ELDER LAW DEVELOPMENTS

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I. The Special Needs Trust Fairness Act.

A. Signed into law and became effective on December 13, 2016.

1. Included in H.R. 34, the 21st Century Cures Act.

2. Section 5007 included the Special Needs Trust Fairness Act (SNTFA).

   a. This was NAELA's top priority for the last Congress and has been a goal of NAELA for many years.

   b. It allows individuals with disabilities to set up their own so-called "(d)(4)(A)" trusts (sometimes referred to as "under age 65 trusts").

B. The SNTFA involves a simple amendment to §1917(d)(4)(A) of the Social Security Act [42 U.S.C. §1396p(d)(4)(A)] to allow an individual, as well as a parent, grandparent, legal guardian, or a court having jurisdiction, to establish a self-settled special needs trust.

1. Previously, a so-called "(d)(4)(A) trust", or "under age 65 trust", could only be established for SSI and Medicaid eligibility by a parent, grandparent, legal guardian, or the court.

2. So-called "(d)(4)(B) trusts", also called "Miller trusts" and "qualified income trusts", can be established by an individual by himself or herself, as can a pooled trust sub-account (also called a "non-profit corporation" special needs trust) under §1917(d)(4)(C).

C. This small change corrects an apparent error made 24 years ago in the Omnibus Budget Reconciliation Act of 1993.

1. That law codified the ability for persons with special needs to establish a trust to supplement public benefits.

2. Without a special needs trust (SNT), persons with disabilities risk losing public benefits if they receive an inheritance, personal injury award, or other funds.

3. Due to an apparent omission, however, the law did not permit individuals to establish their own (d)(4)(A) SNTs.

   a. This would appear to have been an omission since a "pooled trust" SNT could be self-funded.

   b. Unfortunately, due to strict enforcement of this omission, a person with disabilities who did not have a living parent or grandparent was forced to spend time and money to go through a court to have a judge approve the trust (directly or through a guardianship proceeding).

4. The SNTFA is the second law in as many years liberalizing the use of funds on behalf of persons with disabilities.

   a. In 2015, Congress enacted the ABLE law that allows persons with disabilities to have accounts that are sheltered from being counted as a resource for public benefits eligibility.

   b. Unfortunately, there are significant limitations on the use of ABLE accounts as will be addressed later in these materials:

      (1) The disability must have occurred prior to age 26, there is a $100,000 maximum accumulation above which SSI eligibility would be affected, and only $14,000 in the aggregate can be added to the account each year.

      (2) A self-settled SNT does not contain any of these restrictions.

   c. Refer to Part III of these materials regarding the current status of ABLE accounts.

II. Use Of Special Needs Trusts By Military Parents.

A. The Disabled Military Child Protection Act, 10 U.S.C. §1450, became law on December 19, 2014. It provides in part:

1. "...a monthly annuity...shall be paid to the person's beneficiaries under the [Survivor Benefit Plan], as follows":

> Special needs trusts for sole benefit of certain dependant children - ...a supplemental or special needs trust established under subparagraph (A) or (C) §1917(d)(4) of the Social Security Act...for the sole benefit of a dependant child considered disabled under §1614(a)(3) of that Act [42 U.S.C. §1382c(a)(3)], who is incapable of self-support because of mental or physical incapacity.

2. The United States Department of Defense issued guidance to implement this law on December 31, 2015, so that military parents may plan to allow a survivor benefit to be paid to an SNT for that child's benefit in accordance with the guidance provided in the directive.

3. For additional information concerning this guidance, see *http://tinyurl.com/elr-DefenseGuidance.*

B. Prior to this new law, military members and retirees who are parents of a child with a disability were unable to plan properly for their child's future.

1. Federal law did not previously permit them to direct their retirement benefit under the Survivor Benefit Plan (SBP) to a special needs trust upon the retiree's death.

2. The Department of Defense had consistently determined that a "person" under the current law then in effect did not include a trust.

3. Consequently, prior to this new law, the only choices were either to have the benefit paid to a non-disabled "person," thereby disregarding the child completely and hoping others would care for the child, or to have the survivor benefit paid outright to child, thereby affecting the child's eligibility for public benefits.

C. There are numerous requirements in order to qualify under this new law:

1. The SNT must be established under existing federal law permitting first party self-settled or pooled SNTs.

2. Either a statement from the Social Security Administration certifying that the SNT is acceptable or an attorney must supply a written statement specifying the adequacy of the trust.

3. Prior to the SNTFA covered in Part I of these materials, a (d)(4)(A) SNT would have been required to be established by a parent, grandparent, legal guardian, or the court.

4. The election may be made after the death of a member or a retiree under certain circumstances (i.e., when it would otherwise be payable to the dependent child, or when the Secretary of Defense makes the election to cover a dependent child due to the death of an active duty member in the line of duty, or when the member dies during active duty leaving no spouse and the benefit is payable to dependent children).

D. The foregoing commentary regarding the use of special needs trusts by military parents has drawn significantly from ***The Elder Law Report***, Vol. XXVII, Issue 2, September 2016.

III. Developments Concerning ABLE Accounts.

A. Passage by the U.S. Congress of the Achieving A Better Life Experience Act of 2015 (the "ABLE Act") was covered in detail at the 37th Annual Judge Robert H. Staton Indiana Law Update.

   1. Additional information explaining developments that had occurred subsequent to enactment were addressed at the 38th Annual Judge Robert H. Staton Indiana Law Update.

   2. The first actual ABLE accounts were not established until the middle of 2016, when Ohio launched its STABLE accounts, followed shortly thereafter by Tennessee.

B. General background.

   1. The ABLE Act allows each state to establish and operate an ABLE program.

   2. The purpose of the ABLE Act is to allow contributions to be made to an ABLE account that was established for the purpose of meeting the Qualified Disability Expenses (QDE) of the disabled beneficiary.

   3. Because the ABLE Act amended § 529 of the Internal Revenue Code and provides for thresholds tied to that section's permitted accounts in each state, ABLE accounts are similar to § 529 college savings accounts.

      a. For those under 19, must establish that beneficiary was either blind or disabled under the Social Security Act definitions, or under the new disability certification criteria set forth in § 529A(e)(2) of the Act.

      b. For those older than 19, must establish that beneficiary was either blind or disabled under the Social Security Act definitions, and such blindness or disability occurred before the date on which beneficiary turned age 26.

c. For purposes of the section defining disability, the phrase "marked and severe functional limitations" means the standard of disability in the Social Security Act (see 20 C.F.R. § 416.906).

4. For additional information concerning ABLE accounts, refer to my Elder Law Developments materials presented at the 37th and the 38th Annual Judge Robert H. Staton Indiana Law Update programs, or consult my website, www.rkcraiglaw.com, titled respectively 2015 Elder Law Developments and 2016 Elder Law Developments.

C. Purposes and goals of the ABLE Act.

1. To allow persons to place their own assets in an account that presumably would be easier to establish and to administer than a "(d)(4)(A)" trust.

2. To avoid the limitation prohibiting the disabled person himself from being able to establish a "(d)(4)(A)" trust, but this limitation has now been eliminated by the SNTFA.

3. To allow the disabled person to manage his or her own account, if able to do so; note, however, that the ability to manage is very limited.

