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Wills: Indiana

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Status: **Law stated as of 07 Nov 2024** | Jurisdiction: **Indiana, United States**

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A Q&A guide to the law of wills in Indiana. This Q&A addresses state laws and customs that impact wills, including the key statutes and rules related to wills and electronic wills, the rules of intestacy, the requirements for creating a valid will or electronic will, common will provisions, information concerning fiduciaries, and information regarding making changes to wills after execution, special circumstances regarding gifts made under a will or gift recipients, and lost wills. Answers to questions can be compared across a number of jurisdictions (see Wills: State Q&A Tool).

Key Statutes and Rules

1. What are the key statutes and rules that govern wills in your state?

Indiana's Probate Code governs:

- The execution of wills (Ind. Code Ann. §§ 29-1-5-1 to 29-1-5-9).
- Intestate succession (Ind. Code Ann. §§ 29-1-2-0.1 to 29-1-2-15).
- Family allowances (Ind. Code Ann. §§ 29-1-4-0.1 and 29-1-4-1).
- Taking against wills (Ind. Code Ann. §§ 29-1-3-0.1 to 29-1-3-8).
- Administration issues (Ind. Code Ann. §§ 29-1-7-0.1 to 29-1-9-3).
- Personal representatives (Ind. Code Ann. §§ 29-1-10-0.1 to 29-1-11-11).
- Claims (Ind. Code Ann. §§ 29-1-14-0.1 to 29-1-14-21).

Who Can Create a Will

2. Is there a minimum age requirement to create a will?

To create a will in Indiana, a person must be either:

- At least 18 years old.
- A member of the armed forces or merchant marine.

(Ind. Code Ann. § 29-1-5-1.)

3. What is the standard of mental capacity required to create a will?

The Indiana standard for testamentary capacity requires a testator to have a sound mind (Ind. Code Ann. § 29-1-5-1). Sound mind is the mental capacity sufficient to:

- Know the extent and value of the testator's property.
- Know the number and names of the persons who are the natural objects of the testator's bounty.
- Retain the facts necessary to direct the making of a will.

(*Ramseyer v. Dennis*, 116 N.E. 417, 418 (Ind. 1917); *In re Rhoades*, 993 N.E.2d, 291, 299 (Ind. Ct. App. 2013).)

Under this standard, even individuals who have been adjudicated as incapacitated may have sufficient capacity to make a will. There is generally a presumption of testator capacity and the will challenger has the initial burden of establishing lack of testamentary capacity (*In re Rhoades*, 993 N.E.2d at 299). In the case of an adjudicated incapacity, it is easier to shift the burden to the will proponent (see *Ramseyer*, 116 N.E. at 418).

4. Can an agent under a power of attorney create a will on behalf of a testator?

Indiana law does not authorize an agent acting under power of attorney to create a will for the testator. However, if a testator acknowledges to attesting witnesses that an instrument is the testator's will, any person can sign the testator's name:

- At the testator's direction.
- In the testator's presence.
- In the presence of two or more attesting witnesses.

(Ind. Code Ann. § 29-1-5-3(b).)

Permissible Form of Will

5. What form must the will take? In particular, please specify whether:

- Handwritten (holographic) wills are permitted.
- Oral (nuncupative) wills are permitted.
- Contractual wills are permitted.
- Statutory wills are permitted.
- Electronic wills are permitted.
- Out-of-state wills are binding.

Handwritten (Holographic) Wills

A holographic will is a will that is handwritten by the testator in its entirety and signed but not witnessed. Holographic wills are generally not valid in Indiana. However, a will handwritten by the testator and executed with the witness and other formalities required for a valid will in Indiana is valid under Indiana law (Ind. Code Ann. §§ 29-1-5-1 to 29-1-5-9). The execution requirements for wills are still necessary (see Question 6).

Oral (Nuncupative) Wills

A nuncupative will is an oral will. Oral wills are permitted in Indiana only if:

- The testator:
  - is in imminent peril of death;
  - dies because of that impending peril; and
  - declares the will before two disinterested witnesses.
- The will is:
  - reduced in writing by or under the direction of one of the witnesses within 30 days after the declaration; and
  - submitted for probate within six months after the testator's death.

(Ind. Code Ann. § 29-1-5-4(a).)

An oral will may only dispose of personal property not exceeding an aggregate value of $1,000. If the testator is an active military servicemember in a time of war, the aggregate value is increased to $10,000 (Ind. Code Ann. § 29-1-5-4(b)).

If the testator who makes an oral will has an existing will, the oral will acts only as a codicil. The provisions of the oral will only change the existing will to the extent necessary to give effect to the gifts made under the oral will. (Ind. Code Ann. § 29-1-5-4(c).)

Contractual Wills

A testator's contractual agreement to make a testamentary disposition may be valid in Indiana. The enforcement of this type of contract is typically done through the filing and prosecution of a claim in the testator's estate. (see *Markey v. Est. of Markey*, 38 N.E.3d 1003, 1007-08 (Ind. 2015).)

Statutory Wills

A statutory will is a form will provided under state statute where a testator fills in blanks and checks boxes related to certain will provisions.

Indiana law does not provide a statutory will.

Electronic Wills

Indiana permits electronic wills executed on or after July 1, 2018 (Ind. Code Ann. §§ 29-1-21-1 to 29-1-21-18). An electronic will is an instrument initially created and maintained as an electronic record that contains both:

- The electronic signatures of the testator and attesting witnesses.

- The date and times of the electronic signatures.

(Ind. Code Ann. § 29-1-21-3(10).)

For information on the execution, attestation, and self-proving requirements for electronic wills, see Question 6: Electronic Will Execution and Self-Proving Requirements.

Many Indiana courts converted to e-filing of petitions and various documents (see Indiana Judicial Branch, Where e-filing is available mandatory or coming soon). The courts accept or require the filing of probate administration cases electronically, including the filing of an originally executed will as an electronic document rather than submitting the original will to the probate court. For more information on e-filing in Indiana, see the Indiana Judicial Branch's E-filing User Guide.

Out-of-State Wills

Indiana refers to out-of-state wills as foreign wills. A foreign will is lawful in Indiana if, at the time the will was executed or at the testator's death, the will was executed according to laws of either:

- Indiana.
- The jurisdiction where the testator was:
  - located at execution;
  - domiciled at execution; or
  - domiciled at death.

(Ind. Code Ann. § 29-1-5-5.)

Counterpart Wills

Indiana allows testators to execute counterpart wills. A counterpart will is one involving multiple copies of the will, with the testator's signature on one copy and the signature of the witnesses on one or more identical counterparts. To be a valid counterpart will, these copies must then be assembled into a single composite document that contains all signatures.

Counterpart wills must be in tangible, readable paper form and comply with the execution requirements under Ind. Code Ann. § 29-1-5-3(c)-(e) (see Question 6: Counterpart Wills).

Will Execution Requirements

6. What are the execution requirements for a valid will? In particular, please specify:

- Requirements for the testator's signature.
- Any requirements for witnesses to a will.
- Any requirements for the will to be notarized.
- An example of an attestation clause.
- The requirements for a self-proving affidavit.
- If electronic wills are permitted, any different execution requirements.

Testator's Signature

For a will to be valid in Indiana, the testator must signify to at least two witnesses that the instrument is the testator's will and either:

- Sign the will.
- Direct another person to sign the testator's name in the testator's presence. This is typically only done when the testator is not able to sign because of a physical incapacity.
- Acknowledge the testator's signature to the witnesses, if the testator signed the will before the witnesses were present.

(Ind. Code Ann. § 29-1-5-3(b)(1).)

