

TOP TEN RULES TO FOLLOW IN FIRST PROBATE CASE

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Preface: As you will determine from a brief review of this paper, Judge Gerald S. Zore and I have much to cover in the one hour time slot scheduled for this topic. The Judge's materials provide important information for your first case in his court, Marion Superior Court 8, Probate Division. Given the breadth of the subject and the limited time, we cannot address every issue but it is hoped that these materials may spur questions that can be addressed at the conference and that they will also provide you with a ready reference in the quiet of your office.

There are many situations involving deaths where property may be transferred by means other than through probate, such as: estates where the net assets are no more than \$50,000; non-probate transfers (named beneficiary, joint tenants, pay-on-death) and related actions. This paper addresses none of those, except by passing reference, and is instead addressed to a situation in which there will be an actual administration of a decedent's estate opened in an Indiana court. Although there are many more than ten rules to follow in any probate case, to comply with the topic, I have selected ten of my favorite rules.

For a fair understanding of my commentary, it is important to understand that I attempt to approach each probate matter with the philosophy that as lawyers, we owe a duty to our courts and judicial system to be problem solvers rather than problem creators. I do not initially approach the opening on an estate to administration as if it will be adversarial and I advise the prospective personal representative that I favor that approach. I inform them that they have an absolute fiduciary duty under law to both the heirs and creditors of the estate and that breach of that duty can result in serious financial consequences to them personally. During my many probate experiences in courts across Indiana, I have found that some lawyers do not necessarily agree with my philosophy and they would perhaps advise you to proceed in a manner different than I herein set forth.

Although the vast majority of probate matters generally do not involve contested litigation, in accepting your first probate case, you need to be aware that your actions may ultimately be governed by appropriate provisions of the Rules of Civil Procedure, Rules of Evidence and Jury Rules as applied to matters which must be administered under the Indiana Probate Code, Trust Code, Tax Code and Local Probate Rules.

Therefore, **Rule No. 1** is: **Obtain assistance from experienced probate counsel if your first probate case looks as though it might involve disagreeable heirs, complicated income or inheritance tax issues or complex property rights issues.** I am usually available to respond to email or telephone questions as are many other probate lawyers throughout the state. Also, the Probate, Trust & Real Property section of the Indiana State Bar Association maintains a very active list-serve with members always willing to assist.

Rule No. 2: Know your client and the interested persons.¹ It goes without saying that the loss of a loved one is usually an emotional and difficult time for the prospective personal representative and survivors. Having likely already buried their loved one, they have now experienced some difficulties in trying to liquidate the decedent's accounts and other assets and have come to the realization that they need legal advice. Irrespective of what the Last Will states or what intestate succession rules require, they may have already taken certain actions because: "Dad promised me that I could have this;" or, "My mom always wanted my daughter to have this; or, "My sister never took care of my parents like I did;" or, "Given that my brother ran up all those debts that my parents had to pay, it's only fair that I have this;" or, "My son needs a car and none of the other kids do, so I am going to give it to him," and on and on.

¹ "Interested persons" means heirs, devisees, spouses, creditors, or any others having a property right in or claim against the estate of a decedent being administered. This meaning may vary at different stages and different parts of a proceeding and must be determined according to the particular purpose and matter involved. I.C. 29-1-1-3 (13).

One of my first questions when I take the call involves determining the identity of the heirs² and whether they all appear to be in agreement on what should happen, at least at that moment in time. I am then able, hopefully, to schedule a joint meeting with everyone which provides me the opportunity to explain the law regarding such things as fiduciary responsibility, probate and non-probate transfers, intestate succession, interpretation of the testamentary document, the importance of inventory and appraisals and related matters, and, to make sure that all understand that everything must be performed in accordance with law – whether or not that is to their individual benefit.

Having then answered all of their questions and being comfortable that they understand the process, we jointly agree on a course of action and it is likely that before they leave, they all will have signed the appropriate consents and fee document.

When it is not possible to have everyone present at this meeting, either in person or by telephone, it is my standard practice to send follow up correspondence to those not in attendance.

When the results of this meeting indicate that there will be adversity between the heirs, I make it clear that my actual client will be the person named as personal representative in the Last Will or, if there is no Will, the surviving spouse or other person to be appointed pursuant to the order of priority listed in I.C. 29-1-10-1, and, that my client will fully comply with the requirements of law in administration of the estate.³ I am also careful to inform them that since

² “Heirs” denotes those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the real and personal property of a decedent on the decedent's death intestate, unless otherwise defined or limited by the will. I.C. 29-1-1-3 (11).

³ It is important to note here that some lawyers may be heard from time to time to say that they represent the estate when in fact their actual client is the personal representative, who has a fiduciary responsibility to administer the estate in the best interest of all heirs and creditors. There can be very significant concerns regarding this issue and for an instructive analysis, see ISBA, Legal Ethics Committee, Opinion No. 4 of 1997, attached hereto.

it appears they have concerns, they should immediately talk to a lawyer of their choosing and that I will then be happy to speak to their lawyer and to provide her with all relevant documents.

Rule 3. Understand the law regarding attorneys' fees and always obtain a signed fee agreement. The appropriate starting point here is the pertinent provision from the probate code:

“When any person designated as executor in a will, or the administrator with the will annexed, or if at any time there be no such representative, then any devisee therein, defends it or prosecutes any proceedings in good faith and with just cause for the purpose of having it admitted to probate, whether successful or not, he shall be allowed out of the estate his necessary expenses and disbursements including reasonable attorney's fees in such proceedings. I.C. 29-1-10-14.

Most Indiana courts with probate jurisdiction have a local rule pertaining to the requirement that all probate fiduciaries must be represented by an attorney at all times. “Once a local rule is made, all litigants and the court are bound by the rules of the court.” *State v. Decatur Circuit Court*, 247 Ind. 567, 219 N.E.2d 898, 899 (1966). Additionally, courts with probate jurisdiction are specifically authorized by the probate code to promulgate rules and forms of procedure for probate proceedings (I.C. 29-1-1-7).

Since most of our probate courts also have at least one local rule pertaining to payment of fees, it is important to know what is permitted in that venue. Marion County's current local rules provide

412.1 No fees for personal representative, guardians or attorneys shall be paid from any guardianship or supervised estate without prior written order of the court.

412.2 Fees in unsupervised estates shall not be subject to court approval.

412.3 A petition for fees must be signed or approved in writing by the personal representative or guardian.

412.4 Partial fees in a supervised estate may be requested when:

- A. An intermediate accounting has been approved, or
- B. The court finds upon petition that a tax advantage will result from payment of partial fees.

412.5 In all other cases payment of fees in supervised estates shall be authorized as follows:

- A. One-half upon the filing of an inheritance tax return or upon a court determination of no taxes due: and
- B. The remaining one-half upon approval of the final account.

As noted, in unsupervised administration, matters involving attorneys' fees are between the personal representative and their attorney and the court would not become involved unless a dispute over those fees was brought before the court.

In my practice, no matter the type of case involved, I always have a written and signed fee agreement because: both the client and the attorney know precisely what the agreement is at the outset of their relationship; concerns over billing statements can be resolved by reference back to the agreement; and, I believe that our courts prefer that course of action.⁴ The following text from *In re Estate of Inlow* 735 N.E.2d 240 (Ind.App., 2000), is instructive:⁵

“We recognize, however, that acrimony and litigiousness occasionally rear their ugly heads during estate administration and that probate attorneys may have to defend their fee petitions against baseless challenges brought by contentious heirs or legatees. An attorney may recover fees in such cases under Indiana Code Section 34-52-1-1(b) if the court finds that the complaining party

(1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;

(2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or

(3) litigated the action in bad faith.^{FN12}

FN12. In determining whether a fee petition challenge is litigated in bad faith or is sufficiently “frivolous, unreasonable, or groundless” to warrant the shifting of fees under section 34-52-1-1, the trial court may consider the following factors, which are not intended to be an exhaustive list: (1) whether a fee agreement

⁴ I have attached my form agreement.

⁵ Also, be sure to review Rule 1.5 of the Rules of Professional Conduct.
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exists; (2) whether the fee petition is calculated pursuant to or closely follows the fee agreement; (3) whether the fee petition is sufficiently specific and demonstrates not only the time spent and fees incurred but also the specific tasks performed to allow a reasonable determination of whether the fees are warranted and reasonable; and (4) whether events have occurred during the administration of the estate which have significantly altered the premise upon which the fee agreement was originally based. If the attorney does not enter into a fee agreement, as here, or does not calculate his fees pursuant to the agreement, then the attorney accepts the risk that he will have to defend his fee petition at his own expense.” *In re Estate of Inlow* 735 N.E.2d 240, 254 (Ind.App.,2000).

Among the matters discussed during this seminar are the proposed amendments to the Local Rules of the Marion Superior Court, Probate Division, currently under discussion. One of those proposed rules provides as follows:

402.2 Fee Agreement. It is strongly recommended by the court that a written contract for legal services be entered into by the personal representative or guardian and their legal counsel. If a disagreement arises with regard to the attorneys’ fees, the Court will consider the written contract as evidence of the fee agreement between the parties. All fiduciaries in supervised estates and guardianships should be informed by counsel that fees to the attorney and fiduciary are subject to final court approval prior to payment.

