8-1-1993

Understanding Your Estate in Indiana

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Agricultural
ECONOMICS

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Contents

Page
Introduction .................................................. 1
Death Without a Will in Indiana ....................... 2
If There Is No Will ........................................ 2
Will Substitutes ............................................ 3
Considerations in Will Making .......................... 4
Types of Real Estate Ownership ....................... 7
Tenants-in-Common ...................................... 8
Ordinary Joint-Tenancy .................................. 8
Tenancy-by-the-Entirety .................................. 8
Special Rules and Planning Implications .......... 8
Retained Life Estates .................................... 9
Jointly Held Personal Property ......................... 9
Special Statutes ........................................... 9
Multiple-Party Bank Accounts ......................... 10
Alternatives to Survivorship Accounts .............. 10
Elections, Allowances, and Options ................. 11
Spouse's Elections ...................................... 11
Trusts as a Limitation ................................... 12
Family Allowance ....................................... 12
Prenuptial Agreement .................................... 12
Renunciation or Disclaimers ............................ 12
Indiana Inheritance Tax ................................ 13
"Pick-Up" Tax ............................................ 13
Probate or Estate Administration ....................... 14
Transfer of Joint Accounts and Other Personal Property 14
Presentation of the Will .................................. 15
Appointment of the Personal Representative ....... 15
Notice to Creditors ....................................... 15
Collection and Management of Assets ............... 16
Preparation and Filing of the Inventory ............. 16
Determining Estate and Inheritance Taxes ......... 16
The Final Account ....................................... 17
Supplemental Report and Discharge ................. 17
Delay in Closing the Estate ............................ 17
Special Administration Procedures ..................... 18
Unsupervised Administration ........................... 18
No Administration ....................................... 18
Summary Administrative Procedure .................. 18
Notes ..................................................... 19

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

Several topics not discussed at length in this booklet belong in a basic estate and financial planning program: various trust alternatives; advance healthcare directives; long term care insurance; and gift, estate and income tax fundamentals.

Certain information is essential to make informed decisions about individual estate planning. Having no will is much less a problem for the person with numerous "will substitutes" such as right of survivorship arrangements for a residence and most personal property. Table 2 illustrates several will substitutes or probate avoidance arrangements and shows the federal estate and Indiana inheritance implications of each arrangement.

Considerations in making a will are outlined, and the relationship of a will to the ever-popular living trust is discussed.

* Gerry Harrison is a Professor and Extension Economist at Purdue University and member of the Indiana Bar. Susan M. Vance was a major contributor to the initial version of this publication. Thanks also to Diane Bender, Freddie Barnard, John Kadlec, and Howard Doster for their helpful suggestions. A special thanks to Laura Hoelscher for her patient editorial assistance.

DISCLAIMER: This publication is not intended to serve as a definitive answer to any of your estate planning or estate settlement problems. Legal counsel is advised for dealing with matters concerning the maintenance and transfer of your estate.
Basic choices for estate administration (probate) in Indiana are discussed. Individuals should not choose the living trust alternative without having an understanding of the modern options available for estate administration. Unsupervised administration may satisfy some of the concerns about unnecessary process in traditional estate probate. However, the unsupervised administration alternative does not negate the widespread aversion for the lawyer’s probate fee.

The best approach to negotiating compensation for legal counsel to the personal representative is to be knowledgeable about the nature of your estate and the relevant planning alternatives. Many alternatives for creating and planning are possible while living, but choices remain for a well-advised personal representative to exercise after death. Understanding the alternatives is critical, and these matters should not be left to your legal and financial planning counsel. Become well-informed and take responsibility for as many decisions as possible.

Death Without a Will in Indiana

A person without a will directing how his or her property is to be distributed leaves the Indiana intestacy law to determine who gets the decedent’s probate property. Intestacy law is intended to represent how the average person would want an estate to be distributed. This law may not be what the deceased person would have preferred. Table 1 is a display of Indiana intestacy laws which shows how probate property may pass in the event of death without a will and for property not covered by other transfer arrangements.

Many will substitutes, such as joint tenancy, tenancy-by-the entirety, retirement plans, and life insurance, may keep a large part of many estates from being subject to probate. Will substitutes, including living trusts, are discussed in this publication. Many married couples and individuals rely almost exclusively on will substitute arrangements with or without a will.

If There Is No Will

1. John and his wife Mary have one child, John Jr. One-half of John’s estate (subject to probate) would pass to Mary and one-half to John Jr. Because John Jr. is a minor, Mary, as guardian, may be required to make annual accountings to a court concerning her son’s share. However, a trusteeship could be substituted for the guardianship.

2. Joseph is married with three children. If Joseph dies without a will, his widow receives one-half and the children will each be entitled to an equal share of the remaining half.

3. Loren and Kathy are childless. Kathy may not receive all of his probate property if Loren dies without a will. Kathy receives three-quarters, and Loren’s parent(s) receive the other quarter. If Loren has no parents and no children of a prior marriage, all of his probate property will pass to Kathy.

4. Gregory is a widower with two children. His probate property passes to the children equally at his death. If, instead, he had no spouse, no children, and no parents surviving, his brothers and sisters would share equally. Where Gregory’s brothers or sisters predecease him, his nieces and nephews would take by representation (i.e., the children of a brother or sister divide their parent’s share equally).

5. Jerry is married to Janice. He has two children from his prior marriage. Jerry’s childless widow would have a statutory right to one-half of the personal property and one-third life estate in real estate. The children would receive one-half of the personal property and a two-thirds interest in the real estate. The one-third life estate may leave an unmanageable situation, and a public sale or intra-family buy-out may be necessary.

6. Joan is married and has no children. Both of Joan’s parents predeceased her. She has a sister, Marie, and a half-brother, Jeffrey. If Joan dies intestate, each will take one-half. This is because half-bloods are treated the same as full-bloods in Indiana.

7. Jackie and James have just adopted David. In Indiana, David is entitled to a share as if he were a natural child of his adoptive parents.

While the above results may be acceptable in many situations, generally a will greatly facilitates estate administration. For some individuals or couples and families, the will can incorporate tax-saving features.