D. Advantages of ABLE accounts.

1. Simplicity and economy in terms of establishment and administration.

2. Allows the disabled person himself or herself to be the account manager and decide what distributions should be made and for what purposes, unlike a "(d)(4)(A)" trust or a "(d)(4)(C)" pooled trust for which a third-party trustee is needed for that role.

3. All growth in an ABLE account is income-tax free.

4. Contributions by third parties qualify for the annual gift tax exclusion, but contributions must be in cash unless it is the result of an in-kind rollover.

5. The designated beneficiary of the ABLE account can be changed to a different disabled family member.

6. There is no age-65 limit on the disabled person funding his or her own ABLE account as long as the disability occurred before age 26.

7. Distributions for QDE are income-tax free.

    a. QDE are defined as: "Any expenses related to the eligible individual's blindness or disability which are made for the benefit of an eligible individual who is the designated beneficiary, including the following expenses: education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses which are approved by the Secretary under regulations and consistent with the purposes of this section."

    b. Proposed regulations from the IRS interpret QDE very liberally and broadly, perhaps even more broadly than would be allowed for distributions from a "(d)(4)(A)" trust or a "(d)(4)(C)" pooled trust.

    c. The IRS has concluded that QDE "should be broadly construed to permit the inclusion of basic living expenses and should not be limited to expenses for items for which there is a medical necessity or which provide no benefits to others in addition to the benefit to the disabled individual."

    d. The proposed regulations include in QDE "expenses that are for the benefit of the designated beneficiary in maintaining or improving his or her health, independence, or quality of life." [Prop. Reg. §1.529A-1(b)(16)].

e. Expenses will not be QDE if they are incurred at a time when a designated beneficiary is neither disabled nor blind within the meaning of Treas. Reg. § 1.529A-1(b)(9)(A) and § 1.529A-2(e)(1)(i).

f. If the IRS imputes a penalty because a distribution is not a QDE, the impact could be minimal or irrelevant:

(1) The ten percent withdrawal penalty is only levied on the income (the appreciation portion) of the account that is distributed.

(2) For example, if the parents contribute $1,000 per month at the beginning of each month, which is used immediately to pay a non-qualified expense, the penalty would be zero, since there would be no income earned from that investment, nor would there be the chance of a Medicaid pay-back lien on the ABLE account funds since the account would be a conduit for payments and there would be no account build-up subject to the lien.

(3) If an ABLE beneficiary is also a beneficiary of a third party SNT which owns a home in which the beneficiary lives, there will be no Medicaid lien or estate recovery because the beneficiary does not own the home; if the SNT funds the ABLE account with money that can be used to pay taxes and utilities, there will be no loss to the beneficiary of benefits, as noted below, and the beneficiary will not be saddled with the obligation of paying rent.

8. Distributions for QDE are not countable income for public benefits purposes (*see* POMS SI § 01130.740).

a. This makes distributions from ABLE accounts more beneficial than administering a "(d)(4)(A)" trust or a "(d)(4)(C)" pooled trust, or even, perhaps, a third-party SNT.

b. Distributions of cash can be made from an ABLE account without affecting benefits, although accounting to public benefits agencies for such distributions could be complex and administratively inconvenient.

   (1) Unfortunately, Housing Authorities in the case of the Section 8 Housing Program have generally regarded virtually any distribution to be income for Section 8 purposes, thus increasing rent by 30 percent of the amount distributed.

   (2) However, see the *DeCambre* decision discussed in Part IV below in which the U.S. Court of Appeals for the First Circuit ruled that it is only actual income distributed from a "(d)(4)(A)" trust that should be countable, which might make the importance of an ABLE account for a Section 8 beneficiary less significant.

c. ABLE's best benefit may be the ability to use the ABLE account funds for housing assistance without SSI reduction for in-kind support and maintenance (ISM).

   (1) The SSA recently directed that distributions from an ABLE account do not count as income for SSI purposes regardless of whether the distributions are for non-housing QDEs, housing QDEs, or non-qualified expenses. (POMS SI § 01130.740).

   (2) For persons with disabilities and their families, and especially those on public benefits, finding sustainable housing can be daunting.

(3) The ABLE Act provides a new tool to assist persons with disabilities and their families to secure housing and in some cases minimize the loss of benefits.

(4) The ABLE Act can be used to assist a beneficiary of an ABLE account to provide for their housing needs.

   (a) For example, a major expenditure of many special needs beneficiaries is for housing and utility payments;

   (b) If parents provide money directly, there is a dollar-for-dollar reduction in SSI which can cause the complete loss of benefits;

   (c) If the parents pay the housing costs directly, the payments would be counted as ISM, and the child's SSI benefits would be reduced but not eliminated;

   (d) If instead the parents contribute to his or her ABLE account, and in turn the funds in the ABLE account are used to pay the housing costs, then there would be no reduction in SSI.

(5) As a planning maneuver, a parent's planning for a disabled child presumably could entail establishing an SNT and authorizing the SNT to continue to contribute to the ABLE account annually in an amount necessary to pay or contribute toward the housing costs.

(6) Essentially, the POMS provide that QDEs for housing, as well as for non-housing QDEs, are excluded as income and are treated instead as a conversion of a resource from one form to another.

(a) The POMS exclude from the designated beneficiary's countable resources a distribution for non-housing QDE if the beneficiary retains that distribution beyond the month of receipt.

(b) The exclusion applies as long as the distribution is unspent and identifiable and is intended to be used for a non-housing-related QDE.

(c) If the beneficiary uses a distribution previously excluded for either a non-qualified purpose or as a housing-related QDE, or if the individual's intent to use it for a qualified disability expense changes, the amount of funds used for a non-qualified expense or for a housing-related QDE will be treated as a resource as of the first moment of the month in which the funds were spent, or if the individual's intent changes, the funds will be treated as a resource as of the first day of the following month.

(d) If the beneficiary spends the housing-related distribution within the month of receipt, there is no effect on eligibility; however, the distribution for housing-related QDE or for an expense that is not a QDE will be treated as a resource if the beneficiary retains the distribution into the month following the month of receipt.

E. Disadvantages of ABLE accounts.

1. While not necessarily disadvantageous, the advantages of accumulations not being taxable may be negligible due to the fact that most disabled beneficiaries are in a very low or zero income-tax bracket.
2. In order to establish an ABLE account, the disabled person must be eligible for SSDI or SSI, or submit a disability certification, which is not required in the case of a "(d)(4)(A)" trust or a "(d)(4)(C)" pooled trust.
3. A disabled person can have no more than one ABLE account.
4. The disabled person or his or her guardian cannot direct investments of the account more than two times per calendar year, and the range of investment options are determined by the state.
5. Distributions other than for QDE are subject to income tax under the annuity rules, and an additional penalty of ten percent is imposed on the taxable amount distributed.
6. There is a Medicaid payback requirement on the death of the disabled beneficiary, which applies, also, in the case of a "(d)(4)(A)" trust and a "(d)(4)(C)" pooled trust.
    a. In the case of a "(d)(4)(A)" trust and a "(d)(4)(C)" pooled trust, the Medicaid payback covers all medical assistance ever received under Medicaid programs in any and all states, even if the trust was established and funded long after the Medicaid benefits began.
    b. In the case of an ABLE account, payback is only required for medical assistance paid by the Medicaid program ***after*** the ABLE account was established.
7. The disabled person must have been disabled prior to attaining age 26.

a. Proposed legislation is pending in Congress which would raise the age to 46 from 26.

b. It may be difficult for older persons to prove their disability onset was prior to age 26.