Rule No. 4: Begin with at least a reasonable understanding of the estate’s assets.

The probate code (I.C. 29-1-7-5) requires a listing of estate assets in petitions for supervised or unsupervised administration only when the decedent was not domiciled in Indiana at the time of death. Even then, the only property required to be listed is that which is located in the county where the petition is filed. Nonetheless, most courts want at least some explanation of the estate’s value, if for no other reason than to determine the amount of the personal representative’s bond. It is also important to note that in order for an estate to be opened to unsupervised administration, it must be “solvent” (I.C. 29-1-7.5-2). It is therefore the better practice to list in the petition the then known assets of the estate.

For our first appointment, I ask the client to bring with them the death certificate and the original of all decedent’s paperwork pertaining to his or her property, such as: deeds; mortgages; vehicle titles, bank account statements; statements on investments, retirement accounts, tax

returns, life insurance policies and related documents. Not only does that then permit me to consider and discuss such things as inheritance taxes, it also is a good start on the Personal Representative's inventory of estate assets, required in every estate, and permits me to begin work and documentation on the required Consents to Transfer (IH-14) and completion of appropriate beneficiary documents.

The personal representative needs to understand that their first listed duty in the probate code (I.C. 29-1-13-1) is to take "possession of all the real and personal property of the decedent." In fulfilling this responsibility, your client should not be expected to understand all that this entails and they must be able to look to you for the proper guidance. In fact, this is just one of the reasons why a personal representative is required to have an attorney. I have been involved in matters where proper advice was either not given or not followed with respect to the following issues:

- failure to pay taxes on the property required by I.C. 29-13-1(1).
- failure to collect the rents and earnings on property, required by I.C. 29-13-1(1).
- failure to keep in tenable repair the buildings and fixtures, required by I.C. 29-13-1(2).
- failure to protect the buildings and fixtures by insurance at least, implicitly required by I.C. 29-13-1(3).
- failure to obtain appropriate court instructions with respect to valueless, or overly encumbered property, required by I.C. 29-1-13-8.
- failure to obtain court permission to continue operation of the decedent's business, required by I.C. 29-1-13-11.
- failure to obtain court permission regarding performance of decedent's contract, required by I.C. 29-1-13-13.

- failure to invest and make productive the funds of the estate, required by I.C. 29-1-13-14.
- failure to make timely partial distribution to avoid further damage to property, required by I.C. 29-1-17-1.

Although the actual reporting of the fully known estate assets occurs when the inventory is filed, within two months after appointment (I.C. 29-1-12-1), the wise practitioner assists her client in taking possession of and properly managing the estate property as soon as possible.

Rule No. 5: Begin with at least a reasonable understanding of the estate’s liabilities. As with the listing of estate assets in the petition for administration, the probate code does not require a listing of the decedent’s debts and liabilities. However, in addition to aiding the court’s determination regarding bond and solvency, other important issues dictate that all known creditors should be listed in the petition.

I.C. 29-1-7-7 requires the clerk of the court to (in addition to causing newspaper publication) mail notice of the estate administration to each heir, devisee, legatee, and **known** creditor whose name and address is set forth in the petition for probate. The legislature’s choice of language says to me that if a creditor is “known,” they should be listed on the petition. The analysis does not end there. That statute also requires the personal representative to serve notice on each creditor of the decedent whose name is not set forth in the petition for probate who is known or reasonably ascertainable within one month after the newspaper publication of notice and that a schedule of creditors that received such notice shall be delivered to the clerk of the court as soon as possible after notice is given.

I. C. 29-1-7-7.5 imposes on the personal representative an even stricter duty of notice by requiring them to exercise reasonable diligence to discover the reasonably ascertainable creditors of the decedent within one month of the first publication of notice including to: (A) conduct a

review of the decedent's financial records that are reasonably available to the personal representative; and (B) make reasonable inquiries of the persons who are likely to have knowledge of the decedent's debts and are known to the personal representative.

I.C. 29-1-14-1 imposes time restrictions for filing a creditor's claim of three month after publicized notice and a forever-barred date of nine months after date of death. Whether those dates can be extended because of failure to give the required notice to a known creditor is a topic of genuine disagreement among members of the probate bar. I believe that they well can be extended and cite the following text from *Farm Credit Services of Mid Am., ACA v. Estate of Decker*, 624 N.E.2d 491, 496 (Ind. Ct. App. 1993):

“We hold that counsel's knowledge of the existence of FCS' claim against the estate is imputed to the personal representative for the estate. Thus, the representative's failure to give FCS actual notice of the opening of the estate was in contravention of Ind.Code § 29-1-7-7...The intentional failure to give notice to or discover the existence of a reasonably ascertainable creditor does not automatically extend the applicable statute of limitations. Rather, where such conduct by the personal representative for the estate has prevented a party from commencing an action or induced the party to delay in bringing an action beyond the time allowed by law, then equity may require that the statute be extended.”

Your attention is also directed to I.C. 29-1-1-21 which provides in pertinent part:

“For illegality, fraud or mistake, upon application filed within one (1) year after the discharge of the personal representative upon final settlement, the court may vacate or modify its orders, judgments and decrees or grant a rehearing therein.”

Since the personal representative's fiduciary duty not only extends to heirs but also to creditors, additional concerns involving other legal principles, such as constructive fraud (duty to speak) and breach of fiduciary duty, should cause the wise practitioner to insist that proper notice be provided to all known creditors and to obtain knowledge of their identity as soon as possible.

Rule 6: Always request unsupervised administration – if possible. Under the probate code (I.C. 29-1-7.5) the court may grant a petition for administration without court supervision if

the following conditions are met:

1. all the decedent's heirs at law if the decedent dies intestate or all the legatees and devisees under the decedent's will have joined in the petition;
2. the estate is solvent;
3. the personal representative is qualified to administer the estate without court supervision;
4. the heirs, or legatees and devisees, or the parent or guardian of an heir, legatee, or devisee, freely consent to and understand the significance of administration without court supervision; and,
5. the will does not request supervised administration.

Alternatively, the court may also grant such petition if: the decedent's will authorized the administration of the estate to be unsupervised; the estate is solvent; and the personal representative is qualified to administer the estate without court supervision.

Full appreciation of the powers of a personal representative of an unsupervised administration compared to one requiring court supervision is provided in the text of I.C. 29-1-7.5-3. There, the code lists 29 powers, many of which are unavailable without court order in a supervised estate, including power 29: "Perform any other act necessary or appropriate to administer the estate."

In the vast majority of unsupervised estates, once the estate is open, the court will likely be required only to issue an order on the inheritance tax return. No formal accounting is required, distributions can be made to heirs during the pending administration, your fees are paid as incurred and the estate can be closed three months after published notice to creditors – all without court order.

The obvious cost reduction is just one benefit that is matched by the savings in time spent and the expeditious resolution of estate issues. As food for thought, consider that in 2009, the Marion Superior Court 8, Probate Division began the year with 6,952 active cases, added 3,811

new cases and closed the year with an active case load of 7,743. Although that court has a presiding judge, a magistrate and a commissioner to handle the incredible case load, statutorily required notice periods for hearings coupled with that case load necessarily result in the delays not experienced in unsupervised estates.

Although the unsupervised estate is essentially managed by the personal representative and their attorney, heirs can always object to the statutorily required closing statement and the wise attorney for the personal representative will make sure to keep all heirs in the loop throughout the estate administration.

Rule 7: Use the forms and follow the procedure: Probate practice is made much easier by the ready availability of forms for the required filings. An excellent source is Aline F. Anderson's materials found at *Anderson's Probate Forms* in the Indiana Practice Series TM, © 2011 Thomson Reuters. I have attached sample forms to open an unsupervised estate.

Please note that all forms are useful for the purpose of guidance and that each case will bring variables that must be included in the actual filing with the court. Also, do not forget that each application by a fiduciary to the court must be verified as follows: "I verify under the penalties for perjury that the above statements are true."

Judge Zore's materials describe the appropriate procedure for opening an estate to administration in Marion County. Make sure to take three checks with you when you file: (1) filing fee to clerk- currently \$156; (2) fee for corporate surety bond – currently \$122 for a minimum bond of \$17,000 ⁶; and, (3) fee to newspaper for publication – currently \$80. Other counties utilize different procedures and it is important that you comply with those procedures

⁶ A personal representative is not required to execute and file a bond relating to the duties of his office unless: (1) the will provides for the execution and filing of such a bond; or (2) the court finds, on its own motion or on petition by an interested person, that a bond is necessary to protect creditors, heirs, legatees, or devisees. I.C. § 29-1-11-1

and the local probate rules. In some counties, you will have to take the Notice of Administration directly to the newspaper. Although in Marion County a bondsman is always available, that may not be the case in a particular county and if a bond is likely to be required, you should be prepared in advance to get that accomplished. In most cases, when the petition seeks unsupervised administration and contains all the required consents, and, the remaining forms are in order, you should have little difficulty with the procedure.