Another planning alternative is to transfer property into a living trust and provide for distribution with the trust. Where family business capital is involved, thoughtful estate planning techniques are important in preventing economic loss from intra-family disputes. “Buy-sell” agreements or restricted transfer arrangements which are imposed on survivors’
### Table 1. Indiana Intestacy Law.*

<table>
<thead>
<tr>
<th>Survivors</th>
<th>Who Receives What</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spouse, 1 or more children</td>
<td>1/2 estate to spouse&lt;sup&gt;b&lt;/sup&gt;</td>
</tr>
<tr>
<td></td>
<td>1/2 estate to child or children&lt;sup&gt;c&lt;/sup&gt;</td>
</tr>
<tr>
<td>Spouse, no children</td>
<td>3/4 estate to spouse</td>
</tr>
<tr>
<td>Parents of deceased person</td>
<td>1/4 estate to parent(s)</td>
</tr>
<tr>
<td>Spouse, no children or parents</td>
<td>All to spouse</td>
</tr>
<tr>
<td>2nd or subsequent childless spouse</td>
<td>Spouse: 1/2 of personal property, 1/3 of real estate for life.</td>
</tr>
<tr>
<td>Children of first marriage</td>
<td>The rest to child, children, or issue of deceased child or children.</td>
</tr>
<tr>
<td>Children, no spouse or parents</td>
<td>All to children</td>
</tr>
<tr>
<td>No spouse or children</td>
<td>Parents and sisters and brothers share equally, but parents get at least 1/4 each</td>
</tr>
<tr>
<td>No issue of deceased brothers and sisters,</td>
<td>Surviving grandparents share equally</td>
</tr>
<tr>
<td>no parent</td>
<td></td>
</tr>
<tr>
<td>No grandparents</td>
<td>Brothers and sisters (uncles and aunts) of decedent’s parents share equally or</td>
</tr>
<tr>
<td></td>
<td>issue of uncles and aunts by representation</td>
</tr>
<tr>
<td>None of the above</td>
<td>State of Indiana</td>
</tr>
</tbody>
</table>

* These rules are found at IC 29-1-2-1 of the Indiana Statutes. Consult a lawyer for explanation.

<sup>b</sup> A surviving spouse is entitled to this amount as a minimum even if the deceased spouse had a will which left the surviving spouse a lesser share. IC 29-1-3-1 sets the spouse’s elective share at one-half (1/2) if a first spouse or a spouse with children by the deceased spouse. The second or subsequent childless spouse’s elective share remains at one-third (1/3) of the testator’s personal property and one-third (1/3) life estate in real estate. However, children and other lineal descendants and ancestors have no such statutory right. That is, a decedent may avoid all family in a will with or without mentioning heirs and ancestors, except a surviving spouse, unless the spouse does not object or is bound by a contractual agreement.

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

Shares may be important for limiting transfer alternatives.

### Will Substitutes

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

Table 2 serves as a reminder that the law provides many will substitutes. In the estate of "Carl K., the decedent," there are numerous "No" entries in the "Probate" column. "No" implies that the interest is not a probate asset, but instead is a will substitute.
Many people utilize joint ownership with survivorship rights, life insurance and legal life estates (retained life income), and living trusts to avoid probate. With extensive use of will substitutes, the will may apply to very little property. However, a will is important even if many assets avoid probate.

Table 2 indicates property interests that are subject to federal estate and Indiana inheritance taxes as compared to whether the items are part of the probate estate. Individuals and couples with modest wealth (say, $600,000 plus) should examine the federal estate tax law. You should analyze your own estate with respect to the tax and probate issues. Avoiding probate may be no more important than strategies to reduce taxes. Will substitutes (probate avoidance) may provide relatively more cost savings for those with small estates (less than $600,000).

The "?" notation following certain items in the estate and inheritance tax columns signals the fact that a surviving joint tenant may be able to keep some or all of the value of the asset out of the decedent's estate and inheritance tax returns if evidence of contribution on the part of the survivor is shown. Property passing to a surviving spouse may be 100% deductible in the calculation of the federal estate tax. Also, transfers to the surviving spouse may be 100% exempt from the Indiana inheritance tax.

Life insurance proceeds payable to an individual and not the estate have an exemption from Indiana inheritance tax. Jointly owned and tenants-by-the-entireties property held by married couples is automatically included for federal estate tax purposes to the extent of one-half since 1981. At least this is true for joint tenancies assembled after 1981. A 1992 court case (Gallenstein, Sixth Circuit Court of Appeals) has held that the "consideration furnished" rule still applies to joint interest created before 1977. Whatever is included, its value is 100% deductible. The included value takes on an income tax basis equal to the property's fair market value on the decedent's date of death. Normally, there is a step up in basis which may reduce future income tax liability.

Considerations in Will Making

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

- The maker of a will must be of sound mind and be at least 18 years old.
- The will must be in writing.
- The will must be signed by the maker and be witnessed by at least two witnesses in a special manner provided by law. Persons who are beneficiaries under the will should not serve as witnesses. After death, the will is presented to the probate court, generally a Circuit Court in Indiana. A will may be made self-proving by the acknowledgement of the will by the testator (party whose will it is) and the verification of the witnesses in the form of a certificate (see Figure 1).

The self-proving certificate contains the legal requirements for a valid will. Its effect is to allow the will to be admitted to probate without testimony of a witness. Avoiding the need for witnesses to come forward saves administration expense. A self-proving certificate may be a valuable addition to a will that otherwise needs no changes.

Wills may be revoked or changed by the maker at any time before death as long as the testator has the "capacity." All changes must be made in strict compliance with the law. Changes in wills are frequently made by an addition to the will called a "codicil." (It is possible to make a will which cannot be changed.)

"Deathbed" wills might be challenged. A will should be prepared while a person is in good health and in a position to consider carefully its provisions. Hastily prepared wills may not accurately carry out the maker's wishes. Furthermore, such a will may invite a will contest—a lawsuit brought to have the will or parts of it declared invalid. Will contests can arise over changes made while under the possible influence of medication or the "undue" influence of another individual. The process of making or revising a will should be viewed in the light of one's total objectives and other provisions for estate planning. Remember, there are several typical will substitutes (e.g., joint property, life insurance, retirement plans, trusts, and life estates). Complex will arrangements may accomplish nothing if all the significant interests go to a surviving spouse by rights of survivorship. All of these matters should be reviewed with legal counsel.

Following is a list of common considerations.