8. Any amounts in the ABLE account in excess of $100,000 are countable for SSI purposes (but not for Medicaid purposes).

9. Annual contributions from all sources combined, including the disabled person, cannot exceed an amount equal to the annual gift tax exclusion (currently $14,000 per year).

10. Aggregate contributions from all sources, including the disabled person, are limited to the state's aggregate contribution limit for Section 529 plans (the Indiana limit is $450,000).

F. Planning considerations:

1. In most cases, and certainly in the case of larger distributions over time, third-party contributions can be made more favorably by means of other arrangements than by means of funding an ABLE account.

a. Because Medicaid payback is required for ABLE accounts, and not in the case of a third-party special needs trust, then in most instances it will be better for a parent or other third-party donor to establish a separate third-party SNT in order to avoid the Medicaid payback.

b. An ABLE account might be useful for small gifts from other people, but it would generally not be a very good receptacle for a significant gift or bequest.

2. An ABLE account might be appropriate for a disabled person who is able to manage his or her own funds and who finds it very important personally to maintain control and individual autonomy.

3. If a disabled person who is accumulating income, perhaps from wages, SSI benefits, etc., over a period of time, placing funds in an ABLE account may be an easy and convenient mechanism for placement of funds in order to avoid accumulating resources in excess of the $2,000 resource limitation.

4. An ABLE account might be a convenient and easy way to preserve funds from a small Uniform Transfers to Minors Act (UTMA) account when a young disabled person expects to apply for SSI at the age of 18 when the UTMA account would be a countable asset.

5. An ABLE account would be a convenient way to save for a major purchase, whether for a service or for a non-countable asset (a home, car, etc.) without the cost and complexity of setting up a separate trust.

6. An ABLE account might be useful for a disabled person who is over the age of 64 and cannot utilize a (d)(4)(A) trust or when a (d)(4)(C) pooled trust arrangement is not available in his or her jurisdiction, or if the state in which he or she resides would treat the funding of a pooled trust sub-account as a penalizable transfer.

7. An ABLE account might be a convenient way to deposit a distribution from a larger SNT, including possibly a third-party SNT, which might make a direct distribution to an ABLE account to allow the beneficiary some degree of autonomy and control or to fund regular payments of housing expenses.

a. There are no regulations or rulings yet to provide a definitive answer to the question whether or not an ABLE account could be funded in part by a distribution from another trust.

b. Making such a distribution would allow the beneficiary to take advantage of other benefits of an ABLE account, such as non-countability of distributions for housing purposes.

c. *Query: would the distribution from the trust to the ABLE account, to the extent that it included income from a separate trust, be deemed income for Section 8 purposes?*

G. Availability of ABLE accounts.

1. Ohio became the first state to offer ABLE accounts on June 1, 2016 (called STABLE accounts in Ohio), followed by Tennessee on June 13, 2016, Nebraska on June 30, 2016, and Florida (for Florida residents only) on July 1, 2016. In addition to Indiana's recent commencement of ABLE account enrollment, the following states are among those which currently have ABLE programs up and open for enrollment:

a. Alabama, Alaska, Florida, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee and Virginia.

b. ABLE account enrollment began in Indiana in July of 2017.

(1) See the website for INvestABLE Indiana for information concerning plan eligibility, benefits and investment options: https://savewithable.com/in/home.html.

(2) For more information, contact Amy Corbin, Executive Director of the Indiana ABLE Authority (ACorbin@tos.IN.gov).

c. For a chart comparing the various state plans, see: http://tinyurl.com/ASNP-ABLEchart.

d. For an update of various available state plans, refer to the website of the ABLE National Resource Center at www.ablenrc.org/.

2. There is no longer a residency requirement, and an ABLE account can be established in any state that allows a non-resident of that state to establish an ABLE account [Consolidated Appropriations Act, 2016, PL114-113 12/18/2015, Division Q(III)(A), Section 303]. Most current plans allow enrollment of out-of-state residents.

3. It would usually be best to enroll in plans which permit transfers to different ABLE accounts to allow switching to a different plan in the future.

a. A "rollover" from one ABLE account to another is permitted, if accomplished within 60 days, although the process may be inconvenient and fraught with risks.

b. It may be better to establish an ABLE account through a plan which permits a direct transfer to another ABLE account.

4. It should be noted that presently final regulations have not been established by the Treasury Department regarding the rules applicable to ABLE accounts.

a. See IRS Notice 2015-81 issued November 20, 2015.

b. You may refer to the materials that I presented at the 38th Annual Judge Robert H. Staton Indiana Law Update referenced previously in these materials, or consult my website at www.rkcraiglaw.com.

c. The IRS has stated that various states and financial institutions may rely on the current Proposed Regulations.

5. It should be noted also that not all federal public benefits programs are yet fully in compliance with ABLE statutes.

   a. As noted in the materials that I presented at the 38th Annual Judge Robert H. Staton Indiana Law Update, the Social Security Administration has published revisions to its Program Operations Manual System (POMS), which I addressed in some detail in my 2016 Elder Law Developments materials, and some of the changes are discussed above.

   b. Thus far nothing has been published in conjunction with the Section 8 housing (HUD) program or the Veterans Administration pension program.

   c. There may also be certain Medicaid issues pending the adoption of specific Medicaid rules and regulations.

H. Other ABLE account issues:

1. The proposed IRS regulations make it clear that the designated beneficiary is the owner of the account and manages the distributions.

   a. The IRS recognizes, however, that certain eligible individuals may be unable to establish an account themselves.

   b. Therefore, the proposed regulations clarify that if the eligible individual cannot establish the account, the eligible individual's agent under a power of attorney, or if none, his or her parent or legal guardian, may establish the ABLE account for that eligible individual.

   c. Compare this to the (d)(4)(A) and (d)(4)(C) trust requirements and the SNTFA.

d. As a planning matter, as in the case of virtually every other individual, if the eligible individual has capacity, it is a good idea for the individual to sign a power of attorney immediately.

e. If the beneficiary lacks capacity to manage the account and the parents have signature authority, the parents may want to consider establishing a conservatorship or guardianship to fund and manage an ABLE account, and to include a successor to be able to continue managing both accounts.

I. The foregoing commentary regarding ABLE accounts has drawn significantly from *The Elder Law Report*, Vol. XXVII, Issue 3, October 2016. (Attached as Exhibit "A" is a chart comparing ABLE accounts and Special Needs Trusts prepared by the Tucson, Arizona firm of Fleming & Curti, PLC).

IV. *DeCambre v. Brookline Housing Authority*, Nos. 15-1458 and 15-1515 (U.S. Court of Appeals, First Circuit, June 14, 2016).

A. The Brookline Housing Authority (the "BHA") determined that Kimberly DeCambre ("DeCambre") was "over income" for participation in a federal housing assistance program.

1. DeCambre was receiving distributions from an irrevocable trust funded with the proceeds from a series of legal settlements. There were also issues presented regarding the calculation of DeCambre's income.

