ESTATE PLANNING UNDER THE GUARDIANSHIP CODE

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STATUTES INVOLVED

Guardians have a fiduciary duty to preserve and protect the ward's property – not give it away. Indiana Code Section 29-3-8-3 states that "A guardian (other than a temporary guardian) shall do the following:

> (1) Act as a guardian with respect to the guardianship property and **observe the standards of care and conduct applicable to trustees**.
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> (2) **Protect and preserve the property of the protected person** subject to guardianship and secure the protective orders or other orders that are required to protect any other property of the protected person.
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> (3) **Conserve any property of the protected person in excess of the protected person's current needs**.
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> (4) Encourage self-reliance and independence of the protected person.
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> (5) Consider recommendations relating to the appropriate standard of support, care, education, and training for the protected person or the protected person's dependent made by the protected person's parent."

Under Indiana Code Section 29-3-9-4 a guardian may petition for authority to make gifts from the ward's assets that are in excess of what she might need for support.

> "(a) Upon petition of the guardian (other than a temporary guardian) or any other person as approved by the court, and after notice to such persons as the court may direct, the court may, after hearing and by order, **authorize the guardian to apply or dispose of the principal or income of the estate of the protected person that the court determines to be in excess of that likely to be required for the protected person's future support** or for the future support of the protected person's dependents during the lifetime of the protected person, in order to carry out the estate planning that the court determines to be appropriate **for the purposes of minimizing current and prospective income, estate, or other taxes**. The court may

> accordingly authorize the guardian **to make gifts, outright or in trust, on behalf of the protected person to or for the benefit of the prospective legatees, devisees, or heirs**, including any person serving as the protected person's guardian, or to other individuals or charities, to whom or in which it is shown that the protected person had an interest. In addition, the court may also authorize the guardian to:
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> > (1) **apply or dispose of the excess principal or income for any other purpose the court decides is in the best interests of the protected person or the protected person's property, spouse, or family**;
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> > (2) exercise or waive the right of the protected person to renounce or **disclaim** any interest in whole or in part devolving by testate or intestate succession or by inter vivos transfer, including the right of the protected person to surrender the right to revoke a revocable trust; or
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> > (3) exercise or release any power of appointment that is vested in the protected person.
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> "(b) In a hearing upon a petition filed under subsection (a), **the court shall determine whether the planned disposition, renunciation, disclaimer, release, or exercise is consistent with the apparent intention of the protected person, which determination shall be made on the basis of evidence as to the declarations, practices, or conduct of the protected person** or, in the absence of that type of evidence, upon the court's determination as to what a reasonable and prudent person would do under the same or similar circumstances as are shown by the evidence presented to the court.
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> "(c) The guardian may examine the will of the protected person."

The only way to harmonize Indiana Code Sections 29-3-8-3 and 29-3-9-4 is for the court to permit a guardian to make gifts only "for the purposes of minimizing current and prospective income, estate, or other taxes" to the specific beneficiaries of that property. Changing an estate plan for any other purpose diminishes vested inheritances and denies interested persons constitutional protections. *Lewis v. Clifton*, *837 N.E.2d 1016 (Ind.App. 2005)*; *Trusteeship of Creech*, *159 N.E.2d 291 (Ind. 1959)* (showing that a beneficiary's interest was fixed and vested although the time he might receive the property was contingent and uncertain).

EXAMINE THE ESTATE PLAN

Indiana Code Section 29-3-9-4 requires the court to inquire into ward's "declarations, practices, or conduct". This is not a license to rewrite a person's will. *Steele v. Chase*, *281 N.E.2d 137 (Ind.App. 1972)*; *Weishaar v. Burton*, *179 N.E.2d 211 (Ind.App. 1962)*; *Szulkowska v. Werwinski*, *36 N.E.2d 948 (Ind.App. 1941)*. In *USI v. Baker*, *843 N.E.2d 528 (Ind. 2006)*, the Indiana Supreme Court recently allowed all relevant extrinsic evidence to be admitted where an instrument is ambiguous. Unless there is an ambiguity, the court cannot allow extrinsic evidence to add to, eliminate, nor vary the terms a will. *Hertford v. Harned*, *113 N.E. 727 (Ind. 1916)*. Neither should the court eliminate words or phrases and supply others under the auspices of finding the intention of the testator. *Sturgis v. Work*, *22 N.E. 996 (Ind. 1889)*. Simply put, where documents state the ward's intentions, the court should not search elsewhere.