Rule 8: Make sure that the personal representative understands and performs. Ask any probate lawyer and she will be able to talk non-stop of the problems that can occur where an uninformed personal representative, left unguided, turned a simple administration into a nightmare. It will not be unusual for your client to never contact you for guidance! I'm compelled to repeat that: It will not be unusual for your client to never contact you for guidance!

In far too many cases, once the lawyer gets the estate open, they turn all of the estate management over to the personal representative without ever checking on their progress. Any lawyer that does that, does so at their own risk. Never forget that the personal representative has fiduciary duties that once breached can subject them to personal financial liability. When challenged by a heir for an unreasonable action or inaction, their usual defense is: "My lawyer didn't tell me to do that," or, "I asked my lawyer what to do and that is what she told me." In one of my cases, the personal representative said his lawyer's only advice on running a complex business was: "Count every penny." He was then left to his own devices, he claimed, without any other lawyer input. The resultant litigation, including a suit against the attorney for malpractice, lasted eight years.

Granted that you have already met with the personal representative and obtained the required information for the court filings. You have answered all the questions they had at that

time and you have explained their important fiduciary duty. You've explained how the procedure works and that you stand ready to help them. In many cases (required in Marion County) they have accompanied you to the courthouse and met with a judge – so they have to understand, you think, that this is an important legal proceeding and they know they must do as you have explained. You have even made sure that they have a copy of the court's instructions⁷ and that they have read them. My experience is that all of this is simply not enough to make sure they understand and properly perform.

One of my first rules of thumb is that even if a particular court does not require the filing of signed instructions, I have my client sign them anyway and file them with the court. Then, step-by-step, I go through with them each instruction, what it precisely means and how to perform under that instruction. Many times that is also not enough. For example, one common instruction is that the fiduciary is not to pay himself any money from the estate for performing as the fiduciary. Yet, do not be surprised when it comes time to file a final accounting or closing statement that they have done that very thing.

Your client is of course an adult and you cannot be expected to babysit them. What you can do is give them timely reminders. Here is an example from a recent conversation with one of my clients: “Bill, this is Bob York calling to see how you're coming on the inventory of the property owned by the estate.” ... “I'm still working on it.” ... “I'm happy to hear that but you know that it's due in court in two weeks.” ... “What, you mean there is a deadline?” ... “While I'm on the phone, can you pull out those instructions from the court – do you see there where it states you must file your inventory within sixty days after you were appointed?” ... “Yeah, I

⁷ Attached is a form of instructions to the personal representative under consideration as an amendment to the current Marion County Instructions.

guess I forgot that was in there.” The bottom line is that while you do not have to babysit your client, you will have to repeatedly prompt their proper performance.

I am aware of some probate lawyers who mandate that the estate checking account requires two signatures, including that of the attorney. I do not follow that practice but it is not unusual for me to have the estate’s check book at my office or to make sure I personally receive the monthly bank account statements. Remember that in preparing the Indiana inheritance tax return, you will be required to include non-probate transfers, some of which may have occurred without your involvement. Prompt reminders that you must be kept in the loop regarding all property transfers are highly recommended.

Rule 9. You do not have to be a CPA to practice probate law. An understanding of the relevant Indiana statutes governing inheritance tax is most often sufficient for you to provide the proper information to the personal representative and to prepare the inheritance tax return.⁸ Having said that, although I do prepare the IH-6⁹, I never prepare the federal or Indiana income tax returns for the year prior to death, the estate’s final income tax returns for year of death or the federal estate tax returns¹⁰. Among other things, with the frequently changing tax code and regulations, these returns can be complex and time consuming and I find that my hourly rate compared to that of a CPA does not justify such estate expense. I find that it usually works best if I choose the CPA and provide all the relevant information along with the client contact information so that they can also work directly together.

⁸ Known as IH-6 and available for download from the website of the Indiana Department of Revenue.

⁹ There is a pretty strong sentiment that preparation of the IH-6 constitutes the practice of law and that CPAs should not prepare this document unless under the direction of an attorney.

¹⁰ Briefly stated, all property to spouse is exempt and the 2011 & 2012 federal estate tax exemption is 5 million dollars.

Indiana's inheritance tax statutes are found at I.C. 6-4.1-1 *et seq.* In summary, they provide:

- An inheritance tax is imposed on the date of death (appraisal date if a federal estate tax return is filed) value ¹¹ of virtually all property transferred as a result of a decedent's death. (Review the statutes for the exceptions which include among other things life insurance benefits not paid to the estate).
- All transfers to a surviving spouse are exempt.
- The first one hundred thousand dollars (\$100,000) of property interests transferred to a Class A transferee is exempt.
- A Class A transferee is:
 - (1) lineal ancestor of the transferor;
 - (2) lineal descendant of the transferor;
 - (3) stepchild of the transferor, whether or not the stepchild is adopted by the transferor; or
 - (4) lineal descendant of a stepchild of the transferor, whether or not the stepchild is adopted by the transferor.
- The first five hundred dollars (\$500) of property interests transferred to a Class B transferee is exempt.
- A Class B transferee is:
 - (1) brother or sister of the transferor;
 - (2) descendant of a brother or sister of the transferor; or
 - (3) spouse, widow, or widower of a child of the transferor.

¹¹ Under current law, no formal appraisal is required and a market analysis is enough. The Dept. of Revenue is currently promoting legislation to require a formal appraisal.

- The first one hundred dollars (\$100) of property interests transferred to a Class C transferee is exempt.
- A Class C transferee is a transferee, except a surviving spouse, who is neither a Class A nor a Class B transferee.
- The following items, and no others, may be deducted from the value of probate/trust property transfers by a resident decedent (see I.C. 6-4.1-3-15 re: non-resident decedent):
 - (1) decedent's debts which are lawful claims against his resident estate;
 - (2) taxes on the decedent's real property which is located in this state and subject to the inheritance tax, if the real property taxes were a lien at the time of the decedent's death;
 - (3) taxes on decedent's personal property which is located in this state and subject to the inheritance tax, if the personal property taxes are a personal obligation of the decedent or a lien against the property and if the taxes were unpaid at the time of the decedent's death;
 - (4) taxes imposed on the decedent's income to date of death, if the taxes were unpaid at the time of his death;
 - (5) inheritance, estate, or transfer taxes, other than federal estate taxes, imposed by other jurisdictions with respect to intangible personal property which is subject to the inheritance tax;
 - (6) mortgages or special assessments which, at the time of decedent's death, were a lien on any of decedent's real property which is located in this state and subject to the inheritance tax -deductible only from the value of the real property encumbered by the mortgage or special assessment.
 - (7) decedent's funeral expenses;

(8) amounts, not to exceed one thousand dollars (\$1,000), paid for a memorial for the decedent;

(9) expenses incurred in administering property subject to the inheritance tax, including but not limited to reasonable attorney fees, personal representative fees, and trustee fees;

(10) the amount of any allowance provided to the resident decedent's children by IC 29-1-4-1; and

(11) The value of any property actually received by a resident decedent's surviving spouse in satisfaction of the allowance provided by IC 29-1-4-1, regardless of whether or not a claim for that allowance has been filed under IC 29-1-14.

- The following items, and no others, may be deducted from the value of non-probate transfers by a resident decedent (see I.C. 6-4.1-3-15 re: non-resident decedent):

(1) taxes described in number (5) above;

(2) liens against the property being transferred;

(3) The decedent's debts, funeral expenses, and estate administration expenses, including reasonable attorney's fees incurred in filing the inheritance tax return;

(4) Any portion of the deduction provided by number (10) above which is not needed to reduce to zero (0) the value of the property referred to in (1) through (11) above.

- A return is not required unless tax is due, and alternatively, an affidavit of no tax due may be filed. You can also request and Order from court of No Inheritance Tax Due. Others may disagree but I prefer to file the IH-6 for a host of reasons too lengthy to explain here.
- Return is due 9 months after date of death and penalty of \$.50 per day to maximum of \$50 for filing late.

- Tax rate is prescribed for each Class of transferee at I.C. 6-4.1-5-1 with an escalating percentage based upon total of taxable estate and starting at 1% for Class A, 7% for Class B and 10% for Class C. For example, a \$100,000 **net** estate would have a tax of \$2,250 to a Class A transferee, \$7,000 to a Class B transferee and \$10,000 to a Class C transferee.
- Tax is due 12 months after date of death and 6% interest is added if paid late.
- If paid within 9 months of date of death, a 5% reduction is granted.
- **The transferee of the property and any personal representative or trustee who has possession of or control over the property are personally liable for the inheritance tax.**
- Recommended procedure:
 - (1) Within 9 months of date of death, complete four originals of the IH-6, printed on light green paper, and have the client sign all copies. The client should also give you a signed and dated estate account check made payable to the county Treasurer, but with the amount left blank (in case you miscalculated the tax).
 - (2) Take the IH-6 to the probate court which will file-stamp and return all copies to you after they enter on the CCS that it was filed.
 - (3) Take the IH-6 to the county Assessor's office. In Marion County, the Assessor will calculate the tax due while you wait and hopefully it will be in the amount indicated on the IH-6 you prepared. The Assessor will keep two copies of the IH-6.
 - (4) The Assessor will give you a form showing the amount of tax due which you then take to the county Treasurer.