- Who should receive your property? Your instructions are important despite the use of will substitutes. If there is no will, assets not covered
<table>
<thead>
<tr>
<th>Interests:</th>
<th>Probate</th>
<th>Federal Estate Tax</th>
<th>Indiana Inheritance Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Real Estate:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Carl K. and Julie K., TBEWROS&lt;sup&gt;a&lt;/sup&gt;</td>
<td>No</td>
<td>1/2&lt;sup&gt;b&lt;/sup&gt;</td>
<td>No&lt;sup&gt;b&lt;/sup&gt;</td>
</tr>
<tr>
<td>2. Carl K. (sole owner or tenant in common)</td>
<td>Yes</td>
<td>Yes?&lt;sup&gt;c&lt;/sup&gt;</td>
<td>Yes?&lt;sup&gt;c&lt;/sup&gt;</td>
</tr>
<tr>
<td>3. Carl K. and Richard K., JTWROS&lt;sup&gt;d&lt;/sup&gt;</td>
<td>No</td>
<td>Yes?</td>
<td>Yes?</td>
</tr>
<tr>
<td><strong>Personal Property:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. Carl K. and Julie K., JTWROS</td>
<td>No</td>
<td>1/2</td>
<td>No</td>
</tr>
<tr>
<td>5. Carl K.</td>
<td>Yes</td>
<td>Yes?</td>
<td>Yes?</td>
</tr>
<tr>
<td>6. Carl K. and Richard K., JTWROS</td>
<td>No</td>
<td>Yes?</td>
<td>Yes?</td>
</tr>
<tr>
<td><strong>Insurance:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7. Life of Carl K. (Carl K., owner)</td>
<td>No</td>
<td>Yes?</td>
<td>No&lt;sup&gt;e&lt;/sup&gt;</td>
</tr>
<tr>
<td>8. Life of Julie K. (Carl K., owner)</td>
<td>Yes</td>
<td>Yes?</td>
<td>Yes?</td>
</tr>
<tr>
<td>9. Life of Carl K. (Julie K., owner)</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td><strong>Other:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10. Qualified Pension Plan</td>
<td>No</td>
<td>Yes?&lt;sup&gt;f&lt;/sup&gt;</td>
<td>Yes?</td>
</tr>
<tr>
<td>11. Stock Option Rights</td>
<td>Yes</td>
<td>Yes?</td>
<td>Yes?</td>
</tr>
<tr>
<td>12. Trust Assets (Carl K., owner)</td>
<td>No</td>
<td>Yes?</td>
<td>Yes?</td>
</tr>
<tr>
<td>13. A Granted Life Interest&lt;sup&gt;g&lt;/sup&gt;</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>14. Revocable (Living Trust) Assets or Retained Life Estate&lt;sup&gt;h&lt;/sup&gt;</td>
<td>No</td>
<td>Yes?</td>
<td>Yes?</td>
</tr>
<tr>
<td>15. Social Security Benefits</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>16. Partnership Interest</td>
<td>Yes</td>
<td>Yes?</td>
<td>Yes?</td>
</tr>
<tr>
<td>17. Annuity (Carl K. only)</td>
<td>No&lt;sup&gt;i&lt;/sup&gt;</td>
<td>Yes?</td>
<td>Yes?</td>
</tr>
<tr>
<td>18. Land Installment Contract (seller)</td>
<td>No&lt;sup&gt;i&lt;/sup&gt;</td>
<td>Yes?</td>
<td>Yes?</td>
</tr>
</tbody>
</table>

* An original draft was prepared by Carl W. Kloeper, attorney, Lafayette, IN. This table is an illustration of many interests that avoid probate but may be subject to federal estate and Indiana inheritance taxes.

<sup>a</sup> Tenants-by-the-entireties with rights of survivorship.
<sup>b</sup> As of Jan. 1, 1982, the federal estate tax law requires one-half the value on marital, joint property to be subject to tax. Also, the income-tax basis is stepped-up on this one-half of the value. A 1992 case (Gallenstein from the Sixth Circuit Court of Appeals) held that the "consideration furnished" rule applies to joint interests created before 1977 where the decedent died after 1981. Thus, if a surviving spouse cannot show consideration furnished for joint interests created before 1977, the entire value may be in the decedent spouse's estate tax estate and the income tax basis may be stepped-up on that included value. After June 30, 1979, all transfers from a decedent spouse to a surviving spouse are 100% exempt from Indiana inheritance tax. However, Indiana levies an estate tax (pick-up tax) if the Federal/State Death Tax Credit exceeds the calculated inheritance tax for an estate. Indiana also has a generation-skipping tax.
<sup>c</sup> There is a question mark (?) because if the assets go to the surviving spouse, there is 100% avoidance of estate or inheritance taxes.
<sup>d</sup> Joint tenants with rights of survivorship.
<sup>e</sup> Life insurance benefits are exempt from Indiana inheritance tax if not payable to the insured decedent's estate.
<sup>f</sup> Prior to 1985, there was an $100,000 exclusion available. After 1984, these benefits are part of the gross estate for tax purposes.
<sup>g</sup> Carl K. did not previously own the property from which the life interest arose. The life interest was a gift to him.
<sup>h</sup> A retained life interest (retained by the decedent) and assets in a revocable trust both give rise to taxable value just as if the decedent had retained sole ownership of the assets. The living trust is one of many ways to avoid probate, but the living trust does not avoid federal estate nor Indiana inheritance taxes and the trust income is taxable to the grantor.
<sup>i</sup> If the sale were of tenant-by-the-entirety without other intent specified, the proceeds are the spouse's free of inheritance tax and without probate; otherwise there may be probate and inheritance taxes. If such an interest were inherited, there would be probate. The amount subject to Federal estate tax in Carl's return depends upon Julie's interest in the contract. Generally, the fair market value of an installment contract is the discounted value of the stream of principal and interest payments. The stream of payments must be discounted in order to reflect delay in time to collect the payments.
Figure 1. Self-Proving Will Certificate.

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

(1) that the testator executed the instrument as his/her will;

(2) that, in the presence of both witnesses, he/she signed or acknowledged his/her signature already made or directed another to sign for him/her in his/her presence.

(3) that he/she executed the will as his/her free and voluntary act for the purposes expressed in it;

(4) that each of the witnesses, in the presence of the testator and of each other, signed the will as witnesses;

(5) that the testator was of sound mind when the will was executed;

(6) that to the best knowledge of each of the witnesses, the testator was at the time the will was executed eighteen (18) or more years of age, or was a member of the armed forces or of the merchant marine of the United States or its allies.

<table>
<thead>
<tr>
<th>Date</th>
<th>Testator</th>
<th>Witness</th>
<th>Witness</th>
</tr>
</thead>
</table>

by a will substitute are transferred by the law of descent (see Table 1). If you have a charitable organization in mind, consider lifetime gifts, especially if you can save income tax.

- Who should be named as guardian(s) of children under 18 years of age? You may want a trust to manage property left to the children and selected family or other individuals to raise the children (guardian of the person). This is important for parents of minors or for individuals who are responsible for anyone who is legally or financially incompetent.

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

- Should a trust be created for you, your spouse, children, or others? In some cases, a legal life estate may adequately serve a family situation. However, a trust with many useful provisions, such as a buy-sell agreement, is a better choice than the ordinary, legal life estate. Be sure you know the income, estate, and inheritance tax ramifications of what you do! Also, it should be recognized that many types of trust arrangements are possible. In the case of a living trust, you, your spouse, or other family members can serve as trustee(s). What is best for your situation may require legal and tax analysis with professional assistance. A lifetime (living) trust may be the best choice along with a "pour-over" will. A pour-over will provides for the transfer of assets not already in the living trust to go into the trust.

- Should life insurance proceeds be made payable to a trustee? The use of a trust for management of life insurance proceeds may be one of the most important uses of a trust for most young families.
Most decedents do not leave large estates. If they die prematurely while their children are still dependents, life insurance proceeds for specific needs of the children may be a way the decedent can aid in the development of the children. Equity in a home, an automobile, savings accounts, life insurance benefits, and retirement benefits are likely to be left to the surviving spouse. Life insurance in a trust is an efficient way for managing life-insurance proceeds. In the case of minor children, the life insurance trust can control the use of insurance proceeds according to the decedent-insured’s desires.