The court should give effect to every provision, clause, term and word. *Gladden v. Jolly*, *655 N.E.2d 590 (Ind.App. 1995)*. If the court needs to interpret a will, it should do so in a way that does not render any part meaningless; the law presumes the testator intended for every word to have some meaning. *Diaz v. Duncan*, *406 N.E.2d 991 (Ind.App. 1980)*. Courts cannot heed one phrase and disregard another. *Hayes v. Second Nat. Bank*, *375 N.E.2d 647 (Ind.App. 1978)*. Individual clauses are to be taken in context, yet without reference to the whole instrument. *St. Mary's v. McCarthy*, *829 N.E.2d 1068 (Ind.App. 2005)*; *Hauck v. Second Nat. Bank*, *286 N.E.2d 852 (Ind.App. 1972)*.

Provided no ambiguity exists, written terms are given their plain and ordinary meaning. *Uzelac v. Guzik*, *663 N.E.2d 238, 240 (Ind.App.1996)*. If a written document is ambiguous solely because of its language, the courts construe it as a matter of law. *Fresh Cut v. Fazli*, *650 N.E.2d 1126, 1133 (Ind.1995)*. However, the Court "presume[s] that all provisions were included for a purpose" and "harmonizes all the various parts so that no provision is deemed to conflict with ... any other provision," *Magee v. Garry-Magee*, *833 N.E.2d 1083, 1092 (Ind.App.2005)*, and so as not to render any part meaningless. *Jones v. City of Logansport*, *436 N.E.2d 1138 (Ind.App.1982)*. A court should not read language into a writing that does not exist, anymore than it might ignore terms that do exist. *Modern Photo v. Woodfield*, *663 N.E.2d 547, 550 (Ind.App.1996)*.

An ambiguity exists only where "reasonable people could come to different conclusions about the contract's meaning." *Ruff v. Charter*, *699 N.E.2d 1171, 1176 (Ind.App. 1998)*.[1] The court should exclude all parol evidence of prior or

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1 In determining the intention of the parties, the court looks only within the "four corners" of the writing; traditionally, if a latent ambiguity exists courts consider extrinsic evidence. *McCae v. Merchants Nat'l Bank & Trust Co. of Indianapolis*, *553 N.E.2d 884, 887 (Ind.App.1990)*; *Rieth v. Auto-Owners*, *408 N.E.2d 640, 645 (Ind.App.1980)*; *In re Boelson Trust*, *830 N.E.2d 37, 43 (Ind.App.2005) (citing *East v. Estate of East*, 785 N.E.2d 597, 601 (Ind.App.2003)* (determining that "[i]f an instrument is worded so that it can be definitely interpreted and its terms carried out by applying that language to the subject matter thereof without contradiction, then the instrument is unambiguous, and extrinsic evidence is inadmissible").

A patent ambiguity exists where the language of the will is not consistent or certain so that it either conveys no definite meaning or a confused meaning. In such a case courts did not admit extrinsic evidence. *Boelson Trust v. Baker*, *830 N.E.2d 37 (Ind.App. 2005)*. Such an ambiguity did not arise simply because a casual reading shows a lack of clarity, it could have been written more clearly, or is difficult to construe. *East v. Estate of East*, *785 N.E.2d 597 (Ind.App.2003)*; *Baxter v. I.S.T.A.*, *749 N.E.2d 47, 52 (Ind.App.2001)*; *Hauck v. Second Nat. Bank*, *286 N.E.2d 852 (Ind.App. 1972)*. Nor are terms considered ambiguous because the parties dispute their interpretations. *Ecorp v. Rooksby*, *746 N.E.2d 128, 131 (Ind.App. 2001)*.