The testator must sign any self-proving clause attached to the will. However, separate signatures for the will and self-proving affidavit are not required. A single signature of each of two witnesses in each other's presence and in the testator's presence serves to witness the will and to make the will self-proving (Ind. Code Ann. § 29-1-5-3.1(a); *Dellinger v. First Source Bank*, 793 N.E.2d 1041, 1043-45 (Ind. 2003)). If the testator and witnesses cannot be in the same physical space, statute allows them to use real-time, two-way technology and still be considered in one another's presence (Ind. Code Ann. § 29-1-1-3(15), (16)). For more information on self-proving clauses, see Self-Proving Affidavit.

Witness Requirements

In Indiana, for a valid will, the witnesses must be competent to be witnesses when the will is executed and both:

- Either:
  - witness the testator's signature to the will;
  - witness the signature of someone who signs the will at the testator's direction; or
  - have the testator acknowledge the testator's signature to the witnesses if the testator previously signed the will.
- Execute the will or a self-proving clause attached to the will in the testator's and each other's presence.

(Ind. Code Ann. §§ 29-1-5-2 and 29-1-5-3; *Scampmorte v. Scampmorte*, 179 N.E.2d 302, 306-10 (Ind. Ct. App. 1960).)

If the testator and witnesses cannot be in the same physical space, statute allows them to use real-time, two-way technology and still be considered in one another's presence (Ind. Code Ann. § 29-1-1-3(15), (16)).

A will beneficiary should not serve as a witness. If a beneficiary serves as a witness and the will cannot be proved without that beneficiary's testimony or signature, the will generally is void as to that beneficiary and persons claiming under that beneficiary. However, if the beneficiary would be entitled to a distributive share of the testator's estate except for the will, the beneficiary can claim the lesser of the share they would be entitled to:

- Except for the will.
- Under the will.

(Ind. Code Ann. § 29-1-5-2.)

Notary Requirements

There is no requirement for a will or a self-proving affidavit to be notarized in Indiana and they are not typically notarized. However, certain electronic wills and wills executed in counterpart may require an affidavit of compliance from an attorney or a directed paralegal supervising the execution. For more information on counterpart affidavits of compliance and counterpart wills, see Affidavits of Compliance and Counterpart Wills.

Sample Attestation Clause

An attestation clause is typically added to Indiana wills in the following form:

"Signed, sealed, published and declared by [TESTATOR NAME], the Testator above named, as and for Testator's Last Will and Testament, in our presence, and we, in Testator's presence, and in the presence of each other, have hereunto subscribed our names as witnesses on [MONTH] [DAY], [YEAR]."

The witnesses sign the will and provide their addresses in the space directly below the attestation clause.

Self-Proving Affidavit

A self-proving affidavit, sometimes referred to in Indiana as a self-proving clause, is not required to create a valid will. However, generally a will that is self-proved is admitted to probate without having to submit additional proof that the will was properly executed (Ind. Code Ann. § 29-1-5-3.1). Therefore, it is common practice to include a self-proving affidavit with every will.

The form of a self-proving affidavit is codified in Ind. Code Ann. § 29-1-5-3.1. The will usually includes this form at the end of the instrument. The testator and witnesses sign it during the will execution. (Ind. Code Ann. § 29-1-5-3.1(d).)

The will and self-proving affidavit do not each require separate testator and witness signatures. A single signature of each of the two witnesses in each other's presence and in the signing testator's presence accomplishes the witnessing and self-proving of the will. (Ind. Code Ann. § 29-1-5-3.1(a); *Dellinger*, 793 N.E.2d at 1043-45.)

If the testator executes the will and the witnesses execute it with only an attestation clause and no self-proving affidavit, the will may later be made self-proving by attaching a self-proving clause signed by the testator and the witnesses that meets the requirements of the statute (Ind. Code Ann. § 29-1-5-3.1(b)).

Special Execution Requirements Related to COVID-19

On March 31, 2020, in response to the COVID-19 pandemic, the Indiana Supreme Court issued an order modifying the execution requirements for wills

and codicils signed and witnessed between March 31, 2020 and January 1, 2021. The order modifies the normal requirement that a will or codicil be executed in the actual presence of witnesses, and allows for a will or codicil to be executed remotely if:

- The remote witnesses and testator can positively identify one another and see the execution of the document.
- The document:
  - specifically references the Indiana Supreme Court order before the attestation or self-proving clause; and
  - describes the methods used for the remote appearance and signatures, including the specific technology platform and electronic process used.

(*In re Emergency Procedures for the Witnessing of Wills Relating to the 2019 Novel Coronavirus (COVID-19)*, 145 N.E.3d 787 (May 29, 2020).)

Wills and codicils executed under these provisions between March 31, 2020 and January 1, 2021 do not need to be re-executed with the normal statutory formalities (Ind. Stat. Ann. §§ 29-1-5-3.3 and 29-1-21-4.1).

Electronic Will Execution and Self-Proving Requirements

Executing an Electronic Will

An electronic will must:

- Include either:
  - the testator's electronic signature; or
  - the electronic signature of another adult individual, who is not an attesting witness, made at the testator's direction.
- Be attested to by the electronic signatures of at least two witnesses, who may be remote witnesses.

(Ind. Code Ann. § 29-1-21-4(a).)

The testator must state, in the presence of the attesting witnesses, that the instrument to be electronically signed is the testator's will (Ind. Code Ann. § 29-1-21-4(a)(3)). The testator, or another adult individual at the testator's direction and not an attesting witness, must electronically sign the electronic will in the attesting witnesses' presence. The attesting witnesses must electronically sign the electronic will in the testator's and each other's presence. (Ind. Code Ann. § 29-1-21-4(a)(1), (4), (5).) If the testator and witnesses cannot be in the same physical space, statute allows them to use real-time, two-way technology and still be considered in one another's presence (Ind. Code Ann. § 29-1-1-3(15), (16)).

An electronic signature is both:

- An electronic sound, symbol, or process attached to or logically associated with an electronic record.
- Executed or adopted by a person with the intent to sign the electronic record.

(Ind. Code Ann. §§ 29-1-21-3(9) and 26-2-8-102(10).)

The testator and attesting witnesses must comply with both:

- The prompts issued by the software used to perform the electronic signing.
- The instructions given by any person responsible for supervising the execution of the electronic will.

(Ind. Code Ann. § 29-1-21-4(a)(2).)

The testator or other adult individual who is not an attesting witness and acts for the testator must command the software application or user interface to finalize the electronically signed electronic will as an electronic record. This may include any:

- Identity verification evidence pertaining to the testator.
- Document integrity evidence for the electronic will.

(Ind. Code Ann. § 29-1-21-4(a)(6).)

Affidavits of Compliance

Electronic wills may be witnessed and executed remotely, and the testator and witnesses do not need to be in each other's physical presence. However, when executing an electronic will in this fashion, the execution must be supervised by an attorney or a directed paralegal. (Ind. Code Ann. § 29-1-21-4(b).) A directed paralegal is a non-lawyer assistant who is employed or retained by a licensed attorney and whose works that attorney directly supervises (Ind. Code Ann. § 29-1-1-3(a)(9)).

Within a reasonable amount of time after the attorney or directed paralegal witnesses a remotely executed electronic will, they must sign an affidavit of compliance certifying that the electronic will was

executed in compliance with statutory formalities. This affidavit must include:

- The name and residential address of the testator.
- The name and residential or business address of each witness.
- The address, city, and state where the testator was physically located at execution.
- The city and state where each witness was physically located at execution.
- A description of the method and form of identification used to confirm the identity of the testator to the witnesses and supervising attorney or directed paralegal.
- A description of the method used by the testator, witnesses, and supervising attorney or directed paralegal to interact with each other during the signing process.
- A description of the electronic method used to record the signature of the testator and witnesses.
- The name, telephone number, and business or residential address of the attorney or directed paralegal supervising the process.
- Other information the attorney or directed paralegal considers relevant to determining:
  - the testator's capacity; and
  - the testator's and witnesses' compliance with the execution formalities.