- Should you make provisions for death transfer taxes? What is the anticipated value of your taxable estate? Married individuals who each have estates approaching or above $600,000 may use the typical tax-avoidance approaches for the estate of the surviving spouse. Each may choose to isolate at least $600,000 from the estate of the survivor in a trust with income from the trust to the survivor. Several options exist. This fundamental estate tax planning may be accomplished in a living trust and by a will.

- Do you understand the rights of a surviving spouse? Don’t forget the importance of prenuptial agreements (contracts), especially where mature individuals are contemplating marriage but have children and property from a prior marriage. A spouse who “agrees” to a plan may elect against a will that leaves him or her less than a surviving spouse’s statutory share. This election may be prevented by a proper pre- or postnuptial agreement.

- Has the size or makeup of your estate changed significantly since you made your will?

- Have any intended beneficiaries of your estate had changes in circumstances or died?

- Have the probate and/or death tax laws changed since you made your will?

- Have you provided for control of business assets? Where a family business is involved, its control and transfer may be a critical area of planning for you. A number of tools are available to assist with control and transfer of business capital, including land. "Buy-sell" restrictions are important in this area of planning. Rules for buying and selling assets between co-owners of property are important. Buy-sell rules can be used inside a will and in trusts, partnerships, and corporations.

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

- Do you have a charitable intention which could be provided for in your will? Remember that gifts to tax-exempt organizations are exempt from estate, gift, and inheritance taxes. Lifetime gifts to tax-exempt organizations may also bring a reduction in federal and state income taxes. If you plan to make gifts and can manage without the gifted assets, the income tax savings may encourage lifetime gifts.

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

The drafting of a will is an important legal matter involving many decisions that require professional judgment which can be obtained only by training and experience. A lawyer familiar with estate planning, probate practice, and the drafting of wills, trusts, and business arrangements—with other professional assistance as needed—can avoid many pitfalls.

Finding an adequately trained lawyer for your estate planning and will-drafting is a difficult problem for many individuals. Recognize that in many estate planning and will-making situations, federal income and estate tax expertise is needed. Judgments similar to those required for obtaining professional counsel for other purposes will be needed. The individual’s best protection from inadequate service is knowledge of the facts and of alternatives and their implications.

Types of Real Estate Ownership

Three types of multi-party (co-tenancy) arrangements are typical alternatives to sole ownership of
real estate in Indiana. They are tenants-in-common, joint tenancy, and tenants-by-the entirety.

**Tenants-In-Common**

To own as tenants-in-common means each party has a percentage interest in the property. Each owns a part of the whole. The part owned may be any fraction (e.g., one-fourth, one-third, one-eighth) of the whole. Upon death, one’s tenant-in-common interest is part of the probate estate and passes by the law of descent or according to a will provision. One right of a tenant-in-common is that of partition (a court remedy for physical division or sale of the property). Where such partition is not possible, another alternative is to sell the real estate and divide the proceeds according to percentage interests.

It is typical for brothers and sisters and unrelated parties to hold real estate as tenants-in-common. It is often wise to restrict the in-common ownership arrangements so one owner cannot impose a sale of the property upon the others—for example, an exclusive first option to buy, held by all sisters and brothers or held by specific members of the family. If a parent dies with real estate and without a will, leaving a spouse and children, they will take as tenants-in-common. One should plan in advance for the possibility that they may not be able to agree on how to manage the property. If an heir or legatee or his/her guardian or trustee or judgment creditor wants cash, a public auction may be the result. Thus, a restrictive transfer arrangement (a buy-sell agreement) is good planning.

**Ordinary Joint Tenancy**

Ordinary joint tenancy is similar to tenants-in-common in some respects. A severance of the interests can be carried out by one party to the tenancy, or one party can encumber his/her interest independently. When a joint tenant in real estate transfers an interest, the transferee becomes a tenant-in-common with the other joint tenant(s). A major distinction is that joint tenants enjoy rights of survivorship. If one joint tenant dies, the surviving joint tenant(s) own the entire interest. Thus, the decedent’s joint tenancy interest is not subject to probate but instead passes by law to the surviving joint tenant(s). Married couples typically use joint tenancy as a method for owning personal property. Occasionally, parents own realty and personal property with children as joint tenants with rights of survivorship. For estate tax purposes, a decedent joint tenant is assumed to have contributed the entire value of the jointly-held property unless the surviving joint tenant can prove otherwise. An important exception to this rule applies for a deceased spouse; one-half the asset value is included in that case.

**Tenancy-by-the-Entirety**

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

**Special Rules and Planning Implications**

An Indiana statute provides that words on a deed conveying realty to a married couple will be deemed to create a tenancy-by-the-entirety unless the language makes it clear that such is not intended, such as "John and Mary Smith as tenants-in-common." In Indiana, without other words to the contrary, the wording "John and Mary Smith" creates a tenancy-by-the-entirety in real estate. In the case of unmarried parties, such wording as "John Smith and Mary Smith" creates a tenancy-in-common. Married couples with significant real estate often switch to tenants-in-common for estate planning purposes.

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

A joint tenancy plan may be undesirable from the point of view of minimizing estate and inheritance taxes as property passes to the children or grandchildren. Further, the surviving spouse may not utilize the property for the benefit of the decedent tenant’s children in a way that was intended. In fact, the children may never receive an inheritance that must pass
through the estate of a parent who was a joint tenant with the first parent to die. Children have no legal right to share in the estate of their parents, except in the case of minors who are entitled to a survivor's allowance ($8,500).

Joint ownership with survivorship rights creates a federal estate tax problem when passing valuable capital, such as farmland, through survivorship rights. For example, a widow or widower may become wealthy only with the passage of time due to appreciation in asset values received through survivorship rights. The more prematurely a spouse dies with a significant jointly-held estate, the more important this problem. A relatively young widow or widower may experience substantial appreciation in farmland values. The children may find the property subject to substantial federal estate and inheritance-tax liability and administration costs in the estate of a widow or widower. Each individual may have an estate tax base of up to $600,000 and avoid federal estate tax. The $600,000 is the equivalent exemption of the $192,800 unified credit. Above $600,000, the estate tax may be a very significant expense. For example, with an estate-tax estate of $700,000, the estate tax after the credit is $37,000.

Married individuals who have modest estates, including the wealth that is made available from life insurance, should study the alternatives to joint property with rights of survivorship. Good results can be achieved by the use of trusts of various types and a will.

Retained Life Estates

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

The retained life estate may be in writing in a deed, or the retention of life income may be oral and the deed may be in fee simple to the children. If, in effect, the income or part of it or if there were a right to it continuing to the grantor of the deed, the IRS demands full value in the gross estate for estate tax purposes at the death of the grantor. But the retained life estate arrangement will avoid probate of the real estate, and that fact alone may save administration expense and eliminate uncertainty. Most counselors would use a trust arrangement in lieu of the legal life estate unless the property owner objects. However, the tax rules discussed here are the same whether an interest is retained via a legal life estate or a lifetime (revocable living) trust.

