
PRELIMINARY DRAFT
No. 3214

PREPARED BY
LEGISLATIVE SERVICES AGENCY
2010 GENERAL ASSEMBLY

DIGEST

Citations Affected: IC 30-4.

Synopsis: Trust matters. Prescribes trust interpretation rules to protect discretionary interests held by beneficiaries. Precludes creditor actions against certain trust interests. Authorizes matrimonial trusts. Authorizes a trustee to decant a trust. Authorizes a trustee to close a trust when a beneficiary cannot be found by selling the beneficiary's share and depositing the proceeds with the clerk of the court. Requires the clerk to hold the proceeds for the use and benefit of the person or persons thereafter determined by law to be entitled to the proceeds.

Effective: July 1, 2010.



A BILL FOR AN ACT to amend the Indiana Code concerning trusts and fiduciaries.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 30-4-2.1-13 IS ADDED TO THE INDIANA CODE
2 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
3 1, 2010]: **Sec. 13. (a) The following rules apply only to discretionary
4 interests:**

5 (1) A discretionary interest is a mere expectancy that is
6 neither a property interest nor an enforceable right.

7 (2) A creditor may not:

8 (A) require a trustee to exercise the trustee's discretion to
9 make a distribution; or

10 (B) cause a court to foreclose a discretionary interest.

11 (3) A court may review a trustee's distribution discretion only
12 if the trustee acts dishonestly or with an improper motive.

13 (b) Words such as sole, absolute, uncontrolled, or unfettered
14 discretion dispense with the trustee acting reasonably.

15 (c) Absent express language to the contrary, if the distribution
16 language in a discretionary interest permits unequal distributions
17 between beneficiaries or distributions to the exclusion of other
18 beneficiaries, a trustee may, in the trustee's discretion, distribute
19 all of the accumulated, accrued, or undistributed income and
20 principal to one (1) beneficiary to the exclusion of the other
21 beneficiaries.

22 (d) Regardless of whether a beneficiary has any outstanding
23 creditors, a trustee of a discretionary interest may directly pay any
24 expense on behalf of the beneficiary and may exhaust the income
25 and principal of the trust for the benefit of the beneficiary. A
26 trustee is not liable to a creditor for paying the expenses of a
27 beneficiary who holds a discretionary interest.

28 SECTION 2. IC 30-4-2.1-14 IS ADDED TO THE INDIANA CODE
29 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
30 1, 2010]: **Sec. 14. If a party challenges a settlor or a beneficiary's
31 influence over a trust, none of the following factors, alone or in**



1 combination, may be considered dominion and control over a trust:

- 2 (1) A beneficiary serving as a trustee or co-trustee.
 3 (2) The settlor or beneficiary holds an unrestricted power to
 4 remove or replace a trustee.
 5 (3) The settlor or a beneficiary:
 6 (A) is a trust administrator, a general partner of a
 7 partnership, a manager of a limited liability company, or
 8 an officer of a corporation; or
 9 (B) has any other managerial function in any other entity;
 10 that is owned in whole or in part by the trust.
 11 (4) A person related by blood or adoption to a settlor or
 12 beneficiary is appointed as trustee.
 13 (5) An agent, accountant, attorney, financial adviser, or friend
 14 of the settlor or a beneficiary is appointed as trustee.
 15 (6) A business associate of the settlor or a beneficiary is
 16 appointed as trustee.
 17 (7) A beneficiary holds any power of appointment over part
 18 or all of the trust property.
 19 (8) The settlor holds a power to substitute property of
 20 equivalent value.
 21 (9) The trustee may loan trust property to the settlor for less
 22 than a full and adequate rate of interest or without adequate
 23 security.
 24 (10) The trust contains broad purposes or highly
 25 discretionary distribution language.
 26 (11) The trust has only one (1) beneficiary eligible for current
 27 distributions.

28 SECTION 3. IC 30-4-2.1-15 IS ADDED TO THE INDIANA CODE
 29 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
 30 1, 2010]: **Sec. 15. Absent clear and convincing evidence otherwise,**
 31 **a settlor of an irrevocable trust may not be considered the alter ego**
 32 **of a trustee. The following factors, alone or in combination, are not**
 33 **sufficient evidence to conclude that the settlor controls a trustee or**
 34 **is the alter ego of the trustee:**

- 35 (1) Any combination of the factors listed in section 14 of this
 36 chapter.
 37 (2) Isolated occurrences of the settlor signing checks, making
 38 disbursements, or executing other documents related to the
 39 trust as a trustee when the settlor is, in fact, not a trustee.
 40 (3) Requesting a trustee to make distributions on behalf of a
 41 beneficiary.
 42 (4) Requesting a trustee to hold, purchase, or sell any trust
 43 property.

