

PLANNING FOR DIGITAL ASSETS

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**ESTATE PLANNING COUNCIL
OF INDIANAPOLIS**

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**This information is not intended
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consultation with an attorney
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TODAY'S TOPICS



Fiduciary access to digital assets



Dealing with digital assets in estate planning documents



Remote signing/witnessing



Digital wills



TOPIC #1

Fiduciary
access to
digital assets

WHAT IS A DIGITAL ASSET??

- **REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT (Indiana Code 32-39-1 et seq., effective July 1, 2016)**
- **Sec. 10. “As used in this article, ‘digital asset’ means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.”**



DIGITAL ASSETS EVERYWHERE

Personal (photos, videos, music)

Social media

Cryptocurrency

Business accounts

Domain names/websites

Loyalty program benefits

NFTs

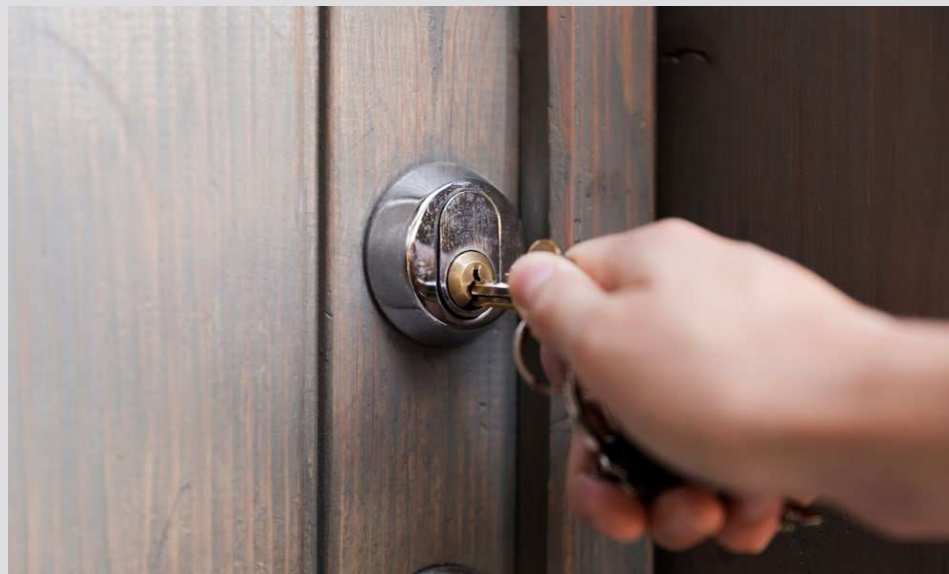
Gaming accounts

Other

FIDUCIARY ACCESS UNDER INDIANA'S UFADAA

■ IC 32-39-2-1(b):

- “[T]he user, in a will, trust, power of attorney, or other record, may (1) allow, or (2) prohibit; disclosure to a fiduciary of some or all of the user’s digital assets, including the content of electronic communications sent or received by the user.”



INTERPLAY WITH TERMS-OF-SERVICE AGREEMENTS

- What about those pesky terms of service agreements that no one ever reads?!?



- Use of an “online tool” to make specific designation as to the disclosure or non-disclosure of a digital asset trumps any generic authorization or prohibition in an estate planning document
 - Pursuant to IC 32-39-1-17, an “online tool” is “an agreement distinct from the terms-of-service agreement” between the asset custodian and the user
- This law explicitly does not reduce any access rights previously provided by a terms-of-service agreement or the federal government (IC 32-39-2-2)

GEORGE DIES AT 30.... (FROM A FREAK CHEAP WEDDING INVITATION, TOXIC GLUE FIASCO. SUSAN HIS FIANCÉE IS DEVASTATED.)



- He is not married and has no children
- He does everything online:
 - Pays house payment \$2,500 per month
 - Pays student loans \$2,000 per month
 - Pays all utilities on-line \$500 per month
 - Pays health insurance on-line \$600 per month
 - Each are automatically withdrawn from his account each cycle
- Assets of \$50,000 at death
- Each month the \$5,600 in bills are paid each month and the Personal Representative has no idea they even exist

Personal Representative is responsible for deficiency if creditors are not paid according to Indiana Law, IC 29-1-14 et seq.