2. The case arose under Section 8 of the U.S. Housing Act of 1937, added as part of a 1974 amendment, which authorizes the Department of Housing and Urban Development ("HUD") to utilize federal funds for housing assistance for the purpose

of aiding lower-income families to obtain a decent place to live and to promote economically mixed housing.

3. In general, the amount of a participating tenant's monthly subsidy is based on income and is generally equal to the total monthly rent obligation minus 30 percent of the monthly adjusted income of the tenant's family.

B. DeCambre had participated in the Program since 2005.

1. In her annually required Application for Continued Occupancy, she listed among her assets a trust that had been established by a Massachusetts court order in June of 2010 to hold certain proceeds from a series of tort settlements.

2. The trust was a (d)(4)(A) SNT under 42 U.S.C. § 1396p(d)(4)(A).

3. The trust met the requirements of a (d)(4)(A) "under age 65" trust and gave the trustee "sole discretion" to determine how the property of the trust "...would be spent."

4. The case involved a series of procedural steps including a determination that she was no longer entitled to a rent subsidy, internal appeals, and a somewhat confusing determination by the U.S. District Court.

5. Aside from various procedural and other claims, DeCambre's principal ground for appeal was that the BHA misapplied HUD regulations by including the disbursements from the SNT in her annual income.

a. The Court cited 24 C.F.R. § 5.609(b) which defines the term "net family assets" as follows:

> In cases where a trust fund has been established and the trust is not revocable by, or under the control of, any member of the family or household, the value of the trust

fund will not be considered an asset so long as the fund continues to be held in the trust. Any income distributed from the trust fund shall be counted when determining annual income.

b. The Court pointed out that the parties appeared to agree with the premise that the recognition of income from an irrevocable trust is disregarded until the income has been distributed out of the trust.

c. The Court explained that the dispute was, essentially, then, what happens when the trust distributes some or all of the principal originally paid into the trust to or for the benefit of a tenant.

d. DeCambre's trust generated no substantial earnings or other income, and as a result, essentially all disbursements were disbursements of principal.

e. DeCambre maintained that this disbursed principal should retain the character and classification that it would have had as a lump sum addition to family assets, not counted toward annual income, had it been paid directly to her, rather than having first been routed through the irrevocable trust.

f. The BHA conceded that the regulations themselves did not squarely address this issue.

C. The Court pointed out that an Advisory Letter the BHA treated as controlling, authored by one of HUD's regional offices, expressly states that "[n]ot all distributions from a[n] SNT should be counted towards [a Section 8] applicant's annual income."

1. The Advisory Letter provides that only those disbursements "that do not fall under an exclusion or deduction are...counted towards annual income."

2. The Court held that the word "income" in § 5.6.3(b) does not include the principal that initially funded the trust.

3. There were a number of other issues and arguments relating to the definition of "income" and whether or not a payment that went into a trust should have been excluded in the same way that it might have been had it been paid directly to the tenant's family.

4. The Court could discern no reason to exclude lump sum personal injury settlement proceeds from annual income paid directly to a tenant, and yet not exclude those same proceeds merely because they first go through a trust in which the tenant is a beneficiary.

    a. It therefore made sense to the Court that a regulation that postpones recognition of earnings on the fund until they are distributed should therefore treat the principal similarly.

    b. Otherwise an irrevocable trust would have the effect of transforming assets into income.

5. The Court also pointed out that taking the contrary position could result in the double-counting of income (e.g., a tenant earns wages that count toward income, and then subsequently moves that income into an irrevocable self-settled spendthrift trust, and then later receives the same money back as a disbursement, then the result would be that double-counting would occur).

    a. The Advisory Letter does state that "[d]istributions from the trust would be counted when determining annual income."

    b. However, the Court did not feel that the Advisory Letter specifically addressed the issue before the Court and felt that it offered no rationale at all that would favor classifying the disbursements of settlement proceeds from an irrevocable trust differently from how one would classify expenditures of those same funds had the funds not first gone into the trust.

6. The Court therefore concluded that the BHA improperly counted the distributions of principal from DeCambre's settlement-funded irrevocable trust toward her annual income.

7. The U.S. Supreme Court has denied *certiorari* in the *DeCambre* case leaving intact the First Circuit's decision.

D. For an analysis of the *DeCambre* case, see *Special Needs Trusts Come to Federal Housing Supports for the Needy*, NAELA Journal, Volume 13, No. 1, 2017 (Page 55, *et seq*).

1. Although *DeCambre* may not be followed by Public Housing Authorities in judicial circuits other than the First Circuit, the essence of *DeCambre* is as follows:

   a. Actual distributions which carry out trust income will to that extent generate countable income that can increase rents $30 for every $100 distributed.

   b. To the extent the distributions reflect principal, they should be disregarded.

2. Since *DeCambre* did not address a third-party SNT, such trusts might be treated differently.

   a. HUD may not be as generous as the SSA, which disregards all third-party vendor payments except those for food and shelter, and even then under-counts them by use of the one-third PMV Rule applicable to such in-kind support and maintenance.

   b. HUD does not address SNT issues in its rules and regulations in an authoritative way – this lack of guidance may evidence either a lack of experience or a difference in policy perspectives, or both.

3. It clearly can be argued under *DeCambre* that all SNT distributions of principal should be disregarded for Section 8 purposes.

a. The general argument starts with the premise that SSI and Medicaid have resource tests and federal housing programs have no such tests, at least until the enactment of the Housing Opportunity Through Modernization Act of 2016 (HOTMA) discussed in Part V of these materials.

b. There are a number of differences between first party SNTs and third-party SNTs as they apply to SSI and Medicaid.

(1) NAELA has been at the forefront of this issue.

(2) As addressed in my Elder Law Developments materials at the 38th Annual Judge Robert H. Staton Indiana Law Update, NAELA requested the Secretary of HUD in a letter dated January 6, 2016, to clarify its policy regarding housing programs and special needs trusts due to the concern that some Public Housing Authorities (PHAs) have interpreted HUD rules to require that all distributions from SNTs are income for HUD-related assistance purposes.

(3) NAELA pointed out in its letter to the Secretary of HUD that HUD housing programs are only income tested, while Medicaid and SSI are subject to both asset and income tests.

(4) NAELA encouraged HUD to adopt a position regarding SNTs that is consistent with HUD's policy as set out in 24 CFR § 5.609(c)(17), which requires exclusion of income excluded by other public benefit programs.

V. Housing Opportunity Through Modernization Act Of 2016 (HOTMA).

A. HOTMA, H.R. 3700, was signed into law on July 29, 2016 after being unanimously passed by Congress.

1. Streamlines certain parts of the U.S. Department of Housing and Urban Development (HUD) rental assistance programs, including pubic housing programs, the Housing Choice Voucher (HCV) program, and the Project-Based Rental Assistance program.

2. Makes certain revisions to income calculations and inspection processes and limits eligibility based on assets.

3. HOTMA makes the first major changes in approximately 18 years to the Section 8 Program.

B. Calculating income.

1. HOTMA changes how income is defined and what deductions can be taken when determining a tenant's rent responsibility for all federal assistance programs.

2. Income includes any income received by each member of a household that is 18 or older and any unearned income for each dependant younger than age 18.

3. Income excludes imputed returns on assets unless net family assets exceed $50,000 (which is adjusted for inflation), certain SSI payments, disability payments from the VA, Aid and Attendance assistance for veterans, and other income sources as determined by HUD.