- (5) The Treasurer will give you a receipt showing payment of the taxes and file-stamp the form given to you by the Assessor. You need to retain this receipt for ultimate attachment to the final accounting.
- (6) Take the newly file-stamped form back to the Assessor.
- (7) In a week or so, you should receive in the mail an Order from the court, on light green paper, showing the court's determination as to the tax. This will almost certainly be precisely as the Assessor determined.
- (8) You will not hear from the Indiana Dept. of Revenue for several months (it has a 120 statute of limitations) unless it is dissatisfied with the IH-6 and Order. They may call or write and you may be able to resolve disputes without any additional formal proceedings. Ultimately, and this could take months, you will receive a Closing Letter from the Dept. of Revenue. Note: The Department does not issue a Closing Letter if just the above-referenced affidavit has been filed.
- (9) Please note that current Indiana Inheritance Tax Administrator, Don Hopper, (317) 232-2154, is very collegial and responsive to questions about inheritance tax issues. In Marion County, the current Assessor's Inheritance Tax Manager, Jennifer Smith, (317) 327-4924, is also very responsive and helpful.
- (10) There are numerous statutory provisions pertaining to the Assessor's right to appraise, the Department's right to object, file suit and related matters which are too lengthy to discuss in this paper.
- (11). The probate court is the final arbiter of inheritance tax issues and its decision may be appealed to the Indiana Tax Court.

Rule 10. The probate code (and court) is your friend. For all reasonable intents and purposes, virtually every question likely to arise in your first probate case is addressed by the probate code – or, if not, then certainly by the annotations to the text of the statute. The following is but a brief sampling:

- Do I have to probate a will? I.C. 29-1-7-3.
- How long do I have to probate a will? (3 years after death). I.C. 29-1-7-15.1 (d)(1).
- The will is not self-proving and I can't find the witnesses. I.C. 29-1-7-10.
- Who receives the estate property if there is no will? I.C. 29-1-2-1.
- How do I determine those who are the rightful heirs? I.C. 29-1-6-6.
- What must be listed on the Inventory? I.C. 29-1-12-1.
- A creditor filed a claim, what should I do? I.C. 29-1-14-10.
- What about a contract claim? I.C. 29-1-14-1, 4 & 5.
- They filed a will contest, now what? I.C. 29-1-7-18 to 21.
- Settling disputes by written agreement. I.C. 29-1-9-1.

As you will note from Judge Zore's materials, in Marion County one of the three probate judicial officers is available for "walk-in" and telephone questions and you will find them very accommodating and knowledgeable.

In addressing your first probate case, it is suggested that the personal representative be viewed as the CEO of a company and that you are chief counsel with duties not only to the CEO but also to the shareholders (beneficiaries and creditors) as well as to the court administering the estate. In performing your duties, there are an abundant number of requirements which are easy to determine and follow so long as you make the effort. Help in your performance is close at hand in the probate code and local rules. Follow those, and I believe you will look back on your

first case with a well earned sense of accomplishment and appreciation for the opportunity and education you received.

I have attached the following:

- ISBA, Legal Ethics Committee, Opinion No. 4 of 1997
- Sample Fee Agreement
- Petition for Unsupervised Administration
- Oath of Personal Representative
- Letters of Administration
- Notice of Administration (newspaper publication)
- Notice of Administration to Heirs and Creditors
- Clerk's Certificate of Mailing
- Consent
- Affidavit of Heirship
- Closing Statement
- Instructions to Personal Representatives of Supervised Estate (proposed)

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**INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE
OPINION NO. 4 OF 1997**

The Legal Ethics Committee of the Indiana State Bar Association (the "Committee") has been requested to provide an advisory opinion with respect to the following facts and issues:

FACTS

Daughter is administrator of Father's intestate estate. The only other heir is Son, who, although an adult, has an I.Q. of 70 and lives in a group home on account of his developmental disabilities. Further, Son has very little education and may not be able to read or write.

Daughter tells Lawyer that Son doesn't want any part of the estate, and asks Lawyer to "prepare some paper" which Daughter will take to Son to have him sign. Lawyer advises Daughter that Son may not have the capacity to disclaim or make a gift of his interest. Daughter says if Lawyer isn't going to "do things her way," she'll hire another lawyer.

Daughter does retain new counsel. When Daughter comes to Lawyer's office to pick up the file, Daughter tells Lawyer that her new counsel has a plan to "get around things."

ISSUES

1. Who did Lawyer represent, Daughter as personal representative, "the estate," or other interests, such as heirs, creditors and taxing authorities? (In effect, does Lawyer have any duty to protect Son's interests?)

2. May or must Lawyer disclose to the court the concerns Lawyer has about Daughter's plan or about Son's capacity?

ANALYSIS

Issue One

A. Applicable Rules

R.P.C. Rule 1.7(b) provides that a lawyer shall not represent a client if the representation may be materially limited by the lawyer's responsibilities to another client, a third person, or the lawyer's own interests, absent the lawyer's reasonable belief that the representation will not be adversely affected and consent of the client. The Comment highlights the issue:

Conflict questions may also arise in estate planning and estate administration. . . . In estate administration the identity of the client maybe unclear under the law of a

fiduciary, under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

R.P.C. Rule 1.2(d) provides that a lawyer shall not counsel a client to engage, or assist a client in engaging in criminal or fraudulent conduct, but a lawyer may discuss the legal consequences of proposed conduct and counsel or assist a client in making a good faith effort to determine the validity, scope, meaning or application of the law. The Comment to Rule 1.2 contains the following:

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealing with a beneficiary.

R.P.C. Rule 1.14 governs a lawyer's representation of a client under a disability, and subsection (b) provides that a lawyer may take protective action or seek the appointment of a guardian of a client only where the lawyer reasonably believes the client cannot act adequately in the client's own interest. The Comment to Rule 1.14 states:

If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

R.P.C. Rule 1.16(a) provides that a lawyer shall withdraw from representation if, among other grounds, the representation will result in violation of the Rules of Professional Conduct. Subsection (b) provides that a lawyer may withdraw from representation if withdrawal can be accomplished without material adverse effect upon the client's interest or if, among other grounds, the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.

B. Discussion

Indiana case law provides scant authority on who is the client. In Vollmer by Vollmer v. Rupright, 517 N.E.2d 1240 (Ind.App. 1988), guardians of a minor child sought to challenge the attorney fee agreement between the personal representative of the child's mother's wrongful death estate and the attorney. The Court of Appeals affirmed the trial court's denial of the petition to vacate the award of attorney fees. In the course of assessing the fairness of the contingent fee agreement, the Court of Appeals observed that a wrongful death estate personal representative is a trustee for the benefit of distributees, and

does not act in his individual capacity or for his own benefit in hiring counsel. Further, given the extraordinary fiduciary nature of such a personal representative's responsibility, his activities and those of his attorney must be totally above reproach. The Court of Appeals held that any proposed contingent fee contract should be submitted for court approval prior to execution, but upheld the agreement at issue even though it was not submitted to the trial court for approval.

In Walker v. Lawson, 526 N.E.2d 968 (Ind. 1988), the Indiana Supreme Court held that an action will lie by will beneficiaries against the attorney who drafted the will on the basis that the beneficiaries are known third parties. A terminally ill woman asked her lawyer for advice on how to convey her estate to her two sons and not to her second childless spouse. The lawyer prepared a will disinheriting the husband and devising her entire estate in trust to the two sons. After her death, the spouse filed an election to take against the will. Sons sued lawyer, alleging he should have employed some other device to protect the estate against husband. While affirming the existence of a legal duty owed by lawyer to known third parties such as sons who would be will beneficiaries, the Supreme Court held that there was no mechanism available to lawyer to carry out wife's intent, so lawyer's failure to do so was not malpractice.

Hermann v. Frey, 537 N.E.2d 529 (Ind.App. 1989) was another malpractice case involving whether an attorney is subject to suit by a known third party who is not his client. The trial court granted summary judgment in favor of attorney, reasoning that attorney represented the administrator of the wrongful death estate, not surviving spouse individually. The Court of Appeals reversed, finding privity was not a requirement in a suit against attorneys by known third party beneficiaries. Spouse was permitted to proceed with her suit against attorney, which alleged that attorney was negligent in not naming one particular physician as a defendant in a medical malpractice action.

Two excellent law review articles examine in depth the issue of who is the client: "The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation," by Robert W. Tuttle, 1994 Univ. of Illinois Law Review 889 (1994) and "Representations Involving Fiduciary Entities: Who Is the Client?" by Jeffrey N. Pennell, 62 Fordham Law Review 1319 (1994). Tuttle in particular does a thorough job of examining the problem through a process known as casuistry.