- If you represent the Personal Representative, what is your ethical standard in making sure they are aware of these issues?

PERSONAL REPRESENTATIVE'S DUTIES

Then.....

Gather Information

- Home
- Lock Box
- Business
- Mail
- Bank Records

Now.....

Enter the Cloud



SUGGESTIONS FOR A PERSONAL REPRESENTATIVE

- **Get help!** (ask a digital native for directions)
- **Try to get all files, email accounts, social media accounts**
- **Notify online world of death**
- **Change all passwords**
- **Be slow to delete files, if at all**
- **Locate all financial information**
- **Secure all credit cards**
- **Get a good external USB hard drive to store data**



PERSONAL REPRESENTATIVE ACCESS UNDER INDIANA'S RUFADAA

What is the personal representative's authority if the will is silent?

IC 32-39-2-4
concerning contents
of electronic
communication:

- Deceased user must consent to disclosure, or court must authorize disclosure by the custodian

IC 32-39-2-5
concerning other
digital assets:

- Personal representative given default access unless explicitly prohibited, including access to a "catalogue" of electronic communications
- **NOTE:** the PR must give the custodian information about and potentially an affidavit concerning the accounts to be accessed, if requested by the custodian under IC 32-39-2-5(4)

AIF ACCESS UNDER INDIANA'S RUFADAA

What is the attorney-in-fact's authority if the POA is silent?

**IC 32-39-2-6
concerning contents
of electronic
communication:**

- Document must authorize disclosure of electronic communications to the attorney-in-fact

**IC 32-39-2-7
concerning other
digital assets:**

- AIF given default access unless explicitly prohibited, including access to a “catalogue” of electronic communications

TRUSTEE ACCESS UNDER INDIANA'S RUFADAA

What is the trustee's authority if the trust is silent?

IC 32-39-2-8 concerning trusts:

- Trustee is given full access to all assets, accounts, and communications of which the trustee was an original user, unless prohibited by the trust terms or court order

IC 32-39-2-9 concerning contents of electronic communications:

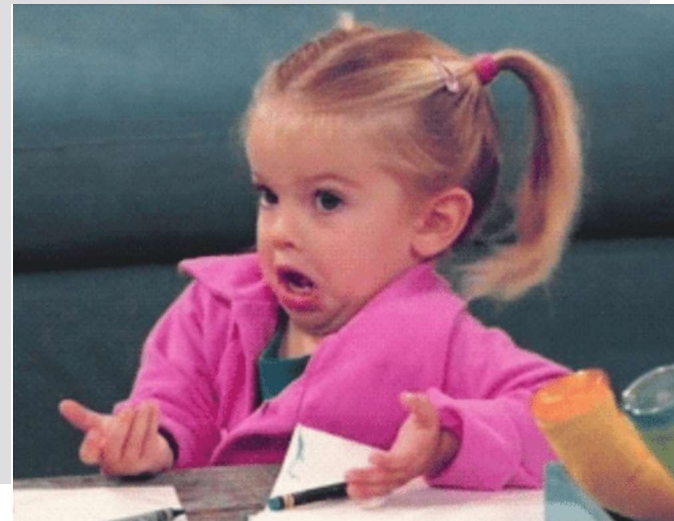
- Settlor must consent to disclosure in trust instrument, or court must authorize disclosure to a trustee who is not an original user

IC 32-39-2-10 concerning other digital assets to a trustee who is not an original user:

- Trustee given default access unless explicitly prohibited, including access to a "catalogue" of electronic communications

GUARDIAN ACCESS UNDER INDIANA'S RUFADAA

- What is the guardian's authority?
- **IC 32-39-2-11**: after an opportunity for a hearing, a guardian has default access to all digital assets and a catalogue of electronic communications.
- Can a guardian see the content of electronic communications or suspend/terminate an email account?



WHAT DOES YOUR POWER OF ATTORNEY SAY ABOUT YOUR DIGITAL ASSETS?