(Ind. Code Ann. § 29-1-21-4(c).)

The party who files a petition to probate an electronic will also files the affidavit of compliance with the electronic will. If a remote electronic will is offered for probate without the supervision of an attorney or directed paralegal, the will is voidable:

- At the discretion of the court.
- On an objection to probate under Ind. Code Ann. § 29-1-7-16.
- On a timely will contest under Ind. Code Ann. § 29-1-7-17.

(Ind. Code Ann. § 29-1-21-4(d).)

Self-Proving an Electronic Will

A testator may self-prove an electronic will both:

- At signing.
- Before the will is electronically filed.

The testator may also create an electronic will without self-proving it. (Ind. Code Ann. § 29-1-21-4(e).)

A self-proving clause must be:

- Attached to the electronic will.
- Substantially in the following statutory form:

  "We, the undersigned testator and the undersigned witnesses, whose names are signed to the attached or foregoing instrument, declare:

  (1) That the testator executed the instrument as the testator's will.

  (2) That, in the presence of both witnesses, the testator signed the will or directed another individual who is not one of the witnesses to sign for the testator in the testator's presence and in the witnesses' presence;

  (3) That the testator executed the will as a free and voluntary act for the purposes expressed in it;

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

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

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

(Ind. Code Ann. § 29-1-21-4(f).)

The testator and attesting witnesses may each provide a single signature for any electronic will that includes a self-proving clause and do not have to separately sign the electronic will and self-proving clause (Ind. Code Ann. § 29-1-21-4(f)).

For more information on electronic wills, see Question 5: Electronic Wills.

Counterpart Wills

In Indiana, wills may be executed in counterpart. In a counterpart will, there are multiple identical copies of the will, one signed by the testator and one or more additional counterparts signed by the witnesses. A counterpart will must:

- Be in tangible, readable form.
- Be created under the supervision of an attorney or directed paralegal.

(Ind. Code Ann. § 29-1-5-3(c).)

After execution, the testator, or another individual at the testator's direction, must assemble the counterparts of the will and signatures of the testator and witnesses within five business days. If the testator has directed another to assemble the separate potions into a single document, the five-day period does not start until the individual receives all the separately signed counterparts. If the testator dies after executing the will, but before compiling the composite document, the validity of the will is not affected. Scanned copies or photocopies of the composite document containing all the signatures may be validly presented for filing (Ind. Code Ann. § 29-1-5-3(c).)

The supervising attorney or directed paralegal must also complete an affidavit of compliance certifying that the statutory formalities have been met. The affidavit must include:

- The name and residential address of the testator.
- The name and residential or business address of each witness.
- The address, city, and state where the testator was physically located when they signed a counterpart.
- The city and state where each attesting witness was physically located when they signed a counterpart.
- A description of the method used to confirm the identity of the testator to the witnesses and supervising attorney or directed paralegal.
- A description of the audiovisual or other method used by the testator, witnesses, and supervising attorney or directed paralegal to interact with each other in real time during the signing process.
- A description of the method used by the testator and witnesses to identify each page break in the will and verify that the separate counterparts were identical in content.
- A general description of how and when the attorney or directed paralegal combined the counterparts into a single document.
- The name, telephone number, and business or residential address of the supervising attorney or directed paralegal who supervised the execution and witnessing.
- Other information the attorney or directed paralegal considers relevant to determining:
  - the testator's capacity; and
  - the testator's and witnesses' compliance with the execution formalities.

(Ind. Code Ann. § 29-1-5-3(d).)

The party filing a petition to probate a counterpart also files the affidavit of compliance with the counterpart will. If a counterpart will is offered for probate without the supervision of an attorney or directed paralegal, the will is voidable:

- At the discretion of the court.
- On an objection to probate under Ind. Code Ann. § 29-1-7-16.
- On a timely will contest under Ind. Code Ann. § 29-1-7-17.

(Ind. Code Ann. § 29-1-5-3(e).)

A self-proving clause must be attached to the counterpart will and substantially in the following statutory form:

"We, the undersigned testator and undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument, declare the following:

(1) That the undersigned testator and witnesses interacted with each other in real time through the use of technology, and each witness was able to observe the testator and other witnesses throughout the signing process.

(2) That the testator executed a complete counterpart of the instrument, in a readable form on paper, as the testator's will.

(3) That, in the presence of both witnesses, the testator:

(A) signed the paper counterpart of the will;

(B) acknowledged the testator's signature already made; or

(C) directed another individual to sign the paper counterpart of the will for the testator in the testator's presence.

(4) That the testator executed the will as a free and voluntary act for the purpose expressed in the will.

(5) That each of the witnesses, in the presence of the testator and of each other, signed one (1) or more other complete paper counterparts of the will as a witness.

(6) That each paper counterpart of the will that was signed by the witness was complete, in readable form, and with content identical to the paper counterpart signed by the testator.

(7) That the testator was of sound mind when the will was executed.

(8) That, to the best knowledge of each witness, the testator was at least eighteen (18) years of age at the time the will was executed or was a member of the armed forces or of the merchant marine of the United States or its allies."

(Ind. Code Ann. § 29-1-5-3.1(e).)

Limitations on Gifts to Fiduciaries and Attorney Draftsperson

7. Are there any limitations on beneficiaries a testator can name in a will? In particular, please specify if a will can provide for gifts to:

- Executors.
- Gifts to trustees named in the will.
- Gifts to guardians.
- The lawyer who drafted the will.

Gifts to Executors

In Indiana, a will can generally provide for gifts to executors. Individuals may serve as executor even though they may also:

- Be a beneficiary.
- Have a claim against an estate.

(See *In re Est. of Baird*, 408 N.E.2d 1323, 1328-29 (Ind. Ct. App. 1980).)

Gifts to Trustees Named in the Will

A will generally can provide for gifts to trustees named in the will. There is no authority prohibiting these gifts.

Gifts to Guardians

A will generally can provide for gifts to guardians named in the will. There is no authority prohibiting these gifts.

Gifts to Lawyer Draftsperson

Gifts in a will to the lawyer drafting the will are generally disfavored. A gift to the drafting lawyer may be voidable based on undue influence (IN ST RPC Rule 1.8, cmt. 6). When a testator makes a substantial gift in a legal instrument such as a will or conveyance, the client should have the independent advice of another lawyer concerning the preparation of the legal instrument (IN ST RPC Rule 1.8, cmt. 7).

A lawyer must not solicit any substantial gift from a client, including a testamentary gift, or prepare for a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the client is a relative of the drafting attorney (IN ST RPC Rule 1.8(c)).

Rights of Family Members to Inherit

8. Are a testator's will bequests affected by community property laws, elective share laws, or other local laws that prohibit a testator from excluding a beneficiary from taking a share in the estate? In particular, please specify if a will can disinherit:

- The testator's spouse.
- A child of the testator.

In Indiana, both surviving spouse and surviving children may have the rights to a family allowance, and the surviving spouse may have the right to elect against the will and receive a portion of the probate assets of the deceased (Ind. Code Ann. §§ 29-1-3-1 to 29-1-4-1).

Disinheriting a Testator's Spouse

Surviving Spouse's Allowance

Regardless of any disinheritance language in the will or the failure to provide for a surviving spouse in the will, the surviving spouse of a decedent who was domiciled in Indiana at death is entitled to an allowance of $25,000 from the decedent's probate estate (Ind. Code Ann. § 29-1-4-1). This is a statutory allowance and is not treated as a will contest or other claim against the estate (Ind. Code Ann. § 29-1-4-1(c)).