Tuttle finds fault with the two leading models of fiduciary representation, which would operate as default rules in the absence of a specific agreement. The two models are the American

Bar Association Committee on Ethics and Professional Responsibility Formal Opinion 94-380, and the model of Professor Geoffrey Hazard set out in "Triangular Lawyer Relationships: An

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Exploratory Analysis," 1 Geo. J. Legal Ethics 15 (1987). ABA 94-380 states that the fiduciary is the lawyer's only client, and a lawyer owes the client's beneficiaries only the obligations owed to third parties. Hazard would treat the fiduciary and the beneficiary as joint clients of the lawyer, extending the lawyer's duties of loyalty and care to include the client's beneficiaries. Tuttle finds that ABA 94-380 ignores the peculiar nature of a fiduciary's role and the fiduciary's relationship to beneficiaries, and that the Hazard approach does not deal with all contexts in which lawyers represent fiduciaries, discounts the potential for conflict of interest, and exposes lawyers to increased malpractice liability.

Tuttle offers an alternative theory by which a lawyer representing a fiduciary assumes a relationship with the beneficiary that, while not an attorney-client relationship, is also not the same as the usual relationship between an attorney and a non-client. At a minimum, Tuttle would impose a legal duty on lawyers not to advise or assist fiduciary clients to breach fiduciary obligations, and in addition would impose a moral duty to protect the beneficiary from harm. Tuttle attempts to strike a balance between the two harms a lawyer might do a beneficiary through 1) not protecting the beneficiary against a fiduciary's breach, and 2) turning the lawyer into a "fiduciary watchdog" which would duplicate the oversight by courts or others and greatly increase costs, which tend to fall on beneficiaries.

Tuttle concludes that changes need to be made in the Rules of Professional Conduct. The first, a change to Rule 1.2(d), would prohibit a lawyer from counseling a client to engage, or assist a client, in conduct the lawyer knows is criminal, fraudulent, or a breach of fiduciary duties. The second is a change to Rule 1.6, so that a lawyer would have the discretion to disclose a fiduciary's breach of duty, without liability either to the fiduciary for disclosing or the beneficiary for failing to disclose. (Washington's version of Rule 1.6 authorizes an attorney to disclose a breach of fiduciary duty to a court which appointed the fiduciary, which would solve the problem involving a personal *representative* but would not address defalcations of a trustee, which is not court-appointed.) One other possible rule change bears consideration: Florida's Rule 1.7 expressly provides that the personal representative is the client and not the estate or the beneficiaries, and Pennell finds that this is a viable approach for other states in addressing the problem of who is the client, as it would minimize conflicts of interest and

help clarify parties' expectations.

It bears mentioning that the lawyer and client may enter into an agreement affecting the scope or terms of representation. Some probate lawyers make it clear in an engagement letter that the lawyer has the right to disclose the client's breach of fiduciary duties. Some even go so far as to send a "non-

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engagement letter" to estate beneficiaries making it clear the lawyer does not represent them, Finally, the Marion County Probate Court recently added the following language to the advisory of duties which each personal representative and guardian must sign:

I authorize my attorney to disclose to the court any information relating to his or her representation of me as personal representative even if such information would otherwise be confidential.

Such waivers eliminate any problem with the lawyer advising the court of client wrongdoing.

Absent rule changes, the law in Indiana would seem still to be unclear, though Turtle's argument that a lawyer has legal duties running only to a fiduciary client is compelling. Having answered the question "who is the client?" with the answer "probably the personal representative as a fiduciary," the analysis of conflict of interest and confidentiality issues becomes somewhat more straightforward.

Issue Two

A. Applicable Rules

R.P.C. Rule 1.9(b) provides that a lawyer who formerly represented a client in a matter shall not thereafter use confidential information to the disadvantage of the former client except as Rules 1.6 or 3.3 would permit or require, or when the information has become generally known.

R.P.C. Rule 1.6(a) provides that a lawyer shall not reveal information relating to a client's representation without consent after consultation, except for disclosures impliedly authorized in order to carry out the representation or except as provided in subsection (b). R.P.C. Rule 1.6(b) provides that a lawyer may reveal confidential information to the extent the lawyer reasonably believes disclosure is necessary to prevent the client from committing a criminal act or where the lawyer's representation of the client has been called into question (in

such contexts as a civil action against the lawyer, a criminal charge against the lawyer, or a disciplinary action against the lawyer).

R.P.C. Rule 3.3(a)(2) prohibits a lawyer from making a false statement of material fact to a tribunal and from failing to disclose a material fact to a tribunal which is necessary to avoid assisting a client's criminal or fraudulent act against the tribunal.

R.P.C. definition of "fraud" or "fraudulent" is conduct having a purpose to deceive and not merely negligent

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misrepresentation or failure to apprise another of relevant information.

R.P.C. definition of "knowingly" is actual knowledge of the fact in question, which may be inferred from circumstances.

B. Discussion

Under the facts as set out, and under the assumption that Daughter as personal representative is Lawyer's client, four theories would support Lawyer's disclosure of Son's possible incapacity: 1) The information of Son's possible incapacity has become generally known, 2) disclosure is impliedly authorized to carry out Lawyer's representation, 3) disclosure is authorized because necessary to prevent Daughter's crime, and 4) disclosure is required in order not to assist Daughter in committing a fraud on a tribunal.

Under the first theory, lawyer would be permitted pursuant to Rule 1.9(b) to disclose Son's possible incapacity if such information has become generally known. (Note that information about Daughter's scheme to coerce Son into giving her his share of the inheritance is different, in that this information is almost certainly not generally known.) The director of Son's group home is aware of Son's condition, and if Son were placed there by any social service agency or after some agency study or report or a physician's diagnosis, it begins to look as though Son's condition is generally known. Any special education or testing by or through a school would also contribute to an inference that son's condition is generally known. Lawyer's belief that Son's condition is generally known would probably be reasonable if Lawyer learns of some of the circumstances such as the above. If the fact is generally known, Rule 1.9(b) authorizes Lawyer to disclose the fact to the court.

The analysis of the second theory begins with viewing
Ten Rules – First Probate Case
Robert W. York
Page 27 of 49

Lawyer's role as assisting Daughter as personal representative in complying with her duties under the law. Among these are, in supervised administration, a duty to file an accounting with the court; in unsupervised administration, a duty to furnish an accounting to interested distributees and file a verified closing statement with the court; and in every estate, a duty to make distribution only to the persons entitled thereto. Note also I.C. 29-1-1-20(b), which provides that in a probate proceeding where an interested person is incapacitated, a court may appoint a guardian ad litem to represent such person if the court determines that representation of the interests otherwise would be inadequate, and which further provides that the court shall set out its reasons for appointing a guardian ad litem. Note also that under I.C. 29-3-3-2, if an incapacitated person's property does not exceed \$3500, the court may authorize a suitable person to receive and manage the property instead of appointing a guardian. Where the property exceeds \$3500, the implication is that only a

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guardian may receive it. Thus, a personal representative may never distribute property to an incapacitated heir or devisee, but must distribute to a court-appointed suitable person where the amount is \$3500 or less, or otherwise, to a guardian. I.C. 29-1-1-20(b) and I.C. 29-3-3-2 may be seen as imposing additional duties on a personal representative where a distributee is incapacitated. These duties of Daughter as personal representative make the fact of Son's questionable capacity information the fiduciary must report to the court prior to making distribution. Since Lawyer was retained to assist Daughter in carrying out her duties, Lawyer is impliedly authorized to disclose the fact to the court in order to carry out the representation, pursuant to Rule 1.6(a). Under this theory, then, Lawyer may disclose the fact of Son's questionable capacity to the court. There is some doubt, however, whether disclosures can be impliedly authorized by a representation after the representation has terminated, though such a result would seem to follow because Rule 1.9 (which applies to former clients) incorporates Rule 1.6 (which applies during a representation).

The third theory is that Lawyer may disclose the fact to the court in order to prevent Daughter from committing a criminal act, as authorized by Rule 1.6(b). If Son indeed lacks capacity or is subject to undue influence and Daughter knows it, Daughter's having him sign over his inheritance to her may well constitute all of the elements of criminal fraud or conversion. This potential crime can be prevented by Lawyer disclosing Son's questionable capacity to the court and the court's appointment of a guardian ad litem in two ways: First, the court will make a determination that Son is incapacitated, so that no subsequent attempt by Son to alienate his property will be valid. Second,

Son will have an ally in the person of the guardian ad litem, who can help Son resist undue influence and otherwise protect Son's interests.