Ours includes broad authority concerning:

“Electronic records, reports, and statements (including authority to (i) gain access to and exercise control over my digital assets, (ii) access my user accounts with online service providers, (iii) access, retrieve, copy, or store electronic communications sent or received by me, and (iv) perform any acts in connection with the use of electronic records pertaining to my affairs)”



TRUSTEE/PR ACCESS LANGUAGE

TRUST/TRUSTEE

Any trustee of any trust created under this instrument shall have all power to access, use, modify, delete or control digital assets that I can access, use, modify, delete or control. "Digital Assets" means electronic information that is inscribed on a tangible medium or that is stored in electric or other medium and is retrievable in perceivable form. It includes contents or electronic communications and catalog of electronic communications. "Digital Assets" includes but is not limited to emails, digital videos, digital pictures, digital music, software licenses, cryptocurrencies, social network accounts, file sharing accounts, financial accounts, domain registrations, web hosting accounts, on-line stores, tax preparation, frequent flyer and similar bonus programs and digital assets or similar assets which exist now or in the future. I consent to the trustee's access to all such digital assets.

WILL/PERSONAL REP

My personal representative shall have all power to access, use, modify, delete or control digital assets that I can access, use, modify, delete or control during my lifetime or in the future. "Digital Assets" means electronic information that is inscribed on a tangible medium or that is stored in electric or other medium and is retrievable in perceivable form. It includes contents or electronic communications and catalog of electronic communications. "Digital Assets" includes but is not limited to emails, digital videos, digital pictures, digital music, software licenses, cryptocurrencies, social network accounts, file sharing accounts, financial accounts, domain registrations, web hosting accounts, on-line stores, tax preparation, frequent flyer and similar bonus programs and digital assets or similar assets which exist now or in the future. I consent to my personal representative's access to my digital assets.



TOPIC #2

Dealing with
digital assets
in estate
planning
documents



DRAFTING WILLS

- What section of the will do digital assets pass under?
 - Personal property?
 - Intangible property?



WHAT THE HECK IS CRYPTO, ANYWAY?

Cryptocurrency Growth

\$126B

\$197B

\$728B

\$2,000B

\$795B



2018

2019

2020

2021

2022

24% of American adults own some type of cryptocurrency

DEFINITION – BLOCKCHAIN TECHNOLOGY

- **Blockchain**
 - A distributed digital ledger storing data.
 - Decentralized ledger on multiple computers called “nodes.”
 - Node = network stakeholder who uses a computer to keep track of the ledger data. Anyone can create a node if they want to, but it takes a lot of computing power, and most crypto currency users use a commercially available “wallet” software to hold their crypto instead.
 - As new data is added, it is a new “block” that is added to the previous data.
 - Transactions are encoded with cryptography, and a majority of the nodes must verify a transaction’s legitimacy before it is added to the chain.
 - Can be public or private.

DEFINITION – CRYPTOCURRENCY WALLET

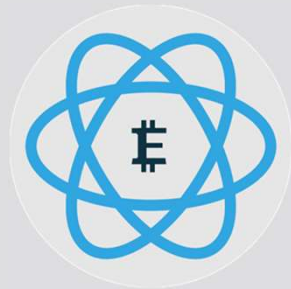
- Stores a crypto owner's public and private “keys” and allows the user to manage crypto balances
 - Keys: string of random characters that identify crypto ownership
 - Public key = bank account number
 - Private key = PIN



CRYPTO STORAGE: HOT OR COLD

■ “Hot” Wallet:

- Connected to the internet
- Vulnerable to online attacks
- Instant, global access
- Make trades or provide payment for goods and services
- Coinbase, MetaMask, Edge



Access

■ “Cold” Wallet:

- Offline, no internet access
- Vulnerable to physical destruction, theft, loss
- Requires connection for transfer or use
- Delay in access can impact sale price
- Nano X: Ledger, Trezor Model Z, Paper

Security



A REALLY, REALLY COLD WALLET

In 2013, an IT worker from Wales named James Howells accidentally threw away an external hard drive with the private key to 7,500 bitcoins.

In 2021, this was worth around \$273 million USD.



<https://www.cnn.com/2021/01/15/uk/bitcoin-trash-landfill-gbr-scli-intl/index.html>

INCOME TAX REPORTING 2020-2021

2020 form 1040 asked for the first time if you received, sold, spent, exchanged or otherwise acquired any financial interest in any virtual currency. You did not have to answer yes if you only bought virtual currency with real currency.