Spouses may agree in a prenuptial agreement to prevent a surviving spouse from asserting a claim for an allowance (*Beatty v. Beatty*, 555 N.E.2d 184, 189 (Ind. Ct. App. 1990)).

Surviving Spouse's Election

In addition to the spousal allowance, the surviving spouse is entitled to take against the will of a deceased spouse (Ind. Code Ann. §§ 29-1-3-1 to 29-1-3-7). On electing against the will, the surviving spouse in most circumstances is entitled to one-half of the deceased's net personal and real property, which is an elective share of the deceased's net probate estate (Ind. Code Ann. § 29-1-3-1).

A valid *inter vivos* trust does not pass under the laws of descent and distribution. Therefore, it is not part of the decedent's probate estate and its assets are not subject to the spouse's election to take against the will.

The surviving spouse's elective share is either:

- One-half of the deceased's net personal and real property.
- One-third of the net personal estate of the deceased plus 25% of the net fair market value of the real property (minus the value of liens and encumbrances on the real property) if:
  - the surviving spouse is a second or subsequent spouse;
  - the surviving spouse did not have any children with the deceased; and
  - the deceased left children or descendants by a previous spouse.

(Ind. Code Ann. § 29-1-3-1(a).)

A surviving spouse that elects against the will is not precluded from also taking the spousal allowance. Common practice in Indiana is for surviving spouse to take against will and file claim for spousal allowance if it makes sense. Spouses can waive the surviving spouse's election rights in a prenuptial or postnuptial agreement (Ind. Code Ann. § 29-1-3-6; *Boetsma v. Boetsma*, 768 N.E.2d 1016, 1024 (Ind. Ct. App. 2002)).

A revocable trust may be subject to the spouse's rights of election if the trust receives property from the settlor's estate (Ind. Code Ann. § 30-4-2-16). If the purpose of the trust agreement was to avoid the spouse's elective share, the assets of the trust may be subject to the spousal election (*In re Est. of Weitzman*, 724 N.E.2d 1120, 1123 (Ind. Ct. App. 2000)).

Disinheriting a Child of the Testator

If there is no surviving spouse, the deceased's children who are under 18 years of age at the time of the decedent's death are entitled to an allowance of $25,000 from the decedent's probate estate. This allowance is divided equally among those minor children. Adult children are not entitled to this allowance. (Ind. Code Ann. § 29-1-4-1(a).)

Unlike the surviving spouse, the children of the deceased have no right to elect against the will of the deceased and only have a right to claim the allowance if there is no surviving spouse. However, decedent's children born after the will's execution may be entitled to a share of the decedent's estate (see Question 14: After-Born Children).

Common Will Provisions

9. Discuss specific provisions commonly found in a will and the rules that apply to these provisions in your state. In particular, please discuss the following provisions and their effect:

- Incorporation by reference.
- Disposition of remains or funeral wishes.
- No-contest clause.
- Rule against perpetuities.
- Sample rule against perpetuities clause.

Incorporation by Reference

Indiana allows incorporation by reference of documents outside of the will. For a will to validly incorporate another writing by reference, generally:

- The will must refer to the writing.
- The writing must be clearly identified.
- The writing must be in existence at:
  - the will's execution; and
  - the decedent's death.

(Ind. Code Ann. § 29-1-6-1(h); *Bircher v. Wasson*, 44 180 N.E.2d 118, 126 (Ind. Ct. App. 1962).)

When revocable trusts are used, Indiana practitioners typically draft a pour-over will with the revocable trust. The pour-over will typically incorporates the revocable trust by reference to become part of the will if the trust becomes invalid as the result of some irregularity. Since the terms of the trust are incorporated by reference into the will, the executor can follow the terms of the trust.

The trust must exist before the will may validly incorporate it (Ind. Code Ann. § 29-1-6-1(h)). Therefore, when executing a revocable trust and pour-over will, the settlor should sign the revocable trust agreement before the will to comply with the law for incorporation by reference.

Incorporation by Reference for Distribution of Tangible Personal Property

Indiana allows for a will to incorporate by reference a written statement or list disposing of items of tangible personal property, other than property used in trade or business, not otherwise specifically disposed of by the will. The writing must:

- Be referred to in the will.
- Be signed by the testator.
- Refer to the items and beneficiaries with reasonable certainty.

(Ind. Code Ann. § 29-1-6-1(m).)

The writing may be prepared before or after the execution of the will and may be changed by the testator after the writing is prepared (Ind. Code Ann. § 29-1-6-1(m)).

Disposition of Remains or Funeral Wishes

A will generally may include specific burial, cremation, or other directions for the disposition of the testator's remains, though there is no specific authorizing statute. However, the practitioner should be mindful that the will is often not reviewed or discussed until after the disposition of the testator's remains. Clients are advised to execute funeral planning declarations under Ind. Code Ann. §§ 29-2-19-1 to 29-2-19-19 and look to other means, including the use of a healthcare advance directive under Ind. Code Ann. §§ 16-36-7-1 to 16-36-7-44 combined with discussions with family members, to direct disposition of remains (Ind. Code Ann. § 29-2-19-17).

A decedent's health care advanced directive can control the disposition of the decedent's remains (Ind. Code Ann. § 16-36-7-38). A decedent may also execute a separate funeral planning declaration (Ind. Code Ann. §§ 29-2-19-1 to 29-2-19-19). The testator must be careful not to include conflicting directions in different planning documents.

The right to control disposition of a decedent's body, to make arrangements for funeral services, and to make other ceremonial arrangements after death is granted to the following persons in the following order:

- The person granted authority under the funeral planning declaration.
- The person named in a US Department of Defense Record of Emergency Data form, if the decedent died while serving in any branch of the US Armed Forces.
- A person specifically granted the authority under a power of attorney or healthcare power of attorney or healthcare advance directive.
- The surviving spouse.
- Surviving adult children, acting by majority.
- Surviving parents.
- Surviving siblings, acting by majority.
- A guardian appointed under Ind. Code Ann. § 29-3-5-3.
- Other specified family members within specified degrees of kinship, including stepchildren.
- The personal representative.
- Any other person willing to act and arrange for the final disposition of the decedent's remains.

(Ind. Code Ann. § 29-2-19-17.)

No-Contest Clause

A no-contest clause, also called an *in terrorem* clause, is an optional provision in a will. The main purpose of a no-contest clause is to discourage beneficiaries from challenging the will or any of its provisions.

As of July 1, 2018, no-contest clauses are valid and enforceable under the express terms of the clause. However, a no-contest clause does not apply to any:

- Action brought by a beneficiary if good cause is found by a court.
- Action brought by an executor or other fiduciary of a will that incorporates a no-contest clause, unless the executor or other fiduciary is a beneficiary against whom the no-contest clause is otherwise enforceable.

- Agreement, including a non-judicial settlement agreement, among beneficiaries and any other interested persons to settle or resolve any other matter relating to a will or an estate.
- Action to determine whether a proposed or pending motion or proceeding constitutes a contest.
- Action brought by or on behalf of a beneficiary to seek a ruling on the construction or interpretation of a will.
- Action or objection brought by a beneficiary, an executor, or other fiduciary that seeks a ruling on:
  - proposed distributions;
  - fiduciary fees; or
  - any other matter where a court has discretion.
- Action brought by the attorney general, if good cause is shown to do so, that seeks a ruling regarding the construction or interpretation of either:
  - a will with a charitable trust or bequest; or
  - a no-contest clause provision contained in a will or trust that purports to penalize a charity or charitable interest.
- Action brought by the attorney general that institutes any other proceedings relating to an estate or trust if good cause is shown to do so.