4. Also changes rules regarding income reviews.

C. Eligibility limitations.

1. Housing assistance cannot be provided to any family whose net assets, as defined by HOTMA, exceed $100,000, adjusted for inflation.

2. Also cannot be provided to any family who owns real property that is suitable to live in, although this prohibition would not apply in some circumstances, such as victims of domestic violence or a family that is offering the property for sale.

D. Requires PHAs to terminate the tenancy or increase rent for families in public housing whose income for the most recent two consecutive years exceeds 120 percent of the area's median income; written notice must be provided to the family after one year if income has exceeded the limits.

VI. Proposed V.A. Rule Changes Delayed.

A. The Department of Veterans Affairs (VA) published proposed rule changes regarding VA benefits on January 23, 2015.

1. Detailed information concerning the proposed changes were contained in my 2015 Elder Law Developments materials presented at the 37th Annual Judge Robert H. Staton Indiana Law Update and in my 2016 Elder Law Developments materials presented at the 38th Annual Judge Robert H. Staton Indiana Law Update.

2. You may also refer to my website, and in particular the detailed outline contained in the "Articles and Links" section of my website titled *Proposed Changes to the VA Pension Rules, VA Pension Trust Issues and a Comparison Between the Medicaid and VA Pension Trust Rules*.

B. Informal comments from the VA suggest that the VA does not anticipate publishing final rules until much later during the 2017 calendar year, and possibly not until 2018 or later, if the rules are even adopted at all.

VII. Trust Decanting To Implement A Special Needs Trust.

A. *In the Matter of Alan D. Kroll, etc. v. New York State Department of Health*, 2016 NY Slip OP 06499, OCT 2016, File No. 369907/12, No. 2016-06499 (Supreme Court of New York, Second Department, October 5, 2016); see also Estate Planning, Volume 44, No. 2, March 2017 (Page 45).

1. The court allowed a Trustee of an existing trust to appoint the assets of the existing trust to a new special needs trust.

2. The goal was to permit the beneficiary to continue to receive certain public benefits, which the terms of the existing trust would have precluded.

B. To "decant" a trust means to set up a different trust, which is done by the trustee of an existing trust.

1. The assets of the old trust are moved into the new trust with different terms and conditions.

2. Decanting is one way to change a trust, or certain implications concerning the trust, compared to other alternatives, such as reformation or trust modification.

a. Reformation or modification of an existing trust would usually require court approval, while decanting an existing trust may or may not require court approval.

b. Trust decanting can be used to avoid certain unanticipated tax implications of a trust, or to change the nature of a beneficiary's interest so that the beneficiary might be impacted more favorably, as well as to avoid or cure certain trust administration problems.

C. The availability of decanting will depend on the facts and circumstances of each case.

1. In the *Kroll* case, the beneficiary was 20 years old, disabled, and receiving Medicaid and Supplemental Security Income (SSI).

a. Under the terms of the original trust, he would have had the right to withdraw all of the principal of the trust when he attained age 21, as would be typical with a so-called “minor’s trust” under IRC § 2503(c).

b. Having the right to withdraw the principal would cause the entire trust corpus to be considered an available resource, thus disqualifying the beneficiary for certain government benefits.

   (1) With court approval, the trustees exercised a power of appointment of the assets from the original trust to a new trust containing substantially the same terms, conditions, beneficiaries and trustees, but which contained supplemental needs provisions.

   (2) The goal was to allow the beneficiary to continue receiving government benefits, and at the same time permit the assets in the new trust to be used to enhance the grandson’s quality of life.

c. The trust contained a specific spend-thrift provision prohibiting any power of assignment, etc.

   (1) The New York State Department of Health objected, arguing that the trust was effectively created with the beneficiary’s assets, making the trust a “first-party” or “self-settled” special needs trust requiring a “pay-back” provision which would be mandatory for self-settled “safe harbor” trusts, such as a (d)(4)(A) “under age 65" trust or a (d)(4)(C) “pooled” trust.

   (2) The court rejected the State’s objections and concluded that the pay-back provision was not required.

d. The New York decanting statute specifically authorizes a trustee to appoint the assets of an existing trust to a new supplemental needs trust.

(1) This is authorized even if the action could "reduce, limit or modify" a beneficiary's right to receive income or principal from the existing trust.

(2) Pursuant to the applicable decanting statutes, it was clear that the beneficiary was not the "creator" of the new trust.

(a) The court found that at the time the trustees exercised their power of appointment, the principal contained in the original trust did not constitute a "resource" or "income" of the beneficiary since he did not establish the trust, and none of his assets were used to fund the trust, nor did he have the right to withdraw the assets at the time that the trust was decanted.

(b) The court essentially held that because Daniel did not create the original trust, and at the time the trustees decanted the trust the principal was not considered Daniel's assets under state and federal law, a Medicaid pay-back provision was not required.

D. *Simonson v. Bremby*, No. 16-204-cv, United States Court of Appeals, Second Circuit (February 15, 2017).

1. The Second Circuit affirmed in a Summary Order a determination by the District Court for the District of Connecticut which enjoined the Connecticut Department of

Social Services (DSS) from imposing a Medicaid transfer penalty as a result of two decanted trusts.

a. The District Court concluded that DSS had impermissibly employed a “more restrictive” methodology than that used to determine federal Supplemental Security Income (SSI) eligibility. See 42 U.S.C. §§ 1396a(a)(10)(C)(i) and 1396a(r)(2)(A)(i).

b. The language in the document creating the predecessor trusts stated the following:

> The Trustee shall pay to my daughter or utilize for her benefit so much of the income and principal of her trust as the Trustee deems necessary or advisable from time to time for her health, maintenance in reasonable comfort, education and best interests considering all of her resources known to the Trustee and her ability to manage and use such funds for her benefits.

2. Simonsen argued that pursuant to the applicable POMS [*see* POMS SI § 01120.200(B)(16), (D)(1)(a), (D)(2)], the existence of a spendthrift clause in the predecessor trusts precludes them from being considered available resources for the federal SSI program and, in any event, the trust language establishes that the predecessor trusts cannot be considered support trusts nor, consequently, available resources.

3. The Second Circuit Court of Appeals found that the District Court did not abuse its discretion in finding that Simonsen’s interest in the predecessor trusts was not an

available resource for the purposes of Connecticut’s Medicaid plan because that interest would not be so deemed for the purpose of the SSI program.

4. The POMS defines an available resource as property (i) owned by an individual (ii) who has the right, authority, or power to convert it to cash, *and* (iii) who is not legally restricted from using it for her support and maintenance. *See* POMS SI § 01110.100(B)(1).

5. The POMS further states that property is not a resource if the individual “is not legally able to transfer that interest to anyone else.” *Id.* § 01110.100(B)(3).

   a. The court found that the applicable trust language did not afford Simonsen authority to convert the trust corpus to cash or to transfer the trust interest to anyone else, and thus the predecessor trusts did not constitute “support trusts.”

   b. The court found that Simonsen remained “legally restricted from using” the trust funds except as disbursed in the discretion of the trustee. *Id.* § 01110.100(B)(1).