44 SECTION 4. IC 30-4-2.1-16 IS ADDED TO THE INDIANA CODE
 45 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
 46 1, 2010]: **Sec. 16. (a) A creditor may not reach, exercise, or**



1 otherwise acquire an interest of a beneficiary or any other person
 2 who holds an unconditional or conditional removal or replacement
 3 power over a trustee. A power described in this subsection is
 4 personal to a beneficiary or other person and may not be exercised
 5 by the person's creditors. A court may not direct a person to
 6 exercise the power.

7 (b) A creditor may not:

8 (1) reach an interest of a beneficiary who is also a trustee or
 9 co-trustee; or

10 (2) otherwise compel a distribution to a beneficiary who is
 11 also a trustee or co-trustee.

12 (c) A court may not foreclose against an interest held by a
 13 beneficiary described in subsection (b).

14 SECTION 5. IC 30-4-3-35 IS ADDED TO THE INDIANA CODE
 15 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
 16 1, 2010]: Sec. 35. (a) As used in this section, "joint matrimonial
 17 trust" means a single inter vivos trust established under this
 18 section by settlors who are related as husband and wife.

19 (b) As used in this section, "matrimonial property" means real
 20 property that:

21 (1) is subject to a written election to treat the property as
 22 matrimonial property under this section; and

23 (2) is owned by a matrimonial trust.

24 (c) As used in this section, "matrimonial trust" means a trust
 25 established under this section to own matrimonial property.

26 (d) As used in this section, "separate matrimonial trust" means
 27 a separate trust that is also a matrimonial trust.

28 (e) As used in this section, "separate trust" means a trust
 29 established by one (1) individual.

30 (f) A matrimonial trust may be established:

31 (1) jointly by a husband and wife; or

32 (2) in two (2) or more separate trusts.

33 (g) A husband and wife may elect to treat real property as
 34 matrimonial property with a written statement of the election:

35 (1) in an instrument or instruments conveying the real
 36 property to a matrimonial trust or trusts; or

37 (2) in a separate writing that must be recorded in the county
 38 where the real property is situated and indexed in the records
 39 of the county recorder's office to the instrument or
 40 instruments that convey the real property to a matrimonial
 41 trust or trusts.

42 (h) A guardian of a husband and wife may make an election
 43 under this section:

44 (1) without the approval of the court if the guardian has
 45 unlimited powers under IC 29-3-8-4; and

46 (2) with the approval of the court in all other cases.



1 (i) An attorney in fact of a husband and wife may make an
2 election under this section under the powers conferred upon the
3 attorney in fact by IC 30-5-5-2 if the power of attorney is recorded
4 in the county where the real property is situated and indexed in the
5 records of the county recorder's office to the instrument or
6 instruments that convey the real property to a matrimonial trust
7 or trusts.

8 (j) An interest in matrimonial property is not severable during
9 the marriage of the husband and wife unless:

10 (1) both the husband and wife join in the severance in writing;

11 or

12 (2) a third party owns and forecloses a mortgage or other lien
13 against the interests of both the husband and wife in the
14 matrimonial property.

15 (k) Notwithstanding any other provision of this section, the legal
16 rights of a lien holder that exist at the time of an election to treat
17 the real property subject to the lien as matrimonial property may
18 not be subject to a severance described in subsection (j) without the
19 lien holder's written consent.

20 (l) A matrimonial trust established by an individual continues
21 to be a matrimonial trust after the death of the settlor if the
22 deceased settlor's separate trust provides to the surviving spouse:

23 (1) a life estate;

24 (2) an interest that qualifies for a deduction from the gross
25 estate of the decedent under Section 2056 of the Internal
26 Revenue Code regardless of whether an election is made to
27 qualify the interest for the deduction; or

28 (3) in some respect the current right to occupy or receive rent,
29 royalties, or other kinds of income with respect to the
30 matrimonial property.

31 (m) A separate matrimonial trust ceases to be a matrimonial
32 trust upon the termination of payments to the surviving spouse as
33 a result of the surviving spouse's death or the surviving spouse's
34 disclaimer of all interests in the separate matrimonial trust.

35 (n) A joint matrimonial trust ceases to be a matrimonial trust
36 upon the death of one (1) of the settlors.

37 (o) A matrimonial trust ceases to be a matrimonial trust upon
38 the dissolution of the marriage of the settlors.

39 (p) A husband and wife may revoke a matrimonial trust by
40 together executing a writing expressing the revocation.