(Ind. Code Ann. § 29-1-6-2(b).)

The statute is silent on whether no-contest clauses in wills executed before July 1, 2018 are presently valid. If a testator wants to ensure the validity of a no-contest clause included in a will executed before that date, the testator should execute a codicil to the testator's will including the no-contest clause.

Rule Against Perpetuities

Indiana has generally adopted the uniform statutory rule against perpetuities (Ind. Code Ann. §§ 32-17-8-1 to 32-17-8-6). A non-vested property interest in a trust is valid only if the interest when created is certain to vest or terminate not later than either:

- 21 years after the death of an individual then alive whose life is used for measuring.
- Within 360 years after the interest creation, unless the terms of the trust require that all beneficial interests in the trust vest or terminate within a lesser period of time.

(Ind. Code Ann. § 32-17-8-3(a).)

Sample Rule Against Perpetuities Provision

"The Maximum Duration for Trusts is the longest period that property may be held in trust under this Last Will and Testament under the applicable rules governing perpetuities, vesting, accumulations, the suspension of alienation and the like (including any applicable period in gross such as twenty-one (21) years or three hundred and sixty (360) years). If under those rules the Maximum Duration for Trusts shall be determined (or alternatively determined) with reference to the death of the last survivor of a group of individuals alive upon the Settlor's death [or the Settlor's Wife's death], or at such other time that the application of such rules limiting the maximum duration of trusts is deemed to begin, those individuals shall consist of those measuring lives described in the paragraph below entitled "Measuring Lives."

The measuring lives under the paragraph above entitled "Maximum Duration for Trusts Defined" shall consist of those of the [DESIRED MEASURING LIVES] and their respective descendants who are living at the time that the application of such rules limiting the maximum duration of trusts is deemed to begin."

Executors

10. What are the rules regarding executor appointments in your state? In particular, please discuss:

- The terminology that is used to identify the person who is in charge of the estate (referred to here as the executor).
- Criteria for qualifying as an executor, including limitations on who a testator can name as executor.
- Rules regarding compensation of executors.
- Whether the drafting attorney can serve as executor.
- Priority rules for appointment of executor if the named executor fails to qualify.
- Who has authority to act when there are multiple executors.

Terminology Used to Identify Person in Charge of Estate

In Indiana, the person in charge of administering the estate is called the personal representative, and the term personal representative generally refers to an executor, administrator, administrator with the will annexed, administrator *de bonis non*, and special administrator (Ind. Code Ann. §§ 29-1-1-3(a)(30) and 29-1-10-1 to 29-1-10-21).

Qualification as Executor

A person is disqualified from acting as personal representative if the person is:

- Under 18 years old.
- Incapacitated, unless the incapacity is physical in nature only.
- A convicted felon.
- A resident corporation not authorized to act as a fiduciary in Indiana.
- Any individual the court finds unsuitable.

(Ind. Code Ann. § 29-1-10-1(b).)

The court may waive the automatic disqualification from one or more felony convictions of a proposed personal representative. The court considers factors including:

- The amount of time since the person was convicted of a felony.
- The nature of the felony conviction.
- Whether the felony conviction is no longer felony under current law.
- Whether felony conviction was expunged.
- Whether the person's felony conviction was acknowledged in the testator's will or in a consent signed by the distributees.

(Ind. Code Ann. § 29-1-10-1(g).)

A non-resident individual or corporate fiduciary may qualify and serve as a joint personal representative with an Indiana resident by both:

- Posting a bond.
- Otherwise being qualified to act as personal representative.

(Ind. Code Ann. § 29-1-10-1(c).)

A nonresident individual may qualify only by filing with the court:

- A written notice that the individual accepts the appointment.
- A notice of appointment of a resident agent in Indiana.
- A bond of sufficient value.

(Ind. Code Ann. § 29-1-10-1(d).)

Compensation of Executors

The personal representative is entitled to reasonable compensation. If the testator includes a will provision for the personal representative's compensation, that is the representative's full compensation unless the representative files a written instrument renouncing the representative's claim to the compensation provided by the will.

When no specific compensation is provided by the will or if the personal representative renounces the compensation provided in the will, the compensation must be just and reasonable. (Ind. Code Ann. § 29-1-10-13.) There is no statutory limitation or schedule for these fees. Compensation generally is determined based on:

- The nature of the estate.
- The nature of the service provided.
- Any peculiar qualifications for the duties being performed and the advantage to the estate of these qualifications.
- The difficulties encountered in the estate administration.
- All other factors in a consideration of compensation fair to the estate and reasonable for the personal representative.

(*In re Est. of Kingseed*, 413 N.E.2d 917, 932 (Ind. Ct. App. 1980).)

Drafting Attorney as Executor

The drafting attorney of a will generally can be named as executor (IN ST RPC Rule 1.8, cmt. 8).

An attorney named as personal representative in the will may receive compensation in addition to the attorney's fees for personal representative services as attorney and for other services not required of a personal representative. These fees must be just,

reasonable, and fully disclosed in writing to the client in an understandable way. (Ind. Code Ann. § 29-1-10-13; IN ST RPC Rules 1.7 and 1.8.) The attorney must also be careful to abide by the Rules of Professional Conduct in this arrangement and should advise the client about:

- The nature and extent of the lawyer's financial interest in the appointment.
- The availability of alternative candidates for the position.

(IN ST RPC Rule 1.8, cmt. 8).

The attorney may also wish to, among other things:

- Advise the testator in writing to seek independent legal counsel.
- Obtain from the testator written and signed informed consent.

(IN ST RPC Rule 1.8(a).)

Failure of Named Executor to Qualify

The executor or executors designated in the will admitted to probate have priority to serve. However, when the will does not name an executor or when none of the persons named are able to serve, the following persons may serve in the following order:

- The surviving spouse who is a devisee in the will that is admitted to probate.
- A devisee in the will that is admitted to probate.
- The surviving spouse or other person nominated by the surviving spouse.
- An heir or other person nominated by the heir.
- Any other qualified person.

(Ind. Code Ann. § 29-1-10-1(a).)

Multiple Executors

When there are two or more personal representatives, generally any one of the personal representatives may act alone unless the will provides otherwise. However, the following actions must be exercised, if at all, by all the personal representatives:

- Instituting a suit on behalf of the estate.
- Employing an attorney.
- Carrying on the business of the deceased.
- Voting corporate shares held by the estate.
- Exercising those powers under the will which by the terms of the will are only to be exercised by all the personal representatives.

(Ind. Code Ann. § 29-1-10-10.)

When more than two personal representatives possess powers that must be exercised by them jointly, the decision of a majority controls. When there are two personal representatives, they must act unanimously, unless the will provides otherwise. If the personal representatives or majority cannot agree or are equally divided on a matter, they must petition the court and exercise the power according to the direction from the court after a hearing. (Ind. Code Ann. § 29-1-10-11(a).)

Trustees

11. What are the rules regarding appointment of trustees for testamentary trusts in your state? In particular, please discuss:

- Criteria for qualifying as a trustee.
- Rules regarding compensation of trustee.
- Priority rules for appointment of trustee if the named trustees fail to qualify.
- Who has authority to act when there are multiple trustees.

Qualification as Trustee

In Indiana, a natural person can act as a trustee both of a testamentary trust (a trust under a will) if the natural person:

- Has the capacity to deal with property for the person's own benefit.
- Is at least 18 years old.
- Is of sound mind.
- Has good moral character.

(Ind. Code Ann. § 30-4-2-11(a).)

A corporate trustee must have trust powers under Indiana law (Ind. Code Ann. § 30-4-2-11(b)). The fact that a trustee is also a beneficiary does not disqualify

the individual from acting as trustee (Ind. Code Ann. § 30-4-2-11(c)).