6. The court stated that:

   a. Its conclusion finds further support in POMS SI § 01120.200, which, in specifically referencing trusts, states *inter alia* that trust principal is a resource of a beneficiary who, "under the terms of the trust," can "direct the use of [that principal] for . . . support and maintenance." *Id.* § 01120.200(D)(1)(a).

   b. The applicable POMS sections recognize that a beneficiary's authority to control trust principal may be evident from "either specific trust provisions allowing the beneficiary to act on his or her own or by permitting the beneficiary to order actions by the trustee." *Id.* § 01120.200(D)(1)(b).

c. The trust documents were found to provide no such authority or permission. The trustee alone had authority to direct the use of trust principal for Simonsen's support and welfare. Furthermore, the trust documents did not authorize Simonsen to "revoke or terminate" the trusts, and DSS did not contend that Simonsen could "sell . . . her beneficial interest" in the trusts, since they contain a valid spendthrift clause. *Id.* § 01120.200(D)(1)(a).

d. The court also stated as follows:

> To the extent the trustee is authorized to direct use of principal only for Simonsen's support and welfare, Simonsen might well be able to sue were the trustee to do otherwise. *See generally* Restatement (Second) of Trusts § 187 (stating that a trustee's exercise of discretion "is not subject to control by the court, except to prevent an abuse by the trustee of his discretion"). But the applicable POMS section states that an individual is "not require[d] . . . to undertake litigation in order to accomplish . . . access" to a resource. POMS SI § 01120.010(C)(2). The property is not a resource under such circumstances. . . *Id.*

E. Indiana's trust decanting rules are found in the Indiana Trust Code, I.C. 30-4-3-36.

1. Trust decanting is allowed unless the trust expressly provides otherwise, as long as:

a. The beneficiaries of the second trust are the same as the beneficiaries of the first trust;

b. The second trust does not reduce any income, annuity or unitrust interest in the assets of the first trust; and

c. If any contributions of the first trust qualify for a charitable or marital deduction for the purpose of the federal income, gift, or estate tax systems, the second trust does not contain any provision that, if included in the first trust, would have prevented the first trust from qualifying for a deduction or reduce the amount of the deduction.

2. The exercise of the power must be by an instrument that is in writing, signed by the trustee, and filed with the records of the first trust.

3. The exercise of the power is specifically treated as not the exercise of a general power of appointment, and the exercise of the power does not extend the time when the permissible period of the rule against perpetuities begins or the law that determines the permissible period of the rule against perpetuities of the first trust.

4. The trustee must notify all qualified beneficiaries in writing at least sixty (60) days before the effective date of the trustee's exercise of the power to invade principal.

5. A copy of the proposed instrument exercising the power satisfies the trustee's notice obligation.

6. If all qualified beneficiaries waive the notice by a signed written instrument, the trustee's power may be exercised immediately.

7. The trustee's notice does not limit the right of any beneficiary to object to the exercise of the trustee's power.

8. The exercise of the power to invade principal is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits revoking or amending the trust.

VIII. Irrevocable Income-Only Trust Developments.

A. In my 2016 Elder Law Developments materials presented at the 38th Annual Judge Robert H. Staton Indiana Law Update, several suggestions were made regarding certain provisions that either should be included, or should not be included, in an irrevocable income-only trust ("IIOT").

1. The right to "use and occupy" real estate is increasingly being treated as tantamount to ownership; it would be better to establish a limited right in the nature of a lease through an occupancy agreement which is very clearly limited and which requires the occupant to either pay rent, or, in lieu of rent, to pay all expenses associated with the right of occupancy (taxes, insurance, routine maintenance and repairs, utilities, etc.).

2. Trusts that permit termination under certain conditions and which would require that the property be distributed to the remainder beneficiaries rather than to the holder of the income interest would tend to substantiate the efficacy of the trust and the limited nature of the grantor's interest. It should be very clear that the "grantor" is not a beneficiary who will receive assets in the event of the termination of the trust and the distribution of trust assets.

3. The trust should specifically prohibit the distribution of principal, and should probably not mandate that non-productive property be sold or otherwise converted to income-producing assets.

4. The trust should not specifically refer to the possibility of making "loans" from the trust which might be used for the benefit of the grantor, but if in fact such transactions occur, they should be well documented. I have used IIOTs in many

instances involving loans made to the grantor to make up for an insufficiency of funds during the penalty period or to meet other needs of the incapacitated grantor.

5. If a power of appointment is used, as it would in most instances, it should be a specifically limited testamentary power of appointment and not one which would appear in any way to unduly or inappropriately advantage the grantor or apply undue pressure to the trustee.

6. The right to remove the trustee should be limited to specifically-defined circumstances, i.e., misconduct, negligence, inconvenience of location, etc.

7. Steer clear of language commonly used in special needs trusts (e.g., that the trust is for the "sole benefit" of the grantor, or that the income can be used for "special needs" circumstances, etc.); income should always be distributed and under no circumstances accumulated, and under no circumstances should principal be distributed or available for distribution.

8. Rather than allowing the trustee to determine that which is principal and that which is income, it should be very specifically stated that capital gains and capital gain distributions will be treated as principal and not as income.

9. Principal should not be available for distribution or in fact distributed to anyone during the grantor's lifetime and until the termination of the trust.

B. The federal and Indiana statutes and regulations pertaining to irrevocable trusts include the following:

1. 42 U.S.C. § 1396p(d)(3)(B)(i) states:

> If there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which,

> payment to the individual could be made shall be considered resources available to the individual...

2. 42 U.S.C. § 1396p(d)(3)(B)(ii) states:

   > Any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual...

3. The Indiana rules are set forth in the Indiana Health Care Program Policy Manual (IHCPPM) beginning at § 2615.75.10.

   a. If a trust is established so that neither the corpus nor the income can under any circumstances benefit the individual, then the trust corpus will not be treated as an available resource and will be treated as having been transferred when the trust was established or funded.

   b. CMS has affirmed that if no portion of the trust corpus can be distributed, the corpus will not be counted as a resource to the individual.

   c. Thus, no part of an “income only” trust should be counted as a resource, but instead the trust corpus will be treated as having been transferred when the trust was established.

   d. Actual payments to the Medicaid recipient will be counted as income in the Medicaid budgeting process.

4. Any portion of an irrevocable trust which can under some circumstances be used to benefit the individual should be treated as an available resource until transferred to a third party.

a. Any portion of an irrevocable trust which cannot ever be used to benefit the individual should not be considered an available resource but instead should be considered to have been transferred when the trust was established, or if later, the date upon which payment to the individual was foreclosed.

b. A trust that is labeled as "irrevocable" does not by itself determine whether the assets in the trust are available and countable as a resource.

(1) One needs to review the language of the trust to see if there are any circumstances under which the grantor can receive a distribution from the assets.

(2) To the extent the answer is yes, the assets are available and countable as a resource.

C. *Designing the Perfect Income-Only Irrevocable Trust* Estate Planning (Vol. 44, No. 1, January, 2017).

1. This article addresses the recent series of cases, principally in the State of Massachusetts, establishing that IIOT's are an acceptable planning tool to protect assets from the costs of long-term care, provided that they are carefully drafted so as not to violate the federal or state laws covering such trusts.

a. This article also addresses in detail the types of provisions that either should, or should not, be used in order to design and implement an appropriate IIOT for asset protection purposes.

b. The suggestions contained in this article typically reinforce the foregoing recommendations regarding the provisions which either should, or should not, be included in an IIOT.