INCOME TAX REPORTING 2022

- **Changes implemented January 24, 2023 for 2022 returns:**
 - **“Digital assets” replaces “virtual currency”**
 - **At any time during 2022, did you (a) receive (as a reward, award, or payment for property or services) or (b) sell, exchange, gift, or otherwise dispose of a digital asset (or a financial interest in a digital asset)?**

1099??

**The IRS treats cryptocurrency as property,
NOT as currency!**

- When you buy a token or digital coin the purchase price is your basis. Is this basis documented?
- When you purchase an asset with your digital coin you should pay tax if the coin has appreciated in value since the original purchase
- When you die, your heirs get a step up in the basis, **IF THEY KNOW THE ASSET EXISTS AND THEY CAN ACCESS IT**

DEFINITION – NFT (NON-FUNGIBLE TOKEN)



According to Merriam-Webster.com: “A unique digital identifier that cannot be copied, substituted, or subdivided, that is recorded in a blockchain, and that is used to certify authenticity and ownership (as of a specific digital asset and specific rights relating to it).”

The definition of “NFT” is an NFT owned by AOI on the NFT marketplace platform OpenSea

<https://opensea.io/AOICOLLECTION>

The first known use of an NFT was in 2017.

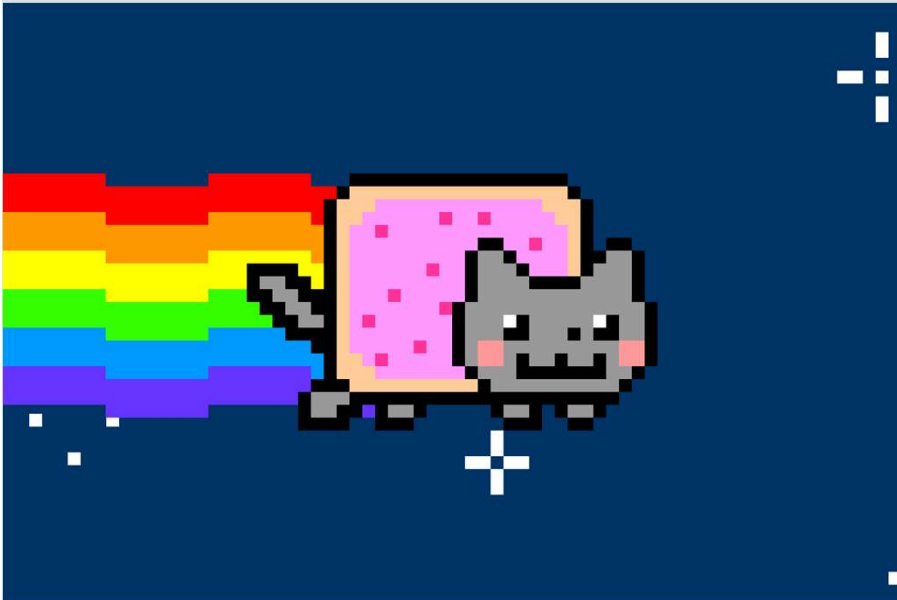
DEFINITION – NFT (NON-FUNGIBLE TOKEN)

NFT = digital original



Other digital or printed images of the same work are like the prints you buy in a museum gift shop

THE \$600,000 POP-TART (OR CAT? OR POP-TART CAT?)



“Nyan Cat,” created by web comic author Chris Torres in 2011, is a YouTube video of an animated cat with a Pop-Tart body happily flying along to a Japanese pop music tune.

A GIF NFT created by Torres of Nyan Cat sold for \$587,000 in Ether cryptocurrency in February 2021.

https://en.Wikipedia.org/wiki/Nyan_Cat

CRYPTO & NFTS: TANGIBLE OR INTANGIBLE?

- Does it matter if the asset is in a digital wallet or stored on a thumb drive?
- What does your will/trust say about your digital assets?
- Is it personal property disposed of as a specific bequest or part of your general residuary estate?