On the other hand, a life estate that is granted to a person is not a part of the decedent grantee's federal estate tax estate. This type of life estate is a valuable estate-tax-planning tool. One who devises a life estate to another may keep the value of the realty out of the devisee's estate at his/her death. Farmers have favored the legal life estate because it keeps the management within the family. However, a trust would be preferable in most cases. A family member could be the trustee, if desired, to avoid outside intervention and costs if that is the wish of the estate planner. The trust approach invites provisions for a buy-sell plan and for management assistance for the life beneficiary.

Jointly Held Personal Property

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

Special Statutes

A statute provides the intent where the "right-of-survivorship" words are missing for personal property held in the names of both husband and wife, unless it is clearly stated that the item is not to be considered as held with the rights of survivorship. Because of the law in Indiana, spouses must indicate "without rights of survivorship" on the ownership document if tenancy-in-common and not joint tenancy is desired. In the case of unmarried individuals, "with rights of survivorship" must be indicated where co-ownership (two or more names) appears, or else the law presumes tenants-in-common.
The statute states: Personal property, other than an account, which is owned by two (2) or more persons is owned by them as tenants-in-common, unless expressed otherwise in a written instrument. However, household goods acquired during coverture (marriage) and in possession of both husband and wife, and any promissory note, bond, certificate of title to a motor vehicle, or any other written or printed instrument evidencing an interest in tangible or intangible personal property, other than an account, in the name of both husband and wife, shall upon the death of either become the sole property of the surviving spouse unless a clear contrary intention is expressed in a written instrument.

Multiple-Party Bank Accounts

Multiple-party bank accounts (checking, savings, certificates of deposit, and other like accounts) are excluded from the above statement of the law since they are under a special section of the law on "non-probate" transfers. During the 1970s, litigation developed over whether a person who was designated as having rights of survivorship on a bank account with a decedent should get the account balance, even though the survivor was unaware his/her name was on the account. The personal representative and heirs of the decedent account depositor would argue that the decedent’s intent was not to allow an individual to receive the entire account balance. They would reason that it was only a convenience to the depositor to have someone who could draw money for the disabled depositor’s needs. Since married couples and those in other family relationships often use survivorship bank accounts, including payable on death (P.O.D.) or trust accounts, for lifetime convenience and to avoid probate, a "nonprobate transfer" statute was enacted in Indiana. The statute provides that at the death of a party to a joint account, unless there is clear and convincing evidence at the time the account was created, the entire account belongs to the surviving party(ies) to the account.

In effect, rights of survivorship are presumed by the law where the signature card or contract with the bank mentions two or more names but does not make survivorship rights clear. Note that this presumption deals only with intangibles at financial institutions and not personal property in general. For other personal property, the presumption when doubt exists over a co-ownership arrangement is tenants-in-common, unless the parties were married.

Nonprobate transfer rules concerning multiple-party accounts also stipulate the following:

1. The account belongs to the parties in proportion to their contributions. If the decedent was the only contributor, then the parties (if two or more survive) share equally in the account.

2. Multiple-party accounts cannot be used to avoid the decedent’s debts, taxes and expenses of administration to the extent that the decedent had contributed to the account. If a parent-depositor owns an account with survivorship rights in a son and the son predeceases the parent, the parent could show proof of contribution, avoid the deceased son’s creditors, and prevent having any part of the account be subject to federal estate or Indiana inheritance taxes in the son’s estate.

A surviving party who has received funds which were the decedent party’s contribution to the account remains liable to account to the decedent party’s personal representative for this amount.

3. A right of survivorship that arises for multiple-party accounts defined above cannot be changed by statements about the accounts in the decedent depositor’s will. If the depositor wants to clear up the transfer intent concerning multiple-party accounts, it can be done by appropriate documentation with the financial institution holding the accounts. The law clears-up any ambiguity, not the will or living trust.

Individuals who have managed money with joint bank accounts but do not intend to personally keep the decedent’s remaining balance must take appropriate action. Since the law says the survivor owns the account, a disclaimer is necessary to get what was a jointly owned account back into the decedent’s estate for distribution to other heirs according to a will or by the law of descent.

Even though we have rules for bank accounts and clear indications in a will as to who is entitled to household items and other personal property, the procedures may be costly in both dollars and in human emotions.

Alternatives to Survivorship Accounts

Problems can arise over accounts that are stated to be joint with right of survivorship. Often a son or daughter can draw on the account for the parent-depositor, but the parent may not have intended for
the balance to go to an individual child. Special-purpose accounts should be designated as such, and durable powers of attorney can describe rights extended to handle another's affairs.

A living trust may be a better approach than joint accounts for asset management. An adult child could be a co-trustee or a contingent trustee. The trust should describe the distribution to beneficiaries of a decedent's trust assets.

In the case of second or subsequent marriages, disputes could arise over household and other items that children know were not acquired during the final marriage of a decedent parent. Children may have gifted or loaned certain items to a parent(s), and the parent would like for them to receive the item back after they are gone. Special provisions in a will or other legal document may be the only sure way to accomplish the desired disposition. A parent may want to transfer certain assets into an irrevocable trust with children of a prior marriage as the ultimate beneficiaries. This arrangement could be established for a second or subsequent marriage.

It is of interest to note that under federal gift tax rules, one party (child) can hold a joint account or deposit with another party (parent) making the total or a more than proportionate contribution, yet the act of establishing the account is not a taxable gift. Federal tax regulations permit no taxable gift of what is or was a jointly held bank account until the donor joint tenant(s) permits a donee joint tenant to withdraw funds which the donee uses for purposes other than a legal obligation of the donor. The reason no gift exists until withdrawal is that the donor joint tenant may withdraw all the deposit, and the other joint tenant may never benefit from the account. If a lifetime gift is desired, the donor may gift outright or set up a separate account for the donee.

The general rule is that one's personal contribution into a joint tenant account is excludable from what otherwise might be declared a gift or counted for federal estate-tax purposes at the death of a joint tenant. Federal estate-tax rules require that one-half of the value of spousal-survivorship property be included in the gross estate of a deceased spouse. At least this is true for joint tenancies acquired since 1976. This is an arbitrary rule regardless of contribution. Yet this one-half is 100% deductible for federal estate-tax purposes. Transfers to spouses are 100% exempt from Indiana inheritance tax.

It may be a good idea for each spouse to have money in a private account. It would be available for routine expenses for a few weeks or months after death of a spouse. This strategy would prevent apprehension following the death of a spouse about gaining access to joint accounts. However, since there is no federal estate or Indiana inheritance tax on a spouse's survivorship account, there should be little effort involved in getting these accounts cleared or freed-up (consent to transfer) at a bank.