Fourth, it can be argued that Lawyer is required to disclose the fact to the court in order not to assist Daughter in committing a fraud on the court, pursuant to Rule 3.3(a)(2). Daughter's failure to apprise the court of the relevant information that Son may be an incapacitated person interested in the estate may constitute fraud on the tribunal under the R.P.C. definition of fraud. The failure to disclose relevant information, coupled with a personal representative's duty not to distribute to an incapacitated person, may raise Daughter's silence to the level of conduct having a purpose to deceive, in this case to deceive the court. Lawyer shall not then knowingly fail to disclose the information, because such conduct would assist Daughter's fraud on the tribunal. Lawyer need not "know" that Son actually lacks capacity; Lawyer need only know that Son's condition is such that the court ought to consider whether Son's interests require the appointment of a guardian ad litem, and Lawyer certainly knows this.

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In sum, Lawyer may disclose to the court the fact that Son may be incapacitated either because the fact is generally known, because the disclosure is impliedly authorized by the representation, or because disclosure is necessary to prevent Daughter from committing a criminal act. Alternatively, Lawyer must disclose the fact of Son's questionable capacity to the court in order not to assist Daughter in committing a fraud on the tribunal. Disclosure of Daughter's scheme itself (clearly something Daughter expects to be covered by lawyer-client confidentiality) would not be necessary if disclosure of Son's questionable capacity results in the court appointing a guardian ad litem for him.

While these good-faith arguments in favor of disclosure are available to Lawyer under the current state of Indiana law, the result is by no means clear-cut. Daughter would need to be audacious indeed to sue Lawyer in malpractice for breaching her confidence and defeating her scheme by disclosure, but a suit by Son's later-appointed guardian (suing Lawyer in malpractice because Son is a known third party) would be a real possibility if Lawyer does not disclose. Where, however, a personal representative client is merely negligent instead of greedy and corrupt and an estate beneficiary is not incapacitated, a more difficult balancing-of-interests problem is presented. Each fact situation is, of course, different, but one or more of the theories justifying Lawyer's disclosure here may apply in other circumstances.

Sample Fee Agreement

Date

| | |
|-----------------------|-----------------------------------|
| Petitioner Address | Co-Petitioner (if any) Address |
|-----------------------|-----------------------------------|

RE: Estate of _____

Dear _____:

I am pleased that you have chosen me and my law firm with respect to the matters involving the estate of _____ (deceased) (protected person). Under the Indiana Rules of Professional Conduct, it is advisable that we confirm in writing the terms and conditions under which this law firm will provide services to you so that both we and you can concentrate on the provision of the services you require.

You have agreed to pay for the legal services provided by me at the rate of \$_____ an hour. From time to time, it may be necessary to also utilize the services of other professional members of the firm in order to properly provide appropriate representation for you. Our fees for legal services will be billed on an hourly basis according to the billing rates charged by each attorney or paralegal of our firm. These rates currently range from \$_____ per hour for beginning associates to \$_____ per hour for more senior associates. Paralegal time is charged at \$_____ per hour. These billing rates are subject to adjustment at the beginning of a calendar year.

Our fees are not contingent in any way upon the outcome of your case, but will reflect the uniqueness, complexity and the difficulty of obtaining the resolution of the matters at issue. Due to the many variables which affect the time needed to provide the services you have requested, I am unable to provide you with an estimate of your total fees.

In matters involving supervised probate estates and guardianship estates, the Court will determine the amount of attorneys' fees, expenses and fees to you and our firm that it will permit the estate to pay as costs of administration. In the event the Court authorizes fees/expenses in an amount less than you agree to in this agreement, you agree to personally pay the difference. Almost always, the fees and expenses we collect are in the amount authorized by the Court but given unforeseen circumstances that may apply to this matter, I cannot make that commitment at the outset.

I have requested advancement against attorney fees and expenses of _____ (\$) which you have now paid from your personal resources. That amount will be placed into my trust account for your credit towards payment of the future fees and expenses of this law firm. You agree to keep that amount current in my trust account so that I will always have money in the trust account to pay on your behalf attorney fees and expenses as they are incurred.

The following are firm billing policies which you should know. We will provide you with invoices on a monthly basis. The invoices will describe our services and itemize our expenses in accordance with our standard firm policies. These invoices reflect attorney services rendered during the month, the incurrence of litigation expenses and the current balance of your amount in our trust account. If the statement reflects an amount due you are expected to pay the amount upon receipt of the bill and replenish the retainer as set forth above. The bill for services rendered represents our time devoted to your case and our expenditures made on your behalf during the preceding month. Therefore, the services and costs may have been rendered up to thirty days or more prior to your receipt of the bill. Expenses which you agree to pay include such items as printing/photocopying (\$. per page), deposition costs, subpoenas, investigators, long-distance telephone charges, facsimile charges (\$ per page), travel and related expenses, computerized legal research, postage and delivery and courier services, and fees for experts witnesses. If we anticipate that certain major expenses will be incurred, we may request that you pay these expenses directly in advance of when they are incurred.

Payment of each invoice is due upon receipt. Subject to any limitations imposed by the Indiana Rules of Professional Conduct, our firm will be entitled to cease work on any aspect of this representation if any invoices are not paid within thirty (30) days after the invoice is mailed. If any attorney fees or expenses remain unpaid by the time the bills are prepared for the following month, we reserve the right to assess a one percent late fee on all unpaid balances. If we are required to resort to collection proceedings to recover any amounts from you, we will also be entitled to recover all costs incurred concerning such collection proceedings including reasonable attorneys' fees incurred either by us or separate counsel.

You shall have the right at any time to terminate our services and representation upon written notice to the firm. Such termination shall not, however, relieve you of the obligation to pay for all services rendered and costs or expenses incurred on your behalf prior to the date of such termination. As permitted by law, we reserve the right to retain your files until all invoices have been paid in full.

We reserve the right to withdraw from your representation if, among other things, you fail to honor the terms of this engagement letter, you fail to cooperate or follow our advice on a material matter, or any fact or circumstances would, in our view, render our continuing representation unlawful or unethical. If we elect to withdraw from your representation, you agree to take all steps necessary to free us of any obligation to perform further, including the execution of any documents reasonably necessary to complete our withdrawal, and we will be entitled to be paid for all services rendered and costs and expenses incurred on your behalf through the date of withdrawal.

During the course of our representation of you, I encourage you to call to discuss any questions or concerns that you may have. I have found that communication is the best means available for avoiding misunderstanding or undue anxiety regarding a pending case. You will find that I may not always be available to speak with you over the telephone. Commitments to other clients, regularly scheduled court appearances, depositions and other responsibilities both within and outside my office sometimes precludes my availability to speak with a client when

such calls are received. I have given you all of my telephone numbers and want you to feel free to try to reach me after normal business hours.

By signing this letter, you agree with the terms of this engagement letter. I have enclosed an additional original of this letter for your signature. Please sign in the appropriate space and return it to me in the enclosed self-addressed, stamped envelope.

Again, I welcome the opportunity to represent you in this case. Please keep a copy of this letter for your files.

Sincerely,

LAW FIRM

Attorney

The undersigned acknowledges that she and he have read this letter, understands everything contained herein and agree to all of the terms set forth herein.

Date

Name

Date

Name

STATE OF INDIANA) IN THE MARION SUPERIOR COURT 8
) SS: PROBATE DIVISION
 COUNTY OF MARION) CAUSE NO.

IN RE THE UNSUPERVISED ESTATE OF:)
 _____, Deceased.)

**PETITION FOR APPOINTMENT OF PERSONAL REPRESENTATIVE
 AND FOR UNSUPERVISED ADMINISTRATION WITH LAST WILL ANNEXED**

Come now _____, the Petitioner, and respectfully requests the Court to appoint her as Personal Representative of the Estate of _____, deceased, and in support thereof, states the following:

1. _____, Decedent, an unmarried male, age 69, having been born on October 2, 1940, died testate on February 10, 2010, while domiciled in Marion County, Indiana.

2. On April 26, 2006, Decedent properly executed his Last Will and Testament by executing an acknowledgment of said will and verification of its execution by two (2) witnesses thereto, _____ and _____. **Said Last Will is annexed hereto.**

3. The Petitioner herein, _____, is a person qualified to serve as Personal Representative of the Estate of _____ in that:

A. In Item IV of his Will, the Decedent nominated his daughter, _____, the Petitioner, to serve as his personal representative.

B. The Petitioner is a qualified person in that she:

- (i) is over the age of eighteen (18) years;
- (ii) is not incapacitated;
- (iii) is not a convicted felon.

4. The persons named by Decedent in Article IV of his Will to receive the proceeds from his estate are as follows:

| | |
|--------------------------|--------------------------|
| Name and Address | Name and Address |
| Relation to Decedent | Relation to Decedent |
| “Adult” or date of birth | “Adult” or date of birth |

5. To the Petitioner's best knowledge, the Decedent's estate is believed to be solvent and to consist of the following assets, believed to be in the approximate value listed:

A. Real Property: _____ Street, Indianapolis, Marion County, Indiana 46219, being more particularly described as:

B. Motor Vehicles:

C. Household Goods:

D. Accounts:

6. The Decedent's known creditors are listed as follows: Name, address and approx. debt.

7. The contact information for the Petitioner is as follows: Name and telephone number.

8. The name and business address of the legal counsel who will represent the personal representative is:

Robert W. York, Attorney # 1435-49
ROBERT W. YORK & ASSOCIATES
7212 N. Shadeland Avenue, Suite 150
Indianapolis, Indiana 46250
Tel: (317) 842-8000
Fax: (317) 577-7321
Email: rwYork@york-law.com

9. In Item IV of his Will, the Decedent requested that his personal representative be appointed to serve without posting a corporate surety bond and Petitioner requests that such bond not be required.