2. The article also points out that, in some cases, including an appropriate "purpose" clause as a provision in the trust to recite asset protection as one of the intended purposes of the trust can be beneficial when a court is asked to interpret trust language in light of the stated purposes of the trust.

   a. Such trusts should specifically state that principal cannot be distributed to the donor at any time or under any circumstances; if the trust fails to mention whether or not, or under what circumstances, principal could be distributed, then the trust could be interpreted to allow principal distributions in certain cases (e.g., applicable state trust law might assume that the trust does not prohibit distributions unless the trust document itself specifically precludes distributions to the trust creator).

   b. The article suggests that the trustee can have the power to lend money, but that it should be specifically stated that the trustee cannot lend money to the donor or creator of the trust.

      (1) I have not included such a provision and I have frequently utilized IIOTs to make loans to the trust creator.

      (2) Thus far, those transactions have not been questioned; a "loan" is not the same thing as a distribution of trust principal.

   c. Because the trustee may have the power under applicable state trust law to allocate principal to income, the article suggests that the trustee should specifically be precluded from having the power to allocate principal to income.

   d. The article also suggests that a "power of substitution," which is one of the powers often included in irrevocable trusts to assure "grantor trust" status for income tax purposes, should not be included because the exercise of the power could result in principal being distributed to the creator of the trust.

e. The article also suggests that the trust not include the power to pay the donor's estate tax, estate administration costs, or costs associated with last illness.

3. For an in-depth analysis of the Massachusetts experience regarding irrevocable trusts and long term care planning, see *Limiting State Medicaid Agency Attempts to Expand the "Any Circumstances" Test: An Analysis of Massachusetts' Multiyear Legal Battle Over the Use of Irrevocable Trusts In Long Term Care Planning*, NAELA Journal, Volume 13, 2017 (Page 35, *et seq*).

a. Regarding Massachusetts developments, a recent case, *Daley v. Secretary of Executive Office of Health & Human Servs*., 2017 WL 2347025 (Mass. May 30, 2017), addresses the issue of a life estate or right to use and occupy a home owned by a trust.

(1) This case was also an appeal of the *Nadeau v. Director of the Office of Medicaid* reported and discussed in my 2016 Elder Law Developments materials presented at the 38th Annual Judge Robert H. Staton Indiana Law Update.

(2) That case, *Nadeau v. Thorn* (Mass. Super. Ct., No. 14-DV-02278C, Dec. 30, 2015), held that the reservation of the right of occupancy in an irrevocable income-only trust of either a life estate or the right to use and occupy a residence does not make the equity in the home owned by the trust a countable asset for the purpose of Medicaid eligibility.

b. In the *Daley* case, Mary Daley and her husband deeded their primary residence to their children as trustees of an IIOT and retained a life estate in the property rather than a right of use and occupancy.

4. In these cases, the Massachusetts Supreme Judicial Court held that neither the reservation in an irrevocable trust of a life estate or a right to use and occupy the home owned by the trust made the equity in the home a countable asset for Medicaid eligibility purposes.

IX. Rev. Proc. 2016-49 and the Interplay Between the QTIP and Portability Elections.

A. For Elder Law attorneys and middle class clients, usually only a passing concern is given to federal estate tax issues.

1. However, there are many non-federal estate tax reasons for utilizing a qualified terminable interest property ("QTIP") trust:

a. One goal may be to control the ultimate disposition of assets following the death of the surviving spouse while providing an income stream for the benefit of the surviving spouse.

b. Another goal may be to protect the principal from potential creditors.

2. When QTIP trusts are used, an additional benefit is the "step-up" in basis which occurs following the death of the surviving spouse.

3. In order for this to occur, however, the QTIP election must be made, which requires the filing of a federal estate tax return for the sole purpose of electing QTIP.

a. The election in such circumstances will not result in an estate tax savings.

b. This would have been a problem prior to recently issued Rev. Proc. 2016-49 which was released on September 27, 2016.

B. Prior to the issuance of Rev. Proc. 2016-49, the IRS had issued Rev. Proc. 2001-38.

1. The IRS announced in Rev. Proc. 2001-38 that a QTIP election would be disregarded and treated as void if it was unnecessary to reduce the estate tax to zero.

2. In Rev. Proc. 2016-49, however, the IRS confirmed that it would not disregard and treat as void a QTIP election that was unnecessary in order to reduce the estate tax to zero if the portability election was also made with respect to the same estate.

C. For clients whose estates do not equal or exceed the federal estate tax exemption equivalent amount, a federal estate tax return is not required.

1. However, if a QTIP trust is utilized, it is necessary to file a Form 706 in order to make the QTIP election, even though the election is not needed to reduce the state tax on the first decedent's estate to zero.

a. Disregarding the QTIP election pursuant to Rev. Proc. 2001-38 would create a significant income tax problem because of the loss of the basis step-up if the QTIP election was disregarded.

b. If the terms of Rev. Proc. 2016-49 apply, then the IRS would not apply Rev. Proc. 2001-38 to ignore the QTIP election.

2. The effect of Rev. Proc. 2016-49 is to treat as void a QTIP election if (a) the estate tax liability was zero, without the QTIP election, based on values as finally determined for federal estate tax purposes; (b) the executor neither made nor was deemed to have made the portability election.

3. In effect, under Rev. Proc. 2016-49, for the QTIP election to be treated as void, the taxpayer must (a) file a supplemental estate tax return for the first spouse's estate, a gift tax return for the surviving spouse, or an estate tax return for the surviving spouse, within the applicable period of limitations; (b) state at the top of the estate or gift tax return "Filed pursuant to Rev. Proc. 2016-49"; (c) identify the QTIP

election that should be treated as void under Rev. Proc. 2016-49 and provide an explanation of why it falls within the portion of the Revenue Procedure treating certain elections as void, in which explanation the taxpayer must include the value of the predeceased spouse's taxable estate without regard to the allowance of the marital deduction for the QTIP at issue, and the applicable exclusion amount in effect for the year of the predeceased spouse's death, and to state that the portability election was not made in the predeceased spouse's estate and include the relevant facts to support this statement; (d) provide sufficient evidence that the QTIP election should be treated as void under Rev. Proc. 2016-49, establishing that the QTIP election was not necessary to reduce the estate tax liability to zero based on values as finally determined for federal estate tax purposes, and that the executor opted not to elect portability of the DSUEA amount (which may include a copy of the predeceased spouse's estate tax return filed with the IRS).

4. While making the election to utilize the deceased spouse's unused exemption amount ("DSUEA") may be irrelevant as far as the potential for the future estate tax is concerned, electing portability would ensure the protection of Rev. Proc. 2016-49 so that the IRS would not disregard the QTIP election.

X. Recent Indiana Statutory Changes.

A. Senate Enrolled Act 175.

1. Effective July 1, 2017, Indiana Code §16-36-1-5 is amended to provide that an adult grandchild may consent to health care for an individual incapable of consenting if a health care representative has not been appointed, is not reasonably available, declines to act, or is unknown to the health care provider.

2. The amendment further provides that a grandparent may consent to health care for a grandchild incapable of consenting if a health care representative has not been appointed, is not reasonably available, declines to act, or is unknown to the health care provider.