Unlike the requirements to serve as a personal representative, there is no requirement for a named trustee to not be a convicted felon (see Question 10: Qualification as Executor). However, the requirement that the trustee be of good moral character may impact whether a convicted felon can act as trustee.

Compensation of Trustee

A trustee is generally entitled to reasonable compensation for services as trustee unless either:

- The terms of the trust specifically provide otherwise.
- There is a breach of trust.

(Ind. Code Ann. § 30-4-5-16(a).)

If the terms of the trust specify trustee compensation, the trustee may petition the court to allow more or less compensation if:

- The duties of the trustee are substantially different from those contemplated when the trust was created.
- The specified compensation is unreasonable.

(Ind. Code Ann. § 30-4-5-16(b).)

Typically, corporate trustee fees are higher than individual trustee fees, absent special circumstances, due to the special expertise of the corporate trustee and pre-set corporate trustee fee schedules.

The trustee is also entitled to be reimbursed out of the trust property for expenses incurred administering the trust (Ind. Code Ann. § 30-4-5-16(c)).

Failure of Named Trustee

Unless the trust provides otherwise, if at least two co-trustees are serving and one co-trustee remains in office after a co-trustee vacancy, the vacancy does not need to be filled (Ind. Code Ann. § 30-4-3-33(b)). If a vacancy is required to be filled, the vacancy is filled in the following priority order:

- The person designated in the trust terms to act as successor.
- A person appointed by a majority of the qualified beneficiaries.
- A person appointed by the court.

(Ind. Code Ann. § 30-4-3-33(c).)

Qualified Beneficiaries

The qualified beneficiaries of a trust at a given time are::

- A distributee or permissible distributee of trust income and principal.
- Those who would be a distributee or permissible distributee of trust income or principal if the interests of the current distributee terminated without causing the trust to terminate at that time.
- Those who would be a distributee or permissible distributee of trust income or principal if the trust terminated under its terms at that time.

(Ind. Code Ann. § 30-4-1-2(19).)

Qualified beneficiaries also include:

- A beneficiary who is a charitable organization expressly designated to receive distributions under the terms of a charitable trust.
- A person appointed to enforce a trust for the care of an animal.
- A person appointed to enforce a trust for a noncharitable purpose.
- The attorney general, if the trust is a charitable trust with its principal place of administration in Indiana.

(Ind. Code Ann. § 30-4-1-2(19).)

Multiple Trustees

Unless the trust provides otherwise, any power vested:

- In two trustees must be exercised by them unanimously.
- In three or more trustees must be exercised by a majority.

(Ind. Code Ann. § 30-4-3-4(a)).

If there are two or more trustees and they are unable to exercise a power:

- If there is immediate risk of irreparable damage to the trust property, any trustee may exercise the power and petition the court for approval after the power is exercised.
- If there is no immediate risk of irreparable harm, any trustee may petition the court for permission to exercise the power.

(Ind. Code Ann. § 30-4-3-4(b).)

If there are three or more trustees and one co-trustee refuses to join in the action of the co-trustees, that trustee will be excused from liability if the trustee both:

- Refuses to join in the exercise of power.
- Either:
  - mails written dissent to the other co-trustees; or
  - if the power if exercised without the trustee's knowledge, mails written dissent within a reasonable time after being informed the power was exercised.

(Ind. Code Ann. § 30-4-3-4(c).)

Guardians

12. What are the rules regarding appointment of guardians for minor children by will in your state? In particular, please discuss:

- Criteria for qualifying as a guardian.
- Whether a guardianship nomination in the will is binding or persuasive.
- At what age the guardianship terminates.

Qualification as Guardian

In Indiana, it is common practice for parents of minor children to nominate one or more individuals in the parent's will to serve as guardian of minor children in case the other parent is not living or is incapacitated. Usually, the person named as guardian in the will files a petition for appointment to serve as guardian for a minor. However, any person can file the petition (Ind. Code Ann. §§ 29-3-5-4 and 29-3-5-5).

In appointing a guardian for a minor child, the court acts in the best interest of the minor (Ind. Code Ann. § 29-3-5-5(b)). The court considers many factors, including:

- The request made for a minor by a parent of the minor or the minor's de facto custodian.
- Any request in a will or other written instrument.
- An existing designation of standby guardian.
- Any request made by a prospective ward who is at least 14 years old.
- The relationship of the proposed guardian to the prospective ward.
- The best interest of the prospective ward and the ward's property.

(Ind. Code Ann. § 29-3-5-4.)

Where a parent is deceased or incapacitated, a person nominated in the will or power of attorney of the surviving parent generally has priority to consideration for appointment as guardian of a minor child over anyone other than a standby guardian designated by the parent's written declaration. However, the court has discretion to appoint another person the court considers to be best qualified to serve. (Ind. Code Ann. §§ 29-3-3-7 and 29-3-5-5.)

Individuals may not act as guardian if they:

- Have been adjudged to be sexually violent predator (Ind. Code Ann. § 35-38-1-7.5.
- After reaching age 18, were convicted of:
  - child molesting; or
  - sexual misconduct with a minor against a child less than 16 years old.
- Were convicted of other specified felonies.

(Ind. Code Ann. § 29-3-7-7).

Although not specifically stated, it is presumed that the guardian must also be over the age of 18 and of sound mind. If the nominated guardian is a person with a disability as defined in the Americans with Disabilities Act, a court must, when considering the person's suitability as guardian:

- Not discriminate against the individual.
- Take into consideration any reasonable accommodations that can be provided.

(Ind. Code Ann. § 29-3-5-4.1.)

Guardianship Binding or Persuasive

The nomination of a guardian in an individual's will is persuasive. The court considers guardianship nominations using specified factors and order of priority. (Ind. Code Ann. §§ 29-3-5-4 and 29-3-5-5; see Qualification as Guardian.)

Termination of Guardianship

A guardianship of a minor generally terminates on the earlier to occur of:

- The minor reaches age 18, though guardianships may be extended beyond age 18 by petition to the court (Ind. Code Ann. § 29-3-12-7).
- The minor's death.

(Ind. Code Ann. § 29-3-12-1(a).) A court may also terminate a guardianship when the court determines that the guardianship is no longer necessary and in certain other limited circumstances, including the minor's adoption or marriage (Ind. Code Ann. § 29-3-12-1).

Indiana guardianship termination processes sometimes differ among the Indiana courts, with some courts requiring notice and others where guardianships terminating automatically. Accordingly, counsel should check the local court rules.

Changes to Will After Execution

13. What are the rules regarding changes to a will after it is executed? In particular, please specify:

- How a will can be modified after it is executed.
- How a will can be revoked after it is executed.
- Whether a previously revoked will can be reinstated, and if so, how.

Modification of a Will

Indiana includes the term codicil in its definition of will (Ind. Code Ann. § 29-1-1-3(a)(38)). Modifications to a will are completed by the execution of a codicil. Codicils must be executed with the same execution requirements as wills (Ind. Code Ann. § 29-1-5-3; see Question 6). Typically, practitioners use a codicil for smaller changes to a will and create a new will for larger changes or if there are many previous codicils. However, there are no limitations on the use of codicils.

Revocation of a Will

Revocation of a Traditional Will

A current will can be revoked by:

- The testator or another person at the testator's direction and in the testator's presence destroying or mutilating the will with the intent to revoke.
- The testator executing another writing to revoke the will, including a new will with revocation language and which is signed, subscribed, and attested according to the will execution procedures (see Question 6). A will can be revoked in part only by the execution of a writing.

(Ind. Code Ann. § 29-1-5-6.)