10. As evidence by their signatures on this Petition, all Decedent's testate heirs approve of and request the Court to grant the relief herein requested.

WHEREFORE, the Petitioner prays the Court for an order appointing _____ as Personal Representative of the Estate of _____, decedent, directing Letters of Administration be issued upon the taking of an oath, and that said Petitioner be authorized to proceed with the unsupervised administration of the decedent's testate estate, that bond not be required but if it is so required it be established in the minimum amount, and for all other relief which is proper in the premises.

I affirm under the penalties for perjury that the foregoing facts are true.

_____, Petitioner

We, the sole testate heirs of the Decedent, hereby approve of and request the Court to grant all the relief requested in this Petition.

Printed

Printed

Respectfully submitted

ROBERT W. YORK & ASSOCIATES
Attorneys for Petitioner

By: _____
Robert W. York, #1435-49

ROBERT W. YORK & ASSOCIATES
7212 North Shadeland Avenue, Suite 150
Indianapolis, Indiana 46250
Phone: (317) 842-8000
Fax: (317) 577-7321
Email: rwYork@york-law.com

To be accompanied by a proposed Order, reciting the same facts as findings and ordering the relief requested.

To also be accompanied by an Appearance showing “Case Type under Administrative Rule 8(b)(3): EU.”

STATE OF INDIANA) IN THE MARION SUPERIOR COURT 8
) SS: PROBATE DIVISION
COUNTY OF MARION) CAUSE NO.

IN RE THE UNSUPERVISED ESTATE OF:)
_____, Deceased.)

OATH OF PERSONAL REPRESENTATIVE

I, _____ who am over the age of eighteen (18) years, swear I will faithfully discharge the duties of my trust as Personal Representative of the Estate of _____, deceased, according to law.

I verify under the penalties for perjury that the above statements are true.

Dated: _____
_____, Personal Representative
Address
Tel: (317) _____

Robert W. York, #1435-49
Robert W. York & Associates
7212 N. Shadeland Avenue, Suite 150
Indianapolis, IN 46250
(317) 842-8000

STATE OF INDIANA) IN THE MARION SUPERIOR COURT 8
) SS: PROBATE DIVISION
COUNTY OF MARION) CAUSE NO.

IN RE THE UNSUPERVISED ESTATE OF:)
_____, Deceased.)

LETTERS OF ADMINISTRATION

Estate No. _____

STATE OF INDIANA, MARION COUNTY, Sct:

I, Elizabeth L. White, Clerk of the Marion Superior Court 8, Probate Division, within and for said County of Marion, in the State of Indiana, do hereby certify that the Estate of _____, deceased, late of said County, has been opened to probate in the Court and cause number above shown on April 21, 2010, and)_____, being duly qualified as and having been appointed by the Court as Personal Representative is duly authorized and empowered to take upon herself the administration of such estate according to law and to carry out the orders of said Court.

(SEAL) WITNESS my hand and seal of said Court, at Indianapolis, Indiana
This _____ day of _____.

Elizabeth L. White, Clerk, Marion Superior Court 8,
Probate Division

You may contact the attorney for the Personal Representative:

Robert W. York
ROBERT W. YORK & ASSOCIATES
7212 N. Shadeland Ave., Suite 150
Indianapolis, Indiana 46250-2030
(317) 842-8000
Fax: (317) 577-7321

Note: The Clerk's of the various counties have their own procedure and will create letters as well, usually for a fee.

STATE OF INDIANA) IN THE MARION SUPERIOR COURT 8
) SS: PROBATE DIVISION
COUNTY OF MARION) CAUSE NO.

IN RE THE UNSUPERVISED ESTATE OF:)
_____, Deceased.)

NOTICE OF ADMINISTRATION

Notice is hereby given that on the _____ day of April, 2010, _____ was appointed Personal Representative of the Estate of _____, deceased, who died on the _____ day of February, _____. All persons having claims against the estate whether or not now due, must file a claim in the office of the Clerk of this Court within three (3) months from the date of the first publication of this notice or within nine (9) months after the decedent’s death whichever is earlier, or the claims will be forever barred.

Dated at Indianapolis, Indiana this _____ day of _____

Elizabeth L. White, Clerk, Marion Superior Court 8
Probate Division

Attorney for the Personal Representative

Robert W. York # 1435-49
ROBERT W. YORK & ASSOCIATES
7212 North Shadeland Avenue, Suite 150
Indianapolis, Indiana 46250
Tel: (317) 842-8000
Fax: (317) 577-7321

Note: This is what will go to the newspaper for publication

STATE OF INDIANA) IN THE MARION SUPERIOR COURT 8
) SS: PROBATE DIVISION
COUNTY OF MARION) CAUSE NO.

IN RE THE UNSUPERVISED ESTATE OF:)
CHARLES THOMAS EYRE, Deceased.)

NOTICE OF ADMINISTRATION TO HEIRS AND CREDITORS

To: **(Mailed to Heirs and Creditors. Show name and address)**

Notice is hereby given that on the _____ of _____, 2011, _____ was appointed Personal Representative of the Estate of _____, deceased, who died on the ____ day of February, 2011. All persons having claims against the estate whether or not now due, must file a claim in the office of the Clerk of this Court within three (3) months from the date of the first publication of this notice or within nine (9) months after the decedent’s death whichever is earlier, or the claims will be forever barred.

Dated at Indianapolis, Indiana this _____ day of _____

Elizabeth L. White, Clerk, Marion Superior Court 8
Probate Division

Attorney for the Personal Representative

Robert W. York # 1435-49
ROBERT W. YORK & ASSOCIATES
7212 North Shadeland Avenue, Suite 150
Indianapolis, Indiana 46250
Tel: (317) 842-8000

Note: Mailed by the Clerk

STATE OF INDIANA) IN THE MARION SUPERIOR COURT 8
) SS: PROBATE DIVISION
COUNTY OF MARION) CAUSE NO.

IN RE THE UNSUPERVISED ESTATE OF:)
_____, Deceased.)

CLERK’S CERTIFICATE OF MAILING

I, Elizabeth L. White, Clerk of the Marion Superior Court 8, Probate Division, hereby certify that Notice of Administration to Heirs and Creditors, a copy of which is contained in the Court’s file in this cause, was mailed the date set forth below to the following:

| | |
|--|--|
| | |
|--|--|

Dated at Indianapolis, Indiana this _____ day of _____

Elizabeth L. White, Clerk, Marion Superior Court 8
Probate Division

Attorney for the Personal Representative

Robert W. York # 1435-49
ROBERT W. YORK & ASSOCIATES
7212 North Shadeland Avenue, Suite 150
Indianapolis, Indiana 46250
Tel: (317) 842-8000

STATE OF INDIANA) IN THE MARION SUPERIOR COURT 8
) SS: PROBATE DIVISION
COUNTY OF MARION) CAUSE NO.

IN RE THE UNSUPERVISED ESTATE OF:)
_____, Deceased.)

AFFIDAVIT OF HEIRSHIP

Comes now _____, being duly sworn upon her oath, and states that:

1. She is the biological child of _____ and _____, having been born on _____.
2. (Mother) died on _____.
3. Decedent, (father) died testate on _____.
4. The Last Will and Testament of (father) _____, dated April 26, 2006, was admitted to probate in this cause on _____ and she was appointed as Personal Representative of the Estate of _____ in this cause.
5. Pursuant to Article IV of decedent's Will, decedent's residuary estate is to be equally divided between "my grandchildren who survive me."
6. That decedent's grandchildren who survived him are identified as follows: (List)
7. That she has personal knowledge of and is competent to testify to the matters related herein.

I verify under the penalty for perjury that the above statements are true.

Robert W. York
Attorney No. 1435-49
ROBERT W. YORK & ASSOCIATES
7212 N. Shadeland Ave., Suite 150
Indianapolis, Indiana 46250

Note: Can be but does not need to be filed at same time you file Petition.

STATE OF INDIANA) IN THE MARION SUPERIOR COURT 8
) SS: PROBATE DIVISION
COUNTY OF MARION) CAUSE NO.

IN RE THE UNSUPERVISED ESTATE OF:)
_____, Deceased.)

PERSONAL REPRESENTATIVE’S CLOSING STATEMENT

Comes now _____, Personal Representative of the Estate of _____, deceased, and pursuant to I.C. 29-1-7.5-4, submits her verified Closing Statement to close the unsupervised Estate of _____ as follows:

1. _____, Decedent, an unmarried male, age 69, having been born on October 2, 1940, died testate on February 10, 2010, while domiciled in Marion County, Indiana.

