <u>*unless*</u> —
    - The removal power is held by just one person and that person consents in writing to the modification, or
    - The modification grants a substantially similar removal power to another person and the original power holder and all qualified beneficiaries consent in writing to the modification, or
    - The modification grants a substantially similar removal power to another person and the probate court approves the modification.
- New I.C. § 30-4-10-50(a) permits a second trust to have a duration that is the same as or different from the duration of the first trust (Subsection (b), explained above, provides that assets transferred from the first trust remain subject to the same RAP rules.
- Under new I.C. § 30-4-10-51, even if the discretionary distribution standard under the first trust would not have allowed a court to compel the authorized fiduciary to make a discretionary distribution of principal, that authorized fiduciary can still exercise the decanting power (unless otherwise explicitly prohibited or restricted under the first-trust instrument).
- If an exercise of the decanting power did transfer or was intended to transfer *all* principal assets from the first trust to one or more second trusts, *and* if the authorized fiduciary does not adopt a specific provision to deal differently with later-discovered trust assets, new I.C. § 30-4-10-56(a) requires all later-discovered assets of the first trust to be treated as assets of the second trust. Conversely, if the decanting power is exercised to transfer *less than all* principal assets from the first trust to a second trust(s), later-discovered trust assets are treated as assets of the first trust.

- New I.C. § 30-4-10-57 states that If a debt or other obligation is owed to a creditor and if that obligation is enforceable against assets of the first trust, that obligation is enforceable to the same extent against those assets after they are transferred by decanting to the second trust.

EN20171.Public-20171 4886-5274-5749v1
4/12/2022