DEFINING DIGITAL ASSETS IN ESTATE PLANNING DOCUMENTS

“All of my content-based digital assets shall be considered tangible personal property subject to Article ____ of this will. “Content-based digital assets” shall be comprised of digital files containing content that is not stored in physical form, such as photos, videos, slide decks/PowerPoint presentations, Excel spreadsheets, word-processing documents and plain-text files, logos, graphics, HTML documents, audio files, PDFs, digital publications and audiobooks, digital models, data packages and databases, domain names, and network infrastructure assets such as IP addresses, and all metadata associated with the foregoing. However, any financial account, such as a bank account, investment/brokerage account, or retirement account, shall not be considered a content-based digital asset even if my primary or sole mode of accessing such account is online, electronic, or digital. All of my digital tokens, crypto tokens and cryptocurrencies, such as (but not limited to) Bitcoin, Bitcoin Cash, and altcoins shall not be considered to be content-based digital assets, but shall instead be treated like cash or cash equivalents and therefore be considered part of my residuary estate.”



TOPIC #3

Remote
signing and
witnessing



“REMOTE” VERSUS “ELECTRONIC”



- Remember the difference between remotely signing/witnessing and electronically signing/witnessing
 - Remote: some necessary parties are not physically present in the same room
 - Electronic: parties may or may not be in the same room, but there are no “wet” signatures
 - Digital documents only – no paper

OPTIONS TO CONSIDER

■ How is document signed?

- “Wet” pen-to-paper signatures on actual paper
- Electronic signatures on electronic device (e.g., AdobeSign on a tablet)

■ How is document witnessed?

- In person: everyone is in the same room
- Remotely: at least one necessary party is located elsewhere

■ Is document signed in counterparts?

- Typically, a remotely witnessed document would have to be signed in counterparts, except in the scenario where everyone is in the same building at the same time but unable to be in the same room (think COVID isolation unit in a hospital)

A PATCHWORK OF LAWS



- SEA 204 (2021) – Advance directives overhaul
- HEA 1255 (2021) – changes to method of execution of wills, trusts, POAs
- SB 505 (2018) – digital signatures and notarization

SIGNING A NEW ADVANCE DIRECTIVE (SEA 204)

- Sign before notary or two witnesses (IC 16-36-7-28)
 - IC 16-36-7-19 permits witnesses and/or notary to interact remotely through “audiovisual technology” or “telephonic interaction”
- Spouse or family member can be one of the witnesses (unless document is being signed at principal’s direction) (IC 16-36-7-28)
- No reference to electronic (digital only) signature

REMOTELY-EXECUTED WILLS (HEA 1255)

- Physically signed counterparts must be assembled within 5 days of the person charged with assembly receiving all of the pages (IC 29-1-5-3)
- Intervening death of the testator before assembly does not invalidate the will (IC 29-1-5-3)
- Will execution must be supervised by a lawyer or a directed paralegal (IC 29-1-5-3)



REMOTELY-EXECUTED WILLS (HEA 1255)

- The lawyer or paralegal who supervised the remote signing must execute an “affidavit of compliance” (IC 29-1-5-3)
- Lack of an affidavit of compliance makes the will voidable, not de facto void (IC 20-1-5-3)
- Remotely-witnessed will must have a modified self-proving clause (IC 29-1-5-3.1)
- Electronically-signed will may also be executed in this manner (IC 29-1-21-3)

CHANGE CONCERNING TRUSTS (HEA 1255)

- Trusts may be signed electronically (this is not new, since 2018) (IC 30-4-1.5-4)
- Trusts may also be signed by someone else at the settlor's direction (this is not new, since 2020)
- New restriction: a person who is NOT a POA who is signing at the settlor's direction, may NOT be a relative of the settlor, be the trustee, or entitled to any beneficial interest in the trust (IC 30-4-1.5-4)
 - Trust instrument must recite that the person signing at the settlor's direction is not in any of the above restricted categories.
- Also: a person who is NOT a POA may electronically sign at the settlor's direction, but must be in the settlor's actual physical presence (IC 30-4-1.5-4)

POA PANDEMONIUM!!!