The above discussion is not intended to suggest that multiple-party accounts are recommended estate-planning tools. Where considerable value is involved, the use of a well-drafted living trust and a durable power of attorney may be preferable. Outright gifts to separate accounts may be better than the joint-account approach. But many people rely on joint accounts because they feel more comfortable with these seemingly uncomplicated arrangements. Further, they may feel more in control of their liquid assets.

Elections, Allowances, and Options

Spouse's Elections

In the past, if a husband owned real estate in his own name and wished to convey it to someone else, he was required to have his wife sign away her marital interest. Today, by Indiana statute, this should no longer be necessary. Neither spouse has an interest in the property owned individually (i.e., not joint or rights-of-survivorship property) by the other, and either should be able to transfer his or her property without consent of the other spouse. Avoiding the loss of this freedom and flexibility may be a reason that many in Indiana have resisted efforts to adopt community property law.

In the case of tenancies-by-the-entirety, neither spouse can independently convey an interest, even though one or the other may have provided the funds to acquire the property or have inherited the property.

A surviving spouse can elect to take one-half of the net estate (real estate and personal property) instead of taking what the will provides if the will provision is less than the one-half statutory guarantee.
However, if the surviving spouse is a second or subsequent childless spouse and the deceased person had children from a prior marriage, he or she has an elective right to one-third of the personal property and a life estate in one-third of the real estate.

Example: A person dies with funeral expenses of $1,500, medical expenses of $200, and other debts of $4,000. Administration expenses of the estate are $800. The estate itself consists of assets worth $13,000. Since the family allowance is given priority over many other claims or debts of the estate, the total estate of $13,000 is distributed in the following order:

1. $800   administration expenses
2. $1,500 funeral expenses
3. $8,500 family allowance
4. $0    federal taxes
5. $200  medical expenses
6. $0    state taxes
7. $2,000 left to pay other creditors

Prenuptial Agreement

Previously married individuals may have property in their own names which they wish to pass to their children of the prior marriage(s). Before marrying, each signs a prenuptial contract agreeing to waive what he/she would otherwise be entitled to by law after the death of the other. In this case, the promise of marriage is sufficient consideration to make the agreement binding, in contract law. If the decision is made after the marriage has taken place, each must receive something as consideration from the other in return for the waiver to constitute a binding contract.

Renunciation or Disclaimers

Indiana law provides that property to be received by right of survivorship by a will, or by the law of intestacy can be renounced (disclaimed) in whole or in part by filing a written instrument to that effect within nine months after the death of the decedent. A person renouncing need not receive anything in return to be legally bound. The property then passes as if the disclaimant had predeceased the decedent. The disclaimant is not permitted to renounce in favor of anyone. The owner of property may designate in a will specifically who takes, in case the first-intended party renounces.

Disclaimers may permit the disclaimant to avoid creditors, income tax, and Indiana inheritance tax. Federal estate tax can be reduced ultimately in the disclaimant’s estate. A federal tax law permits an individual devisee to disclaim and not have to
declare the value of what was disclaimed for gift-tax purposes.

Federal tax law places several requirements for a disclaimer to be effective, including the following:
1. The disclaimant must make an irrevocable and unqualified refusal to accept an interest in the property.
2. The disclaimer must be in writing.
3. The disclaimant must have accepted the interest disclaimed or any of its benefits.
4. The disclaimer must be delivered to the transferor or title holder not later than nine (9) months after the transfer.

Example: A person with children who inherits from a parent could exercise a disclaimer and allow children who are alternative heirs to benefit directly from the inheritance. This may not change the grandparent’s federal estate tax. It is possible that estate tax could be saved in the estate from which the disclaimed interest arises; for example, if the alternative taker is a tax-exempt organization. Also, if a child disclaims in favor of a surviving spouse, the 100% marital deduction could provide an estate tax savings as well as an Indiana Inheritance Tax savings.

All death transfers from one spouse to another are 100% exempt from the Indiana inheritance tax. Life insurance proceeds, Social Security benefits, and certain retirement funds are exempt from Indiana inheritance tax for all individual beneficiaries.

An important benefit of the 100% inheritance tax exemption to surviving spouses is that now a husband and wife may avoid joint ownership, knowing that in the event of death, a property interest left in a trust, by will, or by the law of descent to a surviving spouse is exempt from the inheritance tax. Elimination of joint tenancy may be necessary for accommodating other estate planning goals such as minimization of federal estate tax.  

"Pick-Up" Tax

Indiana retains the "pick-up" tax as part of its inheritance tax structure. The pick-up provision results in Indiana's collecting at least the amount of the federal estate death tax credit. For Indiana resident decedents, the pick-up tax is equal to the federal estate death tax credit minus the calculated Indiana inheritance tax for all heirs taking from a given estate. If the credit is less than the calculated inheritance tax, then there is no pick-up tax. The pick-up tax is also referred to as the Indiana "estate tax."

The pick-up tax arises only when there actually is a federal estate tax resulting after subtracting the unified estate tax credit of $192,800 (equivalent to $600,000 of federal estate taxable value) from the calculated federal estate tax.

A decedent spouse could leave a net estate of $1.2 million. As long as the surviving spouse received at least $600,000 of this net estate, there would be no federal estate tax due to the unified credit. The federal estate tax on $600,000 is $192,800, which is the amount of the unified credit. Remember that assets left to surviving spouse with certain minimum rights (such as the right to any annual income) are 100% deductible from the federal estate tax base.

However, there often is an inheritance tax without a federal estate tax. For example, a child has only a small exemption from the Indiana inheritance tax. If a child age 21 or over received $600,000 of the above $1.2 million and this amount were all subject to the inheritance tax except for the $5,000 exemption, the inheritance tax on $595,000 would be $24,950 (see Table 3, Class A beneficiary section).
Table 3. Indiana Inheritance Tax Schedule.

<table>
<thead>
<tr>
<th>Beneficiary Class</th>
<th>Exemptions</th>
<th>Inheritance Tax Brackets (thousands of dollars)*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Class A:</td>
<td></td>
<td>$0 to $25 / $50 to $100 / $200 to $300 / $500 to $700 / $1000 to $1500 / $1500 over</td>
</tr>
<tr>
<td>Natural &amp; adopted children-</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Under age 21</td>
<td>1%</td>
<td></td>
</tr>
<tr>
<td>Age 21 &amp; over</td>
<td>2%</td>
<td></td>
</tr>
<tr>
<td>Parents</td>
<td>3%</td>
<td></td>
</tr>
<tr>
<td>All other descendants, including those of adopted children &amp; lineal ancestors</td>
<td>4%</td>
<td></td>
</tr>
<tr>
<td></td>
<td>5%</td>
<td></td>
</tr>
<tr>
<td>Class B:</td>
<td>6%</td>
<td></td>
</tr>
<tr>
<td>Brothers, sisters, descendants of brothers &amp; sisters, &amp; child's spouse</td>
<td>7%</td>
<td></td>
</tr>
<tr>
<td></td>
<td>8%</td>
<td></td>
</tr>
<tr>
<td>Class C:</td>
<td>9%</td>
<td></td>
</tr>
<tr>
<td>All others</td>
<td>10%</td>
<td></td>
</tr>
</tbody>
</table>

* Each bracket starts after the top number and goes through the bottom number. For example, the second bracket, "$25 to $50".
* Transfers to a surviving spouse are 100 percent exempt from the Indiana inheritance tax.