41 SECTION 6. IC 30-4-3-36 IS ADDED TO THE INDIANA CODE
42 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
43 1, 2010]: Sec. 36. (a) Unless a trust expressly provides otherwise, a
44 trustee who has absolute power under the terms of a trust
45 (referred to in this section as the "first trust") to invade the
46 principal of the trust to make distributions to or for the benefit of



1 one (1) or more persons may instead exercise the power by
2 appointing all or part of the principal of the first trust in favor of
3 a trustee of another trust (referred to in this section as the "second
4 trust") for the benefit of one (1) or more persons under the same
5 trust instrument or under a different trust instrument as long as:

6 (1) the beneficiaries of the second trust are the same as the
7 beneficiaries of the first trust;

8 (2) the second trust does not reduce any income, annuity, or
9 unitrust interest in the assets of the first trust; and

10 (3) if any contributions to the first trust qualified for a marital
11 or charitable deduction for purposes of the federal income,
12 gift, or estate taxes, the second trust does not contain any
13 provision that, if included in the first trust, would have
14 prevented the first trust from qualifying for a deduction or
15 reduced the amount of a deduction.

16 (b) For purposes of this section, an absolute power to invade
17 principal includes a power to invade principal that is not limited to
18 specific or ascertainable purposes, such as health, education,
19 maintenance, and support regardless of whether the term
20 "absolute" is used.

21 (c) The exercise of a power to invade principal under subsection
22 (a) must be by an instrument that is:

23 (1) in writing;

24 (2) signed and acknowledged by the trustee; and

25 (3) filed with the records of the first trust.

26 (d) The exercise of a power to invade principal under subsection
27 (a) is considered the exercise of a power of appointment, other than
28 a power to appoint to the trustee, the trustee's creditors, the
29 trustee's estate, or the creditors of the trustee's estate. The exercise
30 of the power does not extend the time at which the permissible
31 period of the rule against perpetuities begins and the law that
32 determines the permissible period of the rule against perpetuities
33 of the first trust.

34 (e) The trustee shall notify in writing all qualified beneficiaries
35 of the first trust at least sixty (60) days before the effective date of
36 the trustee's exercise of the power to invade principal under
37 subsection (a) of the manner in which the trustee intends to
38 exercise the power. A copy of the proposed instrument exercising
39 the power satisfies the trustee's notice obligation under this
40 subsection. If all qualified beneficiaries waive the notice period by
41 signed written instrument delivered to the trustee, the trustee's
42 power to invade principal may be exercised immediately. The
43 trustee's notice under this subsection does not limit the right of any
44 beneficiary to object to the exercise of the trustee's power to invade
45 principal, except as otherwise provided by this article.

46 (f) The exercise of the power to invade principal under



1 subsection (a) is not prohibited by a spendthrift clause or by a
 2 provision in the trust instrument that prohibits amending or
 3 revoking the trust.

4 (g) This section is not intended to create or imply a duty to
 5 exercise a power to invade principal. No inference of impropriety
 6 may be made as a result of a trustee not exercising the power to
 7 invade principal conferred under subsection (a).

8 (h) This section may not be construed to abridge the right of any
 9 trustee who has a power of invasion to appoint property in further
 10 trust that arises under the terms of the first trust, under any other
 11 provision of this article or any other statute, or under common law.

12 SECTION 7. IC 30-4-3-37 IS ADDED TO THE INDIANA CODE
 13 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
 14 1, 2010]: Sec. 37. (a) If a beneficiary of a trust cannot be found
 15 after a reasonable search, the trustee may file a petition setting out
 16 the facts of the unsuccessful search. The court may order the
 17 trustee to sell the shares of the trust to which the beneficiary is
 18 entitled and to pay the proceeds to the clerk of the court. The clerk
 19 shall hold the proceeds for the use and benefit of the person or
 20 persons thereafter determined by law to be entitled to the proceeds.

21 (b) If a trustee pays any money to the clerk of the court under
 22 this section, the trustee shall file a receipt with the court. Filing the
 23 receipt is sufficient to discharge the trustee in the same manner
 24 and to the same extent as though the trustee had paid or
 25 distributed the appropriate share of the trust to the unlocated
 26 beneficiary.

27 (c) This section does not apply to stocks, dividends, capital
 28 credits, patronage, refunds, utility deposits, membership fees,
 29 account balances, or book equities for which the owner cannot be
 30 found that are the result of distributable savings of a rural electric
 31 membership corporation formed under IC 8-1-13, a rural
 32 telephone cooperative corporation formed under IC 8-1-17, or an
 33 agricultural cooperative association formed under IC 15-12-1.