(HEA 1255)

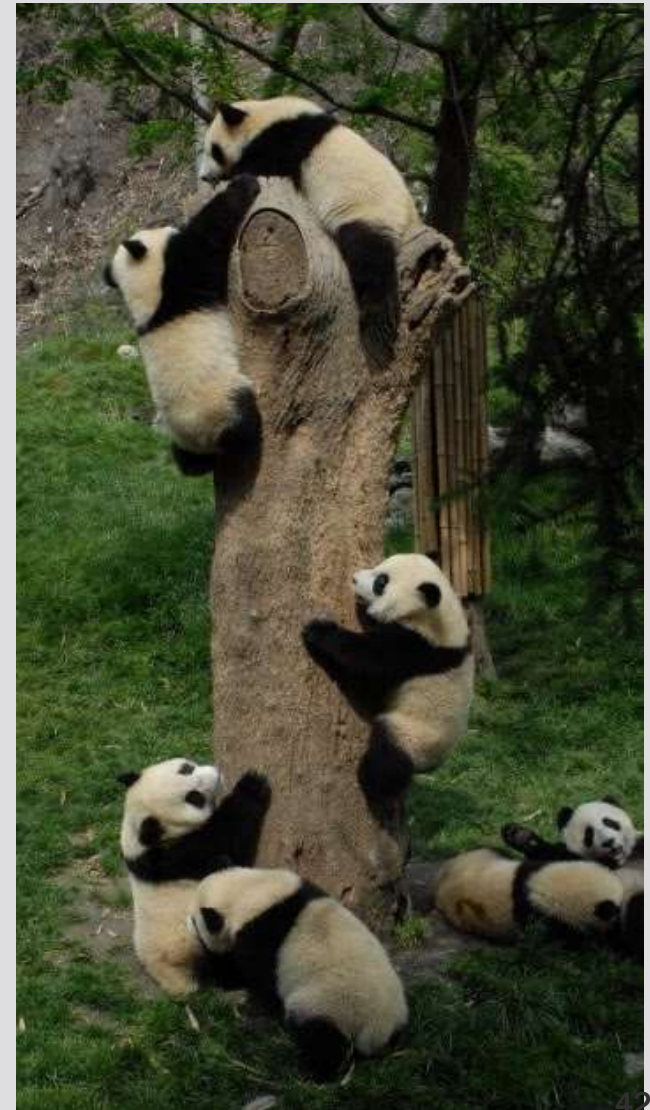
POAs can now be:

Witnessed instead of
notarized (IC 30-5-2-3.6)

Signed remotely in
counterparts (IC 30-5-4-1.5)

Signed electronically (IC 30-
5-11-3)

Signed electronically,
remotely in counterparts (IC
30-5-11-4)



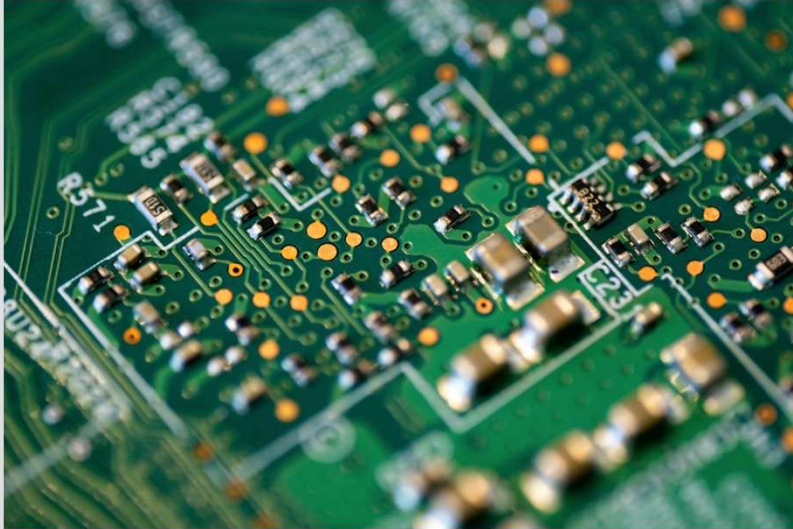
POAs CAN NOW BE WITNESSED

- POAs can now be signed with two witnesses instead of a notary (IC 30-5-2-3.6)
- If a POA is witnessed, and signed by someone else at the principal's direction, it **MUST** have an attestation clause (IC 30-5-4-1.5(b))
- An attestation clause for any witnessed POA is still best practice, although not required (IC 30-5-4-1.5(c))
- Witnesses must be disinterested:
 - Not named in the document, and not a spouse or relative of someone named in the document
 - IC 30-5-4-1.3