contemporaneous conversations or declarations tending to substitute a new or different intention for the one shown by the writing. *Sandage v. Studebaker, 41 N.E. 380 (Ind. 1895).* Under the "four corners" rule, unambiguous language determines the intent of the parties and parol or extrinsic evidence is not admissible to contradict, expand, vary, or explain the writing. Even if ambiguity exists, extrinsic evidence is admissible only to explain the instrument and not to contradict it. *Hauck v. Second Nat. Bank, 286 N.E.2d 852 (Ind.App. 1972); Lippeatt v. Comet Coal, 419 N.E.2d 1332 (Ind.App.1981); East v. Estate of East, 785 N.E.2d 597 (Ind.App.2003); UFG v. Southwest, 784 N.E.2d 536 (Ind.App.2003); Fillmore v. Fillmore Machine,783 N.E.2d 1169 (Ind.App.2003); Utica v. Precedent, 782 N.E.2d 470 (Ind.App.2003); Rogier v. American Testing, 734 N.E.2d 606 (Ind.App.2000); Niccum v. Niccum, 734 N.E.2d 637 (Ind.App.2000); Crawford County v. Enlow, 734 N.E.2d 685 (Ind.App.2000); Cooper v. Cooper, 730 N.E.2d 212 (Ind.App.2000); Samar v. Hofferth, 726 N.E.2d 1286 (Ind.App.2000); Indiana Gaming v. Blevins, 724 N.E.2d 274 (Ind.App.2000); Clark v. CSX, 737 N.E.2d 752 (Ind.App.2000).*

If a will contains conflicting intentions, a specific bequest in clear terms is not diminished by subsequent words unless the specific bequest is clearly and decisively repudiated in language as strong as that which created the gift in the first place. *Ross v. Clore, 76 N.E.2d 839 (Ind. 1948); Hockstedler v. Hockstedler, 9 N.E. 467 (Ind. 1886); Bailey v. Sanger, 9 N.E. 159 (Ind. 1886); Boren v. Reeves, 123 N.E. 359 (Ind.App. 1919); Langman v. Marbe, 58 N.E. 191 (Ind. 1900); Mulvane v. Rude, 45 N.E. 659 (Ind. 1896); Fowler v. Duhme, 42 N.E. 623 (Ind. 1896); Ross v. Ross, 35 N.E. 9 (Ind.*

In *USI v. Baker, 843 N.E.2d 528 (Ind. 2006)*, the Indiana Supreme Court recently overruled all of the above case law and allows all relevant extrinsic evidence to be admitted where an instrument is ambiguous.

1893); Allen v. Craft, 9 N.E. 919 (Ind. 1887); Herron v. Stanton, 147 N.E. 305 (Ind. App. 1920).

In construing a will, introductory phrases that purport to express an intention to dispose of property do not dispose of anything. *Meyer v. Rusterholtz, 55 N.E. 870 (Ind.App. 1900).* Specific language creating a gift cannot be diminished by less specific language. *Bryson v. Hicks, 134 N.E. 874 (Ind.App. 1922); Collins v. Held, 369 N.E.2d 641 (Ind.App. 1977); Weishaar v. Burton, 179 N.E.2d 211 (Ind.App. 1962); Porter v. Union Trust, 108 N.E. 117 (Ind. 1915).*

In the case of *Dwyer v. Allyn, 596 N.E.2d 903 (Ind.App. 1992),* the court held that the phrase "it is my desire" that property not be partitioned was merely an expression of the testator's hope, rather than a straightforward command; which in that case did not preclude partitioning of property. Precatory words, for purposes of will construction, signify a suggestion rather than a command. In addition to "desire", the court mentioned other examples, including wish, want, ask, request, and should. *See also Forth v. Forth, 409 N.E.2d 1107 (Ind.App. 1980); Osborn v. Osborn, 116 N.E.2d 653 (Ind.App. 1954); Lewis v. Adkins, 105 N.E.2d 183 (Ind.App. 1952).* Simply put, a wish or desire is not a bequest.