2. On April 26, 2006, Decedent properly executed his Last Will and Testament by executing an acknowledgment of said will and verification of its execution by two (2) witnesses thereto, _____ and _____

3. On _____, the Court admitted the Will to probate under unsupervised administration and appointed _____ as personal representative of the Estate of _____.

4. Publication of notice to creditors of the Estate was first made on _____ in the Court & Commercial Record, a newspaper of general circulation in Marion County, Indiana and a copy of the Publisher’s Affidavit establishing such publication was filed on _____ and is contained in the files of the Court. Proper notice of administration was also made to all known creditors of the estate in accordance with I.C. 29-1-7-7(c) and IC 29-1-7-7(d).

5. The personal representative had fully administered the estate of the decedent by making payment, settlement, or other disposition of all claims which were presented, expenses of administration and estate, inheritance, and other death taxes.

6. Decedent's real properties were owned jointly by the entirety with _____, his spouse, and decedent's interest in the real estate properties passed to _____ outside the probate estate as a matter of law.

7. All furniture and household goods of the decedent were acquired during the marriage of decedent to _____ and were in the possession of decedent and _____ at the time of decedent's death. Pursuant to IC 32-17-11-29 all such property passed to _____ outside the probate estate as a matter of law.

8. The personal representative has now distributed all the assets of the estate to _____ the beneficiaries: _____ and _____.

9. Except for the estate assets distributed pursuant to the terms of the Last Will to the beneficiaries, all other assets in which decedent had an interest at the time of his death were jointly owned with others or were devised to a named beneficiary and as non-probate transfers are not subject to administration in this estate.

10. On _____, the personal representative filed the estate's Indiana Inheritance Tax Return and paid \$_____ to the Marion County Treasurer for all inheritance taxes due the State of Indiana, including all Indiana inheritance taxes due as a result of the non-probate transfers. All income tax returns of the Decedent and the Estate have been filed and all taxes due thereon have been paid. No federal estate tax return was required to be filed.

11. The personal representative has paid all claims and creditors of the estate, has performed all actions required of her to facilitate transfer of the non-probate transfers to those entitled to receive them.

12. As required by law, the personal representative has provided a copy of this Closing Statement to the following known creditors and distributees of the estate: list with address.

13. The personal representative acknowledges that if no proceedings involving her as the personal representative are pending in the Court three (3) months after this Closing Statement is filed, her appointment as the Personal Representative terminates and the Estate will be closed by operation of law.

I verify under the penalties for perjury that the above statements are true.

Dated: _____, _____, Personal Representative

Respectfully submitted,

Robert W. York, # 1435-49
ROBERT W. YORK & ASSOCIATES
Attorneys for Personal Representative
7212 North Shadeland Avenue, Suite 150
Indianapolis, IN 46250
Phone: (317) 842-8000
Fax: (317) 577-7321
rwyork@york-law.com

Note: Some courts will *sua sponte* issue an Order closing the estate after the three month period.

Marion County Proposed Probate Form 412.2. Instructions to Personal Representative of Supervised Estate
MARION SUPERIOR COURT 8 – PROBATE DIVISION

SUPERVISED ESTATE OF _____

CAUSE NUMBER _____

**COURT’S INSTRUCTIONS TO PERSONAL REPRESENTATIVE
OF SUPERVISED ESTATE**

Please read carefully before you date and sign. One copy of this form must be filed with the Court before your appointment as personal representative is confirmed by the Court. Keep one copy for your records.

Introduction:

You have been appointed as the personal representative of the estate of a deceased person. By your appointment, the Court has placed in you the highest trust that you will perform your duties in the best interests of all beneficiaries and creditors of the estate. It is important that you fully realize your duties and responsibilities. Listed below are some, but not all of them.

You must be represented at all times by an attorney of record. Your attorney is required to reasonably supervise and guide your actions as personal representative unless and until that attorney is permitted by order of the Court to withdraw from representing you.

Your attorney is required to notify the Court in the event that you are not timely performing or improperly performing your fiduciary duties to the beneficiaries and creditors of the estate and by signing these Instructions, you agree that the filing of that notice does not violate the attorney-client privilege. If the Court receives such notice, it will set the matter for hearing and require you to personally appear and account to the Court for all actions taken or not taken by you as personal representative. You are required to notify the Court in writing in the event that your attorney is not timely performing or improperly performing his or her duties to reasonably supervise and guide your actions as personal representative. Upon receipt of the notice, the Court will set the matter for hearing and require you and your attorney to personally appear and account to the Court for all actions taken or not taken by the attorney.

The Instructions which follow are to be considered by you as Orders of the Court which require you to perform as directed. Although your attorney will file all papers with the Court, you, as personal representative, are ultimately responsible to see that the estate is properly and promptly administered, and you are personally liable for incorrect distributions, payments, or acts, as well as any unpaid taxes or costs of administration.

The Court appreciates your efforts on behalf of the estate.

Gerald S. Zore
Judge, Marion Superior Court 8
Probate Division

As Personal Representative, you are required to:

1. Locate, collect and maintain all property owned by the decedent.
2. Keep motor vehicles and real estate insured and protected.
3. Immediately fill out a change of address at the post office to have the decedent's mail forwarded to you.
4. No later than two (2) months after your appointment, have your attorney file in this Court an inventory describing all property belonging to the estate, with date of death values, and forthwith serve a copy of the inventory on all known heirs, beneficiaries or distributees of the estate.
5. **Estate Checking Account.**
 - A. Open a separate checking account in your name "as personal representative for the estate of (the decedent).” Obtain a federal tax I.D. number for the checking account. Do not use your Social Security number or decedent's Social Security number.
 - B. **DO NOT** put any of your funds or anyone else's funds in this account.
 - C. Always pay for estate expenses by checks from this account. Do not pay any expenses with cash.
 - D. Make sure that the bank is willing to return cancelled checks or electronic versions of the checks to you.
 - E. Keep records of all deposits including the identity of the person or entity paying the money into the estate.
6. Determine all debts that the decedent owed. Look through decedent's tax returns and other papers. Talk to anyone who knew decedent's business. Consult your attorney as to payment of debts, costs of administration, bond premiums, and funeral bills. Some debts may be unenforceable. Some may have priority over others.
7. Have your attorney provide written notice of the administration of the estate to all known creditors of the estate.
8. If the decedent owned a business or was involved in contracts which were not yet fully performed, have your attorney obtain directions from the Court as to those matters.
9. **DO NOT MAKE** any distribution of personal property or real estate to an heir or devisee without prior Court order.
10. **NEVER** borrow estate property or put it to your own personal use.
11. Prepare and file income tax returns for the tax year in which the decedent died and any returns for prior years if needed. Timely prepare and file any estate, inheritance or fiduciary tax returns and pay taxes as they come due.
12. **Accounting.** Indiana law requires the estate to be closed within one (1) year of your appointment as personal representative. Before the estate can be closed, you must file with the Court a final accounting of your actions as personal representative.
 - A. Have your attorney file your final accounting, consisting of three (3) schedules, after the administration of the estate has been completed.
 - B. The first schedule must include all assets listed on the inventory, any income and additional assets obtained during administration, and any adjustments to the inventory.

C. The second schedule must be an itemized list of expenditures. Documentation for each expense shall include: (a) the payee; (b) check number or other identifying number on the instrument; (c) the amount disbursed; and, (d) if the reason for disbursement is not apparent from the description of the payee, a description of the reason for the disbursement sufficient to substantiate the reason for the disbursement as part of the administration of the estate. Cancelled checks or facsimile copies of paid checks for each expenditure must be attached as evidence of payment.

D. The third schedule must be a recapitulation indicating the remaining estate property after subtracting expenditures. A proposed distribution must be furnished to all interested parties, including heirs.

13. After the Court approves your final account, make distribution to the proper people and file a supplemental report with the Court, attaching receipts.

14. Notify the Court and your attorney of any change in your address or telephone number.

15. **NEVER** pay yourself or your attorney any fees from assets of the estate without a prior Court Order.

16. Keep a record of the time you spend working on the estate. You are entitled to a reasonable fee, unless you waive a fee. Time records will help the Court determine your fee.

17. Always contact your attorney for advice if you are unsure as to any act as personal representative. Have your attorney counsel you in relation to the estate and explain anything that you do not fully understand.

18. Do not sell an estate asset without prior Court Order unless the Will, in very specific terms, authorizes sale without court order. Consult your attorney about this.

I authorize my attorney to notify the Court in the event that he or she has reason to believe that I am not timely performing or improperly performing my fiduciary duties to the beneficiaries and creditors of the estate even if such information would be otherwise confidential.

I acknowledge that I have carefully and completely read the above instructions and received a copy for my records. I agree to properly carry out my duties.

Dated this _____ day of _____, 20 ____.

Signature, Personal Representative

Signature, Personal Representative

Print, Personal Representative

Print, Personal Representative

I acknowledge that I have carefully and completely discussed the above instructions with my client before this form was signed and believe that he or she is fully aware of and capable of performing the duties required of a personal representative of a supervised estate.

Signature, Attorney

Print, Attorney