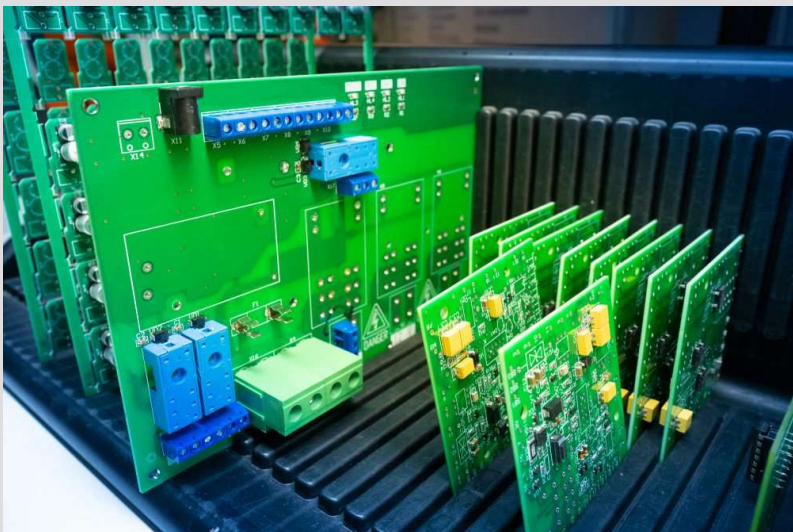
POAs CAN NOW BE REMOTELY WITNESSED

- Same presence and assembly requirements as wills (IC 30-5-4-1.5(d))
- Same lawyer/paralegal supervision requirements (IC 30-5-4-1.5(d))
- Same affidavit of compliance requirements (IC 30-5-4-1.5(f))

ELECTRONIC SIGNATURES (SB 505)



- Indiana Code 29-1-21 (Wills)
- Indiana Code 30-4-1.5(Trusts)
- Indiana Code 30-5-11 (Powers of Attorney)
- SB 505 is silent on health care directives! But SEA 204 (Indiana's 2021 health care advance directive overhaul) allows for electronic signatures



REMOTE NOTARIZATION (SB 505)

- Added to Indiana Code at 33-42-17-1 *et seq.* but not effective until July 1, 2019.
- Must register as a “remote notary public with the Secretary of State and use AV/technological equipment pre-approved by the Indiana Secretary of State. Indiana Code 33-42-17-2; 33-42-17-3(c); 33-42-17-6(a).
- Notary public must be present in Indiana, but the principal may sign from anywhere. Indiana Code 33-42-17-2(g); 33-42-17-3(d).
- Notarial acts must be recorded (audio and video). Indiana Code 33-42-17-2(h).
- Indiana Code 33-42-17-7 contains an example of a notarial certificate for remote notarization.

REMOTE NOTARIZATION

■ Remote Notary Technology Vendors approved by Indiana SOS to date:

- Notarize, Inc.
- Digital Delivery, Inc.
- NotaryCam, Inc.
- Pavaso, Inc.
- Simply Sign LLC
- eNotaryLog, LLC
- Black Knight DocVerify
- Amrock, LLC
- LiveNotary, LLC
- Epic River Healthcare, Inc.
- Stavvy, Inc.
- Simplifile, LLC
- Cyberize It, LLC
- Blend Labs, Inc.
- PandaDoc, Inc.
- Qualia Labs, Inc.



REMOTE NOTARIZATION

Can an Indiana notary use audiovisual technology (i.e. Zoom) and notarize without a remote technology vendor?