A general statement in a residuary clause cannot reduce a specific bequest. *Bryson, 134 N.E. 874; Collins, 369 N.E.2d 641; Weishaar, 179 N.E.2d 211; Porter, 108 N.E. 117; Boelson Trust v. Baker, 830 N.E.2d 37 (Ind.App. 2005)* (case illustrates how language in the residuary clause does not effect specific bequests).

DISPUTED ESTATE PLANS

If wills are in dispute and a will contest is expected, the court may require a resolution of which will is the valid one in order to make an informed decision about the decedent's intentions. This is an excellent example of how the parties can use the Declaratory Judgment Act to resolve a will contest during the testator's lifetime. *See Trial Rule 57*, and *Uniform Declaratory Judgments Act*, *Indiana Code Section 34-14-1-1, et seq.*. Indiana Code Section 34-14-1-2 specifically permits jurisdiction over any and all "will[s and to] obtain a declaration of rights, status, or other legal relations thereunder."

COMPENSATING HEIRS

If the court permits any estate planning or gifts under Indiana Code Section 29-3-9-4, an issue that remains is whether a beneficiary under an estate plan would still be entitled to compensation. Indiana Code Section 29-3-8-6 states:

> "(1) a guardian sells or transfers during a protected person's lifetime property belonging to the protected person **that is specifically devised to another in a will** executed by the protected person;
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> (2) the protected person subsequently dies; and
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> (3) **the devised property is consequently not contained in the protected person's estate** following the death of the protected person;
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> **the devisee may, at the devisee's option, elect to receive the value of the devised property, as valued at the time of death of the protected person, as a general devise or proceeds of the sale or transfer as a specific devise**.

Note that under Indiana Code Section 29-1-6-1(l), an attorney in fact of an incapacitated person who sells specifically devised property gives the beneficiary a general pecuniary devise equal to the proceeds.

UNDISPUTED PLANS

As to the estate planning envisioned by Indiana Code Section 29-3-9-4, heirs and interested persons rarely have objections to the guardian distributing cash to each of ward's children in an amount of $11,000.00 per year, which is the permitted amount a person can give annually to anyone free of gift tax. This is also the limit an attorney in fact can gift to himself or herself and dependants under Indiana Code Section 30-5-5-9(a)(2).

Beneficiaries would also be wise to permit charitable bequests to be made during the ward's lifetime. Under no scenario would any ward pay any gift, estate or inheritance tax on charitable gifts. Giving away the money during lifetime, however, permits a current income tax deduction that an estate cannot use.

The Marion County, Indiana Probate Court recently used the estate planning provisions of the guardianship code to devise a new plan for Ruth Lilly. The plan made provisions for virtually every charity that she had gifted to during her lifetime and charities she identified in any of her estate plans, along with provisions for her family members. No interested person appealed the decision, so case law in this area is extremely thin.

CASE AUTHORITY

The first reported decision on these matters is *Boone County State Bank v. Andrews, 446 N.E.2d 618 (Ind.App. 1983)*. The statute in 1983 was Indiana Code Section 29-1-18-33(c). It permitted the guardian to petition for estate planning, along with any interested person. The current statute, 29-3-9-4, permits the guardian and any person approved by the court. Whether the court has discretion to not approve the standing of an heir is probably an academic question rather than one of substance; but it is better procedure for any petitioner other than the guardian to seek leave of court for approval to file the petition in the first place.

The *Andrews* applies the statute as it existed then and now to hold that in the absence of a donative intent, the court can determine what a reasonable person would do under the circumstances.

The court's obligation is to make sure the ward has enough for future support. I doubt that this includes approval of traditional Medicaid planning; that is, gifts to distribute the ward 's property so that he or she can qualify for Medicaid in the future.

Recently the court of appeals decided *Guardianship of E.N., 853 N.E.2d 960 (Ind.App. 2006)*, approving an estate plan transferring all of the ward's assets into a trust. In essence the trial court resolved which of the ward's wills was effective, and approved an estate plan that ultimately benefited ward's children who had "repaired" their relationship with the ward. The case held that a court has discretion that is not bound by the ward's Last Will & Testament. The statute allows consideration of the ward's declarations, practices, and conduct, which is much broader than just looking at the Will.