Revocation of an Electronic Will

A testator can revoke an electronic will by either:

- Executing a new electronic will or paper will with revocation language.
- Permanently deleting each copy of the electronic record associated with the electronic will in the testator's possession or control. If the electronic will is in the possession or control of more than one custodian, the testator must use the testator's best efforts to contact each custodian and to instruct each custodian to permanently delete and render non-retrievable each revoked or superseded electronic will.
- Rendering the electronic record unreadable or non-retrievable.
- Executing a revocation document that:
  - is signed by the testator and two attesting witnesses;
  - refers to the date on which the electronic will that is being revoked was signed; and
  - states that the testator is revoking that electronic will.

(Ind. Code Ann. § 29-1-21-8.)

A revocation document can be signed by either:

- Electronic signature.
- Signatures on paper.

(Ind. Code Ann. § 29-1-21-8(d).)

If a testator uses the services of an attorney or custodian for storing the electronic record associated with the testator's electronic will, the testator may revoke the electronic will by directing the custodian or attorney to permanently delete or make unreadable or non-retrievable the electronic record associated with the electronic will. The testator must make this direction in writing to the attorney or custodian. (Ind. Code Ann. § 29-1-21-8(e).)

Reinstatement of a Will

If a testator executes a second will, thereby revoking the first will, a revocation of the second does not revive the first unless either:

- It appears by the revocation to be the testator's intent to revive the first.
- After revocation the testator duly re-executes the previous will with the required formalities.

(Ind. Code Ann. § 29-1-5-6.)

The doctrine of dependent relative revocation applies in Indiana and provides that if a testator mutilates or destroys a will with a present intention of making a new one immediately, and the substitute new will is not made or fails to be effective for any reason, the old will is admitted to probate unless there is evidence overcoming the presumption. Dependent relative revocation presumes the testator preferred the old will to intestacy. Without the present intention to make a new will immediately, the destruction amounts to an absolute revocation. (*In re Est. of Oliva*, 880 N.E.2d 1223, 1225-26 (Ind. Ct. App. 2008).)

When a testator destroys a will with the intent to revoke it unconditionally, dependent relative revocation does not apply. The mere intention to make a new will at some future time is not enough to prevent revocation and does not implicate the doctrine of dependent relative revocation. (*Roberts v. Fishers*, 105 N.E.2d 595, 599-600 (Ind. 1952).)

Special Circumstances Regarding Gifts or Recipients

14. Please describe what happens if:

- A beneficiary does not survive the testator.
- A gift is not owned by the testator at the testator's death.
- There are not enough assets passing through the will to satisfy all the gifts.
- The gifted property is encumbered.
- The testator and a beneficiary or fiduciary to which the testator was married when the will was executed are no longer married when the testator dies.
- The testator gets married after the will is executed.
- A child is born after the will is executed.
- A beneficiary causes the testator's death.
- The testator and a beneficiary die at the same time.

Beneficiary Does Not Survive

In Indiana, if the beneficiary does not survive the testator, then the provisions of the will should specify what happens to the gift. For example, the will may provide that if the beneficiary does not survive the testator, the gift passes to:

- Another named individual.
- The beneficiary's descendants per stirpes.

Without succession language, the gift is generally distributed with the residue under the will, commonly referred to as lapsing (Ind. Code Ann. § 29-1-6-1(g)).

However, Indiana's anti-lapse statute provides that if the beneficiary was a descendant of the testator and predeceases the testator, the gift does not lapse. Rather, it is distributed to the descendant's heirs as if the descendant survived the testator and died intestate. (Ind. Code Ann. § 29-1-6-1(g).) Under the anti-lapse statute, descendants include:

- A child born to or adopted by the settlor or by the settlor's descendant. However, the adoption must occur before the child is age 18.
- A descendant of a child adopted before the child attains age 18 by the settlor or the settlor's descendant.
- A child born out of wedlock if the mother is the settlor or the settlor's descendant.
- A child born out of wedlock, if the right of a child to inherit from the father was established under statute, and the father is the settlor or the settlor's descendant.
- A descendant of a child born out of wedlock if the other requirements of the statute are satisfied.

(Ind. Code Ann. § 29-1-6-1(g).)

Gift Not Owned by Testator at Death

If a specific gift is not part of the probate estate because it was distributed, sold, lost, or destroyed before the testator's death, the gift adeems by extinction. Ademption by extinction causes the gift to become inoperative because the subject matter of the gift is not in the testator's estate (*In re Est. of Warman*, 682 N.E.2d 557, 560 (Ind. Ct. App. 1997)).

Ademption by extinction applies only to specific bequests and not general bequests. A specific bequest is a bequest of something definite or a specific part of the testator's estate which is capable of being designated, identified, or distinguished from other items in the estate. A general bequest is a bequest out of general assets of the estate such as a gift of money or other things in quantity which are not in any way separated or distinguished from other things of the same kind. (*Key v. Sneed*, 408 N.E.2d 1305, 1307 (Ind. Ct. App. 1980).)

Ademption occurs only when the subject matter of a legacy is so altered or extinguished that the legacy is completely voided. The court's responsibility is limited to determining whether the specific subject matter of the bequest is still in existence. (*Warman*, 682 N.E.2d at 560.)

A court determines the gift adeems by extinction if the court both:

- Can identify the specific gift.
- Applies the form and substance test to determine that the gift has changed in substance, which includes the gift being given away, lost, or destroyed during the settlor's lifetime, versus a change in the form of the bequest. If the change is substantive, the gift adeems. If the change is only in form, then there is no ademption.

(*In re Est. of Young*, 988 N.E.2d 1245, 1248 (Ind. Ct. App. 2013).)

Not Enough Assets

When there are not enough assets in the estate to pay all obligations and dispositions under the will and any claims or statutory shares, the various bequests are reduced or eliminated, commonly known as abatement. Unless otherwise provided in the will, the bequests abate in the following order:

- Property not disposed of by the will.
- Property devised to the residuary devisee.
- Property disposed of by the will but not specifically devised and not devised to the residuary devisee.
- Specifically devised property.

(Ind. Code Ann. § 29-1-17-3(a).)

However, for abatement, a general devise charged on any specific property or fund is deemed to be specifically devised up to the value of the property on which it is charged. For example, Indiana considers a general cash devise to be paid out of a specific account to be a specific devise. Further, the statutory order of abatement is a default rule that can be altered as necessary to give effect to any implied purpose under the will for a specific devise. (Ind. Code Ann. § 29-1-17-3.)

Gifted Property Encumbered

When any specifically devised property is subject to a lien, the devisee takes the property subject to the lien unless the will provides expressly or by necessary implication that the lien be paid. If the lienholder receives payment on a claim from the estate, the devise is charged with reimbursing the estate for the amount of the payment. (Ind. Code Ann. § 29-1-17-9(b).) A general direction in the will to pay debts does not imply an intent that the devise of property subject

to a lien should be distributed free from the lien (Ind. Code Ann. § 29-1-17-9(c); *Gibbon v. Est. of Gibbon*, 829 N.E.2d 27, 27-28 (Ind. Ct. App. 2005)).

Effect of Divorce

If, after making a will, the testator is divorced or the marriage is annulled, all provisions in the will in favor of the former spouse are revoked as of the date of dissolution or annulment. However, the will provisions in favor of a former spouse are reinstated if the testator remarries the former spouse. (Ind. Code Ann. § 29-1-5-8.)

If the testator's spouse leaves the testator and is living in an adulterous situation at the testator's death, the surviving spouse is considered to have abandoned the testator and takes no part of the decedent's estate (Ind. Code Ann. § 29-1-2-14). If the parties mutually consented to their separation, there is no abandonment by either party (*In re Est. of Patrick*, 958 N.E.2d 1155, 1160 (Ind. Ct. App. 2011)).