The more children or grandchildren inheriting, the more individual exemptions and the more value taxed at lower rates.

Probate or Estate Administration

Estate administration or probate can take one of several forms, depending upon the situation and options under the law. Generally, the court procedure (probate) is designed to assure that the deceased person’s property goes to (or is titled to) the proper persons after valid claims on the estate, including taxes, have been paid.

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

Transfer of Joint Accounts and Other Personal Property

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

The same consent provisions apply for other personal property of an Indiana resident decedent, except proceeds payable under a life insurance policy. Again, there is an exception to the consent requirement for a surviving spouse. This waiver of the consent to transfer requirement for a surviving spouse became a part of the law in 1980. While the consent requirement is waived for a surviving spouse, notice of a transfer to the assessor or Department of Revenue is still required.

The 1980 amendment to the consent-to-transfer rules for a surviving spouse is logical, since as of July 1, 1979, all transfers to a surviving spouse enjoy a 100% exemption from the inheritance tax. The justification for obtaining consent before being allowed to transfer was to allow the county assessor or Indiana Department of Revenue to identify taxable inheritance and to seek assurances that the inheritance tax would be paid.
Consent should be given by the appropriate official if the transfer will not jeopardize the collection of inheritance tax. Usually, the consent to transfer is not a difficult process. However, this requirement has been viewed as awkward and an annoyance, especially by widows and widowers.

In many situations, a surviving spouse may feel an urgent need for money from what was a jointly held account and perhaps hurry the process of opening up the estate in order to obtain assistance with the consent to transfer. Thus, the waiver of the requirement for a surviving spouse to obtain consent to transfer should be helpful in allowing more deliberation before starting the estate administration process.

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

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

However, effective July 1, 1993, an Indiana law removes the requirement for the bank or other institution that rents the joint, safe deposit to a married couple to freeze the box (and report to the assessor) upon the death of one of the joint-owner spouses. Further, there is no longer a requirement nor right in the Indiana Department of Revenue or the county assessor's office to examine and inventory the contents of a safe deposit box in this limited situation.

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

In 1987, it became the practice of the Indiana Inheritance Tax Division to allow for the use of a "Permit to Examine Safety Deposit Box." Such a permit must be signed by the judge of the appropriate probate court. This permit allows only the removal of a will. The permit can be obtained without having chosen a lawyer for the estate.

Presentation of the Will

The person having possession of the decedent's will has the duty to present it to the probate court. Whether the will is admitted to probate is important since, unless it is admitted, the will is not effective. A will is not honored if presented more than three years after death or at any time after the court decrees a final distribution of estate assets. Once the will is accepted for probate, the court looks to the will to determine the testator's wishes.

In addition to the will, an affidavit of death is filed with the court. This affidavit is essential to demonstrate that there is a decedent's estate to be administered. If there is no will, this fact is documented with the court, and the appropriate order is issued to install a personal representative.

Appointment of the Personal Representative

"Personal representative" is the term provided in the law for what is commonly called an "executor" (executrix) if there is a will and an "administrator" (administratrix) if there is no will. A personal representative is the individual or corporation (trust department trustee) appointed by the probate court to take charge of the decedent's property during the probate process.

The personal representative must identify, locate, and assume control over all of the decedent's property. The personal representative must pay all lawful claims against the decedent's estate including the decedent's debts, income and estate taxes, and all expenses of administering his estate. The personal representative will usually employ a lawyer and utilize other technical service.

A personal representative (PR) must be at least 18 years of age, of sound mind, a resident or a nonresident who serves as co-personal representative with a resident, and cannot be a convicted felon. A nonresident may serve as a sole PR, but he/she must
have a resident as an agent. PRs will be recognized in the following order:

1. The PR named in the will.
2. If there is no will or none requested in will or the one designated in a will may not serve, then the surviving spouse or the nominee of the surviving spouse.
3. If there is no surviving spouse, the next of kin or their nominee.

The fact that a person or institution is named in a valid will as PR does not give the necessary authority to administer the estate. The PR must be issued "letters testamentary," in effect, be accepted by the court. If the decedent died without a will, the court will issue "letters of administration" instead.

If no petition for letters is filed within 30 days after the date of death, any other qualified person may file. A nonrelative who has an interest in the estate, such as a creditor of the decedent or a partner of the decedent, could be a qualified person.

It is important for the PR who has been named in a will—or for the party who plans to ask to be appointed—to recognize that legal counsel for administration of the estate is employed by and responsible to the PR. Generally, the counsel for the estate administration should be a lawyer of the PR's choosing. A lawyer or law firm that holds the decedent's will or drafted the will or one mentioned in the will to serve as counsel need not be the one chosen.

Traditionally, the PR posted a bond to secure his handling of the estate. Today, no bond requirement is presumed in Indiana. A bond will not be required unless the will requests it or the probate court decides one is necessary.

**Notice to Creditors**

Notice of the letters testamentary or letters of administration must be given in a public manner so as to constitute legal notice of the opening of an estate and the appointment of a personal representative. This is done by publication in a newspaper(s). Indiana law allows five months from date of public notice to permit creditors to file claims against the estate. However, law requires the estate to give actual or direct notice to those known to have a claim against the estate.

**Collection and Management of Assets**

The PR must act as if he were the decedent doing what the original owner would have done or would be required to do if he still held the property. The PR has the duty to take possession of the decedent's assets, pay taxes, collect any income and protect the property, communicate with the court, and distribute assets to the proper individuals.

**Preparation and Filing of the Inventory**

Within two months following appointment, the PR must prepare and file an inventory of the decedent's property. The inventory lists assets and their appraised value less liens, mortgages, and other debts of the estate.

Not all property owned by the decedent is subject to the probate procedure. Joint property, property held in trust, and life insurance proceeds are examples of some types of property which largely escape the probate process. However, while there may be many nonprobate assets, these asset values may be subject to estate and/or inheritance tax.

**Determining Estate and Inheritance Taxes**

For estates with modest or greater asset values, important among the PR's duties is complying with the federal estate tax and Indiana inheritance tax laws. The federal estate tax return (Form 706) and associated documents are due to be filed nine months following the subject's death. IRS Publication 448 indicates how valuable the estate assets must be before it is necessary to file a federal estate tax return. Generally, a gross estate of more than $600,000 is needed before a federal estate return must be filed.

Numerous complicated options exist in the federal estate tax rules which generally require the assistance of a tax lawyer or a skilled tax practitioner for interpretation and application. For example, three alternative provisions exist for valuation of assets for federal estate tax purposes. Farmland in some estates may be eligible for valuation at less than fair market value.
Other papers and publications concerning the special valuation of farmland for estate tax purposes are available from the author.6

If a federal estate tax return is required, a copy of the final determination of the federal estate tax must be filed with the Inheritance Tax Division of the Indiana Department of Revenue.