3. Provides that a grandparent also may consent to health care for a minor grandchild if a guardian or other representative, or a parent, an individual *in loco parentis*, or an adult sibling is not reasonably available, declines to act, or is unknown to the health care provider.

4. Requires the health care provider make a reasonable attempt to determine whether a minor has a parent, an individual *in loco parentis*, or an adult sibling who is able to consent to the minor's treatment prior to seeking consent from the grandparent.

B. Senate Enrolled Act 412.

1. Effective July 1, 2017, numerous Indiana Code sections were added which prohibit, unless otherwise provided under federal law, money in a 529 education savings account from being considered as a resource or asset in determining an applicant’s or recipient’s eligibility for: (1) certain public assistance programs; or (2) scholarships, grants, or awards administered by the commission for higher education.

2. The affected sections are new section IC§4-4-33-2 dealing with home energy assistance through the Low Income Home Energy Assistance Block Grant, new section IC §12-14-1-1.3 dealing with assistance under TANF, new section IC §12-15-3-8 dealing with eligibility for Medicaid, new section IC §12-17.6-3-2.5, and new section IC §21-12-1.2-3 dealing with eligibility for any scholarship, grant, or award administered by the commission.

C. Senate Enrolled Act 516.

1. Effective July 1, 2017, Indiana Code §16-39-1-3 is amended to provide that, even though a guardianship terminates upon the death of the protected person, a guardian is authorized to request the health records of the protected person within 60 days after the protected person's death if the protected person was an incapacitated person.

2. Provides, however, that a guardian may not request the health records of the protected person after the protected person's death if a personal representative of the estate of the protected person has been appointed.

D. Senate Enrolled Act 1407.

1. Indiana Code §29-1-7-17 is amended effective July 1, 2017, to state that a Will Contest will once again be filed in the same court where the estate is pending but in a separate cause of action.

2. Indiana Code §29-1-7-5.4 is amended effective July 1, 2017, to allow for the closing of an unsupervised estate after three months have transpired as well as a number of other steps.

3. A full statement must be sent to all creditors or other claimants of whom the personal representative has actual knowledge whose claims are neither paid nor barred and must furnish a full account in writing of the personal representative's administration to the distributees whose interests are affected, **unless waived in writing**.

4. Effective July 1, 2017, Indiana Code §29-1-8-3 is amended to provide as follows:

   a. If it appears that the value of a decedent's gross probate estate, less liens and encumbrances, does not exceed the sum of : (1) twenty-five thousand dollars ($25,000), for the estate of an individual who dies before July 1, 2007, and fifty thousand dollars ($50,000), for the estate of an individual who dies after

June 30, 2007; (2) the costs and expenses of administration; and (3) reasonable funeral expenses; the personal representative **of an unsupervised estate** or a person acting on behalf of the distributees, without giving notice to creditors, may immediately disburse and distribute the estate.

b. The same requirement is added to Indiana Code §29-1-8-4 for summary closing of an insolvent estate.

5. New Indiana Code §29-3-1-3.5 is added effective July 1, 2017 to state that **"De facto custodian" has the meaning set forth in IC 31-9-2-35.5**. Indiana Code §29-3-5-4 is amended effective July 1, 2017 to provide that a court shall appoint as guardian a qualified person or persons most suitable and willing to serve, having due regard to the following: (1) Any request made by a person alleged to be an incapacitated person, including designations in a durable power of attorney under IC 30-5-3-4(a), (2) Any request made for a minor by: (A) a parent of the minor; or (B**) a de facto custodian of the minor, including a designation in a power of attorney under IC 30-5-3-4(b) or IC 30-5-3-4(c)**.

6. Indiana Code §29-3-5-5 is amended effective July 1, 2017 to add to the list of potential guardians: (5) A parent of an incapacitated person, or a person nominated by will of a deceased parent of an incapacitated person or by any writing signed by a parent of an incapacitated person and attested to by at least two (2) witnesses, **or in a power of attorney of a living parent of an incapacitated person under IC 30-5-3-4(c) and (6) A parent of a minor, a de facto custodian of a minor, or a person nominated: (A) by will of a deceased parent or a de facto custodian of a monic; or (B) by a power of attorney of a living parent or a de facto custodian**

of a minor or (1) A person designated in a durable power of attorney or (2) A person designated as a standby guardian under IC 29-3-3-7.

7. New section Indiana Code §30-4-3-7.5 is added effective July 1, 2017 to read: **A transaction otherwise prohibited by section 7 of this chapter is authorized if: (1) the proposed prohibited transaction is authorized by the written consent of all qualified beneficiaries; or (2) the proposed prohibited transaction is approved by an order of the court issued after: (A) notice to all qualified beneficiaries; and (B) a hearing to ensure that adequate consideration is received by or delivered from the trust for the interest transferred**.

8. Indiana Code §30-4-5-12 is amended effective July 1, 2017 to read as follows: **(e) Receipt of a statement or accounting by a beneficiary or other interested person is presumed if the trustee has procedures in place requiring the mailing or delivery of an account to the beneficiary or other interested person. This presumption applies to the mailing or delivery of a statement or account by electronic delivery or access (as described in IC 30-4-6-6.5), if the beneficiary or other interested person has agreed to receive the statement or accounting by electronic delivery or access**.

9. New Indiana Code §30-4-6-6.5 is added effective July 1, 2017 to read as follows: **(a) The sending of notice or a document to a beneficiary, a trustee, or another interested person under this article or under IC 30-2-14 must be accomplished in a manner reasonably suitable under the circumstances and that is likely to result in receipt of the notice or document. Permissible methods for sending notice or a document include first class mail, personal delivery, delivery to the**

person's last known place of residence or place of business, or electronic delivery, including access to information by electronic means, if the intended recipient has agreed to receive ethe electronic delivery or to access a properly directed electronic message; (b) An electronic message meets the requirements of this chapter if the sender transmits the message to the intended recipient by a method that: (1) the sender and the recipient have previously agreed to in writing or in a previous electronic communication; or (2) is reasonably calculated to prevent unauthorized access to the content of the electronic message or to nonpublic identifying or personal information of the sender or recipient, such as encryption of the electronic message itself or sending the recipient a link to a password protected or encrypted website that stores the electronic message and any related documents.

10. Indiana Code §30-5-3-4 is amended effective July 1, 2017 to read as follows: (a) A principal may nominate a guardian for consideration by the court if protective proceedings for the principal's person or estate are commenced. The court shall make an appointment in accordance with the principal's most recent nomination in a power of attorney except for good cause or disqualification; **(b) A parent of a minor or a de facto custodian of a minor may nominate a guardian of the minor for consideration by the court if protective proceedings for the minor's person or estate are commenced. The court shall consider a nomination in a power of attorney; (c) A parent of an incapacitated person may nominate a guardian of the incapacitated person for consideration by the court if protective proceedings for the incapacitated person's person or estate are commenced. The court shall consider a nomination in a power of attorney**.

11. Indiana Code §31-17-2-8 is amended effective July 1, 2017 to provide that when a court is determining custody it can now also consider **(9) A designation in a power of attorney of: (A) the child's parent; or (B) a person found to be a de facto custodian of the child**.

12. Indiana Code §33-37-4-7 is amended effective July 1, 2017 to provide that a clerk may not collect a court costs fee for the filing of the **(4) Filing a closing statement for an estate described in IC 29-1-8-4**.