REMOTE NOTARIZATION

- Seems to be permitted specifically for appointments of health care representation – see 16-36-7-28(d)

- BUT COMPARE:
 - IC 33-42-9-3 “If a notarial act relates to a statement made in or a signature executed on a record, the declarant or signatory shall appear personally before the notarial officer;” and

 - IC 33-42-17-4 “If a remote notarial act relates to a statement made in or a signature executed on a record, the principal shall appear before the remote notary public (1) physically; or (2) by means of audiovisual communication described in section 6 of this chapter [referring to approved remote notary technology vendors]”



TOPIC #4

Digital wills

ELECTRONIC WILLS IN INDIANA IC 29-1-21-1 ET SEQ

- Indiana law now allows for wills to be drafted and executed in entirely digital format
 - Example execution instructions to client contained in IC 29-1-21-6
 - Whoever stores the electronic original must be able to provide “document integrity evidence” to prove that it has not been tampered with
 - Form of “affidavit of regularity” provided in IC 29-1-21-13
 - Can be “converted” to non-digital format (think, printed or made into a PDF) for probating under IC 29-1-21-9 (together with accompanying affidavit)

ELECTRONIC WILLS

IC 29-1-21-3(6)

Document integrity evidence:

“the part of the electronic record for the electronic will that (A) is created and maintained electronically; (B) includes digital markers showing that the electronic will has not been altered after its initial execution and witnessing; (C) is logically associated with the electronic will in a tamper evidence manner so that any change made to the text of the electronic will after its execution is visibly perceptible when the electronic record is displayed or printed; (D) will generate an error message, invalidate an electronic signature, make the electronic record unreadable, or otherwise display evidence that some alteration was made to the electronic will after its execution . . .” And on and on and on!



YOUR GOOGLE DIGITAL WILL (CHECK YOUR ELECTRONIC PULSE)

- **Inactive Account Manager**
 - Google Drive, Gmail, YouTube, photos, etc.
 - 3, 6, 9, 12 months
- **You decide what happens to your data**
- **Add up to 10 “trusted” contacts to receive**

<https://support.google.com/accounts/answer/3036546?hl=en>

MEMORIALIZE OR REMOVE A FACEBOOK (META) ACCOUNT

- Anyone can still send private messages
- No one can log into a memorialized account, however you can designate a “legacy contact”
 - Legacy contact can: write a pinned post for your profile (example: to share a final message on your behalf or provide information about a memorial service); respond to new friend requests (example: old friends or family members who weren’t yet on Facebook); update your profile picture and cover photo
 - Legacy contact cannot login to your account, see messages, or remove prior posts or pictures
- Estimates show 30 million Facebook users died the first eight years of its existence with 8,000 users passing away every day
- https://www.facebook.com/help/150486848354038/?helpref=uf_share



EMAIL ACCESS: YAHOO

YAHOO

- Request to close account
 - Letter requesting closure with reason for closure
 - Include Yahoo ID of deceased/disabled
 - Copy of personal representative letter or small estate affidavit
 - Copy of death certificate or notarized letter of incompetence from a physician

Send to:

Concierge Executive Escalations

Yahoo

22000 AOL Way

Dulles, VA 20166



EMAIL ACCESS: MICROSOFT

MICROSOFT/OUTLOOK/ONEDRIVE

- Next of Kin Process for Death or Incapacitation
 - Need death certificate or certificate of incapacity letter notarized from treating professional
 - Government Photo ID
 - Email of deceased and next of kin
 - Full legal name/birthdate of deceased
 - Approximate date account was opened
 - Street address (No PO Box) of next of kin



Contact:

Microsoft “Custodian of Record” by email to msrecord@microsoft.com

OR

One Microsoft Way
Redmond, WA 98052

*You hope to receive a disc with all content- must supply within one year

EMAIL ACCESS: APPLE

APPLE

- iOS update 15.2 added digital legacy contacts
- You can choose specific people (“Legacy Contacts”) who can access your accounts after you die



EMAIL ACCESS: APPLE

- Open iPhone settings
- Tap your name at the top
- Select “Passwords and Security”
- Choose “Legacy Contact”
 - Select up to five people
- You will receive an access code – add it to your estate planning documents
- Your Legacy Contact will need to provide the code and a death certificate to access your account.
- Legacy Contact then visits Apple’s website to gain access



PLANNING SUGGESTIONS

■ Inventory of your digital assets

- Update your inventory quarterly
- Consider an online information storage service
- Use a digital asset inventory form (we have provided an example from Professor Gerry Beyer of the Texas Tech University School of Law)



AUTHORIZED ACCESS TO DIGITAL ASSETS

You can now use a small estate affidavit
to access digital assets after death!

Indiana Code 29-1-8-1 (g)





QUESTIONS?