The Indiana inheritance tax discussed above is a tax on transfers to individuals, but the PR is viewed as an agent of the state in making collection and is personally responsible for collection of this tax as well as the federal estate tax. While the federal estate tax is a tax against the estate as a whole, the inheritance tax is a tax chargeable against the inheritance of an individual.

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

Inheritance tax arising from estates of a resident decedent is paid to the county treasurer. If paid within one year of the decedent's death, there is a 5% discount. Interest is chargeable if the inheritance tax is not paid by 18 months after death.

The Final Account

When all administration activity is completed, formal closing action can begin. Basically, this occurs when all properties have been collected and bills (including estate and inheritance taxes) have been paid. The first step in the closing of the estate is the preparation of a detailed final account. The accounting is divided into three schedules:

1. Property inventory including income generated during estate administration.
2. All claims and losses charged against the estate.
3. The balance of the property remaining in the estate and available for distribution.

Once the final account is completed, the PR can petition the court to approve it and request that the court grant the authority to make final distribution to the heirs. Notice of the hearing must be given to all interested persons.

If the court is fully satisfied, a decree of final distribution will be granted. The court must (1) approve the PR’s and attorney’s fees, (2) find that the final account is completed, (3) find that all Indiana inheritance and federal estate taxes have been paid, (4) find that all creditors have been paid, and (5) find that the proposed distribution to each heir is equitable and reasonable.

Supplemental Report and Discharge

At this point, the PR is not done. Distribution of the assets to the heirs may still be incomplete.

A supplemental report is filed to inform the court of these activities. If the court approves, the PR then requests from the judge a discharge from any further responsibility. Once discharged, the estate is officially closed.

Delay in Closing the Estate

Normally, estate administration (probate) involves a lawyer representing a PR before the probate court. The administration of the estate is done with direct court supervision at all steps in the process. For practical purposes, the estate may be open for one to three years or until a federal estate tax clearance is received from the IRS.

Estates may remain open because of a backlog in the processing of estate tax returns that are being audited in the IRS Estate and Gift Tax Division. The final estate and inheritance taxes will depend upon the valuation figures settled upon with the IRS. Thus, both the federal estate tax and Indiana inheritance tax may be the only unsettled issues. If there is no estate tax return due, a closing may be possible within a year after death.

If the estate tax is a significant amount and there is some likelihood of a dispute with the IRS, distributions of assets to the heirs may be totally or partially delayed. The PR is liable to both the federal and state governments for the proper tax. Thus, the PR should be sure that assets are readily available to pay the ultimate tax.

Many other factors, including PR and legal counsel procrastination, can add to the normal and necessary delays preventing the closing of an estate. But for estates which are required to file an estate tax return, the delay in the closing of the estate is not the fault of the probate process and may not be the fault of the PR or the legal counsel.
Special Administration Procedures

As a technical matter, "probate" means proving of the will with the local "probate" court overseeing this process. Will "proving" or disputes are infrequent since there is usually no legal basis to question the will. In order to reduce the cost of routine estate administration, state law may permit a less formal procedure than that described above. What is allowed is a procedure that reduces court involvement in the estate administration process.

Unsupervised Administration

Unsupervised administration is an alternative to the normal method. Unsupervised administration is conducted without court supervision at each intervening step so long as all interested persons and the probate court concur. The interested parties that must agree to permit an unsupervised administration once the estate is opened are those who stand to take from the estate by will or by law where there is no will.

Further, unsupervised administration is not available unless the estate is solvent, the PR is willing and qualified to act independently, and the will is free of a request to the contrary. Beneficiaries are given direct notice of the request for an unsupervised administration and are advised by this notice that they may object to an unsupervised administration. The unsupervised administration may simplify and expedite the administration process and reduce PR and legal counsel fees. Unsupervised administration does not shorten the notice period for creditors to come forward with claims. It does not suggest that the administration should be "casual" or sloppy. Prudent conduct is required, and the beneficiaries are entitled to a detailed accounting of the estate assets.

No Administration

No administration is a third kind of administration which is a dispensing with administration. It may be applied when the value of the probate assets, less liens and encumbrances, does not exceed $15,000. In this case, no PR need be appointed. An affidavit procedure can be carried out days after death of the decedent to document a lawful distribution of assets.

No administration procedures could be considered when the decedent's wealth is far greater than $15,000 after subtracting estate debts. Many decedent's assets, such as joint property, life insurance proceeds, living trust assets, retirement benefits, and other contractual arrangements are not probate assets. Joint accounts and other nonprobate assets can be used to pay valid claims if these claims cannot be paid with other assets.

Summary Administrative Procedure

A summary administrative procedure is available when an estate is less than allowances, costs, expenses of administration, and funeral expenses. Where this situation presents itself, the PR may be allowed to make distribution of what assets are available to those who are entitled to them by law.

The law provides a priority for who gets paid first when assets do not equal debts and allowances. This procedure is "summary" in the sense that the PR can have an accounting and be discharged without waiting the five months normally required for all claims to be presented.
Notes

1 This section benefits from a public service publication of the Indiana State Bar Association, *ESTATES: Property Ownership and Death Taxes*. Numerous pamphlets are available from the Indiana State Bar Association, 230 East Ohio Street, Indianapolis, IN 46204.

2 Indiana law does permit a "nuncupative" (oral) will but only for transfer of personal property of $1,000 or less (unless in the military in time of war—then the limit is $10,000) when a person is in imminent peril of death and the person dies of the impending peril. To be upheld, the nuncupative will must have been declared before two disinterested witnesses and then put in writing within 30 days of death under the direction of at least one of the witnesses. The nuncupative will does not revoke an existing will; it only brings an adjustment up to the satisfaction of the maximum $1,000 (or $10,000) limit.

3 The Indiana inheritance tax law and rulings are in a booklet *Indiana Inheritance Tax Statutes, Regulations, Comments, Tables, and Cases (Revised 1990)* available from the Inheritance Tax Division, Indiana Department of Revenue, Government Center North N248, 100 North Senate Avenue, Indianapolis, IN 46204 (Phone: 317/232-2156). This information indicates the deductions that are allowed in arriving at taxable transfers.

4 For details on the federal estate and gift tax, see IRS Publication 448 or write: Gerald A. Harrison, Department of Agricultural Economics, Purdue University, 1145 Krannert Building, West Lafayette IN 47907-1145. (Phone: 317/494-4216).

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

6 See the author's address in note 4 above.
Cooperative Extension work in Agriculture and Home Economics, state of Indiana, Purdue University, and U.S. Department of Agriculture cooperating; H. A. Wadsworth, Director, West Lafayette, IN. Issued in furtherance of the acts of May 8 and June 30, 1914.

The Cooperative Extension Service of Purdue University is an affirmative action/equal opportunity institution.