Effect of Marriage After Execution of Will

If a testator marries after executing a will and the will is not revised to include the new spouse, the surviving spouse has the same spousal allowance and elective share rights under the will as other surviving spouses (Ind. Code Ann. §§ 29-1-3-1 to 29-1-3-7 and 29-1-4-1). Spouses can waive both the elective share and the spousal allowance by written agreement (Ind. Code Ann. §§ 29-1-2-13 and 29-1-3-6; *Beatty*, 555 N.E.2d at 189).

For more information on elective shares and spousal allowances, see Question 8: Disinheriting a Testator's Spouse.

Pretermitted Children

If a child is not mentioned in the will, such as a child born or adopted after the making of a will, the child is called a pretermitted child.

After-Born Children

An after-adopted or after-born child, whether born before or after the testator's death, receives a share of the testator's estate equal to what the child would have received if the testator had died intestate unless either:

- It appears from the will that omitting any after-born children was intentional.
- The testator had children known to the testator at the time of the execution of the will and knowingly devised substantially all assets to a surviving spouse.

(Ind. Code Ann. § 29-1-3-8(a).)

For more information on after-born children, see Question 8: Disinheriting a Child of the Testator.

Child Mistakenly Believed to Be Deceased

A pretermitted child mistakenly believed by the testator to be deceased, takes an intestate share in the same manner as an after-born child (Ind. Code Ann. § 29-1-3-8(b)).

Pretermitted Heir Presumption

The pretermitted heir provisions create a presumption that a child was unintentionally omitted. This presumption can be rebutted by facts showing the intent to disinherit a pretermitted heir (*Haskett v. Haskett*, 327 N.E.2d 612, 620 (Ind. Ct. App. 1975)).

Beneficiary Causes Testator's Death

Under the constructive trust doctrine, a culpable person is a constructive trustee of any property acquired resulting from the decedent's death.

A culpable person is:

- A person who has been charged with causing a decedent's unlawful death and is found guilty, or guilty but mentally ill, on a charge of causing an unlawful death under a guilty plea or guilty verdict under applicable Indiana statute.
- A person who is determined by a preponderance of the evidence in a civil action to have knowingly or intentionally caused the decedent's unlawful death.
- The estate of a person describe above who died after causing the decedent's unlawful death.

(Ind. Code Ann. § 29-1-2-12.1(a)(1).) An unlawful death is a death resulting from murder, voluntary manslaughter, or suicide caused by a person other than the decedent (Ind. Code Ann. § 29-1-2-12.1(a)(3)).

The constructive trustee holds the property for the benefit of those persons who would receive the decedent's property if the constructive trustee died

immediately before the decedent (Ind. Code Ann. § 29-1-2-12.1(f)).

A judgment of conviction is conclusive in a subsequent civil action to have a culpable person declared a constructive trustee of property that is acquired by the culpable person, or that the culpable person is otherwise entitled to receive as a result of an unlawful death (Ind. Code Ann. § 29-1-2-12.1(b)).

An interested person may initiate a civil action to declare a constructive trust if:

- The person has been charged with murder, assisted suicide, or voluntary manslaughter because of the individual's death.
- Is found not responsible for the crime because of insanity.

(Ind. Code Ann. § 29-1-2-12.1(e).)

If this civil action is initiated, the court declares a constructive trust if it is established by preponderance of the evidence that the person k caused the unlawful death (Ind. Code Ann. § 29-1-2-12.1(e)).

Simultaneous Death

The will's terms determine the distribution of property if a testator and beneficiary die simultaneously (Ind. Code Ann. § 29-2-14-6). If a will does not include a survivorship provision, title to property passing under the will's terms depends on the order of death, and the order cannot be established, the property of each person is disposed of as if the person survived the beneficiary (Ind. Code Ann. § 29-2-14-1).

Lost Wills

15. Please describe what happens if the original will is lost.

If a will is lost, the following may be used to admit the will to probate in Indiana:

- A detailed statement of the provisions of the will so far as is known.
- A copy of the will.
- The testimony of the will's subscribing witnesses.

(Ind. Code Ann. § 29-1-7-5(5); *Scampmorte*, 179 N.E.2d at 307-10.)

For this rule to apply, a proponent of a lost will must first, by a preponderance of evidence, rebut the presumption that the will was destroyed with the intent to revoke it (*Matter of Est. of Borom*, 562 N.E.2d 772, 776 (Ind. Ct. App. 1990)).

Rules of Intestacy

16. Please describe how property passes if there is no will or if the terms of the will distribute assets according to the laws of intestacy in your state (who are the testator's heirs).

In Indiana, if a person dies without a will, or there is not sufficient evidence of a lost will's contents, the estate is distributed in intestacy. In intestacy, the surviving spouse receives:

- One-half of the net probate estate if the intestate is survived by at least one child or by the issue of at least one deceased child.
- Three-fourths of the net probate estate, if there is no surviving issue, but the intestate is survived by one or both of the intestate's parents.
- All the net probate estate, if there is no surviving issue or parent.

(Ind. Code Ann. § 29-1-2-1(b).)

However, the surviving spouse takes only 25% of the remainder of the date of death fair market value of the deceased spouse's real property minus the value of the liens and encumbrances on the property and the same share of the personal property of the deceased as provided above if the surviving spouse:

- Is a second or other subsequent spouse.
- Did not have children by the decedent.
- The decedent left surviving children or the descendants of children by a previous spouse.

(Ind. Code Ann. § 29-1-2-1(c).)

In this case, at the decedent's death, the balance of the net estate vests in the decedent's surviving child or children or the issue of the decedent's child or children who may be dead (Ind. Code Ann. § 29-1-2-1(c)).

The share of the net estate not distributable to the surviving spouse, or the entire net estate if there is no surviving spouse, descends and is distributed as follows:

- To the intestate's issue. If they are all the same degree of kinship to the intestate, they take equally, or if unequal degree, then those of more remote degrees take by representation, per stirpes. In other words, the predeceased beneficiary's descendants take the predeceased beneficiary's share.
- If there is a surviving spouse but no surviving intestate issue, then to the intestate's surviving parents.
- If there is no surviving intestate spouse or issue, then to the intestate's surviving parents, brothers, and sisters, and the issue of deceased brothers and sisters. Each living parent is treated as of the same degree as a brother or sister and is entitled to the same share as a brother or sister. However, each parent's share is not to be less than 1/4 of the decedent's net estate. Issue of deceased brothers and sisters take by representation.
- If there is no surviving intestate parent or brother or sister, then to the issue of brothers and sisters. If these distributees are all in the same degree of kinship to the intestate, they take equally or, if of unequal degree, then the more remote degrees take by representation.
- If there is no surviving intestate issue or parent or issue of a parent, then to the surviving intestate grandparents equally.
- If there is no surviving intestate issue or parent or issue of a parent, or grandparent, then the decedent's estate is divided into that number of shares equal to the sum of:
  - the number of surviving brothers and sisters of the decedent's parents; and
  - the number of deceased brothers and sisters of the decedent's parents leaving issue surviving both them and the decedent.
- One of the shares passes to each of the brothers and sisters of the decedent's parents or their respective issue per stirpes.
- If there is no person mentioned in this section, then to the state.

(Ind. Code Ann. § 29-1-2-1(d).)

If interests in real estate go to a husband and wife, the aggregate interests descending are owned by them as tenants by the entireties. Interests in personal property descending are owned as tenants in common. (Ind. Code Ann. § 29-1-2-1(d)(7).)

Descendants of an intestate decedent born after the decedent's death inherit as if they were born during the lifetime of the intestate and survived the decedent (Ind. Code Ann. § 29-1-2-6).